

You Have the Duty to Remain Silent: How Workplace Gag Rules Frustrate Police Accountability

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I. Introduction

When reporter Sara Koenig of the acclaimed podcast *Serial* sought to tell the story of how Cleveland police fatally shot a 12-year-old boy playing with a toy gun in a city park,¹ the only representative of the Cleveland Police Department who would speak to her was the head of the patrolman’s union, Steve Loomis. Acknowledging that Loomis’ opinion might not be representative of the views of rank-and-file officers, Koenig explained to listeners that “no other Cleveland officers were permitted to talk to us on the record.”²

This response – that police officers are forbidden from discussing anything work-related with the news media – has become a staple of daily routine for journalists. One survey of reporters who regularly cover law enforcement agencies found that 57% had been blocked by a media-relations officer from getting an interview with a police department employee.³ The gagging of America’s police officers prevents journalists and their audiences from hearing the perspective of frontline law enforcement officers at a time when policing is under unprecedented scrutiny.

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¹ Emma G. Fitzsimmons, *Video Shows Cleveland Officer Shot Boy in 2 Seconds*, N.Y. TIMES (Nov. 26, 2014), <https://www.nytimes.com/2014/11/27/us/video-shows-cleveland-officer-shot-tamir-rice-2-seconds-after-pulling-up-next-to-him.html>.

² SERIAL, Season 3, Ep. 3, “Misdemeanor, Meet Mr. Lawsuit,” <https://serialpodcast.org/seasonthree/3/misdemeanor-meet-mr-lawsuit>.

³ Carolyn S. Carlson, *Mediated Access: Crime Reporters’ Perceptions of Public Information Officers’ Media Control Efforts, Use of Social Media, Handling of Body Camera Footage and Public Records* (2016), <https://www.spj.org/pdf/sunshineweek/crime-reporters-survey-report.pdf> at 3.

The ability of police officers to tell their own stories has undeniable value. The public needs to hear why officers make the decisions they do, without filtering through a public-relations officer who lacks first-hand knowledge and may be inclined to apply a “spin” to the facts.⁴ As with any highly scrutinized public employee, police officers may be wrongfully suspected of misconduct, and officers’ ability to explain themselves to the public by way of the news media can help dispel suspicion and vindicate reputations.⁵ Transparency is widely recognized as a core value in restoring strained public trust in law enforcement,⁶ but a police department that refuses to make its officers accessible to answer questions is hardly transparent.

Although courts have acknowledged that police, “like teachers and lawyers, are not relegated to a watered-down version of constitutional rights,”⁷ officers’ right to free speech has historically been shackled by agency gag orders that, in many cases, clearly overstep both First Amendment boundaries and principles of responsible governance. To cite just one example among many, a directive on the books at Ohio’s Columbus Police Department tells officers that, even

⁴ See Ryan J. Foley, *Video evidence increasingly disproves police narratives*, ASSOCIATED PRESS (Jun. 9, 2020), <https://apnews.com/article/us-news-ap-top-news-mn-state-wire-pa-state-wire-police-a172fb01bdb74b4159b39da390d9e79e> (documenting instances in which video evidence debunked official press statements from police agencies downplaying severity of violent behavior by officers, “fueling mistrust and embarrassing agencies that made misleading or incomplete statements that painted their actions in a far more favorable light”); David DeBolt, *Bay Area police shooting videos follow same recipe; critics call it ‘slick marketing.’* MERCURY NEWS (May 16, 2021), <https://www.mercurynews.com/2021/05/16/police-pr-video-machine-criticized/> (describing how law enforcement agencies contract with marketing firms to produce selectively edited videos “to create an early narrative and spin the story in their favor while keeping raw footage out of public view”).

⁵ For example, when an Indiana police officer was ordered reinstated to his job after a review board concluded that he had been unfairly labeled as mentally unfit for duty, police department policy kept him from telling his side of the story to the local media. WAVE 3 NEWS, *FOP, merit commission defend decision to reinstate officer accused of unfit for duty* (Oct. 9, 2013), <https://www.wave3.com/story/23651754/fop-merit-commission-defend-decision-to-reinstate-officer/>.

⁶ See Joshua Chanin & Salvador Espinosa, *Examining the Determinants of Police Department Transparency: The View of Police Executives*, 27 CRIM. JUST. POL’Y REV. 498, 499 (2016) (explaining that recognized virtues of transparency in criminal justice include fortifying trust and accountability, and promoting dialogue and increasing public involvement in agency decision-making). See also Imani J. Jackson & Frank LoMonte, *Policing Transparency*, 44 HUM. RTS. 12, 12 (2020) (“Access to documents and data from law enforcement agencies enables the public and press to discharge essential oversight functions”).

⁷ *Garrity v. New Jersey*, 385 US 493, 500 (1967).

when they are off duty, they must refrain from expressing opinions about what should or should not be police department policy or voicing criticism of the department or any of its employees.⁸

Restrictive speech policies can stifle whistleblowing – and when one whistleblower is punished, an unmistakable message of intimidation is sent to other would-be leakers.⁹ When Minneapolis police officer Colleen Ryan was pseudonymously quoted in a national magazine complaining about the department’s toxic culture after one of her fellow officers killed George Floyd, an unarmed Black man, while making an arrest for a petty crime, the police department tracked Ryan down and disciplined her for speaking to the media without approval.¹⁰ (It is no small irony that the officer convicted of murdering Floyd, Derek Chauvin, largely avoided discipline over a checkered career of violent run-ins with citizens,¹¹ while the department acted swiftly to penalize speech perceived as harming the agency’s image.) When law enforcement agencies silence officers from speaking, those disparately impacted will be dissenters like Colleen Ryan, whose opinions break from the party line.

Police officers are not the only ones who suffer under repressive speech policies: The public suffers when police are unable to speak out on matters of public concern, including issues within their own departments or more broadly within the profession of policing. The Supreme Court has recognized “the importance of promoting the public’s interest in receiving the well-

⁸ Columbus Police Dept., Media Relations and Public Appearances 10.13, § II.D (rev’d Mar. 30, 2021), *available at* <https://www.columbus.gov/police-divisiondirectives/>.

⁹ See Robert E. Drechsel, *The Declining First Amendment Rights of Government News Sources: How Garcetti v. Ceballos Threatens the Flow of Newsworthy Information*, 16 COMM. L. & POL’Y 129, 139 (2011) (asserting that “[i]f government employees can be disciplined without First Amendment limits for job related speech, government employers now have another tool to discourage, intimidate and punish whistleblowers and leakers”).

¹⁰ See Libor Jany, *Minneapolis police chief reprimands officer who anonymously detailed department’s ‘toxic culture’*, STAR TRIB. (Jan. 8, 2021), <https://www.startribune.com/minneapolis-police-chief-reprimands-officer-who-anonymously-detailed-department-s-toxic-culture/600008451/> (describing how a Minneapolis officer, Colleen Ryan, was reprimanded after being identified as the anonymous leaker who contacted a reporter for *GQ* to give an interview about her concerns with the tolerance for violent misconduct within her agency).

¹¹ Dakin Andone, Hollie Silverman & Melissa Alonso, *The Minneapolis police officer who knelt on George Floyd’s neck had 18 previous complaints against him, police department says*, CNN.COM (May 29, 2020), <https://www.cnn.com/2020/05/28/us/minneapolis-officer-complaints-george-floyd/index.html>.

informed views of government employees engaging in civic discussion.”¹² Yet workplace policies that prevent the public from hearing the inside knowledge of law enforcement officers remain widely in force and unchallenged across the country.

When journalists are unable to speak with officers involved in newsworthy events, that information vacuum increasingly is filled by public relations operations within police departments that affirmatively push out their own version of the story – at times bypassing journalists altogether and taking advantage of social media channels.¹³ This practice allows police agencies to reframe the narrative in the guise of transparency.

This article will examine the legality of commonplace policies in effect at law enforcement agencies throughout the United States restricting communications between police and the news media. The article concludes that there is no doctrinal support in constitutional law for gagging police officers from supplying information to journalists, and further, that such speech-restrictive policies are civically unhealthy as a matter of public policy. Section II lays out the First Amendment principles that govern speech in the public workplace, and how federal courts have narrowed traditionally commodious free-speech protections in deference to countervailing managerial interests. Section III describes how news organizations have struggled to obtain complete and candid information about the activities of police agencies in the absence of unfettered access to the officers with subject-matter knowledge, and why access to that information is of great public value. Section IV describes how courts have overwhelmingly issued speech-protective

¹² *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006).

¹³ See Maya Lau, *Police PR machine under scrutiny for inaccurate reporting, alleged pro-cop bias*, L.A. TIMES (Aug. 30, 2020), <https://www.latimes.com/california/story/2020-08-30/police-public-relations> (using case study of Los Angeles County Sheriff’s Office to examine the growth of “crisis communications” operations within law enforcement agencies, which have at times disseminated incomplete or misleading information in an attempt to rationalize questionable use-of-force decisions: “Public information officers have taken on an expanded role within police departments in recent years, with the ability to publish news on their own platforms, including social media, instead of relying on traditional media.”).

rulings when police and firefighters have challenged blanket prohibitions on unauthorized communications with the press and public. Section V then turns to an analysis of policies gathered by researchers at the Brechner Center for Freedom of Information from law enforcement agencies throughout the United States, analyzing their constitutionality up against prevailing standards established in a half-century's worth of successful First Amendment challenges. Section VI analyzes the rationales commonly offered to justify restraining law enforcement officers' speech, and concludes that more narrowly tailored proscriptions can amply accommodate legitimate confidentiality concerns. Finally, Section VII concludes that the widespread practice of restricting police from offering their candid perspective to the public dis-serves the interests of the officers (as a matter of workplace safety), the public (as a matter of police accountability) and the law enforcement agencies themselves (as a matter of rebuilding the trust sundered by a wave of nationally publicized instances of excessive use of deadly force).¹⁴

II. Freedom of Speech and the Government Workplace

A. Government Gatekeeping: Regulator Versus Supervisor

The First Amendment is understood to strictly circumscribe the government's authority to prohibit or punish speech when acting as a regulator, with only narrow exceptions for especially harmful speech, such as true threats of violence.¹⁵ In particular, the courts have forcefully protected speech that addresses matters of public concern (*i.e.*, social and political issues), recognizing that

¹⁴ See N'dea Yancey-Bragg, *Americans' Confidence in Police Falls to Historic Low, Gallup Poll Shows*, USA TODAY (Aug. 12, 2020), <https://www.usatoday.com/story/news/nation/2020/08/12/americans-confidence-police-falls-new-low-gallup-poll-shows/3352910001/> (reporting on nationwide survey, taken in the wake of the May 2020 police killing of George Floyd in Minneapolis, which showed that only 48% of Americans have "a great deal" or "quite a lot" of trust in police, with distrust especially pronounced among Black respondents).

¹⁵ See *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (enumerating narrow list of categories historically recognized as unprotected by the First Amendment and thus subject to content-based regulation, including "true threats," child pornography, fraud, and similar types of harm-causing speech).

the public and the democratic process benefit from the free flow of ideas.¹⁶ Government policies that discriminate based on the content of speech are especially disfavored and subject to strict scrutiny if challenged.¹⁷ To cite one example, the Supreme Court found that a Chicago ordinance against picketing in residential areas was impermissibly content-based because it singled out only certain types of messages – those unrelated to labor disputes – as punishable.¹⁸ A rule or policy that discriminates based on the speaker’s viewpoint is an especially disfavored type of content-based discrimination, and courts view such restrictions with singular skepticism.¹⁹

Prior restraints that prevent a speaker’s message from ever reaching its intended audience are especially disfavored, and are rarely found to be constitutional when challenged.²⁰ When a government agency acts as a gatekeeper, insisting that speakers must obtain permission before speaking, any such licensing regime will be deemed unconstitutional unless there are rigorous safeguards in place, including neutral and objective criteria to prevent the government from making viewpoint-discriminatory decisions.²¹ For instance, the Supreme Court struck down a Georgia county ordinance requiring a permit for demonstrations on public property because it gave

¹⁶ See *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) (“[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.”); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (assessing libel case against newspaper brought by public officials in light of “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials”).

¹⁷ Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 237 (2012).

¹⁸ *Carey v. Brown*, 447 U.S. 455, 471 (1980).

¹⁹ See *Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819, 929 (1995) (“When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. ... Viewpoint discrimination is thus an egregious form of content discrimination.”) (citation omitted).

²⁰ See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”). See also Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 844 (2006) (analyzing federal courts’ application of “strict scrutiny” doctrine and concluding that “strict scrutiny is actually most fatal in the area of free speech, where the survival rate is 22%, lower than in any other right”).

²¹ Now-Justice Elena Kagan explained the doctrine elaborately in a 1996 law journal article: “A law conferring standardless discretion effectively delegates to administrators the power to make decisions about speech on the basis of content. Such administrative decisions raise the same constitutional concern as do content-based laws: the danger of improper motive.” Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 457 (1996).

the county administrator unreviewable discretion to decide how much to charge each applicant, inviting viewpoint-discriminatory variances.²²

Courts regularly invalidate restrictions on speech on the grounds of vagueness or overbreadth. Vague statutes offend the Constitution because they fail to give the speaker fair warning of what speech will trigger punitive sanctions.²³ Speakers who are subject to vague restraints are likely to censor themselves to make sure they are stopping well short of the line of punishability.²⁴ An overbroad restriction is one that prohibits substantially more speech than necessary to achieve the government's stated objective, sweeping in harmless or even societally beneficial speech.²⁵

First Amendment rights apply in the government workplace, but the degree of protection has long been disputed. Courts widely recognize that government agencies have greater authority to regulate their employees' speech than the speech of the general public, because agencies speak through their employees as agents and because speech can sometimes undermine workplace harmony or shake public confidence in the agency.²⁶

Until the mid-20th century, it was widely accepted that public employment was a privilege that could freely be taken away without running afoul of the First Amendment, even if the

²² Forsyth County v. Nationalist Movement, 505 U.S. 123, 133 (1992).

²³ See Commonwealth v. Ashcraft, 691 S.W.2d 229, 230 (Ky. App. 1985) ("It has been held that an enactment may be void for vagueness where it fails to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.").

²⁴ See Cramp v. Bd. of Pub. Instruction, 368 U.S. 278, 283 (1961) ("The vices inherent in an unconstitutionally vague statute—the risk of unfair prosecution and the potential deterrence of constitutionally protected conduct—have been repeatedly pointed out in our decisions.").

²⁵ See M. Chester Nolte, *Invalid for Vagueness or Overbreadth: Challenging Prohibition of Protected Speech*, 30 ED. LAW REP. 1017, 1020 (1986) ("[A] statute is said to be overbroad when its language, given its ordinary meaning, is so broad that the sanctions apply to conduct that the state is not entitled to regulate.").

