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New York Supreme Court

APPELLATE DIVISION — THIRD DEPARTMENT

Docket No. CV-22-1940

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,

(Caption Continued on the Reverse)

BRIEF FOR RESPONDENT-APPELLANT

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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

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

QUESTIONS PRESENTED 5

NATURE OF THE CASE 6

A. The State's Regulation of Adult Homes Prior to Promulgation of the Regulations at Issue 6

B. The State's Promulgation of the Regulations 8

C. The Effects of the Regulations 14

D. The Oceanview Litigation 16

E. The Trial Court's Decision 17

ARGUMENT 19

I. THE TRIAL COURT ERRED IN NOT GRANTING DEFERENCE TO DOJ'S VIEWS THAT THE FEDERAL *OLMSTEAD* INTEGRATION MANDATE SUPPORTS THE REGULATIONS, WHICH ARE VALID UNDER THE FHA 19

II. THE TRIAL COURT ERRED IN FAILING TO GRANT JUDGMENT FOR THE STATE AFTER OCEANVIEW FAILED TO MEET THE *SALERNO* STANDARD OF SHOWING THE REGULATIONS ARE INVALID UNDER ALL CIRCUMSTANCES 24

III. THE TRIAL COURT ERRED IN FAILING TO GRANT JUDGMENT FOR THE STATE AFTER UNDISPUTED EVIDENCE SHOWED THE STATE WAS JUSTIFIED IN PROMULGATING THE REGULATIONS TO FURTHER LEGITIMATE GOVERNMENTAL INTERESTS IN A NARROWLY TAILORED WAY 30

A. Undisputed Evidence Showed the Regulations Further the State's Legitimate Interests in Desegregating Persons With Disabilities and Improving Their Lives 31

1. The Regulations Further the State's Legitimate Interest in Fostering the Integration of Persons With Disabilities 31

a. The Trial Court Erred in Holding the Federal Integration Mandate Does Not Apply to the State's Regulation of Private Facilities 32

b. The Trial Court Erred in Holding That the State Failed to Comply with the Requirements of *Olmstead* 36

2. The Regulations Furthered the State's Legitimate Interest in Improving Chances for Recovery 42

a. The Trial Court Erred in Rejecting The State's Interest in Improving Chances for Recovery 43

b. The Trial Court Erred in Holding That The State's Interest in Improving Chances for Recovery Was Illegitimate Because It Was Not Based on Clinical Studies 47

B. Undisputed Evidence Showed That the Regulations are Serving the State's Legitimate Interests in a Narrowly Tailored Way 53

IV. THE TRIAL COURT ERRED IN HOLDING THE REGULATIONS ARE ARBITRARY AND CAPRICIOUS UNDER ARTICLE 78 60

CONCLUSION 62

TABLE OF AUTHORITIES

Cases **Page(s)**

Adirondack Health-Uihlein Living Ctr. v. Shah,
125 A.D.3d 1366 (4th Dep't 2015) 49

Albano v. Kirby,
36 N.Y.2d 526 (1975)..20

Bangerter v. Orem City Corp.,
46 F.3d 1491 (10th Cir. 1995) 22, 40, 55

Bd. of Trustees of Univ. of Alabama v. Garrett,
531 U.S. 356 (2001) 41

Boykin v. Gray,
986 F.Supp.2d 14 (D.D.C. 2013)..48

Boykin v. Fenty,
650 F. App'x 42 (D.C. Cir. 2016)..48

Carrier v. Salvation Army,
88 N.Y.2d 298, (1996)..49

Children's Health Def. v. Fed. Commc'ns Comm'n,
25 F.4th 1045 (D.C. Cir. 2022) 26

City of Cleburne, Tex. v. Cleburne Living Ctr.,
473 U.S. 432 (1985) 40, 53

Civ. Serv. Emps. Ass'n, Inc. v. Milowe,
66 A.D.2d 38 (3d Dep't 1979).. 21, 32, 54

Cmty. House v. City of Boise,
490 F.3d 1041 (9th Cir. 2007) 22, 30, 55

Consolation Nursing Home, Inc. v. Comm'r of New York State Dep't of Health,
85 N.Y.2d 326 (1995)..48

Copeland v. Vance,
893 F.3d 101 (2d Cir. 2018) 25

Daveri Dev. Grp., LLC v. Vill. of Wheeling,
934 F.Supp.2d 987 (N.D. Ill. 2013)....................27

Disability Advocs., Inc. v. Paterson,
598 F.Supp.2d 289 (E.D.N.Y. 2009)....................34

Disability Advocs., Inc. v. Paterson,
653 F.Supp.2d 184 (E.D.N.Y. 2009).................... 8, 9, 23, 33, 42, 54

Disability Advocs., Inc. v. New York Coal. for Quality Assisted Living, Inc.,
675 F.3d 149 (2d Cir. 2012)....................8, 9

Familystyle of St. Paul, Inc. v. City of St. Paul, Minn.,
728 F.Supp. 1396 (D. Minn. 1990).................... 38, 54

Familystyle of St. Paul, Inc. v. City of St. Paul, Minn.,
923 F.2d 91 (8th Cir. 1991).................... 38, 39

General Elec. Co. v. New York State Dep't of Labor,
936 F.2d 1448 (2d Cir.1991)....................25

Green v. City of New York,
465 F.3d 65 (2d Cir. 2006)....................36

Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co.,
61 A.D.3d 13 (2d Dep't 2009)....................35

Laflamme v. New Horizons, Inc.,
605 F.Supp.2d 378 (D. Conn. 2009)....................41

M.R. v. Dreyfus,
697 F.3d 706 (9th Cir. 2012)....................21

Maisto v State of New York,
154 A.D.3d 1248 (3rd Dep't 2017)....................35

Martin v. Taft,
222 F.Supp.2d 940 (S.D. Ohio 2002)....................33

Matter of Exec. Cleaning Servs. Corp. v. New York State Dep't of Lab.,
193 A.D.3d 13 (3d Dep't 2021)....................35

Matter of Howard v. Wyman,
28 N.Y.2d 434 (1971) 20

Matter of Malone v. City of New York,
192 A.D.3d 510, (1st Dep't 2021) 49, 51

Matter of New York State Conf. of Blue Cross & Blue Shield Plans v. Muhl,
253 A.D.2d 158 (3d Dep't 1999) 49

Matter of Real Est. Bd. of New York, Inc. v. City of New York,
165 A.D.3d 1, (1st Dep't 2018) 25

Moran Towing Corp. v. Urbach,
99 N.Y.2d 443 (2003) 25

Oconomowoc Residential Programs, Inc. v. City of Greenfield,
23 F.Supp.2d 941 (E.D. Wis. 1998) 27

Ohio House, LLC v. City of Costa Mesa,
No. SACV 19-01710 JVS (PJW), 2020 WL 4187765, 2020 US Dist LEXIS 130089 (C.D. Cal. Mar. 16, 2020) 26

Ohio House, LLC v. City of Costa Mesa,
No. SACV 19-01710 JVS (PJWX) 2020 WL 4187764 (C.D. Cal. June 11, 2020) 26

Olmstead v. L.C. ex rel. Zimring,
527 U.S. 581 (1999) .... passim

Reno v. Flores,
507 U.S. 292 (1993) 25, 26

Residents and Fams. v. Zucker,
No. 16-CV-1683, 2017 WL 5496277 (E.D.N.Y. Jan. 24, 2017) 13

Sailboat Bend Sober Living, LLC v. City of Fort Lauderdale, Fla.,
479 F.Supp.3d 1298 (2020) 39

Sailboat Bend Sober Living, LLC v. City of Fort Lauderdale, Fla.,
46 F.4th 1268 (11th Cir. 2022) 39

Samiento v. World Yacht Inc.,
10 N.Y.3d 70 (2008) 20

Scherer v. U.S. Forest Serv.,
653 F.3d 1241 (10th Cir. 2011)..24

Sierra v. City of New York,
552 F.Supp.2d 428 (S.D.N.Y. 2008)...30

Sierra v. City of New York,
579 F.Supp.2d 543 (S.D.N.Y. 2008).. 39, 50

State of Connecticut Off. of Prot. & Advoc. for Persons with Disabilities v. Connecticut,
706 F.Supp.2d 266 (D. Conn. 2010) 33

Sw. Fair Hous. Council, Inc. v. Maricopa Domestic Water Improvement Dist.,
17 F.4th 950 (9th Cir. 2021)...57

United States v. New York,
No. 1:13-CV-4165, 2017 WL 2616959 (E.D.N.Y June 15, 2017) 13, 22, 41

United States v. Salerno,
481 U.S. 739 (1987) 24, 25, 26

Witzke v. Idaho State Bar,
No. 1:22-cv-00090-REP, 2022 WL 17340272 (D. Idaho Nov. 29, 2022)...........27

Yount v. Regent Univ.,
No. CV 08-8011-PCT-DGC, 2008 WL 4104102 (D. Ariz. Aug. 22, 2008)........27

Statutes

28 U.S.C. § 517..5

42 U.S.C. § 12101(b)(1) 41

42 U.S.C. § 12131(1) 35

42 U.S.C. §§ 3601-3619 3

Rules

CPLR §7803.. 17, 60

Regulations

18 NYCRR § 487.2(c) 1

18 NYCRR § 487.4(c) (1), (2), (3) 7, 37

18 NYCRR § 487.4 (d) 1, 11

18 NYCRR § 487.4(i) 1

18 NYCRR § 487.10(e)(3) 1

18 NYCRR § 487.13 1

18 NYCRR § 487.13 (b) 14

18 NYCRR § 487.13(b)(1) 11

18 NYCRR § 487.13(d)(2) 12

18 NYCRR § 487.13(h) 14

24 C.F.R. § 100.202(c)(2)-(3) 23

28 C.F.R. § 35.130 (b) (6) 33

28 C.F.R. § 35.130(b)(3) 35

28 C.F.R. § 35.130(d) 34

PRELIMINARY STATEMENT

Appellant-Respondent, the New York State Department of Health ("DOH" or the "State"), seeks reversal of a judgment that would strike down State regulations designed to desegregate adult homes and improve the chances for recovery of persons with serious mental illness.

After a bench trial, the Supreme Court of the State of New York, Albany County (Walsh, J.) (the "Trial Court") rendered its Amended Decision/Order/Judgment (the "Decision"), which commits clear errors of law in enjoining the State from enforcing the DOH regulations at 18 NYCRR §§ 487.2(c), 487.4 (d), (i), 487.10(3)[1] and 487.13 (the "Regulations"). The State crafted the Regulations after a decade of civil rights litigation and substantial agency experience in dealing with the serious problem of the segregation of persons with disabilities in State-regulated adult homes that were not designed to foster their recovery.

