

The First Amendment, Policing, and White Supremacy in America

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In recent years, journalists, researchers and community activists have identified thousands of law enforcement officers holding white supremacist, misogynistic, Islamophobic, homophobic, and other bigoted views. In addition to engaging in hateful activity online, officers have displayed insignia and hand signals for white supremacist groups, performed Heil Hitler salutes, referred to racial justice activists as thugs, and encouraged violence against people of color. Members of law enforcement also joined the January 6, 2021 attack on the Capitol. These reports are noteworthy not just because they sever trust between communities and local law enforcement, but also because they raise questions about freedom of speech, freedom of association, and the role of police. This article provides an in-depth exploration of the issue of white supremacists in law enforcement. Although previous articles have considered issues relating to the First Amendment rights of public employees, this article focuses more specifically on First Amendment jurisprudence as it relates to law enforcement, especially in the age of the internet. In addition to providing an overview of the relevant First Amendment legal framework, this article considers real world examples of officers with white supremacist ideologies or ties, the response to these reports by local municipal leaders, and how First Amendment precedent may apply. Finally, the article considers more systemic responses to white supremacist police and examines state legislative responses to the issue, as well as additional recommendations for local, state, and federal leaders.

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Introduction

In the aftermath of the January 6, 2021 attack on the U.S. Capitol and amid reports that numerous police officers and former military members had participated in the attack, concern about white supremacists infiltrating law enforcement agencies has risen across the country.¹ While the attack on the Capitol brought renewed attention to the issue of white supremacist police, the issue is not new. Indeed, even before the nation's founding, and before official state and local police agencies were created, white supremacy played

1. Olivia Rubin, *Number of Capitol Riot Arrests of Military, Law Enforcement and Government Personnel Rises to 52*, ABC NEWS (Apr. 23, 2021, 3:14 AM), <https://abcnews.go.com/US/number-capitol-riot-arrests-military-law-enforcement-government/story?id=77246717> [<https://perma.cc/T33R-DTZQ>].

a role in policing: slave patrols, which were first created in the 1700s to catch runaway slaves, were the forerunners of our current day police system.²

Current research indicates that thousands of law enforcement officers hold *explicitly* white supremacist, misogynistic, Islamophobic, homophobic, or other bigoted views.³ In addition to engaging in hateful activity online, officers have displayed insignia for groups with white supremacist views,⁴ performed Heil Hitler salutes,⁵ referred to racial justice activists as thugs, encouraged violence against people of color,⁶ and made white supremacist hand signals.⁷ In 2006, in the wake of numerous news stories revealing neo-Nazi and hate group ties to a number of law enforcement agencies, the FBI issued a bulletin warning of the consequences “of white

2. *The Origins of Modern Day Policing, History Explained*, NAACP, <https://naacp.org/find-resources/history-explained/origins-modern-day-policing> [<https://perma.cc/S8PK-8M9K>].

3. Dakin Andone, *This Group Found Thousands of Offensive Facebook Comments by Police. Here's What You Should Know*, CNN (June 20, 2019, 4:40 PM), <https://www.cnn.com/2019/06/20/us/plain-view-project-what-is/index.html> [<https://perma.cc/Z3EJ-5W9X>].

4. Nick Gerda, *OC Sheriff Says Deputy on Leave for Wearing Symbols 'Associated with Extremist Groups'*, VOICE OF OC (Dec. 8, 2020), <https://voiceofoc.org/2020/06/oc-deputy-under-investigation-for-wearing-extremist-symbols-at-protest/> [<https://perma.cc/FZP8-5HY2>]; Travis Gettys, *Chris Pratt's Brother and Other California Deputies Linked to Three Percenter Gun Militia: Report*, RAW STORY (Feb. 5, 2021), <https://www.rawstory.com/three-percenter-2650330955/> [<https://perma.cc/7F3H-VYPL>].

5. Char Adams, *Black Officers Say Washington Sheriff's Department Has a 'Culture of Animosity'*, NBC NEWS (Nov. 11, 2021, 8:53 PM), <https://www.nbcnews.com/news/nbcblk/black-jail-officers-say-sheriffs-department-culture-animosity-rcna5334> [<https://perma.cc/4HHT-WL98>]; Mike Carter, *Kent Assistant Police Chief Disciplined for Posting Nazi Insignia, Joking About Holocaust*, SEATTLE TIMES (Jan. 6, 2022, 9:42 AM), <https://www.seattletimes.com/seattle-news/law-justice/kent-assistant-police-chief-disciplined-for-posting-nazi-insignia-and-joking-about-the-holocaust/> [<https://perma.cc/V8NF-ME4V>].

6. Kolbie Satterfield, *'I Don't Feel Safe in This Town Anymore': Culpeper Co. Sheriff Posts Anti-Black Lives Matter Comments to Department's Facebook Page*, WUSA9 (Sep. 17, 2020, 12:11 AM), <https://www.wusa9.com/article/news/local/virginia/culpeper-county-sheriff-posts-anti-black-lives-matter-comments/65-7122fbe7-844f-401a-b22f-41f31b06cb9e> [<https://perma.cc/7PFD-NXVU>]; TaMaryn Waters, *Tallahassee Police Sergeant Demoted, Disciplined After Black Lives Matter Mural Post*, TALLAHASSEE DEMOCRAT (Aug. 4, 2020, 3:14 PM), <https://www.tallahassee.com/story/news/2020/08/04/tallahassee-police-sergeant-demoted-disciplined-after-black-lives-matter-mural-posts/3290644001/> [<https://perma.cc/UWC4-SG5S>].

7. John Bowden, *Alabama Police Officers Suspended for Making Hand Gesture Linked to White Power*, HILL (July 17, 2018, 4:47 PM), <https://thehill.com/blogs/blog-briefing-room/news/397509-alabama-police-officers-suspended-for-making-hand-gesture/?r=1> [<https://perma.cc/S6HU-RB7B>]; *NC Police Officer Accused of Flashing White Supremacist Sign in Senior Night Photo with Son*, ABC11 (Mar. 14, 2021), <https://abc11.com/nc-officer-white-supremacy-symbols-wadesboro-senior-night-photo/10419239/> [<https://perma.cc/9KXW-GWS3>]; Madeline Mitchell, *Middletown Officer Accused of Making Racist Gesture, NAACP Says Incident Has 'Not Yet Been Resolved'*, CINCINNATI INQUIRER (Feb. 4, 2021, 1:48 PM), <https://www.cincinnati.com/story/news/2021/02/04/middletown-police-investigate-after-officer-accused-making-racist-gesture/4386355001/> [<https://perma.cc/67NQ-C3PY>].

supremacist groups infiltrating local and state law enforcement,” finding that this posed a “significant threat to national security.”⁸ However, despite the FBI’s warnings, this issue remains a serious threat—and with the growing use of social media, researchers have been able to identify many more officers with white supremacist ties and beliefs. In 2019, for instance, the findings of a number of large-scale research projects were made public.⁹ Researchers with the Plain View Project examined police officers’ social media content in three cities and discovered more than five thousand hateful Facebook posts made by more than 3,500 officers.¹⁰ Posts by active police officers encouraged violence against Black people and other people of color: Black men “should be dead,” read one post;¹¹ others encouraged the use of cars to run over protestors,¹² as was done at the Unite the Right rally in Charlottesville, Virginia in 2017.¹³ Other posts referred to Muslims as “savages” and “goat-humpers.”¹⁴

Also in 2019, the Center for Investigative Reporting released findings identifying hundreds of law enforcement officers across the country who were members of racist, Islamophobic, misogynistic or anti-government militia groups on Facebook.¹⁵ Another research project, which was conducted by the nonprofit newsroom ProPublica, released findings in 2019 regarding a Facebook group with about 9,500 members—mainly border patrol officers—who shared derogatory and racist commentaries, including

8. Kenya Downs, *FBI Warned of White Supremacists in Law Enforcement 10 Years Ago. Has Anything Changed?*, PBS: NEWS HOUR (Oct. 21, 2016, 4:10 PM), <https://www.pbs.org/newshour/nation/fbi-white-supremacists-in-law-enforcement> [<https://perma.cc/X7T5-JJ4W>].

9. Andone, *supra* note 3.

10. *Id.*

11. See generally *About the Project*, PLAIN VIEW PROJECT, <https://www.plainviewproject.org/about> [<https://perma.cc/3ZGU-AEXC>] (explaining that in some posts, officers commented that “apprehended suspects—often black men—‘should be dead’”).

12. See generally *Post Data*, PLAIN VIEW PROJECT, <https://www.plainviewproject.org/data/philadelphia-100000282668548-1538?name=robert%20oa#philadelphia-100000282668548-1538> [<https://perma.cc/55PU-7NEV>] (describing a Philadelphia police officer who commented in response to protesters on a highway, “They should be run over!!!!”).

13. See generally *Events Surrounding White Nationalist Rally in Virginia Turn Fatal*, NAT’L. PUB. RADIO (Aug. 12, 2017, 10:04 PM), <https://www.npr.org/sections/thetwo-way/2017/08/12/542982015/home-to-university-of-virginia-prepares-for-violence-at-white-nationalist-rally> [<https://perma.cc/G32W-E9P9>] (explaining that a vehicle ran into a crowd of counter-protesters).

