New York Supreme Court

APPELLATE DIVISION — THIRD DEPARTMENT

Docket No.
CV-22-1940

OCEANVIEW HOME FOR ADULTS, INC.
d/b/a OCEANVIEW MANOR,

Petitioner-Respondent,

against

HOWARD ZUCKER, M.D., in his official capacity
as Commissioner of Health of the State of New York,

Respondent-Appellant.

MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR LEAVE TO REARGUE OR PERMISSION TO APPEAL

CONSTANTINE CANNON LLP
Attorneys for Respondent-Appellant
335 Madison Avenue, 9th Floor
New York, New York 10017
212-350-2700
gmalone@constantinecannon.com
rbegleiter@constantinecannon.com

Of Counsel:

Gary J. Malone
Robert L. Begleiter

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PRELIMINARY STATEMENT

Appellant-Respondent, the New York State Department of Health ("DOH" or the "State"), respectfully submits this memorandum of law in opposition to the motion of Petitioner-Respondent, Oceanview Home for Adults ("Oceanview"), for leave to reargue or permission to appeal (NYSCEF No. 103) this Court's May 4, 2023, Opinion and Order (the "Opinion) (NYSCEF No. 101).

After waiting seven months, Oceanview asks this Court to reconsider the Opinion. That decision reversed a judgment of the Supreme Court (Margaret T. Walsh, J.) (the "Trial Court") that would have invalidated the State's regulatory scheme to improve the lives of persons with serious mental illness through regulations (the "Regulations") designed to prevent the segregation of such persons in certain large, state-regulated adult homes ("Transitional Adult Homes"). This Court reversed, on the law, the Trial Court's judgment that the Regulations violate the federal Fair Housing Act (the "FHA"), 42 U.S.C. § 3601 *et seq*.

The Opinion held that the Trial Court erred as a matter of law by failing to apply the correct legal standard for FHA claims. Applying the correct legal standard, this Court held that the Regulations do not violate the FHA because they benefit persons with serious mental illness in a narrowly tailored way. The United States Department of Justice ("DOJ") had recommended this standard—which is the prevailing standard in federal Courts of Appeals—in a statement of interest it

submitted in this case supporting the legality of the Regulations. Relying on undisputed facts, the Opinion held that the Regulations are beneficial in a narrowly tailored way because they (1) support the integration of persons with disabilities into the community, consistent with the integration mandate of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12101 *et seq*. and the landmark decision of *Olmstead v L.C. ex rel. Zimring*, 527 U.S. 581 (1999), and (2) complement the settlement of federal litigation (the "Federal Settlement") brought by the DOJ and disability advocates.

Oceanview does not seek reargument based on this Court's application of the law. Instead, Oceanview claims that this Court overlooked certain of the Trial Court's findings of fact.

Oceanview's arguments are meritless. This Court did not overlook or misapprehend any matter of fact or law, as required under CPLR 2221(d)(2). Instead, Oceanview does nothing more than repeat the same findings of fact and arguments it made in opposition to the State's appeal of the Trial Court's decision, which this Court considered and rejected in the Opinion. Moreover, as the Opinion explains, the "facts" on which Oceanview relies are not even material under the correct legal standard for FHA challenges. Oceanview's motion for leave to reargue should be denied.

Similarly, this Court should deny Oceanview's request in the alternative for leave to appeal to the Court of Appeals.

Oceanview fails to set forth any compelling reason why the Court of Appeals should review the proposed legal question, which pertains to interpretation of the federal FHA. Not only is there no dispute among the Appellate Divisions, but the standards to be applied in FHA challenges is hardly a novel issue of law. Indeed, this Court applied the correct legal standard, which has been followed by multiple federal Courts of Appeals. Moreover, that standard was recommended in this case by the DOJ—which has expertise in enforcing that very same federal law.

STATEMENT OF FACTS

A. The State's Adoption of the Regulations

Adult homes are a form of adult care facility that provide long-term housing to persons in need of assistance with basic aspects of daily living. "The State—through its agencies—plays a crucial role in the licensure, inspection and operation of adult homes (*see* Social Services Law §§ 460-b, 461, 461-a; 18 NYCRR parts 485-487), and 'administer[s] the State's mental health service system, plan[s] the settings in which mental health services are provided, and allocate[s] resources within the mental health service system' (*Disability Advocates, Inc. v Paterson*, 598 F Supp 2d 289, 317 (E.D.N.Y. 2009))." Opinion at 9.

