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Before the Committee on the Judiciary
Phil Mendelson, Chairperson

Regarding Bill 19-567:
Prostitution-Free Zone Amendment Act of 2011

Office of the Attorney General
District of Columbia

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Good morning Chairman Mendelson, members of the Committee on the Judiciary, and staff and guests. I am Ariel Levinson-Waldman, Senior Counsel to the Attorney General for the District of Columbia. On behalf of the Executive Branch, I am pleased, along with Chief Newsham of the Metropolitan Police Department, to testify before the Committee regarding Bill 19-567. The administration supports the policy goal of reducing prostitution and the related risks in the District, and we commend the Council for focusing on ways to attack these important public safety problems. However, we have substantial concerns about the bill in its current form, as related to (1) its constitutional soundness and (2) its practical utility, if enacted.

First, Section 104 of the Omnibus Public Safety Amendment Act of 2006[1] contains provisions that raise substantial concerns under the constitutional due process principles as interpreted by the Supreme Court and courts around the country. Bill 19-567 would amend Section 104 by providing for the authorization of permanent prostitution-free zones, and in doing so, could exacerbate the constitutional concerns arising from the underlying Omnibus Act.

Under the current Omnibus Act, the Chief of Police may declare any public area in the District a prostitution-free zone for a period not to exceed 480 consecutive hours (equal to twenty consecutive, 24- hour days). While prostitution

[1] Omnibus Public Safety Amendment Act of 2006, D.C. Law 16-306 (effective April 24, 2007); D.C. Official Code § 22-2731 (2011 Supp.)

is, of course, unlawful throughout the District, the declaration of a particular geographic zone as a "prostitution-free zone" for purposes of the Omnibus Act triggers specific additional statutory authority. Under that authority, after the Chief declares a given geographic area within the District to be a prostitution-free zone, section 104(d) of the Omnibus Act makes it a crime for a person to congregate in a group of two or more people on public space within the zone, and to then fail to obey an instruction by a police officer to disperse if the officer reasonably believes that the person is congregating for the purpose of engaging in prostitution or prostitution-related offenses.[2] Previously, the Office of the Attorney General opined to this Committee in 2005 regarding the draft Omnibus Bill that "if a statute is to pass muster, it must require an intent to violate the law."[3] Nonetheless, Section 104 as enacted in the 2006 Omnibus Act, and as it currently stands, does not require as an element of the statutory offense that the defendant intend to engage in prostitution or a related offense.

Bill 19-567, if enacted, would allow prostitution-free zones for purposes of the Omnibus Act to be established for any period of time -- permanent or

[2] The Code enumerates numerous "prostitution-related offenses." These offenses include D.C. Official Code §§ 22-2701 (engaging and soliciting for prostitution); 22-2704 (abducting or enticing a child from his or her home for purposes of prostitution); 22-2705 (pandering); 22-2712 (operating a house of prostitution); 22-2713 (premises occupied for lewdness), and 22-2722 (keeping bawdy or disorderly houses).

[3] *Public Hearing on B16-247, the Omnibus Public Safety Act of 2005,B16-172 the Criminal Code Reform Commission Establishment Act of 2005, B16-130 the Criminal Code Modernization Amendment Act of 2005 Before the District of Columbia Committee on the Judiciary*, at 36 (May 31, 2005) (testimony of Robert J. Spagnoletti, Attorney General, District of Columbia).

temporary -- if the Chief finds, among other things, that there has been a disproportionately high occurrence of prostitution-related activity in the proposed zone within the preceding twelve months.[4] Further, under the bill, the law would continue to make it a crime for people to congregate in a group of two or more on public space within the declared prostitution-free zone – whether permanent or temporary – and to then fail to obey an instruction to disperse if the officer reasonably believes that the person is congregating for the purpose of engaging in prostitution or prostitution-related offenses. Under the bill, Section 104 would continue not to contain intent as an element of the offense.

The bill's lack of an affirmative intent requirement raises substantial due process concerns for Section 104 as it would stand after the bill, if left in its current form, was enacted. Many cities have enacted similar statutes that criminalize loitering for a variety of illegal purposes, usually drug activity or prostitution – and these laws have produced a substantial body of litigation and resulting judicial decisions that provide guidance on the governing legal rules likely to apply to any judicial review of the bill if challenged in court. Under the governing

[4] Bill 19-567 provides that other criteria the Chief may consider include (1) objective evidence or verifiable information that shows that disproportionately high incidence of prostitution or prostitution-related offenses are occurring on public space or public property within the proposed permanent prostitution-free zone; and (2) any other verifiable information from which the Chief may ascertain whether the public health or safety is endangered by prostitution or prostitution-related offenses in the prostitution-free zone.

constitutional principles of due process,[5] the key question is whether the ordinance gives sufficient "notice to citizens who wish to use the public streets" of what is unlawful under the ordinance.[6] Where a statute has prohibited loitering in a manner suggesting a purpose to engage in a particular type of illegal activity, but *without* specifying as an element of the crime that the defendant have intent to engage in a specific criminal act, such as solicitation of prostitution, courts have generally held the statute to be unconstitutionally vague under due process principles. Courts have held anti-loitering statutes that lack an intent element of the offense invalid even when the statute contained specific factors or conduct to be considered by the police officer in determining whether the person exhibited the requisite illegal purpose.[7] These rulings have been based on the reasoning that unless specific conduct is prohibited, a person occupying public space would have no basis for knowing what conduct in addition to the loitering itself, which, without more, has long been recognized as a constitutionally protected activity, is prohibited by law. The result of such a statute would be to make an individual

[5] Although the cases applying due process have generally applied the due process clause of the Fourteenth Amendment, the same due process standards would apply through the Fifth Amendment to the District. "Because the District of Columbia is a political entity created by the federal government, it is subject to the Fifth Amendment and not the Fourteenth, which applies to the States." *Molina-Aviles v. Dist. of Columbia*, 10-CV-953 RMC, 2011 WL 5517044, at *4 n.8 (D.D.C. Nov. 14, 2011).

