To Be Argued By: BRIAN D. GINSBERG
Time Requested: 10 MINUTES

Supreme Court of the State of New York
Appellate Division – Third Department

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

Petitioners-Respondents-Cross Appellants,

v.

Case No. 531036

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,

Respondents-Appellants-Cross Respondents,

and

STEVEN R. BANKS, COMMISSIONER, NEW YORK CITY HUMAN RESOURCES ADMINISTRATION AND DEPARTMENT OF SOCIAL SERVICES,

Respondent.

REPLY BRIEF FOR APPELLANTS ANNUCCI AND STANFORD

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December 13, 2021

Supreme Court, Albany County – Index No. 2534-16

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (cont'd)

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

TABLE OF AUTHORITIES (cont'd)

STATUTES (cont'd) **PAGE**

MISCELLANEOUS

PRELIMINARY STATEMENT

In the opening brief in support of its appeal, the State demonstrated that the Correction Law gives the New York State Department of Corrections and Community Supervision ("DOCCS") the discretion whether to include, as part of the programs established for residents of its residential treatment facilities ("RTFs"), activities that take place outside facility walls. Thus, DOCCS does not violate its statutory obligations by operating the RTF program at Fishkill Correctional Facility in a manner that does not include employment, education, and training activities conducted in the surrounding community. In their answering brief to this Court, petitioners do not show otherwise. Nor do petitioners establish, in connection with their cross appeal, that DOCCS's operation of the Fishkill RTF runs afoul of the Correction Law in any other respect.

Indeed, the Court of Appeals in *Matter of Gonzalez v. Annucci*, 32 N.Y.3d 461 (2018), foreclosed all of petitioners' claims. In *Matter of Gonzalez*, the Court held that DOCCS's operation of the Woodbourne Correctional Facility RTF complied with all relevant statutory obligations. The operation of that RTF is materially identical to the

operation of the RTF at Fishkill. In effect, what petitioners seek here in opposition to the State's appeal and in support of their cross appeal is to relitigate *Matter of Gonzalez*. They should not be permitted to do so.

This Court should reverse Supreme Court's grant of summary judgment to petitioners, and enter summary judgment for the State, on the claim that the Fishkill RTF program fails to provide residents with adequate opportunities for education, training, and employment outside the facility. The remainder of Supreme Court's judgment, which dismissed all other claims against the State, should be affirmed.

ARGUMENT

POINT I

UNDER THE CORRECTION LAW, DOCCS IS AUTHORIZED—BUT NOT REQUIRED—TO INCLUDE IN THE FISHKILL RTF PROGRAM EMPLOYMENT, EDUCATION, AND TRAINING ACTIVITIES THAT TAKE PLACE IN THE COMMUNITY

A. DOCCS May—But Need Not—Incorporate Into RTF Programs Activities that Take Place Outside Residents' Assigned Facilities.

As the State demonstrated in the opening brief in support of its appeal (State's Opening Br. 22-25), the Correction Law gives DOCCS discretion to include, as part of the programs established for RTF

residents, employment, education, and training activities that take place outside their assigned facilities, but the Correction Law does not require that such activities be included. Specifically:

- Correction Law § 72 states that all persons placed in DOCCS's care or custody "shall be confined" within their assigned facilities "[e]xcept as otherwise provided in [that] section."[1] *Id.* § 72(1).

- Section 72 does provide otherwise for RTF residents, to a limited extent: An RTF resident "*may be permitted* to leave such facility in accordance with the provisions of section seventy-three." *Id.* § 72(6) (emphasis added).

- Under the provisions of section 73, an RTF resident "*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).

- Although DOCCS must ensure that every RTF program include employment, education, and training activities, the only applicable criterion is that such activities be "appropriate." *Id.* § 73(2).

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[1] The full text of Correction Law § 72(1) is:

> Except as otherwise provided in this section, all persons committed, transferred, certified to or placed in the care or custody of the department shall be confined in institutions maintained by the department until paroled, conditionally released, transferred to the care of another agency or released or discharged in accordance with the law.

