**John Tehranian**
**Paul W. Wildman Chair & Professor of Law**
**Southwestern Law School**
**Los Angeles, California**

**File No. 12079**

November 19, 2021

# PRIVILIGED & CONFIDENTIAL

James Wheeler
President
Association of Los Angeles Deputy Sheriffs
2 Cupania Circle
Monterey Park, California 91755

**Re:** ***Proposed Los Angeles County Civilian Oversight Committee Policy to Ban Deputy Subgroups***

Dear Mr. Wheeler:

At the request of the Association of Los Angeles Deputy Sheriffs ("ALADS"), I have prepared this opinion letter to provide a legal analysis of the recently proposed policy by the Los Angeles County Civilian Oversight Committee ("COC") to ban deputy subgroups/cliques (the "Policy"). Specifically, I am examining whether the Policy raises any concerns regarding the constitutional rights of the employees of the Los Angeles County Sheriff's Department "(LASD") who would come within the Policy's purview. Among other things, my analysis considers the rights that said employees enjoy under both the United States Constitution and the California Constitution, including but not limited to free speech, associational, religious exercise and privacy protections secured thereunder.

## I. SHORT ANSWER

Civilian regulation of policing plays a vital role in achieving transparency and accountability in law enforcement, promoting social justice and ensuring that policing efforts serve the public weal. There is every reason to believe that the COC's proposed Policy, which aims to rid LASD of the scourge of certain deputy subgroups that have reportedly engaged in and promoted illegality, violence, intimidation and harassment, is well meaning. But even the best of intentions does not immunize a policy from constitutional scrutiny, particularly when such a policy implicates expressive, associational, religious and privacy rights.

Unfortunately, the proposed Policy directly threatens the fundamental rights of deputies. As such, for several reasons, the Policy does not pass constitutional muster. First, a ban on participation in subgroups implicates the First Amendment since it impacts the ability of deputies to engage in expressive and associational activities as citizens acting outside of the scope of their

official duties. Second, the ban prohibits a wide swath of matters legally recognized as related to issues of 'public concern.' Third, because the Policy is not tailored at all (let alone narrowly tailored) to meet the County's substantial interest in regulating certain kinds of deputy subgroup activity and because it makes no effort at all to balance the significant expressive and associational interests of deputies, the Policy is unlikely to survive constitutional scrutiny. Finally, the Policy also imperils other constitutional rights (for example, the right of free religious exercise and the right to privacy) and statutory protections (for example, the right to union activity). Given the Policy's sweeping reach and the serious risks it poses to the free speech, associational, religious and privacy rights of deputies protected under both the United States and California Constitutions, I have grave concerns about the Policy and do not believe it would withstand constitutional review.

## II. BACKGROUND

### A. Author's Credentials and Experience

I currently hold the Paul W. Wildman Chair as a Professor of Law at Southwestern Law School in Los Angeles, where I have taught since 2011. I previously served as a tenured Professor of Law at the University of Utah, S.J. Quinney College of Law, and as a Visiting Professor of Law at Loyola Law School in Los Angeles. I have taught constitutional law at these institutions for two decades.

A graduate of Harvard University and Yale Law School, my scholarship focuses on the interface between law and culture, with a particular emphasis on issues of free speech and civil rights. I am the author of dozens of articles and two books: WHITEWASHED (New York University Press, 2009), which *Publisher's Weekly* has lauded as a "consistently informative" work that "covers fresh legal and social territory," and INFRINGEMENT NATION (Oxford University Press, 2011), which the *Harvard Law Review* has praised for its "insightful critique" and "convincing case for . . . reform." My scholarship has appeared in such publications as the *Yale Law Journal*, *Harvard Journal of Law & Gender*, *Northwestern University Law Review*, *University of Pennsylvania Journal of Constitutional Law*, *Iowa Law Review, William & Mary Law Review, George Washington Law Review*, *Hastings Law Journal*, *U.C. Davis Law Review*, *University of Colorado Law Review*, *University of Connecticut Law Review*, *BYU Law Review*, *Utah Law Review, Berkeley Technology Law Journal* and the *Chronicle of Higher Education*. My work also been widely cited, including in testimony before Congress, numerous federal, state and foreign court decisions and in briefs before the U.S. Supreme Court in such landmark cases as *MGM v. Grokster*, *Tiffany v. eBay*, *Golan v. Holder* and *Kirtsaeng v. John Wiley & Sons*.

