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2023 ACCG ANNUAL CONFERENCE

ACCG: 2023 Annual Conference

First Amendment Audits

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County Attorney to Forsyth County, Barrow County, Cherokee County, Jackson County, Greene County, Newton County, Dawson County, Screven County, and Georgetown Quitman County & City Attorney to the City of Milton, City of Stone Mountain, City of Fayetteville, and City of Alpharetta

What is a First Amendment Audit?

- A First Amendment Audit is a uniquely American phenomenon where persons will endeavor to enter and film public spaces for the purpose of assessing the reaction to those working or conducting business in those spaces.
- The ultimate objective is to:
 - (1) determine whether the government appropriately respects the First Amendment and other rights of the “auditor;”
 - (2) goad the police or public worker into a confrontation or embarrassing moment, and
 - (3) possibly trigger a response that gives right to a lawsuit for damages or YouTube videos.



https://www.youtube.com/watch?v=MI_qjTfrT4

Pooler Police spotlighted in viral YouTube video by independent journalist



https://www.youtube.com/watch?v=MI_nqjTfrT4

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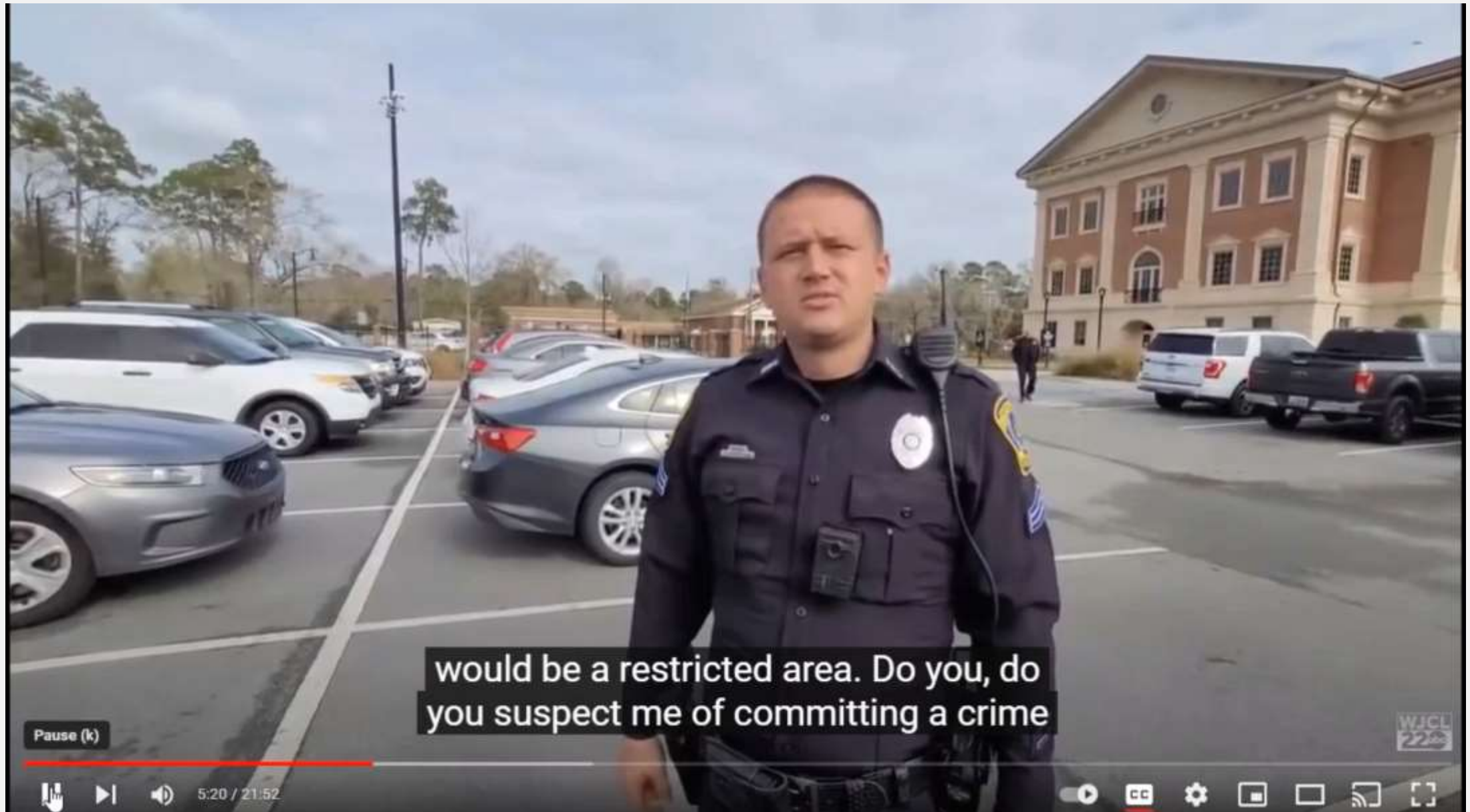
and make sure that they respect our
freedom of press? Right.

