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Via Email: [BOC@boc.nyc.gov](mailto:BOC@boc.nyc.gov)

NYC Board of Correction  
2 Lafayette Suite 1221  
New York, NY 10007

**Re: Department of Correction Variance Requests Regarding Correspondence and Packages**

Dear Members of the Board,

On November 14, 2022, the New York City Department of Correction (“DOC” or “Department”) requested two variances from the Board of Correction (“BOC” or “Board”): a variance from Board Minimum Standards § 1-11(e)(1)(i) that would limit the receipt of physical mail, and a variance from Board Minimum Standards § 1-12(a) that would limit the sources of external packages. The Board plans to vote on these variances at its January 10, 2023 meeting. In advance of the BOC meeting, Brooklyn Defender Services (“BDS”) writes in strong opposition to both variance requests. First, these policies would further dehumanize people in custody by isolating them from crucial family ties and subjecting them and their families to enhanced surveillance. Second, such policies have been shown ineffective at reducing drug use and overdoses and the Department has failed to take more fruitful steps to curb drug use in the jails and save lives. As such, the variance requests represent a drastic overreach by the Department that would significantly harm the well-being of the people in custody and the BOC should deny the variance requests.

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 over 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. Our staff consists of specialized attorneys, social workers, investigators, paralegals, and administrative staff who are experts in their individual fields. Our Criminal Defense Practice represents thousands of people detained or incarcerated in the New York City jail system each year while they are fighting their cases in court or serving a sentence of a year or less upon conviction of a misdemeanor. Furthermore, many of the people that we serve live in heavily policed and highly surveilled communities. BDS’s Science & Surveillance Project investigates government and private entity use of new science, surveillance, and data analysis techniques and advocates against the weaponizing of technology and unlawful surveillance of communities.

Under the Department’s proposed mail policy, all non-privileged correspondence will be sent to a P.O. Box at a vendor’s off-site location to scan the correspondence and forward it to the

recipient's tablet.<sup>1</sup> As such, people in custody will no longer be able to keep physical mail, including photos, children's drawings, or handwritten letters from family or friends, and instead will depend on access to a tablet to read poorly scanned correspondence. The text of every non-privileged correspondence will become data retained by Securus Technologies, the private vendor of DOC's mail scanning program. Under the Department's proposed package policy, all incoming packages must be purchased from and mailed by a private company whose "ordinary business includes the sale and shipping of such items," such as Amazon, Target, and Walmart.<sup>2</sup> As such, family and friends, legal providers, and community aid organizations cannot send care packages and vital items directly, but rather must incur additional expenses to use a private vendor. The Department claims these proposed policies are necessary because drugs, including fentanyl, are entering DOC facilities through correspondence and packages.<sup>3</sup> However, the experience of jurisdictions that have instituted similar mail and package policies belie the Department's contentions, because such policies do not result in a decrease in drug use in the jails.

**A. The Department's Justifications for the Variance Requests Are Not Reasonably Related to the Proposed Policy Changes**

The Department's stated justification for the variance requests is to keep contraband, specifically drugs, out of DOC facilities. However, similar mail and package 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.

That other jurisdictions are implementing similar mail and package policies is not a reason for the Board to grant DOC these variances—instead, the experience of other states and the federal system are warning signs for the Board to closely scrutinize DOC's proposed policies and require the Department to consider less intrusive and more effective means of curbing contraband entering the jails. For example, a policy and media review of prison systems across the United States showed that mail scanning policies are becoming common, despite there being "no solid evidence to date that mail scanning" reduces contraband coming into jails and despite the "enormous benefits of genuine mail."<sup>4</sup> Jurisdictions are choosing to strip away the "privacy and the sentimentality of mail, which is often the least expensive and most-used form of communication between incarcerated people and their loved ones" in order to enact policies that primarily benefit private technology companies.<sup>5</sup>

In several jurisdictions that have implemented mail scanning policies, the use of drugs in detention facilities actually increased. For example, after Missouri implemented a ban on physical

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<sup>1</sup> See Nov. 14, 2022, DOC Variance Request Regarding Correspondence.

<sup>2</sup> See Nov. 14, 2022, DOC Variance Request Regarding Packages.

<sup>3</sup> See Nov. 14, 2022, DOC Variance Requests.

<sup>4</sup> Leah Wang, *Mail scanning: A harsh and exploitative new trend in prison*, Prison Policy Initiative (Nov. 17, 2022), <https://www.prisonpolicy.org/blog/2022/11/17/mail-scanning/>.

