SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

FUQUAN FIELDS, LUIS GARCIA, and JIMMY BARNER, on behalf of themselves and all similarly situated individuals, Plaintiffs-Petitioners, v. ANTHONY J. ANNUCCI,[1] as Acting Commissioner of the New York State Department of Corrections and Community Supervision, Defendant-Respondent.	Index No. 902997-23 Bryant, J. Motion Nos. 1, 2

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT-RESPONDENT'S MOTION TO DISMISS AND IN FURTHER SUPPORT OF PLAINTIFFS-PETITIONERS' AMENDED ARTICLE 78 PETITION

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New York, New York

[1] Daniel F. Martuscello III has replaced Anthony J. Annucci as Acting Commissioner of the New York State Department of Corrections and Community Supervision and should therefore be substituted as the Defendant-Respondent in this litigation. (*See* Dkt. No. 39, n.1; CPLR § 1019).

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PRELIMINARY STATEMENT

DOCCS attempts to cabin this case to a narrow dispute over three individual disciplinary reports. But that deceptive reframing obscures the true scope of what Petitioners challenge: not just the results of their disciplinary charges, but the unlawful policy—the k(ii) Confinement Policy—that commanded those results.

Under that categorical policy, DOCCS makes restrictive k(ii) confinement the inevitable result of conviction on *any* Tier III charge, irrespective of any individual facts found or explained. And the outcome of that atextual approach is clear: The k(ii) Confinement Policy reliably ensures that thousands of New Yorkers are placed in restrictive disciplinary confinement under circumstances that the HALT Act expressly forbids.

DOCCS's failure—or refusal—to engage with the true gravamen of Petitioners' challenge, or to reckon with the scope of its own unlawful conduct under the k(ii) Confinement Policy, pervades each aspect of DOCCS's motion and answer. DOCCS claims declaratory judgment is inappropriate but ignores the ongoing policy that Petitioners challenge. DOCCS contends class certification is inappropriate but ignores the formidable burdens and imminent harm to each class member whom the k(ii) Confinement Policy touches. And DOCCS argues Petitioners each committed misconduct qualifying for k(ii) confinement but ignores the categorical nature of its k(ii) Confinement Policy, under which the stringent requirements of Correction Law ("CL") § 137(6)(k)(ii) are rendered mere surplusage.

Each of these flaws fatally undermines DOCCS's attempt to justify the practices at issue in this case. And because DOCCS does not—and could not—explain how its k(ii) Confinement Policy squares with the HALT Act, the Court should deny DOCCS's motion to dismiss and grant the petition.

ARGUMENT

I. A Declaratory Judgment Action Is a Proper Vehicle for Challenging the k(ii) Confinement Policy.

In moving to dismiss, DOCCS disputes the propriety of a declaratory judgment action as a vehicle for challenging its decisions on Petitioners'[2] disciplinary charges. But DOCCS ignores both the scope of this case and a wealth of contrary caselaw: Courts routinely permit declaratory judgment actions to proceed in cases, like this one, challenging ongoing agency policies; And the availability of Article 78 review in this case requires no different result here. DOCCS's argument is thus baseless, and the Court should permit Petitioners' declaratory judgment action to proceed.

A. Courts Routinely Permit Declaratory Judgment Actions Challenging Ongoing Agency Policies Like DOCCS's k(ii) Confinement Policy.

DOCCS argues that a declaratory judgment is an inappropriate vehicle for challenging its determinations on Petitioners' disciplinary charges (NYSCEF Doc No. 47, Respondents' Opp. & Answer at 5–6). But this ignores the scope of Petitioners' claims: Petitioners challenge not just the results of their particular disciplinary hearings but also the ongoing DOCCS policy—the k(ii) Confinement Policy—that commanded those results.

