**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, as Acting Commissioner of the New York State Department of Corrections and Community Supervision,

Defendant-Respondent.

Index No. 902997-23

**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS-PETITIONERS' AMENDED ARTICLE 78 PETITION**

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PRELIMINARY STATEMENT

In passing the Humane Alternatives to Long-term Solitary Confinement Act ("HALT Act"), the Legislature spoke with unmistakable clarity about the need to curtail rampant overuse of disciplinary confinement in New York prisons. HALT imposes stringent and precise constraints, embodied in section 137(6)(k)(ii) of the Correction Law ("CL"), on the narrow circumstances in which DOCCS can subject incarcerated people to extended segregated confinement and other restrictive forms of disciplinary confinement (collectively referred to as "k(ii) confinement"). But for over a year since HALT went into effect, DOCCS has evaded those constraints, enacting a policy and practice—referred to here as the "k(ii) Confinement Policy"—that far expands the limited conduct for which the Legislature authorized k(ii) confinement and ignores the robust and individualized factual inquiries that the Act requires.[1]

Through that Policy, DOCCS unilaterally dispenses with the carefully crafted safeguards contained in section 137(6)(k)(ii); and subjects the named petitioners, as well as hundreds of class members at any given time, to disciplinary confinement of a type and duration that the Legislature specifically intended HALT to proscribe.

FACTS

I. The Legislature Enacted HALT to Limit Rampant Overuse of Disciplinary Confinement in New York Prisons

In 2021, responding to widespread public concern over the harmful impact of disciplinary confinement across New York, the Legislature passed HALT, imposing stringent limits on who can be placed in segregated confinement and other forms of restrictive disciplinary confinement,

[1] Because their declaratory judgment claim in this hybrid proceeding cannot be decided solely on the pleadings, Plaintiffs-Petitioners reserve briefing on that claim until an appropriate later stage in the litigation.

for how long, and why (Assembly Mem in Support, Bill Jacket, 2021 A.B. 2277, ch. 93). HALT came into full effect a year later, on March 31, 2022 (*Id.*).

Among other key reforms, HALT limits placement in "segregated confinement"—the Act's term for solitary and other in-cell confinement exceeding 17 hours per day—to a maximum of three consecutive days, or six days in any 30-day period, in most circumstances (*see* Correction Law ("CL") § 137[6][k][i]). To extend segregated confinement beyond these durational limits (i.e., to impose "extended segregated confinement"), the Legislature required that DOCCS meet two precisely defined requirements contained in CL § 137(6)(k)(ii), often referred to as the "k(ii) confinement criteria" (*see id.* § 137[6][k][ii]). And DOCCS must also satisfy the k(ii) confinement criteria to impose placement of *any* duration in a Residential Rehabilitation Unit ("RRU")[2]—an alternative, ostensibly rehabilitative setting to solitary confinement created by the HALT Act—or in several other disciplinary confinement settings.[3]

The k(ii) confinement criteria are: first, that "pursuant to an evidentiary hearing," DOCCS determines "by written decision" that an individual has committed one or more of seven acts specifically enumerated in the statute; and second, that DOCCS determines, "in writing" and "based on specific objective criteria," that the 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]).

[2] An RRU—a new form of housing created pursuant to HALT—is "a separate housing unit used for therapy, treatment, and rehabilitative programming of incarcerated people who have been determined to require more than fifteen days of segregated confinement pursuant to department proceedings." *See* CL § 2(34).

[3] The k(ii) confinement criteria also apply to disciplinary placement of any duration in a host of other settings. (*See, e.g.*, CL § 401[1] (requiring DOCCS to comply with k(ii) confinement criteria in placement in Residential Mental Health Treatment Units ("RMHTU"), an alternate setting for people with serious mental illness); *see also infra* at 6, n.5).

