



**New York City Council Public Hearing
Committee on Public Safety
Mental Health Involuntary Removals and Mayor Adams' Recently Announced Plan**

**Written Testimony of the New York City Bar Association
February 6, 2023**

The New York City Bar Association (City Bar),¹ through its Civil Rights Committee, Disability Law Committee, Mental Health Law Committee, New York City Affairs Committee and Social Welfare Law Committee, urges Mayor Adams to pause implementation of the new directive on “mental health involuntary removals” (the “NYC Removal Directive”).²

The NYC Removal Directive purports to clarify that the NYPD and other agencies are empowered to forcibly remove from public spaces people who appear to have a mental illness and to be unable to meet their basic needs to an extent that causes them harm. This vague and broad initiative raises significant legal issues that demand careful review to ensure the City’s compliance with City, State, and Federal anti-discrimination laws, as well as State laws governing mental health treatment and the U.S. Constitution. Furthermore, as is evidenced by the numerous concerns raised by directly impacted individuals and groups advocating for people with mental illness, the NYC Removal Directive also presents serious policy concerns that deserve thoughtful consideration and would benefit from additional stakeholder input. We call on the City to pause its rushed implementation of the NYC Removal Directive and engage in a transparent and good faith dialogue with service providers, advocates, and directly impacted individuals to design interventions that are evidence-based, consistent with individuals’ rights and autonomy, and do

¹ The mission of the New York City Bar Association, which was founded in 1870 and has over 23,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.

² On November 29, 2022, Mayor Adams delivered an “Address on the Mental Health Crisis in New York City” transcript available at: <https://www.nyc.gov/office-of-the-mayor/news/871-22/transcript-mayor-eric-adams-delivers-address-mental-health-crisis-new-york-city-holds> (all websites last visited February 2, 2023). The 5 page directive that was released with the announcement is captioned *Mental Health Involuntary Removals, as of 11/28/2022*, and is available at: <https://www.nyc.gov/assets/home/downloads/pdf/press-releases/2022/Mental-Health-Involuntary-Removals.pdf>. Following the announcement, the City has communicated the new policy to its police officers through a FINEST message dated December 6, 2022 (FINEST message). The FINEST message was posted on the docket in the *Baerga et al. v. NYC et al.*, 21-cv-05762 (SDNY) (PAC) litigation, ECF/Docket # 123-1.

About the Association

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not violate (on their face or in their implementation) our anti-discrimination laws or the U.S. Constitution.

Below, we highlight our primary legal and policy concerns and reiterate fundamental principles—such as autonomy in decision-making and the “least restrictive alternative”—that we believe should undergird any future City initiative affecting people with mental health conditions.

First, the City’s broad language in the NYC Removal Directive would allow removals that are not justified under the U.S. Constitution or State mental health law;

Second, the City’s language announcing this initiative both reflects and will exacerbate bias against unhoused people and people with serious mental illness, in violation of anti-discrimination principles, and the NYC Removal Directives will disproportionately burden people of color; and

Third, this initiative directs resources into a failed strategy, at a time when the City has reduced investments in effective strategies that connect people to long term treatment and care.

I. The City’s broad language would allow removals that are not justified under the U.S. Constitution or State law.

Summary

Under Mental Hygiene Law (MHL) sections 9.41 and 9.58, the City has the prerogative to remove individuals to a hospital involuntarily under certain circumstances. Indeed, public reporting indicates NYPD effectuated more than 1,000 such removals in 2022 before the issuance of the NYC Removal Directive.³ This authority which, under section 9.41 is vested in peace officers and law enforcement officers, and under section 9.58 is additionally vested in physicians and certain mental health professionals, is constrained by the Constitution. The New York State Office of Mental Health (“OMH”) guidance largely aligns with the caselaw around mental hygiene arrests under MHL § 9.41 with respect to both the probable cause standard and the requirement of an inability to meet basic needs such that a person presents a present risk of harm to self. The mayor’s announcement and the accompanying NYC Removal Directive, however, do not.

Background Law and Policy

The Mental Hygiene Law (“MHL”) provides authority for peace officers and law enforcement officers to take into custody for the purpose of a psychiatric evaluation those individuals who appear to be mentally ill and are conducting themselves in a manner which is

³ Ethan Geringer-Sameth, “Police Have Removed Over 1,300 ‘Emotionally Disturbed People from Transit in 2022; Where Did They Go?” Gotham Gazette, Dec. 13, 2022, <https://www.gothamgazette.com/city/11717-adams-nypd-subway-mental-illness-removals-hospitals>.

likely to result in serious harm to self or others. MHL § 9.41.⁴ Additionally, MHL § 9.58 provides that “a physician or qualified mental health professional who is a member of an approved mobile crisis outreach team shall have the power to remove” someone under the same circumstances.⁵

OMH Commissioner Ann Marie T. Sullivan and Chief Medical Officer Thomas Smith issued interpretive guidance in February 2022 (the “OMH Involuntary Removal Guidance”) setting forth the circumstances under which courts have determined that the MHL permits “persons who appear to be mentally ill and who display an inability to meet basic living needs” to be mandated into emergency psychiatric assessments and emergency and involuntary inpatient psychiatric admissions.⁶

