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

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

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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).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases ..... Page[s]

PRELIMINARY STATEMENT

In 2021, responding to a humanitarian crisis that long has pervaded New York's prisons, the Legislature took decisive action, passing the HALT Act to curb DOCCS's rampant overuse of segregation and other isolative forms of disciplinary confinement.

Among other key reforms, the HALT Act sets stringent limits—known as the "k(ii) confinement criteria" after the statute that enumerates them—on the circumstances in which DOCCS can impose extended segregation or disciplinary confinement in several other isolative settings. (*See generally* Correction Law ("CL") § 137[6][k][ii]).

Despite the stringency of the k(ii) confinement criteria, years on from HALT's passage, DOCCS has persisted in disregarding the criteria, routinely imposing extended segregation and other so-called "k(ii) confinement" on thousands of New Yorkers in a manner the law simply does not allow. DOCCS has achieved this unlawful result through its k(ii) Confinement Policy, an interpretive policy and practice by which the agency radically distorts and outright ignores both the plain text of HALT and the legislative intent underlying it.

For as long as the k(ii) Confinement Policy remains in effect, thousands of New Yorkers will continue to languish in isolative disciplinary confinement that the Legislature specifically saw fit to forbid. In light of this far-reaching harm, Plaintiffs—three individuals whom DOCCS is unlawfully holding in isolative k(ii) confinement—seek to represent a class of similarly situated individuals in challenging the k(ii) Confinement Policy.

Plaintiffs—like all members of the putative class—have a strong interest in challenging the k(ii) Confinement Policy. Because that policy applies across the putative class, Plaintiffs' challenge is ideally suited for class status: It will resolve questions at the center of each class members' claims, is ideally suited to class-wide resolution, and will promote efficiency.

Accordingly, Plaintiffs satisfy the requirements of CPLR 901(a), and the Court should grant this motion.

BACKGROUND

I. The HALT Act and DOCCS's k(ii) Confinement Policy

Consensus is now clear that solitary confinement—the use of extreme isolation as punishment—even for relatively short periods, inflicts profound long-lasting, and often irreparable harm. Yet for decades, DOCCS has persisted in imposing lengthy periods of solitary confinement and other similarly restrictive disciplinary confinement, exacting a devastating toll that has disproportionally accrued to Black and Latinx communities.

In 2021, responding to widespread public concern over the cruelty and severity 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, 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* 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.[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]).

But through its k(ii) Confinement Policy, DOCCS ignores these requirements. First, DOCCS treats all "Tier III" infractions—including those charged against the 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).

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[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 requirements of CL § 137(6)(k) also apply to disciplinary placement in a host of other settings. (*See e.g.* CL § 401[1] [requiring DOCCS to comply with CL § 137[6][k] for placement in Residential Mental Health Treatment Units ("RMHTU"), alternative settings for people with serious mental illness]).

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

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 that it has made a categorical determination that *any* rule violation that they have determined 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)."]).

II. Putative Class Representatives

Through its k(ii) Confinement Policy, DOCCS has imposed disciplinary confinement on Plaintiffs Fields, Garcia, and Barner—as well as thousands of other individuals incarcerated in New York prisons—in a manner that the HALT Act specifically prohibits.

A. Fuquan Fields

Putative class representative Fuquan Fields is a 44-year-old man in DOCCS custody who is serving 120 days of disciplinary confinement in an RRU.

Mr. Fields first entered DOCCS custody in 2007, and he has lived with chronic depression and anxiety for years. On January 12, 2023, while incarcerated at the Fishkill Correctional Facility, Mr. Fields began experiencing a mental health crisis and made suicidal statements. Staff placed him in a restraint chair in a hearing room to wait for escort to be seen by staff for a one-to-one suicide watch. While waiting for transport, Mr. Fields asked to go to the bathroom, but staff ignored this request. After waiting roughly two hours, Mr. Fields allegedly exposed himself and urinated on the floor. According to the misbehavior report, he then threw

"wet looking sugar packets" at an officer. (Am. Pet. ¶ 42). The misbehavior report charged him with rule violations for assault on staff, lewd conduct, threats, refusal to obey a direct order, and committing an unhygienic act—all of which were charged as Tier III violations of the disciplinary rules.