²⁶ See Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1, 4 (1990) ("[W]hile First Amendment doctrine has developed so as to expand expressive liberty against the state acting as sovereign, Supreme Court opinions over the past decade suggest that courts are to defer rather than scrutinize the judgments of governmental decision makers when regulating expressive activity in institutional contexts such as public employment, school, and the military.").

employer's motive was to punish speech.²⁷ That began to change in response to the McCarthy "Communist witch hunt" era, as courts rejected the notion that public employees could be compelled to divulge their past political associations or renounce their political beliefs.²⁸

B. NTEU: Prior Restraints Don't Work at Work

Once the federal courts recognized that the First Amendment applies in the public sector workplace, a key question naturally arose: Does the prior restraint doctrine curb the authority of government supervisors to restrict employees from speaking? In 1995, the Supreme Court finally answered the question with a resounding "yes." *United States v. National Treasury Employees Union* (popularly known as the "NTEU" case) involved a ban on speaking fees for members of Congress and executive branch employees, imposed for the rationale of curbing influence-buying.²⁹ The Supreme Court found the statute to be overly broad because its deterrent effect was so powerful as to constitute a prior restraint on a wide swath of speech by many thousands of employees, warranting an exacting level of scrutiny.³⁰ Though the restriction was on payment for speaking, and not on the speech itself, the Court found this distinction immaterial, as its purpose and effect was to inhibit government employees from speaking at all.³¹

The policy in question encompassed speech that was "addressed to a public audience," was "made outside the workplace," and "involved content largely unrelated to [...] government employment."³² Essentially, the government was attempting to regulate speech far removed from

²⁷ See Cynthia Estlund, *Free Speech Rights That Work at Work: From the First Amendment to Due Process*, 54 UCLA L. REV. 1463, 1465 (2007) ("Public employees were once relegated to that black hole of constitutional law known as the rights-privileges distinction.").

²⁸ See *id.* at 1466 (explaining that, beginning in the 1950s, federal courts developed a different approach when weighing constitutional challenges to the loss of discretionary benefits: "The government is not required to confer on individuals valuable entitlements such as welfare benefits, professional licenses, or employment. But when it does so, it may not withhold or take away those entitlements for unconstitutional reasons.").

²⁹ *United States v. Nat'l Treasury Emp's Union*, 513 U.S. 454, 473 (1995).

³⁰ *Id.* at 468.

³¹ *Id.* at 468-69.

³² *Id.* at 466.

the speaker's position as a government employee. This necessitates heightened scrutiny, as the prohibition on compensation for outside speech or writing "unquestionably impose[d] a significant burden on expressive activity" that would have been permissible but for the speaker's status as a government employee.³³

To justify a prior restraint on speech, the government must show that the interests of both "potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed" by the expression's impact on the actual operation of the government.³⁴ Where the government regulates expression to address an anticipated harm, the agency must show that the harm is real and not merely speculative, and that the restriction will prevent the harm in a direct and material way.³⁵ A restraint cannot be upheld absent a showing that there is "a reasonable ground to fear that serious evil will result if free speech is practiced."³⁶

NTEU set forth a demanding standard: The government must "show that the speech being restricted necessarily would have impacted the actual operation of the government"³⁷ and that any restriction is narrowly tailored to prevent that harm. Otherwise, "[d]eferring to the Government's speculation about the pernicious effects of thousands of articles and speeches yet to be written or delivered would encroach unacceptably on the First Amendment's protections."³⁸ *NTEU* remains the standard in any case involving pre-speech regulation, with courts rejecting less-stringent tests to ensure that prior restraints on employee speech are as limited in scope as possible.³⁹

³³ *Id.* at 468.

³⁴ *Id.* (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 571 (1968)).

³⁵ *Id.* at 475.

³⁶ *Id.* at 475 (quoting *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring)).

³⁷ See *Int'l Ass'n of Firefighters Local 3233 v. Frenchtown Charter Twp.*, 246 F. Supp. 2d 734, 740 (E.D. Mich. 2003) (referencing the *NTEU* standards).

³⁸ *NTEU*, 513 U.S. at 476-77.

³⁹ *International Ass'n of Firefighters Local 3233 v. Frenchtown Charter Twp.*, 246 F.Supp.2d 734, 740 (E.D. Mich. 2003) (maintaining that if a regulation contains a pre-speech threat of punishment, the *NTEU* test is the only one that is proper).

The justices in *NTEU* took pains to distinguish the context of a blanket prior restraint on speech that affects an entire class of employees from the more-familiar First Amendment scenario of a challenge to an individualized disciplinary action for speech that the employer deems disruptive.⁴⁰ In that latter scenario, federal courts apply a more deferential measure of review that has its roots in the Court’s 1968 *Pickering* decision and its progeny.⁴¹

Pickering held that public employees do not surrender all of their free-speech rights, and that they cannot be penalized for speaking in an unofficial capacity about matters of public concern.⁴² When an employee challenges punishment for the content of speech, *Pickering* sets up a two-pronged test: First, the court assesses whether the employee was speaking as a citizen on a matter of public concern.⁴³ Matters of public concern have come to be defined by the courts as those including political or social issues, matters of public health and safety, and matters relating to officers’ own working conditions and compensation.⁴⁴

Second, the court must inquire whether the speech jeopardized workplace functions severely enough to override the employee’s presumptive right to speak freely, such as by provoking disharmony among co-workers that interferes with the agency’s ability to do business, or undermining the public’s trust in the agency.⁴⁵ To justify imposing discipline for the content of employee speech, the speech must “impair discipline by superiors, have a detrimental impact on close working relationships, undermine a legitimate goal or mission of the employer, impede the

⁴⁰ See *NTEU*, 513 U.S. at 469 (holding that “the Government’s burden is greater with respect to this statutory restriction on expression than with respect to an isolated disciplinary action”).

⁴¹ *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

⁴² *Id.* at 574.

⁴³ *Id.*

⁴⁴ See, e.g., *McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983) (holding that speech criticizing compensation for officers “substantially involved matters of public concern and was thus entitled to the highest level of protection”); *International Ass’n of Firefighters Local 3233 v. Frenchtown Charter Township*, 246 F.Supp.2d 734, 737 (E.D. Mich. 2003) (labor disputes and alleged violations of workplace safety laws are matters of public concern); *Kessler v. City of Providence* 167 F.Supp.2d 482, 486 (D.R.I. 2001) (“police department policies, procedures, and rules” are matters of public concern because of their potential effect on public safety).

⁴⁵ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

performance of the speaker's duties, or impair harmony among co-workers.”⁴⁶ The two prongs of the *Pickering* test are commonly understood as a balancing test between the employee’s interest in addressing the contemporary issues of the day and the employer’s interest in managing the agency and maintaining relations with the public.⁴⁷

In the decades since *Pickering*, the Court has put a somewhat more employer-friendly gloss on the balancing test, finding that speech is unprotected if it constitutes a purely personal grievance over one’s own workplace dissatisfaction,⁴⁸ or if the speech itself is part of a work assignment, such as writing a memo.⁴⁹ But in its most recent employee-speech case, *Lane v. Franks*, the Court clarified that speech does not lose First Amendment protection merely because it involves the topic of the workplace or draws on information learned at work.⁵⁰ Thus, public employees have meaningful protection against punishment by their employers even when discussing work-related matters – especially if the punishment is for disobeying a prior restraint designed to prevent speech from ever being heard.

III. The Importance of Access

The problem of government image-minders impeding journalists’ access to rank-and-file public employees is well-documented and not limited to the law enforcement setting. During the Obama administration, news organizations chafed at tight restrictions on access to federal policymakers and experts within the executive branch.⁵¹ A coalition of journalism advocates led

⁴⁶ *Meyers v. City of Cincinnati*, 934 F.2d 726, 730 (6th Cir. 1991).

⁴⁷ *Id.*

⁴⁸ *Connick v. Myers*, 461 U.S. 138, 154 (1983).

⁴⁹ *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

⁵⁰ *Lane v. Franks*, 573 U.S. 228, 240 (2014).

⁵¹ See Roger Yu, *Report: Obama often blocks press access to information*, USA TODAY (Oct. 10, 2013), <https://www.usatoday.com/story/news/2013/10/10/cpj-report-on-obama-press/2960607/> (describing findings of Committee to Protect Journalists report decrying barriers to media access during the Obama administration).

by the Society of Professional Journalists (“SPJ”) wrote letters of concern to both the Obama and Trump administrations about the silencing of federal employees, but received no redress.⁵²

It is especially concerning when law enforcement officers are gagged from speaking freely, because policing is a uniquely important governmental function. Criminal justice agencies are alone among government authorities in their power to take away people’s freedom and even use deadly force. How those agencies use their authority is manifestly a matter of paramount public concern,⁵³ and in the absence of effective public scrutiny and oversight, abuses can proliferate.⁵⁴

The ability to speak with law enforcement officers helps journalists tell compelling stories. For instance, after an angry mob stormed the U.S. Capitol building on Jan. 6, 2021, in an attempt to prevent Congress from certifying Joe Biden as the winner of the 2020 presidential election, Capitol police officers gave riveting accounts of being brutally beaten by rioters.⁵⁵ The authenticity of officers’ firsthand accounts – authenticity that would have been lacking in a mere prepared statement issued by a spokesperson – made it more difficult for apologists to insist that the insurrection was nonviolent. When emboldened to speak publicly, officers have told stories that are by turns inspiring and enraging. Law enforcement officers have shared their insider perspective to alert the public to understaffing, equipment shortages, and other management issues within their

⁵² Al Tompkins, *SPJ research suggests that a surge in PIOs negatively impacts journalism*, POYNTER.ORG (Sept. 2018), <https://www.poynter.org/newsletters/2018/spj-research-suggests-that-a-surge-in-pios-negatively-impacts-journalism/>.

⁵³ See *Auriemma v. Rice*, 910 F.2d 1449, 1460 (7th Cir.1990) (“It would be difficult to find a matter of greater public concern in a large metropolitan area than police protection and public safety.”).

⁵⁴ See *Peer News LLC v. City & County of Honolulu*, 376 P.3d 1, 22 (Hawai’i 2016) (“Police officers are entrusted with the right to use force—even deadly force in some circumstances—and this right can be subject to abuse. Public oversight minimizes the possibility of abuse by ensuring that police departments and officers are held accountable for their actions.”).

⁵⁵ See Tim Elfrink, *D.C. officer who suffered heart attack on Jan. 6 calls out Trump for downplaying ‘brutal, savage’ riot*, WASH. POST (Apr. 28, 2021), <https://www.washingtonpost.com/nation/2021/04/28/michael-fanone-trump-gop-riots/>; Jackie Bensen, *‘It Was Brutal, Medieval-Style Combat’: DC Police Officers Describe Defending US Capitol*, NBC NEWS (Jan. 14, 2021), <https://www.nbcwashington.com/news/local/it-was-brutal-medieval-style-combat-dc-police-officers-describe-defending-us-capitol/2542536/>.

departments that bear on public safety.⁵⁶ This is the exact type of criticism that they almost certainly would not get approval to voice if required to vet their interviews in advance through a public relations functionary.

If the officers who have first-hand knowledge of newsworthy situations are prohibited from speaking, journalists may be forced to accept information under a grant of anonymity.⁵⁷ For instance, when the Reuters news agency published a nationwide look at inadequacies in safety protocols to protect police officers during the COVID-19 pandemic, they were unable to share personal accounts from officers in New York City, the epicenter of the outbreak: “All of the New York officers interviewed by Reuters spoke on condition of anonymity. They say the department forbids them from speaking to reporters.”⁵⁸ Coverage of police news regularly relies on sources within law enforcement agencies, even in situations of high public interest that law enforcement agencies should feel duty-bound to comment on, including responding to allegations of misconduct

⁵⁶ See, e.g., LaShanda McCuin, *More resources needed to address the mental health of officers, police say*, KNOE.COM (May 13, 2021), <https://www.knoe.com/2021/05/13/more-resources-needed-to-address-mental-health-of-officers-police-say/> (quoting Louisiana police sergeant decrying insufficiency of mental health services for law enforcement officers); Rebecca Lopez, *Richardson Police Department patrol division under review after some officers say they're being forced into ticket-writing competition*, WFAA.COM (May 6, 2021), <https://www.wfaa.com/article/news/local/some-richardson-police-officers-say-ticket-writing-competition/287-c35e885a-d150-4b3f-a605-2c2bdb261391> (quoting members of Texas police force who say their department is violating state law by holding officers to a ticket-writing quota under threat of discipline); Keri O'Brien, *'They're not cleaning properly': Deerfield Corrections officers speak out against conditions*, WRIC.COM (Sept. 25, 2020), <https://www.wric.com/news/virginia-news/theyre-not-cleaning-properly-deerfield-corrections-officers-speak-out-against-conditions/> (describing accounts from six Virginia correctional officers who accused the state prison system of scrimping on COVID-19 safety measures, allowing the deadly virus to proliferate inside correctional institutions).

⁵⁷ See, e.g., Mariah Medina & Dillon Collier, *'This is the worst it's ever been': Frustration grows among Bexar County Jail deputies*, KSAT.COM (Aug. 16, 2019), <https://www.ksat.com/news/2019/08/16/this-is-the-worst-its-ever-been-frustration-grows-among-bexar-county-jail-deputies/> (quoting Texas county sheriff's officer “who spoke on condition that they would not be identified because they are not authorized to speak with the media,” complaining about low morale because of dangerously long shifts, high turnover and other problems).

⁵⁸ Michelle Conlin, Linda So, Brad Heath & Grant Smith, *Coronavirus hits hundreds of U.S. police amid protective gear shortages*, REUTERS (Mar. 30, 2020), <https://www.reuters.com/article/us-health-coronavirus-usa-police-insight/coronavirus-hits-hundreds-of-u-s-police-amid-protective-gear-shortages-idUSKBN21H2X6>. The same proved true in Chicago as well. See Patrick Smith, *The Chicago Police Department Is Struggling To Protect Officers During The Coronavirus Pandemic*, WBEZ CHICAGO (Mar. 23, 2020), <https://www.wbez.org/stories/chicago-police-department-struggles-to-protect-officers-during-coronavirus-crisis/df5e9795-f38a-4d07-9093-b2b791b72f1d> (“One veteran Chicago police officer, who asked not to be named because he wasn’t authorized to speak to the media, said he was worried about not having enough hand sanitizer. He also said he was concerned about squad cars and other shared equipment not being cleaned between shifts.”).

by officers.⁵⁹ But attributing information to unnamed police sources is an imperfect recourse. Anonymously sourced stories are inherently less believable to the audience,⁶⁰ and stories heavily based on information from unnamed sources are more easily denied.⁶¹ To preserve anonymity, reporters often must omit identifying personal details about the interviewee – the type of details that can humanize news accounts and make them more relatable. The refuge of anonymity can be abused, too, by sources with an agenda to release false or misleading information without accountability.⁶² Relying on unnamed sources can even place journalists and their employers at greater risk of legal liability, as some courts have found that publishing an article based wholly on

⁵⁹ See, e.g., Kevin Foster, *Quawan Charles' disappearance didn't meet Amber Alert criteria, source says; drowning possible factor in death*, KPLCTV.COM (Nov. 16, 2020), <https://www.kplctv.com/2020/11/16/quawan-charles-disappearance-didnt-meet-amber-alert-criteria-source-says-drowning-possible-factor-death/> (relying on unnamed police source to address controversy over Louisiana police department's decision not to issue missing-persons alert for teenager who was later found dead); Brad Edwards, *Names, Private Information Of Child Sex Crime Victims Were Illegally Made Public In Cook County Court Records*, CBSLOCAL.COM (Oct. 23, 2020), <https://chicago.cbslocal.com/2020/10/23/names-private-information-of-child-sex-crime-victims-were-illegally-made-public-in-cook-county-court-records/> (quoting "high-ranking Chicago Police Department source" reacting to police department's failure to redact names of juvenile sex crime victims from documents filed in court, exposing their identities in violation of state law); Daniel Telvock, *Buffalo Police internal affairs investigative officer involved in off-duty Elmwood fight*, WIVB.COM (Sept. 4, 2020), <https://www.wivb.com/news/buffalo-police-internal-affairs-investigative-officer-involved-in-off-duty-elmwood-fight/> (relying on unnamed police source to explain circumstances of street fight in which off-duty New York police officer was videotaped punching a man and squatting on top of him); Pam McLoughlin, *West Haven police sergeant used Facebook aliases, deleted posts, report alleges*, NEW HAVEN REGISTER (Jan. 17, 2019), <https://www.nhregister.com/news/article/Report-details-West-Haven-police-sergeant-s-13542467.php> (relying on "a police department source" to address the agency's response to an independent investigation concluding that a senior member of the police force padded his time sheets to inflate his pay, and that the department needed to strengthen its financial controls).