14. PLAIN VIEW PROJECT, *supra* note 11.

15. Will Carless, *Hundreds of Cops Are in Extremist Facebook Groups. Why Haven’t Their Departments Done Anything About It?*, REVEAL (Sept. 30, 2019), <https://revealnews.org/article/hundreds-of-cops-are-in-extremist-facebook-groups-why-havent-their-departments-done-anything-about-it/> [<https://perma.cc/P6B3-ENXQ>].

jokes about the deaths of migrants and statements calling Latina congressional representatives “scum buckets” and “hoes.”¹⁶

These reports are noteworthy, not just because they sever trust between communities and local law enforcement but also because they raise serious questions regarding the role of police and the freedom of speech and association. This article provides an in-depth exploration of the issue of white supremacists in law enforcement with a particular focus on examining First Amendment jurisprudence. Section I provides an overview of relevant case law and delves into what courts have recognized as First Amendment-protected activity by public employees, especially by law enforcement officers. Section II takes a closer look at how these issues have played out in different jurisdictions. It includes two case studies involving officers who made explicitly racist comments, associated with recognized hate groups such as the Proud Boys, or otherwise engaged in hateful activity. It also includes a case involving an officer disciplined for expressing support for racial justice. Section III considers state legislative responses to the issue of white supremacist officers. Finally, Section IV considers policy proposals and advocacy efforts aimed at addressing explicit forms of white supremacy in policing.

I. Legal Frameworks: The First Amendment, Public Employees, and White Supremacy in Policing

This Section offers an overview of relevant First Amendment case law in the context of public employment. Specifically, it examines decisions regarding challenges to disciplinary action taken against public employees—in law enforcement as well as in other public sectors—for speech or other expressive activity. This legal framework is key to understanding the ability of police chiefs, municipalities, and other stakeholders to respond to an officer’s hateful activity.

The Supreme Court’s seminal decision concerning First Amendment rights for public employees is the 1968 case *Pickering v. Board of Education*.¹⁷ *Pickering* created a balancing test for deciding whether a public employee’s speech is protected by the First Amendment.¹⁸ First, the test asks whether the employee’s speech is a “matter of public concern.”¹⁹ If the employee’s speech or conduct relates to a matter of public concern, then it is presumed to have First Amendment protection and courts move to the second

16. A.C. Thompson, *Inside the Secret Border Patrol Facebook Group Where Agents Joke About Migrant Deaths and Post Sexist Memes*, PROPUBLICA: (July 1, 2019, 10:55 AM), <https://www.propublica.org/article/secret-border-patrol-facebook-group-agents-joke-about-migrant-deaths-post-sexist-memes> [<https://perma.cc/NM26-Z4RQ>].

17. 391 U.S. 563 (1968).

18. *Id.* at 568.

19. *Id.*

prong of the test.²⁰ The second prong balances the interests of the employee's First Amendment rights with the government employer's needs as an employer, including its interest in how the public perceives it, external relations, internal working relationships, interference of regular operations, and impediment of the employee's ability to perform their job.²¹ This Section discusses these two prongs and considers how courts have treated conduct taken while off-duty versus conduct taken while on-duty.

A. *Matters of Public Concern*

The *Pickering* Court established that if an employee's speech or conduct relates to a matter of public concern, it should be presumed to have First Amendment protection.²² In *Pickering*, the Court found that a high school science teacher, who had written a letter in a local newspaper criticizing school district officials for their decision to spend money on athletics rather than academics, was speaking on a matter of public concern.²³ However, the Court failed to provide further explanation as to what it meant by matters of "public concern" until more than twelve years later in *Connick v. Myers*,²⁴ a case involving an assistant district attorney who was fired after distributing a questionnaire at work regarding management practices.²⁵ In considering whether the questionnaire related to matters of public concern, the Court defined matters of "public concern" as those relating to any "political, social, or other concern to the community."²⁶ For speech to be considered related to a public concern, it need not touch on "matters of transcendent importance, such as the origins of the universe, the merits of constitutional monarchy . . . [or be] vital to the survival of western civilization."²⁷ Rather, as long as an employee's speech or conduct relates to something out in the public sphere, instead of only the internal affairs of the work environment, it may be

20. *Id.* at 570.

21. *Id.* at 570–72. *See Rankin v. McPherson*, 483 U.S. 378, 388–89 (1987) (explaining that "pertinent considerations [include] whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise. . . . Interference with work, personnel relationships, or the speaker's job performance can detract from the public employer's function; avoiding such interference can be a strong state interest").

22. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968).

23. *Id.* at 572–73.

24. 461 U.S. 138 (1983).

25. *Id.* at 141.

26. *Id.* at 146.

27. *See Dishnow v. Sch. Dist. of Rib Lake*, 77 F.3d 194, 197 (7th Cir. 1996) (discussing the scope of interests that could and could not be matters of "public concern" under the *Connick* decision).

considered a matter of public concern.²⁸ While the Court found that most of the questions in the questionnaire did not relate to matters of public concern,²⁹ it found one question—asking if assistant district attorneys “ever feel pressured to work in political campaigns on behalf of office supported candidates”—a matter of public concern.³⁰ However, when the Court applied the second prong of the test—analyzing the government employer’s interest in “effective and efficient fulfillment of its responsibilities to the public”³¹—it upheld the decision to fire the assistant district attorney.³²

In *Cromer v. Brown*,³³ the Fourth Circuit similarly found the speech at issue implicated a matter of public concern.³⁴ The plaintiff in *Cromer* was a former deputy sheriff and a member of a local Black law enforcement officers’ association. After the association sent a letter to the sheriff about racism within the department,³⁵ the plaintiff was subsequently demoted and then fired for participating in the letter.³⁶ In considering the case, the court held that the letter “prompted an expression of concern about the inability of the sheriff’s office to carry out its vital public mission effectively,”³⁷ and therefore included “matters of serious public import” and “involved a matter of public concern.”³⁸ Due to its importance as a matter of public concern, the court found the plaintiff deserved First Amendment protection for his participation in the letter.³⁹

B. *The Pickering Balancing Test and the Government’s Interests in Disciplining Officers with White Supremacist Ideologies or Ties*

If a court finds that speech implicates a matter of public concern, it will likely presume the speech is protected and advance to the next step of the *Pickering* framework: balancing the interests of the employee’s First Amendment rights with the government employer’s needs as an employer.⁴⁰ In the context of racist or other bigoted speech by officers, departments have

28. *Connick v. Myers*, 461 U.S. 138, 154 (1983); *see also Cromer v. Brown*, 88 F.3d 1315, 1326 (4th Cir. 1996).

29. *Connick*, 461 U.S. at 148.

30. *Id.* at 149.

31. *Id.* at 150.

32. *Id.* at 154. The second prong of the *Pickering* balancing test is discussed in more detail below.

33. 88 F.3d 1315 (4th Cir. 1996).

34. *Id.* at 1326.

35. *Id.* at 1320.

36. *Id.* at 1322.

37. *Id.* at 1325.

38. *Id.* at 1326.

39. *Cromer v. Brown*, 88 F.3d 1315, 1329 (4th Cir. 1996).

40. *Pickering*, 391 U.S. at 568.

argued a range of interests supporting disciplinary action.⁴¹ Many of these interests—which may range from an interest in maintaining the public trust to avoiding logistical complications—are discussed below.

1. *Government Interest in the Public Perception of Police and Avoiding Damage to the Public Trust*

One commonly cited interest is the perception of racist behavior or speech by an officer and the damage done to public trust in law enforcement when that behavior becomes public. For instance, in *Pappas v. Giuliani*,⁴² the Second Circuit upheld the termination of a police officer for anonymously disseminating racially offensive material.⁴³ The court noted that:

The effectiveness of a city's police department depends importantly on the respect and trust of the community and on the perception in the community that it enforces the law fairly, even-handedly, and without bias. If the police department treats a segment of the population of any race, religion, gender, national origin, or sexual preference, etc., with contempt, so that the particular minority comes to regard the police as oppressor rather than protector, respect for law enforcement is eroded and the ability of the police to do its work in that community is impaired. Members of the minority will be less likely to report crimes, to offer testimony as witnesses, and to rely on the police for their protection. When the police make arrests in that community, its members are likely to assume that the arrests are a product of bias, rather than well-founded, protective law enforcement. And the department's ability to recruit and train personnel from that community will be damaged.⁴⁴

Similarly, in *Locurto v. Giuliani*,⁴⁵ the Second Circuit considered the “disruptive effect” of officers’ racist actions.⁴⁶ In *Locurto*, a group of white New York City police officers and firefighters were fired after wearing blackface, Afro wigs, and ratty clothes on a parade float while pretending to break-dance, eating Kentucky fried chicken and watermelon, and shouting “Crackers, we’re moving in.”⁴⁷ Particularly egregious was the fact that one of the firefighters on the float reenacted and mocked the death of James Byrd Jr., a Black man who had been killed just months earlier in Jasper, Texas by

41. See, e.g., *Pappas v. Giuliani*, 290 F.3d 143, 149 (2d. Cir. 2002) (involving public perception of biased behavior when it becomes public); *Locurto v. Giuliani* 447 F.3d 159, 180 (2d. Cir. 2006) (involving a government interest in preventing the disruption caused by racist actions).

42. 290 F.3d 143 (2d. Cir. 2002).

43. *Id.* at 151.

44. *Id.* at 146–47 (citation omitted).

45. 447 F.3d 159 (2d. Cir. 2006).

46. *Id.* at 178–79.

