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)

REPLY 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 completed, and oral argument has been scheduled for October 15, 2024.
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 notice of entry has been filed and no appeal has been taken.

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?

PRELIMINARY STATEMENT

The State's response to the serious legal and factual issues Oceanview identified in the Third Department's decision has been largely argument by repetition. The State fails to engage with Oceanview's arguments concerning the correct legal standard for evaluating facial discrimination under the Fair Housing Act, replying instead on a supposed consensus in the federal courts that Oceanview already extensively debunked in its opening brief. (Appellant's Br. 13–14, 18–28.)

With respect to the Third Department's unexplained implicit and explicit rejections of Supreme Court's detailed findings of fact, the State insists that the Third Department's reversal was solely on the law and that it was based on "undisputed facts," despite continuing to rely extensively on factual assertions that were not only disputed but were resolved against the State after trial.

Most offensively, the State advances the claim that the Challenged Regulations — regulations that expressly bar access to housing solely on the basis of a protected disability — are not in fact discriminatory at all. This is not only wrong, it is frivolous, directly contrary to the express command of the Challenged Regulations and unsupported by anything in the lengthy trial record.

Finally, the State in its brief studiously avoids mentioning an issue that was not only pervasive at trial, the subject of significant discussion in Supreme Court's

Decision, and highlighted in Oceanview's opening brief: the assisted living programs ("ALPs"), which provide care in the adult home setting for persons eligible for a nursing home level of care. The State prefers to act as if the ALPs do not exist because they critically undermine its narrative about the reasons persons with mental illness might need the services of an adult home, the benefits adult homes provide, and the available alternatives for a person excluded from access.

ARGUMENT

POINT I

THE STATE REFUSES TO ACKNOWLEDGE THE ASSISTED LIVING PROGRAMS.

The State has crafted a narrative based on a series of false premises, for example, that a person with mental illness seeking admission to an adult home is necessarily seeking mental health services, or that the relevant alternative for a person denied admission is an independent supportive housing apartment. The State studiously avoids even acknowledging the existence of the ALPs because they undermine its narrative at every turn. ALPs were a major focus of the trial in this case and were discussed at length in Supreme Court's decision. (*See, e.g.*, R.18–22.) Indeed, Supreme Court noted that the State had "failed to address the benefit of transitional adult homes with ALPs for people with a serious mental illness having

comorbidities (people with a serious mental illness having physical limitations requiring assistance that an adult home can provide)." (R.8.) The ALPs were also highlighted in Oceanview's opening brief before this Court, (Appellant's Br. 45–46,) yet the State does not even give them a single mention.

"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])). As a DOH official testified at trial, ALPs were specifically created with the goal of providing services to "keep somebody from potentially being placed in a nursing home." (R.1514–15.). Applicants seek the services of ALPs for reasons unrelated to mental illness. (R.23.) 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.) As a result, for persons with serious mental illness — a significant segment of the population in need of nursing home level of care — the Challenged Regulations, adopted by DOH, end up defeating the clear statutory scheme enacted by the Legislature.

For example, a person temporarily placed in a nursing home after illness, injury, or surgery may still require skilled nursing care after rehabilitation. The availability of an ALP allows discharge to a less restrictive lower level of care; the alternative is an extended — or even permanent — stay at a much more restrictive and segregated nursing home. (R.29, 1906.) Indeed, one of the State's own officials conceded that persons with serious mental illness may seek admission to transitional adult homes, and ALPs, in particular, for reasons unrelated to their mental illness, (R.61,) but that the Challenged Regulations require that such persons be denied admission based on their mental health diagnosis regardless of comorbidities or any other reason. (R.49.)

The ALPs are not some minor ancillary service — they are core to what transitional adult homes do. For example, at the time of trial, 169 of Oceanview's 176 beds were certified as ALP beds, and 141 were filled with ALP residents. (R.10.) Persons with substantial physical or medical limitations that would make them eligible for a nursing home level of care are *the primary population* served by transitional adult homes. This affects every aspect of this case.