Thus, under the plain meaning of sections 72 and 73, DOCCS is vested with discretion to incorporate into RTF programs employment, education, and training activities that take place outside the facilities in which RTF residents are housed, but DOCCS is not required to do so. And under settled principles of statutory interpretation, this plain meaning controls. (State's Opening Br. 22.)

B. There Is No Merit to Petitioners' Argument that DOCCS Must Incorporate Employment, Education, and Training Activities Taking Place in the Community.

Petitioners do not confront the above statutory analysis head on. They do not even acknowledge Correction Law § 72, let alone attempt to explain why that provision does not serve as the starting point for the analysis and why it does not restrict RTF residents' opportunities for out-of-facility activities to those allowed by section 73.

Nevertheless, petitioners argue that the Fishkill RTF program must include employment, education, and training activities that take place not merely outside facility walls but in the community at large, so as to involve interaction with the public. Petitioners' argument is both foreclosed by precedent and, in any event, unsupported by the statutory provisions and legislative history on which they rely.

1. Petitioners' Argument Is Foreclosed by the Court of Appeals Decision in *Matter of Gonzalez*.

Petitioners' position is foreclosed by Court of Appeals precedent. As the State explained (State's Opening Br. 32-33), the RTF program at Woodbourne Correctional Facility, which was at issue in *Matter of Gonzalez*, contained just two activities taking place beyond facility walls: (1) a work crew, in which Gonzalez, the petitioner there, was on-call to perform maintenance at the facility and to help persons sent to the facility to serve sentences of incarceration unload their property upon arrival, and (2) while assigned to that work crew, weekly trips to Poughkeepsie to meet with parole officers there and discuss his search for outside housing that complied with the Sexual Assault Reform Act ("SARA"), which prohibits the persons to whom it applies from entering within 1,000 feet of any school, *see* Executive Law § 259-c(14). Neither of these Woodbourne program activities involved the sort of community integration that petitioners here contend is required; neither afforded the opportunity for RTF residents to interact with members of the public. Yet the Court of Appeals in *Matter of Gonzalez* rejected Gonzalez's challenge to the adequacy of Woodbourne's RTF program. 32 N.Y.3d at 475. The necessary implication of that holding is that DOCCS has no statutory

obligation to include in RTF programs employment, education, and training activities that take place within the community at large.

Petitioners are mistaken in their contention that *Matter of Gonzalez* "left open this issue for lower courts to decide." (Petitioners' Answering Br. 28 [some capitalization omitted].) Notwithstanding the lack of Woodbourne RTF program activities taking place in the community, the Court in *Matter of Gonzalez* held that there was "insufficient record evidence" to establish that the Woodbourne RTF program was in violation of any relevant statutory obligation. 32 N.Y.3d at 475. It follows that the materially identical RTF program used at Fishkill is not in violation of any relevant statutory obligation, either, including the purported obligation to include community activities.

The theory that this issue remains open is not supported by the fact that, in *Matter of Gonzalez*, "[n]o judgment was made regarding *this case*." (Petitioners' Answering Br. 28 [emphasis added].) That observation, while correct, is beside the point. The State acknowledges that *Matter of Gonzalez* did not literally adjudicate the present dispute. The point is that the holding of *Matter of Gonzalez* necessarily forecloses the position that petitioners in the present dispute are advancing.

To be sure, things would be different if, as petitioners assert (Petitioners' Answering Br. 28-29), the record here regarding the Fishkill RTF program were materially distinct from the record in *Matter of Gonzalez* regarding the Woodbourne RTF program as far as the inclusion of employment, education, and training activities in the community at large was concerned. But the respective records are materially identical on that dimension: As explained above, no such activities are incorporated into either program.

2. Petitioners' Argument Is Unsupported by the Statutory Provisions and Legislative History on Which They Rely.

a. Correction Law § 2(6)

The State previously explained why Correction Law § 2(6), the provision setting forth the general definition of an RTF, does not require RTF programs to include employment, education, and training activities that take place in the community. (State's Opening Br. 30-31.) Because petitioners make section 2(6) a centerpiece of their counterargument (*see* Petitioners' Answering Br. 18-21, 26-27), the State provides a further response here.