The Trial Court erroneously concluded that the Regulations—which a federal court and the U.S. Department of Justice ("DOJ") have endorsed as vital to efforts to desegregate housing provided for persons with disabilities, and thereby eliminate discrimination against those persons—are themselves discriminatory under federal law. As these federal entities have confirmed, far from being discriminatory, the

[1] There is no 18 NYCRR § 487.10(3). The reference is an apparent miscitation to 18 NYCRR §§ 487.10(e)(3).

Regulations benefit persons with disabilities by fostering their integration into the community, in housing that is more conducive to their recovery.

The Regulations are designed to foster the recovery of persons with serious mental illness—and to protect their civil rights to be free from discrimination—by integrating them into community settings instead of accepting their segregation into large facilities that have institutional characteristics. As the U.S. Supreme Court held in its landmark decision of *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), the undue segregation of persons with disabilities is itself a form of disability discrimination. The Regulations further the State's interests in protecting and improving the lives of persons with disabilities and in furthering the civil rights of such persons, including the right "to enjoy the benefits of community living," as mandated by *Olmstead.* 527 U.S. at 599.

The Regulations seek to accomplish these goals by prohibiting large State-licensed adult homes with significant concentrations of persons with serious mental illness ("Transitional Adult Homes") from admitting additional persons with serious mental illness until those facilities both become more integrated, and adopt plans to improve the living conditions and chances for recovery of such persons. The Regulations work hand in glove with a comprehensive State initiative to ensure that persons with disabilities live in the least restrictive setting possible by assisting such persons who wish to move, or "transition," from those facilities to independent,

community-based housing. This initiative results from the settlement of federal litigation (the "Federal Settlement") brought by DOJ and a class of private individuals with disabilities that alleged that the State's mental health system—as administered by 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 persons with mental illness into large adult homes that have the characteristics of an institution.

The Trial Court has entered judgment annulling the Regulations—not at the request of any person with a serious mental illness—but at the urging of a Transitional Adult Home, Petitioner-Respondent Oceanview Home for Adults, Inc. The court held that the Regulations violate the federal Fair Housing Act as amended ("FHA" or "FHAA"), 42 U.S.C. §§ 3601-3619. Taking a broad-brush approach, the court struck down all of the Regulations—even those Regulations that Oceanview admitted were designed to make adult homes more conducive to the recovery of persons with serious mental illness. The Trial Court even resurrected Oceanview's Article 78 claim—which had been dismissed and not litigated at the trial—in order to declare that Regulations were also arbitrary and capricious.

The Trial Court's ruling that the Regulations should be annulled is based on erroneous conclusions of law that would eviscerate the State's regulation of State-licensed facilities and efforts to comply with federal law. Disregarding settled state

and federal precedent, the Decision concludes that the State has no legitimate governmental interest in either (1) ensuring that its regulation of state-licensed facilities that house persons with disabilities advances the federal goal of integrating such persons into the community, or (2) requiring State-regulated facilities to refrain from admitting persons with disabilities that the State has determined—based on the experience of its mental health professionals and policymakers—would have a better chance of recovery elsewhere.

These conclusions rely on several glaring misapplications of law—including that a state has no legitimate interest in regulating privately-owned facilities—that provide housing to persons with disabilities pursuant to a state regulatory scheme—to further the goals of integration embodied in the ADA and *Olmstead*. If followed by other courts, the Trial Court's holding would hamstring both DOJ enforcement actions and states' voluntary efforts to further the integration of persons with disabilities into the community. The possibility of such a pernicious effect makes reversal imperative.

Contrary to the directives of both the U.S. Supreme Court and the New York Court of Appeals, the Trial Court also failed to give deference to State and federal agencies in areas of their expertise, and arrogated to itself the drafting of policy in the complex area of regulating facilities serving persons with disabilities—which courts have advised should be left in the hands of professionals.

DOJ—which is charged with enforcing both the FHA and the ADA—filed a Statement of Interest (R8709) pursuant to 28 U.S.C. § 517, expressing the views of the United States that the Regulations are valid under the FHA because they protect the well-being of persons with serious mental illness and further the integration of persons with disabilities into the community, as mandated by the ADA—and in accordance with the Federal Settlement. Far from granting deference to the DOJ's views, the court below simply ignored them and interpreted the FHA and the ADA in a manner contrary to the position of the United States.

While the Decision's invalidation of the Regulations has been stayed by this Court pending appeal, it threatens to do substantial harm to the State and persons with serious mental illness. Implementation of the Decision would likely result in additional persons with disabilities being segregated into facilities that have been targeted as segregated by DOJ and a federal court—reversing the progress the State has made towards bringing the benefits of community living to one of the State's most vulnerable populations.

The State respectfully requests that this Court protect this vulnerable population by reversing the Decision and entering judgment for the State.

QUESTIONS PRESENTED

Question No. 1: In considering a claim that a law was violated, must a court give deference to the agency charged with enforcing the law?

Answer Below: No.

Question No. 2: Does the State have a legitimate governmental interest in using its regulatory authority to advance the federal goal of integrating persons with disabilities into the community?

Answer Below: No.

Question No. 3: Does the State have a legitimate governmental interest in seeking to improve the lives of persons with disabilities, based on the experience and expertise of its mental health professionals and policymakers?

Answer Below: No.

Question No. 4: Do the State's efforts to desegregate facilities housing disabled persons and improve their living conditions meet the standard of being narrowly tailored when those efforts benefit such persons, and no party shows that any alternative would serve the objectives of desegregation and improvement of living conditions?

Answer Below: No.

NATURE OF THE CASE

A. The State's Regulation of Adult Homes Prior to Promulgation of the Regulations at Issue

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. Adult homes are heavily regulated by the DOH, which licenses those facilities—subject to meeting

detailed standards—to ensure the health, safety and well-being of those residents. R10-11; R2910-16 (Deetz Testimony). The State's comprehensive regulatory scheme for adult homes is set forth in Part 487 of Title 18 of New York Codes, Rules and Regulations.

Adult homes—which are not medical facilities—do not provide mental health services. R2911 (Deetz Testimony); R2864 (Vider Testimony); R4705-07 (Vider Testimony). Even prior to the promulgation of the Regulations at issue, the State's regulations set forth detailed admission standards, which bar adult homes from admitting into residence multiple groups with special needs, including persons who need continual supervision in a facility licensed by the Mental Hygiene Law, who suffer from a serious and persistent mental disability sufficient to warrant placement in a residential facility licensed by the Mental Hygiene Law or who require mental health services that cannot be provided by local service agencies or providers. 18 NYCRR § 487.4(c) (1), (2), (3).

Prior to promulgation of the Regulations in 2013, the State had been concerned for years about the living conditions faced by persons with mental illness residing in adult homes. For example, in 2007, OMH circulated several policy documents referencing the problem of persons with mental illness being "stuck" in adult homes, which OMH called a "blight." R7338; R7342; R1963-72 (Sederer Testimony).

B. The State's Promulgation of the Regulations

The Regulations were adopted after several years of litigation brought by disability rights advocates and DOJ challenging the State's policies relating to the residence of persons with serious mental illness in certain large adult homes as contrary to the ADA, as interpreted by the Supreme Court in its landmark *Olmstead* decision. The *Olmstead* decision imposes affirmative duties on states to ensure that individuals with mental disabilities do not live in segregated settings and are given meaningful opportunities to interact with individuals without disabilities. R11-12; *Olmstead*, 527 U.S. at 607 .

In 2013, Disability Advocates, Inc., "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*").

After years of litigation and a lengthy trial, Judge Garaufis held that the State "violated the ADA's integration mandate and found that [administration of] the State's mental health system resulted in the unjustified segregation of DAI's

constituents in large adult homes." R11-12; *DAI*, 653 F.Supp.2d at 187-88. After the liability phase of the trial, the United States intervened in the case, and DOJ filed a "complaint [that adopted] the findings of fact and conclusions of law of the District Court." *DAI II*, 675 F.3d at 160-61.

In April 2012, the Second Circuit vacated the judgment after finding that Disability Advocates lacked standing. *See also DAI II*, 675 F.3d at 162-63. The Second Circuit, however, acknowledged that DOJ's *Olmstead* litigation against the State would likely continue, "and expressed its hope that 'an appropriate, efficient resolution' that would 'consider an appropriate remedy' could be facilitated in such event …." R12 (quoting *DAI II*, 675 F.3d at 162).

As contemplated by the Second Circuit, nearly identical claims were re-asserted by the United States and a class of persons with mental disabilities. R12. As reflected by DOJ's complaint, the United States asserted claims to vindicate the rights of the same persons whose civil rights were found to have been violated in the *DAI* case: (1) persons with mental illness in adult homes with 120 or more beds in New York City in which at least 25 percent of the residents or 25 residents (whichever was fewer) had mental disabilities, and (2) "those at risk of entry into" such adult homes. R1358. DOJ sought injunctive relief against the State for "discriminating against persons with mental illness residing in, and at risk of entry into, [such] Adult Homes by failing to provide services and supports in the most

integrated setting appropriate to their needs …." R1372. The DOJ complaint named only one defendant—the State of New York, which was sued for the operation of its mental health system through OMH and DOH." R1372.

Following the Second Circuit's April 2012 decision, the State and DOJ began negotiating a settlement of the *Olmstead* claims against the State. These negotiations—to resolve claims concerning adult homes with 120 or more beds in New York City in which at least 25 percent of the residents or 25 residents (whichever was fewer) had mental disabilities, and those at risk of entry into such adult homes—included discussion of what eventually became the Regulations. R12-13; R1358.

In conjunction with the State's and DOJ's negotiations to resolve these claims, OMH issued two clinical advisories in August and October of 2012. These clinical advisories concluded that large adult homes meeting the definition of Transitional Adult Homes were not conducive to the recovery of persons with a serious mental illness and were therefore clinically inappropriate. These clinical advisories supported the Regulations, which were promulgated by DOH in January 2013. R12.

The promulgation of the Regulations followed, among other things, detailed discussions among numerous officials at DOH and OMH (which promulgated comparable regulations), as well as numerous consultations with DOJ. R12; R1977-83, R1988-95 (Sederer Testimony); R3139-40, R3172, R3239-40 (Myers

Testimony); R3555, R3565-67 (Briney Testimony). The State gave the public notice of the proposed Regulations, which led to "numerous comments" on the proposals and resulted in several revisions, which did "not substantially alter the regulatory scheme." R4976 (NYS Register).