A frequent commentator for the broadcast and print media, I have appeared on such television programs as ABC's *Nightline* and have been quoted as an expert on legal issues in such publications as *The New York Times, Harper's Magazine, Financial Times, Los Angeles Times, Hollywood Reporter* and *Christian Science Monitor.* I have also spoken at numerous national and international conferences and venues, from the National Baseball Hall of Fame and Museum, South by Southwest (SXSW), Fox Entertainment Group and International Creative

Management (ICM) to the Royal Institute of Technology (Stockholm), Humboldt University (Berlin), and Monash University (Melbourne).

As a practicing attorney, I began my career at O'Melveny & Myers LLP and I am a founding partner of One LLP (est. 2002), a thirty-attorney law firm with offices in Beverly Hills and Newport Beach. In my practice, I have litigated numerous high-profit lawsuits, including disputes involving Madonna, Don Henley, B.B. King, Bettie Page, Jimi Hendrix, Winston Churchill and Perez Hilton, among others, and I have been involved in numerous constitutional cases related to free speech, religious establishment, free assembly, due process, discrimination, and privacy issues. *Variety*'s Legal Impact Report has recognized me as one of the world's top 50 entertainment lawyers, *Billboard Magazine* has identified me as one of the top music lawyers in the business, and I have been repeatedly honored as a Southern California *Super Lawyer*. Active in a variety of pro bono legal work, I regularly represent immigrants, civil rights plaintiffs and indigent criminal defendants and I have received the Wiley W. Manuel Award for Pro Bono Legal Services from the Board of Governors of the State of California of my work on behalf of low-income clients.

B. Procedural Posture

On or about August 19, 2021, the County Counsel produced a memorandum (the "CC Memo") to the COC. The CC Memo described a growing wave of deputy subgroup (or so-called 'clique') activity that had, in recent years, undermined the functioning of LADS, promoted illegal activity, violence, intimidation and harassment, frustrated reforms efforts and civilian oversight over law enforcement, and compromised the public's faith in local policing. Recognizing these serious dangers, Sheriff Alex Villanueva promulgated a new policy in February 2020 that expressly prohibited all LASD personnel from participating or joining "in any group of Department employees which promotes conduct that violates the rights of others or members of the public." LADS Manual of Policy and Procedures § 3-01/050.83 ("LASD Policy"). On April 15, 2021, the COC proposed its own policy (the "Policy"), which was far broader in scope and reach than the LASD Policy. Under the COC Policy, LASD personnel would unilaterally be banned from "participat[ing] in, join[ing] or solicit[ing] other Department personnel to join a deputy clique." In short, the Policy would prohibit all deputy subgroups outright, regardless of their nature or purpose.

After proposing the Policy, COC requested a formal legal opinion from the County Counsel as to whether the County of Los Angeles could, in fact, ban all participation in deputy subgroups without violating the rights of impacted employees. Responding to this query, the CC Memo detailed the County Counsel's formal legal opinion and concluded that (a) the proposed Policy was unlikely to implicate any free speech or associational rights; (b) membership in any subgroups was unlikely to involve any matters of public concern; and (c) the County's interest in eliminating the potential harms caused by subgroups would outweigh any First Amendment concerns, even if Department personnel had cognizable free speech or associational rights implicated by the Policy. As such, the CC Memo concluded that the Policy was likely to survive constitutional scrutiny.

The CC Memo did not address whether the Policy would run afoul of: (a) other rights, besides expressive and associational rights, protected under the First Amendment, such as the freedom of religious exercise; (b) other rights secured under the United States and California Constitution outside of the First Amendment; or (c) other statutory rights protected under state and federal law.

