LEGAL MEMORANDUM REGARDING THE CONSTITUTIONALITY OF THE COC'S PROPOSED POLICY BANNING DEPUTY CLIQUES

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EXECUTIVE SUMMARY

The undersigned have considered and evaluated the constitutionality of a policy banning deputy cliques recently proposed by the Los Angeles Civilian Oversight Commission ("COC") at its meeting on April 15, 2021. That policy would ban outright so-called "deputy cliques" in the Los Angeles Sheriff's Department ("LASD") by prohibiting Sheriff's deputies, on a going forward basis, from joining, participating in and/or soliciting other deputies to join deputy cliques.

At the outset we note that much has been made of the appropriate terminology to describe these deputy subgroups. Some in the community object to the use of the word "cliques," and prefer that these cliques be referred to as deputy "gangs."[2] There is no question that deputy cliques have and continue to engage in gang-type behavior. Indeed, that is one of their characteristics. But because an enforceable policy must define the prohibited conduct and because going back decades to the Kolts Commission these groups of deputies have been known as "deputy cliques," we use that term, as the COC has in its proposed Policy.

As pointed out in the Preamble to the COC's proposed Policy, deputy cliques are groups of Sheriff's deputies within a particular patrol station, bureau, or unit who self-associate as a subgroup to the exclusion of others in their station or unit. Deputy cliques have existed for decades and have engaged in substantial misconduct and criminal activity. These cliques pose serious problems for the LASD and its relationship with the broader community it serves. As the Sheriff himself stated just last year, the cliques have "had a negative impact on the department's mission and created a negative public perception. This has undermined trust and increased the risk of civil liability."[3] Last year, in fact, the Sheriff adopted his own policy in an effort to address the problems related to deputy cliques. The policy bans membership in groups that "promote[] conduct that violates the rights of other employees or members of the public," and it provides that any employee who engages in "misconduct of any kind, including but not limited to, the use of excessive force or mistreating or harassing others, will be subject to discipline." But the Sheriff's policy does *not* unequivocally ban deputy cliques or make participation in or joining such cliques a basis for the imposition of discipline.[4] As a result, that policy has proven ineffective. Deputy cliques still exist within the LASD, and they hamper the LASD's mission to protect and serve its community. Consequently, the COC determined that a more fulsome ban of

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[2] *See* LOYOLA L. SCH. CTR. FOR JUV. L. & POL'Y, 50 YEARS OF DEPUTY GANGS IN THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT 2-4 (2021) (discussing the lack of agreement "among stakeholders about how to refer to the LASD internal subgroups").

[3]Video, *Sheriff Alex Villanueva Addresses Policy on Deputy Cliques and Subgroups with Department Members*, L.A. CTY. SHERIFF'S DEP'T, https://lasd.org/deputy-clicks-and-subgroups/ [hereinafter Villanueva Remarks] at 0:19–31.

[4]LASD Manual of Policy and Procedures § 3-01/050.83, http://pars.lasd.org/Viewer/Manuals/10008/Content/14944.

deputy cliques—whether or not they probably "promote[] conduct that violates the rights" of others or engage in "misconduct"—is absolutely necessary.

In response to the COC's proposed policy, the Sheriff has raised constitutional concerns as a basis for resisting the COC's proposal. For that reason, the undersigned have considered the constitutionality of the COC's proposed policy by focusing on whether it comports with the U.S. Constitution and particularly speech and associational rights protected by the First Amendment, which has been the main legal objection interposed by the Association of Los Angeles Deputy Sheriffs ("ALADS"), the deputies union, and the only substantive reason given by the Sheriff for not adopting the COC's proposed policy.

Our conclusion is that the COC's proposed policy will almost certainly withstand this constitutional challenge. Binding precedent confers on law enforcement agencies like the LASD broad authority to regulate the First Amendment rights of their employees. In light of these precedents and the well-established legal tests for which they stand, the COC's proposed policy is constitutional for four reasons:

- *First*, the First Amendment allows a public employer like the LASD to limit public employee speech or association made pursuant to an employee's official duties. The COC's proposed policy would do just that, banning deputies' on-the-job membership in cliques that often operate in the context of deputies performing their official duties.

- *Second*, even if the policy were deemed to regulate expression outside the scope of the deputies' job responsibilities, the policy does not affect LASD employees' abilities to speak on matters of public concern. Rather, the policy addresses only how deputies will speak and interact with other deputies in their stations or units, and it allows for numerous other channels for expression.

- *Third*, law enforcement agencies receive a wide degree of deference in regulating employee expression if the burdens a policy imposes on employees help fulfill the department's public responsibilities. In our view, the limited burdens imposed on deputies by the proposed clique ban are considerably outweighed by the government interests the policy advances, including remedying the decades-long serious harms and damage to public trust the cliques have caused and continue to cause.

- *Fourth*, the proposed policy is neither unconstitutionally overbroad nor vague, as it articulates clear standards giving deputies notice of what conduct is prohibited.

Although we respect the Sheriff's consideration of the First Amendment rights of his employees, his objections to the COC's proposal are not well grounded in constitutional doctrine or any relevant precedent. First Amendment rights are vital and should be protected and should not be restricted on a whim. But the COC's carefully considered and historically grounded policy proposal fits within the contours of the highly deferential precedent analyzing restrictions on the First Amendment rights of public employees—especially law enforcement. Given the clearly established precedent that will apply to the COC's proposed policy, constitutional concerns cannot and do not justify the LASD's refusal to adopt the COC's proposal. The complete ban of deputy cliques is a necessary step to eradicate the culture of violence, racism, and distrust these

subgroups perpetuate. Thus, the complete ban proposed by the COC comports with the United States Constitution.[5]

BACKGROUND

The LASD is facing an institutional crisis in the form of "deputy cliques."[6] These deputy cliques truly constitute a cancer with the LASD. These cliques, gang-like groups that have plagued the LASD for decades, are groups of Sheriff's deputies within a particular patrol station or unit who self-associate as a subgroup to the exclusion of others in that station or unit. The cliques often engage in criminal activity.[7] And like criminal gangs, many cliques sport matching tattoos and participate in violent rituals.[8] While a code of silence makes it difficult to conclusively prove the scope of deputies' memberships in cliques, mounting allegations in numerous lawsuits, investigations, and public reporting make it abundantly clear that the cliques exist and have long fostered a dangerous subculture of corruption, racism, insubordination, and violence within the LASD.[9] Moreover, the deputy cliques have eroded the relationship of trust between community members and the deputies who are meant to serve them; trust that is essential for the LASD to perform its mission.[10]

