No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 8 of the United States Housing Act of 1937, as amended, 42 U.S.C. 1437f, authorizes the United States Department of Housing and Urban Development (HUD) to enter into agreements with state and local public housing agencies (PHAs) in order for PHAs to administer housing assistance payments to low-income families. In evaluating Section 8 eligibility based on family income, HUD's regulation defines annual income to include the full amount of wages "and other compensation for personal services." The regulation, however, excludes "[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).

Soliciting but ultimately rejecting HUD's interpretation of this ubiquitous income definition – one that governs over a dozen programs besides Section 8 – the California Supreme Court expressly disagreed with another state court of last resort as to the meaning of this regulation. In a 4-3 decision, the California Supreme Court also rejected the Fifth Circuit's interpretation. Having rejected the interpretation expressed by HUD, and that of the Minnesota Supreme Court and the Fifth Circuit, the California Supreme Court's majority disagreed with the extensive dissenting opinion as well. The question presented is as follows:

Whether a public housing authority, in calculating a family's annual income, is required by this regulation

to exclude Medicaid-funded payments made to a family by a State agency to allow the Section 8 tenant to provide personal caregiving services in order to keep a developmentally disabled family member at home.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the California Superior Court; the California Court of Appeal, First District, Division Two; and the California Supreme Court:

- *Reilly v. Marin Housing Authority*, No. CIV1503896 (Superior Court of County of Marin), judgment entered Nov. 4, 2016;
- *Reilly v. Marin Housing Authority*, No. A149918 (Cal. App.), judgment entered April 25, 2018;
- *Reilly v. Marin Housing Authority*, No. S249593 (Cal. Supreme Court), judgment entered August 31, 2020.

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Marin Housing Authority respectfully petitions for a writ of certiorari to review the judgment of the California Supreme Court in this case.

OPINIONS BELOW

The California Supreme Court's opinion is reported at 472 P.3d 472 and reproduced below. Pet. App. 1a-68a. The California Court of Appeal's opinion is reported at 232 Cal. Rptr. 3d 789. App. 69a-91a. The judgment of the superior court dismissing this case is unreported. App. 96a-97a.

JURISDICTION

The judgment of the California Supreme Court was entered on August 31, 2020. App. 1a-68a. On March 19, 2020, this Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a timely petition for rehearing. The effect of that order was to extend the deadline for filing a petition for a writ of certiorari to January 28, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

STATUTES & REGULATIONS INVOLVED

42 U.S.C. 1437a(b)(4) provides in relevant part:

> The term "income" means income from all sources of each member of the household, as determined in accordance with criteria prescribed by the Secretary[.]

Section 5.609 of Title 24 of the Code of Federal Regulations provides in relevant part:

> (a) Annual income means all amounts, monetary or not * * * (3) [w]hich are not specifically excluded in paragraph (c) of this section.

Paragraph (c), in turn, excludes the following category of income, among others:

> Annual income does not include the following:
>
> * * *
>
> (16) Amounts 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.

Pertinent provisions of additional statutes and regulations are reproduced in the appendix to this petition. App. 114a-133a.

INTRODUCTION

This case involves the intersection of two types of government programs. While Section 8 provides subsidized housing, Medicaid provides funding to state agencies so that they can make so-called "homecare payments" to families of individuals with developmental disabilities. Designed to minimize institutionalization of disabled individuals, such payments allow families to provide care at home in different ways—e.g., by hiring third party caregivers using homecare payments or by relying on such

payments, in lieu of a traditional job outside the home, while the family itself provides care.

The federal regulation at issue here, Section 5.609(c)(16), excludes homecare payments from the definition of income but only if such payments "*offset the cost of services and equipment* needed to keep the developmentally disabled family member at home[.]" When a family pays a third party caregiver to provide care, the homecare payment offsets the cost of hiring the caregiver, an actual and quantifiable cost. By contrast, where—as here—the family itself provides care, there is no tangible or legally cognizable cost to the family, other than the obvious emotional cost or lost opportunity costs such as losing the opportunity to earn money outside the home. The court below, however, held that the "cost" of caregiving services provided by respondent to her own daughter is just as real and cognizable as though she had hired and paid a third-party caregiver to provide such services. Accordingly, the court deemed the income exclusion to apply in such cases where the family itself provides care.

While rejecting the contrary view applied in *Anthony v. Poteet Hous. Auth.*, 306 Fed. Appx. 98 (5th Cir. 2009) in interpreting Section 5.609(c)(16), the California Supreme Court held it was "not persuaded by *Anthony*'s reasoning." App. 19a. The California Supreme Court also explicitly held that "we disagree" with *In re Ali*, 938 N.W.2d 835 (Minn. 2020) because the court below was not "persuaded by the Minnesota Supreme Court's recent decision" interpreting this particular income exclusion. App. 20a. Certiorari is

warranted because the decision below is plainly in conflict with both "the decision of another United States court of appeals on the same important matter" and "a decision by a state court of last resort." S. Ct. R. 10(a).

By expressly creating a split of authority, the decision below impedes the efficient administration of a key government program that provides a lifeline in the form of subsidized housing to a large segment of the population. It also creates practical dilemmas for over two thousand public housing authorities that must comply with a complex body of law in administering the Section 8 program nationwide. The decision also creates unfairness to litigants—both housing authorities and affected Section 8 participants—by allowing higher Section 8 subsidies in one jurisdiction that are denied in other jurisdictions based solely on their geographic location.

Representing a lopsided split of authority with other appellate courts, the California Supreme Court's decision is patently erroneous and will have enormous consequences for numerous federal assistance programs. Because the subject regulation defines the income-eligibility standard for at least *fourteen* federal assistance programs, not just the Section 8 program, this split of authority has a major domino effect for all such programs. A decision of such magnitude, in interpreting a ubiquitous income-eligibility test for a dozen-plus federal programs, should not be based on a bare majority opinion by a state appellate court. In fact, of the 25 jurists that have decided this issue so far in the various trial and appellate courts in *Anthony*,

Ali, and this case, 21 of them have adopted petitioner's view—the contrary position gaining support here from a slender judicial minority.

This case would warrant review even in the absence of such a spillover effect of the express conflict openly acknowledged by the California Supreme Court, given the wide-ranging consequences of its decision for the Section 8 programs adopted across the nation. The decision below creates a roadmap for Section 8 tenants – those with developmentally-disabled family members in California and 45 other States – to sue housing authorities for refunds to recover the rent such tenants overpaid over the last several years based on the calculation of their rental subsidies, a mathematical computation rendered erroneous and illegal by this decision. By stretching housing authorities' finite resources based on such exposure to tens of millions of dollars in terms of claims for retroactive refunds and tenants' attorneys' fees, the decision will have potentially disastrous consequences for the Section 8 housing program. Every dollar spent on paying such claims—whether to refund overpaid rent or to shift attorneys' fees incurred to prosecute such lawsuits—represents one less dollar that can be spent to provide housing for the 2.8 million families on waiting lists for the Section 8 program.

