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To: Councilmember Charles Allen,
Chairperson, Committee on the Judiciary and Public Safety
From: Richard Schmechel,
Executive Director, D.C. Criminal Code Reform Commission (CCRC)
Date: October 9, 2018
Re: Testimony for the October 4, 2018 Hearing on Bill 22-0877, "Protecting Immigrants from Extortion Amendment Act of 2018"

I. Introduction.

Thank you for the opportunity to provide written testimony to the Committee on the Judiciary and Public Safety for the record of the public hearing on the Protecting Immigrants from Extortion Amendment Act of 2018 ("bill"), held on October 4, 2018. I am presenting testimony on behalf of the Criminal Code Reform Commission (CCRC).

The CCRC is a small, independent District agency that began operation on October 1, 2016. The CCRC's mission is to prepare comprehensive recommendations for the Mayor and Council on reform of the District's criminal statutes. Specifically, the CCRC's work is focused on developing possible reforms to the District's "substantive" criminal statutes—i.e., laws that define crimes and punishments, such as extortion and blackmail.

To date, the CCRC has not submitted final recommendations to the Mayor or Council for offenses that may address or relate to the conduct that is the aim of the bill. However, the agency has completed research and drafted recommendations on extortion and several other relevant, existing offenses.

Specifically, in 2017 the CCRC developed and received feedback from its statutory Advisory Group[1] on a first draft of revised language for the District's extortion offense. Through its use of a new defined term "coercion," the CCRC's first draft revised extortion statute would—similar to the present bill—criminalize efforts to obtain property of another by threatening to notify

[1] The Criminal Code Revision Advisory Group (Advisory Group) is a statutorily-designated group of stakeholders who review and provide information and suggestions on proposals prepared by the Commission. The Advisory Group consists of 7 members. The Advisory Group consists of: two Council appointees; the Designee of the United States Attorney for the District of Columbia; the Designee of the Director of the Public Defender Service for the District of Columbia; the Designee of the Attorney General for the District of Columbia; the Designee of the Chairperson of the Committee on the Judiciary and Public Safety; and the Designee of the Deputy Mayor for Public Safety and Justice. The CCRC submitted its first draft of a revised extortion offense to the Advisory Group on August 11, 2017.

law enforcement authorities about a person's immigration status. To date, there has been no objection to this proposed change by any of the CCRC's Advisory Group members.

This winter the CCRC also expects to submit to its statutory Advisory Group a second draft of revised language for the extortion statute and other relevant offenses, including the District's blackmail, sexual abuse, and human trafficking statutes. The CCRC also has begun research on other matters implicated by the bill, such as penalty proportionality in District offenses.

While the CCRC has not completed its recommendations for reform, at this point it appears likely that the agency will endorse the general thrust of the policy in the proposed bill—clarifying that efforts to coerce a person to some action by threatening to report on a person's immigration status are criminal in the District. However, the CCRC is likely to propose an alternative means of achieving this goal that ensures a more consistent approach across the District's various criminal laws. The present testimony is based on the CCRC's research and distinct expertise evaluating the ambiguities, overlap, and proportionality in the current D.C. Code.

II. Bill Amendment and Purpose.

The bill would amend the District's current extortion statute, D.C. Code § 22-3251 to read as follows (additions in underline, deletions in strikethrough):

> (a) A person commits the offense of extortion if that person obtains or attempts to obtain:
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> (1) ~~That person obtains or attempts to obtain~~ [T]he property of another with the other's consent which was induced by wrongful use of actual or threatened force or violence or by wrongful threat of economic injury; ~~or~~
>
> (2) ~~That person obtains or attempts to obtain~~ [P]roperty of another with the other's consent which was obtained under color or pretense of official right; or
>
> (3) The property, labor, or service of another with the other's consent if the consent was induced by wrongful actual or threatened notification of law enforcement officials about the other's immigration status.
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> (b) Any person convicted of extortion shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 10 years, or both.

The bill makes no other changes to District statutes.

III. Bill Analysis.

As described below, the bill creates overlapping liability with the District's blackmail, human trafficking, and other statutes. While not explicitly addressing coercive threats based on immigration status, these existing statutes already provide criminal liability for most (though not all) the conduct targeted by the bill. The bill's creation of overlapping liability may lead to disproportionate outcomes depending on which statute(s) is/are applied in a given case. Also, the bill, like the current extortion statute, does not specify the culpable mental states that must be proven for there to be criminal liability, or define key terms. There are also several technical drafting issues with the current bill that could be clarified.

