To be Argued by:
MICHAEL HAWRYLCHAK
(Time Requested: 30 Minutes)

APL-2024-00056
Albany County Clerk's Index No. 906012/16
Appellate Division–Third Department Docket/Case No. CV-22-1940

Court of Appeals

of the

State of New York

In the Matter of

OCEANVIEW HOME FOR ADULTS, INC. d/b/a OCEANVIEW MANOR,

Petitioner-Appellant,

– 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-Respondent,

(For Continuation of Caption See Inside Cover)

BRIEF FOR PETITIONER-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.

STATUS OF RELATED LITIGATION

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(a), Petitioner-Appellant is aware of two related cases currently pending in other courts. Each of these cases involves, among other things, a challenge under the federal Fair Housing Act to the same regulations at issue in this case:

1. *Doe v. Zucker*, No. 23-1224-cv, is currently pending before the United States Court of Appeals for the Second Circuit. After this case survived summary judgment in the District Court for the Northern District of New York, the Second Circuit granted leave for an interlocutory appeal on the issue of standing. Briefing is ongoing.
2. *Residents and Families United to Save Our Adult Homes v. Zucker*, No. 9038/13, is currently pending before Supreme Court, Kings County. After this case initially survived summary judgment, the State moved to renew on the basis of the Appellate Division, Third Department decision on appeal here. Supreme Court granted that motion to renew and granted summary judgment for the State. As of today, no appeal has been filed.

CORPORATE DISCLOSURE STATEMENT

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.1(f), Petitioner-Appellant Oceanview Home for Adults states that it has no such corporate parents, subsidiaries, or affiliates.

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QUESTIONS PRESENTED

1. Are challenges to facially discriminatory laws under the Fair Housing Act subject to a government interests means-ends balancing test, or are they instead governed by the text of the Fair Housing Act including its express preemption provision?
2. Does the Fair Housing Act have an implicit exception for so-called "benign discrimination"?
3. To the extent a "benign discrimination" exception exists, does it require more than a mere showing of benefits that outweigh the burdens on the protected class?
4. Does narrow-tailoring under the Fair Housing Act require that the challenged actions be the least discriminatory means of achieving the purported interests?
5. Did the Appellate Division, Third Department wrongly disregard Supreme Court's extensive findings of fact without explanation or support in the record?

JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear this case pursuant to CPLR § 5602(a)(1)(i). This appeal is from an order of the Appellate Division, Third Department, dated May 4, 2023, which finally determined the action, holding that certain Challenged Regulations do not violate the federal Fair Housing Act. (R.8768–80.) A motion for permission to appeal was timely made by Petitioner-Appellant and was granted by the Third Department in an order pursuant to CPLR § 5713, dated May 9, 2024. (R.8766.)

The questions presented to this Court have been preserved. The parties disputes concerning the applicable legal standard under the federal Fair Housing Act (Question Nos. 1–4) were briefed and decided in Supreme Court (R.5–85) and in the Third Department (R.8768–80).

This Court has jurisdiction to review the Third Department's express and implied reversals of Supreme Court's findings of fact (Question No. 5) pursuant to CPLR § 5501(b).

PRELIMINARY STATEMENT

Supreme Court, Albany County, after a lengthy bench trial, issued an 81-page Decision/Order/Judgment (the "Trial Decision") with extensive factual findings, holding that certain facially discriminatory regulations (the "Challenged Regulations") enacted by the New York State Department of Health — regulations that expressly require certain private housing providers to discriminate against persons with disabilities — were invalid as violative of the federal Fair Housing Act. On appeal to the Appellate Division, Third Department, the State argued, among other things, that Supreme Court had applied the wrong legal standard.

In a May 4, 2023 Opinion and Order (the "Appellate Decision"), the Third Department, in considering the proper legal standard to evaluate the validity of facially discriminatory regulations under the FHA, rejected in certain respects the legal standard applied by Supreme Court. Having established the applicable standard, rather than remanding to allow the Supreme Court to apply it in the first instance, the Third Department instead purported to independently evaluate the Record, holding that the Challenged Regulations do not violate the FHA. Petitioner-Appellant Oceanview Home for Adults now appeals the Appellate Decision.

First, the Third Department adopted an inappropriate legal standard to govern challenges to facially discriminatory regulations under the FHA, ignoring the statutory

text in favor of a test drawn from constitutional caselaw and a judicially created exception for so-called benign discrimination. Although state and federal courts are deeply divided on the proper standard, the Third Department has only deepened this split without contributing any clarity or coherence.

Second, even under the legal standard adopted by the Third Department, Oceanview should prevail on the basis of the facts actually established at trial. The Third Department was able to hold the Challenged Regulations valid under the Fair Housing Act only by making a series of factual assertions — largely without explanation — that not only contradict Supreme Court's detailed and extensive factual findings, but are entirely unsupported in the extensive trial Record.

While the Appellate Division has the authority to reexamine the record and independently evaluate the facts, in this case, the Third Department provided no indication that it had actually done so. The Appellate Decision also implicitly rejects several of Supreme Court's express credibility determinations without any explanation.

Oceanview now asks this Court to step in, first, to bring some clarity to the legal standard under the Fair Housing Act which has caused such confusion in the lower courts, and, second, to rein in the Third Department's casual disregard for Supreme Court's fact-finding.

BACKGROUND

I. The State adopted regulations that facially discriminated on the basis of disability.

Adult homes, like Oceanview, are "adult care facilit[ies] established and operated for the purpose of providing long-term residential care, board, housekeeping, personal care and supervision to five or more adults unrelated to the operator." 18 N.Y.C.R.R. § 485.2(b). Adult homes provide support services to residents who, by reason of age or infirmity or both, need a certain level of care, supervision, or assistance with activities of daily living. *See* 18 N.Y.C.R.R. § 487.7. Residents in adult homes are guaranteed a variety of freedoms, including, for example, the right to come and go from the facility at will, without permission. (R.31.) Oceanview, like many adult homes also operates an assisted-living program ("ALP"), which allows persons who are eligible for placement in a nursing home to receive a higher level of care in the less restrictive adult home setting. (R.18, 24.)

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

when a person applies to live at a transitional adult home and that person is determined to have a diagnosis of serious mental illness, the adult home is compelled by law to turn the applicant away. 18 N.Y.C.R.R. § 487.4(e)(3)(ii). Notably, the regulations do not allow for any individualized determination, but instead mandate exclusion based solely on a person's mental illness diagnosis — a disability classification.

