



**CIVIL RIGHTS
CORPS**



**WASHINGTON
LAWYERS'
COMMITTEE
FOR CIVIL RIGHTS & URBAN AFFAIRS**

MEMORANDUM

To: DC Council Legislative Directors

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Re: Constitutional Concerns with Anti-mask and Drug Free Zone Sections of Secure DC Omnibus Bill

Date: February 28, 2024

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I. INTRODUCTION / SUMMARY

The Secure DC Omnibus Bill seeks to revive two laws that the DC Council (“the Council”) has repealed and rejected in the past for good reason. The drug free zone and anti-mask provisions of the bill would redundantly punish conduct that is already criminalized while giving the Metropolitan Police Department (“MPD”) more license to harass, arrest, or physically harm innocent people for simply living their lives.

Supreme Court precedent is clear: “The Constitution does not permit a legislature to set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.” *City of Chicago v. Morales*, 527 U.S. 41, 60 (1999) (citation omitted). With expanded powers, MPD will inevitably generate a large volume of criminal prosecutions for harmless and mundane behavior like wearing a mask or failing to disperse. None of this exertion will reduce crime or violence in DC. Instead, it will lead to extensive civil rights litigation challenging the constitutionality of the provisions themselves as well as every stop, search, arrest, and use of force these provisions produce.

The Council should strike the drug free zone and the anti-mask provisions from the Secure DC Omnibus Bill to protect DC residents from unnecessary harm and prevent needless strain on our court systems’ limited capacity and resources. Alternatively, the Council should, at a minimum, adopt the proposed amendments below.¹

Drug Free Zone Provisions	Anti-Mask Provision
<p>Require officers to have probable cause to believe a crime has been committed before issuing a dispersal order: amend line 2032 to replace “reasonably believes” with “has probable cause to believe.”</p> <p>Make clear that community members do not need an “apparent lawful reason” to be outside in drug free zones so long as they are not engaged in criminal activity: strike lines 2053-55 (§ 5(b)(6)), which read:“(6) Such person has no other apparent lawful reason for congregating in the drug free zone, such as waiting for a bus, being near one’s own residence, or waiting to receive medical or social services.”</p>	<p>Amend lines 1090-1093 to read “It shall be unlawful for any person under 18 years of age, while wearing a non-medical, non-religious mask as to conceal the identity of the wearer if the intent of the person is to;”</p> <p>Strike “civil or” from line 1094;</p> <p>Strike line 1105, which reads, “Intimidate, threaten, abuse, or harass any other person;”</p> <p>Add the following language: “(b) This section shall not apply to a person wearing a mask: (1) For a religious purpose; (2) For a medical purpose (3) While engaged in a trade or employment where the wearing of a mask is for the physical safety of the wearer; (4) For the</p>

¹ The Council should be aware that the broader Us Not Crimnibus coalition will be proposing additional alternative amendments to the drug free zone provisions that seek to mitigate the harms of these provisions. We support those amendments as well, but focus here on the bare minimum changes the Council must make to protect DC residents’ constitutional rights. Above all, we maintain that the best course forward is to completely strike the anti-mask and drug free zone provisions from the Secure DC Omnibus bill.

<p>Make clear that neither a person’s drug-related criminal history nor their purported gang member status—in isolation or combined—can serve as the basis for a dispersal order: strike lines 2050-52 (§ 5(b)(4-5)), which read: “(4) Such person is physically identified by the officer as a member of a gang or association which engages in illegal drug activity; “(5) Such person is a known unlawful drug user, possessor, or seller;” strike lines 2056-58 (§ 5(b)(7)), which read: “(7) Any vehicle involved in the observed circumstances is registered to a known unlawful drug user, possessor, or seller, or a person for whom there is an outstanding arrest warrant for a crime involving drug related activity.”</p>	<p>purpose of protecting the wearer from the elements; or (5) While lawfully engaging in a First Amendment activity.”</p>
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Should the Council have any questions about these recommendations, please reach out to Brittany Francis at brittany@civilrightscorps.org regarding the drug free zone provisions and Kiah Duggins at kiah@civilrightscorps.org regarding the anti-mask provision.

