

**SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION – THIRD DEPARTMENT**

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In the Matter of the Application of

RICHARD ALCANTARA, LESTER CLASSEN,  
JACKSON METELLUS, CESAR MOLINA,  
CARLOS RIVERA, and DAVID SOTOMAYOR,

*Respondents-  
Cross Appellants,*

v.

ANTHONY J. ANNUCCI, Acting  
Commissioner, New York State  
Department of Corrections and  
Community Supervision, and  
TINA M. STANFORD, Chairperson,  
New York State Board of Parole,

*Appellants-  
Cross Respondents.*

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No. 531036

Supreme Court  
Albany County  
Index No. 2534-16

**AFFIRMATION IN  
OPPOSITION TO  
MOTION FOR LEAVE  
TO APPEAL**

BLAIR J. GREENWALD, an attorney duly admitted to practice in the courts of this State, affirms the following under penalty of perjury:

1. I am an Assistant Solicitor General in the Office of Letitia James, Attorney General of the State of New York, and counsel for respondents–appellants-cross respondents Anthony J. Annucci, Acting Commissioner of the New York State Department of Corrections and Community Supervision (DOCCS), and Tina M. Stanford, Chairperson of

the New York State Board of Parole (collectively, “respondents”). I make this affirmation in opposition to the motion of petitioners—respondents—cross appellants (collectively, “petitioners”) for leave to appeal to the Court of Appeals, based on my review of the record in this matter, my review of the records of the Office of the Attorney General, and my conversations with attorneys in this Office and at DOCCS.

2. Petitioners are certified sex offenders who, after completing terms of imprisonment, were temporarily housed at the residential treatment facility (RTF) at Fishkill Correctional Facility until they could secure housing in the community that complied with the Sexual Assault Reform Act of 2000 (SARA). SARA requires that qualifying sex offenders reside at least one thousand feet from school grounds during a term of community supervision. While at Fishkill’s RTF, petitioners were assigned to an RTF program that included activities designed to facilitate rehabilitation and reintegration into the community.

3. Petitioners filed this lawsuit in Supreme Court, Albany County, challenging the adequacy of their RTF program under the standards set forth in Correction Law § 73. Supreme Court (Hartman, J.) granted summary judgment to respondents in part, finding that Fishkill’s RTF

provided adequate program activities *inside* the facility. But the court granted summary judgment to petitioners in part, concluding that Correction Law § 73 requires DOCCS to establish RTF program activities in the community and that Fishkill's RTF failed to do so.

4. This Court reversed the latter ruling and granted summary judgment to respondents in full. The Court held as a matter of statutory construction that Correction Law § 73 permits, but does not obligate, DOCCS to establish RTF program activities in the community and thus that Fishkill's RTF program complied with applicable statutory requirements.

5. Petitioners' motion for leave to appeal merely rehashes the arguments that this Court correctly rejected. Petitioners' motion also fails to identify any conflict between this Court's decision and any precedent of this Court, other departments of the Appellate Division, or the Court of Appeals. And petitioners' motion fails to raise any issue of novel or public importance warranting further review. The motion should therefore be denied.

## BACKGROUND<sup>1</sup>

6. Correction Law § 73 authorizes DOCCS “to use any residential treatment facility as a residence for persons who are on community supervision” and provides that “[p]ersons who reside in such a facility shall be subject to conditions of community supervision imposed by the board.” Correction Law § 73(10). An RTF is defined as a “correctional facility consisting of a community based residence,” which is located “in or near a community where employment, educational and training opportunities are readily available for persons” serving terms of community supervision. *Id.* § 2(6). DOCCS is “responsible for securing appropriate education, on-the-job training and employment for incarcerated individuals transferred to residential treatment facilities.” *Id.* § 73(2).

7. Correction § 73 further provides that an individual housed at an RTF “*may* be allowed to go outside the facility during reasonable and necessary hours to engage in any activity reasonably related to his or her rehabilitation and in accordance with the program established for him or her.” *Id.* § 73(1) (emphasis added). “While outside the facility,” an RTF

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<sup>1</sup> The full background of this case is set forth in respondents’ opening brief on appeal. See Opening Br. for Appellants at 4-20. The following summary is offered for the Court’s convenience.

resident “shall be at all times in the custody of the department and under its supervision.” *Id.* DOCCS is required to “supervise such incarcerated individuals during their participation in activities outside any such facility and at all times while they are outside any such facility.” *Id.* § 73(2).

8. Petitioners Richard Alcantara, Lester Classen, Jackson Metellus, Cesar Molina, Carlos Rivera, and David Sotomayor are sex offenders who were temporarily housed at Fishkill’s RTF for periods of time between 2014 and 2017 while serving terms of community supervision for one or more sex offenses subject to SARA. (Record on Appeal (R.) 80-82.)

