July 19, 2022

Minnesota Board of Peace Officer Standards and Training (POST)
1600 University Ave. Suite 200
St. Paul, MN 55104-3825

Re: POST Board's Revisions to the Rules Relating to Education and Licensing of Peace Officers

Sent Via Email: POSTrules.POST@state.mn.us

Dear POST Board Members,

True North Legal (TNL), the National Legal Foundation, Pacific Justice Institute (PJI), and North Star Law and Policy Center (NSLPC) are non-for-profit organizations engaged in both national and state law and policy, all of which are vitally interested in proper policing within the confines of the United States and Minnesota constitutions.[1] If passed in its current draft form, the POST Board's new revisions to the Rules Relating to Education and Licensing of Peace Officers will create serious legal and policy implications impacting numerous peace officers across the state, as further discussed and referenced in our analysis.

Minnesota is facing an unprecedented crime wave at the same time as a record number of peace officers have retired or taken medical leave. Minneapolis in particular is facing a shortage of more than three hundred peace officers and is struggling to recruit new ones.[2] In this context, we would expect the POST Board to promulgate rules that will increase the likelihood that new peace officers will join the force or be retained. As a public entity, we would also expect that the POST Board would carefully balance public and private interests in a manner that guarantees compliance with the United States and Minnesota constitutions. Unfortunately, revisions proposed by the POST Board fail constitutional muster in several respects and will undermine public safety by discouraging new officers to join the force and inevitably lead to the expulsion of others.

We start with the shared understanding that no one, including peace officers, should engage in unlawful discrimination. Minnesota and Federal law already provide significant protections against such discrimination by peace officers. Alongside this important principle, however, the United States Supreme Court has on many occasions emphasized that government employees do not forfeit their constitutional rights by taking a government job. Just last month, the Court in *Kennedy v. Bremerton School District*[3] reinforced that a government employee, in that case a

[1] The Minnesota constitution's protection of speech and due process has been interpreted in harmony with the protections provided by the United States Constitution. *State v. Wicklund*, 589 N.W.2d 793, 801 (Minn. 1999); *State v. Davidson*, 481 N.W.2d 51, 56 (1992). Freedom of religion can be interpreted more broadly in Minnesota than under the First Amendment (*see, e.g. State v. Hershberger*, 462 N.W.2d 393 (1990), but the differences are not material in this context. Thus, these comments will focus on federal precedents.

[2] https://www.startribune.com/were-in-dire-trouble-after-mass-shooting-july-4th-minneapolis-braces-for-summer-of-gun-violence/600188971/ (accessed on July 19, 2022).

[3] 597 U.S. ---, No. 21-418, 2022 WL 2295034 (June 27, 2022).

public high school football coach, retains significant private rights of speech and religion, even when "on the clock" of government employment. The government employer may not punish or refuse to employ the individual for exercising those rights appropriately. The proposed POST Board revisions to the rules stretch farther than the situation condemned by the Supreme Court in *Kennedy*, as they seek to regulate conduct taking place off-duty, punish pre-employment conduct *and* beliefs, are viewpoint discriminatory, and are in several respects vague and ambiguous.

The proposed standards of conduct in many respects track the attempt of the American Bar Association to do the same with respect to the legal profession. The ABA, about five years ago, proposed that states adopt a new Rule 8.4(g) to prohibit attorneys from discriminating on many of the same categories identified in the POST rule revisions. Most states, including Minnesota, have appropriately rejected these rules as vague, unfair, and unconstitutional. Moreover, all state attorneys general who have rendered opinions on proposed Rule 8.4(g) have found it to violate both First Amendment and Due Process protections. Unsurprisingly, a federal court in Pennsylvania recently found Rule 8.4(g) to be unconstitutional on free speech and due process grounds.[4] The proposed POST Board revisions suffer from the same infirmities as further outlined below.

I. The Proposed Revisions of Concern

There are several provisions in the proposed revisions which are troubling. They include the following.

1. Overbroad and Ambiguous Definition of "Discriminatory Conduct." In Section 6700.0100, subp. 26, the definition of "discriminatory conduct" includes a "pattern of conduct or a single egregious act that evidences knowing and intentional discrimination" regarding certain categories, provided it "would lead an objectively reasonable person to conclude that the individual may not perform the duties of a peace officer in a fair and impartial manner." There are three concerns with this definition. First, it covers acts that have occurred (or will occur) in an officer's personal life no matter how long ago such an act occurred. The revisions make clear that an officer must disclose and "facilitate a review" of his or her private social media accounts. Second, it is ambiguous as to what constitutes an "egregious" act. Third, it covers conduct broadly without any requirement or limitation that the action be illegal.

