To be Argued by:
MATTHEW FREIMUTH
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Third Department

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

Case No.: 531036

Petitioners-Respondents-Cross Appellants,

– against –

ANTHONY J. ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, TINA M. STANFORD, COMMISSIONER, 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.

ANSWERING BRIEF FOR PETITIONERS-RESPONDENTS-CROSS APPELLANTS

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PRELIMINARY STATEMENT

The issues facing this Court boil down to straightforward questions of statutory interpretation. New York has tasked its Department of Corrections and Community Supervision ("DOCCS") with implementing a statutory scheme designed to appropriately house, rehabilitate, and ultimately reintegrate parolees and other individuals who have served their sentence of incarceration and who are under post-release supervision ("PRS"). To accomplish this, the Correction Law provides for DOCCS to establish and run residential treatment facilities ("RTFs"). These facilities must be placed within or near communities where educational and vocational opportunities that would aid in the rehabilitation and reintegration of residents are available to them. DOCCS is also obligated to establish multiple programs designed to facilitate the rehabilitation and reintegration of RTF residents and to ensure that each resident is assigned to an appropriate program, including access to community-based opportunities.

Despite the non-discretionary nature of these obligations, plain language of the statute, and legislative history detailing the important role that RTFs play in providing an intermediate step between the isolation and limitations of prison and full release into the community, DOCCS maintains that it has the discretion to confine individuals who are on post-release

supervision ("PRS") at the Fishkill Correctional Facility without providing access to community-based opportunities or programs that meet the requirements and purpose of the statutory scheme devised by the Legislature.

Respondents/Cross Appellants (the "RTF Parolees"), individuals subject to the Sexual Assault Reform Act ("SARA") who are on post-release supervision and were confined by DOCCS to Fishkill, challenge DOCCS's use of Fishkill as a residential treatment facility in light of DOCCS's failure to satisfy the statutory requirements attendant to such facilities. The court below agreed with RTF Parolees that the failure to offer community-based opportunities was in violation of the Correction Law. This Court should affirm that ruling and require DOCCS to comply with the Legislature's command.

The court below also found, however, that DOCCS's treatment of RTF Parolees fell within the Department's discretion because RTF residents resided in a facility co-located with a prison and also that RTF residents' inclusion in the prison's programming and provision of one hastily created curriculum was "minimally adequate." (R. at 28.) But the court below misidentified the proper question here. It should have asked and analyzed whether the offerings made available to RTF residents at Fishkill satisfy the

statutory requirements for a residential treatment facility. Specifically, the court below did not find that (or consider whether):

- Fishkill offers multiple programs;
- RTF residents at Fishkill are assigned a specific program, from among those created and designed by DOCCS to facilitate their rehabilitation and reintegration; and
- DOCCS had secured *appropriate* educational and vocational opportunities for RTF residents.

On the basis of the record below, there is only one answer. They do not. This Court should reverse the grant of summary judgment to DOCCS on this issue or, in the alternative, vacate it so the court below may reconsider the evidence in the record to determine whether these requirements of the Correction Law are met at Fishkill.

QUESTIONS PRESENTED

1. Correction Law § 2(6) defines an RTF as a residence in or near a community where employment, educational, and training opportunities are available for parolees. RTF residents at Fishkill are not permitted to work off the facility's grounds and have virtually no opportunity to interact with non-facility personnel. Did Supreme Court correctly conclude that Fishkill does not meet the statutory requirements for an RTF by failing to provide community-based assignments to RTF residents?

2. Correction Law § 73 requires that an RTF provide each resident with a program directed toward their rehabilitation and reintegration into the community as well as appropriate education, on-the-job training, and employment opportunities. Did Supreme Court err in finding the programs offered at Fishkill were minimally adequate without determining what programs met the statutory guidelines or the appropriateness of the opportunities offered to RTF residents?

STATEMENT OF THE CASE

A. The Statutory Regime Governing the Placement of Individuals into Residential Treatment Facilities

All persons convicted of a felony sex offense must be sentenced to a term of post-release supervision lasting between three and twenty-five years, depending on the offense committed. Penal Law § 70.80, 70.45(2-a). Post-release supervision begins once an incarcerated person has completed their sentence of imprisonment, a date known as the maximum expiration date, and is released from prison. Penal Law § 70.45(5). No longer an inmate, a parolee on PRS must abide by conditions set by the Board of Parole and is supervised by parole officers who are employees of DOCCS.

Post-release supervision is intended to foster the "reintegration" into society of people who have been incarcerated "by [providing] services to the offender, such as assistance with employment or housing." Donnino, Practice Commentary, McKinney's Cons. Laws of N.Y., Penal Law § 70.45. A stable living situation and "access to employment and support services are important factors that can help offenders to successfully re-enter society." 9 N.Y.C.R.R. § 8002.7(d)(4).

Under the Sexual Assault Reform Act, it is a mandatory condition of PRS that people convicted of certain sex offenses are prohibited from residing within 1,000 feet of school grounds. Exec. Law § 259-c(14). This restriction

severely limits the ability of individuals on PRS to find housing that can be approved by parole authorities.

The Board of Parole may require that a person on PRS "be transferred to and participate in the programs of a residential treatment facility [RTF]" for up to six months following their release from the underlying term of imprisonment. Penal Law § 70.45(3). For individuals on PRS who must find SARA-compliant housing, the Court of Appeals has held that DOCCS may require they "reside" in an RTF facility beyond the six-month period until such persons locate compliant housing. Corr. Law § 73(10), *construed in People ex rel. McCurdy v. Warden, Westchester Cnty. Corr. Facility*, 36 N.Y.3d 251, 262 (2020).

An RTF is a specialized type of correctional facility designed to facilitate the reintegration of incarcerated individuals into society through their involvement with community-based educational and vocational opportunities upon release. Correction Law § 2(6) defines a "residential treatment facility" as:

> A correctional facility consisting of a <u>community based residence in or near a community where employment, educational and training opportunities are readily available</u> 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.

(emphasis added).

RTFs may also be made available as a residence for individuals on PRS (i.e., community supervision). Correct. Law § 73(10). RTFs may house both individuals eligible for or soon to become eligible for parole who have not yet been released but have been transferred from a different facility, as well as other residents who are on parole but have yet to find SARA-compliant housing.

