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Statement on behalf of the
American Civil Liberties Union of the District of Columbia
before the
D.C. Council Committee on the Judiciary and Public Safety
Public Hearing Regarding
Bill 25-0479, the Addressing Crime through Targeted Interventions and Violence Enforcement ("ACTIVE") Amendment Act of 2023
by
Monica Hopkins, Executive Director
November 8, 2023

Good morning, Chairperson Pinto and members of the Committee on the Judiciary and Public Safety. I am Monica Hopkins, Executive Director of the American Civil Liberties Union of the District of Columbia. On behalf of our over 14,000 members in all 8 wards, the ACLU of the District of Columbia submits the following testimony opposing Bill 25-0479, the ACTIVE Amendment Act.

The ACLU of D.C. strongly opposes this legislation and urges the Committee not to move it forward. Provisions that would expose District residents on parole, supervised release, or probation for gun offenses to suspicionless and warrantless searches when they are out in public would erode crucial protections against government abuse of power and open the door to broad, unfocused searches that would be a poor use of police resources. Meanwhile, the Act's proposed permanent changes to District law regarding pretrial detention and speedy trials will needlessly grow the number of people held in unacceptable detention conditions, add to already lengthy trial delays for defendants in detention, and narrow judicial discretion when people are presumed innocent of a crime. Finally, the Act's broadening of the definition of carjacking is unnecessary and illustrates the problematic nature of piecemeal legislating when it comes to criminal offenses. This is not the right approach to public safety and risks further eroding trust in a criminal legal system that already produces inequitable results. We urge the Committee not to move forward with this legislation, as it does not represent the approach that is needed to keep people safe.

The Legislation's Warrantless Search Provisions Open the Door to Abuses of Power

The Act provides that individuals who have been convicted of a gun offense and are on parole, supervised release, or probation "shall be subject to search or seizure by a law enforcement officer at any time of the day or night, with or without a search warrant or with or without cause, when that person is in a place other than the

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person's dwelling place, place of business, or on other land possessed by the person."[1] Furthermore, language in Section 7 of the Act could subject certain individuals who have been charged with – but not convicted of – certain crimes to similar searches as a condition of their pre-trial release.[2] These two provisions would effectively subject categories of District residents to warrantless, suspicionless searches when they are out in public. The Act's warrantless search language is problematic for several reasons, including its potential to harm the returning citizens who could be subjected to it and the possibility that it will lead to infringements on the rights of the broader District population.

As a threshold matter, by allowing individuals who fall into the categories outlined in the legislation to be searched "with or without cause" in nearly any setting, the bill takes away meaningful protection against police abuses of power. In a free society, baseline protections against unreasonable searches and seizures are not simple formalities – they exist to prevent the government from using one of its most intrusive and traumatizing powers to harass people through groundless and/or repeated searches. The Council should be extremely hesitant to throw away safeguards against abuse of power in the name of perceived safety.

Given that this language applies directly to returning citizens, it is particularly important to consider how relaxing safeguards against abusive search tactics risks disrupting re-integration into their communities. Returning citizens in the District already face significant challenges as they try to rebuild their lives. Data show that of the individuals who were under the supervision of the Court Services and Offender Supervision Agency's (CSOSA's) Community Supervision Program at the end of FY22 (September 30, 2022),[3] 62.1% were considered employable, and of

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[1] Bill 25-0479, Addressing Crime through Targeted Interventions and Violence Enforcement ("ACTIVE") Amendment Act of 2023, Sec. 2 (2023), available at: https://lims.dccouncil.gov/downloads/LIMS/53873/Introduction/B25-0479-Introduction.pdf?Id=175953

[2] *Id.* at Sec. 7.

[3] "The Court Services and Offender Supervision Agency's (CSOSA's) Community Supervision Program (CSP) supervises adults released by the Superior Court of the District of Columbia on probation, those released by the U.S. Parole Commission on parole or supervised release, as well as a smaller number of individuals subject to Deferred Sentencing Agreements (DSA) or Civil Protection Orders (CPOs)." Court Services and Offender Supervision Agency Community Supervision Program, Congressional Budget Justification Fiscal Year 2024, p. 3 (March 9, 2023), available