II. CONSTITUTIONAL CONCERNS WITH THE ANTI-MASK PROVISION

The Secure DC Omnibus bill’s anti-mask provision seeks to revive DC Code § 22-3312.03, which the DC Council (“the Council”) repealed less than a year ago through the Comprehensive Policing and Justice Reform Amendment Act of 2022. *See* D.C. Law 24-345, § 108(a), 70 D.C. Reg. 7904 (2022). The Council repealed the law because of its discriminatory impact on policing and its negative impacts on public health.² As written, the provision prohibits wearing any face covering on public property or during demonstrations with the intent to violate civil or criminal law, deprive others of equal protection under the law, or “intimidate” others.³ As the Council itself has noted, this provision would reinforce discriminatory policing.⁴ The provision also threatens DC residents’ First Amendment rights and would do nothing to stop violent crime.

A. The Council should strike the entire anti-mask provision to protect DC residents’ First Amendment rights.

Clothing itself can be a form of expression protected by the First Amendment. In *Tinker v. Des Moines Independent Community School District*, the Supreme Court determined that certain

² Council of the District of Columbia, Committee on the Judiciary and Public Safety, Report on Bill 24-0320, the “Comprehensive Policing and Justice Reform Amendment Act of 2022,” at 7 (November 30, 2022). https://lims.dccouncil.gov/downloads/LIMS/47448/Committee_Report/B24-0320-Committee_Report1.pdf?Id=151042

³ Bill 25-345, Secure DC Omnibus Amendment Act of 2024 at 1089-1105.

⁴ *Id.*

types of clothing worn “for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment.” 393 U.S. 503, 505 (1969). Moreover, clothing can be protected speech even if authorities fear it might cause a disturbance, because, “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.” *Id.* at 508; *see also Aryan v. Mackey*, 462 F. Supp. 90, 94 (N.D. Tex. 1978) (striking down anti-mask law where students’ masks became symbolic of their protest and “the connection between the prohibition and the University interest [was] merely speculative.”).

1. The anti-mask provision threatens DC residents’ First Amendment right to freedom of expression.

Many people in DC wear face coverings as constitutionally protected symbolic expression. For example, people often wear keffiyehs—scarves that symbolize Palestinian liberation—as face coverings.⁵ Some people wear face coverings as part of their constitutionally protected religious practices; for example, people who practice hijab or wear burqas. One practical implication of the anti-mask provision’s vague construction is that a police officer could determine that a face covering’s speech (e.g., a COVID-19 mask printed with “Black Lives Matter”) reflects an intent to intimidate⁶ and use the provision to arrest the person wearing the face covering. This kind of arrest violates the First Amendment. *See Tinker*, 393 U.S. 503 at 508. Another practical implication is that a person could fear that the police will target them based on the palatability of their face covering’s speech and then self-censor. This also threatens DC residents’ First Amendment rights. *See Washington Mobilization Comm. v. Cullinane*, 566 F.2d 107, 128 (D.C. Cir. 1977).

2. The anti-mask provision will reinforce MPD’s existing discriminatory, politically motivated arrest practices at protests.

The text of the anti-mask provision criminalizes wearing “any” face covering with “intent” to “intimidate” while “within public property” or while holding “any meeting or demonstration.”⁷ This means that if a person wears an article of clothing that covers part of their face while participating in unpopular but constitutionally protected speech, the police could—arbitrarily and in a discriminatory manner—decide that the content of the speech carries the “intent” to “intimidate,” and arrest that person in violation of their First Amendment rights.

The Council itself has noted MPD’s record of discriminatory protest enforcement.⁸ The Council reported on MPD’s discriminatory behavior against masked protestors by comparing

⁵ Linah Mohammed, *What Is a Keffiyeh, Who Wears It, and How Did It Become a Symbol for Palestinians?* NPR (Dec. 6, 2023, 9:27 AM), www.npr.org/2023/12/06/1216150515/keffiyeh-hamas-palestinians-israel-gaza.

⁶ Bill 25-345, Secure DC Omnibus Amendment Act of 2024 at 1105.

⁷ Bill 25-345, Secure DC Omnibus Amendment Act of 2024 at 1092-1105.

