When Disability Is a "Nuisance": How Chronic Nuisance Ordinances Push Residents with Disabilities Out of Their Homes

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Over the last fifteen years, municipalities across the United States have enacted chronic nuisance ordinances (CNOs), presenting a growing but underexamined threat to fair housing for people with disabilities. CNOs are local ordinances, usually at the city or county level, that label a broad array of conduct "nuisance behavior." Definitions of nuisance behavior vary by ordinance, but often include any alleged criminal conduct occurring on or near the property or what the city deems an "excessive" number of 911 calls. A home can be labeled a "nuisance" when a threshold number of nuisance incidents occur or a certain number of 911 calls are made involving the property. When a property is deemed a nuisance, municipalities encourage—and, in some cases, even require—landlords to "abate the nuisance" by evicting tenants in the name of keeping properties orderly and safe. Civil rights advocates have examined how local governments disproportionately enforce these ordinances against victims of domestic violence and people of color. But insufficient attention has been paid to their impact on another protected class: people with disabilities. Individuals with disabilities often require emergency services, such as suicide hotlines, to get assistance with medical issues that result from their disability. CNOs thus force people with physical or mental disabilities to make an impossible choice between calling 911 and risking eviction or foregoing medical assistance in a crisis.

Using case studies gathered through open records requests, the authors will demonstrate how the use of CNOs in countless municipalities violates the Fair Housing Act, the Americans with Disabilities Act, and the Constitution. CNO enforcement penalizes people with disabilities, by targeting behavior related to their disability, including calls for help during medical emergencies, and by targeting group homes for enforcement. CNOs thus force people with disabilities out of their homes and onto the streets—in direct violation of civil rights law.

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Introduction

In February 2017, Jane[1] called 911 after her boyfriend threatened to commit suicide. The police responded, wrote a report, and left. But the next day, Jane's landlord got a fine and a form letter from the town's Chief of Police ordering the landlord to "abate the nuisance" created by Jane's 911 calls.[2] Under threat of fines and a first-degree misdemeanor charge carrying a sentence of up to 180 days,[3] the landlord began eviction proceedings against Jane—all because she called for help, fearing her boyfriend was suicidal.[4]

Bedford Codified Ordinance 511.12 is a chronic nuisance ordinance (CNO), just one of a growing number of municipal laws that label a household a "nuisance" when it is the site of a certain number of calls to the police, responses by emergency services, or other incidents of alleged nuisance conduct.[5] The city designated Jane's home a nuisance in December 2016,[6] three days after another incident in which she called 911 because her boyfriend had threatened to commit suicide by taking pills.[7] When Jane called 911 again in February for the same reason, the city noticed that the call came from a so-called "nuisance property;" her landlord was fined $250, and Jane lost her home.[8]

Jane and her boyfriend are not alone. Many tenants are evicted due to CNOs, local laws that punish vulnerable residents because their homes are the site of behavior that cities and towns designate a "nuisance," often including calls to 911. When a municipality labels a home a nuisance, landlords are encouraged—or, like Jane's landlord, legally required—to "abate

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[1] These facts reflect a real chronic nuisance enforcement action in the City of Bedford. The authors have used a pseudonym out of respect for the privacy of people affected.

[2] Letter from Kris Nietert, Chief of Police, Bedford Police Dep't, Bedford Landlord (name redacted) (Feb. 2, 2017), *published in* Joseph Mead et al., Cleveland State Univ., Who is a Nuisance? Criminal Activity Nuisance Ordinances in Ohio (2017), https://engaged-scholarship.csuohio.edu/cgi/viewcontent.cgi?article=2513&context=urban_facpub, *archived at* https://perma.cc/S66B-JS7T; Bedford Police Dep't, Call for Service Report, Report No. 170000170 (Feb. 1, 2017), *published in* Mead et al., *supra*.

[3] Bedford, Oh., Codified Ordinances § 511.12 (2018).

[4] *Id.*

[5] CNOs and "crime-free" are the "two basic types" of such ordinances but they are "fundamentally similar" in how they operate. *See* Emily Werth, Sargent Shriver Nat'l Ctr. on Poverty Law, The Cost of Being "Crime Free": Legal and Practical Consequences of Crime Free Rental Housing and Nuisance Property Ordinances 1 n.3 (2013), http://www.povertylaw.org/files/docs/cost-of-being-crime-free.pdf, *archived at* https://perma.cc/3V68-PKSM.

[6] Letter from Kris Nietert, Chief of Police, Bedford Police Dep't to Bedford Landlord (name redacted) (Dec. 13, 2016), *published in* Mead et al., *supra* note 2 ("Since May 2016 the Bedford Police has had to respond to this residence (3) times for disturbance calls. See attached reports. You are hereby notified that it is the intent of the Bedford Police Department to utilize this ordinance in any future police response to this address that comply with section 511.12.").

[7] Bedford Police Dep't, Call for Service Report, Report No. 160095112 (Dec. 10, 2016), *published in* Mead et al., *supra* note 2.

[8] *See* Mead et al., *supra* note 2, at 14.

the nuisance." Civil rights attorneys report that "[m]any landlords respond by evicting the tenant[,] . . . refusing to renew the lease[,]" or urging tenants not to call 911 for help.[9] For tenants like Jane, CNOs create an impossible choice between risking eviction and forgoing help for a loved one in crisis. This Note will examine the serious threat that CNOs pose to fair housing, especially for individuals with physical and mental disabilities. Part I explores the history, background, and features of CNOs. Part II presents a series of case studies, drawn from CNO enforcement actions within the last five years, that illustrate the severe, disparate impact CNOs have on people with disabilities. Part III argues that CNOs' adverse impact is likely underreported and considers structural reasons for this disparity. Parts IV through VII argue that CNOs violate both landmark civil rights laws and the Constitution, especially when enforced against people with disabilities. Part VIII examines state and federal reforms that may blunt nuisance ordinances' discriminatory impact, but which are ultimately insufficient, and recommends that local legislatures repeal CNOs entirely.

I. Chronic Nuisance Ordinances: A Growing Threat to Fair Housing

Over the last fifteen years, CNOs have spread rapidly across the United States, and an estimated 2,000 municipalities now have CNOs on the books.[10] As of 2013, "more than 100 municipalities in the state of Illinois alone ha[d] adopted some kind of [nuisance] ordinance,"[11] and in 2018, the New York Civil Liberties Union found that more than half of New York State's most populous municipalities had a CNO on the books.[12]

The ordinances vary across towns, cities, and counties, but generally share similar features. CNOs label a broad array of conduct nuisance activity. Definitions of nuisance behavior vary by ordinance, ranging from criminal conduct occurring on or near the property—even when the resident is the victim—to innocuous activities like excessive noise or failing to tend one's lawn.[13] Other ordinances define a "nuisance" violation broadly to include

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[9] *I Am Not a Nuisance: Local Ordinances Punish Victims of Crime*, Am. Civil Liberties Union, https://www.aclu.org/other/i-am-not-nuisance-local-ordinances-punish-victims-crime, *archived at* https://perma.cc/MLX9-ZATV (last visited Dec. 26, 2018).

[10] Nicole Livanos, *Crime-Free Housing Ordinances: One Call Away from Eviction*, 19 Pub. Int. L. Rep. 106, 107 (2014).

[11] *See* Werth, *supra* note 5, at 1.

[12] Scout Katovich, N.Y. Civil Liberties Union, More Than a Nuisance: The Outsized Consequence of New York's Nuisance Ordinances 10 (2018), https://www.nyclu.org/sites/default/files/field_documents/nyclu_nuisancereport_20180809.pdf, *archived at* https://perma.cc/C7UB-3CNU.

[13] *See* Helen R. Kanovsky, U.S. Dep't of Hous. and Urban Dev., Office of Gen. Counsel, Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Service 2 (2016), https://www.hud.gov/sites/documents/FINALNUISANCEORDG

any act that city officials perceive as an "annoyance" or "inconvenience."[14] These vague definitions enable discriminatory enforcement. A law that fails to provide minimal guidelines to police allows them "to pursue their personal predilections."[15] Vague definitions of nuisance conduct can thus exacerbate over-policing of communities of color and other marginalized groups by enabling local officials to enforce laws based on personal bias.[16]

The majority of CNOs characterize a nuisance property as one that generates what the city deems an "excessive" number of 911 calls.[17] Thus, if a resident, family member, neighbor, or someone else makes too many calls for emergency services regarding a property over a specified period of time, that property will be labeled a nuisance.[18] The threshold number of "excessive" calls may not, in fact, be very many calls at all.[19] For example, in Maplewood, Missouri, more than two calls to the police because of a "peace

DNCE.PDF, *archived at* https://perma.cc/UR5B-3D4W. *See, e.g.*, JEFFERSON, WIS., CODE § 197-6(F) (2018).

[14] *See, e.g.*, MAPLEWOOD, MO., CODE OF ORDINANCES § 34-240 (2018) (defining nuisances to include "[a]ny pursuit followed or act done by any person to the hurt, injury, annoyance, inconvenience or damage of the public," graffiti, public urination, "[m]ore than two instances within a 180-day period of incidents of peace disturbance or domestic violence resulting in calls to calls [sic] the police," and other various acts).

[15] Kolender v. Lawson, 461 U.S. 352, 358 (1983) (quoting Smith v. Goguen, 415 U.S. 566, 575 (1974)). Although *Kolender* and *Smith* articulate the vagueness doctrine in criminal law, the broad sweep of CNOs raises similar concerns, which are often enforced by law enforcement or other city officials who may share racial biases.

[16] Research shows that law enforcement officers frequently harbor implicit biases against black people—and that implicit anti-black bias or overt racism affect the application of the law. For example, a 2017 study written by researchers at Stanford University study developed a "threshold test" to quantify how police in the 100 largest North Carolina Police Departments initiate vehicle searches and found that "black and Hispanic drivers face lower search thresholds than white and Asian drivers." Camelia Simoiu, Sam Corbett-Davies, & Sharad Goel, *The Problem of Infra-Marginality In Outcome Testing For Discrimination*, 11 ANNALS OF APPLIED STAT. 1193, 1207 (2017), *archived at* https://perma.cc/Z887-URAH. Similar research shows that police are more likely to stop black pedestrians than white pedestrians, "even when controlling for 'race-specific estimates of crime.'" *Id.* (quoting Andrew Gelman et al., *An Analysis of the New York City Police Department's "Stop-and-Frisk" Policy in the Context of Claims of Racial Bias*, 102 J. AM. STAT. ASS'N 813, 821–22 (2007)). These examples demonstrate that vague definitions can enable discriminatory enforcement of civil and criminal law, including by law enforcement officers tasked with enforcing nuisance ordinances in many jurisdictions.

[17] *See* Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOC. REV. 118, 120 (2013), https://scholar.harvard.edu/files/mdesmond/files/desmond.valdez.unpolicing.asr__0.pdf, *archived at* https://perma.cc/84RR-ZC7Z; *see also* WERTH, *supra* note 5, at 18 n.70 (describing how individuals can weaponize nuisance ordinances by making "repeated baseless calls to the police" about an unpopular neighbor).

[18] *See* KANOVSKY, *supra* note 13, at 2–3; KATOVICH, *supra* note 12, at 6. *See generally*, Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOC. REV. (ONLINE SUPPLEMENT) (2013), https://scholar.harvard.edu/files/mdesmond/files/unpolicing.asr2013.online.supplement_0.pdf, *archived at* https://perma.cc/84RR-ZC7Z.

[19] Some chronic nuisance ordinances do not differentiate between large and small buildings. For example, the CNO of the City of Fond du Lac, Wisconsin allows the Chief of Police to designate a premises a chronic nuisance when three or more nuisance activities occur there over 12 months, and defines "premises" to include both individual units or "an apartment building (all units included as one premises)." FOND DU LAC, WIS., CODE § 476-7 (2018).

disturbance" (including domestic violence) within a 180-day period constitutes a nuisance.[20] As recently as 2016, Cincinnati, Ohio considered three calls for emergency police or medical help within a thirty-day period a nuisance and a St. Louis, Missouri law designated a property a nuisance after just two calls for emergency services in one year.[21] Other ordinances define a premises as a public nuisance after a threshold number of convictions for nuisance offenses (as defined by the city) committed on the property. In practice, however, police may threaten to initiate nuisance proceedings based simply on the number of calls for police services, many of which do not result in arrest, much less conviction.[22]

When a home is labeled a nuisance, CNOs typically require housing providers to "abate the nuisance" or face civil penalties, often a flat fine and/or a fine equivalent to the cost of any further police responses to the property.[23] For example, one Wisconsin ordinance fines property owners up to $2,500 the first time their premises are labeled a public nuisance and $5,000 for subsequent violations at the same property, and also allows the local police department to issue a "special charge" for the cost of police or emergency responses to the property.[24] Some jurisdictions go further and threaten landlords who do not abate so-called "nuisances" with revocation of rental permits or even forfeiture of the property.[25] In some extreme cases, landlords who do not "abate" a nuisance face criminal penalties, including incarceration.[26] Cincinnati, Ohio provides that a first-time failure to comply

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[20] *See* MAPLEWOOD, MO., CODE OF ORDINANCES § 34-240(17)(f) (2018) (defining a chronic nuisance to include "[m]ore than two instances within a 180-day period of incidents of peace disturbance or domestic violence resulting in calls to the police").

[21] *See* KANOVSKY, *supra* note 13, at 4 nn.21–22.

[22] The City of Fulton, NY provides an unfortunate example of this. Fulton's ordinance defines a property as a public nuisance after there are three convictions for nuisance offenses at the property. But an ACLU investigation found that "in practice, the City notifies landlords of police responses that have occurred at the premises, many of which have not even resulted in arrests. The Chief of Police sends landlords a form letter with a description of 'a series of offenses which have been reported to the police department'" and warning landlords that "in light of the *volume of calls for service* at this location . . . the Chief of Police plans to initiate a nuisance abatement action." The letter threatens that, if the landlord doesn't intervene "to address the nuisance conduct," the city may close the rental property. AM. CIVIL LIBERTIES UNION WOMEN'S RIGHTS PROJECT, SILENCED: HOW NUISANCE ORDINANCES PUNISH CRIME VICTIMS IN NEW YORK 21 (2015), https://www.aclu.org/sites/default/files/field_document/equ15-report-nuisanceord-rel3.pdf, *archived at* https://perma.cc/C3SF-L9JF (emphasis added) [hereinafter SILENCED].

[23] *See* Cari Fais, *Denying Access to Justice: The Cost of Applying Chronic Nuisance Laws to Domestic Violence*, 108 COLUM. L. REV. 1181, 1189 (2008).

[24] WAUSAU, WIS., CODE § 9.24.090 (2018).

[25] Desmond & Valdez, *supra* note 18, at 2; *see, e.g.*, MIDDLETON, WIS., CODE § 17.02(7)(f)(2) (listing forfeiture as a penalty for violating a chronic nuisance ordinance); *see also* Fais, *supra* note 23, at 1189.

