

## Defunding C.O.P.S.: Conditioning Federal Funding to State and Local Law Enforcement Agencies Upon the Implementation of a Program that Screens its Current and Future Officers for White Supremacist Affiliations

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**DEFUNDING C.O.P.S.: CONDITIONING FEDERAL FUNDING  
TO STATE AND LOCAL LAW ENFORCEMENT AGENCIES  
UPON THE IMPLEMENTATION OF A PROGRAM THAT  
SCREENS ITS CURRENT AND FUTURE OFFICERS FOR  
WHITE SUPREMACIST AFFILIATIONS**

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I. INTRODUCTION

For eight minutes and forty-six seconds, Minnesota police officer Derek Chauvin, knelt on the neck of George Floyd.<sup>1</sup> This sight set in motion the largest protest in the history of the United States.<sup>2</sup> Amidst

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<sup>1</sup> Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES, <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> (Jan. 24, 2022) (“On June 18, the Hennepin County attorney’s office said that its criminal complaint misstated the amount of time Mr. Chauvin kept his knee on Mr. Floyd’s neck. The complaint originally said that Mr. Chauvin had done so for eight minutes and 46 seconds, a length of time that became a symbol and rallying cry for protesters. Responding to inquiries from journalists who noted a discrepancy with the durations listed in the complaint, the office said the actual time was seven minutes and 46 seconds. But The Times’s own analysis of the video shows that this revised time is also incorrect. ‘It makes no difference,’ said Jamar Nelson, who works with the families of crime victims in Minneapolis. ‘The bottom line is, it was long enough to kill him, long enough to execute him.’”).

<sup>2</sup> See Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>.

civil unrest and a deadly health crisis,<sup>3</sup> something else emerged—widespread solidarity among law enforcement officers and white supremacist organizations. Not to mention the four previous years of President Trump promoting political violence across the country.<sup>4</sup> One might call the invasion of the United States Capitol the culmination of all of these things.

To some, the January 6, 2021, Capitol invasion is one of the most infamous examples of white supremacy in law enforcement to date.<sup>5</sup> This may come as a surprise to some, but present at the Capitol invasion were many men and women with law enforcement and military ties.<sup>6</sup> Also present were a hangman’s noose and an Auschwitz Concentration Camp t-shirt, both of which are symbols commonly associated with white supremacy.<sup>7</sup> Unsurprisingly, far-right militant groups like the Oath Keepers and Proud Boys were closely linked to the invasion.<sup>8</sup> President Biden has even stated that the Capitol invasion “was about white supremacy[.]”<sup>9</sup> Even more troubling, a former reporter said, for far-right

<sup>3</sup> See Jordan Allen et al., *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES, <https://www.nytimes.com/interactive/2021/us/covid-cases.html> (last updated Jan. 9, 2023).

<sup>4</sup> See Fabiola Cineas, *Donald Trump is the accelerant*, VOX (Jan. 9, 2021, 11:04 AM), <https://www.vox.com/21506029/trump-violence-tweets-racist-hate-speech>.

<sup>5</sup> See Christine Fernando & Noreen Nasir, *Years of White Supremacy Threats Culminated in Capital Riots*, A.P. NEWS (Jan. 14, 2021), <https://apnews.com/article/white-supremacy-threats-capitol-riots-2d4ba4d1a3d55197489d773b3e0b0f32>. The author also refers to the “January 6th Capital invasion” as “invasion” and “attack.”

<sup>6</sup> See Tom Dreisbach, *A Capitol Police Officer is Accused of Telling a Jan. 6 Suspect to Hide Evidence*, NPR (Oct. 15, 2021, 5:20 PM), <https://www.npr.org/2021/10/15/1046445304/a-capitol-police-officer-is-accused-of-telling-a-jan-6-suspect-to-hide-evidence>.

<sup>7</sup> See Scott MacFarlane, *Noose Displayed at Capital Insurrection in FBI’s Custody*, NBC WASH., <https://www.nbcwanbcwashi.com/news/local/noose-displayed-at-capitol-insurrection-in-fbis-custody/2863204/> (Nov. 1, 2021, 7:50 PM); David K. Li & Shamar Walters, *Man in ‘Camp Auschwitz’ Shirt, Photographed at U.S. Capitol Riot, Arrested in Virginia*, NBC, <https://www.nbcnews.com/news/us-news/man-camp-auschwitz-shirt-photographed-u-s-capitol-riot-arrested-n1254070> (Jan. 13, 2021, 5:14 PM).

<sup>8</sup> See Betsy Woodruff Swan et al., *Jan. 6 Investigators Subpoena Proud Boys, Oath Keepers as Probe Turns to Domestic Extremism*, POLITICO, <https://www.politico.com/news/2021/11/23/january-6-subpoena-proud-boys-oath-keepers-523255> (Nov. 23, 2021, 4:23 PM).

<sup>9</sup> See Erin Doherty, *Biden: Jan. 6 Capitol Riot “Was About White Supremacy”*, AXIOS (Oct. 21, 2021), <https://www.axios.com/biden-jan-6-capitol-riot-white-supremacy-36c90e43-071a-4751-ac5c-0c792295f503.html>.

extremists, the Capitol invasion marks not the failure of an insurrection attempt, but rather, the “first shot” in a broader war.<sup>10</sup>

But the attack on the Capitol should come as no surprise considering the well-documented history of white supremacy in law enforcement. The earliest examples of white supremacy in policing can be traced as far back as the slave patrols of the early 1700s.<sup>11</sup> The Capitol riot is not an aberration. Instead, it is a microcosm of a much larger issue—domestic terrorism.<sup>12</sup>

This Article calls upon Congress to protect its citizens where state and local legislators will not. Although Congress is limited in its ability to regulate local policing,<sup>13</sup> the United States Constitution does provide authority for some congressional reform and oversight into matters of state and local law enforcement through Article 1, Section 8.<sup>14</sup> Congress can (and has before) conditioned the receipt of federal funds over states’ conformity to federal standards or programs.<sup>15</sup> This Article proposes that the millions of dollars in federal grants sent to state and local police organizations be conditioned upon each organization’s compliance with a program designed to screen current and law enforcement officials for active affiliations with white supremacist or far-right militant organizations. Such a proposal would allow for a level of specificity missing from many other “defund the police” suggestions.

Although members of Congress have already expressed interest in proposing legislation to address police reforms in response to George

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<sup>10</sup> See William M. Arkin, *Exclusive: How Officials’ Fear of Donald Trump Paralyzed Intelligence Agencies, Led to Capital Riot*, NEWSWEEK (Jan. 21, 2021, 7:00 AM) <https://www.newsweek.com/2021/01/08/exclusive-how-officials-fear-donald-trump-paralyzed-intelligence-agencies-led-capitol-riot-1563221.html>; Richard Hall, *Surrounded by Men Dressed for War, I Saw Trump’s Fascism at the Heart of American Democracy*, INDEPENDENT UK (Jan. 7, 2021, 1:56 PM), <https://www.independent.co.uk/news/world/americas/us-election-2020/capitol-riot-donald-trump-congress-election-b1783609.html>.