⁸ Council of the District of Columbia, Committee on the Judiciary and Public Safety, Report on Bill 24-0320, the “Comprehensive Policing and Justice Reform Amendment Act of 2022,” at 36-38 (November 30, 2022). https://lims.dccouncil.gov/downloads/LIMS/47448/Committee_Report/B24-0320-Committee_Report1.pdf?Id=151042

MPD’s peaceful escort of masked white supremacy protestors⁹ to MPD’s decisions to arrest, use chemical weapons on, and remove the medical masks of racial justice protestors during the height of the COVID-19 pandemic in 2020.¹⁰ The Council went on to say that “the use of riot gear, less-lethal weapons, and kettling tactics, the police response to protests for racial justice during the summer of 2020, compared to the insurrection at the U.S. Capitol on January 6, 2021,” raised “concerns about how bias affects the manner in which MPD polices First Amendment Assemblies.”¹¹ The Council should therefore strike the anti-mask provision in its entirety because it will enable discriminatory protest enforcement and infringe on DC residents’ First Amendment rights.

3. The anti-mask provision threatens DC residents’ First Amendment right to anonymous speech.

The First Amendment protects anonymous speech. The Supreme Court upheld the right to speak anonymously in *McIntyre v. Ohio Election Commission*, stating that “under our Constitution, anonymous [speech] is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent; anonymity is a shield from the tyranny of the majority . . . It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society.” 514 U.S. 334, 357 (1995); *see also United States v. Popa*, 187 F.3d 672 (D.C. Cir. 1999); *NAACP v. State of Alabama, ex rel. John Patterson*, 357 U.S. at 462 (finding that “inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.”); *Aryan v. Mackey*, 462 F. Supp. at 92 (striking down anti-mask law used to arrest students who were protesting anonymously by wearing face coverings). Governmental infringements on First Amendment rights are subjected to a high level of scrutiny. *See NAACP*, 357 U.S. at 460–61; *In re Sealed Case*, 77 F.4th at 830.

Civil rights groups, including ACLU-DC,¹² explicitly recommend that people protect their privacy and their First Amendment rights by wearing face coverings at protests. Many protestors exercise their First Amendment right to freedom of association by wearing face coverings while protesting, especially when they know that simply expressing their political beliefs will likely lead to dire consequences.¹³ The vagueness of the anti-mask provision (*see infra* pages 6-8) invites

⁹ *Masked white nationalists march in Washington with police escort*, Reuters (Feb. 8 2020, 8:38 PM), www.reuters.com/article/idUSKBN20301G.

¹⁰ “Protest During Pandemic: D.C. Police Kettling of Racial Justice Demonstrators on Swann Street.” ACLU of the District of Columbia, Washington Lawyers’ Committee for Civil Rights and Urban Affairs, and Sidley Austin LLP. March 9, 2021. Available at <https://www.acludc.org/en/swann-street-report>.

¹¹ Council of the District of Columbia, Committee on the Judiciary and Public Safety, Report on Bill 24-0320, the “Comprehensive Policing and Justice Reform Amendment Act of 2022,” at 36-38 (November 30, 2022). https://lims.dccouncil.gov/downloads/LIMS/47448/Committee_Report/B24-0320-Committee_Report1.pdf?Id=151042

¹² “How to Defend against Police Surveillance at Protests.” *ACLU of DC*, 30 Oct. 2020, www.acludc.org/en/how-defend-against-police-surveillance-protests#:~:text=Put%20your%20phone%20on%20airplane,your%20location%20from%20being%20tracked.

¹³ Kim, Joyce, and Asher Montgomery. “Doxxed Harvard Students Decry ‘heinous and Aggressive’ Online Harassment, Call for Greater Support from University: News: The Harvard Crimson.” *News | The Harvard Crimson*, 8 Dec. 2023, www.thecrimson.com/article/2023/12/8/doxxing-students-palestine-feature/.

arrests whenever and wherever a person feels intimidated or harassed by an anonymous protest. Further, this provision could embolden police to issue directives for protestors to remove their face coverings. These police actions would violate protestors' First Amendment right to freedom of association, of which the right to anonymity is "vital." *See NAACP*, 357 U.S. 449 at 462.

B. The Council should strike the anti-mask provision in its entirety because it invites confusion and discriminatory enforcement in violation of DC residents' due process rights.

The Due Process Clause "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *see United States v. Bronstein*, 849 F.3d 1101, 1106 (D.C. Cir. 2017) (a law violates the constitution if it "is so standardless that it invites arbitrary enforcement."); *Act Now to Stop War & End Racism Coal. & Muslim Am. Soc'y Freedom Found. v. Dist. of Columbia*, 846 F.3d 391, 409 (D.C. Cir. 2017); *see also Ricks v. Dist. of Columbia*, 414 F.2d 1097, 1101 (D.C. Cir. 1968) (same). A law can also violate the constitution for being too vague if it "sweeps too broadly" and criminalizes constitutionally protected activity. *United States v. Matthews*, 419 F.2d 1177, 1180 (D.C. Cir. 1969).

