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Court of Appeals

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,

(Caption Continued on the Reverse)

BRIEF FOR RESPONDENT-RESPONDENT

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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.

STATEMENT 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), Respondent-Respondent (the "State") states that the following two related cases are currently pending in other courts:

1. *Doe v. Zucker*, No. 23-1224-cv, is currently pending before the United States Court of Appeals for the Second Circuit. The petitioner in that case is also challenging the Regulations being challenged in this case. After the United States District Court for the Northern District of New York denied summary judgment, the Second Circuit granted leave for an interlocutory appeal on the issue of standing. Briefing was completed on July 3, 2024. The parties have requested oral argument, which has not been scheduled.

2. *Residents and Families United to Save Our Adult Homes v. Zucker*, No. 9038/13, is pending in the Supreme Court, Kings County. The petitioners in that case are also challenging the Regulations being challenged in this case. The Supreme Court granted the State's motion for summary judgment on February 9, 2024. No notice of entry has been filed, and the court's summary judgment order has not been appealed.

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PRELIMINARY STATEMENT

Respondent-Respondent, the New York State Department of Health ("DOH" or the "State") [1] submits this brief in opposition to the appeal of Petitioner-Appellant Oceanview Home for Adult, Inc. ("Oceanview") of the Opinion and Order of the Appellate Division, Third Department, dated May 4, 2023 (the "Order").

Oceanview asks this Court to reverse the Order and reinstate Supreme Court's Amended Decision/Order/Judgment (the "Trial Decision"), which enjoined the State from enforcing the DOH regulations at 18 NYCRR §§ 487.2(c), 487.4 (d), (i), 487.10(3)[2] and 487.13 (the "Regulations"). The Trial Decision would have invalidated the State's regulatory scheme to improve the lives of persons with serious mental illness by preventing their segregation in large, state-regulated adult homes ("Transitional Adult Homes"). The Appellate Division unanimously reversed, on the law, Supreme Court's judgment that the State's effort to desegregate these facilities violates the federal Fair Housing Act as amended (the "FHA" or "FHAA"), 42 U.S.C. § 3601 et seq.

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[1] This action seeks relief against the DOH. Howard Zucker, M.D., was named as a party solely in his capacity as Commissioner of Health of the State of New York. James V. McDonald, M.D., is currently serving as Commissioner of Health.

[2] There is no 18 NYCRR § 487.10(3). The reference is an apparent miscitation to 18 NYCRR §§ 487.10(e)(3).

The Appellate Division unanimously held that Supreme Court erred as a matter of law by failing to apply the correct legal standard for FHA claims. Applying the correct legal standard, that Order held that the Regulations do not violate the FHA because they benefit persons with serious mental illness by fostering their integration into the community in a narrowly tailored way. The United States Department of Justice ("DOJ") recommended this standard—which is the prevailing standard in federal Courts of Appeals—in a Statement of Interest it submitted in this case supporting the legality of the Regulations.

Relying largely on undisputed facts, the Appellate Division held that the Regulations are beneficial in a narrowly tailored way because they (1) support the integration of persons with disabilities into the community, consistent with the integration mandate of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12101 et seq., and the landmark decision of *Olmstead v L.C. ex rel. Zimring*, 527 U.S. 581 (1999), and (2) complement the settlement of federal litigation (the "Federal Settlement") brought by DOJ and disability advocates.

As the Appellate Division recognized, the Regulations are supported and deemed beneficial—not discriminatory—by parties that have been working for years to improve the lives of persons with serious mental illness—including public health officials at DOH and the Office of Mental Health, DOJ, class counsel for the

Federal Settlement, and the United States District Court of the Eastern District of New York, which is overseeing the Federal Settlement.

In seeking reinstatement of Supreme Court's flawed Trial Decision, Oceanview, a Transitional Adult Home financially impacted by the Regulations, mischaracterizes the law and ignores the undisputed facts that support these efforts of the State's public health professionals to improve the lives of persons with disabilities as part of a comprehensive reform that includes the Federal Settlement. Oceanview ignores settled law requiring courts to seriously consider—and even to defer to—the views of DOJ—which is charged with enforcing the FHA and the ADA—and State public health officials, who promulgated the Regulations on the basis of their expertise in grappling with the complex problems posed by fashioning a regulatory scheme designed to serve and protect persons with disabilities.

Supreme Court turned the FHA on its head by ruling that the State's remedial efforts—in cooperation with DOJ and disability advocate and under the supervision of a federal judge—to desegregate adult care facilities and to integrate persons with disabilities into the community violate the FHA. The Appellate Division correctly followed the approach urged by DOJ, and followed by federal courts, in holding that the State's Regulations do not violate the FHA because they benefit the protected class in a narrowly tailored way.

The Regulations benefit persons with disabilities in two ways. First, the Regulations prohibit Transitional Adult Homes from admitting additional persons with serious mental illness until those facilities both become more integrated and adopt plans to improve the living conditions and chances for recovery of such persons. Second, the Regulations work hand in glove with a comprehensive State initiative to ensure that persons with disabilities live in the least restrictive setting possible by assisting such persons who wish to move, or "transition," from those facilities to independent, community-based housing.

Supreme Court erroneously concluded that the Regulations—which a federal district court and DOJ have endorsed as supporting efforts to desegregate housing provided for persons with disabilities and thereby foster the integration of such persons—are themselves discriminatory under federal law. DOJ—which is charged with enforcing both the FHA and the ADA—filed a Statement of Interest (R.8709) pursuant to 28 U.S.C. § 517, expressing the views of the United States that the Regulations are valid under the FHA because they protect the well-being of persons with serious mental illness and further the integration of persons with disabilities into the community, as mandated by the ADA and in accordance with the Federal Settlement. Instead of giving serious consideration to DOJ's views, Supreme Court simply ignored them and interpreted the FHA and the ADA in a manner contrary to the position of the United States.

Supreme Court entered judgment annulling the Regulations—not at the request of any person with a serious mental illness—but at the urging of Oceanview, a Transitional Adult Home that has a financial interest in admitting such persons as residents. Disregarding settled state and federal precedent, 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.

Supreme Court's conclusions relied on several glaring misapplications of law—including 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. If followed by other courts, such a rule would hamstring both DOJ enforcement actions and states' voluntary efforts to further the integration of persons with disabilities into the community.

The invalidation of the Regulations would do substantial harm to the State and persons with serious mental illness. Reinstatement of Supreme Court's Trial Decision would likely result in additional persons with disabilities residing in

facilities that have been targeted as segregated by DOJ and a federal court—reversing the progress the State has made towards bringing the benefits of community living to one of the State's most vulnerable populations. In addition, the invalidation of the Regulations would undermine the Federal Settlement, which has garnered overwhelming support from the federal court, DOJ, and disability advocates.

QUESTIONS PRESENTED

1. Was the order of the Appellate Division, which unanimously reversed the order of the Supreme Court, properly made?

2. Do the views of DOJ regarding an FHA challenge to State Regulations—which were adopted in tandem with settlement of a DOJ enforcement action—warrant considerable respect, given that DOJ is charged with enforcing both the FHA and ADA?

3. Did the Appellate Division correctly hold that Supreme Court erred in concluding that because state-regulated Transitional Adult Homes are privately owned and operated, compliance with the ADA's integration mandate cannot serve as a valid justification for the Regulations?

4. Did the Appellate Division correctly follow the recommendations of DOJ—and most federal Court of Appeals that have considered the issue—in holding that State Regulations that impose restrictions that affect persons with

disabilities do not violate the FHA if they benefit such persons by implementing the goal of integration in a narrowly tailored way?

5. Did the Appellate Division correctly hold that courts normally should defer to the reasonable medical judgments of public health officials, without requiring that State Regulations be supported by statistical data?

6. Did the Appellate Division correctly exercise its broad authority to independently evaluate the evidence after determining that Supreme Court improperly rejected the testimony of the State's experts because of the absence of statistical data supporting their testimony?

STATEMENT OF THE CASE

A. The State's Regulation of Adult Homes Prior to Promulgation of the Regulations at Issue

Adult homes are a form of adult care facility that provide long-term housing to persons in need of assistance with basic aspects of daily living. Adult homes are heavily regulated by the DOH, which licenses those facilities—subject to meeting detailed standards—to ensure the health, safety and well-being of those residents. (R.10-11, R.2910-16.) The State's comprehensive regulatory scheme for adult homes is set forth in Part 487 of Title 18 of New York Codes, Rules and Regulations.

Adult homes—which are not medical facilities—do not provide mental health services. (R.2911, R.2864, R.4705-07.) Even prior to the promulgation of the Regulations at issue, the State's regulations set forth detailed admission standards,

which bar adult homes from admitting multiple groups with special needs, including persons who need continual supervision in a facility licensed pursuant to the Mental Hygiene Law, who suffer from a serious and persistent mental disability sufficient to warrant placement in a residential facility licensed pursuant to the Mental Hygiene Law or who require mental health services that cannot be provided by local service agencies or providers. 18 NYCRR § 487.4(c) (1), (2), (3).

Prior to promulgation of the Regulations in 2013, the State had been concerned for years about the living conditions faced by persons with mental illness residing in adult homes. In 2007, OMH circulated several policy documents referencing the problem of persons with mental illness being "stuck" in adult homes, which OMH called a "blight." (R.7339, R.7343, R.1963-72.)

