



TESTIMONY OF:

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My name is Lucas Marquez. I am the Director of the Civil Rights and Law Reform Project at Brooklyn Defender Services (BDS). We thank Chair Rivera, Speaker Adams, and the Committee on Criminal Justice for the opportunity to testify on the city's criminal justice budget.

BDS is a public defense office whose mission is to provide outstanding representation and advocacy free of cost to people facing loss of freedom, family separation, and other serious legal harms by the government. For more than 25 years, BDS has worked, in and out of court, to protect and uphold the rights of individuals and to change laws and systems that perpetuate injustice and inequality. Thousands of the people we represent are detained or incarcerated in the New York City jail system each year while fighting their cases in court or serving a sentence of a year or less upon conviction of a misdemeanor. Our staff consists of specialized attorneys, social workers, investigators, paralegals, and administrative staff who are experts in their individual fields.

In addition to zealous legal defense, BDS provides a wide range of services to address the causes and consequences of legal system involvement. We have built a practice around supporting people who are detained pretrial to mitigate the burdens and trauma created by confinement and to protect our clients from collateral consequences. Through our jail-based programming, we are able to advocate for our clients to access services they are entitled to such as medical care and educational access. Additionally, our established presence in New York City jails allows us to monitor and document the conditions New Yorkers encounter when incarcerated and advocate for the basic human rights, health, and safety of our clients and other incarcerated people. Furthermore, many of the people that we serve live in heavily policed and highly surveilled communities.

Background

How a society allocates its budget is a statement of its values. As the Council convenes to consider the funding needs of the Department of Correction (DOC), thousands of people are enduring horrific conditions merely a few miles away. The early months of the COVID-19 pandemic response saw an unprecedented and successful effort to decarcerate through the concerted efforts

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of the last Administration, the District Attorneys' offices, the Courts, Correctional Health Services (CHS), DOC, and the City Council, along with the institutional defender organizations and advocacy groups,¹ After achieving an historic low in average daily jail population during the last Administration,² this Administration's policies have resulted in a significant increase in the population at DOC facilities—a fact the DOC concedes.³

The DOC has created conditions that resulted in 20 deaths over the past 12 months through a combination of aged, failing facilities and deeply ingrained mismanagement.⁴ Last year was the jails' deadliest in history. DOC is unable and unwilling to provide consistent access to medical and mental health care for the people in its custody,⁵ or timely process people through intake to the jails.⁶ These conditions are of the Department's own making.

In the face of these deadly conditions and increases in population, the Department seeks to skirt its statutory oversight controls, whether by the Board of Correction (BOC), the City Council, or the Comptroller's office. In just the past few months, the DOC has demonstrated a blatant disregard for meaningful oversight by:

- Unilaterally withholding crucial video access from the Board while erroneously blaming BOC members and staff for not visiting the jails and relying on dubious legal reasoning;⁷

¹ Victoria Law, *Rikers Just Had Its Deadliest Year. Two Authors Explain Why It's Still Open*, The Nation (Jan. 20, 2023), <https://www.thenation.com/article/society/qa-rikers-rayman-blau/> (“The jail population dipped to a historic low of fewer than 4,000 people during the early days of the Covid-19 pandemic. Since then, the numbers have been rising, causing Mayor Eric Adams to backtrack from de Blasio's pledge.”).

² “City Jail Population Drops Below 4,000 for First time Since 1946,” New York City Office of the Mayor, Apr. 21, 2020, at <https://www.nyc.gov/office-of-the-mayor/news/278-20/city-jail-population-drops-below-4-000-first-time-since-1946>.

³ Matt Katz, *Close Rikers? Correction officials say they may have too many New Yorkers to incarcerate*, Gothamist (Dec. 13, 2022), <https://gothamist.com/news/close-rikers-correction-officials-say-they-may-have-too-many-new-yorkers-to-incarcerate>.

⁴ Jan Ransom and Jonah E. Bromwich, *Tracking the Deaths in New York City's Jail System*, The New York Times (Feb. 4, 2023), <https://www.nytimes.com/article/rikers-deaths-jail.html>.

⁵ *Agnew et al. v. DOC*, Index No. 813431/2021E, Decision and Order (Sup Ct, Bronx County) (May 17, 2022); *Agnew et al. v. DOC*, Index No. 813431/2021E, Decision and Order (Sup Ct, Bronx County) (Aug. 10, 2022).

⁶ *Nunez et al. v. DOC*, Index No. 11-CV-05845-LTS-JCF, Memorandum Opinion and Order on Motion for Contempt (SDNY) (Mar. 13, 2023) (“Plaintiffs have proffered clear and convincing evidence that the Department has failed to comply with the Intake Tracking Clause with respect to new admissions.”); *see also* Chris Gelardi, *Rikers Intake is a Mess, But We Can't Expect Too Much Progress, Federal Judge Rules*, New York Focus, (Mar. 21, 2023), <https://www.nysfocus.com/2023/03/21/rikers-island-intake-contempt-federal-takeover/>.