<sup>11</sup> See Chelsea Hansen, *Slave Patrols: An Early Form of American Policing*, NAT’L L. ENF’T OFFS. MEM’L FUND (July 10, 2019), <https://nleomf.org/slave-patrols-an-early-form-of-american-policing/>.

<sup>12</sup> See Ryan Lucas, *FBI Director Defends Agency in Testimony, Calls Jan. 6 Attack ‘Domestic Terrorism’*, NPR: ALL THINGS CONSIDERED (Mar. 2, 2021, 4:07 PM), <https://www.npr.org/2021/03/02/972970812/fbi-director-defends-agency-in-testimony-calls-jan-6-attack-domestic-terrorism>.

<sup>13</sup> See generally JARED P. COLE, CONG. RSCH. SERV., R44104, FEDERAL POWER OVER LOCAL LAW ENFORCEMENT REFORM: LEGAL ISSUES (2016).

<sup>14</sup> U.S. CONST. art. I, § 8.

<sup>15</sup> See generally COLE, *supra* note 13.

Floyd's death,<sup>16</sup> there is currently no national strategy designed to identify law enforcement officials who are actively engaged with groups who promote and defend white supremacy, white nationalism, racial cleansing, etc. Congress has attempted police reform with the George Floyd Justice in Policing Act,<sup>17</sup> but this effort faltered at the Senate steps. The legislation aimed to combat police misconduct, excessive force, and racial bias in policing.<sup>18</sup> Ultimately, the parties could not agree on the fate of qualified immunity for police departments and Republicans were unwilling to agree to a national database to track police misconduct.<sup>19</sup> The conversations have been quiet ever since.

## II. WHITE SUPREMACY IN POLICING<sup>20</sup>

White supremacy and racism in American law enforcement have a long and ugly history. Policing in the early American South was built on the belief that the white race is inherently superior to other races and white people should have control over people of color, particularly Black people.<sup>21</sup> Early evidence of this type of control can be seen in

<sup>16</sup> The proposed legislation includes those that utilize Congress's Spending Clause authority to impose new conditions on existing grant programs to states and localities. See Police CAMERA Act of 2019, H.R. 120, 116th Cong. (2019); Police Training and Independent Review Act of 2019, H.R. 125, 116th Cong. (2019); Preventing Tragedies Between Police and Communities Act of 2019, H.R. 2927, 116th Cong. (2019); Police Exercising Absolute Care With Everyone Act of 2019, H.R. 4359, 116th Cong. (2019); Police Accountability Act of 2020, H.R. 5777, 116th Cong. (2020).

<sup>17</sup> *Civil Rights Leaders Call on Congress to Pass George Floyd Justice in Policing Act*, NAT'L URBAN LEAGUE (Jan. 11, 2023), <https://nul.org/news/civil-rights-leaders-call-congress-pass-george-floyd-justice-policing-act>.

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

<sup>19</sup> Times Editorial Board, *Editorial: Congress Failed with the George Floyd Act, but There's Still Hope*, L.A. TIMES (Sept. 27, 2021, 3:00 AM), <https://www.latimes.com/opinion/story/2021-09-27/police-reform-failure-congress>; see Catie Edmondson, *Bipartisan Police Overhaul Talks Are Official Dead on Capitol Hill*, N.Y. TIMES (Sept. 22, 2021), <https://www.nytimes.com/2021/09/22/us/politics/police-reform-booker-scott.html?searchResultPosition=54>; Felicia Sonmez & Mike DeBonis, *No Deal on Bill to Overhaul Policing in Aftermath of Protests Over Killing of Black Americans*, WASH. POST (Sept. 22, 2021, 7:35 PM), <https://www.washingtonpost.com/powerpost/policing-george-floyd-congress-legislation/2021/09/22/36324a34-1bc9-11ec-a99a-5fea2b2da34bstory.html>.

<sup>20</sup> This section does not provide a complete survey of the history of policing, instead, it highlights some of the most extremely violent examples of white supremacy in policing from the early 1700s until now.

<sup>21</sup> See generally Vann R. Newkirk II, *The Language of White Supremacy*, THE ATLANTIC (Oct. 6, 2017), <https://www.theatlantic.com/politics/archive/2017/10/the-language-of-white-supremacy/542148/>; Victor E. Kappeler, *A Brief History of Slavery and the Origins of American Policing*, E. KY UNIV. (Jan. 7, 2014),

1704 when the Colony of Carolina created the first public police organization known as the slave patrols.<sup>22</sup> The slave patrols were comprised of white men hired by wealthy, white landowners to prevent Black slaves from rebelling or running away.<sup>23</sup> This practice was eventually backed by Congress's passing of the Fugitive Slave Act in 1850,<sup>24</sup> which required law enforcement officials in "free" states to return escaped slaves to their enslavers in the South.<sup>25</sup> Slave patrols lasted over 150 years, ending with the abolition of slavery following the Civil War.<sup>26</sup>

In the post-Civil War era, vigilante groups like the Ku Klux Klan (KKK) and the Knights of the White Camellia replaced the former slave patrols in maintaining a racial hierarchy.<sup>27</sup> Enraged with the South's defeat in the Civil War, their purpose was to terrorize the Black community through violence in the form of thousands of beatings, lynchings, and incidents of torture and mutilation.<sup>28</sup> These atrocities were inflicted with impunity because many law enforcement officers were either fellow Klansmen, loyal sympathizers, or at the very least, complicit via inaction.<sup>29</sup> Arthur Raper, an American sociologist, estimated from his

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<https://ekuonline.eku.edu/blog/police-studies/brief-history-slavery-and-origins-american-policing/>.

<sup>22</sup> See Otis S. Johnson, *Two Worlds: A Historical Perspective of the Dichotomous Relations Between Police and Black and White Communities*, 42 HUM. RTS. 6, 7 (2016); Gary Potter, *The History of Policing in the United States, Part 1*, E. KY UNIV. (June 25, 2013), <https://plsonline.eku.edu/insideloook/history-policing-united-states-part-1>.

<sup>23</sup> See Kappeler, *supra* note 21; Hansen, *supra* note 11. The Slave Patroller's Oath from North Carolina states, "I [patroller's name], do swear, that I will as searcher for guns, swords, and other weapons among the slaves in my district, faithfully, and as privately as I can, discharge the trust reposed in me as the law directs, to the best of my power. So help me, God." *Id.*

<sup>24</sup> See Catherine A. Paul, *Fugitive Slave Act of 1850*, VA. COMMONWEALTH UNIV.: SOC. WELFARE HIST. PROJECT (2016), <https://socialwelfare.library.vcu.edu/federal/fugitive-slave-act-of-1850/>; see generally C.W.A. David, *The Fugitive Slave Law of 1793 and Its Antecedents*, 9 J. NEGRO HIST. 18, 23 (1924).

