COUNTY OF LOS ANGELES
OFFICE OF THE COUNTY COUNSEL

648 KENNETH HAHN HALL OF ADMINISTRATION
500 WEST TEMPLE STREET
LOS ANGELES, CALIFORNIA 90012-2713

RODRIGO A. CASTRO-SILVA
County Counsel

TELEPHONE
(213) 974-0995
FACSIMILE
(213) 633-1915
TDD
(213) 633-0901
E-MAIL
Azuiderweg@counsel.lacounty.gov

August 19, 2021

CONFIDENTIAL

THIS MATERIAL IS SUBJECT TO THE ATTORNEY-CLIENT AND/OR THE ATTORNEY WORK PRODUCT PRIVILEGES

VIA E-MAIL ONLY

Brian K. Williams, Executive Director
Sheriff Civilian Oversight Commission
350 South Figueroa Street, Room 288
Los Angeles, California 90071
BWilliams@coc.lacounty.com

Re: Request for Legal Opinion Regarding Policy to Prohibit Sheriff's Department Employees from Participating in Subgroups

Dear Mr. Williams:

At the Sheriff Civilian Oversight Commission's ("COC") May 20, 2021 meeting, the COC requested that County Counsel issue an opinion regarding whether the County of Los Angeles ("County") can legally ban participation in deputy subgroups. This memorandum analyzes whether a ban on participation in deputy subgroups would infringe on the First Amendment rights of Los Angeles County Sheriff's Department ("LASD") employees, and it clarifies the scope of a 2014 County Counsel opinion analyzing a LASD draft tattoo policy.

SHORT ANSWER

The County may regulate LASD employees' conduct while they are performing their official duties, including their participation in deputy subgroups, without implicating the First Amendment. The First Amendment protects government employees only when they are acting as private citizens, not as public employees. Subgroups owe their existence to LASD employment. They form based on LASD stations, bureaus, or units. Subgroup activities are therefore intertwined with law enforcement functions. Without LASD employment, subgroups would not exist. Even if a policy that prohibits subgroup participation is interpreted as more broadly regulating off-duty conduct, including conduct taken as private citizens, the First Amendment is implicated only if an employee's

speech or association touches on a matter of public concern. It is doubtful that subgroup participation touches on a matter of public concern because subgroups are exclusive, workplace organizations, not public groups.

Even for a policy that regulates employee speech and conduct that occurs in an employee's private capacity and that touches on a matter of public concern, there is still a balancing test that asks whether the employer has an "adequate justification" for the restriction. Under that test, regulating subgroup involvement would still be defensible. The County's compelling interest in restoring or increasing public trust in the LASD and preventing the harm subgroups cause to the County, LASD, and community members justifies a policy that bans participation in subgroups.

I. BACKGROUND

A. Deputy Subgroups

Generally, subgroups are groups of employees within LASD stations or units who self-associate to the exclusion of other employees in that station or unit. Subgroups often have matching tattoos and have at times been associated with criminal activity and violence.[1] They have often been referred to as "cliques" or "gangs." Recent proposed State legislation (AB 958 (Gipson)) defines a "law enforcement gang" as

> a group of peace officers within a law enforcement agency who may identify themselves by a name and may be associated with an identifying symbol, including, but not limited to, matching tattoos, and who engage in a pattern of on-duty behavior that intentionally violates the law or fundamental principles of professional policing, including, but not limited to, excluding, harassing, or discriminating against any individual based on a protected category under federal or state antidiscrimination laws, engaging in or promoting conduct that violates the rights of other employees or members of the public, violating agency policy, the persistent practice of unlawful detention or use of excessive force in circumstances where it is known to be unjustified, falsifying police reports, fabricating or destroying evidence, targeting persons for

[1] Report by Special Counsel James G. Kolts at 316 (https://www.clearinghouse.net/chDocs/public/PN-CA-0001-0023.pdf); Report of the Citizens' Commission on Jail Violence at 67 (https://ccjv.lacounty.gov/wp-content/uploads/2012/09/CCJV-Report.pdf).

