To be Argued by:
WILLIAM C. SILVERMAN
(Time Requested: 30 Minutes)

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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.

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DISCLOSURE STATEMENT

Pursuant to Section 500.1(f) of the Rules of Practice for this Court, Petitioners-Appellants disclose the following:

1. Petitioner-Appellant Lawyers For Children has no parents, subsidiaries, or affiliates.
2. Petitioner-Appellant The Legal Aid Society has no parents, subsidiaries, or affiliates.
3. Petitioner-Appellant Legal Aid Bureau of Buffalo, Inc. has no parents, subsidiaries, or affiliates.

STATUS OF RELATED LITIGATION

Pursuant to Section 500.13(a) of the Rules of Practice for this Court, Petitioners-Appellants state that there is no related litigation.

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PRELIMINARY STATEMENT

Lawmaking is the purview of the legislature and the legislature alone. After the legislature enacts a statute, an agency is tasked with enforcing that statute. In so doing, the agency interprets what the law requires in practical terms and develops rules, procedures, and programs to carry it out. In short, an agency's role is to *implement* laws, not make them. That separation of powers is a bedrock principle of constitutional government and when agencies threaten that bedrock principle, courts must step in to preserve it.

The State of New York established through statute a voluntary foster-care system that supports parents who are temporarily unable to care for their children due to sudden illness or other family crisis and have no one to assist. The governing statutes mandate that children voluntarily placed by their parents into foster care be provided with several essential protections, including judicial oversight and a right to counsel. The statutes also require that the State provide families with preventive and supportive services to ensure children remain safely at home when feasible and return home as quickly as possible. They also require the State to place children in safe and appropriate homes, prioritize their placement with kin, restrict their out-of-state placement, monitor their progress toward family reunification, and expedite their return to their families.

In December 2021, however, Respondents-Respondents New York State Office of Children and Family Services ("OCFS") and Sheila J. Poole, in her official capacity as then-Commissioner of OCFS (collectively, "Respondents"), promulgated regulations creating, without statutory authority, a parallel system of voluntary placement of children into "Host Homes" devoid of statutorily mandated and essential safeguards, including judicial oversight and required independent legal representation of children (the "Host Homes Regulations"). In effect, the State has attempted to turn back the clock to a time when vulnerable children were simply shipped off to strangers with little or no protection or judicial oversight and the State was insulated from responsibility for the outcome.

Through an Article 78 Petition, Petitioners-Appellants Lawyers for Children, The Legal Aid Society, and Legal Aid Bureau of Buffalo, Inc. (collectively, "Appellants")—who represent children in voluntary foster-care placements under current law—sought an order annulling the Host Homes Regulations in their entirety as an abuse of discretion, unlawful, and arbitrary and capricious. The Third Department's 3-2 decision upholding the lower court's dismissal of the Petition is the subject of this appeal.

The Third Department's majority decision (the "Majority") suffers from two independently fatal flaws. *First*, the Majority erred in finding that OCFS did not exceed its statutory authority in promulgating the Host Homes Regulations even

though the Regulations directly conflict with the statutory framework governing voluntary foster-care placement. In doing so, it fundamentally mischaracterized the Host Homes program as a "preventive service" rather than what it truly is: a new, State-run voluntary child placement system under which children can be placed with strangers indefinitely. The Host Homes program is, in fact, the opposite of a preventive service. It does nothing to prevent children from being separated from their families but rather facilitates it. And, unlike existing law, there is *no* requirement that children and families in need be provided with preventive services under the Host Homes program.

In leaning into this fiction, the Majority relied on the false distinction that parents under the Host Homes program—unlike under the voluntary foster-care system—retain legal custody and somehow place children on their own. But this bare formalistic approach overlooked the fact that a Host Homes placement cannot occur until a parent executes a designation under General Obligations Law ("GOL") title 15-A, which authorizes the host parent to assume day-to-day care and decision-making responsibilities. This effectively confers greater custodial authority upon a caretaker than a voluntary foster-care placement, although both placements are made through a State-run placement program where the agency—not the parent—vets, selects, and supervises the Host Home according to OCFS regulations.

The Majority's erroneous framing of the Host Homes program enabled it to sidestep a necessary inquiry into whether the program, which lacks vital safeguards for children and parents, conflicts with the Legislature's carefully crafted voluntary foster-care framework under New York Social Services Law ("SSL") and the Family Court Act ("FCA"). It does. Further, the various statutory provisions that the Majority *did* rely on cannot serve as the source of authority for OCFS's creation of the Host Homes program, as the program is inconsistent with them in numerous ways. For this reason alone, this Court should reverse the Majority's decision and annul the Host Homes Regulations.

Second, the Majority's mischaracterization of the Host Homes program as a preventive service infected its analysis under *Boreali v. Axelrod*, 71 N.Y.2d 1 (1987), which provides the framework for determining whether an administrative agency engaged in impermissible policymaking. Properly understood, the Host Homes program exemplifies the precise kind of policymaking *Boreali* prohibits—a substantive value judgment that ventures beyond mere rulemaking. The Host Homes program is not a mere "subsidiary policy choice," but rather reflects a new policy choice entirely: that a child can be voluntarily placed through a State-run program with a stranger in a new home without *ever* triggering a host of critical safeguards currently available to children voluntarily placed under the existing statutory framework, including appointment of counsel and judicial oversight. Ultimately,

the Host Homes program represents a fundamental change in child welfare policy—a shift only the Legislature is entitled to enact. This Court should reverse the Majority's decision on this second, independent basis as well.

QUESTIONS PRESENTED

1. Are the Host Homes Regulations inconsistent with the relevant statutory framework and the statutory provisions the Majority relied upon, thereby demonstrating that OCFS lacked regulatory authority to promulgate them?

Yes. The Host Homes Regulations directly conflict with the statutory framework for voluntary foster care, as well as the statutory provisions the Majority relied upon to conclude that OCFS had regulatory authority to promulgate the Host Homes Regulations.

2. Do the *Boreali* factors demonstrate that OCFS exceeded its regulatory authority and engaged in legislative policymaking when it created the Host Homes program?

Yes. The Host Homes program fails the Boreali *test because OCFS made fundamental policy choices—balancing competing interests—without legislative guidance, effectively stepping into the role of the Legislature rather than merely filling in statutory gaps.*

STATEMENT OF THE CASE

I. OVERVIEW OF THE FOSTER-CARE SYSTEM IN THE STATE OF NEW YORK.

Through duly enacted statutes, the Legislature, as the voice of the people, defines the rights, responsibilities, and procedures that govern the foster-care

system. OCFS, as an executive agency, is tasked *solely with implementing and enforcing* the Legislature's statutory framework—not rewriting it. It does so by promulgating regulations.

The instant appeal pertains solely to one component of New York's foster-care system: voluntary foster-care placement. Voluntary placement occurs when a parent or legal guardian who is not charged with abuse or neglect temporarily places their child in foster care. This is often due to a temporary crisis, illness, or other inability to care for the child where the parent has no one else who can step in to assist. The Legislature has gone to great lengths to pass laws that provide robust protections for children and parents who require voluntary foster-care services.

II. THE GOVERNING STATUTORY FRAMEWORK FOR VOLUNTARY PLACEMENT IN NEW YORK AND APPELLANTS' INVOLVEMENT.

The statutory framework for voluntary foster care in New York is primarily established by SSL § 384-a and supplemented through FCA § 358-a. Recognizing the profound consequences of separating a child from a parent, the Legislature enacted these statutes to protect the rights of both children and parents. These key protections include:

Placement with authorized agencies. Under SSL § 384-a(1), only an "authorized agency" can accept care and custody of a child. The Legislature defined

"authorized agency" under SSL § 371(10) to mean, among other things, a non-profit organization "empowered by law to care for, to place out or to board out children."

Written, informed consent. Under SSL § 384-a(1), a parent, guardian, or legal custodian may voluntarily transfer the care and custody of a child to an authorized agency by executing a written instrument, commonly referred to as a voluntary placement agreement. SSL § 384-a(1). The statute requires that the written agreement contain bold, prominently printed advisories (in at least 18-point font) informing parents of their legal rights, including the non-mandatory nature of the agreement, the ability to revoke consent and seek the child's return, the right to counsel, and the consequences of extended foster care. *Id.* § 384-a(2)(c).

Offering preventive services. Before a child is placed in foster care pursuant to SSL § 384-a, the statute requires a social services official to assess whether preventive services can resolve the family's crisis without separating the child from his or her home. Specifically, the statute mandates that before a child is placed in voluntary foster care, and where it is reasonable to believe that alternative services will enable the child "to remain with or be returned to his or her family," a social services official must offer the parent such alternative options referred to by statute as "preventive services." SSL §§ 398(1)(a), 409-a(1)(a)(i). The statute defines "preventive services" as "supportive and rehabilitative services provided . . . to children and their families for the purpose of:

1. "[A]verting an impairment or disruption of a family which will or could result in the placement of a child in foster care;
2. "[E]nabling a child who has been placed in foster care to return to his family at an earlier time than would otherwise be possible; or
3. "[R]educing the likelihood that a child who has been discharged from foster care would return to such care."

