

## **Countering Bigotry and Extremism in the Ranks: A First Amendment Guide for Law Enforcement Agencies**

The overwhelming majority of law enforcement officers serve their communities with honor, integrity, and respect for the oath they took to serve and protect. Americans across the political spectrum are grateful for their work and dedication. But law enforcement agencies (LEAs) are not immune from the wide range of extremist ideologies that have gained traction in recent years. Bigotry and extremism<sup>1</sup> are destructive forces within an LEA, undermining effectiveness, reputation, and trust in the community, and the morale of other officers. The degradation of trust impedes the ability of law enforcement executives to fully execute the mission of their organizations.

As law enforcement leaders seek to avoid the disruption and impairments caused by bigotry and extremism within their ranks, thorny legal and constitutional questions can arise. What speech does the First Amendment protect in this context? Does the Constitution permit an LEA to reprimand, discipline, or fire an officer based on their bigoted or extremist speech or associations? Can an LEA refuse to hire an individual on these grounds?

Fortunately, courts across the country, including the U.S. Supreme Court, have considered and resolved many of these questions. First, it is important to note that public employees **do not** have First Amendment protection for speech made as part of their official duties, and LEAs are free to discipline officers and other employees for speech that is uttered while they are on the job.<sup>2</sup> But even when the speech is made in an employee's unofficial capacity (for example, while they are off duty), the bottom line is clear: **because of their unique public safety role and responsibilities, LEAs generally have broad discretion to take disciplinary action against officers who express bigoted or extremist views without running afoul of the First Amendment.** This document aims to provide practical First Amendment guidance for law enforcement leaders navigating these challenges.

### **What Does the First Amendment Protect?**

Free speech and the freedom to peaceably assemble are fundamental rights guaranteed by the First Amendment to the U.S. Constitution. These rights generally bar the government (whether local, state, or federal) from censoring, punishing, or retaliating against anyone because of the viewpoints they express or the people with whom they associate.

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<sup>1</sup> There are of course many forms of speech and association that can be disruptive to the effectiveness of a LEA's public safety mission. For the purposes of this guidance, bigotry and extremism encompass a wide range of such speech and associations, including those that express intolerance or prejudice on the basis of race, ethnicity, national origin, religion, disability, pregnancy, gender, gender identity, sex, sexual orientation, or veteran's status, and those that express violent, anti-government ideologies.

<sup>2</sup> *Garrett v. Ceballos*, 547 U.S. 410, 421 (2006).

For government employees or those seeking to be employed by the government, however, these rights may be limited where the speech or assembly interferes with the mission or effectiveness of the government agency, or when it “has some potential to affect [the government agency’s] operations.”<sup>3</sup> This means that when the government acts as an employer, it has significant authority to fire, reprimand, or refuse to hire employees because of activity that might otherwise be protected under the First Amendment.

Courts have recognized that the effectiveness of an LEA “depends importantly on the respect and trust of the community and on the perception in the community that it enforces the law fairly, even-handedly, and without bias.”<sup>4</sup> Accordingly, LEAs “have special organizational needs that permit [them to impose] greater restrictions on employee speech”<sup>5</sup> than other public employers may impose. This is particularly true as to officers who directly engage with their communities, as courts have made clear that “[w]here a Government employee’s job quintessentially involves public contact, the Government may take into account the public’s perception of that employee’s expressive acts in determining whether those acts are disruptive to the Government’s operations.”<sup>6</sup>

### Understanding the Supreme Court’s *Connick-Pickering* Test

A decision to fire, discipline, demote, or otherwise reprimand a law enforcement officer or other employee due to their exercise of speech or association is evaluated under the ***Connick-Pickering* balancing test**, named for the two Supreme Court cases establishing the test.<sup>7</sup> The same test generally applies to a public agency’s decision *not* to hire an employee in the first place and to the discipline of existing employees when such actions are challenged on First Amendment grounds.

The *Connick-Pickering* test poses two sequential questions:

- **First, does the speech at issue comment on “matters of public concern”?**
  - **If the answer is “no,”** courts will almost always conclude that the disciplined employee or rejected applicant has no legal recourse under the First Amendment.
- **Second, if the answer to the first question is “yes,”**—that is, the speech at issue comments on a matter of public concern—courts will ask: Does the public employer have an adequate justification for taking the adverse employment action due to that speech?
  - **Even when the speech addresses a matter of public concern, the First Amendment gives LEAs wide latitude to protect the agency’s interests.** LEAs—and the public they serve—have a significant interest in the safe, efficient, and effective accomplishment of their public-safety mission. And “because police departments function as paramilitary organizations charged with maintaining public safety and order, they are given more latitude in their decisions regarding discipline and personnel regulations than an ordinary government employer.”<sup>8</sup>

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<sup>3</sup> *Garretti*, 547 U.S. at 421.