The Regulations define a 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). The Regulations provide that as long as a facility fits the definition of a Transitional Adult Home, it cannot admit new residents with serious mental illness: "No operator of an adult home with a certified capacity of 80 or more and a mental health census . . . of 25 percent or more of the resident population shall admit any person whose admission will increase the mental health census of the facility." 18 NYCRR § 487.4(d).

The Regulations require operators of Transitional Adult Homes to submit a compliance plan to the State specifying how the Transitional Adult Home will achieve a mental health census that is less than 25 percent of the resident population, and how the Transitional Adult Home will address the needs of its residents, in particular those residents with serious mental illness, including:

(i) fostering the development of independent living skills;

(ii) ensuring access to and quality of mental health services;

(iii) encouraging community involvement and integration; and

(iv) fostering a homelike atmosphere.

18 NYCRR § 487.13(d)(2); R2921-22, R2935-36 (Deetz Testimony). As the Trial Court found, Section 487.13 requires Transitional Adult Homes "to teach skills to enable residents to live more independently in another setting, including managing finances, laundering clothes, basic cooking skills, housekeeping, and shopping." R48-49.

After a Transitional Adult Home reduces its mental health census to less than 25 percent of its residents, that facility is no longer considered a Transitional Adult Home and may resume admitting new residents with serious mental illness. R15.

After the State promulgated the Regulations, the State, DOJ and the class of persons with mental disabilities agreed to the Federal Settlement to resolve the claims of DOJ and the class. The Federal Settlement was then submitted to the federal court for its approval in July 2013. The preamble of the Federal Settlement referenced both the Regulations and their supporting clinical advisories. The Federal Settlement required the State to take steps to reduce the number of persons with serious mental illness in New York City adult homes with a certified capacity of at least 120 beds and a mental health census of 25 percent or more of the resident population or 25 persons, whichever is less—a category that substantially overlapped with Transitional Adult Homes. These steps included requiring the State

to fund supported housing units in communities, together with other supportive services. R12-13.

The Federal Settlement was so-ordered by Judge Garaufis in March 2014. R860; R481.[2] After approving the Federal Settlement, Judge Garaufis—who has continued to oversee the Federal Settlement—has repeatedly noted the importance of the Regulations in furthering the goals of the Federal Settlement to benefit persons with serious mental illness, including by stating that by "closing the front door" to settings that are already segregated within the standards of *Olmstead* and its progeny, the "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). As Judge Garaufis subsequently explained:

> 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, the 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).

[2] The court-ordered Federal Settlement was amended multiple times, all of which amendments were approved by Judge Garaufis. R6891; R6923; R13.

The Regulations currently require operators of Transitional Adult Homes to facilitate the movement of persons with serious mental illness into housing in the community by requiring them to:

> cooperate with the community transition coordinator, housing contractors, peer bridger agencies, care managers, health homes and managed long-term care plans 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).

Following the State's experience with operation of the Regulations, the State instituted a practice of granting waivers to former residents of Transitional Adult Homes that expressed a preference to again reside in a Transitional Adult Home. That process enabled Transitional Adult Homes to admit persons with serious mental illness if they had previously been a resident of a Transitional Adult Home. R63. The State subsequently formalized this waiver practice by amending the Regulations to incorporate the State's waiver process into the Regulations. R7542; R7987.

C. The Effects of the Regulations

Following the State's adoption of the Regulations, the number of Transitional Adult Homes decreased from 49 in 2013 to 35 in 2018. R58; R2934-35 (Deetz Testimony). The percentage of residents in Transitional Adult Homes with serious mental illness has declined. R58. At Oceanview, the percentage of residents with serious mental illness declined from 92.6% in 2013 to less than 47% in 2019. R270,

R2712-13 (Vider Testimony).

Though there is more work to be done, DOH views the Regulations as successful because they 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. R2921-22, R2935-36, R2940-45, R2961, R2970-71 (Deetz Testimony).

OMH funds an extensive system of supports to assist people with mental illness who are living in community settings. OMH has followed the progress of people with serious mental illness who have moved from Transitional Adult Homes into housing in the community in connection with the Federal Settlement. As an OMH official testified, OMH has found that "many people have experienced aspects of recovery as they moved and as they settled into the community …." R3921-22, R3965-76 (Myers Testimony).

Neither DOH nor OMH has received any reports of the Regulations having a detrimental effect on persons with serious mental illness finding appropriate housing. R2961-62 (Deetz Testimony); R3196-99 (Myers Testimony); R3501-03 (Briney Testimony); R3668-69 (Hayes Testimony).

D. The Oceanview Litigation

In 2016, Oceanview and three residents of that facility brought this action, alleging the Regulations and companion regulations promulgated by OMH were invalid under several legal theories.[3] In 2017, the court below, per Justice Gerald W. Connolly (the "Motion Court") dismissed the residents' claims for lack of standing. R102.

In 2018, the Motion Court granted the State summary judgment on all of Oceanview's claims, with the exception of Oceanview's third cause of action that the DOH Regulations violate the FHA because they allegedly impose an unlawful quota on the number of residents with a serious mental illness who may reside in a Transitional Adult Home. R105-38.

In denying the State's motion for summary judgment on Oceanview's FHA claim, the Motion Court applied a test requiring the State to show "that its actions further, in theory and in practice, a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect." R135. The Motion Court held that the State had demonstrated that the Regulations "serve the legitimate bona fide governmental interest of fostering integration of the disabled, in this case the serious mentally ill, into the community rather than

[3] This lawsuit was filed naming Howard M. Zucker as Commissioner of DOH. On January 1, 2023, James McDonald became Acting Commissioner of DOH.

permitting the segregations of such individuals." R136. The Motion Court denied summary judgment, however, on the ground that the State had not demonstrated that there was no issue of material fact "that no alternative would serve that interest with less discriminatory effect." R136.

Among the claims on which the Motion Court granted summary judgment was Oceanview's sixth cause of action seeking a declaration under CPLR Article 78 that the Regulations are arbitrary and capricious. R119, R136. As the court noted, Oceanview had acknowledged at oral argument that its Article 78 petition "did not argue that the challenged regulations lack any rational basis" or "lack any sound scientific or empirical basis." R119.

Oceanview did not seek review of the dismissal of its Article 78 claim. Accordingly, the issue of whether the Regulations should be declared arbitrary and capricious under Article 78 was not litigated at the subsequent trial.

E. The Trial Court's Decision

On June 5, 2019, the Trial Court commenced a trial on Oceanview's sole remaining claim, which continued over 18 non-consecutive days. Subsequently, the court took judicial notice of certain materials in September 2019. R6.

On February 24, 2022, DOJ filed its Statement of Interest on behalf of the United States, in which DOJ expressed the view that Regulations do not violate the FHA. R8709.

On August 31, 2022, the Trial Court reopened the record to admit additional evidence from both parties, and acknowledged receipt of DOJ's Statement of Interest, but indicated that the court viewed DOJ's views as being entitled to no greater deference than an amicus brief filed by an interested party. R6, R4811-13.

On October 6, 2022, the Trial Court filed a Decision/Order/Judgment. On October 18, 2022, the Trial Court filed an Amended Decision/Order/Judgment (the "Decision"), which corrected erroneous citations to the Regulations. R5.

The Decision granted judgment in favor of Oceanview, annulling the Regulations on the ground that they "violate, and [are] therefore preempted by, the" FHA. The court ordered that the State was "immediately and permanently enjoined from enforcing the Challenged Regulations." R9. The Decision does not discuss, or even mention, the contrary views of DOJ set forth in the United States' Statement of Interest.

Although the Motion Court had dismissed Oceanview's Article 78 claim in its entirety, the Trial Court inaccurately described Oceanview's FHA claim as a hybrid claim seeking relief under Article 78 as well, and declared the Regulations arbitrary and capricious under Article 78. R67, R83. The Trial Court did not give notice to the parties prior to the Decision that it was resurrecting Oceanview's dismissed Article 78 claim.

The State filed its Notice of Appeal on October 19, 2022. On November 21, 2022, this Court granted the State's motion for a stay of the Decision pending determination of the appeal, except as it applies to individuals whose admissions were scheduled on or before November 2, 2022.

ARGUMENT

I. THE TRIAL COURT ERRED IN NOT GRANTING DEFERENCE TO DOJ'S VIEWS THAT THE FEDERAL *OLMSTEAD* INTEGRATION MANDATE SUPPORTS THE REGULATIONS, WHICH ARE VALID UNDER THE FHA

The Trial Court's analysis of federal law is fundamentally flawed, and therefore should be reversed. Given that Oceanview's sole claim alleged a violation of the FHA—and the State's defense relied heavily on the ADA—the Trial Court should have begun its analysis by considering the views of the United States. The United States submitted these views to the Trial Court via the DOJ—the agency charged with enforcing these civil rights laws.

Instead of considering DOJ's views on construction and enforcement of these federal laws, the Trial Court devised its own singular interpretation that (1) the federal integration mandate does not apply to the State's regulation of private facilities—even if that regulation results in segregation of persons with disabilities, and (2) the Regulations violate the FHA, primarily because they do not give persons with disabilities the option of not having the Regulations apply to them. These constructions of federal law are contrary to overwhelming precedent and the views

of the United States that the Regulations both support the ADA and are valid under the FHA because they benefit—rather than discriminate against—persons with disabilities.

The Trial Court's failure to grant any deference to the views of DOJ is contrary to the mandates of the United States Supreme Court, the New York Court of Appeals and this Court that courts should generally grant deference to the views of agencies charged with enforcing the laws under consideration.

The leading case on whether courts may disregard the views of agencies entrusted with the enforcement of laws being considered is *Albano v. Kirby*, 36 N.Y.2d 526 (1975). In *Albano*, the court held that "[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," including memoranda by agencies charged with enforcement, of which a court may take "judicial notice." 36 N.Y.2d at 532. *See also Samiento v. World Yacht Inc.*, 10 N.Y.3d 70, 79 (2008) (agency's "interpretation of a statute it is charged with enforcing is entitled to deference"). The Court of Appeals has emphasized that "[i]t is well settled that the construction given statutes and regulations by the agency responsible for their administration, *if not irrational or unreasonable, should be upheld*." *Matter of Howard v. Wyman*, 28 N.Y.2d 434, 438 (1971) (emphasis added).