The seven enumerated acts that qualify for confinement under the k(ii) confinement criteria (the "k(ii) acts") are defined narrowly. They include:

> (A) causing or attempting to cause serious physical injury or death to another person or making an imminent threat of such serious physical injury or death if the person has a history of causing such physical injury or death and the commissioner and, when appropriate, the commissioner of mental health or their designees reasonably determine that there is a strong likelihood that the person will carry out such threat. [];
> (B) compelling or attempting to compel another person, by force or threat of force, to engage in a sexual act;
> (C) extorting another, by force or threat of force, for property or money;
> (D) coercing another, by force or threat of force, to violate any rule;
> (E) leading, organizing, inciting, or attempting to cause a riot, insurrection, or other similarly serious disturbance that results in the taking of a hostage, major property damage, or physical harm to another person;
> (F) procuring a deadly weapon or other dangerous contraband that poses a serious threat to the security of the institution; or
> (G) escaping, attempting to escape or facilitating an escape from a facility or escaping or attempting to escape while under supervision outside such facility.

(*Id.* §§ 137[6][k][ii][A]–[G]).

Even if DOCCS satisfies the k(ii) confinement criteria, the HALT Act places an absolute durational cap on segregated confinement. Under no circumstances may DOCCS keep an individual in segregated confinement for more than 15 consecutive days or 20 days in any 60-day period. At these absolute limits, the HALT Act requires that DOCCS transfer an individual in segregated confinement to an RRU.

II. DOCCS's k(ii) Confinement Policy

Though HALT has been effective for over a year now—since March 31, 2022, DOCCS continues to violate its clear requirement, leveraging the k(ii) Confinement Policy to impose disciplinary confinement widely, regularly, and in ways the law does not allow.

The Policy encompasses at least two key aspects. First, DOCCS treats all "Tier III" infractions—including those charged against the named petitioners—as categorically constituting one of the seven narrowly-defined k(ii) acts[4] (*see* Amended Petition ("Am. Pet."), Ex. 1, DOCCS Review Officer Training Manual). In other words, DOCCS has determined that all offenses charged in Tier III disciplinary hearings constitute one of the seven specifically enumerated acts that could qualify for extended segregated confinement or other k(ii) confinement under HALT, irrespective of the particular nature of the conduct in question or how far it falls outside the narrow definitions of the acts enumerated in section 137(6)(k)(ii).

Second, DOCCS routinely fails to make determinations "in writing based on specific objective criteria" that a charged act was "so heinous or destructive" that the actor "creates a significant risk of imminent serious physical injury to staff or other incarcerated persons, and creates an unreasonable risk to the security of the facility" (CL § 137[6][k][ii]). Attempting to justify this practice in recent regulatory comments, DOCCS confirmed the categorical approach by which it has made an across-the-board determination that *any* rule violation that can result in segregated confinement is per se sufficiently "heinous or destructive" to satisfy the k(ii) confinement criteria, irrespective of any individual circumstances (*see* NY Reg., May 10, 2023 at 6 ("[T]he rule violations in which someone can be placed in segregated confinement meet the definition of ["heinous or destructive"] as defined in CL section 137(6)(k)(ii)).

[4] DOCCS uses a three-tier disciplinary system, with Tier III as the most serious offenses, adjudicated at a superintendent's hearing.

III. DOCCS Uses Its k(ii) Confinement Policy to Impose Unlawful Confinement on the Named Petitioners

A. Fuquan Fields

Petitioner Fuquan Fields is a 44-year-old man who has been in the custody of DOCCS since 2007 and is currently incarcerated at Great Meadow Correctional Facility. For years, he has lived with mental illness (Am. Pet. ¶ 8).

On January 12, 2023, while incarcerated at the Fishkill Correctional Facility, Mr. Fields began experiencing a mental health crisis, making suicidal statements early in the morning. Staff at the facility moved Mr. Fields out of his cell and placed him in a restraint chair in a hearing room to wait for escort to be seen by OMH staff for a one-to-one suicide watch (*Id*. ¶¶ 39-40). While waiting in the hearing room, Mr. Fields asked to use the bathroom but staff ignored this request (*Id.* ¶ 41). After waiting approximately two hours, Mr. Fields allegedly exposed himself and urinated on the floor (*Id.* ¶ 42). According to the misbehavior report, he then threw "wet looking sugar packets" at an officer (Am. Pet., Ex. 3, Fields Misbehavior Report dated January 12, 2023). The misbehavior report charged him with violations of rules 100.11 (assault on staff), 101.20 (lewd conduct), 102.10 (threats), 106.10 (direct order), and 118.22 (unhygienic act)—all of which were charged as Tier III violations of the disciplinary rules (*Id.*). The hearing officer found Mr. Fields guilty of assault on staff, unhygienic act, and lewd conduct (Am. Pet., Ex. 4, Fields Hearing Disposition dated January 27, 2023).[5] The hearing officer sentenced Mr. Fields to 180 days of disciplinary segregation in the special housing unit ("SHU") (*Id.*).