<sup>25</sup> David, *supra* note 24; Michael German, *Hidden in Plain Sight: Racism, White Supremacy, and Far-Right Militancy in Law Enforcement*, BRENNAN CTR. FOR JUST. (Aug. 27, 2020), <https://www.brennancenter.org/our-work/research-reports/hidden-plain-sight-racism-white-supremacy-and-far-right-militancy-law> [hereinafter German I].

<sup>26</sup> Hansen, *supra* note 11.

<sup>27</sup> See *White Supremacy & Terrorism*, PBS: SLAVERY BY ANOTHER NAME, <https://www.pbs.org/tpt/slavery-by-another-name/themes/white-supremacy/> (last visited Jan. 14, 2023); Hansen, *supra* note 11.

<sup>28</sup> MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 38 (2d ed. 2020)

<sup>29</sup> See S. POVERTY L. CTR., *KU KLUX KLAN: A HISTORY OF RACISM AND VIOLENCE*, S. POVERTY (6th ed. 2011), <https://www.splcenter.org/sites/default/files/Ku-Klux-Klan-A-History-of-Racism.pdf>; German I, *supra* note 25 ("Explicit racism in law

study of one hundred lynchings, that “at least one-half of the lynchings are carried out with police officers participating, and that in nine tenths of the others the officers either condone or wink at the mob action.”<sup>30</sup>

During the era of “Jim Crow,”<sup>31</sup> police enforced segregation and participated in extrajudicial violence.<sup>32</sup> In the infamous “Mississippi Burning” case of 1964, three civil rights workers, James Chaney, Andrew Goodman, and Michael Schwerner, went missing after being jailed for a speeding fine.<sup>33</sup> While searching for the three men, FBI agents found the remains of eight Black men.<sup>34</sup> Six weeks later, investigators found the three civil rights workers’ remains in a dam.<sup>35</sup> Local law enforcement refused to investigate.<sup>36</sup> Eventually, the Justice Department took over and a federal grand jury indicted eighteen members of the KKK with conspiracy with the objective “to injure, oppress, threaten, or intimidate[.]”<sup>37</sup> Unsurprisingly, among those charged, were three law enforcement officials.<sup>38</sup> Seven of the Klansmen were convicted, including one of the officers.<sup>39</sup>

In 1985, the Ku Klux Klan firebombed a Black family’s home in Kentucky.<sup>40</sup> The following investigation exposed a Jefferson County police officer as the Klan member responsible for the firebomb attack.<sup>41</sup> The officer admitted that he possessed a forty-member list of the Klan subgroup called the Confederate Officers Patriot Squad, half of whom

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enforcement takes many forms, from membership or affiliation with violent white supremacist or far-right militant groups, to engaging in racially discriminatory behavior toward the public or law enforcement colleagues, to making racist remarks and sharing them on social media.”)

<sup>30</sup> Arthur Raper, *Race and Class Pressures*, 275 (June 1, 1940) (unpublished manuscript) (on file with *An American Dilemma* for the 21st Century digital platform).

<sup>31</sup> *A Brief History of Civil Rights in the United States: Jim Crow Era*, HOW. UNIV. SCH. L.: VERNON E. JORDAN L. LIBR., <https://library.law.howard.edu/civilrightshistory/blackrights/jimcrow> (Jan. 6, 2023, 12:25 PM).

<sup>32</sup> *The Origins of Modern Day Policing*, NAACP, <https://naacp.org/find-resources/history-explained/origins-modern-day-policing> (last visited Jan. 17, 2023).

<sup>33</sup> See *Murder in Mississippi*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/freedomsummer-murder/> (last visited February 3, 2023).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*; 18 U.S.C. § 241.

<sup>38</sup> *Supra* note 32.

<sup>39</sup> U. S. DEP’T OF JUST., U.S. DEPARTMENT OF JUSTICE REPORT TO THE ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI: INVESTIGATION OF THE 1964 MURDERS OF MICHEAL SCHWERNER, JAMES CHANEY, AND ANDREW GOODMAN (2017).

<sup>40</sup> *Marshall v. Bramer*, 828 F.2d 355, 356 (6th Cir. 1987).

<sup>41</sup> *Id.* at 357.

were police officers.<sup>42</sup> The officer asserted that the police department knew of and accepted his affiliation with the Klan.<sup>43</sup>

In recent years, connections between white supremacist groups and police officers have persisted primarily in three ways: (1) officers join and retain active membership of white supremacist or white nationalist organizations; (2) officers engage in overt displays of racism; and (3) officers show deferential treatment toward known white supremacists.<sup>44</sup>

According to a classified FBI Counterterrorism Policy Guide from 2015, the FBI warned that the white supremacist and anti-government militia groups they investigate often have “active links” to law enforcement officials.<sup>45</sup> Police links to militias and white supremacist groups have been uncovered in several states including Alabama, California, Connecticut, Florida, Illinois, Louisiana, Michigan, Nebraska, Oklahoma, Oregon, Texas, Virginia, Washington, and West Virginia.<sup>46</sup> A 2006 FBI memo revealed Neo-Nazi organizations and the Ku Klux Klan have historically engaged in strategic efforts to “infiltrate” and “recruit” from law enforcement communities.<sup>47</sup> The report warned that skinhead groups were actively encouraging their members to become “ghost skins” within law enforcement agencies.<sup>48</sup> Notably, and consistent with the FBI’s reports, more than eighty defendants charged in the Capitol invasion have ties “to law enforcement and the military.”<sup>49</sup>

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> See Sam Levin, *White Supremacists and Militias Have Infiltrated Police Across US, Report Says*, THE GUARDIAN (Aug. 27, 2020, 10:13 AM), <https://www.theguardian.com/us-news/2020/aug/27/white-supremacists-militias-infiltrate-us-police-report>; Janelle Griffith & Matteo Moschella, *NYPD Officer Appears to Make White Power Sign at Protest, Prompting Probe*, NBC NEWS (June 4, 2020, 12:39 PM), <https://www.nbcnews.com/news/us-news/nypd-officer-appears-make-white-power-sign-protest-prompting-probe-n1224141>.

<sup>45</sup> See German I, *supra* note 25 (citing to F.B.I., COUNTERTERRORISM DIV., COUNTERTERRORISM POLICY DIRECTIVE AND POLICY GUIDE, 89 (2015) <https://s3.documentcloud.org/documents/3423189/CT-Excerpt.pdf>); Levin, *supra* note 44.

<sup>46</sup> See Levin, *supra* note 44.

<sup>47</sup> See Alice Speri, *Unredacted FBI Document Sheds New Light on White Supremacist Infiltration of Law Enforcement*, THE INTERCEPT (Sept. 29, 2020, 11:30 AM), <https://theintercept.com/2020/09/29/police-white-supremacist>

<sup>48</sup> See Alice Speri, *The FBI Has Quietly Investigated White Supremacist Infiltration of Law Enforcement*, THE INTERCEPT (Jan. 31, 2017, 7:10 AM), <https://theintercept.com/2017/01/31/the-fbi-has-quietly-investigated-white-supremacist-infiltration-of-law-enforcement/> (“Ghost skins” is a term white supremacists use to describe members “who avoid overt displays of their beliefs to blend into society and covertly advance white supremacist causes.”).

