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.

BRIEF FOR PETITIONER-RESPONDENT

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

JEFFREY J. SHERRIN
MICHAEL Y. HAWRYLCHAK
Of Counsel

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PRELIMINARY STATEMENT

After a lengthy bench trial, the Supreme Court, Albany County (the "Trial Court"), found that Department of Health ("DOH") regulations that barred persons with mental illness[1] from admission into certain adult care facilities were invalid under the federal Fair Housing Act ("FHA"). (R.82–83.) The Challenged Regulations are facially discriminatory, expressly barring persons with mental illness — a protected disability under the FHA[2] — from admission to a subset of adult care facilities designated by DOH as "transitional adult homes."[3]

Appellant now argues that the Trial Court committed multiple errors of law, but it can do so only by egregiously misrepresenting that court's actual holdings, in a cynical effort to manufacture legal grounds to sidestep the extensive factual findings in the court's detailed 81-page Decision/Order/Judgment ("Decision"). (R.5–85.)

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[1] The Challenged Regulations refer to *serious* mental illness, but, as the Trial Court found, New York's extremely broad definition of serious mental illness is not consistent with the way the term is normally used in the psychiatric profession. (R.64.) Under New York law, the serious mental illness label applies to any of 865 disorders identified in the DSM-IV — "essentially, the full range of psychiatric diagnoses," including "eating disorders, sexual dysfunction, intellectual disorders, and personality disorders" — if that disorder results in a functional disability. (R16–17.)

[2] The Fair Housing Amendments Act of 1988 ("FHAA") amended the FHA by extending its anti-discrimination protections to persons with disabilities, among other changes. Throughout this brief, "FHA" refers generally to the Fair Housing Act as amended by the FHAA.

Appellant also argues that the Trial Court erred in failing to defer to the positions expressed in a Statement of Interest filed by the Department of Justice. But the propositions in the Statement of Interest to which Appellant points — DOJ's assertions concerning the operation of a New York State regulatory scheme, unsupported by the record in this case or any other evidentiary submission — are entitled to no deference whatsoever.

Because Appellant's arguments are without merit, this Court should affirm the judgment of the Trial Court that the discriminatory Challenged Regulations violate the Fair Housing Act and are therefore invalid and their enforcement is enjoined.

QUESTION PRESENTED

Question: Are state regulations that deny access to certain housing solely on the basis of an individual's disability invalid under the federal Fair Housing Act?

Answer Below: Yes.

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[3] The term "transitional adult home" is not found in statute nor historically in DOH regulation of adult homes. The term was introduced in the Challenged Regulations solely for the purpose of defining those adult homes required to discriminatorily bar admission to persons with mental illness.

NATURE OF THE CASE

A. The Decision.

On October 18, 2022, after an 18-day non-jury trial as well as the reopening of the Record to allow into evidence newly discovered internal DOH and OMH emails, extensive post-trial briefing, and the submission of proposed findings of fact and conclusions of law by both parties, the Supreme Court, Albany County (Hon. Margaret Walsh, presiding), issued an extensive and thorough 81-page Amended Decision/Order/Judgment declaring the Challenged Regulations to be violative of the Federal Fair Housing Act and enjoining their further enforcement.

Contrary to Appellant's repeated characterizations of its factual presentation as unchallenged or unrebutted, the Trial Court extensively reviewed the evidence submitted in support of and in opposition to the parties' many factual claims.

The Trial Court found that many actual and prospective residents of transitional adult homes have comorbidities, *i.e.*, serious physical and medical conditions distinct from mental illness that require the level of care, supervision, and assistance that can be provided by an adult home. (R.19.) Left uncontrolled or untreated, these comorbidities can lead to more serious medical and physical disabilities and sickness, and even death. (R.19.)

The Trial Court also noted that many transitional adult homes, including Oceanview, are authorized to provide assisted living programs ("ALPs"), which are designed to enable an individual who would otherwise need nursing home level of care to live in an "integrated, home-like setting." (R.22.) The State receives Medicaid funding from the Federal Government for ALP services in transitional adult homes only after certifying to the Federal Government that such transitional adult homes provide community-based, home-like settings. (R.23.) There are adult home residents who have a serious mental illness but are in an ALP to care for their physical medical comorbidities, such as COPD and diabetes, where the absence of such medical management would threaten them with additional comorbidities or even death. (R.23.)

The Trial Court emphasized that the regulations prohibit a person with mental illness from moving into a transitional adult home even if his or her physician opines that it is the most appropriate setting to meet the individual's needs and the individual desires to move into the transitional adult home. (R.25.) The individual's medical, social, familial, or other circumstances are irrelevant. (R.25.) Thus, a person with a serious mental illness and physical or medical comorbidities who desires the supports provided by a transitional adult home is prohibited from being admitted under the Challenged Regulations. (R.26.) The court discussed the testimony of Kenneth

Przyjemski, a Citadel graduate with a degree in Economics, with both serious physical limitations and a history of depression, who elected to move into a transitional adult home prior to the Challenged Regulations being promulgated, and has since refused opportunities to move into an apartment, because he prefers the supports and community at his adult home. (R.32–33.)

The court found, and the parties agreed, that housing is part of treatment. (R.27.) The court also heard and credited testimony concerning several specific individuals who suffered harm due to their exclusion from transitional adult homes, (R.27–28,) including John Doe, whose exclusion led to the temporary restraining order enjoining enforcement of the regulations. (R.66–67.) The Challenged Regulations have also resulted in individuals enduring unnecessary and harmful extended stays in nursing homes, where they are subject to much more restriction, including limitations on visitors, inability to freely leave the facility, locked doors, and food restrictions, among others. (R.29.)

The Trial Court found that the transitional adult homes are neither state-operated nor the sole or predominant destination for state referrals of persons with serious mental illness, nor were discharges to transitional adult homes made against the will of the referred individual. (R.30.) No evidence was presented to show any unjustified segregation of persons with serious mental illness in adult homes. (R.31.)

The Trial Court also found that the transitional adult homes are not institutions or institution-like: residents enjoy virtually the same freedoms as persons in other types of housing; they exercise choice and autonomy except where prevented from doing so by the State's regulations; they can come and go at will, stay out overnight, have visitors, form intimate relations with one another, and enjoy confidentiality of mail and privacy; they may be employed outside the transitional adult home; and they can engage in religious exercise of their choosing. (R.31.) To the extent that transitional adult homes have certain institutional characteristics, these are shared with non-transitional adult homes, and often stem from DOH regulations. (R.32.) The Trial Court further found that the assertion that transitional adult homes are institutional was belied by DOH's certification to the federal government for funding purposes that ALPs were home-like settings. (R.35.)

The Trial Court found that none of the State's witnesses credibly testified that transitional adult homes are clinically inappropriate and that the rationale expressed for the Challenged Regulations lacked any factual or evidentiary basis. (R.35.) With respect to the State's principal expert, Dr. Lloyd Sederer, the court found that his opinions were not based on any significant personal experience, nor were they supported by any evidence-based studies, publications, analyses, or reports, and Dr. Sederer was entirely ignorant of important features of transitional adult homes,

including their provision of ALP services. (R.38–40.) Dr. Sederer conceded that, particularly in New York City, there is a lack of housing options for persons with disabilities. (R.39.)

The Trial Court further noted, with respect to the Clinical Advisories issued by Dr. Sederer at the direction of other state officials that provided the purported clinical justification for the Challenged Regulations, that Dr. Sederer admitted to having no basis for the formulation of the specific numerical parameters in his advisories, and that there was no published evidence for these numerical limitations. (R.40.) Indeed, The Trial Court found that "his clinical opinion is not based upon anything." (R.41.) The court also credited evidence that the Challenged Regulations, and the numerical parameters incorporated therein, originated not from OMH expertise concerning how persons with mental illness fared in transitional adult homes, but were instead driven by other government actors outside the agency. (R.51–52.)

The court concluded that "[t]here was no 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. Consequently, the Court accords no weight to Dr. Sederer's testimony regarding people with a serious mental illness residing in a transitional adult home. His testimony about the reasons he established the 80 beds/25 percent census is wholly unconvincing." (R.41.)

DOH conceded that mental illness is the sole factor that denies someone otherwise eligible the right to live in a transitional adult home, regardless of factors such as age, comorbidities, a treating physician's medical opinion, the fact that a loved one or intimate partner already resides there, or the wishes of the individual's family. (R.49.)

DOH's witnesses also conceded that there are no studies comparing outcomes of persons in transitional adult homes versus other settings. (R.50.) Further, some adult home residents are substantially unable to live independently and need personal care and supervision, including assistance with taking medications, managing finances, or grooming. (R.50.) Such individuals would be more vulnerable in a more independent setting like supported housing. (R.50.) This vulnerability was illustrated by testimony about John Doe, an Oceanview resident with serious mental illness who deteriorated after moving to a supported housing apartment. (R.66–67.) DOH could not say whether reductions in the mental health census in adult homes have improved the mental health of anyone living in the adult home or anyone who was denied admission to a transitional adult home due to mental illness. (R.50.)