> enforcement based solely on protected characteristics of those persons, theft, unauthorized use of alcohol or drugs on duty, unlawful or unauthorized protection of other members from disciplinary actions, and retaliation against other officers who threaten or interfere with the activities of the group.[2]

Over the past 50 years, at least 18 subgroups have operated within LASD. Subgroups have plagued LASD since the 1970s. Public acknowledgement of the need for reform dates back to the 1990s, when the Kolts Commission recommended that LASD "take aggressive steps to eradicate station mascots and conduct an immediate and thorough Internal Affairs investigation to identify, root out and punish severely any lingering gang-like behavior by its deputies." The Kolts Commission monitored LASD for 21 years. In 2011, the Board of Supervisors created a Citizen's Commission on Jail Violence ("CCJV") to conduct a review of the use of force in County jails. The CCJV found that "deputy cliques and subcultures" have "contributed to force problems in the jails as well as numerous off-duty force incidents involving deputies." The CCJV recommended discouraging participation in cliques.

In September 2019, eight deputies filed a lawsuit alleging that the Banditos, a subgroup operating out of the East Los Angeles station, subjected them to discrimination and workplace harassment.[3] The American Civil Liberties Union ("ACLU") of Southern California was subsequently added as a plaintiff. Plaintiffs have demanded institutional change in the form of changes in policies, investigation, training, supervision, and oversight. In March 2021, the plaintiffs named 47 LASD employees as defendants. The lawsuit has received significant media attention, as have several other lawsuits implicating subgroups.[4] The County has paid out at least $55 million due to lawsuits involving subgroups, including at least $21 million in the last 10 years.[5]

---

[2] Sen. Amend. to Assem. Bill No. 958 (2021-2021 Reg. Sess.) July 8, 2021.

[3] *Hernandez et al. v. County of Los Angeles, et al.*, Los Angeles Superior Court Case No. 19STCV33158;

[4] *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.

[5] 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/california/story/2020-08-04/sheriff-deputy-clique-payouts.

In February 2020, Sheriff Alex Villanueva adopted a new policy addressing subgroups. That policy states 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.*"[6] Under the policy, employees who "engag[e] in misconduct of any kind, including but not limited to, the use of excessive force or mistreating and harassing of others" may be disciplined. Although the policy states that subgroups or 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," it is unclear whether it prohibits employees from joining or participating in subgroups generally, without some other associated misconduct. The Sheriff has provided inconsistent information regarding the scope of the policy. Although the Sheriff stated at the December 17, 2020 and May 20, 2021 COC meetings[7] that he cannot legally ban participation in subgroups, he has also stated on at least one occasion that it is unacceptable to "join, participate in, or solicit others to join any non-approved department-sanctioned group," implying that participation alone violates the current policy.[8]

B. The COC Proposed Policy

On April 15, 2021, the COC approved a proposed policy banning participation in deputy cliques ("Proposed Policy"). The Proposed Policy states:

> 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,

---

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

[7] Recording of the December 17, 2020 Meeting of the COC, https://lacountyboardofsupervisors.webex.com/recordingservice/sites/lacountyboardofsupervisors/recording/e4e37d6b1dc549b6af2e9ed6ac73fb20/playback, at 3:54:00; Recording of the May 20, 2021 Meeting of the COC, https://lacountyboardofsupervisors.webex.com/recordingservice/sites/lacountyboardofsupervisors/recording/70c328e39bb21039aad90050568fe5b7/playback, at 3:21:21

[8] January 29, 2021, LASD video regarding subgroup policy, https://www.youtube.com/watch?v=FnbhHV73ctY, at 2:22.

> 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.[9]

Under the Proposed Policy, any LASD employee "who participates in or joins a deputy clique, or solicits another employee to join a deputy clique, will be subject to discipline."

In a March 17, 2021 letter to the COC, Sheriff Villanueva stated that the COC Proposed Policy "violates the Constitution." Sheriff Villanueva elaborated in statements at the May 20, 2021 COC meeting (as he has on other occasions) that he was relying on a 2014 County Counsel legal opinion. He also stated at the May 20, 2021 COC meeting that he would welcome a new, updated opinion from County Counsel.