<sup>5</sup> *Id.*

mail in June 2022, overdoses increased.<sup>6</sup> Similarly, after New Mexico enacted a ban on physical mail, the state’s Legislative Finance Committee found that the new policy “does not appear to have reduced drug use,” and, instead, the policy brought an increase in positive results from random drug tests that “reverses three years of reduced drug use.”<sup>7</sup> In Texas, after in-person visits were banned during the pandemic and access to physical mail was severely curtailed, access to drugs in the facilities only increased.<sup>8</sup> The Marshall Project’s interviews with corrections officers and people in custody, as well as agency data in Texas, made clear that “the persistent contraband problem is driven mostly by staff.”<sup>9</sup> Similarly, after Pennsylvania implemented a ban on physical mail, drug test positivity rates rose.<sup>10</sup>

In its variance request regarding packages, DOC claims that a similar policy led to success for New York State DOCCS, stating that as compared to 2020 when DOCCS seized 924 packages containing “serious contraband,” this year only four such packages have been seized, and that their use of naloxone “has declined dramatically.”<sup>11</sup> However, DOCCS only implemented this policy in all its facilities in July 2022, so the policy cannot explain such a drastic decline in packages seized. We do not know what DOC considers a “dramatic” decline in naloxone use, but of course the amount of naloxone used is not the real measure of the effectiveness of such a policy. During a hearing before the City Council Committee on Criminal Justice on October 25, 2022, Commissioner Molina declared, “How does fentanyl get into our jails? The short answer is that most of it enters in letters and packages laced with fentanyl. Literally soak the drug and mail it to people in custody.”<sup>12</sup> Yet, DOC provided only anecdotal evidence of fentanyl entering the facilities in this manner, including overheard conversations between people in custody claiming to smoke fentanyl laced paper and images of wet mail, which DOC’s general counsel was unable to confirm had been tested in an independent lab.<sup>13</sup> DOC has not cited any examples of jurisdictions where overdoses or drug test positivity rates have declined following a ban on physical mail or

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<sup>6</sup> In Missouri, before the ban, an average of 31 people overdosed per month and after the ban, between July and September 2022, people overdosed on average 37 times per month, including a record 46 overdoses in September 2022, the highest number all year. See Claudia Levens, *Overdoses in Missouri prisons continue despite electronic mail policy*, News Tribune (Oct. 18, 2022), <https://www.newstribune.com/news/2022/oct/18/overdoses-in-missouri-prisons-continue-despite/>.

<sup>7</sup> Austin Fisher, *Restrictions on prison mail don’t appear to decrease drug use, legislative report says*, Source NM (July 7, 2022), <https://sourcenm.com/2022/07/07/restrictions-on-prison-mail-dont-appear-to-decrease-drug-use-legislative-report-says/>.

<sup>8</sup> Keri Blakinger and Jolie McCullough, *Texas Prisons Stopped In-Person Visits and Limited Mail. Drugs Got in Anyway*, The Marshall Project (March 29, 2021), <https://www.themarshallproject.org/2021/03/29/texas-prisons-stopped-in-person-visits-and-limited-mail-drugs-got-in-anyway>.

<sup>9</sup> *Id.*

<sup>10</sup> Lauren 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/>.

<sup>11</sup> See Nov. 14, 2022, DOC Variance Request Regarding Packages.

<sup>12</sup> City Council Committee on Criminal Justice Hearing on Drugs in the Jails, Oct. 25, 2022, <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=5870741&GUID=EEA301B3-6740-41EC-930F-379ED25B205E&Options=&Search=> .

<sup>13</sup> *Id.*

packages. No such examples exist because this policy does not target the primary source of drugs in prisons and jails: corrections officers and staff.

While DOC wants the Board to believe that families and loved ones on the outside are to blame for the proliferation of contraband and the overdose crisis, multiple sources indicate that most drugs are brought into the facility by uniformed and civilian staff.<sup>14</sup> The city's own Department of Investigation reported that "[t]he mail and visits are not significant entry points for contraband" and have focused their investigations on uniformed staff.<sup>15</sup> Further, when visits to people in custody were cancelled due to the COVID-19 pandemic, seizures for contraband, including drugs, increased. Maureen Sheehan, a retired NYPD detective who until early 2022 was DOC's deputy director of investigation, stated: "We saw more contraband when visits were canceled than ever before."<sup>16</sup>

Several recent high-profile cases have illuminated large scale drug trafficking operations by corrections officers. These are not anecdotal stories of a person receiving a wet letter in the mail and reflect only a small fraction of the over 200 allegations<sup>17</sup> of officers trafficking contraband into the jails each year.