As a DOH official testified, the State has found that Transitional Adult Homes are more likely to have certain problems, including lack of supervision, environmental issues, unsafe conditions and physical altercations between residents. (R.2947.)

B. The State's Promulgation of the Regulations

The Regulations were adopted after several years of litigation brought by disability rights advocates and DOJ challenging the State's policies relating to the residence of persons with serious mental illness in certain large adult homes as contrary to the ADA, as interpreted by the Supreme Court in its landmark *Olmstead*

decision. The *Olmstead* decision imposes affirmative duties on states to ensure that individuals with mental disabilities do not live in segregated settings and are given meaningful opportunities to interact with individuals without disabilities. *Olmstead*, 527 U.S. at 607.

In 2003, Disability Advocates, Inc., "a protection and advocacy organization authorized by statute to bring suit on behalf of individuals with disabilities," brought an "action on behalf of individuals with mental illness residing in, or at risk of entry into, 'adult homes' in New York City with more than 120 beds and in which twenty-five residents or 25% of the resident population (whichever is fewer) have a mental illness." *Disability Advocs., Inc. v. Paterson*, 653 F.Supp.2d 184, 187 (E.D.N.Y. 2009) ("*DAI*"), *vacated on other grounds sub nom. Disability Advocs., Inc. v. New York Coal. for Quality Assisted Living, Inc.*, 675 F.3d 149 (2d Cir. 2012) ("*DAI II*").

After years of litigation and a lengthy trial, Judge Garaufis held that the State "violated the ADA's integration mandate and found that [administration of] the State's mental health system resulted in the unjustified segregation of DAI's constituents in large adult homes." *DAI*, 653 F.Supp.2d at 187-88. After the liability phase of the trial, the United States intervened in the case, and DOJ filed a "complaint [that adopted] the findings of fact and conclusions of law of the District Court." *DAI II*, 675 F.3d at 160-61.

In April 2012, the Second Circuit vacated the judgment after finding that

Disability Advocates lacked standing. *See also DAI II*, 675 F.3d at 162-63. The Second Circuit, however, acknowledged that DOJ's *Olmstead* litigation against the State would likely continue, "and expressed its hope that 'an appropriate, efficient resolution' that would 'consider an appropriate remedy' could be facilitated in such event …." (R.12 (quoting *DAI II*, 675 F.3d at 162).)

As contemplated by the Second Circuit, nearly identical claims were re-asserted by the United States and a class of persons with mental disabilities. (R.12.) As reflected by DOJ's complaint, the United States asserted claims to vindicate the rights of the same persons whose civil rights were found to have been violated in the *DAI* case: (1) persons with mental illness in adult homes with 120 or more beds in New York City in which at least 25 percent of the residents or 25 residents (whichever was fewer) had mental disabilities, and (2) "those at risk of entry into" such adult homes. (R.1358.) DOJ sought injunctive relief against the State for "discriminating against persons with mental illness residing in, and at risk of entry into, [such] Adult Homes by failing to provide services and supports in the most integrated setting appropriate to their needs …." (R.1372.) The DOJ complaint named only one defendant—the State of New York, which was sued for the operation of its mental health system through OMH and DOH." (R.1372.)

Following the Second Circuit's April 2012 decision, the State and DOJ began negotiating a settlement of the *Olmstead* claims against the State. These

negotiations—to resolve claims concerning adult homes with 120 or more beds in New York City in which at least 25 percent of the residents or 25 residents (whichever was fewer) had mental disabilities, and those at risk of entry into such adult homes—included discussion of what eventually became the Regulations. (R.12-13; R.1358.)

In conjunction with the State's and DOJ's negotiations to resolve these claims, OMH issued two clinical advisories in August and October of 2012. These clinical advisories concluded that large adult homes meeting the definition of Transitional Adult Homes were not conducive to the recovery of persons with a serious mental illness and were therefore clinically inappropriate. These clinical advisories supported the Regulations, which were promulgated by DOH in January 2013. (R.12.)

The promulgation of the Regulations grew out of extensive discussions among numerous officials at DOH and OMH (which promulgated comparable regulations), as well as numerous consultations with DOJ. (R.12, R.1977-83, R.1988-95, R.3139-40, R.3172, R.3239-40, R.3555, R.3565-67.) The State gave the public notice of the proposed Regulations, which led to "numerous comments" on the proposals and resulted in several revisions, which did "not substantially alter the regulatory scheme." (R.4976.)

The Regulations define a Transitional Adult Home as "an adult home with a certified capacity of 80 beds or more in which 25 percent or more of the resident population are persons with serious mental illness …." 18 NYCRR § 487.13(b)(1). The Regulations provide that as long as a facility fits the definition of a Transitional Adult Home, it cannot admit new residents with serious mental illness: "No operator of an adult home with a certified capacity of 80 or more and a mental health census . . . of 25 percent or more of the resident population shall admit any person whose admission will increase the mental health census of the facility." 18 NYCRR § 487.4(d).

The Regulations require operators of Transitional Adult Homes to submit a compliance plan to the State specifying how the Transitional Adult Home will achieve a mental health census that is less than 25 percent of the resident population, and how the Transitional Adult Home will address the needs of its residents, in particular those residents with serious mental illness, including:

(i) fostering the development of independent living skills;

(ii) ensuring access to and quality of mental health services;

(iii) encouraging community involvement and integration; and

(iv) fostering a homelike atmosphere.

18 NYCRR § 487.13(d)(2); R.2921-22, R.2935-36.. As Supreme Court found, Section 487.13 requires Transitional Adult Homes "to teach skills to enable residents

to live more independently in another setting, including managing finances, laundering clothes, basic cooking skills, housekeeping, and shopping." (R.48-49.)

After a Transitional Adult Home reduces its mental health census to less than 25 percent of its residents, that facility is no longer considered a Transitional Adult Home and may resume admitting new residents with serious mental illness. (R.15.)

After the State promulgated the Regulations, the State, DOJ and the class of persons with mental disabilities agreed to the Federal Settlement to resolve the claims of DOJ and the class. The Federal Settlement was then submitted to the federal court for its approval in July 2013. The preamble of the Federal Settlement referenced both the Regulations and their supporting clinical advisories. The Federal Settlement required the State to take steps to reduce the number of persons with serious mental illness in New York City adult homes with a certified capacity of at least 120 beds and a mental health census of 25 percent or more of the resident population or 25 persons, whichever is less—a category that substantially overlapped with Transitional Adult Homes. These steps included requiring the State to fund supported housing units in communities, together with other supportive services. (R.12-13.)

The Federal Settlement was so-ordered by Judge Garaufis in March 2014. (R.860; R.481.)[3] After approving the Federal Settlement, Judge Garaufis—who has continued to oversee the Federal Settlement—has repeatedly noted the importance of the Regulations in furthering the goals of the Federal Settlement to benefit persons with serious mental illness, including by stating that by "closing the front door" to settings that are already segregated within the standards of *Olmstead* and its progeny, the "Regulations . . . serve as the foundation of the Settlement Agreement . . ." *Residents and Fams. v. Zucker*, No. 16-CV-1683, 2017 WL 5496277, at *11 (E.D.N.Y. Jan. 24, 2017).

The Regulations currently require operators of Transitional Adult Homes to facilitate the movement of persons with serious mental illness into housing in the community by requiring them to:

> cooperate with the community transition coordinator, housing contractors, peer bridger agencies, care managers, health homes and managed long-term care plans and shall provide, without charge, space for residents to meet privately with such individuals or entities. The operator shall not attempt to influence or otherwise discourage individual residents from meeting with such entities and individuals.

18 NYCRR § 487.13(h).

Following the State's experience with operation of the Regulations, the State instituted a practice of granting waivers to former residents of Transitional Adult

[3] The court-ordered Federal Settlement was amended by consent multiple times, all of which amendments were approved by Judge Garaufis. (R.6891; R.6923; R.13.)

Homes that expressed a preference to again reside in a Transitional Adult Home. That process enabled Transitional Adult Homes to admit persons with serious mental illness if they had previously been a resident of a Transitional Adult Home. (R.63.) The State subsequently formalized this waiver practice by amending the Regulations to incorporate this waiver process. (R.7542; R.7987.)

C. The Effects of the Regulations

Following the State's adoption of the Regulations, the number of Transitional Adult Homes decreased from 49 in 2013 to 35 in 2018. (R.47, R.2934-35.) The percentage of residents in Transitional Adult Homes with serious mental illness has declined. (R.47.) At Oceanview, the percentage of residents with serious mental illness declined from 92.6% in 2013 to less than 47% in 2019. (R.2706, R.2712-13.)

Though there is more work to be done, DOH views the Regulations as successful because they have fostered the integration of persons with serious mental illness into the community, and have helped individuals become more independent in their life skills as a result of the Regulations' requirement that Transitional Adult Homes adopt compliance plans that require those facilities to foster the development of independent living skills. (R.2921-22, R.2935-36, R.2940-45, R.2961, R.2970-71.)

