

NAVIGATING FIRST AMENDMENT AUDITS

BEST PRACTICES FOR MUNICIPAL EMPLOYEES AND OFFICIALS

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AGENDA

What is an “Auditor”?

Legal Framework

Best Practices & Procedures

Common Mistakes



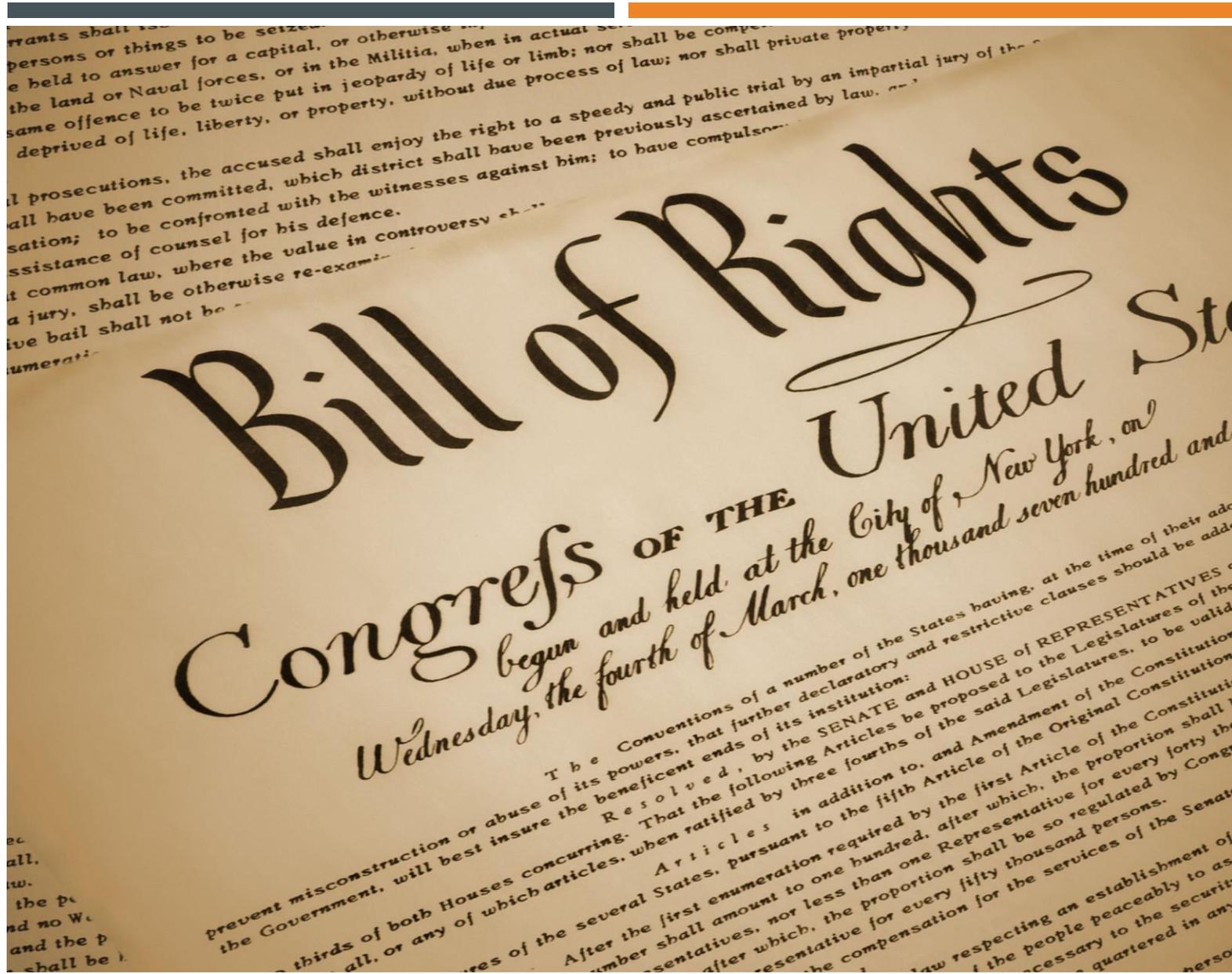
WHAT IS A FIRST AMENDMENT AUDITOR?

First Amendment auditors enter public building or public property and film or photograph public officials to document their encounters.

GOAL = Getting a reaction!

