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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF OCEANVIEW HOME FOR ADULTS,
INC.,

Appellant,

-against-

NO. 6

ZUCKER,

Respondent.

20 Eagle Street
Albany, New York
January 8, 2025

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE WILSON: Good afternoon. The first
2 case on today's calendar is Matter of Oceanview v. Zucker.
3 Counsel?

4 MR. HAWRYLCHAK: Thank you, Your Honor. May it
5 please the court. I'm Michael Hawrylchak of O'Connell and
6 Aronowitz, representing the appellant, Oceanview Manor, and
7 I would like to request three minutes for rebuttal.

8 CHIEF JUDGE WILSON: Yes.

9 MR. HAWRYLCHAK: The challenged regulations at
10 issue in this case expressly single out a class of persons
11 with disabilities and deny access to housing solely on the
12 basis of that disability. This is the exact sort of
13 invidious discrimination the Fair Housing Act was designed
14 to prohibit. And if these regulations applied to any other
15 protected class, the invalidity would be immediately
16 obvious. There's nothing in the Fair Housing Act that
17 justifies lesser protections - - -

18 JUDGE RIVERA: Yeah. But - - - but there is a
19 difference, is there not? Obviously, if - - - if the
20 regulations said you can't go above twenty-five percent of
21 female patients, that would harm the female patients. But
22 if indeed you have patients who are harmed by too many
23 people with particular needs that cannot be addressed by
24 the facility, there's some benefit to be gained by a cap
25 that is lifted once you get below the twenty-five percent;

1 is it not?

2 MR. HAWRYLCHAK: So I - - - I'd like to address
3 that in two different ways.

4 JUDGE RIVERA: Sure.

5 MR. HAWRYLCHAK: One as a matter - - - a legal
6 matter and one on - - - on the facts - - -

7 JUDGE RIVERA: Sure.

8 MR. HAWRYLCHAK: - - - in this case.

9 JUDGE RIVERA: Sure.

10 MR. HAWRYLCHAK: And as a matter of law, you
11 know, this - - - the - - - the state has argued, and the
12 court below, they - - - they held that the - - - under - -
13 - under kind of an exception for - - - for benign or
14 beneficial discrimination, discrimination that purportedly
15 benefits the class of - - - of people, that this could be
16 justified.

17 We have argued extensively in our - - - in our
18 papers that - - - that this supposed exception, which is
19 nowhere in the statutory text of the Fair Housing Act, is -
20 - - is - - - is not legitimate. And I would point
21 specifically to the Supreme Court's decision in the Bostock
22 case, which - - - which was a - - -

23 JUDGE RIVERA: Uh-huh.

24 MR. HAWRYLCHAK: - - - Title VII case about sex
25 discrimination. It was the - - -

1 JUDGE HALLIGAN: But - - - but Bostock didn't
2 involve two competing federal statutory mandates, right?

3 MR. HAWRYLCHAK: Well, yeah, that's - - -

4 JUDGE HALLIGAN: The question in Bostock was
5 simply, I think, what did the words in Title VII mean as
6 applied to a particular group?

7 MR. HAWRYLCHAK: Yes. And the - - - well, the -
8 - - the - - - and I'll come - - - come back to that - - - I
9 - - - at that point also. But the point I was making about
10 Bostock is there's a specific discussion in Bostock where
11 they say when we are looking at whether something is
12 discriminatory, what we care about is the - - - the impact
13 it has on a particular individual. Does it treat an
14 individual's - - -

15 JUDGE HALLIGAN: Understood, and I'm - - - I'm
16 just asking whether Bostock is - - - is - - - is as on
17 point as you're suggesting because, unlike Bostock, this
18 case concerns both the FHA mandate and the ADA mandate.

19 MR. HAWRYLCHAK: Right. So I - - - again, I
20 would respond to that on two different points, on a - - -
21 both as a factual matter and as a legal matter. And on - -
22 - first of all, the - - - you know, it's - - - the courts
23 have said repeatedly - - - the Supreme Court and other
24 federal courts - - - that when you're faced - - - when you
25 have two different federal statutes, that they - - - that

1 they - - - should be read harmoniously, read not to - - -
2 to - - - to be in conflict with each other. So if the - -
3 - the Fair Housing Act, which expressly prohibits
4 discrimination on the basis of mental illness, that unless
5 there is something in another federal statute that mandates
6 that sort of discrimination, it should not be interpreted
7 to require - - -

8 JUDGE HALLIGAN: Well, what about the integration
9 mandate that follows from Olmstead, and you know, as - - -
10 as the litigation - - - the related litigation starting
11 with DAI and then the O'Toole settlement suggests - - - I -
12 - - I think that - - - that there's some sense that the
13 percentage in these facilities is relevant to ADA
14 compliance, but maybe you have a different view.

15 MR. HAWRYLCHAK: So - - - yes. And I'd like to
16 also address that in two different ways. The first is that
17 as far as the - - - well, I'll - - - I'll start with the -
18 - - the - - - the federal settlement. The - - - well, let
19 me start with - - - Olmstead actions have been brought
20 against various types of living arrangements in states all
21 across the country.

22 JUDGE HALLIGAN: Uh-huh.

23 MR. HAWRYLCHAK: There was testimony from the
24 state's own expert at this trial that this is the only
25 instance where a state has tried to comply with its

1 Olmstead obligations through direct discrimination against
2 persons with mental illness, where every other state has
3 complied through increasing opportunities for those
4 persons, rather than a discriminatory bar on access to
5 certain housing.