- In September 2022, two DOC correction officers pled guilty to federal charges in the Eastern District of New York for accepting \$44,000 in bribes in exchange for smuggling

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<sup>14</sup> See, e.g., Ginia Bellafante, *Rikers Has a Deadly Contraband Problem. Are Cargo Pants to Blame?*, The New York Times (Dec. 17, 2022), <https://www.nytimes.com/2022/12/17/nyregion/rikers-drug-crisis.html>; John Annese and Graham Rayman, *Rikers Island correction officers contribute to the flow of drugs, contraband*, The Daily News (Dec. 18, 2022), <https://www.nydailynews.com/new-york/nyc-crime/ny-contraband-rikers-island-correction-officers-20221218-b3mbsbu66rdirjffh4mfxoty-story.html>.

<sup>15</sup> Graham Rayman, *Deadly Overdose Spike in NYC jails – and City Agencies have Conflicting Answers on Who is Smuggling in the Drugs*, The Daily News (July 11, 2022), <https://www.nydailynews.com/new-york/nyc-crime/ny-rikers-contraband-louis-molina-overdoses-smuggling-overdoses-20220711-ohtjxkvqavffkwcuauvcwdqje-story.html>. The DOI issued two reports, first in 2014 and then in 2018, exposing the security shortcoming and lapses at entrances to DOC facilities on Rikers Island that enabled DOC staff to smuggle contraband into the jails. In 2018, DOI identified the same serious security lapses as in 2014 and found that DOC had failed to adopt the recommendations made in 2014. DOI, *DOI Report Finds Serious Security Lapses at Two Correction Department Facilities Allowing Weapons and Drugs into the Facilities*, Feb. 8, 2018, [https://www1.nyc.gov/assets/doi/press-releases/2018/feb/09Contraband\\_Report\\_020818.pdf](https://www1.nyc.gov/assets/doi/press-releases/2018/feb/09Contraband_Report_020818.pdf).

<sup>16</sup> John Annese and Graham Rayman, *Rikers Island correction officers contribute to the flow of drugs, contraband*, The Daily News (Dec. 18, 2022), <https://www.nydailynews.com/new-york/nyc-crime/ny-contraband-rikers-island-correction-officers-20221218-b3mbsbu66rdirjffh4mfxoty-story.html>; see also George Joseph and Reuven 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>; see also George Joseph and Reuven 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>.

<sup>17</sup> John Annese and Graham Rayman, *Rikers Island correction officers contribute to the flow of drugs, contraband*, The Daily News (Dec. 18, 2022), <https://www.nydailynews.com/new-york/nyc-crime/ny-contraband-rikers-island-correction-officers-20221218-b3mbsbu66rdirjffh4mfxoty-story.html>.

“narcotics and cellphones” into the city jails and facilitating the sale of drugs and electronics on Rikers Island.<sup>18</sup>

- In 2021, the United States Attorney for the Southern District of New York indicted seven DOC correction officers and two civilian staff members for accepting bribes and smuggling contraband—including drugs, phones, and weapons—into the jails.<sup>19</sup> As of December 2022, eight of the people facing charges have accepted guilty pleas.<sup>20</sup>
- In January 2020, six New York City correction officers were charged with others in the Eastern District of New York with conspiring to accept bribes and smuggle contraband, including drugs, into DOC jails.<sup>21</sup> At the November 2022 trial of one of the defendants, a former DOC correction officer testified to the ease with which he smuggled pounds of marijuana and synthetic marijuana into Rikers Island under his clothing, carrying it through metal detectors between his legs: “If there’s no metal, you can walk right through.”<sup>22</sup> In the same trial, DOC investigator Andrew Walker—who has conducted over 500 contraband investigations—testified that contraband is “usually” brought into DOC jails by correction officers and staff: “Anything that they can hide they will try to hide as long as it doesn’t beep when it goes through [a metal detector].”<sup>23</sup>

Families and community members impacted by this carceral system must not be the scapegoats for systemic failures by DOC. The proposed policies amount to collective punishment under the pretense of “safety.”