## III. LEGAL STANDARD

As detailed in the CC Memo, the Supreme Court's decisions in *Pickering v.Board of Education*, 391 U.S. 563 (1968), *Garcetti v. Ceballos*, 547 U.S. 410 (2006), and their progeny have established a two-part inquiry to determine whether a policy runs afoul of expressive and associational rights enjoyed by public employees (as private citizens) under the First Amendment. However, the actual two-part inquiry is somewhat different than the way it is stated in the CC Memo. First, one must ask whether the employee is speaking "as a citizen on a matter of public concern," *Garcetti*, 547 U.S. at 418 (citing *Pickering*, 391 U.S. at 568). If the answer is yes, then one must ask whether the government has adequate justification to restrict the speech. *Id.* (citing *Pickering*, 391 U.S. at 568). In the second part of the inquiry, the government must show that the restriction on speech meets heightened scrutiny, *i.e.,* that public employees "***only face*** those speech restrictions that are ***necessary*** for their employers to operate efficiently and effectively" *Garcetti*, 547 U.S. at 419 (emphasis added). Thus, heightened constitutional scrutiny on limitations on the rights of public employees to engage in expressive activities related to matters of public concerns is needed "to ensure that citizens are not deprived of fundamental rights by virtue of working for the government." *Connick v. Myers*, 461 U.S. 138, 147 (1983).[1]

## IV. ANALYSIS

### A. A Ban on Participation in Subgroups Absolutely Implicates the First Amendment.

County Counsel's analysis begins by arguing that a ban on deputy participation in subgroups "likely does not implicate the First Amendment." However, this view is not supported by either the relevant jurisprudence or an analysis of the scope of the proposed ban. In fact, the proposed Policy directly impacts the cognizable expressive and associational interests of LASD employees.

[1] The CC Memo effectively adds a third element (which the CC Memo actually calls the first part of the inquiry): determining whether a policy implicates speech outside of "the scope of an employee's duties," CC Memo at 8 (citing *Coomes v. Edmonds Sch. Dist. No 15*, 816 F.3d 1255, 1260 (9th Cir 2016)). For the purposes of consonance and ease of reference, this analysis will track the CC Memo's three-pronged approach. However, it is worth noting that the extant jurisprudence has found that speech that is within the scope of an employee's duties necessarily is not speech being "made as a citizen" and, therefore, fails the first part of the *Pickering* query, since "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communication from employer discipline." *Garcetti*, 547 U.S. at 421.

At the outset, it is worth noting that public entities do indeed possess a right to regulate the speech of their employees under appropriate circumstances. Moreover, ALADS supports appropriate constitutional regulation of employee speech, and did not oppose Sheriff Villanueva's carefully crafted policy that banned membership in subgroups "which promote[] conduct that violates the rights of other employees or members of the public." LASD Manual of Policy and Procedures § 3-01/050.83. But the LASD policy that ALADS supports is carefully circumscribed precisely because the precedent on the *Pickering* standard has made clear that the ability of the government to regulate the speech of its employees is not without bounds. As the Supreme Courts has explained in its holding in *Garcetti v. Ceballos*, 574 U.S. 410 (2006), public employee speech is excluded from First Amendment protection only when it is "made pursuant to the employee's official job responsibilities" *Id.* at 426. With this critical framing of the issue from the leading Supreme Court decision on the matter, the error in County Counsel's analysis becomes clear. The CC Memo has mistakenly presumed that the employee speech being regulated in the proposed Policy necessarily flows from the performance of the employee's professional responsibilities. That is simply not the case.

*Garcetti* firmly rebukes the kind of plenary right to regulate the public-employee speech espoused by the CC Memo. Specifically, in *Garcetti*, the Court took pains to caution against any excessively broad view of what constitutes (unprotected) speech pursuant to one's job duties. As the Court highlighted, it was even possible that "[e]mployees in some cases may receive First Amendment protection for expressions made at work." *Id.* at 420. The Court also added that "[t]he First Amendment protects some expressions related to the speaker's job." *Id.* at 421. These directives from the Supreme Court directly refute the CC Memo's blithe conclusion that, simply "because a ban on subgroups is connected to employees conduct in their capacity as LASD personnel, not as private citizens, it like does not implicate the First Amendment," CC Memo at 7. Indeed, an examination of the very cases cited by County Counsel makes clear that *Garcetti* and its progeny provide a very different view of what constitutes (unprotected) job-related speech than the CC Memo advances.

