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Responding to First Amendment "Audits" in the Local Government Context

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Imagine you are a local government employee, working in the lobby of a county agency. A man walks in holding a cell phone and begins filming the lobby area, including your interactions with people seeking services from the county. When you ask what he is doing, he says, "I'm exercising my First Amendment right to film inside a government building that's open to the public." What do you do?

This scenario is happening at municipal and county offices, police departments, departments of social services, local health departments, and other local government buildings across North Carolina. The individuals filming in these buildings refer to themselves as "First Amendment auditors"[1] and claim to be testing whether a local government is complying with the First Amendment by allowing them to film freely.[2] This nationwide movement, loosely connected through social media and other online platforms, involves individuals who film their encounters with government officials and employees and subsequently post the videos online.

First Amendment auditors frequently refuse to identify themselves in response to questions and sometimes wear a face mask while filming.[3] Even when auditors act in a peaceful manner, their refusal to identify themselves or their business in the building, followed by roaming the premises with a camera in hand, makes some local government employees anxious about their intentions. In an era of mass shootings, an unidentified individual who walks around filming entrances and exits to a building may set off alarm bells for a vigilant observer.

Some individuals involved in First Amendment audits monetize their videos by posting them to YouTube and accumulating subscribers.[4] A quick online search produces thousands of these videos from across the United States, many of which have been edited to include sensationalized captions and text. The public comments posted to these videos sometimes mock, demean, and belittle the public officials and employees shown in the videos.[5] For example, some of the audit videos describe local government officials or employees as "stupid," "tyrants," "idiots, "dummies," or "Karens." Employees who show fear of the auditor or call law enforcement in response to the auditor are generally ridiculed in the captions or comments to such videos. As one scholar has noted, this conduct raises the question of whether filming and posting First Amendment audits is "simply cyberbullying disguised as activism."[6] On the other hand, some videos of First Amendment audits show calm and peaceful encounters, along with captions or comments

1. While these individuals refer to themselves as "auditors" and their filming activities as "audits," they are not exercising governmental oversight or investigative authority derived from federal or state law. This bulletin uses the terms "audit" and "auditors" to reflect the terminology used by the individuals engaged in this activity.

2. Kayla Epstein & Avi Selk, *What Is 'Auditing,' and Why Did a YouTuber Get Shot for Doing It?*, Wash. Post (Feb. 5, 2019), https://www.washingtonpost.com/technology/2019/02/15/what-is-auditing-why-did-youtuber-get-shot-doing-it/.

3. *See* Diane Valden, *That's Who That Masked Man Was?*, The Columbia Paper (March 31, 2022), https://www.columbiapaper.com/2022/03/thats-who-that-masked-man-was/.

4. Jim Kiertzner, *'Remain Calm & Pleasant.' How State Is Asking Employees to Handle So-Called '1st Amendment Auditors,'* WXYZ Detroit, https://www.wxyz.com/news/remain-calm-pleasant-how-state-is-asking-employees-to-handle-so-called-1st-amendment-auditors (Nov. 22, 2021); Daniel Telvock, *How First Amendment 'Auditors' Target Public Servants for Viral Videos*, WIVB.com, https://www.wivb.com/news/investigates/how-first-amendment-auditors-target-public-servants-for-viral-videos/ (May 3, 2022).

5. *See* Elizabeth M. Jaffe, *Caution Social Media Cyberbullies: Identifying New Harms and Liabilities*, 66 Wayne L. Rev. 381, 396 (2021).

6. *Id.*

praising how local government officials handle the situation.[7] The behavior of auditors in First Amendment audit videos varies widely, with some taking a more aggressive and confrontational approach, and others acting with a more calm and composed demeanor.

First Amendment auditors argue that their filming activities serve as an important form of accountability for government officials.[8] Indeed, video recordings can provide a powerful medium for exposing corrupt or unlawful behavior. Many recent examples of law enforcement officers using excessive force would not have come to light without viral videos filmed by bystanders.[9] It is unlikely that we would know the names of Rodney King or George Floyd today if bystanders had not chosen to film their encounters with police officers. Unlike other forms of gathering information, the "accuracy of video increases the credibility and reliability of expression," while also allowing "more information to be translated quickly and in a manner unfiltered by a third-party account."[10] On the other hand, many First Amendment audit videos are not capturing matters of public controversy. Rather, many of these videos capture mundane vignettes at local government buildings, such as a town clerk sitting at her desk, a receptionist at a tax assessor's office, or signs on the walls of city hall.

Dealing with First Amendment auditors raises a host of questions for local governments that want to comply with the First Amendment while also protecting their employees and private citizens from undue harassment. Is filming itself even protected by the First Amendment? If so, does the law allow a local government to place some reasonable restrictions on this activity? How could such restrictions be implemented? This bulletin addresses legal issues associated with First Amendment audits in the local government context and provides practical takeaways for county and municipal governments that must respond to them.

I. The First Amendment and Filming

The Scope of the First Amendment

The First Amendment to the United States Constitution reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Through the Fourteenth Amendment, this prohibition applies to states and their political subdivisions, including county and municipal governments.[11] The First Amendment solely impacts how the *government* can regulate or restrict certain freedoms. The First Amendment

7. Stephen Peterson, *Online Group Gives Foxboro Police Dept. High Marks on Preserving First Amendment Rights*, The Sun Chronicle (Oct. 20, 2019), https://www.thesunchronicle.com/news/local_news/online-group-gives-foxboro-police-dept-high-marks-on-preserving/article_d71b9211-c387-5aad-aba0-9537755a1bfe.html.

8. Telvock, *supra* note 4.

9. *See* Justin Marceau & Alan K. Chen, *Free Speech and Democracy in the Video Age*, 116 Colum. L. Rev. 991, 993 (2016).

10. *Id.* at 1010.

11. *See* Aptive Env't, LLC v. Town of Castle Rock, Col., 959 F.3d 961, 979 (10th Cir. 2020) (citing Chaplinsky v. State of N.H., 315 U.S. 568, 570–71 (1942)).

does not, for example, give any individual an affirmative right to walk into a privately owned business and give a political speech against the owner's wishes. Nor does the First Amendment restrain private entities or persons from imposing restrictions on what speech they choose to allow in privately owned spaces.[12]

"Filming" and "recording" are not referenced in the text of the First Amendment—after all, it was written far before video recording technology was invented. So, is filming a right protected by the First Amendment? More specifically, is the activity of filming itself a form of protected "speech"?

How Does the First Amendment Apply to the Act of Filming?

To date, there is no U.S. Supreme Court case establishing a right to film public officials engaged in carrying out their official duties or a right to film inside public buildings generally. However, the Supreme Court has recognized a "paramount public interest in a free flow of information to the people concerning public officials."[13] Moreover, the Supreme Court has acknowledged that "the First Amendment goes beyond protection of the press and self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."[14] Filming public officials engaged in public duties may fall within this broadly defined "news gathering" or "information gathering" right courts have recognized in prior First Amendment cases.[15]

Alternatively, filming may be seen as speech itself, or at a minimum, a precedent activity to speech. The First Amendment protects many forms of expressive activity, not just pure speech.[16] Several Supreme Court cases recognize that the First Amendment protects film as a form of expression.[17] By the logic of these cases, playing, posting, or distributing a film would be a form of constitutionally protected speech. But does that protection extend to the act of filming itself?

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12. *See* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1930, 204 L. Ed. 2d 405 (2019) ("[W]hen a private entity provides a forum for speech, the private entity is not ordinarily constrained by the First Amendment because the private entity is not a state actor. . . . merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints.").

13. Garrison v. State of La., 379 U.S. 64, 77 (1964).

14. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 783 (1978).

15. *See* Glik v. Cunniffe, 655 F.3d 78, 82 (1st Cir. 2011) ("Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting the free discussion of governmental affairs.") (quotation omitted); *see also* W. Watersheds Project v. Michael, 869 F.3d 1189, 1197 (10th Cir. 2017) ("We agree with the Seventh Circuit that 'the First Amendment provides at least some degree of protection for gathering news and information, particularly news and information about the affairs of government.'") (citing Am. C.L. Union of Ill. v. Alvarez, 679 F.3d 583, 600 (7th Cir. 2012)).

16. *See, e.g.,* Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Group of Bos., 515 U.S. 557, 569 (1995) (marching in a parade treated as protected expressive conduct); Texas v. Johnson, 491 U.S. 397, 405–06 (1989) (burning American flag at a protest rally treated as protected expressive conduct); Brown v. Louisiana, 383 U.S. 131, 141–42 (1966) (sit-ins to protest segregation treated as protected expressive conduct).

17. Turner v. Lieutenant Driver, 848 F.3d 678, 688 (5th Cir. 2017) (citing Kingsley Int'l Pictures Corp. v. Regents of Univ. of State of N.Y., 360 U.S. 684, 688 (1959); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952) ("[W]e conclude that expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments.")); *see also* Jacobellis v. Ohio, 378 U.S.

In the landmark 2010 *Citizens United* case, the Supreme Court recognized that "[l]aws enacted to control or suppress speech may operate at different points in the speech process."[18] If a law restricts filming itself, one could argue that such a law "restricts a medium of expression—the use of a common instrument of communication—and thus an integral step in the speech process."[19] In other words, by prohibiting someone from filming, the government is arguably prohibiting future speech (sharing or posting the video) by suppressing it at the first point in the speech process (the act of filming itself).[20] Following this line of reasoning, several U.S. Circuit Courts of Appeals have found that the First Amendment protects the act of video recording itself, not just disseminating the recording.[21] The Seventh Circuit Court of Appeals, for example, has held that "[t]he act of making an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording."[22]

How Does the First Amendment Apply to Filming Government Officials?

The Supreme Court has not yet decided a case regarding a right to film government officials engaged in public duties. However, a clear trend toward recognizing such a right has emerged in the U.S. Courts of Appeals. To date, the First, Third, Fifth, Seventh, Ninth, and Eleventh Circuit Courts of Appeals have recognized a First Amendment right to record police personnel carrying out their official duties in a public place.[23] While all of these cases involved plaintiffs filming (or seeking to film) law enforcement officers engaged in carrying out their duties in traditional public forums (such as parks, streets, and sidewalks), the various courts have defined the scope of the "right to record" differently. The Eleventh and Ninth Circuits have recognized a broad right to film matters of public interest,[24] while the First Circuit recognizes a right to film government officials engaged in their duties in public spaces.[25] The Third, Fifth, and Seventh Circuits recognize a narrower right to film law enforcement officers engaged in their duties in public

184, 187 (1964) ("Motion pictures are within the ambit of the constitutional guarantees of freedom of speech and of the press.").

18. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 336 (2010).

19. *Alvarez*, 679 F.3d at 600 (7th Cir. 2012); *see also* Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record,* 159 U. Pa. L. Rev. 335, 372–73, 390–91 (2011) (arguing that "image capture" is expressive activity).

20. *See* Brown v. Ent. Merchants Ass'n, 564 U.S. 786, 793 n.1 (2011) ("Whether government regulation applies to creating, distributing, or consuming speech makes no difference.").

21. *See* Fields v. City of Phila., 862 F.3d 353, 358 (3d Cir. 2017) ("The First Amendment protects actual photos, videos, and recordings, and for this protection to have meaning the Amendment must also protect the act of creating that material." (citation omitted)); *Turner*, 848 F.3d at 689 ("[T]he 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." (quotation omitted)); *Alvarez,* 679 F.3d at 595 ("The right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of making the recording is wholly unprotected. . . .).

22. *Alvarez*, 679 F.3d at 595.

23. *See Alvarez*, 679 F.3d at 600; Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995); Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000); Glik v. Cunniffe, 655 F.3d 78, 85 (1st Cir. 2011); *Fields*, 862 F.3d at 360; *Turner*, 848 F.3d at 688; Askins v. U.S. Dep't of Homeland Sec., 899 F.3d 1035, 1044 (9th Cir. 2018).

24. *See Smith*, 212 F.3d at 1333; *Fordyce*, 55 F.3d at 439; *Askins*, 899 F.3d at 1044.

25. *See Glik*, 655 F.3d at 83.

places.[26] There is no federal court of appeals decision holding against a First Amendment right to record police activity in a public place, though some federal courts of appeals have held that the right to record is not "clearly established" for purposes of determining qualified immunity.[27] The U.S. Department of Justice has also recognized "individuals' First Amendment right to observe and record police officers engaged in the public discharge of their duties."[28] Several of the U.S. Courts of Appeals analyzing a First Amendment right to record the police have found that the right "may be subject to reasonable time, place, and manner restrictions."[29]

Notably for local governments in North Carolina, the Fourth Circuit Court of Appeals has not yet recognized a "right to record" under the First Amendment. In an unpublished 2009 decision, *Szymecki v. Houck*, the Fourth Circuit concluded in the context of determining qualified immunity that the plaintiff's "asserted First Amendment right to record police activities on public property was not clearly established" in the Fourth Circuit as of June 2007.[30] Since then, some district courts within the Fourth Circuit have recognized a right to record police activities in public places[31] or a broader right to film government officials performing their duties.[32]

A recent case from the Eastern District of North Carolina, *Sharpe v. Winterville Police Department*, held in the context of qualified immunity that the plaintiff did not have a clearly established First Amendment right to record and livestream a traffic stop.[33] The *Sharpe* case is currently on appeal to the Fourth Circuit.[34] The Fourth Circuit's unpublished 2009 decision in *Szymecki* was made before the First, Third, Fifth, and Seventh Circuits issued their decisions on how the First Amendment applies to filming police activities, so it is unclear how the court might rule on the issue now when faced with a similar legal question. Moreover, it is unclear how the livestreaming and interactive messaging components of the filming activity in the *Sharpe* case may impact the Fourth Circuit's decision. Arguably, livestreaming is more clearly

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26. See *Fields*, 862 F.3d at 359; *Turner*, 848 F.3d at 690; *Alvarez*, 679 F.3d at 600.

27. *See* Project Veritas Action Fund v. Rollins, 982 F.3d 813, 831–32 (1st Cir. 2020) ("[W]hile some courts of appeals have held that this right to record is not clearly established in some contexts for purposes of qualified immunity, none has held that the right does not exist.").

28. Letter from the U.S. Dep't of Justice, Civil Rights Div., *Re: Christopher Sharp v. Baltimore City Police Dep't* at 2 (May 14, 2012), https://www.justice.gov/sites/default/files/crt/legacy/2012/05/17/Sharp_ltr_5-14-12.pdf.

29. *Turner*, 848 F.3d at 690 (quotation omitted); *see Fields*, 862 F.3d at 353; *Alvarez*, 679 F.3d at 605; *Glik*, 655 F.3d at 84; *Smith*, 212 F.3d at 1333.

30. 353 F. App'x 852, 853 (4th Cir. 2009) (per curiam).

31. J.A. v. Miranda, No. CV PX 16-3953, 2017 WL 3840026, at *5 (D. Md. Sept. 1, 2017) ("[V]ideo recording police conduct is squarely protected by the First Amendment."); Garcia v. Montgomery Cnty., 145 F. Supp. 3d 492, 508 (D. Md. 2015) (recognizing the right to record "police activity, if done peacefully and without interfering with the performance of police duties").

32. *See* Dyer v. Smith, No. 3:19-CV-921, 2021 WL 694811, at *7 (E.D. Va. Feb. 23, 2021) ("[T]his Court finds that the First Amendment protects the right to record government officials performing their duties.").

33. No. 4:19-CV-157-D, 2020 WL 4912297 (E.D.N.C. Aug. 20, 2020).

34. Numerous amicus briefs have been filed in the appeal to the Fourth Circuit by groups advocating for the Fourth Circuit to recognize a First Amendment right to film the police in public spaces (or to film public officials, more broadly), including briefs by the American Civil Liberties Union, the Electronic Privacy Information Center, the Cato Institute, the Institute for Justice, the National Press Photographers Association, the Virginia School of Law First Amendment Clinic, the Duke University School of Law First Amendment Clinic, and the Electronic Frontier Foundation.

a form of expressive conduct than mere video recording since it involves broadcasting a video to an audience in real time. However, livestreaming and interactive messaging may also present additional safety concerns for the individuals being filmed, as noted by the district court in *Sharpe*.

What about filming on government property that does not involve capturing government officials in action? The Eighth Circuit recently examined such a case in *Ness v. City of Bloomington*.[35] In *Ness*, the plaintiff-appellant took photographs and video recordings of a public park to document purported city permit violations. The plaintiff-appellant posted these photos and videos on her blog and on Facebook. Subsequently, the Bloomington City Council approved an ordinance prohibiting the photography and recording of children in city parks. The plaintiff-appellant sued the City of Bloomington under 42 U.S.C. § 1983, alleging violations of the First Amendment and seeking a declaration that the ordinance was unconstitutional. The Eighth Circuit ruled in favor of the plaintiff-appellant, finding that "[t]he acts of taking photographs and recording videos are entitled to First Amendment protection because they are an important stage of the speech process that ends with the dissemination of information about a public controversy."[36]

The *Ness* court considered two primary factors in determining that filming and photography in the park constituted First Amendment–protected speech. First, the court noted that the act of taking a photograph or making a recording in this case was to facilitate subsequent speech (a step in the "speech process"). On the other hand, if the filming or photography had been "unrelated to an expressive purpose," the court noted that the act of recording might *not* receive First Amendment protection.[37] In other words, what an individual plans to do with the video recording *in the future* becomes relevant to the analysis of whether the act of filming itself is protected by the First Amendment. Second, the court focused on the fact that the plaintiff-appellant's photography and filming was "analogous to news gathering," since she intended to use these photos and videos to inform the public about a matter of public concern (the alleged misuse of a public park).[38] It is unclear whether the Eighth Circuit would have found that the plaintiff-appellant's photography and video recording were protected speech under the First Amendment if she were not using those tools to capture and disseminate information about what she believed to be a matter of public controversy.

Open Questions about the Emerging "Right to Record"

By and large, the cases in which U.S. Courts of Appeals have recognized a "right to record" concern one category of public employees (police officers) engaged in one type of activity (carrying out public duties) in one type of area (traditional public forums). The existing case law focused on filming police in public areas leaves a number of open questions.

- **How would the holdings of these cases apply to filming government officials and employees who are *not* police officers (teachers, clerks, attorneys, administrative staff, and so forth)?** For example, a recent Sixth Circuit case, *Clark v. Stone*, rejected the argument there is a clearly established First Amendment right to record social

35. 11 F.4th 914 (8th Cir. 2021).
36. *Id.* at 923.
37. *Id.*
38. *Id.* (citing Am. C.L. of Ill. v. Alvarez, 679 F.3d 583, 595–97 (7th Cir. 2012)).

workers conducting home visits during their investigative process.[39] The Sixth Circuit acknowledged that many courts have recognized a constitutional right to film encounters with police officers, but found that those cases were not sufficient to demonstrate a clearly established right to film interactions with a social worker.[40] Likewise, a district court in the Sixth Circuit recently found that the cases regarding the right to film public officials in public places did not establish any First Amendment right to film municipal employees investigating complaints of police misconduct in a nonpublic space.[41] As noted above, some U.S. Courts of Appeals have recognized a broader right to film "government officials" engaged in their duties in a public place, while others have recognized the right only as applied to filming law enforcement officers. It remains to be seen how the scope and contours of the "right to record" may be shaped by courts when evaluating cases involving other types of public officials and employees.

- **How would the "right to record" public officials apply in a space that was not a clearly recognized traditional public forum?** The existing U.S. Courts of Appeals cases on filming public officials examine what restrictions on filming are permissible in traditional public forums—areas like parks, streets, and sidewalks. As described in more detail in later sections, the government generally has greater flexibility to impose restrictions on expressive activity in areas of government property that are not traditional public forums or designated public forums.
- **To what extent can the government impose restrictions to mitigate the impact on the privacy rights of private citizens who happen to get captured on one of these videos?** The U.S. Courts of Appeals have not had to address this question in the "right to record" cases, presumably because anyone in a traditional public forum (for example, parks, streets, sidewalks) has no reasonable expectation of privacy. However, privacy rights and protection of confidential information are certainly issues a court might consider in its analysis of filming in other contexts.[42]

To summarize, while some U.S. Courts of Appeals have recognized a right to film certain public officials in public places:

- the right has not yet been recognized by the Supreme Court or by the Fourth Circuit Court of Appeals and
- even in the jurisdictions that *do* recognize some version of this right, the degree to which the right extends beyond filming law enforcement officers in traditional public forums is still unclear.

39. 998 F.3d 287, 303 (6th Cir. 2021), *cert. denied*, 142 S. Ct. 773 (2022).

40. *Id.*

41. Hils v. Davis, No. 1:21CV475, 2022 WL 769509, at *7–8 (S.D. Ohio Mar. 14, 2022).

42. *See Ness*, 11 F.4th at 924 (holding that a city ordinance prohibiting photography or filming of children in city parks was not narrowly tailored as applied to plaintiff's activity but theorizing that a narrowly tailored ordinance aimed at protecting children from intimidation and exploitation could pass strict scrutiny).

II. The Importance of Location: Forum Analysis

Suppose that filming public officials engaged in carrying out their duties *is* a clearly established First Amendment right. Are local governments then unable to impose any type of limitations on this activity? The answer is no. In the words of the Supreme Court, "Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities."[43] The Supreme Court has recognized that the government, "no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."[44]

Courts conduct a three-step analysis when the government restricts speech on public property.[45] First, a court must decide whether the activity at issue is speech protected by the First Amendment.[46] Second, a court must identify the nature of the "forum" where the speech is being restricted.[47] Third, a court must assess whether the government's restrictions satisfy the standard of judicial review associated with that forum.[48] Courts use different tests to analyze government limitations on First Amendment activities depending on the nature of the space (the "forum") the government is attempting to regulate.

Categories of Forums

To evaluate a governmental restriction on speech occurring on public property, courts must determine how the regulated area fits into the following categories.

1. **Traditional public forum.** These are "places which by long tradition or by government fiat have been devoted to assembly and debate," including public streets and parks.[49] Traditional public forums 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."[50] The hallmarks of a traditional public forum are that it "has been traditionally open to the public for expressive activity" and used for "communicating thoughts between citizens, and discussing public questions."[51] Expressive activity receives the greatest level of protection from government interference in a traditional public forum. Courts will uphold a content-based regulation of First Amendment activity in such a forum only if the government can show that "its regulation is necessary to serve a compelling state interest and

43. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 799–800 (1985).

44. Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 46 (1983) (citing United States Postal Serv. v. Council of Greenburgh, 453 U.S. 114, 132 (1981)).

45. Courts evaluating cases involving filming public officials are split as to whether restrictions on filming should be evaluated as a restriction on speech or a restriction on access to information. Most courts evaluating these cases seem to treat them as "speech" restrictions, though the "access" theory will be discussed in more detail herein.

46. Boardley v. U.S. Dep't of Interior, 615 F.3d 508, 514 (D.C. Cir. 2010) (citing *Cornelius,* 473 U.S. at 797).

47. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 201 (2015).

48. *Boardley*, 615 F.3d at 514.

49. *Perry*, 460 U.S. at 45.