<sup>49</sup> Dreisbach, *supra* note 6.



White supremacist groups are not just morally reprehensible but also very dangerous. In 2017, the FBI identified that white supremacists are the “most lethal domestic terror threat” in the country.<sup>50</sup> These groups include the Oath Keepers and the Proud Boys—the groups being charged for the Capitol attack.<sup>51</sup> Alarming, “white supremacists have committed far more attacks and killed more people in the [United States] over the last 10 years than any foreign terrorist movement.”<sup>52</sup>

While many officers may not be registered members of these organizations, it is not uncommon to see officers who share similar racist ideals. In 2019, Professor Vida B. Johnson, an associate professor at Georgetown Law, noted that more than one hundred police departments in forty-nine states have faced scandals over racist texts, e-mails, or public social-media posts by officers since 2009.<sup>53</sup> Similarly, an investigation published in 2019 by the Center for Investigative Reporting found that hundreds of active-duty and retired law enforcement officers are members of Confederate sympathizing, anti-Islam, or anti-government militia groups on Facebook such as “White Lives Matter”, “Death to Islam Undercover”, “Veterans Against Islamic Filth”, and “Purge Worldwide.”<sup>54</sup>

In recent history, there are several incidents where police officers have been seen sympathizing or fraternizing with known white supremacists. For example, it is well-documented that during the Capitol invasion, police officers were taking selfies, opening up gates, and

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<sup>50</sup> Michael German, *The FBI Warned for Years that Police Are Cozy with the Far Right. Is No One Listening?*, Guardian. (Aug. 28, 2020, 1:47 PM), <https://www.theguardian.com/commentisfree/2020/aug/28/fbi-far-right-white-supremacists-police> [hereinafter German II]; see Sharon Weinberger, WHITE SUPREMACIST EXTREMISM 4 (2017), <https://www.documentcloud.org/documents/3924852-White-Supremacist-Extremism-JIB.html> (last visited Nov 30, 2020).

<sup>51</sup> Teaganne Finn & Daniel Barnes, *Oath Keepers Leader, 10 Others Charged with ‘Seditious Conspiracy’ in Jan. 6 Capitol Attack*, NBC NEWS, <https://www.nbcnews.com/politics/congress/oath-keeper-leader-10-others-charged-seditious-conspiracy-jan-6-n1287434> (Jan. 13, 2022, 5:58 PM); Woodruff Swan et al., *supra* note 8.

<sup>52</sup> German II, *supra* note 50.

<sup>53</sup> Vida B. Johnson, *KKK in the PD: White Supremacist Police and What to Do About It*, 23 LEWIS & CLARK L. REV. 205, 210 (2019).

<sup>54</sup> Will Carless & Michael Corey, *To Protect and Slur: Inside Hate Groups on Facebook, Police Officers Trade Racist Memes, Conspiracy Theories, and Islamophobia*, REVEAL (June 14, 2019), <https://revealnews.org/article/inside-hate-groups-on-facebook-police-officers-trade-racist-memes-conspiracy-theories-and-islamophobia/>; Will Carless & Michael Corey, *American Cops Have Openly Engaged in Islamophobia on Facebook, with No Penalties*, REVEAL (June 27, 2019), <https://revealnews.org/article/american-cops-have-openly-engaged-in-islamophobia-on-facebook-with-no-penalties/>.

offering water to white supremacist invaders.<sup>55</sup> This occurred during and after the mob destroyed House Speaker Nancy Pelosi's office, smeared human feces down a hallway, and most troublingly, after a Capitol officer's life was taken.<sup>56</sup>

Another recent, well-known example of law enforcement fraternizing with white militia occurred during the protests following the police shooting of Jacob Blake in Kenosha, Wisconsin.<sup>57</sup> Law enforcement officers were seen on video handing water bottles to a group of armed civilians shortly before Jacob Blake was killed.<sup>58</sup> The officers then thanked the men for their help and said “[w]e appreciate you guys, we really do.”<sup>59</sup> This encounter was captured fifteen minutes before Rittenhouse killed two unarmed people.<sup>60</sup> Even after the shooting, the police walked right by Rittenhouse, despite bystanders telling the officers that Rittenhouse had just shot two people.<sup>61</sup> The police officers' actions in Kenosha were eerily similar to those of the officers in South Carolina who bought Dylann Roof food from Burger King just after he killed

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<sup>55</sup> Julie Gerstein, *Officers Calmly Posed for Selfies and Appeared to Open Gates for Protesters During the Madness of the Capitol Building Insurrection*, INSIDER (Jan. 7, 2021, 11:34 PM), <https://www.businessinsider.com/capitol-building-officers-posed-for-selfies-helped-protesters-2021-1>; Levin, *supra* note 44.

<sup>56</sup> Chris Cameron, *These Are the People Who Died in Connection With the Capitol Riot*, N.Y. TIMES, <https://www.nytimes.com/2022/01/05/us/politics/jan-6-capitol-deaths.html> (Oct. 13, 2022); Ebony Bowden, *Capitol Protestors Loot, Vandalize Nancy Pelosi's Office*, N.Y. POST, <https://nypost.com/2021/01/06/capitol-protesters-loot-vandalize-nancy-pelosis-office/> (Jan 6, 2021, 5:09 PM); Carl Campanile & Yaron Steinburch, *Rioters Left Feces, Urine in Hallways and Offices During Mobbing of US Capitol*, N.Y. POST, <https://nypost.com/2021/01/08/rioters-left-feces-urine-in-hallways-and-offices-during-mobbing-of-us-capitol/> (Jan. 8, 2021, 12:18 PM).

<sup>57</sup> Christina Morales, *What We Know About the Shooting of Jacob Blake*, N.Y. TIMES (Nov. 16, 2021), <https://www.nytimes.com/article/jacob-blake-shooting-kenosha.html>; Phil Helsel, *Kyle Rittenhouse, Charged with Killing 2 Kenosha Protesters, Extradited to Wisconsin*, NBC NEWS (Oct. 30, 2020, 10:36 PM), <https://www.nbcnews.com/news/us-news/kyle-rittenhouse-charged-killing-2-kenosha-protesters-extradited-wisconsin-n1245579>.

<sup>58</sup> Zack Beauchamp, *Why Police Encouraged a Teenager With a Gun to Patrol Kenosha's Streets*, VOX (Aug. 27, 2020, 4:20 PM), <https://www.vox.com/2020/8/27/21404117/kenosha-kyle-rittenhouse-police-gun-populism>.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

nine Black members of a local church.<sup>62</sup> There are countless other examples.<sup>63</sup>

It is safe to say “[t]he government’s response to known connections of law officers to violent racist and militant groups has been strikingly insufficient.”<sup>64</sup> Few police departments have explicit policies against affiliating with white supremacist organizations. These departments do not often take action until an officer’s affiliations, beliefs, or actions boil over and cause an adverse public reaction.<sup>65</sup> Short of a public crisis, federal, state, and local governments are doing far too little, and in some cases, nothing at all to proactively identify and eliminate racist affiliations among its officers, in light of numerous reports from the FBI highlighting this issue.