Over the past 50 years, at least 18 secret subgroups have operated within the LASD.[11] To cite just one early example, in 1998, the LASD publicly acknowledged the existence of deputy cliques when eight members of a clique known as "the Posse" decided to express their resistance to reforms for mentally ill inmates by severely beating a mentally ill prisoner until he was left

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[5] Our analysis and opinions are based on facts set forth in the Preamble to the COC's proposed Policy and many public reports going back decades, to include, among others, the reports of the Kolts Commission and more recently the factual findings of the Citizens Commission on Jail Violence. *See, e.g.*, Civilian Oversight Commission's Proposed Policy Prohibiting Deputy Cliques Preamble to Proposed Policy, *available a*t https://coc.lacounty.gov/Our-Work/Secret-Deputy-Subgroups (last visited May 9, 2021) [hereinafter "Preamble"]; Report of the Citizens' Commission on Jail Violence (Sept. 2012). We also cite to other publicly available source material.

[6] *See Los Angeles Sheriff's deputies say gangs targeting "young Latinos" operate within department*, CBS NEWS (Feb. 25, 2021), https://www.cbsnews.com.

[7] *See* P.R. Lockhart, *A new lawsuit describes a violent gang in LA County. Its members are deputy sheriffs*, VOX (Oct. 11, 2019), https://www.vox.com.

[8] *Id.*

[9] *See id.*; *see also* Report of the Citizens Commission on Jail Violence, at 101–04 (Sept. 2012) (finding that, in addition to contributing "aggressive behavior" and "excessive force," deputy cliques have been "resistant to supervision"); Alene Tchekmedyian, *Deputies accused of being in secret societies cost L.A. County taxpayers $55 million, records show*, L.A. TIMES (Aug. 4, 2020), https://www.latimes.com..

[10] *See* Villanueva Remarks at 0:19–31, 3:37–4:03; *see also Mission Statement*, L.A. CTY. SHERIFF'S DEPT., https://lasd.org/mission-statement/ ("The Mission of the Los Angeles County Sheriff's Department is to partner with the community. To proactively Prevent Crime, enforce the law fairly and enhance the public's trust through transparency and accountability.").

[11] *See* Frank Stoltze, *Gangs? Cliques? Subgroups? Call Them What You Will—There've Been 18 (Yes, 18) in the LA Sheriff's Department*, LAIST (Jan. 20, 2021), https://laist.com.

with flashlight marks on his back and boot prints on his side.[12] Today, at least seven deputy cliques remain active, including the Banditos, Executioners, Cowboys, Grim Reapers, Rattlesnakes, Regulators, and Spartans.[13] The deputy cliques tend to dominate the LASD stations they occupy. The Banditos, based in the East LA Station, for example, refer to themselves as "shot callers," a term often used to describe gang leaders.[14] Some cliques associate with particular racial or ethnic groups; the Banditos consist primarily of Latino deputies, and black deputies and women are not permitted to join. The Executioners, based in the Compton Station, also exclude based on race and gender.[15] In addition to excluding many deputies based on race, ethnicity, and/or gender, the cliques share other commonalities. They operate in secrecy. They maintain a code of silence. They are not open to all deputies in the particular station or unit. And they often encourage violence against inmates, community members, and even fellow deputies.

Deputy cliques also often have matching tattoos that glorify the use of force. A top LA County Jail official observed that deputies in certain cliques "'earn their ink' by breaking inmates' bones."[16] To become "inked" as a member of the Executioners, deputies may be expected to kill someone or encouraged to commit violent acts against civilians.[17] Further, one deputy reported that members of the Executioners hold parties at bars after a shooting, calling it a "998 briefing" (referring to the code for a deputy-involved shooting), and after the party, the deputies involved are often inked with the signature Executioner tattoo: a skeleton with a rifle and military helmet surrounded by flames.[18] Similarly, the Banditos reportedly commemorate shootings and the initiation of new members with "inking parties" in which members receive a tattoo of a skeleton with a sombrero, bandoleer, and pistol.[19] And as for the clique known as the "Two Thousand Boys," based at Men's Central Jail, members earned their tattoos by beating inmates and concealing the abuse with false reports.[20] A few images are included below for reference.

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[12] *Id*.

[13] *Id*.

[14] *Id*.

[15] *See* Alene Tchekmedyian, *Compton Executioners sheriff gang lied about guns and hosted inking parties, deputy says*, L.A. TIMES (Aug. 20, 2020), https://www.latimes.com; Alene Tchekmedyian, *Prosecutors decline to charge deputies in alleged East L.A. Station hazing linked to Banditos*, L.A. TIMES (Feb. 21, 2020),.

[16] Tchekmedyian, *supra* note 7.

[17] *See* Alene Tchekmedyian & Maya Lau, *Deputy says gang of fellow lawmen thrives*, L.A. TIMES (July 31, 2020), https://www.latimes.com/.

[18] Tchekmedyian, *Compton Executioners*, *supra* note 13.

[19] Tchekmedyian, *Prosecutors decline to charge deputies*, *supra* note 13.

[20] *See* Report of the Citizens Commission on Jail Violence, at 102 (Sept. 2012); Stoltze, *supra* note 9.

