STATE OF NEW YORK
APPELLATE DIVISION – THIRD DEPARTMENT

Case No.: CV-22-1940

OCEANVIEW HOME FOR ADULTS, INC D/B/A
OCEANVIEW MANOR,

Petitioner-Respondent,

-against-

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

Respondent-Appellant.

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

O'CONNELL AND ARONOWITZ
Attorneys for Petitioner
54 State Street
Albany NY 12207-2501
(518) 462-5601
mhawrylchak@oalaw.com

JEFFREY J. SHERRIN
MICHAEL Y. HAWRYLCHAK
Of Counsel

Dated: January 5, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Federal Cases

New York State Cases

Federal Statutes

New York State Regulations

PRELIMINARY STATEMENT

The Challenged Regulations require certain housing providers to intentionally discriminate against persons with mental illness,[1] denying them access to housing solely on the basis of their disability even when they otherwise meet all criteria for admission.

After an 18-day trial, Supreme Court held, in an 81-page Decision/Order/Judgment (the "Trial Decision") that the Challenged Regulations violate the federal Fair Housing Act and are therefore invalid. In an Opinion and Order (the "Decision"), this Court reversed, and, as relevant to this motion, did two significant things: (1) adopted a legal standard for claims of intentional discrimination under the FHA that differs as to one of the prongs of the test with the standard applied by Supreme Court; and (2) asserted various factual conclusions that, expressly or implicitly, overturn Supreme Court's extensive and detailed findings of fact, but without any explanation of why Supreme Court's findings are erroneous or how this Court's alternative findings are supported by the record.

Oceanview now moves for reargument, asking this Court to consider the incongruity between the conclusory factual assertions on which it bases its decision

[1] *See infra*, Section II.A, for more discussion of this point.

and Supreme Court's detailed findings and the extensive record supporting them. In the alternative, Oceanview asks permission to appeal to the Court of Appeals for consideration of the proper legal standard governing these claims — a question that has divided various federal and state courts and on which the Court of Appeals has never had opportunity to opine.

BACKGROUND

In its Trial Decision, Supreme Court considered the applicable legal standard for claims of intentional disability discrimination under the FHA and adopted a two-part test. First, the challenged practice must "further, in theory and in practice, a legitimate, bona fide governmental interest." (R.74 (citing *Sierra v. City of New York*, 552 F. Supp 2d 428, 431 (S.D.N.Y. 2008)).) Supreme Court identified the applicable governmental interests as "either (1) respond[ing] to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals; or (2) benefit[ing], rather than discriminat[ing] against, a protected class." (R.73 (citing *Bangerter v. Orem City Corp.*, 46 F.3d at 1491, 1503–04 (10th Cir. 1995)).

Second, the restriction must be narrowly tailored, (R.60,) which Supreme Court understood to mean that "no alternative would serve that interest with less discriminatory effect," (R.74,) following several lower federal courts. *See Hum. Res. Rsch. & Mgmt. Grp., Inc. v. Cnty. of Suffolk*, 687 F. Supp. 2d 237, 265 (E.D.N.Y.

2010) ("least discriminatory means of effectuating defendant's proffered interests"); *Sierra*, 552 F. Supp. 2d at 431 ("no alternative would serve that interest with less discriminatory effect").

As to the first part of this test, this Court stated that "a housing restriction that facially discriminates against people with disabilities 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," (App. Dec. 7,) quoting the DOJ's statement of Interest, (R.8720,) which quoted the Ninth Circuit's Decision in *Community House, Inc. v. City of Boise*, 490 F.3d 1041, 1050 (9th Cir. 2007), which paraphrased the Sixth Circuit's decision in *Larkin v. State of Mich. Dep't of Soc. Servs.*, 89 F.3d 285, 290 (6th Cir. 1996), which was in turn paraphrasing the Tenth Circuit's decision in *Bangerter*, 46 F3d at 1503–04. Although the precise wording is different, both Supreme Court and this Court applied this standard by analyzing "whether the Challenged Regulations are beneficial to persons with a serious mental illness" and therefore serve a legitimate governmental interest. (R.74; *see also* App. Dec. 11.)

With respect to the second part of the test, however, this Court expressly disagreed with Supreme Court, rejecting the least discriminatory alternative test, and instead followed a federal district court decision from California in adopting "a less

onerous standard." (App. Dec. 8.) The Decision does not, however, provide any formulation of this less onerous version of narrow tailoring.