[26] *See* Fais, *supra* note 23, at 1189. Some nuisance ordinances impose criminal penalties "as a punishment for maintaining a chronic nuisance," while others do so "as a penalty for failing to pay the police costs." *Id.* at 1189 n.42. (citing CINCINNATI, OHIO, CODE § 761-7(a) (making first violation of chronic nuisance code a misdemeanor of the fourth degree and subsequent violations third-degree misdemeanors); MILWAUKEE, WIS., CODE § 80-10 (allowing for imprisonment upon default of payments); WILKES-BARRE, PA., CODE OF ORDINANCES § 7-

with the city's nuisance ordinance is a fourth-degree misdemeanor.[27] Additional failures can raise the offense to a second-degree misdemeanor.[28] Milwaukee, Wisconsin provides for incarceration for up to ninety days for each violation as an "alternative penalty for non-payment" of CNO fines.[29]

These harsh penalties encourage landlords to evict tenants who need more emergency services or force tenants not to call 911, no matter how badly the residents need help. Some CNOs go further by requiring eviction after a threshold number of alleged nuisance activities: for example, a nuisance ordinance in East Rochester, New York required a landlord to evict any household for which three police calls were made over the course of twelve months.[30] Residents report that they "stopped calling the police," even when facing domestic violence, to avoid receiving a third strike and becoming homeless.[31]

As CNOs spread across the nation, civil rights advocates are raising alarms about the ordinances' severe, discriminatory impact on people of color and survivors of domestic violence. Calls related to domestic violence are the "single largest category of calls" made to the police.[32] Many cities with CNOs have encouraged or ordered landlords to evict the victims of this violence because they or third parties make an "excessive" number of calls for intervention.[33] Because women and transgender people are subjected to stalking, physical violence, and sexual violence by intimate partners at staggering rates, they are disparately impacted by CNOs.[34]

Unsurprisingly, CNOs also appear to disproportionately impact communities of color. From 2012 to 2018, Rochester, New York issued nearly

240 (imposing fine and/or thirty days imprisonment for first violation); YORK, PA., CODE art. 1751 (providing for maximum of six months incarceration for defaulting on chronic nuisance code costs)).

[27] *See* Desmond & Valdez (2013), *supra* note 18, at 8.

[28] *Id.*

[29] *See* Desmond & Valdez, *supra* note 18, at 12.

[30] *See* Second Am. Compl. at 5, Grape v. Town/Vill. of East Rochester, No. 07-CV-6075-CJS (F) (W.D.N.Y. July 6, 2007), http://www.nhlp.org/files/Grape%20WDNY%20nuisance%202d%20compl.pdf, *archived at* https://perma.cc/7XDH-XYZP.

[31] *See, e.g.*, Lakisha Briggs, *I Was a Domestic Violence Victim. My Town Wanted Me Evicted for Calling 911,* THE GUARDIAN (Sept. 11, 2015), https://www.theguardian.com/commentisfree/2015/sep/11/domestic-violence-victim-town-wanted-me-evicted-calling-911, *archived at* https://perma.cc/E52P-7L47.

[32] ANDREW KLEIN, U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE, PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH: FOR LAW ENFORCEMENT, PROSECUTORS, AND JUDGES 1 (2009), https://www.ncjrs.gov/pdffiles1/nij/225722.pdf, *archived at* https://perma.cc/9MLY-YGP7.

[33] *See* SILENCED, *see supra* note 22, at 18; Desmond & Valdez, *supra* note 17, at 132–35.

[34] *See* NAT'L COAL. AGAINST DOMESTIC VIOLENCE, FACT SHEET: DOMESTIC VIOLENCE 1 (2017), https://www.speakcdn.com/assets/2497/domestic_violence2.pdf, *archived at* https://perma.cc/EPQ6-RZPZ ("1 in 4 women and 1 in 9 men experience severe intimate partner physical violence, intimate partner contact sexual violence, and/or intimate partner stalking . . . ."); TAYLOR N.T. BROWN & JODY L. HERMAN, THE WILLIAMS INST., INTIMATE PARTNER VIOLENCE AND SEXUAL ABUSE AMONG LGBT PEOPLE (2015) (reviewing existing research and estimating that the lifetime rate of IPV among transgender people ranges from 31.1% to 50.0%).

five times as many nuisance enforcement actions in the quarter of the city with the highest concentration of people of color as it did in the quarter with the lowest concentration of people of color.[35] A two-year study of Milwaukee, Wisconsin found that properties in predominantly black neighborhoods were over two and a half times as likely to receive a nuisance citation as properties in predominantly white neighborhoods.[36] Even when neighborhoods made a similar number of calls, majority black neighborhoods were consistently more likely to receive nuisance citations than majority white neighborhoods.[37]

People with disabilities who are also marginalized in other ways are doubly vulnerable to CNOs. For example, women with disabilities also face disturbing, disproportionate rates of domestic violence—they have a 40% greater chance of experiencing domestic violence than women without disabilities.[38] Nuisance ordinances frequently fail to provide exceptions for police calls made by residents experiencing domestic violence, and where exceptions exist, calls placed by survivors of domestic violence are regularly miscategorized and the tenants are punished under the CNO anyway.[39]

There is currently no empirical research documenting a causal link between chronic nuisance citations and gentrification. However, there is some evidence that, in gentrifying neighborhoods, new and predominantly white residents are more likely to place both 911 and quality-of-life calls than longtime residents of color. One New York City study of 600,000 calls to "311"—which residents can use for quality-of-life complaints about noise, excessive trash, or graffiti—found that 311 calls rose 70% faster in gentrifying neighborhoods than in non-gentrifying neighborhoods.[40] Because homes can be designated nuisances based on quality-of-life calls,[41] a significant increase in quality-of-life calls in a given neighborhood may increase the like-

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[35] KATOVICH, *supra* note 12, at 12–13.

[36] *See* Desmond & Valdez, *supra* note 17, at 118, 125.

[37] *See id.*, at 125 (finding that properties eligible to be cited as nuisances in white neighborhoods had a one in forty-one chance of receiving a nuisance citation, but similar properties in black neighborhoods had a one in sixteen chance).

[38] *Abuse of Women with Disabilities: Facts and Resources*, AM. PSYCHOLOGICAL ASS'N, https://www.apa.org/topics/violence/women-disabilities, *archived at* https://perma.cc/UD3K-VJPK (last accessed Feb. 6, 2019).

[39] *See, e.g.*, OPEN CMTYS. & SARGENT SHRIVER NAT'L CTR. ON POVERTY LAW, REDUCING THE COST OF CRIME FREE: ALTERNATIVE STRATEGIES TO CRIME FREE/NUISANCE PROPERTY ORDINANCES IN ILLINOIS 8 (2015) (discussing how domestic-violence-related calls for service may be recorded by a municipality as criminal trespass, damage to property, or noise complaints, effectively mischaracterizing them).

[40] See Tanvi Misra, *Yes, 311 Nuisance Calls Are Climbing in Gentrifying Neighborhoods*, CITYLAB (Oct. 18, 2018), https://www.citylab.com/equity/2018/10/yes-311-nuisance-calls-are-climbing-gentrifying-neighborhoods/573271, *archived at* https://perma.cc/4C88-833U.

[41] *See, e.g.*, GLENS FALLS, N.Y., CODE § 146-2(C)(6) (2000) (defining public nuisance to include "permitting unduly loud music or other sources of noise in such a manner as to annoy persons residing on or visiting adjacent properties"); CARSON CITY, NEV., CODE § 8.36 (2018) (defining graffiti to be a public nuisance); BINGHAMTON, N.Y. CODE § 315-3(1) (2007) (assigning public nuisance "points" under the city's ordinance to include noise, littering, and howling dogs).

lihood that properties there are declared nuisances.[42] Moreover, an increase in quality-of-life calls can increase police presence in an area. For example, a *BuzzFeed News* investigation found a 2,300% increase in 311 calls on a gentrifying Harlem block, many of which were noise complaints or calls about longtime Latinx residents playing dominoes on the block.[43] Although these calls did not require a police response, police nonetheless sometimes "respond when they're not handling emergencies."[44] Because some ordinances designate a home a nuisance based on the number of police responses alone,[45] increased quality-of-life calls that exacerbate the police presence and misdemeanor enforcement in a gentrifying community could easily lead to more nuisance citations and, ultimately, more evictions. For these reasons, the authors suspect that CNOs hit people of color in gentrifying neighborhoods especially hard and believe this issue merits further empirical research.

II. Chronic Nuisance Ordinances Penalize People with Disabilities

A. Background

Individuals with disabilities may call 911 or other hotlines for a variety of reasons related to their disability, including seeking medical assistance or mental health care.[46] For the purpose of this Note, the authors define "disability-based call" as any call for emergency services that police records show arises from or implicates a disability, including calls for police and medical assistance and welfare checks on other residents. A significant number of 911 calls for service may be disability-based: for example, in Fulton,

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[42] This issue remains understudied, but some experts believe that gentrification drives increased police presence, which may drive increased arrests, nuisance citations, and evictions. *See, e.g.*, Abdallah Fayyad, *The Criminalization of Gentrifying Neighborhoods,* The Atlantic (Dec. 20, 2017) (quoting former federal prosecutor Paul Butler, who explains that misdemeanor arrests reflect police presence rather than the number of infractions committed in a neighborhood).

[43] Lam Thuy Vo, *They Played Dominoes Outside Their Apartment for Decades. Then the White People Moved in and Police Started Showing Up,* BuzzFeed News (June 29, 2018), https://www.buzzfeednews.com/article/lamvo/gentrification-complaints-311-new-york, *archived at* https://perma.cc/D22J-B5RF.

[44] *Id.*

[45] *See, e.g.*, Cheektowaga, N.Y., Town Code § 194-4(A) (specifying that if a police officer responds to the dwelling unit for *reports* of criminal or public nuisance activity and issues a police report, the Town Council office shall send the owner or property manager a notice and "owner or property manager shall then take appropriate action to notify the tenant to cease any such activity, or evict said tenant").

[46] For additional information on why people with disabilities may require police intervention and early assistance, see Int'l Ass'n of Police Chiefs, Building Safer Communities: Improving Police Response to Persons with Mental Illness 6 (2010), https://www.theiacp.org/sites/default/files/2018-08/ImprovingPoliceResponsetoPersonsWithMentalIllnessSummit.pdf, *archived at* https://perma.cc/QRP6-VRLC.

New York, suicide, mental health crises, health and welfare checks, and calls for emergency medical service together made up nearly 13% of calls.[47]

CNOs frequently fail to exempt police calls by or on behalf of people with disabilities, including those with severe depression and chronic health conditions.[48] For example, a 2015 investigation by the American Civil Liberties Union (ACLU) of Illinois and the Sargent Shriver National Center on Poverty Law (Shriver Center) found that, at the time, forty-two Illinois towns and cities, including Chicago and its suburbs, "directly punish[ed] landlords or tenants based on the number of police calls to a particular residence," without exceptions for calls for emergency services arising from a disability.[49]

To analyze the relationship between CNOs and people with disabilities, the authors submitted public records requests for enforcement records, call logs, and police reports from municipalities throughout the Midwest, with a focus on states like Wisconsin, where CNOs have proliferated.[50] This Part presents case studies showing some of the ways that municipalities use CNO enforcement as a tool to evict or penalize people with disabilities, drawn from the records requests as well as from ongoing or resolved litigation by civil rights groups.

B. Residents Who Experience Mental Health Crises

Because nuisance ordinances generally penalize residents for 911 calls, no matter the reason for the call, residents may be cited—or even evicted—when they call for help with a mental health crisis. Jane's story in the Introduction is just one example of that disturbing pattern. The authors' research found several jurisdictions that enforced CNOs against residents where calls arose from their mental health-related disabilities. Below are a few illustrative case studies:

> ***Maplewood, Missouri*:** Emily Doe called a crisis hotline because she was suicidal.[51] Emergency personnel were sent to her house,

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[47] KATOVICH, *supra* note 12, at 23 fig.13 (explaining Fulton data).

[48] While discrimination on the basis of disability in providing police services is prohibited, see *infra* Part VII, the broad language of CNOs and the fact that no municipality the authors investigated has any kind of formal review process means that calls involving a disability are included when municipalities determine if a property is a nuisance. In writing this Note, the authors reviewed fifty-four CNOs in the state of Wisconsin, none of which specifically mentioned disability.

[49] Press Release, Am. Civil Liberties Union of Ill., Ordinances in More Than 40 Illinois Municipalities Conflict With New Illinois Law (Sept. 21, 2015), https://www.aclu-il.org/en/press-releases/ordinances-more-40-illinois-municipalities-conflict-new-illinois-law, *archived at* https://perma.cc/ACF9-2UGK.

[50] The choice of states was based on consultation with attorneys working in the fair housing space. The authors submitted requests to fifty-four municipalities in Wisconsin that had CNOs.

[51] PO Boucher, Police Officer, Maplewood Police Dep't, Investigative Report, Report No. 15-850 (Apr. 5, 2015) (on file with journal).

where she informed the police that she was bipolar and suffered from anxiety and post-traumatic stress disorder.[52] She was transported to a psychiatric hospital for evaluation and treatment. Crisis hotline volunteers sent the police to Emily's house two more times within the same year after receiving calls from Emily that prompted concern. Three months after her last police interaction, Emily received a citation and summons from the city to attend a CNO enforcement hearing for "generating too many calls for police services."[53] The potential consequences of this hearing were severe. Maplewood requires all residents to have an "occupancy permit" to reside in the city, and Emily's permit could be revoked were the City to determine she was a nuisance.[54] A revocation effectively exiles an individual from her home community for six months or longer.[55]

***Lakewood, Ohio*:** After a resident called a mobile crisis center threatening to harm himself, the center notified the police.[56] The City sent details of the call to his landlord and warned that "[t]his activity qualifies the property as a nuisance."[57] The landlord initiated eviction proceedings within weeks.[58]

Nuisance ordinances have also been enforced against suicidal residents who did not themselves call for emergency assistance:

***Baraboo, Wisconsin*:** Sarah Doe called the police after her daughter made suicidal statements.[59] One month later, Sarah Doe called the police again because her daughter posted statements on social media indicating that she was suicidal and engaging in self-harm.[60] Sarah's daughter told the police she was feeling a lot of anxiety and depression and showed them her cutting scars.[61] The police transferred her to a crisis center.[62] Eight months later, the City in-

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[52] *Id.*; *see also* Complaint at 10, Metro. St. Louis Equal Hous. and Opportunity Council v. Maplewood, No. 4:17-cv-886-PLC (E.D. Mo. March 13, 2017).

[53] Complaint at 10, Metro. St. Louis Equal Hous. and Opportunity Council v. Maplewood, No. 4:17-cv-886-PLC (E.D. Mo. March 13, 2017).

[54] *Id.* at 6. In Maplewood, individual people—not just properties—can be deemed a "nuisance." See Part I, *infra*, for a discussion of how chronic nuisance ordinances may differ in structure while having essentially the same consequences for individual tenants.

[55] Complaint at 6–7, Metro. St. Louis Equal Hous. and Opportunity Council v. Maplewood, No. 4:17-cv-886-PLC (E.D. Mo. March 13, 2017).