C. 2014 County Counsel Letter Regarding Proposed Tattoo Ban

In 2014, County Counsel provided an opinion letter regarding a proposed LASD tattoo policy ("2014 Letter").[10] This is the County Counsel opinion that Sheriff Villanueva has referred to in connection with subgroups, stating that "County Counsel concluded that a department cannot ban something that is a constitutionally protected speech and tattoos are a form of speech protected by the First and Fourth Amendments."[11] The Sheriff's description of the 2014 Letter is not completely accurate. Because that 2014 Letter addressed a different policy and different facts, it should not be relied upon as an opinion regarding the COC Proposed Policy regarding deputy subgroups or other County regulation of deputy subgroups.

The tattoo policy addressed in the 2014 Letter not only required LASD employees to cover tattoos while on duty, on LASD business, on LASD property, or at a LASD approved or sponsored event, but also prohibited employees from *having* certain types of tattoos. (2014 Letter at 2.) Prohibited tattoos included "[m]atching or numbered tattoos or brandings that are associated with cliques" or linked to "[d]eputy-involved shootings and/or any unconstitutional or rogue

---

[9] http://file.lacounty.gov/SDSInter/bos/supdocs/COC_sProposedPolicyandPreambleregardingDeputyCliquesApproved4-15-21.pdf

[10] November 21, 2014 Letter from County Counsel to Interim Sheriff John L. Scott, enclosed for reference.

[11] https://lasd.org/sheriff-discusses-organizational-change-and-transparency/

behavior." (*Id.*) Tattoos covered by the policy were prohibited *even if* they were located on private areas of the employee's body. (*Id.*) The policy also would have required employees under administrative investigation regarding prohibited tattoos to show their tattoos to a medical professional. (*Id.*)

The 2014 Letter recommended limiting the tattoo policy to requiring employees to cover their tattoos. (2014 Letter at 1.) The 2014 Letter concluded that "the proposed prohibition of tattoos conveying undesirable messages, irrespective of whether the tattoos can be covered, presents several constitutional concerns that likely would prove problematic if legally challenged." (2014 Letter at 3.) The 2014 Letter thus did not prohibit LASD from regulating tattoos entirely, as the Sheriff has suggested. More importantly, the 2014 Letter only examined a specific draft policy banning tattoos. It did not address the First Amendment implications of banning work-related subgroup participation and subgroup participation while on the job.

II. LEGAL STANDARD

"When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." (*Garcetti v. Ceballos* (2006) 547 U.S. 410, 418.) In assessing whether those limitations comply with the First Amendment, courts use the test the U.S. Supreme Court developed in *Pickering v. Board of Education* (1968) 391 U.S. 563, as modified by subsequent cases. (*Garcetti*, 547 U.S. 410 at 418.[12]) The *Pickering* test applies both to "pure" speech cases and "hybrid" First Amendment claims that involve both speech and associational rights. (*Hudson v. Craven* (9th Cir. 2005) 403 F.3d 691, 693.[13])

The *Pickering* test begins with a two-step inquiry for determining if a public employee's speech falls within First Amendment protection. (*Lane v. Franks* (2014) 573 U.S. 228, 237.) The first step distinguishes between speech as a public employee and speech as a private citizen. (*Lane*, 573 U.S. at 237.) The "critical question" here is whether the "speech at issue is itself ordinarily within

[12] The *Pickering* test takes the place of the traditional forum-based First Amendment analysis when the speaker is a government employee. (*Johnson v. Poway Unified Sch. Dist.* (9th Cir. 2011) 658 F.3d 954 (trial court "erred in applying a pure forum-based analysis rather than the *Pickering*-based inquiry" because "the Supreme Court has held that where the government acts as both sovereign *and employer*," the forum-based analysis does not apply).)

[13] At least one court has concluded that *Pickering* also applies to claims that *only* involve associational rights and not speech. (*See Nichols v. Hager* (D. Nev. July 18, 2005) 2005 8149134, at *3.)

the scope of an employee's duties." (*Coomes v. Edmonds Sch. Dist. No. 15* (9th Cir. 2016) 816 F.3d 1255, 1260.) If the answer to that question is yes, the speech is not protected by the First Amendment. (*Id.*; *see also Garcetti*, 547 U.S. at 421-22 ("Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen.").) If a court finds that a regulation implicates speech as a public employee only, the inquiry ends there.

