Written Statement of
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on behalf of the
National Association of Criminal Defense Lawyers

Before the
Committee on the Judiciary & Public Safety
of the Washington, DC, City Council

Re:
Bill 23-409 (the "Sexual Orientation and Gender Identity Defense Prohibition Act of 2019)
and
Bill 23-435 (the "Tony Hunter and Bella Evangelista Panic Defense Prohibition Act of 2019)

October 23, 2019

The National Association of Criminal Defense Lawyers (NACDL) appreciates this opportunity to present its views in opposition to two pending bills before this committee -- Bill 23-409, the "Sexual Orientation and Gender Identity Defense Prohibition Act of 2019," and Bill 23-435, the "Tony Hunter and Bella Evangelista Panic Defense Prohibition Act of 2019."[1] The stated purpose of B23-409 is "to limit criminal defenses and authorization for the use of force relating to a victim's sexual orientation or gender identity." And the stated purpose of B23-435 is "to curtail the availability and effectiveness of defenses that seek to partially or completely excuse crimes such as murder and assault on the grounds that the victim's sexual orientation, gender identity, or other inherent identity, is to blame for the defendant's violent action, and to require an anti-bias jury instruction in criminal trials if requested by the prosecutor or defendant."

NACDL proudly stands with our allies in the LGBTQ community and others in the criminal justice community in support of the Equality Act (H.R. 5), which prohibits discrimination and segregation based on sex, sexual orientation, and gender identity in public accommodations and facilities, education, federal funding, employment, housing, credit, and very significantly, in the jury system. The Equality Act is currently pending in Congress. NACDL is a long-time member of the National LGBT/HIV Criminal Justice Working Group. In fact, just last week, NACDL joined with allied organizations to call for the repeal of a New York anti-loitering law known to many as the "Walking While Trans Ban." NACDL also works to oppose HIV/AIDS criminalization, training lawyers to defend such cases as well as filing amicus, or friend-of-the-court, briefs in the appellate courts. And, of course, we are not just allies of the LGBTQ community -- the people we serve, our clients, and our membership are comprised of every conceivable gender identity and sexual orientation. We recognize and, like you, abhor violence against LGBTQ people in the District and elsewhere. However, for the reasons set forth here and that we expect NACDL's affiliate, the District of Columbia Association of Criminal Defense Lawyers, to outline in its testimony, Bills 23-409 and 23-435 will do nothing to address any rising tide of violence and will not function as the kind of tool their authors hope to provide in the prosecution of hate crimes.

I speak today about the broader implications of bills like those under consideration today -- bills that, through legislative action, categorically prohibit specific defenses in criminal cases. NACDL's mission, vision, and values compel it to oppose Bill 23-409 and Bill 23-435 because they are categorical, legislative prohibitions of specific defenses in criminal cases. Such prohibitions undermine the constitutional right to present a defense.

The constitutional right of every accused person to present a defense must be assured by the assiduous application of existing rules of evidence and principles of relevance and materiality. Every day, District of Columbia judges make determinations regarding the availability of legal defenses only after a full and fair presentation of *all* relevant evidence, including evidence of behavior and views of witnesses for the defense and the prosecution that may be socially

[1] The National Association of Criminal Defense Lawyers is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's many thousands of direct members in 28 countries – and 90 state, provincial and local affiliate organizations totaling up to 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges committed to preserving fairness and promoting a rational and humane criminal justice system.

unacceptable and offensive to many. We rely on the thoughtful deliberation by properly instructed jurors to parse this evidence and render verdicts based on the application of the law, as instructed by the court, to the evidence presented at trial. The categorical, legislative prohibition of specific defenses falsely presumes that judges are not capable of determining that which is relevant and admissible evidence, when in fact judges, who have heard all of the evidence during a trial, are in the best position to apply long-established rules of evidence to the unique facts and circumstances of the cases which come before them. Moreover, these bills also denigrate the ability of your constituents, the persons who are selected to serve on juries in the District to follow instructions, and presupposes that these citizens are incapable of discharging their duty to render fair verdicts due, in the case of these bills, to their own homophobia, transphobia, and bigotry. NACDL believes District residents are better than this. Our Constitution, the judges of the District of Columbia, and the persons who give their time and experience to serve as jurors in the District deserve better.

On February 16, 2019, after significant study by NACDL's Task Force on Defenses, NACDL's Board of Directors adopted a resolution "Concerning Categorical Legislative Prohibitions of Defenses in Criminal Cases."[2] It maintains that legislative efforts to categorically prohibit certain defenses chip away at the foundational principles of our criminal justice system by undermining well-established rules of evidence that serve to balance principles of relevance and due process rights of accused persons.

