STATE OF NEW YORK
APPELLATE DIVISION

SUPREME COURT
THIRD DEPARTMENT

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

Petitioner-Respondent,

-against-

HOWARD M. ZUCKER, M.D., J.D., in his official capacity as COMMISSIONER OF HEALTH OF THE STATE OF NEW YORK,

Respondent-Appellant.

App. Div. Case No. CV-22-1940
Albany Co. Index No. 906012-16

PROPOSED BRIEF OF EMPIRE STATE ASSOCIATION OF ASSISTED LIVING, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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DISCLOSURE STATEMENT

Empire State Association of Assisted Living, Inc. ("ESAAL") is a New York not-for-profit corporation that is a trade organization representing the interests of assisted living and other adult care facilities and their residents. The petitioner-respondent in this manner, Oceanview Home for Adults, Inc. d/b/a Oceanview Manor ("Oceanview") is not a member of ESAAL.

PRELIMINARY STATEMENT

Adult homes are New York State licensed facilities which care for adults who, by reason of physical or other limitations associated with age, disability, mental conditions or other factors, are unable to live independently and may require assistance with activities of daily living (*see* Social Services Law § 2 [25]). Activities of daily living include bathing, dressing, toileting, eating, and assisting with self-administering medications (*see* 18 NYCRR 487.7 [e]). "Residents are provided with personal care and services on a long-term basis, in order to enable them to remain healthy and to participate in daily personal and community activities" (Department of Health, *NYS Adult Care Facility Profiles*, available at https://profiles.health.ny.gov/acf [accessed Mar. 1, 2023]).

In January 2013, appellant-respondent ("the Commissioner" or "DOH") adopted 18 NYCRR 487.13, and amended portions of 18 NYCRR 487.2, 487.4, and 487.10 (collectively, the "Challenged Regulations"). The Challenged Regulations prohibit adult homes from admitting new applicants with a "serious mental illness" or "SMI" if (a) the adult home has the capacity to house 80 or more persons and (b) at least 25% of the adult home's resident population is classified as having SMI. The Challenged Regulations also require adult homes designated by DOH as "transitional adult homes"—i.e., those with the capacity to house at least 80 persons, of whose current population at least 25% are classified as having

SMI—to adopt plans to reduce the proportion of residents with SMI to less than 25%.

The Challenged Regulations are, quite simply, a restriction on housing choice based upon whether a person has SMI. SMI constitutes a disability under Federal anti-discrimination law. The issue before the Court is simple. Supreme Court, after a lengthy trial, annulled the Challenged Regulations as facially discrimination against persons with disabilities in violation of the Fair Housing Act (as amended, the "FHA"). The Court can allow this decision to stand. Or, the Court can reverse, as requested by DOH, so that the agency can continue to enforce a rule that bars individuals from their choice of housing solely on the basis of a disability. ESAAL respectfully submits that an affirmance is appropriate.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

What Are Adult Homes?

Adult homes are residences of choice. People must apply to reside there (*see* 18 NYCRR 487.7 [q]). The application process includes a medical evaluation using a form issued by DOH (*see* 18 NYCRR 487.7 [h]). Adult homes are not institutional facilities to which a person may be involuntarily admitted (*see* Mental Hygiene Law § 9.27). Rather, they are providers of long-term care services in the community.

Adult homes exist within a continuum of long-term care providers in the State of New York. Long-term care services can include health services, such as nursing

or personal care, and human services, such as assistance with dressing or incidental household tasks (*see e.g.* Public Health Law § 3602 [1]). Long-term care services may be provided by government agencies, particularly in institutional settings, but a significant proportion are delivered by private, not-for-profit or proprietary providers regulated by the Department of Health or the Office of Children and Family Services (*see* Public Health Law §§ 2801; 3612; Social Services Law § 461).

At one end of the long-term care spectrum are "residential health care facilities" (commonly referred to as nursing homes), which provide "lodging, board and physical care" and which may provide "nursing care to sick, invalid, inform, disabled or convalescent persons" (Public Health Law § 2801 [2]-[4]). A nursing home is often a person's "last home" (10 NYCRR 415.1 [a]). Nursing homes are generally considered to be "institutional" settings, similar to a hospital (*Matter of Blossom View Nursing Home v Novello*, 4 NY3d 581, 584 [2005]).

