First Amendment Audits

Presenters: James R. Benjamin Jr., Esquire
Bambi Glenn, Esquire

WHAT DOES THE FIRST AMENDMENT PROTECT?

FIRST AMENDMENT FUNDAMENTAL FREEDOMS

First Amendment

- 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

- **Fundamental liberties**
- **Freedom of Religion**
- **Freedom of Speech**
- **Freedom of Press**
- **Freedom of Assembly**
- **Freedom of Petition**

WHY FIRST AMENDMENT AUDITS?

- Consider themselves activists and journalists
- Believe they are promoting transparency and open government
- Often a financial motive

First Amendment Audits are generally conducted in public spaces in public buildings – Public forums

Ability to restrict fee speech is limited

Can enforce reasonable time, place, and manner of expression restrictions which

(1) are content neutral,

(2) narrowly tailored to serve significant government interest, and

(3) leave open other ample alternative channels of communication

First Amendment Auditors typically take a video camera into public spaces, and often identify themselves as members of the press



- Is video recording protected speech? (yes)
- Does the auditor need to be a member of the press? (no)
- Is recording public employees protected speech? (yes)
- Glik v. Cunniffee (2011), the 1st Circuit Court of Appeals held that the First Amendment Protects the right to record video and audio of public officials performing their duties in public places, as long as the recording does not interfere with their work.

WHAT DO THEY DO?

- Record their interactions with public employees and officials
- Frequently want immediate and unfettered access to record public employees in public buildings and workspaces
- Often aggressive and appear to intentionally make the public employees uncomfortable to escalate the encounter

TYPICAL QUESTIONS:

- What is your name/badge number?
- Do you know what my rights are under the First Amendment?
- Am I being detained? Or under arrest?

WHERE CAN YOU EXPECT THESE AUDITS?

- Police stations
- Courthouses
- Government Buildings
- Post Offices
- Public sidewalks and parking lots

A Cautionary Tale…



We could have done better…



WHAT TO EXPECT AFTER THE ENCOUNTER:

- Post videos on YouTube or other social media
- File multiple complaints and encourage other individuals to file complaints about the violation of the auditor’s rights
- File suit seeking monetary damages

SUGGESTED POLICIES FOR BETTER OUTCOMES:

(1) Educate employees

- They do not need to consent to being filmed
- Do not react
- Do not escalate
- Do not involve police unless a law has been broken (threat, entry into non-public areas, etc.)

SUGGESTED POLICIES FOR BETTER OUTCOMES (CONT'D):

(2) Identify and mark non-public forums

- Identify which buildings / parts of buildings are accessible to the public and make it clear to staff that video recording is allowable in those areas.

- Identify areas that should be deemed as non-public and install "Authorized Personnel Only" or "Restricted Area –Authorized Employees Only" signs.

- In "public counter areas", put up signs that should read something to the effect of "For the Privacy of Our Customers, Please Wait Here Until Called."