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<sup>18</sup> Department of Justice, *Two New York City Correction Officers Plead Guilty to Accepting Bribes in Exchange for Smuggling Contraband Into Rikers Island for Gang Members*, Sept. 20, 2022, <https://www.justice.gov/usao-edny/pr/two-new-york-city-correction-officers-plead-guilty-accepting-bribes-exchange-smuggling>; see also Kim Somajor, *NY Correctional Officers Plead Guilty of Smuggling Contraband into Rikers for Blood Gang*, *The Source*, Sept. 25, 2022, <https://thesource.com/2022/09/25/ny-correctional-officers-plead-guilty-of-smuggling-contraband-into-rikers-for-bloods-gang/>; see also Kim Somajor, *NY Correctional Officers Plead Guilty of Smuggling Contraband into Rikers for Blood Gang*, *The Source* (Sept. 25, 2022), <https://thesource.com/2022/09/25/ny-correctional-officers-plead-guilty-of-smuggling-contraband-into-rikers-for-bloods-gang/>.

<sup>19</sup> United States Department of Justice, *9 Department of Correction Officers and Employees Charged With Taking Bribes To Smuggle Contraband To Inmates At New York City Jails*, May 26, 2021, <https://www.justice.gov/usao-sdny/pr/9-department-correction-officers-and-employees-charged-taking-bribes-smuggle-contraband>.

<sup>20</sup> John Annese and Graham Rayman, *Rikers Island correction officers contribute to the flow of drugs, contraband*, *The Daily News* (Dec. 18, 2022), <https://www.nydailynews.com/new-york/nyc-crime/ny-contraband-rikers-island-correction-officers-20221218-b3mbsbu66rdirojffh4mfxotya-story.html>.

<sup>21</sup> Department of Justice, *Six New York City Correction Officers and 15 Others Charged with Conspiring to Accept Bribes and Smuggle Contraband into Rikers Island Facilities*, Jan. 14, 2020, <https://www.justice.gov/usao-edny/pr/six-new-york-city-correction-officers-and-15-others-charged-conspiring-accept-bribes>.

<sup>22</sup> Jake Offenhartz, *‘I Brought in Contraband’: Ex-Rikers Guard Describes How He Smuggled Drugs into Troubled NYC Jail*, *Gothamist* (Nov. 28, 2022), <https://gothamist.com/news/i-brought-in-contraband-ex-rikers-guard-describes-how-he-smuggled-drugs-into-troubled-nyc-jail>.

<sup>23</sup> John Annese, *Rikers Island Guards and Staff are ‘Usually’ Source of Drugs at the Jail, Investigator Testifies*, *Daily News* (Nov. 29, 2022), <https://www.nydailynews.com/new-york/nyc-crime/ny-rikers-officers-smuggle-contraband-trial-20221129-ldqmm6ftlna3dagrfgmxdvxpom-story.html>.

**B. The Department's Proposed Mail and Package Policies Will Have a Significant Detrimental and Dangerous Impact on the People in Custody and their Communities**

**1. Mail and Packages Are Critical For the Emotional Wellbeing of People In Custody**

The very nature of incarceration isolates people from their families, friends, and communities. The Department fails to account for the fact that an extremely valuable connection is lost by denying people access to their physical mail. Digitizing mail is not a viable substitute; it dehumanizes people in custody and further isolates people from their children, parents, and loved ones on the outside. The location of Rikers Island makes visiting the jails difficult for many, and DOC adds additional barriers to receiving support from the outside by limiting visits to specific days and times that are usually an obstacle to those who work or are primary caregivers.

The people we serve greatly benefit from having access to physical mail, photographs, and other tangible items from families with them at all times. Under the proposed variances, scanned letters and photographs would only be available at times that people in custody have access to tablets. Many people in custody report that they struggle the most during the night, when they are locked in their cells and unable to make calls or connect with other people. Mental health conditions are often linked to sleep-wake disorders,<sup>24</sup> and people with psychosis<sup>25</sup> or dementia<sup>26</sup> may experience worsening symptoms at night. People we serve have told us that letters, photos, and other printed material they can engage with help them cope and feel connected to others when they need it most. One young woman we represent is the mother to two small children. She is having a difficult time and her only request has been for photos of her children. After receiving pictures of her children in the mail, she reported feeling more able to cope. Another person we represent has photos of his nieces and nephews on the wall of his cell. He often expressed that he was motivated to get his life in order by wanting to be there for his niece and nephew in ways he wished adults had been there for him. The pictures were a tangible, daily reminder of his family and this goal. One father we represent has a primary school aged child who is uncomfortable visiting the jail. To maintain their connection, they created a drawing game. The father draws part of a picture, folds over the paper and mails it to his son, who then draws the next piece and mails it back. The plan was to create something together, like silly monsters and animals, something tangible they create together over a distance.