The legislative scheme makes clear that RTFs were intended to serve as transitional facilities whose residents are in the process of "integrating" into the community. Correction Law § 73(3) requires DOCCS to establish programs directed toward "the rehabilitation and total reintegration into the community" of RTF residents. Correction Law § 73(1) states that RTF residents "may be allowed to go outside the facility during reasonable and necessary hours to engage in any activity reasonably related to [their] rehabilitation." RTF residents are also entitled to "appropriate education, on-the-job-training and employment," which DOCCS is responsible for securing. *Id*. §§ 73(2), (3). Collectively, these provisions make clear that the legislature intended time spent in an RTF to bridge the gap between time spent serving a sentence of incarceration and time rebuilding one's life in the community.

B. The RTF Parolees' Imprisonment at Fishkill

Until approximately 2014, individuals subject to SARA were allowed to reside briefly at the 30th Street Intake Center of the New York City Department of Homeless Services, a preliminary step for entry into the City's shelter system, even though that center is located within 1,000 feet of school grounds. *People ex rel. Johnson v. Superintendent*, *Fishkill Corr. Facility,* 47 Misc. 3d 984, 987 (Sup. Ct. Dutchess Cty. 2015). In 2014, DOCCS prohibited individuals subject to SARA from being released to shelters within 1,000 feet of school grounds, even briefly, and no longer permitted these individuals to reside at the 30th Street Intake Center. (*See* R. at 130–37.) This policy change created a massive backlog of parolees on PRS who were unable to pay for the limited SARA-compliant housing available in New York City and could no longer readily access the City's shelter system. (*See* R. at 576.)

To address the loss of New York City shelter residences, DOCCS decided to utilize certain prisons as RTFs—including Fishkill—and ordered the transfer of individuals subject to SARA who were approaching their maximum expiration date to such prisons unless and until they were able to provide DOCCS with an address at which they intended to reside that was both SARA-compliant and otherwise approved by parole authorities. (R. at 89; Joseph Goldstein, Housing Restrictions Keep Sex Offenders in Prison

Beyond Release Dates, N.Y. TIMES, Aug. 21, 2014, at A18.) As understood by DOCCS' employees, the current RTF system was created to house a "backlog" of parolees convicted of sex offenses who could no longer be placed in New York City Department of Homeless Services shelters. (R. at 576–77) (McNamara Aff., Ex. Q (Claudio Tr. 43:10–46:25).)

1. The Lack of "Community Based" Integration Opportunities at Fishkill

Fishkill was not designed to meet the specific needs of the RTF Parolees, despite the mandates of Correction Law §§ 2(6) and 73. RTF residents are not permitted to work beyond the prison grounds, nor do they travel within the local community. (R. at 548–51) (McNamara Aff., Ex. M (Urbanski Tr. 45:24–46:1; 59:9–21; 62:16–23).) They were unable to leave the Fishkill grounds unless escorted by correctional officers to meet with a parole officer in Poughkeepsie. (R. at 545; 550) (McNamara Aff., Ex. M (Urbanski Tr. 19:21–20:8; 59:9–21).) The few RTF residents who do perform work outside of the prison's walls still do so "on grounds" at a storehouse that is "less than a tenth of a mile" from the main prison building. (R. at 548) (McNamara Aff., Ex. M (Urbanski Tr. 45:2–11).) And work at the prison's storehouse does not entail more than de minimis contact with members of the community. (R. at 531; 1623) (McNamara Aff., Ex. K (Heady Tr. 100:6–15); Mallozzi Tr. 156:5–19.) The remaining population of RTF residents must

work in the Fishkill prison facility alongside general population inmates. (R. at 530–31) (McNamara Aff., Ex. K (Heady Tr. at 92:11–17; 101:11-24).)

2. The Lack of Employment and Educational Opportunities at Fishkill

Fishkill offers few employment and educational opportunities. No work assignments are tailored to RTF residents and RTF residents never perform work off prison grounds. (R. at 548–49) (McNamara Aff., Ex. M (Urbanski Tr. at 45:24–46:2).) The work that is currently performed by the outside work crew on the prison grounds was previously handled by general population inmates prior to Fishkill's establishment of its RTF in 2014. (R. at 535) (McNamara Aff., Ex. K (Heady Tr. at 133:6–17).) Aside from the storehouse assignment, RTF residents are permitted to work in certain prison facilities. (R. at 531) (*Id*. at 100:16–101:23.) None of these jobs engage with members of the community. (R. at 533) (*Id.* at 110:3–9.) Some jobs available to general population inmates at Fishkill are not available to RTF residents, including RTF Parolees. (*See, e.g.*, R. at 552) (McNamara Aff., Ex. M (Urbanski Tr. 70:2–71:6) (general population inmates are permitted to pursue employment off Fishkill grounds through the work release program that allows eligible inmates—but not RTF Parolees—to "leave the facility…and [] go work within the community.").) These include positions involving interactions with members of the community. (R. at 552) (*Id.*)

Educational opportunities are similarly lacking. RTF residents participate in a general orientation to the facility alongside general population inmates. (R. at 528) (McNamara Aff., Ex. K (Heady Tr. 76:18–22).) And theoretically, the same educational opportunities available to general population inmates at Fishkill are also available to RTF residents. (R. at 532) (*Id.* at 107:10–108:21.)

Beyond that, DOCCS created a curriculum in 2014 that purports to address the particular needs of people convicted of sex offenses. (R. at 317–89.) This curriculum is provided, without modification, to every RTF resident at Fishkill. (R. at 518) (McNamara Aff., Ex. J (Gonzalez Tr. 94:17–96:12).)

Shelly Mallozzi, an author of the RTF Program, testified that the Fishkill staff were supposed to update housing and job ads from 2014 used in the curriculum. (R. at 569) (McNamara Aff., Ex. P (Mallozzi Tr. 62:16–18).) But, Ms. Iccari, one of the offender rehabilitation coordinators ("ORCs") tasked with teaching the curriculum at Fishkill, confirmed that the housing and job ads are never updated. (R. at 506; 508) (McNamara Aff., Ex. H (Iccari Tr. 126:16–25; 152:20–153:2).) The curriculum used at Fishkill contains no content specific to RTF residents and the unique challenges they face in reintegrating to society or otherwise participating in a rehabilitatory program. (R. at 317–89.) DOCCS employees are well aware of this oversight. Each of

the ORCs deposed confirmed that the curriculum used at Fishkill is not tailored to the needs of RTF residents. ORC Gonzalez admitted that nothing in the 28-day workbook was specific to the reintegration or rehabilitation of RTF residents subject to SARA. (R. at 519–20) (McNamara Aff., Ex. J (Gonzalez Tr. 113:7–114:6).) ORC Greenberg was equally unable to identify anything in the curriculum addressing the unique challenges of RTF Parolees convicted of sex offenses finding employment or SARA-compliant housing. (R. at 513–14) (McNamara Aff., Ex. I (Greenberg Tr. 54:8–58:22).)