<sup>4</sup> *Pappas v. Giuliani*, 290 F.3d 143, 146 (2d Cir. 2002).

<sup>5</sup> *Henry v. Johnson*, 950 F.3d 1005, 1012 (8th Cir. 2020) (internal citations omitted).

<sup>6</sup> *Locurto v. Giuliani*, 447 F.3d 159, 172 (2d Cir. 2006).

<sup>7</sup> *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983).

<sup>8</sup> *Nixon v. City of Houston*, 511 F.3d 494, 498 (5th Cir. 2007).

## When Does Bigoted or Extremist Speech Address a “Matter of Public Concern”?

A court will likely conclude that speech containing a clear political or social message, even if highly offensive, comments on an issue of “public concern” and warrants greater First Amendment protection. By contrast, bigoted or extremist speech that is merely offensive or expresses personal grievances—without any political or social commentary—is unlikely to be seen as commenting on an issue of public concern. Courts will not simply accept an employee’s word that they believed they were speaking on a matter of public concern. “Whether an employee’s speech addresses a matter of public concern must be determined by the content, form, and context”<sup>9</sup> of the speech, and courts will “look behind pretextual ‘public concern’” rationales advanced by disciplined officers.<sup>10</sup>

Two contrasting real-world cases help illustrate this public/private distinction. In the first, an officer was fired after attending an off-duty party “wearing bib overalls and a black, curly wig, and carrying a watermelon.”<sup>11</sup> Although he claimed his costume was expressive, he admitted that he wore it strictly to “have a good time”<sup>12</sup> and the court concluded that the conduct did not address a matter of public concern. In the second case, an employee at a public utility agency made racially charged comments on Facebook, including praising the 2017 white supremacist rally in Charlottesville, Virginia, and complaining about the lack of a “white history” month, and spoke out against the removal of a confederate statue at a protest. The court ruled that this speech, while offensive, clearly commented on matters of public concern.<sup>13</sup>

## How Can LEAs Justify Discipline or Failure to Hire Even When Bigoted or Extremist Speech Comments on a Matter of Public Concern?

Even when an employee’s or applicant’s offensive speech comments on a matter of public concern, courts will balance the free speech interests of the employee or applicant against the LEA’s significant interest in carrying out its public safety mission. In other words, an LEA can justify a disciplinary action or failure to hire if it “reasonably believe[s] that the speech would potentially interfere with or disrupt the government’s activities, and can persuade the court that the potential disruptiveness [is] sufficient to outweigh the First Amendment value of that speech.”<sup>14</sup> LEAs should proactively express their values to potential employees in recruitment information and throughout the hiring process to ensure candidates understand that bigoted or extremist behavior is not tolerated or welcomed in their ranks.

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<sup>9</sup> *Connick*, 461 U.S. at 147.

<sup>10</sup> *Pappas v. Giuliani*, 118 F. Supp. 2d 433, 443 (S.D.N.Y. 2000).

<sup>11</sup> *Tindle v. Caudell*, 56 F.3d 966, 968 (8th Cir. 1995).

<sup>12</sup> *Id.*

<sup>13</sup> See *Gozu v. Memphis Light, Gas & Water Division*, 398 F. Supp. 3d 303, 318 (W.D. Tenn. 2019).

<sup>14</sup> *Heil v. Santoro*, 147 F.3d 103, 109 (2d Cir.1998).

Among the relevant types<sup>15</sup> of disruption or harm to an LEA’s mission are the actual or likely impacts of the bigoted or extremist speech on:

- Respect and trust in the community,<sup>16</sup> and the diversion of LEA resources to address complaints or media attention to bigoted or extremist speech;
- Perception in the community that the LEA and its staff enforce the law fairly, even-handedly, and without bias;<sup>17</sup>
- Willingness of communities to report crimes, offer witness testimony, or to rely on the LEA for public safety needs;<sup>18</sup>
- Recruitment, retention, and morale;<sup>19</sup> and/or
- Internal workplace harmony and cooperation and trust among officers and staff.<sup>20</sup>

Before taking any adverse disciplinary action in response to offensive speech on matters of public concern, an LEA should evaluate what evidence of actual or likely disruption to the effectiveness of its mission they could marshal against a potential constitutional challenge. In addition, LEAs should consider practices to help strengthen the documentation of such disruptions.