In regulating adult homes, the State must comply with the federal integration mandate of the ADA, as explicated by the United States Supreme Court in *Olmstead*. In that 1999 decision, the Supreme Court "interpret[ed] the states' obligations under Title II of the [ADA] to ensure that persons with mental disabilities are not unjustifiably isolated in institutions and are provided services in the most integrated setting appropriate to their needs." Opinion at 2 (internal citation omitted). "Although the *Olmstead* Court did not establish fixed guideposts for implementing this integration mandate on a national level, it highlighted the importance of relying on the assessments of the states' mental health professionals in determining the appropriateness of serving individuals with disabilities in community-based settings." Opinion at 2 (internal citation omitted).

"Following Olmstead, a series of federal lawsuits were filed challenging the State's provision of services for persons with mental illness living in adult homes." Opinion at 3. In 2003, Disability Advocates, Inc. ("DAI"), "a protection and advocacy organization authorized by statute to bring suit on behalf of individuals with disabilities," brought an "action on behalf of individuals with mental illness residing in, or at risk of entry into, 'adult homes' in New York City with more than 120 beds and in which twenty-five residents or 25% of the resident population (whichever is fewer) have a mental illness." *Disability Advocs., Inc. v. Paterson*, 653 F.Supp.2d 184, 187 (E.D.N.Y. 2009) ("*DAI*"), *vacated on other grounds sub*

nom. Disability Advocs., Inc. v. New York Coal. for Quality Assisted Living, Inc., 675 F.3d 149 (2d Cir. 2012) ("*DAI II*"); Opinion at 3.

After years of litigation and a lengthy trial, the United State District Court rendered judgment for DAI, and held that "approximately 4,300 individuals with mental illness, are not receiving services in the most integrated setting appropriate to their needs," and that DAI had "established a violation of the integration mandate of the ADA and the Rehabilitation Act." *DAI*, 653 F.Supp.2d at 187-88. "On appeal, the Second Circuit vacated the District Court's judgment on the ground that DAI lacked standing to bring the action (*see* [*DAI II*], 675 F3d at 162-163)." Opinion at 3.

Shortly after the Second Circuit's reversal on standing grounds, DOJ "and a class of persons with mental illness separately filed suits against the State …, raising nearly identical claims as those asserted by DAI (*see United States v New York*, US Dist Ct, ED NY, 13-cv-4165)." Opinion at 3. The State eventually entered into a settlement (the "Federal Settlement") with DOJ and the class the required the State "to take certain remedial action on behalf of individuals with mental illness living in adult homes, including providing the opportunity to move into community-based, supported housing." Opinion at 3 (internal citations omitted).

While the parties were negotiating the terms of the Federal Settlement, "the State embarked on its own endeavor to implement *Olmstead* (*see* 28 CFR 35.130 [b]

[7] [i]).” Opinion at 3. “The Office of Mental Health (hereinafter OMH) and [DOH] memorialized certain reforms to the State's mental health system that the agencies viewed as critical to implement the goal of deinstitutionalization, including providing options for more community-based, integrated housing for persons with mental illness.” Opinion at 3-4.

As part of this comprehensive effort to implement the federal integration mandate and improve the lives of persons with disabilities, DOH promulgated the challenged Regulations, which bar adult homes from admitting new residents with serious mental illness if those facilities are “Transitional Adult Homes,” which are defined as “adult homes with a certified capacity of 80 beds or more in which 25 percent or more of the resident population are persons with serious mental illness ….” Opinion at 4 (internal quotation marks and citation omitted). “OMH, in turn, issued clinical advisories in 2012 concluding that such facilities ‘are not clinically appropriate . . . for the significant number of persons with serious mental illnesses who reside in such settings, nor are they conducive to the rehabilitation or recovery of such persons’.” Opinion at 4 (internal citation omitted).

