



TESTIMONY OF:

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**Presented before
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Committee on Public Safety
Hearing on the Nuisance Abatement Fairness Act**

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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

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.

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

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.

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.