No. 20-1046

IN THE

Supreme Court of the United States

MARIN HOUSING AUTHORITY,

Petitioner,

v.

KERRIE REILLY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of California

RESPONDENT'S BRIEF IN OPPOSITION

ELIZABETH G. BENTLEY
JONES DAY
90 South Seventh St.
Suite 4950
Minneapolis, MN 55402

NATHANIEL P. GARRETT
Counsel of Record
MARGARET ADEMA MALOY
AMOS J. B. ESPELAND
THILINI CHANDRASEKERA
JONES DAY
555 California St., 26th Fl.
San Francisco, CA 94104
(415) 875-5731
ngarrett@jonesday.com

Counsel for Respondent

QUESTIONS PRESENTED

1. Whether this Court lacks jurisdiction under 28 U.S.C. § 1257(a) to review an interlocutory decision of the Supreme Court of California reversing the judgment of a lower court, which had sustained a demurrer to a petition for writ of mandate on a limited legal issue, and remanding the case for further proceedings.

2. Whether payments made to a parent who provides care directly to a developmentally disabled child under California's In-Home Supportive Services program are excluded from the family's "[a]nnual income" for purposes of calculating its Section 8 Housing Choice Voucher program rental subsidy, because they are "[a]mounts paid by a State agency to a family with a member who has a developmental disability and is living at home to offset the cost of services and equipment needed to keep the developmentally disabled family member at home," 24 C.F.R. § 5.609(c)(16).

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

INTRODUCTION

Petitioner Marin Housing Authority seeks review of an interlocutory California Supreme Court decision holding that payments by the California Department of Social Services to a mother who provides care to her developmentally disabled daughter are excluded from the family's "annual income" for purposes of calculating the amount of its Section 8 rental subsidy. The petition should be denied for four reasons: (1) the Court does not have jurisdiction over this case under 28 U.S.C. § 1257(a); (2) the California Supreme Court decision does not create a split with any other court that warrants this Court's review; (3) the question presented does not raise an issue of ongoing importance, in particular because the Department of Housing and Urban Development ("HUD") is on the verge of publishing a new rule that revises the regulation at issue, confirms the correctness of the decision below, and renders the question presented moot; and (4) the decision below is correct.

First, this Court lacks jurisdiction to review the decision below because it is not a final judgment. 28 U.S.C. §1257(a). Respondent Kerrie Reilly's case came to the California Supreme Court on appeal from an order sustaining Petitioner's demurrer. The California Supreme Court's decision reversed that order and remanded for further proceedings in which Ms. Reilly will have the opportunity to prove her case. The state court decision under review is not final as an effective determination of the litigation, and is not reviewable in this Court at this preliminary stage.

Second, Petitioner is incorrect that the California Supreme Court's decision creates a conflict worthy of

this Court's review. The HUD regulation at issue in this case, 24 C.F.R. § 5.609(c)(16) (the "Home Care Exclusion Rule"), plays out differently in different states depending on the structure of each state's benefits program that supports families with developmentally disabled individuals living at home. California's In-Home Supportive Services ("IHSS") program, which provides payments to Ms. Reilly, is unlike either the Texas or Minnesota programs at issue in Petitioner's cited cases. Neither the Fifth Circuit's unpublished opinion (which is not binding even in that Circuit), nor the Minnesota Supreme Court's opinion, interprets the language of 24 C.F.R. § 5.609(c)(16) with consideration of the unique features of California's IHSS program.

Third, the petition wildly overstates the consequences of the decision below for Section 8 programs in other states. Pet. 5. To begin, any "consequences," such as they are, will be eclipsed by HUD's intended revision to the Home Care Exclusion Rule. In 2019, HUD published a proposed rule to clarify Section 5.609(c)(16). Under that clarification, all payments provided by a state Medicaid managed care system to a family to keep a member who has a disability living at home must be excluded from Section 8's definition of annual income. Without question, the payments Ms. Reilly receives fall within the exclusion as revised. This forthcoming rule (currently in the Final Rule Stage) confirms the correctness of the California Supreme Court's interpretation of the regulation below and resolves any future ambiguity as to the meaning of the regulation.

What is more, the decision below only governs how California administers its housing assistance program in partnership with HUD. Even if courts in other states were to adopt its reasoning, it would only apply to the minority of states that provide benefits to parents who care directly for a developmentally disabled child. And then, the decision still would only affect that narrow category of beneficiaries who receive both those care payments *and* Section 8 vouchers.

Fourth, the decision below is correct. The California Supreme Court applied the plain meaning of the words "offset" and "costs" as they appear in the Home Care Exclusion Rule to determine that payments made to Ms. Reilly qualify for exclusion under that provision. Its interpretation also comports with the intent of the rule to reduce the incidence of institutionalization of individuals with developmental disabilities. Petitioner's interpretation, in contrast, undermines that regulatory purpose and reflects a policy preference that should be presented to HUD or Congress, not this Court.

STATEMENT

A. The Department of Housing and Urban Development's Home Care Exclusion Rule.

1. For most of the 20th century, people with developmental disabilities often were confined to large public institutions, in significant part because of a dearth of community-based alternatives.