The experiences of the people we serve are corroborated by research indicating that long-term connection through mail can have a dramatic positive impact on mental health and

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<sup>24</sup> Maurice Ohayon, Prevalence of DSM-IV diagnostic criteria of insomnia: distinguishing insomnia related to mental disorders from sleep disorders. *Journal of psychiatric research*, 1997, 31(3), pp.333-346.

<sup>25</sup> Kaskie RE, Graziano B, Ferrarelli F., Schizophrenia and sleep disorders: links, risks, and management challenges. *Nat Sci Sleep*. 2017 Sep 21;9:227-239. doi: 10.2147/NSS.S121076. PMID: 29033618; PMCID: PMC5614792.

<sup>26</sup> Nina Khachiyants, et al. Sundown syndrome in persons with dementia: an update. *Psychiatry investigation* 8.4 (2011): 275.

suicidality.<sup>27</sup> The Department’s proposed mail and package policies come at a time of record deaths in the jails and high rates of self-harm and suicide among people in custody.<sup>28</sup> The Department does not meaningfully engage in its variance requests with the potential impact on the mental health of people in custody, instead doubling down on its flawed premise that mail is a primary source of contraband.<sup>29</sup>

Further, letters that are received via scan are often very poor quality, in many cases blurry, black and white, cut off, or illegible,<sup>30</sup> making them a poor substitute for physical mail and photographs. Mail can also be rejected by Securus as unscannable with no notice to the person in custody that a loved one has tried to reach them.<sup>31</sup> For example, in another jurisdiction, Securus banned the mailing of cardboard or rigid parchment as it cannot be run through the scanner, making it more difficult to send photos or children’s artwork.<sup>32</sup>

Finally, DOC’s proposed system would require correction officers to ensure that each person has access to a charged and functional tablet. Tablets can be revoked and, if lost or damaged, DOC will not issue a new tablet. Given the breakdown that has occurred in nearly every aspect of the operation of the jails, including having appropriate staffing in housing units, it is unreasonable to think DOC would be capable and willing to ensure each person in custody has consistent access to their digital mail.<sup>33</sup>

## **2. The Package and Mail Proposed Policies Raise Significant Surveillance Concerns for People in Custody, Their Families, and Communities of Color**

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

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<sup>27</sup> In a randomized control study of people who had been discharged from a hospital after a mental health crisis and declined ongoing care, individuals who received ongoing mail correspondence from their hospital providers had significantly lower rate of suicide than those who did not have ongoing contact. See Jarome Motto, et al., A Randomized Controlled Trial of Postcrisis Suicide Prevention, *Psychiatric Services*, 52.6, (2002): 828-833.

<sup>28</sup> See BOC, *Second Report on 2022 Deaths in New York City Department of Correction Custody*, Nov. 16, 2022; BOC, *February & March 2022 Deaths in DOC Custody Report and Recommendations*, May 9, 2022; BOC, *A Report and Recommendations on the November 2019 Attempted Suicide of Mr. Nicholas Feliciano*, Oct. 18, 2021.

<sup>29</sup> See Variance Request on Correspondence at 2.

<sup>30</sup> Lauren Gill, *Federal prisons switch to scanning mail is a surveillance nightmare*, The Intercept, Sept.25, 2021, <https://theintercept.com/2021/09/26/surveillance-privacy-prisons-mail-scan/>.

<sup>31</sup> See The Journal, *New prison mail policy costly to families – emotionally and financially* (Jan. 20, 2022), <https://www.the-journal.com/articles/new-prison-mail-policy-costly-to-families-emotionally-and-financially/> (People in custody “often are not even aware they are receiving letters from family because prison officials do not tell them when mail addressed to them gets rejected.”).

<sup>32</sup> See *id.* (describing how a family member who tried to send two photos a month to their loved one in custody, had some of their photos returned due to Securus’ policy).

<sup>33</sup> See, e.g., Nunez Monitor’s Second Status Report on DOC’s Action Plan, Oct. 28, 2022, 6 (finding that “nearly every facet of the jails’ operations, procedures and practices needs to be dismantled and reconstituted to reflect quality practice.”).

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. Thus, mail scanning creates 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.

Mail scanning opens the door to keyword search and social network analysis. These tools may 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.<sup>34</sup> More people will be tracked through DOC’s proposed policies, and people in custody will be surveilled even more closely than they are now. For example, Smart Communications, a vendor providing similar services to prisons in Florida, has bragged to the press that it “has never lost or deleted any records or any data from our database. There are hundreds of millions of data records stored for investigators at anytime [*sic*].”<sup>35</sup> Yet, if true, this means that Smart Communications and companies like it, including Securus, maintain their surveillance of people in custody—and everyone who contacted them—long after they have been released from custody.

