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

SUPPLEMENTAL BRIEF FOR PETITIONER

ROBERT COOPER
Counsel of Record
WILSON ELSER MOSKOWITZ
EDELMAN & DICKER, LLP
555 South Flower Street
Suite 2900
Los Angeles, CA 90071-2407
(213) 330-8950
robert.cooper@wilsonelser.com

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

MISCELLANEOUS

INTRODUCTION

The United States has now joined its voice with those of petitioner and its *amici* in recognizing the decision below is wrong and that there is an express conflict on the issue presented. After devoting the vast majority of its brief in endorsing petitioner's position – in addition to eliminating respondent's jurisdictional argument – the government's brief abruptly reverses course, arguing that review should be denied based on proposed changes to the subject regulation. But even if the proposed change were hypothetically adopted tomorrow, despite having languished in the "proposed" form in the past 26 months, it would have literally zero impact on housing authorities' current liability exposure because "any final rule would not be applied retroactively." U.S. Br. 21. Certiorari should be granted for all of the reasons discussed below.

ARGUMENT

I. The Mere Possibility of Future Promulgation of a Proposed Amendment Cannot Preclude Review, Given the Urgent Need for Immediate Review.

A. To support its perplexing recommendation to deny review, the government states that HUD "has initiated a rulemaking to revise the relevant regulations." U.S. Br. 20. But the mere fact that "HUD has received comments on the proposed exclusion and is currently considering what policy would be appropriate in light of those comments" does not change the analysis for several reasons. *Id.* at 21.

First, the government speculates as to *whether,* when and in what form the proposed regulation would be ultimately adopted. The government, for example, argues that "*if* the revision of the exclusion here is finalized as proposed," such action by HUD "will ensure that the erroneous decision below has no prospective effect." U.S. Br. 21. But housing authorities throughout California's 58 counties will continue to remain exposed to massive pre-amendment liability for miscalculating Section 8 tenants' rental contributions under the California Supreme Court's erroneous view. Housing authorities in 45 other States are also exposed. Pet. 25-26.

Second, the government speculates that if "the current exclusion is replaced *in some other manner*" besides what was proposed 26 months ago (U.S. Br. 21), the impact of the lower court's decision will fade away. But judging by HUD's noncommittal position as to the timing of the proposed regulation, the only thing HUD has done is to inform the Solicitor General "that, *as of now*, it plans to promulgate a final rule in 2022." *Id.* By statute, even if HUD carried out its currently-contemplated plan by finalizing a new regulation on January 1, 2022, that regulation will not go into effect until 2023. See *id.* at 2 (citation omitted). That means at least two thousand housing authorities in 45 States would remain stuck in the current legal limbo for another 12 to 14 months, not knowing whether to adopt the Minnesota Supreme Court's view or that of the California Supreme Court, when calculating tenants' rental contributions for each of those 12-14 months. The potential of a purely prospective regulatory change at some undefined time in the future thus does nothing

to alleviate the churning uncertainty and disruption that housing authorities face every day.

Third, a more realistic timeframe is much longer, assuming some version of the proposed rule is ultimately adopted. Reply 9 (quoting this Court's decision where final rule "took the opposite position from the proposed rule"). For a variety of reasons, notice-and-comment rulemaking "often requires many years and tens of thousands of person hours to complete." Richard J. Pierce, *Distinguishing Legislative Rules from Interpretative Rules*, 52 Admin. L. Rev. 547, 550-51 (2000). In the meantime, absent review, the ramifications of the decision below will wreak havoc beyond the public housing industry. The use of the income definition at issue here is mandated by federal law in evaluating income eligibility for at least a dozen other federal programs besides Section 8. Pet. 22-24 nn. 3-5. Because the subject regulation governs a host of complex nationwide benefits programs, *id*., different interpretations should not be tolerated for each jurisdiction.

