

Testimony of Courtney L. Colwell, On Behalf of the New York Civil Liberties Union Before the New York City Board of Correction Regarding DOC's Variance Request on Processing Mail in New York City Jails

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The New York Civil Liberties Union (NYCLU) respectfully submits the following testimony regarding a variance request from the Department of Correction to change its policies on processing mail and packages in New York City jails. The NYCLU is the New York affiliate of the American Civil Liberties Union. It is a not-for-profit, non-partisan organization with eight offices throughout the state and more than 180,000 members and supporters. The NYCLU's mission is to promote and protect the fundamental rights, principles, and values embodied in the Bill of Rights of the U.S. Constitution and the New York Constitution.



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Over the past few years, New York City jails have seen a tragic rise in drug overdoses. Indeed, this year between January 2021 and September 2022, there were 481 overdoses and/or suspected overdoses in New York City Jails.¹ And in the year 2022 alone, five people died under the Department of Correction's (DOC) care due to drug overdoses or suspected overdoses.² The NYCLU cares deeply about this public health crisis. Unfortunately, the DOC's plan to solve it is not only inadequate—it is harmful.

Under the DOC's variance request, two changes would be made. First, the Department would require all mail to be sent to an off-site facility to be scanned and digitized so that people in custody could read letters only electronically on tablets. Second, the Department would require that all packages be sent directly from a limited list of approved vendors.

¹ *Oversight: Examining Drugs in City Jails, Hearing Before the New York City Council Committee on Criminal Justice*, New York City Council (Oct. 25, 2022) (statement of Dr. Bipin Subedi, Chief Medical Officer, NYC Health and Hospitals/Correctional health Services).

<https://legistar.council.nyc.gov/MeetingDetail.aspx?ID=1004348&GUID=F3F5B0A2-36C5-44FF-A48F-F8D2E345FD14&Options=info|&Search=>.

² Bellafante, Rikers has a Deadly Contraband Problem. Are Cargo Pants to Blame?, NY TIMES (Dec. 17, 2022), <https://www.nytimes.com/2022/12/17/nyregion/rikers-drug-crisis.html>.



Although the DOC argues that this variance is needed to reduce the spread of drugs in jails, in reality, this request represents yet another attempt by the DOC to infringe upon the rights of incarcerated New Yorkers. The NYCLU is deeply committed to ensuring that all people in custody are treated with dignity and respect. To that end, the NYCLU strongly urges the Board to reject the Department's request.

Four central concerns guide the NYCLU's opposition here.

First, drugs are largely not coming in through the mail. The Department of Investigation has corroborated this fact, previously stating that “the mail and visits are not significant entry points for contraband.”³ In fact, recent data suggests that the mail accounts for less than a third of drug recoveries.⁴ Rather, it is the correction officers themselves, who have “contribute[d] significantly to the flow of drugs into city jails.”⁵ Staff have smuggled drugs in McDonalds salads,⁶ lunchboxes,⁷ and in the pockets of their uniform cargo pants⁸—to name just a few instances.

Indeed, in the early days of the pandemic when visitor access was restricted, and only correction officers, staff, and contractors were able to enter the jails, drugs were even more widespread.⁹ As a city Correction Department Investigator stated in Federal Court, corrupt officers and staff are “usually” the source of drugs.¹⁰ Unsurprisingly,

³ Rayman, *Deadly overdose spikes in NYC jails despite drop in inmate visits*, NY DAILY NEWS (Jul. 11, 2022), <https://www.nydailynews.com/new-york/nyc-crime/ny-rikers-contraband-louis-molina-overdoses-smuggling-overdoses-20220711-ohjtjxkvqavffkwcuaucvwdqje-story.html>.

⁴ Blau, *City Jails Move to Digitize Mail, Which Led Other Lockups Into Legal Fights*, THE CITY (Nov. 4, 2022), <https://www.thecity.nyc/2022/11/4/23439318/city-jails-could-digitize-mail-other-lockups-legal-fights>.

⁵ Annese & Rayman, *Rikers Island correction officers contribute to flow of drugs and other contraband in NYC jails*, NY DAILY NEWS (Dec. 18, 2022), <https://www.nydailynews.com/new-york/nyc-crime/ny-contraband-rikers-island-correction-officers-20221218-b3mbsbu66rdiriffh4mfxotya-story.html>.

⁶ *Id.*

⁷ *Id.*

⁸ Bellafante *supra* note 2.