The disposition contains no determination that Mr. Fields's alleged misconduct constituted any of the seven enumerated k(ii) acts (Am. Pet. ¶ 47). Nor does the disposition

[5] For the hearing dispositions of each of the three named Plaintiffs—exhibits 4, 7, and 10—dates referenced in the exhibit description refer to the hearing end date rather than the date at the top of the document.

contain any written determination, based on specific objective criteria, that Mr. Fields' conduct was so heinous or destructive that his placement in general population housing would create a significant risk of imminent serious physical injury to staff or other incarcerated persons and create an unreasonable risk to the security of the facility (*Id.* ¶ 48).

On March 20, 2023, DOCCS's Office of Special Housing ("OSH"), which decides appeals of Tier III-hearing determinations, affirmed the disposition of Mr. Fields's hearing as to the 118.22 (unhygienic act) and 101.20 (lewd conduct) charges (Am. Pet., Ex. 5, Fields Final Determination). OSH dismissed the assault-on-staff charge and modified Mr. Fields's SHU confinement penalty from 180 days to 120 days (*Id.*). Mr. Fields began serving his sentence for this confinement sanction on May 1, 2023, and is currently confined in an RRU (Am. Pet. ¶ 51).

B. Luis Garcia

Luis Garcia is a 41-year-old man with serious mental illness who has been classified by DOCCS as requiring the very highest level of outpatient mental healthcare available in New York prisons (*Id.* ¶¶ 9, 53). On September 20, 2022, Mr. Garcia was incarcerated at Coxsackie Correctional Facility and confined to a Residential Mental Health Unit[6] when he allegedly threw an "unknown brown feces smelling liquid" that hit two officers (Am. Pet., Ex. 6, Garcia Misbehavior Report dated September 20, 2022). The misbehavior report charged him with two counts of 100.11 (assault on staff) and two counts of 118.22 (unhygienic act) (*Id.*). The hearing officer found Mr. Garcia guilty of the charges in the misbehavior report and sentenced him to

[6] A Residential Mental Health Unit ("RMHU") is one type of Residential Mental Health Treatment Unit ("RMHTU"). RMHTUs are "housing for incarcerated individuals with serious mental illness that is operated jointly by [DOCCS] and the [Office of Mental Health]" and are intended to be "therapeutic in nature" (*see* CL § 2[21]). RMHTUs encompass various types of housing in addition to RMHUs, including Behavioral Health Units, Intensive Intermediate Care Programs, Intermediate Care Programs, and Therapeutic Behavioral Units (*see id.*; 7 N.Y.C.R.R. § 320.2 *et seq.*). The k(ii) confinement criteria apply to disciplinary placement in each of these settings (*see supra* at 2, n.3).

730 days—over two years—of disciplinary confinement in the SHU (Am. Pet., Ex. 7, Garcia Hearing Disposition dated October 5, 2022).

The hearing officer's disposition did not contain a determination that Mr. Garcia's alleged misconduct constituted any of the seven enumerated k(ii) acts (Am. Pet. ¶ 60). Nor did the disposition contain any written determination, based on specific objective criteria, that the alleged misconduct was so heinous or destructive that his placement in general population housing would create a significant risk of imminent serious physical injury to staff or other incarcerated persons and create an unreasonable risk to the security of the facility (*Id.* ¶ 61). On December 5, 2022, OSH affirmed the disposition (Am. Pet., Ex. 8, Garcia Final Determination). Mr. Garcia began serving his sentence for this confinement sanction on March 19, 2023, and is currently confined in an RMHU (Am. Pet. ¶ 64).

