To Be Argued By:
Gary J. Malone
Time Requested: 15 Minutes

New York Supreme Court

APPELLATE DIVISION — THIRD DEPARTMENT

Docket No.
CV-22-1940

In the Matter of

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

Petitioner-Respondent,

and

RESIDENT AA, RESIDENT BB, and RESIDENT CC,

Petitioners,

against

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

Respondent-Appellant,

(Caption Continued on the Reverse)

REPLY BRIEF FOR RESPONDENT-APPELLANT

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and

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

Respondent.

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

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PRELIMINARY STATEMENT

Appellant-Respondent, the New York State Department of Health ("DOH" or the "State"), submits this reply brief in further support of the State's appeal of the Amended Decision/Order/Judgment (the "Decision") striking down DOH regulations (the "Regulations") designed to improve the lives of persons with serious mental illness.

In its Opening Brief, the State showed how the undisputed evidence established that the Regulations are valid under the Federal Fair Housing Act ("FHA")—as a matter of law. Instead of discriminating against persons with disabilities—as alleged by Oceanview—they benefit those persons by fostering both the recovery of such persons and their integration into the community.

As the State demonstrated, prior to the promulgation of the Regulations, the Transitional Adult Homes were segregated facilities, with adult homes such as Oceanview having a resident population that was more than 90% persons with serious mental illness. Although these facilities were licensed and heavily regulated by the State, they lacked the environments and services—such as recovery-oriented programs—that would be beneficial to persons with serious mental illness.

The U.S. Department of Justice ("DOJ") initiated a lawsuit against the State, alleging its policies relating to adult homes violated the federal integration mandate of the Americans with Disabilities Act ("ADA"), as interpreted by the Supreme

Court in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999). In tandem with negotiations to settle that lawsuit (the "Federal Settlement"), the State developed the Regulations.

Since promulgation of the Regulations, persons with serious mental illness are no longer moving into large, regimented, segregated facilities, and Transitional Adult Homes have become more integrated. State agencies have not received any reports indicating that persons with serious mental illness are not finding appropriate living arrangements as a result of the Regulations.

These are the undisputed facts laid out in the State's Opening Brief. Although Oceanview's brief states in conclusory terms that it objects to the State's references to "undisputed evidence," Oceanview does not challenge any of the evidence cited by the State as establishing the above facts.

Under settled law, these undisputed facts establish that the Regulations do not violate the FHA because they benefit persons with serious mental illness. Oceanview repeatedly argues that the Regulations must be considered discriminatory because they prohibit Transitional Adult Homes from accepting new residents that have serious mental illness. Oceanview's argument ignores the above undisputed evidence, which establishes that the Regulations' restriction on Transitional Adult Homes' admission of new residents with serious mental illness is

based on those facilities' inability to provide beneficial environments and services to those persons—not on those persons' disabilities.

Strikingly, the Regulations are supported—and deemed beneficial—by parties that have been working for years to improve the lives of persons with serious mental illness—State officials at DOH and the Office of Mental Health, DOJ, class counsel for the Federal Settlement, and the federal court overseeing the Federal Settlement. Oceanview, however, argues that courts hearing its challenge may disregard these views. The law is to the contrary.

Oceanview misconstrues settled law requiring courts to give deference to the DOJ—an agency charged with enforcing the FHA and the ADA—and to State officials, who promulgated the Regulations on the basis of their expertise in grappling with the complex problems posed by fashioning a regulatory scheme designed to serve and protect persons with disabilities.

This Court should follow controlling state and federal precedent and grant deference to these views and uphold the validity of the Regulations so that they can continue benefitting persons with disabilities.

ARGUMENT

I. OCEANVIEW FAILED TO SATISFY THE *SALERNO* STANDARD THAT FEDERAL AND STATE COURTS HAVE HELD MUST BE APPLIED TO FACIAL CHALLENGES OF STATE LAWS

As the State showed in its Opening Brief, the Trial Court erred in failing to apply the standard set forth in *United States v. Salerno*, 481 U.S. 739, 745 (1987), which requires proponents of facial challenges to prove that "no set of circumstances exists" under which the challenged regulation would be valid. As the State explained, Oceanview's facial challenge necessarily fails because, by the admissions of its own witnesses, the Regulations are beneficial to certain persons with disabilities—which is the hallmark of a valid regulation under the FHA. Indeed, Oceanview does not attempt to defend the Decision's erroneous analysis of this issue. Instead, Oceanview offers alternative grounds for affirmance by arguing that *Salerno* does not apply to challenges based on the express preemption clause of the FHA, and that, in any event, Oceanview supposedly satisfied that standard.