SSL § 409. Failing to consider the availability of preventive services violates the statute, and where such services were not offered, a parent is entitled to a fair hearing to examine whether such services were adequately considered. SSL §§ 384-a(2)(c)(iv) & (vii), 358-a(1).

Priority of placement. A social services official must attempt to locate any other parent, relatives, or family friends and inform them of the opportunity to have the child reside with them, rather than with strangers. SSL § 384-a(1-a)(a). In addition, siblings must be placed together unless such placement would not be in a child's best interests. *Id*. § 384-a(1-a)(b). Where siblings are not placed together, they may seek court intervention to request placement, visitation, or communication with their siblings. *Id.* § 358-a(11)(b) & (c); FCA § 1089(d)(2)(viii)(I).

Strict limitations on out-of-state placements. New York statutes impose strict limitations on placing children in homes outside of New York State. SSL § 374-a. When these requirements are met, New York courts retain jurisdiction over

the child, and the placement must comply with the Interstate Compact on the Placement of Children ("ICPC"). *Id.*

Mandatory court review for greater-than-30-day placements. Under SSL § 358-a, if the child is likely to remain in voluntary placement for more than 30 days, the social services official must petition the court for approval, whereby the court assesses whether (1) the parent's decision was knowing and voluntary—that is, the parent pursued voluntary foster care because he or she could not adequately care for the child in his or her own home, (2) the placement continues to be in the child's best interests—that it would be contrary to the welfare of the child to live in his or her own home, (3) where appropriate, preventive services were offered, and (4) all requirements of SSL § 384-a have been satisfied. SSL § 358-a(1) & (3).

Continued judicial oversight. Court oversight does not end upon approval of the voluntary placement, but rather continues so long as the child remains out of the home. At least eight months after the child's initial placement and every six months thereafter, the Family Court must conduct a "Permanency Hearing" to monitor the child's welfare and to determine what "permanency plan" would be most appropriate for the child (*e.g.*, returning to parents, appointing kin as their guardian, adoption, etc.). FCA § 1089(d)(2)(iii) & (iv). The purpose of the Permanency Hearing is "to provide children placed out of their homes timely and effective judicial review that promotes permanency, safety and well-being in their lives." *Id.* § 1086. During

Permanency Hearings, both the parent and child may raise concerns regarding the child's well-being in the foster home, whether the placing agency made reasonable efforts to facilitate the child's goal of reunification with their parent(s), and whether siblings are placed together or adequately visiting and communicating with each other. SSL § 358-a(3)(a); FCA § 1089. The order approving a voluntary placement and the order at the conclusion of each hearing may include conditions requiring the implementation of a specific plan of action by the social services official to exercise diligent efforts toward the child's discharge from foster care. SSL § 358-a(3)(e); FCA § 1089(d)(2)(iii).

Right to counsel. Throughout the initial proceedings and subsequent Permanency Hearings, both the parent and the child are entitled to their own counsel. FCA §§ 249(a), 262(a), 1090(a)–(b); SSL § 358-a(6). Appellants are the primary legal organizations contracted to provide this mandated representation to children in New York City and Erie County. R. 19–21 at ¶¶ 8–10.

III. INTERFERENCE WITH NEW YORK'S STATUTORY FRAMEWORK FOR VOLUNTARY PLACEMENT.

A. The Organization Spearheading the Host Homes Program.

Safe Families for Children ("SFC"), founded in 2003, is a national nonprofit organization that partners with volunteers to offer families in need temporary care

for children without involving the foster care system or courts.[1] R. 585, R. 589. SFC is incorporated in Illinois and applied to do business in New York in 2017. R. 129–35. Included in its application was a letter from OCFS, which wrote that its approval was not needed for SFC's stated business of "[r]ecruiting and training families to mentor families in need or in crisis situations" and gave neither approval nor disapproval. R. 134. However, it noted that under no circumstances was SFC to "place out" or "board out" children as defined in SSL § 371. *Id.*

In May 2018, SFC reached out to OCFS to discuss potential legislation pertaining to its model of temporary childcare outside of the foster care system. *See* R. 461. That June, SFC's New York City Director Laura Galt met with then-OCFS Commissioner Sheila Poole. R. 458. After this meeting, Ms. Galt emailed an OCFS attorney, stating that SFC was "thrilled that [Poole] is supportive of our model and taking the next steps to figure out the legal part of things," namely, the introduction of a bill. R. 676. By October, Galt and Renee Hallock, the Associate Commissioner of OCFS, were in frequent email communication regarding the implementation of the SFC model in New York. *See* R. 380–92, R. 424–37.

Shortly thereafter, OCFS and SFC began to investigate whether SFC's program could qualify under regulations rather than legislation. *See* R. 436–37.

[1] *See* https://safe-families.org.

Unable to find a fitting regulation, OCFS proposed that it promulgate new regulations to implement SFC's program. *See* R. 432, R. 580. By January 2019, Hallock had opined that legislation was not necessary; instead, OCFS was looking to expand the definition of an "authorized agency." R. 697. This expansion did not proceed, and OCFS subsequently pivoted to drafting regulations that would allow SFC to "operate without becoming an authorized agency" and avoid the "administrative burden" such a designation would impose. R. 701.

Thus, OCFS set out to "transform and modernize New York State's child welfare system" by promulgating new regulations that would provide temporary care "without invasive and unnecessary engagement of the child welfare and court systems." R. 1407, R. 1410. While drafting the regulations in early 2019, Hallock continued to ask Galt for examples of regulations from other states where the program was active. R. 685–86, R. 700. Galt confirmed that no other state had established a program by regulations, only legislation. R. 699–700. Nevertheless, OCFS continued to draft and process its proposed regulations. *See* R. 705–06, R. 719–21, R. 725–26.

In an email exchange, Hallock responded to a question from Galt about families' use of the existing voluntary placement process by stating, "[y]es[,] parents do use them, but why should they have to." R. 739. Hallock also wrote to Galt, "I will continue to fight for your type of program," and stated that she would not retire

until she got the Host Homes program "across the finish line" because she "firmly believe[s] this is what families need." R. 807.

B. The Host Homes Regulations.

In January 2020, OCFS proposed regulations for the Host Homes program. *See* R. 1253. During the comment period, OCFS received 137 comments from two New York State Unified Court System committees, child welfare experts, advocates for parents and children, and other stakeholders, each criticizing the regulations as creating a de facto foster-care system without essential legal protections for children and parents, such as the right to counsel, judicial oversight, and prioritization of kinship placements. *Id.*; R. 1459–60; *see* R. 820–1252.

OCFS published revised regulations on July 7, 2021 (the "Revised Regulations"), inviting a second round of public comment. R. 1458–60. The Revised Regulations included changes in response to criticism that the initial proposed regulations created a "quasi foster care system" without important protections given to parents and children through foster care —including the right to receive services and to be appointed counsel. R. 1459–60. The Revised Regulations stated that the Host Homes agency "*may* . . . provide additional services to families" (but did not require any such additional services), that "[t]he agency must have policies and procedures in place to adequately provide that parents . . . are making an informed decision," including that parents are informed "that they have legal

rights," and that children over the age of 14 should be consulted about the placement. 18 N.Y.C.R.R. §§ 444.2(c) (emphasis added), 444.5(j), 444.11(a)(5); *see* R. 1257–67. The Revised Regulations, however, did not provide either the parent or child with an opportunity to be heard through assignment of and advocacy by counsel. *See generally* 18 N.Y.C.R.R. §§ 444.1–444.19.

The Revised Regulations included several changes intended to distinguish the Host Homes program from foster care, further eroding safety protections for children placed in the program. *See* R. 1253–56. Notably, OCFS removed the prohibition on placing a child outside New York State without complying with the ICPC (as would be required in a voluntary foster-care placement)—increasing the risk that children would be placed beyond the jurisdiction of New York courts and far from their families.

Significantly, in response to criticism that the earlier proposal violated the statutory prohibition on placing children in the care of an authorized agency outside of the foster care system, the Revised Regulations required parents to sign a Designation of Person in Parental Relation giving a host family direct authority over the child's care rather than a "host family home placement agreement" with the Host Homes agency. R. 1255; *see* 18 N.Y.C.R.R. § 444.5(b).

OCFS received an additional 85 public comments during the second comment period from a broad swath of the public. *See* R. 1257. Once again, members of the

public criticized OCFS's attempt to create a de facto foster-care system without any of the necessary safeguards. *See, e.g.*, R. 1162–63; R. 1174–76; R. 1207–08. Despite the voluminous objections to the Revised Regulations, OCFS did not make additional changes and adopted them as final on December 8, 2021. R. 1257–67.

