No. 20-1046

In the
Supreme Court of the United States

MARIN HOUSING AUTHORITY,
Petitioner,

v.

KERRIE REILLY,
Respondent.

On Petition for Writ of Certiorari to the California Supreme Court

BRIEF OF AMICUS CURIAE SCOTT COUNTY COMMUNITY DEVELOPMENT AGENCY IN SUPPORT OF THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE[1]

Scott County Community Development Agency ("Scott County CDA") is a government agency that works to provide affordable rental housing for low-and-moderate income families in Scott County, Minnesota. Its duties include determining eligibility for participation in Section 8 of the United States Housing Act of 1937, 42 U.S.C. §1434f, and its accompanying regulations. In other words, Scott County CDA performs the same functions as Petitioner Marin Housing Authority. This includes implementing the Department of Housing and Urban Development ("HUD") regulation at issue here, 24 C.F.R. §5.609(c)(16).

In addition, Scott County CDA was the respondent in one of the two cases that form the split with California Supreme Court's opinion below, and was fortunate enough to present its arguments before a state court of last resort that interpreted §5.609(c)(16) according to its plain and ordinary meaning. *See In re Ali*, 938 N.W.2d 835 (Minn. 2020). Unlike the California Supreme Court, the Minnesota Supreme Court recognized that the term "cost" as used in §5.609(c)(16) is limited to specific monetary charges incurred for services, and does not include the more

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[1] Amicus provided timely notice to both parties of its intent to file this brief, and both parties provided amicus with written consent to file this brief. No counsel for either party authored this brief in whole or in part, nor did counsel for either party make any monetary contribution intended to fund the preparation or submission of this brief.

nebulous concept of "lost opportunity costs." *See Ali*, 938 N.W.2d at 838-40.

Scott County CDA thus has practically the same interest in the outcome of this lawsuit as Petitioner Marin Housing Authority. This brief elaborates on the split that the decision below has created between the California Supreme Court on the one side, and the Minnesota Supreme Court and the Fifth Circuit on the other side, over the meaning of "cost" in §5.609(c)(16). *See Ali*, 938 N.W.2d at 838-40; *Anthony v. Poteet Hous. Auth.*, 306 F. App'x 98 (5th Cir. 2009).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This Court has frequently recognized the need to resolve lower court splits over the proper interpretation of statutes and regulations where the proper allocation of money is at issue. *See, e.g., Arlington Central School Dist. v. Murphy*, 548 U.S. 291, 295 (2006) ("We granted certiorari…to resolve the conflict among the Circuits with respect to whether Congress authorized the compensation of expert fees to prevailing parents…."); *Christensen v. Harris Cty.*, 529 U.S. 576, 581-82 (2000) (granting certiorari to resolve split over how employers could implement compensatory time policies under the Fair Labor Standards Act). Here, the California Supreme Court has created a direct split between itself and two other courts—the Minnesota Supreme Court and the Fifth Circuit—over the proper meaning of the term "costs" in §5.609(c)(16). Such a disparate treatment of the term cannot stand, given the amount of money at issue, and this Court's review is critically needed to resolve the matter.

ARGUMENT

I. The decision below is in direct conflict with both the Minnesota Supreme Court and the Fifth Circuit, despite the California Supreme Court's claim to the contrary.

The California Supreme Court tried to have it both ways in its decision below—on the one hand, it explicitly acknowledged that its interpretation of "cost" as used in §5.609(c)(12) diverged from how both the Minnesota Supreme Court and the Fifth Circuit interpreted that term. (App.19) ("[A]s with *Anthony*, we disagree with the *Ali* court's narrow interpretation of 'cost'…."). On the other hand, it sought to distinguish both *Anthony* and *Ali* from the facts of this case on the ground that in the two former cases the state agencies distributed the funds in question in a manner different from how Marin Housing Authority distributed the funds here. (App.18-21). But this is a distinction without a difference: the manner in which the state agencies distributed the funds played no role in the Minnesota Supreme Court and the Fifth Circuit concluding that the term "cost," as used in §5.609(c)(16), is limited to actual monetary expenses that have been or will be incurred in caring for a developmentally-disabled family member at home, and does not include non-monetary opportunity costs. Those courts based their conclusions on an analysis of the regulation's text, and not on the particular facts before them. No matter how much the California Supreme Court tried to avoid it, there now exists a clear split regarding the proper interpretation of "cost" under §5.609(c)(16).

A. The California Supreme Court's attempt to distinguish Anthony *and* Ali*, and thus avoid a split, is unconvincing.*

The California Supreme Court sought to downplay the similarities between this case, the Fifth Circuit's decision in *Anthony*, and the Minnesota Supreme Court's decision in *Ali*. It claimed that the dissenting opinion "overstated" the importance of these cases. (App.18). But the majority opinion gave no serious explanation about how either of those cases are materially different from the present one, other than proffering conclusory statements to that effect with no underlying support.