Contrary to Oceanview's argument, application of the *Salerno* standard does not depend on the "presumption against the preemption of state law." Oceanview's Brief at 17. Oceanview miscites *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 583, 593 (1987), by inaccurately suggesting that *Salerno's* application depended on the Court's findings "that the regulations were 'devoid of any expression of intent to pre-empt state law,' and that 'Congress specifically

disclaimed any intention to pre-empt pre-existing state authority.'" Oceanview's Brief at 18-19 (citing *Cal. Coastal Comm'n*, 480 U.S. at 583, 593). However, the reason the Court emphasized the lack of express pre-emption is that the sole question presented was whether a challenged state permit requirement was pre-empted by federal statutes and regulations. 480 U.S. at 575. The Court did not consider whether the *Salerno* standard applied because the plaintiff—which argued the state action was pre-empted—acknowledged that *Salerno* had to be applied, given that plaintiff was mounting a facial challenge. 480 U.S. at 580.

Oceanview is even more off-point in arguing that *Salerno* is inapplicable under the holdings of *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 579 U.S. 115, 125 (2016), *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 517 (1992), and *Mich. Canners and Freezers Ass'n, Inc. v. Agric. Mktg. and Bargaining Bd.*, 467 U.S. 461, 469 (1984). Oceanview's Brief at 17-18. In none of these cases did the Court consider whether the *Salerno* standard applied. Instead, all three decisions address the separate issue of to what extent federal laws preempt state laws.

This Court need not decide whether the Regulations are preempted by the FHA because the FHA expressly provides that preemption applies only to acts that are found to be discriminatory housing practices in violation of the FHA. 42 U.S.C. § 3615. As the State shows in its Opening Brief—and as the United States agrees in its Statement of Interest (R8712, 8719-24) and Federal Settlement class counsel

agree in their amicus brief (NYSCEF No. 89)—no such violation occurred here. To the contrary, far from being discriminatory, the Regulations—in the words of DOJ—"benefit people with disabilities." R8723. In any case, Oceanview is mistaken in citing the above Supreme Court cases for the proposition that the presumption against preemption of state law becomes irrelevant whenever a federal statute contains a preemption clause. Oceanview's Brief at 17-18.

In *Puerto Rico*, the Court found it unnecessary to go beyond the "plain text of the Bankruptcy Code" to determine Puerto Rico is a "State" for purposes of the preemption provision of the Federal Bankruptcy Code. 579 U.S. at 125. By contrast, the Court has resorted to the presumption against preemption of state law when federal laws arguably preempt matters traditionally governed by the states.

In *Cipollone* the Court held that when the police powers of a state are at issue, "[c]onsideration of issues arising under the Supremacy Clause start[s] with the assumption that the historic police powers of the States [are] not to be superseded by ... Federal Act unless that [is] the clear and manifest purpose of Congress." 505 U.S. at 516 (internal quotation marks and citation omitted). Courts "must construe [preemption] provisions in light of the presumption against the pre-emption of state police power regulations." *Id.* at 518.

As the Supreme Court has recognized, "States traditionally have had great latitude" in the exercise of "their police powers to protect the health and safety of

their citizens," which "are primarily, and historically, ... matter[s] of local concern …." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (internal quotation marks and citations omitted). In all preemption cases involving "state regulation of matters of health and safety," courts must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 485 (internal quotation marks and citations omitted).

The Court of Appeals has followed these admonitions of the Supreme Court and applied the principle that in "all pre-emption cases," courts must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Sutton 58 Assocs. LLC v. Pilevsky*, 36 N.Y.3d 297, 306 (2020) (internal quotation marks and citations omitted). *See also Williams v. Marinelli*, 987 F.3d 188, 198 (2d Cir. 2021) (same).

Here, the purpose of the Regulations is to protect and advance the health and safety of the State's citizens. Given that there is nothing indicating a clear and manifest purpose by Congress to preempt states' beneficial regulation of facilities serving persons with disabilities, the presumption against the preemption of state police power regulations is applicable to the Regulations..

Oceanview fails to distinguish the many cases cited by the State in its Opening Brief (at 27) holding that the *Salerno* standard applies to challenges based on the FHA. *See, e.g., Children's Health Def. v. Fed. Commc'ns Comm'n*, 25 F.4th 1045, 1052 (D.C. Cir. 2022); *Daveri Dev. Grp., LLC v. Vill. of Wheeling*, 934 F.Supp.2d 987, 996 (N.D. Ill. 2013); *Oconomowoc Residential Programs, Inc. v. City of Greenfield*, 23 F.Supp.2d 941, 951 (E.D. Wis. 1998). As reflected by these authorities, courts routinely reject arguments that *Salerno* does not apply to statutes with express preemption provisions. As one court recently stated, "*Salerno* … applies to any *facial* preemption challenge, including express preemption challenges." *Am. Apparel & Footwear Ass'n, Inc. v. Schroeder*, No. 3:21-CV-1757-SI, 2023 WL 372657, at *4 (D. Or. Jan. 24, 2023).

