COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON THE JUDICIARY AND PUBLIC SAFETY
1350 Pennsylvania Avenue, NW, Washington, D.C. 20004
Agenda and Witness List

COUNCILMEMBER TOMMY WELLS, CHAIRPERSON
COMMITTEE ON THE JUDICIARY AND PUBLIC SAFETY

ANNOUNCES A PUBLIC HEARING ON

BILL 20-793, "CIVIL MARRIAGE DISSOLUTION EQUALITY CLARIFICATION AMENDMENT ACT OF 2014"

BILL 20-760, "REPEAL OF PROSTITUTION FREE ZONES AMENDMENT ACT OF 2014"

and

BILL 20-468, "ANTI-SHACKLING OF INCARCERATED PREGNANT WOMEN ACT OF 2013"

Wednesday, July 9, 2014
11 a.m., Room 412, John A. Wilson Building
1350 Pennsylvania Avenue, NW, Washington, D.C. 20004

Agenda and Witness List

A. CALL TO ORDER

B. OPENING REMARKS

C. BILL 20-793 "CIVIL MARRIAGE DISSOLUTION EQUALITY CLARIFICATION AMENDMENT ACT OF 2014"

PUBLIC WITNESSES

1. Michael Sindram (absent)    DC Justice for All/ Disabled Veteran
2. Richard Rosendall           Secretary, Gay and Lesbian Activists Alliance (GLAA)
3. Nancy D. Polikoff           Professor of Law, American University Washington College of Law

GOVERNMENT WITNESS

1. Phillip Husband             General Counsel, Department of Health
D. BILL 20-760 “REPEAL OF PROSTITUTION FREE ZONES AMENDMENT ACT OF 2014”

PUBLIC WITNESSES

1. Michael Sindram  
   DC Justice for All/ Disabled Veteran
2. Richard Rosendall  
   Secretary, Gay and Lesbian Activists Alliance (GLAA)
3. Maneka Sinha  
   Supervisor, Trial Attorney, Public Defender Service
4. Dr. Elijah Edelman (absent)  
   DC Trans Coalition
5. Kishan Putta  
   Advisory Neighborhood Commissioner (2B-04)
6. Cyndee Clay  
   Executive Director, HIPS
7. Elisabeth Fernandez-Kimmel  
   HIPS
8. Debbie McMillian (absent)  
   Harm Reduction Service Manager, HIPS
9. Mikelina Belaineh  
   Law Fellow, ACLU of the Nation’s Capital
10. Martin Moulton  
    Public Witness

GOVERNMENT WITNESS

1. Andrew Fois  
   Deputy Attorney General, Public Safety Division  
   Office of the Attorney General

E. BILL 20-468 "ANTI-SHACKLING OF INCARCERATED PREGNANT WOMEN ACT OF 2013"

PUBLIC WITNESSES

1. Michael Sindram (absent)  
   DC Justice for All/ Disabled Veteran
2. Maneka Sinha  
   Supervisor, Trial Attorney, Public Defender Service
3. Sandy Henderson  
   Staff Attorney, Special Litigation Division, PDS
4. Emily Harrison  
   Law Fellow, ACLU of the Nation’s Capital
5. Carolyn Beth Sufrin, MD, PhD  
   Assistant Professor, University of California, San Francisco
6. Rebecca Turner (absent)  
   D.C. Prisoners’ Project, Washington Lawyers’ Committee for Civil Rights and Urban Affairs
7. Peggy Ye  
   American Congress of Obstetricians and Gynecologists

GOVERNMENT WITNESS

1. Thomas Faust  
   Department of Corrections
COUNCILMEMBER TOMMY WELLS, CHAIRPERSON
COMMITTEE ON THE JUDICIARY AND PUBLIC SAFETY

ANNOUNCES A PUBLIC HEARING ON

BILL 20-793, “CIVIL MARRIAGE DISSOLUTION EQUALITY CLARIFICATION AMENDMENT ACT OF 2014”
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Wednesday, July 9, 2014
11 a.m.
John A. Wilson Building, Room 412
1350 Pennsylvania Avenue, NW, Washington, D.C. 20004

Councilmember Tommy Wells, Chairperson of the Committee on the Judiciary and Public Safety, announces a public hearing on July 9, 2014, beginning at 11 a.m. in Room 412 of the John A. Wilson Building. The purpose of this public hearing is to receive testimony on Bills 20-793, 20-760, and 20-468.

Bill 20-793 would amend D.C. Official Code § 16-902 to clarify that the mechanism for the dissolution of marriage authorized under that section includes divorce and legal separation. The bill may be viewed online at http://lims.dccouncil.us/Legislation/B20-0793.

Bill 20-760 would repeal the authority of the Chief of Police to declare any public area a Prostitution Free Zone, and all accompanying provisions. The bill may be viewed online at http://lims.dccouncil.us/Legislation/B20-0760.

Bill 20-468 would establish that no women or youth in the custody of the Department of Corrections, Halfway Houses, or lock-ups may be shackled while pregnant or during labor, transport to a medical facility for treatment related to birth, delivery, or post-partum recovery up to six weeks. The bill may be viewed online at http://lims.dccouncil.us/Legislation/B20-0468.

The Committee invites the public to testify. Individuals and representatives of organizations who wish to testify should contact Nicole Goines at 724-7808 or ngoines@dccouncil.us, and furnish their name, address, telephone number, and organizational affiliation, if any, by 5 p.m. on Monday, July 7, 2014. Witnesses should bring 15 copies of their testimony. Testimony may be limited to 3 minutes. For those unable to testify at the public hearing, written statements are encouraged and will be made part of the official record. Written statements should be submitted by 5 p.m. on Tuesday, July 22, 2014 to Ms. Goines, Committee on the Judiciary and Public Safety, Room 109, 1350 Pennsylvania Ave., NW, Washington, D.C., 20004, or via email at ngoines@dccouncil.us.
Testimony on Bill 20-793,
"Civil Marriage Dissolution Equality Clarification Amendment Act of 2014"
Delivered before the Committee on Judiciary and Public Safety
July 9, 2014

Good morning, Chairman Wells. I am Saul Cruz, Secretary of the Gay and Lesbian Activists Alliance, which has fought for LGBT equality in the District since 1971.

Bill 20-793, the "Civil Marriage Dissolution Equality Clarification Amendment Act of 2014," amends the D.C. Code to clarify that the mechanism for the dissolution of marriage includes divorce and legal separation. We thank Chairman Mendelson for introducing it. We support the bill with a recommended change.

We agree with Professor Nancy Polikoff that the bill should be amended to make it clear that the court can decide matters of property division and spousal support. As she explained in an email on May 7, "[F]or a same-sex couple married in DC but domiciled in a non-recognition state, there is no other place that will determine a division of property and an award of spousal support if appropriate because those laws apply only to married couples and the state of domicile does not consider them married."

If District judges think they cannot divide property or award spousal support in such cases, it is best to be explicit. We will leave the amendatory language to Professor Polikoff. We thank her for lending her expertise, which has been invaluable in helping the District navigate its journey to equality for same-sex couples and their families. The greatest challenge, as in this case, has stemmed from the confusion and gaps in legal protection caused by differences in family law from state to state. We cannot be governed by speculation as to when the U.S. Supreme Court may end all such confusion by establishing marriage equality nationwide. So let us clarify our law this year.

Thank you.
Testimony by Nancy D. Polikoff on Bill 20-0793

"CIVIL MARRIAGE DISSOLUTION EQUALITY CLARIFICATION AMENDMENT ACT OF 2014"

D.C. City Council Committee on Judiciary and Public Safety
Wednesday, July 9, 2014

Thank you for the opportunity to present testimony in favor of Bill 20-0793, the Civil Marriage Dissolution Equality Clarification Amendment Act of 2014.

My name is Nancy Polikoff. I am Professor of Law at American University Washington College of Law, where I have taught Family Law for more than 25 years. I also teach a course on Children of LGBT Parents. I have been a D.C. resident for more than 40 years, and a member of the District of Columbia Bar since 1975. I have devoted the bulk of my career to the legal issues facing lesbian, gay, bisexual, and transgender families, and especially LGBT parents. Over the past several years I have worked with this Committee on numerous pieces of legislation affecting LGBT families, including the Domestic Partnership Judicial Determination of Parentage Act of 2008.

This bill solves a problem that surfaced when a Judge of the Superior Court of the District of Columbia denied a legal separation to a same-sex couple, married in the District of Columbia, neither of whom resided in a jurisdiction that would permit them to dissolve their relationship. That judge believed that the absence of explicit inclusion of legal separation in §16-902(b) indicated that the Council did not intend an action for legal separation to lie in the District of Columbia unless the residency requirements of §16-902 were satisfied. Enactment of Bill 20-0973 will ensure that actions for both divorce and legal separation may be brought in the District when the criteria in §16-902(b) are established.

I would ask the Council, in addition, to address two other areas of concern. §16-902(b)(3) states that "any action for divorce as provided in this subsection shall be adjudicated in accordance with the laws of the District of Columbia."
Although the laws of the District of Columbia include laws governing alimony and assignment and equitable distribution of property, both permanently and pendent lite, at least one Superior Court judge has questioned the Court’s authority to address those issues in the context of a divorce of a same-sex couple when neither resides in the District of Columbia.

Any such ruling would create a grave problem for the divorcing couple. Awards of alimony and equitable distribution of property require an underlying action somewhere for divorce or legal separation. When neither party to the marriage resides in a state that recognizes their marriage, then neither party resides in a state that will award alimony or equitably distribute property.

In keeping with the rule applied to all divorces, a court may determine matters of alimony and property distribution when there is personal jurisdiction over the parties. A party may consent to personal jurisdiction. This takes care of the plaintiff and any consenting defendant. When an out-of-state defendant does not consent to personal jurisdiction, a court must find that s/he has sufficient “minimum contacts” with the District of Columbia such that it does not offend “traditional notions of fair play and substantial justice” to require her/him to defend the specific action in the District of Columbia. Entering the District of Columbia specifically to benefit from the District of Columbia law allowing two people of the same gender to marry is such a contact. It demonstrates that both individuals have “purposefully availed” themselves of the law of the District of Columbia. It actually offends notions of fair play and substantial justice to allow an individual to marry here and then take advantage of living in a state that does not recognize the marriage to escape the financial consequences of that marriage.

In order to clarify the above point, I urge the Council to amend §16-902(b)(3) to read as follows:

(3) Any action for divorce or legal separation as provided by this subsection, including any accompanying petition for alimony, assignment and equitable distribution of property, or pendent lite relief, shall be adjudicated in accordance with the laws of the District of Columbia.

The final matter on which I hope the Council will act concerns the custody of children of the marriage. Jurisdiction over child custody actions are covered in
the District of Columbia and all states by the UCCJEA, the Uniform Child-Custody Jurisdiction and Enforcement Act (§16-4602.01 et seq). There is always some place that can hear a child custody dispute, regardless of that jurisdiction’s ability to dissolve the marriage or award alimony or divide property. But requiring the parties to proceed in two different jurisdictions to wind up the matters involved in dissolving their marriage can pose a significant burden. In addition, states that do not recognize a same-sex marriage may also have laws that deny a child of that marriage the benefit of having two legally recognized parents.

Without changing current custody jurisdiction law, which I would not support, the Council can play a role in facilitating the ability of the Superior Court to issues orders for custody and visitation by simply restating in §16-902 one portion of the existing law in the DC UCCJEA.

One basis for the District’s jurisdiction to make an initial child custody determination is when those courts that would otherwise have jurisdiction, typically the state where the child has lived for the preceding six months (the “home state”), decline to exercise jurisdiction on the ground that a court of the District is the more appropriate forum. This is contained in §16-4602.01(a)(3). At a meeting I attended earlier this year, a Wisconsin family court judge pointed out to me that a judge whose hands are tied, because the state in which she sits does not recognize that the child of a same-sex couple has two parents, may be willing to rule that the District is the more appropriate jurisdiction to determine custody and visitation because the child can be more fully protected under D.C. law.

D.C. Code §16-902 is an appropriate statute in which to signal to attorneys representing parents who reside outside the District that the UCCJEA allows the Superior Court to make a child-custody determination if a judge in the child’s “home state” issues an order declining to exercise jurisdiction. Again I want to stress that I am not suggesting a change to the jurisdictional requirements for child custody determinations, simply a restatement of existing law in the portion of the Code governing divorces of same-sex couples who married in the District of Columbia but reside elsewhere.

I recommend that §16-902 be amended to include a new §16-902(b)(4) which would read as follows:
Any action for divorce or legal separation as provided by this subsection may include a petition for a child-custody determination when consistent with §16-4602.01 or §16-4602.03, including when all courts having jurisdiction under paragraph (1) or (2) of §16-4602.01 (a) have declined to exercise jurisdiction on the ground that a court of the District is the more appropriate forum to determine custody of the child. Any such petition shall be adjudicated in accordance with the laws of the District of Columbia.

Thank you for the opportunity to testify on this important legislation.

