



August 10, 2020

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Clerk of the City of Wilmington  
Wilmington Civil Service Commission  
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Dear Members of the Wilmington Civil Service Commission,

We are writing on behalf of the Lawyers' Committee for Civil Rights Under Law<sup>1</sup> to offer guidance as you consider a request for reinstatement filed by Officer James B. Gilmore, whose employment was terminated after being captured on film making racist remarks about Black residents of Wilmington along with other officers. As we explain in detail below, reinstatement of Officer Gilmore could undermine the public trust in the Wilmington Police Department (WPD) and further strain its relationship with the community that its officers have sworn to protect and serve. Moreover, the Commission is under no legal obligation to protect the racist hate speech in which Officer Gilmore engaged.

Due to a history of violent and disrespectful interactions, we have seen how mistrust can develop between police and people of color, especially Black people. When an officer participates in openly hateful and racist conversations, that mistrust is further exacerbated and validated.<sup>2</sup> Even the perception of police officers harboring racist sentiment jeopardizes the integrity of law enforcement agencies, endangers individual officers and community members alike, and deepens the divide between police forces and communities of color.<sup>3</sup> Communities who lose trust in law enforcement are less likely to

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<sup>1</sup> The Lawyers' Committee, a nonpartisan and nonprofit organization, was formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership in combatting discrimination and the resulting inequalities. The James Byrd Jr. Center to Stop Hate, at the Lawyers' Committee, supports communities and individuals targeted for hate and challenges white supremacy by using creative legal advocacy, disrupting systems that enable hate, and educating the general public and policy makers.

<sup>2</sup> See, e.g., Kenya Downs, *FBI Warned of White Supremacists in Law Enforcement 10 Years ago. Has Anything Changed?*, PBS (Oct. 21, 2016), <https://www.pbs.org/newshour/nation/fbi-white-supremacists-in-law-enforcement>.

<sup>3</sup> *Id.*; See Gifford's Law Center, *In Pursuit of Peace: Building Police-Community Trust to Break the Cycle of Violence* (Jan. 2020), <https://lawcenter.giffords.org/wp-content/uploads/2020/01/Giffords-Law-Center-In-Pursuit-of-Peace.pdf> (finding lack of trust between police and communities is a major driver of national gun violence). See Department of Justice, *Importance of Police-Community Relationships and Resources for Further Reading*, <https://www.justice.gov/crs/file/836486/download> (emphasizing community trust in police is critical to public safety, and stating community trust depends on perceptions that police actions reflect community values). See Desmond, Matthew, Andrew V. Papachristos, and David S. Kirk, *Police Violence and Citizen Crime Reporting in*

productively engage with police, which may obstruct the application of justice and make communities less safe.<sup>4</sup> These very dangers are evident in Wilmington.

According to the WPD Internal Investigation Report, Officer Gilmore participated in disturbingly racist conversations with Officer Michael Piner, in which they ridiculed Black people, criticized the protests against racism occurring across the nation, and expressed regret that the WPD did not deploy harsher measures against civilian protestors.<sup>5</sup> When speaking about the protests, Piner complained to Gilmore that the WPD was only concerned with “kneeling down with the [B]lack folks.”<sup>6</sup> Gilmore responded by telling Piner that he watched a social media video about white people bowing down and “worshipping [B]lacks,” exclaiming “how many times have I told you it’s almost like they think they [Black people] [are] their own God?”<sup>7</sup> Gilmore then told Piner about a second video he had seen of a “fine looking white girl and this punk little pretty boy bowing down and kissing their toes.”<sup>8</sup> Later, Gilmore derided a fellow Black officer on the force, to which Piner replied “let’s see how his boys take care of him when shit gets tough, see if they don’t put a bullet in his head.”<sup>9</sup>

We have spoken with members of the community and are concerned that Gilmore’s disparaging comments regarding people of color undermine his ability to maintain the public faith in his service.<sup>10</sup> Furthermore, because the Department discovered the video recordings entirely by chance, the public will likely lack confidence that the officers had not previously engaged in similarly offensive discussions or that the WPD has sufficient screening, training, and enforcement protocols to ensure a culture of compliance and respect towards the Black community. Rather, the video may provide the public with insight into a shared culture of discriminatory and offensive behavior within the WPD.

Beyond these concerns, the First Amendment does not protect the type of speech at issue here. As the U.S. Supreme Court has recognized, the speech of public employees is generally protected only when employees speak on a matter of public concern and their speech does not risk interfering with the employer's operations.<sup>11</sup> Speech involves a

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*the Black Community*, American Sociological Review 81.5 (2016) (finding that news of police abuses led to fewer 911 calls and diminished community safety).

