

**STATEMENT OF
LISA BLAND
COUNSEL
NEW YORK CITY POLICE DEPARTMENT**

**BEFORE THE NEW YORK CITY COUNCIL
COMMITTEE ON GOVERNMENTAL OPERATIONS
REMOTE HEARING
FEBRUARY 9, 2021**

Good morning Chair Cabrera and Members of the Council. I am Lisa Bland, Counsel for the Deputy Commissioner of Public Information, I am joined today by Paul Antonio Ochoa, the Mayor's Director of City Legislative Affairs, Oleg Chernyavsky, Assistant Deputy Commissioner for Legal Matters of the New York City Police Department (NYPD), and Michael Clarke, Managing Attorney of the Legislative Affairs Unit. On behalf of Commissioner Dermot Shea, I wish to thank the Council for the opportunity to discuss this important issue and comment on the bill being heard today.

The heart of the NYPD's mission is to protect the health, safety and welfare of those that live in, work in, and visit our city. Yet, while protecting the safety of the citizens of this city remains our number one priority, the NYPD currently has a multitude of other functions.

One of those functions is the issuance of press credentials. Credentials that enable members of the press access to news-worthy events so that they may inform the public. The Administration unequivocally supports the freedom of the press to do their jobs, reporting on events that take place throughout the city on a daily basis. An informed public on issues ranging from crime, to traffic, to politics and elections, as well as new city policies and programs, and even trash collection, is essential to the functioning of the city. Journalists also play a critical role in holding everyone in government, NYPD included, accountable.

When the NYPD and the media intersect, it is the policy of the Department to help facilitate the media's ability to fulfill their critical responsibilities. This is represented by a fully-staffed, 24/7 Public Information Bureau that responds to thousands of media inquiries each year, coordinates and notifies the press regarding NYPD news conferences and other media sessions, and enables media access at newsworthy incidents, such as crime scenes, where safety permits. To facilitate such access, the NYPD has issued press credentials for several decades. The rules for issuance and continued maintenance of such credentials have been codified into the Rules of the City of New York (RCNY), and are available for public inspection.

Pursuant to the RCNY, press credentials are available to members of the press who cover emergency, spot or breaking news and/or public events of a non-emergency nature. From 2015 to 2020, the NYPD has issued over 5,000 press cards to members of the press so that journalists can do their jobs. During that five-year span, there have been no revocations of press credentials. These numbers illustrate the NYPD's commitment to facilitating the work that journalists do each day to keep the public informed.

I would now like to speak about the bill being heard today.

Proposed Intro. 2118 – This bill would give the Department of Citywide Administrative Services (DCAS) sole authority to issue, suspend and revoke press credentials. The Administration supports moving press credentialing out of the NYPD, but we believe further conversations are needed to determine the right agency to take on this important work. The Department will work with the appropriate agency to ensure a seamless transition.

I would be happy to answer any questions you may have.



PUBLIC ADVOCATE FOR THE CITY OF NEW YORK

Jumaane D. Williams

**TESTIMONY OF PUBLIC ADVOCATE JUMAANE D. WILLIAMS
TO THE COMMITTEE ON GOVERNMENTAL OPERATIONS - HEARING
FEBRUARY 9, 2021**

Good morning,

My name is Jumaane D. Williams, and I am the Public Advocate for the City of New York. I thank Chair Fernando Cabrera for holding today's hearing.

Last spring, numerous New Yorkers publicly demonstrated for racial justice. I was one of those people who stood alongside others in the streets. Unfortunately, as seen on videos and told in testimony to this Council, several people were forcibly detained and/or assaulted by police officers. Others were threatened with arrest or trapped. I recall talking with officers to de-escalate situations and avoiding possible arrests. This was a pervasive problem that both police leadership and our Mayor have not fully addressed.

That is why I am proud to co-sponsor Councilmember Powers' Intro. No. 2118. As he explained, the legislation would permanently transfer issuing, suspending, and revoking press credentials from the New York Police Department to the Department of Citywide Administrative Services. I welcome this as the NYPD is not capable of the responsibility.

During those demonstrations in 2020, there were several incidents of journalists also being threatened, detained, or arrested. One reporter filmed an arrest and was pushed by officers despite showing an NYPD-issued press badge. Another was hit and tackled to the ground while wearing a jacket with the word "PRESS." A separate journalist was violently arrested in spite of wearing a press badge. A journalist with a press badge was hit in the face with riot shields. I can go on, but the point is clear. An NYPD-press badge meant nothing for officers who can decide to assault or arrest reporters for doing their job.

This is not a new phenomenon. You can go back to the 2011 Occupy Wall Street demonstrations. You can go back to the anti-war protests in 2003. Journalists, despite getting press credentials from the NYPD, are faced with threats, harassment, confiscations, and arrests from police officers. It makes us question why the department should be responsible for issuing credentials. Issuing press credentials is not a public safety responsibility, therefore the NYPD should not be responsible.

Councilmember Powers' legislation is the right answer. DCAS already manages the credentials



PUBLIC ADVOCATE FOR THE CITY OF NEW YORK

Jumaane D. Williams

of City employees, and it should be capable of a similar task with press credentials. The NYPD cannot get another chance. Last November, we again saw that having an NYPD-issued press badge does not guarantee the right to report. Reporters were either pushed back with bicycles, shoved to the ground, or arrested. At this point, we must say when, not if, the next incident between officers and a reporter will come.

The consequences of officers targeting journalists are clear. It should not be tolerated, particularly in this political climate. Journalists should receive credentials from an agency that does not treat them poorly. Therefore, DCAS is the most capable agency in overseeing press credentials.

I do view the legislation as a start as there must be an effort to redefine public safety in our City. I welcome solutions to ensure we have accountability for the public. I thank the chair for allowing me to speak, and I look forward to today's testimony.



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**Testimony of Justin Harrison
On Behalf of the New York Civil Liberties Union
Before the New York City Council Committee on Governmental
Operations
Regarding NYPD Press Credentialing Amendments**

February 9, 2021

The New York Civil Liberties Union (NYCLU) is grateful for the opportunity to submit the following testimony regarding transfer of press credentialing authority from the NYPD to the DCAS. The NYCLU, the New York State affiliate of the American Civil Liberties Union, is a not-for-profit, nonpartisan organization with eight offices across the state and over 180,000 members and supporters. The NYCLU defends and promotes the fundamental principles and values embodied in the Bill of Rights, the U.S. Constitution, and the New York Constitution through an integrated program of litigation, legislative advocacy, public education, and community organizing.

City Administrative Code gives the New York Police Department sole authority to grant or suspend press credentials in New York City. Journalists need such credentials to report on breaking news, public emergencies, and crowded or high-security events, as they allow passage through police barriers, fire lines, and security or crowd control points closed to the general public. The NYPD has a history¹ of arbitrarily denying credentials to—or confiscating the credentials of—journalists who’ve criticized the Department’s actions, particularly its treatment of protestors, journalists, and bystanders at last year’s Black Lives Matter protests.² Limiting or revoking access in such an arbitrary manner violates the First Amendment.³

¹ Public Hearing Comments, “Suspension or Revocation of Press Credentials.” August 18, 2020. Available at: <https://rules.cityofnewyork.us/rule/31926/>

² Robert Pozarycki, “NYPD should be relieved of press credential duties, Stringer tells de Blasio,” *AMNY.com*. June 6, 2020. Available at: <https://www.amny.com/news/nypd-should-be-relieved-of-press-credential-duties-stringer-tells-de-blasio>

³ “[...]nce there is a public function, public comment, and participation by some of the media, the First Amendment requires equal access to all of the media.” *Am. Broad. Cos. v. Cuomo (ABC)*, 570 F.2d 1080, 1083 (2d Cir. 1977); see also *Nicholas v. Bratton*, 376 F. Supp. 3d 232, 259–60

Int. 2118-2020 would transfer press credentialing authority away from the NYPD to the New York City Department of Citywide Administrative Services (DCAS), ideally reducing arbitrary or discriminatory credentialing practice.

The NYCLU supports this bill. The NYPD—notoriously secretive and famously hostile to criticism—should not get to decide who may or may not investigate and report the news, particularly news *about the NYPD*. That authority—to the extent it should exist at all—should belong to an independent agency empowered to issue credentials in a neutral fashion, without input, influence, or threat of reprisal from the NYPD. The DCAS is an appropriate choice.

The bill also would require the DCAS Commissioner to set rules, criteria, and procedures for obtaining, approving, denying, suspending, and revoking press credentials, and for appealing denials, suspensions, and revocations. The NYCLU would urge the Commissioner to promulgate broad, neutral rules that would allow for liberal credentialing in keeping with an inclusive application of the First Amendment’s free press guarantees.

The NYCLU urges the Council to pass this bill.

(S.D.N.Y. 2019), *reconsideration denied*, No. 15-CV-9592 (JPO), 2019 WL 2223407 (S.D.N.Y. May 23, 2019) (“whenever an area is open to either the general public or to some members of the press, the First Amendment restricts the government’s ability to selectively regulate the press’s access to that area.”).

Testimony on Int. No. 2118 Before the Council of the City of New York Committee on Governmental Operations

COMMITTEE ON MEDIA LAW

Media Law #4

February 12, 2021

The Committee on Media Law of the New York State Bar Association (the “Committee”) submits this written Testimony on Int. No. 2118, “A Local Law to amend the administrative code of the city of New York, in relation to press credentials.”

As stated on February 9, 2021, in our oral testimony during a hearing of the Committee on Governmental Operations regarding Introduction Number 2118-2020 (“Int. 2118”), we oppose the bill as currently drafted. The bill would give the Department of Citywide Administrative Services (“DCAS”) sole authority to issue, suspend, and revoke press credentials (all without specifying what those rules, requirements, or procedures would be), and would remove that authority from the New York Police Department (“NYPD”). Therefore, we respectfully request that action on Int. 2118 be held until such time as the NYPD final rule is published and an assessment of its impact can be made. Additionally, the bill must be revised to include specific language detailing procedures and criteria for press credentialing and address other concerns outlined below.

The Committee appreciates the Council’s interest in improving police-press relations and in particular the process by which press credentials are issued, suspended, or revoked, but as we previously expressed during an October 2020 virtual meeting with the bill’s authors, we are extremely concerned that enactment of this bill would short-circuit and undermine the rulemaking process which itself stemmed from the settlement of litigation dating back many years, has been months in the rulemaking process and for which a final rule is long overdue. What is also troubling is the report that NYPD completed their rulemaking, incorporating our comments and others it received, in late November 2020 and publication has been awaiting approval from the Corporation Counsel’s office and the Mayor’s Office of Operations.

While there is overall recognition that the NYPD credentialing process is far from perfect, the rulemaking process must be finalized and reviewed by those it impacts most before a wholesale change is made as to which city agency oversees that process, especially given the fact that NYPD officers will still be the ones that journalists come in direct contact with, in situations where press credentials, other than those issued by NYPD, have not been honored and where NYPD-issued credentials have been seized or threatened to be seized if journalists do not comply with officer’s orders. We are also extremely concerned that the language of Int. 2118 is long on giving DCAS (or possibly some other agency) sole authority but short on specifics as to what the rules setting forth the procedures and criteria for press credential qualification, issuance, suspension, revocation, and appeal will be.

The Committee previously submitted extensive comments and testimony in response to NYPD’s notice regarding its proposed changes to the rules that govern the adjudication of hearings for the suspension and/or revocation of NYPD issued press credentials and amending/repealing certain sections of Title 38 of the RCNY. As noted in the Committee Report of the Council’s Governmental Affairs Committee

published on February 9, 2021,¹ “[t]he deadline for public comment on these proposed rules was August 18, 2020, and comments are partially viewable online (Some commenters submitted their comments as attachments, which are not available online. See <https://rules.cityofnewyork.us/rule/31926/>.)” To better inform the legislative process we are attaching our comments submitted on that date in Appendix A.

Before getting to the proposed revisions to Int. 2218, the Committee wishes to address an additional concern that arose at the time of the February 9, 2021 hearing. While the proposed bill purports to “give the Department of Citywide Administrative Services (“DCAS”) sole authority to issue, suspend, and revoke press credentials” while removing “that authority from the New York Police Department (“NYPD”),” Mayor Bill de Blasio announced on that same day, “There's been a lot of concern about how to handle the credentialing of members of the media going forward. It's a very important process, it has to be done the right way. I believe it is the right time to move that function from the NYPD to the Mayor's Office of Media and Entertainment.”² The Mayor went on to state, “I think the very orientation of that office, MOME as we call it, is a place that could best handle journalists, make sure they get the support they need, make sure the process goes smoothly and quickly because it's important as new journalists come on the scene that they get those credentials quickly and we do it the right way. So, given that the Mayor's Office of Media and Entertainment has experienced, of course, dealing with the media and dealing with permitting on many levels, it's the right home and we'll be talking to the City Council about that and working together to make a change going forward on how we credential the media.”³

A recommendation was made during the hearing that a new agency outside of any existing city department or office be formed to administer the press credential system, run by someone familiar with news gathering as well as regulations and staffed by qualified people. That proposal received pushback from Councilmember Powers and others on the grounds that there are enough agencies. While there is an acknowledgment that additional bureaucratic agencies should be avoided, there is still strong concern about which department/agency would be best to have authority over this process. Some have said that DCAS might not be the best department to have this authority but given the ongoing complaints that NYPD had a perceived conflict of interest being the sole arbiter regarding the issuance and oversight of press credentials as well as an inherent conflict regarding the fact that those press credentials are needed by the very journalists who cover the NYPD every day, it may well be time for a change after publication of a final rule.

However, the recent announcement by the Mayor, that MOME would now administer this process raises new concerns where there is a strong desire to eliminate or minimize to the greatest extent possible any political influence in the credentialing process. Should it be decided that MOME does handle press credentialing, the Committee recommends that thought be given to providing some other agency or department authority to hear and decide appeals to avoid any appearance of a conflict of interest.

¹ See: <https://legistar.council.nyc.gov/View.ashx?M=F&ID=9170215&GUID=8A400553-BE79-42E0-AE4F-1E9D9B483394>

² Transcript of Mayor’s statement at <https://www1.nyc.gov/office-of-the-mayor/news/097-21/transcript-mayor-de-blasio-holds-media-availability>.

³ *Id.*

Proposed Revisions to Intro No. 2118:

- **Freedom of the Press.** The bill must contain language that provides that the promulgation of any new rulemaking pertaining to the issuance, suspension, and revocation of press credentials be guided by First Amendment and Due Process considerations, if the true intent of Int. 2118 is “to protect the Freedom of the Press” as set forth in the U.S. and New York State Constitutions. “Nor is it suggested that newsgathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated,”⁴
- **Honor Press Credentials.** As noted during the 2/9/21 hearing on this matter, valid press credentials issued by other jurisdictions and law enforcement agencies have been disregarded by NYPD officers. In many other situations, officers have ignored the protections and privileges DCPI issued press credentials are meant to provide. Because there is a strong possibility that press credentials will no longer be issued by NYPD, the bill must contain language that requires, all City personnel (including but not limited to, police, fire, EMT’s and first-responders) to comply with the current terms of the credential entitling “the bearer, subject to safety and evidence preservation concerns or space limitations, to cross police lines, fire lines or other restrictions, limitations or barriers established by the city at emergency, spot, or breaking news events and public events of a non-emergency nature where police lines, fire lines or other restrictions, limitations or barriers established by the city have been set up for security or crowd control purposes and to attend events sponsored by the city which are open to members of the press.”
- **Interference and Arrest.** As noted in the most recent lawsuit by the New York State Attorney General,⁵ “[w]hile New York Residents were engaged in speech, expressive conduct, or press reporting – all rights secured by the New York State Constitution–NYPD Officers infringed upon such constitutionally-protected activity and retaliated against those New York Residents engaged in such conduct by assaulting, battering, and/or detaining them.”⁶ Many news and free press organizations have noted that there have been far too many instances in which NYPD officers threaten and coerce journalists with arrest or seizure of their press card. They do this through unlawful orders that serve no legitimate public safety interest but rather for the purpose of harassment, interference with or in retaliation against constitutionally protected newsgathering activities. “A police officer is not a law unto himself; he cannot give an order that has no colorable legal basis and then arrest a person who defies it.”⁷ Int. 2118 must contain language that references the directives found in various sections of the NYPD Patrol Guide regarding treatment of the press.⁸

⁴ *Branzburg v. Hayes*, 408 US 665 (1972).

⁵ See: *People Of The State Of New York v. City Of New York, et al*, Case No. 21-cv-322 (SDNY, 2021).

https://Ag.Ny.Gov/Sites/Default/Files/Filed_Complaint_Ny_V_Nypd_1.14.2021.Pdf

⁶ *Id.* at 64.

