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 Supreme Court of California

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The Rule 29.6 corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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Despite respondent's best efforts to kick up dust, the case for review remains exceptionally clear. As for respondent's initial claim that review is premature, this argument can be easily dispatched because petitioner's view, if adopted, would bring this case to an end. While disagreeing with HUD's interpretation of its own regulation, as articulated in HUD's brief filed below, respondent also insists that her interpretation of the homecare-payment exclusion should prevail. The adoption of her view in the decision below displaces the considered, long-established views of the expert federal agency that Congress authorized to implement the massive Section 8 program, thus justifying review.

Respondent also tries to downplay the practical repercussions of this case by disregarding the arguments presented by different amici supporting the petition based on ongoing, real-world harm caused by the decision below. Far from demonstrating that the issue presented will disappear, the brief in opposition underscores its importance. The petition should be granted.

ARGUMENT

I. Respondent's Jurisdictional Argument Lacks Merit.

A. Respondent makes a half-hearted argument that this case is supposedly not final (Opp. 12-15) because the California Supreme Court "remand[ed] the matter for further proceedings consistent with [its] opinion." Pet. App. 34a. While respondent does not even bother to identify any specific issues that could somehow

preclude finality of the decision below, the record refutes respondent's diversionary argument.

In filing this lawsuit to challenge the termination of her Section 8 subsidies, respondent sought two forms of relief: (1) cancellation of her contractual repayment plan requiring her to reimburse petitioner for its overpayment of subsidies based on respondent's misrepresentation of her family size, and (2) recalculation of the rental subsidies to exclude from her annual income the amounts she was paid for taking care of her daughter at home under section 5.609(c)(16) of Title 24 (the "homecare-payment exclusion"). Resp. App. 9a, ¶¶ 29-30; 10a-11a, ¶¶ 36-37, 40; Pet. App. 37a-38a. Because "a party cannot recover on a cause of action not in the complaint," *Griffin Dewatering Corp. v. Northern Ins. Co. of New York*, 97 Cal. Rptr. 3d 568, 573 (2009), these two issues are the only ones that can form the basis for any relief here. [1]

Although petitioner invoked two grounds in the trial court to dismiss this lawsuit – i.e., the terminated status of respondent's subsidies based on her breach of the repayment plan and petitioner's interpretation of the homecare-payment exclusion (Resp. App. 31a-39a) – the trial court, the intermediate court and the California Supreme Court addressed only the issue presented here regarding the proper interpretation of Section 5.609(c)(16). Pet. App. 26a, n.4; 74a-88a; 93a-

[1] While the prayer in the complaint also sought reinstatement of the terminated subsidies and injunctive relief against future enforcement of the repayment plan plus attorneys' fees, Resp. App. 11a-12a, these ancillary remedies were all predicated on the request to cancel the repayment plan.

95a. Petitioner, however, has permanently abandoned the other ground for seeking dismissal of this lawsuit. Petitioner no longer seeks to enforce the repayment plan and it no longer seeks to terminate respondent's Section 8 voucher based on her misrepresentations. In fact, shortly after losing in the California Supreme Court, petitioner implemented that court's decision by recalculating and paying respondent's higher subsidies on a going-forward basis. Consequently, the only issue remaining on remand is the quantification of the pre-reversal subsidies petitioner must pay for the appropriate limitations period preceding the state Supreme Court's decision. Given petitioner's abandonment of the remaining ground for seeking dismissal, there is absolutely no jurisdictional issue here because "finality may be achieved if the parties dismiss or otherwise relinquish the remaining issues that would preclude finality," Stephen Shapiro et al., *Supreme Court Practice* 156 (10th ed. 2013) (citation omitted). Accordingly, because the state court has effectively "remanded for further proceedings on the computation of damages," *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 896 (1982), "its judgment is final for purposes of our jurisdiction," *id.* at 907 n.42.