⁶⁰ See Tom Jones, *Here's why you should be willing to believe anonymous sources*, POYNTER.ORG, (Sept. 8, 2020), <https://www.poynter.org/newsletters/2020/heres-why-you-should-be-willing-to-believe-anonymous-sources/> ("The problem with anonymous sources is that the public might not trust that the source actually exists or that the source is truly reliable.").

⁶¹ See *id.* (citing example of Trump White House's practice of claiming that anonymously sourced news stories were fabricated and that reporters' purported sources were fictitious: "if no one is publicly putting their name on the allegations, dismissing it is easier to do."). See also Patrick M. Garry, *Anonymous Sources, Libel Law and the First Amendment*, 78 TEMP. L. REV. 579, 595 (2005) (collecting critiques, including those within the journalism field, of the growing over-reliance on unnamed sources, and commenting that "without the context of knowing the source's identity, readers and viewers cannot fully understand or analyze the meaning of facts disclosed by that source").

⁶² See David Abramowicz, *Calculating the Public Interest in Protecting Journalists' Confidential Sources*, 108 COLUM. L. REV. 1949, 1950 (2008) (noting that leakers sometimes furnish information opportunistically with an agenda to do harm, and commenting that "journalists' confidentiality promises may be used not to protect the weak from retribution, but to protect the powerful from accountability").

anonymous informants can support a finding of reckless disregard for the truth, if the information turns out to be erroneous.⁶³

Alternatively, journalists may turn to *former* officers – people who have been fired or quit, and have nothing left to lose – to blow the whistle about abusive workplace conditions. For instance, a former small-town police officer in Louisiana took his complaints about supervisory sexual harassment to the Baton Rouge newspaper after filing discrimination complaints that, he says, were not taken seriously. Two other former employees of the same department shared similar stories with the newspaper, but insisted on remaining unnamed because they remain employed in law enforcement.⁶⁴ But that option, too, comes with credibility costs. A former employee may understandably come across to a skeptical audience as a score-settler nursing a grudge whose word is to be taken lightly. There is, in short, no substitute for unfettered, on-the-record access to the people within an agency who have expert knowledge to share.

While agencies may rationalize compulsory screening of media interviews as a convenience that facilitates access, a series of studies by the SPJ has found the opposite. Public information spokespeople make it more difficult for journalists to access officers for interviews, with 60% of crime reporters stating their access has been limited and 26.1% reporting that their access has been barred altogether.⁶⁵ A 2016 study by Kennesaw State University journalism professor Carolyn Carlson, a former SPJ national president, found that 31.5% of journalists were rarely or never allowed to interview their town's chief of police,⁶⁶ 55% are rarely to never allowed

⁶³ See Garry, *supra* n. 61, at 595.

⁶⁴ Megan Wyatt, *Broussard police chief faces allegations of sexual harassment by former officers*, THE ADVOCATE (Apr. 17, 2021), https://www.theadvocate.com/acadiana/news/crime_police/article_84843276-9b9d-11eb-a0ae-03aa7e4d5851.html.

⁶⁵ *Id.*

⁶⁶ Carolyn Carlson & Paymon Kashani, *Mediated Access: Crime Reporters' Perceptions of Public Information Officers' Media Control Efforts, Use of Social Media, Handling of Body Camera Footage and Public Records*, Society of Professional Journalists, 2 (Mar. 2016), <https://www.spj.org/pdf/sunshineweek/crime-reporters-survey-report.pdf>.

to interview officers on-scene,⁶⁷ and 41.6% of journalists report access to police departments overall has become more difficult in the previous five to ten years.⁶⁸

Veteran police reporter and true-crime author David Krajicek has written about the increasing difficulty that journalists encounter when running up against hidebound law enforcement agencies: “The 20-year trend in police reporting has been toward limiting access to ‘real’ cops in favor of a public information officer (PIO) who serves as an information filter. At crime scenes, we are bullpenned behind ropes and subjected to ‘briefings.’ Any enterprise reporting that goes beyond the briefing is likely to be viewed unfavorably[.]”⁶⁹ There is no question, then, that law enforcement agencies’ restrictive policies are having their intended effect of dampening media coverage. The question is: Are these policies legal?

IV. What Courts Have Said: Untie the Gags

A. Uniformed, Not Uninformed: Courts Value Officers’ Contributions to Public Discourse

Police officers and firefighters have periodically clashed with their superiors over restrictive policies that forbid unapproved interaction with the news media. While public safety agencies are not, by far, the only agencies that restrict employee communications with the media, it makes sense that those agencies would be regular sources of legal disputes. Police and firefighters are often involved in newsworthy events, and their agencies tend to be unionized,⁷⁰ meaning they have professional advocates to fight their legal battles.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ David J. Krajicek, *Nobody Loves a Crime Reporter*, 2003 J. INST. JUST. INT’L STUD. 33, 34 (2003).

⁷⁰ See U.S. Bureau of Labor Stats. Economic News Release, Union Members Summary (Jan. 22, 2021), <https://www.bls.gov/news.release/union2.nr0.htm> (reporting that 36.6% of workers in “protective service occupations” are unionized, the highest percentage of any sector).

Since 1968, when the Supreme Court recognized in *Pickering* that government employees have a constitutional right to speak about matters of public concern, police and firefighters have overwhelmingly prevailed when challenging the constitutionality of prohibitions against unapproved communications with the press and public. Indeed, once a regulation is understood to categorically forbid discussing work-related issues with the media – or to require advance approval before doing so – the policy is invariably found to be unconstitutional.⁷¹

Judicial disfavor for rules that forbid public employees from speaking to the news media even predates *Pickering*. In 1946, New York’s highest court found that the New York City fire department violated firefighters’ First Amendment rights by directing union leaders not to talk to the media.⁷² The ruling tested the legality of a department policy stating that firefighters “shall not sanction the use of their names or photographs, in connection with any written or printed article ... without the written approval of the Chief of Department.”⁷³ The court found that the city fire commissioner’s directive against speaking to the press “was so broad in scope and so rigid in terms as to be arbitrary and unreasonable.”⁷⁴ But the frequency of legal disputes over gag policies escalated after the 1968 *Pickering* ruling explicitly recognized that public employees do not surrender their free speech rights when they accept a government paycheck.

In a 1971 ruling that represents the earliest known post-*Pickering* decision, a Louisiana federal court considered the case of a police officer punished for writing a union newsletter article that criticized the police department.⁷⁵ The court found that the sanctions violated the officer’s First Amendment rights, because the rules under which he was disciplined were unconstitutionally

⁷¹ Frank D. LoMonte, *Putting the 'Public' Back into Public Employment: A Roadmap for Challenging Prior Restraints That Prohibit Government Employees from Speaking to the News Media*, 68 U. KAN. L. REV. 1, 14-18 (2019).

⁷² *Kane v. Walsh*, 66 N.E.2d 53 (N.Y. 1946).

⁷³ *Id.* at 55.

⁷⁴ *Id.* at 56.

⁷⁵ *Flynn v. Giarrusso*, 321 F. Supp. 1295 (E.D. La. 1971).

broad.⁷⁶ Among the rules that the court deemed invalid were a confidentiality policy that forbade sharing "the content of any official instruction, policy, or record, or the conduct of departmental functions" and another policy against allowing the publication of any "statement concerning official business or law enforcement policy" without supervisory approval.⁷⁷

The Fifth and Ninth federal circuits have found in favor of law enforcement officers challenging policies that entirely forbade speaking to the press and public, or that curtailed the topics that officers are permitted to discuss.⁷⁸

In *Barrett v. Thomas*, the Fifth Circuit struck down a Texas sheriff's department policy that prevented employees from making "unauthorized public statements" and forbade comments to reporters on any topic "that is or could be of a controversial nature."⁷⁹ The lead plaintiff was a sheriff's officer who, after publicly criticizing the newly elected sheriff for demoting him, was then fired in response to the criticism.⁸⁰ The appellate panel held that, although a law enforcement supervisor has a legitimate interest in promoting discipline and efficiency, "the public employer may not employ a prophylactic approach that prohibits constitutionally protected expression."⁸¹ The two regulations, the court concluded, were facially unconstitutional both because of their overbreadth and because they were unduly vague.⁸²

A more recent First Amendment challenge reached a comparable outcome in *Moonin v. Tice*, in which the federal Ninth Circuit struck down a speech-restrictive policy that prevented employees of the Nevada Highway Patrol from speaking to the press or public about the patrol's

⁷⁶ *Id.* at 1300-01.

⁷⁷ *Id.* at 1300-01.

⁷⁸ *Moonin v. Tice*, 868 F.3d 853 (9th Cir. 2017); *Barrett v. Thomas*, 649 F. 2d 1193, 1199 (5th Cir. 1981).

⁷⁹ *Barrett*, 649 F. 2d at 1199.

⁸⁰ *Id.* at 1196.

⁸¹ *Id.* at 1199.

⁸² *Id.* at 1198.

K-9 program, which had been a matter of controversy.⁸³ The challenged regulation instructed patrol officers that “[a]ny communication with ANY non-departmental and non-law enforcement entity or persons regarding the Nevada Highway Patrol K9 program [...] WILL be expressly forwarded for approval to your chain-of-command.”⁸⁴ The appellate court found that the policy was infirm because it could easily be interpreted as limiting all officer speech, not just speech made in an official capacity.⁸⁵ The *Moonin* court noted that the policy in question was so broad that it “reaches legitimate ‘whistleblower’ complaints about the program.”⁸⁶ The policy was so broadly worded, the judges wrote, that it could be read to apply even when speaking with family and friends, speech that is clearly not made in any official capacity.⁸⁷

In addition to the circuit-level interpretations, more than a dozen trial courts have similarly ruled in favor of public safety officers in facially challenging broad restrictions on speech to the press and public.⁸⁸ This body of precedent strongly indicates that a policy forbidding all unapproved contact with the news media, however commonplace, will not survive if challenged as an affront to the First Amendment.

B. Fatally Flawed: Gag Policies Flunk Test of Vagueness, Overbreadth, Unbridled Discretion

⁸³ *Moonin*, 868 F.3d at 862.

⁸⁴ *Id.* at 859 (emphasis in original).

⁸⁵ *Id.* at 862.

⁸⁶ *Id.*

⁸⁷ *Id.* at 863.

⁸⁸ *Brady v. Tamburini*, No. 1:17-CV-00475, 2021 WL 462650 (D.R.I. Feb. 9, 2021); *Davis v. Phenix City*, No. 3:06cv544, 2008 WL 401349 (M.D. Ala. Feb. 12, 2008); *Lauretano v. Spada*, 339 F. Supp. 2d 391 (D. Conn. 2004); *Parow v. Kinnon*, 300 F. Supp. 2d 256 (D. Mass. 2004); *Int’l Ass’n of Firefighters Local 3233 v. Frenchtown Charter Twp.*, 246 F.Supp.2d 734 (E.D. Mich. 2003); *Kessler v. City of Providence* 167 F.Supp.2d 482 (D.R.I. 2001); *Wagner v. City of Holyoke*, 100 F.Supp.2d 78 (D.Mass. 2000); *Davis v. N.J. Dept. of Law & Pub. Safety*, 327 N.J. Super. 59 (N.J. Super. 1999); *Providence Firefighters Local 799 v. City of Providence*, 26 F.Supp.2d 350 (D.R.I. 1998); *Spain v. City of Mansfield*, 915 F. Supp. 919 (D. Mass 1996); *Grady v. Blair*, 529 F. Supp. 37 (N.D. Ill. 1981); *Steenrod v. Board of Engineers*, 87 Misc.2d 977 (N.Y. Super. 1976); *Flynn v. Giarrusso*, 321 F. Supp. 1295 (E.D. La. 1971).

Most commonly, employer gag rules flunk First Amendment scrutiny because they are overbroad, failing to distinguish between speech pursuant to official duties that the employer can legitimately regulate,⁸⁹ and speech in a personal capacity that is constitutionally protected. For instance, an Illinois federal court found that the Chicago Fire Department’s policy of requiring pre-approval for “interviews, television, radio or movie appearances, whether on or off duty, relating to Fire Department activities” was overly broad.⁹⁰ The court characterized the policy as “an unconstitutional prior restraint and ... a ‘gag rule’ that prevents the dissemination of not only incorrect information, but correct information and matters of opinion as well.”⁹¹ Similarly, a federal court in Rhode Island struck down a directive requiring express authorization before any member of the Providence Police Department could speak to the news media, and forbidding officers from making “any public statement regarding a private matter of [the] department” or sharing “any information concerning the business of the department.”⁹² The court emphasized that the policy affected not only the employee’s interest in being heard, but also the public’s interest in receiving information about policing: “Such an all-encompassing ban necessarily works to deprive Police Department employees of their First Amendment right, as citizens, to comment on matters of public interest, thereby depriving the public of information regarding matters relevant to public health and safety.”⁹³ Similarly, a New York state-court judge recognized the public value of information about fire safety in ruling that a municipal fire department policy requiring supervisory approval for firefighters to discuss “matters concerning the department” was unduly broad.⁹⁴ The

⁸⁹ See *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006) (holding that “the First Amendment does not prohibit managerial discipline based on an employee’s expressions made pursuant to official responsibilities”).

⁹⁰ *Grady v. Blair*, 529 F. Supp. 370, 371 & n.1 (N.D. Ill. 1981).

⁹¹ *Id.* at 372.

⁹² *Kessler v. City of Providence*, 167 F.Supp.2d 482, 483 (D.R.I. 2001).

⁹³ See *id.* at 487 (“The Rules are not narrowly drawn; they require prior approval before an employee makes a public statement on any topic even remotely related to Police Department matters. As a result, the Rules inevitably stifle Police Department employees in their role as citizens.”).

⁹⁴ *Steenrod v. Board of Engineers*, 87 Misc.2d 977, 978 (N.Y. Super. 1976).

court enjoined the disciplinary proceeding against a union official who gave an unapproved speech questioning the effectiveness of the city's fire-safety policies: "Since it is undisputed that fire protection for any municipality is a matter of grave public interest, the regulations in question appear to absolutely restrict petitioner's right of free speech."⁹⁵

A policy can be unconstitutionally broad even when it restricts only a subcategory of speech, if that subcategory encompasses some constitutionally protected expression, as with the Ninth Circuit's *Moonin* case. For instance, in *Wagner v. City of Holyoke*, a whistleblower who was punished for telling the news media that a fellow officer had physically and verbally abused an arrestee challenged the constitutionality of his department's speech restrictions.⁹⁶ A federal district court granted an injunction against enforcing the department's unconstitutionally broad rules, which forbade criticizing other officers and allowed only the police chief or a designee to release information "regarding policy, discipline, organizational changes, and criticisms."⁹⁷ Even though the rules only selectively prohibited addressing certain subjects, rather than categorically restraining all speech, the court found that the rules would unduly inhibit speech addressing matters of public concern.⁹⁸

Courts have also found restrictive media policies to be unconstitutional where they entrust the decisionmaker with unfettered discretion to decide whose speech may and may not be heard. For instance, in *Lauretano v. Spada*, a federal district court grappled with a Connecticut State Police policy that forbade officers from making "official comments relative to department policy"

⁹⁵ *Id.* at 979. *See also* Int'l Ass'n of Firefighters Local 3233 v. Frenchtown Charter Twp., 246 F.Supp.2d 734 (E.D. Mich. 2003) (applying *NTEU* and concluding that fire department violated employees' First Amendment rights by enforcing a regulation providing that the fire chief "shall be the only authorized person who may release facts regarding fire department matters, fires or other emergencies to the news media"). The regulation in the *Frenchtown Charter* case was uniquely extreme; it made unauthorized speech a misdemeanor criminal offense, not just a personnel matter.