⁷ See: *Iacobucci v. Boulter*, 193 F.3d 14, 25 (1st Cir. 1999)

⁸ See, e.g., NYPD Patrol Guide § 212-49 (“Members of the service will not interfere with the video[]taping or the photographing of incidents in public places. Intentional interference such as blocking or obstructing cameras or harassing the photographer constitutes censorship. Working Press Cards clearly state [that] the bearer ‘is entitled to cross police and fire lines.’ This right will be honored and access will not be denied.” (emphasis in original)). “To the extent it is feasible to do so, the media’s access to demonstrations on private property will not be impeded by the Department. The media will be given access as close to the activity as possible, with a clear line of sight and within hearing range of the incident. When incidents spill over or occur on private property, members of the media will not be arrested for criminal trespass, unless an owner or representative expressly indicates that the press is not to be permitted to enter or remain on the property.” NYPD Patrol Guide § 203-29, states: 1. Individuals have a right to lawfully observe and/or record police activity including, but not

- **Remove seizure language.** Currently press credentials issued by the NYPD containing the following language on the back of each card: “This card is the property of the New York City Police Department. It may be taken away by competent authority at any time.” This language must be removed from any future press cards. Additionally, any regulations related to press credentials must state that “no one, including any law enforcement officers has the authority to seize, take away (or threaten to seize or take away), summarily suspend or revoke duly issued press credentials without the due process procedures set forth in the regulations.” Rather than permitting a seizure or summary suspension followed by review and adjudication, the Committee proposes that suspension should *follow* adjudication attended by appropriate due process safeguards.
- **Access.** Generally, while journalists may have no greater right of access than the public, they have no less right either. Int. 2118 must include language that requires credentialed journalists to be afforded the same (if not greater) access than the public to emergency scenes and where police or fire lines have been established. There have been far too many incidents where journalists, because they have been specifically identified as members of the press, have been placed in press pens far from the scene and beyond the ability to see or hear what is transpiring while the public is allowed much closer. The revised language should note that in a traditional public forum, where a citizen has a legal right to be present, or on private property (with the permission of the owner) no press credential is required to observe, photograph, record, or report on newsworthy matters. Some additional proposed language:
 - A press credential allows its bearer to cross police and fire lines whenever formed, subject only to “legitimate concerns about safety and evidence preservation, as well as space limitations” and that such right “will be honored and access will not be denied.”
 - A press credential holder must be “given access as close to the activity as possible, with a clear line of sight and within hearing range of the incident.”
 - A press credential holder may not be excluded from an area where the general public has access, including limited access with an official escort.
- **Remove Background Check.** The revised bill must remove the current requirement that “[t]he commissioner may not issue a press credential to an individual member of the press unless a city agency

limited to detentions, searches, arrests or uses of force. This right extends to individuals in public places, such as streets, sidewalks, and parks, as well as private property in which the individual has a legal right to be present, such as buildings, lobbies, workplaces or an individual’s own property. This right to observe and/or record police action can be limited for reasons such as the safety of officers or other members of the public, or when a violation of law is committed by the individual(s) who are observing/videotaping. The following guidelines should be utilized by members of the service whenever the above situation exists:

DO NOT: Threaten, intimidate, or otherwise discourage an observer from recording the police officer’s activities; or Intentionally block or obstruct cameras or other recording devices when there is no legitimate law enforcement reason to do so; or Delete any pictures or recordings from observer’s recording device or order observer to delete such pictures or recordings. Absent additional actions constituting a violation of law, an individual CANNOT be arrested for: Taking photographs, videotaping, or making a digital recording; Requesting or making note of shield numbers or names of members of the service; Criticizing the police or objecting to police activity; Refusing to leave the area, or Using crude or vulgar speech. 2.

An arrest for Obstruction of Governmental Administration (Penal Law section 195.05) requires probable cause to believe the person(s) is obstructing governmental administration. Actual interference with the performance of an official police function is required. Interference can include actual physical force (touching or physically interfering with the officer or the suspect, i.e., using a camera so close to the officer’s face that it intentionally obstructs his or her view), or intruding into the physical space necessary to safely perform police operations and refusing to obey an order to move back, or purposefully engaging in passive behavior that prevents an officer from taking enforcement action (i.e., blocking a prisoner van, etc.). This procedure is not intended in any manner to limit the authority of the police to establish police lines (e.g., crowd control at scenes of fires, demonstrations, special events, etc.).

has completed a background check of such individual.” As noted during the 2//9/21 hearing there was unanimous agreement that this clause is a further restriction on freedom of the press rather than one that enhances it.

- **Reinstatement of the Press Identification Card.** The Press Identification Card should be reinstated so those covering general news, sports and feature stories, who might not otherwise qualify under the application requirements for a press credential would still be able to have some form of press identification to be used in situations where they are assigned or for other purposes where authorities seek to determine press eligibility.
- **Reinstatement of the Press Vehicle Card.** The Press Vehicle Card should be reinstated along with appropriate and sufficient press parking (NYP) zones to facilitate and ensure the ability of journalists to cover breaking news stories and other matters of public concern.
- **Input.** The Committee respectfully requests that as part of Int. 2118 revision, representatives of the media are invited and allowed to participate in that process as well as have direct input in the promulgation of any new rules for press credentialing along with any rulemaking process.
- **Training.** Int. 2118 should include provisions requiring NYPD members and other City personnel to receive training regarding the constitutional rights and limitations of journalists to observe, photograph, record, and report on matters of public concerns. Organizations like the National Press Photographers Association (NPPA) with such expertise, have provided free training to law enforcement agencies throughout the country and continue to make that offer with the hope that the invitation will be accepted. We hope that proponents of Int. 2118 recognize the ne benefit of such training to improve, police-press relations, reduce lawsuits against the City and allow the citizens to receive information and images to keep informed regarding matters of public concern.

Finally, the Committee strongly supports defining and strengthening the procedural due process rights of journalists who possess City-issued press credentials. We support a change in the administration of press credentialing if it will result in the cessation of threats to seize and the actual seizure of press credentials by NYPD officers, who have employed this practice to interfere with legitimate newsgathering activities.

It is within this framework of meaningfully improving police-press relations that we offer this testimony. We sincerely hope that for the reasons stated above, our suggested revisions will be given serious consideration. We also look forward to working with the Council and the City to resolve the concerns we have raised.

Respectfully submitted,

The New York State Bar Association Committee on Media Law⁹

Committee Co-Chairs: Daniel R. Novack and Jacquelyn Schell

Press Credential Working Group: Mickey H. Osterreicher, Brian Barrett, Townsend Davis,
Joseph M. Finnerty, Matthew Leish, Robert Roth

⁹ *Opinions expressed are those of the Section/Committee preparing this memorandum and do not represent those of the New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee.*

Appendix A

Comments on New York Police Department Proposed Press Credential Rules

COMMITTEE ON MEDIA LAW

Media Law #3

August 12, 2020

The Committee on Media Law of the New York State Bar Association (the “Committee”) submits these Comments on the Proposed Rule, certified July 2, 2020, of the New York Police Department (“NYPD”), titled “Amendment of Rules for Suspension or Revocation of Press Credentials,” Reference Number 2020 RG 059. The changes would amend section 11-11 and repeal section 11-12 of Chapter 11 of Title 38 of the Rules of the City of New York.

The Committee supports the concept underlying the Proposed Rule — namely, defining and strengthening the procedural due process rights of journalists who possess City-issued press credentials in circumstances where NYPD/DCPI seizes, suspends, or proposes the suspension or revocation of those credentials. However, the Committee urges the Department to cease seizing and suspending press credentials prior to a hearing. This practice has had the repeated effect of interfering with legitimate newsgathering activities of credentialed journalists, sidelining journalists pending adjudication of such seizures and suspensions, curtailing and undermining robust reporting on matters of public interest and concern, and having an overall chilling effect on freedom of the press. Rather than permitting a seizure or summary suspension followed by review and adjudication, the Committee proposes that suspension should *follow* adjudication attended by appropriate due process safeguards.

Should NYPD choose not to modify its Proposed Rule in this respect, the Committee offers the following comments and proposed revisions. First, the Committee has great concerns about the statement of “basis and purpose,” which justifies “a *summary* suspension or revocation if the credential holder *abuses their privileges or engages in conduct that endangers public safety*” (emphasis added). Because the Proposed Rule fails to narrowly and clearly define the italicized words in the prior sentence, it provides the department with too much discretion to improperly threaten to seize or seize credentials in violation of journalists’ rights.

Second, the time periods in the Proposed Rule for the administrative review should be accelerated so the adjudicatory process will be completed more promptly. Journalists, who need their press credentials to work, should not be without their credentials for any extended period of time.

Third, the bases for suspension or revocation of a press credential in the Proposed Rule, *see* section 11-11 (b)(1)(i), should be narrowed to only lawful arrests for felonies and misdemeanors related to a journalist’s immediate newsgathering activities. The current

language, based on lawful arrests for misdemeanors and violations, is far too broad given that, as Justice Gorsuch noted in his concurrence in *Nieves v. Bartlett*, 587 U.S. ___ (2019). S. Ct. 1715, 1722 (2019): “In our own time and place, criminal laws have grown so exuberantly and come to cover so much previously innocent conduct that almost anyone can be arrested for something.” Additionally, the very “catch and release” charges we have seen NYPD employ to chill the right to record are criminal consequences based on subjective criteria. This broad discretion has been so abused that the U.S. Department of Justice has expressed its concern “that discretionary charges, such as disorderly conduct, loitering, disturbing the peace, and resisting arrest, are all too easily used to curtail expressive conduct or retaliate against individuals for exercising their First Amendment rights.” *See, e.g.*, Statement of Interest of the United States, *Garcia v. Montgomery Cty., Md.*, No. 8:12-cv-03592-JFM (D. Md. Mar. 4, 2013), Dkt. 15 at 1-2. (addressing discretionary charges filed against a photojournalist).

Fourth, the Committee is concerned that there is a perceived conflict of interest having the Commanding Officer, Public Information Division as the hearing officer, and believes it would be in everyone’s best interest to address those concerns before a final rule is implemented.

Fifth, the Committee once again urges that the NYPD work with us to help provide training to its members regarding First Amendment protections for newsgathering. Our members stand ready to provide robust training free of charge.

Throughout the history of police-press relations in New York City there has often been tension between the NYPD and journalists. There have been many lawsuits over the past 50 years regarding police interference with press coverage that have resulted in several changes to both the Rules of the City of New York regarding press cards¹ and the NYPD Patrol Guide regarding police-press interaction.² Please see attached Appendix A for the Patrol Guide references to these pertinent issues regarding journalists and newsgathering.

It is within this framework of meaningfully improving police-press relations that we offer our comments and suggested edits to the proposed new rule. We sincerely hope that for the reasons stated below, our suggested revisions will be given serious consideration. We also look forward to working with the NYPD to resolve the concerns we have raised.

Respectfully submitted,

The New York State Bar Association Committee on Media Law³

Committee Co-Chairs: Daniel R. Novack and Jacquelyn Schell

Press Credential Working Group: Mickey H. Osterreicher, Robert Balin,
Joseph M. Finnerty, Daniel Kummer, Matthew Leish, Amanda Leith

¹ *See: Martinez-Alequin et al v. The City of New York et al*, Case No. 1:08-cv-09701 (SDNY 2007)

² *See:* NYPD Patrol Guide, Procedure No. 212-49 available at https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/public-pguide2.pdf p. 507 last visited 08/02/20

³ Committee member Robert Roth voted to oppose these comments.

New material is underlined in red
[Deleted material is in brackets in red]

Chapter 11 of Title 38 of the Rules of the City of New York is amended to read as follows:

Subchapter B: Procedures For Denial, [Summary] Suspension and Revocation
§11-11 Hearing Procedures.

(a) Denial.

- (1) Any person who is denied any of the above-described press credentials may appeal and request a hearing with respect to such decision, in writing, to the Commanding Officer, Public Information Division, within twenty (20) days from the date of the denial. The applicant will be notified of a hearing date, which shall be no more than [thirty (30)] seven (7) days from receipt of the request for a hearing, unless there is a mutual agreement to another date. [Any person denied a Single Event Press Card may request that the hearing be waived.]⁴
- (2) If, after a hearing, the decision to deny the applicant's request for a press credential is upheld, the applicant will be advised in writing and sent via email with a copy sent by FedEx Priority Overnight Delivery or any other nationally recognized trackable service within seven (7) days of such determination, of the basis for the denial of the application. An appeal of this decision must be made, in writing, to the Deputy Commissioner, Public Information within twenty (20) days of the date contained in the "Notice of Hearing Result." Any documentation in support of the appeal must be submitted with the request to the Deputy Commissioner, Public Information. The Deputy Commissioner, Public Information shall issue a written decision, setting forth the basis for denial in the event the denial is upheld, or vacating the initial denial in the event the denial is not upheld, within [thirty (30)] seven (7) days of the date when the appeal is received.

(b) [Summary] Suspension.

- (1) The Deputy Commissioner, Public Information may [summarily] suspend a press credential that has been previously issued based upon:
 - (i) the press credential holder's lawful arrest incident to newsgathering activities by an NYPD officer based on the press credential holder's commission of a [violation or crime] felony or misdemeanor; or

⁴ This sentence should be clarified or deleted as it is our understanding that the single event card is usually requested by those who wish to cover parades or are by out-of-town journalists needing to cover an event. We are not sure what effect waiving a hearing would have on this process.

- (ii) the press credential holder's failure to comply with a lawful order of [a police] an NYPD officer incident to newsgathering activities; or
 - (iii) the press credential holder's intentional and material interference or attempt to materially interfere with the performance of [a police] an NYPD officer's lawful and official function incident to newsgathering activities; or
 - [(iv) the press credential holder misusing or misrepresenting the press credential while not acting in a news gathering capacity; or]⁵
 - (v) the press credential holder [conducting an unauthorized transfer or assignment of] gives or loans such credential to an individual who has not been assigned any of the above-described press credentials; or
 - (vi) other conduct incident to newsgathering activities that significantly endangers public safety or materially interferes with legitimate law enforcement needs.
 - (vii) Nothing contained herein may be modified by any language contained on the Press Card, by any receipt of other document the holder is required to sign in order to receive it.
 - (viii)The grounds contained herein are the sole and exclusive grounds for suspension.
- (2) Where a press credential is seized by a member of the police department, the press credential holder shall receive a letter notice via email within two (2) business days of the seizure, with a copy sent by FedEx Priority Overnight Delivery or any other nationally recognized trackable service, containing a copy of 38 R.C.N.Y. § 11-11 and advising the press credential holder of:
- (i) the [summary] suspension of the press credential;
 - (ii) the reason or reasons for the [summary] suspension of the press credential;
 - (iii) the press credential holder's right to request a hearing contesting the decision to [summarily] suspend the press credential;
 - (iv) instructions on how to request a hearing; and that
 - (v) the maximum length for a [summary] suspension shall be no more than [six (6)] two (2) months[, except if the summary suspension came as a result of a lawful arrest based on the press credential holder's commission of a crime, then the length of the summary suspension may be extended until resolution

⁵ This subsection must be more clearly defined to avoid abuse of discretion or deleted from the proposed rule.

of the criminal proceedings, and, i] In the event an arrest for a misdemeanor or felony, incident to newsgathering activities results in a conviction or guilty plea, then the length of the [summary] suspension may be extended by the Deputy Commissioner, Public Information for a maximum length of [six (6)] two (2) months or the period of the imprisonment that results from the conviction or guilty plea, whichever is greater.

- (3) If the press credential holder requests a hearing to contest the decision to [summarily] suspend the press credential, a hearing shall be held within [nine (9)] seven (7) [business] days of the request and the press credential holder will be notified via email, with a copy sent by FedEx Priority Overnight Delivery or any other nationally recognized trackable service, of the hearing date. If the press credential holder does not respond to the letter notice within thirty (30) days, or if the press credential holder notifies the Deputy Commissioner, Public Information in writing via email, with a copy sent by FedEx Priority Overnight Delivery or any other nationally recognized trackable service, that the press credential holder will not request a hearing, then the Commanding Officer of the Public Information Division will notify the press credential holder in writing and sent via email, with a copy sent by FedEx Priority Overnight Delivery or any other nationally recognized trackable service within seven (7) days of such determination, of the length of the [summary] suspension and the reason for such suspension. In [considering] determining the length of the suspension, the Commanding Officer of the Public Information Division shall consider the criteria set forth in paragraph (1) of this subsection and the written notice to the press credential holder shall make reference to these criteria.
- (4) Prior to a hearing, the Deputy Commissioner, Public Information will assign an investigator to the matter. The investigator:
 - (i) may, but is not required to, prepare a report on the matter. If a report is prepared, it shall be produced to the press credential holder or his or her attorney at least two (2) business days before the hearing and read into the record at the hearing; and
 - (ii) shall introduce into the record any and all documentary, photographic, and video evidence, including records and documents in possession of the police department relevant to the [summary] suspension of the press credential. Such evidence shall be produced to the press credential holder or his or her attorney at least [two (2)] three (3) business days before the hearing;
- (5) The press credential holder:
 - (i) has a right to be represented by counsel at the hearing, give testimony, bring witnesses, and introduce evidence that the press credential holder believes would be relevant to the issues that are the subject of the hearing. A list of any witnesses the press credential holder intends to call at the hearing must be

provided to counsel for the New York City Police Department at least two (2) business days before the hearing so that they can make any necessary arrangements with security within the building. Failure to provide this list of witnesses may result in these individual(s) being prohibited from entering the building. If an investigator's report is prepared and if after reviewing said report, or receiving the evidence set forth in (b)(4)(ii) of these Rules, the press credential holder identifies another witness(es) the press credential holder would like to call, the press credential holder must provide the name of the witness(es) to counsel for the NYPD at least twenty-four (24) hours in advance of the scheduled hearing. Again, failure to provide the name of this additional witness(es) at least twenty-four (24) hours before the hearing may result in the individual(s) being prohibited from entering the building.