II. After a lengthy trial, Supreme Court held the Challenged Regulations invalid under the Fair Housing Act.

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

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

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

Second, the restriction must be narrowly tailored, (R.60,) which Supreme Court understood to mean that "no alternative would serve that interest with less discriminatory effect," (R.74,) following decisions by the United States District Courts for the Eastern and Southern Districts of New York. *See Human Res. Research & Mgmt. Grp., Inc. v. County of Suffolk*, 687 F. Supp. 2d 237, 265 (E.D.N.Y. 2010)) ("least discriminatory means of effectuating defendant's proffered interests"); *Sierra*, 552 F. Supp. 2d at 431 ("no alternative would serve that interest with less discriminatory effect").

After an extensive review of relevant trial testimony, Supreme Court analyzed the regulations 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, including:

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

2. The State 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 v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999) 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. The State 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.)

III. The Third Department reversed, holding that the Challenged Regulations are valid under the FHA.

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

In overturning the Trial Decision, the Appellate Decision did two significant things: (1) adopted a legal standard for claims of intentional discrimination under the FHA that differs from the standard applied by Supreme Court, giving the State more latitude to adopt discriminatory laws; and (2) asserted various factual conclusions that, expressly or implicitly, overturn Supreme Court's extensive and detailed findings of fact, but without any explanation of why Supreme Court's findings are erroneous or how the Third Department's alternative findings are supported by the Record.

As to the legal standard, the Third Department stated that "a housing restriction that facially discriminates against people with disabilities will pass muster under the FHA upon a showing (1) that the restriction benefits the protected class or (2) that it responds to legitimate safety concerns raised by the individuals affected, rather than being based on stereotypes," (R.8774,) indirectly quoting the Ninth Circuit's Decision in *Community House, Inc. v. City of Boise*, 490 F.3d 1041, 1050 (9th Cir. 2007), which paraphrased the Sixth Circuit's decision in *Larkin v. State of Mich. Dep't of Soc. Servs.*, 89 F.3d 285, 290 (6th Cir. 1996), which was in turn paraphrasing the Tenth Circuit's decision in *Bangerter*, 46 F3d at 1503–04. Although the precise wording is different, both Supreme Court and the Third Department ultimately applied this standard by analyzing "whether the Challenged Regulations are beneficial to

persons with a serious mental illness" and therefore serve a legitimate governmental interest. (R.74; *see also* R.8778.)

With respect to the second part of the legal test, however, the Third Department expressly disagreed with Supreme Court, rejecting the least discriminatory alternative test, and instead followed a federal district court decision from California in adopting "a less onerous standard." (R.8775.) The Appellate Decision does not, however, provide any formulation of this less onerous version of narrow tailoring.

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

Notice of Entry was served on December 6, 2023, and Petitioner-Appellant moved for leave to reargue, or, in the alternative, for permission to appeal to this Court. On May 9, 2024, the Third Department denied the motion to reargue, but granted permission to appeal to this Court. (R.8766.)

STANDARD

The appropriate legal standard under the Fair Housing Act is a question of law which is reviewed by this Court de novo. *People v. Weinstein*, ___ N.Y.3d ___, 2024 NY Slip Op 02222, *5 (2024).

This Court has jurisdiction to review questions of fact, because the Appellate Division, in reversing Supreme Court's final judgment, "expressly or impliedly found new facts." CPLR § 5501(b); N.Y. Const. Art. VI, § 3(a).

ARGUMENT

POINT I

THE FAIR HOUSING ACT EXPRESSLY PREEMPTS STATE LAWS THAT PURPORT TO REQUIRE DISCRIMINATION IN HOUSING.

As the Third Department acknowledged, the Challenged Regulations at issue in this case are facially discriminatory. (R.8773.) To be specific, they operate by requiring certain housing providers — transitional adult homes like Oceanview — to engage in intentional discrimination on the basis of disability by denying certain persons access to housing solely on the basis of their mental health diagnosis.

Although the Fair Housing Act's preemption provision expressly invalidates any state law that would permit or require discriminatory housing actions, the Third Department held that a housing provider who engages in intentional discrimination against the disabled need only show that the benefits to some in the protected class outweigh the burdens to others, and although some degree of narrow tailoring is required, the housing provider need not employ the least discriminatory means of

achieving its objectives. The atextual standard adopted by the Third Department is impossible to reconcile with the text of the Fair Housing Act, which expressly forbids states from requiring housing providers to engage in disability discrimination.

A. Despite the FHA's clear language establishing a categorical prohibition on disability discrimination, federal and state courts have adopted a variety of more permissive legal standards.

As the Third Department acknowledged, (R.8774,) the legal standard governing claims of intentional discrimination under the Fair Housing Act is the subject of a federal circuit split. Numerous courts have noted the divide between the Eighth Circuit, which has held that an intentionally discriminatory law need only have a rational basis to survive under the FHA, and the Sixth, Ninth, and Tenth Circuits, which require a higher showing. (R.8774.) But the disagreement goes beyond this divide due to the different ways the Sixth, Ninth, and Tenth Circuits have described the applicable standard. *See, e.g.*, *Sailboat Bend Sober Living, LLC v. City of Fort Lauderdale, Fla.*, 46 F.4th 1268, 1277 (11th Cir. 2022) (differentiating the Sixth Circuit from the Ninth and Tenth and stating that "[o]ur sister circuits have adopted three different tests"). But even this description understates the degree of division as various courts purporting to follow Ninth Circuit's articulation of the standard have

disagreed about what types of government interests can be considered and the degree of narrow tailoring that is required.

In fact, as we will explain below, the actual legal standard required by the Fair Housing Act is clear and straightforward. Unfortunately, a series of early Eighth Circuit cases inexplicably imported a test from Equal Protection caselaw. This erroneous equal protection framing has persisted, even in courts that purport to reject the Eight Circuit's approach, leading to a proliferation of different versions of the legal standard, none of which are reconcilable with the text of the Fair Housing Act itself. The Third Department's decision only deepens the confusion concerning the proper legal standard.

1. The Fair Housing Act categorically prohibits disability discrimination and expressly preempts inconsistent state laws.

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). 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 FHA also directly addresses its impact on state laws. The FHA includes an express preemption provision, which states that "any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid." 42 U.S.C. § 3615. In other words, a state regulation that *requires* or *permits* any action that would violate the FHA is invalid. When challenging the validity of a state law under the FHA, therefore, the inquiry called for by the statute is whether the state law in question *requires or permits* any action that violates the FHA.

With respect to the Challenged Regulations, this inquiry is straightforward. The Challenged Regulations prohibit transitional adult homes from admitting persons with serious mental illness. In other words, the regulations *require* transitional adult homes like Oceanview to engage in direct, facial discrimination on the basis of disability, in direct contravention of the FHA's discrimination prohibition. Because the Challenged Regulations require actions that would otherwise be discriminatory housing practices under the FHA, the preemption provision therefore expressly renders them invalid.