As a threshold matter, Correction Law § 2(6) does not control the question whether RTF programs must include employment, education, and training activities that take place in the community, because sections 72 and 73 address that question more specifically. "Under principles of statutory construction, whenever there is a general and a specific provision in the same statute, the general applies only where the particular enactment is inapplicable." *Matter of Perlbinder Holdings, LLC v. Srinivasan*, 27 N.Y.3d 1, 9 (2016); *accord, e.g.*, *Matter of Lamar Advertising of Penn, LLC v. Pitman*, 9 A.D.3d 734, 735 (3d Dept. 2004). Sections 72 and 73 were enacted as part of the same legislation as section 2(6). *See* L. 1970, ch. 476, secs. 1, 9. And whereas section 2(6) sets forth the general definition of an RTF, sections 72 and 73 specifically address the circumstances under which RTF residents are allowed to leave their facilities, *id.* §§ 72(1), (6), 73(1), and specifically state the criterion that RTF program activities in the nature of employment, education, and training must satisfy, *id.* § 73(2). Thus, sections 72 and 73—not section 2(6)—govern the question whether RTF programs must include employment, education, and training activities taking place in the community.

Even if Correction Law § 2(6) were considered in the analysis, it would not change the outcome because, taken on its own terms, it does not mandate that RTF programs include employment, educational, and training activities that take place in the community. Section 2(6) defines an RTF thusly:

> A correctional facility consisting of a community based residence in or near a community where employment, educational and training opportunities are readily available for persons who are on parole or conditional release and for persons who are or who will soon be eligible for release on parole who intend to reside in or near that community when released.

At most, this provision requires that an RTF be located where employment, education, and training opportunities are routinely available so that DOCCS may incorporate them into RTF programs to the extent it finds appropriate, and so that RTF residents who are ultimately released to supervision in the surrounding area can pursue those opportunities at that time. The provision does not require that DOCCS provide such opportunities to RTF residents as a matter of course during RTF residency.

Indeed, DOCCS generally cannot provide employment, education, and training opportunities in the community without the cooperation of

outside individuals or entities. And DOCCS has no authority to compel outside individuals or entities to provide opportunities for supervised persons. For example, DOCCS has no mechanism by which to compel an outside employer to give a supervised person a job or to compel an outside educational institution to accept a supervised person into an academic or vocational course of study. The Legislature could not have intended Correction Law § 2(6) to require DOCCS to perform these potentially impossible tasks.[2]

Petitioners are mistaken in their suggestion (Petitioners' Answering Br. 20-21) that the State's interpretation of Correction Law § 2(6) fails to give any reasonable meaning to the term "community." The State agrees with petitioner that "community" bears its ordinary

[2] Like petitioners (R. 80), the vast majority of RTF residents at Fishkill and at least several other facilities are sex offenders serving terms of supervision subject to the SARA condition prohibiting entry within 1,000 feet of any school. (R. 568.) By definition, offenders subject to SARA either committed their offenses against victims under the age of 18 years old or have been adjudicated a level 3 risk under the Sex Offender Registration Act, indicating that "the risk of repeat offense is high and there exists a threat to the public safety," Correction Law § 168-l(6)(c). *See* Executive Law § 259-c(14). Securing the cooperation of outside individuals and entities to provide employment, education, and training opportunities for such offenders can be especially difficult.

meaning: "an interacting population of various kinds of individuals in a common location." *Merriam-Webster's Collegiate Dictionary* 251 (11th ed. 2004) (parenthetical omitted). And the State further agrees with petitioners that DOCCS must site its RTFs in or near a "community" where employment, education, and training opportunities are readily available for supervised individuals. The State differs with petitioners not over the meaning of "community" but over the obligations of DOCCS in relation to the community. As the State has demonstrated, neither section 2(6) nor any other statutory provision requires DOCCS to incorporate the employment, education, and training opportunities in the community into its RTF programs. DOCCS may arrange for RTF residents to participate in such opportunities if it is able to secure suitable placements.