Oceanview's reliance on Supreme Court decisions that have not applied *Salerno* to facial challenges is also misplaced. As courts have recognized, "[t]he Supreme Court … [has] called into question the continuing validity of the *Salerno* rule in the context of First Amendment challenges." *Sprint Telephony PCS, L.P. v. Cnty. of San Diego*, 543 F.3d 571, 579 n.3 (9th Cir. 2008) (citing *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008). "In cases involving federal preemption of a local statute, however, the rule applies with full force." *Id.*

The Second Circuit recently reaffirmed the validity of the *Salerno* standard by noting that subsequent Supreme Court authority has reinforced the principle that

"*Salerno* provides the prevailing standard for facial challenges to statutes outside the context of the First Amendment …." *Cmty. Hous. Improvement Program v. City of New York*, 59 F.4th 540 (2d Cir. 2023). Accordingly, "outside of First Amendment overbreadth challenges, a plaintiff bringing a facial challenge in other, non-speech-related contexts must meet the Salerno standard." *NCTA -- The Internet & Television Ass'n v. Frey*, 7 F.4th 1, 17 (1st Cir. 2021) (internal quotation marks and citations omitted).

Similarly, New York State courts continue to apply *Salerno* to facial challenges. *See, e.g., White v. Cuomo*, 38 N.Y.3d 209, 216 (2022) ("party mounting a facial challenge" bears the "substantial burden of demonstrating that in any degree and in every conceivable application," the challenged law suffers impairment) (internal quotation marks and citations omitted); *Owner Operator Indep. Drivers Ass'n, Inc. v. New York State Dep't of Transportation*, 205 A.D.3d 53, 58 (3d Dep't 2022) ("petitioners must establish that no set of circumstances exists under which the [rule] would be valid") (internal quotation marks and citation omitted).

In arguing that the *Salerno* standard is satisfied, Oceanview misconstrues which party has the burden of proof. Oceanview argues that the *Salerno* standard is satisfied because the State "failed to show any … legitimate application [of the Regulations] exists." Oceanview's Brief at 21. Under *Salerno*, however, the party making a facial challenge has the burden of proving that "no set of circumstances

exists" under which the challenged regulation would be valid. *Salerno*, 481 U.S. at 745. Oceanview clearly failed to make any such showing.

Indeed, Oceanview's sole expert effectively admitted that the Regulations benefit—i.e., are not discriminatory against—certain persons with disabilities. While Oceanview's expert opined that the Regulations adversely affects persons with serious mental illness—who also have comorbidities—he actually conceded that persons with serious mental illness, but no comorbidities, should not be in Transitional Adult Homes. R1732-33, R1775-76. Moreover, he acknowledged that his opinion that the Regulations adversely affect this subset of persons with both serious mental illness and comorbidities is dependent on the presence of the State's Assisted Living Program ("ALP")—which is not offered in more than a third of Transitional Adult Homes. R7-8, R47, R74-75. Oceanview's expert further limited his opinion on the Regulations' adverse effects to the two—out of 35—Transitional Adult Homes that he visited for a few hours. R65; R1653, R1671.

Moreover, although Oceanview states conclusorily that it disagrees with the State's references to "undisputed or unrebutted evidence" (Oceanview's Brief at 15), Oceanview does not rebut the State's showing that the Trial Court heard undisputed evidence that Transitional Adult Homes often have unsafe living environments, including resident endangerment, unsafe living conditions, lack of supervision, unsafe smoking leading to fires, altercations and fighting among residents, and rats

and vermin. R2926, R2947-50 (Deetz Testimony); R3005 (Deetz Testimony); R2291 (Nikic Testimony); R2404, 2406-07 (Przyjemski Testimony); R6952; R6994.

Similarly, Oceanview does not rebut the State's showings that the Regulations have had specific beneficial effects for persons with serious mental illness—including fostering the desegregation of facilities such as Oceanview (where residents with serious mental illness exceeded 92% of the population prior to the Regulations), integrating such persons into the community, helping such persons develop independent living skills—and that the State has received no reports indicating the Regulations have been detrimental to such persons. R58; R2921-22, R2934-36, R2940-45, R2961-62, R2970-71 (Deetz Testimony); R2706, R2712-13 (Vider Testimony); R3196-99, R3921-22, R3965-76 (Myers Testimony); R3501-03 (Briney Testimony); R3668-69 (Hayes Testimony).

Although Oceanview had the burden of proof under the *Salerno* standard, even if the State had the burden of proof, such undisputed evidence of the beneficial effects of the Regulations would satisfy that burden. As Oceanview concedes, "beneficial discrimination *in favor* of the disabled … falls outside the FHA's coverage" because "[t]he FHA "only makes it illegal 'to discriminate *against* any [handicapped persons].'" Oceanview's Brief at 31 (quoting *Bangerter v. Orem City*

Corp., 46 F.3d 1491, 1504 n.22 (10th Cir. 1995)) (emphasis and alteration in *Bangerter*).