Viewed in its proper context, Petitioners' challenge to the k(ii) Confinement Policy is thus appropriately adjudicated in a declaratory judgment action. "[T]he Court of Appeals has consistently held that . . . a declaratory judgment action is appropriate where . . . the petitioners seek review of a continuing policy" (*Matter of Dorst v Pataki*, 167 Misc 2d 329, 332–333 [Sup Ct, Albany County] [collecting cases]*, affd,* 228 AD2d 4 [3d Dept 1997], *affd*, 90 NY2d 696 [1997]). Courts around the state have allowed declaratory judgment actions to proceed in just these circumstances (*see e.g. Allen v Blum*, 58 NY2d 954, 955 [1983]; *Protect the Adirondacks!*

[2] This memorandum refers to Plaintiffs-Petitioners simply as "Petitioners" throughout.

Inc. v New York State Dept. of Envtl. Conservation, 2013 NY Slip Op 32083[U] [NY Sup Ct, Albany County 2013]; *Matter of Broome County v State*, 141 Misc 2d 693, 695 [Sup Ct, Broome County 1988] [utilizing a declaratory judgment action to review the procedures used to transport parole violators from jails to state prisons]. This is so even where, as in this case, the challenged agency action is comprised of a complex series of policy choices (*Matter of Zuckerman v. Bd. of Educ. of City Sch. Dist. Of City of New York*, 44 NY2d 336, 341, 343–44 [1978] [permitting declaratory judgment to proceed where plaintiffs-petitioners, agency employees challenging their dismissal, also sought review of a multi-step policy process by which the agency allegedly circumvented merit-based hiring laws]).

The wealth of caselaw supporting Petitioners' right to seek declaratory relief in challenging the k(ii) Confinement Policy also makes clear why DOCCS's reliance on *Matter of Shore Winds LLC v Zucker*, 179 AD3d 1208 [3d Dept 2020], is misplaced (Def. Memo. of Law at 6). Unlike Petitioners' challenge to the k(ii) Confinement Policy, the *Shore Winds* plaintiff, a residential health care facility, challenged not any ongoing policy, but an individual decision by the Medicaid Inspector General to recoup funds from the facility. (*See Shore Winds*, 179 AD3d at 1210). *Shore Winds* is thus readily distinguishable from the Petitioners' challenge here and provides no basis for dismissing Petitioners' declaratory judgment action.

B. The Availability of Article 78 Review Does Not Foreclose Declaratory Judgment.

Nor, as DOCCS further argues, does the availability of Article 78 review preclude Petitioners from seeking declaratory judgment. Courts finding otherwise have done so only where Article 78 review could afford adequate relief, such as in challenges to individual agency decisions (*see e.g. Shore Winds*, 179 AD3d at 1211 [finding declaratory judgment action improper in challenge, not involving broader agency policy, to individual agency decision];

Matter of Escalera v Roberts, 193 AD3d 1232, 1233–34 [3d Dept 2021] [same]). But as Petitioners have explained, their challenge in this case is not so limited; and Article 78 cannot afford full relief in their challenge to DOCCS's k(ii) Confinement Policy.

Under these circumstances, courts regularly allow plaintiffs to seek both Article 78 review and declaratory judgment in hybrid proceedings (*see e.g. Matter of E. W. Bank v L & L Associates Holding Corp.*, 144 AD3d 1030, 1033 [2016] [permitting the case to continue as a hybrid Article 78 declaratory judgment action]; *Matter of Kerri W.S. v Zucker*, 202 A.D.3d 143, 152 [4th Dept 2021] [finding that a lawsuit is "properly characterized as a true hybrid article 78 proceeding and declaratory judgment action"]), *leave to appeal dismissed*, 38 N.Y.3d 1028 [2022]). No different approach is required here.

II. Class Action Claims Can Be Pursued Via an Article 78 Proceeding

DOCCS contends that the government operations rule precludes class certification, but the case law does not support this contention.[3] An exception to the government operations rule applies where, as here, potential class members face formidable barriers to individual litigation and imminent harm (*See e.g. Matter of Stewart v Roberts*, 163 AD3d 89, 94 [3d Dep't 2018] [stating that superiority is satisfied in actions against government bodies where "the members of [the] proposed class are indigent individuals who seek modest benefits and for whom commencement of individual actions would be burdensome"]; *see also New York City Coalition to End Lead Poisoning v Giuliani,* 245 AD2d 49 [1st Dept 1997] [stating that the government