Over time, however, it became apparent that institutionalized care was not in the best interests of the individual or the government. State-sponsored

institutions were in many situations found to be "dangerous" and "inadequate," causing the "deteriorat[ion]" of "the physical, intellectual, and emotional skills of some residents." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 7 (1981). Institutions also were more expensive than community-based alternatives. *Id.* at 49 (White, J., dissenting in part). In 1975, Congress enacted the Developmentally Disabled Assistance and Bill of Rights Act, recognizing that "[t]he treatment, services, and habilitation for a person with developmental disabilities ... should be provided in the setting that is least restrictive of the person's personal liberty." 42 U.S.C. § 6010(2) (1976). Subsequently, governments at every level began working together to serve individuals with developmental disabilities in their communities, rather than in large, state-operated institutions.

In 1990, Congress enacted the Americans with Disabilities Act ("ADA"), recognizing that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2). The same year, Congress passed the Cranston-Gonzalez National Affordable Housing Act with the understanding that "independent living with assistance is a preferable housing alternative to institutionalization for many ... persons with disabilities" and that the Act was designed "to enable persons with disabilities to live with dignity and independence within their communities." Cranston-Gonzalez National Affordable Housing Act, Pub. L.

No. 101-625, §§ 802, 811, 104 Stat. 4079, 4304, 4324 (1990); 42 U.S.C. §§ 8011, 8013.

2. Consistent with these nationwide efforts to prevent the unnecessary institutionalization of people with disabilities, HUD promulgated the rule at issue in this case, which reduces HUD's measure of a family's annual income (that is used to determine the amount of rental assistance the family may receive under HUD's rental assistance programs, including Section 8) by "[a]mounts paid by a State agency to a family with a member who has a developmental disability and is living at home to offset the cost of services and equipment needed to keep the developmentally disabled family member at home." 24 C.F.R. § 5.609(c)(16). HUD adopted the rule to "keep a developmentally disabled family member at home, rather than placing the family member in an institution" because "families that strive to avoid institutionalization should be encouraged, and not punished." Combined Income and Rent, 60 Fed. Reg. 17388, 17389 (Apr. 5, 1995).[1]

In 2019, HUD issued a Notice of Proposed Rulemaking announcing its intention to revise the Home Care Exclusion Rule. Housing Opportunity Through Modernization Act of 2016, 84 Fed. Reg. 48820 (Sept. 17, 2019). Under the language of the

---

[1] Like HUD, the Internal Revenue Service also has adopted rules designed to "enabl[e] individuals who otherwise would be institutionalized to live in a family home setting rather than in an institution." Foster Care Payment, Medicaid Waivers, IRS Notice 2014-7, 2014-4 I.R.B. 445. For example, the IRS treats in-home care payments—whether the provider is related or unrelated to the disabled individual—as excludable from a provider's income under 26 U.S.C. § 131(c). *See id.*

proposed new rule, which replaces the disputed language in this case, a family's annual income does not include "[p]ayments provided by a State Medicaid managed care system to a family to keep a member who has a disability living at home." *Id.* at 48836.

3. HUD's Home Care Exclusion Rule is part of a broader strategy of "cooperative federalism," whereby the federal government designs national programs to serve vulnerable people and then delegates authority to the states to implement them, allowing each state to customize the program in the way that best serves residents of that particular state. *See Wis. Dep't of Health & Fam. Servs. v. Blumer*, 534 U.S. 473, 485 (2002) (Medicaid); *James v. N.Y.C. Hous. Auth.*, 622 F. Supp. 1356, 1359 (S.D.N.Y. 1985) (Housing Act); 42 U.S.C. § 1437(a)(4). States often further delegate administration to local governments.

California's In-Home Supportive Services program is part of one such cooperative arrangement. The California legislature created IHSS in 1973 to enable "disabled poor persons to avoid institutionalization by remaining in their homes with proper supportive services." Pet. App. 18a (cleaned up); Cal. Welf. & Inst. Code §§ 12300 et seq., 14132.95, 14132.951. The program is funded with a combination of state, county, and federal Medicaid monies. Cal. Welf. & Inst. Code § 12306.

In certain circumstances, California will pay a parent for providing care services directly to a disabled child under IHSS. For example, a parent providing care for a developmentally disabled minor child qualifies if she "leaves full-time employment or is prevented from obtaining full-time employment

because no other suitable provider is available and where the inability of the provider to provide supportive services may result in inappropriate placement or inadequate care." *Id.* § 12300(e); Cal. Dep't Soc. Servs., MANUAL OF POLICIES AND PROCEDURES: SOCIAL SERVICES STANDARDS 30-763.45 (July 2019).

County social workers assess each recipient's needs to set the number of hours of services IHSS will provide each month, not to exceed a statutory cap of 283 hours for severely impaired persons. *See Basden v. Wagner*, 181 Cal. App. 4th 929, 934 (2010); Cal. Welf. & Inst. Code §§ 12301.1, 12303.4. The payment a parent can receive under this program is determined by the hourly rate set by each county. Cal. Dep't Soc. Servs., MANUAL OF POLICIES AND PROCEDURES: SOCIAL SERVICES STANDARDS 30-764.1.12 (July 2019).

4. Efforts to promote community-based care have been successful. The number of people with developmental disabilities in public institutions declined from 167,056 in 1977 to 36,650 in 2007. Naomi Scott, et al., *The 40th Anniversary of Deinstitutionalization in the United States: Decreasing State Institutional Populations, 1967–2007*, 46 INTELL. & DEVELOPMENTAL DISABILITIES 402, 402 fig. 1 (2008). Research confirms that developmentally disabled individuals who live in community-based living arrangements have "a better objective quality of life than do people in large, congregate settings." Agnes Kozma, et al., *Outcomes in Different Residential Settings for People With Intellectual Disability: A Systematic Review*, 114 AM. J. ON INTELL. & DEVELOPMENTAL DISABILITIES 193, 210 (2009).

