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**New York Supreme Court**  
**APPELLATE DIVISION—THIRD DEPARTMENT**

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In the Matter of

OCEANVIEW HOME FOR ADULTS, INC. D/B/A OCEANVIEW MANOR,  
*Petitioner-Respondent,*

—and—

RESIDENT AA, RESIDENT BB, and RESIDENT CC,  
*Petitioners,*

—against—

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

—and—

ANNE MARIE T. SULLIVAN, M.D., in her official capacity as  
Commissioner of Mental Health for the State of New York,  
*Respondent.*

For a Judgment Pursuant to Article 78  
of the Civil Practice Law and Rules

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**BRIEF OF *AMICUS CURIAE***  
**CLASS COUNSEL FOR THE FEDERAL SETTLEMENT IN SUPPORT**  
**OF RESPONDENT-APPELLANT AND IN SUPPORT OF REVERSAL**

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## INTRODUCTION

### I. INTEREST OF THE AMICI CURIAE

*Amici* consists of five co-Class Counsel<sup>1</sup> charged with enforcement of settlement in federal litigation<sup>2</sup> (the “Federal Settlement”) acknowledging that the State’s mental health system—as administered by the State’s Department of Health (“DOH”) and the State’s Office of Mental Health (“OMH”)—violated the Americans with Disabilities Act (“ADA”), as interpreted by *Olmstead*, by permitting the segregation of individuals with serious mental illness into large adult homes. We represent the 4,300 individuals with serious mental illness currently stuck in an argument between the State and a for-profit corporation that professes to advocate for them. Nine years ago, we were designated by the United States District Court Eastern District of New York (“the District Court”) as Class Counsel for all individuals with serious mental illness who reside in twenty-three impacted<sup>3</sup> adult homes in New York City,<sup>4</sup> and our work on their behalf continues today. We write to ensure that the individuals who are caught in this legal battle

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<sup>1</sup> There are five co-Class Counsel: Disability Rights New York; MFY Legal Services; Paul, Weiss, Rifkind, Wharton & Garrison LLP; New York Lawyers for the Public Interest, Inc.; and the Bazelon Center for Mental Health Law.

<sup>2</sup> *O’Toole v. Hochul*, No. 1:13-CV-4166 (E.D.N.Y. 2014).

<sup>3</sup> An “impacted” adult home is an adult home in which 25% of the residents, or twenty-five residents (whichever is fewer) have mental disabilities. *See* N.Y. Exec. § 553.10 (McKinney 2013).

<sup>4</sup> *Disability Advocs., Inc. v. Paterson*, 653 F. Supp. 2d 184 (E.D.N.Y. 2009), vacated sub nom. *Disability Advocs., Inc. v. New York Coal. for Quality Assisted Living, Inc.*, 675 F.3d 149 (2d Cir. 2012).

are not casualties. They cannot be sacrificed at the hands of the adult home industry, which will enjoy a financial windfall should the Trial Court’s decision stand, while individuals with serious mental illness have their rights to lose.

## II. BACKGROUND

### A. PRE-LITIGATION INVESTIGATION DOCUMENTED SYSTEMATIC ABUSE AND NEGLECT IN LARGE NEW YORK CITY ADULT HOMES

In 2002, a Pulitzer Prize-winning series of articles published in the *New York Times* documented the anarchy of adult homes in New York City, overwhelmingly blighted by abuse, neglect, inadequate medical and mental health care, fraud and death.<sup>5</sup> The articles established that between 1995 and 2001, there were 946 deaths at twenty-six of the largest adult homes in New York City.<sup>6</sup> In many cases, these deaths were a result of poor living conditions or treatable ailments.<sup>7</sup>

Many inspection reports of various adult homes chronicled vermin-infested rooms and deficient—sometimes fraudulent—record-keeping regarding residents’

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<sup>5</sup> Clifford J. Levy, *For Mentally Ill, Death and Misery*, N.Y. TIMES (Apr. 28, 2002), <https://www.nytimes.com/2002/04/28/nyregion/for-mentally-ill-death-and-misery.html?searchResultPosition=2>; Clifford J. Levy, *Here, Life is Squalor and Chaos*, N.Y. TIMES (Apr. 29, 2002), <https://www.nytimes.com/2002/04/29/nyregion/here-life-is-squalor-and-chaos.html?searchResultPosition=1>; Clifford J. Levy, *Voiceless, Defenseless, and a Source of Cash*, N.Y. TIMES (Apr. 30, 2002), <https://www.nytimes.com/2002/04/30/nyregion/voiceless-defenseless-and-a-source-of-cash.html?searchResultPosition=1>.