The Trial Court then analyzed the State's purported reliance on the United States Supreme Court's decision in *Olmstead v. L. C.*, 527 U.S. 581 (1999), as justification for the Challenged Regulations, noting that no state other than New York

has implemented *Olmstead* by preventing persons with mental illness from making their own decisions about where to reside. (R.56–57.) The Trial Court found that the State made no evidentiary connection between a decline in transitional adult home mental health censuses and the actual integration of persons with mental illness into community alternatives. (R.58.) No evidence was presented as to where persons resided after being denied admission into a transitional adult home. (R.58–59.) DOH expressly disclaimed any role or responsibility for helping make a suitable placement for any such individual and did not monitor or follow up with persons with mental illness who were precluded from admission into a transitional adult home. (R.59.) "In other words, the DOH does not ascertain where any persons with serious mental illness ultimately goes." (R.59.)

The Trial Court further found that the Challenged Regulations are not narrowly tailored and that less discriminatory alternatives exist that would promote the State's interests. (R.60.) Such potential alternatives include providing more information about housing options to individuals and their clinicians, (R.61,) allowing admission of persons with serious mental illness to an ALP when the admission is motivated by medical conditions rather than mental illness, (R.61,) or relaxing the State's own regulatory requirements that impose "institutional" characteristics. (R.62.)

The Trial Court expressly found that the Challenged Regulations harm persons with mental illness. (R.63–67.) The court found Petitioner-Appellant's expert, Dr. Geller, "to be credible in all respects," (R.64,) and found, among other things, that the State's definition of serious mental illness is so broad as to capture 30–60 percent of students on college campuses, (R.64,) that there are no adequate alternative to ALPs for people with serious mental illness and co-morbidities, (R.64,) and that the Challenged Regulations prevent people living in homeless shelters or state hospitals from accessing more appropriate housing. (R.64.)

Dr. Geller further testified that Dr. Sederer's claim that housing with a significant concentration of persons with serious mental illness is not conducive to recovery is "fundamentally incorrect," (R.65,) that the theory "learned helplessness" underlying the Challenged Regulations has been discredited, (R.65,) and that a more independent setting cannot always meet the needs of individuals with mental illness because of the absence of necessary skill sets and the presence of medical comorbidities. (R.67.) The Trial Court found that with respect to the appropriateness of a transitional adult home, "[t]he overriding consideration should be the individual's needs and where those needs can safely be met, in view if the individual's choices, his or her negative symptoms, and social competence or skills." (R.67.)

The Trial Court discussed at length its analysis under the FHA, concluding that "[b]ecause they require a transitional adult home to engage in a discriminatory housing practice, the Challenged Regulations are preempted by the [FHA] and are therefore void and unenforceable." (R.72.) In support of this conclusion, the court made a number of findings and conclusions of law:

1. The Challenged Regulations are facially discriminatory, and Appellant did not argue otherwise. (R.73.)

2. Appellant failed to adduce any credible evidence demonstrating that the Challenged Regulations, in theory or in practice, further legitimate governmental interests. (R.74.)

3. Transitional adult homes are neither institutions nor institution-like, and any regimentation is the function of the State's own regulations and is also found in non-transitional adult homes. (R.75.)

4. No evidence was offered that the "institutional" characteristics of transitional adult homes adversely impacted any resident's ability to recover or otherwise thrive. To the contrary, the credible evidence demonstrated that transitional adult homes can and do provide appropriate residential settings for persons with a serious mental illness. (R.75–76.)

5. The Challenged Regulations did not originate from evidence-based sources or clinical data. (R.76.)

6. The State's reliance on *Olmstead* was misplaced. Adult homes are not "public entities" for purposes of Title II of the ADA, and there was no evidence of state action in the placement, discharge, or retention of persons with serious mental illness in transitional adult homes. Further, *Olmstead* requires integration on an individualized basis and ensures that the disabled person has a choice. (R.76–79.)

7. Appellant offered no evidence demonstrating that the Challenged Regulations resulted in integration of the mentally ill into the community. (R.81–82.)

8. Credible proof establishes that the Challenged Regulations are unnecessary for *Olmstead* compliance, and no other state has enacted any similar law or regulation. (R.81.)

9. The Challenged Regulations are not narrowly tailored, the State failed to prove that less discriminatory alternatives do not exist, and the discretionary waivers do not remedy the discriminatory effect of the Challenged Regulations. (R.81–82.)

B. Appellant's mischaracterizations.

Appellant chooses to target not the actual Decision on appeal, but instead repeatedly attributes holdings to the Trial Court that do not appear anywhere in its Decision.

First, Appellant repeatedly asserts that the Trial Court held that each of the State's purported objectives is not a legitimate government interest, stating that "the Decision concludes that the State has no legitimate governmental interest in either (1) ensuring that its regulation of state-licensed facilities that house persons with disabilities advances the federal goal of integrating such persons into the community, or (2) requiring State-regulated facilities to refrain from admitting persons with disabilities that the State has determined — based on the experience of its mental health professionals and policymakers — would have a better chance of recovery elsewhere." (Appellant's Br. 4.)

Appellant elsewhere characterizes the court as having held that the State does not "have a legitimate governmental interest in using its regulatory authority to advance the federal goal of integrating persons with disabilities into the community," (Appellant's Br. 6,) and flatly asserts that "[t]he Trial Court held that the State's interest in fostering integration was not a legitimate governmental interest." (Appellant's Br. 31.) Appellant similarly characterizes the court as having held that the State does not "have a legitimate governmental interest in seeking to improve the lives of persons with disabilities, based on the experience and expertise of its mental health professionals and policymakers," (Appellant's Br. 6,) and states that "the court

rejects the legitimacy of the State's interest in addressing" clinically appropriate placement. (Appellant's Br. 43.)

Neither of these supposed holdings actually appears anywhere in the Decision, and nowhere did the Trial Court suggest that the State's asserted goals — fostering the integration of persons with disabilities and avoiding clinically inappropriate housing placements — are not legitimate government purposes. Rather, the court held, on the basis of extensive findings of fact, that the State had failed to meet its burden of proving that the Challenged Regulations actually further either of the State's asserted interests. (R.74–76, 80–81.) Appellant attempts, by misrepresenting the Trial Court's Decision, to convert its dissatisfaction with the court's amply supported fact-finding into an issue of law subject to *de novo* review. This Court should reject Appellant's attempt to put words in the Trial Court's mouth.

As discussed further in Point III, below, Appellant similarly mischaracterizes the Trial Court as holding that *Olmstead* has no application to the State's regulation of private parties. In fact, the court accurately states that *Olmstead* does not apply directly to private parties, but recognizes that it does apply indirectly via the State's regulation of private parties. What Appellant actually objects to is the court's findings of fact that the conditions the State objects to are not the result of state action. But

again, Appellant misrepresents the court's holdings in an effort to convert a factual disagreement into a supposed error of law.

Appellant's representations are no more reliable when describing the trial record in this case. Appellant refers more than ten times to supposedly undisputed or unrebutted evidence and testimony. For example, Appellant asserts that "The Trial Court heard undisputed testimony from DOH and OMH officials — based on their experience and expertise — that they have found that Transitional Adult Homes are not conducive to recovery of persons with serious mental illness and that other housing is more conducive to recovery." (Appellant's Br. 51.) Appellant can describe this as "undisputed" only by completely ignoring the testimony of Oceanview's expert Dr. Geller, whom the Trial Court found to be " to be credible in all respects." (R.64.) As the Trial Court noted, Dr. Geller "found the transitional adult homes in New York that he visited to be safe housing, which fosters recovery," "opined that the Challenged Regulations interfere with recovery because they disempower a person with a serious mental illness by depriving him or her of a choice in housing," and "explained that a transitional adult home can foster recovery for a person with a

serious mental illness if such home is a choice for the individual, and the deprivation of choice is antithetical to a person's recovery." (R.65.)[4]

ARGUMENT

POINT I

OCEANVIEW'S FACIAL CHALLENGE TO THE REGULATIONS IS GOVERNED BY THE FAIR HOUSING ACT'S EXPRESS PREEMPTION PROVISION, NOT *SALERNO*

Appellant argues that the Trial Court committed legal error by not applying the standard from *United States v. Salerno*, 481 U.S. 739 (1987), which held that a party bringing a facial challenge to a regulation must show that there is "no set of circumstances" under which the challenged regulation could be lawfully applied. Appellant further asserts that circumstances exist under which the Challenged Regulations could be lawfully applied, and therefore, the State argues, the facial challenge must fail.