- (ii) [or] the press credential holder's attorney may cross-examine the investigator about the substance of the evidence submitted into the record and about the investigator's report, if one was prepared;
- (iii) [or] the press credential holder's attorney may [not] subpoena any documents or records from the police department or subpoena any City of New York or police department employee.

(6) The hearing officer:

- (i) shall be the Commanding Officer of the Public Information Division. In the event of a conflict, the Commanding Officer shall designate a neutral and detached hearing officer to preside over the hearing. This shall include, but is not limited to, if the Commanding Officer participated in or witnessed the events in question, participated in or authorized the decision to seize the press credential at issue, or participated in the investigation;
- (iv) shall disclose, on the record at the hearing, the existence and substance of any contacts with the assigned investigator, the press credential holder, or any witness scheduled to testify at the hearing;
- (v) may, at the hearing, ask questions of the investigator, press credential holder and/or any other witness;
- (vi) has the discretion to disallow any question or questions on the grounds of relevance, duplicity, harassment, or if the questions are of a cumulative nature;
- (vii) may only consider evidence in the record at the hearing in deciding whether to uphold or vacate the [summary] suspension of the press credential; and
- (viii) need not observe the rules of evidence observed by courts during the hearing but must be satisfied any evidence relied on is reliable.

- (7) Agency counsel for the police department is permitted to be at the hearing, but may not question any witness. Agency counsel may, however, confer with the hearing officer before, during, and after the hearing.
- (8) Only the hearing officer, press credential holder or the press credential holder's attorney may ask questions of any witness.
- (9) The burden of proof shall be on the New York City Police Department to demonstrate, by a preponderance of the evidence, that the [summary] suspension was proper based upon the criteria as set for in paragraph (1) of this subsection.
- (0) An audio record shall be made of all proceedings and, upon request, a copy of the audio record shall be provided to the press credential holder or if represented by counsel to the press credential holder's attorney within two (2) business days of such request.
- (1) Within [twenty-one (21)] ten (10) days of the conclusion of the hearing, the hearing officer shall issue a factually detailed, non-conclusory written decision, which shall include the length of the [summary] suspension if the decision to [summarily] suspend the press credential has been upheld. Should the hearing officer decide to vacate the [summary] suspension, the press credential holder shall be notified immediately by telephone and/or email and the press credential shall be made available for pick up from the office of the Deputy Commissioner, Public Information within one (1) business day.
- (2) In deciding whether the NYPD press credential holder engaged in conduct that justifies a [summary] suspension of credentials, the Hearing Officer shall consider:
 - (a) that an NYPD press credential allows its bearer to cross police and fire lines whenever formed, subject only to "legitimate concerns about safety and evidence preservation, as well as space limitations" and that such right "will be honored and access will not be denied."⁶
 - (b) that an NYPD press credential holder must be "given access as close to the activity as possible, with a clear line of sight and within hearing range of the incident."⁷
 - (c) that an NYPD press credential holder may not be excluded from an area where the general public has access, including limited access with an NYPD escort, so long as the credential holder is not in an interior crime scene;

⁶ See: Appendix A. NYPD Patrol Guide

⁷ *Id.*

- (d) that only an NYPD officer with a rank of lieutenant or above, or a member of office of the Deputy Commissioner for Public Information, may seize an NYPD-issued press credential;
 - (e) that before an NYPD-issued press credential is seized its bearer is entitled to warning that if the credential holder does not comply with the order being given that his or her credential may be seized;
 - (f) that it is NYPD policy to afford NYPD press credential holders the maximum amount of access as possible to locations of official activity to observe, photograph, record and report, consistent with evidence preservation or other legitimate law enforcement needs;
 - (g) that an NYPD press credential holder may not be arrested for trespass while covering events that spill over or occur on private property, unless the property owner or representative expressly indicates that the press is not permitted to enter or remain on the property;
 - (h) the length of time that the press credential holder has held department-issued credentials without any charges or complaints
- (13)(a) It shall be a total defense to allegations that an NYPD press credential holder failed to comply with a lawful order of an NYPD officer, or that the NYPD press credential holder intentionally and materially interfered or attempted to materially interfere with the performance of an NYPD officer's lawful official function, that the allegedly lawful order or official function was not, in fact, lawful and/or was contrary to rules in subsection vi (a-g).
- (b) If, in seizing an NYPD press credential an NYPD officer violated any of rules in subsection vi (a-g). above, the Hearing Officer must immediately return the NYPD press credential to its holder.
- (14) Should the hearing officer uphold the [summary] suspension, the hearing officer shall determine the length of the [summary] suspension. In deciding the length of any [summary] suspension, the hearing officer shall consider:**
- (i) whether the misconduct actually occurred in the manner and degree originally alleged;
 - (ii) the severity of any misconduct;
 - (iii) the length of time the press credential holder has already been without the press credential;
 - (iv) the risk that the press credential holder will engage in future misconduct;

- (v) the penalties imposed in other cases; and
- (vi) any other equitable factors raised by the parties at the hearing.

(15) In the event a press credential is [summarily] suspended, the press credential holder may not obtain or use a reserve card during the suspension. The [summary] suspension of the press credential also suspends the use of any reserve card.

(c) Revocation.

- (1) The Deputy Commissioner, Public Information may seek to revoke a press credential that has been previously issued based upon:
 - (i) two (2) or more legitimate [summary] suspensions of a press credential within that credential's two (2) year cycle. A "legitimate suspension" shall be defined as one upheld by a hearing or that was otherwise unchallenged through the hearing process; or
 - (ix) if the press credential holder's continued possession of the press credential creates legitimate, objective and articulable safety or security [concerns] issues that cannot be resolved by a [summary] suspension.
- (2) Whenever revocation of a press credential is sought by the Deputy Commissioner, Public Information, a hearing shall be held following the same suspension guidelines as above before such revocation shall take effect.
- (3) Should the Deputy Commissioner, Public Information seek revocation of a press credential, the press credential holder shall receive a letter notice via email, with a copy sent by FedEx Priority Overnight Delivery or any other nationally recognized trackable service, containing a copy of 38 R.C.N.Y. § 11-11 and advising the press credential holder of the date of the hearing. This letter notice shall also include the fact that Deputy Commissioner, Public Information seeks to revoke the press credential and the reason(s) Deputy Commissioner, Public Information is seeking such revocation.
- (4) If a [summary] suspension occurs, Deputy Commissioner, Public Information may also seek revocation of the holder's press credential provided the criteria in paragraphs (1) and (3) of this subsection have been met. In that event, the hearing for the [summary] suspension may also serve as the hearing for the revocation.
- (5) A revocation hearing shall be governed by the same rules that govern a [summary] suspension hearing. The burden of proof for the revocation of a press credential shall be on the New York City Police Department to demonstrate, by a preponderance of the evidence, that the revocation was proper in accordance with the criteria as set forth in paragraph (1) of this subsection.

- (6) Within [twenty-one (21)] seven (7) days of the conclusion of the hearing, the hearing officers shall issue a factually detailed, non-conclusory written decision stating the officer's determination regarding the press credential.
- (7) If a press credential is revoked, then the press credential holder shall have the right to reapply for a new press credential one (1) year after the date of the written decision to revoke the press credential.
- (3) In the event a press credential is revoked, the press credential holder may not obtain and/or use a reserve card during the period of revocation. The revocation of the press credential also revokes the use of any reserve card.

APPENDIX A

The stated purpose of one section of the Patrol Guide is: "to cooperate with media representatives by not interfering or allowing others to interfere with media personnel acting in their news gathering capacity."⁸ That section also notes: "a member of the press with proper credentials may not be excluded from an area where the general public has access."⁹ Additionally,

Members of the service will not interfere with the videotaping or the photographing of incidents in public places. Intentional interference such as blocking or obstructing cameras or harassing the photographer constitutes censorship. Working Press [now succeeded by Press] Cards clearly state the bearer "is entitled to cross police and fire lines." This right will be honored and access will not be denied. However, this does not include access to interior crime scenes or areas frozen for security reasons. In order to cooperate more fully with members of the news media and provide them with access to cover newsworthy events, the following guidelines will be adhered to unless safety interests or proper performance of police duties require otherwise:

- a. To the extent it is feasible to do so, the media's access to demonstrations on private property will not be impeded by the Department.
- b. The media will be given access as close to the activity as possible, with a clear line of sight and within hearing range of the incident.
- c. When incidents spill over or occur on private property, members of the media will not be arrested for criminal trespass, unless an owner or representative expressly indicates that the press is not to be permitted to enter or remain on the property.
- d. If the ranking officer at the incident determines that press access must be restricted in certain circumstances (i.e., in order for the Department to carry out its law enforcement functions), he retains the discretion to do so.¹⁰

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

Procedure No. 203-29, states:

1. Individuals have a right to lawfully observe and/or record police activity including, but not limited to detentions, searches, arrests or uses of force. This right extends to individuals in public places, such as streets, sidewalks, and parks, as well as private property in which the individual has a legal right to be present, such as buildings, lobbies, workplaces or an individual's own property. This right to observe and/or record police action can be limited for reasons such as the safety of officers or other members of the public, or when a violation of law is committed by the individual(s) who are observing/videotaping.

The following guidelines should be utilized by members of the service whenever the above situation exists:

a. DO NOT:

- (1) Threaten, intimidate, or otherwise discourage an observer from recording the police officer's activities; or
- (4) Intentionally block or obstruct cameras or other recording devices when there is no legitimate law enforcement reason to do so; or
- (8) Delete any pictures or recordings from observer's recording device or order observer to delete such pictures or recordings.

b. Absent additional actions constituting a violation of law, an individual CANNOT be arrested for:

- (1) Taking photographs, videotaping, or making a digital recording;
- (2) Requesting or making note of shield numbers or names of members of the service;
- (3) Criticizing the police or objecting to police activity;
- (4) Refusing to leave the area, or
- (5) Using crude or vulgar speech.

2. An arrest for Obstruction of Governmental Administration (Penal Law section 195.05) requires probable cause to believe the person(s) is obstructing governmental administration. Actual interference with the performance of an official police function is required. Interference can include actual physical force (touching or physically interfering with the officer or the suspect, i.e., using a camera so close to the officer's face that it intentionally obstructs his or her view), or intruding into the physical space necessary to safely perform police operations and refusing to obey an order to move back, or purposefully engaging in passive behavior that prevents an officer from taking enforcement action (i.e., blocking a prisoner van, etc.). This procedure is not intended in any manner to limit the authority of the police to establish police lines (e.g., crowd control at scenes of fires, demonstrations, special events, etc.).¹¹

¹¹ See: NYPD Patrol Guide, Procedure No 212-4 available at https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/public-pguide1.pdf p. 159 last visited 08/02/20

TESTIMONY OF
Jane Tillman Irving
President of the New York Press Club
Before the New York City Council
Committee on Governmental Operations
Intro 2118 - Press Credentials
Public Hearing – February 9, 2020

Good Morning. My name is Jane Tillman Irving. I am the President of the New York Press Club, and a retired reporter and news writer at WCBS Newsradio 880 and other outlets, with more than four decades of experience, all of it in this city. Thank you to the Council Members for holding a hearing on this most important issue.

The New York Press Club is a membership organization founded in 1948 to represent the interests of all journalists in New York City.

While we agree that the emergence of digital media and the proliferation of freelancers require a new approach to the issuance of press credentials, it is the position of

the New York Press Club that the authority should remain with the New York Police Department (NYPD) rather than be transferred to another city agency, the Department of Citywide Administrative Services (DCAS), as proposed. However, there is a great need for procedural change regarding how and to whom the cards are issued, and for defined rules for suspension and revocation of press cards. Civilian input would be advantageous as well, perhaps from trusted, respected retired journalists (where is Walter Cronkite when we need him?).

Press credentials allow for passage behind police lines. Surely, the NYPD is the best judge of where and when those barriers can be crossed. Moreover – and this is very important -- **we are not convinced that the NYPD would honor and respect credentials issued by another city agency.**

While the NYPD and the press have many times, of necessity, operated as adversaries, there also has been an understanding that we both have jobs to do to keep the public informed and safe.

Recently the adversarial positions have deepened as citizens took to the streets in protest, and we have seen

an increase in apparent police retaliation against both demonstrators and the newsmen and -women trying to tell their stories; it is as if, as the New York Times put it in an editorial on July 15, 2020, the NYPD wants to “punish journalists.”

In response to that editorial, the New York Press Club wrote that in addition to violation of the First Amendment – reason enough to oppose allowing the NYPD to summarily suspend or revoke a journalist’s credentials – there is also a violation of the due process clause of the Fifth Amendment. Revoking press credentials upon arrest or “being perceived not to be complying with police orders” **presumes** guilt.

We have seen reporters in New York City and beyond manhandled, attacked, and arrested. Memorably, last summer during the protests of the police killing of George Floyd in Minneapolis, a CNN reporter was arrested on live TV.

The NYPD wants broader powers to keep journalists behind barriers, farther away from the action, and it’s not always a matter of safety; more and more, it appears to be retributive and retaliatory. Over the decades, we have found it increasingly difficult to get information

from DCPI. Nonetheless, we believe there is the possibility of reform.

On August 18, 2020, I and many of my news colleagues participating in today's hearing testified at a public hearing held by the NYPD on proposed rules governing the suspension or revocation of press credentials. I said then that we at the New York Press Club were alarmed by the proposed restrictions. To date, we have heard nothing regarding the outcome of that hearing; the NYPD has not yet published any results or presented proposed final regulations.

Therefore, we think the Council Members' proposal to change the system is premature. We ask, What's your hurry? We will have a new mayor, new Council Members, and possibly new police leadership by this time next year.

At a time when news operations are shrinking, and local news, the most immediate level of what we like to call "the first draft of history," is becoming more and more constrained, we cannot have more restrictions placed on the operation of a free press, the bedrock of our democracy. We believe that reformation of the current system would benefit all journalists and improve

relations between the press and the NYPD. The New York Press Club urges the Council to reconsider this proposed change.

Thank you.

**BEFORE THE
COUNCIL OF THE CITY OF NEW YORK
COMMITTEE ON GOVERNMENTAL OPERATIONS**

TESTIMONY REGARDING INTRODUCTION NUMBER 2118 (INT. NO. 2118),
A LOCAL LAW TO AMEND THE ADMINISTRATIVE CODE OF THE
CITY OF NEW YORK, IN RELATION TO PRESS CREDENTIALS

**TESTIMONY OF THE
NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION**

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February 12, 2021

Introduction

Founded in 1946, the National Press Photographers Association (NPPA) is a 501(c)(6) non-profit professional organization dedicated to the advancement of visual journalism, its creation, editing and distribution in all news media. NPPA encourages visual journalists to reflect the highest standards of quality in their professional performance, in their business practices and in their personal code of ethics. NPPA vigorously promotes freedom of the press in all its forms. Its members include still and television photographers, editors, students, and representatives of businesses that serve the photojournalism industry.

As both staff photographers and freelance visual journalists, members of the National Press Photographers Association (NPPA) gather and report the news for publication by means of print, radio, television, Internet, and other forms of media. While the NPPA commends the Council of the City of New York and the sponsors of Int. 2118, a local law to amend the Administrative Code of the City of New York, in relation to press credentials in their attempt to improve the procedures for the application, issuance, suspension, revocation and appeals process regarding press credentials as well as to remove the NYPD's authority over press credentialing, we must oppose this bill until such time as the final NYPD rule is published¹ and further revisions are made to Int. 2118.

To avoid repetition and make this testimony as concise as possible we are attaching the comments submitted in August 2020, which was joined by the Committee to Protect Journalists ([CPJ](#)), First Look Media's Press Freedom Defense Fund ([PFDF](#)), the New York News Publishers Association ([NYNPA](#)), the New York Press Photographers Association ([NYPPA](#)), the Radio and Television Digital News Association ([RTDNA](#)) and the Society of Professional Journalists ([SPJ](#)) in response to that rule making process (Appendix A).

¹ Rulemaking regarding changes proposed by the NYPD to the rules that govern the adjudication of hearings for the suspension and/or revocation of NYPD issued press credentials and amending/repealing certain sections of Title 38 of the RCNY.

By way of background and to help with guidance regarding the application and issuance of press credentials we are also attaching NPPA’s comments submitted ten (10) years ago in response to a notice of proposed rulemaking regarding revisions to 38 RCNY §§ 11-01, 11-02, 11-03 and 11-04. relating to the “Issuance of Working Press Cards, Reserve Working Press Cards, Single Event Working Press Cards and Press Identification Cards” (Appendix A). Those proposed rules were meant to address a previous lawsuit² challenging the then existing credentialing system, which were overly broad, as well as arbitrary and capricious and failed to adequately address the issue of seizure, suspension, and revocation of the working press cards (credentials).