1. The anti-mask provision invites confusion and encourages discriminatory enforcement within the context of a global pandemic.

The anti-mask provision includes "any" article that covers a substantial portion of the face,¹⁴ meaning that it could include medical masks, sunglasses, scarves, hoodies, and religious face coverings. When the Council repealed a similar anti-mask provision less than one year ago, one of its explanations for doing so was that "criminalizing the use of masks during [the Covid-19 pandemic] ma[de] little sense" because "the Centers for Disease Control and Prevention suggested wearing masks to prevent the spread of the virus."¹⁵ The CDC still recommends that people wear masks in certain situations to protect themselves from Covid-19.¹⁶ The pandemic has made it relatively common to see people in public wearing masks and face coverings for medical reasons. Because the law includes clothing that many people wear on a daily basis, the average person would not know or guess that their regular clothing could lead to criminal penalties. The provision also does not define "intent," thereby licensing individual police officers to arbitrarily guess the intent of people who wear face-coverings in public for any reason—including medical, religious, political, or weather-related reasons. This vagueness adds to the police arsenal the power to arbitrarily—and incorrectly—assign nefarious intent to people who are wearing face coverings to protect their health. *See Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) (Where a statute fails to provide sufficient standards governing police discretion, "[i]t furnishes a convenient

¹⁴ [D.C. B25-345, Secure DC Omnibus Amendment Act of 2024 at 1090-1091.](#)

¹⁵ Council of the District of Columbia, Committee on the Judiciary and Public Safety, Report on Bill 24-0320, the "Comprehensive Policing and Justice Reform Amendment Act of 2022," at 7 (November 30, 2022). https://lms.dccouncil.gov/downloads/LIMS/47448/Committee_Report/B24-0320-Committee_Report1.pdf?Id=151042

¹⁶ "Use and Care of Masks." *Centers for Disease Control and Prevention*, Centers for Disease Control and Prevention, 11 May 2023, www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/about-face-coverings.html.

tool for ‘harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.’”).

2. The anti-mask provision will reinforce MPD’s existing racially discriminatory arrest practices.

When the Council repealed a similar anti-mask provision less than a year ago, one of its motivations was that “the vagueness and breadth of the offense can lead to unnecessary police interactions—even outside the context of a global health emergency.”¹⁷ The DC Police Reform Commission Report recommended that the original anti-mask law be repealed because, “it is written so broadly and can be applied so subjectively . . . the law has been used to stop, pat down and even charge District residents, often minors who are 17 or 18 years old, for wearing hoodies.”¹⁸ The concerns of the Council and the Police Reform Commission are not unfounded, as data shows that MPD disproportionately stops and arrests Black people without probable cause.¹⁹

A Civil Rights Corps client and Black DC resident, Andre Jackson, recently survived a motion to dismiss in his lawsuit against MPD and the District of Columbia. *Jackson v. Dist. of Columbia*, 23-CV-922 (CRC), 2023 WL 7182120 (D.D.C. Nov. 1, 2023). The complaint states that “MPD officers seized and arrested Mr. Jackson without probable cause within seconds of approaching him on a sidewalk; sexually and physically assaulted Mr. Jackson during the arrest; and then jailed Mr. Jackson for over 24 hours” while he “was wearing a face covering to protect his face from the elements, making only his eyes, eyebrows, and forehead visible.”²⁰ Passing the anti-mask provision in Secure DC will only increase this type of illegal police conduct, requiring the District to foot the bill when advocates inevitably sue officers for violating DC residents’ constitutional rights.

C. The Council should strike the anti-mask provision in its entirety because it will not reduce crime; instead, it will expand MPD’s power to violate DC residents’ Fourth Amendment rights.

The anti-mask provision will not reduce violent crime in public areas. It is already well within MPD’s power and ability to observe, approach, and arrest individuals who are engaged in criminal activity. To start, the DC Code already criminalizes the act of avoiding identification through its provisions on fraud (§ 22-3221), interfering with reports of a crime (§22-1931), and identity theft (§ 22-3227.02). Similarly, the DC Code already criminalizes harassing and

¹⁷ Council of the District of Columbia, Committee on the Judiciary and Public Safety, Report on Bill 24-0320, the “Comprehensive Policing and Justice Reform Amendment Act of 2022,” at 7 (November 30, 2022).

https://lms.dccouncil.gov/downloads/LIMS/47448/Committee_Report/B24-0320-Committee_Report1.pdf?Id=151042

¹⁸ *Decentering Police to Improve Public Safety: A Report of the DC Police Reform Commission*, Members of the District of Columbia Police Reform Commission, 1 Apr. 2021, Page 119. dccouncil.gov/wp-content/uploads/2021/04/Police-Reform-Commission-Full-Report.pdf.