The Host Homes program functions like foster care in that children are temporarily placed outside their parental home and cared for by strangers, called "host families," approved by Host Home agencies. *See* 18 N.Y.C.R.R. § 444.2(d). Under the proposed Host Homes program, any parent may contact a Host Home agency to request short-term care for their child. *Id.* § 444.4. After the agency conducts an intake assessment, the agency will match the child with a pre-approved host family. *Id.* § 444.4(a)–(c). The parent then signs a "Designation of Person in Parental Relation" under GOL title 15-A, granting the host family authority to care for the child. All adult parties sign a written agreement outlining the placement terms, and the child is then placed in the host home. *Id.* §§ 444.4–444.5. Notably, the child is not considered a party to such agreements, even where the child is over the age of 14. The agency must conduct an initial visit within 48 hours of placement and conduct monthly check-ins. *Id.* § 444.17(b)(1). The parent may end the arrangement at any time, and placements may be extended. *See id.* §§ 444.5(h)(5), 444.13(a)(15). With continued parental consent, placement under the Host Homes

program can be extended every six months until the child ages out at 18. *See id.* §§ 444.2(b); 444.5(h).

The Host Homes program mirrors the existing voluntary foster-care system in numerous ways. Like the regulations governing voluntary foster-care placements, the Host Homes Regulations detail the duties and responsibilities of the host family, including the family's duty to notify the agency of any incidents that may affect the child's adjustment, health, safety, or well-being;[2] the qualifications for approval of a host family;[3] the requirements to be met in a home study before placement of a child;[4] the agency's obligation to supervise the home;[5] the procedures and consequences for revocation of approval of a host home;[6] the physical conditions of homes;[7] the forms of discipline that may be used;[8] the way children must be treated;[9] the requirement of monthly contact by the agencies overseeing the homes;[10] and the records that must be kept by the agency overseeing the homes.[11]

[2] *Compare* 18 N.Y.C.R.R. § 444.13(a)(10), *with* 18 N.Y.C.R.R. § 443.3(b)(10).
[3] *Compare* 18 N.Y.C.R.R. § 444.16, *with* 18 N.Y.C.R.R. § 443.3(a).
[4] *Compare* 18 N.Y.C.R.R. § 444.15, *with* 18 N.Y.C.R.R. § 443.2(c).
[5] *Compare* 18 N.Y.C.R.R. § 444.17, *with* 18 N.Y.C.R.R. §§ 443.4, 441.21.
[6] *Compare* 18 N.Y.C.R.R. § 444.18, *with* 18 N.Y.C.R.R. § 443.11.
[7] *Compare* 18 N.Y.C.R.R. § 444.16, *with* 18 N.Y.C.R.R. § 443.3(a).
[8] *Compare* 18 N.Y.C.R.R. § 444.8, *with* 18 N.Y.C.R.R. § 441.9.
[9] *Compare* 18 N.Y.C.R.R. § 444.13, *with* 18 N.Y.C.R.R. § 443.3.
[10] *Compare* 18 N.Y.C.R.R. § 444.17(b)(2), *with* 18 N.Y.C.R.R. § 441.21(c)(2).
[11] *Compare* 18 N.Y.C.R.R. § 444.15(d), *with* 18 N.Y.C.R.R. § 443.2(f).

Critically, however, the Host Homes program lacks the protections surrounding voluntary placement that the Legislature codified through statute. Specifically, unlike the legislatively enacted voluntary placement scheme, the Host Homes program:

Does not provide children or parents the right to counsel. Under the Host Homes program, no child is entitled to legal counsel who would have advocated on his or her behalf, including identifying kin who could care for the child, ensuring regular visitation and communication with parents and siblings, confirming that all of their medical, educational, and mental health needs are being met, and raising any concerns regarding the safety and appropriateness of the child's placement.

Operates without any court oversight. Under the Host Homes program, there is no judicial review of any kind to ensure the child's best interests are being independently assessed throughout the child's placement, which, as explained above, can be renewed indefinitely.

Neither requires the offering of supportive or preventive services to families nor obligates agency efforts to reunify families. The Host Homes program does not require the agency to provide any preventive services that could obviate the need to place the child in a stranger's home. Nor does the program require OCFS or the Host Home agencies to offer supportive services to facilitate the safe and speedy

return of the child. Instead, the regulations only require that a Host Homes agency provide information on services. See 18 N.Y.C.R.R. § 444.11(a)(3).

Does not prioritize placing children with kin or keeping siblings together. Unlike the statutory voluntary placement scheme, the Host Homes program does not mandate that agencies prioritize placing children with kin and keeping siblings together.

Does not put any restrictions on placing children out of state. In addition to the complete absence of judicial oversight, children in the Host Homes program can be placed anywhere in the country contrary to the ICPC's requirements.[12]

IV. THE UNDERLYING LAWSUIT AND DECISION UNDER REVIEW.

A. The Article 78 Petition and Supreme Court Proceedings.

On April 5, 2022, Appellants—organizations that contract with New York to represent children in voluntary placement proceedings—filed, pursuant to CPLR 7803, an Article 78 proceeding (the "Petition") to annul the Host Homes program as the product of OCFS improperly engaging in policymaking, and for being arbitrary and capricious. R. 17–54.

[12] The ICPC, which has been adopted by all 50 states, requires specific vetting and oversight of a child's placement when a child in foster care is placed outside of New York. *See* SSL § 374-a.

The trial court ultimately held that OCFS acted within its regulatory authority in promulgating the challenged regulations pursuant to the factors outlined in *Boreali*, 71 N.Y.2d 1, and that they were not arbitrary and capricious.[13] R. 6–14.

B. The Decision Under Review.

Appellants appealed, and the Appellate Division, in a 3-2 decision, affirmed the trial court's decision. R. 1602–25.

1. The Majority Opinion.

The Majority based its decision on a characterization of the Host Homes program as "preventive" and providing "supplemental rather than substitute care." R. 1604. Relying primarily on the fact that parents retain legal custody over their children under the Host Homes program, the Majority concluded that it was not a form of voluntary foster care. R. 1607–08. The Majority pointed to SSL § 20(3)(d) (OCFS's general rulemaking authority), SSL § 409 (preventive services), SSL § 371 (authority to "place out" children), and GOL title 15-A (allowing a Designation of Person in Parental Relation) as statutory provisions that enabled OCFS to promulgate the Host Homes Regulations. R. 1608–09.

[13] The Supreme Court previously granted OCFS's motion to dismiss the Petition for lack of standing. The Appellate Division reversed, holding that Petitioners sufficiently alleged injury due to the program's interference with their organizational missions and its impairment of their contractual obligations, and remanded for OCFS to answer the Petition. *Laws. for Child. v. N.Y. State Off. of Child. & Fam. Servs.*, 218 A.D.3d 913 (3d Dep't 2023). That decision is not part of this appeal.

The Majority then analyzed the Regulations under the *Boreali* factors, concluding:

i) OCFS did not make value judgments of its own because the Regulations further the central policy choice at issue: avoiding placement of children in foster care;

ii) OCFS did not write on a clean slate because the Host Homes Regulations were largely a form of respite care, a matter entrusted to the agency's discretion;

iii) the Legislature had not unsuccessfully attempted to reach agreement on this issue; and

iv) OCFS utilized its expertise in creating the Regulations.

R. 1609–11.

The Majority thus concluded that the Regulations were a valid exercise of OCFS's rulemaking authority. R. 1612.

2. The Dissenting Opinion.[14]

In dissent, Justice Pritzker, joined by Justice Ceresia, concluded that the Host Homes Regulations create a parallel, extrajudicial voluntary foster-care system that circumvents the statutory framework enacted by the Legislature and are thus an unlawful exercise of legislative power. *See generally*, R. 1612–24. The Dissent noted SFC's close collaboration with OCFS in drafting the Regulations, the lack of

[14] Reference to "Dissent" refers to the Third Department, Appellate Division's Dissenting opinion below.

precedent for a program like this one created through regulation, and the voluminous comments in opposition to the proposed Regulations. *Id*.

In analyzing the *Boreali* factors, the Dissent concluded that factors one and two weighed against OCFS. R. 1618–22. The Dissent reasoned that OCFS had substituted its own judgment regarding the provision of temporary care to families in need, as evidenced by OCFS's stated desire to "transform and modernize" the child welfare system, by offering temporary care outside the purview of the child welfare and court systems. R. 1618–19. Regarding the second factor, the Dissent found that OCFS wrote on a clean slate "in a manner contrary to legislative intent, essentially erasing the blackboard and using new chalk" and that its interpretation of GOL title 15-A was incorrect. R. 1624. It deemed the third and fourth factors irrelevant. R. 1625–26.

The Dissent concluded that OCFS not only acted without legislative authority or guidance, but that it had "gone rogue" by issuing the Regulations, which were an "administrative mousetrap" lacking "the hard-fought, constitutionally grounded due process rights of children." R. 1624.