Nancy D. Polikoff
Professor of Law
American University
Washington College of Law
4801 Massachusetts Ave NW
Washington, DC 20016
202-274-4232
202-274-4130 (fax)
npoliko@wcl.american.edu
Statement of Phillip Husband  
General Counsel, Department of Health  

Before the  
Committee on the Judiciary and Public Safety  
Tommy Wells, Chairperson  

Bill 20-793, Civil Marriage Dissolution Equality Clarification Amendment Act of 2014  

Office of the Attorney General for the District of Columbia  

July 9, 2014  

Room 412  
John A. Wilson Building  
1350 Pennsylvania Avenue, NW  
Washington, D.C.
Good morning Chairperson Wells, members of the Committee on the Judiciary and Public Safety, and staff. I am Phillip Husband, the General Counsel for the Department on Health. I am pleased to testify on behalf of the Executive in support of Bill 20-793, the Civil Marriage Dissolution Equality Clarification Amendment Act of 2014. Bill 20-793 is technical in nature and would amend section 16-902(b) of the District of Columbia Official Code to clarify that the mechanism for the dissolution of marriage authorized under that section includes divorce and legal separation.

In 2012, the Council passed, and the Mayor signed, Bill 19-526, the Civil Marriage Dissolution Equality Amendment Act of 2012. This bill fixed a gap in the law in order to provide same-sex couples equal access to the legal process for dissolving a marriage. Same-sex couples cannot obtain a divorce in states that do not recognize same-sex marriages – if the marriage is not recognized, then it cannot be dissolved. These same-sex couples must go to the jurisdiction in which they were married in order to obtain a divorce. However, many jurisdictions have a residency requirement for obtaining a divorce (e.g. six-month requirement) and this can create a hardship for the couple.

Bill 19-526 remedied this problem by providing for the dissolution of marriage that was performed in the District of Columbia but the parties to which reside in another jurisdiction that does not recognize the marriage or otherwise will
not maintain an action to dissolve the marriage. Since Bill 19-526 became law, however, there have been media accounts of same-sex couples coming to the District and being able to obtain absolute divorces only; they cannot obtain legal separations because of how judges are interpreting the 2012 law.¹ For example, in a 2013 D.C. Superior Court Order of Dismissal, Judge Irving wrote in part “...[H]ad the Council of the District of Columbia intended for this Court to exercise jurisdiction of legal separations, it would have specifically provided for such. As such, this Court must dismiss this action on jurisdictional grounds.” Couples may choose legal separation over divorce for any number of personal reasons. Bill 20-793 makes clear that this option is available to same-sex couples as well.

Thank you for the opportunity to testify and offer the Executive’s comments on Bill 20-793. I would be pleased to answer any questions you may have.

Good morning, Chairman Wells. I am Saul Cruz, Secretary of the Gay and Lesbian Activists Alliance, which has fought for LGBT equality in the District since 1971.

GLAA strongly supports repeal of Prostitution Free Zones, as we testified in 2012. [1] We therefore thank Councilmembers David Grosso, David Catania, and Mary Cheh for introducing Bill 20-760, the "Repeal of Prostitution Free Zones Amendment Act of 2014." We urge this committee to pass it.

The use of PFZs facilitates discriminatory police profiling of transgender people. [2] It is constitutionally questionable. As our colleagues in the DC Trans Coalition note:

1. The Attorney General has determined that PFZs cannot be defended in court and are likely unconstitutional.
2. MPD suspended PFZ implementation and said it was working to rescind its PFZ general order.
3. Eliminating PFZs is a step toward reducing violence against sex workers.
4. PFZ repeal makes sense from a public health perspective.

We agree with the 2005 testimony of Stephen M. Block, then legislative counsel for ACLU of the Nation's Capital, concerning the bill authorizing temporary PFZs then under consideration. To summarize:

• "The bill ... would punish people for their status, i.e., who they are rather than the wrong they have done. It authorizes an officer to order someone to leave an area, if the officer believes that the person is a prostitute even though the person has not done anything illegal.... This is antithetical to the fundamental American principle that we are not required to prove our innocence and cannot be arrested simply because we might be thinking of committing a crime.... See Johnson v. City of Cincinnati, 310 F.3d 484, 503 (6th Cir. 2002)."
• "The Court of Appeals for the District of Columbia threw out convictions for solicitation for prostitution based on evidence that the defendants 'looked and perhaps acted like prostitutes.' Ford v. U.S., 533 A.2d 617, 625 (DC 1987). If such evidence is insufficient to sustain a conviction, it also cannot be sufficient to justify an order that someone leave a prostitution free zone.... See also Coleman v. Richmond, 364 S.E.2d 239, 244 (Va. App. 1988)."
• "Someone believed to be a prostitute may be in a prostitution free zone for a lawful purpose.... Because it would prohibit lawful activities, Title XXI is unconstitutionally overbroad. See Shelton v. Tucker, 364 U.S. 479, 488 (1960) ... Johnson v. Carson, 569 F.Supp. 974 (M.D. Fla. 1983) ... ACLU v. Alexandria, 747 F.Supp. 324 (E.D. Va. 1990)."
• "Because Title XXI vests open-ended discretion in the police to order someone to leave a prostitution free zone without evidence of wrongdoing, the proposal is also unconstitutionally vague. See Chicago v. Morales, 527 U.S. 41, 56 (1999) ... Akron v. Rowland, 618 N.E.2d 138, 145 (Ohio 1993) ... Louisiana v. Muschkat, 706 So.2d 429 (Louisiana 1999); Wyche v. Florida, 619 So.2d 231 (Florida 1993)."
• "Title XXI will also be challenged as legally inadequate for failure to explicitly require specific intent (mens rea) as an element of the offense. See NAACP v. Annapolis, 133 F.Supp. 2d 795 (D. Md. 2001)."
• "The courts have also required the proponents of exclusion zones to demonstrate that there is no less onerous remedy. See Johnson v. City of Cincinnati, 310 F.3d at 505." [3]

The ruling in another case states that the law cannot punish people for their status, but only for a specific

Jason A. Terry testified for DC Trans Coalition on November 2, 2011: "Profiling trans people as sex workers is indeed such a prevalent occurrence that MPD's General Order 501.02 on interacting with trans people explicitly states 'Members shall not solely construe gender expression or presentation as reasonable suspicion or prima facie evidence that an individual is or has engaged in prostitution or any other crime.' Yet Prostitution Free Zones allow for exactly that suspicion to be made, and it almost always is." [4]

Public radio station *WAMU* reported on this problem on January 13, 2012. The reporter interviewed Cyndee Clay, executive director of HIPS: "Clay says the prostitution-free zone law didn't get rid of prostitution in the District. The law simply moved it from downtown to the outskirts of the city.... An analysis of the District's crime data shows that Clay is right....

"It's bad public health, it's bad social policy," says Clay. 'It's not even effective judicial policy because we're not giving people the tools that they need to change their life or to make a change. We're just re-incarcerating the same people over and over again for the same thing.' ...

"HIPS keeps track of every sex worker it encounters, and the group is seeing roughly the same number of sex workers on the streets now as there was a decade ago. The difference is now they're more likely to get a criminal record and more likely to be working in a violent area. The sex workers are more isolated and more at risk. But they're less visible." [5]

Councilmember Alexander responded to David Schultz, the *WAMU* reporter, in an exchange on Twitter on January 17, 2012. She wrote, "Prostitution is illegal and our residents as well as PG are fed up!" Jason Terry of DC Trans Coalition replied, "I appreciate your ire, but why not tackle the roots of injustice instead the symptoms?" Councilmember Alexander replied, "I'm supportive of that too, but how do you answer my communities' frustration? Come with me to Eastern Ave."

We have been to Eastern Avenue. In July, 2011, many of us had occasion to visit that neighborhood to attend a vigil in memory of Lashai Mclean, a transgender woman who was murdered on the 6100 block of Dix Street NE. Like Jason Terry, we appreciate Councilmember Alexander's and her constituents' frustration. Like him, we think the proper response to that frustration is to seek real solutions rather than merely chasing sex workers to different streetcorners.

A 2007 story by Oregon's *East Portland News* reported that the Portland City Council had allowed that city's PFZ law to expire due to its ineffectiveness and discriminatory enforcement. [6] John H. Campbell, whose firm Campbell DeLong Resources, Inc. was commissioned by Portland Mayor Tom Potter to study Portland's Prostitution and Drug Free Zones, found that they were enforced unfairly against minorities. Campbell sent then GLAA President Miguel Tuason some suggestions on Jan. 19, 2012 based on Portland's experience:

"It is one thing to permit a police chief to designate a zone for a short period of time, but it seems quite another to grant power to designate such zones in perpetuity. If there is sufficient discomfort with the law that all agree it should not apply to the whole city, it seems odd to grant any non-elected official the power to extend such a law, on a permanent basis, to an ever increasing amount of the city." He would reserve the designating power for the D.C. Council.

Mr. Campbell continues: "I would hope that an arrest for engaging in prostitution or 'prostitution related offenses' as defined in the relevant criminal code would be a minimal prerequisite before an exclusion can be issued or enforced. A step further would be to require, in addition to the arrest for prostitution, a past conviction for related crimes as well in order for a pre-trial exclusion to be issued or enforced. A step still further would be to require the specific prostitution conviction, with the full criminal proof that requires, and make exclusion either part of the sentencing or an option for police at that time for a given period of time....

"Suggest suspending enactment of any ordinance until police have summarized for Council national best practices for prostitution problem solving.... The tools available cover a very wide range and depend on the characteristics of the activity and physical location....
"Withhold support for any ordinance that doesn't include a method to measure, report, and take all appropriate corrective action regarding the incidence of transgender profiling."

Legislators have a responsibility to pay attention to whether their policy solutions, and police methods, actually work. Chasing sex workers into more distant and unsafe neighborhoods is no solution. Giving them criminal records only makes it harder for them to escape the streets. Many transgender people are driven into sex work by discrimination that renders them jobless. [7] To resolve this situation we must step back from a purely crime-based perspective to recognize and address the intersecting problems that lead to it.

We understand that police have a job to do, but they must do it in a constitutional manner, as they themselves recognize. Please pass Bill 20-760. Let us then work together—residents, activists, and policymakers—to find solutions that will work better for everyone as well as hold up in court.

Thank you.

COMMENTS OF THE PUBLIC DEFENDER SERVICE
FOR THE DISTRICT OF COLUMBIA

cconcerning

BILL 20-760

REPEAL OF PROSTITUTION FREE ZONES AMENDMENT ACT OF 2014

Presented by

Maneka Sinha
Supervising Attorney, Trial Division

before

THE COMMITTEE ON THE JUDICIARY AND PUBLIC SAFETY
COUNCIL OF THE DISTRICT OF COLUMBIA

The Honorable Phil Mendelson, Chair

July 9, 2014

Avis E. Buchanan, Director
Public Defender Service
633 Indiana Avenue, N.W.
Washington, D.C. 20004
(202) 628-1200
Thank you for the opportunity to testify on Bill 20-760, the Repeal of Prostitution Free Zones Amendment Act of 2014. My name is Maneka Sinha and I am a Supervising Attorney in the Trial Division at the Public Defender Service. The Public Defender Services supports Bill 20-760.

As has been pointed out numerous times since its enactment several years ago, D.C. Code § 22-2731, the statute that Bill 20-760 would repeal, is, in all likelihood, unconstitutional. The prostitution free zones portion of the Omnibus Public Safety Amendment Act of 2006, which went into effect in April 2007, was designed based on the District’s anti-loitering drug free zone law from 1997. But when the prostitution free zones provision was drafted, its proponents failed to recognize that in 1999, after the anti-loitering drug free zone law took effect, the Supreme Court declared a similar Chicago anti-loitering ordinance unconstitutionally vague.¹

A law may be void for vagueness because it either (1) “fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute” or (2) “encourages arbitrary and erratic arrests and convictions.”² PDS agrees with the countless advocates and community organizations who have explained that the prostitution-free zone statute encourages arbitrary and discriminatory enforcement. My testimony today focuses on the first type of vagueness, failing to give fair notice.

The prostitution free zone statute makes it a crime, with a penalty of 6-months imprisonment, for a person to congregate in a group of 2 or more persons on public space within a prostitution free zone and fail to disperse after being ordered to do so by an MPD officer who reasonably believes the person was congregating for the purpose of engaging in prostitution.³ The focus of the statute is on a person who is congregating with at least one other person. Surprisingly, if a police officer reasonably believes that a single person is in the designated prostitution free zone for the purpose of prostitution, that person is not subject to a dispersal order as long as the person is alone. It is only when that person “congregates” in a group of two or more persons that she becomes subject to a dispersal order. Thus, the meaning of “congregate” is critical.

Nevertheless, while the prostitution free zone statute at D.C. Code § 22-2731 defines a number of terms, it does not define “congregate.” The dictionary tells us that “congregate” means “to gather, to assemble or to collect into a group.” But when has a

² Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972). See also Morales, 527 at 56.
³ See D.C. Code §22-2731(d)(1).
person "assembled" or "gathered?" Does any contact with another person constitute "congregating?" Does a five-minute conversation with a friend on the street count? What about stopping briefly to greet someone? Does it constitute "congregating" to have a ten-minute discussion about whom to vote for in the next election? A statute must give notice of how one is to conform her conduct so as not to run afoul of the law and, where constitutional rights are implicated, a statute should give notice of the limit of its reach so as not to inhibit the exercise of constitutional rights. But the prostitution free zone statute fails on both counts. It does not give fair notice as to when an interaction with another person becomes substantial enough to constitute "congregating" and does not give notice as to when an interaction, though it is substantial, will not subject one to a dispersal order because, for example, the interaction is protected by the First Amendment.