Additionally, attached (Appendix B) are comments submitted by NPPA to New York State Attorney General Letitia James in response to a “Public Hearing on Police and Public Interactions During Protests”³ as well as a letter (Appendix C) submitted by NPPA to Mayor de Blasio, NYPD Commissioner Shea, and other, officials regarding the unlawful arrest (for jaywalking) of one of our members in November 2020 while she was covering a protest in Manhattan. It should be noted that the New York Criminal Court dismissed that charge in the interest of justice and sealed the file.

NPPA submits this Testimony with the goal of improving the Int. 2118 and the credentialing process. Finally, NPPA requests to be included in any subsequent legislative revisions and offers the service and vast expertise of its members to the Committee.

Int. 2118 Enactment

While the NPPA supports the premise that in order to avoid an apparent conflict of interest, the administration and oversight of the press credentialing be transferred from the NYPD to another

² See: *Martinez-Alequin et al v. The City of New York et al*, Case No. 1:08-cv-09701 (SDNY 2007)

³ See: <https://ag.ny.gov/press-release/2020/public-notice-ny-ag-james-holds-public-hearings-police-and-public-interactions>

department within the City of New York, that action must wait until the final rule is published in the rulemaking process regarding the rules that govern the adjudication of hearings for the suspension and/or revocation of NYPD issued press credentials and the amendment and repeal of certain sections of Title 38 of the RCNY.

Once that has been done and after review of that final rule, all parties involved (the City Council, the NYPD and press stakeholders) will have a better idea of what those guidelines should look like. Even if Int. 2118 is enacted, the final rule will help inform and should provide a template for any subsequent rulemaking on press credentialing.

Int. 2118 Revisions

NPPA fully supports the proposed revisions to Int. 2118 offered by the New York State Bar Association Committee on Media Law.⁴ In the interest of time and efficiency, rather than expand on those recommendations we will briefly touch on them.

Foremost, a revised Int. 2118 must be guided by the overarching principles of First Amendment and Due Process jurisprudence. Just as important, there should be a provision in the bill that would require the NYPD to honor a press credential issued by another City department, along with valid press credentials issued by other jurisdictions and law enforcement agencies other than NYPD. Next, we propose that Int. 2118 contain language that directs police officers to abide by the policies and procedures concerning the media and their rights found in various sections of the NYPD Patrol Guide.

Another issue of paramount importance must be the removal of current press credential language that states “This card is the property of the New York City Police Department. It may be taken away by competent authority at any time.” Int. 2118 should also have a section prohibiting anyone (especially

⁴ Full disclosure – This writer drafted the Testimony of the New York State Bar Association Committee on Media Law in his capacity as chair of the Press Credential Working Group.

NYPD officers) from the longstanding practice of seizing or threatening to seize a press credential in order to coerce compliance by the media with orders which are unrelated to public safety or evidence preservation.

The seizure issue directly ties into access which must be given to journalists covering newsworthy events occurring in traditional public forums (i.e., streets, sidewalks, parks) and may not be restricted to a greater degree than public access (i.e., press pens). As current NYPD language clearly states, “the [press credential] bearer ‘is entitled to cross police and fire lines.’ This right will be honored and access will not be denied” (emphasis in original).⁵ The bill must also reinforce those other directives requiring that “a press credential holder must be ‘given access as close to the activity as possible, with a clear line of sight and within hearing range of the incident,’” and “may not be excluded from an area where the general public has access.”⁶

If indeed the purpose of Int. 2118 is to protect the Freedom of the Press, then the current language requiring a background check before a press credential may be issued must be removed. This additional requirement goes beyond current NYPD press credentialing criteria and is an additional and unnecessary impediment to the intended purpose of facilitating the press credentialing process.

Other revisions must include the reinstatement of the Press Identification Card for journalists who may not otherwise qualify for a press credential but may require some form of press identification in certain situations. To further facilitate newsgathering in New York, the Press Vehicle Card must also be reinstated along with restored press parking (NYP) zones which have been greatly diminished over the years. Notice should be taken by the drafters of this bill that these current impediments have detrimental im

⁵ NYPD Patrol Guide § 212-49.

⁶ *Id.*

pact on the ability of journalists to park news vehicles safely and quickly near the scenes of newsworthy stories and thus negatively affect meaningful news coverage.

Finally, NPPA repeats its ongoing offer to the City and NYPD to provide training regarding First Amendment protections for newsgathering, as we have done for so many law enforcement agencies, most recently the Denver Police Department (as part of a settlement in a federal civil rights lawsuit⁷) and the Milwaukee Police Department (in preparation for the Democratic National Convention).

Conclusion

The NPPA appreciates the opportunity to submit this Testimony regarding Int. 2118. We hope that for the reasons stated above, our proposals will be given serious consideration. We expect that the concerns we have expressed will allow time for a final NYPD rule regarding press credentials to be published and that our proposed revisions will help strengthen the bill and we request to participate in that revision process.

Respectfully submitted,

NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION

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⁷ See: Denver police agree to First Amendment training in settlement with Indy editor they wrongfully detained <https://www.coloradoindependent.com/2019/09/10/denver-police-agree-to-first-amendment-training-in-settlement-with-indy-editor-they-wrongfully-detained/>

Appendix A

BEFORE THE
NEW YORK CITY POLICE DEPARTMENT
LEGAL BUREAU
NEW YORK, NY

NOTICE OF OPPORTUNITY TO COMMENT ON PROPOSED RULE
REVISION OF CHAPTER 11 OF TITLE 38 OF
THE OFFICIAL COMPILATION OF RULES OF THE CITY OF NEW YORK

Sections 11-01, 11-02, 11-03 and 11-04. Relating to the Issuance of Working
Press Cards, Reserve Working Press Cards, Single Event Working Press
Cards and Press Identification Cards

**COMMENTS OF THE
NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION**

ASSOCIATION

MICKEY H. OSTERREICHER, GENERAL COUNSEL

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April, 5, 2010

Summary

As both staff photographers and freelance photojournalists, members of the National Press Photographers Association (NPPA) gather and report the news for publication by means of print, radio, television, Internet and other forms of media. While the NPPA applauds the proposed new rules for issuing press credentials to members of the media in New York City, we believe that the rules proposed to be adopted by the Police Department (NYPD) can go further in modernizing the City's credentialing system.

The NPPA appreciates the effort by the NYPD to broaden the definition of "members of the press." We also appreciate the attempt by the NYPD to have its credentialing rules reflect changes in the way that news is disseminated and firmly believe that in 2010 it is time that "online-only media such as blogs" be recognized as a valid part of the media industry.

The NPPA also understands that while the new rules may also address a major contention of the lawsuit challenging the existing credentialing system, we believe that some of the proposed rules are overly burdensome, vague and arbitrary. Some of those rules do not provide equal protection to out-of-town journalists and in themselves create new due process issues that may be challenged in court. That would be unfortunate given the opportunity at hand to revise the proposed rules.

The NPPA would very much like to see a "credentialing system for the online age that can serve as a model for governments around the country," as envisioned by

Administrative Law Division Chief Gabriel Taussig, but in its present form we believe that more is needed to fulfill that goal. It is hard for us to imagine that through a truly “collaborative process” the NYPD did not listen to members of the media who voiced concern over the unequal treatment and due process issues of those seeking to obtain a “Single Event Working Press Card.”

It is to that end that the NPPA submits this Comment. Additionally, the NPPA offers the service and vast expertise of its members should the NYPD wish any additional input and advice regarding the proposed rule revisions.

BEFORE THE
NEW YORK CITY POLICE DEPARTMENT
LEGAL BUREAU
NEW YORK, NY

NOTICE OF OPPORTUNITY TO COMMENT ON PROPOSED RULE REVISION OF CHAPTER 11 OF
TITLE 38 OF THE OFFICIAL COMPILATION OF RULES OF THE CITY OF NEW YORK

Sections 11-01, 11-02, 11-03 and 11-04. Relating to the Issuance of Working Press
Cards, Reserve Working Press Cards, Single Event Working Press Cards and Press
Identification Cards

Comments of the National Press Photographers Association

Introduction

Founded in 1946, the National Press Photographers Association (NPPA) is a 501(c)(6) non-profit professional organization dedicated to the advancement of photojournalism, its creation, editing and distribution in all news media. NPPA encourages photojournalists to reflect high standards of quality in their professional performance, in their business practices and in their personal code of ethics. NPPA vigorously promotes freedom of the press in all its forms. Its more than 8,000 members include still and television photographers, editors, students and representatives of businesses that serve the photojournalism industry.

§11-01 Press Card.

In reviewing this section dealing with press access the NPPA is concerned that new language providing for “approval of a supervising officer or a member of the Office of the Deputy Commissioner, Public Information of the New York City Police Department” in order to “cross police, fire lines or other restrictions, limitations, or barriers established by the City of New York” is on its face an unconstitutional prior restraint under the First Amendment of the United States Constitution as well as under Article I, Section 8 of the New York State Constitution that so severely limits the access intended to be granted to the bearer of the card as to make that privilege almost meaningless. The additional language modifying access “subject to . . . safety, evidence preservation and privacy concerns . . .” is also vague and overly broad. It is our fear that such language may be open to arbitrary and capricious interpretation by police personnel. While the NPPA understands the rationale behind “safety” and “evidence preservation” restrictions we nevertheless believe that those additional qualifiers are unnecessary. The NPPA also asserts that the term “privacy concerns” constitutes an unreasonable restriction on press access and suggests that all those terms limiting access be deleted.

Therefore, the NPPA proposes that the previous language contained in §11-01 be incorporated into §11-01(a) as follows: “The Press Card entitles the bearer to cross police, fire lines or other restrictions, limitations, or barriers established by the City of New York at emergency, spot or breaking news events and public events of a non-emergency nature where police, fire lines or other restrictions, limitations, or barriers

established by the City of New York have been set up for security or crowd control purposes, within the City of New York; and subject to space limitations, attend events sponsored by the City of New York which are open to members of the press.”

It has also come to the attention of the NPPA that there have been many situations where members of the media have been subject to greater restrictions than those imposed upon the general public. Therefore, the NPPA proposes adding additional language to §11-01(a) which would read: “In no case will a member of the press bearing a valid Press Card issued by the NYPD be denied access to areas open to the general public or where a private property owner has granted that member of the press access to his/her property.”

§11-03 Single Event Press Card

The NPPA objects to some of the requirements as set forth in §11-03 entitled “Single Event Press Card” as being overly burdensome while creating equal protection and due process issues for those seeking to obtain said credential.

We believe that §11-03 should be revised to permit applicants for the Single Event Press Card to submit their application by telephone, fax, email or by completing an on-line form. To allow such a preregistration process only “in case of exigent circumstances, such as a natural disaster, terrorist attack or other public emergency” creates an overly burdensome rule for those members of the media who do not reside in New York City or its nearby environs. It also raises free press, equal protection and

due process issues under the First and Fourteenth Amendments of the United States Constitution as well as under Article I, Sections 8 and 11 of the New York State Constitution. Given the acknowledgment that the proposed rules “reflect changes to the media industry” and now apply to “online-only media” it only seems reasonable that the application process should also be modernized to reflect technological advancements and the widespread use and acceptance of electronic communication for that purpose.

The NPPA also believes that these proposed new rules could be an example for the rest of the country. However, rules that are unfair to out-of-town journalists may expose members of the media from New York City to similar “retaliatory” rules by other municipalities and law enforcement agencies by the issuance of their own single event press credentials.

The NPPA recommends that the NYPD revise its requirements for a Single Event Press Card by accepting a copy of a valid press card from another municipality, law enforcement agency or media organization, as an alternative to providing “a description of six (6) of the individual’s most recent news publications.”

The NPPA also proposes that §11-03(b)(2) requiring that a person applying for the Single Event Press Card do so in person, be revised to read “applies for said Single Event Press Card [in person]:” (thus deleting the words “in person”).

Additionally, we propose that §11-03(d) be amended to read as follows: “An application for a Single Event Press Card shall be granted or denied no later than two (2) business days before the scheduled event, except that in the case of applications

submitted less than two (2) weeks before the scheduled event, the application shall be granted or denied as soon as practicable” but in any case no later than two (2) days before the scheduled event.

The NPPA also proposes that the requirement set forth in §11-03(e) that “An individual must appear in person to obtain a Single Event Press Card if his or her application is granted” contain clarifying language as to when and where the credential shall be obtained. Once again it would be abundantly unfair and overly burdensome to require the applicant to appear in person at Police Headquarters on a date prior to the date of the single event covered by the credential. NPPA proposes revising §11-03(e) to read “An individual whose application has been granted shall obtain the Single Event Press Card by picking up said credential on the day of the event at a convenient time and location prior and nearby to the event (to be determined by the NYPD). The NYPD shall provide this information to the applicant by email no later than two (2) days before the event.”

Finally, the NPPA recommends that the language contained in §11-03(c)(ii) that reads “each preregistration will be valid for two (2) years” be expanded to explain its intent more fully as it is vague and confusing in its current form.

§11-11 Hearing

The NPPA also has concerns regarding the denial, appeal and hearing process for those applying for the Single Event Press Card. Given the short window of opportunity to apply for that credential and its single purpose, once a denial has been issued, allowing the NYPD to notify the applicant of a hearing date within thirty (30) days from receipt of the request for a hearing and then permitting an additional forty-five (45) days after the conclusion of the hearing to issue a decision results in that decision being moot for all intents and purposes.

Therefore, the NPPA proposes the following language changes for §11-11:

- (a) Any person who is denied any of the above-described press credentials under §11-01 and/or §11-02 may appeal and request a hearing with respect to such decision, in writing, to the Commanding Officer, Public Information Division, within [ten (10)] twenty (20) days from the date of the denial. The applicant will be notified of a hearing date which shall be no more than thirty (30) days from receipt of the request for a hearing, unless there is a mutual agreement to another date.
- (b) At such hearing the applicant will have the right to be represented by counsel.
- (c) The Commanding Officer, Public Information Division, shall hold a hearing and issue a decision within forty-five (45) days of the conclusion of the hearing.

(d) Any person who is denied [any of the above-described] a Single Event press credential[s] may appeal and request a hearing with respect to such decision, [in writing] by email, to the Commanding Officer, Public Information Division, within [ten (10) twenty] (20) days from the date of the denial. The applicant will be notified of a hearing date which shall be no more than [thirty (30)] five (5) days from receipt of the request for a hearing and no later than seventy-two (72) hours before the event in question, unless there is a mutual agreement to another date and time.

(e) At such Single Event denial hearing the applicant will have the right to be represented by counsel.

(f) The Commanding Officer, Public Information Division, shall hold a Single Event denial hearing and issue a decision within [forty-five (45) days] twenty-four (24) hours after the conclusion of the hearing.

§11-12 Review by the Deputy Commissioner, Public Information

In addition to a revision of §11-11, the NPPA proposes that as it pertains to an appeal of a decision by the Commanding Officer, Public Information Division, upholding the denial of the issuance of a Single Event Press Card, §11-12 be revised as follows:

(a) If, after a hearing, the decision to deny the applicant's request for a press credential under §11-01 and/or §11-02 is upheld, the applicant will be advised in writing of the [bases] basis for denial of the application. An appeal of this decision may be made, in writing, to the Deputy Commissioner, Public Information, within [ten (10)] twenty (20) days of the date contained in the "Notice of Hearing Result." Any documentation in support of the appeal should be submitted with the request to the Deputy Commissioner, Public Information. The Deputy Commissioner, Public Information shall issue a written decision, setting forth the factual [bases] basis for denial in the event the denial is upheld, within thirty (30) days of the date when the appeal is received.

(b) If, after a hearing, the decision to deny the applicant's request for a Single Event press credential is upheld, the applicant will be advised [in writing] by email of the [bases] basis for denial of the application. An appeal of this decision may be made, [in writing] by email, to the Deputy Commissioner, Public Information, within [ten (10) twenty (20) days] twenty-four hours after receiving that decision. [of the date contained in the "Notice of Hearing Result.]" Any documentation in support of the appeal should be submitted electronically with the request to the Deputy Commissioner, Public Information. The Deputy Commissioner, Public Information shall issue a written decision, setting forth the [bases] basis for denial in the event the denial is upheld, within [thirty (30) days of the date] twenty-four hours after receiving the applicant's email request for an appeal.

Seizure/Revocation of Press Credential

It has also come to the attention of the NPPA that there have been a number of incidents where members of the press have had their press credentials taken away from them by members of the NYPD for various reasons. It is our understanding that the process by which members can appeal this action are vague, inconsistent, arbitrary and capricious. The NPPA recommends that language be included in the proposed rules regarding press credentials that would set forth that appeal process. It should also do so in a manner that provides a factual basis, an opportunity to respond, and a final statement of the reasons for the seizure/revocation.

Additional Rules

The complaint in the lawsuit, that was in part an impetus to the current proposed rulemaking, and the allegations that the NYPD circumvented their own regulations and timeframes for granting or denying press credential applications raise additional concerns about the process. Therefore, in the event that the NYPD does not provide a timely and proper response pursuant to the rules and regulations set forth in Chapter 11 of Title 38 of the Official Compilation of Rules of the City of New York, Sections 11-01, 11-02, 11-03, 11-04, 11-11 and 11-12; the NPPA proposes that that the rules be revised to include administrative remedies and penalties for such situations so as to avoid the necessity for future litigation. One such remedy could be that in the case of an untimely response the application would be presumptively approved.