47. *Id.* at 164–65.

three white supremacists who had kidnapped him and dragged him to death.⁴⁸ The Second Circuit found that in terminating the officers and firefighters, the defendants were “motivated by a reasonable concern for the potentially disruptive effects of the plaintiffs’ actions.”⁴⁹ Recognizing that “[e]ffective police and fire service presupposes respect,” for the members of the community they serve, the court noted that the defendants “legitimately took into account” the “reaction[s] to the float” by Black and other minority community members.⁵⁰

The concern about loss of community trust raised in *Pappas* and *Locurto* is echoed in more recent research. The Giffords Law Center has found that communities who lose trust in law enforcement are less likely to productively engage with police, which, in turn, may obstruct the application of justice and make communities less safe.⁵¹ In *In Pursuit of Peace: Building Police-Community Trust to Break the Cycle of Violence*, the Giffords Law Center notes that a lack of trust between police and communities is a major driver of gun violence nationally.⁵² Matthew Desmond, Andrew V. Papachristos, and David S. Kirk similarly found that news of police abuses led to fewer 911 calls and diminished community safety.⁵³ The Department of Justice has also emphasized that community trust in police is critical to public safety.⁵⁴ As courts have noted, even the mere perception of police officers harboring racist or bigoted sentiment jeopardizes the integrity of law enforcement, endangers individual officers and community members alike, and deepens the divide between police officers and communities of color.⁵⁵

48. *Id.* at 165. Sadly, the reenactment of the murder of James Byrd Jr. was not the only time officers have come under fire for reenacting and mocking the death of Black men. In 2020, a corrections officer in New Jersey reenacted and mocked the death of George Floyd and was subsequently disciplined. See Elizabeth Joseph, Lauren del Valle & Susannah Cullinane, *NJ Corrections Officer May Lose His Job over George Floyd Death Re-enactment*, CNN (June 26, 2020, 10:22 AM), <https://www.cnn.com/2020/06/26/us/all-lives-matter-reenactment-njdoc/index.html> [<https://perma.cc/KUZ5-5UWP>].

49. *Locurto v. Giuliani*, 447 F.3d 159, 183 (2d. Cir. 2006).

50. *Id.* at 182–83.

51. See GIFFORDS LAW CTR., *IN PURSUIT OF PEACE: BUILDING POLICE-COMMUNITY TRUST TO BREAK THE CYCLE OF VIOLENCE* (2021); see also U.S. DEP’T OF JUST., *IMPORTANCE OF POLICE-COMMUNITY RELATIONSHIPS AND RESOURCES FOR FURTHER READING* 1–2; Matthew Desmond, Andrew V. Papachristos & David S. Kirk, *Police Violence and Citizen Crime Reporting in the Black Community*, 81 AM. SOC. REV. 857, 870 (2016).

52. GIFFORDS LAW CTR., *supra* note 51.

53. Desmond, Papachristos & Kirk, *supra* note 51, at 870.

54. U.S. DEP’T OF JUST., *supra* note 51, at 1.

55. See, e.g., *Dible v. City of Chandler*, 515 F.3d 918, 929 (9th Cir. 2008) (clarifying that a police officer’s activities do not have to be related to their employment for the public to form a negative opinion which could undermine public trust of the police); *McMullen v. Carson*, 754 F.2d 936, 939 (11th Cir. 1985) (demonstrating a Black community would “categorically distrust” a police department with known KKK members).

2. *Government Interest in Maintaining Safety, Avoiding Racial Violence, and Preserving “Espirit de Corps” Within a Department*

States have a recognized interest in maintaining safety and avoiding racial violence. In *Weicherding v. Riegel*,⁵⁶ the Seventh Circuit upheld the firing of a prison sergeant for associating with and promoting the Ku Klux Klan,⁵⁷ including on a local newscast where he was identified as an employee at a state prison.⁵⁸ The state’s interests in “maintaining safety and avoiding racial violence” outweighed the prison sergeant’s speech and associational interests.⁵⁹ The court noted that a perception of tolerance of white supremacy would reflect on the entire staff, exacerbating racial tensions and mistrust of prison administrators.⁶⁰ The Eleventh Circuit reached similar conclusions in *McMullen v. Carson*,⁶¹ a case involving an employee of a sheriff’s office who was fired after it was revealed that he was a recruiter for the KKK.⁶² As the *McMullen* court wrote,

[T]he very esprit de corps of the employees and officers of the Sheriff’s office was at stake. The record shows that even plaintiff’s fellow record office clerks, with whom he got along well, were glad to see him go once he became known as a Klansman. They knew serious conflict was inevitable considering the number of [Black employees] working in the same records section.⁶³

3. *Government Interest in Avoiding Logistical Complications*

In addition to concerns about public perception and trust, safety, and disruption to the internal dynamics of a department, courts have also noted the time-consuming logistical complications created when a department retains an officer who has engaged in racist speech.⁶⁴ For example, in *Hernandez v. City of Phoenix*,⁶⁵ the court noted a major disruption to a police department’s operations after an off-duty police officer made public social media posts denigrating Muslims.⁶⁶ The department could not efficiently

56. 160 F.3d 1139 (7th Cir. 1998).

57. *Id.* at 1141.

58. *Id.* at 1143.

59. *Id.*

60. *Id.*

61. 754 F.2d 936 (11th Cir. 1985).

62. *Id.* at 939–40.

63. *Id.* at 939 (holding that a sheriff’s office could fire an employee without violating their First Amendment rights in order to prevent a deleterious effect on sheriff’s ability to enforce the law after the employee was interviewed on local television as a recruiter for the Klu Klux Klan).

64. *See, e.g., Hernandez v. City of Phx.*, 432 F. Supp. 3d 1049, 1064 (D. Ariz. 2020).

65. 432 F. Supp. 3d 1049 (D. Ariz. 2020).

66. *Id.* at 1064.

function with its phone lines being flooded and social media accounts shut down, which complicated recruitment efforts.⁶⁷

C. *Off-Duty versus On-Duty Conduct*

The Supreme Court’s decision in *Garcetti v. Ceballos*⁶⁸ in 2006 added a new threshold question to the *Pickering-Connick* analysis to determine if a public employee’s speech is protected: whether the employee made the speech pursuant to their official duties or as a private citizen.⁶⁹ In *Garcetti*, a deputy district attorney wrote a memo “pursuant to his duties as a prosecutor,” in which he criticized the legitimacy of a warrant.⁷⁰ When he was later denied a promotion, the deputy district attorney claimed that the denial was retaliation due to the memo.⁷¹ The Court ruled that “[w]hen public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”⁷² Rather, speech or activity taken pursuant to an employee’s official duties is better “conceptualized as job performance.”⁷³

Post-*Garcetti*, courts typically begin their analysis of public employees’ First Amendment claims “by determining simply whether the contested speech was delivered pursuant to the plaintiff’s official duties.”⁷⁴ If the answer is yes, the “First Amendment challenge fails, regardless of the strength of the public’s interest in the expression or its impact, if any, on the efficiency of the government workplace.”⁷⁵ However, if the answer is no—i.e., if a court determines that the conduct at issue was not taken pursuant to the employee’s official duties—then the court may advance to the *Pickering-Connick* inquiry.⁷⁶

Mary-Rose Papandrea notes that, since *Garcetti*, there has been ample confusion regarding off-duty speech and conduct.⁷⁷ Critics of the decision have pointed out that “[t]he line the decision draws between job performance

67. *Id.*

68. 547 U.S. 410 (2006).

69. *Id.* at 423.

70. *Id.* at 414, 421.

71. *Id.* at 415.

72. *Id.* at 421.

73. Kermit Roosevelt III, *Not as Bad as You Think: Why Garcetti v. Ceballos Makes Sense*, 14 U. PA. J. CONST. L. 631, 635 (2012).

74. Helen Norton, *Constraining Public Employee Speech: Government’s Control of Its Workers’ Speech to Protect Its Own Expression*, 59 DUKE L. J. 1, 13 (2009).

75. *Id.*

76. *Id.*

77. Mary-Rose Papandrea, *The Free Speech Rights of “Off-Duty” Government Employees*, 2010 BYU L. REV. 2117, 2122 (2010).

and non-job-performance speech is unclear.”⁷⁸ However, it is important to note that, in considering the impact of *Garcetti* in the context of law enforcement, many police departments have policies stating that police officers are *always* on-duty for the purposes of their speech and conduct, and courts have traditionally upheld these policies.⁷⁹

II. Case Studies

To better understand the nature of white supremacy and free speech questions in law enforcement and the response by stakeholders, this Section analyzes three case studies. The first case study provides an example of a situation in which both on-duty and off-duty officers engage in hate-filled speech. The second case study discusses off-duty activity by an officer who affiliated with a hate group; it raises questions regarding both freedom of expression and freedom of association. The final case study does not involve white supremacist activity. Instead, it examines a fact pattern in which an officer who is supportive of racial justice is disciplined for violating their department’s social media code of conduct.

Each of these case studies raises questions under the First Amendment and demonstrate the strength and applicability of a department’s code of conduct and other policies, law enforcement’s relationship with the surrounding community, and the appropriate response by authority figures.

A. Case Study 1: Wilmington, NC

1. Background

In 2020, three officers in Wilmington, N.C. were caught on tape engaging in explicitly racist commentary and using the n-word.⁸⁰ During one

78. Roosevelt III, *supra* note 73, at 636 (describing concerns raised by critics of *Garcetti*).

79. See, e.g., *Young v. City of Providence*, 404 F.3d 4, 16 (1st Cir. 2005) (characterizing department policy as requiring officers to be on-duty at all times); *Revene v. Charles Cnty. Comm’rs*, 882 F.2d 870, 873 (4th Cir. 1989) (discussing local ordinance that clarifies that officers are on-duty twenty-four hours a day); *Davis v. Murphy*, 559 F.2d 1098, 1101 (7th Cir. 1977) (holding that two police officers were “always subject to duty” under department regulations and were thus on-duty); *Eubank v. Sayad*, 669 S.W.2d 566, 568 (Mo. Ct. App. 1984) (“In a very real sense a police officer is never truly off-duty.”); *Davenport v. Bd. of Fire & Police Comm’rs*, 278 N.E. 2d 212, 216 (Ill. App. Ct. 1972). Particularly, the *Davenport* court held that:

[T]here is no distinction between “off duty” or “on duty” misconduct by a police officer. . . . By the very nature of his employment a police officer is in the eyes of the public and for the good of the department must exercise sound judgment and realize his responsibilities to the department and the public at all times.