<sup>4</sup> See Gifford’s Law Center, *In Pursuit of Peace: Building Police-Community Trust to Break the Cycle of Violence*; Department of Justice, *Importance of Police-Community Relationships and Resources for Further Reading*; Desmond et. al, *Police Violence and Citizen Crime Reporting in the Black Community*.

<sup>5</sup> Wilmington Police Dept., *Professional Standards Internal Investigation*, 201A007 (June 11, 2020), available at <https://www.wilmingtonnc.gov/home/showdocument?id=12012>.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Wilmington Police Dept., *Oath of Office and Code of Ethics* (Aug. 15, 2016), available at <https://www.wilmingtonde.gov/home/showdocument?id=9275>. The Wilmington Police Department Code of Ethics recognizes each officer’s badge “as a symbol of public faith” and a “public trust.”

<sup>11</sup> See *Connick v. Myers*, 461 US 138 (1983); see also *Pickering v. Board of Education*, 391 U.S. 563 (1972) (in considering a First Amendment retaliation case, a court’s first charge is “to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”) and *Arvinger v. Mayor & City Council of Baltimore*, 862 F.2d 75, 77 (4th Cir. 1988) (restating Connick test and emphasizing “a public employee, it has long been held, does not have a constitutional right to his job”).

matter of “public concern” when “it involves an issue of social, political, or other interest to a community.”<sup>12</sup> For instance, courts have recognized police officers’ speech as a matter of “public concern” when the subject of the speech is misconduct by government officials, because community members have an interest in knowing if a government leader is engaging in fraud or other wrongdoing.<sup>13</sup> Here, Gilmore’s comments about white people “worshipping Blacks,” Black people thinking they are “their own god,” and the “punk little pretty boy” are not a matter of “public concern”— they do not relate to matters that the public would be concerned with, such as alleged misconduct by a local leader,<sup>14</sup> but rather are part of a racist rant.

In addition, in similar cases concerning the First Amendment as it relates to speech by police officers and other government employees, courts have considered the “employer’s interest in maintaining efficiency, integrity and discipline.”<sup>15</sup> Specific factors courts look at in making this inquiry include whether a public employee’s speech:

- (1) impaired the maintenance of discipline by supervisors;
- (2) impaired harmony among coworkers;
- (3) damaged close personal relationships;
- (4) impeded the performance of the public employee’s duties;
- (5) interfered with the operation of the institution;
- (6) undermined the mission of the institution;
- (7) was communicated to the public or to coworkers in private;
- (8) conflicted with the responsibilities of the employee within the institution; and
- (9) abused the authority and public accountability that the employee’s role entailed.<sup>16</sup>

Nearly all of these factors weigh against First Amendment protection of Gilmore’s speech. His comments about his Black colleague and people “worshipping Blacks,” very likely damaged relationships both within the department and with the community,

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<sup>12</sup> *Grutzmacher v. Howard County*, 851 F.3d 332, 343 (4th Cir. 2017) (citing *Urofsky v. Gilmore*, 216 F.3d 401, 406 (4th Cir. 2000) (en banc)). See also *Kirby v. City of Elizabeth City*, 388 F.3d 440, 446 (4th Cir. 2004) (quoting *Arvinger v. Mayor of Baltimore*, 862 F.2d 75, 79 (4th Cir. 1988)) (“In considering whether speech involves a matter of public concern, a court examines whether a member of the community is ‘likely to be truly concerned with ... the particular expression.’”), *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 352–53 (4th Cir. 2000) (“This is a subtle, qualitative inquiry; we use the content, form, and context as guideposts in the exercise of common sense, asking throughout: would a member of the community be truly concerned with the employee’s speech?”) and *Jurgensen v. Fairfax Cty., Va.*, 745 F.2d 868, 879 (4th Cir. 1984) (holding that speech is less protected if it relates primarily to matters of “limited public interest” and does not “seek to bring to light actual or potential wrongdoing or breach of public trust”).

<sup>13</sup> *Durham v. Jones*, 737 F.3d 291 (4th Cir. 2013). See also, *Maciariello v. Sumner*, 973 F.2d 295, 300 (4th Cir. 1992) (“We agree with the district court that an allegation of evidence tampering by a high-ranking police officer is a matter in which the public should be interested.”)

<sup>14</sup> *Id.*

<sup>15</sup> See *Maciariello v. Sumner*, 973 F.2d 295, 300 (4th Cir. 1992).