6 Here, the O'Toole settlement put in place an in-
7 reach program where people that were already in these adult
8 homes - - - the targeted adult homes - - - were offered new
9 opportunities where they could choose, if they so chose, to
10 move out into a different opportunity. So it was expanding
11 options, which was - - - if you go back to the original
12 Olmstead decision, it was all about choice. The court was
13 very clear that this is about expanding choice, giving
14 options in other settings, but it was - - - it's not about
15 closing the door on anyone. The regulations we're
16 challenging here bar certain people from access to these
17 homes without providing anything in exchange for that.
18 They were given no new opportunity - - -

19 JUDGE CANNATARO: Well, counsel - - -

20 MR. HAWRYLCHAK: Yes?

21 JUDGE CANNATARO: - - - assuming you agree that
22 part of the ADA mandate is not to warehouse the mentally
23 ill in these types of facilities, how do you - - - since
24 you're the one who said the goal here is to harmonize the
25 two federal mandates - - - how would you harmonize it

1 differently than the way DOJ and DOH did in their
2 agreement?

3 MR. HAWRYLCHAK: Well, so what I would say is
4 that the - - - the in-reach program that was put in place
5 through the O'Toole settlement, where - - - where they - -
6 - they are giving these opportunities for people to move
7 out into other - - - other - - - these supportive housing
8 units, that we - - - that is - - - we have not challenged
9 that, and we think that's perfectly appropriate. That is
10 something that expands choice. It gives a choice to those
11 persons who are, you know, in these facilities with this
12 concentration of - - - of people with mental illness and is
13 giving them an additional option, an opportunity to move
14 out. And it's - - - it's the other piece of it that deals
15 with a different population, people who have never been in
16 these facilities and are looking for housing options, and
17 closes the door to them solely because of their mental
18 illness - - -

19 JUDGE HALLIGAN: But I think the settlement also
20 cites these regulations specifically, does it not? And
21 DOJ, you know, who is tasked with doing significant
22 enforcement, I think, not just under the ADA, but also does
23 housing discrimination and enforcement, seems to take the
24 view that the regulations are relevant and perhaps integral
25 to compliance with the Olmstead mandate here in the state.

1 MR. HAWRYLCHAK: So I - - - I would answer that
2 in several different ways. First of all, again, it is only
3 in New York where the Olmstead obligations - - - where the
4 - - - the - - - in the context of this O'Toole settlement,
5 where the state has try - - -

6 JUDGE HALLIGAN: So be that as it may - - -

7 MR. HAWRYLCHAK: Yeah. Okay. And - - -

8 JUDGE HALLIGAN: - - - there is - - - there is
9 that - - - that indication, I think.

10 MR. HAWRYLCHAK: And so then I would refer back
11 to the factual record in this case in the extensive - - -
12 the extensive fact finding by the trial court on - - - on
13 the issue and - - - and the - - - the question is, what
14 benefit is there to this class of people from being
15 excluded from the door being closed on them when they're
16 not being provided with anything else in return? And
17 again, the question is - - -

18 JUDGE RIVERA: So is that - - - is that really
19 what is the basis of the claim? If they had the other
20 options, it would be - - -

21 MR. HAWRYLCHAK: Well - - -

22 JUDGE RIVERA: - - - fine to have the regulation
23 in place?

24 MR. HAWRYLCHAK: No - - - so - - -

25 JUDGE RIVERA: As long as they could go

1 elsewhere. It still sounds like discrimination to me.

2 MR. HAWRYLCHAK: If - - - we agree completely
3 that it is discrimination.

4 JUDGE RIVERA: Uh-huh.

5 MR. HAWRYLCHAK: However, the state has justified
6 it under the claim - - -

7 JUDGE RIVERA: Uh-huh.

8 MR. HAWRYLCHAK: - - - that it is actually
9 benefiting this class of people. So if the claim is that
10 these people are being benefited, then you have to ask, is
11 there an actual benefit? If there is no actual benefit,
12 then there is - - - then they - - - they can't rely on this
13 supposed beneficial discrimination exception.

14 JUDGE GARCIA: Counsel, could you explain for me
15 simply, if possible, how do these regulations work?

16 MR. HAWRYLCHAK: Okay.

17 JUDGE GARCIA: How do they affect the facility?

18 MR. HAWRYLCHAK: So what happens is if any person
19 - - - when - - - when - - - when someone applies for
20 residence at one of these adult homes, they're - - - the
21 adult home is required to submit that person's identifying
22 information to the State Department of Health - - -

23 JUDGE GARCIA: Regardless of whether they're
24 getting any funding from the state.

25 MR. HAWRYLCHAK: Yeah - - - yes - - - yes.

1 JUDGE GARCIA: Okay.

2 MR. HAWRYLCHAK: Regardless. It's - - - it's - -
3 - they - - - they - - - any applicant, they have to submit
4 that applicant's identifying information to the Department
5 of Health. It's called the pre-clearance process. The
6 Department of Health, then, if the person has no mental ill
7 - - - no diagnosis of mental illness, they come back and
8 say, you are permitted to - - - to admit that person. If
9 they do, they come back and say, this person is prohibited
10 from admission. You have to turn them away. That is - - -