Persons eligible for an ALP level of care, who are definitionally "medically eligible for, and would otherwise require placement in, a residential health care facility" and "require[] more care and services to meet daily health or functional needs than can be provided directly by an adult care facility," 18 N.Y.C.R.R. § 494.3(d)(1)–

(2)), are necessarily unlikely to be candidates for an independent community setting like a supportive housing apartment. The effect of excluding such a person from access to an ALP placement is unlikely to be community integration, but instead confinement in a nursing home or deterioration in a facility that cannot provide the needed support services.

In arguing that transitional adult homes are clinically inappropriate, the State relies on an expert's opinion that an adult home is not an appropriate setting for "somebody who has a serious mental illness and no comorbidities or nothing else that would require the services in an adult home." (State's Br. 54.) But this quote simply does not describe the typical population of a transitional adult home. Those who are ALP-eligible — the vast majority of transitional adult home residents — by definition have significant comorbidities separate and apart from any mental health diagnosis. And, as Supreme Court noted, "[m]edical management of comorbidities is required to prevent the development of additional comorbidities and even death." (R.23.) The State can declare transitional adult homes clinically inappropriate only by treating mental illness as the sole defining characteristic guiding a person's housing decisions and needs, assuming that persons with serious mental illness seeking admission into an adult home must necessarily need mental health services and nothing else, and

ignoring all other physical and medical conditions for which a person might need assistance from an ALP or adult home.

It is simply impossible to understand the effects of the Challenged Regulations, or to weigh and potential costs and benefits, without considering the role of the ALPs.

POINT II

THE PROPER LEGAL STANDARD IS DICTATED BY THE TEXT OF THE FAIR HOUSING ACT.

As Oceanview explained in its Opening Brief, the Fair Housing Act itself clearly defines what constitutes prohibited discrimination. The act prohibits denying access to housing on the basis of disability. 42 U.S.C. § 3604(f)(1). The FHA also contains an express preemption provision declaring invalid any state law that "purports to require or permit" otherwise prohibited acts. 42 U.S.C. § 3615.

In other words, if it would be a violation of the Fair Housing Act for a housing provider to refusing to admit persons on the basis of mental illness, then any state law purporting to require that housing provider to refuse admission on the basis of mental illness would be expressly invalidated by the FHA. The FHA's preemption provision is utterly incompatible with the idea that government interests have any role to play in assessing whether a state regulation violates the Fair Housing Act. As Oceanview explained at length, (Appellant's Br. 18–27,) this government interest analysis

framework was wrongly imported into the FHA context by the Eighth Circuit — without explanation or justification — and has since spread through FHA caselaw without any analysis of its origin.

Notably absent from the State's brief is *any* attempt to reconcile its preferred legal standard with the actual text of the FHA, including its express preemption provision, or *any* effort to defend the reasoning in the chain of cases that ultimately resulted in courts applying variations of the State's preferred standard.

Instead, the State simply declares the standard settled and asks this Court to look no further. But the State fundamentally misrepresents the degree of agreement in the federal courts. Rather than blindly adopting some amalgamation of the various standards that have been applied in the federal courts, this Court should perform its own analysis, starting with the text of the FHA itself.

A. The FHA standard is not settled in the federal courts.

The State insists that it is advocating the "prevailing standard in federal Court of Appeals," (State's Br. 2,) adopted by "most federal Court of Appeals that have

considered the issue," (State's Br. 6,), which is "followed by nearly all federal Court of Appeals that have ruled on the issue" (State's Br. 27.) This is simply not true.[1]

A grand total of four federal circuits have weighed in on this question. One, the Eight Circuit, adopted a rational basis standard imported from equal protection caselaw that no one here defends.[2] (Appellant's Br. 18–21.) The Tenth Circuit expressly rejected the equal protection framework and instead recognized only exceptions explicitly or impliedly present in the FHA's text.[3] (Appellant's Br. 21–22.) The Ninth Circuit purported to adopt the Tenth Circuit's approach, but reframed it as a means-ends government interest scrutiny test, which is contrary to the Tenth Circuit's analysis. (Appellant's Br. 24.) And the Sixth Circuit, after paraphrasing the Tenth Circuit's approach instead adopted its own unique disability-based means-ends

