

To be Argued by:
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Appellate Division—Third Department Case No. CV-23-2341

Court of Appeals
of the
State of New York

In the Matter of the Application of

LAWYERS FOR CHILDREN, THE LEGAL AID SOCIETY
and LEGAL AID BUREAU OF BUFFALO, INC.,

Petitioners-Appellants,

— against —

NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES and
SHEILA J. POOLE, in her official capacity as Commissioner of
New York State Office of Children and Family Services,

Respondents-Respondents.

REPLY BRIEF FOR PETITIONERS-APPELLANTS

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PRELIMINARY STATEMENT

In announcing Host Homes, Respondents trumpeted the program as a “bold, new initiative” that “will support families without involving the child welfare system.”¹ Respondents boasted to the trial court that Host Homes would “transform and modernize New York State’s child welfare system” by creating an entirely new system for out-of-home care by strangers “without invasive and unnecessary engagement of the child welfare and court systems.” (R. 1407; 1410). And in its order dismissing this Article 78 action, the trial court, in turn, concluded that “[b]y allowing parents the option to circumvent foster care placement . . . this ultimately reduces the burden on the foster care system.” (R. 10).

Tellingly, Respondents do not now address, much less defend, that portion of the trial court’s decision or refer to their earlier statements touting the transformational nature of the new program. Instead, embracing a “nothing to see here” appellate strategy, they attempt to recast the Host Homes program as simply an extension of existing child welfare policy, “merely ‘fill[ing] in the details’ of the temporary placement regime” while “break[ing] no new ground.” (Resp’ts’ Br. 62, 63). The Host Homes program, however, flies in the face of the detailed statutory

¹ *The New York State Office of Children and Family Services Announces Adoption of Host Family Home Regulations*, OFF. OF CHILD. & FAM. SERVS. (Dec. 13, 2021), <https://ocfs.ny.gov/main/news/article.php?idx=2314>.

framework enacted by the Legislature designed to promote the care and protection of children who are voluntarily placed into out-of-home care overseen and regulated by Respondents. In promulgating the Host Homes Regulations, Respondents exceeded their administrative authority and improperly substituted their own policy preferences for those of the Legislature. Accordingly, the Regulations should be vacated.

Standing

In 2023, the Appellate Division reversed the trial court's dismissal of this case for lack of standing and remanded the action for further proceedings. *Laws. for Child. v. N.Y. State Off. of Child & Fam. Servs.*, 218 A.D.3d 913 (3d Dep't 2023). Respondents did not raise the issue again until now in opposition to this appeal.

The Appellate Division's finding that Appellants have standing to challenge the Host Homes Regulations should be affirmed. Appellants have demonstrated direct injury within the zone of interest protected by the relevant statutes because children they represent in voluntary foster care proceedings, under contractual obligation where appointment of counsel is statutorily mandated, would be diverted to the Host Homes program where no counsel would be appointed. Respondents argue that the harm is speculative. No diversion of Appellants' clients has taken place, however, because the program has not been implemented. Indeed, the entire objective of this litigation is to stop that implementation before a child is lost to the

Host Homes program with no legal recourse. Finding otherwise would impose an impossible burden on Appellants of demonstrating actual diversion before the program has even launched—an unattainably higher standard than that required by well-established law.

Appellants also have demonstrated third-party standing because the children at issue would otherwise face an “impenetrable barrier” to obtaining relief. Children placed in Host Homes would lose statutory protections under existing law governing voluntary placements into foster care, including the right to judicial oversight and independent counsel, without any means to challenge the State’s failure to meet its obligations under the law. If Appellants are denied standing, the Host Homes Regulations—which are unlawful for the reasons explained below—would be insulated from judicial review. That too would be contrary to well-established law.

The Merits

The New York State Legislature has enacted statutes to provide an array of critical support and protection for families when parents are unable to care for their children and need to place them temporarily in the homes of strangers. These safeguards include judicial oversight (for placements expected to last more than 30 days), a right to counsel for children and parents, prioritizing placement with kin, restrictions on out-of-state placements, and mandated services designed to prevent family separation and expedite reunification. Through the Host Homes program,

OCFS has created, without statutory authority, a parallel State-run system of voluntary placement of children with strangers that bypasses these statutorily mandated safeguards.

Respondents acknowledge the statutory safeguards provided in voluntary foster-care placements but argue that they do not apply to the Host Homes program because parents participating in Host Homes place their children directly with the host family, rather than with the authorized agency. However, Host Homes is a *State-run* child placement system, in which State-authorized agencies, not parents, identify, vet, and oversee the homes according to OCFS regulations and under OCFS oversight. The safeguards put in place by the Legislature as part of the voluntary foster care system are intended to ensure that children are placed out of their homes only when absolutely necessary, that they are placed with relatives or close family friends when placement is unavoidable, that services are provided to the child and parent to ensure that the child is returned as quickly as possible, that the child's educational and medical needs are met, and that when the child is not able to return home to the parent, another plan is made to ensure that the child has a safe and permanent place to live. The Host Homes program contains none of those safeguards. In sum, Respondents dedicate their brief to the purported value of providing *parents* with another placement program. That option, however, comes at

the expense of hard-fought, critical protections for children and is irreconcilable with the existing statutory framework governing voluntary placements.

Respondents also incorrectly claim that Host Homes is distinct from the voluntary placement statutory framework because parents who temporarily place their children with Host Homes do not relinquish legal custody of their children, unlike parents who voluntarily place their children in foster care. That distinction is baseless. In fact, parents retain greater custodial rights under voluntary placements than they do under Host Homes. Determining whether OCFS's program is a legitimate exercise of authority does not rest on the extent to which parents cede or retain decision-making authority. It is undisputed that both the statutory scheme for voluntary placements and the Host Homes program attempt to address the *same* problem of supporting families in crisis who need temporary help. Under well-established law, OCFS's attempt to substitute its own policy judgment for that of the Legislature with respect to how that problem should be addressed is entirely inappropriate.

Respondents search far and wide to find a statutory basis for the Host Homes program. The general statutory provisions Respondents cite, however, do not empower OCFS to create, through regulation, a voluntary foster care system by another name with less oversight than the foster-care statutes themselves demand. In a further attempt to justify their clear administrative overreach, Respondents seek

to characterize Host Homes as a form of “respite care” and, although they now acknowledge that Host Homes is *not* a “preventive service,” they still describe it as “consistent with the policy underlying that provision of law.” (Resp’ts’ Br. 57 n.6). In fact, under Host Homes, Respondents would evade their legal obligation to provide preventive services to children and parents, undermining the clear mandate of New York law. Nor does the Host Homes program meet the required standards for a respite program, which is limited to short-term immediate relief. Respondents seek to paint Host Homes as an attempt to address an unmet need when, in fact, the Legislature has directly addressed that need through a detailed statutory scheme. Short-term emergencies are addressed through respite care while longer-term needs are addressed through the voluntary placement system. A new regulatory system that disregards statutory safeguards and limitations is nowhere authorized.

Here, OCFS acted without legislative authority or guidance; it wrote on a “clean slate” and substituted its own policy judgments for that of the Legislature; and the Regulations are out of harmony and indeed in conflict with an existing statutory scheme. Accordingly, the lower court’s decision should be reversed and this Court should enter an order annulling the Host Homes Regulations in their entirety as an abuse of discretion, unlawful, and arbitrary and capricious.