11 JUDGE GARCIA: And that - - -

12 MR. HAWRYLCHAK: - - - plain and simple. The way
13 it works.

14 JUDGE GARCIA: Again, that doesn't follow state
15 funding or federal funding at all, that mandate?

16 MR. HAWRYLCHAK: No, it's for - - - it's for any
17 - - - you know - - - the adult homes in these are - - -
18 are, you know, heavily regulated by the Department of
19 Health. And as part of the Department of Health
20 regulations that apply to them, any resident, if they - - -

21 JUDGE RIVERA: But just - - - just to clarify,
22 that's if it's above twenty-five percent already in the
23 facility - - -

24 MR. HAWRYLCHAK: If - - - if it is a transitional
25 adult home - - -



1 JUDGE RIVERA: - - - because there's a cap. It's
2 not that everyone. It's once you've hit that cap, correct?

3 MR. HAWRYLCHAK: Right. But - - - but the - - -

4 JUDGE RIVERA: And it is for the seriously
5 mentally ill, correct?

6 MR. HAWRYLCHAK: So I - - - I'd like to address
7 that as well because the - - - these - - - these - - -

8 JUDGE RIVERA: Well, on the first part you agree
9 with me. It's once you've hit the cap that then you cannot
10 - - -

11 MR. HAWRYLCHAK: Right. But - - - but - - - but
12 it - - -

13 JUDGE RIVERA: - - - accept more people.

14 MR. HAWRYLCHAK: - - - at the time when this went
15 into place, there were many of these facilities that were -
16 - - you know, they're - - - if the cap is twenty-five
17 percent, there are many facilities that are over that say
18 they have forty percent, fifty percent, whatever. It - - -

19 JUDGE RIVERA: Uh-huh.

20 MR. HAWRYLCHAK: - - - it serves as an absolute
21 bar to those facilities to introduce any other - - -

22 JUDGE RIVERA: Let me ask if you, if you were
23 already at forty percent, did it require the facility to
24 then remove people to send them elsewhere?

25 MR. HAWRYLCHAK: It required them to participate

1 in a process to give these people opportunities to get them
2 out of the house. They weren't - - - they were not
3 required to evict anyone or forcibly remove anyone, but
4 they were required to take efforts to - - - to facilitate
5 them.

6 JUDGE GARCIA: But when they get to twenty-five
7 percent - - -

8 MR. HAWRYLCHAK: Yeah.

9 JUDGE GARCIA: - - - then is it essentially a one
10 for one? So if you want to admit someone, you have to lose
11 someone.

12 MR. HAWRYLCHAK: So in theory - - -

13 JUDGE GARCIA: So you maintain a twenty-five
14 percent ratio - - -

15 MR. HAWRYLCHAK: - - - it's - - - this is this -
16 - - this gets a little complicated the way it plays out in
17 practice. But in theory, once a home is no longer a
18 transitional adult home. So if they lost - - - their
19 mental-health census declined enough to bring them out of
20 that category, then they wouldn't be covered by that, and
21 they would immediately come - - - but then as soon as they
22 admitted someone, they'd come right back into it and become
23 that. And there's a lot of bureaucratic, you know, things
24 that are involved in being designated as a transitional
25 adult home, new regulatory requirements and things that

1 come on. So this law has kind of an interim effect on
2 facilities that are near the threshold, where they are - -
3 - have a very, very strong disincentive not to admit people
4 that would put them over the twenty-five percent cap - - -

5 JUDGE RIVERA: So it functions as a twenty-five -
6 - - I know it's called twenty-five percent census - - - but
7 it functions at a twenty-five percent cap.

8 MR. HAWRYLCHAK: In theory, - - - yes. Yes,
9 eventually.

10 JUDGE SINGAS: So what - - - what standard are
11 you asking us to evaluate this claim under? Why shouldn't
12 we do what the 6th, 9th, and 10th circuits have done?

13 MR. HAWRYLCHAK: So first, I would - - - I would
14 contest that - - - that there is a consistent standard
15 that's been applied by the 6th, 9th, and 10th circuits.
16 And we've walked through that in our - - - our briefs, and
17 that they - - - they are not actually applying the same
18 standard. They're applying materially different standards.

19 But we would - - - we would say the best - - -
20 the - - - the court that most closely does what it - - -
21 that follows the - - - the actual statute is the 10th
22 Circuit's decision in the Bangerter case.

23 But what we would say is the court - - - you need
24 to give weight - - - give weight to the express preemption
25 provision in the law, which says that if a facility - - - a

1 housing provider - - - if a housing provider is prohibited
2 from doing something, the state cannot permit or require
3 them to do that. And if a housing provider cannot turn
4 someone away because they have a protected disability, the
5 state can't then require them to do that. It is right in
6 the law. There's a black and white, clear as day, the
7 state cannot require or permit something that is otherwise
8 prohibited. And - - -

9 JUDGE SINGAS: And if we disagree with you on
10 preemption?

11 MR. HAWRYLCHAK: So if you - - - if you disagree
12 on that, if you adopt something more like the state's view,
13 again, we - - - we - - - we make the extensive argument
14 that the - - - the beneficial discrimination exception that
15 they've relied on has no basis in the statute and is not -
16 - - is just - - - just plainly illegitimate.