Similarly vague is what it means to "disperse." D.C. Code § 22-2731(a)(2) defines "disperse" to mean "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." But "reassemble" is not defined. What does it mean to "reassemble?" Is "reassembling" the same as "congregating?" If the terms are intended to mean the same thing, why did the Council not use the same word? If they are to have different meanings, does "reassemble" require more social interaction or less than the "congregating" that can trigger the dispersal order in the first place? If regardless of what a police officer chooses to believe about their purpose for being in a public place, a person wants to comply with the law, what guidance does the law provide about at what point a social interaction crosses the line to become "congregating" and the question of whether it is at that same point that conduct will cross the line and constitute "reassemble." The prostitution free zone law provides no such guidance; the statute fails because it does not provide fair notice of how one should conduct oneself to comply with the law.

4 MPD apparently recognizes the constitutional implications of these zones. Its website notes that "all acceptable group activities are, and continue to be, lawful within the Prostitution Free Zone." It then goes on to list examples of group activities that fall squarely in conduct and speech protected by the First Amendment, such as "distributing campaign literature" and "collecting names on petitions." Leaving aside whether and how a court might factor in a police department's website when determining the constitutionality of a criminal statute, the website so narrowly explains what is an "acceptable" group activity that both citizens and law enforcement agents are still left unaware of the breadth of constitutionally protected conduct that the zone law should not criminalize.
Further, though the order to disperse must be tied to an officer’s reasonable belief that a person is “congregating” for the purpose of engaging in prostitution, it constitutes “failure to disperse” (and is therefore a crime) to reassemble within the zone for the duration of the zone regardless of the purpose of the reassembly. The statute makes no exception allowing one to reassemble for constitutionally protected activity.

Finally, while the constitutional freedom to associate is not a freedom to socially associate, at some point there must be limits on the government’s authority to dictate, on pain of punishment, where and how people can associate with each other, even socially, if that socializing is otherwise lawful. The prostitution free zone statute allows the government, based on nothing more than a “reasonable belief” about one’s purpose for congregating, to make it a crime to reassemble in a particular area for any purpose for twenty days. That result, even if constitutional – as unlikely as that is – is troubling enough. The prostitution free zones statute allows the government to forbid two or more people from gathering with each other in a specific public area even for lawful purposes and allows the government to do so based only the belief of a single police officer about the people’s purpose for congregating at one time. The Public Defender Service supports the repeal of the prostitution free zones statute and encourages the Council to adopt this bill.
May 21, 2014

The Honorable Vincent Gray, Mayor
District of Columbia
1350 Pennsylvania Avenue, N.W.
Suite 316
Washington, DC 20004

Council of the District of Columbia
The Wilson Building
1350 Pennsylvania Avenue, N.W.
Washington, DC 20004

RE: Resolution Supporting the Repeal of Prostitution Free Zones Amendment Act of 2014

Dear Mayor Gray and Council Members,

At its regular meeting on May 14, 2014, the Dupont Circle Advisory Neighborhood Commission ("ANC 2B" or "Commission") considered the above-referenced matter. With 9 of 9 Commissioners in attendance, a quorum at a duly-noticed public meeting, the Commission approved the following resolution by a vote of (9-0). The Commission agreed on the following resolution:

Whereas, the Council of the District of Columbia is currently considering passage of the Repeal of Prostitution Free Zones Amendment Act of 2014 (B20-760), legislation that would permanently repeal the Prostitution Free Zone Act of 2005, which allows the Metropolitan Police Department to permanently declare public space as a "Prostitution Free Zone;"

Whereas, Advisory Neighborhood Commission 2B has previously voiced its opposition to Prostitution Free Zones in February 2012;

Whereas, Prostitution Free Zones do not reduce prostitution and further marginalize sex workers, low income people of color, transgender people, lesbians and gays, and the homeless;

Whereas, both the Metropolitan Police Department and the Office of the Attorney General have acknowledged that the implementation of Prostitution Free Zones is likely unconstitutional;

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Therefore, be it resolved that, Advisory Neighborhood Commission 2B supports the Repeal of Prostitution Free Zones Amendment Act of 2014 (B20-760) and encourages the Council of the District of Columbia to adopt the proposed legislation.

In addition, ANC 2B respectfully encourages Ward 2 Councilmember Jack Evans sponsor and support the bill.

Commissioners Kevin O’Connor (kevin.o’connor@dupontcircleanc.net) Kishan Putta (kishan.putta@dupontcircleanc.net), and Will Stephens (will.stephens@dupontcircleanc.net) are the Commission’s representatives in this matter.

ON BEHALF OF THE COMMISSION.

Sincerely,

Will Stephens
Chairman

cc: gottlieb.simon@dc.gov
Testimony on behalf of the
American Civil Liberties Union of the Nation’s Capital
by
Mikelina Belaineh
Law Fellow
before the
Committee on the Judiciary and Public Safety
of the Council of the District of Columbia
on Bill 20-760, the
“Repeal of Prostitution Free Zones Amendment Act of 2014”
July 9, 2014

The ACLU of the Nation’s Capital commends Councilmember Grosso for introducing Bill 20-760, the “Repeal of Prostitution Free Zones Amendment Act of 2014.” The ACLU of the Nation’s Capital has repeatedly testified that Prostitution Free Zones, codified in Section 104 of the Omnibus Public Safety Act of 2006, raise serious constitutional questions and undermine public safety. Enforcement of this law, and others like it, result in racially disparate arrest rates and police profiling of transgender women. The ACLU wholeheartedly supports this bill and the repeal of this ineffective and damaging statute.

Prostitution Free Zones and related laws reflect the over-criminalization of commercial sex in the District. The misguided campaign against commercial sex contributes to the over-incarceration of communities of color because of the disproportionate impact this law has on discrete communities, particularly Trans women of color. Arrest data obtained from the Metropolitan Police Department (MPD) and anecdotal evidence confirms that commercial-sex laws are being enforced in a racially disparate manner. In 2011, the most recent year for which the ACLU has data, 73% of the arrests for charges categorized by MPD as prostitution or commercial vice were of Black people. In 2010, 78% of the arrests were of Black people. These arrests have burdened hundreds of residents with the consequences of an arrest record. An arrest record or conviction may result in a loss of housing or employment, the later inability to obtain housing, employment or student loans, and other serious and debilitating consequences. D.C. cannot afford to continue criminalizing and marginalizing whole swaths of its population.

Prostitution Free Zones and related laws also result in individuals being harassed on a daily basis. The National Transgender Discrimination Survey documented the police profiling of transgender women of color. According to the report, 41 percent of African-American transgender women and 25 percent of transgender Latinas reported police harassment, or being arrested and detained due to gender-based
profiling. Without meaningful guidance to officers as to what conduct is prohibited, vague laws, like the Prostitution Free Zones law, increase the likelihood that impermissible profiling will take place. The prevalence of police profiling of Trans women as sex workers is further demonstrated by the findings of the Hate Crimes Assistance Task Force’s report on MPD. The report found that the mistreatment of transgender people, and particularly transgender women of color, by police officers is among the most frequently cited and egregious examples of bias and misconduct in D.C. Though the actual number and nature of these stops is unavailable because the MPD does not keep records on pedestrian contacts, anecdotal information raises serious constitutional questions. Where officers are afforded limitless discretion to stop people on the street, the erosion of public confidence in law enforcement is inevitable.

For transgender women, the discriminatory application of the law also makes it more difficult to seek police help when needed. The National Transgender Discrimination Survey found that one-fifth of transgender respondents who had interacted with the police reported harassment, and almost half (46%) of respondents reported being uncomfortable seeking police assistance. Amnesty International reported anecdotes of transgender women who were victims of police profiling them as sex workers. Anecdotes included a woman in Los Angeles being arrested for solicitation when she was walking her dog, and another woman being stopped on five separate occasions on her way home from working a shift at her place of employment. In the interest of public safety, we want people to be able to trust the police and feel safe reporting crimes when they occur. To the extent the District has an interest in preventing prostitution, the Prostitution Free Zones law does not effectively advance that interest. Making it a crime to stand in certain public areas does not prevent prostitution, but it does raise serious constitutional questions and undermines public safety by eroding trust in law enforcement.

**Constitutional Concerns**

The Prostitution Free Zones law is both vague and overbroad. Under the law, it is unlawful for people to congregate in groups of two or more on public property within the zone and thereafter fail to leave after being instructed to disperse by an MPD officer who reasonably believes the person is congregating for the purpose of engaging in prostitution or prostitution-related offenses. The statute lists a number of circumstances that may be considered in determining whether such a purpose is manifested in the observed congregation of persons. However, ultimate discretion is left entirely with an MPD officer. The law gives no guidance to officers, which can result in impermissible profiling, as discussed above. Additionally, the breadth of the law sweeps up constitutionally protected speech, and because there is no criminal intent requirement, impermissibly creates a status-based offense.

**Statute Establishes a Status Based Crime**

The Prostitution Free Zones law punishes people based solely on their status, by authorizing an officer to issue a dispersal order if the officer reasonably believes that a person is congregating for the “purpose of engaging in prostitution or prostitution-related offenses,” regardless of whether she has committed any illegal act. In other words, the law permits an officer to order someone to leave an area, and to subsequently arrest that person, based on the officer’s subjective belief that the person is a sex worker. This flies in the face of basic constitutional principles, because it criminalizes people for who they are rather than for a wrong they have committed.

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1 See also Amnesty International Report: Stonewalled (4.1.2)
2 National Transgender Discrimination Survey
3 Amnesty International-- Stonewalled
4 DC Code §22-2731 (c)(1)
5 See Ford v. U.S., 533 A.2d 617, 625 (D.C. 1987) (overturning convictions for solicitation for prostitution based only on evidence that the defendants “looked and perhaps acted like prostitutes.”); see also Coleman v. Richmond, 364 S.E.2d 239, 244 (Va. App. 1988) (striking down a statute prohibiting loitering “under circumstances
In making this subjective determination, the statute permits officers to consider: the conduct of the person being observed, information from a reliable source that the observed person routinely engages in or is currently engaging in prostitution-related offenses, physical identification of the person as a member of an association which engages in prostitution-related offenses, or knowledge by an officer that the person is a known participant in prostitution related offenses. Conduct to be considered includes: "repeatedly beckoning to, stopping, attempting to stop, or attempting to engage passers-by in conversation for the purpose of prostitution; stopping or attempting to stop motor vehicles for the purpose of prostitution; or repeatedly interfering with the free passage of other persons for the purpose of prostitution." As a result, people may be punished for lawful behavior that a police officer perceives to be the type of behavior a sex worker might engage in, rather than for any actual prostitution-related offenses that occur. This, in turn, has led to the profiling and harassment of transgender women of color, as previously discussed. This criminalization of status is antithetical to the values inherent in our criminal justice system and to the bedrock concept of innocent until proven guilty.

**Statute is Unconstitutionally Vague**

Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will allow ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement. The Prostitution Free Zones statute raises concerns of unconstitutional vagueness, due to its failure to specify an intent to engage in an explicit criminal act as an element of the crime. All it requires to permit a dispersal order is that an MPD officer reasonably believe a person is congregating in a Prostitution Free Zone for the purpose of engaging in prostitution-related offenses. The statute sets out the aforementioned examples of circumstances a police officer may consider in making this determination, however that does not save the law. Case law demonstrates that even when a statute, as here, lists specific factors or conduct for officers to consider when making determinations, anti-loitering statutes lacking a requirement of specific intent to engage in a particular criminal act are often rendered invalid due to being unconstitutionally vague.

Further, due to the vast discretionary power afforded to MPD officers in determining when a dispersal order is warranted, the Prostitution Free Zones law does not provide adequate notice to citizens. The Prostitution Free Zones statute makes no effort to define what activity is being prohibited by law, essentially leaving the determination of why the observed person is in the Prostitution Free Zones entirely to the police officer's discretion. In so doing, the ordinance fails both to provide adequate notice to the ordinary citizen and to establish minimal guidelines to govern enforcement of the statute, thereby entrusting lawmaking to the heat of the moment judgment of the officer on duty. The crucial

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6 DC Code §22-2731 (d)(2)(A)-(E)
7 DC Code §22-2731 (d)(2)(A)(i)-(iii)
8 Robinson v. California, 370 U.S. 660, 666 (1962) (Supreme Court held that state law which made "status" of narcotic addiction a criminal offense for which offender might be prosecuted at any time before he was reformed, and upon conviction required imprisonment of at least 90 days in a county jail, violated the Fourteenth Amendment); See also Jones v. City of Los Angeles, 444 F.3d 1118, 1131 (9th Cir. 2006) (held that it was unconstitutional for the state to criminalize conduct that is an unavoidable consequence of being homeless. By criminalizing sitting, lying, and sleeping, the City is in fact criminalizing Applicants' status as homeless individuals.)
9 Amnesty International Report: Stonewalled (4.1.2); See also Make The Road: Transgressive Policing
12 DC Code §22-2731 (d)(2)(A)-(E)
13 NAACP v. Annapolis at 808
14 Id.
constitutional threshold all criminal statutes must overcome is whether the statute gives sufficient notice to citizens regarding what conduct is unlawful under the ordinance so that they may conform their conduct to the law. The Prostitution Free Zones law fails to meet this threshold requirement, rendering the statute unconstitutionally vague.