B. Even if a final rule had been promulgated by now, granting plenary review would still be the proper course. Rejecting the government's recommendation to deny review where the identical federal agency had actually "promulgated a final rule, after notice and comment, that directly addresses" the question presented, this Court granted review in another case, dismissing the contention that no "court of appeals has considered the final rule, and it would be appropriate for this Court to allow courts to implement HUD's recent guidance." U.S. Cert. Amicus Br. at 5-6,

Township of Mount Holly v. Mt. Holly Gardens Citizens in Action, No. 11-1507 (May 17, 2013), cert. granted, 570 U.S. 904, cert. dismissed per stipulation, 571 U.S. 1020 (2013).

Conversely, when faced with the indeterminacy of an embryonic regulatory process contemplated by other agencies, this Court has frequently granted certiorari, despite the government's contrary recommendation. See, e.g., U.S. Br. in Opp. at 14, *Dada v. Mukasey,* No. 06-1181 ("Although the courts of appeals are divided on the question, review is not warranted in this case or at this time *** in light of the judicial decisions and issues that have been raised, the Department of Justice has determined that it will promulgate regulations specifically regarding the tolling question presented by this case."), cert. granted, 551 U.S. 1188 (Sept. 25, 2007); U.S. Br. in Opp. at 5, *Knight v. Comm'r of Internal Revenue,* No. 06-1286 ("That conflict, however, does not require resolution by this Court because it is likely to be resolved by new regulations interpreting Section 67(e)(1)"), cert. granted, 551 U.S. 1144 (June 25, 2007); U.S. Cert. Amicus Br. at 9, *Wisconsin Dep't of Health & Family Servs. v. Blumer,* No. 00-952 ("Nonetheless, we do not believe that review of the issue by this Court is warranted at this time. [HHS] has informed us that, in light of the Wisconsin Court of Appeals' invalidation of the income-first rule on a state-wide basis, it plans promptly to promulgate regulations addressing the question presented here."), cert. granted, 533 U.S. 927 (June 25, 2001); cf. U.S. Cert. Amicus Br. at 9, 20, *Ragsdale v. Wolverine Worldwide, Inc.*, No. 00-6029 (recommending against

certiorari to review invalidation of FMLA regulation), cert. granted, 533 U.S. 928 (June 25, 2001).

To summarize, even if the proposed regulation were hypothetically enacted this week so as to eliminate the "prospective effect" of "the erroneous decision below," U.S. Br. 21, the issue presented would still require review. See *Colony, Inc. v. Comm'r*, 357 U.S. 28, 32 (1958) (certiorari granted even though issue presented was "resolved for the future" by change in tax law enacted four years earlier; issue "remains one of substantial importance in the administration of the income tax laws for earlier taxable years"); *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 subject federal statute had been repealed).

II. Leaving in Place An Admittedly Erroneous Decision by the Most Frequently-Followed State Court Will Have Enormous Financial Consequences.

A. As confirmed by the government (at 18-19), the split of authority reaches across multiple jurisdictions, ranging from Minnesota to the Fifth Circuit's territory—i.e., Texas, Louisiana and Mississippi. "Moreover, the conflict is between [multiple] courts whose jurisdiction includes California, the State with the largest population," *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992). As the government successfully argued in another case, given that "California is the most populous State in the union," "California's outsized importance *** counsels in favor of review" here. U.S. Cert. Amicus Br. at 23, *Americans for*

Prosperity Found. v. Bonta, 141 S. Ct. 2373 (2021) (Nos. 19-251, 19-255). This is particularly true because "the California Supreme Court has been, and continues to be, the most 'followed' state high court in the nation." Jake Dear & Edward Jessen, *'Followed Rates' and Leading State Cases, 1940-2005*, 41 U.C. Davis L. Rev. 683, 693 (2007).

B. Adoption of the government's view also raises major problems of fundamental fairness— particularly on the hundred-plus housing authorities located in California alone. Cal. Ass'n of Hous. Auth. Amicus Br. 1. According to the government's brief, petitioner's inclusion of respondent's IHSS income in calculating the latter's monthly rent contributions was completely lawful. U.S. Br. 14-19. Despite this case-dispositive admission, the government argues that review should be denied even though the decision below is binding on all California housing authorities, *id.* at 22, thus exposing them to ruinous liability. But as the Court observed in *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) in a different context, "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *Id.* at 363. This basic concept also applies on a territorial basis. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003) ("A State cannot punish a defendant for conduct that may have been lawful where it occurred").