Finally, having adopted this legal standard, this Court proceeded to hold that the Challenged Regulations are not invalid under the FHA, in the process ignoring or rejecting various detailed findings of fact by Supreme Court, for the most part without explanation.[2]

ARGUMENT

POINT I

THIS COURT SHOULD GRANT REARGUMENT TO ADDRESS THE EXTENSIVE FACTUAL RECORD AND TRIAL COURT FINDINGS

As Oceanview noted in its opening brief, although even under the less demanding legal standard adopted by this Court, the State is required to bear the

[2] In its efforts to cast aspersions on Supreme Court's work in this case, the State provides an itemized list of no fewer than ten separate points on which, it asserts, this Court found Supreme Court to be in error. (App. Dec. 9.) Oceanview addressed many of these points — which include mischaracterizations of the Trial Decision and the Decision of this Court, and conflations of distinct issues — in its opening brief, and the rest are addressed later in this brief: (a) *infra*, Section II.B; (b) Oceanview Br. 36–37; *see also infra*, Section II.B; (c) *infra*, Section II.A; (d) Oceanview Br. 8 n.1; (e) *infra*, Section I.B.1; (f) *infra*, Section I.B.1; (g) Oceanview Br. 24–26; *see also infra*, Section I.B.2; (h) Oceanview Br. 20–24; *see also infra*, Section I.B.2; (i) Oceanview Br. 20–24; *see also infra*, Section I.A, I.B.2; (j) *infra*, Section I.B.3.

burden of proving that the validity of its regulations under the FHA, this Court's Decision provides no explanation of how this burden has been met. In its opposition brief, the State largely fails to engage with Oceanview's evidence.

A. This Court should give deference to Supreme Court's well-supported factual findings.

As an initial matter, the State spends pages responding to an argument that Oceanview never made. At no point in its brief did Oceanview argue that this Court lacks the authority to conduct its own weighing of the evidence in the record. To the contrary, Oceanview expressly recognized that "this Court has the authority to reexamine the record and independently evaluate the facts."[3] (Oceanview Br. 2.) Rather, as Oceanview argued in its opening brief, and as is further addressed below, the "Decision provides no indication that the Court has actually done so." (*Id.*)

[3] However, there is also ample authority for a higher court, after identifying errors in Supreme Court's decision, remitting the matter to Supreme Court for reconsideration. *See, e.g.*, *Pflaum v. Grattan*, 116 A.D.3d 1103, 1105 (3d Dep't 2014) (remanding to Supreme Court for reconsideration after identifying legal and factual errors); *see also New York Ass'n of Convenience Stores v. Urbach*, 92 N.Y.2d 204, 214–15 (1998) (after holding that lower court applied the wrong legal standard to a claim of discrimination, remanding to Supreme Court for reconsideration under the correct standard); *H & J Blits, Inc. v. Blits*, 65 N.Y.2d 1014, 1015–16 (1985) (remanding to Supreme Court for reconsideration after holding that court failed to consider all relevant factors); *Macaluso v. Macaluso*, 124 A.D.3d 959, 962 (3d Dep't 2015); *Murray v. Murray*, 101 A.D.3d 1320, 1323 (3d Dep't 2012). Due to the extensive and complex record in this case, Oceanview believes such a remand would have been appropriate here.

And, as Oceanview noted, this Court has explained that "[i]n reviewing a nonjury verdict . . . we should defer to the trial court's credibility determinations and factual findings," *Schroeder v. State*, 145 A.D.3d 1204, 1205 (3d Dep't 2016) (cleaned up), affirming when the record "adequately supports the court's determination." *Id.* at 1207. None of the cases the State cites supports disregarding extensive trial court fact-finding without discussion or explanation.

In *Bibeau v. Ward*, 228 A.D.2d 943, 943–46 (3d Dep't 1996), a dispute arising out of a contractual relationship, this Court engaged in an examination of the specific contract terms at issue and cited specific testimony and record evidence that supported its own factual determinations. It is precisely this sort of careful analysis of the record that should have occurred here before overturning Supreme Court's findings of fact. The *Court in Bibeau* also "defer[ed] to the trial court's credibility assessments." *Id.* at 944.

