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Sent via email

September 12, 2022

**Re: Eligible Voters in Delaware Prison Facilities'
Access to Registration & Absentee Ballots**

Commissioner Hudson:

The ACLU of Delaware has been retained by clients who represent the constitutional and statutory interests of eligible voters held in Delaware Department of Corrections (“DDOC”) custody. Our clients are concerned about DDOC’s ongoing interference with the constitutional right to vote of pretrial detainees and people convicted of misdemeanor offenses, who are otherwise eligible voters, held in DDOC facilities. Please accept this letter as a formal demand that the DDOC provide reasonable assurances that eligible voters in DDOC custody are provided an opportunity to register to vote and request and return absentee ballot applications and ballots.

As you know, many of these concerns were raised in a meeting with you and other stakeholders, including the Department of Elections’ Commissioner Anthony Albence and legislators Sen. Marie Pinkney and Rep. Eric Morrison, on August 17, 2022. At that meeting, we sought clarity regarding how eligible voters in DDOC custody would have access to voter registration forms and absentee voter applications and ballots. What we learned was startling. To summarize, the following topics were discussed:

- DDOC intends to follow the same process as was used in 2020 for eligible voters held in DDOC custody, despite having no evidence or information that any eligible voter successfully cast a ballot in 2020;
- Flyers that included inaccuracies about voter registration deadlines and which had not been previously reviewed by Department of Elections’



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officials, had been posted for three weeks in every prison facility;

- DDOC's mailroom staff had not been thoroughly trained on how to process absentee ballots and confusion still remained on whether the required absentee ballot return envelopes would be considered contraband in accordance with the general mailroom policies;
- Eligible voters in DDOC custody would be required to rely upon paper forms for registration and absentee ballot requests and such forms and other necessary documentation would be provided only through scheduled meetings with DDOC counselors;
- Eligible voters in any form of solitary confinement would not be provided any opportunity to register to vote or request or return an absentee ballot while in that disciplinary setting; and,
- You characterized the constitutional right to vote for eligible voters in DDOC custody as a "privilege."

In this meeting, Prisoners Legal Advocacy Network ("PLAN") offered to assist the DDOC in ensuring that eligible voters in DDOC custody were provided an opportunity to register to vote and request and return absentee ballots, as is required by law. See *O'Brien v. Skinner*, 414 U.S. 524 (1974) (finding certain restrictions on absentee voting by pretrial detainees unconstitutional under the Equal Protection Clause). Specifically, PLAN offered, in partnership with the Delaware Voting Rights Coalition, the Election Protection Delaware Coalition, and the Election Protection Jail & Post-Release Working Group ("the Coalition"), to provide qualified programming for eligible voters incarcerated in DDOC facilities and DDOC mailroom employees at no cost to DDOC. The Coalition volunteered to assist incarcerated Delawareans in determining if they are eligible to vote, registering to vote, and/or requesting an absentee ballot. The Coalition offered to dispatch registrars to DDOC facilities who could hand-deliver forms, thus overcoming the obstacles and uncertainties created by paper mail that you, yourself, identified as a concern. This programming help was offered, in part, to address the new mail policy instituted at James T. Vaughn Correctional Institution ("Vaughn") that prohibits the delivery of paper mail to individuals incarcerated at that facility. The

Coalition was particularly alarmed by a representation of a Vaughn mailroom officer to PLAN that they were aware of no policy to ensure that ballots were allowed to be delivered to Vaughn prisoners. Further, the Coalition offered to provide an informational webinar for DDOC officials who manage prisoner mail to advise them of the ballot components that must be timely delivered to voters in order for them to vote. The Coalition offered to provide this programming to ensure that eligible voters who are incarcerated can participate in the democratic process and the Department of Elections can meet its obligation to administer fair elections that do not systematically exclude a category of voters.

Following this meeting, our clients' concerns have only been exacerbated. First, on August 26, 2022, we learned that for the General Election in 2020, only *one* ballot was sent to a correctional institution address. The ballot was sent to the Hazel D. Plant Women's Treatment Center, not delivered, and was returned to the Department of Elections as undeliverable. That means that the process used by the DDOC in 2020 to ensure that eligible voters were able to participate in absentee voting, the same process the DDOC has committed to following in 2022, resulted in *universal disenfranchisement* of these eligible voters. This outcome is even more alarming when considering that these eligible voters held in pretrial detention or on misdemeanor convictions are disproportionately Black or voters of color. What's more, this disenfranchisement occurred prior to the institution of the new mail policy that created new barriers to successfully receiving and casting ballots for eligible incarcerated voters.

Second, on September 6, 2022, we learned through Sen. Marie Pinkney that DDOC had rejected PLAN's proposed remedial measures and would not permit the Coalition, or anyone else, to assist DDOC employees or eligible voters in DDOC custody with ensuring that voter registration forms and absentee applications and ballots were properly requested and returned, in compliance with state and federal law.

The DDOC's current restrictions on eligible voters' access to voter registration materials and absentee voter applications and ballots create an unreasonable and unjustifiable burden

on our democracy's most fundamental constitutional guarantee: the right to vote. With less than two months remaining for eligible voters to register to vote and request and return an absentee ballot for the November 8, 2022 General Election, this is a matter of urgent concern.

Our clients request that, by **no later than Monday, September 19, 2022**, DDOC provide reasonable assurances of the following:

1. Eligible voters were provided an opportunity to register to vote and request and return an absentee ballot in the 2022 Primary Election concluded on September 13, 2022 and the means by which such opportunities were afforded; and
2. Eligible voters will be provided an opportunity to register to vote and request and return an absentee ballot in the 2022 General Election concluding on November 8, 2022, as demonstrated by:
 - a. Providing accurate voter registration and absentee ballot request and return information to all eligible voters in DDOC custody;
 - b. Training and monitoring all mailroom employees' understanding of the proper procedures for immediately processing any voter registration forms and absentee voter requests or ballots;
 - c. Training and monitoring all DDOC employees' understanding of the proper procedures for immediately providing any necessary voter registration forms and identification documents, absentee voter applications, and absentee ballots;
 - d. Identifying and correcting all unreasonable and unjustifiable barriers that prevented eligible voters from successfully casting an absentee ballot in the 2020 General Election;
 - e. Permitting PLAN, Coalition Partners, and/or other voting rights advocates access to provide educational information and any other assistance to eligible voters in DDOC custody to successfully cast an absentee ballot.

While failure to provide these requested assurances may result in further legal advocacy, we remain committed to



working with the DDOC in ensuring that eligible voters in DDOC custody are provided with an opportunity to participate in elections. We sincerely hope that the DDOC will take these concerns seriously and work diligently to ensure compliance with the law.

Please do not hesitate to contact me if you have any questions. We look forward to your response.

/s/ Dwayne J. Bensing

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