Contrary to petitioners' assertion that the State's reading of Correction Law § 2(6) "would serve no identifiable purpose" (Petitioners' Answering Br. 27), the State's reading of that provision serves the core purpose of promoting the reintegration of RTF residents into the community. Siting RTFs in or near the types of communities described in section 2(6) makes it more likely that DOCCS will succeed in arranging

for RTF residents to be able to participate in outside employment, education, and training opportunities as part of their RTF programs. This siting requirement also makes it more likely that RTF residents released to continue their supervision in the surrounding community will be able to take advantage of those opportunities at that time.

b. Correction Law § 73(3)

Petitioners are mistaken in their contention (Petitioners' Answering Br. 23) that community opportunities for employment, education, and training must be included in RTF programs by virtue of Correction Law § 73(3)'s "overall focus on rehabilitation and community integration." Section 73(3) requires that RTF programs be "*directed toward* the rehabilitation and total reintegration into the community of persons transferred to a residential treatment facility." *Id.* (emphasis added). It follows that RTF programs must incorporate activities that help RTF residents prepare for life in the community. But it does not follow that such programs must include activities that actually take place in the community and involve interactions with the general public. For example, the nine-module therapeutic course is delivered to RTF residents in a custodial setting, but it nevertheless is "directed toward"

preparing them for non-custodial life insofar as it is designed to build skills that residents will find useful once they have re-entered the community following release. (*See* State's Opening Br. 8-11.)

As shown above in the discussion of Correction Law § 2(6) (*supra* pp. 7-12), the State's position is consistent with, and actively advances, an overall focus on rehabilitation and community integration.

c. Legislative History of Correction Law Former § 66

The legislative history on which petitioners rely (Petitioners' Answering Br. 21-22) likewise falls short of establishing that RTF programs must include opportunities for employment, education, and training in the community.

At the outset, it is inappropriate to consult legislative history in this case. "Resort to legislative history will be countenanced only where the language is ambiguous or where a literal construction would lead to absurd or unreasonable consequences that are contrary to the purposes of the enactment." *Auerbach v. Board of Educ.*, 86 N.Y.2d 198, 204 (1995); *accord, e.g.*, *Matter of Price v. New York State & Local Employees' Retirement Sys.*, 107 A.D.3d 1212, 1214 (3d Dept. 2013). And as demonstrated in the State's opening brief, and again here, the relevant

provisions of the Correction Law by their plain terms leave it to DOCCS whether to include in its RTF programs employment, education, and training activities that take place in the community—a result that is neither absurd nor unreasonable.

Even if resort to legislative history were warranted, it would not support petitioners' position. Preliminarily, the relevant history, if any, would be the history of chapter 476 of the Laws of 1970, the legislation that created the RTF regime currently in effect. Petitioners, however, rely on history from the prior RTF regime, enacted in 1966, and codified at Correction Law former § 66.[3] L. 1966, ch. 655, sec. 1.

Correction Law former § 66 may well have incorporated a presumption that RTF programs include activities taking place in the surrounding community. Indeed, the history of former section 66 elsewhere described the RTF concept envisioned therein as akin to a "halfway house." Bill Jacket at 3, L. 1966, ch. 655 (letter to Governor from Community Service Society). And understandably so: Pursuant to former

[3] Petitioners do cite one historical document from 1970, but it is part of the history of chapter *475* of the Laws of that year. (Petitioners' Answering Br. 22.)

section 66, a person could not be transferred to an RTF unless the New York State Board of Parole first determined that "the person's participation in a program that permits him to leave the facility during reasonable and necessary hours to engage in rehabilitory activities is not incompatible with the safety or general welfare of the community." *Id.* former § 66(5).

