February 10, 2023

Chair Dwayne C. Sampson
Board of Correction
125 Worth Street
New York NY 10013

Dear Chair Sampson and Members of the Board of Correction:

We are attorneys for LatinoJustice PRLDEF, Brooklyn Defender Services, New York County Defenders, and Neighborhood Defender Service of Harlem. We write to ask the Board of Correction ("BOC") to reject the proposed variance from Board Minimum Standard § 1-11(e)(1)(i) that would limit the receipt of unopened, physical mail and the variance from Board Minimum Standard § 1-12(a) that would limit the sources of external packages. Should the Board pass either or both of these variances, either with or without conditions, as a continuing variance or a limited variance, we are prepared to bring legal action against the BOC and the Department of Correction ("DOC"). Our legal arguments are summarized in this letter and will be delivered in person at the BOC meeting on February 14 where the Board is scheduled to vote on these variances.

The evidence before the Board is unequivocal that the proposed mail and package policies are ineffective at reducing drug use and overdoses—the Department's stated purpose of the variances—and would cause a multitude of harms on people in custody and our communities in New York City. Neither the Board nor the Department may overlook their own procedures and proper rulemaking processes when making such significant changes that limit the crucial family and community ties for people in DOC custody. The granting of these proposed mail and package variances and the implementation of these policies without proper rulemaking would be unlawful as: (1) any decision to pass either of these variances is arbitrary and capricious because the Board would be failing to follow its own procedures and rules for granting a variance; (2) it would be done in violation of lawful procedure because it constituted rulemaking outside of the prescribed public process required by the Citywide Administrative Procedure Act ("CAPA"); and (3) it would be unsupported by substantial evidence in the record.

First, the decision to pass either of the proposed variances is arbitrary and capricious because neither DOC nor BOC followed the rules under which a variance may be granted. "An agency's failure to follow its own procedures or rules in rendering a decision is arbitrary and capricious." *D.F. v. Carrion*, 43 Misc. 3d 746, 756 (Sup. Ct. 2014). Title 40 of the Rules of the City of New York empowers the Board to grant a variance when DOC makes a showing that "despite its best efforts, and the best efforts of other New York City officials and agencies, full compliance with the

subdivision or section cannot be achieved." 40 R. City of N.Y. §1-15(b)(1). In applying for a variance, DOC must also include other information including efforts to achieve compliance such as: the efforts undertaken by DOC to achieve compliance, the *specific* facts or reasons making full compliance impossible (emphasis added); the *specific* plans, projects and timetables for achieving full compliance (emphasis added); the *specific* plans for serving the purpose of the subdivision or section for the period that strict compliance is *not* possible (emphasis added); and if the application is for a limited variance. 40 R. City of N.Y. §-15(c)(1)(v–vii). DOC has provided none of the above. The Department is currently complying with the minimum standards so it cannot claim that compliance cannot be achieved. Rather, it has simply stated a policy preference for repealing the minimum standards, which cannot be effectuated through the variance process. Any decision by the Board to grant either variance is arbitrary and capricious as the Board would not be following its own procedures and rules for granting a variance.

Second, the mail and package variances represent rulemaking outside of proper rulemaking processes set forth in the Citywide Administrative Procedure Act that BOC and DOC are mandated to follow. Neither agency may use the variance process to skirt or circumvent the CAPA requirements. To modify the minimum standards, BOC must engage in rulemaking. It engaged in rulemaking in 2015 to modify the number of hours a package may be searched before delivery from 48 to 72. Changing something as drastic as whether a person will ever receive a drawing from his child, a homemade gift, or necessary clothes and reading materials is a change to a "fixed, general principle applied without regard to the facts and circumstances of the individual case" regarding mail and packages. *Cordero v. Corbisiero*, 80 N.Y.2d 771, 773 (1992). The administrative record itself is replete with public comments made both in writing and orally during the variance process that demonstrate the significant interests impacted by the proposed policies. If an agency promulgates a statement of general policy through some procedure other than rulemaking when the statement "should have been promulgated as a rule, consistent with the requirements of CAPA," then the ensuing statement or position is a "nullity." *Callahan v. Carey*, No. 42582/79, 2012 WL 680318 (N.Y. Sup. Ct. Feb. 21, 2012). DOC similarly cannot simply avail itself of the variance process here and proceed with any mail digitization program or package limitation policy without engaging in a full rulemaking process.