Conclusion

The NPPA appreciates the opportunity to make recommendations regarding the revision of Chapter 11 of Title 38 of the Official Compilation of Rules of the City of New York, Sections 11-01, 11-02, 11-03 and 11-04 as well as Sections 11-11 and 11-12, relating to the Issuance of Working Press Cards, Reserve Working Press Cards, Single Event Working Press Cards and Press Identification Cards. We hope that for the reasons stated above, our proposals will be given serious consideration. We believe that their adoption will truly improve New York City's Rules for Press Credentials and accommodate all those who seek press accreditation from the NYPD.

Respectfully submitted,

NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION

By *Mickey H. Osterreicher*
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Appendix B



National Press Photographers Association

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New York Attorney General Public Hearings on Police and Public Interactions During Protests

Testimony of NPPA General Counsel Mickey H. Osterreicher June 15, 2020

My name is Mickey Osterreicher¹ and I am the general counsel for the National Press Photographers Association (NPPA). I appreciate the opportunity to provide testimony at today's hearing.

Since its founding in 1946, in New York, NPPA has been the *Voice of Visual Journalists*. We are a 501(c)(6) non-profit professional organization dedicated to the advancement of visual journalism, its creation, editing and distribution in all news media. NPPA encourages visual journalists to reflect the highest standards of quality and ethics in their professional performance, in their business practices and in their comportment. We vigorously advocate for and protect the Constitutional rights of journalists as well as freedom of the press and speech in all its forms, especially as it relates to visual journalism. Our members include still and television photographers, editors, students, and representatives of businesses serving the visual journalism community.

For the past 10 years, NPPA has worked with the NYPD and other police agencies to improve police-press relations, especially on behalf of visual journalists. The NYPD Patrol Guide contains several well-articulated sections dealing with these issues. In law enforcement, as in other professions, there is no substitute for proper ongoing training. Reports during the recent protests have shown a disconnect between the Patrol Guide's policies and the behavior of some members of the NYPD, indicating better training is needed to improve police-press interactions. In May of this year we issued a statement urging accountability for police who violate journalists' rights.²

In my position I deal with many incidents nationwide of visual journalists being interfered with, detained, and arrested for doing nothing more than photographing or recording in public. Unfortunately, there have been a disproportionate number of such incidents involving our members and other journalists in New York City in recent weeks.

The U.S. Department of Justice expressed concern "that discretionary charges, such as disorderly

¹ I have been a photojournalist in print and broadcast for over forty years. Since 1976 I have also been a uniformed reserve sheriff's deputy with the Erie County Sheriff's Office and continue to serve in that capacity. I was a member of the International Association of Chiefs of Police (IACP) *Public Recording of Police* advisory committee and helped draft the manuals and provide training on the right to record police performing their official duties in public. I have also written numerous articles and instructed police agencies and organizations throughout the country on this issue.

² See: <https://nppa.org/news/nppa-urges-accountability-police-who-violate-journalists-rights>

conduct, loitering, disturbing the peace, and resisting arrest, are all too easily used to curtail expressive conduct or retaliate against individuals for exercising their First Amendment rights.”³ NPPA believes the abuse of such “catch and release” type charges to prevent journalists from exercising those rights is exactly what happened in New York. Of greater concern is the reports from our members that officers disregarded NYPD issued press credentials as well as other forms of press identification (such as vests and helmets with “PRESS” written in large letters and clearly visible) when dealing with journalists. Despite executive orders classifying members of the media as being “essential” businesses or personnel exempt from curfew orders, NYPD officers challenged photographers and reporters as to their presence and location while covering the protests and used unjustifiable arrest as well as excessive physical force against journalists which restricted their newsgathering activities.

These incidents occurred in spite of the fact that the NYPD Patrol Guide states in pertinent part, “Members of the service will not interfere with the videotaping or the photographing of incidents in public places. Intentional interference such as blocking or obstructing cameras or harassing the photographer constitutes censorship.”⁴

After the arrest of 26 journalists covering police activity in and around Zuccotti Park during the Occupy Wall Street demonstrations in 2011, I helped draft a letter to the NYPD signed by almost every major media organization in NY objecting to such police conduct. I was also a part of a small group of media attorneys who met with then Commissioner Kelly two days later. As a result of that meeting, the commissioner issued a FINEST message directing members to cooperate with the press. The very next day there were two separate incidents of press interference.

In another incident one of our members, a New York Times photographer, was arrested and charged with obstruction of governmental administration while covering a story about stop and frisk in the Bronx in clear violation of the language found in Section 208-03 of the NYPD Patrol Guide. As I wrote in the New York Times in 2012, “It is unfortunate that the rights of the press and the public to record and photograph matters of public concern on city streets are frequently disregarded by both patrol and supervisory officers. To improve the situation, we urge the New York Police Department to work with us to improve training and supervision for its members starting from the top down.”⁵

No matter how many times the NYPD Commissioner issues a FINEST Message⁶ related to these issues (and there have been many over the years), it cannot be stressed strongly enough that these messages and Patrol Guide directives are merely pieces of paper and will continue to fall on deaf ears without proper training accompanied by commensurate disciplinary consequences for officers who violate these rights.

New York is far from the only place where abridgement of constitutional rights by police officers occurs. I was in Ferguson, MO dealing with these very same issues as officers, threatened,

³ Statement of Interest of the United States, *Garcia v. Montgomery Cty., Md.*, No. 8:12-cv-03592-JFM (D. Md. Mar. 4, 2013), Dkt. 15 at 1-2.

⁴ NYPD Patrol Guide, 212-49 Incidents Involving Media Representatives, Effective Date 01-01-00

⁵ *New York Times*, Opinion Letter, August 10, 2012

⁶ FINEST Messages are read citywide during multiple police rollcalls See:
http://therighttophotographinpublic.com/general_orders/NYPD_multiple_documents.pdf

intimidated, detained and arrested journalists and citizens who were doing nothing more than exercising their rights.

Ever since 911 there has been a heightened awareness of anyone taking pictures or recording events in public. This issue has only been exacerbated by the widespread proliferation of cellphone cameras and the ability of everyone to post photos and recordings on the Internet where they may be viewed and shared, in many cases going "viral" with millions of views. Many in law enforcement still have the erroneous belief that they can order people to stop taking pictures or recording in public. Interference, and in some cases arrests, stemming from those actions have led to numerous court cases resulting in settlements that have cost taxpayers hundreds of thousands of dollars.

Having provided journalists training regarding their rights for almost 20 years, I always note that it does not matter if journalists know their rights if police do not know or care what those rights are. To that end I have helped develop guidelines and policies for police departments throughout the country. I have also done presentations and training sessions for the International Association of Chiefs of Police (IACP), the National Sheriffs Association and NY State Sheriffs Association to name a few and was part of the IACP *Public Recording of Police*⁷ advisory committee that developed a training toolkit addressing the public's right to record police officers.

In any free country the balance between providing police protection with integrity versus overzealous enforcement is delicate. It is one thing for officers to act when there is reasonable suspicion or probable cause; it is quite another to abuse that discretion by chilling free speech and creating a climate of fear and distrust under the pretext of safety and security. The denigration of these rights undermines public confidence in our police departments, lessens the accountability of our governmental officers, and runs counter to the very constitutional freedoms that are the foundation of our nation.

NPPA offers its assistance to work with your office, the NYPD, and other agencies to create successful training programs in order to remedy these situations and foster better relations between the police, the public and the press. We also urge your office to work with us to develop and enforce policies to help bring about meaningful change for policing in New York, especially as it relates to the First Amendment rights of journalists.

Thank you very much for your time and attention in allowing me to submit my testimony today.

Respectfully submitted,

Mickey H. Osterreicher

Mickey H. Osterreicher
General Counsel
National Press Photographers Association (NPPA)

⁷ See: <https://www.theiacp.org/prop>

Appendix C



National Press Photographers Association

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November 3, 2020

Via Email

Mayor Bill de Blasio
New York City Mayor's Office
c/o Freddi Goldstein
fgoldstein@cityhall.nyc.gov

Dermot F. Shea
New York City Police Commissioner
pc.office@nypd.org

Cyrus Vance, Jr.
Manhattan District Attorney's Office
vancec@dany.nyc.gov

Leticia James
New York Attorney General's Office
c/o Kelley Donnelly
kelley.donnelly@ag.ny.gov

Re: Arrest of Photojournalist Chae Kihn

Dear Mayor de Blasio, Commissioner Shea, Mr. Vance, and Ms. James:

As general counsel for the National Press Photographers Association (NPPA) and on behalf of the 13 news media and press freedom associations listed below, I write to express our objection to the unwarranted arrest of photojournalist Chae Kihn, while she was covering a protest near 10th Avenue and W. 24th Street on Sunday, Nov. 1, 2020. She was given a Criminal Appearance Ticket for a violation of NYS Vehicle and Traffic Law § 1156A "Pedestrians on roadways." The elements of that violation, "(a) [w]here sidewalks are provided and they may be used with safety it shall be unlawful for any pedestrian to walk along and upon an adjacent roadway" are unsupported by the available video and images where it appears that Ms. Kihn was in the process of complying with officers' orders to get onto the sidewalk when she was tackled, handcuffed and arrested, all the while stating she was a member of the press. Given all that has transpired regarding [police-press relations](#) over the past few months it is unconscionable that members of the NYPD service would not be better trained to avoid these types of egregious and unnecessary incidents.

Adding insult to injury, after a number of social media posts about the arrest appeared online, @NYPDNews [tweeted](#) that "these reports are false" and that "all arrested individuals from today's protests have been verified to not be NYPD credentialed members of the press." Rather than play semantics it would have been much better for everyone involved, especially Ms. Kihn, had the officers respected the First Amendment protected rights of journalists to photograph and record matters of concern (such as these demonstrations) in a traditional public forum, regardless of whether or not they displayed a DCPI issued press credential.

As the court noted in the seminal case of *Glik v. Cunniffe*, 655 F. 3d 78 (1st Cir. 2011) “news-gathering protections of the First Amendment cannot turn on professional credentials or status.” *Id.* at 84. Additionally, the U.S. Justice Department has pointedly noted that “courts have viewed and should view discretionary charges brought against individuals engaged in protected speech with considerable skepticism. Several cases that have arisen recently regarding the recording of public police activity have involved discretionary charges such as disorderly conduct, loitering, disturbing the peace, and resisting arrest, being brought against the person engaged in the recording . . . [and] [c]ourts have routinely rejected officers’ attempts to criminalize protected speech through the use of charges that rely heavily on the discretion of the arresting officer on both First and Fourth Amendment grounds.” Statement of Interest of the United States, *Garcia v. Montgomery Cty., Md.*, No. 8:12-cv-03592-JFM (D. Md. Mar. 4, 2013) (Dkt. 15 at 8-9). Given that the minor VTL violation Ms. Kihn was arrested for would normally result in just a citation being issued, one can only suspect that officers abused their discretion so as to chill her constitutional rights and prevent her from photographing activity that would inform the public.

It should also be noted that this arrest also appears to violate the recently enacted, “New Yorker’s right to monitor act” which states in pertinent part. “A claim of unlawful interference with recording a law enforcement activity is established under this section when a person demonstrates . . . an officer acted to interfere with that person’s recording of a law enforcement activity, [], by: stopping, seizing, searching, ticketing or arresting that person because that person recorded a law enforcement activity.” N.Y. Civ. Rights Law § 79-P(3)(iv) (“Added by New York Laws 2020, ch. 100, Sec. 2, eff. 7/14/2020.”)

We strongly condemn the NYPD’s treatment of Ms. Kihn and respectfully request that, in the interest of justice, the District Attorney’s office decline to prosecute the baseless VTL violation against Ms. Kihn and immediately dismiss that charge. Also, the Mayor’s Office and the NYPD should issue a public apology to Ms. Kihn. Finally, we urge the New York Attorney General’s Office to investigate this latest incident of an unlawful arrest of a journalist by NYPD officers.

Very truly yours,

Mickey H. Osterreicher

Mickey H. Osterreicher
General Counsel

On behalf of:

American Society of Media Photographers
Committee to Protect Journalists
Freedom of the Press Foundation
International Women’s Media Foundation
James W. Foley Legacy Foundation
New York News Publishers Association
New York Press Photographers Association

PEN America
Press Freedom Defense Fund, a program of
First Look Media Works, Inc.
Radio Television Digital News Association
Reporters Committee for Freedom of the Press
Reporters Without Borders (RSF)
Society of Professional Journalists

cc: Nitin Savur, Deputy Chief of New York Criminal Court Trial Division, District
Attorney’s Office (savurn@dany.nyc.gov)
Richard J. Esposito, Deputy Commissioner of Public Information (dcpi@nypd)
Ernest F. Hart, Deputy Commissioner for Legal Matters (ernest.hart@nypd.org)

Testimony

Thanks to the City Council for hearing this issue today. Firstly, I want request that Dep Commissioner Richard Esposito respond to our repeated requests for a meeting on important police-press issues including the issue before us today. Our inability to talk with Commissioner Esposito is disappointing as he has been in our business for decades.

The NYPPA currently would prefer the NYPD to issue press cards as the cards are scrutinized only by law enforcement and are essentially a security clearance and not a license to practice journalism. I want to note however, that I personally believe they don't want to be in the press card business any more as they continue over the years to be late in issuing the cards, most of them renewed long after they have expired. This has been fairly common over the year. Yes, the department has sent notifications to the NYPD rank and file that the cards are extended, but do they send it to their law enforcement partners in the metropolitan area who have taken note of the expired press credential?

Anyway, we are concerned that having DCAS issue the cards will degrade the card in the eyes of law enforcement and lead to new issues. Currently, the NYPD has the right to take up that card, but should DCAS issue them, what would be an alternative for police? Arrest? What freelancer wants to spend time in court or money on an attorney? Do we jam up the courts with press arrests, instead of dealing with issues administratively?

Further, what would be criteria for giving out cards? Same as the NYPD, or do we give it to anyone? Does anyone know that Jack Ruby shot Oswald pretending to be a member of the media. Do you know that the Northern Alliance Leader in Afghanistan was killed by a bomb inside a press camera. Remember, this idea to move the card from NYPD came about because there were protestors who were interested in infiltrating the media ranks.

What would the new criteria be for revoking a card? Do media organizations have any say here? I know there is a problem with the NYPD, but it comes down to oversight – something needs attention by the council and the mayor but can be corrected with communications.

Again, we believe the NYPD should issue the cards and they should be obligated to treat all members or the media equally, eliminate their conflicts of interest that currently plague our industry and listen to our grievances that can are not implacable.

Moving this to DCAS doesn't necessarily solve the problem and certainly creates new, complicated difficulties.

The Deadline Club of New York

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RE: COMMENTS ON PRESS CREDENTIALING PROPOSAL INT. 2118

Dear City Councilmembers,

In August 2020, the Board of Governors of the Deadline Club, which has hundreds of members as the New York City chapter of the Society of Professional Journalists, vehemently opposed efforts by the New York Police Department to make it easier for press credentials to be suspended or revoked.

Now, even before the new rules around press credentialing are published by the NYPD, there is a proposal to shift authority to a New York City agency.

Given that the press credential is displayed primarily when interfacing with law enforcement, there is good reason for the New York Police Department to continue issuing the credential. We, the board, simply do not have confidence in another agency to manage the process any better, nor do we feel that showing a pass not issued by the NYPD will carry as much weight, authority or respect with law enforcement at a scene.

Ultimately, we would like to see the press credentialing process stay with the NYPD, just as other major cities such as Chicago and Los Angeles continue to rely on their police departments to do the same.

However, we do feel that a separate body should intervene if and when a revocation or suspension occurs. If a third party participated in an appeal, that could ensure fair due process.

We also question the proposed legislation's addition of background checks in order to be issued a press credential. What about a person's background would make them ineligible for a press credential? Would that apply to a single-event pass or all types of proposed passes? More broadly, would this law then impose a standard of access on press freedom in New York City? There remain too many unanswered questions that present opportunities for confusion, misinterpretation and abuse, which could then ultimately lead to a more restricted press, a limited First Amendment and a less informed public.

We believe a task force, including members of press associations in New York City, should be empaneled to review these credentialing policies and make recommendations. That would make the process more inclusive—with experienced journalists sitting at the table—and result in a stronger press credentialing process without limiting press freedom.

Thank you for your consideration.

Respectfully,

The Board of Governors
Colin DeVries, President
The Deadline Club
NYC Professional Chapter
Society of Professional Journalists

Johnny Milano

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6315650537

In the last year, a *New York Times* web search brings up over 2,000 results for “New York Police Department”. In the last year, a *New York Post* web search brings up nearly 3,500 results for “NYPD”. In just two publications, the last 365 days have yielded nearly 5,500 stories that reference the NYPD. How can one seriously argue that an agency and institution of such magnitude as the NYPD be granted the sole discretionary power to determine who can and cannot legally perform the public service that is journalism, particularly when said organization commands such a large presence in the news cycle every day, endlessly. You cannot trust police officers to fairly issue, monitor, and revoke at will 1st Amendment rights for the same reason you don’t trust your children to grade their own tests.