At the other end are long-term care services performed by home health aides or personal care aides in the person's residence (*see* Public Health Law § 3602 [4]-[5]). This offers the option to receive some long-term care services without relocating, if the services "can maintain the recipient's health and safety in his or her own home" (18 NYCRR 505.23 [b] [2] [i]).

Adult homes are community-based, non-institutional settings that provide "long-term residential care, room, board, housekeeping, personal care . . . and

supervision to five or more adults" (Social Services Law § 2 [25]; *see* New York State Home and Community Based Settings Transition Plan [May 2018], 78-79 available at https://www.health.ny.gov/health_care/medicaid/redesign/hcbs/docs/2018-05-18_hcbs_final_rule.pdf [accessed Feb. 23, 2023] [contrasting adult care facilities with "institutional-like settings, such as nursing homes"]).

People choose adult homes for a variety of reasons. They are regulated by DOH, and must meet certain standards for the physical environment that may make them a safer option for a person with mobility issues (*see e.g.* 18 NYCRR 487.11). They provide 24-hour supervision, including "monitoring residents to identify abrupt or progressive changes in behavior or appearance that may signify the need for assessment and service" and "arranging for medical or other services" in the event of an "individual" emergency (18 NYCRR 487.7 [d]). Adult homes provide "medication management" services to assist residents with proper dosing, timing, frequency, and safe storage of prescribed drugs (18 NYCRR 487.7 [f]). They also provide "an organized and diversified program of individual and group activities," which may help a person previously alone in his own apartment to connect with others in his community (*see* 18 NYCRR 487.7 [h] [1]).

Adult home residents benefit from these services but also enjoy the social model of long term care. Adult home residents have many freedoms not available in a nursing home or hospital. These freedoms include the ability to come and go as

they wish, to see friends, develop relationships and make their own decisions. By legal definition and practical reality, adult homes are "non-institutional[,] home-like flexible environments" (R. 1492).

Although not technically tenants, adult home residents enter into a written agreement with the operator of the home and are, with certain exceptions, entitled to the protections of a special judicial proceeding before their agreement may be terminated involuntarily (*see* Social Services Law §§ 461-c; 461-h; *see also* 42 CFR 441.710 [a] [iv] [A]). Residents may voluntarily terminate their admission agreement with the adult home and leave at a time of their choosing (*see* 18 NYCRR 487.1 [f] [1]).

"ALPs" as an Alternative to Nursing Home Placement

Some adult homes participate in the "Assisted Living Program" or "ALP" (Social Services Law § 461-l). ALP was established in the early 1990s as "an alternative to nursing home placement for individuals who historically have been admitted to nursing facilities yet do not have the health care needs that would make placement in a nursing facility the only possible option" (NY Reg, July 14, 1993, at 20). ALP services include, in addition to those offered by all adult homes, "personal care services, home care services and such other services" the State "determine[s] by regulation must be included" to the ALP (Social Services Law § 461-l [1] [e]). These additional services include "nursing services"; "physical therapy, speech

therapy, and occupational therapy"; and "case management" to "establish linkages to services provided by other community agencies" (10 NYCRR 505.35 [g], [h]). Adult homes must be approved by DOH to operate as an ALP, and may only provide ALP services for the number of beds within the home authorized by DOH (*see* Social Services Law § 461-l [3] [a]).

ALP placement occurs following an evaluation by the individual's primary care physician, and a clinical assessment by a Licensed Home Care Services Agency or Certified Home Health Agency. ALP residents have substantially greater health care and other needs, and therefore require more assistance, than may be provided by an adult home without enhanced licensure. This assistance includes help with both scheduled and unscheduled needs.

