SUPREME COURT STATE OF NEW YORK
COUNTY OF KINGS

RESIDENTS AND FAMILIES UNITED TO SAVE OUR ADULT HOMES, et al.

Petitioners-Plaintiffs,

v.

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

Respondents-Defendants.

Index No. 9038/2013

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

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INTRODUCTION

The United States of America respectfully submits this Statement of Interest to address the application of the Fair Housing Act (FHA), 42 U.S.C. §§ 3601-3619 and Title II of the Americans with Disabilities Act ("ADA), 42 U.S.C. § 12132, to a regulation issued by the New York State Department of Health regarding the admission of individuals with serious mental illness (SMI) to certain long term care facilities licensed by the State.[1] The long term care facilities are known as adult homes, and the regulation at issue prevents "adult home[s] with a certified capacity of 80 or more and a mental health census … of 25 percent or more of the resident population" from admitting any more individuals who need long term care due to serious mental illness. *See* N.Y. Comp. Codes R. & Regs. tit. 18, § 487.4(d) (DOH regulation). The regulation followed clinical advisories from the State's Office of Mental Health (OMH) that these adult homes—referred to as "transitional adult homes"—are not clinically appropriate settings in which to provide services to the significant number of individuals with serious mental illness residing in them, nor do they promote recovery or rehabilitation. *See* N.Y. State OMH Clinical Advisory (Aug. 8, 2012), *available at* http://www.omh.ny.gov/omhweb/advisories/; N.Y. State Office of Mental Health, Update – Clinical Advisory Regarding Adult Homes Previously Issued to Psychiatric Inpatient Programs on August 8, 2012 (Oct. 1, 2012), *available at* http://www.omh.ny.gov/omhweb/advisories/.

Petitioners, which include an organization called Residents and Families to Save Our Adult Homes (the Residents and Families Petitioners) and the Empire State Association of Assisted Living (the Empire Petitioners) argue that the DOH regulation violates the FHA

[1] Under 28 U.S.C. § 517, "[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."

because the regulation requires transitional adult homes to deny "housing"—namely, admission to an adult home—on the basis of disability. Residents and Families Pet'rs' Mem. in Supp. Mot. for Summ. J. 7, NYSEF No. 205; Empire Pet'rs' Mem. in Supp. Mot. for Summ. J. 17-20, NYSEF No. 111. They further assert that the DOH regulation violates the ADA and the Supreme Court's decision in *Olmstead v. L.C.*, 527 U.S. 581, 587 (1999), because it limits the choice of individuals to receive services in certain adult homes. Residents and Families Pet'rs' Mem. at 12; Empire Pet'rs' Mem. at 17-20.

The State, in turn, relates that the DOH regulation was enacted to further the State's compliance with the "integration mandate" of the ADA and was also in response to findings in the District Court for the Eastern District of New York that the State violated this mandate by unnecessarily placing individuals with serious mental illness in adult homes. *See* Resp't's Mem. in Supp. Mot. for Summ. J. 2-4, NYSEF No. 54. The State also explains that the DOH regulation is intended to prevent admissions of individuals with serious mental illness to settings that are not "clinically appropriate" nor "conducive to [the] health, safety, and recovery [of individuals with SMIs]." *See id.* at 10 & 17. For the reasons explained below, the DOH regulation does not violate the Fair Housing Act or the Americans with Disabilities Act.

INTEREST OF THE UNITED STATES

The United States has important enforcement interests under both the FHA and the ADA. With respect to the FHA, the Attorney General may, for example, initiate civil proceedings on behalf of the United States in cases alleging a "pattern or practice" of housing discrimination or where a denial of rights raises a matter of general public importance. 42 U.S.C. § 3614(a). Additionally, the Attorney General "shall commence and maintain a civil action" on behalf of an aggrieved person who has filed a complaint of housing discrimination with the Department of Housing and Urban Development (HUD), where HUD has issued a determination of reasonable

cause and the complainant or respondent has elected to proceed in federal court. 42 U.S.C. § 3612(o). The Attorney General may also commence suits where the HUD refers a discriminatory housing practice involving the legality of a state or local zoning or land use law. 42 U.S.C. §§ 3614(b), 3610(g).