II. OCEANVIEW FAILS TO JUSTIFY THE TRIAL COURT'S REJECTION OF DOJ'S STATEMENT OF INTEREST

A. The Trial Court Erred by Failing to Grant Deference to DOJ's Statements Supporting Validity of the Regulations

Oceanview misconstrues the law with its argument that the Trial Court did not need to address DOJ's Statement of Interest. Oceanview's Brief at 23. As Oceanview acknowledges, the State showed in its Opening Brief "that DOJ's Statement of Interest is entitled to deference because courts should 'defer to the construction given statutes and regulations by the agencies responsible for their administration, if said construction is not irrational or unreasonable.' Appellant's Br. 20 (quoting *Albano v. Kirby*, 36 N.Y.2d 526, 632 (1975))." Oceanview's Brief at 23-24. Thus, the Trial Court erred by rejecting DOJ's views without making any finding that they were irrational or unreasonable. *See, e.g., Davis v. Shah*, 821 F.3d 231, 263 (2d Cir. 2016)) ("[b]cause the integration mandate is a creature of the [DOJ's] own regulations, DOJ's interpretation of that provision is controlling unless plainly erroneous or inconsistent with the regulation") (internal quotation marks and citation omitted).

Oceanview proffers three reasons in defense of the Trial Court's rejection of DOJ's Statement of Interest—none of which establishes any irrationality or unreasonableness.

First, Oceanview argues that DOJ's views are not entitled to deference because the U.S. Department of Housing and Urban Development ("HUD") is the agency primarily charged with implementation and regulation of the FHA.

Oceanview ignores the fact that its claims depend on not just construction of the FHA, but also construction of ADA's integration mandate and the interplay between the FHA and the ADA's integration mandate. As the agency primarily responsible for enforcing ADA, the author of the integration mandate regulations and one of the two agencies charged with enforcement of the FHA, DOJ is uniquely positioned to offer guidance on such issues. Indeed, given that DOJ is the only agency charged with enforcing both the ADA and the FHA, DOJ is in the best position to offer guidance on whether actions taken in response to enforcement actions under the ADA run afoul of the FHA.

The fact that both DOJ and HUD are charged with enforcement of the FHA does not make DOJ's view on construction of that statute unworthy of deference. Oceanview miscites *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019), as holding "that when Congress divides regulatory power between two entities, courts presume the interpretive power is invested in whichever actor is best positioned to develop

expertise." Oceanview's Brief at 24. *Kisor* made no such holding. In *Kisor*, the Supreme Court cited *Martin v. Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144, 151 (1991), a case that considered which of two agencies' interpretations of a statute "controlled" when the agencies had conflicting views. *Kisor*, 139 S. Ct. at 2417. As the Supreme Court noted in *Martin*, the question presented was "to whom should a reviewing court defer when [two agencies] furnish reasonable but *conflicting* interpretations of an ambiguous regulation." (Emphasis added.) 499 U.S. at 146.

Here, not only is there no conflicting interpretation by the FHA, but the Statement of Interest expresses joint views of DOJ and HUD by citing to the "Joint Statement of the Dep't of Hous. and Urban Dev. and the Dep't of Justice: State and Local Land Use Laws and Practices and the Application of the Fair Housing Act ('HUD/DOJ Joint Land Use Statement') 12 (Nov. 10, 2016), available at: https://www.justice.gov/opa/file/912366/download." R8722 n.12. As DOJ notes, it is the joint view of DOJ and HUD that the "FHA permits states to adopt standards that are 'reasonable, individualized, and specifically tailored to enable individuals with disabilities to live and interact with individuals without disabilities to the fullest extent possible.'" R8723 (Statement of Interest quoting HUD/DOJ Joint Land Use Statement at 11).

Second, Oceanview argues that DOJ's views are not entitled to deference because they do not interpret "any particular language of the FHA or federal regulations." Oceanview's Brief at 24-25. Oceanview is flat-out wrong.

The first sentence of the Statement of Interest states that it is being submitted "under 28 U.S.C. § 517 to address the application of the Fair Housing Act" to the Regulations. R8711. The Statement of Interest then discusses how the FHA should be interpreted, including in light of DOJ's and HUD's interpretation of the ADA's integration mandate. R8711-12, R8722 n.12.

For example, DOJ interprets the FHA's use of such broad terms as "discriminate" and "discrimination," and concludes that "the FHA's non-discrimination provisions permit housing eligibility to be limited based on type of disability in certain circumstances, even though this may restrict the housing choices of persons with disabilities." R8720. DOJ then interprets the FHA's prohibitions on "deny[ing]" and "mak[ing] unavailable housing on the basis of disability" as not prohibiting the Regulations, "any more than would a decision by the State that limits inpatient or institutional care altogether as part of its disability services system." R8721.

The Trial Court failed to give deference to DOJ's interpretations, and came to opposite conclusions. For example, the Trial Court held—without citing any authority—that prohibiting Transitional Adult Homes from admitting persons with

serious mental illness "without any regard to their individual and clinical needs" is contrary to "the intention of the integration mandate." R79-80.

Third, Oceanview argues that this Court should reject the Statement of Interest under the authority of *Kisor*, in which the Supreme Court listed three factors a court could consider in deciding whether an agency interpretation is entitled to "controlling weight." Oceanview's Brief at 26-27 (quoting *Kisor*, 139 S. Ct. at 2416). Tellingly, Oceanview does not discuss the three factors listed by the Supreme Court—all of which strongly support giving the Statement of Interest "controlling weight."

