

TESTIMONY OF THE NEW YORK CITY BAR ASSOCIATION
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COMMITTEE ON GOVERNMENTAL OPERATIONS
INTRODUCTORY BILL NO. 260

Chairman Felder, Council Members, Good Afternoon. On behalf of the New York City Bar Association, I am grateful for the opportunity to share the Association's views on Bill No. 260. The Association believes that speedy adoption of this legislation is important on multiple levels. I would like to outline the most compelling arguments for passage of the bill.

First, the quality of Council deliberations and decisions turns on your receiving accurate and objective testimony from witnesses. Reliance on the veracity of witnesses' sworn testimony is vital for the effective functioning of the Council. However, permitting an individual or company to shape, mold, or manipulate a witness' testimony - - whether by overt or covert threats - undermines the integrity of Council proceedings. Indeed, the testimony of witnesses vulnerable to economic or physical coercion will be greeted skeptically, whether or not suspicion is warranted. Equally worrisome, the Council may legislate based on spurious testimony, risking misguided policy decisions.

But misinformation is not the only threat presented by economic reprisals against Council witnesses. An employee fearful of retaliatory termination by her employer, or physical violence by another individual, might forego testifying altogether. In this regard, the District of Columbia Court of Appeals emphasized that modern America "is a nation of employees. We are dependent upon others for our means of livelihood, and most of our people have become completely dependent on wages. If they lose their jobs they lose every resource. . . ." ¹ An employee fearful of vindictive discharge will pause long before addressing this or any committee, particularly when her family's very well-being hangs in the balance. Indeed, the peril to the public discourse when private corporations and public employers silence their workers is real. As Justice Black observed over half-a-century ago, the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. . . ." ² Several years later, in *Bond v. Floyd*, Chief Justice Warren declared that "the central commitment of the First Amendment is that debate on public

¹ *Carl v. Children's Hospital*, 702 A.2d 159, (D.C.App. 1997) (en banc) (Ferren, J., concurring).

² *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

issues should be uninhibited, robust, and wide open."³ The threat here is especially serious because the testimony employers seek to suppress is often highly significant. Indeed, the aggressive measures taken to discourage witnesses from presenting the testimony is the best evidence of its value to the legislative process.

Intimidation of prospective witnesses, however, threatens First Amendment rights in a more fundamental way. Indeed, economic or physical coercion of prospective witnesses represents a qualitatively different danger than, for example, a restriction on marching in the public square or distributing pamphlets to fellow citizens. Issues addressed by the Council are almost inevitably of considerable public significance. Further, Council members often rely heavily on this testimony, attaching great weight to the views expressed. As Alexander Meiklejohn declared, "[W]hat is essential is not that everyone shall speak, but that everything worth saying shall be said."⁴ Testimony before the Council on pressing public issues surely qualifies as a thing "worth saying."

³ *Bond v. Floyd*, 385 U.S. 116, 136 (1966) (citation omitted).

⁴ *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 122 (1973) (quoting Alexander Meiklejohn, *POLITICAL FREEDOM* 26 (1948)).

The Council's reliance on committee testimony stems, in part, from the fact that committees select witnesses perceived as representatives of a larger class of individuals or stakeholders. Thus, the selected witness' testimony effectively enables a wider collective to exercise its First Amendment rights and directly communicate with elected representatives. Intimidation of committee witness, therefore, not only limits the witness' ability to air her concerns, but also effectively precludes a broader constituency from participating meaningfully in the political process.

The penalty enhancements contained in the bill will deter companies contemplating retaliation against employees who testify before this or other committees. The bill provides strong penalties, including a maximum fine of \$1,000 and a maximum incarceration period of up to one year. Private or public employers wishing to discourage a courageous employee from testifying before this or any other committee will pause long and hard before taking any action.

Finally, and equally significantly, the bill acknowledges that creative employers possess an endless variety of stratagems to dissuade prospective witnesses from testifying. Indeed, outright discharge or demotion are not the exclusive methods to influence an

employee's testimony. Transfer to another department, a substantial reduction in salary or professional responsibilities, negative performance evaluations, exclusion from training opportunities, and verbal harassment are just a few of the ways imaginative employers can communicate their disapproval. The bill squarely addresses this reality, adopting the broad definition of "adverse personnel action" found in § 12-113 of the New York City Administrative Code. Thus, employers face criminal liability not only when they threaten dismissal, demotion, or salary reductions to silence a witness, but also when they fail to promote her, deprive her of office staff, space or equipment, or reassign her to another department.

Thank you again, Chairman Felder, for the opportunity to express our strong support for this critical legislation. Its speedy enactment, the Association believes, is now imperative.