

EXECUTIVE SUMMARY

To Sue Parker Gerson, Anti-Defamation League
Cc Jessica Black Livingston
From Annie Liu, Steve Bruns
Date July 27, 2021
Subject **Privileged And Confidential**
Executive Summary: Topic 7: Regulating Officers' Hate Speech and Association with Hate Groups

QUESTION PRESENTED

As early as 2006, federal officials warned of a “white supremacist infiltration of law enforcement.”¹ Since that time, the federal government has not developed a clear strategy for keeping white supremacists out of law enforcement. Instead, states have taken on the mantle of protecting their communities from white supremacist police officers. This presents the thorny issue of whether law enforcement agencies can identify white supremacists by examining their speech or associational activities and accordingly fire or refuse to hire white supremacist officers. Several states have proposed giving law enforcement agencies more power to exclude officers who use hate speech or associate with hate groups. Can these laws withstand constitutional scrutiny? And are they sound from a policy perspective?

SHORT ANSWER

The First and Fourth Amendments protect individuals' rights to speech, association, and privacy. Police officers relinquish some measure of these protections when they apply to or work for law enforcement agencies. Rather than subject a police officer's First Amendment claims to strict scrutiny, courts balance the police officer's interest in hateful speech or association against that officer's law enforcement agency's interest in efficient operation—with the law enforcement agency's interests almost always taking the upper hand. A police officer's claim for violation of privacy under the Fourth Amendment involves a two-prong inquiry. The court will consider whether the police officer's expectation of privacy is reasonable and the totality of circumstances surrounding the investigation, including the government's interest in conducting the search and the scope of the search.

If a law enforcement agency investigates and refuses to hire or fires a police officer based on her hate speech or association with a hate group, the officer will most likely claim that the government violated her constitutional rights of free speech, association, and privacy. The officer could either challenge the statute authorizing such an employment decision or challenge the decision itself as infringing her speech or associational rights, or both. The cause of action likely makes no difference. Courts tend to hold that law enforcement's interests in efficiency and public trust outweigh an officer's interests in using hate speech or maintaining associations with hate groups. Additionally, a police officer has a diminished expectation of privacy because she occupies a position of public trust and carries enormous responsibilities. Furthermore, the law enforcement agency has a compelling interest in ensuring the preservation of its employees' integrity and ability to make sound judgment, which entitles the agency to utilize what normally would be considered excessive investigative measures.

¹ FEDERAL BUREAU OF INVESTIGATION, WHITE SUPREMACIST INFILTRATION OF LAW ENFORCEMENT (2006), <https://assets.documentcloud.org/documents/3423189/CT-Excerpt.pdf>.