⁹⁶ *Wagner v. City of Holyoke*, 100 F.Supp.2d 78, 81 (D.Mass. 2000).

⁹⁷ *Id.* at 89-90.

⁹⁸ *Id.* at 89.

without supervisory approval.⁹⁹ The court found the policy to be unconstitutional both because of its overbreadth and because of its lack of intelligible standards.¹⁰⁰ The lack of standards was deemed objectionable because supervisors were left with total discretion to dictate the timing of speech, potentially delaying to the point that the request becomes moot.¹⁰¹ Similarly, the lack of any boundaries to cabin the discretion of the decisionmaker doomed an Ohio fire department's regulation forbidding any unapproved public discussion of "matters concerning Mansfield Fire Department rules, duties, policies, procedures and practices."¹⁰² A U.S. district judge found the rule facially unconstitutional because "[t]here are no standards which govern the approval or disapproval of the City officials."¹⁰³

In scrutinizing First Amendment challenges to gag rules, courts have recognized the importance of timely information about matters of public safety and the impact of gagging officers on the public's receipt of information as well as the officers' own rights. Not allowing officers to speak in the wake of a critical incident can delay the immediacy of their speech and decrease its newsworthiness.¹⁰⁴ *Davis v. New Jersey Department of Law & Public Safety* involved such a restriction. The regulation in *Davis* forbade any officer from disclosing "any information not generally available to members of the public" without supervisory approval, and required officers to treat "any information" pertaining to the agency as confidential.¹⁰⁵ The *Davis* court recognized the unique value of information about policing, noting that when officers are forced to navigate the obstacle of prior approval, the public's receipt of news is delayed and the value of any

⁹⁹ *Lauretano v. Spada*, 339 F. Supp. 2d 391, 414 (D. Conn. 2004).

¹⁰⁰ *Id.* at 419-20.

¹⁰¹ *Id.* at 420 (quoting *Harman v. City of New York*, 140 F. 3d 111 (2d Cir. 1998)).

¹⁰² *Spain v. City of Mansfield*, 915 F. Supp. 919, 922 (N.D. Ohio (1996)).

¹⁰³ *Id.* at 923.

¹⁰⁴ *Davis v. N.J. Dept. of Law & Pub. Safety*, 327 N.J. Super. 59 (N.J. Super. 1999).

¹⁰⁵ *Id.* at 66.

information officers might offer is diluted.¹⁰⁶

Public employees have enjoyed the same overwhelming success challenging broad gag regulations outside the context of public safety agencies.¹⁰⁷ Most recently, a federal court in West Virginia ruled in favor of a teacher who challenged a directive forbidding her from speaking to the news media, which prevented her from defending herself against criticism of divisive political remarks she shared on Twitter.¹⁰⁸ The court held that the First Amendment prohibition against prior restraints was so clearly established that the employer could not invoke the defense of qualified immunity to defeat the teacher's First Amendment claims.¹⁰⁹ The West Virginia court's 2019 ruling aligns with decades' worth of authority, including circuit-level precedent from the Second and Tenth circuits, disapproving of categorical rules that forbid public employees from speaking to the press and public, even outside the setting of law enforcement.¹¹⁰

In addition to this direct body of precedent, several other circuits have handed down rulings in favor of officers disciplined for violating rules that prohibit public criticism of their agencies or their supervisors, as opposed to categorically forbidding all work-related speech. While these scenarios are analyzed as viewpoint discrimination cases rather than as blanket prior restraints on all speech, the result is the same: Unduly restrictive rules that inhibit whistleblowing are

¹⁰⁶ *Id.*

¹⁰⁷ See LoMonte, *supra* n. 71, at 14-18 (collecting rulings in favor of employees facially challenging workplace gag policies, and observing that “no ‘prior restraint’ on public employee speech, even outside the context of media interviews, appears to survive constitutional challenge once the strong medicine of *NTEU* is found to apply”).

¹⁰⁸ Durstein v. Alexander, No. 3:19-0029, 2019 WL 6833858 (S.D. W.Va. Dec. 13, 2019).

¹⁰⁹ *Id.* at 85.

¹¹⁰ See Harman v. City of New York, 140 F. 3d 111, 116 (2d Cir. 1998) (finding that a New York social-service agency overreached in requiring employees to contact the agency's public-relations office before releasing any information to the media “regarding any policies or activities of the Agency”); Brammer-Hoelter v. Twin Peaks Charter Acad., 602 F.3d 1175, 1185-87 (10th Cir. 2010) (finding that a school administrator violated clearly established First Amendment principles in telling school employee not to discuss “school matters” with anyone outside the agency, a prohibition beyond just safeguarding confidential student information). See also Luethje v. Peavine Sch. Dist., 872 F.2d 352 (10th Cir. 1989) (concluding that school board violated the First Amendment in enacting and enforcing a rule restricting lunchroom employees' speech, which read: “If you have any problems, consult [the principal]. Don't take any school problems other places, or discuss it with others.”).

unconstitutional.

In a 1970 ruling, the federal Seventh Circuit struck down a Chicago Police Department policy that, while not a classic gag rule, was applied to discipline an officer who spoke critically about his agency to the news media.¹¹¹ The plaintiff, a Chicago police detective who blew the whistle on officers' misuse of recovered stolen property, was reprimanded for telling a news reporter that the internal affairs investigative process was ineffective.¹¹² A disciplinary board found that the detective had violated a workplace rule forbidding any speech or conduct "derogatory to the Department or any member or policy of the Department."¹¹³ But the Seventh Circuit found the regulation to be "unavoidably overbroad" because it would inhibit any criticism of the police department, even constitutionally protected speech.¹¹⁴

Similarly, the Third Circuit ruled in favor of a New Jersey police union leader who was disciplined for criticizing police supervisors in a newspaper article.¹¹⁵ The case tested the constitutionality of police department rules prohibiting any "derogatory reference to Department orders or instructions" in public statements, or commenting "unfavorably or disrespectfully on the official action of a superior officer" or on the department's rules and procedures.¹¹⁶ Even in this pre-*NTEU* case applying a less rigorous *Pickering* review, the appeals court still found the rules to be unconstitutionally broad, in recognition of "the public's strong interest in open debate and access to information about its police[.]"¹¹⁷ Then in a post-*NTEU* case, the Third Circuit applied the Supreme Court's more exacting review of prior restraints to strike down a Pittsburgh policy requiring any police officer who wished to testify as an expert witness to first obtain written

¹¹¹ *Muller v. Conlisk*, 429 F.2d 901 (7th Cir. 1970).

¹¹² *Id.* at 902.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Gasparinetti v. Kerr*, 568 F.2d 311 (3d Cir. 1977).

¹¹⁶ *Id.* at 315-16.

¹¹⁷ *Id.* at 317.

permission from the chief.¹¹⁸ As with the *NTEU* case, even though the policy was not a categorical prohibition on all speech, the court found that the proscription was unjustifiably broad and would deprive the public of the benefit of officers' expert perspective.¹¹⁹

In recent years, the battle to control police employee speech has gone where all speech has gone: Online.¹²⁰ Restrictive speech policies have fared no better there. In *Liverman v. City of St. Petersburg*, the Fourth Circuit ruled in favor of two officers disciplined for using personal Facebook pages to express views critical of their agency's promotion standards.¹²¹ The policy at issue in *Liverman* prohibited making any "negative comments" about the department or other officers that would impact the "public's perception of the department" or "reflect unfavorably" on the department.¹²² Even an attempted savings clause, which purported to allow officers to comment as citizens on matters of public concern, did not salvage the otherwise unconstitutional policy in the eyes of the court: "[T]he restraint is a virtual blanket prohibition on all speech critical of the government employer."¹²³

Notably, in none of the publicly reported First Amendment challenges has the court treated the law enforcement context as conclusive. While a law enforcement agency might argue that the sensitive nature of police work justifies greater control over speech than in ordinary government agencies, the courts have not made such a distinction. In the *Barrett* case, the Fifth Circuit expressly differentiated policing from the military, where greater control might be justified.¹²⁴

¹¹⁸ *Swartzwelder v. McNeilly*, 297 F.3d 228, 232 (3d Cir. 2002).

¹¹⁹ *Id.* at 231.

¹²⁰ See Christina Jaremus, *#FiredforFacebook: The Case for Greater Management Discretion to Discipline or Discharge for Social Media Activity*, 42 RUTGERS L. REC. 1, 3 (2014-15) ("In the context of employment, labor relations boards and courts have inevitably been called upon to determine whether employers can discipline and/or fire employees for engaging in activity or speech on social media.").

¹²¹ *Liverman v. City of St. Petersburg*, 844 F.3d 400 (4th Cir. 2016).

¹²² *Id.* at 404.

¹²³ *Id.* at 407.

¹²⁴ See *Barrett v. Thomas*, 649 F. 2d 1193, 1198 n.9 (5th Cir. 1981) ("The public employer's interest in regulating the speech of police officers does not rise to the level of the government's interest in regulating the conduct of military personnel.").

In sum, there is no support for the proposition that a government employer may forbid employees from sharing their expertise with the press and public, require supervisory approval as a precondition for speaking, or selectively prohibit entire categories of speech on the basis of viewpoint. And there is nothing unique about the setting of a public-safety agency that changes this well-established rule.

V. Putting Police Policies Under Surveillance

Knowing that public employers may not forbid employees from speaking to the media, and that they may not enforce open-ended prohibitions on speaking that lack safeguards against viewpoint discrimination, the question becomes whether law enforcement agencies are obeying, or ignoring, these constitutional imperatives. To assess agencies' compliance, researchers from the Brechner Center for Freedom of Information used state freedom-of-information requests to obtain the media-relations policies and handbooks from police and sheriff's departments throughout the country.

Researchers from the Brechner Center asked for media-relations policies from the nation's 50 largest police departments and 50 largest county sheriff's departments, as tabulated by the U.S. Justice Department, representing 100 total agencies in 33 states plus the District of Columbia.¹²⁵ Of the 100 law enforcement agencies that received a public records request, 77 departments responded and 23 failed to respond.¹²⁶ Three of the responding agencies indicated that they have no written regulation governing employee interaction with the news media. One non-responding agency's news media policy, Memphis, was readily found on the police department's website and

¹²⁵ Shelley Hyland & Elizabeth Davis, *Local Police Departments, 2016: Personnel*, U.S. Department of Justice, Bureau of Justice Statistics (Oct. 2019), <https://www.bjs.gov/content/pub/pdf/lpd16p.pdf>.

¹²⁶ The relatively low response rate is at least in part attributable to two factors: First, the requests were transmitted during a time when agencies were still largely in "work-from-home" mode during the global COVID-19 pandemic, and second, several of the target agencies were located in states (Alabama, Tennessee, Virginia) that enforce a "residents-only" standard for honoring requests for public records.

included in the study. So the universe of policies examined for this study was 75 policies from police and sheriff's offices in 27 states plus the District of Columbia (28 total jurisdictions).

Most of the 75 policies include at least one feature that, under prevailing legal precedent, render them constitutionally suspect. More than half of the policies – 39 out of 75 policies, or 52% – explicitly contain prior restraints indistinguishable from those repeatedly found to be unconstitutional, because they categorically require approval before speaking to the press or public. Another 19 policies (25% of those reviewed) contain constitutionally questionable content-specific or context-specific restrictions – such as requiring prior approval for addressing controversial matters, or for interviews but not for routine interactions with journalists – or contain internally contradictory instructions that would confuse a reasonable reader. In no case do any of the 58 speech-restrictive policies incorporate any procedural safeguards, such as a process by which an aggrieved officer who wanted to speak to the media could appeal a refusal to approve an interview. While some law enforcement agency policies leave officers considerable discretion to speak – and at times, even encourage sharing information – those 17 policies (23% of those reviewed) are in the minority.

A. Blanket Prohibitions on Speaking Without Approval

When a police department policy entirely prohibits speaking to the media, or requires supervisory approval without exception before discussing work-related matters with the public, the policy faces dual infirmities. First, it may run afoul of the prohibition recognized by the Supreme Court in *NTEU* against categorical prior restraints on speech. Second, it may fail to protect the ability to engage in speech as a citizen on matters of public concern, which the Supreme Court recognized as constitutionally protected in *Pickering* (and reaffirmed in *Lane*).

A policy that forbids officers from speaking publicly without their agency’s approval has been recognized as a prior restraint, which “bears a heavier presumption against constitutionality than one that merely penalizes people who have already spoken.”¹²⁷ Even the mere delay in being able to speak to a time-sensitive matter, such as a fast-breaking news story, can constitute irreparable harm for purposes of a First Amendment claim.¹²⁸ Prior restraints are considered to be *per se* injurious, and any “regulation conditioning [the right to speak] on obtaining the prior permission of the public employer is presumptively invalid.”¹²⁹ There is a qualitative distinction between policies that merely suggest that journalists contact the public information office as their first point of contact, which are constitutionally unobjectionable, versus policies indicating that officers are required to refrain from answering questions from journalists, which the caselaw regards as an impermissible restraint. But many law enforcement agencies fail to make that distinction.

New York City, home to the nation’s largest police force with more than 36,000 full-time officers,¹³⁰ is also home to one of the most controlling media policies – despite binding circuit-level legal precedent finding restrictive speech policies unconstitutional.¹³¹ The New York Police Department tells officers that they are forbidden from “[d]ivulging or discussing official Department business, except as authorized.”¹³² A policy requiring authorization to discuss anything about “official Department business” unmistakably encompasses at least some

¹²⁷ *Providence Firefighters Local 799 v. City of Providence*, 26 F.Supp.2d 350, 355 (D.R.I. 1998).

¹²⁸ *See id.* at 354 (recognizing that prior restraints inhibiting speakers’ opportunity to be heard “for even minimal amounts of time constitute not only injury, but irreparable injury”).

¹²⁹ *Parow v. Kinnon*, 300 F. Supp. 2d 256, 264 (D. Mass. 2004).

¹³⁰ Shelley Hyland & Elizabeth Davis, *Local Police Depts.*, 2016: Personnel, U.S. Dept. of Justice, Bureau of Justice Statistics (Oct. 2019) at 14, <https://www.bjs.gov/content/pub/pdf/lpd16p.pdf>.

¹³¹ *Harman v. City of New York*, 140 F. 3d 111 (2d Cir. 1998).

¹³² N.Y. Police Dept., *Patrol Guide, Procedure No. 203-10* (Feb. 12, 2020), https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/public-pguide1.pdf.

constitutionally protected speech, and New York’s policy is indistinguishable from those found unconstitutional elsewhere.¹³³

New York’s policy is no outlier. Comparable gags exist at law enforcement agencies across the country. The Phoenix Police Department policy provides that officers can speak to the media when designated to do so by supervisors, but “under no circumstances will information be released without first obtaining permission.”¹³⁴ The St. Louis Police Department has one of the nation’s most explicit gag policies, stating, in boldface type: “No Department employee will speak to the news media without proper authorization. ... Any violations are subject to disciplinary action.”¹³⁵ Officers in Greenville County, S.C., are held to the same restrictive speech policy as all other county employees, providing that: “All information (requested or otherwise) provided to any media outlet or to any individual or group who intends to display such communication in a public forum on any topic must first be viewed and approved by the Administrator’s Office and the Governmental Affairs Coordinator.”¹³⁶

Prohibitions against unapproved communications with journalists take many forms, including:

¹³³ See *Lauretano v. Spada*, 339 F. Supp. 2d 391 (D. Conn. 2004) (highway patrol department violated employees’ First Amendment rights by requiring approval for “official comments relative to department policy”); *Parow v. Kinnon*, 300 F. Supp. 2d 256 (D. Mass. 2004) (fire department violated employees’ First Amendment rights by requiring approval for any statements for publication “concerning the plans, policies, or affairs of the administration of the fire department”); *Spain v. City of Mansfield*, 915 F. Supp. 919 (D. Mass 1996) (fire department violated employees’ First Amendment rights by requiring approval for comments on “Fire Department rules, duties, policies, procedures and practices”); *Grady v. Blair*, 529 F. Supp. 370 (N.D. Ill. 1981) (fire department violated employees’ First Amendment rights by requiring approval for statements to the media “relating to fire department activities”).

