
Handling First Amendment “Audits” at DSS

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CAUTION



This is a general
overview, not legal
advice.

Consult with your
county attorney!

Agenda

- What is the First Amendment?
- How does the First Amendment apply to filming?
- What is a “forum” for First Amendment purposes?
- How does this apply in a DSS?
- Takeaways

First Amendment

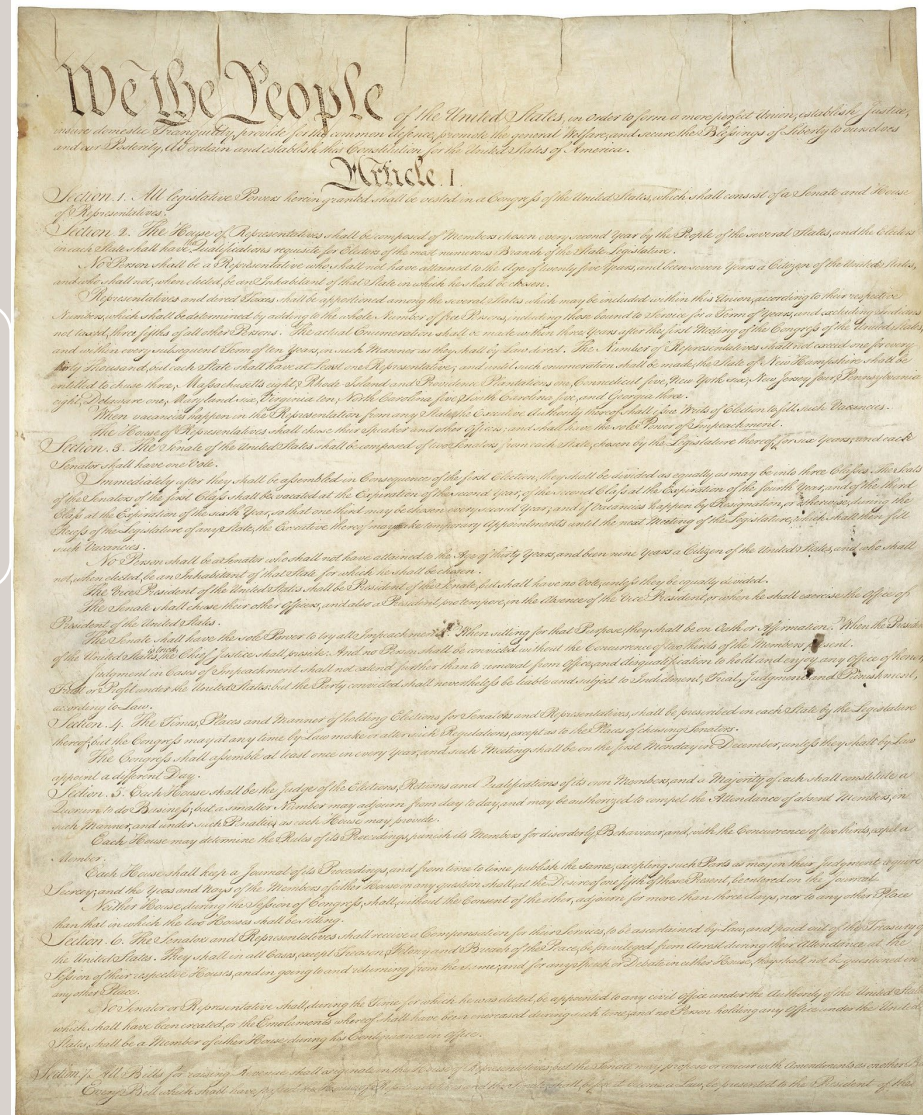
“Congress shall make no law...abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

Freedom of speech

Freedom of the press

Freedom of assembly

Freedom to petition



How does this apply to filming?

The Supreme Court has recognized a “paramount public interest in a free flow of information to the people concerning public officials.”