In addition to being restricted to a small subset of adult homes—the largest facilities with the heaviest concentrations of persons with serious mental illness—the Regulations are limited in other ways. Opinion at 12, n.9. The Regulations permit Transitional Adult Homes to admit new residents with serious mental illness

once the percentage of their residents with serious mental illness go below that threshold. Opinion at 4. "The regulations also contain a waiver permitting former residents of a transitional adult home to return to the facility even if readmission increases the mental health census above the 25% cap." Opinion at 4-5 (internal citation omitted).

B. Oceanview's Challenge of the Regulations

Oceanview filed this action challenging the Regulations in 2016. The Trial Court held an 18-day bench trial in 2019, and then, for the next three years, accepted substantial post-trial submissions. Opinion at 5.

Among the post-trial submissions accepted by the Trial Court was a Statement of Interest of the United States filed by the DOJ pursuant to 28 U.S.C. § 517. Opinion at 7. The DOJ—which is charged with enforcing both the FHA and the ADA—expressed the view that the Regulations "do not violate the FHA" because they protect the well-being of persons with serious mental illness and further the goals of the Federal Settlement by encouraging integration of persons with disabilities, as mandated by the ADA. Opinion at 8-9. The DOJ also expressed the view that Oceanview's challenge to the Regulations as violating the FHA should be judged under the legal standard adopted by the United States Courts of Appeals for the Sixth, Ninth and Tenth Circuits that such regulations are valid under the FHA if they benefit the protected class and are narrowly tailored. Opinion at 7-9, 12-13.

In 2022, the Trial Court rendered its "judgment in favor of [Oceanview] on its claim under the FHA and permanently enjoined enforcement of the regulations." Opinion at 5. As this Court summarized the Trial Court's decision:

> [The Trial Court] among other things, rejected respondent's argument that the admissions cap does not violate the FHA because, rather than discriminating against individuals with serious mental illness, it furthers the integration mandate of *Olmstead* by "divert[ing] [such persons] away from institutions and into alternative settings that are more integrated in the community and consequently more conducive to their recovery." Instead, the court found that transitional adult homes "are not 'institutions' for purposes of Title II of the ADA or as addressed by the Supreme Court in Olmstead" insofar as they "are not owned, established, or operated by the State," "[n]one of the residents . . . are committed to or confined there against their will" and they "live in a setting far less restrictive than those of nursing homes and state psychiatric hospitals." The court further held that the regulations are "not necessary for compliance with Olmstead, nor are they narrowly tailored to suit individuals' particular needs," and that less discriminatory alternatives – such as requiring individualized assessments about whether a transitional adult home is appropriate for an individual applicant or "allowing a prospective resident to decide about living" in such residence – existed to promote the goal of integration.

Opinion at 5.

C. This Court's Opinion

The State appealed the Trial Court's judgment to this Court. On May 4, 2023, this Court issued the Opinion, which "reversed, on the law," the Trial Court's judgment and held that the Regulations "do not violate the Fair Housing Act." Opinion at 13.

This Court identified multiple errors that the Trial Court made, including the following:

> (a) Failing to apply the legal standard for FHA challenges adopted by the Sixth, Ninth and Tenth Circuits, and urged by the DOJ;
>
> (b) Requiring that the Regulations achieve their goals by the "least restrictive alternative";
>
> (c) Failing to "account for DOJ's view that the challenged regulations do not violate the FHA";
>
> (d) "[C]oncluding that, because transitional adult homes are privately owned and operated, Title II of the ADA does not apply in this case and, therefore, cannot serve as a valid justification for the admissions cap";
>
> (e) Engaging in "too narrow a reading of" the *Olmstead* decision;
>
> (f) Ignoring "trial evidence equating [Transitional Adult Homes] to institutionalized settings";
>
> (g) Failing to "defer to the reasonable medical judgments of public health officials";
>
> (h) Holding that "statistical data was … necessary to support the challenged regulations";
>
> (i) Engaging in a "wholesale rejection of the State's witnesses"; and
>
> (j) Failing to recognize the "importance of leaving room for flexible solutions to address the complex problem of discrimination and to realize the goals established by the Congress in the" FHA.

Opinion at 8-12 (internal quotation marks and citations omitted).