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[1] Even if the federal courts of appeals had settled on a single legal standard, absent a decision from the United States Supreme Court, this Court would be free to perform its own analysis and exercise its own judgment. *See Flanagan v. Prudential-Bache Sec., Inc.*, 67 N.Y.2d 500, 506 (1986); *423 S. Salina St., Inc. v. City of Syracuse*, 68 N.Y.2d 474, 489 (1986).

[2] Even while rejecting the Eighth Circuit's rational basis standard, numerous courts have adopted its equal protection-based means-ends government interest scrutiny framework, even when purporting to follow courts that expressly reject the equal protection-based approach. (Appellant's Br. 24–27.)

[3] Oceanview contends that the Tenth Circuit's basic approach was correct, but it wrongly interpolated a "benign discrimination" exception into the statute. (Appellant's Br. 30–33.)

tailoring approach.[4] (Appellant's Br. 23.) No two of these circuits have adopted the same standard, and lower courts have introduced even further variation. (Appellant's Br. 24–27.)

The State asks this Court to engage in nose-counting, or to synthesize a single standard out of the disparate decisions of various courts, without regard to the soundness of their reasoning or fundamental differences in methodology. Oceanview asks this Court to *get it right*: to adopt a standard consistent with, and dictated by, the FHA's statutory text; and to read the relevant precedents critically, attentive to whether they employ a coherent methodology and accurately describe the caselaw on which they rely.

B. The "benign discrimination" exception has no basis in the statute, and to the extent that it has a basis in caselaw, its scope is narrow.

The so-called benign discrimination exception not only has no basis in the FHA's statutory text, it directly conflicts with the FHA's prohibition against disability discrimination. Nevertheless, the Tenth Circuit in *Bangerter v. Orem City Corp.*, 46 F.3d at 1491, 1504 (10th Cir. 1995)), carved this exception out of the FHA's

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[4] A number of courts — and the DOJ in its Statement of Interest — have described the Sixth Circuit as adopting the same standard as the Tenth Circuit. This is simply

protections by analogy with the U.S. Supreme Court's Title VII decision in *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193, 201–08 (1979).

As Oceanview noted, in more recent cases, the Supreme Court has repudiated this approach, making clear that the text of federal antidiscrimination law must be given its full effect and rejecting the judicial imposition of extratextual limitations that would reduce the scope of federal antidiscrimination law. (Appellant's Br. 30–32.) Additionally, the factor that drove the Supreme Court to adopt a benign discrimination exception in Weber — the asymmetry between races counseled against a strict application in a "reverse discrimination" context — is entirely inapplicable when the discrimination at issue is directed against the very group — disabled persons — that the statute expressly protects. (Appellant's Br. 32–33.)

The State's only substantive defense of the atextual benign discrimination exception is its insistence that, because the Challenged Regulations are allegedly beneficial to persons with disabilities, they are not in fact discriminatory at all. This is sophistry. The Challenged Regulations expressly single out a class of persons on the basis of their disability status and deny them access to otherwise available housing solely on that basis. This is disability discrimination by any definition, and it is

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wrong. *See Sailboat Bend Sober Living, LLC v. City of Fort Lauderdale, Fla.*, 46 F.4th 1268, 1277 (11th Cir. 2022).

squarely within the FHA's core prohibition. It is one thing to argue that, under the caselaw, this discrimination is *justified* or fits within an *exception* to the FHA's protections. But the claim that it is not discrimination at all — and in the face of evidence at trial of specific individuals who suffered real harm as a direct result of their exclusion — is beyond the pale.[5] A plain reading of the FHA's text and the Supreme Court's recent caselaw precludes any exception for so-called benign discrimination.