The Jump Out Boys' tattoo (far left, above) is particularly evocative. It consists of a skeleton holding a revolver, but the deputies belonging to this clique apparently add a "special detail" to their tattoos each time they are involved in a shooting—new wisps of smoke emerging from the revolver.[21] The Jump Out Boys were subject to scrutiny following the discovery of the clique's "manifesto" in a patrol car in 2012.[22] The "creed" of the Jump Out Boys "hailed their members as a brotherhood of Los Angeles County sheriff's deputies who were foremost loyal to one another" and who knew "'when the line needs to be crossed and crossed back.'"[23] In 2013, seven members of the clique were terminated, as the LASD concluded that the Jump Out Boys exhibited "elements similar to those used to establish membership in a criminal gang," including signature tattoos "suggest[ing] street justice," initiation rites, and maintenance of a secret black book of shootings.[24]

The Banditos have come under particular scrutiny in the media in the past few years. At least one female deputy has reported that members of the Banditos assaulted and harassed her after she refused to comply with their demand for sex.[25] In September 2018, four deputies were beaten by members of the Banditos at an off-duty party that resulted in one deputy knocked unconscious and others hospitalized.[26] Although the LASD performed an internal investigation, more than 20 witnesses declined to give interviews.[27]

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[21] Waylon Cunningham, *These 'rogue' deputies were fired. So how did the Jump Out Boys win back their badges?*, L.A. TIMES (Jan. 1, 2021), https://latimes.com. Of note, the terminations of most of the Jump Out Boys were overturned by the LA County Civil Service Commission because there was no policy barring membership and participation in deputy cliques.

[22] *Id*.

[23] *Id*. (quoting the manifesto).

[24] *Id*. Four of the seven of these deputies were re-instated. *See id.* Such reinstatement is not uncommon. *See, e.g.*, Maya Lau, *L.A. County Sheriff Alex Villanueva reinstates a second deputy fired for misconduct*, L.A. TIMES (Apr. 3. 2018), https://www.latimes.com.

[25] *See* Tchekmedyian, *Prosecutors decline to charge deputies*, *supra* note 13.

[26] *See* Alene Tchekmedyian, *Sheriff's deputies sue county, accusing Bandito's colleagues of beatings, withholding backup*, L.A. TIMES (Sept. 19, 2019), https://www.latimes.com -county-lawsuit; Tchekmedyian, *Prosecutors decline to charge deputies*, *supra* note 13.

[27] *Id*.

A year later, in September 2019, eight Sheriff's deputies filed a lawsuit against Los Angeles County, claiming civil rights violations and workplace harassment, among other claims.[28] The plaintiffs alleged that the Sheriff's Department has a "well documented history of being permeated by a culture of corruption and racism," and that they were regularly harassed and threatened by the Banditos, received hostile messages, were repeatedly denied backup on dangerous calls, and were forced to pay so-called "taxes," *i.e.*, demands from the Banditos for envelopes of cash (sometimes up to $2,000).[29] Recently, in March 2021, 47 Sheriff's officials were added as named defendants in the suit.[30]

Another lawsuit against the County that has received significant public attention is the excessive-force action brought by Sheldon Lockett. Lockett alleges that during his false arrest in 2016, two Compton deputies who were "chasing ink," or vying to become members of the Executioners, punched and kicked him in the head multiple times, called him the N-word, and rammed a police baton in his eye, causing permanent damage, even though Lockett did not possess a gun.[31] At a hearing for Lockett's case, U.S. Magistrate Judge Patrick J. Walsh (ret.) of the U.S. District Court for the Central District of California acknowledged that there was "evidence that the clique [the Executioners] existed in Compton and that it routinely violated the rights of suspects," and that "the command staff at the station knew about it and not only did not stop it but it encouraged the behavior and placed its members in positions of authority."[32] Months after Lockett's false arrest in 2016, certain deputies with alleged ties to a clique shot at and killed 31-year-old Donta Taylor during a foot chase, claiming that Taylor had a handgun, even though no weapon was found.[33] The County settled with Taylor's family for $7 million.[34]

These claims represent just a few examples among a myriad of grievances related to deputy cliques. Los Angeles County has paid at least $55 million in settlements and payouts due to lawsuits involving deputies associated with cliques.[35] In the last ten years alone, the County has paid out nearly $21 million.[36] And the actual costs are likely much higher given that the Sheriff's Department does not always investigate whether any given deputy involved in a shooting is associated with a deputy gang.[37] The largest payout—$10.1 million—was made to Francisco Carrillo Jr., who was incarcerated for 20 years before his murder conviction was

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28 *See More LA Sheriff's Officials Accused of Misconduct in 'Banditos' Deputy Gang Lawsuit*, LAIST (Mar. 23, 2021), https://laist.com.

29 *See* Tchekmedyian, *Sheriff's deputies sue county, supra* note 24.

30 *Id*.

31 Tchekmedyian, *Compton Executioners*, *supra* note 13.

32 *Id*.

33 *Id*.

34 *Id*.

35 Tchekmedyian, *supra* note 7.

36 *Id*.

37 *See* LOYOLA L. SCH. CTR. FOR JUV. L. & POL'Y, 50 YEARS OF DEPUTY GANGS IN THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT 32–33 & n.142 (2021).

overturned.[38] In a civil suit, Carrillo claimed that certain deputies and members of the deputy clique, the Vikings, improperly influenced witnesses to select his photograph from a lineup when he was arrested at age 16.[39] The Vikings have been recognized as a neo-Nazi, white supremacist gang.[40] Over the years, deputy cliques have sparked internal inquiries, probes by the Inspector General, and investigations by the United States Commission on Civil Rights, the FBI, and commissions, such as the Citizens' Commission on Jail Violence. Still, these gang-like cliques remain entrenched in the LASD and an detrimental part of its culture.

In February 2020, the current Sheriff, recognizing the problem, adopted a new policy designed to limit the damage of deputy cliques. That policy provides that LASD "personnel shall not participate or join in any group of Department employees *which promotes conduct that violates the rights of other employees or members of the public.*"[41] It provides for the imposition of discipline on employees who "engag[e] in misconduct of any kind, including but not limited to, the use of excessive force or mistreating and harassing others."[42] The policy explained that the deputy cliques "undermine the Department's goals and can create a negative public perception of the Department, increasing the risk of civil liability to the Department and involved personnel."[43] But the policy does *not* specifically prohibit deputies from joining or participating in deputy cliques, nor does it make participation in or joining deputy cliques a basis for the imposition of discipline. The policy has existed for over a year. Based on information provided to the COC, it appears that no deputies have been disciplined for joining or participating in deputy cliques, nor have any cliques been disbanded.[44]

In the face of the LASD's continuing problem with deputy cliques, the COC adopted a proposed Policy at its April 15, 2021 meeting banning participation in deputy cliques.[45] The COC's proposed Policy provides:

> Department personnel shall not participate in, join or solicit other Department personnel to join a deputy clique. A deputy clique is a group of Sheriff's deputies, assigned to a particular LASD station, unit or bureau, who self-associate, self-identify and exclude other deputies assigned to the same station or unit, and thus are a subgroup within a particular station or unit. Deputy cliques identify themselves by name, *e.g.*, the Banditos, the Executioners, the Regulators, the Grim Reapers, the Rattlesnakes, the Cowboys, etc., and often their members have

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[38] *Id*.