Engaging with an auditor could lead to a lawsuit.





UNDERSTANDING
THE LEGAL
FRAMEWORK



UNDERSTANDING THE LEGAL FRAMEWORK

FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

“Congress shall make no law ...Abridging the freedom of the speech ... Or the right of the people to peaceably assemble.”

“[T]he First Amendment protects the filming of government officials in public spaces.”

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

UNDERSTANDING THE LEGAL FRAMEWORK

WHAT IS A “PUBLIC SPACE”?



Traditional public forum
(e.g., city park, public street)



Designated public forum
(e.g., library meeting space
open to groups)



Limited public forum (e.g.,
town council meeting)



Nonpublic forum (e.g.,
office space not open to
the public, city’s internal
email system)

UNDERSTANDING THE LEGAL FRAMEWORK

FREE SPEECH RIGHTS

Public Areas

- Portions of municipal buildings that are open to the public to conduct municipal business (e.g., lobby counter, area where residents pay taxes)
- Broad rights to free speech and free expression
- Generally permissible to make video or audio recordings of people without their consent
- Government generally may not interfere
- Reasonable time, place, and manner restrictions permitted

Non-Public Areas

- Portions of municipal buildings that are NOT open to the public to conduct municipal business (e.g., bathrooms, records storage areas, tax assessor's individual office)
- Rights more limited
- Government restrictions permitted if reasonable and viewpoint neutral

UNDERSTANDING THE LEGAL FRAMEWORK

42 U.S.C. § 1983

LOCAL GOVERNMENT

- Direct liability only (no vicarious liability)
- Requires unconstitutional policy or custom (*Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978))
- Failure to train can be an unconstitutional policy (*Canton v. Harris*, 489 U.S. 378 (1989))
- No sovereign immunity
- Attorney's fees

INDIVIDUAL

- Qualified immunity defense
- Defendant acted within discretionary authority
- Objective, good faith standard
- Must not violate clearly established law (*Hope v. Pelzer*, 536 U.S. 730 (2003))
- Attorney's fees

UNDERSTANDING THE LEGAL FRAMEWORK

Miner v. City of Pawtucket

- Plaintiff got into altercation with a landscaper, who called police
- Plaintiff's friend video recorded Plaintiff's interaction with police
- Plaintiff ultimately arrested for disorderly conduct
- Filed suit alleging violation of Fourth Amendment rights
- Police Department prevailed at trial

Cote v. City of Warwick

- Plaintiff not recording, but knew City Council meeting was being recorded
- Stopped by president pro tempore and told to "stick to City government issues."
- Plaintiff responded, "You know this is gonna be with the ACLU."
- Brought suit alleging violation of First Amendment rights
- Case pending

BEST PRACTICES
&
PROCEDURES





BEST PRACTICES & PROCEDURES

3 MOST IMPORTANT PRACTICES:

1. Stay calm
2. Know your rights
3. Know the rights of the public



BEST PRACTICES & PROCEDURES

- Pause to compose yourself
- Practice patience
 - Don't be rude or dismissive
- Respectfully disengage
 - You don't have to talk to an auditor!
- Limit the conversation
 - May ask if the individual needs assistance. If not, leave him alone.
- Let the auditor record
 - Caveat – Unless they are acting illegally, interfering with municipal business, or improperly recording in a private place.



BEST PRACTICES & PROCEDURES

Clearly designate non-public areas

- Post signs/other notices stating that non-public areas may only be entered if conducting official business or that these areas are restricted to “employees only”
- If possible, create clear barriers between public and non-public areas (e.g., doors, privacy screens)

Ensure confidential information is not in public view

- Store confidential information in private areas
- Ensure private documents are concealed from public view (e.g., turning computer screen away from public facing counter)

BEST PRACTICES & PROCEDURES

What if an auditor tries to record a private place or disrupts municipal business?