To the extent, however, that a benign discrimination exception does exist, caselaw is clear that it must be narrowly construed. (*See* Appellant's Br. 33–35.) Moreover, as Oceanview noted, the Third Department's rejection of the least discriminatory means standard for narrow tailoring in favor a standard more forgiving of invidious discrimination is both at odds with the only federal court of appeals to specifically speak to the narrow tailoring standard, *see Bangerter*, 46 F.3d at 1504, and creates a bizarre anomaly where the intentional facial discrimination is judged

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[5] The State similarly attacks Oceanview's terminology, asserting that "[n]either the federal courts applying this standard nor the Appellate Division use the term 'benign discrimination exception' or treat benign discrimination as an 'exception' for conduct that otherwise would be considered in violation of the FHA." (State's Br. 32.) This is wrong. For example, a recent Tenth Circuit case, in discussing the contours of the benign discrimination rationale, explained that "we must narrowly construe any 'exceptions to the FHAA's prohibitions on discrimination.'" *Courage to Change Ranches Holding Co. v. El Paso Cty.*, 73 F.4th 1175, 1197 (10th Cir. 2023).

under a more lenient standard than facially neutral laws with discriminatory effect. (Appellant's Br. 35–37.)

Under a plain reading of the FHA, including its express preemption provision, consistent with Supreme Court caselaw, the Challenged Regulations require discrimination in violation of the FHA's protections and are therefore invalid.

POINT III

DOJ'S STATEMENT OF INTEREST IS NOT ENTITLED TO DEFERENCE.

In its decision reversing Supreme Court, the Third Department criticized Supreme Court for failing to appropriately defer to DOJ's Statement of Interest. This criticism was strange, as the Third Department itself rejected DOJ's argument for the validity of the Challenged Regulations, ultimately reversing Supreme Court under a completely different theory from that put forth by DOJ.

The State now attacks Oceanview for failing to respond to the Third Department's criticism and failing to defer to an utterly indefensible position that the Third Department itself rejected. In fact, DOJ's Statement of Interest is not entitled to deference.

A. The Third Department rejected DOJ's indefensible argument in support of the Challenged Regulations.

DOJ's Statement of Interest has two parts. DOJ begins by opining as to the appropriate legal standard for assessing claims of facial discrimination under the FHA. (R.8719–21.) Then, strangely, DOJ sidesteps this standard entirely by declaring that the Challenged Regulations are not in fact discriminatory at all, asserting that they "do[] not facially deny or make unavailable housing on the basis of disability." (R.8721, 8723.) This is a baffling description of a regulation that *expressly prohibits admission to housing solely on the basis of disability*. *See* 18 N.Y.C.R.R. § 487.4(d). In the light of the unambiguous language of the regulations and the undisputed fact that they operate by prohibiting transitional adult homes from admitting any person diagnosed with mental illness, DOJ's characterization is utterly indefensible.

How did the DOJ reach this conclusion? By misdescribing the Challenged Regulations as based on the services sought by prospective residents rather than on their mental health status. The Statement of Interest's misrepresentation of the Challenged Regulations begins with the second sentence of its Introduction. According to DOJ, the "regulation at issue prevents 'adult home[s] with a certified capacity of 80 or more and a mental health census . . . of 25 percent or more of the resident population' from admitting any more individuals who need long term care

due to serious mental illness." (R.8711.) This is flatly wrong. The Challenged Regulations' admission bar turns solely on an individual's mental illness diagnosis and has nothing to do with that individual's reason for admission or the services that individual seeks to access. 18 N.Y.C.R.R. § 487.4(d).