⁷ *See* Nick Pinto, *NYC Jails Commissioner Revoked Watchdog's Camera Access for Making His Department Look Bad*, Hell Gate (Feb. 23, 2023), <https://hellgatenyc.com/jails-commissioner-revoked-camera-access-for-making-his-department-look-bad/>; Graham Rayman, *Outgoing NYC Board of Correction director calls out DOC commissioner Molina for 'destructive' remarks*, New York Daily News (Feb. 16, 2023), <https://www.nydailynews.com/new-york/nyc-crime/ny-rikers-board-of-correction-amanda-masters-resignation-letter-20230216-ifdy72vynncn7akxyk6neklf2m-story.html> (quoting outgoing Executive Director Amanda Masters: “[T]he Commissioner of the Department of Correction has made several disparaging remarks about our agency over the course of several weeks, which were inaccurate, and this was destructive. ... His messaging has reached the DOC staff and been repeated and that has impaired some of the respect our staff get out in the jails from their DOC staff colleagues.”).

- Failing to attend public, previously scheduled Board of Correction meetings;⁸
- Reinstating the use of restraint desks, without the input of the BOC and in violation of the Board’s Minimum Standards, a practice the Commissioner had previously testified the DOC would not use;⁹
- Expanding its contract for a massive surveillance program with a notoriously bad actor, Securus Technologies, without public disclosures including to the city’s comptroller;¹⁰
- Resisting any coordination with the TGNCNBI Task Force even at the behest of City Council members, while transgender women are continually being mis-housed and suffering harassment and assaults in NYC jails;¹¹
- Continuing to use deadly so-called “de-escalation units”¹² and other exceptions to standard housing that constitute solitary confinement in the jails, despite the Commissioner’s repeated testimony before the Council to the contrary.

The Department’s apparent disregard of the Board’s authority, along with its cavalier attitude toward Council oversight, militate for increased scrutiny, critically including over its contracting practices.

The Department testified before this Committee about their need for additional funding, but they ignored the fact that New York City jails have long had the largest budget of any jail system in the country¹³ and the highest cost per person in custody per year of anywhere in the country.¹⁴ The Department has shown it is unable to safely and humanely house people in its custody. Increasing

⁸ See Graham Rayman, *Correction Department officials skip NYC oversight meeting*, New York Daily News, (Oct. 18, 2022), <https://www.nydailynews.com/new-york/nyc-crime/ny-rikers-correction-department-officials-no-show-20221018-gyprnwktffhejd7qcsptudib4q-story.html>.

⁹ Graham Rayman, *Rikers Island detainees shackled to desks during classroom sessions; NYC jail oversight board not consulted on rule change*, New York Daily News (Mar. 18, 2023), <https://www.nydailynews.com/new-york/nyc-crime/ny-rikers-restraint-desks-controversy-louis-molina-bobby-cohen-20230320-xnzarkvi55hubeinwrze2ysete-story.html> (“Dozens of Rikers Island inmates are shackled and handcuffed to specially-built desks when they participate in classes or other group activities – despite a promise last year by the city Correction Commissioner to stop the practice.”).

¹⁰ Matt Katz, *Coming soon to NYC jails: Electronic surveillance, fees to text loved ones*, Gothamist (Feb. 13, 2023), <https://gothamist.com/news/coming-soon-to-nyc-jails-electronic-surveillance-fees-to-text-loved-ones>; Graham Rayman, *NYC comptroller questions no-bid jail contract as Correction commissioner touts positive Rikers steps*, New York Daily News (Jan. 10, 2023), <https://www.nydailynews.com/new-york/nyc-crime/ny-mail-package-ban-rikers-island-jails-20230111-xbxbquta4je3niro4jb2urqpcq-story.html>.

¹¹ George Joseph, *Under Eric Adams, a Rikers Island Unit That Protected Trans Women Has Collapsed*, The City (Jan. 24, 2023), <https://www.thecity.nyc/2023/1/24/23567498/rikers-lgbtq-trans-eric-adams-corrections>; George Joseph, *City Council Grills Jails Commissioner on Treatment of Trans Detainees at Rikers*, The City (Jan. 25, 2023), <https://www.thecity.nyc/2023/1/25/23570904/city-council-louis-molina-rikers-corrections-trans>.

¹² Chris Gelardi, *Why Does Rikers Island Still Lock People in Shower Stalls?*, New York Focus, (Mar. 22, 2023), <https://www.nysfocus.com/2023/03/22/rikers-island-decontamination-deescalation-unit-shower-cages/> (Recounting a “near-hanging” that took place at EMTC’s “‘de-escalation unit,’ a new type of Rikers module where officers send incarcerated people who’ve just been involved in a violent incident, including a ‘use of force’ by staff.”).

¹³ “A Look Inside the New York City Correction Budget,” Vera Institute of Justice, May 2021 (New York City “spends far more than any other city to incarcerate its citizens, despite tremendous strides to safely shrinking its jail population. The city’s proposed fiscal year 2022 budget details a \$2.6 billion corrections allocation, more than \$1 billion above the nation’s second most expensive jail system.”).

¹⁴ *Id.* (“NYC spends more than any other big city in the country to incarcerate far fewer people”).

DOC's budget will not create safety in the city jails. We urge the Council to work with Mayor Adams to take meaningful steps to decarcerate our jails and commit to funding programs and services that support and uplift our communities—not simply government systems that surveil, punish, and harm them.