**Statute is Unconstitutionally Overbroad**

The Prostitution Free Zones statute also results in the prohibition of lawful activities, making it unconstitutionally overbroad. The statute allows officers to use a person’s otherwise lawful conduct to make a subjective determination about that person’s intent to potentially engage in an illegal act. The statute therefore prohibits and criminalizes lawful activities, such as “beckoning to passers-by,” when it provides that such conduct can be considered in determining a criminal purpose. This means that lawful activities, such as collecting signatures, soliciting charitable contributions, and handing out leaflets on behalf of an organization, could all be used as basis for an order to disperse subject to an MPD officer’s reasonable beliefs. This kind of criminalization and prohibition of lawful conduct, through allowing these lawful acts to be used as manifestations of criminal purpose, runs contrary to basic constitutional principles and has often led Courts finding statutes like the Prostitution Free Zones law to be overbroad on those grounds.

The ACLU is pleased the Council is taking the important step of removing this antiquated and ill-conceived law, and we are eager to work with the Council to re-examine the criminal justice approach to commercial sex more broadly.

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17 Although MPD reports that they are not making gender-expression related arrests under this statute, as previously mentioned, police profiling transgender individuals as sex workers is a prevalent practice in D.C. and nationally. Arrests made based on the gender-expression of the individual would be unconstitutional under the First amendment, because the way in which a person expresses their gender would be a non-verbal, particularized message likely to be understood by those who viewed it. **Tinker v. Des Moines Independent Community School District**, 393 U.S. 503 (1969); **Stromberg v. California**, 283 U.S. 359 (1931); **Spence v. State of Wash.**, 418 U.S. 405, 411 (1974). The ACLU is concerned about the prevalence of this type of police profiling, and the associated First Amendment implications, and will therefore be continuing to monitor these types of practices closely.
Statement of Andrew Fois

Deputy Attorney General for the Public Safety Division
Office of the Attorney General for the District of Columbia

Before the Committee on the Judiciary and Public Safety
Tommy Wells, Chairperson

Regarding Bill 20-760:
Repeal of Prostitution Free Zone Amendment Act of 2014

Office of the Attorney General
District of Columbia

July 9, 2014

John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, D.C.
Good morning Chairman Wells, other Council Members, staff and guests. I am Andrew Fois, Deputy Attorney General for the Public Safety Division in the Office of the Attorney General for the District of Columbia. On behalf of the Executive Branch, I am pleased to testify in support of Bill 20-760, the Repeal of Prostitution Free Zones Amendment Act of 2014.

Let there be no doubt that the administration supports strongly the policy goal of combatting and reducing prostitution and the related risks in the District in every legal and practical way possible. We also commend the Council for reexamining the legality and effectiveness of tools to address these important public safety problems. We have substantial concerns about the constitutional soundness of the prostitution free zones law as well as doubts about its practical utility. MPD supports repeal and has not established a prostitution free zone since OAG expressed its constitutional issues in January of 2012.

First, Section 104 of the Omnibus Public Safety Amendment Act of 2006\(^1\) contains provisions that raise serious questions under constitutional due process principles as interpreted by the Supreme Court and courts around the country.\(^2\)

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 (twenty consecutive days). While prostitution 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 rules. Under those rules, after the Chief declares a given geographic area within the District to be a prostitution free zone, section 104(d) of the 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.3

The Office of the Attorney General has testified before about the Act's need for an intent element. As former Attorney General Robert Spagnoletti testified, generally "if a statute is to pass muster, it must require intent to violate the law."4 Nonetheless, section 104 does not require as an element of the statutory offense that the defendant intended to engage in prostitution or a related offense.

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3 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).

4 Testimony of Robert J. Spagnoletti, Attorney General, at 36 (May 31, 2005), Public Hearing on B16 the Omnibus Public Safety Act of 2005 ... ; B16-130 the Criminal Code Modernization Amendment Act of 2005); See also Testimony of Ariel Levinson-Waldman, supra at FN 2.
The Act’s lack of an affirmative intent requirement raises substantial due process concerns for section 104. 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 constitutional principles of due process, 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. 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 the 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

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5 MPD has not made any arrests under the Act so section 104 remains untested in the courts.
6 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.
requisite illegal purpose. 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. The result of such a statute would be to make an individual subject to arrest without notice for engaging in legal behavior without any harmful intent. 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.

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. 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

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8 See NAACP v. City of Annapolis, 133 F. Supp. 2d 795, 808 (D. Md. 2001) ("anti-loitering statutes that do not contain a mens rea element have been invalidated as unconstitutionally vague"); Johnson v. Athens-Clarke County, 529 S.B. 2d 613 (Ga. 2000).
government prosecutor is required to establish beyond a reasonable doubt to a trier of fact that the person arrested loitered with the intent to violate the law.\textsuperscript{12}

Even if the Act did include an intent element, significant practical hurdles would still remain in the courts and on the streets. The standard of proof required in the District to show intent to engage in prostitution is high, and would be hard to prove in many cases without making an undercover sting arrest. The District of Columbia Court of Appeals has made clear that it will require a high evidentiary standard for showing intent to engage in prostitution.\textsuperscript{13}

A second reason to support repeal of prostitution free zones, and MPD was consulted and is here for its operational expertise on these points, is the changing nature of prostitution and its enforcement. With the emergence of the Internet, prostitution has to some extent moved off the streets and into on-line services. Though still a problem, average annual calls for service for prostitution are down from the period when the Act was before the Council.\textsuperscript{14} According to

\textsuperscript{12}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 court, the ordinance impermissibly "entrust[ed] lawmaking to the moment-to-moment judgment of the policeman on the beat." \textit{NAACP Annapolitan Branch v. City of Annapolis}, 133 F.Supp.2d at 808 (internal quotations omitted).

\textsuperscript{13}For example, in the \textit{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 officers, indicated to them that the women were prostitutes, and the officers then arrested them for solicitation. 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 people simply for repeatedly beckoning or stopping motor vehicles or pedestrians which are notorious for drug sales or prostitution." \textit{Ford v. United States}, 533 A.2d 617, 623 (D.C. 1987).

\textsuperscript{14}See Testimony of Assistant Chief Peter Newsham (January 24, 2012) Public Hearing on Bill 19-567, the Prostitution Free Zone Amendment Act of 2011.
MPD, no arrests have ever been made under the Act and a prostitution free zone has not been declared in almost a year and a half. Moreover, very substantial penalties for prostitution-related offenses are already in place under current law.\(^{15}\)

For these reasons the Executive is happy to support this bill to repeal the Act. Thank you for the opportunity to testify and I would be pleased to answer any questions you may have.

\(^{15}\) For example, a pimp or brothel-keeper now faces a maximum penalty of 15 years if he compels an adult into 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 years. With aggravating circumstances, the maximum could be up to life without release. See D.C. Official Code Secs. 22-3002, 22-3008.
COMMENTS OF THE PUBLIC DEFENDER SERVICE
FOR THE DISTRICT OF COLUMBIA

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BILL 20-468
ANTI-SHACKLING OF INCARCERATED PREGNANT WOMEN ACT OF 2013

Presented by

Maneka Sinha
Supervising Attorney, Trial Division

before

THE COMMITTEE ON THE JUDICIARY AND PUBLIC SAFETY
COUNCIL OF THE DISTRICT OF COLUMBIA

The Honorable Phil Mendelson, Chair

July 9, 2014

Avis E. Buchanan, Director
Public Defender Service
633 Indiana Avenue, N.W.
Washington, D.C. 20004
(202) 628-1200
Thank you for the opportunity to testify on Bill 20-468, the Anti-Shackling of Incarcerated Pregnant Women Act of 2013. I am Maneka Sinha, a Supervising Attorney in the Trial Division at the Public Defender Service. The Public Defender Service supports Bill 20-468.

The United States is one of the last countries in the world that continues the needless and demeaning practice of shackling pregnant women. We continue to shackle pregnant women who are incarcerated—a population that is already among the most vulnerable in our community—despite the fact that there is no data that suggests that the policy actually achieves its purported goals of protecting the safety of pregnant women themselves or of the public or of preventing escape.

More importantly, medical professionals advise that shackling pregnant women can impede their ability to provide proper care by delaying diagnoses of various conditions and inhibiting treatment of serious pregnancy-related issues, including seizures. Likewise, shackling can harm the health of both the mother and her child.

One obvious example is that shackling impedes women's mobility and can increase the likelihood of falling, thereby causing harm to the mother and fetus. Another is that during childbirth, women must be able to move their bodies to regulate pain, among other

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3 Id.

4 Id.
things. Shackling unnecessarily inhibits this process, increasing the stress on the mother’s body. That stress, in turn, can impede the flow of oxygen to the fetus.

The United Nations Human Rights Committee has acknowledged that the shackling of pregnant women who have lost their liberty is a human rights problem in the United States. Enactment of Bill 20-468 moves the District of Columbia towards meeting international human rights standards which decry the shackling of women who are pregnant, giving birth, or recovering from childbirth.

While Bill 20-468 is a positive step towards bringing the District of Columbia in line with the recommendation of the human rights community to end the practice of shackling pregnant women in the United States, it is not a complete solution. Specifically, the Bill lacks clarity regarding which agencies are required to comply with its mandate and which categories of women and youth fall within its purview. PDS’s primary concerns are (1) that Bill 20-468 inadequately addresses pregnant girls who may be at risk of being shackled in juvenile detention facilities and (2) that it fails to address the indiscriminate shackling of children in District of Columbia courts. My testimony focuses on the lack of clarity of the Bill, specifically its failure to adequately protect pregnant girls from shackling. My colleague, Sandy Henderson, will testify about the equally dehumanizing practice of shackling children, which is a policy that we propose should be addressed by this Bill.

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5 Id.
The Public Defender Service often represents girls who are detained or residing at facilities operated by the Department of Youth Rehabilitation Services, or DYRS, such as the Youth Services Center (YSC) or New Beginnings Youth Development Center who are shackled despite being pregnant. Indeed, data suggests that pregnancy rates are even higher in juvenile facilities than in adult facilities.\(^8\) Bill 20-468 should be more clearly written to cover pregnant girls in DYRS custody.

As an example, Section 3(c) of the Bill requires that any Metropolitan Police Department officer or Department of Corrections officer accompanying a pregnant woman or youth must remove her restraints at the request of a medical professional treating the woman or youth. This section covers women being transported or in custody of MPD or the Department of Corrections, but what if a woman is being accompanied by a representative of an agency other than MPD or the Department of Corrections? Most obviously, Section 3(c) leaves out *girls* in the custody of DYRS. If enacted as written, would this law require a DYRS representative to unshackle a pregnant girl at the request of her doctor? It seems not. The Bill should be rewritten so that no woman—or girl—falls outside of its protections.

The Public Defender Service has provided the Committee with proposed changes to Bill 20-468 through Section 3. PDS’s recommended changes are aimed at clarifying the Bill and at addressing its coverage of incarcerated girls. PDS is willing to work with the Judiciary Committee to edit or clarify the remaining sections of Bill 20-468.

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By enacting this Bill, the District would be taking a positive step towards meeting the human rights and medical communities' recommendation to end the inhumane practice of shackling pregnant women. But shackling pregnant girls is no less inhumane. Though the Public Defender Service well recognizes the positive aim of Bill 20-468, we urge the Committee to rework the Bill—with our help—for clarity and to ensure that no girl is left out of its important protections.
Councilmember Grosso introduced the following bill, which was referred to the Committee on

To establish that no women or youth, who are pregnant while in the custody of the District of Columbia Central Detention Facility (DC Jail), the Correctional Treatment Facility, Halfway Houses, any Department of Youth Rehabilitation Services (DYRS) facility, or lock-ups can be shackled at any time while they are pregnant, during labor, transport to a medical facility for treatment related to the birth, during delivery, or during post-partum recovery up to six weeks. This act requires the Department of Corrections, the Metropolitan Police Department, Halfway Houses, and the Department of Youth Rehabilitative Services to collect and publish data about their shackling practices and provide the appropriate training for their staff and notice to incarcerated persons about this act.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Anti-Shackling of Incarcerated Pregnant Women Act of 2013."

Sec. 2. Definitions.

(a) "Administrator of the place of confinement" means the warden of the penal institution, the director of the facility under the control of the Department of Corrections, the superintendent of the secure residential facility or the director of the facility under the control of the Department of Youth Rehabilitative Services.

(b) "Confined" means housed, detained or serving a sentence or commitment in a penal institution or other facility under the control of the Department of Corrections or in a secure
residential facility or other facility under the control of the Department of Youth Rehabilitative
Services.

(a)(c) "Labor" means the period of time before a birth during which contractions are of
sufficient frequency, intensity, and duration to bring about effacement and progressive dilation of
the cervix.

(d) "Penal institution" shall have the same meaning as provided in § 22-2603.01(6).

(e)(e) "Postpartum recovery" means (a) the entire period a woman or youth is in the
hospital, birthing center, or clinic after giving birth and (b) an additional time period, of at least
six weeks or more if, a treating physician determines is necessary for healing after the woman or
youth leaves the hospital, birthing center, or clinic.