If an employee was speaking as a private citizen, and not as a public employee, the next step asks whether the employee was speaking on a matter of public concern. (*Connick v. Myers* (1983) 461 U.S. 138, 147-48 ("Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.").) If employee speech passes both steps of the *Pickering* inquiry (as modified by *Garcetti*), the government must prove that it had an "adequate justification" for the restriction. (*Garcetti*, 54 U.S. at 418.)

III. ANALYSIS

A. A Ban on Participation in Subgroups Likely Does Not Implicate The First Amendment

Because a ban on participation in subgroups only regulates personnel serving in their capacity as public employees, not as private citizens, the First Amendment is likely not implicated. (*Garcetti*, 547 U.S. at 418.) [T]he First Amendment does not protect employee speech when that speech is "pursuant to . . . official duties" or speech that "owes its existence to an employee's professional responsibilities." (*Dahlia v. Rodriguez* (9th Cir. 2013) 735 F.3d 1060, 1068; *Hagen v. City of Eugene* (9th Cir. 2013) 736 F.3d 1251, 1257-58.)

Because a ban on subgroups is connected to employees' conduct in their capacity as LASD personnel, not as private citizens, it likely does not implicate the First Amendment. (*See Garcetti*, 547 U.S. at 422 ("Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings. . . . When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee."); *Hagen*, 736 F.3d at 1253 ("Where . . . a public employee reports departmental-safety concerns to his or her supervisors pursuant to a duty to do so, that employee does not speak as a private citizen and is not entitled to First Amendment protection."); *Johnson v. Poway Unified Sch. Dist.* (9th Cir. 2011) 658 F.3d 954, 966 (public school teacher who decorated his

classroom with religious banners "did not act as a citizen when he went to school and taught class, took attendance, supervised students, or regulated their comings-and-goings; he acted as a teacher—a government employee").)

Furthermore, subgroup membership "owes its existence" to employment with LASD. (*See Hagen*, 736 F.3d at 1257-58; *Johnson*, 658 F.3d at 968 ("An ordinary citizen could not have walked into Johnson's classroom and decorated the walls as he or she saw fit, anymore (sic) than an ordinary citizen could demand that students remain in their seats and listen to whatever idiosyncratic perspective or sectarian viewpoints he or she wished to share.").) Subgroups do not exist separate and apart from LASD employment. They are defined based on LASD stations, bureaus, or units, and their activities are intertwined with law enforcement functions.

Because subgroups rise and fall with LASD employment, subgroup participation is likely "not protected by the First Amendment." (*Hagen*, 736 F.3d at 1257-58; *Eng v. Cooley* (9th Cir. 2009) 552 F.3d 1062, 1075.)

B. Membership in Subgroups Likely Does Not Involve Matters of Public Concern

If a court were to find that a ban on participation in subgroups reaches personnel acting as private citizens, rather than as public employees, it would next have to determine whether subgroup involvement touches a matter of public concern.

The "boundaries of the public concern test are not well defined." (*City of San Diego v. Roe* (2004) 543 U.S. 77, 83.) However, the Ninth Circuit has "defined public concern speech broadly to include almost any matter *other than* speech that relates to internal power struggles within the workplace." (*Tucker v. State of Cal. Dep't of Educ.* (9th Cir. 1996) 97 F.3d 1204, 1210 (emphasis added); *Johnson v. Multnomah Cnty., Or.* (9th Cir. 1995) 48 F.3d 420, 422 ("Speech involves a matter of public concern when it can fairly be considered to relate to 'any matter of political, social, or other concern to the community.'") (quoting *Connick*, 461 U.S. at 146).) "[P]ublic concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication." (*City of San Diego*, 543 U.S. at 83–84.)

"Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." (*Connick*, 461 U.S. at 147-48.) The content of the speech

is the "single greatest factor" in this inquiry. (*Desrochers v. City of San Bernardino* (9th Cir. 2009) 572 F.3d 703, 710.) "To deserve First Amendment protection, it is sufficient that the speech concern[s] matters in which even a relatively small segment of the general public might be interested." (*Roe v. City & Cnty. of San Francisco* (9th Cir. 1997) 109 F.3d 578, 585.)