50. *Id.*

51. United States v. Kokinda, 497 U.S. 720, 727 (1990)*;* Int'l Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 679 (1992).

that it is narrowly drawn to achieve that end."[52] The government may regulate the time, place, and manner of expressive activities in a traditional public forum so long as those regulations "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[53]

2. **Designated public forum.** A designated public forum is "created by purposeful governmental action" when the government has intentionally opened property "for expressive activity by part or all of the public," even if the property was not *traditionally* used for such purposes.[54] The hallmark of a designated public forum is that the government has made it "generally accessible to all speakers," in a similar manner to the broad expressive activity permitted in traditional public forums.[55] The government is not obligated to create such a forum or keep it open, but while the forum is open, the government is subject to the same limitations applicable in a traditional public forum.[56] Examples of such forums include university meeting facilities open for use by student groups and a municipal auditorium and city-leased theater designed for and dedicated to expressive activities.[57]
3. **Limited public forum.** A limited public forum exists where a government has intentionally reserved a forum only for certain groups or for the discussion of certain topics.[58] In other words, the government has opened a forum for expressive activity, but it has established initial restrictions on access to that forum based on subject matter, the speaker, or both. Examples of spaces found by courts to be limited public forums include public school facilities during after-school hours[59] and the interior of a city hall.[60] In such a forum, a government entity may impose restrictions on expressive activity so long as they are viewpoint-neutral and reasonable in light of the purpose served by the forum.[61] Once a government entity opens a limited public forum to certain speakers or topics, it "must respect the lawful boundaries it has itself set."[62] As with a designated public forum, the government is not obligated to create a limited public forum or keep it open to expressive activity indefinitely.

52. *Perry*, 460 U.S. at 45.

53. *Id.*

54. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998).

55. Sons of Confederate Veterans, Va. Div. v. City of Lexington, Va., 722 F.3d 224, 230 (4th Cir. 2013) (citing Child Evangelism Fellowship of Md., Inc. v. Montgomery Cnty. Pub. Sch., 457 F.3d 376, 382 (4th Cir. 2006)).

56. *Perry*, 460 U.S. at 45–46; *see also* Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 469–70 (2009).

57. Goulart v. Meadows, 345 F.3d 239, 249 (4th Cir. 2003) (citations omitted).

58. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 215 (2015) (citing Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)).

59. Good News Club v. Milford Central Sch., 533 U.S. 98 (2001).

60. Miller v. City of Cincinnati, 622 F.3d 524, 535 (6th Cir. 2010); Sheets v. City of Punta Gorda, Fla., 415 F. Supp. 3d 1115, 1122 (M.D. Fla. 2019).

61. *Summum*, 555 U.S. at 470; *see also Rosenberger*, 515 U.S. at 829.

62. *Rosenberger*, 515 U.S. at 829.

4. **Nonpublic forum.** A nonpublic forum is a government space that "is not by tradition or designation a forum for public communication."[63] Spaces in which "the government is acting as a proprietor, managing its internal operations" fall into this category.[64] "Courts have consistently found public property to be a nonpublic forum where the evidence shows . . . that the property's purpose is to conduct or facilitate government business, and not to provide a forum for public expression."[65] Examples of spaces courts have held to be nonpublic forums include the offices of government employees,[66] the interior of polling places,[67] the mailboxes of public school teachers,[68] lobby areas of government buildings,[69] terminals in publicly operated airports,[70] and military bases.[71] The Supreme Court has recognized that "the government has much more flexibility to craft rules limiting speech" in a nonpublic forum "so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint-neutral."[72] Stated another way, "The First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose."[73] The Supreme Court has "long recognized that the government may impose some content-based restrictions on speech in nonpublic forums, including restrictions that exclude political advocates and forms of political advocacy."[74]

Section IV of this bulletin explores how courts have categorized some specific types of government property within these four forum categories.

In a traditional public forum or designated public forum, restrictions on the time, place, and manner of speech are permissible so long as those regulations are (1) content-neutral, (2) narrowly tailored to serve a significant government interest, and (3) leave open ample alternative channels of communication. In a limited public forum or nonpublic forum, restrictions on speech are permissible if they are (1) viewpoint-neutral and (2) reasonable in light of the purpose of the forum. Viewpoint-based restrictions on speech are unconstitutional in any forum. Section V explains these tests for evaluating restrictions in particular forums in more detail.

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63. Minnesota Voters All. v. Mansky, 138 S. Ct. 1876, 1885 (2018) (quoting Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 46 (1983)).

64. Int'l Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992); Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 216 (2015).

65. Freedom Found. v. Wash. Dep't of Ecology, 426 F. Supp. 3d 793, 801 (W.D. Wash. 2019), *aff'd*, 840 F. App'x 903 (9th Cir. 2020) (collecting cases).

66. *See e.g.*, Lavite v. Dunstan, 932 F.3d 1020, 1029 (7th Cir. 2019).

67. *Mansky*, 138 S. Ct. at 1886.

68. *Perry*, 460 U.S. at 48.

69. *See e.g.*, Make the Rd. by Walking, Inc. v. Turner, 378 F.3d 133, 145–46 (2d Cir. 2004); United States v. Gilbert, 920 F.2d 878, 884–85 (11th Cir. 1991).

70. Int'l Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 679 (1992).

71. Greer v. Spock, 424 U.S. 828, 838 (1976).

72. *Mansky*, 138 S. Ct. at 1885; Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985).

73. *Cornelius*, 473 U.S. at 811.

74. *Mansky*, 138 S. Ct. at 1885–86.

How can a local government know which of these categories an area of property likely falls into?

- **Exterior areas**
  - Generally, exterior areas (streets, parks, sidewalks, plazas) are likely to be considered traditional public forums, though some exceptions are described below.
- **Interior areas**
  - The primary way that the highest level of scrutiny may apply to a part of the interior of a government building is if the government has intentionally opened up that part of the building as a "designated public forum." A designated public forum is created when public property is *intentionally* opened by the government for indiscriminate use by the public as a place for expressive activity—in the same way a traditional public forum (parks, streets, sidewalks, and so forth) would be broadly open to many different speakers and forms of speech.
  - Unless a local government has taken *intentional* action through policy or past practice to allow indiscriminate public use of a space for expressive activity (protests, pamphleting, speeches, lectures, solicitation, posting signs, and so forth), the interior of a government building is more likely to constitute a limited public forum or nonpublic forum. In both limited public forums and nonpublic forums, courts apply a lower level of scrutiny to restrictions on First Amendment activity. Section V explains the various levels of scrutiny in more detail.

Confusion over Forums

Both scholars and courts have acknowledged that forum analysis can be a confusing and frustrating exercise.[75] This is particularly true since courts have sometimes collapsed or confused the notion of a "designated public forum" with a "limited public forum," while others have conflated "limited public forum" with "nonpublic forum."[76] As one scholar noted, "It is a bad sign if the doctrine is so confused that reasonable observers cannot even agree on how many categories of forum exist."[77] Some legal scholars have posited that courts should abandon or clarify the limited public forum concept based on its limited usefulness and potential to create confusion, particularly since the standard applied to restrictions in limited public forums appears identical to the standard applied to nonpublic forums.[78]

In one of the most recent Supreme Court cases regarding First Amendment free speech protections, *Minnesota Voters Alliance v. Mansky*, the Court mentioned only traditional public forums, designated public forums, and nonpublic forums—conspicuously omitting limited

75. *See* Judith Welch Wegner & Matthew Norchi, *Regulating Panhandling: Reed and Beyond*, 63 S.D. L. Rev. 579, 635 (2019) ("Determining the status of a particular locale for purposes of the 'public forum doctrine,' can be a frustrating exercise, particularly because the doctrine is so unclear and the cases often seem inconsistent.").

76. *See generally* Chiu v. Plano Indep. Sch. Dist., 260 F.3d 330, 345–47 (5th Cir. 2001).

77. Aaron H. Caplan, *Invasion of the Public Forum Doctrine*, 46 Willamette L. Rev. 647, 654 (2010).

78. *See id.*; *see, e.g.*, *Strict Scrutiny in the Middle Forum*, 122 Harv. L. Rev. 2140 (2009); Norman T. Deutsch, *Does Anybody Really Need a Limited Public Forum?*, 82 St. John's L. Rev. 107 (2008).

public forums as a separate category.[79] However, *Mansky* did not expressly abandon limited public forums as a separate category from designated public forums, and the year prior to *Mansky*, the Court issued a decision discussing limited public forums as its own category.[80] Moreover, multiple Supreme Court justices have also continued to reference the limited public forum category in concurring opinions since *Mansky*.[81] For purposes of this bulletin, we presume that courts will continue to recognize four separate levels of forums: traditional public forums, designated public forums, limited public forums, and nonpublic forums.

What's the key difference between a *designated* public forum and a *limited* public forum? This distinction largely turns on the government's intent in opening the space for expression. Did the government intend to open a nonpublic forum for the broad spectrum of expressive activity permitted in a traditional public forum (for example, streets and parks)? If so, the area is likely a designated public forum. Alternatively, did the government clearly intend to open a nonpublic forum only for expressive activity by certain groups or only for expression regarding certain subjects? If so, the area is likely a limited public forum. The breadth of expressive activity the government intended to allow in a particular area becomes a key touchstone when courts analyze the distinction between these two types of forums.[82]

Section IV discusses examples of forum determinations in prior court cases regarding restrictions on First Amendment activities in certain areas of government property.

Is Forum Analysis the Right Way to Evaluate a Government Restriction on Filming?

As described above, the First, Third, Fifth, Seventh, Ninth, and Eleventh Circuits have recognized a First Amendment right to record public officials carrying out public duties in a public place, at least in the context of recording encounters with the police. Likewise, the Eighth Circuit has held that taking photographs and recording videos may be entitled to First Amendment protection if those acts involve the intent to disseminate information about a public controversy.

Unlike most of the aforementioned U.S. Courts of Appeals, courts in the Sixth Circuit have largely evaluated filming cases under a "right to access information" framework, rather than the framework courts apply to "freedom of speech" cases.[83] Both types of analyses involve the First Amendment, but each uses a different test to determine whether a restriction is permissible. In the "right to access" line of cases, courts have concluded that "the First Amendment does not

79. 138 S. Ct. 1876, 1885 (2018).

80. Matal v. Tam, 137 S. Ct. 1744, 1748 (2017).

81. *See* Shurtleff v. City of Bos., Mass., 142 S. Ct. 1583, 1602 (2022) (Alito, J., Thomas, J., and Gorsuch, J., concurring); Iancu v. Brunetti, 139 S. Ct. 2294, 2305 (2019) (Breyer, J. and Sotomayor, J., concurring).

82. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 215–16 (2015); Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 469–70 (2009); Child Evangelism Fellowship of Md., Inc. v. Montgomery Cnty. Pub. Sch., 457 F.3d 376, 382–83 (4th Cir. 2006).

83. *See, e.g.,* S.H.A.R.K. v. Metro Parks Serving Summit Cnty., 499 F.3d 553, 559 (6th Cir. 2007); Hils v. Davis, No. 1:21CV475, 2022 WL 769509, at *5 (S.D. Ohio Mar. 14, 2022); Knight v. Montgomery Cnty., No. 3:19-CV-00710, 2019 WL 13109761, at *2 (M.D. Tenn. Aug. 16, 2019); Maple Heights News v. Lansky, No. 1:15CV53, 2017 WL 951426, at *3–4 (N.D. Ohio Mar. 10, 2017); McKay v. Federspiel, No. 14-CV-10252, 2014 WL 7013574, at *7 (E.D. Mich. Dec. 11, 2014), *aff'd*, 823 F.3d 862 (6th Cir. 2016); *but see* Enoch v. Hamilton Cnty. Sheriff's Office, No. 19-3428, 818 F. App'x 398 (6th Cir. June 11, 2020) (indicating in dicta that a local rule prohibiting filming in a courthouse implicated speech concerns and thus could be subject to a forum analysis).

require unfettered access to government information,"[84] nor does it "mandate[] a right of access to government information or sources of information within the government's control."[85] Rather than analyzing restrictions based on the type of area where activity is being restricted, Sixth Circuit courts generally begin by determining whether the government's restriction "selectively delimits the audience" that receives access to information. If the rule does not selectively delimit the audience, courts will uphold the restriction so long as it is reasonably related to the government's interest in creating it. If the rule does selectively delimit who has access to information, courts will apply a stricter level of scrutiny.[86] Under that analysis, local government restrictions on video recording have been consistently upheld by courts in the Sixth Circuit.[87] However, at least one federal district court in the Sixth Circuit has distinguished livestreaming from mere video recording, positing that livestreaming on social media could potentially constitute expressive conduct under the First Amendment and thus restrictions on livestreaming could be subject to forum analysis like other forms of "speech."[88]

The First Circuit has taken a mixed approach. In a 2011 case, *Glik v. Cunniffe*, the First Circuit Court of Appeals held that "the federal constitutional guarantee of freedom of speech" protects the right to record government officials discharging their duties in public places.[89] However, in a 2020 case, *Project Veritas Action Fund v. Rollins*, the First Circuit rejected the use of forum analysis to examine a restriction on recording.[90] The *Project Veritas* court noted that "while the Supreme Court has not addressed a challenge to a prohibition against secretly (or, for that matter, openly) recording law enforcement, there is no indication in its precedent that the forum-based approach that is used to evaluate a regulation of speech on government property . . . necessarily applies to a regulation on the collection of information on public property."[91] Instead, consistent with other "news-gathering rights" cases, the First Circuit applied intermediate scrutiny in *Project Veritas*—a level of scrutiny that allows "time, place, and manner" restrictions so long as they are narrowly tailored to serve an important government interest.[92]

Arguably, either the "freedom of speech" or "right to access" analysis could apply to a First Amendment case involving a government restriction on video recording, depending on where an individual is attempting to film. Using forum analysis seems appropriate in a case where an individual is attempting to film in a publicly accessible area.[93] On the other hand, if individuals attempt to film in a location where they would ordinarily have no right of access (for example, private offices, certain court proceedings, prisons), the "right to access" framework might be

84. Whiteland Woods, L.P. v. Twp. of West Whiteland, 193 F.3d 177, 182 (3d Cir. 1999).

85. *S.H.A.R.K.*, 499 F.3d at 560 (quoting Houchins v. KQED, Inc., 438 U.S. 1, 15 (1978)).

86. *Id.* at 560–61; *see also Hils*, 2022 WL 769509, at *6.

87. *Id.* at 559; *Hils*, 2022 WL 769509, at *5; *Lansky*, 2017 WL 951426, at *3–4; *McKay*, 2014 WL 7013574, at *7.

88. Knight v. Montgomery Cnty., Tenn., 470 F. Supp. 3d 760, 767–68 (M.D. Tenn. 2020); Knight v. Montgomery Cnty., Tenn., No. 3:19-CV-00710, 2022 WL 842699, at *5 (M.D. Tenn. Mar. 21, 2022).

89. 655 F.3d 78, 85 (1st Cir. 2011).

90. 982 F.3d 813, 835 (1st Cir. 2020), *cert. denied*, 142 S. Ct. 560 (2021).

91. *Id.* at 835 (internal citations and quotation marks omitted).

92. *Id.* at 835–36.

93. *See* Am. C.L. of Ill. v. Alvarez, 679 F.3d 583, 599 n.7 (7th Cir. 2012) ("This is not, strictly speaking, a claim about the qualified First Amendment right of access to governmental proceedings. Access is assumed here; the ACLU claims a right to audio record events and communications that take place in traditional public fora like streets, sidewalks, plazas, parks, and other open public spaces.").

more applicable.[94] In such cases, the threshold question would be whether the individual had a right to access those private spaces at all, not whether they had a right to engage in expressive activity (filming) in those spaces. Imagine, for example, a case in which an individual started filming in the lobby of a government building, then proceeded to ignore an "Employees Only" sign and entered a private office area to begin filming there. Theoretically, a court could apply both analyses in this situation—the forum analysis for a filming restriction in the lobby and the "right to access" framework for the individual's right to enter a restricted area to film.[95] The court might uphold the restriction on filming in both areas, but potentially under two different analytical frameworks.

A recent Ninth Circuit case regarding restrictions on photography and filming at U.S. ports of entry recognizes this distinction. In *Askins v. U.S. Department of Homeland Security*, the Ninth Circuit explicitly rejected the government's argument that the "right to access" framework should be used to analyze the photography and filming restrictions instead of forum analysis.[96] In doing so, the court noted that the "right to access" analysis might be relevant if plaintiffs challenged the restrictions on photography of government-controlled computer screens or secured areas at the port that were not freely open to the public. However, where the right asserted is the right to record or photograph matters exposed to public view, the court reasoned that forum analysis was the proper framework for analyzing such restrictions.[97]

Most First Amendment auditors focus their filming activity on areas that are publicly accessible or within public view. Accordingly, this bulletin focuses primarily on forum analysis as a way for local governments to assess the constitutionality of restrictions on filming in such areas.

III. Classifying Forums

The Supreme Court's forum classification framework involves specifically identifying the area at issue and conducting a case-by-case analysis of several different factors.[98] To identify the forum at issue, the Court looks closely at the specific access an individual seeks.[99] When individuals

94. *See* Margot E. Kaminski, *Privacy and the Right to Record*, 97 B.U. L. Rev. 167, 196 (2017) ("The logic of applying a variation of the access framework to a location where physical entry is already permitted is strained.").

95. At least one federal district court has bifurcated its analysis of a filming case based on whether the plaintiff already had access to a particular area. That case, *Cirelli v. Town of Johnston Sch. Dist.*, 897 F. Supp. 663 (D.R.I. 1995), involved a high school teacher attempting to film purported health and safety hazards in the school where she worked. The court found that there was no right of access issue when the teacher was filming during times when she was already properly on school grounds, such as prior to the start of her class or while teaching. However, the court held that the First Amendment right of access was implicated if the plaintiff wished to film on weekends or other times when permission would normally be required to enter the building.

96. 899 F.3d 1035, 1045 n.2 (9th Cir. 2018).

97. *Id.*

98. *See* Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 801–04 (1985).

99. *Id.* at 801–02. *See also* Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 40–41 (1983) (holding that the forum at issue was an interschool mail system, not the school building in which that mail system was located, since the plaintiffs sought to access the mail system specifically).

seek general access to a property as a whole, the entire property is the forum at issue.[100] When individuals seek more limited or specific access to an area *within* a property or building, courts apply a narrower approach by identifying the specific boundaries of the precise access sought.[101] For example, in *Perry Education Association v. Perry Local Educators Association,* the appellees claimed that a local school board violated the First Amendment when it barred them from using a public school's internal school mail system.[102] Though the teacher mailboxes constituting the mail system were located within a school building, the Court determined that the internal mail system itself—not the school building as a whole—was the forum at issue.[103] Identifying the precise area where an individual seeks to engage in First Amendment activity is the first step in courts' forum classification.

After identifying the forum at issue, courts must classify that forum. The government's intent for an area is the key consideration for forum classification.[104] The government does not create a public forum merely by inaction or by permitting limited discourse, but only by intentionally opening a nonpublic forum for expressive activity by members of the general public.[105] Thus, courts must ask if the government intended to allow expression within the forum, and if so, to what extent. Answering that question requires examining:

- policies regarding the use and purpose of an area,
- practices regarding the use of an area,
- the nature of the property and its compatibility with expressive activity,
- the extent of the use or access granted to the public, and
- the history of the area at issue.[106]

Courts consider these factors collectively, and no one factor is dispositive.[107]

First Amendment auditors often claim they have a First Amendment right to engage in filming in a government building because it is open to the public (or in some cases, simply because it is owned by the government). However, the fact that an area is held open to the public is not sufficient to establish it as a public forum for First Amendment purposes. Rather, the area must also be traditionally used for or expressly dedicated to expressive activity.[108] The Supreme Court has explicitly stated that publicly owned or operated property "is not transformed into 'public forum' property merely because the public is permitted to freely enter and leave the grounds at practically all times and the public is admitted to the building during specified

100. *Cornelius*, 473 U.S. at 801.
101. *Id*.
102. 460 U.S. 37, 40–41 (1983).
103. *Id.* at 44.
104. *Cornelius,* 473 U.S. at 802.
105. *Id.*
106. *Id.*; *Perry,* 460 U.S. at 46–47. *See also* Askins v. U.S. Dep't of Homeland Sec., 899 F.3d 1035, 1045 (9th Cir. 2018) (noting that traditional or historic use of property is relevant to forum classification); Silberberg v. Bd. of Elections of N.Y., 272 F. Supp. 3d 454, 476 (S.D.N.Y. 2017) (citing Hotel Emps. & Rest. Emps. Union, Loc. 100 of N.Y., N.Y. v. N.Y. Dep't of Parks and Recreation, 311 F.3d 534, 547 (2d Cir. 2002)) (discussing that courts should consider whether a forum has historically been open or used for expressive activity in making its forum classification).
107. *Cornelius,* 473 U.S. at 802–03.
108. United States v. Kokinda, 497 U.S. 720, 729–30 (1990).

hours."[109] Moreover, "[i]n cases where the principal function of the property would be disrupted by expressive activity, the [Supreme Court] is particularly reluctant to hold that the government intended to designate a public forum."[110]

The Supreme Court has been clear that the government may impose reasonable limitations on public expression to preserve its intended use for a particular space. A recent decision from the North Carolina Court of Appeals reflects this principle. In *State v. Barber*, the court held that the interior of the North Carolina General Assembly is not "an unlimited public forum" for purposes of First Amendment activity.[111] Even though "citizens are free to visit the General Assembly and communicate with members and staff," the court found that "the government may prohibit . . . conduct on a content-neutral basis that would affect the ability of members and staff to carry on legislative functions."[112] Outside of North Carolina, multiple courts have found areas of government property open to the public to be nonpublic forums. For example, the Supreme Court has held that the terminals of a publicly owned airport are nonpublic forums for First Amendment purposes.[113] Likewise, a court has held the interior of the United States Capitol to be a nonpublic forum, despite the fact that Congress allows the public to observe its proceedings and visit the inside of the Capitol.[114] As discussed in more depth in Section IV, a number of courts have found publicly accessible lobby areas of government buildings to be nonpublic forums. Other courts have even held certain publicly accessible *outdoor* areas to be nonpublic forums, including open-air plazas connected to government-owned buildings,[115] areas outside of sports arenas,[116] and sidewalks connected to government buildings.[117] Public access, in and of itself, does not make an area a public forum.

Why is public accessibility (or lack thereof) not determinative of a court's forum classification decision? The remainder of this section examines each factor relevant to forum classification in greater detail.

Policies Regarding the Use and Purpose of an Area

Written or informal policies for a particular space are important indicia of governmental intent.[118] Policies help courts understand whether a government is *intentionally* opening a space for public expression. For example, in *Make the Road by Walking, Inc. v. Turner,* an advocacy organization filed suit under the First Amendment after being excluded from welfare office

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109. United States v. Grace, 461 U.S. 171, 178 (1983); *see also* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 686 (1992).

110. *Cornelius*, 473 U.S. at 804.

111. 281 N.C. App. 99, 108 (2021), *appeal dismissed*, *review denied*, No. 38P22, 2022 WL 1448550 (N.C. May 4, 2022).