(e)(f) "Restraints" means any physical restraint or mechanical device used to control the
movement of a person's body or limbs.

(f) "Secure juvenile residential facility" shall have the same meaning as provided in § 22-
2603.01(7).

Sec. 3. Use of Restraints.

(a) Except as provided in subsections (b) and (c), no confined woman or youth who is
known to be pregnant or to be in post-partum recovery shall be put in restraints The person(s) in
charge of a correctional facility shall not permit restraints of any kind on an incarcerated
pregnant woman or youth known to be pregnant and in labor or delivery at any time, including
while in transport to a medical facility or while receiving treatment at a medical facility or
hospital, except as provided in subsection (b) of this section.

(b) (1) The Administrator of the place of confinement may authorize the use of restraints
on a confined woman or youth known to be pregnant or in post-partum recovery after making
extraordinary circumstances, where the warden or acting warden of the correctional facility or
the shift commander for the Metropolitan Police makes an individualized determination that
extraordinary circumstances apply and restraints are necessary to prevent an incarcerated
pregnant the woman or youth from escaping, or from injuring herself or others, including
medical or correctional personnel, or others, such woman or youth may be restrained. The
restraints used must be the least restrictive available and the most reasonable under the
circumstances, but in no case shall leg irons or waist chains be used on any pregnant woman or
youth. In no case may such restraints be used. The Administrator of the place of confinement
shall not authorize the use of restraints on a confined woman or youth who is in labor unless the
physician treating the woman or youth determines that therapeutic restraints are necessary.

(2) The restraints used must be the least restrictive available and the most reasonable
under the circumstances, but in no case shall leg irons or waist chains be used on any pregnant
confined woman or youth known to be pregnant or in post-partum recovery.

(3e) Notwithstanding the authorization by the Administrator of the place of confinement
of the use of restraints on a confined woman known to be pregnant or in post-partum recovery, if
the doctor, nurse, or other health professional treating the pregnant woman or youth requests that
restraints not be used, the restraints shall be removed Metropolitan Police officer or Department
of Corrections officer or staff member accompanying the pregnant woman or youth shall
immediately remove all restraints.

(c) Nothing in this Act is intended to restrict the ability of a physician, nurse or other
health professional who is treating a confined woman or youth who is in labor to authorize staff
at the medical facility to use restraints if the physician, nurse or health professional determines
that the use of restraints is necessary to protect the health or safety of the woman or youth or her baby.

(d) Within 10 days of authorizing the use of restraints pursuant to paragraph (b), in each individual instance in which restraints are used, the Warden, Director of the Department of Youth Rehabilitative Services, Metropolitan Police shift officer on duty during the shackling, or case manager at the half house Administrator of the place of confinement shall submit a written statement making and maintaining written findings to the Director of the Department of Corrections in the case of confined women and to the Director of the Department of Youth Rehabilitative Services in the case of confined youth for review within ten days of authorizing the use of restraints the restraint explaining the extraordinary circumstances and the reasons the use of restraints were necessary as to the reasons for such use and if the use was proper the Department of Corrections Director must request a statement from the physician if restraints were used on hospital or medical facility grounds. These findings shall be retained by the Department of Corrections or the Department of Youth Rehabilitative Services kept on file by the correctional facility for at least twenty years and be made available for public inspection in the Department of Corrections quarterly reports. The Department of Corrections and the Department of Youth Rehabilitative Services shall present this information annually to the Council of the District of Columbia during their scheduled oversight hearing. The written statement information presented must not include individually identifying information of any confined incarcerated pregnant woman or youth shall be made public without the written authorization of the woman or youth.
Sec. 4. Department of Corrections Requirements.

(a) The DC Department of Corrections (DOC) Director shall require that all staff at the correctional facilities that are responsible for carrying out the requirements of this act be trained in the requirements of this act. The initial training shall be completed within six months of the effective date of this section. All staff who are hired after the initial training, in a correctional facility where women or youth are or may become pregnant, shall be trained in the requirements of this act before participating in the transportation of women or youth who are or may become pregnant.

(b) The DOC director shall provide notice of the requirements of this act to the appropriate staff at correctional facility. Appropriate staff shall include all medical staff and staff and contractors who are involved in the transport of women and youth of child bearing age, as well as such other staff as the director deems appropriate.

(c) The DOC director shall cause the requirements of this act to be provided to all women or youth who are or may become pregnant, at the time the DOC assumes custody of the person. In addition, the DOC director shall cause a notice containing the requirements of this act to be posted in conspicuous locations in the correctional facility, including but not limited to the locations in which medical care is provided within the facility.

Sec. 5. Metropolitan Police Department Requirements.

(a) The Metropolitan Police Department (MPD) chief of police shall require that all staff at the institutions or facility that is responsible for carrying out the requirements of this act be trained in the requirements of this act. The initial training shall be completed within six months of the effective date of this section. All staff who are hired after the initial training, in an institution or facility where women or youth are or may become pregnant, shall be trained in the
requirements of this act before participating in the transportation of women or youth who are or may become pregnant.

(b) The MPD chief of police shall provide notice of the requirements of this act to the appropriate staff at institutions or facilities. Appropriate staff shall include all medical staff and staff who are involved in the transport of women and youth who are or may become pregnant, as well as such other staff as the sheriff or police chief deems appropriate.

(c) The MPD chief of police shall cause the requirements of this act to be provided to all women or youth who are or may become pregnant, at the time the District of Columbia assumes custody of the person. In addition, the chief of police shall cause a notice containing the requirements of this act to be posted in conspicuous locations in the institutions or facilities, including but not limited to the locations in which medical care is provided within the facilities.

Sec. 6. Data Collection.

(a) A correctional institution shall report each restraint applied to a pregnant prisoner or detainee, or any grievances and complaints filed by prisoners related to shackling to the Warden of the institution who must then Director of the Department of Corrections. The report must be made within ten days, must be in writing, and must note the number of restraints. Individual, separate written findings for each restraint must accompany the report. This report shall include the following:

(1) The circumstances that led to the determination that the prisoner or detainee represented a substantial risk of imminent flight; or

(2) The circumstances that led to the determination that other extraordinary
medical or security circumstances dictated the prisoner or detainee be restrained to ensure the
safety and security of the prisoner or detainee, the staff of the correctional institution or medical
facility, other prisoners or detainees or the public.

(3) The Director of the Department of Corrections must request in writing a
statement from the attending physician at the medical center and from the correctional facility’s
nurse and doctor on staff at the time that restraints were used. This request and the response
must be added to the file, published in the quarterly report, and reported to the District of
Columbia Council during annual oversight hearings.

Sec. 7. Fiscal Impact Statement.
The Council adopts the fiscal impact statement of the Budget Director or the Chief
Financial Officer as the fiscal impact statement required by section 602(c)(3) of the District of
Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1 –
206.02(c)(3)).

Sec. 8. Effective date.
This act shall take effect following approval of the Mayor (or in the event of veto by the
Mayor, action by the Council to override the veto), and 30-day period of Congressional review
provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December
24, 1973 (87 Stat. 813; D.C Official Code § 1-206.22(c)(1)), and publication in the District of
Columbia Register.
COMMENTS OF THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA

concerning

BILL 20-468

ANTI-SHACKLING OF INCARCERATED PREGNANT WOMEN ACT OF 2013

Presented by

Sonam Henderson
Staff Attorney, Special Litigation Division

before

COMMITTEE ON THE JUDICIARY AND PUBLIC SAFETY COUNCIL OF THE DISTRICT OF COLUMBIA

Chairman Tommy Wells

July 9, 2014

Avis E. Buchanan, Director
Public Defender Service
633 Indiana Avenue, N.W.
Washington, D.C. 20004
(202) 628-1200
Thank you for the opportunity to testify on Bill 20-468, the Anti-Shackling of Incarcerated Pregnant Women Act of 2013. My name is Sandy Henderson, and I am a Staff Attorney in the Special Litigation Division of the Public Defender Service for the District of Columbia. You have already heard from my colleague Maneka Sinha on the Bill in its current form, which bars the shackling of incarcerated pregnant women. I am here to ask the Committee to add a short provision to the Bill addressing a similarly dehumanizing and humiliating practice that is both unnecessary and unworthy of the District of Columbia: the indiscriminate shackling of children in District of Columbia courtrooms. As you will see, we do not ask the Council to ban shackling of child defendants in all circumstances, but rather to join the many states and local governments that require that before a child may be brought into court in shackles, the court must make an individualized finding that shackling is actually necessary.¹

Currently, every child detained in the District of Columbia is shackled throughout his or her hearings, with no regard to his or her age, size, or circumstances, and with no determination as to whether shackles are actually necessary. This is pursuant to a blanket policy of the United States Marshals Service that applies to all detained defendants in federal courts around the country, with no distinction made between adults and children.² So, perhaps the first important


² PDS’s understanding is that the only courts in which the United States Marshals Service encounters child defendants in any significant numbers are in the District of Columbia and on Indian reservations.
thing to note is that the indiscriminate shackling of children in DC is not the result of careful consideration of what is necessary for child defendants in the District, but rather collateral damage from a policy designed for adult offenders nationwide.

That policy states that, unless a jury is present, all detained defendants be “fully restrained” with “a minimum of handcuffs, waist chain, and leg irons” when brought into court. The “waist chain” is a thick metal chain that hangs around the waist like a heavy belt. It is supposed to go once around the waist, but on a small child – for instance the 3’ 10”, 55-pound eight year-old PDS was appointed to represent not long ago – the heavy chain goes around the waist twice or even three times. The handcuffs attach to the front of the waist chain to restrict the upwards or sideways movements of children’s arms. The leg irons go around the ankles, forcing the children to shuffle as they walk.

To give you a sense of what this looks like, I have brought a couple of photographs. Juvenile confidentiality rules prevent us from photographing shackled children in District of Columbia courtrooms, so we have had to look elsewhere for representative images. This picture from Florida shows a child in wrist and ankle restraints. Children in the District of Columbia are additionally shackled at the waist, like the children in this 1903 photograph. So if you take the child in the first photo and add the waist chains you see in the second photo, that should give you a sense of what the Marshals Service policy requires.

Pursuant to that policy, detained children are shackled like this whenever they appear in Superior Court, no matter how lengthy the hearing, no matter the attributes of the individual child, and no matter that they have not been and may never be charged or adjudicated as delinquent. Judges almost uniformly defer to this policy. Perhaps even worse, the Department of Youth and Rehabilitation Services, which has custody over child defendants who are considered especially at risk also unquestioningly follows the Marshals Service policy. This means that even the most vulnerable children in the system are brought into court in chains.

And our system has many very vulnerable children. The District of Columbia has no minimum age for prosecuting a child, meaning that the children shackled in DC courts include boys and girls of seven and eight years old who are so slight that the chains make it difficult for them to walk and so short that their chained feet do not touch the ground when they sit. But the

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3 Children in the District of Columbia are not afforded trial by jury, so are shackled even at trial unless the judge orders the shackles removed. While some judges grant requests for unshackling at trial, many others do not.


problems with shackling go beyond mere age and size. There are also many children detained for court whose circumstances make them particularly vulnerable to trauma from being shackled. Nevertheless, children arrested for running away from difficult and abusive home situations are shackled. Children with intellectual disabilities are shackled. Even children suffering from severe PTSD because they have previously been kidnapped, held against their will, and sexually abused are shackled.

The results of this indiscriminate shackling are predictable and tragic. Every parent's first sight of her child in the District's custody is of her child shuffling into court in chains. Parents regularly break down in tears at the sight. PDS has heard family members comment that the shackling reminds them of slavery.

Shackling also interferes with a child's ability to interact with his or her lawyer and participate in hearings, by distracting the child, and by making it impossible to write notes or otherwise quietly get counsel's attention in order to, for instance, ask questions about what is happening and why. Worse still, psychologists who study children and their psychological development warn us that unnecessary shackling interferes in multiple ways with rehabilitation, which is the primary purpose of our juvenile justice system. For instance, children experience being shackled in court as a public humiliation, which creates barriers to developing the positive self-image and self-confidence necessary to development and psychological well-being. This is especially true for children who have been physically and sexually abused, for whom the experience of being shackled may trigger memories of prior trauma. As the Florida Supreme Court has aptly put it, indiscriminate child shackling is "repugnant, degrading, humiliating, and contrary to the... primary purposes of the juvenile justice system."

It is also wholly unnecessary. It bears repeating that the children being shackled have in many cases not even been charged with a delinquent act, much less found involved in one. Moreover, judges in juvenile court have on hand all the tools they would need to make discriminating determinations as to the need for shackling in any individual case. The Marshals and DYRS can advise the court as to a child's behavior leading up to court; the Office of the

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7 Children often complain that the shackles hurt. Indeed, DYRS requires that when children are shackled in its facilities, medical staff must examine the children within 30 minutes of the shackling to determine if medical care is required. DYRS (YSA) Policy 9.16: Use of Physical Restraints, Sec. V(D) (Effective July 20, 2001). No such policy is followed in Superior Court, where children are routinely shackled for much more than 30 minutes.

8 D.C. Code § 16-2301.02(5). The same section further provides that the goals of the juvenile justice system are to be achieved "in the least restrictive setting necessary." Id. at (9).