[39] *Id*.

[40] *See* Stoltze, *supra* note 9.

[41] LASD Manual of Policy and Procedures § 3-01/050.83, http://pars.lasd.org/Viewer/Manuals/10008/Content/14944 (emphasis added).

[42] *Id*.

[43] *Id.*

[44] *See More LA Sheriff's Officials Accused of Misconduct in 'Banditos' Deputy Gang Lawsuit*, LAIST (Mar. 23, 2021), https://laist.com. .

[45] *See* Preamble, *supra* fn. 5.

common or matching tattoos or use hand signals, and/or engage in other rituals and behaviors similar to street gangs.

Any Department employee who participates in or joins a deputy clique, or solicits another employee to join a deputy clique, will be subject to discipline.[46]

Specifically, deputy cliques include but are not limited to the Banditos, the Executioners, the Regulators, the Grim Reapers, the Rattlesnakes, and the Cowboys.

This policy supersedes and replaces 3-01/050.83 of 2/14/2020

As is evident, the proposed Policy forbids LASD employees from "participat[ing] in, join[ing] or solicit[ing] other Department personnel to join a deputy clique" and states that employees who do so will be subject to discipline. The proposed policy defines a deputy clique as a "group of Sheriff's deputies, assigned to a particular LASD patrol station or unit, who self-associate, self-identify and exclude other deputies assigned to the same station or unit, and thus are a subgroup within a particular station or unit." The policy lists a number of attributes common to deputy cliques, noting that these groups "identify themselves by name" and often have common or matching tattoos, use hand signals, or engage in other "rituals and behaviors similar to street gangs." In addition to these descriptions, the policy specifically prohibits participation in a number of deputy cliques by name that are believed to be active currently: the Banditos, the Executioners, the Regulators, the Grim Reapers, the Rattlesnakes, and the Cowboys.

In the Preamble to the proposed Policy, the COC sets forth a number of factual findings that chronicle the lengthy history of deputy cliques in the LASD over multiple decades.[47] These findings note that deputy cliques have "created myriad internal and external problems" for the LASD by hurting morale and disrupting the chain of command. The cliques have also "eroded trust and mutual respect" between the LASD and its community by fostering a culture of "frequent and excessive uses of force, dishonesty, racial profiling, and the enforcement of a code of silence."

Prior to the COC's April 15, 2021 meeting, the COC's Ad Hoc Committee regarding Deputy Cliques provided the Sheriff with a copy of the proposed Policy, together with the Preamble, for comment. Since then, the Sheriff has raised concerns.[48] Sheriff Villanueva has

[46] The Table of Discipline must provide for this as a distinct MPP violation. The range discipline for violation of this policy should range from reprimand, involuntary re-assignment, to and including termination. *See* COC's Proposed Policy, footnote 8.

[47] *Id.*

[48] In addition, ALADS has questioned whether deputies who join a religious group, BIPOC or LGBTQ organization, deputies' union, recreational team, or advocacy group would be considered members of a "deputy clique" under the policy. The COC has requested that ALADS provide any currently existing groups of deputies, which ALADS has not done to date. Suffice it to say that while statutes and regulation can be, in some circumstances, unconstitutional

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claimed that the policy "violates the Constitution, exposes [the LASD] to litigation, and cites a study which is not peer reviewed or academically acceptable."[49] He also suggests that he has already addressed the issue of deputy cliques through the policy he implemented in February 2020.[50]

This memorandum specifically addresses the Sheriff's concern that the COC's proposed Policy "violates the Constitution", and concludes, based on an analysis of U.S. Supreme Court cases, that it does *not* violate the Constitution.[51]

LEGAL ANALYSIS

I. The First Amendment allows the LASD to ban deputy cliques.

The First Amendment protects the freedom of speech and association. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984); *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968). Those freedoms apply to public employees just as they do to private citizens. But where the government acts as an employer regulating the speech or associational rights of its employees, the government retains additional leeway and deference. *Pickering*, 391 U.S. at 568. The First Amendment does not bar a public employer like the LASD from restricting public employee expression made "pursuant to [an officer's] official duties." *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). And even when a regulation impacts or restricts speech that exists outside of an officer's job responsibilities, "a sheriff's office" in particular receives "'a wide degree of deference'" in how it burdens employee expression if it believes those burdens are "'essential to fulfilling public responsibilities.'" *Pool v. VanRheen*, 297 F.3d 899, 909 (9th Cir. 2002). (quoting *Connick v. Myers*, 461 U.S. 138, 152–53 (1983)) (upholding demotion of deputy for public criticisms of her sheriff's office); *see also, e.g.*, *Dible v. City of Chandler*, 515 F.3d 918, 922 (9th Cir. 2008) (upholding termination of police officer who was fired for "performing in, recording and purveying[] a sexually explicit website").

"as applied" to a particular person or group, nothing in the COC's proposed policy suggest that, if adopted, it would be applied to groups of deputies bearing none of the enumerated characteristics of "deputy cliques."

[49] *See* Letter from Sheriff Villanueva letter to Brian Williams, COC Exec. Dir. (March 17, 2021).

[50] *See* LASD Manual of Policy and Procedures § 3-01/050.83, http://pars.lasd.org/Viewer/Manuals/10008/Content/14944.

[51] Although not within the purview of our legal analysis, Sheriff Villanueva's assertion the Loyola Law School's paper titled "50 Years of Deputy Gangs in the Los Angeles County Sheriff's Department" was not "peer reviewed or academically acceptable" is astonishing inasmuch as the paper was reviewed and vetted by former high ranking members of the LASD as well as by law professors from several law schools. *See* LOYOLA L. SCH. CTR. FOR JUV. L. & POL'Y, 50 YEARS OF DEPUTY GANGS IN THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT (2021)

We analyze whether the COC's proposed Policy would violate the free speech and the free association rights of LASD employees under the First Amendment. We conclude it would not.