In the relevant jurisprudence, courts have repeatedly found that speech is unprotected only when it is inextricably a part of the actual performance of one's basic job duties—not, as the CC Memo claims, when that speech is (or theoretically could be) related or even connected to one's work. So, for example, in *Garcetti*, the Supreme Court found a memorandum written by Los Angeles deputy district attorney Richard Ceballos (wherein Ceballos questioned the legitimacy of an affidavit to receive search warrant) did not constitute protected speech since Ceballos was speaking pursuant to his official duties "as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case." *Garcetti*, 547 U.S. at 421. In other words, Ceballos's drafting of the memorandum literally constituted one of duties entailed by his job. By contrast, in *Pickering*, the Supreme Court held that a teacher's letter to a local newspaper about funding policies related to the school board (a matter of public concern) constituted protected speech, even though the speech most certainly related to the teacher's own job. *Pickering,* 391 U.S. at 572 ("Teacher are, as a class, the members a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions.").

A good example of the distinction between protected and unprotected employee speech is found in a leading Ninth Circuit case on the issue, *Dahlia v. Rodriguez*, 735 F.3d 1060 (9th Cir. 2013), where the Court found that a police officer's formal report of misconduct by fellow officers was not subject to First Amendment protection since it pertained directly to the exercise of his professional (and, indeed, legal) duties as an employee but also held that that the same officer's other communications about misconduct that occurred outside of the chain of command, such as when he spoke to Internal Affairs, his union and the LASD, ***did constitute protected speech***. *See id.* at 1077-78. Contrary to the position adopted by County Counsel, this conclusion was not altered in any way by the fact that the latter communications were directly "connected to employees conduct in their [official] capacity," CC Memo at 7. Similarly, *Hagen v. City of Eugene*, 736 F.3d 1251 (9th Cir. 2013) found that a public employee's reports of departmental-safety concerns to a supervisor was not subject to First Amendment protection because the issuance of such reports was not just pursuant to a formal job responsibility, but literally "required" as part of his job duties, *see id*. at 1258. By sharp contrast, the forming of subgroups is most certainly ***not*** a part of a deputy's formal job duties, let alone an actual part of their jobs.

In fact, in its post-*Garcetti* jurisprudence, the Ninth Circuit has announced two specific rules that directly contravene County Counsel's conclusion that the proposed Policy does not implicate the protected speech of deputies. Specifically, the Ninth Circuit has held that: (1) "particularly in a highly hierarchical employment setting such as law enforcement . . . , [w]hen a public employee communicates with individuals or entities outside of his chain of command, it is ***unlikely that he is speaking pursuant to his duties***," *Dahlia*, 735 F.3d at 1074 (emphasis added); and (2) "when a public employee speaks in direct contravention to his supervisor's orders, that speech may often fall outside of the speaker's professional duties." *Id.* at 1075. If subgroups are actually not permitted (or frowned upon) by supervisors (as the proposed Policy itself suggests), they are clearly outside of one's normal job duties. Moreover, these subgroups involve communications outside of the chain of command. As such, under both of the tenets established by the Ninth Circuit in the case law cited by County Counsel, it is clear that deputy subgroup activity would firmly be protected under the First Amendment.

As such, County Counsel's argument—that "because subgroups rise and fall with LASD employment, subgroup participation is likely 'not protected by the First Amendment,'" CC Memo at 8—is both spurious and flies in the face of the existing jurisprudence. Despite County Counsel's statement that the "activities [of subgroups] are intertwined with law enforcement functions," *id.*, that unsupported assertion is wholly incorrect. A subgroup bringing together officers with an interest in prayer, climate change and meteorology, or the #FreeBritney movement would have nothing whatsoever to do with law enforcement functions or the fulfillment of any deputy job duties. As such, such subgroups would receive First Amendment protection.

The Constitution does not tolerate government policies that would prevent public employees from having the ability to partake in "the kind of activity engaged in by citizens who do not work for the government." *Garcetti*, 547 U.S. at 423. Quite simply, "a citizen who works

for the government in nonetheless a citizen." *Id.* at 419. As Justice Fortas once famously wrote in a related context, public employees should not be forced to "shed their constitutional rights to freedom of speech and expression at the [workplace] gate." *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969).

B. Membership in Subgroups Very Much Involves Matters of Public Concern and Any Presumption to the Contrary Is Unsupported.