Constitutional Considerations

In discussing involuntary confinement, the United States Supreme Court has stated that “a State cannot constitutionally confine, without more, a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.” *O’Connor v. Donaldson*, 422 U.S. 563, 576 (1975). The Court added that “[m]ere

⁴ Like most of the provisions of Article 9 of the MHL relating to involuntary admission and treatment, MHL § 9.41 rests on the definitional construct of “danger” to self or others, permitting what is commonly referred to as a Mental Hygiene “arrest.” Section 9.41 provides as follows:

Any peace officer, when acting pursuant to his special duties, or police officer who is a member of the state police or of an authorized police department or force or of a sheriff’s department **may take into custody any person who appears to be mentally ill and is conducting himself in a manner which is likely to result in serious harm to himself or others. “Likelihood to result in serious harm” shall mean (1) substantial risk of physical harm to himself as manifested by threats of or attempts at suicide or serious bodily harm or other conduct demonstrating that he is dangerous to himself, or (2) a substantial risk of physical harm to other persons as manifested by homicidal or other violent behavior by which others are placed in reasonable fear of serious physical harm.** Such officer may direct the removal of such person or remove him to any hospital specified in subdivision (a) of section 9.39 or, pending his examination or admission to any such hospital, temporarily detain any such person in another safe and comfortable place, in which event, such officer shall immediately notify the director of community services or, if there be none, the health officer of the city or county of such action.

N.Y. Mental Hyg. Law § 9.41 (emphasis added).

⁵ N.Y. Mental Hyg. Law § 9.58 uses identical language (“any person who appears to be mentally ill and is conducting himself in a manner which is likely to result in serious harm to himself or others”) and does not elaborate on the standard for likelihood for serious harm articulated in § 9.41. Though the NYC Removal Directive purports to authorize numerous agencies, including many that employ individuals covered by § 9.58, the City Bar is not aware of any specified guidance that has been provided by any of these agencies. The legal issues presented by the overbroad language of the NYC Removal Directive are not ameliorated depending on whether a peace officer or mental health professional makes the determination. That said, arrests pursuant to § 9.41 present a special risk, since peace officers are not trained mental health professionals, are armed, and are authorized to use force in certain instances.

⁶ See Interpretative Guidance for the Involuntary and Custodial Transportation of Individuals for Emergency Assessments and for Emergency and Involuntary Inpatient Psychiatric Admissions, Date: February 18, 2022, <https://omh.ny.gov/omhweb/guidance/interpretative-guidance-involuntary-emergency-admissions.pdf>. This document was issued by OMH in connection with Governor Hochul’s and New York City Mayor Eric Adams’ unveiling of their joint plan to remove people from the New York City subway system. See The Subway Safety Plan, <https://www1.nyc.gov/assets/home/downloads/pdf/press-releases/2022/the-subway-safety-plan.pdf>.

public intolerance or animosity cannot constitutionally justify the deprivation of a person’s physical liberty.” *Id.* At 575. In a Second Circuit case dealing with the seizure of a woman for a psychiatric evaluation, the Court held that evidence that the woman appeared irrational, annoyed, and very uncooperative was not sufficient to imply that she appeared dangerous and to establish probable cause for arrest. *Myers v. Patterson*, 819 F.3d 625, 632 (2d Cir. 2016).

Federal courts have long read constitutional guarantees of due process into the various provisions of MHL’s Article 9 as they relate to involuntary retention and treatment. *See e.g. Project Release v. Prevost*, 722 F.2d 960 (2d Cir. 1983). It is well settled that for involuntary removals under § 9.41 of the MHL, “courts apply the same concepts of probable cause and objective reasonableness as in criminal cases to determine whether the confinement is privileged because the plaintiff’s behavior was likely to result in serious harm.” *Greenaway v. County of Nassau*, 97 F. Supp. 3d 225, 233 (E.D.N.Y. 2015). In doing so, courts treat involuntary removals as “the functional equivalent of [] arrest[s],” *Disability Advocates, Inc. v. McMahon*, 279 F. Supp. 2d 158, 168-69 (N.D.N.Y. 2003), *aff’d*, 124 F. App’x 674 (2d Cir. 2005). It should be noted that no caselaw specifically assesses whether inability to meet basic needs rises to the level of probable cause to justify a mental hygiene arrest under MHL § 9.41.

Probable cause for an involuntary hospitalization under the mental hygiene laws—a so-called “mental health arrest”—only “exists if there are reasonable grounds for believing that the person seized is dangerous to herself or to others.” *Guan v. City of New York*, 2020 WL 6365201, at *2 (S.D.N.Y. Oct. 29, 2020), *aff’d on other grounds*, 37 F.4th 797 (2d Cir. 2022) (internal citation and quotation omitted); *Anthony v. City of New York*, 339 F.3d 129, 142 (2d Cir. 2003) (citation omitted); *see Guan*, 37 F.4th at 805 (addressing probable cause standard for involuntary hospitalization under mental health laws and describing an involuntary hospitalization under said laws as a “mental health arrest”).