The right to due process, enshrined in the Sixth and Fourteenth amendments to the United States Constitution and analogous state constitution provisions throughout the United States, includes the rights to confront, cross examine, and compel the attendance of witnesses. Considered together, all of these rights are integral to ensuring the singular fundamental right of criminally accused persons to present a defense.

The right to present a defense encompasses the presentation of any evidence that shows that an accused person either did not commit the crime or that his or her actions were excused, justified, or mitigated in some way. Where the law allows an affirmative defense, mitigation, or justification, it reflects society's collective determination, enshrined in the law, that conduct that may otherwise be considered worthy of punishment may be excused or considered less blameworthy. Some defenses like defense of self or others, necessity, and duress are such fundamental precepts that they are universally understood to afford context and justification for otherwise unlawful conduct. Other defenses and forms of mitigation reflect enormous advances in our understanding of human psychology and brain development. And regardless of why a violent act may have been committed, proof of guilt beyond a reasonable doubt is always required.

It is in the crucible of trial that these general principles are applied to facts through the presentation of testimony and evidence to juries of our peers. That process is guided by accepted rules of evidence and established case law interpreting the application of those rules and defining

[2] This NACDL Board Resolution is available at https://www.nacdl.org/Content/Concerning-Categorical-Legislative-Prohibitions-of.

the defenses that have developed through thousands and thousands of trials and review by higher courts charged with interpreting our state and federal constitutions and statutes.

Outside of the courtroom, the tragic circumstances of many cases justifiably give rise to a public outcry. Sympathy for victims of crime targeted because they are vulnerable, oppressed, or marginalized often leads to important and meaningful community advocacy to legislate policy changes that protect and make life safer for members of these groups. The impulse to legislate solutions in the wake of tragic cases, however, has led lawmakers to pass statutes designed to categorically prohibit certain defenses and thereby undermine the ability of defendants to present a defense. These prohibitions derive from the public discourse around high profile cases which tends to stir passions and to distill complicated facts and circumstances into sensationalistic headlines and rhetorical soundbites.

Categorically prohibiting defenses through legislation may feel like a meaningful solution in the aftermath of a high-profile crime, but it is a misguided impulse. These laws dramatically impinge on accused persons' rights to confront their accusers and mount a defense. Evidence at trial, whether presented by the prosecution or the defense, is always adapted, limited, and shaped to comport with constitutional requirements of due process and to fulfill the practical purpose of trial, the pursuit of truth. Indeed, evidence that does not satisfy the standard of relevance is excluded. Because categorical prohibitions of defenses do not evolve through well-considered case law, they must be mechanically applied by judges without regard to the trial's truth-seeking function. Predictably, limiting the constitutional right of accused persons to mount a defense results in coerced guilty pleas, false convictions, and convictions of more serious crimes than legally justified by the evidence.

Statutes that limit defenses or the evidence that juries are permitted to consider also undermine the trust that the public has and should have in judicial discretion and the ability of juries to reach just verdicts. Legislation that focuses on limiting certain defenses and the consequential media attention that follows encourages the public to believe, incorrectly, that trials are conducted by judges mechanically applying the law instead of through an adversarial process culminating in a fair jury verdict that is based on a thorough and searching consideration of all of the relevant evidence at trial.

Ultimately, jury trials conducted in a manner to ensure full and transparent exposure and examination of bias and prejudice in open courtrooms guided by the principles of due process and the right to confront witnesses are the best method of de-stigmatizing societally marginalized individuals who come into the criminal justice system whether as witnesses, victims, or defendants.

NACDL seeks to promote transparent trial processes and to educate the public that trials must be a search for truth through the complete and rigorous examination of all relevant evidence and consideration of any argument for acquittal or mitigation presented by the unique facts and circumstances in each case.

Finally, and perhaps most significantly, this legislation is unprecedented. We can find no other example in which this legislative body has sought to categorically limit defenses in this way – in

a way that is likely unconstitutional and contravenes well-established District of Columbia case law. Today, the proposed legislation is in response to violence against an already marginalized community. But Councilmembers, I ask you, how will the line be drawn? Should the defense of necessity be categorically outlawed for homeless people accused of breaking and entering enclosed structures when they only sought to escape dangerously cold temperatures? One could imagine that in jurisdictions where abortion becomes increasingly outlawed, that bills like these set the precedent for categorically outlawing necessity as a defense for doctors who act to save a woman's life. Several states have categorically eliminated defenses related to mental illness. Is that a road the District wishes to go down? Frequently unconstitutional on their face, always potentially violative of due process - categorical legislative prohibitions of specific defenses, these bills included, do nothing to address the underlying social ill they purport to address and pose grave risks to our rule of law.

NACDL urges this body to vote no on Bills 23-409 and 23-435.