The State has been devoting substantial resources to making supported housing in the community available to persons with serious mental illness,

including—but not limited to—persons who have moved out of Transitional Adult Homes. (R.2756-59, R.3065-66, 3078-79, 3084-85, R.1398-1400.) OMH has followed the progress of people with serious mental illness who have moved from Transitional Adult Homes into housing in the community in connection with the Federal Settlement. As an OMH official testified, OMH has found that "many people have experienced aspects of recovery as they moved and as they settled into the community …." (R.3921-22, R.3965-76.)

Neither DOH nor OMH has received any reports of the Regulations having a detrimental effect on persons with serious mental illness finding appropriate housing. (R.2961-62, R.3196-99, R.3501-03, R.3668-69).

D. The Oceanview Litigation

In 2016, Oceanview and three residents of that facility brought this action, alleging the Regulations and companion regulations promulgated by OMH were invalid under several legal theories. In 2017, the court below, per Justice Gerald W. Connolly (the "Motion Court") dismissed the residents' claims for lack of standing. (R.102.)

In 2018, Supreme Court granted the State summary judgment on all of Oceanview's claims, with the exception of Oceanview's third cause of action that the DOH Regulations violate the FHA because they allegedly impose an unlawful

quota on the number of residents with a serious mental illness who may reside in a Transitional Adult Home. (R.105-38.)

In denying the State's motion for summary judgment on Oceanview's FHA claim, Supreme Court applied a test requiring the State to show "that its actions further, in theory and in practice, a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect." (R.135.) Supreme Court held that the State had demonstrated that the Regulations "serve the legitimate bona fide governmental interest of fostering integration of the disabled, in this case the serious mentally ill, into the community rather than permitting the segregations of such individuals." R136. Supreme Court denied summary judgment, however, on the ground that the State had not shown "that no alternative would serve that interest with less discriminatory effect." (R.136.)

E. Supreme Court's Decision

On June 5, 2019, Supreme Court commenced a trial on Oceanview's sole remaining claim, which continued over 18 non-consecutive days. Subsequently, the court took judicial notice of certain materials in September 2019. (R.6.)

On February 24, 2022, DOJ filed its Statement of Interest on behalf of the United States, in which DOJ expressed the view that Regulations do not violate the FHA. (R.8709.)

On August 31, 2022, Supreme Court reopened the record to admit additional evidence from both parties, and acknowledged receipt of DOJ's Statement of Interest, but indicated that the court viewed DOJ's views as being entitled to no greater deference than an amicus brief filed by an interested party. (R.6, R.4811-13.)

On October 6, 2022, Supreme Court filed a Decision/Order/Judgment. On October 18, 2022, Supreme Court filed an Amended Decision/Order/Judgment (the "Trial Decision"), which corrected erroneous citations to the Regulations. (R.5).

The Trial Decision granted judgment in favor of Oceanview, annulling the Regulations on the ground that they "violate, and [are] therefore preempted by, the" FHA. The court enjoined the State "from enforcing the Challenged Regulations." (R.9.) The Trial Decision does not discuss, or even mention, the contrary views of DOJ set forth in the United States' Statement of Interest.

F. The Appellate Division's Order

The State appealed Supreme Court's judgment to the Appellate Division. On May 4, 2023, the Appellate Division issued the Order, which, in a unanimous decision, "reversed, on the law," Supreme Court's judgment and held that the Regulations "do not violate the Fair Housing Act." (R.8780.)

The Appellate Division identified multiple errors that Supreme Court made, including the following:

(a) Failing to apply the legal standard for FHA challenges adopted by the Sixth, Ninth and Tenth Circuits, and urged by the DOJ;

(b) Requiring that the Regulations achieve their goals by the "least restrictive alternative";

(c) Failing to "account for DOJ's view that the challenged regulations do not violate the FHA";

(d) "[C]oncluding that, because transitional adult homes are privately owned and operated, Title II of the ADA does not apply in this case and, therefore, cannot serve as a valid justification for the admissions cap";

(e) Engaging in "too narrow a reading of" the *Olmstead* decision;

(f) Ignoring "trial evidence equating [Transitional Adult Homes] to institutionalized settings";

(g) Failing to "defer to the reasonable medical judgments of public health officials";

(h) Holding that "statistical data was … necessary to support the challenged regulations";

(i) Engaging in a "wholesale rejection of the State's witnesses"; and

(j) Failing to recognize the "importance of leaving room for flexible solutions to address the complex problem of discrimination and to realize the goals established by the Congress in the" FHA.

(R.8775-79.) (Internal quotation marks and citations omitted).

Applying the correct legal standard for FHA challenges, the Order holds that the Regulations "benefit" persons with disabilities "by directly implementing integration into smaller and more diverse settings where people with serious mental illness have greater ability to exercise autonomy and interact with individuals who

do not have serious mental illness, enhancing their chances of recovery." (R.8777, R.8779.)

The Order also holds that the admissions cap of the Regulations is "narrowly tailored" to implement integration because (1) the "admissions cap applies only to people with a serious mental illness," (2) the admissions cap applies "solely to a subcategory of large adult homes," (3) "once the mental health census of a transitional adult home has been sufficiently reduced below the cap, the facility may resume accepting residents with serious mental illness," and (4) the Regulations "contain a waiver permitting transitional adult homes to admit individuals with serious mental illnesses who were previously residents …." (R.8778-79.)

The Appellate Division held that under the correct legal standard, the Regulations do not violate the FHA because they "benefit … the protected class and are sufficiently narrowly tailored to implement the goal of integration." (R.8779-80.) (Internal quotation marks and citations omitted.)

The Appellate Division denied Oceanview's motion for reargument, but granted its motion for leave to appeal. (R.8766.) The Appellate Division certified "that a question of law has arisen which, in its opinion, ought to be reviewed by the Court of Appeals." (R.8776.)

ARGUMENT

I. THE APPELLATE DIVISION CORRECTLY HELD THE VIEWS OF DOJ REGARDING THE FHA AND ADA WARRANT CONSIDERABLE RESPECT

One of the main bases of the Appellate Division's reversal of the Trial Decision was its conclusion that Supreme Court committed an error of law in disregarding the "DOJ's view that the challenged regulations do not violate the FHA …." (R.8776.) As the Appellate Division held, DOJ's views on the propriety of the Regulations "warrant considerable respect." (R.8775.) (Internal quotation marks and citation omitted.)

Oceanview waived any argument that this holding was erroneous, by failing to raise any such argument in its opening brief. *See, e.g., People v. Ford*, 69 N.Y.2d 775, 777 (1987) (appellant's contention was improperly raised for the first time in appellant's reply brief). In the event this Court does review the Appellate Division's holding that DOJ's views warrant considerable respect, that holding should be affirmed.

Given that Oceanview's sole claim alleged a violation of the FHA—and the State's defense relied heavily on the ADA—Supreme Court should have begun its analysis by considering the views of the United States. The United States submitted these views to Supreme Court via DOJ—the agency charged with enforcing these civil rights laws.

Supreme Court failed to give any weight to the views of DOJ—which is contrary to the mandates of this Court and the U.S. Supreme Court that courts should generally grant deference or give considerable weight to the views of agencies charged with enforcing the laws under consideration.

In *Albano v. Kirby*, 36 N.Y.2d 526, 532 (1975), this Court held that "[o]rdinarily, courts will defer to the construction given statutes and regulations by the agencies responsible for their administration, if said construction is not irrational or unreasonable," including memoranda by agencies charged with enforcement, of which a court may take "judicial notice." 36 N.Y.2d at 532. *See also Samiento v. World Yacht Inc.*, 10 N.Y.3d 70, 79 (2008) (agency's "interpretation of a statute it is charged with enforcing is entitled to deference"). This Court has repeatedly emphasized that "[i]t is well settled that the construction given statutes and regulations by the agency responsible for their administration, *if not irrational or unreasonable, should be upheld*." *Matter of Howard v. Wyman*, 28 N.Y.2d 434, 438 (1971) (emphasis added). *See also Jennings v. New York State Off. of Mental Health*, 90 N.Y.2d 227, 239 (1997) ("when construction of a statute depends on an understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, the question of statutory interpretation is generally left to the special expertise of the agency and the determination is entitled

to deference when it is not irrational or unreasonable") (internal quotation marks and citation omitted).

It is undisputed that DOJ is the only agency charged with enforcing both the ADA and the FHA, and has unparalleled expertise in construction of those laws. (R.8712-13.) As the U.S Supreme Court held in the seminal case of *Olmstead*:

> Because [DOJ] is the agency directed by Congress to issue regulations implementing Title II, … *its views warrant respect*. We need not inquire whether the degree of deference described in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), is in order; "[i]t is enough to observe that the well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.' " *Bragdon v. Abbott*, 524 U.S. 624, 642, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–140, 65 S.Ct. 161, 89 L.Ed. 124 (1944)).

527 U.S. at 597-98 (emphasis added). Given that the Supreme Court's explicit statement that this holding is not based on the rule of deference enunciated in *Chevron*, the Court's recent decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), overruling *Chevron* does not affect the Court's admonition that DOJ's views on the ADA "warrant respect."