"To begin with, the regulatory interpretation must be one actually made by the agency," which means that "it must be the agency's "authoritative" or "official position." 139 S. Ct. at 2416. The Court noted that even an "informal memorandum recounting a telephone conversation between employees could count as an authoritative pronouncement." *Id.* (internal quotation marks and citation omitted). Here, DOJ submitted the Statement of Interest not just on behalf of DOJ, but on behalf of the United States, pursuant to 28 U.S.C. § 517. R8711. Thus, the Statement of Interest is an authoritative statement.

"Next, the agency's interpretation must in some way implicate its substantive expertise." 139 S. Ct. at 2417. Here, DOJ is the only agency charged with enforcement of both the ADA and the FHA. R8712-13. DOJ is knowledgeable

about the purposes and effects of the Regulations, which, as the Trial Court acknowledged were developed "in tandem" with settlement of the DOJ's *Olmstead* litigation against the State. R51, R8712, R8713, R8718. Given that the interplay between the ADA and FHA are central to this case, DOJ's expertise with those statutes is invaluable.

"Finally, an agency's reading of a rule must reflect fair and considered judgment," which means that the interpretation should not be a rationalization "to defend past agency action against attack" or a new "agency construction conflict[ing] with a prior one." 139 S. Ct. at 2417 (internal quotation marks and citations omitted). Here, the Statement of Interest does not respond to any attack on past DOJ action. Similarly, the Statement of Interest does not conflict with any prior position. *See, e.g.*, HUD/DOJ Joint Land Use Statement at 11 (although *Olmstead* "did not interpret the Fair Housing Act, the objectives of the Fair Housing Act and the ADA, as interpreted in *Olmstead*, are consistent").

Accordingly, under the three *Kisor* factors on which Oceanview relies, the Statement of Interest is entitled to "controlling weight." 139 S. Ct. at 2416.

B. The Statement of Interest Correctly Characterizes the Regulations

Oceanview's argument that the Statement of Interest mischaracterizes the Regulations amounts to nothing more than a disagreement with DOJ's interpretations of the FHA and the ADA.

Oceanview disagrees with DOJ's statements that the "Regulations 'do[] not facially deny or make unavailable housing on the basis of disability.' (R.8721, 8723.)" Oceanview's Brief at 27. Oceanview claims it finds that description "baffling" because, in Oceanview's opinion, the Regulations "expressly prohibit[] admission to housing solely on the basis of disability." Oceanview's Brief at 27. Oceanview has no reason to be baffled, however, because the Statement of Interest clearly explains why DOJ interprets the FHA's statement that it is "unlawful '[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of' disability" as not encompassing regulatory schemes such as the Regulations. (R8713, R8720-23).

As the Statement of Interest explains, the Regulations "form[] part of the State's licensing scheme for health care facilities," which, "[b]y their nature, are restricted to persons with specific types of disabilities …." R8721. "Such licensing regulations, in turn, help determine the structure of the State's disability services system and the types of settings in which individuals will receive services." Given the necessity of structuring such licensing regimes for persons with specific disabilities, the Regulations do "not 'deny' or 'make unavailable' housing on the basis of disability," as those terms are used in the FHA. R8721.

Simply put, DOJ interprets the FHA's prohibitions on discrimination as not encompassing licensing schemes that designate which facilities are appropriate for

persons with certain disabilities. The Regulations prohibit Transitional Adult Homes from accepting additional residents with serious mental illness not on the basis of those persons' disabilities—but on the basis of those facilities' inability to provide beneficial services and environments to those persons.

Oceanview also wrongly insists (Oceanview's Brief at 28) that DOJ must have misunderstood the Regulations, because it described them as preventing "'adult home[s] with a certified capacity of 80 or more and a mental health census . . . of 25 percent or more of the resident population' from admitting any more individuals who need long term care due to serious mental illness." R.8711. DOJ's description was correct, however.

The Regulations prohibit Transitional Adult Homes from admitting additional persons with serious mental illness, including persons who need long term care due to their disability as well as those who seek admission due to some reason unrelated to their mental illness.

Contrary to Oceanview's suggestion, the Statement of Interest's reference to the most likely reason a person with serious mental illness may seek admission to a Transitional Adult Home does not indicate that DOJ believes the Regulations are limited to persons who seek admission to such facilities "due to" their disability. There can be no serious argument that DOJ has any misunderstanding given its statement that the Regulations provide "that transitional adult homes must limit their

residents with serious mental illness to 25 percent of the home's overall population." R8718.

