STATE OF NEW YORK
SUPREME COURT

APPELLATE DIVISION
THIRD DEPARTMENT

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.

NOTICE OF MOTION FOR LEAVE TO REARGUE OR PERMISSION TO APPEAL

Case No.
CV-22-1940

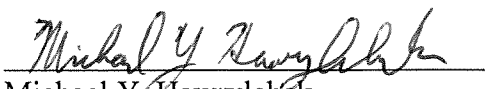
PLEASE TAKE NOTICE that upon the attached Affirmation of Michael Y. Hawrylchak, dated December 6, 2023, and the accompanying Memorandum of Law dated December 6, 2023, Petitioner-Respondent will move at a term of this Court to be held in the City of Albany, New York, on the 8th day of January, 2024, at 10:00 a.m., for leave to reargue this Court's Opinion and Order dated May 4, 2023, or, in the alternative, for permission to appeal to the Court of Appeals, together with any other relief this Court may deem just and proper.

PLEASE TAKE NOTICE that pursuant to CPLR 2214(b) answering affidavits and other papers must be served at least seven days before the motion return date.

Dated: Albany, New York
December 6, 2023

Yours, etc.,

O'CONNELL AND ARONOWITZ, P.C



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STATE OF NEW YORK
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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.

AFFIRMATION IN SUPPORT OF MOTION FOR LEAVE TO REARGUE OR PERMISSION TO APPEAL

Case No.
CV-22-1940

MICHAEL Y. HAWRYLCHAK, an attorney duly admitted to practice law in the Courts of the State of New York, and not a party to the above-entitled action, hereby affirms the following to be true under the penalties of perjury, pursuant to CPLR § 2106:

1. I am an attorney with the law firm of O'Connell and Aronowitz, P.C., attorneys for Petitioner-Respondent Oceanview Manor. I am fully familiar with the facts and circumstances stated herein.

2. I submit this affirmation in support of Petitioner-Respondent's motion seeking an order pursuant to CPLR 2221(d) granting reargument of an Opinion and Order of this court dated May 4, 2023, or, in the alternative, an order pursuant to CPLR 5602(a)(1)(i) granting Petitioner-Respondent permission to appeal to the Court of Appeals from said Opinion and Order.

3. Respondent-Appellant took an appeal from an Amended Decision/Order/Judgment of Supreme Court, Albany County (Walsh, J.) entered October 18, 2022. In that post-trial decision, Supreme Court held that certain regulations of the

New York State Department of Health (the "Challenged Regulations") violate the federal Fair Housing Act and were therefore invalid. By an Opinion and Order dated May 4, 2023, a copy of which is annexed hereto as Exhibit A, this Court reversed and declared that the Challenged Regulations do not violate the Fair Housing Act. This Opinion and Order was served with Notice of Entry on December 6, 2023.

REARGUMENT SHOULD BE GRANTED.

4. In the decision that was the subject of this appeal, Supreme Court held, in a detailed 81-page opinion based on an extensive record including an 18-day bench trial, that the Challenged Regulations violate the Fair Housing Act.

5. This Court's Opinion and Order held that the legal standard applied by Supreme Court was in certain respects incorrect. Rather than remanding to allow the trial judge to apply the correct standard in the first instance, this Court reversed, holding that the Challenged Regulations do not violate the Fair Housing Act.

6. In so doing, this Court erred because it overlooked or misapprehended several significant facts.

7. First, this Court's Opinion and Order states that the Challenged Regulations provide a benefit to persons with mental illness. This assertion is directly contrary to extensive and detailed factual findings, explained at length in Supreme Court's decision, that the State had failed to demonstrate that the Challenged Regulations provide any benefit to such persons, and that in fact the Challenged Regulations had imposed harm. (*See* R.26–30, 64–67.) This Court's Opinion and Order does not address Supreme Court's findings of fact, does not explain why Supreme Court's findings are erroneous, and does not explain how its contrary assertion is supported by the trial Record.

8. Second, this Court's Opinion and Order found that transitional adult homes are "not beneficial to recovery for people with serious mental illness." This assertion is directly contrary to extensive and detailed factual findings, explained at length in Supreme Court's decision, that the State had failed to demonstrate that transitional adult homes are not beneficial to persons with serious mental illness. (*See* R.35–50.) This Court's Opinion and Order does not address Supreme Court's express findings of fact that persons with serious mental illness can benefit from residing at transitional adult homes, but supports its contrary view on the basis of testimony by the State's expert Dr. Lloyd Sederer.

9. Supreme Court rejected Dr. Sederer's testimony because it was "not based upon anything: no professional literature, no empirical research, and no first-hand experience," (R.41,) after extensively reviewing the lack of any basis, whether quantitative or qualitative and whether from professional sources or from personal experience, for his opinions, as well as his ignorance of key features of adult homes directly relevant to their suitability as housing for persons with mental illness. (*See* R.36–41.) Supreme Court further made a direct credibility determination, finding Dr. Sederer's testimony "wholly unconvincing." (R.41.) This Court mistakenly attributed Supreme Court's rejection of Dr. Sederer's testimony as "due to the absence of statistical data," and did not address any of the deficiencies noted by Supreme Court or Supreme Court's credibility determination.

10. Third, this Court's Opinion and Order held that the Challenged Regulations are narrowly tailored. In so doing, this Court made assertions, including with respect to the definition of serious mental illness, that are directly contrary to Supreme Court's factual findings. (*See* R.64.) This Court's Opinion and Order does not address Supreme Court's

contrary findings of fact, does not explain why they are erroneous, and does not explain how its contrary assertions are supported by the trial Record.

IN THE ALTERNATIVE, PERMISSION TO APPEAL TO THE COURT OF APPEALS SHOULD BE GRANTED.

11. Permission to appeal to the Court of Appeals is warranted where "the questions presented merit review by [the Court of Appeals], such as that the issues are novel or of public importance." 22 N.Y.C.R.R. § 500.22(b)(4). The questions presented here, involving the proper standard of review for claims of intentional disability discrimination under the federal Fair Housing Act, are novel, in that the Court of Appeals has never previously considered this issue and most of the federal Courts of Appeals, including the Second Circuit, have not yet weighed in on the question. The applicable legal standard is of significant public importance, as it will govern the protections afforded to all disabled persons in the state and will apply to any housing provider in this state that engages in intentional discrimination against the disabled.

12. In addition, the correct legal standard for these claims is subject to a multi-way division of authority in the federal Courts of Appeals, and this Court's decision expressly rejects the standard applied by several lower federal courts within the state of New York. A thorough, well-reasoned decision from the Court of Appeals could bring clarity to this unsettled area of law.

13. Petitioner-Respondent seeks review of several questions of law related to the legal standard for intentional discrimination under the Fair Housing Act.

14. First, are challenges to facially-discriminatory laws subject to a government interests means-ends balancing test, or are they instead governed by the text of the Fair

Housing Act including its express preemption provision? The Court here, following several federal courts, adopted a government interest means-ends balancing test. Petitioner-Respondent contends that this standard has no basis in the statute and is in irreconcilable conflict with its express preemption provision.

15. Second, does the narrow-tailoring condition require that the challenged actions be the least discriminatory means of achieving the purported interests? This Court expressly rejected the least-discriminatory-means requirement employed by several local federal courts. Petitioner-Respondent contends that this creates an anomalous situation where facially discriminatory actions are subject to a less stringent standard than facially neutral actions with a disparate impact.

16. Third, does the "benign discrimination" exception to the Fair Housing Act, to the extent such an exception exists, require more than a mere showing of benefits that outweigh the burdens on the protected class? This Court held that a quota imposed on the disabled could be upheld by a mere showing that the benefits outweigh the burdens on the targeted class. Federal courts that have recognized an implied "benign discrimination" exception to the FHA's prohibitions have held that it must be narrowly cabined and have rejected justifications based on stereotypes and generalizations or mechanisms like quotas where the burden falls on the disadvantaged group. Petitioner-Respondent contends that, to the extent such an exception exists, it should be construed narrowly following federal caselaw.

WHEREFORE, Petitioner-Respondent respectfully requests that this Court grant reargument of the Opinion and Order dated May 4, 2023, or, in the alternative, grant

permission to appeal to the Court of Appeals from said order, and grant such other and further relief as the Court deems just and proper.

Dated: Albany, New York
December 6, 2023

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Exhibit A

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: May 4, 2023 CV-22-1940

In the Matter of OCEANVIEW HOME FOR ADULTS, INC., Doing Business as OCEANVIEW MANOR,

Respondent,

v OPINION AND ORDER

HOWARD ZUCKER, as Commissioner of Health,

Appellant,

et al.,

Respondent.

Calendar Date: March 30, 2023

Before: Garry, P.J., Lynch, Pritzker, Reynolds Fitzgerald and McShan, JJ.

Constantine Cannon LLP, New York City (*Gary J. Malone* of counsel), for appellant.

O'Connell and Aronowitz, Albany (*Michael Y. Hawrylchak* of counsel), for Oceanview Home for Adults, Inc., respondent.

Disability Rights New York, Brooklyn (*Marc Fliedner* of counsel), for Class Counsel for the Federal Settlement, amicus curiae.

Hinman Straub PC, Albany (*David T. Luntz* of counsel), for Empire State Association of Assisted Living, Inc., amicus curiae.

Lynch, J.

Appeal from an amended judgment of the Supreme Court (Margaret T. Walsh, J.), entered October 18, 2022 in Albany County, which partially granted petitioner's application, in a combined proceeding pursuant to CPLR article 78 and action for declaratory judgment, to, among other things, declare invalid certain regulations promulgated by respondent Commissioner of Health.

In 1999, the Supreme Court of the United States issued a landmark decision interpreting the states' obligations under Title II of the Americans with Disabilities Act (hereinafter ADA) to ensure that persons with mental disabilities are not unjustifiably isolated in institutions and are provided services in the most integrated setting appropriate to their needs (*see Olmstead v L.C. ex rel. Zimring*, 527 US 581 [1999]). Justice Ginsberg, writing for the majority, explained that the ADA is "intended 'to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities' " (*id.* at 589, quoting 42 USC § 12101 [b] [1]), concluding that "unjustified institutional isolation of persons with disabilities is a form of discrimination" and that integration of such persons into community-based settings is required upon certain conditions (*Olmstead v L.C. ex rel. Zimring*, 527 US at 600, 587). In so holding, the Court recognized that "institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life" and "severely diminishes the everyday life activities of [such] individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment" (*id.* at 600, 601).