ARGUMENT

I. The Appellate Division Correctly Found That Appellants Have Standing.

To demonstrate standing, “a party must show that the in-fact injury of which it complains (its aggrievement, or the adverse effect upon it) falls within the ‘zone of interests,’ or concerns, sought to be promoted or protected by the statutory provision under which the agency has acted.” *Soc’y of Plastics Indus., Inc. v. Cnty. of Suffolk*, 77 N.Y.2d 761, 773 (1991) (citation omitted). For the party to have an “actual legal stake in the matter being adjudicated,” the alleged injury cannot be “tenuous, ephemeral, or conjectural,” but rather must be “sufficiently concrete and particularized to warrant judicial intervention.” *Common Cause N.Y. v. Kosinski*, 241 A.D.3d 1036, 1038 (3d Dep’t 2025) (citation omitted). At the same time, there is no “requirement that the harm necessary to confer standing be actual and in the present.” *Police Benevolent Ass’n of N.Y. State Troopers, Inc. v. Div. of N.Y. State Police*, 29 A.D.3d 68, 70 (3d Dep’t 2006). Rather, the harm can be “potential and in the future as long as it is reasonably certain that the harm will occur if the challenged action is permitted to continue.” *Id.*; see also *N.Y. State Ass’n of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 214 (2004) (“standing requires a showing of ‘cognizable harm,’ meaning that an individual member of plaintiff organizations ‘has been *or will be* injured’” (emphasis added)).

In reversing the trial court’s dismissal of this action for lack of standing, the Appellate Division found that Appellants “sufficiently alleged an injury in fact that is not merely conjectural, as implementation of the program would, in essence, place children outside their home without the right to legal representation to which they would be entitled by Social Services Law 358-a and that petitioners have a contractual obligation to provide.” *Laws. for Child.*, 218 A.D.3d at 915. The Court further found that “this injury falls squarely within the zone of interests sought to be protected by the Social Services Law.” *Id.* at 915-16. The Appellate Division’s decision on the issue of standing should be affirmed.

A. Appellants Have Established an Injury-in-Fact.

Appellants have suffered an injury-in-fact as a result of the Host Homes Regulations, which undermine Appellants’ critically important organizational mission and purpose to represent children in voluntary placement proceedings specifically and children in foster care proceedings generally. Appellants train their attorneys and staff to represent these children to ensure that their voices are heard throughout the proceedings, that their needs are met in safe and appropriate placements, and that their expeditious return to their parents is pursued, or if that is not possible, that another plan for permanency is implemented. (R. 91-92 at ¶¶ 6–7; R. 97-99 at ¶¶ 4–10; R. 113 at ¶ 5). Moreover, Appellants are appointed as counsel to fulfill statutorily mandated representation in these cases pursuant to contracts with

the Office of Court Administration (OCA). (R. 98, 102-03 at ¶¶ 5, 24–27; R. 113-14 at ¶¶ 4–8; R. 92, 93-94 at ¶¶ 8, 12–14).

Under the Host Homes Regulations, however, Appellants’ clients would be diverted and denied legislatively mandated representation. (R. 27-28 at ¶¶ 24–26; R. 92, 94-95 at ¶¶ 8, 14–15; R. 100-02 at ¶¶ 14-23; R. 117-21 at ¶¶ 16–28). As explained in Appellants’ opening brief, a placement into the Host Homes program is the functional equivalent of a voluntary placement into foster care, but is extrajudicial, without any of the safeguards under existing law governing voluntary placements, including the appointment of counsel. The Host Homes Regulations deny children much needed protections, “including, but not limited to: the right to have the separation from their parents reviewed by Family Court; the right to services promoting reunification with their parents; the right to visit with their parents, siblings, and other family members; and the right to educational stability.” (R. 1388 at ¶ 29). Accordingly, Appellants will have no ability to represent or even identify those children diverted by OCFS into its shadow foster care system.

Respondents argue that the harm here is speculative. (Resp’ts’ Br. 26-31). Appellants, in fact, met the applicable legal standard by demonstrating with reasonable certainty that the Host Homes Regulations, if implemented, would lead to a reduction in statutorily mandated representations. *Police Benevolent Ass’n*, 29 A.D.3d at 70. Respondents concede that the whole point of the Host Homes

Regulations is to divert families away from voluntary placements under the current statutory scheme where children are appointed counsel. Indeed, in March 2020, one of the proponents of the Regulations from an out-of-state organization specifically asked OCFS whether parents use voluntary foster care placements for “respite.” The OCFS official responded, “Yes parents do use them, but why should they have to.” (R. 30 at ¶ 33; R. 739). Thus, by Respondents’ own admission, the Regulations at issue are specifically intended to bypass existing law governing voluntary placements, including the right to appointment of counsel. Accordingly, there is nothing speculative about the injury to Appellants—who will no longer be able to fulfill that right to counsel—should these Regulations go forward. Appellants will never have the opportunity to represent the children placed in Host Homes because there is *no* reasonable possibility that the children subject to Host Homes placements would somehow be able to consult with Appellants or engage Appellants to represent them.

Respondents further argue that this injury is speculative because Appellants “remain free to represent children” within the existing foster care system. (Resp’ts’ Br. 27). That does not, however, negate the injury that Appellants will suffer through the diversion of clients from voluntary placements under the existing statutory framework into the Host Homes program. While an asserted injury may not be speculative, it is well-established that—contrary to what Respondents are

demanding here—“it need not be stated with specific quantification.” *N.Y. Propane Gas Ass’n v. N.Y. State Dep’t of State*, 17 A.D.3d 915, 916 (3d Dep’t 2005). As one court noted: “[I]n cases such as this, where parties seeking to challenge administrative rulemaking are subject to the relatively short statute of limitations set forth in CPLR 217, the precise particulars of the asserted injury may not be ascertainable.” *Id.*

The alleged injury here to Appellants’ organizational missions and their contractual obligation to represent children—where the appointment of counsel is statutorily mandated—is sufficient to confer standing. *See, e.g., Mahoney v. Pataki*, 98 N.Y.2d 45, 51–52 (2002) (attorneys have standing to challenge agency interpretation of fee statute eliminating compensation for non-lawyer defense team members); *Agencies for Child.’s Therapy Servs., Inc. v. N.Y. State Dep’t of Health*, No. 15763/12, 2013 N.Y. Misc. LEXIS 1222, at *5-6 (Sup. Ct. Nassau Cnty. Feb. 4, 2013) (complaint satisfies injury requirement where it alleges “lost opportunities” and “the inability to service children”); *N.Y. Cnty. Laws.’ Ass’n v. Bloomberg*, 30 Misc. 3d 161, 165-66 (Sup. Ct. N.Y. Cnty. 2010) (injury-in-fact adequately alleged in challenge to rule regarding appointment of counsel where plaintiff argued rule “may substantially affect” its ability “to be appointed as conflict counsel and to represent indigent criminal defendants”).

Respondents' reliance on *Roulan v. County of Onondaga*, 21 N.Y.3d 902, 905 (2013), is misplaced. The plaintiff in that case challenged the process for appointment of lawyers in certain criminal proceedings, but his injury was considered speculative because he could not cite an example of a "case in which he was assigned" and had to withdraw or a case where he "unsuccessfully sought to be assigned." *Id.* In contrast, as explained above, the Host Homes program, *by design*, was created to bypass existing law governing voluntary placements, including the right to counsel. Moreover, *Roulan* involved a motion for summary judgment where the program at issue had already been implemented. Here, the Regulations have *not* been implemented. Requiring Appellants to prove an actual reduction of clients would impose on Appellants a higher—indeed, unattainable—standard than that required by the law governing standing.

B. Appellants Fall Within the Zone of Interest.

To have standing, an injured party's interests must be more than "'marginally related' to the purposes of the statute in question." *Mahoney*, 98 N.Y.2d at 52 (citation omitted). As this Court explained, "while the universe of potential plaintiffs must be circumscribed in order to avoid misuse of legal challenges to administrative actions, we must preserve access to the courts for those who have been wrongly injured by administrative action . . . directly flowing from statutory authority." *Id.*; *see also Dairylea Coop., Inc. v. Walkley*, 38 N.Y.2d 6, 9 (1975) (petitioner must

show “that the interest asserted is arguably within the zone of interest to be protected”).