Oceanview also inaccurately claims that the Statement of Interest introduces a "newly proposed legal theory, which is based on a conflation of a person's mental health status—the diagnosis that requires exclusion from admission under the Challenged Regulations—with the services that person is seeking or receiving." Oceanview's Brief at 29. According to Oceanview, the "Regulations do not regulate in any way the types of services adult homes can provide." *Id.*

Oceanview is wrong. As the Trial Court noted, prior to promulgation of the Regulations, the State's regulatory scheme required adult homes to provide, or arrange for, various services, including case management services and mental health services. R20-21. As reflected in OMH's August 8, 2012, Clinical Advisory, one of the reasons the State promulgated the Regulations was that Transitional Adult Homes had an "absence of specifically designed rehabilitative and recovery-oriented" services for persons with serious mental illness. R36. Moreover, Oceanview's administrator admitted that Oceanview is not a medical facility; is not a mental health provider; does not provide mental health services; and does not provide residents with lessons in essential life skills. R2745-46 (Vider Testimony); R2864 (Vider Testimony); R4705-07 (Vider Testimony).

Oceanview's argument that the Regulations do not regulate services is particularly surprising given that the Regulations not only limit Transitional Adult Homes' ability to admit persons with serious mental illness, but also impose duties on those facilities designed to ensure the provision of mental health services. The Regulations require each Transitional Adult Home to submit a "compliance plan" specifying "how the operator will address the needs of its residents, in particular those residents who are persons with serious mental illness . . . , while the reduction in mental health census is being achieved, including but not limited to: (i) fostering the development of independent living skills; (ii) ensuring access to and quality of mental health services; (iii) encouraging community involvement and integration; and (iv) fostering a homelike atmosphere." 18 NYCRR § 487.13(d)(2); R197-98.

Finally, Oceanview takes issue with the Statement of Interest's reliance on other regulations that take into account persons' disabilities as part of a regulatory scheme, claiming that such other regulations are distinguishable because the Regulations are supposedly not beneficial to persons with disabilities. Oceanview's Brief at 31.

As the Statement of Interest explains, however, under DOJ's interpretation of the FHA, the Regulations are beneficial to such persons: "Just as the State could limit admission to facilities that were found to have dangerous living conditions or inadequate supervision and care without contravening the FHA, it may similarly

ensure that mental health services are not being provided in congregate facilities that have been found by both the State and the district court in *DAI* to be segregated, in contravention of the State's obligations under the ADA and *Olmstead*, and therapeutically harmful." R8723.

III. THE TRIAL COURT'S ERRORS OF LAW REQUIRE REVERSAL OF THE DECISION

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

Contrary to Oceanview's argument (Oceanview's Brief at 33), the Decision holds that the integration mandate and *Olmstead* do not apply to the State's regulation of Transitional Adult Homes. Indeed, the Decision includes an extended discussion of the issue that unambiguously concludes by holding that the integration mandate and Olmstead do not apply because "*Olmstead's* integration mandate is aimed directly at public entities, not private facilities, and the Regulations regulate private facilities." R77-79.

Oceanview next argues that this error was rendered "harmless," because the Trial Court proceeded to assume for purposes of argument that Olmstead did apply and nonetheless reached the right result. Oceanview's Brief at 35. Oceanview, however, is unable to defend the Trial Court's legal analysis of *Olmstead*, and instead argues weakly that the Trial Court's analysis of *Olmstead* should be upheld on the basis of unspecified "findings of fact after trial." Oceanview's Brief at 35.

Oceanview argues that the Trial Court correctly held that additional state action—beyond the State's broad regulation of facilities housing persons with disabilities—is necessary to make the federal integration applicable to the State's regulation of those facilities. Oceanview's Brief at 33-35. Yet Oceanview cites no authority for that proposition. Oceanview also fails to distinguish the numerous court decisions and statements by DOJ cited by the State that hold that such regulated private facilities are subject to the federal integration mandate. Opening Brief at 32-36.

B. The Trial Court Erred in Holding the Regulations Do Not Serve a Legitimate Government Interest

As the State showed in its Opening Brief, the undisputed evidence established that the Regulations serve two legitimate government interests: (1) fostering the integration of persons with disabilities (Opening Brief at 31-42); and (2) improving the chances for recovery by persons with disabilities. Opening Brief at 42-53. Oceanview's Brief purports to dispute only the State's showing with respect to the second interest—and thereby in effect concedes the legitimacy of the first.

As to that second interest, Oceanview argues that findings of fact support the Decision's rejection of that interest. Oceanview cites the Decision's conclusion of law that "the [State] presented no credible proof that transitional adult homes are clinically inappropriate for or not conducive to the recovery of persons with a serious

mental illness." Oceanview's Brief at 36 (internal quotation marks omitted) (citing R74).

Oceanview's argument ignores the State's showing that undisputed evidence established that the State had concluded, based on its experience and expertise, that Transitional Adult Homes lack the services and environments necessary to be considered clinically appropriate and conducive to recovery. Opening Brief at 44-47. Indeed, the Trial Court acknowledged that the State concluded that Transitional Adult Homes are neither clinically appropriate nor conducive to recovery based on the facts that they:

- Are not specifically designed to serve people with serious mental illness;
- Are not under the license and clinical quality control of the New York State Office of Mental Health (OMH);
- Do not foster independent living as a result of institutional practices of congregate meals, ritualized medication administration, and programming that is often not individually tailored; or
- Have an absence of specifically designed rehabilitative and recovery-oriented programs conducive [to] meeting the clinical needs of persons with serious mental illness.