The Department’s vague assertions that “no one will read” the mail and that it will “remain private,” belie the reality that scanning means mail will be electronically read and stored in a database, and that Securus has a track record of faulty privacy safeguards and improperly distributing confidential communications, including in New York City. The vendor which the Department has contracted with, Securus Technologies, advertises that “converting physical postal mail into electronic communications creates measurable results,” including “dramatically improv[ing] investigative intelligence,” and that mail will be handled by “investigative staff.”<sup>36</sup> It also offers a variety of investigative technology—once the Department is allowed to scan mail and privatize packages, it can thereafter employ a wide range of surveillance products on the data being gathered.<sup>37</sup> The Department has not explained what information Securus will collect and store and for how long, or what security procedures it is requiring to protect information and prevent data breaches.

In fact, we know that Securus regularly allows data breaches involving sensitive and protected information. In New York City itself, reporting from 2021 revealed that thousands of phone calls made by people detained at Rikers to their lawyers were recorded by Securus, despite

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<sup>34</sup> 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>.

<sup>35</sup> Stephanie Krent, *Writing to Someone in Prison? Uncle Sam May Keep a Copy*, Knight Institute (Sept. 2021), <https://knightcolumbia.org/blog/writing-to-someone-in-prison-uncle-sam-may-keep-a-copy>.

<sup>36</sup> Digital Mail Center® - Securus Technologies, <https://securustechnologies.tech/corrections/communication/digital-mail-center/> (last accessed Jan. 5, 2023).

<sup>37</sup> *See Investigation - Securus Technologies*, <https://securustechnologies.tech/investigative/investigation/> (last accessed Jan. 5, 2023).



those numbers being on a designated “do not record” list.<sup>38</sup> Many of those recordings ended up in the hands of state and federal law enforcement agencies and District Attorney’s offices.<sup>39</sup> There is no reason to believe that Securus’ mail scanning software 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.<sup>40</sup> 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.<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup>

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 communications.<sup>44</sup> 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 the mail for people in New York City jails poses a serious risk that the data of people in custody will be breached and their 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.

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<sup>38</sup> 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-zni5qacdhjaozok7rdmwyg2wsm-story.html>.

<sup>39</sup> 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>.

<sup>40</sup> *United States v. Carter*, 429 F. Supp.3d 788, 798-800, 847 (D. Kan. 2019).

<sup>41</sup> Order, *Huff v. Core Civic, Inc.*, No. 17 Civ. 2320 (JAR), Dkt. No. 146 (D. Kan. Sept. 26, 2019).

<sup>42</sup> *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).

<sup>43</sup> *Albert v. Global Tel\*Link Corp.*, No. 20 Civ. 01936 (LKG), 2021 WL 4478696 (D. Md. Sept. 30, 2021).

<sup>44</sup> 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/>.

Lastly, mail scanning 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.<sup>45</sup> 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. This proposed 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.”<sup>46</sup>

In places that have implemented mail scanning, some family members have stopped including photos of their children in letters, fearing that their children’s faces will end up permanently stored in a database under private control and accessible by prison officials for years.<sup>47</sup> And, in New Mexico, Securus’ mail scanning system has rejected newsletters from political organizations, leading to concerns of unconstitutional viewpoint discrimination and a lawsuit filed by a state senator on behalf of several people in custody.<sup>48</sup>

If the Board grants the requested variance, the people we represent and their communities will be chilled from corresponding with each other or prevented from communicating freely, depriving them of a vital and often irreplaceable connection.

### **3. People in Custody and Their Families Will Bear Additional Costs**

We disagree with DOC’s claim that their variance requests will have no financial cost to families or people in custody. While some services on the tablets may be provided free of charge, there are untold added costs to this program.<sup>49</sup>

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<sup>45</sup> *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).

<sup>46</sup> *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).

<sup>47</sup> Stephanie Krent, *Writing to someone in prison? Uncle Sam may keep a copy*, Knight First Amendment Institute at Columbia University, (Sept. 27, 2021), <https://knightcolumbia.org/blog/writing-to-someone-in-prison-uncle-sam-may-keep-a-copy>.

