NYPD

Wednesday, November 2, 2016

STATEMENT OF ROBERT F. MESSNER
ASSISTANT DEPUTY COMMISSIONER, CIVIL ENFORCEMENT UNIT
NEW YORK CITY POLICE DEPARTMENT

BEFORE THE NEW YORK CITY COUNCIL PUBLIC SAFETY COMMITTEE
CITY HALL, COUNCIL CHAMBERS
WEDNESDAY, NOVEMBER 2, 2016

Good morning Speaker Mark-Viverito, Chair Gibson and members of the Council. I am Robert F. Messner, Assistant Deputy Commissioner of the New York City Police Department's (NYPD) Civil Enforcement Unit. I am joined here today with Lawrence Byrne, the NYPD's Deputy Commissioner of Legal Matters, and Oleg Chernyavsky, the NYPD's Director of Legislative Affairs. On behalf of Police Commissioner James P. O'Neill, we wish to thank the City Council for the opportunity to comment on the bills under consideration today which relate to reforms of the City's Nuisance Abatement Law.

The Nuisance Abatement Law and how the Police Department administers its nuisance abatement program have been the subject of robust public debate. At the outset of my testimony, I believe it is important to say that the NYPD has engaged in significant discussions on this subject with the Council, other elected officials, and interested stakeholders, and the Police Department is open to reforms of the Nuisance Abatement Law and how it conducts its program.

The Police Department's nuisance abatement program is designed to address public nuisances that occur within a particular location. On the surface, the term "public nuisance" sounds more benign than it really is as defined by law. Under the Administrative Code, a wide variety of crimes are deemed "public nuisances." These include gun crimes, the sale of synthetic marijuana, known as "K2", prostitution, gambling, drug sales and violations of the Alcoholic Beverage Control Law. The Nuisance Abatement Law, which was enacted in 1977, is designed to provide direct and immediate relief to neighborhoods impacted by these types of crimes, thereby improving the quality of life of those neighborhoods as well as those who live and work in the community.

The nuisance abatement process already contains procedural and due process safeguards which culminate in every case being subject to judicial review and approval. The Department identifies locations for potential nuisance abatement proceedings before they are referred to the Civil Enforcement Unit for possible action. In many of these cases, judicially-issued criminal search warrants were previously executed at the subject locations. Attorneys with the Civil Enforcement Unit then review the facts to determine whether they comport with the strict requirements of the law. For every nuisance abatement case, a set of legal papers containing sworn allegations of criminal conduct is drafted and sent to the New York City Law Department for review. If an action is authorized by the Law Department, the action is filed and is reviewed by a judge who will independently assess the allegations and may issue a temporary restraining

order that may exclude offending parties from the premises in order to prevent the illegal conduct from continuing, and/or an order temporarily closing the particular location. Within days of obtaining either a temporary restraining order or closing order from the court, the affected parties have an opportunity to contest the court ordered relief.

The vast majority of these civil cases are initiated in response to complaints from the community, neighbors, residents, people who are victimized by illegal activity, and often, elected officials in areas where specific criminal conditions and activities are occurring – such as unruly or illegal night clubs, brothels, and, more recently, commercial establishments selling K2.

Now, turning to the legislation under consideration today. Rather than address each of the thirteen bills individually, I will broadly discuss this legislative package. The Department is supportive of the concepts behind many of these proposals, and more broadly the goal of reforming the Nuisance Abatement Law. We look forward to further discussions with the Council to find the right balance between ensuring fairness and the ability to provide expedited relief to communities through the use of this valuable precision policing tool. Some of the bills, however, if enacted in their current form, place significant limitations on the Department's ability to provide immediate and much needed relief to an affected community.

For example, increasing the number of violations required before a nuisance abatement action can be initiated, and significantly reducing the timeframe within which these violations are to occur, would alter the existing scheme that tracks the criminal court process that has been initiated. These criminal court proceedings require a minimum of two drug buys before a search warrant is issued. The issuance of the search warrant reflects a NY State Supreme Court Judge's determination that there is probable cause to believe that drug sales are occurring at the location. One of the legal requirements of the issuance of a search warrant is that the Judge must make a formal determination that the source of the information, the witness, is reliable. Two undercover narcotics purchases, together with the recovery of drugs and/or evidence of drug sale at the time a search warrant is executed, currently serve as the three violations required to trigger a nuisance abatement action in such cases. The proposed increase in such required incidents would necessitate additional enforcement activity, which by its nature, would put confidential informants, undercover officers and supporting officers participating in such operations at a significantly greater safety risk. Likewise, shortening the timeframe within which all of such incidents are to occur to either 3 or 4 months prior to filing, depending on the nuisance being addressed, creates too short a window in which to conduct all of the required operations and a multi-stage review aimed at determining viability of a case.

Additionally, the Department is willing to work with the Council in examining whether marijuana possession of a "personal use" amount alone should be viewed as a violation of the Nuisance Abatement Law. We believe that exemptions for individuals using locations for the purpose of sale, or possessing such large amounts that evince the intent to sell, should not be enacted. It is these types of locations that drive community complaints and create dangerous conditions for law-abiding residents by drawing individuals into their buildings and neighborhoods to engage in criminal behavior.

Another area of concern is the requirement that the Department verify, within 15 days of an operation, that an offender is still present at a targeted location and the illegal activity is ongoing. As written the Department would be obligated to conduct an independent operation at a location, even though it has otherwise met its burden to demonstrate an ongoing nuisance exists. While we are certainly supportive of working with the Council towards instituting even greater safeguards aimed at determining that an offending tenant has not relocated, the 15-day verification requirement as proposed may not be the most effective way to ensure this, and we would welcome the chance to discuss alternative ways of achieving this goal.

As to the drafting and filing of nuisance abatement actions, the Department supports including lab reports and excluding sealed records from legal papers. These are procedures that the Department has already implemented as a matter of policy.

The Department has concerns about prohibiting the filing of a nuisance abatement case when a similar proceeding is filed in other venues. This would prevent a nuisance case from being filed in instances where, for example, the State Liquor Authority may have a pending action related to a licensee, the New York City Housing Authority has commenced an exclusion proceeding, the District Attorney or a landlord commences an eviction proceeding, or when any other agencies have commenced a proceeding. While the Department understands the desire to avoid duplicative actions, the ability to proceed against criminal locations and provide effective and immediate relief to impacted communities should not be precluded in favor of other proceedings that may take several months or even years to resolve. We would like to work with the Council to identify specific types of proceedings to which nuisance abatement proceedings should defer.

Likewise, the Department is concerned with proposals to repeal existing statutory provisions that provide temporary relief. The Department's ability to file nuisance cases *ex parte* enables courts to expedite these actions and provide immediate relief to affected communities from locations where ongoing illegal activity is taking place during the pendency of the underlying case. Understanding the seriousness of this process as well as the concerns raised by key stakeholders, including members of the Council, the Police Department has already reformed its use of *ex parte* proceedings and is willing to undertake additional reforms in the use of *ex parte* filings in nuisance abatement actions. We look forward to further conversations about this significant subject.

The proposed legislation also seeks to limit the method of service of nuisance abatement actions in a manner that would result in the Department having to expend significant resources. We look forward to working with the Council on a compromise that will continue to ensure proper service is effected on all defendants in nuisance abatement cases pursuant to State law.

The Department is supportive of many of the reforms of the settlement process involving nuisance actions, including limiting the period of exclusion. However, requiring that settlements or court decisions in nuisance abatement actions use the "least restrictive means"

to stop the nuisance is a broad and unclear standard. While the "least restrictive means" would likely prohibit the closing of a location, it could also be interpreted to mean that any enforcement greater than an injunction, against that which is already illegal, is too restrictive. Furthermore, prohibiting closure of a business unless the owner is actively involved would provide owners with an exemption from liability and in effect eliminate their current level of accountability for agents they employ or activity that they were aware of and did not stop. We are certain that we can reach a compromise that provides a workable standard that is protective of business operators who do not have knowledge or involvement in criminal activity.

The Department supports improving public awareness through the reporting of nuisance abatement data. Although we have some concerns about our current technological abilities to track certain data sought in the bills and the upgrades necessary to do so, we look forward to working with the Council towards the goal of transparency we both seek to achieve.

Lastly, the Department has not enforced the Padlock Law in over a decade and supports its repeal. That said, while the Police Department does not enforce certain sections of the Nuisance Abatement Law such as obscene performance, obscene material, noise, and certain environmental violations that the Council also seeks to repeal, other City agencies and offices may still utilize these tools in connection with carrying out their primary mission, and we urge an open dialogue with all such agency stakeholders prior to finalizing this series of bills.

Notwithstanding some of the concerns and challenges we have presented today and in discussions with the Council to date, the Police Department believes we can work together to strike the appropriate balance between fairness and the Department's ability to provide the public with effective relief at locations where public nuisances have been created. We look forward to maintaining an open and robust dialogue on these legislative proposals.

Thank you for the opportunity to speak with you today and we are happy to answer any questions that you may have.

TESTIMONY BEFORE THE NEW YORK CITY COUNCIL COMMITTEE ON PUBLIC SAFETY ON THE PACKAGE OF THIRTEEN BILLS INTRODUCED, TOGETHER KNOWN AS "THE NUISANCE ABATEMENT FAIRNESS ACT"- A LOCAL LAW TO AMEND THE ADMINISTRATIVE CODE OF THE CITY OF NEW YORK IN RELATION TO THE PUBLIC NUISANCE ABATEMENT ACT

NOVEMBER 2, 2016

Introduction

The Legal Aid Society (the Society) is the oldest and largest provider of legal assistance to low-income families and individuals in the United States. Operating from 26 locations in New York City with a full-time staff of more than 2,000, the Society handles approximately 280,000 individual cases and legal matters each year. The Society operates three major practices: the Civil Practice, which improves the lives of low-income New Yorkers by helping families and individuals obtain and maintain the basic necessities of life - housing, health care, food, and subsistence income or self-sufficiency; the Criminal Practice, which serves as the primary provider of indigent defense services in New York City; and the Juvenile Rights Practice, which represents virtually all of the children who appear in Family Court as victims of abuse or neglect or as young people facing charges of misconduct. The Society is counsel on numerous class-action cases concerning the rights of public housing residents.

We thank the Speaker Melissa Mark-Viverito, Chairperson Vanessa Gibson, and members of the Committee on Public Safety for the opportunity to testify about Intros 1308, 1315, 1317, 1318, 1320, 1321, 1323, 1326, 1327, 1333, 1334, 1338 and 1339– a package of bills to be known as "The Nuisance Abatement Fairness Act" that will comprehensively reform

provisions of the Nuisance Abatement Law and its enforcement by the New York Police Department ("NYPD"). Today, the City routinely abrogates tenants' due process rights by evicting them without notice from their homes. Unlike most other cases in our legal system, tenants learn about the public nuisance abatement case filed against them when they return to their homes and find themselves locked out. After tenants have been evicted, they come to court, usually without counsel, to face the City's attorneys who then pressure them to permanently exclude family members for low-level drug charges. Many cases involve charges, not convictions. We have even seen close orders where the criminal charges had been dismissed. The legislation before this Committee addresses these egregious clauses and promises to hold the NYPD accountable for their actions. We strongly support the passage of the proposed legislation and applaud the Council's commitment to this issue.

