Testimony on behalf of the
American Civil Liberties Union Of the National Capital Area

by

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before the
Committee on the Judiciary

of the
Council of the District of Columbia

on
Bill 19-567
the "Prostitution Free Zone Amendment Act of 2011"

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The ACLU of the National Capital Area testified before this Committee in 2005, identifying significant constitutional flaws in the original prostitution-free zone (PFZ) law.[1] Those constitutional concerns have not gone away. In fact, an increasing number of jurisdictions have held that zoning ordinances like this one are unconstitutional for the reasons we cited in 2005. The proposed amendment fails to correct the defects; to the contrary, it makes the law even more subject to constitutional attack. We urge the Committee to reject the proposed amendment and to reconsider the PFZ approach to combating the problem of prostitution-related loitering.

We begin with a few basic propositions. The PFZ statute is a loitering statute. It authorizes the Chief of Police to designate zones in the District, up to one million square feet in size, where loitering will be more strictly regulated for up to two weeks at a time. Importantly, however, loitering itself is constitutionally protected. Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). Loitering for the purpose of committing a crime is not. Thus, a state may outlaw loitering only if it is being done with the specific intent to commit an illegal act, such as the sale of regulated drugs or sex.[2]

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[1] *See* attached testimony by Stephen M. Block on Bill 16-247, "Omnibus Public Safety Act of 2005," June 20, 2005. The current law is codified at D.C. Code § 22-2731.

[2] *See*, *e.g.*, People v. Smith, 44 N.Y.2d 613 (N.Y. Ct. App. 1978); People v. Pulliam, 62 Cal.App. 4th 1430 (Cal. Ct. App. 4th Dist. 1998); Arizona v. Savio,

The Fourth Amendment requires that an arrest for such an offense – like an arrest for any offense – must be supported by probable cause to believe that a crime has been committed. Devenpeck v. Alford, 543 U.S. 146 (2004); Terry v. Ohio, 392 U.S. 1, 26-27 (1968).

Further, a conviction for the underlying crime of solicitation can only be obtained with proof beyond a reasonable doubt. In Ford v. United States, 533 A.2d 617 (DC 1987), the District of Columbia Court of Appeals held that the evidence was insufficient to support a conviction for solicitation because the prosecution presented no evidence that the defendants offered sexual services for financial consideration; at most, the evidence established that the defendants "looked and perhaps acted like prostitutes" by beckoning to male motorists and engaging in conversation. Id. at 625.[3]

Like some other jurisdictions, however, the District of Columbia has sought to evade the constitutional requirement of probable cause by criminalizing the act of loitering under "circumstances" where an officer suspects – but does not have probable cause to believe – that criminal activity may be afoot. The problem with cutting out probable cause and substituting an officer's assessment of the "circumstances" is that this shortcut will inevitably create a law that is unconstitutionally vague. As we noted in our earlier testimony, this is the fundamental flaw in the PFZ ordinance.

A law is unconstitutionally vague if it leaves too much discretion in the hands of individual officers on the beat to enforce the law in an arbitrary and discriminatory fashion. City of Chicago v. Morales, 527 U.S. 41 (1999). That is the case here. A person may be arrested, charged, and convicted of violating the PFZ law if: (1) the person is congregating within the PFZ with one or more other persons; (2) the officer "reasonably believes" that the person is congregating for

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924 P.2d 491 (Az. Ct. App. 1996) (Phoenix ordinance prohibiting "manifesting an intent to solicit prostitution" was not vague or overbroad because it required a showing of specific intent and probable cause for arrest); City of Tacoma v. Luvene, 827 P.2d 1374 (Wash. 1992) (finding a similar ordinance to be constitutional against vagueness and overbreadth challenges, but only by importing specific intent language, which did not exist in the statute itself, and by requiring specific, overt acts).

Even if the law contains a specific intent requirement, however, there is a danger that it may be deemed unconstitutionally overbroad, because it prohibits and chills a substantial amount of legitimate activity in relation to its legitimate sweep. *See* Northern Virginia Chapter of the ACLU v. City of Alexandria, 747 F.Supp. 324 (E.D. Va. 1990).