In *Allstate Ins. Co. v. Oberfast*, 36 A.D.2d 708, 708 (1st Dep't 1971), the appellate division overturned the trial judge's decision not to credit witness testimony where "[t]he trial court gave no reason why the evidence of the investigation by the State Trooper was rejected." In reweighing the evidence and reaching a different result, the appellate division considered this testimony because the trial court had failed to provide it with any reason not to. *Id.* In this case, by contrast, Supreme

Court spent page after page recounting and evaluating the testimony of the State's witnesses. (R.36–50.) And contrary to the impression given by the State, Supreme Court did not disregard witness testimony in gross, but rather provided particularized explanations as to why witness testimony as to specific subjects was not entitled to weight.[4] (*See, e.g.*, R.40–41.)

And in *McAvoy v. Harron*, 26 A.D.2d 452, 454 (4th Dep't 1966), after reversing a dismissal on statute of limitations grounds, the court proceeded to decide merits issues that hadn't been passed on by the trial court. It did not, as here, disregard extensive factual findings without explanation or analysis.

Finally, the State cites *Maisto v. State*, 196 A.D.3d 104, 115 (3d Dep't 2021), in support of the argument that Supreme Court's "wholesale rejection of [the State's] experts was unwarranted." But in *Maisto*, each of the three experts on school administration had provided "comprehensive" and "detailed reports pertaining to inputs, outputs and causation and independently analyzed those factors for each district," based on "a lengthy review process, which included evaluating officially-reported data . . . interviewing district officials and, in many cases, visiting schools in

[4] And with respect to Dr. Sederer, Supreme Court's finding that his testimony concerning the origins of the clinical justification for the Challenged Regulations was "wholly unconvincing," (R.41,) was supported by documentary evidence — contemporaneous emails that contradicted his trial testimony. (R.51–52.)

the subject districts." *Id.* at 114–15. In that context, this Court in *Maisto* found it unreasonable to reject the expert opinions in their entirety based on limited criticisms of their data or methodology. *Id.* at 115. But the Court in *Maisto* did not simply declare the lower court's rejection of the experts invalid; rather, it explained why each of the lower court's criticisms was either unfounded or warranted less than a total rejection. *Id.* at 115–16.

To be blunt, the State's experts here do not remotely resemble the experts in *Maisto*. Indeed, Supreme Court's rejection of these experts' assertions was based, in large part, on the complete absence of any articulable basis for their opinions. And the Court here did not explain, as it did in *Maisto*, why Supreme Court's specific criticisms of the State's experts were unwarranted.

B. The State has failed to refute Supreme Court's factual findings.

In Oceanview's opening brief, it identified three key factual findings of Supreme Court that this Court implicitly or explicitly rejected without adequate explanation. The State in its response has failed to show why these factual findings are not correct and well-founded in the Record.

1. The Appellate Decision assumes a benefit from the Challenged Regulations that was not proved at trial.

Perhaps Supreme Court's single most important factual finding is that the State failed to provide any evidence that the Challenged Regulations result in "the actual integration of persons with serious mental illness into alternative community settings." (R.58.) All of the discussion of the superiority of smaller or more integrated housing settings over transitional adult homes is completely and utterly irrelevant if the Challenged Regulations do not actually cause anyone to move into these other settings.

In its opening brief, Oceanview explained at length why there is no good reasons to believe that the Challenged Regulations would have such a result — the regulations do not provide any additional housing opportunities to anyone, the State makes no effort to reach out to any person who is excluded by them or to follow or track these affected individuals in any way, and at trial the State provided no evidence of a single person excluded from a transitional adult home who subsequently ended up in a smaller or more community-based setting. (Oceanview Br. 9–10.)

On the other hand, there is very good reason to believe otherwise. Before the Challenged Regulations, transitional adult homes received many referrals of persons with mental illness from homeless shelters. Now, those referrals must be rejected.

Many of those individuals presumably remain in shelters. Before the regulations, transitional adult homes received referrals of persons with mental illness from nursing homes. Now, some of those individuals are discharged to homeless shelters. Others who qualify for a nursing home level of care but are capable of living in a more independent setting — in other words, persons eligible for the ALP services provided to a large majority of residents at many transitional adult homes like Oceanview — will remain in nursing homes. (Oceanview Br. 11–13.)