OMH Involuntary Removal Guidance

Although the OMH Involuntary Removal Guidance does not reference the standards requiring probable cause and danger to self or others that underpin a mental hygiene arrest under MHL § 9.41, the OMH Involuntary Removal Guidance specifies that for purposes of a § 9.41 mental hygiene arrest, “[l]ikelihood of serious harm includes: attempts/threats of suicide or self-injury; threats of physical harm to others; or other conduct demonstrating that the person is dangerous to him or herself, including a person’s refusal or inability to meet his or her essential need for food, shelter, clothing or health care, **provided that such refusal or inability is likely to result in serious harm if there is no immediate hospitalization**” (emphasis added).⁷

⁷ OMH Involuntary Removals Guidance at 3 (quoting *Matter of Scopes v. Shah*, 59 A.D.2d 203, 398 N.Y.S.2d 911 (3d Dep’t 1977)). In *Matter of Scopes*, the Appellate Division’s Third Department ruled that in order to satisfy substantive due process requirements, “the continued confinement of an individual must be based upon a finding that the person to be committed poses a real and present threat of substantial harm to himself or others.”) *See also Matter of Carl C.*, 126 A.D.2d 640 (2d Dept 1987) (“State must prove, by clear and convincing evidence, that the person is mentally ill and that he poses a substantial threat of physical harm to himself (resulting) from a refusal or inability to meet his essential needs for food, clothing or shelter”); *Boggs v. Health Hosps. Corp.*, 132 A.D.2d 340, 523 N.Y.S.2d 71 (1st Dept. 1987) (noting that the sole issue before the court is whether, upon clear and convincing evidence, “Ms. Boggs is so severely mentally ill that, unless she continues to receive hospital treatment,

The OMH Involuntary Removal Guidance relies on caselaw describing an individual’s inability to meet their essential needs in the context of continued retention or involuntary admission of the person for psychiatric treatment. It notes that in order to satisfy substantive due process requirements, “the continued confinement of an individual must be based upon a finding that the person to be committed poses a real and present threat of substantial harm to himself or others, but that such a finding does not require proof of a recent overtly dangerous act.”⁸

The NYC Removal Directive

As demonstrated above, the standard of proof set forth in caselaw and the OMH Involuntary Removal Guidance for what sort of risks rise to the level of “likely to result in serious harm” contemplate imminence (“immediate”), likelihood (“real and present”), and seriousness (“substantial harm” or “dangerousness”), rather than a long-running, speculative risk, or less significant harm.⁹ OMH largely aligns with the caselaw when it articulates circumstances in which an “inability to meet essential needs” (also referred to as the “basic needs standard”) could rise to that threshold. The NYC Removal Directive deviates significantly, sweeping in circumstances that are not as imminent, risky, or as substantial as those contemplated by caselaw or OMH, and therefore purports to authorize removals that will be legally indefensible.

The NYC Removal Directive notes that “case law does not provide extensive guidance regarding removals for mental health evaluations based on short interactions in the field” and then directs that the following circumstances “could be reasonable indicia”: “serious untreated physical injury, unawareness or delusional misapprehension of surroundings, or unawareness or delusional misapprehension of physical condition or health.” These are vague, broad, and undefined standards untethered to caselaw or any OMH interpretative guidance, and in particular, they do not incorporate the temporal urgency standard found in the latter source.

The City’s December 6, 2022 FINEST message explaining the NYC Removal Directive to its police officers offers slightly more specificity.¹⁰ It bears noting that, while this specificity is an

she is in danger of doing serious harm to herself”). In the *Boggs* case, the evidence before the court presented a combination of factors that led to the court’s conclusion that there was justification for involuntary retention of Ms. Boggs in a psychiatric facility, i.e. Ms. Boggs was homeless and was allegedly living without sufficient clothing on a sidewalk grate in winter, running into traffic, making verbal threats to passersby, tearing up and urinating on money that passersby gave her, and covering herself in her own excrement.

⁸ OMH Involuntary Removals Guidance at 2 (internal citation and quotation omitted).

⁹ See the discussion of *Matter of Scopes* in note 7, *supra*, and the quoted language from *O’Connor* in the preceding section entitled “Constitutional Considerations” and the OMH Involuntary Removal Guidance in the section bearing that title.

¹⁰ FINEST messages are read to police officers at roll call and are used to announce NYPD policy changes. Unlike the NYC Removal Directive, the instructions provided to officers in the FINEST message reference OMH’s standard of temporal urgency (in one of the two relevant passages) and *O’Connor*’s language with respect to survival. The FINEST message allows involuntary removal: “when the person appears mentally ill and incapable of meeting basic human needs to such an extent that the person is likely to suffer physical injury or serious harm **without immediate attention**” (emphasis added). The FINEST message provides as examples (without language of imminence of danger): “an incoherent person may be unable to assess and safely navigate their surroundings (e.g.

improvement on the NYC Removal Directive, it is only being distributed to one agency (NYPD), and the NYC Removal Directive purports to empower many city agencies (not just NYPD). Given the broader language found in the NYC Removal Directive and the Mayor's statements (discussed below), we remain concerned about the initiative's implementation across all agencies and future training at NYPD specifically.

