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November 21, 2014

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John L. Scott
Sheriff, Los Angeles County
4700 Ramona Boulevard
Monterey Park, California 91754-2169

Re: Request for Legal Opinion Regarding Proposed Tattoo Policy

Dear Sheriff Scott:

On September 4, 2014, you requested that this office provide a formal opinion regarding the Los Angeles County Sheriff's Department's ("the LASD" or "the Department") proposed tattoo policy.

In this letter, we address a number of legal issues presented by the current draft of the policy and make recommendations regarding how the policy can be modified to alleviate those concerns. First, we explain that while tattoos are protected "speech" under the First Amendment, the Department may require that its employees cover visible tattoos while on duty. Second, we explain the First Amendment issues implicated by the policy's content-based approach to regulating only certain kinds of employee tattoos. Third, we explain the problems presented with the proposed method of enforcing the policy's prohibition on certain kinds of tattoos in private areas (i.e., an area of the body normally covered by undergarments). And finally, we address the potential for discrimination lawsuits based on the policy.

Based on our analysis of these issues, we recommend that the policy be revised and clarified as follows:

- Because a wholesale ban on certain types of tattoos and the proposed method of searching employees to enforce such a ban are not likely to survive constitutional challenges, the policy should be limited to requiring that an employee's tattoos are covered while on duty, on Department business, on Department property, or at a Department approved or sponsored event;

- If the Department chooses to include the ban on certain types of tattoos, some of the definitions of the terms describing the prohibited tattoos should be clarified, as set forth in greater detail below;

- The policy should explicitly state that personnel may seek an exemption from the policy if they contend it interferes with their right to observe and practice their religion;

- The policy should set forth the procedure for seeking such an exemption and explain how such applications for an exemption are evaluated; and,

- The Department should ensure that supervisors are consistently enforcing the policy to avoid discrimination claims.

BACKGROUND

The Department's proposed tattoo policy has four key components for purposes of this letter. First, it requires that all tattoos be covered while on duty, on Department business, on Department property, or at a Department approved or sponsored event. Second, it prohibits employees from getting matching tattoos and further prohibits any employee from getting tattoos that are "lewd and lascivious, extremist, sexist, racist, drug, or gang-related, or anti-American," as defined by the policy. These tattoos are prohibited even if the tattoos are located on private areas of the employee's body. Third, in the course of an administrative investigation regarding the existence of a prohibited tattoo on a private area, the employee will be ordered to display the private area where the tattoo is located during an examination by a licensed medical professional of the same gender. Fourth, employees may seek exemptions from the policy if they are assigned to a detective division in which visible tattoos may foster credibility, if the tattoos are deemed medically necessary, or if the employee contends that the policy, as applied, discriminates on an unlawful basis. Employees who violate the proposed policy will be subject to discipline up to and including discharge.

ANALYSIS

I. Although Tattoos Are "Speech" Protected by the First Amendment, the Department May Require Employees to Cover Their Tattoos While on Duty Without Violating the First Amendment.

The Federal Ninth Circuit Court of Appeals has explicitly held that a tattoo "itself is pure First Amendment 'speech'." *Anderson v. City of Hermosa*

Beach, 621 F.3d 1051, 1060 (9th Cir. 2010) (holding that municipal ban on tattoo parlors violates the First Amendment). In reaching its holding, the *Anderson* court reasoned that "[t]attoos are generally composed of words, realistic or abstract images, symbols, or a combination of these, all of which are forms of pure expression that are entitled to full First Amendment protection." *Id.* at 1061. Tattoos can express a plethora of messages, including religious and political messages and an indication of self-identification. *Id.* Although the *Anderson* case is not binding on California State courts, at least one state's Supreme Court has adopted the *Anderson* court's reasoning on this issue. *See, e.g., Coleman v. City of Mesa,* 230 Ariz. 352, 358-59 (2012) (tattoo artist stated First Amendment claim in challenging ordinance because tattoos are protected speech).

Because tattoos constitute protected speech under the First Amendment, the Department's regulation of its employees' tattoos implicates their constitutional rights to free expression. There are very few cases addressing whether a public employer's tattoo policy or the individual application of such a policy raises First Amendment concerns. In fact, most plaintiffs who have challenged these policies have **not** done so on First Amendment grounds because they conceded their tattoos were not protected speech. *See, e.g., Inturri v. City of Hartford,* 365 F.Supp.2d 240 (D. Conn. 2005) (challenging requirement that the plaintiffs cover up spider web tattoos while on duty). Many of these cases, however, were filed before the Ninth Circuit and other courts had held that tattoos are protected under the First Amendment.