The transition to community-based living also has conserved public resources because providing care services in the community rather than in large public institutions yields significant cost savings. National Council on Disability, *Deinstitutionalization: Unfinished Business* 41 (2012), *available in plain text at* https://ncd.gov/publications/2012/Sept192012/Plans. According to the most recent available data (from 2009), the average annual cost of institutionalizing a disabled individual in California is $255,865, as compared to an average annual cost of $22,809 for home and community-based waiver services. National Council on Disability, *Deinstitutionalization Toolkit: Costs in Detail*, tbl.1 (2012), *available in plain text at* https://ncd.gov/publications/2012/DIToolkit/Costs/inDetail.

B. Factual Background

In 1998, Ms. Reilly and her two daughters moved into a three-bedroom apartment in Novato, California. Pet. App. 2a. Ms. Reilly receives a monthly Section 8 housing subsidy, the amount of which depends on her family's annual income as defined by 24 C.F.R. § 5.609. *Id.* Petitioner administers Ms. Reilly's Section 8 voucher. Pet. App. 3a.

Ms. Reilly lives with and provides full-time care to her daughter, KR, who has a severe developmental disability and genetic disorder known as "Fragile X Syndrome." Resp. App. 5a; Pet. App. 2a, 69a. Although in her thirties, KR has an IQ of 40 and requires constant, 24-hour supervision. Resp. App. 5a; Pet. App. 8a. Ms. Reilly's caregiving allows her daughter to avoid placement in an institutional setting. Resp. App. 2a.

Ms. Reilly receives IHSS payments to partially offset the cost of providing protective-supervision care to KR. "There is no dispute that Reilly's adult daughter was entitled to IHSS services, or that Reilly was authorized to receive IHSS compensation for providing those services to her." Pet. App. 9a. When KR was a minor, Ms. Reilly received IHSS payments because the county determined that "no other suitable provider is available" and "the inability of [Ms. Reilly] to provide supportive services may result in inappropriate placement or inadequate care" for KR. Cal. Welf. & Inst. Code § 12300(e).

Ms. Reilly's other daughter, RR, moved out in mid-2004 to attend college when KR was 16 years old. Pet. App. 2a, 37a; Resp. App. 5a–6a. Based on Ms. Reilly's belief that she and KR could continue living in their subsidized housing, Ms. Reilly did not inform Petitioner about RR's departure for college until 2009. Pet. App. 2a–3a; Resp. App. 6a.

Petitioner informed Ms. Reilly that she and KR could continue living in their home as a reasonable accommodation, but—as a consequence of Ms. Reilly's delay in reporting RR's departure—demanded $16,011 in damages. Pet. App. 71a; Resp. App. 6a. The parties established a "repayment plan," under which Ms. Reilly would pay the damages in monthly installments. Pet. App. 71a. In light of RR's college expenses and KR's medical expenses, Ms. Reilly faced great difficulty making the payments and missed multiple payments. Resp. App. 6a. To date, however, she has paid Petitioner over $8,000 in damages for her reporting violation. Resp. App. 7a.

In 2015, Ms. Reilly asked Petitioner to recalculate her family's annual income and to exclude the IHSS payments pursuant to the Home Care Exclusion Rule. Pet. App. 3a. Approximately eighty percent of the family's financial support is attributable to IHSS payments (with the remainder composed of social security benefits for KR). Pet. App. 37a.

Petitioner disregarded Ms. Reilly's request to recalculate her income and exclude the IHSS payments. Pet. App. 71a. Instead, Petitioner sought to terminate the family's Section 8 voucher based on Ms. Reilly's missed payments under the repayment plan. *Id.* Without counsel, Ms. Reilly appeared at an informal hearing and explained to the hearing officer that Petitioner failed to properly exclude the IHSS payments under the Home Care Exclusion Rule and lacked any lawful basis to have demanded $16,000 in damages. Resp. App. 7a. The hearing officer upheld Petitioner's termination decision based only on Ms. Reilly's failure to make damages repayments, disregarding the fact that Petitioner had been miscalculating the family's income and overcharging them for rent during and after the damages period. Resp. App. 7a–8a; Pet. App. 107a–09a.

C. Underlying Proceedings

Ms. Reilly filed a petition for writ of mandate in the Marin County Superior Court on October 26, 2015, challenging the hearing officer's decision. Pet. App. 72a. She sought an order terminating the repayment plan based on Petitioner's failure to calculate her annual income in accordance with federal regulations, and an order compelling Petitioner to recalculate her annual income by excluding IHSS payments. Resp.

App. 11a. The trial court sustained Petitioner's demurrer to the petition on the basis that the Home Care Exclusion Rule does not apply to Ms. Reilly's IHSS payments. Pet. App. 93a–95a.

The California Court of Appeal affirmed the trial court's order. Pet. App. 88a. The court determined that HUD's Home Care Exclusion Rule does not exclude from income IHSS payments that are made directly to Ms. Reilly for her work caring for KR; rather, the Home Care Exclusion Rule only excludes such payments if they serve to reimburse amounts that a family pays to a third-party caretaker. Pet. App. 87a–88a.

The California Supreme Court granted Ms. Reilly's petition for review, "limited to the issue whether IHSS payments should be excluded from 'annual income' for purposes of calculating a Section 8 beneficiary's home assistance payment." Pet. App. 4a. The Supreme Court reversed and remanded the matter for further proceedings. Pet. App. 34a.