However, the RTF regime embodied in Correction Law former § 66 is no longer on the books. "Although the bill was signed into law and a considerable amount of effort was expended in selection of a site and planning, funds were not made available for this project." Governor's Special Committee on Criminal Offenders, *Preliminary Report* 18 (1968). In 1970, the Legislature repealed Correction Law former § 66 and replaced it with the framework currently in effect. L. 1970, ch. 476, secs. 8-9. And as the Court of Appeals has expressly recognized, the RTF concept embodied in the current framework is "prison-like," rather than "shelter-like" or "home-like." *People ex rel. Johnson v. Superintendent, Adirondack Corr. Facility*, 36 N.Y.3d 187, 206 (2020). To that end, there is no current requirement that persons be approved for participation in community activities by the Parole Board, or any similar entity, prior to

being transferred to an RTF and thus becoming entitled to participation in RTF programs.[4] In light of this underlying statutory difference, the history of the predecessor regime is not probative of whether DOCCS is statutorily obligated to incorporate community employment, education, and training activities into RTF programs under the regime currently in effect.

Moreover, the history of Correction Law former § 66 is ambiguous on its own terms. The only document petitioners identify that was actually created contemporaneously with that provision's enactment is the Governor's approval memorandum, which characterized the RTF concept embodied in that provision as "intermediate between prison isolation and community freedom." (Petitioners' Answering Br. 22 [quoting Bill Jacket at 4, L. 1966, ch. 655 (emphasis omitted)].) Petitioners also quote a statement from a report issued two years later that residents of such an RTF (had there been any) would have been

[4] However, the superintendent of an RTF is statutorily authorized to discontinue one or more of an RTF resident's assigned program activities (in the community or elsewhere) in the event the superintendent determines that participation in the activity or activities is not compatible with the safety of the community. Correction Law § 73(4).

"permitted to leave the institution, under parole supervision, to engage in rehabilitory activities." (Petitioners' Answering Br. 22 [quoting *Preliminary Report* at 157].) Neither of these historical materials establishes that DOCCS was required to arrange for such activities to be a part of RTF programs. Both documents, including the portions quoted by petitioners, are consistent with DOCCS's having been authorized, but not obligated, to incorporate such activities into RTF programs.

C. DOCCS's Discretion Whether To Include Community Activities in RTF Programs Need Not Be Exercised on an Individualized, Resident-by-Resident Basis.

Petitioners further argue (Petitioners' Answering Br. 24-25) that even if DOCCS is not statutorily obligated to include, as part of the programs established for RTF residents, employment, education, and training activities that take place in the community, and instead has the discretion whether to do so, DOCCS must exercise that discretion via individualized determinations made on a resident-by-resident basis. This argument should be rejected.

Petitioners' sole support is Correction Law § 73(1), which provides that an RTF resident "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." While DOCCS relies on that very language to establish the discretionary nature of its authority to provide RTF residents with program activities taking place outside the facility (*see supra* pp. 2-4; State's Opening Br. 22-25), petitioners focus on the fact that the provision is phrased in terms of an individual resident (in the singular) rather than multiple residents (in the plural) and surmise that therefore DOCCS's discretion must be exercised resident-by-resident. That statutory phrasing does not support petitioners' position. Under default rules of construction, "words in the singular number include the plural, and in the plural number include the singular." *People v. Buckley*, 75 N.Y.2d 843, 846 (1990) (quoting General Construction Law § 35 [alteration marks omitted]); *accord, e.g.*, *Matter of Toys "R" Us v. Silva*, 89 N.Y.2d 411, 421 n.2 (1996).

Moreover, petitioners' desired conclusion would not follow in the absence of that default rule, either. All that Correction Law § 73(1) would accomplish in that context would be to confirm that DOCCS *may* proceed resident-by-resident on an individualized basis in deciding whether to incorporate into RTF programs employment, education, and training

activities taking place in the community. Section 73(1) would not show that DOCCS *must* proceed in that manner.