112. *Id*.

113. *Lee*, 505 U.S. at 679.

114. *See* Bynum v. United States Capitol Police Bd., 93 F. Supp. 2d 50, 56 (D.D.C. 2000).

115. *See* Ball v. City of Lincoln, Neb., 870 F.3d 722, 736 (8th Cir. 2017) (finding plaza in front of university sports arena to be a nonpublic forum); Hotel Emps. & Rest. Emps. Union, Loc. 100 of N.Y., N.Y. v. City of N.Y. Dep't of Parks & Recreation, 311 F.3d 534, 550 (2d Cir. 2002) (finding plaza in front of Lincoln Center performing arts complex to be a nonpublic forum); Hodge v. Talkin, 799 F.3d 1145 (D.C. Cir. 2015) (finding Supreme Court plaza to be a nonpublic forum).

116. *See, e.g.*, Ball v. City of Lincoln, Neb., 870 F.3d 722, 736 (8th Cir. 2017) (plaza area outside Pinnacle Bank Arena was nonpublic forum); Pomicter v. Luzerne Cnty. Convention Ctr. Auth., 939 F.3d 534, 537 (3d Cir. 2019) (concourse outside Mohegan Sun Arena was nonpublic forum); Calash v. City of Bridgeport, 788 F.2d 80, 83 (2d Cir. 1986) (Kennedy Stadium was either nonpublic or limited forum).

117. United States v. Kokinda, 497 U.S. 720, 730 (1990).

118. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985).

waiting rooms.[119] The Second Circuit identified the forum at issue as the welfare office waiting rooms and examined the government agency's policies regarding public access to those waiting rooms.[120] The policies restricted access to individuals with "official business" at the welfare center and to activities that were "specifically authorized" by the agency's administrator.[121] Limiting public access to those with official business evinced "a clear intent" for the welfare waiting rooms to be nonpublic forums.[122] The Second Circuit concluded that welfare waiting rooms were nonpublic forums, in part based on the agency's policy.[123]

Local government policies regarding public expression in a space are relevant to determining where First Amendment auditors may film. Some local governments may not have any policies at all regarding public expression on government property. Given that policies can serve as significant evidence of a government's intent for a certain space, local governments should carefully assess how and if they want the public to use different areas of government property for expressive purposes. A local government's policies should clearly delineate the areas it wishes to hold open for expressive activity and those where it wants to limit expressive activity. The parameters of those policies should be clearly and consistently communicated to the public through signage or other means. As in *Turner,* policies that are clearly communicated and consistently enforced are more likely to be credible evidence of a government's intent for a specific space.[124] More information about creating such policies can be found in Section VI.

Practices Regarding Use of an Area

To determine intent, courts examine not only what a government *says* about public expression on government property (its policy) but what it actually *does* with public expression on government property (its practice). Both policy *and* practice are relevant in analyzing governmental intent regarding the purpose, functions, and limitations on use of a specific forum.[125]

The Third Circuit analyzed the practice factor in detail in *Gregoire v. Centennial School District.*[126] There, a religious group sought to use a high school auditorium for a magic show involving some Christian teachings.[127] The school denied the religious group's request, citing its policy prohibiting the use of school facilities for religious services, instruction, or activities.[128] The school later revised its policy to allow auditorium use only for groups, organizations, or activities that were consistent with the school's function and mission.[129]

119. 378 F.3d 133, 140 (2d Cir. 2004).
120. *Id.* at 145–46.
121. *Id.*
122. *Id.* at 146.
123. *Id.* at 147.
124. *Id.* at 145–47.
125. *See* Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37 (1983) and Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985).
126. 907 F.2d 1366 (3d Cir. 1990).
127. *Id.* at 1369.
128. *Id.*
129. *Id.*

Even though the school's policy prohibited the use of school facilities for religious services, instruction, and activities, *in practice* the school permitted religious courses to be taught in its adult education program held in the auditorium.[130] Moreover, the school allowed religious discussion in its evening programs and opened its doors to dramatic and musical performances that did not relate to school purposes.[131] Despite its stated intent to create a nonpublic forum, the school allowed many groups that were inconsistent with an educational mission and purpose access to its facilities, while barring only religious content and groups.[132] In fact, the evidence suggested that the plaintiff's religious group was the only group who had ever been denied access.[133] Taking the school's practices as a whole, the Third Circuit held that the school had in practice created a designated public forum, despite its stated intent and policies.[134]

As the *Gregoire* case illustrates, courts look behind a local government's policies when categorizing a forum. The way a unit of local government applies a policy in practice may undermine the stated intent of the policy for First Amendment forum purposes. Accordingly, local governments must ensure that (1) the actual practices of government officials and employees on the ground align with the parameters of any written policies, and (2) policies are enforced even-handedly and consistently.

Nature of the Property

The nature of the property is another relevant factor for forum classification.[135] In considering this factor, courts analyze the function of a particular area and its physical characteristics.[136] "In cases where the principal function of the property would be disrupted by expressive activity, the [Supreme] Court is particularly reluctant to hold that the government intended to designate a public forum."[137] The Supreme Court has recognized that the government workplace, like any place of employment, "exists to accomplish the business of the employer."[138] Thus, the government has an interest in regulating expressive activity to avoid disruptions to its employees' work.[139]

The Sixth Circuit illustrated how function impacts forum classification in *Helms v. Zubaty.*[140] There, a member of the public entered the reception area for a county judge's office to complain about a new tax.[141] While she waited for the judge to return, she sat in the reception area and spoke loudly about the tax, becoming agitated and disruptive.[142] An employee sharing that office asked the complaining citizen to leave, stating that she was disrupting his work, before involving

130. *Id.* at 1372.
131. *Id.* at 1374.
132. *Id.* at 1375.
133. *Id.*
134. *Id.* at 1377.
135. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985).
136. United States v. Kokinda, 497 U.S. 720, 732 (1990) (quoting Heffron v. Int'l Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 650–51 (1981)).
137. *Cornelius,* 473 U.S. at 804.
138. *Id.* at 805.
139. *Id.* at 805–06.
140. 495 F.3d 252 (6th Cir. 2007).
141. *Id.* at 254.
142. *Id.*

law enforcement.[143] The citizen argued that the judge had an "open-door policy" wherein he allowed members of the public to enter his office and speak with him and that consequently, the county employee had violated her First Amendment rights.[144]

In considering the citizen's claims, the Sixth Circuit noted that a balancing test should be applied when First Amendment rights are implicated in a government workplace.[145] Since the purpose of a government workplace is to accomplish the business of the government, courts must evaluate whether the government's interest in limiting the use of its property to its intended purpose outweighs others' interest in using the government property for alternative purposes.[146] The *Helms* plaintiff offered insufficient evidence to preempt the government's interest in using its property to accomplish its business.[147] While the defendant judge conceded that he had an open-door policy, the *Helms* court did not believe that such a policy permitted disruptive behavior in a reception area of an office shared with other county employees.[148] As a result, the Sixth Circuit held that the function of the forum at issue was still to accomplish government business and categorized the area as a nonpublic forum.[149]

Another facet of court analysis of the nature of a property is the area's physical characteristics. In *Claudio v. United States,* the Eastern District of North Carolina noted that the lobby of the Raleigh Federal Building was small and completely ill-equipped to handle noise, a crowd, or any sort of disruptive behavior.[150] Its physical characteristics were incompatible with expressive activity, which weighed in favor of the court finding the lobby to be a nonpublic forum.[151] The Ninth Circuit reached a similar conclusion in evaluating the lobby of the state Department of Ecology.[152] There, the lobby was separated into various units with a walkway connecting two locked offices.[153] The Ninth Circuit considered this physical structure to be poorly designed to accommodate public expression and held that the area was a nonpublic forum.[154]

Finally, in *United States v. Kokinda*, the Supreme Court relied on physical characteristics and intended use to conclude that a post office sidewalk was a nonpublic forum.[155] *Kokinda* involved a political group setting up a table on the sidewalk leading to the entrance of a post office to solicit contributions, sell books, and distribute political literature. The group was asked to leave, arrested, and convicted of violating a Postal Service regulation banning solicitation on Postal Service property. The convicted individuals then challenged the Postal Service ban on solicitation as violating the First Amendment when applied to their activity on the sidewalk. Prior to *Kokinda*, public sidewalks, like public streets, had generally been recognized by the Supreme Court as traditional public forums—areas where expressive activity receives the

143. *Id.*
144. *Id.* at 255–56.
145. *Id.* at 255.
146. *Id.* (citing Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985)).
147. *Id.* at 257.
148. *Id*.
149. *Id.* at 257–58.
150. 836 F. Supp. 1219, 1225 (E.D.N.C. 1993).
151. *Id; see also Cornelius*, 473 U.S. at 804.
152. Freedom Found. v. Wash. Dep't of Ecology, 840 Fed. App'x 903, 904 (9th Cir. 2020).
153. *Id.*
154. *Id*.
155. 497 U.S. 720, 720 (1990).

greatest level of protection from government interference.[156] Despite this precedent, a plurality of the Supreme Court held that the sidewalk on Postal Service property was a *nonpublic* forum and upheld the Postal Service regulation banning solicitation.[157] In reaching its holding, the Court noted that the postal sidewalk at issue did "not have the characteristics of public sidewalks traditionally open to expressive activity" because it was "constructed solely to provide for the passage of individuals engaged in postal business."[158] Even though the sidewalk was completely open to any member of the public, the *purpose* of the sidewalk was to lead from the parking lot to the post office, not "to facilitate the daily commerce and life of the neighborhood or city."[159]

These examples indicate that if public expression is incompatible with or likely to substantially disrupt the intended function of an area, a court may be more likely to categorize that area as a nonpublic forum. Likewise, an area that is not physically suited for expressive activity is also more likely to be classified as a nonpublic forum.

Extent of the Use Granted

A fourth factor for forum classification is the type and extent of use of an area that a government grants to the public. Permission procedures, consistency, and the extent to which similarly situated groups have been treated equally are all relevant to this factor.[160] In *Gregoire,* the school district's policy described a particular permission procedure, but in practice, the school district granted access to virtually all groups aside from the religious group bringing suit.[161] The school district's lack of a clear standard for permission led to inconsistent results and virtually unfettered access for some groups.[162] This inconsistency and breadth of access weighed in favor of the court holding the high school facilities to be a designated public forum—a forum "created when public property is intentionally opened by the state for indiscriminate use by the public as a place for expressive activity."[163]

While universally granting access to all who seek it may support finding a designated public forum, granting only selective access does not.[164] Selectively granting access to a group or a certain speaker does not by itself demonstrate the government's intent to convert an area into a public forum.[165] In other words, whether access is granted is less telling than *how* it is granted and *to whom.* For example, in *Greer v. Spock,* political candidates challenged a military base's

156. *See, e.g.*, Boos v. Barry, 485 U.S. 312 (1988); Frisby v. Schultz, 487 U.S. 474 (1988).

157. *Kokinda*, 497 U.S. at 730. Four Supreme Court justices joined in the opinion finding that the sidewalk was a nonpublic forum. A fifth justice concurred that the postal regulation did not violate the First Amendment but stated that he believed it was not necessary to determine whether the sidewalk was a public or nonpublic forum, because the ban on solicitation was a reasonable "time, place, and manner" restriction.

158. *Id.* at 727.

159. *Id.* at 728.

160. Gregoire v. Centennial Sch. Dist., 907 F.2d 1366, 1371 (3d Cir. 1990) (citing Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 804–05 (1985)).

161. *Id.* at 1375.

162. *Id.*

163. *Id.* at 1370, 1376–77.

164. Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 47 (1983). *See also* Greer v. Spock, 424 U.S. 828, 838 n.10 (1976); Lehman v. City of Shaker Heights, 418 U.S. 298, 303–04 (1974).

165. *Perry*, 460 U.S. at 47. *See also Greer,* 424 U.S. at 838 n.10; Christ's Bride Ministries, Inc. v. Se. Pennsyl. Transp. Auth., 148 F.3d 242, 248 (3d Cir. 1998).

denial of their application to give campaign speeches on the base.[166] The political candidates argued that the base had previously granted access to several different types of outside speakers, including speakers on business management and drug abuse, clergy members, theatrical performers, and musicians.[167] However, the base had never allowed political campaigning or candidate speeches.[168] In weighing these facts, the Supreme Court noted that the base had strictly, even-handedly, and consistently enforced its ban on political campaigning.[169] None of the other civilian speakers who were allowed to access the base addressed political or campaign issues.[170] The fact that the base had granted selective access to some types of speakers did not guarantee all types of speakers access to the forum.[171]

Was the ban enforced in *Greer* a form of content-based discrimination since it prohibited political speech while allowing speech on other topics? Arguably yes, but content-based discrimination is subject to strict scrutiny only in traditional or designated public forums. In *Greer*, the Supreme Court found that the military base at issue was a nonpublic forum.[172]

Historical Use

Historical use is a particularly important factor when trying to determine whether an area is a traditional public forum. Traditional public forums are those 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."[173] The Supreme Court has limited the traditional public forum category to "its historical confines," although without describing or defining those confines.[174]

While the Supreme Court has not explicitly recognized history as a forum classification factor outside of the context of traditional public forums, at least four circuits, including the Fourth Circuit, have acknowledged this factor.[175] In examining an area's history, these circuits consider whether a forum has historically been open to expressive activity and how a property has been historically used.[176] Courts might also ask if a particular forum or location is part of

166. 424 U.S. 828, 832–33 (1976).

167. *Id.* at 831.

168. *Id.*

169. *Id.* at 839.

170. *Id.* at 831.

171. *Id.* at 839.

172. *Id.* at 836–38 ("[I]t is consequently the business of a military installation like Fort Dix to train soldiers, not to provide a public forum.").

173. Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45 (1983) (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)) (internal quotations omitted).

174. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 678 (1998).

175. Askins v. U.S. Dep't. of Homeland Sec., 899 F.3d 1035, 1045 (9th Cir. 2018) (noting that traditional or historic use of property is relevant to forum classification); United States v. Marcavage, 609 F.3d 264, 276–77 (3d Cir. 2010) (evaluating the historic uses of an area in classifying the forum at issue); Warren v. Fairfax Cnty., 196 F.3d 186, 191 (4th Cir. 1999) (citing Int'l Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 680–81 (1992)); Silberberg v. Bd. of Elections of N.Y., 272 F. Supp. 3d 454, 476 (S.D.N.Y. 2017) (citing Hotel Emps. & Rest. Emps. Union, Loc. 100 of N.Y., N.Y. v. N.Y. Dept. of Parks and Recreation, 311 F.3d 534, 547 (2d Cir. 2002)) (discussing that a court should consider whether a forum has historically been open or used for expressive activity in making its forum classification).

176. *Warren,* 196 F.3d at 191 (citing *Lee*, 505 U.S. at 680–81).

a category that has traditionally been subject to access restrictions.[177] Different aspects of a particular forum's history of access—specifically, what groups have been afforded access, what speech has been permitted or prohibited, and how the government has typically regarded its own forum—may all be relevant to the forum's classification.[178] Courts may examine not only a local government's current practice regarding access for expressive activities, but its historical practice as well. Thus, history and practice may overlap in a court's forum determination.

In *Hotel Employees & Restaurant Employees Union, Local 100 of N.Y., N.Y. v. N.Y. Department of Parks and Recreation,* the Second Circuit evaluated the history factor by comparing the characteristics of an open-air plaza to the characteristics of other forums such as public streets and parks that had historically been considered traditional public forums.[179] The plaza at issue acted as an entryway to Lincoln Center, a performing arts facility.[180] Though the plaza "clearly invite[d] passers-by to stroll through or linger," the court found that it "was not created primarily to operate as a public artery, nor to provide an open forum for all forms of public expression."[181] The Second Circuit narrowly defined the forum at issue as "plazas that serve as forecourts in performing arts complexes" and noted that these types of plazas were not areas that have "traditionally been dedicated to expressive uses."[182] In reaching this conclusion, the *Hotel Employees* court looked to case law from the Tenth Circuit holding that an arts facility plaza was a nonpublic forum.[183] The Second Circuit weighed the historical legal treatment of the forum at issue in reaching its conclusion that the Lincoln Center plaza was either a limited public forum or a nonpublic forum.[184]

The historical use factor may be important for local governments that have had a long practice of permitting public expression in areas they now want to restrict. Those governments should keep the following two points in mind:

- If the area is a *traditional* public forum such as a public park, street, or sidewalk—a place that has "immemorially been held in trust for the use of the public, and, time out of mind [has been] used for purposes of assembly, communicating thoughts between citizens, and discussing public questions"—then a mere change in policy cannot change the nature of the forum.[185] Historical use and tradition will continue to dictate the nature of that forum. For example, a local government cannot transform a public park into a nonpublic forum solely by declaring it to be a nonpublic forum in an ordinance or policy.

177. *Id.* at 192.

178. Shurtleff v. City of Bos., Mass., 142 S. Ct. 1583 (2022) (evaluating the history of Boston's flag-raising program to see what flags had been permitted in the past, what degree of control the government exercised over the flag program, and whether the government expressed an intent to control the flag program or limit public expression); Christ's Bride Ministries, Inc. v. Se. Pennsyl. Transp. Auth., 148 F.3d 242, 252–53 (3d Cir. 1998) (analyzing what advertisements had been permitted in the past to assess what forum was at issue); Gregoire v. Centennial Sch. Dist., 907 F.2d 1366, 1374 (3d Cir. 1990) (considering the school's history of permitting access to a wide variety of diverse groups).

179. 311 F.3d 534, 550 (2d Cir. 2002).

180. *Id.* at 551–52.

181. *Id.* at 552.

182. *Id.* at 551.

183. *Id.*

184. *Id.* at 553.

185. *See* United States v. Grace, 461 U.S. 171, 180 (1983) ("Traditional public forum property occupies a special position in terms of First Amendment protection and will not lose its historically recognized

- On the other hand, if an area is open to expressive activity because the government has *intentionally* opened it to the public as a designated or limited public forum, the government may close such a forum through new policy and practices. Local governments are not required to keep a designated or limited public forum open to expressive activity indefinitely.[186] As the Fourth Circuit has stated, "A government is entitled to close a designated public forum to all speech."[187]

IV. Examples of Forum Determinations

Assuming that filming might be treated by courts as a "step in the speech process" for First Amendment purposes, how can local governments identify the areas in which they may have greater leeway to regulate filming? First and foremost, local governments should look to the factors described in Section III and attempt to apply them to specific areas of government-owned or government-controlled property. Courts make these forum determinations on a case-by-case, fact-specific basis.

Though fact-specific analysis should be the first step in determining what type of local restrictions might pass constitutional muster, it can also be helpful to look at how courts have treated certain areas of property in prior cases. This section provides some specific examples of how courts across the United States have categorized some specific types of government property for First Amendment forum analysis purposes. However, a comprehensive analysis of every type of government-owned property or space is beyond the scope of this bulletin.

While this section includes illustrative cases from other jurisdictions, only decisions from the Supreme Court, the Fourth Circuit, or North Carolina state courts will be binding precedent for local governments in North Carolina in the event of litigation challenging a filming restriction on First Amendment grounds.

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character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression. Nor may the government transform the character of the property by the expedient of including it within the statutory definition of what might be considered a nonpublic forum parcel of property.").

186. *See, e.g.*, Sons of Confederate Veterans, Va. Div. v. City of Lexington, Va., 722 F.3d 224, 231 (4th Cir. 2013) (collecting cases recognizing that the government is not required to retain the open nature of a designated public forum).

187. *Id.* at 232. *See also* Frank D. LoMonte, *Everybody Out of the Pool: Recognizing a First Amendment Claim for the Retaliatory Closure of (Real or Virtual) Public Forums*, 30 U. Fla. J.L. & Pub. Pol'y 1, 16 (2019). LoMonte argues for a First Amendment claim for "retaliatory closure" of designated and limited public forums but notes that such a claim has been recognized by only a small handful of courts and has never been recognized by the Supreme Court.

Streets, Sidewalks, and Parks

Parks, streets, and sidewalks are "quintessential" examples of traditional public forums.[188] Areas of government property similar to streets, sidewalks, and parks have also been deemed to be traditional public forums, including:

- the main public square of a city,[189]
- a publicly owned outdoor pedestrian mall,[190]
- the steps in front of city hall,[191]
- the front lawn of a county office building,[192] and
- a city-maintained alleyway.[193]

The fact that a space is an open-air, publicly accessible area indicates that it is likely a traditional public forum. However, there are exceptions to that general principle. The function and purpose of the property at issue are relevant to determining whether such property constitutes a traditional public forum.[194] Traditional public forums are areas that "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[195] The *Kokinda* and *Greer* cases, discussed earlier, provide examples of instances in which the Supreme Court has *not* treated publicly accessible sidewalks and streets as traditional public forums, based on the unique function and purpose of the areas at issue. Similarly, in *Hawkins v. City and County of Denver*, the Tenth Circuit found that an open air, glass-covered pedestrian walkway was not a traditional public forum, where the sole function of the walkway was to permit ingress to and egress from various buildings within a performing arts complex.[196] However, cases like *Kokinda*, *Greer*, and *Hawkins* are the exception, not the rule. Generally, local governments should assume that courts will treat streets, sidewalks, plazas, town squares, parks, and other outdoor areas dedicated to assembly or general pedestrian passage as traditional public forums.

188. Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45 (1983); Boos v. Barry, 485 U.S. 312, 318 (1988).

189. Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati, 363 F.3d 427, 430 (6th Cir. 2004).

190. ACLU of Nev. v. City of Las Vegas, 333 F.3d 1092, 1099, 1106 (9th Cir. 2003).

191. Pouillon v. City of Owosso, 206 F.3d 711, 715–17 (6th Cir. 2000).

192. Smith v. Cnty. of Albemarle, Va., 895 F.2d 953 (4th Cir. 1990).

193. McTernan v. City of York, Pa., 564 F.3d 636, 645 (3d Cir. 2009).

194. *See, e.g.*, United States v. Kokinda, 497 U.S. 720, 728 (1990) ("The postal sidewalk was constructed solely to assist postal patrons to negotiate the space between the parking lot and the front door of the post office, not to facilitate the daily commerce and life of the neighborhood or city."); United States v. Grace, 461 U.S. 171, 179–80 (1983); Greer v. Spock, 424 U.S. 828, 835–37 (1976) (holding that military base was a nonpublic forum and the presence of sidewalks and streets within the base does not change that conclusion).

195. Hague v. CIO, 307 U.S. 496, 515 (1939).

196. 170 F.3d 1281, 1287 (10th Cir. 1999).

Lobby Areas of Government Buildings

Increasingly, First Amendment auditors are focusing their filming activity on lobbies or waiting areas of local government buildings. In the context of other types of First Amendment activity, courts across the United States have generally treated these areas in government-owned buildings as nonpublic forums.

