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 No. 3

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFFS-PETITIONERS' MOTION FOR CLASS CERTIFICATION

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Dated: July 20, 2023
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

In opposing class certification, DOCCS renews the same basic argument it made in moving to dismiss: that the government operations rule precludes class litigation against agency policies. But that categorical approach to the government operations rule was wrong then and remains wrong now.

For decades, courts throughout the state have recognized a range of contexts in which class claims against government operations are permissible—and in some cases, even the norm. This caselaw fatally undermines DOCCS's sole basis for opposing class certification.

Were there ever a case in which the government operations rule should not preclude class certification, it is this one, involving a systemic challenge to an entrenched governmental policy, brought on behalf of incarcerated people who face high barriers to individual litigation and imminent harm in the absence of immediate relief.

The Court should thus reject DOCCS's flawed argument opposing class certification; and because Petitioners satisfy the requirements of Article 9 of the Civil Practice Law and Rules ("CPLR"), the Court should grant this motion and certify the class.

ARGUMENT

DOCCS's opposition to class certification rests primarily[2] on the notion that the government operations rule categorically bars class claims against agency practices.[3] In so arguing, DOCCS exaggerates the true scope of the rule.

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[2] DOCCS also opposes this motion because "this case is subject to dismissal" (NYSCEF Doc No. 57, Respondent's Opp to Class Certification at 5). But because DOCCS's argument for dismissal lacks merit (*see generally* NYSCEF Doc No. 55, Petitioners' Opp & Answer at 2–6), so, too, does this further basis for opposing class certification.

[3] DOCCS declines to contest, and thus effectively concedes, that Petitioners satisfy the remaining requirements for class certification (*see generally* CPLR §§ 901, 902).

In reality, New York courts long have recognized that the government operations rule applies only "where subsequent petitioners will be adequately protected under the principles of *stare decisis*" (*Matter of Martin v Lavine*, 39 NY2d 72, 75 [1976] [internal citation omitted]). The contrapositive is true, too: Where *stare decisis* will *not* protect subsequent litigants, the rule does not apply (*see e.g. Smith v Berlin,* 2013 NY Slip Op 52305[U] [Sup Ct, NY County 2013] ["Where the relief accorded to individual petitioners will . . . not effectively operate as precedent for the class, this 'governmental operations rule' does not bar class certification"] [citations omitted]).

Relying on this basic principle, courts throughout the state have identified contexts—several directly applicable here—in which the government operations rule does not preclude class claims challenging agency action. DOCCS neither engages with, nor even acknowledges, this established body of caselaw (*see* Respondent's Opp to Class Certification at 4–5).

First, courts decline to apply the government operations rule where an agency shows reluctance to extend court-ordered relief beyond the named plaintiffs (*see e.g. Varshavsky v Perales*, 202 A.D.2d 155, 155–56 [1st Dept 1994] ["[C]lass certification was appropriately granted, notwithstanding the governmental entity doctrine, in view of defendants' demonstrated reluctance to extend the temporary injunctive relief to individuals other than the named plaintiffs"] [citations omitted]; *Lamboy v Gross*, 126 AD2d 265, 274 [1st Dept 1987] [finding class certification proper in light of government's "continued reluctance" to provide relief]. Here, absent class certification, there is ample reason to think DOCCS will circumscribe its response to any court order in this case, affording relief only to the named petitioners. Already, DOCCS has attempted to cabin this case to a narrow dispute over Petitioners' three individual disciplinary reports, ignoring altogether Petitioners' systemic challenge to the k(ii) Confinement Policy (*see*

NYSCEF Doc. No. 47, Respondent's Mot to Dismiss & Answer at 10–16). And even following the recent decision and order by a justice of this Court in *Griffin v Annucci*, Sup Ct, Albany County, July 6, 2023, Connolly, J., Index No. 901471-23, available at NYSCEF Doc. No. 56, Ex 1, DOCCS has only doubled down on its k(ii) Confinement Policy here, leaving little doubt it will do the same in the future if any ruling by the Court does not apply to a certified class.[4]

Second, courts decline to apply the government operations rule where a challenged practice threatens immediate harm that cannot await adjudication of individual actions (*see e.g. New York City Coalition to End Lead Poisoning v Giuliani*, 245 AD2d at 52 [1st Dept 1997] [certifying class and declining to apply government operations rule where hazardous lead conditions warranted immediate action]; *Lamboy*, 126 AD2d at 274 ["[T]o require recourse to individual judicial proceedings would be to ignore the realities of homeless, destitute families desperately seeking shelter . . . ."]). Such are the circumstances here, where Petitioners challenge a policy by which thousands of putative class members are or soon will be confined in highly isolative disciplinary settings and likely unable to pursue individual litigation in time to avoid the harms of that confinement[5] (*see e.g.* Dkt No. 52, Fields aff ¶ 8 ["To this day, I continue to struggle mentally from my experience in extended segregated confinement. Being punished with placement in RRU has been deeply distressing,"]; Dkt No. 53, Garcia aff ¶ 6 [describing "cruelty" of isolative disciplinary confinement]; Dkt. No. 54, Barner aff ¶¶ 7–8 ["Serving time in

[4] In *Griffin*, an individual action, the court found DOCCS violated the HALT Act in part by imposing k(ii) confinement without making the "explicitly required statutory findings and determinations" required under Correction Law § 137(6)(k)(ii) (*Griffin*, Index. No. 901471-23 at 18). Yet in this litigation, DOCCS continues to press the baseless claim that those same findings need not explicitly be made (*see* Respondent's Mot. to Dismiss & Answer at 14–16).