[4] It is also worth noting that some of the testimony that Appellant cites here as "undisputed," such as Dr. Sederer's testimony regarding people with a serious mental illness residing in a transitional adult home, was specifically identified by the Trial Court as carrying "no weight" due to the lack of a sufficient basis for his conclusions. (R.41.)

Appellant is wrong on both counts. First, the FHA preemption challenge in this action is not governed by the *Salerno* standard, and second, even if it were, Oceanview has succeeded in demonstrating that there exists no set of circumstances under which the Challenged Regulations can be validly applied.

This case involves not a general challenge to the lawfulness of regulations alleged to be unconstitutional or *ultra vires*. Rather, it is a challenge under a particular federal statute, the FHA, which has its own express preemption provision. The FHA expressly provides that "any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid." 42 U.S.C. § 3615. "Thus, to the extent that the challenged provisions . . . conflict with the FHA, the FHA preempts them." *Human Res.*, 687 F. Supp. 2d 237, 253 n.13 (E.D.N.Y. 2010).

While there is normally a presumption against the preemption of state law, no presumption against invalidity can apply when Congress has explicitly *commanded* the *invalidation* of inconsistent state laws. As the United States Supreme Court has instructed, where "the statute contains an express pre-emption clause, we do not invoke any presumption against pre-emption but instead focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive

intent." *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 579 U.S. 115, 125 (2016). "When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue . . . we need only identify the domain expressly pre-empted" by that provision. *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 517 (1992); *see also Mich. Canners and Freezers Ass'n, Inc. v. Agric. Mktg. and Bargaining Bd.*, 467 U.S. 461, 469 (1984) ("Federal law may pre-empt state law [where] . . . Congress . . . explicitly define[s] the extent to which it intends to pre-empt state law.").

Under the express preemption language of the FHA, the Challenged Regulations are invalid to the extent that they "purport[] to require or permit any action that would be a discriminatory housing practice" under the FHA. 42 U.S.C. § 3615. Because the Challenged Regulations purport to require transitional adult homes to engage in intentional discrimination on the basis of disability in direct contravention of the FHA's protections, they are facially invalid.

The United States Supreme Court has never applied the *Salerno* test to a challenge under an express preemption provision. By contrast, in the leading Supreme Court case applying the "no set of circumstances" test to an implied preemption claim, the Court repeatedly emphasized the lack of express preemption, noting, for example, 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." *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 583, 593 (1987). Here, Congress has expressed just such an intention. The application of the "no set of circumstances" test would be wholly incompatible with the FHA's express preemption language, and *Salerno* simply does not apply.[5]

Appellant's position — that an express statutory declaration by Congress that certain state laws are invalidated is ineffective if a single valid application can be identified — is not only wholly inconsistent with the Court's teachings about the interpretation of express preemption provisions, but would also have the practical effect of seriously impeding Congress's ability to enact civil rights protections by allowing any state to defend even blatantly discriminatory laws — like the Challenged Regulations here — from invalidation simply by showing that the discrimination was justified for one person.

As courts have noted, "[t]he idea that the Supreme Court applies the 'no set of circumstances' test to every facial challenge is simply a fiction, readily dispelled by a

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[5] *Salerno* is also inconsistent with the FHA with respect to the allocation of the burden of proof. Under the FHA, the State bears the burden of showing that its facially discriminatory regulations are valid. Appellant attempts to evade this burden by invoking *Salerno* to shift it to Oceanview. (*See* Appellant's Br. 27 ("Oceanview failed to prove that there are no set of circumstances under which the Regulations would be valid.").)

plethora of Supreme Court authority." *Doe v. City of Albuquerque*, 667 F.3d 1111, 1124 (10th Cir. 2012) (reviewing numerous Supreme Court cases).

The Supreme Court itself has recently clarified the application of the "no set of circumstances" test, noting that "when assessing whether a statute meets this standard, the Court has considered only applications of the statute in which it actually authorizes or prohibits conduct." *City of Los Angeles, Calif. v. Patel*, 576 U.S. 409, 418 (2015). Lower courts have interpreted this to mean that "[a] facial challenge is best understood as a challenge to the terms of the statute, not hypothetical applications, and is resolved simply by applying the relevant constitutional test to the challenged statute without attempting to conjure up whether or not there is a hypothetical situation in which application of the statute might be valid." *United States v. Sup. Ct. of New Mexico*, 839 F.3d 888, 917 (10th Cir. 2016); *see also Bruni v. City of Pittsburgh*, 824 F.3d 353, 363 (3d Cir. 2016).

The Challenged Regulations operate directly on the transitional adult homes, imposing on them an across-the-board mandate to deny admission to any person with serious mental illness. Because this mandated disability discrimination expressly requires adult homes to engage in actions that are prohibited under the FHA, it is preempted.

But even assuming for the sake of argument that the existence of a single individual who could be properly denied admission would be sufficient to uphold the validity of the Challenged Regulations, Appellant has failed to show that any such legitimate application exists. Appellant cites the testimony of Dr. Geller as establishing that an adult home is not appropriate for persons with serious mental illness without other comorbidities. (Appellant's Br. 20.) Appellant's argument, however, conflates whether a particular person would be best-served by an adult home with whether it would be legal to discriminatorily deny the right to make that choice. Even if Appellant could establish that there were some group of individuals who would not benefit from residing in a transitional adult home, they have not established that discriminatorily denying housing to such persons would result in them residing in a more appropriate setting, or that subjecting them to such an exclusion would be a narrowly tailored, least restrictive means of furthering the government's interest in appropriate housing. *See* Points III, IV, below.

Finally, the focus on the specific facts of this case obscures the shocking breadth of Appellant's argument. Nothing in Appellant's argument concerning the application of the *Salerno* standard depends on the fact that this case involves adult homes, or mental illness, or even disability broadly. Rather, Appellant has argued that *any* facially discriminatory state law can render persons wholly outside the protection

of the FHA if the State can point to a single individual who could be properly subject to the law. Under this theory, for example, a city could defend a policy of complete residential racial segregation against facial challenge, if it could identify a single individual whose race-based restriction could survive strict scrutiny. See *Johnson v. California*, 543 U.S. 499, 515 (2005) (remanding to consider constitutionality of race-based segregation in prisons); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) ("When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the "narrow tailoring" test this Court has set out in previous cases."). To state the full ramifications of Appellant's theory is to refute it.

POINT II

THE TRIAL COURT CORRECTLY REJECTED THE ARGUMENTS IN THE DEPARTMENT OF JUSTICE'S STATEMENT OF INTEREST

Appellant argues that the Trial Court committed legal error by failing to consider the Statement of Interest filed by the federal Department of Justice long after the conclusion of trial testimony and post-trial briefing. (Appellant's Br. 19–24.) Neither the failure to expressly discuss the Statement of Interest nor the failure to adopt the arguments contained therein was legal error.

A. Failure to discuss the Statement of Interest was not legal error.

The Trial Court was well aware of the Statement of Interest. During virtual proceedings held on August 31, 2022, in denying the State's request that the Statement of Interest be accepted into evidence as an exhibit, the Trial Court indicated that the arguments made in the Statement of Interest could be addressed in the court's final decision. (R.4852–54.) That the Statement of Interest was not directly addressed in the Decision suggests only that the Trial Court did not find it helpful in resolving the issues before it.

"A court need not address, in its decision, every argument raised by a party, and a ruling that is not to a litigant's liking does not demonstrate either bias or misconduct." *Ctr. for Jud. Accountability, Inc. v. Cuomo*, 167 A.D.3d 1406, 1408 (3d Dep't 2018). That is all the more true when dealing with new arguments injected into the case for the first time by a non-party that rely on a gross mischaracterization of the regulations at issue.

B. The Statement of Interest is not entitled to deference.

Appellant argues 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)). No such deference is warranted here.

First, DOJ itself does not claim it is entitled to this deference, but instead identifies *HUD*, not DOJ, as the "administering agency" that is "primarily charged with the FHA's implementation and regulation" and therefore entitled to deference. (R.8721 n.9 (brackets omitted).) And while Appellant cites caselaw for the proposition that DOJ is entitled to deference in the interpretation of Title II of the ADA, this was expressly premised on DOJ's role as "the agency directed by Congress to issue regulations implementing Title II." *Olmstead*, 527 U.S. at 597–98. The DOJ has no such role with respect to the FHA, and Appellant cites no cases supporting the proposition that the DOJ is entitled to deference with respect to the interpretation of the FHA. To the extent that Appellant suggests that DOJ's ability to bring enforcement actions under the FHA entitles it to deference, the United States Supreme Court has held 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. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019). Here, that would be HUD, not DOJ.