On January 27, 2023, the hearing officer found Mr. Fields guilty of assault on staff, unhygienic act, and lewd conduct and sentenced him to 180 days in a Special Housing Unit ("SHU"). The disposition did not contain a determination that any of the alleged conduct constituted an act defined under CL § 137(6)(k)(ii)(A)–(G). The disposition also contains no written determination by DOCCS, based on specific objective criteria, that Mr. Fields's 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.

On March 20, 2023, the Office of Special Housing issued a written determination affirming the disposition of Mr. Fields's hearing as to the unhygienic act and lewd conduct charges. The Office of Special Housing dismissed the assault on staff charge and modified his penalty from 180 days to 120 days of disciplinary confinement in SHU.

Mr. Fields began serving his sentence for this confinement sanction on May 1, 2023, and, under DOCCS's k(ii) Confinement Policy, is currently confined in an RRU—a placement for which DOCCS's compliance with the k(ii) confinement criteria is mandatory.

B. Luis Garcia

Putative class representative Luis Garcia is a 41-year-old man in DOCCS custody who was sentenced to 730 days of disciplinary confinement in SHU on October 5, 2022.
On September 20, 2022, Mr. Garcia was confined in a Residential Mental Health Unit ("RMHU")—a therapeutic treatment unit exclusively for individuals with serious mental

illness—at the Coxsackie Correctional Facility when he allegedly threw an "unknown brown feces smelling liquid" that hit two officers. (Am. Pet. ¶ 54). The misbehavior report charged him with two counts of assault on staff and two counts of committing an unhygienic act. The hearing officer found Mr. Garcia guilty of the charges in the misbehavior report and sentenced him to 730 days—over two years—of disciplinary confinement in SHU.

The hearing officer's disposition did not contain a determination that any of the alleged conduct constituted an act defined under CL § 137(6)(k)(ii)(A)–(G). The disposition also contained no written determination by DOCCS, based on specific objective criteria, that Mr. Garcia's 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.

On December 5, 2022, the Office of Special Housing issued a written determination affirming the disposition. Under the k(ii) Confinement Policy, this confinement sanction has resulted in Mr. Garcia's confinement in an RMHU, a placement for which compliance with the k(ii) confinement criteria is mandatory.

C. Jimmy Barner

Putative class representative Jimmy Barner is a 41-year-old man in DOCCS custody who was sentenced to 210 days of disciplinary confinement on January 19, 2023.

On January 13, 2023, a DOCCS Corrections Officer filed a misbehavior report against Mr. Barner. The report charged Mr. Barner with assault on inmate, violent conduct, smuggling, committing an unhygienic act, and contraband. Mr. Barner was accused of pulling an "unknown container" out of his pants and spraying an "unknown brown liquid" with an "odor of feces" onto three other incarcerated individuals. (Am. Pet ¶ 67). The hearing officer found Mr. Barner guilty

of the charges in the misbehavior report and sentenced him to 210 days of disciplinary confinement in the SHU.

The hearing officer's disposition did not contain a determination that any of the alleged conduct constituted an act defined under CL § 137(6)(k)(ii)(A)–(G). The disposition also contained no written determination by DOCCS, based on specific objective criteria, that Mr. Barner's 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.

On March 27, 2023, the Office of Special Housing issued a written determination dismissing the violent conduct and contraband charges; but otherwise affirming the charges against Mr. Barner and affirming the penalty against him, including the sentence to 210 days in disciplinary confinement. Under the k(ii) Confinement Policy, Mr. Barner is scheduled to serve this sanction from June 17, 2023, through January 13, 2024, in a confinement setting for which compliance with the k(ii) confinement criteria is mandatory.

ARGUMENT

The representative parties seek to certify a class of "all individuals in DOCCS custody who are or will be placed in segregated confinement for more than three consecutive days, or six days in any 60-day period; a residential rehabilitation unit; or any other unit for which compliance with the requirements of k(ii) is required before placement." (Am. Pet. ¶ 75).

The Court should certify this putative class because it meets the prerequisites to class certification under CPLR § 901(a) and because the factors under CPLR § 902 weigh decisively in favor of maintaining this challenge as a class action.