These issues are thus of extraordinary importance to all participants in the Section 8 program, as well as the Nation as a whole. Particularly in light of the express conflict between the decision below and the opinions of other courts, review is absolutely critical here. It is difficult to imagine a question on which

thousands of public housing agencies across the country more desperately need this Court's guidance. Because the question presented has enormous legal and practical importance and this case is an optimal vehicle for resolving this legal issue, the petition for a writ of certiorari should be granted.

STATEMENT

1. a. In 1974, Congress created the housing subsidy program commonly known as "Section 8" for "the purpose of aiding low-income families in obtaining a decent place to live and of promoting economically mixed housing." Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 201(a), 88 Stat. 662 (42 U.S.C. 1437f) (amending United States Housing Act of 1937, ch. 896, 50 Stat. 888). Although Section 8 has historically encompassed several programs, the "majority of federal housing assistance takes place through the Housing Choice Voucher Program, which subsidizes the cost of renting privately-owned housing units," *Nozzi v. Hous. Auth. of City of Los Angeles*, 806 F.3d 1178, 1184 (9th Cir. 2015).

To achieve its national objective, the U.S. Department of Housing and Urban Development (HUD) subsidizes housing rentals for eligible tenants. HUD contracts with state and local agencies to have them administer the Section 8 program by providing them with "annual contributions" for rental subsidies and administrative fees. § 201(a), 88 Stat. 662; 24 C.F.R. 883.302 (1976). The state or local agencies then enter into Housing Assistance Payment (HAP) contracts with private landlords who agree to rent units to qualifying households.

HAP contracts specify the maximum rent that a landlord may charge for each unit, 42 U.S.C. 1437f(c)(1)(A). Section 8 tenants pay a portion of the monthly rent, determined based on various factors. 24 C.F.R. 883.302 (1976). Landlords, pursuant to their HAP contracts, receive "assistance payments" in "an amount calculated to make up the difference between the tenant's contribution and a 'contract rent' agreed upon" in writing, *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 12 (1993). See 42 U.S.C. 1437a(a).

To calculate the tenant's subsidy, housing authorities must first quantify the tenant's income based on the amount the Section 8 family receives or expects to receive. 24 C.F.R. 5.609(a); 24 C.F.R. 982.201(a), (b)(3). The governing regulation defines "annual income" broadly to include "all amounts, monetary or not," 24 C.F.R. 5.609(a). For example, income includes "compensation for personal services" (24 C.F.R. 5.609(b)(1)) and "[p]ayments in lieu of earnings, such as unemployment and disability compensation," 24 C.F.R. 5.609(b)(5). Income, however, does not include amounts "specifically excluded" by this regulation, 24 C.F.R. 5.609(a)(3). While there are 16 specified exclusions (24 C.F.R. 5.609(c)(1)-(16)), the one at issue here excludes "[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) (emphasis added).

b. The Medicaid program, established in 1965 by Title XIX of the Social Security Act, 42 U.S.C. 1396 et

seq., is a joint federal-state program to provide medical care to needy individuals. *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 502 (1990). Medical providers who furnish services under Medicaid receive payment directly from the States, and the federal government in turn reimburses States for a fixed percentage of the expenses that they incur on behalf of Medicaid-eligible individuals. 42 U.S.C. 1396b. While State participation in Medicaid is voluntary, those States that elect to participate must comply with numerous requirements imposed by the Medicaid Act and by the Secretary of Health and Human Services. See 42 U.S.C. 1396a; *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606, 610 (2012). Subject to those limits, however, each State enjoys great flexibility in designing and administering its own program. *Alexander v. Choate*, 469 U.S. 287, 303 (1985).

To qualify for federal funds, participating States must submit to the Secretary, through the Centers for Medicare & Medicaid Services (CMS), a "plan for medical assistance" detailing the nature and scope of the State's Medicaid program and demonstrating its compliance with the Medicaid Act. 42 U.S.C. 1396a(a); 42 C.F.R. 430.10. The Secretary reviews the State's plan to evaluate whether it complies with statutory and regulatory requirements. 42 U.S.C. 1396a(b); 42 C.F.R. 430.10 et seq.

c. In 1981, Congress enacted a Medicaid "waiver" program, allowing States to apply to CMS, as the Secretary's designee, for a waiver of certain Medicaid rules in order to offer home or community-based services (HCBS) as part of the "medical assistance"

furnished under a State plan. See 42 U.S.C. 1396n(c), (i); 42 C.F.R. 430.25(c)(2), 440.180-440.181, 441.300 et seq. The waiver program authorizes States to provide a range of services "to individuals who would otherwise require institutional care." *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 601 n.12 (1999). "Waivers are intended to provide the flexibility needed to enable States to try new or different approaches to the efficient and cost-effective delivery of health care services, or to adapt their programs to the special needs of particular areas or groups of beneficiaries." 42 C.F.R. 430.25(b).

d. The State of California has a CMS-approved HCBS waiver program to provide supportive services to individuals with developmental disabilities, among others. App. 6a-7a, 41a-42a; cf. 42 C.F.R. 430.25(c)(2), 441.301; Cal. Welf. & Inst. § 12000 et seq. (2020). The program provides eligible individuals with personal care services and protective supervision, in addition to other supportive services, to enable "the recipient to establish and maintain an independent living arrangement." Cal. Welf. & Inst. § 12300(b); *Basden v. Wagner*, 104 Cal. Rptr. 3d 394, 397 n.4 (2010) (explaining three component programs and funding sources); *City of Sacramento v. State of Cal.*, 184 Cal. Rptr. 648, 649-650 (1982) (summarizing state legislation).

California's In-Home Supportive Services Plus waiver program, the one at issue here, is one of the three state programs collectively referred to as IHSS. App. 6a-7a (describing programs); Cal. Welf. & Inst. § 14132.951. County welfare departments administer

the IHSS program under the State's supervision, and "determine an applicant's individual needs to authorize necessary services." App. 7a. A county welfare department "may either obtain and pay directly a provider of the supportive services, or pay the recipient who hires one" to do so. *Id*. at 8a.

Alternatively, the county welfare department may compensate the parent who provides in-home care to a disabled child, subject to one caveat: "a parent will not be paid through the IHSS program for providing supportive services to a child unless the parent has left 'full-time employment' to care for her child or is unemployed on account of providing supportive services to her child," *Basden*, 104 Cal. Rptr. 3d at 398 (citing Cal. Welf. & Inst. § 12300(e)).