<sup>6</sup> *For Mentally Ill, Death and Misery*, *supra* note 5. A third of these days included people under sixty years old. *Id.* For context, these twenty-six homes housed about 5,000 individuals with mental illness. *Id.*

<sup>7</sup> *See id.*



money and health care.<sup>8</sup> The investigation also uncovered that various adult home operators and staff routinely threatened residents and were abusive, both psychologically<sup>9</sup> and physically.<sup>10</sup> There were also corroborated reports of adult home operators encouraging staff to engage in misconduct such as falsifying records and misreporting resident deaths.<sup>11</sup> There was ample evidence that adult home operators and their associated health care providers coerced residents to undergo treatment that they did not need in order to bill Medicaid and Medicare.<sup>12</sup> If residents refused to see the health care providers, adult home administrators threatened to hospitalize residents, evict them, or withhold their personal needs allowances from their disability checks.<sup>13</sup>

These articles paint a harrowing portrait of adult homes as inhumane institutions that are more concerned with maximizing capacity and generating revenue than caring for the people they are meant to serve. Although adult homes were originally intended to help individuals with mental illness establish self-sufficiency and return to the community, the *New York Times* reported “there is nothing rehabilitative about the place – it rarely tries to help residents obtain proper

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<sup>8</sup> *Id.*

<sup>9</sup> *Voiceless, Defenseless, and a Source of Cash, supra note 5.*

<sup>10</sup> *Here, Life is Squalor and Chaos, supra note 5.*

<sup>11</sup> *For Mentally Ill, Death and Misery, supra note 5; Voiceless, Defenseless, and a Source of Cash, supra note 5.*

<sup>12</sup> *For Mentally Ill, Death and Misery, supra note 5; Voiceless, Defenseless, and a Source of Cash, supra note 5.*

<sup>13</sup> *Voiceless, Defenseless, and a Source of Cash, supra note 5.*

therapy, job training or, at times, even get dressed.”<sup>14</sup> As one resident succinctly stated, “this is the last stop...they are not preparing anyone for living outside of here.”<sup>15</sup>

## **B. DISABILITY ADVOCATES, INC. v. PATERSON**

In 2003, Disability Advocates, Inc. (“DAI”)<sup>16</sup>—through its representation by co-Class Counsel that comprise the *amici*—brought suit against the State. They did so 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 25% of the resident population, or twenty-five residents (whichever is fewer), have a mental illness. *Disability Advocs., Inc. v. Paterson*, 653 F. Supp. 2d 184, 187 (E.D.N.Y. 2009). Oceanview Home for Adults is one such impacted adult home. *Id.* at 196. The complaint alleged that the State, in violation of the ADA and Section 504 of the Rehabilitation Act of 1973 (“Section 504”), knowingly placing individuals with serious mental illness into substandard adult homes rather than in more integrated residential settings. Complaint at 3, *Disability Advocs., Inc. v. Paterson*, 653 F. Supp. 2d 184 (E.D.N.Y. 2009) (No. 03-CV-3209). The complaint sought an order that would require the State to promptly take necessary steps for DAI’s

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<sup>14</sup> *Here, Life is Squalor and Chaos*, *supra* note 5.

<sup>15</sup> *Here, Life is Squalor and Chaos*, *supra* note 5.

<sup>16</sup> Disability Advocates, Inc. (now doing business as Disability Rights New York) is a protection and advocacy organization congressionally authorized to pursue legal remedies on behalf of individuals with disabilities.

constituents to receive services in the most integrated setting appropriate to their needs. *Id.* at 34.

Discovery concluded on November 14, 2006. *Disability Advocs., Inc. v. Paterson*, 653 F. Supp. 2d at 188. After discovery, the parties amassed a factual record of over 13,000 pages and approximately 675 exhibits. *Id.* In 2009, the District Court presided over an eighteen-day bench trial that spanned five weeks. *Id.* During the trial, the District Court heard testimony from State officials, mental health and other experts, lay witnesses with considerable government experience, service providers, and current and former adult home residents. *Id.* In total, “twenty-nine witnesses testified, more than three hundred exhibits were admitted into evidence, and excerpts from the deposition transcripts of twenty-three additional witnesses were entered into the record, along with the 3,500 page trial transcript.” *Id.* at 189.

On September 8, 2009, the District Court issued a sixty-page Memorandum and Order (“Order”) that set forth findings of fact and conclusions of law. *Id.* In its Order, the District Court concluded:

“DAI has proven by a preponderance of the evidence that its constituents...are not receiving services in the most integrated setting appropriate to their needs. *The adult homes at issue are institutions that segregate residents from the community and impede residents’ interactions with people who do not have disabilities.* DAI has proven that that virtually all of its constituents are qualified to receive services in “supported housing,” a far more integrated setting in which individuals with mental illness live in apartments scattered throughout the community and receive

flexible support services as needed. DAI has also proven that its constituents are not opposed to receiving services in more integrated settings. Therefore, DAI has established a violation of the integration mandate of the [ADA] and the Rehabilitation Act (emphasis added).”

*Id.* at 187–88 (emphasis added).