Courts have followed this admonition of the Supreme Court in deciding whether to consider statements of interest by the United States on interpretation of the ADA. *See, e.g.*, *M.R. v. Dreyfus*, 697 F.3d 706, 735 (9th Cir. 2012) (district court

erred in discounting DOJ's interpretation of ADA's integration mandate in statement of interest, which views were worthy of "considerable respect").

As noted by DOJ, "[t]he United States has important enforcement interests under both the FHA and the ADA." (R.8712.) "[T] the United States has entered into an enforceable settlement agreement with the State on behalf of individuals with serious mental illness who are unnecessarily segregated in adult homes and therefore has an interest in whether the DOH regulation is upheld." (R.8713.) DOJ emphasized "the importance of the DOH regulation to achieving the goals of the 2013 settlement agreement . . . ." (R.8718.) As DOJ explained, the Regulations support the Federal Settlement by providing a "mechanism for limiting admissions" of persons with serious mental illness into the subject adult homes, without which, those "adult homes could easily revert to being warehouses for individuals with serious mental illness." (R.8718 (quoting *United States v. New York*, No. 1:13-CV-4165, 2017 WL 2616959, at *1 n. 3 (E.D.N.Y. June 15, 2017).)

Not only does DOJ have a strong interest in the application of federal law, but—as the enforcer of the FHA and ADA—it has invaluable expertise in the interplay of the rights protected by these civil rights laws. The United States has an obvious interest in ensuring that these two antidiscrimination statutes are applied consistently, in a noncontradictory manner. (R.8712-13.) *See also* Fair Housing Act

("HUD/DOJ Joint Land Use Statement") (Nov. 10, 2016)[4] at 11 (although *Olmstead* "did not interpret the Fair Housing Act, the objectives of the Fair Housing Act and the ADA, as interpreted in *Olmstead*, are consistent").

Based on this expertise, DOJ explained that a housing restriction challenged as facially discriminatory,

> 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." *Cmty. House v. City of Boise*, 490 F.3d 1041, 1050 (9th Cir. 2007); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1503-04 (10th Cir. 1995) ….

(R.8720.)

Applying these principles, DOJ concluded that the Regulations could not be considered invalid under the FHA—even if the Regulations were considered facially discriminatory:

> Even if the State's limit on admissions of persons with serious mental illness to adult homes could be considered facially discriminatory, the DOH regulation would not violate the FHA. First, adult homes are unquestionably designated as facilities providing long term residential care for persons with disabilities, and the State may permissibly limit or prioritize admission to individuals with certain disabilities that the facility is designed to serve. See 24 C.F.R. § 100.202(c)(2)-(3). Second, the DOH regulation operates to benefit people with disabilities and is "tailored to particularized concerns" about adult home residents. *See Bangerter*, 46 F.3d at 1503.

(R.8723.)

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[4] https://www.justice.gov/opa/file/912366/download.

As DOJ explained, the United States has concluded that the Regulations benefit such persons because "[j]ust as the State could limit admission to facilities that were found to have dangerous living conditions or inadequate supervision and care without contravening the FHA," it may similarly limit admission to State-regulated facilities that were found to have been segregated and therapeutically harmful. (R.8723.)

Supreme Court erred in failing to follow this Court's mandate that "the construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld." *Matter of Howard*, 28 N.Y.2d at 438. Supreme Court did not find that the views of DOJ were irrational or unreasonable. Instead of following this Court's mandate, Supreme Court simply ignored the well-reasoned views of DOJ that (1) the federal integration mandate of the ADA and *Olmstead* apply to the State's regulation of State-licensed adult homes housing persons with disabilities, (2) the Regulations serve to further the integration of persons with disabilities into the community, and (3) the Regulations do not discriminate against such persons in violation of the FHA—but rather benefit them.

In light of the above authorities, the Appellate Division was unquestionably correct in following the views DOJ in ruling on the propriety of the Regulations and the legal standard to apply under FHA. As the court noted, given that this case

“concerns the interplay between the discrimination proscriptions of the FHA and the integration mandate of Title II of the ADA,” a court should look to the views of DOJ, which has “has enforcement power under the [FHA] and is specifically tasked with issuing regulations implementing Title II of the ASA ….” (R.8775.) Accordingly, the Appellate Division held that DOJ’s views “warrant considerable respect.” (R.8775.) The Appellate Division correctly “followed the standard [for FHA challenges] adopted by the Sixth, Ninth and Tenth Circuits as recommended by DOJ,” and took into “account … DOJ’s view that the challenged regulations do not violate the FHA ….” (R.8775-76.) (Internal quotation marks and citations omitted.)

II. THE APPELLATE DIVISION CORRECTLY ADOPTED THE PREVAILING STANDARD FOR FHA CHALLENGES OF GOVERNMENT REGULATIONS

Federal courts have developed a framework for analyzing governmental policies under the FHA. The Appellate Division adopted the standard recommended by DOJ, which has been followed by nearly all federal Courts of Appeals that have ruled on the issue. Under this standard, if a regulation imposes restrictions on a protected class to benefit the class in a narrowly tailored way, it is not considered discriminatory under the FHA. Oceanview urges this Court to reject this generally-accepted standard and adopt a new, inflexible standard for interpreting a federal statute that was crafted by Oceanview and that no court has ever adopted.

A. The FHA Standard Adopted by the Appellate Division is Supported by Substantial Authority

The standard adopted by the Appellate Division for considering Oceanview's claim that the Regulations violate the FHA is supported by substantial authority. The Order "follow[ed] the standard adopted by the Sixth, Ninth and Tenth Circuits as recommended by DOJ" to evaluate claims that a government policy, law or regulation is facially discriminatory under the FHA.[5] (R.8775.)

The Appellate Division began its analysis by holding that it "agree[d] with Supreme Court that the regulations at issue are discriminatory on their face – regardless of their remedial purpose – insofar as the admissions cap applies solely to individuals with serious mental illness." (R.8773.) (Internal citations omitted.) However, as the Appellate Division recognized, a determination that regulations are facially discriminatory merely establishes a prima facie case—it does not establish that the regulations are discriminatory under the FHA. "The further question is the appropriate standard to apply in gauging the propriety of the regulations under the FHA in light of the facial discrimination." (R.8773.)

In order to answer this further question, the Appellate Division adopted the

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[5] Oceanview cites Supreme Court's inaccurate statement that the State did not argue that the Regulations are not facially discriminatory. Oceanview's Brief at 8 (citing R.73.) In fact, the State has argued throughout this case that the Regulations are not facially discriminatory. *See, e.g.*, R.1350, R.7774, R.7869-71.

standard recommended by DOJ to evaluate claims that a government regulation is facially discriminatory under the FHA.

DOJ "urged" the Appellate Division to adopt the standard for analyzing "facial challenges under the FHA" embraced by the Sixth, Ninth and Tenth Circuits, citing *Community House, Inc. v. City of Boise*, 490 F.3d 1041 (9th Cir.2007), *Bangerter v. Orem City Corp.*, 46 F.3d 1491 (10th Cir.1995), and *Larkin v. State of Mich. Dept. of Social Services*, 89 F.3d 285 (6th Cir. 1996). (R.8774.) The Appellate Division "succinctly stated" that standard "as follows: [a] housing restriction that facially discriminates against people with disabilities will pass muster under the FHA upon a showing (1) that the restriction benefits the protected class or (2) that it responds to legitimate safety concerns raised by the individuals affected[,] rather than being based on stereotypes." (R.8774.) (Internal quotation marks and citations omitted.) The Appellate Division noted that this standard employs a more searching method of analysis than the rational basis test used by the Eighth Circuit, and that "[e]ven when the restrictions purport to benefit the protected class, this standard requires that the means be 'narrowly tailored' to effectuate the beneficial purpose." (R.8775.) As noted by the Ninth Circuit, "[t]he majority of district courts to consider this question have also followed [this] framework." *Community House*, 490 F.3d at 1050 n.5.

The Order's approach is in line with the approach of federal Courts of

Appeals. As the Ninth Circuit has exclaimed, under this standard, a plaintiff challenging a government regulation as discriminatory can establish a prima facie case "merely by showing that a protected group has been subjected to explicitly differential—i.e. discriminatory—treatment." *Id.*, 490 F.3d at 1050 (internal quotation marks omitted) (citing *Bangerter*, 46 F.3d at 1501). After the plaintiff establishes such "a prima facie case of facial discrimination," the government can justify the regulation by 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." *Community House*, 490 F.3d at 1050 (citing *Larkin*, 89 F.3d at 290; *Bangerter*, 46 F.3d at 1503–04).

Applying this flexible approach is in keeping with the remedial purpose of the FHA. As the Tenth Circuit has noted, courts ruling on FHA challenges to regulations "all recognize the importance of leaving room for flexible solutions to address the complex problem of discrimination and to realize the goals established by Congress in the Fair Housing Act." *Bangerter*, 46 F.3d at 1505.

B. Oceanview's Proposed FHA Standard is Not Supported by Any Authority

Oceanview's main argument on this appeal is that the Appellate Division erred in "follow[ing] the [FHA] standard adopted by the Sixth, Ninth and Tenth Circuits as recommended by DOJ." (R.8775.) As discussed above, Oceanview does not challenge the Appellate Division's giving considerable weight to the

views of the DOJ. However, Oceanview does challenge the Order's following the prevailing standard used by federal Courts of Appeals. Oceanview's argument is based on a fundamental misunderstanding of the law.