3. Treatment of RTF Parolees at Fishkill

Despite the fact that RTF Parolees have completed their term of imprisonment and are on PRS, residential life at Fishkill commingles RTF residents with general population inmates. (R. at 546) (McNamara Aff., Ex. M (Urbanski Tr. 27:11–23).) RTF residents are assigned the same uniforms, (R. at 527) (McNamara Aff., Ex. K (Heady Tr. 47: 2–11), are subject to the same visitation rules, (R. at 525–26) (McNamara Aff., Ex. K (Heady Tr. 41:16–42:11), are required to eat meals and get yard access at the same time as general population inmates (R. at 546–47) (McNamara Aff., Ex. M (Urbanski Tr. 28:6–30:17; 31:2–18), and are visually indistinguishable from inmates serving active prison sentences at Fishkill, (R. at 527; 529)

(McNamara Aff., Ex. K (Heady Tr. 47: 2–48:18; 80:19–81:2). The reality is there is no "RTF" at Fishkill, only a prison.

PROCEDURAL HISTORY

A. Supreme Court Proceedings

More than five years ago, in May 2016, Richard Alcantara, Lester Classen, Jackson Metellus, Cesar Molina, Carlos Rivera, and David Sotomayor (together, the Petitioners-Respondents-Cross Appellants or "RTF Parolees") were individuals under post-release supervision and held at Fishkill, purportedly as residential housing. (*See* R. at 71–137) (Mitchell Affirmation, Ex. 1 (Verified Petition).) They commenced this action as an Article 78 proceeding, alleging that they and a class of similarly situated individuals were being illegally confined at Fishkill (as well as the RTF at the Woodbourne Correctional Facility), and that Appellants-Cross Respondents Annucci and Stanford had failed to perform the duties required of them by statute because they did not provide adequate educational and vocational programming, nor did they provide assistance in securing SARA-compliant housing, to the RTF Parolees at Fishkill. (R. at 103–11) (*Id*. ¶¶ 82–114.) In response, the State on behalf of Annucci and Stanford answered and moved to dismiss the Article 78 petition. (R. at 395–403) (McNamara Aff., Ex. A (Answer and MTD).)

On February 24, 2017, Supreme Court denied Respondents' motion to dismiss on the claim that Fishkill "fails to comply with the statutes governing residential treatment facilities because it does not offer adequate programming or employment opportunities," and then converted the case to a declaratory judgment action (the "Order"). (R. at 435–36) (McNamara Aff., Ex. B (Order at 31–32).) The court below also ordered a fact-finding hearing but, in lieu of such a hearing, the parties proceeded to discovery. (R. at 435–36) (*Id*.)

Discovery in this case was extensive. The RTF Parolees propounded 24 interrogatories and 13 requests for production upon each Appellant-Cross Respondent. (R. at 438–51; 452–66; 467–80; 481–95; 496–98) (McNamara Aff., Ex. C (interrogatories to Annucci); Ex. D (document requests to Annucci); Ex. E (interrogatories to Stanford); Ex. F (document requests to Stanford); Ex. G (Affirmation of Service).) In response, they produced to RTF Parolees—on a rolling basis from June 2, 2017 through March 11, 2019—just under six thousand pages of documents and information. RTF Parolees then deposed fourteen current and former DOCCS employees who held significant supervisory experience at Fishkill, as well as a detailed knowledge of the facility's treatment of RTF residents.

On February 5, 2019, RTF Parolees filed their Note of Issue seeking a trial without jury on the remaining claims. And on May 30, 2019, the State

moved for summary judgment dismissing petitioners' remaining claims. RTF Parolees opposed DOCCS's motion.

B. The Decision and Judgment in the Court Below

On December 20 2019, Supreme Court granted partial summary judgment to both the RTF Parolees and the State. (R. 40–65.) The decision essentially bifurcated the petitioners' claims into two aspects: those related to the treatment of the RTF residents outside of Fishkill and those related to the treatment of RTF residents within the prison.

As to the treatment of RTF residents outside of the facility, Supreme Court granted summary judgment to RTF Parolees, holding DOCCS was not complying with its statutory obligation to provide RTF residents with out-of-facility opportunities for education, training, and employment. (R. at 60–61.) RTF Parolees have almost "no opportunity to interact with non-facility personnel" and no ability to avail themselves of community-based programming outside the facility. (R. at 61–64.)

Supreme Court, however, also granted summary judgment to the State with respect to the RTF residents' treatment within the Fishkill prison. The court below held that the petitioners had not raised a genuine dispute of fact as to whether the programming, vocational and educational opportunities for RTF Parolees within the Fishkill RTF facility complied with the requirements

of Correction Law § 73(3). Further, Supreme Court ruled that Fishkill is "community-based" relative to New York City, notwithstanding the fact that it is located 60 miles away. (R. at 57.)

The State appealed from Supreme Court's final judgment (R. at 4–5), and petitioners cross-appealed (R. at 6–39).

STANDARD OF REVIEW

This Court's review of Supreme Court's order granting and denying summary judgment to the parties below is de novo. *Rothouse v. Ass'n of Lake Mohegan Park Prop. Owners, Inc*., 15 A.D.2d 739 (1st Dep't 1962). Under this standard of review, the issue before the Appellate Division is the same as confronted the court below: whether "upon all the papers and proof submitted, the cause of action or defense [is] established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." CPLR 3212(b); *Myer v. Jova Brick Works, Inc*., 38 A.D.2d 615 (3d Dep't 1971).

ARGUMENT

A. The Court Should Affirm Supreme Court's Holding that the Correction Law Requires DOCCS to Provide RTF Residents With Access to Employment, Educational, and Training Opportunities in Communities Surrounding the Facility

The court below correctly found—and the State does not dispute—that "the State defendants have proffered no evidence that RTF parolees can avail

themselves of other 'employment, educational, and training opportunities' in the communities of Fishkill, Beacon, Poughkeepsie, or other nearby communities." (R. at 31.) This Court should affirm the lower court's ruling that this failure violates Sections 2(6) and 73 of the Correction Law, which provide that an RTF must be a "community based facility" located where "employment, educational and training opportunities are readily available" for persons who are on parole and that there must exist the possibility of going "outside the facility during reasonable and necessary hours to engage in any activity reasonably related to his or her rehabilitation." (R. at 30.) DOCCS's obligations arise from the plain meaning of the controlling statutes, which "reflect an unmistakable legislative intent to provide community-based programming for RTF parolees in furtherance of the statutory objective to help them reintegrate into the community." (R. at 29–30.)