B. Respondent's cursory argument challenging this Court's jurisdiction is fundamentally wrong for additional reasons. Respondent claims (Opp. 12-15) the decision below is not final under *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). But she does not dispute the federal issue as to the proper construction of HUD's regulation has been determined finally by California's highest court. This Court has never interpreted the finality requirement of section 1257

literally "to preclude review '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.'" *Cox Broadcasting*, 420 U.S. at 477 (citation omitted). Rather, "the Court has recurringly encountered" and granted review in "situations in which the highest court of a State has finally determined the federal issue present in a particular case, but in which there are further proceedings in the lower state courts to come." *Id*.

Among the four categories of cases that meet these criteria, the first two are implicated here. Under the first category identified in *Cox Broadcasting*, the judgment of a state high court on a federal issue will be "deemed final" where "*the federal issue is conclusive* or the outcome of further proceedings preordained." 420 U.S. at 479 (emphasis added). While respondent omits the italicized language of the disjunctive test in her two-sentence discussion of both of these categories (Opp. 14), that test is dispositive here. The federal issue is conclusive here because a decision in petitioner's favor would necessarily determine the outcome in this case. If this Court were to grant review and reverse the California Supreme Court by holding that respondent's IHSS income is not excluded from her annual income in calculating her Section 8 subsidies, that decision would bring this litigation to an end. While respondent had also sought reinstatement of her terminated subsidies, that issue is moot, given petitioner's reinstatement of her subsidies and petitioner's abandonment of any attempt to collect the amounts unpaid under the repayment plan.

This case also fits the second category of cases identified in *Cox Broadcasting*. "As the cases in this category indicate, the state court decision on the federal issue is considered separable and distinct from the subsequent proceedings, so much so that the federal issue will be unaffected and undiluted by the later proceedings; hence for all practical purposes the ruling on the federal issue is final." Shapiro, *supra*, at 165 (footnote omitted). Because the dispute over the quantification of respondent's damages has absolutely nothing to do with the antecedent liability inquiry, this category provides another ground for jurisdiction in this case. See, e.g., *NAACP,* 458 U.S. at 907 n.42 (First Amendment ruling deemed final, despite remand for a recomputation of damages); *Brady v. Maryland*, 373 U.S. 83, 85 n.1 (1963) (subsequent trial on sole issue of punishment could not affect federal issue resolved on appeal from a criminal conviction). Given this Court's jurisdiction, respondent's attempts to deflect the Court's attention from the merits of the petition are futile.

II. The Mutually Exclusive Views Adopted by the Conflicting Authorities Cannot Be Reconciled.

A. Respondent downplays the split openly acknowledged in the majority opinion below. Opp. 15-18; Pet. App. 19a, 21a. Expressly rejecting the Fifth Circuit's decision in *Anthony v. Poteet Housing Authority,* 306 Fed. Appx. 98 (5th Cir. 2009), the California Supreme Court held that it was "not persuaded by *Anthony*'s reasoning on several grounds." Pet. App. 19a. The court explained that "we do not

agree with the Fifth Circuit's narrow interpretation of the exclusion as limited to out-of-pocket expenses that a state directly reimburses." *Id.* at 20a.

Despite such explicit acknowledgment of the split, respondent attempts to distinguish *Anthony* by quoting the majority's comment that "Texas does not provide any amounts *directly* to families to offset costs incurred to keep a disabled family member at home." Opp. 15 (emphasis added). Respondent's attempt to distinguish *Anthony* is hopeless because the income exclusion does not differentiate between income paid "directly" versus indirectly by a State. The regulation simply excludes from income "[a]mounts *paid by a State agency* to a family with a member who has a developmental disability[.]" 24 C.F.R. 5.609(c)(16) (emphasis added). Therefore, whether the income was paid to the family directly or through an intermediary who, in turn, pays the family makes no legal difference. Opp. 15-16.

Furthermore, the point raised by respondent – whether the Section 8 tenant was paid by "pass-through" funding or directly by the State – was simply irrelevant in the Fifth Circuit's analysis. The court assumed that payments by the State to private intermediaries constitute "[a]mounts paid by a State agency to a family," thus satisfying this aspect of the income exclusion. *Anthony*, 306 Fed. Appx. at 101. Because it was "assuming" this to be the case (*ibid.*), the only question left for the Fifth Circuit was whether such payments could be deemed to "offset the cost of services" for keeping the tenant's family member at home. The court held that because "[o]ne must incur costs before they can be offset" (*ibid.*), the family could

not invoke the income exclusion to obtain a larger Section 8 subsidy—the exact opposite of the majority's opinion below.