With respect to the ADA, the Department of Justice is charged with enforcement and implementation of Title II of the ADA, 42 U.S.C. §§ 12133-12134, and accordingly has an interest in supporting the proper and uniform application of the ADA, in furthering Congress's intent to create "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities," *id.* § 12101(b)(2), and in furthering Congress's intent to reserve a "central role" for the federal Government in enforcing the standards established in the ADA. *Id.* § 12101(b)(3). In addition, 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. *See United States v. New York*, No. 1:13-cv-04165-NGG-ST, ECF No. 28, Mem. and Order (E.D.N.Y. Mar. 17, 2014) (approving settlement agreement).

BACKGROUND

A. Statutory Background

In 1988, Congress amended the FHA to, among other things, make it unlawful "[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of" disability.[2] Fair Housing Amendments Act, Pub. L. No. 100-430 § 6, 102 Stat. 1619, 1620-21 (1988), *codified at* 42 U.S.C. § 3604(f)(1). In enacting these

[2] Throughout this brief, the United States uses the term "disability" instead of "handicap." For purposes of the FHA, the terms have the same meaning. *See Bragdon v. Abbott,* 524 U.S. 624, 631 (1998).

amendments, Congress made "a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with [disabilities] from the American mainstream" and recognized that "[t]he right to be free from housing discrimination is essential to the goal of independent living." H.R. Rep. No. 100-711, at 18 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 2173, 2179; *accord Step by Step, Inc. v. City of Ogdensburg*, 176 F. Supp. 3d 112, 135 (N.D.N.Y. 2016); *Support Ministries for Persons with AIDS v. Vill. of Waterford*, 808 F. Supp. 120, 130 (N.D.N.Y. 1992). The amendments "responded to a recognized prejudice against those with [disabilities] '[who] have been excluded because of stereotypes about their capacity to live safely and independently.'" *Groome Res. Ltd. v. Parish of Jefferson*, 234 F.3d 192, 201 (5th Cir. 2000) (quoting H.R. Rep. No. 100-711, at 18, 1988 U.S.C.C.A.N. at 2179) (first bracket added; second in original). Thus, for example, Congress expressly intended for the amendments to apply to zoning and land use laws that were "used to restrict the ability of individuals with [disabilities] to live in communities." *Id.* (quoting H.R. Rep. No. 100-711, at 24, 1988 U.S.C.C.A.N. at 2185) (brackets added).

In 1990, Congress enacted the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). In so doing, Congress again recognized that "historically, society has tended to isolate and segregate individuals with disabilities, and despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." *Id.* § 12101(a)(2).

Title II of the ADA prohibits discrimination against persons with disabilities by state and local governments. *Id.* § 12132. In 1999, in *Olmstead v. L.C.*, the Supreme Court held that the failure by States to serve individuals with disabilities in community, as opposed to institutional,

settings in certain circumstances constitutes discrimination on the basis of disability, in violation of Title II. 527 U.S. 581, 587 (1999).[3] The Court's reasoning included two key findings: first, that "institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life," and, second, that "confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." *Id.* at 600-01.

B. Adult Homes and the DAI Lawsuit

In 2003, Disability Advocates, Inc. ("DAI")[4] filed suit against New York state agencies and officials on behalf of approximately 4,300 persons with serious mental illness who resided in, or were at risk of entering, large "adult homes" in New York City. *See Disability Advocates, Inc. v. Paterson*, 653 F. Supp. 2d 184, 187 (E.D.N.Y. 2009) ("*DAI*"), *vacated on other grounds sub nom.*, *Disability Advocates, Inc. v. N.Y. Coal. for Quality Assisted Living*, 675 F.3d 149, 162 (2d Cir. 2012). Adult homes are "privately-owned, for-profit facilities" that are "licensed by the State and authorized to provide long-term residential care, room, board, housekeeping, personal care, and supervision" to residents. *See id.* at 193. By regulation, they are designated to serve persons with disabilities, specifically "adults who … by reason of physical or other limitations