Oceanview mischaracterizes both the legal standard applied by the federal courts and the Appellate Division's application of that standard. Oceanview has a fundamental misunderstanding of what courts mean by "facial discrimination." Oceanview mischaracterizes "facial discrimination" as constituting discrimination in violation of the FHA. Oceanview's Brief at 12-18. For example, Oceanview claims that "facial discrimination" is "in direct contravention of the FHA's discrimination prohibition." Oceanview's Brief at 15.

Oceanview apparently does not understand that a finding that a regulation engages in "facial discrimination" merely establishes that a prima facie case has been made. Once that prima facie case has been made, a court must determine whether the government has shown a sufficient justification for the regulation's restrictions. *Community House*, 490 F.3d at 1050.

Oceanview fails to appreciate that differential treatment of a protected class—which can establish a prima facie case of facial discrimination—does not by itself establish unlawful discrimination. As the Ninth Circuit has noted, "[s]ome differential treatment may be objectively legitimate." *Community House*, 490 F.3d at 1050. Specifically, "the FHAA should not be interpreted to preclude special

restrictions upon the disabled that are really beneficial to, rather than discriminatory against," persons with disabilities. *Bangerter*, 46 F.3d at 1504. As the Tenth Circuit has explained:

> The underlying objective of the FHAA is to "extend[ ] the principle of equal housing opportunity to handicapped persons," H.R.Rep. No. 100–711 at 13, 1988 U.S.Code Cong. & Admin.News [2173] at p. 2174, and end discrimination against the handicapped in the provision of housing based on prejudice, stereotypes, and ignorance, id. at 18, 1988 U.S.Code Cong. & Admin.News at p. 2179. Removing discrimination in housing promotes "the goal of independent living" and is part of Congress's larger "commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream." *Id.*

Bangerter, 46 F.3d at 1504. The Regulations advance these very goals by fostering the desegregation of Transitional Adult Homes and the integration of persons with disabilities into the community.

Oceanview inaccurately characterizes the standard adopted by the Appellate Division as a "benign discrimination exception" to the FHA. Oceanview's Brief at 22. The inaccurate term is an invention of Oceanview's. Under the standard adopted by the Appellate Division, benign discrimination—by itself—will not save a regulation from an FHA challenge. Neither 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. Instead, these courts have held that when a restriction benefits—instead of discriminates against—a protected

class, there is no FHA violation at all. For example, the Tenth Circuit indicated that a facially discriminatory regulation would be valid under the FHA if its restrictions were not merely benign discrimination, but were "really beneficial to, rather than discriminatory against," persons with disabilities. *Bangerter*, 46 F.3d at 1504.

Oceanview cites two U.S. Supreme Court decisions—*Muldrow v. City of St. Louis, Missouri*, 144 S. Ct. 967 (2024), and *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644 (2020)—for the principle that the scope of anti-discrimination statutes should not be narrowed based on "extratextual considerations." Oceanview's Brief at 31. That principle has no application here, however, because regulations that benefit a protected class by fostering their integration into the community further the goals of an anti-discrimination statute—instead of narrowing its scope, In fact, both cases support the standard adopted by the Order, which focuses on whether restrictions discriminate against, or are beneficial to, the protected class. In both cases the Supreme Court stated that "[t]he words 'discriminate against,' we have explained, refer to 'differences in treatment that injure' employees." *Muldrow*, 144 S. Ct. at 974 (quoting *Bostock*, 590 U.S. at 681). The Regulations cannot be said to discriminate against persons with serious mental illness because they do not injure such person, but rather benefit them.

The other authorities cited by Oceanview are also unsupportive of its

argument. Oceanview mistakenly relies on *Larkin v. Michigan Department of Social Services*, 89 F.3d 285 (6th Cir. 1996), for the proposition that the Regulations cannot be justified on the basis that they serve the goal of integration. Oceanview's Brief at 34-35. *Larkin* was decided in 1996, three years before the *Olmstead* decision, which unambiguously held that public entities have an affirmative obligation to integrate housing and services for persons with disabilities. *Olmstead*, 527 U.S. at 596-97. Moreover, in *Larkin* it appeared that "integration [wa]s not the true reason for the" challenged restriction. 89 F.3d at 287, 291. Here, undisputed evidence shows that the State promulgated the Regulations to foster integration.

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

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

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

Ignoring such authorities, Oceanview claims the Regulations' numerical thresholds are essentially quotas that violate the FHA under the authority of another pre-*Olmstead* decision, *United States v. Starrett City Assocs.*, 840 F.2d 1096 (2d Cir. 1988). Oceanview's Brief at 34.

In *Starrett City*, the Second Circuit condemned a private landlord's use of a race-based quota system. 840 F.2d at 1098. The U.S. Supreme Court has explicitly condemned raced-based quotas used to benefit one group by protecting it from competition with other groups. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) ("race-conscious [college] admissions program cannot use a quota system"). By contrast, the Regulations do not benefit one group at the expense of another—persons with serious mental illness who are not being admitted to Transitional Adult Homes are the actual beneficiaries of the Regulations. Moreover, the Supreme Court has not condemned disability-based quotas, and distinctions based on disability—as opposed to race—do not receive the same scrutiny or treatment under the

Constitution. *See City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440-42 (1985) (classifications "by race, alienage, or national origin" are subject to greater scrutiny than classifications by mental disability).[6]

Starrett City is also inapposite because "there [wa]s no evidence [of] the existence of prior racial discrimination …." 840 F.2d at 1102. In contrast, the Regulations were formulated "in tandem" with settlement negotiations to resolve claims of alleged disability-based segregation in a federal court that had previously held the State must take steps to desegregate the very facilities at issue. (R.51, R.8716-18, R.8777.).

Oceanview's argument ignores the fact that unlike other anti-discrimination laws, anti-discrimination disability laws guarantee persons with disabilities special protections. The ADA imposes affirmative obligations on public entities to ensure the integration of persons with disabilities. "[T]he express prohibitions against disability-based discrimination in … Title II [of the ADA] include *an affirmative obligation* to make benefits, services, and programs accessible to disabled people."

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[6] *See* Mark C. Weber, *Numerical Goals for Employment of People with Disabilities by Federal Agencies and Contractors*, 9 St. Louis U. J. Health L. & Pol'y 35, 43 (2015) ("Unlike affirmative action on the basis of race, a measure whose constitutionality has often been called into question, affirmative action on the basis of disability, including the use of numerical goals, is not in serious constitutional doubt" (citing *Cleburne Living Ctr.*, 473 U.S. at 442-43)).

Pierce v. District of Columbia, 128 F.Supp.3d 250, 266 (D.D.C. 2015) (emphasis in original).

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

III. THE APPELLATE DIVISION CORRECTLY HELD THAT UNDER THE APPLICABLE LEGAL STANDARD, THE REGULATIONS DO NOT VIOLATE THE FHA BECAUSE THEY BENEFIT THE PROTECTED CLASS IN A NARROWLY TAILORED WAY

After adopting the legal standard recommended by DOJ and most federal courts for FHA challenges of government regulations, the Appellate Division applied this standard to largely undisputed facts regarding the adoption and implementation of the Regulations. The Appellate Division's analysis also corrected other legal errors made by Supreme Court in evaluating the Regulations. Analyzing this evidence under the correct legal standards, the Appellate Division properly concluded that the Regulations do not violate the FHA because—far from

discriminating against persons with disabilities—those Regulations benefit such persons in a narrowly tailored way.

This Court's authority to review the factual issues considered by the Appellate Division is limited. In contrast to the Appellate Division's authority to review factual issues, predominantly factual issues "are for the most part unreviewable in this Court." *Baba-Ali v. State*, 19 N.Y.3d 627, 640 (2012). In reviewing a nonjury verdict, the Appellate Division has "broad" authority to "render the judgment it finds warranted by the facts, taking into account in a close case the fact that the trial judge had the advantage of seeing the witnesses." *Northern Westchester Professional Park Assoc. v. Town of Bedford*, 60 N.Y.2d 492, 499 (1983) (internal quotation marks and citations omitted). "Where the Appellate Division reaches a factual conclusion different from that reached by the trial court, the scope of [this Court's] review is limited to determining whether the evidence of record ... more nearly comports 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).

A. The Appellate Division Corrected Supreme Court's Legal Errors in Construing the ADA, the *Olmstead* Mandate and the Evidence

The Appellate Division concluded that in addition to adopting the wrong standard for FHA challenges, Supreme Court committed several additional errors of law that tainted its analysis of the evidence. Supreme Court misconstrued the

law in holding that (1) the integration mandate of the ADA and *Olmstead* do not apply to the State's regulation of adult homes and (2) the professional judgments of the State's public health officials that Transitional Adult Homes are not clinically appropriate was not supported by sufficient evidence because they had not conducted any clinical studies. The Appellate Division applied the correct legal standards in correcting these errors of law.