- The Eleventh Circuit, in *United States v. Gilbert*, held simply that "there is no question" that the interior of a federal government building was a nonpublic forum, as was a covered outdoor portico extending from the lobby.[197]
- The Seventh Circuit, in *Sefick v. Gardner*, held that the lobby of a federal courthouse is a nonpublic forum, "not a place open to the public for the presentation of views."[198]
- The Eighth Circuit, in *Families Achieving Independence & Respect v. Nebraska Department of Social Services*, held that a department of social services lobby was a nonpublic forum, finding that the principal purpose of the lobby was to provide services to the public, not to provide free access for expressive activities.[199]
- In a 2019 decision affirmed by the Ninth Circuit, the Western District of Washington held that the lobby of the Washington Department of Ecology was a nonpublic forum because department policies granted access to visitors in the lobby only if they had a reason for being present that was related to the agency's business.[200] In making its decision, the court noted that the Eighth, Second, and Eleventh Circuits have all ruled that a government agency lobby is a nonpublic forum.[201]
- In *Selfick v. United States*, the Northern District of Illinois held that the lobby of a federal government office building was a nonpublic forum.[202]
- In *Low Income People Together, Inc. v. Manning*, the Northern District of Ohio held that the lobby and outpatient clinic waiting areas of a public, county-owned hospital were nonpublic forums. In reaching this conclusion, the court noted that the sole purpose of these areas was "to serve patients, friends and families of patients, and the Hospital staff who provide medical care."[203]
- In *Grossbaum v. Indianapolis–Marion County Building Authority*, the Seventh Circuit accepted the defendant's concession that the lobby of a city-county building (the seat of government for the City of Indianapolis and the County of Marion, Indiana) was a nonpublic forum and upheld a regulation barring all private displays in the lobby.[204]

197. 920 F.2d 878, 884–85 (11th Cir. 1991).
198. 164 F.3d 370, 372 (7th Cir. 1998).
199. 111 F.3d 1408, 1419 (8th Cir. 1997).
200. Freedom Found. v. Wash. Dep't of Ecology, 426 F. Supp. 3d 793, 799–802 (W.D. Wash. 2019), *aff'd*, 840 F. App'x 903 (9th Cir. 2020).
201. *Id.* at 801–02 (collecting cases).
202. No. 98-C5301, 1999 WL 778588, at *9 (N.D. Ill. May 6, 1999) (unpublished).
203. 615 F. Supp. 501, 516 (N.D. Ohio 1985), *amended*, 626 F. Supp. 1344 (N.D. Ohio 1986).
204. 100 F.3d 1287, 1297 (7th Cir. 1996).

- In *Miller v. City of Cincinnati*, the Sixth Circuit held that by opening the interior of Cincinnati's city hall to events by certain private groups, the city had created, at most, a limited public forum. The court noted that limited public forum status leads to the same result as if the interior of city hall were a nonpublic forum, because in both types of spaces, restrictions need only be "reasonable and viewpoint-neutral."[205]
- In dicta, the Southern District of Georgia noted that "a public building's front lobby is typically considered a non-public forum."[206]
- In a 2020 case, *Commonwealth v. Bradley*, the Superior Court of Pennsylvania upheld a "no-filming" restriction imposed in the lobby of a police department as a reasonable restraint on free speech.[207]

As noted in the *Claudio* and *Turner* cases discussed above, some courts analyze the nature of the lobby area, the policies enforced in the lobby area, and the past use of the lobby area for expressive activities in determining the forum status of a government building lobby.

Offices and Workspaces of Government Employees

There is limited case law analyzing government employee offices as a "forum" for First Amendment purposes. However, courts that have evaluated the issue have consistently held that office spaces for government employees are nonpublic forums. As the Supreme Court stated:

> The [government] workplace, like any place of employment, exists to accomplish the business of the employer. '[T]he Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs.' It follows that the Government has the right to exercise control over access to the [government] workplace in order to avoid interruptions to the performance of the duties of its employees.[208]

Likewise, the Seventh Circuit has broadly stated: "A public agency's administrative headquarters is presumptively not a public forum."[209]

The fact that an employee office or reception area is open to the public for purposes of conducting official business or receiving government services does not change its status as a nonpublic forum. The *Helms v. Zubaty* case, discussed earlier, illustrates this point.[210] Recall that in *Helms*, the Sixth Circuit found no evidence that the county executive's "open-door policy" was intended to create a public "forum for expressive activity" in the reception area outside of an office suite he shared with several other county officials and their staff.[211] Moreover, the court

205. 622 F.3d 524, 535 (6th Cir. 2010).

206. Gay Guardian Newspaper v. Ohoopee Reg'l Libr. Sys., 235 F. Supp. 2d 1362, 1369 (S.D. Ga. 2002), *aff'd sub nom.* Gay Guardian Newspaper v. Ohoopee Reg'l Libr. Sys., 90 F. App'x 386 (11th Cir. 2003).

207. 232 A.3d 747, 755 (Pa. Super. 2020). The court did not use forum analysis, finding instead that the no-filming condition was a reasonable "time, place, and manner" restriction on speech.

208. Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 805–06 (1985) (internal citations omitted).

209. Day v. Chi. Bd. of Educ., 234 F.3d 1272, No. 99-3890, 2000 WL 1090473, at *1 (7th Cir. 2000) (*unpublished table decision*) (citing Int'l Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 392 (1993).

210. 495 F.3d 252, 257 (6th Cir. 2007).

211. *Id.*

found no reason why the county executive's *personal* practices should "preempt the county's control over a government workplace for purposes of a First Amendment analysis," noting that government workplaces are "a forum that courts have consistently defined as nonpublic."[212]

Other courts around the United States have also found government workplaces to be nonpublic forums, as described below.

- In *Lavite v. Dunstan*, the Seventh Circuit found that a county administration building housing over twenty county departments was a nonpublic forum, where no evidence showed that the building had been used for political activity, assembly of the public, or other expressive activity.[213]
- In *Freedom Foundation v. Sacks*, the Western District of Washington held that the Washington Department of Labor & Industries was a nonpublic forum, because "the purpose of L&I's headquarters is to serve as a workplace for its near 2,000 employees, not a forum of free debate and expressive activity."[214] The court noted that "the nature of the building as an office leads to the conclusion that it is a nonpublic forum."[215]
- In *State v. Chiapetta*, the Supreme Judicial Court of Maine held that a town voter registration office was a nonpublic forum.[216] The court noted that government offices open to the public "may take on a nonpublic character depending on their nature and function."[217]
- In *Day v. Chicago Board of Education*, the Seventh Circuit found that a teacher's certification and substitute teacher's center run by the Chicago Board of Education was a nonpublic forum.[218]
- In *O'Brien v. Welty*, the Ninth Circuit held that faculty offices in a university department building—as well as the hallway on which the offices were located—were nonpublic forums.[219] The case involved a student who walked to the open doors of two professors' offices and attempted to videotape conversations with them. The court observed, "Professors at work in their personal offices do not generally expect to be confronted without warning by a student asking hostile questions and videotaping. If the uninvited student refuses to cease hostile questioning and refuses to leave a professor's personal office after being requested to do so . . . the professor may reasonably become concerned for his or her safety."[220]
- In *Sheets v. City of Punta Gorda, Florida*, the Middle District of Florida treated a city hall—including a city clerk's office where the plaintiff was attempting to film with a body camera—as a limited public forum.[221] As discussed earlier, restrictions on First Amendment activity in a limited public forum are evaluated under the same standard as those in a nonpublic forum.

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212. *Id.*
213. 932 F.3d 1020, 1029 (7th Cir. 2019).
214. No. 3:19-CV-05937-BJR, 2021 WL 1250526, at *7 (W.D. Wash. Apr. 5, 2021), *aff'd sub nom.* No. 21-35342, 2022 WL 671017 (9th Cir. Mar. 7, 2022).
215. *Id.*
216. 513 A.2d 831, 833 (Me. 1986).
217. *Id.* at 834.
218. 234 F.3d 1272 (7th Cir. 2000).
219. 818 F.3d 920, 931–32 (9th Cir. 2016).
220. *Id.* at 932.
221. 415 F. Supp. 3d 1115, 1122 (M.D. Fla. 2019).

As seen in *United States v. Kokinda*, even sidewalks or parking lots directly adjacent to government workspaces may be deemed nonpublic forums when they are used primarily for egress from and ingress to the building and the government has not intentionally opened them for expressive activity. In *Brown v. Arkansas Department of Finance and Administration*, the Western District of Arkansas held that certain outdoor areas adjacent to a local office of the Arkansas Department of Finance and Administration's Revenue Division were all nonpublic forums.[222] The sidewalk leading from the parking lot to the front door, the grassy area in front of the building's door, as well as the building's parking lot—which was intended only for the use of revenue office patrons—were all on private property leased by the State from a third party.[223] This nonpublic forum determination was affirmed by the Eighth Circuit Court of Appeals.[224]

Courthouses

Courts have consistently held that courtrooms—as well as courthouses as a whole—are nonpublic forums.[225] Courtrooms have been recognized as a place "where the First Amendment rights of everyone . . . are at their constitutional nadir."[226] As one court stated, the purposes of a courthouse are "incompatible with expressive activities inside a courthouse."[227] Courts have also found many outdoor areas connected to courthouses—such as plazas, walkways, and parking lots—to be nonpublic forums as well.[228] Public sidewalks around the perimeter of courthouse grounds, however, may constitute a traditional public forum.[229]

However, like any nonpublic forum, courthouse grounds may be converted into a limited public forum or designated public forum when the government opens them up for expressive activity. For example, one court found that a courthouse was a limited public forum when the public had been given free access to the courthouse for the purposes of commercial filmmaking.[230] Likewise, in *United States v. Gilbert*, the Eleventh Circuit held a plaza adjacent to a federal court building to be a designated public forum because it was used for demonstrations and protests on a regular basis.[231] However, six years later, the Eleventh Circuit held that part of this same plaza was no longer a designated public forum, because the government had instituted

222. 180 F. Supp. 3d 602, 615 (W.D. Ark. 2016).

223. *Id.* at 614.

224. Brown v. Ark. Dep't of Fin. & Admin., 674 F. App'x 599, 600 (8th Cir. 2017).

225. *See, e.g.*, Mezibov v. Allen, 411 F.3d 712 (6th Cir. 2005); Huminski v. Corsones, 396 F.3d 53 (2d Cir. 2005); Sefick v. Gardner, 164 F.3d 370, 372 (7th Cir. 1998); Berner v. Delahanty, 129 F.3d 20 (1st Cir. 1997).

226. *Mezibov*, 411 F.3d at 718.

227. *Huminski*, 396 F.3d at 91.

228. *See, e.g.,* Verlo v. Martinez, 262 F. Supp. 3d 1113, 1148 (D. Colo. 2017) (holding courthouse plaza to be nonpublic forum); Schmidter v. State, 103 So.3d 263, 270 (Fla. Dist. Ct. App. 2012) (holding walkway from the courthouse garage to the main courthouse entrance and areas within courthouse complex grounds to be nonpublic forums); Hodge v. Talkin, 799 F.3d 1145 (D.C. Cir. 2015) (holding Supreme Court plaza to be a nonpublic forum); *Huminski*, 396 F.3d at 53 (holding courthouse parking lot to be a nonpublic forum); *but see* United States v. Gilbert, 920 F.2d 878 (11th Cir. 1991) (holding portico to be a nonpublic forum, but unenclosed plaza to be a designated public forum).

229. *See* United States v. Grace, 461 U.S. 171, 180 (1983) (holding sidewalks around the perimeter of the Supreme Court grounds to be a public forum).

230. Amato v. Wilentz, 753 F. Supp. 543 (D.N.J. 1990), *vacated on other grounds*, 952 F.2d 742 (3d Cir. 1991).

231. 920 F.2d 878, 884 (11th Cir. 1991).

a policy restricting protests and demonstrations in the area.[232] These cases serve as a reminder that a property may lose its nonpublic forum status if the government habitually permits expressive activity in that area. Conversely, the government can revert a designated or limited public forum area to nonpublic forum status by instituting policies and practices closing the area to expressive activity. In other words, the government is not required to keep a designated or limited public forum open indefinitely.[233]

A number of federal district courts have upheld restrictions on filming (or restrictions on using electronic devices generally) in courthouses.[234] This includes a District of Maryland decision affirmed by the Fourth Circuit, in which the court stated that "there is no First Amendment 'right to communication' that guarantees a right to carry cellular phones in government buildings."[235]

Prisons and Jails

Prisons and jails are nonpublic forums.[236] The Supreme Court "is particularly reluctant to hold that the government intended to designate a public forum . . . [on] jailhouse grounds."[237] In *Jones v. North Carolina Prisoners' Labor Union, Inc.*, the Supreme Court stated that "a prison is most emphatically not a public forum," even where the prison had allowed certain external groups to engage in expressive activity on prison grounds.[238] Moreover, the Supreme Court has explicitly stated there is "no basis for reading into the Constitution a right of the public or the media to enter [penal] institutions, with camera equipment, and take moving and still pictures of inmates for broadcast purposes."[239]

In a 2021 case, *Kerr v. City of Boulder, Colorado*, the District of Colorado ruled that plaintiffs did not have a First Amendment right to film with their cell phones on county jail property.[240] In its analysis, the court noted:

> [J]ail property is not the type of publicly-owned property on which a citizen may exercise the full range of First Amendment rights anytime that he wishes. This conclusion does not change even assuming . . . that Plaintiffs were standing or

232. United States v. Gilbert (*Gilbert III*), 130 F.3d 1458, 1461 (1997).

233. *See, e.g.,* Koala v. Khosla, 931 F.3d 887, 900 (9th Cir. 2019); Archdiocese of Wash. v. Wash. Metro. Area Transit Auth., 897 F.3d 314, 323 (D.C. Cir. 2018); Verlo v. Martinez, 820 F.3d 1113, 1129 (10th Cir. 2016); Satawa v. Macomb Cnty. R. Comm'n, 689 F.3d 506, 517 (6th Cir. 2012); *Gilbert III*, 130 F.3d at 1461.

234. *See, e.g.*, Hodge v. Bd. of Cnty. Comm'rs, No. CIV.A. RWT-10-2396, 2010 WL 4068793 (D. Md. Oct. 15, 2010), *aff'd*, 414 F. App'x 567 (4th Cir. 2011); McKay v. Federspiel, No. 14-CV-10252, 2014 WL 7013574, at *7 (E.D. Mich. Dec. 11, 2014), *aff'd*, 823 F.3d 862 (6th Cir. 2016); Rouzan v. Dorta, No. EDCV 12-1361-BRO JPR, 2014 WL 1716094, at *12–13 (C.D. Cal. Mar. 12, 2014), *report and recommendation adopted*, No. EDCV 12-1361-BRO JPR, 2014 WL 1725783 (C.D. Cal. May 1, 2014).

235. *Hodge*, 2010 WL 4068793, at *2, *aff'd*, 414 F. App'x 567.

236. Adderley v. Fla., 385 U.S. 39, 47–48 (1966); Jones v. N.C. Prisoners' Lab. Union, Inc., 433 U.S. 119, 136 (1977); *see also* Hrdlicka v. Reniff, 631 F.3d 1044, 1050 (9th Cir. 2011).

237. Cornelius v. NAACP Legal Def. and Educ. Fund, 473 U.S. 788, 804 (citing *Adderley*, 385 U.S. 39); *see also Jones*, 433 U.S. at 134 ("A prison may be no more easily converted into a public forum than a military base.").

238. 433 U.S. 119, 136 (1977).

239. Houchins v. KQED, Inc., 438 U.S. 1, 9 (1978).

240. No. 19-CV-01724-KLM, 2021 WL 2514567, at *9 (D. Colo. June 18, 2021).

> walking on portions of the Jail's property which are generally open to the public for ingress and egress purposes, for example by visitors to the Jail, or for any other legitimate purpose.[241]

Police Departments

As discussed earlier, many jurisdictions have recognized a right to record police activities in traditional public forums. However, there is limited case law analyzing the interior of a police department as a forum for First Amendment purposes. The case law that does exist indicates that a police department is a nonpublic forum. The Seventh Circuit has held that "the interior of a police station is not a public forum."[242] The Southern District of New York has recognized New York Police Department meeting rooms as nonpublic forums.[243] Likewise, the Central District of California has held that a police station is a nonpublic forum.[244]

In a decision affirmed by the Eighth Circuit, the Western District of Missouri held that a plaintiff had no constitutional right to videotape a police department lobby.[245] Likewise, the Superior Court of Pennsylvania upheld a "no-filming" restriction imposed in the lobby of a police department as a reasonable restraint on free speech.[246]

Polling Places

In *Minnesota Voters Alliance v. Mansky*, the Supreme Court recently held that the interior of a polling place is a nonpublic forum.[247] Over two decades prior, in *Burson v. Freeman*, the Supreme Court upheld the constitutionality of a "campaign-free zone" *outside* of polling places, finding that the zone was necessary to serve the state's compelling interest in protecting voters from confusion and undue influence.[248] *Burson* upheld a statute that prohibited certain speech in areas including streets and sidewalks adjacent to polling places—areas that a plurality of the Court held to be traditional public forums. Justice Scalia, concurring in the result, concluded that the environs of a polling place are *not* a traditional public forum on election day.[249]

The U.S. Courts of Appeals have also taken a mixed approach to sidewalks and parking lots adjacent to polling places. In 2000, the Eighth Circuit concluded that on election day, the parking lot and walkway leading to a polling place within a public school constituted designated public forums for voting-related activity, while the rest of the school property remained a nonpublic

241. *Id.* at *8.

242. First Def. Legal Aid v. City of Chi., 319 F.3d 967, 968 (7th Cir. 2003).

243. Latino Officers Ass'n v. City of New York, No. 97 CIV. 1384 (KMW), 1998 WL 80150, at *4 (S.D.N.Y. Feb. 25, 1998).

244. Boyd v. City of Hermosa Beach, No. CV0410528AGJTLX, 2007 WL 9717625, at *3 (C.D. Cal. Oct. 2, 2007).

245. Akins v. City of Columbia, No. 2:15-CV-04096-NKL, 2016 WL 4126549, at *17 (W.D. Mo. Aug. 2, 2016), *aff'd sub nom.* Akins v. Knight, 863 F.3d 1084 (8th Cir. 2017).

246. Commonwealth v. Bradley, 2020 PA Super 109, 232 A.3d 747, 755 (2020). The court did not use forum analysis, finding instead that the no-filming condition was a reasonable "time, place, and manner" restriction on speech.

247. 138 S. Ct. 1876, 1885 (2018).

248. 504 U.S. 191, 196–97 (1992).

249. *Id.* at 196–97, and n.2 (plurality opinion); *id.* at 214–16 (opinion of Scalia, J.).

forum.[250] In 2004, the Sixth Circuit rejected the Eighth Circuit's analysis, holding instead that the parking lots and walkways leading to polling places are nonpublic forums, unless there is evidence that the government intended to open these areas for public discourse.[251]

Courts have also reached mixed conclusions when evaluating restrictions on photography of ballots within polling places. In a 2016 case, *Rideout v. Gardner*, the First Circuit Court of Appeals held that a New Hampshire law restricting the making and distribution of "ballot selfies" violated the First Amendment.[252] Likewise, in 2017, the Southern District of Indiana held that an Indiana statute prohibiting voters from taking or sharing photographs of their ballots violated the First Amendment as a content-based restriction on speech that failed to withstand strict scrutiny.[253] Importantly, these courts did not use forum analysis when evaluating these restrictions, meaning they applied a stricter standard of scrutiny than that typically applied in a nonpublic forum (the polling place). These courts may have believed forum analysis was inapplicable because the laws in question prohibited both the initial act of photography in the polling place *and* the subsequent distribution of the photograph.[254]

This line of reasoning was rejected by the Southern District of New York in 2017 when it upheld a policy prohibiting photography at polling sites in *Silberberg v. Board of Elections of New York*.[255] Specifically, the court stated: "Because the first step must take place in a non-public forum and the second step may take place in a non-public forum, it is appropriate to assess the impact of the statute as a restriction of speech taking place in a non-public forum."[256] Under that framework, the *Silberberg* court found a prohibition on photography in polling places to be a reasonable, viewpoint-neutral restriction that was narrowly tailored to protect voter privacy, minimize disruptions of the electoral process, increase efficiency at polling sites, and hinder the production of counterfeit ballots.[257] Moreover, the court found that the "no photography" policy was content-neutral, since it "regulates the medium, rather than the content, of expression."[258] Following this same logic, the Illinois Court of Appeals also upheld a statute prohibiting photography of completed ballots, finding it was a reasonable, viewpoint-neutral restriction on First Amendment activity in a nonpublic forum (polling sites).[259] In explaining why the statute was reasonable, one court noted, "[I]t neither limits a voter's access to a ballot, nor limits a voter's choice in voting. Instead, it effectually limits an outsider's access to viewing a voter's completed ballot."[260] Similar arguments could be made about a restriction on filming inside of polling places.

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250. Embry v. Lewis, 215 F.3d 884, 888 (8th Cir. 2000).

251. United Food & Com. Workers Loc. 1099 v. City of Sidney, 364 F.3d 738, 750 (6th Cir. 2004).

252. 838 F.3d 65, 74–76 (1st Cir. 2016).

253. Ind. C.L. Union Found., Inc. v. Ind. Sec'y of State, 229 F. Supp. 3d 817, 827 (S.D. Ind. 2017).

254. See *Rideout*, 838 F.3d at 73, noting that the law in question restricted "the use of imagery of marked ballots, regardless of where, when, and how that imagery [was] publicized."

255. 272 F. Supp. 3d 454 (S.D.N.Y. 2017).

256. *Id.* at 476.

257. *Id.* at 479.

258. *Id.*

259. Oettle v. Guthrie, 2020 IL App (5th) 190306, ¶ 14, *appeal denied*, 167 N.E.3d 624 (Ill. 2021), and *cert. denied sub nom.* Oettle v. Cadigan, 142 S. Ct. 105 (2021).

260. *Id.*

Departments of Social Services and Local Health Departments

A. Social Services Agencies

There are relatively few cases in which courts have analyzed the forum status of departments of social services and other human services agencies. However, the courts that have analyzed the issue have consistently concluded that social services agencies are nonpublic forums.