[3] Specifically, the Court held that community placement is required when "community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with" disabilities. *Id.*

[4] DAI, which is now known as Disability Rights New York, is a protection and advocacy organization for persons with disabilities. *See* 42 U.S.C. §§ 10801-10807.

associated with age, physical or mental disabilities or other factors, unable or substantially unable to live independently." N.Y. Comp. Codes R. & Regs. tit. 18, § 485.2(a).[5] Originally designed to serve "the frail elderly," adult homes began serving persons with serious mental illness due in large part to the State's failure to develop community mental health services. *DAI*, 653 F. Supp. 2d at 197-98.

In its lawsuit, DAI alleged that the State, in administering its mental health services system, violated Title II of the ADA and *Olmstead* by failing to serve adult home residents with serious mental illness "in the most integrated setting appropriate to their needs," namely, "a setting that enables individuals to interact with non-disabled persons to the fullest extent possible." *Id.* (quoting 28 C.F.R. § 35.130(d) & 28 C.F.R. pt. 35 app. A). In 2009, following a five-week trial, the district court entered judgment for DAI, finding unequivocally that "[t]he adult homes at issue are institutions that segregate residents from the community and impede residents' interactions with people who do not have disabilities." *Id.*

Specifically, the court found that adult homes were "designed to manage and control large numbers of people by eliminating choice and personal autonomy, establishing inflexible routines for the convenience of staff, restricting access, implementing measures which maximize efficiency, and penalizing residents who break the rules." *Id.* at 199 (citing Plaintiff's expert report) (internal quotation marks and alterations omitted). As such, adult homes did not promote the rehabilitation or recovery of individuals with serious mental illness and "impede residents' community integration." *Id*. at 197, 202. The court noted that even the State itself recognized that adult homes were "de facto mental institutions" that were not "desirable" and would not

[5] This regulation governs "adult care facilities," of which adult homes are a subset. *See* N.Y. Comp. Codes R. & Regs. tit. 18, § 485.2(b).

"promote people's recovery and integration and full social inclusion." *Id.* at 197-98. The court likewise found that "virtually all" residents of the adult homes at issue "are qualified to receive services in 'supported housing,' a far more integrated setting in which individuals with serious mental illness live in apartments scattered throughout the community and receive flexible support services as needed." *Id.* at 188.

In 2013, the district court in *DAI* approved a settlement agreement in two subsequent, substantively identical lawsuits filed against the State by the United States and a plaintiff class of adult home residents under the ADA.[6] *See generally* Stipulation & Order of Settlement (Settlement Agreement), *United States v. New York*, No. 1:13-cv-4165, ECF No. 74 (E.D.N.Y. July 23, 2013).[7] The Settlement Agreement requires the State to provide integrated housing and community-based services to all eligible individuals with serious mental illness who wish to move out of adult homes, among other relief. *See id.* § E.2; 2d Am. Stip. and Order of Settlement, *United States v. New York*, No. 1:13-cv-4165, ECF No. 112 (E.D.N.Y. May 18, 2017).

[6] This lawsuit and settlement followed the Second Circuit's opinion vacating the *DAI* judgment on grounds that DAI lacked standing to bring the original action and the United States' intervention did not cure this defect. *Disability Advocates, Inc. v. N.Y. Coal. for Quality Assisted Living*, 675 F.3d at 159-61. In so ruling, however, the Court of Appeals was "mindful of the possibility that this litigation will continue, inasmuch as the United States—whose standing is not disputed—has represented that, in the event of a dismissal on the basis of standing, it would re-file the action and submit the same evidence at a subsequent trial." *Id.* at 162.