In *Mahoney*, the Court held that defense attorneys were within the zone of interest created by the law governing representation of capital defendants. 98 N.Y.2d at 52. Likewise, Appellants here are within the zone of interest created by the Social Services Law (“SSL”) and Family Court Act (“FCA”), which govern voluntary placements, including the appointment of counsel. As in *Mahoney*, Appellants are attorneys who provide the services necessary to exercise a right created by statute. They are, as such, within the zone of interest created by that statute. *See, e.g., Dental Soc’y of State of N.Y. v. Carey*, 61 N.Y.2d 330, 334-35 (1984) (association of dentists within the zone of interest of the Social Services laws in dispute over reimbursements); *Oil Heat Inst. of Upstate N.Y. v. Pub. Serv. Comm’n*, 90 A.D.2d 942, 943 (3d Dep’t 1982) (“It cannot be gainsaid that petitioners have passed the ‘zone of interest test’ for they have sufficiently demonstrated that the administrative action will in fact have a harmful effect upon them and that their interest is, at least, arguably within the zone of interest to be protected by the statute.”).

C. Appellants Have Third-Party Standing.

Although not reached by the Appellate Division, Appellants also have third-party standing. This Court has recognized standing where “the failure to accord such

standing would be in effect to erect an impenetrable barrier to any judicial scrutiny of legislative action.” *Boryszewski v. Brydges*, 37 N.Y.2d 361, 364 (1975). Moreover, this Court has applied the doctrine to challenges to administrative action, explaining “that standing rules ‘should not be heavy-handed’ Rather, we have been reluctant to apply these principles in an overly restrictive manner where the result would be to completely shield a particular action from judicial review.” *Ass’n for Better Long Island, Inc. v. N.Y. State Dep’t of Env’t Conservation*, 23 N.Y.3d 1, 6 (2014) (quoting *Sun-Brite Car Wash, Inc. v. Bd. of Zoning & Appeals*, 69 N.Y.2d 406, 413 (1987)); see also *Saratoga Cnty. Chamber of Com., Inc. v. Pataki*, 100 N.Y.2d 801, 814 (2003) (“Were we to agree with the State and deny standing . . . in this action, an important constitutional issue would be effectively insulated from judicial review, something we cautioned against”); *Town of Waterford v. N.Y. State Dep’t of Env’t Conservation*, 187 A.D.3d 1437, 1440 (3d Dep’t 2020) (“Standing rules are not to be applied in a manner so restrictive that agency actions are insulated from judicial review.”).

Accordingly, New York courts have recognized that organizations have standing when, as in this case, they “represent individuals who are unable to seek a judicial remedy on their own behalf.” *Mixon v. Grinker*, 157 A.D.2d 423, 427 (1st Dep’t 1990). In *Grant v. Cuomo*, 130 A.D.2d 154 (1st Dep’t 1987), *aff’d*, 73 N.Y.2d 820 (1988), the Court held that organizations devoted to the care and protection of

children had standing on behalf of those children to sue government agencies for violating their obligation to provide protective and preventive services. The Court explained:

[W]e cannot ignore the obvious fact that if organizations of this kind are denied standing, the practical effect would be to exempt from judicial review the failure of the defendants . . . to comply with their statutory obligations. Manifestly, the abused children are not themselves able to seek a judicial remedy, nor is it likely that parents or caretakers, the objects of the claims of abuse or maltreatment, would undertake to secure a remedy. Given the obvious reality that the protection of abused or maltreated children is a central concern of our society, and given the historic relationship of organizations concerned with the care and protection of children to the goals sought to be achieved by the relevant statute, we are persuaded that Special Term was justified in denying the motion to dismiss as to the organizational plaintiffs.

Id. at 159; *see also Grinker*, 157 A.D.2d at 427–28 (Coalition for the Homeless had standing in a representative capacity to sue New York City over homeless policy); *N.Y. Cnty. Laws.’ Ass’n v. State*, 294 A.D.2d 69, 76 (1st Dep’t 2002) (Lawyers’ Association had standing to challenge system for compensating appointed counsel where “it is readily apparent” that indigent children and adults “are not in a position to protect their own rights.”).²

² Respondents rely on *Kowalski v. Tesmer*, 543 U.S. 125 (2004), where the United States Supreme Court applied a different standard in addressing third-party standing. In any event, in that case, unlike here, the Court specifically found that there was no “hindrance” to the indigent adult defendants at issue advancing their own rights. *Id.* at 126.

Denying Appellants standing would have the effect of creating an impenetrable barrier for the children at issue to seek judicial review of the Host Homes Regulations and the Respondents' failure to comply with their statutory obligations. Because the parties whose rights are at stake are children with parents who are unable to care for them and because there is no provision for the appointment of counsel on their behalf now or at any point during the Host Homes out-of-home placement, the impacted children are effectively denied any legal recourse to challenge the Regulations themselves and are, therefore, not able to seek a judicial remedy of any kind. Indeed, it is impossible now to identify which children will be subject to Host Homes arrangements, none of whom will be able to benefit from the appointment of counsel or any of the other safeguards mandated by law.

Respondents appear to concede that if the Appellate Division's decision were overturned, no party would have standing to bring an Article 78 action to challenge the Host Homes Regulations before they become effective. Respondents argue instead that down the road "a noncustodial parent" or "guardian" could challenge the Regulations. (Resp'ts' Br. 35). This argument—that the children at issue have sufficient legal recourse through family and friends—fails for three main reasons.

First, the argument is flatly contradicted by Respondents themselves, who explain in their papers that the Host Homes Regulations are intended for parents who do not "have the social support network needed to temporarily place their child in

the care of family or friends.” (*Id.* at 1). If there is no friend or relative available to provide temporary care, there can be no reasonable scenario in which a friend or relative would come forward to challenge the Host Homes Regulations on behalf of the child. Just as in *Grant*, third-party standing is justified because the children at issue here do not have legal recourse and no one else can be reasonably relied upon to seek judicial remedies on their behalf.

Second, even if a friend or relative were available, it is entirely unlikely that they would be able to file an action challenging the Host Homes Regulations and Respondents’ failure to meet their statutory obligations. There is no mechanism for them to find out about the child’s placement. In contrast, under the existing voluntary foster care system, the State is *required* to seek out a relative before placing the child with strangers. SSL § 384-a(1-a). Moreover, a friend or relative would have to meet a stringent standard in order to successfully advance the child’s claims challenging the Host Homes Regulations over a parent’s preference to participate in the program. As one court noted, “[t]he statutory preference is for a parent to represent the child Generally, a custodial parent should be removed as the child’s representative in an action only where the parent has an interest adverse to the child.” *Mazzuca v. Warren P. Wielt Tr.*, 59 A.D.3d 907, 908–09 (3d Dep’t 2009); *see also* N.Y. C.P.L.R. § 1201 (a child “shall appear by his guardian ad litem if . . . the court so directs because of a conflict of interest or for other cause”); *Stahl*

v. Rhee, 220 A.D.2d 39, 44 (2d Dep’t 1996) (the relieving of a guardian is a “drastic procedure”).

Third, even if a friend or relative did come forward to assist the child, it is more likely that they would ask the parent to agree to have the child stay with them or file a custody petition, rather than filing a lawsuit challenging the validity of the entire Host Homes program, as this action does.

Respondents’ unfounded claim that a friend or relative would be able to adequately assert judicial remedies on behalf of the children at issue is also inconsistent with New York’s strong statutory preference for children to have their own counsel. The Family Court Act itself expresses this preference:

This act declares that minors who are the subject of family court proceedings or appeals in proceedings originating in the family court should be represented by counsel of their own choosing or by assigned counsel. This declaration is based on a finding that counsel is often indispensable to a practical realization of due process of law and may be helpful in making reasoned determinations of fact and proper orders of disposition.

FCA § 241. It is for this reason that courts mandate the assignment of independent counsel to children whose parents seek to voluntarily place them in the care of strangers in a home overseen by an OCFS-authorized agency. *Id.* § 249(a).

Given the strong societal interest in protecting children, Appellants’ key role in furthering the goals of the existing statutory scheme, and the serious issues raised

in this Article 78 proceeding, Appellants should not be foreclosed from challenging OCFS's authority to promulgate the Host Homes Regulations.