The DOC Seeks to Expand Its Contract with Securus Technologies to Increase the Surveillance Web Across New York City

Despite the Department claiming they lack human and financial resources, DOC continues to spend millions of dollars on pervasive corporate surveillance products that do not enhance facility safety. In the past year, the Department has sought to expand its contract with Securus Technologies to include more surveillance and investigative tools without a public contractual process, shielded even from the city's comptroller.

Securus Technologies has built a vast and interconnected web of surveillance that is blanketing not only those presently detained in our city jails, but also their families, communities, and advocates.¹⁵ Unlike other records that are sealed or expunged when an individual is released, this surveillance web is verging on permanent with extremely long data retention periods and absolutely no data oversight. Securus's surveillance web is constructed without any requirement of individual suspicion, no need for court oversight, and no need for a warrant. By contrast, if a person could afford bail and was not held in our city jails, law enforcement could only eavesdrop on that person's communications with a specifically issued warrant. The mere reality of being poor and unable to afford bail means a New Yorker—and their families—have fewer rights, less privacy, and diminished dignity. This web of surveillance is impacting our Black and brown communities at a staggering rate, and when combined with the blanket of surveillance deployed by the NYPD, ACS, and other law enforcement entities, this web decimates any notion of freedom, justice, and fairness in New York City. The time for the City Council to act to dismantle this web is now. The budget oversight provided by the Council is a critical first place to intervene.

As we testified before this committee last year,¹⁶ thousands of phone calls made by people detained at Rikers to their lawyers were recorded by Securus, despite those numbers being on a designated “do not record” list.¹⁷ Many of those recordings ended up in the hands of state and federal law

¹⁵ This surveillance reality has not always existed in New York City. In fact, universal jail call recording only began here in 2008, when crime rates were both low and declining. And Securus itself was only brought to New York City in 2014. For decades before that, law enforcement was only able to record jail calls in the way they are able to record anyone's phone calls: with a specifically-issued eavesdrop warrant.

¹⁶ Brooklyn Defender Services Testimony before New York City Council Committee on Criminal Justice regarding the Preliminary Budget, Mar. 23, 2022, <https://bds.org/latest/bds-testimony-before-new-york-city-council-committee-on-criminal-justice-regarding-the-preliminary-budget>.

¹⁷ Testimony of New York City Comptroller Brad Lander to the Board of Correction, Mar. 14, 2023, <https://comptroller.nyc.gov/newsroom/testimony-of-new-york-city-comptroller-brad-lander-to-the-board-of-correction-2/>; Noah Goldberg & John Annese, *NYC Correction contractor recorded thousands more lawyer-client jail phone calls than first reported; could jeopardize court cases*, New York Daily News, December 30 2021, <https://www.nydailynews.com/new-york/nyc-crime/ny-audit-shows-doc-listened-in-on-even-more-lawyer-inmate-calls-20211230-zni5qacdjhjaozok7rdmwyg2wsm-story.html>.

enforcement agencies and District Attorney's offices.¹⁸ And this was not the first jurisdiction to have confidential calls recorded.

Despite Securus' serious breaches of confidential information, the Department has not only renewed Securus' contracts to provide phone services, as discussed below, but *expanded* its use of Securus' services and access to private communications. In November 2022, the DOC sought a permanent variance from the Board of Correction's Minimum Standards to allow the scanning and electronic delivery via tablet of all non-legal mail,¹⁹ which BDS strongly opposed.²⁰ Simultaneously, without any public process or meaningful oversight, the Department selected Securus as the vendor to provide electronic tablets to people in custody and to implement the Department's mail scanning proposal. Neither the Comptroller nor the BOC knew what the cost of those services would be because "there was no competitive bidding process [and] no Request for Proposals or scope of services."²¹

Through Securus's tablet contract, the Department is providing Securus even greater access to private communications between people in its custody and their families and community members via costly e-messages and the mail scanning policies discussed further below. The Department will also obtain related investigatory tools from Securus leaving no doubt about the surveillance purpose of these policies. Specifically, as part of the tablet deal, Securus will do the following:²²

- Give correction officers the ability to view scanned letters and stop them from being delivered to people in custody;
- Charge the city for a service, called Securus Word Alert, that uses speech-to-text technology to transcribe audio from phone calls made on Securus tablets and allow "investigators to search text transcripts for specified words and phrases" that may represent security threats;
- Offer a service in which analysts for a Securus subsidiary identify "suspicious or suggestive key words or phrases" in correspondence that may "suggest threats to security" or criminal activity within the jails;
- Charge people in custody for text messaging via the tablets;

¹⁸ Chelsea Rose Marcus, *NYC's 5 DA offices wound up with recordings of confidential jailhouse calls between inmates and lawyers*, New York Daily News, March 21, 2021, <https://www.nydailynews.com/new-york/ny-jails-recordings-attorney-client-privilege-calls-20210321-tzbyxwnle5dc5jgvi5cona6wry-story.html>.

¹⁹ See "Continuing Variance Request to Board of Correction Minimum Standards Section 1-11(e)(1)(i) Regarding Correspondence," dated Nov. 14, 2022, at <https://www.nyc.gov/site/boc/meetings/january-10-2023.page>.