2. Mere "Indications" of Discriminatory Conduct Can Lead to Sanctions. Section 6700.0700, Subp. 1.G. requires that peace officers be "free of any indication" of discriminatory conduct. Would an inappropriate smile, nod, frown or slight head shake constitute an "indication" of discriminatory intent? Note that there is no requirement that the applicant intend the discriminatory conduct or acted on it. This provision is particularly troubling when combined with subp. 2K. which requires that the applicant must "have passed a

[4] *See Greenberg v. Goodrich*, No. CV 20-03822, --- F. Supp.3d ----, 2022 WL 874953 at *37 (E.D. Pa. Mar. 24 2022) ("In conclusion the Court finds that 8.4(g) is an unconstitutional infringement of free speech according to the protections provided by the First Amendment. The Court also finds that Rule 8.4(g) unconstitutionally vague under the Fourteenth Amendment."); *Greenberg v. Haggerty*, 491 F. Supp. 3d 12, 32-22, *appeal dismissed*, No. 20-3602, 2021 WL 2577514 (3d Cir. Mar. 17 2021) (similar).

psychological screening." Per Sec. 6700.0675. A(3), this screening "must include" a psychologist's "evaluation of a predisposition on the part of an applicant to engage in discriminatory conduct." Thus, not only is an overt act not required, even a desire is not essential—a mere tendency or potential likelihood to act in a certain way is sufficient.

3. Off Duty Behavior is Equally Scrutinized. Section 6700.1600, supb. G requires discipline of an officer for discriminatory conduct "on duty or off duty." The review of off duty behavior includes in Section 6700.0670, subp.1.B. "a review of social media accounts." Thus, an officer can be disciplined or discharged for any violative behavior (including a Facebook or Twitter post) even if not on the job. As noted below, this is a blatant attempt to chill free speech and deny peace officers the ability to interact in the public square like other citizens.

4. Overbroad and Ambiguous Definitions of Disfavored Groups. In several instances, the proposed revisions deal with "extremist," "hate," or "white supremacist" groups. The Minimum Selections Standards in 6700.0700, subp.1.H. require that an officer "have no record or *indication* of participation or support of an extremist or hate group." There is no definition of what constitutes an extremist or hate group. Further, the "Violation of Standards of Conduct" section in 6700.1600, subp. 1, elaborates and requires discipline up to dismissal if peace officers "disrupt the cohesive operation of law enforcement by supporting, advocating, or participating in any form" with a hate, extremist or white supremacist group that promotes *derogatory or harmful actions"* against the discrimination categories earlier listed (emphasis added). Subp. 1.H. provides that such can be demonstrated by any method, including dissemination of the printed word by hand or electronically, engagement in social media, display of symbolism on one's body or otherwise, financial or other contributions, and any "other conduct that could reasonably be considered support, advocacy, or participation."

II. Overview of Constitutional Defects

1. Freedom of Speech

Peace officers, in most circumstances, have the same First Amendment rights as any other citizen.[5] It is clear, for example, that when the officer is speaking as a private citizen, the officer's speech is protected.[6] Even speech made by an officer at work can receive free speech protection.[7] The proposed rule, as summarized above, covers all sorts of constitutionally protected speech. The rule clearly reaches peace officer speech not connected to their police work, and there is no question that peace officer speech outside their scope of employment enjoys full constitutional protection. While peace officer speech is subject to lesser constitutional protection when they are performing their job duties, the proposed rule reaches far beyond these limited contexts and so infringes on a substantial amount of constitutionally protected speech.