Although the *Olmstead* Court did not establish fixed guideposts for implementing this integration mandate on a national level, it highlighted the importance of relying on the assessments of the states' mental health professionals in determining the appropriateness of serving individuals with disabilities in community-based settings (*see id.* at 602). A plurality of the Court also emphasized that, under the ADA, states generally have an obligation to "make reasonable modifications in policies, practices, or procedures . . . necessary to avoid discrimination on the basis of disability" (28 CFR 35.130 [b] [7] [i]; *see Olmstead L.C. ex rel. Zimring*, 527 US at 592), writing that, "[i]f . . . [a] [s]tate were to demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, . . . the reasonable-modifications standard would be met" (*Olmstead v L.C. ex rel. Zimring*, 527 US at 605-606).

Following *Olmstead*, a series of federal lawsuits were filed challenging the State's provision of services for persons with mental illness living in adult homes. To that end, Disability Advocates, Inc. (hereinafter DAI and now known as Disability Rights New York) commenced an action "on behalf of individuals with mental illness residing in, or at risk of entry into" certain large adult homes[1] in New York City – those "with more than 120 beds and in which [25] residents or 25% of the resident population (whichever is fewer) have a mental illness" – arguing that they were not receiving services in the most integrated setting appropriate to their needs (*Disability Advocates, Inc. v Paterson*, 653 F Supp 2d 184, 187 [ED NY 2009], *vacated sub nom. Disability Advocates, Inc. v New York Coalition for Quality Assisted Living, Inc.*, 675 F3d 149, 162-163 [2d Cir 2012]). After a lengthy trial, the District Court agreed, finding that the adult homes were "institutions that segregate[d] residents from the community and impede[d] [their] interactions with people who do not have disabilities" and, therefore, DAI proved by a preponderance of the evidence a violation of the integration mandate of Title II of the ADA (*id.* at 187). On appeal, the Second Circuit vacated the District Court's judgment on the ground that DAI lacked standing to bring the action (s*ee Disability Advocates, Inc. v New York Coalition for Quality Assisted Living, Inc.*, 675 F3d at 162-163).

Thereafter, the Department of Justice (hereinafter DOJ) and a class of persons with mental illness separately filed suits against the State (hereinafter collectively referred to as the *O'Toole* action), raising nearly identical claims as those asserted by DAI (*see United States v New York*, US Dist Ct, ED NY, 13-cv-4165). These actions were consolidated and ended in a settlement under which the State agreed to take certain remedial action on behalf of individuals with mental illness living in adult homes, including providing the opportunity to move into community-based, supported housing (*see United States v New* York, 2017 WL 2616959, *2 [ED NY, June 15, 2017, Nos. 13-cv-4165, 13-cv-4166, 16-cv-1683 (NGG) (RML) (RER), Garaufis, J.]; *see also Residents & Families United to Save Our Adult Homes v Zucker*, 2017 WL 5496277, *2 [ED NY, Jan. 24, 2017, No. 16-cv-1683 (NGG), Garaufis, J.]).

Meanwhile, the State embarked on its own endeavor to implement *Olmstead* (s*ee* 28 CFR 35.130 [b] [7] [i]). The Office of Mental Health (hereinafter OMH) and the Department of Health (hereinafter DOH) memorialized certain reforms to the State's mental health system that the agencies viewed as critical to implement the goal of

[1] Adult homes are "adult-care facilit[ies] established and operated for the purpose of providing long-term residential care, room, board, housekeeping, personal care and supervision to five or more adults unrelated to the operator" (18 NYCRR 485.2 [b]).

deinstitutionalization, including providing options for more community-based, integrated housing for persons with mental illness. To that end, DOH issued a notice of proposed rulemaking enumerating certain actions it was going to take to "limit the number of residents with serious mental illness in large adult homes" throughout the state, including defining adult homes with "a certified capacity of 80 beds or more in which 25 percent or more of the resident population are persons with serious mental illness" as "transitional" (Notice of Proposed Rulemaking, 2012 NY Reg Text 300713 [NS], 18 NYCRR 487.13 [b] [1] [Aug. 8, 2012]). OMH, in turn, issued clinical advisories in 2012 concluding that such facilities "are not clinically appropriate . . . for the significant number of persons with serious mental illnesses who reside in such settings, nor are they conducive to the rehabilitation or recovery of such persons" (NY St Off of Mental Health Clinical Advisory, Aug. 8, 2012; *see* NY St Off of Mental Health Clinical Advisory, Oct. 1, 2012).[2]

In 2013, DOH then formally promulgated regulations defining transitional adult homes in the manner set forth above (*see* 18 NYCRR 487.13 [b] [1]) and placed an admissions cap on such facilities precluding them from "admit[ting] any person whose admission will increase the mental health census of the facility" (18 NYCRR 487.4 [d] [hereinafter referred to as the admissions cap]). Mental health census "means the number of residents in a facility who are persons with serious mental illness as defined in [18 NYCRR 487.2 (c)]" (18 NYCRR 487.13 [b] [4]). The regulations require transitional adult homes to submit to the State "a compliance plan that is designed to bring the facility's mental health census to a level that is under 25 percent of the resident population over a reasonable period of time, through the lawful discharge of residents with appropriate community services to alternative community settings" (18 NYCRR 487.13 [c]). Once a transitional adult home has adequately reduced its mental health census, nothing in the regulations precludes it from admitting residents with serious mental illness provided it remains within the census. The regulations also contain a waiver permitting former residents of a transitional adult home to return to the facility

[2] In a 2013 report by the State's *Olmstead* Commission providing recommendations for serving New Yorkers with disabilities in the most integrated setting, the Commission also highlighted the importance of moving persons with serious mental illness from "segregated settings" – including "adult homes" – into more integrated community placements (Report and Recommendations of the Olmstead Cabinet, *A Comprehensive Plan for Serving People with Disabilities in the Most Integrated Setting*, at 8, 9 [Oct. 2013], *available at* https://www.criminaljustice.ny.gov/opca/pdfs/9-Olmstead-Cabinet-Report101013.pdf [last accessed Mar. 31, 2023]).

even if readmission increases the mental health census above the 25% cap (*see* 18 NYCRR 487.4 [e] [3] [ii] [b]).

After respondent Commissioner of Health (hereinafter respondent) upheld a citation finding petitioner – a privately-owned and operated transitional adult home – in violation of the admissions cap pertaining to persons with serious mental illness,[3] petitioner commenced this hybrid CPLR article 78 proceeding and action for declaratory judgment in 2016 challenging the regulations under various legal theories, including that the admissions cap violates the Fair Housing Act (*see* 42 USC § 3601 *et seq.* [hereinafter FHA]) by discriminating against persons with serious mental illness in terms of their housing. Following joinder of issue, motion practice and an 18-day trial, Supreme Court – in a thorough and detailed decision – granted judgment in favor of petitioner on its claim under the FHA and permanently enjoined enforcement of the regulations.[4]

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

[3] The record contains evidence that, as of 2013, over 90% of petitioner's residents were persons with serious mental illness. This number dropped to around 47% by 2019.

[4] The FHA claim was the only one remaining by the time of trial.

goal of integration. Respondent appeals, arguing that Supreme Court erred in finding that the challenged regulations violate the FHA.[5] We agree.

We begin our analysis with a basic overview of the purpose behind the FHA and the conduct that it prohibits. The FHA prohibits discrimination in housing practices against certain protected classes, including persons with both physical and mental disabilities (*see* 42 USC § 3602 [h] [1]). In enacting the Fair Housing Amendments Act of 1988 – which amended the 1968 version of the FHA – Congress sought, among other things, to "end the unnecessary exclusion of persons with handicaps from the American mainstream" (*City of Edmonds v Washington State Bldg. Code Council*, 18 F3d 802, 806 [9th Cir 1994] [internal quotation marks and citation omitted], *affd* 514 US 725 [1995]). To that end, the FHA makes it illegal to "discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of . . . that buyer or renter, [or] a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available" (42 USC § 3604 [f] [1] [A], [B]). The statute also prohibits discrimination in the "terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap" (42 USC § 3604 [f] [2]), and contains a preemption clause providing that "[a]ny law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid" (42 USC § 3615).

We agree with Supreme Court that the regulations at issue are discriminatory on their face – regardless of their remedial purpose – insofar as the admissions cap applies solely to individuals with serious mental illness (*see Bangerter v Orem City Corp.*, 46 F3d 1491, 1500 [10th Cir 1995]; *see also International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v Johnson Controls., Inc.*, 499 US 187, 199 [1991]). The further question is the appropriate standard to apply in gauging the propriety of the regulations under the FHA in light of the facial discrimination. The trial court determined that respondent was required "to prove that the [c]hallenged [r]egulations further, in theory and in practice, a legitimate, bona fide governmental interest *and that no alternative would serve the interest with less discriminatory effect*" (emphasis added) – a standard enunciated by the District Court for the Southern District of New York in *Sierra*

[5] This Court stayed enforcement of Supreme Court's judgment "pending determination of the appeal taken therefrom, except as it applies to individuals whose admissions were scheduled on or before November 2, 2022" (2022 NY Slip Op 74905[U] [3d Dept 2022]).

v City of New York (552 F Supp 2d 428, 431 [SD NY 2008]). For the reasons that follow, we conclude that Supreme Court erred in utilizing the least restrictive alternative standard underscored above.