The appellant in *Anthony* worked as a personal-care attendant for several different private health care organizations. *Anthony*, 306 Fed. App'x at 99-100. As such, she received wages directly from the private health organizations themselves. *See id*. The appellant also had a developmentally-disabled son who resided with her and qualified for a Texas program that appropriated both state and federal funds to private, for-profit health organizations to provide in-home care services for developmentally-disabled individuals. *See id*. The appellant worked for two private health organizations that received funding from this Texas program. *See id*. Her job as a personal-care attendant did not require that she be assigned to look after her son. *Id*. at 100. Nevertheless, she was, in fact, assigned to provide at-home, personal care services to her son under the Texas program. *Id*.

The appellant argued that the wages she received from the private health organizations to provide in-

home services to her developmentally-disabled son fell within §5.609(c)(16)'s exclusion of income. *Anthony*, 306 Fed. App'x at 100-01. In ruling on the matter, the Fifth Circuit initially noted that the "regulation does not specifically address whether funds paid by a state to a family member after passing through a private entity are excluded from the term 'annual income.'" *Id*. It also observed that "all state-funded in-home attendant care services in Texas are provided by private intermediaries, and Texas does not provide any amounts directly to families to offset costs incurred to keep a disabled family member at home." *Id*. As a result, the Fifth Circuit could not "determine how allowing pass-through funds would affect the regulation's central purposes." *Id*.

Despite this uncertainty, the Fifth Circuit proceeded to rule on the merits of the case under the assumption "that the regulation allows for pass-through funds to be excluded from annual income…." *Id*. Working on this assumption, the Fifth Circuit concluded that the term "costs" was limited to actual monetary expenses, as opposed to lost opportunity costs. *Id*. at 101-02. Consequently, the appellant's providing at-home care services to her son as part of her job did not incur any out-of-pocket costs for the State to reimburse. *Id*. at 102. The Fifth Circuit thus read "costs" to include only actual expenses incurred, not lost opportunity costs. *Id*.

The California Supreme Court made only a perfunctory attempt to distinguish *Anthony* from the present matter. It noted that the Texas program, unlike the California program here, did not provide any

payments directly to families to offset the cost of services; rather, the Texas program sent all payments exclusively to private intermediaries. (App.19). But this was irrelevant to the Fifth Circuit's analysis—that court explicitly noted that its opinion worked on the assumption that "pass-through" funding paid from the State to private intermediaries constituted "[a]mounts paid by a State agency to a family" under §5.609(c)(16). *Anthony*, 306 Fed. App'x at 101. Having proceeded under this assumption, the only issue remaining for it to decide was whether the term "costs" encompassed matters beyond monetary expenses; the Fifth Circuit concluded it did not. *Id*. In the eyes of the Fifth Circuit, the payments the appellant received in that case were indistinguishable from those Respondent Kerrie Reilly received here. Despite the California Supreme Court's efforts to the contrary, it is impossible to distinguish its holding below from the Fifth Circuit's holding in *Anthony* in any meaningful way; the two opinions are directly at odds with each other over the meaning of a regulation involving the allocation of millions of dollars.

The opinion below fares no better in its attempt to distinguish this matter from the Minnesota Supreme Court's decision in *Ali*. There, the appellant participated in a Section 8 housing program. *Ali*, 938 N.W.2d at 837. She also had a developmentally-disabled son, and qualified for Minnesota's Developmental Disability Waiver program. *Id*. As part of this program, county social workers created and approved a budget to cover the cost of services and equipment needed to keep the appellant's son living at home. *Id*. The appellant elected, similar to Reilly here,

"to allocate a portion of the budget to herself as a paid parent to provide to her son some of the necessary services," *id*., as opposed to using the money to pay for a third party to look after her son. This required her "to file a timesheet tracking her weekly hours and to pay income tax." *Id*.

Based on its reading of §5.609(c)(16), Scott County CDA concluded that while most of the benefits the appellant received to care for her developmentally-disabled son were excluded from her income for purposes of Section 8, "the amounts she paid herself…were not." *Id*. This was because those amounts "were not used to 'offset' any 'cost' to [the appellant], as [the appellant] did not actually incur an out-of-pocket expense." *Id*. at 838.