Rather than confront this inconvenient fact, the State embarks on an expansive tour of the Correction Law to arrive at the simple but incorrect point that the Legislature's use of the word "may" in Section 73(1) provides DOCCS with complete discretion whether or not to create opportunities to leave a facility designated as an RTF. But one word cannot negate an entire statutory scheme, and the Legislature did not enable DOCCS to undermine its "unmistakable . . . intent" that RTFs provide access to community-based

opportunities. Just as parolees must follow inconvenient laws, so too must DOCCS.

1. Correction Law §§ 2(6) and 73 Establish that a Residential Treatment Facility Must Provide Meaningful Access to Community-Based Opportunities Outside of Prison Walls

The starting point for "any case of interpretation must always be the language itself, giving effect to the plain meaning thereof." *McCurdy*, 36 N.Y.3d at 257 (quotations omitted) (citing *People v. Anonymous*, 34 N.Y.3d 631, 636 (2020)). Furthermore, the statute "must be construed as a whole" and "its various sections must be considered together and with reference to each other." *Id*. (citations and quotations omitted). Here, the starting point is Correction Law § 2(6) which, in relevant part, defines an RTF as a "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."

Correction Law § 73 then articulates the authorities and responsibilities specific to residential treatment facilities. Section 73(2) establishes DOCCS's obligation to secure "appropriate education, on-the-job training and employment for inmates transferred to residential treatment facilities." Section 73(3) requires DOCCS to establish programs "directed toward the[ir] rehabilitation and total reintegration into the community." And other sections

contemplate regular offsite excursions by RTF residents. RTF residents "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." Corr. Law § 73(1); *see also id*. § 73(4) (permitting modification of a resident's activities if "any aspect of the program assigned to an individual is inconsistent with the welfare or safety of the community or of the facility or its inmates"); *id*. § 73(7) (noting "provisions of this chapter relating to good behavior allowances" apply to "behavior on the premises and outside the premises of such facility").

These words mean what they say. To qualify as an RTF, a facility must be located within or near a community where employment, educational, and training opportunities are "readily available" for parolees, including those on PRS and subject to SARA. If those opportunities do not exist or are not "readily available" for parolees, the facility does not satisfy the statutory requirements for a residential treatment facility. Furthermore, it is DOCCS's responsibility to secure "appropriate education, on-the-job training and employment" for RTF residents. *Id*. § 73(2). Section 73 further confirms that RTF residents are permitted to leave the facility to participate in such opportunities and it distinguishes RTF residents' interactions within the facility from those in the community. Whatever discretion may be

permissible under the Correction Law, the basic framework establishes that an RTF *must* be positioned to enable not just the *availability* of educational and job-related opportunities in a local community but also *access* to those opportunities by RTF residents. A failure to satisfy these statutory requirements is a failure of the facility to qualify as a residential treatment facility.

As the court below recognized, these words and their commands are clear; however, the factual record below shows a complete failure to provide *any* access to opportunities based in the surrounding communities, or that reasonably approximate the "appropriate education, on-the-job training and employment" DOCCS is tasked with securing. (R. at 29–31.)

Beyond the plain meaning of individual provisions of a statute, "courts must harmonize the various provisions of related statutes and [] construe them in a way that renders them internally compatible." *McCurdy*, 36 N.Y.3d at 257 (internal quotations and citations omitted). Such a construction should give "effect to each component and avoid[] a construction that treats a word or phrase as superfluous." *Lemma v. Nassau Cnty. Police Indemn. Bd.*, 31 N.Y.3d 523, 528 (2018). Correction Law § 2 defines no fewer than fourteen types of correctional facilities and emphasizes that an RTF is "a community based residence in or near a community" where opportunities are available for

parolees "who intend to reside in or near that community when released." Corr. Law § 2(6). The use of the word 'community' three times in the definition, the most of any subsection, must mean *something,* and it must also meaningfully differentiate RTFs from other types of correctional facilities to give effect to the statute. The most natural reading is that it means RTFs must be situated to (and in practice do) provide meaningful access to opportunities based in the local community or communities surrounding the facility.

2. Supreme Court's Construction of the Correction Law Is Supported by Legislative Intent and the Overall Statutory Scheme's Focus on Rehabilitation and Community Reintegration

"When presented with a question of statutory interpretation, a court's primary consideration is to ascertain and give effect to the intention of the Legislature." *Lemma*, 31 N.Y.3d at 528 (internal quotations and citations omitted). The Legislature's purpose in ensuring access to community-based programming is its determination that interactions with the community will aid in RTF residents' rehabilitation.

RTFs were created fifty-five years ago, nearly to the day, when New York committed itself to establishing and operating a new type of facility in order to aid the successful reintegration back into society of people serving sentences of incarceration. In approving the bill, Governor Nelson Rockefeller wrote, "[t]he establishment of the Residential Treatment Facility

opens a new dimension in the State's penal system, *intermediate between prison isolation and community freedom*." Governor's Approval Mem, Bill Jacket, L 1966, ch 655 at 2, 1966 NY Legis Ann at 349 ("1966 Governor's Approval Mem") (emphasis added). Shortly thereafter, the State passed a comprehensive package of laws intended to fund and reform the correctional system. These bills were "the direct result of the nationally significant work of the Governor's Special Committee on Criminal Offenders and incorporate many of the findings and recommendations contained in the pioneering report made by the Committee." Governor's Approval Mem, Bill Jacket, L 1970, ch 475 at 62, 1970 NY Legis Ann at 498. And the 1970 revisions further solidified New York's commitment to "merge the concepts of parole and incarceration by permitting 'inmates' to be transferred to a special residential facility that would be operated by the State Department of Correction and such 'inmates' would be permitted to leave the institution, under parole supervision, 'to engage in rehabilitory activities.'" Preliminary Report of the Governor's Special Committee on Criminal Offenders, June 1968, at 157.