2. a. i. Petitioner Marin Housing Authority, pursuant to its contract with HUD, administers the Section 8 program in Marin County, California, located near San Francisco. Respondent Kerrie Reilly has been participating in the tenant-based Section 8 program, receiving a monthly subsidy since 1998 to pay rent for her three-bedroom apartment. App. 2a, 5a. Because respondent's adult daughter, K.R., is developmentally disabled and requires constant supervision, the State of California pays respondent each month to provide in-home supportive care to K.R., thereby eliminating K.R.'s institutionalization. *Id*. at 2a, 8a. Respondent's annual income exceeds $52,000, comprising $41,000 in such homecare payments, plus $11,000 in social security benefits. *Id.* at 37a.

In 2009, respondent disclosed to petitioner that her other daughter had moved out of the apartment. App. 37a. Because the amount of the Section 8 subsidy can change based on the number of individuals living in the unit, petitioner calculated the amount of its subsidy-overpayment for the five-year period in which respondent had failed to disclose this critical fact. *Id*. at 37a-38a. Respondent, however, ultimately breached her settlement agreement to pay back petitioner $16,000 based on such overpayment. *Id*. at 38a.

In 2015, invoking the income definition set forth in HUD's regulation, respondent requested recalculation of her subsidy to exclude the amount of income she was receiving from the State to provide care for her disabled daughter. App. 3a (citing 24 C.F.R. 5.609(c)(16)). Without specifically addressing this request, petitioner notified respondent of the termination of her Section 8 voucher based on her breach of the settlement agreement. *Id*. at 100a-101a, 107a-109a. An administrative hearing officer later upheld this decision, noting such a breach justified termination of the rent subsidies. *Id*. at 111a-113a.

ii. Respondent filed suit in California state court, seeking reinstatement of her Section 8 voucher and an order terminating her repayment obligations under the settlement agreement. App. 3a-4a. Rejecting respondent's interpretation of HUD's regulation, the trial court held that respondent's State-paid compensation qualifies as income in calculating her Section 8 rent subsidy. *Id*. at 4a, 92a-95a. Adopting the Fifth Circuit's interpretation of the subject regulation,

the intermediate appellate court affirmed. *Id.* at 77a-89a.

Respondent successfully sought discretionary review in the California Supreme Court. Having obtained amicus support from 32 organizations and individuals that submitted or joined amicus requests (one of whom represented an *additional* 21 organizations), respondent argued the case had significant implications statewide. While focusing on its impact just in California, respondent argued that "tens of thousands of tenants who rely on Section 8 housing vouchers will be affected" besides "tens of thousands of additional HUD and state subsidized housing complexes" who use the same "HUD income counting rules, including the [developmental disability] income exemption at issue here." Pet. for Rev. 2-3. Respondent also cited Congressional findings that "88 percent of individuals with developmental disabilities live with their families or in their own households," *id.* at 22 (citing 42 U.S.C. 15001(a)(10) which lists figures as of 2000)). The court granted review.

b. After extensive merits briefing, including presentation of court-invited amicus brief (App. 134a-149a) and oral argument by HUD, the state court of last resort reversed in a 4-3 decision.

i. The majority held that respondent's income, paid by the State's HCBS waiver program to enable respondent to provide care for her daughter, should be excluded in quantifying her Section 8 subsidies. App. 4a-34a. The majority reasoned that the subject regulation, by excluding amounts paid "*to offset the cost of services and equipment* needed to keep the

developmentally disabled family member at home," 24 C.F.R. 509(c)(16), "encompass[es] emotional costs Reilly bears in caring for her daughter, [and] any lost opportunity costs when Reilly forgoes outside employment to be her daughter's [in-home] provider." App. 11a (emphasis modified).

Acknowledging the contrary view adopted in *Anthony v. Poteet Hous. Auth.*, 306 Fed. Appx. 98 (5th Cir. 2009), the court explained that it did "not agree with the Fifth Circuit's narrow interpretation of the exclusion as limited to out-of-pocket expenses that a state directly reimburses." App. 20a. In addition, the California Supreme Court was not "persuaded by the Minnesota Supreme Court's recent decision … which relied in part on both *Anthony* and the Court of Appeal opinion below to reach a similar conclusion." *Id.* (expressly rejecting *In re Ali*, 938 N.W.2d 835 (Minn. 2020)). "[A]s with *Anthony*, we disagree with the *Ali* court's narrow interpretation of 'cost' and 'offset,'" the court held. *Id*. at 21a.

The court also rejected HUD's interpretation of its own regulation. App. 32a-33a. The court explained that agency deference is inappropriate if the agency's position is not consistent with "other indications of the [agency's] intent at the time of the regulation's promulgation." *Id*. at 33a (citation and emphasis omitted). Because HUD's stated purpose in adopting the subject exclusion was to avoid institutionalization of disabled individuals, the court held this goal "is fully realized only when" homecare payments are excluded from the definition of income. *Id.*

In rejecting the contrary views adopted by other courts and HUD, the court began its analysis by distinguishing the terms "reimbursement" and "offset." App. 11a. The court reasoned that while the former contemplates an actual out-of-pocket expense, the latter does not. *Id.* The court also invoked HUD's interim rule that led to the addition of the subject exclusion. *Id.* at 13a (citing 60 Fed. Reg. 17,388-17,395 (April 5, 1995)). In language that "closely tracks" the exclusion as adopted in the final regulation (*id.* at 15a), the interim rule made a general statement that States providing "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." *Id.* at 14a. Based on this broad statement, the court believed HUD regarded homecare payments received for taking care of a disabled family member to meet the cost-offsetting requirement. *Id.* at 14a-16a.

The court also cited HUD's response to a public comment in which HUD had declined to define "developmentally disabled children" and "adult family members" when finalizing the subject regulation. App. 14a. Quoting HUD's response to that comment, the court held that "[i]f the family is receiving such a [homecare] payment from the State because a family meets the criteria of the [developmentally-disabled] definition, the public housing authority should consider the family eligible for the exclusion." *Id.* (quoting 61 Fed. Reg. 54,492, 54,497 (Oct. 18, 1996)).

ii. Justice Kruger and Justice Corrigan joined the dissenting opinion authored by California Chief Justice

Cantil-Sakauye. App. 35a-68a. Sharply criticizing the majority, the dissent noted that "[e]very other appellate court to consider" the language at issue "has adopted a narrower construction, limiting the income exclusion to those state payments that reimburse a family's expenditures." *Id.* at 35a. Rejecting the majority's reliance on the commentary published by HUD in adopting the regulation, the dissent noted such "commentary never expressly addresses the issue before us" in terms of "the distinction between state payments made to reimburse a family's expenditures for services and those made to compensate the family's own provision of services." *Id*. at 52a. The dissent also rejected the notion that homecare payments received by respondent offset her "cost * * * of not having other employment," explaining that lost opportunity costs do not trigger the income exclusion. *Id*. at 47a.