II. OCFS Exceeded Its Regulatory Authority and Engaged in Impermissible Policymaking.

A. OCFS Improperly Attempted to Substitute Its Own Program for a Comprehensive Statutory Scheme Enacted by the Legislature.

Through Host Homes, OCFS is attempting to insert its own solution to a specific problem that the Legislature already has addressed in detail. Moreover, that solution conflicts with the existing legislative scheme. Not only is that decisive when balancing the *Boreali* factors, but it is also an independent, stand-alone reason to annul the Host Homes Regulations. Both Host Homes and voluntary foster-care placements are temporary arrangements intended to help families through crisis. SSL § 384-a(2)(a); *see, e.g., In re Michael B.*, 80 N.Y.2d 299, 309 (1992) (voluntary placements help parents “in temporary crisis”); *In re Joshua A.*, 289 A.D.2d 763, 764 (3d Dep’t 2001) (“[t]he statute is intended to ‘provide temporary assistance to parents who are experiencing some difficulty with the custody of the child’ rather than as a means of permanently denying a parent custody of the child” (citations omitted)). But only the voluntary placement system was properly enacted by elected officials.

Respondents acknowledge that the Host Homes program was developed “to help parents who need assistance caring for their children in times of crisis, but who

lack the social support network needed to find that care.” (Resp’ts’ Br. 14). That, however, is the very *same* problem the Legislature addressed through voluntary foster-care placements. The clear statutory scheme that exists to assist those families, including a framework with important protections for both the parent and child, precludes OCFS from substituting its own policy considerations in creating an alternative program for placing the same universe of children with strangers, but without those protections. The Legislature’s decision to set 30 days as the point at which voluntary placements require court approval and the corresponding appointment of counsel for both parent and child as well as the mandated provision of services and all the other statutory protections reflect a series of choices made by the Legislature after balancing competing policy considerations. By creating a new State-run system governing voluntary out-of-home placements that ignores these guardrails that the Legislature has mandated whenever the State becomes involved in the separation of children from their parents, Respondents are, in effect, improperly attempting to amend the Social Services Law and Family Court Act.

B. The Host Homes Agency is Placing Out the Child Under the Regulations Without Statutory Basis.

Without any statutory basis for the Host Homes program, Respondents argue that the statutory safeguards and restrictions for placing out a child do not apply to Host Homes because it is the parent, and not the agency, who is doing the placement.

(Resp'ts' Br. 39). In their view, Host Homes somehow operates in a separate sphere from statutory voluntary placements. That is simply not so.

Respondents rely on SSL § 374(2), which provides that only an “authorized agency shall place out or board out any child” but that nothing shall “restrict or limit the right of a parent . . . to place out or board out a child.” That section simply reaffirms the existing rights of parents to place their own children outside of their homes.³ Nowhere, however, does it authorize a new State-run voluntary child placement system. The notion that under Host Homes it is simply the parents placing out their own children is completely misplaced. Under the Regulations, it is the agency—not the parents—that identifies the Host Home, vets the home, and oversees the home in accordance with OCFS regulations (just as the authorized agency identifies, vets, and oversees a foster home in a voluntary foster-care placement).⁴ Respondents, in fact, concede that a “host family agency is authorized ‘to place out a child in a host family home for the purpose of providing [temporary]

³ In arguing that parents have the right to place their children with others subject to fewer restrictions, Respondents are incorrect that parents may place their children directly with adoptive parents without court approval. (Resp'ts' Br. 8). No adoption is legal without court approval, but even before the child is placed, the home must be certified by the Court in a private placement adoption. N.Y. DOM. REL. LAW § 115(1)(b) & (3).

⁴ 18 N.Y.C.R.R. § 444.5(b).

care’ . . . 18 N.Y.C.R.R. 444.2(c),” (Resp’ts’ Br. 48 (alterations in original)), and that the Host Homes agencies assist parents by “facilitating temporary placements.” (*Id.* at 67).⁵ The fact that a Host Homes placement is made with the parent’s consent does not change the role played by the agency.

The assistance that the Host Homes agencies provide fits the meaning of “placement” under the Social Services Law. To “[p]lace out” a child means “to arrange for the free care of a child in a family other than that of the child’s parent, step-parent, grandparent, brother, sister, uncle, or aunt or legal guardian, for the purpose of . . . providing care.” SSL § 371(12). Facilitating temporary placements with strangers easily meets that statutory definition. Thus, according to the Respondents and the plain meaning of the Regulations themselves, the Host Homes agencies are placing out children and therefore should not be immune from the safeguards and limitations spelled out in the statutory framework governing the voluntary placement of children. *See* 18 N.Y.C.R.R. § 444.4(a)–(c).

Respondents’ reliance on *In re Sanjivini K.*, 47 N.Y.2d 374 (1979), is misplaced. Although there, the Court acknowledged that “no statute is directly applicable” to a scenario where a mother “permitted her child to remain with a family

⁵ Respondents also claim to be “explicitly authorized” by SSL § 371(10), noting correctly that “only authorized agencies may place out children from their parents’ homes.” (Resp’ts’ Br. 63). That statement squarely contradicts their argument that the parent is placing out the child.

friend” through a private placement, it explicitly distinguished that kind of placement from an “agency placement governed by statute.” *Id.* at 382. Here, OCFS is seeking to reach the same result through the Host Homes Regulations as a statutory voluntary placement. Under Host Homes, children are voluntarily placed in the homes of strangers selected by and under the auspices of an agency in accordance with regulations promulgated by OCFS. Like the regulations governing voluntary placements, the Host Homes Regulations detail the duties and responsibilities of the host family; the qualifications for approval of a host family; the requirements to be met in a home study before placement of a child; the agency’s obligation to supervise the home; the procedures and consequences for revocation of approval of a host family home; the physical conditions of homes; the forms of discipline that may be used; the way children must be treated; the requirement that the agency provide notification of any incidents that may affect the child’s adjustment, health, safety, or well-being; the requirement of monthly contacts by the agencies overseeing the homes; and the records that must be kept by the agency overseeing the homes.⁶ The idea that Host Homes is more akin to an informal placement by a parent with a friend than a formal agency placement governed by statute ignores reality.⁷

⁶ 18 N.Y.C.R.R. §§ 444, *et seq.*

⁷ Under Host Homes, children are not being placed with friends and family members selected by parents, but with strangers selected by the State. Respondents are thus downplaying the role of the State in facilitating and overseeing the placement.

C. Respondents' Argument That OCFS Has Authority to Implement Host Homes Because a Parent Retains Legal Custody is Baseless.

Respondents claim that the Host Homes Regulations do not conflict with the statutory requirements governing voluntary placements, asserting that the numerous statutory safeguards do not “apply when parents temporarily place their children with a host family for the sole purpose of providing care, without transferring legal custody of or financial responsibility for their children.” (Resp’ts’ Br. 46). This argument has no basis in law or fact.

As a matter of law, the Social Services Law specifically requires that when an authorized agency arranges for the care of a child in the home of a stranger, custody must remain with the agency.⁸ SSL § 383(2). Here, the Regulations directly contradict the statute: a Host Homes agency (which is defined by the Regulations as an “authorized agency”) is arranging for the care of a child in the home of a stranger

Indeed, if a parent transferred decision making authority to an unvetted stranger, it could be the basis for a finding of child neglect. *See, e.g., In re Cody P.*, 227 A.D.2d 724, 725 (3d Dep’t 1996) (neglect found where parent placed child in the care of a virtual stranger).

⁸ Respondents claim that this basic statement of the law was not preserved by Appellants. (Resp’ts’ Br. 49). That is incorrect. The Petition, in fact, lays out the applicable law governing voluntary placements, including the requirement that custody be transferred to the authorized agency, and specifically alleges that the Host Homes program is inconsistent with the statutory regime and that OCFS exceeded its regulatory authority. (R. 44-49). Respondents have not raised a new issue on appeal.