¹⁹ ACLU Analytics & ACLU of the District of Columbia, Racial Disparities in Stops by the Metropolitan Police Department: 2020 Data Update (last visited November 28, 2022),

https://www.acludc.org/sites/default/files/field_documents/2021_03_10_near_act_update_vf.pdf

²⁰ Complaint ¶ 1, 21, *Jackson v. District of Columbia*, 1:23-cv-922 (D.C. District Court, 2023)

intimidating behavior through its provisions on the defacement of certain symbols and display of certain emblems (§ 22-3312.02), threats to bodily harm (§22-407), assault (§§ 22-401, 22-402, 22-403, 22-404, 22-405), bias-related crimes (§ 22-3701), and obstruction of justice (§22-722).

As written, the anti-mask prohibits DC residents from wearing a mask with the intent to “(1) Engage in conduct prohibited by civil or criminal law and avoid identification.”²¹ The plain text of this section of the provision—“prohibited by civil or criminal law”—acknowledges that the DC Code already prohibits the conduct targeted by the anti-mask provision. However, by including violations of “civil law” the provision attempts to criminalize non-criminal behavior, specifically because a person is wearing a face covering. Thus, the only new power this portion of the anti-mask provision would afford MPD officers is the power to arrest people who, by definition, have not committed a crime. This threatens DC residents’ Fourth Amendment rights and will not make DC safer.

In sum, the Council should strike the anti-mask provision in its entirety because it will likely 1) reinforce MPD’s existing discriminatory arrest practices, 2) infringe on people’s first amendment rights, and 3) criminalize non-criminal behavior while doing nothing to stop violent crime.

III. CONSTITUTIONAL CONCERNS WITH DRUG FREE ZONE PROVISIONS

The Secure DC Omnibus bill’s drug-free zone (“DFZ”) provisions seek to revive the Anti-Loitering/Drug Free Zone Act of 1996, which the Council repealed in 2014, noting that “the unconstitutional nature of [the Act was] no longer questioned.”²² As currently written, the provisions would permit MPD to order any community members who are standing in a group of two or more to disperse from a DFZ based solely on the officer’s “reasonable belief” that the group has a criminal purpose. The officer does *not* have to observe actual criminal conduct to issue the dispersal order, and does not need to have probable cause to believe a crime is being committed to initiate an arrest for a failure to disperse. Further, the statute invites officers to use a person’s status as a returning citizen or their listing in MPD’s racially biased, uncorroborated, and unreliable “gang database” as a basis for suspicion. These provisions pose grave risks to DC residents’ constitutional rights and must be stricken in their entirety or, at the very least, substantially reworked.

A. The Council should strike the drug free zone provisions in their entirety because they invite confusion and discriminatory enforcement in violation of DC residents’ due process rights.

Supreme Court precedent is clear: “The Constitution does not permit a legislature to set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.” *City of Chicago v. Morales*, 527 U.S. 41, 60 (1999). The drug free zone provisions of the Secure DC Omnibus bill aim to cast such

²¹ Bill 25-345, Secure DC Omnibus Amendment Act of 2024 at 1090-1095.

²² Council of the District of Columbia, Committee on the Judiciary and Public Safety, Report on Bill 20-760 *Repeal of Prostitution Free Zones and Drug Free Zones Amendment Act of 2014* at 4 (Sept. 17, 2014) https://lims.dccouncil.gov/downloads/LIMS/31535/Committee_Report/B20-0760-CommitteeReport1.pdf?Id=61014

a net, crude and vast in scope, with our residents and court systems paying the price. The revival of failed and harmful “drug free zone” powers for MPD to wield against Black and brown DC residents would not only invite litigation around the constitutionality of the DFZ scheme itself, but on behalf of innocent people who are harassed, arrested, or physically harmed for simply living their lives inside of targeted areas.

The Due Process Clause “requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The DFZ provisions of the Secure DC Omnibus bill are open to attack on both fronts.