C. Jimmy Barner

Mr. Barner is a 40-year-old man who has been incarcerated since 2008 and is currently incarcerated at Gouverneur Correctional Facility. (*Id.* ¶ 65). On January 13, 2023, a DOCCS Corrections Officer filed a misbehavior report against Mr. Barner. (Am. Pet., Ex. 9, Barner Misbehavior Report dated January 13, 2023). The misbehavior report charged Mr. Barner with assault on inmate (100.10), violent conduct (104.11), smuggling (114.10), unhygienic act (118.22), and contraband (113.23) (*Id.*). A hearing officer subsequently found Mr. Barner guilty of the charges in the misbehavior report and sentenced him to 210 days of disciplinary confinement in the SHU (Am. Pet., Ex. 10, Barner Hearing Disposition dated Jan. 16, 2023).

The hearing officer's disposition did not contain a determination that Mr. Barner's alleged misconduct constituted any of the seven enumerated k(ii) acts (Am. Pet. ¶ 70). Nor did the disposition contain any written determination, based on specific objective criteria, that the alleged misconduct was so heinous or destructive that his placement in general population

housing would create a significant risk of imminent serious physical injury to staff or other incarcerated persons and create an unreasonable risk to the security of the facility (*Id.* ¶ 71).

On March 27, 2023, OSH dismissed the violent conduct (104.11) and contraband (113.23) charges while affirming the assault on inmate (100.10), smuggling (114.10), and unhygienic act (118.22) charges (Am. Pet., Ex. 11, Barner Final Determination). OSH also affirmed the 210-day confinement penalty against Mr. Barner (*Id.*). Mr. Barner is scheduled to serve his confinement sanction from June 17, 2023, through January 13, 2024 in a unit for which compliance with the k(ii) confinement criteria is required (Am. Pet. ¶ 74).

ARGUMENT

DOCCS's k(ii) Confinement Policy departs so markedly from the requirements of CL § 137(6)(k)(ii) as to warrant relief for Petitioners and the class on several interrelated claims under Article 78. Article 78 permits a court to inquire whether agency decision-making is "affected by an error in law," "arbitrary and capricious," or "an abuse of discretion,"; and whether it reflects the agency's "failure to perform a duty enjoined . . . by law" (CPLR §§ 7803[1], [3].). Relief is warranted here under each of these provisions.

Courts reviewing for "error of law" inquire whether an agency has properly interpreted or applied a statute (*see New York City Health & Hosps. Corp. v. McBarnette*, 84 NY2d 194, 205 [1994]). Whether an agency has properly interpreted a statute is determined based on a court's de novo review, without deference to the agency (*see Grube v. Bd. of Educ. Spencer-Van Etten Cent. Sch. Dist.*, 194 AD3d 1222, 1224 [3d Dept 2021] ["We accord no deference to [the agency's] statutory interpretation, as the questions raised on appeal depend only upon the accurate apprehension of legislative intent."] [citing *Civ. Serv. Emps. Assn., Inc., Loc. 1000 v. Olympic Regional Dev. Auth.*, 163 AD3d 1110, 1112 [3d Dept 2018]]).

Arbitrary-and-capricious review centers on the reasonableness—or rationality—of an agency's actions (*see Kuppersmith v. Dowling*, 93 NY2d 90, 96 [1999]; *see also Pell v. Bd. of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974] ["Arbitrary action is without sound basis in reason and is generally taken without regard to the facts."] [internal citations omitted]). Arbitrary and capricious agency actions necessarily constitute an abuse of discretion (*Douglas v. Miller*, 55 Misc 2d 303, 303 [Sup Ct, Westchester County 1967], *affd* 31 AD2d 889 [2d Dept 1969] ["Administrative decisions made in the exercise of discretion that are arbitrary and unreasonable constitute an abuse of discretion."]).

An agency "fail[s] to perform a duty enjoined on it by law" when it violates the non-discretionary requirements of a statute (*see e.g. Meyer v. Zucker*, 185 AD3d 1265, 1266 [3d Dept 2020], *lv denied* 36 NY3d 904 [2021] [internal quotation and citation mark omitted]).

DOCCS's k(ii) Confinement Policy commands an irrational interpretation of the HALT Act's non-discretionary limitations on disciplinary confinement, and thus fails under each of these inquiries.