Id.

80. Jason Slotkin, *North Carolina Police Chief Fires Three Officers over Racist Comments Caught on Tape*, NAT’L. PUB. RADIO (June 25, 2020, 5:11 PM), <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/06/25/883358818/wilmington-n-c-police-fires-three-officers-over-racist-comments-caught-on-tape> [<https://perma.cc/8YJ6-X7LH>].

conversation, an officer referred to racial justice protesters as “worshipping blacks,” while his colleague explained that he expected a “civil war” and that he planned to buy an assault rifle.⁸¹ An officer also referred to a Black woman as a “negro,” commenting that she “needed a bullet in her head right then.”⁸² In addition, one of the officers was recorded deriding a Black officer on the force, to which his colleague replied, “Let’s see how his boys take care of him when shit gets tough, see if they don’t put a bullet in his head.”⁸³

The remarks were discovered as part of a routine audit in early June of 2020.⁸⁴ Less than a month later, the police chief, who was new to his position, investigated and fired the three officers.⁸⁵ The police chief recommended that the officers be disqualified for re-employment by the city, notified “state authorities responsible for deciding if an officer can maintain state certification,” and coordinated with the district attorney to review criminal cases the officers had been involved in for possible bias.⁸⁶

2. *Internal Policies*

Like many departments, the Wilmington Police Department (WPD) has internal policies within its Code of Ethics, Mission Statement, and Professional Rules of Conduct, which hold officers to a particularly high standard of conduct, in recognition of the fact that officers are the most visible signs of governmental authority, and their foremost duty is to serve all residents of their jurisdiction.⁸⁷ In the case of the three officers caught on tape, numerous provisions of WPD’s internal policies were implicated. The WPD Code of Ethics states that an officer’s “first duty is to serve the people of Wilmington,” which includes “protect[ing] . . . the weak against oppression or intimidation” and “[a]bove all else . . . [protecting] the constitutional rights of all citizens to liberty, equality and justice.”⁸⁸

81. *Id.*

82. *Id.*

83. Benjamin Schactman, *National Civil-Rights Group Weighs in on Reinstatement of Fired Wilmington Cop*, PORT CITY DAILY (Aug. 11, 2020), <https://portcitydaily.com/local-news/2020/08/11/national-civil-rights-group-weighs-in-on-reinstatement-of-fired-wilmington-cop/> [<https://perma.cc/J7Z7-QKNK>]; WILMINGTON POLICE DEPT., 201A007, PROFESSIONAL STANDARDS INTERNAL INVESTIGATION 1 (2020), <https://www.wilmingtonnc.gov/home/showdocument?id=12012> [<https://perma.cc/7NHB-BMTU>].

84. Slotkin, *supra* note 80.

85. *Id.*

86. *Id.*

87. WILMINGTON POLICE DEPT., OATH OF OFFICE AND CODE OF ETHICS 2 (2016), <https://www.wilmingtonde.gov/home/showdocument?id=9275> [<https://perma.cc/R7A3-8223>]. For example, the WPD Mission Statement requires that “[a]s the most visible sign of government and authority, all personnel will endeavor to represent the Department in a favorable light.” *Id.*

88. *Id.* Furthermore, the Code requires that each officer be “honest in (thought) and deed in both [their] personal and official life” and never “permit personal feelings, prejudices, [or] animosities . . . to influence [their] decisions.” *Id.*

Furthermore, Standard of Conduct 2.25 requires that officers “shall not conduct themselves, on or off duty, in such a manner as to reflect unfavorably on the department.”⁸⁹ Additionally, WPD policies affirm the department’s commitment to unbiased policing and to “[p]reventing [p]erceptions of [b]iased [p]olicing.”⁹⁰ As noted by the police chief in announcing the termination of the three officers caught on tape, the type of language they used (e.g., referring to community members and colleagues in a derogatory manner, discussing an oncoming race war, etc.) violated WPD’s internal policies.⁹¹

3. *First Amendment Implications*

As discussed above, in *Garcetti v. Ceballos* the Court ruled that “when public employees make statements pursuant to their official duties, [they] are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”⁹² So, in the post-*Garcetti* landscape, a threshold question is “whether the employee was acting pursuant to [their] professional duties or merely speaking as a citizen.”⁹³

In the Wilmington incident, two of the officers appear to have been on-duty and in their patrol cars at the time they made their comments.⁹⁴ During a second conversation between one of the original officers and an off-duty third officer, the third officer called his on-duty colleague who unknowingly recorded the conversation.⁹⁵ Under *Garcetti*, the question is whether these conversations occurred in the course of their “official duties.” A court might find that the first two officers’ conversation occurred in the course of their

89. Under the internal investigation summary, WPD Standard of Conduct 2.25 requires that “officers shall, at all times, abide by [their] Code of Ethics” and that officers “shall not conduct themselves, on or off duty, in such a manner as to reflect unfavorably on the department.” See WILMINGTON POLICE DEPT., *supra* note 83, at 3.

90. See WILMINGTON POLICE DEP’T, *Directive 01.03 Prohibition of Biased Based Policing*, POLICY MANUAL 2, <https://powerdms.com/public/WILMINGTON/tree/documents/508227> [<https://perma.cc/L2EX-F4LH>]. The policy “affirms the [WPD’s] commitment to unbiased policing,” which includes diminishing any form of officer bias or prejudice, and particularly that against the protected classifications of race or ethnicity. *Id.* at 1.

91. Slotkin, *supra* note 80.

92. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

93. Paul M. Secunda, *Garcetti’s Impact on the First Amendment Speech Rights of Federal Employees*, 7 FIRST AMEND. L. REV. 117, 125 (2008).

94. According to the internal affairs summary of the department’s investigation into the remarks, one of the conversations occurred when one officer “pulled his vehicle up next to” the other car of a fellow officer. WILMINGTON POLICE DEPT., *supra* note 83, at 1.

95. *Id.* at 1–2.

“official duties” as they were on the clock and in their patrol cars. Under such a finding, it is unlikely their communications would be protected.⁹⁶

The third officer, however, raises a slightly different question, as he was off-duty and, according to him, at home on his own phone at the time he made his comments. Therefore, his situation arguably does not fall under the stricter *Garcetti* guidance and one must consider whether his speech constituted a matter of “public concern” by applying the *Pickering* balancing test. In 2000, in *Goldstein v. Chestnut Ridge Volunteer Fire Co.*,⁹⁷ the Fourth Circuit—where Wilmington is located—noted that the question of what constitutes a matter of “public concern” requires a “subtle, qualitative inquiry” using the “content, form, and context as guideposts in the exercise of common sense” and “asking throughout: would a member of the community be truly concerned with the employee’s speech?”⁹⁸ More recently, in 2017, the Fourth Circuit found that “[s]peech involves a matter of public concern when it involves an issue of social, political, or other interest to a community.”⁹⁹ Specifically, in the context of law enforcement, the Fourth Circuit has recognized police officers’ speech as a matter of “public concern” when the subject of the speech relates to misconduct by government officials because community members have an interest in knowing if a government leader is engaging in fraud or other wrongdoing.¹⁰⁰

So, were the comments made by the Wilmington off-duty officer a matter of public concern? It is difficult to argue that this officer’s comments—describing an arrested woman as a “negro,” “n*gger,” and “crazy bitch,” who “need[s] a bullet in her head” so that the officers could “move the body out of the way keep going”—related to matters that the public would be concerned with, such as alleged misconduct by a local leader.¹⁰¹ Rather, these comments were part of a racist

96. See *Garcetti*, 547 U.S. at 421 (holding that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes”).

97. 218 F.3d 337 (4th Cir. 2000).

98. *Id.* at 352–53.

99. *Id.* at 343 (quoting *Urofsky v. Gilmore*, 216 F.3d 401, 406 (4th Cir. 2000) (en banc)). See also *Kirby v. City of Elizabeth City*, 388 F.3d 440, 446 (4th Cir. 2004) (quoting *Arvinger v. Mayor of Baltimore*, 862 F.2d 75, 79 (4th Cir. 1988)) (explaining that the “public-concern inquiry centers on whether ‘the public or the community is likely to be truly concerned with . . . the particular expression’”); *Jurgensen v. Fairfax Cty.*, 745 F.2d 868, 879 (4th Cir. 1984) (holding that speech is less protected if it relates primarily to matters of “limited public interest” and does not “seek to light actual or potential wrongdoing or breach of public trust”).

100. See, e.g., *Durham v. Jones*, 737 F.3d 291, 300 (4th Cir. 2013) (holding that speech implicated a matter of public concern because the plaintiff sought to bring his superiors’ wrongdoings to the public’s attention through the news media and elected officials); see also *Maciariello v. Sumner*, 973 F.2d 295, 300 (4th Cir. 1992) (“We agree with the district court that an allegation of evidence tampering by a high-ranking police officer is a matter in which the public should be interested.”).

101. WILMINGTON POLICE DEPT., *supra* note 83, at 1–2.

rant that impeded the government's interest in retaining public trust in the city's police.