Applying the correct legal standard for FHA challenges to state regulations, the Opinion holds that the Regulations "benefit individuals with serious mental illness by implementing the integration mandate of *Olmstead*," including "by

directly implementing integration into smaller and more diverse settings where people with serious mental illness have greater ability to exercise autonomy and interact with individuals who do not have serious mental illness, enhancing their chances of recovery." Opinion at 10, 12. The Opinion also holds that the admissions cap of the Regulations is "narrowly tailored to implement the integration mandate of Title II of the ADA" because (1) the "admissions cap applies only to people with a serious mental illness," (2) the admissions cap applies "solely to a subcategory of large adult homes," (3) "once the mental health census of a transitional adult home has been sufficiently reduced below the cap, the facility may resume accepting residents with serious mental illness," and (4) the Regulations "contain a waiver permitting transitional adult homes to admit individuals with serious mental illnesses who were previously residents …." Opinion at 11-12.

This Court held that under the correct legal standard, the Regulations do not violate the FHA because they "benefit … the protected class and are sufficiently narrowly tailored to implement the goal of integration." Opinion at 12-13 (internal quotation marks and citations omitted).

ARGUMENT

I. THIS COURT SHOULD DENY OCEANVIEW's REQUEST FOR PERMISSION TO REARGUE THE APPEAL

The Opinion reversed the Trial Court's judgment based on its errors of law and fact. Oceanview does not ask this Court to review its correction of the Trial Court's multiple errors of law. Instead, Oceanview limits this request to asking this Court to reconsider its review of the Trial Court factual findings. Oceanview's argument should be rejected because it denigrates this court's power to review the factual findings of a bench trial and fails to identify any facts the Court overlooked.

A. This Court Applied the Correct Legal Standard in Reviewing the Trial Court's Findings of Fact

Oceanview argues this Court should grant reargument to engage in a more extended discussion of the record and the reasons why it rejected some of the Trial Court's findings of fact. Oceanview Mem. at 6 (NYSCEF No. 103). Although Oceanview concedes that this Court made factual findings contrary to the findings of the Trial Court, Oceanview claims that the Opinion is deficient because "the Court does not explain why it rejects Supreme Court's fact-finding, nor does the Court explain how its contrary factual conclusions are supported by the extensive Record in this case." Oceanview Mem. at 7. Oceanview also suggests that this Court should have remanded the case to the Trial Court to correct its errors. Oceanview Mem. at 1.

Oceanview's argument is contrary to both the authority of this Court and to the standards that govern its review of bench trials. First, Oceanview is mistaken in arguing that this Court should have remanded this case to the Trial Court.

When this Court reviews a judgment rendered after "a nonjury trial, we may weigh the evidence and grant the judgment, which, in our view, should have been granted by the trial court" *Bibeau v. Ward*, 228 A.D.2d 943, 943 (3d Dep't 1996). Thus, as the First Department has noted, "in a non jury case the Appellate Division may deal with the evidence as the trial court should have done, and render judgment without granting a new trial." *Allstate Ins. Co. v. Oberfast*, 36 A.D.2d 708, 708–09 (1st Dep't 1971). *See also McAvoy v. Harron*, 26 A.D.2d 452, 454 (4th Dep't 1966), *aff'd*, 21 N.Y.2d 821 (1968) ("[t]he record being adequate for a determination of the action on the merits, this court will modify the judgment of the court below, render a final determination of the case (CPLR 5522), and grant the judgment which the court below should have granted").

Oceanview's argument that this Court was constrained by the Trial Court's findings is also contrary to the well-established principle that the Appellate Division has the power to make its own decisions based on the record and to enter judgments when a party appeals from a bench trial. Not only is the Appellate Division's authority "as broad as that of the trial court," it "may render the judgment it finds warranted by the facts." *Northern Westchester Professional Park Assocs. v. Town of*

Bedford, 60 N.Y.2d 492, 499 (1983) (citations omitted). *See also York Mortg. Corp. v. Clotar Const. Corp.*, 254 N.Y. 128, 133 (1930) ("the appropriate function of an appellate court in equity cases to determine controverted questions of fact, and render final judgment thereon. . . . It renders the judgment which the facts warrant").