²⁰ BDS Opp. Ltr to BOC, Jan. 5, 2023, https://bds.org/assets/files/2023_01_05-BDS-Ltr-re-DOC-Mail-and-Package-Variations-2.pdf; LatinoJustice PRLDEF, BDS, Bronx Defenders, the Neighborhood Defender Service of Harlem, and New York County Defenders, Demand Ltr to BOC, March 10, 2023, <https://bds.org/assets/files/2023-03-10-Joint-Letter-Prior-to-03-14-meeting-FINAL-1.pdf>.

²¹ Testimony of New York City Comptroller Brad Lander to the Board of Correction, Mar. 14, 2023, <https://comptroller.nyc.gov/newsroom/testimony-of-new-york-city-comptroller-brad-lander-to-the-board-of-correction-2/>.

²² Matt Katz, *Coming soon to NYC jails: Electronic surveillance, fees to text loved ones*, Gothamist (Feb. 13, 2023), <https://gothamist.com/news/coming-soon-to-nyc-jails-electronic-surveillance-fees-to-text-loved-ones>.

- Offer an application that allows law enforcement officers from Rikers Island to share personal communications of people in custody with officers from correctional facilities outside the city in order to identify potential threats.

The Department has not explained what information Securus will collect and store and for how long, or what security procedures the Department is requiring to protect information and prevent data breaches pursuant to the tablet services. This is particularly troublesome as Securus has a track record of faulty privacy safeguards and improperly distributing confidential communications, including in New York City.

We know that Securus regularly allows data breaches involving sensitive and protected information nationwide. As thousands of phone calls made by people detained at Rikers to their lawyers were recorded by Securus,²³ there is no reason to believe that Securus' software for safeguarding tablet and mail data is any more secure than its phone systems. This fact alone should disqualify Securus from *any* contract with DOC, much less an expanded role for their services to tablets and mail scanning.

Moreover, Securus has been subject to hundreds of lawsuits regarding its lax control over the privacy and confidentiality of protected communications. For example, in 2019, a special master appointed by a federal judge in Kansas determined that Securus had enabled prosecutors, in violation of the Sixth Amendment, to obtain recordings of attorney-client phone calls.²⁴ In a class action case raising similar allegations, Securus reached a settlement providing monetary damages to people incarcerated at a Kansas jail whose attorney-client calls the company illegally recorded.²⁵ In another settlement related to claims of recording attorney-client phone calls, Securus pledged to implement what would seem like basic safeguards that should have been in place at the outset.²⁶ Securus' questionable practices do not stop with data privacy. In an ongoing case, Securus is alleged to have engaged in a conspiracy to inflate prices for the calls it offers and to have misrepresented the costs of calls to government officials and to consumers.²⁷

As this sampling of lawsuits shows, Securus cannot securely digitize and manage large amounts of sensitive personal information. Securus' encroachments on privacy and protected communication are not glitches in an otherwise watertight system. Rather, they are a natural outcome of allowing private companies to collect and store sensitive information and

²³ Noah Goldberg & John Annese, *NYC Correction contractor recorded thousands more lawyer-client jail phone calls than first reported; could jeopardize court cases*, New York Daily News, Dec. 30 2021, <https://www.nydailynews.com/new-york/nyc-crime/ny-audit-shows-doc-listened-in-on-even-more-lawyer-inmate-calls-20211230-zni5qacdhjaozok7rdmwyg2wsm-story.html>; Chelsea Rose Marcus, *NYC's 5 DA offices wound up with recordings of confidential jailhouse calls between inmates and lawyers*, New York Daily News, March 21, 2021, <https://www.nydailynews.com/new-york/ny-jails-recordings-attorney-client-privilege-calls-20210321-tzbyxwnle5dc5jgvi5cona6wry-story.html>.

²⁴ *United States v. Carter*, 429 F. Supp.3d 788, 798-800, 847 (D. Kan. 2019).

²⁵ Order, *Huff v. Core Civic, Inc.*, No. 17 Civ. 2320 (JAR), Dkt. No. 146 (D. Kan. Sept. 26, 2019).

²⁶ *Romero v. Securus Tech., Inc.*, No. 16 Civ. 1283 (JM) (MDD), 2020 6799401(S.D. Cal. Nov. 19, 2020) (denying motion to dismiss for numerous claims against Securus including claims made pursuant to the California Invasion of Privacy Law); Order, *id.* Dkt. No. 184 (Nov. 19, 2020).

²⁷ *Albert v. Global Tel*Link Corp.*, No. 20 Civ. 01936 (LKG), 2021 WL 4478696 (D. Md. Sept. 30, 2021).

communications.²⁸ Because of Securus' lax control over the privacy and confidentiality of protected communications, it is unclear who has access to the intimate communications of people in custody. Whether this access is "authorized" for a specific purpose is irrelevant. After all, Securus was not "authorized" to record attorney-client phone calls, but they did so anyway. Entrusting it with even more data and communications from people in New York City jails poses a serious risk that the data will be breached and privacy violated. The only way to be sure the data will not be misused is to ensure it is not collected in the first place.

The DOC Must End its Contract with Securus Technologies

The DOC first entered its contract with Securus Technologies "for the installation, configuration and maintenance of an inmate telephone system" on October 1, 2014. The original contract was set to run for a five-year term. At the conclusion of that term, DOC had five one-year sole options to renew the Agreement. The original contract expired on April 30, 2019. DOC extended that Agreement through March 31, 2020, and then exercised its renewal option to extend the Agreement again on April 1, 2020. This renewal expired on March 31, 2021.