Interpreting the Home Care Exclusion Rule in the context of IHSS payments, the majority held that "[a]mounts paid … *to offset* the cost of services and equipment needed to keep the developmentally disabled family member at home," 24 C.F.R. § 5.609(c)(16) (emphasis added), need not offset costs the family itself incurs to keep a developmentally disabled member at home. Pet. App. 10a–11a. Rather, the amounts paid need only offset service "cost[s]," which, in turn, include both amounts paid and "the expenditure of something, such as time or labor, necessary" for the services required to keep KR at home. Pet. App. 12a. The plain language of Section

5.609(c)(16) is thus broad enough to include "a parent's IHSS compensation to provide care to keep a developmentally disabled child at home." Pet. App. 34a.

The court observed that its conclusion was consistent with the rulemaking history of the Home Care Exclusion Rule, during which HUD stated that the "exclusion exempts amounts paid by a State agency to families that have developmentally disabled children or adult family members living at home." Pet. App. 13a–14a. The court's interpretation also advanced "the complementary purposes" of the federal Section 8 and the state IHSS programs. Pet. App. 17a–18a. Excluding IHSS payments allows low-income families to obtain housing, and enables "'disabled poor persons to avoid institutionalization by remaining in their homes with proper supportive services.'" Pet. App. 18a (citation omitted). A qualified California resident, the Court reasoned, "should not be forced to make an impossible choice between these two critical benefits." Pet. App. 26a.

Three justices dissented, concluding that the Home Care Exclusion Rule requires that a family incur out-of-pocket expenses before IHSS payments can be considered to offset costs. Pet. App. 35a–36a.

REASONS FOR DENYING THE PETITION

I. THIS COURT LACKS JURISDICTION OVER THE STATE COURT'S INTERLOCUTORY DECISION.

This Court lacks jurisdiction to review the decision below at this time. Under 28 U.S.C. § 1257(a), the Court has jurisdiction over state court decisions that are "[f]inal judgments or decrees." This "final-

judgment rule has been interpreted 'to preclude reviewability … where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State.'" *Flynt v. Ohio*, 451 U.S. 619, 620 (1981) (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)). That is, the decision must "be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Mkt. St. Ry. Co. v. R.R. Comm'n of State of Cal.*, 324 U.S. 548, 551 (1945); *McComb v. Comm'rs of Knox Cnty.*, 91 U.S. (1 Otto) 1, 2 (1875) (noting that where the state court decision "is one of reversal only … , it was not a final judgment").

The California Supreme Court's decision is not final in any sense of the word. The court "reverse[d] the Court of Appeal's judgment," and "remand[ed] the matter for further proceedings." Pet. App. 34a. The effect of that decision sends the case back to the Marin County Superior Court, which had tossed out Ms. Reilly's case at the pleading stage by sustaining Petitioner's demurrer on the basis of an (incorrect) interpretation of the Home Care Exclusion Rule. Pet. App. 92a–95a.

As a result of the California Supreme Court's decision reversing the judgment sustaining the demurrer, the superior court now must "proceed with the case according to law." *McComb*, 91 U.S. (1 Otto) at 2. Thus, "far from putting an end to the litigation," the California Supreme Court "purposely left it open," *id.*, and both parties now have opportunity to litigate the case. The state court decision under review, therefore, is not final as an "effective determination of

the litigation." *Mkt. St. Ry. Co.*, 324 U.S. at 551; *see also Jefferson v. City of Tarrant*, 522 U.S. 75, 81–82 (1997) (state supreme court decision was not final where it "remanded the case for further proceedings," including "a trial on the merits of the state-law claims").

This Court has recognized four exceptions to the final judgment rule, but this case does not fall within any of them. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 478–79 (1975). As to the first and second exceptions, the California Supreme Court's interpretation of the Home Care Exclusion Rule "does not foreordain the outcome of the proceedings below," *Pierce Cnty. v. Guillen*, 537 U.S. 129, 141 n.5 (2003), and it is not certain that the federal issue "will survive and require decision regardless of the outcome of future state-court proceedings," *Cox*, 420 U.S. at 480. It is possible, given the early stage of this litigation, that the issue decided by the California Supreme Court could "be mooted or otherwise affected by the proceedings yet to be had." *Id.* at 478.

Third, this is not a situation "in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 481. If Ms. Reilly prevails on the merits of her suit, Petitioner "will be free to seek [this Court's] review once the state-court litigation comes to an end." *Jefferson*, 522 U.S. at 82–83.

Fourth, Petitioner has no colorable argument that review is necessary now because refusal to grant certiorari "might seriously erode federal policy." *Cox*, 420 U.S. at 483. HUD is in the final stage of the process of revising the Home Care Exclusion Rule to

make crystal clear that individuals like Ms. Reilly are entitled to exclude from annual income the amounts paid by state agencies to keep a disabled family member at home. In addition, Petitioner's arguments about the impact of the California Supreme Court's decision on local housing authorities are overblown; more importantly, for purposes of jurisdiction, such concerns do not implicate any important *federal* policy.

Because this Court lacks jurisdiction under section 1257(a) to hear this case, the petition should be denied.