To support its conclusion that impacted adult homes, including Oceanview Home for Adults, isolate residents from nondisabled individuals, the District Court relied on evidence that supported its factual finding that adult homes are institutions. *Disability Advocs., Inc. v. Paterson*, 653 F. Supp. 2d at 224. The District Court found that adult homes are large congregate settings that house people with disabilities, many who have mental illness. *Id.* By design, large adult homes control their residents through highly regimented routines, restricting access to those outside the home, and limiting choice and autonomy. *Id.* They have little to no privacy, and are discouraged—and many times prohibited—from managing activities of daily living, such as cooking, medication administration, cleaning, and managing their own finances. *Id.* Given the regimentation of the adult home setting, residents’ opportunities to maintain relationships with nondisabled individuals are limited. *Id.*

Further, the District Court concluded that virtually all of DAI’s constituents are qualified for supported housing. *Id.* at 256. The District Court credited DAI’s three expert witnesses, all of whom testified that virtually all adult home residents could move to supported housing if the appropriate supports were provided to

them. *Id.* at 233–34. The District Court also found that there were no material differences between adult home residents and supported housing residents, as adult home residents often do not reside there by choice or even by clinical determination that it is the most appropriate setting for them. *Id.* at 245–46.

Lastly, the District Court concluded as a matter of law that DAI’s constituents were not opposed to living in more integrated settings and would choose to live in settings other than adult homes. *Id.* at 267. The District Court found that, in fact, adult home residents have expressed a preference for supported housing. *Id.* at 263.

The Department of Justice (“DOJ”) successfully intervened in the lawsuit after the District Court’s Order, due to its status as the agency that enforces the ADA. *Disability Advocs., Inc. v. Paterson*, No. 03-CV-3209, 2009 WL 4506301 at \*1 (E.D.N.Y. Nov. 23, 2009). The District Court acknowledged that the DOJ has an interest in consistent interpretation and enforcement of the integration mandate of the ADA. *Id.*

On appeal, the Second Circuit Court of Appeals vacated the District Court’s Order due to lack of standing. *Disability Advocs., Inc. v. New York Coal. for Quality Assisted Living, Inc.*, 675 F.3d 149, 152 (2d Cir. 2012). However, the Second Circuit did not question the District Court’s underlying findings of fact or conclusions of law. *See id.*

### **C. O'TOOLE v. HOCHUL**

On July 23, 2013, the United States filed an enforcement action against the State for failing to provide individuals with mental illness opportunities to live in the “most integrated setting” appropriate for their needs, as required by the ADA and Section 504. *United States v. New York*, 13-CV-4165, 2014 WL 1028982 at \*2 (E.D.N.Y. Mar. 17, 2014). The five co-Class Counsel<sup>17</sup> simultaneously filed, on behalf of a class of individuals with serious mental illness who reside in twenty-three impacted adult homes in New York City including Oceanview Home for Adults, an action for injunctive and declaratory relief on the same grounds. *Id.* The two cases were consolidated and the parties immediately filed a joint proposed Stipulation and Order of Settlement. *Id.*

Among other things, the then-proposed Federal Settlement called for the State to provide all class members the opportunity to live in supported housing and other integrated settings appropriate to their needs. *Id.* The Federal Settlement required the State to provide a minimum of 2,000 supported housing units for current adult home residents, and any additional necessary units. *Id.* The Federal Settlement also required services to be provided for class members who transition into the community to assist with their transition. *Id.* The District Court and an

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<sup>17</sup> The District Court appointed Class Counsel in *O'Toole* on November 20, 2013. *United States v. New York*, 2014 WL 1028982, at \*2.

appointed Independent Reviewer monitor the implementation of the Federal Settlement. *Id.* at 3. Many settlement terms were informed by material gleaned from a decade of litigation in *DAI*, including thousands of pages of discovery documents, expert reports, testimony from trial witnesses, and written opinions from the District Court. *Id.* at 5.

The adult home regulations (“the Challenged Regulations”)<sup>18</sup> that were issued by DOH in January 2013 were a cornerstone of the original settlement filed by the parties in 2013. Pls.’ Pre-Hr’g Mem. of Law in Supp. of Mot. for Final Approval of the Proposed Settlement and Arty’s Fees at 13, *O’Toole v. Hochul*, 13-CV-4166 (E.D.N.Y. Jan. 8, 2014). After another challenge to these regulations by the adult home industry in the Supreme Court in Albany County (*Doe v. Zucker*, Index No. 07079/2016, eventually removed to the District Court of Northern District of New York), resulting in a 5-month temporary restraining order on enforcement of the regulations, the parties executed a supplemental settlement that removed reference to the regulations so that such challenges would not stall implementation of the settlement. Stipulation and Order at 3, *O’Toole v. Hochul*, 13-CV-4166 (E.D.N.Y. May 18, 2017). Among other important provisions that are

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<sup>18</sup> The Challenged Regulations, as identified by the Trial Court in its amended decision, are at 18 NYCRR §§ 487.2(c), 487.4(c), (h), 487.10(e)(3) and 487.13. Amended Decision/Order/Judgment at 7, *Oceanview Home for Adults, Inc. v. Zucker*, No. 906012-16 (Sup. Ct. Albany Cnty, 2022). The decision does not include 18 NYCRR § 487.4(d). However, most of the Trial Court’s decision centers around that regulation.

discussed below, the Challenged Regulations provide that Transitional Adult Homes<sup>19</sup> cannot admit new residents with serious mental illness. 18 NYCRR § 487.4(d). Judge Garaufis<sup>20</sup> has repeatedly highlighted the importance of the Challenged Regulations in furthering the goals of the Federal Settlement to benefit individuals with serious mental illness, including by stating the Challenged Regulations “. . . serve as the foundation of the Settlement Agreement . . .” *Residents and Fams. v. Zucker*, No. 16-CV-1683, 2017 WL 5496277, at \*11 (E.D.N.Y. Jan. 24, 2017).