I. The Policy Is Contrary to the Plain Language of the Statute.

The k(ii) Confinement Policy is affected by "error of law" because it misinterprets the confinement criteria in at least two distinct ways, both of which contribute to the unlawful disciplinary confinement of class members, and each of which warrants annulment of the Policy and of disciplinary confinement sentences imposed thereto (*see Civ. Serv. Empls. Assn., Inc., Local 1000, AFSCME, AFL-CIO v. Westchester County Health Care Corp.*, 138 AD3d 741, 742 [2d Dept 2016] [affirming annulment of governmental resolution that reflected error of law]).

A. The Policy Distorts the Seven k(ii) Acts Beyond Recognition.

The k(ii) Confinement Policy falsely equates all misconduct adjudicated in a Tier III hearing with the seven narrowly defined k(ii) acts. Under this categorical approach, DOCCS deems all Tier III disciplinary charges to "qualify as a k(ii) offense," irrespective of the specific act alleged to have occurred (*see* Am. Pet., Ex. 1). But DOCCS's Tier III misconduct designation encompasses a broad range of conduct that often does not—and, in some cases, could *never*—constitute any of the seven k(ii) acts enumerated (*see* CL § 137[6][k][ii][A]–[G]).

Mr. Fields, for example, received a guilty disposition on a Tier III charge for exposing himself to urinate on the floor (Am. Pet. ¶¶ 42-45). Mr. Garcia received a Tier III guilty disposition for throwing feces and urine at staff (*Id.* ¶¶ 54-58). Mr. Barner received a Tier III guilty disposition for spraying an unknown brown liquid at other incarcerated individuals (*Id.* ¶¶ 67-68). And DOCCS routinely convicts other class members for conduct—all chargeable as Tier III infractions—ranging from throwing cold water on a staff member (chargeable as "assault") to "causing a miscount."

None of these acts—or any number of other acts charged as Tier III infractions—approximates any of the k(ii) acts. Yet under the k(ii) Confinement Policy, DOCCS treats them as such, leading predictably and reliably to the result that class members face extended segregated confinement and other restrictive disciplinary confinement for conduct falling far outside the narrowly defined k(ii) acts.

B. The Policy Reads the "Heinous or Destructive" Requirement Out of the Statute.

The k(ii) Confinement Policy also eschews the HALT Act's unambiguous requirement that DOCCS make the written findings —based on "specific objective criteria"[7]—that a class

[7] Whether DOCCS has developed "specific objective criteria" for determining whether k(ii) acts satisfy the "heinous or destructive" requirement under section 137(6)(k)(ii) is not clear.

member's predicate k(ii) acts "were so heinous or destructive that placement of the individual in general population housing creates a significant risk of imminent serious physical injury . . . [and] an unreasonable risk to the security of the facility" (CL § 137[6][k][ii]). Instead, DOCCS has claimed, *all* acts charged as Tier III offenses satisfy the heinous or destructive findings per se, obviating the need for individualized inquiry into any specific act.[8] The language of the statute is unambiguous, and this strained interpretation, effectuated through the k(ii) Confinement Policy, does not square with the plain text.

First, the k(ii) Confinement Policy reduces section 137(6)(k)(ii)'s prerequisite written findings to "mere surplusage" (*Scott v. Massachusetts Mut. Life Ins. Co*., 86 NY2d 429, 435 [1995]). Under longstanding principles of statutory construction, courts "give effect, if possible, to every clause and word of a statute" (*Inhabitants of the Twp. of Montclair, County of Essex v. Ramsdell*, 107 US 147, 152 [1883]). By deeming k(ii) acts as *automatically* warranting k(ii) confinement, the k(ii) Confinement Policy renders meaningless the detailed statutory requirement for determining whether any such act was also so "heinous or destructive" as to warrant k(ii) confinement.

Second, section 137(6)(k)(ii)'s requirement that DOCCS make fact-intensive findings as to the "heinous or destructive" nature of a k(ii) acts lends itself to individualized inquiry, not blanket determination. Whether given conduct creates a "*substantial* risk of imminent serious physical injury," for example, turns on particular facts that are not susceptible to categorical determination based merely on the category of offense.[9]

[8] There is no evidence that DOCCS takes any steps to satisfy section 137(6)(k)(ii)'s additional requirement that these findings be made "in writing" and "based on specific objective criteria."