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

The First Amendment “goes beyond protection of the press and the self-expression of individuals to prohibit [the] government from limiting the stock of information from which members of the public may draw.”

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

“[T]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.”

Branzburg v. Hayes, 408 U.S. 665, 684 (1972)



“Laws enacted to control or suppress speech may operate at different points in the speech process.”

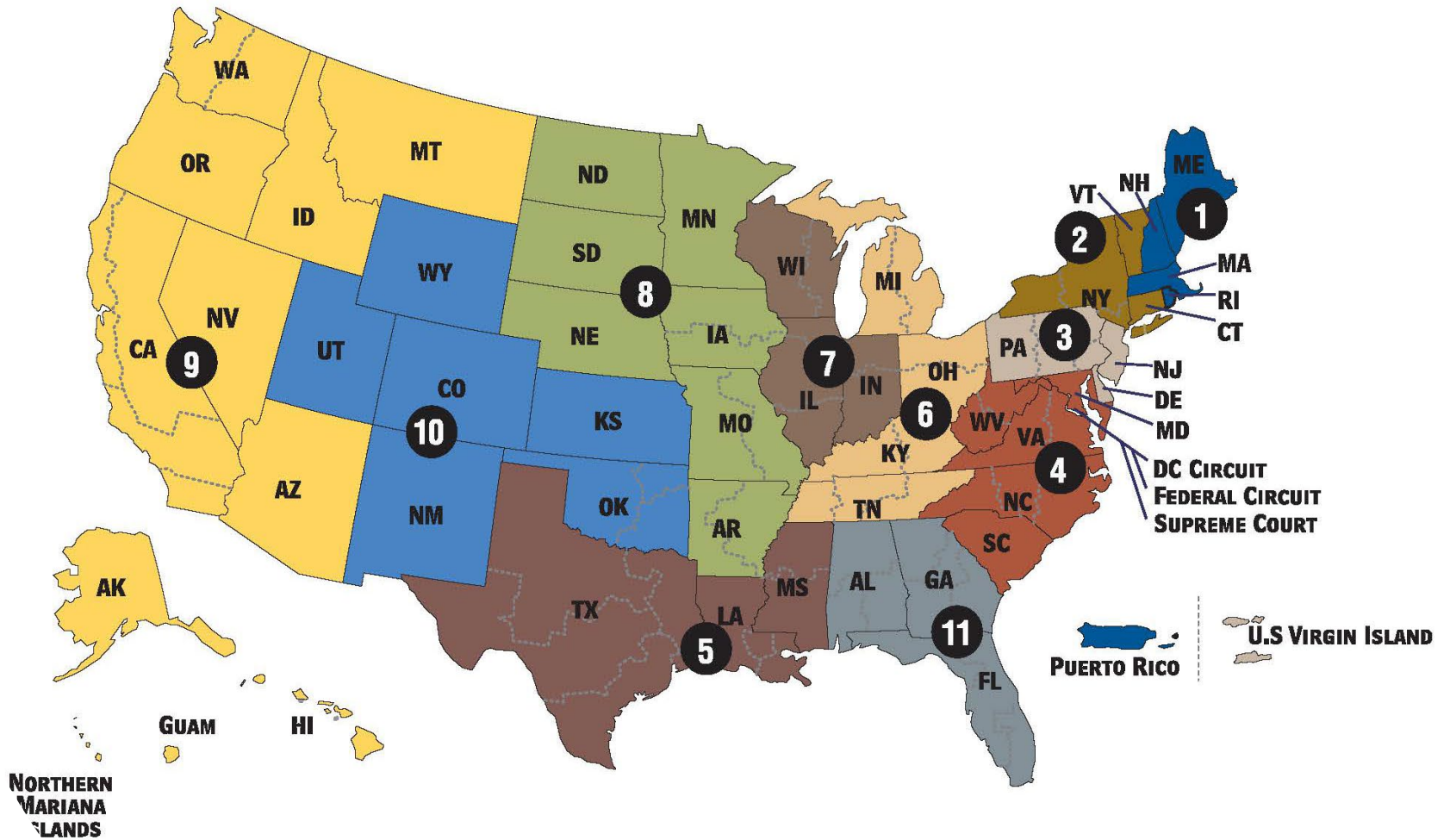
- *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 336 (2010).

