

June 27, 2023

Council of the District of Columbia
Committee on the Judiciary & Public Safety
1350 Pennsylvania Ave, NW
Washington, DC 20004
Re: Testimony of EPIC on Bill B25-0291

Dear Chairman Mendelson and Council Members:

EPIC writes and will testify in person to urge you not to enact Titles V and VI of the Safer Stronger Amendment Act of 2023, Bill B25-0291.¹ DC enacted electronic monitoring by GPS ankle bracelet as part of a system that does not use cash bail. In some cases, electronic monitoring may be appropriate. But the system requires careful safeguards and scrutiny from this Council to ensure that electronic monitoring does not swallow up the substantial benefits to public safety and public health derived from a cashless bail system. The proposed changes would require all DC supervisory agencies to turn over GPS data from ankle monitors to police without a warrant and to make that data admissible at trial. These changes undermine the purpose of electronic monitoring and erode privacy protections for everyone.

The Electronic Privacy Information Center (EPIC) is a public interest research center established in 1994 to focus public attention on emerging privacy and civil liberties issues.² EPIC has long advocated for strong privacy protections for location data.³ EPIC regularly advocates for strong limits on — and meaningful oversight of — advanced surveillance technologies.⁴

Title V § (a) of the proposed bill would change the law to make GPS data from any form of electronic monitoring, pre-trial, civil commitment, and post-trial/probation admissible in “any judicial proceeding”. Pretrial agency records, including historical location data, are not currently admissible at trial to preserve the role of these agencies in providing supportive services to people in the criminal justice system.⁵ Title VI would amend the policy for all DC supervisory agencies, including the Department of Youth Rehabilitation Services, to turn over GPS data and other data collected from electronic monitoring without a warrant, effectively giving the Metropolitan Police Department unfettered access to extraordinarily sensitive data.

The District of Columbia currently tasks four different agencies with monitoring different groups of people through GPS surveillance. The Pretrial Services Agency (PSA) oversees around 9,000 people each day who have been arrested and granted conditional release with pretrial monitoring before their case is adjudicated. These people, who have not been convicted of any

¹ <https://legiscan.com/DC/bill/B25-0291/2023>.

² EPIC, *About EPIC*, <https://epic.org/epic/about.html>.

³ See EPIC, *Location Tracking*, <https://epic.org/issues/data-protection/location-tracking/>.

⁴ See EPIC, *Surveillance Oversight*, <https://epic.org/issues/surveillance-oversight/>.

⁵ D.C. Code §23-1303(d).

crime, are evaluated for dangerousness using an algorithmic risk assessment. There are serious transparency concerns with the PSA, which does not publish data on how many people are assigned electronic monitoring as a part of supervised release, or what conditions are regularly required of defendants. The Department of Youth Rehabilitation Services imposes curfews and travel restrictions on children in the criminal justice system that are enforced using GPS ankle monitors.⁶ The Social Services Division of the District of Columbia Superior Court, a branch of the DC Family Courts, also subjects children to electronic monitoring in its Delinquency Prevention Unit and as a part of routine case management.⁷ Finally, the Court Supervision and Offender Services Agency monitors adults who have been released post-conviction before they serve a term in prison or after they are released on parole. None of these units provides the public with transparent information about how many people they surveil, or are clear about whether juveniles, defendants, or parolees must pay for their own electronic monitoring. No provision of the District of Columbia Code authorizes or prohibits agencies from charging for GPS monitoring services.⁸

Despite problems with transparency, DC's current model of pretrial support is working well. Changes to the way the agency supervises arrestees that blur the line between police and Pretrial Services risk disturbing a model program that has led the nation for three decades. Pre-trial recidivism rates in the DC are exceptionally low in a system that releases 93 percent of defendants before trial.⁹ Only 5 percent of defendants are rearrested before trial and only 2 percent are rearrested for violent crimes.¹⁰ The proposed changes would have no positive impact on public safety because they consider only historical GPS data, useable for investigations but not emergency response. Lowering the barriers to surveilling and investigating people on electronic monitoring has several demonstrable negative impacts, and few, if any, benefits to the public.