These concerns are heightened because of the constitutional right (due process for deprivation of liberty) at stake. In contrast to the standards articulated in caselaw and the OMH Involuntary Removal Guidance, the NYC Removal Directive's basic needs standard is, in and of itself, insufficient to demonstrate immediate dangerousness to self or an incapability of surviving safely in the community. Given *O'Connor* and progeny, application of the basic needs standard absent sufficient indicia of dangerousness raises constitutional concerns. See also *Myers*, 819 F.3d at 632 (holding that a display of irrationality, annoyance, and a lack of cooperation was insufficient to imply dangerousness and to establish that the police acted with probable cause). The NYC Removal Directive's attempt to establish a link between basic needs and conduct likely to result in serious harm is analogous to the police's unsuccessful attempt to establish a link between dangerousness and behaviors unrelated to harm in *Myers*.¹¹

II. The City's language announcing this initiative both reflects and will exacerbate bias against unhoused people and people with serious mental illness, in violation of anti-discrimination principles, and the NYC Removal Directive will disproportionately burden people of color.

City, State, and Federal law all prohibit discrimination on the basis of disability. The City Bar is concerned that the statements by key policymakers both accompanying the announcement of the NYC Removal Directive and subsequently explaining it will have a harmful effect in perpetuating negative public attitudes towards people with mental illness. The City Bar is further concerned that the NYC Removal Directive will disproportionately burden people of color who are unhoused or experiencing mental illness.

Anti-Discrimination Laws

City, State, and Federal law prohibit discrimination on the basis of disability, including mental illness, and require the City and other actors to provide reasonable accommodations to

avoiding oncoming traffic or subway tracks), may suffer from a serious untreated injury, or unable to seek out food, shelter or other things **needed for survival**" (emphasis added). A copy of the FINEST message, labeled SER#: 42286935, was posted on the docket in the *Baerga et al. v. NYC et al.*, 21-cv-05762 (SDNY) (PAC) litigation, ECF/Docket # 123-1.

¹¹ There are, no doubt, legal risks that will be created by implementation of the NYC Removal Directive. Most directly, the NYC Removal Directive allows for seizures that will expose the City to liability for wrongful arrests. See, e.g. *Myers*, 819 F.3d at 633 (denying qualified immunity to a police officer where the record was insufficient to demonstrate arguable probable cause for the seizure and transfer to a psychiatric hospital). Additionally, prior experience has unfortunately but consistently shown that involuntary traumatizing interactions with law enforcement and other first responders have, in numerous instances, resulted in serious harm to both City employees and members of the public. This initiative will prompt incidents that are likely to result in additional City liability to its residents, through worker's compensation and tort litigation.

people with disabilities.¹² The NYC Removal Directive is at odds with the City’s obligations under these laws in at least two distinct ways.

First, involuntary removals under the NYC Removal Directive could deny people access to public spaces such as the subway and the streets, based on their mental illness or the perception of it, in a much broader set of circumstances than is allowable under the Americans with Disabilities Act (ADA), and without the provision of reasonable accommodations. The ADA explicitly does not require an entity to include an individual who presents a “direct threat” meaning “a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.” 42 U.S.C. § 12182(3). But the NYC Removal Directive covers a significant range of situations that cannot be categorized as falling within this narrow exception to the ADA’s general requirement of inclusion.

Second, this initiative’s focus on hospitalization in the absence of adequate and appropriate community-based services is inconsistent with both federal law and aligned state commitments to ensure the availability of community-based treatment options. The Supreme Court ruled in *Olmstead v. L.C.*, 527 U.S. 581 (1999)¹³ that unnecessary institutionalization of people with disabilities is discrimination under the ADA. Simply stated, the ADA’s “integration mandate” “requires that individuals with disabilities receive services in the most integrated setting appropriate to their needs.”¹⁴ OMH has acknowledged that this mandate necessitates a shift in New York’s state mental health services towards greater community-based services.¹⁵

¹² Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132, provides: “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” The City’s Human Rights Law further provides: “it is an unlawful discriminatory practice for any person prohibited by the provisions of this section from discriminating on the basis of disability not to provide a reasonable accommodation to enable a person with a disability to . . . enjoy the right or rights in question provided that the disability is known or should have been known by the covered entity.” N.Y.C. Admin. Code § 8-107(15)(a).