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 only statutory provision[1] that has been identified as even plausibly relevant to this inquiry is the FHA's 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, however, is narrow. 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 v. New Horizons, Inc.*, 605 F. Supp. 2d 378,

[1] The State has argued for, and the Third Department relied on, an *implied* exception for so-called "benign discrimination" that appears nowhere in the FHA's text. This exception is addressed further in Point I.B, below.

393 (D. Conn. 2009) (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. Not only is the State-mandated disability discrimination of the Challenged Regulations not based on any individualized risk assessment, but it does not even distinguish among the disparate diagnoses that are subsumed within the capacious designation of SMI.

Under the legal standard required by the text of the FHA, including its express preemption provision, the inquiry should end here. The Challenged Regulations require transitional adult homes to engage in discrimination prohibited by the FHA and not within any statutory exception. They are therefore invalid.

2. A series of indefensible errors by the Eighth Circuit has led to confusion and a proliferation of different legal standards.

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). Indeed, this is a category error. The *McDonnell Douglas* burden-shifting test is a tool to draw *factual* inferences about the motivation behind a policy with a disparate impact; Fourteenth Amendment means-ends scrutiny is a test of the *legal* justification for a discriminatory government action.

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 Tenth Circuit charted a very different course. In *Bangerter v. Orem City Corp.*, 46 F.3d 1491, that court held that "[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 & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) (facially discriminatory policy can survive only if it satisfies statutory exception). That court considered, first, whether discriminatory government actions might fit within the direct threat exception, 42 U.S.C. § 3604(f)(8), to the FHA's prohibition on disability discrimination. *Bangerter*, 46 F.3d at 1503.

In addition to this express exception, the *Bangerter* court also found an implied exception for so-called "benign discrimination,"[2] holding that "the FHAA should not

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[2] The legitimacy of the so-called benign discrimination exception is discussed further in Point I.B, below.

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. That court was guided by the United States Supreme Court's decision in *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193, 201–08 (1979), holding that Title VII "should not be read literally" and "should not be construed to prohibit race-conscious affirmative action." *Bangerter*, 46 F.3d at 1504.

The *Bangerter* court, therefore identified two circumstances under which discrimination against persons with disabilities might not violate the Fair Housing Act: where a person posed a direct threat to health and safety; and where the discriminatory action was in fact beneficial toward the protected class. Notably, the categories identified by the *Bangerter* court had nothing to do with government interests — indeed, both the FHA cases it cited in support of the benign discrimination exception and the Supreme Court's decision in *Weber* involved allegations of private discrimination without government action.

The *Bangerter* court also described the narrow-tailoring standard applied in FHA disparate impact cases, which requires that "no alternative would serve [the legitimate] interest with less discriminatory effect," and favorably cited a string of cases applying a "similar approach" in FHA racial discrimination cases in which facial

discrimination was defended as beneficial to the protected group. *Bangerter*, 46 F.3d at 1504–05.

The next circuit to weigh in was the Sixth Circuit in *Larkin v. State of Michigan Department of Social Services*, 89 F.3d at 290, which recognized a split between the Eighth and Tenth Circuits. The *Larkin* court described *Bangerter* as having held that facially discriminatory laws can survive under the FHA if they "(1) are justified by individualized safety concerns; or (2) really benefit, rather than discriminate against, the handicapped, and are not based on unsupported stereotypes." *Id.* But rather than endorsing *Bangerter*'s categorical approach,[3] the Sixth Circuit in *Larkin* instead declared that "for facially discriminatory statutes to survive a challenge under the FHAA, the defendant must demonstrate that they are warranted by the unique and specific needs and abilities of those handicapped persons to whom the regulations apply." *Larkin*, 89 F.3d at 290. Notably, the *Larkin* court makes no attempt to connect this new means-ends tailoring inquiry with the text of the FHA.

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

Finally, the Ninth Circuit in *Community House*, 490 F.3d at 1050, described a circuit split between the Eighth Circuit's decisions in *Oxford House-C* and *Familystyle*, and the Tenth and Sixth Circuit's decisions in *Bangerter* and *Larkin*, respectively. The *Community House* court described itself as "follow[ing] the standard adopted by the Sixth and Tenth Circuits," which it characterized as requiring a showing that "(1) that the restriction benefits the protected class or (2) that it responds to legitimate safety concerns raised by the individuals affected, rather than being based on stereotypes." *Id.* The *Community House* court, however, described itself as identifying the appropriate level of "scrutiny" to assess asserted "government interests", equal protection concepts that were not part of the analysis in *Bangerter* or *Larkin*. The court did not address narrow tailoring because it found the government had failed to demonstrate a benefit to the protected class. *Id.* at 1051–52.

Lower federal courts attempting to reconcile these decisions, including several in New York, have created yet more variation. For example, 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 (citing *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926, 936 (2d Cir. 1988)). The court characterized its heightened scrutiny test 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 was a paraphrase of the *Bangerter* court's identification of specific express and implied exceptions to the FHA's prohibitions on disability discrimination. 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. The *Sierra* court held that this standard required narrow tailoring, employing the least discriminatory means test. *Id.* at 431.

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 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. This court followed *Sierra* in adopting the least discriminatory means test for narrow tailoring. *Id.* at 265.

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."

Several state courts have followed the lead of these federal district courts. For example, in *Residents & Families United to Save Our Adult Homes v. Zucker*, No. 9038/2013, NYSCEF No. 251, at 28 (Sup. Ct. Kings Cty. May 2, 2023), Supreme Court, Kings County, rejected the categorical approach and adopted the Equal Protection based heightened scrutiny standard, with least-discriminatory-means narrow tailoring.[4] In an earlier decision in this case, Supreme Court, Albany County held the same. *Oceanview Home for Adults, Inc. v. Zucker, et al.*, Index No. 06012-16, Decision and Order, at 30–31 (N.Y. Sup. Ct., Albany Cty. Aug. 27, 2018).

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[4] Following the Third Department's decision in this case, the *Residents and Families* court found itself bound by the Appellate Division's decision and overturned this holding. *Residents & Families United to Save Our Adult Homes v. Zucker*, No. 9038/2013, 2024 NY Slip Op 30459(U), at *9 (Sup. Ct. Kings Cty. Feb. 9, 2024).