With respect to the portion of the policy requiring that all tattoos, regardless of content, remain covered while on duty, we believe that a court would find that the Department's interest in maintaining a professional uniform appearance to the public would outweigh the minimal burden placed on a person's free speech rights by requiring that tattoos be covered while on duty. *See Inturri,* 365 F.Supp.2d at 251 (police chief may order police officers to cover potentially offensive tattoos); *Riggs v. City of Fort Worth,* 229 F.Supp.2d 572, 578 (N.D. Tex. 2002) (requiring police officer to cover tattoos served the police department's interest in insuring professional uniform appearance to the public).

II. The Department's Content-Based Prohibition of Certain Tattoos and Proposed Method of Enforcement Present Several Constitutional Concerns.

Although the portion of the proposed policy requiring employees to cover their visible tattoos is very likely permissible, we believe the policy's proposed prohibition of tattoos conveying undesirable messages, irrespective of whether these tattoos can be covered, presents several constitutional concerns that likely would prove problematic if legally challenged. While it is understandable that the

Department would want to prohibit certain tattoos in light of the recent attention to Deputy tattoos and their alleged association with Deputy misconduct, we believe this section of the policy attempts to regulate a perceived symptom of such behavior, rather than the cause of it, making it very difficult for the Department to justify enacting the current draft of the proposed policy. Indeed, many alleged members of the so-called "deputy gangs" that have received the most media attention, such as the "3000 Boys," do not even have tattoos prohibited by this policy. Conversely, some Department members have tattoos depicting their station's symbol and have never been found to engage in any serious misconduct.[1]

In formulating this opinion, we also reviewed the tattoo policies of the Riverside County Sheriff's Department, the Orange County Sheriff's Department, the Long Beach Police Department, and the Los Angeles Police Department. Those policies merely require that all tattoos be covered while personnel are on duty. They do not prohibit tattoos based on their content, even while covered. Based on our review of the websites of several other law enforcement agencies,[2] this seems to be consistent among most agencies. Consistent with the law, we recommend that the Department's policy be limited to requiring that tattoos, regardless of content or message, remain covered while the involved Deputy is on duty, on Department business, on Department property, or at a Department approved or sponsored event. The authority in support of our position is discussed below.

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[1] Department members are routinely asked questions regarding tattoos in depositions attended by both County Counsel and outside counsel.

[2] We have also reviewed the tattoo policies and/or websites of the following law enforcement agencies within California: San Diego County Sheriff's Department, Fullerton Police Department, Oxnard Police Department, and the Palo Alto Police Department. Additionally, several news articles pertaining to the Oakland Police Department and the San Jose Police Department stated that both departments have banned visible tattoos while officers are on duty. Finally, the San Francisco Police Department's policies posted online do not include a tattoo policy.

A. The Prohibition on Certain Kinds of Tattoos Likely Violates the First Amendment.

1. While a Public Employer May Regulate Some Speech of its Employees, it May Not Punish an Employee for Speech Regarding Matters of Public Concern Outside of the Workplace.

"Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Garcetti v. Ceballos,* 547 U.S. 410, 419 (2006). Accordingly, the United States Supreme Court has recognized that when a citizen enters government service, he must necessarily accept some limitations on his freedom. *Id.* at 418. Indeed, "government offices could not function if every employment decision became a constitutional matter." *Connick v. Myers,* 461 U.S. 138, 143 (1983).

Still, when public employees engage in expression unrelated to their employment while away from their workplace, their First Amendment rights are no different from those of the general public. *Pickering v. Board of Education of Township High School District,* 391 U.S. 563, 568 (1968). Under such circumstances "the speech can have First Amendment protection, absent some governmental justification far stronger than mere speculation in regulating it." *City of San Diego, Cal. v. Roe,* 543 U.S. 77, 80 (2004).

In light of the competing interests set forth above, courts employ the following sequential five-step inquiry to determine whether a public employee plaintiff's First Amendment rights have been violated:

> (1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action; (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and (5) whether the state would have taken the adverse employment action even absent the protected speech.

Eng v. Cooley, 552 F.3d 1062, 1070 (9th Cir. 2009). This inquiry is known as the *Pickering* test. The employee bears the burden of proof on the first three areas of inquiry, and the employer has the burden to prove the last two. *Id.* at 1071. Stated in simple terms, the *Pickering* test is aimed at determining whether an

employee's interest in expression is outweighed by the expression's "necessary impact on the actual operation" of the government. *Pickering,* 391 U.S. at 571. In addition to the factors set forth above, courts consider the availability of less restrictive alternatives to accomplish the employer's stated justifications for the restriction. *Garcetti,* 547 U.S. at 419. A government employer's regulation of speech must be only as restrictive as necessary to ensure the employer's effective and efficient operation.[3] *Id.* (citing *Connick v. Myers*, 461 U.S. 138, 147 (1983) ("Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government . . . .")