This is not a trivial point — Supreme Court heard extensive testimony at trial about how the Challenged Regulations exclude persons who seek to access the services of an Assisted Living Program — assistance with activities of daily living — due to physical or medical limitations, but who are discriminatorily barred due to a mental illness diagnosis. (*See, e.g.*, R.28, 61, 64.) Under the Challenged Regulations, a person with a diagnosis of mental illness is barred from admission even if that person seeks the services of the transitional adult home for reasons unrelated to mental illness, and even if that person does not seek access to mental health treatment at all. *See* 487.4(e)(3)(ii) (determination based solely on mental health evaluation and mental health history). Conversely, persons not excluded from admission at an adult home, for example, those whose mental health issues do not result in functional limitations and thus do not meet the State's definition of *serious* mental illness, are entitled to reside at the adult home and to receive mental health services, whether provided by an on-site or off-site provider.

Indeed, this mischaracterization of the Challenged Regulations is wrong on every conceivable level. First, the text of the Challenged Regulations plainly and expressly prohibits admission solely on the basis of diagnosed mental illness without any reference to the services sought or needed. 18 N.Y.C.R.R. § 487.4(e)(3)(ii). Second, the Challenged Regulations operate in practice in precisely this way, barring admission solely on the basis of diagnosed mental illness without regard to treatment needs. (R.1607–09.) And third, *all* of the trial testimony concerning the Challenged Regulations uniformly described it as operating on the basis of mental health diagnosis, not the services sought by the individual seeking admission. This is simply not in dispute.

This misrepresentation of the operation of the Challenged Regulations underlies the entirety of DOJ's legal theory, which is based on a conflation of a person's mental health status — the diagnosis that requires exclusion from admission under the Challenged Regulations — with the services that person is seeking or receiving.

With this distinction in mind, we turn to the argument in the Statement of Interest. DOJ begins by asserting that adult homes, by their nature, "are restricted to persons with specific types of disabilities or conditions" as part of the State's structuring of "the types of settings in which individuals will receive services." (R.8721.) But the "specific types of disabilities or conditions" that adult homes and

ALPs are designed and licensed to address — age or infirmity that results in an individual's inability to take care of all activities of daily living without assistance — are present in individuals with and without mental illness alike. The Challenged Regulations do not regulate in any way the types of services adult homes can provide. They operate solely by excluding a category of persons from accessing those services at adult homes, and that exclusion is based solely on their disability status. A person with mental illness who seeks admission to an adult home for assistance managing his diabetes will be denied admission not due to the services he seeks, but solely because of his status as a person with mental illness. A similarly situated person seeking the exact same services but without the disability — the mental illness designation — would be eligible for admission.

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

seeks such services. The Challenged Regulations are based entirely on status, not services. DOJ similarly argues that the Challenged Regulations merely govern "the types of services and settings the State determined it will provide," (R.8722,) which is wrong for the same reason.

Finally, DOJ attempts to analogize the Challenged Regulations to federal regulations that allow for certain housing to be "available only to persons with handicaps or to persons with a particular type of handicap" and allow for the prioritization of certain housing for "persons with handicaps or to persons with a particular type of handicap." 24 C.F.R. § 100.202(c)(2)–(3). These federal regulations are, under any definition, the sort of beneficial discrimination *in favor* of the disabled that falls wholly outside the FHA's coverage which bars only discrimination *against* persons with disabilities. And adult homes are in fact "available only to persons with handicaps or to persons with a particular type of handicap" — those who need assistance with activities of daily living due to age or infirmity.

But these federal regulations provide no support for *excluding* persons from housing on the basis of their disability. And indeed, DOJ's interpretation flips the preferential treatment of persons with disabilities on its head: the persons excluded by the Challenged Regulations are those who would be otherwise eligible for adult home

or Assisted Living Program services — in other words, those for whom the federal regulations allow *prioritized* treatment. Under the Challenged Regulations, an individual who has difficulties with certain activities of daily living, like bathing or toileting, and who desires the services of an Assisted Living Program in a transitional adult home — programs designed, licensed, and certified by the State to provide just such services — will be excluded if the State designates her as having mental illness.