[7] The original 2013 court-ordered settlement was amended by a Second Amended Stipulation and Order of Settlement in May 2017. 2d Am. Stip. and Order of Settlement, *United States v. New York*, No. 1:13-cv-4165, ECF No. 112 (E.D.N.Y. May 18, 2017), and supplemented by the Supplement to the Second Amended Stipulation and Order of Settlement, executed in March 2018. Suppl. to 2d Am. Stip. and Order of Settlement, *United States v. New York*, No. 1:13-cv-4165, ECF No. 141-1 (E.D.N.Y. Mar. 12, 2018).

C. The Challenged Regulation

In August and October 2012, OMH issued Clinical Advisories finding that "transitional adult homes"—*i.e.*, homes with eighty or more beds in which over 25 percent of residents have serious mental illness (*see* N.Y. Comp. Codes R. & Regs. tit. 18, § 487.13(b)(1))—"are not clinically appropriate settings for the significant number of persons with serious mental illness who reside in such settings, nor are they conducive to the rehabilitation or recovery of such persons." N.Y. State OMH Clinical Advisory (Aug. 8, 2012), *available at* http://www.omh.ny.gov/omhweb/advisories/; N.Y. State Office of Mental Health, Update – Clinical Advisory Regarding Adult Homes Previously Issued to Psychiatric Inpatient Programs on August 8, 2012 (Oct. 1, 2012), *available at* http://www.omh.ny.gov/omhweb/advisories/. These Advisories were consistent with the district court's 2009 findings in *DAI*. *See* 653 F. Supp. 2d at 214 (finding that adult homes foster "learned helplessness" because "the skills of community living are eroded by the routines of institutional life.") (quoting OMH Commissioner testimony to Legislature).

On January 16, 2013, based on these advisories, DOH issued the licensing regulation at issue here, which states that transitional adult homes must limit their residents with serious mental illness to 25 percent of the home's overall population. N.Y. Comp. Codes R. & Regs. tit. 18, § 487.4(d). In 2019, DOH added a waiver provision to this regulation that allows for the re-admission of former transitional adult home residents notwithstanding the 25 percent limit on residents with serious mental illness. *Id.* § 487.4(e)(3)(ii). Respondents state that DOH has generally granted all waiver requests made on behalf of former transitional adult home residents. Resp't's Mem. at 16.

The 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 and remedying the State's ADA discrimination:

> 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, No. 1:13-CV-4165, 2017 WL 2616959, at *1 n. 3 (E.D.N.Y. June 15, 2017).

D. The Instant Case

On May 13 and 14, 2013, Petitioners, a self-styled "unincorporated association" of residents and family members of residents of adult homes; owners of adult homes; and operators of certain adult homes, commenced two separate but largely identical actions, claiming that the DOH regulation violates, *inter alia*, the FHA, 42 U.S.C. §§ 3601-3619, and the ADA. *See e.g.,* Residents and Families Verified Compl. and Pet., NYSEF No. 1, ¶¶ 6, 284-88. The cases were consolidated in October 2013. Both sides have cross-moved for summary judgment. The United States now respectfully submits this Statement of Interest to address the FHA and ADA issues raised in this action.[8]

ARGUMENT

I. THE DOH REGULATION DOES NOT VIOLATE THE FAIR HOUSING ACT

[8] The current action is one of three substantively-identical pending challenges to the DOH regulation. The others are *Doe v . Zucker*, No. CV-17-01005 (N.D.N.Y.) and *Oceanview Home for Adults et al. v. Zucker et al*., Index No 906012-16 (Sup. Ct. Albany Cnty.). The Petitioners in those cases share the same counsel. The United States has filed Statements of Interest in those actions as well.

A. Standard for Intentional Discrimination under the FHA

The FHA makes it unlawful "[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a [disability] of … a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available." 42 U.S.C. § 3604(f)(1)(B). The FHA also prohibits discrimination in the "terms, conditions, and privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such a dwelling." *Id.* § 3604(f)(2).