10 Id.

11 In re Amendments to the Florida Rules of Juvenile Procedure, 26 So.3d 552, 556-57 (Fla. 2009).
Attorney General is on hand to discuss the delinquency allegations; and court social services is available with the child’s social file, which includes mental health information, whether the child has suffered abuse or neglect or otherwise been victimized, and other information that would help the court determine if shackling is appropriate in a given case. There is no reason not to take advantage of that information to avoid unnecessary shackling of children.

PDS has tried to end indiscriminate shackling using litigation, but the Court of Appeals declined to decide the issue, instead saying that the legislature “may be far better positioned to consider the competing considerations.” So today we respectfully ask the Committee to consider the attached proposed provision. This proposed provision is modeled on recently enacted statutes and rules from other jurisdictions. We believe it is a modest, practical proposal. It does not prevent a judge from ordering a child shackled if shackling is necessary. It simply demands that before a child appears in court in shackles, the judge must make an individualized finding that shackling is required to prevent physical harm to the child or another person, disruptive courtroom behavior, or a substantial risk of flight. We believe inclusion of this provision in the Bill, like the Bill as a whole, would be a positive step towards ensuring that our criminal justice system reflects the decency and humanity of the people of the District. Thank you for considering it.

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Sec. ___ Shackling of children
(a) At any hearing authorized or required by Title 16, Chapter 23 of the D.C. Code, restraints may not be used on a child and must be removed prior to the child’s appearance before the court, unless the court makes an individualized determination that:
   (1) use of restraints is necessary to prevent:
       A. Physical harm to the child or another person,
       B. Disruptive courtroom behavior, as evidenced by the child’s past disruptive courtroom behavior or threats to create a disturbance, or
       C. A substantial risk of flight from the courtroom, as evidenced by a history of courtroom escapes or other relevant factors, and
   (2) There are no less restrictive alternatives to restraints, including the presence of the court personnel, United States Marshals, law enforcement officers, or personnel from the Department of Youth Rehabilitation Services.
(b) The court may receive information relevant to this determination from the agency or agencies charged with custody of the child, but shall not cede responsibility for determining the use of restraints in the courtroom to that agency or those agencies.
(c) The court shall provide the child and the child’s attorney an opportunity to be heard to contest the use of restraints prior to making a determination that restraints may be used.
(d) If restraints are ordered, the court shall make findings of fact in support of the order.
Councilmember Tommy Wells  
Chair, Committee on the Judiciary and Public Safety  
1350 Pennsylvania Avenue, Suite 402  
Washington, DC 2004

July 9, 2014

Re: Anti-Shackling of Incarcerated Pregnant Women Act of 2013

Dear Councilmember Wells:

This letter summarizes the Department of Youth Rehabilitation Services’ (“DYRS”) analysis of the above-referenced proposed legislation and its potential impact on this agency, which raises some initial concerns.

The proposed legislation requires DYRS to report youth information to the Department of Corrections.¹ This requirement, however, conflicts with the District’s juvenile confidentiality laws, which does not permit the agency to share confidential youth information, except under limited circumstances. See D.C. Official Code §§ 2-1515.06 and 16-2332. These laws place specific restrictions on who may inspect juvenile or departmental records and the information this proposed legislation covers would not fall into those limited categories of exceptions. The proposed legislation would compromise youth confidentiality, even if redacted, which could compromise the long term rehabilitative efforts of the agency. DYRS’s female population is consistently at approximately 10%, and the agency operates one secure facility – the Youth Services Center (“YSC”) – that serves this population. With consistently low percentages of female enrollment and the even smaller number of pregnant youth who may be in the facility at any given time, it would not be difficult to extrapolate which one of our youth is being referenced in a redacted file or report.² This could directly compromise a youth’s legally protected confidential record especially considering the information would be released to the public and made available on a quarterly basis for a 20-year period under the proposed legislation.

Furthermore, the proposed legislation is overly broad, as it applies to youth who may only be one month pregnant to youth who are no longer pregnant.³ Additionally, it will be difficult for the Agency to know if a youth is six weeks (or more) post-partum. This information would not be garnered until

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¹ DYRS is a cabinet level agency that operates its own secure facilities which are not under the direction or control of the Department of Corrections.

² In any event, simply redacting a youth’s name from a document would not change the confidential nature of the record.

³ Youth may remain at YSC for 30 to 45 days; however, the average length of stay is only 10 to 14 days and some youth may only remain at the facility for a few hours. The proposed legislation assumes that agency employees would immediately know when a youth is pregnant (indeed, the youth herself may not know), even in circumstances when the youth is only at the facility for a few hours.
after a medical evaluation, which may not occur until after the youth is either transported to YSC or the youth is arriving at the facility following her court hearing.

Lastly, the mission of DYRS is to improve public safety and give court-involved youth the opportunity to become more productive citizens by building on the strengths of youth and their families using the positive youth justice framework. For this reason, there are no wardens at our facilities, thus making it difficult to assign a person with the authority to grant shackling exemptions, as required in Sec. 3 (b) of the proposed legislation.

DYRS shares the Council’s concerns for achieving positive outcomes for youth in the least restrictive, most homelike environment consistent with public safety. Thank you for the opportunity to provide comments on the proposed legislation.

Best regards,

Dionne L Hayes
DYRS General Counsel
Introduction

The ACLU of the Nation’s Capital commends the Council for introducing this important piece of legislation, which advances the rights of women in the criminal justice system by restricting the use of shackles and other restraints on pregnant women. We urge the Committee to take advantage of this opportunity to become a national leader by passing Bill 20-468, as well as the ACLU’s recommended amendments, which reflect best practices from across the country.

The harms caused by shackling pregnant women are of concern to the ACLU and cannot be overstated. One story is that of the ACLU’s client, Shawana Nelson, who was arrested for a non-violent crime and received a short sentence that she would serve at the Arkansas prison system. Upon going into labor, correctional officers shackled her legs to opposite sides of the bed. While in labor, Ms. Nelson remained shackled until taken to the delivery room. Immediately after her son was born, Ms. Nelson was re-shackled. Shackling caused Ms. Nelson cramps and intense pain because she was unable to adjust her position during contractions. Furthermore, after childbirth, the presence of the shackles caused Ms. Nelson to soil her sheets because she could not be unshackled soon enough to be able to use the bathroom. Ultimately, her case went to the Eighth Circuit of the Federal Court of Appeals, which held that her Eighth Amendment rights were violated.

Ms. Nelson’s story is unfortunately not the exception. Of the more than 200,000 women
in United States prisons or jails each year,¹ about 6%, or 12,000, of those women are pregnant when they are incarcerated.² The use of shackles and other restraints on pregnant women poses enormous health risks to both the mother and her fetus. In addition to raising tremendous health concerns, shackling pregnant and birthing women represents a serious violation of domestic constitutional law and international human rights. Therefore, it is imperative that the Council ensures, by law, that pregnant, incarcerated women are no longer subject to the use of shackles and other restraints, except under extraordinary circumstances.


Shackling and other physical restraints pose an unacceptable risk to the health of women and safety of the fetus. It is essential that pregnant women are free from physical restraints, particularly during labor, delivery, and the postpartum period. At these times, women must be able to freely move their legs as part of the birthing process. If movements are restricted, in the course of attempting to make expected movements, women could suffer bruising due to leg and abdomen restraints.³ Leg restraints are also known to cause severe cuts on ankles due to the strains involved in childbirth. The presence of restraints on pregnant women not only hinders a woman’s ability to move during the extreme pains of labor and childbirth, but also interferes with medical staff’s ability to appropriately assist in childbirth or initiate emergency procedures.⁴ In instances that require an emergency cesarean section, a delay of only five minutes could cause permanent brain damage to the child.⁵ Furthermore, the use of restraints after delivery can prevent mothers from effectively healing and breast-feeding.⁶ In earlier stages of pregnancy, the use of shackles and other restraints pose a risk of serious harm to the fetus, including the potential for miscarriage. Pregnancy itself can create problems with balance; shackling and other restraints can exacerbate these problems and prevent a woman from breaking a fall. A potential fall could harm not only the pregnant mother, but also the fetus. Additionally, Vice Chair of the American Congress of Obstetricians and Gynecologists Philip Diamond, MD, notes: “[M]inor forces may be sufficient to shear the placental attachments and increase the risk of a placental abruption after blunt abdominal trauma.”⁷ These various health concerns clearly justify prohibiting the use of physical restraints on pregnant, incarcerated women.

⁶ Garcia supra note 5.
These health issues also support the proposition that medical decisions should be made between medical practitioner and patient. A number of preeminent national medical and correctional associations have expressed opposition to the shackling of pregnant women. For example, the American Congress of Obstetricians and Gynecologists (ACOG), the nation’s leading experts in maternal, fetal and child health care, opposes the practice of shackling because it interferes with the ability of physicians to safely practice medicine and is “demeaning and unnecessary.” The American Medical Association (AMA) adopted a resolution that supports restrictions on the use of restraints of any kind on a woman in labor, delivering her baby, or recuperating from delivery unless the woman is an immediate and serious threat to herself or others or a substantial flight risk. Lastly, the Federal Bureau of Prisons, U.S. Immigration and Customs Enforcement, the U.S. Marshals Service, and the American Correctional Association have all adopted policies that seek to limit the use of shackles on pregnant prisoners.

Shackling pregnant prisoners is almost never justified, and restricting the use of restraints on pregnant prisoners will not jeopardize the safety of correctional or medical staff. In D.C., 74.3% of incarcerated women are non-violent offenders and pose a low security risk, which is especially the case during labor and postpartum recovery. Of the states that passed laws restricting the use of restraints on incarcerated pregnant women, there have been no documented instances of women in labor attempting to flee or causing harm to themselves, the public, security guards, or medical staff. Additionally, correctional officers who accompany pregnant women to the hospital sufficiently guarantee the safety of the doctors, mothers, and newborns without the use of physical restraints.

2. Prohibiting the Shackling of Incarcerated, Pregnant Women is Consistent with International and Domestic Law, and Shields the District from Potential Liability.

Shackling pregnant women violates United States constitutional law and international human rights standards. The Supreme Court held in Estelle v. Gamble, 429 U.S. 97, 104 (1976) that prison officials violate a prisoner’s Eighth Amendment right to be free from cruel and unusual punishment when they act with deliberate indifference to a prisoner’s serious medical needs. This standard has been extended to cover the shackling of pregnant women, and courts around the country have held that shackling pregnant, incarcerated women constitutes deliberate indifference.

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8 Am. Coll. Obstetricians & Gynecologists, supra note 4.
12 U.S. MARSHALS SERV., POLICY 9.1 (RESTRAINING DEVICES) §§ (D)(3)(c), (h) (as amended in 2010).
indifference to a prisoner's serious medical needs.\textsuperscript{16} Nearly two decades ago, the D.C. Circuit recognized that the shackling of pregnant women can violate the Eighth Amendment and prohibited the Department of Corrections from using shackles during labor, delivery or postpartum recovery. \textit{Women Prisoners of D.C. Dep't of Corr. v. D.C.}, 93 F.3d 910, 927, 936 (D.C. Cir. 1996).

International treaties, such as the \textit{Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment}, and the \textit{United Nations Standard Minimum Rule for the Treatment of Prisoners}, also prohibit the practice of shackling pregnant prisoners.\textsuperscript{17} A variety of international organizations such as the United Nations' Human Rights Committee and the Committee Against Torture, Amnesty International, and the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, have called for an end to shackling women during pregnancy and postpartum recovery.\textsuperscript{18} Lastly, the United Nation's Committee Against Torture criticized the United States for violating the \textit{Convention Against Torture} by shackling women during childbirth.\textsuperscript{19}

If Bill 20-468 is enacted, the District of Columbia can more effectively shield itself from liability from lawsuits that could cost it potentially hundreds of thousands of dollars.\textsuperscript{20} The training and reporting required by the bill of the Department of Corrections and Metropolitan Police Department are a best practice and will positively help to ensure that women who are pregnant are fairly treated pursuant to the bill's provisions. Additionally, the reporting and monitoring requirements in the bill importantly allow the public to hold DC officials accountable to the law so as to ensure women's health and fundamental constitutional and human rights.

