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Testimony of Tyler Nims, Executive Director, Independent Commission on New York City Criminal Justice and Incarceration Reform

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I am Tyler Nims, Executive Director of the Independent Commission on New York City Criminal Justice and Incarceration Reform, sometimes known as the Lippman Commission after our chairperson Judge Jonathan Lippman. Thank you for the opportunity to testify.

One of the core principles of our work is that New York City should use incarceration as sparingly as possible, consistent with public safety. The pretrial reform legislation that will take effect in January reflects this precept by making pretrial release the presumption in New York.

Domestic violence allegations, of course, pose special challenges and risks. In some cases, pretrial supervision and diversion programs can help strike the appropriate balance between those special challenges and the mandate to limit pretrial incarceration.

Of the approximately 200,000 cases arraigned in New York City criminal courts in 2018, approximately 30,000 involved domestic violence allegations.¹ Because New York's penal code does not have a domestic violence-specific offense, cases involving intimate partner and other domestic violence allegations are charged under laws that are also applicable to conduct that does not include domestic violence.²

The vast majority of cases—85 percent—involving domestic violence allegations were misdemeanors, primarily assault (61%), criminal contempt (12%), and aggravated harassment

¹ Rempel, M. & Rodriguez, K., *Bail Reform and Domestic Violence: Implications of New York's New Pretrial Statute*, Center for Court Innovation, August 2019, at 4.

² *Id.* at 4.

(8%). Seven percent were classified as nonviolent felonies, primarily criminal contempt—most often for violating an order of protection. Eight percent were classified as violent felonies, primarily assault (49%), strangulation (16%), burglary (13%), and robbery (10%).³

Although domestic violence cases involve special considerations, overall pretrial release rates parallel those of non-domestic violence cases: 76 percent of people accused of charges involving domestic violence allegations are released on recognizance. Fewer than one percent are remanded, and the rest—approximately 24 percent—currently have bail set.⁴ Most people who have bail set are eventually able to make bail, and are not detained throughout the entire case.⁵ The racial disparities in our justice system are also present in domestic violence cases. Black and Latinx people accused of charges involving domestic violence allegations are significantly more likely to have had bail set than white people facing similar charges.⁶

As of October 16, 2019, there were approximately 465 people incarcerated in City jails on charges involving allegations of domestic violence—roughly 7 percent of the total jail population. 62 people were incarcerated pretrial on misdemeanor charges, 81 people were incarcerated pretrial on nonviolent felony charges, and 156 people were incarcerated pretrial on violent felony charges. Another 98 people were incarcerated pretrial for charges involving domestic violence allegations, but were also subject to detention on a parole warrant, meaning they are ineligible for pretrial release. Approximately 68 people were serving jail sentences for offenses involving domestic violence.⁷

³ *Id.* at 4-5.

⁴ *Id.* at 5.

⁵ Kerodal, A. & Rempel, M., *Domestic Violence Case Processing in New York City*, Center for Court Innovation, February 2018, at vii.

⁶ *Id.* at vii, 11, 28; *but see id.* at 45 (noting the absence of racial disparities in sentencing).

⁷ These figures are based on the October 16, 2019 Open Data snapshot of the City's jail population. The domestic violence figures were estimated by applying the percentage of specific

As bail reform takes effect in January, some domestic violence cases will no longer be eligible for pretrial incarceration at arraignment, although incarceration or other conditions may be imposed if the charged person violates an order of protection. Other charges will come with a presumption of release and a requirement the least restrictive conditions be imposed, even though bail and pretrial detention are permissible. If the pretrial reform legislation had been in effect on October 16, we estimate that approximately 100 of the people detained pretrial would have been subject to release. But it is important to note that because people who are held in pretrial detention for misdemeanor domestic violence offenses average approximately 15 days in jail, it is likely that many of these people eventually would have made bail or otherwise been released regardless of the pretrial legislation.⁸

There is reason to believe that some of those who are incarcerated today could be released pretrial, with or without conditions. According to an analysis last year by the Center for Court Innovation, “significant fractions of those who are detained pretrial pose only a low or low-moderate risk of re-arrest or [of] domestic violence re-arrest specifically.” The CCI study concluded that “11% of those detained pose a low and 16% pose a low-moderate risk of domestic violence re-arrest.”⁹

We recommend replacing incarceration in appropriate cases with evidence-based alternatives that hold people accountable for their behavior and promote rehabilitation. These programs may be more effective than incarceration, because while jails may offer temporary reprieve from the burdens some people are creating for the community, they often do not address

charges, such as assault and criminal contempt, that are known to involve domestic violence based on court data provided by the Office of Court Administration.

⁸ Aborn, R. *et al.*, *A More Just New York City*, April 2017, at 48.

⁹ Kerodal, A. & Rempel, M., *Domestic Violence Case Processing in New York City*, Center for Court Innovation, February 2018, at 31.

the problems and circumstances that drive violent behavior, so that charged person may simply return from jail doing the same harmful things that led them there in the first place.¹⁰

In addition, with the implementation of the pretrial legislation, we recommend that judges be given the discretion to allow defendants charged with domestic violence offenses to participate in the supervised release program. We suggest a specialized supervised release track that emphasizes strict compliance with orders of protection and offers programming that includes cognitive behavioral therapy or restorative justice principles to help address the causes of domestic violence.¹¹

In sum, allowing some charged persons to be released and engaged in programs that are tailored toward addressing domestic violence may be more beneficial to victims and more productive to the charged persons than jail. We encourage the Administration and the Council to develop programs for cases involving domestic violence allegations, and to seek alternatives to incarceration where possible.

¹⁰ See generally Aborn, R. *et al.*, *A More Just New York City*, April 2017, at 48-49.

¹¹ *Id.*; see also Independent Commission on New York Criminal Justice and Incarceration Reform, *Beyond Bail or Nothing: The Case for Expanding Supervised Release*, June 2018, at 7.