This Court has applied *Albano* by instructing courts to "adhere to the basic rules that the construction given a statute by the agency responsible for its administration should not be lightly set aside, and should be upheld if not irrational or unreasonable." *Civ. Serv. Emps. Ass'n, Inc. v. Milowe*, 66 A.D.2d 38, 43 (3d Dep't 1979) (internal citations omitted).

It is undisputed that DOJ is the agency charged with enforcing both the ADA and the FHA, and has unparalleled expertise in construction of those laws. As the Supreme Court stated in *Olmstead*, "[b]ecause the Department [of Justice] is the agency directed by Congress to issue regulations implementing Title II [of the ADA], its views warrant respect." 527 U.S. at 597–98 (citation omitted). Courts have followed this admonition of the Supreme Court in deciding whether to consider statements of interest by the United States on interpretation of the ADA. *See, e.g.*, *M.R. v. Dreyfus*, 697 F.3d 706, 735 (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").

As noted by DOJ, "[t]he United States has important enforcement interests under both the FHA and the ADA." R8712. "In addition, the United States has entered into an enforceable settlement agreement with the State on behalf of individuals with serious mental illness who are unnecessarily segregated in adult homes and therefore has an interest in whether the DOH regulation is upheld."

R8713. DOJ emphasized "the importance of the DOH regulation to achieving the goals of the 2013 settlement agreement . . . ." R8718. As DOJ explained, the Regulations support the Federal Settlement by providing a "mechanism for limiting admissions" of persons with serious mental illness into the subject adult homes, without which, those "adult homes could easily revert to being warehouses for individuals with serious mental illness." R8718 (quoting *United States v. New York,* 2017 WL 2616959, at *1 n. 3.

Not only does DOJ have a strong interest in the application of federal law, but—as the enforcer of the FHA and ADA—it has invaluable expertise in the interplay of the rights protected by these civil rights laws. The United States has an obvious interest in ensuring that these two antidiscrimination statutes are applied consistently, in a noncontradictory manner. R8722. *See also* Fair Housing Act ("HUD/DOJ Joint Land Use Statement") (Nov. 10, 2016)[4] at 11 (although *Olmstead* "did not interpret the Fair Housing Act, the objectives of the Fair Housing Act and the ADA, as interpreted in *Olmstead*, are consistent").

Based on this expertise, DOJ explained that a housing restriction challenged as facially discriminatory,

> will pass muster under the FHA upon a showing "(1) that the restriction benefits the protected class or (2) that it responds to legitimate safety concerns raised by the individuals affected rather than being based on stereotypes." *Cmty. House v. City of Boise*, 490 F.3d 1041, 1050 (9th

[4] https://www.justice.gov/opa/file/912366/download.

> Cir. 2007); *Bangerter v. Orem City Corp*., 46 F.3d 1491, 1503-04 (10th Cir. 1995) ….

R8720.

Applying these principles, DOJ concluded that the Regulations could not be considered invalid under the FHA—even if the Regulations were considered facially discriminatory:

> Even if the State's limit on admissions of persons with serious mental illness to adult homes could be considered facially discriminatory, the DOH regulation would not violate the FHA. First, adult homes are unquestionably designated as facilities providing long term residential care for persons with disabilities, and the State may permissibly limit or prioritize admission to individuals with certain disabilities that the facility is designed to serve. See 24 C.F.R. § 100.202(c)(2)-(3). Second, the DOH regulation operates to benefit people with disabilities and is "tailored to particularized concerns" about adult home residents. *See Bangerter*, 46 F.3d at 1503.

R8723.

As DOJ explained, the United States has concluded that the Regulations benefit such persons because "[j]ust as the State could limit admission to facilities that were found to have dangerous living conditions or inadequate supervision and care without contravening the FHA, it may similarly ensure that mental health services are not being provided in congregate facilities that have been found by both the State and the district court in *DAI* to be segregated, in contravention of the State's obligations under the ADA and *Olmstead*, and therapeutically harmful." R8723.

The Trial Court committed a clear error of law in failing to defer to the well-reasoned views of DOJ that (1) the federal integration mandate of the ADA and *Olmstead* apply to the State's regulation of State-licensed adult homes housing persons with disabilities, (2) the Regulations serve to further the integration of persons with disabilities into the community, and (3) the Regulations do not discriminate against such persons in violation of the FHA—but rather benefit them.

II. THE TRIAL COURT ERRED IN FAILING TO GRANT JUDGMENT FOR THE STATE AFTER OCEANVIEW FAILED TO MEET THE *SALERNO* STANDARD OF SHOWING THE REGULATIONS ARE INVALID UNDER ALL CIRCUMSTANCES

The Trial Court's holding that Oceanview did not need to prove the Regulations were invalid under all circumstances in order to prevail on its claim that the Regulations are facially invalid is contrary to *United States v. Salerno*, 481 U.S. 739, 745 (1987), requiring challenges alleging facial invalidity to prove that "no set of circumstances exists" under which the challenged regulation would be valid. Given that Oceanview failed to offer any evidence showing the Regulations would be invalid as applied to every Transitional Adult Home or every person with serious mental illness, the court erred in not granting judgment to the State.

Because Oceanview asked the Trial Court to strike down the Regulations in their entirety, and not just enjoin their enforcement as applied to Oceanview, Oceanview's FHA claim is a facial challenge, as opposed to an as-applied challenge. *See Scherer v. U.S. Forest Serv.*, 653 F.3d 1241, 1243 (10th Cir. 2011) (plaintiffs'

challenge to regulation was a facial challenge because plaintiffs sought a ruling that regulation "violates the rights of the public and that strikes down the Plan for the benefit of all," instead of "seek[ing] to enjoin enforcement of the [regulation] *only as to them and their particular circumstances*—the hallmark of an as-applied challenge") (emphasis added). The Trial Court acknowledged that Oceanview's FHA claim was a facial challenge to the validity of the Regulations. R72 at fn. 23.

"To prevail in such a facial challenge, [plaintiffs] 'must establish that no set of circumstances exists under which the [regulation] would be valid." *Reno v. Flores*, 507 U.S. 292, 300–01 (1993) (quoting *Salerno*, 481 U.S. at 745). In the words of the Supreme Court, a facial challenge is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Salerno*, 481 U.S. at 745.

New York law is consistent, requiring that "the challenger must establish that no set of circumstances exists under which the Act would be valid." *Moran Towing Corp. v. Urbach*, 99 N.Y.2d 443, 448 (2003) (internal quotation marks and citation omitted). *See also Matter of Real Est. Bd. of New York, Inc. v. City of New York*, 165 A.D.3d 1, 10, (1st Dep't 2018) ("[i]n a facial challenge, the claimant must establish that no set of circumstances exists under which the [challenged statute] would be valid") (quoting *General Elec. Co. v. New York State Dep't of Labor*, 936 F.2d 1448, 1456 (2d Cir.1991)).

Although Oceanview is making a facial challenge to the Regulations, the Trial Court held that the *Salerno* rule was inapplicable on the grounds that it only applies to vagueness challenges—citing *Copeland v. Vance*, 893 F.3d 101, 110 (2d Cir. 2018)—and is inapplicable to facial discrimination challenges—citing *Ohio House, LLC v. City of Costa Mesa* No. SACV 19-01710 JVS (PJW), 2020 WL 4187765, 2020 US Dist LEXIS 130089 (C.D. Cal. Mar. 16, 2020). R72 at fn. 23. The Trial Court was mistaken.

In *Copeland*, the Second Circuit applied the *Salerno* rule to a facial challenge of a statute on vagueness grounds—but did not suggest that rule was limited to vagueness challenges. 893 F. 3d at 110. Indeed, there was no vagueness challenge in *Salerno* itself, which dealt with a claim that a statute was contrary to the Fifth and Eighth Amendments to the Constitution. *See also Reno*, 507 U.S. at 301 (holding *Salerno* test for facial challenges applied to both constitutional and statutory challenges).

In the other case on which the Trial Court relied, *Ohio House*, the district court initially rejected the applicability of the *Salerno* rule—in a preliminary ruling—based on a supposed lack of precedent for applying that rule to a claim of facial discrimination under the FHA. In a subsequent decision, however, that court admitted it was wrong, citing precedent for applying the *Salerno* rule to such claims.

Ohio House, LLC v. City of Costa Mesa, No. SACV 19-01710 JVS (PJWX), 2020 WL 4187764, at *5–6 (C.D. Cal. June 11, 2020).

Courts have regularly applied *Salerno* to facial discrimination claims. *See, e.g., Children's Health Def. v. Fed. Commc'ns Comm'n*, 25 F.4th 1045, 1052 (D.C. Cir. 2022) ("in order to succeed in their facial challenge [to regulations for allegedly violating the FHA and ADA], petitioners had to show that there are no circumstances in which amendment of the regulation would be valid"); *Witzke v. Idaho State Bar*, No. 1:22-cv-00090-REP, 2022 WL 17340272, at *13 (D. Idaho Nov. 29, 2022) (applying Salerno test to "claim that a rule facially violates the ADA"); *Daveri Dev. Grp., LLC v. Vill. of Wheeling*, 934 F.Supp.2d 987, 996 (N.D. Ill. 2013) (applying Salerno rule to claims zoning code was facially discriminatory under FHA and ADA); *Yount v. Regent Univ.*, No. CV 08-8011-PCT-DGC, 2008 WL 4104102, at *3 (D. Ariz. Aug. 22, 2008) (claims that university policy facially violated the ADA failed the *Salerno* rule); *Oconomowoc Residential Programs, Inc. v. City of Greenfield*, 23 F.Supp.2d 941, 951 (E.D. Wis. 1998) (applying Salerno rule to claims that Wisconsin statutes were "facially discriminatory' and, therefore, preempted by the FHA and ADA).

The Decision itself establishes that Oceanview failed to prove that there are no set of circumstances under which the Regulations would be valid. The Trial Court held that the Regulations are invalid because of certain characteristics of Oceanview

that may be beneficial to some of its residents. However, Oceanview failed to show that all Transitional Adult Homes share those characteristics. R8-9. In fact, the undisputed evidence showed that the characteristics of Oceanview that form the basis of the Decision are not shared by all Transitional Adult Homes.

The Trial Court relied on findings that Transitional Adult Homes that participate in the State's Assisted Living Program ("ALP"), such as Oceanview, provide some benefits for some residents with serious mental illness who have comorbidities, and that such facilities are not institutional on the basis of their qualifying for that program, which has certain housing requirements. R7-8, R74-75. As the court found, however, at least a dozen of the 35 Transitional Adult Homes have no ALP programs. R47.