(potentially for an indefinite time period), but the agency is not retaining custody. That alone is a fatal flaw in the Regulations because it is in direct conflict with the statute governing placement by authorized agencies. Respondents nonetheless argue, without citing any authority or providing any reasonable explanation, that the statute “does not apply to a host agency.” (Resp’ts’ Br. 50). However, it defies logic that the Legislature’s detailed framework for addressing voluntary placements would be optional. This is not an example of an agency filling in the details of a broad legislative policy, but rather an improper attempt by Respondents to make an end-run around a clear Legislative command and institute their own policy preferences with respect to voluntary placements. Stated simply, “when executive policy and legislative policy conflict, it is the legislative policy that governs.” *Leading Age N.Y., Inc. v. Shah*, 32 N.Y.3d 249, 290 (2018) (Wilson, J., dissenting in part).

Respondents falsely claim that “[s]hort of neglect or abandonment, however, and in the absence of a prior court order, arrangements by parents to provide for the care of their children outside the home are not subject to regulation by the State or involvement by Family Court.” (Resp’ts’ Br. 40). To the contrary, a voluntary foster-care placement through an authorized agency involves neither neglect nor abandonment, nor a prior court order, and is subject to regulation by the State and involvement by the Family Court (for placements expected to last more than 30

days). In short, the Legislature has already addressed the exact situation Respondents are attempting to address through Host Homes.

Respondents further claim that in Host Homes, parents do not “cede parental rights” and accordingly the statutory safeguards should not apply. (Resp’ts’ Br. 42). As Appellants explain in their opening brief, however, the purported distinction between the transfer of care under a Host Homes placement and a voluntary foster-care placement does not justify circumventing the statutory safeguards meant to protect families and children. Respondents acknowledge that the Host Homes parental designation that parents sign “formalizes a temporary caregiving arrangement” that requires parents to cede key parental decision-making authority to the host home family as the vehicle and predicate to make and sustain a Host Homes placement. (*Id.* at 43). A designation of a person in parental relation pursuant to General Obligations Law (“GOL”) § 5-1551 is designed and executed for the specific purpose of ceding parental authority to make decisions pursuant to Public Health Law §§ 2164 (immunizations) and 2504 (provision of medical, dental, health, and hospital services to a child), and Education Law §§ 2 and 3212 (authorizing educational decisions). That precise decision-making authority is the hallmark of legal custody.⁹ Thus, pursuant to Host Homes, parents relinquish their

⁹ *See, e.g., Trapp v. Trapp*, 136 A.D.2d 178, 180-81 (1st Dep’t 1988) (defining legal custody as having the right to make “decisions with respect to the important issues, such as religious training, education and medical care”).

right to make fundamental decisions about their children’s upbringing to facilitate placement with a stranger, potentially for an extended or even indefinite time period, without court oversight at any point.¹⁰

In an attempt to distinguish Host Homes placements from voluntary placements, Respondents argue that the Regulations permit parents “to limit the scope of medical and educational consents.” (Resp’ts’ Br. 42). In fact, a parent who voluntarily places their child in foster care retains greater rights to make fundamental decisions than the parent who places their child in the Host Homes program. Under 18 N.Y.C.R.R. § 441.22(d), prior to accepting a child into foster care on a voluntary placement, “authorization in writing must be requested from the child’s parent or guardian for routine medical and/or psychological assessments, immunizations and medical treatment, and for emergency medical or surgical care in the event that the parent or guardian cannot be located at the time such care becomes necessary.” Absent such authorization, parents retain that authority (unlike parents of children who are involuntarily placed); under 8 N.Y.C.R.R. § 200.5(b)(6), parents retain the right to make special education decisions for their children in foster care; and under SSL § 373 and FCA § 116(g), parents retain control of the religious

¹⁰ The role of the Host Homes agency—not the parent—as bearing ultimate responsibility for the child, is clear in the regulation requiring that the agency—not the parent—be informed of any incident or event that affects or may affect the child’s adjustment, health, safety, or well-being. 18 N.Y.C.R.R. § 444.13(a)(10).

upbringing of their children in foster care. *See Michael B.*, 80 N.Y.2d at 309 (“Parents in temporary crisis are encouraged to voluntarily place their children in foster care without fear that they will thereby forfeit their parental rights.”). Moreover, contrary to Respondents’ suggestion, parents who voluntarily place their children in foster care retain financial responsibility for them.¹¹

Respondents also attempt to distinguish Host Homes placements on the basis that parents “retain ultimate responsibility for approving a placement,” (Resp’ts’ Br. 48), and can terminate the placement at any time. (*Id.* at 42). In fact, both Host Homes and voluntary foster-care placements require parental consent, and in both cases, the placement is identified by an agency. With respect to terminating a placement, Respondents mischaracterize the law governing voluntary foster care. (*Id.* at 45). An agency is obligated to return a child voluntarily placed in foster care on the previously agreed-upon date, with no court appearance or order required. SSL § 384-a(2)(a). If the parent requests the child’s return before that date, the agency is

¹¹ The voluntary placement agreement form used by OCFS requires the parent to acknowledge their obligation to pay support for the child. Voluntary Placement Agreement (Form OCFS-2202), OCFS (rev. Oct. 2020), <https://ocfs.ny.gov/forms/ocfs/OCFS-2202.pdf>. Unlike the Host Homes program, however, the regulations governing child support collection for children in foster care contain exclusions for cases in which, among other things, enforcing the obligation “will adversely affect the length of the child’s placement or impair the ability of the child to return home.” 18 N.Y.C.R.R. § 422.4(a)(1). This is yet another way in which the voluntary foster care framework, in contrast to Host Homes, is designed to keep families together.

likewise required to return the child upon the parent's request—again, with no court order or appearance required. *Id.* Similarly, when the parent signs an indefinite placement, the child must be returned within 20 days of the parent's written demand to the agency for the child's return. *Id.* If, for any reason, the child is not returned, the parent, through their previously assigned counsel, can file a motion to enforce the terms of the agreement in the court where the placement was approved.

In contrast, the Host Homes program provides *no* protection for the parent when a Host Family or agency refuses to return the child. The parent, who does not have the benefit of appointed counsel, must bear the burden of commencing a court proceeding for a writ of *habeas corpus* to return the child. The parent may then be embroiled in a custody battle with the host family. Needless to say, these challenges would only be heightened if the child is placed out of state, as the Host Homes program would allow. Under current law, when a child who has been voluntarily placed in foster care is placed in a home outside of New York State, the New York family court retains jurisdiction over the child so that any dispute regarding the child's placement or custody is heard in this state. SSL § 374-a art. V. The Host Homes program, however, provides no such protection for children or parents. If a child is placed out of state for six months or longer, the Uniform Child Custody Jurisdiction and Enforcement Act may force a parent who seeks return of their child to commence a proceeding in another state—a prospect that may be nearly

impossible for a parent with limited resources, as is the likely case for a parent turning to Host Homes. N.Y. DOM. REL. LAW § 76.

Respondents also point to the fact that in Host Homes, unlike voluntary placements, Family Court approval would not be needed before returning a child home after eight or more months. (Resp'ts' Br. 45). But this argument disregards the significance of the requirement; when a parent has ceded care of their child for eight months or more, the Legislature deemed it appropriate to require that there be an independent assessment of whether it would be in the child's best interest to be returned to the parent and whether they would be at risk of harm if returned. The Legislature grappled with these difficult issues and arrived at the current statutory system, which furthers its vitally important policy goals of protecting vulnerable children and families. The Host Homes Regulations disregard this statutory scheme and upset the careful balance set by the Legislature.

Accordingly, the distinction Respondents try to make based on the purported relinquishment of "legal custody" in voluntary foster-care placements is baseless. Whether Respondents had the authority to create the Host Homes program does not rest on the degree to which parents cede or retain decision-making authority. Both placement regimes require the relinquishment of some degree of parental decision-making to facilitate the placement. Moreover, as explained above, a parent who voluntarily places their child in foster care, in fact, retains greater rights than the

parent who places their child in the Host Homes program. This, in turn, completely undermines Respondents' position that the Host Homes program is somehow excused from statutory safeguards based on "the nature of the placement" and "the extent to which that placement infringes parental rights." (Resp'ts' Br. 45). According to their own logic, the Host Homes program should be providing *greater* procedural safeguards rather than gutting them.