1. Supreme Court Erred in Construing the Integration Mandate of the ADA and Olmstead

Supreme Court held that the State's interest in fostering integration was not a legitimate governmental interest because the State's obligations under the ADA's integration mandate, as interpreted by *Olmstead*, supposedly do not apply to the State's regulation of privately-owned adult homes. (R.77, R.79.) Additionally, Supreme Court held that even if the ADA, as interpreted by *Olmstead*, applies, the integration mandate would require restrictions on housing to "be made on an individualized basis," and to give persons with disabilities the option to decline being subject to the restriction if they "would prefer to reside" in the restricted housing. (R.79-80.) The Appellate Division correctly concluded that Supreme Court was wrong on both issues.

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—even if that scheme results in the segregation of

persons with disabilities. As discussed above, this holding fails to consider—let along defer to—the views of DOJ that the State's provision of mental health services in State-regulated facilities is subject to the "obligations" imposed by the ADA and *Olmstead*. (R.8723.)

Under this Court's precedents, DOJ's construction should be upheld if "not irrational or unreasonable." *Albano*, 36 N.Y.2d at 532. Far from being irrational or unreasonable, DOJ's construction of the federal integration mandate as being applicable to a state's regulation of private facilities is supported by overwhelming authority.

DOJ has repeatedly warned states that if their regulatory regimes enable the segregation of persons with disabilities, they can be subject to its enforcement actions. The U.S. Attorney General has issued regulations on the integration mandate that provide:

> A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability.

28 C.F.R. § 35.130 (b)(6).

DOJ's construction of the federal integration mandate as applicable to the State's regulation of adult homes is supported by the federal court that both ruled on

that very issue in *DAI* and is overseeing the State's compliance with the Federal Settlement:

> It is immaterial that DAI's constituents are receiving mental health services in privately operated facilities. Public entities are required under the ADA to "*administer* services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." Discrimination, in the form of unjustified segregation of individuals with disabilities in institutions, is thus prohibited in the administration of state programs.

Disability Advocs., Inc. v. Paterson, 598 F.Supp.2d 289, 317-18 (E.D.N.Y. 2009) (emphasis in original) (internal citations omitted) (quoting 28 C.F.R. § 35.130(d)).

Here, there is no dispute that the State provides mental health services to residents of adult homes, which are licensed and regulated by the State. (R.10-11, R.2823-24.) As the Appellate Division concluded:

> Supreme Court also erred in concluding that, because transitional adult homes are privately owned and operated, Title II of the ADA does not apply in this case and, therefore, cannot serve as a valid justification for the admissions cap. The discrimination proscriptions of Title II of the ADA apply to public entities, defined as "any State or local government" or "any department, agency, special purpose district, or other instrumentality of a State or States or local government" (42 USC § 12131[1][A], [B]). Such public entities must "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities" (28 CFR 35.130[d]).

(R.8776.)

Supreme Court also erred in concluding that the *Olmstead* integration mandate does not apply because Transition Adult Homes supposedly do not have the characteristics of an institution. As the Appellate Division held, this

determination was doubly erroneous. "Supreme Court's determination that transitional adult homes cannot be equated to the type of institutions at issue in Olmstead rests upon too narrow a reading of that decision and ignores the trial evidence equating such facilities to institutionalized settings …." (R.8776-77.) (Citations omitted.)

The holding of *Olmstead* was not limited to facilities that have all the characteristics of an institution. "Unjustified isolation, we hold, is properly regarded as discrimination based on disability." *Olmstead*, 527 U.S. at 597. As the U.S. Supreme Court recognized, the integration mandate of the ADA is not concerned only with institutionalization, it is also intended "to secure opportunities for people with developmental disabilities to enjoy the benefits of community living." 527 U.S. at 599.

DOJ guidance cautions against treating "institutionalization" as a talisman for requiring the integration of persons with disabilities. In its online Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.*,[7] DOJ advises that "the ADA and the *Olmstead* decision extend to persons at serious risk of institutionalization or

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[7] https://mn.gov/olmstead/assets/2011-06-22-doj-enforcement-integration-mandate-olmstead-ada_R_tcm1143-508974.pdf#:~:text=In%20the%20years%20since%20the%20Supreme%20Court%E2%80%99s%20decision,for%20the%20promise%20of%20Olmstead%20to%20be%20fulfilled.

segregation and are not limited to individuals currently in institutional *or other segregated settings*." Page 3 of 6 (emphasis added). In other words, administering programs that have the effect of segregation can violate the integration mandate, regardless of whether the segregated facility is considered an institution. Moreover, as discussed below, Oceanview's sole expert admitted that Transitional Adult Homes do have institutional characteristics. (R.1694, R.1772-73, R.1698.)

Supreme Court also erred in holding that Olmstead compliance requires that depriving a person of a housing "must be made on an individualized basis." (R.79.)

Contrary to Supreme Court, *Olmstead* counsels that "the State generally may rely on the reasonable assessments of its own professionals in determining whether an individual 'meets the essential eligibility requirements' for habilitation in a community-based program." 527 U.S. at 602. Indeed, the U.S. Supreme Court recognized that governments would be hamstrung in developing policies to benefit persons with disabilities if such policies were required to provide for each individual's choices. The Court held that a state could defend its policies by showing "that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities." 527 U.S. at 604.

In *Familystyle of St. Paul, Inc. v. City of St. Paul, Minn.*, 728 F.Supp. 1396, 1404 (D. Minn. 1990), *aff'd*, 923 F.2d 91 (8th Cir. 1991), the district court applied this principle to hold that under the FHA, governmental policies designed to benefit a group can outweigh an individual's choice or needs when "the public interests sought to be furthered by the laws are substantial enough to outweigh the private detriment caused by them." In affirming, the Eighth Circuit agreed that "deinstitutionalization" regulations that "limit housing choices" for persons with disabilities do not violate the FHA, "perceive[ing] the goals of non-discrimination and deinstitutionalization to be compatible." *Familystyle of St. Paul, Inc. v. City of St. Paul, Minn.*, 923 F.2d 91, 93–94 (8th Cir. 1991).

Similarly, in *Sierra v. City of New York*, 579 F.Supp.2d 543, 548 n.6 (S.D.N.Y. 2008), the plaintiff's claim that a housing regulation violated the FHA because she was deprived of her individual choice was rejected due to the benefit the regulation provided to her group as a whole:

> [B]ecause Sierra is asking the Court to enjoin enforcement of HMC section 27–2076(b) across the board, the Court has made an effort to consider the effects on children of the more standard SRO unit: a room or rooms whose inhabitants share an exterior kitchen and/or bathroom with other tenants.

The Appellate Division correctly held that *Olmstead* does not require public health officials to conduct individualized assessments when complying with the federal integration mandate. As that court recognized, federal courts have held that

challenged regulations that impose burdens on individuals are valid when "the benefit to the [protected class from the subject regulations] … clearly outweighs whatever burden may result to them." (R.8778.) (Internal quotation marks and citations omitted.) Indeed, as the Appellate Division noted, "several federal district courts have, in a different context, rejected the proposition that it is a violation of the ADA to place an institutionalized disabled person in a community-based treatment program unless consent is given and an individualized assessment is made." (R.8778.) (Internal quotation marks and citations omitted.)

2. Supreme Court Erred in Holding that the Professional Judgments of the State's Public Health Officials Must be Based on Clinical Studies

Supreme Court 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. (R74-76.) The Appellate Division correctly overruled Supreme Court's holding that professional judgments of the State's public health officials can be credited only when supported by "statistical data." (R.8778.)

The U.S. Supreme Court has endorsed the principle that courts should generally defer to the professional judgments of agency officials. As the court held in *Olmstead*, "the State generally may rely on the reasonable assessments of its own

professionals in determining whether an individual 'meets the essential eligibility requirements' for habilitation in a community-based program." 527 U.S. at 602. As the Appellate Division noted, the *Olmstead* Court "highlighted the importance of relying on the assessments of the states' mental health professionals in determining the appropriateness of serving individuals with disabilities in community-based settings." (R.8769.) (Citation omitted). Accordingly, courts should be hesitant about second-guessing such judgments by state officials.

In the words of the Appelate Division, "[a]s Justice Ginsberg noted in *Olmstead*, '[c]ourts normally should defer to the reasonable medical judgments of public health officials.'" (R.8777.) (Quoting Olmstead, 527 U.S. at 602.) *See also Boykin v. Gray*, 986 F.Supp.2d 14, 28 (D.D.C. 2013), *aff'd sub nom. Boykin v. Fenty*, 650 F. App'x 42 (D.C. Cir. 2016) (granting summary judgment to government in FHA discrimination case because "the particular facts of this case place difficult policy judgments directly in issue, and implicate decisions about how the District government allocates benefits and burdens through its homelessness policy").

Similarly, this Court has held that "[a]n administrative agency's exercise of its rule-making powers is accorded a high degree of judicial deference, especially when the agency acts in the area of its particular expertise." *Consolation Nursing Home, Inc. v. Comm'r of New York State Dep't of Health*, 85 N.Y.2d 326, 331 (1995). Thus, "[a]lthough documented studies often provide support for an agency's rule making,

such studies are not the sine qua non of a rational determination" by a department commissioner, who "is not confined to factual data alone but also may apply broader judgmental considerations based upon the expertise and experience of the agency he heads." 85 N.Y.2d at 332 (internal quotation marks and citation omitted). *See also Kurcsics v. Merchants Mut. Ins. Co.*, 49 N.Y.2d 451, 459 (1980) ("[w]here the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute").