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February 11, 2021

Via Email to testimony@council.nyc.gov

Re: Introduction 2118 (2021)

To the Members of the New York City Council
Committee on Government Operations:

Thank you for affording me the opportunity to testify regarding this bill. This document will supplement my oral statements.

I have more than 40 years' experience as a journalist and attorney and I represent other journalists who hold New York City Press Cards. I am a member of the New York State Bar Association Committee on Media Law and Chair of its subcommittee on New York News Gathering. The statements herein express my own opinions.

While there are some people who would like the issuance of press cards taken away from the NYPD there is almost no one who wants this to happen without much clearer policies than those laid out in Intro 2118.

Last August 18, the Police Department held a hearing on proposed revisions to the rules governing the suspension and revocation of press credentials contained in 38 RCNY Chapter 11. The department has not yet published its final version of the new rule and I would urge the Committee to hold off action on Intro 2118 until the new rule is published. This will provide the needed view of the position of both the Corporation Counsel and Mayor on this topic. (I append to this testimony a copy of the brief I submitted to the Department as an official comment to its proposed changes.)

In the interim, I have a few brief points on the bill in its present form.

First, as in 1971 when the Council took the jurisdiction of taxicabs away from the NYPD and created the Taxi and Limousine Commission, set up a new agency run by someone familiar with news gathering as well as regulations and staffed by qualified people. to take over the important task of the issuance of press credentials.

Second, mandate that the new credential must be recognized by all city agencies in the same way as the current Police Department card.

Third, provide for the expansion of different types of cards. Bring back the Press Identification card, eliminated in 2010 so sports journalists, especially photographers, will have official press identification.

Fourth, restore the press vehicle cards. As testimony bore out in the hearing on Intro 332, the news business should not be the only business that cannot park legally while working.

Fifth, order that no one may seize, suspend, revoke or otherwise take away a press credential unless that action follows a fair hearing at which the journalist is given Due Process.

Additionally, I respectfully call the Committee's attention to what appears to be a printing error. Section 2, subparagraph b. reads:

The commissioner shall have the sole authority to issue, suspend and revoke press credentials. The commissioner shall issue press cards, reserve press card and single press cards and may establish by rule additional types of press credentials.

It appears that in the phrase "single press cards" the word "event" is missing. The phrase was probably intended to repeat the way it is used in the directly preceding paragraph to appear as "single event press cards."

Thank you for the opportunity to be heard. I would be pleased to respond to further questions from members of the Committee or their staffs.

Respectfully submitted,

/s/

Robert Roth

BEFORE THE NEW YORK CITY POLICE DEPARTMENT

In the Matter of

Proposed Rules for Amendment
and Suspension
Of Press Credentials

COMMENTS OF
ANGUS MORDANT
and
STEFAN JEREMIAH

1. ANGUS MORDANT and STEFAN JEREMIAH (hereinafter “Mordant,” “Jeremiah” or, collectively, the “Commenters”) by their attorney, Robert Roth, Esq., hereby submit the following comments.

I. THE COMMENTERS

2. Mordant is a professional photojournalist with eight years of experience. He has held a City of New York Press Card for five years.

3. Jeremiah is a professional photojournalist with 15 years of experience. He has held a City of New York Press Card for eight years.

II. BACKGROUND

4. While never mentioned in the Statement of Basis and Purpose, these proposed amendments arise from a lawsuit against the NYPD, *Nicholas v. City of New York*, 15 CV 9592 (SDNY). Commenters are informed and believe that as part of a possible settlement of his case, Nicholas has agreed with the City to create the proposed amendments to 38 RCNY as provided

in the published statement at <http://rules.cityofnewyork.us/content/amendment-rules-suspension-or-revocation-press-credentials>

5. Although his case was never brought as a class action, Nicholas assumed for himself the role of representative of the class consisting of every single journalist who holds a City of New York Press Card (hereinafter the “Press Card”) since these proposed rules will affect all of them. Commenters are informed and believe that the number of these journalists exceed 1,000.

6. Despite whatever good intentions he may have had, Nicholas did not “fairly and adequately protect the interests of the class” (See FRCP Rule 23 (a) (4).) of Press Card holders. in multiple ways:

7. Notwithstanding having the extremely relevant experience of having had his Press Card seized and being subjected to an NYPD hearing and having been a longstanding Press Card holder, Mordant was never consulted regarding the proposed amendments and was never given an opportunity to express his views regarding them prior to publication.

8. Notwithstanding having been a longtime Press Card holder, Jeremiah, too, was never consulted regarding the proposed amendments and was never given an opportunity to express his views regarding them prior to publication.

9. The Commenters collectively know hundreds of journalists who are Press Card holders yet do not know anyone who was consulted regarding the proposed amendments and who was ever given an opportunity to express his or her views regarding them prior to publication.

10. Upon information and belief, no holder of a Press Card other than Nicholas was given an opportunity to be heard by Nicholas, his attorney or the City prior to the drafting and release of the Proposed Amendments.

11. For the foregoing reasons, Commenters request that the Proposed Amendments be withdrawn, and that the City solicit the views of at least a representative sample of the holders of Press Cards prior to re-writing the Proposed Amendments.

III. PRELIMINARY STATEMENT

12. A Press Card is an essential tool in exercising the Freedom of the Press. In the absence of a compelling public interest, it should not be taken away from a journalist. The NYPD has demonstrated no such compelling interest.

IV. COMMENTS

13. The Commenters are aware that the Proposed Amendments follow those enacted in 2010 also in response to a lawsuit, *Martinez-Alequin v. City of New York*, 08-Civ.-9701 (SDNY) where the holders of Press Cards were also not consulted by the parties and the NYPD followed the same practice and procedure of publishing proposed rules. If the NYPD and the City decline the Commenter's request for the withdrawal of the Proposed Amendments, the Commenters have the criticisms to make following this paragraph. These criticisms are not meant to be all-inclusive. Indeed, there is so much wrong with the Proposed Amendments that to adequately express concern with each and every issue would require a document of great size. Commenters, do however, reserve the right to express these concerns in the future.

V. THE PROPOSED CHANGES TO §11-11 FAIL TO ADDRESS A SERIOUS ISSUE: WHO CAN SEIZE A PRESS CARD?

14. Noting contained in 38 RCNY §11-01 et seq. provides any authority for the *seizure* of a Press Card, especially during news coverage. (Section 11-11 (b) does speak of “those instances where any of the above-described press credentials are summarily suspended” but no grounds for seizure and *who* may do the seizing are specified. This has a chilling effect on Freedom of the Press since every member of the NYPD from rookie police officer to Chief of Staff to the Police Commissioner may view themselves as having such authority.

15. In past times, the department issued orders stating that before a Press Card could be seized, a supervisor of at least the rank of captain be summoned to the scene and give their authorization. This allowed cooler heads to prevail and avoid unnecessary conflict for both the department and the press.

16. Today, however, NYPD Patrol Guide Procedure 212-49 entitled “Incidents Involving Media Representatives,” contains no such requirement. Commenters have found nothing in the Patrol Guide to address this question.

17. Proposed Amended Rule 11-11 (b) (1), again says nothing about the seizure of the card, only, and rather obliquely, “The Deputy Commissioner, Public Information may summarily *suspend* a press credential.” Further obliquely, Section 11-11 (b) begins, “(2) Where a press credential is seized by a member of the police department. . .”

18. The term “member of the police department,” although not defined in Rule 11-11, would appear to encompass every single rank from police officer on upward. Is the NYPD actually saying that *rookie police officers*, just out of the Academy have the authority to seize press cards?

19. . If a member of the service, or as Commenters urge, a supervisor of captain or above, believes there are reasonable grounds to believe that any of the provisions of Proposed

Amended Rule 11-11 (b) (1) exist, then Commenters urge that some sort of accusatory instrument, e.g. a notice, be issued calling for a hearing after which a penalty—if any—would be assessed.

20. Petitioners draw the following analogy. A motorist is stopped for speeding on the FDR Drive. He or she is then issued a summons. After that, the motorist can continue to drive pending a hearing and does not lose his or her license merely because of an accusation by a police officer. Driving is not a constitutional right. In contrast, gathering news by photography, as Commenters do, is an exercise of Freedom of the Press, *a constitutional right* enshrined in the preferred position of the First Amendment. It is outrageous that the NYPD would place in its rules, procedures that afford less rights to journalists than drivers.

**VI. THE PROPOSED GROUNDS WRITTEN IN §11-11 (b) (1) ARE VAGUE,
OVERBROAD, AMBIGUOUS AND OTHERWISE HAVE SERIOUS
ISSUES**

21. Commenters will examine each of these below. Section 11-11 (b) entitled “Summary Suspension” as proposed, begins:

(1) The Deputy Commissioner, Public Information may summarily suspend a press credential that has been previously issued based upon:

22. Subparagraph (1) states:

(i) the press credential holder’s lawful arrest based on the press credential holder’s commission of a violation or crime.

23. Multiple issues exist with this. First and foremost is the fact that an arrest, which the law considers merely an *accusation*, serves to deprive a journalist *immediately* of the ability to exercise a constitutional right. As stated previously, this gives journalists, who are protected by the First Amendment, less rights than drivers.

24. Second, the NYPD has improperly sought extraterritorial jurisdiction over matters in which it has no business. Not only are the grounds of “arrest” not limited to one occurring in New York City, or even New York State, they are not even limited to the United States of America. This provision, if allowed to stand, would apply to any “lawful” “arrest” *worldwide*. While there are many fine and ethical officers who serve in the office of the Deputy Commissioner of Public Information, a small few have been known to be vindictive.

25. Application of this provision, if unchanged, could lead to outrageous abuses against the press. For example, the late CBS News correspondent Bob Simon was arrested in 1991 and imprisoned by the Iraqi government on charges of espionage along with three colleagues. Simon was held for 40 days, 24 of which were in solitary confinement.¹

26. Was this an “arrest based on the press credential holder’s commission of a violation or crime?” Quite likely. Espionage was a crime under the laws of Iraq and is also a crime with the exact same name in the United States.²

27. Was the arrest “lawful?” Under the laws of Iraq, certainly. At least, that is what the Iraqi government said.

¹ This story was covered extensively worldwide. See for example, Stephen McFarland, *Bob Simon and his CBS crew recount their 40 days in captivity in Iraq in 1991*, New York Daily News, February 12, 2015 (originally published March 4, 1991), <https://www.nydailynews.com/news/world/bob-simon-crew-recounts-40-days-captivity-1991-article-1.2112972> (last visited August 11, 2020)

² 18 USC Chapter 37

28. Under circumstances like this, if the proposed change in subparagraph 1 (i) were enacted, the returning journalists could have their press cards suspended by an overzealous NYPD official. If the NYPD wishes to respond that this example is farfetched, then the solution is simple—change the rule to limit it to acts: a) occurring in New York City; b) involving the journalist covering the news; and c) where an NYPD member of the service is the arresting officer based upon an act committed in his or her presence, as further clarified below.

29. Turning to another problem with this subsection, it allows the suspension of a constitutional right based simply upon an arrest. Going back to at least the Nineteenth Century every arrested person (defendant) enjoys the presumption of innocence³ Why then can an arrest be the basis for a suspension of the Press Card?

30. Commenters urge that this language be changed to require a *conviction* rather than merely an arrest.

31. Next, the laws of the City and State of New York, the rest of the United States, and indeed the world, contain scores of statutes, rules and regulations that on their face seem almost laughable. To cite merely one of many examples, Section 10-114 of the Administrative Code of the City of New York⁴ makes it illegal to conduct a *puppet show* from the window of a house. This was ridiculous in the past, but in today's climate of COVID-19, when it is virtually impossible to have any public entertainment performances, someone trying to entertain children especially with their parents approval, in a socially distanced environment might be applauded.

32. However, this is indeed a “violation” as provided:

³ *Coffin v. United States*, 156 US 432 (1895), see also *In Re Winship*, 397 US 358 (1970)

⁴ <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYAdmin/0-0-0-6071>

c. Violations. Any person who shall violate any provision of this section, upon conviction thereof, shall be punished by a fine of not more than twenty-five dollars, or imprisonment for thirty days, or both.

33. If an arrest is made for this “violation,” should a journalist have his or her Press Card suspended for this nonsense? The Commenters think not. If the NYPD claims this would never happen, then it should limit the language.

34. Additionally, the words “violation or crime” as shown above are overly broad. While Commenters reiterate their position that absent a compelling public interest a Press Card should never be taken away from a journalist, if the NYPD rejects this position, it should modify this language to read “felony involving serious bodily injury.” That might approach the compelling public interest standard.

35. Finally, as to the modifier of “lawful” in the phrase, “lawful arrest based on the press credential holder’s commission of a violation or crime,” Commenters believe this provides Press Card holders with a benefit that is at best, illusory since the determination of whether or not the arrest was in fact lawful is, for this purpose, not made by a Criminal Court judge or Supreme Court justice but by an NYPD police commander who is invariably not even an attorney, apart from the inherent conflict of interest such person has, to be discussed *infra*.

36. The fact pattern in the case of *Kalfus v. New York and Presbyterian Hospital*, 706 F. Supp2d 458 (SDNY, 2010) provides an illustrative example. A photojournalist was arrested by hospital security for activity related to news coverage. After detaining him, the hospital security officers took him to the 33rd Precinct NYPD police station. Later, a lieutenant from the office of the Deputy Commissioner of Public Information issued him a desk appearance ticket “and confiscated Plaintiff’s press card.” 706 F. Supp2d 458, 467.

37. After considering the merits of the case, “the prosecution voluntarily dismissed the case because it determined that ‘[t]he People cannot prove the case beyond a reasonable doubt.’” 706 F. Supp2d 458, 467-468.

38. Thus, we have a case where the journalist had been arrested, the arrest *may* have been “lawful,” but he was not convicted. Why was the journalist deprived of his Press Card before a trial which the prosecution did not even consider worth pursuing?

39. Commenters therefore urge that subparagraph (1) (i) be deleted. If the NYPD declines to accept this proposal, the Commenters believe it should be rewritten as follows:

(i) the press credential holder’s ~~lawful arrest based on the press credential holder’s commission of a violation or crime~~ conviction of a New York State or federal felony based upon an act causing serious bodily injury.

40. Subparagraph (ii) states:

(ii) the press credential holder’s failure to comply with a lawful order of a police officer.

41. The Commenters do not believe that this provision can be remedied by other than deletion. Even if, as some have suggested, the word “failure” be modified by “intentional” the fact remains that this is a thinly veiled attempt justify the seizure and suspension of a Press Card when the alleged acts of the journalist fall short of the conduct required to constitute the crime of Obstructing Governmental Administration in the Second Degree.⁵

42. The possibilities of abuse are almost endless. For example, a police officer tells a photojournalist, “Move back!” The journalist does not move quickly enough for the police

⁵ Penal Law §195.05

officer's liking. This proposed rule under these facts allows *the same officer* to seize the Press Card and provide grounds for summary suspension even though it could never support the criminal charge. In short, it is worse than the previous rule and should be stricken entirely.

43. If, however, the NYPD rejects Commenters' view, then Commenters ask that this rule be rewritten, in the minimum, as follows:

(ii) the press credential holder's failure to comply with a lawful order of a New York City Police Officer ~~police officer~~ while the Press Card holder is engaged in covering the news.

44. Subparagraph (iii) states:

(iii) the press credential holder's intentional interference or attempt to interfere with the performance of a police officer's official function.

45. The same criticism and facts, and examples used in explaining The Commenters' position on (ii), *supra*, apply here. In sum, this proposed rule allows *an officer* to seize the Press Card and provide grounds for summary suspension even though it could never support the criminal charge of Obstructing Governmental Administration in the Second Degree. This proposed rule should be stricken entirely.

46. If, however, the NYPD rejects Commenters' view, then Commenters ask that this rule be rewritten, in the minimum, as follows:

(iii) the press credential holder's intentional and substantial interference ~~or attempt to interfere~~ while covering a news event with the performance of a New York City Police Officer's ~~police officer's~~ official function incidental to that news event.

47. Subparagraph (iv) states:

(iv) the press credential holder misusing or misrepresenting the press credential while not acting in a news gathering capacity.

48. Commenters are completely bewildered at this proposed rule and cannot determine what activity it seeks to prohibit. It begs two questions: 1) How does one “misuse” a Press Card? 2) How does one “misrepresent” a 3 ½ by 5-inch card which has the word “PRESS” emblazoned on it no less than *five (5) times?! (Two of these are in 36 pt. (1/2 inch) letters, two in 24 pt. (1/3 inch) letters and one in approximately 12 pt. letters, all of them in **bold face type**. In what bad movie does someone hold up a Press Card and claim to be a doctor or lawyer or police officer?*

49. Moreover, it is not the role or function of the New York City Police Department to determine what “not acting in a news gathering capacity” means and to prohibit a journalist from using a Press Card. Like police officers, journalists too can be off duty. And just as a police officer who is not working a shift may see potential unlawful activity and consider whether to act further, a journalist who is not at the moment on assignment may come across, for example, police or fire activity, and inquire what is happening. This is a time-honored newsgathering method used to alert editors to the potential need for coverage or to secure assignments. Many freelance photojournalists will *first* take the photographs or videos and *then* see if there is an interest in editors using the work. To suggest that there is something illegal or improper in this activity is outrageous.