¹³⁴ Phoenix Police Department, Media Relations, Operations Order 5.2 (Mar. 2017), https://www.phoenix.gov/policesite/Documents/operations_orders.pdf.

¹³⁵ City of St. Louis Office of the Police Commissioner, Public Information Policy, Special Order SO 6-03 (Aug. 21, 2018) (produced in response to request, copy on file with authors).

¹³⁶ Greenville County Personnel Handbook, Rule 5.12, Media Relations (Oct. 13, 2014), http://www.greenvillecounty.org/Council/_Agenda/Meetings_percent202015/Finance/2015.02.09/PersonnelHandbook.pdf.

- “Officers shall direct all requests for information and interviews to the [Office of Media Relations].” (Boston Police Department)¹³⁷
- “No unauthorized personnel will reach out to the media and provide information pertaining to the Memphis Police Department, ongoing/closed investigation or personal endeavors without the approval of the PIO. ... Media outlets must submit requests for information through the PIO prior to the release of information.” (Memphis Police Department)¹³⁸
- “Non-authorized personnel shall not provide any substantive information to the media.” (Seattle Police Department)¹³⁹
- “Requests for public information from the media should be referred to a public information officer or ranking supervisor.” (Broward County, Fla., Sheriff’s Office)¹⁴⁰

Rigorous First Amendment scrutiny of pre-speech restraints is essential, because of the substantial risk these restraints present of inviting viewpoint-based discrimination. A police department supervisor is highly unlikely to grant permission for a known malcontent or whistleblower to give an interview if advance permission is required. An officer should not be forced to calibrate a *Pickering*-type balance to determine whether an act of whistleblowing – which could certainly provoke strong disagreements in the workplace – will lose First Amendment protection depending on the degree of public outrage it incites. Sometimes the *point* of whistleblowing is to incite a strong adverse public reaction – which is why the speech-protective

¹³⁷ Boston Police Dept., Rules & Procedures, Rule 300, Office of Media Relations-Release of Official Information (May 6, 2015), at § 9, <https://static1.squarespace.com/static/5086f19ce4b0ad16ff15598d/t/56a2567705caa7ee9f29e5ac/1453479543904/rule300.pdf>. The policy does allow certain senior officers to release “routine” information without need for permission, but cautions that if the request seems to cross the line into an “interview,” even a senior officer should consult the media relations office before speaking. *Id.* at §§ 10, 11.

¹³⁸ Memphis Police Dept., Policies & Procedures, Public Information Office, *available at* <https://memphispolice.org/wp-content/uploads/2020/03/CH1.pdf>.

¹³⁹ Seattle Police Dept., Public Information, General Policy 1.110 (Nov. 2017), <https://www.seattle.gov/police-manual/title-1--department-administration/1110--public-information>.

¹⁴⁰ Broward County Sheriff’s Office, Sheriff’s Policy Manual, Rule 5.3: Public Information (Sept. 27, 2016) (produced in response to request, copy on file with authors).

NTEU analysis is the right one for a blanket prohibition of the type that is on the books in New York and elsewhere throughout the country. Without the ability to express views contrary to those of the department's official position, officers would be unable to bring abuses or shortcomings to light, including concerns about their own safety.

Any policy that gives supervisors unbridled discretion to prevent speech from being heard is a prior restraint.¹⁴¹ To withstand constitutional scrutiny, such a regulation must contain narrow and objective standards for review.¹⁴² Otherwise, the danger that “unfettered discretion, coupled with the power of prior restraint, [will] intimidat[e] parties into censoring their own speech” will be too great and a wide range of speech will unnecessarily and unconstitutionally be censored.¹⁴³ None of the policies that require supervisory approval for speaking to the media contain either standards to cabin the authority of decisionmakers to grant or deny permission to speak, or any similar procedural safeguards. Lacking these safeguards, policies such as those on the books in New York, Phoenix, and St. Louis invite supervisors to make content- or viewpoint-discriminatory decisions, such as allowing only officers known to be loyal to the agency's “party line” to participate in interviews, or approving only interviews that involve routine and uncontroversial subjects.

B. Policies lacking clarity that exist in a constitutional gray zone

While many police policies unequivocally require employer approval for all interactions with the news media, other policies are more nuanced, leaving open the possibility that officers may have latitude to speak freely when they are off duty or when they are not addressing especially confidential police business. Narrow tailoring may make these types of policies constitutionally

¹⁴¹ *Spain v. City of Mansfield*, 915 F. Supp. 919 (D. Mass 1996) (citing *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988)).

¹⁴² *Id.* at 923.

¹⁴³ *Id.* (citing *City of Lakewood*, 486 U.S. at 763).

defensible against an overbreadth challenge – but they still may flunk First Amendment scrutiny if they are unduly vague. If a reasonable officer would be uncertain whether speech is or is not constitutionally protected against punishment, the regulation would predictably chill officers into silencing themselves.¹⁴⁴

Some law enforcement agency policies, rather than forbidding all communication with the press and public, selectively restrict certain categories of speech. For instance, the Louisville police department specifies that only the agency’s Media and Public Relations Office may respond to requests for “general information regarding the department[.]”¹⁴⁵ Officers in Austin must have approval from a public information officer before distributing any controversial information to the media.¹⁴⁶ The sheriff’s department in Oakland County, Mich., requires employees to refer “all requests on major incidents” to the public information officer or that person’s designee rather than answering the requests themselves.¹⁴⁷ These policies leave decisive terms – such as “major,” “controversial” or “general information” – undefined. A policy that fails to provide clear notice of what speech is or is not publishable may be vulnerable to challenge as unconstitutionally vague.¹⁴⁸

The Miami-Dade Police Department’s policy is a minefield for the unwary speaker. The policy begins by saying that the Public Information Office is responsible for releasing “[g]eneral information concerning police activities[.]”¹⁴⁹ However, employees are allowed to speak about

¹⁴⁴ See *Speech First, Inc. v. Killeen*, 968 F.3d 628, 639 (7th Cir. 2020) (stating that a First Amendment plaintiff may establish injury, even without suffering punitive action, by showing “a chilling effect on his speech that is objectively reasonable, and that he self-censors as a result”).

¹⁴⁵ Louisville Metro Police Dept., Standard Operating Procedures, No. 3.3, Media & Public Relations Office (Aug. 6, 2018) (produced in response to request, copy on file with authors).

¹⁴⁶ Austin Police Dept., News and Media Relations, General Order 326 (Feb. 2020), at 219-20, http://www.austintexas.gov/sites/default/files/files/Police/General_Orders.pdf.

¹⁴⁷ Oakland Co. Sheriff’s Dept., Gen’l Order No. 4, Guidelines for Media Relations; Police and the Media at III (Oct. 20, 2001) (produced in response to request, copy on file with authors).

¹⁴⁸ See *Chicago v. Morales*, 527 U.S. 41, 55 (1999) (a statute penalizing speech is subject to vagueness challenge if it “fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits”).

¹⁴⁹ Miami-Dade Police Dept., Departmental Order 11.6.26.3, Release to News Media (Jan. 2021), https://www.miami-police.org/DeptOrders/MPD_Departmental_Orders.pdf.

“cases or information of which they possess firsthand knowledge, provided the ends of justice are not thereby defeated, impaired, or impeded.”¹⁵⁰ But only the chief or a designee may speak to the media about “plans, policies, or affairs of the administration” of the department.¹⁵¹ Separately from the agency’s media policy, the department’s disciplinary code says officers will be punished for “[c]ommunicating or giving police information to any person concerning the business of the Department, which is detrimental to the Department, without prior approval or authorization by a commanding officer.”¹⁵² The sum total of these rules is that an officer presented with an opportunity to address a police department matter must assess whether the question seeks general information about department activities, whether the question concerns departmental plans or policies, whether the response calls for disclosing information detrimental to the department, or whether the response would disserve the interests of justice. If any of those things are true, then giving the answer will be a punishable offense. The predictable outcome of such a confusing policy is that officers simply will not speak at all.

A similar quandary would face employees at New York’s Suffolk County Police Department, which handles policing in five towns in eastern Long Island with a force of some 2,700 officers.¹⁵³ A departmental media relations directive first states that officers must contact the department’s Crime Stoppers office or public information office before replying to any media inquiry that is “not related to an issued press release or a developing situation[.]”¹⁵⁴ The directive later goes on to state: “No Department member shall speak to the media about a developing situation before first contacting the Crime Stoppers and the Public Information Bureau.”¹⁵⁵ The

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at § 11.6.17.24.

¹⁵³ Suffolk County Gov’t, Pub. Safety, <https://www.suffolkcountyny.gov/public-safety>.

¹⁵⁴ Police Dept. of Suffolk Cty., Dept. Gen’l Order No. 13-58, Media Relations (Jun. 25, 2013) at VI.K, https://suffolkpd.org/Portals/59/scpd_pdfs/infoandpolicies/MediaRelations.pdf.

¹⁵⁵ *Id.* at VI.M.

combined effect of these directives – that officers must get approval before speaking (1) *unless* the situation is developing, or (2) *if* the situation is developing – seems almost purposefully calculated to confuse.

Los Angeles, the nation’s third-largest police department with more than 9,800 full-time officers,¹⁵⁶ maintains a policy that seems to differentiate between scheduled interviews, which require supervisory approval in all cases, versus providing information to journalists on an unscheduled basis, as to which officers appear to have considerable discretion. The department instructs officers:

Requests for Department cooperation in the preparation of articles for newspapers, magazines, and other publications will be individually considered, and, if approved, permission for the interviewing of Department personnel and the photographing of police facilities will be limited to the scope of approval. Officers participating in the preparation of such articles should ascertain the scope of approval and should be cautious not to exceed those limits.¹⁵⁷

Perhaps ironically, Los Angeles begins its media policy with an aspirational preface about the importance of candor with the press – before specifying that interviews must be approved in advance:

One of the first and most fundamental considerations of this nation's founders in drafting the Bill of Rights was to provide for a free press as an essential element of the First Amendment to the Constitution. They recognized that a well-informed citizenry is vital to the effective functioning of a democracy. Police operations profoundly affect the public and therefore arouse substantial public interest. Likewise, public interest and public cooperation bear significantly on the successful accomplishment of any police mission. The police should make every reasonable effort to serve the needs of the media in informing the public about crime and other police problems. This should be done with an attitude of openness and frankness whenever possible. The media should have access to personnel, at the lowest level in a Department, who are fully informed about the subject of a press inquiry.¹⁵⁸

¹⁵⁶ Shelley Hyland & Elizabeth Davis, *Local Police Departments*, 2016: Personnel, U.S. Dept. of Justice, Bureau of Justice Stats. (Oct. 2019) at 14, <https://www.bjs.gov/content/pub/pdf/lpd16p.pdf>.

¹⁵⁷ L.A. Police Dept., 2020 3rd Quarter Manual, § 440.30, Cooperation for Feature Articles or Programs, *available at* http://lapdonline.org/lapd_manual/.

¹⁵⁸ *Id.*, § 115.

Outside of the interview setting, the policy suggests that officers have latitude to furnish information to the media; they are told to use care and discretion when speaking to the media so they are not misquoted, but otherwise are given leeway in deciding what to speak about.¹⁵⁹ The LAPD cautions officers against making public remarks critical of the criminal justice system, but states that personal views may be expressed, even if they are critical.¹⁶⁰ The Tucson, Arizona, police policy manual makes a similar distinction between “appearances or interviews regarding police matters or department business,” which require supervisory approval, versus providing “information of a factual nature” at a crime scene, which does not.¹⁶¹

As a matter of First Amendment law, it probably is permissible for a law enforcement agency to exercise control over speech if a journalist contacts the agency and asks the department to choose an officer to make available to be interviewed. If the agency offers up a particular interviewee, it could reasonably be understood that the officer is serving as a spokesperson, so that the officer’s speech could be regarded as delivered pursuant to official duties, bringing it within the ambit of the Supreme Court’s *Garcetti* standard. However, an interview could also encompass a journalist tracking down an officer after-hours in search of a personal opinion drawing on the officer’s experience and knowledge. This is the type of speech that, under an *NTEU* analysis, should be beyond the agency’s authority to interdict. A prohibition on unapproved interviewing, then, occupies a doubtful gray area.

A comparably vague policy is in place in Houston. The policy provides that officers may not make “statements about departmental policy or initiatives” without getting the statements approved – with an exception for statements made in emergency situations – but otherwise

¹⁵⁹ *Id.*, § 440.40.

¹⁶⁰ *Id.*, § 480.20.

¹⁶¹ Tucson Police Dept., Media and Public Information Policies, Gen’l Order 3060 (May 2001) (produced in response to request, copy on file with authors).

explicitly permits sharing “personal opinions.”¹⁶² A prohibition on speaking about police matters could inhibit officers from speaking about pay and working conditions, about policies that address choke-holds or stun-gun use or other public safety concerns, or even publicly defending themselves if implicated in wrongdoing. A whistleblower interested in going to the press or public could reasonably interpret a prohibition against discussing policy or initiatives to cover concerns about, for instance, the way officers use force or whether officers are being given adequate training or safety equipment.

These side-effects are not merely speculative: Ex-officer Kenneth Mitchell was removed from duty when he went public with concerns about potentially dangerous understaffing issues in the Houston Police Department.¹⁶³ Mitchell sent the disputed email from his personal account, while he was off duty, detailing the slower response times that residents of a particular neighborhood were facing as a result of the closure of their local substation.¹⁶⁴ Following an internal investigation, Mitchell was given the choice between a dishonorable discharge and resignation.¹⁶⁵ Mitchell’s lawyer told reporters that, while it may be inconvenient that officers have opinions, their First Amendment protections supersede police policy.¹⁶⁶ Though Houston’s policy seems to favor free speech, the extent of that right is called into question by the sometimes sharply circumscribed limits on what officers are actually allowed to discuss with the media and how practice may differ from policy.

¹⁶² Houston Police Dept., Media Relations, Gen’l Order 800-02 (Mar. 2020), https://www.houstontx.gov/police/general_orders/800/800-02_percent20Media_percent20Relations.pdf.

¹⁶³ Gabrielle Banks, *Houston officer who questioned police staffing files free speech suit after he was forced out*, HOUSTON CHRON. (Dec. 19, 2018), <https://www.chron.com/news/houston-texas/houston/article/Houston-officer-who-questioned-police-staffing-13479070.php>.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

Whether policies are vague or internally inconsistent, officers will be left wondering whether their speech will be protected – with their careers at risk if they guess wrong. When a policy appears internally self-contradictory, a speaker predictably will remain silent for fear that a supervisor will enforce the more restrictive interpretation. Functionally, then, a vague or ambiguous policy can be as speech-restrictive as an outright prohibition.