Respondent argues that the test espoused in *United States v Salerno* (481 US 739, 745 [1987]) governs this case. In *Salerno*, the Supreme Court of the United States stated that, where a facial constitutional challenge is made to a "legislative [a]ct," the petitioner must show that "no set of circumstances exists under which the [a]ct would be valid" (*United States v Salerno*, 481 US at 745). However, *Salerno* was not considering a claim under the FHA in enunciating this rule and federal Circuit Courts have largely, though not invariably, refrained from using this standard in evaluating facial challenges to housing restrictions under the FHA, instead placing the burden on the respondent to justify the differential treatment (*see e.g. Community House, Inc. v City of Boise*, 490 F3d 1041, 1050 [9th Cir 2007]; *Larkin v State of Mich. Dept. of Social Services*, 89 F3d 285, 290 [6th Cir 1996]; *Bangerter v Orem City Corp.*, 46 F3d at 1503-1504; *see also Sailboat Bend Sober Living, LLC v City of Fort Lauderdale, Fla.*, 46 F4th 1268, 1277 [11th Cir 2022]; *but see Children's Health Defense v Federal Communications Commn.*, 25 F4th 1045, 1052 [DC Cir 2022]).

By promoting the *Salerno* test, respondent has also taken a position at odds with the standard espoused by DOJ for analyzing facial challenges under the FHA. In a "Statement of Interest of the United States of America" filed in the trial court,[6] DOJ urged use of a standard embraced by the Sixth, Ninth and Tenth Circuits, succinctly stated as follows: "[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' " (quoting *Community House, Inc. v City of Boise*, 490 F3d at 1050; *see Bangerter v Orem City Corp.*, 46 F3d at 1503-1504; *see also Larkin v State of Mich. Dept. of Social Servs.*, 89 F3d at 290-291). This standard "employ[s] a more searching method of analysis" than the rational basis test utilized by the Eighth Circuit (*Community House, Inc. v City of Boise*, 490 F3d at 1050; *see Oxford House-C v City of St. Louis*, 77 F3d 249, 252 [8th Cir 1996], *cert denied* 519 US 816 [1996]; *Familystyle of St. Paul, Inc. v City of St. Paul, Minn.*, 923 F2d 91, 94 [8th Cir 1991]), and certainly requires a more heightened scrutiny than *Salerno*.

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[6] DOJ filed this statement of interest pursuant to its authority under 28 USC § 517, which entitles it "to attend to the interests of the United States in a suit pending . . . in a court of a State."

Even when the restrictions purport to benefit the protected class, this standard requires that the means be "narrowly tailored" to effectuate the beneficial purpose (*Bangerter v Orem City Corp.*, 46 F3d at 1504; *see Community House, Inc. v City of Boise*, 490 F3d at 1050; *see also Larkin v State of Mich. Dept. of Social Servs.*, 89 F3d at 290-291).

We will follow the standard adopted by the Sixth, Ninth and Tenth Circuits as recommended by DOJ. Although DOJ is not the entity charged with implementing the FHA (*see* 42 USC § 3608 [a]), it has enforcement power under the statute (*see* 42 USC § 3614) and is specifically tasked with issuing regulations implementing Title II of the ADA (*see* 42 USC § 12134). In a case such as this – which concerns the interplay between the discrimination proscriptions of the FHA and the integration mandate of Title II of the ADA – DOJ's views regarding the propriety of the challenged regulations, while not requiring deference, do warrant "considerable respect" (*M.R. v Dreyfus*, 697 F3d 706, 735 [9th Cir 2012]; *see Olmstead v L.C. ex rel. Zimring*, 527 US at 598; *Matter of Mental Hygiene Legal Serv., Third Jud. Dept. v Delaney*, 38 NY3d 1076, 1103 [2022, Rivera, J., dissenting]). In our view, the standard employed by these Circuits – rather than the lower level of scrutiny used by the Eighth Circuit – best achieves a balance to implement the ADA and FHA mandates.

That said, we disagree with Supreme Court that the "least restrictive alternative" test is the formulation of narrow tailoring that applies. We recognize that the "least restrictive alternative" test was used in *Sierra v City of New York* (552 F Supp 2d at 431) when considering a claim of facial discrimination under the FHA, with the court in that case characterizing it as "essentially a broader wording" (*id.*) of the standard used by the Ninth Circuit in *Community House, Inc. v City of Boise*. In our view, however, 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 of implementing the goal of integration (*see Bischoff v Brittain*, 183 F Supp 3d 1080, 1091 [ED Cal 2016] [concluding that the narrow tailoring approach of the Ninth Circuit "does not require that (the) defendants' policy be the least restrictive means of achieving the allowed interests"]; *see also Rehabilitation Support Servs., Inc v City of Albany, N.Y.*, 2017 WL 3251597,*4 [ND NY, July 28, 2017, 14-cv-0499 (LEK/DJS)]; *Human Resource Research & Mgt. Group, Inc. v County of Suffolk*, 687 F Supp 2d 237, 257 [ED NY 2010]).[7] As such, we decline to apply the "least restrictive alternative" test in

[7] Although we are bound by the decisions of the Supreme Court of the United States on issues of federal law (*see People v Kin Kan*, 78 NY2d 54, 59-60 [1991]), that is not the case with respect to decisions of lower federal courts where there is a lack of

analyzing whether the challenged regulations are narrowly tailored to achieve the goal of integration.

Before engaging in that analysis, a few more points warrant discussion. For reasons unknown, Supreme Court did not account for DOJ's view that the challenged regulations do not violate the FHA (*see Olmstead v L.C. ex rel. Zimring*, 527 US at 598). Supreme Court also erred in concluding that, because transitional adult homes are privately owned and operated, Title II of the ADA does not apply in this case and, therefore, cannot serve as a valid justification for the admissions cap. The discrimination proscriptions of Title II of the ADA apply to public entities, defined as "any State or local government" or "any department, agency, special purpose district, or other instrumentality of a State or States or local government" (42 USC § 12131 [1] [A], [B]). Such public entities must "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities" (28 CFR 35.130 [d]). Supreme Court's determination that adult homes, including transitional adult homes, are not "public entities" for purposes of Title II of the ADA evinces a misunderstanding of the nature of the claim being asserted here. Unlike the situation in *Green v City of New York* (465 F3d 65, 78-79 [2d Cir 2006]) – upon which Supreme Court relied – this is not a circumstance where an individual is bringing an ADA claim against a private entity. Rather, petitioner is challenging regulations promulgated by the State in accordance with its plan to administer its mental health services in the "most integrated setting appropriate to the needs of qualified individuals with disabilities," as it is required to do under the ADA (28 CFR 35.130 [d]; *see* 28 CFR 35.130 [b] [7]).

The State – through its agencies – plays a crucial role in the licensure, inspection and operation of adult homes (*see* Social Services Law §§ 460-b, 461, 461-a; 18 NYCRR parts 485-487), and "administer[s] the State's mental health service system, plan[s] the settings in which mental health services are provided, and allocate[s] resources within the mental health service system" (*Disability Advocates, Inc. v Paterson*, 598 F Supp 2d 289, 317 [ED NY 2009]). The State's administration of its mental health services, including in adult homes, is subject to the ADA's integration mandate regardless of whether the adult homes at issue are privately owned and operated (*see id.*). Moreover, Supreme Court's determination that transitional adult homes cannot be equated to the type of institutions at

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uniformity (*see Flanagan v Prudential-Bache Sec.*, 67 NY2d 500, 506 [1986], *cert denied* 479 US 931 [1986]; 31 Carmody-Wait 2d § 172:92). As such, we decline to apply the portion of *Sierra* finding that the least restrictive alternative test is the appropriate formulation of heightened scrutiny to apply in this type of case.

issue in *Olmstead* rests upon too narrow a reading of that decision and ignores the trial evidence equating such facilities to institutionalized settings (*see* 28 CFR 35.130 [d]; *Guggenberger v Minnesota*, 198 F Supp 3d 973, 1026 [D Minn 2016]).

Turning to the merits, we conclude that, under the standard applied by the Sixth, Ninth and Tenth Circuits, the challenged regulations do not violate the FHA. When considering the justification proffered by respondent in support of the regulations – i.e., to benefit individuals with serious mental illness by implementing the integration mandate of *Olmstead* – the circumstances under which they were promulgated cannot be overlooked. Under the ADA, the phrase "most integrated setting appropriate to the needs of qualified individuals with disabilities" means " 'a setting that enables individuals with disabilities to interact with nondisabled persons *to the fullest extent possible*' " (28 CFR part 35, App. B [2011] [former App. A, p. 450 (1998)] [emphasis added]). DOH adopted these regulations to come into compliance with this mandate, in direct response to federal lawsuits challenging the State's provision of services to individuals with mental illness living in adult homes on the ground that their rights under the ADA were being violated, and in tandem with the *O'Toole* settlement discussions negotiating a proposed remedy. A fundamental component of the *O'Toole* settlement is that the State provide additional supportive housing in the community and facilitate the process for residents of adult homes to make informed choices about relocating back into the community. The challenged regulations complement that objective by limiting the admission of new residents with a serious mental illness into transitional adult homes (*see Residents & Families United to Save Our Adult Homes v Zucker*, 2017 WL 5496277 at *11).

At trial, respondent presented testimony from several experts – including Lloyd Sederer, OMH's former chief medical officer who issued the 2012 advisories, and other mental health professionals – who consistently testified that transitional adult homes are akin to institutionalized settings and are not beneficial to recovery for people with serious mental illness because, among other things, they lack integrative, community-based, mental health services, restrict the ability of persons with serious mental illness to interact with persons who do not have serious mental illness, and do not require employees to have mental health training. Sederer, a licensed psychiatrist and public health physician, explained that the concept of "recovery" in this context speaks to the improved functioning of a person with a mental illness, enhancing his or her personal dignity and quality of life. Sederer opined that the institutionalized practices of adult homes were not conducive to the recovery of a resident with a serious mental illness. As Justice Ginsberg noted in *Olmstead*, " '[c]ourts normally should defer to the reasonable medical judgments of public health officials' " (*Olmstead v L.C. ex rel. Zimring*, 527 US at 602, quoting

School Bd. of Nassau County v Arline, 480 US 273, 288 [1987]). There was also testimony that smaller facilities are beneficial to the recovery of people with serious mental illness by providing more individualized support. Supreme Court rejected the testimony of these experts mainly due to the absence of statistical data supporting their conclusions. However, statistical data was not necessary to support the challenged regulations (*see Matter of Consolation Nursing Home v Commissioner of N.Y. State Dept. of Health*, 85 NY2d 326, 332 [1995]; *Sierra v City of New York*, 579 F Supp 2d 543, 551 [SD NY 2008]) and the trial court's wholesale rejection of the State's witnesses was unwarranted (*see generally Specfin Mgt. LLC v Elhadidy*, 201 AD3d 31, 37 [3d Dept 2021]; *Maisto v State of New York*, 196 AD3d 104, 115 [3d Dept 2021]). In reviewing a nonjury verdict on appeal, this Court has broad authority to independently evaluate the evidence and render a judgment warranted by the facts, with due deference to the trial court's credibility assessments (*see Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499 [1983]). On this record, we conclude that respondent has demonstrated that the admissions cap was implemented to benefit, rather than to discriminate against, persons with serious mental illness (*see generally Bangerter v Orem City Corp.*, 46 F3d at 1504 n 22; *compare Community House, Inc. v City of Boise*, 490 F3d at 1051).