[3] DOCCS's objection to class certification in Article 78 proceedings is more appropriately raised in response to Petitioners' motion for class certification, not in a motion to dismiss (*see Mid Island LP v Hess Corp.*, 41 Misc 3d 1237(A) at *6 [Sup Ct, New York County 2013] [deferring consideration of defendant's objection to class certification until a motion for class certification is made]). Petitioners anticipate further addressing any such objections, if raised by DOCCS, in their class certification reply brief.

operations rule does not bar class certification where "plaintiffs' ability to commence individual suits is highly compromised, due to indigency or otherwise" and "where the condition sought to be remedied by the plaintiffs poses some immediate threat that cannot await individual determinations"]).

Relying on precisely this exception, courts around the state, including in the Appellate Division, Third Department, have certified Article 78 actions as class actions (*Stewart*, 163 AD3d at 94 [reversing order denying class certification in a hybrid Article 78 and declaratory judgment proceeding to allow for discovery on numerosity question]; *Dudley v Kerwick*, 84 AD2d 884 [3d Dept 1981] [certifying a class of taxpayers who benefitted from a religious exemption]). In *Brad H.*, for example, the court certified a class of incarcerated people receiving treatment for mental illnesses in city jails under just this exception to the government operations rule (*Brad H. v City of New York*, 185 Misc 2d 420, 425 [Sup Ct, NY County 2000], *affd*, 276 A.D.2d 440 [1st Dept 2000] [noting that "the governmental operations rule does not apply where . . . due to indigence or otherwise, the class plaintiffs would likely be unable to file suit to protect themselves"]). Courts have also relied on similar reasoning to certify Article 78 classes of children with developmental disabilities in foster care (*City of New York v Maul*, 2008 WL 10587255 [Sup Ct NY County 2008]) and to certify classes of senior citizen tenants seeking rent increase exemptions (*Tindell v Koch*, 164 A.D.2d 689 [1st Dept 1991]).

As these cases make clear, the putative class here—comprised of individuals who face formidable barriers to individual litigation and imminent harm under the k(ii) Confinement Policy—falls well within this established exception. Its members are indigent individuals incarcerated in prisons geographically dispersed across the state. Their practical ability to pursue

individual litigation may be limited as a result; and they may face powerful disincentives, in the form of retaliation, to pursuing efforts to vindicate their rights.

Moreover, the stakes for members of the putative class—who number in the hundreds, if not thousands, and who face unlawful confinement in restrictive and often highly isolative settings while the k(ii) Confinement Policy remains in effect—could hardly be higher. (*See Brad H.*, 185 Misc 2d at 242–25 [finding Article 78 class appropriate "where the class plaintiffs face an immediate threat from the condition for which a remedy is sought"]; *HALT Incident List June 2023*, https://doccs.ny.gov/system/files/documents/2023/07/halt-incident-list-june-2023.pdf [NY St DOCCS] [reflecting 855 convictions resulting in SHU sanctions in June 2023 alone]). Awaiting individual determinations is not practical, then, given the heightened stakes present in this case.

As the established caselaw and the facts of this case make clear, where, as here, an exception to the government operations rule applies, class-based pursuit of Article 78 claims is appropriate.

III. Defendants' Opposition to Article 78 Relief Is Meritless.

In opposing Plaintiffs-Petitioners' Article 78 petition on the merits, DOCCS relies on a series of flawed arguments, each easily rejected, and none warranting the dismissal DOCCS seeks.

A. DOCCS Invites the Court to Upend the Rules of Statutory Interpretation.

DOCCS begins with the remarkable claim that the Court must defer to DOCCS's own interpretation of the HALT Act's requirement (Respondents' Opp. & Answer at 8). In so claiming, DOCCS turn the rules of statutory interpretation on their head.