A significant part of (but not all) the conduct targeted by the bill is already criminal under the District's blackmail statute. The District's current blackmail statute, D.C. Code § 22–3252, is as follows:

> (a) A person commits the offense of blackmail, if, with intent to obtain property of another or to cause another to do or refrain from doing any act, that person threatens:
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> (1) To accuse any person of a crime;
>
> (2) To expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt, or ridicule; or
>
> (3) To impair the reputation of any person, including a deceased person.
>
> (b) Any person convicted of blackmail shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 5 years, or both.

To the extent that it is a federal crime to enter the United States without proper approval of an immigration officer,[2] threatening to report someone as an undocumented immigrant in order to induce them to give over property may constitute blackmail. However, in some circumstances a person may have a problematic immigration status that does not entail a putative crime.[3] In that scenario, a threat to inform law enforcement authorities about the other's immigration status could hold severe negative consequences and coercive power, yet subsection (a)(1) of the District's blackmail statute would not provide liability. Subsections (a)(2) and (a)(3) may provide additional liability for disclosures to law enforcement about a person's immigration status where the disclosure would reasonably or necessarily lead to hatred, contempt, ridicule, or reputational harm. Yet, overall, it appears that the current blackmail statute does not adequately address coercive threats to report a person's immigration status to law enforcement authorities—the statute may not apply to allegations about immigration status that do not amount to a crime or otherwise impair that person's reputation.

A significant part of (but not all) the conduct targeted by the bill also is already criminal under the District's human trafficking statutes. The District's current human trafficking statutes, D.C. Code §§ 22–1832 – 1843 criminalize a business or person coercing a person to provide labor,[4] services,[5] or a commercial sex act[6], or participating in recruiting, transporting, or other acts in reckless disregard that the person is being so coerced.[7] These human trafficking statutes rely on the following definition of coercion in D.C. Code § 22–1831(3):

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[2] 8 U.S.C. § 1325.

[3] For example, overstaying a visa.

[4] D.C. Code § 22-1831(6) ("'Labor' means work that has economic or financial value.").

[5] D.C. Code § 22-1831(8) ("'Services' means legal or illegal duties or work done for another, whether or not compensated.").

[6] D.C. Code § 22-1831(4) ("'Commercial sex act' means any sexual act or sexual contact on account of which or for which anything of value is given to, promised to, or received by any person. The term "commercial sex act" includes a violation of § 22-2701, § 22-2704, §§ 22-2705 to 22-2712, §§ 22-2713 to 22-2720, and § 22-2722.").

[7] D.C. Code § 22-1833 ("Trafficking in labor or commercial sex acts. It is unlawful for an individual or a business to recruit, entice, harbor, transport, provide, obtain, or maintain by any means a person, knowing, or in reckless disregard of the fact that: (1) Coercion will be used or is being used to cause the person to provide labor or services or to engage in a commercial sex act; or (2) The person is being placed or will be placed or kept in debt bondage.").

> "Coercion" means any one of, or a combination of, the following:
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> (A) Force, threats of force, physical restraint, or threats of physical restraint;
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> (B) Serious harm or threats of serious harm;
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> (C) The abuse or threatened abuse of law or legal process;
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> (D) Fraud or deception;
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> (E) Any scheme, plan, or pattern intended to cause a person to believe that if that person did not perform labor or services, that person or another person would suffer serious harm or physical restraint;
>
> (F) Facilitating or controlling a person's access to an addictive or controlled substance or restricting a person's access to prescription medication; or
>
> (G) Knowingly participating in conduct with the intent to cause a person to believe that he or she is the property of a person or business and that would cause a reasonable person in that person's circumstances to believe that he or she is the property of a person or business.

The plain language of the definition of coercion does not mention immigration status. However, several of the subsections in the definition are likely to apply in instances where disclosure of a person's immigration status is threatened. Most relevantly, subsection (B) of the coercion definition states that "serious harm or threats of serious harm" constitute coercion, and subsection (C) of the coercion definition states that "abuse or threatened abuse of law or legal process" constitutes coercion. The term "serious harm" is itself a defined term in D.C. Code § 22–1831(7):

> "Serious harm" means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue to perform labor, services, or commercial sex acts to avoid incurring that harm.

The current code does not define the term "abuse of law or legal process." However, the term under an analogous federal statute is defined as "the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action."[8]

Again, while the term "abuse of law or legal process" and the definition of serious harm do not explicitly address disclosures of immigration status, the terms appears to squarely fit the conduct targeted by the bill. That is, any threat of disclosing a person's immigration status to law enforcement authorities to get that person to provide "labor," "services," or "commercial sex acts" that is sufficiently serious to compel a reasonable person in that situation to perform the desired conduct, or that constitutes an abuse of law or legal process, would be criminal. However, there is no case law clearly holding that disclosure of immigration status fits the definition of "serious harm," or "abuse of law or legal process," and the CCRC is not aware of trial court prosecutions relying on this definition. Moreover, unlike the extortion statute, the human trafficking statutes do not reach efforts to obtain tangible property. And, unlike the blackmail statute, the human trafficking statutes are limited to actions that constitute "labor," "services," or a "commercial sex

[8] 18 U.S.C. § 1589.

act" and may not reach other types of acts.[9] Overall, then, it appears that the current human trafficking statutes do not completely address coercive threats to report a person's immigration status to law enforcement authorities—they may not apply to coercion to gain tangible property or some discrete acts.