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Scroll for details



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Overview of First Amendment Concepts That Generate Audits

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.



Overview of First Amendment Concepts That Generate Audits

Q: Who is the First Amendment a restraint on?

A: The government.

- So, the government may not abridge (think: reduce or lessen) the freedom of the American people to speak or assemble, or the freedom of the press.
- The advent of technology has also blurred the line between what most of us think as the legacy media versus citizen journalists.

Overview of First Amendment Concepts That Generate Audits

Q: Does a member of the press need to be credentialed?

A: No. While it is the case that some organizations grant special privileges to individuals with press credentials, there is nothing magical under the law regarding a press pass. A citizen journalist does not need a press pass to be considered an actual journalist.



Overview of First Amendment Concepts That Generate Audits

- There are four (4) types of traditional fora, each with its own judicially created rules governing how speech or assembly may be limited.



Traditional Public Forums

- Courts have recognized four different forum types for First Amendment purposes. At one end of the spectrum is the traditional public forum, such as streets or parks, which historically “have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983).
- In a **traditional public forum**, any content-based restriction on speech receives strict scrutiny, but “[t]he state may ... enforce regulations of the time, place, and manner” in these forums, so long as the regulations are “content-neutral, are narrowly-tailored to serve a significant government interest, and leave open ample alternative channels of communication.
- Think sidewalks and park areas. Permits for such activity can be required – so long as they are merely imposing time, place, and manner restrictions. Such restrictions must be content-neutral and narrowly tailored.

Designated Public Forums

- A designated public forum “consists of public property which the state has opened for use by the public as a place for expressive activity,” such as a meeting space in a state-run university. *Id.* The government is not obligated to make the forum open to the public, but once it does, “[t]he same standards apply” as in a traditional public forum. *Minn. Voters All. v. Mansky*, --- U.S. ----, 138 S. Ct. 1876, 1885, 201 L.Ed.2d 201 (2018). “Reasonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.” *Perry*, 460 U.S. at 46, 103 S.Ct. 948.
- Permits and/or permission may be required here as well. Any restrictions on *content* will be subject to strict scrutiny.
- If the City opened its assembly areas for public use, then this would become a designated public forum.

Limited Public Forums

- The third recognized category—the limited public forum—is similar to a designated public forum, but the opened public property is “limited to use by certain groups or dedicated solely to the discussion of certain subjects.” *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez*, 561 U.S. 661, 679 n.11, 130 S.Ct. 2971, 177 L.Ed.2d 838 (2010).
- In limited public forums, the state may restrict expression so long as the restriction (a) does “not discriminate against speech on the basis of viewpoint” and (b) is “reasonable in light of the purpose served by the forum.” *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001); see *Perry*, 460 U.S. at 46, 103 S.Ct. 948 (“In addition to time, place, and manner regulations, the state may reserve the 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.”).
- Think of the public comment portion of a Council meeting. The difference between a designated public forum versus a limited public forum is that in a limited public forum the government can impose reasonable regulations on topics - but not viewpoint within topics. In a designated public forum, the government can only impose content-based restrictions upon a demonstration of a compelling state interest (strict scrutiny). This is the highest level of judicial scrutiny.

Non-Public Forums

- The nonpublic forum, which consists of government-owned property that is not traditionally (or by designation) open for public communication. **Like the limited public forum, in nonpublic forums the government can restrict speech as long as the restrictions are “reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view.”** *Perry*, 460 U.S. at 46, 103 S.Ct. 948; see also *Mansky*, 138 S. Ct. at 1885 (“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*, 460 U.S. at 46, 103 S.Ct. 948)).
- Think of courthouses, jails, the interior of administrative buildings, employee parking lots, and other public grounds designed for specific uses.