The prerequisites to class certification under CPLR § 901(a) are:

(1) the class is so numerous that joinder of all members, whether

otherwise required or permitted, is impracticable;
(2) there are questions of law or fact common to the class which predominate over any questions affecting only individual members;
(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
(4) the representative parties will fairly and adequately protect the interests of the class; and
(5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

(CPLR § 901[a]).

To certify a class, under CPLR § 902, the Court must also consider the following factors.

(1) [t]he interest of members of the class in individually controlling the prosecution or defense of separate actions;
(2) [t]he impracticability or inefficiency of prosecuting or defending separate actions;
(3) [t]he extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
(4) [t]he desirability or undesirability of concentrating the litigation of the claim in the particular forum; [and]
(5) [t]he difficulties likely to be encountered in the management of a class action.

(CPLR § 902).

These requirements are "liberally construed and [] any error, if there is to be one, should be in favor of allowing the class action." (*Lauer v New York Tel. Co*., 231 AD2d 126, 130 [3d Dept 1997] [cleaned up]).[5]

[5]In interpreting the requirements of CPLR § 901(a), New York courts frequently look to federal caselaw examining Rule 23 of the Federal Rules of Civil Procedure. (*See e.g., Friar v Vanguard Holding Corp*., 78 AD2d 83 [2d Dept 1980]; *Ackerman v Price Waterhouse*, 683 NYS2d 179 [1st Dept 1998]; *Pruitt v Rockefeller Ctr. Properties, Inc*., 574 NYS2d 672 [1st Dept 1991]).

I. THE PLAINTIFFS-PETITIONERS MEET THE PREREQUISITES TO CLASS CERTIFICATION UNDER CPLR § 901(a).

A. The Putative Class, Which Includes Thousands of Individuals at Any One Time, is Sufficiently Numerous.

The putative class satisfies the requirement that "the class [be] so numerous that joinder of all members . . . is impracticable." (CPLR § 901[a][1]).

Sufficient "numerosity is presumed at a level of 40 members." (*Borden v 400 E. 55th St. Assocs., L.P.*, 24 NY3d 382, 399 [2014] [quoting *Consolidated Rail Corp. v Town of Hyde Park*, 47 F3d 473, 483 [2d Cir 1995]]). Here, the putative class far exceeds that presumptive threshold: The available data show that DOCCS is currently holding thousands of individuals in disciplinary confinement in settings for which compliance with the k(ii) confinement criteria is mandatory. (*See* DOCCS Incarcerated Profile Report – June 2023 https://doccs.ny.gov/system/files/documents/2023/06/2023_06_01-uc-profile.pdf [last accessed June 28, 2023] [reflecting 32 individuals in SHU, 1,859 in RRU, 164 in RMHU, and 26 in BHU]). Those numbers will only increase, further enlarging the class, because the putative class definition is "open," including people whom DOCCS will place in k(ii) confinement in the future. (*See e.g. M.C. v Jefferson County New York*, No. 6:22-CV-190, 2022 WL 1541462, at *2 [ND NY May 16, 2022] [recognizing same as a basis for numerosity]). And because of the fluid and ever-changing composition of the class, joinder of all its members is impracticable, further underscoring that the class satisfies the numerosity prerequisite to class certification. (*See Westchester Ind. Living Ctr., Inc. v State Univ. of New York, Purchase Coll.*, 331 FRD 279, 290 [SD NY 2019] ["[J]oinder is difficult, if not impossible, where the identities of some class members are unknowable to plaintiffs, either because they have not been disclosed by defendants or because the class's composition is fluid and changing."]).

Numbers aside, several contextual factors support numerosity. (*See Pa Pub Sch. Employees' Retirement Sys. v Morgan Stanley & Co.*, 772 F3d 111, 120 [2d Cir 2014] ["[T]he numerosity inquiry is not strictly mathematical but must take into account the context of the particular case . . . ."]). Class members are geographically dispersed in prisons across the state. (*See Raymond v New York State Dept. of Corrections and Community Supervision,* 579 F Supp 3d 327, 336 [ND NY 2022] [noting that geographic dispersion of class members may support a finding of numerosity]). Class members have low financial resources. (*See id.* [noting that financial low financial resources of class members may support a finding of numerosity]; *see also Borden*, 24 NY3d at 399 [noting that cost and income may support a finding of numerosity]).