Background on the Public Nuisance Abatement Law

Enacted in 1977, the Public Nuisance Abatement Law (N.Y. Admin. Code § 7-701 *et seq.)* was originally used primarily to close illegal commercial establishments, such as gambling houses or movie theaters that were centers for AIDS transmission. Over the years, the nuisance abatement law's use has been vastly expanded. While the majority of cases involve commercial establishments, today these nuisance abatement actions are used by the City hundreds of times each year to evict people from their homes, including public housing apartments. Commenced by the NYPD's law department in civil court, the City routinely seeks and obtains sealing orders under the abatement law without the other party present. Known as *ex parte* close orders, they permit the NYPD to evict the tenant and his/her family *before* the tenant has an opportunity to go to court to contradict the NYPD allegations before a judge.

A series of articles co-published by ProPublica and the New York Daily News earlier this year, highlights the widespread abuse of the current Nuisance Abatement Law, whose targets are overwhelmingly low-income households of color[1]. The articles describe how their investigations show that NYPD's lawyers in its Civil Enforcement Unit ("CEU") routinely file papers in court that are based on boiler-plate statements with no independent scrutiny, that they fail to check on outcomes of the underlying criminal cases, and that there is no internal policy mandating that they check for ongoing illegal activity[2].

As early as April, 2015, The Legal Aid Society together with Legal Services NYC brought our concerns about the City's use of the public nuisance abatement law to the attention of Zachary Carter, the chief attorney at Corporation Counsel, and tried to get the City to change the way it enforces the law. See, letter attached hereto. In his response in June, 2015, Mr. Carter assured both organizations that the City took our concerns seriously and would ensure that innocent tenants not involved in illegal activity would not be harmed by the City's enforcement of the nuisance abatement law. See, Zachary Carter letter attached hereto. We know, however, that despite such assurances, innocent households continue to suffer harm from the unchanged practices of the NYPD's lawyers in the CEU. Indeed, in an April, 2016 article, Pro Publica described a tenant, Ms. Bueno, who was evicted under the public nuisance abatement law in December, 2015 even though she had not lived in the apartment when the crimes were alleged to occur[3]. Instead, she moved in months later. Ms. Bueno's story demonstrates that neither the NYPD nor its lawyers in the CEU have safeguards in place to prevent this type of extreme

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[1] Pro Publica "The NYPD is Kicking People Out of Their Homes, Even if They Haven't Committed a Crime" http://www.propublica.org/article/nypd-nuisance-abatement-evictions. Last accessed November 1, 2016.
[2] Pro Publica "Insiders Say NYPD's Nuisance Unit Skirts the Law and Relies on Unconfirmed Allegations" https://www.propublica.org/article/insiders-say-nypd-nuisance-unit-skirts-law-unconfirmed-allegations Last accessed November 1, 2016.
[3] Pro Publica "NYPD Gets Sued After Kicking Wrong Family Out of Home" https://www.propublica.org/article/nypd-gets-sued-after-kicking-wrong-family-out-of-home. Last Accessed November 1, 2016.

injustice from occurring. The facts of Ms. R's case, a client of The Legal Aid Society, are all too familiar.

The Story of Ms. R– a client of The Legal Aid Society

Ms. R is a 47-year old disabled, single mom. She survives on SSI and suffers from major depression, lupus, diabetes and asthma. She sees a psychotherapist twice weekly for PTSD. She has lived in public housing for over 20 years. In March, 2014, the NYPD carried out a search warrant in her apartment and her twin sons were arrested and charged with possession of marijuana and drug paraphernalia. On the same day, the twin sons pled to disorderly conduct, a non-criminal violation. Ms. R herself was never arrested or charged with any crime.

In June, 2014, the New York City Housing Authority ("NYCHA"), her landlord, commenced a tenancy termination administrative proceeding against Ms. R, based on the alleged criminal conduct of her sons. At an evidentiary hearing in February, 2015, the hearing officer at NYCHA found that Ms. R was eligible to remain living in the apartment, but excluded her sons from the household. In light of the hearing officer's decisions, Ms. R's two sons moved out of the apartment.

On February 26, 2015, a couple of days after she had finished the evidentiary hearing at NYCHA, the police were back at Ms. R's apartment, this time with a lawyer and a court order to seal her apartment that had been granted in secret, on an *ex parte* basis. Ms. R was confused about why the NYPD were at her apartment– she didn't know that she was facing a nuisance abatement action. After all, she had just finished her tenancy termination due process proceeding at NYCHA that was based on the same criminal allegations that had been resolved over 11 ½ months earlier.

The public nuisance abatement case against Ms. R was based on allegations from an anonymous informant of two sales of marijuana out of the apartment on February 27, 2014 and

March 5, 2014 and then the execution of a search warrant in the apartment on March 13, 2014. In the NYPD's filing, there was no description of the alleged ongoing public nuisance.

The NYPD commenced the public nuisance abatement case on February 26, 2015, one day before the expiration of the one-year statute of limitations under the Nuisance Abatement law. The filing was supported with affidavits from police officers made over four months prior to the filing and over seven months after the alleged criminal acts. The papers contained boiler plate assertions– at best misleading, at worst, clear falsehoods that were not subject to any contradiction by Ms. R prior to the issuance of the sealing order regarding the existence of an ongoing public nuisance. The city demanded immediate closing, it claimed, because it was necessary to protect the public, even though for 11 ½ months the city itself had not treated the matter with any sense of urgency.

Three days later, Ms. R went to court to find out what the case was about. In court, the lawyer for the NYPD offered to settle the case rather than go to a trial and gave Ms. R a typed up stipulation of settlement to review that contained unconscionable terms. In order to settle the case and get back into her apartment, Ms. R would have to agree to permanently exclude her sons from the apartment forever and that she and any person in her apartment would be permanently enjoined from violating *any* provision of New York State Penal Law (not just those provisions of the nuisance abatement law). Additionally, in order to settle the case, Ms. R would have to agree that, without any further judicial intervention, she would automatically forfeit her lease if the NYPD accused her of wrongdoing in the future.

Luckily for Ms. R, she managed to secure the assistance of an attorney and The Legal Aid Society was able to file papers on her behalf in court and successfully negotiate a settlement stipulation that did not contain any of the egregious conditions listed in the first stipulation handed to her on her first court appearance by the NYPD attorney.

Ms. R's experience with the NYPD and the public nuisance abatement action against her illustrate how flawed the process has become and how the NYPD uses the leverage of secret close orders to compel over-reaching agreements from vulnerable tenants who do not have a right to counsel in these actions and who are routinely unrepresented by counsel.

Introduction 1308– Eliminating Ex Parte Close Orders

Intro 1308 would repeal the ex parte close order section of the public nuisance abatement law, an important limitation on enforcement powers under the Act. The Legal Aid Society applauds this significant change to the law that will go a long way to restoring due process and protecting the constitutional rights of defendants in these proceedings.

With the passage of Intro 1308, what happened to Ms. R would not have happened. Under this bill, Ms. R would have had an opportunity to appear before the judge to explain that, despite the NYPD's boiler-plate language that closing her apartment was the only way to abate the nuisance, there was no need for a close order because the underlying charges were over a year old. Furthermore, she would have been able to show the judge that her sons had actually moved out of the apartment and were no longer living with her.

Ms. R is not our only client to face this terrible process. The Legal Aid Society has been concerned for some time about the use of ex parte close orders against our clients. As with the cases reviewed by Pro Publica and the New York Daily News, we have found that the City routinely applies for and obtains ex parte close orders in the majority of cases and in virtually all of these actions, the offenses underlying the complaint occurred many months prior to the application for the close order. The City's papers, however, misleadingly allege the existence of a continuing nuisance even though no subsequent criminal incidents have occurred. Our clients have been elderly, disabled or the parents of minor children and often are not the individuals subject to criminal proceedings related to the civil actions. The amended law in which ex parte

orders are repealed will ensure that a person is locked out of her home only in the most egregious and necessary cases and only after having an opportunity to give her side of the story to a judge. We support the added protections that Intro 1308 will provide to tenants facing the loss of their homes.

Support Intros 1317, 1318, 1318, 1320, 1321 and 1333

The package of bills introduced together as part of the "Public Nuisance Abatement Fairness Act" would narrow the scope of cases that can be brought under Article 7 and ensure that its use is properly tailored to ensure that enforcement abates a real nuisance involving illegal activities. The comprehensive amendment would ensure that cases like Ms. R's do not happen again.

The Legal Aid Society supports Intro 1317, increasing alleged violations from three to four and exempting misdemeanor possession of marijuana from the definition of "public nuisance." Many of the cases that we have reviewed are based on minor drug offenses that are more consistent with personal use. We also support Intro 1318, requiring the verification of ongoing nuisance prior to the enforcement of a preliminary injunction. Such a reform will help ensure that draconian measures are not used when there is no need. Intros 1320 and 1321 will help bring some objectivity to the facts alleged by the NYPD and address important due process concerns. For too long, the police have been prosecuting their own allegations against unrepresented tenants based on allegations in filings made by NYPD CEU lawyers with rubber stamping by the City's law department. With the passage of Intro 1333, amending the statute of limitations from one-year to four months, the NYPD must quickly decide whether the case reaches the threshold to use this extraordinary remedy. The NYPD will no longer be able to sit on those cases for months and then at the last minute throw tenants out of their homes.

Each of the bills in the package of proposed legislation help address the abuses of the law that our clients experience and add important due process protections to defendants in these proceedings.

Recommendation:

The Legal Aid Society congratulates the Council on Intros 1308, 1315, 1317, 1318, 1320, 1321, 1323, 1326. 1327, 1333, 1334, 1338 and 1339, a package of bills to amend the public nuisance abatement law. The current proposals are a great first step in addressing and remedying some of the most abused portions of the law. However, we would urge the Council to go one step further and completely remove *all* residential dwellings from the purview of the law as there are adequate alternate enforcement mechanisms that a landlord can use to address certain illegal behavior within an apartment that afford tenants full due process, including Bawdy House proceedings commenced either by the landlord or the District Attorney under RPAPL 715 in Housing Court or tenancy termination administrative proceedings in New York City Housing Authority public housing projects.

CONCLUSION

Thank you again for the opportunity to testify before this committee on these important bills that go a long way to ensuring due process and protecting individuals who are not involved in criminal activity. We strongly support these bills and look forward to working on them with you and the Committee.

Respectfully Submitted:

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Queens Legal Services

Legal Services NYC

Introduction of Ms. Phyllis Williams
New York City Council, Committee on Public Safety
Hearing on the NYC Nuisance Abatement Law
November 2, 2016

Good morning and thank you for your time. My name is George C. Gardner III, and I am a staff attorney in the Housing Rights Unit at Queens Legal Services. Earlier this year, I represented Ms. Phyllis Williams in an eviction proceeding that arose from the law that we are discussing today.

Ms. Phyllis Williams is a 70-year old mother who has lived in her apartment for 50 years. Her son was accused of selling marijuana on two occasions, but the charges were never substantiated and were ultimately dismissed. Still, through the Assistant District Attorney's presence and undue influence in housing court—Ms. Williams was pressured to permanently exclude her son from her home.

Then, 6 months after the alleged sales—and with no new information—the City requested a closing order for Ms. Williams's apartment. Without an attorney and at risk of losing her home again, she was forced to sign a second agreement to exclude her son.

The Nuisance Abatement Law too often operates as a weapon that threatens to uproot long-term, low-income tenants and rip apart multi-generational families.