This Court has rejected factual findings, including credibility findings, of a trial court when the record warrants it. For example, in *Maisto v. State*, 196 A.D.3d 104, 114, 115 (3d Dep't 2021), after reviewing the record, this Court disagreed with the trial court's "conclusion that plaintiffs' expert witnesses were not credible," and "conclude[d] that a wholesale rejection of these experts was unwarranted." As this Court explained, "[a]lthough deference to the trial court's credibility assessments may be appropriate in many circumstances, we need not accord such deference where resolution of the issue does not turn on an assessment of witness credibility *or where the trial court's findings are unwarranted*." *Maisto v. State*, 196 A.D.3d at 114 (internal citations omitted) (emphasis added).

This Court applied these well-accepted principles of appellate review in rejecting conclusions of the Trial Court that were both contrary to the law and to the weight of the evidence. As this Court noted, not only was the Trial Court's "wholesale rejection of the State's witnesses … unwarranted," but "[i]n reviewing a nonjury verdict on appeal, this Court has broad authority to independently evaluate

the evidence and render a judgment warranted by the facts, with due deference to the trial court's credibility assessments." Opinion at 11 (citations omitted).

B. Oceanview has Failed to Show that the Opinion Overlooked any Facts in Deciding the Appeal

CPLR Rule 2221(d)(2) provides that a motion for reargument "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." On a motion for reargument, the movant bears "the burden of demonstrating that [this Court] overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law." *Campos v. State*, 139 A.D.3d 1276, 1277 (3d Dep't 2016) (internal quotation marks and citation omitted). A motion for leave to reargue "is not designed to afford an unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted." *Mayer v. Nat'l Arts Club*, 192 A.D.2d 863, 865 (3d Dep't 1993) (internal citations omitted).

Oceanview argues that this Court overlooked certain of the Trail Court's findings of fact in coming to three of its conclusions supporting its determination that the Regulations do not violate the FHA because they are beneficial in a narrowly tailored way. Hawrylchak Aff. ¶¶ 6-10 (NYSCEF No. 103). Contrary to Oceanview's argument, the Opinion does not overlook these findings of fact—the

Opinion just treats them as not material under the correct legal standard or as not supported by this Court's own review of the evidence.

1. The Opinion did not Overlook any Facts in Concluding the Regulations are Beneficial to Persons With Serious Mental Illness

Oceanview first argues that the Opinion's conclusion that the Regulations are beneficial to persons with serious mental illness overlooked the Trial Court's contrary findings of fact. Hawrylchak Aff. ¶ 7. The Opinion did not overlook those findings of fact; it rejected them on multiple legal and factual grounds.

As recognized by this Court, the Trial Court's findings that integration of persons with serious mental illness into smaller facilities in the communities is not beneficial was based on several errors, including "too narrow a reading of [the *Olmstead*] decision and ignor[ing] the trial evidence equating such facilities to institutionalized settings." Opinion at 9-10. Rejecting the Trial Court's legal error in holding the federal integration mandate is not applicable to the State's regulation of adult homes, the Opinion held that that the State's compliance with the integration mandate was beneficial to persons with serious mental illness. As the Opinion held, the Regulations "benefit individuals with serious mental illness by implementing the integration mandate of Olmstead," including "by directly implementing integration into smaller and more diverse settings where people with serious mental illness have

greater ability to exercise autonomy and interact with individuals who do not have serious mental illness, enhancing their chances of recovery." Opinion at 10, 12.

Oceanview inaccurately claims "that the State provided no evidence that persons excluded by the admissions bar have ended up in smaller or more integrated settings …." Oceanview Mem. at 14-15. Ironically, Oceanview is committing the same error this Court held the Trial Court committed in "ignor[ing] the trial evidence." Opinion at 10. As the Opinion noted, the State "presented testimony from several experts – including Lloyd Sederer, OMH's former chief medical officer who issued the 2012 advisories, and other mental health professionals – who consistently testified that transitional adult homes are akin to institutionalized settings and are not beneficial to recovery for people with serious mental illness because, among other things, they lack integrative, community-based, mental health services, restrict the ability of persons with serious mental illness to interact with persons who do not have serious mental illness, and do not require employees to have mental health training." Opinion at 10. Moreover, "[t]here was also testimony that smaller facilities are beneficial to the recovery of people with serious mental illness by providing more individualized support." Opinion at 11.