Applying the same principle here by analogy, it is inherently unfair and illogical to require literally dozens of California housing authorities to write five- or six-figure refund checks to every single Section 8

tenant impacted by a state court decision that the government *itself* deems "erroneous" on multiple levels. U.S. Br. 16-17. The fact that 21 of 25 total jurists that have examined this issue adopted petitioner's view so far exacerbates this unfairness. Pet. 4-5. And while petitioner is not subject to punitive damages, as in *State Farm*, for assessing an erroneously-high monthly rental contribution on respondent in the past 23 years of the parties' relationship, housing authorities are now subject to massive refund claims. Such claims "would dissipate resources that could have been spent on the needy." *Schweiker v. Gray Panthers*, 453 U.S. 34, 48 (1981) (upholding HHS Secretary's method of calculating income for Medicaid eligibility).

The unfairness does not end there. Adding the attorneys' fees that will be demanded by each tenant for prosecuting such lawsuits, these claims have a disastrous impact because the "majority of public housing agencies are very small, with over 2,200 agencies having 250 units of public housing or less." Council of Large Public Hous. Auth., *Programs*, https://tinyurl.com/c6h3nvnj (last visited Nov. 12, 2021) (confirming there are "approximately 1.1 million public housing units owned and managed by more than 3,000 housing authorities" nationwide). To top it all off, under the government's view, petitioner should be held liable for respondent's attorneys' fees for defending *the correct position* through three levels of the California court system for half a decade. U.S. Br. 13 n.2.

C. The government responds that while it "does not have projections" quantifying the harm faced by California housing authorities, petitioner has not

provided "precise estimates." U.S. Br. 22. The dissent, however, did just that as to respondent's case, identifying a $12,000 annual funding gap based on her claim alone. Pet. App. 59a. The figures calculated by the dissent in quantifying the funding gap created by the majority decision become astronomical when applied nationwide. Limiting the math just to the Section 8 program, and using petitioner's estimated 408,250 figure as the minimum number of individuals impacted by the issue presented here, Reply 12, the annual funding gap could be as high as $4.9 billion nationwide, assuming respondent's annual gap figure is representative of others.[1] Even if we arbitrarily discount the $4.9 billion figure by 75% just to be exceptionally conservative, the funding gap for this program alone would be over $1.2 billion *per year*. If these figures do not justify review, it is hard to imagine what does.

III. By Erroneously Rejecting the Federal Government's Construction of the Subject Regulation, the 4-3 Decision Below Cries Out for Review.

By confirming that the California Supreme Court's decision is flawed on multiple grounds, U.S. Br. 14-18, the government reinforces petitioner's view that the decision below is at war with a well-established construction of a federal regulation given by the administrative agency charged with its enforcement. This, in and of itself, justifies review. See *Morton v. Ruiz*, 415 U.S. 199, 202 (1974) (granting certiorari

[1] $12,000 x 408,250 = $4,899,000,000.

where decision below was "inconsistent with long-established policy of the Secretary [of the Interior] and of the Bureau"); *Patterson v. Lamb*, 329 U.S. 539, 541 (1947) (decision below upset 25 years of War Department rulings and practices). Such cases abound.[2]

The lower court's rejection of HUD's view has other ramifications. Housing authorities receiving HUD funds must certify their "compliance with applicable Federal statutory and regulatory requirements[.]" Form HUD-50077-ST-HCV-HP (12/2014), *Certification of Compliance with PHA Plans and Related Regulations,* p. 2 (noting "criminal and/or civil penalties" for false representations); see Form HUD-50077-CRT-SM (12/2014) (same certification for small housing authorities); cf. 24 C.F.R. 903.15. California housing authorities cannot truthfully declare their compliance with HUD's regulation, as construed by HUD, regarding the subject income exclusion while following a contrary judicial mandate. This Catch-22 further highlights the need for review.