Queens Legal Services welcomes the proposed amendments, and thanks the Council for providing an opportunity for Ms. Williams to share her story.

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Queens Legal Services

Legal Services NYC

Testimony of Ms. Phyllis Williams
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Good Morning.

My name is Phyllis Williams, and I live in Hollis, Queens. In June of 2015, my son was arrested in my apartment. They said that he was selling marijuana. So, in August of 2015, I had to go to Housing Court. My landlord wanted to put me out. I had no place to go, and I was afraid to lose my home, so I signed a paper that said my son had to move out in 3 weeks and that he could never come back.

Later, in December of 2015, I had to go to the Supreme Court. I was confused, because I had been to Housing Court already. I did not have an attorney to help me, but they told me that I had to sign another paper to say that my son could not live in my home.

When my son came to my home to get his belongings, my landlord took me back to Housing Court to put me out. The court cases made me confused, worried, and afraid. I lost a lot of sleep. Queens Legal Services helped me to explain to the judge why it was unfair to put me out for something that I did not do and for something that I did not know about. The judge let me keep my apartment, but my son can never come back.

I think it is wrong that I was almost put out of my home that I have lived in for 50 years for something that I did not do and that I did not know about. I think it is wrong that I had to go to 2 different courts for the same thing. And I think it is wrong that my son, who helped take care of me, had to leave forever.

But I think it is right that the City wants to change the law, so that other families do not have to go through what my son and I have gone through.

Thank You.

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TESTIMONY OF AUSTRIA BUENO
New York City Council, Committee on Public Safety
Hearing on the NYC Nuisance Abatement Law
November 2, 2016

Good morning. My name is Austria Bueno and I reside in Queensbridge Houses in Long Island City Queens. I am the mother two wonderful boys, one six and the other fifteen. One attends middle school and the other is studying at a specialized high school. My husband works at deli and I am employed as a housekeeper. My family used to live in a very unaffordable apartment where I paid $1,550.00 per month for a small one-bedroom apartment. Furthermore, I was pregnant with my youngest child. Therefore, my husband and I applied for a New York City Housing Authority apartment, which I hoped would be more affordable. I waited six long years on the waitlist. We were very happy to secure our current apartment. For one, we could provide a better life for our children now that our apartment was affordable, my commute to work is very convenient, and my children's' commute to school is also very convenient.

On August 1, 2015, my husband and I signed a lease for our current two-bedroom apartment. We, at that time, paid $792.00 per month in rent. Over the next several months, we did everything to make our space feel like a home. On Friday, December 11, 2015, like many days since I have lived in the apartment, I was cooking dinner for my family before I left to pick my son up from school. I removed the food from my oven and left it to cool on the stove. After returning home from picking up my sons, I saw a notice taped to my door. It stated that I could not enter my home. I could not believe what was happening. I have done nothing wrong. According to the notice, the City claimed that someone from my apartment sold drugs in January and February of 2015—at least six months before I moved in and ten months before I was locked out of my home. I never had any prior contact or relationship with the people who lived in the apartment before I moved in.

Terrified, locked out of my home, and with nowhere for me and my family to go, I immediately called the police. The police simply told me that they could not do anything since it was a court order. According to the notice, the next court date was scheduled for Tuesday, December 15, 2015—four days from the date I was locked out.

Frantic, I called the management office to inform them that I was locked out of my home by the city. The person I spoke with sympathized with me because he knew that I recently moved in and had nothing to do with whatever the alleged drug activity the city decided to lock me out of my home, but the person told me that there was nothing he could do. With no place to go, my family and I were forced to stay at a hotel, paying $208.00—more than a quarter of my family's entire

monthly rent—for a single night. Instead of eating the dinner I prepared, our family purchased dinner from McDonalds.

The next morning, my family and I have to stay with my mother-in-law's apartment since we could no longer afford to stay in the hotel. My family of four slept on the living room floor for three nights. I usually work on the weekends, but I could not since I did not have access to my clothes. Therefore, I missed three days of work. Those days were deducted from my already small paycheck. My husband also missed work, and my youngest son did not have his school uniform. The entire family was terrified and confused.

While I was locked out of my apartment, I had to purchase replacement groceries, hot food, clothes, toiletries and other necessities. On Monday, December 14, 2015, I woke up early so I could go to court and explain to the judge that there has been a mistake. I have never engaged in any criminal acts. When I appeared in court that day, I was sent away because my court date was scheduled for the next day, Tuesday, December 15, 2016. I was so confused and upset because I brought my lease with me to show that I could not have engaged in the acts stated in the notice, since I did not move there until August 1, 2015, months after the wrongful acts occurred.

The City did not drop the case until March of 2016. It took three months because I refused to waive my constitutional rights by signing a court agreement. Now, I am fearful that I may be locked out of my apartment again. Therefore, I sued the City earlier this year because I do not want this to happen to anyone else. No one should taken by surprised by being locked out of their apartment for something they did not do. The proposed amendments to the law are important to make sure that this does not happen to anyone else.

Thank you for your time and consideration.

Queens Legal Services

Legal Services NYC

TESTIMONY OF LEGAL SERVICES – NYC
New York City Council, Committee on Public Safety
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November 2, 2016

Good morning. My name is Robert Sanderman and I am a staff attorney at Queens Legal Services (QLS), which is the Queens borough branch of Legal Services NYC, the largest provider of free civil legal services to low-income New Yorkers. I work in the Housing Rights Unit, representing clients who face eviction, termination of housing subsidies, lack of repairs, deceptive business practices, and unlawful discrimination. One of our clients, Ms. Austria Bueno, and I will testify about the disastrous effect the current Nuisance Abatement Law has on New York City residents and discuss the New York City Council's newly proposed amendments to the Nuisance Abatement Law. My office is currently representing Ms. Bueno in a federal lawsuit alleging that the Public Nuisance Law is a violation of the Due Process Clause of the United States Constitution and that it disproportionately affects people and communities of color.

As the current law stands, the NYPD may engage in temporary *ex-parte* evictions wherein the City and/or the NYPD lock New York City residents out of their homes—by literally sealing the doors—without any prior notice, regardless of whether the apartment's residents are even suspected of committing a crime, simply on the basis of past alleged criminal activity happening at the address. The Nuisance Abatement Law violates the most basic principle of due process. The City need simply to make these allegations, which are usually stale and months' old, often based on unverified reports by confidential informants that they purchased some unspecified quantity of drugs at the apartment in question. As a result, even where the alleged wrongdoer is not charged, let alone tried or convicted of any crime, everyone in the home—including innocent minors, elderly and infirm tenants—are subject to a surprise eviction that can occur many months after any alleged activity. This is occurring in a City experiencing an affordable housing and homelessness crisis, where gentrification is rampant, and NYC residents are struggling to make ends meet.

The current Nuisance Abatement Law thus allows the NYPD and the City law Department to circumvent the hard-fought eviction protection laws and procedures that currently protect residents from sudden, unexpected eviction. Moreover, the nuisance abatement laws allow the City to put low-income residents of color in impossible situations—requiring them to sign waivers of their rights and onerous stipulations of settlements as a condition of being allowed to simply return to their apartments and access their belongings. While the nuisance abatement statute requires a *court date* three business days after the lockout, this is insufficient time for tenants to obtain legal counsel and, moreover, as we understand it, the City Law Department

rarely, if ever, appears at these court dates prepared to put on their proofs. Rather, the court date is a mere formality, wherein the actual hearing date is adjourned, leaving tenants to remain evicted from their apartments pending a date for an actual hearing, unless they are willing to sign away their rights.

This is a very discriminatory practice. The *ex parte* evictions, like stop and frisk, overwhelmingly occur in communities of color. The independent journalism center *ProPublica* and the *New York Daily News* recently reviewed NYPD lockouts filed between 2013 and mid-2014 and found over 85% of these *ex parte* lockouts occurred in communities of color. Legal Services NYC, in working with Paul Weiss Rifkind Wharton and Garrison, found similar results when we reviewed all the nuisance abatements filed by the City from January 2014 through mid-October 2016.

[Point to the map "As you can see from this map, these nuisance abatements are not occurring in predominantly white neighborhoods."]

This is truly the Tale of Two Cities that Mayor DeBlasio has so eloquently described. There is a City where people go home at night, close the door, and know that they are safe. And there is the other city, where anyone might simply come home one day to discover that their home is no longer their own—that, if they ever want to see any of their belongings again, they must go to court to try and prove their innocence.

To the extent that the City will continue to use nuisance abatements against residential tenants—instead of utilizing the well-established process of a landlord commencing a case in housing court—we are glad to see that the amendments will ensure that New York City residents, such as Ms. Bueno, are served personally and put on notice of the City's charges, receives adequate time to secure an attorney and prepare her defenses, that the City has to verify that some type of nuisance is ongoing and continuing, that lockouts will be used only when they are determined to be the least restrictive means to achieving an end to a given nuisance, and that the window for narcotics abatements will be reduced from a year to 90 days.

However, we are concerned that providing a defendant with only three days to find a lawyer and prepare a defense to a preliminary injunction – that is, a lockout in anticipation of a full trial on the merits of whether someone should be permanently evicted -- is insufficient. Any tenant would need more than three days to secure an attorney and that attorney would certainly need more than three days to prepare a defense.

For the reasons mentioned above, LSNYC applauds the City Council's proposed bills. I want to thank the Committee on Public Safety and the Speaker's office for holding this very important hearing. Specifically, we would like to thank Speaker Melissa Mark-Viverito for introducing the bill to eliminate the practice of locking people out of their homes without notice or a chance to be heard – in essence, ending the practice of *ex parte* lockouts entirely. Hopefully, this will set a new standard in all types of eviction cases.

New York City has one of the strongest and most protective housing and human rights laws in

the country. The Council has repeatedly acted to strengthen the rights of New York City residents by passing forward-thinking legislation to protect tenants facing homelessness and discrimination. As advocates, we thank you for your commitment to protecting the rights of all New Yorkers. Adopting these amendments will keep families together, preserve housing for New York City residents, decrease recidivism, secure affordable housing, protect the constitutional rights of NYC residents, mitigate discrimination based on race, and the many collateral consequences that result from an arrest, eviction, and missing days from work. Just as the Council has passed historic legislation to protect tenants from harassment, the proposed Nuisance Abatement bills constitute a promising step towards securing the constitutional rights of all New Yorkers, and to improve community and police relations—and the lives of NYC residents.

A home, as this Council is fully aware, is fundamental to the stability of New York families. NYC residents should be afforded the opportunity to defend themselves in court.

Thank you. I will now like to introduce Ms. Austria Bueno.

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Testimony of the New York Civil Liberties Union
From Staff Attorney Bobby Hodgson
Before the New York City Council Committee on Public Safety
Regarding
The Nuisance Abatement Fairness Act
(Int. Nos. 1308, 1315, 1317, 1318, 1320, 1321, 1323, 1326, 1327, 1333-A, 1338, 1339, & 1344-2016)
November 2, 2016

The New York Civil Liberties Union (the "NYCLU") respectfully submits the following testimony to the Committee on Public Safety in support of the proposed legislation, Int. Nos. 1308 through 1344-2016 (collectively, the "Nuisance Abatement Fairness Act" or the "Bills"). These Bills seek to reform New York City's Nuisance Abatement Law (the "NAL") to address features of the existing law that have resulted in its widespread misuse, overwhelmingly against low-income New Yorkers in communities of color.