9. While at Fishkill’s RTF, each petitioner was assigned an individualized version of the standard program for RTF residents. The program includes a small-group course to gain insight into behavior and build practical and employment-related skills for use in the community (R. 312-315, 324-325, 1358-1359, 1546-1548); a daily stipend of five dollars (R. 530); access to libraries and academic courses (R. 258, 950, 1001, 1052-1053, 1376-1377); paid employment opportunities inside and outside Fishkill Correctional Facility’s perimeter security fence (R. 242-244, 285, 531, 548, 1366-1367); and access to business courses, computer instruction, and practical trade opportunities (R. 1240-1241, 1377-1378).

On a regular basis, RTF residents also receive housing assistance from DOCCS staff both inside and outside the facility. (R. 298-299, 545, 940-941, 998-999, 1178, 1181-1182, 1400-1402, 1413-1414.)

10. In 2016, petitioners filed a C.P.L.R. article 78 proceeding alleging, among other things, that Fishkill's RTF did not provide sufficient education, employment, or on-the-job training opportunities to satisfy Correction Law § 73, and that RTF residents were treated like general population incarcerated individuals in violation of Correction Law § 2(6) and § 73. (R. 103-111.) Petitioners sought injunctive and declaratory relief. (R. 112.)

11. By 2017, petitioners were no longer housed at Fishkill's RTF. Three petitioners had secured SARA-compliant housing in the community and three had been returned to prison for violating conditions of their supervised release. *See Alcantara v. Annucci (Alcantara I)*, 2017 N.Y. Slip Op. 50610(U) at 4 (Sup. Ct. Albany County 2017). Supreme Court applied the exception to the mootness doctrine for issues capable of repetition yet evading review and converted the article 78 proceeding to a declaratory judgment action to address petitioners' claims. *Id.* at 4, 8.

12. Respondents moved for summary judgment. *See Alcantara v. Annucci (Alcantara II)*, 66 Misc. 3d 850, 852 (Sup. Ct. Albany County 2019). Supreme Court granted the motion in part, finding that Fishkill's RTF provided adequate programming inside the facility, *id.* at 861-63, and rejecting petitioners' argument that RTF residents were treated the same as incarcerated individuals in violation of the Correction Law, *id.* at 859-61. But Supreme Court granted summary judgment to petitioners in part, holding that Correction Law § 73 required DOCCS to establish RTF programming outside the facility and that the programming DOCCS provided outside the facility's security perimeter but nonetheless on the grounds of the facility was insufficient to satisfy this requirement. *Id.* at 863-66.

13. After both sides appealed, this Court unanimously granted respondents summary judgment in full. *See Alcantara v. Annucci (Alcantara III)*, 203 A.D.3d 1483, 1487 (3d Dep't 2022). The Court affirmed Supreme Court's holding that the RTF programming inside the facility was adequate because it was directed toward rehabilitation and reintegration through appropriate education, on-the-job training, and employment. *Id.* at 1485-86. The Court also rejected petitioners'

argument that the Correction Law requires RTFs to be maintained as entirely separate facilities whose residents must be kept separate and apart from general population incarcerated individuals. *Id.* at 1486-87. While the Court recognized that Fishkill’s RTF residents “were afforded separate housing and privileges compared to general population incarcerated individuals,” it held that the fact that the RTF residents were treated like general population residents in some other respects did not violate the statutory scheme. *Id.* at 1486. Finally, the Court held that Correction Law § 73 permits, but does not obligate, DOCCS to establish RTF programming in the community and therefore reversed Supreme Court’s grant of summary judgment to petitioners on that issue. *Id.* at 1484-85. While § 2(6) requires that an RTF be located “in or near a community where employment, educational and training opportunities are readily available,” the statute does not obligate DOCCS to provide RTF programming in the community. *Alcantara III*, 203 A.D.3d at 1484-85 (quoting Correction Law § 2(6)). And the plain language of Correction Law § 73(1) makes clear that DOCCS “may,” but is not required to, permit RTF residents to leave the facility for programming. *See id.* at 1485.



## REASONS THAT LEAVE SHOULD BE DENIED

14. This Court's unanimous decision awarding summary judgment to respondents in full provides no basis to grant leave to appeal to the Court of Appeals. Petitioners' motion instead merely rehashes their argument—correctly rejected by this Court—that Fishkill's RTF failed to comply with Correction Law §§ 2(6) and 73.

15. *First*, petitioners identify no conflict between this Court's decision and either any decision of the Court of Appeals or any decision of the Appellate Division. *See* Rules of Ct. of Appeals (22 N.Y.C.R.R.) § 500.22(b)(4). Nor could petitioners do so. Indeed, several decisions confirm this Court's decision. In *Matter of Gonzalez v. Annucci*, the Court of Appeals rejected a challenge under Correction Law §§ 2(6) and 73 to the adequacy of materially identical programming at the Woodbourne Correctional Facility's RTF. 32 N.Y.3d 461, 467, 469, 475 (2018); *see also id.* at 475 n.6 (noting that “similar claims relating to Fishkill Correctional Facility as an RTF” were raised in *Alcantara I*). And in *Matter of Alvarez v. Annucci*, the Second Department similarly rejected the argument that the programming at Queensboro Correctional Facili-

ty's RTF failed to comply with Correction Law §§ 2(6) and 73. *See* 186 A.D.3d 704, 706 (2d Dep't 2020), *aff'd*, 38 N.Y.3d 974 (2022).