[5] *Garcetti v. Cebellos*, 547 U.S. 410 (2006).
[6] *Id.* at 419.
[7] *Id.*

That the proposed revisions would target speech considered harassing or offensive to some people does not reduce—let alone eliminate—the constitutional protection. "When laws against harassment attempt to regulate oral or written expression. . . however detestable the views expressed may be, we cannot turn a blind eye to the First Amendment implications."[8] "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[9] There is, for example, "no categorical 'harassment exception' to the First Amendment's speech clause."[10] As the Supreme Court explained in *Matal v. Tam,* "the Government has an interest in preventing speech expressing ideas that offend . . . Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'"[11]

The most demanding form of constitutional review—strict scrutiny—applies whenever the government punishes speech based on its content or viewpoint. "Government regulation of speech is content based if a law applies to a particular speech because of the topic discussed or the idea or message expressed." That is precisely what the proposed rule does. Peace officers who make a statement in their private capacity, at any age and at any point in their lives, that a government official believes "indicates" hate, or a government-paid psychologist categorizes as a "disposition" towards discrimination, could be denied employment or terminated. Or, if a reviewer sees a social media post as "derogatory," the officer (or potential officer) could be sanctioned. A peace officer might run afoul of these provisions by, for example, criticizing some aspects of immigration law, making a contribution to a religious freedom group that advocates for traditional marriage, or opining that certain gender-transition efforts for minors are harmful. But, a peace officer who speaks in favor of these issues or groups is safe from sanctions. This constitutes a preference for one set of perspectives over others. Such "a law disfavoring 'ideas that offend' discriminates based on viewpoint, in violation of the First Amendment."[12]

The POST Board cannot show that this kind of viewpoint discrimination satisfies strict scrutiny, which requires a showing that the law "(1) furthers a compelling interest and (2) is narrowly tailored to achieve that interest."[13] Assuming the State has a compelling interest in preventing discrimination in supervising peace officers, the proposed rule is not narrowly tailored for several reasons. It 1) extends far beyond a peace officers' job duties; 2) extends back in time in an unlimited fashion; and 3) does not limit itself to matters that relate in any way to police work. This includes peace officers' (and potential officers') statements to family members and at social gatherings, alleged predispositions, contributions to political and advocacy groups, personal social media posts, and statements and testimony on issues (whenever given and in any capacity). Punishing such a vast array of speech is not remotely, let alone carefully, tailored to ensuring an effective police force.

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[8] *Nat'l Inst. Of Fam. & Life Advocs. v. Becerra,* 138 S.Ct. 2361, 2371-72 (2018).
[9] *Texas v. Johnson*, 491 U.S. 397, 414 (1989).
[10] *Saxe v. State. Coll. Area Sch. Dist.*, 240 F.3d 200, 204 (3d. Cir. 2001) (Alito, J.)
[11] 137 S. Ct. 1744, 1764 (2017) (plurality).
[12] *Iancu v. Brunetti*, 139 S. Ct. 2294, 2301 (2019)
[13] *Reed v. Town of Gilbert, Ariz.,* 576 U.S. 155, 171 (2015).

The proposed revisions' threats to free speech are not isolated or minimal, but are far-reaching and systemic. The proposal is unconstitutionally overbroad and invalid on its face. Additionally, because of its overbreadth, the rule would effectively operate as an unconstitutional prior restraint on speech – silencing people with the threat of punishment before they utter a word.

The proposed revisions clearly violate the First Amendments Free Speech clause and should be significantly amended or shelved.

2. Freedom of Religion

The U.S. Supreme Court has recently reiterated that freedom of religion and free speech often go hand in hand, with a violation of one being a violation of the other when the speaker or actor has religious motivations.[14] Often, freedom of assembly and association are implicated as well when the speaker or actor is doing so in a group setting.[15] This has often come to the fore as sexual orientation and gender identity anti-discrimination provisions such as those found in the revised regulations are asserted against Christians, the dominant religious group in this country, who believe in traditional, Bible-based sexual ethics, as was seen most prominently in *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*.[16] In that decision, the Supreme Court struck down a decision of the commission that was tainted with bias against traditional Christian beliefs.[17] And the constitutionality of applying the discrimination laws to a web-site designer who refuses to service same-sex marriages for religious reasons is to be argued this next term at the U.S. Supreme Court.[18]

These cases that have reached the Supreme Court (and many others) have demonstrated that, simply by politely expressing disagreement with a homosexual or transgender lifestyle, individuals may be accused of being "discriminatory," "derogatory," or "harmful," terms used in the proposed revisions. This puts many Christians on a potential collision course with the revisions. Is a peace officer or candidate's exercising free exercise and assembly rights by attending a church that preaches Biblical sexual morality a violation of the proposed regulation such that the officer or candidate is disqualified from service? Indeed, the Southern Poverty Law Center has labeled Coral Ridge Presbyterian Church a "hate group" because of its preaching on the subject.[19]