The NYCLU, the New York State affiliate of the American Civil Liberties Union, is a not-for-profit, nonpartisan organization with eight offices across the state and 65,000 members. The NYCLU's mission is to defend and promote the fundamental principles, rights, and constitutional values embodied in the Bill of Rights of the U.S. Constitution and the Constitution of the State of New York. This mission includes the rights to equality, due process, and access to justice that are implicated by today's legislation.

In light of our long history of vigorously defending the rights and liberties of New Yorkers against unjust and unconstitutional police action, the NYCLU is pleased to testify in support of the Bills. For far too long, the NAL has been misused and exploited by the NYPD to evict or displace thousands of people and their families or businesses—overwhelmingly in communities of color—with inadequate process and without the protections guaranteed by traditional landlord-tenant or criminal proceedings. These Bills represent a welcome step taken

by the Council to address the absence of due process protections in the current law and to ensure that the NYPD cannot continue to do an end-run around the Constitution and the many New York laws that protect the rights of tenants and small businesses.

The existing law invites widespread misuse and abuse by the NYPD.

These Bills represent a positive and common-sense step towards ensuring that vulnerable New Yorkers are not subjected to the unreasonable evictions and business closures that have proliferated under the NAL. Pursuant to the current law, Article 7 of the New York City Administrative Code authorizes the City to commence "public nuisance" actions in the New York State Supreme Court seeking orders to evict tenants or close businesses based on alleged histories of illegal activity.[1] These orders can be obtained *ex parte*, without providing any opportunity to be heard to the tenant facing eviction or the business owner facing closure. Moreover, such orders may rest on allegations of illegal activity that occurred up to a year prior to the NYPD's "emergency" action.[2]

The failure of the current law to protect New Yorkers from unjust evictions and closures has been widely documented in recent years. In April of 2015, the Legal Aid Society and Legal Services NYC sent a letter to the Corporation Counsel of the City of New York detailing their analysis of several years of Article 7 filings involving residential premises and their discovery that, in the majority of these filings, the City applied for and was granted *ex parte* emergency temporary closing orders without giving tenants notice or the opportunity to be heard, even though the offenses underlying the City's complaints were many months old and there were no facts alleged that would justify an *ex parte* closure.[3] Many of the evicted tenants were elderly, disabled, or the parents of minor children, and they were often not the individuals directly implicated by the underlying criminal allegations related to the NAL actions. In addition, many of the underlying criminal charges had been dismissed and sealed, or disposed of with a non-criminal disposition, by the time the *ex parte* closing order was sought. In other cases, the tenants were already involved in pending landlord-tenant or New York City Housing Authority

[1] NYC Code § 7-701, *et seq.*

[2] *Id.*

[3] Letter from Legal Services NYC and the Legal Aid Society to Zachary Carter (April 2, 2015), *available at* https://assets.documentcloud.org/documents/2820049/Legal-Aid-Letter-to-Law-Dept.pdf.

("NYCHA") proceedings—non-NAL proceedings that provided a vital measure of process to protect the rights of the tenants—based on the same criminal allegations.[4]

A 2016 series of articles published by *ProPublica* and *The New York Daily News* further highlighted the extent to which the NYPD has vastly expanded its use of the NAL—originally created in the 1970s to address specific concerns about the sex industry in Times Square—and estimated that it now targets over 1,000 residences and small business per year, overwhelmingly in communities of color.[5] These investigations revealed a host of alarming and constitutionally-inadequate practices involving the NYPD's use of the NAL. Beyond the NYPD's overreliance on emergency *ex parte* proceedings, the articles noted the frequency of overlapping NYCHA or other proceedings based on the same underlying allegations;[6] the lack of procedures in place to ensure that the tenants evicted are in fact the same tenants alleged to have been associated with the underlying criminal activity;[7] the lack of procedures to ensure that "ongoing" criminal activity is in fact ongoing;[8] the regular, and illegal, introduction into evidence of records that should be sealed pursuant to New York's criminal procedure law;[9] and the frequency with which tenants and business owners who were not alleged to have knowledge of any criminal activity were forced to accept settlement terms they considered coercive.[10]

As long as the NAL continues to exist in its current form, there is no reason to believe that the NYPD will stop exploiting the NAL's astonishingly broad language to obtain the same kinds of unjustifiable closing orders and evictions described above. As recently as two weeks ago, reports revealed the NYPD's continued reliance on emergency *ex parte* orders as a first step

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[4] *Id.*

[5] *See* Sarah Ryley, *The NYPD is Kicking People Out of Their Homes, Even If They Haven't Committed a Crime*, ProPublica and the New York Daily News (Feb. 4, 2016).

[6] *Id.*

[7] Sarah Ryley, *Insiders Say NYPD's Nuisance Unit Skirts the Law and Relies on Unconfirmed Allegations*, ProPublica and the New York Daily News (Mar. 25, 2016).

[8] *Id.*

[9] *Id.*

[10] Sarah Ryley, *Lawsuit to Seek Rollback of NYPD's Controversial Nuisance Abatement Efforts*, ProPublica and the New York Daily News (Oct. 12, 2016).

in many of its NAL actions.[11] These practices threaten to violate or undermine the core constitutional interests of New Yorkers, depriving people of property without notice or the opportunity to be heard, disproportionately targeting Black and Latino communities, and flouting the confidentiality provisions of the criminal sealing statute. The passage of the Nuisance Abatement Fairness Act would serve as a welcome and necessary assurance that the basic rights of vulnerable people who come into even the most glancing contact with the criminal justice system cannot be forsaken in the name of nuisance abatement.

The Bills offer common-sense and necessary reforms to the current law.

The reforms included in the Nuisance Abatement Fairness Act can go a long way towards providing tenants and business owners much-needed protection from the kinds of unjust eviction and closure proceedings described in the previous section. We support each of the proposed Bills; taken together, they address the most pressing deficiencies in the current NAL.

The most vital reform introduced by the various Bills is Int. No. 1308, which eliminates the sections of the current NAL that allow the City to seek *ex parte* temporary restraining orders and temporary closing orders without the defendant being put on notice and having the opportunity to be heard in court. As described in the previous section, the NYPD's current practice of seeking *ex parte* orders as a matter of course in non-emergency situations constitutes a violation of the procedural due process rights afforded by the Constitution, which generally requires notice and a hearing prior to such a significant property deprivation absent an exceedingly compelling government interest that would preclude such a hearing.[12] The Council is right to eliminate these TROs completely and to further strengthen the procedural protections of the NAL by adding a personal service requirement—included in Int. No. 1338—for all defendants facing eviction.[13]

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[11] Sarah Ryley, *After Mayor Pledges 'Due Process,' NYPD Renews Aggressive Nuisance Abatement Enforcement*, ProPublica and the New York Daily News (Oct. 13, 2016).

[12] *See Mathews v. Eldridge*, 424 U.S. 319 (1976) (holding that the deprivation of property without notice and an opportunity to be heard requires extraordinary governmental interests that must override the private interest of the defendant and the risk of erroneous deprivation); *U.S. v. James Daniel Good Real Property*, 510 U.S. 43, 53-54 (1993) (holding that the "right to maintain control over [one]'s home, and to be free from governmental interference, is a private interest of historic and continuing importance" that required a pre-deprivation hearing).

[13] We also support the repeal of the Padlock Law—Int. No. 1326—which permits the NYPD to close a residence or business housing criminal activity after two arrests and one conviction, without judicial review, NYC Code §§ 10-

The other bills included in this Act offer common-sense and necessary reforms to the current NAL. Several offer additional procedural protections for affected parties: preventing the NYPD from pursuing a NAL action unless it can confirm that similar proceedings are not already underway (Int. No. 1315); requiring the NYPD to ensure that sealed criminal records have not been used as evidence in any NAL action (1338); and prohibiting drug-related NAL actions without laboratory tests verifying the presence of drugs (1320) and at least one drug-related incident witnessed by a police officer (1321). Others establish more reasonable time-limits for the NYPD to seek and execute orders: reducing the current one-year Statute of Limitations to four months for most actions and 90 days for drug cases (1333-A); requiring the NYPD to enforce a preliminary injunction order within 15 days (1333-A); and preventing the NYPD from executing a NAL order if it has not verified the ongoing nature of the nuisance in the prior 15 days (1318). These reforms can prevent some of the more egregious NAL actions described in the previous section—including cases of mistaken identity and cases in which the intended defendant had long since moved on from the targeted residence when the order was sought or enforced—from continuing to occur in the future.

Additional reforms offer welcome limits to the scope of the law's reach, excluding common but less serious allegations like simple drug possession and lower-level drug sales from the set of underlying criminal activities that can merit a NAL order (Int. No. 1317). Such allegations clearly should not trigger the extraordinary remedies of the NAL, nor should violations of the Alcoholic Beverage Control Law when a reasonable person would not have been aware of such a violation (1338). Similarly, bills limiting the amount of time an individual may be excluded from a property by a NAL action to one year in most cases (1323)[14] and generally requiring a court to ensure that its order imposes the least restrictive remedy available to address the alleged nuisance (1339) codify much more reasonable limits on punishment than currently exist in the statute. Also, by including a detailed reporting provision (1327), the Act ensures much-needed transparency regarding how the NAL will be used, enforced, and adjudicated in the future.

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155 & 10-156, although reports indicate that it has not been used in approximately 15 years, *see* Sarah Ryley, *The NYPD is Running Stings Against Immigrant-Owned Shops, Then Punishing For Warrentless Searches*, ProPublica and the New York Daily News (Apr. 22, 2016).

[14] The NYCLU does not support Int. No. 1323-2016's inclusion of a provision allowing for "unique circumstances" to merit an exclusion of up to three years—a clear one-year ceiling offers a more reasonable upper limit for one of the most severe and life-altering orders that can be imposed on an individual.

Finally, the NYCLU notes that, despite their breadth, these Bills will not threaten the NYPD's ability to identify and eliminate serious public nuisances. In addition to the reformed NAL, the City will retain its vast array of other means to address the problem of buildings that are plagued by persistent criminal activity, including the similar closure provisions of the Bawdy House Law,[15] traditional criminal proceedings, NYCHA exclusion actions, and any number of preventive policing strategies.[16]

* * *

In conclusion, we applaud each of the Bills' sponsors and co-sponsors for their recognition of the Council's responsibility to reduce the number of unjust and unjustifiable actions brought pursuant to the NAL. These orders overwhelmingly affect tenants and business owners who belong to communities that have long been disproportionately targeted by police action. This is a welcome step towards fulfilling the City's recent promises to ensure a fairer criminal justice system for all New Yorkers, and we respectfully submit this testimony in support of the Nuisance Abatement Fairness Act to the Committee.

[15] RPAPL § 715.

[16] Indeed, due to the availability of these laws and other strategies, it is the NYCLU's position that the NAL can and should be repealed in its entirety. We would support such a proposal, but in the meantime we recognize the pressing need for the reforms included in the current version of the Nuisance Abatement Fairness Act.