The Minnesota Supreme Court agreed with Scott County CDA's interpretation of "cost" under §5.609(c)(16). It noted that "cost" is primarily defined as "'the amount or equivalent paid or charged for something: PRICE.'" *Ali*, 938 N.W.2d at 839 (quoting *Merriam-Webster's Collegiate Dictionary* 262 (10th ed. 2001)). While acknowledging that "cost" also has a secondary, non-monetary definition—that is, "cost" can also mean the amount of effort or sacrifice involved in carrying out a task—the court concluded that this meaning did not make sense when reading §5.609 as a whole. *Ali*, 938 N.W.2d at 839. Section 5.609(c)(16) does not exclude merely the "cost of services" from income—it excludes the cost of services *and* equipment from income. *Ali*, 938 N.W.2d at 839. "The 'and' between the words services and equipment suggests that the same measurement is used for each." *Id*. Nor

did it stop there—the Minnesota Supreme Court explicitly referenced, in support of this conclusion, the Fifth Circuit's decision in *Anthony* and the decision of the California Court of Appeal in this matter prior to the California Supreme Court overruling it. *Ali*, 938 N.W.2d at 840. The California Court of Appeal "concluded that the word 'cost' means price—which is the 'more common and concrete meaning.'" *Id*. (quoting *Reilly v. Marin Hous. Auth.*, 232 Cal. Rptr. 3d 789, 796 (Cal. Ct. App. 2018) (reprinted in the Appendix at App.81)).

The California Supreme Court limited itself to a single sentence in its argument that the current matter is distinguishable from *Ali*. "As with the Texas program, the Minnesota program…is structured differently from the [California] program in a way that makes *Ali* distinguishable." (App.21). The court gave no further explanation as to how the Minnesota program was structured differently from the California program, or why this made any material difference to interpreting the meaning of "cost" in §5.609(c)(16). If the California Supreme Court meant that the Minnesota program, unlike the California program, gave the recipient of the funds the discretion over how to budget and spend the funds, this is irrelevant for purposes of deciding whether "costs" is limited to monetary expenditures or includes something more. What's more, there does not appear to be much of a substantive difference between the Minnesota program and the California program in this regard: had she so wished, Reilly could have used the state funds to pay for a third party to provide at-home personal services to her son instead of looking after her son herself. The

California Supreme Court's attempt to distinguish *Ali* from the present matter falls flat.

B. By staying the issuance of the remittitur pending the disposition of the petition for a writ of certiorari, the California Supreme Court has implicitly recognized its opinion creates a split on a major issue requiring this court's review.

Approximately two weeks after the California Supreme Court issued its opinion below reversing the Court of Appeal, Marin Housing Authority asked the court to stay the issuance of the remittitur[2] pending the filing and disposition of a petition for a writ of certiorari in this Court. (Motion to stay, filed Sept. 15, 2020). Over Reilly's objections, the court granted the motion and ordered a stay of the remittitur pending the filing and disposition of Marin Housing Authority's petition in this Court. (Order of Sept. 30, 2020).

The California Supreme Court may stay the issuance of the remittitur "for good cause." Cal. Rules of Court 8.540(a)(c)(2). There does not appear to be any caselaw elaborating on what amounts to "good cause" in this context. Nevertheless, the California Supreme Court's willingness to delay the execution of its judgment strongly indicates that, despite its attempts to distinguish this matter from *Anthony* and *Ali*, a clear split now exists between it, the Fifth Circuit, and the Minnesota Supreme Court on the matter that warrants this Court's review.

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[2] The remittitur in California state appellate practice is equivalent to the mandate in federal appellate practice. *Compare* Cal. Rules of Court 8.540(e) *with* Fed. R. App. P. 41(d).

II. By departing from the plain and ordinary meaning of the word "cost," the California Supreme Court has substituted its own policy preferences for those of Congress and HUD.

As the dissenting opinion recognized, §5.609(c)(16)'s plain language serves the purpose of "ensur[ing] that the acceptance of state financial help by families who keep a developmentally disabled family member at home does not place the families at a disadvantage in receiving Section 8 housing assistance…." (App.55). But the majority opinion substitutes a different policy for this—instead of furthering §5.609(c)(16)'s purpose of placing such families on the same level as other families, it "provide[s] affirmative *advantages* to families with a developmentally disabled member at home." (App.56) (emphasis in original). This utilization of the judicial power to compel a policy not mandated under the regulation's plain language sets a dangerous precedent that, if left uncorrected, provides fodder for courts of other jurisdictions to do the same thing and substitute their own views for the plain language of statutes and regulations. *Cf. TransAm Trucking, Inc. v. ARB*, 833 F.3d 1206, 1217 (10th Cir. 2016) (Gorsuch, J., dissenting) ("[I]t is our obligation to enforce the terms of [a law] as expressed in the law itself, not to use the law as a sort of springboard to combat all perceived evils lurking in the neighborhood….[I]t is…work enough for the day to apply the law Congress did pass, not to imagine and enforce one it might have but didn't."). This is all the more reason for this Court to review the case on the merits.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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