B. Questions of Law and Fact Are Common to the Putative Class.

The putative class satisfies the requirement that "questions of law or fact common to the class . . . predominate over any questions affecting only individual members." (CPLR § 901[a][2]). Here, DOCCS has subjected or will subject class members to similar unlawful treatment under its blanket k(ii) Confinement Policy, which applies across the class. Resolution of the common predominating questions will address this harm for all class members.

The "linchpin" of the commonality requirement is predominance. (*City of New York v Maul*, 14 NY3d 499, 514 [2010]). Whether common questions predominate is determined not by a "mechanical test" but based on whether class resolution "would achieve economies of time, effort, and expense, and promote uniformity of decisions as to persons similarly situated." (*Friar*, 78 AD2d at 97). Predominance does not require identity or unanimity of common questions. (*Maul*, 14 NY3d at 514). The mere existence of different or unique questions among class members does not defeat commonality. (*See id.* at 512 [finding commonality even where "each of the plaintiffs and putative class members possesses . . . unique factual circumstances

and needs"]). Instead, commonality "simply requires that there be issues whose resolution will affect all or a significant number of the putative class members." (*Johnson v Nextel Communications Inc*., 780 F3d 128, 137 [2d Cir 2015]). "[T]he focus [of the commonality requirement] is whether the putative class action will 'generate common answers apt to drive the resolution of the litigation.'" (*Burdick v Tonoga, Inc.*, 179 AD3d 53, 56 [3d Dept 2019] [quoting *Wal-Mart Stores, Inc. v Dukes*, 564 US 338, 350 [2011]]).

Here, the representative parties' challenge to the k(ii) Confinement Policy implicates a host of questions common to the class that predominate over questions affecting individual members. (*See Maul*, 14 NY3d at 514). Among others, these include, (a) whether DOCCS maintains the k(ii) Confinement Policy; (b) whether the k(ii) Confinement Policy violates CL § 137(6)(k); and (c) whether the k(ii) Confinement Policy is affected by an error of law, is arbitrary and capricious, or is otherwise irrational. (Am. Pet. ¶ 77). Resolving these questions on a class-wide basis will promote efficiency and uniformity by resolving the lawfulness of a decision-making process that DOCCS has applied across the class. (*See Burdick*, 179 AD3d at 56).

C. The Claims of the Representative Parties are Typical of the Putative Class.

For substantially the same reasons that Plaintiffs-Petitioners' claims satisfy the commonality requirement, they also satisfy the requirement that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." (CPLR § 901[a][3]; *see City of New York v Maul*, 59 AD3d 187, 190 [1st Dept 2009], *affd* 14 NY3d 499 [2010] ["Plaintiffs' claims meet the typicality requirement for the same reasons they satisfy the commonality test" where "plaintiffs' claims and the claims of the class generally flow from the same alleged conduct"]; *see also Sykes v Mel Harris & Associates, LLC*, 285 FRD. 279, 286 [SD

NY 2012] ["The commonality and typicality requirements . . . tend to merge such that similar considerations inform the analysis for both prerequisites."] [cleaned up]).

Typicality is satisfied where the Plaintiffs' claims "arise from the same facts and circumstances as the claims of the class members." (*Globe Surgical Supply v GEICO Ins. Co*., 871 NYS2d 263, 274 [2d Dept 2008]). For the typicality requirement to be met, "it is not necessary that the claims of the named plaintiff be identical to those of the class, and, should it prove necessary, the option of creating subclasses remains." (*Super Glue Corp. v Avis Rent A Car System, Inc*., 517 NYS2d 764, 767 [2d Dept 1987]). Rather, "[w]hen the same unlawful conduct was directed at or affected both the named plaintiffs and the prospective class, typicality is usually met." (*V.W. by and through Williams v Conway*, 236 F Supp 3d 554, 576 [ND NY 2017]).

Here, the claims of representative parties "arise from the same facts and circumstances as the claims of the class members." (*Globe Surgical Supply*, 871 NYS2d at 274). Specifically, the representative parties and other class members are all subject to the same challenged policy by which DOCCS imposes k(ii) confinement on all misconduct adjudicated in a Tier III hearing, irrespective of whether the HALT Act's k(ii) confinement criteria are met. And whatever minor factual variations may exist between individual class members, all class members' legal arguments against the k(ii) Confinement Policy are fundamentally the same. (*See Robidoux v Celani*, 987 F2d 931, 936–937 [2d Cir 1993] [noting that "minor variations" in facts in class members' underlying claims does not defeat a finding of typicality where "each class member makes similar legal arguments to prove the defendants' liability"]).