Although the *Pickering* test merely requires "adequate justification" with respect to isolated acts of discipline based on an employee's exercise of his or her First Amendment rights, the Supreme Court has held that the government must meet a heightened burden when it asks a court to uphold a regulation or policy that amounts to a "wholesale deterrent to a broad category of expression by a massive number of potential speakers . . . ." *United States v. National Treasury Employees Union* ("*NTEU*"), 513 U.S. 454, 467 (1995). For example, in the *NTEU* case, a group of federal employees challenged the constitutionality of a ban on accepting any compensation for making speeches or writing articles, even if the subject of the speech had no relation to the employee's official duties. *NTEU,* 513 U.S. at 457. When the Supreme Court applied the *Pickering* test, it determined that the government had a "heavy burden" in justifying the ban because its widespread impact resulted in "far more serious concerns than could any single supervisory decision." *Id.* at 468. Further, the Court stressed that "unlike an adverse action taken in response to actual speech, th[e] ban chills potential speech before it happens," which further justifies a heightened standard. *Id.*

2. Applying the *Pickering* Test, the Department Likely Will Have Difficulty Providing an Adequate Justification for the Policy's Prohibition on Certain Types of Tattoos.

Based on the case law set forth above, it is questionable whether a court would find the LASD is justified in prohibiting personnel from having certain

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[3] It is well-established that a government entity "cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick v. Myers,* I461 U.S. 138, 142 (1983). Accordingly, our analysis with respect to our First Amendment concerns with the policy is equally applicable to individuals who have submitted applications of employment to the Department.

kinds of tattoos, especially if those tattoos are on private, covered areas of an employee's body.

Regarding the first factor of the *Pickering* test, the Ninth Circuit has defined public-concern speech broadly "to include any matter other than speech that relates to internal power struggles within the workplace." *Tucker v. State of Cal. Dept. of Educ.,* 97 F.3d 1204, 1210 (9th Cir. 1996). Accordingly, "[s]peech 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." *Johnson v. Multnomah County,* 48 F.3d 420, 422 (9th Cir. 1995). Moreover, the Supreme Court has clearly held that an employee need not address the public at large for his speech to constitute a matter of public concern. *See Rankin v. McPherson,* 483 U.S. 378, 384-87 (1987) (employee statement made only to co-worker was a matter of public concern).

In light of the broad definition of "public concern," we believe it is likely that many, if not most, of the tattoos that are prohibited by the proposed policy would be deemed to be a matter of public concern. For example, many of the tattoos that fall within the definition of "extremist" or "anti-American" are likely to constitute political speech,[4] which is unquestionably a matter of public concern. While station or unit tattoos are more likely to be found to relate to workplace issues, many of the symbols associated with stations or units can also relate to other matters of public concern. For example, the policy expressly prohibits "grim reaper" tattoos out of South Los Angeles station. Such a tattoo could also relate to an employee's religious beliefs.[5] Accordingly, we believe that an employee could establish the first two factors of the *Pickering* analysis (i.e., that in getting a tattoo, he was speaking as a private citizen on a matter of public concern).

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[4] Courts afford political speech the highest level of First Amendment protection. *See In re Anonymous Online Speakers,* 661 F.3d 1168, 1173 (9th Cir. 2011).

[5] An employee could also challenge the policy on the grounds that it violates the free exercise of religion clause of the First Amendment. Courts have also applied the *Pickering* balancing test to such claims. *See, e.g., Berry v. Department of Social Services,* 447 F.3d 642, 651-51 (9th Cir. 2006). Accordingly, the analysis is similar. Potential issues with the policy regarding an employee's religion are addressed in greater detail in Section III.

The issue then becomes whether the Department can provide an "adequate justification" for regulating the speech of its employees in this manner. Because the Department's policy amounts to a "wholesale ban" on broad categories of speech, as was the situation in the *NTEU* case, a court will probably require the Department to meet a heightened standard in justifying the prohibition. We do not believe that the Department can meet this elevated burden in justifying such a blanket prohibition on broad categories of protected speech.