Appellants appealed to this Court.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal from the Appellate Division's Opinion and Order pursuant to CPLR 5601, because the Order "finally determine[d]

the action" and "at least two justices" dissented from it "on a question of law in favor" of Appellants. N.Y. C.P.L.R. § 5601(a)(1).

STANDARD OF REVIEW

The Supreme Court's order on appeal "decide(d) petitioner[s'] petition on the merits . . . through an analysis of the *Boreali* factors." R. 7. This Court reviews dismissal of an Article 78 petition *de novo* where the question(s) on appeal involve "pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent." *Kurcsics v. Merchts. Mut. Ins. Co.*, 49 N.Y.2d 451, 459 (1980); *see also Indus. Liaison Comm. v. Williams*, 72 N.Y.2d 137, 144 (1988) (appellate courts reviewing dismissal of Article 78 petitions on the merits "use their own competence to decide issues of law raised, since those questions are of ordinary statutory reading and analysis") (citing *Town of Mamaroneck PBA, Inc. v. N.Y. State Pub. Emp. Rels. Bd.,* 66 N.Y.2d 722, 724 (1985)).

A court will strike down a regulation under Article 78 if it determines that the regulation was "made in violation of lawful procedure," "affected by an error of law," "arbitrary and capricious," or "an abuse of discretion." N.Y. C.P.L.R. § 7803(3).

ARGUMENT

I. OCFS EXCEEDED ITS STATUTORY AUTHORITY BY ENACTING REGULATIONS INCONSISTENT WITH MULTIPLE STATUTES.

This Court has made clear time and again that a "fundamental principle of administrative law" is that an agency cannot promulgate regulations that "contravene the will of the Legislature." *Weiss v. City of New York*, 95 N.Y.2d 1, 4–5 (2000); *see also Under 21, Cath. Home Bureau for Dependent Child. v. City of New York*, 65 N.Y.2d 344, 359 (1985) (warning that an agency "may not usurp the legislative function by enacting social policies not adopted by the Legislature"). That is, agencies have no authority to create a rule "out of harmony" with a statute. *Jones v. Berman*, 37 N.Y.2d 42, 53 (1975). And this Court has clarified that a regulation "in direct conflict with the plain language of" a statute is out of harmony with that statute. *Finger Lakes Racing Ass'n v. N.Y. State Racing & Wagering Bd.*, 45 N.Y.2d 471, 480–81 (1978).

First, it is essential to confront a fundamental flaw at the heart of the Majority's analysis: its acceptance of OCFS's mischaracterization of the Host Homes program. By rejecting the plain reality that the Host Homes program is a form of voluntary foster care, the Majority never grappled with SSL § 384-a. Instead of addressing that statutory scheme, the Majority relied on a collection of inapposite provisions for its rationale that OCFS had authority under them to promulgate the Host Homes Regulations. In doing so, the Majority not only disregarded the

governing framework, but also mistook the very nature of the program it was tasked with evaluating. The Host Homes program is in direct conflict with the plain language of SSL § 384-a, thereby making it "out of harmony" with the statute.

Second, the statutory provisions the Majority *did* rely on—SSL § 409 (preventive services), SSL § 371 (authority to "place out" children), SSL § 20(3)(d) (OCFS's general rulemaking authority), and GOL title 15-A (Designation of Person in Parental Relation)—similarly fail to establish that OCFS had regulatory authority to create the Host Homes program. Indeed, the Host Homes Regulations conflict with the plain language of these provisions as well.

Accordingly, this Court should reverse the Majority's decision and annul the Host Homes Regulations.

A. The Majority Adopted OCFS's Mischaracterization of the Host Homes Program and Ignored the Governing Statutory Provision With Which It Directly Conflicts.

The Majority attempted to distinguish Host Homes placements from voluntary foster care based on a parent's retention of legal custody under the former. That belies the true form and substance of the Host Homes Regulations. OCFS has established a regulatory scheme that requires parents to cede key parental decision-making authority to the Host Homes family as the vehicle and predicate to make and sustain a Host Homes placement. Indeed, the Host Homes program delimits the

rights and interests of parents and children more than voluntary placements do under voluntary foster care.

A Host Home placement, by OCFS design, constitutes a change in the physical residence of a child to the home of a stranger, potentially for an extended period of time, without court oversight. The prescribed vehicle to effect the Host Homes placement is GOL § 5-1551, through which the parent surrenders parental authority to the host family in matters integral to the parenting of children. Such a designation gives the host family authority to make decisions pursuant to Public Health Law ("PHL") §§ 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.[15] Any claim that parents do not give up their right to make fundamental decisions about their children's upbringing under the Host Homes scheme is patently false.

So too is the suggestion that parents yield greater fundamental rights to make decisions about their children in a voluntary foster-care placement. 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

[15] *See, e.g.*, *Trapp v. Trapp*, 136 A.D.2d 178, 181 (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").

program. For example, under 18 N.Y.C.R.R. § 441.22(d), prior to accepting a child into foster care on a voluntary placement, an authorized agency must request from the child's parent or guardian the power to make decisions related to routine medical and/or psychological assessments, immunization and medical treatment, and emergency medical or surgical care in the event 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 upbringing of their children in foster care.

The distinction the Majority attempted 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 and the Majority's corresponding failure to evaluate the relevant statutory scheme was error.

1. The Host Homes Program Is Inconsistent with the Existing Statutory Framework for Voluntary Foster Care.

The Host Homes program conflicts with the statutory scheme for voluntary foster care in five key ways:

Inconsistency number one: the statutory scheme for voluntary foster care mandates court approval for placements expected to last longer than 30 days. The

Host Homes program does not. Under SSL § 358-a, if a child remains in voluntary placement expected to last more than 30 days, a social services official must petition the court for approval, whereby the court assesses whether the parent's decision was knowing and voluntary; the placement continues to be in the child's best interests; preventive services were offered where appropriate; and the requirements of SSL § 384-a, governing the transfer of care and custody of children, have been satisfied. *Id.* § 358-a(1) & (3). By contrast, the Host Homes program provides for no judicial review or legal safeguards to assess the necessity of the placement or the child's best interests throughout the placement, which, as explained above, can be indefinite if renewed by the parents every six months.

Inconsistency number two: The statutory scheme provides children and parents the right to counsel. The Host Homes program does not. By statute, both the parent and the child in a voluntary foster-care placement are entitled to their own counsel throughout the initial proceedings and subsequent Permanency Hearings. FCA §§ 249(a), 262(a), 1090(a) & (b); SSL § 358-a(6). The Host Homes program provides for no such protection, thereby leaving the child without any meaningful way to express safety concerns or raise issues of any kind throughout the process.

Inconsistency number three: The statutory scheme requires the offering of preventive services. The Host Homes program does not. Before a child is placed in voluntary foster care pursuant to SSL § 384-a, the statute requires a social services

official to assess whether preventive services can resolve the family's crisis without separating the child from his or her home. Specifically, the statute mandates that before a child is placed into voluntary foster care, and throughout the time that a child is in out-of-home care, if it is reasonable to believe that alternative services will be effective, a social services official must offer preventive services focused on (1) preventing disruption of the family, (2) enabling an early return of a child placed in foster care, and (3) reducing the likelihood that a child will return to foster care. SSL § 409. Failing to provide preventive services where appropriate violates the statute, and where such services are not offered, a parent is entitled to a fair hearing to examine whether such services were adequately considered. SSL §§ 384-a(2)(c)(iv) & (vii), 358-a(1).

The Host Homes program does not require the agency working with the parent to offer any preventive services that would ensure family unity. The Regulations only require that a Host Homes agency provide information on preventive services. *See* 18 N.Y.C.R.R. § 444.11(a)(3). Thus, parents who relinquish care of their children under the Host Homes program can do so without receiving a single service that could have allowed the family to stay together. Indeed, far from offering preventive services intended to keep a family together, the Host Homes program encourages the opposite by facilitating the placement of children in strangers' homes. Moreover, children placed into voluntary foster care are entitled to critical

services until age 21 that are intended to secure a safe transition to adulthood, while children placed in Host Homes are not.[16]

Inconsistency number four: The statutory scheme prioritizes placing children with kin and keeping siblings together. The Host Homes program does not. Under the statute, a social services official must attempt to locate any other parent, relatives, or family friends and inform them of the opportunity to have the child reside with them, rather than with strangers. SSL § 384-a(1-a). Siblings must be placed together unless doing so is not in a child's best interests, and children may seek court intervention if they are not placed with siblings. *Id*. §§ 384-a(1-a)(b), 358-a(11)(b)–(c); FCA § 1089(d)(2)(viii). The Host Homes program contains no such mandates.

Inconsistency number five: The statutes governing voluntary foster care place strict limitations on when a child who has been placed with an authorized agency can be sent to a home outside of New York State. SSL § 374-a. When these requirements are met, New York courts retain jurisdiction over the child, and the placement must comply with the ICPC. *Id*. In stark contrast, children in the Host Homes program can be placed anywhere in the country, far from family and community, for years with no judicial oversight.