Respondents further argue that "extreme potential uses of host family care" and "hypothetical applications" should not be the basis for concluding that the Regulations undermine statutory safeguards and that Appellants should rely instead on "as applied" challenges to the Regulations. (Resp'ts' Br. 47). In pointing to "extreme" examples, Respondents are, in effect, acknowledging the danger under Host Homes of extended, out-of-state placements that would be devastating to families and children. That is exactly why the statutory safeguards are critically important. Moreover, there is nothing hypothetical about the loss of preventive services, court oversight, appointment of counsel, and priority placement with kin, which would affect *all* families and children caught up in Host Homes.

As for the nature of this challenge, Respondents fundamentally misconstrue the applicable law and Appellants' arguments. A separation of powers violation is appropriately addressed via facial challenge, as it is a "*structural safeguard* rather than a remedy to be applied only when specific harm, or risk of specific harm, can

be identified.” *Maron v. Silver*, 14 N.Y.3d 230, 260-61 (2010) (emphasis in original) (citation omitted). Here, OCFS exceeded the scope of its statutory authority in promulgating the Host Homes Regulations, circumventing that structural safeguard. And while Respondents claim an unlawful application of the Host Homes Regulations could be challenged in “some other way,” (Resp’ts’ Br. 47), they ignore that children who have been removed from their homes pursuant to the Host Homes program have no legal recourse precisely because they are *not* afforded the critical rights and protections the Legislature has guaranteed them in voluntary foster care, such as judicial oversight and appointment of counsel.

D. Respondents Improperly Attempt to Substitute Their Own Policy Objectives for those of the Legislature.

Throughout their brief, Respondents argue that preventing a loss of custody is a Legislative policy goal in and of itself. There is no support for that position. As explained above, voluntary placements are structured by statute so that custody is maintained by the authorized agency throughout the placement. The Legislature’s interest in preventing foster care placement, however, is not an interest in avoiding the disruption of legal custody, but rather avoiding disruption of the family unit and ensuring a child’s welfare and legal rights are protected. That is clearly reflected under current law in the requirements, among other things, to provide preventive services; to prioritize placement with kin; to require the agency to attempt to locate any other parent, relative, or family friend and inform them of the opportunity to

have the child reside with them, rather than with strangers; to keep siblings together; to guarantee a right to counsel; and to hold permanency hearings. SSL §§ 358-a(6), 374-a, 384-a(1-a), 398(1)(a), 409-a(1)(a)(i); FCA §§ 249(a), 262(a), 1090(a) & (b). Those safeguards, however, would be lost under Host Homes.

This Court addressed the policy goals behind voluntary foster care in *Michael B.*, 80 N.Y.2d at 309. As the Court explained, there is a “statutory emphasis on the biological family as best serving a child’s long-range needs.” Accordingly, “[t]he State’s first obligation is to help the family with services to prevent its break-up, or to reunite the family if the child is out of the home. While a child is in foster care, the State must use diligent efforts to strengthen the relationship between parent and child, and work with the parent to regain custody.” *Id.* (citations omitted). The Legislature’s interest in preserving the family unit is grounded in social science research establishing that children’s outcomes are improved by placement with family. *See, e.g.*, Sponsor’s Mem., Bill Jacket, A.B. 10808, Ch. 519 (N.Y. 2008) (“Research shows that children who are at risk of placement in the foster care system often achieve better outcomes if they are placed with family members.”).¹² Under

¹² Furthermore, the federal government recognizes that placement with kin is in the best interests of children removed from their parent(s). Family First Prevention Services Act of 2018, Pub. L. No. 115-123, tit. VII, 132 Stat. 64 (2018). A large volume of research establishes that kinship placements increase the likelihood of placement stability and better promotes the child’s behavioral and mental well-being. *See, e.g. Why should child protection agencies adopt a kin-first approach?*, CASEY FAM. PROGRAMS (Aug. 12, 2020). Although OCFS touts Host Homes as a

Host Homes, however, the State would shirk its statutory obligations, thereby undermining Legislative policy.

Respondents further argue that the Host Homes Regulations would promote the legislative policy goal of protecting child welfare. (Resp'ts' Br. 58, 62, 67). The Regulations, they argue, provide basic protections "such as the right to adequate food, clothing, and shelter." (Resp'ts' Br. 55). The Host Homes program, in fact, does away with the very safeguards enacted by the Legislature to benefit children whose parents are unable to care for them. Without any judicial oversight or appointment of counsel, children would have no legal recourse or opportunity to be heard during their potentially indefinite placement with strangers. In enacting the

program for parents who have no support system, Host Homes regulations dispense with any requirement to independently identify and locate kin, including the non-custodial parent. This directly contradicts other OCFS policies imposing such mandates when children are removed from a parent and placed into foster care. *See* N.Y. State Off. of Child. & Fam. Servs., 20-OCFS-ADM-18, Administrative Advisory on Kin-First Firewall Practice (Oct. 14, 2020), https://ocfs.ny.gov/main/policies/external/ocfs_2020/ADM/20-OCFS-ADM-18.pdf. OCFS also has acknowledged the strong evidence in favor of keeping siblings together. N.Y. State Off. of Child. & Fam. Servs., Informational Letter 07-OCFS-INF-04, *Keeping Siblings Connected: A White Paper on Siblings in Foster Care and Adoptive Placements in New York State* (June 8, 2007), https://ocfs.ny.gov/main/policies/external/ocfs_2007/INFs/07-OCFS-INF-04%20Keeping%20Siblings%20Connected%20-%20A%20White%20Paper%20on%20Siblings%20in%20Foster%20Care%20and%20Adoptive%20Placements%20in%20New%20York%20State.pdf (Underlying New York State regulations is the understanding that "the sibling bond [is important] to children's development and emotional well-being.").

Host Homes Regulations, Respondents acted arbitrarily and capriciously because, as described above, they acted outside of their legislatively delegated authority and substituted their own policy judgment for that of the Legislature.

E. Host Homes Is Not a “Preventive Service” Sanctioned by the Legislature.

Respondents’ position with respect to preventive services is a moving target. They emphatically disclaim any argument that Host Homes constitutes a preventive service, but then go on to say it is “consistent with the policy underlying that provision of law” and is “akin” to a preventive service. (Resp’ts’ Br. 56, 57 n.6). To the contrary, the Host Homes program is the very opposite of preventive services, which are rehabilitative and supportive services designed, crucially, to prevent children’s removal from their homes or speed their return home from an out-of-home placement. SSL §§ 409; 409-a(1)(a); *see also Michael B.*, 80 N.Y.2d at 309 (“The State’s first obligation is to help the family with services to prevent its break-up, or to reunite the family if the child is out of the home.”).

Under the Host Homes Regulations, in contrast to current law, the agency has *no* obligation to provide preventive services prior to placing the child with strangers. SSL §§ 384-a(2), 358-a(1). They are only obligated to provide referral lists of potential service providers. 18 N.Y.C.R.R. § 444.4(e). And, unlike voluntary placements, Respondents are not obligated to offer services to assist the family for the purpose of reunification as part of the Host Homes program. FCA §

1089(d)(2)(viii)(A). In short, the Host Homes program does nothing to *prevent* the impairment or disruption of a family and instead facilitates the placement of children with strangers through a new State-run system that lacks critically important protections mandated by the Legislature. Respondents’ position rests on the flawed premise that avoiding any involvement with the voluntary foster care system is akin to a “preventive service,” even if it means the child is separated from their family and placed indefinitely with strangers through the Host Homes program. That is a distinction without a difference—especially from the child’s perspective.