50. This proposed rule is subject to arbitrary and capricious interpretation of any police officer and allow the seizure and provide grounds for suspension of the Press Card.

Commenters see no way this proposed rule can be rewritten and urge that it be stricken.

51. Subparagraph (v) states:

(v) the press credential holder conducting an unauthorized transfer or assignment of such credential to an individual who has not been assigned any of the above-described press credentials.

52. Once again, Commenters are extremely puzzled by the meaning of this proposed rule. What does “unauthorized” mean? Specifically, who must give “authorization?” Similarly, what is a “transfer?” What is an “assignment?” Was the drafter of this proposed rule thinking of a lease or contract? Moreover, how could the holder of a Press Card make an “assignment” of a large plastic credential that contains both his or her color photograph and name printed on it? If the NYPD has specific conduct in mind, then a proposed rule should be written clearly defining that conduct.

53. Consider another hypothetical example. A journalist, like a police officer, can be injured while working.⁶ Before being taken to the hospital, he hands his cameras and Press Card to a colleague for safekeeping. Is this an “unauthorized transfer or assignment?” Commenters have no way of knowing and believe this proposed rule should be stricken or rewritten to express

⁶ See for example, David Handschuh, *Daily News photographer relives terror, heroism at 9/11 Museum with firefighters who saved him from rubble*, New York Daily News, May 26, 2014, <https://www.nydailynews.com/new-york/daily-news-photographer-relives-terror-heroism-9-11-museum-article-1.1805299> (last visited, August 12, 2020)

clearly its meaning. Commenters have no information sufficient to form a belief as to what activity subparagraph (v) seeks to proscribe.

54. Subparagraph (vi) states:

(vi) other conduct that endangers public safety or interferes with legitimate law enforcement needs.

55. As with (ii), (iii) and (iv) discussed *supra*, this provision can be used to mean whatever a police officer wants it to mean. What are “legitimate law enforcement needs?” This should be a question for a jury in a criminal case, not serve as a pretext for the seizure of a Press Card and its summary suspension by an overreaching police officer.

56. This proposed rule should be stricken entirely. If, however, the NYPD rejects Commenters’ view, then Commenters ask that this rule be rewritten, in the minimum, as follows:

(vi) other conduct of the Press Credential holder while covering a news event in the City of New York that substantially endangers public safety or substantially interferes with legitimate law enforcement needs directly related to the news event.

57. Concluding the analysis of §11-11 (b) (1) Commenters request that immediately following the words “Summary Suspension” and preceding (1) the following language be inserted:

“The grounds contained herein are the sole and exclusive grounds for summary suspension. Nothing contained herein may be modified by any

language contained on the Press Card, by any receipt of other document
the holder is required to sign in order to receive it.”

**VII. THE PROPOSED NOTICE REQUIREMENT WRITTEN IN §11-11 (b) (2)
IS INADEQUATE AND UNREASONABLE**

58. Proposed Section 11-11 (b) (2) begins:

*(2) Where a press credential is seized by a member of the police
department, the press credential holder shall receive a letter notice **via
email within two (2) business days** of the seizure. . . [emphasis added]*

59. The Commenters applaud the NYPD’s interest in providing adequate notice. However, this method is insufficient. Email, even in 2020, is fraught with both sending and receiving problems whether the protocol used is POP3, IMAP or Exchange. In fact, even with the recipient’s cooperation, it may not be possible to know that an email was received. For example, GMail does not support receipts.

60. The Commenters are engaged in the business of photojournalism. The NYPD, similarly, is engaged in the business of law enforcement. Business contracts and other important commercial agreements such as leases, routinely have stronger notice provisions than email. For this reason, the Commenters urge that this section be rewritten to provide for the use of email and, in addition, a second form of delivery via a nationally recognized reputable overnight delivery service such as FedEx or UPS but not the Postal Service.

61. Accordingly, the Commenters request that this provision be rewritten as follows:

the press credential holder shall receive a letter notice via email within two (2) business days of the seizure via email sent to the email address listed on the Press Card application with a paper copy to the home address listed on the Press Card application via FedEx, UPS or any other nationally recognized delivery reputable service that provides both tracking numbers and receipts (excepting the United States Postal Service.) The same email and letter procedures shall apply to all notices issued pursuant to Section 11-11.

The Department shall place a notice on the Press Card Application⁷ stating that Press Card holders may update their email, home and business addresses by sending an email to DCPIPpresscards@nypd.org. Prior to the next renewal of Press Cards, the Department shall notify every Press Card holder of the need to keep these addresses current.

VIII. PROPOSED AMENDED SECTION 11-11 (B) (5) IN ITS ENTIRETY IS INCOMPREHENSIBLE WITHOUT GRAMMATICAL CHANGES AND, IN ADDITION, OTHER CHANGES ARE REQUIRED

62. Proposed Amended Section 11-11 (b) (5) (ii) begins with the word “or.” Proposed Amended Section 11-11 (b) (5) (iii) also begins with the word “or.” This makes no sense. Commenters believe this problem may be remedied by striking the word “or” in each instance and by ending Proposed Amended Section 11-11 (b) (5) (i) with the word “and” and also ending

⁷ <https://www1.nyc.gov/assets/nypd/downloads/pdf/press-credentials-application-rev-2091-12-11a.pdf>

Proposed Amended Section 11-11 (b) (5) (ii) with the word “and,” in each case followed by a semicolon.

63. Proposed Amended Section 11-11 (b) (5) (i) begins:

A list of any witnesses the press credential holder intends to call at the hearing must be provided to counsel for the New York City Police Department at least two (2) business days before the hearing so that they can make **any necessary arrangements with security within the building**. Failure to provide this list of witnesses may result in these individual(s) being prohibited from entering the building. [emphasis added]

64. If the NYPD wishes to enact such a rule, it should do so at least with an honest explanation. Two days is absolutely not required for “security arrangements.” Police Headquarters is a heavily guarded building. Visitors, including members of the press carrying the Department’s own Press Card and attorneys carrying the Office of Court Administration Attorney Secure Pass, are required to pass through airport-style security of a metal detector and x-ray machine both of which are manned by armed police officers in a building separated from the actual Headquarters building of One Police Plaza.

65. Once inside, visitors again must go through another security “portal,” stop at a desk, present identification again, and have their appointments confirmed before being issued a special photo identification card good only for a specific office to proceed.

66. The Police Department regularly announces press conferences with as little as one hour notice. (In fact, even visitors, e.g. attorneys, who have made an appointment only a short

while beforehand can be authorized with a simple phone call.) It surely does not need 48 times that amount of time under the dubious justification of “security.”

67. Pending the Department offering a valid reason, this time limitation should be stricken.

68. Proposed Amended Section 11-11 (b) (5) (iii) as suggested above, would begin:

(iii) the press credential holder’s attorney may subpoena any documents or records from the police department or subpoena any City of New York or police department employee.

69. The Commenters request the following changes:

(iii) the press credential holder’s attorney may subpoena any documents or records from the police department [\(including, but not limited to Body Worn Camera recordings\)](#) ~~or~~ [and](#) subpoena any City of New York or police department employee. [The Department will promulgate rules and procedures to guarantee its compliance with this provision.](#)

70. The first change is a clarification of the meaning of the phrase “documents or records.” The second assures that the proposed rule actually works.

IX. THE COMMANDING OFFICER OF THE PUBLIC INFORMATION DIVISION ALMOST ALWAYS HAS A CONFLICT OF INTEREST.

71. Proposed Amended Section 11-11 (b) (6) states

(6) The hearing officer:

(i) shall be the Commanding Officer of the Public Information

Division. In the event of a conflict, the Commanding Officer shall

designate a neutral and detached hearing officer to preside over the hearing. This shall include, but is not limited to, if the Commanding Officer participated in or witnessed the events in question, participated in the decision to seize the press credential at issue, or participated in the investigation;

72. Commenters present two examples of how this is a problem. Returning to *Kalfus, supra*, in that case the lieutenant who issued the Desk Appearance Ticket to the photojournalist was under the direct command of the commanding officer of DCPI. Asking the commanding officer to preside at a hearing involving one of the supervisors or police officers *in his command*, presents an inherent conflict of interest as well as at least the *potential* for bias and prejudice.

73. In *Nicholas, supra*, Plaintiff alleged that a detective under the direct, on scene, in person, supervision of the Deputy Commissioner of Public Information, seized his press card.⁸ Under facts similar to these, the commanding officer of the Public Information Division is both the subordinate to the Deputy Commissioner, who was directly involved, as well as the superior of the detective. Clearly, the conflicts would be even worse than in *Kalfus*.

74. Allowing the Commanding Officer to be the sole decider of who would be a “neutral and detached hearing officer” is unalterably tainted with conflict. While there are many possible ways of solving this problem, Commenters suggest, to start, the following change:

75. Proposed Amended Section 11-11 (b) (6) be rewritten as follows

(6) The hearing officer:

⁸ This incident is detailed in different documents within the docket but see in particular, *Memorandum of Law in Support of Motion for a Preliminary Injunction*, December 8, 2015, 2015 WL 10608906 (S.D.N.Y.) (Trial Motion, Memorandum and Affidavit)

(i) shall be ~~the Commanding Officer of the Public Information Division. In the event of a conflict, the Commanding Officer shall designate a neutral and detached hearing officer to preside over the hearing. This shall include, but is not limited to, if the Commanding Officer participated in or witnessed the events in question, participated in the decision to seize the press credential at issue, or participated in the investigation;~~ a civilian attorney chosen by the Deputy Commissioner of Legal Matters from outside the Public Information Division.

X. THE STANDARD OF PROOF IS UNFAIR AND IMPROPER WHEN THE EXERCISE OF A CONSTITUTIONAL RIGHT IS CONTINGENT ON THE OUTCOME OF THE HEARING.

76. Proposed Amended Section 11-11 (b) (9) states:

(9) The burden of proof shall be on the New York City Police Department to demonstrate, by a preponderance of the evidence, that the summary suspension was proper based upon the criteria as set for in paragraph (1) of this subsection.[emphasis added]

77. “Preponderance of the evidence,” as is well known, is the standard for civil actions whether the amount in controversy is one million dollars and the case is heard in Supreme Court, or one hundred dollars and the case is heard in the Small Claims Part of Civil Court. Commenters, however, believe this standard is too low since suspension of a Press Card results in the immediate inability of the journalist to exercise the Freedom of the Press.

78. Commenters have previously drawn attention to the greater rights accorded the drivers of motor vehicles in the State of New York. When a police officer alleges a driver did something wrong, the driver is momentarily stopped, issued a ticket calling for a hearing on a future date, and then allowed to continue driving.

79. The hearing before the Traffic Violations Bureau, like the hearing called for by the Proposed Amended Section 11-11 is also an administrative hearing. At the TVB hearing, however, the standard is indeed *more* than a Preponderance.

80. Indeed, the rules for the Administrative Adjudication of Traffic Violations provide in 15 NYCRR 124.4 that:

*The burden of proving the charge rests with the police officer, who has the obligation to present evidence which is sufficient to establish each material element of the charge by **clear and convincing evidence**. [emphasis added]*

81. This is a standard of proof greater than Preponderance (although admittedly less than Beyond a Reasonable Doubt). Commenters repeat that driving is not a constitutional right. In contrast, gathering news by photography, as Commenters do, is an exercise of Freedom of the Press, *a constitutional right* enshrined in the preferred position of the First Amendment. It is outrageous that the NYPD would place in its rules, procedures that afford less rights to journalists than drivers.

82. Accordingly, Commenters urge that Proposed Amended Section 11-11 (b) (9) be rewritten as follows:

(9) The burden of proof shall be on the New York City Police Department to demonstrate, by a ~~preponderance of the evidence~~ clear and convincing evidence, that the summary suspension was proper based upon the criteria as set for in paragraph (1) of this subsection.

XI. CONCLUSION

83. The Commenters request that the NYPD withdraw the Proposed Amendments to Section 11. If the NYPD and the City decline the Commenter's request, Commenters request that the NYPD consider favorably the criticisms in the foregoing document.

Dated: Brooklyn, New York
August 14, 2020

Respectfully submitted,

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Attorney for Angus Mordant
and Stefan Jeremiah.

In Opposition to Intro 2186-'Master Plan' for Development

Preserve Our Brooklyn Neighborhoods

February 11th, 2021

To: Committee on Governmental Operations

Re: Intro 2186 (Johnson) City Council Hearing

Feb 23rd, 2021

In Opposition to the bill proposal

We are in unanimous opposition to this proposed bill and its construct even as the need for mitigating comprehensive planning is long overdue. But-this is not it.

Its foundation continues to revolve around 'growth' -no matter the impact to the local districts nor to the residents who live in them.

The 'three scenario' template with assigned targets-forcing community boards to select one of the three -'take your medicine' or else-is nothing less than a disguised top-down enforcement to produce housing in which the cure is worse than the ailment.

Perish the thought that a community board would demur from any of the three preconceived 'scenarios'...were that the case-as punishment-a "Director" would pick it -like it or not at which time it would be integrated into the 'master-plan' i.e. the so called "comprehensive"10 year plan for the entire city-ratified into Council law.

Within the guideline-there is an onerous escape hatch for developers-a contrivance, which permits a developer to evade public review-citizen protest or even Councilmember deference. This is a total disenfranchisement of New York City residents. Indeed, one may be

forgiven for thinking that this is the raison d'etre for this onerous bill in the first place. Bothering with protesting citizens is so messy!

The one-size-fits-all-ism handed down from 'on high' -to achieve characterless and sanitized urban planning goals -will be an arbitrary imposed contravention of neighborhood self-determination and a furtherance of the Council's handovers to more real estate developer predation.

It is undemocratic and it must not be ratified into law.

Thank you.

Sandy Reiburn-President

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Preserve Our Brooklyn Neighborhoods

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My name is Stefan Jeremiah, I am a freelance photographer based in the New York metropolitan area.

I shoot a range of assignments including covering breaking news in the city and I've been a press credential holder for approximately eight years.

In principle I, like a great many of my colleagues in the field, am in favour of transferring the credentialing process out of the NYPD's hands.

Firstly in a free society such as this, it is a conflict of interest to have a police department, that is subject to scrutiny and reporting by the press, deciding who is and who isn't a legitimate member of the press.

The NYPD may have revoked only a small number of press credentials over the years. However I can testify that the threat of revocation has been used frequently to curtail press activity around breaking news scenes.

Moreover the body responsible for issuing credentials within the NYPD, known as The Deputy Commissioner for Public Information, has a history of presenting its relationship to the press as one of a quid pro quo. Work with us, and we'll work with you. However "public" information is traded as currency, forcing journalists to play delicate balancing game.

Let me be the first to say this a 95% one way street in DCPIs favour. The press are routinely hounded and harassed around crime scenes often being singled out and forced to stand in places making observations difficult. Any resistance is met with threats of arrest and credential revocation. While regular members of the public are allowed to freely walk...taking pictures with cell phones as they go.

The NYPD will excessively tape off scenes making their perimeters larger by a matter of blocks once members of the press show up, citing "safety" of course. I point this out because the original intent of these press cards was to permit the media to cross police lines.

Being accommodated and allowed to cross police lines in my experience is a rarity in the extreme. I understand you cannot have a volume of press folks walking in and out of crimes scenes. I wouldn't advocate for that. The problem is the extreme opposite is now the reality. Being shoed away from police lines has crept in. It used to be we could cross them, which was the point of them issuing cards. But now the NYPD don't even want the press to

stand up against the tape. Lately it has become the modus operandi for patrolmen to insist we stand back from the tape. Any effort to work around this request is met with the threat of arrest, usually for smaller petty things like stepping off the sidewalk momentarily.

The bigger picture is that the credential issued by the NYPD has become a defacto working license to practice in the city. It's recognised by all of the city, state and federal agencies and courthouses and honoured by them as the trustworthy standard. Significantly more so than the issuing authority! The credential has become more useful in 100 different ways than what it was originally intended for. In fact, the original intention has been diminished to the point of redundancy.

The NYPD's outsized ability to frivolously revoke my press card would immediately restrict my ability to function as a photojournalist in the city.

I would no longer be able to bring my cameras into the courthouse, I would no longer be able to enter City Hall. It would create a situation in which all manner of seemingly simple tasks would be made much harder and give me many more hoops to jump through.

In fact as a freelancer, Not having a press card may in fact cost me work. And if a curfew was to arise again as we had recently I would be unable to prove my status as a working member of the press. And would most likely be arrested as a consequence. Although it's worth pointing out that no commanding officer bothered to inform the rank and file that the media was exempt from this summer's curfew, and I was frequently forced to explain that fact myself, to officers in riot gear who were more than eager to make an arrest.

I could go on, as there is much, much more to say on this matter. However I have other responsibilities to tend to.

Thank you for your consideration.

Regards
Stefan Jeremiah

Dear Council Members,

I am a NYC photographer who worked long and hard to obtain a NYC Police Press Pass. For years it was advantageous to my work and a source of pride. And I had no issue with the police. Not so much anymore.