A. The Council should not weaken protections around location data for anyone, including people on supervised release.

EPIC has written extensively about the extraordinary sensitivity of location data, how this data can reveal the most intimate parts of a person's life.¹¹ A history of a person's movements can reveal your religious practices, medical and reproductive healthcare decisions, sexuality or gender

⁶ Dep't of Youth Rehabilitation Services, *Electronic Monitoring*, <https://dyrs.dc.gov/service/electronic-monitoring>.

⁷ District of Columbia Courts, *Supervision Services*, <https://www.dccourts.gov/superior-court/family-social-services/supervision-services>; *Id.* Delinquency Prevention Unit, <https://www.dccourts.gov/superior-court/family-social-services/delinquency-prevention-unit>.

⁸ Fines and Fees Justice Center, *Electronic Monitoring Fees: A 50-State Survey of the Costs Assessed to People on E-Supervision* at 11 (Sept. 2022), <https://finesandfeesjusticecenter.org/content/uploads/2022/09/FFJC-Electronic-Monitoring-Fees-Survey-2022.pdf>; Adult federal parolees in the DC area are required to pay the costs of their GPS ankle bracelets. U.S. Probation Office for the District of Columbia, *Supervision Orientation Handbook* at 16 (Nov. 2018), https://www.dcp.uscourts.gov/sites/dcp/files/Supervision_Orientation_Handbook.pdf.

⁹ Pretrial Services Agency, *It's About Results, - Not Money* (Dec. 2022), <https://www.psa.gov/sites/default/files/It%27s%20About%20Results%20Not%20Money-FINAL-12-2022.pdf>.

¹⁰ *Id.*

¹¹ See EPIC, *Location Tracking*, <https://epic.org/issues/data-protection/location-tracking/>.

identity any many more intimate details.¹² At a time when GPS surveillance is becoming increasingly common through smartphone app tracking and the expansion of electronic monitoring in the criminal justice and immigration systems, maintaining strong bulwarks against harmful surveillance and abuse is critical to protecting the public.

The landmark Supreme Court case *Carpenter v. United States* imposed just such a bulwark, ruling that the government must obtain a warrant before accessing historical geolocation data from cellular service providers.¹³ Title VI would allow the Metropolitan Police Department an end-run around *Carpenter* for anyone under electronic monitoring, including vulnerable populations like children in the criminal justice system. While this change will certainly be harmful for people on pre-trial release, probation, etc., it also erodes hard-fought rules imposing limits on government surveillance.

Without careful oversight and legislative scrutiny, government surveillance systems tend to grow over time—expanding who the system monitors, how much it monitors people, and what that data can be used for. Scholars call this process mission creep, the slow expansion of what a law enforcement agency does with the ever-present temptation to use powerful surveillance technologies.¹⁴ The Council should be careful to prevent mission creep in DC’s supervised release system.

The Council can prevent mission creep by limiting police access to historical GPS data to the times that police can get a valid search warrant. That would reduce the entanglement between police investigations and social services agencies meant to support people in the criminal justice system. To be clear, this rule would not hamstring police. A warrant requirement is reasonable limit that serves to ensure police have probable cause to suspect a person of wrongdoing, helping to prevent abuses of power and unjustified surveillance. Maintaining separation between DC’s supervisory agencies and police investigations can make those agencies more effective at their jobs while preventing police from conducting fishing expeditions and other unnecessary surveillance. Expert-recognized best practices for electronic monitoring include strictly limiting electronic monitoring and enacting strong data protection including warrant requirements for police searches¹⁵

B. The Council should not introduce perverse incentives into the pre-trial release system.

The proposed rules also introduce inappropriate incentives into the pre-trial release system by giving prosecutors a potential new source of evidence. DC’s cashless bail system works better than a cash bail system because it simplifies and improves the way judges make decisions on pretrial release. When considering releasing someone from jail, both prosecutors and judges should only

¹² Jennifer Valentino-Devries et al., *Your Apps Know Where You Were Last Night, and They’re Not Keeping It Secret*, N.Y. Times (Dec. 10, 2018), <https://www.nytimes.com/interactive/2018/12/10/business/location-data-privacy-apps.html>.

¹³ EPIC, *Carpenter v. United States*, <https://epic.org/documents/carpenter-v-united-states-2/>.