There is simply no reason to believe that closing the door of transitional adult homes to persons with serious mental illness has resulted in any of those excluded persons residing in settings that the State favors like supportive housing apartments. Rather than address this critical failure of proof, the State attempts to sidestep it by blatantly mischaracterizing Supreme Court's decision as having found that "that integration of persons with serious mental illness into smaller facilities in the communities is not beneficial." (State's Br. 15.) Supreme Court's finding was not that "smaller facilities in the community" are not beneficial, but that the State "presented no evidence about where in the community persons with serious mental illness went after they were denied admission into transitional adult homes." (R.58–59.) Having misrepresented Supreme Court's actual finding, the State simply repeats

the unsupported assertion that the Challenged Regulations have "directly implement[ed] integration into smaller and more diverse settings." (State's Br. 15.)

Moreover, the State conflates two separate issues in this Court's Decision when says the Court held that Supreme Court erred in finding no benefit because it had "too narrow a reading of the *Olmstead* decision and ignor[ed] the trial evidence equating such facilities to institutionalized settings." (State's Br. 15 (cleaned up).) This Court's statement, that "Supreme Court's determination that transitional adult homes cannot be equated to the type of institutions at issue in *Olmstead*," (App. Dec. 9–10,) pertained to its threshold discussion of the *legal* question of whether *Olmstead* applies to transitional adult homes, not its later discussion of the *factual* questions of the benefits or harms that flow from more or less institutional settings.[5]

[5] This Court's statement in turn rests on a similar conflation of two separate issues in Supreme Court's decision. The case the Court cites in support of its assertion is *Guggenberger v. Minnesota*, 198 F. Supp. 3d 973, 1026 (D. Minn 2016), which stands for the proposition that Title II's integration mandate is not limited to institutional settings, but rather extends to any public program resulting in the unjustified segregation of persons with disabilities. *Id.* at 1027. Rather than adopting a broad interpretation of "institution", it stands for the quite different proposition that *Olmstead* applies to more than just institutions. But nothing in Supreme Court's decision suggests otherwise. Indeed, Supreme Court's analysis of the application of *Olmstead* to transitional adult homes, (*see* R.30–31, 52–53, 77–79,) does not depend in any way on whether they fit within any definition of "institutional," but was based solely on the lack of evidence of any State action resulting in unjustified segregation.

When the State purports to address this core question of whether persons excluded by the regulations end up in smaller or more integrated housing, it instead quotes this Court's summary of expert testimony opining that smaller facilities are more beneficial to the recovery of persons with serious mental illness than transitional adult homes. (State's Br. 16.) Notably, this testimony does nothing whatsoever to establish that any excluded person has actually ended up in such a smaller facility.

Finally, the State cites what it purports to be Record evidence contradicting Supreme Court's finding. In fact, however, its first two points are exclusively focused on existing adult home residents who move out into supportive housing, *not* persons excluded from admission by the Challenged Regulations. (State's Br. 16–17.) The State's third point — the only one with any bearing on this crucial factual issue — is the assertion that State officials have not received reports of the Regulations having a detrimental effect on persons with serious mental illness finding appropriate housing. (State's Br. 17.) But it is hard to see how the State's lack of knowledge, when the State concedes that it makes no attempt to monitor, follow up, track, or in any way reach out to persons excluded by the Regulations, (*see* R.58–59,) can be sufficient to satisfy its burden of demonstrating that the Challenged Regulations benefit those excluded persons. Indeed, the Record evidence about persons actually harmed by the Challenged Regulations — for example, persons discharged to a homeless shelter or

retained in a nursing home because they were ineligible for admission to a transitional adult home — did not involve "complaints" or reports of "problems" with the regulation, but simply the everyday operation of the Challenged Regulations in practice. (*See, e.g.*, R.29.)

2. The Appellate Decision assumes that the Challenged Regulations respond to harm that was not proved at trial.

As Oceanview noted in its Opening Brief, Supreme Court made findings of fact that the State had "failed completely to present credible evidence to support [the] proposition" that transitional adult homes are "neither clinically appropriate for nor conducive to the recovery" of persons with SMI. (R.75.)

As an initial matter, and as Oceanview noted in its opening brief, the alleged deficiencies of transitional adult homes are entirely irrelevant without consideration of the alternative. (Oceanview Br. 17–18.) The legally relevant question is not whether the State has some valid reason to disfavor adult homes, but rather, whether excluding persons from adult homes results in a *benefit* to those persons. Even at its most brazen, the State has never suggested that a homeless shelter is more conducive to the recovery of a person with serious mental illness than an adult home. And concerns about the "institutional" qualities of an adult home can have no weight if the likely alternative — for example, for an ALP-eligible applicant who requires significant

assistance with basic activities of daily living — is a far more regimented and restrictive nursing home.