- In *Make the Road by Walking, Inc. v. Turner*, the Second Circuit Court of Appeals found that welfare center waiting rooms were nonpublic forums because the New York City Human Resources Association enforced a policy reserving those rooms for the transaction of official business, including for welfare claimants and those accompanying them.[261] The court's reasoning in *Turner* is explained in more detail in Section III.
- In *Families Achieving Independence & Respect v. Nebraska Department of Social Services*, the Eighth Circuit held that a department of social services lobby was a nonpublic forum, finding that the lobby's principal purpose was to provide services to the public.[262] The court noted the lobby was a high-traffic "workplace where government employees provide financial assistance and social services to thousands of clients," concluding that "[k]eeping the Lobby generally closed to outside groups helps prevent additional congestion and the resultant disruption."[263]
- In *National Federation of Blind of Missouri v. Cross*, the Eighth Circuit held that a state vocational rehabilitation agency for blind persons was a nonpublic forum.[264] The court found that the rehabilitation agency's *own* provision of information to clients and discussion of issues related to blindness could not be characterized as the intentional opening of a forum for *public* discourse.[265]
- In *Nathaniel v. Iowa Department of Human Services*, the Southern District of Iowa held that the Iowa Department of Human Services was a nonpublic forum.[266]

B. Local Health Departments

The authors of this bulletin have found no cases applying First Amendment forum analysis to areas within a public health department. Public hospitals, however, have generally been recognized by courts as nonpublic forums, as have Veterans Affairs medical facilities.[267] As one court explained, "Few places have more nonpublic characteristics than medical centers, whose work is private by its very nature."[268] Public hospitals and medical centers are an imperfect analogue for local health departments, which provide a wide range of services outside of clinical care (for example, environmental health services). However, the comparison may still be instructive, given that many local health departments do provide clinical health care services. In *Low Income People Together, Inc. v. Manning*, the Northern District of Ohio held that the lobby

261. 378 F.3d 133, 145–46 (2d Cir. 2004).
262. 111 F.3d 1408, 1419 (8th Cir. 1997).
263. *Id.* at 1421.
264. 184 F.3d 973, 982 (8th Cir. 1999).
265. *Id.*
266. No. 4:05-CV-00044, 2005 WL 8157815, at *9 (S.D. Iowa Sept. 16, 2005).
267. *See* Pritchard v. Carlton, 821 F. Supp. 671, 677 (S.D. Fla. 1993) (collecting cases regarding hospitals); United States v. Szabo, 760 F.3d 997, 1002 (9th Cir. 2014) (finding VA medical center to be a nonpublic forum).
268. United States v. Krahenbuhl, No. 21-CR-127, 2021 WL 4728816, at *3 (E.D. Wis. Oct. 11, 2021).

and outpatient clinic waiting areas of a county-owned hospital were nonpublic forums.[269] As would be the case for some local health departments, a key purpose of lobby and waiting areas is "to serve patients, friends and families of patients, and. . . staff who provide medical care," not to provide a space for expressive activity by the general public.[270]

Based on a review of case law examining other similar settings (including departments of social services), courts would likely find all areas of a local health department to be nonpublic forums, unless a county had intentionally created a designated or limited public forum by purposefully opening some part of the building for the public to engage in expressive activities. In a formal opinion letter, the State of Alabama's Office of the Attorney General reached the same conclusion regarding the nonpublic forum status of county health departments, stating that the Alabama Department of Public Health could prohibit photography and video recording by the public in these facilities.[271]

Schools

It is well established that public school facilities are nonpublic forums unless "school authorities have by policy or by practice opened those facilities for indiscriminate use by the general public . . . or by some segment of the public, such as student organizations."[272] Public school classrooms are nonpublic forums during school hours.[273] Other areas in use during school hours, such as cafeterias and hallways between classrooms, have similarly been treated by courts as nonpublic forums.[274]

Outside of the classroom setting, certain areas of school property may become limited public forums if the school has opened them up for expressive activity by student groups or the outside public.[275] A meeting facility at a public school is a classic example of a limited public forum.[276] In *Good News Club v. Milford Central School*, the Supreme Court held that a public school created a limited public forum when it opened its building after hours for public meetings, subject to the

269. 615 F. Supp. 501, 516 (N.D. Ohio 1985), *amended*, 626 F. Supp. 1344 (N.D. Ohio 1986).

270. *Id.*

271. Ala. Op. Att'y Gen. No. 2021-020 (Feb. 9, 2021).

272. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988) (internal citations and quotation marks omitted); *see also* Busch v. Marple Newtown Sch. Dist., 567 F.3d 89, 95 (3d Cir. 2009), *as amended* (June 5, 2009), and *cert. denied*, 130 S. Ct. 1137 (2010).

273. *See, e.g.*, *Busch*, 567 F.3d at 95 ("[I]n classrooms, during school hours, when curricular activities are supervised by teachers, the nonpublic nature of the school is preserved."); Axson-Flynn v. Johnson, 356 F.3d 1277, 1285 (10th Cir. 2004) (finding university classroom was a nonpublic forum); Peck v. Upshur Cnty. Bd. of Educ., 155 F.3d 274, 277–78 (4th Cir. 1998) (accepting district court's conclusion that school is a nonpublic forum); Chandler v. Forsyth Tech. Cmty. Coll., No. 1:15CV337, 2016 WL 4435227, at *8 (M.D.N.C. Aug. 19, 2016) (finding community college to be a nonpublic forum).

274. *See* M.A.L. ex rel. M.L. v. Kinsland, 543 F.3d 841, 847 (6th Cir. 2008) (hallways in middle school were a nonpublic forum); LoPresti v. Galloway Twp. Middle Sch., 381 N.J. Super. 314, 323 (Law. Div. 2004) (holding cafeteria in middle school was a nonpublic forum).

275. *See* Christian Legal Soc. Chapter of Univ. of Cal., Hastings Coll. of L. v. Martinez, 561 U.S. 661, 678–79 (2010).

276. *See* Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829 (1995); *see also* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106–07 (2001) (noting that the school in question operated as a limited public forum); Widmar v. Vincent, 454 U.S. 263, 267 (1981) (noting that a university may create a limited public forum by granting student groups access to its facilities).

permission of the administration.[277] Likewise, a public school may create a limited public forum when it opens a gymnasium to the public during interschool athletic events or when it allows members of the public to engage in artistic expression on outdoor school grounds.[278]

When analyzing restrictions on expressive conduct in a school setting, First Amendment rights must be considered "in light of the special characteristics of the school environment."[279] The Supreme Court has held that speech may be restricted in an educational setting if the speech "might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities," or if the speech "colli[des] with the rights of other students to be secure and to be let alone."[280] Recordings of class activities and discussions could implicate the privacy rights of other students under that standard.[281]

Public Meetings

In the Fourth Circuit, courts have held public meetings of elected and appointed public bodies to be limited public forums, where a public body "is justified in limiting its meeting to discussion of specified agenda items and in imposing reasonable restrictions to preserve the civility and decorum necessary to further the forum's purpose of conducting public business."[282] Other U.S. Courts of Appeals, including the Third, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits, have also recognized public meetings of governing bodies as limited public forums.[283] However, the

277. 533 U.S. 98, 98 (2001).

278. *See* Johnson v. Perry, 859 F.3d 156, 175 (2d Cir. 2017) (gymnasium was a limited public forum during interschool athletic events); Demmon v. Loudoun Cnty. Pub. Sch., 342 F. Supp. 2d 474, 482 (E.D. Va. 2004) (brick walkway on school grounds was a limited public forum when school had allowed students and others to purchase, design, and engrave walkway bricks with messages and symbols).

279. Tinker v. Des Moines Indep. Comm. Sch. Dist., 393 U.S. 503, 506 (1969).

280. *Id.* at 508, 514.

281. *See* Felkner v. R.I. Coll., 203 A.3d 433, 451 (R.I. 2019) (finding that the privacy rights of other students to be secure and to be let alone were implicated by a fellow student's recording of classroom activities); *see also* Pollack v. Reg'l Sch. Unit 75, No. 2:13-CV-109-NT, 2017 WL 1592264, at *18 (D. Me. Apr. 28, 2017) (denying motion for summary judgment due to evidence suggesting that school district officials could reasonably expect that allowing a student to wear a recording device at school would deprive other students of their right to be secure).

282. Steinburg v. Chesterfield Cnty. Plan. Comm'n, 527 F.3d 377, 385 (4th Cir. 2008) (holding county planning commission meeting to be a limited public forum); Davison v. Rose, 19 F.4th 626, 635 (4th Cir. 2021) (treating school board meetings as limited public forums); Stevens v. Town of Snow Hill, N.C., No. 4:19-CV-156-D, 2021 WL 2345353, at *4 (E.D.N.C. June 8, 2021) (holding town meeting to be a limited public forum); McClure v. City of Hurricane, No. CIV.A. 3:10-0701, 2011 WL 1485599, at *8 (S.D.W. Va. Apr. 19, 2011) (holding city council meeting to be a limited public forum).

283. *See, e.g.*, Ison v. Madison Loc. Sch. Dist. Bd. of Educ., 3 F.4th 887, 893 (6th Cir. 2021) (treating school board meetings as a limited public forum); Barrett v. Walker Cnty. Sch. Dist., 872 F.3d 1209, 1225 (11th Cir. 2017) ("[P]ublic-comment portions of [Board of Education] meetings and planning sessions fall into the category of limited public fora because the Board limits discussion to certain topics and employs a system of selective access."); Green v. Nocciero, 676 F.3d 748, 753 (8th Cir. 2012) (holding that school board meeting was either a limited public forum or a nonpublic forum); Galena v. Leone, 638 F.3d 186, 199 (3d Cir. 2011) (county council meeting was a limited public forum because the meeting was held for the limited purpose of governing the county and discussing topics related to that governance); Fairchild v. Liberty Indep. Sch. Dist., 597 F.3d 747, 759 (5th Cir. 2010) (finding that a school board meeting fit the "hornbook definition" of a limited public forum); Norse v. City of Santa Cruz, 629 F.3d 966, 975 (9th Cir. 2010) ("[C]ity council meetings, once open to public participation, are limited public forums."); Rowe v.

public comment portion of a public meeting could become a designated public forum if the governing body opens up the floor to all types of speech without imposing any restrictions on the topics that may be discussed or on who may speak.[284]

The First Amendment forum analysis is somewhat irrelevant to analyzing restrictions on filming in public meetings in North Carolina. North Carolina's Open Meetings Law establishes a statutory right for "[a]ny person [to] photograph, film, tape-record, or otherwise reproduce any part of a meeting required to be open."[285] The only exception to this right is if the public body determines in good faith that the size of the meeting room cannot accommodate the members of the public body, members of the public, and all the equipment and personnel necessary for broadcasting, photographing, filming, and tape-recording the meeting without unduly interfering with the meeting.[286] In such a case, the public body may require those recording the meeting to pool their equipment and the personnel operating it.[287] The statute also allows a public body to regulate the placement and use of filming equipment so as to prevent undue interference with the meeting.[288]

V. Enforceability of Restrictions on Activities Protected by the First Amendment

As discussed earlier, the forum at issue dictates how local governments may regulate First Amendment activities. Ultimately, all four forums correspond with one of two frameworks for evaluating government restrictions on speech, as shown in Table 1, below.

Though courts have identified four types of forums, local governments may find it simpler to think about areas of property as falling into two types of categories.

- **Is the area a *traditional* public forum or *designated* public forum, open (by tradition or by intentional action) to a full spectrum of expressive activity?** If so, the local government can only impose restrictions if they are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.
    - Local governments should think carefully before imposing any restrictions on filming in such areas, as these restrictions will be subject to more demanding judicial scrutiny.

City of Cocoa, 358 F.3d 800, 803 (11th Cir. 2004) (per curiam) ("As a limited public forum, a city council meeting is not open for endless public commentary speech but instead is simply a limited platform to discuss the topic at hand."); Griffin v. Bryant, 30 F. Supp. 3d 1139, 1178 (D.N.M. 2014) (holding that village council meetings constituted a limited public forum).

284. *See* Surita v. Hyde, 665 F.3d 860, 869 (7th Cir. 2011) (treating public comment period during city council meetings as a designated public forum).

285. Chapter 143, Section 318.14(a), of the North Carolina General Statutes (hereinafter G.S.).

286. G.S. 143-318.14(b).

287. *Id.*

288. *Id.* (*see also* Baldeo v. City of Paterson, No. CV1805359KMESK, 2020 WL 7778084, at *8 (D.N.J. Dec. 31, 2020) ("A reasonable instruction on camera placement does not meaningfully interfere with any First Amendment right to access a meeting.").

TABLE 1. Forum types in the evaluation of First Amendment speech restrictions on government property

Type of forum	Test for evaluating restrictions

Traditional public forum[a]
Designated public forum[b]
	• Restrictions on the time, place, and manner of speech are permissible, so long as those regulations:
	  ○ are content-neutral,
	  ○ are narrowly tailored to serve a significant government interest, and
	  ○ leave open ample alternative channels of communication.
	• Content-based restrictions on First Amendment activities are subject to strict scrutiny. The government must show that the regulation is necessary to serve a compelling government interest and narrowly tailored such that it is the least restrictive means of achieving that interest.
	• Viewpoint-based restrictions are prohibited.

Limited public forum[c]
Nonpublic forum[d]
	• Restrictions on First Amendment activity are permitted so long as they are:
	  ○ viewpoint-neutral and
	  ○ reasonable in light of the purpose served by the forum.
	• Viewpoint-based restrictions are prohibited.

a. *See* Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 469 (2009); McCullen v. Coakley, 573 U.S. 464, 477–78 (2014).

b. *McCullen*, 573 U.S. at 469–70; *see also* Child Evangelism Fellowship of Md., Inc. v. Montgomery Cnty. Pub. Sch., 457 F.3d 376, 382–83 (4th Cir. 2006).

c. *See* Christian Legal Soc. Chapter of Univ. of Cal., Hastings Coll. of L. v. Martinez, 561 U.S. 661, 679 (2010) (finding that any access barrier to a limited public forum must be reasonable and viewpoint-neutral); *see also Child Evangelism Fellowship*, 457 F.3d at 382–83.

d. Minnesota Voters All. v. Mansky, 138 S. Ct. 1876, 1885 (2018) ("The government may reserve such a forum 'for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.'") (quoting Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 46 (1983)).

- **Is the area a *nonpublic* forum (where the property's primary purpose is to conduct or facilitate government business or services and not to provide a forum for public expression) or a *limited* public forum (where the government has intentionally reserved a nonpublic forum for expressive activity only by certain groups or only for the discussion of certain topics)?** If so, restrictions on filming must merely be viewpoint-neutral and reasonable in light of the purpose of the forum.
  - Restrictions in these areas are more likely to be upheld by courts, though like any restriction implicating the First Amendment, they will still be subject to a fact-specific analysis.

What does it mean for a restriction on speech to be "content-neutral" or "viewpoint-neutral"? Likewise, what does it mean for a restriction on expressive activity to be "reasonable" in light of the purpose of a particular forum? What types of restrictions on filming have courts upheld in the past? This section explores these issues.

Content Neutrality and Viewpoint Neutrality

Under the First Amendment, discrimination against speech content is deeply suspect.[289] In analyzing potential content discrimination, courts first evaluate whether a regulation is content-based on its face or in its plain language.[290] "A law that is content-based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack

289. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828 (1995).

290. Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 166 (2015).

of 'animus toward the ideas contained' in the regulated speech."[291] If a regulation does not target content on its face, courts will analyze whether the regulation is content-based as applied.[292] A regulation is content-discriminatory as applied if the regulation "cannot be justified without reference to the content of the regulated speech" or was enacted due to "disagreement with the message [the speech] conveys."[293] A regulation that does not target content on its face, can be justified without reference to content, and was not enacted merely due to disagreement with a certain message will likely be deemed content-neutral.

Viewpoint discrimination is "an egregious form of content discrimination in which the government targets not subject matter, but particular views taken by speakers on a subject."[294] A regulation that does not discriminate based on opinion or belief about a particular issue or subject matter will likely be deemed viewpoint-neutral. As with content-based restrictions, a regulation can be viewpoint-discriminatory either on its face or as applied.

A. Distinguishing between Content- and Viewpoint-Based Discrimination

Content-based restrictions apply to types of speech based on the topic or subject matter discussed. Viewpoint-based restrictions are also based on content, but they go a step further by discriminating against particular views held about a subject. The difference between content and viewpoint discrimination can be difficult to crystallize, but the distinction has significant legal implications. For example, some types of content-based discrimination may be permissible in a limited public forum or a nonpublic forum.[295] *Viewpoint discrimination* in those same limited or nonpublic forums would be impermissible.[296] Viewpoint-based restrictions are unlawful under the First Amendment regardless of the type of forum at issue.[297]

Examples from case law illuminate the subtle distinction between content and viewpoint. In *City of Cincinnati v. Discovery Network, Inc.,* the Supreme Court evaluated a municipal regulation that prohibited the distribution of commercial handbills on public sidewalks but allowed the distribution of newspapers and other types of pamphlets.[298] The Court held that this regulation was content-discriminatory since it distinguished permissible speech based on the content of the handbills—namely, that they were commercial in nature.[299] The regulation applied to all commercial handbills and did not single out any specific commercial opinion or perspective for differential treatment.[300] This regulation discriminated against speech based on content (subject to strict scrutiny in a traditional public forum or designated public forum), but not viewpoint (meaning it may have been upheld if it were regulating a limited public forum or nonpublic forum).

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291. *Id.* (citing Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993)).
292. *Id*.
293. *Id.* at 164 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).
294. Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five, 470 F.3d 1062, 1067 n.2 (4th Cir. 2006).
295. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829–30 (1995).
296. *Id*.
297. Minnesota Voters All. v. Mansky, 138 S. Ct. 1876, 1885 (2018).
298. 507 U.S. 410, 430 (1993).
299. *Id.*
300. *Id.*

In contrast, in *Rosenberger v. Rector and Visitors of University of Virginia,* the Court found an action to be viewpoint-discriminatory.[301] The University of Virginia denied a student newspaper's request for printing reimbursement because the paper "primarily promote[d] or manifest[ed] a particular belief in or about a deity or an ultimate reality" in violation of the university's student group reimbursement policies.[302] In analyzing this restriction, the Court discussed that the university did not target this student group because it was religious, but instead targeted the group's opinion about beliefs in a deity and ultimate reality.[303] The Court honed in on the university's specific reasoning for excluding this student group, noting, "The prohibited perspective, not the general subject matter, resulted in the refusal to make third-party payments."[304] As *Rosenberger* illustrates, the dividing line between content- and viewpoint-based discrimination may, in some cases, be how the local government describes the regulation's purpose.[305]

Rosenberger demonstrates that a regulation restricting speech on a general subject is likely content-discriminatory, while a regulation restricting a particular perspective on that subject matter will likely be deemed viewpoint-discriminatory. By way of illustration, imagine a local government wants to restrict speech around the topic of immigration. A regulation that restricted *all* speech pertaining to immigration would be a content-based regulation. A regulation that restricted only pro-immigration speech, while allowing anti-immigration speech, would be a viewpoint-based regulation. Likewise, imagine a local government has created a social media page and enacted a policy that prohibits all posts on the page related to "controversial issues." Such a restriction would be *content*-based, since it prohibits speech on an entire subject matter (controversial issues). If the same local government went a step further and prohibited "all posts critical of local government officials," that restriction would be *viewpoint*-based. Such a restriction targets a specific perspective rather than a broad subject matter. Content-based restrictions target an entire category or topic of speech, whereas viewpoint-based restrictions go a step further by suppressing one viewpoint on an issue while allowing others.

Litigants may challenge both content-based and viewpoint-based restrictions using a facial or an as-applied approach. A facial challenge questions the language of a particular regulation and the regulation's justification. An as-applied challenge argues that the regulation makes distinctions based on content or viewpoint in practice and favors or restricts some speakers over others depending on the messages or opinions those speakers hold.

B. Content-Based Discrimination: Facial and As-Applied Challenges

A speech regulation may be facially content-based if its plain language "target[s] speech based on its communicative content" or "applies to particular speech because of the topic discussed or the idea or message expressed."[306] The Supreme Court comprehensively analyzed content-based discrimination in *Reed v. Town of Gilbert, Arizona*.[307] The *Reed* Court described facially content-based regulations as restrictions that draw distinctions between different types of messages and

301. 515 U.S. 819, 831 (1995).
302. *Id.* at 822–23.
303. *Id.* at 831.
304. *Id.*
305. *Id.*
306. Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 163 (2015).
307. *Id.*

regulate speech differently according to different subject matters.[308] Regulations that explicitly target messages based on the function or purpose of those messages are also facially content-based under *Reed.*[309] Additionally, the Court asserted that the purpose underpinning a regulation is not relevant if that regulation is facially content-based.[310]

Some circuit courts of appeals interpreted *Reed* as requiring a bright-line test for facial content discrimination; namely, if "[a] reader must ask: who is the speaker and what is the speaker saying" to know whether a regulation applies, then the regulation is automatically content-based on its face.[311] However, in a landmark 2022 case, *City of Austin, Texas v. Reagan National Advertising of Austin, LLC (Austin II),* the Supreme Court clarified that "[t]his rule, which holds that a regulation cannot be content neutral if it requires reading the sign at issue, is too extreme an interpretation of this Court's precedent."[312] Instead, the Court urged a nuanced approach, holding that the mere fact that one might have to hear or read the speech at issue to know whether a regulation applies does not automatically make that regulation facially content-based.[313] While the Court did not define the parameters of this approach in detail, it encouraged a case-by-case analysis of whether the regulation at issue is actually a message-based restriction and whether the regulation is "singl[ing] out a specific subject matter for differential treatment."[314]

This approach led the *Austin II* Court to conclude that the off-premises sign regulations at issue were not facially content-based.[315] The Court reasoned that the signs' substantive messages had no relation to how and if the signs were regulated.[316] The regulation treated signs differently based on their location and location is not a subject matter or topic.[317] Instead, the Court reasoned, a location-based regulation is akin to a content-neutral time, place, and manner restriction, which does not trigger strict scrutiny.[318] In the wake of *Austin II*, courts may focus on what triggers the relevant regulation—does it apply based on subject matters or topics, or based on another factor similar to time, place, or manner? If the restriction singles out particular subject matters or topics for differential treatment, the regulation is likely content-based on its face.

A facially content-neutral regulation can still be unconstitutional as applied "if its manifest purpose is to regulate speech because of the message it conveys."[319] Stated differently, a policy or regulation that is content-neutral in its language may still be unconstitutional if its underlying purpose is to suppress speech due to the content of that speech.[320] To show that a facially

308. *Id.*
309. *Id*.
310. *Id.* at 166–67.
311. Reagan Natl'l Advert. of Austin, Inc. v. City of Austin, 972 F.3d 696, 706 (5th Cir. 2020); Thomas v. Bright, 937 F.3d 721, 729 (6th Cir. 2019).
312. 142 S. Ct. 1464, 1471 (2022).
313. *Id.* at 1475.
314. *Id.* at 1471.
315. *Id.* at 1473.
316. *Id.* at 1472–73.
317. *Id*.
318. *Id*.
319. Turner Broadcasting Sys., Inc. v. F.C.C., 512 U.S. 622, 645 (1994).
320. Sorrell v. IMS Health, Inc., 564 U.S. 552, 566 (2011).

content-neutral restriction is content-based in practice, and therefore subject to strict scrutiny in traditional and designated public forums, a speaker must demonstrate "not only that a regulation distinguishes between speakers, but also that it 'reflects a content preference.'"[321]

A regulation may reflect a content preference by silencing certain types of speech while permitting others without a neutral justification. The Ninth Circuit encountered this type of scenario in *Klein v. City of Laguna Beach.*[322] There, the defendant city's noise ordinance prohibited the use of amplification devices after 5:00 p.m.[323] The plaintiff was barred from using sound amplification to engage in critical political speech near city hall after 5:00 p.m., but other individuals, such as organizers for an annual cultural festival, had been permitted to use amplified sound in their after-hours events.[324] The city had no content-neutral policy or explanation for granting exceptions to some groups but not the plaintiff.[325] As a result, while the ordinance was facially content-neutral, it reflected a particular disfavor of or distaste for the plaintiff's message specifically. The ordinance was therefore content-discriminatory as applied to the plaintiff since the city silenced his message in particular while permitting others without any justification for the differing treatment.[326]

In sum, content-based discrimination can appear in the text of regulations or in the way a local government applies those regulations. Regulations that do not distinguish between messages or subject matter in their text are likely facially content-neutral. However, a local government must also be careful to apply such regulations in a manner that does not promote certain messages or speakers over others based on content.