II. THIS CASE DOES NOT IMPLICATE A SPLIT OF AUTHORITY WARRANTING THE COURT'S REVIEW.

Petitioner premises its request for certiorari on a purported conflict between the decision below and decisions of the Fifth Circuit and Minnesota Supreme Court. However, neither of Petitioner's cited cases squarely reached the question presented in this case, as the application of the Home Care Exclusion Rule applies differently in each state depending on how the state administers its in-home care benefit program. The pertinent issues are simply not well-developed for this Court's review.

1. Petitioner relies on the unpublished decision in *Anthony v. Poteet Housing Authority*, 306 F. App'x 98 (5th Cir. 2009). There, the Fifth Circuit considered application of the Home Care Exclusion Rule to Texas's Community Based Alternatives Program. Unlike California's IHSS program, the Texas program "does not provide any amounts directly to families to offset costs incurred to keep a disabled family member at home." *Id.* at 101. Rather, "all state-funded in-

home attendant-care services in Texas are provided by private intermediaries." *Id.*

The Section 8 tenant in *Anthony* gained employment as a personal-care attendant with two private companies that provided personal-care services to her son. *Id.* at 100. The companies "chose to accommodate [the tenant's son] by hiring his mother," but "ha[d] the authority and discretion to assign any home health provider to care for [him]." *Id.* And the tenant was "subject to being called as a backup for other home health providers to care for other participants." *Id.* Accordingly, the question presented in *Anthony* was whether the wages received by the tenant from her employment with the companies qualified for exclusion from her annual income under the Home Care Exclusion Rule. *Anthony* did not address whether payments made by a state agency directly to a parent who cares for her developmentally disabled child qualifies under the Home Care Exclusion Rule.

Nor did the Fifth Circuit have reason to consider the question in the context of a state agency program like IHSS that, in certain circumstances, only provides payments to a parent if no other suitable provider is available and the inability of the parent to provide supportive services may result in inappropriate placement or inadequate care. Cal. Welf. & Inst. Code § 12300(e). In *Anthony*, the Fifth Circuit recognized that the tenant's son would avoid institutionalization with adequate at-home care regardless of his mother's status as his caregiver, as "*any* home health provider" could provide the services he required. 306 F. App'x at 100 (emphasis added). The court also found that the tenant was free to pursue any outside employment she

desired and her son would continue to receive at-home care from the state-contracted service providers. *See id*.

By contrast, the California Supreme Court determined that Ms. Reilly incurred qualifying costs as a result of her time and labor. Pet. App. 11a. For example, while KR was a minor, Ms. Reilly could only receive payments by establishing that she had to forego outside employment to keep KR out of an institution because no third-party provider could provide suitable at-home care. Cal. Welf. & Inst. Code § 12300(e); Pet. App. 27a. The Fifth Circuit did not consider whether amounts paid to account for the substantial time and labor, lost opportunity, and emotional costs incurred by a parent who must forego outside employment qualify for exclusion under 24 C.F.R. § 5.609(c)(16).

2. The Minnesota Supreme Court decision on which petitioner relies likewise poses no material conflict. Minnesota's Developmental Disabilities Waiver program permits a parent caring for her minor child to divert some of the state benefit to pay herself wages, even though she "could have chosen … to pay a *different person* to provide those services." *Matter of Ali*, 938 N.W.2d 835, 841 (Minn. 2020) (Thissen, J., concurring) (emphasis added). Minnesota's program is "structured differently from the IHSS program in a way that makes *Ali* distinguishable." Pet. App. 21a. The Minnesota Supreme Court was not presented with the question whether payments made to a parent under a program like IHSS, which only provides payments for care of a minor child where *no other suitable provider is available* and the inability of the parent to provide services *may result in inappropriate*

placement or inadequate care, qualify under the Home Care Exclusion Rule.

Minnesota's Consumer Directed Community Support ("CDCS") option permits parents to pay themselves for providing services to a developmentally disabled minor child, regardless of whether a third party is capable of providing the aid. *See* Minn. Dep't of Human Servs., Consumer Directed Community Support Manual, *Paying a spouse or parent of a minor for personal assistance* (2020). In *Ali*, the tenant chose to participate in the CDCS option, which allowed "Ali to allocate her budget as she saw fit to keep her son living at home." 938 N.W.2d at 837. The tenant then allocated a portion of the budget to herself as a paid parent to provide her son some of the necessary services. *Id.* Because the parent in *Ali* could receive payment for services regardless of whether another suitable provider was available or whether the parent had to forego outside employment, the Minnesota Supreme Court, like the Fifth Circuit, never considered whether payments for services provided by a family member under a system structured like IHSS qualify under the Home Care Exclusion Rule.

III. HUD IS REVISING THE HOME CARE EXCLUSION RULE.

The question presented asks the Court to consider the meaning of HUD's Home Care Exclusion Rule. HUD, however, is imminently poised to revise that rule. In 2019, HUD issued a Notice of Proposed Rulemaking that would revise the language of 24 C.F.R. § 5.609(c)(16) to delete the "offset" and "costs" terms that gave rise to this dispute. 84 Fed. Reg. 48820. As proposed, the revised Home Care Exclusion

Rule would exclude from a family's annual income "[p]ayments provided by a State Medicaid managed care system to a family to keep a member who has a disability living at home." *Id.* at 48836.

Because the revised rule eliminates the terms that are at issue in this case—"offset" and "costs"—any interpretation of those terms in this context would have negligible effect. The impending rule change thus renders the question presented unimportant in providing future guidance to courts, housing authorities, and benefit recipients.