It is beyond debate that “[T]he freedom to loiter for innocent purposes is part of the ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment.” *Morales*, 527 U.S. at 53 (1999). As the DC Circuit has recognized, “That citizens can walk the streets, without explanations or formal papers, is surely among the cherished liberties that distinguish this nation from so many others.” *Gomez v. Turner*, 672 F.2d 134, 143 (D.C. Cir. 1982). Although the current DFZ provisions make some attempt to carve out innocent loitering and give notice to community members of prohibited conduct, officers would still be given enormous leeway to deem mundane behavior “criminal” and to disproportionately target Black and brown DC residents.²³

1. The drug free zone provisions threaten DC residents’ due process rights by inviting discriminatory arrests based on status and presumed propensity rather than overt criminal acts.

As the DFZ provisions currently stand, a brief conversation between two people on the street would be sufficient to trigger MPD suspicion and intervention so long as at least one participant had ever been convicted of a drug-related crime (the “known unlawful drug user, possessor, or seller” factor) or had ever been added to MPD’s gang database (the “identified by [an] officer as a member of a gang” factor).²⁴ This is untenable, because it invites officers to impinge on community members’ freedom based solely on assumptions about their *propensity* for crime rather than any observed criminal acts. As Justice Black noted in *Powell v. State of Tex.*, 392 U.S. 514, 543 (1968), “[T]he fundamental requirement that some action be proved is solidly

²³ Bill 25-345, Secure DC Omnibus Amendment Act of 2024 at 2035-2038, 2053-2055 (“In making a determination that a person is congregating in a drug free zone for the purpose of committing an offense under Title IV of the Controlled Substances Act, the totality of the circumstances involved shall be considered. Among the circumstances which may be considered in determining whether such purpose is manifested are: . . . (6) **Such person has no other apparent lawful reason for congregating in the drug free zone, such as waiting for a bus, being near one’s own residence, or waiting to receive medical or social services.**”)

²⁴ *Id.* at 2035-2038, 2050-2052 (“In making a determination that a person is congregating in a drug free zone for the purpose of committing an offense . . . circumstances which may be considered . . . are: . . . (4) Such person is **physically identified by the officer as a member of a gang** or association which engages in illegal drug activity; (5) Such person is **a known unlawful drug user, possessor, or seller.**” Section 5(b)(7) states: “(7) Any vehicle involved in the observed circumstances is registered to **a known unlawful drug user, possessor, or seller**, or a person for whom there is an outstanding arrest warrant for a crime involving drug related activity.” Section 2(6) defines “known unlawful drug user, possessor, or seller” as a person who has, within the knowledge of the arresting officer, **been convicted in any court of any violation involving the use, possession, or distribution of any of the substances referred to in Title IV of the Controlled Substances Act.**”

established even for offenses most heavily based on propensity, such as attempt, conspiracy, and recidivist crimes.”

Prior drug-use-related convictions cannot and should not become anchors on returning citizens’ necks, forever subjecting them to heightened police suspicion and harassment. People who have served their time, particularly those who first became entangled in the criminal legal system due to addiction, deserve to go about their lives without being stereotyped and targeted for incidents in their past they cannot change. The DC Circuit has been clear: “Statistical likelihood that a particular societal segment will engage in criminality is not permissible as an all-out substitute for proof of individual guilt. And not even past violation of the criminal law authorizes one’s subjection to innately vague statutory specifications of crime.” *Ricks v. D.C.*, 414 F.2d 1097, 1110 (D.C. Cir. 1968); *see also Farber v. Rochford*, 407 F. Supp. 529, 534 (N.D. Ill. 1975) (“[I]t is clear that crime cannot be short-circuited by the arrest of those with a ‘propensity’ to crime.”).