In Light of The Above Authorities, We Must Return To Our First Amendment Auditors

- Do we believe that when a person decides to “test” whether his/her local government understands the First Amendment or other constitutional protections – that the person doing it is involved in expressive activity?
 - Speech?
 - More so when holding a camera?
 - A de facto member of the press?
- Should we be surprised if the individual involved in the First Amendment Audit states that they are working on a story? What is the story? You and your government!

It is firmly established that the First Amendment's aegis extends further than the text's proscription on laws "abridging the freedom of speech, or of the press," and encompasses a range of conduct related to the gathering and dissemination of information. As the Supreme Court has observed, "the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978); see also *Stanley v. Georgia*, 394 U.S. 557, 564, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969) ("It is ... well established that the Constitution protects the right to receive information and ideas."). An important corollary to this interest in protecting the stock of public information is that "[t]here is an undoubted right to gather news 'from any source by means within the law.'" *Houchins v. KQED, Inc.*, 438 U.S. 1, 11, 98 S.Ct. 2588, 57 L.Ed.2d 553 (1978) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681–82, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972)).

Smith v. City of Cumming (11th Cir. 2000)

As to the First Amendment claim under Section 1983, we agree with the Smiths that they had a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct. **The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest.** See *Blackston v. Alabama*, 30 F.3d 117, 120 (11th Cir.1994) (finding that plaintiffs' interest in filming public meetings is protected by the First Amendment);

Additional Legal Takeaways

- Freedom of the press includes the right to record video and audio -- *Am. Civil Liberties Union of IL v. Alvarez*, No. 11-1286 (7th Cir. 2012)
- Credentials are not needed to be considered press in the context of the First Amendment -- *Lovell v. City of Griffin*, 303 U.S. 444 (1938)
- The press, in its historic connotation, comprehends every sort of publication that affords a vehicle of information and opinion. -- *Branzburg v. Hayes*, 408 U.S. 665 (1972)
- It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.

Additional Legal Takeaways

- ...liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.
- Recording police and other government officials in the discharge of their duties is explicitly allowed -- *Glik v. Cunniffe*, No. 10-1764 (1st Cir. 2011)
- Prior to detaining anyone, law enforcement must have a particularized and objective basis for suspecting the particular person of criminal activity -- *United States v. Cortez*, 449 U.S. 411 (1981)
- In determining what cause is sufficient to authorize police to stop a person, the totality of the circumstances — the whole picture — must be taken into account. Based upon that whole picture, the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity

Case Law Examples

In September 2012, Amanda Geraci, a member of the police watchdog group “Up Against the Law,” attended an anti-fracking protest at the Philadelphia Convention Center. She carried her camera and wore a pink bandana that identified her as a legal observer. About a half hour into the protest, the police acted to arrest a protestor. Geraci moved to a better vantage point to record the arrest and did so without interfering with the police. An officer abruptly pushed Geraci and pinned her against a pillar for one to three minutes, which prevented her from observing or recording the arrest. Geraci was not arrested or cited.

Case Law Examples

One evening in September 2013, Richard Fields, a sophomore at Temple University, was on a public sidewalk where he observed a number of police officers breaking up a house party across the street. The nearest officer was 15 feet away from him. Using his iPhone, he took a photograph of the scene. An officer noticed Fields taking the photo and asked him whether he “like[d] taking pictures of grown men” and ordered him to leave. J.A. 8. Fields refused, so the officer arrested him, confiscated his phone, and detained him. The officer searched Fields' phone and opened several videos and other photos. The officer then released Fields and issued him a citation for “Obstructing Highway and Other Public Passages.” These charges were withdrawn when the officer did not appear at the court hearing.

Case Law Examples

4 The First Amendment protects the public's right of access to information about their officials' public activities. It "goes beyond protection of the press and the self-expression of individuals to prohibit 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, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978). Access to information regarding public police activity is particularly important because it leads to citizen discourse on public issues, "the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v. Phelps*, 562 U.S. 443, 452, 131 S.Ct. 1207, 179

5 To record what there is the right for the eye to see or the ear to hear corroborates or lays aside subjective impressions for objective facts. Hence to record is to see and hear more accurately. Recordings also facilitate discussion because of the ease in which they can be widely distributed via different forms of media. Accordingly, recording police activity in public falls squarely within the First Amendment right of access to information. As no doubt the press has this right, so does the public. See *PG Publ'g. Co. v. Aichele*, 705 F.3d 91, 99 (3d Cir. 2013); *Branzburg v. Hayes*, 408 U.S. 665, 684, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972).