But even leaving that aside, the State has failed to prove that transitional adult homes are not conducive to the recovery of persons with serious mental illness. The State characterizes Supreme Court's finding as "based on that court's holding that such facilities 'are neither "institutions" nor "institution-like."'" (State's Br.17.) In fact, however, Supreme Court's finding was based on the State's failure to establish "that the 'institutional' characteristics of a transitional adult home adversely impacted any seriously mentally ill resident's ability to recover or to otherwise thrive in such home." (R.75.) The State's "institutional" argument rests on a kind of flawed syllogism: (1) transitional adult homes have 'institutional' characteristics; (2) institutions are bad for persons with mental illness; therefore (3) transitional adult homes are bad for persons with mental illness. Supreme Court found that the State had failed to make the necessary connection between those "institutional" characteristics and the alleged detriment to persons with mental illness.

Much of the State's response consists of repetition of the claim that Supreme Court rejected its experts due to a lack of "statistical data," which Oceanview addressed at length in its opening brief. (Oceanview Br. 20–22.) Supreme Court based its evaluation of the State's experts not simply on the lack of empirical data or

statistics, but on the absence of *any* evidentiary basis for the expert opinions, whether quantitative or qualitative, and whether from professional sources or from personal experience. Moreover, Dr. Sederer demonstrated a profound ignorance of certain basic and fundamental features of the adult homes about which he claimed to be an expert. (Oceanview Br. 22–23.) In doubling down on this argument, the State conflates a lack of statistical data with Supreme Court's actual criticism of the absence of any evidentiary basis whatsoever for Dr. Sederer's opinions. (State's Br. 19.)

The State talismanically invokes Dr. Sederer's years of experience as a "public health professional," (State's Br. 18,) but does not mention his almost complete lack of direct experience with adult homes or his demonstrated ignorance of basic and fundamental characteristics of adult homes. (Oceanview Br. 22–23.)

As noted in Oceanview's opening brief, (Oceanview Br. 24–26,) this Court's quotation from *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 602 (1999), that "[c]ourts normally should defer to the reasonable medical judgments of public health officials," is singularly inapt. This language in *Olmstead* refers to *individualized* clinical determinations that particular persons would not benefit from a less restrictive setting, but the Challenged Regulations disallow any such individualized consideration.

Moreover, the qualifying language, that courts *normally* should defer to *reasonable* judgments, necessarily implies that courts should not always defer, such as when a judgment is not adequately supported by reason.

3. The Appellate Decision ignores Supreme Court's factual findings in holding that the Challenged Regulations are narrowly tailored.

In its opening brief, Oceanview noted specific factual findings by Supreme Court that significantly undercut this Court's characterization of the Challenged Regulations as narrowly tailored. (Oceanview Br. 26–30.) The State responds by simply quoting from this Court's Decision without acknowledging Oceanview's critique.

Oceanview also noted that New York has chosen to adopt a response to *Olmstead* that is *more* discriminatory than the approach of any other state. (Oceanview Br. 30–31.) Rather than proactively reaching out to offer housing alternatives to persons with mental illness, as some states have done, (*see* R.59, 3380–81,) New York and New York alone responded with a discriminatory admission bar. (R.81.) Although this Court held that narrow-tailoring does not require use of the least discriminatory alternative, (App. Dec. 8,) surely narrow-tailoring must mean *something*. The State's only defense to New York's uniquely discriminatory approach is that New York's transitional adult homes are "anomalous compared to the rest of

the country." (State's Br. 21.) But this is contradicted by the State's own expert on *Olmstead* compliance who discussed his experience in three different states involving "large facilities, congregate settings with some personal care assistant services populated primarily by people with serious mental illness" that were "[e]ssentially similar in nature to what you have in New York." (R.3330.)

The State also refers to this Court's emphasis on the "importance of leaving room for flexible solutions to address the complex problem of discrimination and to realize the goals established by the Congress in the [FHA]." (App. Dec. 12 (quoting *Bangerter*, 46 F.3d at 1505. In Bangerter, however, this language follows immediately after a review of a body of caselaw recognizing limits on engaging in discriminatory actions in pursuit of beneficial purposes under the FHA, including cases expressly rejecting the use of ceiling quotas to further integration by capping the concentration of minorities in a particular location, exactly as the Challenged Regulations cap the percentage of persons with serious mental illness here. *Id.* Although the *Bangerter* court noted the residual flexibility that remains after recognizing these limits, this Court did not even acknowledge the existence of these cases, let alone the larger body of caselaw constraining the use of "benign" or "beneficial" discrimination as a defense under other federal civil rights laws.