<sup>48</sup> Austin Fisher, *Some publications blocked by new prison mail system in NM*, Source NM, Aug. 12, 2022, <https://sourcenm.com/2022/08/12/some-publications-blocked-by-new-prison-mail-policy/> (describing freedom of information lawsuit filed by state senator in light of potential violations to incarcerated peoples’ constitutional rights).

<sup>49</sup> *See, e.g.,* The Journal, *New prison mail policy costly to families – emotionally and financially* (Jan. 20, 2022), <https://www.the-journal.com/articles/new-prison-mail-policy-costly-to-families-emotionally-and-financially/> (“In

The current package policy allows family members to send a loved one’s own belongings to them, not requiring the purchase of additional items. The proposed package variance shifts costs to families who cannot afford it. Many people sending packages to loved ones at Rikers would pay their bail if they could afford to. For years, BDS has sent hundreds of packages of clothing items, such as underwear, socks, t-shirts, and long-underwear, to people in custody. DOC has been unable or unwilling to appropriately heat or cool the jails, and people in custody are often without weather appropriate clothing or access to laundry. BDS and other organizations buy socks and undergarments in bulk at lower cost and package items to send to each person, along with new and used books and magazines. Other organizations collecting used books for people in custody will no longer be able to help people access reading materials, forcing them instead to buy new materials. Requiring all packages to be sent through a vendor will have a significant financial impact on families, organizations, and advocates and limit their ability to provide these essential items. It also eliminates the ability for someone who is unbanked or does not have access to a credit card to send packages. Additionally, Amazon and other online retailers engage in data mining, forcing people to participate in these surveillance systems for commercial purposes just to send a loved one needed items.

People in custody and advocates fought for years to make phone calls free. Commissioner Molina indicated during a City Council hearing that although some services will remain free on tablets, people in custody will be charged for “premium” services.<sup>50</sup> The Board must not allow vendors to profit off the incarceration of our neighbors.

#### **4. Mail and Package Restrictions Raise Concerns for People with Disabilities**

BDS also has serious concerns about the accessibility of digitized mail for people with disabilities, including those with limited eyesight or mobility. DOC has provided no explanations for how people who currently require braille or large text communication will be able to access mail, the law library, or other resources that are being migrated to the tablets. We fear that this program will be implemented without a plan to ensure people with disabilities have ongoing connection to their families. We have seen DOC fail to allow access for medically necessary and prescribed ambulatory aids—such as canes or crutches—for people in custody despite the advocacy of defenders and Correctional Health Services (“CHS”).

#### **C. DOC Should Prioritize Increasing Access To Substance Use Treatment, Not Limiting Physical Mail, as a Preventive Measure**

Instead of eliminating physical mail and the connection it offers to peoples’ loved ones, and subjecting people in custody to surveillance, DOC should be implementing harm reduction strategies and expanding access to substance use treatment. Nearly 60 percent of people in jail in

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North Carolina, senders must now use an app from the contractor TextBehind to draft letters or create digital cards and drawings. Fees start at \$0.49 and increase with every photo or drawing.”); Grace Toohey, *Florida prisons’ plan to digitize incoming mail faces criticism*, THE ORLANDO SENTINEL, May 28, 2021, <https://www.orlandosentinel.com/news/crime/os-prem-ne-florida-prison-mail-change-scanned-20210528-zctjzceergsvcdqapl2uxxfpy-story.html> (describing how the Florida Department of Corrections has introduced a system that charges people in custody for access to their own communications).

<sup>50</sup> 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>.

New York State have a substance use disorder.<sup>51</sup> DOC does not make fentanyl test strips or naloxone available to people in custody, which are simple measures that would save lives. DOC has trained only a fraction of its staff on the use of naloxone.<sup>52</sup> It is simply unacceptable that all DOC staff are not prepared to provide this life-saving treatment. And even if all staff are trained to reverse overdoses, people in custody must also be permitted to carry opioid antagonists. Recent BOC reports have highlighted that correction officers have failed to respond to medical emergencies in time to save lives of people in custody and people in custody have been forced to try to save the lives of their peers by attempting to provide first aid and carrying people to receive medical assistance.<sup>53</sup> We know that naloxone and fentanyl test strips are critical harm reduction tools in the community, and we must give people in custody the same tools.