Overwhelmingly, residents in an ALP have disabilities, whether due to conditions associated with age or other health concerns. Their care needs must significant enough to qualify them for placement in a nursing home. They require hands-on assistance from staff at various times during the day and night with activities of daily living including dressing, bathing, and maintaining continence, which may involve escorting to the restroom on a regular schedule or assisting with changing incontinence undergarments. ALP residents need more intensive assistance from staff, along with skilled nursing and medical assistance to manage conditions such as diabetes. Many residents are fall risks, and need ongoing

monitoring assistance with a multitude of tasks, including transferring from their beds to chairs, feeding and nutrition, and assistance with toileting, bathing, and grooming. Many need regular assistance to manage their incontinence. This level of community-based care is rarely available outside of the ALP service model. The individual care needs of a nursing home-eligible person are substantial.

The State's medical assistance program ("Medicaid") will pay for ALP "services" because DOH determined ALP provides a "supporting housing alternative for the care of elderly and other frail persons" (NY Reg, July 14, 1993, at 20). From the State's perspective, ALP is financially beneficial because it is "cost-effective," i.e., less "expensive," than a nursing home (*id.*). Approximately 85% of ALP residents in New York (and a similar percentage of ESAAL member ALP residents) are Medicaid beneficiaries (*see* https://www.health.ny.gov/health_care/medicaid/program/longterm/alps.htm).

The Challenged Regulations

Under New York law, provided that an individual is medically eligible, and meets other applicable admission criteria, she or he would normally be legally permitted to live in any adult home (*see* Social Services Law § 461-c [6]). The rules defined by the trial court as the "Challenged Regulations" disrupt the ordinary process based upon an individual's mental health status (R. at 6).

The Challenged Regulations define a "person with serious mental illness" ("SMI") as someone with a "diagnosed mental illness whose severity and duration of mental illness results in a substantial functional disability" (18 NYCRR 487.2 [c]). A "transitional adult home" is any adult home with the capacity to house at least 80 persons where at least 25% of the current residents have a serious mental illness (18 NYCRR 487.13 [b] [1]). Transitional adult home operators are not permitted to accept applicants with SMI "whose admission would increase the mental health census of the facility" (18 NYCRR 487.4 [d]).

An adult home's status as a transitional adult home is determined by DOH, based upon "a quarterly statistical report" (18 NYCRR 487.10 [e] [3]). According to DOH, at various times during 2022, approximately 25 adult homes, including Oceanview, were "transitional adult homes" (*see* https://health.data.ny.gov/Health/Transitional-Adult-Homes/rzzx-9t3e/data). Of these homes, 18 (including Oceanview) were in New York City, and 7 were outside of the City.

Since DOH adopted the Challenged Regulations, the ALP program has expanded. Much of that expansion has involved transitional adult homes (*see* DOH, Assisted Living Program 4500 Conversion Initiative for Transitional Adult Homes [Oct. 17, 2014], *available at* https://www.health.ny.gov/funding/soi/inactive/alp_4500_solicitation/). As a consequence, in many counties across the State, the majority of the capacity to provide ALP services is in transitional adult homes. For

example, only 8 of the 20 adult care facilities in Kings County are certificated to provide ALP services; of those, 5 (including Oceanview) are transitional adult homes (*see* DOH, Adult Care Facility Quarterly Statistical Information Report: 2013-present, *available at* https://health.data.ny.gov/Health/Adult-Care-Facility-Quarterly-Statistical-Informat/h5s5-hcxg [accessed Mar. 1, 2023]). Over 78% of the ALP bed capacity in Kings County is in transitional adult homes.

The same is true outside of New York City. In Dutchess County, 5 of the 11 adult care facilities are certificated to provide ALP services; however, 63% of the actual ALP beds are in the two communities that have been designated by DOH as transitional adult homes. In Niagara County, 56% of the ALP beds are in the two transitional adult homes. The Challenged Regulations severely limit community access to the ALP program.

ESAAL Members and Their Residents Are Affected by the Challenged Regulations

ESAAL represents over 333 assisted living and adult care facilities across the State, serving more than 32,847 New York seniors and other persons with disabilities (*see* Affirmation of David T. Luntz, Esq., ¶ 4). ESAAL members include ALPs and facilities designated as transitional adult homes under the Challenged Regulations (*see* Luntz Affirm., ¶ 11). ESAAL's membership includes ALPs and transitional adult homes inside and outside of New York City (*see id.*).