There was also no evidence to support a finding that persons with serious mental illness—but no comorbidities—benefit from residing in Transitional Adult Homes. Oceanview's sole expert, Dr. Jeffrey Geller, criticized the Regulations to the extent that they preclude persons with serious mental illness who have comorbidities from gaining access to Transitional Adult Homes "that can meet those needs." R1673 (Geller Testimony). But Dr. Geller insisted that persons with serious mental illness, but no comorbid condition, "shouldn't be in any adult home," and that even the two facilities he had visited (which he believed were superior to other

Transitional Adult Homes) would not be conducive to recovery of persons with no comorbidities. R1732-33, R1775-76.

Dr. Geller testified that he visited only two adult homes, which he considered "to be safe housing, which fosters recovery, and to have the resources to meet the needs of people with comorbidities." R65; R1653 (Geller Testimony). But, according to Dr. Geller, these two facilities were superior to other adult homes he had visited years ago. R1724-25, R1729-30. While he opined that Oceanview and Mermaid Manor provided safe housing, he refused to state that any other adult homes provided safe housing. R1671.

The opinion of Oceanview's psychiatric expert that Transitional Adult Homes are not appropriate residences for persons with serious mental illness, but no comorbid condition, was confirmed by other evidence. The Trial Court heard undisputed evidence—from the State's witnesses and Oceanview's witnesses—that Transitional Adult Homes often have unsafe living environments, including resident endangerment, unsafe living conditions, lack of supervision, unsafe smoking leading to fires, altercations and fighting among residents, and rats and vermin. R2926, R2947-50 (Deetz Testimony); R3005 (Deetz Testimony); R2291 (Nikic Testimony); R2404, 2406-07 (Przyjemski Testimony); R6952; R6994.

Undisputed evidence establishes that the Regulations are valid when they preclude Transitional Adult Homes without ALP programs from admitting residents

with serious mental illness, and when they preclude any Transitional Adult Home from admitting persons with serious mental illness, but no comorbidities. Given Oceanview's failure to prove that no set of circumstances exist under which the Regulation would be valid, the Trial Court erred in not granting judgment in favor of the State.

III. THE TRIAL COURT ERRED IN FAILING TO GRANT JUDGMENT FOR THE STATE AFTER UNDISPUTED EVIDENCE SHOWED THE STATE WAS JUSTIFIED IN PROMULGATING THE REGULATIONS TO FURTHER LEGITIMATE GOVERNMENTAL INTERESTS IN A NARROWLY TAILORED WAY

Even if the Trial Court had been justified in disregarding the *Salerno* test, the Trial Court should have entered judgment for the State under the "heightened … scrutiny" standard it adopted to "evaluate[e] whether the Challenged Regulations are beneficial to persons with a serious mental illness, … [and] to determine whether the Commissioner's underlying rationales pass muster." R74.

Under the standard adopted by the Trial Court, "the defendant must prove that its actions furthered, in theory and in practice, a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect." *Sierra v. City of New York*, 552 F.Supp.2d 428, 431 (S.D.N.Y. 2008) (internal quotation marks and citation omitted). Other courts have applied a slightly different version of the heightened scrutiny test for facial discrimination challenges and require that "a defendant must show either: (1) that the restriction benefits the

protected class or (2) that it responds to legitimate safety concerns raised by the individuals affected, rather than being based on stereotypes. *Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1050 (9th Cir. 2007). This Court need not decide which standard is the correct one because, under either formulation, the Regulations pass muster.

A. Undisputed Evidence Showed the Regulations Further the State's Legitimate Interests in Desegregating Persons With Disabilities and Improving Their Lives

Undisputed evidence shows the Regulations were adopted for—and furthered—two legitimate—interests: (1) to foster the integration of persons with serious mental illness into the most integrated setting appropriate to their needs—consistent with the State's ADA obligations respecting adult homes it licenses—and (2) to improve the chances for recovery and rehabilitation of persons with serious mental illness by limiting their admission into clinically inappropriate facilities.

1. The Regulations Further the State's Legitimate Interest in Fostering the Integration of Persons With Disabilities

The Trial Court held that the State's interest in fostering integration was not a legitimate governmental interest because the State's obligations under the ADA integration mandate and *Olmstead* supposedly do not apply to the State's regulation of privately-owned adult homes. R77, R79. Additionally, the court held that even if the ADA, as interpreted by *Olmstead* applies, the integration mandate would require restrictions on housing to "be made on an individualized basis," and to give

persons with disabilities the option to decline being subject to the restriction if they "would prefer to reside" in the restricted housing. R79. The Trial Court was wrong on both issues.

a. The Trial Court Erred in Holding the Federal Integration Mandate Does Not Apply to the State's Regulation of Private Facilities

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—even if that scheme results in the segregation of persons with disabilities. As discussed above, this holding fails to consider—let along defer to—the view of DOJ that the State's provision of mental health services in segregated, congregate facilities was "in contravention of the State's obligations under the ADA and *Olmstead* …." R8718.

Under settled law, DOJ's construction "should be upheld if not irrational or unreasonable." *Milowe*, 66 A.D.2d at 43. Far from being irrational or unreasonable, DOJ's construction of the federal integration mandate is supported by overwhelming authority.

DOJ has repeatedly warned states that if their regulatory regimes enable the segregation of persons with disabilities, they can be subject to its enforcement actions. The U.S. Attorney General has issued regulations on the integration mandate that provide:

> A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. The programs or activities of entities that are licensed or certified by a public entity are not, themselves, covered by this part.

28 C.F.R. § 35.130 (b) (6). In other words, even though a private facility licensed by a state to provide housing to persons with disabilities is not subject to the federal integration mandate, that state is subject to the mandate to the extent that the state's regulation of such licensees results in discrimination.

Courts have consistently endorsed this view that the ADA's integration mandate and *Olmstead* apply to a state's regulation of private facilities. *See, e.g., State of Connecticut Off. of Prot. & Advoc. for Persons with Disabilities v. Connecticut*, 706 F.Supp.2d 266, 277 (D. Conn. 2010) (residents of privately-owned nursing facilities could state a claim by alleging the state's policies violate the integration mandate, given that "*Olmstead* made clear that the actions of the state that led to a denial of integrated settings could serve as the basis for an ADA claim"); *Martin v. Taft,* 222 F.Supp.2d 940, 981 (S.D. Ohio 2002) (*Olmstead* "liability does not hinge upon whether the setting in question is owned or run directly by the State").

Moreover, DOJ's construction of the federal integration mandate being applicable to the State's regulation of adult homes is supported by the federal court

that both ruled on that very issue in *DAI* and is overseeing the State's compliance with the Federal Settlement:

> It is immaterial that DAI's constituents are receiving mental health services in privately operated facilities. Public entities are required under the ADA to "*administer* services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." Discrimination, in the form of unjustified segregation of individuals with disabilities in institutions, is thus prohibited in the administration of state programs.

Disability Advocs., Inc. v. Paterson, 598 F.Supp.2d 289, 317 (E.D.N.Y. 2009) (emphasis in original) (internal citations omitted) (quoting 28 C.F.R. § 35.130(d)).

Additional support for DOJ's conclusion that *Olmstead* applies to a state's regulation of private facilities can be found in the substantial *Olmstead* enforcement litigation brought by DOJ—which has led to numerous settlement agreements confirming *Olmstead's* applicability. The Trial Court took judicial notice of DOJ's *Olmstead* enforcement webpage, which lists multiple *Olmstead* enforcement actions with respect to state systems that rely on private facilities. R533. These cases include: *United States v. New York*, 13-cv-4165 (E.D.N.Y. 2013); *United States v. North Carolina*, No. 5:12-cv-557 (E.D.N.C. 2012); *United States v. Virginia*, 3:12CV059 (E.D. Va. 2012); *Ligas v. Maram* 05-CV-04331 (N.D. Ill. 2005); *Connecticut Office of Protection and Advocacy v. State of Connecticut*, 3:06-CV-179 (D. Conn. 2006). R533, R542, R552.

This Court may also take judicial notice of DOJ's current version of that Olmstead Enforcement webpage,[5] which lists those cases and more recent *Olmstead* enforcement actions against states for providing their mental health services through a system that relies on private facilities.[6] For example, that webpage links to the March 3, 2022, DOJ Findings Letter to Colorado,[7] which states that:

> The State of Colorado is a public entity as defined by the ADA. 42 U.S.C. § 12131(1). Title II requires public entities to ensure that their services, programs, and activities comply with Title II, even when operated by private entities through contracts or other arrangements. 28 C.F.R. § 35.130(b)(3). Thus, Colorado remains responsible for complying with the integration mandate, notwithstanding that it provides services to individuals with disabilities through private nursing facilities.

DOJ Findings Letter to Colorado at 6. Here, there is no dispute that the State provides mental health services to residents of adult homes, which are licensed and regulated by the State. R10-11; R2823-24 (Myers Testimony).

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[5] https://archive.ada.gov/olmstead/olmstead_cases_list2.htm.

[6] New York courts regularly take judicial notice of information on government websites. *See, e.g., Matter of Exec. Cleaning Servs. Corp. v. New York State Dep't of Lab*., 193 A.D.3d 13, 18 n.4 (3d Dep't 2021) (court "may take judicial notice" of information on state agency websites); *Maisto v State of New York*, 154 A.D.3d 1248, 1251 n.4 (3rd Dep't 2017) (judicial notice of summaries of enacted state budgets published on an official New York State government website); *Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co.*, 61 A.D.3d 13, 19 (2d Dep't 2009) ("official promulgations of government appear to be particularly appropriate for judicial notice").

[7] https://archive.ada.gov/olmstead/documents/colorado_lof.pdf.

By contrast, the Trial Court did not cite any authority holding that a state's regulation of private facilities is immune from *Olmstead* enforcement actions. Instead, it based its ruling that *Olmstead* is inapplicable on inapposite decisions that dealt with the issue of whether a private facility could be held liable under Title II of the ADA—not whether a state can be held liable for its regulation of such a private facility. R77-78. *See, e.g., Green v. City of New York*, 465 F.3d 65, 78 (2d Cir. 2006) (affirming "court's dismissal of the ADA claim against [private hospital] because it is not a public entity subject to suit under Title II").

b. The Trial Court Erred in Holding That the State Failed to Comply with the Requirements of *Olmstead*

The Trial Court misconstrued the law with its holding that a state's efforts to comply with *Olmstead* are not legitimate unless any housing restrictions affecting persons with disabilities are "made on an individualized basis," and give such persons the option to decline being subject to the restriction if they "would prefer to reside" in the restricted housing. R79.