It is undisputed that the State has expertise in the area of regulating adult homes to advance the health, safety and well-being of persons with disabilities. As this Court has noted, adult care facilities are "heavily regulated" by the State, which has "broad enforcement powers to ensure proper care and treatment of residents …." *Carrier v. Salvation Army*, 88 N.Y.2d 298, 302–03, (1996).

The principle that agency regulations do not need to be based on any empirical studies is fully applicable to facial discrimination claims. As the *Sierra* court explained in its decision on the merits:

> In a perfect world, legislatures would always have scientific studies to guide and justify the measures they enact; however, such studies very rarely exist, and in any event, are in no way required to support a challenged statute—even one, like this one, that is facially discriminatory. To require such studies before finding that an ordinance "further[s] ... in practice, a legitimate, bona fide governmental interest"

> would be, in effect, to hold that no facially discriminatory statute ever could be upheld. Clearly, that is not the law, nor should it be.

Sierra, 579 F.Supp.2d at 551.

Supreme Court's rejection of the legitimacy of the Regulations because they were based on agency expertise and consultations with DOJ, the agency charged with enforcement of the FHA and ADA, and not on clinical studies—turns the principle that an agency may rely on the expertise of professionals on its head. (R.12, R.76.) The Appellate Division correctly applied this principle in holding that the professional judgments of the State's public health officials do not need to be supported by "statistical data." (R.8778.)

B. The Evidence Supports the Appellate Division's Holding that the Regulations Benefit Persons With Disabilities in a Narrowly Tailored Way

Contrary to Oceanview's argument, the Appellate Division's holding that the Regulations benefit persons with disabilities in a narrowly tailored way is supported by substantial, undisputed evidence.

1. The Regulations Benefit Persons With a Serious Mental Illness Instead of Discriminating Against Them

Undisputed facts support the Appellate Division's conclusion that the Regulations benefited persons with serious mental illness by (a) fostering their integration into the community and less segregated settings, and (b) restricting the admission of such persons into clinically inappropriate facilities.

a. The Regulations Benefit Persons With a Serious Mental Illness by Fostering Their Integration Into the Community and Combatting Segregation

As discussed above, Supreme Court's conclusion that integration of persons with serious mental illness into smaller facilities in the community is not beneficial was based on several errors, including engaging in "too narrow a reading of [the *Olmstead*] decision and ignor[ing] the trial evidence equating such facilities to institutionalized settings." (R.8776-77.). Rejecting Supreme Court's legal error in holding the federal integration mandate is not applicable to the State's regulation of adult homes, the Appellate Division relied on largely undisputed evidence to hold that that the State's compliance with the integration mandate was beneficial to persons with serious mental illness.

As the Appellate Division stated, the Regulations "benefit individuals with serious mental illness by implementing the integration mandate of Olmstead," including "by directly implementing integration into smaller and more diverse settings where people with serious mental illness have greater ability to exercise autonomy and interact with individuals who do not have serious mental illness, enhancing their chances of recovery." (R.8776, R.8779.)

Oceanview inaccurately claims "that the State provided no evidence that persons excluded by the admissions bar have ended up in smaller or more integrated settings …." Oceanview's Brief at 47. Ironically, Oceanview is committing the

same error the Appellate Division held Supreme Court committed in "ignor[ing] the trial evidence." (R.8777.)

Indeed, the State submitted substantial evidence that the Regulations have both fostered the integration of persons with serious mental illness into the community, and have resulted in adult homes becoming more integrated. Supreme Court heard undisputed testimony from DOH and OMH officials that the State has not received any reports of the Regulations having a detrimental effect on finding appropriate housing for persons with serious mental illness. (R.2961-62, R.3196-99, R.3501-03, R.3668-69.)

Oceanview makes the egregious and untrue claim that the State, through the Regulations, is restricting housing choices for persons with disabilities without providing such persons access to supported housing. Oceanview's Brief at 48-49. Oceanview ignores the undisputed evidence that the Regulations are part of the State's comprehensive efforts to further the goals of the *Olmstead* integration mandate, which includes spending many millions of dollars a year to expand the supply of supported housing in the community for persons with disabilities to benefit not just persons in the Federal Settlement class—but also persons who otherwise might have moved to Transitional Adult Homes. (R.2756-59, R.3065-66, R.3078-79, R.3084-85, R.1398-1400.) Undisputed testimony also established that non-transitional adult homes (which are not barred from accepting new residents with

serious mental illness) across the state have vacancies. (R.2965-66.)

It is also undisputed that the Regulations have resulted in significant desegregation of the Transitional Adult Homes. The number of Transitional Adult Homes decreased from 49 in 2013 to 35 following the promulgation of the Regulations. (R.47, R.2934-35.) The percentage of residents in Transitional Adult Homes with serious mental illness has declined. R58. At Oceanview, the percentage of residents with serious mental illness declined from 92.6% in 2013 to less than 47% in 2019. (R.2706, R.2712-13.)

In its Statement of Interest, DOJ stated unequivocally that the Regulations benefit persons with serios mental interest by furthering the goals of the federal integration mandate. As DOJ stated, "[t]he Court in the DAI case has noted the importance of the DOH regulation to achieving the goals of the 2013 settlement agreement benefitting adult home residents …." (R.8718.) DOJ then quoted Judge Garaufis's ruling regarding the beneficial effects of the Regulations:

> The Regulations limit the admission of individuals with serious mental illness into adult homes whose mental health census is 25 percent or more. If the Regulations are eliminated, it will open the front doors of the adult homes to individuals with serious mental illness. Without some mechanism for limiting admissions or quickly transitioning individuals who are willing and able to move into supported housing, the adult homes could easily revert to being warehouses for individuals with serious mental illness.

United States v. New York, 2017 WL 2616959, at * 1 n. 3.

As the Appellate Division explained:

> When considering the justification proffered by respondent in support of the regulations – i.e., to benefit individuals with serious mental illness by implementing the integration mandate of *Olmstead* – the circumstances under which they were promulgated cannot be overlooked…. DOH adopted these regulations to come into compliance with this mandate, in direct response to federal lawsuits challenging the State's provision of services to individuals with mental illness living in adult homes on the ground that their rights under the ADA were being violated, and in tandem with the [Federal Settlement] discussions negotiating a proposed remedy. A fundamental component of the [Federal Settlement] is that the State provide additional supportive housing in the community and facilitate the process for residents of adult homes to make informed choices about relocating back into the community. The challenged regulations complement that objective by limiting the admission of new residents with a serious mental illness into transitional adult homes (*see Residents & Families United to Save Our Adult Homes v. Zucker*, 2017 WL 5496277 at *11).

(R.8777.)

Given that it was undisputed that the Regulations were adopted in tandem with the Federal Settlement, the Appellate Division had ample evidence to support its conclusion that the Regulations benefited persons with disabilities by furthering the integration mandate.

b. The Regulations Benefit Persons With a Serious Mental Illness by Limiting Their Admission Into Clinically Inappropriate Facilities

Oceanview mistakenly argues that the Appellate Division's holding that the Regulations benefited persons with serious mental illness by restricting their admission into clinically inappropriate facilities lacks any "evidentiary basis."

Oceanview's Brief at 53. Once again, Oceanview simply ignores the undisputed evidence that supports the Appellate Division's conclusions.

Undisputed evidence established that the State determined, based on its experience and expertise, that Transitional Adult Homes lack the services and environments necessary to be considered clinically appropriate and conducive to recovery. Indeed, Supreme Court acknowledged that the State concluded that Transitional Adult Homes are neither clinically appropriate nor conducive to recovery based on the facts that they:

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

(R.36.)

Each one of these factors was established by undisputed evidence—including the testimony of Oceanview's own witnesses. Oceanview's administrator admitted that Oceanview is not a medical facility; is not a mental health provider; does not provide mental health services; and does not provide its residents with lessons in such life skills as housekeeping and cleaning. (R.2745-46, R.2864, R.4705-07.)

Oceanview's sole expert, Dr. Jeffrey Geller, admitted that Transitional Adult Homes have "institutional features in the standard terminology that are clearly institutional …." (R.1694, R.1772, R.1698.) In fact, he conceded that "adult homes are big places [that] have to impose certain procedures and certain rules to have an orderly operation of the facility," and that they are "institution-like." (R.1694, R.1772.) Among the other institution-like features identified by Dr. Geller were delivery of medicine during a meal, requiring guests to register and get a tag, the assignment of seats for meals and housing most residents two to a room. (R.1772-74.)

Dr. Geller also admitted to the detrimental effects of such characteristics, testifying that a person with serious mental illness (but no other health issues that would require services offered by a specific adult home) should not reside in a Transitional Adult Home, admitting that "somebody who has a serious mental illness and no comorbidities or nothing else that would require the services in an adult home, shouldn't be in a transitional adult -- shouldn't be in any adult home …." (R.1733.)