- Advise the auditor that recording is not permissible in that area
- If auditor refuses to comply, call the police
- DO NOT attempt to forcibly remove the auditor
- Document any improper actions



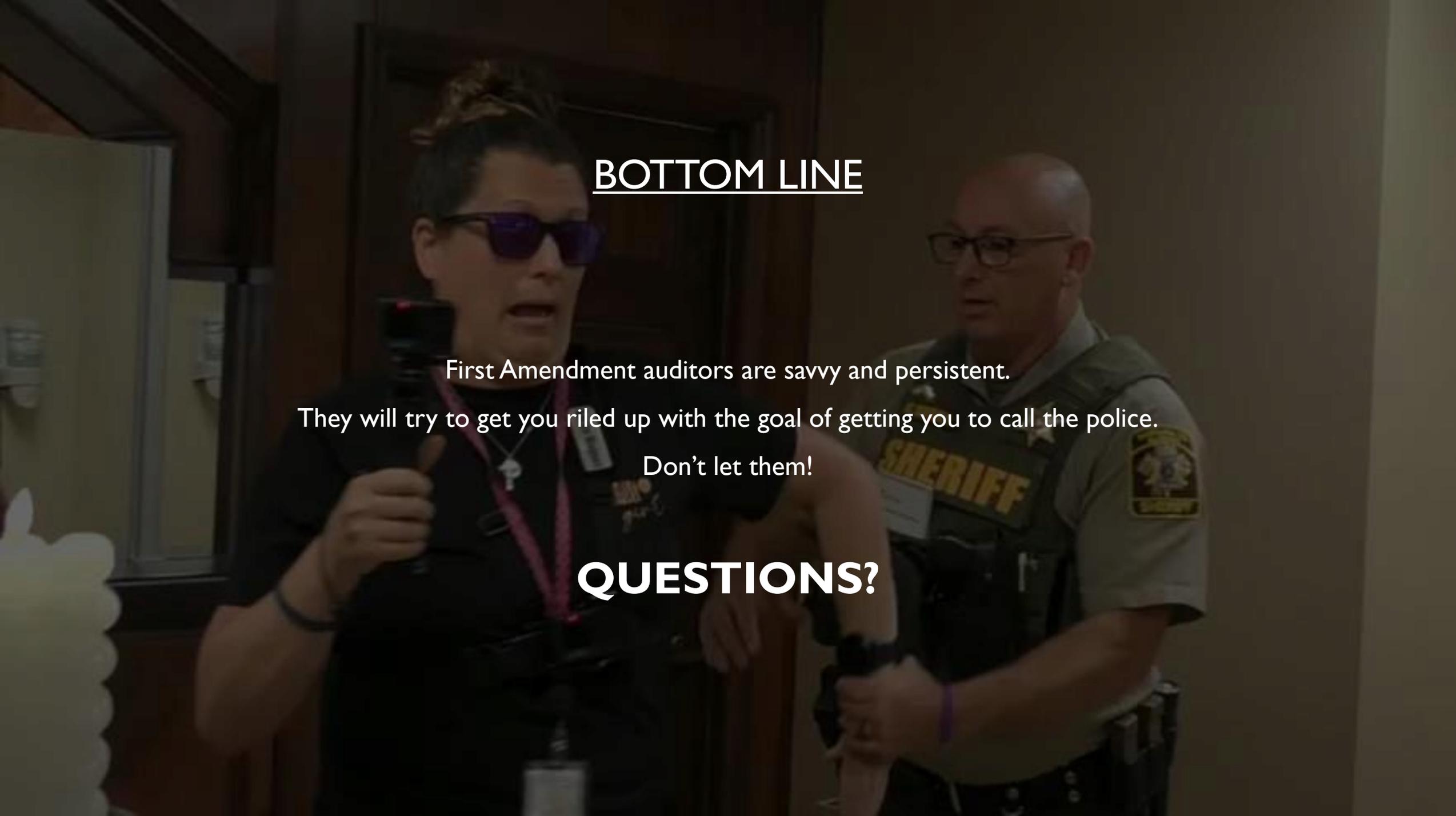
COMMON MISTAKES





COMMON MISTAKES

- Trying to intimidate the auditor
- Touching the auditor or his camera
- Trying to detain the auditor
- Engaging in lengthy conversation
- Antagonizing the auditor
- Losing your cool
- Calling law enforcement if the auditor has not done anything unlawful

A woman with her hair in a bun, wearing sunglasses and a black t-shirt, is holding a microphone and speaking. She has a pink lanyard around her neck. Next to her is a man in a light-colored sheriff's uniform with a "SHERIFF" patch on his chest. He is wearing glasses and looking towards the woman. The background is a hallway with a door.

BOTTOM LINE

First Amendment auditors are savvy and persistent.
They will try to get you riled up with the goal of getting you to call the police.
Don't let them!

QUESTIONS?