17 But even if you accept that - - - that you're
18 going to apply that, the case law that has applied that in
19 other - - - in racial contexts, other things like that - -
20 - has said this is extremely narrow and has to be very
21 carefully applied, and they have expressly rejected any
22 sort of ceiling quota, which is what's at issue here.
23 That's been flatly rejected by the courts as a permissible
24 means of implementing that exception.

25 CHIEF JUDGE WILSON: Thank you.

1 MR. HAWRYLCHAK: All right. Thank you.

2 MR. MALONE: Good afternoon, Your Honors. May it
3 please the court. I'm Gary Malone, representing
4 Respondent, the New York State Department of health.

5 JUDGE HALLIGAN: Counsel - - -

6 MR. MALONE: Yes?

7 JUDGE HALLIGAN: - - - can I ask you, for
8 starters, about the standard? So, the cases in the federal
9 circuits. I'm not completely persuaded they're on point,
10 because they seem to me to involve circumstances where you
11 have an alleged FHA violation. And on the other hand, you
12 have some explanation for the conduct that is arguably
13 protective of the class that's at issue or benign or
14 whatever word we want to use to describe it. But here, by
15 comparison - - - so - - - so those are the zoning cases,
16 right? The SRO single sex case. Here, instead, we have
17 two different federal statutes. And I think the question
18 maybe is, unlike in those cases, how do we reconcile the
19 two federal statutes?

20 So why are those cases on point? And also, maybe
21 you can tell me what we do about the point that your
22 adversary makes about whether or not the first case and
23 then - - - and then, additionally, the others, by resting
24 in part on Weber, which I'm not sure, you know, how strong
25 a footing Weber still stands on, what to make of that.

1 MR. MALONE: Okay. Several points, Your Honor.
2 First, with respect to whether the - - - there's a benefit
3 here, I should - - -

4 JUDGE HALLIGAN: No, I'm asking what the right
5 standard is, not whether there's a benefit, but whether the
6 case - - - the federal circuit cases are actually on point
7 here, because here instead we have two different federal
8 statutes.

9 MR. MALONE: Oh, those federal cases, Your Honor,
10 are definitely on point. When you look at the standard - -
11 - and counsel is mistaken when he says that there's a split
12 between the 6th, the 9th, and the 10th circuits. They use
13 a slightly different verbiage, but essentially the
14 Appellate Division got it right when it said, when you boil
15 all those cases down, what they're essentially saying is,
16 is there a benefit to the protected class - - - right.

17 JUDGE HALLIGAN: But none of those cases - - -
18 unless I'm missing something - - - none of those cases, I
19 believe, involve a - - - a additional federal statute. And
20 - - - and so maybe the question - - - I don't know - - - is
21 - - - is not the standard that the federal circuits have
22 laid out in I think trying to figure out is this conduct
23 acceptable, even if it appears to violate the FHA for the
24 reasons that you're saying benefit, et cetera, but instead,
25 what do we do about making sense of the ADA Olmstead

1 mandate and the FHA mandate, and how do they - - - what's
2 the interplay between them?

3 MR. MALONE: Okay. That's an excellent question,
4 Your Honor. And the Department of Justice answered that
5 question in its statement of interest. The Department of
6 Justice, which enforces the Fair - - - the Fair - - - Fair
7 Housing Act and is one of the agencies, along with the
8 Department of Housing and Urban Development that enforces
9 the Fair Housing Act, and the Department of Justice is the
10 only agency that enforces the Americans with Disabilities
11 Act. And in fact, the Department of Justice is the
12 promulgator - - -

13 JUDGE HALLIGAN: Right.

14 MR. MALONE: - - - of the federal integration
15 mandate. In a statement of interest, the Department of
16 Justice discusses the interplay of those two statutes, and
17 it discusses whether or not there's any conflict. And the
18 Department of Justice is very clear here that there is no
19 conflict, and the Department of Justice, in its statement
20 of interest - - -

21 JUDGE HALLIGAN: That - - -

22 MR. MALONE: - - - cites policy statements that
23 it entered into with Housing and Urban Development - - -
24 yeah - - -

25 JUDGE HALLIGAN: And - - - and they also say, I

1 think - - - I think this is at 8721 in their statement - -
2 - they actually argue that this is in fact not
3 discrimination because it rests on a clinical
4 determination. And it seemed to me that that's not an
5 argument that you adopted, and I was curious why.

6 MR. MALONE: On - - - on the contrary, Your
7 Honor, we do adopt that argument. In our brief, we say
8 that the benefits here are essentially two-fold - - -

9 JUDGE HALLIGAN: I think, though, they're saying
10 we don't even have to get to that inquiry because it's not
11 discrimination that's cognizable under the FHA in any event
12 because it's a - - - a clinical determination about whether
13 the facility can provide therapeutically effective care at
14 that - - - above the percentage. But I didn't take you to
15 be advocating that, instead, just turning to the - - - the
16 question of whether it's permissible.

17 MR. MALONE: Well - - - well, we think that is
18 accurate. In the brief, we discussed the Appellate
19 Division decision, which takes the position that the
20 regulations are facially discriminatory, and we talk about
21 how that is supportable. But we do agree, because the
22 regulations here have a therapeutic purpose, it should not
23 even be considered discriminatory at all. And what we - -
24 -

25 JUDGE HALLIGAN: What - - -

1 MR. MALONE: I'm sorry.

2 JUDGE HALLIGAN: - - - so - - - so where in your
3 brief - - - maybe - - - maybe you can point me, where in
4 your brief do you argue that it's not - - - it's not
5 discrimination for purposes of the FHA? I might have
6 missed that.