If a decision maker found that the officer's comments *were*, somehow, a matter of public concern, the next step under *Pickering* would be to balance the employee's speech interests against those of the government employer. Specific factors the Fourth Circuit has considered in implementing the *Pickering* balancing test and making this inquiry include whether a public employee's speech:

- (1) Impaired the maintenance of discipline by supervisors;
- (2) Impaired harmony among coworkers;
- (3) Damaged close personal relationships;
- (4) Impeded the performance of the public employee's duties;
- (5) Interfered with the operation of the institution;
- (6) Undermined the mission of the institution;
- (7) Was communicated to the public or to coworkers in private;
- (8) Conflicted with the responsibilities of the employee within the institution; and
- (9) Abused the authority and public accountability that the employee's role entailed.¹⁰²

Applying these factors to the Wilmington incident, they nearly all weigh against First Amendment protection for the third officer. The officer's comments very likely damaged relationships both within the department and the community, therefore interfering with the department's mission.¹⁰³

102. *Brickey v. Hall*, 828 F.3d 298, 304–06 (4th Cir. 2016) (upholding police chief's decision to fire an officer because the chief could reasonably believe that the officer's speech would undermine efforts to restore credibility to the department, increase public distrust in the department, and harm public trust in the police chief himself). *See also*, *Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 317–18 (4th Cir. 2006) (citing *McVey v. Stacy*, 157 F.3d 271, 278 (1998)) (stating that in evaluating whether speech disrupted an employer's operations, courts weigh if the speech undermined the institution's mission, abused employee's authority and public accountability, conflicted with their responsibilities, was privately communicated to coworkers, and impaired harmony among coworkers).

103. *See, e.g.*, *Pappas v. Giuliani*, 290 F.3d 143, 147 (2d Cir. 2002) (holding that by espousing discriminatory speech, a police officer "promote[s] the view among . . . [the] citizenry that those are the opinions of New York's police officers," "immense[ly]" damages the department's effectiveness in the community, and causes internal disharmony by "promoting resentment, distrust and racial strife between fellow officers").

B. Case Study 2: Fresno, CA

1. Background

In March 2021, an officer in Fresno, California was captured on video marching with Proud Boys at an anti-LGBTQ rally.¹⁰⁴ Journalists and social media users quickly discovered the officer's extensive association with the Proud Boys as well as a history of racist, violent rhetoric.¹⁰⁵ Journalists also noted the officer's attendance at a Proud Boys "Stop the Steal" rally in November 2020, during which he wore the group's signature black and yellow colors and appeared to carry a stolen counter-protestor's flag.¹⁰⁶ Online posts by the officer also caused concern. In a video posted by the officer, he encouraged viewers to get involved in various far-right groups, citing the Proud Boys, the Three Percenters,¹⁰⁷ Patriot Prayer,¹⁰⁸ and his own Sons of '76 as viable options.¹⁰⁹ In a now-deleted 2019 Instagram post, the officer shared a photo of himself wearing a "Punisher" mask and pointing a gun with the caption, "Shit is a lot easier when you can kill people."¹¹⁰ A

104. Rhuaridh Marr, *California Cop Under Investigation After Attending Anti-LGBTQ Proud Boys Rally*, METRO WKLY. (Mar. 19, 2021), <https://www.metroweekly.com/2021/03/california-cop-under-investigation-after-attending-anti-lgbtq-proud-boys-rally/> [<https://perma.cc/EJP7-KCQF>]. The Anti-Defamation League (ADL) describes the Proud Boys as "a right-wing extremist group with a violent agenda" and notes that "[t]hey are primarily misogynistic, Islamophobic, transphobic and anti-immigration" and that "[s]ome members espouse white supremacist and antisemitic ideologies and/or engage with white supremacist groups." *Proud Boys*, ANTI-DEFAMATION LEAGUE (Jan., 23, 2020), <https://www.adl.org/resources/backgrounders/proud-boys-0> [<https://perma.cc/L8KZ-CQLH>].

105. *See id.*

106. *See* Trone Dowd, *Cop Seen Attending Proud Boy Rally Sure Dresses like a Proud Boy*, VICE (Mar. 15, 2021, 11:48 AM) <https://www.vice.com/en/article/wx8mnb/cop-seen-attending-proud-boy-rally-sure-dresses-like-a-proud-boy> [<https://perma.cc/S3AM-UTRQ>]; @Borwin10, TWITTER (Mar. 14, 2021, 2:05 PM), <https://twitter.com/Borwin10/status/1371175704889466882> [<https://perma.cc/CRC9-DGSK>].

107. The Three Percenters are an anti-government extremist movement whose followers have advocated and glorified violence against their perceived enemies, including Black Lives Matter supporters and elected officials. *See Three Percenters*, ANTI-DEFAMATION LEAGUE, (June 26, 2017), <https://www.adl.org/resources/glossary-terms/three-percenters> [<https://perma.cc/L5J5-Y7XA>].

108. Patriot Prayer is a far-right group, often affiliated with Proud Boys, that frequently engages in violence against their political opponents. Hatewatch Staff, *What We Know About Patriot Prayer*, S. POVERTY L. CTR. (Aug. 31, 2020), <https://www.splcenter.org/hatewatch/2020/08/31/what-we-know-about-patriot-prayer> [<https://perma.cc/3SF7-ENHQ>].

109. *Fresno Police Officer Investigated: Hear His Views on BLM, Biden, Guns, Violence*, FRESNO BEE, at 5:39 (Mar. 15, 2021), <https://www.fresnobee.com/news/local/article249939048.html> [<https://perma.cc/9SRF-9UWU>] ("But now more than ever is a time for us to get together. If you are not involved, if you aren't a part of a group, get in a group. I don't care if it's Proud Boys, Three Percenters, Patriot Prayer, Sons of '76, get involved.")

110. Brianna Calix, *Fresno Police Officer Placed on Leave After Seen with Proud Boys at Tower Theatre Protest*, FRESNO BEE (Mar. 15, 2021, 3:24 PM), <https://www.fresnobee.com/news/local/article249939048.html> [<https://perma.cc/9SRF-9UWU>].

letter signed by over four hundred Fresno residents described other concerning social media posts by the officer, including an image of bloody knuckles with the caption “Rough day at work.”¹¹¹ The letter also alleges that he and other officers tried to form a “White Officers Association” within the department.¹¹² The officer’s questionable ties and beliefs were acknowledged by his defense counsel, who shared that his client admitted to previously being a member of the Proud Boys.¹¹³ The officer also admitted that he had reached the “third degree” of the Proud Boys and obtained a leadership level of membership in the group.¹¹⁴

After the officer’s ties and social media posts became public, he was placed on paid administrative leave,¹¹⁵ and was fired a few weeks later.¹¹⁶ The Fresno County district attorney and the public defender committed to investigating all cases involving the officer to determine the impact of his demonstrated biases.¹¹⁷

2. *Internal Policies*

The Fresno Police Department’s Policy Manual imposes discipline when a member’s off-duty conduct “is related to act(s) that may materially affect or arise from the member’s ability to perform official duties or to the

111. See Letter from Arusha Gordon, Assoc. Dir., LAWYERS’ COMM. FOR C.R. UNDER L., to City of Fresno Elected Officials and Fresno Police Chief Balderrama 3 (Apr. 6, 2021) (on file with author) (citing Letter to City of Fresno Elected Officials and Fresno Police Chief Balderrama (Mar. 21, 2021)).

112. *Id.*

113. Calix, *supra* note 110; see also Corin Hoggard, *Courtroom Consequences? Fresno Officer Admits Previous Proud Boys Membership*, ABC30 ACTION NEWS (Mar. 16, 2021), <https://abc30.com/fpd-proud-boys-fresno-officer-police-boy/10423826/> [<https://perma.cc/9UHC-Q8SY>].

114. See *id.*; see also *Backgrounder: Proud Boys*, ANTI-DEFAMATION LEAGUE (Jan. 23, 2020), <https://www.adl.org/resources/backgrounder/proud-boys-0> [<https://perma.cc/7YRQ-K5MH>] (“To attain level one [membership of the Proud Boys], an initiate must publicly state: ‘I am a proud Western chauvinist, I refuse to apologize for creating the modern world.’ To reach level two, the initiate must endure a beating by his comrades while reciting the names of five breakfast cereals. . . . To achieve the third level, an initiate must get a Proud Boys tattoo. . . . Finally, the fourth level . . . is an honorary degree awarded for ‘a material sacrifice or service by a brother.’”).

115. Adrian Thomas, *Fresno Police Officer on Leave After Allegations of ‘Proud Boys’ Ties*, YOUR CENT. VALLEY, (Mar. 14, 2021, 11:43 PM), <https://www.yourcentralvalley.com/news/fresno-police-officer-on-leave-after-allegations-of-proud-boys-ties-2/> [<https://perma.cc/3F8M-9P82>].

116. Alexandra Meeks, *Fresno Police Fires Officer for Alleged Involvement with Proud Boys*, CNN (Apr. 11, 2021, 10:58 PM), <https://edition.cnn.com/2021/04/11/us/proud-boys-fresno-officer-fired/index.html> [<https://perma.cc/9PV8-ARJK>].