### **Official vs. Unofficial Capacity: How to Tell?**

As outlined above, LEA officers and employees may be disciplined for bigoted or extremist speech even if made in their unofficial capacity. But whether an officer uttered the offensive speech in an official versus unofficial capacity is the first step in determining whether the speech is protected by the First Amendment at all. The Supreme Court has ruled that public employees **do not** have constitutional protection for speech issued as part of their official duties, “and the Constitution does not insulate their communications from employer discipline.”<sup>21</sup> To determine if an officer is speaking in his or her official capacity, courts will ask whether the officer is speaking “pursuant to their official duties,”—in other words, *as part of their* job. For example, in the seminal case establishing this rule, the Supreme Court determined that a prosecutor’s speech was made in his official capacity because he “spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case.”<sup>22</sup> LEAs should adopt policies and personnel rules that clearly express the values of the organization and that applicants with bigoted or extremist views will not be considered for employment.

### **Discipline Based on Association with Extremist Groups**

In recent years the United States has seen a disturbing rise in the activity of organized extremist and white nationalist groups. As the FBI recently acknowledged, these groups often seek to recruit law enforcement agents, whom they value for their training, skills, and discipline.<sup>23</sup> An officer’s

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<sup>15</sup> See, e.g., *Pappas*, 290 F.3d at 146-47.

<sup>16</sup> *Id.* at 146.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 147.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Garvetti*, 547 U.S. at 421.

<sup>22</sup> *Id.*

<sup>23</sup> See Josh Margolin, *White supremacists 'seek affiliation' with law enforcement to further their goals, internal FBI report warns*, ABC News (Mar. 8, 2021), <https://abcnews.go.com/US/white-supremacists-seek-affiliation-law-enforcement-goals-internal/story?id=76309051>.

affiliation with such groups—whether the group is dedicated to racism, anti-government objectives, or other extremist ideologies—poses clear and severe harms to his or her LEA. It remains somewhat unclear, however, how courts will handle First Amendment challenges to LEA discipline or office policies that seek to restrict officers’ affiliation with these groups. Existing case law suggests that because association with these groups often explicitly relates to social and/or political issues, courts applying the *Connick-Pickering* test will conclude that the affiliation does implicate a matter of public concern. The burden would then fall on the LEA to demonstrate how the affiliation disrupts or will potentially disrupt the safe, efficient, and/or effective accomplishment of the LEA’s public-safety mission, including the perception in the community that it enforces the law fairly, even-handedly, and without bias. LEAs are encouraged to promulgate disciplinary policies and rules that prohibit affiliation with racist, violent, or other extremist ideologies. These policies should provide for serious disciplinary action, including termination for membership in these extremist groups.

### What about Social Media?

Law enforcement agencies **can and should** implement social media policies that prohibit certain types of extremist speech and association likely to harm the LEA’s public image and operations and, where appropriate, should negotiate for their inclusion in collective bargaining agreements. Such policies place prospective and existing employees on notice of the types of speech and association that may subject them to discipline, including termination. For example, an LEA’s social-media policy may prohibit employees from posting any “sexual, violent, harassing, racist, sexist, or ethnically derogatory” content—a scope that courts have routinely upheld against First Amendment challenges.<sup>24</sup>

### Conclusion

This overview is intended to provide a roadmap for LEA leaders grappling with these challenges. But every case is different, and whether the First Amendment protects an employee’s or applicant’s speech against adverse employment action always depends on the specific facts of each case. This guidance does not constitute legal advice, and LEAs should generally consult with counsel before taking disciplinary actions that may result in First Amendment challenges. LEAs should also consider whether there are state constitutional or other legal protections for public employee speech. Legal experts at the Institute for Constitutional Advocacy and Protection and the States United Democracy Center are available as a resource, and we invite you to reach out.

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*This guidance document was prepared by the States United Democracy Center and the Institute for Constitutional Advocacy and Protection (ICAP) at Georgetown University Law Center.*

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<sup>24</sup> See, e.g., *O’Laughlin v. Palm Beach County*, 500 F. Supp. 3d 1328, 1333 (S.D. Fla. 2020).