[16] This includes, among other things, helping older children develop independent living skills, SSL § 358-a(3)(f); FCA § 1089 (d)(2)(vii)(G), and paying for room and board for children in voluntary foster care attending college, SSL § 398(15).

In sum, OCFS is attempting to create a separate State-run process by which parents can voluntarily place their children out of the home with strangers but without judicial oversight or *any* of the critical safeguards mentioned above. Indeed, under Host Homes placements, children would have no opportunity to appear in court or have their voices heard, contrary to the protections the Legislature afforded to children in voluntary placements under existing law. The statutes' emphasis on providing services to keep families together and restricting out-of-state placement would be lost. Host Homes does not even include a requirement, as there is under current law, that a non-custodial parent be informed of the decision to place the child, much less provide a procedure for their participation in any part of the process. R. 1577 at ¶ 9. Such a scheme harkens back to a tragic time of "orphan trains," when children from families in poverty and crisis were placed into the hands of charitable organizations, only to be sent out of state to live with strangers, without appropriate safeguards, such as appointment of counsel and judicial oversight.[17]

The Majority further erred in failing to appreciate that the inconsistencies between the Host Homes program and current law touch on issues of critical importance to the Legislature, *e.g.*, the safety and security of vulnerable families and children. Indeed, the Legislature determined that the lack of protections and

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

safeguards described above, especially the lack of appointment of counsel, is extremely harmful to the young population represented by Appellants. Their clients in voluntary placement proceedings are low-income children, often in crisis and in great need of social services. Under the Host Homes program, these children would have no voice in the mechanics of their placement and no legal recourse to object to the placement or mandate needed services at any point. The Regulations undermine not only children's rights but also parental rights by failing to provide parents with free preventive and supportive services or an appointed lawyer. R. 1574–77 at ¶¶ 4-8. Furthermore, families of color, who disproportionately reside in under-resourced communities, would bear the brunt of this unlawful regulatory scheme. *See* R. 90-123.

2. The Host Homes Program is a State-Run Placement Program.

The Majority attempted to justify the absence of the safeguards described above on the basis that *parents* are placing their children under Host Homes and not the welfare agency as in a voluntary placement. According to this logic, "parents have always been permitted to place their children," so *any* protections provided by the Host Homes Regulations somehow constitute "increased protections" even where they lack the safeguards guaranteed under existing law for voluntary placements. R. 1611.

This reasoning is deeply flawed. In reaching this conclusion, the Majority relied on SSL § 374(2), which provides that only an "authorized agency shall place out or board out any child" but nothing shall "restrict or limit the right of a parent . . . to place out or board out a child." R. 1608–09. That section, however, simply reaffirms the existing rights of parents to place their own children outside of their homes. It does not authorize a new *State-run* voluntary foster-care system to facilitate out-of-home placements. Indeed, the notion that parents place out their children in the Host Homes program is a complete fiction. Under the Regulations, it is the State-approved agency—not the parent—that identifies, vets, and oversees the Host Home in accordance with OCFS regulations (just as authorized agencies identify, vet, and oversee a foster home in a voluntary placement). The Host Homes agency's fulfillment of these functions, which are outlined in the text of the Regulations, meets the statutory definition of "placement" in the Social Services Law. *See* SSL § 371 [12] (defining to "[p]lace out" as "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 adoption or for the purpose of providing care"); *see also* 18 N.Y.C.R.R. § 444.4(a)–(c). Thus, even according to the Regulations themselves, the Host Homes agencies are truly doing the placing, rather than the parents, who are not independently involved in the host family identification process. OCFS is seeking here to reach the same result as a

voluntary placement and, accordingly, the Majority's purported distinction is baseless.

B. The Statutory Provisions the Majority Relied on Similarly Fail to Provide OCFS Regulatory Authority to Create the Host Homes Program.

OCFS lacked the authority to promulgate the Host Homes Regulations and the Majority's decision should consequently be reversed.

1. The Host Homes Regulations Exceed OCFS's Authority.

In upholding the Host Homes Regulations, the Majority pointed to general regulatory authority granted to Respondents by the Legislature. None of those statutory provisions, however, authorizes OCFS to create the Host Homes program, which constitutes a *new* State-run system for placing children with strangers. The fact that OCFS "is the agency responsible for administering the child welfare laws of this state," does not provide OCFS with the authority to create Host Homes.[18] SSL § 20(3)(d). In *New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Department of Health and Mental Hygiene,* for

[18] A general enabling statute, by itself, does not give an agency authority to act. *Boreali*, 71 N.Y.2d at 9 ("Even under the broadest and most open-ended of statutory mandates, an administrative agency may not use its authority as a license to correct whatever societal evils it perceives."). The delegation of authority is not a "broad assignment . . . to revise general statutes governing a substantive body of law" to circumvent the legislative process. *Delgado v. State*, 39 N.Y.3d 242, 257 (2022). Thus, it is up to the courts to strike down administrative actions that exceed the scope of the enabling statute and cause a constitutional separation-of-powers problem. *Boreali*, 71 N.Y.2d at 11.

example, this Court invalidated New York City regulations restricting sugary beverages despite a broad statutory mandate that included regulating "activities affecting public health in the city." 23 N.Y.3d 681, 694 (2014) (citation omitted). The Court found that "[d]evising an entirely new rule" was "not an auxiliary selection of means to an end; it reflects a new policy choice." *Id.* at 700.

Consistent with *Statewide Coalition*, the statutory provisions relied upon by the Majority 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. *See id.*; *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); *see also 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'"); *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*, 230 A.D.3d 83 (3d Dep't 2024), *aff'd*, No. 56, 2025 WL 1697944 (N.Y. June 18, 2025).

2. The Host Homes Program Is Not a Preventive Service.

In concluding that OCFS did not exceed its regulatory authority by promulgating the Host Homes program, the Majority cited SSL § 409, reasoning that OCFS "also has the authority to provide preventive services for children and their families." R. 1609. That was clear error.

The Social Services Law defines "preventive services" as "supportive and rehabilitative services provided . . . to children and their families for the purpose of: [1] averting an impairment or disruption of a family which will or could result in the placement of a child in foster care; [2] enabling a child who has been placed in foster care to return to his family at an earlier time than would otherwise be possible; or [3] reducing the likelihood that a child who has been discharged from foster care would return to such care." SSL § 409. The Host Homes program is the very opposite of a preventive service. Under the Host Homes Regulations, in contrast to current law,[19] the agency has no obligation to provide preventive services prior to placing the child with strangers. *Compare* 18 N.Y.C.R.R. § 444.11(a)(3), *with* SSL § 384-a(2)(c)(iv)&(vii), *and* SSL § 358-a(1). And, unlike voluntary placements,

[19] For example, the Social Services Law provides for families to receive special cash grants sufficient to obtain adequate housing. SSL § 409-a(5)(c). Regulations provide additional emergency resources and housing, as well as services that help manage the home, parent training, transportation, day care, and clinical services. 18 N.Y.C.R.R. § 423.2(b). These services all aim to keep the child with his or her family.

Respondents are *not* obligated to offer services to assist the family as part of the Host Homes program. *See* FCA § 1089(d)(1)(viii)(A). In short, the Host Homes program does nothing to prevent the impairment or disruption of a family but instead facilitates the placement of children with strangers. *See Finger Lakes Racing Ass'n*, 45 N.Y.2d at 481 (invaliding regulations "in direct conflict with the plain language" of the statute).

The Majority's decision rests on the flawed premise that avoiding any involvement with the voluntary foster-care system constitutes a "preventive service" even if it means the child is placed with strangers through the Host Homes program. R. 1607–08. The idea that the Host Homes program qualifies as a "preventive service" because it avoids a formal placement in "foster care" (even where that placement is voluntary) elevates form over substance: Host Homes is, in effect, a voluntary foster-care placement without the corresponding statutory safeguards. It serves the same purpose and has the same effect of separating children from their homes, but simply operates under a different label. The fact that the Legislature defined "preventive service" in part to avoid placing a child in "foster care" is immaterial. The Legislature's use of the term "foster care" simply reflects the available placement models at the time the statute was enacted and further indicates the Legislature's intent to limit out-of-home placement with strangers only to those placement models explicitly provided by statute.

Here, the Majority appears to have erroneously compared the Host Homes program to foster care generally as opposed to *voluntary* placements into foster care. Diverting parents from one voluntary placement program to another voluntary placement program while making no effort to keep the families together, as required by existing law, does not reasonably constitute a "preventive" service.

The Majority's reliance on *Juarez v. New York State Office of Victim Services*, 36 N.Y.3d 485 (2021), is misplaced. R. 1605. There, this Court analyzed whether amended regulations of the Office of Victim Services (OVS) that limited attorneys' fee awards conflicted with the authorizing statute. *Juarez*, 36 N.Y.3d at 488. This Court held that the regulations were consistent with the statute because it permitted OVS to reimburse fees deemed "reasonable," but was silent as to the parameters of what is reasonable. *Id*. Accordingly, this Court concluded that the Legislature necessarily granted OVS the authority to determine the scope of that term, and its regulations were consistent with the statute's purpose of providing support for victims of crime. *Id*.