117. *Fresno Co. DA Promises Full Investigation into Fresno Officer’s Alleged Proud Boys Affiliation*, ABC30 ACTION NEWS (Mar. 18, 2021), <https://abc30.com/fresno-police-officer-proud-boys-investigation-department-rick-fitzgerald/10428852/> [<https://perma.cc/4V3F-MRYU>]; Corin Hoggard, *‘Huge Credibility Issues’: Fresno Officer’s Alleged Proud Boys Connection Investigated*, ABC30 ACTION NEWS (Mar. 15, 2021), <https://abc30.com/fresno-police-proud-boys/10420542/> [<https://perma.cc/BX8G-YMV4>].

extent that it may be indicative of unfitness for their position.”¹¹⁸ Policies relevant to the matter involving the officer with ties to the Proud Boys include:

- Policy 341.2.5(p): “Criminal, dishonest, infamous or notoriously disgraceful conduct adversely affecting the employee/employer relationship (on or off-duty);”¹¹⁹
- Policy 341.2.5(x): “Substantiated, active, continuing association on a personal, rather than official, basis with a person or persons who engage in or are continuing to engage in serious violations of state or federal laws, where the member has or reasonably should have knowledge of such criminal activities;”¹²⁰
- Policy 341.2.5(s): “Substantiated, active, continuing association with or membership in ‘gang,’ ‘organized crime’ and/or ‘criminal syndicates’ with knowledge thereof;”¹²¹
- Policy 341.2.5(ab): “Any other on-duty or off-duty conduct which any member knows or reasonably should know is unbecoming [of] a member of the Department or which is contrary to good order, efficiency or morale, or which tends to reflect unfavorably upon the Department or its members;”¹²² and
- Law Enforcement Code of Ethics: Each officer affirms that they will “keep [their] private life unsullied as an example to all” and “be exemplary in obeying the laws of the land and the regulations of [their] department.”¹²³

Applying these factors to the type of behavior and associations demonstrated by the Fresno officer, the conduct would likely be found to be “notoriously disgraceful.”¹²⁴ The officer’s association with the Proud Boys, whose members have been charged with numerous federal crimes for attacking the Capitol and which is considered a hate group by the Canadian government and the Southern Poverty Law Center,¹²⁵ is arguably “unbecoming” and risks “reflect[ing] unfavorably upon the Department”

118. FRESNO POLICE DEPT., *Policy 341.1.1*, in POLICY MANUAL 241 (2020), <https://www.fresno.gov/police/wp-content/uploads/sites/5/2020/08/PolicyManualRedacted-Chap-1-to-3.pdf> [<https://perma.cc/ABZ5-LC3U>].

119. *Id.* *Policy 341.2.5*, in POLICY MANUAL at 243.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* *Law Enforcement Code of Ethics*, in POLICY MANUAL at i.

124. FRESNO POLICE DEPT., *Policy 341.2.5*, in POLICY MANUAL, *supra* note 118, at 243.

125. *Proud Boys*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/proud-boys> [<https://perma.cc/2JSX-K6DM>].

under Policy 341.2.5.¹²⁶ A Fresno police officer with ties to the Proud Boys could also be seen as threatening “good order, efficiency,” and “morale.”¹²⁷

3. *First Amendment Implications*

Unlike the first two officers fired in Wilmington for their racist conduct, the conduct at issue in the Fresno case involved off-duty activity, therefore making the First Amendment assessment a question of whether the *Pickering* test is applicable and whether the matter is one of public concern. Unlike the Wilmington incident, however, the Fresno case involved both the employee’s speech and his association with certain groups (i.e., the Proud Boys). When speech and associational rights are intertwined, a public employee’s associational rights may still be subject to the *Pickering* framework.¹²⁸

A comparable case concerning the use of social media by a public employee is *Grutzmacher v. Howard County*.¹²⁹ In *Grutzmacher*, a paramedic for a fire department made a “joke” on Facebook about killing liberals as part of a commentary on gun control.¹³⁰ Plaintiff also complained about his employer department’s social media policies.¹³¹ He was later disciplined and fired.¹³² The Fourth Circuit found that the paramedic’s comments about “liberal gun” control policies and criticisms of the department’s social media policy related to matters of public concern and constituted protected speech.¹³³ However, even though these comments related to matters of public concern, when the Fourth Circuit applied the *Pickering* balancing test the court found that the “[d]epartment’s interest in efficiency and preventing [workplace] disruption outweighed the public interest commentary contained in [the employee’s] Facebook activity.”¹³⁴

In the Fresno incident, several of the former officer’s social media posts, such as the post stating that “Shit is a lot easier when you can kill people” and the post with an image of bloody knuckles captioned, “Rough day at work,”¹³⁵ would likely not constitute matters of public concern. A deft

126. FRESNO POLICE DEPT., *Policy 341.2.5*, in POLICY MANUAL, *supra* note 118, at 243.

127. *Id.*

128. See *Hudson v. Craven*, 403 F.3d 691, 698 (9th Cir. 2005) (“[W]e conclude that *Pickering* should be applied in this hybrid rights case. The speech and associational rights at issue here are so intertwined that we see no reason to distinguish this hybrid circumstance from a case involving only speech rights.”); see also *Melzer v. Bd. of Educ.*, 336 F.3d 185 (2nd Cir. 2003).

129. 851 F.3d 332 (4th Cir. 2017).

130. *Id.* at 338.

131. *Id.* at 338–39.

132. *Id.* at 339–40.

133. *Id.* at 344 (explaining that the public has an interest in receiving information from “informed” public employees’ opinions about the government’s policies that circumscribe public employees’ speech).

134. *Id.* at 348.

135. *Calix*, *supra* note 110.

attorney might have better luck arguing that the officer's attendance and participation in a Proud Boys rally somehow constitutes a matter of public concern, but, even then, the officer would need to overcome the *Pickering* balancing test. The Fresno Police Department had a clear interest in its perception by the public, building public trust and improving community relations, and minimizing logistical complications and the fallout from retaining a cop with Proud Boys ties. As the Fresno police chief stated when explaining the decision to fire the officer, "[p]ublic trust and accountability are paramount in our ability to fairly police this community. The integrity and legitimacy of our police department must be maintained."¹³⁶ Indeed, in Fresno and elsewhere, a police officer's badge is "a symbol of public faith" and "public trust."¹³⁷

The Fresno example is also illustrative of another trend in these cases: officer suits against their former employer in the wake of disciplinary action. Months after he was terminated, the Fresno officer sued the city, city officials, and others, arguing, amongst other theories, that defendants were guilty of libel¹³⁸ and that his First Amendment¹³⁹ and due process rights¹⁴⁰ had been violated. As of this writing, that lawsuit is still pending.

C. *Case Study 3: Disciplinary Action Taken Against Officers Supportive of Racial Justice*

The current discussion would be incomplete without recognizing that the same case law and policies upholding the termination of officers for engaging in white supremacist conduct might be applied to officers supportive of racial justice. Given evidence that officers of color may be disciplined disproportionately to white officers,¹⁴¹ policy makers and others looking to address the issue of white supremacy in law enforcement must proceed with caution.

136. Brianna Calix, *Fresno Police Officer who Was Former Proud Boy Fired. Chief Details Investigation*, FRESNO BEE (Apr. 10, 2021, 8:48 AM), <https://www.fresnobee.com/news/local/article250559869.html> [<https://perma.cc/H4XC-35L3>].

137. See FRESNO POLICE DEPT., *Law Enforcement Code of Ethics*, in POLICY MANUAL, *supra* note 118, at i.

138. Complaint at 19, *Fitzgerald v. City of Fresno*, No. 1:21-CV-01409-AWI-SAB (E.D. Cal. Apr. 22, 2022).

139. *Id.* at 14, 16.

140. *Id.* at 9.

141. Sheryl L. Walter et al., *The Race Discipline Gap: A Cautionary Note on Archival Measures of Behavioral Misconduct*, 166 *ORG. BEHAVIOR & HUM. DECISION PROCESSES* 166, 174 (2021).

Multiple police and corrections officers have already been disciplined or terminated for conduct related to support of racial justice.¹⁴² For instance, days after the murder of George Floyd by police in the spring of 2020, a police officer of Puerto Rican descent working in Springfield, Massachusetts posted a picture to her personal Instagram of her niece at a Black Lives Matter (BLM) protest in a different part of the country.¹⁴³ The image showed the officer's niece protesting and holding a sign that read "Shoot the F--- Back."¹⁴⁴ Another sign in the picture read, "Who do we call when the murderer wears the badge?"¹⁴⁵ The officer posted the picture while off-duty to show "support [for] her niece and the cause."¹⁴⁶

After she realized that her co-workers were offended, the officer took the post down.¹⁴⁷ However, she was notified soon after that she would be written up for a "possible" social media violation.¹⁴⁸ Weeks later, she was fired for violating the department's social media policy, which prohibits "discrediting or disrespecting the department" or leaking information about crimes and requires avoiding "sexual, violent, racial, ethnically derogatory material, comments, pictures, artwork, video[s], or other reference[s]."¹⁴⁹ The officer claimed that she did not violate the policy, and sued the City of Springfield for employment discrimination, arguing that she was "treated unfairly by the police department in comparison with her male, non-minority counterparts" and should be given her job back, plus back pay and compensation for emotional distress.¹⁵⁰

III. Legislative Responses

Increasingly, state legislatures have turned their attention to legislation focused on weeding out members of law enforcement with white supremacist views. However, if not constructed carefully, legislative initiatives aimed at

142. See, e.g., Bryan Pietsch, *Massachusetts Detective Is Fired over Black Lives Matter Post*, N.Y. TIMES (July 5, 2020), <https://www.nytimes.com/2020/07/05/us/Black-lives-matter-detective-fired-Springfield.html> [<https://perma.cc/654C-7AW5>].

143. *Id.*

144. Stephanie Barry, *Springfield Police Detective Florissa Fuentes Fired over Pro-Black Lives Matter Social Media Post*, MASS LIVE (July 1, 2020, 2:08 PM), <https://www.masslive.com/news/2020/07/springfield-police-detective-fired-over-pro-black-lives-matter-social-media-post.html> [<https://perma.cc/HSV2-U7CB>].

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. Stephanie Barry, *Former Springfield Police Detective Florissa Fuentes, Fired over Black Lives Matter Social Media Post, Files Lawsuit Against City*, MASS LIVE (Sept. 28, 2020, 4:09 PM), <https://www.masslive.com/police-fire/2020/09/former-springfield-police-detective-florissa-fuentes-fired-over-black-lives-matter-social-media-post-files-lawsuit-against-city.html> [<https://perma.cc/4RWL-WKKL>].

150. *Id.*

addressing white supremacist law enforcement could face serious legal challenges.