In short, under 24 C.F.R. § 100.202(c)(2)–(3), if a facility specializes in treating persons with blindness, then it is permitted to prioritize access for — *i.e.*, discriminate in favor of, not against — blind persons. But if a facility providing cancer treatment were to refuse to serve persons suffering from blindness, this would be straightforward disability discrimination, not the mere regulation of settings in which services are provided. Replace "cancer treatment" with "assistance with activities of daily living" and "blindness" with "mental illness" and you have precisely the Challenged Regulations at issue here.

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

The Third Department itself rejected DOJ's characterization, acknowledging that the Challenged Regulations "are discriminatory on their face — regardless of their remedial purpose — insofar as the admissions cap applies solely to individuals with serious mental illness." (R.8773.) The Third Department asked instead whether "a housing restriction that facially discriminates against people with disabilities" could nevertheless "pass muster under the FHA," (R.8774,) — a standard DOJ never needed to apply because of its declaration that the Challenged Regulations were not discriminatory in the first place.

B. DOJ is entitled to no deference with respect to the operation of New York State regulations.

The State argues that DOJ's Statement of Interest is entitled to deference because courts should "defer to the construction given statutes and regulations by the agencies responsible for their administration, if said construction is not irrational or unreasonable." (State's Br. 22 (quoting *Albano v. Kirby*, 36 N.Y.2d 526, 632 (1975)).) No such deference is warranted here.

First, DOJ itself does not claim it is entitled to this deference, but instead identifies *HUD*, not DOJ, as the "administering agency" that is "primarily charged with the FHA's implementation and regulation" and therefore entitled to deference. (R.8721 n.9 (brackets omitted).) And while the State cites caselaw for the proposition

that DOJ is entitled to deference in the interpretation of Title II of the ADA, this was expressly premised on DOJ's role as "the agency directed by Congress to issue regulations implementing Title II." *Olmstead v. L.C.*, 527 U.S. 581, 597–98 (1999). The DOJ has no such role with respect to the FHA, and Appellant cites no cases supporting the proposition that the DOJ is entitled to deference with respect to the interpretation of the FHA. To the extent that the State suggests that DOJ's ability to bring enforcement actions under the FHA entitles it to deference, the United States Supreme Court has held that when Congress divides regulatory power between two entities, courts presume the interpretive power is invested in whichever actor is best positioned to develop expertise. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019). Here, that would be HUD, not DOJ.

Second, the caselaw relied on by the State concerns deference to statutory or regulatory constructions. For example, in *Albano*, 36 N.Y.2d 526, the Court of Appeals was considering competing interpretations of ambiguous language in a civil service law. In *Olmstead*, 527 U.S. at 597–98, the United States Supreme Court gave deference with respect to the meaning of "discrimination by means of disability."[6]

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[6] *See also Samiento v. World Yacht Inc.*, 10 N.Y.3d 70, 79 (2008) (deference concerning the definition of the word "gratuity" in the Labor Law); *Howard v. Wyman*, 28 N.Y.2d 434, 438 (1971) (deference concerning the scope of the word "catastrophe" in the Social Services Law); *Civ. Serv. Emps. Ass'n, Inc. v. Milowe*, 66

Here, the State does not ask for deference to the DOJ's interpretation of any particular language of the FHA or federal regulations.

Rather, the State demands deference to DOJ's assertions concerning the operation of a New York State regulatory scheme. According to the State, Supreme Court erred by not adopting DOJ's conclusory assertions about such things as the impact and effects of the Challenged Regulations, the State's compliance with its obligations under federal law, the narrow tailoring of the Challenged Regulations, and the ultimate question of the Challenged Regulations' validity under the FHA. (*See, e.g.*, State's Br. 24, 26, 40, 61,)

None of these assertions involves an agency's construction of a statute or regulation that it administers, and none of these is owed any deference by this Court. The State's argument that courts must defer to DOJ's pronouncements about the operation of a state program, made without any evidentiary support, is entirely baseless. The State's apparent position is that all trial testimony and evidentiary support introduced subject to the rules of evidence must be completely disregarded once DOJ inserts itself into a case and opines — without evidence — on the very

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A.D.2d 38, 43 (3d Dep't 1979) (deference concerning ambiguous provisions of the Civil Service Law); *M.R. v. Dreyfus*, 697 F.3d 706, 735 (9th Cir. 2012) (deferring with respect to the meaning of the integration mandate, not its application to the challenged regulation).

factual disputes at issue in the case. Under this theory, DOJ could never lose a case involving compliance with federal law.