As for the means used to achieve the beneficial purpose, we further conclude that respondent has demonstrated that the challenged regulations are narrowly tailored to implement the integration mandate of Title II of the ADA and that the "benefit to the [protected class from the subject regulations] . . . clearly outweigh[s] whatever burden may result to them" (*Bangerter v Orem City Corp.*, 46 F3d at 1504; *compare Larken v State of Mich. Dept. of Social Servs.*, 89 F3d at 291).[8] The admissions cap applies only to people with a *serious* mental illness – those "who have a designated diagnosis of mental illness under the Diagnostic and Statistical Manual of Mental Disorders . . . and whose severity and duration of mental illness results in *substantial functional disability*" (18

[8] We note that several federal district courts have, in a different context, rejected the proposition that it is a violation of the ADA to "place[ ] . . . an institutionalized disabled person in a community-based treatment program unless" consent is given and an individualized assessment is made (*Richard C. ex rel. Kathy B. v Houstoun*, 196 FRD 288, 292 [WD Penn 1999], *affd sub nom. Richard C. v Snider*, 229 F3d 1139 [3d Cir 2000]; *see Richard S. v Department of Dev. Servs. of Cal.*, 2000 WL 35944246, *3 [CD Cal, Mar. 27, 2000, 97-cv-219-GLT (ANx)]; *Sciarillo ex rel. St. Amand v Christie*, 2013 WL 6586569, *4 [D NJ, Dec. 13, 2013, 13-cv-03478 (SRC)]; *Black v Department of Mental Health*, 83 Cal App 4th 739, 754-755 [2d Dist Cal, 2020]).

NYCRR 487.2 [c] [emphasis added]). Accordingly, the cap is specifically tailored to the very individuals who are the subject of the integration mandate. Rather than limiting admissions to all adult homes, the regulations apply solely to a subcategory of large adult homes – those certified with at least an 80-bed capacity – where new admissions would increase the population of persons with serious mental illness over the 25% threshold.[9] As transitional adult homes are large facilities and the most segregated to begin with, the admissions cap benefits persons with serious mental illness by directly implementing integration into smaller and more diverse settings where people with serious mental illness have greater ability to exercise autonomy and interact with individuals who do not have serious mental illness, enhancing their chances of recovery. Moreover, once the mental health census of a transitional adult home has been sufficiently reduced below the cap, the facility may resume accepting residents with serious mental illness. The regulations also contain a waiver permitting transitional adult homes to admit individuals with serious mental illnesses who were previously residents – even if it increases the mental health census of the facility above the 25% threshold. In these circumstances, we cannot agree with Supreme Court's finding that the means used to implement the goal of integration are not narrowly tailored insofar as the regulations do not provide for individualized assessments. Indeed, there was testimony at trial that utilizing a more individualized approach could impede the State's integration goal and, as already noted, the least restrictive means of effectuating the beneficial purpose is not required.

In closing, we must stress 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 [FHA]" (*Bangerter v Orem City Corp.*, 46 F3d at 1505). Although the challenged regulations may not be a perfect solution to the problem articulated in *Olmstead*, they reflect a sound public health policy judgment undertaken in conjunction with the State's mental health experts to implement reasonable modifications to the State's provision of services in furtherance of the " 'national mandate for the elimination of discrimination against individuals with disabilities' " (*Olmstead v L.C. ex rel. Zimring*, 527 US at 589, quoting 42 USC § 12101 [b] [1]). We conclude that respondent has sufficiently demonstrated that the challenged regulations "benefit[ ] the protected class" (*Community House, Inc. v City of Boise*, 490 F3d at 1050; *see Bangerter v Orem City Corp.*, 46 F3d at 1503-1504; *see generally Familystyle of St. Paul, Inc. v City of St.*

[9] At the time of trial, less than 10% of the approximately 400 adult homes in the state met the definition of a transitional adult home.

Paul, Minn., 923 F2d at 93-94),[10] and are sufficiently narrowly tailored to implement the goal of integration. Accordingly, the amended judgment of Supreme Court should be reversed. Our determination renders academic respondent's additional argument regarding Supreme Court's use of the "arbitrary and capricious" standard of review.

Garry, P.J., Pritzker, Reynolds Fitzgerald and McShan, JJ., concur.

ORDERED that the amended judgment is reversed, on the law, without costs; petition dismissed; and it is declared that the challenged regulations do not violate the Fair Housing Act.

ENTER:

Robert D. Mayberger
Clerk of the Court

[10] We cite *Familystyle of St. Paul, Inc.* – an Eighth Circuit case – solely for the proposition that the "goals of non-discrimination and deinstitutionalization" are "compatible" (923 F2d at 93-94), and not for the proposition that rational basis scrutiny should apply in these cases.

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.

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

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Dated: December 6, 2023

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PRELIMINARY STATEMENT

Petitioner-Respondent Oceanview Home for Adults brings this motion for leave to reargue the appeal decided in this Court's May 4, 2023 Opinion and Order (the "Appellate Decision"), or in the alternative, permission to appeal this Appellate Decision to the Court of Appeals.

Supreme Court after a lengthy bench trial issued an 81-page Decision/Order/Judgment (the "Trial Decision") with extensive factual findings, holding that certain facially discriminatory regulations (the "Challenged Regulations") enacted by the New York State Department of Health were invalid as violative of the federal Fair Housing Act. On Appeal to this Court, the State argued, among other things, that Supreme Court had applied the wrong legal standard.

This Court, in considering the proper legal standard to evaluate the validity of facially discriminatory regulations under the FHA, rejected in certain respects the legal standard applied by Supreme Court. Having established the applicable standard, rather than remanding to allow the Supreme Court to apply it in the first instance, this Court instead purported to independently evaluate the Record, holding that the Challenged Regulations do not violate the Fair Housing Act.

The Court's decision, however, fails to explain how the State met its burden even under the less demanding legal standard it adopted. In the Trial Decision, which

this Court described as "thorough and detailed," (App. Dec. 5,) Supreme Court made extensive factual findings about the operation of the Challenged Regulations and the facilities that they govern. This Court's decision, however, appears to simply assume conclusions about disputed issues of fact without any explanation of how its conclusions are supported by the Record in this case or any explanation of why this Court implicitly rejects Supreme Court's detailed and extensive fact-finding that is amply supported by the Record.

While this Court has the authority to reexamine the record and independently evaluate the facts, the Appellate Decision provides no indication that the Court has actually done so. This Court also notes that it must give "due deference to the trial court's credibility assessments," (App. Dec. 11,) but the Appellate Decision implicitly rejects several of Supreme Court's express credibility determinations without any explanation whatsoever.

Although Oceanview disagrees with this Court's explication of the proper legal standard, even under the Court's chosen standard, based on the facts actually established at trial — as opposed to the State's unproved assertions — Oceanview should prevail. Oceanview therefore moves this Court for the opportunity to demonstrate why the State has failed to meet its burden under the legal standard adopted by this Court.

Should this Court deny leave to reargue, Oceanview requests, in the alternative, permission to appeal to the Court of Appeals. This case presents an unsettled legal issue of great significance that should be resolved by the Court of Appeals.

The proper legal standard that applies to facially discriminatory regulations under the FHA is subject not only to a three-way split among federal circuits, but also a direct disagreement between this Court and federal district courts within the state of New York. As this Court acknowledged, the Challenged Regulations in this case require certain housing providers to intentionally and discriminatorily deny housing to persons solely on the basis of disability. While the Challenged Regulations at issue in this case apply only to a limited set of adult care facilities, the rule this Court adopted governs the protection afforded to all disabled persons in the state and applies to any housing provider in this state that engages in intentional discrimination against the disabled.

Because of the exceptional importance of this issue and the extensive disagreements among state and federal courts as to the correct legal standard, the Court of Appeals should be given the opportunity to weigh in.

BACKGROUND

Adult homes are "adult care facilit[ies] established and operated for the purpose of providing long-term residential care, board, housekeeping, personal care and

supervision to five or more adults unrelated to the operator." 18 N.Y.C.R.R. § 485.2(b). In 2013, in response to lawsuits alleging that the high concentration of persons with mental illness in certain adult homes was preventing those persons from being fully integrated with the broader community, in violation of the State's obligations under Title II of the Americans with Disabilities Act as interpreted by the United States Supreme Court in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), the State entered into a settlement (the "*O'Toole* Settlement") under which the State agreed to provide opportunities for persons with serious mental illness ("SMI") living in certain adult homes to move out into supportive housing apartments.

Also in 2013, the New York State Department of Health adopted the Challenged Regulations that define a certain subset of adult homes as "transitional adult homes" — those with 80 or more beds and a resident population consisting of at least 25% diagnosed with serious mental illness — and prohibit those homes from admitting any more persons with serious mental illness.

In 2016, Oceanview brought this action, alleging, among other things, that the facially discriminatory Challenged Regulations violate the federal Fair Housing Act, which generally prohibits disability discrimination in housing, and are therefore invalid.

Beginning in June of 2019, Supreme Court, Albany County, held a bench trial consisting of 18 non-consecutive days of testimony. After trial, the Record was subsequently reopened in August of 2022 to allow the admission of additional documents into evidence. On October 18, 2022, Supreme Court issued a detailed 81-page Decision/Order/Judgment that extensively reviewed the trial testimony and, after doing so, held that the Challenged Regulations violate the Fair Housing Act and are therefore invalid. (R.84.)