In its 1992 decision *R.A.V. v. City of St. Paul*,¹⁵¹ the Supreme Court held that laws and regulations evincing viewpoint discrimination¹⁵² must withstand the highest form of scrutiny.¹⁵³ *R.A.V.* involved a group of teenagers who were arrested and charged for burning a cross on a Black family's yard under the St. Paul Bias-Motivated Crime Ordinance.¹⁵⁴ That ordinance provided:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.¹⁵⁵

One of the teenagers moved to dismiss the count under the anti-bias ordinance, arguing that the ordinance “was substantially overbroad and impermissibly content based and therefore facially invalid under the First Amendment.”¹⁵⁶ The Supreme Court agreed, finding that the ordinance was facially unconstitutional because it “prohibit[ed] otherwise permitted speech solely on the basis of the subjects the speech addresses.”¹⁵⁷

As the Court explained, the First Amendment “prevents [the] government from prohibiting speech or even expressive conduct because of [the] disapproval of the ideas expressed.”¹⁵⁸ And the government cannot

151. 505 U.S. 377 (1992).

152. Viewpoint discrimination is a heightened form of content discrimination, involving the opinion or view of the speaker. *See id.* (“A State might choose to prohibit only that obscenity which is the most patently offensive *in its prurience—i.e.,* that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive *political* messages.”). Content discrimination, on the other hand, involves the content of the message, not the opinion behind it. *See id.* at 387–88; *see also* *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (“Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.”). For instance, a prohibition on all political rallies that discuss abortion might constitute content discrimination. A prohibition on all political rallies that support abortion would constitute viewpoint discrimination. The Court has held that viewpoint discrimination is a “more blatant” and “egregious form of content discrimination.” *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Content-based discrimination can also run afoul of the First Amendment, unless the government can demonstrate a compelling interest. *See Morse v. Frederick*, 551 U.S. 393, 407 (2007) (explaining that a principal may restrict student speech that promotes illegal drug use because deterring drug use by schoolchildren is an important, compelling interest).

153. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992).

154. *Id.* at 379.

155. *Id.* at 380.

156. *Id.*

157. *Id.* at 381.

158. *Id.* at 382 (citation omitted).

provide protection for a favored group or point of view while refusing to provide the same protection to its opponent.¹⁵⁹ As Justice Scalia wrote, “St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.”¹⁶⁰

As different states consider legislation regarding white supremacists in law enforcement, the *R.A.V.* decision and related cases are important to consider. Proposed legislation ranges in specificity, raising competing concerns. On one hand, overly specific legislation risks running into charges of viewpoint discrimination. On the other hand, legislation lacking specificity might risk being used in an unintended manner.

A good example of fairly specific legislation on this issue came out of the Minnesota legislature in 2021. A proposed law prohibited officers from membership in or support of “white supremacist groups, causes, or ideologies,” which it defined as organizations, associations, and ideologies that:

[P]romote white supremacy and the idea that white people are superior to Black, Indigenous, and people of color (BIPOC), promote religious and racial bigotry, or seek to exacerbate racial and ethnic tensions between BIPOC and non-BIPOC or engage in patently hateful and inflammatory speech, intimidation, and violence against BIPOC as means of promoting white supremacy.¹⁶¹

This proposed language specifically focuses on *white supremacy* rather than broadly referring to “extremism” or “bigotry.” Although this level of specificity gets to the heart of the statute’s goal, the language also arguably risks being struck down based on viewpoint discrimination.¹⁶²

Other states have approached the issue more broadly. In Oregon, H.B. 2936, which was signed into law in January 2022, acknowledges that “[m]embership or participation in hate groups, racial supremacist organizations or militant groups erodes public trust in law enforcement officers and community safety.”¹⁶³ However, the legislation does not define “hate groups,” “racial supremacist organizations,” or “militant groups.” If the leader of a law enforcement agency views BLM as a militant group or hate group, they might move to terminate an officer who demonstrates support or is a member of a local BLM chapter. This lack of specificity could lead to confusion and violations of officers’ First Amendment rights.

159. *R.A.V.*, 505 U.S. at 391.

160. *Id.* at 392.

161. H.F. 593, 92nd Leg., Reg. Sess. (Minn. 2021).

162. The language addressing white supremacist policing was not included in the final version of the bill. See Peter Callaghan (@CallaghanPeter), TWITTER (Apr. 8, 2021, 2:27 PM), <https://twitter.com/callaghanpeter/status/1380240915265118211> [<https://perma.cc/S9XB-HGE4>].

163. H.B. 2936, 81st Leg., Reg. Sess. (Or. 2021).

A 2021 legislative proposal in California perhaps strikes a better balance between the specificity of legislation like that proposed in Minnesota and the broad language of the Oregon legislation. The California Law Enforcement Accountability Reform Act, which was signed into law in September 2022, requires an examination into whether a candidate for a “peace officer position” “has engaged or is engaging in membership in a hate group, participation in any hate group activity or advocacy of public expressions of hate.”¹⁶⁴ The legislation defines “hate groups” as “an organization that supports, advocates for, threatens, or practices genocide or the commission of hate crimes.”¹⁶⁵ This language arguably covers many violent white supremacist groups—especially those, like Patriot Front, that seek the establishment of a white ethnostate under the guise of a “return to the traditions and virtues of [their European] forefathers”¹⁶⁶—while avoiding the issue of viewpoint discrimination by not naming any particular ideologies.

IV. Recommendations

What then can police chiefs, municipal bodies, state legislatures and others do to address white supremacist activity within law enforcement ranks without trampling on First Amendment rights? Despite the deep roots of white supremacy in policing, there have been few comprehensive efforts made to address the issue. This section reviews policy suggestions made by various researchers and academics that may help prevent white supremacists from joining law enforcement in the first place and root out officers with white supremacist ideologies who have already joined the ranks of law enforcement.

A. *Routine Investigations into Law Enforcement Officer’s Potential Ties to White Supremacy*

Investigating officers and their potential ties to white supremacist ideologies must be made a routine part of law enforcement agencies’ operations. These investigations should occur at a number of junctures, including, but not limited to: when an officer is first considered for employment;¹⁶⁷ during frequent surprise audits of an entire department or agency; in the wake of any civil rights violations an officer is alleged to have

164. A.B. 655, 2021-2022 Leg., Reg. Sess. (Ca. 2021).

165. *Id.*

166. *Patriot Front*, ANTI-DEFAMATION LEAGUE (June 23, 2022), <https://www.adl.org/resources/background/patriot-front> [<https://perma.cc/LEW2-EC6D>].

167. See Vida B. Johnson, *KKK in the PD: White Supremacist Police and What to Do About It*, 23 LEWIS & CLARK L. REV. 205, 239 (2019) (“The best way to avoid a white supremacist on the police department is to never hire him or her in the first place. Screening interview questions must be employed.”).

committed; if an officer is alleged to have engaged in race discrimination in the workplace; and if an officer is placed on a prosecutor's *Brady* list. As Professor Vida Johnson of Georgetown Law has suggested, police chiefs and other leadership may also consider conducting tattoo checks for white supremacist symbols.¹⁶⁸ The Brennan Center for Justice recommends requiring the FBI to audit its own existing investigations into white supremacist groups for any ties to law enforcement.¹⁶⁹ The Brennan Center also recommends that the FBI report white supremacist ties in its background checks for law enforcement officers assigned to federal task forces.¹⁷⁰

B. Improving Data and Records Documenting White Supremacist Ties in Law Enforcement

It is an unfortunate reflection that journalists and research groups, such as the Plain View Project, compile the most centralized data on white supremacist ties to law enforcement instead of government agencies. Policy makers should push for state and national databases listing law enforcement officers fired for misconduct related to discriminatory beliefs.

Policy makers must also make efforts to require the preservation of records of discriminatory misconduct and ties to white supremacy ideologies. An investigation by Reveal noted that “departments across the country [] routinely destroy misconduct records.”¹⁷¹ In a 2016 study of the union contracts of some of the largest police departments in the country, Campaign Zero, a group working on policing policies, found that “[m]ore than half [of police union contracts] required departments to purge records that would help identify officers with histories of misconduct.”¹⁷² In destroying these records, these departments destroy the evidence “needed to identify the most problematic officers”—including those with white supremacist ties—and “prevent [] incidents [of misconduct] from happening in the future.”¹⁷³

168. *Id.*; see also Daniel Trotta, *U.S. Army Battling Racists Within Its Own Ranks*, REUTERS (Aug. 12, 2012, 12:02 AM), <https://www.reuters.com/article/us-usa-wisconsin-shooting-army/u-s-army-battling-racists-within-its-own-ranks-idUSBRE87K04Y20120821> [<https://perma.cc/LA84-GZBM>] (explaining that the Army screens its recruits for tattoos that indicate membership in gangs and white supremacist organizations).

169. MICHAEL GERMAN, BRENNAN CTR. FOR JUST., *HIDDEN IN PLAIN SIGHT: RACISM, WHITE SUPREMACY, AND FAR-RIGHT MILITANCY IN LAW ENFORCEMENT* (2020), <https://www.brennancenter.org/our-work/research-reports/hidden-plain-sight-racism-white-supremacy-and-far-right-militancy-law> [<https://perma.cc/G57D-TLDA>].

170. *Id.*

171. Carless, *supra* note 15.

172. *Id.*; see also Andone, *supra* note 3 (documenting the Plain View Project's efforts to uncover officers' offensive public posts and comments).