### III. CONGRESS’ SPENDING CLAUSE POWER<sup>66</sup>

Article I, Section 8 of the United States Constitution, otherwise known as the Spending Clause, gives Congress the “[p]ower [t]o lay and collect Taxes, Duties, Imposts, and Excises, to pay Debts and provide for the Common Defense and general Welfare of the United States[.]”<sup>67</sup> Congress has frequently used its Spending power to achieve

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<sup>62</sup> *Cops Bought Burger King for Dylann Roof Following His Arrest*, ABC7 (June 23, 2015), <https://abc7.com/dylann-roof-south-carolina-church-shooting-emanuel-african-methodist-episcopal/801013/>.

<sup>63</sup> Steve Volk, *The Enemy Within: Race and White Supremacy in American Policing*, ROLLING STONE (May 12, 2021, 8:57 AM), <https://www.rollingstone.com/culture/culture-features/racism-white-supremacy-american-policing-1167304/>.

An officer in New York allegedly flashed a “white power” hand sign during the Floyd protests. Footage from a 2017 Portland, Oregon, protest shows a right-wing militia member assisting police in the arrest of an anti-fascist. In a video of the “Unite the Right” rally in Charlottesville, police watch as a gang of white men beat black counter-protester Deandre Harris with flags and metal poles. In Oregon, a police lieutenant in Salem was caught on video telling a group of armed white men how to avoid arrest, so “we don’t look like we’re playing favorites.”

*Id.*

<sup>64</sup> See German I, *supra* note 25.

<sup>65</sup> See Maddy Crowell & Sylvia Varnham O’Regan, *Extremist Cops: How US Law Enforcement is Failing to Police Itself*, THE GUARDIAN (Dec. 13, 2019 1:00 AM), <https://www.theguardian.com/us-news/2019/dec/13/how-us-law-enforcement-is-failing-to-police-itself> (“Had the video of Doggrell’s speech never gone viral, though, it’s quite likely he would still be serving on the Anniston police force.”).

<sup>66</sup> This paper assesses the Congress’ Spending Clause Power only in the context of conditioning receipt of federal funds.

<sup>67</sup> U.S. CONST. art. I, § 8.

its goals by conditioning federal funds on recipient compliance with various guidelines.<sup>68</sup>

The Supreme Court has upheld congressional use of the Spending power to raise the drinking age,<sup>69</sup> provide for the disposal of nuclear waste,<sup>70</sup> and prohibit federally funded state employees from engaging in partisan activities.<sup>71</sup> The Supreme Court has held that pursuant to the Spending Clause, “Congress may attach conditions on the receipt of federal funds[.]”<sup>72</sup> These conditions can include the adoption of policies that Congress could not otherwise directly impose on states.<sup>73</sup> Further, the Court explains that Congress may indirectly achieve objectives it would otherwise lack authority to pursue under its constitutionally enumerated powers.<sup>74</sup> The Supreme Court has repeatedly upheld constitutional challenges to Congress’s use of the Spending power to induce governments and private parties to cooperate.<sup>75</sup>

For a funding condition to be successful under Congress’ Spending Clause powers, the condition must be analyzed under the four-part test created in *South Dakota v. Dole* (“Dole”)<sup>76</sup> and must pass the coercion test developed in *National Federation of Independent Business v. Sebellius* (“NFIB”).<sup>77</sup> First, a funding condition must be “in pursuit of ‘the general welfare.’”<sup>78</sup> The Supreme Court has essentially described the general welfare prong as a throw away.<sup>79</sup> To date, the Supreme Court “has never held that a federal expenditure was not ‘for the general welfare.’”<sup>80</sup> The Court has made it clear that “courts should defer

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<sup>68</sup> Fullilove v. Klutznick, 448 U.S. 448, 474 (1980) (Chief Justice Burger’s opinion for the Court cited five cases to document the assertion: California Bankers Ass’n v. Shultz, 416 U.S. 21 (1974); Lau v. Nichols, 414 U.S. 563 (1974); Oklahoma v. Civil Service Comm’n, 330 U.S. 127 (1947); Helvering v. Davis, 301 U.S. 619 (1937); and Steward Machine Co. v. Davis, 301 U.S. 548 (1937)).

<sup>69</sup> South Dakota v. Dole, 483 U.S. 203, 212 (1987).

<sup>70</sup> New York v. United States, 505 U.S. 144, 188 (1992).

<sup>71</sup> Oklahoma v. Civ. Serv. Comm’n, 330 U.S. 127, 143-44 (1947).

<sup>72</sup> Dole, 483 U.S. at 206.

<sup>73</sup> Samuel R. Bagenstos & Ilya Somin, *The Spending Clause: Common Interpretation*, THE NAT’L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/article-i/clauses/755> (last visited Nov. 30, 2020).

<sup>74</sup> *Civ. Serv. Comm’n*, 330 U.S. at 143-44.

<sup>75</sup> *Id.* at 143.

<sup>76</sup> Dole, 483 U.S. at 207-08.

<sup>77</sup> Nat’l Fed’n of Indep. Bus. v. Sebelius (NFIB), 567 U.S. 519, 585 (2012) [hereinafter NFIB].

<sup>78</sup> Dole, 483 U.S. at 207; NFIB, 567 U.S. at 580.

<sup>79</sup> Dole, 483 U.S. at 207 n.2 (“The level of deference to the congressional decision is such that the Court has more recently questioned whether ‘general welfare’ is a judicially enforceable restriction at all.”).

<sup>80</sup> NFIB, 567 U.S. at 674 (Scalia, Kennedy, Thomas, and Alito, J.J., dissenting).

substantially to the judgment of Congress” when determining if spending power legislation is properly directed to the general welfare.<sup>81</sup>

Second, “if Congress intends to [place] condition[s]” on federal funds, “it must do so unambiguously” so that states can knowingly choose whether to accept the funds.<sup>82</sup> Congress must set out the conditions unambiguously, so that the states may make an informed decision. In *NFIB*, Chief Justice Roberts seemed to indicate that past adjustments to the Medicaid program had been permissible but concluded that the new expansion was a “transform[ation] ... so dramatic[.]” as to constitute a “shift in kind, not merely degree” that ran afoul of the requirement that conditions be made “unambiguously[.]”<sup>83</sup>

Third, conditions on federal funding must be related or “germane[.]” to “the federal interest in particular national projects or programs.”<sup>84</sup> The Supreme Court continues to state that the condition must be related or “bear some relationship” to the federal interest for which the funds are expended.<sup>85</sup> Conditioning the receipt of particular funds via restrictions on the use of the funds themselves likely satisfies this requirement.<sup>86</sup> Similar to the general welfare test, “the Supreme Court has never invalidated legislation under the Spending Clause on relatedness grounds.”<sup>87</sup> Fourth, the Court must determine whether constitutional provisions may bar the conditions placed on the grant of federal funds.<sup>88</sup>

The Court must also assess whether the funding condition is “coercive[.]”<sup>89</sup> The Supreme Court has suggested “that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion.’”<sup>90</sup> States may feel coerced because funding is critical. In *NFIB*, the Court explained that because of the size of the existing Medicaid program, Congress could not “penalize States that choose not to participate in that new program by taking away their existing Medicaid funding” because

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<sup>81</sup> *Dole*, 483 U.S. at 207.