Of course, the mere implication of protected speech under the Policy does not doom the Policy to constitutional failure. Rather, we must assess whether speech impacted by the Policy relates to "matter[s] of public concern." *Garcetti*, 547 U.S. at 418 (citing *Pickering*, 391 U.S. at 568). The legal meaning of 'public concern' is, by County Counsel's own admission, remarkably capacious. In the context of regulating the speech of public employees, the Ninth Circuit has defined 'public concern' broadly "to include ***almost any matter other than speech that relates to internal power struggles within the workplace***." *Tucker v. State of Cal. Dep't of Educ.*, 97 F.3d 1204, 1210 (1996) (emphasis added). With this binding authority in mind, it is clear that, contrary to County Counsel's conclusion, subgroup activity will often involve matters of public concern.

County Counsel argues that "it is doubtful that subgroup participation touches on a matter of public concern because subgroups are exclusive, workplace organization, not public groups," CC Memo at 2. Such a position, however, ignores the guiding analytical principles in the case law. As County Counsel acknowledges, *see* CC Memo at 7, the necessary query under *Pickering* and its progeny is whether the speech being regulated pertains to a matter of public concern. Whether a group itself is "public" or "private" (whatever that may mean) is wholly irrelevant as to whether the group is involved in or discussing matters of public concern. Whether a group consists of people from the workplace or not is also entirely unrelated to whether group is involved in or discussing matters of public concern.

Indeed, exclusive, workplace organizations that are not open to members of public can, and regularly do, involve themselves in matters that have nothing whatsoever to do with internal power struggles within the workplace. There is no merit to County Counsel's unsupported presumption that subgroups are "inherently job-related," CC Memo at 9, and, even if they were, that is still not the relevant query for the purposes of the 'public concern' test.[2]

[2] As a side note, the CC Memo's narrow construction of what constitutes 'public concern' is also myopic and dangerous. Arguing that any matter that is "inherently job-related" necessarily falls outside of what might constitute a matter of public concern is a position that could come back to haunt the County in other types of litigation. For example, the tort of public disclosure of private facts requires, amongst its elements, that the plaintiff show that the revealed materials were "not of legitimate public concern." Schulman v. Group W Productions, Inc., 18 Cal.4th 200, 214 (Cal. 1998) (citations omitted). Similarly, in defamation, false light and intentional infliction of emotional distress cases, the Supreme Court has extended *New York Times v. Sullivan*'s actual malice requirement for liability to any case involving a matter of public concern, regardless of whether the plaintiff was a public or private figure. *See Rosenbloom v. Metromedia Inc.*, 403 U.S. 29 (1971) (extending *Sullivan*'s actual malice requirement in defamation claims to any matter of public concern); *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (extending *Sullivan*'s actual malice requirement to false light claims); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (extending *Sullivan*'s actual malice requirement to intentional infliction of emotional distress claims). If County Counsel were

There are literally myriad topics and interests upon which subgroups can (and indeed may) be organized that have nothing whatsoever to do with "internal power struggles within the workplace," *Tucker*, 97 F.3d at 1210.[3] A subgroup might be organized by animal welfare-promoting deputies, religious deputies, atheist deputies, Democrat deputies, Libertarian deputies, environmentalist deputies, deputies promoting firearm deputies who love the LA Lakers, Dodgers or the Rams, deputies with a taste for yacht rock, deputies with a taste for hip hop, or deputies who are members of common affinity groups based on gender, sexual orientation or cultural backgrounds. The list of possibilities is endless and all of these illustrative subgroups would involve matters legally recognized as related to issues of 'public concern.' As a result, the CC Memo's dismissive conclusion to the contrary is wholly unwarranted and the Policy most certainly impacts the protected expressive and associational rights of deputies.

C. The County's Interest in Eliminating the Dangers Posed by Certain Subgroups Does Not Outweigh the First Amendment Interests of Deputies, and the County's Goals Can Be More Carefully Addressed in the Sheriff Villanueva's Narrowly Tailored Policy on Subgroups, Which ALADS Supports.

Even if speech is protected, that does not mean that government cannot regulate it under the appropriate circumstances. However, it is an axiomatic principle of constitutional jurisprudence that any government effort to regulate protected speech is presumed to be invalid absent substantial justification for that policy. Thus, the burden lies squarely upon the government to show a policy abridging protected speech and associational rights is sufficiently warranted. *See Rankin v. McPherson*, 483 U.S. 378, 388 (1987) ("The State bears a burden of justifying [any abridgment of public employee speech] on legitimate grounds.")