On January 9, 2014, the District Court held a Fairness Hearing to give class members the opportunity to share their opinions of the then-proposed settlement. *United States v. New York*, 13-CV-4165, 2014 WL 1028982 at \*3 (E.D.N.Y. Mar. 17, 2014). Prior to the hearing, 125 class members registered to speak or attend, and 61 class members gave statements at the hearing. *Id.* Class members provided their views on the settlement in 162 signed declarations, letters or other written submissions to the Court. *Id.* Class members described “their feelings of confinement, mental deterioration, and unhappiness in adult homes.” *Id.* at 4. Some class members reported dangerous or unsanitary living conditions, recounting

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<sup>19</sup> The Challenged Regulations define “transitional adult home” as “an adult home 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 . . .” 18 NYCRR § 487.13(b)(1).

<sup>20</sup> Judge Garaufis presided over DAI and continues to oversee the Federal Settlement.



incidents in which they were given the wrong medication by adult home staff, were denied toilet paper, or dealt with bed bug infestations. *Id.* at 4. They overwhelmingly supported the proposed settlement because it gave them an opportunity to have greater autonomy and freedom. *Id.* The Federal Settlement was so-ordered by Judge Garaufis in March 2014.

**D. ADULT HOMES DO NOT REPRESENT THE INTERESTS OF INDIVIDUALS WITH SERIOUS MENTAL ILLNESS**

Following the District Court’s Order in *DAI*, two trade associations<sup>21</sup> that represent the interests of assisted living residences and adult homes throughout the State moved to intervene in the action. *Disability Advocs., Inc. v. Paterson*, No. 03-CV-3209, 2009 WL 5185807 at \*1 (E.D.N.Y. Dec. 23, 2009). To support their motions, they asserted several interests. As the District Court noted, “[c]hief among [their interests] is a concern over the economic ramifications for the adult homes of any remedy that might be imposed” such as the possibility that the State may eliminate adult home grant programs, reduce or reallocate public funding for adult homes, revoke operating certificates for some adult homes, or interfere with adult homes’ private contracts with residents. *Id.* at 2. The District Court denied their motion, ruling that permitting intervention would unnecessarily delay a “long

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<sup>21</sup> These trade associations are the Empire State Association of Assisted Living and the New York Coalition for Quality Assisted Living. *Disability Advocs., Inc. v. Paterson*, No. 03-CV-3209, 2009 WL 5185807 at \*1 (E.D.N.Y. Dec. 23, 2009).

overdue” remedy. *Id.* at 6. The District Court found that any harm resulting to adult homes was “largely of their own making” because they were fully aware of the litigation and its possible consequences. *Id.*

In January 2014, adult homes once again attempted to insert themselves into federal court litigation through counsel that represented nineteen adult homes in which class members lived, while simultaneously claiming to represent “several thousand” adult home residents. Pls.’ Feb. 4, 2014, Ltr. at 1, *O’Toole v. Hochul*, 13-CV-4166 (E.D.N.Y. 2014). In a letter to the District Court, they made several claims in opposition to the Federal Settlement. Perhaps the most concerning was a claim that class members’ testimony at the Fairness Hearing “demonstrates a lack of understanding among residents regarding the contents of the Proposed Settlement and the practical effect it will have on their lives.” *Id.* at 2. This claim is troubling, particularly after class members courageously spoke about their lived experience in adult homes despite the legitimate threat of retaliation by adult home operators. In dismissing their objections, the District Court noted “the court remains skeptical of the Adult Home Operators’ role and motives in this case. It does not escape the court that adult homes and their representative trade association have a financial interest in preventing residents from leaving their facilities, which may face funding or staff reduction should residents transfer to

alternative housing.” *United States v. New York*, 13-CV-4165, 2014 WL 1028982 at \*10 (E.D.N.Y. Mar. 17, 2014).

Unsuccessful in their attempts to intervene in federal court litigation, adult homes have moved on to try their luck in state court. In challenging the regulations, adult homes feign to be advocates for individuals with mental illness, “concerned” with their right to choose to live in Transitional Adult Homes. However, numerous studies, investigations, and decades of litigation—which centered the voices of individuals with mental illness, not the adult home operators’—have demonstrated that adult homes have only been interested in maintaining capacity to generate revenue. The annulment of the Challenged Regulations only stands to benefit adult homes monetarily while harming individuals with mental illness by placing them into institutions proven to cause them harm.