B. Respondent's attempt to explain away the express conflict between the California Supreme Court's decision and the Minnesota Supreme Court's decision in *In re Ali*, 938 N.W.2d 835 (Minn. 2020) is also flawed. The majority opinion below held that "as with *Anthony*, we disagree with the *Ali* court's narrow interpretation of 'cost' and 'offset.'" Pet. App. 21a. While both state courts of last resort construed the identical federal regulation in two mutually-exclusive ways, respondent seeks to minimize this express conflict based on one feature of the Minnesota program. Opp. 17-18. In particular, respondent points out that the Minnesota 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.'" *Id.* at 17 (citation omitted).

Setting aside the fact that respondent's daughter is now in her thirties, Opp. 8, the construction of the key terms used in this federal regulation – "cost" and "offset" – cannot vary state by state. Because the meaning of these terms in this Section 8 regulation does not depend on the eligibility rules adopted by different states in enacting their respective Medicaid-funded programs, respondent cannot make the express split of authority disappear. In fact, while HUD has "left it up to states to determine" the meaning of "developmental disability" as used in the same federal regulation, Pet. App. 22a, there is no reason to believe

that HUD sought to import state law in construing "cost" and "offset."

III. The Proposed Amendment to the Subject Regulation Has No Bearing on This Case.

Respondent argues the Court should disregard the split of authority implicated in this case based on a notice of proposed rulemaking regarding the definition of income under the subject regulation. Opp. 18-19. The proposed rule indicates that "HUD is only simplifying the definition to eliminate confusing regulatory language that excluded some income that should have been *included*," 84 Fed. Reg. 48820, 48825 (Sept. 17, 2019).

Setting aside this background, respondent's argument is fundamentally erroneous for multiple reasons. Even if the proposed rule were hypothetically adopted tomorrow, that would apply only on a going-forward basis. The promulgation of such a final rule would not change the exposure that housing authorities will continue to face in terms of pre-existing liability for improper rent calculations that took place prior to such an amendment. Here, for example, respondent seeks to recover overpaid rent going back to 1998 when she enrolled in the Section 8 program administered by petitioner. The enormous potential liability facing housing authorities across the nation compels review. See *Alaska v. American Can Co.*, 358 U.S. 224, 225 (1959) (certiorari granted "in view of the fiscal importance of the question to Alaska," even though the tax statute involved had been repealed).

Respondent's contention that the proposed rule somehow vindicates the majority's decision below is equally flawed. Opp. 19. "It goes without saying that a proposed regulation does not represent an agency's considered interpretation of its statute," *Commodity Futures Trading Com'n v. Schor*, 478 U.S. 833, 845 (1986). And while "an agency is entitled to consider alternative interpretations before settling on the view it considers most sound," *ibid.*, HUD did not change its view in terms of adopting petitioner's position. In fact, even *after* the notice of proposed rulemaking was published following the completion of briefing in the state Supreme Court, HUD continued to maintain its position at oral argument below that *petitioner's* view "accords with the basic policy objectives of the regulation" by ensuring that "families that strive to avoid institutionalization" are "encouraged, and not punished." Pet. App. 142a (citation omitted).

Finally, while the proposed amendment to the regulation has not been adopted despite being published nearly two years ago, proposed regulations may be withdrawn or modified at any time. See, e.g., *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2123 (2016) (following notice of proposed rulemaking, federal agency adopted "a final rule that took the opposite position from the proposed rule"). Because the income exclusion, as construed by the lower courts, "remains on the books for now," *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 627 n.5 (2018), the mere fact that a modification has been proposed does not "render this case moot." *Ibid.* (after review was granted, issuance of proposed rule to rescind the original rule did not establish mootness). In sum, even

if we assume the proposed rule is ultimately adopted – certainly a debatable scenario – this "does not change the underlying substantive question," *Douglas v. Independent Living Center*, 565 U.S. 606, 614 (2012) (addressing agency action adopted while case was pending before this Court).