Highlighting the "unfortunate and selective public policy consequences" of the majority's view, App. 36a, the dissent concluded that "[b]y skewing the allocation of Section 8 housing subsidies to families receiving [homecare] compensation, contrary to HUD's express intent, the majority's misinterpretation of the regulation will likely lead to a reduction in the housing subsidies available to other low-income families in California," *id.* at 67a.

iii. Despite respondent's extensive objections, the court subsequently granted a stay of the mandate pending the outcome of this petition. See Order Granting Motion to Stay, *Reilly v. Marin Hous. Auth.*, No. S249593 (Cal. Sept. 30, 2020).

REASONS FOR GRANTING THE PETITION

The decision below openly rejects the longstanding view of the Fifth Circuit, that of another state court of last resort and the settled administrative construction of a key federal regulation. This legal dichotomy creates the risk of protracted litigation against other housing authorities across the nation that are faced with two mutually exclusive interpretations of HUD's regulation. That ambiguity will dissuade other housing authorities from adopting petitioner's conservative approach in calculating rental subsidies in order to avoid litigation. This preventive measure, in turn, undermines the core aim of the Section 8 program by reducing the availability of government-assisted housing for qualified applicants, given the depletion of the limited pool of funds based on the additional subsidies mandated by the court below.

Consequently, the ones adversely affected by the decision below are the impecunious individuals they serve; i.e., the estimated 2.8 million families on Section 8 waiting lists whose ability to obtain subsidized housing is jeopardized or delayed based on the expedited exhaustion of funds. In light of the practical significance of the Section 8 subsidies for this vulnerable segment of the population, and the billions of dollars that flow through this massive program, the uncertainty injected by the decision below into an already complex system requires immediate review.

But the decision below does far more than cut off such poor applicants from much-needed housing subsidies. At least fourteen federal regulations incorporate Section 5.609's definition of "annual

income," thus highlighting the domino effect of the decision below on the administration of so many federal programs. Leaving this split of authority in place is untenable, and if such a fundamental restructuring of the legal parameters governing a federal assistance program is to come from any court, it should be this Court.

The decision below also sets a dangerous precedent for other state courts that may disagree with federal regulators. Here, for example, by forcing HUD to disburse taxpayer dollars in furtherance of a policy that HUD has determined violates the best reading of Section 5.609, the majority's decision undermines the government's weighty interest in maximizing the use of federal funds by subsidizing a greater number of Section 8 recipients while requiring a larger rent contribution from tenants receiving homecare payments. While attempting to divine HUD's true intent in adopting the subject regulation, the state court effectively invalidated a key provision in the regulation by expressly rejecting a federal agency's interpretation of its own regulation. In the process, the court substituted its own judgment as to how to run the Section 8 program, essentially telling a federal agency that it did not intend to say what the agency says it intended in adopting the regulation. In sum, because "this case involves an administrative agency's interpretation of a statute it administers," *Powell v. Hous. Auth. of City of Pittsburgh*, 812 A.2d 1201, 1208 (Pa. 2002) (adopting HUD's interpretation of Section 8 regulation), the need for a nationally binding rule of law is imperative.

I. Having Expressly Rejected Decisions by Another State Court of Last Resort and the Fifth Circuit in Interpreting the Identical Federal Regulation, the California Supreme Court's Decision Requires Immediate Review.

A. The California Supreme Court was not "persuaded by the Minnesota Supreme Court's recent decision" interpreting Section 5.609. App. 20a. Adopting petitioner's view, the Minnesota court of last resort held that amounts received by a parent to care for a developmentally-disabled family member count as income in evaluating Section 8 subsidies. See *In re Ali*, 938 N.W.2d 835, 839 (Minn. 2020). Reviewing the text of the homecare-payment exclusion, the court reasoned it "refers to amounts that 'offset the cost of services *and* equipment.'" *Id.* (emphasis in original). The court explained the use of this conjunction "suggests that the same measurement is used" for services and equipment. *Ibid.* Because "the cost of equipment is calculated in monetary terms—such as the cost to buy or lease," the cost-of-services language similarly entails an out-of-pocket expenditure, the court held. *Id.*

The Minnesota court further reasoned that HUD knew how "to exclude amounts paid to family members for their own services," citing two other income exclusions in the same regulation. *Ali*, 938 N.W.2d at 839. The court concluded that "cost" refers to "an actual monetary expense that has been, or will be, incurred by the family to keep the disabled family member living at home." *Id.* at 840. Finally, the court cited the intermediate appellate court's decision in this case

(while respondent's appeal was pending in the California Supreme Court) and that of the Fifth Circuit, both of which had construed the subject exclusion to require an out-of-pocket expenditure. *Id.* [1]

This Court has not hesitated to grant review in procedurally analogous cases. See Petition for Writ of Certiorari at 16, *U.S. Dep't of Housing v. Rucker*, 535 U.S. 125 (2002) (No. 00-1770) (successfully invoking conflict between the Minnesota Supreme Court's interpretation of HUD's regulation and that of the Ninth Circuit in seeking review). The Court should similarly grant review here.

B. Besides rejecting *Ali*, the majority below also rejected the Fifth Circuit's interpretation of the subject exclusion. App. 18a-20a. In *Anthony v. Poteet Hous. Auth.*, 306 Fed. Appx. 98 (5th Cir. 2009), plaintiff provided caregiving services to her son in her Section

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[1] Despite acknowledging its express disagreement with the Minnesota Supreme Court, the court below nonetheless tried to distinguish the Minnesota decision. Under the Minnesota program, "a family receives a budget for specific services and equipment needed to keep a developmentally disabled member at home," the court observed. App. 20a. The plaintiff in *Ali* "chose to allocate a portion of the budget to herself as a paid parent to provide to her son some of the necessary services." *Ibid.* Without explaining how or why the use of a budget – an accounting tool – has any legal significance in construing the legal meaning of the regulation's text, the court summarily stated that "the Minnesota program—which allowed the mother to 'allocate her budget as she saw fit to keep her son living at home'—is structured differently from the [California] program in a way that makes *Ali* distinguishable." *Id.* at 21a. Because the subject exclusion does not refer to a budget one way or the other, this attempt to distinguish *Ali*, despite expressly disagreeing with it, is analytically flawed.