* * * * *

The Legislature has decided in favor of "allowing DOCCS leeway to design its RTF programs." *Johnson*, 36 N.Y.3d at 207. As demonstrated, this leeway extends to whether to include activities taking place in the community. The grant of summary judgment to petitioners should therefore be reversed, and summary judgment should be entered for the State, on the claim that DOCCS violated the Correction Law by failing to incorporate adequate out-of-facility activities into the Fishkill RTF program.

POINT II

THE CONDITIONS OF THE FISHKILL RTF—INCLUDING THE PROGRAM ACTIVITIES THAT *ARE* PROVIDED—SATISFY ALL RELEVANT CORRECTION LAW STANDARDS

This Court should affirm the portion of Supreme Court's judgment from which petitioners have cross appealed that dismissed the remainder of their claims against the State. The conditions of the Fishkill RTF, including the activities that *are* incorporated into the Fishkill RTF program, meet all relevant Correction Law standards.

A. *Matter of Gonzalez* Confirms that the Fishkill RTF Is Statutorily Compliant.

The general statutory framework governing DOCCS's operation of RTFs was explained in the State's opening brief. (State's Opening Br. 4-6.) By way of review, DOCCS must establish "[p]rograms directed toward the rehabilitation and total reintegration into the community of persons transferred to a residential treatment facility," and each resident "shall be assigned a specific program." Correction Law § 73(3). Exactly what rehabilitative and reintegrative content such programs must contain is largely a matter of DOCCS's discretion. However, DOCCS "shall be responsible for securing appropriate education, on-the-job training and employment for inmates transferred to residential treatment facilities," so the program must include activities that fulfill those specific functions. *Id.* § 73(2).[5]

The conditions of the RTF at Fishkill comply with these statutory standards. Namely, the record establishes:

- Fishkill RTF residents are enrolled in a "therapeutic group" course consisting of nine units: sex offender registration

[5] During the pendency of this appeal, the Legislature passed a law replacing the term "inmate," where it appears in state statutes, with the term "incarcerated individual." L. 2021, ch. 322.

obligations, employment, healthy relationships and activities, life skills, available community resources, core values and beliefs underlying behavior, understanding feelings, problem solving, and relapse prevention. Therapeutic course participants are paid $5 per day, of which 80 percent is held in escrow until their release.

- Fishkill RTF residents can use the facility's general-purpose library, as well as its law library.

- Fishkill RTF residents can take high school equivalency classes, and (if accepted into the relevant course of study) higher education classes via correspondence.

- Fishkill RTF residents can obtain janitorial jobs working in the facility's "porter pool." They are paid $5 a day for such work, 80 percent of which is held in escrow until their release.

- Eight Fishkill RTF residents at a time can obtain jobs on the "work crew" loading and unloading trucks on Fishkill property several hundred feet outside the facility's perimeter security fence. Work crew members earn $10 a day, subject to the same escrow arrangement as porter pool earnings.

- Fishkill RTF residents regularly meet one-on-one with offender rehabilitation coordinators or parole officers to discuss, among other things, issues related to obtaining SARA-compliant outside housing.

- Fishkill RTF residents who are unable to secure appropriate private housing are placed on a waiting list of supervised persons in need of compliant housing in the New York City Department of Homeless Services shelter system.

(State's Opening Br. 8-15.) These rights and benefits of Fishkill RTF residency are statutorily sufficient.

As with the State's appeal, on petitioners' cross appeal the Court of Appeals decision in *Matter of Gonzalez* concerning the RTF at Woodbourne Correctional Facility confirms the adequacy of the Fishkill RTF at issue here. There are no material legal or factual distinctions to be drawn.

Matter of Gonzalez rejected the claim of Gonzalez, a Woodbourne RTF resident, "that the conditions of his placement at that facility were in violation of [DOCCS's] statutory or regulatory obligations," including the obligation to assist persons on supervision with securing appropriate outside housing, and concluded that Gonzalez "was accorded the rights of a resident of an RTF" during his Woodbourne stay. 32 N.Y.3d at 473-75. That holding controls this case. As the Legal Aid Society and Prisoners' Legal Services of New York (which have been counsel to petitioners here since this case's inception) told the Court of Appeals when appearing as *amici curiae* in their own right in *Matter of Gonzalez*: "The claims made in *Alcantara*, filed as a class action, closely parallel the claims made in [*Matter of Gonzalez*]" (R. 194), and "the available evidence establishes that the 'RTF' operations at the two prisons [*i.e.*, Woodbourne

and Fishkill] are almost the same" (R. 217).[6] Accordingly, the decision reached in *Matter of Gonzalez* "will inevitably apply" to Fishkill, as well. (R. 217.)