POINT II

IN THE ALTERNATIVE, THIS COURT SHOULD GRANT OCEANVIEW PERMISSION TO APPEAL THIS COURT'S DECISION TO THE COURT OF APPEALS.

This case presents a question of law of great practical importance that has been the subject of significant judicial disagreement. The Court of Appeals could help bring clarity to an area that has divided courts for decades.

A. The standard governing claims of intentional discrimination under the FHA is an important legal question.

In opposing Oceanview's motion for permission to appeal to the Court of Appeals, the State seeks to denigrate the importance of the legal questions involved, stating that "Oceanview falsely asserts that this Court held that the Regulations require Transitional Adult Homes to engage in 'intentional discrimination' against persons with disabilities," and that "[t]o the contrary, this Court held that the Regulations were beneficial to — not discriminatory against — persons with disabilities."[6] (State's Br. 22.)

[6] The State also mischaracterizes this Court's Decision, which did not say that the Challenged Regulations "could be considered" discriminatory on their face, (State's Br. 23,) but rather that "the regulations at issue *are* discriminatory on their face." (App. Dec. 6 (emphasis added).)

First, the State's assertion is flatly incorrect as a matter law. As the United States Supreme Court recognized in the context of Title VII, "[w]hether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination." *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991). Neither "the absence of a malevolent motive" or "[t]he beneficence of an employer's purpose" serves to "alter the *intentionally discriminatory* character of the policy." *Id.* (emphasis added). The principle applies equally in the FHA context. *See Bangerter*, 46 F.3d at 1501.

Second, the State's assertion flies in the face of how the Challenged Regulations operate. When a person applies to live at a transitional adult home and that person is determined to have a serious mental illness diagnosis, the adult home is compelled by law to turn the applicant away — solely on the basis of that disability classification. 18 N.Y.C.R.R. § 487.4(e)(3)(ii). That is government-mandated intentional discrimination, regardless of whether the State may be able to proffer a legal justification. Finally, Supreme Court heard testimony about several specific human beings who suffered real harm after being denied admission due to their

diagnoses. (R.27–29.) It is offensive for the State to now insist that these people were never actually discriminated against.[7]

The legal question at issue in this case — what protection does the FHA provide to persons with disabilities against intentional discrimination by actors with "benign" intentions — is undeniably important and affects a broad class of New Yorkers statewide.

B. There is significant disagreement among courts that have considered this issue.

The State also downplays the degree of disagreement among the federal courts over the correct legal standard, claiming that "Federal Courts of Appeals have been ruling on the correct legal standard to apply to such challenges for the past three

---

[7] The DOJ advanced a different, but equally wrong, version of this argument in its Statement of Interest. The DOJ's position, directly contrary to this Court's recognition that the Challenged Regulations are the "discriminatory on their face," (App. Dec. 6,) is that these regulations are in fact not discriminatory at all because they merely regulate the settings in which certain services are being provided. (R.8721–22, 8723 n.13.) As Oceanview has previously demonstrated in response to DOJ's filing, this is an egregious misrepresentation of the Challenged Regulations. (See R.8733–37.)

In short, if a facility providing cancer treatment were to refuse to serve persons suffering from blindness, this would be straightforward disability discrimination, not the mere regulation of settings in which services are provided. Replace cancer treatment with assistance with activities of daily living and blindness with mental illness and you have the Challenged Regulations at issue here.

decades," and that "[t]he Sixth, Ninth and Tenth Circuits have all adopted the standard recommended by the DOJ and applied by the Opinion." (State's Br. 24.) This is incorrect. In fact, these courts do not even agree on whether the standard is based on defined statutory exceptions or legitimate government interests, *see Sailboat Bend Sober Living, LLC v. City of Fort Lauderdale*, Fla., 46 F.4th 1268, 1277 (11th Cir. 2022) (noting divide between Sixth Circuit approach and that of Ninth and Tenth Circuits); *see also infra*, let alone establish the test for narrow tailoring — a critical part of the legal standard. Lower courts have added to this confusion, with each of the three New York federal district courts that has addressed this matter each applying a different version of the standard. *See Sierra*, 552 F Supp 2d 428; *Hum. Res. Rsch. & Mgmt. Grp.*, 687 F. Supp. 2d 237; *Doe v. Zucker*, No. 117CV1005GTSCFH, 2023 WL 4305246 (N.D.N.Y. June 30, 2023).