### **ARGUMENT**

Class Counsel for the Federal Settlement submit this *amici curiae* brief in support of reversal of the Trial Court’s decision that permanently enjoined the State from enforcing regulations designed to desegregate impacted adult homes and promote the chances of recovery for individuals with serious mental illness. The Trial Court’s ruling that adult homes are not institutions contravenes decades-long litigation that has proven otherwise through extensive discovery, multiple

export reports, and a five-week bench trial. Moreover, the Trial Court’s holding that the Fair Housing Act Amendments (“FHAA”) preempt the Challenged Regulations does not comport with the statute’s intent. The FHAA’s goals are to promote the societal inclusion and independence of individuals with disabilities. H.R. Rep. No. 100-711, at 18 (1988), as reprinted in 1988 U.S.C.C.A.N. 2173, 2179. The Challenged Regulations were promulgated to further those goals, and therefore do not violate the FHAA.

The Trial Court’s annulment of the Challenged Regulations will also have far-reaching harmful effects beyond the litigants in this case. The annulment risks a disastrous consequence—the resumption of segregation of individuals with mental illness into large institutional settings. The annulment of the Challenged Regulations also makes enforcement of the Federal Settlement more difficult by eliminating key provisions designed to protect class members, such as curbing discouragement and interference by adult home operators and their staff.

**I. THE TRIAL COURT’S RULING THAT ADULT HOMES ARE NOT INSTITUTIONS IS IN DIRECT CONTRAVENTION OF FEDERAL LAW**

**A. IT HAS ALREADY BEEN ESTABLISHED IN FEDERAL COURT THAT ADULT HOMES, INCLUDING OCEANVIEW HOME FOR ADULTS, ARE INSTITUTIONS**

In its Order, the District Court held that DAI established that the State violated the integration mandate of the ADA and Section 504 by not providing

services to individuals with mental illness in the most integrated setting appropriate to their needs. *Disability Advocs., Inc. v. Paterson*, 653 F. Supp. 2d 184, 188 (E.D.N.Y. 2009). In so doing, the District Court made a factual finding that adult homes are, in fact, institutions. *Id.* at 198. The District Court relied on DAI expert Elizabeth Jones' definition that "an institution...in my experience, and in the literature, is a segregated setting for a large number of people that through its restrictive practices and its controls on individualization and independence limits a person's ability to interact with other people who do not have a similar disability." *Id.* at 199. As a preliminary matter, the District Court found that, as of December 31, 2008, more than 80% of residents in the twenty-eight impacted adult homes in New York City had a mental illness. *Id.* at 196. In eighteen homes, more than 95% of the residents have mental illness, and in nine homes, 100% of the residents have a mental illness. *Id.* There were only four homes in which less than 50% of the residents have mental illness. *Id.*

The District Court then went into a ten-page discussion as to why impacted adult homes are, in fact, institutions, relying on expert testimony from both parties as well as former and then-current adult home residents. The District Court noted many features that make adult homes comparable to State psychiatric facilities. *Disability Advocs., Inc. v. Paterson*, 653 F. Supp. 2d at 199. As the District Court explained, life in adult homes is "highly regimented...designed to manage and

control large numbers of people...by eliminating choice and personal autonomy, establishing inflexible routines for the convenience of staff, restrictive access, implementing measures which maximize efficiency, and penalizing residents who break the rules.” *Id.* There are strict schedules for mealtimes, taking medication, receiving public benefits, and other daily activities. *Id.* These schedules impede on residents’ ability to come and go freely. *Id.* at 205. Residents are assigned roommates and health care providers and have assigned seating during mealtimes. *Id.* at 224. They must seek permission to change these assignments. *Id.* at 199, 204.

The District Court noted that, far from community-based residences, adult homes “bear little resemblance to the homes in which people without disabilities live.” *Disability Advocs., Inc. v. Paterson*, 653 F. Supp. 2d at 200. A State expert testified that medical and mental health staff are constantly present in adult homes; that meals times, medication times, phone calls, and mail deliveries are announced over a public address system; and that privacy is extremely limited because of the large numbers of residents and staff. *Id.* Beyond that, residents are subject to an extensive set of rules that concern aspects such as visitors, curfews, and reporting their comings and goings from the home. *Id.* at 201. Some residents expressed fear that they will face retaliation if they do not follow these rules, and some have been punished for not abiding by them. *Id.*

The District Court found that much of the residents’ daily lives takes place in the adult homes, from the activities<sup>22</sup> the adult home organizes to the health care providers residents see. *Disability Advocs., Inc. v. Paterson*, 653 F. Supp. 2d at 203–04. The District Court further found that the adult home setting limits its residents’ opportunities to interact with nondisabled people or to become integrated in the community. *Id.* at 208. Some residents had visitors, but there were many impediments. As one former resident testified, there was nowhere to have a private conversation, the visiting areas were small, visitors could not join mealtimes, visitors were not allowed to stay overnight, and visiting hours ended at 8 p.m.” *Id.* at 210. As one of the State’s experts, Dr. Jeffrey Geller—an expert for Oceanview Home for Adults in the instant action—testified, the adult home setting made it difficult for residents to gain employment, as “living in a place where the phone is answered ‘Brooklyn Adult Care Center’ ‘diminishes your work options and social contacts.’” *Id.* at 211.