[6] *City of Chicago v. Morales*, 527 U.S. 41, 64 (1999).

[7] *See NAACP* v. *City of Annapolis*, 133 F. Supp. 2d 795, 808 (D. Md. 2001) ("[A]nti-loitering ordinances that do not contain a mens rea element have been invalidated as unconstitutionally vague"); *Johnson v. Athens-Clarke County*, 529 S.E. 2d 613 (Ga. 2000).

subject to arrest without notice for engaging in legal behavior without any harmful intent.[8] In addition, courts have found statutes to be overbroad where a person's otherwise lawful conduct, such as beckoning to cars, can determine whether an illegal purpose has been established.[9]

In contrast, courts applying the vagueness doctrine under due process principles have generally *upheld* loitering statutes that *included* intent to engage in the statutorily prescribed illegal conduct, *e.g.*, drug activity or prostitution, as an element of the crime of loitering.[10] Courts have found that vagueness and overbreadth concerns do not arise in this situation because the person arrested knows that he or she intends to commit a crime and the police, and ultimately the government prosecutor, are required to establish beyond a reasonable doubt to a trier of fact that the person arrested loitered with the intent to violate the law. For example, a federal judge explained, in striking down under due process principles a City of Annapolis anti-loitering ordinance, that by leaving the determination to the discretion of the police officer without the check of review by the finder of fact in

[8] *See Akron* v. *Rowland*, 618 N.B. 2d 138, 145-46 (Oh. 1993).

[9] *See Louisiana v. Muschkat,* 706 So.2d 429,434-36 (La. 1998)

[10] *See City of Tacoma* v. *Luvene*, 827 P.2d.1374, 1383-85 (Wash. 2002); *City of Chicago v. Powell*, 735 N.E. 2d 122, 129-30 (Ill. App. 2000); *People* v. *Ellison*, 80 Cal. Rptr. 2d 120, 124-25 (Cal. Ct. App. 1998).

court, the ordinance impermissibly "entrust[ed] lawmaking to the moment-to-moment judgment of the policeman on the beat."[11]

As Chief Newsham noted in his testimony, MPD has not to date made any arrests for failure to disperse under the Omnibus Act of 2006. The Act, and specifically Section 104, are therefore untested in the courts. Applying the due process principles just outlined, we recommend that if the Council elects to go forward with Bill 19-567 to amend Section 104, the bill should be amended to make explicit that an element of the criminal offense is the intent to commit prostitution or a prostitution-related offense, which would place the bill on sounder constitutional footing.

Second, if the Council elects to go forward with the bill and, for purposes of constitutional soundness, includes intent as element of the statute, this will leave practical hurdles to successfully prosecuting under Section 104. It should be recognized that the standard of proof required in the District to show intent to engage in prostitution is high, and may be hard to prove in many cases. The District of Columbia Court of Appeals has made clear that the evidentiary standard is high for showing intent to engage in prostitution. For example, in the *Ford* decision, three women were observed by officers on the street approaching male pedestrians and motorists and talking to them in a way that, according to the

[11] *NAACP*, 133 F.Supp.2d at 808 (internal quotations omitted).

officers, indicated to them that the women were prostitutes, and the officers then arrested them for solicitation.[12] The court of appeals there overturned the convictions because the bill required "objective conduct evincing that the observed activity is for the purpose of prostitution", and because there was no evidence that the women had mentioned anything about a financial transaction. The court stated that it would likely be unconstitutional "to arrest persons simply for repeatedly beckoning or stopping motor vehicles or pedestrians in areas which are notorious for drug sales or prostitution"[13] Thus, the Council should recognize that it will be relatively difficult in any criminal prosecutions under Section 104 to successfully show requisite intent, assuming, as would be prudent for purposes of constitutionality, the intent requirement is added. In light of this evidentiary hurdle in any prosecution under the Act, the Council may wish to revisit whether further legislative focus on the prostitution-free zones is warranted. Indeed, data from MPD suggests it may not be necessary. As Chief Newsham indicated, average annual calls for service for prostitution have been more than 60% lower in the past 3 years than the average for the 2005-2006 period when the Omnibus Bill was

[12] See *Ford v. United States*., 533 A.2d 617 (D.C. 1987).

[13] *Id*. at 623.

before the Council, and very substantial penalties for prostitution-related offenses are already established and in place under current law.[14]

Thank you for the opportunity to discuss this legislation. I would be pleased to answer any questions you may have.

[14] For example, a pimp or brothel-keeper now faces a maximum penalty of 15 years if he compels an adult in prostitution and 20 years if he prostitutes a younger person. See D.C. Official Code § §22-2704, 22-2706. In addition, if the victim is under 16 years of age, he might also be charged with first degree child sexual abuse for causing the child to engage in a sexual act. If an adult victim is forced to engage in a sexual act, he might also be charged with first degree sexual abuse. Both of these offenses carry a maximum penalty of 30 year. With aggravating circumstances, the maximum could be up to life without release.