8 apartment. *Id*. at 99. While employed as a personal care attendant for two companies, plaintiff provided care for her own son and other clients. *Id*. at 100.

After the public housing authority included plaintiff's wages in calculating her subsidized rent, plaintiff sued for a refund of her overpaid rent, claiming the homecare-payment exclusion applied based on the caregiving services she provided her son. *Anthony*, 306 Fed. Appx. at 100. The Fifth Circuit rejected plaintiff's argument that the services she rendered for her son were provided at a "cost." *Id*. at 102. The court reasoned those services "are free" as to plaintiff because she "has no out-of-pocket expenses – 'costs' – that must be reimbursed or 'offset' by the state." *Ibid*.

Rejecting *Anthony*, the majority held below that it does "not agree with the Fifth Circuit's narrow interpretation of the exclusion as limited to out-of-pocket expenses that a state directly reimburses." App. 20a. The majority was "not persuaded by *Anthony*'s reasoning on several grounds." *Id*. at 19a.

Besides confirming its express disagreement, the majority sought to distinguish the Texas program at issue in *Anthony*, noting that "Texas does not provide any amounts *directly* to families to offset costs incurred to keep a disabled family member at home." App. 19a (emphasis added). This is simply irrelevant because the subject exclusion does not make a distinction between direct versus indirect payments to offset such costs.[2]

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[2] The homecare-payment exclusion exempts from income "[a]mounts paid by a State agency to a family with a member who

Attempting to distinguish *Anthony*, the majority also held that Anthony's employer paid "not just to care for her disabled son, but also to care for other clients. Thus, Anthony's compensation as an in-home attendant was arguably indistinguishable from wages a parent earns from outside employment, and therefore properly not excluded." App. 20a (citation omitted). But regardless of how much Anthony received for taking care of other clients, *some* portion of her total income was necessarily attributable to caring for her own son. Thus, whatever that figure was, under the majority's view, at least some portion of Anthony's total income should have been excluded. The Fifth Circuit, however, allowed the housing authority to count Anthony's *entire* income in quantifying her subsidies. Consequently, the majority's decision below conflicts with *Anthony*.

This Court should grant certiorari to resolve the open and acknowledged division of authority created by the majority decision below. Whatever the merits of the parties' respective positions, there is an undeniable need for uniformity in construing HUD's regulation.

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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).

II. The Decision Below Has Adverse Implications on a National Scale for Administering Numerous Other Federal Assistance Programs In Addition to Its Negative Implications for All Section 8 Stakeholders.

A. Review is particularly necessary because the definition of income adopted in Section 5.609 is ubiquitous, defining eligibility for numerous other government programs besides Section 8.

Because Section 5.609 governs income-based eligibility determinations for literally over a *dozen* other federal programs, the proper construction of its omnipresent standard for measuring eligibility for such multifarious programs presents a significant issue. See 24 C.F.R. 236.3 (Section 5.609's annual-income definition governs eligibility requirements for mortgage insurance provided by HUD under section 236 of the National Housing Act, 12 U.S.C. 1701); 24 C.F.R. 200.1303 (Section 5.609's annual income parameters apply to contracts under Rent Supplement Program as specified in section 200.1303); 24 C.F.R. 983.4 (Section 5.609 governs Project Based Voucher program eligibility); 24 C.F.R. 576.401(c) (same for those assisted under Emergency Solutions Grants program); 24 C.F.R. 574.310(d)(1) (Section 5.609 governs tenants' rent contributions in Housing Opportunities for Persons with Aids program); 24 C.F.R. 578.77(b)(4) (Section 5.609 governs calculation of occupancy charges for participants in Continuum of Care program); 24 C.F.R. 582.310(b)(1) (Section 5.609 governs calculation

of income for participants in Shelter Plus Care program); 24 C.F.R. 891.105 (adopting definition of annual income under Section 5.609, by referencing its location in Title 24, for purposes of Supportive Housing for the Elderly Program, known as Section 202 housing). Because Section 5.609 represents a master key for applicants' entry into these various HUD programs, the proper interpretation of this regulation requires this Court's review as the final authority.

While the preceding eight regulations require the mandatory application of Section 5.609's definition of income, other regulations use Section 5.609's definition as one of two or more alternative income definitions in evaluating eligibility for *additional* HUD programs.[3] Besides HUD, other federal agencies use Section 5.609's definition of income to evaluate eligibility for their own programs, further reinforcing the need for review here.[4]

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[3] See 24 C.F.R. 92.203(b)(1) (Section 5.609 applicable in making income eligibility determination under HOME program created by 42 U.S.C. 12701 et seq.); 24 C.F.R. 93.151(b)(1)(i) (income eligibility determinations in connection with Housing Trust Fund-assisted rental housing may be made by using Section 5.609's income definition); 24 C.F.R. 1000.10(b)(1) (Section 5.609's definition of annual income may be used as one of three alternatives in evaluating eligibility for Indian Housing Block Grant created under Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. § 4101, et seq.).

[4] See 38 C.F.R. 62.2 (Section 5.609's definition of annual income governs eligibility determinations for designated veterans under Supportive Services for Veteran Families Program pursuant to 38 U.S.C. 2044 et seq. and 38 C.F.R. 62.35(a)); 7 C.F.R. 3560.153(a) (Section 5.609 governs income calculations for rural multi-family

Finally, in addition to Section 5.609's universal application in the fourteen federal programs listed above, nearly half a dozen States, including the District of Columbia, use the same income definition to determine applicants' eligibility under *their* welfare and other programs.[5] Against this regulatory background, the use of the identical income-eligibility test for over a dozen federal programs renders Section 5.609 a universal test by any standard. While it is impossible to quantify the total number of participants in all of these programs that are subject to this pervasive income test at any given time, it can reasonably be assumed that several million participants in the aggregate are subject to Section

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housing projects administered by Secretary of Agriculture through loans funded under 42 U.S.C. 1485 et seq.); 12 C.F.R. 1807.401(f)(2)(ii) (using Section 5.609's definition of annual income as alternative method for evaluating eligibility for affordable housing built by recipients of Capital Magnet Funds, administered by Treasury Department under 12 U.S.C. 4569).

[5] See CONN. AGENCIES REGS. § 8-30g-8(f) (2020) (eligibility for affordable housing under state law evaluated using Section 5.609's income definition); FLA. ADMIN. CODE ANN. r. 67-50.005(3) (2020) (Section 5.609 governs income calculation under Florida's Homeownership Loan Program enacted to promote affordable housing); MD. CODE REGS. 05.04.09.03(B)(2) (2020) (Section 5.609 governs income calculation under Maryland's group home financing program created to meet special housing needs); 8 COLO. CODE REGS. § 1304-2(IV)(G)(19) (LexisNexis 2016) (Section 5.609 governs income definition in evaluating application of statutory property tax exemption); see also D.C. Mun. Regs, tit. xxix, § 7603.11(h) (2019) (using Section 5.609's income exclusions to evaluate applicants' eligibility for Homelessness Prevention and Rapid Re-Housing Program).