Christians believe that all people are created and loved by God, and they also believe that God has set moral absolutes for behavior. Medical and social science amply support the wisdom of these religious principles. The text of the proposed revisions, however, is susceptible of being used to attack those who sincerely hold and express religiously based opinions critical of prevailing cultural practices as reflected in the revisions. There is an evident desire by some to punish and drum out of the public conversation any who express those religious beliefs. The POST Board

[14] *See Kennedy*, slip op. at 11-32.
[15] *See* Nebraska Attorney General Comments of May 22, 2022, at 12-13.
[16] 138 S. Ct. 1719 (2018).
[17] *Id.* at 1728-32.
[18] *303 Creative LLC v. Elenis*, No. 21-476 (U.S. Sup. Ct.) (limiting issue to Free Speech Clause).
[19] *See Coral Ridge Ministries Media v. So. Poverty Law Ctr.*, No. 21-802 (June 27, 2022) (Thomas, J., dissenting from denial of pet. for cert.).

should not contribute to providing a platform for such unconstitutional behavior by adopting the proposed revisions.

3. Due Process Vagueness

The proposed rule also violates due process. A fundamental principle of the Fourteenth Amendment's Due Process Clause "is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."[20] A law that "forbids . . . the doing of an act in terms so vague that [people] of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."[21] When a law "interferes with the right of free speech or of association, a more stringent vagueness test should apply."[22] The purpose of the vagueness doctrine is twofold: first, vague laws fail to provide "fair warning" of what speech and conduct is prohibited; second, vague laws permit "arbitrary and discriminatory enforcement" by the government.

The proposed revisions are filled with vague language. In Subp. 6700.0675, an applicant must submit to a pre-employment screening. An applicant may be denied employment based upon an alleged "predisposition . . . to engage in discriminatory conduct." There is no description of what such a predisposition entails—is a desire to commit an act necessary? Would an implicit bias be sufficient? A tendency to be sympathetic to those who hold disfavored views? A propensity to gather with those who commit acts of bias? Some combination of all those factors? Similarly, an applicant must, as part of the Minimum Selection Criteria in 6700.0700 Subp.1.G. "be free of any *indication* of discriminatory conduct" and in Subp. 1.H. "have no record or *indication* of participation or *support* of an *extremist* or *hate* group." The terms "indication" and "support" are utterly undefined, and could be a mental thought, being part of a group, reading a certain book, supporting a political candidate, expressing an opinion, or stating a wish for a policy outcome. Is reading a best-seller propounding critical race theory acceptable but reading a critique of CRT verboten?

Additionally, there is no description of what constitutes a "hate" or "extremist" group. Almost any conceivable group is termed by somebody as a hate group. By way of example, the Alliance Defending Freedom, a religious freedom advocacy group that has won 14 cases at the Supreme Court since 2011[23] has been listed as a "hate" group by the Southern Policy Law Center,[24] Equity Forward,[25] and the American Independent.[26] At the same time, ADF has won numerous awards, such as the Defender of Religious Freedom award from the Religious Freedom Institute,[27] and

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[20] *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).
[21] *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926).
[22] *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 499 (1982).
[23] https://adflegal.org/about-us (accessed July 14, 2022).
[24] https://www.splcenter.org/news/2020/04/10/why-alliance-defending-freedom-hate-group (accessed July 19, 2022).
[25] https://pro-lies.org/alliance-defending-freedom/ (accessed July 19, 2022).
[26] https://americanindependent.com/alliance-defending-freedom-international-poland-hungary-lgbtq-abortion-rights/ (accessed July 19, 2022).
[27] https://religiousfreedominstitute.org/dinner-2022-registration/(accessed July 19, 2022).

Pope Francis awarded two of its leaders with the highest award a layperson can receive.[28] How is a peace officer to know whether past or future financial support to ADF will lead to sanctions? How about telling a friend a positive story about the ADF? Would that lead to sanctions? Who defines what a "hate" or "extremist" group is?