Indeed, as the State set forth its Appellant's Brief (NYSCEF No. 81), it submitted substantial evidence that (a) the Regulations "have fostered the integration of persons with serious mental illness into the community, and have helped

individuals become more independent in their life skills as a result of the Regulations' requirement that Transitional Adult Homes adopt compliance plans that require those facilities to foster the development of independent living skills," (b) State officials have "found that many people have experienced aspects of recovery as they moved and as they settled into the community" and (c) State officials have not "received any reports of the Regulations having a detrimental effect on persons with serious mental illness finding appropriate housing." Appellants' Brief at 15 (internal quotation marks and citations omitted).

2. The Opinion did not Overlook any Facts in Concluding the Transitional Adult Homes are not Beneficial to Recovery for Persons With serious Mental Illness

Oceanview next argues that the Opinion's conclusion that Transitional Adult Homes are not beneficial to recovery for persons with serious mental illness overlooked the Trial Court's contrary findings of fact. Hawrylchak Aff. ¶ 8. The Opinion did not overlook those findings of fact; it rejected them on multiple legal and factual grounds.

The Trial Court's finding that Transitional Adult Homes are beneficial to persons with serious mental illness was based on that court's holding that such facilities "are neither 'institutions' nor 'institution-like.'" R75. As the Opinion held, however, the Trial Court's analysis was both legally and factually flawed because it

is based on "too narrow a reading of [the *Olmstead*] decision and ignor[ing] the trial evidence equating such facilities to institutionalized settings." Opinion at 9-10.

Oceanview challenges this Court's statement that "the State's experts 'consistently testified that transitional adult homes are akin to institutionalized settings' …." Oceanview Mem. at 24 (quoting Opinion at 10). However, Oceanview fails to identify any facts this Court supposedly overlooked. In fact, not only did the State's experts consistently testify that Transitional Adult Homes are akin to institutionalized settings (R36-R38, R42, R45-R46, R48, R53-R54, R56), but Oceanview's sole expert admitted that Transitional Adult Homes have "institutional features in the standard terminology that are clearly institutional …." R1694, R1772, R1698. In fact, Oceanview's own expert conceded that "adult homes are big places [that] have to impose certain procedures and certain rules to have an orderly operation of the facility," and that they are "institution-like." R1694, R1772.

Oceanview also inaccurately claims that Dr. Sederer was the "State's principal expert," and baselessly attacks the extent to which Dr. Sederer's testimony was based on "evidence-based" research. Oceanview Mem. at 20. Oceanview ignores the evidence of Dr. Sederer's substantial experience as a public health professional and the extent to which the Regulations were based on the contributions and review of many other public health professionals, disability advocates, the DOJ and the federal court overseeing the Federal Settlement. Opinion at 3-4, 10-12; R35-R38,

R42. Oceanview ignores not only the State's other expert and professional witnesses (including its principal exert witnesses, Dr. Lisa Dixon and Kevin Martone), but also the extent to which the testimony of the State's witnesses was based on their experience and expertise as public health professionals. R35-R38, R41-R44, R45, R47-R49, R53-R56.

Moreover, Oceanview repeats the legal error of the Trial Court in criticizing the Regulations as not being sufficiently "evidence-based." The Opinion correctly rejected this argument on which the Trial Court relied, noting that under well-established law, "statistical data was not necessary to support the challenged regulations …." Opinion at 11 (citations omitted). *See also Consolation Nursing Home, Inc. v. Comm'r of New York State Dep't of Health*, 85 N.Y.2d 326, 332 (1995) ("[a]lthough documented studies often provide support for an agency's rule making, such studies are not the *sine qua non* of a rational determination" by a department commissioner, who "is not confined to factual data alone but also may apply broader judgmental considerations based upon the expertise and experience of the agency he heads"); *Matter of New York State Conf. of Blue Cross & Blue Shield Plans v. Muhl*, 253 A.D.2d 158, 163 (3d Dep't 1999) ("agency is to be accorded great deference in its decisionmaking powers, especially where the agency acts within its area of expertise"). As the Opinion noted, the *Olmstead* Court "highlighted the importance of relying on the assessments of the states' mental health professionals in

determining the appropriateness of serving individuals with disabilities in community-based settings." Opinion at 2 (citation omitted).