5.609, thereby highlighting the urgent need for review by this Court.

B. Review is also necessary because the express conflict created by the decision below has adverse practical ramifications for housing authorities and Section 8 participants across the entire nation.

1. The California Supreme Court's decision has negative repercussions for both sides: housing authorities and prospective Section 8 participants. While housing authorities in Minnesota and those governed by the Fifth Circuit (i.e., those located in Texas, Louisiana and Mississippi) face no liability exposure in rejecting California's approach for calculating income for Section 8 tenants, this split of authority has major consequences for housing authorities in all other jurisdictions. Those located in the remaining 45 States, faced with conflicting interpretations of the law, can adopt either view but if they reject California's view, they will face liability exposure from existing tenants for having overpaid their monthly rent contributions. The opinion below thus opens the floodgates of litigation by Section 8 tenants seeking reimbursements for their prior rent payments under the basic theory that their housing authorities miscalculated the tenants' portion of the rent by including homecare payments in their income calculations. In addition to exposing housing authorities in 45 other States to such massive liability, the opinion declares open season on the housing authorities located throughout California's 58 counties

that had previously adopted HUD's interpretation. Such public agencies are perfect targets for class actions where *each* tenant can potentially seek tens of thousands of dollars for monthly rental contributions overpaid cumulatively during the past several years.[6]

Besides making housing authorities retroactively liable for prior rent calculations that conformed with HUD's view, the decision stretches housing authorities' limited funds by judicially redistributing a much larger piece of the pie to subsidize current Section 8 tenants' rent, at the expense of those on waiting lists. A national survey revealed that there were "more than 2.8 million families on Housing Choice Voucher (HCV) waiting lists" as of 2012. Nat'l Low Income Housing Coalition, *Millions of Families on Voucher and Public Housing Waiting Lists* (March 7, 2016), https://nlihc.org/resource/millions-families-voucher-and-public-housing-waiting-lists. This national figure confirms the adverse ramifications of the decision below are not limited to the 40-plus million residents in California where the "housing picture has reached a crisis of historic proportions," Cal. Gov't Code § 65589.5(a)(2)(J) (West 2020). In sum, "the need for national uniformity in resolving certain fundamental interpretive questions

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[6] To use respondent as an example, following the decision below, she issued written demands seeking a refund for her rent-overpayments going back to 1998 when she initially joined petitioner's Section 8 program. While her demands are unquantified, respondent is expected to seek on remand several hundred thousand dollars in excess rent paid in the last 22 years. Given the threshold liability issue, petitioner does not take a position here regarding the applicable statute of limitations or the feasibility of classwide remedies in such lawsuits.

regarding the parameters of a federal benefit" is particularly acute here where "a voucher recipient's annual income could vary by over [$41,000] depending on one's interpretation of federal law," *DeCambre v. Brookline Hous. Auth.*, 826 F.3d 1, 14 (1st Cir. 2016), cert denied, 137 S. Ct. 813 (2017).

2. Respondent may try to discount the significance of this case by arguing the decision below focuses on one category of Section 8 tenants: those receiving homecare payments from their respective States to keep a disabled family member at home. However, this subset of Section 8 tenants is surprisingly large, estimated to reach the seven-figure range nationally. Using HUD's figures, the Housing Choice Voucher program "assisted approximately 2.2 million households representing more than 5 million people" in 2017. Office of Policy Dev. & Research, *Evidence Matters,* https://www.huduser.gov/portal/periodicals/em/winter19/highlight1.html. Breaking down this population, 23% of all Housing Choice Voucher participants have a disability "among all persons in [their] households." Office of Policy Dev. & Research, *Picture of Subsidized Households*, https://www.huduser.gov/portal/datasets/assthsg.html#2009-2019_codebook (capitalization omitted).[7] While the precise number of voucher recipients that live with a disabled family member is not known, one can infer, by applying the

[7] This data was obtained by using the interactive tool provided on HUD's website and running the following query: 2019 figures for total U.S. population under the HCV program, while selecting the following variable: "% with disability among all persons in households."

23% figure to the five million figure noted above, that this subset of the Section 8 population comprises 1,150,000 individuals nationwide.

To be sure, this seven-figure number includes those that have medical, as opposed to developmental, disabilities; this figure also includes those hiring a third-party caregiver, as opposed to a family member, to take care of a developmentally-disabled individual. These two sub-categories of Section 8 tenants are not covered by the decision below.[8] But even after excluding these sub-groups from the analysis (by focusing only on those with developmental disabilities and those who rely on family members for care), other statistics highlight the national ramifications of the decision below.

a. "Nearly all states * * * offer services to persons with intellectual and developmental disabilities through a Section 1915(c) HCBS Waiver. This allows such persons to live in a community setting in lieu of institutionalization." *Prunckun v. Del. Dep't of Health & Soc. Serv.*, 201 A.3d 525, 530 (Del. 2019). "The use of waivers has grown markedly over the past two decades. Every state offers at least one waiver, and most operate several, for a total of approximately 300 waiver programs nationally." Naomi Karp & Erica Wood, *Choosing Home for Someone Else: Guardian Residential Decision-Making*, 2012 Utah L. Rev. 1445,

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[8] The subject regulation refers to those with a "*developmental* disability." 24 C.F.R. 5.609(c)(16). In addition, those that hire a third-party caregiver admittedly incur a "cost" that can be "offset" by homecare payments, thereby triggering this income exclusion. *Ibid.*

1455 (2012). Whether implemented by their respective statutes[9] or regulations,[10] the

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[9] See ARIZ. REV. STAT. § 36-2939(B)(2) (LexisNexis 2014); COLO. REV. STAT. § 25.5-6-409(2) (2013); CONN. GEN. STAT. § 17b-605b (2017); FLA. STAT. § 393.0661 (2020); HAW. REV. STAT. ANN. § 333F-21 (LexisNexis 1995); IDAHO CODE §§ 56-255(3)(e)(ii), (iii); 39-5603(1), (2) (1981); 405 ILL. COMP. STAT. ANN. 80/2-4 (2020); KAN. STAT. ANN. § 39-7,100(a)(1) (2020); MICH. COMP. LAWS ANN. § 400.109c(1) (West 2014); MISS. CODE ANN. § 43-13-117.1 (West 2007); NEB. REV. STAT. ANN. § 83-1216 (LexisNexis 2018); N.H. REV. STAT. ANN. § 126-A:5, XIX(i) (LexisNexis 2019) (listing waivers); WIS. STAT. ANN. § 46.278 (2020).