[9] This is even more true given DOCCS's expansive interpretation—consistent with the k(ii) Confinement Policy—of the qualifying k(ii) acts. Under the Policy, a k(ii)-qualifying "assault," for example, could involve conduct ranging from splashing cold water at a guard to an act of serious violence.

Indeed, while some of the enumerated k(ii) acts include a requirement that the conduct threaten serious injury, not all of them do. For example, subsection (C)—"extorting another, by force or threat of force, for property or money"—encompasses even those uses of force that do not create a potential for serious physical injury (*see* CL ¶§ 137[6][k][ii][C]). It is for precisely this reason that section 137(6)(k)(ii) imposes a separate and additional requirement that a given k(ii) act would create a "significant risk of imminent serious physical injury" were the accused placed in general population housing (*id.*).

Third, the plain language of section 137(6)(k)(ii)'s prerequisite "heinous or destructive" findings underscores the statute's focus on particular past acts, not the nature of k(ii) acts as a general matter. Courts are constrained to give effect to the plain meaning of unambiguous statutory text (*see People v. Floyd J.*, 61 NY2d 895, 896 [1984]). CL section 137(6)(k)(ii) unambiguously requires inquiry into whether the specific predicate k(ii) acts "*were* . . . heinous or destructive," not whether they *are*. The import of that linguistic choice is clear: The Legislature intended an additional individualized inquiry into the "heinous or destructive" nature of the particular conduct at issue.

II. The Policy Demands Absurd Results and an Unreasoned Process.

The k(ii) Confinement Policy is also "arbitrary and capricious" (CPLR § 7803[3]). In imposing segregated confinement and other k(ii) confinement on Petitioners and other class members, DOCCS must act reasonably and with a rational basis—both in substance and process (*see New York State Assn. of Counties v. Axelrod,* 78 NY2d 158, 166 [1991]; *Allentown Mack Sales & Serv., Inc. v. N.L.R.B.*, 522 US 359, 374 [1998] ["Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result

must be logical and rational."]).[10] Under the k(ii) Confinement Policy, however, DOCCS can do neither.[11] This flaw independently requires that the Policy be annulled (*see Kuppersmith*, 93 NY2d at 96; *see also Pell*, 34 NY2d at 231 ["Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." (internal citations omitted)]).

Substantively, the k(ii) Confinement Policy reliably encourages—and, indeed, *requires*—outcomes that violate the HALT Act's strict limitations on segregated confinement and other k(ii) confinement. When charged as Tier III offenses, infractions like throwing water, causing a miscount, exposing oneself, and urinating on the floor—are *automatically* treated as highly dangerous security risks warranting extended placement in segregated confinement or other k(ii) confinement without any further inquiry into whether the misconduct in question fits within the seven k(ii) acts. As to Petitioners and other class members convicted of infractions bearing no reasonable resemblance to the k(ii) acts, such results are absurd on their face. Yet under the flawed interpretation of the k(ii) confinement criteria, these are precisely the results that DOCCS ensures.

Procedurally, the k(ii) Confinement Policy also ensures that class members are uniformly deprived of the rational explanation that reasoned decision-making necessarily entails (*see State Farm*, 463 US at 48 [requiring that agency "cogently explain" its decisions]; *New York v. Wolf*, [US Dist Ct, SD NY, Oct. 13, 2020, Furman, J., at 5] [noting that agency decision-making must be both "reasonable and reasonably explained" (quoting *Mfrs. Ry. Co. v. Surface Transp. Bd.*,

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[10] New York courts frequently rely on federal caselaw under the Administrative Procedure Act in analyzing whether agency conduct is arbitrary and capricious (*See e.g.*, *Prometheus Realty Corp. v. New York City Water Bd.*, 30 NY3d 639, 654 [2017] [citing *Motor Veh. Mfrs. Assn. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 US 29, 41–42 [1983]]).