The policy states that these tattoos are prohibited because they are "prejudicial to good order and discipline on and off-duty and can create an intimidating and/or threatening work environment." It further provides that prohibiting matching tattoos associated with Deputy cliques is necessary to "eliminate activities and symbols within the Department that stem from or reflect cronyism, favoritism, elitism, and abuse of power, as well as to demonstrate to the community that Department members are all worthy of the public's trust, confidence, and respect." Courts have recognized some of these interests as adequate for justifying a law enforcement agency's minor burden on its employees' free speech rights while on duty. *See, e.g., Riggs,* 229 F.Supp.2d at 581 (law enforcement agency's interest in promoting disciplined, identifiable, and impartial police force justified requiring officer to cover tattoos while on duty). However, we are not aware of any authority holding that such interests are sufficient to justify a total ban on certain speech of this magnitude, which completely prohibits the involved tattoos.

If the Department has documented the effect of certain types of tattoos on Department morale and public perception of the Department, such documentation may be helpful in attempting to establish that the policy's ban on certain tattoos serves these interests. In that same vein, if the Department has any documentation demonstrating that there is a correlation between Deputies with tattoos and misconduct, this may be useful in justifying the proposed ban.

While it is difficult to predict what a court will do, we think it is unlikely a court would find that preventing Department members from obtaining tattoos that are never visible in the workplace, and may very well never be visible in public, can be justified by the concerns set forth above, particularly when there are less restrictive options available. Although maintaining order, preventing an intimidating workplace, and maintaining the public's trust are all legitimate interests, these interests must be weighed against the burden placed on employee speech as a result of the proposed ban of certain tattoos. As set forth above, at the heart of the *Pickering* analysis is whether the type of speech at issue negatively impacts the government employer's operation. We think a court would likely question whether tattoos that are never visible have any impact on the Department's efficient operation.

Additionally, we believe the Department's stated interests can be served by requiring employees to cover potentially offensive tattoos at all times while on duty or in a Department facility. For example, to the extent the Department is concerned about other Department members being offended by certain prohibited tattoos described in the policy when the employee is changing in the locker room or under similar circumstances, this can be remedied by requiring that the employee wear a patch underneath his or her clothing while on duty.

We understand the Department has specific concerns about a Deputy being questioned about his potentially offensive or embarrassing tattoo during trial in a civil action. Although this is certainly a legitimate concern, it is difficult to justify a complete ban on certain types of protected speech as to all employees based on speculation that some employees with tattoos may be involved in an incident that results in a lawsuit that proceeds to trial. Another means of addressing these concerns might be to hold mandatory training for both current and newly hired employees that specifically sets forth the ramifications of getting certain types of tattoos. For example, the training could explain that, in light of the recent controversy surrounding the Department, judges have allowed questioning regarding Deputy tattoos. Accordingly, if a Deputy has a tattoo that is offensive or indicative of gang-like behavior, it may color a jury's perception of the Deputy and make it more likely that the jury will not only find that the Deputy engaged in misconduct, but also may award punitive damages against the Deputy, which punitive damages award will not be paid by the County unless the Board of Supervisors expressly elects to do so. County Counsel can assist the Department in preparing and conducting these trainings.

B. An Employee May Successfully Challenge the Proposed Policy on Equal Protection Grounds Due to its Content-Based Restrictions on Speech.

In addition to the First Amendment analysis addressed above, we believe the portion of the policy prohibiting certain kinds of tattoos is also susceptible to Equal Protection challenges. The Supreme Court has held that permitting some to speak, while denying the same opportunity to others supports an "equal protection claim [that] is closely intertwined with the First Amendment." *Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 95 (1972). "Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* Such restrictions are known as "content-based restrictions" because their application depends on the message being communicated.

While a First Amendment plaintiff claims that he or she was subject to disciplinary action based on his or her protected expression, a plaintiff bringing an Equal Protection claim is alleging that he or she was a member of a particular group that was treated differently than others outside this group. Accordingly, a plaintiff alleging an Equal Protection claim based on First Amendment free speech rights is claiming that he or she is one of a defined group of people who was prohibited from or punished for speaking, while others faced no such limitation. With respect to the Department's proposed tattoo policy, such an Equal Protection claim would be based on the Department's differential treatment of some tattoos because they convey less desirable or more controversial messages. In other words, an Equal Protection plaintiff in this context would be claiming that the Department is engaging in discrimination based on a tattoo's message.

Courts apply two steps in analyzing an Equal Protection claim: (1) a plaintiff must show that the government action in question results in members of a certain group being treated differently from other persons based on membership in that group; and (2) the court must determine the appropriate level of scrutiny to apply and evaluate the legitimacy of the discriminatory government action under that standard. *See Sagana v. Tenorio,* 384 F.3d 731, 740 (9th Cir. 2004).