The State appealed, and this Court, in an Opinion and Order dated May 4, 2023, reversed the Trial Decision, holding that the Challenged Regulations do not violate the Fair Housing Act.

Notice of Entry was served on December 6, 2023, and Petitioner-Respondent Oceanview now moves for leave to reargue, or, in the alternative, for permission to appeal this Court's Appellate Decision to the Court of Appeals.

STANDARD

Under CPLR § 2221(d), a motion to reargue "is addressed to the sound discretion of the court and is properly granted upon a showing that the court overlooked or misapprehended the facts and/or the law or mistakenly arrived at its earlier decision." *Loris v. S & W Realty Corp.*, 16 A.D.3d 729, 730 (3d Dep't 2005).

Under CPLR § 5602(a)(1)(i), "[a]n appeal may be taken to the court of appeals by permission of the appellate division" from an "order of the appellate division which finally determines the action and which is not appealable as of right."

ARGUMENT

POINT I

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

In holding that the facially discriminatory Challenged Regulations do not violate the federal Fair Housing Act, this Court "overlooked or misapprehended" various facts found by Supreme Court concerning the operation of the Challenged Regulations. *See* 22 N.Y.C.R.R. § 1250.16.

In its decision, this Court held 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.) The Court described the burden of demonstrating this as "heightened scrutiny," (*id.*,) and held that the "means must be 'narrowly

tailored' to effectuate the beneficial purpose." (*Id.* at 8.) The Court placed the "burden on the respondent to justify the differential treatment." (*Id.* at 7.)

The Court went on to hold that under this standard, the Challenged Regulations do not violate the Fair Housing Act. In so holding, the Court stated that the Challenged Regulations benefit persons with serious mental illness and that they are sufficiently narrowly-tailored that the benefits to the protected class outweigh the burdens. (*Id.* at 11.) This Court has previously held 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. But here, although this Court's factual assertions in support of reversal are directly contradicted by the extensive findings of fact in the Trial Decision, the Court does not explain why it rejects Supreme Court's fact-finding, nor does the Court explain how its contrary factual conclusions are supported by the extensive Record in this case.

Although this Court held that the State is subject to a less demanding legal standard under the FHA than that advocated by Petitioner-Respondent, even under this Court's chosen legal standard, the State is required to bear its burden of proof with actual admissible evidence, not speculation, conjecture, or bald assertions not

supported by the Record. This Court's Decision provides no explanation of how the State has met that burden and, under the Record, Petitioner-Respondent contends that it could not.

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

The State's defense of the Challenged Regulations and this Court's Decision upholding them rely heavily on the Supreme Court's decision in *Olmstead* and the relation between the Challenged Regulations and the *O'Toole* Settlement. But the Record in this case, as reflected in Supreme Court's extensive factual findings, undermines this reliance on *Olmstead* and the *O'Toole* Settlement. As part of the *O'Toole* Settlement, the State implemented processes whereby current residents of certain adult homes who are designated as having SMI are provided voluntary opportunities to move out of those adult homes into supportive housing apartments. (App. Dec. 3.) Consistent with the purpose of Title II as interpreted in *Olmstead*, the *O'Toole* Settlement operates by expanding housing options for persons with SMI, offering residents of certain adult homes a new choice of settings in which to live and receive necessary services.[1]

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[1] Although this Court characterizes Supreme Court as holding that *Olmstead* does not apply because transitional adult homes are private facilities, (App. Dec. 9,) in fact

The Challenged Regulations, by contrast, do not provide a single additional housing option to any person whatsoever. The admissions bar operates solely and exclusively by taking a housing option away from a broad class of persons with disabilities and providing nothing in its place. As Supreme Court found, 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.) Indeed, "DOH does not monitor or follow up with any person with a serious mental illness precluded from admission to a transitional adult home, or otherwise track or ensure alternative housing was obtained. In other words, the DOH does not ascertain where any persons with serious mental illness ultimately goes." (R.59.) As a result, the State failed to make any "evidentiary connection between a decline in a

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Supreme Court's holding was based on the lack of proof of any State action resulting in segregation, including no proof "that the State solely or predominantly discharged, placed, or referred persons with a serious mental illness, to transitional adult homes," (R.31,) "that the State's actions, systems, or practices led to the alleged unjustified segregation of persons with a serious mental illness in transitional adult homes," (R.31,) that "any State agency or other branch of government, either solely or predominantly caused an unjustified placement, discharge and/or retention of persons with serious mental illness in transitional adult homes.," (R.53,) or "that the State, any State agency, or other branch of government relied on transitional adult homes causing unjustified placements, discharges and/or retention of persons with serious mental illness in such homes." (R.53.) This Court does not mention these factual findings or explain how a contrary position is supported by the Record.

transitional adult home's mental health census and the actual integration of persons with serious mental illness into alternative community settings." (R.58.)

None of the Respondent's witnesses testified that the Challenged Regulations have, in fact, resulted in the integration of persons with serious mental illness into community alternatives." (R.58; *see also* R.80–81.) And the State could provide no evidence "whether the mental health of persons denied housing in transitional adult homes has improved in those persons." (R.50.)

Neither the Challenged Regulations nor any other legal mandate requires the State to provide alternative appropriate housing to any "person with serious mental illness who is denied admission into a transitional adult home due to the Challenged Regulations." (R.56.) And while it is possible that some of these people may be eligible for supportive housing or some other housing program, the State has no obligation to provide these persons with knowledge of or access to any such program, and in practice the State does not do so. (R.59.)

Simply stated, while the State's justification rests on the claim that "housing situations most conducive to recovery [for persons with SMI] are smaller, independent, or supported housing situations," (R.46,) it utterly failed to provide evidence that the Challenged Regulations would result in *any* additional person living in such smaller independent settings.

On the other hand, there is persuasive evidence in the Record that the Challenged Regulations result in many of these excluded individuals ending up in significantly *worse* housing situations. As the State's principal expert conceded, "particularly in New York City, there was a lack of housing options for people with disabilities" and the "[l]ack of appropriate housing for someone being discharged from a psychiatric hospital was 'a persistent resource problem'" (R.39.)

Admissions to transitional adult homes come from a variety of sources, including homeless shelters. (R.24, 56.) But under the Challenged Regulations, "[a] person with a serious mental illness living in a homeless shelter is prohibited from obtaining housing in a transitional adult home." (R.25.) And Supreme Court heard expert testimony, which it found wholly credible, that "[p]eople with serious mental illness living in homeless shelters cannot access more appropriate housing because there are an insufficient number of options for these individuals." (R.64.)

Indeed, the City of New York, where many of the transitional adult homes are located, operates mental health shelters — facilities much larger than adult homes housing exclusively persons with serious mental illness — where "residents' abilities to choose their living circumstances and to come and go freely are significantly limited, unlike in a transitional adult home." (R.64.) Under the Challenged Regulations, a person with serious mental illness can be housed in such a shelter but

cannot choose to move into a transitional adult home, nor can any resident of one of these shelters be referred to a transitional adult home.

Another important source of transitional adult home referrals is nursing homes. (R.24, 56.) Since the adoption of the Challenged Regulations, because persons with SMI can no longer be discharged to transitional adult homes, nursing homes had increasing difficulty finding appropriate discharges, leading to longer and medically unnecessary nursing home stays. (R.25, 29.) And when a homeless shelter resident has been treated at a nursing home and is ready to be discharged, that person will typically be discharged back to the shelter if a better housing arrangement is not available. (R. 29.) Unlike transitional adult homes, there are no restrictions on the admission of persons with serious mental illness into homeless shelters. (R.44.)

The lack of access to transitional adult homes is of particular concern for persons with SMI eligible for an assisted living program (ALP) level of care. "An ALP is a Medicaid-funded program that provides more services and supports than an adult home is required to provide and permits the individual to avoid a more costly and restrictive setting such as a nursing home or residential health care facility." (R.18.) By definition, persons eligible for an ALP placement at a transitional adult home must be medically eligible for placement in a nursing home. (R.24 (citing Social Services Law § 461-1[1][d])). But if a person with SMI seeks the services of

an ALP at a transitional adult home and is otherwise eligible for ALP care, the Challenged Regulations nevertheless prohibit admission. (R.26.) And without access to an ALP at a transitional adult home, the only available housing providing the needed level of care may be a nursing home. (R.29)

Nursing homes, however, are far more restrictive and segregated settings than transitional adult homes, with locked doors, restrictions on visitors, and a prohibition on leaving without authorization, whether temporarily or in order to move to different housing, none of which are present at adult homes. (R.29.) Indeed, as one of DOH's witnesses conceded, "ALPs provide nursing and personal care services to individuals to permit people to age in an environment less restrictive than in a nursing home." (R.61.) Prior to the Challenged Regulations the "main population served by transitional adult homes consists of people with comorbidities" — that is, persons with both mental illness and a serious physical or medical limitation. (R.64.) And as a result of the Challenged Regulations, "[t]here are no adequate alternatives to transitional adult homes for people with both serious mental illness and co-morbidities." (R.64.) And even if these individuals were offered the alternative of a supportive housing apartment, it may not meet their needs due to the high level of care required by that person's medical comorbidities. (R.66.)

Supreme Court also heard and considered concrete examples of specific persons harmed by the admissions bar, including an applicant who was forced to remain in a nursing home due to the bar on admission to a transitional adult home, (R.27,) another applicant with serious medical conditions that could have been treated in an ALP who was denied admission due to an unrelated mental health diagnosis, (R.29,) and an individual whose exclusion from a transitional adult home resulted in his admission at a non-transitional adult home in an unfamiliar neighborhood geographically distant from his family, where he subsequently deteriorated. (R.28.) Supreme Court also heard and credited testimony that the harms from being denied access to one's housing of choice are compounded by the knowledge that the exclusion is a direct result of intentional discrimination on the basis of one's mental health diagnosis. (R.66.)

Despite Supreme Court's detailed fact-finding on the basis of an extensive Record, this Court's Decision simply asserts that "the admissions cap benefits persons with serious mental illness by directly implementing integration into smaller and more diverse settings where people with serious mental illness have greater ability to exercise autonomy and interact with individuals who do not have serious mental illness." (App. Dec. 12.) The Court does not provide any explanation of why it implicitly rejects Supreme Court's findings of fact — that the State provided no

evidence that persons excluded by the admissions bar have ended up in smaller or more integrated settings, and that the evidence in the trial Record establishes that the Challenged Regulations push many of these people into *more* restrictive settings — nor does it explain how the Record provides any support for its conclusion.