A brief review of the legal landscape makes clear that there is no consensus on the correct legal standard. Rather, the federal courts disagree substantially over various aspects of the standard, including: whether the permissible justifications for discrimination are open-ended or limited to certain categories; if so limited, how those categories are derived and defined; and what degree of narrow tailoring is required.

The Eighth Circuit in *Familystyle of St. Paul, Inc. v. City of St. Paul, Minnesota*, 923 F.2d 91, 94 (8th Cir. 1991), and later in *Oxford House-C v. City of St.*

Louis, 77 F.3d 249, 252 (8th Cir. 1996), relying on an earlier case that had imported a Fourteenth Amendment equal protection framework into the FHA, held that the government need only have a rational basis in order to discriminate against persons with mental illness.

In *Bangerter*, 46 F.3d at 1503, the Tenth Circuit expressly rejected an equal protection approach based on government interests. That court instead, relying on the language of the FHA and Supreme Court caselaw on analogous statutes, held that a discriminatory action could be justified only if it fit within an explicit or implicit statutory exception, and identified two: the express statutory exception for "an individual whose tenancy would constitute a direct threat to the health or safety of other individuals," 42 U.S.C. § 3604(f)(8), and an implied exception for so-called "benign discrimination," by analogy with Supreme Court decisions under Title VII. *Bangerter*, 46 F .3d at 1503–04.

Although the *Bangerter* court did not expressly adopt a narrow tailoring standard, it described the standard applied in FHA disparate impact cases, which requires that "no alternative would serve [the legitimate] interest with less discriminatory effect," and favorably cited a string of cases applying the same

standard in FHA racial discrimination cases in which facial discrimination was defended as beneficial to the protected group.[8] *Bangerter*, 46 F.3d at 1504–05.

The next circuit to weigh in was the Sixth Circuit in *Larkin*, 89 F.3d at 290, which recognized a split between the Eighth and Tenth Circuits. The *Larkin* court described *Bangerter* as having held that facially discriminatory laws can survive under the FHA if they "(1) are justified by individualized safety concerns; or (2) really benefit, rather than discriminate against, the handicapped, and are not based on unsupported stereotypes." *Id.* But rather than endorsing *Bangerter*'s categorical approach,[9] the Sixth Circuit in *Larkin* declared that "for facially discriminatory statutes to survive a challenge under the FHAA, the defendant must demonstrate that they are warranted by the unique and specific needs and abilities of those handicapped persons to whom the regulations apply." *Larkin*, 89 F.3d at 290. The *Larkin* court

---

[8] It is difficult to reconcile this Court's assertion that "the narrow tailoring required by the Sixth, Ninth and Tenth Circuits is a less onerous standard and does not require a showing that the challenged regulations are the least restrictive means," (App. Dec. 8,) with the Tenth Circuit's actual discussion in *Bangerter*.

[9] The Sixth Circuit in *Larkin* is frequently cited as having applied the same standard as the Tenth Circuit in *Bangerter* and the Ninth Circuit in *Community House*, but some courts have recognized that it in fact applies its own different standard. *See Sailboat Bend Sober Living*, 46 F.4th 1268, 1277 (11th Cir. 2022) (differentiating *Larkin*'s means-ends tailoring test from the limited categorical approach of *Bangerter* and *Community House*).

appears to blend the tailoring inquiry and the identification of interests into a single step.

Finally, the Ninth Circuit in *Community House*, 490 F.3d at 1050, described a circuit split between the Eighth Circuit's decisions in *Oxford House-C* and *Familystyle*, and the Tenth and Sixth Circuit's decisions in *Bangerter* and *Larkin*, respectively. The *Community House* court described itself as "follow[ing] the standard adopted by the Sixth and Tenth Circuits," which it characterized as requiring a showing that "(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." *Id.* The court did not address narrow tailoring because it found the government had failed to demonstrate a benefit to the protected class. *Id.* at 1051–52.