7 MR. MALONE: Okay. Well, we - - -

8 JUDGE HALLIGAN: Not - - - not that it's
9 permissible, but that it's not even - - - you don't even
10 have to go through the FHA analysis.

11 MR. MALONE: Well, I - - - I believe in the very
12 first section of our brief, we say that this isn't
13 discrimination at all, because when you talk about
14 discrimination under the Fair Housing Act, you're talking
15 about discrimination against the protected class. And here
16 we have not a discrimination against the protected class,
17 we have differential treatment that benefits the protected
18 class. And - - -

19 JUDGE GARCIA: But is that true in all - - -

20 MR. MALONE: Yes.

21 JUDGE GARCIA: - - - cases? I mean, I thought at
22 the Supreme Court they had an example in that opinion,
23 extensive fact finding of someone or a relative of someone
24 who wanted to get into a facility and was turned away and
25 had to go to Dutchess County or something.

1 MR. MALONE: But - - -

2 JUDGE GARCIA: Does that benefit that particular
3 person?

4 MR. MALONE: Well, that person was turned away
5 from a segregated transitional adult home in which the
6 majority of people had been - - - what - - -

7 JUDGE GARCIA: So it's beneficial to that person,
8 they just don't know it.

9 MR. MALONE: Yes. Which occasionally does
10 happen, Your Honor. And he - - - the person was sent to a
11 different adult home that was not segregated, that was not
12 a transitional adult home, that the Office of Mental Health
13 has decided are not therapeutically helpful to people with
14 serious mental illness. And - - -

15 JUDGE GARCIA: So even a person in that position
16 who wants to go to a particular facility using private
17 funds knocks on the door, they can say, no, I'm sorry, you
18 have a serious mental illness, you can't come in. We have
19 twenty-five percent already. Thanks.

20 MR. MALONE: Yes, because, Your Honor, the
21 Department of Health here has to develop standards for a
22 heavily regulated industry, the adult homes. And when a -
23 - - when the adult homes are segregated, it's harmful to
24 the people actually in those adult homes that they're not
25 getting to have interactions with people who do not have

1 serious mental illness. That's the whole point of the
2 integration mandate. And Congress has a policy that says
3 it's better for people with serious mental illness, or
4 people with mental illness, to be able to interact with
5 people in the community. And to the extent that - - -

6 JUDGE GARCIA: And there's a very flexible - - -

7 MR. MALONE: Yes.

8 JUDGE GARCIA: - - - standard there. Right. And
9 I understand there's expertise at - - - at the state level
10 in - - - in assessing this. But there's much flexibility
11 in that mandate, as you call it. So when we get to a
12 review of what avenue the state has chosen to take, how do
13 we weigh in the potential violation of the FHA, or at least
14 - - - at least the facial discriminatory effect of the new
15 law?

16 MR. MALONE: Okay. Well, there is no violation
17 of the FHA, as the Department of Justice discusses in its
18 statement of interest, Your Honor - - -

19 JUDGE GARCIA: I understand - - -

20 MR. MALONE: Yes, correct.

21 JUDGE GARCIA: - - - the Department of Justice's
22 position. But I want to know, legally, your explanation on
23 the law of why - - - I - - - I'm thinking of Judge Rakoff's
24 opinion in the Southern District in Sierra - - -

25 MR. MALONE: Uh-huh.

1 JUDGE GARCIA: - - - where he's looking at a
2 similar thing, and he's saying least restrictive means.
3 Right. And that language comes from different things. But
4 if you're looking at a settlement to comply with a mandate,
5 approaching it as the least restrictive means so you don't
6 run potentially afoul of the FHA seems to make sense to me.

7 MR. MALONE: Well, most of the federal courts of
8 appeals that have considered this have not said that you
9 need to adopt the least restrictive means test; they say -
10 - -

11 JUDGE GARCIA: I understand.

12 MR. MALONE: - - - that it should be narrowly
13 tailored, which makes more sense because you're not
14 essentially asking the government then to prove a negative.

15 And what Olmstead said, Your Honor, is that you
16 should give deference to the considered medical judgments -
17 - - to the considered professional judgments of state
18 health officials. And Olmstead, in fact, actually said
19 sometimes that means you can't just go with - - - along
20 with an individual's choice because you're trying to have
21 broad regulations here.

22 In Olmstead, this court said a state could defend
23 its policies by showing that in the allocation of available
24 resources, immediate relief for certain plaintiffs would be
25 inequitable, given the responsibility the state has

1 undertaken for the care and treatment of a large and
2 diverse population - - -

3 JUDGE GARCIA: You see, I think some of the issue
4 we're having here - - - or I'm having - - - that is someone
5 goes to get a housing accommodation, they otherwise qualify
6 for this housing, they want to be in this housing, and they
7 are told, because of your characteristics, because you have
8 a serious mental illness, you can't come in. We have
9 enough. There's something fundamentally at odds with fair
10 housing approach in that scenario, isn't there?

