

March 5, 2020

Hon. Mayor Bill de Blasio
City Hall
New York, NY 10007
Via Email and U.S. Mail

Re: Electronic Monitoring's Dangerous Impact

Dear Mayor de Blasio,

We, the undersigned organizations, write to express concerns over your administration's expansion of electronically monitoring New Yorkers awaiting trial. Electronic monitoring tools began with the promise of releasing Americans from jail, but these tools are now shackling many who would otherwise have been set free. Effective and equitable bail reform must not saddle those it was meant to help with greater burdens. We oppose any expansion of electronic monitoring, and we highlight the most important constraints needed for such a program below.

The benefits of bail reform must not be undermined by electronic monitoring.

New York State law puts tens of thousands at risk of electronic monitoring each year, including many who are only charged with, not convicted of, misdemeanors.¹ In 2018 alone, more than 77,000 New York City residents were arrested for felonies, and more than two-thirds of these arrests were for non-violent offenses.² This staggering number does not even include qualifying misdemeanors.

For those who have not even had their day in court, electronic monitoring is a daunting punishment. New forms of electronic monitoring reveal more than a user's location, and devices can even impact co-workers, friends, and loved ones. The technology is a waste of money; individuals released without electronic monitoring appear in court and avoid rearrests at the same rate.³ Electronic monitoring is just a different form of incarceration, turning individuals' homes into cells,⁴ limiting

¹ N.Y. Crim. Proc. Law § 500.10(21).

² N.Y. State Division of Criminal Justice Services, *Adult Arrests: 2009–2018* (2019), <https://www.criminaljustice.ny.gov/crimnet/ojsa/arrests/nyc.pdf>.

³ See James Kilgore et al., *No More Shackles: Why We Must End the Use of Electronic Monitors for People on Parole* 5 (2018), https://mediajustice.org/wp-content/uploads/2019/05/NoMoreShackles_ParoleReport_UPDATED.pdf; Marie VanNostrand et al., Pretrial Justice Inst., *State of the Science of Pretrial Release Recommendations and Supervision* 24–27 (2011), <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=47063a15-8e11-461e-6ee5-cc109b053b08>.

⁴ See James Kilgore, *The Spread of Electronic Monitoring: No Quick Fix for Mass Incarceration*, Truthout (July 30, 2014), <https://truthout.org/articles/the-spread-of-electronic-monitoring-no-quick-fix-for-mass-incarceration/>; Kilgore et al., *supra* note 3, at 5–6.

where and when wearers can travel.⁵ Wearers are effectively tethered to electrical outlets, fearful that a dead device battery might mean a return to jail.⁶

Bail's sole legitimate purpose is to ensure those charged with crimes appear for their day in court.⁷ Prior to New York's recent reforms, Black and Latinx New Yorkers were effectively imprisoned by poverty.⁸ But when electronic monitoring is the price of release, wearers pay a steep price. Electronic Monitoring causes physical and psychological trauma and impairs getting and maintaining employment. Just like incarceration, electronic monitoring pressures innocent New Yorkers to falsely plead guilty rather than endure continued monitoring.⁹ And, like the cash bail system before, low-income New Yorkers are disproportionately impacted.

For these reasons, electronic monitoring should only be considered under the most extreme circumstances as an alternative to incarceration. Location tracking must not be normalized for the countless New Yorkers who will appear in court without such draconian measures.

Electronic monitoring devices can track far more than a user's location.

Electronic monitoring raise profound Fourth and Fifth Amendment concerns. Not only is location tracking highly invasive and completely unnecessary in most criminal cases, but electronic monitoring can do far more, recording calls and conversations without users' consent or knowledge.¹⁰ Wearers become walking wiretaps—recording themselves and anyone nearby. Devices could capture sensitive conversations, such as consultations with attorneys or healthcare providers. Some jurisdictions even use this capability to record children.¹¹

⁵ See M.M., *Living with an Ankle Bracelet*, Marshall Project (July 16, 2015, 12:31 PM), <https://www.themarshallproject.org/2015/07/16/living-with-an-ankle-bracelet>; Kilgore, *supra* note 4; see also Kilgore et al., *supra* note 3, at 9.

⁶ See Claire Chevrier, Opinion, *Costly, Coercive GPS Monitoring Devices Are Not the Solution to Cash Bail Reform*, Cleveland.com (Sept. 15, 2019), <https://www.cleveland.com/opinion/2019/09/costly-coercive-gps-monitoring-devices-are-not-the-solution-to-cash-bail-reform-claire-chevrier.html>; Ava Kofman, *Digital Jail: How Electronic Monitoring Drives Defendants Into Debt*, ProPublica (July 3, 2019, 5:00 AM), <https://www.propublica.org/article/digital-jail-how-electronic-monitoring-drives-defendants-into-debt>; M.M., *supra* note 5.

⁷ See *How Courts Work: Bail*, A.B.A. (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/bail; *What is Bail?*, Legal Aid Soc'y, <https://www.legalaidnyc.org/get-help/bail-incarceration/bail-definition> (last updated Nov. 6, 2019).

⁸ Emma Whitford, *New York Democrats on Eliminating Cash Bail: Not If, But How*, Gotham Gazette (Feb. 1, 2019), <https://www.gothamgazette.com/state/8245-new-york-democrats-on-eliminating-cash-bail-not-when-but-how>.