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those, only a little more than half (54.3%) were employed.[4] CSOSA reports that "about 3 in 10 offenders" lack a GED or high school diploma.[5] And, in a report on homelessness among returning citizens, the D.C. Fiscal Policy Institute cited a 2019 assessment stating that 57 percent of individuals experiencing homeless in the District had previously been incarcerated, with 55 percent reporting that incarceration caused their homelessness.[6] As our returning citizens attempt to re-establish their support networks, become employable, and find and maintain jobs and stable housing, creating an atmosphere in which categories of returning citizens can be stopped and searched without cause by any Metropolitan Police Officer while they are on their way to work or school, at a family member or friend's home, or out in the community will only work to destabilize their daily lives and impede their progress. Further, it sends a deeply problematic message: that we are willing to leave entire groups of returning citizens more vulnerable to harassment and barriers to re-integration. The D.C. Council and the Mayor should be looking for additional ways to support and invest in the progress of individuals on parole,

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at: https://www.csosa.gov/wp-content/uploads/bsk-pdf-manager/2023/03/CSP-FY2024-Congressional-Budget-Justification-03092023-1.pdf

Some general population information: "On September 30, 2022, CSP supervised 6,901 individuals, including 4,439 probationers, 2,180 offenders on supervised release or parole, 174 defendants with DSAs, and 108 individuals with CPOs. Approximately 5,000 of those under supervision reside in the District of Columbia, representing about 1 in every 110 adult residents of the District.3 The remaining supervised offenders, defendants, or individuals reside in another jurisdiction, and their cases are monitored by CSP per the Interstate Compact Agreement (ICA)." Court Services and Offender Supervision Agency Community Supervision Program, Congressional Budget Justification Fiscal Year 2024, p. 4 (March 9, 2023), available at: https://www.csosa.gov/wp-content/uploads/bsk-pdf-manager/2023/03/CSP-FY2024-Congressional-Budget-Justification-03092023-1.pdf

[4] Court Services and Offender Supervision Agency Community Supervision Program, Congressional Budget Justification Fiscal Year 2024, p. 40 (March 9, 2023), available at: https://www.csosa.gov/wp-content/uploads/bsk-pdf-manager/2023/03/CSP-FY2024-Congressional-Budget-Justification-03092023-1.pdf

[5] *Id.* at 40-41

[6] Kate Coventry, Coming Home to Homelessness (February 27, 2020), available at: https://www.dcfpi.org/all/coming-home-to-homelessness/#_ednref3

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supervised release, or probation. Giving the police the power to stop and search them indiscriminately is actively harmful to helping them reintegrate into District communities.

It is also worth noting that, if the goal of this legislation is to create safe communities and target alleged criminal behavior, it is difficult to understand how allowing the government to search people for no reason helps to achieve that goal. Data on MPD's current "stop and frisk" tactics already suggests that stopping individuals is not an effective method of removing weapons from the streets: ACLU analysis of data on MPD stops found that "only 1.0% of all stops and 2.2% of all non-traffic stops led to the recovery of a firearm in 2020."[7] Even when narrowing the analysis to look only at stops that resulted in searches, the percentage of these interactions resulting in the seizure of a gun was quite low: 6.7% in 2020.[8] Simply, put "stop and frisk" tactics do not recover weapons in the vast majority of circumstances. Given this reality, lowering the standard for conducting searches on categories of District residents runs contrary to what the evidence tells us about the overall effectiveness of this tactic.

Finally, those harmed by warrantless search powers will likely not be limited to those within the categories outlined by the bill. Reducing protections around searches for some has the potential to harm *everyone* – and especially harm District residents from communities that already disproportionately experience problematic interactions with the police. To understand why, Councilmembers need to look beyond the "tough on crime" rhetoric surrounding this legislation and bills like it and ask themselves this: On a practical level, how would the search provisions in this bill be implemented?

The legislation allows police to search certain categories of returning citizens without a warrant or cause but offers no guidance on how officers are to determine whether an individual who they see in the community falls within those categories. In practice, it will not be immediately obvious whether an individual who an officer sees in the community is a returning citizen, let alone whether they are on parole,

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[7] ACLU Analytics & ACLU of the District of Columbia, Racial Disparities in Stops by the Metropolitan Police Department: 2020 Data Update (2021), available at: https://www.acludc.org/en/racial-disparities-stops-metropolitan-police-department-2020-data-update#:~:text=This%20update%20analyzes%20the%20stops,stop%20data%20have%20not%20changed.