Once again, the Trial Court fails to consider, let alone give deference to, the views of DOJ—the agency charged with *Olmstead* enforcement—as to what *Olmstead* requires.

In its Statement of Interest, DOJ expresses the view that the Regulations may, consistent with *Olmstead*, limit housing choices available to persons with disabilities, given that the Regulations "form[] part of the State's licensing scheme

for health care facilities," which, by their nature, "are restricted to persons with specific types of disabilities or conditions." R8721. While such licensing regimes "will sometimes mean that certain individuals cannot access services in the residential setting of their choosing, such limits are a common and routine aspect of State disability services, which are subject to conditions and limitations on how they are structured and funded." R8722.

As DOJ explained, "adult homes are unquestionably designated as facilities providing long term residential care for persons with disabilities, and the State may permissibly limit or prioritize admission to individuals with certain disabilities that the facility is designed to serve." R8723. Even prior to the promulgation of the challenged Regulations, the State's regulations governing adult homes' admissions of residents set forth specific eligibility requirements. Among those requirements were provisions that adult homes may not admit into residence multiple groups with mental health needs that the State has determined adult homes cannot satisfy. 18 NYCRR § 487.4(c) (1), (2), (3).

The Trial Court's opinion that Olmstead compliance is illegitimate if it deprives any person of a housing choice is based on its misreading of *Olmstead* that "*Olmstead* expressly counsels, a determination whether a disabled person is 'unjustifiably' segregated and is qualified for other community-based alternatives

rests with such person's treatment providers," and that "[t]hese determinations clearly must be made on an individualized basis." R79.

Contrary to the Decision, *Olmstead* actually counsels that "the State generally may rely on the reasonable assessments of its own professionals in determining whether an individual "meets the essential eligibility requirements" for habilitation in a community-based program." 527 U.S. at 602. Indeed, the Supreme Court recognized that governments would be hamstrung in developing policies designed to benefit persons with disabilities if such policies were required to provide for each individual's choices. The Court held that a state could defend its policies by showing "that in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities." 527 U.S. at 604.

In *Familystyle of St. Paul, Inc. v. City of St. Paul, Minn*., 728 F.Supp. 1396, 1404 (D. Minn. 1990), *aff'd*, 923 F.2d 91 (8th Cir. 1991), the district court applied this principle to hold that under the FHA governmental policies designed to benefit a group can outweigh an individual's choice or needs when "the public interests sought to be furthered by the laws are substantial enough to outweigh the private detriment caused by them." As the court explained, governments' interests in

deinstitutionalization is valid even if it deprives some persons with disabilities of some choices:

> These interests go beyond the monetary ones of an organization, or *a limitation of choice on a small number of handicapped individuals*. The laws fostering deinstitutionalization seek to enhance the individual lives of all handicapped and to improve society as a whole through the integration of these people into the mainstream. These societal goals substantially outweigh the limited monetary harm or speculative individual harm which may be caused by the challenged laws.

728 F.Supp. at 1405 (emphasis added).

In affirming, the Eighth Circuit agreed that "deinstitutionalization" regulations that "limit housing choices" for persons with disabilities do not violate the FHA, "perceive[ing] the goals of non-discrimination and deinstitutionalization to be compatible." *Familystyle of St. Paul, Inc. v. City of St. Paul, Minn.*, 923 F.2d 91, 93–94 (8th Cir. 1991). As that court stated, "[w]e cannot agree that Congress intended the Fair Housing Amendment Act of 1988 to contribute to the segregation of the mentally ill from the mainstream of our society." *Id.* at 94. *See also Sailboat Bend Sober Living, LLC v. City of Fort Lauderdale,* 479 F.Supp.3d 1298, 1315-16 (2020), *aff'd sub nom. Sailboat Bend Sober Living, LLC v. City of Fort Lauderdale, Fla.*, 46 F.4th 1268 (11th Cir. 2022) ("[i]t would be ironic—to say the least—if laws intended to achieve 'full participation' and 'fair housing' for those with disabilities made unlawful ordinances that furthered those very ends").

Similarly, in *Sierra v. City of New York*, 579 F.Supp.2d 543, 548 n.6 (S.D.N.Y. 2008), the plaintiff's claim that a housing regulation violated the FHA because she was deprived of her individual choice was rejected due to the benefit the regulation provided to her group as a whole:

> [B]ecause Sierra is asking the Court to enjoin enforcement of HMC section 27–2076(b) across the board, the Court has made an effort to consider the effects on children of the more standard SRO unit: a room or rooms whose inhabitants share an exterior kitchen and/or bathroom with other tenants.

The Trial Court's holding that the State has a legitimate interest in desegregating housing for persons with disabilities only if it is *required* to take such action is another clear error of law. As the U.S. Supreme Court has recognized, states should be given latitude in dealing with such problematic issues. In *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), the Supreme Court treated a state's interest in formulating policies for persons with intellectual disabilities as clearly a legitimate interest that should be interpreted broadly to give states the latitude to deal with complex problems. As the court stated,

> the States' interest in dealing with and providing for [persons with intellectual disabilities] is plainly a legitimate one. How this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary.

473 U.S. at 442–43 (footnote omitted).

Significantly, the Supreme Court also expressed concern that "merely requiring the legislature to justify its efforts" under too exacting a standard "may lead it to refrain from acting at all." 473 U.S. at 444. Thus, "governmental bodies must have a certain amount of flexibility and freedom from judicial oversight in shaping and limiting their remedial efforts." *Id.* at 445. *See also Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1505 (10th Cir. 1995) ("courts [dealing with claims of discrimination] all recognize the importance of leaving room for flexible solutions to address the complex problem of discrimination and to realize the goals established by Congress in the Fair Housing Act") .

Regardless of the scope of the obligations imposed by *Olmstead* on states, desegregation of persons with disabilities is a legitimate governmental interest. As the U.S. Supreme Court has held, "Congressional enactment of the ADA represents its judgment that there should be a 'comprehensive national mandate for the elimination of discrimination against individuals with disabilities.' 42 U.S.C. § 12101(b)(1)." *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 374 (2001). *See also Laflamme v. New Horizons, Inc.*, 605 F.Supp.2d 378, 390 (D. Conn. 2009) ("[p]romoting the opportunity for disabled persons to live independently was in fact a central feature of the FHA amendments").

Given the overwhelming authority that fostering integration of persons with disabilities is a legitimate governmental interest, the Regulations should be upheld.

If the Trial Court's invalidation of the Regulations stands, resegregation of persons with disabilities will be the likely result. As Judge Garaufis—the federal judge who both approved the Federal Settlement and is overseeing its implementation—has noted, "[i]f the Regulations are eliminated, … the adult homes could easily revert to being warehouses for individuals with serious mental illness." *United States v. New York*, 2017 WL 2616959, at *1 n. 3.

2. The Regulations Furthered the State's Legitimate Interest in Improving Chances for Recovery

The Regulations also further the State's legitimate interest in improving the chances for recovery of persons with serious mental illness by limiting their admission into clinically inappropriate facilities.

In considering this issue, the Trial Court should have given deference to the views of DOJ that the Regulation's limitation of admissions to Transitional Adult Homes do not contravene the FHA because they "ensure that mental health services are not being provided in congregate settings that have been found by both the State and the district court in *DAI* to be segregated, in contravention of the State's obligations under the ADA and Olmstead, and therapeutically harmful." R8723.

Instead, the Trial Court held that the State's interest in improving the chances for recovery of persons with disabilities was not legitimate because (a) Transitional Adult Homes are neither "institutions" nor "institutional-like," and (b) the Regulations were not based on "any empirical research, data, scientific articles, or

other fact-based studies showing that transitional adult homes are clinically inappropriate housing for persons with serious mental illness and that these adult homes were not conducive to such persons' recovery." R75. Under settled law, neither ground is a sufficient basis to disregard the expertise of the State in regulating adult homes to advance the health, safety and welfare of persons with disabilities.

a. The Trial Court Erred in Rejecting The State's Interest in Improving Chances for Recovery

The Decision acknowledges that the State has concluded that Transitional Adult Homes "are neither clinically appropriate for nor conducive to the recovery of" persons with serious mental illness. Nonetheless, the court rejects the legitimacy of the State's interest in addressing this issue because such facilities are supposedly neither "institutions" nor "institution-like." R74-75. This conclusion of law, however, is irrelevant to the issue of whether the State has any legitimate interest in improving the chances of recovery for persons with disabilities.

In its Conclusions of Law, the Trial Court misses the point that the State's interest turns on whether Transitional Adult Homes have therapeutically harmful aspects—not on whether they meet some definition of "institution." The court engages in an extended discussion of whether Transitional Adult Homes should be considered institutions, given that residents of such facilities have certain freedoms (such as the freedom to come and go), some Transitional Adult Homes have self-certified that they are "home-like" to qualify for funds under an unrelated program—

the Home and Community Based Services waiver program ("HCBS")—and some of the undisputed "regimentation in certain aspects of residential life" is supposedly a function of the State's regulations. R74-75.

The Trial Court knocked down a strawman of its own making by focusing on whether Transitional Adult Homes can be called institutions instead of focusing on whether Transitional Adult Homes have the harmful characteristics identified by the State's witnesses. In fact, not only was there undisputed evidence that Transitional Adult Homes have harmful characteristics, but Oceanview's own witnesses admitted that they do.

The State's conclusion that Transitional Adult Homes are therapeutically detrimental for persons with serious mental illness was set forth in OMH's August 8, 2012, Clinical Advisory, which stated that adult homes are neither clinically appropriate for, nor conducive to the recovery of serious mental illness when there is a large concentration of significant number of people with mental illnesses in settings which:

- Are not specifically designed to serve people with serious mental illness;
- Are not under the license and clinical quality control of the New York State Office of Mental Health (OMH);
- Do not foster independent living as a result of institutional practices of congregate meals, ritualized medication administration, and programming that is often not individually tailored; or

- Have an absence of specifically designed rehabilitative and recovery-oriented programs conducive [to] meeting the clinical needs of persons with serious mental illness.

R36.

Although the Decision states that "[b]y virtue of their certifications, Oceanview and other adult homes seeking funding under the HCBS program "are not 'institutional' or 'institution-like,'" that statement also misses the point. R8. Oceanview's self-certification that it has certain "home-like" qualities does not address whether it has the problematic characteristics outlined in the above Clinical Advisory. R8.