11 MR. MALONE: No, Your Honor. And the Department
12 of Justice said that with the Fair Housing Act, one of the
13 main goals of it is integration of people with disabilities
14 into the community. And that's being served here by these
15 regulations because the - - - the federal case, Your Honor,
16 arise - - -

17 JUDGE GARCIA: Well, what if - - -

18 MR. MALONE: Yes.

19 JUDGE GARCIA: - - - the person could show that
20 that particular facility has a better medical support for
21 my particular condition than the one in Dutchess County?
22 So where is the weighing of more integrated setting with
23 medical need?

24 MR. MALONE: Well, first, Your Honor, that's not
25 in the record. There's no record - - - there's nothing - -

1 -

2 JUDGE GARCIA: It's a hypothetical.

3 MR. MALONE: Okay. It's a hypothetical. In that
4 hypothetical, Your Honor, it would depend upon the
5 circumstances. The Department of Health has a - - - not
6 just a waiver provision for people who are previous
7 residents of transitional adult homes, it also has a
8 general waiver provision that it can generally make
9 waivers. So if it really were the case that a person could
10 receive adequate medical care from one transitional adult
11 home and no place else, which is unlikely, but if the
12 person could show that, the person could ask the Department
13 of Health for a waiver - - -

14 JUDGE GARCIA: What if it was a support
15 situation, which is more similar to what is in the record,
16 I believe, where the family support, which this person
17 believed was critical to their well-being, was in Long
18 Island, let's say.

19 MR. MALONE: Uh-huh.

20 JUDGE GARCIA: And because of the twenty-five
21 percent rule, you're being placed in Dutchess. Could you
22 get a waiver for that?

23 MR. MALONE: Just on those circumstances,
24 probably not, Your Honor. But the problem here is that
25 when you're having a heavily regulated industry, such as

1 the adult home industry, and you want to have rules to
2 desegregate facilities that - - - in federal court, under
3 Judge Garaufis, there was a determination that there was
4 warehousing, that there was segregation. And that's why
5 the state then entered into a settlement agreement with the
6 Department of Justice and Disability Advocates, who were
7 arguing that the state needed to do this to prevent
8 warehousing and segregation of people - - -

9 JUDGE HALLIGAN: On - - - on that question - - -

10 JUDGE RIVERA: Can you clarify - - - can you
11 clarify - - - I'm sorry - - - can you clarify - - -

12 MR. MALONE: Yes.

13 JUDGE RIVERA: - - - what happens when a person
14 does go to - - - or seeks to live in one of these
15 facilities and they're told, I'm sorry, we're at the
16 twenty-five cap, we can't do that, or however they're told
17 they can't be admitted, what - - - what then happens?

18 MR. MALONE: Well, the person could - - -

19 JUDGE RIVERA: Because I think they argue that
20 sometimes they can become homeless. So I just want clarity
21 on what happens.

22 MR. MALONE: All right. Well, there's - - -
23 there's no support for that in your record - - - in the
24 record, Your Honor.

25 JUDGE RIVERA: Uh-huh.

1 MR. MALONE: The officials at the Department of
2 Health and the Office of Mental Health have not received
3 any reports that people are having difficulty finding
4 appropriate housing because of the regulations. And there
5 was evidence that there were vacancies in nontransitional
6 adult homes across the state. And so - - -

7 JUDGE TROUTMAN: So what - - -

8 MR. MALONE: I'm sorry.

9 JUDGE TROUTMAN: - - - efforts were undertaken to
10 make up for the fact that they can no longer go into those
11 transitional homes? Are there additional settings that are
12 created so that they could have those options?

13 MR. MALONE: Certainly, Your Honor. In fact, in
14 the record we show that there - - - there's been
15 substantial resources, many millions of dollars spent each
16 year, to increase the availability of supported housing.
17 And this - - -

18 JUDGE HALLIGAN: Can you tell us where in the
19 record specifically that is? It's a big record.

20 MR. MALONE: Yes, certainly, Your Honor.

21 JUDGE HALLIGAN: And - - - and while you're
22 looking, one other record question I have for you - - -

23 MR. MALONE: Yes.

24 JUDGE HALLIGAN: - - - you've made the argument a
25 couple of times, and you make the argument in your brief,



1 that the cap is necessary to further compliance with the
2 Olmstead mandate. And - - - and so I think that Mr.
3 Martone's testimony addresses that. If there's other
4 evidence in the record that supports the nexus between the
5 regulation and that goal, maybe you could point me to it.

6 MR. MALONE: Okay. And - - - well, with respect
7 to the - - - in the record, we discussed this at pages 15
8 to 16 of our brief, that there's been substantial resources
9 devoted to supported housing. And there's quite a few
10 record cites. It's - - - it's at the top of page 16 of our
11 brief. And - - -

12 JUDGE CANNATARO: So would you feel comfortable
13 making the representation that in this record, if we look
14 in the right place, that there are sufficient services
15 available for anyone who's turned away from a transitional
16 adult home? Somewhere, there's a place for them to go.

17 MR. MALONE: Yes, Your Honor. But - - -

18 JUDGE RIVERA: Okay. Can we get back to my
19 question? So my question was, what happens when someone
20 shows up, they can't be admitted into that home, what - - -
21 what happens, the - - - are there staff at the home who'll
22 help them find another placement, or do they call some DOH
23 representative. What - - - what happens?