Second, the caselaw relied on by Appellant concerns deference to statutory or regulatory constructions. For example, in *Albano*, 36 N.Y.2d 526, the Court of

Appeals was considering competing interpretations of ambiguous language in a civil service law. In *Olmstead*, 527 U.S. at 597–98, the United States Supreme Court gave deference with respect to the meaning of "discrimination by means of disability."[6] Here, Appellant does not ask for deference to the DOJ's interpretation of any particular language of the FHA or federal regulations.[7]

Rather, Appellant demands deference to DOJ's assertions concerning the operation of a New York State regulatory scheme. According to Appellant, the Trial Court erred by not adopting DOJ's conclusory assertions about such things as the impact and effects of the Challenged Regulations, the State's compliance with its obligations under federal law, the narrow tailoring of the Challenged Regulations, and

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[6] *See also Samiento v. World Yacht Inc.*, 10 N.Y.3d 70, 79 (2008) (deference concerning the definition of the word "gratuity" in the Labor Law); *Howard v. Wyman*, 28 N.Y.2d 434, 438 (1971) (deference concerning the scope of the word "catastrophe" in the Social Services Law); *Civ. Serv. Emps. Ass'n, Inc. v. Milowe*, 66 A.D.2d 38, 43 (3d Dep't 1979) (deference concerning ambiguous provisions of the Civil Service Law); *M.R. v. Dreyfus*, 697 F.3d 706, 735 (9th Cir. 2012) (deferring with respect to the meaning of the integration mandate, not its application to the challenged regulation).

[7] Indeed, one of the few assertions in the Statement of Interest that is actually the construction of a statute or regulation is the statement of the legal standard governing intentional discrimination under the FHA. (R.8720; Appellant's Br. 22–23.) Ironically, DOJ directly contradicts Appellant's legal position with respect to this standard. *See* Point IV, below.

the ultimate question of the Challenged Regulations' validity under the FHA. [8] (Appellant's Br. 24, 32, 42, 54.)

None of these assertions involves an agency's construction of a statute or regulation that it administers, and none of these is owed any deference by this Court. Appellant's argument that courts must defer to DOJ's pronouncements about the operation of a state program, made without any evidentiary support, is entirely baseless. Appellant's apparent position is that all trial testimony and evidentiary support introduced subject to the rules of evidence must be completely disregarded once DOJ inserts itself into a case and opines — without evidence — on the very factual disputes at issue in the case. Under Appellant's theory, DOJ could never lose a case involving compliance with federal law.

Third, even the narrow deference to agencies supported by Appellant's caselaw has been substantially limited by the United States Supreme Court's decision in *Kisor v. Wilkie*, which emphasized that "not every reasonable agency reading of a genuinely ambiguous rule" is entitled to deference, and "a court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to

[8] Appellant also faults the Trial Court for not deferring to DOJ's view that "the federal integration mandate of the ADA and *Olmstead* apply to the State's regulation of State-licensed adult homes housing persons with disabilities." (Appellant's Br. 24.) But, as explained in Point III.A, below, the

controlling weight." *Kisor*, 139 S. Ct. at 2416. Among other limitations, the Court noted that deference is due only to "the agency's 'authoritative' or 'official position,' rather than any more *ad hoc* statement not reflecting the agency's views," *id.* at 2416, and no deference is due to a "'convenient litigating position' or '*post hoc* rationalizatio[n] advanced' to 'defend past agency action against attack.'" *Id.* at 2417. Appellant cannot show that DOJ's Statement of Interest meets these standards.

C. The Statement of Interest mischaracterizes the Challenged Regulations.

DOJ asserts in its Statement of Interest that the Challenged Regulations "do[] not facially deny or make unavailable housing on the basis of disability." (R.8721, 8723.) This is a baffling description of a regulation that *expressly prohibits admission to housing solely on the basis of disability*. *See* 18 N.Y.C.R.R. § 487.4(d). In the light of the unambiguous language of the regulations and the undisputed fact that they operate by prohibiting transitional adult homes from admitting any person diagnosed with mental illness, DOJ's characterization is utterly indefensible.

How did the DOJ reach this conclusion? By misdescribing the Challenged Regulations as based on the services sought by prospective residents rather than on

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Trial Court's actual position on this point is entirely in agreement with DOJ. Appellant insists otherwise only by willfully misreading the Trial Court's Decision.

their mental health status. The Statement of Interest's misrepresentation of the Challenged Regulations begins with the second sentence of its Introduction. According to DOJ, the "regulation at issue prevents '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.) This is flatly wrong. The Challenged Regulations' admission bar turns solely on an individual's mental illness diagnosis and has nothing to do with that individual's reason for admission or the services that individual seeks to access. 18 N.Y.C.R.R. § 487.4(d).

This is not a trivial point — the Trial Court heard extensive testimony at trial about how the Challenged Regulations exclude persons who seek to access the services of an Assisted Living Program — assistance with activities of daily living — due to physical or medical limitations, but who are discriminatorily barred due to a mental illness diagnosis. (*See, e.g.*, R.28, 61, 64.) Under the Challenged Regulations, a person with a diagnosis of mental illness is barred from admission even if that person seeks the services of the transitional adult home for reasons unrelated to mental illness, and even if that person does not seek access to mental health treatment at all. *See* 487.4(e)(3)(ii) (determination based solely on mental health evaluation and mental health history). Conversely, persons not excluded from admission at an adult home,

for example, those whose mental health issues do not result in functional limitations and thus do not meet the State's definition of *serious* mental illness, are entitled to reside at the adult home and to receive mental health services, whether provided by an on-site or off-site provider.

This misunderstanding of the operation of the Challenged Regulations underlies the entirety of DOJ's 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.

With this distinction in mind, we turn to the argument in the Statement of Interest. DOJ begins by asserting that adult homes, by their nature, "are restricted to persons with specific types of disabilities or conditions" as part of the State's structuring of "the types of settings in which individuals will receive services." (R.8721.) But the "specific types of disabilities or conditions" that adult homes and ALPs are designed and licensed to address — age or infirmity that results in an individual's inability to take care of all activities of daily living without assistance — are present in individuals with and without mental illness alike. The Challenged Regulations do not regulate in any way the types of services adult homes can provide. They operate solely by excluding a category of persons from accessing those services

at adult homes, and that exclusion is based solely on their disability status. A person with mental illness who seeks admission to an adult home for assistance managing his diabetes will be denied admission not due to the services he seeks, but solely because of his status as a person with mental illness. A similarly situated person seeking the exact same services but without the disability — the mental illness designation — would be eligible for admission.

DOJ asserts that "the DOH regulation reflects the State's decision not to provide mental health services in [the transitional adult home] setting." (R.8721–22.) But this is wrong in both directions. First, persons with a mental illness diagnosis are excluded from admission regardless of whether they seek or are receiving any mental health services. And second, transitional adult homes can continue to admit residents who need mental health services so long as those individuals do not meet the State's definition of serious mental illness, and adult homes must coordinate on- or off-site mental health treatment for any current resident, with or without mental illness, who seeks such services. The Challenged Regulations are based entirely on status, not services. DOJ similarly argues that the Challenged Regulations merely govern "the types of services and settings the State determined it will provide," (R.8722,) which is wrong for the same reason.

Finally, DOJ attempts to analogize the Challenged Regulations to federal regulations that allow for certain housing to be "available only to persons with handicaps or to persons with a particular type of handicap" and allow for the prioritization of certain housing for "persons with handicaps or to persons with a particular type of handicap." 24 C.F.R. § 100.202(c)(2)–(3). These federal regulations are, under any definition, the sort of beneficial discrimination *in favor* of the disabled that falls outside the FHA's coverage. The FHA "only makes it illegal 'to discriminate *against* any [handicapped persons].'" *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1504 (10th Cir. 1995) (emphasis and alteration in original). And adult homes are in fact "available only to persons with handicaps or to persons with a particular type of handicap" — those who need assistance with activities of daily living due to age or infirmity.

But these federal regulations provide no support for *excluding* persons from housing on the basis of their disability. And indeed, DOJ's interpretation flips the preferential treatment of persons with disabilities on its head: the persons excluded by the Challenged Regulations are those who would be otherwise eligible for adult home or Assisted Living Program services — in other words, those for whom the federal regulations allow *prioritized* treatment. Under the Challenged Regulations, an individual who has difficulties with certain activities of daily living, like bathing or

toileting, and who desires the services of an Assisted Living Program in a transitional adult home — programs designed, licensed, and certified by the State to provide just such services — will be excluded if the State designates her as having mental illness.

Because the Statement of Interest is premised on a fundamental mischaracterization of the operation of the Challenged Regulations that is at odds with the language of the regulations, the way they have been enforced in practice, and the way the State has defended them throughout this litigation, the Trial Court was right to reject its arguments.