⁹ Chevrier, *supra* note 6; Kofman, *supra* note 6; see also M.M., *supra* note 5.

¹⁰ Debra Cassens Wiss, *GPS Ankle Monitors Can Call and Record People Without Consent; Do They Violate 5th Amendment?*, A.B.A. J. (Apr. 9, 2019, 11:39 AM), <http://www.abajournal.com/news/article/electronic-monitoring-devices-can-call-and-record-people-accused-of-crimes-without-their-consent>.

¹¹ See, e.g., Kira Lerner, *Chicago Is Tracking Kids with GPS Monitors that Can Call and Record Them Without Consent*, The Appeal (Apr. 8, 2019), <https://theappeal.org/chicago-electronic-monitoring-wiretapping-juveniles>; see also *Electronic Monitoring Program*, Cook Cty. Sheriff, <https://www.cookcountysheriff.org/cook-county-department-of-corrections/electronic-monitoring-program-placement> (last visited Feb. 4, 2020).

Excessive location monitoring is unlawful and dangerous.

An individual's location "provides an intimate window . . . [revealing] his 'familial, political, professional, religious, and sexual associations.'"¹² With more and more-precise location data, what that window reveals comes into clearer relief.¹³ In those extreme cases where electronic monitoring is used as a substitute for pretrial detention, monitoring is legally permissible only to ensure the wearer returns to court and complies with release conditions. Location tracking must be narrowly tailored to the conditions of release. For example, a monitoring device could be set to only record location data in the event that the wearer failed to appear in court. Similarly, a device could be set to only activate during the period of a curfew order or when the wearer enters a proscribed, stay-away zone. Any location tracking beyond these limited terms would be unsupported by the legal justification for requiring such electronic monitoring in the first place.

Electronic monitoring devices that injure wearers must not be used.

Many electronic monitoring devices can injure wearers and cause an array of medical complications. Devices have been reported as causing cuts and bruises,¹⁴ hair loss,¹⁵ and headaches.¹⁶ They have electrically shocked their wearers.¹⁷ And they have impaired both their wearers' ability to breathe¹⁸ and their blood circulation.¹⁹ New Yorkers should not be forced to choose between their health and freedom.

Electronic monitoring must not hijack users' cell phones and tablets.

Some electronic monitoring firms install tracking software on users' smart devices. These applications use the same location tracking capabilities that commercial entities routinely deploy to track phone users' movements and target them with advertisements.

These products can be less stigmatizing than highly visible tracking devices, but they can have significant privacy and economic impacts. Many phone-based applications record users' biometric information²⁰ without disclosing how that data is saved or shared. Applications may access other

¹² *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018) (quoting *United States v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring)).

¹³ See *id.* at 2217–18 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

¹⁴ Jens Manuel Krogstad, *Monitoring Bracelets Removed for Health Reasons*, *Courier* (July 28, 2009), https://wfcourier.com/news/local/monitoring-bracelets-removed-for-health-reasons/article_44c1d128-bffa-540a-98bb-6e071bec46fa.html; see also M.M., *supra* note 5.

¹⁵ Ruthie Epstein, *ICE Is Using an Alternative to Immigrant Detention. But It's Inhumane.*, *Wash. Post* (Sept. 5, 2018, 2:56 PM), <https://www.washingtonpost.com/news/theworldpost/wp/2018/09/05/trump-immigrants-2>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ M.M., *supra* note 5.

²⁰ Robert S. Gable, *Let's Stop Using Ankle Bracelets to Monitor Offenders*, *IEEE Spectrum* (July 20, 2017, 3:00 PM), <https://spectrum.ieee.org/consumer-electronics/portable-devices/lets-stop-using-ankle-bracelets-to-monitor-offenders>.

information saved on users' devices, and they can exhaust their data allowance and battery life. These impacts are quite substantial, especially for low-income device users, and are a completely inappropriate way to punish New Yorkers who have not yet had their day in court.

Criminal justice reform requires New York to drastically reduce the number of our neighbors in confinement, not simply change the way in which they are confined. The nation looks to New York City for leadership on progressive policing, and we urge you to have the courage to stand for truly progressive pre-trial practices.

Sincerely,

1. American Arab Anti-Discrimination Committee
2. The Bronx Freedom Fund
3. California Coalition for Women Prisoners
4. Center for Human Rights and Privacy
5. Council on American-Islamic Relations, New York (CAIR-NY)
6. Common Cause/NY
7. DRUM - Desis Rising Up & Moving
8. Electronic Frontier Foundation
9. Equal Justice Under Law
10. Equality Labs
11. Fight for the Future
12. Freedom to Thrive
13. Illinois Coalition to Challenge Electronic Monitoring
14. JustLeadership USA
15. Lucy Parsons Labs
16. Media Justice
17. Mothers Against Wrongful Convictions
18. National Action Network
19. National Lawyers Guild
20. Policing and Social Justice Project at Brooklyn College
21. Red Canary Song
22. Restore The Fourth
23. Surveillance Technology Oversight Project
24. Tenth Amendment Center
25. The Urban Justice Center, Mental Health Project
26. Worth Rises