BROOKLYN DEFENDER SERVICES

TESTIMONY OF:

Bill Bryan – Supervising Attorney, Civil Justice Practice
BROOKLYN DEFENDER SERVICES

Presented before

The New York City Council

Committee on Public Safety
Hearing on the Nuisance Abatement Fairness Act

November 2, 2016

My name is Bill Bryan and I am a Supervising Attorney in the Civil Justice Practice at Brooklyn Defender Services (BDS). Thank you for this opportunity to address the New York City Council Committee on Public Safety. BDS provides multi-disciplinary and client-centered criminal, family, and immigration defense, as well as civil legal services, social work support and advocacy, to tens of thousands of clients in Brooklyn every year. We thank the New York City Council for moving to protect New Yorkers from the harms of so-called nuisance abatement and padlock laws. We believe the Nuisance Abatement Fairness Act includes many critical improvements to the City's Nuisance Abatement Law.

Public Nuisance Abatement, a little-known provision of the NYC Administrative Code, was ostensibly created to assist in the shuttering of illegal gambling and sex industry in Times Square. However, it has since evolved into a law enforcement tool to circumvent the due process protections of New York's Landlord-Tenant Laws and deprive citizens of access to their homes. The ProPublica/Daily News report published in February 2016 shed light on what attorneys in BDS' civil justice practice have seen for years: that these laws disenfranchise mostly low-income New Yorkers of color, break up families, and punish entire households for allegations that are often unsubstantiated or wholly dismissed by our criminal and civil courts. ProPublica found that 98% of the nuisance abatement actions that occurred over 18 months targeted people of color. While the NYPD is ultimately responsible for affirmatively enforcing these laws in such a flagrantly racially disparate manner, it is New York City's nuisance abatement laws, as currently

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written, that have allowed for years of unchecked abuse and unmitigated harm to some of New York's most vulnerable communities.

Nuisance abatement actions are not being filed in emergency situations where the city is without another remedy to halt alleged conduct. Indeed, we routinely see these cases filed where a client's tenancy, and possibly their guilt or innocence, has withstood two other proceedings on the same set of facts--for example, first a criminal proceeding and then a NYCHA termination proceeding. These actions, based upon the same circumstances as an arrest, are often filed long after a criminal case has finished, leaving tenants without legal representation or even advice about their rights or options. In our experience, these cases seem intentionally geared to taking advantage of *pro se* litigants. One way of assessing this phenomenon would be to analyze how many of the filed cases have not settled with an attorney on both sides. This doubling (and in some case tripling up) of cases on the same facts and circumstances is not a good use of resources on the side of the court, the NYPD or the tenants, who disproportionately suffer from this expenditure of resources by missing work and/or medical appointments.

Ultimately, BDS believes that the NYPD should not be in the business of evicting people from their homes. We also believe that the criminalization of drug use, which underlies many nuisance abatement actions, is the cause of much of the associated social problems, not the solution. Making people homeless and breaking up families, as an auxiliary of criminalization, is at best a horribly destructive crime reduction strategy, and at worst, a counterproductive, criminogenic attack on low-income communities of color. The term "nuisance abatement" is misleading; the NYPD's mandatory exclusions of loved ones and evictions simply relocate any nuisances that may be present. The sex industry that once was centered in Times Square has not abated; it has simply migrated into other communities and online.

More concerning, these cases are filed seemingly with the sole purpose of fishing for default judgments. In every case where an attorney from our office has answered a public nuisance complaint, the NYPD has backpedaled and been willing to settle the matter with a simple "do not engage in criminal activity" stipulation. While this practice is arguably functional for those who are represented by an attorney, the vast majority of tenants facing these types of procedurally complicated, high-stakes proceedings are unrepresented. The immediate disposal of the cases we fight calls into question the good faith in which they are brought. Yet when a tenant fails to answer, the NYPD invariably moves forward with a lockout.

These NYPD-initiated proceedings are another burden on tenants' time, limited resources, and shelter, without a clear benefit to The City. They are being utilized in a way that conflicts with the stated purpose of the law. For a program that claims to exist to help stabilize neighborhoods, these tools serve only to further alienate vulnerable citizens and erode public trust in law enforcement in communities of color.

These cases should not be used as fishing expeditions to try to get enhanced discovery or hold tenants (who may or may not be guilty) to perpetually binding probationary-style stipulations.

BDS is grateful to the City Council for bringing these laws to light and introducing a variety of changes that we hope will require the NYPD to dramatically reduce their use of nuisance

abatements. There are a few provisions that would benefit from small but important adjustments. We list below our assessment of each bill, with specific comments or suggestions for each.

Responses to Proposed Legislation

1. **Int. No. 1308 (The Speaker, Council Member Johnson, and the Public Advocate) -- A Local Law to amend the administrative code of the city of New York, in relation to repealing sections of the nuisance abatement law permitting certain forms of injunctive relief**

We strongly support this legislation, which would eliminate temporary closing orders, or *ex parte* orders through which the NYPD evicts New Yorkers without giving them any chance to defend themselves.

These closing orders are the most egregious practice in the nuisance abatement law as currently written, especially when applied to residential closings. Every client we have seen who has suffered an unexpected and unannounced closing is left reeling, homeless, and desperate, and is often willing to do anything, or sign anything, to get back into their home as quickly as possible. The coercive nature of settlements offered in order to resolve a temporary closing order cannot be overstated. If nothing else passes, this change is imperative because it means the person stays in their home, due process is maintained, and they can be removed from their home only after the NYPD meets their burden and the tenant(s) are given a meaningful opportunity to be heard. When a tenant, and their family, are still in their home, they are less likely to agree to exclude a loved one as a condition of reentry. This provision alone may help to keep vulnerable families together.

2. **Int. No. 1315 (Council Member Garodnick and The Speaker) – A Local Law to amend the administrative code of the city of New York, in relation to resolving conflicts between the nuisance abatement law and related proceedings**

This is a useful provision limiting the amount of cases filed. It must be noted that the city also files these cases based on allegations in NYCHA apartments. Thus, it may be necessary, to meet the goals of this amendment, to require corporation counsel to inquire whether NYCHA is already seeking termination of tenancy or permanent exclusion based upon the same conduct.

The term "similar legal proceedings" is vague and confusing. In almost every residential action, we see criminal charges filed based upon the same conduct that forms the basis of the nuisance abatement action. Does the Council intend for this amendment to completely foreclose the possibility of these actions in such cases? If so, we applaud this measure. If "similar" is going to be more narrowly defined to mean that a nuisance abatement alleging repeated drug sales can go forward if the criminal case didn't seek closure of the apartment, then it is unnecessary, as this will never be an issue in a criminal proceeding.

3. **Int. No. 1317 (Council Member Gibson and The Speaker) – A Local Law to amend the administrative code of the city of New York, in relation to excluding possession**

of a controlled substance or marihuana from the nuisance abatement law and increasing the number of sales of controlled substances sufficient to create a nuisance

We strongly support this legislation, which would end the use of nuisance abatements against New Yorkers accused of low-level drug offenses. As stated above, such behaviors do not belong in the criminal justice system, and they certainly do not warrant evictions or exclusions by the NYPD. Among the communities where these offenses are most commonly enforced, stable housing is a critical resource. The New York State Office Alcohol and Substance Abuse Services has found that "safe, affordable housing and stable living-wage employment are fundamental to successful long-term recovery." Household-wide evictions and exclusions of loved ones are fundamentally inappropriate responses to suspected drug use.

4. **Int. No. 1318 (Council Member Grodenchick, Johnson, and The Speaker) – A Local Law to amend the administrative code of the city of New York, in relation to requiring verification of a nuisance prior to enforcing injunctive relief pursuant to the nuisance abatement law**

We appreciate the Council's focus on the question of whether the alleged conduct precipitating a nuisance abatement is ongoing. As was reported by ProPublica, often, it is not. With this change, even the granting of a closing order is not a guarantee that it can be enforced. By requiring the NYPD to independently verify the situation hasn't changed before they enforce the court's order, it allows an individual locked out of their home to challenge not only the underlying lockout but also the NYPD's decision to enforce it at the time, and in the manner that they do.

While ensuring that the NYPD complies with this verification requirement, especially where respondents are unrepresented, will be difficult, this legislation provides an additional remedy and protection to affected residents. By adding a layer of discretion in enforcement, this change will remove the ability of the NYPD to claim they are merely enforcing a court order.

As referenced in the discussion of closing orders, once an injunction is enforced and a family is removed from their home, the bargaining power of the parties in negotiating settlement drastically changes, especially for *pro se* residents. Every time a closing order is enforced where there is a possibility that the alleged nuisance has been ameliorated or the offending party has vacated, the risk increases that innocent residents will permanently lose their homes or exclude innocent loved ones.

We hope this change will have the effect intended and put a stop to evictions where the alleged misconduct is no longer occurring. As always, we are available to discuss possible amendments to help strengthen this legislation.

5. **Int. No. 1320 (Council Member Johnson and The Speaker) – A Local Law to amend the administrative code of the city of New York, in relation requiring laboratory reports in drug-related nuisance abatement cases**

We strongly support this legislation. Most of our clients who are charged with possession of a controlled substance are prosecuted based on "the experience and expertise" of the arresting officers. Many marijuana arrests are predicated on field tests. A recent ProPublica investigation into the widespread reliance on such cheap field tests for controlled substances by inadequately trained police officers in scientifically unsound conditions. The outlet estimates that "every year at least 100,000 people nationwide plead guilty to drug-possession charges that rely on field-test results." In response, the Safariland Group, the largest manufacturer of the test kits, released a statement that "field tests are specifically not intended to be used as a factor in the decision to prosecute or convict a suspect...Our training materials and instructions make it clear that every test kit, whether positive or negative, should be confirmed by an independent laboratory."[1] Positive findings in proper laboratory tests should be a prerequisite in any criminal conviction for an offense relating to controlled substances. Requiring them in nuisance abatement proceedings is an important step in the right direction, though I must reiterate that drug charges should not precipitate an eviction by the NYPD or any other city agency, regardless of the lab findings.

This change is necessary not just to ensure the substance alleged actually was illegal, or to encourage the NYPD to conduct laboratory testing, but also to ensure they don't *ignore* and omit previously conducted negative lab results and simply allege drugs were found based solely on disproven arrest records. So long as judges understand and enforce the requirement of lab reports, this change has the potential to limit many of the most egregiously frivolous filings.

6. **Int. No. 1321 (Council Member Johnson and The Speaker) -- A Local Law to amend the administrative code of the city of New York, in relation to requiring a police or peace officer to personally witness a drug violation to file an action under the nuisance abatement law**

We support this legislation. We note, however, the NYPD, and at least one local District Attorney, lack any accountability measures to ensure police officers do not falsely represent to a court that they have witnessed an offense; in one case involving a BDS client, a judge found that three officers in the 67th Precinct had perjured themselves in court, yet they remain on the beat and the District Attorney apparently continues to rely on their word for prosecutions.[2] That said, this legislation could give our civil attorneys the opportunity to cross-examine the police officer who served as a witness in the criminal case.

7. **Int. 1323 - By Council Member Koslowitz and The Speaker (Council Member Mark-Viverito) -- A Local Law to amend the administrative code of the city of New York, in relation to prohibiting permanent exclusions pursuant to the nuisance abatement law.**

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[1] Ryan Gabrielson & Topher Sanders, *Busted: Common Roadside Drug Test Routinely Produces False Positives*, PROPUBLICA, July 7, 2016, available at https://www.propublica.org/article/common-roadside-drug-test-routinely-produces-false-positives.

[2] Nick Pinto, *The Incredibles: Judges Said These Cops Can't Be Trusted, So Why Does the D.A. Rely on Them?*, THE VILLAGE VOICE, Nov. 1, 2016, available at http://www.villagevoice.com/news/the-incredibles-judges-said-these-cops-cant-be-trusted-so-why-does-the-da-rely-on-them-9292168.