<sup>82</sup> *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

<sup>83</sup> *NFIB*, 567 U.S. at 583-84.

<sup>84</sup> *Dole*, 483 U.S. at 207-08 (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion)).

<sup>85</sup> *New York v. United States*, 505 U.S. 144, 167 (1992).

<sup>86</sup> *Dole*, 483 U.S. at 20 (citing *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980)).

<sup>87</sup> CONG. RSCH. SERV., LSB10469, FEDERAL AUTHORITY TO LIFT OR MODIFY STATE AND LOCAL COVID-19 “STAY AT HOME” ORDERS: FREQUENTLY ASKED QUESTIONS 3 (2020).

<sup>88</sup> *Dole*, 483 U.S. at 208.

<sup>89</sup> *Id.* at 211.

<sup>90</sup> *Id.*

it left states with no real choice to refuse to participate in the new program.<sup>91</sup>

Nevertheless, Courts have rarely used these spending power limitations to invalidate conditions placed on the receipt of federal funds.<sup>92</sup> *NFIB* remains the only instance in the modern era of the Supreme Court invalidating an exercise of the congressional spending power.<sup>93</sup> Post-*NFIB* Spending Clause challenges have largely been unsuccessful in lower courts.<sup>94</sup>

#### IV. PROPOSED SCREENING PROGRAM

The focus on improving police-to-civilian relations has historically been at the individual level.<sup>95</sup> Instead of focusing on individual police officers, this section proposes a department-level solution. This section assesses whether Congress, using its Spending Power under Article 1, Section 8 of the United States Constitution,<sup>96</sup> can amend federal grant programs Community Oriented Policing Services (“COPS”)<sup>97</sup> and Edward Byrne Memorial Justice Assistance Grant Program (“Byrne JAG”)<sup>98</sup> to condition receipt of aid upon the implementation of a program that screens law enforcement officials for white supremacist affiliations. The hope is this proposal would affect state and local policing budgets enough that law enforcement officials in position of leadership will filter their departments of “bad apples[.]”<sup>99</sup>

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<sup>91</sup> Nat’l Fed’n of Indep. Bus. v. Sebelius (*NFIB*), 567 U.S. 519, 585 (2012).

<sup>92</sup> Bagenstos & Somin, *supra* note 73.

<sup>93</sup> *Id.*

<sup>94</sup> *See, e.g.*, Mayhew v. Burwell, 772 F.3d 80 (1st Cir. 2014).

<sup>95</sup> Taimi Castle, “*Cops and the Klan*”: *Police Disavowal of Risk and Minimization of Threat from the Far-Right*, 29 *CRITICAL CRIMINOLOGY* 215, 231 (2021). Bias training fails to address structural racism. Reform through bias training rests on “an ‘assumption that there is a politically neutral and sociologically unbiased ideal of police that must be returned to[.]’” *Id.*

<sup>96</sup> U.S. CONST. art. I, § 8.

<sup>97</sup> Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 1701 (1994); CONG. RSCH. SERV., IF10922, COMMUNITY ORIENTED POLICING SERVICES (COPS) PROGRAM (2022); Grants, CMTY. ORIENTED POLICING SRVS., <https://cops.usdoj.gov/grants> (last visited Aug. 29, 2022).

<sup>98</sup> Edward Byrne Memorial Justice Assistance Grant (JAG) Program, Overview, BUREAU OF JUST. ASSISTANCE, U.S. DEPARTMENT OF JUSTICE (Nov. 3, 2022) <https://bja.ojp.gov/program/jag/overview>; CONG. RSCH. SERV., IF10691, THE EDWARD BYRNE MEMORIAL JUSTICE ASSISTANCE GRANT (JAG) PROGRAM (2022).

<sup>99</sup> Rashawn Ray, *Bad Apples Come From Rotten Trees in Policing*, BROOKINGS (May 30, 2020), <https://www.brookings.edu/blog/how-we-rise/2020/05/30/bad-apples-come-from-rotten-trees-in-policing/>.

Federal regulation of state and local law enforcement primarily comes in the form of grant programs that provide money to local governments and police forces.<sup>100</sup> The COPS program is one example.<sup>101</sup> It authorizes the Department of Justice to distribute grants to hire police officers and support community policing.<sup>102</sup>

As explained by Juhohn Lee:

COPS . . . was established as part of a bill signed by President Bill Clinton in 1994 to combat the rise in violent crime at the time. Although its funding has dramatically decreased over the years, it still funneled \$304 million in 2019 to state, local, and tribal law enforcement agencies. The Byrne Justice Assistance Grants . . . were started as a part of the Anti-Drug Abuse Act of 1988 and consolidated in 2005 with a program that honored an officer who died in the line of duty. Although the program was designed to award funding to a wide variety of initiatives, more than half of the grants are awarded to support law enforcement across the country. The funding from Byrne JAG still averages around \$435 million each year.<sup>103</sup>

Recipients can use these grants for hiring officers, procuring equipment, or establishing partnerships between local law enforcement agencies and local school districts.<sup>104</sup> Funding for these grant programs is subject to various conditions that may further federal interests in regulating law enforcement activities.<sup>105</sup> Existing proposals call for law enforcement agencies that receive federal funds to conduct racial-bias

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<sup>100</sup> Brian Naylor, *How Federal Dollars Fund Local Police*, NPR, (June 9, 2020, 5:10 AM), <https://www.npr.org/2020/06/09/872387351/how-federal-dollars-fund-local-police>.

<sup>101</sup> See 42 U.S.C. § 1701, *supra* note 97.

<sup>102</sup> CONG. RSCH. SERV., R44104, FEDERAL POWER OVER LOCAL LAW ENFORCEMENT REFORM: LEGAL ISSUES (July 7, 2016).

<sup>103</sup> Juhohn Lee, *Here's How Two Federal Programs Helped Expand Police Funding By Over 200% Since 1980*, CNBC, (June 25, 2020, 11:16 AM), <https://www.cnbc.com/2020/06/25/two-federal-programs-helped-expand-police-funding-by-over-200percent.html>.

<sup>104</sup> CONG. RSCH. SERV., IF10691, THE EDWARD BYRNE MEMORIAL JUSTICE ASSISTANCE GRANT (JAG) PROGRAM (2022).