The Court similarly notes that "[t]here was also testimony that smaller facilities are beneficial to the recovery of people with serious mental illness by providing more individualized support." (App. Dec. 11.) But again, any such testimony is relevant only if the Challenged Regulations actually result in people being housed in smaller facilities — an assumption contrary to Supreme Court's findings and to the evidence in the Record.

The only other statement in this Court's Decision that hints at some benefit to the protected class is the conclusory assertion that the Challenged Regulations "complement" the *O'Toole* Settlement's objectives of "provid[ing] additional supportive housing in the community and facilitat[ing] the process for residents of adult homes to make informed choices about relocating back into the community." (App. Dec. 10.)[2] But, as noted above, the Challenged Regulations do not do anything

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[2] It is worth noting that neither Oceanview nor any other adult home was a party to *Disability Advocates, Inc. v Paterson*, 653 F. Supp 2d 184 (E.D.N.Y. 2009), which was vacated on appeal, *Disability Advocates, Inc. v. New York Coalition for Quality Assisted Living, Inc.*, 675 F.3d 149 (2d Cir. 2012), or the *O'Toole* Settlement, and no

to provide the excluded non-residents with access to supportive housing or information about housing options. Rather than facilitating "informed choices," the Challenged Regulations merely eliminate certain choices while providing nothing in their place.

Finally, elsewhere in the Decision this Court gives weight to "the justification proffered by respondent in support of the regulations – i.e., to benefit individuals with serious mental illness by implementing the integration mandate of *Olmstead.*" (App. Dec. 10.) But "heightened scrutiny requires that the relationship between the asserted justification and discriminatory means employed be substantiated by objective evidence. Mere speculation or conjecture is insufficient, as are appeals to 'common sense' which might be inflected by stereotypes." *Hassan v. City of New York*, 804 F.3d 277, 306 (3d Cir. 2015), as amended (Feb. 2, 2016) (cleaned up). *See also Latta v. Otter*, 771 F.3d 456, 476 (9th Cir. 2014) ("Heightened scrutiny, however, demands more than speculation and conclusory assertions.").

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factual findings in those cases are binding on Oceanview here. To the extent the Court suggests that the Challenged Regulations indirectly benefit persons with serious mental illness by somehow assisting the *O'Toole* Settlement, the State would bear the burden of proving that the *O'Toole* Settlement — in fact, not merely in intention — actually benefits persons with serious mental illness who are denied admission into a TAH. The Record does not support any such finding.

The State bears the burden of proving that the "benefit to the [protected class from the subject regulations] . . . clearly outweigh[s] whatever burden may result to them," (App. Dec. 11,) but without some showing that any individual actually *benefits* from the admission bar, the State has not even begun to bear its burden.

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

As noted above, the State failed at trial to provide evidence of any single person who, having been denied access to a transitional adult home, ended up in supportive housing or some other more integrated setting. Nor did the State provide any reason to believe that the admission bar would result in those excluded persons ending up in more integrated environments.

Without this unsupported assumption that persons excluded from admission to transitional adult homes would somehow end up in supportive housing, the State's only remaining justification for barring admission is the assertion that residing in a transitional adult home is, by itself, harmful to persons with SMI. But the relevant legal question is not whether transitional adult homes are "good" or "bad" in some abstract sense, but whether persons with SMI *benefit* from the discriminatory admission bar, which cannot be assessed without consideration of the alternatives. The State cannot plausibly suggest that persons with SMI would be better served

living in a homeless shelter than in a transitional adult home, yet we know that at least some persons barred admission to transitional adult homes will as a result end up in shelters. Similarly, it is undeniable that nursing homes are far more segregated and restrictive than transitional adult homes, but evidence shows that some persons end up with longer nursing home stays because they cannot be admitted to a transitional adult home, and for individuals eligible for an ALP bed, who by definition are eligible for a nursing home level of care, a nursing home may be the only other available facility that can provide the level of care required.

But even if it made sense to assess the benefit of excluding persons with SMI from transitional adult homes without regard to where they will end up, any alleged benefit still depends on the assertion that transitional adult homes are inherently harmful to persons with SMI. The State failed to prove this assertion.

On the contrary, Supreme Court found 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.) Moreover, the State "failed to support its assertion 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.)

Rather, Supreme Court found that transitional adult homes could benefit some persons with SMI "because of support services, which, in turn, promote adherence with treatment plans." (R.27.) This was bolstered by testimony that Petitioner-Respondent Oceanview "frequently received referrals from agencies overseeing supported housing because prospective residents were unable to live more independently in such settings and needed the additional supports offered by Oceanview." (R.26.) The Court also heard testimony directly from an individual with SMI who suffered a severe depressive episode while living independently but recovered at a transitional adult home and who chooses to continue to reside there due to the community and activities it offers him. (R.32–33.)

Indeed, during a time period when enforcement of the Challenged Regulations was enjoined due to a temporary restraining order in another action, OMH made a deliberate decision to allow its own state psychiatric centers to resume discharging patients to transitional adult homes, (R.44,) indicating that the State's own officials and clinicians determined that transitional adult homes were an appropriate housing option for at least some persons with serious mental illness. The Court also heard and credited expert testimony about the important role that individual choice plays in recovery and how discriminatorily depriving persons of choice is disempowering and antithetical to recovery. (R.65.)

This Court rejected Supreme Court's factual findings on the ground that "the trial court's wholesale rejection of the State's witnesses was unwarranted." (App. Dec. 11.) The Court explained that Supreme Court had erred by rejecting the State's expert testimony "mainly due to the absence of statistical data supporting their conclusions." (App. Dec. 11.)

But while Supreme Court's single-paragraph summary of the issue made a brief reference to the State experts' lack of empirical data or statistics, among other things, (R.8,) that court's detailed multi-page analysis of these experts went far beyond the lack of statistical evidence. Rather, Supreme Court highlighted the absence of *any* evidentiary basis for the expert opinions, whether quantitative or qualitative, and whether from professional sources or from personal experience.

The State's principal expert was Dr. Lloyd Sederer, the official to whom the State attributed the clinical determinations about transitional adult homes that formed the basis for the Challenged Regulations. Supreme Court noted, however, that Dr. Sederer was not aware of any "evidence-based study or publication" or "any research" showing that residence at an adult home is inconsistent with recovery for a person with mental illness. (R.38–39.) He was similarly aware of "no publication" that addressed the extent to which persons with SMI can recover in adult homes. (R.41.) Indeed, Supreme Court found a complete absence of "factual or evidence-supported

basis offered by Dr. Sederer to support the conclusion that people with serious mental illness do not recover in a transitional adult home." (R.41.)

And although the State put Dr. Sederer forward as the person principally responsible for defining "transitional adult homes" as facilities with 80 or more beds and a mental health census of 25 percent or more, he "admitted having no basis for the formulation of the specific numerical parameters that now restrict admissions of persons with serious mental illness to transitional adult homes." (R.40.) This is no minor implementation detail, but rather serves to identify those specific facilities from which persons with SMI will be discriminatorily barred. But there was "no published evidence" and "no professional literature" supporting the 80-bed threshold, and the 25 percent SMI census was not based on "any published work or other professional source" or "any evidence-based information." (R.40–41.) In short, these numbers were supported by "[n]o literature, no evidence-based programs, no studies, and no professional guidelines." (R.41.)

Dr. Sederer had a similar lack of basis for any comparison between transitional adult homes and supportive housing. "He was not aware of any evidence-based study, analysis, or report about how well residents who leave an adult home to supported housing have done," and neither OMH nor New York City had created any study or

report comparing outcomes of residents living in an adult home versus in supported housing. (R.39.)

And Dr. Sederer did not make up for this lack of any studies, literature, or professional guidelines with personal experience. He had "no interaction with residents or the family of residents of . . . adult homes of any size," nor had he ever even "spoken with the treating clinician of a mentally ill resident of an adult home." (R.39.) His sole experience was limited to visits some years earlier to "a couple" of adult homes, including only a single facility "with more than 80 beds and population of 25 percent or more residents with serious mental illness." (R. 38, 41.) As Supreme Court summarized, "his clinical opinion is not based upon anything: no professional literature, no empirical research, and no first-hand experience." (R.41.)

Perhaps most surprising was Dr. Sederer's profound ignorance about transitional adult homes. He did not know, for example, that adult home residents were free to engage in community activities like attending baseball games and movies or eating at a restaurant. (R.38.) It is not difficult to see why a court might not credit Dr. Sederer's opinion on the degree of segregation or institutional character of an adult home if he doesn't understand the difference between a tightly-controlled facility like a nursing home, and an adult home where any resident can come and go without permission at any time of the day or night. (R.31–32, 34.)

Dr. Sederer was similarly ignorant, both at the time he drafted his clinical advisories and at the time of trial, of the fact that transitional adult homes can provide ALP services. (R.39–40.) This demonstrates a lack of understanding of both the level of care and types of services provided at adult homes and the alternative housing options available to persons requiring ALP level of care, particularly at a facility like Oceanview, where a significant majority of residents are receiving ALP services. (R.10.)

Finally, Supreme Court made express credibility determinations, according "no weight to Dr. Sederer's testimony regarding people with a serious mental illness residing in a transitional adult home," and specifically describing his testimony concerning the establishment of the transitional adult home parameters as "wholly unconvincing." (R.41.) This credibility determination was further bolstered by the court's analysis of certain internal emails that cast doubt on Dr. Sederer's testimony because he admitted to "having no choice" in the Clinical Advisory he was directed to issue. (R.52.) It was for all these reasons that Supreme Court accorded "no weight to his expert opinion that the restrictions imposed by the Challenged Regulations are a reasonable approach for compliance with *Olmstead*." (R.53.)

Although this Court stated that it evaluates the Record "with due deference to the trial court's credibility assessments," (App. Dec. 11,) the Decision does not even

mention Supreme Court's credibility determination, let alone provide any explanation for why, in light of all the deficiencies identified by that court, that determination was not entitled to deference.