The relevant precedent on the First Amendment rights of public employees emphasizes these dictates by holding that the government can only restrict speech that is "necessary" for it to achieve its interest in orderly public administration. See *Garcetti*, 547 U.S. at 419 ("So long as [public] employees are speaking as citizens about matters of public concern, ***they must face only*** those speech restrictions that are ***necessary*** for their employers to operate efficiently and effectively.") This means that the government also bears the burden of showing that it cannot achieve its legitimate goals with a policy that is less restrictive. At a minimum, therefore, any policy that limits the protected speech of public employees cannot pass constitutional muster unless it is narrowly tailored and not overbroad.

---

defending allegations of public disclosure of private facts, defamation, false light or intentional infliction of emotional distress in relation to the LASD, it would immediately adopt a broad view of whether issues related to police force constitute matters of public concern (such that the claims would then be subject to the more rigorous actual-malice standard). Thus, taking a rather narrow view of 'public concern' here could significantly compromise the County in future litigation.

[3] There are also many job-related issues that would nevertheless constitute matters of public concern. For example, as *Pickering* itself held, a teacher's speech about funding of his school was protected speech pertaining to a matter of public concern even though the speech also related to the teacher's own job. *Pickering,* 391 U.S. at 572.

It is here that the fatal constitutional flaw in the Policy becomes most clear: it has literally no limitation whatsoever to what kinds of subgroups or speech it pertains. This kind of sweeping, blanket banning of a significant swath of deputy speech-related activity cannot withstand constitutional scrutiny. Indeed, contrary to the very spirit of the *Pickering* standard, the proposed Policy does not even make an attempt to balance the expressive and associational rights of deputies with the County's interests in eliminating the danger posed by certain types of subgroups. Instead, the latter interest is allowed to completely overwhelm and trump the former. This is not how constitutional rights work.

There is no doubt that the government has a significant interest in "the need for orderly [public] administration," *Pickering*, 391 U.S. at 569, and that that interest would certainly support regulating certain kinds of deputy subgroups given the documented history of problems with subgroups that have engaged in and promoted illegality, violence, intimidation and harassment. And, as the CC Memo correctly notes, courts have previously upheld some policies that curtail public employee speech. *See* CC Memo at 10. But none of the cases cited in the CC Memo involved the kind of unilateral, broad ban on a particular kind of activity embraced by the Policy. Instead, to survive constitutionality review, the policies in these cases were carefully circumscribed. So, for example, while an Alabama District Court did uphold the termination of a police officer for membership and participation in a racist organization (despite his claim that the action violated his First Amendment rights), it was not that the Anniston Police Department had a policy broadly barring officers from membership in any outside group, or even any outside activity relating to race. *See Doggrell v. City of Anniston*, 277 F. Supp. 3d 1239 (N.D. Ala. 2017). Rather, the Department had interdicted officers from working on behalf of a group that advocated racist beliefs, promoted division and harassment on the basis of race and undermined the ability of the Police Department to conduct its work as a bias-free servant of the people. *Id*. at 1250-51. Thus, there was a narrowly tailored policy that linked active membership and participation in certain types of organizations (in that case, a white supremacist one) and the undermining of the department's legal obligation and commitment to bias-free policing that enabled the action to survive constitutional review. *Id.* at 1259.

By sharp contrast, the proposed COC Policy engages in literally no tailoring, let alone narrow tailoring. In fact, the proposed Policy does not even comply with the express edict of the Supreme Court that several factors "must [be] consider[ed] . . . in balancing the State's interest in efficient provision of public services against [deputies'] speech interest[s], including: (1) whether the speech at issue impedes the government's ability to perform its duties efficiently, (2) the manner, time and place of the speech, and (3) the context within which the speech was made." *Morales v. Stierheim*, 848 F.2 1145 (11th Cir. 1988), *cert. denied*, 489 U.S. 1013 (1989) (citing *Connick*, 461 U.S. at 151-55). Indeed, the Policy fails on all three of these mandatory considerations as it is not circumscribed in any way to consider and account for the fundamental rights of deputies as private citizens.