The Catholic Church, the largest Christian church in the world with over 1.3 billion adherents, has also been tagged by many with the "hate" or "extremist" label.[29] Does a peace officer have to leave the Catholic Church? Avoid what some call the "ultra-orthodox Catholics?"[30] Not wish her Catholic mother Happy Easter? Where is the line, and how will a peace officer know? A final example should close the point. The New York Times has published articles calling the Republican Party a hate group[31] as has salon.com,[32] medium.com[33] and many others. Does supporting, giving money to, sending out a tweet or just voting for a Republican open a peace officer to sanctions? If not, how does the officer know that? The questions and uncertainties abound.

When peace officers are left to guess about these matters—with their careers and livelihoods hanging in the balance—the practical effect is undeniable: they will censor themselves. As the Supreme Court has observed, when a vague law "abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked."[34] Preventing this chilling of constitutionally protected activity is precisely why the vagueness doctrine exists. It stands in firm opposition to the proposed revisions.

III. Conclusion

Minnesota currently faces the interrelated crises of high crime and an exodus of peace officers, especially in its largest cities. Minneapolis faces a "wave of gun violence" where "hours of chaos" reign on city streets.[35] At the same time, the police force has dropped by more than 300, and now stands at just over 600 officers. Recruitment efforts have stalled – the most recent class of

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[28] https://caucus99percent.com/content/pope-awards-%E2%80%9Chighest-honor%E2%80%9D-head-anti-lgbtq-hate-group (accessed July 19, 2022).

[29] https://sojo.net/magazine/august-2020/catholic-church-has-visible-white-power-faction ("some Catholics now embrace the most extreme forms of racial hatred"); https://www.splcenter.org/hatewatch/2017/12/15/minnesota-catholic-conference-hosted-discredited-speakers-and-anti-lgbt-hate-groups (accusing the Minnesota Catholic Conference of hosting "hate groups" at a 2017 symposium) (accessed July 19, 2022).

[30] https://www.splcenter.org/hatewatch/2018/08/17/ultra-orthodox-catholic-propaganda-outlet-pushes-anti-lgbt-agenda (accessed July 19, 2022).

[31] https://www.nytimes.com/roomfordebate/2016/07/21/what-is-the-republican-party/the-republican-party-has-become-the-party-of-hate (accessed July 19, 2022).

[32] https://www.salon.com/2015/11/27/the_republican_party_is_now_americas_largest_hate_group/(accessed July 19, 2022).

[33] https://medium.com/flux-magazine/the-republican-party-is-officially-a-party-of-hate-and-nothing-more-eb8435127925 (accessed July 19, 2022).

[34] *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).

[35] https://www.startribune.com/were-in-dire-trouble-after-mass-shooting-july-4th-minneapolis-braces-for-summer-of-gun-violence/600188971/ (accessed July 19, 2022).

Minneapolis police academy graduates was 70% below the city's need.[36] The crisis has gotten so severe that the Minnesota Supreme Court has ordered the City to hire more than 100 officers.[37] A current city councilor says that this is the result of the many who have "demonized" the police force, which has led to the reality that "young people no longer want to be police officers." [38]."

In this climate of high crime and peace officer shortage, the POST Board should be focused on finding ways to attract and retain officers. Instead, the proposed revisions to the Rules Relating to Education and Licensing of Peace Officers will have the opposite effect. The proposed revisions use of vague, overbroad, and discriminatory language will leave officers fearful and confused, and inevitably reduce those interested in joining the force, or willing to stay on. While it is clear that peace officers should not commit unlawful discrimination, the proposed revisions go far beyond this common-sense idea, and sets forth an Orwellian regime of thought crimes and vague standards. Anyone who does not subscribe to the prevailing (yet unknowable) orthodoxy of decision-makers will be sanctioned. The proposed revisions are also clearly unconstitutional, violating the Free Speech, Freedom of Religion, Freedom of Assembly and Due Process Clauses of the Minnesota and United States Constitutions. The POST Board should scrap their proposed unconstitutional revisions and look instead for ways to promote public safety by hiring and retaining peace officers.

Respectfully Submitted,

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[36] https://www.startribune.com/were-in-dire-trouble-after-mass-shooting-july-4th-minneapolis-braces-for-summer-of-gun-violence/600188971/ (accessed July 19, 2022).
[37] https://www.startribune.com/minnesota-supreme-court-says-minneapolis-falls-short-on-police-staffing-requirements/600183752/ (accessed July 19, 2022).