Furthermore, people whose arrests are related to substance use issues deserve treatment, not incarceration. Instead, they find themselves incarcerated in inhumane and isolating conditions that only exacerbate any preexisting substance use or mental health issues. CHS' Key Extended Entry Program ("KEEP") has been an excellent resource for people in custody with opioid use disorders.<sup>54</sup> But even when people in custody are connected to substance use treatment, such as the KEEP program, DOC's failure to provide consistent access to medical care frequently impedes treatment, sometimes with tragic results.<sup>55</sup> For example, on July 2, 2022, CHS noted that DOC

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<sup>51</sup> Lauren Jones, Sandra van den Heuvel, and Amanda Lawson, *The Cost of Incarceration in New York State: How Counties Outside New York City Can Reduce Jail Spending and Invest in Communities*, January 2021, <https://www.vera.org/downloads/publications/the-cost-of-incarceration-in-new-york-state.pdf>.

<sup>52</sup> New York Daily News, *NYC Council presses DOC Commissioner on reasons for contraband drugs entering jails*, Oct. 25, 2022, <https://www.nydailynews.com/new-york/nyc-crime/ny-contraband-drugs-rikers-council-hearing-20221025-5gbrsgeffzcr3pdliplytirr4u-story.html>.

<sup>53</sup> See, e.g., Board of Correction, *Second Report and Recommendations on 2022 Deaths in New York City Department of Correction Custody*, Nov. 16, 2022, <https://www.nyc.gov/assets/boc/downloads/pdf/Reports/BOC-Reports/FINAL-Second-Report-and-Recommendations-on-2022-Deaths-in-DOC-Custody-and-CHS-response.pdf> (describing three instances in which correction officers failed to render first aid to people in custody who passed away and stating that people in custody alerted correction officers when Mary Yehudah and Elijah Muhammad were in medical distress); Board of Correction, *February & March 2022 Deaths in DOC Custody Report and Recommendations*, May 9, 2022, <https://www.nyc.gov/assets/boc/downloads/pdf/Reports/BOC-Reports/deaths-report-and-chs-response-202202-202203.pdf> (reporting that Tarz Youngblood was carried out of his cell by people in custody who attempted to provide first aid, that Herman Diaz and George Pagan were carried by people in custody to receive medical assistance and that people in custody also tried to provide first aid to Mr. Diaz in the absence of a B officer).

<sup>54</sup> KEEP, one of the first jailed-based opioid use disorder treatment programs in the country, provides critical access to methadone and buprenorphine maintenance to people in custody. The KEEP model centers reentry planning from the beginning of incarceration, assisting people in maintaining connections to their outside providers, communicating with defense counsel, and setting people up for success when they reenter their communities. This program saves lives. People are able to remain on methadone or buprenorphine while incarcerated, which greatly lowers the risk of fatal overdose upon return to the community. Others are able to access medicated assisted treatment (MAT) for the first time. Jonathan Giftos, *Substance Use & Incarceration: Presentation to the NYC Board of Correction*, July 12, 2018, <https://www1.nyc.gov/assets/boc/downloads/pdf/Meetings/2018/July-10-2018/POST/BOC%20SUT%20Service%20Overview%20-%20July%202018%20-%20FINAL.pdf>.

<sup>55</sup> See *Agnew et. al. v. DOC*, Index No. 813431/2021E, Decision and Order (Sup Ct, Bronx County) (May 17, 2022).

had failed to produce Elijah Muhammad for six methadone appointments in a row.<sup>56</sup> On July 8, Mr. Muhammad reported ongoing withdrawal symptoms and again asked to receive methadone.<sup>57</sup> Two days later, he died by overdose.<sup>58</sup> We cannot ignore the causal link between the inaccessibility of medical and mental health care, including substance use treatment, in the city jails and the unprecedented number of lives lost in those jails over the past year. DOC must produce people to every substance use treatment appointment they have.

\* \* \*

The Department's proposals to cut off physical mail and non-commercial packages to everyone in DOC custody represents a drastic and unreasonable overreach when the Department could be taking steps that would be effective in reducing drug use and overdoses, such as increasing staff screening and security, expanding harm reduction strategies, improving access to medical care, and reducing the jail population. For the aforementioned reasons, we strongly urge the Board to deny DOC's variance requests regarding mail and packages. Thank you for your time and attention to this important matter.

Sincerely,



S. Lucas Marquez  
Associate Director / Interim Acting Director  
Civil Rights & Law Reform

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<sup>56</sup> Board of Correction, *Second Report and Recommendations on 2022 Deaths in New York City Department of Correction Custody*, Nov. 16, 2022, 16, <https://www.nyc.gov/assets/boc/downloads/pdf/Reports/BOC-Reports/FINAL-Second-Report-and-Recommendations-on-2022-Deaths-in-DOC-Custody-and-CHS-response.pdf>.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 16-17.