“If the act of making a photograph or recording is to facilitate speech that will follow, the act is a step in the ‘speech process,’ and thus qualifies itself as speech protected by the First Amendment.”

- *Ness v. City of Bloomington*, 11 F.4th 914, 923 (8th Cir. 2021)

Geographic Boundaries

of United States Courts of Appeals and United States District Courts



Is there a right to film public officials?

“[T]he First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest.”

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

“[T]he videotaping of public officials is an exercise of First Amendment liberties.”

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



The First, Third, Fifth, Seventh, Ninth, and Eleventh Circuit have all recognized a First Amendment “right to record,” at least in the context of police activity.

The Fourth Circuit has not *yet* recognized this right.

Are First Amendment rights unlimited?

NO!

Government can place some restrictions on speech, based on:

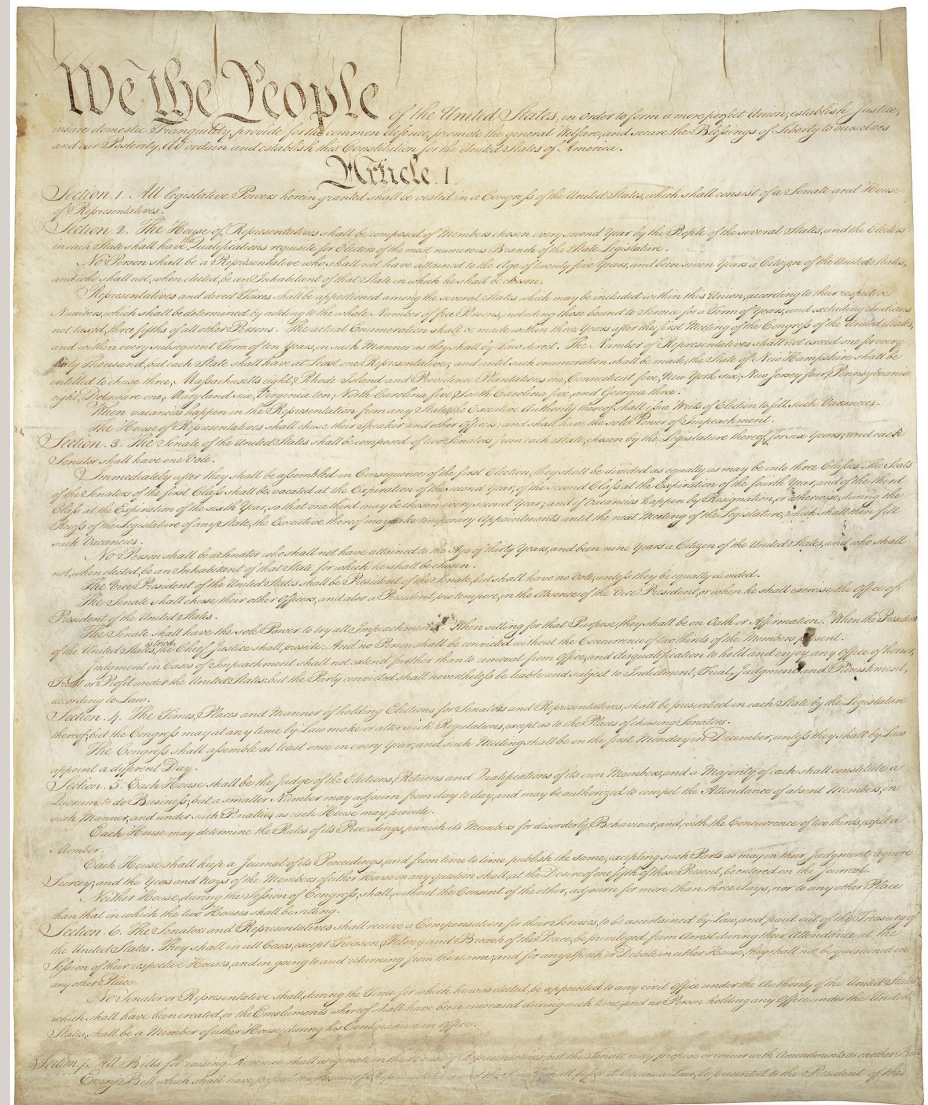
Type of speech

Where speech is
happening (“forum”)

Freedom of Speech

The Supreme Court has ruled that some forms of speech have “low” First Amendment value and can be more heavily restricted or prohibited:

- Defamation
- True threats
- Fighting words
- Obscenity
- Child pornography
- Commercial advertising





Where is Speech Happening?

Public Forum:

Areas of public property traditionally open for public assembly, expression, protest, solicitation, and debate, or “which 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.”

Perry Ed. Assn. v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45 (1983).

- Examples:
 - Streets.
 - Sidewalks.
 - Parks.
 - Public squares.
 - Highways.
- *Content-based* governmental limitations are presumed unconstitutional.
- *Time, place, and manner* restrictions are allowed, if they are (i) narrowly tailored to further a substantial government interest, and (ii) leave ample channels of communication available.



Where is Speech Happening?

Limited Public Forum:

- Public forums that are either:
 - Only open for use by certain groups or
 - Dedicated solely to the discussion of certain subjects.
- Government may prohibit discussion outside the subjects that are the purpose for the forum.
- Any restriction on speech in a limited public forum must:
 - Be viewpoint neutral.
 - Be reasonable in light of the purpose served by the forum.