POINT III

APPELLANT HAS NOT IDENTIFIED ANY LEGAL ERROR JUSTIFYING REVERSAL.

Recognizing the heavy burden it bears in challenging the detailed findings of fact in the Trial Court's decision, which include numerous findings that the State had failed to adduce any evidence in support of its assertions and include adverse credibility determinations about several of the State's key witnesses, the State instead contorts and misrepresents the Trial Court's decision to manufacture supposed "clear errors of law" that are not in fact present. Its remaining complaints are based on arguments that the State failed to advance below and on calls for unwarranted blind deference to unsupported assertions of the federal Department of Justice.

A. The Trial Court did not err in describing the application of *Olmstead*.

Appellant attributes to the Trial Court's opinion the holding that "the State's interest in fostering integration was not a legitimate governmental interest because the State's obligations under the ADA integration mandate and *Olmstead* supposedly do not apply to the State's regulation." (Appellant's Br. 31.) According to Appellant, "[t]he Trial Court mistakenly held that the federal integration mandate of the ADA and *Olmstead* does not apply to a state's administration of a regulatory scheme governing private facilities," (Appellant's Br. 32,) and held that "a state's regulation of private facilities is immune from *Olmstead* enforcement actions." (Appellant's Br. 36.) This is a willful misrepresentation of the Trial Court's Decision.

First, the Trial Court's statement, that "*Olmstead's* integration mandate is aimed directly at public entities, not private facilities," (R.79,) is an indisputably correct statement of the law. As the Trial Court correctly notes, *Olmstead* was an application of the integration mandate of Title II of the ADA, which applies only to public entities, which are defined as state and local governments and their instrumentalities. (R.76–77.) And adult homes are not public entities subject to Title II.

This does not mean that *Olmstead* and Title II are irrelevant to private facilities, nor does the Trial Court suggest that they are. It means that *Olmstead* and Title II

apply to private facilities only *indirectly* through government action that violates the ADA's integration mandate. Indeed, both *Disability Advocates, Inc. v. Paterson*, 598 F. Supp. 2d 289 (E.D.N.Y. 2009), and the federal settlement that Appellant relies on so heavily involved claims that *New York State* had violated the ADA through the actions of its agencies, not that any individual adult home had violated the law. (*See* R.12–13.)

Contrary to Appellant's characterization, the Trial Court did not determine that the ADA and *Olmstead* have no application to the State's regulation of private facilities. Appellant's Br. 32. In fact, the Trial Court made very specific findings of fact concerning the State's failures of proof:

> While witnesses for both parties testified that transitional adult homes received some referrals from OMH-operated psychiatric facilities, *there was no proof that the State solely or predominantly discharged, placed, or referred persons with a serious mental illness, to transitional adult homes. No proof was adduced that it was the State's practice of discharging, placing, or referring persons with a serious mental illness to transitional adult homes, or that any such referrals or discharges were unjustified or against the will of persons with a serious mental illness.*
>
> *Ultimately, no evidence was presented to show 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.* Rather, Dr. Myers testified that transitional adult homes were not "a major discharge source for state hospitals" at the time the Challenged Regulations were being developed. According to Mr. Nikic, referrals to Erie Station came from a "wide array" of sources, including Rehabilitation Support Services ("RSS"), nursing homes, short-term nursing rehabilitations, hospitals, people servicing the mentally ill, and OMH.

> *Similarly, no evidence was adduced that residents were restrained in adult homes, including transitional adult homes, by the State or any State agency.*

(R.30–31 (emphasis added).) And the Trial Court clearly explained that its conclusion that *Olmstead* was inapplicable was based on the State's complete failure to prove state action resulting in a violation of Title II. (R.78 (summarizing lack of evidence of state action).)

But even if the Appellant's mischaracterization were correct and the Trial Court had wrongly concluded that *Olmstead* did not apply to the State's regulation of private facilities, any such error would have been harmless. In the next three sections of the Decision, the court assumes for the sake of argument that *Olmstead* applies, and then proceeds to explain why it does not support the Challenged Regulations. (R.79 ("Assuming arguendo that *Olmstead* applies . . ."); R.80 ("Even assuming that reliance on *Olmstead* and the integration mandate are proper . . ."); R.77 ("To the extent *Olmstead* applies . . .").) And again, the Trial Court's conclusions in these subsequent sections were based on findings of fact after trial.

B. The Trial Court did not err in finding that the Challenged Regulations do not serve a legitimate government interest.

Appellant asserts that the Trial Court erred by "reject[ing] the legitimacy of the State's interest in addressing this issue because such facilities are supposedly neither 'institutions' nor 'institution-like.'" (Appellant's Br. 43.) According to Appellant,

"[t]he Trial Court knocked down a strawman of its own making by focusing on whether Transitional Adult Homes can be called institutions instead of focusing on whether Transitional Adult Homes have the harmful characteristics identified by the State's witnesses." (Appellant's Br. 44.) In again attempting to convert its disagreement with the Trial Court's fact-finding into a legal error, Appellant misrepresents both the Trial Court's reasoning and its own prior arguments to the court.

As an initial matter, the Trial Court never questions that the State has a legitimate interest in avoiding clinically inappropriate placements for persons with mental illness. Rather, the court rejected Appellant's embedded factual assertion — that transitional adult homes are clinically inappropriate for persons with mental illness — finding that "the Respondent 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." (R.74 (capitalization altered).)

As the Trial Court explained, the State's "articulated basis" for keeping persons with mental illness out of transitional adult homes "is that transitional adult homes are neither clinically appropriate for nor conducive to the recovery of such individuals." (R.74.) And the Trial Court comprehensively reviewed the State's purported evidence for this assertion, (R.35–52,) finding that "[n]one of the Respondent's witnesses . . .

credibly testified that transitional adult homes are clinically inappropriate for and not conducive to the recovery of persons with serious mental illness. The Court concludes that the rationale expressed for the Challenged Regulations has no factual or evidentiary basis." (R.35.)

The Trial Court addresses whether transitional adult homes are institutions or institution-like not because it is knocking down a strawman, but because Appellant in its Post-Trial briefing invited the court to do so, expressly arguing that transitional adult homes are clinically inappropriate precisely because they are institutional settings and "living in an institutional setting is not conducive to a person's recovery from mental illness and can have negative effects on a person's well-being." (R.7785.) Indeed, Appellant's entire argument that transitional adult homes are clinically inappropriate centered around its characterization of them as "institutional settings," (R.7785–94,) including a discussion of supposedly "institutional characteristics" of transitional adult homes, (R.7788,) an explanation of what it means to be an "institutional setting" and why these settings are allegedly detrimental, (R.7790,) and Dr. Sederer's explanation of why he believes transitional adult homes are "institutionalized." (R.7791.) Appellant even reframed the State's purported "legitimate justification under the FHA" in terms of its "efforts to benefit persons with

mental illness by reducing the public health system's reliance on institutional settings." (R.7793.)

To the extent that the Trial Court's evaluation of the clinical appropriateness of transitional adult homes focused on whether they are institutional or have institutional characteristics, it is because Appellant expressly framed its argument in precisely these terms.[9]

Appellant also characterizes the Trial Court as having held "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 bases those regulations on evidence-based research and clinical studies." (Appellant's Br. 47–48.) But the Trial Court did not rely solely on the absence of any evidence-based research, clinical studies, publications, analyses, reports, investigations, or professional guidelines bearing on the disputed issues. It also reviewed testimony concerning the 'experience' and 'consultation' that went into the key clinical determination. What

[9] This supposed "strawman" argument also forms the core of the amicus brief filed by class counsel for the federal settlement (NYSCEF No. 89) which attacks the Trial Court's finding that transitional adult homes are not institutions. According to amici, the Trial Court erred, because the institutional status of transitional adult homes has already been "established in federal court." Amicus Br. 14–18. Amicus refers to the decision in *Disability Advocates, Inc. v. Paterson*, 653 F. Supp. 2d 184 (E.D.N.Y. 2009), a proceeding in which no adult home was a party or a participant, which was subsequently vacated by the Second Circuit, and which has no preclusive or precedential value in this action. Amicus makes no reference to the substantial record on appeal or the Trial Court's

emerged was evidence that the individual responsible for the purported clinical determination on which the State claims to have relied, OMH's then-Chief Medical Officer Dr. Lloyd Sederer, had a remarkable lack of experience with and knowledge about adult homes. He had virtually no relevant personal experience, having never interacted with residents or the family of residents in any adult home, having never spoken with the treating physician of any mentally ill adult home resident, and having ever visited only a couple of adult homes more than a decade earlier, only one of which had a significant population with mental illness. (R. 38–40.) He knew little about activities in which adult home residents engage, and he was entirely unaware that adult homes provided ALP services. (R.38, 40.) Although Dr. Sederer claimed responsibility for the numerical thresholds in the Challenged Regulations, he could not provide any basis for them, and the Trial Court found his testimony about creating those thresholds "wholly unconvincing." (R.40–41.)