As for “identified gang members,” Washington Lawyers’ Committee’s recent report on MPD’s gang database should raise grave concerns for this Council about MPD’s ability to reliably identify and track “gang membership.” As detailed in the report,

*“Inclusion in the database disproportionately impacts Black and Latinx residents: of the 1,951 tracked individuals during the study period, 1,619 (83%) were Black, 288 (12%) were Latinx, and **only one individual was White (.05%)**... MPD uses eight loosely connected criteria to justify placing individuals in the DC Gang Database . . . However, nearly 75% of all individuals (1,202) in the database are associated with only two criteria: being “observed associating with gang members” and being “observed attending gang meetings” (98% interrelation). The use of weak, undefined inclusion criteria provides MPD officers with nearly uninhibited powers to place individuals in the database, thereby potentially subjecting them to extraordinary police action. Furthermore, the vast majority of the gangs “identified” by the DC Gang Database (99%) are named after street corners or DC apartment complexes that do not necessarily correspond to existing gangs, showing the enormous discretion MPD has in executing this program. The DC Gang Database is a racially biased and arbitrary surveillance system and its lack of procedural buffers makes it opaque and difficult to challenge.”²⁵*

Allowing MPD to use its faulty, uncorroborated gang database entries as a basis to interfere with community members’ freedom of movement inside of drug free zones will only compound the harms of the gang database and incentivize its increased use. Further, it will disproportionately subject Black and Brown residents to police harassment who may not be aware they have been erroneously and unfairly labeled a “gang member.” A law is unconstitutional when “it seeks to punish an individual for what he is reputed to be, regardless of what he actually is.” *Farber*, 407 F. Supp. at 532.

²⁵ Washington Lawyers’ Committee, *Targeted, Labeled, Criminalized: Early Findings on the District of Columbia’s Gang Database*, January 2024, Page 4. <https://www.washlaw.org/mpd-gang-database/wp-content/uploads/2024/01/Edited-TARGETED%5EJ-LABELED%5EJ-CRIMINALIZED-Final-Conforming-Edits-01-11-24.pdf>

2. The drug free zone provisions threaten DC residents' due process rights by inviting arrests for mundane behaviors that community members would not and could not anticipate would draw police suspicion.

The other delineated factors that may sustain an officer's "reasonable belief" of criminal purpose in the DFZ provisions are just as flawed and overly broad. The "distribution of small packages to other persons" could be the work of a delivery service worker. "Concealing" oneself need not be nefarious, but an attempt to avoid exposure to COVID-19 or to the cold.²⁶

It is of little comfort that "chatting outside" is converted into "unlawful activity" only when congregants have "no other apparent lawful reason for congregating in the drug free zone, such as waiting for a bus, being near one's own residence, or waiting to receive medical or social services." How is a DC resident to know whether she has an "apparent lawful reason" to be outside, beyond the non-exhaustive list of "acceptable" reasons provided in the ordinance? As the Supreme Court asked in *Morales*, "If she were talking to another person, would she have an apparent purpose? If she were frequently checking her watch and looking expectantly down the street, would she have an apparent purpose?" 527 U.S. at 57. Under the DFZ provisions, it appears delivering a package while wearing a medical mask would trigger a dispersal order.

The statute also fails to define "congregate," a failure this Council raised concerns about back in 2014, noting:

*"'Congregate' is defined as 'to collect into a group or crowd' or 'to come together into a group, crowd, or assembly.' But even with this definition, a number of questions remain: When has a person 'assembled' or 'gathered?' Does any contact with another person constitute 'congregating?' Does a five-minute conversation with a friend on the street count? What about stopping briefly to greet someone? The statute fails to give notice of how one is to conform his conduct so as not to run afoul of the law or when an interaction will not subject one to a dispersal order because the interaction is protected by, for example, the First Amendment."*²⁷

In short, the DFZ provisions of the Omnibus "make[] criminal activities which by modern standards are normally innocent" and place far too much discretion in the hands of the police. *Papachristou*, 405 U.S. at 163. Giving MPD officers the broad discretion to surveil, arrest, and

²⁶Bill 25-345, Secure DC Omnibus Amendment Act of 2024 at 2035-2045 ("In making a determination that a person is congregating in a drug free zone for the purpose of committing an offense . . . circumstances which may be considered . . . are: . . . (1) The conduct of a person being observed, including that such person is behaving in a manner raising a reasonable belief that the person is engaging or is about to engage in illegal drug activity, such as the observable **distribution of small packages to other persons**, the receipt of currency for the exchange of a small package, operating as a lookout, warning others of the arrival of police, **concealing himself or herself** or any object which reasonably may be connected to unlawful drug-related activity, or engaging in any other conduct normally associated by law enforcement agencies with the illegal distribution or possession of drugs.")

