



**Testimony of M. Aurora Vásquez, Senior Attorney
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Hearing before the Committee on Public Safety and the Judiciary
Council of the District of Columbia
Neighborhood and Victims Rights Amendment Act of 2009
[Bill 18-595]
April 19, 2010**

Chairperson Mendelson and members of the Committee, thank you for the opportunity to appear before you today. My name is Aurora Vásquez and I submit this testimony in my capacity as a Senior Attorney with Advancement Project, a policy, communications, and legal action group committed to racial justice. Through partnerships with organized communities, we support communities of color in their struggles to achieve universal opportunity and a just democracy. I testify today in strong support of our partners, the Latino Federation of Greater Washington and DC Jobs with Justice who, along with Advancement Project, urges the DC City Council to reject a well-intentioned yet legally flawed and precarious provision of Bill 18-595 or “The Neighborhood and Victims Rights Amendment Act.” We believe Section 102 of this bill is constitutionally unsound and, if enacted, ironically would create new victims in seeking to protect the rights of other victims.

For years Advancement Project has collaborated with numerous communities, including within the District of Columbia, to push back on race-based inequities and ethnic intimidation that many Americans hoped would no longer exist. For example, in the past six years alone we have partnered with a diverse coalition in Tennessee to prevent a judge from terminating the parental rights of an indigenous mother from México simply because she did not speak English; in Ohio we prevented the use of voter caging lists as a tool for Election Day challenges disproportionately targeting African American voters; in the weeks immediately after hurricane Katrina, we partnered with displaced African American residents to prevent landlords from engaging in self-help evictions and for several years thereafter we worked with displaced residents of the Ninth ward in an effort to protect their right to return and we have also partnered with the mostly African and South Asian immigrant cab drivers in Alexandria and now in Prince George’s County MD, to open the industry to economic opportunity for cab drivers. I share these examples of our work in particular to demonstrate that intolerance is alive and well and to underscore why we are all well to worry about creating laws that strengthen discord.

The Neighborhood and Victims Rights Amendment Act focuses on several clearly identifiable concerns, namely offenses related to gangs, guns, and drugs. On April 7, 2010 Council member Graham described the bill as one meant to “fight entrenched crime in our neighborhoods.”¹ My testimony today will focus solely on Section 102 of the bill – Public Nuisance and Abatement.

Section 102 opens the door to abuse of already vulnerable communities and misuse of the courts

Bill 18-595 intends to “fight entrenched crime.” Section 102 however, could be seen as a surrender to entrenched discrimination. Broadly construed, it could allow persons motivated by racial, ethnic, or class intolerance to cloak themselves with the authority of law while using loose definitions to intimidate vulnerable people. The definitions for “community-based organization” and “public nuisance” are much too broad, the standard for obtaining an injunctive order much too weak, and the burden of proof much too low all leading to a constitutionally suspect provision that needlessly positions the District of Columbia for legal challenge.

A. The definition of “community-based organization” can be exploited.

Section 102(b)(1) extends the power to take action “wherever there is reason to believe that a public nuisance exists” beyond the usual parties, including the United States Attorney and the Attorney General for the District of Columbia, to “community-based organizations.” These organizations are broadly defined in Section 102(a)(2). The section authorizes an ad hoc group of people claiming to be organized “for the benefit of one or more communities” or “the quality of life in a residential area” to file an action in Superior Court against those alleged to be committing a public nuisance. A broad interpretation of the definition of “community organization” such as the one we set forth here is encouraged by the proposed language of Section 102(l) which states, “This section shall be construed liberally in accordance with its remedial purposes.” Moreover, because of the breadth of this definition members of such an ad hoc group would not have to live in the community or residential area on whose behalf they purport to act. In particular, Section 102 states, “*Community-based organization means any group, whether unincorporated or incorporated, affiliated with or organized for the benefit of one or more communities or neighborhoods, of defined geographic boundaries, containing the public nuisance, or any group organized to benefit the quality of life in a residential area containing the public nuisance.*”

Advancement Project strongly opposes this language because it gives potential wrongdoers the ability to forum shop for vulnerable targets in any DC neighborhood or residential area and once a target is identified, it allows them to use the courts to impose themselves on others. With Anti-immigrant groups such as the Federation for American Immigration Reform for example, already encouraging its followers to use public nuisance laws as a specific tool for targeting day laborers,² Section 102’s broad definition of “community-based organization” opens the door for abuse of immigrant workers and other vulnerable groups.