[56] MEAD ET AL., *supra* note 2, at 14.

[57] *Id.*

[58] *Id.*

[59] Nathan Lund, Police Officer, Baraboo Police Dep't, Offense/Incident Report, Complaint No. 2015-05656 (Aug. 6, 2015) (on file with journal).

[60] Nick Defiel, Police Officer, Baraboo Police Dep't, Offense/Incident Report, Complaint No. 2015-06937 (Sept. 23, 2015) (on file with journal).

[61] *Id.*

[62] *Id.*

formed Sarah's landlord that he would be subject to penalties if he continued to let this nuisance go unabated.[63]

***Village of Groton, New York*:** Police officers responded to a call about a resident with a known history of suicide attempts when the resident engaged in self-harm.[64] In Groton, a household that receives twelve "points" for disturbances within six months or eighteen points over a year is declared a public nuisance—and this incident was deemed a disturbance worth four points.[65] In an unrelated incident, a different Groton landlord was cited after a police officer heard "sounds of distress" coming from an apartment; the officer found a tenant "in a state of mental and physical distress," who requested "medical assistance and was voluntarily transported to the hospital."[66] Despite the fact that the officer responded to a tenant in acute need of medical help, the incident was labeled a noise complaint, assigned points, and became a basis for requiring the landlord to submit a written abatement plan to the Village Attorney.[67] If the Village determined that the abatement plan included eviction, the nuisance ordinance required the landlord to begin eviction proceedings within a mere ten days.[68]

C. Residents Who Need Reasonable Accommodations for Property Maintenance

In addition to police calls, nuisance ordinances frequently list as actionable nuisance behavior related to the aesthetic appearance of property, such as littering,[69] failing to mow a lawn,[70] or having an "unsightly" yard.[71] When a city determines that a property is an aesthetic nuisance, it often requires

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[63] Letter from Mark Schauf, Police Chief, Baraboo Police Dep't, to Prop. Owner of 520 & 522 Remington St. (Apr. 8, 2016) (on file with journal).

[64] Brief of Amici Curiae ACLU et al. at 27, Bd. of Trustees of Groton v. Pirro, 152 A.D. 3d 149 (N. Y. App. Div. 2016) (No. 2015-0719).

[65] *Id.* at 5, 27.

[66] *Id.* at 27.

[67] *Id.* at 5, 27.

[68] GROTON, N.Y., ORDINANCES § 152-6(C) (2018); *see also* Brief of Amici Curiae ACLU et al. at 5, Bd. of Trustees of Groton v. Pirro, 152 A.D. 3d 149 (N. Y. App. Div. 2016) (No. 2015-0719).

[69] *See, e.g.*, SPOKANE, WASH., CODE § 10.08A.20(H)(1) (2016) (defining "nuisance activity" to include all civil code violations including "Litter and Rubbish"); KANOVSKY, *supra* note 13, at 2 ("The conduct defined as a nuisance varies by ordinance and has ranged from conduct affecting the appearance of the property—such as littering, failing to tend to one's lawn or abandoning a vehicle . . . .").

[70] *See* KANOVSKY, *supra* note 13, at 2.

[71] S*ee, e.g.*, MITCHELL, S.D., CITY CODE tit. 5, ch. 5-3-2, 5-3-3 (B)(3) (2017) (defining a public nuisance to include anything that "tends to lower the value of adjacent real estate because of unsightly conditions," and defining "unsightly" broadly to include "a visual appearance which is unattractive . . . or otherwise unpleasant to a reasonable person").

homeowners, residents, or landlords to abate the nuisance quickly or face penalties. At the moment, there is no empirical data documenting how frequently aesthetic nuisance provisions are enforced against people with disabilities.[72] However, these laws can be applied against residents whose disabilities prevent them from meeting their home jurisdiction's yard maintenance standards due to their disability.[73]

> ***Portland, Oregon*:** Richard McGary, a resident living with AIDS, was cited under the City's nuisance ordinance after a City inspector determined that the trash in his yard constituted a nuisance.[74] Because of McGary's illness, he was unable to regularly clear his yard, most notably when he was hospitalized for treatment.[75] After being cited, McGary tried to hire people to clean his yard—but before he could do so, he was hospitalized with meningitis, "an exacerbation of his disabling condition."[76] McGary's patient advocate notified the City and requested more time to clean the yard as a reasonable accommodation to city policy, but Portland refused. The City issued a warrant against McGary for violating the ordinance while he was still hospitalized, charged McGary $1,818.83 for the cost of clean-up, and placed a lien on his home. Because of Portland's failure to accommodate McGary's disability, he was forced to sell his home to satisfy his debt to the city.[77]

Ordinances penalizing residents for non-criminal, aesthetic "nuisances" may likewise impose a discriminatory burden on people with other disabilities, including chronic health conditions, mental disabilities, and a wide range of physical disabilities limiting mobility or ability to grasp or lift objects.

D. Residents Who Need Supportive Housing

Not only have municipalities used nuisance ordinances to designate as nuisances the homes of individual people with disabilities, but some cities have also enforced nuisance ordinances against organizations providing sup-

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[72] Although the authors' open records requests uncovered many cases in which properties were designated aesthetic nuisances, documentation of a nuisance determination generally does not include information on whether the affected resident had a disability or if the reason the property was not maintained was related to the resident's disability. More research is needed.

[73] For examples of strict yard maintenance rules, see, e.g., TROY, N.Y., CODE § 205-2 (2018) (making overgrown weeds a nuisance); DALLAS, TX. CODE §§ 18-13, 18-14 (2019) (defining overgrown yards as a public nuisance *separately* from another provision which defines yards that are overgrown such that they become a fire hazard a nuisance).

[74] *See* McGary v. City of Portland, 386 F.3d 1259, 1260 (9th Cir. 2004).

[75] *See id.* at 1260. HIV/AIDS qualifies as a disability under the ADA. *See* Bragdon v. Abbott, 524 U.S. 624, 641–42 (1998).

[76] *McGary*, 386 F.3d at 1260.

[77] *Id.* at 1261.

portive housing to people with disabilities. The Fair Housing Amendments Act of 1988 (FHAA) was enacted in part to address restrictive local zoning and land-use laws that limited the ability of people with disabilities to live in residences they chose (such as group homes).[78] Since the FHAA's passage, courts have struck down a number of facially neutral land-use laws after finding that the local laws were thin cover for the discriminatory intent of lawmakers seeking to exclude group homes from their towns.[79]

Another way CNOs may have a disparate, discriminatory effect on people with disabilities is by penalizing supportive housing programs for resident behavior arising from residents' disabilities: for example, one Ohio city designated a group home for adults a nuisance after one resident engaged in self-harm, a different resident went missing, and the staff called 911.[80] Moreover, local governments can pass facially neutral CNOs as a pretext for pushing supportive housing out of their communities.

> ***Bedford, Ohio*:** Bedford fined a supporting housing facility for children with disabilities when the staff called 911 for medical assistance. Two children were rough-housing and one hit his head, "got his eye split open[,] and [was] bleeding."[81] The child was later transported to a city medical center.[82] The City marked the call for help a "[d]isturbance call," fined the group home $250—a sum representing the police response "time associated with said criminal activity"—and threatened escalating fees or even "imprisonment" for the property owner if staff or residents made further calls for police or medical assistance.[83] The supportive housing facility had been designated a nuisance a month earlier after police responded to reports that a "15 year old autistic male [was] irate," although the resident was calm when the officers

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[78] The House Committee drafting the legislation produced a conference report explicitly addressing the application of the FHAA to restrictive zoning and land-use laws:

> The Committee intends that the prohibition against discrimination against those with handicaps apply to zoning decisions and practices. The Act is intended to prohibit the application of special requirements through land-use regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community.

H.R. REP. NO. 100-711, at 24 (1988).

[79] *See, e.g.*, Support Ministries v. Vill. of Waterford, 808 F. Supp. 121 (N.D.N.Y. 1992) (overturning a facially neutral maximum occupancy ordinance because evidence showed it was passed with discriminatory intent). The FHAA also imposes disparate impact liability. *See infra* Part V.C.

[80] MEAD ET AL., *supra* note 2, at 15.

[81] Bedford Police Dep't, Call for Service Report, Report No. 160096840 (Dec. 16, 2016), *published in* MEAD ET AL., *supra* note 2.

[82] *Id.* at 15.

[83] These letters appear to be form letters that are sent even when the activity that led to the police response was not criminal activity, as this case study demonstrates. Letter from Kris Nietert, Chief of Police, Bedford Police Dep't, to Bedford Landlord (name redacted), *published in* MEAD ET AL., *supra* note 2.

arrived;[84] after a young person ran away from the group home;[85] and after fights broke out between residents, even though the disputes were sometimes resolved before police arrived.[86] Later that year, the city council explicitly discussed using a CNO against the group home's "affiliated school" as part of the council's efforts to push the school "to pay for an off-duty city police officer."[87]

***South Milwaukee, Wisconsin*:** The City declared a supportive living center for people with disabilities a chronic nuisance property based on five incidents over the course of three months.[88] Two incidents were calls for emergency medical assistance.[89] The other calls included a disorderly conduct call for a resident with a disability, a 911 call from a drunk resident who objected to a visit from her roommate's boyfriend, and a 911 call for help for an intoxicated resident.[90] After the fifth incident, city police notified the supportive living center that it was being declared a chronic nuisance and threatened it with a fine.[91]

Landlords operating group homes may respond by deterring tenants from both calling 911 and seeking emergency services. A landlord for one such facility in Milwaukee "responded to her nuisance citation" by posting a sign telling tenants to "Stop before calling 911."[92]

III. Disability-Related Sanctions Are Likely Underreported

CNO enforcement against individuals with disabilities is likely underreported because a person's disability may not be obvious during interactions with law enforcement.[93] In addition, police in most states receive only cur-

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[84] Bedford Police Dep't, Call for Service Report, Report No. 160088129 (Nov. 12, 2016), *published in* Mead et al., *supra* note 2.

[85] Robert Martel, Police Officer, Bedford Police Dep't, Incident/Offense Report, Incident No. 160110 (Nov. 17, 2016), *published in* Mead et al., *supra* note 2.

[86] Call for Service Report, Bedford Police Dep't, Report No. 160089576 (Nov. 18, 2016), *published in* Mead et al., *supra* note 2.

[87] *Id.* at 15.

[88] Letter from Todd Vinohardsky, Police Officer, South Milwaukee Police Dep't, to Faith, Hope and Charity Supportive Living Inc. (Dec. 17, 2017) (on file with journal).

[89] *Id.*

[90] Letter from Todd Vinohardsky, *supra* note 88; Call Detail Report, South Milwaukee Police Dep't. (Dec. 3, 2017) (on file with journal); Call Detail Report, South Milwaukee Police Dep't. (Dec. 15, 2017) (on file with journal).

[91] Letter from Todd Vinohardsky, *supra* note 88.

[92] Desmond & Valdez, *supra* note 17, at 135.

[93] *See, e.g.*, David M. Perry & Lawrence Carter-Long, *How Misunderstanding Disability Leads to Police Violence*, The Atlantic (May 6, 2014), https://www.theatlantic.com/health/archive/2014/05/misunderstanding-disability-leads-to-police-violence/361786/, *archived at* https://perma.cc/KN98-GKJC ("Disability is varied and complex. Sometimes disability is visibly apparent, making it easier for law enforcement, to see—if not misinterpret. For others, disability is invisible."). This invisible disability issue is a serious one for disability rights advocates because of the high prevalence of police violence against individuals with disabili-

sory training on how to identify disability—as a result, police records and subsequent enforcement actions may not identify whether a disability was the source of a call for services.[94] The case study below provides an example where disability likely contributed to CNO enforcement, even if the accompanying reports do not specifically say so.

> ***Fond Du Lac, Wisconsin*:** A woman contacted the police because her neighbor was displaying "bizarre behavior," including telling her he owned a handgun for safety and later writing her an apology note.[95] The police report indicates that the woman "[did] not believe this [wa]s normal."[96] The City considered this interaction in determining the neighbor's residence was a nuisance property.[97]

Nuisance ordinances have also been enforced against tenants who have received police assistance through welfare checks (also called wellness checks). In many municipalities, citizens are encouraged by their local governments to call and ask the police to conduct welfare checks if they are concerned about another citizen's wellbeing; often, these wellness checks implicate mental health or other disabilities.[98] Unfortunately, these contacts can also count toward nuisance determinations.[99]

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ties. *See id.* (noting "[l]aw enforcement officials expect and demand compliance, but when they don't recognize a person's disability in the course of an interaction, the consequences can be tragic"). For example, Disability Rights North Carolina provides a guide for people with disabilities on interacting with law enforcement, which includes headings such as "Tell the Officer that You Have a Disability Right Away" and "Carry a Pocket-Sized Card with Information About your Disability." *See* DISABILITY RIGHTS NORTH CAROLINA, INTERACTING WITH LAW ENFORCEMENT: A GUIDE FOR PERSONS WITH DISABILITIES 4 (2015), https://adanc.org/wp-content/uploads/2018/08/Interacting-with-Law-Enforcement.pdf, *archived at* https://perma.cc/5DAZ-GZ3Q.

[94] In a fifty-state survey conducted in 1995, eight states were found to not require any disability training for police officers; in the states that did provide it, the content was inconsistent and few places provided any training about intellectual disabilities or physical impairments. James K. McAfee & Stephanie L. Musso, *Training Police Officers About Persons with Disabilities: A 50-State Policy Analysis*, 16 REMEDIAL AND SPECIAL EDUC. 53, 53–55 (1995). More recent work has also emphasized that police officers do not receive sufficient training in recognizing disability. *See, e.g.*, Steve Silberman, Opinion, *The Police Need to Understand Autism*, N.Y. TIMES, Sept. 19, 2017, https://www.nytimes.com/2017/09/19/opinion/police-autism-understanding.html?module=inline, *archived at* https://perma.cc/YX2L-7SGF (discussing how police are not trained to recognize signs of autism, which can lead to situations with potentially autistic suspects becoming violent).

[95] Fond Du Lac Police Department, Call for Service Summary from 10/4/2016 to 11/28/2016 for Location [redacted] (Nov. 10, 2016) (on file with journal).

[96] *Id.*

[97] *Id.*

[98] *See, e.g.*, *Calling 911 and Talking With Police*, NATIONAL ALLIANCE ON MENTAL ILLNESS, https://www.nami.org/find-support/family-members-and-caregivers/calling-911-and-talking-with-police, *archived at* https://perma.cc/H5UC-DJM8 (last accessed Apr. 5, 2019) (describing how welfare checks are a tool citizens can use if they are concerned about an individual's mental health).