A. The COC's proposed policy does not violate deputies' free speech rights under the First Amendment.

Courts assessing challenges of government employer restrictions on First Amendment rights follow a three-step framework:

First, the courts assess whether the speech restricted was "made pursuant to . . . employment responsibilities." *Coomes v. Edmonds Sch. Dist. No. 15*, 816 F.3d 1255, 1260 (9th Cir. 2016) (citing *Garcetti*, 547 U.S. at 423–24). If so, then the employee's claim generally fails, because the "First Amendment does not protect speech by public employees" that falls within their "professional responsibilities." *Id.*

Second, courts consider "whether the speech addressed matters of 'public' as opposed to 'personal' interest." *Desrochers v. City of San Bernardino*, 572 F.3d 703, 709 (9th Cir. 2009) (quoting *Connick*, 461 U.S. at 147). The First Amendment limits the ability of even government employers from restricting speech relating to a matter of public concern. *Id.* To qualify as touching on "a matter of public concern," the speech "must involve 'issues about which information is needed or appropriate to enable members of society to make informed decisions about the operation of their government." *Id.* at 710 (quoting *McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983)).

Third, courts then balance the public employee's interests against those of their employer. *See Pickering*, 391 U.S. at 568. This test requires a court to weigh the government employer's "legitimate interest in running" itself as an entity against the public employee's "free speech rights." *Pool*, 297 F.3d at 908. Relevant considerations include "the manner, time and place of the employee's speech," the "context" of the speech, and "whether the speech '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.'" *Id.* (quoting *Rankin v. McPherson*, 483 U.S. 378, 388 (1987)).

Here, each step of the First Amendment analysis favors the ban on deputy cliques.

a. The proposed policy only restricts speech within the scope of LASD employees' employment responsibilities.

The proposed policy banning cliques only restricts speech within the scope of LASD deputies' "employment responsibilities." *Coomes*, 816 F.3d at 1260. The policy specifically limits the definition of cliques to groups that are comprised exclusively of deputies and "are a subgroup within a particular station or unit" within the LASD. All that the deputy clique policy does, then, is "restrict[] speech that owes its existence to" the deputies' "professional responsibilities." *Garcetti*, 547 U.S. at 421–22. The proposed policy "reflects the exercise of

employer control over what the employer itself has commissioned or created" and therefore "does not infringe any liberties [a deputy] might have enjoyed as a private citizen." *Id.*

The case law, particularly with respect to law enforcement, heavily favors treating deputies' clique involvement as falling within their "official duties." *See Dahlia v. Rodriguez*, 735 F.3d 1060, 1074 (9th Cir. 2013). Accordingly, courts have found that employee speech directed at others within their departments falls within their "employment responsibilities," while communications with outsider individuals or entities outside their departments does not. *E.g.*, *id.* at 1074–78; *Hunt v. City of Portland*, 599 F. App'x 620, 620–21 & n.2 (9th Cir. 2013). In *Hagen v. City of Eugene*, for instance, the Ninth Circuit held that a police officer spoke pursuant to official duties when he raised concerns about his workplace "to his coworkers and his superior officers," since the communications occurred within the police department's hierarchy and the officer's actions were "inextricably intertwined with his duties as a K–9 officer." 736 F.3d 1251, 1257–60 (9th Cir. 2013).

Similarly, deputy cliques only exist on the job. They exist at particular LASD stations, and they conduct their activities while their members are supposed to be performing their duties as law enforcement officers. The cliques create problems for the LASD precisely because of the threats that clique-affiliated deputies pose to coworkers and the public *while performing their on-the-job duties*. Banning the cliques thus has no effect on any aspect of an LASD deputy's life "as a private citizen." *Garcetti*, 547 U.S. at 420. It comfortably falls within "employer control" of how a deputy conducts himself while serving as a member of law enforcement. *Id.* Consequently, the First Amendment would likely not prohibit the LASD from prohibiting membership in deputy cliques as the COC proposal sets forth.

b. The proposed policy does not purport to restrict speech on matters of public concern.

Even if a court somehow found that deputies speak as private citizens in their clique involvement, a court would still likely find that the policy banning cliques does not address a matter of public concern and therefore comports with the First Amendment. Speech on a matter of public concern is that which "enable[s] members of society to make informed decisions about the operation of their government." *Desroschers*, 572 F.3d at 709–10. Membership in deputy cliques does not fit that bill. The proposed policy makes no mention of what the deputies may say to anyone outside of the LASD. Rather, all it does is prohibit how they interact with fellow deputies "within [their] particular station[s] or unit[s]." *See Desrochers*, 572 F.3d at 705–06 (rejecting government employee's retaliation claim where claim arose from merely "a difference of personalities between the four sergeant" officers and their "[l]ieutenant" in the carrying out of duties); *see also Roe v. City & County of San Francisco*, 109 F.3d 578, 587 (9th Cir. 1997) (a police officer's claim failed the public concern test where his speech was merely an "inter-office transmittal" about what to do in an ongoing investigation, meaning the speech "addressed purely matters of internal governmental management, unrelated to an issue beyond [his] bureaucratic niche"). A deputy's clique membership does not express a view on a matter affecting the public—rather, it implicates "internal office affairs," "relate[s] to the [deputy's] employment," and "brings the mission of the [LASD] and the professionalism of its officers into serious disrepute." *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004); *Connick*, 461 U.S. at 149. Deputies

join and participate in cliques while at work. And the cliques abuse the LASD's reputation by engaging in wrongful and illegal clique activities in uniform.