HUD's proposed revision also reinforces that the California Supreme Court reached the correct result when interpreting the language of the current regulation. *See infra*, Section V. According to HUD, its revision to the Home Care Exclusion Rule is designed to "maintain th[e] exclusion" and introduces the change only "to provide greater clarity and understanding." 84 Fed. Reg. at 48826.

IV. THE DECISION BELOW HAS A NARROW IMPACT.

A. The decision below affects only a narrow group of California benefit recipients.

The decision below also lacks nationwide importance because it only governs how *California* administers housing assistance programs in partnership with HUD and, within that context, it affects only a discrete population of benefit recipients who receive both HUD rental assistance and IHSS payments for directly caring for a family member with a developmental disability.

Petitioner's assertion that at least forty-five states will feel pressure to conform to the decision below is

without merit. It ignores the fact that, in accordance with Medicaid's cooperative federalism structure, states vary in how they administer benefits to families supporting individuals with developmental disabilities. *See* Pet. 25. California's IHSS program allows parents to receive payment for care provided directly to a developmentally disabled child. Many states, however, do "not pay families directly for in-home care" at all. Pet. App. 18a–19a. In fact, "[w]hile some state programs explicitly compensate spouses and other family members for providing care to individuals with disabilities, the majority explicitly prohibit family members to serve as paid caregivers except in unusual and limited circumstances." Michael J. Malinowski, *Biting the Hands That Feed "The Alligators": A Case Study in Morbid Obesity Extremes, End-of-Life Care, and Prohibitions on Harming and Accelerating the End of Life*, 44 AM. J.L. & MED. 23, 39 (2018). Because of these variations in state law, this Court's review of the decision below would not affect the majority of programs in states like Texas, which do "not provide any amounts directly to families." *Anthony*, 306 F. App'x at 101.

Even further limiting the pool of individuals and housing authorities affected by the Court's consideration of this case, any decision would only apply to a narrow set of individuals who receive both HUD housing assistance payments and IHSS benefits for providing *direct* care to a family member with a *developmental* disability. The relevant domain plainly is not everyone "subject to Section 5.609." Pet. 24–25.

Petitioner undercuts its own argument about the significance of the decision below in admitting that two significant "sub-categories of Section 8 tenants are

not covered by the decision below": "those that have medical, as opposed to developmental, disabilities; [and] those hiring a third-party caregiver, as opposed to a family member, to take care of a developmentally-disabled individual." Pet. 28. Then, it relies on a smattering of inapposite statistics about government programs for individuals with disabilities and the number of disabled individuals who live with family caregivers (without regard to whether those families also receive federally subsidized housing). *See* Pet. 28–31.

The bottom line is that Petitioner seeks review of a decision that, even if applied outside the boundaries of California, would impact only a limited set of families that (a) receive Section 8 benefits; (b) receive state benefits for in-home supportive services; (c) live in a state that permits direct payments to a parent for provision of services to a developmentally disabled child; and (d) actually provide qualifying direct care to the child. Petitioner offers nothing beyond conjecture to suggest that this discrete category of families is composed of a meaningful number of persons. The Court should decline to grant review based on such speculation.

B. Petitioner overstates the impact of the decision below on other federal programs.

Likewise, review of the question presented will have minimal impact on other federal assistance programs. First, as discussed *supra*, Section III, HUD has announced its intention to amend the Home Care Exclusion Rule to clarify that the types of payments Ms. Reilly receives under IHSS are excluded from

annual income. Federal programs that incorporate 24 C.F.R. § 5.609 into their own annual income definitions will be subject to the amended regulation, mooting any lasting effect of a decision by the Court.

Second, the federal programs Petitioner cites are not "multifarious," Pet. 22, and prior amendments to HUD's definition of annual income show that Petitioner's call for concern is overblown. The programs are related in that they all provide rental assistance and use the income exclusions in Section 5.609 to determine the amount program participants must contribute towards rent or housing costs. *See* Libby Perl & Maggie McCarty, CONG. RSCH. SERV., R42734, INCOME ELIGIBILITY AND RENT IN HUD RENTAL ASSISTANCE PROGRAMS: FREQUENTLY ASKED QUESTIONS 1–2, 8–10, 13–16 (2017), *available at* https://crsreports.congress.gov/product/pdf/R/R42734. The formula for assessing such contributions was standardized across HUD programs forty years ago by the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357. From time to time, HUD has changed what it excludes from its measure of a family's annual income,[2] and there is no indication that these changes have upset the various programs

[2] *E.g.*, Definition of Income in the Rent Supplement, Section 236, Section 8 and Public and Indian Housing Programs, 52 Fed. Reg. 34108 (Sept. 9, 1987) (reorganizing and modifying the exclusions); Definition of Annual Income: Holocaust Reparations, 58 Fed. Reg. 15773 (Mar. 24, 1993) (adding exclusion for Holocaust Reparations payments); Combined Income and Rent, 60 Fed. Reg. 17388 (Apr. 5, 1995) (adding nine additional exclusions); Combined Income and Rent, 61 Fed. Reg. 54492 (Oct. 18, 1996) (moving rules to 24 C.F.R. § 5.609; making linguistic changes).

inside and outside of HUD that rely upon HUD's income definition. Moreover, to the extent a federal or state agency other than HUD wishes to use a different definition, they would be free to amend their regulation to clarify the definition of annual income as it applies in the context of that program.