<sup>16</sup> *Brickey v. Hall*, 828 F.3d 298, 304 (4th Cir. 2016) (upholding chief’s decision to fire officer because he could reasonably believe that officer’s speech would undermine efforts to restore credibility to department, increase public distrust in department, and harm public trust in police chief himself.). See also, *Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 317 (4th Cir. 2006) (stating that in evaluating whether speech disrupted employer’s operations, courts weigh if the speech undermined institution’s mission, abused employee’s authority and public accountability, conflicted with his responsibilities, was privately communicated to coworkers, and impaired harmony among coworkers).

therefore impeding the ability for Gilmore to perform his duties and interfering with the mission of the department.<sup>17</sup> While Gilmore may claim that his comments were not meant to be disruptive, and rather were just a reflection of his religious belief that one should not worship anyone except God, Gilmore's intent is irrelevant here: the question is the likely impact of the speech and how it may complicate the ability of both the individual employee and organizational employer to perform their duties.<sup>18</sup>

Courts have also recognized that “police officials are entitled to impose more restrictions on speech than other public employers;” because of the special nature of police work, “discipline is demanded, and freedom must be correspondingly denied.”<sup>19</sup> Moreover, because the nature of police work requires extensive public contact, community trust and close working relationships, courts grant wide deference to a department's judgment that an officer's actions disrupts the department's harmony.<sup>20</sup> An FBI Intelligence Assessment similarly notes that although the First Amendment protects an individual's right to express his or her opinions, the government can limit the employment opportunities of individuals “who hold sensitive public sector jobs, *including jobs within law enforcement*” when their expression would interfere with their duties.<sup>21</sup>

Finally, as you consider the reinstatement request, we urge you to consider the WPD Code of Ethics, Mission Statement, and Professional Rules of Conduct which holds enforcement officers to a particularly high standard in recognition of the fact that they are the most visible signs of governmental authority, and their foremost duty is to serve all residents of Wilmington.<sup>22</sup> The WPD Code of Ethics states that an officer's “first duty is to serve the people of Wilmington,” which includes “protect[ing] the weak against

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<sup>17</sup> See, e.g., *Pappas v. Giuliani*, 290 F.3d 143, 147 (2d Cir. 2002) (holding that by espousing discriminatory speech, a police officer “promotes the view among [the] citizenry that those are the opinions of New York's police officers, “immense[ly]” damages the department's effectiveness in the community, and causes internal disharmony by “promoting resentment, distrust and racial strife between fellow officers.”).

<sup>18</sup> *Brickey v. Hall*, 828 F.3d 298, 305 (4th Cir. 2016) (discussing how, despite plaintiff officer's claim that he intended no harm in making certain comments about the police department, his comments could reasonably be interpreted as accusing the police chief of incompetence, therefore weighing against First Amendment protections).

<sup>19</sup> *Brickey v. Hall*, 828 F.3d 298, 304 (4th Cir. 2016) (quoting *Jurgensen*, 745 F.2d 868, 880 (4th Cir. 1984), see also *Tindle v. Caudell*, 56 F.3d 966, 971 (8th Cir.1995) (“because police departments function as paramilitary organizations charged with maintaining public safety and order, they are given more latitude in their decisions regarding discipline and personnel regulations than an ordinary government employer.”).

<sup>20</sup> See, e.g., *Pappas* 290 F.3d at 147 (2d Cir. 2002) (recognizing a police officer's job quintessentially involves public contact, and holding the public's perception of officer's speech factors into whether it disrupts Government operations); see also *Locurto v. Giuliani*, 447 F.3d 159, 178–79 (2d Cir. 2006) (recognizing NYPD's legitimate interest in its public perception, and upholding termination of officer who engaged in “disruptive” expressive activities that could perpetuate widespread perception of NYPD officers as racist), *Hughes v. Whitmer*, 714 F.2d 1407, 1419 (8th Cir. 1997) (“The need for harmony and close working relationships between co-workers in a police department is of great importance.”), and *Gasparinetti v. Kerr*, 568 F.2d 311, 315–16 (3rd Cir.1977), cert. denied, 436 U.S. 903 (1978) (“More so than the typical government employer, the Patrol has a significant government interest in regulating the speech activities of its officers in order “to promote efficiency, foster loyalty and obedience to superior officers, maintain morale, and instill public confidence in the law enforcement institution.”).

<sup>21</sup> FBI Counterterrorism Division, *Intelligence Assessment: White Supremacist Infiltration of Law Enforcement* (Oct. 17, 2006), available at <https://assets.documentcloud.org/documents/3439212/FBI-White-Supremacist-Infiltration-of-Law.pdf> (emphasis added).