[8] *Id.*

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supervised release, or probation for the specific types of offenses that could trigger warrantless, causeless searches. Because community members who would be subject to the bill's search language are unlikely to be obviously distinguishable from the vast majority of community members who are not, the bill incentivizes police to interact with community members – whether they have engaged in criminal behavior or not – in order to see if they can bypass basic search protections that apply to the broader population. In short, the bill opens a broader population of people to unnecessary and potentially inappropriate interactions with police.

The potential for harassment – of both returning citizens and members of the broader community alike – has broader implications. As we have noted before, if we want to address public safety challenges in the District, we must confront the ways in which inappropriate police tactics and interactions corrode trust between communities and the individuals who are sworn to protect them.[9] Passing a law that subjects certain residents to searches "with or without cause" simply reinforces the message that it is acceptable to lower basic standards for police behavior, that procedural protection are a convenience, and that our leaders do not expect police to be both effective and accountable at the same time. It also reduces pressure on MPD to ensure that it is conducting searches in a focused way that makes the best use of finite resources. At a time when we face important public safety challenges, the Council should be ensuring that when police target individuals for the use of the Government's vast power, they have a clear, articulable reason for doing so. Anything less opens the door to misuse and abuse of power.

The Bill's Expansion of Pre-Trial Detention Will Not Achieve Public Safety

Under the due process clause of the Constitution, no one can be denied their liberty without due process of law. The United States Supreme Court has said liberty is the norm and detention is the carefully crafted exception.[10] Individuals charged with a

[9] *See*, American Civil Liberties Union of the District of Columbia, Statement on behalf of the American Civil Liberties Union of the District of Columbia before the D.C. Council Committee on the Judiciary and Public Safety Public Roundtable on the Matter of the Nomination of Pamela A. Smith to the Position of Chief of the Metropolitan Police Department by Monica Hopkins, Executive Director, pp. 6-8 (September 27, 2023), available at: https://lims.dccouncil.gov/downloads/LIMS/54102/Oversight_Hearing_Record/HR25-0093-Oversight_Hearing_Record.pdf?Id=178529

[10] United States v. Salerno, 481 U.S. 739, 755 (1987).

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crime are presumed innocent and the burden is traditionally on the government to justify why an individual's liberty should be taken away. This bill makes major changes to current law regarding pre-trial detention, including expanding the rebuttable presumption of detention to all unarmed crimes of violence; lowering the level of proof required for a rebuttable presumption of detention; and narrowing judicial discretion at the beginning of proceedings when individuals are presumed innocent of a crime.

These proposed changes would drive up the jail population and balloon taxpayer spending on incarceration without improving public safety. The ACTIVE Act would make it much easier to detain people pretrial when they are presumed innocent. The bill also creates a rebuttable presumption of detention for some misdemeanors and for other offenses that in most instances do not pose a risk to public safety, turning our system of justice on its head by presuming guilt instead of innocence. Furthermore, the bill would attack the right to a speedy trial, meaning that people who are presumed innocent will wait even longer for trials to move forward.

The legislation also expands the rebuttable presumption of detention to all unarmed crimes of violence and labels misdemeanor sexual abuse a crime of violence. This means that there will be a rebuttable presumption of pretrial detention for conduct such as slapping the butt of a nonconsenting adult. Individuals would also be subject to a rebuttable presumption of detention for the charge of robbery, which can include snatching something that is merely near the complainant or pickpocketing. Stealing a bike from a porch, which constitutes burglary in the second degree, would also be called a crime of violence and included in the rebuttable presumption of detention. Individuals can currently be detained for all of these charges under current law, making the creation of a presumption that would inevitably lead to the excessive use of detention unnecessary.

If enacted, the legislation would lower the level of proof required for a rebuttable presumption of detention in specific cases. Under the legislation, only probable cause would then be required for a rebuttable presumption of detention. According to the Public Defender Service, individuals who are held under this statute routinely spend two to three years in detention before ever having a trial. Lowering the standard of proof required for pretrial detention would greatly increase the number of people subject to detention – potentially for long periods of time – throughout the District.

Additionally, the bill effectively narrows judicial discretion at a stage in proceedings when individuals are presumed, and may be, innocent of a crime. Especially at this stage, judges should be able to carefully consider the totality of the circumstances

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and balance factors related to public safety against the damaging effects of incarceration. By requiring judges to include written findings of fact and a written statement of the reasons for release, this will create a chilling effect on judges. The burden of persuasion never shifts; it is on the Government to justify detention at all times.[11] This is an attempt to pressure judges into holding people when the government has not met its burden to justify detention by forcing written findings that would require more work, strain judicial resources, and further subject them to scrutiny. District judges already have broad discretion under current law to order detention and hold individuals accountable. These proposed changes should not be taken lightly and should not be implemented.