Relationships between the press, the Police Dept. and even the Mayor are far more complicated in the past few years and have left journalists feeling insecure and often like the enemy. It's not so much how many press passes are permanently confiscated as how often we are pushed aside and threatened with the loss of our press passes while we are trying to work. I have not personally had my credentials snatched but I have been threatened with it and physically pushed aside.

Because of the power of the police to snatch our passes any time for any reason and the fact that we are not afforded due process, I firmly believe that issuance of NYC Press passes needs to be shifted to a department not dependent on the Police or the Mayor. In addition, we must be assured that the Police Department will respect those credentials and allow us to do our jobs.

I am very much in agreement with Norman Seigel, Justin Harrison (ACLU), Craig Ruttle, and CM Powers who all spoke at the meeting.

Thank you so much,

Donna Aceto

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Int 2118-2020

Committee on Governmental Operations on Tuesday, February 9

I am in full agreement to give the Department of Citywide Administrative Services (DCAS) sole authority to issue, suspend and revoke press credentials.

We need an agency that will supersede the authority of the NYPD and ensure accountability for their acts, protecting the rights of journalists.

As a freelance photographer with NYPD press credentials, I have been many times prevented from photograph police misconduct under the threat to have my badge taken away by the same officers committing misconduct acts, been told many times by police officers that they decide when or what I was able to photograph and being physically assaulted many times when I tried to do my work of documenting.

And finally when I was wrongfully arrested and injured by the NYPD even after I identify myself as a member of the press, it was on me to bear the burden of proof after I file a complaint.

Erik McGregor

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City Council, Government Operations Committee, Bill Int. 2118-2020, Feb. 9, 2021

TESTIMONY BY JB NICHOLAS in opposition to Bill Int. 2118-2020

A BIRD IN THE HAND IS WORTH TWO IN THE BUSH

My name is JB Nicholas. In 2015 I filed a lawsuit that resulted in a settlement that reformed the way the NYPD suspends or revokes press credentials. Implementation of the new rules that the settlement requires has been derailed by this bill. Although the City has finalized the rules, it has not published them.

I condemn this bill in no uncertain terms. It does not protect the First Amendment, it threatens it. Background checks are tantamount to a licensing scheme that violates the First Amendment. Just as wrong, the bill fails to specify what due process rights and procedures a journalist is entitled to whenever his press credential is suspended or revoked.

I spent almost 30 years of my life defending the constitution, first in prison as a jailhouse lawyer and advocate, then after my parole as a journalist. I fought for and won a five-year legal battle to establish the nation's first prisoner-run, prisoner-rights organization. I fought and won another five-year legal battle to bring greater fairness to parole hearings in New York.

For the last six years, I have fought a lawsuit against the NYPD to reform the way it deals with the press. My inspiration for this lawsuit came directly from my experience as a prisoner.

I urge you to stop this bill dead; or entirely change it by eliminating the background check requirement and specifying the procedures to be used by whatever agency has jurisdiction over press credentials. These questions are too important to let an agency decide. The problem is not just the NYPD. In my experience, all administrative agencies can act like the NYPD. No administrative agency can be trusted to enact regulations that satisfy the constitution.

Unless the Council legislates the rights and procedures, I guarantee you that passing this bill will put me and everyone else fighting with me back to square one—without sufficient legal rights to protect the First Amendment.

Lastly, I want to respond to something I heard. Allowing the NYPD to seize credentials even if they are issued by another agency will accomplish nothing. They cannot be allowed to seize credentials—only the new, issuing agency should be allowed to suspend or revoke the credentials through a prescribed process.

So, from my perspective, a bird in the hand is worth two in the bush.

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February 12, 2021

Re: *Intro. No. 2118-2020: A Local Law to Amend the Administrative Code of the City of New York, in Relation to Press Credentials*

We submit this letter on behalf of photojournalist Jason B. Nicholas, in response to Intro. No. 2118-2020, *A Local Law to Amend the Administrative Code of the City of New York, in Relation to Press Credentials* (“Intro 2118”). Mr. Nicholas opposes Intro No. 2118 in its current form and advocates tabling the bill until the NYPD issues its long-awaited proposed rule governing the seizure and revocation of NYPD-issued press credentials. That proposed rule is the product of years of hard-fought litigation between Mr. Nicholas and the NYPD. If the bill is passed now, however, it should be amended to provide guidelines to rulemakers that ensure that the First Amendment and Due Process rights of journalists are adequately protected and to remove the requirement that the City perform background checks on journalists before they can be issued a press credential.

The Bill Should Be Tabled Until the NYPD’s Proposed Rule is Finalized

Intro No. 2118 proposes transferring the power over press credentials from the NYPD to a different City agency — likely either the Department of Citywide Administrative Services or the Mayor’s Office of Media and Entertainment — without specifying what the new rules will ultimately look like. (The bill calls for a rulemaking process that would yield new procedures for the issuance, suspension, and revocation of press credentials.) But, as a result of litigation filed by Mr. Nicholas, the NYPD is currently modifying its rules governing press credentials. And it is difficult to sign onto a wholesale shift in the process when we do not yet know what changes the NYPD will make to the current rules.

Some background: On July 14, 2020, the City published a proposed rule governing NYPD-issued press credentials that, among other reforms, would (i) impose criteria governing when the City may suspend or revoke press credentials, (ii) require the City to provide written notice whenever a press credential is seized outlining the alleged infraction and informing the credential

holder of the right to a hearing to challenge the seizure, and (iii) give press credential holders the right to a full and fair hearing whenever the City seizes a press credential.

The rule was proposed in response to a lawsuit brought by Mr. Nicholas to address longstanding and pervasive problems with the NYPD's treatment of journalists that led to a pattern of First Amendment and Due Process violations against credentialed journalists. For example, the NYPD has never defined criteria for when a credential could be suspended or revoked. As a result, the NYPD had unfettered discretion to seize or threaten to seize credentials for any reason at all. And when the NYPD did seize a credential, journalists were not informed of what they needed to do to get it back. In practice, most journalists who have had their credentials seized have concluded that they need to plead with officers or the Deputy Commissioner of Public Information ("DCPI") to get their credentials back. As a result of this unfettered discretion — and the fact that journalists in this City need credentials to do their job — the NYPD has had too much power over those responsible for covering them in the news.

Significantly, although journalists have had the right to a formal hearing to challenge seizures of press credentials since August 2010, because journalists were not given any notice of that right, no journalist ever received a hearing until Mr. Nicholas in May 2016. And that only happened because Mr. Nicholas filed suit, and, under questioning from a federal judge, counsel for the City admitted that Mr. Nicholas had the right to a hearing.

The City has also failed to tell journalists what they need to do to get seized credentials returned. And for good reason: there are currently *no* criteria governing when the City may suspend or revoke press credentials. In practice, the only way to get a press credential returned has been to apologize profusely to the NYPD, even if the journalist had done nothing wrong. This regime has contributed to a sometimes toxic relationship between journalists and the City — journalists need press credentials to work, but are at the mercy of the City, which has no limit to its power to determine whether, when, and why to return a seized press credential.

The results have been predictable. The City knows that it has the upper hand in this relationship, and the NYPD has routinely taken advantage of this fact by improperly threatening to seize or improperly seizing the credentials of journalists who fail to obey unlawful directions to leave breaking-news scenes that are open to other journalists or to members of the public.

This is the environment that gave rise to Mr. Nicholas's lawsuit, which was filed in response to an eight-month seizure of his press credential. Consistent with the City's customary practice, Mr. Nicholas was not told why his credential had been seized, whether it had been suspended or revoked, or what he needed to do to get it returned. Mr. Nicholas's multiple efforts to get clarification from DCPI went largely unanswered. All the while, without his press credential, Mr. Nicholas could not get regular work covering breaking news in the City.

Mr. Nicholas filed suit, and, after approximately six months, the Court pressed counsel for the City, who eventually disclosed that Mr. Nicholas had the right to a formal hearing. Mr.

Nicholas immediately requested a hearing, but the hearing the City provided lacked any semblance of fairness or due process. Among other failings, the City (i) provided no notice of what Mr. Nicholas had allegedly done wrong; (ii) did not tell Mr. Nicholas what he needed to prove to get his credential returned; (iii) failed to state which party had the burden of proof at any hearing or what that burden was; (iv) did not permit Mr. Nicholas to view or challenge the evidence presented against him (even though the hearing examiner admitted to considering evidence from the police that was not disclosed to Mr. Nicholas); and (v) did not explain its decision to return the credential. All told, Mr. Nicholas went almost eight months without his credential, largely because of the lack of notice and opportunity to be meaningfully heard.

Discovery in Mr. Nicholas's case revealed that these problems were systemic. Since 2011, at least nine journalists have had experiences similar to Mr. Nicholas's. All had their credentials seized with no formal explanation of the charges or of what they needed to do to get their credentials back. None was given meaningful notice of his/her rights or opportunity to be heard when his or her credentials were seized.

The NYPD's proposed rule is a substantial improvement over the existing rule. At a virtual hearing on August 18, 2020, the general consensus among commenters was that, although the proposed rule represents an improvement over the *status quo*, additional changes were needed to protect the rights of journalists. We are optimistic that the City will incorporate this feedback into a final rule that will provide even greater protections to journalists than the proposed rule. Almost six months have passed, and we are still waiting for the City to issue the final rule.

Given the state of play with the proposed rule, it makes no sense to pass Intro No. 2118 now. The legislation should therefore be tabled until the City publishes its final rule governing press credentials. This would allow the City Council to evaluate whether additional reforms were warranted.

In Any Event, Intro No. 2118 Should be Revised to Provide Concrete First Amendment and Due Process Protections

Given that Intro No. 2118 does not outline what the actual rules governing press credentials would look like — but instead delegates these decisions entirely to a rulemaking process — it is difficult to support the bill in its current form. While Council Member Powers has stated that he introduced Intro No. 2118 “to protect the freedom of the press” — and Mr. Nicholas applauds that effort — it is not clear that the new rules will adequately protect press freedom because the bill fails to require the rulemakers to ensure that the new rules have certain minimum First Amendment and Due Process protections. Such guiding principles would be easy to add and essential to ensuring that the bill accomplishes what its sponsors want it to accomplish.

At a minimum, the bill should require that the new rules include the following:

- ***No Summary Suspensions:*** The City should not have the authority to summarily suspend press credentials. In practice, the NYPD has all too often used its ability to seize press credentials without a pre-deprivation hearing to coerce journalists to leave breaking-news scenes by threatening to take their credentials, even when the journalists are within their rights to be there. The authority to summarily suspend press credentials is also unnecessary: the NYPD is already authorized to remove people from scenes for safety reasons, and there is no legitimate reason why the NYPD would also need to confiscate credentials without a pre-deprivation hearing. To that end, the following language should be removed from all press credentials issued in the future: “This card is the property of the New York City Police Department. It may be taken away by a competent authority at any time.”
- ***Meaningful Criteria to Suspend or Revoke Credentials:*** The City should not be given unfettered discretion to suspend or revoke press credentials, as is the case under the current rule. Instead, the bill should make clear that any final rule must provide meaningful criteria for suspensions and revocations that do not provide unfettered discretion to the City — e.g., the City should be allowed to suspend or revoke press credentials only when the press credential holder commits a crime or engages in conduct endangering public safety or legitimate law-enforcement needs in relation to the press credential holder’s newsgathering function.
- ***Written Notice of the Right to a Hearing:*** The bill should require that any final rule must require the City to provide written notice of the right to a hearing to challenge the seizure of a press credential and to advise the press credential holder of the reasons for the seizure and how to request a hearing.
- ***Burden of Proof:*** The bill should require any final rule to place the burden on the City to demonstrate by clear and convincing evidence that the suspension or revocation was proper based on the relevant criteria for suspensions and revocations.
- ***Hearing Officer:*** The bill should require any final rule to mandate that a hearing officer at a suspension or revocation hearing be neutral and detached and not have any *ex parte* contact with anyone involved in the incident.
- ***Production of Evidence:*** The bill should mandate that any final rule require the City to produce any documentary, photographic, and video evidence, including records and documents in the possession of the NYPD relevant to the seizure of the press credential in advance of a suspension/revocation hearing.
- ***Right to Defense:*** The bill should require that any final rule allow press credential holders to present a meaningful defense, including by retaining counsel, introducing evidence, giving testimony, bringing witnesses, and cross-examining any of the witnesses presented

by the City.

- **Written Decision:** The bill should provide that any final rule require the hearing officer to issue a factually-detailed and non-conclusory written decision explaining why a credential was suspended or revoked.
- **Transparency:** The bill should require that any final rule require the City to publish metrics about suspensions and revocations, including the number of pending matters, the annual number of closed matters, and other relevant information.
- **Equal Access:** The bill should require the final rule to make clear that, at the very least, credentialed members of the press should be given the same access to breaking-news scenes as the public and the City's public relations professionals.
- **Codify NYPD Patrol Guide Procedure No. 212-49:** The bill should affirmatively state circumstances in which it is improper to seize a press credential. NYPD Patrol Guide Procedure No. 212-49 already details some of these circumstances¹, and these protections should also be enshrined in the bill.
- **First Amendment Training:** The bill should require NYPD personnel to receive First Amendment training from instructors with media-law expertise. Mr. Nicholas understands that organizations, such as the National Press Photographers Association, have offered to provide such training free of charge, but that the NYPD has declined to accept this generous invitation. Such training would undoubtedly improve the often-strained relationship between the police and the press.

The Background Check Provision Should Be Removed from the Bill

If the City Council insists on proceeding with this legislation before it has a chance to evaluate the NYPD's final press credential rule, the City Council should remove language in the proposed legislation stating that the Commissioner of Citywide Administrative Services "may not issue a press credential to an individual member of the press unless a city agency has completed a background check of such individual." Intro. No. 2118, *A Local Law to Amend the Administrative code of the City of New York, in Relation to Press Credentials*.

¹ See, e.g., NYPD Patrol Guide § 212-49 ("*Members of the service will not interfere with the video[]taping or the photographing of incidents in public places. Intentional interference such as blocking or obstructing cameras or harassing the photographer constitutes censorship. Working Press Cards clearly state [that] the bearer 'is entitled to cross police and fire lines.' This right will be honored and access will not be denied.*" (emphasis in original)).

This provision is surprising because it would impose greater restrictions on journalists than those imposed by the existing rule. If implemented, this provision would violate the privacy rights of journalists and would grant far too much discretion to City employees, who could deny press-credential applications for past crimes or even associations with disfavored groups or political parties. Far from enhancing the rights of journalists, this provision would give journalists considerably less protection than they currently have under the woefully deficient existing rule.

Moreover, there is no need for background checks before journalists are given press credentials. The Government should not be in the business of licensing journalists and this provision brings the City dangerously close to doing so.

In sum, the City Council should wait until the City implements a final rule before deciding whether to proceed with the proposed legislation. To the extent that the City Council insists on implementing new legislation without so much as considering the City's final rule, the City Council should revise the bill to provide detailed First Amendment and due process protections and should not condition the right to obtain a press credential on the successful completion of a background check.

/s/ Joel Kurtzberg

Joel Kurtzberg
John MacGregor

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Counsel for Jason B. Nicholas

Take the credentials out of the NYPD hands

As a photographer who has been shooting in NYC for 30 + years, I feel that the police having the power to give out and take away press cards causes many journalists to self censor themselves for fear of losing their credentials. Personally I don't carry NYPD press cards anymore for that reason. I've been to dozens of other countries and none had the police handling credentials. In Manila it was the Press Club, and that worked fine.

This is solely my opinion and not that of my employer.

Jim Tynan
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Regarding NYC Press Pass

I would like to submit written testimony advocating for the shift of responsibility away from NYPD for providing press credentials.

In numerous situations, I have witnessed NYPD ignore the authority and autonomy of registered members of the press. NYPD officers frequently threaten to revoke credentials for standing on public property performing the essential functions of their jobs. Additionally, I have witnessed the NYPD arrest credentialed members of the press on numerous occasions without cause. Members of the press have been specifically and methodically targeted for arrest under numerous instances. I have not only witnessed this abuse of power grow over the past few years, but believe the evidence of abuse of power is irrefutable.

Thank you,

Karla Coté

February 9, 2021

Re: Int 2118-2020

To: The honorable members of the City Council

I write this letter in support of the transfer of the issuing and administration of press credentials from the New York Police Department to the Department of Citywide Administrative Services.

My reasons are the following:

- 1) The NYPD is fundamentally [anti-press](#).
- 2) The NYPD has repeatedly [arrested](#) journalists for doing their job. Sometimes those [arrests](#) have been violent.
- 3) The NYPD has a well-known reputation of not returning emails or phone calls from journalists, nor responding to FOIL requests.
- 4) The NYPD's requirements for obtaining press credentials [limit independent](#) journalists.
- 5) The NYPD has [revoked](#) press credentials as a way to punish journalists.

Instead, the Department of Citywide Administrative Services (DCAS) should have the sole authority to issue, suspend and revoke press credentials. This transfer is a step in the right direction in supporting journalists as they exercise their constitutionally protected 1st amendment rights.

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