A deputy challenge to the clique ban would likely be unsuccessful even under the broadest reading of "public concern." In *Godwin v. Rogue Valley Youth Correctional Facility*, the Ninth Circuit held that a correctional officer's "wearing" the "insignia" of "and associat[ing] with" members of the Vagos Motorcycle Club, "a perceived criminal organization" was a matter of public concern where the officer's activities all occurred *outside of the workplace*. 656 F. App'x 874, 875 (9th Cir. 2016); *see also Godwin v. Rogue Valley Youth Corr. Facility*, 2017 WL 3816150, at *1–3 (D. Or. Aug. 31, 2017) (recounting the officer's associations as only occurring outside of work). By comparison, the LASD cliques exist and operate *within* the LASD. Deputies join and participate in cliques while at work. They engage in clique activity on the job and in uniform. "An internal dispute" over whether LASD personnel may organize themselves into cliques has "no wider societal implications [and] is not a matter of public concern. Instead, it falls within "the genre of 'personnel disputes and grievances' which are not constitutionally significant." *Roe*, 109 F.3d at 586 (quoting *McKinley*, 705 F.2d at 1114).

c. The LASD's interest in eliminating the longstanding and recognized harms of deputy cliques outweighs deputy speech interests.

The LASD's interests in preserving order within its ranks and protecting the public will likely outweigh the deputies' interest in being able to freely express themselves through membership in deputy cliques. Particularly when it comes to "a sheriff's office," government officials can curtail employee speech because "[d]iscipline and esprit de corps are vital to [the office's] functioning." *Pool*, 297 F.3d at 909 (quoting *Cochran v. City of Los Angeles*, 222 F.3d 1195, 1201 (9th Cir. 2000)); *accord I.N.S. v. Fed. Labor Relations Auth.*, 855 F.2d 1454, 1466 (9th Cir. 1988) (recognizing that immigration enforcement agency had an "interest in the efficient functioning of the department" and "encourag[ing] *esprit de corps*"). Courts grant significant weight to the interests of law enforcement agencies in preserving "order, loyalty, morale and harmony" and accordingly afford such agencies "more latitude" than other government employers in restricting their officers' expression. *Oladeinde v. City of Birmingham*, 230 F.3d 1275, 1293 (11th Cir. 2000). In *Pool*, for instance, the court found that the sheriff's department was in its rights to have "demoted" a deputy even though she had engaged in clearly protected speech by making public criticisms about her department. *Id.* at 908–09 (noting that "Pool was aware" her comments criticizing the department "undermined Sheriff Noelle's authority and ability to competently run the Sheriff's Office").

Courts applying this balancing analysis have often ruled in favor of law enforcement bodies that punish employees for their connections to dangerous or harmful groups. In *Piscottano v. Murphy*, for instance, the Second Circuit upheld disciplinary actions against correctional officers for associating with a motorcycle club whose members engaged in a range of crimes. 511 F.3d 247, 278 (2d Cir. 2007). The court credited the government's concerns that the association created a risk of disruption and "interference with the integrity of [prison] operations" from violence or conflicts of interest and found that those concerns outweighed the prison officers' associational interests. *Id.* at 276–78. Similarly, a court found that a police officer's publicly known involvement with a racist group justified his termination because it damaged the operation of the police department's "law enforcement activities" by creating

discord and controversy in the community. *Doggrell v. City of Anniston*, 277 F. Supp. 3d 1239, 1261 (N.D. Ala. 2017).

Likewise, in light of the LASD's duties as a law enforcement agency and the threat to both other deputies and the general public that clique activities pose, the *Pickering* balancing test strongly favors the LASD. As the Sheriff himself has explained, "this issue has driven a wedge between the department and the public we serve"—a "wedge" that can "serve to delegitimize our department in the eyes of some."[52] He went on: "without public trust, we are ineffective in the courageous and difficult work we perform each day."[53] And he conceded that even "the *appearance* of membership in cliques or subgroups has had a negative effect on the department's mission and created negative public perception. This has undermined trust and increased the risk of civil liability."[54]

The history of deputy cliques in the LASD—both in previous decades and in recent years—demonstrates that these groups have invariably endangered the public, harassed other LASD deputies, disrupted the chain of command, and impeded the department's effective functioning. Deputy cliques have posed and continue to pose serious threats to the LASD's efforts to maintain morale and order among its deputies and to efficiently protect residents of Los Angeles County and maintain trust. As a result, the government needs here outweigh any interest the deputies have in associating with other LASD employees.

Were there any doubt that the COC policy is adequately balanced, the inadequacy of the current deputy clique policy proves the point. Even if the Sheriff's current policy is less restrictive, as it would not prohibit deputy clique membership *per se*, that policy has not worked. Even a year later, deputy cliques remain a problem. And we are unaware of *any* instance in which any deputy has been penalized or any clique disbanded pursuant to that policy. The LASD would thus be justified in adopting a stricter rule designed to actually achieve its goal of wiping out the cliques in order to restore order and morale to its force and to protect the public.

B. The COC's proposed policy also does not violate First Amendment associational rights.

Just as the prohibition on deputy cliques does not violate the deputies' First Amendment speech rights, it also does not impermissibly infringe on their association rights for similar reasons.

Free association claims by public employees largely track the same legal framework as speech claims, even when pled as separate claims and even when the associational claims "predominate" over the speech claims. *See Hudson v. Craven*, 403 F.3d 691, 695–98 (9th Cir. 2005); *see also Candelaria v. City of Tolleson, Arizona*, 721 F. App'x 588, 590 n.1 (9th Cir. 2017) (evaluating "hybrid speech/association claims" "as a single claim" under *Connick*/*Pickering*). Therefore, a public employee asserting a free association violation must first

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[52] Villanueva Remarks at 3:44–52.

[53] *Id.* at 3:52–4:03.

[54] *Id.* at 0:19–31 (emphasis added).

show that his association came in his capacity as a citizen, not pursuant to his "official duties." *See, e.g.*, *Killion v. Coffey*, 696 F. App'x 76, 78 (3d Cir. 2017) (ruling against plaintiffs because their association did not stem from their roles as "private citizens"); *D'Angelo v. Sch. Bd. of Polk Cty.*, 497 F.3d 1203, 1212 (11th Cir. 2007) (requiring "public employees to have engaged in associational activity *as citizens* to be protected under the First Amendment"); *see also Thomas v. Cty. of Riverside Sheriff's Dep't*, 2011 WL 13224841, at *7 (C.D. Cal. July 7, 2011) (noting that public employers violate "associational freedoms" when they "infringe[] on an employee's right to speak *as a citizen* [on] matters of public concern" (emphasis added)). Next, the employee must show that his association related to a matter of public concern. *Hudson*, 403 F.3d at 695–98. Finally, he must prevail in showing that the burdens on his First Amendment activity outweigh the government's interests in limiting that activity. *Id.*

For the same reasons articulated above, the proposed prohibition on deputy cliques complies with the First Amendment. *First*, deputy sheriffs associate with cliques while on the job and in the course of performing their "official duties," rendering their clique association unprotected under the First Amendment. *Second*, since the cliques are internal to the LASD and operate at the workplace at various stations, the LASD's prohibition on deputy cliques implicates a personnel dispute rather than a matter of public concern under *Connick*. And *third*, under *Pickering*, the LASD's interests in preserving order within its ranks and protecting the public outweigh the deputies' interest in being able to freely associate. Therefore, the policy banning cliques does not violate LASD employees' association rights.