C. Viewpoint-Based Discrimination: Facial and As-Applied Challenges

As with content-based restrictions, a regulation can be viewpoint-discriminatory either on its face or as applied. To be facially viewpoint-discriminatory, the regulation must identify in its text a particular belief, opinion, or perspective and single it out for differential treatment. In *McCullen v. Coakley,* petitioners challenged a "buffer zone" law prohibiting anyone from entering an area that extended 35 feet from the entrance of an abortion clinic.[327] The law contained an exception for abortion clinic employees acting within the scope of their employment.[328] The petitioners challenged the statute as viewpoint-discriminatory on its face, arguing that the exception for abortion clinic employees favored pro-abortion perspectives.[329] The Court disagreed, reasoning that nothing in the text of the statute singled out pro-abortion views or opinions for preferential treatment.[330] Because the text of the statute merely restricted access around abortion clinics without explicitly favoring pro-abortion or anti-abortion views, the statute was viewpoint-neutral on its face.

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321. Signs for Jesus v. Town of Pembroke, N.H., 977 F.3d 93, 101 (6th Cir. 2020) (quoting *Turner*, 512 U.S. at 658); see also Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

322. 533 Fed. App'x 772 (9th Cir. 2013).

323. *Id.* at 774.

324. *Id.* at 775.

325. *Id*.

326. *Id*.

327. 573 U.S. 464, 471–72 (2014).

328. *Id.* at 472.

329. *Id.* at 472–73, 475, 478.

330. *Id.* at 483–84.

If a regulation is facially viewpoint-neutral, it may still be viewpoint-discriminatory as applied. To prevail on an as-applied viewpoint-discrimination challenge, a plaintiff must show that a regulation was unconstitutional as applied *to that plaintiff*.[331] In other words, plaintiffs must demonstrate that they personally were prevented from "speaking" based on their viewpoint while someone communicating an alternative viewpoint was allowed to "speak."[332] Such was the case in *Sons of Confederate Veterans, Inc. ex rel. Griffin v. Commissioner of Virginia Department of Motor Vehicles.* There, the state of Virginia had a special program whereby members of particular groups could seek legislation to allow them to be issued specialized license plates, typically depicting their organization's motto and logo.[333] When the Sons of Confederate Veterans sought specialized license plates through this program, the resulting statute authorized the special license plates but prohibited them from displaying their logo.[334] Meanwhile, other groups that qualified for special license plates were allowed to display their logos.[335] The Sons of Confederate Veterans argued that the statute discriminated against it on the basis of its viewpoint, expressed through its logo containing the Confederate flag.[336] The court concluded that the restriction was facially viewpoint-neutral, restricting only logos or emblems without appearing to prefer or disfavor any opinions or viewpoints.[337] However, the statute in practice restricted the Confederate flag as used by the specific organization, burdening only a single speaker in the forum.[338] Even though the statute made no viewpoint distinctions on its face, in its application it burdened one specific organization's expression of its viewpoint through its logo and was unconstitutionally viewpoint-based as applied.[339]

D. How Do These Concepts Relate to Forum Analysis?

Whether a law is content-based or content-neutral dictates the level of scrutiny courts will apply to a restriction on speech in a traditional public forum or designated public forum. Laws or regulations that discriminate based on the content of speech must satisfy strict scrutiny review—that is, the regulations must be the least restrictive means of achieving a compelling government interest.[340] Strict scrutiny is a demanding standard and "[i]t is rare that a regulation restricting speech because of content will ever be permissible."[341]

Courts apply a slightly less rigorous standard—intermediate scrutiny—to content-neutral regulations in traditional public forums and designated public forums.[342] To pass intermediate scrutiny, a regulation must (1) be justified without reference to the content of speech, (2) be narrowly tailored to serve a significant government interest, and (3) leave open ample alternative

331. *Id.* at 485 n.4.
332. *Id*.
333. Sons of Confederate Veterans, Inc. ex rel. Griffin v. Comm'r of Va. Dep't of Motor Vehicles, 288 F.3d 610, 614 (4th Cir. 2002).
334. *Id.* at 613.
335. *Id.* at 614.
336. *Id.* at 622.
337. *Id.* at 623.
338. *Id.* at 625–26.
339. *Id.* at 625–27.
340. McCullen v. Coakley, 573 U.S. 464, 478 (2014) (citing United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 813 (2000)).
341. *Playboy*, 529 at 818.
342. Turner Broadcasting Sys., Inc. v. F.C.C., 512 U.S. 622, 642 (1994).

channels of communication for the speech or information at issue.[343] To satisfy narrow tailoring, a regulation must not burden significantly more speech than necessary to further the government's legitimate interests.[344] If a regulation substantially burdens a wide variety of speech without advancing governmental goals, that regulation is not likely narrowly tailored.[345] In the Fourth Circuit, the government must show that it at least considered less restrictive measures but found them inadequate to protect the significant government interest.[346]

The Fourth Circuit Court of Appeals illustrated how intermediate scrutiny works in *Billups v. City of Charleston*.[347] There, the Fourth Circuit analyzed an ordinance requiring city tour guides to obtain a license before leading any paid tours on city streets and sidewalks.[348] The Fourth Circuit assumed that the ordinance was content-neutral and consequently applied intermediate scrutiny, focusing on whether the ordinance was narrowly tailored to serve a significant government interest and left open ample alternative communication channels.[349] In evaluating whether a regulation implicates a significant government interest, courts can rely on "common sense and the holdings of prior cases."[350] Using these guideposts, the Fourth Circuit concluded that Charleston, a thriving tourist destination, had a significant government interest in protecting tourists from fraudulent or incompetent tour guides.[351] Regarding narrow tailoring, however, the government presented no evidence that it considered less restrictive regulations.[352] In response to the less restrictive alternatives the plaintiffs identified, the city merely offered post-hoc testimony that the alternatives would be inadequate.[353] Without any substantial evidence that the city seriously considered less restrictive regulations, the Fourth Circuit could not find that the regulation was narrowly tailored.[354] As a result, the regulation failed the second prong of intermediate scrutiny and was held to be unconstitutional.[355]

In limited public forums and nonpublic forums, a restriction on speech need not be content-neutral or narrowly tailored to meet a compelling or substantial government interest. Instead, the question is whether the restrictions are *viewpoint*-neutral and reasonable considering the forum's purpose. The "reasonableness" requirement—a less demanding standard than strict or intermediate scrutiny—is discussed in more detail below.

343. Billups v. City of Charleston, 961 F.3d 673, 685 (4th Cir. 2020) (citing Ward v. Rock Against Racism, 491 U.S. 781 (1989)).
344. *Id.* at 686 (quoting *Ward*, 491 U.S. at 799).
345. *Id.* (quoting *Ward*, 491 U.S. at 798–99).
346. *Id.* at 688 (citing McCullen v. Coakley, 573 U.S. 464, 494 (2014)).
347. 961 F.3d 673, 673 (4th Cir. 2020).
348. *Id.* at 676.
349. *Id.* at 685.
350. *Id.* (quoting Reynolds v. Middleton, 779 F.3d 222, 227 (4th Cir. 2015)).
351. *Id.* at 686.
352. *Id.* at 688–89.
353. *Id*.
354. *Id.* at 690.
355. *Id*. The court did not analyze whether there were ample alternative channels of communication since the regulation failed the second prong of the intermediate scrutiny analysis.

E. Application to the First Amendment Auditor Context

How will courts analyze whether a filming restriction is content- or viewpoint-based? The act of filming itself does not inherently express any viewpoint. Accordingly, it is unlikely that a total ban on filming could be viewpoint discriminatory unless a local government applied the ban in an uneven manner to parties wanting to express different viewpoints with their films. While case law interpreting "no filming" or "no recording" policies on government property is scarce, at least one case within the Fourth Circuit has upheld a filming restriction as viewpoint-neutral.[356] In *Benzing v. North Carolina*, a probation office required that all patrons turn off cell phones before entering the office and prohibited any recording within the office.[357] The court declined to find any First Amendment right to use a cell phone in the probation office and noted that the restriction was viewpoint-neutral.[358] The court did not explain *why* it deemed the restriction viewpoint-neutral, but it did note that the restriction was generally applicable and did not limit the plaintiff's right to speak within the probation office.[359]

Other federal courts outside of the Fourth Circuit have also treated filming restrictions as viewpoint-neutral.[360] In *Sheets v. City of Punta Gorda, Florida,* for example, the court evaluated a city ordinance prohibiting filming in city hall without the consent of the individuals being filmed.[361] Since the city hall was a limited public forum, the ordinance did not need to be content-neutral, but it did need to be viewpoint-neutral to pass constitutional muster.[362] The ordinance was viewpoint-neutral on its face because it did not target any specific opinion, belief, view, or ideology in its plain language.[363] The regulation simply prohibited nonconsensual filming, regardless of who was filming or what beliefs or opinions the film might express.[364] The court also suggested that it might have upheld the no-filming regulation even without a consent exception, noting that the consensual filming exception permitted more speech than was necessary.[365] Although not binding precedent in North Carolina, this case may be persuasive authority for upholding filming restrictions in limited public forums and nonpublic forums.

Given the scarce case law, it is difficult to draw conclusions about the types of filming or recording regulations courts will uphold as content- and viewpoint-neutral. However, the cases described above demonstrate that courts may treat generally applicable prohibitions on filming as constitutionally permissible viewpoint-neutral restrictions in limited public forums and nonpublic forums.

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356. Benzing v. N.C., No. 3:17-CV-000619-KDB-DCK, 2020 WL 3439558, at *6 (W.D.N.C. June 23, 2020).

357. *Id.* at *3.

358. *Id.* at *6.

359. *Id*.

360. *See, e.g.*, Kushner v. Buhta, No. 16-CV-2646 (SRN/SER), 2018 WL 1866033, at *9–11 (D. Minn. Apr. 18, 2018); Rouzan v. Dorta, No. EDCV 12-1361-BRO JPR, 2014 WL 1716094, at *12–13 (C.D. Cal. Mar. 12, 2014), *report and recommendation adopted*, No. EDCV 12-1361-BRO JPR, 2014 WL 1725783 (C.D. Cal. May 1, 2014).

361. 415 F. Supp. 3d 1115, 1120 (M.D. Fla. 2019).

362. *Id.* at 1121.

363. *Id.* at 1124.

364. *Id*.

365. *Id.* at 1125.

When might a regulation prohibiting filming be deemed "content-based" and thus problematic in a traditional or designated public forum? Under lower courts' earlier formalistic interpretations of *Reed*, regulations specifically prohibiting filming in certain areas could have been deemed content-based because the government would have to look at the videos at issue to determine whether they were prohibited (that is, did the video capture the forbidden "content"?).[366] However, after the 2022 *Austin II* case, the question is whether the filming regulation discriminates based on "the topic discussed or the idea or message expressed."[367] Arguably, broadly restricting filming in a particular *area* does not discriminate against any particular topic or opinion, meaning such a restriction would be both content-neutral and viewpoint-neutral if applied equally to anyone seeking to film in that area. Of course, content neutrality is not the end of the constitutional analysis, but it is an important starting point in evaluating whether a restriction will likely be upheld.

To bolster the enforceability of prohibitions on filming in particular areas, local governments must justify and apply such restrictions in a manner unrelated to suppressing speech of particular individuals or groups. If the sole justification for a "no filming" policy is to restrict the access of First Amendment auditors, even a facially neutral "no filming" policy could fail under an as-applied challenge. Consider, for example, a policy that purports to ban all filming in a local government building lobby. Arguably, such a policy is content- and viewpoint-neutral. However, if employees in the building routinely allow members of the media to film in the area and enforce the "no filming" policy only against First Amendment auditors, the policy might be deemed viewpoint-based as applied.[368] Inconsistent application of such a policy against First Amendment auditors (but not against other individuals seeking to film) could appear to discriminate against their particular viewpoint.

Local governments should think critically about what purposes filming restrictions serve in particular forums. Are local governments primarily concerned about safety, privacy, or some other issue? Is that concern unrelated to the suppression of speech that is critical of the local government? Local governments must be able to clearly articulate their motives for enacting no-filming restrictions in order to create policies and regulations that may withstand judicial scrutiny. Local government units should also consider how no-filming or no-recording restrictions achieve a policy's underlying purposes. If the concern is safety or privacy, is the no-filming restriction specifically designed to promote that interest? Are there alternative ways to promote that interest that do not burden speech or expression? All these considerations relate to achieving the narrow tailoring required to withstand at least the intermediate scrutiny level of review in a traditional public forum or designated public forum but may also help demonstrate that a restriction is "reasonable" in a nonpublic or limited public forum.

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366. *See* Ness v. City of Bloomington, 11 F.4th 914, 923–24 (8th Cir. 2021) ("To determine whether Ness's photography or recording in a park is proscribed by the ordinance, an official must examine the content of the photograph or video recording to determine whether a child's image is captured. Thus, the ordinance is content-based as applied to the facts of this case."). *Ness* was decided prior to the Supreme Court's decision in *City of Austin,* and thus used the more formalistic *Reed* approach to determine that an ordinance banning recording was "content-based."

367. City of Austin, Tex. v. Reagan Nat'l Advertising of Austin, LLC (*Austin II*), 142 S. Ct. 1464, 1474 (2022).

368. *See generally* Houchins v. KQED, Inc., 438 U.S. 1, 16 (1978) ("[T]he media have no special right of access . . . different from or greater than that accorded the public generally.").

Reasonableness of Restrictions on First Amendment Activity

If a local government restricts filming in a nonpublic forum or limited public forum, those restrictions must be viewpoint-neutral and reasonable in light of the purpose of the forum.[369] What is a "reasonable" restriction? Reasonableness is much less demanding than the standard for a traditional or designated public forum. As the Supreme Court has stated, "The Government's decision to restrict access to a nonpublic forum need only be reasonable; it need not be the *most* reasonable or the *only* reasonable limitation."[370] Courts have noted that satisfying the reasonableness standard "is not a particularly high hurdle."[371] The Fourth Circuit has recently opined that reasonableness in a nonpublic forum "is akin to some form of so-called intermediate scrutiny, in which the government's means and ends must both be reasonable," while noting there is "no requirement that the restriction be narrowly tailored or that the Government's interest be compelling."[372]

A. Restrictions Must Be Capable of Clear Interpretation and Application

Even though narrow tailoring of restrictions on speech is not required in limited public forums and nonpublic forums, such restrictions still must be clearly articulated and capable of consistent application. Courts have been reluctant to accept policies that restrict First Amendment activity based on subjective or overly general criteria.[373] The Fourth Circuit has stated that "even in cases involving nonpublic or limited public forums, a policy . . . that does not provide sufficient criteria to prevent viewpoint discrimination generally will not survive constitutional scrutiny."[374]

In *Minnesota Voters Alliance v. Mansky*, the Supreme Court recently ruled that a state's ban on political apparel in polling places violated the First Amendment because the word "political" was too vague and confusing for the law to be clearly and consistently applied.[375] The Court found that while the law's objective (preventing voter intimidation, confusion, and disorder) was reasonable, the law's approach to the problem did not provide "objective, workable standards."[376] In making its decision, the Court noted that while "reasonableness" is a "forgiving test," the government "must be able to articulate some sensible basis for distinguishing what may come in from what must stay out."[377]

What does this mean for local governments? Any restriction on filming should be written in a way that is capable of being clearly understood and consistently applied by the government employees enforcing it. A policy, ordinance, or other restriction that gives significant discretion to officials and employees to interpret where, when, and how to stop someone from filming

369. Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1885 (2018).

370. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 808 (1985) (emphasis added).

371. Del Gallo v. Parent, 557 F.3d 58, 72 (1st Cir. 2009).

372. White Coat Waste Project v. Greater Richmond Transit Co., 35 F.4th 179, 198 (4th Cir. 2022) (internal quotation marks and citations omitted).

373. Hopper v. City of Pasco, 241 F.3d 1067, 1077 (9th Cir. 2001) (collecting cases).

374. Child Evangelism Fellowship of Md., Inc. v. Montgomery Cnty. Pub. Sch., 457 F.3d 376, 387 (4th Cir. 2006).

375. 138 S. Ct. 1876, 1888–92 (2018).

376. *Id.* at 1891.

377. *Id.* at 1888 (citing Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 808–09 (1985).

may lead to misinterpretation and inconsistent application.[378] Moreover, a vague or ill-defined restriction may lead some officials or employees to apply the restriction in a viewpoint-discriminatory manner, which is prohibited in all forums.

B. Restrictions Must Support a Legitimate Government Objective

Assuming a restriction is viewpoint-neutral, the key question in a nonpublic or limited public forum is whether the restriction at issue is "reasonable in light of the purpose served by the forum."[379] The language of this test indicates that the purpose and nature of the forum play a significant role in determining what type of restrictions are reasonable. As the Supreme Court has stated, "[C]onsideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved."[380] In assessing reasonableness, courts generally consider factors such as the uses of the forum, the risks associated with the speech activity in question, and the government's proffered rationale for a restriction on speech.[381]

In nonpublic forums and limited public forums, courts have upheld restrictions on First Amendment activities as reasonable where the restriction was intended to:

- limit congestion and disruption,[382]
- prevent disruption of a government property's intended function,[383]
- keep walkways free of obstruction,[384]
- protect the safety of those who work in a government building,[385]
- protect the safety and convenience of those using a public forum,[386]
- avoid disruption and maintain the peace in a government workplace,[387]
- prevent expressive activity that would hinder a government agency's effectiveness in serving and caring for a vulnerable population,[388]

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378. *Id.*

379. *Id.* at 1888 (citing *Cornelius*, 473 U.S. at 806).

380. Heffron v. Int'l Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 650–51 (1981).

381. *See* Pomicter v. Luzerne Cnty. Convention Ctr. Auth., 939 F.3d 534, 543 (3d Cir. 2019) (citing New England Reg'l Council of Carpenters v. Kinton, 284 F.3d 9, 20 (1st Cir. 2002); Hawkins v. City & Cnty. of Denver, 170 F.3d 1281, 1290 (10th Cir. 1999)).

382. *See* Int'l Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 683–84 (1992) (restriction on solicitation reasonable because it limits disruption); Fams. Achieving Indep. & Respect v. Neb. Dep't of Soc. Servs., 111 F.3d 1408, 1419 (8th Cir. 1997) (restriction on expressive activity was reasonable when it limited congestion and disruption in a social services waiting room); *Heffron*, 452 U.S. at 650–54 (government had a legitimate interest in managing the flow of a crowd and maintaining orderly movement).

383. Del Gallo v. Parent, 557 F.3d 58, 74 (citing Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 52 n.12 (1983) and *Cornelius*, 473 U.S. at 810).

384. United States v. Gilbert, 920 F.2d 878, 886 (11th Cir. 1991).

385. *Id.*

386. *Heffron*, 452 U.S. at 650 ("As a general matter, it is clear that a State's interest in protecting the 'safety and convenience' of persons using a public forum is a valid governmental objective.").

387. *Cornelius*, 473 U.S. at 809.

388. United States v. Szabo, 760 F.3d 997, 1002–03 (9th Cir. 2014) ("We have recognized that patients at VA medical facilities 'have significant health care needs,' which justify the government's prohibiting conduct that diverts attention and resources from patient care.").

- provide patrons with a safe and comfortable environment for attending performing arts events,[389]
- avoid the appearance of political favoritism on behalf of the government,[390]
- maintain established legal procedures in the calmness and solemnity of a courtroom setting as necessary to the fair and equal administration of justice,[391] or
- prevent disruptions and safety threats to employees conducting city business.[392]

What if the harms a local government is trying to prevent have not yet occurred? The Supreme Court has stated that "the Government need not wait until havoc is wreaked to restrict access to a nonpublic forum."[393] Phrased another way, "the flexibility of the reasonableness standard also empowers the government to act prophylactically."[394] For example, in *Perry Education Association,* the Supreme Court found that a restriction on a union's ability to communicate with teachers served a government interest in ensuring peace and avoiding disruption within schools.[395] Despite the fact that there was "no showing in the record of past disturbances" or "evidence that future disturbance would be likely," the Court noted that it does not "require[] that such proof be present to justify the denial of access to a non-public forum on grounds that the proposed use may disrupt the property's intended function."[396] However, even though the government may not be required to prove past or future harm, it must still provide some explanation as to why "certain speech is inconsistent with the intended use of the forum."[397]

Other Government Objectives to Consider in the "Reasonableness" Analysis

A. Safety and Efficacy of Local Government Employees

Local governments have an important interest in preserving the ability of employees to carry out their duties safely, including an interest in preventing disruptions to government employees carrying out their duties in nonpublic forums.[398] Even in cases involving filming of police activity in traditional public forums—where the "right to record" has been established by multiple U.S. Courts of Appeals[399]—courts have found that such a right could be limited if recording the police

389. Hawkins v. City and Cnty. of Denver, 170 F.3d 1281, 1291 (10th Cir. 1999).

390. *Cornelius*, 473 U.S. at 809 (citing Greer v. Spock, 424 U.S. 828, 839 (1976); Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974)).

391. Rouzan v. Dorta, No. EDCV 12-1361-BRO JPR, 2014 WL 1716094, at *12 (C.D. Cal. Mar. 12, 2014), *report and recommendation adopted*, No. EDCV 12-1361-BRO JPR, 2014 WL 1725783 (C.D. Cal. May 1, 2014).

392. Sheets v. City of Punta Gorda, Fla., 415 F. Supp. 3d 1115, 1123 (M.D. Fla. 2019).

393. *Cornelius*, 473 U.S. at 810.

394. Pomicter v. Luzerne Cnty. Convention Ctr. Auth., 939 F.3d 534, 542 (3d Cir. 2019).

395. Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 52 (1983).

396. *Id.* at n.12; *see also* Hawkins v. City & Cnty. of Denver, 170 F.3d 1281, 1290 (10th Cir. 1999) ("Although Denver admits that plaintiffs did not cause any congestion problems or major disruption on the particular occasion that they demonstrated within the Galleria, that is not dispositive.").

397. *See* Nat'l Ass'n for Advancement of Colored People v. City of Phila., 834 F.3d 435, 445 (3d Cir. 2016) (citing Int'l Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 691–92 (1992)).

398. *See, e.g.*, *Lee*, 505 U.S. at 683–84; *Perry*, 460 U.S. at 52 n.12; *Cornelius*, 473 U.S. at 810; Fams. Achieving Indep. & Respect v. Neb. Dep't of Soc. Servs., 111 F.3d 1408, 1419 (8th Cir. 1997).