And the Trial Court did not have to rely only on the lack of evidence from the State's witnesses. It also heard from, and credited the testimony of, Oceanview's expert Dr. Jeffrey Geller, who ably rebutted the State's position on the basis of his own extensive experience and expertise as a psychiatrist working with the mentally ill.

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findings of fact, but instead asks this Court to accept the *Disability Advocates* court's factual assertions, which are no more than pure hearsay in this matter and were vacated on appeal.

(R. 64–67.) The Trial Court's rejection of the State's purported clinical justification for the Challenged Regulations is amply supported by the trial record.

Appellant contends that the Trial Court's fact finding must be cast aside, arguing for effectively blind deference to the judgments of agency officials. (Appellant's Br. 48–49.) This is not what the law requires. The leading case on which the State relies, *Consolation Nursing Home, Inc. v. Commissioner of New York State Department of Health*, 85 N.Y.2d 326 (1995), is entirely inapposite. *Consolation* involved an Article 78 challenge to a state regulation as arbitrary and capricious.[10] An arbitrary and capricious challenge is subject to a rational basis standard of review, which entails considerable deference to government officials. But this case does not involve an arbitrary and capricious claim; it involves the validity of a facially discriminatory law under the federal Fair Housing Act. Under the legal standard advocated by the State, (R.7781,) and applied by the Trial Court, such claims are subject to a heightened scrutiny analysis. (R.74.)

Unlike a rational basis case, where the challenging party bears "the heavy burden of showing that the regulation is unreasonable and unsupported by any

[10] Appellant's other cases are similarly inapposite. *See New York State Conf. of Blue Cross & Blue Shield Plans v. Muhl*, 253 A.D.2d 158, 162 (3d Dep't 1999) (arbitrary and capricious claim); *Malone v. City of New York*, 192 A.D.3d 510 (1st Dep't 2021) (rational basis challenge); *Adirondack Health-*

evidence," *Consolation*, 85 N.Y.2d at 331–32, under the heightened scrutiny standard, the government bears the burden of proving an adequate justification for its discriminatory treatment of persons with disabilities. *Hum. Res. Rsch. & Mgmt. Grp.*, 687 F. Supp. 2d at 256 (E.D.N.Y. 2010). And a court applying heightened scrutiny can consider, among other things, the adequacy of the evidentiary basis underlying the government's decisions. *See id.* at 258. The State did not meet its burden here.

Indeed, even the lower rational basis standard does not give a blank check to agency officials. The Court in *Consolation* held only that an agency official was "not confined to factual data alone but also may apply broader judgmental considerations based upon the expertise and experience of the agency." *Consolation*, 85 N.Y.2d at 332. Here, the State failed to present evidence that its clinical determination was adequately supported by expertise or evidence, and the Trial Court credited Oceanview's evidence to the contrary.

Uihlein Living Ctr. v. Shah, 125 A.D.3d 1366, 1368 (4th Dep't 2015) (arbitrary and capricious claim subject to rational basis review).

POINT IV

APPLICATION OF THE CORRECT LEGAL STANDARD REQUIRES THAT THE TRIAL COURT'S JUDGMENT BE AFFIRMED.

There is a circuit split concerning the proper legal standard for evaluating facially discriminatory state actions under the FHA. The Sixth, Ninth, and Tenth Circuits have endorsed what should be the controlling standard. The confusion stems from a different, erroneous standard adopted by the Eighth Circuit, and some lower federal courts that have taken a variety of approaches, sometimes drawing language from cases on both sides of this split.[11] The Trial Court adopted a "heightened scrutiny" standard drawn mainly from several federal district court opinions. Oceanview argued below, and the Trial Court found, that the Challenged Regulations were invalid under the FHA under the State's preferred heightened scrutiny legal standard.

[11] The Second Circuit has not weighed in on this circuit split, but even if it had, it would not be binding on this Court. "[A] State court required to interpret the Federal statute has the same responsibility as the lower Federal courts and is not precluded from exercising its own judgment or bound to follow the decision of the Federal Circuit Court of Appeals within the territorial boundaries of which it sits." *Flanagan v. Prudential-Bache Sec., Inc.*, 67 N.Y.2d 500, 506 (1986). *See also 423 S. Salina St., Inc. v. City of Syracuse*, 68 N.Y.2d 474, 489 (1986) ("[A] State court required to interpret a Federal statute is not bound to follow the decision of the Federal courts or precluded from exercising its own judgment."). This Court owes no special deference to the lower federal courts within the Second Circuit.

Oceanview's primary legal argument in its post-trial briefing, however, was that under the FHA, the Challenged Regulations can survive only if they satisfy the much less permissive legal standard adopted by the Sixth, Ninth, and Tenth Circuits.[12] Had the Trial Court applied this correct standard, the Challenged Regulations' invalidity would have been even clearer. Although the State has failed to identify any error in the Trial Court's thorough and comprehensive Decision, even if it had, the judgment should be affirmed on the alternate ground that the Challenged Regulations are clearly invalid under the correct legal standard for challenges to facial discrimination under the FHA.

A. The correct legal standard is based on the statutory text of the Fair Housing Act, including its express preemption provision.

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

[12] The same standard is endorsed by DOJ in its Statement of Interest. (R.8720.)

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. The proper inquiry, therefore, is whether the Challenged Regulations require or permit any action that violates the FHA.

This inquiry is not a difficult one. The Challenged Regulations prohibit transitional adult homes from admitting persons with serious mental illness. In other words, the regulations require transitional adult homes to engage in direct, facial discrimination on the basis of mental illness. Mental illness is included within the term "handicap" for purposes of the FHA. *See* 42 U.S.C. § 3602(h) (defining "handicap" to include "a physical or mental impairment which substantially limits one or more of such person's major life activities"); 24 C.F.R. § 100.201 (defining "Physical or mental impairment" to include "[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."). The Challenged Regulations therefore require transitional adult homes to facially discriminate against persons with mental illness in direct contravention of the FHA's discrimination prohibition. The only remaining question is whether the Challenged Regulations can nevertheless be somehow legally

justified in a manner that would allow them to survive the FHA's preemption provision.

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 discriminatory actions that appear to violate the FHA's prohibitions might actually fall within some such exception. If that were so, then regulations requiring such discriminatory actions would not be invalidated under the FHA's preemption provision.

The 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). Here, the only potentially relevant exception is found at 42 U.S.C. § 3604(f)(8): "Nothing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to

the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others."

In the analogous Title VII context, where a broad prohibition on discrimination (in that case, sex-based) comes with a specific statutory exception (for bona fide occupational qualifications), the Supreme Court has held that the defendant bears the burden of proving that the discriminatory conduct fits within the statutory exception. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 248 (1989) ("[I]t is the employer's burden to justify decisions resulting from" the use of "an illegitimate criterion to distinguish among employees."); *see also Larkin*, 89 F.3d at 290 ("Because the statutes at issue are facially discriminatory, the burden shifts to the defendant to justify the challenged statutes."). Likewise, here, the State would bear the burden of proving that the discriminatory actions required by the Challenged Regulations — refusing admission to persons with serious mental illness by transitional adult homes — fit within the exception for direct threats to the health and safety of other individuals.

In addition to this explicit statutory exception, courts have also found an implicit carveout to the FHA's prohibition on discrimination for so-called "benign discrimination." By analogy with the Supreme Court's decisions under Title VII, some courts have held that "the FHAA should not be interpreted to preclude special restrictions upon the disabled that are really beneficial to, rather than discriminatory

against, the handicapped." *Bangerter,* 46 F.3d at 1504. The FHA was intended to extend "the principle of equal housing opportunity to handicapped persons and end discrimination against the handicapped in the provision of housing based on prejudice, stereotypes, and ignorance," *id.* at 1504 (internal citation omitted), and benign efforts to serve this purpose should not be prohibited. The court in *Bangerter* held that any such restrictions must be "narrowly tailored to the particular individuals affected" and "the benefit to the handicapped in their housing opportunities [must] clearly outweigh whatever burden may result to them." *Id.* As discussed further below, Courts have read this implied exception to the FHA quite narrowly.

In short, unless the discriminatory actions required by the Challenged Regulations fit within one of two narrow exceptions — preventing direct threats to health and safety or benignly serving the FHA's anti-discrimination purposes — the regulations are expressly preempted by the FHA and are therefore invalid. The Tenth Circuit's approach in *Bangerter* was later adopted by the Sixth Circuit in *Larkin v. State of Michigan Department of Social Services,* 89 F.3d 285, 289 (6th Cir. 1996), and the Ninth Circuit in *Community House, Inc. v. City of Boise*,490 F.3d 1041, 1049 (9th Cir. 2007).