Other District statutes also would provide overlapping liability with the bill's amended extortion statute. To the extent that the bill seeks to cover a coercive threat, it potentially overlaps with an array of District statutes that prohibit coercive threats of any content (i.e. whether about revealing immigration status or committing another harm) when issued to get the victim to engage in specific behavior. For example, any coercive threat that causes a person to engage in a sexual act is criminalized under the District's second degree sexual abuse[10] statute. Similarly, coercive threats that seek to influence a person's action in an official investigation or proceeding is criminalized under the District's obstruction of justice[11] statute. The scenarios where these statutes are implicated may be relatively rare, but they highlight the potential importance of ensuring that general definitions of coercion used throughout the D.C. Code also clearly include coercion based on immigration status.

The creation of new liability in a revised extortion statute that overlaps with the existing liability in the blackmail and human trafficking statutes may lead to disproportionate outcomes in some cases. Blackmail, in current law, is subject to a 5 year statutory maximum[12] while extortion, both under current law and the bill, is subject to a 10 year statutory maximum sentence.[13] Human trafficking, by contrast, is normally subject to a 20 year statutory maximum sentence.[14] Broadening the District's extortion statute per the bill to encompass conduct now criminalized by the blackmail and human trafficking statutes would exacerbate the wide range of maximum imprisonment penalties a person may be subject to under current law. Whether or not a 5- or 10- or 20-year maximum penalty is justified, the fact that a person may be charged and convicted for the same harm under any or multiple[15] offenses with differing penalties creates the possibility for disparate outcomes based on variations in individual charging practices. That is, one person who coerces a person to provide free labor under threat of a disclosure about immigration status to law enforcement authorities may be charged with blackmail (and subject to a 5-year maximum), while another in the exact same situation may be charged under the bill with extortion (a 10-year maximum) or with human trafficking (a 20-year maximum).

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[9] For example, threatening disclosure of a person's immigration status to compel that person to give a good grade (in school) or to remain silent about a crime they witnessed.

[10] D.C. Code § 22-3003.

[11] D.C. Code § 22-722.

[12] D.C. Code § 22–3252.

[13] D.C. Code § 22-3251.

[14] D.C. Code § 22-1837.

[15] Charges could be brought under *both* blackmail or the bill's extortion language in situations where the threatened disclosure about a victim's immigration status would amount to accusing the person of committing a crime. Given the differences in elements in the statutes, it is unclear whether convictions on both charges would merge per the constitutional prohibition on multiple punishments. The case for required merger of convictions under both the bill's extortion language and the human trafficking statutes is strong, but also subject to litigation. Merger analysis is an art here, not a science, given the statutes' unclear culpable mental states and other elements. The CCRC can provide further analysis of this matter on request.

Also, the bill, like the current extortion statute, does not specify the culpable mental states that must be proven for there to be criminal liability, or define key terms. A common defect in the drafting of older statutes, including the District's extortion statute, is that no "mens rea" or culpable mental state is specified in the offense--e.g. "knowingly," "recklessly," etc. As the Supreme Court has noted, it is usually presumed that the defendant must have knowledge of all the facts that distinguish his or her conduct from being criminal, and courts typically will read in such a requirement even where there is legislative silence.[16] However, absent legislative specification of a culpable mental state, extensive litigation often occurs.[17] The bill's amendment to the existing extortion statute does not specify the degree of awareness a person must have as to the threat of a person's immigration status. For example, is a person criminally liable for talking about calling law enforcement authorities about a coworker's immigration status before asking them for a cash loan? Even if the victim believes they were being threatened with being reported if they didn't give over cash, the answer as to liability may critically depend on the speaker's culpable mental state. Did the speaker have any belief that his words could be interpreted as a threat? Should he have known? What if it could be proven that the statement was intended as a joke? Specifying a culpable mental state such as knowledge in the bill's revision of extortion may clarify the statute and avoid litigation. Like the current extortion statute, the bill also does not define the crucial term "consent."[18] Adding a clear culpable mental state and defining the term "consent" would clarify the bill.