D. The Representative Parties Will Fairly and Adequately Represent the Class.

The putative class also satisfies the requirement that "the representative parties will fairly and adequately protect the interests of the class." (CPLR § 901[a][4]). In assessing adequacy,

courts consider "potential conflicts of interest between the representative and the class members, personal characteristics of the putative class representative (*e.g.* familiarity with the lawsuit and his or her financial resources), and the quality of the class counsel." (*Globe Surgical Supply*, 871 NYS2d at 274; *see also Pruitt*, 574 NYS2d at 678). Each of these considerations demonstrates the adequacy of the representative parties to serve as class representatives here.

Challenging the k(ii) Confinement Policy on a class-wide basis creates no foreseeable conflict between the representative parties and other class members, because the policy applies to all class members—representative parties and other class members alike—and all class members share an interest in ending the policy. (*See Marcondes v Fort 710 Assoc., L.P.,* 75 Misc 3d 1214(A), 4 [Sup Ct, NY County 2022] [finding "no conflict between the representatives and class members because the class representatives are experiencing the type of [harm] that are emblematic of the systematic deprivation" at issue]).).).

Additionally, Mr. Fields, Mr. Garcia, and Mr. Barner are each well situated to serve as class representatives in this matter. They are familiar with the lawsuit, enthusiastic about serving as class representatives, and both willing and able to assist counsel in litigating this matter on behalf of themselves and the putative class. *(See* Fields aff. ¶¶ 12–15; Garcia aff. ¶¶ 8–10; Barner aff. ¶¶ 9–11; *see also Pruitt*, 574 NYS2d at 678 [stating that adequacy of class representative involves considering the class representatives' "background and personal character, as well as [their] familiarity with the lawsuit"]).

Finally, class counsel at the New York Civil Liberties Union Foundation and Prisoners' Legal Services of New York have decades of experience in class action litigation—including in the context of prison litigation—and have sufficient resources to pursue this litigation competently and vigorously to its conclusion. (*See* Gemmell Aff. ¶¶ 5–11).

E. A Class Action is the Superior Vehicle for Adjudicating this Controversy.

The class action vehicle "is superior to other available methods for the fair and efficient adjudication of th[is] controversy" because Plaintiffs-Petitioners challenge a single practice that affects thousands of people across New York. (CPLR § 901[a][5]).

CPLR § 901's superiority requirement is satisfied where many individual actions would be costly or inefficient. (*See Pruitt*, 574 NYS2d at 677 [stating that a class action was both "superior" and "practical" where individual actions were "cost prohibitive[] and the large number of class members render[ed] consolidation unworkable"]; *see also Onadia v City of New York*, 56 Misc 3d 309, 321-322 [Sup Ct, Bronx County 2017] [finding relevant to superiority both "the possibility of excessive costs and delays resulting from multiple lawsuits seeking the same or similar relief" and the risk of "inconsistent rulings"]). Superiority is also demonstrated where class members are "indigent individuals" for whom the "commencement of individual actions would be burdensome," (*Stewart v Roberts*, 163 AD3d 89, 94 [3d Dept 2018]); and "where the class plaintiffs face an immediate threat from the condition for which a remedy is sought." (*Brad H. v City of New York*, 185 Misc 2d 420, 424–425 [Sup Ct, NY County 2000], *affd* 276 AD2d 440 [1st Dept 2000]).

Each of these considerations demonstrates why a class action is a superior vehicle for litigating this controversy. DOCCS's k(ii) Confinement Policy applies on a blanket basis to thousands of incarcerated people across New York. Requiring each of these individuals to challenge that policy in separate actions will inevitably result in a deluge of duplicative litigation that clogs courts around the state—precisely the type of inefficiency the class-action device is designed to avoid. (*See Borden*, 24 NY3d at 400 [2014] [finding superiority of class action where it would "preserve judicial resources" relative to individual actions]).