Third, even the narrow deference to agencies supported by the State's caselaw has been substantially limited by the United States Supreme Court's decision in *Kisor v. Wilkie*, which emphasized that "not every reasonable agency reading of a genuinely ambiguous rule" is entitled to deference, and "a court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight." *Kisor*, 139 S. Ct. at 2416. Among other limitations, the Court noted that deference is due only to "the agency's 'authoritative' or 'official position,' rather than any more *ad hoc* statement not reflecting the agency's views," *id.* at 2416, and no deference is due to a "'convenient litigating position' or '*post hoc* rationalizatio[n] advanced' to 'defe[n]d past agency action against attack.'" *Id.* at 2417. Appellant cannot show that DOJ's Statement of Interest meets these standards.

POINT IV

THE STATE REPEATEDLY MISCHARACTERIZES SUPREME COURT'S DECISION.

The State repeatedly mischaracterizes Supreme Court's opinion and criticizes imagined holdings that that court never made.

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

The State attributes to the Supreme Court's opinion the holding that "the State's interest in fostering integration was not a legitimate governmental interest because the State's obligations under the ADA integration mandate and *Olmstead* supposedly do not apply to the State's regulation." (State's Br. 39.) According to the State, "Supreme Court mistakenly held that the federal integration mandate of the ADA and *Olmstead* does not apply to a state's administration of a regulatory scheme governing private facilities." (State's Br. 39.) This is a willful misrepresentation of Supreme Court's Decision.

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

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

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

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

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

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

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

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

B. Supreme Court did not hold that the State has no legitimate government interest in furthering integration or avoiding clinically inappropriate placements.

The State repeatedly asserts that Supreme Court held that each of its purported objectives is not a legitimate government interest, stating that "the Trial Decision

concluded the State has no legitimate governmental interest in either (1) ensuring that its regulation of state-licensed facilities that house persons with disabilities advances the federal goal of integrating such persons into the community, or (2) requiring State-regulated facilities to refrain from admitting persons with disabilities that the State has determined — based on the professional judgment of its public health officials — would have a better chance of recovery elsewhere," and that Supreme Court concluded "that a state has no legitimate interest in furthering the goals of integration embodied in the ADA and *Olmstead* by regulating privately-owned, state licensed facilities that provide housing to persons with disabilities pursuant to a state regulatory scheme." (State's Br. 5.) The State elsewhere flatly asserts that "Supreme Court held that the State's interest in fostering integration was not a legitimate governmental interest." (State's Br. 39.)

None of these supposed holdings actually appears anywhere in the Decision, and nowhere did Supreme Court suggest that the State's asserted goals — fostering the integration of persons with disabilities and avoiding clinically inappropriate housing placements — are not legitimate government purposes. Rather, the court held, on the basis of extensive findings of fact, that the State had failed to meet its burden of proving that the Challenged Regulations *actually further* either of the State's asserted interests. (R.74–76, 80–81.)

C. Supreme Court did not require clinical studies or statistical data.

The State also characterizes the Trial Court as having held "that the State does not have a legitimate interest in promulgating regulations designed to further the health, safety and well-being of its residents because the professional judgments of its public health officials were not supported by evidence-based research and clinical studies," and "that the State's public health officials can be credited only when supported by 'statistical data'." (State's Br. 45.)