[11] Identical reasoning supports the conclusion that the k(ii) Confinement Policy reflects an "abuse of discretion" (CPLR § 7803[3]). Though DOCCS is not without discretion in implementing the requirements of HALT, it cannot do so based on an unreasonable interpretation of the Act, unmoored from the statutory text.

676 F3d 1094, 1096 [DC Cir 2012])]). Contrary to the requirements of CL section 137(6)(k)(ii), DOCCS has not provided any kind of written findings that Petitioners' charges are heinous or destructive. Nor could DOCCS do so, for the reasons explained *infra* in part IV.

III. The Policy Requires that DOCCS Violate the HALT Act.

By implementing its k(ii) Confinement Policy, DOCCS has also "failed to perform a duty enjoined . . . by law," CPLR § 7803[1], to make the HALT Act's required findings after an evidentiary hearing before placing individuals in k(ii) confinement. To succeed on this claim, a party must demonstrate "a clear right to the relief sought" and be seeking the performance of duties that "are ministerial and mandatory, not discretionary" (*Meyer*, 185 AD3d at 1266 [internal quotation and citation omitted]; *see also Clark v. Metro. Transp. Auth.,* 46 Misc 3d 344, 352 [Sup Ct, NY County 2013] ["The performance of the duty petitioners-plaintiffs seek to enforce must be non-discretionary . . . without allowance for the exercise of judgment."]). DOCCS is not without discretion in implementing the HALT Act's requirements. But it must exercise that discretion within the parameters of the statute; DOCCS has no discretion to override the will of the Legislature as expressed in the mandatory language of the k(ii) confinement criteria (*see Matzell v. Annucci*, 183 AD3d 1, 4 [3d Dept 2020] ["[A] statute's plain language is dispositive"]).

The plain language of the statute leaves no doubt about the detailed and individualized evidentiary findings that DOCCS must make before imposing k(ii) confinement (*Hernandez v. State*, 173 AD3d 105, 111 [3d Dept 2019] [explaining that it is a "basic tenet of constitutional and statutory interpretation that the clearest and most compelling indicator of the drafters' intent is the language itself" (internal quotation marks omitted)]). But by acting pursuant to its k(ii) Confinement Policy instead, DOCCS disregards the Legislature's mandate, ensuring that the

named Petitioners and other class members will continue to face k(ii) confinement for conduct that does not meet the confinement criteria. Because this is precisely the result that the HALT Act prohibits, DOCCS's k(ii) Confinement Policy reflects a "fail[ure] to perform a duty enjoined . . . by law" (CPLR § 7803[1]).

IV. Petitioners' Confinement Sanctions Exemplify the Unlawful Results that the Policy Routinely Produces.

The confinement DOCCS has imposed on the named Petitioners exemplifies the absurd results, untethered from the k(ii) confinement criteria, that the Policy routinely visits on class members throughout New York in clear violation of HALT.

First, the named Petitioners' charged misconduct does not approximate any of the seven narrowly defined k(ii) acts. But that is of little consequence under the Policy, by which the named Petitioners' acts, charged as Tier III misconduct, are all deemed k(ii) acts anyway.

DOCCS's "lewd conduct" charge against Mr. Fields for "exposing himself" to urinate on the floor hours after he requested to use the bathroom, was deemed a k(ii) act. Yet the only conceivably correspondent k(ii) act—subsection (B), related to "sexual acts"—requires as an essential element "compelling or attempting to compel another person, by force threat of force"—an obvious mismatch for the actual conduct of which Mr. Fields was found guilty. Nor does the "unhygienic act" charge against Mr. Fields for urinating correspond to any of the k(ii) acts at all.

DOCCS's "unhygienic act" and assault charges against Messrs. Garcia and Barner for projecting liquids resembling bodily waste at correction officers (in Mr. Garcia's case) and other incarcerated people (in Mr. Barner's case), were deemed k(ii) acts. Yet the only conceivably correspondent k(ii) act—subsection (A)—requires "causing or attempting to cause *serious physical injury or death* to another person . . . " (*see* CL § 137[6][k][ii][A] (emphasis added)).