Supreme Court similarly held that none of the State's other witnesses had "credibly testified that transitional adult homes are clinically inappropriate for and not conducive to the recovery of persons with a serious mental illness." (R.35.) Dr. Dixon's testimony, for example, was accorded "no weight" due to her "admitted lack of experience with adult homes, residents living in adult homes, and residents who have a serious mental illness who live in adult homes," the fact that she had never heard of "transitional adult homes" before being asked to serve as an expert, and the fact that her first-hand experience was limited to a single 10-minute visit during which she did not speak to a single resident. (R.45.)

Although this Court's Decision asserts that the State's experts "consistently testified that transitional adult homes are akin to institutionalized settings," (App. Dec. 10,) it does not provide any discussion of the basis for this testimony. Instead, its analysis is confined to the assertion that "[c]ourts normally should defer to the reasonable medical judgments of public health officials." (App. Dec. 10 (quoting *Olmstead*, 527 US at 602).) This quotation is ironic, because it comes from the discussion in *Olmstead* of *individualized* clinical determinations that it would not be

appropriate to place particular individuals in a more community-based setting. *Olmstead*, 527 US at 602. There, the Court noted that "it would be inappropriate to remove a patient from the more restrictive setting" absent such an individualized determination. *Id.* Indeed, the *Olmstead* Court was careful to "emphasize that nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings." *Id.* at 601–02.

Here, by contrast, the Challenged Regulations disallow any such individualized consideration of whether a particular person with SMI would be better served in a transitional adult home. (R.25–26.) And Dr. Sederer expressly disclaimed any individualized consideration, stating that "I'm not in a position to talk about any individual patient. I'm taking about how to maxim[ize] the lives of populations[3] of people." (R.39.) In this context, it's particularly inapt to cite *Olmstead* in support of deference to Dr. Sederer.

But even taking this quotation from *Olmstead* at face value, it states that courts should *normally* defer, not that they should always and unfailingly defer, to *reasonable* medical judgments — that is, judgments adequately supported by reason.

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[3] A population-wide generalization is another word for a stereotype.

Supreme Court here explained in significant detail why it did not give weight to Dr. Sederer's clinical determination[4], and this Court does not explain why Dr. Sederer's opinion is a reasonable medical judgment.

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

Under the legal standard adopted by this Court, for a facially discriminatory law to survive under the FHA, the State must show that the Challenged Regulations are "'narrowly tailored' to effectuate the beneficial purpose." (App. Dec. 8.) Although this Court expressly rejected the "least restrictive means" formulation of narrow tailoring that has been employed by a number of other courts, the Court did not provide an alternative formulation of the narrow tailoring standard. The Court held that the Challenged Regulations are narrowly tailored, but its justifications are at odds with Supreme Court's findings and not supported by the Record.

First, the Court asserted that "[t]he admissions cap applies only to people with a *serious* mental illness," and therefore, "the cap is specifically tailored to the very individuals who are the subject of the integration mandate." (App. Dec. 11–12

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[4] None of the State's witnesses other than Dr. Sederer had any role in the creation of the clinical advisories that the State purports to have relied on as a justification for the Challenged Regulations.

(emphasis in original).) Supreme Court, however, specifically addressed the State's definition of serious mental illness, crediting Petitioner's expert who explained that New York's definition was "unique" and "not consistent with the professionally acceptable definition." (R.64.) Even one of the State's witnesses conceded that this definition of SMI was "weird." (R.45.) Indeed, this definition is so capacious that it would likely capture "between 30 and 60 per cent of students at a college campus." (R.64.) The Record does not support the assertion that the definition of SMI employed by the Challenged Regulations is a good proxy for those individuals at risk of segregation and in need of protection by the integration mandate of Title II.

The mere fact that persons with *serious* mental illness are a subset of the larger population of all persons with mental illness does not demonstrate any degree of tailoring. A regulation that discriminatorily applies to all blind persons would not be inherently narrowly tailored just because it does not apply to the larger population of persons with visual impairments. If narrow tailoring requires nothing more than that a regulation could conceivably have been even broader, then it is a meaningless protection against invidious discrimination. Here, the Challenged Regulations are not narrowly targeted, but rather, they "group all persons with a serious mental illness into

one category without regard to their individual disability or disabilities, housing needs, supports needs, or treatment requirements."[5] (R.82.)

The Court further justified its finding of narrow tailoring by noting that transitional adult homes comprise only a small subset of all adult homes. (App. Dec. 12.) But in so noting, the Court ignores Supreme Court's findings that a significant portion of the non-transitional adult homes do not accept Medicaid, the primary means of payment for persons with serious mental illness. (R.25, 50.) To the extent that these private pay facilities are not among the adult homes affected by the Challenged Regulations, this does nothing to lessen the burden on the majority of persons in the targeted population for whom those private pay facilities are as a practical matter inaccessible.

Moreover, the Court's decision did not consider the geographic distribution of these facilities. As Supreme Court noted, "[d]ischarging such individuals [with SMI] close to friends and family and to a setting where they are receiving follow-up care is important; location is therefore an important issue." (R.29.) Supreme Court heard testimony about the harm that can be inflicted on an individual who is forced to be

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[5] Moreover, Supreme Court found that, in practice, a licensed clinician's determination that a resident does not have SMI could be overridden by survey staff comprised of social workers and nurses. (R.18.)

housed distant from family and familiar locations (R.28.) The State, which bears the burden, provided no evidence that non-transitional adult homes with available rooms serve the same geographic neighborhoods as the transitional adult homes from which persons with SMI are excluded. (*See* R.50.) By contrast, the State's own witnesses conceded that "particularly in New York City, there was a lack of housing options for people with disabilities" and the "[l]ack of appropriate housing for someone being discharged from a psychiatric hospital was 'a persistent resource problem'" (R.39.)

The Court also cited the existence of "a waiver permitting transitional adult homes to admit individuals with serious mental illnesses who were previously residents."[6] (App. Dec. 12.) But rather than a demonstration of narrow tailoring, this is an illustration of the stark divide between the *O'Toole* Settlement and the Challenged Regulations. Residents of transitional adult homes with SMI are eligible for assistance in moving into supportive housing, and if they should wish to return to the adult home, they may receive a waiver from DOH. As the State's witnesses explained, "the waiver is resident-specific, applying only to people who went into

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[6] The Court's Decision incorrectly states that the regulations "contain a waiver" allowing these residents to return. In fact, the regulations only permit, but do not require, a transitional adult home to apply for a waiver, 18 N.Y.C.R.R. § 487.3(g), and the grant of such a waiver "is entirely in DOH's discretion and does not guarantee a person the ability to live in a transitional adult home." (R.82.)

supported housing but who then desired to return to the transitional adult home." (R.63.) But the persons who bear the brunt of the Challenged Regulations' absolute bar on admissions, those who have never lived in a transitional adult home, are neither eligible for assistance under the *O'Toole* Settlement nor eligible for a waiver.

Finally, in finding that the Challenged Regulations are narrowly tailored, this Court took no notice of Supreme Court's findings, which are undisputed in the Record, that New York State is the *only* state that has purported to address *Olmstead* by discriminating against persons with SMI in housing. As Supreme Court found, "[n]o other state was required to enact a law or regulation prohibiting admission of persons with serious mental illness into settings similar to adult homes in order to settle *Olmstead* litigation." (R.81.) And the State's own *Olmstead* expert, testified that he was not aware of any other state that "prevented people with a serious mental illness from making their own decisions about where to reside" or "precluded admission of persons with serious mental illness into any housing setting whatsoever." (R.57, 57.)

While the Court rejects any requirement that New York adopt the *least* discriminatory means of achieving its objectives, here it has chosen an approach that is *more* discriminatory than any other state — indeed, the Record does not reflect *any* other state that has attempted to comply with *Olmstead* through discriminatorily

excluding persons with disabilities from housing rather than providing additional housing opportunities. While this Court's decision does not provide a specific formulation of the narrow tailoring standard, if it means anything, it should at least preclude the State from going out of its way to be *more* discriminatory than every other state to address the issue.

* * *

For the foregoing reasons, this Court should grant leave to reargue the appeal of Supreme Court's decision holding the Challenged Regulations invalid as violative of the federal Fair Housing Act.

POINT II

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

As argued above, even under the legal standard adopted in the Appellate Decision, Oceanview should still prevail on the factual record established at trial. Oceanview, however, continues to contend that this Court has not identified the correct legal standard, and due to the significance of this issue and the division of authority among the various state and federal courts that have confronted this question, it would be appropriate to allow the Court of Appeals to resolve this issue.

See 22 N.Y.C.R.R. § 500.22(b)(4) (question may merit review by the Court of Appeals when "the issues are novel or of public importance").

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

As this Court acknowledged, the Challenged Regulations at issue in this case are facially discriminatory. (App. Dec. 6.) To be specific, they operate by requiring certain housing providers — transitional adult homes — to engage in intentional discrimination on the basis of disability by denying certain persons access to housing solely on the basis of their mental health diagnosis. The Court's decision holds that a housing provider who engages in intentional discrimination against the disabled need only show that the benefits outweigh the burdens, and although some degree of narrow tailoring is required, the housing provider need not employ the least discriminatory means of achieving its objectives.

This question — what standard must be met in order to intentionally discriminate on the basis of disability in access to housing — is undeniably significant to those persons whom the FHA was designed and intended to protect. If this Court is going to expressly hold that the FHA provides less protection to persons with disabilities than federal courts that have considered this issue, this is worthy of review by the Court of Appeals.

B. The Court of Appeals has never considered the applicable legal standard, and other courts have disagreed in multiple respects.

The question of the correct standard for claims of facial disability discrimination under the FHA is the subject of a multi-way division of authority, with various courts disagreeing on various aspects of the legal standard.