What is it about a camera?



Case Law Examples

Q: Can you freely film within a.....

- Jail/Detention facility even while on jail property – *Kerr v. City of Boulder*, Colorado United States District Court, D. Colorado June 18, 2021; *Adderly v. Florida*, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966) **A:** NO
- Airport security checkpoint - *Mocek v. City of Albuquerque*, 813 F.3d 912, 919 (10th Cir. 2015) **A:** NO
- A military base - *Greer v. Spock*, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976) **A:** NO

Case Law Examples

AND....

Q: For security purposes, if a courthouse temporarily restricts access to only those with official business – and an auditor is turned away – does the auditor have a claim? **A:** No. *Braun v. Terry*.

- [U]nder the reasoning of *Council of Greenburgh Civic Associations*, the Court need not engage in a traditional “time, place, and manner” analysis given the finding that the Jail property is not a traditional public forum. See also *Perry Ed. Ass’n v. Perry Local Ed. Ass’n*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983) (stating that “when government property is not dedicated to open communication, the government may—without further justification—restrict use to those who participate in the forum's official business”).

First Amendment Auditors

What Auditors CAN do:

- They have the right to enter most public buildings.
- They have the right to film or photograph within the public areas of the buildings – with perhaps modest exceptions.
- They have the right to film and record persons in the open areas of the building.
- They have the right to enter any publicly accessible space in the facility.
- There is no expectation of privacy in the open spaces of a government building.
- They have the right to talk to you. (you have the right to not engage!)
- They have the right to sit and film.

First Amendment Auditors

What they CANNOT do:

- Cannot enter restricted areas.
- Cannot create disturbances in the public areas that disrupt business operations.
- Cannot harass or threaten persons or otherwise engage in criminal conduct.

First Amendment Auditors

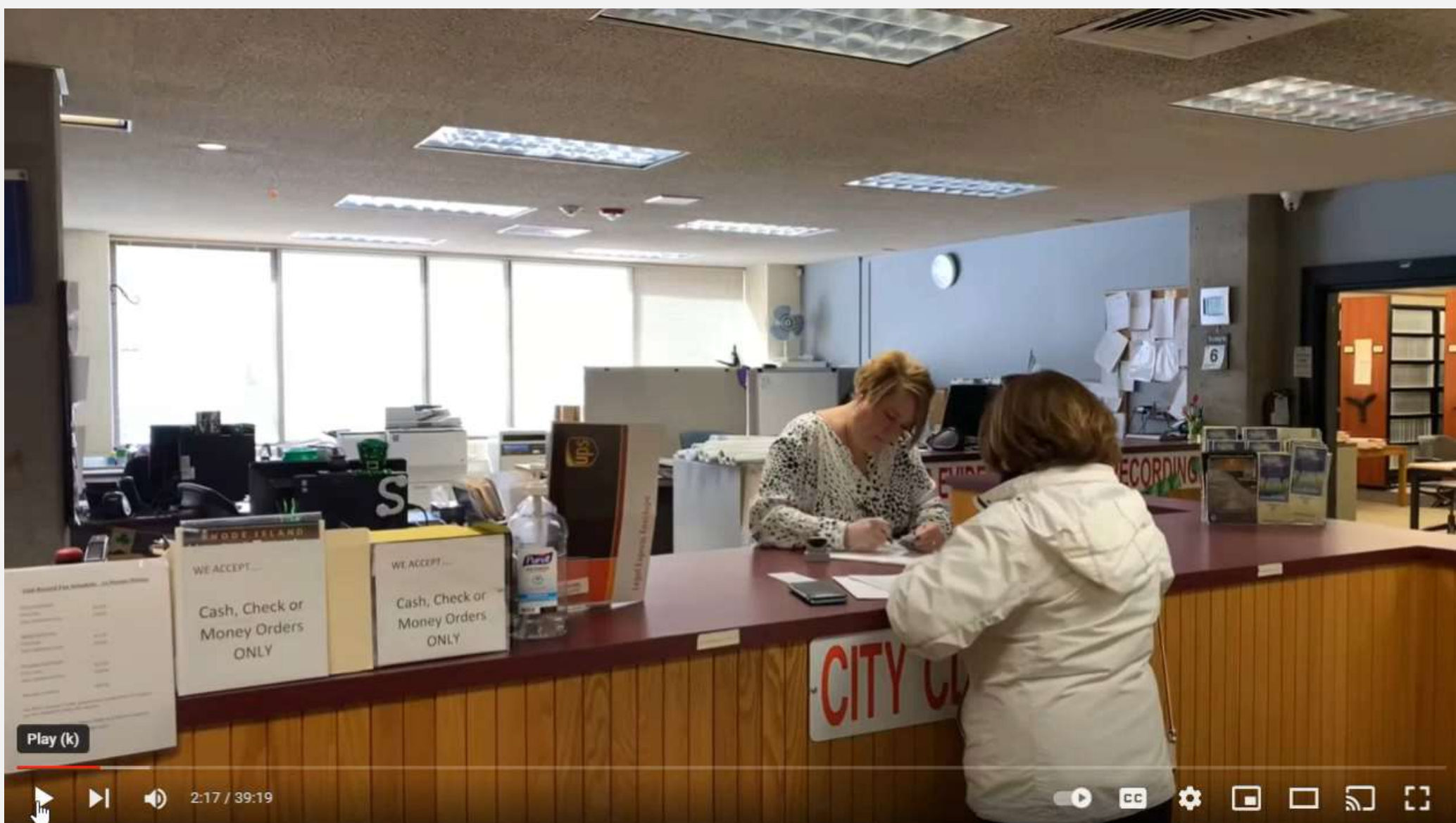
How they may present themselves:

- The person may be alone with a camera, or may have a separate person as a videographer.
- They may circle facilities in a vehicle or simply roam around on foot looking for open areas or garages.
- They will have a passing understanding of First Amendment law.
- They may be very talkative and seek to engage. Or, they may be completely quiet.
- They may be dressed provocatively (perhaps all dark or paramilitary clothes)
- They may wear masks or even makeup.
- They will not show you ID or give you their name (nor are they required to).
- They may seek to bait you into a confrontation. The more confrontations, the more YouTube views, the more subscribers, the more money.





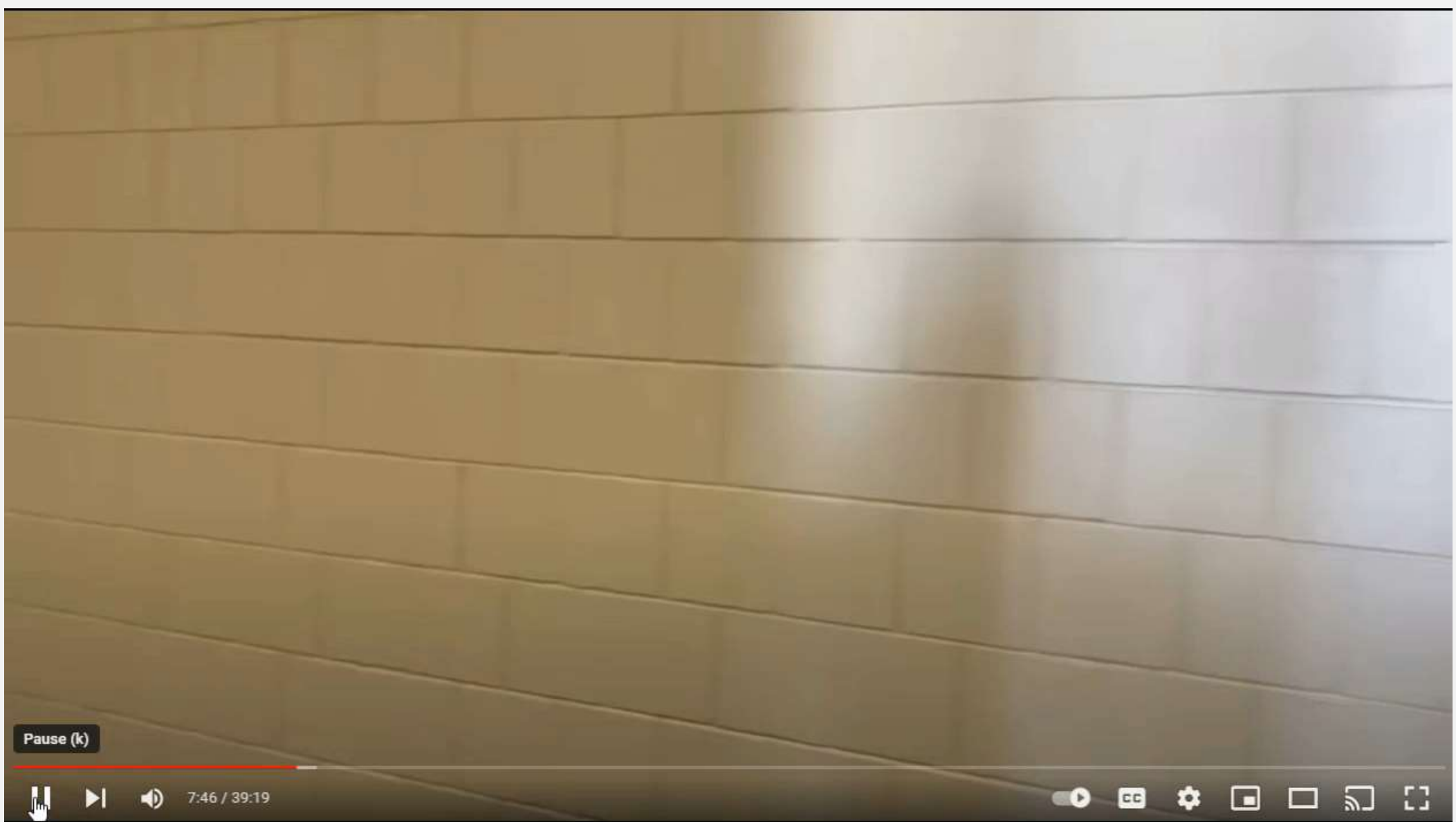
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Best Practices