In the meantime, in early 2021 prior to the expiration of the second renewal option, the Department conducted internal audits that revealed its illegal call recording of privileged calls. However, despite Securus' constitutional violations and technical failures, DOC quietly and with no oversight exercised its renewal option year on April 1, 2021, registering that renewal on October 27, 2021. According to the Comptroller's CheckbookNYC website, this renewal option was only extended through December 31, 2021, while a subsequent renewal ran from January 1, 2022, through December 31, 2022. The current renewal option, apparently received on March 14, 2023, is labeled on the Comptroller's website as "pending." However, the Department confirmed they have contracted with Securus to provide not only phone services, but also to manage the tablet program, resulting in increased expenditures on the Securus contract.²⁹

Ending the contract with Securus Technologies will not only preserve New Yorkers' rights and liberties, it will also save the city money. Presently, it appears that the Department pays Securus approximately \$250,000 per month for phone and surveillance services. The overall contract agreement indicates that the Department is paying Securus Technologies \$3 million for a year of phone service. By contrast, almost every other city agency appears to pay well less than \$500,000 per year for such services.

Even if the Department's renewal term has already been non-publicly exercised, the city can still end its relationship with Securus now. Not only does DOC currently hold the sole renewal option on its agreement with Securus, the city and Department's original Agreement with Securus included a provision granting the city "the right to terminate this Agreement, in whole or in part, [with or] without cause"

²⁸ Lauren Gill, *Federal Prisons' Switch to Scanning Mail Is a Surveillance Nightmare*, THE INTERCEPT, September 26, 2021, <https://theintercept.com/2021/09/26/surveillance-privacy-prisons-mail-scan/>.

²⁹ In the DOC's testimony at the March 23, 2023, Preliminary Budget hearing, it stated that this fourth extension of the contract for phone services includes, for the first time, the management of the tablet program, which it stated accounts for the increased expenditure of \$5.4 million, up from the prior contract extension amount of \$3 million.

In addition to terminating the Securus agreement, the Council should urge the Department to issue a new RFP for phone services. This RFP should be limited to legal phone service only and should not include surveillance products similar to Securus's. Moreover, while Commissioner Molina testified that the tablet offerings from Securus represented a savings to the Department, the lack of transparency around the terms of the contract and the well-documented fact that the prior tablet service was free to people in the jails³⁰ suggests that the Department may be balancing its own expenses on the backs of those people in its custody and their families and community members, who will now incur the additional costs associated with Securus products.

Ending the agreement with Securus is the only way for New York to get its communities' data back. Until the date of agreement termination, Securus Technologies retains New Yorkers' data within their systems. DOC's original agreement with Securus contained the following provision:

7.3.2 Within thirty (30) days of expiration or early termination of the Agreement, the Contractor shall, at no cost to the DOC, perform the following actions:

- (i) transmit the DOC Data to the DOC or its designee in a format that is easily usable by the DOC or its designee and does not contain any proprietary software or other materials of the Contractor or third parties;
- (ii) destroy the DOC Data and any copies, extracts, descriptions, and summaries thereof contained in the Contractor's records or systems; and
- (iii) provide the DOC with a written certification of such destruction

When that data is returned to New York, the city and the Department should implement specific sequestration, notification, and destruction policies.

The Expansion of Securus's Surveillance Products Threaten the Privacy and Rights of New Yorkers

The concerns raised by Securus's business practices with respect to illegally recorded and shared phone recordings and other weak safeguards are compounded this year by the Department's efforts to expand its reliance on Securus for providing tablets and scanning and delivering all mail addressed to people in Department custody.

DOC claims that recording people's phone calls advances jail security and enables DOC to respond to risks of violence in the jails. This narrative is not borne out by the facts. In a two-year period, from January 1, 2020 through January 1, 2022, DOC records indicate that at least 17,977,510

³⁰ Matt Katz, *NYC jails detainees get their tablets back, but costs are undisclosed*, Gothamist, (Dec. 14, 2022), <https://gothamist.com/news/nyc-jail-detainees-get-their-tablets-back-but-costs-to-use-premium-services-an-open-question> ("The Department of Correction's contract with tablet provider APDS ended June 30 and was not extended for reasons that officials did not explain. That program was completely free for detainees; it included movies and had the capacity to provide video calls. It had been in place since 2015, and during the pandemic it was expanded to reach almost all of the approximately 5,000 detainees."); Matt Katz, *Incarcerated New Yorkers lose access to free electronic tablets, a critical lifeline*, Gothamist, (Nov. 9, 2022) <https://gothamist.com/news/incarcerated-new-yorkers-lose-access-to-free-electronic-tablets-a-critical-lifeline> ("APDS offered a virtual law library, substance abuse therapy, audio books, e-books, games, job skill training, adult basic education, and movies, all free to incarcerated people.").