[10] See ALA. ADMIN. CODE, r. 560-X-35-.01 (2020); ALASKA ADMIN. CODE, tit. 7, § 130.200 (2010); 016-20 ARK. CODE R. § 001, Med. Srvs. Manual § B-317 (LexisNexis 2020) (describing Alternative Community Services Waiver Program); 10 COLO. CODE REGS. § 2505-10 8.500 (2020); D.C. Code Mun. Regs. tit. 29 § 1916 (LexisNexis 2020); HAW. CODE R. § 11-88.1-6 (LexisNexis 2015); IDAHO ADMIN. CODE r. 16.03.10, § 700 et seq. (2020); ILL. ADMIN. CODE tit. 59, § 120.20(d) (2020); 455 IND. ADMIN. CODE 2-5-1(a) (2020); IOWA ADMIN. CODE r. 441-83.66 (2011); KAN. ADMIN. REGS. § 30-5-79 (2020); 907 KY. ADMIN. REGS. 1:145 (2020) LA. ADMIN. CODE tit. 50, § 16101 (2015); 10-144 ME. CODE R. § 29 (2019); MD. CODE REGS. 10.09.84.04(A)(1) (2015); 130 MASS. CODE REGS. § 519.007(D) (2019); 23 MISS. ADMIN. CODE Pt. 208, R. 1.2 (West 2012); MO. CODE REGS. tit. 9, § 45-3.080(8) (2017); MONT. ADMIN. R. 37.34.101 (2020); NEV. ADMIN. CODE §§ 435.500, 435.523(1)(c) (2018); N.J. ADMIN. CODE § 10:46-1.1(a), (b) (2020); N.M. CODE R. § 8.314.5.9; R. § 8.290.400.9 (LexisNexis 2018); N.Y. COMP. CODES R. & REGS. tit. 14, § 687.2 (2016); N.D. ADMIN. CODE 75-04-05-24 (2020) (referencing "home- and community-based developmental disabilities traditional waiver services"); OHIO ADMIN. CODE 5123:2-9-01 (2020); OKLA. ADMIN. CODE § 317:30-5-420 (2020); OR. ADMIN. R. 411-317-0000(72)(c) (2020) (noting developmental disabilities services may be provided through a particular HCBS waiver as referenced in subsection 100(a)(A) of this rule); 55 PA. CODE § 6100.1 (2020); 210-50 R.I. CODE R. 1.6(A)(4) (LexisNexis

pervasive nature of such programs across the nation – as reflected in case law in other jurisdictions[11] – reinforces the importance of the issues presented here.

The adoption of such programs on a national scale also explains the magnitude of government spending to assist those with developmental disabilities. With "1.5 million participants in 2012" in the HCBS "waiver population," Medicaid expenditures on long term services and supports for beneficiaries with intellectual and developmental disabilities reached "$41.7 billion in 2014, including $31 billion spent on HCBS." Office of Disability, Aging and Long-Term Care Policy, U.S. Dep't of Health and Human Services, *An Overview of Long-Term Services and Supports and Medicaid: Final Report* 16 (2018). Judging by these additional figures,

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2018); S.D. ADMIN. R. 67:54:04:01(3); R. 67:44:03:02 (2020); TENN. COMP. R. & REGS. 1200-13-01-.02(85) (2020); UTAH ADMIN. CODE r. 539-1-5(1) (2020); 13-007 VT. CODE R. § 4.7(g) (2020); 12 VA. ADMIN. CODE § 30-120-710(A) (2014); WASH. ADMIN. CODE § 388-845-0030 (2020); 048-34 WYO. CODE R. § 4(q) (LexisNexis 1995).

[11] *Ga. Dep't of Behavioral Health & Developmental Disabilities v. United Cerebral Palsy of Ga., Inc.*, 784 S.E.2d 781, 784 (2016); *Prunckun,* 201 A.3d at 530 (discussing Delaware program); *Waskul v. Washtenaw County Community Mental Health*, 900 F.3d 250, 253 (6th Cir. 2018) ("The State of Michigan operates a Medicaid waiver program * * * that provides community-based services to individuals with developmental disabilities"); *In re Ali*, 938 N.W.2d 835, 841 n.1 (Minn. 2020); *Robinson v. N. Carolina Dep't of Health & Human Serv's*, 715 S.E.2d 569, 570 (N.C. 2011); *Doe v. S. Carolina Dept. of Health and Human Serv's.*, 727 S.E.2d 605, 607 (S.C. 2011); *Anthony v. Poteet Hous. Auth.*, 306 Fed. Appx. 98, 99 (5th Cir. 2009) (discussing Texas program "funded through a Medicaid waiver"); *Wysong v. Walker*, 686 S.E.2d 219, 221 (W. Va. 2009).

the issues presented here have major implications for a sizeable segment of society.

b. As for the number of individuals that are cared for by a family member, rather than by a third-party caregiver, the statistics illustrate again the national implications of the decision below. "In 2011, 71% of individuals with [intellectual and developmental disabilities] lived with a *family* caregiver." Williamson & Perkins, *Family Caregivers of Adults with Intellectual and Developmental Disabilities: Outcomes Associated with U.S. Services and Supports*, 52 Intellectual & Developmental Disabilities 147, 147 (2014) (emphasis and brackets added). Assuming the 71% figure has not increased in the past decade, the decision below affects the vast majority of developmentally-disabled individuals because their caregivers are *family members*, thereby triggering the subject income exclusion under respondent's view for computing Section 8 subsidies. In sum, the lower court's decision has significant ramifications for a particularly large subset of the Section 8 population: those with a developmental disability cared for by a family member receiving homecare payments.

III. The Decision Below Is Incorrect.

The ultimate issue presented here is whether, in evaluating income eligibility, the subject regulation requires those applying for, or participating in, the Section 8 program to incur an out-of-pocket cost to trigger the income exclusion at issue here. While respondent successfully argued below that lost opportunity costs incurred to keep a disabled family member at home are sufficient to trigger the exclusion,

this broad view contravenes the text and structure of the regulation. As for the majority's reliance on the rulemaking history of this regulation, its analysis is flawed.