- Proactively identify and mark nonpublic areas.



Best Practices

- Keep protected areas, protected. Doors shut. Windows locked. Garages closed. Gated areas with the gate closed.



Helpful Tips for Engaging With an Auditor

- Don't overreact!



Helpful Tips for Engaging With an Auditor

- Have a plan in place for alerting all departments to avoid surprise and reduce confrontation



Helpful Tips for Engaging With an Auditor

- Don't touch, grab, or otherwise assault the auditor.



Helpful Tips for Engaging With an Auditor

- Do not attempt to take their recording device.



Helpful Tips for Engaging With an Auditor

- Do not seek to have the police arrest or detain them if the ONLY issue is the recording.



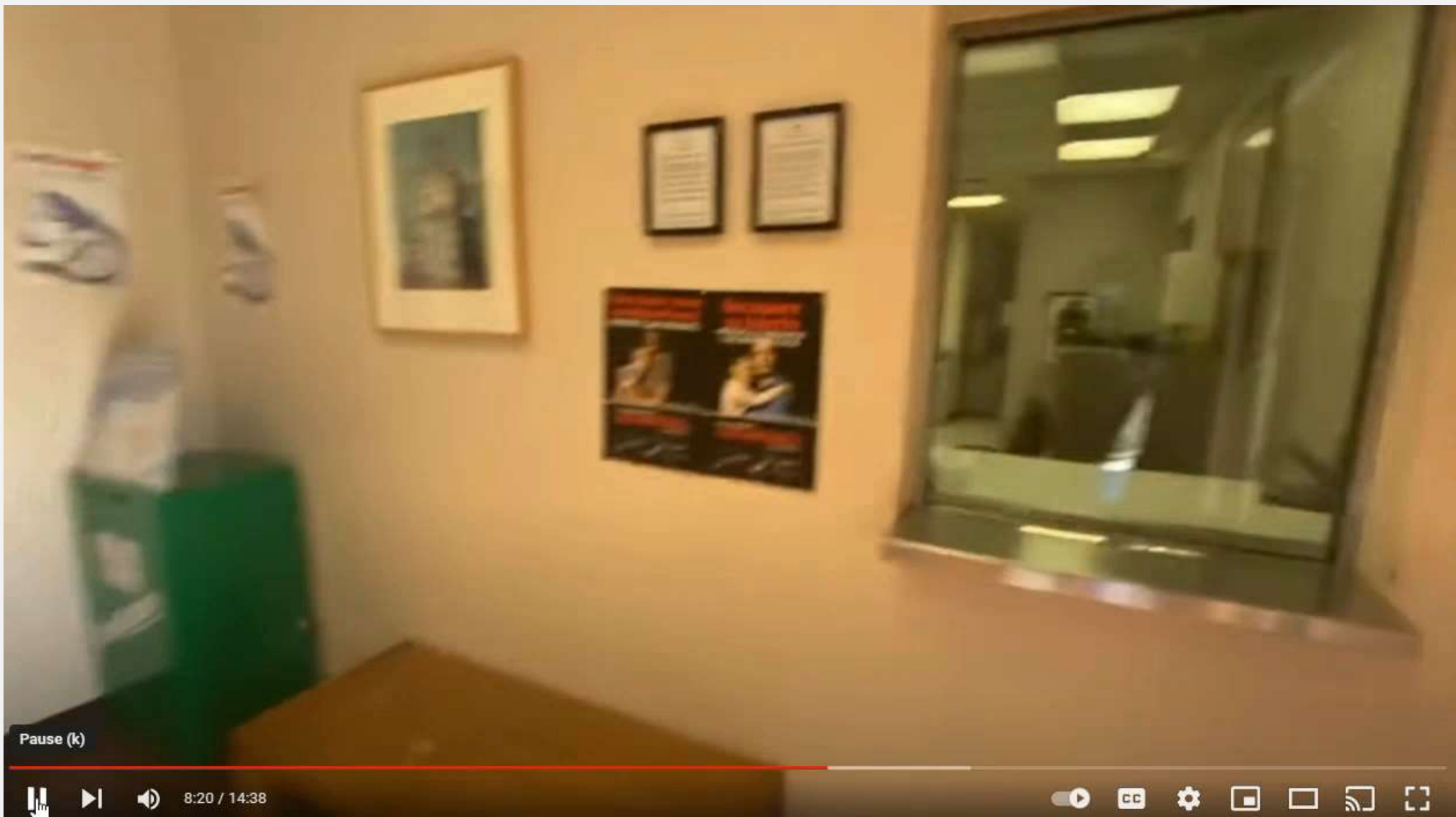
Helpful Tips for Engaging With an Auditor

- Stay calm!



Helpful Tips for Engaging With an Auditor