completed phone calls were recorded.³¹ Within that same time period, DOC employees listened to calls 305,381 times—which may include listening multiple times to the same recorded phone call. This indicates that, *at most*, 1.7% of phone call recordings were utilized in any way by DOC officials in a recent 2-year period.³² DOC was not able to quantify how many of those recorded calls were helpful to facility security or led to the interception of contraband or prevention of violation. DOC is not using the phone surveillance system to make the jails safer. Instead, Securus is using the phone surveillance system to gather and profit from data on our clients and their loved ones. Similarly, the Department’s stated justification for their mail scanning proposal is to keep contraband, specifically drugs, out of DOC facilities. However, similar mail policies have not been effective at reducing drug use and overdoses within detention facilities, demonstrating that letters and packages from loved ones are not a significant source of the drugs entering jails. In fact, it is uniformed and civilian staff that are the main source of drugs entering New York City jails, as discussed in more detail below.³³

Although the Board has thus far not provided the Department the necessary variance from the Minimum Standards to implement the mail scanning procedures, it is important to reiterate that entrusting a private company to scan, deliver, and store mail raises significant concerns regarding surveillance, data breaches, and infringements on the rights of people in custody and those who communicate with them. Mail scanning is not simply a mundane exercise to digitize mail, but rather represents yet another surveillance platform designed to capture and retain as much information as possible to the ultimate benefit of private companies, here Securus, and law enforcement. Once a piece of physical mail is scanned, the data—including the content of the correspondence, faces in photographs, and the names and address of the sender and recipient—are stored in a platform managed by Securus, that can be accessed, retrieved, searched, and distributed. This is true, not only for mail scanning, but also for any electronic messages sent via the tablets, creating a risk of surveillance and data breaches for *both* people in custody themselves *and* anyone with whom they correspond, whether family members, friends, commercial contacts, or even civil and political groups.

Electronic messaging and mail scanning opens the door to keyword search and social network analysis. In fact, the investigatory tools that Securus is contracted to provide the Department—as listed above—will precisely include these capabilities. These tools can be used to identify patterns in communications, thereby increasing both the breadth and depth of surveillance, and exacerbating guilt by association at a scale like that of the so-called “criminal group database,” another project based on mass collection of data for dubious and seldom-specified investigatory purposes.³⁴ More people will be tracked and people in custody will be surveilled even more closely than they are now.

³¹ Data received from BDS FOIL of DOC.

³² *Id.*

³³ See BDS Opp. Ltr to BOC, Jan. 5, 2023, at 2-5, https://bds.org/assets/files/2023_01_05-BDS-Ltr-re-DOC-Mail-and-Package-Variations-2.pdf.

³⁴ James Blum, *The NYPD’s Gang Database: A New Age of Stop and Frisk*, Surveillance Technology Oversight Project, July 23, 2019, <https://www.stopspying.org/latest-news/2019/7/23/the-nypds-gang-database-a-new-age-of-stop-and-frisk>.

Lastly, surveillance on private communications will also negatively impact open communication between people in custody and the outside world and raises First Amendment concerns. Prior cases have established that people in custody “have a First Amendment right to the free flow of both incoming and outgoing mail” and that their mail cannot be tampered with absent proper justification.³⁵ Private companies, which are susceptible to data breaches, should not be trusted to collect, process, and retain sensitive communications from both people in custody and their loved ones. The Department’s surveillance system threatens to chill the exercise of the right to send and receive correspondence. As the Second Circuit has noted:

“It cannot be gainsaid that the reading of mail by jail officials chills the expression of first amendment rights by correspondents inside and outside the institution. It takes little more than common sense to realize that a tender note, so important to the morale of the incarcerated individual, might never be penned if the writer knew that it would be first scrutinized by a guard.”³⁶

It is critical that the Council remain vigilant on behalf of New Yorkers who will be chilled from corresponding with each other or prevented from communicating freely, depriving them of a vital and often irreplaceable connection. The city must also consider the costs of continuing to use Securus to provide services through which it has repeatedly demonstrated such a high disregard for privacy rights and the attendant liability costs that come with such disregard.

The time for New York City to get out of business with predatory surveillance phone and technology companies like Securus is now. Our communities’ data should be returned from Securus. This two million plus per year project of surveillance should be dismantled. Neither our Constitutional rights to silence and to counsel, nor our dignity, privacy, and intimacy should be for sale in our city. New Yorkers deserve more.

DOC’s Testimony on Medical Access Was Misleading

During Commissioner Molina’s testimony, he repeatedly claimed that DOC had fixed its access to medical care problems and that only one percent of medical appointments were missed because DOC did not provide escorts. This claim obscures the reality that people in custody continue to miss hundreds of medical appointments each month due to DOC’s mismanagement.

After Brooklyn Defender Services, along with the Legal Aid Society and Milbank LLP, sued DOC for failing to provide access to medical care, instead of focusing on fixing the problem, DOC created new medical non-production categories so they could shift medical non-production numbers out of the no-escort category. These newly created categories are non-productions to medical appointments that are also attributable to DOC’s administrative failures.³⁷ Significantly,

³⁵ *Moore v. Gardner*, 199 F. Supp.2d 17, 32 (W.D.N.Y. 2002)(internal citations omitted); *see also Hudson v. Greiner*, No. 99 Civ. 12339 (LAP), 2000 WL 1838324, at *5 (S.D.N.Y Dec. 13, 2000); *Heimerle v. Att’y Gen.*, 753 F.2d 10, 12 (2d Cir. 1985).