Government action alleged to violate the Equal Protection Clause is subject to one of three levels of "scrutiny" by courts: strict scrutiny, intermediate scrutiny, or rational basis review. *Tucson Woman's Clinic v. Eden,* 379 F.3d 531, 543 (9th Cir. 2004). Government action is subject to strict scrutiny when it discriminates "against a suspect class, such as a racial group, or when [it] discriminate[s] based on any classification but [also] impact[s] a fundamental right . . . ."[6] *Id.* (internal citations omitted); *see City of Cleburne v. Cleburne*

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[6] Plaintiffs who have filed lawsuits challenging a law enforcement agency's tattoo policy on Equal Protection grounds have generally not alleged the First Amendment as the basis for the claim, but rather have based their Equal Protection claims on a purported interest in their personal appearance. The only such case in which a plaintiff did raise an Equal Protection claim based on the First Amendment was decided before many courts, including the Ninth Circuit, held that tattoos are entitled to First Amendment protection. *See, Riggs,* 229 F.Supp.2d at 579. Accordingly, courts have applied a rational basis review in evaluating these Equal Protection challenges. Because these lawsuits only address policies requiring an individual to cover his or her tattoos (rather than a complete prohibition on certain types of tattoos, as is the case with the proposed LASD policy), courts have regularly found that such requirements survive rational basis review. *See, e.g., Inturri,* 365 F.Supp.2d at 249 (challenging order to cover tattoos); *Riggs*, 229 F.Supp.2d at 578 (same).

Living Ctr., Inc., 473 U.S. 432, 439 (1985). The First Amendment right to free speech is one such fundamental right. *Mosley,* 408 U.S. at 101. Accordingly, when analyzing an Equal Protection claim, government action impacting First Amendment rights is subject to strict scrutiny. Courts will uphold such government actions only if they are narrowly tailored to serve a compelling government interest. *See Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 227 (1995).

Here, the proposed LASD policy prohibits personnel from getting certain tattoos based on their content. Specifically, it prohibits tattoos that are "lewd and lascivious, extremist, sexist, racist, drug or gang-related, or anti-American." It also prohibits "[m]atching or numbered station or unit tattoos or brandings that are associated with cliques allowed 'by invitation only,' or are linked to Deputy-involved-shootings and/or any unconstitutional or rogue behavior by Department personnel." Because the proposed policy denies individuals with certain types of tattoos the opportunity to "speak," while allowing others to engage in that very same manner of expression, a court evaluating an Equal Protection claim based on the proposed policy would likely apply strict scrutiny.

In order to pass strict scrutiny, the Department would have to demonstrate that the proposed policy is narrowly tailored to serve a compelling government interest. This standard is more difficult to meet than the *Pickering* balancing test discussed above. Accordingly, even if the Department can meet its burden under the *Pickering* balancing test to defend against a First Amendment claim as discussed in Section II.A above, it is unlikely that the policy can survive strict scrutiny to defeat an Equal Protection claim. Even assuming that maintaining "good order and discipline" and eliminating symbols that may cause "an intimidating and/or threatening work environment" amount to a compelling government interest, we believe a court would likely question whether the proposed policy serves that interest by banning tattoos that will not be displayed at work. Furthermore, as stated above, because these interests can be served by the more narrowly drawn requirement that employees cover such tattoos while they are working, we believe it is unlikely a court would find that the proposed policy passes constitutional muster.

C. A Court May Also Find That the Proposed Policy is Constitutionally Overbroad or Vague.

A government regulation on speech may also be invalidated as being unconstitutionally overbroad or vague. If a government enactment "reaches a substantial amount of constitutionally protected conduct[,]" then a court may invalidate it as overbroad. *Village of Hoffman Estates v. Flipside Hoffman Estates, Inc.,* 455 U.S. 489, 494 (1982). "It is well-established that the First

Amendment protects speech that others might find offensive or even frightening." *Fogel v. Collins,* 531 F.3d 824, 829 (9th Cir. 2008); *see Berger v. Battaglia,* 779 F.2d 992, 1000 (4th Cir. 1985) (recognizing that the First Amendment protects "free, uncensored artistic expression – even on matters trivial, vulgar or profane.") The proposed policy's ban on tattoos that are "lewd and lascivious, extremist, sexist, racist, drug or gang-related, or anti-American" and prohibition on certain matching tattoos associated with a station or unit of assignment implicates a wide range of expression that enjoys First Amendment protection, including political speech, as discussed above. Accordingly, in addition to the constitutional issues discussed above, we believe that a court may strike down this portion of the policy as unconstitutionally overbroad.