399. See Section I of this bulletin.

officer interferes with (or is about to interfere with) the officer's duties.[400] These cases indicate that restrictions may be upheld as reasonable when they are necessary to ensure public officials and employees are capable of carrying out their duties. They also indicate that when evaluating a restriction, courts will consider the importance of maintaining the safety of the general public, the government official or employee involved, and the individual filming.[401]

B. Protection of Confidential Information

In some local government agencies, private citizens sometimes must disclose sensitive personal information to receive services. For example, individuals in the lobby of a social services or a local health department often must disclose the type of services they are seeking in order to be ushered into a more private intake or treatment room. Such disclosures could involve information about the type of economic assistance a person is seeking, medical treatment or testing a person is seeking, or child abuse or neglect. A First Amendment auditor filming in one of these lobby areas may capture these disclosures on video and then disseminate the information to the general public via YouTube and other platforms. While it is accurate that any person sitting in the lobby might also overhear such disclosures, there is a significant difference between accidentally overhearing a conversation and intentionally broadcasting it to the public at large.

Consider, for example, an individual at a local department of social services seeking to report suspected child abuse. In some cases, even showing the identity of the individual in the building's lobby—much less capturing the information they are disclosing to employees—may endanger the life of a child or the person making the report. The privacy and safety risks associated with filming become even greater with livestreaming videos—broadcasting the location of certain individuals in real time to viewers on social media.[402] As another example, imagine a local health department that holds a clinic for sexually transmitted infection testing every week on Tuesday afternoons. By simply posting a video on YouTube of an individual in the department lobby speaking to a nurse on a Tuesday afternoon, an auditor could be disseminating highly sensitive information about an individual's health status.

400. *See* Fields v. City of Phila., 862 F.3d 353, 360 (3d Cir. 2017) ("If a person's recording interferes with police activity, that activity might not be protected."); Gericke v. Begin, 753 F.3d 1, 8 (1st Cir. 2014) ("[A] police order that is specifically directed at the First Amendment right to film police performing their duties in public may be constitutionally imposed only if the officer can reasonably conclude that the filming itself is interfering, or is about to interfere, with his duties."); State v. Russo, 407 P.3d 137, 149 (2017) ("[T]he constitutionally-guaranteed right to photograph or film the activities of police officers in public may be limited by time, place, and manner restrictions so long as a reasonable officer would conclude that the individual's action is interfering or about to interfere with the officer's performance of his or her duties.").

401. *See Russo*, 407 P.3d at 149. (Reasonable time, place, and manner restrictions "may be necessary to ensure that law enforcement officials are capable of carrying out their duties and maintaining the safety of both the general public and of the individual conducting the photography or videography.").

402. *See* Sharpe v. Winterville Police Dep't, No. 4:19-CV-157-D, 2020 WL 4912297 (E.D.N.C. Aug. 20, 2020) (recognizing the potential safety issues involved with "contemporaneous messaging applications" which "allow the individual recording, and those watching, to know the location of the interaction and to comment on and discuss in real-time the interaction").

The Supreme Court has recognized that individuals have a privacy interest "in keeping personal facts away from the public eye."[403] Moreover, the Court has noted that "the fact that an event is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of the information."[404] Sharing information with a government employee in a lobby setting—a selective and necessary disclosure to receive government services—is not equivalent to authorizing the disclosure of the same facts to thousands or millions of YouTube viewers.[405] Disclosing sensitive or confidential information captured on video in a publicly accessible lobby area may not necessarily support an individual's privacy tort lawsuit,[406] but the need to prevent such disclosures could support a local government's filming restrictions being "reasonable in light of the purpose of the forum."[407] In other words, a court's analysis of an invasion of privacy claim by a plaintiff who was unwillingly captured on a video is different than the analysis a court would use to evaluate whether a government's restriction on First Amendment activity is "reasonable" in a nonpublic or limited public forum.

Beyond the interest in protecting the privacy and dignity of people seeking services from a local government agency, some agencies also have a legal obligation to protect confidential information related to the people they serve. For example, local health departments, county departments of social services, and consolidated human services agencies are subject to a host of federal and state laws protecting health and social services information from disclosure.[408] This includes, for example, laws that restrict the disclosure of protected health information,[409] information identifying someone as having a communicable disease,[410] or information identifying an individual as a recipient of social services or public assistance[411]—all of which

403. U.S. Dep't of Just. v. Reps. Comm. for Freedom of Press, 489 U.S. 749, 769 (1989); *see also* Whalen v. Roe, 429 U.S. 589, 598–99 (1977) (collecting cases that involved "the individual interest in avoiding disclosure of personal matters").

404. *Reps. Comm.*, 489 U.S. at 769 (internal quotation marks omitted).

405. *See* Virgil v. Time, Inc., 527 F.2d 1122, 1127 (9th Cir. 1975) ("Talking freely to someone is not in itself . . . making public the substance of the talk. There is an obvious and substantial difference between the disclosure of private facts to an individual—a disclosure that is selective and based on a judgment as to whether knowledge by that person would be felt to be objectionable—and the disclosure of the same facts to the public at large.").

406. The authors of this bulletin do not opine on the viability of a tort claim under North Carolina law for an individual captured on a First Amendment audit video. We simply note that the analysis of privacy in such cases is different than the standard that a court would use to evaluate whether a restriction on First Amendment activity is "reasonable" in a nonpublic or limited public forum.

407. *See* United States v. Krahenbuhl, No. 21-CR-127, 2021 WL 4728816, at *4 (E.D. Wis. Oct. 11, 2021) (finding in the context of a First Amendment claim that "[l]imiting plaintiff from interfering with the treatment of other [patients], or overhearing confidential health information, is eminently reasonable.").

408. For more information on state and federal confidentiality laws related to health information, please see Jill D. Moore, North Carolina Communicable Disease Law (UNC School of Government, 2017). For more information on state and federal confidentiality laws applicable to social services information, see Aimee N. Wall, Disclosing Protective Services Information: A Guide for North Carolina Social Services Agencies (UNC School of Government, 2015); Kristi A. Nickodem, *Internal Sharing of Information Within a County Department of Social Services*, Soc. Servs. Bull. 50 (UNC School of Government, May 2022).

409. *See, e.g.*, 45 C.F.R. pts. 160 & 164 (the HIPAA Privacy Rule); G.S. 130A-12 (making patient information maintained by local health departments confidential).

410. *See* G.S. 130A-143.

411. *See, e.g.*, G.S. 108A-80.

might be captured by someone filming in the lobby area of these agencies. Local governments should consider carefully whether failing to restrict filming in such areas may be facilitating unlawful disclosures of confidential information.

C. Imposition upon a Captive Audience

As a general rule, the First Amendment does not allow the government to regulate protected speech simply because it believes an unwilling listener or viewer will find it offensive.[412] An exception to this rule is the "captive audience doctrine," which recognizes that the government may prohibit offensive speech when substantial privacy interests of a "captive" audience are being invaded in an essentially intolerable manner.[413] The Supreme Court has largely limited the captive audience doctrine to cases involving speech directed at people's homes and residential neighborhoods.[414] However, the Supreme Court has recognized that "when a nonpublic forum is involved, the government may limit speech to protect against its imposition upon a captive audience, even outside of the home."[415] For example, courts have found that government agencies have an interest in regulating speech disseminated to "captive audiences" traveling on public transportation.[416] In such spaces, the Supreme Court has recognized that an individual's interest in avoiding unwanted communication is an aspect of the broader "right to be let alone," which is one of "the most comprehensive of rights and the right most valued by civilized men."[417]

Courts have shown a greater willingness to uphold restrictions on speech that is targeted toward individuals "in particularly vulnerable physical and emotional conditions."[418] For example, in a case upholding a 36-foot buffer zone around entrances to a women's health clinic, the Supreme Court noted that "targeted picketing of a hospital or clinic threatens not only the psychological, but also the physical, well-being of the patient held 'captive' by medical circumstance."[419] Likewise, the Supreme Court found a restriction on speech appropriate in public airport terminals where face-to-face solicitation presented "risks of duress" to passengers traveling through an airport.[420] In that case, the Court found it relevant that "[t]he skillful, and unprincipled, solicitor can target the most vulnerable, including those accompanying children or those suffering physical impairment and who cannot easily avoid the solicitation."[421] The same could be said of First Amendment auditors who direct their cell phone cameras toward unwilling participants in lobbies and waiting rooms of agencies that provide public health services, social

412. *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 459 (2011); Cohen v. California, 403 U.S. 15, 21 (1971).

413. *See* Frisby v. Schultz, 487 U.S. 474, 487 (1988) ("The First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech."); *Cohen*, 403 U.S. at 21.

414. *Snyder*, 562 U.S. at 459.

415. State of Tex. v. Knights of Ku Klux Klan, 58 F.3d 1075, 1080 (5th Cir. 1995) (citing Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974)).

416. *Lehman*, 418 U.S. at 304; Am. Freedom Def. Initiative v. King Cnty., 796 F.3d 1165, 1170 (9th Cir. 2015).

417. Hill v. Colorado, 530 U.S. 703, 716–17 (2000).

418. *See Hill*, 530 U.S. at 728–30 (upholding an 8-foot regulatory buffer around clinic entrances where those using the clinic "are often in particularly vulnerable physical and emotional conditions").

419. Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 768 (1994).

420. Int'l Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 684 (1992).

421. *Id.*

services, veterans' services, aging and adult services, and other health and human services. These are areas where vulnerable populations *must* go if they want to receive crucial services from their local government.

Several courts have considered the presence of vulnerable individuals seeking services in finding restrictions on speech in a nonpublic forum to be reasonable. For example, when examining a restriction on leafleting and voter registration activity in a public hospital, the court in *Low Income People Together, Inc. v. Manning* found it relevant that public hospital waiting areas featured individuals confined there by impending appointments and in some cases by disabilities limiting their physical mobility.[422] In light of these facts, the court held that "the Hospital has sound medical reasons for wishing to keep the lobby and the outpatient waiting areas clear of individuals whose stated aim is to confront and lobby patients and families."[423] The same factors would be relevant for the waiting areas of other government agencies, such as a local health department lobby.

Likewise, in *Families Achieving Independence & Respect v. Nebraska Department of Social Services*, the Eighth Circuit held that it was reasonable for a department of social services to restrict outside groups from speaking with clients in the agency lobby because these clients were "virtually a captive audience."[424] In reaching this conclusion, the court noted:

> In this case, the waiting/reception area is filled with some of the most underprivileged in our society seeking benefits from the state for the most basic necessities of life. . . . [T]hese waiting/reception areas are not public or limited public forums but are, indeed, but holding stations for the most pitiful captive audiences in our country.
>
> These individuals—some of whom need protective services because of mental impairments, and all of whom need state assistance for some or all of the necessities of life—are peculiarly susceptible to coercion. . . . This is true both because of the welfare recipients' unfortunate stations in life and because of the captive nature of their attendance at the welfare office.[425]

Indeed, filming is arguably more invasive than other forms of "speech" directed at a captive audience because it actively captures the likeness and actions of the subject without the subject's consent. In limiting its application of the captive audience doctrine, the Supreme Court has stated that "the burden normally falls upon the viewer" to avoid being offended by speech "simply by averting [their] eyes."[426] However, filming presents a form of "speech" that individuals cannot avoid by averting their eyes or covering their ears. The only way a private citizen in the lobby of a local government agency can avoid the intrusion of filming is to literally leave the building, thereby forcing that person to choose between maintaining their privacy and receiving necessary services from the agency.

Some auditors might argue that the "captive audience" problem—and any associated privacy concerns—can be resolved if local governments permit them to film with the consent of the parties who are captured on camera. However, this argument ignores the same concerns that

422. 615 F. Supp. 501, 504–19 (N.D. Ohio 1985).
423. *Id.* at 517.
424. 111 F.3d 1408, 1421 (8th Cir. 1997).
425. *Id.* at 1421–22.
426. Erznoznik v. Jacksonville, 422 U.S. 205, 210–11 (1975) (internal quotation marks omitted).

make a vulnerable captive audience particularly susceptible to being harmed or harassed by filming in the first place. The same potential for coercion and confusion exists with respect to an individual who is approached by an auditor asking if they consent to being filmed. Imagine a local government with a policy that generally restricts filming in certain areas, but has an exception allowing filming with the consent of all parties captured on camera. To comply with the policy, a First Amendment auditor walks around a county department of social services or local health department lobby asking each person there if they are willing to be filmed. Some individuals in those lobbies may feel pressured to consent or may fear harassment if they refuse to consent. Some may be confused and think they must consent to being filmed in order to receive government services.[427] Many individuals in these lobbies will be particularly vulnerable to coercion since they will be seeking services they cannot receive from any other entity. Other individuals may simply lack capacity to provide consent on their own, given that these agencies serve and work with minors and adult wards under guardianship. It would be difficult—if not impossible—for a local government to consistently monitor compliance with such a policy in a crowded waiting room or lobby filled with people who may or may not have decisional capacity to provide informed consent.

Cases Analyzing Filming Restrictions on Government Property

Case law addressing filming and recording restrictions for First Amendment purposes is scarce. However, a handful of courts have upheld filming and recording restrictions, or at least declined to invalidate them on a preliminary motion. In addition to the *Sheets* and *Benzing* cases discussed in Section V, the list below describes many of these cases.

- In *Somberg v. Cooper*, the Eastern District of Michigan denied a plaintiff's motion for summary judgment when that plaintiff argued he had a First Amendment right to record courtroom proceedings. The court held that courtrooms are nonpublic forums and declined to find there was a First Amendment right to record in the courtroom.[428]
- In *People v. Ackerman*, the Michigan Court of Appeals upheld a restriction on photographing jurors after court proceedings as constitutional because it was a reasonable time, place, and manner restriction under the First Amendment.[429]
- In *Commonwealth v. Bradley*, the Superior Court of Pennsylvania evaluated a no-filming policy that applied to a police department lobby.[430] The court upheld the no-filming policy as a reasonable time, place, and manner restriction based on the police department's privacy and security concerns.[431]

427. *See* N.Y.C. Unemployed & Welfare Council v. Brezenoff, 742 F.2d 718, 722 (2d Cir. 1984) (noting that recipients of social services "may well be peculiarly susceptible to verbal misrepresentations, whether because of the noisy and crowded atmosphere of [a social services agency] lobby, language barriers, or even a misperceived need to do anything necessary to ensure the receipt of welfare checks or to lessen the wait in [the social services agency]").

428. 2022 WL 263039, at *7–8 (E.D. Mich. Jan. 26, 2022).

429. No. 228937, 2001 WL732062, at *3 (Mich. Ct. App. June 12, 2001).

430. 232 A.3d 747 (Pa. Super. 2020).

431. *Id.* at 756.

- In *Kerr v. City of Boulder, Colorado*, the District Court of Colorado held that the exterior and curtilage of county jail property were not traditional public forums and that plaintiffs consequently did not have a First Amendment right to film in those areas.[432]
- In *Kushner v. Buhta*, the District Court of Minnesota upheld a restriction on filming during a presentation at the University of Minnesota law school, holding that the auditorium where the presentation occurred was a limited public forum and that the filming restriction was reasonable and viewpoint-neutral.[433]
- In *Rouzan v. Dorta*, the Central District of California upheld a no-filming policy where the plaintiff attempted to film court personnel in a courthouse hallway. The Central District held that the courthouse as a whole was a nonpublic forum, and that the no-filming policy was reasonable and viewpoint-neutral.[434]
- In *Knight v. Montgomery County, Tennessee*, the Middle District of Tennessee held that a county commissioner meeting was both a designated and limited public forum and accordingly upheld a resolution banning livestreaming of county commissioner meetings as content-neutral and narrowly tailored to serve a significant government interest.[435]
- In *Whiteland Woods, L.P. v. Township of West Whiteland*, the Third Circuit held that a restriction on videotaping public meetings did not violate the plaintiff's First Amendment right of access to those meetings.[436]
- In *Carlow v. Mruk*, the District of Rhode Island found a prohibition on videotaping fire district meetings, which were limited public forums, to be both reasonable and viewpoint-neutral.[437]
- In *Hils v. Davis*, the Southern District of Ohio found that a city department's policy prohibiting recording of interviews of police officers accused of misconduct did not violate the First Amendment rights of plaintiffs (police officers).[438]
- In *Larsen v. Fort Wayne Police Department*, the Northern District of Indiana found that a "no videography" rule was reasonable as applied to the nonpublic forum of a school gymnasium.[439]

While none of these cases are binding in North Carolina, they may still be persuasive to North Carolina courts wrestling with this issue.

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432. No. 19-cv-01724-KLM, 2021 WL 2514567, at *9 (D. Colo. June 18, 2021).

433. No. 16-cv-2646 (SRN/SER), 2018 WL 186603, at *10–11 (D. Minn. Apr. 18, 2018), *aff'd*, Kushner v. Buhta, No. 18-2099, 771 Fed. App'x. 714 (8th Cir. June 13, 2019).

434. No. EDCV 12-1361-BRO (JPR), 2014 WL 1716094, at *12 (C.D. Cal. Mar. 12, 2014).

435. No. 3:19-CV-00710, 2022 WL 842699, at *14 (M.D. Tenn. Mar. 21, 2022), *appeal dismissed sub nom.* Knight v. Montgomery Cnty., Tenn., No. 22-5249, 2022 WL 2348094 (6th Cir. May 11, 2022). Note, however, that North Carolina's open meetings law would likely allow such livestreaming. *See* G.S. 143-318.14(a)

436. 193 F.3d 177, 184 (3d Cir. 1999). This case was decided many years prior to the Third Circuit's 2017 *Fields v. City of Philadelphia* decision, which established the right to film police officers conducting official police activity in public areas. Accordingly, it is unclear whether the Third Circuit would reach the same conclusion in a similar case today.

437. 425 F. Supp. 2d 225, 249 (D.R.I. 2006).

438. No. 1:21CV475, 2022 WL 769509, at *8 (S.D. Ohio Mar. 14, 2022).

439. 825 F. Supp. 2d 965 (N.D. Ind. 2010).

VI. Practical Considerations for Local Governments

After considering the existing case law on video recording and forum analysis, North Carolina local governments should consider developing guidance, training, signage, and/or policies regarding filming on government property. There is no "one size fits all" solution to this training or these policies because some types of forums will differ from jurisdiction to jurisdiction. Forum analysis is a case-specific, fact-intensive determination made by a court evaluating the constitutionality of a specific restriction. For example, if one county allows many types of expressive activity (pamphleting, posting signs, protests, and so forth) in the common areas of its county offices but a neighboring county has not traditionally allowed such activity, a court may categorize the same type of area in each county differently.

A local government cannot necessarily transform property into a certain kind of forum simply by declaring it to be so as a matter of policy. For example, a local government's policy stating that a public park was a nonpublic forum for First Amendment activity would not be sufficient to transform that park (a traditional public forum) into a nonpublic forum.[440] However, outside of traditional public forums like parks, sidewalks, and streets, the government's stated intention and policy with respect to the use of a particular area are highly relevant in the overall forum analysis. Courts will look to a local government's express policies (rules, ordinances, handbooks, guidance documents, and so forth) as well as to its customs and practices with respect to a particular area to determine how the government intended to open (or not open) that area to expressive activity.

Adopting a Policy Regarding Filming

Local governments should consider whether to adopt a policy regarding filming in certain areas of government property. Whether this occurs in the form of an ordinance, a policy, or a resolution is immaterial for First Amendment purposes. One method is having a city or county governing board adopt an ordinance giving the city or county manager authority to adopt and enforce a policy regarding this issue. Crafting a thoughtful policy—and providing training on how to consistently implement it—prevents employees from having to make ad hoc decisions on how to handle these situations.

Below are several issues local governments should consider when drafting and implementing a policy regarding filming.

- Policies should not target specific opinions, beliefs, or perspectives in their language. Policies explicitly prohibiting recording negative interactions, prohibiting recording of government employees for purposes of criticism or harassment, or prohibiting the dissemination of recordings for purposes of criticism or harassment would all likely be treated as viewpoint-based restrictions, which are prohibited in all forums. Policies that specifically reference First Amendment auditors in their language could also be held to be content- and viewpoint-discriminatory if the motive underlying the policy is to suppress the message of those particular speakers.

440. *See* United States v. Grace, 461 U.S 171, 180 (1983) ("Traditional public forum property occupies a special position in terms of First Amendment protection and will not lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression. Nor may the government transform the character of the property by the expedient of including it within the statutory definition of what might be considered a non-public forum parcel of property.").

- Local governments should carefully consider the governmental interests they intend to promote via no-filming policies. When possible, governments should articulate these interests in their policies to demonstrate that these interests are unrelated to an intent to suppress speech. While the standard applied to no-filming policies varies depending on the forum at issue, the policies and regulations are more likely to be upheld by courts in any forum if they are clearly connected to the purpose they purportedly serve.
- Local governments should be as specific and descriptive as possible when establishing restrictions in specific areas. Does the restriction apply to an entire facility or solely in "employees only" or "restricted" areas? Does it apply to areas outside the building? Clear drafting will help local government employees and the public understand exactly where filming is prohibited.
- Local governments should consider including language explaining the potential consequences of continuing to record a video after being asked to cease. For example, the policy might state that continuing to film in violation of the policy will be deemed disruptive and be grounds to remove someone from a particular facility.[441]
- If a local government decides to prohibit filming in a certain area, it should consider including an exception for recordings made by law enforcement officials while performing their official duties.[442] An overly broad policy without such an exception could be construed to prevent law enforcement officials from recording with bodycams, for example.
- Local governments must decide whether a policy should apply only to video/audio recordings or will also prohibit still photography. Different considerations might apply to these different mediums. As part of this determination, consider whether staff in a particular building might need to take pictures as part of their official duties. Aside from any specific exceptions the local government carves out in a policy, a restriction on still photography should be enforced consistently regardless of why someone is taking the photograph or the identity of the person taking the photograph, which may be challenging in some cases.
- Local governments may consider whether to include an exception allowing filming with the consent of all parties being filmed. On the one hand, such an exception theoretically solves privacy and confidentiality concerns, since the parties will have provided consent. It could also demonstrate an attempt to more narrowly tailor a restriction, as opposed to a complete prohibition on recording. On the other hand, this exception may be difficult to enforce or defeat the purpose of the restriction in certain forums with "captive audience" issues, as discussed earlier in Section V. Moreover, a consent exception may be contrary to a government's purpose and interest in enacting the filming restriction. Accordingly, a consent exception may be appropriate in some forums and not in others.

441. The city ordinance regarding filming that was upheld in *Sheets v. City of Punta Gorda, Florida*, 415 F. Supp. 3d 1115 (M.D. Fla. 2019), contains such language. *See* Punta Gorda, Fla., Code of Ordinances § 15-48 (2017, 2020), https://www.ci.punta-gorda.fl.us/government/city-clerk/code-of-ordinances.

442. *See* Am. C.L. Union of Ill. v. Alvarez, 679 F.3d 583, 604 (7th Cir. 2012) (finding that an exemption allowing law enforcement to make recordings was merely facilitating government speech and was not content-based discrimination); *see also Sheets*, 415 F. Supp. 3d at 1123 (finding city's use of security cameras would not open a limited public forum to unconsented recording by visitors).