As a technical drafting matter, the bill's reference to "labor, or services" appears to be redundant, and potentially confusing. The District's extortion statute is a property offense subject to the statutory definitions in D.C. Code § 22-3201. The definition of "property"[19] is "anything of value," and specifically includes "services." Moreover, "services"[20] is itself a defined term for the chapter that includes "Labor, whether professional or nonprofessional." By separately referring to terminology that is elsewhere defined to be part of "property," the bill's drafting may be confusing. Eliminating the bill's reference to "labor, or services" may clarify the bill without substantive change.

*Also, the bill's reference to "*wrongful *actual or threatened notification of law enforcement officials," (emphasis added) appears to be redundant, and potentially confusing.* The meaning of the word "wrongful" in the bill's new language is unclear. It does not appear to be the intent of the bill to limit liability to instances where a person's threatened notification of law enforcement officials is *otherwise* "wrongful" or illegal—e.g. where the claim an immigration violation is fraudulent or is part of a course of stalking. Rather, the intent of the bill seems to be to cover *any* threatened notification of law enforcement officials that seeks to induce the victim to consent to handing over property. Unlike the seemingly parallel use of the word "wrongful" in the existing provisions of the extortion statute which distinguishes types of force or economic injury,[21] any

[16] *Elonis v. United States*, 135 S. Ct. 2001, 2009-10 (2015).
[17] *See, e.g., Carrell v. United States*, 165 A.3d 314, 317 (D.C. 2017).
[18] For example, does "consent" include consent obtained in significant part by a lie?
[19] D.C. Code § 22-3201(3).
[20] D.C. Code § 22-3201(5).
[21] The precise meaning of "wrongful" in the existing subsections is unclear, but at the very least appears to differentiate innocent uses of force or infliction of economic injury from what is otherwise a criminal assault or fraud. Legislative history also suggests that the term "wrongful" may affect the culpable mental state(s) that must be proven for the offense. See *Extension of Comments on Bill No. 4-193, District of Columbia Theft and White Collar Crime Act of*

threat to notify law enforcement authorities of a person's immigration status in order to obtain his or her property should presumably be criminalized under the bill. Eliminating the bill's reference to "wrongful" may clarify the bill without substantive change.

Lastly, the bill's reference to "actual" notification to law enforcement officials appears to be redundant, and potentially confusing. It is not clear whether or how a person would successfully coerce another person to consent to giving up his or her property after having notified law enforcement authorities of the victim's immigration status. Rather, the intent of the bill seems to be to cover the "threatened notification" of authorities, a possible action that the victim wishes to avoid. Unlike the seemingly parallel use of the word "actual" in the existing extortion statute in conjunction with "force or violence," actual notification of authorities is a one-time event that holds no implicit threat of repetition. Eliminating the bill's reference to "actual" may clarify the bill without substantive change.

IV. Closing.

The CCRC's current work generally supports the aim of the bill. While not final, the CCRC's current draft recommendations would explicitly state that threats to report a person's immigration status in a manner similar are a form of coercion which, if used in connection with a request for an action or property, is criminal. However, unlike the present bill, the CCRC approach would more consistently incorporate threats to reveal a person's immigration status in multiple offenses—e.g., human trafficking and sexual assault as well as extortion. The CCRC will also seek to reduce the possibility of disparate sentences by reducing the overlap between extortion, blackmail, and human trafficking offenses.

The draft bill, by expanding only the District's extortion statute and not repealing or changing other statutory provisions, may both go too far and not far enough. By creating overlapping liability under both the existing blackmail statute and the revised extortion statute, the bill may lead to disparate outcomes for persons committing the same harms. By not expanding the District's blackmail statute, the coercive use of immigration status to control a victim's actions (other than transferring property) the bill may not adequately criminalize the harms it seeks to redress. The current drafting of the bill, in certain respects, is also potentially confusing and some definitions of terms and technical changes could clarify the bill's meaning.

Pending the completion of the CCRC's comprehensive recommendations for revising extortion, blackmail, human trafficking, and other offenses to clearly and consistently include threats about immigration status, an alternative to the present bill would be an amendment of the District's current blackmail statute (rather than the extortion statute). Amendment of the blackmail statute could potentially avoid the primary concerns about the penalty and scope of the liability for threats about immigration status.

1982, Committee on the Judiciary (July 20, 1982) at 69 ("The threat, however, must be 'wrongful.' The term 'wrongful' is used in other criminal statutes contained in the District of Columbia Code. As noted in Masters v. United States, 42 App. D.C. 350, 358 (1941), the term 'wrongful' when used in criminal statutes implies an evil state of mind." (citing also to *Anozoategui v. United States*, 335 F.2d 1000 (D.C. Cir. 1964))).

Thank you for your consideration of this testimony. For questions about the testimony or the CCRC's work more generally, please do not hesitate to contact our office or visit the agency website at www.ccrc.dc.gov.

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