[99] Our records from Madison, Wisconsin show properties with numerous instances of "wellness check," "welfare check," and "check person" calls designated as nuisances—for example, one cited apartment building had six welfare checks in a row within a two- to three-

***Bedford, Ohio*:** The City designated a property a nuisance after police responded to several acts of non-criminal activity: a resident's "slit[ting] her wrists,"[100] a friend's later request for a "personal welfare check" on that resident, and a verbal argument between that resident—who could not afford medication[101]—and a roommate who "called her mentally ill."[102] While the officers reported that the resident would seek treatment and "contact the [police department] if she [was] ever feeling suicidal" in the future, the City still designated her home a nuisance—based on the very police contacts it offered as a city service.[103]

IV. Chronic Nuisance Ordinances Violate the Fair Housing Act

The Fair Housing Amendments Act of 1988 (FHAA) expanded coverage of the federal Fair Housing Act (FHA) to include people with disabilities by declaring it unlawful to "discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap."[104] The law also prohibits discriminating "in the provision of services or facilities in connection with a dwelling" on the basis of a protected disability.[105] Courts have construed the FHA's "otherwise make unavailable or deny" prohibition broadly, to include both private and government action, such as exclusionary zoning or a CNO.[106] Department of Housing and Urban Development (HUD) regulations also explicitly note that evicting tenants because of a protected characteristic (including race, sex, or a disability) is a form of prohibited discrimination.[107]

Despite these initiatives, people with disabilities continue to face pervasive discrimination throughout the housing market.[108] A 2017 study con-

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day span. *See, e.g.*, Letter from Captain Joe Balles, South Police Dist., Madison Police Dep't to Dewayne Pohl, ACC Mgmt. (Oct. 22, 2015) (on file with journal).

[100] Bedford Police Dep't, Call for Service Report, Report No. 1500008181 (Apr. 20, 2015), *published in* Mead et al., *supra* note 2.

[101] Bedford Police Dep't, Call for Service Report, Report No. 1500035067 (Aug. 21, 2015), *published in* Mead et al., *supra* note 2.

[102] Bedford Police Dep't, Call for Service Report, Report No. 1500006108 (Mar. 30, 2015), *published in* Mead et al., *supra* note 2.

[103] Letter from Kris Nietert, Chief of Police, Bedford Police Dep't, to Bedford Landlord (name redacted) (Sep. 2, 2015), *published in* Mead et al., *supra* note 2.

[104] 42 U.S.C. § 3604(f). See *infra* Section V.B. for discussion of what constitutes a protected disability (a handicap) under the FHA.

[105] *Id.*

[106] "[C]ourts of appeals, recognizing these policies, regularly have provided relief from exclusionary zoning . . . under the Fair Housing Act." Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 616 F.2d 1006, 1011–12 (7th Cir. 1980); *see, e.g.*, McGary v. City of Portland, 386 F.3d 1259, 1264 (9th Cir. 2004) (holding that a disabled resident stated a claim under the FHAA in an as-applied challenge to a CNO); *see also In re* Malone, 592 F. Supp. 1135, 1155–56 (E.D. Mo. 1984) (holding that exclusionary zoning violates the Fair Housing Act).

[107] 24 C.F.R § 100.50(b)(5) (2019).

[108] Rental discrimination against people with disabilities is especially harmful because they are disproportionately likely to rent in the first place. Nationally, 41.8% of households

ducted by HUD and the non-profit Urban Institute evaluated 200 paired tests in the Chicago Metropolitan area in which similarly-situated civil rights testers, some of whom have disabilities and some of whom do not, meet with an unsuspecting housing provider or rental agent to determine if they were treated differently on the basis of the protected characteristic.[109] The study found that people with physical disabilities and people with mental disabilities are substantially less likely than those without a disability to be told that an advertised housing unit is available and are less likely to be given a reason for its unavailability.[110] Moreover, in pair testing, only 15% of requests for reasonable accommodations made by email were accommodated.[111] HUD's research demonstrates that disability discrimination in housing remains alive and well.

A. The FHA Framework

Plaintiffs may bring a federal fair housing claim against a party under three theories: intentional discrimination; disparate impact; or "a refusal to make reasonable accommodations in rules, policies, practices or services" to ensure access for people with disabilities.[112] CNOs affecting people with disabilities are vulnerable to challenge under all three theories.

A practice—like a city's CNO—violates the Fair Housing Act if it has an unjustified discriminatory effect, such that "it actually or predictably results in a disparate impact on a group" or frustrates the FHA's goal of promoting integrated housing patterns.[113] Under this standard, a nuisance ordinance with a discriminatory effect on people with disabilities violates the FHA when the practice does not have a "legally sufficient justification," regardless of whether the enacting local government intended to discriminate.[114]

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which include a non-elderly person with a disability rent (compared to 31.6% of households that rent overall). U.S. DEP'T OF HOUS. AND URBAN DEV., OFFICE OF POLICY DEV. AND RESEARCH, 2009 WORST CASE HOUSING NEEDS OF PEOPLE WITH DISABILITIES: SUPPLEMENTAL FINDINGS OF THE WORST CASE HOUSING NEEDS 2009: REPORT TO CONGRESS 17 (2011), https://www.huduser.gov/portal/publications/WorstCaseDisabilities03_2011.pdf, *archived at* https://perma.cc/ZF7P-DBQQ.

[109] *See* Josh Hamell, U.S. Dep't of Hous. and Urban Dev., Rental Housing Discrimination on the Basis of Mental Disabilities: Results of Pilot Testing *iii,* 5–6, 17 (2017), https://www.huduser.gov/portal/sites/default/files/pdf/MentalDisabilities-FinalPaper.pdf, *archived at* https://perma.cc/SZ2Y-E8MQ.

[110] *Id.* at 36, 53–54 (2017).

[111] *See id.* at vii (2017).

[112] 42 U.S.C. § 3604(f)(3)(B) (2018); 24 C.F.R. § 100.500(a) (2018).

[113] 24 C.F.R. § 100.500(a) (2018) ("A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin.").

[114] 24 C.F.R. § 100.500(b) (2018); *see also* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Proj., Inc., 135 S. Ct. 2507, 2518 (2015) (holding that disparate impact claims are cognizable under the Fair Housing Act).

The FHA's liberal standing grounds empower a broad range of potential plaintiffs to sue to enforce the law.[115] The FHA grants standing to any "aggrieved person," defined as anyone who "claims to have been injured by a discriminatory housing practice," or who believes she "will be injured by a discriminatory housing practice about to occur."[116] The latter option ensures that a person with a disability need not suffer discrimination before challenging a putatively illegal city practice. This standard allows someone directly victimized by disability discrimination to sue, but also permits "family members, roommates, housing providers, or any other person associated with the buyer or renter" to sue.[117]

B. Defining Disability Under the FHA

People with disabilities are only protected by the FHAA if they meet the statute's definition of "handicapped."[118] Unlike plaintiffs in other civil rights cases, people with disabilities must thus show that they are members of a protected class before their suits can proceed.[119] In this context, "handicap" and "disability" are defined as a matter of law rather than a medical diagnosis. Nonetheless, many potential plaintiffs should be able to clear this

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[115] The Supreme Court has held that "Congress intended standing under [portions of the Fair Housing Act] to extend to the full limits of Art. III." Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 103 (1979).

[116] 42 U.S.C. § 3602(i) (2018). The FHAA's legislative history shows that Congress was aware of the Supreme Court's broad construction of the FHA when amending the law to extend protection to people with disabilities. The House Committee drafting the legislation reviewed the relevant Supreme Court precedents:

> In *Gladstone Realtors v. Village of Bellwood*, the Supreme Court affirmed that standing requirements for judicial and administrative review are identical under title VIII. In *Havens Realty Corp. v. Coleman*, the Court held that 'testers' have standing to sue under title VIII, because Section 804(d) prohibits the representation 'to any person because of race, color, religion, sex or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.' The bill adopts as its definition language similar to that contained in Section 810 of existing law, as modified to reaffirm the broad holdings of these cases.

H.R. Rep. No. 100-711, 2174, 2184 (1988) (internal citations omitted). For further discussion of the Fair Housing Act's liberal standing grounds, see generally Erwin Chemerinsky, *Standing to Enforce the Fair Housing Act*, Amer. Const. Society: ACSBlog (Oct, 28, 2016), https://www.acslaw.org/?post_type=acsblog&p=11657, *archived at* https://perma.cc/CD38-XG2V; Robert G. Schwemm, *Standing to Sue in Fair Housing Cases*, 41 Ohio St. L.J. 1 (1980).

[117] Arlene Kanter, *A Home of One's Own: The Fair Housing Amendments Act and Housing Discrimination Against People With Mental Disabilities*, 43 Am. U. L. Rev. 925, 947 (1994).

[118] The authors use the term "handicapped" to the extent that it is used in statutory definitions of disability and related case law; however, we want to acknowledge that the preferred term is "people with disabilities" or "the disability community." The authors have used these terms when not directly referencing statutes or cases using the terms "handicap" or "handicapped." For more information, see, e.g., Nat'l Ctr. on Disability and Journalism, NCDJ Style Guide 22 (2018).

[119] For example, plaintiffs of color alleging racial discrimination are not required to prove that they are people of color to sufficiently plead a violation of civil rights law.

threshold hurdle because many of the disabilities punished by CNOs and outlined in our case studies are recognized and protected under the FHAA.

The FHAA defines disability broadly, lifting its definitions from the Rehabilitation Act of 1973.[120] Under regulations implementing the FHAA, HUD defines "handicap" to mean

> (1) a physical or mental impairment which substantially limits one or more of such person's major life activities,
> (2) a record of having such an impairment, or
> (3) being regarded as having such an impairment[.][121]

"Physical or mental impairment" includes, but is not limited to "any mental or physiological disorder" including learning disabilities, "emotional or mental illness," and autism.[122] Federal courts likewise recognize that "[t]he FHA's definition of 'handicapped' includes persons with a mental illness or personality disorder,"[123] such as depression,[124] post-traumatic stress disorder,[125] and obsessive-compulsive disorder.[126] A psychiatric diagnosis is helpful, but not necessary, to show a plaintiff has a "mental impairment."[127] Federal courts also recognize the FHAA protects people with HIV and AIDS.[128]

Some people may have disabilities that nonetheless do not substantially limit them in major life activities (for example, because the condition has been managed in treatment). However, they are still protected under the FHA's "regarded as" prong, which protects people with disabilities from discrimination based on ableist stigma or animus—even if they do not meet the FHAA's requirement that they have a disability that sufficiently limits a major life activity.[129]

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[120] *See* 29 U.S.C. § 794 (2018).

[121] 42 U.S.C. § 3602(h) (2018).

[122] 24 C.F.R. § 100.201(a)(2) (2018).

[123] *See, e.g.*, Step by Step, Inc. v. City of Ogdensburg, 176 F. Supp. 3d 112, 125 (N.D.N.Y. 2016); *see also* Valley Hous. LP v. City of Derby, 802 F. Supp. 2d 359, 385 (D. Conn. 2011) (stating that "[m]ental illness is also recognized as a handicap or and disability" and referring to post-traumatic stress disorder as a covered handicap).

[124] *See, e.g.*, Castillo Condo. Ass'n v. U.S. Dep't of Hous. & Urban Dev., 821 F.3d 92, 98 (1st Cir. 2016) (holding that the charging party, who experienced "anxiety and chronic depression," stated a prima facie case for disability discrimination).

[125] *See, e.g.*, Giardiello v. Marcus, Errico, Emmer & Brooks, P.C., 261 F. Supp. 3d. 86, 98 (D. Mass. 2017) (holding that the plaintiff, who had post-traumatic stress disorder, stated an FHA claim).

[126] *See, e.g.*, Neudecker v. Boisclair Corp., 351 F.3d 361, 364 (8th Cir. 2003) (concluding that plaintiff, who had OCD, stated a claim under the FHA and the Rehabilitation Act).

[127] *See* 33 Am. Jur. Proof of Facts 3d 1 (Originally published in 1995) ("Courts have found emotional or mental problems [sic] to be disabilities even when they do not have a diagnostic label.").

[128] *See, e.g.*, Baxter v. Belleville, 720 F. Supp. 720, 729 (S.D. Ill. 1989) (noting that the FHAA includes people with HIV as "individuals with handicaps").

[129] 42 U.S.C. § 3602(b) (2018).

C. Challenging CNOs Under the FHA's Disparate Impact Theory of Liability

CNOs directly conflict with the FHAA's goals because they restrict the availability of housing based on a wide range of "nuisance conduct" stemming from residents' disabilities,[130] and thereby cause a predictable, disparate impact on people with disabilities. As a result, CNOs can be challenged under a disparate impact (also known as discriminatory effect) theory of liability.

1. CNOs Have an Adverse, Disparate Impact on People with Disabilities

Nuisance ordinances have a predictable, disparate impact on people with certain disabilities that lead them to more frequently call 911 for emergency services, or to be the subject of police calls for non-criminal behavior. To establish a prima facie disparate impact claim under the Fair Housing Act, courts have long held that plaintiffs must show that a challenged policy "results in, or can be predicted to result in, a disparate impact upon a protected class compared to a relevant population as a whole."[131] In one of the first cases to raise a disability discrimination challenge to a CNO, plaintiffs in Maplewood, Missouri presented evidence that, in at least 11 out of 43—more than 25%—of enforcement activities, "Maplewood initiated proceedings because of obvious manifestations of disability . . . rather than suspected criminal activity."[132] Plaintiffs emphasized that Maplewood's broad, but not atypical, definition of nuisance—which included any conduct that causes public "annoyance" or "inconvenience"—effectively guarantees that residents who are suicidal, have chronic health conditions, or otherwise need emergency assistance will be punished by the city's CNO for their disabilities.[133] The Maplewood complaint was a ground-breaking test case advancing a theory that CNO enforcement constitutes unlawful disability

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[130] *See supra* Part II.

[131] Charleston Hous. Auth. v. U.S. Dep't of Agric., 419 F.3d 729, 740–41 (8th Cir. 2005). In 2015, the Supreme Court affirmed disparate impact liability under the FHA. It held that plaintiffs bringing disparate impact claims that rely on statistical evidence of race-based disparities must "point to a defendant's policy or policies causing that disparity." Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2523 (2015). Plaintiffs challenging CNOs clear this bar because they are identifying the ordinance as the policy causing the prohibited disability-based disparate impact.

[132] Plaintiff's Motion For Relief From Judgment at 11–12, Metro. St. Louis Equal Hous. and Opportunity Council v. City of Maplewood, 2018 U.S. Dist. LEXIS 77280 (E.D. Mo. May 8, 2018) (No. 4:17-cv-886-RLW).

[133] Telephone Interview with Sasha Samberg-Champion, Counsel, Relman, Dane & Colfax (Apr. 27, 2018); *see also* MAPLEWOOD, MO., CODE § 34-240(17)(f) (2018).

discrimination, and civil rights attorneys predict additional litigation will reveal similar disparate impact patterns across the nation.[134]

Even where an individual plaintiff does not have data to show that nuisance ordinances have a disparate impact on people with disabilities in their specific jurisdiction, evidence that nuisance ordinances *predictably will result in* that disparate impact is enough to show a discriminatory effect under the plaintiff-friendly FHA.[135] As Part III.B's examples show, CNOs that punish police calls have the predictable result of disproportionately punishing people for clear manifestations of disabilities, such as calling a suicide hotline or engaging in self-harm.