Later courts attempting to reconcile these decisions have created yet more variation. For example, the court in *Sierra*, 552 F. Supp. 2d at 430, characterized the split as between the Eighth Circuit, which employed the rational basis test, and the Sixth, Ninth, and Tenth Circuits, which it described using the Ninth Circuit's formulation. The *Sierra* court rejected the rational basis standard, but instead borrowed a heightened scrutiny standard from the disparate impact burden-shifting analysis in the Second Circuit's decision in *Huntington Branch, N.A.A.C.P. v. Town of*

Huntington, 844 F.2d 926, 936 (2d Cir. 1988). *Sierra*, 552 F. Supp. 2d at 431. The court characterized this standard as "a broader wording of the standard adopted by the Ninth Circuit in Community House," *id.*, it abandoned the statute-based exceptions, allowing the government to instead rely on *any* legitimate interest. This standard required narrow tailoring, employing the least discriminatory means test. *Id.* at 431.

Other federal district courts in New York later adopted the Ninth Circuit's formulation both with, *Hum. Res. Rsch. & Mgmt. Grp.*, 687 F. Supp. 2d at 265, and without, *Doe*, 2023 WL 4305246, at *30, the least discriminatory means test. Finally, the DOJ in its Statement of Interest quoted the Ninth Circuit's language, citing both the Ninth and Tenth Circuits. (R.8720.) Because it advocated deciding the case under a different theory, (R.8721–22,) DOJ did not discuss narrow tailoring.

This Court in its Decision applied what it described as the "standard embraced by the Sixth, Ninth and Tenth Circuits," (App. Dec. 7,) quoting the Ninth Circuit's articulation of the applicable exceptions. But although the Court sometimes refers to its task as determining whether the Challenged Regulations are narrowly tailored to benefit the protected class, it also interchangeably and repeatedly refers to the question as whether they are narrowly tailored to implement the "goal of integration," (*see* App. Dec. 8, 9, 12, 13,) framing the analysis in terms of a governmental interest as advocate by the State in its post-trial briefing, (*see* R.7794,) demonstrating the

continuing influence of the Eighth Circuit's equal protection-based approach despite its express rejection by both DOJ, (R.8720,) and the Tenth Circuit case that introduced the categorical approach. *See Bangerter*, 46 F.3d at 1503.

The Fair Housing Act prohibits various forms of housing discrimination against persons with disabilities, 42 U.S.C. § 3604(f), and makes no exception whatsoever for discrimination in support of "legitimate governmental interests." In fact, it does precisely the opposite — it expressly preempts any effort by state governments to "require or permit" any discrimination that would otherwise be prohibited. 42 U.S.C. § 3615. Despite this, various courts, including this one, have settled on standards that allow states to affirmatively require discriminatory conduct in service of purported governmental interests. A thorough reexamination of this issue is overdue.

C. New York courts would benefit from review by the Court of Appeals.

The State also argues that the Court of Appeals should not take this case because it involves an issue of federal, not state, law. (State's Br. 23.) But until the United States Supreme Court rules on this issue, the Court of Appeals has the final word on the application of the Fair Housing Act in all state courts. Given the length of time the federal circuit split has persisted without resolution or further development, there is no reason to believe a uniform standard will emerge from the

federal circuits in the near future, and absent such a uniform view, or even a decision by the Second Circuit which might be viewed as more persuasive authority to New York courts, the state courts are effectively without clear direction on this important matter of federal law.

The State also argues that the issue is not novel, citing the federal circuit courts that have weighed in. (State's Br. 24.) But it is certainly a novel issue for the Court of Appeals, which would be confronting this issue for the very first time — not merely engaging in error correction concerning the application of well-settled caselaw.

The State also notes the lack of a conflict between departments of the Appellate Division, as only this Court has so far weighed in. (State's Br. 24.) The State does not note, however, the conflict that now exists between this Court and decisions of federal district courts within the state of New York. A well-reasoned decision from the Court of Appeals thoroughly considering these various divides in authority and carefully setting out the proper legal standard with attention to nuance would not only ensure that New York courts do not further contribute to the confusion and proliferation of different legal standards, but could provide much needed guidance that might lead the federal courts to greater uniformity going forward.

CONCLUSION

For the foregoing reasons and those stated in Oceanview's opening brief, this Court should grant Petitioner-Respondent Oceanview's motion for reargument, or, in the alternative, grant Oceanview permission to appeal this Court's decision to the Court of Appeals.

DATED: January 5, 2024

O'CONNELL AND ARONOWITZ, P.C.

By: 

Michael Y. Hawrylchak
Jeffrey J. Sherrin
Attorneys for Petitioner-Respondent
54 State Street
Albany, New York 12207
Tel: (518) 462-5601
Fax: (518) 462-2670
Email: mhawrylchak@oalaw.com