3. The Opinion did not Overlook any Facts in Concluding the Regulations are Narrowly Tailored

Finally, Oceanview argues that the Opinion's conclusion that the Regulations are narrowly tailored overlooked the Trial Court's contrary findings of fact. Hawrylchak Aff. ¶ 10. Once again, the Opinion did not overlook those findings of fact; it rejected them on multiple legal and factual grounds.

The Opinion held that the Regulations are narrowly tailored based on the facts that (1) the "admissions cap applies only to people with a serious mental illness," (2) the admissions cap applies "solely to a subcategory of large adult homes," (3) "once the mental health census of a transitional adult home has been sufficiently reduced below the cap, the facility may resume accepting residents with serious mental illness," and (4) the Regulations "contain a waiver permitting transitional adult homes to admit individuals with serious mental illnesses who were previously residents …." Opinion at 11-13.

Oceanview fails to cite any facts overlooked by this Court that refute the above facts establishing that the Regulations are narrowly tailored. Instead Oceanview cites the Trial Court's findings that the Regulations could be even more narrowly tailored. Oceanview Mem. at 26-30. The Opinion, however, held that

these factual findings as insufficient as matter of law. As this Court held, after discussing how the above factors show how the Regulations are narrowly tailored:

> In these circumstances, we cannot agree with Supreme Court's finding that the means used to implement the goal of integration are not narrowly tailored insofar as the regulations do not provide for individualized assessments. Indeed, there was testimony at trial that utilizing a more individualized approach could impede the State's integration goal and, as already noted, the least restrictive means of effectuating the beneficial purpose is not required.

Opinion at 12.

Oceanview also argues that the Regulations should not be narrowly tailored because other states have not adopted similar regulations. Oceanview Mem. at 30. This argument ignores the undisputed evidence indicating that no other state had a need to regulate such facilities in this fashion. As the Trial Court noted, it heard expert testimony that not only has the mental health community sought to decrease reliance on institutional settings, such as Transitional Adult Homes, in recent decades, but that Transitional Adult Homes are now "anomalous compared to the rest of the country and Europe." R37-R38, R45. Moreover, as the Opinion stressed, courts should leave room for "flexible solutions" and rely on "the assessments of the states' mental health professional in determining the appropriateness of serving individuals with disabilities in community-based settings." Opinion at 2, 12.

As the above examples show, rather than show any facts that this Court overlooked, Oceanview's arguments consists of rearguing that the factual findings

and legal analysis of the Trial Court should endorsed by this Court. This Court has already rejected these arguments, and Oceanview has shown no reason the Court should reconsider the Opinion.

II. THIS COURT SHOULD DENY OCEANVIEW'S REQUEST FOR PERMISSION TO APPEAL TO THE COURT OF APPEALS

Oceanview's request in the alternative for permission to appeal to the Court of Appeals should be denied. Oceanview fails to set forth any compelling reason why the Court of Appeals should review its proposed legal question.

The only question on which Oceanview seeks review by the Court of Appeals is whether this Court applied the correct legal standard for claims alleging that state regulations violate the FHA. This Court applied the appropriate legal standard "adopted by the Sixth, Ninth and Tenth Circuits as recommended by DOJ." Opinion at 8. Under this standard, a state's regulations are valid under the FHA if they benefit the protected class and are narrowly tailored. Opinion at 7-9, 12-13.

Oceanview fails to offer any substantial reason this standard for evaluating claims under a federal statute should be reviewed by the Court of Appeals. Instead, Oceanview resorts to mischaracterizing the Opinion. Oceanview falsely asserts that this Court held that the Regulations require Transitional Adult Homes to engage in "intentional discrimination" against persons with disabilities. Oceanview Mem. at 3, 32. To the contrary, this Court held that the Regulations were beneficial to—not discriminatory against—persons with disabilities. The Opinion held that although

the Regulations could be considered "discriminatory on their face," the State had "demonstrated that the admissions cap was implemented to benefit, rather than to discriminate against, persons with serious mental illness." Opinion at 6, 11 (internal citations omitted).