In sum, on the strength of *Matter of Gonzalez*, Supreme Court's dismissal of the claims that petitioners were not treated as bona fide RTF residents, that they were not given adequate assistance in securing outside housing, and that the activities that were incorporated into their RTF program were substantively inadequate, should be affirmed.

B. Even if *Matter of Gonzalez* Did Not Control, Petitioners Would Not Prevail.

1. An RTF Need Only Offer One Program.

Petitioners contend, at the outset (Petitioners' Answering Br. 34-35), that DOCCS has not satisfied its statutory obligations in connection with RTF programming at Fishkill because it only offers Fishkill RTF residents one program. In petitioners' view, DOCCS must develop multiple programs per facility (including at Fishkill) and assign them to residents on an individualized basis.

[6] Supreme Court denied class certification (R. 431-435), and petitioners have not appealed that denial.

Petitioners are incorrect. Correction Law § 73(3) requires that DOCCS establish "[p]rograms directed toward the rehabilitation and total reintegration into the community of persons transferred to a residential treatment facility." On its face, this provision is satisfied so long as DOCCS establishes at least one RTF program for each facility bearing an RTF classification. The provision does not purport to require multiple programs per facility.

And section 73(3)'s coordinate requirement that "[e]ach inmate shall be assigned a specific program" means only that each RTF resident must be assigned a particular, identifiable program. It does not mean that each resident at a given facility must be assigned an individualized program crafted for that resident and that resident alone, or, indeed, that any one resident be assigned a program that differs at all from the program assigned to any other resident.

2. Supreme Court Evaluated the Fishkill RTF Program Under the Correct Legal Standard.

Petitioners are correct that DOCCS's designation of Fishkill as an RTF "does not forestall an examination of the sufficiency of the RTF program." (Petitioners' Answering Br. 33.) But Supreme Court conducted just such an examination. (R. 24-29.) And on the basis of that

examination, it correctly found that the activities that were included in the program were statutorily sufficient.

Petitioners nonetheless contend that, in conducting this examination, Supreme Court applied the wrong legal standard with respect to activities in the nature of employment, education, and training. In their view (Petitioners' Answering Br. 33), the court "mistakenly viewed the appropriate touchstone for analyzing the sufficiency of an RTF's programmatic offerings as 'adequacy'" instead of asking whether those offerings were "appropriate." Petitioners are incorrect. There is no distinction in this semantic difference: The words "adequate" and "appropriate" are essentially synonyms. *Compare Merriam-Webster's Collegiate Dictionary* 15 (definition of "adequate") *with id.* at 61 (definition of "appropriate"). Moreover, the court plainly understood that "appropriate" is the relevant standard: The court quoted, in full, the provision in which that standard is set forth. (R. 15 [quoting Correction Law § 73(2)].) The court's conclusion that the Fishkill RTF program is adequate can only be understood to mean adequate *under that standard*, *i.e.*, "appropriate."

3. The Subjective Views of Individual DOCCS Employees Are Irrelevant.

Petitioners argue (Petitioners' Answering Br. 36) that the Fishkill RTF is inadequate—both with respect to its overall operation and with respect to the particular program it assigns RTF residents—because some of the DOCCS employees who testified in this matter "seemed to view" the Fishkill RTF as merely a dormitory for housing supervised persons in need of SARA-compliant outside housing. (*See also* Petitioners' Answering Br. 37-39.) But the subjective opinions of those employees are irrelevant to the issues before this Court. Those opinions do not bear on whether the Fishkill RTF in fact functions as an RTF or on whether the activities that the Fishkill RTF program offers are indeed adequate.