Even policies that are relatively speech-permissive at times contain constitutional red flags because they fail to differentiate between on-duty and off-duty speech in a way likely to inhibit constitutionally protected speech in an officer's individual capacity. For example, the Kern County Sheriff's Office, in Southern California, generally encourages employees to cooperate with the media and enumerates, in detail, the types of case-related information that are and are not subject to release.¹⁶⁷ But the department's media policy also states:

Statements of Sheriff's Office policy, official positions of the agency, official responses to criticism of the agency, comments critical of another department, agency, institution or public official, or statements pertaining to pending or ongoing litigation involving the Sheriff's Office, shall be made only by a command officer or other individuals designated by the Sheriff-Coroner.¹⁶⁸

A law enforcement agency obviously cannot enforce a viewpoint-discriminatory rule that restricts employees from making comments critical of any agency or official at any level of government (even, for instance, criticizing the White House), or punish them for doing so. Except when made in the course of official duties, such comments would be close to the heart of the political speech that the Constitution most fiercely protects. Restricting only speech critical of the government would be quite difficult to defend constitutionally. If the policy is meant to avoid entangling officers in contested political disputes, it is inadequately tailored to that objective, because it would

¹⁶⁷ Kern Cty. Sheriff's Ofc., Policies & Procedures, Media Relations-Release of Information No. 1-100, https://www.kernsheriff.org/Policies_Document/Department/DepartmentPolicies_SectionI.pdf.

¹⁶⁸ *Id.*

permit laudatory comments about government agencies or officials, but not critical ones. For instance, an officer would be a violator of the policy's plan language if he advocated against the mayor's re-election, but not if he endorsed the mayor's re-election.

A variation on the prior-approval policy that avoids some of the worst constitutional infirmities of a prior restraint is a policy requiring after-the-fact notice to the employer. The Contra Costa County Sheriff's Office in California, for example, tells employees:

Any Sheriff Office employee who has contact or interactions with the media will report that contact up through his or her immediate chain of command, who will provide this information to the Sheriff for operational awareness. The Public Information Officer will also be notified. This will be done as soon as practical, normally within 4 hours.¹⁶⁹

The Las Vegas and Portland police manuals contain a similar after-the-fact notification requirement.¹⁷⁰ Meanwhile the Tampa Police Department enforces a variation of the policy that requires advance notification (though unlike common gag policies, not phrased in terms of approval) before an officer may speak.¹⁷¹ A post-interview notification policy would not be a classic prior restraint, because the speaker can speak first and furnish notice afterward. Nevertheless, the practical effect of a notification requirement is to make it a punishable offense to provide information to a journalist on a not-for-attribution basis – as Colleen Ryan did in Minneapolis – because an officer who insists on the protection of anonymity obviously will not forfeit anonymity by notifying a supervisor, either beforehand or afterward. A mandatory notice

¹⁶⁹ Contra Costa County Sheriff's Dept., News Media Relations, No. 1.06.78 (2021) <https://www.cocosherriff.org/Home/ShowDocument?id=318>.

¹⁷⁰ Las Vegas Metro. Police Dept., Dept. Manual § 5/107.24, News Media & Public Information, *available at* [http://www.lvpmsa.org/Forms/Dept. percent20Man percent207-14-07.pdf](http://www.lvpmsa.org/Forms/Dept.%20Man%207-14-07.pdf); Portland Police Bureau, Directives Manual 0631.35 Press/Media Relations at § 2.5.

¹⁷¹ Tampa Police Dept., Standard Operating Procedure 504, Media Relations, <https://public.powerdms.com/TAMPA/tree/documents/424111> (“[S]ubject to certain exceptions, no employee is prohibited from speaking with media personnel, but all employees must coordinate with and notify the Public Information Office prior to communicating with the media”).

requirement thus can be read as effectively prohibiting anonymous speech, placing it in a constitutional gray area.¹⁷²

C. Narrowly tailored policies

A handful of the policies gathered and reviewed by the Brechner Center adhere to prevailing First Amendment standards as developed by the federal courts. These policies regulate with narrow specificity and leave ample opportunity for employees to share non-confidential information without fear of discipline. For example, the Philadelphia Police Department's news media policy tells officers to provide the media with as much information as possible, unless doing so would put someone's safety at risk or interfere with an active investigation.¹⁷³ Any officer is allowed to speak to the media, though certain information is designated as off-limits for release (such as the names of juveniles or sex crime victims) or requires supervisory approval before release (such as detailed information about arrestees) on the basis of privacy concerns.¹⁷⁴

Other jurisdictions, too, have policies with clearly delineated standards that do not leave officers guessing when they are approached by members of the press. The Detroit Police Department is among a small minority that affirmatively assures officers that they are free to speak to the press: "All members of the Detroit Police Department have the right to answer questions from the news media on matters of which they have direct personal knowledge," with the exception of certain sensitive information at crime scenes that is identified as non-releasable.¹⁷⁵ San Antonio, similarly, instructs officers that they are free to release nine specified categories of basic factual

¹⁷² See *McIntyre v. Ohio Elections Com'n*, 514 U.S. 334, 342 (1995) (stating that "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment").

¹⁷³ Philadelphia Police Dept., Media Relations and Release of Information to the Public, Directive 4.16 (Sept. 2015), <http://www.phillypolice.com/assets/directives/D4.16-MediaRelationsAndReleaseOfInformationToThePublic.pdf>.

¹⁷⁴ *Id.*

¹⁷⁵ Detroit Police Web Manual, Directive 302.5, Office of Public Info, *available at* https://www.prisonlegalnews.org/media/publications/detroit_police_web_manual_v2.pdf.

information about incidents to which they respond, such as the location and nature of a crime and a description of the suspect, without needing supervisory approval.¹⁷⁶ The policy goes on to state that responses to certain types of media inquiries, such as “the interpretation of departmental policy or procedures,” are to be made only by the police chief or a designee.¹⁷⁷ The policy thus directly addresses one of the primary concerns raised by gag policies – promoting the flow of timely information about crimes and safety hazards – while remaining silent as to the extent to which officers are free to venture opinions about work-related matters without needing approval.

Of all of the policies reviewed, the Cleveland Police Department provides the most detailed distinction between speech in an official capacity (which is tightly controlled) versus speech in an individual capacity (which is not).¹⁷⁸ The department tells officers that they must obtain written permission before giving an interview in uniform or as a representative of the agency, and explains how to get permission.¹⁷⁹ But it goes on to explain that officers are free to speak during their off-hours as long as they are off police premises, out of uniform, and state explicitly that they are speaking in a personal capacity and not on behalf of the department.¹⁸⁰

Clearly constitutional policies invariably get three things right. First, they narrowly and specifically identify the types of information that cannot be disclosed because of potential risk to victims, witnesses or the justice system. Second, they differentiate between employer-controlled speech when acting as a department spokesperson versus speech in an individual capacity. Third, they affirmatively provide discretion to release information outside of the narrow categories that

¹⁷⁶ San Antonio Police Dept., Gen'l Manual, Procedure 307–Public and Media Information, §§ 307.04-.06, https://www.sanantonio.gov/Portals/0/Files/SAPD/GeneralManual/307_percent20Public_percent20and_percent20Media_percent20Information.pdf.

¹⁷⁷ *Id.*

¹⁷⁸ Cleveland Division of Police, Media Relations, Order 1.3.01 (May 2020) (produced in response to request, copy on file with authors).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

legitimately qualify as confidential. The fact that some large metropolitan law enforcement agencies maintain relatively speech-permissive policies undermines any contention that police departments need total control over officers' speech to operate effectively. Plainly, it is possible to operate a law enforcement agency with relatively minimal control over what officers say, and with boundaries that respect their ability to speak off duty in their citizen role.

While it is valuable to examine and question the on-the-books policies of law enforcement agencies, official rulebooks tell only part of the story. Officers are often under the impression that they are entirely forbidden from speaking, even if no such restriction appears on the page, because of powerful unwritten workplace norms. For instance, the Chicago Police Department's formal written policies do not require all interactions with journalists to be approved in advance.¹⁸¹ Rather, the Chicago policy requires approval only if the officer is acting as an official representative of the police department.¹⁸² An off-duty interview requires no approval, as long as officers make clear that they are expressing personal opinions.¹⁸³ Nevertheless, Chicago officers have said they believe they are categorically prohibited from speaking without approval, so the perceived prohibition exerts the same chilling effect as if a prohibition actually existed.¹⁸⁴ For this reason, a survey of police rulebooks undoubtedly understates the true scope of the gagging problem, and any solution

¹⁸¹ Chicago Police Dept., Special Order S09-02, News Media Guidelines (Oct. 1, 2004), <http://directives.chicagopolice.org/directives/data/a7a57be2-12937790-40c12-9382-b55711f227214acc.html>.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ See Patrick Smith, *Chicago Police Turn Down City-Provided COVID-19 Vaccine*, WBEZ CHICAGO (May 3, 2021), <https://www.wbez.org/stories/chicago-police-turn-down-city-provided-covid-19-vaccine/9909c907-37bb-4dc5-adb0-feb7f3278c94> (stating that Chicago officers interviewed about hesitancy to take the COVID-19 vaccine “spoke with WBEZ on the condition of anonymity because they are not allowed to speak with the media”); Patrick Smith, *Chicago Police Officer Posts On Facebook ‘Work, Hustle, Kill.’ CPD Still Investigating After 15 Months*, WBEZ CHICAGO (Jul. 20, 2020), <https://www.wbez.org/stories/chicago-police-officer-posts-on-facebook-work-hustle-kill-cpd-still-investigating-after-15-months/2fb03618-349d-4b06-8120-65a0789f60dc> (stating that officer under lengthy unresolved investigation for disturbingly violent social media posts “is not allowed to speak to the media because of department rules that bar officers from talking to the press”).

must recognize both the constitutional defects in written standards as well as the powerful deterrent effect of unwritten “standards.”

VI. The Argument for Handcuffing Officer Speech

Because police are handling sensitive information that can bear on their own safety and that of the public, the law at times recognizes that the public’s right-to-know may be subordinated to the agency’s legitimate objectives. For instance, the federal Freedom of Information Act and its state counterparts recognize some latitude for law enforcement agencies to withhold records, which would otherwise be publicly accessible, when they contain information that might compromise ongoing investigations.¹⁸⁵ The need for a degree of regimentation in the ranks of public safety officers has often been recognized as a justification for compromising their individual expressive interests.¹⁸⁶ For instance, rigid restrictions on attire and grooming that might not be permissible in an ordinary government office setting are countenanced within public safety agencies.¹⁸⁷

The fact that police and sheriff’s departments across the United States insist on filtering employee communications with the news media indicates that these agencies believe they have a

¹⁸⁵ See 5 U.S.C. § 552 (permitting federal law enforcement agencies to turn down FOIA requests for records that would “reasonably be expected to interfere with enforcement proceedings,” invade personal privacy, compromise confidential informants, or otherwise give away mission-critical confidences). See also Steven D. Zansburg & Pamela Campos, *Sunshine on the Thin Blue Line: Public Access to Police Internal Affairs Files*, 22 Comm. Law. 34 (2004) (observing that “most state statutes follow FOIA by including an exemption for investigatory records”).

¹⁸⁶ See *Maciariello v. Sumner*, 973 F.2d 295, 300 (4th Cir. 1992) (contrasting considerable First Amendment protection afforded to speech of college professors with relatively more limited freedom afforded to police officers: “Police are at the restricted end of the spectrum because they are ‘paramilitary’ — discipline is demanded, and freedom must be correspondingly denied.”); *Kannisto v. City & Cty. of San Francisco*, 541 F.2d 841, 843 (9th Cir. 1976) (holding that “a prohibition against the communication of an officer’s disaffection to rank-and-file members of the department during regular duty hours may be considered as a necessary adjunct to the department’s substantial interest in maintaining discipline, morale and uniformity”).

¹⁸⁷ See, e.g., *Kelley v. Johnson*, 425 U.S. 238, 248 (1976) (affording highly deferential review in upholding constitutionality of police department’s regulation on hair length and facial hair, which could be justified “based on a desire to make police officers readily recognizable to the members of the public, or a desire for the esprit de corps which such similarity is felt to inculcate within the police force itself”).

legitimate interest in controlling the flow of information about police matters. Courts have recognized that, as with any workplace, law enforcement employers have legitimate needs to maintain harmony among coworkers, prevent the release of legally protected confidences, and “encourage close and personal relationships between employees and their superiors.”¹⁸⁸ Undoubtedly, some information handled by law enforcement agencies is legitimately off-limits for distribution to the general public on safety grounds (such as the names of confidential police informants) or privacy grounds (such as the names of young children who are cited for offenses of no public importance). The careless release of sensitive investigatory information can compromise resolving cases or even put lives at risk,¹⁸⁹ so policies that restrict the unfettered distribution of that type of information are unobjectionable.

Police have a legitimate interest in making sure that critical public-safety information is accurate and consistent, so that, for instance, an order to evacuate an area is communicated uniformly without mixed messages. Legitimate concerns have been raised, too, about police and prosecutors gratuitously volunteering damaging information about people hurt or killed by police in an effort to rationalize a questionable decision to use force, and perhaps influence a future jury to devalue the life of the victim if the case ends up in court.¹⁹⁰ For these reasons, there are defensible arguments that public safety agencies need greater latitude to control the flow of information than, for instance, a county parks department.

¹⁸⁸ Hall v. Mayor and Director of Public Safety, 422 A.2d 797, 799 (N.J. App. 1980).

¹⁸⁹ See, e.g., Rafael Olmeda, *In a rare move, cop faces a criminal leak investigation*, SUN SENTINEL (Oct. 30, 2019), <https://www.sun-sentinel.com/local/broward/sunrise/fl-ne-sunrise-police-ia-roger-krege-20191030-r7uv4xkqjrifi5d7ku5hw23yw6y-story.html> (reporting that a police sergeant’s leak of confidential investigative information to the local newspaper compromised the location of the base of operations for an undercover drug investigation, forcing officers to relocate). See also Michael James, *Denver pair executed robbery witness after court system mistakenly released his identity*, USA Today (Feb. 2019), <https://www.usatoday.com/story/news/nation/2019/02/21/robbers-executed-witness-after-court-mistake-life-witness/2945462002/> (reporting that a Denver man was shot and killed in front of his home when documents identifying him as a witness to a robbery were mistakenly released to the public).

¹⁹⁰ Sam Levin, *Killed by police, then vilified: how America's prosecutors blame victims*, THE GUARDIAN (Mar. 21, 2019), <https://www.theguardian.com/us-news/2019/mar/20/us-police-killings-district-attorney-prosecutor-reports>.

The Ninth Circuit’s *Moonin* case offered something of a roadmap for how law enforcement agencies rationalize exerting control over what employees say to the press and public. The highway patrol offered three rationales to justify the restriction: Protecting sensitive information relating to drug enforcement, controlling the department’s messages to outsiders, and ensuring effective operation of the department without interference from outsiders.¹⁹¹ Although the court found these to be legitimate government interests,¹⁹² “efficiency grounded in the avoidance of accountability is not, in a democracy, a supervening value” that would justify overbroad restraints on speech.¹⁹³ Any prior restraints on speech must be narrowly tailored and have a “close and rational” relationship to the subject of the speech, the judges wrote, and the Nevada Highway Patrol’s rule against any discussion of the agency’s use of police dogs did not meet that test.¹⁹⁴

The asserted interests of policing agencies do not support the conclusion that all interactions between officers and the public must be intermediated, for two primary reasons. First, it is possible to craft a more narrowly tailored policy that asserts control only over the critical subset of speech that can lawfully be regulated to protect the agency’s legitimate interests, including the integrity of confidential information in the agency’s custody. Second, agencies still have the authority recognized in the Supreme Court’s *Pickering* line of cases to discipline speakers for especially harmful instances of speech that undermine the agency’s effectiveness, without categorically gagging all speakers.