Unlike *Juarez*, the Legislature here defined "preventive service" in the statute, and the Host Homes program directly conflicts with the statutory definition. The Regulations do not "fill in the interstices" of determining what constitutes appropriate preventive services. *See Juarez*, 36 N.Y.3d at 492. Rather, they do the opposite—they create an easier path to family separation and eliminate the

procedural safeguards of the voluntary foster care system, including the provision of services. *Cf. DeVera v. Elia*, 32 N.Y.3d 423, 435, 438 n.8 (2018) (annulling Department of Education contracts with charter schools that improperly granted the Department monitoring authority, the "exact opposite" of the Charter Schools Act's grant of "*all* such monitoring" to the charter schools (emphasis in original)).

The Majority's attempt to spin Host Homes as "respite care" and, thus, within the definition of "preventive services" is similarly improper. R. 1612–13. Respite care is expressly defined by statute as "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." SSL § 409-a(5)(f). 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 up to a maximum of seven weeks per child, per year. 18 N.Y.C.R.R. § 435.5(c); *see, e.g.*, *In re Alachi I.*, 215 A.D.3d 1014 (3d Dep't 2023) (parent using respite care to place children with agency "for a brief period so that she could attend to a custody matter in Georgia").

The Host Homes program runs afoul of both the respite care statute and implementing regulations because it is far broader in scope, is not limited to "immediate relief," and allows a child's placement to last indefinitely provided that the placement is renewed by the parent every six months. The program thus does not qualify as "respite care" as a matter of law. 18 N.Y.C.R.R. § 444.5.

3. Authority to "Place Out" or "Board Out" Children Does Not Authorize the Host Homes Program.

Nor does OCFS's statutory authority to "place out" or "board out" children provide legal justification for the creation or operation of the Host Homes program. Curiously, the Majority relied on this authority at the same time it contended (incorrectly, as established above) that in Host Homes the *parent* is placing their own child. Those terms have defined meanings within New York's child welfare framework, and the Host Homes program falls well outside them. "Place out" 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). There can be no question that this is precisely the role played by the Host Homes agencies. However, while Respondents and the Majority maintain that the parent retains custody of the child in a Host Homes arrangement and therefore can avoid the requirements of the Social Services Law, the law is clear that the custody of a child placed out by an agency "shall be vested . . . in the authorized agency." SSL § 383(2). Custody may

be transferred to an authorized agency either by court order or voluntarily, pursuant to the procedures set forth in SSL § 384-a. Placements made by the agency must occur within the regulated foster-care system, involving certified placements, and they are subject to oversight by the courts and administrative bodies. The Host Homes program, by contrast, involves the removal of children from their homes and placement with strangers outside the statutory structure, and without any judicial oversight.

Indeed, SSL § 374, which is titled "Authority to place out or board out children," is followed by provisions concerning specific types of out-of-home placements—but notably, 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. Similarly, SSL § 398 identifies placement options authorized by statute as well as circumstances in which children can be placed. Host Homes is nowhere authorized.

This case is in stark contrast to cases like *Greater New York Taxi Association v. New York City Taxi and Limousine Commission*, where the Court recognized that the Taxi and Limousine Commission had a history of promulgating regulations "with little interference" by the City Council, and that, accordingly, the agency was "not writing on a clean slate in the sense that it ha[d] always regulated" in such a manner. 25 N.Y.3d 600, 611 (2015). 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, its failure to do so here shows that OCFS exceeded its statutory authority. [20]

4. The Host Homes Program Is Out of Harmony with Title 15-A of the General Obligations Law.

The Majority also erred in treating GOL title 15-A—a set of general laws outside the scope of OCFS's delegated authority—as a source of authority for OCFS to create the Host Homes program and, in so doing, to circumvent its statutory obligations. The Host Homes Regulations contemplate a parent executing a Designation of Person in Parental Relation under GOL § 5-1551 as a predicate to the Host Homes agency effectuating the placement of a child in a host home. Specifically, the Regulations provide that a child may not be cared for in a host home unless the parent "has executed a designation of 'person in parental relation' in accordance with Title 15-A of Article 5 of the General Obligations Law" that names the host family "as the child's caregiver." 18 N.Y.C.R.R. § 444.5(b).

[20] The Host Homes Regulations consider a Host Home agency to be an "authorized agency." By statute, only an authorized agency may place out a child, but in order to qualify as such the agency must be "empowered by law." SSL§§ 371(10)(a), 374(2). Since a Host Home agency is nowhere empowered by law to place out children, it does not qualify as an authorized agency. That, in fact, appears to have been OCFS's initial conclusion when it contemplated expanding the "authorized agency" definition. R. 697, R.701.

This "designation" is the legal linchpin of the Regulations. They define "[p]arent," "[h]ost family home agency," "[h]ost family care," and "[h]ost family home program" in terms of those considering designating a person in parental relation and those who may be designated. *Id*. § 444.2(a), (c), (d), (f). Placement of a child in a host home cannot occur without this designation. *Id.* § 444.5(b). Additionally, revocation of this designation by the parent purportedly terminates the host home care immediately. *Id.* §§ 444.5(h)(5), 444.18(a)(1).

The Majority, however, failed to recognize that using Title 15-A in this manner distorts the purpose for which the statute was enacted. It merely authorizes a parent of a minor child to "designate another person as a person in parental relation to such minor or incapacitated person *pursuant to*" four specific statutes:

(1) Public Health Law § 2164, concerning child immunizations;

(2) Public Health Law § 2504, concerning the provision of medical, dental, health, and hospital services to a child;

(3) Education Law § 2, defining "parental relation" for purposes of the Education Law; and

(4) Education Law § 3212, concerning compulsory education.

GOL § 5-1551 (emphasis added).

Title 15-A was added to the GOL in 2005 to assist grandparents and other kinship caregivers who might have difficulty raising a child in the absence of

parents. Specifically, it provided a mechanism for those caregivers to obtain medical and educational services for the child without having to go to court to obtain legal custody. The Sponsor's Legislative Memorandum explains: "Under current law it can be difficult for grandparents or other caregivers, who do not have legal custody of the children in their care, to sign relevant consent forms for educational or health care services. The number of grandparents and other non-parent caregivers has risen dramatically over the last fifteen years." R. 1283. The Memorandum concludes that the "proposed legislation would ease these difficulties for the caregivers and allow the children to get school services and health care in a timely fashion." R. 1284. Further, Title 15-A has been amended only once, to permit the limited designations to last up to 12 months rather than the prior limit of six months—a change, according to the Legislative Memorandum, to address the reality of "kinship caregiving." R. 1273.

Accordingly, Title 15-A provides for the limited transfer of specific, enumerated decision-making authority to address difficulties faced by grandparents and other kinship caregivers. It was never intended to facilitate, and does not authorize, the transfer of full authority for the care of children to strangers under the oversight of a State-sponsored placement program. As the Dissent pointed out, "the reliance on the designation of a person in parental relation form . . . is curious given that this form had no place in the first iteration of the program (*see* NY Reg, Jan. 29,

2020 at 1–2),” but rather was added after the receipt of public criticism that OCFS was creating a de facto foster care system. R. 1622.

The Majority erred by enabling OCFS to legislate a new application of the General Obligations Law that plainly exceeds its reach. Further, Respondents’ attempt to use the General Obligations Law to avoid the requirements and protections of the Social Services Law and Family Court Act, as detailed above, conflicts with the clear mandate of the Legislature.

In sum, OCFS improperly exceeded its authority by promulgating the Host Homes Regulations, which directly conflict with New York’s statutory framework governing voluntary foster care and the other statutes upon which the Majority relied.

II. UNDER THE *BOREALI* FRAMEWORK, THE HOST HOMES PROGRAM IS THE PRODUCT OF IMPERMISSIBLE LEGISLATIVE POLICYMAKING AND THUS CANNOT STAND.

The Majority also erred in its application of the *Boreali* factors. In *Boreali*, this Court introduced a framework to guide courts evaluating whether an agency has exceeded its regulatory authority by venturing into the realm of policymaking—a domain reserved exclusively for the Legislature. This framework involves consideration of four factors, although not all factors must point to the same conclusion. *Statewide Coalition*, 23 N.Y.3d at 696–97. Instead, courts “treat the circumstances as overlapping, closely related factors that, taken together, [can]

support the conclusion that an agency has crossed [the] line." *Id*. These factors are: (1) whether the agency "made value judgments [that] entail difficult and complex choices between broad policy goals to resolve social problems;" (2) whether the agency "merely filled in details of a broad policy or if it wrote on a clean slate;" (3) 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;" and (4) whether "the agency used special expertise or competence in the field to develop the challenged regulation." *LeadingAge N.Y., Inc. v. Shah*, 32 N.Y.3d 249, 260–61 (2018) (citing *NYC C.L.A.S.H., Inc. v. N.Y. State Off. of Parks, Recreation & Historic Pres.*, 27 N.Y.3d 174, 179-90 (2016); *Boreali*, 71 N.Y.2d at 12–14).