This appeal relates to State regulations which directly and expressly restrict a basic freedom, which is the ability of disabled New Yorkers to live where they want to live, with the services and supports they need. For this reason, ESAAL considers the issues presented to extend far beyond the parties in this matter.

ESAAL's Members Are Distinctly Affected by the Regulations Because They Include Homes That, Unlike Oceanview, Are Not "Impacted Adult Homes" Involved in the Federal Settlement

In its brief, Respondent makes the broad statement that, "[p]rior to promulgation of the [Challenged] Regulations in 2013, the State had been concerned for years about the living conditions faced by persons with mental illness residing in adult homes" (Respondent's Brf., at 7). The testimony cited by Respondent specifically concerns adult homes "in the City" which some Office of Mental Health ("OMH") officials apparently viewed as "institution-like settings that were contrary to the recovery of people with serious mental illness" (R. at 1972).

This specific group of adult homes in New York City were identified in a Federal civil rights actions against the Commissioner's predecessor in the Eastern District of New York, alleging that the government's mental health system discriminated against certain New York City adult home residents by not offering them "supported housing" (*Disability Advocates, Inc. v New York Coalition for Quality Assisted Living, Inc.*, 675 F3d 149, 155 [2d Cir 2012]). The relevant actions were filed in 2013 (*see* R. 1357). The allegations were similar to those from prior

civil rights litigation against the State that had been dismissed by the Second Circuit in 2012. A settlement that had been negotiated with the State after the Second Circuit dismissed the original litigation (the "*O'Toole* settlement") was filed simultaneously with the 2013 actions (*see* R. 6,860).

During the time when the State was negotiating the *O'Toole* settlement, DOH proposed the Challenged Regulation. The Challenged Regulation is not expressly required by the *O'Toole* settlement but is discussed therein (*see* R. at 6,861).

The *O'Toole* settlement applies only to "NYC Adult Home Resident[s]", meaning a person with SMI residing at an "Impacted Adult Home" in New York City (R. 6,863). The settlement requires DOH to "afford[]" these persons "the opportunity to transition to a unit" of "Supported Housing . . . within New York City" (R. 6,865-6,866). The *O'Toole* settlement also directs the State to "fund Supportive Housing units in a quantity sufficient such that every NYC Adult Home Resident for whom Supportive Housing is appropriate . . . is afforded the opportunity transition to a unit during the time when this Agreement is in effect" (R. 6,865). The settlement further specified "a minimum of 2,000 Supportive Housing units", all of which had to be located within "New York City" (R. at 6,866).

Oceanview, the petitioner in this proceeding, is located within New York City and is one of the Impacted Adult Homes relevant to the *O'Toole* settlement. The

alternative housing contemplated by the *O'Toole* settlement is offered only to New York City residents in specific adult homes, including Oceanview.

However, the Challenged Regulations are imposed on all adult homes in the State, not just New York City. The State was not required to, and did not, provide alternative housing elsewhere in the State as part of the *O'Toole* settlement. ESAAL respectfully submits this amicus brief to highlight for the Court the problematic impacts of the Challenged Regulations outside of New York City and the discriminatory nature of the Challenged Regulations in context of the *O'Toole* settlement.

STATEMENT OF RELEVANT FACTS

ESAAL adopts Oceanview's Statement of Relevant Facts of as relevant to ESAAL's arguments.

ARGUMENT

POINT I

THE CHALLENGED REGULATIONS IMPROPERLY LIMIT THE ABILITY OF PERSONS WITH SMI TO ACCESS ASSISTED LIVING SERVICES

Section 804 (f) (1) of the Fair Housing Act ("FHA") states that "it shall be unlawful [t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of that buyer or renter" (42 USC § 3604 [f] [1] [i]). Section 816 of the FHA provides that "any law of a

State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid" (42 USC § 3615). There is no dispute in this proceeding that, regardless of a person's other health conditions, SMI constitutes a disability for the purposes of the FHA claim (*see Hollandale Apts. & Health Club, LLC v Bonesteel*, 173 AD3d 55, 64 [3d Dept 2019]).