There are fundamental values at stake any time legislation seeks to narrow judicial discretion in this area. Presumptive pre-trial release should be the norm and the conditions of pre-trial release should be narrowly tailored. Pre-trial detention is a deprivation of liberty and makes an assumptive determination of guilt, based on previous actions, absent due process. As per the American Bar Association's general guidelines on Pre-Trial release, the law favors pre-trial release and the determination to hold an individual pre-trial should be made by a judge or judicial officer based on a number of conditions carefully considered by the court. The court can, and does, already consider previous convictions as one of the factors in determining pre-trial release.

There is a mismatch between the goal of improving public safety and making more people subject to pre-trial detention. Pretrial releases in the District are not driving crime: 92 percent of people released from pretrial are not rearrested and only 1 percent are rearrested for a violent offense while awaiting trial.[12] Beyond the District, data from other jurisdictions suggest that policy changes leading to increases in the rates of defendants released pretrial did not harm public safety, and further, that pre-trial detention can increase rearrest rates. Even short periods of unnecessary detention increase a person's risk of re-arrest: a 2023 study

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[11] *Johnson v. U.S.*, 23-CO-0649 (D.C. 2023), https://www.dccourts.gov/sites/default/files/2023-09/Johnson%20v%20US%2023-CO-649%20published%20judgment.pdf.

[12] Pretrial Services Agency for the District of Columbia, Congressional Budget Justification Fiscal Year 2024, p. 25 (March 9, 2023), available at: https://www.csosa.gov/wp-content/uploads/bsk-pdf-manager/2023/03/PSA-FY2024-Congressional-Budget-Justification-03092023.pdf.

suggested that "spending more than 7 days in pretrial detention was associated with an increased probability of a new arrest and new violent arrest earlier."[13]

Finally, this legislation significantly weakens those rights by allowing judges to give prosecutors long extensions, where under current law extensions can only be granted in 20-day increments. Individuals who are held pending trial for most offenses have a right to be indicted within 90 days and a right to trial within 100 days. The bill weakens the limitations on judges granting extensions by presuming good cause for an extension for "defense motions" and forensic testing requested within a reasonable period. In practice, this would lengthen the amount of time individuals would be held, almost guaranteeing that their speedy trial rights would be violated.

If passed, this bill could make the District less safe. Instead of passing this legislation, the Council and District leaders should focus on building a comprehensive public safety system that focuses on prevention, effectiveness, and accountability.

The Bill's Expansion of the Definition of Carjacking is Unnecessary

In addition to the provisions above, the legislation also makes further changes to the criminal code, most notably, broadening the definition of carjacking.

Under current law, carjacking carries a mandatory minimum sentence of seven years if unarmed and 15 years if armed.[14] As the Criminal Code Reform Commission notes in its testimony, these penalties reflect, not only the seriousness of stealing someone's car, but the way in which carjacking violates the sense of privacy and safety that people feel in their vehicles.[15].

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[13] Ian Silver, Jason Walker, Matthew DeMichele, and Ryan Labrecque, Does Jail Contribute to Individuals Churning in and Out of the Criminal Legal System? A Quasiexperimental Evaluation of Pretrial Detention on Time Until New Arrest (July 7, 2023). Available at SSRN: https://ssrn.com/abstract=4503725 or http://dx.doi.org/10.2139/ssrn.4503725.

[14] DC Code § 22–2803

[15] D.C. Criminal Code Reform Commission, Testimony of Executive Director Jinwoo Park on B25-0479 the "Addressing Crime Through Targeted Interventions and

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The bill, however, broadens the definition of carjacking to apply, not just to situations in which a person takes possession of a car itself by force or violence, but also, situations in which a person uses force or violence to take possession of car *keys* with purpose of taking a car. Such behavior is already criminalized,[16] but this expanded definition of carjacking would erase distinctions among types of behaviors that do not present the same types of harms. A person who steals car keys far away from the location of the relevant vehicle is not engaging in the same behavior as someone who forces their way into a car with a driver and passengers inside. Our criminal system should (and does) contemplate penalties for both sets of behaviors, but treating them the same for the purposes of prosecution and sentencing does not appropriately reflect the differences in the nature of the offenses.