24 MR. MALONE: It - - - it really depends on where
25 the person is - - -

1 JUDGE RIVERA: Okay.

2 MR. MALONE: - - - in the system, if the person's
3 in the system at all. The Office of Mental Health - - -

4 JUDGE RIVERA: Yes.

5 MR. MALONE: - - - has substantial staff dealing
6 with people with mental health issues that can help them.
7 And if it's - - -

8 JUDGE RIVERA: And then they would refer them?
9 Is that what you're saying? They would refer them - - -

10 MR. MALONE: They can do that, yes.

11 JUDGE RIVERA: - - - to an appropriate - - - what
12 - - - what DOH deems to be an - - - or Office of Mental
13 Health deems to be an appropriate living situation.

14 MR. MALONE: That can happen, yes - - -

15 JUDGE RIVERA: So they - - - they should - - -
16 they would not be referred to a shelter or told, we can't
17 find anything for you tonight, that kind of thing?

18 MR. MALONE: Well, it depend - - - it depends
19 upon a hypothetical whether or not they're - - - when they
20 called. But there's nothing in the record indicating that
21 that happens. As I indicated - - -

22 JUDGE SINGAS: Chief, can I ask one more?

23 CHIEF JUDGE WILSON: Of course. Yeah.

24 JUDGE SINGAS: What is your best argument for why
25 the state shouldn't be held to a less restrictive standard



1 here? I mean, I know you're saying narrowly tailored. I
2 don't really know how that's defined. To me, it seems like
3 if you have a reason for it and it's pretty rational, then
4 it's good enough. But why shouldn't the state be held to a
5 standard like Sierra?

6 MR. MALONE: Well, Your Honor, we would say that
7 the state actually does meet the Sierra standard. But the
8 problem with the Sierra standard, Your Honor, is it's too
9 restrictive because it essentially requires, then, the
10 state to prove a negative.

11 And we showed at the trial that there's really no
12 - - - no alternative that would serve these goals in a more
13 narrow way. The trial court said, well, why don't you
14 have, like, individualized assessments and do this on an
15 individual by individual basis? But we - - - as a
16 Department of Health official testified, if you do that,
17 then you're not going to reduce the number of people with
18 serious mental illness in these facilities, because then
19 you're essentially - - - it's no standard at all.

20 And the - - - with respect to Your Honor's
21 question regarding the twenty-five percent cap, we'll point
22 out that other federal policies, such as the Frank Melville
23 program, which we cite in our brief, has a twenty-five
24 percent cap - - -

25 JUDGE HALLIGAN: Uh-huh.



1 MR. MALONE: - - - saying that in order to get
2 federal funding, you have to have no more than twenty-five
3 percent - - -

4 JUDGE HALLIGAN: And I know your light's on, but
5 if I could just ask one last question.

6 MR. MALONE: Yes.

7 JUDGE HALLIGAN: I'm - - - I'm just curious if
8 the record happens to reflect. I think generally the
9 Attorney General's office represents the commissioner.
10 Does it - - - is there anything in the record about why
11 that's not so here?

12 MR. MALONE: I don't think there's anything in
13 the record on that, Your Honor. We were - - -

14 JUDGE HALLIGAN: Okay. Thanks.

15 MR. MALONE: Okay. Okay. And just - - - just
16 very quickly, Your Honor, with respect to the twenty-five
17 percent cap, I'll also point out that the Department of
18 Justice and Disability Advocates, when they originally
19 brought the case against the state, claimed that facilities
20 that had more than twenty-five percent were not in
21 compliance - - - compliance with the federal Olmstead
22 mandate.

23 CHIEF JUDGE WILSON: Thank you.

24 MR. MALONE: Thank you, Your Honor.

25 MR. HAWRYLCHAK: In my limited time, I'd like to

1 try and address a few different things. First, and most
2 importantly, the facts matter. This was a trial with
3 eighteen days of testimony and an eighty-one page opinion
4 with detailed and extensive fact finding. And among other
5 things, the trial court found that there was - - - the
6 state could show no benefit to any person who was excluded
7 from admission. They could not point to a single person
8 excluded from admission who then ended up in what the state
9 would consider to be a better environment. And on the
10 contrary, there was direct evidence of harm to at least
11 some persons who were excluded.

12 Now, the question was asked, what happens to
13 someone who is excluded? When someone comes, they apply
14 for admission, and they're excluded because of their mental
15 illness. The state's own representatives testified at
16 trial nothing happens. The state does nothing. They do
17 not track these people. They do not offer any services to
18 them. They provide nothing to those people. They are
19 turned away. That is what happens from the state's
20 perspective.

21 The argument was made that there's no evidence in
22 the record that some people end up homeless as a result of
23 this. That is not true. In the record, there was
24 testimony from a discharge facilitator from a nursing home
25 who testified that when someone is getting rehabilitation

1 and a - - - they are ineligible for placement in a assisted
2 living bed in a transitional adult home due to their mental
3 illness, that they will often be discharged back to a
4 homeless shelter. So some people, the alternative is
5 between a transitional adult home and a homeless shelter,
6 and that is in the record.