But Supreme Court did not rely solely on the absence of any evidence-based research, clinical studies, publications, analyses, reports, investigations, or professional guidelines bearing on the disputed issues. It also reviewed testimony concerning the 'experience' and 'consultation' that went into the key clinical determination. What emerged was evidence that the individual responsible for the purported clinical determination on which the State claims to have relied, OMH's then-Chief Medical Officer Dr. Lloyd Sederer, had a remarkable lack of experience with and knowledge about adult homes. He had virtually no relevant personal experience, having never interacted with residents or the family of residents in any adult home, having never spoken with the treating physician of any mentally ill adult home resident, and having ever visited only a couple of adult homes more than a

decade earlier, only one of which had a significant population with mental illness. (R. 38–40.) He knew little about activities in which adult home residents engage, and he was entirely unaware that adult homes provided ALP services. (R.38, 40.) Although Dr. Sederer claimed responsibility for the numerical thresholds in the Challenged Regulations, he could not provide any basis for them, and Supreme Court found his testimony about creating those thresholds "wholly unconvincing." (R.40–41.)

POINT V

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 only "on the law," its decision necessarily rejects a number of Supreme Court's findings of fact, including, among others, that the State failed to adduce any credible evidence demonstrating that the Challenged Regulations, in theory or in practice, further legitimate governmental interests, (R.74,) that credible evidence demonstrated that transitional adult homes can and do provide appropriate residential settings for persons with a serious mental illness, (R.75–76,) and that the State offered no evidence demonstrating that the Challenged Regulations resulted in integration of the mentally ill into the community. (R.81–82.)

As Oceanview explained in its opening brief, the State's claim that the Challenged Regulations would benefit persons excluded from adult homes was entirely premised on the assumption that after being denied admission to an adult home, these persons would end up in smaller, more community-based settings. This assumption is entirely baseless, but without it any claimed benefit falls apart. The State was unable to provide evidence of a single person who, after being denied admission to an adult home, ended up in supportive housing or another small, community-based setting. And there is no plausible mechanism as to how that would occur — the State has no legal obligation or practice of providing housing alternatives to such persons, and it makes no effort to track them to learn where they end up. On the other hand, the court heard evidence of persons excluded from adult homes who ended up in nursing homes or homeless shelters.[7] (Appellant's Br. 40–47.)

In the face of this extensive record and Supreme Court's findings of fact, the State continues to simply assert the opposite, stating, for example, that the Challenged Regulations "bring[] the benefits of community living to one of the State's most

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[7] Indeed, when the State is being candid, it has acknowledged that of those who are "not going into an adult home setting because of the regulation," "tragically, many individuals . . . will wind up in a shelter." Transcript of Status Conference, ECF No. 244, *United States of America v. State of New York*, No. 1:13-cv-04165-NGG-ST (January 21, 2022 E.D.N.Y.).

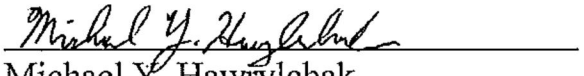
vulnerable populations," (State's Br. 6,) "foster[] the integration of persons with serious mental illness into the community" (State's Br. 15, 48,) and "directly implement[] integration into smaller and more diverse settings." (State's Br. 19, 49.) Where, as here, "the appellate division, on reversing or modifying a final or interlocutory judgment, has expressly or impliedly found new facts," (CPLR § 5501(c),) this Court's "review is limited to determining whether the evidence of record . . . more nearly accords with the trial court's findings or with those of the Appellate Division." *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 N.Y.3d 543, 552 (2015). Here, despite the requirements of CPLR § 5712(c)(2), the Third Department failed to "set forth any new findings of fact made by the appellate division with such particularity as was employed for the statement of the findings of fact in the court of original instance." This Court should reverse the Appellate Division and affirm Supreme Court's judgment, holding the Challenged Regulations invalid under the Fair Housing Act.

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.

DATED: September 6, 2024

O'CONNELL AND ARONOWITZ, P.C.

By: 

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WORD COUNT CERTIFICATION

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Point Size: 14

Line Spacing: Double

Dated: September 6, 2024

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