¹³ The Court in *Olmstead* was encountering a remarkably similar circumstance to the issue at hand, where the plaintiffs, including Lois Curtis, a passionate self-advocate who recently passed away, cycled in and out of psychiatric hospitalization. “Lois and Elaine found themselves going in and out of the state’s mental health hospitals dozens of times. After each stay in the hospital, they would go back home; but then, because they did not have help at home, they would start to struggle again and would have to go back to the hospital to get help again. Lois and Elaine asked the state of Georgia to help them get treatment in the community so that they would not have to go live at the state mental hospital off and on.” Disability Integration Project of Atlanta Legal Aid Society, Brief History of *Olmstead*, <https://www.olmsteadrights.org/about-olmstead/>.

The Supreme Court stated in *Olmstead* that “unjustified institutional isolation of persons with disabilities is a form of discrimination” in part because “[i]n order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar sacrifice.” *Olmstead v. L.C.*, 527 U.S. at 600, 601.

¹⁴ U.S. Department of Health and Human Services (HHS) Office for Civil Rights (OCR), <https://www.hhs.gov/civil-rights/for-individuals/special-topics/community-living-and-olmstead/index.html>.

¹⁵ New York State HCBS [Home and Community-Based Services] Settings Transition Plan (2018) at pg. 195. “The legal system’s expansion of civil rights to include people with mental illness, as part of *Olmstead* Legislation and Americans with Disabilities Act, has begun to move policy from the concept of least restrictive setting to full community inclusion. However, New York currently exceeds both the national average inpatient

Even assuming a person requires and would benefit from acute inpatient psychiatric services, there is a shortage of inpatient psychiatric beds in New York City, meaning that many people simply languish in psychiatric emergency rooms for longer. Some inpatient psychiatric wards take few Medicaid patients, which can make it harder to find beds for homeless people. The fundamental systemic issue, however, is that there are inadequate services and support for patients following their discharge from a hospital.¹⁶ To that end, the City Bar welcomes Governor Hochul's recent announcement that hospitals and other inpatient providers will be required to develop a discharge plan that involves immediate wraparound services.

Disproportionate Effects on Communities of Color

The NYC Removal Directive may also implicate the City's obligations to refrain from engaging in practices that have a disparate effect on people of color. Data suggests policies like the NYC Removal Directive are likely to disproportionately impact Black and brown people.

People of color with disabilities are overrepresented in the population of individuals experiencing homelessness.¹⁷ Black New Yorkers already make up 44% of the people currently receiving court-mandated treatment under one state law, though they're less than a quarter of the city's population. In New York City, "44% of current assisted outpatient treatment (AOT) recipients are Black and 32% are Latinx, according to state data."¹⁸ This data suggest that Black and brown New Yorkers are much more likely to be subjected to forced removals from public spaces than white New Yorkers.

utilization rate at state-operated Psychiatric Centers (PCs), and per capita inpatient census levels at state-operated PCs in other urban states and all Mid-Atlantic States. . . . The OMH is in the process of creating the mental health system that New York needs in the 21st Century—a system focused on prevention, early identification and intervention, and evidence-based clinical services and recovery supports. OMH is rebalancing the agency's institutional resources to further develop and enhance community-based mental health services which are also consistent with the Americans with Disabilities Act (ADA). The US Supreme Court's 1999 Olmstead decision held that the ADA mandates that the State's services, programs, and activities for people with disabilities must be administered in the most integrated setting appropriate to a person's needs." Available at: https://www.health.ny.gov/health_care/medicaid/redesign/hcbs/docs/2018-05-18_hcbs_final_rule.pdf.

¹⁶ Andy Newman and Joseph Goldstein, *Can New York's Plan for Mentally Ill Homeless People Make a Difference?*, New York Times, December 15, 2022, <https://www.nytimes.com/article/nyc-homeless-mental-health-plan.html>.

¹⁷ Basic Facts about Homelessness, Coalition for the Homeless, updated December 2022, <https://www.coalitionforthehomeless.org/basic-facts-about-homelessness-new-york-city/>. See also Stacy M. Brown, *Blacks Hit Hardest as NYC's Homeless Population Grows Amid Mental Health Crisis* (Mar. 23, 2022), <https://www.washingtoninformer.com/blacks-hit-hardest-as-nycs-homeless-population-grows-amid-mental-health-crisis/>.

¹⁸ See Ethan Geringer-Sameth, *What's Behind the Increased Use of Kendra's Law in New York City?*, Gotham Gazette, September 27, 2022, https://www.gothamgazette.com/state/11599-increase-kendras-law-new-york-city?utm_source=The+Marshall+Project+Newsletter&utm_campaign=703deaa159-EMAIL_CAMPAIGN_2022_12_16_05_14&utm_medium=email&utm_term=0_5e02cdad9d-703deaa159-%5BBLIST_EMAIL_ID%5D.

Bias and Stereotyping

In their public explanations of this initiative, the mayor and public entities have focused on two primary justifications. The first is, according to the mayor, the “moral obligation” to connect severely mentally ill New Yorkers to appropriate care and housing. We support the removal of barriers to accessing care and stable housing for those who need them. The second justification, however, has included the repeated use of stigmatizing language that relies upon stereotypes and exacerbates bias. These statements, quoted below, reflect a shared and fundamentally flawed premise, which is an erroneous belief that those experiencing mental illness definitionally constitute a threat to the personal safety of others.