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." *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); *see also Larkin v. Mich. Dep't of Social Servs.*, 89 F.3d 285, 290 (6th Cir. 1995) ("[I]n order for facially discriminatory statutes to survive a challenge under the [FHA], the defendant must demonstrate that they are warranted by the unique and specific needs and abilities of those handicapped persons to whom the regulations apply.").[9]

Accordingly, the FHA's non-discrimination provisions permit housing eligibility to be limited based on type of disability under certain circumstances, even though this may restrict the housing choices of persons with disabilities. For example, HUD FHA regulations expressly

[9] This is different from the rational-basis review employed by the Eighth Circuit in FHA cases. *See* Resp't's Mem. at 10 (citing *Familystyle of St. Paul, Inc., v. City of St. Paul*, 923 F.2d 91, 94 (8th Cir. 1991)). Other circuits that have considered this question have rejected the use of an equal protection analysis under the FHA. *See Bangerter*, 46 F.3d at 1503; *Cmty. House*, 490 F.3d at 1050. In determining the standard of review under the FHA, the Court should follow the Sixth, Ninth, and Tenth Circuits and decline to apply an equal-protection analysis to the FHA.

allow inquiries into a housing applicant's disability when they are intended "to determine whether an applicant is qualified for a dwelling available only to persons with handicaps or to persons with a particular type of handicap," as well as "to determine whether an applicant for a dwelling is qualified for a priority available to" persons with disabilities.[10] 24 C.F.R. § 100.202(c)(2)-(3). This reflects a recognition by HUD that, for example, group homes that are designated to serve only people with specific types of disabilities, such as intellectual disabilities or serious mental illness, are permissible under the FHA even though residency in such homes is restricted based on disability.

B. The DOH Regulation Permissibly Governs the Types of Settings in Which the State Provides Mental Health Services

Unlike a restriction on the sale or leasing of a dwelling, or a zoning or land use provision that governs where housing for persons with disabilities may be located, the DOH regulation forms part of the State's licensing scheme for health care facilities. By their nature, these facilities are restricted to persons with specific types of disabilities or conditions. *See*, *e.g.*, 42 U.S.C. § 1396d(d) (under Medicaid, an "intermediate care facility for [individuals with intellectual disabilities]" is defined as "an institution (or a distinct part thereof) for [individuals with intellectual disabilities] or persons with related conditions . . . ."). Such licensing regulations, in turn, help determine the structure of the State's disability services system and the types of settings in which individuals will receive services.

[10] HUD is "the agency primarily charged with the [FHA's] implementation and regulation," and "the Court ordinarily defers to an administering agency's reasonable statutory interpretation[.]" *Meyer v. Holley*, 537 U.S. 280, 281 (2003).

As such, the DOH regulation at issue in this case does not "deny" or "make unavailable" housing on the basis of disability, any more than would a decision by the State that limits inpatient or institutional care altogether as part of its disability services system.[11] Instead, the DOH regulation reflects the State's decision not to provide mental health services in a setting—namely, a congregate residential facility in which a large number of residents have serious mental illness—that the State has determined is, as a general matter, clinically and therapeutically ineffective for persons with serious mental illness (and which the *DAI* court has held violates the ADA and *Olmstead*).[12] While this will sometimes mean that certain individuals cannot access services in the residential setting of their choosing, such limits are a common and routine aspect of State disability services, which are subject to conditions and limitations on how they are structured and funded.[13] Here, however, the DOH regulation does not govern or impact

[11] For example, as of 2017, 16 states and the District of Columbia had closed all of their publicly-owned residential institutions for persons with intellectual disabilities, and two states—Oregon and Michigan—additionally did not provide services to anyone in privately-operated Intermediate Care Facilities for persons with intellectual disabilities. Univ. of Minn., Residential Information Systems Project, *In-Home and Residential Long-Term Supports and Services for Persons with Intellectual or Developmental Disabilities: Status and Trends Through 2017* 55, 108 (June 2020), *available at:* https://ici-s.umn.edu/files/aCHyYaFjMi/risp_2017.