2. *Municipalities Cannot Withstand an FHA Challenge for Legally Sufficient Justification for CNOs that Penalize 911 Calls*

When a plaintiff makes a prima facie showing of disparate impact discrimination under the FHAA, the burden shifts to the defendant to show that a facially neutral policy has a "legally sufficient justification" and can thus withstand the challenge.[136] A "legally sufficient justification" exists when a challenged policy meets two prongs: it is (i) "necessary to achieve a substantial, legitimate, and nondiscriminatory interest of the municipality," and (ii) those interests could not be served by another practice with a less discriminatory effect.[137]

To be "legitimate," the local government's justification must be genuine, rather than a pretextual screen for discrimination or generalizations about people with disabilities or other protected classes.[138] As interpreted in

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[134] Telephone Interview with Samberg-Champion, *supra* note 133; Telephone Interview with Kate Walz, Dir. of Hous. Justice, Sargent Shriver Nat'l Ctr. on Poverty Law (May 3, 2018). In *Watson v. City of Maplewood*, the ACLU's facial challenge of Maplewood's nuisance ordinance as violating the First Amendment survived a motion to dismiss. No. 4:17CV1268 JCH, 2017 U.S. Dist. LEXIS 173944, at *15 (E.D. Mo. Oct. 20, 2017). The case ultimately settled in September 2018. *See Rosetta Watson v. Maplewood*, Am. Civil Liberties Union, https://www.aclu.org/cases/rosetta-watson-v-maplewood, *archived at* https://perma.cc/5VXP-3RWV (last updated Apr. 10, 2017). To the authors' knowledge, the Maplewood complaint is the first to present a robust claim of disability discrimination. *But see* Brief of Amici Curiae ACLU et al. at 27, Bd. of Trustees of Groton v. Pirro, 152 A.D. 3d 149 (N.Y. App. Div. 2016) (No. 2015-0719) (noting that "there is a serious risk that Groton is forcing or motivating landlords, including Mr. Pirro, to violate bans on housing discrimination against people with disabilities in both federal and state laws").

[135] 24 C.F.R. § 100.500(a) (2018) ("A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin."); *see also* United States v. City of Black Jack, 508 F.2d 1179, 1184 (8th Cir. 1974) ("To establish a prima facie case of racial discrimination, the plaintiff need prove no more than that the conduct of the defendant actually or *predictably results* in racial discrimination; in other words, that it has a discriminatory effect.") (emphasis added).

[136] 24 C.F.R. § 100.500(b) (2018).

[137] *Id.*

[138] *Cf.* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11460, 11471 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100.500(b)) ("Whether an inter-

HUD's 2013 Discriminatory Effects Final Rule, a "substantial" interest is a "core interest of the organization that has a direct relationship to the function of that organization."[139] HUD explicitly analogized its substantial interest requirement "to the Title VII requirement that an employer's interest in an employment practice with a disparate impact be job related" under which defendants in a disparate impact case bear both the burdens of proof and production.[140] The implementing regulations emphasize that "[t]he determination of whether goals, objectives, and activities are of substantial interest . . . requires a case-specific, fact-based inquiry."[141] To be non-discriminatory, the justification must "not itself discriminate based on a protected characteristic."[142] To be legally sufficient, a justification must meet all three elements of the first prong.[143]

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est is 'legitimate' is judged on the basis of objective facts establishing that the proffered justification is genuine, and not fabricated or pretextual.").

[139] *Id.* at 11470. In early 2019, the *Washington Post* reported that the Department of Housing and Urban Development was considering rolling back regulations that affirm disparate impact liability, such as the 2013 Discriminatory Effects Final Rule. Laura Meckler & Devlin Barrett, *Trump Administration Considers Rollback of Anti-Discrimination Rules,* WASH. POST (Jan. 3, 2019), https://www.washingtonpost.com/local/education/trump-administration-considers-rollback-of-anti-discrimination-rules/2019/01/02/f96347ea-046d-11e9-b5df-5d3874f1ac36_story.html?__twitter_impression=true&utm_term=.4f17ab113bc8, *archived at* https://perma.cc/TAL3-K8NV. While the Trump Administration's attempts to undermine disparate impact regulations signal deep hostility to fair housing and should be of serious concern to advocates, it would not necessarily preclude disparate impact claims against CNOs. Since the disparate impact rule was issued, the Supreme Court has affirmed disparate impact liability under the FHA. Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2523 (2015). Prior to the adoption of the 2013 Discriminatory Effects Final Rule, most circuits "employed a burden-shifting analysis" in which defendants may rebut a prima facie showing of disparate impact by showing that the challenged practice is "justified by a substantial, legitimate, nondiscriminatory objective." Michael G. Allen et al., *Assessing HUD's Disparate Impact Rule: A Practitioner's Perspective*, 49 HARV. C.R.-C.L. L. REV. 155, 161 (2014). *But see id.* at 162 (noting that, prior to the adoption of the 2013 Rule, a minority of circuits instead used a balancing test). Before the rule was established, courts employing the majority burden-shifting approach generally placed the burden of proving a justification was legally sufficient on the defendant and evaluated their claims in a highly fact-based inquiry. *See, e.g.*, NAACP v. Town of Huntington, 844 F.2d 926, 940 (2d Cir. 1988) (engaging in a fact-intensive analysis of the town's seven proposed justifications, all of which were found to be insubstantial on the basis of specific facts related to the site and evidence in the record). Thus, it may become more difficult—but not impossible—to overturn CNOs under a discriminatory effects theory if the Trump Administration revokes the 2013 Discriminatory Effects rule.

[140] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11471; Allen et al., *supra* note 139, at 177–78 (citing 78 Fed. Reg. at 11470) ("But in Title VII disparate impact cases—as in HUD's Final Rule—the defendant carries both a burden of production and proof to show that the challenged practice is job-related and consistent with business necessity. That burden is more demanding because it requires a defendant to establish these factors by a preponderance of the evidence. HUD's new rule . . . adopts this higher burden for defendants.").

[141] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11470.

[142] *Id.*

[143] 24 C.F.R. § 100.500(b) (2018).

Additionally, "a legally sufficient justification must be supported by evidence and may not be hypothetical or speculative."[144] To prevail on a legally sufficient justification defense, a municipality must therefore produce evidence that the challenged policy will actually achieve the government's stated interest. Jurisdictions defending CNOs would thus face the difficult burden of proving that penalizing residents with disabilities for seeking help by calling 911 is necessary to achieve a legitimate core interest of the local government. Several of the most common justifications for CNOs are unlikely to meet this bar.

Municipalities often justify CNOs as cost-saving measures: many ordinances include an explicit legislative finding that properties that generate more than a threshold number of nuisance calls place an "undue and inappropriate burden on the taxpayers."[145] But as a matter of law, cost savings from deterring emergency calls are not a legally sufficient justification under the FHA. In litigation over the FHAA's application to local zoning ordinances, multiple federal appeals courts have unequivocally held that a municipality may not effectively prevent people with disabilities from living in the community simply because it does not want to pay the manageable cost of responding to calls for emergency services.[146] Because courts are unwilling to accept that the cost of the "assistance of the local police and other emergency services" imposes a "cognizable administrative and financial burden upon the community,"[147] courts are unlikely to find that a city's unwillingness to pay the cost of responding to emergency calls made by residents with disabilities meets the substantial prong of the test for a legally sufficient justification. Providing emergency services is a city's responsibility, and it cannot lawfully deny those services to people simply because they have a disability.

Jurisdictions might also argue that public safety is a legally sufficient justification for CNOs.[148] Courts do accept public safety justifications for

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[144] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11470.

[145] GREENFIELD, WIS., CODE c. 10.30 (2019); *see also, e.g.*, VILL. OF GREENDALE, WIS., CODE CH. 10.09 (2019) ("Any premises that has generated three or more calls for service for nuisance activities within a sixty-day period has received more than the level of general and adequate service and has placed an undue burden on the taxpayers."); STEVENS POINT, WIS., CODE c. 24.51 ("The Common Council finds that any premises . . . that has generated 3 or more responses from the City of Stevens Point Police Department for nuisance activities has received more than the level of general and adequate police service and has placed an undue and inappropriate burden on the taxpayers of the City.").

[146] *See, e.g.*, Hovsons, Inc. v. Township of Brick, 89 F.3d 1096, 1105 (3d. Cir. 1996) ("The mere fact that the employees and residents of Holiday Village will at times require the assistance of the local police and other emergency services does not rise to the level of imposing a cognizable administrative and financial burden upon the community."); *see also* Oconomowoc Residential Programs v. City of Milwaukee, 300 F.3d 775, 786 (7th Cir. 2002).

[147] *Id.*

[148] *See, e.g.*, City of Maplewood's Reply Mem. in Support of its Mot. to Dismiss at 9, Watson v. City of Maplewood, Mo., 2018 WL 2184347 (E.D. Mo. May 11, 2018) (No. 4:17-cv-01268-JCH), 2018 WL 1638792. (asserting that the city's CNO was justified by the city's

discriminatory policies, including in the fair housing context.[149] However, plaintiffs challenging a CNO can make at least two compelling rebuttals. First, a local government must be able to show that its public safety interest is "supported by evidence," rather than being "hypothetical or speculative."[150] To date, there is no empirical evidence that CNOs reduce crime or improve public safety. By contrast, a wealth of evidence demonstrates that CNOs chill reporting of violence and deter people from seeking help in a crisis—frustrating rather than fulfilling the government's interest in public safety.[151] Any claimed public safety justification for a CNO is speculative, rather than based on evidence. Second, housing "[r]estrictions predicated on public safety cannot be based on blanket stereotypes about the handicapped, but must be tailored to particularized concerns about individual residents."[152] Many CNOs would not meet this requirement, because many designate properties a nuisance based purely of the number of calls made, not individualized concerns. At best, these policies do not consider the impact on people with disabilities; at worst, enforcement may reflect the false, outdated, and insidious stereotype that people with disabilities are threats to public safety.

Maplewood provides several disturbing examples: one family was deterred from seeking ambulance services when a parent had a mental illness-related emergency, another suicidal man had his occupancy permit revoked for making too many calls for medical services, and a third woman with post-traumatic stress disorder faced an enforcement action for generating too many police calls.[153] None of this conduct was criminal activity. Any claim that these residents were a threat to public safety is speculative rather than supported by evidence, and the city did not provide individualized public safety concerns about them—but these residents were still swept up by the broad scope of the city's CNO. Thus, Maplewood should not be able to claim that its CNO is the least discriminatory policy it can use to achieve a legally sufficient public safety justification.

In addition to cost-savings and public safety, cities may raise other interests, such as preserving the aesthetic character of a neighborhood or neighbors' property rights. To prevail on other arguments, jurisdictions would still face the burden of proving that a chronic nuisance ordinance achieves a substantial, legitimate, and non-discriminatory interest. Under the

"legitimate interest in addressing public safety" against a challenge under the Equal Protection Clause); Mike Koziatek, *Belleville Might Extend Crime-Free Ordinance for Four More Years*, BELLEVILLE NEWS-DEMOCRAT, July 14, 2017 (explaining that the town's City Council passed a CNO "in an effort to reduce crime in rental properties").

[149] *See, e.g.*, *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1503–04 (10th Cir. 1995) (recognizing that FHAA permits "reasonable restrictions on the terms or conditions of housing [to people with disabilities] when justified by public safety concerns . . .").

[150] Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11470.

[151] *See, e.g.*, SILENCED, *supra* note 22, at 19; Fais, *supra* note 23, at 1189.

[152] *Bangerter*, 46 F.3d at 1503.

[153] Plaintiffs Motion for Relief from Judgment, *supra* note 132, at 12.

second prong of the test for a legally sufficient justification, cities would then bear the burden of showing that those interests could not be served by another policy with a less discriminatory effect. For example, even assuming that the aesthetic characteristic of a neighborhood constitutes a legally sufficient justification, a city could achieve that legitimate interest by providing free or volunteer cleanup services for nuisance yards, establishing a similar ordinance which includes protection from evictions, or protecting people with disabilities from enforcement.[154] Thus, even if a defendant jurisdiction can show that it has a substantial, legitimate, or non-discriminatory interest that is achieved through a CNO, the plaintiffs could prevail by identifying less discriminatory alternatives. Jurisdictions would *also* then have to show that they could not have reasonably accommodated people with disabilities impacted by the ordinances.[155]

Some fair housing advocates argue that the true purpose of CNOs is in fact a purely discriminatory one: to run people with disabilities out of town.[156] In case after case, courts have found that facially neutral land-use laws, such as exclusionary zoning laws, were applied as thin "pretext[s] for discrimination on the basis of disability."[157] While no court has yet found a CNO was enacted for a discriminatory purpose, the long history of invidious disability discrimination baked into facially neutral laws raises the concern that CNOs are simply intentional discrimination in disguise.

D. Challenging Selective Enforcement of CNOs Against People with Disabilities Under the FHA's Disparate Treatment Theory

The FHA prohibits both disparate treatment and disparate impact discrimination.[158] A disparate-treatment claim requires intentional discrimination and proof of "differential treatment of similarly situated persons or groups."[159] Under the FHA, a local government is liable for disparate treat-

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[154] Other potential legitimate interests are *already* served by existing, less discriminatory law. For example, neighbors may already use common-law torts to recover for damages caused by nuisance conduct and to deter future nuisance conduct.

[155] *See supra* Part III.E.

[156] *See* Telephone Interview with Samberg-Champion, *supra* note 133.

[157] Valley Hous. LP v. City of Derby, 802 F. Supp. 2d 359, 373 (D. Conn. 2011); *see, e.g.*, Moira J. Kinnally, *Not in My Backyard: The Disabled's Quest for Rights in Local Zoning Disputes Under the Fair Housing, the Rehabilitation, and the Americans with Disabilities Acts*, 33 VAL. U. L. REV. 581, 602–07 (1999); DISABILITY RIGHTS PA, DISCRIMINATORY ZONING AND THE FAIR HOUSING ACT 8–11 (2018), https://www.disabilityrightspa.org/wp-content/uploads/2018/04/DiscriminatoryZoningAndFHAAPRIL2018.pdf, *archived at* https://perma.cc/E24H-UXTS; Stewart B. McKinney Found., Inc. v. Town Plan & Zoning Comm'n of Town of Fairfield, 790 F. Supp. 1197, 1218 (D. Conn. 1992) ("[T]he Town has applied a facially neutral zoning requirement in a way that treats handicapped people, a protected class under Title VIII, differently than other unrelated family groups").

[158] *See* Mountain Side Mobile Estates P'ship v. Sec'y of HUD, 56 F.3d 1243, 1250 (10th Cir. 1995).

[159] Reinhart v. Lincoln County, 482 F.3d 1225, 1229 (10th Cir. 2007) (internal citations omitted).

ment if it selectively enforces nuisance ordinances against people because of a protected characteristic.[160] The FHAA extends those protections not only to people with disabilities that substantially impair major life functions, but also to residents who face discriminatory CNO enforcement because police officers or other city officials *perceive* them to have such a disability.[161] Thus, if a local government or its police department designates properties where people with disabilities live as nuisances, but does not sanction properties where people without disabilities commit similar conduct, the city may be liable for intentional discrimination.