The Majority misapplied each of these factors in reviewing the Host Homes Regulations.

A. OCFS Cannot Satisfy the First *Boreali* Factor Because Host Homes Is Unquestionably the Product of a Value Judgment.

Applying the first *Boreali* factor, this Court should conclude that OCFS made a value judgment, thereby stepping "outside of its proper sphere of authority." *Boreali*, 71 N.Y.2d at 12. The first *Boreali* factor asks whether the agency did more than "balanc[e] costs and benefits according to preexisting guidelines," and instead made value judgments between policy goals. *Greater N.Y. Taxi Ass'n*, 25 N.Y.3d

at 610 (alterations in original) (citation omitted). That is precisely what OCFS did through the Host Homes program.

The Majority concluded that the first factor weighed in OCFS's favor because "the Legislature, not OCFS, made the basic policy choice that is central to the program – avoiding placement of children in the foster care system in the first instance by proactively offering services to families." R. 1612. The Majority reasoned that the Host Homes Regulations furthered that policy by providing an additional form of support to parents to avoid formal child welfare intervention. *Id*. This determination rests on a complete misunderstanding of the Legislature's policy goal.

The Legislature's goals underlying voluntary placement into foster care are twofold: (1) avoiding, where possible, the disruption of the family, and (2) ensuring a child's welfare and legal rights are protected through a formal system of safeguards if placement with a stranger is unavoidable. This two-part framework reflects a deliberate legislative balance between preserving family integrity and protecting children once removed from their homes. Critically, the Legislature did *not* authorize any third path where children are placed in a new home selected and administered by a State-run agency *without* triggering the protections that the Legislature has deemed vital. Yet, OCFS set out, in their words, to "transform and modernize New York State's child welfare system" by promulgating new

regulations that would provide full-time care "without invasive and unnecessary engagement of the child welfare and court systems." R. 1407, R. 1410. OCFS intentionally circumvented the formal system of safeguards built into the voluntary foster-care system over decades and omitted them from the Regulations.

This Court has made clear that the goal of an enabling legislation is not analyzed in isolation. In *Statewide Coalition*, this Court held that a regulation establishing a cap on the container size for sugary drinks served or sold at a food service establishment exceeded the agency's delegated authority because the policy of discouraging the consumption of sugary drinks for better health competed with other special interests, including how much legitimate influence the government may have over personal autonomy. 23 N.Y.3d at 690–91, 698–99. That contrasts with cases finding delegated authority based on a single legislative policy goal that does not raise difficult, intricate, and controversial issues of social policy, *see Acevedo v. N.Y. State Dep't of Motor Vehicles*, 29 N.Y.3d 202, 223 (2017) (no value judgment needed for regulation requiring certain drunk driving offenses to preclude relicensing that was made pursuant to the "well-established and widely shared" goal of "protecting the public from the dangers of recidivist drunk driving"), or based on a clear directive from the Legislature resolving competing social policies, *see Garcia v. N.Y.C. Dep't of Health & Mental Hygiene*, 31 N.Y.3d 601, 612 (2018) (the Legislature chose between competing policies of advancing public health and

economic disruption of specific industries when it prescribed the "means" of advancing public health through vaccinations).

Here, OCFS is the "agency responsible for administering the child welfare laws of this state," which include not just preventive services but also the voluntary foster-care system it aims to avoid via Host Homes. *See* R. 1608. In enacting the Host Homes Regulations, it chose among "competing ends" and thus made a value judgment reserved for the Legislature. *See Acevedo*, 29 N.Y.3d at 223. "That is policy-making, not rule-making," *Statewide Coal.*, 23 N.Y.3d at 699, so the Host Home Regulations cannot stand.

1. The Host Homes Program Upsets the Legislature's First Policy Goal of Avoiding Family Disruption.

The Host Homes program fails to promote the legislative goals of keeping families together and keeping those children placed outside of their homes safe. First, the Legislature has made a clear policy judgment that the State must try to avoid the disruption of families. Accordingly, under current law, social services officials must provide preventive services to a parent prior to accepting a voluntary placement outside the home whenever it is reasonable to believe that those services would enable the child to remain at home. SSL §§ 398(1)(a), 409-a(1)(a)(i).

The Legislature recognized the significant trauma involved in separating children from their homes and thus prioritized the provision of services to prevent such separation, and, in the event an out-of-home placement, to ensure that the child

is returned as quickly as possible. Indeed, there is an extensive body of research documenting the harm to children placed out of their homes. *See* R. 1584–90 at ¶¶ 8–27; R. 1576–77 at ¶ 8; *see also Martin A. v. Gross*, 153 A.D.2d 812, 817 (1st Dep't 1989) (where defendants failed to provide preventive services, as required by law, the court recognized "the irreparable injury of needless separation of families"). In contrast, under Host Homes, families are provided only referral lists of potential service providers, rather than actual services, which, given the scarcity of resources available to families, cannot reasonably be considered equivalent. R. 1591–93 at ¶¶ 31–36; R. 1576 at ¶ 7. Thus, Respondents, in effect, are improperly attempting to amend the statutory scheme by substituting their own policy decisions for those of the Legislature, which has *required* Respondents to provide not just "lists" but actual services to families in crisis.

As explained above, the Majority erred in defining the Legislature's policy as avoiding placement in foster care even where the placement is voluntary and the alternative is placement in the home of a stranger through the Host Homes program. This distinction makes no difference in the eyes of a child and is in no way discernable from the plain statutory language that a preventive service "*avert[] an impairment or disruption of a family* which will or could result in the placement of a child in foster care." SSL § 409 (emphasis added); *see In re Hyde*, 15 N.Y.3d 179, 185 (2010) ("The Legislature's intentions should normally be ascertained from a

careful reading of the statute itself[.]"). The Legislature's goal was not to avoid out-of-home placement only when it carries the formal label of "foster care," but to avoid removal from the home altogether. The Legislature's concern was *not* with the label, but rather with the actual removal of children from their homes and placement in state-arranged substitute care. The Legislature determined that removal should be a last resort, and that every effort should be made to keep children safely with their parents. To interpret the Legislature's directive as limited only to the system formally labeled as "foster care" is to elevate form over substance in a way that undermines the statute's core purpose. *Abood v. Hosp. Ambulance Serv., Inc.*, 30 N.Y.2d 295, 298 (1972) ("[T]he literal language of the statute, where it does not express the statute's manifest intent and purpose, need not be adhered to.").

With Host Homes, OCFS has subverted the statutory scheme by creating a purported "preventive service" that directly conflicts with the Legislature's definition. As explained above, the Host Homes program exists to make it easier to place children out of their homes—it does nothing to advance the goal of keeping children with their parents or ensuring that removal is a last resort. *See Leading Age N.Y., Inc*, 32 N.Y.3d at 264 ("[A]n agency may promulgate regulations not specifically directed by its enabling legislation as long as they are consistent with and intended to advance the legislature's broad policy choice."). At bottom, OCFS

is substituting its own policy goals for those of the Legislature—precisely the kind of reasoning the *Boreali* framework is designed to prevent.

2. The Host Homes Program Upsets the Legislature's Second Policy Goal of Prescribing Safeguards Where Removal from the Home Is Unavoidable.

Second, the Legislature has decided that where voluntary placement outside of the home is unavoidable, specific safeguards must be put in place to protect the child's welfare and legal rights. Those safeguards are, as explained above: (1) mandated court review for greater-than-30-day placements; (2) the right to counsel for children and parents; (3) the offering of preventive services; (4) priority for placing children with kin and keeping siblings together; and (5) restrictions on placing children in homes outside the State.

The Legislature grappled with 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, however, upend this statutory scheme and upset the balance set by the Legislature. The program omits numerous protections deemed critical by the Legislature, despite offering the same living arrangement in practical terms; that is, a full-time living arrangement in a stranger's home selected and overseen by a Host Homes agency according to OCFS regulation.

One key indicator of agency overreach is where a regulation centers on "administratively created exemptions rather than on rules that promote the legislatively expressed goals, since exemptions ordinarily run counter to such goals and, consequently, cannot be justified as simple implementations of legislative values." *Boreali*, 71 N.Y.2d at 12; *see also NYC C.L.A.S.H., Inc.*, 27 N.Y.3d at 181 (an agency cannot "construct[] a regulatory scheme laden with exceptions based solely upon economic and social concerns" (citation omitted)).