Similarly, the proposed policy may be challenged on vagueness grounds. Challenges to a government enactment as vague are based on the due process clause of the Fourteenth Amendment. *Hunt v. City of Los Angeles,* 638 F.3d 703, 712 (9th Cir. 2011). A government regulation may be void for vagueness if it fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited or "abut(s) upon sensitive areas of basic First Amendment freedoms, operating to inhibit the exercise of those freedoms." *Id.* (internal citations and quotations omitted.)

The proposed policy includes several definitions for the terms used to describe the prohibited tattoos. As set forth above, due to the constitutional concerns presented by the proposed policy's wholesale ban on tattoos conveying certain messages, it is our recommendation that the policy be limited to requiring that employees cover their tattoos, regardless of content or message, while on duty. If the Department were to modify the policy as recommended, these vagueness concerns would be moot because there would be no need to include these definitions in the policy. That said, if the Department is inclined to use the current version of the policy, some of these definitions should be clarified, to the extent possible, to avoid any additional challenges on vagueness grounds.

First, "cliques" are defined as "groups of co-workers who socialize, whether in or outside the workplace in a manner that suggests or promotes the exclusion of others, or adopt standards contrary to the Department's oath and Core Values." The phrase "in a manner that suggests or promotes the exclusion of others" is not clear. As the definition currently reads, it arguably includes any group of friends. Because the Department is targeting the groups that promote misconduct in this policy, we believe the more defensible definition of "cliques" is: "Cliques are groups of co-workers who socialize, whether in or outside the workplace, and adopt standards contrary to the Department's oath and Core Values."

Second, we believe the definition of "indecent tattoos" requires clarification. Regulating indecent or obscene speech is inherently difficult because of its subjective nature. What is "vulgar, filthy, or disgusting" to one person may be perfectly acceptable to another. Accordingly, the policy should include as much detail as possible in establishing what is prohibited as "indecent." Is an "indecent tattoo" any tattoo that includes some form of nudity or does it require something more? Once we are able to understand exactly what the Department seeks to prohibit with respect to "indecent" tattoos, we can recommend a means of clarifying the definition.

Third, we believe that the definition of "Anti-American" is also vague and overbroad. Specifically, the meaning of the phrase "as to negatively impact morale and the Department's public perception" is unclear and should be clarified. Again, if the Department follows our recommendation to limit the policy to covering tattoos while on duty, then this issue will be moot as these definitions will no longer be necessary.

D. Enforcing the Proposed Policy's Prohibition of Certain Types of Tattoos on Private Areas May Violate the Fourth Amendment.

In addition to the First Amendment and Equal Protection issues regarding the proposed policy's ban on certain types of tattoos, the policy's method of enforcing its ban may also invite challenges under the Fourth Amendment. If the Department were to amend the policy to only require that tattoos are covered (as recommended above), then this issue would also be moot. If, however, the Department is inclined to use the current version of the policy, this issue should also be addressed.

"[T]he Fourth Amendment protects individuals from unreasonable searches conducted by the Government, even when the Government acts as an employer . . . ." *National Treasury Employees Union v. Von Raab,* 489 U.S. 656, 665 (1989). As a threshold matter, a public employee claiming a Fourth Amendment violation must demonstrate that he or she had a reasonable expectation of privacy in the area searched. *O'Connor v. Ortega,* 480 U.S. 709. 715 (1987). The Supreme Court has recognized that "public employees' expectations of privacy in their offices, desks, and file cabinets . . . may be reduced by virtue of actual office practices and procedures, or by legitimate regulation." *Id.* at 717.

If the employee does have a reasonable expectation of privacy regarding the area of their body subject to the challenged search as set forth above, courts must then balance the invasion of those privacy interests against the employer's

need for supervision, control, and the efficient operation of the workplace. *Id.* at 719-20. Generally, a public employer's search is justified when it had "reasonable grounds for suspecting that it will turn up evidence that the employee is guilty of work-related misconduct." *Wasson v. Sonoma County Junior College District,* 4 F.Supp.2d 893, 905 (N.D. Cal. 1997) *aff'd on other grounds by Wasson v. Sonoma County Junior College District*, 203 F.3d 659 (9th Cir. 2000). Importantly, "the intrusiveness of the search must be commensurate with the seriousness of the suspected misconduct." *Carter v. County of Los Angeles,* 770 F.Supp.2d 1042, 1051 (C.D. Cal. 2011). Regarding searches of an employees' person, the Ninth Circuit has held that investigative strip searches of police officers by their employer must be supported by a reasonable suspicion that evidence of criminal misconduct will be uncovered. *Kirkpatrick v. City of Los Angeles,* 803 F.2d 485, 489 (9th Cir. 1986).