A. The text of the regulation excludes amounts received by a family "*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). In order to "offset" the *cost* of a service or equipment, one must logically incur an out-of-pocket cost in the first place. Cf. *Arlington Central School Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291, 297 (2006) ("costs," as used in Individuals with Disabilities Education Act's fee-shifting provision, does not encompass lost opportunity costs such as "lost wages due to time taken off from work" by disabled individuals' parents). While the majority decision invokes a single dictionary's definition of "cost" to encompass the time or labor expended by respondent to take care of her disabled daughter (App. 11a), dictionary definitions "provide scant guidance," *Peter v. Nantkwest, Inc.*, 140 S. Ct. 365, 372 (2019) (rejecting dictionary definition of "expense" which encompasses "expenditure[s] of money, time, labor, or resources to accomplish a result").

Other federal regulations that use verbatim language—"to offset the cost of services and equipment"—require tangible, quantifiable costs, as evidenced by their context. For example, another regulation uses this particular phrase to define the amount of income used to evaluate a borrower's ability to repay USDA home loans for low income rural

families—a mathematical formula that cannot possibly include emotional costs, lost opportunity costs or other intangible costs. 7 C.F.R. 3550.54(b)(10). Likewise, another regulation excludes from loan applicants' repayment income amounts paid to a family "to offset the cost of services and equipment needed to keep the developmentally disabled family member at home." 7 C.F.R. 3555.152(b)(5)(x). Because evaluation of one's ability to satisfy a loan cannot possibly take into account lost opportunity costs, the use of such verbatim language in Section 5.609 conclusively shows that the lower court's interpretation is atextual.

The dichotomy created by the decision below, requiring two diametrically opposed interpretations of the identical text found in the preceding regulations, does not end there. The decision below also creates a double standard for interpreting several other federal regulations that refer exclusively to tangible economic costs in using the same phrase—"to offset the cost"—found in Section 5.609.[12] Congress has likewise used this particular phrase in various statutes to refer to tangible economic costs, thereby highlighting the gap

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[12] See, e.g., 49 C.F.R. 1510.13(c) (prohibiting airlines from retaining fees "to offset the costs of collecting * * * passenger security service fees"); 40 C.F.R. 35.2140(f) (revenue associated with wastewater treatment project must be "used to offset the costs of operation and maintenance"); 45 C.F.R. 147.145(c)(1) (student administrative health fee is charged "to offset the cost of providing health care"); 7 C.F.R. 3550.62(b) (fees collected are "paid to the contractor at closing to offset the cost of the real estate appraisal").

between the text of Section 5.609 and the lower court's interpretation of this regulation.[13]

B. The decision below also contravenes the structure of Section 5.609. This regulation begins with the broadest possible definition of income by capturing "all amounts, monetary or not," that are received by the family. 24 C.F.R. 5.609(a). While counting as income amounts "not specifically excluded in paragraph (c)" (§ 5.609(a)(3)), the regulation broadly states that "income includes, but is not limited to" wages, salaries, "and other compensation for personal services." 24 C.F.R. 5.609(b)(1). Judging by the structure of this regulation, the compensation received by respondent for providing personal-care services to her daughter necessarily qualifies as income. The only way to avoid this outcome is to establish such compensation is "specifically excluded" under subparagraph (c)(16). As explained cogently by the dissent below, that exclusion does not apply here. App. 43a-68a.

C. The rulemaking history of the subject regulation does not support respondent's view. While the majority opinion cited the interim and final rules adopting this regulation as HUD's "contemporaneous intent" to

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[13] See, e.g., 15 U.S.C. 6307c(d)(3) (FTC may assess a "fee to offset the costs it incurs" to process certain information); 40 U.S.C. 8906(b)(1) (conditioning construction permit on mandatory donation of 10% of estimated cost of construction "to offset the costs" of preserving the subject commemorative work); 42 U.S.C. 15855(b)(1) (federal grant awarded to facility operator "to offset the costs incurred to purchase biomass"); 12 U.S.C. 2294(b) (federal agency guaranteeing certain obligations may make periodic payments "sufficient to offset the costs * * * of purchasing obligations" of associated public agencies).

exclude homecare payments from the definition of income, App. 33a, HUD's "commentary never expressly addresses the issue before us." *Id*. at 52a (Cantil-Sakauye, C.J., dissenting).

1. In adopting eight new income exclusions simultaneously (including the "homecare payment" exclusion at issue here), HUD's interim rule expressed HUD's belief "that the costs of these additional exclusions will be offset by long–term future savings because the exclusions will increase the number of economically self-sufficient families residing in assisted housing." 60 Fed. Reg. 17,388, 17,388 (Apr. 5, 1995). Regarding the subject exclusion in particular, the interim rule made the following observations:

> "States 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. Since families that strive to avoid institutionalization should be encouraged, and not punished, the Department is adding this additional exclusion to income."

60 Fed. Reg. at 17,389.

The majority relied on this language to justify its rejection of HUD's official position as expressed in this case. The majority reasoned this commentary by HUD "did not use 'cost' and 'offset' in terms of a specific monetary expense or amount a Section 8 family incurs, but in a broad sense with respect to describing the overall objective of the exclusion." App. 15a. The

majority's rationale is flawed because it assumes this two-sentence commentary sought to capture every single possible scenario by which a family could keep a disabled family member at home.[14]

2. The majority's reliance on the 1996 rule that finalized the interim rule is equally flawed. App. 14a. In response to a public comment about a separate issue (the perceived ambiguity of the terms "developmentally disabled children" and "adult family members"), HUD's final rule declined "to define these terms, as they are defined by the State program providing the payments." 61 Fed. Reg. 54,492, 54,497 (Oct. 18, 1996). HUD immediately, albeit tersely, explained its refusal to define these two terms as follows: "If the family is receiving such a payment from the State because a family member meets the criteria of the definition, the [housing authority] *should consider the family eligible for the exclusion*." *Ibid*. (emphasis added).

The majority, however, misconstrued the italicized phrase by holding that, based on this language, HUD intended to exclude all homecare payments from the definition of income. App. 14a-16a. But HUD's explanation for refusing to define "developmentally disabled children" and "adult family members" provides no guidance whatsoever on what HUD intended in using two other, unrelated terms that appear in the

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[14] In reality, there are various potential scenarios, such as hiring a third party caregiver (thus triggering an actual monetary cost), using long term care insurance proceeds to keep the disabled individual at home (thereby requiring payment of insurance premiums), or providing care by the family itself (as in respondent's case where no tangible monetary cost exists).

subject exclusion: to "offset" the "cost" of services. While the first two terms refer to the eligibility criteria for participating in the various state programs offering homecare payments, HUD's regulation imposes additional preconditions for excluding homecare payments from income: such payments must "offset the cost of services and equipment" needed to keep disabled individuals at home. To summarize, besides misconstruing HUD's intent, the majority's reliance on the rulemaking history is based on "circular reasoning." *Id*. at 53a (Cantil-Sakauye, C.J., dissenting).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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