IV. Respondent's Attempt to Minimize the Impact of the Split of Authority Is Futile.

Respondent claims the decision below "lacks nationwide importance because it only governs how California administers housing assistance programs." Opp. 19 (emphasis omitted). But the mere existence of the split of authority based on the decision below justifies review. The administrative chaos and confusion caused by having two mutually-exclusive interpretations of the identical federal regulation requires this Court's review as the final arbiter. Pet. 18-21. Review is particularly necessary because "the California Supreme Court has been, and continues to be, the most 'followed' state high court in the nation." Jake Dear & Edward W. Jessen, *'Followed Rates' and Leading State Cases, 1940-2005*, 41 U.C. Davis L. Rev. 683, 693 (2007).

As for respondent's myopic focus on the impact of the decision in California, the statewide repercussions of the decision further justify review. There are "over one hundred housing authorities throughout the state of California" serving "the needs of [] 395,000 households," Cal. Ass'n of Housing Authorities Amicus Br. 1. Because the California Supreme Court's decision is binding on *all* California housing authorities, every single Section 8 tenant in California receiving

homecare payments for family-provided care can now sue to recover overpayments. Whether these lawsuits proceed individually or as class actions, the amount of such liability is staggering. Pet. 26. And while respondent shifts the blame for such liability exposure to HUD based on its Guidebook requiring housing authorities to "immediately refund *the total amount due*" (Opp. 24-25), it is the decision below that defines "the total amount due," not this timing provision in the Guidebook.

Seeking to downplay the recurring nature of the issue presented, respondent also quotes an article about morbid obesity where the author asserts "the majority [of States] explicitly prohibit family members to serve as paid caregivers except in unusual and limited circumstances." Opp. 20 (citation omitted). While the article cites a 2003 survey in a footnote to support this assertion, it is obsolete. "Today, federal Medicaid law generally permits states to pay family members to care for disabled adults. While some states still restrict who can receive caregiver payments for adults, those states are now a minority." Christine Speidel, *Difficulty of Care: Aligning Tax and Health Care Policy for Family Caregiving*, 52 Loy. U. Chi. L.J. 503, 519-20 (2021).

Respondent also dismisses the statistics illustrating the national significance of the issue presented. Opp. 21. While the precise number of Section 8 participants subject to the homecare-payment exclusion is not known, an estimated 1,150,000 individuals receiving Section 8 vouchers live with a disabled family member. Pet. 28. Assuming conservatively that only half of those

with disabilities have developmental (rather than medical) disabilities, 575,000 individuals can potentially use the homecare-payment exclusion. Given that 71% of developmentally-disabled individuals live with a family caregiver, Pet. 31, applying this percentage to the 575,000 figure yields 408,250—the minimum number of individuals impacted by the issue presented.

Respondent further quibbles with the precise number of federal programs that use the income exclusions found in Section 5.609, arguing that two of the fourteen programs cited (Pet. 24) are no longer implicated. Opp. 23. That leaves twelve federal programs plus an additional five non-federal programs that use the income exclusions found in this regulation (Pet. 24), thus illustrating the significant repercussions of the decision below.

V. Respondent's Remaining Arguments Should Be Rejected.

Respondent also argues that concerns over the distribution of funds among current and prospective Section 8 participants "should be raised before HUD and Congress, not this Court." Opp. 24. But in adopting petitioner's view, HUD has already articulated the same concerns. Pet. App. 137a (noting finite funding). Because the court below substituted its own policy judgment for that of HUD, the agency to whom Congress delegated the duty to administer housing programs, review is necessary.

Finally, respondent's merits contentions are irrelevant here. Opp. 26-30. While the dissent below

extensively refuted those arguments, Pet. App. 43a-68a, respondent claims that her position is supported "by the rulemaking history of the regulation." Opp. 28. Suffice it to say that the agency that promulgated this regulation completely disagrees with her view. Pet. App. 141a-147a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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