[12] For this reason, Petitioners' reliance on *United States v. Starrett City Associates*, 840 F.2d 1096 (2d Cir. 1988) (*see* Residents and Families Pet'rs' Mem. at 10-11; Empire Pet'rs' Mem. at 18-19) is misplaced. *Starrett City* invalidated leasing restrictions that were based on the race of applicants who otherwise qualified for rental housing. By contrast, the DOH regulation forms part of the State's licensing and regulatory scheme for long-term health care for people with disabilities. In administering this system of care, the State may regulate admission to long term care facilities to ensure that recipients of mental health care receive clinically appropriate care in appropriate settings. Indeed, HUD has recognized that the FHA does not prohibit the designation of housing (such as group homes) for individuals with particular disabilities, diagnoses, or conditions. *See* 24 C.F.R. § 100.202(c)(2)-(3).

[13] For example, federal Medicaid law prohibits States from paying for services provided

where housing for persons with disabilities may be located, but instead the types of services and settings the State determined it would provide.[14]

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. Just as the State could limit admission to facilities that were found to have dangerous living conditions or inadequate supervision and care without contravening the FHA, it may similarly ensure that mental health services are not being provided in congregate facilities that have been found by both the State and the district court in *DAI* to be segregated, in contravention of the State's obligations under the ADA and *Olmstead*, and therapeutically

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to individuals ages 21-65 in an "institution for mental diseases." 42 U.S.C. § 1396d(a)(B); *accord Va. Dep't of Med. Assistance Servs. v. U.S. Dep't of Health & Human Servs.*, 678 F.3d 918, 919-20 (D.C. Cir. 2012). These institutions have more than 16 beds and are "primarily engaged in providing diagnosis, treatment, or care of persons with mental diseases." 42 U.S.C. § 1396d(i).

[14] In this regard, the DOH regulation is different from spacing requirements that restrict the location of housing for persons with disabilities within residential communities, which often operate to prevent the establishment of small group homes necessary to facilitate implementation of *Olmstead*. Although such provisions may violate the FHA, HUD and the U.S. Department of Justice have also noted that "[s]ometimes compliance with the integration mandate of the ADA and *Olmstead* requires government agencies responsible for licensing or providing housing for persons with disabilities to consider the location of other group homes when determining what housing will best meet the needs of the person being served." Joint Statement of the Dep't of Hous. and Urban Dev. and the Dep't of Justice: State and Local Land Use Laws and Practices and the Application of the Fair Housing Act ("HUD/DOJ Joint Land Use Statement") 12 (Nov. 10, 2016), *available at:* https://www.justice.gov/opa/file/912366/download.

harmful. *See* HUD/DOJ Joint Land Use Statement at 13 (FHA permits states to adopt standards that are "reasonable, individualized, and specifically tailored to enable individuals with disabilities to live and interact with individuals without disabilities to the fullest extent possible."). And while Petitioner argues that certain individuals have benefitted from adult home placements, the DOH regulation does not ban all such admissions, but limits them to one-quarter of an adult home's population and also allows for individual waivers. Finally, it cannot be said that the DOH regulation—which presumes that most persons with serious mental illness are capable of being served in the community—is "based on blanket stereotypes" or negative perceptions of persons with disabilities. *See Bangerter*, 46 F.3d at 1503.

THE DOH REGULATION DOES NOT VIOLATE THE AMERICANS WITH DISABILITIES ACT

A. *Standard for Discrimination under the ADA*

The ADA prohibits states and local entities from discriminating against individuals with disabilities. 42 U.S.C. § 12132. One form of discrimination prohibited by the ADA is unnecessary segregation. *Olmstead*, 527 U.S. at 587. Accordingly, states must administer their services for people with disabilities in the most integrated setting appropriate to the needs of qualified persons with disabilities. *Id.*; 28 C.F.R. § 35.130(d). The most integrated setting is a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible. 28 C.F.R. Part 35, App. B, at 711 (2020).