<sup>105</sup> *Id.*

training,<sup>106</sup> adopt policies that prohibit racial profiling,<sup>107</sup> and appoint special prosecutors in police shootings.<sup>108</sup>

Due to the long history of law enforcement's affiliation with white supremacist organizations, this proposal would allow for Congress to monitor the police departments that receive federal aid in hopes of solving this deadly issue. A federal policy does not currently exist to screen or monitor the country's over 800,000 law enforcement officers for extremist views.<sup>109</sup> The 18,000 or so police departments across the country are largely left to police themselves.<sup>110</sup>

Other scholars have also recommended that police officers be screened for white supremacist affiliations,<sup>111</sup> Law Professor Vida Johnson<sup>112</sup> writes that "[t]he best way to avoid a white supremacist on the police department is to never hire [them]."<sup>113</sup> She also recommends that prospective applicants submit to tattoo checks to identify any white supremacist tattoos because "[d]eep investigation into any particular hire is prudent."<sup>114</sup> Screening allows "[p]rospective officers...to prove they are not racist[.]"<sup>115</sup> Michael German, a former FBI agent, now scholar has also recommended that the Justice Department implement a program that screens state and local law enforcement officials that have active links to white supremacist or militant groups, engage in racist behavior, or post overtly racist messages on social media.<sup>116</sup>

The proposed amendment would require the federal government to withhold most, if not all, of the COPS and Byrne JAG funding from law enforcement agencies that fail to implement measures to screen their current and future officers for white supremacist and far-right militant group affiliation. The proposed condition serves the general welfare because law enforcement officers are public servants sworn to serve and protect all citizens. Screening law enforcement officers for

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<sup>106</sup> POST Act of 2015, H.R. 1065, 114th Cong. (2015).

<sup>107</sup> End Racial Profiling Act of 2015, H.R. 1933, 114th Cong. (2015).

<sup>108</sup> Grand Jury Reform Act of 2015, H.R. 429, 114th Cong. (2015).

<sup>109</sup> Crowell & Varnham O'Regan, *supra* note 65.

<sup>110</sup> *Id.*

<sup>111</sup> *See* Johnson, *supra* note 53, at 239.

<sup>112</sup> Johnson is an American criminal defense attorney and professor of law at Georgetown University Law Center. Johnson previously worked as an E. Barrett Prettyman fellow. At the Georgetown University Law Center. Vida Johnson, GEO. L., <https://www.law.georgetown.edu/faculty/vida-johnson/> (last visited Jan. 16, 2023).

<sup>113</sup> Johnson, *supra* note 53, at 239.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> German II, *supra* note 50.



affiliations with groups that not only spread hate speech but commit violent crimes against U.S. citizens is the antithesis of serving and protecting.

The Supreme Court would likely defer to the government's interest in preventing domestic terrorist threats from serving on local police forces based on the rational basis test.<sup>117</sup> These groups are very dangerous; and in many cases, are more dangerous than foreign terrorists.<sup>118</sup> The links between domestic terrorists and law enforcement officials are "active"<sup>119</sup> and have been uncovered in many states.<sup>120</sup> Further, preventing discriminatory police practices is likely sufficiently related to withholding funds from police departments that employ officers affiliated with known white supremacist organizations that promote discrimination under *Dole*'s low-bar for relatedness.

The proposal may appear to impose new conditions on the future receipt of funds under the COPS and Byrne JAG programs. It is worth noting that the current recipients of funds under the Byrne JAG program are barred from discriminating based on race.<sup>121</sup> Relatedly, recipients of funds under COPS are barred under Title VI of the Civil Rights Act from discriminating on the basis of race.<sup>122</sup> The proposed condition might be seen as simply restating these requirements. Even if new conditions on federal funds are not deemed to be simple modifications, the funds at risk for non-compliance under the COPS programs appear closer to *Dole*'s permissible "mild encouragement"<sup>123</sup> than the coercive "gun to the head" in *NFIB*.<sup>124</sup>

COPS funding amounted to \$400 million in 2020,<sup>125</sup> a lower sum than the \$614.7 million the Court called a "mild encouragement" in

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<sup>117</sup> The Notorious RBT (Rational Basis Test), INST. FOR JUST., <https://ij.org/center-for-judicial-engagement/programs/the-notorious-rbt-rational-basis-test/> (last visited Dec. 15, 2022). "If the court can imagine a 'legitimate' interest that might be served by the challenged law, that's enough to uphold it." *Id.*

<sup>118</sup> See German II, *supra* note 50.

<sup>119</sup> See German I, *supra* note 25.

<sup>120</sup> See German I, *supra* note 25.

<sup>121</sup> IND. CRIM. JUST. INST., REQUEST FOR PROPOSAL, EDWARD BYRNE MEMORIAL JUSTICE ASSISTANCE GRANT (JAG) PROGRAM 18-19, 21 (2022) ("Federal laws that apply to recipients of federal grant awards prohibit discrimination on the basis of actual or perceived race, color, national origin, religion, sex, disability, sexual orientation, or gender identity in funded programs or activities, not only in employment but also in the delivery of services or benefits.").

<sup>122</sup> Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq.

<sup>123</sup> *South Dakota v. Dole*, 483 U.S. 203, 211 (1987).

<sup>124</sup> *Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB)*, 567 U.S. 519, 581 (2012).

<sup>125</sup> Press Release, U.S. Dep't Just., Department of Justice Awards Nearly \$400 Million for Law Enforcement Hiring to Advance Community Policing (June 2, 2020),

*Dole*.<sup>126</sup> Even if you include \$244.2 million in funding from the Byrne JAG program, it's still well below the \$233 billion at stake in *NFIB*.<sup>127</sup> Therefore, it is unlikely that Congress will have imposed a financial inducement that is unduly coercive of the states.

Scholars often debate the effectiveness of “carrot and stick” legislation like the proposal in this Article.<sup>128</sup> The likelihood of success may depend on whether the carrot (a financial incentive) or a stick (a financial penalty) approach is taken.<sup>129</sup> Below are two recent examples of both carrot and stick legislation. As explained by Grace Leeper,

The Police Reporting Information, Data, and Evidence Act of 2015 (PRIDE Act) provides a model of offering positive financial incentives for states to report data. Introduced in the Senate and referred to the Senate Judiciary Committee, the PRIDE Act would allow the Attorney General to distribute new grant funding to states who comply with several conditions, including: 1) making their use-of-force policy publicly available, and 2) reporting on [deadly force incidents].<sup>130</sup>

Ultimately, the PRIDE Act was introduced, but never passed. History has shown the stick is likely to be more effective. For example, the Death in Custody Reporting Act (DICRA), which was first passed in 2000,<sup>131</sup>

requires states that receive funding under certain provisions of the Omnibus Crime Control and Safe Streets Act of 1968 to report information regarding the death of any person who is detained, under arrest, in the process of being arrested, incarcerated, or en route to being incarcerated. Unlike the PRIDE Act . . . DICRA directly

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<https://www.justice.gov/opa/pr/department-justice-awards-nearly-400-million-law-enforcement-hiring-advance-community>.