Several examples of CNO enforcement in Section III suggest disparate treatment through discriminatory enforcement. For example, Bedford, Ohio officials explicitly discussed wielding a nuisance ordinance against a group home for children with disabilities to push an affiliated school "to pay for an off-duty city police officer."[162] Maplewood, Missouri revoked a resident's occupancy permit because of calls she made to a suicide crisis hotline.[163] Unfortunately, because the records the authors obtained only reveal where CNOs were enforced (and not when local governments used their discretion not to enforce CNOs for similar behavior), we do not yet have the information to show disparate treatment of similarly situated groups. With more data, however, future plaintiffs challenging CNOs may be able to show a violation of the FHA's prohibition on intentional discrimination.

E. Jurisdictions Have an Affirmative Duty to Reasonably Accommodate People with Disabilities

Even if a city can successfully defend a CNO from a facial challenge, the ordinance may violate fair housing law *as applied* to people with disabilities. The Fair Housing Amendment Act expanded the FHA's prohibition on unlawful discrimination to include refusals to make reasonable accommodations in rules, policies, and practices that are necessary to ensure a resident with disability's "equal opportunity to use and enjoy a dwelling."[164] Thus, housing providers or jurisdictions must make a "change, exception, or adjustment" to generally applicable policies (such as nuisance ordinances) that have a "different effect on persons with disabilities than on other persons," even if the policy is otherwise valid.[165] For example, a housing provider

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[160] *See, e.g.*, Schwarz v. City of Treasure Island, 544 F.3d 1201, 1216–17 (11th Cir. 2008) (discussing selective enforcement claims under the FHA); S & R Dev. Estates, LLC v. Town of Greenburgh, New York, 336 F. Supp. 3d 300, 307 (S.D.N.Y. 2018) (explaining that the Court denied a motion to dismiss a claim under the FHA for selective enforcement of a covenant).

[161] *See supra* Part IV.B.

[162] *See* MEAD ET AL., *supra* note 2, at 15.

[163] *See supra* Part II.B.

[164] 42 U.S.C. § 3604(f)(3)(B).

[165] U.S. DEP'T OF HOUS. AND URBAN DEV. & U.S. DEP'T OF JUSTICE, REASONABLE ACCOMMODATIONS UNDER THE FAIR HOUSING ACT 3, 6 (2004), https://www.justice.gov/sites/de-

would be required to make an exception to a generally valid "no pets" policy for people with disabilities who require assistance animals.[166] Likewise, a landlord may be required to "waive, in a given instance, fees generally applicable to all residents," such as parking fees for people with mobility impairments, to accommodate people with disabilities.[167] Similarly, a jurisdiction may enact a valid, generally applicable rule requiring leaseholders to keep properties tidy and setting aesthetic standards for the neighborhood, but the jurisdiction would have to make exceptions or adjustments for people with disabilities. The reasonableness of an accommodation is a fact-intensive inquiry "framed by the nature of the particular [disability]."[168] The FHAA thus imposes an affirmative duty on both landlords and municipalities to reasonably accommodate tenants with disabilities, including by making exceptions to facially neutral policies to meet disability-linked needs.

In the 2004 case *McGary v. Portland*,[169] the Ninth Circuit ruled that Portland, Oregon violated the FHAA when it failed to provide reasonable accommodations to a resident with a disability before enforcing the city's nuisance ordinance against him.[170] The court held that this denial violated the FHAA's reasonable accommodation requirement[171] and issued the first reported federal appellate decision finding that CNO enforcement violated federal civil rights law. The Ninth Circuit also reversed a lower court's dismissal of McGary's claim under Title II of the Americans With Disabilities Act (ADA),[172] noting that that CNO enforcement could be unlawful under the ADA's requirement that no qualified individual with a disability shall be "denied the benefits of the services, programs, or activities of a public entity" or otherwise subjected to discrimination by a public entity because of that disability.[173] *McGary v. Portland* thus shows that municipalities must make reasonable accommodations in enforcing their nuisance ordi-

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fault/files/crt/legacy/2010/12/14/joint_statement_ra.pdf, *archived at* https://perma.cc/U3W8-CM4B (noting that the Act applies to "[a]ny person or entity engaging in prohibited conduct—*i.e.*, refusing to make reasonable accommodations in rules, policies, practices, or services," including "individuals, corporations, associations . . . property owners, housing managers, homeowners and condominium associations, lenders, real estate agents . . . [and] state and local governments").

[166] NOTICE ON SERVICE ANIMALS AND ASSISTANCE ANIMALS FOR PEOPLE WITH DISABILITIES IN HOUSING AND HUD-FUNDED PROGRAMS FROM THE U.S. DEP'T OF HOUSING AND URBAN DEV. TO HUD REGIONAL AND FIELD OFFICE DIRECTORS (Apr. 25, 2013), https://archives.hud.gov/news/2013/servanimals_ntcfheo2013-01.pdf, *archived at* https://perma.cc/C4BV-RM3R.

[167] United States v. Cal. Mobile Home Park Mgmt. Co., 29 F.3d 1413, 1414 (9th Cir. 1994).

[168] Salute v. Stratford Greens Garden Apartments, 136 F.3d 293, 301 (2d Cir. 1998); *see also* Austin v. Town of Farmington, 826 F.3d 622, 630 (2d Cir. 2016) ("[R]easonableness analysis is "highly fact-specific, requiring a case-by-case determination.").

[169] 386 F.3d 1259 (9th Cir. 2004).

[170] *McGary*, 386 F.3d at 1263–64. For a detailed explanation of the facts, see *supra* Section III.C.

[171] *Id.* at 1262–63.

[172] *Id.* at 1269–70.

[173] *Id.* at 1265.

nances—perhaps by exempting conduct arising from a disability from their scope altogether.

V. Chronic Nuisance Ordinances Violate the Americans with Disabilities Act

A. Background

Congress passed the ADA in 1990 to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[174] Under Title II of the ADA, public entities have an obligation to ensure that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity."[175] The ADA defines public entity as any state or local government, or any instrumentality of a state or local government,[176] and courts have generally read the definition broadly to include entities like public schools and even local police departments.[177] Individuals with disabilities who are adversely impacted by CNOs can likely bring a claim under Title II of the ADA because they have been discriminated against in the provision of police and medical services.

B. Challenging CNOs under ADA Title II

1. Establishing a Prima Facie Claim of Discrimination under the ADA

To state a claim under Title II of the ADA, potential plaintiffs must demonstrate that (1) they are qualified individuals with disabilities; (2) they were excluded from participation in or denied the benefits of a public entity's services or were otherwise discriminated against by the public entity; and (3) the exclusion or discrimination was due to their disability.[178]

First, individuals with disabilities who run afoul of CNOs would be required to prove that they are "qualified individual[s]" with disabilities under the ADA to proceed with a discrimination claim. The ADA's language supports a broad definition of disability. Disability can refer to an individual with a "physical or mental impairment that substantially limits one or more major life activities," and it can also refer to an individual who is "regarded

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[174] 42 U.S.C. § 12101(b)(1) (2018).
[175] 42 U.S.C. § 12132 (2018).
[176] 42 U.S.C. § 12131(1) (2018).
[177] Gorman v. Bartch, 152 F.3d 907, 912 (8th Cir. 1998) ("A local police department falls squarely within the statutory definition of 'public entity,' . . . just like a state prison.") (internal quotation marks omitted).
[178] Parker v. Universidad de P.R., 225 F.3d 1, 5 (1st Cir. 2000).

as having such an impairment," whether that impairment actually limits or is perceived to limit a major life activity.[179] However, for practitioners bringing claims under the ADA, qualification may be the biggest hurdle they face: though the ADA's language is inclusive, many courts view disability as limited to serious physical and mental conditions.[180]

First, individuals who receive a nuisance citation and have a diagnosis of a physical or mental disability meet the ADA's definition of qualified individual, provided they can demonstrate their disability limits a major life activity.[181] Major life activities include but are not limited to "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."[182] For example, Emily Doe's documented diagnosis of bipolar disorder and manic depression, described in Part III.B, could qualify her for relief under the ADA,[183] but she would still have to prove that the disability impaired a major life activity. Other plaintiffs have pointed to sleep disruption and inability to think and concentrate as ways similar diagnoses affected a major life activity.[184]

As with the FHAA, individuals can also meet the ADA's qualification requirement if they can show they were mistakenly *perceived* to have a disa-

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[179] 42 U.S.C. § 12102(1), (3) (2018); *see also* 28 C.F.R. § 35.108 (2016) (implementing regulations for Title II).

[180] In the decade following the enactment of the ADA, the Supreme Court interpreted the Act as setting a high threshold for what kinds of conditions qualified as disabilities. *See* Laurence Paradis, *Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act: Making Programs, Services, and Activities Accessible to All*, 14 STAN. L. & POL'Y REV. 389, 405 (2003). In ADA Amendments Act of 2008, Congress stated that courts should construe disability in favor of "broad coverage." ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(1), 122 Stat. 3553, 3554 (codified as amended 42 U.S.C. § 12101). However, scholars have argued that lower courts still rely on old Supreme Court precedent to construe a narrow definition of disability, making it difficult for plaintiffs to qualify. *See* Deborah A. Widiss, *Still Kickin' after All These Years: Sutton and Toyota as Shadow Precedents*, 63 DRAKE L. REV. 919, 936–42 (2015).

[181] *See* 42 U.S.C. § 12102(1)(A) (2018). A court will determine on a case-by-case basis if a plaintiff has offered sufficient evidence that the limitation is substantial. *See, e.g.*, Millet Sanchez v. ACAA, 247 F. Supp. 2d 61, 69 (D.P.R. 2003) (finding plaintiff's schizophrenia was a major life impairment where plaintiff offered evidence that his thinking was impacted).

[182] 42 U.S.C. § 1202(2)(A) (2018). Scholars have noted that while the courts have taken steps to narrow the definition of who is protected, "significant populations of people . . . clearly are protected under Title II," including individuals with mental disorders, mobility issues, hearing and vision problems, and even HIV/AIDS. *See, e.g.*, Paradis, *supra* note 180, at 405; *see also* Bragdon v. Abbott, 524 U.S. 624, 639 (1998) (holding individual with HIV is protected under the ADA).

[183] *See* Duda v. Bd. of Educ., 133 F.3d 1054, 1059 (7th Cir. 1998) (holding manic depressive individual qualified under the ADA because manic depression is a "medically diagnosed mental condition[ ]," unlike "mere temperament").

[184] *See* Battle v. United Parcel Serv., 438 F.3d 856, 862 (8th Cir. 2006) (finding qualified disability where depression affected plaintiff's ability to concentrate); Rohan v. Networks Presentation LLC, 175 F. Supp. 2d 806, 813 (D. Md. 2001) (finding qualified disability where depression affected plaintiff's sleep).

bility by authorities of the public entity.[185] Courts have held that the congressional intent behind the phrase "regarded as" having a disability was meant to protect individuals from discrimination based on "myths, fears and stereotypes about disability, which may occur even where a person does not actually have an actual disability."[186] To the extent that enforcement decisions are based on a perception of disability—for example, in situations where neighbors may call the police on neighbors for acting "bizarrely"[187]—potential plaintiffs can argue that they are covered by the ADA.[188]

2. *Showing the Denial of Benefits of a Public Entity's Services Due to Disability*

Once an individual with a disability establishes she is qualified under the ADA, she must show that she was denied the benefits of a public entity's services because of her disability. Courts have construed the ADA's "services, programs, or activities" language to broadly encompass "anything a public entity does."[189] For municipalities and local police departments, the provision of emergency services would fall under the definition of "services" under the ADA.[190] CNOs create a chilling effect: individuals with disabilities are deterred from seeking medical assistance and other services because they know that doing so could lead to an eviction. This amounts to a constructive denial of emergency services for individuals with disabilities.[191]

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[185] *See* 42 U.S.C. § 12102(3)(A) (2018); *see also* Bonner v. Home Depot, 323 F. Supp. 2d 1250, 1261 (S.D. Ala. 2004), *aff'd* 125 Fed. Appx. 982 (11th Cir. 2004) (finding that, where there is no diagnosis, "it is necessary that a covered entity entertain misperceptions about the individual" to support liability); Thalos v. Dillon Cos., 86 F. Supp. 2d 1079, 1086 (D. Colo. 2000) (same); *supra* Part IV (discussing where disabilities may be implicated in police interaction but not diagnosed).

[186] Papadopoulos v. Modesto Police Dep't, 31 F. Supp. 2d 1209, 1218 (E.D. Cal. 1998).

[187] *See* Fond Du Lac case study in Part III, *supra*.

[188] *See, e.g.*, Dean v. Knowles, 912 F. Supp. 519, 522 (S.D. Fla. 1996) ("[A] finding of disability [is] dependent on the factual issue of the treatment of the Plaintiff at the hands of the [entity].").

[189] Seremeth v. Bd. of Cty. Comm'rs Frederick Cty., 673 F.3d 333, 338 (4th Cir. 2012) (holding Title II applies to police interrogations); Barden v. City of Sacramento, 292 F.3d 1073, 1076 (9th Cir. 2002) (holding Title II applies to sidewalk maintenance); Yeskey v. Pa. Dep't of Corr., 118 F.3d 168, 171 (3d Cir. 1997) (holding Title II applies to programs at correctional facilities).

[190] *See* Salinas v. City of New Braunfels, 557 F. Supp. 2d 777, 782 (W.D. Tex. 2008) (holding that "a municipality's 911 emergency services fall within the protections of the ADA" and noting that "[i]t is clear that the City, as an emergency responder, has a duty to provide such services to a person in peril").

[191] Constructive denial of services (e.g. in situations where an entity effectively denies a service through delay or making the service impossible to access) is prohibited under Title I of the ADA and is thus arguably applicable under Title II as well. *See* Logan v. Matveevskii, 57 F. Supp. 3d 234, 260 (S.D.N.Y. 2014) (noting that courts regularly look to Title I of the ADA for guidance in interpreting Title II and that "[i]t is thus reasonable to rely on Title I reasonable-accommodation case law in considering . . . Title II . . . claims as a general matter, as well as in the specific context of constructive denial").

Further, the implementing regulations of Title II state that public entities may not utilize methods of administration that "have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability" or "that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities."[192] If a municipality chooses to provide medical and other emergency services to its citizens, it cannot administer those services in a way that disincentivizes individuals with disabilities from accessing them.[193] To do so impairs the primary objective of emergency services, which is to provide assistance during medical crises. If emergency services come with a chronic nuisance citation and potential eviction, municipalities are administering them in a manner that contravenes their primary objective.

3. Provision of Emergency Services Does Not Modify the Fundamental Nature of Any Program, Nor Is It an Undue Burden

Providing individuals with disabilities equal access to emergency services does not require local police departments or municipalities to make drastic modifications of any kind. Courts have held that where making a modification in services would fundamentally alter the nature of the institution or create an undue burden, the public entity is not obliged to do so.[194] But municipalities will be hard-pressed to argue that either condition applies to providing individuals with disabilities emergency services. The essential point of emergency medical services is to improve public health and provide immediate treatment for the sick.[195] To decide that individuals who need assistance are burdening medical services would defeat the purpose of these programs.