Inefficiency aside, members of the putative class face significant barriers to litigating individual challenges to the k(ii) Confinement Policy: Many are incarcerated in remote, rural locations where opportunities to retain civil counsel are scarce; And those members who retain counsel are confined in settings where communications with counsel are often significantly limited. (*See e.g.,* DOCCS Directive #4423, Incarcerated Individual Telephone Calls at 10 [limiting attorney calls to one every 30 days], available at https://www.ny.gov/sites/default/files/2023-04/Incarcerated_Individual_Call-Home_Program.pdf [last accessed June 28, 2023]).

II. THE CPLR § 902 FACTORS WEIGH DECISIVELY IN FAVOR OF CLASS CERTIFICATION

In determining whether to certify a class, a court must also consider the five factors enumerated in CPLR § 902. These are:

> 1. The interest of members of the class in individually controlling the prosecution . . . of separate actions;
> 2. The impracticability or inefficiency of prosecuting separate actions;
> 3. The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
> 4. The desirability of concentrating the litigation of the claim in the particular forum; [and]
> 5. The difficulties likely to be encountered in the management of a class action.

(See CPLR § 902[1]–[5]).

Each of these factors weighs decisively in favor of class certification here.

First, in the months since this case was filed, there has been no "indication that the members of the class have expressed any interest in controlling the prosecution of their own claims"—as opposed to challenging this blanket policy in a class action. (*Krebs v Canyon Club, Inc*., 22 Misc 3d 1125(A), 16 [Sup Ct, Westchester County 2009]).

Second, a class action will avoid the impracticability and inefficiency of hundreds—if not thousands—of separate actions by class members across the state mounting duplicative challenges to the k(ii) Confinement Policy. (*See Kurovskaya v Project O.H.R.*, 194 AD3d 612, 613 [1st Dept 2021], *lv to appeal,* 37 NY3d 1104 [2021] [finding class certification warranted under CPLR 902 because "the burden on the litigants and the courts would be significantly increased if 1,000 potential individual lawsuits were pursued"]; *see also Lavrenyuk v Life Care Servs., Inc*., 198 AD3d 569, 570 [1st Dept 2021], *lv dismissed* 38 NY3d 1021 [2022] [similar]).

Third, given the limited number of cases brought by class members challenging DOCCS's failure to adhere to CL § 137(6)(k)(ii), "[t]he extent and nature of any litigation concerning the controversy" does not counsel against class certification. (CPLR § 902[3]; *see e.g. Jones v Bd. of Educ. of Watertown City School Dist.*, 6 Misc 3d 1035(A) [Sup Ct, Jefferson County 2005], *affd as mod* 30 AD3d 967 [4th Dept 2006] [finding that mere existence of another lawsuit concerning the controversy did not weigh against class certification under CPLR § 902(3)]).

Fourth, it is desirable to concentrate litigation challenging the k(ii) Confinement Policy in Albany County, where Defendant-Respondent is located and the policy was made. (*See* CPLR § 902[4])). (*See e.g. Fleming v Barnwell Nursing Home & Health Facilities, Inc.*, 309 AD2d 1132, 1134 [3d Dept 2003] [holding that the CPLR § 902 requirements were satisfied because, *inter alia*, "it [was] desirable to concentrate the litigation in the county where the [respondent] is located"]).).

Finally, this lawsuit—which challenges the lawfulness of a single policy as to each member of a well-defined class and involves no claims for damages—presents no "apparent difficulties" in manageability, (*Fleming*, 309 AD2d at 1134); and is markedly different from

cases where courts have found otherwise. (*See e.g. Russo & Dublin v Allied Maint. Corp.*, 95 Misc. 2d 344, 348 [Sup Ct, New York County 1978] [finding class unmanageable where certification would have required an estimated 100,000 separate evidentiary determinations as to both liability and damages]).

CONCLUSION

For the foregoing reasons, the Plaintiffs-Petitioners respectfully request that this Court grant this motion, certifying the putative class; appointing the representative parties as class representatives; and appoint the undersigned as class counsel.

Dated: June 30, 2023
New York, New York

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH 22 NYCRR §202.8-b

I hereby certify that this Memorandum of Law 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 Memorandum of Law, excluding the parts exempted by §202.8-b is 4,894 words.

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New York, New York

/s/ Ifeyinwa K. Chikezie
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