Finally, following the Third Department's decision in this case, the Northern District of New York in *Doe v. Zucker*, No. 1:17-CV-1005 (GTS/CFH), 2023 U.S. Dist. LEXIS 112869, at *80 (N.D.N.Y. June 30, 2023), expressly adopted the Equal Protection framing, describing its task as "assess[ing] the government's justifications for the regulation." The court described the circuit split as a disagreement over the level of scrutiny, and chose to follow *Sierra*, *Human Resource*, and *Rehabilitation Support Services* in applying heightened scrutiny. *Id.* at *82. That court expressly rejected the categorical exceptions identified first in *Bangerter*, holding instead that discrimination could be justified by any "legitimate state interest." *Id.* at *83. The *Doe* court, however, departed from the other New York federal district courts in holding that narrow tailoring does not require the least discriminatory means. *Id.* at *85. Notably, of all these decisions, *Doe*, in describing the parties' arguments, was the only one to mention the existence of the FHA's preemption provision. Having declared that it would follow prior courts in adopting a government-interest equal protection-based approach, however, the court makes no effort to explain how this is consistent with the statute's express instruction that state's are powerless to permit or require prohibited discrimination. *Id.* at *78–79.

Although courts are divided over the proper legal standard across multiple dimensions — whether to apply the categorical approach, equal-protection means-

ends scrutiny, or a hybrid; how to characterize the applicable categorical exceptions, if applicable; and what degree of narrow tailoring is required — each of these decisions adopting an equal-protection, government-interest, means-ends scrutiny standard shares a common lack of curiosity over how these concepts became attached to the Fair Housing Act.

3. The Third Department's decision gives the State license to discriminate while adding to the confusion over the correct legal standard.

The Third Department in its decision applied what it described as the "standard embraced by the Sixth, Ninth and Tenth Circuits," (R.8774,) and "recommended by DOJ," (R.8775,) quoting the Ninth Circuit's articulation of the applicable exceptions. The Third Department sometimes referred to its task as determining whether the Challenged Regulations are narrowly tailored to benefit the protected class, but although the court purports to follow the federal DOJ (*see* R.8720) and the Tenth Circuit, *see Bangerter*, 46 F.3d at 1503, which introduced the categorical approach, both of whom expressly rejected importing equal protection analysis into the FHA, it also interchangeably and repeatedly refers to the question as whether the Challenged Regulations are narrowly tailored to implement the "goal of integration," (*see* R.8775, 8776, 8779, 8780,) framing the analysis in terms of a governmental interest as advocate by the State in its post-trial briefing. (*See* R.7794.) The Third Department

also rejected the least-discriminatory-means test for narrow tailoring in favor of a "less onerous standard," (R.8775,) expressly departing from the standard previously adopted by federal district courts in New York.

Perhaps most significantly, although the Third Department mentions in passing the existence of the FHA's express preemption provision, (R.8773,) it performs no analysis of that provision and makes no attempt whatsoever to reconcile a standard that allows the state to facially discriminate against persons with disabilities with the FHA's express preemption provision which *invalidates* state laws that permit or require discrimination in violation of the FHA's protections.

B. The Challenged Regulations are not justified by the so-called "benign discrimination" exception.

As noted above, the Third Department followed several federal courts in holding that there is an implicit exception to the Fair Housing Act's prohibitions on disability discrimination for discriminatory acts that are in fact "beneficial" to the protected class.

This exception is not warranted by, and directly contradicts, the text of the Fair Housing Act, and the importation of this exception into the FHA by analogy with other federal antidiscrimination laws is legally unsound.

1. The benign discrimination exception has no basis in the Fair Housing Act.

As an initial matter, the Challenged Regulations are indisputably facially discriminatory, and therefore in violation of the plain language of the Fair Housing Act. As the United States Supreme Court recognized in the context of Title VII, "[w]hether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination." *Johnson Controls, Inc.*, 499 U.S. at 199 (1991). Neither "the absence of a malevolent motive" or "[t]he beneficence of an employer's purpose" serves to "alter the *intentionally discriminatory* character of the policy." *Id.* (emphasis added). The principle applies equally in the FHA context. *See Bangerter*, 46 F.3d at 1501.

The text of the Fair Housing Act contains no exception for supposedly beneficial discrimination, nor has the United States Supreme Court ever recognized such an exception to the FHA. But the Tenth Circuit in *Bangerter* held, by analogy with the Supreme Court's decision in *Weber*, 443 U.S. at 201–08, that the Fair Housing Act should be construed to have an implied exception for benign discrimination. *Bangerter*, 46 F.3d at 1504. More recent cases from the Supreme

Court, however, have expressly rejected narrowing the scope of antidiscrimination law on the basis of congressional intent or extratextual considerations.

For example, in *Bostock v. Clayton Cty.*, 590 U.S. 644, 677 (2020) (internal quotation marks omitted), the Court held that Title VII's ban on sex discrimination covers discrimination on the basis of sexual orientation or gender identity, regardless of whether this was intended or anticipated by the enacting Congress, holding that "in the context of an unambiguous statutory text, whether a specific application was anticipated by Congress is irrelevant." The Court analyzed the specific statutory text of Title VII, declaring that "[w]hen the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest," *id.* at 653, and that "[t]he people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration." *Id.* at 674.

Similarly, mere months ago, the Court in *Muldrow v. City of St. Louis*, 144 S. Ct. 967, 975 (2024), rejected the importation of a significant-harm requirement into Title VII's anti-discrimination analysis, explaining that "[t]o demand 'significance' is to add words — and significant words, as it were — to the statute Congress enacted. It is to impose a new requirement on a Title VII claimant, so that the law as applied demands something more of her than the law as written." *Id.* at 974.

Here, as in *Bostock* and *Muldrow*, the benign discrimination exception would exclude from the Fair Housing Act's protection actions that are indisputably within the scope of the statute's text. It is not enough that actions discriminate against persons with disabilities; in order to be subject to the FHA's protections those actions must discriminate in a way that the courts find disproportionate — where the harms to some are not outweighed by the purported benefits to others. Such a contraction of the scope of the FHA's protection against discrimination has no place in the statutory text and is at odds with the modern Supreme Court's caselaw.

But even if the Supreme Court had not so clearly instructed courts against imposing extratextual limitations to reduce the scope of federal antidiscrimination law, there would be good reason not to blindly import the judicially-created exceptions from *Weber* into disability discrimination under the FHA. In *Weber*, 443 U.S. at 202–04, the Supreme Court acknowledged that "Title VII forbids discrimination against whites as well as blacks," but carved out an exception for certain affirmative action programs that disadvantaged white employees only after an extensive discussion of Congress's goals in enacting Title VII, demonstrating that the motivating purpose was to combat black unemployment. In other words, even though Title VII was framed in formally neutral terms, it was intended primarily to benefit racial minorities.