⁹ Joseph & Blau, *When Visitors Were Banned From Rikers Island, Even More Drugs Showed Up*, THE CITY (Feb. 9, 2022), <https://www.thecity.nyc/2022/2/9/22926241/when-visitors-were-banned-from-rikers-island-even-more-drugs-showed-up>.

¹⁰ Annese, *Rikers Island guards and staff ‘usually’ source of jail drugs*, NY DAILY NEWS (November 29, 2022), <https://www.nydailynews.com/new-york/nyc-crime/ny-rikers-officers-smuggle-contraband-trial-20221129-ldqmm6ftlna3dagrfpmgdvxpom-story.html>.



over the past five years, 25 city correction officers have faced criminal charges for contraband incidents.¹¹

Yet despite this clear problem, the DOC refuses to take significant action regarding officer security policies. As Commissioner Molina admitted at a City Council Hearing this past October, when staff go to work each day, they do not have to enter through the same body control scanners that visitors pass through.¹² This creates a critical gap in security—one the Commissioner does not seemingly intend to fix. By placing misguided attention on drugs coming in through the mail, the DOC has thus critically diverted attention and scrutiny away from themselves. But a variance request that addresses a non-issue like the mail will do little to curb drug overdoses in New York City jails.

Second, digitizing mail doesn't work, and it won't work here. Indeed, data from other states has indicated that such a move is not an effective way to curb the spread of drugs among people in custody. In Missouri, for example, jail officials banned physical mail and moved to a digitized process in June.¹³ Overdoses not only continued, they spiked, from an average of 31 overdoses to 37 a month.¹⁴ Meanwhile, in Pennsylvania, there was no decrease in the average drug test positivity rate after implementing a digital mail policy.¹⁵ The Department of Corrections was later forced to rescind its policy after settling with a number of legal organizations, including the ACLU of Pennsylvania.¹⁶ Digitizing mail in other states, then, has hardly been considered an effective tactic.

Moreover, there is good reason to believe that digitizing mail in New York City jails will be particularly problematic. Under DOC's proposed plan, people in DOC custody would be able to view letters only on DOC-issued tablets. Unfortunately, however, tablets were not at all in use in New York City jails from June when the DOC's contract with its tablet provider expired through December.¹⁷ And although current

¹¹ Blau *supra* note 4.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Krent, *Writing to Someone in Prison? Uncle Sam May Keep a Copy*, KNIGHT FIRST AMENDMENT INSTITUTE (Sept. 27, 2021), <https://knightcolumbia.org/blog/writing-to-someone-in-prison-uncle-sam-may-keep-a-copy>.

¹⁶ *Plip v. Wetzel* Settlement Agreement, No. 1:18-cv-2100 (2019). Available at: https://www.aclupa.org/sites/default/files/field_documents/filed_settlement_agreement.pdf.

¹⁷ 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>.



information on the DOC's contract with its new provider, Secerus, is limited, given the DOC's past history there is good reason to believe that free tablet access will not be well implemented.¹⁸ Incarcerated persons are already reporting issues, and without such reliable access to tablets, the DOC's plan is doomed to fail.

And as advocates, family members, and individuals under DOC custody have repeatedly emphasized, even under the current non-digital procedure, access to mail is unreliable. Adding another step into the process will only increase the chances that people under custody will not receive their mail. It is highly unlikely then, that digitizing mail in New York City Jails would be an effective and efficient procedure.

Third, the DOC's request raises serious constitutional concerns. During the 1980's, the Supreme Court made clear that the right to receive information under the First Amendment extends to prisons and jails. Indeed, "Prison walls do not form a barrier separating [incarcerated people] from the protections of the Constitution."¹⁹

In *Turner v. Safely*, the court held that when a rule impinges on an incarcerated person's constitutional rights, the rule is valid only "if it is reasonably related to legitimate penological interests."²⁰ Four factors guide the court's inquiry. First, there needs to be a "valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it."²¹ Second, the court considers whether there are "other avenues" available for the exercise of the incarcerated individual's right.²² Third, the court considers the impact that accommodating the asserted right will have on staff, on other incarcerated persons, and on prison resources. And finally, the court considers whether there were "obvious, easy alternatives" that could have addressed the prison's concerns.

With these factors in mind, the DOC has put itself in murky constitutional territory. Given how digitizing mail has failed in other states to reduce the prevalence of drugs in jail,²³ it's certainly

¹⁸ Press Release, The New York City Department of Correction, DOC officially launches new tablet program for all people in custody (Dec. 13, 2022), <https://www.nyc.gov/site/doc/media/tablet-program.page#:~:text=Partnering%20with%20an%20existing%20vendor.and%20maintain%20vital%20support%20networks>.