³⁶ *Wolfish v. Levi*, 573 F.2d 118, 130 (2d Cir. 1978), *rev’d on other grounds, sub nom.*, *Bell v. Wolfish*, 411 U.S. 520 (1979).

³⁷ For example, DOC would like the City Council to ignore the “Maximum Safe Capacity” non-productions, which are instances in which DOC says it did not produce people to their scheduled clinic appointments because it did not

overall non-productions to medical appointments have increased dramatically in the last year, demonstrating that access to medical care in New York City jails has not improved.³⁸ Commissioner Molina's one percent figure only accounts for no escort non-productions and does not encompass new categories of non-production attributable to DOC incompetence or data shifting.

Furthermore, DOC's non-production figures cannot be trusted. Their data is skewed to suggest that DOC is responsible for fewer non-productions than is the case. For example, CHS data demonstrates that DOC is undercounting total non-productions to medical appointments by several thousand non-productions each month.³⁹

We continue to hear from the people we represent daily who are struggling to access essential medical care. If DOC continues to focus on manipulating their statistics rather than providing access to care, New Yorkers will remain at risk of dying in our city's jails.

provide sufficient space and security for them to wait safely to be seen by clinical staff. These waiting spaces as well as the staff DOC claims must accompany people while they wait, are squarely under DOC's control. Furthermore, data shows that hundreds of appointments per month are also denied due to DOC's failure to develop plans for keeping its scheduled appointments while addressing inevitable emergencies that arise. These instances of non-production are classified under the "Priority Medical Emergency" category and also constitute distinct evidence of DOC's noncompliance—DOC is required to deliver medical care, and may not deny or delay that care because it plan for or allocate its resources properly when faced with medical emergencies. *See Agnew v. DOC*, Index No. 813431/2021E NYSCEF Doc No. 197 at 6-7.

³⁸ Compare DOC Medical Non-Production Report for Jan. 2022 (reporting 6,792 total non-productions) available at https://www.nyc.gov/assets/doc/downloads/pdf/Medical_Non_Production_Report%20_January%202022.pdf with DOC Medical Non-Production Report for Dec. 2022 (reporting 9,968 total non-productions) available at https://www.nyc.gov/assets/doc/downloads/pdf/Medical_December_2022.pdf. https://usc-word-edit.officeapps.live.com/we/wor editorframe.aspx?ui=en-US&rs=en-US&wopisrc=https://bkds.sharepoint.com/sites/BDSCivilRights/_vti_bin/wopi.ashx/files/f7bff5278bdc4a089546503fc5525fa8&wdenableroaming=1&mssc=1&hid=B460A2A0-B019-D000-EB87-AFF415BCC718&wdorigin=Teams-HL.Sharing.DirectLink&jsapi=1&jsapiver=v1&newsession=1&corrid=0bdb4a6b-6c42-4141-aec0-d90463a3cb2a&usid=0bdb4a6b-6c42-4141-aec0-d90463a3cb2a&sftc=1&cac=1&mtf=1&sfp=1&instantedit=1&wopicomplete=1&wdredirectionreason=Unified_SingleFlush&rct=Normal&ctp=LeastProtected#_ftn1

³⁹ For example, in June 2022, when DOC reported 8,997 total non-productions across all categories, CHS reported a staggering 16,083 non-productions. Compare CHS Access to Health Services Report, April-June 2022, p.30 available at https://www1.nyc.gov/assets/boc/downloads/pdf/Reports/Correctional-Health-Authority-Reports/CHS-Access-Report_CY2022_Q2_25Jul22.pdf with DOC Medical Non-Production Report for June 2022 available at [https://www.nyc.gov/assets/doc/downloads/pdf/Medical_June%202022_\(2\).pdf](https://www.nyc.gov/assets/doc/downloads/pdf/Medical_June%202022_(2).pdf). https://usc-word-edit.officeapps.live.com/we/wor editorframe.aspx?ui=en-US&rs=en-US&wopisrc=https://bkds.sharepoint.com/sites/BDSCivilRights/_vti_bin/wopi.ashx/files/f7bff5278bdc4a089546503fc5525fa8&wdenableroaming=1&mssc=1&hid=B460A2A0-B019-D000-EB87-AFF415BCC718&wdorigin=Teams-HL.Sharing.DirectLink&jsapi=1&jsapiver=v1&newsession=1&corrid=0bdb4a6b-6c42-4141-aec0-d90463a3cb2a&usid=0bdb4a6b-6c42-4141-aec0-d90463a3cb2a&sftc=1&cac=1&mtf=1&sfp=1&instantedit=1&wopicomplete=1&wdredirectionreason=Unified_SingleFlush&rct=Normal&ctp=LeastProtected#_ftn1

The City Must Invest in Fairness and True Public Safety

Public safety remains the focal point of the discourse surrounding the city's budget. As public defenders, we know that true investment in public safety must address the systemic issues giving rise to drug use, mental health crises, and community violence. We cannot arrest, prosecute, or incarcerate our way to solving these problems. Punitive responses can only exacerbate the very issues they intend to solve. Many of the people we serve may have avoided the court system and incarceration had they had access to support services sooner. Instead, many of our clients become eligible for support services only because of their interaction with the NYPD, Administration for Children's Services (ACS), or Immigration and Customs Enforcement (ICE). With the support of the City Council, we are able to provide our clients with robust support and assistance in navigating benefits applications and affordable housing processes, and accessing quality mental health care, substance use treatment, educational support, respite centers, or immigration assistance.