BDS supports this bill's intention of limiting the harm of exclusion to one year for individuals who are named in nuisance abatement actions (or up to three years if corporation counsel can demonstrate through clear and convincing evidence that unique circumstances exist such that a greater period up to 3 years is required to abate the nuisance).

However, in our experience, whether a bar excluding someone from their home or business is one or two of three years is irrelevant to our clients, all of whom are tenants. In practice, New York City landlords evict the leaseholder at the point of the nuisance abatement and find a new tenant. Once evicted, the exclusion is de facto lifted because our clients no longer have access to their home. The *ProPublica/Daily News* report noted that tenants and homeowners lost or had already left homes in three-quarters of the 337 cases where they were able to determine the outcome. The other cases were either withdrawn without explanation, were missing settlements, or were still active.[3] The *ProPublica* data backs up our experience representing clients – that this reform, while well-intentioned, would not protect the vast majority of people facing nuisance abatement actions.

Furthermore, the law is not explicit that any settlement reached after a nuisance abatement action is filed must be reviewed and signed off on by the presiding judge. While decisions rarely result in permanent exclusion, the NYPD often asks for such exclusion as a condition of dismissing the case. Even if a court *disposition* cannot exceed one or three years, that would not stop the NYPD from facilitating a tenant's voluntary agreement to permanently exclude an individual in exchange for dismissal.

For these reasons, we would ask the Council to look for alternate means to strengthen this bill. As always, we are available to assist in amending the bill to go further to accomplish its stated aims.

8. **Int. 1326 - By Council Members Levin, Torres, Williams, and The Speaker (Council Member Mark-Viverito) - A Local Law to amend the administrative code of the city of New York, in relation to repealing the padlock law.**

BDS strongly supports repeal of the Padlock Law, which permits the NYPD to close a residence or business housing illicit activities after two offenses and one conviction without a judicial order. According to the Council, the NYPD has not used this draconian remedy for more than 15 years, and this bill will permanently abolish it. We have never heard of this law being used in Brooklyn, though we rarely represent clients with stores and generally only represent tenants.

The Padlock Law set a much lower standard for closing a residence or business than the nuisance abatement process and granted nearly unfettered power to the NYPD that unsurprisingly resulted in abuse. The Council's wholesale repeal of the law recognizes the importance of due process and rejects granting the NYPD broad authority to act without judicial oversight.

9. **Int. 1327 - By Council Members Levine, Gibson, Johnson, and The Speaker (Council Member Mark-Viverito) - A Local Law to amend the administrative code**

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[3] Sarah Ryley, *No Conviction Home*, NY DAILY NEWS, Feb. 5, 2016, available at http://interactive.nydailynews.com/2016/02/nypd-nuisance-abatement-actions-boot-hundreds/.

of the city of New York, in relation to requiring reporting on the use of the nuisance abatement law.

BDS strongly supports this reporting bill. We believe it is also encouraging to see the Council pursuing substantive reform at the same time as they require reporting on these practices. We hope the data will allow for meaningful review and oversight of the effect these changes have on these practices and lead to further amendments as necessary.

10. **Proposed Int. 1333-A - in relation to establishing a statute of limitations for the nuisance abatement law and repealing provisions of the nuisance abatement law that define some types of nuisances.**

BDS strongly supports the creation of a statute of limitations of four months for filing nuisance abatement actions. As the New York Court of Appeals appropriately noted, statutes of limitations are valuable because they "protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time" and they "encourag[e] law enforcement officials [to] promptly investigate suspected... activity."[4]

11. **Int. 1338 - By Council Members Salamanca, Johnson, and The Speaker (Council Member Mark-Viverito) - A Local Law to amend the administrative code of the city of New York, in relation to requiring procedures for the corporation counsel when filing actions under the nuisance abatement law.**

BDS strongly supports the Council's objective to preclude the NYPD from filing actions based on sealed records but we do not believe this bill, as written, will accomplish this goal. Our Criminal Procedure Law already precludes the NYPD from relying on sealed records in subsequent legal proceedings. Thus, if anything, this bill really only reiterates what the small number of New Yorkers who challenge these cases with legal assistance will already be aware of. For the City Council's bill to have any force in protecting pro se litigants, there would need to be a penalty for use of sealed records or put in a requirement that no closing order will be granted unless the NYPD make showing that none of the enumerated allegations resulted in favorable dispositions with sealed records. This would then put the onus on the judge to check each factual allegation before signing a closing order.

Arrest and court records in cases that are dismissed are already sealed by operation of law. Yet the NYPD routinely files public nuisance abatement cases based exclusively on these records months after they have been sealed. Where an individual is *pro se* they may be locked out of their home or agree to exclude family members based upon a court action that directly contradicts the purpose of the sealing laws explicitly aimed at rendering the arrest a nullity. These laws are intended to be so strong, despite the NYPD's refusal to follow them, that an individual whose case has been dismissed is entitled to state under oath that they have never been arrested. Yet the NYPD is routinely seeking to evict the most vulnerable citizens based entirely on these arrests that, by operation of law, never occurred. The NYPD attorneys, in effect, are violating the law each time they file one of these cases based upon sealed records.

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[4] *Toussie v. United States*, 397 U.S. 112, 114-15, as cited in *People v. Seda*, 93 NY 2d 307, 311 (N.Y. 1999).

Perhaps not surprisingly, but infuriatingly, the NYPD is usually willing to settle cases based on sealed records when confronted on the issue by an attorney, but the cases where new Yorker's who are supposed to be protected by these laws can retain counsel are few and far between. For every case we successfully settle due to the existence of sealed records, there are countless more that the City is prosecuting against *pro se* individuals. ProPublica found that only 22% of those without lawyers reached settlements with police that allowed them to keep their apartments without barring anyone, versus 43% of tenants with lawyers.[5] In our experience, representation by counsel is often the difference between staying in your home or not.

The NYPD practice of knowingly using sealed records and prosecuting claims based solely on sealed records continues. The NYPD should be required to take steps to comply with state law and implement some measures to ensure records that should be sealed are no longer accessible and that any records copied or sent to other agencies or entities are destroyed.

This bill will not create any greater incentive for the NYPD to comply with existing law. Our office is happy to work with the Council to explore further what kind of language would actually accomplish the bill's intent.

We also support the second provision of Int. 1338, which would require that agencies seeking nuisance abatements provided defendants with "personal service upon a natural person as provided in the civil practice law and rules."

This change, similar to the removal of the provisions permitting temporary closing orders, will go a long way in ensuring that residents are not locked out of their homes without any notification or before any opportunity to confront the allegations against them.

12. Int. 1339 - By Council Member Torres and The Speaker (Council Member Mark-Viverito) - A Local Law to amend the administrative code of the city of New York, in relation to restricting certain orders and dispositions pursuant to the nuisance abatement law.

BDS strongly supports this bill. This legislation will restrict any action enforced pursuant to the Nuisance Abatement Law to only the least restrictive remedy, meaning that a judge could evict a person or shutter a residence only if there were no less burdensome means of ceasing the nuisance. This bill would also prohibit the application of this law from restricting the rights of any person who was not aware or had no reason to be aware of a nuisance.

Again, we support the Council's efforts to ensure these laws are used and injunctions are enforced only where necessary, but these laws were already drafted, and allegedly used, only where there were no less restrictive means available. Nonetheless, closing orders, voluntary exclusions and homelessness resulted in an extremely large percentage of cases. Presumably the judges who signed these orders are persuaded by the City's language concerning imminent risk to the health, safety, and welfare of the public. Implied in the inflammatory language that is standard in these filings is the fact that no other means are available to curb the practices alleged.

[5] Ryley, *No Conviction Home.*

That said, the Council is taking a strong stand with this package of legislation, sending a clear message that nuisance abatement actions are generally not an appropriate remedy.

13. **Int. 1344 - By Council Member Williams and The Speaker (Council Member Mark-Viverito) - A Local Law to amend the administrative code of the city of New York, in relation to reforming the nuisance abatement law regarding the alcoholic beverage control law.**

BDS supports this bill, which adds protections for those facing nuisance abatement cases involving violations of the State's ABC Law. The bill would require 4 violations of this law to constitute a "nuisance" and restrict these violations to only those in which a reasonable person in the position of the person violating the law would have been aware of such violation. The bill also restricts the application of this portion of the Nuisance Abatement Law to "continued, willful, and flagrant" violations.

We recommend that the City apply the proposed language allowing a defense of a reasonable person without knowledge of the violation to all other nuisance abatement cases, not just those involving violations of the ABC Law.

Conclusion

Thank you for considering my comments. BDS looks forward to continuing to work with the Council to make our criminal justice system more fair, effective and humane. If you have any questions, please contact me at bbryan@bds.org or (718) 254-0700 x 351.

NDS

HARLEM

TESTIMONY OF THE NEIGHBORHOOD DEFENDER SERVICE

before the

NEW YORK CITY COUNCIL
COMMITTEE ON PUBLIC SAFETY

IN RELATION TO

Int. No. 1308, Int. No. 1315, Int. No. 1317, Int. No. 1318, Int. No. 1320, Int. No. 1321, Int. No. 1323, Int. No. 1325, Int. No. 1327, Int. No. 1333, Int. No. 1338, Int. No. 1339, and Int. No. 1344 – NUISANCE ABATEMENT FAIRNESS ACT

by

Emily Ponder
STAFF ATTORNEY, CIVIL DEFENSE PRACTICE

November 2, 2016

Testimony of Emily Ponder

Introduction

I am Emily Ponder, Staff Attorney in the Civil Defense Practice at the Neighborhood Defender Service of Harlem (NDS). NDS is a community-based public defender office that provides high-quality legal services to residents of Northern Manhattan. NDS's Civil Defense Practice represents community members facing collateral civil consequences of contacts with the criminal justice system.

Background

For over 25 years, NDS has been an innovator in improving the quality and depth of criminal defense representation for those unable to afford an attorney. Since 1990, our service model has enhanced the quality of in-court representation and expanded the services that defenders provide to their clients. Consistent with our expanded approach, **NDS's Civil Defense Practice represents tenants in all matters of housing defense proceedings.**

THE NUISANCE ABATEMENT IMPACT

NDS has represented Harlem tenants in nuisance abatement proceedings in New York County Supreme Court and provided advice to those tenants we could not represent through our unique community intake. Through this representation and numerous conversations with affected family members, **it has become apparent that the current nuisance abatement laws have a severe and lasting impact on New York City's most vulnerable tenants and communities.**

A Case Example

Earlier this year, NDS represented a 73 year-old immigrant grandmother living with her family in a rent-stabilized apartment in Harlem. She had recently been diagnosed with liver cancer and was struggling to afford care through her Social Security income. Shortly after her grandson was arrested in her apartment due to a small amount of drugs being found in his bedroom on a single occasion, she was shocked and devastated when the District Attorney's office compelled her landlord to start eviction proceedings against her in housing court. Obviously, this would not have happened were she able to afford to live at 57th and Park Avenue.

Then things got worse. She was traumatized when, months after her grandson's arrest and while the housing court proceeding was ongoing, the NYPD appeared at her door with an ex parte closing order authorizing the padlocking of her apartment and her immediate ouster. She was now also facing a nuisance abatement proceeding based on the same, single arrest of her grandson, plus hearsay allegations that he was involved in three prior incidents of illegal activity.