Regulations that are facially discriminatory are subjected to heightened scrutiny by the courts and, if they cannot withstand heightened scrutiny, are preempted by the FHA (*see Sierra v City of New York*, 552 F Supp 2d 428, 431 [SD NY 2008]; *see Tsombanidis v West Haven Fire Dept.*, 352 F3d 565, 575 [2d Cir 2003]). Courts applying heightened scrutiny have repeatedly "rejected the proposition that the government has a legitimate interest in preventing" concentration of housing "for the mentally disabled . . . in order to benefit disabled individuals" (*Human Resource Research & Mgmt. Grp., Inc. v Suffolk County*, 687 F Supp 2d 237, 259 [ED NY 2010]; *see United States v Starrett City Assocs.*, 840 F2d 1096, 1102 [2d Cir 1988], *cert denied* 488 US 946 [1988]). Put simply, "the principle of nondiscrimination has lexical priority over the principle of integration" and a government agency under a "duty to pursue the goal of integration" must use "policies which do not involve discrimination" (*United States v Charlottesville Redev. & Hous. Auth.*, 718 F Supp 461, 468 [WD Va 1989]; *see H.O.P.E., Inc. v*

Eden Mgmt., LLC, Case No. 13-CV-7391, 2017 WL 4339824, *16 [ND Ill Sept. 29, 2017] [holding that a State's "constructive denial of participation" in supportive housing "based on" plaintiffs' "mental health diagnoses" was actionable under the "FHA"]). DOH selected a discriminatory means to achieve an ostensibly integrative end. This it cannot do.

Assisted Living Programs provide health care and personal care services to persons who, based upon assessment by medical professionals, cannot live independently because they require assistance with activities of daily living. ALP residents have medical and human service needs great enough that, absent placement, they would be eligible to reside in a nursing home. Some of these services, such as medication management, may provide significant benefit to a person with SMI whose treatment plan includes prescription drugs. But most of these services, from assistance with bathing, dressing, and toileting to arranging for supplies to manage diabetes, may be needed by an ALP resident for reasons that have nothing to do with their mental health.

ALP services are available only in licensed facilities. As noted above, half or more of the ALP capacity in many counties is in facilities designated by DOH as transitional adult homes. This has the effect of denying persons with SMI the choice to reside in a home where they can access services they need, solely because of a disability.

Outside of New York City, there is no federal settlement obligating the State to provide alternative housing. Thus, there is a very real risk that the Challenged Regulations will lead persons with SMI who are eligible to reside in an ALP being forced, instead, to reside or remain in an institutional setting such as a nursing home. Supreme Court's well-reasoned judgment ensuring freedom of choice should, therefore, be affirmed.

POINT II

THE TRIAL COURT PROPERLY CONSTRUED *OLMSTEAD*

In the seminal case of *Olmstead ex rel. L.C. v Zimring*, the Supreme Court of the United States held that "under Title II of the ADA, States are required to provide community-based treatment for persons with mental disabilities when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities" (527 US 581, 606 [1999]). As noted by the trial court in this matter, this "holding is often referred to as the *Olmstead* mandate" or integration mandate (R. at 77).

DOH contends that the trial court "mistakenly held that the federal integration mandate of the ADA and *Olmstead* does not apply to a state's administration of a

regulatory scheme governing private facilities" (DOH's Brf., at 32). DOH is incorrect.

Title II of the ADA states "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities *of a public entity*, or be subjected to discrimination *by any such entity*" (42 USC § 12132 [emphasis added]). In its well-reasoned decision, the trial court stated DOH erred in relying "upon *Olmstead*" to argue that "the Challenged Regulations further the government's bona fide interest in integrating persons with serious mental illness into the most integrated setting appropriate for their mental health needs, as required by Title II of the ADA" (R. at 76). The court below explained that "Title II of the ADA does not apply to adult homes" that "are privately owned and operated facilities" but only "to a 'public entity,' defined as 'any State or local government'" (R. at 77).