¹⁴ See e.g. Jennifer Granick et al., *Mission Creep and Wiretap Act Super Warrants: A Cautionary Tale*, 52 Loy. L. A. L. Rev. 431 (2018-2019).

¹⁵ ACLU, *Rethinking Electronic Monitoring: A Harm Reduction Guide* (2022), <https://www.aclu.org/report/rethinking-electronic-monitoring-harm-reduction-guide>.

consider the risks to that person and to the community.¹⁶ But allowing police and prosecutors easy access to GPS data, and making that data automatically admissible at trial, distorts that decision-making process by giving prosecutors an incentive to request electronic monitoring in virtually every case. From a prosecutor’s perspective, requesting electronic monitoring under the proposed regime would have virtually no risks and many possible benefits. From this perspective, if the police do not obtain any evidence from the ankle bracelet, there is no harm done. But if they do get potentially incriminatory evidence, that evidence may be difficult to rebut and automatically admissible.

EPIC’s recent study on risk assessments in DC found that despite years of improvements, DC’s pretrial risk assessment tool continues to exhibit racial biases, meaning that electronic monitoring is already disproportionately harmful to Black and Brown communities.¹⁷ Adding more perverse incentives to a system that is already biased will not improve outcomes. The potential to generate new evidence is not an appropriate consideration for conditions on a person’s freedom. Rather, the question should be: does the defendant pose an unacceptable risk to the community unless they are subjected to 24/7 GPS surveillance? If the answer is no, that defendant should not be forced to wear an ankle monitor.

C. The Council should be taking steps to reduce the burden of electronic monitoring, not increase it.

While EPIC recognizes that there may be some instances where electronic monitoring is appropriate, the substantial weight of the evidence shows that electronic monitoring can be deeply harmful to people in similar ways to incarceration. The Council should not add an additional layer of surveillance—and stress—onto an already vulnerable population. One of the most comprehensive studies on ankle monitoring from George Washington University found that electronic monitoring restrict people’s movements, limits their privacy, undermines their family and social relations, jeopardizes employment and housing, and subjects people to arbitrary rules that are unevenly enforced.¹⁸

Electronic monitoring creates high levels of stress from constant surveillance and frequently glitchy technology, leading to anxiety, depression, and higher risks of suicide.¹⁹ People wearing

¹⁶ Nicole Zayas Manzano, *The High Price of Cash Bail*, American Bar Assn. (Apr. 12, 2023), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/economic-issues-in-criminal-justice/the-high-price-of-cash-bail/ (“Americans can both strengthen the justice system and avoid the costly consequences of current law by (1) requiring that judges make decisions about pretrial release and detention based on evidence and due process rather than money as a proxy for who goes home; (2) ensuring that pretrial detention is the rare, limited exception, as the U.S. Supreme Court has emphasized; and (3) investing in solutions that address people’s basic needs as they return to their communities while their cases are pending.”).

¹⁷ Tom McBrien, Ben Winters, Enid Zhao, and Virginia Eubanks, *Screened and Scored in the District of Columbia* at 15, EPIC (Nov. 2022), <https://epic.org/wp-content/uploads/2022/11/EPIC-Screened-in-DC-Report.pdf>.

¹⁸ Kate Weisburd, *Electronic Prisons: The Operation of Ankle Monitoring in the Criminal Legal System*, George Washington University Law School (2021), <https://issuu.com/gwlawpubs/docs/electronic-prisons-report?fr=sOGI5NDcxODg3>.

¹⁹ James Kilgore, Emmett Sanders, and Kate Weisburd, *The Case Against E-carceration*, The Inquest (Jul. 30, 2021), <https://inquest.org/the-case-against-e-carceration/>; Bail for Immigration Detainees, Medical Justice, and Public Law Project, *Every Move You Make: The Human Cost of GPS Tagging in the Immigration*

ankle monitors must worry about system errors flagging them as violating conditions of release, leading to police or social services interacting with the monitored person or their family.²⁰ And the available evidence shows that electronic monitoring does not increase rates of court appearances or reduce re-arrest rates.²¹