By contrast, the Trial Court heard undisputed testimony that confirmed that Transitional Adult Homes do indeed have such characteristics—and that they are detrimental to the well-being of persons with serious mental illness. In fact, Oceanview's witnesses confirmed these points.

Oceanview's administrator admitted that Oceanview is not a medical facility; is not a mental health provider; does not provide mental health services; and does not provide its residents with lessons in such life skills as housekeeping and cleaning. R2745-46 (Vider Testimony); R2864 (Vider Testimony); R4705-07 (Vider Testimony).

Oceanview's sole expert, Dr. Geller, admitted that Transitional Adult Homes have "institutional features in the standard terminology that are clearly institutional

….” R1694, R1772, R1698. In fact, he 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. Among the other institution-like features identified by Dr. Geller were delivery of medicine during a meal, requiring guests to register and get a tag, the assignment of seats for meals and housing most residents two to a room. R1772-74.

Dr. Geller also admitted to the detrimental effects of such characteristics, testifying that a person with serious mental illness (but no other health issues that would require services offered by a specific adult home) should not reside in a Transitional Adult Home, admitting that “somebody who has a serious mental illness and no comorbidities or nothing else that would require the services in an adult home, shouldn't be in a transitional adult -- shouldn't be in any adult home ….” R1733.

The Trial Court also heard unrebutted testimony that “many adult home residents are vulnerable because they are substantially unable to live independently and require a certain amount of personal care and supervision.” R50. The unrebutted testimony established that becoming residents of Transitional Adult Homes—instead of one of the many other non-transitional adult homes or other housing options—is particularly harmful to such vulnerable persons. That is because Transitional Adult Homes “tend[] to have certain types of problems more frequently

than other adult homes, such as lack of supervision, environmental issues, unsafe smoking leading to fires, and altercations between residents." R49.

Moreover, DOJ guidance cautions against treating "institutionalization" as a talisman for requiring the integration of persons with disabilities. In its online Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.*,[8] DOJ advises that "the ADA and the *Olmstead* decision extend to persons at serious risk of institutionalization or segregation and are not limited to individuals currently in institutional *or other segregated settings*." Page 3 of 6 (italics added). In other words, administering programs that have the effect of segregation can violate the integration mandate, regardless of whether the segregated facility is considered an institution.

b. The Trial Court Erred in Holding That The State's Interest in Improving Chances for Recovery Was Illegitimate Because It Was Not Based on Clinical Studies

The Trial Court's conclusion that the State does not have a legitimate interest in promulgating regulations designed to further the health, safety and well-being of

[8] https://mn.gov/olmstead/assets/2011-06-22-doj-enforcement-integration-mandate-olmstead-ada_R_tcm1143-508974.pdf#:~:text=In%20the%20years%20since%20the%20Supreme%20Court%E2%80%99s%20decision,for%20the%20promise%20of%20Olmstead%20to%20be%20fulfilled.

its residents unless it bases those regulations on evidence-based research and clinical studies is equally erroneous as a matter of law. R74-76. Not surprisingly, the court failed to cite a single authority as support for this high standard for justifying state regulations.

The U.S. Supreme Court has endorsed the principle that courts should generally give deference to the professional judgments of agency officials. As the court held in *Olmstead*, "the State generally may rely on the reasonable assessments of its own professionals in determining whether an individual meets the essential eligibility requirements for habilitation in a community-based program." 527 U.S. at 602. Accordingly, courts should be hesitant about second-guessing such judgments by state officials. "[C]ourts normally should defer to the reasonable medical judgments of public health officials." *Id.* (internal quotation marks and citation omitted). See also *Boykin v. Gray*, 986 F.Supp.2d 14, 28 (D.D.C. 2013), *aff'd sub nom. Boykin v. Fenty*, 650 F. App'x 42 (D.C. Cir. 2016). (granting summary judgment to city government in FHA discrimination case because "the particular facts of this case place difficult policy judgments directly in issue, and implicate decisions about how the District government allocates benefits and burdens through its homelessness policy").

New York courts have agreed that courts should grant deference to public officials when they craft regulations in areas of their expertise. The Court of Appeals

has held that "[a]n administrative agency's exercise of its rule-making powers is accorded a high degree of judicial deference, especially when the agency acts in the area of its particular expertise." *Consolation Nursing Home, Inc. v. Comm'r of New York State Dep't of Health*, 85 N.Y.2d 326, 331 (1995) Thus, "[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." 85 N.Y.2d at 332 (internal quotation marks and citation omitted). *See also 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 decision-making powers, especially where the agency acts within its area of expertise"); *Matter of Malone v. City of New York*, 192 A.D.3d 510, 511, (1st Dep't 2021). ("while … studies can provide a rational basis for a rule, they are not required"); *Adirondack Health-Uihlein Living Ctr. v. Shah*, 125 A.D.3d 1366, 1368 (4th Dep't 2015), ("[c]ontrary to petitioners' contention, DOH is not required to rely upon empirical studies when it adopts a regulation").

It is undisputed that the State has expertise in the area of regulating adult homes to advance the health, safety and well-being of persons with disabilities. As the Court of Appeals has noted, adult care facilities are "heavily regulated" by the

State, which has "broad enforcement powers to ensure proper care and treatment of residents …." *Carrier v. Salvation Army*, 88 N.Y.2d 298, 302–03, (1996).

The principle that agency regulations do not need to be based on any empirical studies is fully applicable to facial discrimination claims. As the *Sierra* court explained in its decision on the merits:

> In a perfect world, legislatures would always have scientific studies to guide and justify the measures they enact; however, such studies very rarely exist, and in any event, are in no way required to support a challenged statute—even one, like this one, that is facially discriminatory. To require such studies before finding that an ordinance "further[s] ... in practice, a legitimate, bona fide governmental interest" would be, in effect, to hold that no facially discriminatory statute ever could be upheld. Clearly, that is not the law, nor should it be.

Sierra, 579 F.Supp.2d at 551.

Here, the Regulations were the product of, among other things, extended discussions among numerous officials at DOH—which had substantial expertise with the regulation of adult homes—and OMH—which had substantial expertise in formulating policies relating to persons with mental illness. The drafting of the Regulations also involved numerous consultations with DOJ—which had substantial expertise protecting the civil rights of persons with disabilities, including residents of the adult homes that were eventually designated as Transitional Adult Homes. R12; R1977-83, R1988-95 (Sederer Testimony); R3139-40, R3172, R3239-40 (Myers Testimony); R3555, R3565-3567 (Briney Testimony); R8712-13, R8716-18.

The Decision's rejection of the legitimacy of the Regulations because they were based on agency expertise and consultations with DOJ, the agency charged with enforcement of the FHA and ADA, and not on clinical studies—turns the principle that an agency may rely on expertise on its head. R12, R76. As the First Department recognized in *Malone*, consultations with other agencies with "expertise" in enforcing relevant laws can be a sufficient basis for regulations. *Malone*, 205 A.D.3d at 1200.

The Trial Court heard undisputed testimony from DOH and OMH officials—based on their experience and expertise—that they have found that Transitional Adult Homes are not conducive to recovery of persons with serious mental illness and that other housing is more conducive to recovery. R1963-72 (Sederer Testimony); R2946-2947, R2956-2957, R2961 (Deetz Testimony); R3129-40, R3149-50, R3177-81 (Myers Testimony); R3921-22, R3965-76 (Myers Testimony); R4052-53 (Sederer Testimony). The court also heard undisputed testimony from DOH and OMH officials that the State has not received any reports of the Regulations having a detrimental effect on finding appropriate housing for persons with serious mental illness. R2961-62 (Deetz Testimony); R3196-99 (Myers Testimony); R3501-03 (Briney Testimony); R3668-69 (Hayes Testimony).

The lack of deference the Trial Court gave to the experience and expertise of the State's mental health professionals and policymakers is exemplified by its

surprising ruling invalidating all of the Regulations—not just the restrictions on admitting persons with serious mental illness. As the Decision acknowledges, Section 487.13 of the Regulations require Transitional Adult Homes "to teach skills to enable residents to live more independently in another setting, including managing finances, laundering clothes, basic cooking skills, housekeeping, and shopping." R48-49. Section 487.13 also requires Transitional Adult Homes (a) to foster the development of independent skills, (b) to assure access to quality mental health service, (c) to encourage community involvement and integration and (d) to foster a home-like atmosphere. R2960-61 (Deetz Testimony). As a DOH official testified, such requirements in the Regulations are beneficial because they "help an individual become more independent in their life skills so that they can feel confident to move out of the adult home." R2960-61 (Deetz Testimony).

Not only did Oceanview's administrator not identify Section 487.13 as one of the Regulations that Oceanview was seeking to have annulled, but she conceded that it was "important" for Oceanview and other Transitional Adult Homes to comply with such requirements to foster independent living skills, to encourage community involvement and to foster a home-like atmosphere. R2596-2597, R2599-2602 (Vider Testimony). As a DOH official testified, the development of such independent living skill are important because such skills are needed by persons with

serious mental illness who want to move from Transitional Adult Homes into housing in the community. R2944-45 (Deetz Testimony).

Yet despite the undisputed evidence that Section 487.13 of the Regulations imposed important obligations on Transitional Adult Homes that were beneficial to persons with serious mental illness, the Trial Court invalidated that section, along with the other Regulations, without even bothering to offer any justification for nullifying that "important" provision. R85. Such disregard of the State's professional judgment—which even Oceanview conceded was correct—is a clear error of law. As the U.S. Supreme Court indicated in *Cleburne*, formulating housing policies for persons with disabilities is "very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary." 473 U.S. at 443.

There is simply no support for the Decision's holding that a DOH regulation—based on agency expertise and consultations with the DOJ—is not furthering a legitimate governmental interest unless it is based on "evidence-based research or clinical data." R76.

B. Undisputed Evidence Showed That the Regulations are Serving the State's Legitimate Interests in a Narrowly Tailored Way

The Trial Court committed several errors of law in holding that the Regulations are invalid under the FHA because they are supposedly not narrowly tailored to achieve the State's goals.

As DOJ noted, the Regulations are sufficiently tailored to achieve the State's goals because "the DOH regulation operates to benefit people with disabilities and is 'tailored to particularized concerns' about adult home residents. R8723. The Regulations are tailored "to ensure that mental health services are not being provided in congregate facilities that have been found by both the State and the district court in *DAI* to be segregated, in contravention of the State's obligations under the ADA and *Olmstead*, and therapeutically harmful." *Id.* Once again, there is nothing "irrational or unreasonable," about DOJ's views that would justify the Trial Court's failure to give it deference. *Milowe,* 66 A.D.2d at 43.