The answers to those questions are determined by comparing the Fishkill RTF's actual operation and program activities to the statutory standards applicable thereto. And as *Matter of Gonzalez* shows (*see supra* pp. 20-23), those comparisons show that the Fishkill RTF is compliant across the board.

4. The Similarities Between RTF Residency at Fishkill and Incarceration in Fishkill's General Population Are Likewise Irrelevant.

Petitioners assert (Petitioners' Answering Br. 40) that "RTF residents at Fishkill are treated nearly identically to general population inmates." Specifically, petitioners note that "residential life at Fishkill commingles RTF residents with general population inmates" insofar as "RTF residents are assigned the same uniforms, are subject to the same visitation rules, are required to eat meals and get yard access at the same time as general population inmates, and are visually indistinguishable from inmates serving active prison sentences." (Petitioners' Answering Br. 12 [record citations omitted].) And petitioners conclude from these similarities that "there is no 'RTF' at Fishkill, only a prison." (Petitioners' Answering Br. 13.)

Petitioners' conclusion does not follow from the similarities that they identify. This is because the Correction Law does not require DOCCS to treat RTF residents differently from individuals incarcerated in the general population in those particular respects. Indeed, petitioners do not purport to identify any statutory authority requiring differential treatment along those specific lines.

Moreover, petitioners' digression on the constitutionality of treating RTF residents similarly to incarcerated individuals in the general population (Petitioners' Answering Br. 40-41) is misplaced. For one thing, petitioners' cross appeal presents only statutory questions. (Petitioners' Answering Br. 4.) For another, the Court of Appeals has held that DOCCS's practice of temporarily housing SARA-restricted offenders at RTFs until compliant housing in the community can be found *is* constitutional, even though the time spent in such housing may be effectively equivalent to serving an extended incarceratory sentence. *Johnson*, 36 N.Y.3d at 201.

Additionally, the unreviewed Supreme Court decision in *Arroyo v. Annucci*, 61 Misc. 3d 930 (Sup. Ct. Albany County 2018), on which petitioners rely (Petitioners' Answering Br. 29, 40-41), does not support their constitutional concerns in any event. Arroyo, a sex offender, was serving a term of PRS as an RTF resident because he was unable to obtain outside housing that complied with the SARA condition. 61 Misc. 3d at 931. He was terminally ill and in need of round-the-clock medical care. *Id.* at 937. Arroyo sought release from the RTF on the ground that enforcement of SARA against him was unconstitutional. *Id.* at 941.

Supreme Court agreed and ordered release, holding that "the practical implication of SARA *to this specific petitioner [i.e., Arroyo]*—namely, that although he has completely served out the maximum incarceratory portion of his sentence, he is nonetheless likely to die in prison—render this mandatory condition of release unconstitutional *as applied to him*." *Id.* at 940 (emphases added). The *Arroyo* decision thus does not call into question the enforcement of SARA against anyone other than Arroyo: not petitioners here, and not SARA-restricted offenders in general.

CONCLUSION

This Court should reverse the grant of summary judgment to petitioners, and enter summary judgment for the State, on the claim that the Fishkill RTF program fails to provide residents with adequate opportunities for education, training, and employment outside the facility. The Court should affirm the judgment insofar as it dismissed the remaining claims against the State.

December 13, 2021

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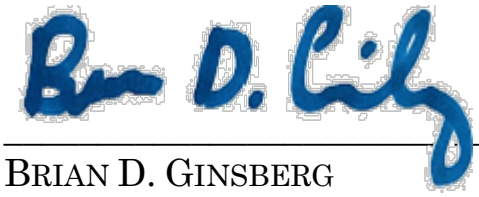
PRINTING SPECIFICATIONS STATEMENT

The foregoing brief was prepared on a computer using double-spaced, 14-point Century Schoolbook font. It consists of 5,553 words, excluding those excepted under 22 N.Y.C.R.R. § 1250.8(f)(2).



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