II. The policy banning cliques is neither facially overbroad nor unconstitutionally vague.

The proposed policy should also withstand any facial overbreadth or vagueness challenges. We address each potential challenge in turn.

a. The COC's proposed policy is not facially overbroad.

The overbreadth doctrine allows courts to invalidate government enactments that "inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when judged in relation to the statute's plainly legitimate sweep." *Pest Comm. v. Miller*, 626 F.3d 1097, 1110–11 (9th Cir. 2010) (internal quotation marks omitted) (quoting *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999)); *see also Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) (explaining that a law will only be invalidated if the overbreadth is not only "real, but substantial as well"). Facial invalidation is "a last resort" and is generally not invoked "when a limiting construction has been or could be placed on the challenged statute." *Broadrick*, 413 U.S. at 613. And even where "the outermost boundaries of [a policy] may be imprecise, any such uncertainty has little relevance" where a challenger's "conduct falls squarely within the 'hard core' of the statute's proscriptions[.]" *Id.* at 608.

The COC's proposed policy is not overbroad. The policy permits individuals to associate freely and to speak their minds (consistent with other LASD rules and regulations). What it does not allow deputies to do is to engage in associational cliques or gangs that have historically engaged in criminal and other misconduct and have harmed the reputation and community trust of the LASD as a law enforcement agency. The Association for Los Angeles Deputy Sheriffs

have charged in a letter to COC that the COC's proposed policy would ban First Amendment protected activity like engaging in LGBTQ organizations, affiliating with religious groups, or participating in recreational teams. But none of those groups likely fits the definition of prohibited clique in the policy: a "group of Sheriff's deputies, assigned to a particular LASD patrol station or unit, who self-associate, self-identify and exclude other deputies assigned to the same station or unit, and thus are a subgroup within a particular station or unit." We are unaware of the existence of any religious or LGBTQ subgroups of deputies assigned to particular stations that exclude other deputies. Moreover, these and related affinity groups would likely fall outside of the COC's proposed policy, as affinity groups are generally non-exclusive and regularly open their doors to people who identify as allies.[55] In any case, a party's "ability to conceive of hypothetical problematic applications does not render the rule susceptible to an overbreadth challenge." *Tindle v. Caudell*, 56 F.3d 966, 973 (8th Cir. 1995) (citation omitted); *see also Virginia v. Hicks*, 539 U.S. 113, 122 (2003) (noting that the "claimant bears the burden of demonstrating, from the text of the law and from actual fact, that substantial overbreadth exists" (alteration, internal quotation marks, citation omitted)).

That the COC's proposal would ban more associational activities than the current policy in effect also does not render the COC's plan unconstitutionally overbroad, either. The policy currently in effect prohibits employees from participating in "any group of Department employees which promotes conduct that violates the rights of other employees or members of the public." But it does not specifically ban deputy cliques or make participation in or joining deputy cliques a basis to impose discipline. That policy has not worked. It has resulted in no publicly known penalties or clique disbanding, and cliques still remain a serious problem.[56] Consequently, a broader, wholesale ban on deputy cliques, without any caveats regarding whether a banned clique "promotes conduct that violates [others'] rights" is appropriately—not overbroad.

Courts have upheld law enforcement regulations far broader and less precise than the COC's proposal. The Third Circuit, for instance, rejected an overbreadth challenge to a rule requiring firemen to "refrain from conduct unbecoming a fireman and a gentleman whether on or off duty." *Aiello v. City of Wilmington*, 623 F.2d 845, 848, 855 (3d Cir. 1980). The court noted that the rule was "substantially aimed at conduct and speech of firemen which could reasonably be expected to have a deleterious effect upon the City's legitimate concerns for efficiency, discipline and morale within the Fire Bureau, as well as public trust in the Fire Bureau's integrity." *Id.* Similarly, the Fifth Circuit rejected an overbreadth challenge where a rule permitted a fireman's discharge for "conduct prejudicial to good order of the fire department." *Davis v. Williams*, 617 F.2d 1100 (5th Cir. 1980). There are numerous other examples. *See, e.g.*, *Dade v. Baldwin*, 802 F. App'x 878, 881 (6th Cir. 2020) (rejecting vagueness challenge to regulation prohibiting officers from "associat[ing] or dealing[ ] with persons whom they know . . . have a reputation . . . for involvement in felonious or criminal behavior"); *Piscottano*, 511 F.3d at 282 (rejecting vagueness challenge to regulation prohibiting officers from

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[55] *See* WESTLAW PRACTICAL LAW LABOR & EMPLOYMENT, AFFINITY GROUPS IN THE WORKPLACE (2021) (recommending that employers prohibit "exclusive" affinity groups "[t]o protect the employer against discrimination, harassment, and retaliation claims").

[56] *See More LA Sheriff's Officials Accused of Misconduct in 'Banditos' Deputy Gang Lawsuit*, LAIST (Mar. 23, 2021), https://laist.com/latest/post/20210322/LA-county-sheriff-officials-lawsuit-banditos.

“[e]ngag[ing] in unprofessional or illegal behavior, both on and off duty, that could in any manner reflect negatively on the Department of Correction”); *Kannisto v. City & County of San Francisco*, 541 F.2d 841, 844 (9th Cir. 1976) (declining to invalidate a regulation for overbreadth or vagueness which prohibited conduct “tend[ing] to subvert the good order, efficiency, or discipline of [the police] Department”); *Mullen v. Port Auth. of N.Y. & N.J.*, 100 F. Supp. 2d 249, 256–59 (D.N.J. 1999) (rejecting police officer’s overbreadth challenge to regulation barring, among other things, any act “prejudicial to good order” in the agency). The COC’s proposed policy is not likely vulnerable to a facial overbreadth challenge.

b. The COC’s proposed policy is not unconstitutionally vague.