Inability to meet *one’s own* basic needs is not indicative of dangerousness *to others*. As noted above, both the MHL and caselaw provide for distinct lanes of analysis for whether someone constitutes a threat to *themselves* and whether someone constitutes a threat to *others*, and do not countenance unjustified slippage between these concepts.¹⁹ The OMH Involuntary Removal Guidance explicitly identifies inability to meet one’s needs as potential evidence of a risk of danger to oneself, rather than as evidence of a danger to others: “conduct demonstrating that the person is dangerous to him or herself, including a person’s refusal or inability to meet his or her essential need for food, shelter, clothing or health care, . . .”²⁰ Despite popular perceptions and fears, empirical data connecting even severe mental illness with an increased risk of perpetrating interpersonal violence is inconclusive, and an appropriate assessment of dangerousness is necessarily highly individualized.²¹

The mayor’s statements at the press conference announcing this new initiative present a fundamental misconception and improperly conflate mental illness and interpersonal violence: “There’s nothing dignified about using a corner of a tent as a restroom or having month-old food sitting there or talking to yourself, being delusional, or waiting until you carry out a dangerous act before we respond. That is just so irresponsible that **we know that this person is about to probably go off the edge and harm someone** but we’re going to wait until it happened.”²²

¹⁹ See *supra* note 4 quoting MHL § 9.41: “‘Likelihood to result in serious harm’ shall mean (1) substantial risk of physical harm to himself as manifested by threats of or attempts at suicide or serious bodily harm or other conduct demonstrating that he is **dangerous to himself**, or (2) a substantial risk of physical harm **to other persons** as manifested by homicidal or other violent behavior by which others are placed in reasonable fear of serious physical harm” (emphasis added).

Though both the FINEST message and the NYC Removal Directive repeat the MHL’s general language of “harm to themselves or others” there is nothing in either document suggesting that self-neglect would indicate a risk of harm to others, and in fact the FINEST message is quite clear that the risk of harm contemplated by the initiative is “to that person.”

²⁰ OMH Involuntary Removals Guidance at 3.

²¹ See, e.g., Varshney M, Mahapatra A, Krishnan V, et al. *Violence and Mental Illness: What is the True Story?* J Epidemiology & Community Health 2016; 70:223-225, <https://jech.bmj.com/content/70/3/223>.

²² “Address on the Mental Health Crisis in New York City” transcript available at: <https://www.nyc.gov/office-of-the-mayor/news/871-22/transcript-mayor-eric-adams-delivers-address-mental-health-crisis-new-york-city-holds> (cited *supra*, n. 2) (emphasis added).

Governor Hochul, in announcing funding for mental health services, similarly conflated general public discomfort with individualized assessments of danger, describing “a public safety crisis” stemming from underfunding of mental health services, and pointing to the public feeling “anxious” about encountering people with mental health conditions while on the subway as evidence thereof.²³

Unfortunately, these descriptions of the initiative by elected officials -- as well as others that have appeared in both City and State published documents²⁴ -- have the effect of perpetuating bias. The Mayor, the Governor, and the *Making New York Work for Everyone* report, which was the culmination of months of collaboration among a panel “of civic leaders and industry experts”²⁵ (although the list of panel contributors does not include experts in mental health treatment or leaders of disability advocacy organizations) have repeated harmful stereotypes about people with mental illness. As the New York City Bar Association has stated in other contexts, “Words matter because they reflect thought and drive action.”²⁶ The disability rights community has a motto: “nothing about us without us,” which calls for the meaningful involvement of people with disabilities in the development of policy that impacts them. We call on City leaders to repudiate bias and commit to inclusive decision-making in its future efforts relating to mental illness.

As discussed further below, this new initiative arrives in the context of the City’s inadequate provision of voluntary, community-based mental health treatment options, which has resulted in the inaccessibility of low-cost care and long waiting lists. Governor Hochul’s State of

²³ Destra, Shantel, “Lawmakers welcome Hochul’s \$1 billion to address mental health,” City & State NY, Jan. 11, 2023, <https://www.cityandstateny.com/policy/2023/01/lawmakers-welcome-hochuls-1-billion-address-mental-health/381708/>.

²⁴ Similarly, the City’s Subway Safety Plan notes as an impetus for this initiative the perceptions of the public: “Second, our subways must be safe and feel safe for every person who enters them Our city’s prosperity depends on everyone feeling confident and secure when they enter a station.” Subway Safety Plan at 4, <https://www1.nyc.gov/assets/home/downloads/pdf/press-releases/2022/the-subway-safety-plan.pdf> (cited *supra*, n. 6).