Implementing a Policy Regarding Filming

If a county or municipality adopts a policy restricting filming in certain areas, it should train department heads and public-facing employees on the policy's use and application. This training should emphasize that the policy must be applied in a *consistent and neutral* manner, regardless of who is attempting to make a recording. In other words, if a local government has decided to completely prohibit filming in certain areas, then an "auditor" should be treated the same as a member of the media who asks to take video or a photograph inside one of these areas. Unless the policy has carved out particular exceptions (for example, for recordings made by law enforcement officials), employees should be reminded that filming in certain areas is prohibited regardless of the *identity* or the *intent* of the person behind the camera. Local governments should also train law enforcement officers who may be dealing with individuals who refuse to comply with the policy.

When training officials or employees who will be implementing any policy restricting filming, it is crucial to emphasize the importance of de-escalation. Some auditors may provoke or elicit an emotional response from the government employees who confront them. Intense, emotional, or argumentative responses by government employees and officials make more sensational videos, which are more likely to go "viral" and get increased viewer engagement. Staying calm, collected, and rational in the face of pressure—though challenging—helps to de-escalate these situations.

Any restriction on filming in certain areas should also be clearly communicated to the public in the form of signage, particularly if those areas are routinely held open to the public.

Threats of Violence and Incitement to Unlawful Activity

Regardless of the forum where filming is occurring, auditors do not have a First Amendment right to threaten violence or incite imminent lawless action toward local government officials. The First Amendment permits the government to ban a "true threat," since "threats of violence are outside the First Amendment."[443] The North Carolina Supreme Court recently defined a *true threat* as "an objectively threatening statement communicated by a party which possesses the subjective intent to threaten a listener or identifiable group."[444] Intimidation, where a speaker directs a threat to a person or group with the intent of placing the victim in fear of bodily harm or death, is a form of true threat.[445] Likewise, speech that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action" is not protected under the First Amendment.[446] On the other hand, political hyperbole and "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials" that do not involve threats of violence or incitement to imminent unlawful activity are generally protected forms of speech under the First Amendment.[447] Whether on social media or in physical buildings, the First Amendment does not require local governments to tolerate or allow threats of violence toward local government employees.

443. Virginia v. Black, 538 U.S. 343, 359–60 (2003) (internal citations and quotation marks omitted).
444. State v. Taylor, 379 N.C. 589, 605 (2021).
445. *Black*, 538 U.S. at 359.
446. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).
447. Watts v. United States, 394 U.S. 705, 708 (1969) (citing New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

When Auditors Refuse to Leave

When a First Amendment auditor has entered a restricted area or otherwise engaged in substantially disruptive behavior, local government employees may direct the auditor to leave. If the auditor refuses, local governments may need to involve law enforcement. Auditors might believe they have not broken the law by entering and filming in a public building, but as North Carolina trespass law demonstrates, that may not always be the case.

A. Overview of North Carolina Trespass Law

Under North Carolina law, the type of trespass that may be most relevant to encounters with First Amendment auditors is second-degree trespass. Second-degree trespass occurs when an individual enters or remains on another's premises without authorization and after being asked to leave by a person in charge of the premises, a lawful occupant, or another authorized person.[448] Individuals can also be charged with second-degree trespass if they enter or remain on another's premises without authorization after being notified of restrictions on entry by posted notices.[449] As a threshold issue, second-degree trespass requires entering or remaining on the premises of another. A common misconception is that government buildings cannot be the premises "of another" since they are held open for the public and in some sense belong to the public. This interpretation misconstrues and overstates public entitlement to access government-owned buildings.

As this bulletin addressed in Section II, local governments have similar rights to private property owners with respect to controlling the use of property.[450] Government buildings—even when held open to the public—belong to the government. As a result, government buildings or premises constitute the premises "of another" for purposes of North Carolina's trespass statutes. However, if government buildings are held open to the public, the law implies the government's consent for the public to enter at least some areas of the building.[451]

This default implied consent to enter and remain in government buildings extends only to areas that are held open to the public.[452] Entering an area not held open to the public, even if it is adjacent to an area that *is* held open to the public, exceeds the boundaries of the government's implied consent. For example, in *In re S.D.R.,* the defendant was in a local N.C. Cooperative Extension office when he entered the director's office and stole money from her purse.[453] Although the director's office was located in a public building that housed public agencies, there was no evidence that the director's office was itself held open to the public.[454] To the contrary, the

448. G.S. 14-159.13(a)(1)–(2).

449. *Id.*

450. Adderley v. Florida, 385 U.S. 39, 47 (1966).

451. State v. Nickens, 262 N.C. App. 353, 366 (2018).

452. *In re* S.D.R., 191 N.C. App. 552, 557 (2008).

453. *Id*. Although its analysis centers on breaking and entering, *In re S.D.R.* is still instructive because first-degree trespass is a lesser-included offense of breaking and entering, meaning that all of the requirements of first-degree trespass must be met for a breaking and entering to be present. *See* State v. Hamilton, 132 N.C. App. 316, 320–21 (1999).

454. *In re S.D.R.,* 191 N.C. App. at 558.

director's office was open by appointment and invitation only and was not held open for regular foot traffic.[455] Moreover, even if the defendant theoretically had implied consent to enter the office, his criminal act of stealing money was sufficient to render the implied consent void.[456]

In contrast, in *State v. Winston,* the North Carolina Court of Appeals held that the defendant had not exceeded the scope of the implied consent to be in a government building. In this case, the defendant entered the clerk of court's office in the Cumberland County courthouse.[457] The door to the office was partially open and there were no signs indicating the office was private.[458] Members of the general public used the office and the office was open for public business when the defendant entered.[459] The defendant did not engage in any criminal conduct but merely stood in the office and stated he wanted to leave a note for the public defender.[460] Such conduct was insufficient to invalidate the implied consent.[461] As a result, the defendant did nothing to render the implied consent void and had implied consent to enter that office.[462]

The government can also explicitly revoke this implied consent, as occurred in *State v. Nickens,* a 2018 North Carolina Court of Appeals case. Here, the defendant began to shout and swear at Division of Motor Vehicle (DMV) employees as she waited in the DMV lobby, a publicly accessible area.[463] A DMV License and Theft Bureau inspector instructed the defendant to leave and attempted to escort her off the property.[464] The DMV inspector's order for the defendant to leave explicitly revoked any implied consent because the inspector was a lawful occupant and an "authorized person" for purposes of the second-degree trespass statute.[465]

Finally, case law suggests that remaining in a building without a legitimate purpose may be a sufficient basis to expressly revoke implied consent in certain cases. In *State v. Marcoplos,* a group of protesters entered a privately owned corporate building through its lobby.[466] The protestors demanded to see the CEO, and a security officer asked them to leave.[467] The protestors were ultimately charged with second-degree trespass after refusing to leave the lobby area.[468] The lobby was held open to the public for certain legitimate purposes such as visiting any of the businesses located in the lobby.[469] As a result, the protestors likely had implied consent to enter the lobby.[470] However, the court held that this implied consent was expressly revoked both because the security officer directed the protestors to leave and because the defendants "no

455. *Id.* at 559.
456. *Id.*; *see also* State v. Moss, No. COA16-665, 2017 WL 163788, at *3 (N.C. Ct. App. Jan. 17, 2017) (finding there was no implied consent when "it is apparent that the victim's office was not open to regular foot traffic and not held out as open to the public.").
457. 45 N.C. App. 99, 100 (1980).
458. *Id.*
459. *Id.* at 101.
460. *Id.* at 101, 102.
461. *Id.*
462. *Id.* at 102.
463. 262 N.C. App. 353, 366 (2018).
464. *Id.* at 367.
465. *Id.*
466. 154 N.C. App. 581, 584–85 (2002).
467. *Id.* at 584.
468. *Id.* at 582.
469. *Id.* at 584.
470. *Id.*

longer had a legitimate purpose for being in the lobby."[471] This case is distinguishable from the local government context in that it deals with privately owned property. However, it indicates that the lack of legitimate purpose for remaining in an area held open to the public may in some cases be a sufficient basis for a person with lawful authority to expressly revoke implied consent to remain in the area.

What constitutes a "legitimate purpose" for remaining in a particular area of government property may depend on the policy and practices regarding the area as well as its historical use, which is where trespass issues dovetail with forum analysis. Consider *Make the Road by Walking, Inc. v. Turner*, where welfare office policies restricted access to individuals with "official business" at the welfare center and to activities that were "specifically authorized" by the agency's administrator.[472] Limiting public access to those with official business—including welfare claimants and those accompanying them—served as evidence of the government's intent for the welfare waiting rooms to be nonpublic forums for First Amendment activity.[473] In the trespass context, similar policies might serve to limit the scope of implied consent for the public to be in certain areas of government buildings by defining what constitutes a "legitimate purpose" for the public's presence in the building.

B. Application of Trespass Law to the Auditor Context

As discussed above, while government-owned premises are the premises "of another," the law implies consent to enter and remain on government-owned premises held open to the public. As a result, no trespass charge is likely to succeed if it is based merely on someone entering a government building held open to the public. However, if someone with lawful authority directs an individual to leave, this default implied consent is likely revoked.

The trespass legal framework provides several relevant principles in the First Amendment auditor context. First, auditors are not entitled to enter or remain in every area within a public building—only those areas intentionally held open to the public. In determining whether an area is held open to the public for trespass purposes, courts will consider whether areas are marked as "private," "restricted," "employees only," or with some other similar qualifying language.[474] Courts will also examine whether the public in practice does access those areas without an appointment or invitation and whether the area is open to regular foot traffic.[475] If an auditor enters an area that is restricted, not traditionally available to the public, or not open to foot traffic, that individual has likely exceeded the scope of the implied consent to be in the area and can be told to leave.

Even when a First Amendment auditor is in an area that is held open to the public, the auditor's behavior may be sufficient to revoke the implied consent to enter and remain there. If an auditor substantially disrupts normal operations after being ordered to desist or leave, that conduct may be sufficient to revoke implied consent to remain, resulting in a trespass.[476] If the auditor engages in any illegal conduct, that behavior will also be sufficient to revoke any implied

471. *Id.* at 585 ("In sum, we hold one with lawful authority may order a person to leave the premises of a privately owned business held open to the public when that person no longer has a legitimate purpose for being upon the premises.").

472. 378 F.3d 133, 145–46 (2d Cir. 2004).

473. *Id.* at 146.

474. *See, e.g.*, State v. Winston, 45 N.C. 99 (1980).

475. *See generally id.*; *In re* S.D.R., 191 N.C. App. 552, 557 (2008).

476. *See* State v. Marcoplos, 154 N.C. App. 581, 584 (2002).

consent to be in the building.[477] This may also be true when a local government establishes a "no-filming" policy in a particular area and the auditor refuses to comply with the policy after being directed to do so.

Consider the aforementioned *Sheets v. City of Punta Gorda, Florida* case, in which a federal district court affirmed that a city restriction on recording at city hall was reasonable and viewpoint-neutral.[478] The city ordinance contains the following language regarding the consequences of violating the prohibition on recording:

> In addition to being a violation of this Ordinance, if anyone who is observed to be recording video and/or sound within City-owned, controlled, or leased property, without the consent of all persons whose voice or image is being recorded, and such person refuses to cease activity after being advised that such activity is prohibited under this Ordinance, such refusal shall be considered to be a disruption to the work of City government. Therefore, such persons shall be deemed to no longer be present within the City-owned, controlled, or leased property on legitimate public business. The City Manager and his designees are hereby authorized on behalf of the City of Punta Gorda, Florida to request any person who refuses to cease the unconsented video and/or sound recording to immediately leave the premises. Any person who refuses to cease the unconsented to video and/or sound recording, and refuses to immediately leave the premises following the request of the City Manager or his designee, shall be considered as a trespasser. Law Enforcement, at its option, at the request of the City may issue a trespass warning notice for this conduct.[479]

Using the standard applicable to nonpublic and limited public forums (viewpoint-neutral and reasonable in light of the purpose of the forum), the court concluded that the language regarding trespass warnings in the ordinance was reasonable under the First Amendment.[480] The court found it relevant that the ordinance at issue did not empower city employees to control the duration of the trespass warning, but rather, "simply empowers City employees to ask the police to issue a trespass warning."[481] The *Sheets* case demonstrates how a policy restricting recording in a nonpublic or limited public forum may comply with the First Amendment by being viewpoint-neutral and reasonable, while also empowering government employees to revoke the implied consent of those who violate the policy to remain in the forum.

When drafting policies or ordinances regarding restrictions on filming, local governments should consider including language explaining the potential consequences for violating such a policy, which may include being told to leave the building. These policies should be communicated clearly to the public through signage or other means. If a local government has such a policy and local government employees encounter an auditor who refuses to stop filming, an employee should first inform the auditor of the policy and ask the auditor to comply. If the auditor continues to film in violation of the policy or engages in other disruptive behavior, the

477. *See In re S.D.R.,* 191 N.C. App. at 557.

478. 415 F. Supp. 3d 1115 (M.D. Fla. 2019).

479. *See* Punta Gorda, Fla., Code of Ordinances § 15-48 (2017, 2020), https://www.ci.punta-gorda.fl.us/government/city-clerk/code-of-ordinances.

480. *Sheets*, 415 F. Supp. at 1123.

481. *Id.*

employee should order the auditor to leave the premises (thereby revoking implied consent to remain in the building). Finally, if the auditor refuses to comply with the directive to leave the premises, the employee should involve law enforcement. Following this step-by-step approach, if it is possible to do so safely, may help avoid unnecessarily escalating tensions in an encounter with an auditor who is unaware of the policy or is unwilling to comply with it.

Public Records Requests and First Amendment Audits

When asked about their business in a government building, some First Amendment auditors respond that they want to submit a public records request.[482] The auditors then make the records request while filming and attempt to film the response. In this situation, the First Amendment and North Carolina's Public Records Act intersect and govern how local government employees and officials can respond. Below are some key takeaways from public records law.

A. An Auditor's Presence and Filming Does Not Mandate Immediate Fulfillment of the Request

The deadline for fulfilling public records requests under North Carolina's Public Records Act depends on the type of request. If a requestor merely wants to read or inspect a document, the local government's obligation is to arrange for the inspection "at reasonable times and under reasonable supervision."[483] Neither the statute nor case law sets out an exact definition of "reasonable." The legislature likely intended the reasonableness standard to be flexible, commonsense, and adaptable on a case-by-case basis. In the context of First Amendment auditing, a local government employee may invite the auditor to come back later in the day or the following day to allow the employee time to locate the document, make it available, and arrange for reasonable supervision. The statute does not require that requests for inspection be fulfilled immediately, only that the timeline be reasonable. Providing the requested records within a day or a couple of business days would likely be reasonable depending on the size and nature of the request.

If the requestor wants copies of a document, the statutory deadline is "as promptly as possible."[484] Neither the statute nor case law provides a hard-and-fast rule for sufficient promptness. Again, "as promptly as possible" is likely meant to be a flexible standard that considers differences in size and personnel capacity across agencies and variations in the complexity of requests. As with requests for inspection, nothing in the statute requires an immediate response. Requestors are entitled to receive the copies in whatever format they request, to the extent possible.[485] For example, if an auditor requests a hard copy of a document, even paperless local government agencies must provide a hard copy if they have access to a printer. Similarly, if an auditor wants an electronic copy of a record traditionally kept in hard copy, the unit must scan and email the document if it has the equipment to do so.

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482. *See* United States v. Hollingberry, No. 2003058MJ001PHXMTM, 2020 WL 2771773, at *4 (D. Ariz. May 28, 2020), *aff'd*, No. 20-10183, 2020 WL 5237342 (9th Cir. July 23, 2020) (mentioning public records request made in connection with a First Amendment audit).

483. G.S. 132-6.

484. *Id*.

485. G.S. 132-6.2(a).

As with any public record request, local governments may charge for the actual cost of making copies.[486] Under the statute, an actual cost is an expense directly chargeable from the reproduction of the records.[487] Actual costs must be costs the agency would not have incurred but for the public records request. For example, paper and ink are both actual costs because the agency would not be printing the public records request on that paper using that ink had the request not been made. In contrast, personnel time used to make copies *would not* be an actual cost. The agency pays its personnel regardless of whether a public records request arises. Given the narrow nature of an actual cost, copy charges for public records requests are likely to be minimal but can be legally charged under North Carolina's public records law.

The North Carolina public records law does not allow local government employees to treat public records requests from First Amendment auditors differently than requests from other individuals or groups. If a local government office has a policy of answering public records requests in the order in which they are received, there is no legal basis to alter that policy merely to respond immediately to an auditor's filmed request. However, an auditor may be under the mistaken impression that public records requests must be fulfilled immediately. How should local government employees respond? They may politely inform auditors of any local policies regarding answering requests in the order in which they are received. Employees should then consider laying out a tentative timeline for response with the requestor. If the auditor requests inspection, set a mutually convenient appointment for the auditor to return and inspect the document. If the auditor has requested copies, verify the auditor's desired format for the copies. Local governments may also want to inform auditors that they may charge for the actual costs of making copies under G.S. 132-6.2(b) and provide a fee estimate to alert the auditor of potential charges. Finally, local government employees may consider providing contact information so auditors can ask questions about their requests.

B. Auditors Are Not Required to Complete Forms or Identify Themselves

Many local governments have policies governing how the public may submit public records requests. Often these policies specify that the request must be in writing and may require requestors to identify themselves and the purpose of their request. Local governments can legally enact such policies but may not withhold public records based on noncompliance with them. Under North Carolina public records law, public records belong to the public and the public may access such records for free or minimal cost.[488] While there are some exceptions to this general rule, local governments may not enforce policies that bar otherwise lawful access to public records. Moreover, G.S. 132-6(b) provides that no person is required to disclose the motive or purpose of a public records request. A local government may seek information from a requestor but cannot deny a request based on failure to provide that information.

C. Auditors May Legally Film Documents Provided in Response to the Request

In addition to filming the request process, First Amendment auditors may also want to film the actual document requested upon receipt. By filming public records disclosed by a local government, auditors are filming documents the general public already has a legal right to inspect. Local government employees should be aware that, in the absence of a no-filming

486. G.S. 132-6.2(b).
487. *Id.*
488. G.S. 132-1(b).

policy, the documents provided may be filmed. Accordingly, as with any public records request, employees should be careful to provide only those records to which the auditor is legally entitled. Even though a document may be a public record, certain information within the document may be confidential, such as Social Security numbers[489] or certain personnel information.[490] Local government employees must carefully redact public records containing confidential information before releasing them to the public.

When an auditor uploads footage to the internet, individuals outside of North Carolina may access it. Does the fact that people in other states may view the footage have any legal ramifications? North Carolina public records law provides general access to "the public" as a whole and makes no distinctions based on a person's residency or citizenship. As a result, out-of-state individuals are entitled to inspect North Carolina records under North Carolina public records law.

VII. Conclusion

Analyzing when, where, and how a local government can regulate First Amendment auditor activity presents a host of complex and challenging issues. Local government officials should remember the following key takeaways when considering how to respond to First Amendment audits.

- **Is filming a First Amendment right?**
  - The "right to record" public officials has not yet been recognized as a First Amendment right by the Supreme Court or by the Fourth Circuit Court of Appeals. However, many U.S. Courts of Appeals have recognized some form of such a right, so local governments should proceed as if there were a First Amendment right implicated in this activity. Even in jurisdictions where courts have recognized some version of this right, however, the degree to which the right may extend beyond filming police officers in traditional public forums is still unclear.

- **Can a local government regulate filming in certain areas?**
  - When analyzing the constitutionality of government regulations on expressive activities on government property, courts engage in forum analysis to determine the nature of the forum being regulated and the corresponding standard of judicial review that applies to regulations in the forum. When seeking to regulate filming on public property, local governments should begin by analyzing the nature of the forum they seek to regulate and considering whether the contemplated restriction is likely to meet the standard for constitutionality in that forum.
  - When classifying an area as a particular type of forum, courts evaluate the government's intent for public expression in that area by examining the government's policies and practices regarding use of the area, the nature of the area at issue, the extent of the use granted, and the history of the area. Policies and practices that limit expressive activity

489. G.S. 132-1.10.
490. *See* G.S. 160A-168 (municipal employees); G.S. 153A-98 (county employees).

to certain topics or certain groups of people or restrict expressive activity entirely more likely suggest a governmental intent for a limited or nonpublic forum. Policies and practices allowing the general public to engage in a broad range of expressive activity more likely indicate governmental intent for a designated public forum.
    - Generally, exterior areas (streets, parks, sidewalks, plazas) are likely to be considered traditional public forums, though some exceptions are described in this bulletin. Interior areas are likely limited public forums or nonpublic forums—both of which correspond with a lower level of judicial scrutiny. However, if an interior area has been intentionally opened by the government for use by the public as a place for a broad spectrum of expressive activity in the same way as a traditional public forum (parks, streets, sidewalks, and so forth), it likely constitutes a "designated public forum." Restrictions in such an area will be subject to the same demanding level of scrutiny applied in traditional public forums.
    - While traditional public forums will maintain their historical classification regardless of government action, designated and limited public forums need not be held open indefinitely. Local governments may "close" designated and limited public forums via policy and practice.

- **What are the criteria for imposing restrictions on expressive activities protected by the First Amendment?**
    - In traditional public forums and designated public forums, the government may impose reasonable time, place, and manner restrictions on speech if they are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. Regulations based on content in these forums must satisfy strict scrutiny, meaning they must be necessary to serve a compelling government interest and narrowly tailored such that the regulation is the least restrictive means of achieving that interest.
    - In limited and nonpublic forums, restrictions need only be viewpoint-neutral and reasonable in light of the purpose of the forum.
    - Restrictions intended to suppress expression merely because public officials oppose the speaker's viewpoint are prohibited in all forums. A restriction must be written and applied in a viewpoint-neutral manner in order to be upheld as constitutional, regardless of the forum at issue.

- **What should a local government keep in mind when attempting to regulate filming activity in certain areas of government property?**
    - In assessing the reasonableness of a restriction, courts consider factors such as the uses of the forum, the risks associated with the speech activity in question, and the government's proffered rationale for its restrictions. Issues a local government should consider when deciding whether a restriction is appropriate in a certain forum include employee safety, privacy and confidentiality, preventing disruption of a government property's intended function, and the captive nature of a vulnerable population in the forum.
    - Local governments considering enacting filming restrictions should evaluate what governmental interests and concerns they wish to address with a no-filming policy. They should be able to explain the governmental interests at stake in the particular area and

clearly articulate how the no-filming policy connects to and promotes those interests. Policies must be written and applied in a way that does not favor some individuals seeking to film over others.

- **How should a local government handle encounters with First Amendment auditors?**
  - Ensure that any policies restricting filming, usage, or access in a particular area are communicated to the public via clear signage.
  - Consider identifying a "point person" within each local government building who can take the lead on encounters with individuals filming in the building. This individual should be knowledgeable about filming policies applicable to areas in the building and capable of de-escalating these encounters when necessary. If an auditor violates a local restriction regarding filming, the employee may direct the auditor to cease filming and leave the building if the auditor does not comply. If the auditor refuses to cease filming or leave the building, the employee may want to contact law enforcement.
  - If an auditor enters a restricted area or refuses to leave the area after a directive to leave, involving law enforcement may be appropriate. This type of behavior may also be grounds for a second-degree trespass charge.