Moreover, the mental health programs provided to residents placed little emphasis on skill development. *Disability Advocs., Inc. v. Paterson*, 653 F. Supp. 2d at 212. A review by the New York State Commission on the Quality of Care for and Advocacy for Persons with Disabilities showed a “disconnect” between

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<sup>22</sup> These activities consist of “games, puzzles, and other child-appropriate leisure activities.” *Disability Advocs., Inc. v. Paterson*, 653 F. Supp. 2d at 203–04.

residents’ goals—achieving independent living and job skills—and the goals of these programs.<sup>23</sup> *Id.* To the extent that some mental health programs did try to teach independent living skills, the District Court found that residents do not have the opportunity to practice skills such as cooking, budgeting, and grocery shopping in the adult homes. *Id.* at 213. This is because adult homes discourage, and some prohibit, residents from cooking, cleaning, doing their laundry, administering their medication, and handling their finances. *Id.* at 214–15. As one former resident testified, “the adult home fosters complete dependency upon them to do everything for you, [and] discourages independence.” *Id.*

The District Court held a Fairness Hearing to give class members the opportunity to share their opinions of the Federal Settlement. *United States v. New York*, 13-CV-4165, 2014 WL 1028982 at \*3 (E.D.N.Y. Mar. 17, 2014). Many class members complained of a lack of privacy and expressed the desire for a home in which they could spend time alone or entertain their loved ones. *Id.* at 4. Class members overwhelmingly supported the Federal Settlement because it gave them an opportunity to have greater autonomy. *Id.* Class members looked forward to freedoms many take for granted: the prospect of seeking employment, the ability to prepare their own meals, choose when to eat, manage their own finances, and do

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<sup>23</sup> Some of these programs simply provided group movie viewings and coloring books to residents. *Disability Advocs., Inc. v. Paterson*, 653 F. Supp. 2d at 212.



their own laundry. Pls.' Pre-Hr'g Mem. of Law in Supp. of Mot. for Final Approval of the Proposed Settlement and Arty's Fees at 14, *O'Toole v. Hochul*, 13-CV-4166 (E.D.N.Y. Jan. 8, 2014).

**B. THE FHAA CANNOT BE USED TO JUSTIFY THE INSTITUTIONALIZATION OF INDIVIDUALS WITH SERIOUS MENTAL ILLNESS**

The Trial Court's decision that the Challenged Regulations violate the FHAA because they discriminate on the basis of disability does not comport with the intention of federal disability legislation. The FHAA makes it unlawful to "discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a [disability]." 42 U.S.C. § 3604(f)(1). The FHAA also prohibits discrimination in the "terms, conditions, and privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling." 42 U.S.C. § 3604(f)(2). Through these prohibitions, Congress made "a clear pronouncement of a *national commitment to end the unnecessary exclusion of persons with [disabilities] from the American mainstream*" and recognized that "[t]he right to be *free from housing discrimination is essential to the goal of independent living* (emphasis added)." H.R. Rep. No. 100-711, at 18 (1988), as reprinted in 1988 U.S.C.C.A.N. 2173, 2179.

Title II of the ADA prohibits discrimination against individuals with disabilities by state and local governments. 42 U.S.C. § 12132. In the opening provisions of the ADA, Congress found, “historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.” 42 U.S.C. § 12101(a)(2). Congress specifically emphasized that “discrimination against individuals with disabilities persists in such critical areas as... institutionalization...” 42 U.S.C. § 12101(a)(3). In *Olmstead*, the Supreme Court held that “[u]njustified isolation...is properly regarded as discrimination based on disability.” *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 587 (1999). The Supreme Court relied on two key findings: (1) “institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life”; and (2) “institutional confinement severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.” *Id.* at 600–01.

In *DAI*, the District Court concluded, among other things, that “impacted” adult homes, including Oceanview Home for Adults, are institutions that segregate residents from the community and impede residents’ interactions with people who

do not have disabilities. *Disability Advocs., Inc. v. Paterson*, 653 F. Supp. 2d 184, 187 (E.D.N.Y. 2009). As a result, the District Court held that the State violated the integration mandate of the ADA and Section 504. *Id.* at 188. In response to this holding, the State enacted the Challenged Regulations in order to further its compliance with the integration mandate in a manner that is consistent with the District Court's interpretation of the State's responsibility under federal law.

The Trial Court was incorrect when it held that the Challenged Regulations violate the FHAA. Rather than perpetuate discrimination, the Challenged Regulations remedy discrimination. They do so by recognizing that individuals with serious mental illness do not belong in large institutions that have been found to segregate them from nondisabled individuals, curtail their autonomy and independence, and diminish their employment and educational opportunities. *Amici* have actively monitored adult homes since the Federal Settlement was so-ordered in 2014. We have found no fundamental difference between impacted adult homes at the start of the *DAI* litigation and these adult homes today. We receive frequent reports of harm from individuals with mental illness. For example, class members have reported verbal abuse by adult home staff members, such as being called racial slurs and other disparaging names. Settlement providers have reported cockroach and bed bug infestations. Class members have reported mismanagement of funds, such as adult home administrators denying residents

their checks or giving their funds, without consent, to other residents to manage. Numerous class members have reported that staff attempted to dissuade them from the transition process. Former residents even reported that adult home staff attempted, post-transition, to coax them back into the adult home. These examples do not even begin to scratch the surface. By diverting individuals with mental illness away from institutional adult homes that have been found to cause them harm, the State is promoting the goals of the FHAA and ADA to end the exclusion of individuals with mental illness from mainstream society.