Whether an agency has properly interpreted a statute is determined by the courts, without deference to the agency (*Walsh v New York State Comptroller*, 34 NY3d 520, 523 [2019]; *Schwabler v Dinapoli*, 194 AD3d 1235, 1236 [3d Dept 2021]). And under longstanding principles of statutory interpretation, it is the intent of the Legislature, as expressed through the unambiguous language of the statute, to which the courts must defer (*see Makinen v City of New York*, 30 NY3d 81, 85 [2017]). Here, the stringent constraints on k(ii) confinement are clear and unambiguous in the statutory text (*see generally* CL § 137[6][k][ii]).[4] And the Court is thus bound to interpret those constraints according to their plain meaning (*see Walsh*, 34 NY3d at 524 ["We have long held that the statutory text is the clearest indicator of legislative intent, and that a court should construe unambiguous language to give effect to its plain meaning."]).

DOCCS expends pages of briefing underscoring the limited scope of Article 78 review and the deference owed to prison administrators in matters of prison discipline (Def. Memo. of Law at 8–10). But the language of CL § 137(6)(k)(ii) is clear, and any deference owed to DOCCS cannot override the express and mandatory constraints on k(ii) confinement that the Legislature saw fit to include in the HALT Act (*see Bank of Am., N.A. v Kessler*, 39 NY3d 317, 324 [2023] ["Where the natural signification of the words employed as a definite meaning, which involves no absurdity or contradiction, there is no room for constructions and courts have no right to add to or take away from that meaning."]).

[4] Indeed, as those constraints make clear, the Legislature intended the HALT Act to answer "the growing chorus of individuals, organizations, and policymakers" who "called for a dramatic transformation and curtailment of the use of segregated confinement." (N.Y. State Assembly Memo. In Support of Legislation, Bill Jacket, L 2021, ch 93 at 9).

B. DOCCS Ignores the Gravamen of Petitioners' Challenge to the k(ii) Confinement Policy and Misreads the HALT Act.

DOCCS argues imposing k(ii) confinement on Petitioners was justified because their charged misconduct involved "attempt[s] to cause serious physical injury" under CL § 137(6)(k)(ii)(A) (Respondents' Opp. & Answer at 10–12). But in attempting to reframe this case as a narrow dispute over three individual disciplinary reports, DOCCS ignores the central focus of Petitioners' challenge, which is not just to the results of their particular disciplinary hearings but also to the DOCCS policy—the k(ii) Confinement Policy—that commanded those results.

Under that categorical policy, DOCCS makes k(ii) confinement inevitable for conviction on *any* Tier III charge—including misconduct bearing no resemblance to the seven k(ii) acts[5]—without regard to individual facts or the stringent requirements of CL § 137(6)(k)(ii). Yet beyond blinkered arguments aimed solely at Petitioners, DOCCS offers nothing to explain how the k(ii) Confinement Policy, which applies categorically across the class, could possibly square with the HALT Act.[6]

[5] For example, offenses like splashing water on a corrections officer or causing a miscount can be charged as Tier III misconduct (*see* NYSCEF Doc No 36, Pet. Am. Memo. of Law at 13).

[6] Moreover, even on its own narrow terms, the claim that Petitioners each committed misconduct constituting an "attempt[] to cause serious physical injury" under CL § 137(6)(k)(ii)(A) fails. That claim rests solely on the notion that throwing bodily waste on others can lead to illness for infection. But, for example, Mr. Fields was convicted of urinating *on the floor*, not on others. The suggestion that sugar packets he threw at a corrections officer were soaked in urine is a mere allegation and, as such, an insufficient basis for imposing k(ii) confinement (*see* CL § 137[6][k][ii] [requiring that conviction for a k(ii) act precede k(ii) confinement]). DOCCS's sole proffered justification for placing Mr. Fields in k(ii) confinement thus fails on its face.