With this in mind, the language of Correction Law § 73(10) was slightly modified in 2011 to clarify that DOCCS's authority to use an RTF as a residence was not limited to parolees released by the Parole Board and those on conditional release but also included individuals with the concurrent ability

to reside in the community such as those on PRS and other forms of "community supervision." *See* Laws of 2011, ch. 62, § 8 (Part C, Subpart B). The direct references to RTFs as an "intermediate" step between incarceration and residents' liberty in the community require the Court to reject DOCCS's claim of unfettered authority to maintain RTFs as places of "prison isolation" without meaningful access to community-based opportunities.

Indeed, access to the community is a central purpose and one of the distinctive elements of an RTF, and community access underscores the Legislature's intent to distinguish life in an RTF from life in other types of correctional institutions. *Compare* Corr. Law § 2(6) *with* §§ 2(8) (correctional camp), 2(9) (diagnostic and treatment center), 2(17) (alcohol and substance abuse treatment facility).

And as discussed above, Correction Law § 73 includes several requirements for RTFs, including access to community-based opportunities, designed to further the Legislature's goal of providing RTF residents with "[p]rograms directed toward the rehabilitation and total reintegration into the community." Corr. Law §§73(2), (3). This overall focus on rehabilitation and community integration confirms that Section 73(1) serves that legislative purpose by ensuring the availability of and access to community-based educational and employment opportunities to aid in acclimating individuals

to post-release life. Here, the court below correctly recognized that absent the availability of community-based opportunities, Fishkill did not satisfy the minimum requirements of an RTF.

3. Supreme Court Correctly Rejected the State's Argument that DOCCS Has Discretion to Ignore the Community-Based Opportunities Requirement

The State first contends that the Legislature's use of the word "may" rather than "shall," grants DOCCS complete discretion whether to allow RTF residents to engage in off-grounds activities. State's Br. at 21–26. But the more common-sense reading of this language – and the one more consistent with clear legislative intent – is that the word "may" conveys only the discretion to decide whether to allow individuals to engage in activities outside the facility on a case-by-case basis "in accordance with the program established for him or her." (R. at 31.) DOCCS cannot rely on this individualized discretion to deny access to community-based activities to *all* RTF residents as the record below demonstrated. (R. at 31.)

Section 73(1) permits DOCCS to decide whether "*such person* may be allowed to go outside the facility," (emphasis added), but it does not permit DOCCS to decide categorically that *no* person shall be permitted to leave the facility to participate in community-based opportunities. Under the State's logic, permission to take a vacation at one's discretion would also permit one

to never work. Life does not work that way and neither does Correction Law § 73. The exercise of discretion with respect to individuals granted in Section 73(1) does not eliminate the need for DOCCS to comply with Section 73(2); the State must secure "appropriate education, on-the-job training, and employment" in the community.

DOCCS next compares Correction Law § 73 to temporary release programs that "necessarily include out-of-facility activities" and contends the absence of the detailed standards governing temporary release programs in Section 73 indicates the Legislature did not require RTF programs include off-grounds activities. State's Br. at 26–28. DOCCS provides no support for this conclusion. And "those safeguards, procedures, and requirements are largely absent from the RTF regime" for good reason; RTFs are designed with an entirely different population in mind.

From their inception, RTFs held a position "intermediate between prison isolation and community freedom" and involve concurrent supervision of residents' interactions in the community. 1966 Governor's Approval Mem. at 349. It strains credulity to conclude the Legislature would create such an "intermediate" facility and not intend any greater access to the community than normal "prison isolation." Furthermore, inmates participating in temporary release programs are presumed to be incarcerated; but, by statute,

RTF residents include those already on parole and under community supervision. Corr. Law § 73(10); *see also* Corr. Law § 2(31) (defining persons on PRS as being "released into the community").

Further, even if DOCCS's interpretation were correct, it concedes that the Legislature "intended to leave the decision whether to include any such activities to DOCCS's case-by-case discretion." State's Br. at 28. But DOCCS does not exercise case-by-case discretion at Fishkill. (R. at 30–31.) Accordingly, the court below correctly concluded DOCCS is not in "compliance with their statutory obligation to provide community-based assignments that would further RTF parolees' post-release reintegration into the community where they intend to live." (R. at 32–33.)

Finally, the State seeks to downplay the significance of understanding what an RTF is and how it fits into the statutory scheme by arguing that Section 2(6) adds nothing to the provisions of Section 73. State's Br. at 30. The State goes so far as to argue that the definition of an RTF as "a community based residence where employment, educational and training opportunities are readily available" refers exclusively to the opportunities available "to RTF residents upon *their release*" and not "provided to them via RTF programming, *during their RTF residency*." *Id*. at 31 (emphasis in original). This narrow interpretation confuses rather than clarifies the role and function

of an RTF. If an RTF need not differ from a prison facility, what function does it serve? No answer DOCCS provides to this question is consistent with *all* the provisions of the statutory scheme.

It would serve no identifiable purpose to place an RTF in a community with "readily available" educational and employment opportunities but no ability to access them until after release. Nor is there any apparent reason for the Legislature to provide unlimited discretion whether to provide access to offsite opportunities only to then limit DOCCS's discretion in selecting physical *locations* for an RTF. If RTF residents are not able to avail themselves of community-based opportunities, the Legislature would be unconcerned with whether RTFs are situated within or near communities where opportunities are available. Simply put, the DOCCS's interpretation of the Correction Law cannot be squared with the statute's definition of an RTF as a "community-based facility" in a community where educational and employment opportunities are "readily available." Correction Law §2(6).

As the court below noted, at best "only eight of the nearly 100 RTF parolees can be assigned" to the sole work assignment located outside of the prison's fences (but still on Fishkill's grounds). (R. at 30–31.) This total lack of access to opportunities outside the facility and in the community does not reflect the kind of discretionary assessment envisioned in Correction Law §

73(1), but instead shows that DOCCS has fully abdicated its responsibilities to secure offsite opportunities in direct contravention of the requirements of Correction Law § 73(2).

4. The Court of Appeals Specifically Left Open this Issue for Lower Courts to Decide

The State's final contention is that the Court of Appeals decision in *Gonzalez v. Annucci*, 32 N.Y.3d 461 (2018), requires reversal of the lower court's opinion. State's Br. at 32–36. In particular, the State contends that because "Woodbourne's out-of-facility activities" and Fishkill's "are materially identical," the Court of Appeals' ruling on the adequacy of the programs available at Woodbourne forecloses the court below from the granting of summary judgment to the RTF Parolees on this issue. *Id*. *Gonzalez* made no such decision and does not foreclose the relief granted to the RTF Parolees. The Court of Appeals found "there was insufficient record evidence to establish that DOCCS's determination to place petitioner at the Woodbourne RTF was irrational or that the conditions of his placement at that facility were in violation of the agency's statutory or regulatory obligations." 32 N.Y.3d at 475. The Court of Appeals then immediately noted with regards to this case, "similar claims relating to Fishkill Correctional Facility as an RTF are pending in discovery proceedings before Albany County Supreme Court." *Id*. at n.6. No judgment was made regarding this case, and the Court of

Appeals' limited ruling was based only on an "insufficient record." Supreme Court was correct to find "the record in *Gonzalez* is factually distinct from the record before this Court." (R. at 32.)