- Be polite and patient



<https://www.youtube.com/watch?v=8mgqFXA1XqM>

Helpful Tips for Engaging With an Auditor

- Act in conformity to the agency's mission, being mindful that you do work for the government.



Helpful Tips for Engaging With an Auditor

- Enforce security requirements.



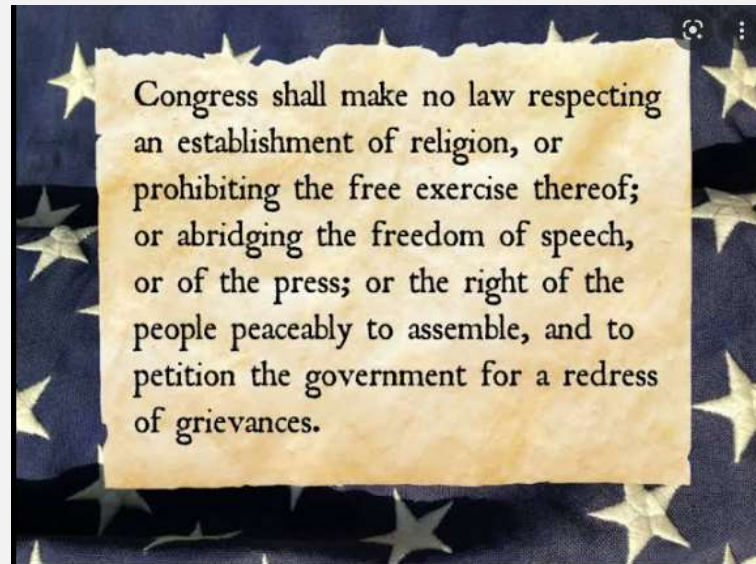
Helpful Tips for Engaging With an Auditor

- Let them film so long as they are not committing any crimes or disrupting the use of the property.



Helpful Tips for Engaging With an Auditor

- Be mindful of their First Amendment rights, as well as the government's ability to enforce reasonable time, place, and manner restrictions which are content neutral and compatible with the intended use of the property, including preventing employees from being interrupted while performing work.



Questions?