DOCCS's further attempts to justify imposing k(ii) confinement on Petitioners misread the relevant statutes and are thus also misplaced. DOCCS makes the puzzling claim that CL § 137(6)(m)(ii) authorizes Petitioners' k(ii) confinement (Respondents' Opp. & Answer at 13). But subsection m(ii) merely establishes a presumption of release from RRU after one year (or within 60 days of release from custody) and describes the narrow circumstances in which RRU placement can be extended beyond that limit—such as commission of new misconduct constituting a k(ii) act (*see* CL § 137[6][m][ii]). Subsection m(ii) thus does not justify the k(ii) confinement DOCCS imposes on Petitioners here. DOCCS also notes that RRU and RMHU placement do not constitute "segregated confinement" under the HALT Act (Def. Memo. of Law at 13–14). This assertion is immaterial, because the requirements of CL § 137(6)(k)(ii) nonetheless apply in each of those settings (*see* CL § 137[6][k][ii] [imposing requirements of subsection k(ii) on RRUs]; *id.* § 401[1] [same as to RMHUs]).

C. DOCCS Attempts to Sidestep the HALT Act's Requirement that Detailed Factual Findings Precede k(ii) Confinement.

DOCCS also excises from the HALT Act the requirement to make the factual findings that must precede any imposition of k(ii) confinement. In so doing, DOCCS denies to all class members the reasoned explanation that the statute, and rational decision-making, demand (*see generally* CL § 137[6][k][ii] [enumerating mandatory written findings]; *see also Motor Vehicle Mfrs. Assn. of U.S., Inc. v State Farm Mut. Auto. Ins. Co.*, 463 US 29, 48 [1983] [requiring that agency "cogently explain" its decisions]).

Through the detailed findings required under CL § 137(6)(k)(ii), the HALT Act makes explicit the type of written explanation that must support any decision to impose k(ii) confinement: In addition to conviction for one of the k(ii) acts, HALT requires that DOCCS find "in writing" and "based on specific objective criteria" that predicate k(ii) acts "were so heinous

or destructive" that placing the individual in general-population housing would create both a "significant risk of imminent serious physical injury" and an "unreasonable risk" to facility security (*see* CL § 137[6][k][ii]). Yet under its k(ii) Confinement Policy, DOCCS flouts this obligation to explain, instead imposing k(ii) confinement on anyone found guilty in a Tier III hearing, irrespective of any facts found or reasons given (*see New York v Wolf*, 2020 WL 6047817, at *5 [SD NY Oct. 13, 2020, No. 20-CV-1127, Furman, J.] [noting that agency decision-making must be both "reasonable and reasonably explained"] [internal citation omitted]).

Attempting to resist this conclusion, DOCCS deploys a series of arguments to justify its failure to make the written findings that must precede k(ii) confinement. Those arguments fail.

First, DOCCS argues its hearing officers need not "include the precise words of the statute in their written decisions" (Respondents' Opp. & Answer at 14). This responds to an argument Petitioners have not made. Petitioners do not suggest, as DOCCS claims, that DOCCS must "parrot[]" the k(ii) confinement criteria "during disciplinary hearings" (*Id*. at 15). But neither may DOCCS sidestep its obligation to make the detailed factual findings the HALT Act unambiguously requires before imposing k(ii) confinement (*see Griffin v Annucci*, Sup Ct, Albany County, July 6, 2023, Connolly, J., Index No. 901471-23, attached as Exhibit 1 [granting petition and modifying disciplinary sentence where administrative record of DOCCS's challenged disciplinary decision neither acknowledged nor reflected "considered review" of the requirements of CL § 137(6)(k)]). Yet by deeming all Tier III misconduct to satisfy the requirements of subsection k(ii) irrespective of individual facts, sidestepping that obligation is precisely what the k(ii) Confinement Policy does.

Second, DOCCS claims the findings required under k(ii) are implicit in Petitioners' convictions for misconduct falling under CL § 137(6)(k)(ii)(A), obviating the need for separate written findings. But this claim contradicts the statutory text: Petitioners have already explained why DOCCS's categorical approach conflicts with the clear requirements of subsection k(ii) (*see* Pet. Am. Memo. of Law at 10–12 [providing three such reasons]). And DOCCS declines to respond in specific terms to any of these points.

Third, DOCCS asks the Court to credit various new reasons—offered for the very first time in DOCCS's answer—why placing Petitioners in general population would create an "unreasonable risk" to facility security (*see* CL § 137[6][k][ii]). But those belated explanations are pure pretext, and the Court should not permit DOCCS to revise the record with reasoning that did not actually inform its decision-making (*see Scherbyn v Wayne-Finger Lakes Bd. of Co-op. Educ. Servs.*, 77 NY2d 754, 758 [1991] [citing *Aronsky v Bd. of. Educ.*, 75 NY2d 997 [1990]]).