B. The Fishkill Prison Is Not a Residential Treatment Facility for Reasons that Go Beyond the Lack of Community-Based Opportunities

DOCCS's statutory authority to designate and co-locate an RTF on the grounds of another correctional facility is well established. But when it does so, the designated facility must meet the basic statutory requirements of an RTF. Even beyond the question of providing access to the surrounding community, the record below illustrated that DOCCS's designation that Fishkill is an RTF is "merely a fiction." *Arroyo v. Annucci*, 61 Misc. 3d 930, 939 (Sup. Ct. Albany Cnty. 2018). To both begin and end an analysis of whether DOCCS is meeting its statutory requirements on the basis of its own designations, as the court below did, wrongly elevates form over substance and allows DOCCS to warehouse RTF Parolees in what amounts to an unlawfully extended prison sentence.

1. Supreme Court Gave Unwarranted Deference to DOCCS's Claims of Compliance with Correction Law §§ 2(6) and 73

In granting summary judgment to DOCCS on the basis of its conclusory assertions and discretion granted to it by the Legislature, the court below

reached two flawed legal conclusions. First, it concluded that RTF Parolees' rights were not violated by receiving treatment "much the same as general population inmates" in a medium security correctional facility. (R. at 25.) Second, it concluded that the programming available at Fishkill was "minimally adequate." (R. at 28.) Both conclusions are flawed.

The court below first claims that because Correction Law § 2(6) defines an RTF, in part, as a "correctional facility," the Legislature contemplated the co-location of facilities, and accordingly, equivalent treatment between RTF parolees and "general population inmates" in a medium security correctional facility does not violate the statute.[1] (R. at 24–26.) In support of this contention, the court below cites to Correction Law § 70(6)(b)(ii) to note that an RTF "serves a 'function' within a correctional facility." (R. at 25.) Rather than support Supreme Court's conclusion here, however, Correction Law § 70 confirms RTF Parolees' contention that Fishkill is not a statutorily compliant RTF. Section 70(6) merely outlines "types of classifications," but Section 70(4) limits the co-location of multiple "correctional facilities" in the same building or premises to situations where "the inmates of each are at all times kept separate and apart from each other except that the inmates of one

[1] Even this finding gives DOCCS too much credit as it has also designated Green Haven, a maximum security prison, as an RTF. 7 N.Y.C.R.R. § 100.20(1)(c), as amended 12/5/16.

may be permitted to have contact with the inmates of the other in order to perform duties, receive therapeutic treatment, attend religious services and engage in like activities." Nothing in the record suggests DOCCS has satisfied this condition for co-locating a residential treatment facility at Fishkill. Indeed, plenty of record evidence suggests the opposite—that Fishkill commingles RTF residents with general population inmates, treats them interchangeably, and may even lack the capacity to separate them. *See supra* at 12.

The lower court's reliance on the use of "correctional facility" in Correction Law § 2(6) also fails under scrutiny. That section defines no fewer than fourteen types of "correctional facilities," several of which clearly require distinct treatment and specific configurations. For example, Section 2(9) covers correctional facilities "operated for the purpose of providing intensive physical, mental and sociological diagnostic treatment services," Section 2(15) covers correctional facilities "that may conduct a shock incarceration program," and Section 2(17) covers correctional facilities "designed to house medium security inmates . . . for the purpose of providing intensive alcohol and substance abuse treatment services." But the question of whether any facility qualifies under the appropriate subsection of Correction Law § 2 is answered not by similarities between the facilities and

their populations, which undoubtedly there will be, but by whether the facilities meet the specific statutory requirements governing the designation given to that facility by DOCCS. Here, the court below failed to fully consider this question because it misidentified the relevance to this analysis that, as explained below, Fishkill has done nothing to differentiate the experience and programs available to RTF residents to ensure that they are aligned with the Legislature's goals in establishing RTFs as "community based" facilities designed for the rehabilitation and imminent community reintegration of its residents. DOCCS's failure here is in failing to provide statutorily required opportunities to RTF Parolees as evidenced, in part, by their failure to ensure programming available at Fishkill was appropriate to the needs of RTF residents.

Furthermore, the lower court's elevation of form over substance is completely counter to the intent of revising the definition section of the Correction Law. Revisions in 1970 were designed to

> substantially increase the flexibility of the correctional system by eliminating artificial distinctions among types of State institutions. Under the bill, designations of institutions as 'prisons' and 'reformatories' will be abolished; all institutions will be known simply as 'correctional facilities', to be graded and classified administratively in accordance with rules promulgated.

Governor's Approval Mem, Bill Jacket, L 1970, ch 475 at 62, 1970 NY Legis Ann at 499. The meaningful distinctions between facilities are determined by

their classifications and not their title as a "correctional facility." This is precisely the opposite of what the court below concluded in interpreting Section 2(6).

Accordingly, the Court should find that DOCCS's designation of Fishkill as an RTF is one in name only and does not forestall an examination of the sufficiency of the RTF program at Fishkill.

Next, the court below found that the singular curriculum available to RTF residents at Fishkill in conjunction with on-site work opportunities and the theoretical availability of certain educational programming was "minimally adequate." (R. at 27–28.) But this tepid finding of programmatic sufficiency misconstrues the applicable statutory requirements.[2]

The court below mistakenly viewed the appropriate touchstone for analyzing the sufficiency of an RTF's programmatic offerings as "adequacy" or in this case minimal adequacy. Correction Law § 73(2) on the other hand establishes that that touchstone is appropriateness, not adequacy. The Legislature's command here is not just that DOCCS establish several programs and carefully assign one of them to each RTF resident; it also requires DOCCS to secure "appropriate education, on-the-job training and

[2] RTF Parolees do not contest the lower court's finding that *Gonzalez v. Annucci* forecloses their challenge to the geographically related statutory requirements for the Fishkill facility, (R. at 26), but plainly continue to contest the programmatic sufficiency of the facility.

employment" for individuals transferred to an RTF. Corr. Law § 73(2). The court below erred in failing to consider whether the limited "education, on-the-job training and employment" opportunities offered at Fishkill were *appropriate* to the rehabilitation of RTF residents, including RTF Parolees, as required by statute.