¹ *Your help needed/Tougher Laws, Youth Crime & Victims Rights* (available at: <http://grahamwone.com/?q=node/583>).

² *Confronting Illegal Day Laborer Issues in Your Community*, (“Activists may also adopt a strategy that has been used to bring lawsuits against drug and crack houses, where residents have shown injuries to businesses or property based on public

B. As defined in the law “public space” is ripe for misuse.

With gentrification on the rise in many DC neighborhoods, so too is the apprehension of long-time residents who worry as much about being disconnected from their residences as from the unique culture and character of the communities they call home. Section 102(a)(5) casts a broad net over the spaces in which “public nuisance” is actionable, which could facilitate the displacement of residents from their homes and neighborhoods. For instance, the definition of “public space” goes beyond the common understanding of the term as it applies to streets, allies, sidewalks, and parks instead extending the realm of what is actionable into spaces that are commonly perceived as private property such as one’s yard, stairs, stoop, or porch. In the hands of wrongdoers this language, when coupled with the opportunity to hide behind the title of “community-based organization,” transforms something as innocent as community customs that draw people together in camaraderie – whether it is to play a lively game of dominoes on the front porch, a group of animated teenagers congregating on their stoop to escape a hot apartment building in the middle of summer, or a group of young men of color gathered on the corner discussing the World Cup – into mechanisms for intimidating and permanently disrupting the enjoyment of life and property for people who may possess scant resources and options. Once communities or individuals are forced to defend ordinary acts of comradeship against court intervention, not only will people and our neighborhoods suffer so too will otherwise constitutionally protected activities.

C. The modified standard for obtaining a preliminary injunction or temporary restraining order coupled with the burden of proof, facilitates misuse of the law and courts.

Section 102(d) eliminates the need to show irreparable harm from the standard for obtaining an injunction however, by its very nature an injunction is meant to prevent or mitigate future harmful actions not remedy past injuries. For this reason, requiring a showing of irreparable harm is critical to the process because where the injury can be adequately addressed by compensation or fines, an injunction should not be granted.³ The seemingly small step of eliminating this one factor from the long-held standard for obtaining injunctive relief can have far-reaching consequences because it gives those motivated by bad motives a green light to use the law and ultimately the courts as a mechanism for intimidating those who may already be vulnerable. Ironically, civil rights groups who attempt to protect these vulnerable persons by enjoining enforcement of this new law, if enacted, would be required to prove irreparable harm to block its harmful consequences.

Weakening the standard for obtaining injunctive relief will also encourage individuals to bypass the Metropolitan Police Department’s responsibility to enforce existing laws in an equitable manner by making lawful in the hands of ordinary citizens that which the MPD is

nuisance claims that are very similar to the concerns raised by the tolerance of illegal alien workers within city limits.”) available at: http://www.fairus.org/site/PageServer?pagename=team_team6c4e.

³ Of note, the standard for issuing injunctive relief in federal courts was recently clarified by the United States Supreme Court in *Winter v. Natural Resources Defense Council*. In *Winter* the Court noted that in addition to satisfying the usual factors for obtaining an injunction – success on the merits, the balance of equities tips in ones favor, and issuance of the injunction is in the public interest – the plaintiff must demonstrate “that he is likely to suffer irreparable harm.”

prohibited from doing chiefly, engaging in racial profiling. The likelihood that the powers Section 102 gives to ordinary citizens will intersect with those of the MPD is substantial because much of the conduct subject to Section 102 is already actionable under existing law. Coupled with the section's numerous other shortcomings, by eliminating the requirement that there be a showing of irreparable harm Section 102(d) in effect converts injunctive orders from extraordinary remedies meant to proscribe acts that are contrary to good conscious or law, into commonplace conduits for intolerance.