A joint City and State report *Making New York Work for Everyone* released this month similarly states: “Concerns about safety and quality of life can stymie economic prosperity in terms of investment, revenue, and overall economic activity. We must acknowledge that many residents, commuters, and business owners have been increasingly concerned for their safety and that of their employees as they move around the city.” *Making New York Work for Everyone*, December 2022, at pg. 42, https://edc.nyc/sites/default/files/2022-12/New-NY-Action-Plan-Making_New_York_Work_for_Everyone.pdf. Conflating again the concepts of risk of harm to self and harm to others, the report states: “As part of the [NYC Removal Directive] plan, the Mayor issued a directive to outreach workers, City-operated hospitals, and first responders clarifying that they have the legal authority to provide care to New Yorkers when severe mental illness prevents them from meeting their own basic human needs to the extent that they are a danger to themselves **or others**” (emphasis added). *Id.* at 44.

²⁵ *Making New York Work for Everyone* at 4.

²⁶ President’s Column (Winter 2021) by former City Bar President Sheila Boston, <https://digital.nycbar.org/44thstreetnotes/winter-2021/launch-of-the-six-priorities/>. See also Statement of New York City Bar Association on Reckless Statements and Their Impact in the Charged Environment Surrounding the Mar-A-Lago Search (August 24, 2022) (“words matter and have consequences”) and Statement of New York City Bar Association on The Disturbing Trend of Threats and Violence Against Judges and the Vital Importance of Judicial Security (June 24, 2022) (“today we urge all Americans, particularly public officials and members of the legal profession, to remember that in public discourse our words matter.”).

the State included an announcement of new funding for inpatient and outpatient mental health services, as well as funding for affordable housing.²⁷ These investments are welcome and will, in time, reduce barriers to treatment and stable housing; at the same time, the effects of decades of underfunding for these services will require time and sustained investment to reverse.

III. This initiative directs resources into a failed strategy, at a time when the City has reduced investments in effective strategies that connect people to long term treatment and care.

Numerous groups and individuals with lived experience, both people with mental illness or those with experience providing treatment, have cautioned that increasing involuntary commitments will hinder, rather than improve, our ability to successfully connect people with care.²⁸

Fortunately, there are alternative approaches that will remove barriers to accessing care and stable housing for people experiencing mental illness. As the Bazelon Center has noted,²⁹ research indicates that high-quality engagement of homeless people with mental health conditions, such as that provided through New York’s Street Homeless Advocacy Project,³⁰ which sends people with lived experience with homelessness back to the streets to help others, helps individuals see the value of and agree to participate in supportive services.³¹ Safe, stable, and affordable housing, provided with voluntary supports, has been shown to help homeless New Yorkers and

²⁷ Press Release, “Governor Hochul Announces Comprehensive Plan to Fix New York State’s Continuum of Mental Health Care,” Jan. 10, 2023, <https://www.governor.ny.gov/news/governor-hochul-announces-comprehensive-plan-fix-new-york-states-continuum-mental-health-care>.

²⁸ See, e.g. Fountain House Calls for Comprehensive Mental Health Care in Response to Mayor Adams’ Directive on Involuntary Removals, December 1, 2022. “[T]he approaches announced this week will not address the revolving doors to hospitals and jails, and can further stigmatize and isolate people living with serious mental illness.” Available at <https://www.fountainhouse.org/news/fountain-house-statement-on-mayor-adams-directive-to-expand-involuntary-removals>; Anthony Almojera, *I’m an N.Y.C. Paramedic. I’ve Never Witnessed a Mental Health Crisis Like This One*, The New York Times (guest essay), December 7, 2022. “I’m not opposed to taking mentally ill people in distress to the hospital; our ambulances do this all the time. But I know it’s unlikely to solve their problems While I don’t know how forcing people into care will help, I do see how it will hurt. Trust between a medical responder and the patient is crucial. Without it, we wouldn’t be able to get patients to talk to us, to let us touch them or stick needles filled with medications into their arms. But if we bundle people into our ambulances against their will, that trust will break.” Available at: <https://www.nytimes.com/2022/12/07/opinion/nyc-paramedic-mental-health-crisis.html?smid=nytcore-ios-share&referringSource=articleShare>.

²⁹ Judge David L. Bazelon Center for Mental Health Law, *Mayor Adams’ Plan Will Not Help New Yorkers With Mental Disabilities*, December 22, 2022, <http://www.bazelon.org/wp-content/uploads/2022/12/BC-NYC-Statement-12-2-22.pdf>.

³⁰ See Forum Staff, *City Launches Homeless Advocacy Project*, The Forum (Jul. 21, 2022), <http://theforumnewsgroup.com/2022/07/21/city-launches-homeless-advocacy-project/>.