The pressure of facing eviction from her home of 25 years in two different forums caused immense strain on her already compromised health. Because fighting two separate proceedings and losing her home was not an option due to her failing health and fixed income, she ultimately

agreed to permanently bar her grandson from living with her despite the fact that he was engaging in substance abuse treatment and recently became employed. Although she knew what it would mean to exclude her grandson, she is only just beginning to comprehend the permanency of her family's separation, particularly as her health continues to deteriorate and her mobility outside her home is limited.

One-Sided Settlements

When tenants are pro se, though, the outcomes can be even more devastating. Most of these matters result in heavy handed one-side agreements. They frequently require permanently barring family members from visiting or residing in an apartment and, worse still, allow for warrantless searches by the NYPD—something that ordinarily would be forbidden under the law. Under some provisions, failure to comply with an agreement allows the NYPD to padlock an apartment without any further judicial intervention.

Very often, these imbalanced agreements are signed on the proceeding's initial return date, three days after the service of a closing order. This suggests these pro se tenants saw little choice but to acquiesce to the NYPD's demands or risk continued homelessness if they were to adjourn the proceeding to seek legal counsel.

Community Impact

Both families and the community as a whole suffer in these situations. Often, **the tenants affected by the nuisance abatement laws are low-income families living in New York City's ever-diminishing supply of affordable housing**. Once they are ousted, it is highly likely those families or any permanently excluded household members face certain homelessness. Further, when affordable apartments are vacated, they often become deregulated. Particularly when an alleged nuisance could be abated without the immediate and prolonged ouster of low-income tenants, **the community suffers from increased homelessness and decreased affordable housing stock without any justified public safety ends.**

Conclusion

NDS applauds the Committee on Public Safety for recognizing the deficiency in and inequity of the nuisance abatement laws. Eliminating ex parte orders that force vulnerable tenants into the streets without warning or judicial review and limiting duplicitous proceedings reduces pressure to enter one-sided settlement agreements that tear apart families and even relinquish Constitutional rights. Furthermore, heightening standards of proof, eliminating mere possession as a basis for these cases, ensuring dispositions are the lease restrictive means of abating a nuisance and limiting time for exclusion of household members will ensure that the families and communities are not uprooted and torn apart in the name of public safety.

The Bronx Defenders | Redefining public defense.

NYC CITY COUNCIL, COMMITTEE ON PUBLIC SAFETY
HEARING ON THE NUISANCE ABATEMENT FAIRNESS ACT
November 2, 2016, 10 a.m.
City Hall, Chambers
Runa Rajagopal, The Bronx Defenders

My name is Runa Rajagopal. I am the Director of the Civil Action Practice at The Bronx Defenders. The Bronx Defenders thanks the Committee for the opportunity to submit comments and testify regarding the Nuisance Abatement Fairness Act.

THE BRONX DEFENDERS

Founded in 1997, our organization is nationally renowned for providing holistic and comprehensive legal services, which include civil, criminal and family defense, social services and community programs to approximately 35,000 low-income families in the Bronx each year. Our innovative, team-based model operates on multiple levels to address how an arrest and criminal charge alone can have a devastating impact on a person's life. In New York State, indicative of the rest of the nation, more than 1 in 3 people arrested are never convicted of any crime or offense, yet they suffer drastic collateral legal consequences and enmeshed penalties as a result of their arrest. This collateral damage, and the instability that results, can be far more devastating than any of the direct penalties that accompany the criminal conviction.

CIVIL ACTION PRACTICE

The Civil Action Practice is designed to defend against the many enmeshed civil penalties that arise out of a person's arrest. Criminal accusations can lead to a whole host of devastating civil consequences, not only for the person who stands accused but for his entire family. These consequences are often hidden and invisible to those accused of the crime, to practitioners, legislators and even to judges and the courts. These consequences are scattered across sections of state statutes, local laws, and state and local agency regulations and policies; they can touch every aspect of a person's life and can occur any time after an arrest, leading to job loss, denial of benefits, deportation, loss of property or even, eviction from one's home. The Nuisance Abatement Law is a prime example of a severe housing consequence that is solely based on an *allegation* of criminal conduct yet can devastate and displace an entire family.

On one fine Friday night, Dennis got ready to go to sleep. Suddenly, he heard a banging on his door. It was the NYPD. Confused, Dennis got up and a flood of officers came through the door. Among them was an attorney, who handed him papers and told him that effective immediately, his apartment was closed and he had to leave - all because he allegedly was sold untaxed cigarettes to his neighbors, approximately 7 months earlier. Dennis was shocked that he was barred from his apartment and that he had to go to "Supreme" Court and not "Criminal" Court. He was not arrested, just evicted. With nowhere to go, he slept on the subway for a night. The day after he was closed out, he tried to get back into his apartment to retrieve medications- he is debilitated by a terminal illness. A few minutes after he got back into his apartment, the police arrived and arrested him for trespassing in his own home. At the police precinct on the new arrest, Dennis collapsed and was taken to the hospital, where each of his ankles were shackled to the bed, all while two armed police officers stood watch.

After he was released from the hospital, Dennis connected with The Bronx Defenders. Now with representation at the Supreme Court hearing several days later, the NYPD agreed to let Dennis go back home. He did not admit any of the charges, and in fact, the criminal case against him was still pending and two years later, dismissed. He was never convicted of selling untaxed cigarettes or of any other crime. But without our office, he would have lost his home.

This is the reality of the Nuisance Abatement Law.

THE NUISANCE ABATEMENT LAW IS USED TO EVICT TENANTS AND TO CIRCUMVENT DUE PROCESS.

Nuisance abatement actions, resulting in immediate evictions, are one of the most invasive, disruptive, and counterproductive forms of civil forfeiture. Tenants and their entire families face eviction, with neither notice nor a hearing, in these actions brought by the New York Police Department ("NYPD") Legal Bureau's Civil Enforcement Unit under the local Nuisance Abatement Law, in violation of their fundamental due process rights.

Created in 1977, the Nuisance Abatement Law ("NAL") was designed as a tool to combat the ill effects of illegal businesses on neighboring communities, in particular the shops and theaters in Times Square that profited from prostitution and made the neighborhood unwelcome to residents and tourists. In its first thirty years, the NAL was used as it was intended: to "close" commercial spaces whose owners or tenants were carrying on an illegal business, including high-volume trafficking in illegal drugs.

In 2007, the law was substantially modified to allow a combination of different sorts of law violations to trigger the NAL. Since 2007 and until recent articles by the Daily News[1] and ProPublica in February 2016, use of the NAL shifted dramatically from almost exclusively commercial spaces being "closed" to a substantial and growing number of residential "closings."

[1] The Bronx Defenders was consulted by and worked with Sarah Ryley of The Daily News for its series on Nuisance Abatement, including "The NYPD is Kicking People Out of Their Homes, Even if They Haven't Committed a Crime" and the experiences of our clients were featured in the report.

This is despite the fact that the NYPD stated NAL was not used as a substitute for evictions. In 2007, at a hearing before the Committee on Public Safety, NYPD Assistant Commissioner of the Civil Enforcement Unit, Robert Messner, testified that "We, as a policy, do not use the Nuisance Abatement Law as a substitute for eviction processes in people's residences. . . . We commence actions against apartments or private homes if our investigation has led us to believe that there are no residents in the premises, *except the actual criminals*. If there are family members, we look to other remedies because we are concerned about--We do not believe it's appropriate to use the Nuisance Abatement Law as a substitute for eviction statutes."

However, NYPD is doing just this: using the NAL as a substitute for eviction proceedings in Housing Court. Moreover, it is important to note that because these actions are injunctions that do not sever or nullify the legal responsibilities of tenants under a contractual lease, families are still on the hook to pay rent even when they are closed out of the apartment under NAL.

THE NAL IS USED AGAINST LOW INCOME FAMILIES IN COMMUNITIES OF COLOR.

Alarmingly, the apartments being "closed" almost always belong to low-income tenants of color. Similar to the racial disparities in the rate of drug arrests, prosecutions and incarceration of people of color as compared to whites, despite similar rates of drug use, NAL actions, triggered by those arrests, are brought disproportionately in communities of color. The Daily News found that the majority of NAL cases were brought in communities where the population was 80% or more non-white. This is certainly true with respect to The Bronx and our client community.

ELIMINATING THE *EX PARTE* CLOSING ORDER IS AN IMPORTANT AND NECESSARY FIRST STEP TO NAL REFORM.

Casey was arrested and charged with drug possession. A nuisance abatement case was filed based on that arrest, but not until seven months later. The judge granted the ex parte closing order and the NYPD closed Casey's apartment, making him and his family homeless. After obtaining representation through The Bronx Defenders, his case was settled and Casey was able to get back in his apartment permanently. His criminal charges were also dropped.

The most dangerous, harmful and unconstitutional aspect of NAL is the *ex parte* closing order, which allows the immediate **eviction of an entire household without notice or hearing**. This is relief the NYPD can seek when filing a summons and complaint under §§ 7-709(a) and 7-110(a) if they "show by clear and convincing evidence that a public nuisance within the scope of this subchapter is being conducted, maintained or permitted and that the public health, safety or welfare immediately require a temporary restraining . . . order." Admin. Code §§ 7-709(a), 7-11. No other municipality has a public nuisance statute quite like New York's. For good reason: when other localities considered how far they could stretch their police power against the due process clause, **they concluded that pre-deprivation notice and hearing were the minimum required.**

The reality is that Courts rarely apply this standard, at least until recent news reporting on NAL abuses, and would typically rubber stamp the NYPD's application for an *ex parte* closing order even where their form papers did not contain proof to meet the heightened standard of "clear and convincing evidence" and even where the NYPD brought their application 5, 7 or 9 months after the alleged "nuisance" activity, which would in and of itself bely the presence of a public emergency and the need for an immediate closure. Reporting by the Daily News uncovered that in 2013 and 2014, judges signed off on 75% of requested *ex parte* closing orders against residences, even where the evidence was both untested and minimal.

In the cover of night or as the sun rose, the NYPD with their Civil Enforcement Unit attorney, barged into homes to evict mothers, daughters, grandfathers, grandchildren- whole families who were displaced and left to the streets, hotels, or couches of friends to wait for days to get in front of a judge. Removing this offensive aspect of the law, as does Int 1308, and adding Int 1318 to include verification for enforcement, are critical and will prevent the NYPD and the Courts from unfairly displacing families in violation of their due process and other rights.

THE NYPD MUST BRING THESE CASES IN A TIMELY FASHION AND MUST DEMONSTRATE THAT THERE ARE MULTIPLE VIOLATIONS OF THE LAW AND THAT THEY HAVE PERSONAL KNOWLEDGE OF THESE VIOLATIONS. MOREOVER, THEY SHOULD NEVER USE SEALED CRIMINAL RECORDS

Jenny, her nineteen-year-old daughter, and their dog were made homeless for three days as a result of a nuisance abatement action. Jenny was arrested nine months earlier but her criminal case was dismissed. The nuisance abatement papers described a confidential informant who allegedly bought drugs from her apartment on two occasions, but it did not detail the time this occurred or the quantity of drugs purportedly purchased. The papers also described that an arrest took place pursuant to a search warrant, but failed to mention that Jenny's criminal drug charges were dismissed. Additionally, the NYPD improperly used sealed criminal records from the case in her civil nuisance abatement case to mislead the Judge into signing the ex parte order. The eviction posed a particular hardship since she could not access her asthma medication or other medication prescribed by her doctor.