\textbf{b. Suggested Areas for Improvement of Bill 20-468}

The ACLU recommends that the language in Section 3, "Use of Restraints," be modified to reflect the breadth of coverage set forth in the overview of the bill.\textsuperscript{21} The bill currently

\begin{itemize}
\item \textsuperscript{16} Nelson v. Correctional Medical Services, 583 F.3d 522, 533 (8th Cir. 2009) (denying summary judgment for officer because shackling pregnant prisoner during labor clearly established as a violation of the Eighth Amendment); Brawley v. State of Washington, 712 F.Supp.2d 1208, 1221 (W.D. Wash 2010) (denying summary judgment because shackling a prisoner in labor clearly established as a violation of the Eighth Amendment); and Villegas v. Metropolitan Government of Davidson County, 789 F.Supp.2d 895, 919 (M.D. TN 2011) (holding that the "shackling of a pregnant detainee in the final stages of labor shortly before birth and during the post-partum recovery and denying breast pump post-partum" violates the Eighth Amendment).
\item \textsuperscript{19} CAT Conclusions 2006.
\item \textsuperscript{20} In 2012, a federal judge granted preliminary approval to a $4.1 million settlement of a class of female detainees who claimed they were shackled while in labor at Cook County Jail in Illinois. A federal jury in 2011 awarded $200,000 in damages to a Nashville, Tennessee woman who was shackled during labor.
\item \textsuperscript{21} The ACLU will be providing the Committee with our recommended language changes as amendments to this bill.
\end{itemize}
provides: "The person(s) in charge of a correctional facility shall not permit restraints of any kind on an incarcerated pregnant woman or youth known to be pregnant and in labor or delivery at any time, including while in transport to a medical facility or while receiving treatment at a medical facility or hospital, except as provided in subsection (b) of this section." (emphasis added). We do not think that this language lives up to the intent of this bill. As drafted, the protections of this bill are available only to those women actually in labor. The bill should not be so limited. As noted above, there are medical concerns affecting women at every stage of pregnancy that necessitate a restriction on the use of restraints. Further, Section 3 as it currently stands is actually narrower in coverage than the current Pregnancy Management policy of the Department of Corrections (DOC), which restricts the use of restraints "on any woman in labor, during delivery, or in recovery immediately after delivery. During the last trimester of pregnancy up until labor, the DOC will use no restraints when transporting a pregnant woman unless the woman has demonstrated a history of assaultive behavior ...."22

Of the twenty-two states21 that have legislation restricting the use of restraints on incarcerated pregnant women, two prohibit the use of restraints at any time during the pregnancy,24 two prohibit the use of restraints during the third trimester,25 and ten limit the use of restraints in the first, second, and third trimesters to the least restrictive way possible.26

D.C. has the opportunity to be at the forefront of this issue by adopting the best practice of prohibiting the use of restraints on incarcerated pregnant women at any time, absent extenuating circumstances. The bill should be revised to read as follows: "The person(s) in charge of a correctional facility shall not use restraints on an incarcerated woman known to be pregnant, including during labor, transport to a medical facility or birthing center, delivery, or postpartum recovery, except as provided in subsection (b) of this section."27 This modification is

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24 See CAL. PENAL CODE § 5007.7 (West 2008); CAL. PENAL CODE § 3423 (West 2008); 55 ILL. COMP. STAT. ANN. 5/3-15003.6 (West 2008); 730 ILL. COMP. STAT. ANN. 125/17.5 (West 2008).
25 See WASH. REV. CODE ANN. § 72.09.651 (West 2010); W. VA. CODE ANN. § 25-1-16 (West 2010).
27 Should the Committee decline to extend the protections of this bill to all stages of pregnancy, the ACLU strongly encourages the Committee to maintain the current DOC standard of prohibiting restraints on pregnant women in
not only consistent with the introductory language of the bill, but also ensures that corrections
officers are not in the position of making medical determinations of whether and when a
pregnant woman is in labor. Enacting broader language ensures categorical protection for
pregnant, incarcerated women.

Again, we commend the Council for introducing Bill 20-468 and strongly support it with
the recommended amendments.
District of Columbia Section

COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON THE JUDICIARY AND PUBLIC SAFETY
Public Hearing on Bill 20-468
“Anti-Shackling of Incarcerated Pregnant Women Act of 2013”

Wednesday, July 9, 2014

Testimony of Peggy Peng Ye MD MPH
American Congress of Obstetricians and Gynecologists (ACOG) DC Junior Fellow

The American Congress of Obstetricians and Gynecologists (ACOG) is the leading professional association of physicians who specialize in the healthcare of women with more than 57,000 members. The District of Columbia Section of ACOG (DC ACOG) includes 140 practicing obstetrician-gynecologists who strive to provide the very best possible health care to our city’s women and families.

I am a practicing Obstetrician-Gynecologist in Washington, DC and a Section member of DC ACOG. I received my medical degree from Case Western Reserve University in Cleveland, Ohio, where I also completed my residency in Obstetrics and Gynecology. I moved to Washington, DC in 2012 to train at MedStar Washington Hospital Center as a fellow in Family Planning and will remain here in the District to practice.

On behalf of DC ACOG, I am pleased to submit this testimony in support of the Anti-Shackling of Incarcerated Pregnant Women Act of 2013, Bill 20-0468 (B20-0468). This bill importantly establishes that no woman who is in the custody of the District of Columbia Department of Corrections (DC DOC) can be shackled at any time while she is pregnant, during labor, during transport to a medical facility for treatment related to being
pregnant, during delivery of her child, or during postpartum recovery for a six week period.

Leading health organizations including ACOG\textsuperscript{1}, the American Medical Association (AMA)\textsuperscript{2}, and the American Public Health Association (APHA)\textsuperscript{3} all oppose the practice of shackling pregnant and postpartum women and have numerous clinical and policy guidelines advising against the practice because it poses serious health risks to the pregnant woman and her baby.\textsuperscript{4}

This bill improves on existing DC DOC regulations. Current regulations only address shackles on women who are in their last trimester of pregnancy, restricting the use of shackling restraints during labor and delivery or immediately following delivery unless the inmate poses an extraordinary security risk. This is important, as during labor and delivery, it is possible for life-threatening and emergency situations to arise, requiring immediate medical treatment that can be delayed by shackling. Yet, there are numerous reasons to refrain from the use of shackles not only during labor and delivery but throughout the pre- and postnatal periods as well.

For example, in the first trimester of pregnancy, up to 85\% of pregnant women experience nausea and vomiting.\textsuperscript{5} Adding the discomfort of restraints to a woman who is already suffering is cruel and inhumane. As a pregnancy grows, a woman’s mobility decreases, increasing the risk of falling. If she falls with her ankles and wrists shackled, she

\textsuperscript{1} According to ACOG, shackling of pregnant women interferes with physicians' ability to safely practice medicine, may compromise health care, and is also "demeaning and rarely necessary." Health Care for Pregnant and Postpartum Incarcerated Women and Adolescent Females, Comm. Op. No. 511, at 3 (Am. Coll. Obstetricians & Gynecologists 2011), available at http://www.acog.org/~/media/CommitteeOpinions/Committee%20Opinions/Health%20Care%20for%20Underserved%20Women/Comm%20Op%20511.pdf?
\textsuperscript{3} Stating that "women must never be shackled during labor and delivery." STANDARDS FOR HEALTH SERVICES IN CORRECTIONAL INSTITUTIONS 108 (Am. Public Health Ass'n 2003).
\textsuperscript{5} Nausea and Vomiting of Pregnancy, Practice Bulletin No. 52 (Am. Coll. Obstetricians & Gynecologists 2004)
will be unable to break her fall and therefore more likely land on her abdomen. Such trauma to the pregnant abdomen can result in the placenta separating from the wall of a uterus, a medical emergency that can result in the death of the woman and the loss of the pregnancy. The danger of impairing mobility with shackles extends into the postpartum period. Deep vein thrombosis, a condition in which blood clots form in the blood vessels of the legs and lungs, is a leading cause of maternal mortality. A woman is at highest risk during the postpartum period; the limited movement caused by restraints may further increase this risk. Finally, shackling may prevent or inhibit postnatal mother-child bonding. Direct mother-to-infant contact has been shown to normalize a newborn’s temperature, heart rate, and respiratory rate; improve weight gain; and decrease crying episodes.

Pregnant women who are incarcerated need and deserve the same protection as non-incarcerated women throughout pregnancy and the postpartum period. As a trained and experienced doctor, I have the responsibility of providing my patients with the best, most comprehensive care possible. Health care providers, not non-clinical correctional staff, need make decisions about medical care in the exam or delivery room. B20-0468 will enable me to safely provide care to my patients and promptly diagnose or treat medical emergencies without the threat of shackles.

Recently, I took care of an incarcerated patient in the emergency room who was suffering a miscarriage. She was bleeding heavily and in pain. I was relieved that her guards were sympathetic to our request to remove her restraints and afforded me privacy to

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examining and care for her. However, I can imagine how difficult it would have been to maintain her privacy and dignity had she remained restrained to the hospital bed. In addition, I worry that less prompt release could pose a threat to the health of other patients in similar situations.

My colleague, Dr. Tamika Auguste, who also practices at MedStar Washington Hospital Center, took care of a shackled patient on the postpartum ward. The patient had just delivered a baby who required transfer to the intensive care unit. While on the postpartum unit, the patient remained restrained to the bed. When Dr. Auguste requested that the patient be released from her restraints to allow her to visit her baby, she was informed that obtaining approval to unshackle the patient would be too cumbersome. The patient eventually returned to her correctional facility without seeing her newborn.

My patients come from all walks of life, from every situation imaginable. A physician’s first and foremost responsibility is for her patient’s welfare. If B20-0468 becomes law, pregnant women who are incarcerated in DC will no longer risk unnecessary, harmful, and inhumane restraint during their pregnancy, labor, delivery, and post-partum recovery. This bill is about ensuring patient safety and providing quality health care to all pregnant women, including women who are incarcerated. I urge you to vote in support of B20-0468. On behalf of DC ACOG, I thank you for the opportunity to submit this testimony.

Respectfully submitted,

Peggy Peng Ye MD MPH
ACOG DC Junior Fellow
2800 Quebec St. NW #956
Washington, DC 20008
Testimony

Thomas Faust
Director

D.C. Department of Corrections
Hearing on Bill 20-468
Anti-Shackling of Incarcerated Pregnant Women Act of 2013

Committee on the Judiciary and Public Safety
Tommy Wells, Chair
Council of the District of Columbia

John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, D.C. 20004
Room 412

July 9, 2014
11:00 am

THE EXECUTIVE AGREES THAT SAFEGUARDING THE HEALTH AND WELFARE OF A PREGNANT WOMAN – OR ANYONE – IN THE CUSTODY OF THE DISTRICT IS A HIGH PRIORITY. INDEED, AGENCY POLICIES ARE ALREADY IN ALIGNMENT WITH PARTS OF THE PROPOSED BILL. HOWEVER, IT IS ALSO OUR RESPONSIBILITY TO ENSURE THE SAFETY OF DISTRICT EMPLOYEES, MEDICAL STAFF, AND THE GENERAL PUBLIC, SO WE MUST CAREFULLY BALANCE
THESE OBJECTIVES. WE RECOMMEND THAT THE COUNCIL AND EXECUTIVE WORK TOGETHER TO STRIKE THE APPROPRIATE BALANCE IN THE PROPOSED LEGISLATION.

AS AN INITIAL MATTER, IT IS IMPORTANT TO RECOGNIZE THAT THERE ARE CRITICAL DISTINCTIONS BETWEEN THE POPULATIONS OF ARRESTEES TEMPORARILY IN THE CUSTODY OF THE METROPOLITAN POLICE DEPARTMENT (MPD) AND INDIVIDUALS THAT HAVE ALREADY BEEN COMMITTED TO DOC OR THE DEPARTMENT OF YOUTH REHABILITATION SERVICES (DYRS). AS A RESULT, THE SITUATIONS MAY REQUIRE DIFFERENT POLICIES AND PRACTICES. FOR EXAMPLE, WHEN MPD INITIALLY TAKES AN INDIVIDUAL INTO CUSTODY, THE ARRESTEE IS SUBJECT TO A FIELD SEARCH. THIS IS MORE THOROUGH THAN A SIMPLE FRISK, BUT THE ARRESTEE IS STILL CLOTHED. A FULL CUSTODY SEARCH – WHICH IS MORE THOROUGH – IS NOT CONDUCTED UNTIL THE INDIVIDUAL IS INSIDE A HOLDING
FACILITY. GIVEN THE ABBREVIATED NATURE OF THE FIELD SEARCH, IT WOULD BE UNSAFE FOR MPD TO TRANSPORT AN ARRESTEE WITHOUT RESTRAINTS. THAT SAID, MPD POLICY DOES STIPULATE THAT OFFICERS SHOULD USE THE LEAST RESTRICTIVE MEANS POSSIBLE. FURTHER, IT NOTES THAT IN CERTAIN SCENARIOS, INCLUDING WITH A PREGNANT ARRESTEE, OFFICERS MAY HANDCUFF THE ARRESTEE WITH THE HANDS IN FRONT INSTEAD OF BEHIND THE BACK, AS IS THE STANDARD PRACTICE.

PLEASE NOTE THAT THE DEPARTMENT OF YOUTH REHABILITATION SERVICES’ CONCERNS WITH THE PROPOSED LEGISLATION ARE OUTLINED IN A SEPARATE STATEMENT BEING SUBMITTED FOR THE RECORD.

FOR THE DEPARTMENT OF CORRECTIONS, ALL FEMALE INMATES ARE NOW HOUSED AT THE CORRECTIONAL TREATMENT FACILITY WITH THE EXCEPTION OF THOSE RESIDING AT FAIRVIEW; A COMMUNITY CORRECTIONS
FACILITY UNDER CONTRACT WITH DCDOC FOR THE HOUSING OF 25 FEMALE PRE-TRIAL COURT ORDERED DEFENDANTS AND SENTENCED MISDEMEANANTS.