[3] The court did not address the defendants' constitutional arguments because it ordered a discharge on evidentiary grounds. Id. at 619 n.2.

the purpose of engaging in prostitution or prostitution-related offenses; (3) the officer orders the person to disperse; and (4) the person fails to do so, either by remaining with the other congregants within the PFZ or by "reassembl[ing]" with them within the PFZ during the period of the PFZ. D.C. Code § 22-2731(d), (e).

The primary problem with the existing law is with part (2), allowing an arrest based only on an officer's "reasonabl[e] belie[f]" that a person is congregating for purposes of prostitution. The law includes a list of factors to help guide the officer, but those factors are not binding; the officer may order a person to disperse, and arrest him or her for failing to do so, based on "the totality of the circumstances" – in other words, whatever circumstances the officer finds relevant.[4]

Federal and state courts throughout the country, including the United States Supreme Court, have held that laws such as this are unconstitutionally vague. The list includes:

City of Chicago v. Morales, 527 U.S. 41 (1999) (Chicago gang-loitering statute held unconstitutionally vague because it gave too much discretion to officers to determine whether someone is loitering "for no apparent purpose");

Johnson v. Carson, 569 F.Supp. 2d 974 (M.D. Fla. 1983) (first federal case to invalidate as vague an ordinance barring "loitering under circumstances manifesting a purpose of prostitution," because the law leaves too much discretion in officers to decide whether those circumstances exist);

NAACP of Anne Arundel County v. City of Annapolis, 133 F. Supp. 2d 795 (D. Md. 2001) (striking down as vague a drug-free-zone ordinance which criminalized the failure to move on after a person is seen loitering under circumstances manifesting the intent to commit drug crimes). Like the D.C. PFZ statute, the Annapolis statute purported to give direction to police officers by enumerating certain types of behaviors that could be used to justify suspicion, like making certain hand gestures. The court noted, however, that these definitions were themselves vague, and at any rate were merely part of a non-exhaustive list, leaving full discretion with the officer.

[4] Many of the factors listed in the law are themselves invitations to arbitrary and discriminatory enforcement, including targeting a person based only on status. For example, one factor is "an officer's knowledge that the person has been convicted of a prostitution-related offense in any jurisdiction." D.C. Code § 22-2731(d)(2)(D). Thus, if an officer happens to know that a person has been convicted of a prostitution-related crime at any time in the past, the officer might feel authorized to order that person to disperse from the zone even if he or she is simply speaking with a friend on the street.

City of Alliance v. Carbone, 181 Ohio App.3d 500 (Ohio Ct. App. 2009) (striking down as vague an ordinance barring "loitering in or near toilet buildings" because it left undue discretion in the hands of officers to determine what constitutes loitering).

Silvar v. County of Clark, 122 Nev. 289 (Nev. 2006) (striking down as vague an ordinance barring loitering under circumstances manifesting a purpose of committing or soliciting prostitution because it lacked adequate guidelines for law enforcement);

Commonwealth v. Asamoah, 809 A.2d 943 (Pa. Super. 2002) (striking down as vague a City of York ordinance barring loitering under circumstances indicating an intent or desire to enter into a drug transaction, because police have unfettered discretion to determine whether those circumstances are present; the law criminalized failure to disperse after being instructed to move on);

Johnson v. Athens-Clarke County, 272 Ga. 384 (Ga. 2000) (ordinance prohibiting loitering "under circumstances which cause a justifiable and reasonable alarm or immediate concern that such person is involved in unlawful drug activity" was unconstitutionally vague because a reasonable person would not know whether his conduct was criminal, and because it encouraged arbitrary enforcement);

Akron v. Rowland, 618 N.E. 2d 138 (Ohio 1993) striking down as vague an ordinance banning "loitering under circumstances manifesting purpose to engage in drug-related activity," because it did not require specific intent and left unfettered discretion to police officer to determine whether the circumstances "manifested" purpose of engaging in drug activity);