First, the Policy fails to directly tie its subgroup ban to speech that would directly impede the government's ability to perform its duties efficiently. In other words, the ban applies with equal vigor to a deputy subgroup dedicated to prayer as it would to a deputy subgroup dedicated to violence and harassment. Second, the Policy lacks any time, place or

manner consideration of the type of speech it impacts. Rather than regulate, it bans all deputy subgroups outright; and the Policy is neither time-limited (*e.g.*, whether said subgroups meet at work or wholly outside of work, during off-duty hours) nor subject-matter limited (*e.g.*, banning only subgroups that promote conduct violating the rights of others or only subgroups pertaining to matters that are not of public concern). Finally, the Policy takes no account of context. For example, it ignores the significant, legally protected interests that deputies might affirmatively possess in organizing certain types of subgroups, such as groups dealing with union issues, the exercise of religious faith or the provision of group trauma therapy. All told, since the proposed Policy unilaterally bans all membership in subgroups, it is wildly overbroad and fails to conduct any necessary balancing of the interests of the government in orderly publication administration with the interests of deputies in the protection of their fundamental constitutional rights.

All, both the Policy's overbreadth and its failure to be narrowly tailored in any way whatsoever ultimately doom the Policy's constitutionality. As the Supreme Court held in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), "Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goal."[4] *Id.* at 799. As such, policies impacting protected speech must be narrowly tailored in order to pass constitutional muster.

For example, the Supreme Court applied the *Pickering* standard in deeming unconstitutional § 501(b) of the Ethics in Government Act, which enacted a complete ban on any members of Congress, officer or employee of the federal government from receiving honoraria. *See United States v. National Treasure Employees Union*, 513 U.S. 454 (1995). The Court pointed to the policy's "sweeping statutory impediment to speech," *id.* at 467, as fatal to its constitutionality since there was no effort to narrowly tailor the government's interest in preventing corruption as, for example, the policy prevented government employees from engaging in such activities as "accepting pay to lecture on the Quaker religion or to write dance reviews," *id.* at 473—activities with no conceivable nexus to concerns about corruption or the federal employees' jobs. As the Court concluded, since the honoraria ban's "blanket burden on the speech of nearly 1.7 million federal employees," *id.* at 475, placed a "crudely crafted burden on [government employees'] freedom to engage in expressive activities" and "was not as carefully tailored as it should have been," § 501(b) "violated the First Amendment," *id.* at 477. Similarly, the Policy proposed by COC is a blanket ban on all types of deputy groups, regardless of their activities, and the Policy makes no attempt to draw a nexus between the banned conduct (participating in, joining or soliciting other to join deputy subgroups) and the County's interest in orderly public administration by preventing coordinated efforts by personnel in trampling the rights of other employees or members of the public.

In another example, a federal district court struck a "Staff Conduct" policy adopted by a public school that restricted the ability of any staff member "to criticize other staff members, the administrators, or members of the Board of Trustees to anyone other than the person being criticized[,] except to the Building Principal, Superintendent, or at a regular meeting of the

[4] The Supreme Court has subsequently held that the concept of narrow tailoring applies to any content-neutral restriction on protected speech. *See* Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105, 120-21 (1991).

Board of Trustees." *Westbrook v. Teton County School District No. 1*, 918 F. Supp. 1475 (D. Wyoming 1996). The court found that policy unconstitutional because, among other things, "Teton County's policy burdens substantially more speech than is necessary to further its legitimate interests . . . By ignoring these less burdensome alternatives to its near blanket ban on 'criticism,' Teton County has failed to tailor narrowly the policy to serve its interests." *Id.* at 1495. The COC Policy suffers from a comparable (if not even more grave) flaw, as it has ignored the possibility of less burdensome alternatives to its total (rather than near total) ban on all deputy groups, regardless of subject matter or purpose.

Moreover, as the Supreme Court has held, a pre-emptive ban (rather than an adverse action taken in response to actual speech) raises particularly salient First Amendment concerns since it comes close to representing a prior restraint that "chills potential speech before it happens. For these reasons, the Government's burden is greater with respect to this statutory restriction on expression than with respect to an isolated disciplinary action." *National Treasury Employees Union*, 513 U.S. at 468.