B. The State's preferred legal standard has no basis in the statutory text.

In contrast to the Sixth, Ninth, and Tenth Circuits' approach based on the FHA's statutory text, the Eighth Circuit and a number of federal district courts have adopted variations of a standard based on constitutional equal protection. To understand why these cases are misguided, it is necessary to trace the development of the caselaw.

The earliest case contributing to the confusion was the Eighth Circuit's decision in *United States v. City of Black Jack, Missouri*, an FHA *disparate impact* case. 508 F.2d 1179 (8th Cir. 1974). In disparate impact cases — unlike cases involving disparate treatment, including facial discrimination — courts resolve the dispute over whether the challenged action is in fact discriminatory by applying the *McDonnell Douglas* burden-shifting framework, which allows a defendant to rebut an inference of discriminatory intent by putting forth evidence of a legitimate reason for its actions. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

The *Black Jack* court, in applying this burden-shifting analysis, stated that "[o]nce the plaintiff has established a prima facie case by demonstrating racially discriminatory effect, the burden shifts to the governmental defendant to demonstrate that its conduct was *necessary to promote a compelling governmental interest*." *Id.* at

1185 (emphasis added). The Court explained that "[e]ven though this case is based on a federal statute, rather than on the Fourteenth Amendment, we believe that, once the United States established a prima facie case of racial discrimination, it became proper to apply the compelling governmental interest requirement of the equal protection cases." *Id.* at 1185 n.4. The Court gave no explanation for this belief.

As other courts have recognized, there is no basis for grafting a constitutional standard onto the FHA. "[T]he use of an Equal Protection analysis is misplaced here because this case involves a federal statute and not the Fourteenth Amendment. . . . [A] plaintiff's inability to properly assert a right under the Fourteenth Amendment is not of concern when examining [the plaintiff's] claims brought pursuant to the Fair Housing Act." *Bangerter*, 46 F.3d at 1503 (internal quotation marks omitted).

A subsequent Eighth Circuit case, *Familystyle of St. Paul, Inc. v. City of St. Paul, Minnesota,* 923 F.2d 91, 94 (8th Cir. 1991), compounded the error. *Familystyle* cited *Black Jack* for the proposition that the standard of review for disparate impact claims should be borrowed from equal protection caselaw, but held that due to the nature of the protected class at issue, only the rational basis standard should apply. 923 F.2d 91, 94 (8th Cir. 1991).

The next development in this line of cases was *Oxford House-C v. City of St. Louis*, 77 F.3d 249, 252 (8th Cir. 1996), which cited *Familystyle* in support of the

proposition that a "rule does not violate the Fair Housing Act if the City had a rational basis for enacting the rule." Until now, the Eighth Circuit had been applying the borrowed equal protection scrutiny standard only as one step in the disparate impact burden-shifting analysis. In *Oxford House-C*, however, the court, without any explanation whatsoever, declared that the rational basis standard supplied a blanket exception to the FHA's prohibition on discrimination against the disabled. In three short steps, without any substantive analysis or explanation, the FHA's express prohibition on discrimination against the disabled was transmuted into a standard under which a state government needs only a rational basis to justify engaging in express, intentional discrimination against the disabled.

The Ninth Circuit, in *Community House, Inc. v. City of Boise*, 490 F.3d at 1050, recognized *Oxford House-C* as one side of a circuit split over the standard for assessing "justifications for facial discrimination under the Fair Housing Act," but rejected it, holding that "the Eighth Circuit's approach is inappropriate for Fair Housing Act claims because some classes of persons specifically protected by the Fair Housing Act, such as families and the handicapped, are not protected classes for constitutional purposes." The *Community House* court instead sided with the "more searching method of analysis" in the Tenth and Sixth Circuit's decisions in *Bangerter*, 46 F.3d at 1503–04, and *Larkin*, 89 F.3d at 290 — decisions based on the actual text

of the FHA — which it found to be "more in line with the Supreme Court's analysis in *Johnson Controls*." *Cmty. House,* 490 F.3d at 1050.

Later courts have recognized this circuit split but have failed to examine its origin. The court in *Sierra v. City of New York* noted the split between the Eighth Circuit's rational basis test and the Sixth, Ninth, and Tenth Circuits, which would uphold facial discrimination only on 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." 552 F. Supp. 2d 428, 430 (S.D.N.Y. 2008) (internal quotation marks omitted). The *Sierra* court rejected the Eighth Circuit's rational basis standard, but instead imported a heightened scrutiny standard from another disparate impact burden-shifting case. *Sierra*, 552 F. Supp. 2d at 431. The court characterized this heightened scrutiny as "a broader wording of the standard adopted by the Ninth Circuit in *Community House*," *id.*, but the court failed to show any recognition that the narrower wording of the Ninth Circuit's standard tracks specific statutory exceptions to the FHA. As a result, the *Sierra* court ended up applying a version of the Eighth Circuit's freestanding exception for violations that serve a legitimate government interest, albeit a heightened-scrutiny version.

Like the *Sierra* court, the court in *Human Resource Research & Management Group, Inc. v. County of Suffolk*, 687 F. Supp. 2d 237, 255 (E.D.N.Y. 2010),

recognized the same circuit split and followed *Sierra* in endorsing a heightened level of scrutiny. The *Human Resource* court also recognized that the standard applied by the Sixth, Ninth, and Tenth Circuits is limited to two particular justifications, but does not demonstrate any awareness of the connection between this limitation and the text of the FHA. *Id.* at 257. Likewise, the court in *Rehabilitation Support Services, Inc. v. City of Albany, N.Y.*, No. 114CV0499LEKDJS, 2017 WL 3251597, at *4 (N.D.N.Y. July 28, 2017), cited the Ninth Circuit's decision in *Community House*, describing the inquiry as "whether the statute benefits the protected class or responds to legitimate safety concerns," but then conflates this with the standard from *Sierra*, generally "applying heightened scrutiny to a facially discriminatory housing policy."

Perhaps most significantly, *none* of these cases makes any attempt to reconcile a standard that allows the state to blatantly violate the FHA so long as it has a good enough reason, with the FHA's express preemption provision which *invalidates* state laws that permit or require discrimination in violation of the FHA's protections.

On the other hand, the only cases that have actually analyzed the specific provisions of the FHA and the Supreme Court's caselaw dealing with facially discriminatory policies in the analogous Title VII context have concluded that discriminatory regulations can only be justified if they fit within specific narrow exceptions to the FHA's coverage. *See Bangerter*, 46 F.3d 1491; *Larkin*, 89 F.3d 285.

C. The Challenged Regulations cannot survive under the correct FHA standard.

Under the FHA's express preemption provision, the Challenged Regulations are invalid to the extent that they permit or require any actions that would violate the FHA. The State's burden, therefore, is to show that the discriminatory actions required by the Challenged Regulations fit within the exceptions to the FHA's coverage. The State has failed to meet this burden.

1. The discrimination required by the Challenged Regulations does not prevent direct threats to health and safety.

The FHA's disability discrimination provisions contain an exception for individuals "whose tenancy would constitute a direct threat to the health or safety of other individuals." 42 U.S.C. § 3604(f)(9). This exception is narrow, and the State bears the burden of proof when asserting it as a defense. "[T]he text and legislative history of the FHAA support imposing the burden of proof on the public entity that asserts safety as a defense to a disability discrimination action." *Dadian v. Vill. of Wilmette*, 269 F.3d 831, 840 (7th Cir. 2001). *See also Bangerter*, 46 F.3d at 1503 ("[T]he exceptions to the FHAA's prohibitions on discrimination should be narrowly construed."); *Laflamme v. New Horizons, Inc.*, 605 F. Supp. 2d 378, 392 (D. Conn. 2009) ("The FHA, regulations, and legislative history, however, make clear that this exception has a very narrow reach.").

The narrowness of the direct threat exception is apparent on its face. First, it applies only to threats to *other* individuals, not to oneself. *Cf. Hargrave v. Vermont*, 340 F.3d 27, 36 (2d Cir. 2003) ("[T]he 'direct threat' defense [under the ADA] requires the person to pose a risk of harm to *others*." (emphasis in original)). Therefore, to the extent that the State has relied on concerns about the health and safety of the very individuals being excluded from the transitional adult homes, these concerns fall entirely outside the coverage of the direct threat exception. *See Laflamme*, 605 F. Supp. 2d at 393 (finding "no basis on which to extend this exception to permit denial of housing to an individual who is a threat to herself").