¹⁹¹ *Moonin*, 868 F.3d at 865.

¹⁹² *Id.* at 865-66.

¹⁹³ *Id.* at 866.

¹⁹⁴ *Id.* at 867 (quoting *Gibson v. Office of the Att’y Gen’l*, 561 F.3d 920, 928 (9th Cir. 2009)). To underscore the public importance of access to information about the use of police dogs, The Marshall Project, an investigative news organization focused on criminal justice and corrections, won widespread acclaim for a 2020 series of stories about how police have, at times, unleashed dogs to attack suspects in questionable circumstances even after the pursuit was concluded, sometimes inflicting disabling injuries. Abbie VanSickle, Maurice Chammah, Michelle Pitcher, Damini Sharma, Andrew Calderon & David Eads, *Mauled: When Police Dogs Are Weapons*, THE MARSHALL PROJECT (Oct. 15, 2020), <https://www.themarshallproject.org/2020/10/15/mauled-when-police-dogs-are-weapons>.

A. Less Speech-Restrictive Remedies Exist

Courts have found narrowly tailored policies that restrict officer speech to be constitutionally permissible. In adjudicating a First Amendment challenge, a federal court applied a narrowing construction to the Washington, D.C., police department's media policy, which stated in part: "Only the Chief of Police, Command staff and members designated by them may release information pertaining to Department policies, procedures, rules, personnel issues and direction."¹⁹⁵ Although the prohibition appeared broad, the judge interpreted the prohibition in context with the remainder of the rulebook. The remainder of the rules, in the judge's view, clearly governed only speech delivered "pursuant to official duties," such as making a press statement on behalf of the department.¹⁹⁶ With that narrow understanding, the policy was facially constitutional.¹⁹⁷ Because the policy applied only to official-duty speech, the plaintiff in the case, who was punished for speaking to *The Washington Post* on behalf of the police union, ended up prevailing.¹⁹⁸

Similarly, a Connecticut police department's media policy survived a First Amendment challenge because it was tailored to apply only to formal releases of information to the news media, and to information that would not be publicly accessible under state law, such as information about ongoing criminal investigations.¹⁹⁹ This left room for police department employees to express their views as individuals, including views about police matters, as long as no confidences were compromised.²⁰⁰ Once again, the plaintiff officer prevailed on the merits of his as-applied

¹⁹⁵ *Hawkins v. District of Columbia*, 923 F.Supp.2d 128, 135-36 (D.D.C. 2013).

¹⁹⁶ *Id.* at 136.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 143.

¹⁹⁹ *Shelton Police Union, Inc. v. Voccola*, 125 F.Supp.2d 604, 624-25 (D. Conn. 2001).

²⁰⁰ The challenged policy provided, in full: "To avoid confusion and conflict in the release of information, all formal releases to the press are to be disseminated through the media relations' officer assigned by the Chief of Police or in the absence of such media relations' officer by the commanding officer. No member of the department shall release

challenge, because the speech for which he was punished – criticizing “racial comments made by the Chief of Police, conflicts of interest within the police department, and the general operation and management of the police department” – fell outside the legitimate reach of the prohibition.²⁰¹ Even some successful facial challenges to overbroad policies have recognized that better-tailored restrictions can be constitutional. For instance, while it was deemed unconstitutional for a Massachusetts police department to forbid discussing agency policy, the department could lawfully enforce a narrower prohibition against speech that “is intended to undermine the effectiveness of the Department, is insubordinate, or is made with reckless disregard for truth or falsity.”²⁰²

As these cases demonstrate, it is eminently possible for a law enforcement agency to craft a constitutionally permissible employee-speech policy that protects confidential information critical to agency operations and prevents employees from misleadingly holding themselves out as official spokespeople, while leaving ample breathing space for officers to share information and ideas.

B. Supervisors Have Adequate Speech-Specific Enforcement Power

Public safety agencies have ample legal authority to penalize especially egregious instances of disloyal or unprofessional speech without resorting to an all-out prohibition on speaking with the press and public. It is well-established under the *Pickering* standard that a public employee’s speech loses First Amendment protection and becomes punishable when it undermines the credibility of the agency or casts serious doubt on the employee’s own ability to fairly and

any information relating to pending investigations or any information not otherwise available to the public if such information is exempt from public disclosure pursuant to the Freedom of Information Act.” *Id.* at 608.

²⁰¹ *Id.* at 627-34.

²⁰² *Wagner v. City of Holyoke*, 100 F.Supp.2d 78, 86-87 (D.Mass. 2000).

impartially discharge the duties of a position of public trust.²⁰³ Examples abound in which public safety agencies have prevailed in First Amendment challenges brought by disciplined officers who spoke – or in more recent years, tweeted – in ways that reasonably would cause co-workers or the public to distrust their professional judgment.

Courts have rebuffed First Amendment claims brought by public safety officers for making remarks on social media indicating a violent disposition toward political opponents,²⁰⁴ operating a hardcore sex website and making personal appearances in the community to promote the site,²⁰⁵ appearing at a police Halloween party costumed in blackface and carrying a watermelon,²⁰⁶ and selling videos of sex acts in (and partially out of) a police uniform.²⁰⁷ In none of these cases, and dozens more like them, have courts been willing to second-guess the disciplinary judgments of public safety agencies once it is shown that an employee’s expression actually undermined workplace effectiveness.

Law enforcement supervisors have especially broad authority to regulate individual instances of disruptive speech, because so much speech is regarded as being part of an officer’s official duties, bringing it within the ambit of the Supreme Court’s *Garcetti* rule.²⁰⁸ Once speech is considered to be part of an official work assignment, it ceases being the constitutionally protected speech of the employee under *Garcetti* and becomes attributable to the employer,

²⁰³ See *Gasparinetti v. Kerr*, 568 F.2d 311, 315-16 (3d Cir. 1977) (applying *Pickering* in First Amendment case brought by disciplined police union leader and stating “we can recognize a significant government interest in regulating some speech of police officers in order to promote efficiency, foster loyalty and obedience to superior officers, maintain morale, and instill public confidence in the law enforcement institution. To achieve these ends, regulations may be promulgated, but their restrictive effect may extend only as far as is necessary to accomplish a legitimate governmental interest.”).

²⁰⁴ *Grutzmacher v. Howard County*, 851 F.3d 332 (4th Cir. 2017) (finding that fire department battalion chief was lawfully disciplined for Facebook posts including an anti-gun-control rant fantasizing about “beating a liberal to death” and, after being reprimanded, a defiant follow-up post with a photo of an upraised middle finger directed to the fire chief).

²⁰⁵ *Dible v. City of Chandler*, 515 F.3d 918 (9th Cir. 2008).

²⁰⁶ *Tindle v. Caudell*, 56 F.3d 966 (8th Cir. 1995).

²⁰⁷ *City of San Diego v. Roe*, 543 U.S. 77 (2004).

²⁰⁸ *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

meaning that the agency can freely regulate it.²⁰⁹ For example, when a Milwaukee police officer was demoted after lodging a complaint with the state prosecutor's office that a supervisory officer had helped her fugitive brother evade arrest, the complaint was deemed to be unprotected speech.²¹⁰ Since department policy required officers to report all crimes they were aware of, and because the complaint took place during an official business meeting, the court deemed the report to have been made as part of official duties, and thus not protected by the First Amendment.²¹¹

The *Pickering* analysis for post-speech punishment affords employers latitude to manage workplace-disruptive speech of low value to the public, while at the same time enabling true whistleblowers to vindicate their rights if punished for high-value speech.²¹² The Third Circuit made this observation in invalidating a prior restraint that limited expert testimony by police officers.²¹³ The court observed that if some subset of expert testimony undermines the employer's interests, such as a police ballistics expert testifying that ballistics evidence is worthless, "the balancing process can be performed more satisfactorily after the speech has occurred, when both its usefulness and its impact can be more accurately assessed."²¹⁴ The *Pickering* level of speech-

²⁰⁹ *Id.* at 424.

²¹⁰ *Morales v. Jones*, 494 F.3d 590 (7th Cir. 2007).

²¹¹ *Id.* at 597. Notably, the Seventh Circuit did find that the officer engaged in protected speech by testifying in a civil lawsuit, which was not an assigned professional duty, even though the testimony included information learned in the course of duty. *Id.* at 598.

²¹² *See, e.g., Rode v. Dellarciprete*, 845 F.2d 1195, 1202 (3d Cir. 1988) (ruling in favor of disciplined police officer's First Amendment challenge for sharing concerns with newspaper reporter about racial animus within her department: "[W]hen a public employee participates in an interview sought by a news reporter on a matter of public concern, the employee is engaged in the exercise of a first amendment right to freedom of speech, even though the employee may have a personal stake in the substance of the interview."); *Solomon v. Royal Oak Twp.*, 842 F.2d 862 (6th Cir. 1988) (finding that police officer who made comments to newspaper alleging cronyism, favoritism and sexual harassment by his supervisor was unlawfully fired in retaliation for constitutionally protected speech, because corruption in law enforcement is a matter of public interest); *Broderick v. Roache*, 767 F.Supp. 20 (D. Mass. 1991) (applying *Pickering* and concluding that Boston Police Department violated police union leader's First Amendment rights by punishing him for speech to the news media addressing "crumbling" officer morale, political meddling by mayor's administration, and other issues of public concern).

²¹³ *Swartzwelder v. McNeilly*, 297 F. 3d 228 (3rd Cir. 2002).

²¹⁴ *Id.* at 241.

specific disciplinary authority has proven to be a workable and adaptable standard that balances the employer's and employees' interests, without the need to resort to categorical prior restraints.

VII. Conclusion: Broad Prior Restraints Do Not Serve or Protect

Perhaps the most famous whistleblower story in modern U.S. history is the story of New York City police detective Frank Serpico, whose life was dramatized in a 1973 Hollywood motion picture starring Al Pacino.²¹⁵ After refusing to accept a bribe offer, Serpico became aware that bribery was a widespread problem within the New York Police Department, winked at by superiors, that could compromise the integrity of the police force.²¹⁶ He complained through internal channels and ultimately gave incriminating testimony before a confidential grand jury proceeding, but the grand jury failed to indict any of the culpable higher-ups.²¹⁷ So Serpico did what the rules of many police departments categorize as a punishable disciplinary offense: He told his story to a *New York Times* reporter.²¹⁸ A drumbeat of front-page publicity did what the internal complaint process could not: It forced New York's mayor to appoint a commission of inquiry, the Knapp Commission, that compiled a jaw-dropping investigative report cataloguing the extent to which organized crime and drug dealers had bought off police to protect their illicit operations.²¹⁹ Plainly, no supervisor in the New York Police Department would have given Serpico approval to speak to the *Times* if he had asked. The Serpico case underscores why journalists need access to rank-and-file police officers, not just to spokespeople who are paid to burnish the agency's reputation.

²¹⁵ SERPICO (Sidney Lumet dir., 1973).

²¹⁶ Roberta Ann Johnson, *Whistleblowing and the Police*, 3 RUTGERS J. L. & URB. POL'Y 74, 77 (2006).

²¹⁷ *Id.* at 78.

²¹⁸ *Id.*

²¹⁹ Adam Walinsky *The Knapp Connection*, VILLAGE VOICE (Mar. 1, 1973), <https://www.villagevoice.com/2011/04/18/what-frank-serpico-started-the-knapp-commission-report/>.

It would be naïve to believe that police department media policies are the only, or even the primary, reason that officers refrain from publicly exposing problems within their departments. Powerful peer pressure forces deter officers from ratting out their compatriots.²²⁰ The culture of loyalty among officers is so legendary that it has entered the popular lexicon as a “blue wall of silence” or “blue curtain.”²²¹ Still, the existence of a formal, on-the-books policy against whistleblowing lends official legitimacy to what should be considered a shameful and archaic feature of police culture. Law enforcement agencies avidly encourage civilian witnesses to speak out – “If you see something, say something” is a trademarked slogan of New York’s Metropolitan Transit Authority, licensed by agencies around the world.²²² But internally, agency policies often read as: “If you see something, say nothing.” It asks too much of a would-be whistleblower not just to run the risk of being socially ostracized by colleagues, but also to risk firing or suspension for violating a workplace disciplinary code.²²³

The fear of retaliation is no abstraction. High-profile instances demonstrate that, equipped with the authority to silence or retaliate against speakers, some police supervisors will take the invitation. When Officer Ike Lambert of the Chicago Police Department attempted to report discrepancies between a fellow officer’s report on the shooting of an unarmed man versus

²²⁰ Johnson, *supra* n. 202, at 76-77 (2006) (“The nature of police work... helps define the group. ... One of the most respected tenets of the group is loyalty. Loyalty is exacted with a code of honor that requires officers not to ‘snitch on,’ or ‘rat out,’ or turn in other officers.”); Jerome H. Skolnick, *Corruption and the Blue Code of Silence*, 3 POLICE PRACT. & RES. 7, 8 (2002) (“[T]he unique demands that are placed on police officers, such as the threat of danger as well as scrutiny by the public, generate a tightly woven environment conducive to the development of feelings of loyalty. The refusal to report misconduct to proper authorities, or to falsely claim no knowledge of misconduct, is a common manifestation of these sentiments.”).

²²¹ See Alison Patton, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753, 763 (1993) (quoting an ACLU police practices specialist’s observation that police will even lie under oath at trial to protect each other because officers “depend on each other in life and death situations”).

²²² Dept. of Homeland Sec., About the Campaign, [https://www.dhs.gov/see-something-say-something/about-campaign#:~:text=The percent20 percent22If percent20Y ou percent20See percent20Something,of percent20creating percent20a percent20nationwide percent20campaign](https://www.dhs.gov/see-something-say-something/about-campaign#:~:text=The%20percent20If%20You%20See%20Something,of%20creating%20a%20nationwide%20campaign).

²²³ See Skolnick, *supra* n. 206, at 11-12 (discussing how fear of retribution by co-workers discourages police whistleblowing).

eyewitness testimony and video evidence, he was quickly demoted.²²⁴ A New Jersey police sergeant, Kamil Warraich, was placed on medical leave and forced to undergo psychological evaluations in response to his allegations of racism, excessive force, and missing files in his department.²²⁵ Warraich had previously been suspended for misusing public property after he used department letterhead to report his concerns to prosecutors.²²⁶

Law enforcement agencies might argue that officers need not elevate their concerns to the public and press, because they have the recourse of complaining internally through the chain of command. But as Frank Serpico's experience dramatizes – and hundreds of less-publicized cases confirm – the complaint process is not always effective.²²⁷ One critic has called the internal affairs process “an irresponsible and, frankly, farcical method of responding to misconduct claims.”²²⁸ Further, “the entire process is concealed from the public,” so if an officer is being given repeat opportunities to evade responsibility for wrongdoing, the public may never find out – unless someone within the system speaks up.²²⁹ If the whistleblower's concern is alerting the public to a potentially dangerous person on the police force, filing an internal affairs complaint that will likely never see the light of day is an ineffective way of achieving that objective. Speaking publicly should be understood as a supplement to the internal affairs process that helps ensure the

²²⁴ Musa al-Gharbi, *Police Punish the 'Good Apples'*, THE ATLANTIC, July 2020, <https://www.theatlantic.com/ideas/archive/2020/07/what-police-departments-do-whistle-blowers/613687/>.

²²⁵ S.P. Sullivan, *Why don't more cops speak out about alleged misconduct? Look what happened to one who tried.*, NJ.COM (Nov. 1, 2020), <https://www.nj.com/news/2020/11/why-dont-more-cops-speak-out-about-alleged-misconduct-look-what-happened-to-one-who-tried.html>.