The trial court's construction of *Olmstead* is correct. The Supreme Court explained that Title II applies to "programs, services, and activities" that are "provided by public entities" (*Pennsylvania Dept. of Corrections v Yeskey*, 524 US 206, 210 [1998]). Consequently, a "Title II claim against . . . a private entity" "fails" because the entity is "not a public entity within the meaning of the ADA" (*Prim v Stein*, 6 F4th 584, 594 [5th Cir 2021]). A "private" entity that enters into a "contract with a municipality to provide services" is not subject to the Title II, "even if it

[provides services] according to the municipality's rules and under its direction" because rules and regulations do not transform a private entity into "a creature of any governmental entity" (*Green v City of New York*, 465 F3d 65, 79 [2d Cir 2006]; *see Edison v Douberly*, 604 F3d 1307, 1310 [11th Cir 2010] [holding that Title II did not apply to a private corporation managing a state prison under contract]; *rehg. en banc denied* 405 Fed Appx 475 [11th Cir 2010]; *Lee v Corrections Corp. of Am./Correctional Treatment Facility*, 61 F Supp 3d 139, 143 [D DC 2014]).

In *Noel v New York City Taxi & Limousine Commn.* (687 F3d 63 [2d Cir 2012]), the Second Circuit addressed the application of Title II of the ADA to "the conduct of a public entity administering a licensing program" in light of "the Attorney General's regulations" which "add scope and shape to the general prohibitions in the ADA, which are not self-reading" (687 F3d at 69; *see* 28 CFR 35.130). In *Noel*, the plaintiffs alleged that the Taxi and Limousine Commission violated "Title II of the ADA . . . by failing to provide meaningful access to taxi services for persons with disabilities" (*id.* at 65). The plaintiffs argued that, because "the TLC exercises pervasive control over the taxi industry in New York City" through its "licensing and regulatory authority" the agency was "required by Title II(A)" to use that power "to mandate that persons who need wheelchairs be afforded meaningful access to taxis" (*id.*). The Circuit Court held that, "[n]otwithstanding the broad construction of the ADA," the regulations did not "support plaintiffs'

claims against the TLC" (*id.* at 69). The Court reasoned that, although the Attorney General promulgated a regulation "which governs the conduct of a public entity administering a licensing program," that regulation "makes clear that the persons who are protected are those who are seeking the licenses," not the "persons who are consumers of the licensees' product" (*id.*). The Second Circuit has made it clear that Title II does not apply to a private entity, and applies to a licensing agency only if a discriminatory "private industry practice results from the licensing requirements" (*id.* at 70; *see Ivy v Williams*, 781 F3d 250, 257-258 [5th Cir 2015] ["The named plaintiffs essentially argue that the TEA's pervasive regulation and supervision of driver education schools transforms these schools into agents of the state. But we hold that the mere fact that the driver education schools are heavily regulated and supervised by the TEA does not make these schools a "service, program, or activity" of the TEA. Otherwise, states and localities would be required to ensure the ADA compliance of every heavily-regulated industry, a result that would raise substantial policy, economic, and federalism concerns. Nothing in the ADA or its regulations mandates or even implies this extreme result. Thus, we join the Second Circuit in holding that public entities are not responsible for ensuring the ADA compliance of even heavily-regulated industries."], *vacated as moot sub nom Ivy v Morath* 137 S Ct 414 [2016]).

DOH does not provide adult care facility services, or ALP services. It licenses and regulates them and, in the case of ALP, enters into a provider agreement to pay for services rendered to Medicaid beneficiaries. These fall short of "provision" required for Title II of the ADA. Accordingly, the court below properly held that Title II of the ADA and the *Olmstead* integration mandate are not applicable to DOH's regulation of adult homes.

CONCLUSION

For the foregoing reasons, and the reasons stated by Oceanview, this Court should affirm the judgment of the Court below.

Dated: Albany, New York
March 7, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH 22 NYCRR 1250.8 (f) (2)

This computer-generated amicus brief complies with the word limit of Practice Rules of the Appellate Division (22 NYCRR) § 1250.8 (f) (2) because, excluding parts of the document exempted by that rule, this document contains 4,325 words.

Dated: Albany, New York
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