A "public nuisance" occurs when there are 3 or more "violations" of either possession or sale of narcotics or marijuana in the preceding 12 months, which then triggers NAL's application. Hence, a "violation" could be 3 instances of possession (all of which could be part of one arrest: two pre-warrant "buys" and 1 arrest). Very few nuisance abatement actions, if any, have high-volume drug trafficking that would qualify as a true nuisance. Instead, families are being summarily evicted for possessing small amounts of drugs, if any, consistent with personal use and before anyone has been convicted of anything. Additionally, the NYPD's evidence is based solely on hearsay allegations, information from confidential informants, which is wholly unreliable. Moreover,

We support the changes of Int 1317, Int 1320, 1321 and 1333 creating a statute of limitations to bring these cases, increasing the number of violations required, requiring felony drug sale arrests and that the NYPD have personal knowledge of at least one incident. However, this reform does not go far enough. The NYPD should be required to show there were 4 or more "arrests" in prior

12 months, not just four violations, to bring a nuisance abatement action. Additionally, they should be required that alleged violations be for ***large-scale*** sale of narcotics (measured by weight, quantity, and/or monetary value), not intent to sell or merely felony charges. In sum, these cases should be reserved for criminal enterprise where the conduct is serious and repetitive and has been demonstrated to the Court with reliable, testable evidence.

IMPROVED DISPOSITIONS AND OVERSIGHT OVER THE SETTLEMENT PROCESS IS NECESSARY. PERMANENT EXCLUSIONS OF FAMILY MEMBERS MUST BE PROHIBITED.

The police raided Flora's public housing apartment pursuant to a search warrant. They emptied her HIV+ son's prescription pills into a plastic bag and arrested her younger son and nephew, charging them with selling ecstasy and additionally, her son with possession of marijuana. In criminal court, the family produced the prescription records regarding the prescription pills that were not ecstasy. The charges against Flora's son were dismissed and her nephew took a non-criminal infraction for possession of a small quantity of marijuana, and the family considered their ordeal over. Five months after this arrest, the police evicted Flora's entire family without warning by obtaining an ex parte closing order under NAL on the allegation that Flora's apartment was used for an ecstasy ring, despite the favorable termination of the criminal cases. This displaced her entire family.

In Court, the attorneys for the NYPD stated she could go back in her apartment if she signed an agreement excluding her sons and further, allowing the NYPD to periodically come by and inspect her apartment. Flora refused and sought help from The Bronx Defenders and favorably resolved the action without excluding anyone or agreeing to warrantless searches.

Often, residents facing nuisance abatement actions give up once closed out of their apartments. They are alone, homeless and facing the NYPD; they may agree to permanently vacate their apartment or agree to other oppressive terms under duress, like permanently excluding family members or agreeing to warrantless searches, which is permitted under § 7-712(a) and allows for surprise searches of residential apartments and punishes disobedience of or resistance to an inspection. In the residential context, the NYPD now more frequently seek exclusions instead of closures, particularly after the NAL reporting, and asks for an order barring occupants from "permitting any and all persons…to enter the subject premises for any purpose whatsoever" which Judges routinely sign.

We support the proposed changes of Int 1308, Int 1323 and Int 1339, repealing warrantless searches and prohibiting permanent exclusions. However, Int 1323, in allowing an exclusion of up to 3 years if "unique circumstances exist" goes too far. To seek exclusion, the NYPD should have to 1) demonstrate the person actually lived in, occupied or had some connection to the residence beyond being arrested once that necessitates exclusion and that 2) exclusions should never be longer than 1 year.

THIS LEGISLATION IS AN IMPORTANT FIRST STEP BUT DOES NOT GO FAR ENOUGH.

We are grateful for and largely in support of the Nuisance Abatement Fairness Act and the significant changes it would effect, if adopted. However, we feel strongly that is does not go as far as it should, particularly given what recent reporting and data has indicated regarding the troubling nature of these NYPD civil cases and share the following recommendations:

1. **NAL IN THE RESIDENTIAL CONTEXT IS UNNECESSARY AND SHOULD BE REPEALED.**

The NAL is used against Residential Tenants who, in addition to NAL, face eviction in housing court, termination of public housing and termination of a housing subsidy in administrative fora. NAL as used against residential tenants, are duplicative proceedings that do not address a unique or immediate problem not otherwise addressed by other agencies in other fora with greater due process rights and protections.

Recommendation: For this reason, NAL should never be used in the residential context and it should be limited to use against commercial owners and commercial tenants.

2. **UNDER NUISANCE ABATEMENT, AN INDIVIDUAL IS CRIMINALLY ACCUSED AND A WHOLE FAMILY IS CIVILLY PUNISHED.**

NAL proceedings are brought simultaneous to or without mention of the resolution of criminal proceedings. An arrest or criminal case is not even necessary to trigger a NAL action against a residence. When there is an arrest, there is no mention in the NYPD's papers regarding the status of the criminal case. Sometimes, the criminal cases are dismissed or sealed. Sometimes those arrested plea to a non-criminal disposition. This is supported by statistics that show 1 out of 3 people arrested are never convicted of a crime. Many times, the action is brought when a criminal case is still pending.

Recommendation: Restrict NAL actions and allow them only if there is a criminal conviction and prohibit actions filed solely on an arrest. Bringing cases solely on an arrest, or solely based on allegations and not an arrest in the civil arena where there are less standards and rights undermines and jeopardizes the constitutional rights individuals have in criminal court, namely one's presumption of innocence before proven guilt and right against self-incrimination and is fundamentally un-American. NAL actions should be stayed until a final disposition in the criminal case. Moreover, if the related criminal case was dismissed, the NYPD should be precluded from bringing such a case.

3. **THE APPLICABLE STANDARD- PREPONDERANCE OF THE EVIDENCE AND CLEAR & CONVINCING FOR EXCLUSIONS– MUST BE RECONCILED WITH THE "REASONABLE DOUBT" STANDARD IN CRIMINAL COURT.**

Related to the above, individuals who are arrested are afforded the highest burden of proof in criminal court (guilt beyond reasonable doubt) whereas nuisance abatement actions brought based on the same nexus of facts, need only to be established by a preponderance of evidence or in specific circumstances for exclusions, by clear and convincing evidence. This creates a perverse incentive for the NYPD to take a second bite at the apple with nuisance abatement actions, where the more stringent constitutional protections in criminal court may prevent them from successfully punishing an individual.

Recommendation: Higher scrutiny must be applied in these quasi-criminal actions and Judges must be trained on the applicable standards.

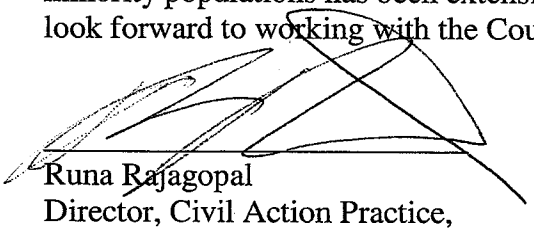
4. **PROVIDE THE RIGHT TO COUNSEL.**

People facing NAL actions almost never have attorneys, even at later stages of the proceedings. Facing homelessness, tenants are then pressured on the first appearance into signing oppressive stipulations, signing away rights, waiving their ability to sue the City and excluding family members from their homes, just to get back into their homes. Others consent to warrantless searches of their homes, or even give up their possession rights altogether without contesting the legality of the City's actions. We recognize that the above may change, should the NAFA pass as is, however, there is still no substitute for an attorney who can navigate Supreme Court and zealously advocate on behalf of an individual and her interests to level the playing field with the NYPD, who are repeat litigants known and favored by the Judges and the Court.

Recommendation: Provide a right to counsel in this limited context, given the enormously high stakes.

CONCLUSION

We are grateful for the opportunity to comment on the Nuisance Abatement Fairness Act. Nuisance abatement laws have been applied in deeply troubling and unconstitutional ways in New York City and have strayed far from their intended purpose. We commend the City Council for taking this important step to safeguard against their misuse and prevent further evictions of low-income families. The human and economic impact of these abuses on our clients and other minority populations has been extensive and it is long past time to take meaningful action. We look forward to working with the Council towards this much-needed reform.



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THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

☒ in favor ☐ in opposition

Date: 11/2/2016

(PLEASE PRINT)

Name: BOBBY HODGSON

Address: 208 Thirtieth St. 11216

I represent: The NEW YORK CIVIL LIBERTIES UNION

Address: 125 Broad St 10004

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

☐ in favor ☐ in opposition

Date: 11/2/16

(PLEASE PRINT)

Name: William Bryan

Address: 177 Livingston St., 7th Fl.

I represent: Brooklyn Defender Services

Address: Brooklyn, NY 11201

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. 1308 et al Res. No. _____

☒ in favor ☐ in opposition

Date: _____

(PLEASE PRINT)

Name: Emily Ponder

Address: 317 Lenox Avenue, 10th Fl, NY, NY 10027

I represent: Neighborhood Defender Service of Harlem

Address: 317 Lenox Avenue, 10th Fl, NY, NY 10027

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THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. ~~NAFA~~ Res. No. _____

☑ in favor ☐ in opposition

(largely) *Date:* _____

(PLEASE PRINT)

Name: Runa Rajagopal, Director, Civil Action Practice

Address: 360 E. 161 St Bronx NY 10451

I represent: The Bronx Defenders

Address:

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Appearance Card

I intend to appear and speak on Int. No. All Res. No. _____

☑ in favor ☐ in opposition

Date: 11/2/16

(PLEASE PRINT)

Name: George C. Gardner III

Address: 89-00 Sutphin Blvd., 5th Fl., Jamaica, NY 11435

I represent: Legal Services NYC / Queens Legal Services

Address:

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Appearance Card

I intend to appear and speak on Int. No. All Res. No. _____

☑ in favor ☐ in opposition

Date: 11-2-16

(PLEASE PRINT)

Name: Robert Sundermen

Address: 89-00 Sutphin Blvd. 5th Fl Jamaica N.Y. 11435

I represent: Legal Services New York

Address:

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Date: _____

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Name: Austria Bueno

Address: Queensbridge South Houses

I represent: myself / Legal Services NYC

Address: _____

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☐ in favor ☐ in opposition

Date: _____

(PLEASE PRINT)

Name: Miss Phyllis Williams

Address: 91-34 195 St Jamaica NY

I represent: _____

Address: _____

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Date: _____

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Name: Lucy NEWMAN, THE LEGAL AID SOCIETY

Address: _____

I represent: THE LEGAL AID SOCIETY

Address: 199 WATER St., NY NY

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Appearance Card

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☐ in favor ☐ in opposition

Date: 11/2/16

(PLEASE PRINT)

Name: Assistant Deputy Commissioner Robert Messner

Address: 1 Police Plaza

I represent: NYPD

Address:

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Appearance Card

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☐ in favor ☐ in opposition

Date: 11/2/16

(PLEASE PRINT)

Name: Lawrence Byrne, Deputy Commissioner of Legal Matters

Address: 1 Police Plaza

I represent: NYPD

Address:

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☐ in favor ☐ in opposition

Date: 11/2/16

(PLEASE PRINT)

Name: Director Oleg Chernyavsky

Address: 1 Police Plaza

I represent: NYPD

Address:

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