Here, the Department's proposed policy states that "[i]f it is alleged that a prohibited tattoo is on a private area as defined above, authorization to order the subject to display the area must be obtained from the concerned Division Chief and an examination will be done by a Department approved licensed medical professional." Although strip searches are more intrusive than the type of searches contemplated by the proposed tattoo policy, Sheriff's Deputies unquestionably have an expectation of privacy in areas of their bodies that are generally covered by clothing, particularly in areas covered by undergarments.

Because the goal of the search is related to alleged policy violations, rather than criminal conduct, the Department may have difficulty demonstrating that the intrusiveness of the search of a Deputy's private areas is proportional to the alleged misconduct (i.e., that the Deputy has a prohibited tattoo as set forth in the policy). Additionally, as discussed above, while maintaining the integrity of the Department may very well be a legitimate government interest, we think it is unlikely that a court would find that searching the private areas of Deputies for purportedly offensive tattoos advances such an interest. Similarly, because a public employer's ability to conduct searches absent probable cause is rooted in its need to facilitate the efficient operation of the workplace and investigate work-related misconduct, a court may again question whether ensuring that the employees do not have certain types of tattoos that are never visible in the workplace has any relation to the efficient operation of the Department.

Of course, if the Department were to obtain a Deputy's written consent to view the area, then there would be no Fourth Amendment violation. However, even where written consent is obtained, a Deputy may assert at a later time that the consent was not voluntary. *See generally Schneckloth v. Bustamonte,* 412 U.S. 218, 227 (1973) (consent to search is valid if consent was freely and voluntarily given and not the result of duress or coercion, express or implied).

Similarly, the Department may not require that employees provide advance consent to these searches at the time that they are hired. *See Thorne v. City of El Segundo,* 726 F.2d 459, 469 (9th Cir. 1983) (A potential public employee "may not be required to forego his or her constitutionally protected rights simply to gain the benefits of [public] employment."); *McDonell v. Hunter,* 612 F.Supp. 1122, 1131 (S.D. Iowa 1985) ("Advance consent to future unreasonable searches is not a reasonable condition of employment.")

We believe that these additional concerns regarding enforcement of the ban on certain tattoos on private areas further support our conclusion that this section of the policy would likely violate employees' constitutional rights unless revised to require only covering of all tattoos, regardless of content.

III. The Proposed Policy May Serve as a Basis for Discrimination Claims Under Federal and State Law.

Even ignoring the constitutional concerns discussed above, employees could challenge the LASD's proposed tattoo policy as discriminatory. The proposed policy presently provides that:

> This policy is not intended to discriminate against anyone based on religion, race, gender, ethnicity, age, disability, sex, sexual orientation, military or veteran's status, nationality, color, or marital status. Personnel may seek an exemption from this policy for any of these reasons but must do so in writing with the reasons for the exemption directly to the concerned Division Chief.

While including this exemption is a step in the right direction, we believe the exemption is still too general. For example, while the policy explains how an employee may seek an exemption, it does not explain how exemptions are evaluated. Are requested exemptions evaluated by the Executive Risk Review panel or is it solely the Division Chief's decision? Additionally, we suggest that the policy include language aimed at preserving an individual's right to observe and practice his or her religion. Furthermore, with respect to discrimination of other protected classes, the Department should be aware that how it applies this exemption and the rest of the policy could potentially serve as a basis for claims

pursuant to Title VII and California's Fair Employment and Housing Act ("FEHA").[7] The legal authority supporting these concerns is discussed below.

A. The Policy Should Provide Explicit Protection for an Employee's Right to Observe and Practice His or Her Religion.

Both Title VII and FEHA prohibit employers from taking an adverse employment action against an employee based on the individual's religion. 42 U.S.C. section 2000e-2(a)(1); Government Code section 12940(a)-(d). "Religion" is broadly defined and includes "all aspects of religious observances and practice, as well as belief, unless [the] employer demonstrates [it] is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. section 2000e(j); *see also* Government Code section 12926(q).