[5] Indeed, these harms are the very reason the Legislature sought to limit the use of disciplinary confinement (*see* NY St Assembly Mem. in Supp of Legislation, Bill Jacket, L 2021, ch 93 at 9 [recognizing "tremendous harm caused by massive isolation" and that "people routinely suffer in segregated confinement"]).

an RRU has had an incredibly negative impact on me and my mental health has suffered as a result . . . . I know that being here will continue to take a serious toll on me."]).

Third, courts decline to apply the government operations rule where the ability of putative class members to pursue individual litigation is significantly compromised (*see e.g. Matter of Stewart v Roberts,* 163 AD3d 89, 94 [3d Dept 2018] [finding individual actions would be unduly burdensome in light of class members' indigence]); *Hurrell-Harring v State*, 81 AD3d 69, 75 [3d Dept 2011] [finding individual pursuit of systemic claim risked imposing "insurmountable" hurdle on class of indigent criminal defendants]; *Brad H. v City of New York*, 185 Misc 2d 420, 424 [Sup Ct, NY County 2000] [finding that class of incarcerated plaintiffs with mental illness would likely be unable to file suit to protect themselves], *affd,* 276 AD2d 440 [1st Dept 2000]); *Tindell v Koch*, 164 AD 2d 689, 695 [1st Dept 1991] [finding it would be "oppressively burdensome" for indigent elderly class members to commence individual actions] [citation omitted]; [*City of New York v Maul*, Sup Ct, NY County, May 1, 2008, Shafer, M., index No. 4002072004 at *9] [recognizing "substantial likelihood" that children with developmental disabilities "would be unable to file suit to protect their rights"]; *Lamboy*, 126 AD2d at 274 [finding that requiring individual judicial proceedings for putative class of unhoused individuals would be "oppressively burdensome"]. As Petitioners have explained, members of the putative class—indigent individuals incarcerated in prisons throughout the state—face a host of formidable barriers that make challenging the k(ii) Confinement Policy impracticable, if not impossible, for many (*see* Petitioners' Opp. & Answer at 5–6).[6] These

[6] Moreover, the putative class includes members, like Mr. Garcia, who have serious mental illness or other disabilities that may pose additional barriers to individual pursuit of litigation (*see e.g. Brad H.*, 185 Misc 2d at 425–26 [certifying class of incarcerated people with mental illness in suit against jail system]). Indeed, as of July 1, 2023, nearly ten percent of all

barriers include both feasibility issues—it would be practically challenging for isolated, indigent individuals to file suit—and powerful disincentives, in the form of possible retaliation (*id.*).

As these cases exemplify, the government operations rule is not categorical. It does not strip courts of discretion to consider context in evaluating class certification (*see Pena v Doar*, 37 Misc 3d 1201(A) [Sup Ct, NY County 2012] ["Courts retain the discretion to determine whether certification is proper where the government is involved."]). Rather, courts regularly permit class claims against governmental agencies where circumstances show that relief to individual plaintiffs would not benefit members of a similarly situated putative class. And this is particularly true in cases, like this one, seeking widespread reform of an agency's systemic deficiencies (*see Matter of Stewart v Roberts*, 193 AD3d 121, 125 [3d Dept 2021] [in case against state agency, finding claims of uniform systemwide violations "particularly appropriate" for class relief] [citations omitted]; *Hurrell-Harring*, 81 AD3d at 75 ["[N]ot insignificantly, our research has failed to identify a single case involving claims of systemic deficiencies which seek widespread, systematic reform that has not been maintained as a class action."]).

Ignoring this caselaw, DOCCS points to a handful of cases in which courts denied class certification under the government operations rule (*see* Respondents' Opp. to Class Certification at 4–5). Those cases do not feature or address the contextual factors, present here, that frequently lead courts to conclude individual actions cannot adequately protect putative class members. (*See Matter of Jones v. Bd. of Educ. of Watertown City Sch. Dist.,* 30 A.D.3d 967 [4th Dept. 2006] [quotation omitted] [examining none of the exceptions to the government operations rule];

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individuals in segregated confinement or a Residential Rehabilitation Unit were designated OMH Levels 1 or 2 (*HALT Monthly Report July 1, 2023*, doccs.ny.gov/system/files/documents/2023/07/halt-monthly-report-july-1-2023.pdf [NY St DOCCS]).

Ferguson v Barrios-Paoli, 279 A.D.2d 396 [1st Dept. 2001] [same]; *Conrad v Regan*, 155 A.D.2d 931 [4th Dept. 1989] [same]; *De Zimm v N.Y. State Bd. of Parole*, 135 A.D.2d 66 [3d Dept. 1988] [same]; *Daniel v N.Y. State Div. of Hous. & Cmty. Renewal*, 179 Misc. 2d 452 [Sup Ct, N.Y. County 1998] [same]). DOCCS's reliance on cases in which those factors are conspicuously absent is thus misplaced and does not diminish the propriety of class certification in this litigation.

This case—a systemic challenge to an entrenched agency policy, brought on behalf of incarcerated people who face high barriers to individual litigation and imminent harm in the absence of immediate relief—presents a quintessential example of circumstances in which the government operations rule should not preclude class certification. Consistent with the liberal construction afforded to requirements of class certification and the Court's broad discretion, the Court should certify the putative class (*see City of New York v Maul*, 14 NY3d 499, 509 [2010]).

CONCLUSION

For these further reasons, the Court should grant Plaintiffs-Petitioners' motion for class certification.

Dated: July 20, 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 2094 words.

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