Yet, once again, the Trial Court failed to give deference to these views of DOJ, and instead held that the Regulations are not sufficiently tailored based on rationales that (1) they "are not narrowly tailored to meet the specific needs of …individual resident[s] or prospective resident[s] with a serious mental illness" and (2) the evidence "established that numerous alternatives exist to address the State's interests that would have less discriminatory effect than that imposed by the Challenged Regulations." R82. Both grounds are based on misinterpretations of the law.

The Trial Court's holding that a regulation is not narrowly tailored unless it is tailored to meet the specific needs of individuals is based on the court's incorrect view of the federal integration mandate discussed above. *See, e.g., Familystyle*, 728

F.Supp. at 1405 (finding no FHA violation because "societal goals" outweigh "a limitation of choice on a small number of … individuals").

Instead, courts have consistently held that government restrictions that limit an individual's choices are sufficiently tailored—and do not conflict with the FHA—when those restrictions are beneficial to persons with disabilities. As one court has explained, "the FHAA should not be interpreted to preclude special restrictions upon the disabled that are really beneficial to, rather than discriminatory against, the handicapped." *Bangerter*, 46 F.3d at 1504. *See also Cmty. House*, 490 F.3d at 1050 (holding that a regulation is justified under the FHA if "the restriction benefits the protected class").

Undisputed evidence established that the Regulations have been tailored to successfully serve the State's interests in fostering the integration of persons with disabilities and their residing in facilities more conducive to their recovery—both of which benefit persons with disabilities.

The Regulations are narrowly tailored to impose restrictions on only a small subset of the housing facilities available to persons with serious mental illness. Rather than limiting admissions to all adult homes, the Regulations are limited in their application to Transitional Adult Homes—the few dozen adult homes that are most likely to have institutional characteristics and to be segregated due to their size and heavy concentrations of persons with serious mental illness. R11830-34 (Deetz

Testimony); R49. These are the large facilities that are, by definition, most segregated and most likely to have such untherapeutic conditions as "lack of supervision, environmental issues, unsafe smoking leading to fires, and altercations between residents." R49. As of December 2018, only 35 out of some 403 adult homes in New York State—less than 10 percent—were classified as Transitional Adult Homes. R2934-35, R2948 (Deetz Testimony); R47. Moreover, the Regulations' restrictions are not permanent—once a Transitional Adult Home reduces its mental health census to less than 25%, that facility "may then resume admitting new residents with a serious mental illness." R15.

The Regulations have resulted both in fewer Transitional Adult Homes and fewer persons with serious mental illness residing in such segregated facilities. R58; R2706, R2712-13 (Vider Testimony); R2934-35 (Deetz Testimony). Thus, the Regulations are serving the State's interest in integrating persons with disabilities into their communities.

The State has also demonstrated flexibility by narrowing the scope of the Regulations—based on its experience with the Regulations—to provide for a waiver process that enables Transitional Adult Homes to admit persons with serious mental illness if they are former residents of a Transitional Adult Home and have expressed a preference to return to such a facility. R63; R7542; R7987.

Pursuant to the Regulations, Transition Adult Homes have adopted compliance plans for increased efforts at helping their residents with serious mental illness to develop independent living skills that can help to successfully transition into living in the community. R2921-22, R2935-36, R2940-42, R2944-45, R2961, R2970-71 (Deetz Testimony). OMH has tracked the progress of persons with serious mental illness who have transitioned from Transitional Adult Homes into the community and has found that many such people have experienced aspects of recovery. R3921-22, R3965-76 (Myers Testimony). Moreover, the State has not received any reports of the Regulations having a detrimental effect on finding appropriate housing for persons with serious mental illness. R2961-62 (Deetz Testimony); R3196-99 (Myers Testimony); R3501-03 (Brine Testimony); R3668-69 (Hayes Testimony). Thus, the Regulations are also serving the State's interest—and the interests of persons with disabilities—that such persons reside in facilities more conducive to their recovery.

The Decision misapprehends the law with its holding that alternatives exist to address the State's interests that would have less discriminatory effect than that imposed by the Regulations. In order to defeat a state's showing that a government restriction on persons with disabilities is narrowly tailored, an alternative must actually "serve" the state's legitimate interests. *See*, *e.g.*, *Sw. Fair Hous. Council, Inc. v. Maricopa Domestic Water Improvement Dist.*, 17 F.4th 950, 970 (9th Cir.

2021); (proposed alternatives must be "equally effective" in serving the defendant's interests, taking into account factors such as the cost or other burdens that alternative policies would impose).

Significantly, no witness testified that the adoption of the alternatives proposed by the Trial Court would either lessen the concentration of persons with serious mental illness in Transitional Adult Homes—i.e., their segregation—or improve their chances for recovery. Thus, there was no evidence that any alternative would serve the state's legitimate interests with less discriminatory effect. Instead, the Trial Court heard undisputed evidence by a State official with expertise in regulating adult homes that such measures were not likely to achieve the State's goals—and, in fact, would likely lead to increased segregation of persons with disabilities in Transitional Adult Homes. R2971-77 (Deetz Testimony).

The Trial Court, however, held that it was rejecting the testimony of the State's witnesses "that no less discriminatory alternatives exist, because, to any extent *Olmstead* applies, *Olmstead* does not require states to limit options for disabled persons," and "explicitly requires consideration of a disabled person's choice and individual needs." R61. Thus, the court held that it was rejecting the undisputed evidence that no sufficient alternatives existed as somehow inadmissible or not relevant due to a supposed requirement by *Olmstead* that the individual choices of persons with disabilities must be considered. But, as discussed above,

Olmstead imposes no such requirement on states to provide for each individual's personal choices. Thus, the Trial Court's rejection of this undisputed testimony was wrong as a matter of law.

Ironically, the Trial Court's discussion of alternatives to the Regulations shows the wisdom of courts' admonitions that courts should not second guess agencies in areas of their expertise.

For example, the Trial Court suggests that the State could reduce the institutional characteristics of Transitional Adult Homes by "relax[ing] regulations regarding census-taking at mealtimes and medication administration." R62. Yet the Trial Court heard undisputed evidence that the State's "regulations of such things as food services, medications and the monitoring persons with serious mental illness --- help ensure the health, safety and well-being of adult home residents." R2917-18 (Deetz Testimony). Even Oceanview's administrator did not dispute that such regulations were for the purpose of ensuring the health, safety and well-being of the facility's residents. R2597 (Vider Testimony).

Since the Regulations were tailored to serve the goals of fostering integration and improving the chances for recovery of persons with disabilities—and undisputed evidence established that no alternatives would serve those goals—the Regulations should be held to be valid under the FHA.

IV. THE TRIAL COURT ERRED IN HOLDING THE REGULATIONS ARE ARBITRARY AND CAPRICIOUS UNDER ARTICLE 78

The Trial Court erred with its conclusion of law that the Regulations should be annulled because they are arbitrary and capricious under Article 78. Not only was Oceanview's Article 78 claim dismissed before trial, but there is no legally sufficient basis for the holding.

The Decision states that "[t]his is a hybrid article 78 and declaratory judgment proceeding," which raises such questions as "whether a determination 'was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion….' (CPLR §7803[3])." R67. The Trial Court answers those questions by concluding the Regulations should be annulled as "irrational, arbitrary and capricious, and contrary to law" because "they violate the FHAA." R83.

The Trial Court disregarded the Motion Court's grant of summary judgment on all of Oceanview's Article 78 claims. As the Motion Court held, Oceanview "acknowledged at oral argument" that it "did not argue that the challenged regulations lack any rational basis as they, *inter alia*, lack any sound scientific or empirical basis and are the result of uninformed opinion as to the nature of adult homes in their Article 78 Petition." R119. Accordingly, the Motion Court held that the State was " entitled to dismissal of [Oceanview's] article 78 claims as set forth

in the petition," and ordered the dismissal of Oceanview's "sixth cause of action, which consists of [Oceanview's] article 78 claims …." R119, R136-37.

Given the Motion Court's dismissal of all of Oceanview's Article 78 claims, the parties did not litigate those claims at trial. For example, Oceanview's Proposed Findings of Fact and Conclusions of Law do not even mention either "Article 78" or "arbitrary and capricious." R7544.

The Trial erred in ruling on Oceanview's Article 78 claims after the State had been granted summary judgment. The fact that the Trial Court ruled on these claims—without giving notice to the State that it was resurrecting claims that had been dismissed—amplifies the prejudice to the State.

Moreover, even if Oceanview's Article 78 claims were still alive, the Trial Court's holding that the Regulations are irrational, arbitrary and capricious lacks any sufficient basis in law. The only rationale for this holding is that the Regulations are invalid under the FHA. However, as discussed above, the court's holding that the Regulations violate the FHA is a clear error of law.

Accordingly, there is no legally sufficient basis for the Decision's holding that the Regulations are irrational, arbitrary and capricious under Article 78.

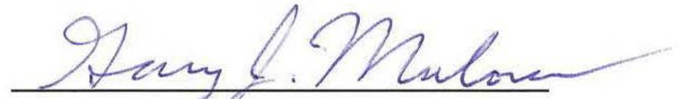
CONCLUSION

For the above reasons, the State respectfully requests that this Court reverse the Decision and enter judgment in favor of the State.

Dated: January 19, 2023
New York, New York

Respectfully submitted,

CONSTANTINE CANNON LLP



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STATEMENT PURSUANT TO CPLR 5531

New York Supreme Court

APPELLATE DIVISION — THIRD DEPARTMENT

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

Docket No. CV-22-1940

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1. The index number of the case in the Court below is 906012/2016.
2. The full names of the original parties are set forth above. There has been no change to the caption.
3. The action was commenced in the Supreme Court, Albany County.
4. This action was commenced on or about October 13, 2016, by the filing of a Notice of Petition and Verified Petition. Issue was joined by service of a Verified Answer on or about November 20, 2017, and service of a corrected Verified Answer on or about March 30, 2018.
5. The nature and object of the action: request for declaratory and injunctive relief declaring regulations of the New York State Department of Health to be in violation of the federal Fair Housing Act, and enjoining the State of New York from enforcing those regulations.
6. The appeal is from the Amended Decision, Order and Judgment of the Supreme Court of the State of New York, County of Albany, entered October 18, 2022.
7. This appeal is being perfected with the use of a fully reproduced Record on Appeal.