173. Carless, *supra* note 15.

C. *Trainings, Improved Reporting, and Support for Whistleblowers*

Key to improving the identification and response to officers with white supremacist ties is ensuring that peer officers who do not share white supremacist beliefs are equipped to take action if they learn of a colleague harboring racist or other bigoted views. Trainings should be regularly offered on what an officer should do if they are concerned about a colleague's white supremacist beliefs. These trainings may also help educate police chiefs and other decision makers about the relevant case law regarding the First Amendment implications of employee speech—such as racist rants—that may interfere with the department's ability to further their mission. The Brennan Center notes that establishing a national reporting hotline for officers and others to report racist police is another way to gather information and improve data on concerning officers.¹⁷⁴

D. *Internal Department Policies and Appetite for Enforcement*

As is evident from the case studies in Section II, many departments already have internal policies or codes of conduct that may address an officer's white supremacist behavior or affiliations. Yet, as the third case study above¹⁷⁵ shows, there is also a risk that officers who support racial justice movements inadvertently run afoul of these same policies. Jurisdictions should include language in their policies that recognizes the history of discriminatory policing in our country and the resulting widespread and deeply rooted distrust of police by many communities of color.¹⁷⁶ This

174. GERMAN, *supra* note 169.

175. See discussion *supra* Section II.C.

176. The Pew Research Center has noted, “Only about a third of blacks but roughly three-quarters of whites say police in their communities do an excellent or good job in using the appropriate force on suspects, treating all racial and ethnic minorities equally and holding officers accountable when misconduct occurs.” Rich Morin & Renee Stepler, *The Racial Confidence Gap in Police Performance*, PEW RSCH. CTR. (Sept. 29, 2016), <https://www.pewresearch.org/social-trends/2016/09/29/the-racial-confidence-gap-in-police-performance/> [https://perma.cc/6L2Q-KTX6]. The history of discriminatory policing and the resulting distrust of police is also a fact that former President of the International Association of Chiefs of Police recognized in a powerful address in 2016:

There have been times when law enforcement officers, because of the laws enacted by federal, state, and local governments, have been the face of oppression for far too many of our fellow citizens. In the past, the laws adopted by our society have required police officers to perform many unpalatable tasks, such as ensuring legalized discrimination or even denying the basic rights of citizenship to many of our fellow Americans. While this is no longer the case, this dark side of our shared history has created a multigenerational—almost inherited—mistrust between many communities of color and their law enforcement agencies.

Olivia B. Waxman, *Police Group Apologizes for Law Enforcement's History as 'Face of Oppression.'* *Read the Speech Here*, TIME (Oct. 18, 2016, 2:09 PM), <https://time.com/4535103/historical-mistreatment-police-chiefs-african-americans-speech/> [https://perma.cc/4Y7V-LQJH].

type of language may provide useful context in explaining why community outrage at an officer with white supremacist ties is informed by a long history of racist violence and discriminatory treatment by police, and should be treated differently than, for example, any potential community backlash over an officer who is inadvertently seen as supporting racial justice protestors.¹⁷⁷ Indeed, in *Virginia v. Black*,¹⁷⁸ the Supreme Court relied on our country's history of racist violence to partially uphold a cross-burning statute,¹⁷⁹ noting that cross burning done with the intent to intimidate has a "long and pernicious history as a signal of impending violence."¹⁸⁰ Similarly, departments may note that white supremacist ties to law enforcement have a long and pernicious history, making it a particular concern and differentiating it from other activity by officers.

Having policies on the books is not enough though. Police chiefs and others who are serious about combatting white supremacy should adopt a zero-tolerance policy for hateful activity and act promptly in responding to reports of racist behavior while respecting an officer's due process. The Wilmington case study¹⁸¹ is an example of a police chief doing exactly that. After discovering the racist remarks by his officers, the police chief acted swiftly by investigating and then firing the three officers.¹⁸²

In other cases, however, departments are much slower to respond to reports of white supremacist behavior by officers. For instance, in 2019 the police chief of East Hampton, Connecticut initially refused to take action against one of his officers who had made payments, likely group member dues,¹⁸³ to the head of the Proud Boys.¹⁸⁴ Even though the police chief acknowledged that his officer was a Proud Boys member and had made payments to the group's leadership, the chief found that he had received an "explanatory report" from the officer.¹⁸⁵ According to news reports, the chief then closed the investigation, after having only reviewed the officer's records of stops from the previous few months rather than doing a comprehensive review going back through the officer's entire history with the department.¹⁸⁶

177. See discussion *supra* Section II.C.

178. 538 U.S. 343 (2003).

179. *Id.* at 363.

180. *Id.*

181. See discussion *supra* Section II.A.

182. See discussion *supra* Section II.A.

183. Proud Boys members are encouraged to make dues payments to the organization. See Complaint at 6, *Metro. Afr. Methodist Episcopal Church v. Proud Boys Intl., LLC.*, No. 2021CA000004B (D.C. Super. Ct. filed Jan. 4, 2021).

184. Michael Kunzelman, *Chief: Officer's Proud Boys Membership Didn't Break Policy*, ASSOC. PRESS (Oct. 15, 2019), <https://apnews.com/article/business-race-and-ethnicity-racial-injustice-12ece8cedbf045259dcddeb619141e7> [<https://perma.cc/RKH3-9ND6>].

185. *Id.*

186. *Id.*

As the Associate Press reported, when the chief of police was asked what he knew about the Proud Boys, the chief said he only knew “what [he] searched on the internet.”¹⁸⁷ Eventually, after the Associate Press story broke, the officer voluntarily resigned.¹⁸⁸

E. Role of Prosecutors

District attorneys can also play a role in addressing white supremacist police. Across the country, progressive district attorneys have used *Brady* lists, “do not call lists,” or “exclusion lists” as a way of alerting prosecutors to cops that have a questionable or unreliable history.¹⁸⁹ Indeed, after the Plain View Project revealed that there had been dozens of racist posts on Facebook by St. Louis police officers,¹⁹⁰ the district attorney placed twenty-two of those officers on an exclusion list.¹⁹¹ Other prosecutors who wish to ensure unbiased law enforcement should prioritize similar practices.

F. Research

Finally, additional research is needed. The scope of the problem needs to be better assessed using systematic methods, such as those employed in three municipalities by the Plain View Project, but on a larger scale. The United States Department of Justice might consider establishing a working group to study the links between law enforcement and white supremacists.¹⁹² Law enforcement organizations, such as the International Association of Chiefs of Police, should also provide research support and assist departments struggling with how to approach the issue.

187. *Id.*

188. Michael Kunzelman, *Police Officer Retires After Far-Right Group Ties Revealed*, ASSOC. PRESS (Nov. 1, 2019), <https://apnews.com/article/kevin-wilcox-police-retire-proud-boys-77dd9b8871ff4aaaab63861ee04e1f11> [<https://perma.cc/CBY8-39ZA>].

189. Eli Hager & Justin George, *One Way to Deal with Cops Who Lie? Blacklist Them, Some DAs Say*, MARSHALL PROJECT (Jan. 17, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/01/17/one-way-to-deal-with-cops-who-lie-blacklist-them-some-das-say> [<https://perma.cc/Q9RD-AGZB>]; see also Johnson, *supra* note 167, at 239 (detailing how prosecutors could be required to disclose information regarding racist police).

190. See discussion *supra* Introduction.

191. Sam Clancy, *Circuit Attorney Puts 22 Officers on Exclusion List After Accusations of Racist Facebook Posts*, 5 ON YOUR SIDE (June 18, 2019, 6:20 PM), <https://www.ksdk.com/article/news/local/circuit-attorney-puts-22-officers-on-exclusion-list-after-accusations-of-racist-facebook-posts/63-c3c50127-ab2b-4ba3-a5c3-4c8a8513fd26> [<https://perma.cc/XJK9-Q7HX>].

192. See GERMAN, *supra* note 169 (suggesting that the Department of Justice “immediately establish a working group to examine law enforcement associations with white supremacist and other far-right militant groups to assess the scope and nature of the problem in a report to Congress”).

Conclusion

Police departments and municipalities across the country are beginning to take steps to address officers with white supremacist ties within their ranks. As discussed above, the Wilmington, North Carolina police chief fired three officers after discovering footage of them exchanging racist and disparaging remarks.¹⁹³ A Clark County, Washington sheriff fired a deputy who was photographed wearing Proud Boys clothing and advertising Proud Boys merchandise on social media.¹⁹⁴ Moreover, law enforcement agencies across the country are investigating their ranks after dozens of current and former officers took part in the January 6, 2021 attack on the Capitol.¹⁹⁵

Oftentimes, however, police chiefs and municipal leaders may be hesitant to respond to reports of white supremacist activity by an officer, especially when police unions may support an officer who loosely asserts First Amendment rights. This Article hopes to arm decisionmakers with a more refined understanding of the relevant case law and precedent, while also providing policy recommendations for addressing this issue. Ridding the ranks of law enforcement of those with explicit white supremacist ideologies is a necessary step to rebuilding trust between communities and the police and strengthening a sense of security and safety for all.

193. Slotkin, *supra* note 80.

194. Katie Shepherd, *Clark County Sheriff Deputy Fired After Wearing a Proud Boys Sweatshirt*, WILLAMETTE WK. (July 20, 2018, 11:47 AM), <https://www.wweek.com/news/courts/2018/07/20/clark-county-sheriff-deputy-fired-after-wearing-a-proud-boys-sweatshirt/> [<https://perma.cc/YV8B-4ZTY>].

195. See Martha Bellisle & Jake Bleiberg, *US Police Weigh Officer Discipline After Rally, Capitol Riot*, ASSOC. PRESS (Jan. 24, 2021), <https://apnews.com/article/us-police-capitol-riot-980545361a10ff982676d42b79b84ab> [<https://perma.cc/MA7J-WUZR>]; Bart Jansen, *'A Nightmare Scenario': Extremists in Police Ranks Spark Growing Concern After Capitol Riot*, USA TODAY (Mar. 22, 2021, 4:04 PM), <https://www.usatoday.com/in-depth/news/politics/elections/2021/03/21/police-charged-capitol-riot-reignite-concerns-racism-extremism/4738348001/> [<https://perma.cc/XL44-3PSE>].