The Fair Housing Act, by contrast, is not neutral between persons with and without disabilities, but rather is expressly designed to protect only persons with disabilities from discrimination on that basis. Discrimination *in favor* of persons with disabilities at the expense of those without disabilities is not prohibited, and, in fact, the implementing regulations recognize that persons with disabilities may be given priority or exclusive access to housing. 24 C.F.R. § 100.202(c)(2), (3). But here, the so-called benign discrimination exception is being invoked to permit discrimination in housing against members of the exact group the FHA was designed to protect. There is simply no basis in congressional intent for extending the benign discrimination exception into this context.

When the Fair Housing Act is properly construed, without the atextual benign discrimination exception, the Challenged Regulations, which require transitional adult homes to engage in intentional facial discrimination against persons with disabilities, are plainly invalid.

2. To the extent any such exception exists, its scope must be narrowly cabined.

Petitioner-Appellant contends that under a proper interpretation of the Fair Housing Act, there is no benign discrimination exception. If this Court disagrees, however, and finds that such an exception does exist, it should be construed narrowly.

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

In cases considering racial discrimination under the FHA, from which the benign discrimination exception was directly borrowed, courts have rejected the use of "programs designed to maintain integration by limiting minority participation, such as ceiling quotas," which "are of doubtful validity because they single[ ] out those least well represented in the political process to bear the brunt of a benign program" and "the impact of [the State's] practices falls squarely on minorities, for whom Title VIII was intended to open up housing opportunities." *United States v. Starrett City Associates*, 840 F.2d 1096, 1104 (2d Cir. 1988) (internal citation and quotation marks omitted). *See also Larkin*, 89 F3d 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.").

Under the Third Department's opinion, however, the strict limitations on the scope of the benign discrimination exception found in the caselaw have been reduced to merely requiring that "the restriction benefits the protected class." (R.8774.) The Challenged Regulations impose exactly the type of ceiling quota whose burden falls exclusively on the disadvantaged minority that was rejected in the context of racial discrimination claims under the FHA. The Third Department, however, rather than analyzing and grappling with the limits that federal courts have placed on justifying discrimination on the basis of its supposed benefits, treats the question as a matter of the court simply conducting a freehand weighing of relative benefits and burdens. (R.8778.)

Under the benign discrimination exception as it has been developed and applied in federal caselaw, the Challenged Regulations are an impermissible ceiling quota, and are therefore invalid.

3. Narrow tailoring requires the employment of the least discriminatory means.

The Third Department held that "the narrow tailoring required by the Sixth, Ninth and Tenth Circuits is a less onerous standard and does not require a showing

that the challenged regulations are the least restrictive means." (R.8775.) As an initial matter, it is difficult to reconcile this assertion with the Tenth Circuit's actual discussion of narrow tailoring in *Bangerter*, 46 F.3d at 1504, which, while not explicit in adopting it, quotes and favorably cites the least discriminatory means standard without even mentioning or alluding to any lesser version of narrow tailoring.

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

As a result of the Third Department's decision, therefore, state actions that are facially neutral with a differential impact will now be held to a higher burden under the FHA than actions that expressly discriminate on their face. Stated differently, if a facially neutral regulation incidentally disadvantages persons with disabilities, it will be found valid only if there is no less discriminatory means of achieving the regulation's purposes, but if the state were to replace the regulation with one that expressly disfavors persons with disabilities, it will get the benefit of a more lenient standard. This bizarre result has no basis in the statute and is indefensible as a matter of policy.

As Supreme Court found, the Challenged Regulations are not the least discriminatory means of achieving the State's objectives and are therefore invalid under the Fair Housing Act.

* * *

Taken as a whole, the Third Department's standard turns a federal statute designed to eliminate discrimination against the disabled, whether hidden or overt, into an invitation for the State to engage in express facial discrimination. This Court should hold that the Fair Housing Act does precisely what it says it does: it prohibits discrimination in housing on the basis of disability and declares invalid any state law that purports to permit or require such discrimination.

POINT II

THE THIRD DEPARTMENT EXPRESSLY AND IMPLIEDLY REVERSED CRITICAL FINDINGS OF FACT WITHOUT EXPLANATION OR SUPPORT IN THE RECORD.

Although the Third Department purported to reverse the Trial Decision "on the law," (R.8780,) in fact its decision depended critically on factual assertions that expressly or implicitly reversed extensive findings of fact below.[5] The Third Department purported to reverse the Trial Decision on the basis of its incorrect statement of the narrow tailoring standard. (R.8775–76.) But before reaching the question of whether the Challenged Regulations are narrowly tailored to achieve the asserted government interest, it is necessary to determine whether they in fact achieve that government interest at all. On this prior question, Supreme Court made detailed factual findings that the State had failed to demonstrate that the Challenged Regulations, in theory or in practice, further legitimate governmental interests, (R.74,) or to demonstrate that the Challenged Regulations resulted in integration of the mentally ill into the community. (R.81–82.) Rather than grappling with these findings and the extensive Record supporting them, the Third Department simply

assumed the very benefit that Supreme Court found the State had failed to prove. Under the Third Department's adopted standard, the State bears the burden of proving that the "benefit to the [protected class from the subject regulations] . . . clearly outweigh[s] whatever burden may result to them," (R.8778,) but without some showing that any individual actually *benefits* from the admission bar, the State has not even begun to bear its burden.

And the Third Department similarly disregarded Supreme Court's findings of fact in the narrow tailoring analysis itself. Although the Third Department disagreed with the trial court's legal test, Supreme Court's holding that the Challenged Regulations were not narrowly tailored was based on multiple underlying factual findings. But in applying its own narrow tailoring standard, the Third Department again simply asserted factual conclusions that were at odds with Supreme Court's findings and unsupported in the Record.

Indeed, the Third Department's decision is replete with factual assertions — unsupported by any Record evidence — that directly contradict Supreme Court's detailed and thorough factual findings. The Third Department has held that "[i]n

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[5] Because the Third Department purported to reverse the Trial Decision only "on the law," it failed to set forth its findings of fact with particularity as required by CPLR § 5712(c)(2).

reviewing a nonjury verdict . . . we should defer to the trial court's credibility determinations and factual findings," *Schroeder v. State*, 145 A.D.3d 1204, 1205 (3d Dep't 2016) (cleaned up), affirming when the record "adequately supports the court's determination." *Id.* at 1207. But here, although the Third Department's factual assertions in support of reversal are directly contradicted by the extensive findings of fact in the Trial Decision, the court does not explain why it rejects Supreme Court's fact-finding, nor does it explain how its contrary factual conclusions are supported by the Record in this case. This Court should demand more when the Appellate Division casts aside the findings of the trier of fact.