FEMALE OFFENDERS COMPRIZE APPROXIMATELY 7% OF OUR TOTAL POPULATION AND HAVE AN AVERAGE AGE OF 37 YEARS. IN 2014 TO DATE, THE AVERAGE DAILY POPULATION OF 151 FEMALES COMPARES TO 1,884 FOR THE MALE INMATE POPULATION. OVER THE PRIOR TWELVE MONTH PERIOD, NEARLY 40% OF WOMEN IN OUR CUSTODY HAVE BEEN RELEASED WITHIN A SEVEN DAY PERIOD. THE AVERAGE LENGTH OF STAY FOR FEMALE INMATES IS 46 DAYS AND FOR THOSE WITH FELONY CONVICTIONS RELEASED TO THE CUSTODY OF THE U.S. MARSHALS SERVICE, 136 DAYS—THIS LATTER GROUP OF WOMEN ARE FOR THE MOST PART TRANSITIONED TO FEDERAL BUREAU OF PRISONS’ FACILITIES.
SINCE CALENDAR YEAR 2011 TO THE PRESENT, THERE HAVE BEEN A TOTAL OF 6,723 FEMALE JAIL ADMISSIONS. OF THAT TOTAL, 245 FEMALES HAVE BEEN PREGNANT DURING INCARCERATION, WHICH REPRESENTS 3.6% DURING THIS PERIOD. ELEVEN OF THE 245 INCARCERATED PREGNANT FEMALES HAVE GONE INTO LABOR AND GIVEN BIRTH.

OUR DAY TO DAY OPERATIONS REQUIRE THAT WE BALANCE THE MANDATE TO MAINTAIN SAFETY AND SECURITY--FOR INMATES, STAFF AND THE COMMUNITY, WHILE BEING COMPASSIONATE AND HUMANE IN THE TREATMENT AND CARE OF THOSE ENTRUSTED TO OUR CUSTODY.

DCDOC SUPPORTS RESTRICTING THE USE OF RESTRAINTS ON PREGNANT FEMALE INMATES AS REFLECTED IN OUR EXISTING OPERATIONAL PROTOCOLS. BILL 20-468, THE ANTI-SHACKLING OF INCARCERATED PREGNANT WOMEN ACT OF 2013, SEEKS TO ESTABLISH AN OVERLY BROAD
RESTRICTION THAT NO WOMEN WHO ARE PREGNANT WHILE IN THE CUSTODY OF THE DISTRICT OF COLUMBIA CENTRAL DETENTION FACILITY (DC JAIL), THE CORRECTIONAL TREATMENT FACILITY, HALFWAY HOUSES, OR LOCK-UPS CAN BE RESTRAINED AT ANY TIME WHILE THEY ARE PREGNANT, DURING LABOR, TRANSPORT TO A MEDICAL FACILITY FOR TREATMENT RELATED TO BIRTH, DURING DELIVERY, OR DURING POST-PARTUM RECOVERY UP TO SIX WEEKS.

THE PRIMARY DIFFERENCE IN THE PROPOSED LEGISLATION AND OUR PRACTICES IS THAT DOC POLICIES NOT ONLY REFLECT A FOCUS ON RESPONSIBLE MEDICAL MANAGEMENT OF PREGNANT INMATES, BUT ALSO ON INSTITUTIONAL AND COMMUNITY SAFETY AND SECURITY CONCERNS. OUR POLICIES DO PERMIT THE USE OF RESTRAINTS DURING THE FIRST TWO TRIMESTERS OF PREGNANCY PRIMARILY BECAUSE OF RISKS ASSOCIATED
WITH MOVING INMATES FROM A LOCKED AND HEAVILY SECURED FACILITY TO A MEDICAL OUTPOST-- TO UNDERGO SPECIALIZED MEDICAL TREATMENT OR OTHER SERVICES DEEMED NECESSARY BY FACILITY HEALTH CARE STAFF.

THERE IS DEFINITELY INCREASED RISK FOR ATTEMPTED ESCAPE OR OTHER EXTRAORDINARY OCCURRENCES DURING SUCH MOVEMENT THUS THE NEED FOR HEIGHTENED SECURITY WITH INMATES LEAVING THE FACILITY IN THIS CAPACITY.

IT IS IMPORTANT TO NOTE THAT PREGNANCY IS NOT AN ILLNESS OR A DISABILITY, AND DURING TRANSPORT A PREGNANT FEMALE IN EARLY PREGNANCY SUCH AS THE FIRST TRIMESTER, CAN STILL BE ASSAULTIVE, RESISTANT, COMBATIVE OR FLEE QUICKLY, PRESENTING A SAFETY AND SECURITY RISK TO THE DOC AND COMMUNITY AT LARGE.

PREGNANCY IN NO WAY LESSENS THE LEGITIMATE SECURITY CONCERNS THAT ARE PRESENTED AND
AMPLIFIED WHEN AN INMATE LEAVES A LOCKED, SECURED AND HEAVILY GUARDED FACILITY FOR TRANSPORT IN THE COMMUNITY TO MEDICAL OUTPOSTS. THE CURRENT DOC POLICY ASSUMES THAT A FEMALE INMATE IN HER FIRST OR SECOND TRIMESTER CAN BE SAFELY RESTRAINED AND CUFFED ONLY IN THE FRONT, ABSENT A MEDICAL FINDING OR RECOMMENDATION TO THE CONTRARY. THIS POLICY DIFFERS FROM THE PROPOSED LEGISLATION ONLY IN SO FAR AS THE DOC POLICY IS LIMITED TO PROHIBITING RESTRAINTS IN THE THIRD TRIMESTER OF PREGNANCY.

IT IS RESPECTFULLY SUGGESTED THAT THE CURRENT LEGISLATION AS PROPOSED IS TOO BROAD TO BALANCE THE INMATE’S MEDICAL CONCERNS AGAINST SERIOUS, LEGITIMATE PENOLOGICAL INTERESTS IN SAFETY, SECURITY AND ORDER IN THE TRANSPORT AND OUTPOSTING OF INMATES. A MORE BALANCED PROPOSAL WOULD BE TO PROHIBIT RESTRAINTS OUTRIGHT IN THE
THIRD TRIMESTER AND DURING LABOR AND DELIVERY, ABSENT EXTRAORDINARY CIRCUMSTANCES SUCH AS ASSAULTIVE BEHAVIOR, OR HISTORY OF ESCAPE OR ATTEMPTED ESCAPE, AND ALLOW AS AN EXCEPTION NO RESTRAINTS IN THE FIRST AND SECOND TRIMESTER WHERE SPECIFICALLY RECOMMENDED BY A MEDICAL CLINICIAN.

THIS FOLLOWS THE POSITION OF THE AMERICAN MEDICAL ASSOCIATION’S (AMA) ADOPTED RESOLUTION SUPPORTING RESTRICTIONS ON THE USE OF RESTRAINTS OF ANY KIND ON A WOMAN IN LABOR, DELIVERING HER BABY OR RECUPERATING FROM DELIVERY UNLESS THE WOMAN IS AN IMMEDIATE AND SERIOUS THREAT TO HERSELF OR OTHERS OR A SUBSTANTIAL FLIGHT RISK.

THE AMERICAN PUBLIC HEALTH ASSOCIATION (APHA) ALSO RECOMMENDS THAT WOMEN MUST NEVER BE RESTRAINED DURING LABOR AND DELIVERY.
IN ADDITION, THE AMERICAN CORRECTIONAL ASSOCIATION’S (ACA) NATIONAL STANDARDS FOR ACCREDITATION STATE THAT WRITTEN POLICY, PROCEDURE AND PRACTICE PROHIBIT THE USE OF RESTRAINTS ON FEMALE OFFENDERS DURING ACTIVE LABOR AND DELIVERY OF A CHILD.

THE APPROPRIATE MEDICAL MANAGEMENT OF PREGNANT WOMEN IS A PRIORITY FOR THE DEPARTMENT OF CORRECTIONS. WOMEN COMMITTED TO OUR FACILITIES UNDERGO A FULL MEDICAL EVALUATION, INCLUDING A MENTAL HEALTH ASSESSMENT AND PREGNANCY TESTING. IF FOUND TO BE PREGNANT, FOLLOWING ASSIGNMENT TO A HOUSING UNIT AT THE CORRECTIONAL TREATMENT FACILITY, THEY RECEIVE ROUTINE PRE-NATAL CARE AND NUTRITIONAL SUPPLEMENTS.

WHILE WE ALSO RECOGNIZE THAT PREGNANCY PRESENTS WOMEN WITH UNIQUE MEDICAL CHALLENGES, THE CARE
THEY ARE GIVEN WHILE IN OUR CUSTODY IS IN NO WAY DIMINISHED BY THE PROTOCOLS IMPLEMENTED FOR SECURITY PURPOSES. FURTHER AS STATED IN OUR POLICIES, EVEN WHEN HIGH SECURITY RISKS ARE EVIDENT, ONLY FRONT HANDCUFFS ARE TO BE APPLIED AS A SECURITY PRECAUTION.

AGAIN IT IS OUR POSITION THAT THE COUNCIL SHOULD NOT MAKE SIGNIFICANT MODIFICATIONS TO EXISTING OPERATIONAL, REPORTING OR INMATE NOTIFICATION POLICIES WHICH TAKE INTO CONSIDERATION BOTH SAFETY AND MEDICAL MANAGEMENT OF THE POPULATION. UNLESS THERE IS A MEDICAL DETERMINATION TO THE CONTRARY, FRONT HANDCUFFS SHOULD BE ALLOWED DURING THE FIRST TWO TRIMESTERS OF PREGNANCY--AS REQUIRED TO MAINTAIN SECURITY AND CONTROL ONCE EXITING THE SECURED FACILITY. AGAIN, THIS IS NOT CONTRARY TO POSITIONS ADOPTED BY THE AMA, APHA, AND ACA.
ALSO NOTEWORTHY IS THE RISK INVOLVED WHEN INFORMING INMATES OF CHANGES IN SECURITY PROTOCOLS. SECTION 4, SUBSECTION (C) OF THE PROPOSED LEGISLATION REQUIRES THAT THE DOC SHALL CAUSE THE REQUIREMENTS OF THE ACT TO BE PROVIDED TO ALL "WOMEN OR YOUTH WHO ARE OR MAY BECOME PREGNANT AT THE TIME DOC ASSUMES CUSTODY OF THE PERSON."

DOC ADVISES AGAINST REVEALING SUCH SECURITY INFORMATION IN ADVANCE TO AN INMATE. IN GENERAL, NEITHER MALE NOR FEMALE INMATES ARE PROVIDED THE DATES OF THEIR APPOINTMENTS FOR MEDICAL CARE OUTSIDE THE FACILITY. THIS SECURITY PROCEDURE PROTECTS AGAINST ADVANCE PLANNING FOR SECURITY COMPROMISES SUCH AS ESCAPES AND PASSING OF CONTRABAND. IT ALSO PROTECTS THE INMATE, WHO MAY REVEAL THESE PLANNED DATES TO FAMILY OR FRIENDS, FROM BEING LOCATED OUTSIDE THE FACILITY BY ENEMIES AND OTHER INDIVIDUALS POSING THREATS. PREGNANT
INMATES GO TO MEDICAL APPOINTMENTS AND OUTPOSTS ON A FAIRLY PREDICTABLE SCHEDULE. THAT PREDICTABILITY AS TO TIMING AND LOCATION COMBINED WITH ADVANCE KNOWLEDGE THAT THEY WILL BE COMPLETELY UNRESTRAINED POSES UNREASONABLE SECURITY RISKS TO INMATES, STAFF AND THE COMMUNITY. MOREOVER, THE ADVANCE NOTICE MAY LEAD TO INMATE REFUSALS TO COMPLY WITH CUFFING WHEN JUSTIFIED DUE TO ESCAPE OR INJURY RISKS.

IN CONCLUSION, THE DOC SUPPORTS LEGISLATION IN GENERAL CODIFYING ITS LONGTIME PRACTICE OF NOT RESTRAINING PREGNANT INMATES IN THE THIRD TRIMESTER WHILE IN TRANSPORT TO MEDICAL APPOINTMENTS, WHILE IN LABOR OR IMMEDIATELY THEREAFTER WITH AN EXCEPTION FOR INMATES WHO PRESENT ESCAPE OR SERIOUS INJURY RISKS TO THEMSELVES OR OTHERS --AND EVEN THEN ONLY FRONT
HANDCUFFS ARE REQUIRED WITHOUT USE OF WAIST OR LEG AND ANKLE RESTRAINTS. HOWEVER, DOC URGES COUNCIL TO LIMIT THE TIME FRAME TO THE THIRD TRIMESTER ABSENT A CLINICAL DETERMINATION IN THE FIRST TWO TRIMESTERS THAT FRONT HANDCUFFS SHOULD NOT BE USED.

IN ADDITION, THE PROPOSED DOCUMENTATION PROCESS OF INSTANCES WHERE RESTRAINTS ARE USED IS OVERLY BURDENSOME. THE DEPARTMENT’S CURRENT RECORD KEEPING PRACTICES HAVE NOT BEEN DEMONSTRATED TO BE INSUFFICIENT. MOREOVER, IT IS NOT PRACTICAL FOR DOC TO BECOME THE COLLECTION POINT FOR RECORDS FROM OTHER AGENCIES SUCH AS MPD AND DYRS. LASTLY, BASIC SECURITY PRACTICES SHOULD NOT BE REVEALED IN ADVANCE TO REDUCE ANY POSSIBLE PLANNED ESCAPE AND ALTERCATION RISKS.
I APPRECIATE THE OPPORTUNITY TO PROVIDE COMMENTS ON THIS IMPORTANT ISSUE AND WELCOME ANY QUESTIONS YOU HAVE AT THIS TIME.