B. The DOH Regulation Governs the Type of Settings in which to Provide Services to Individuals with Serious Mental Illness Consistent with the ADA

The DOH regulation advances the State's responsibility under the ADA to operate its system of mental health services in the most integrated setting appropriate to the needs of individuals with SMI. In 2009, the U.S. District Court for the Eastern District of New York

found that the State violated the ADA's integration mandate by relying on institutional adult homes, including the transitional adult homes, as settings in which to serve individuals with SMI. *DAI*, 653 F. Supp. 2d at 187. Under the subsequent consent decree between the parties, the State committed to remedy this discrimination by providing its mental health services to individuals with SMI in community-based settings, instead of institutional adult homes. The DOH regulation at issue reflects the State's decision not to provide its mental health services in settings that isolate individuals with SMI from their communities in violation of the ADA. As such, the regulation furthers the ADA's integration requirement.

The Petitioners argue that the DOH regulation is "antithetical to *Olmstead*" because it limits the ability of individuals with serious mental illness to receive services in the transitional adult homes. *See* Empire Pet'rs' Mem. at 18-19; Residents and Families Pet'rs' Mem. at 12-13. But *Olmstead* does not require states to maintain or offer institutional settings for the provision of services. For example, plaintiff-intervenors made similar arguments in *Richard C. v. Houstoun*, 196 F.R.D. 288, 291-292 (W.D. Pa. 1999). There, several Pennsylvania agencies and officials had entered into a settlement agreement under which they agreed to transition residents of a state institution from their facility into community-based treatment programs. *Id*. at 289-90. A group of facility residents and families sought intervention to stay the transition of residents, arguing that *Olmstead* precludes community placement unless (1) such placement is appropriate, (2) the affected persons do not oppose such placement, and (3) the placement can be reasonably accommodated. *Id*. at 292. The court rejected this interpretation. It correctly explained that the Supreme Court in *Olmstead* was considering the circumstances in which the ADA *requires* community placement of institutionalized persons with disabilities, and that it does not logically follow that the ADA requires institutionalization if any of the three *Olmstead* criteria are not met.

Id. Numerous other courts have agreed. *See Richard S. v. Dep't of Dev. Servs.*, No. SA CV 97-219-GLT(ANx), 2000 WL 35944246, at *3 (C.D. Cal. Mar. 27, 2000) ("It does not follow from Olmstead that . . . a premature discharge into the community is [] ADA discrimination based on disability. There is no ADA provision that providing community placement is [] discrimination.") (emphasis in original); *Ill. League of Advocates for Dev. Disabled v. Quinn*, No. 13-C-1300, 2013 WL 3168758, at *5 (N.D. Ill. June 20, 2013); *Sciarrillo v. Christie,* No. 13–03478, 2013 WL 6586569, *4 (D. N.J. 2013) ("This Court will therefore join the numerous other federal courts [that] 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."); *cf. Ricci v. Patrick*, 544 F.3d 8, 17-18 n.8, 21 (1st Cir. 2008) (recognizing a state's ability to close institutions, particularly when "allocating its resources to ensure equitable treatment of its citizens," and noting the ADA's preference for community integration under the *Olmstead* decision); *United States v. Tennessee*, 143 F. App'x 656, 661 n.3 (6th Cir. 2005) (acknowledging a state's ability to close an institution for individuals with intellectual disabilities).

Like the closure and downsizing of institutions in the above cases, the DOH regulation limiting admission of prospective residents to transitional adult homes does not violate the ADA or *Olmstead*. While states must provide services in integrated settings where the three *Olmstead* criteria are met, it does not follow that they must maintain or provide particular institutional settings where those criteria are not satisfied.

CONCLUSION

For the reasons stated above, the United States respectfully requests that the Court hold that the DOH regulation does not violate the Fair Housing Act or the Americans with Disabilities Act, consistent with the legal analysis set forth above.

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CERTIFICATE OF SERVICE

I hereby certify that, on May 31, 2022, I electronically filed the foregoing with the Clerk of the State of New York Supreme Court, County of Kings through the New York State Courts Electronic Filing system, which will send a notice of electronic filing to registered participants in the system.

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