As the City Council reviews and responds to Mayor Adam's budget proposal, we urge the Council to invest in communities and ensure that New Yorkers receive the support and resources that promote public safety and help our city thrive. This month, New York City marks the third-year anniversary of the COVID-19 pandemic. The communities impacted most by the criminal and family court legal systems have also been those hit hardest by the pandemic. Funding for indigent defense and legal services has been critical as low-income communities face novel economic and social challenges as a result of the pandemic. New Yorkers continue to require access to legal support to address widespread evictions, job loss, and enormous educational challenges.

The city's dangerous reliance on incarceration as a strategy to promote public safety has deepened systemic inequities in our community and has enabled a culture of abuse and harm in the city's jails. Mismanagement of DOC staff has been well documented. DOC has a higher staff to persons-in-custody ratio than any jail in the country. Yet, the Department still fails to transport people to court, legal visits, family visits or emergency healthcare appointments. Despite this exorbitant ratio, the Department described a need for additional uniformed staff and overtime pay to resolve the staffing crises in the jails.

This Council has been responsible for legislating and funding groundbreaking programs to meet the needs of communities that are highly surveilled but overlooked by other service providers—including the New York Immigrant Family Unity Project (NYIFUP) ensuring universal representation to immigrant New Yorkers facing deportation and the Right to Family Advocacy Project providing advocacy to families being investigated by the Administration for Children's Services. How a society allocates its budget is a statement of its values. We urge the City Council to work with Mayor Adams to begin to move funding away from surveillance and criminalization and toward community investment and community response.

1. Invest in Public Defense

As public defenders, we provide a different type of safety for the public. We provide protection from the overreach of law enforcement and from harsh and unfair laws that destroy lives, often because of one mistake or one moment in a person's life. We represent people who have been arrested, who have been suspended from school, who are facing deportation, or who are navigating other complex legal processes. We also help people access safety nets by providing assistance

accessing housing, benefits, and other support services. We work every day to keep people out of jail, monitor jail conditions, and hold DOC accountable for their failures to meet basic needs and minimum standards for people in custody.

The statewide fiscal crisis that public defense organizations are facing is a direct result of New York's failure to recognize the needs of low-income New Yorkers and properly fund the legal right to counsel. If left unaddressed, the underfunding of New York public defense organizations will further marginalize and disconnect hundreds of thousands of New Yorkers from the legal and social services they need to survive.⁴⁰ We are grateful to the Speaker and the Council for your advocacy for defenders to receive the funding we need in the State budget. True public safety comes from investments that keep people in their homes, in their jobs, and with their families. The final New York State and City budgets must reflect the needs of low-income New Yorkers and properly fund public defense.

2. Ensure Oversight and Accountability

The BOC is tasked with providing essential oversight of the city jails, and to do so it must be fully funded. The Board has a responsibility to all people in city jails, their families, loved ones, and the community to ensure transparency and accountability is sought. For the DOC to be held responsible, we must start with transparency and fully funding the Board. The Board is essential at ensuring the public is made aware of the Department's violations of the BOC Minimum Standards; deaths in custody followed by an investigation; data and statistics related to sexual abuse, investigations, grievances, and the use of restrictive housing to name a few. People in custody and the public depend on the Board, and without them we fear the city jails will become more isolating, only exacerbating the already known horrors within DOC's correctional facilities

3. Invest in Communities

The safest communities are the communities with the most resources. We urge the Council to invest in proven programs that keep our neighbors safe, healthy, and in the community. This must include access to safe and affordable housing, community based mental health care, and psychiatric hospital beds. Many programs that work to create safety face funding cuts, while the DOC and NYPD continue to siphon resources from other city agencies.

One such program, the MOCJ Emergency Reentry Housing Program—which has been a lifeline to people leaving the city jails—is scheduled to close at the end of the fiscal year. In April 2020, the City of New York partnered with direct service providers to establish the emergency reentry housing program to provide immediate, low barrier to people transitioning out of incarceration. With co-located wrap-around services including medical care, case management, and housing and vocational support, people returning to the community had a safe, stable place to stay and receive care. The current emergency hotel program is scheduled to close on June 30, 2023, with the 530 current residents being moved into transitional housing. This plan, however, fails to serve the goal of using transitional housing to decarcerate Rikers Island. As of February 2, 2023, there are over 375 people on a waitlist for a bed in the emergency hotel program—many of whom are incarcerated

⁴⁰ Samar Khurshid, As Prosecutors Get Budget Boost, Public Defenders Seek More Funding Too, Gotham Gazette, February 17, 2023, Available at <https://www.gothamgazette.com/state/11825-public-defenders-prosecutors-budget-funding-courts>.

only because they do not have stable housing. The Council has a moral imperative to continue to fund this critical program as a step in a continuum of reentry housing.

Conclusion

We thank the Council for holding this hearing to highlight the issues in the jails and the need for investment in real safety and justice. We urge the Council to use every mechanism in your power to reduce and eliminate the suffering in New York City jails. We thank the City Council for the opportunity to testify today.

If you have any questions or concerns, do not hesitate to contact me at slmarquez@bds.org.