As this Court acknowledged, (App. Dec. 7,) the legal standard governing claims of intentional discrimination under the Fair Housing Act is the subject of a federal circuit split. Numerous courts, including this one, have noted the divide between the Eighth Circuit, which has held that an intentionally discriminatory law need only have a rational basis to survive under the FHA, and the Sixth, Ninth, and Tenth Circuits, which require a higher showing. (App. Dec. 7.) But the disagreement goes beyond this divide due to the different ways the Sixth, Ninth, and Tenth Circuits have described the applicable standard. *See, e.g.*, *Sailboat Bend Sober Living, LLC v. City of Fort Lauderdale, Fla.*, 46 F.4th 1268, 1277 (11th Cir. 2022) (differentiating the Sixth Circuit from the Ninth and Tenth and stating that "[o]ur sister circuits have adopted three different tests").[7]

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[7] As discussed further in Section II.C.2, below, the Ninth and Tenth Circuits' approaches are actually mutually incompatible.

The division of authority is not confined to the degree of scrutiny applied, but also extends to the types of justifications that the government may legitimately invoke to support a discriminatory law. The Tenth Circuit in *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1503–04 (10th Cir. 1995), limited the "justifications [] available to sustain intentional discrimination" to those found expressly in the statutory text or those inherent in the legal definition of discrimination as determined by the Supreme Court under analogous federal antidiscrimination provisions. The Ninth Circuit, purporting to follow the Tenth Circuit, paraphrased these justifications in broader terms that depart from the statutory language. *See Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1050 (9th Cir. 2007). And some lower courts, purporting to follow the Tenth and Ninth Circuits, have abandoned the statutory justifications altogether, allowing discrimination on the basis of any "legitimate, bona fide governmental interest." *Sierra v. City of New York*, 552 F. Supp. 2d 428, 431 (S.D.N.Y. 2008).

Finally, there is disagreement as to the degree of narrow-tailoring required. Several federal district courts within New York have expressly required a showing that the discriminatory regulation is the least discriminatory means of furthering the government's interests. See *Sierra*, 552 F. Supp. 2d at 431 (requiring showing that "no alternative would serve that interest with less discriminatory effect"); *Human Res. Research & Mgmt. Grp., Inc. v. County of Suffolk*, 687 F. Supp. 2d 237, 242

(E.D.N.Y. 2010)) (requiring "least discriminatory means of furthering these purported interests"); *see also Bangerter*, 46 F.3d at 1505 (10th Cir. 1995) (favorably citing Second Circuit disparate impact standard requiring that "no alternative would serve that interest with less discriminatory effect"). This Court, however, expressly rejected the least restrictive means standard, endorsing a "less onerous standard." (App. Dec. 8.)

Given the great degree of uncertainty as to the proper legal standard governing these claims, a well-reasoned opinion from this state's high court, which has never before weighed in on this question, could help to bring clarity to this important issue.

C. There is good reason to question the legal standard adopted by this Court.

As the Second Circuit has noted, the FHA was "designed 'to eliminate all traces of discrimination within the housing field.'" *Francis v. King Park Manor, Inc.*, 917 F.3d 109, 117 (2d Cir. 2019) (quoting *Cabrera v. Jakabovitz*, 24 F3d 372, 390 (2d Cir. 1994)). But in the face of the FHA's express prohibition on housing discrimination against the mentally ill and an express preemption provision stating that a state may not permit or require a party to engage in actions that violate the FHA, this Court has adopted a standard under which a state may require housing providers to engage in intentional facial discrimination against the mentally ill on a mere showing that the

benefits of its discriminatory actions outweigh the burdens imposed. It is impossible to reconcile this standard with the text and purpose of the FHA.

1. This Court's decision creates an anomalously low standard to allow intentional discrimination.

Unlike the standard for intentional discrimination, the standard for disparate impact discrimination under the FHA is well-settled in the federal courts. When faced with a claim of disparate impact discrimination, the courts apply a burden shifting framework. *See* 24 C.F.R. § 100.500(c). Under this standard, once the challenging party establishes a prima facie case of disparate impact, the burden shifts to the defending party to provide a legitimate justification. *Id.* Significantly, even when supported by such a legitimate interest, it will be found illegally discriminatory where the relevant interests "could be served by another practice that has a less discriminatory effect." *Mhany Mgmt., Inc. v. Cnty. of Nassau*, 819 F.3d 581, 617 (2d Cir. 2016). That is, even a facial neutral law with disparate effects will be found invalid unless it is the *least-discriminatory means* of achieving the relevant interests.

As a result of this Court's decision, therefore, state actions that are facially neutral with a differential impact will now be held to a higher burden under the FHA than actions that expressly discriminate on their face. Stated differently, expressly discriminatory actions are now subject to a more lenient standard than facially neutral

actions with a disparate impact. This bizarre result has no basis in the statute and is indefensible as a matter of rational policy.

2. The legal standard's focus on government interests rather than the discriminatory housing action is at odds with the statute.

The Fair Housing Act's operative provisions make unlawful various discriminatory housing practices, including "[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of . . . that buyer or renter." 42 U.S.C. § 3604(f)(1). The FHA also directly addresses its impact on state laws. The FHA includes an express preemption provision, which states that "any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid." 42 U.S.C. § 3615. In other words, a state regulation that requires or permits any action that would violate the FHA is invalid. Rather than creating an exception to the FHA's prohibitions for actions that further a state interest, the preemption provision is explicit that the state cannot immunize discriminatory acts from challenge by purporting to require or permit them. The only question is whether the challenged discriminatory actions violate the FHA.

Although the FHA prohibits disability discrimination in categorical terms, it also provides certain express statutory exceptions to its requirements. It is at least possible that certain discriminatory actions might fall within some such exception in which case they would not actually violate the FHA's prohibition and would not be invalidated under the FHA's preemption provision.

This approach is most clearly laid out in the Tenth Circuit's decision in *Bangerter v. Orem City Corp.*, 46 F.3d 1491. For purposes of examining facially discriminatory laws, "[t]he proper approach is to look to the language of the FHAA itself, and to the manner in which analogous provisions of Title VII have been interpreted, in order to determine what justifications are available to sustain intentional discrimination against the handicapped." *Bangerter*, 46 F.3d at 1503; *see also Int'l Union, United Auto. Aerospace & Agric. Implement Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 200 (1991) (facially discriminatory policy can survive only if it satisfies statutory exception). The Bangerter court identified two possible exceptions: 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 1504.

Notably, the *Bangerter* decision expressly rejects an Equal Protection tiers-of-scrutiny approach and its test does not depend on government interests. Indeed, in discussion the scope of the benign discrimination exception under the FHA, it cites cases involving discrimination by private parties without any government involvement. *Bangerter*, 46 F.3d at 1505.

The Eighth Circuit Court of Appeals, by contrast, adopted a wholly atextual approach based on Equal Protection clause caselaw, under which the government can engage in intentional discrimination without violating the FHA so long as it meets the low bar of the rational basis test. *See Oxford House-C v. City of St. Louis*, 77 F.3d 249, 252 (8th Cir. 1996). The Eighth Circuit cases adopting this standard make no attempt to root it in the text of the FHA or to reconcile this test with the FHA's preemption provision. Although no other court has adopted the Eighth Circuit's rational basis standard, courts considering both lines of cases have often contrasted the Tenth Circuit's approach as applying "heightened scrutiny" — mischaracterizing that court as weighing government interests rather than evaluating discriminatory actions against the statute. *See Sierra*, 552 F. Supp. 2d at 430; *Human Res. Research & Mgmt. Grp., Inc. v. County of Suffolk*, 687 F. Supp. 2d 237, 255 (E.D.N.Y. 2010); *Rehabilitation Support Servs., Inc. v. City of Albany, N.Y.*, No. 114CV0499LEKDJS, 2017 WL 3251597, at *4 (N.D.N.Y. July 28, 2017).

Because the standard applied by this Court has no basis in the FHA's statutory text, is utterly irreconcilable with the statute's express preemption provision, and relies on demonstrably flawed caselaw, the Court of Appeals should be given the opportunity to take a fresh look at the statute and relevant precedents.

3. This Court's approach divorces the legitimate justifications for a discriminatory law from their statutory origin under the FHA.

Finally, under the approach endorsed by this Court, the legitimate justifications the government may use to support a facially discriminatory law have become entirely untethered from their origin. The Tenth Circuit in *Bangerter* identified a benign discrimination exception to the FHA by analogy with the Supreme Court's treatment of racial discrimination under Title VII. *See Bangerter*, 46 F.3d at 1504. Courts applying this exception have recognized its narrowness, rejecting, for example, restrictions based on "unsupported stereotypes" or "generalizations," as opposed to "restrictions that are narrowly tailored to the particular individuals affected." *Bangerter*, 46 F.3d at 1504.

In the area of racial discrimination, from which the benign discrimination exception was directly borrowed, courts have rejected the use of "programs designed to maintain integration by limiting minority participation, such as ceiling quotas," which "are of doubtful validity because they single[ ] out those least well represented

in the political process to bear the brunt of a benign program" and "the impact of [the State's] practices falls squarely on minorities, for whom Title VIII was intended to open up housing opportunities." *United States v. Starrett City Associates*, 840 F.2d 1096, 1104 (2d Cir. 1988) (internal citation and quotation marks omitted). *See also Larkin v. Michigan Dep't of Social Servs.*, 89 F3d 285, 291 (6th Cir 1996) ("[I]ntegration is not a sufficient justification for maintaining permanent quotas under the FHA or the FHAA, especially where, as here, the burden of the quota falls on the disadvantaged minority.").

Under this Court's opinion, however, the strict limitations on the scope of the benign discrimination exception found in the caselaw have been reduced to merely requiring that "the restriction benefits the protected class," (App. Dec. 7,) and the applicable federal caselaw addressing the use of quotas is not even mentioned.

* * *

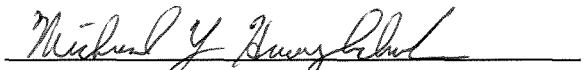
Taken as a whole, this Court's standard turns a federal statute designed to eliminate discrimination against the disabled, whether hidden or overt, into an invitation for the State to engage in express facial discrimination. If this Court denies leave for reargument, it should grant Petitioner-Respondent Oceanview permission to appeal to the Court of Appeals to establish the proper legal standard governing claims of intentional discrimination under the FHA.

CONCLUSION

For the foregoing reasons, 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: December 6, 2023

O'CONNELL AND ARONOWITZ, P.C.

By: 

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