F. Host Homes Does Not Qualify as Respite Under the Social Services Law.

Similarly, Respondents’ attempt to qualify Host Homes as “respite” and thus within the definition of “preventive services” is improper. Under SSL § 409-a(5)(f), respite care is “the temporary care and supervision of a child to relieve parents or other persons legally responsible for the care of such child where immediate relief is needed to maintain or restore family functioning.” This statutory provision, which contemplates “immediate relief” as part of an effort to keep a family intact, is narrowly defined through regulation. “Temporary care” is meant to apply only in certain limited circumstances such as when “a parent is suddenly hospitalized” or is “participating in a substance abuse detoxification program.” 18 N.Y.C.R.R. § 435.3(a)(3) & (5). Moreover, consistent with the statutory language, the regulations impose strict time limitations. Absent “extraordinary circumstances,” respite care

may only be provided for a maximum of seven weeks per child, per year. 18 N.Y.C.R.R. § 435.5(c).

The Host Homes program runs afoul of both the statute and implementing regulations because it is far broader in scope, is not limited to “temporary care” and “immediate relief,” and allows a child’s placement to last *indefinitely* provided that the placement is renewed by the parent every six months. The Host Homes program, as a matter of law, does not qualify as “respite care.” 18 N.Y.C.R.R. § 444.5. Indeed, to find otherwise would undermine the statutes which provide for both respite care, constituting short-term, immediate relief during emergencies, and voluntary placements, which are broader in scope. OCFS’s authority to regulate respite care does not authorize it to create a third option, *i.e.*, a program that goes beyond the statutory definition of respite care and conflicts with the legislative framework governing voluntary placements. *See Dutchess Cnty. Dep’t of Soc. Servs. ex rel. Day v. Day*, 96 N.Y.2d 149, 153 (2001) (“Courts must ‘harmonize the various provisions of related statutes and [] construe them in a way that renders them internally compatible.’” (alteration in original) (citation omitted)). A regulation must be consistent with the statutory language and underlying purpose of its enabling legislation. *Greater N.Y. Taxi Ass’n v. N.Y.C. Taxi & Limousine Comm’n*, 25 N.Y.3d 600, 608 (2015). The Host Homes Regulations fail to pass muster.

G. OCFS Inappropriately Considered the Economic Burden of Providing Foster Care When It Created the Host Homes Program.

Eliminating the provision of preventive services required by statute is one of several components of the Host Homes program that appear to be designed to cut costs for OCFS, thereby indicating that OCFS acted beyond its legislatively delegated authority. Respondents argue that there “is no support for that baseless claim.” (Resp’ts’ Br. 61). It was Respondents, however, who touted the fact before the trial court that Host Homes will operate without “unnecessarily burdening the child welfare system.” (R. 1413). Moreover, the trial court specifically found that “[w]hen creating the Host Family Homes program, OCFS balanced the costs associated with placing children into foster care during such situations.” (R. 10). In both *Boreali* and *Statewide Coalition*, this Court found that consideration of economic burden was part of an inappropriate attempt by the administrative agencies to choose between competing policy goals. *Boreali v. Axelrod*, 71 N.Y.2d 1, 12 (1987); *N.Y. Statewide Coal. Of Hispanic Chambers of Com. v. N.Y.C. Dep’t of Health & Mental Hygiene*, 23 N.Y.3d 681, 697-98 (2014). There can be no ignoring the fact that the Host Homes program, unlike voluntary foster care, provides temporary care for children at no cost to the State. OCFS must bear a significant portion of the monthly rate paid to foster parents, the administrative costs of overseeing a foster home, the cost of preventive and rehabilitative services for parents of voluntarily placed children, and the cost of medical care for children who

are placed in foster care.¹³ OCFS assumes none of these responsibilities for a child placed in a Host Home.

With the creation of Host Homes, Respondents are balancing competing policy choices and improperly attempting to substitute their own judgment for that of the Legislature. The Host Homes program fails to satisfy *Boreali* and is unlawful because it reflects “a choice between competing public policy interests, rather than mere implementation of the legislature’s chosen goal.” *LeadingAge N.Y., Inc.*, 32 N.Y.3d at 269.

H. The Host Homes Regulations Exceed OCFS’s Mandate.

In defending their authority to create the Host Homes program, Respondents point to general regulatory authority granted to them by the Legislature under SSL §§ 17, 20, and 34. (Resp’ts’ Br. 53). Those provisions enable Respondents to “determine the policies and principles upon which public assistance, services and care shall be provided” but also make clear that Respondents must act “within the limits hereinafter prescribed in this chapter” and “in accordance with law.” SSL §§

¹³ See, e.g., 18 N.Y.C.R.R. § 427.3(c)(2)(ii-xii) (authorizing payment for, among other items, costs and services including music, art, and dance lessons, gifts for special occasions, transportation expenses for family visits, and recreational expenses); 18 N.Y.C.R.R. § 441.12(a) (entitling older youth to receive an allowance not to be used to meet basic needs). Older youth in foster care (including voluntary placements) are also entitled to vocational training, college boarding, independent living services, and public housing priority. 18 N.Y.C.R.R. §§ 430.12(f)(2)(i)(a), 441.13; SSL § 398(10).

17(a); 34(3)(f). None of those provisions authorize OCFS to create the Host Homes program. As in *Statewide Coalition*, the general statutory provisions that Respondents cite do not empower OCFS to create, through regulation, a voluntary foster-care placement system by another name with less oversight than the foster-care statutes themselves demand. See *N.Y. Statewide Coal.*, 23 N.Y.3d at 694 (regulation restricting sugary beverages invalidated despite broad statutory mandate that included regulating “activities affecting public health in the city” (citation omitted)); see also *Boreali*, 71 N.Y.2d at 6–7 (despite “broad grant of authority” concerning public health, the agency “overstepped . . . its lawfully delegated authority” by promulgating smoking regulations); *Ellicott Grp., LLC v. State of N.Y. Exec. Dep’t Off. of Gen. Servs.*, 85 A.D.3d 48, 53-54 (4th Dep’t 2011) (New York Executive Department Office of General Services “usurped the role of the Legislature in making its policy decision that prevailing wages should be paid” even though “statute authorizes the Commissioner . . . to lease buildings and office space for state agencies ‘upon such terms and conditions as he or she deems most advantageous to the state’” (citation omitted)); *Parents for Educ. & Religious Liberty in Schs. v. Young*, 79 Misc. 3d 454, 469 (Sup. Ct. Albany Cnty. 2023) (regulations went “above and beyond” authority conferred by enabling legislation), *aff’d as modified on other grounds*, 230 A.D.3d 83 (3d Dep’t 2024), *aff’d*, No. 56-2025, 2025 WL 1697944 (N.Y. June 18, 2025).

In search of authority, Respondents also point to SSL §§ 371(10), 374(2), and 460-a(1), which govern the placement of children. Those provisions in no way authorize OCFS to create a new system of voluntary placement. Indeed, SSL § 374, which is titled “Authority to place out or board out children,” is immediately followed by provisions concerning specific types of out-of-home placements. Notably, the statute does *not* include the Host Homes program. Each of these statutorily authorized placements has corresponding regulations, thereby leaving Host Homes as the only placement choice that was not statutorily created. Where out-of-home placement choices for children are delineated by statute and OCFS historically has looked to statute when promulgating regulations in this area, the failure to do so here—especially since there is already a detailed statutory scheme in place governing voluntary placements—demonstrates that OCFS exceeded its statutory authority. *Cf. Nat’l Rest. Ass’n v. N.Y.C. Dep’t of Health & Mental Hygiene*, 148 A.D.3d 169, 177 (1st Dep’t 2017) (where the agency had a history of adopting similar rules regulating restaurants “without specific legislative guidance,” the agency was “not writing on a clean slate in the sense that it ha[d] always regulated” in such a manner (citation omitted)).

Respondents’ reliance on *Garcia v. New York City Department of Health & Mental Hygiene*, 31 N.Y.3d 601 (2018), and *Greater New York Taxi Ass’n*, 25 N.Y.3d 600, is misplaced. (Resp’ts’ Br. 65-66). In *Garcia*, the Legislature

specifically delegated the power to regulate vaccinations to the Board of Health. 31 N.Y.3d at 613. There is no such delegation here over the creation of a new State-run voluntary out-of-home placement program. Similarly, in *Greater New York Taxi*, the City Council specifically granted the Taxi and Limousine Commission authority to enact the rules at issue regulating taxis. 25 N.Y.3d at 607-08. In contrast, OCFS here wrote on a clean slate, in excess of its statutory authority, by adding a new out-of-home placement program not delineated by statute.