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[192] 28 C.F.R. § 35.130(b)(3)(i)–(ii) (2019).

[193] Identical logic can be seen in Concerned Parents to Save Dreher Park Ctr. v. City of West Palm Beach, where the court held that, while the municipality had no obligation to offer the public recreational or leisure programs, once it chose to offer a recreational program, it could not administer it in a way that would cause harm to residents with disabilities. In this case, "administration" meant closure of the recreational facility. 846 F. Supp. 986, 991 (S.D. Fla. 1994).

[194] *See* 28 CFR § 35.130(b)(7) (2019); Easley v. Snider, 36 F.3d 297, 303 (3d Cir. 1994) (finding undue burden on care program where accommodation to support individuals who had a mental disability as opposed to just a physical disability would jeopardize the existence of the program); Rodriguez v. DeBuono, 44 F. Supp. 2d 601, 620 (S.D.N.Y. 1999) (finding no undue burden on state agencies where accommodation would mean modifying Medicaid program to offer safety monitoring program, which was comparable to already existing services).

[195] See Manish N. Shah, *The Formation of the Emergency Medical Services System*, 96 Am. J. Pub. Health 414, 415 (2006).

VI. Chronic Nuisance Ordinances Penalize People with Substance Use Disorders

Because definitions of nuisance behavior often include any criminal conduct occurring on or near a property, cities may declare homes chronic nuisances if residents are caught using or in possession of controlled substances. Some CNOs (also known as "drug house ordinances") specifically target manufacturing and use of controlled substances.[196]

Disturbingly, some jurisdictions with CNOs also declare homes nuisances on the basis of 911 calls for services related to potential drug overdoses. One study of CNO enforcement in four Ohio jurisdictions found that in three out of four towns studied, more than one in five properties were designated nuisances because of calls related to a drug overdose.[197] In one town, more than 40% of nuisance designations involved a drug overdose.[198] The following case studies illustrate how CNOs affect people with substance use disorders:

> ***Neenah, Wisconsin*:** The police department threatened to designate an apartment a nuisance after responding to two police calls over the course of four months.[199] The first call was for medical help after the tenant's boyfriend overdosed on heroin.[200] Her boyfriend, who had previously been in treatment for substance use disorder, was found without a pulse.[201] After paramedics revived him, the police charged him with possession of heroin and marijuana.[202] In February, he was charged again with simple possession.[203] Based on these charges, the police sent the tenants' landlord a notice that the apartment would be designated a nui-

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[196] *See, e.g.*, *Huntington City Council Unanimously Passes 'Drug House Ordinance'*, WSAZ3 (Sept. 11, 2017), https://www.wsaz.com/content/news/Huntington-City-Council-unanimously-passes-Drug-House-Ordinance-443849433.html, *archived at* https://perma.cc/7BRH-JZ49; Katie Kuba, *Landlords Question Drug House Ordinance*, The Record, (Sept. 24, 2018), https://therecorddelta.com/article/landlords-question-drug-house-ordinance, *archived at* https://perma.cc/RZA2-H98H; Nathan Tauger, *Drug House: A West Virginia Law Meant to Target Dealers May Punish Those Who Call for Help*, Rewire (Sept. 11, 2017), https://rewire.news/article/2017/09/11/drug-house-west-virginia-law-meant-target-dealers-may-punish-call-help/, *archived at* https://perma.cc/9ZPK-EKNX.

[197] Mead et al., *supra* note 2, at 11.

[198] *Id.*

[199] Letter from Neenah Police Dep't to Jerry and Kandis Calmes, Neenah landlords (undated) (on file with journal).

[200] William Mohr et al., Neenah Police Dep't, Incident Report, Incident No. NP12-014170 at 3 (Oct. 28, 2012) (on file with journal).

[201] *Id.* at 5.

[202] *Id.* at 2.

[203] Letter from Neenah Police Dep't to Jerry and Kandis Calmes, Neenah landlords (undated) (on file with journal).

sance, which the police urged her to "abate."[204] The landlord then issued a thirty-day eviction notice.[205]

***Lakewood, Ohio*:** On December 15, 2014, a man overdosed in his home.[206] Alerted by a 911 call, police and Emergency Medical Services (EMS) arrived at his home, where they found him unresponsive, administered Narcan,[207] and transported him to the hospital. Three weeks later, he overdosed at home again, and EMS officers again saved his life. But in February, the City sent his landlord a warning that the overdoses "qualifie[d] the property as a nuisance" under Lakewood Codified Ordinance 510.01 and that the landlord would be fined if the tenant called for help again.[208] The landlord began eviction proceedings immediately.[209]

***Stoughton, Wisconsin*:** The police designated a home a "drug nuisance" after charging four residents with simple possession of marijuana.[210] The police department's letter authorized the landlord to terminate the tenancy with a five-day notice and warned that, "if the drug activity continue[d]," the landlord could face severe penalties, including seizure of the property by the City.[211]

As these case studies indicate, CNOs can force landlords to evict people simply for using drugs, as in Stoughton, or who have overdosed, as in Lakewood or Neenah. While it is unclear whether the individual tenants in the Stoughton case study suffered from a substance use disorder, CNOs' broad application to all drug possession and use guarantees enforcement against many people who do.

CNOs also risk deterring people from calling for help when they experience or witness an overdose, thereby exacerbating an overdose epidemic that caused nearly 64,000 deaths in 2016 alone.[212] Overdose deaths generally occur one to three hours after a victim has initially used drugs,[213] leaving a short window during which emergency care can save a victim's life. An

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[204] *Id.*

[205] Abatement Record, City of Neenah (Feb. 13, 2013) (on file with journal).

[206] Letter from the Lakewood Law Dep't Office of Prosecution to Lakewood Landlord (name redacted) (Feb. 5, 2015) (on file with journal), *published in* MEAD ET AL., *supra* note 2.

[207] Narcan is a common brand of naloxone, medication used to reverse an opioid overdose.

[208] Letter from the Lakewood Law Dep't. Office of Prosecution to Lakewood Landlord (name redacted) (Feb. 5, 2015) (on file with journal), *published in* MEAD ET AL., *supra* note 2.

[209] MEAD ET AL., *supra* note 2, at 16.

[210] Letter from Allen Adams, Detective, Stoughton Police Dep't, to Steve Dickson, Stoughton landlord (Apr. 12, 2012) (on file with journal).

[211] *Id.*

[212] HOLLY HEDERGAARD et al., DRUG OVERDOSE DEATHS IN THE UNITED STATES, 1999–2016 1 (2017), https://www.cdc.gov/nchs/data/databriefs/db294.pdf, *archived at* https://perma.cc/Y2XA-D9FB.

[213] DRUG POLICY ALLIANCE, 911 GOOD SAMARITAN LAWS: PREVENTING OVERDOSE DEATHS, SAVING LIVES 1 (2016), http://www.drugpolicy.org/sites/default/files/DPA_Fact%20

opioid overdose can be reversed by naloxone, which is now routinely administered by paramedics and police officers to prevent overdose deaths.[214] CNO enforcement thus limits access to life-saving emergency care. According to public health research, the most common reason that people cite for not calling 911 while witnessing an overdose is fear of police involvement.[215] Many also say fear of losing housing is a significant deterrent.[216] If tenants believe they may be evicted if they call 911 for a possible overdose, they may hesitate to call until it is too late or may not call at all.

In cases about housing discrimination against people recovering from substance use disorders, federal courts have long recognized addiction as a disability that qualifies for protection under the FHAA.[217] HUD regulations implementing the FHAA specifically affirm that "drug addiction . . . and alcoholism" are impairments that can bring a person into the class protected by the statute.[218] But many people with substance use disorders fall into a wide statutory exemption: the Fair Housing Act specifically and explicitly excludes "*current*, illegal use of or addiction to a controlled substance" from its ambit of protection.[219]

Sheet_911%20Good%20Samaritan%20Laws_%28Feb.%202016%29.pdf, *archived at* https://perma.cc/9DGU-SW68.

[214] Corey S. Davis et al., *Expanded Access to Naloxone Among Firefighters, Police Officers, and Emergency Medical Technicians in Massachusetts*, 104 AM. J. PUB. HEALTH e7, e8 https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4103249, *archived at* https://perma.cc/FNE2-FSG7.

[215] Robin A. Pollini et al., *Response to Overdose Among Injection Drug Users*, 31 AM. J. PREVENTATIVE MED. 261, 262 (2006). *See generally* M. Tracy et al., *Circumstances of Witnessed Drug Overdose in New York City: Implications for Intervention*, 79 DRUG ALCOHOL DEPENDENCY 181 (2005).

[216] Amanda D. Latimore & Rachel S. Bergstein, *"Caught with a Body" Yet Protected by Law? Calling 911 for Opioid Overdose in the Context of the Good Samaritan Law*, 50 INT. J. DRUG POLICY 82, 86 (2017) (As one study participant told researchers, "[My landlord] don't want nobody using [drugs] in the house, and if he found out [that there was an overdose,] he would evict us, so that's another reason [not to call 911.]").

[217] *See, e.g.*, Pac. Shores Props., LLC v. City of Newport Beach, 730 F.3d 1142, 1156–57 (9th Cir. 2013) ("It is well established that persons recovering from drug and/or alcohol addiction are disabled under the FHA and therefore protected from housing discrimination."); Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown, 294 F.3d 35, 46–47 (2d Cir. 2002) (superseded by statute on unrelated grounds); Holy Ghost Revival Ministries v. City of Marysville, 98 F. Supp. 3d 1153, 1168–69 (W.D. Wash. 2015).

[218] HUD Definitions, 24 C.F.R. § 100.201(a)(2) (2008).

[219] 42 U.S.C. § 3602(h) (2018) (emphasis added). The legislative history of the FHAA suggests that Congress sought to distinguish between people whose current conduct (substance use) was prohibited by law, and people who formerly used substances, but are now are in recovery. For example, the House Report notes that "[t]his amendment is intended to exclude current abusers and current addicts of illegal drugs from protection under this Act. The definition of handicap is not intended to be used to condone or protect illegal activity . . . . Similarly, individuals who have a record of drug use or addiction but who do not currently use illegal drugs would continue to be protected if they fell under the definition of handicap. The Committee does not intend to exclude individuals who have recovered from an addition [sic] or are participating in a treatment program or a self-help group such as Narcotics Anonymous." H.R. Rep. No. 100-711, at 22 (1988). For this reason, HUD's implementing regulations protect people from housing discrimination on the basis of "drug addiction," except "addiction caused by current, illegal use of a controlled substance." HUD Definitions, 24 C.F.R. § 100.201 (2008).

Cases interpreting the FHAA rightly recognize that addiction is a disability and extend nondiscrimination protections to people in *recovery* for substance use disorder.[220] But the current statutory scheme prevents courts from extending that same protection to people who are currently using (or who are in recovery but relapse), such as the tenants targeted in Neenah, Lakewood, and Stoughton. To address this, the authors recommend that Congress amend the FHAA so that the law recognizes what medicine long has: substance use disorders are a disability.

VII. Chronic Nuisance Ordinances Violate the First Amendment Right to Petition for Services

Plaintiffs can bring several potential constitutional challenges to CNOs, including claims based on procedural due process,[221] equal protection,[222] and vagueness.[223] This section examines the claim that most specifically pertains to individuals with disabilities: challenging CNOs under the First Amendment. Individuals with disabilities who have been adversely impacted by

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[220] *See, e.g.*, *City of Newport Beach*, 730 F.3d at 1156; Campbell v. Minneapolis Pub. Hous. Auth. *ex rel.* Minneapolis, 168 F.3d 1069, 1072 n.1 (8th Cir. 1999) (holding federal statutes that prohibit handicap discrimination, including the Fair Housing Act, "afford some protection to past drug addicts, but do not protect individuals who currently use illegal drugs").

[221] Fair housing advocates have attempted to challenge CNOs on procedural due process grounds, based on some ordinances' failure to provide notice and provide an opportunity to be heard before denying people of their property interests (including tenants' interests in their leaseholds). *See, e.g.*, Brief of Amici Curiae ACLU et al. at 6–7, Bd. of Trustees of Groton v. Pirro, 152 A.D. 3d 149 (N.Y. App. Div. 2016) (No. 2015-0719) ("The ordinance ignores and violates tenants' due process rights in myriad ways, compounding the due process problems that landlords face . . . . The local law does not provide tenants with any notice or opportunity to be heard, thereby undermining tenants' and landlords' rights."). To the authors' knowledge, no federal court has ruled on the question, but some state courts have found that nuisance ordinances evict tenants without adequate process in violation of the Fourteenth Amendment's Due Process Clause. *See, e.g.*, Alcorn v. Muhammad, 66 N.Y.S.3d 819, 828, 831 (Sup. Ct. Monroe Cty. 2017) (finding that a Rochester nuisance ordinance arbitrarily deprived landlords and tenants of notice and therefore due process).

[222] Under the Fourteenth Amendment's Equal Protection Clause, advocates may be able to challenge CNOs under the theory that once a government decides to provide police and emergency services, the government may not discriminate in providing that service. *See, e.g.*, Estate of Macias v. Ihde, 219 F.3d 1018, 1028 (9th Cir. 2000) (noting arbitrary enforcement of police services can lead to an equal protection violation). However, a potential hurdle could be the requirement of proving discriminatory intent against individuals with disabilities. *See* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977).

[223] Advocates may also be able to challenge CNOs on vagueness grounds. The Due Process Clause of the Fourteenth Amendment requires that laws clearly define prohibited conduct in both criminal and civil contexts. *See* A.B. Small Co. v. American Sugar Refining Co., 267 U.S. 233, 239 (1925). CNOs that sanction "disorderly conduct" as a catch-all term are arguably unconstitutionally vague; a plaintiff with a disability could argue that this definition does not give any clear guidance as to what conduct is and is not allowed, putting too much discretion in the hands of law enforcement. *See* Elliot Oberholtzer, *Police, Courts, Jails, and Prisons All Fail Disabled People*, Prison Policy Initiative Blog (Aug. 23, 2017), *available at* https://www.prisonpolicy.org/blog/2017/08/23/disability/, *archived at* https://perma.cc/ZJH2-YQK6; *supra* Part IV.

CNOs can challenge them under the First Amendment in two ways. First, they can argue that the ordinance at issue violates the First Amendment on its face, and second, that the ordinance violates their First Amendment rights as applied.

The First Amendment includes the right "to petition the Government for a redress of grievances,"[224] which the Supreme Court has called "the most precious of the liberties safeguarded by the Bill of Rights."[225] Courts have repeatedly found that the right to petition protects a citizen's communications with law enforcement, which include calling for medical assistance and reporting assaults.[226] By hindering communication between individuals with disabilities and law enforcement, CNOs violate the First Amendment.