With all of this said, however, ALADS recognizes the importance in prohibiting problematic clique activity. Indeed, as Sheriff Villanueva has formally determined, such activities can, among other things, "create a negative public perception of the Department, increasing the risk of civil liability to the Department and involved personnel." LADS Manual of Policy and Procedures § 3-01/050.8. But, in order to avoid squelching fundamental freedoms such as expressive and associational rights secured under both the United States and California Constitutions, the Sheriff has implemented a narrowly tailored policy that draws a nexus between the government's interests and the specific terms of the regulation. Thus, instead of imposing a unilateral ban on all subgroups that would necessarily impinge on the protected speech of deputies without a link to the County's legitimate interest in orderly publication administration, the Sheriff's policy applies, appropriately, to groups "which promote[] conduct that violates the rights of other employees or members of the public." *Id.* ALADS believes this policy balances the competing interests of the government with those of the deputies and manages to respect the basic civil liberties of the latter while acknowledging the needs of the former.

D. Besides Failing to Recognize the Serious Threat That the Policy Poses to Expressive and Associational Rights, County Counsel's Analysis Entirely Eschews Any Analysis of Other Constitutional and Statutory Rights Endangered by the Policy.

The County Counsel's constitutional scrutiny of the Policy is not sufficiently rigorous in at least two additional ways regarding concerns raised by the proposed Policy. First, while the County Counsel makes reference to free speech and associational rights, it neglects other rights protected under the First Amendment (such as the free exercise of religion) and constitutional rights outside of the First Amendment, including the right of privacy secured under both the United States and California Constitutions.

For example, if a group of station deputies who practice a common religion form a subgroup for gathering off-duty and outside of the workplace so that they might engage in liturgical studies, worship or prayer, the proposed Policy would subject them to punishment. Said group would necessarily not include all deputies as some deputies will have no interest in such a matter. But, under religious exercise clause, the deputies should have every right to engage in such private acts of prayer. As such, disciplinary action for such a subgroup would plainly violate the First Amendment's Free Exercise Clause, which states that government "shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend. I.

The Policy's blanket limit on the rights of deputies to get together outside of the workplace in subgroups also implicates the penumbral right of privacy that citizens enjoy both under the Due Process Clause of the Fourteenth Amendment, as first recognized by the Supreme Court in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and under California's Constitution, which expressly secures the "inalienable right[] . . . [of] privacy," Cal. Const. art. I, § 1. Notably, the California Supreme Court has recognized the state's constitutional right to privacy is significantly broader than the federal right, *see Committee to Defend Reproductive Rights v. Myers*, 29 Cal.3d 252, 263 (1981), and any interference with it must be justified by demonstrating not just a substantial, but compelling, state interest. *See White v. Wade*, 13 Cal.3d 757, 761, 775-76 (1975). Notably, the right of privacy in California includes "our freedom of communion and our freedom to associate with the people we choose." *Id.* at 774 (quoting election statements on the amendment to the California Constitution that added the right to privacy in 1972). In addition, the California Supreme Court has held that privacy protections are particularly strong for certain types of activities, such as medical treatment or "psychotherapeutic sessions." *See In re Lifschutz*, 2 Cal.3d 415, 431-42 (1970). So, for example, if there is a deputy subgroup formed amongst officers who have suffered from PTSD or other mental-health issues from traumatic experiences, such therapeutic sessions would undoubtedly be protected from County regulation both under privacy rights protecting communion and association and privacy rights protecting medical matters related to mental health.

Second, the CC Memo eschews any analysis of how the proposed Policy might undermine statutory protections secured under state and federal law. For example, if pursuant to the right of labor to organize, a group of station deputies interested in unionization gather off-duty and outside of the workplace to engage in union-related activities, the proposed Policy would subject them to punishment. But such disciplinary action would not only impinge free speech and associations rights; it would also violate extant labor laws such as the Meyers-Milias-Brown Act (MMBA), which secures the rights of public employees to unionize. *See* Cal. Gov. Code §§ 3502 et seq. Thus, besides impinging expressive and associational rights, the proposed Policy also threatens other important constitutional rights and statutory protections, including religious freedoms, the right to privacy and unionization rights.

## V. CONCLUSION

For the foregoing reasons, it is my conclusion that the proposed Policy poses a significant threat to the fundamental rights of deputies. As such, I do not believe the Policy would survive constitutional scrutiny and I would strongly recommend against its adoption and implementation.

If you have any questions or would like clarification on any of the analysis above, please do not hesitate to ask.

Sincerely,

John Tehranian
Paul W. Wildman Chair & Professor of Law
Southwestern Law School