¹⁹ *Turner v. Safely*, 482 U.S. 78, 84 (1987).

²⁰ *Id.* at 89.

²¹ *Id.* at 89.

²² *Id.* at 90.

²³ Blau *supra* note 4.



questionable whether there is a rational connection here between the DOC's variance request and its stated justification for it. This connection becomes all the more questionable when we consider the fact that the mail is simply not a significant source of drugs in New York City jails.²⁴ Moreover, with access to tablets being a frequent problem in New York City jails,²⁵ we should be truly concerned that the right to receive information under the First Amendment will be entirely cut off here in certain instances. And implementing such a policy will not only fail to save prison resources—it will put a drain on them. Finally, the “obvious” alternative here would be easy to implement: Rather than jumping straight to impinging on incarcerated person's rights, the DOC should look at its correction officers and implement policies designed to restrict their ability to bring drugs in. The Commissioner has claimed it would be costly to install more body scanners.²⁶ But digitizing mail is costly as well and focusing on correction officers would be a far more cost-efficient practice.

All of this is to say nothing of the very real privacy concerns the DOC's variance request implicates. As the Knight Institute has noted, “Mail digitization systems collect and retain deeply personal information, not only about those in prison, but also about their loved ones, their educators, and their religious advisors.”²⁷ The risk of truly egregious levels of surveillance is extreme here. Digital copies of mail may live on in databases for years. And certain contractors, like Smart Communications, can even surveil the senders of mail who try to track their letters.²⁸

Privacy concerns are even more severe for attorney-client communications,²⁹ religious communications,³⁰ and communications between incarcerated survivors and survivor advocacy organizations and agencies.³¹ Without further information on how the DOC intends to

²⁴ Rayman *supra* note 3.

²⁵ Katz *supra* note 17.

²⁶ Blau *supra* note 4.

²⁷ Krent *supra* note 15.

²⁸ *Id.*

²⁹ Gill, *Federal Prisons' Switch to Scanning Mail is a Surveillance Nightmare*, THE INTERCEPT (Sept. 26, 2021), <https://theintercept.com/2021/09/26/surveillance-privacy-prisons-mail-scan/>. (Noting that many incarcerated people in federal prison systems have had their legal mail opened and copied before it reaches them).

³⁰ Koh, *Prison mail going digital presents challenge for prison ministry*, MISSION NETWORK NEWS (Oct. 19, 2021), <https://www.mnnonline.org/news/prison-mail-going-digital-presents-challenge-for-prison-ministry/>.

³¹ Krent *supra* note 15.



handle these communications,³² it is impossible to truly evaluate the legal legitimacy of DOC's plan. Needless to say, however, essentially all types of digitized mail plans raise constitutional issues that this Board should be concerned about.

Finally, the DOC's request is suggestive of a broader trend: that they fundamentally dehumanize and disrespect the people in their care. Receiving mail is inherently a personal experience and while some oversight from the DOC might be necessary, this degree of intrusion is certainly not. There is a fundamental difference between receiving a handwritten note and receiving a photocopy of one: you lose the color, the scent, the sense of intimacy that a loved one was touching the same sheet of paper. Moreover, letters are often imperfectly copied—parts of words may get cut off, pages may get lost in the shuffle, and images may be blurred. All of these defects have become the norm in the world of digitized mail.³³

Additionally, the DOC's plan to only receive packages from certain specific vendors will inherently limit the number of items available to people in custody and increase the cost for family members and friends to send such packages.

As numerous reports have consistently noted, people under DOC care are frequently denied access to the most basic of services: "Clean laundry, haircuts, time outdoors are so *simple*" but these services are frequently denied to those in New York City jails.³⁴ Receiving real mail is similarly simple: This Board should not allow the DOC to thwart access to it.

With these four considerations in mind, the NYCLU respectfully urges the Board to reject the DOC's variance request. Allowing the DOC to proceed will further dehumanize those in custody while simultaneously doing nothing to stop the onslaught of drug overdoses. To protect individuals in New York City Jails and to protect the constitution, this variance must be denied.

³² The DOC's variance request only addresses the handling of legal mail, and it does so with limited specificity.

³³ Gill *supra* note 29.

³⁴ Nunez Monitoring Team, *Second Status Report on DOC's Action Plan by the Nunez Independent Monitor* (Oct. 28, 2022), https://storage.courtlistener.com/recap/gov.uscourts.nysd.383754/gov.uscourts.nysd.383754.472.0_1.pdf at 85.