At its core, the Host Homes program is a glaring, administratively crafted exemption to New York's statutorily created voluntary foster-care system. A clear illustration of Respondents' encroachment upon legislative decision-making is their attempt to create an end-run around SSL § 358-a(1), which requires court approval for any voluntary placement of a child outside the home expected to last more than 30 days. 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 reflects the Legislature's choice after balancing competing policy considerations. By creating a new State-run system governing voluntary out-of-home placements with *no* requirement for court approval or appointment of counsel for placements of months or even years, much less 30 days, Respondents are, in effect, again improperly attempting to amend the Social Services Law, thereby nullifying the Legislature's policy decision to provide court oversight and

legal representation to ensure the safety of children who are placed with strangers. Offering an alternative State-run voluntary placement option completely outside the court system clearly exceeds OCFS's authority.

The omission of these protections is based on OCFS's judgment that such protections constitute unnecessary "administrative burden." R. 701. Indeed, Respondents tout the fact that Host Homes will operate without "unnecessarily burdening the child welfare system," and the trial court specifically found that OCFS "balanced the costs associated with placing children into foster care" and diverting children into Host Homes "ultimately reduces the burden on the foster care system."[21] In both *Boreali* and *Statewide Coalition*, however, this Court found that an administrative agency's consideration of economic burden constituted an inappropriate attempt to choose between competing policy goals. *Boreali*, 71 N.Y.2d at 12; *Statewide Coal.*, 23 N.Y.3d at 697–98; *see also Health Ins. Ass'n of Am. v. Corcoran*, 154 A.D.2d 61, 73 (3d Dep't 1990) (in considering the claimed "drastic social, economic and psychological impact," State Superintendent of Insurance exceeded legislative authority in promulgating rules banning insurers from considering HIV status), *aff'd*, 76 N.Y.2d 995 (1990); *Ahmed v. City of New York*, 129 A.D.3d 435, 440 (1st Dep't 2015) (Taxi and Limousine Commission exceeded its authority in attempting to establish a "cost-effective structure for

[21] R. 1413 at ¶ 28; R. 10.

promoting driver health"). The same is true here. OCFS is improperly attempting, through regulation, to reduce its own burden in administering the foster-care system by evading statutory requirements and is thus clearly operating outside of its proper sphere of authority.

B. OCFS Cannot Satisfy the Second *Boreali* Factor Because It Wrote on a Clean Slate in Creating the Host Homes Program.

Applying the second *Boreali* factor, this Court should conclude that OCFS "wrote on a clean slate" and created its own set of rules separate and apart from the existing legislation. *Boreali*, 71 N.Y.2d at 13. An agency "wr[ites] on a clean slate" when its action is not clearly connected to the objectives outlined by the Legislature and rather represents a distinct "value judgment." *See LeadingAge N.Y., Inc.*, 32 N.Y.3d at 268. Such action departs from the agency's charge to merely "fill in details and interstices" of its enabling legislation. *Statewide Coal.*, 23 N.Y.3d at 700. While an agency may make "subsidiary policy choices consistent with the enabling legislation," it cannot devise an entirely new rule that reflects a new policy choice. *Id.*

The Majority concluded that OCFS had not written on a "clean slate" because the Host Homes program is merely a form of respite care, a "matter that has long been entrusted to the discretion of OCFS (*see* Social Services Law § 409-a [5] [a])." R. 1612–13. As explained above, however, the statutory definition and implementing regulations make clear that respite care is a narrowly circumscribed,

short-term support service provided to families on a temporary and intermittent basis. The Host Homes program runs afoul of both the statute and implementing regulations because it is far broader in scope, is not limited to "immediate relief," and allows a child's placement to last indefinitely provided that the placement is renewed by the parent every six months. These distinctions are not subsidiary details; they are fundamental policy choices that alter the nature of the service itself and impermissibly exceeds the scope of the agency's authority.

The Majority erroneously relied upon *Greater New York Taxi Association* in support of its *Boreali* analysis. In *Greater New York Taxi Association*, this Court upheld regulations that designated a particular car for purchase after each taxi owner's vehicle was retired. 25 N.Y.3d at 605–06. The Court held that the agency was not writing on a clean slate because it had always regulated the taxi industry with implicit approval by the Legislature. *Id.* at 611. Further, the Court found that the regulations aligned with the "only instance" of legislative guidance which directed the agency to "approve one or more . . . models for use as a taxicab." *Id.* (citation omitted).

Conversely, here, the Legislature has provided guidance on many more aspects of the child welfare system than just respite care, and that guidance counsels against the Host Homes Regulations. The Legislature created a statutory scheme that specified the procedures and safeguards to be used when children are voluntarily

placed outside the home with strangers through a State-run program, which evinces a clear legislative policy of ensuring a child's welfare and legal rights are protected. *Accord Acevedo*, 29 N.Y.3d at 224 (statutory scheme aimed at addressing the problem of drunk driving "evince[d] a clear legislative policy decision to restrict the driving privileges of recidivist drunk drivers"). OCFS's authority to regulate respite care does not give it carte blanche to create a program that conflicts with the legislative framework for voluntary placement (and is not respite care, as described above). Its regulations must be consistent with the statutory language and underlying purpose of its enabling legislation to pass muster. *Greater N.Y. Taxi Ass'n*, 25 N.Y.3d at 608.

Further demonstrating that OCFS wrote on a clean state, the Host Homes Regulations, as explained in detail above, exceed OCFS's statutory authority. That is abundantly clear in the process by which the Regulations were adopted. The initial proposal allowed parents to place children with the Host Homes agency but drew widespread public criticism emphasizing that agencies are not legislatively authorized to place children with strangers outside of the voluntary foster-care system. In response, OCFS revised and reissued the proposed regulations.

The Revised Regulations require that the parent sign a Designation of Person in Parental Relation under GOL title 15-A, thereby purportedly placing the child directly with the host family, rather than with the host agency. R. 1255. That,

however, is a distinction without a difference. Whether the signed contract names the host family or host agency, children are being placed in a home with strangers identified and overseen by the host agency in compliance with regulations set by OCFS. Moreover, as explained above, the Majority's reliance upon GOL title 15-A as statutory authorization for the Host Homes program was clear error.

As in *Statewide Coalition*, the Host Homes Regulations embody not a choice of means to an end but rather an entirely new end not contemplated by the Legislature—a shadow foster-care system devoid of the protections afforded to children and parents in voluntary placement situations. It is an attempt to create an end run around the system created by the Legislature. Although regulations may go beyond the text of the statute, they may do so only "as long as they are in harmony with the statute's over-all purpose." *Goodwin v. Perales*, 88 N.Y.2d 383, 395 (1996). As detailed above, however, the Host Homes Regulations conflict with the existing statutory scheme's purpose because, as acknowledged by the trial court, they are intended to "circumvent" the statutorily prescribed channels for providing a specific kind of assistance—namely, voluntary placement into foster care under SSL § 384-a. The Regulations go well beyond interstitial rulemaking to create policy not only out of whole cloth but also in conflict with existing statutes. The Regulations were therefore adopted in excess of OCFS's authority and should be annulled.

C. The Third and Fourth *Boreali* Factors Do Not Weigh in Favor of OCFS.

The third *Boreali* factor addresses "whether the legislature has unsuccessfully tried to reach agreement on the issue," *NYC C.L.A.S.H., Inc.*, 27 N.Y.3d at 183, while the fourth factor considers whether the agency has special expertise in the area, *Boreali*, 71 N.Y.2d at 13–14.

While there has been no legislative activity as to the Host Homes program, the related activity that has occurred weighs in favor of concluding that "the legislature has unsuccessfully tried to reach agreement" on the issue OCFS has sought to resolve. *See NYC C.L.A.S.H., Inc.*, 27 N.Y.3d at 180 (citation omitted). Less than a month before OCFS published the Revised Regulations, Assemblyman Andrew Hevesi introduced Assembly Bill 2021-A8090, which would have established a new voluntary placement program where the agency would arrange with parents' consent "alternative living arrangements" for children at substantial risk of abuse by naming a relative or other person to care temporarily for their child. This legislation never made it out of committee. It was subsequently introduced in the Senate and likewise failed to advance. Since then, the bills were reintroduced but have not moved out of committee in either house. As in *Statewide Coalition*, "[h]ere, 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." 23 N.Y.3d at 700.

The Majority erred in considering the fourth factor because where, as here, an agency exceeded its statutory authority, the question of expertise is no longer a material factor. *See, e.g.*, *Statewide Coal.*, 23 N.Y.3d at 700–01 ("In light of *Boreali*'s central theme that an administrative agency exceeds its authority when it makes difficult choices between public policy ends, rather than finds means to an end chosen by the legislature, we need not . . . address the fourth *Boreali* factor[.]"). At any rate, the record does not support the Majority's finding that any special expertise was involved in developing the Host Homes program, the model for which had been provided by a national organization.

Considering the *Boreali* factors in their totality, the Majority erred in concluding that OCFS did not cross the line from rulemaking to legislating through its promulgation of the Host Homes Regulations.

CONCLUSION

For the foregoing reasons, this Court should reverse the Majority's decision and annul the Host Homes Regulations because OCFS exceeded its regulatory authority in promulgating them.

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