Given the substantial authority supporting this conclusion as a matter of federal law, there is no reason for the Court of Appeals to review this issue.

The Court of Appeals has a primary interest in settling issues of state law, not in opining on matters of federal law, which would not be dispositive of the issue. It has long been recognized that the Court of Appeals' "major functions ... include the duty uniformly to settle the law for the entire State and finally to determine its principles" *Matter of Miller*, 257 N.Y. 349, 357–358 (1931). As the First Department has noted, the Court of Appeals "makes clear in its Rules of Practice [that] leaveworthy cases are ones in which 'the issues are novel or of public importance, present a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division' (22 NYCRR § 500.22 [b] [4])." *City of New York v. 2305-07 Third Ave., LLC*, 142 A.D.3d 69, 75 (1st Dep't 2016). *See also* Karger, Powers of the N.Y. Court of Appeals § 10:3 ("the primary, though not the sole, function of the Court of Appeals is conceived to be that of declaring and developing an authoritative body of decisional law for the guidance of the lower

courts, the bar and the public, rather than merely correcting errors committed by the courts below") (September 2023 Update).

Here, there is no conflict among the departments of the Appellate Division as to the correct legal standard for challenges to state regulations under the FHA. This Court is the only department of the Appellate Division to rule on the issue.

Not only is the correct legal standard for challenges to state regulations under the FHA a federal issue—not a state issue—but it is not even a particularly novel question.

Federal Courts of Appeals have been ruling on the correct legal standard to apply to such challenges for the past three decades. *See* Opinion at 6, 7. The Sixth, Ninth and Tenth Circuits have all adopted the standard recommended by the DOJ and applied by the Opinion. While Oceanview notes that federal Courts of Appeals have not been unanimous in adopting this standard, the only Court of Appeals it identifies as adopting a different position is the Eighth Circuit Court of Appeals, which has adopted a "rational basis"—standard, which is even more favorable to the Regulations than the Opinion's standard. Oceanview Mem. at 33; Opinion at 7-8. Thus, federal Courts of Appeals have been unanimous in rejecting the standard followed by the Trial Court (and a few district courts) for FHA challenges.

Moreover, Oceanview fails to confront this Court's holding, as a matter of law, that DOJ's views—that the Regulations are beneficial and valid under the FHA

and that the legal standard adopted by the Sixth, Ninth and Tenth Circuits should be followed—"warrant considerable respect." Opinion at 8, 9 (internal quotation marks and citations omitted). *See also Olmstead*, 527 U.S. at 597-98 ("[b]ecause [DOJ] is the agency directed by Congress to issue regulations implementing Title II [of the ADA], its views warrant respect") (citation omitted); *M.R. v. Dreyfus*, 697 F.3d 706, 734-35 (9th Cir. 2012) (district court erred in discounting DOJ's interpretation of ADA's integration mandate in statement of interest, which views were worthy of "considerable respect"); *Albano v. Kirby*, 36 N.Y.2d 526, 532 (1975) ("[o]rdinarily, courts will defer to the construction given statutes and regulations by the agencies responsible for their administration, if said construction is not irrational or unreasonable").

Given that this Court not only followed the prevailing view of the legal standard to follow but also followed the well-recognized principle of giving considerable weight to the views of the DOJ, there is not even a novel issue of federal law—let alone state law—for the Court of Appeals to review here. This Court's following of such substantial authority presents no question worthy of review for the Court of Appeals.

CONCLUSION

For the above reasons, the State respectfully requests that this Court deny Oceanview's motion for leave to reargue or permission to appeal.

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Respectfully submitted,

CONSTANTINE CANNON LLP

Robert L. Begleiter
Gary J. Malone
335 Madison Avenue, Fl. 9
New York, New York 10017
Telephone: (212) 350-2700
Facsimile: (212) 350-2701
Email:
gmalone@constantinecannon.com

Attorneys for Respondent-Appellant