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

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

The State's defense of the Challenged Regulations and the Third Department's Decision upholding them relied heavily on the Supreme Court's decision in *Olmstead* and the relation between the Challenged Regulations and the *O'Toole* Settlement. But the Record in this case, as reflected in Supreme Court's extensive factual findings, undermines this reliance on *Olmstead* and the *O'Toole* Settlement. As part of the *O'Toole* Settlement, the State implemented processes whereby current residents of certain adult homes who are designated as having serious mental illness are provided voluntary opportunities to move out of those adult homes into supportive housing apartments. (R.8770.) Consistent with the purpose of Title II as interpreted in *Olmstead*, the *O'Toole* Settlement operates by expanding housing options for persons with serious mental illness, offering residents of certain adult homes a new choice of settings in which to live and receive necessary services.[6]

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[6] Although the Third Department characterized Supreme Court as holding that *Olmstead* does not apply because transitional adult homes are private facilities, (R.8776,) in fact Supreme Court's holding was based on the lack of proof of any State action resulting in segregation, including no proof "that the State solely or predominantly discharged, placed, or referred persons with a serious mental illness, to transitional adult homes," (R.31,) "that the State's actions, systems, or practices led to the alleged unjustified segregation of persons with a serious mental illness in transitional adult homes," (R.31,) that "any State agency or other branch of government, either solely or predominantly caused an unjustified placement, discharge and/or retention of persons with serious mental illness in transitional adult homes.," (R.53,) or "that the State, any State agency, or other branch of government relied on transitional adult homes causing unjustified placements, discharges and/or

The Challenged Regulations, by contrast, do not provide a single additional housing option to any person whatsoever. The admissions bar operates solely and exclusively by taking a housing option away from a broad class of persons with disabilities and providing nothing in its place. As Supreme Court found, the State "presented no evidence about where in the community persons with serious mental illness went after they were denied admission into transitional adult homes." (R.58–59.) Indeed, "DOH does not monitor or follow up with any person with a serious mental illness precluded from admission to a transitional adult home, or otherwise track or ensure alternative housing was obtained. In other words, the DOH does not ascertain where any persons with serious mental illness ultimately goes." (R.59.) As a result, the State failed to make any "evidentiary connection between a decline in a transitional adult home's mental health census and the actual integration of persons with serious mental illness into alternative community settings." (R.58.)

None of the State's witnesses testified that the Challenged Regulations have, in fact, resulted in the integration of persons with serious mental illness into community alternatives." (R.58; *see also* R.80–81.) And the State could provide no evidence

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retention of persons with serious mental illness in such homes." (R.53.) The Third Department does not mention these factual findings or explain how a contrary position is supported by the Record.

"whether the mental health of persons denied housing in transitional adult homes has improved in those persons." (R.50.)

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

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

On the other hand, there is persuasive evidence in the Record that the Challenged Regulations result in many of these excluded individuals ending up in significantly *worse* housing situations. As the State's principal expert conceded, "particularly in New York City, there was a lack of housing options for people with

disabilities" and the "[l]ack of appropriate housing for someone being discharged from a psychiatric hospital was 'a persistent resource problem'" (R.39.)

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

Indeed, the City of New York, where many of the transitional adult homes are located, operates mental health shelters — facilities much larger than adult homes housing exclusively persons with serious mental illness — where "residents' abilities to choose their living circumstances and to come and go freely are significantly limited, unlike in a transitional adult home." (R.64.) Under the Challenged Regulations, a person with serious mental illness can be housed in such a shelter but cannot choose to move into a transitional adult home, nor can any resident of one of these shelters be referred to a transitional adult home.

Another important source of transitional adult home referrals is nursing homes. (R.24, 56.) Since the adoption of the Challenged Regulations, because persons with

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

The lack of access to transitional adult homes is of particular concern for persons with serious mental illness eligible for an assisted living program (ALP) level of care. "An ALP is a Medicaid-funded program that provides more services and supports than an adult home is required to provide and permits the individual to avoid a more costly and restrictive setting such as a nursing home or residential health care facility." (R.18.) By definition, persons eligible for an ALP placement at a transitional adult home must be medically eligible for placement in a nursing home. (R.24 (citing Social Services Law § 461-1[1][d])). But if a person with serious mental illness seeks the services of an ALP at a transitional adult home and is otherwise eligible for ALP care, the Challenged Regulations nevertheless prohibit admission. (R.26.) And without access to an ALP at a transitional adult home, the only available housing providing the needed level of care may be a nursing home. (R.29)

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

Supreme Court also heard and considered concrete examples of specific persons harmed by the admissions bar, including an applicant who was forced to remain in a nursing home due to the bar on admission to a transitional adult home, (R.27,) another applicant with serious medical conditions that could have been treated in an ALP who was denied admission due to an unrelated mental health diagnosis, (R.29,) and an

individual whose exclusion from a transitional adult home resulted in his admission at a non-transitional adult home in an unfamiliar neighborhood geographically distant from his family, where he subsequently deteriorated. (R.28.) Supreme Court also heard and credited testimony that the harms from being denied access to one's housing of choice are compounded by the knowledge that the exclusion is a direct result of intentional discrimination on the basis of one's mental health diagnosis. (R.66.)

Despite Supreme Court's detailed fact-finding on the basis of an extensive Record, the Appellate Decision simply asserts that "the admissions cap benefits persons with serious mental illness by directly implementing integration into smaller and more diverse settings where people with serious mental illness have greater ability to exercise autonomy and interact with individuals who do not have serious mental illness." (R.8779.) The court does not provide any explanation of why it implicitly rejects Supreme Court's findings of fact — that the State provided no evidence that persons excluded by the admissions bar have ended up in smaller or more integrated settings, and that the evidence in the trial Record establishes that the Challenged Regulations push many of these people into *more* restrictive settings — nor does it explain how the Record provides any support for its conclusion.

The Appellate Decision similarly notes that "[t]here was also testimony that smaller facilities are beneficial to the recovery of people with serious mental illness by providing more individualized support." (R.8778.) But again, any such testimony is relevant only if the Challenged Regulations actually result in people being housed in smaller facilities — an assumption contrary to Supreme Court's findings and to the evidence in the Record.

The only other statement in the Third Department's decision that hints at some benefit to the protected class is the conclusory assertion that the Challenged Regulations "complement" the *O'Toole* Settlement's objectives of "provid[ing] additional supportive housing in the community and facilitat[ing] the process for residents of adult homes to make informed choices about relocating back into the community." (R.8777.)[7] But, as noted above, the Challenged Regulations do not do anything to provide the excluded non-residents with access to supportive housing or

[7] It is worth noting that neither Oceanview nor any other adult home was a party to *Disability Advocates, Inc. v Paterson*, 653 F. Supp 2d 184 (E.D.N.Y. 2009), which was vacated on appeal, *Disability Advocates, Inc. v. New York Coalition for Quality Assisted Living, Inc.*, 675 F.3d 149 (2d Cir. 2012), or the *O'Toole* Settlement, and no factual findings in those cases are binding on Oceanview here. To the extent the Court suggests that the Challenged Regulations indirectly benefit persons with serious mental illness by somehow assisting the *O'Toole* Settlement, the State would bear the burden of proving that the *O'Toole* Settlement — in fact, not merely in intention — actually benefits persons with serious mental illness who are denied admission into a transitional adult home. The Record does not support any such finding.

information about housing options. Rather than facilitating "informed choices," the Challenged Regulations merely eliminate certain choices while providing nothing in their place.