The proposed carjacking definition change is illustrative of what is wrong with the broader approach taken by recent criminal justice bills that make changes to offenses and penalties: layering piecemeal criminal code changes on top of an already-flawed criminal code. The District's criminal code already suffers from a number of problems, including overlapping offenses for the same behaviors and disproportionate penalties, which in turn, can lead to inconsistent results and disproportionate criminal sentences.[17] Because policymakers have only updated our criminal statutes in piecemeal fashion over several decades, the code lacks a basic framework to ensure a coherent, proportionate approach to offenses and penalties.[18] This has made our criminal code difficult to navigate and continually risked public trust in the fairness of our criminal legal system.

The ACLU of D.C. understands that recent Congressional meddling in the District's affairs has made comprehensively addressing these fundamental flaws of our criminal code difficult. We opposed such meddling at the time and continue to do so now. However, the ACTIVE Amendment Act and other recent bills that amend the

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Violence Enforcement Amendment Act of 2023, p. 22 (November 8, 2023), available at: https://lims.dccouncil.gov/Hearings/hearings/147

[16] As the CCRC notes, a defendant who steals car keys by force and subsequently steals the car can be prosecuted under existing statutes for robbery and theft. *Id*.

[17] *See*, Charles Allen, Report on B24-0416, the "Revised Criminal Code Act of 2022," pp. 3-7. (October 26, 2022), available at: https://lims.dccouncil.gov/downloads/LIMS/47954/Committee_Report/B24-0416-Committee_Report1.pdf?Id=148331

[18] *See*, *Id*.

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code appear to represent a return to the type of piecemeal lawmaking in this area that has made our criminal code so problematic. Building a scheme of criminal laws that is clear, internally consistent, distinguishes among different types of behaviors that cause different harms, and takes a proportional approach to penalties is crucial to public safety. Doing so makes it more likely that our criminal legal system produces fair and consistent results, and further, builds public trust. Piecemeal criminal code changes risk exacerbating our current system's inequities. The Council should not continue to engage in piecemeal changes, as doing so will move us further away from a criminal legal system that is truly consistent with public safety and security.

Instead of Passing this Legislation, the Council and the Mayor Should Implement Already-Existing Recommendations for Improving Public Safety

If the Council's goal is to address public safety concerns in ways that will lead to lasting safety and security for communities across the District, bills like the ACTIVE Amendment Act are not the way to accomplish that goal. The District cannot arrest and incarcerate its way to safety and attempts to do so will only further ruin lives, splinter communities, and erode trust between residents and the District's public safety apparatus – ultimately undermining its ability to keep us safe. However, the good news is that bills like the ACTIVE Amendment Act are not the only option.

The last several years have yielded a wealth of recommendations for how policymakers can improve public safety in ways that are more directly responsive to community needs. The Police Reform Commission, for example, has offered a range of recommendations for how to address a full spectrum of the District's public safety challenges. These recommendations have included investing in non-police responses to individuals in crisis, bolstering safety net services (particularly for individuals experiencing behavioral health challenges or who are vulnerable to homelessness), scaling up and improving coordination of violence interruption programming, and ensuring that young people receive the social service and mental health supports they need.[19] At the ACLU of D.C., we have also published a Crisis Response Policy Platform containing recommendations specifically focused on

[19] District of Columbia Police Reform Commission, Decentering Police to Improve Public Safety: A Report of the DC Police Reform Commission, pp 15-28 (April 1, 2021), available at: https://dccouncil.gov/police-reform-commission-full-report/

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meeting the needs of people when they are in a mental health crisis.[20] Recommendations such as those found in the Police Reform Commission's report and the Crisis Response Policy Platform seek to accomplish a number of things. They attempt to bolster programming and interventions that will address instability and potential conflict in communities before they escalate to the level of public safety threats. They attempt to stand up responses to immediate crises that match District residents with responders who can de-escalate tense situations and link residents to appropriate services and supports. And they attempt to reduce the potential for inappropriate interactions between police and community members that corrode community trust in policing. The Council and the Mayor should both be devoting their full energy to grappling with these recommendations and figuring out how to operationalize them.

Conclusion

The ACLU of D.C. thanks the Committee for the opportunity to testify today. We once again urge the Committee not to move forward with this legislation, as it is not the approach to protecting public safety that District residents need or deserve. We are happy to work with the Committee on a comprehensive, proactive approach to public safety that respects and values the rights of D.C. residents and is focused on prevention, effectiveness, and accountability.

[20] *See*, https://www.dccrisisresponse.org/