Potential plaintiffs can argue that CNOs facially violate the First Amendment because these ordinances impose penalties on individuals for engaging in the protected speech of communicating with law enforcement.[227] For example, South Milwaukee, Wisconsin's CNO imposes a penalty of up to $1,000 for offenses under the ordinance, which can include "generat[ing] three or more calls for City service for nuisance activities within a one-hundred-twenty-day period of time."[228] This type of penalty creates a chilling effect, dissuading people with disabilities from calling for emergency services in violation of their constitutional right to do so.

Further, individuals with disabilities who have been affected by CNOs can argue that ordinances violate the First Amendment as applied to their particular situations. For example, in a case filed in April 2019 by the ACLU of Ohio, plaintiff Beverly Somai called the Bedford, Ohio police to report that a neighbor was following and intimidating her and her son, who has

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[224] U.S. CONST. amend I. For a history of the right to petition, see Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 165–66 (1986). For additional information on how the right to petition may help victims of domestic violence impacted by CNOs, see Fais, *supra* note 23, at 1219–22.

[225] United Mine Workers v. Ill. Bar Ass'n, 389 U.S. 217, 222 (1967).

[226] *See, e.g.*, Meyer v. Bd. of Cty. Comm'rs, 482 F.3d 1232, 1243 (10th Cir. 2007) (holding that a denial of "the ability to report physical assaults is an infringement of protected speech"); Whisman v. Rinehart, 119 F.3d 1303, 1313 (8th Cir. 1997) (holding that "[g]overnment action designed to prevent an individual from utilizing legal remedies may infringe upon the First Amendment right to petition the courts") (internal citation omitted); Forro Precision, Inc. v. Int'l Bus. Machs., 673 F.2d 1045, 1060 (9th Cir. 1982) (holding communications with police are protected); Morris v. Dapolito, 297 F. Supp. 2d. 680, 692 (S.D.N.Y. 2004) (noting that "[i]t is axiomatic that filing a criminal complaint with law enforcement officials constitutes an exercise of the First Amendment right to petition government for the redress of grievances") (internal citation omitted).

[227] In *Watson v. City of Maplewood*, for example, the ACLU brought both a facial challenge alongside an as-applied challenge to Maplewood's CNO, arguing that the CNO "burden[ed] tenants' abilities to report crime" by imposing penalties, including banishment from the city. Complaint at 16, Watson v. City of Maplewood, No. 4:17-cv-01268 (E.D. Mo. Apr. 7, 2017), ECF No. 1. The challenge survived a motion to dismiss. *See* Watson v. City of Maplewood, No. 4:17CV1268 JCH, 2017 U.S. Dist. LEXIS 173944, at *16 (E.D. Mo. Oct. 20, 2017). The case ultimately settled in September 2018. *See Rosetta Watson v. Maplewood*, ACLU, *available at* https://www.aclu.org/cases/rosetta-watson-v-maplewood, *archived at* https:// perma.cc/JK8W-H6SA (last visited Apr. 14, 2019).

[228] SOUTH MILWAUKEE, WIS., MUN. CODE §§ 23.47, 23.99 (2016)

disabilities.[229] The police told Ms. Somai to stop calling and pressured her landlord to evict her under Bedford's CNO.[230] Ms. Somai stopped making calls to the police, even though the neighbor's behavior continued, and she was still evicted for violating the CNO.[231] When individuals like Ms. Somai and her son are actively penalized for exercising their First Amendment rights, they are unable to seek redress. Courts will view this type of violation as even more severe than a chilling effect.[232]

Ultimately, chilling and penalizing calls for assistance violates the First Amendment rights of individuals with disabilities and can endanger communities. Police will end up less informed about public safety concerns, and individuals discouraged from seeking medical treatment immediately may exacerbate their medical issues.[233]

VIII. Other Avenues for Reform

In Parts I-VII, this Note focused on the impact CNOs have on individuals with disabilities as well as potential legal challenges to these ordinances. Below, this Note briefly examines methods of reform outside of the sphere of impact litigation.

First, fair housing advocates are pushing to reform state and local laws to prohibit CNO enforcement against victims of domestic violence, other victims of crime, and individuals with disabilities. Illinois passed the first such law in 2015: S.B. 1547,[234] which was shaped by advocacy groups including the Shriver Center and the ACLU of Illinois.[235] Since 2015, the Shriver Center and the ACLU have helped implement S.B. 1547 by working

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[229] First Amended Complaint at 25–26, Somai v. City of Bedford, No.1:19-cv-00373 (N.D. Ohio Apr. 18, 2019), ECF No. 8.

[230] *Id.* 26–27.

[231] *Id.* at 27.

[232] For example, in *Estate of Morris v. Dapolito*, a police misconduct case, the district court stated that "the requirement of a chilling effect is inappropriate" where "the exercise of First Amendment rights allegedly caused the person exercising them to be subjected to severe punishment" and that "[s]uch summary punishment for the exercise of constitutional rights is clearly a more serious infringement of those rights than a mere chilling." 297 F. Supp. 2d 680, 694 (S.D.N.Y. 2004).

[233] *See, e.g.*, Ottensmeyer v. Chesapeake & Potomac Tel. Co., 756 F.2d 986, 993–94 (4th Cir. 1985) (noting that a chilling effect on information flow to police would cause them to be "handicapped in protecting the public").

[234] *See* S.B. 1547, 99th Gen. Assemb. (Ill. 2015), *available at* http://www.ilga.gov/legislation/billstatus.asp?DocNum=1547&GAID=13&GA=99&DocTypeID=SB&LegID=88215&SessionID=88, *archived at* https://perma.cc/26QG-XVWB.

[235] Kate Walz & Jenna Prochaska, *No One Should Be Punished for Calling 911: Responding to the Spread of Harmful Housing Ordinances in Illinois*, Clearinghouse Cmty. at the Sargent Shriver Nat'l Ctr. on Poverty Law (Oct. 2015), *available at* http://povertylaw.org/clearinghouse/stories/prochaska, *archived at* http://perma.cc/G5FB-HDS8. Coalition members spread awareness of the problems with CNOs and worked with Illinois Senator Toi Hutchinson to pass the legislation, eventually securing the support of law enforcement and landlord groups. The law passed after its scope was narrowed to just protect domestic violence victims and people with disabilities from CNO enforcement rather than protecting all victims of crime.

with municipalities to amend their CNOs.[236] Advocates found that one of the biggest challenges was getting municipalities to think about protections beyond the narrow carve-outs the bill mandated.[237] Further, the Illinois legislation creating an exemption for disability did not require any training to help officers understand when a disability may be the underlying cause of a police call.[238] Police officers are thus not equipped to carry out the new law. Further, because "disability" is not a police code there is no recording mechanism for these interactions, making it impossible to track the success of this law.[239]

The authors are also concerned that legislative reforms are insufficient because our research found multiple instances of CNO enforcement violating exemptions written into the law. For example, in Madison, Wisconsin, the CNO states that domestic abuse "shall not be included as Nuisance Activities" unless the City Attorney specifically determines otherwise, and the City Attorney "shall consider the strong public policy in favor of domestic victims reporting alleged abuses, and this ordinance shall not operate to discourage such reports."[240] Despite this policy, the authors found at least eight instances in which citations were issued to Madison properties based in part on a call relating to domestic violence.[241]

This research suggests that statutory exemptions are insufficiently protective in general, and the authors' records gathered from Madison, Wisconsin show that they are not uniformly applied. Ultimately, there is little reason to believe that disability-related exemptions will be effective in preventing these ordinances from harming individuals with disabilities.

State and local legislatures could similarly exempt from CNOs drug offenses and 911 calls related to overdoses, possibly by extending "Good Samaritan" laws to the housing context. Good Samaritan laws encourage overdose victims and witnesses to seek medical care, typically by providing

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[236] Telephone Interview with Amy Meek, Staff Attorney, ACLU of Ill. (Nov. 30, 2018).
[237] *Id.*
[238] *Id.*
[239] *Id.*
[240] MADISON, WIS., CODE OF ORDINANCES § 25.09(3)(b)(2).
[241] Letter from Captain Joe Balles, South Police Dist., Madison Police Dep't to Dewayne Pohl, ACC Mgmt. (Oct. 22, 2015) (on file with journal); Letter from Captain Joe Balles, South Police Dist., Madison Police Dep't to Sheng Tian (July 22, 2015) (on file with journal); Letter from Captain Joe Balles, South Police Dist., Madison Police Dep't to James P. Mulligan, Esq. (Feb. 16, 2015) (on file with journal); Letter from Captain Joe Balles, South Police Dist., Madison Police Dep't to Paul and Melanie Sims (Nov. 13, 2014) (on file with journal); Letter from Captain Joe Balles, South Police Dist., Madison Police Dep't to David and Tracy Smith (Dec. 12, 2013) (on file with journal); Letter from Captain Joe Balles, South Police Dist., Madison Police Dep't Park to House Associates, LLC (Sep. 24, 2013) (on file with journal); Letter from Captain Joe Balles, South Police Dist., Madison Police Dep't to Edward G. Scherer (Aug. 6, 2013) (on file with journal); Letter from Captain Joe Balles, South Police Dist., Madison Police Dep't to Anthony and Jennifer Jakacki (Mar. 18, 2013) (on file with journal). These letters appear to be standard form citations for nuisance properties. They do not indicate whether the city in fact complied with the statute and subjected each of these cases to individualized review by the City Attorney or whether the City Attorney disregarded the policy, and if so, why.

people who call 911 with amnesty from criminal prosecution for being under the influence, simple drug possession, or possession of drug paraphernalia.[242] Existing Good Samaritan laws focus narrowly on amnesty from criminal charges; they do not address the risk that calling 911 will result in eviction.[243] However, research analyzing the effectiveness of Good Samaritan laws has found that the police and the public are often unaware of the statutory exceptions, meaning that officers may still arrest witnesses or overdose victims in violation of state law.[244]

Federal guidance from HUD can provide lawyers, policymakers, and housing providers with valuable information about how the agency views the law. Though guidance memos do not have the force of legal decisions or statutes, they still carry substantial weight with judges. In 2016, HUD issued guidance about how CNOs can harm victims of domestic violence[245] and noted that subsequent guidance would be released to address disability-based discrimination.[246] However, as of the publication of this Note, subsequent guidance has not been released. It is also possible that the Trump Administration will rescind the Obama-era CNO guidance as part of a broader rollback of fair housing rules. In the future, HUD ought to issue detailed guidance regarding CNO enforcement against people with disabilities.

Finally, municipalities should consider decoupling welfare or wellness checks from police services. Cities like Eugene, Oregon have developed programs in which teams of crisis counselors who are specifically trained to de-escalate mental health crises are first responders to certain kinds of welfare checks—not the police.[247] Such reform could help reduce interaction between police and individuals with disabilities, which often ends violently.[248] Grassroots efforts have also sprung up to develop alternatives to calling the police and to educate community members about other ways to assist their

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[242] Justin Peters, *When Junkies Deserve a Pass,* SLATE (Aug. 18, 2015), https://slate.com/news-and-politics/2015/08/good-samaritan-drug-laws-they-save-lives-and-more-states-should-pass-them.html, *archived at* https://perma.cc/7RX2-88P7.

[243] For example, Washington State's Good Samaritan Law states that "[a] person acting in good faith who seeks medical assistance for someone experiencing a drug-related overdose shall not be charged or prosecuted for possession of a controlled substance . . . , or penalized . . . , if the evidence . . . was obtained as a result of the person seeking medical assistance." WASH. REV. CODE ANN. § 69.50.315(1) (2015).

[244] *See* CJ Banta-Green et al., *Washington's 911 Good Samaritan Drug Overdose Law - Initial Evaluation Results*, ALCOHOL & DRUG ABUSE INST., UNIV. OF WASHINGTON 3 (2011), http://adai.uw.edu/pubs/infobriefs/ADAI-IB-2011-05.pdf, *archived at* https://perma.cc/76RD-WT9R; Peters, *supra* note 242.

[245] KANOVSKY, *supra* note 13, at 5.

[246] *Id.* at 1.

[247] *See* Zusha Elinson, *When Mental-Health Experts, Not Police, Are the First Responders*, WALL ST. J. (Nov. 24, 2018), https://www.wsj.com/articles/when-mental-health-experts-not-police-are-the-first-responders-1543071600, *archived at* https://perma.cc/N7DX-CLDS.

[248] For example, mental illness played a role in 25% of the cases of individuals shot by police in 2017. *See Fatal Force*, WASH. POST, https://www.washingtonpost.com/graphics/national/police-shootings-2017/, *archived at* https://perma.cc/SDV8-E8YV.

neighbors and keep their communities safe.[249] However, these are not permanent fixes to the underlying civil rights violations caused by CNOs, which would still be on the books if these interventions are applied.

IX. Conclusion: Reform is Not Enough

Chronic nuisance ordinances have pernicious effects and make communities more dangerous for people with disabilities. This Note has examined situations where people with disabilities have to make an impossible choice between risking eviction or foregoing potentially life-saving medical help, where CNO enforcement has put group homes at risk, and where municipalities have refused to grant reasonable accommodation exceptions to individuals with disabilities trying to maintain their properties. People with disabilities already face greater housing instability than the general population[250]—and CNOs exacerbate this problem.

CNO enforcement directly violates civil rights law and constitutional rights. CNOs violate the FHAA because they have an adverse, disparate impact on people with disabilities and, in some jurisdictions, may be enforced in a discriminatory manner. They violate the ADA because they are an illegal denial of a public entity's services to people with disabilities. They violate the constitutional right to petition for services under the First Amendment. More broadly, through the enforcement of CNOs, jurisdictions are violating their affirmative duty to reasonably accommodate the people with disabilities in their communities. Legislative reforms and HUD guidance may blunt some of the effects of CNOs by requiring exemptions, but these limited remedies are far from sufficient. CNOs unjustly punish people with disabilities simply for having a disability, frustrating the core purpose of fair housing law—and must be repealed entirely.

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[249] *See, e.g.*, *Abolish The Police? Organizers Say It's Less Crazy Than It Sounds,* Chi. Reader (Aug. 25, 2016), https://www.chicagoreader.com/chicago/police-abolitionist-movement-alternatives-cops-chicago/Content?oid=23289710, *archived at* https://perma.cc/6TB4-XM5B (noting that "volunteer facilitators . . . make themselves available to help resolve conflicts for neighbors and friends seeking alternatives to calling the cops"); *see also* Aaron Rose, *What to Do Instead of Calling the Police* (July 15, 2018), *available at* http://www.aaronxrose.com/blog/alternatives-to-police, *archived at* https://perma.cc/G3G2-P9GK (suggesting resources including community-based crime prevention toolkits, mental health trainings, conflict resolution).

[250] *See* Disability, Employment & Homelessness 2012 Policy Statement, National Health Care For The Homeless Council 1 (Sept. 2011), http://www.nhchc.org/wp-content/uploads/2011/09/Disability-2012.pdf, *archived at* https://perma.cc/76D3-EQP3 (noting that disability "causes and prolongs homelessness" and that while 15% of the U.S. population has a disability, people with disabilities constitute 37% of people who are homeless in the U.S.).