Coleman v. City of Richmond, 364 S.E. 2d 239 (Va. App. 1988) (striking down as vague an ordinance banning "loitering under circumstances manifesting a purpose of engaging in prostitution," because it gave officers unfettered discretion to determine whether the circumstances manifested that purpose); and

Profit v. City of Tulsa, 617 P.2d 250 (Okla. Crim. App. 1980) (law prohibiting loitering "under circumstances manifesting the purpose" of prostitution was unconstitutionally vague; including a person's status as a known prostitute did not cure the defect because a person's status could be used as an element of the offense, even if he or she had no intent to commit prostitution).

We recognize that the PFZ law criminalizes a person's failure to comply with a dispersal order, rather than the simple act of loitering. But this is a distinction without a meaningful difference. The key United States Supreme Court case, Morales, concerned a Chicago ordinance where the criminal act was likewise a failure to disperse. *See* 527 U.S. at 47-48**.** The Court looked to the constitutional problems with the underlying dispersal order when it determined that the ordinance was unconstitutionally vague.

The MPD's internal rules for enforcement of the PFZ law (Special Order 6-14, effective August 8, 2006) do not cure these problems. The MPD rules provide that a person will not be ordered to disperse unless the officer has "reasonable suspicion," equivalent to that found in a Terry stop, to believe that a person is engaged in prostitution-related activities. Id. at ¶ V(B)(1). Terry, of course, provides that officers may briefly detain a person for investigative purposes if they have reasonable suspicion to believe that criminal activity is afoot. In our view, this is exactly what officers should do when they have suspicion: investigate further. Here, however, the PFZ law allows officers to skip the investigation. Instead, officers are permitted to order citizens to stay away from others in their group for the duration of the zone, under penalty of arrest. But the law is perfectly clear that the grounds authorizing a Terry stop *do not* authorize an arrest. Terry, 392 U.S. at 27. Individuals cannot be arrested for their status, their presence in a public place, or even merely suspicious behavior. Rowland, 67 Ohio St. 3d at 387-388, citing Brown v. Texas, 443 U.S. 47, 51 (1979). It follows that individuals may not be arrested for failing to comply with a dispersal order founded only on suspicion, or "reasonabl[e] belie[f]."

The Special Order notes that a person should not be targeted with a dispersal order if he or she is simply engaging in constitutionally protected activities, such as leafleting and conversing with friends. See Special Order 6-14 at ¶ V(H). The Special Order also notes that if a small number of people in a group are congregating for prostitution while innocent bystanders are nearby, the bystanders should not be targeted for dispersal. The fact that the Special Order needs to warn officers that the PFZ statute does not authorize such flagrantly unconstitutional arrests is strong evidence of the statute's vagueness. At the end of the day, however, the officer on the beat retains full discretion to determine the circumstances for dispersal, to determine who is subject to the order, and to arrest people for failing to comply.

When laws give arbitrary authority to police officers, there is a significant danger that this authority will be used to disproportionately target the poor, the homeless, racial and ethnic minorities, and LGBT populations. Portland, for example, recently had in place both a drug-free zone ordinance and a prostitution-free zone ordinance. After a comprehensive study showed that the drug-free zone ordinance significantly over-targeted racial minorities, the city rescinded both laws in favor of other more rehabilitative means to combat these problems.[5] In doing so, the mayor of Portland noted that the zones served only

[5] Portland Tribune, "Mayor Potter allows drug and prostitution free zones to expire," Sep. 27, 2007; for the report itself, see http://www.cdri.com/library/CDRI_DFZ_Report_Sept_2007.pdf

to move the problem elsewhere.[6] But even aside from discriminatory enforcement, the District of Columbia should not have a law authorizing arrests on nothing more than suspicion.