Furthermore, the Board's decision to grant the mail and package variance would fail to meet the rigid rulemaking standards of CAPA. CAPA involves more than notice and comment: it requires the text of an actual rule that is vetted and edited throughout the CAPA process. For example, both "the law department and the mayor's office of operations shall review each proposed rule prior to the publication of such proposed rule in the City Record." New York City Charter § 1043(d)(2). One purpose of this review is to determine if the rule is "drafted so as to accomplish the purpose of the authorizing provisions of law." *Id.* at (d)(1)(i). Once this review is complete, the proposed rule and the certification of the law department must be published in the City Record. New York City Charter § 1043(d)(2). Because the Board and the Department are engaged in stealth rulemaking by using the variance process, any granting of the proposed variances and subsequent implementation of the mail and package policy changes would be "in violation of lawful procedure." CPLR § 7803(3).

Finally, the Board's decision to approve either variance would be "unsupported by the evidence in the record." CPLR § 7803(4). Substantial evidence requires that there "be enough relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact." *25-24 Cafe Concerto Ltd. v. New York State Liquor Auth.*, 65 A.D.3d 260, 265 (2009). DOC's

claims here—that digitizing mail and limiting packages will reduce the flow of drugs into the jails and not harm people in custody—has no support in the record. Public comments ranged from Comptroller Brad Lander and 18 City Council members to various organizational stakeholders, people formerly incarcerated, and members of the public, and overwhelming asked the Board to reject the variances. The record before BOC clearly demonstrated that, in jurisdictions where such policies have been implemented, banning physical mail and packages has not led to a reduction in the flow of drugs to jails. While Commissioner Molina testified before City Council that "most [fentanyl] enters [city jails] in letters and packages laced with fentanyl," the administrative record before BOC thoroughly disproves his claim. As commentors made clear, the available evidence—including from the New York City Department of Investigation and an investigator from DOC testifying in federal court—points to correctional officers and other DOC employees as the primary source of drugs in DOC jails.

The administrative record also shows that further restrictions on mail and packages would not stop the flow of drugs into the jails, but rather would come at a high cost to people in custody and their communities. The administrative record demonstrates that extremely valuable connections and coping mechanisms would be lost by denying people access to their unopened, physical mail and care packages. It shows how entrusting Securus 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. It shows that the proposed mail policies fail to account for ensuring access to mail for people with disabilities and religious observances. And that the proposed package variance would limit who can send packages by increasing costs for families and organizations, and disregarding those who are unable to access websites, are unbanked, or do not have access to credit cards. Thus, before it, BOC has a substantial record showing that DOC's proposed variances would be ineffective and harmful. Clearly, should the Board approve either variance, that decision would constitute a determination not "supported by substantial evidence." CPLR § 7803(3) and (4).

While we submit this notice in hopes that you will reject both variances, we are prepared to proceed with a legal action if you approve either of the proposed mail and package variances.

Sincerely,

/s/ *Andrew Case*

Andrew Case, Senior Counsel
Norma Esquivel, Associate Counsel
LatinoJustice PRLDEF
475 Riverside Drive #1901
New York, NY 10015

/s/ *Lucas Marquez*

S. Lucas Marquez, Interim Acting Director,
Civil Rights & Law Reform
Kevin Siegel, Staff Attorney,
Civil Rights & Law Reform
Brooklyn Defender Services
177 Livingston Street, 7th Floor
Brooklyn, NY 11201

/s/ *Rebecca Phipps*

Rebecca Phipps, Special Litigation Attorney
New York County Defender Services
100 William Street, 20th Floor
New York, NY 10038

/s/ *Meghna Philip*

Meghna Philip, Special Litigation Attorney
Neighborhood Defender Service of Harlem
317 Malcolm X Blvd, 10th Floor
New York, NY 10027