Third, at least two of the programs Petitioner references are not even active. Petitioner asserts that the mortgage insurance program under Section 236 of the National Housing Act and the accompanying Rent Supplement Program would be affected by the decision below, Pet. 22, but these programs were terminated by President Nixon in 1973. The Section 236 Program insured mortgages for up to 40 years on buildings rented to low-income tenants. Tenants in Section 236 buildings also received rent subsidies from HUD through the Rent Supplement or similar programs. While HUD continued to service existing Section 236 contacts after 1973, these contracts are rapidly disappearing as the underlying mortgages have matured or been paid off.

C. Petitioner overstates the impact of the decision below on housing authorities.

Petitioner overplays the decision's effect on housing authorities. First, Petitioner's argument, that the decision "stretches housing authorities' limited funds" by "redistributing" funds to current Section 8 tenants at the expense of those on the waiting list, is misleading at best. Pet. 26. HUD and Congress determine eligibility for the Section 8 program and allocate budgets to local housing authorities, and the local housing authorities, in turn, are tasked with administering those funds according to federal

regulations. To the extent a housing authority disagrees with federal policy as to how much funds are available and how those funds are prioritized among current and prospective program recipients, *see* Pet. 25–27, those objections should be raised before HUD and Congress, not this Court.

Second, even though the issue of retroactive relief is not presented by the California Supreme Court's "limited" ruling, Pet. App. 4a, Petitioner exaggerates the likelihood that the decision will result in "massive liability" for housing authorities. The only housing authorities that are even potentially subject to liability are those that have declined to exclude IHSS payments from a family's annual income. That decision has been made at the local-housing-authority level, and only some housing authorities have taken Petitioner's view. *See* Pet. 25–26 (noting the decision affects "the housing authorities … that had previously adopted" the interpretation that payments like those Ms. Reilly receives are not excluded). Moreover, it is too hasty to assert that "45 States" "will face liability exposure from existing tenants." Pet. 25. As discussed *supra* at 19–20, many states contract with third-party intermediaries to provide in-home care and others do not allow beneficiaries to hire family members as paid caregivers. Nor has there been any assessment of "the applicable statute of limitations or the feasibility of classwide remedies in such lawsuits." Pet. 26 n.6.

Third, any such liability is (again) a product of HUD's own rulemaking. HUD requires housing authorities that overcharge tenants, like Petitioner, to "immediately refund the total amount due" from its administrative fee reserves. Dep't of Hous. & Urban Dev., Housing Choice Voucher Program Guidebook ch.

22.5 (2001). And, regardless of the decision below, housing authorities that failed to exclude IHSS payments from "annual income" will be subject to the impending revised Home Care Exclusion Rule that clarifies they have overcharged those tenants. Notably, when announcing the proposed revision to the rule, HUD did not state (as it has in prior amendments) that the revised language "does not provide retroactive relief." Definition of Annual Income: Holocaust Reparations, 58 Fed. Reg. 15773 (Mar. 24, 1993). To the contrary, HUD stated that the revised language merely *clarifies* what payments are already excluded. 84 Fed. Reg. at 48820, 48826. So, whether housing authorities are subject to claims for reimbursement is a product of HUD's rulemaking, including its proposed revision to the regulation, not the decision below.

V. THE DECISION BELOW IS CORRECT.

The California Supreme Court correctly held that under the formulation of 28 C.F.R. § 5.609(c)(16) that is operative in this case, "annual income" does not include IHSS payments made to parents who provide care directly instead of hiring third-party providers. The decision below is in full accord with the plain meaning of the terms "offset" and "cost," the regulatory structure of Section 5.609(c), and HUD's goal of preventing institutionalization. Petitioner's interpretation, in contrast, stretches the plain meaning of the disputed terms, ignores key aspects of the regulatory structure, and results in an outcome that runs counter to HUD's express regulatory intent.

A. The California Supreme Court decision comports with the plain text of the Home Care Exclusion Rule.

The California Supreme Court reached the correct result in applying the plain meaning of the words "offset" and "cost" as they appear in the operative version of the Home Care Exclusion Rule.

1. Section 5.609(c)(16) excludes payments that *offset* the cost of services and equipment needed to keep a developmentally disabled family member at home. The California Supreme Court correctly held that the term "offset" should be given its ordinary meaning: "[t]o balance" or "to compensate for." *Offset*, Black's Law Dictionary (11th ed. 2019); *see* Pet. App. 11a–12a.

The court rightly rejected Petitioner's reasoning that the word "offset" is interchangeable with the term "reimburse," meaning to repay "for money spent or losses incurred." Pet. App. 11a; *see also Los Angeles County v. Frisbie*, 19 Cal. 2d 634, 640 (1942) (ordinary meaning of the word "reimburse" is "to pay back" or "to repay that expended"). Section 5.609 uses the term "reimbursement" in two other exclusions, where the amounts received by a family compensate for monetary expenditures: "the cost of medical expenses" (Section 5.609(c)(4)) and "out-of-pocket expenses" incurred to participate in a publicly assisted program (Section 5.609(c)(8)(iii)). 28 C.F.R. § 5.609(c). "'[W]here Congress includes particular language in one section of a statute but omits it in another ... , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993)

(citing *Russello v. United States*, 464 U.S. 16, 23 (1983)). The use of "offset" rather than "reimburse" in Section 5.609(c)(16) demonstrates that the exclusion contemplates more than repayment for money spent. *Id.*

The California Supreme Court's interpretation of "offset" is also supported by the exclusion's unmodified use of the term "cost." As the decision below explained, the term "cost" includes two concepts: (1) "an amount paid or required in payment for a purchase; a price," or (2) "the expenditure of something, such as time or labor, necessary for the attainment of a goal." Pet. App. 12a (quoting American Heritage Dictionary 454 (5th ed. 2020)). The regulation does not include any modifier to the term "cost" that narrows its meaning to the first concept.