R36.

The State has shown that each one of these factors was established by undisputed evidence—including the testimony of Oceanview's own witnesses. Opening Brief at 44-47. Oceanview does not challenge the State's showing that all of these factors were established by undisputed evidence. Instead, Oceanview relies

on the Decision's conclusion of law that the State failed to submit sufficient proof that Transitional Adult Homes are not clinically appropriate or conducive to recovery.

The Trial Court came to this erroneous conclusion—despite the undisputed evidence supporting the State's determination—by holding that the State does not have a legitimate interest in promulgating regulations designed to further the health, safety and well-being of its residents—unless it relies on clinical studies. R74-76. The Trial Court cited absolutely no authority in support of this proposition.

Similarly, Oceanview does not—and cannot—cite a single case to support the Decision's requirement that legitimate government interests must be supported by clinical studies. Instead, Oceanview attempts to distinguish just one of the many cases the State cited (Opening Brief at 48-53) to show the absence of any such requirement, namely *Consolation Nursing Home, Inc. v. Commissioner of New York State Department of Health*, 85 N.Y.2d 326, 331 (1995). Oceanview's Brief at 40.

And Oceanview's attempt to distinguish even that single case falls flat. Contrary to Oceanview's argument, the fact that *Consolation* was an Article 78 proceeding does not make it inapposite. *Consolation* held that "[a]n administrative agency's exercise of its rule-making powers is accorded a high degree of judicial deference, especially when the agency acts in the area of its particular expertise," and that while "documented studies often provide support for an agency's rule

making, such studies are not the sine qua non of a rational determination." 85 N.Y. 2d at 331-32.

The principle that courts should defer to the expertise of public officials is generally applied by state and federal courts in all types of proceedings, not just Article 78 proceedings. *See, e.g., Kurcsics v. Merchants Mut. Ins. Co.*, 49 N.Y.2d 451, 459 (1980) (in action by insured against insurer, court notes that "[w]here the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute"). *See also Bd. of Educ. of Minisink Valley Cent. Sch. Dist. v. Elia*, 170 A.D.3d 1472, 1473 (3d Dep't 2019) (in determining whether agency "determination was arbitrary and capricious, lacked a rational basis *or was affected by an error of law*," court should "tread[ ] gently in second-guessing the experience and expertise of state agencies charged with administering statutes and regulations") (emphasis added) (internal quotation marks and citations omitted).

Moreover, as the State showed in its Opening Brief (at 48-53), the Supreme Court and other federal courts have held that courts should generally defer to the professional judgments of agency officials. *See, e.g.*, *Olmstead*, 527 U.S. at 602

("courts normally should defer to the reasonable medical judgments of public health officials") (internal quotation marks and citation omitted).

As the State showed in its Opening Brief (at 6-15) the Regulations resulted from the cooperative efforts of its mental health professionals and policymakers, who had developed substantial expertise in their many years of grappling with the complex problems posed by fashioning a regulatory scheme designed to serve and protect persons with disabilities, and responding to federal litigation brought by DOJ and class counsel to vindicate the rights of those persons. Class counsel's amicus brief (NYSCEF No. 89) supporting the Regulations is particularly informative for the non-hearsay purpose of identifying just some of the difficult issues the State's mental health professionals and policymakers had to confront as they developed the Regulations.

IV. OCEANVIEW'S ALTERNATE GROUND FOR AFFIRMANCE IS CONTRARY TO SETTLED LAW

Oceanview argues that the Decision could be affirmed on the alternate ground that the FHA requires subjecting the Regulations to a higher level of scrutiny than the heightened scrutiny standard endorsed by federal courts and adopted by the Trial Court. Oceanview's argument that the Regulations are contrary to the FHA unless they fall within some express statutory exception to the FHA is lacking in legal support and contrary to settled precedent.

Even the cases on which Oceanview relies do not support its position. Those cases acknowledge that a court should consider whether justifications are valid under the FHA by looking to the language and purpose of the statute and analogous anti-discrimination law. *See Bangerter*, 46 F.3d at 1503-05. In *Bangerter*, the court held a government could justify a restriction if it was "beneficial to, rather than discriminatory against, the handicapped," despite the absence of any statutory exception for "beneficial" restrictions. *Id.* at 1504. The *Bangerter* court acknowledged that the two justifications it was recognizing, for "public safety" and "benign discrimination," were "[a]t least two potential justifications," leaving open "the possibility that "additional justifications …might be developed." *Id.* at 1503 & n.19.

Oceanview mistakenly relies on *Larkin v. Michigan Department of Social Services*, 89 F.3d 285 (6th Cir. 1996), for the proposition that integration is not a sufficient justification. Oceanview's Brief at 58. *Larkin* was decided in 1996, three years before the *Olmstead* decision, which unambiguously held that public entities have an affirmative obligation to integrate housing and services for persons with disabilities. *Olmstead*, 527 U.S. at 596-97.