7 I'd also like the court not to lose fact - - - or
8 lose sight of the assisted living programs, the ALP beds
9 that represent the primary population served by most of
10 these transitional adult homes, including Oceanview Manor.
11 And these are people who need a nursing home level of care.
12 Under the statute, they have to be eligible for a nursing
13 home level of care in order to be in these ALP beds, which
14 are the majority of the residents of most of these - - -
15 these homes. These are people who have very limited
16 options. And if - - - if they are not allowed into the
17 adult home, it may be that a nursing home is their only
18 viable option, which is a more restrictive setting, a
19 setting where they can't come and go as they please, where
20 they're in a locked down facility. So then I'd like to
21 very - - -

22 JUDGE RIVERA: Did - - - did the Appellate
23 Division make different - - - make different factual
24 determinations than the trial court?

25 MR. HAWRYLCHAK: The - - - the Appellate Division

1 asserted multiple times in the - - - it referred to the
2 benefit to these individuals of being in smaller, more
3 integrated settings. But the trial court said there's no
4 evidence that anyone is actually - - -

5 JUDGE RIVERA: Well, what - - - what about the
6 Appellate Division's summary of the trial experts?

7 MR. HAWRYLCHAK: What - - -

8 JUDGE RIVERA: The trial experts and its own
9 reading - - - the Appellate Division's own conclusions
10 based on that testimony - - -

11 MR. HAWRYLCHAK: It was - - - so it - - - it - -
12 - it's a - - - that the - - -

13 JUDGE RIVERA: Is that a different fact finding?

14 MR. HAWRYLCHAK: Well, it said that the experts -
15 - - well, they characterized the experts as saying that - -
16 - that people were better off in these smaller, more
17 integrated settings. But the - - - the - - - the important
18 findings are that people are not ending up in those
19 smaller, more integrated settings. The people are ending
20 in homeless shelter - - - shelters. They're ending up in
21 nursing homes. There's no effort to get these people who
22 are excluded at the front door - - - to get these people
23 into those supportive housing environments. So any claim
24 that - - - that that benefit justifies this regulation is -
25 - - is - - - is undone by the fact that that benefit



1 doesn't exist. And the trial court made extensive findings
2 that the state had failed to put on any evidence - - -

3 JUDGE RIVERA: But is that a - - - is that a
4 challenge to the - - - the propriety - - - the lawfulness
5 of the regulation, or the implementation may miss a step
6 here and there, and individuals have other administrative
7 and perhaps judicial recourse to address when - - - when
8 the administration fails.

9 MR. HAWRYLCHAK: There - - - I mean, there is no
10 other means of recourse. The - - - the regulation flatly
11 requires that these people be excluded if they meet those
12 criteria, so - - -

13 JUDGE RIVERA: No, I'm not talking about that
14 part. I'm talking about your argument that - - - that
15 they're excluded and then they're - - - they're left
16 hanging. They have no place to go.

17 MR. HAWRYLCHAK: And the - - -

18 JUDGE RIVERA: He says that's not what happens.

19 MR. HAWRYLCHAK: We'll, there's - - - there's - -
20 -

21 JUDGE RIVERA: You say that is what happens. So
22 my question is - - -

23 MR. HAWRYLCHAK: - - - there's - - - there's - -
24 -

25 JUDGE RIVERA: - - - is that really - - - excuse

1 me - - - is that really about the regulation or about the
2 implementation of the regulation which can be addressed
3 through some other kind of individual based challenge?

4 MR. HAWRYLCHAK: If the state had implemented
5 some other program where they were somehow, you know,
6 tracking these people or providing, you know, some other
7 opportunity so that the people were not being turned away,
8 then maybe there would be a different set of facts that
9 would have affected, you know, the - - - the what - - -
10 whether there's any benefit or whatever, but - - -

11 JUDGE RIVERA: Well, it's not about not being
12 turned away. My question was not about that. And it was
13 not about what you had said before - - - related to that.
14 My question is, when you hit the cap in one of these
15 facilities and they cannot admit them, their argument is,
16 but then DOH and the Office of Mental Health addresses that
17 by ensuring that they have an appropriate placement.

18 MR. HAWRYLCHAK: I - - - I - - - I don't know
19 where they're getting from - - -

20 JUDGE RIVERA: And you say that's not true.

21 MR. HAWRYLCHAK: That's not in the record, and
22 it's not true as a matter of fact on the ground that - - -

23 JUDGE RIVERA: Okay.

24 MR. HAWRYLCHAK: - - - somehow people - - - when
25 a facility is over twenty-five percent - - -

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JUDGE RIVERA: Okay.

MR. HAWRYLCHAK: - - - that people who want to get admitted there are getting some other - - - some other offerings.

JUDGE RIVERA: Okay.

CHIEF JUDGE WILSON: Is there anything in the record that shows the fraction of beds that are in homes that are not subject to the twenty-five percent cap because they are under the eighty bed threshold?

MR. HAWRYLCHAK: I - - - I - - - I do not know that there's anything in the trial record that directly goes to that. You know, there was some discussion, I know, of the geographic distribution, and most of the transitional homes are concentrated in New York City, and many of the nontransitional are in upstate and other areas of the state, but I - - - I don't know that there's any statistics that would go to that question in the record.

CHIEF JUDGE WILSON: Thank you.

MR. HAWRYLCHAK: All right. Thank you.

(Court is adjourned)

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C E R T I F I C A T I O N

I, Christian C. Amis, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Oceanview Home for Adults, Inc. v. Zucker, No. 6 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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