A policy banning participation in subgroups regulates job-related conduct and interactions among employees. Speech that addresses relations in the workplace does not involve matters of public concern. (*Tucker v. State of Cal. Dep't of Educ.* (9th Cir. 1996) 97 F.3d 1204, 1210 (the definition of "public concern" does not include "speech that relates to internal power struggles within the workplace"); *Eng*, 552 F.3d at 1070 ("[S]peech that deals with 'individual personnel disputes and grievances' does not involve matters of public concern"); *Desrochers*, 572 F.3d at 705-06 (speech that "relates to internal power struggles within the workplace" and speech "of no interest beyond the employee's bureaucratic niche" is not of public concern); *Roe*, 109 F.3d at 585 (police officer's "inter-office" communication "to a government colleague" about search and seizure issues "to assist the recipients in the event that a similar issue arose in the future" did not involve a matter of public concern).)

Thus, it is unlikely that a court would find that membership in a subgroup constitutes a matter of public concern for the same reason that a court *is* likely to find that personnel participate in subgroups in their capacity as public employees. Subgroups are inherently job-related.

C. The County's Interest in Eliminating the Harms Caused by Subgroups Outweighs Any First Amendment Interests

When a public employee speaks as a private citizen on a matter of public concern, the question under *Pickering* "becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." (*Connick*, 547 U.S. at 418.) Private speech on a matter of public concern alone does not necessarily outweigh the government's interest in regulating speech and association, particularly in the law enforcement context. (*Pool v. VanRheen* (9th Cir. 2002) 297 F.3d 899, 909 (holding that sheriff's department could make decision to demote a deputy, even though she had engaged in protected speech on a matter of public concern, because her actions "undermined [the Sheriff's] authority and ability to competently run the Sheriff's Office").)

In the context of on-the-job subgroups, even if a court were to find employees' First Amendment rights were implicated, the County would likely be able to show that a policy banning participation in subgroups is justified. The County's need to avoid the harms that subgroups cause (lawsuits, community distrust, workplace harassment, and retaliation) outweighs any First Amendment interest that personnel might have in participating in subgroups.

Since 2001, there have been at least $55 million in payouts in lawsuits involving deputy subgroups. Allegations of subgroup involvement in lawsuits filed against the County, LASD, and individual employees are now commonplace. Subgroups have also disrupted the efficient operation of LASD, and many in the community distrust LASD because of the existence of subgroups.

Against this backdrop, the balancing test favors the County, and a court will likely uphold a policy banning participation in subgroups. (*Pool*, 297 F.3d at 909 (government officials can curtail employees' speech because "[d]iscipline and esprit de corps are vital to [the office's] functioning"); *Oladeinde v. City of Birmingham* (11th Cir. 2000) 230 F.3d 1275, 1293 (recognizing interest of law enforcement agencies in preserving "order, loyalty, morale and harmony" and associated need for "more latitude" in regulating employees' conduct); *Piscottano v. Murphy* (2d Cir. 2007) 511 F.3d 247, 278 (government's concerns about association with motorcycle group interfering with prison operations outweighed officers' associational interests); *Doggrell v. City of Anniston* (N.D. Ala. 2017) 277 F. Supp. 3d 1239, 1261 (holding that termination of police officer was justified because his involvement with a racist group undermined the department's "law enforcement activities").)

IV. CONCLUSION

A policy prohibiting employees from participating in subgroups while on the job is likely to survive a First Amendment challenge. Such a policy regulates job-related conduct and impacts personnel in their capacity as public employees, not private citizens. The County also has a strong argument that subgroup participation does not touch on a matter of public concern. Finally, even if a court were to find that a policy prohibiting subgroup participation implicates First Amendment rights, the County would likely be able to show ample justification for the policy.

If you would like to discuss this matter further, please do not hesitate to contact Assistant County Counsel Liliana Campos at (213) 972-5723, Senior Deputy County Counsel Alexandra B. Zuiderweg at (213) 974-0995, or Deputy County Counsel Danielle Vappie at (213) 443-1345.

Very truly yours,

RODRIGO A. CASTRO-SILVA
County Counsel

By
ALEXANDRA B. ZUIDERWEG
Senior Deputy County Counsel
Board Liaison Division

APPROVED AND RELEASED:

DAWYN R. HARRISON
Chief Deputy

ABZ:eg

Enclosure

c: Max Huntsman, Inspector General
mhuntsman@oig.lacounty.gov