DOCCS now claims Petitioners' misconduct "divert[ed] staff from other duties." (Rodriguez Aff. ¶ 31). But the same could be said of literally *anything* requiring staff attention—misconduct or otherwise. Accepted as valid, this rationale would allow *all* misconduct to constitute an "unreasonable risk," thereby defying cardinal principles of statutory interpretation (*see People ex rel. Killeen v Angle*, 109 NY 564, 575 [1888] ["It is a primary rule of construction that statutes must be so interpreted as to give effect to every part thereof, and leave each part some office to perform; and any construction which deprives any part of a statute of effect and meaning, and leaves it ineffectual, when it is susceptible of another interpretation, is wholly without support from any authority."]; *R.A. Bronson, Inc. v Franklin Correctional Facility*, 255 AD2d 723, 724 [3d Dept 1998] ["[A] statute should be interpreted as a whole so as to give effect to each and every part thereof."] [internal citation omitted]).

DOCCS also now claims Petitioners' propensity for misconduct contributes to the risk they would pose if not held in k(ii) confinement (*see* Respondents' Opp. & Answer at 13, 15). But this claim, too, is a red herring: Under DOCC's k(ii) Confinement Policy, Petitioner's placement in k(ii) confinement was a foregone conclusion, irrespective of their disciplinary histories. Underscoring this point, DOCCS imposed k(ii) confinement on Mr. Barner, for example, in the absence of any indication in the record that DOCCS based its decision on his disciplinary history or other propensity for misconduct (*see* NYSCEF Doc No. 44, Respondents' Exhibit; *see also Griffin*, Index No. 901471-23 at 20 n 4, ["Respondents' belated attempt to supplement the record, in response to the instant proceeding, providing evidence of petitioner's crimes and institutional disciplinary history is without merit as there is nothing to demonstrate that such criteria was utilized the hearing officer . . . ."]). Contrary to DOCCS's suggestion, it is the k(ii) Confinement Policy—not anything else—that led DOCCS to place Petitioners in k(ii) confinement (*see e.g. Griffin*, Index No. 901471-23 at 19 [discussing DOCCS's unlawful imposition of a k(ii) confinement sanction based upon its "published guidelines" and without reference and adherence to CL § 137(6)(k)]).

And even were that not so, "[i]t is the settled rule that judicial review of an administrative determination is limited to the grounds invoked by the agency" at the time of the challenged decision (*Scherbyn*, 77 NY2d at 758). In Article 78 cases, courts routinely reject post hoc rationalization offered by agencies at the time of litigation (*see e.g. id.* [reversing Article 78 dismissal where proffered basis for agency's decision was "belatedly raised by respondents for the first time in their answers to the petition"]). The Court need chart no different course with respect to DOCCS's newfound rationale here.

Nor is any different conclusion warranted by the handful of cases, cited by DOCCS, in which courts based Article 78 review in part on agencies' evidentiary submissions during litigation (*see* Respondents' Opp. & Answer at 15–16). Courts accepting such submissions do so "to permit intelligent judicial review of the evidence [an agency] relied upon in reaching its determination," (Respondents' Opp. & Answer at 16, quoting *Iwan v Zoning Bd. of Appeals*, 252 AD2d 913, 914 [3d Dept 1998]), not to provide a platform—like that sought by DOCCS here—for an agency to paper over an unlawful blanket decision-making process.

CONCLUSION

For all these reasons, the Court should deny Defendant-Respondent's motion and grant the petition.

Dated: July 13, 2023
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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH 22 NYCRR § 202.8-b

I hereby certify that this brief complies with the word count limitation of 22 NYCRR § 202.8-b because the total word count, according to the word count function of Microsoft Word, the word processing program used to prepare this document, of all printed text in the body of the brief, excluding the parts exempted by section 202.8-b is 4,047 words.

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