The court below also failed to analyze (and therefore decide) what distinguishes a program "directed toward the rehabilitation and total reintegration" from the community-based opportunities identified in the statute. It further failed to evaluate the relationship between the statutory requirements and in-facility programming available to general population inmates. Instead it concluded, without analysis, that "programs offered to RTF parolees" were sufficient. (R. at 27–28.)

Correction Law § 73 is designed to ensure that each RTF resident "shall be assigned a specific program," which shall be from among the "*programs* directed toward the rehabilitation and total reintegration into the community" that DOCCS is required to establish. The two mandates, that DOCCS develop more than one program and that it assign a specific program to each RTF resident, are incompatible with the reality at Fishkill. *See supra* at 11. DOCCS has one curriculum that it assigns to every transferee. And the Correction Law makes clear each "readily available" opportunity does not

constitute an individual program. Section 73(2) clarifies that community based education, on-the-job training and employment opportunities constitute parts of the programs to be designed by DOCCS, but nowhere does the statute indicate such opportunities constitute separate programs themselves as the court below does.

DOCCS is required to develop multiple programs and to determine which of those programs is appropriate for each resident. This failure to determine what a program is and whether DOCCS has satisfied its burden to produce multiple programs and assign them on an individualized basis, as it is required to by Sections 73(1) and (3), forecloses the lower court's finding that the programs offered are minimally adequate.

Individually and together, these failures warrant vacatur of Supreme Court's grant of summary judgment to DOCCS.

2. The Record Establishes that DOCCS Did Not Design Fishkill to Meet the Statutory Requirements for an RTF

New York created RTFs to serve as an "intermediate" step between the confines of a prison and full release into a community. With Correction Law §§ 2(6) and 73, the Legislature has established a non-discretionary duty to establish multiple "programs," available to RTF residents, that provide "appropriate" opportunities for each resident's "rehabilitation and total reintegration into the community." The purpose, substance, and unique

characteristics of an RTF are established by law. Fishkill is nothing of the sort; it is a step backwards. In function, if not by design, it maintains the same carceral regime that general population inmates at Fishkill experience. And despite the Correction Law tasking DOCCS with the creation and maintenance of appropriate rehabilitatory programs for the individual residents transferred or otherwise remanded to RTFs, in practice, DOCCS uses them to warehouse people subject to SARA residency restrictions, as a way of avoiding the dilemma created by the lack of available appropriate housing for such individuals.

The use of RTFs and Fishkill in particular as a dorm rather than an RTF was confirmed by DOCCS employees, who almost universally seemed to view RTFs as designed for this specific purpose – not for the clear rehabilitative purposes the statute contemplates. Deposed DOCCS employees were unaware of the important rehabilitative purpose the RTF is meant to serve. (R. at 503; 523; 581; 1361–62) (McNamara Aff., Ex. H (Iccari Tr. 29:5–11); Ex. K (Heady Tr. 21:9–11); Ex. R (McKoy Tr. 28:2–22); Mitchell Aff., Ex. 4 (Greenberg Tr. 25:17–26:9).) No RTF-specific training for DOCCS employees at Fishkill was provided. (R. at 512; 551) (McNamara Aff., Ex. I (Greenberg Tr. 22:12–20); Ex. M (Urbanski Tr. 63:17–22).) Mark Heady, a Supervising Offender Rehabilitation Coordinator at Fishkill, and

thus someone charged with achieving the rehabilitative purpose of the facility, believed "the purpose of the RTF" was "to make sure the inmates have secure housing that's not near a res- -- a school building or something to that effect." (R. at 523) (McNamara Aff., Ex. K (Heady Tr. 18:3–14; 21:9–15).) David Santiago, a Senior Parole Officer who supervises parole officers handling RTF residents at Fishkill, similarly explained that the "RTF program is the task force where they place individuals who have SARA designations and requirements and are unable to obtain or have an approved residence that is SARA-compliant. So therefore they put a hold on these individuals." (R. at 539) (McNamara Aff., Ex. L (Santiago Tr. 19:16–21).) Shelley Mallozzi, who was the Sex Offender Coordinator for the State in 2014, did not know whether Fishkill had RTF programs prior to the decision to house RTF residents there in 2014, after it became impossible to house people with SARA residency restrictions in New York City shelters, and she added "[a]s far as I know, it was when it started." (R. at 1499) (Mallozzi Tr. 32:18–22.)

Furthermore, when tasked with designing the single RTF program used in New York, including at Fishkill, Mallozzi explained that there was no specific training provided by DOCCS in advance of creating the curriculum, (R. at 1496) (*Id.* at 29:7–19), and the only guidance provided was that the program "should be as different as possible from the other programs that were

being utilized for incarcerated individuals." (R. at 1487) (*Id.* at 20:9–23.) This testimony highlights the slapdash nature of DOCCS's approach to designating Fishkill as an RTF.

Mallozzi also testified that the sole curriculum used at Fishkill would use group discussion to address issues specific to RTF residents subject to SARA. (R. at 571) (McNamara Aff., Ex. P (Mallozzi Tr. 74:18–24 ("Q. Would you leave it to the ORCs to sort of explain this in the [group] session? A. Yes. Q. If they were just, for instance, reading from the curriculum from the page, that wouldn't come up; right? A. No.").)) But in practice, that did not happen. (R. at 518) (McNamara Aff., Ex. J (Gonzalez Tr. 94:6-95:14).)

Furthermore, individuals transferred to Fishkill under Correction Law § 73(10), such as some of the RTF Parolees, are "subject to conditions of community supervision imposed by the board." One of these conditions is that they must secure an approved, parole-compliant address. But the restrictions on freedom at Fishkill, including lack of internet access, prevent RTF residents from effectively securing the keys to their own release. Instead, they are reliant on assistance from DOCCS. As the record below made clear, such assistance is a fig leaf. Offender rehabilitation coordinators at Fishkill, parole officers, and DOCCS's Director of Re-Entry Services, Christina Hernandez, collectively could not identify anyone directly responsible for

finding parole-compliant housing for Fishkill residents, even as those residents are largely cut off from access to the outside world that would enable any self-help. (*See* R. at 562; 1403–04; 826; 860) (McNamara Aff., Ex. O (Hernandez Tr. 17:6–24); Mitchell Aff., Ex. 4 (Greenberg Tr. 67:2–68:19); Ex. 1 (Wallace Tr. 41:13–42:2; 75:4–8).)

