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Via Electronic Mail (pmendelson@dccouncil.us)

Councilmember Phil Mendelson
Chairman, Committee on the Judiciary
1350 Pennsylvania Avenue, N.W.
Suite 402
Washington, D.C. 20004

Re: Bill 18-595, "Neighborhood and Victims Rights Amendment Act of 2009".

Dear Chairman Mendelson:

On behalf of the Hispanic Bar Association of the District of Columbia ("HBA-DC"), we respectfully offer comments on Bill 18-595, the Neighborhood and Victims Rights Amendment Act of 2009 ("Act" or "NVR Act"). While we support the ultimate objective of protecting our communities and advancing victims' rights, the Act's expansion of public nuisance is overly broad, and the grant of a private right of action is too vague, and as such, may lead to abuse in the enforcement of the Act. We will comment below on a number of questions that the current draft raises. Our comments are restricted to Section 102 of the Act.

The first issue we note is that Section 102 of the Act expands the concept of public nuisance too broadly. Specifically, the Act defines public nuisance in relevant part as "any conduct that obstructs, impedes or hinders the free use of property or free passage or use of public space or access to non-public space, so as to interfere with the comfortable enjoyment of life or property."[1] Although, historically, the prosecution of a public nuisance has covered minor criminal offenses that interfered, for example, with the public health, safety, morals, peace, or convenience[2] in addressing the public nuisance a community's right to security and protection needed to be reconciled with an individual's right to engage in constitutionally protected activities.[3] For example, the expansive language that defines public nuisance could have the effect of including persons who are picketing on a sidewalk or otherwise standing in public space or engaged in other constitutionally-protected activity.[4]

[1] NVR Act, Section 102(a)(4), Council of the District of Columbia (2009).
[2] *See B & W Management, Inc. v. Tasea Inv. Co.*, 451 A.2d 879, 883 (D.C. 1982).
[3] *See People ex rel. Gallo v. Carlos Acuna* (929 P.2d 596 (Cal. 1997)).
[4] *See Dombrowski v. Pfister*, 380 U.S. 479, 486-487 (1965).

The definition of public nuisance also raises questions about necessity and vagueness. Specifically, the Act's inclusion of the "violation of criminal statutes or the District of Columbia Municipal Regulations"[5] seems unnecessary as separate statutes exist to target such violations, and government agencies are already authorized to enforce those legal mandates. In addition, the Act, in part, defines public nuisance as that which threatens "any considerable number of reasonable persons."[6] The vagueness of this description can lead to unnecessary litigation as courts attempt to determine what a considerable number of persons are and whether those persons are reasonable in the circumstances.

The term "public space" presents similar issues. It is expanded to include "a private building that is open to the public, public housing, or the exterior of any public or private building, including but not limited to yards, stairs, stoops, and porches."[7] This increase in what is considered public space should be scrutinized with an eye to what impact, if any, the expansion has on the privacy rights of persons either in a private building's areas that are not open to the public or in the living spaces of public housing that are not common areas.

The second issue we note is that the grant of a private right of action to enforce a public nuisance suit is too vague, and as such can lead to abuse by private parties. Historically, the government, rather than individuals, had the right to determine when a public nuisance exists, except in matters where a private individual could show "special damage, distinct from that common to the public."[8] Here, the Act grants a private right of action to "community-based organizations," which are vaguely defined as any group organized to benefit some geographic area or the "quality of life in a residential area."[9] The expansion here is from an individual who could show some special damage to a whole group of ill-defined individuals who do not have to show any special damage. Without further limitation, the private right of action can easily be subject to abuse, resulting in an unnecessary increase in the workload of our already burdened court system.

Third, since the Act mandates that public nuisance actions be tried in equity and without a jury, persons implicated under the Act are deprived of the opportunity of having their peers – the jurors – determine whether the behavior in question is a public nuisance. Because what may constitute a public nuisance is often subject to disagreement among members of a community, adjudication of the facts by a jury provides appropriate protection to defendants that should not lightly be eliminated.

Fourth, a party subject to an injunction from practicing behavior deemed a public nuisance under the Act has to wait a year or more before petitioning to the court for the removal of the injunction.[10] Insofar as the injunction may include geographic limitations to the

[5] NVR Act, Section 102(a)(4), Council of the District of Columbia (2009).
[6] *Id*.
[7] *Id* at Section 102(a).
[8] *See Holloway v. Bristol-Myers Corp.*, 327 F. Supp. 17, 24 (D.D.C. 1971).
[9] NVR Act, Section 102(a)(2), Council of the District of Columbia (2009).
[10] *Id* at Section 102(k).

defendant's movements, due regard should be given to the potential impact on defendants who are enjoined from areas that include their residences or places of employment.

We suggest that the Council review the need for the expansion of public nuisance, both in terms of the additional conduct covered and the grant of the private right of action, which Section 102 provides. The government already has ample powers through existing statutes to prosecute many of the behaviors that the Act targets.[11]

The HBA-DC exists in part to promote equal justice and opportunity for all Hispanics. While we recognize that the Council has a legitimate interest in protecting neighborhoods and victims of crime, Section 102 of the Neighborhood and Victims Rights Amendment Act of 2009 appears to create more problems than solutions. We respectfully request that this letter be made a part of the Committee's legislative record on Bill 18-595. Thank you for your consideration.

Sincerely,

Patricia Larios
Co-Chairperson
Legislative & Policy Issues Committee

CC: Councilmembers (dccouncil@dccouncil.us)

[11] *See, e.g.*, D.C. Official Code § 22-1301 (2001) (affrays, or brawls); § 22-1312 (2001) (lewd or indecent acts); § 22-1321 (2001) (disorderly conduct); and § 22-1322 (2001) (rioting).