A policy is “void for vagueness if its prohibitions are not clearly defined.” *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Where violation of a policy could lead to the deprivation of liberty or property under the Fourteenth Amendment, the policy must “give the person of ordinary intelligence a reasonable opportunity to know what is prohibited” and “must provide explicit standards for those who apply them” to prevent arbitrary enforcement. *Id.* at 108–09; *see also Piscottano*, 511 F.3d at 280. Where a policy implicates First Amendment freedoms, “vagueness concerns are more acute” and therefore “scrutiny is more stringent” and the law insists on a “greater degree of specificity.” *Cal. Tchrs. Ass’n v. State Bd. of Educ.*, 271 F.3d 1141, 1150 (9th Cir. 2001). Still, even under this heightened standard, “perfect clarity is not required.” *Id*. (citation omitted); *see also Grayned*, 408 U.S. at 110 (stating that a reviewing court “can never expect mathematical certainty”). Courts have recognized that requiring “meticulous specificity” would “come at the cost of flexibility and reasonable breadth.” *Piscottano*, 511 F.3d at 280 (internal quotation marks omitted) (quoting *United States v. National Dairy Prod. Corp.*, 372 U.S. 29, 32 (1963)). The essential inquiry is whether those “who desire to obey the statute will have no difficulty in understanding it.” *Kannisto*, 541 F.2d at 845 (internal quotation marks and citations omitted).

Courts have long tolerated greater imprecision where the government functions as the employer regulating employee conduct. In *Arnett v. Kennedy*, the Supreme Court rejected vagueness and overbreadth challenges to a statute permitting a federal agency to remove an employee “for such cause as will promote the efficiency of the service,” concluding that the statue was sufficiently explicit in light of the “infinite variety of factual situations in which public statements by Government employees might reasonably justify dismissal for ‘cause.’” 416 U.S. 134, 158, 161 (1974). The Court explained that as long as the statute was “set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest,” it would “not be struck down as vague, even though marginal cases” might cause some doubt. *Id*. at 159 (internal quotation marks and citations omitted). The Court emphasized that “‘the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.’” *Id*. at 160–61 (quoting *Pickering*, 391 U.S. at 568); *see also Dade v. Baldwin*, 802 F. App’x 878, 885 (6th Cir. 2020) (recognizing that “the Supreme Court has made clear that there is substantially more room for imprecision in regulations bearing only civil, or employment, consequences” (citations omitted)); *Piscottano*, 511 F.3d at 281 (recognizing regulations with generalized language have been upheld when “they were plainly applicable to the conduct of the employee plaintiff, despite the

existence of questions as to whether they would give fair notice with respect to other, hypothetical, conduct at the periphery" (citing cases)).

The COC's proposed ban on deputy cliques affords "fair notice to those to whom it is directed" in this "particular context." *Grayned*, 408 U.S. at 112 (internal quotation marks, citation, and alteration omitted). It prohibits deputies from joining a "group of Sheriff's deputies, assigned to a particular LASD patrol station or unit, who self-associate, self-identify and exclude other deputies assigned to the same station or unit, and thus are a subgroup within a particular station or unit." The elements of the prohibited type of affiliation are clear. And were there any doubt, the proposed policy even gives examples of the types of prohibited organizations: "Deputy cliques identify themselves by name, e.g., the Banditos, the Executioners, the Regulators, the Grim Reapers, the Rattlesnakes, the Cowboys, etc., and often their members have common or matching tattoos or use hand signals, and/or engage in other rituals and behaviors similar to street gangs." The policy is also preceded by a three-page set of factual findings and recitals, making clear the history and context that led to the policy proposal and clarifying its reach.

In short, reading the policy as a whole, with its illustrative examples and the historical context supplied by the preamble, it is "clear what the [policy] proscribes 'in the vast majority of intended applications.'" *Cal. Tchrs. Ass'n*, 271 F.3d at 1151 (quoting *Hill v. Colorado*, 530 U.S. 703, 733 (2000)). Accordingly, given the context and the experience of the intended audience, the deputies will know that the prohibition on deputy cliques does not intend to discourage deputies from joining LGBTQ organizations, affiliating with their religious groups, or participating in recreational teams. The deputies at whom this policy is targeted will not be left to speculate as to its scope. The policy is not unconstitutionally vague.

CONCLUSION

The long and dangerous history of deputy cliques within the LASD is well-documented and raises a clear and present danger to those the LASD purports to serve and protect, to the LASD itself, and to the entire community of Los Angeles County. The COC seeks to recommend and have implemented a bold and decisive step to end this threat and seeks to do so in accordance with the Constitution. Courts have consistently observed that "police departments function as paramilitary organizations charged with maintaining public safety and order," and therefore "they are given more latitude in their decisions regarding discipline and personnel regulations than an ordinary government employer" and "their members may be subject to stringent rules." *Tindle*, 56 F.3d at 971, 973; *see also Kannisto*, 541 F.2d at 844 (emphasizing that "police department regulations . . . are entitled to considerable deference because of the state's substantial interest in creating and maintaining an efficient organization to carry out the important duties assigned by law" (internal quotation marks and citations omitted)); *Mullen*, 100 F. Supp. 2d at 258 (observing that courts "have uniformly recognized" a "legitimate and compelling" interest in "preserv[ing] the discipline and order within [a] police force" and "maintain[ing] the credibility and reputation of the force").

Given the historical backdrop of the impact of deputy cliques on the LASD, the LASD would be entitled to this "latitude" in adopting the COC's proposal. Prior policies to eliminate deputy cliques have not worked; more substantial action is needed. The proposed ban on deputy

cliques, in our opinion, would be consistent with the First Amendment's speech and association protections, and it is neither overbroad nor vague. The COC's proposed Policy does not violate the Constitution and, if adopted by the Sheriff, should withstand any court challenge mounted against it.