Finally, elsewhere in the Appellate Decision the court gives weight to "the justification proffered by respondent in support of the regulations – i.e., to benefit individuals with serious mental illness by implementing the integration mandate of *Olmstead*." (R.8777.) But "heightened scrutiny requires that the relationship between the asserted justification and discriminatory means employed be substantiated by objective evidence. Mere speculation or conjecture is insufficient, as are appeals to 'common sense' which might be inflected by stereotypes." *Hassan v. City of New York*, 804 F.3d 277, 306 (3d Cir. 2015), as amended (Feb. 2, 2016) (cleaned up). *See also Latta v. Otter*, 771 F.3d 456, 476 (9th Cir. 2014) ("Heightened scrutiny, however, demands more than speculation and conclusory assertions.").

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

As noted above, the State failed at trial to provide evidence of any single person who, having been denied access to a transitional adult home, ended up in supportive housing or some other more integrated setting. Nor did the State provide any reason

to believe that the admission bar would result in those excluded persons ending up in more integrated environments.

Without this unsupported assumption that persons excluded from admission to transitional adult homes would somehow end up in supportive housing, the State's only remaining justification for barring admission is the assertion that residing in a transitional adult home is, by itself, harmful to persons with serious mental illness. But the relevant legal question is not whether transitional adult homes are "good" or "bad" in some abstract sense, but whether persons with serious mental illness *benefit* from the discriminatory admission bar, which cannot be assessed without consideration of the alternatives. The State cannot plausibly suggest that persons with serious mental illness would be better served living in a homeless shelter than in a transitional adult home, yet we know that at least some persons barred admission to transitional adult homes will as a result end up in shelters. Similarly, it is undeniable that nursing homes are far more segregated and restrictive than transitional adult homes, but evidence shows that some persons end up with longer nursing home stays because they cannot be admitted to a transitional adult home, and for individuals eligible for an ALP bed, who by definition are eligible for a nursing home level of care, a nursing home may be the only other available facility that can provide the level of care required.

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

On the contrary, Supreme Court found that the State had "failed completely to present credible evidence to support [the] proposition" that transitional adult homes are "neither clinically appropriate for nor conducive to the recovery" of persons with serious mental illness. (R.75.) Moreover, the State "failed to support its assertion that the 'institutional' characteristics of a transitional adult home adversely impacted any seriously mentally ill resident's ability to recover or to otherwise thrive in such home." (R.75.)

Rather, Supreme Court found that transitional adult homes could benefit some persons with serious mental illness "because of support services, which, in turn, promote adherence with treatment plans." (R.27.) This was bolstered by testimony that Petitioner-Respondent Oceanview "frequently received referrals from agencies overseeing supported housing because prospective residents were unable to live more independently in such settings and needed the additional supports offered by Oceanview." (R.26.) Supreme Court also heard testimony directly from an individual

with serious mental illness who suffered a severe depressive episode while living independently but recovered at a transitional adult home and who chooses to continue to reside there due to the community and activities it offers him. (R.32–33.)

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

The Third Department rejected Supreme Court's factual findings on the ground that "the trial court's wholesale rejection of the State's witnesses was unwarranted." (R.8778.) The court explained that Supreme Court had erred by rejecting the State's expert testimony "mainly due to the absence of statistical data supporting their conclusions." (R.8778.)

But while Supreme Court's single-paragraph summary of the issue made a brief reference to the State experts' lack of empirical data or statistics, among other things,

(R.8,) that court's detailed multi-page analysis of these experts went far beyond the lack of statistical evidence. Rather, Supreme Court highlighted the absence of *any* evidentiary basis for the expert opinions, whether quantitative or qualitative, and whether from professional sources or from personal experience.

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

And although the State put Dr. Sederer forward as the person principally responsible for defining "transitional adult homes" as facilities with 80 or more beds and a mental health census of 25 percent or more, he "admitted having no basis for the formulation of the specific numerical parameters that now restrict admissions of

persons with serious mental illness to transitional adult homes." (R.40.) This is no minor implementation detail, but rather serves to identify those specific facilities from which persons with serious mental illness will be discriminatorily barred. But there was "no published evidence" and "no professional literature" supporting the 80-bed threshold, and the 25 percent SMI census was not based on "any published work or other professional source" or "any evidence-based information." (R.40–41.) In short, these numbers were supported by "[n]o literature, no evidence-based programs, no studies, and no professional guidelines." (R.41.)

Dr. Sederer had a similar lack of basis for any comparison between transitional adult homes and supportive housing. "He was not aware of any evidence-based study, analysis, or report about how well residents who leave an adult home to supported housing have done," and neither the State's Office of Mental Health nor New York City had created any study or report comparing outcomes of residents living in an adult home versus in supported housing. (R.39.)

And Dr. Sederer did not make up for this lack of any studies, literature, or professional guidelines with personal experience. He had "no interaction with residents or the family of residents of . . . adult homes of any size," nor had he ever even "spoken with the treating clinician of a mentally ill resident of an adult home." (R.39.) His sole experience was limited to visits some years earlier to "a couple" of

adult homes, including only a single facility "with more than 80 beds and population of 25 percent or more residents with serious mental illness." (R. 38, 41.) As Supreme Court summarized, "his clinical opinion is not based upon anything: no professional literature, no empirical research, and no first-hand experience." (R.41.)

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

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

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

Although the Third Department stated that it evaluated the Record "with due deference to the trial court's credibility assessments," (R.8778,) the Appellate Decision does not even mention Supreme Court's credibility determination, let alone provide any explanation for why, in light of all the deficiencies identified by that court, that determination was not entitled to deference.

Supreme Court similarly held that none of the State's other witnesses had "credibly testified that transitional adult homes are clinically inappropriate for and not conducive to the recovery of persons with a serious mental illness." (R.35.) Dr. Dixon's testimony, for example, was accorded "no weight" due to her "admitted lack

of experience with adult homes, residents living in adult homes, and residents who have a serious mental illness who live in adult homes," the fact that she had never heard of "transitional adult homes" before being asked to serve as an expert, and the fact that her first-hand experience was limited to a single 10-minute visit during which she did not speak to a single resident. (R.45.)