The record offers no indication that the conduct of which Messrs. Garcia and Barner were found guilty caused *any* physical injury at all (*see* Am. Pet., Ex. 7, 10). And—though undoubtedly unpleasant and likely unhygienic—that conduct could not cause, or reflect an attempt to cause, "serious physical injury or death" under any serious reading of those terms.

Because "serious physical injury" is not defined in the Correction Law, that term is given "its precise and well settled legal meaning in the jurisprudence of the state" (*People v. Duggins*, 3 NY3d 522, 528 [2004] [internal citations omitted]). In New York, the well settled meaning of "serious physical injury," derived from the Penal Law, is "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ" (*see* Penal Law § 10.00[10]). That definition applies under the Correction Law, including to the k(ii) acts, because the two statutes relate to cognate subjects (*see Plato's Cave Corp. v. State Liquor Authority,* 68 NY2d 791, 793 [1986] ("[S]tatutes which relate to the same or to cognate subjects are in pari materia and to be construed together unless a contrary intent is clearly expressed by the Legislature."); *compare* Penal Law § 1.05 ("The general purposes of the provisions of this Chapter are . . . [t]o proscribe conduct which unjustifiably and inexcusably causes or threatens substantial harm to individual or public interests . . . [and] [t]o provide for an appropriate public response to particular offenses"), *with* CL § 137[6] ("[T]he superintendent of a correctional facility may keep any incarcerated individual confined in a cell or room . . . for such period as may be necessary for maintenance of order or discipline . . . .")).

DOCCS's "smuggling" charge against Mr. Barner for possessing a "plastic container" was likewise deemed a k(ii) act. Yet the only conceivably correspondent k(ii) act—subsection (F)—requires "procuring *deadly weapons* or other dangerous contraband that poses a *serious*

threat to the security of the institution . . ." (*see* CL § 137[6][k][ii][F] (emphasis added)). But DOCCS did not even bring any weapons-related charge against Mr. Barner (*see* Am. Pet., Ex. 9). And the contraband charge against him was ultimately dismissed (*see* Am. Pet., Ex. 11). And even if they had, like "serious physical injury," the term "deadly weapon" is undefined in the Correction Law and instead derives its meaning from the Penal Law (*see Plato's Cave Corp.,* 68 NY2d at 793 [explaining application of *in pari materia* principle]). A plastic container falls far outside the definition of a "deadly weapon" or any commonsense reading of that term. (*see* Penal Law § 10.00[12]).

Second, in adjudicating the named Petitioners' misconduct charges, DOCCS declined to make any individualized written findings—as HALT requires—that any of the Petitioners' particular conduct was "so heinous or destructive" as to create both a "significant risk of imminent serious physical injury" and an unreasonable risk" to facility security (*see* CL § 137[6][k][ii]).

Nor could DOCCS have made such findings, because none of the misconduct that the named Petitioners were ultimately found guilty of could conceivably satisfy this stringent standard. Yet under DOCCS's k(ii) Confinement Policy, the particular facts of the conduct charged against Petitioners and other class members simply do not matter. Instead, under DOCCS's categorical approach, Petitioners' guilty dispositions for misconduct adjudicated in a Tier III hearing categorically results in a finding that the k(ii) confinement criteria, including the "heinous or destructive" requirement, are met. With respect to Mr. Fields, it is fanciful to suggest that exposing oneself to urinate on the floor could create a significant imminent serious physical injury to another or would pose an unreasonable security threat.

With respect to Mr. Garcia, there is no question that throwing a liquid smelling of feces and urine could cause discomfort. But the hearing disposition does not suggest that this put anyone at significant risk of imminent serious physical injury.

And Mr. Barner similarly did not put anyone at significant risk, nor did his hearing disposition suggest that he did. Undoubtedly, Mr. Barner's conduct created an uncomfortable and disturbing experience for three other incarcerated individuals. But the spraying of a liquid—even one that smells of feces—simply cannot be considered so heinous or destructive as to put safety at risk.

Accordingly, the record establishes that, as a result of k(ii) Confinement Policy, Petitioners' judgments ordering their confinement sanctions are infected with an error of law and are an abuse of discretion and must be annulled. (*See* CPLR § 7806.)

CONCLUSION

For all these reasons, the Court should grant Petitioners' petition.

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Respectfully submitted,

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