Second, it carves out an exception only for *direct* threats. To the extent that a threat to health and safety is speculative, indirect, or attenuated, it is simply not within this exception. "Restrictions predicated on public safety cannot be based on blanket stereotypes about the handicapped, but must be tailored to particularized concerns about individual residents." *Bangerter*, 46 F.3d at 1503. This is consistent with the legislative history accompanying the enactment of the direct threat exception, which explained that "[a]ny claim that an individual's tenancy poses a direct threat and a substantial risk of harm must be established on the basis of a history of overt acts or current conduct. Generalized assumption, subjective fears, and speculation are insufficient to prove the requisite direct threat to others." H.R. Rep. 100-711, at 29

(1988). Congress expressly considered the application of the direct threat exception to mental illness, stating that "[i]n the case of a person with a mental illness . . . there must be objective evidence from the person's prior behavior that the person has committed overt acts which caused harm or which directly threatened harm." *Id. See also Corey v. Sec'y, U.S. Dep't of Hous. & Urban Dev. ex rel. Walker*, 719 F.3d 322, 327 (4th Cir. 2013) (direct threat exception must be "supported by objective, individualized evidence").

The Challenged Regulations do not remotely meet this standard. Rather than particularized concerns about individuals, the regulations impose a blanket prohibition on the admission of persons with serious mental illness to transitional adult homes. By their terms, the Challenged Regulations are not limited to individuals who pose a threat to health or safety, and in fact, the regulations make no reference to health or safety and are not based on any individualized assessment of the persons to which they apply.[13] Not only is the State-mandated disability discrimination of the Challenged Regulations not based on any individualized risk assessment, but it makes

[13] And to the extent that the State has carved out an exception in practice through the application of its waiver program, the established criteria for waiver eligibility (*e.g.*, prior discharge from a transitional adult home) have nothing to do with whether an individual poses a threat to health or safety.

no distinctions between the disparate diagnoses that are subsumed within the capacious designation of serious mental illness.

Given the complete lack of fit between the Challenged Regulations and the direct threat exception, the State cannot plausibly argue that all, most, or even a non-trivial fraction of the instances of discriminatory exclusion required by the regulations would be justified because admission would pose a direct threat to the health or safety of others. To the extent that the discriminatory exclusions cannot be so justified, the direct threat exception cannot save the regulations from invalidity.

If there is any provision under which the Challenged Regulations can be defended, it is not under the FHA's exception for direct threats to health and safety.

2. The discrimination required by the Challenged Regulations is not benign.

Although it is not an explicit exception to the statute, some courts have interpreted the FHA to have an implied exception for benign discrimination. *See Bangerter*, 46 F.3d at 1504 ("the FHAA should not be interpreted to preclude special restrictions upon the disabled that are really beneficial to, rather than discriminatory against, the handicapped.").

Assuming that it is appropriate, by analogy with Title VII precedent from the United States Supreme Court, to construe the FHA's coverage not to extend to

"benign" or "beneficial" discrimination, the discrimination required by the Challenged Regulations is anything but. As an initial matter, assertions that discrimination against the disabled is actually beneficial should be viewed with skepticism. "We should be chary about accepting the justification that a particular restriction upon the handicapped really advances their housing opportunities rather than discriminates against them in housing. Restrictions that are based upon unsupported stereotypes or upon prejudice and fear stemming from ignorance or generalizations, for example, would not pass muster. However, restrictions that are narrowly tailored to the particular individuals affected could be acceptable under the FHAA if the benefit to the handicapped in their housing opportunities clearly outweigh whatever burden may result to them." *Bangerter*, 46 F.3d at 1504.

In *United States v. Starrett City Associates*, 840 F.2d 1096, 1101 (2d Cir. 1988), the Second Circuit considered the standards for assessing allegedly benign racial discrimination under the FHA. That case involved a housing complex which imposed racial quotas to maintain a level of racial integration. *Id*. at 1098. The Second Circuit recognized, citing Supreme Court equal protection and Title VII caselaw, that "[a]lthough any racial classification is presumptively discriminatory, a race-conscious affirmative action plan does not necessarily violate federal constitutional or statutory provisions." *Id.* at 1101. The court held that the quotas violated the FHA, noting the

difference between "measures designed to increase or ensure minority participation, such as 'access' quotas" and "programs designed to maintain integration by limiting minority participation, such as ceiling quotas." *Id.* at 1102. The latter, the court held, "are of doubtful validity because they single[ ] out those least well represented in the political process to bear the brunt of a benign program." *Id.* (internal citation and quotation marks omitted).

Similarly, here, the Challenged Regulations impose a ceiling quota on the number of persons with serious mental illness in adult homes, imposing a prohibition on admission at any facility exceeding 25% of its population. And here, "the impact of [the State's] practices falls squarely on minorities, for whom Title VIII was intended to open up housing opportunities." *Id.* *See also Larkin*, 89 F.3d at 291 ("[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.").

On the other hand, race-based programs have been upheld where, for example, they involved "provid[ing] additional information to white home buyers concerning properties they might not ordinarily know about nor consider, and involved no lessening of efforts to attract black home buyers to these same properties." *S.-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors*, 935 F.2d 868, 884 (7th

Cir. 1991) (distinguishing cases involving "a racial quota system which favors whites and thereby lessens housing opportunities for minorities."). Although there are no doubt many policies the State could adopt with respect to housing for persons with serious mental illness for which the FHA would provide no obstacle, the only policy at issue in this case is the facially discriminatory exclusion of persons with serious mental illness from transitional adult homes — a policy whose impact is borne exclusively by the very disabled population whom the FHA is intended to serve.

"The FHAA protects the right of individuals to live in the residence of their choice in the community. If the state were allowed to impose quotas on the number of minorities who could move into a neighborhood in the name of integration, this right would be vitiated." *Larkin*, 89 F.3d at 291 (internal citation omitted). Here, the Challenged Regulations operate by excluding persons with serious mental illness from housing that is available to others without such a diagnosis and thereby denying those persons access to certain adult homes, directly contrary to the FHA's goals of "extend[ing] the principle of equal housing opportunity to handicapped persons," and allowing such persons to "live in the residence of their choice." H.R. Rep. 100-711, at 13, 24 (1988). No amount of benign intentions can render the Challenged Regulations consistent with the language or goals of the FHA.

POINT V

THE TRIAL COURT DID NOT HOLD THAT THE CHALLENGED REGULATIONS WERE ARBITRARY AND CAPRICIOUS UNDER CPLR ARTICLE 78.

Appellant argues that the Trial Court improperly held that the Challenged Regulations were arbitrary and capricious as sought in the sixth cause of action which had previously been dismissed. Appellant's argument is based on a misstatement of the Trial Court's decision.

Appellant's brief characterizes the court's decision as follows:

> The Decision states that "[t]his is a hybrid article 78 and declaratory judgment proceeding," which raises such questions as "whether a determination 'was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion….' (CPLR § 7803[3])." R67.

(Appellant's Br. 60.) But Appellant has cherry picked quotes from the Trial Court's decision out of context and removed crucial language in a manner that misstates the court's decision. What the Trial Court actually stated was:

> This is a hybrid article 78 and declaratory judgment proceeding *in which Oceanview seeks the following relief on its third cause of action: (a) a judgment and order annulling or invalidating the Challenged Regulations as being contrary to law, i.e., the Federal Fair Housing Act as amended; and (b) a judgment and order declaring the Challenged Regulations void, invalid and unenforceable because they conflict with and are preempted by the Federal Fair Housing Act as amended.* Oceanview also seeks a judgment and order permanently enjoining the

Respondent from enforcement of the Challenged Regulations.

> Among questions properly raised in an article 78 proceeding is whether a determination "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion. . . ."

(R.67 (emphasis added).) It is clear from the language omitted by Appellant that the court was concerned solely with the third cause of action which sought a declaration that the Challenged Regulations violated the FHA. The Trial Court went on to accurately quote CPLR 7803(3) that the issues to be raised under that statute are whether a determination "was made in violation of lawful procedure, *was affected by an error of law* or was arbitrary and capricious or an abuse of discretion." (R.67 (emphasis added).) Nothing in the language of the Trial Court's decision was incorrect or improper.

The Trial Court's understanding that the third cause of action was all that was at issue is made clear by the first sentence of its decision and the related footnote laying out the relevant procedural history. It is apparent from these statements and from the balance of the court's decision that the court did not consider any evidence or arguments other those that addressed whether the Challenged Regulations violate the FHA and did not resurrect previously dismissed claims.

CONCLUSION

For the foregoing reasons, this Court should affirm the Decision/Order/Judgment below.

DATED: February 21, 2023

O'CONNELL AND ARONOWITZ

By: 

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

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O'CONNELL AND ARONOWITZ

By: 

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