 - Not selectively deny access for speech in the genre or subject specifically allowed in the limited public forum.
- Examples:
 - Public meetings, in many instances
 - State university space used for student groups
 - Public libraries
 - Public school facilities in after-school hours



Where is Speech Happening?

Nonpublic Forum:

Public property that has not been traditionally used or designated for use as a forum for expressive activity.

- To maintain a nonpublic forum, the government must employ selective-access policies where forum participation is governed by individual non-ministerial judgments (*Child Evangelism Fellowship of Md., Inc. v. Montgomery Cty. Pub. Sch.*, 457 F.3d 376, 381 (4th Cir. 2006)).
- Should convey a clear intent that the government opens the property only as a nonpublic forum.

Any restriction on speech in a nonpublic forum must be:

- **Viewpoint neutral.** Cannot suppress expression merely because the government opposes the speaker's view.
- **Reasonable** in light of the purpose served by the forum.
- Examples:
 - Interior of government office buildings.
 - Polling stations.
 - Courthouse lobbies.
 - Public websites.

What about DSS?

Open to the Public \neq Public Forum for First Amendment Purposes

“Publicly owned or operated property does not become a ‘public forum’ simply because members of the public are permitted to come and go at will.”

“There is little doubt that in some circumstances the Government may ban the entry on to public property that is not a ‘public forum’ of all persons except those who have legitimate business on the premises.”

United States v. Grace, 461 U.S. 171, 177–78 (1983)

[T]he postal sidewalk was constructed solely to provide for the passage of individuals engaged in postal business. **The sidewalk leading to the entry of the post office is not the traditional public forum sidewalk....** 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.

Postal entryways...may be open to the public, but that fact alone does not establish that such areas must be treated as traditional public fora under the First Amendment.

The Postal Service has not expressly dedicated its sidewalks to any expressive activity. Indeed, postal property is expressly dedicated to only one means of communication: the posting of public notices on designated bulletin boards. No Postal Service regulation opens postal sidewalks to any First Amendment activity.