Petitioner, however, qualifies the term "cost" in Section 5.609(c)(16)—without any textual hook—as including only "*actual and quantifiable* cost[s]" (Pet. 3), "*out-of-pocket* cost[s]" (Pet. 32), "*tangible, quantifiable* costs" (Pet. 32), and "*tangible economic* costs." Pet. 33 (emphasis added). In doing so, Petitioner neglects that elsewhere in the same regulation, the word "cost" *is* modified in a manner that narrows its meaning in that particular context. For example, Section 5.609(b)(ii) discusses the "*actual* cost of shelter and utilities." Pet. App. 12a (emphasis added). And Section 5.609(c)(4) uses the term "cost" in conjunction with "reimbursement" for necessarily discrete amounts "that are specifically for, or in reimbursement of, the cost of medical expenses." Pet. App. 12a, 123a. Section 5.609(c)(16), on the other hand, neither contains the adjectives to "cost" that Petitioner supplies, nor pairs the term with

"reimbursement" of monetary expenses. Thus, under Section 5.609(c)(16), the term "costs" includes time, labor, opportunity, or emotional costs, and payments made to "offset" those costs are excludable from "annual income."

Here, the State of California (through the IHSS program) has assigned monetary value to a portion of the tangible and intangible costs Ms. Reilly incurs to care for KR, in order to keep KR at home and out of an institution. IHSS payments, in turn, "offset" or "compensate for" those costs, which are necessary expenditures of Ms. Reilly to "keep [KR] at home." 28 C.F.R. § 5.609(c)(16). In short, IHSS payments are structured to "compensate" Ms. Reilly for some of the "'time or labor necessary'" to keep her developmentally disabled child at home and outside of an institution. Pet. App. 12a (quoting American Heritage Dictionary, *supra*, at 454).

2. The California Supreme Court's interpretation also is confirmed by the rulemaking history of the regulation. In addition to HUD's recent clarification, prior rulemaking commentary also supports the decision below. HUD first proposed the Home Care Exclusion Rule because it sought to encourage, and not punish, "families that strive to avoid institutionalization." 60 Fed. Reg. at 17388, 17389; Pet. App. 13a–14a. When HUD promulgated the exclusion, the agency described it as "exempt[ing] amounts paid by a State agency to families that have developmentally disabled children or adult family members living at home." Pet. App. 13a–14a. In a nod to the fundamental purposes of the rule, the agency found that "[s]tates that provide families with homecare payments do so to offset the cost of services

and equipment needed to keep a developmentally disabled family member at home, *rather than placing the family member in an institution*." 60 Fed. Reg. at 17389 (emphasis added). As the decision below noted, HUD's use of the terms "cost" and "offset" indicates an understanding that the availability of state benefit programs encourages families to keep developmentally disabled family members at home and helps society avoid the far higher cost of institutional care. Pet. App. 15a.

B. The decision below aligns with the regulation's de-institutionalization intent.

The text of the Home Care Exclusion Rule evinces a clear regulatory intent to reduce the institutionalization of individuals with developmental disabilities. Petitioner's reading, however, would counter that intent, as families would become less capable of providing in-home care for their developmentally disabled family members.

The IHSS program recognizes that in some circumstances, parent caretakers must forego full-time employment because no other suitable provider is available and the child may otherwise be inappropriately placed in an institution. Under Petitioner's reading of the regulation, families in that circumstance may be forced out of Section 8 housing—or may never qualify in the first place—because IHSS payments make up the bulk (or even all) of their family income.

That is the precise outcome the Home Care Exclusion Rule is intended to avoid. As the California Supreme Court recognized, allowing families to

"realize the full benefit of the homecare payments without facing a corresponding increase in rent" causes the exclusion to "operate as intended by not penalizing families" who save state and federal governments the expense and onus of institutionalized care. Pet. App. 17a.

Petitioner overlooks that penalty, which is a natural result of its interpretation, and instead touts that its view would aid other families on the Section 8 waiting lists and save agency costs. Pet. 26. But it is well-recognized that efforts to avoid institutionalization *also* saves the government substantial amounts of money. *See supra* at 7–8. And if the Home Care Exclusion Rule results in more families on the Section 8 waiting list (which is entirely speculative given the limited number of benefit recipients affected by the decision below), that is a natural consequence of a policy decision that HUD itself has made, as confirmed by its recent proposed changes to the regulation.

The California Supreme Court's decision reflects a sensible policy that the state should not force parents to choose between taking care of their own children and maintaining their housing. The decision empowers families to make an informed decision about the best way to keep their developmentally disabled family member at home and afford at least the basic necessities of life.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

May 12, 2021

Respectfully submitted,

ELIZABETH G. BENTLEY
JONES DAY
90 South Seventh St.
Suite 4950
Minneapolis, MN 55402

NATHANIEL P. GARRETT
Counsel of Record
MARGARET ADEMA MALOY
AMOS J. B. ESPELAND
THILINI CHANDRASEKERA
JONES DAY
555 California St., 26th Fl.
San Francisco, CA 94104
(415) 875-5731
ngarrett@jonesday.com

Counsel for Respondent