Although the Appellate Decision asserts that the State's experts "consistently testified that transitional adult homes are akin to institutionalized settings," (R.8777,) it does not provide any discussion of the basis for this testimony. Instead, its analysis is confined to the assertion that "[c]ourts normally should defer to the reasonable medical judgments of public health officials." (R.8777 (quoting *Olmstead*, 527 US at 602).) This quotation is ironic, because it comes from the discussion in *Olmstead* of *individualized* clinical determinations that it would not be appropriate to place particular individuals in a more community-based setting. *Olmstead*, 527 U.S. at 602. There, the Supreme Court noted that "it would be inappropriate to remove a patient from the more restrictive setting" absent such an individualized determination. *Id.* Indeed, the *Olmstead* Court was careful to "emphasize that nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings." *Id.* at 601–02.

Here, by contrast, the Challenged Regulations disallow any such individualized consideration of whether a particular person with serious mental illness would be better served in a transitional adult home. (R.25–26.) And Dr. Sederer expressly disclaimed any individualized consideration, stating that "I'm not in a position to talk about any individual patient. I'm taking about how to maxim[ize] the lives of populations[8] of people." (R.39.) In this context, it's particularly inapt to cite *Olmstead* in support of deference to Dr. Sederer.

But even taking this quotation from *Olmstead* at face value, it states that courts should *normally* defer, not that they should always and unfailingly defer, to *reasonable* medical judgments — that is, judgments adequately supported by reason. Supreme Court here explained in significant detail why it did not give weight to Dr. Sederer's clinical determination[9], and the Third Department did not explain why Dr. Sederer's opinion is a reasonable medical judgment.

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

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

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

Under the legal standard adopted by the Third Department, for a facially discriminatory law to survive under the FHA, the State must show that the Challenged Regulations are "'narrowly tailored' to effectuate the beneficial purpose." (R.8775.) Although the Third Department expressly rejected the "least restrictive means" formulation of narrow tailoring that has been employed by a number of other courts, the court did not provide an alternative formulation of the narrow tailoring standard. The court held that the Challenged Regulations are narrowly tailored, but its justifications are at odds with Supreme Court's findings and not supported by the Record.

First, the Third Department asserted that "[t]he admissions cap applies only to people with a *serious* mental illness," and therefore, "the cap is specifically tailored to the very individuals who are the subject of the integration mandate." (R.8778–79 (emphasis in original).) Supreme Court, however, specifically addressed the State's definition of serious mental illness, crediting Petitioner-Appellant's expert who explained that New York's definition was "unique" and "not consistent with the professionally acceptable definition." (R.64.) As Supreme Court noted, the state's definition of serious mental illness encompasses all of the 865 disorders listed in the

DSM-IV, including such things as eating disorders and sexual disfunction. (R.16.) Even one of the State's witnesses conceded that this definition of SMI was "weird." (R.45.) Indeed, this definition is so capacious that it would likely capture "between 30 and 60 per cent of students at a college campus." (R.64.) The Record does not support the assertion that the definition of SMI employed by the Challenged Regulations is a good proxy for those individuals at risk of segregation and in need of protection by the integration mandate of Title II.

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

one category without regard to their individual disability or disabilities, housing needs, supports needs, or treatment requirements."[10] (R.82.)

The Third Department further justified its finding of narrow tailoring by noting that transitional adult homes comprise only a small subset of all adult homes. (R.8779.) But in so noting, the court ignores Supreme Court's findings that a significant portion of the non-transitional adult homes do not accept Medicaid, the primary means of payment for persons with serious mental illness. (R.25, 50.) To the extent that these private pay facilities are not among the adult homes affected by the Challenged Regulations, this does nothing to lessen the burden on the majority of persons in the targeted population for whom those private pay facilities are as a practical matter inaccessible.

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

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

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

The Third Department also cited the existence of "a waiver permitting transitional adult homes to admit individuals with serious mental illnesses who were previously residents."[11] (R.8779.) But rather than a demonstration of narrow tailoring, this is an illustration of the stark divide between the *O'Toole* Settlement and the Challenged Regulations. Residents of transitional adult homes with serious mental illness are eligible for assistance in moving into supportive housing, and if they should wish to return to the adult home, they may receive a waiver from DOH. As the State's

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

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

Finally, in finding that the Challenged Regulations are narrowly tailored, the Third Department took no notice of Supreme Court's findings, which are undisputed in the Record, that New York State is the *only* state that has purported to address *Olmstead* by discriminating against persons with serious mental illness in housing. As Supreme Court found, "[n]o other state was required to enact a law or regulation prohibiting admission of persons with serious mental illness into settings similar to adult homes in order to settle *Olmstead* litigation." (R.81.) And the State's own *Olmstead* expert, who discussed his experience in three different states involving "large facilities, congregate settings with some personal care assistant services populated primarily by people with serious mental illness" that were "[e]ssentially similar in nature to what you have in New York," (R.3330,) testified that he was not aware of any other state that "prevented people with a serious mental illness from making their own decisions about where to reside" or "precluded admission of persons

with serious mental illness into any housing setting whatsoever." (R.57, 57.) Rather than proactively reaching out to offer housing alternatives to persons with mental illness, as some states have done, (*see* R.59, 3380–81,) New York and New York alone responded with a discriminatory admission bar. (R.81.)

While the Third Department rejected any requirement that New York adopt the *least* discriminatory means of achieving its objectives, here the State has chosen an approach that is *more* discriminatory than any other state — indeed, the Record does not reflect *any* other state that has attempted to comply with *Olmstead* through discriminatorily excluding persons with disabilities from housing rather than providing additional housing opportunities. While the Third Department's decision does not provide a specific formulation of the narrow tailoring standard, if it means anything, it should at least preclude the State from going out of its way to be *more* discriminatory than every other state to address the issue.

* * *

Petitioner-Appellant does not dispute the Appellate Division's authority to review Supreme Court's findings of fact, and, where appropriate, to reject them. But where, as here, the court repeatedly asserts and assumes facts in direct contradiction with Supreme Court's findings of fact without acknowledging that it is doing so, and

expressly rejects Supreme Court's credibility determinations without explaining why they are not sound, this Court should step in.

CONCLUSION

For the foregoing reasons, this Court should reverse the Appellate Decision and affirm Supreme Court's Trial Decision, holding that the Challenged Regulations are preempted by the Fair Housing Act and are therefore void and unenforceable.

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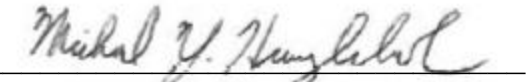
By: 

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