These responses paint a disturbing picture. Key personnel in charge of setting up or running the Fishkill "RTF" and its "program" were unable to explain the very purpose of their facility, unable to demonstrate how their actions aligned with or satisfied statutory requirements, and refreshingly admitted that the purpose of the facility was not rehabilitatory but rather to accommodate a need to find SARA-compliant housing. As the Court of Appeals recently recognized in *McCurdy*, the ability to make an RTF available as a residence for those in need of SARA-compliant housing does not transform the purpose and function of an RTF. *See McCurdy*, 36 N.Y.3d 251, 260–61 (2020) (articulating limits and responsibilities applicable to DOCCS when housing parolees in an RTF under Penal Law § 70.45(3) or Correction Law § 73(10) in part based on the statute affording different "rights" to different categories of residents).

Indeed, statements made by Heady and Mallozzi suggest that minimal, if any, changes occurred at Fishkill in conjunction with its post-2014 use as

an RTF for individuals subject to SARA and under PRS. The record is replete with examples of how RTF residents at Fishkill are treated nearly identically to general population inmates. *See supra* at 12. Indeed, another court found that SARA's geographical limitation violated a Fishkill RTF resident's right to substantive due process in part because it found that his lived experience in the Fishkill "RTF" amounted to a de facto extension of his prison sentence. In relevant part, Supreme Court found:

> Extended discussion of whether petitioner's liberty is a fundamental right at stake in this ligation is hardly necessary. Despite his having fully served the incarceratory portion of his sentence, petitioner remains in prison. That his prison has been designated an RTF is, for this petitioner, merely a fiction. His freedom of movement is as restricted now as it was before his putative "release" to PRS; nothing about his surroundings, options or opportunities has changed from when he was an inmate at Fishkill Correctional Facility to now, when he is on "community supervision" in name only. "The Constitution is not to be satisfied with a fiction."

Arroyo v. Annucci, 61 Misc. 3d 930, 938–39 (Sup. Ct. Albany Cnty. 2018) (quoting *Hyde v. United States*, 225 U.S. 347, 390 (1912) (Holmes, J., dissenting)).

The *Arroyo* plaintiff's experience is not unique. *See* Allison Frankel, *Pushed Out and Locked In: The Catch 22 For New York's Disabled, Homeless Sex-Offender Registrants*, 129 Yale L.J. Forum 279, 294 (2019) ("And, while DOCCS ostensibly transfers people who have completed their maximum

prison terms to residential "treatment" facilities, such facilities are, in reality, simply prison cells by another name."). Indeed,

> [i]f an individual with a sentence that carries PRS has not found housing by their maximum release date, DOCCS places them in facilities called 'Residential Treatment Facilities,' or RTFs, during their PRS. RTFs are ostensibly "community based residence[s]" that provide job training, education, and assistance finding housing, akin to a halfway house. But in reality, life in an RTF is indistinguishable from prison.
>
> DOCCS has administratively designated wings of thirteen state prisons as RTFs. There, prisoners remain "behind razor-wire fences" in medium-and maximum-security facilities far from their communities. They are "treated much the same as inmates in the general population," wearing the same "prison uniform," using "the same commissary, mess hall, and sick hall as the rest of the population," and, like other prisoners, they are forbidden from leaving the prison grounds.

Id. at 296 (citations omitted). The import of these findings in the record, law, and academia is that whatever the Fishkill facility is, it is not a statutorily compliant residential treatment facility. (*See also* R. at 29–31, 170–171.) DOCCS' administrative designations may not elevate form over substance to evade effective review of its compliance with the Legislature's mandates, and the courts of New York "are not required to exhibit a naiveté from which ordinary citizens are free." *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575 (2019) (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, J.)).

C. This Court Is Equipped to Provide an Effective Remedy

This case, like *Gonzalez* and others, represents a consistent failure of DOCCS to address and resolve a problem of its own creation. But despite clear statutory guidelines and evidence of an ability, if not a willingness, to improve conditions, DOCCS has opted instead to tie up the State's resources and RTF residents' lives in litigation after litigation. It is an unfortunate situation and also an intolerable one.

However, to break this logjam and make progress, courts need not "micromanage the programming offered in correctional facilities" as the court below feared. (R. at 29.) The Court can call a spade a spade. The Fishkill facility is simply not a residential treatment facility. It is a medium security prison, euphemistically re-designated as a facility with a co-located "RTF" that facilitates the long-term expulsion of individuals subject to SARA from New York City instead of enabling their "rehabilitation and reintegration."

So declared, the Court has among its options the ability to require that DOCCS take seriously its responsibilities and, with an intention and thoughtfulness not on display in the record, organize Fishkill to meet the statutory requirements of a residential treatment facility. The Court can remand with instructions to enter an order requiring DOCCS to develop minimum standards for the Fishkill RTF that comply with the statutory

requirements outlined above, without dictating what those standards are. Here, the Correction Law does provide administrable standards. But neither RTF Parolees nor the Court can take comfort from DOCCS's track record that the Legislature's mandates will be given proper expression. The Court can take action to grant relief to RTF Parolees and ensure DOCCS's treatment of RTF residents is not arguably inadequate but instead statutorily compliant. At a minimum, the Court should recognize that, just as the emperor has no clothes, neither is Fishkill a residential treatment facility.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that the Court enter an order affirming the Decision by the court below to the extent it granted summary judgment to Respondents-Cross Appellants. The Court should also reverse the Decision as to whether DOCCS has met its obligations to provide "appropriate education, on-the-job training and employment" and other programs "directed toward the rehabilitation and total reintegration into the community" to Fishkill RTF Parolees. In the alternative, the Court should vacate the lower court's grant of summary judgment to DOCCS and remand for further proceedings on the question of DOCCS's compliance with Correction Law § 73.

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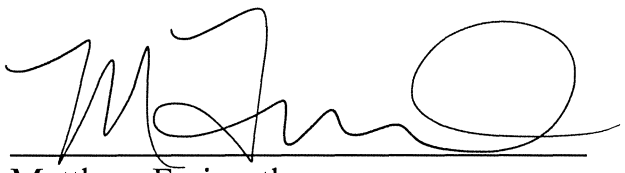
By: 

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