## **II. THE ANNULMENT OF THE CHALLENGED REGULATIONS WILL HAVE FAR-REACHING AND HARMFUL EFFECTS**

### **A. THE ANNULMENT OF THE CHALLENGED REGULATIONS RISKS NEW WAREHOUSING OF INDIVIDUALS WITH SERIOUS MENTAL ILLNESS IN INSTITUTIONS FOUND TO CAUSE THEM HARM**

If the Challenged Regulations are eliminated, the State will soon find itself in the same situation that triggered our litigation nineteen years ago. The Challenged Regulation at the center of this case prohibits Transitional Adult Homes from admitting new residents with mental illness. 18 NYCRR § 487.4(d). The regulation mirrors OMH clinical advisories<sup>24</sup> that stated Transitional Adult

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<sup>24</sup> N.Y. State OMH, *Clinical Advisory* (Aug. 8, 2012), [https://omh.ny.gov/omhweb/advisories/clinical\\_advisory\\_adult.pdf](https://omh.ny.gov/omhweb/advisories/clinical_advisory_adult.pdf); N.Y. State OMH, *Update – Clinical Advisory Regarding Adult Homes Previously Issued to Psychiatric Inpatient Programs*

Homes are not clinically appropriate settings in which to provide services to the scores of individuals with serious mental illness who reside in them, nor do they promote recovery or rehabilitation. Moreover, they reflect the wisdom gleaned from reports, investigations, studies<sup>25</sup> and a decade of litigation that consisted of thousands of pages of discovery, multiple expert reports, and a five-week bench trial.

In *DAI*, the District Court found that the State “denied thousands of individuals with mental illness in New York City the opportunity to receive services in the most integrated setting appropriate to their needs.” *Disability Advocs., Inc. v. Paterson*, 653 F. Supp. 2d 184, 188 (E.D.N.Y. 2009). It follows that the Federal Settlement’s goal was to give class members the opportunity to transition to the most integrated setting appropriate to their needs. The District Court found in *DAI* that for virtually all class members, supported housing and other community-based alternatives were the more appropriate settings. *Id.* at 256.

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on August 8, 2012 (Oct. 1, 2012),

[https://omh.ny.gov/omhweb/advisories/clinical\\_advisory\\_10\\_1.pdf](https://omh.ny.gov/omhweb/advisories/clinical_advisory_10_1.pdf)

<sup>25</sup> There are numerous reports, investigations, and studies spanning decades that underscore that adult homes are not conducive to the rehabilitation or care of individuals with mental illness. *See* Charles J. Hynes, *Private Proprietary Homes for Adults: A Second Investigative Report* (1979); N.Y. State Adult Care Facilities Workgroup, *Report Submitted to the Commissioner, Department of Health* (2002); N.Y. State Comm’n on Quality of Care for the Mentally Disabled, *Exploiting Not-For-Profit Care in an Adult Home: The Story Behind Ocean House Center, Inc.* (2001); N.Y. State Comm’n on Quality of Care for the Mentally Disabled & Mental Hygiene Rev. Bd., *Adult Homes Serving Residents with Mental Illness: A Study of Conditions, Services, and Regulations* (1990).

In its Order, the District Court noted that the evidence demonstrated that for virtually all of DAI’s constituents, “nothing about their disabilities necessitates living in the adult homes as opposed to supported housing, nor would they require services that are not already provided to people living in supported housing.” *Id.*

To support this conclusion of law, the District Court made numerous findings of fact. The District Court found that supported housing programs can serve adult home residents who need varying levels of support, including those who require very high levels of support such as developing activities of daily living, medication management, and assistance with budgeting and socialization. *Disability Advoc., Inc. v. Paterson*, 653 F. Supp. 2d at 231.

The District Court credited DAI’s three expert witnesses, all of whom testified that virtually all adult home residents could move to supported housing. *Id.* at 233–34. Expert Elizabeth Jones<sup>26</sup> concluded that there was “no reason that adult home residents couldn’t live in supported housing if the appropriate supports were provided to them.” *Id.* at 237. State expert Dr. Geller—who testified as an expert for Oceanview Home for Adults in the instant case—conceded that “those who reside in adult homes could reside in apartments with varying degrees of

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<sup>26</sup> In formulating her opinions, Ms. Jones visited twenty-three impacted adult homes for a total of seventy-five hours, personally interviewed 179 residents, and spoke to various medical and mental health care workers. *Disability Advoc., Inc. v. Paterson*, 653 F. Supp. 2d 184, 236 (E.D.N.Y. 2009).

support.” *Id.* at 229. This is more than can be said for adult homes, which Ms. Jones found “do not provide intensive supervision to people...they have restrictive rules and practices, but they do not provide individualized attention to people.” *Id.* at 237–38. And Linda Rosenberg—Former Senior Deputy Commissioner of the OMH, whose experience with adult homes and its residents dates back to the 1970s—testified that adult homes offer “less support in many cases” than supported housing. *Id.* at 240.