Additionally, the statute's definition of dispersal creates serious overbreadth problems. The law provides that "'Disperse' means to depart from the designated prostitution free zone and not to reassemble within the prostitution free zone with anyone from the group ordered to depart for the duration of the zone." D.C. Code § 22-2731(a)(2).

The word "reassemble" is not specifically defined, and thus apparently means simply being in the presence of the other person(s), including engaging in larger group activities where the other person(s) happen to be present. A person is subject to arrest merely for reassembling, without any further warning or any showing of criminal activity, all based on the earlier "reasonabl[e] belie[f]" that the person was at one point congregating with the other(s) within the PFZ for purposes of prostitution. It is obvious that the law authorizes arrest for a breathtaking amount of legitimate activity.

Bill 19-567 would greatly exacerbate these problems

The PFZ Amendment Act of 2011 would exacerbate these deficiencies to a truly shocking extent by authorizing the Chief of Police to "declare any public area a permanent prostitution free zone for any period of time." The bill characterizes such PFZ's of indefinite duration as "permanent," making clear the sponsors' intent that such zones may last forever.

Under the proposed amendment, one moment of police suspicion may subject a person to the threat of immediate arrest, for the rest of his or her life, if he or she is seen in the presence of the same other person or persons within the permanent PFZ. PFZ's are not small – as we have noted, they may be as large as one million square feet – and the statute contains no limit on how many there may be. They include areas where people live, work, shop and recreate, and with the introduction of "permanent" PFZ's they may soon cover large areas of the District simultaneously. This would be a law enforcement monstrosity, and a

[6] http://news.opb.org/article/portland-considers-new-ways-deal-prostitution-problem/; http://eastpdxnews.com/fire-and-police/street-sex-part-3-life-after-prostitution-free-zones/. We also note that last year, an alderman in Chicago proposed an ordinance to create PFZ's in that city, but the proposal was ultimately removed from the agenda with the approval of Mayor Emanuel's office because leaders there realized that PFZ's were not an effective solution.

constitutional monstrosity as well.[7] We therefore urge the Committee to reject this bill.

We also urge the Committee to re-examine the Council's approach to prostitution-related loitering.[8] We have propounded a Freedom of Information Act request to MPD for documents related to PFZ's. Our request sought any statistics on how PFZ's are enforced, and any reports showing whether or not PFZ's are effective in reducing prostitution. We received a voluminous response, but nothing on those topics. We can only conclude that the MPD has no evidence that the PFZ law, in effect since April of 2007, has actually been effective in combating prostitution or prostitution-related loitering. Perhaps the law has been effective in moving it around a bit from place to place, but that simply makes one area happy at the expense of its neighbors. Indeed, a recent public radio report indicates that PFZ's in Ward 2 have served only to drive sex workers into Ward 7.[9]

The ACLU has long favored the decriminalization of prostitution. With decriminalization, prostitution could be much more effectively policed regarding health, safety and working conditions, just as tobacco can be more effectively regulated than marijuana. Decriminalization would also enable the government for the first time to provide effective services to those who find themselves trapped in street-level prostitution, and to take effective action to reduce the supply for this unsavory activity. After literally centuries of ineffective efforts to stamp it out through criminal sanctions, it is time to try something new.

We appreciate the Committee's consideration of our comments.

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[7] To the extent that the MPD enforces the law in a manner that gives the impression that a person cannot re-enter a zone or congregate with anyone in the zone after being ordered to disperse, such enforcement would chill a very substantial additional amount of protected activity.

[8] Under existing law, if a person has been convicted of soliciting for prostitution, the court may impose a wide range of conditions, including "an order to stay away from the area within which the offense or offenses occurred, submission to medical and mental examination, diagnosis and treatment by proper public health and welfare authorities, and such other terms and conditions as the court may deem best for the protection of the community and the punishment, control, and rehabilitation of the defendant." D.C. Code § 22-2703 (emphasis added). Thus, the law already provides for a means of keeping convicted prostitutes away from a given area.

[9] *See* http://wamu.org/programs/metro_connection/12/01/13/dc_cracks_down_on_prostitution