

Attorney General Kathy Jennings  
102 W. Water Street  
Dover, DE 19904

**Sent via email**

October 14, 2022

**Re: Voter Eligibility for Incarcerated Voters**

Attorney General Jennings:

We, the ACLU of Delaware, respectfully request explicit assurance that no otherwise eligible incarcerated voters held in Delaware Department of Corrections (“DDOC”) facilities will be arrested or prosecuted in the event that they vote or attempt to vote absentee in the upcoming November 2022 elections.

As you are likely aware, the Delaware Supreme Court issued an expedited order affirming the September 14, 2022 Court of Chancery’s ruling, which found that the Vote by Mail statute was unconstitutional and that the Delaware Constitution’s enumerated circumstances allowing for absentee voting are exhaustive. The enumerated list of circumstances in the Delaware Constitution does not include individuals who are incarcerated.

In a September 20, 2022 letter—attached to this letter—the Delaware Department of Elections (“DDOE”) wrote that “otherwise eligible persons who are incarcerated” is an “absentee reason [] which falls under the ‘Business or Occupation’ reason set forth” in the Delaware Constitution. DDOE noted that this incarceration reason “has appeared on the Department’s absentee ballot application for several election cycles” and that DDOE “will continue to accept [] absentee ballot applications that are submitted with this reason.”

While the ACLU of Delaware appreciates these representations, eligible voters held in DDOC facilities—



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pretrial detainees and people convicted of misdemeanor offenses—do not currently have assurances that the Delaware Attorney General and law enforcement share DDOE’s interpretation. As such, the ACLU of Delaware is gravely concerned that these voters do not have sufficient guidance and/or assurances from the State about their eligibility to vote in the November 2022 elections, and might potentially have to choose between exercising their fundamental right to vote and risking criminal prosecution.

Recently, around the country, we have witnessed a disturbing rise in the arrest and prosecution of voters—who lack any *mens rea* or intent to commit any crime—for voter fraud or improper voting, because those voters are confused about byzantine election laws and state officials decline to clarify their eligibility. It is imperative that we avoid this situation in Delaware by providing incarcerated voters with the guidance and certainty they need to be able to make informed decisions about their eligibility to vote in November.

**As such, the ACLU of Delaware requests that the Attorney General provide explicit assurance that otherwise eligible incarcerated voters will not be arrested or prosecuted for voting or attempting to vote absentee from DDOC facilities in the November elections.**

To be clear, moving forward, the current status quo is untenable for incarcerated voters, who at this point are unable to vote in-person and who now face conflicting guidance, from the courts and executive branch officials, about their eligibility to vote absentee in future elections. It is clear that a more comprehensive solution is needed in the long term to ensure that eligible incarcerated voters can adequately exercise their fundamental right to vote.

Nonetheless, given the unprecedented nature of the Supreme Court’s decision, resulting in a crisis of confusion in the administration of an election taking place in just a few short weeks, we reserve the necessity of determining a constitutionally stable solution (i.e., in-person voting booths at prison facilities) immediately following November 8, 2022.



Most immediately, though, voters desperately need clarity with regard to this election cycle.

Please do not hesitate to contact me to discuss this matter. We are committed to working with the Attorney General, DDOE, and DDOC to come to the appropriate solution to this issue. We look forward to your response, which we hope to receive by October 18, 2022.

/s/ Dwayne J. Bensing  
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cc: Anthony J. Albence; Monroe Hudson, Jr.; Frank Broujos; Gregory E Smith; Heather Zwickert; Sen. Marie Pinkney; Rep. Eric Morrison; Sen. Kyle Evans Gay; Jon Sheehan; Karen E. Keller