Section 102(d) does not stand alone however and when paired with the burden of proof set forth in Section 102(g), a "preponderance of the evidence," raises the same red flags of previous attempts at nuisance abatement. In a February 2009 committee report on Chairman Mendelson's Public Safety and Justice Amendments Act of 2009, it was noted that the correct standard for proving a public nuisance was "clear and convincing" not a preponderance of the evidence.⁴ Advancement Project agrees with that view because a "preponderance of the evidence," the lowest burden of proof available in civil matters, is too lenient where, as here, there is an exceedingly important need to ensure our laws do not become *de facto* tools of injustice.

Section 102 is likely void for vagueness

In its totality, Section 102 is constitutionally vague and in the context of constructing laws, vagueness has long been recognized as a danger to individual rights. The breadth of Section 102's reach is so broad and the definition of "public nuisance" so pliable that the proposed provision comes dangerously close to sacrificing First Amendment rights such as freedom of association, the right to assemble, and freedom of expression. In particular, Section 102(4) grounds the definition of "public nuisance" in ambiguities that invite expansive interpretation of the law. For example, it proscribes making excessively loud noise to the "*annoyance or disturbance*" of others (emphasis added). This is a standard that even when qualified by the measure of a "reasonable person" is difficult to gauge, thereby making Section 102 constitutionally suspect and needlessly opening the District up to legal challenge.

A. Section 102 places the District in the shadow of Supreme Court precedent proscribing constitutionally vague laws.

While Section 102 declares a suit to abate nuisance a civil matter, violation of an injunctive order could result in imprisonment for up to 30 days, in effect creating a backdoor way to criminalize conduct that is not otherwise expressly forbidden by criminal statute. Criminalizing innocent conduct puts the District squarely in the shadow of previously unsuccessful efforts to address nuisances similar to those identified in Section 102. In the Supreme Court case *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), the Court struck down a vagrancy ordinance which focused on concerns similar to those identified in Section 102(4) including, gamblers, drunkards, brawlers, "persons wandering or strolling...without any

⁴ Committee report, Bill 18-151, the "Public Safety and Justice Amendments Act of 2009" at 2 (available at: <http://www.dccouncil.washington.dc.us/images/00001/20090827154724.pdf>).

lawful business,” and “lewd, wanton, and lascivious persons”⁵ In *Papachristou* the Supreme Court found the ordinance void for vagueness because it “ ‘fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.’” *Id.* at 162 (citing to *United States v. Harris*, 347 U.S. 612, 347 U.S. 617) further noting that “[l]iving under a rule of law entails various suppositions, one of which is that ‘[all persons] are entitled to be informed of what the state commands or forbids.’” *Id.* (citing to *Lanzetta v. New Jersey*, 306 U.S. 451).⁶ Proposed Section 102 is similarly afflicted and should therefore be removed from Bill 18-595 in its entirety.

With fundamental rights clearly at risk we strongly discourage sacrificing the Constitution in order to pave the way for what some may be tempted to characterize as a creative response to laws that may not be producing the outcome they seek. Where existing law falls short, as may be the case with the District’s existing disorderly conduct statutes which some of my colleagues in the legal field find overly broad and constitutionally vague, for example, it is more prudent to improve those laws rather than to bookend District residents between two laws that are ripe for abuse.

Advancement Project reiterates its gratitude for the opportunity to provide the Committee with testimony regarding Section 102 of Bill 18-595. For the foregoing reasons, we respectfully appeal to your better judgment and ask for your careful consideration of our request to purge this pernicious provision from the bill in the best interests of the residents of the District of Columbia.

⁵ In the context of Section 102 this would include persons who urinate or defecate in public as well as those who engage in “public nudity” and “bathing in public,” and people who engage “in sexual acts in public.”

⁶ See also e.g., *Chicago v. Morales*, 527 U.S. 41 (1999) in which the Supreme Court found Chicago’s Gang Congregation Ordinance void for vagueness noting that the ordinance which defined loitering as “to remain in one place with no apparent purpose” lacked “sufficient minimal standards” to guide law enforcement officers’ ability to judge whether a person “has an ‘apparent purpose’” noting further that “any person standing on the street has a general purpose – even if it simply to stand.”