<sup>126</sup> *NFIB*, 567 U.S. at 684-85 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

<sup>127</sup> ALEXIA D. COOPER, U.S. DEP'T JUST., JUSTICE ASSISTANCE GRANT (JAG) PROGRAM 1 (2021), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/jagp20.pdf>; *NFIB*, 567 U.S. at 685 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

<sup>128</sup> Grace E. Leeper, *Conditional Spending and the Need for Data on Lethal Use of Police Force*, 92 N.Y.U.L. REV. 2053, 2085 (2017).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Death in Custody Reporting Act*, BUREAU OF JUST. STAT., <https://bjs.ojp.gov/programs/dicra> (last visited Aug 29, 2022).

requires states to report the relevant data to the Attorney General. States that fail to comply with DICRA can, at the discretion of the Attorney General, be subject to up to a ten percent penalty of funds that would otherwise have been allocated to the state under the Omnibus Crime Control and Safe Streets Act of 1968.<sup>132</sup>

As Leeper emphasizes, although “as of publication, this penalty has never been used,” it sends a greater message to states for compliance.<sup>133</sup>

## V. CONCLUSION

There is a current debate over whether defunding the police will work or not. Experts and many advocates of defunding the police believe this is a viable way to reduce violence against people of color.<sup>134</sup> Diverting funds away from police to mental health experts and community programs would allow other experts to substitute police in areas they aren’t well-trained in.<sup>135</sup> Diverting funds to schools, health care, and other vital programs will strengthen our communities.<sup>136</sup> Conversely, many believe defunding the police will only exacerbate problems. That is, defunding the police could result in the cutting of community interaction programs instead of tanks and guns.<sup>137</sup> Some worry that police budget cuts will start with funding to “community interaction programs that require humanity and commitment, not guns, tanks or pepper spray.”<sup>138</sup> Police agencies may resort to other means of fundraising, such as increased citation issuance.<sup>139</sup> All in all, defunding the police would not come without great challenges.

Despite these challenges, one thing remains very clear —white supremacy is deadly. According to the FBI, white supremacists are the

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<sup>132</sup> Leeper, *supra* note 128, at 2088.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> Britannica, *Defund the Police – Top 3 Pros and Cons*, PROCON.ORG, <https://www.procon.org/headlines/defund-the-police-top-3-pros-and-cons/> (last updated Jan. 20, 2022).

<sup>136</sup> *Id.*

<sup>137</sup> Mary Zerkel, *6 Reasons Why It’s Time To Defund The Police*, AM. FRIENDS SERV. COMM. BLOG <https://www.afsc.org/blogs/news-and-commentary/6-reasons-why-its-time-to-defund-police> (Oct. 15, 2020).

<sup>138</sup> Defunding the police pros and cons: Top 3 arguments for and against, PROCON.ORG (2022), <https://www.procon.org/headlines/defund-the-police-top-3-pros-and-cons/> (last visited Aug 29, 2022).

<sup>139</sup> *Id.*

“most lethal domestic terror threat” in the country.<sup>140</sup> In the words of the nation’s first Black Secretary of Defense, Lloyd Austin, America must “pledge[] to ‘rid [its] ranks of racists and extremists[.]’”<sup>141</sup> So far, America’s response to known connections between law enforcement officers and racist groups has been “strikingly insufficient[.]”<sup>142</sup> Law enforcement officers associating with white supremacist groups should be of utmost concern to American citizens. The FBI has previously warned of “*active links*” between law enforcement and white supremacist militia groups.<sup>143</sup> Officers who hold extremist beliefs regarding race, religion, and sexuality put the lives and liberty of people of color, religious minorities, and LGBTQ+ people at risk for violence.

There is a long history of mistrust between Black citizens and law enforcement in the United States.<sup>144</sup> Biased policing has taken many lives, particularly Black ones. Allowing white supremacists to serve as law enforcement officers signals that their ideals are authorized by the government. Few police agencies have explicit policies against affiliating with White supremacist groups. Federal, state, and local governments must develop a national strategy to proactively identify racist affiliations and ensure citizens can trust the men and women in uniform to keep them safe.

While the problem itself is clear, the best way to solve it is murky. Michael German states that “law enforcement agencies must do more to strengthen their anti-discrimination policies, improve applicant and employee screening, establish reporting mechanisms, and protect and reward officers who report their colleagues’ racist misconduct.”<sup>145</sup> Professor Johnson says that racist affiliations, memberships, and beliefs are not just that. They manifest as bias in arrests, and in the fabrication

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<sup>140</sup> Sharon Weinberger, *WHITE SUPREMACIST EXTREMISM* (2017), <https://www.documentcloud.org/documents/3924852-White-Supremacist-Extremism-JIB.html> (last visited Nov 30, 2020).

<sup>141</sup> Phil Stewart & Idrees Ali, Biden’s defense secretary pick pledges to ‘rid our ranks of racists and extremists’ Reuters (2021), <https://www.reuters.com/article/us-usa-biden-pentagon/bidens-defense-secretary-pick-pledges-to-rid-our-ranks-of-racists-and-extremists-idUSKBN29O2II> (last visited Dec 15, 2022).

<sup>142</sup> Michael German, *HIDDEN IN PLAIN SIGHT: RACISM, WHITE SUPREMACY, AND FAR-RIGHT MILITANCY IN LAW ENFORCEMENT* BRENNAN CENTER FOR JUSTICE (2020), <https://www.brennancenter.org/our-work/research-reports/hidden-plain-sight-racism-white-supremacy-and-far-right-militancy-law> (last visited Nov 30, 2020).

<sup>143</sup> Sharon Weinberger, *WHITE SUPREMACIST EXTREMISM* (2017), <https://www.documentcloud.org/documents/3924852-White-Supremacist-Extremism-JIB.html> (last visited Nov 30, 2020).

<sup>144</sup> Steve Volk, *The Enemy Within* Rolling Stone (2021), <https://www.rollingstone.com/culture/culture-features/racism-white-supremacy-american-policing-1167304/> (last visited Dec 15, 2022).

<sup>145</sup> German II, *supra* note 50; *see supra* Part IV Proposed Screening Program.

of evidence, and often bring about deadly force.<sup>146</sup> As emphasized by Professor Johnson, “[i]dentifying and removing these officers who hold such beliefs could be instrumental in reducing police harassment and violence inflicted on civilians. Ridding police departments of racist officers w[ill] also improve the relationship between the police and the communities they serve.”<sup>147</sup>

The most effective way for law enforcement agencies to restore public trust is to disassociate from individuals with ties to white supremacist organizations. Law enforcement agencies must also dissociate from individuals who have a history of racist conduct. While there remains an ongoing debate on whether defunding the police is an effective strategy, for the American policing system to rid itself of white supremacy, the conversation must shift from modest proposals like anti-bias training and move toward more sweeping changes like financial carrots and sticks.

The program proposed in this Article offers a large-scale, yet practical solution in hopes of achieving institutional reform that would reduce white supremacy in policing. While the carrot and stick approach is not a new or novel concept, it can be effective. To ensure maximum participation, both a carrot and a stick may be necessary. No matter how America decides to solve this problem, it must be done. It may not survive another January 6, 2021.

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<sup>146</sup> See Johnson, *supra* note 53, at 228.

<sup>147</sup> See Johnson, *supra* note 53, at 228.