²⁷ Council of the District of Columbia, Committee on the Judiciary and Public Safety, Report on Bill 20-760 *Repeal of Prostitution Free Zones and Drug Free Zones Amendment Act of 2014* at 3 (Sept. 17, 2014). https://lims.dccouncil.gov/downloads/LIMS/31535/Committee_Report/B20-0760-CommitteeReport1.pdf?Id=61014

banish people from certain neighborhoods for a wide range of innocent activities, based solely on subjective assumptions officers are making about residents' propensity for crime or true purpose for being outside, is constitutionally fraught. "[A] criminal statute perishes on constitutional grounds when it leaves speculative the tests for ascertaining the line separating guilty from innocent acts." *Ricks v. D.C.*, 414 F.2d 1097, 1101 (D.C. Cir. 1968).

B. The Council should strike the drug free zone provisions in their entirety because they invite arrests without probable cause, in violation of the Fourth Amendment.

Mayor Bowser has justified the DFZ provisions in the Secure DC Omnibus bill by pointing to "open-air drug dealing" that she does not want to "proliferate."²⁸ This explanation does not hold up under scrutiny, practically or legally. It is already a crime to sell drugs. It is already well within MPD's power and ability to observe, approach, and arrest individuals who are selling drugs out in the open. The only new power the DFZ provisions would afford MPD officers is the power to arrest people who "fail to disperse" but have not otherwise committed or attempted to commit a crime. This cannot and will not reduce actual drug use or drug sales. Instead, it will increase adversarial interactions between MPD and community members who are unable to discern what conduct will draw an order to disperse.

"We allow our police to make arrests only on 'probable cause, a Fourth and Fourteenth Amendment standard applicable to the States as well as to the Federal Government. Arresting a person on suspicion, like arresting a person for investigation, is foreign to our system, even when the arrest is for past criminality." *Papachristou*, 405 U.S. 169. Accordingly, police can only arrest a person for loitering where an officer has probable cause to believe they are loitering with the intent to commit a crime.

Even with the addition of the phrase, "for the purpose of committing an offense," the DFZ provisions do not honor community members' Fourth Amendment rights. This scheme would still give MPD officers the authority to issue dispersal orders based only on a "reasonable belief" that community members have a criminal purpose, rather than probable cause to believe they have committed a crime.²⁹ As the ACLU of DC recently testified, "Ordering a person who has committed no crime to disperse, and then arresting him if he does not, makes mere loitering a crime, which is unconstitutional. As such, we urge the Council to reject this unconstitutional section outright."³⁰

²⁸ Flynn, Meagan, and Michael Brice-Saddler. "Mayor Muriel Bowser Resurrects D.C. Policy to Target Open-Air Drug ..." *The Washington Post*, 6 Nov. 2023, www.washingtonpost.com/dc-md-va/2023/11/05/dc-mayor-drug-markets-bill/.

²⁹ Bill 25-345, Secure DC Omnibus Amendment Act of 2024 at 2029-2034 "(It shall be unlawful for a person to congregate in a group of 2 or more within the perimeter of a drug free zone . . . and to fail to disperse after being instructed to disperse by a uniformed officer of the Police Department **who reasonably believes the person is congregating for the purpose of committing an offense.**")

³⁰ Melissa Wasser. "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 Hearing on Bill 25-0555 –'Addressing

Should this Council choose to lower the evidentiary threshold for an arrest, civil rights litigation challenging the constitutionality of the DFZ scheme itself, as well as every stop, search, arrest, and use of force inside of DFZs, will proliferate. *See, e.g., Carr v. United States, 758 A.2d 944* (D.C. 2000) (held that police lacked reasonable articulable suspicion to stop person in drug free zone who looked at the police, placed his hand in his pocket, and then stuck his head in the open window of car as if he were having a conversation with the occupants). This civil rights litigation would be in addition to the large volume of criminal cases that police activity in DFZs will generate—needless and costly prosecutions for failures to disperse rather than actual drug sales, which DC already criminalizes.

IV. CONCLUSION

Without corrective action, these provisions will hurt DC residents, entangle more people in the criminal system, and inundate our court system with constitutional litigation. This Council must **strike the anti-mask and drug free zone provisions of the Secure DC Omnibus bill in their entirety** because they will not reduce crime and, instead, will weaken DC residents' constitutional rights. If the council is unwilling to strike these provisions wholesale, it must, at the very least, implement the amendments proposed on page two of this memorandum.

Should Council Members have any thoughts, questions, or concerns, we would welcome and appreciate the opportunity to speak with you.

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www.acludc.org/en/legislation/addressing-crime-trends-act-now-amendment-act-bill-25-0555.