<sup>22</sup> Wilmington Police Dept., *Oath of Office and Code of Ethics* (Aug. 15, 2016), available at <https://www.wilmingtonde.gov/home/showdocument?id=9275>. For example, the WPD Mission Statement requires that “as the most visible sign of government and authority, all personnel will endeavor to represent the Department in a favorable light.”

oppression or intimidation” and “above all else...[protecting] the constitutional rights of all citizens to liberty, equality and justice.”<sup>23</sup> Furthermore, WPD Standard of Conduct 2.25 states that officers shall not conduct themselves, on or off duty, in such a manner as to reflect unfavorably on the department.<sup>24</sup> In addition, WPD policies clearly affirm the WPD’s commitment to unbiased policing and to “preventing perceptions of biased policing.”<sup>25</sup> Officer Gilmore’s racially derogatory remarks and behavior contradict the WPD’s core values and requirements, and risks interfering with its operations by eroding the community’s trust, confidence and willing cooperation with its public officers.<sup>26</sup>

Police departments across the country are now faced with the challenge of responding to the national debate over racially biased policing and police mistreatment of Black people, along with calls for greater accountability in law enforcement. Departments have responded by demonstrating their intolerance for offensive sentiment espoused by their officers: for example, the Fulton Police Department in New York terminated an officer in June after he posted a racist meme on social media.<sup>27</sup> The same week, a police dispatcher in New Jersey resigned after posting a racist comment about a Black boy at a June protest.<sup>28</sup>

We urge the Commission to seriously consider the detrimental impact of Officer Gilmore’s conduct on the Wilmington community’s trust in its public officers and on the WPD’s ability to maintain its critical partnership with residents. We are happy to meet with you to discuss the issue and assist you with this matter. You can reach our office by contacting Arusha Gordon, Associate Director of the James Byrd Jr. Center to Stop Hate at the Lawyers’ Committee for Civil Rights, at [byrdcenter@lawyerscommittee.org](mailto:byrdcenter@lawyerscommittee.org).

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<sup>23</sup> *Id.* Furthermore, the Code requires that each officer be “honest in thought and deed in both [his or her] personal and official life” and never “permit personal feelings, prejudices, [or] animosities...to influence [his or her] decisions.”

<sup>24</sup> See Wilmington Police Dept., *Professional Standards Internal Investigation*, 201A007 (June 11, 2020), available at <https://www.wilmingtonnc.gov/home/showdocument?id=12012>. WPD Standard of Conduct 2.25 also provides that “officers shall, at all times, abide by the Code of Ethics.”

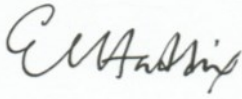
<sup>25</sup> See Wilmington Police Department, *Policy Manual*, Directive .01.03 Prohibition of Biased Based Policing, available at <https://powerdms.com/public/WILMINGTON/tree/documents/508227>. The policy “affirms the [WPD’s] commitment to unbiased policing” which includes diminishing any form of officer bias or prejudice, and particularly that against the protected classifications of race or ethnicity. *Id.*

<sup>26</sup> See e.g., Wilmington Police Dept., *Oath of Office and Code of Ethics* (Aug. 15, 2016), available at <https://www.wilmingtonnc.gov/home/showdocument?id=9275>. The WPD Mission Statement states “by being courteous, understanding, caring, and helpful, we gain the respect and willing cooperation of the citizenry,” while also “enhanc[ing] the image of the Department and increas[ing] respect for the profession.”

<sup>27</sup> See Kassadee Paulo, *Fulton Police Officer Fired Following Social Media Post Investigation*, Oswego County Today (June 1, 2020), available at <https://oswegocountytoday.com/fulton-police-officer-fired-following-social-media-post-investigation/news/fulton/>.

<sup>28</sup> See *‘Inappropriate Post’ About Protests Leaves BSCO Employee Without Job*, WWAY News (June 3, 2020), <https://www.wwaytv3.com/2020/06/03/inappropriate-post-about-protests-leaves-bcso-employee-without-job/>. See also Rachel Ettlinger, *Update: Firefighter Loses Chief Position After Racially Charged FB Posting*, Record Online (June 2, 2020), <https://www.recordonline.com/story/news/2020/06/02/update-firefighter-loses-chief-position-after-racially-charged-fb-posting/111899410/> (Chief of volunteer Washington Heights Fire Department loses chief status after comparing protestors to animals); See e.g., Jeff Smith, *Painted Post Officer Leaves Part-Time Position Following Facebook Comments*, Star Gazette (June 3, 2020), available at <https://www.stargazette.com/story/news/public-safety/2020/06/03/facebook-comments-lead-painted-post-ny-officer-resignation/3136129001/> (Police officer leaves position after posting “Shoot one...they will scatter like roaches” about Black civilians).

Sincerely,

A handwritten signature in cursive script, appearing to read "E. Haddix", written in black ink on a light-colored background.

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