Supreme Court also heard unrebutted testimony that "many adult home residents are vulnerable because they are substantially unable to live independently and require a certain amount of personal care and supervision." (R.50.) The unrebutted testimony established that residing in Transitional Adult Homes—

instead of one of the many other non-transitional adult homes or other housing options—is particularly harmful to such vulnerable persons. Transitional Adult Homes "tend[] to have certain types of problems more frequently than other adult homes, such as lack of supervision, environmental issues, unsafe smoking leading to fires, and altercations between residents." (R.49, R.2947.)

Oceanview also inaccurately claims that Dr. Sederer was the "State's principal expert," and baselessly attacks the extent to which Dr. Sederer's testimony was based on "evidence-based" research. Oceanview's Brief at 53. Oceanview ignores the evidence of Dr. Sederer's substantial experience as a public health professional and the extent to which the Regulations were based on the contributions and review of many other public health professionals, disability advocates, the DOJ and the federal court overseeing the Federal Settlement. (R.8770-71, R.8777-79, R.35-R.38, R.42.)

The Regulations were the product of extended discussions among numerous officials at DOH—which has substantial expertise with the regulation of adult homes—and OMH—which has substantial expertise in formulating policies relating to persons with mental illness. The drafting of the Regulations also involved numerous consultations with DOJ—which has substantial expertise protecting the civil rights of persons with disabilities, including residents of the adult homes that were eventually designated as Transitional Adult Homes. (R.12, R.1977-83,

R.1988-95, R.3139-40, R.3172, R.3239-40, R.3555, R.3565-3567, R.8712-13, R.8716-18.)

Oceanview ignores not only the State's other expert and professional witnesses (including its principal exert witnesses, Dr. Lisa Dixon and Kevin Martone), but also the extent to which the testimony of the State's witnesses was based on their experience and expertise as public health professionals. (R.35-38, R.41-45, R.47-49, R.53-56.)

As discussed above, courts should give deference to the reasonable professional judgements of public health officials. Given the substantial evidence supporting the State's determination that Transitional Adult Homes are not clinically appropriate or conducive to recovery, the Appellate Division was correct to reach the following conclusions.

As the Appellate Division stated, the State "presented testimony from several experts – including Lloyd Sederer, OMH's former chief medical officer who issued the 2012 advisories, and other mental health professionals – who consistently testified that transitional adult homes are akin to institutionalized settings and are not beneficial to recovery for people with serious mental illness because, among other things, they lack integrative, community-based, mental health services, restrict the ability of persons with serious mental illness to interact with persons who do not have serious mental illness, and do not require employees to have mental health

training." (R.8777.) Moreover, "[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.)

Oceanview's argument that there is no evidence supporting these conclusions of the Appellate Division is simply baseless.

2. The Regulations are Narrowly Tailored in Scope and Duration

Finally, Oceanview argues that the Order's conclusion that the Regulations are narrowly tailored is "at odds with Supreme Court's findings and not supported by the Record." Oceanview's Brief at 59. However, Supreme Court's findings are not relevant under the applicable legal standard. The Appellate Division's conclusion that the Regulations are narrowly tailored is based on its application of the correct legal standard to undisputed facts.

Supreme Court held that the Regulations are not sufficiently tailored based on rationales that (1) they "are not narrowly tailored to meet the specific needs of …individual resident[s] or prospective resident[s] with a serious mental illness" and (2) the evidence "established that numerous alternatives exist to address the State's interests that would have less discriminatory effect than that imposed by the Challenged Regulations." (R.81-82.) Both grounds are based on misinterpretations of the law.

As discussed above, Supreme Court's holding that a regulation is not narrowly tailored unless it is tailored to meet the specific needs of individuals is based on the court's incorrect view of the federal integration mandate. *See, e.g., Familystyle*, 728 F.Supp. at 1405 (finding no FHA violation because "societal goals" outweigh "a limitation of choice on a small number of … individuals").

Supreme Court's focus on whether there are less discriminatory alternatives to the Regulations is based on its adoption of the "least restrictive alternative" test to analyze narrow tailoring. (R.8775.) But, as the Appellate Division held, the "least restrictive alternative" test is a more "onerous" standard that is contrary to the view of most federal courts. (R.8775.) *See, e.g., Bischoof v Brittain*, 183 F.Supp.3d 1080, 1091 (E.D. Cal. 2016) (narrow tailoring approach of the Ninth Circuit "does not require that (the) defendants' policy be the least restrictive means of achieving the allowed interests").

Applying the correct legal standard, the Appellate Division held that the Regulations are narrowly tailored based on the facts that (1) the "admissions cap applies only to people with a serious mental illness," (2) the admissions cap applies "solely to a subcategory of large adult homes," (3) "once the mental health census of a transitional adult home has been sufficiently reduced below the cap, the facility may resume accepting residents with serious mental illness," and (4) the Regulations

"contain a waiver permitting transitional adult homes to admit individuals with serious mental illnesses who were previously residents …." (R.8778-80.)

Contrary to Oceanview's argument, these facts are supported by substantial undisputed evidence. Rather than limiting admissions to all adult homes, the Regulations are limited in their application to Transitional Adult Homes—the few dozen adult homes that are most likely to have institutional characteristics and to be segregated due to their size and heavy concentrations of persons with serious mental illness. (R.49, R.2930-31, R.2947, R. 2948, R.2956-57.) These are the large facilities that are, by definition, most segregated and most likely to have such untherapeutic conditions as "lack of supervision, environmental issues, unsafe smoking leading to fires, and altercations between residents." (R.49, R.2947.) As of December 2018, only 35 out of some 403 adult homes in New York State—less than 10 percent—were classified as Transitional Adult Homes. (R.2934-35, R.2948, R.47.) Moreover, the Regulations' restrictions are not permanent—once a Transitional Adult Home reduces its mental health census to less than 25%, that facility "may then resume admitting new residents with a serious mental illness." (R.15.)

The Regulations have resulted both in fewer Transitional Adult Homes and fewer persons with serious mental illness residing in such segregated facilities.

(R.58; R.2706, R.2712-13, R2934-35.) Thus, the Regulations are serving the State's interest in integrating persons with disabilities into their communities.

The State has also demonstrated flexibility by narrowing the scope of the Regulations—based on its experience with the Regulations—to provide for a waiver process that enables Transitional Adult Homes to admit persons with serious mental illness if they are former residents of a Transitional Adult Home and have expressed a preference to return to such a facility. (R.63, R.7542, R.7987.)

Significantly, no witness testified that adoption of the alternatives proposed by Supreme Court would either lessen the concentration of persons with serious mental illness in Transitional Adult Homes—i.e., their segregation—or improve their chances for recovery. Thus, there was no evidence that any alternative would serve the state's legitimate interests with less discriminatory effect. Instead, Supreme Court heard undisputed evidence by a State official with expertise in regulating adult homes that such measures were not likely to achieve the State's goals—and, in fact, would likely lead to increased segregation of persons with disabilities in Transitional Adult Homes. (R.2971-77.)

In the words of the Appellate Division::

> In these circumstances, we cannot agree with Supreme Court's finding that the means used to implement the goal of integration are not narrowly tailored insofar as the regulations do not provide for individualized assessments. Indeed, there was testimony at trial that utilizing a more individualized approach could impede the State's

> integration goal and, as already noted, the least restrictive means of effectuating the beneficial purpose is not required.

(R.8779.).

Moreover, it is the view of DOJ that the Regulations are narrowly tailored. As DOJ explained, the Regulations are sufficiently tailored to achieve the State's goals because "the DOH regulation operates to benefit people with disabilities and is 'tailored to particularized concerns' about adult home residents." (R.8723.) The Regulations are tailored to "ensure that mental health services are not being provided in congregate facilities that have been found by both the State and the district court in *DAI* to be segregated, in contravention of the State's obligations under the ADA and *Olmstead*, and therapeutically harmful." *Id.* Once again, there is nothing "irrational or unreasonable," about DOJ's views that would justify Supreme Court's failure to give DOJ's views considerable weight.

As the Appellate Division stressed, courts should leave room for "flexible solutions" and rely on "the assessments of the states' mental health professional in determining the appropriateness of serving individuals with disabilities in community-based settings." (R.8769, R.8779.)

In *Cleburne*, the Supreme Court expressed concern that "merely requiring the legislature to justify its efforts" under too exacting a standard "may lead it to refrain from acting at all." 473 U.S. at 444. Thus, "governmental bodies must have a certain amount of flexibility and freedom from judicial oversight in shaping

and limiting their remedial efforts." *Id.* at 445. *See also Bangerter*, 46 F.3d at 1505 ("courts [dealing with discrimination claims] all recognize the importance of leaving room for flexible solutions to address the complex problem of discrimination and to realize the goals established by Congress" in the FHA).

Given the flexibility that public health officials should be given in engaging in remedial efforts to improve the lives of persons with disabilities, the Appellate Division was unquestionably correct in holding that the Regulations "are sufficiently tailored to implement the goal of integration." (R.8780.)

CONCLUSION

For the above reasons, the State respectfully requests that this Court affirm the unanimous decision of the Appellate Division.

Dated: August 22, 2024
New York, New York

Respectfully submitted,
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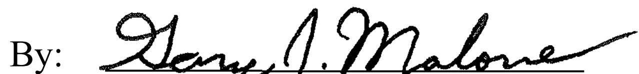
By: 

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NEW YORK STATE COURT OF APPEALS
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