16. *Second*, petitioners fail to identify any issue of novel or public importance warranting further review. *See* 22 N.Y.C.R.R. § 500.22(b)(4). In their motion to this Court (¶ 6), petitioners mistakenly contend that this case presents the novel and important question whether the treatment afforded RTF residents satisfies statutory RTF programming requirements for residents housed at the RTF for more than six months pursuant to DOCCS's authority under Correction Law § 73(10). But petitioners failed to preserve any such argument for review by the Court of Appeals by not raising it below.

17. More particularly, Penal Law § 70.45(3) authorizes DOCCS to place a sex offender at an RTF for the first six months of post-release supervision—a form of community supervision, *see* Correction Law § 2(31)—and Correction Law § 73(10) authorizes DOCCS to continue to house the sex offender at an RTF after six months until the offender secures SARA-compliant housing. *See People ex rel. McCurdy v. Warden, Westchester County Corr. Facility*, 36 N.Y.3d 251, 262 (2020). It is unclear why the statutory source of authority for retaining an individual at an

RTF would change the nature of the programming that DOCCS is required to provide. Regardless, however, petitioners raised no such argument in Supreme Court or this Court distinguishing the degree or type of RTF programming purportedly required for residents housed at an RTF for the first six months under Penal Law § 70.45(3), versus those housed at an RTF beyond six months under Correction Law § 73(10).<sup>2</sup> (See R. 103-108; Answering Br. for Resp'ts-Cross Appellants at 18-43; Reply Br. for Resp'ts-Cross Appellants at 3-15.) Petitioners have therefore failed to preserve any such argument for review by the Court of Appeals. See *Bingham v. New York City Tr. Auth.*, 99 N.Y.2d 355, 359 (2003); see also Arthur Karger, *The Powers of the New York Court of Appeals* § 17:1 (Sept. 2020 update) (Westlaw).

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<sup>2</sup> In Supreme Court, petitioners presented only one argument distinguishing between these two classes of RTF residents—namely, that Penal Law § 70.45(3) authorized DOCCS to house sex offenders at an RTF for the first six months, but that Correction Law § 73(10) did not authorize DOCCS to house sex offenders at an RTF beyond six months. (See R. 109-110.) The Court of Appeals has since held that Correction Law § 73(10) does authorize DOCCS to house sex offenders beyond six months. See *People ex rel. McCurdy*, 36 N.Y.3d at 254. And on appeal, petitioners' sole argument highlighting the class of residents housed at an RTF beyond six months related to the level of housing assistance required by Correction Law § 201(5), not the type or degree of RTF programming required by Correction Law § 73. See Answering Br. for Resp'ts-Cross Appellants at 38-39.

18. In any event, this issue is not novel, of broad public importance, or meritorious. Petitioners’ motion contends (§§ 8-9) that residents housed at Fishkill’s RTF beyond six months are treated the same as incarcerated individuals and therefore do not receive sufficient RTF programming under the Correction Law. But Supreme Court and this Court agreed that the record here established that residents at Fishkill’s RTF were *not* treated the same as incarcerated individuals, but rather were “afforded separate housing and privileges compared to general population incarcerated individuals.” *Alcantara III*, 203 A.D.3d at 1486; *see Alcantara II*, 2019 N.Y. Slip Op. 29407, at 7-8. Moreover, this same issue was addressed by the Court of Appeals and the Second Department, both of which reviewed materially indistinguishable RTF programs and rejected arguments that RTF residents necessarily received inadequate programming by being treated in some respects the same as incarcerated individuals. *See Matter of Gonzalez*, 32 N.Y.3d at 467, 469, 475 (assessing Woodbourne RTF); *Matter of Alvarez*, 186 A.D.3d at 706 (assessing Queensboro RTF).<sup>3</sup> Because this same argu-

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<sup>3</sup> The petitioner in *Matter of Alvarez* argued—unsuccessfully—that his RTF program was insufficient because his job as a porter at the correctional facility and his assignment to a work crew that also included

ment has been repeatedly raised by RTF residents and rejected by the courts, including the Court of Appeals, it does not warrant further review in this case.

### CONCLUSION

For the foregoing reasons, the Court should deny petitioners' motion for leave to appeal.

Dated: New York, New York  
June 10, 2022



BLAIR J. GREENWALD  
Assistant Solicitor General

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incarcerated individuals did not sufficiently distinguish him from the general population incarcerated individuals.