Additionally, the District Court found there are no material differences between adult home residents and supported housing residents. *Disability Advocs., Inc. v. Paterson*, 653 F. Supp. 2d at 245. As numerous former and then-current adult home residents testified, the reason that so many individuals with mental illness resided in adult homes was *not* by choice or because of a clinical determination that an adult home is the most appropriate setting for them. *Id.* at 260. Rather, adult homes were often presented as the only option available. *Id.* As one study of 2,000 adult home residents with mental illness found, approximately 75% of the residents either expressed an explicit interest living somewhere else, or did not express a preference for living in the adult home.<sup>27</sup> *Id.* at 262. For all the concern amongst the adult home industry about individuals with mental illness and

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<sup>27</sup> DAI experts opined that interest may be even higher with education about alternative housing options, which was not given prior to this study. *Disability Advocs., Inc. v. Paterson*, 653 F. Supp. 2d at 262.

their ability to choose, their choices are abundantly clear. As one former resident who has since transitioned into supported housing explained: “I can eat foods that were not permitted in the home...I do my own shopping. I do my own food selection...It’s freedom for me...It’s being able to actually live like a human being again.” *Id.* at 222.

For the last nine years, the State has worked to transition individuals with mental illness out of adult homes and into the community. The elimination of the Challenged Regulations will find us right back where we started when our litigation began nineteen years ago. As Judge Garaufis cautioned, “If the Regulations are eliminated, it will open the front doors of the adult homes to individuals with serious mental illness. Without some mechanism for limiting admissions or quickly transitioning individuals who are willing and able to move into supported housing, adult homes could easily revert to being warehouses for individuals with serious mental illness.” *United States v. New York*, No. 1:13-CV-4165, 2017 WL 2616959, at \*1 n. 3 (E.D.N.Y. June 15, 2017).

**B. THE ANNULMENT OF THE CHALLENGED REGULATIONS WILL HARM CLASS MEMBERS BY MAKING ENFORCEMENT OF THE FEDERAL SETTLEMENT MORE DIFFICULT**

Regardless of whether the Challenged Regulations are in place, the State is obligated, under the Federal Settlement, to transition every class member who



wants to transition into the community. While their obligations are unchanged by the Trial Court’s decision, the annulment of the Challenged Regulations undoubtedly makes enforcement of the Federal Settlement more burdensome—not only for the State and Settlement implementation providers, but also class members. The annulment will do little but create chaos and cause harm.

The Trial Court struck 18 NYCRR § 487.13, which pertains to Transitional Adult Homes and directly affects essential aspects of the Federal Settlement. One provision states “the operator shall cooperate with [Federal Settlement implementation providers] and *shall provide, without charge, space for residents to meet privately with such individuals or entities. The operator shall not attempt to influence or otherwise discourage individual residents from meeting with such entities and individuals.*” 18 NYCRR § 487.13(h) (emphasis added). Another provision provides requirements for this space, including that it must have a door that closes to ensure conversations are private and that the space must not be under surveillance by adult home staff. 18 NYCRR § 487.13(i).

These regulations were enacted to protect individuals with serious mental illness who have experienced retaliation, threats, and abuse from adult home operators and their staff. The reality of such extraordinary and widespread

misconduct has been well documented.<sup>28</sup> Though we are nine years into enforcement of the Federal Settlement, we continue to litigate about these same issues. Several months ago, *amici* litigated the issue of space plans because adult homes were not making suitable, private space available to implementation providers. We frequently receive from the State reports of discouragement and interference by adult home operators and their staff. In addition to the examples enumerated above (see Section *I.B*), implementation providers have reported many times that adult homes interfere with their ability to access class members and speak to them privately. These ongoing issues evidence that the annulment of the Challenged Regulations will only frustrate the Federal Settlement and thwart class members from exercising their right to transition into the community.

### **CONCLUSION**

For the forgoing reasons, Class Counsel for the Federal Settlement submit this brief in support of reversal of the Trial Court's decision.

Date: February 9, 2023

Respectfully submitted,



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Marc Fliedner

Disability Rights New York  
*on behalf of Class Counsel  
for the Federal Settlement*

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<sup>28</sup> See *For Mentally Ill, Death and Misery*, *supra* note 5; *Here, Life is Squalor and Chaos*, *supra* note 5; *Voiceless, Defenseless, and a Source of Cash*, *supra* note 5.

## **PRINTING SPECIFICATIONS STATEMENT**

This brief was prepared using Microsoft 2016. The body of the brief has been prepared in 14-point Times New Roman font and the footnotes of the brief are prepared in 12-point Times New Roman font. The brief is double-spaced, except for headings and footnotes as rules permit. This brief complies with N.Y. R. App. Div. Prac. § 1250.8(f)(2) (McKinney) because it contains 6,597 words, excluding the sections exempted by the rule.