We have held that “[t]he government does not create a public forum by ... *permitting* limited discourse, but only by intentionally opening a nontraditional forum for public discourse.”

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



What about DSS?

Lobbies of Government Buildings

- *Claudio v. U.S.*, 836 F. Supp. 1219 (E.D. N.C. 1993), *aff'd*, 28 F.3d 1208 (4th Cir. 1994)
 - Main entrance lobby of a federal building was a nonpublic forum.
- *United States v. Gilbert*, 920 F.2d 878, 886 (11th Cir. 1991)
 - Interior of a federal government agency building is a nonpublic forum.
- *Freedom Found. v. Washington Dep't of Ecology*, 426 F. Supp. 3d 793, 799 (W.D. Wash. 2019), *aff'd*, 840 F. App'x 903 (9th Cir. 2020)
 - Lobby of the Department of Ecology was a nonpublic forum when Department policies only granted access to visitors in the lobby if they had a reason for being present that is related to the agency's business.
- *State v. Barber*, 2021-NCCOA-695, ¶ 39, 868 S.E.2d 601, 607
 - Held that interior of the NC General Assembly is “not an unlimited public forum.”

Lobbies of Social Services Agencies

- *Make The Rd. by Walking, Inc. v. Turner*, 378 F.3d 133, 145–46 (2d Cir. 2004)
 - Categorizes welfare center waiting rooms as nonpublic forums. Human Resources Administration enforced a written policy reserving them for “official business” or for activities “specifically authorized” by the HRA Administrator.
- *Fams. Achieving Indep. & Respect v. Nebraska Dep't of Soc. Servs.*, 111 F.3d 1408, 1421 (8th Cir. 1997)
 - Concluded that DSS lobby was a nonpublic forum and that DSS's policy of limiting the access of outside groups to the lobby was reasonable.
- *Nat'l Fed'n of Blind of Missouri v. Cross*, 184 F.3d 973, 982 (8th Cir. 1999)
 - Rehabilitation Services of the Blind's provision of information to clients and discussion of issues related to blindness cannot be characterized as the intentional opening by the agency of a forum for public discourse.
- *Nathaniel v. Iowa Dep't of Hum. Servs.*, No. 4:05-CV-00044, 2005 WL 8157815, at *9 (S.D. Iowa Sept. 16, 2005)
 - Iowa Department of Human Services was held to be a nonpublic forum.

What about DSS?



Confidentiality Concerns

G.S. 108A-80: “[I]t shall be unlawful for any person to obtain, disclose or use, or to authorize, permit, or acquiesce in the use of any list of names or other information concerning persons applying for or receiving public assistance or social services that may be directly or indirectly derived from the records, files, or communications of...county departments of social services or acquired in the course of performing official duties except for the purposes directly connected with the administration of the programs of public assistance and social services.”

When “Auditing” Crosses the Line

“The State, 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.”

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

“[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government.”

United States Postal Service v. Greenburgh Civic Associations, 453 U.S. 114, 129 (1981)

“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.”

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

“[O]ne who lawfully enters a place may be subject to conviction for trespass if he or she remains after being asked to leave by someone with authority.”

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

Takeaways

- Filming public officials engaging in public business is *likely* protected activity under the First Amendment
 - **BUT** no settled law in North Carolina/Fourth Circuit and the law in other circuits largely focuses on police in public areas
- DSS lobby would *likely* be considered a nonpublic forum, meaning that a county could impose **reasonable, viewpoint-neutral** restrictions on filming
 - **BUT** no settled law in North Carolina/Fourth Circuit
- Compliance with confidentiality laws may require a county to take reasonable measures to prohibit filming in a DSS building
- Policy and signage may be needed--**discuss any policies on filming with a county attorney!**
- Train employees on responding to auditors

Questions?