Under the Ninth Circuit's two-part framework in analyzing Title VII religious discrimination claims in bringing an action, the employee must first establish a prima facie case by demonstrating the following: (1) a bona fide religious belief or practice which conflicted with the employee's job duty; (2) notice to the employer of the belief and conflict; and (3) the employer threatened or discharged the employee based on the employee's inability to perform the job requirement. *See, e.g., Tiano v. Dillard Dept. Stores, Inc.,* 139 F.3d 679, 681 (9th Cir. 1998). If the employee proves a prima facie case of discrimination, the burden shifts to the employer to show that it "initiated good faith efforts to accommodate reasonably the employee's religious practices or that it could not reasonably accommodate the employee without undue hardship." *Id.*; *see California Fair Employment and Housing Com'n v. Gemini,* 122 Cal.App.4th 1004, 1012 (2004).

Regarding employee tattoo policies, some courts have held that, at least with respect to certain tattoos of a religious nature, employers could not demonstrate that allowing the employee to display a tattoo imposed an undue hardship. In *Equal Employment Opportunity Commission v. Red Robin Gourmet Burgers, Inc.,* 2005 WL 2090677 (W.D. Wash. 2005), for example, the United

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[7] "Claims of employment discrimination under FEHA are analyzed under the same framework as those brought under Title VII." *Scott v. Solano County Health and Social Services Dept.,* 2008 WL 3835267 *5 (E.D. Cal. 2008); *see Brooke v. City of San Mateo,* 229 F.3d 917, 923 (9th Cir. 2000) ("Title VII and FEHA operate under the same guiding principles."); *Beyda v. City of Los Angeles,* 65 Cal.App.4th 511, 517 (1998).

States District Court found that the employer's mere assertion that an employee displaying a tattoo was contrary to its "family-oriented and kid-friendly" image was insufficient to demonstrate undue hardship. Rather, the employer had to provide evidence of "actual imposition on co-workers or disruption of the work routine" to demonstrate such hardship. *Id.* at *5.

In light of the authority above, we suggest adding a sentence to the proposed policy stating that personnel may seek an exemption from the policy to the extent they contend it interferes with their right to observe and practice their religion. In evaluating these exemptions, the Department should keep the "undue hardship" standard in mind. For example, in the context of an employee contending his or her religion requires a certain tattoo to be on display at all times (as was the case in the *Red Robin* case discussed above), the Department should consider how visible the tattoo is and whether any citizens or personnel have complained about the contents of the tattoo.

B. The Department Should Ensure that the Proposed Policy is Consistently Applied to Avoid Discrimination Claims.

In addition to religious discrimination claims, enforcement of the tattoo policy could also serve as a basis for other types of discrimination claims. For example, in *Geotz v. City of Forest Park,* 2012 WL 4009512 (S.D. Ohio 2012), the plaintiff, a Caucasian female, contended that she had been ordered to cover her tattoos and was disciplined for her failure to do so, while an African-American female was never disciplined for the same conduct. The United States District Court held that the alleged inconsistent enforcement of the tattoo policy in the manner described by the plaintiff could serve as a basis for a racial discrimination claim under Title VII. *Id.*

Although we do not believe that any specific aspect of the policy should (or could) be changed to avoid such claims, the Department should remain cognizant of the possibility of these types of lawsuits and have well-reasoned determinations as to why a certain employee may be entitled to an exemption from the policy while another may not be entitled to an exemption sought on similar grounds.

CONCLUSION

While many of the issues raised in this opinion can be rectified by the revisions to the proposed policy set forth above, we believe that it is unlikely the Department's proposed prohibition of employee tattoos based on their content can be modified to comply with constitutional standards. Accordingly, we recommend that the policy be revised to require that all tattoos are covered while

on duty, on Department business, on Department property, or at a Department approved or sponsored event.

If the Department has any supporting materials that it considered in drafting this policy, such as the tattoo and body-art policies of other agencies, documentation regarding the connection between certain tattoos and Deputy misconduct, or complaints regarding certain offensive tattoos, we would be interested in reviewing that material. It may be the case that other law enforcement agencies have employed similar policies and have met little resistance in doing so, although we have been unable to locate any policies instituting a wholesale ban on certain types of tattoos. Still, as one of the largest law enforcement agencies in the country, the LASD should carefully consider the implementation of policies that have the potential to impact the constitutional rights of a large number of individuals based on the conduct of a few Deputies.

If you have any questions concerning this matter, please contact me, Assistant County Counsel Jennifer Lehman at (213) 974-1908, or Deputy County Counsel Alexandra Zuiderweg at (213) 974-1871.

Very truly yours,

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APPROVED AND RELEASED:

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