---

[2] See *First Nat'l Maintenance v. NLRB,* 452 U.S. 666 (1981) (certiorari granted not only because the opinion below "appears to be at odds with decisions of other Courts of Appeals," *id.* at 672, but also because of "the importance of the issue and the continuing disagreement between and among the Board and the Courts of Appeals," *id.* at 674); *Household Credit Servs. v. Pfennig*, 541 U.S. 232, 235 (2004) (granting certiorari where decision below rejected Federal Reserve Board's interpretation of TILA); *Anderson Brothers Ford v. Valencia*, 452 U.S. 205, 211-12 (1981) (similar).

IV. Respondent's Jurisdictional Argument Is Meritless.

The government persuasively refutes respondent's jurisdictional challenge based on the first two categories of cases specified in *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 477 (1975). U.S. Br. 10-13.

A. "In the first category are those cases in which there are further proceedings – even entire trials – yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." 420 U.S. at 479. The federal issue presented here is conclusive: if the Court adopts petitioner's interpretation of the subject income exclusion, the case will be finally dismissed. Such disposition means that petitioner properly calculated respondent's rental contributions, eliminating any basis to refund respondent's rent payments. An outright reversal of the state court of last resort would reinstate the judgment of the California intermediate court, which affirmed the dismissal of the complaint without leave to amend. Pet. App. 88a.

This case involves the quintessential example of the first category for another reason: the outcome of the remaining proceedings is preordained. Given the California Supreme Court's rejection of petitioner's view, petitioner would have no defense to its liability for refunding respondent's overpaid rental contributions unless review is granted. This renders the decision "final" under 28 U.S.C. § 1257. See *Mills v. Alabama*, 384 U.S. 214, 216-17 (1966) (state supreme court's reversal of demurrer sustained on

federal constitutional grounds by state trial court was final even though case was remanded for jury trial because appellant had no defense other than his federal claim).

Having eliminated the voucher-termination issue as a potential ground for contesting liability, Reply 3, petitioner is relying solely on its construction of the subject income exclusion to defeat this lawsuit. "If the court below decided that claim correctly, then nothing remains to be done but the mechanical entry of judgment by the trial court" as to liability issues. *Pope v. Atlantic Coastline R.R. Co.,* 345 U.S. 379, 382 (1953). "Thus, as the case comes to us, the federal question is the controlling question; 'there is nothing more to be decided.'" *Ibid.* (state supreme court's decision overruling demurrer predicated on federal law was final where petitioner conceded he had no other defense to raise on remand to defeat respondent's request for injunction).

While the parties dispute the precise amount of the refund owed under the decision below (and the correct limitations period for calculating the refund), those issues relate to the *amount* of damages, not the threshold liability question. A dispute over the amount of damages, however, is irrelevant in evaluating the antecedent liability question. Otherwise, absent immediate review, petitioner would have to launch a new, post-remand appeal in order for the state court "to formally [] repeat its rejection of [petitioner's federal] contentions whereupon the case could then once more wind its weary way back to us as a judgment unquestionably final and appealable." *Mills*, 384 U.S.

at 217. "Such a roundabout process would not only be an inexcusable delay *** but it would also result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets." *Id.* at 217-18. To summarize, because "the Supreme Court of California has passed on the issues which control the litigation *** there is nothing more to be decided" in terms of liability issues on remand, *Richfield Oil Corp. v. State Bd. of Equalization,* 329 U.S. 69, 73-74 (1946). "The jurisdictional objection is thus without merit." *Ibid*.

B. The second category under *Cox Broadcasting* compels the same result. This category involves cases "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." 420 U.S. at 480. "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." Stephen Shapiro et al., *Supreme Court Practice* § 3.7, at 3-30 (11th ed. 2019) (collecting cases).

Further state-court proceedings in this case would decide nothing but the final sum of money that would be awarded to respondent for her overpaid rent. "The critical federal question *** has, however, already been answered by the State Supreme Court and its judgment is therefore ripe for review." *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 370

n.11 (1988). Accordingly, the decision is final for this additional reason.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

ROBERT COOPER
Counsel of Record
WILSON ELSER MOSKOWITZ EDELMAN
& DICKER, LLP
555 South Flower Street
Suite 2900
Los Angeles, CA 90071-2407
(213) 330-8950
robert.cooper@wilsonelser.com

Counsel for Petitioner

November 2021