Adding an additional layer of surveillance on to a system that already creates stress will exacerbate the worst impacts of electronic monitoring. Enacting Titles V and VI would not just impact people under supervised release, it will also increase surveillance of their friends, family, and associates. A GPS record of one person's movements can also serve as evidence for the person driving with them in a car, or living with them, like a parent or sibling. This is especially harmful for children currently on electronic monitoring, who may worry about triggering searches and arrests of family members. These are overwhelmingly likely to be children in poor and marginalized communities who are already bearing the brunt of a criminal justice system that disproportionately targets them.²²

Reducing barriers to accessing historical GPS data also magnifies the documented risk of abuse. Rogue police officers across the country have been caught using police databases, including databases of location data for inappropriate and dangerous uses including stalking and harassment.²³ The risk of abuse certainly exists in the Metropolitan Police Department. Earlier this year, an officer in the MPD's intelligence branch was charged with leaking confidential information to convicted Proud Boys leader Enrique Tarrío.²⁴ Enforcing a warrant requirement for this extraordinarily sensitive data, data that is often collected from children, would substantially reduce the risk of abuse.

System (Oct. 2022), https://hubble-live-assets.s3.amazonaws.com/biduk/file_asset/file/692/GPS_Tagging_Report_Final_1.pdf (finding “the potential for significant psychological harm” from mandatory electronic monitoring for immigration detainees);

²⁰ Chicago Community Bond Fund, Punishment Is Not a “Service”: The Injustice of Pretrial Conditions in Cook County (Oct. 24, 2017), (see pages 2, 6, 11, and 14 for case studies on the stress and tangible harms of electronic monitoring), <https://perma.cc/BRN8-HGZ7>; ACLU, *Rethinking Electronic Monitoring* at 7-9.

²¹ Chicago Appleseed Center for Fair Courts & Chicago Council of Lawyers, 10 Facts About Pretrial Electronic Monitoring in Cook County (Sept. 2021), https://www.chicagoappleseed.org/wp-content/uploads/2021/11/202109_10-Facts-EM-Cook-County-EM-FINAL-updated.pdf, (finding no statistically significant difference between people released on personal recognizance and electronic monitoring in 2016-18).

²² ACLU, *Rethinking Electronic Monitoring* at 7-8 (reporting that electronic monitoring is disproportionately assigned to, and disproportionately impacts, Black and Brown communities).

²³ Joseph Cox, *US Marshal Charged for Using Cop Phone Location Tool to Track People He Knew*, Vice (Jun. 14, 2022), <https://www.vice.com/en/article/k7bqew/us-marshal-securus-phone-location-tracked>; Sadie Gurman, *AP: Across US, police officers abuse confidential databases*, Associated Press (Sept. 18, 2016), <https://apnews.com/article/699236946e3140659fff8a2362e16f43> (finding more than 350 instances of police officers abusing access to sensitive law enforcement databases); *Officer fired after using database to look up ex-girlfriends, prospective dates, officials say*, Associated Press (Aug. 4, 2021), <https://www.nbcnews.com/news/us-news/officer-fired-after-using-database-look-ex-girlfriends-prospective-dates-n1275952>;

²⁴ Jaclyn Diaz, *A D.C. police lieutenant is accused of tipping off a leader of the Proud Boys*, NPR (May 19, 2023), <https://www.npr.org/2023/05/19/1177111254/washington-dc-lieutenant-charged-proud-boys-enrique-tarrio>.

Conclusion

To avoid re-creating the harms of a cash bail system that overly incarcerated the poor and marginalized populations, the Council should be vigilant in cabining electronic monitoring to cases strictly necessary and reducing the impacts of electronic monitoring as much as possible. But the proposed legislation would do the opposite, subjecting people to more surveillance with demonstrated negative impacts on mental health, relationships, and access to work. And expanding warrantless access to location data normalizes a level of surveillance that both courts and the public finds unacceptable. We urge the Council to protect citizens by declining to enact changes to electronic monitoring through Titles V and VI of the Safer Stronger Amendment Act of 2023.

Thank you for the opportunity to testify, please reach out with any questions to EPIC Counsel Jake Wiener at wiener@epic.org.

Sincerely,

Jake Wiener
Jake Wiener
EPIC Counsel