³¹ See, e.g., Center for Court Innovation, *The Myth of Legal Leverage?* (“Studies of therapeutic intervention strongly suggest that the quality of the human interaction outweighs the importance of any particular protocol or approach. . . .” “factors like goal consensus, empathy, alliance, and positive regard are significantly greater than, say, model fidelity,” and “a robust therapeutic relationship is less a matter of dosage and more a matter of engagement.”), https://www.courtinnovation.org/sites/default/files/media/documents/2020-04/report_the_myth_of_legal_leverage_04232020.pdf.

others stabilize and avoid hospitalization and incarceration.³² And longer-term services, such as assertive community treatment (ACT), supported employment, and peer support services—delivered not in the hospital, but in the person’s own home and community—have been shown to break the cycle of institutionalization.³³

Yet a report issued by New York City’s Public Advocate in November 2022 indicated that the city has reduced the scope of effective evidence-based strategies that would better address mental health crises. There are now only four community- and peer-led Respite Care Centers in the five boroughs of the city, down from eight such centers in 2019.³⁴ There are only 19 behavioral health mobile crisis teams (MCTs) that can respond to calls for help instead of the police, serving the entire city in 2022, down from 24 teams in 2019.³⁵

While the City has a pilot program to send teams of alternative first responders to 911 calls related to mental health crises, these “B-HEARD” teams have a limited scope and capacity. They only responded to 16 percent of 911 calls related to mental health crises in the few Manhattan neighborhoods where they are being piloted, and they have a response time that is not comparable with that of the police.³⁶

The Public Advocate’s report found that the city is “lagging behind in providing supportive housing, with an often-delayed application process,”³⁷ and “lagging in the inclusion of peers with lived-in experiences into the city’s mental health programs.”³⁸ The Correct Crisis Intervention Today - New York City (CCIT-NYC) coalition, which is made up of civil rights and human service organizations, people with lived experience with mental health crises, family members, and other advocates, has advocated for a decade to increase the availability of evidence-based, peer-led responses to mental health crises.³⁹ “The City has the power to provide onsite treatment, as well as treatment in homeless shelters or supported housing, but has chosen not to.”⁴⁰ We note that

³² S. Tsemberis & R.F. Eisenberg, *Pathways to Housing: Supported Housing for Street-dwelling Homeless Individuals with Psychiatric Disabilities*, *Psychiatric Services* Vol. 51, Issue 4, 487-93, <https://doi.org/10.1176/appi.ps.51.4.487>.

³³ Bazelon Center for Mental Health Law, *Diversion to What? Evidence-Based Mental Health Services that Prevent Needless Incarceration* (September 2019), http://www.bazelon.org/wp-content/uploads/2019/09/Bazelon-Diversion-to-What-Essential-Services-Publication_September-2019.pdf.

³⁴ Office of the Public Advocate, *Improving New York City’s Response to Individuals in Mental Health Crisis 2022 Update 3* (November 2022) at pg. 3, https://advocate.nyc.gov/static/assets/Mental_Health_Updates_2022c.pdf.

³⁵ *Id.* at 5.

³⁶ *Id.* at 7-8.

³⁷ *Id.* at 5.

³⁸ *Id.* at 10.

³⁹ <https://www.ccitnyc.org/>.

⁴⁰ National Alliance on Mental Illness – NYC, *NAMI-NYC Calls for Comprehensive, Person-Centered Behavioral Health Care for People Living with Serious Mental Illness*, November 29, 2022, <https://naminycmetro.org/involuntaryremoval/>.

these shortcomings may be addressed by Governor Hochul’s recent announcement of significant funding for community-based mental health services and supportive housing.

Just last month, the United States Interagency Council on Homelessness released a comprehensive report entitled *All In: The Federal Strategic Plan to Prevent and End Homelessness* (the *All In* report).⁴¹ It notes that local officials have responded to a rise in the number of people living in unsheltered locations “not always in the most effective ways” through “out of sight, out of mind” policies that displace people without successfully connecting them to evidence-based services.⁴² The mayor’s initiative fits broadly within the parameters of effectively criminalizing homelessness, which the *All In* report identifies as counterproductive. Such policies take away resources from constructive solutions to homelessness, create trauma, can erect financial and criminal legal barriers for people seeking pathways out of housing insecurity and homelessness, and disproportionately burden already-marginalized communities including people of color, LGBTQI+ people and people with disabilities.

* * *

In conclusion, we ask for a commitment from the City to pause its rushed implementation of this initiative, and take seriously the concerns raised by individuals with lived experience of mental illness and/or homelessness following the announcement. In the coming months, our committees, like many interested New Yorkers, will carefully evaluate the City’s proposed legislative and operational changes, and would welcome the opportunity to meet with city attorneys to discuss these legal issues. There are evidence-based solutions available to the City to better support people accessing care and housing. We call on the City to halt this removal initiative and instead pursue effective strategies within its legal authority.

Civil Rights Committee

Kevin Eli Jason and Kathleen Rubenstein, Co-Chairs

Disability Law Committee

Katherine Rose Carroll, Chair

Mental Health Law Committee

Mikila J. Thompson, Chair

New York City Affairs Committee

Erik Rubinstein, Secretary⁴³

Social Welfare Committee

Lindsay Funk and Sandra Gresl, Co-Chairs

⁴¹ United States Interagency Council on Homelessness, *All In: The Federal Strategic Plan to Prevent and End Homelessness* (December 2022), https://www.usich.gov/All_In_The_Federal_Strategic_Plan_to_Prevent_and_End_Homelessness.pdf.

⁴² *Id.* at 20.

⁴³ The Chair and a number of members of the New York City Affairs Committee recused themselves from discussion and voting on this letter.