

Proskauer Joins American Civil Liberties Union to Protect Constitutional Rights of Incarcerated Individuals

Proskauer For Good on December 21, 2023

On December 7, 2023, a team of Proskauer attorneys joined the American Civil Liberties Union (“ACLU”), the ACLU of Delaware, and attorneys from Shaw Keller LLP in filing a [complaint](#) against the state of Delaware on behalf of the Prisoners Legal Advocacy Network (“PLAN”) to protect the Constitutional right to vote for incarcerated individuals.

Background

Under the Delaware Constitution, incarcerated individuals retain their voting rights unless they have been convicted of a felony and have not had their rights restored. Eligible voters include individuals detained before trial, as well as those imprisoned following a misdemeanor conviction. Since incarceration prevents these eligible voters from voting in-person, their voting options had been limited exclusively to casting mail-in absentee ballots. Yet, absentee voting is currently unlawful for incarcerated individuals, as incarceration is not one of the specifically enumerated categories of absentee voting under the Delaware Constitution.

This issue came into focus last year when the Delaware Supreme Court issued its written opinion in [Albence v. Higgin \(“Higgin”\)](#), striking down a 2022 state statute authorizing all voters to vote by mail. In its ruling, the Delaware Supreme Court determined that the Legislature unconstitutionally expanded the categories of voters eligible to vote absentee under the Delaware Constitution. Since incarcerated persons were not among those enumerated, the ACLU pressed the State to provide assurances that eligible incarcerated voters would be able to vote in a constitutionally permitted manner in 2024—*i.e.*, in person, given the Delaware Supreme Court’s decision in *Higgin*—and free from worry that the vote might be invalidated.

To date, Delaware has repeatedly refused to allow in-person voting machines—or present any other in-person voting option—within state prisons to ensure that these voters can constitutionally exercise their rights.

Prisoners Legal Advocacy Network

PLAN is a non-profit organization that provides legal services and support, including information about how to vote, to incarcerated individuals throughout the country. Delaware's ongoing position on this issue post-*Higgin* has injured, and continues to injure, PLAN, its members and those on whose behalf PLAN serves.

The Lawsuit

The lawsuit brings claims against the State under the First and Fourteenth Amendments and their protections of the fundamental right to vote, as well as under the Fourteenth Amendment's Equal Protection Clause on the basis of unconstitutional wealth discrimination between voters. (Delaware's cash bail system means those who can post bail remain free to vote, but those who cannot afford bail and must remain imprisoned cannot vote. This system disproportionately impacts minorities.)

Among other forms of relief, the lawsuit seeks to enjoin the State from disenfranchising eligible incarcerated voters and require that the State provide these eligible voters with a Constitutional, in-person means of accessing the ballot.

The Proskauer team includes partners Stephen Hibbard and Michael Lebowich; associates Godfre Blackman, Aaron Francis, Dixie Morrison, and Seth Victor; paralegal specialist Bobbi Preyer; and legal project assistant Adam Tolson.

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Related Professionals

- **Stephen Hibbard**
Partner
- **Aaron M. Francis**
Associate
- **Dixie M. Morrison**
Associate