I. The Host Homes Regulations Are Inconsistent with Existing Law.

Respondents argue that Host Homes is not an end-run around voluntary foster-care placements but simply, as the lower court found, “an additional, voluntary option for placing the children.” (Resp’ts’ Br. 59; R. 11). That option, however, would come at the expense of the protections and services deemed vital by the Legislature to ensure that children are not unnecessarily removed from their homes and that, if removed, they receive the support necessary for their prompt and safe reunification with their families. There is no authority to support Respondents’ position that the existing statutory framework governing voluntary placements is “permissive” and that the children in Host Homes should somehow fall outside of the Legislative safeguards that were put in place to protect them.

As explained in Appellants’ Opening Brief, New York has an intricate statutory scheme for the care and protection of children whose parents are unable to

properly care for them, including means to voluntarily place children with families recruited, vetted, and overseen by an authorized agency. This involves the provision of services for families in crisis to avoid or reduce separation,¹⁴ an attempt to place the child with relatives or family friends including a preference for siblings to be placed together,¹⁵ and limitations on placement out of state.¹⁶ The statutes also specify the procedure for judicial review of voluntary placements expected to last more than 30 days, including the appointment of counsel for parent and child. Regardless of the duration, the agency must provide services to the child and parent to facilitate reunification.¹⁷

In promulgating the Host Homes program, OCFS is attempting to create a separate process by which parents can voluntarily place their children out of the home with strangers but without judicial oversight or any of the safeguards mentioned above. The State, in effect, is ignoring the historical evolution of the child welfare system and the shift over the past century away from the very model

¹⁴ SSL §§ 398(1)(a), 409-a(1)(a).

¹⁵ 18 N.Y.C.R.R. § 430.10(b)(2); FCA § 1017(1)(a); SSL § 384-a(1-a), (1-b).

¹⁶ SSL § 374-a.

¹⁷ SSL § 358-a; FCA §§ 249(a), 262, 1016, 1089, 1090(a).

they are seeking to implement with Host Homes.¹⁸ Fundamentally, the Host Homes program throws off the Legislative balance that had been set over decades.

Of significance, both the Majority in the court below and Respondents in their brief focus exclusively on the purported value of providing *parents* with another placement option. Not only do they minimize important safeguards like services and the appointment of counsel intended to protect parents, but they also completely ignore the fact that these crucial rights and safeguards are implemented to protect *children*. Indeed, Social Services Law Article 6 is entitled “Children” while Title 1 is entitled “Care and Protection of Children.” There can be no doubt that the Legislature has decided that providing parents with placement options should never come at the expense of a child’s physical and emotional well-being. Thus, providing services to keep families together and restricting out-of-state placement are vitally important for the safety and security of children, but they would be lost under the Host Homes program. Moreover, under Host Homes, children would have no opportunity to appear in court, no appointment of counsel, and no recourse to have their voices heard, contrary to existing law, even though their placement in a Host Home could be *indefinite* (given that a parent may renew the placement every six months). The purpose of these safeguards is to “minimize the chance of children

¹⁸ See, e.g., Rebecca S. Trammell, *Orphan Train Myths and Legal Reality*, 5 MOD. AM. 3 (2009).

languishing in foster care.” *Laws. for Child.*, 218 A.D.3d at 913; *see also Michael B.*, 80 N.Y.2d at 313 (“the very objective of voluntary foster care” is to serve “as a resource for parents in temporary crisis”). Without such safeguards, there would be nothing to minimize the chance of children languishing instead with strangers through Host Home placements. That result cannot be reconciled with the existing statutory framework or the Legislature’s policy goals. *See Juarez v. N.Y. State Off. of Victim Servs.*, 36 N.Y.3d 485, 495 (2021) (to be valid regulation may not “contradict[] the public policy embodied in the statutory scheme”); *Acevedo v. N.Y. State Dep’t of Motor Vehicles*, 29 N.Y.3d 202, 221 (2017) (“an agency is permitted to adopt regulations that go beyond the text of its enabling legislation, so long as those regulations are consistent with the statutory language and underlying purpose”); *Weiss v. City of New York*, 95 N.Y.2d 1, 5 (2000) (When a regulation “is ‘out of harmony’ with an applicable statute, the statute must prevail.” (citation omitted)).

The Host Homes Regulations reach far beyond the mechanics of administering a statutory program and the goals of OCFS’s enabling statutes. The Regulations modify substantive rights and procedures in conflict with existing law and are thus arbitrary and capricious.

J. A “Designation of Person in Parental Relation” Cannot Be Used to Circumvent the Protections of the Social Services Law.

Respondents acknowledge that GOL §§ 5-1551 – 5-1555, which enacted standards for a parent to designate a person in parental relation, does not authorize the Host Homes program but rather serves as “the vehicle by which parents approve a host family care arrangement.” (Resp’ts’ Br. 67-68).

Title 15-A provides for the limited transfer of specific, enumerated decision-making authority to address difficulties faced by grandparents and other caregivers chosen by parents to care for their children pursuant to a private arrangement.¹⁹ It was never intended to facilitate and does not authorize the transfer of authority for the care of children to *strangers* under the oversight of a State-run placement program. Thus, the attempt to use the General Obligations Law to avoid the requirements and protections of the Social Services Law and the Family Court Act, as detailed above, conflicts with the Legislature’s clear mandate.

K. Legislative Activity in This Area Indicates That the Legislature Does Not Wish to Establish a Host Homes Program.

The third *Boreali* factor inquires “whether the legislature has unsuccessfully tried to reach agreement on the issue, which would indicate that the matter is a policy consideration for the elected body to resolve.” *NYC C.L.A.S.H., Inc. v. N.Y. State Off. of Parks, Recreation & Hist. Pres.*, 27 N.Y.3d 174, 183 (2016) (citation

¹⁹ GOL § 5-1551.

omitted). The parties agree that less than a month before OCFS published its revised Regulations, Assemblyman Andrew Hevesi introduced Assembly Bill 2021-A8090, which would have allowed parents to make “alternative living arrangements” for children at substantial risk of abuse, whereby the parents name a relative or other person to care temporarily for their child. The Legislature considered but did not exhibit any appetite to change the established statutory scheme in favor of an alternative “voluntary placement” system. Accordingly, this factor weighs in favor of Appellants. *See N.Y. Statewide Coal.*, 23 N.Y.3d at 700 (“Here, inaction on the part of the state legislature . . . simply constitutes additional evidence that the [regulation] amounted to making new policy, rather than carrying out preexisting legislative policy.”).

L. Where an Agency Exceeds Its Authority, Expertise is Irrelevant.

Where, as here, an agency exceeded its statutory authority, a court need not address the fourth *Boreali* factor, which considers whether the regulation required expertise. *N.Y. Statewide Coal.*, 23 N.Y.3d at 700–01. Even if this factor were considered, however, it would be of no consequence. Respondents point to their internal deliberations and consultations with officials from other states that had implemented allegedly similar programs. (Resp’ts’ Br. 60). They do not demonstrate how creating the Host Homes program required any special expertise or technical competence. Ironically, OCFS’s expertise in this area derives from

running the voluntary foster care system—the system created by the Legislature that they now seek to circumvent.

CONCLUSION

For the foregoing reasons, the Court should reverse the lower court’s decision and annul the Host Homes program, together with such other relief as the Court may deem just and proper.

Dated: December 16, 2025
New York, New York

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STATE OF NEW YORK)
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COUNTY OF NEW YORK)

ss.:

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I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On December 16, 2025

deponent served the within: **Reply Brief for Petitioners-Appellants**

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the address(es) designated by said attorney(s) for that purpose by depositing 3 true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on December 16, 2025



MARIANA BRAYLOVSKIY
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2026



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