The Sixth Circuit's rejection of an integration justification in *Larkin* is inapposite for other reasons. First, *Larkin* based its rejection on the fact that "disabled individuals who wish to live in the community often have no choice but to

live in an [Adult Foster Care] facility." 89 F.3d at 291. Here, however, evidence demonstrates that the opposite is true in New York—not only are non-transitional adult homes available to persons with disabilities, but they also have a multitude of non-institutional, community-based options available, including supported housing. R42, R48. Second, in *Larkin* it appeared that "integration [wa]s not the true reason for the" restriction in question. 89 F.3d at 287, 291. Here, undisputed evidence shows that integration was one of the two main reasons for the State's promulgation of the Regulations, the other being to foster the recovery of persons with serious mental illness by ensuring appropriate environments and services..

Oceanview argues that the Regulations' goals of fostering integration and recovery cannot be considered legitimate justifications because the State seeks to achieve these goals through the use of numerical thresholds to determine when a Transitional Adult Home has achieved sufficient integration. Oceanview overlooks that many federal and state laws and regulations use quantifiable standards to achieve their goals.

For example, Congress has sought to encourage the development of supported housing by employing a 25 percent threshold to ensure that persons with disabilities do not live in segregated settings. The Frank Melville Supported Housing Investment Act of 2010 limits funding available under HUD's Section 811 program to housing where 25 percent or less of units are for persons with disabilities:

multifamily projects receive funding only if "the aggregate number [of dwelling units] that are used for persons with disabilities . . . [does] not exceed 25 percent of" the total. 42 U.S.C. § 8013. Congress's use of a 25 percent threshold is a strong indicator that the use of such numerical thresholds to promote integration for persons with disabilities is not prohibited by the FHA.

Ignoring such authorities, Oceanview claims the Regulations' numerical thresholds are essentially quotas that violate the FHA under the authority of another pre-*Olmstead* decision, *United States v. Starrett City Assocs.*, 840 F.2d 1096 (2d Cir. 1988). Oceanview's Brief at 57.

In *Starrett City*, the Second Circuit condemned a private landlord's use of a race-based quota system. 840 F.2d at 1098. However, raced-based quotas have been explicitly condemned by the Supreme Court. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) ("race-conscious [college] admissions program cannot use a quota system"). Conversely, the Supreme Court has not condemned disability-based quotas, and distinctions based on disability do not receive the same scrutiny or treatment under the Constitution. *See City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440-42 (1985) (classifications "by race, alienage, or national origin" are subject to greater scrutiny than classifications by mental disability).[1]

[1] *See* Mark C. Weber, *Numerical Goals for Employment of People with Disabilities by Federal Agencies and Contractors*, 9 St. L.U.J. Health 35, 43 (2015) ("Unlike affirmative action on the basis of race, a measure whose constitutionality has often

Starrett City is also inapposite because in that case "there [wa]s no evidence [of] the existence of prior racial discrimination …." 840 F.2d at 1102. In contrast, the Regulations were formulated "in tandem" with settlement negotiations to resolve claims of alleged disability-based segregation in a federal court that had previously held the State must take steps to desegregate the very facilities at issue. R51, R8716-18.

Oceanview's argument ignores the fact that unlike other anti-discrimination laws, anti-discrimination disability laws guarantee persons with disabilities special protections. Both the ADA and the Rehabilitation Act impose affirmative obligations on public entities to ensure the integration of persons with disabilities. "[T]he express prohibitions against disability-based discrimination in Section 504 and Title II [of the ADA] include an affirmative obligation to make benefits, services, and programs accessible to disabled people." *Pierce v. District of Columbia*, 128 F. Supp.3d 250, 266 (D.D.C. 2015).

Federal courts consistently reject arguments—such as Oceanview's—that attempts to remedy institutional segregation is itself a form of discrimination. Disability discrimination protections under the ADA do not support a right of access

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been called into question, affirmative action on the basis of disability, including the use of numerical goals, is not in serious constitutional doubt" (citing *Cleburne Living Ctr.*, 473 U.S. at 442-43)).

to an institutional setting. *See, e.g., Sciarillo ex rel. St. Amand v. Christie*, No. 13-3478, 2013 WL 6586569, at *4 (D.N.J. Dec. 13, 2013) (rejecting ADA claim based on state's closure of institutional facilities). As the *Sciarillo* court stated, "numerous other federal courts have rejected similar 'obverse *Olmstead*' arguments in circumstances where a State has decided to close treatment facilities for the developmentally disabled or relocate such disabled individuals to community settings." *Id.*

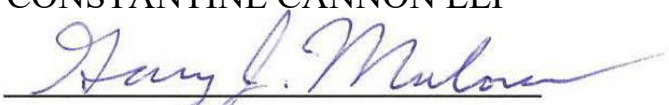
CONCLUSION

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

Dated: March 2, 2023
New York, New York

Respectfully submitted,

CONSTANTINE CANNON LLP



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