²²⁶ *Id.*

²²⁷ See Barbara Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 538 (2004) (observing that, because the internal affairs process is purely punitive and not designed to produce systemic improvements, “internal review, at least as it currently exists, is unlikely to be a very effective vehicle for widespread policy or organizational change”). See also *id.* at 537 n.523 (quoting statistics that show only 13% of internal affairs proceedings result in a finding of guilt against the accused officer, raising questions about the processes' objectivity).

²²⁸ Rachel Moran, *Ending the Internal Affairs Farce*, 64 BUFF. L. REV. 837, 844 (2016).

²²⁹ See Patton, *supra* n. 207, at 787 (commenting that secrecy of internal affairs proceedings is a factor in allowing repeat abusers to re-offend).

effectiveness of the process, because if the complaint is not taken seriously, the complainant can do as Frank Serpico did, and escalate the matter to a higher court: The court of public opinion.

In addition to the increasingly well-documented problem of overzealous use of force against people of color, police agencies have become known as harbors for sexual harassment²³⁰ and racial hostility and discrimination.²³¹ If journalists are limited to speaking with the head of the agency, the agency's public relations spokesperson, or a hand-picked officer chosen by the public relations office, the stories of people experiencing adversity within the workplace will go untold. An officer who is already experiencing harassment or discrimination will understandably hesitate to escalate the situation publicly at an agency that makes unauthorized statements a punishable disciplinary offense.

When rank-and-file officers cannot be heard, at times the only voice speaking for police is that of labor unions. But union representatives do not always represent the diverse and nuanced perspectives of their members, nor can they; it is the role of unions to be assertive advocates in

²³⁰ See Somvadee Chaiyavej & Merry Morash, *Reasons for Policewomen's Assertive and Passive Reactions to Sexual Harassment*, 12 POLICE QUARTERLY 63, 71 (2009) (reporting findings of interviews with 117 female officers from five midwestern law enforcement agencies: "90.6 percent reported at least one experience of harassment by a male officer in their organization within the past 2 years"); Sue Carter Collins, *Sexual harassment and police discipline: Who's policing the police?*, 27 POLICING: AN INTERNATIONAL JOURNAL 512, 513 (2004) (commenting that "there is overwhelming evidence that sexual aggression by male officers against female officers remains unchecked").

²³¹ See Andrea Shalal & Jonathan Landay, *Black cops say discrimination, nepotism behind U.S. police race gap*, REUTERS (Jul. 2, 2020), <https://www.reuters.com/article/us-minneapolis-police-blackofficers/black-cops-say-discrimination-nepotism-behind-u-s-police-race-gap-idUSKBN2432T8> (quoting National Black Police Association's observation that "Black recruits face nepotism, more problems during background checks, greater barriers to promotion and higher discipline rates once hired"); Dan Frosch & Ban Chapman, *Black Officers Say Discrimination Abounds, Complicating Reform Efforts*, WALL STREET JOURNAL (Jun. 16, 2020), <https://www.wsj.com/articles/for-black-police-discrimination-abounds-complicating-reform-efforts-11592299800> ("black officers across the country say they commonly face harassment, discrimination and even abuse from their own departments"). See also Kimberly D. Hassell & Steven G. Brand, *An Examination of the Workplace Experiences of Police Patrol Officers: The Role of Race, Sex, and Sexual Orientation*, 12 POLICE QUARTERLY 408, 418-21 (2009) (reporting that African-American police officers and Latina officers experience "significantly higher levels of stress" than white male officers, and that African-American male officers "report significantly more negative workplace experiences" than their white peers, including vandalism or theft of their equipment, exposure to vulgar language, and lack of opportunity for advancement).

defense of their members, even in questionable cases.²³² Silencing the knowledgeable voices of those in the middle between police critics and professional police advocates leaves the public with a distorted and incomplete set of extreme perspectives. News organizations are under increasing pressure to diversify the sources they quote, so that the voices appearing in the media are reflective of the full range of the community.²³³ But when journalists are limited to speaking only to the person in charge of the law enforcement agency, or the person in charge of the police union, that person is highly likely to be a middle-aged white man.²³⁴

Even acknowledging that there is a range of potentially harmful speech that law enforcement agencies can legitimately regulate, that still leaves a wide swath of speech in which

²³² See Samantha Michaels, *The Infuriating History of Why Police Unions Have So Much Power*, MOTHER JONES (September/October 2020), <https://www.motherjones.com/crime-justice/2020/08/police-unions-minneapolis/> (quoting head of Minneapolis police union who opposed firing of Officer Derek Chauvin even after he was videotaped smothering a man to death, and called for violence against protesters he described as a “terrorist movement”); William Finnegan, *How Police Unions Fight Reform*, THE NEW YORKER (Jul. 27, 2020), <https://www.newyorker.com/magazine/2020/08/03/how-police-unions-fight-reform> (explaining how New York’s police union continued to defend the officer who killed street merchant Eric Garner in 2014 by asphyxiating him in a choke-hold while arresting him for a petty offense, even after it came to light that the officer had a high number of substantiated prior complaints on his record).

²³³ See Katica Roy, *There’s a gender crisis in media, and it’s threatening our democracy*, FAST COMPANY (Sept. 10, 2019), <https://www.fastcompany.com/90401548/theres-a-gender-crisis-in-media-and-its-threatening-our-democracy> (noting that Bloomberg business news organization has made strides in diversifying coverage, but that women still make up only 18% of experts quoted on-air and 10% of experts quoted in front-page news stories); Jeanine Santucci, *Source Diversity At NPR: Grassroots Initiatives Address Challenges*, NPR.ORG (July 24, 2018), <https://www.npr.org/sections/publiceditor/2018/07/24/631964116/source-diversity-at-npr-grassroots-initiatives-address-challenges> (noting that sources interviewed on NPR flagship programs were “overwhelmingly white, male and coastal,” with men making up 70% of the interviewees and white people making up 73%); Adrienne LaFrance, *I Analyzed a Year of My Reporting for Gender Bias (Again)*, THE ATLANTIC (Feb. 7, 2016), <https://www.theatlantic.com/technology/archive/2016/02/gender-diversity-journalism/463023/> (“Women represent about half the global population, and yet they’re dramatically underrepresented in stories meant to help people understand much of the complexity in the world.”).

²³⁴ Federal statistics reflect that, as of 2013, 78% of full-time sworn personnel in sheriffs’ offices were white, 11% were Hispanic, 9% were black, and 2% were members of other minority groups. U.S. Dept. of Justice, *Sheriff’s Office Personnel, 1993-2013* (June 2016), <https://www.bjs.gov/content/pub/pdf/sop9313.pdf>. But 90% of sheriffs are white and 97% are male, according to a June 2020 study. Reflective Democracy Campaign, *Confronting the Demographics of Power: America’s Sheriffs* (June 2020), <https://wholeads.us/wp-content/uploads/2020/06/reflectivedemocracy-americaassheriffs-06.04.2020.pdf>. The nonprofit Marshall Project has likewise found that the people who run police unions are, overwhelmingly, white men. See Eli Hager & Weihua Li, *A Major Obstacle to Police Reform: The Whiteness of Their Union Bosses*, THE MARSHALL PROJECT (Jun. 10, 2020), <https://www.themarshallproject.org/2020/06/10/a-major-obstacle-to-police-reform-the-whiteness-of-their-union-bosses> (“Of the 15 largest departments in which a majority of officers are people of color, only one, Memphis, has a union leader who is black.”).

officers can harmlessly engage. Providing basic factual information to journalists about newsworthy events, sharing personal experiences and observations, and addressing the full range of civic issues on which any community member might have an opinion must still be protected. If a police department policy does not clearly leave leeway for this benign speech, then the policy is overly broad and likely unconstitutional.

Gag policies present two distinct types of problems for the flow of information. First, they can prevent the public and press from finding out timely information about crimes to which police respond by limiting those authorized to answer questions to a single public affairs spokesperson or the chief of the department. This creates a chokepoint delaying the flow of information. Second, they can inhibit employees from sharing personal opinions and observations that are informed by their professional experiences. This is exactly the type of speech that the Supreme Court has recognized as societally valuable.²³⁵

Longstanding business-as-usual assumptions about policing are being revisited as disturbing discoveries come to light. It has become common knowledge that police officers give false testimony so regularly that the practice has a nickname – “testilying”²³⁶ – and that prosecutors are forced to maintain lists of untrustworthy officers to avoid calling as witnesses.²³⁷ In response

²³⁵ See *Lane v. Franks*, 573 U.S. 228, 240 (2014) (“[O]ur precedents dating back to *Pickering* have recognized that speech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment.”); *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006) (“The Court has acknowledged the importance of promoting the public’s interest in receiving the well-informed views of government employees engaging in civic discussion.”). See also Michael L. Wells, *Section 1983, the First Amendment, and Public Employee Speech: Shaping the Right to Fit the Remedy (and Vice Versa)*, 35 GA. L. REV. 939, 995 (2001) (commenting that “a rule that all statements about the job are unprotected would undermine the value of free speech in the employment context”).

²³⁶ Joseph Goldstein, ‘Testilying’ by Police: A Stubborn Problem, N.Y. TIMES (Mar. 18, 2018), <https://www.nytimes.com/2018/03/18/nyregion/testilying-police-perjury-new-york.html>.

²³⁷ Steve Reilly & Mark Nichols, *Hundreds of police officers have been labeled liars. Some still help send people to prison*, USA TODAY (Oct. 14, 2019), <https://www.usatoday.com/in-depth/news/investigations/2019/10/14/brady-lists-police-officers-dishonest-corrupt-still-testify-investigation-database/2233386001/>.

to these concerns, states are revisiting laws that afford special job protections to police,²³⁸ opening long-concealed records of misconduct complaints for public inspection,²³⁹ and restricting the use of chokeholds and other dangerous tactics.²⁴⁰ But these reforms will be incomplete so long as both the written law of policing and its unwritten culture restrain officers from speaking candidly about their work.

Litigation is unlikely to provide a solution, for two reasons. First, there is no indication that decades' worth of court rulings have made any lasting impression on law enforcement agencies. Even after being successfully sued two decades ago for restricting officers' free speech rights,²⁴¹ the Pittsburgh Bureau of Police still has one of the nation's most repressive speech policies, requiring pre-approval for all comments to the media.²⁴² Second, litigation is relatively rare, and facial challenges are even rarer. A police officer is unlikely to be so motivated to give an interview as to get legal counsel and file suit. Opportunities to speak to the media are situational and time-sensitive. An officer might be approached for an interview only a few times over the course of a career. An officer who is denied permission to speak will not be able to obtain judicial redress in time for the interview to be newsworthy. The rare officer who is motivated to sue will almost invariably be an officer who has suffered serious disciplinary sanctions, so that the relationship with the employer is already broken. And disciplinary action often is based on the content of a specific remark (triggering an "as-applied" *Pickering* analysis) as opposed to the decision to accept

²³⁸ Ben Leonard, *Maryland becomes first state to repeal police bill of rights, overriding Hogan veto*, POLITICO (Apr. 10, 2021), <https://www.politico.com/news/2021/04/10/maryland-repeals-police-bill-of-rights-overriding-hogan-veto-480731>.

²³⁹ Ellen Moynihan, Denis Slattery & Chris Sommerfeldt, *Cuomo signs historic 50-a repeal bill, making N.Y. police disciplinary records public after decades of secrecy*, N.Y. DAILY NEWS (Jan. 12, 2020), <https://www.nydailynews.com/news/politics/ny-cuomo-police-reform-disciplinary-records-20200612-5zryohkuwjew7ksjowhtswmsk4-story.html>.

²⁴⁰ Nicholas Bogel-Burroughs, *Washington State Enacts Police Reform a Year After George Floyd's Death*, N.Y. TIMES (May 19, 2021), <https://www.nytimes.com/2021/05/19/us/washington-inslee-police-reform.html>.

²⁴¹ *Swartzwelder v. McNeilly*, 297 F.3d 228 (3d Cir. 2002).

²⁴² Pittsburgh Bureau of Police, Order No. 65-1, Media Policy (Mar. 6, 2015), <https://pittsburghpa.gov/files/police/orders/ch6/65-01-Media-Policy.pdf>.

the interview (which would set up a facial *NTEU* challenge). For these reasons, progress is unlikely unless policymakers codify First Amendment principles both in law and in police culture.

Police officers have a right to speak, and to speak out, but the public also has a right to hear. One of the foundational principles of the American police system is that police power comes from the public's consent and approval.²⁴³ Much of the day-to-day business of policing remains largely out of the public eye, and oversight, even within departments, is limited because of the independent nature of the job.²⁴⁴ Supervising officers and the public alike are not able to oversee every officer all of the time, especially when they are out on patrol. Though recent inventions, such as the use of body cameras, allow supervisors and the public to monitor officers who are out on patrol, oversight remains limited.²⁴⁵ Any argument that police should have diminished free speech rights because of the sensitive nature of their jobs ignores the countervailing concern that the public's First Amendment right to receive information is at its highest when life-and-death decisions are at issue.²⁴⁶

²⁴³ Debo P. Adegbile, *Policing Through an American Prism*, 126 YALE L. REV. 2222, 2228 (2017). See also Vincent Nguyen, *Watching Big Brother: A Citizen's Right to Record Police*, 28 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 637, 669 (2018) ("The impact of distrust between police officers and society is significant, resulting in decreased compliance with and trust of law enforcement. It is possible to build trust through transparent information sharing. Transparency not only minimizes distrust of law enforcement but also allows for increased cooperation in civil society.").

²⁴⁴ See Andrew E. Taslitz, *Racial Auditors and the Fourth Amendment: Data With the Power to Inspire Political Action*, 66 LAW & CONTEMP. PROBS. 221, 238 (2003) (observing that transparency of information about law enforcement "is critical to deterrence precisely because the police so often operate under a code of silence. They often work alone or in small teams, exercising wide discretion in the use of force or its threat to ferret out crime.").

²⁴⁵ See Jake Bleiberg, *Value of police body cameras limited by lack of transparency*, ASSOCIATED PRESS (Jun. 16, 2020), <https://apnews.com/article/99a772c44f58cde36dc33c91c4ee72de> (quoting civil rights technologist's opinion that "[c]ameras have largely failed to deliver swift accountability because the release of video is frequently long delayed or denied entirely").

²⁴⁶ See David L. Hudson, Jr., *First Amendment Right to Receive Information and Ideas Justifies Citizens' Videotaping of the Police*, 10 U. ST. THOMAS J. L. & PUB. POL'Y 89, 93 (2016) (arguing that First Amendment right to receive information should be understood to include a right to videotape police officers conducting official business: "The public has a right to know how its police perform."). See also Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1120 (2000) ("[A] step in the right direction, toward a more democratic conception of discretion and a level of trust in government, requires systematic visibility of policing decisions and concomitant justifications. In other words, official intentions and actions should be transparent to the public: The electorate should be able to observe and scrutinize the substantive and procedural policy choices of criminal law enforcement.").

Placing overbroad and preemptive limits on officer speech harms both police officers and the public. Law enforcement officers have information that the public would benefit from hearing, whether that is information external to the department (such as details about crimes affecting public safety) or internal to the department (such as concerns about agency policies, practices or working conditions). The courts have overwhelmingly sent the message that broad prior restraints on public employee speech are unconstitutional, even if those who run law enforcement agencies are operating in apparent denial that this body of precedent exists. Police will not magically become transparent merely because the rulebook is rewritten to acknowledge the constitutionally protected right to speak publicly. But without that acknowledgment, the urgent work of remaking the culture of policing will remain unfinished.