S249593

Supreme Court Case No. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KERRIE REILLY
Petitioner and Appellant,

v.

MARIN HOUSING AUTHORITY
Respondent.

After a Decision of the Court of Appeal for the First Appellate District,
Division Two, No. A149918

Affirming a Judgment of the Superior Court of Marin County
Case No. CIV 1503896, Honorable Paul M. Haakenson, Judge

PETITION FOR REVIEW

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ISSUE PRESENTED FOR REVIEW

Local housing authorities calculate rent for people living in HUD subsidized housing based on their income. 24 C.F.R. § 5.609(c)(16) prohibits counting as income "[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." California's In-Home Supportive Services program pays family members for services they provide to keep people with developmental disabilities in their homes. Are these payments excluded as income pursuant to Section 5.609(c)(16)?

INTRODUCTION

Housing authorities throughout California provide rental subsidies for over 300,000 families through the federal housing choice voucher program commonly called "Section 8."[1] Housing authorities determine eligibility and calculate rent for Section 8 program participants using income counting rules promulgated by the U.S. Department of Housing and Urban Development ("HUD"). 24 C.F.R. § 982.1(a). Many types of payments are excluded from these income calculations. 24 C.F.R. § 5.609(c). One subsection exempts from income calculations payments by a state agency to offset the costs to families associated with caring for members with a developmental disability. 24 C.F.R. § 5.609(c)(16). This regulation is referred to throughout this petition as the developmental disability income exemption ("DD income exemption").

Petitioner Kerrie Reilly lives in an apartment with rent subsidized by a Section 8 Housing Choice voucher. She lives with her adult daughter, who has a

[1] Center on Budget and Policy Priorities, *California Fact Sheet: Federal Rental Assistance* (March 30, 2017), https://www.cbpp.org/sites/default/files/atoms/files/4-13-11hous-CA.pdf.

severe developmental disability. She provides attendant care 24 hours per day to keep her daughter at home, and receives payments from the California In-Home Supportive Services program that partially offset the cost of this care. *Reilly v. Marin Hous. Auth.*, A149918, Slip Opinion ("slip op.") at 1, 5 (Cal. Ct. App. April 25, 2018).

The purpose of the In-Home Supportive Services program is to provide homecare services to enable people with disabilities like Ms. Reilly's daughter to remain safely in their homes. Cal. Welf. & Inst. Code § 12300(a). The state program pays family members or third parties directly to provide this care. Many California families are able to keep loved ones with developmental disabilities with them at home and out of institutions through attendant care funded by In-Home Supportive Services.[2]

Petitioner brought the underlying writ to compel her housing authority to exempt the payments that she receives from In-Home Supportive Services from her income when calculating her rent under Section 5.609(c)(16). Despite the congruency between the language of the DD income exemption and the purpose of the In-Home Supportive Services program, the Court of Appeal concluded that these payments were not exempt when calculating income for Section 8 rent purposes. Slip op. at 1, 14.

If the published decision below is allowed to stand, it will harm not just Petitioner's family, but thousands of similarly situated families throughout California. As discussed more fully below, tens of thousands of tenants who rely on Section 8 housing vouchers from more than 100 housing authorities will be affected. Tens of thousands of additional HUD and state subsidized housing

[2] Public Policy Institute of California, *California's In-Home Support Program*, (November 2015), http://www.ppic.org/publication/californias-in-home-support-program/.

complexes also use the HUD income counting rules, including the DD income exemption at issue here. Many currently exclude In-Home Supportive Services payments for families caring for members with developmental disabilities, so the Court of Appeal decision will create uncertainty for those entities. Those families whose In-Home Supportive Services payments have already been excluded will face drastic increases in their rent, which could lead to eviction and homelessness. Alternatively, some families, facing significantly more challenges to care for their loved ones at home, may give up their efforts and consign them to a nursing facility or other institution. The enormous impact this decision will have on poor families caring for developmentally disabled family members justifies granting review.

In addition, the Court of Appeal interpreted the DD income exemption so narrowly as to render it meaningless. The only situation in which the Court of Appeal conceded that the regulation was applicable was to exempt In-Home Supportive Services payments to a family member that were used to hire a third party caregiver so the family member could work outside the home. Slip op. at 13. However, such a situation would rarely if ever occur because the In-Home Supportive Services program pays almost all caregivers directly. In addition, the decision ignores the difficulty with finding appropriate third party care and the reality that families are often uniquely equipped to care for their members with severe disabilities.[3] The lower court's conclusion is inconsistent with the language of the regulation and would defeat the purpose of the program, jeopardizing the

[3] *See, e.g.*, 42 U.S.C.A. § 15001(a)(9)-(10) (findings in Developmental Disabilities Act of 1990); *See also* Statewide CDSS In-Home Supportive Services (IHSS) 2012 Consumer Survey, p. 19 (November 2012), http://www.cdss.ca.gov/agedblinddisabled/res/2012IHSSConsumerSurvey(2-1-13).pdf (reporting that difficulty in finding care providers was an important theme to emerge from the statewide survey).

housing stability of the very people with developmental disabilities whom the rule was meant to protect.

The Court of Appeal based its opinion and interpretation of the DD income exemption on the idea that it would be unfair and inequitable for parents caring for children with developmental disabilities to exempt the payments they receive for that care, when parents of children with other disabilities may not. Slip op. at 13-14. The crux of the lower court's analysis is that the plain language of the regulation indicating a clear and articulated benefit specifically for families caring for developmentally disabled members, must be wrong. *Id.* In adopting this position, the Court not only ignores regulatory language but also the history and treatment of people with developmental disabilities and their unique risk for institutionalization. 42 U.S.C. §15001(a)(5).

The DD income exemption provides a unique benefit to a subclass of people who have long lived without it. To that end, it should be assumed that the drafters of the DD income exemption knew what they were saying when they limited the homecare exemption to tenants with developmental disabilities, and meant what they said. This interpretation of the regulation is strengthened by numerous state and federal legislative efforts specifically enacted to serve people with developmental disabilities in their communities. Included in these efforts are the many HUD funded properties throughout California specifically designed to meet the unique needs of people with developmental disabilities.

Finally, income exemptions for homecare payments are not unusual. The Internal Revenue Service ("IRS") excludes In-Home Supportive Services homecare payments for live-in care providers from gross income under Section

131 of the Internal Revenue Code, 24 U.S.C. §131(c).[4] Like the DD income exemption and the In-Home Supportive Services program itself, the IRS income exclusion is meant to encourage utilization of homecare services to enable people with disabilities to live safely at home and avoid institutionalization.

If left to stand, the decision of the Court of Appeal on the interpretation of 24 C.F.R § 5.609(c)(16)— the DD income exemption—will adversely impact thousands of low-income Californians with disabilities and their families who live in subsidized housing and rely on In-Home Supportive Services to remain safely at home.[5] This Court should grant review to settle this important question of law.

FACTUAL AND PROCEDURAL BACKGROUND

As the Court of Appeal explained, Petitioner and Appellant Kerrie Reilly "lives with her severely disabled adult daughter in housing subsidized by the Marin Housing Authority." Slip op. at 1. Ms. Reilly's apartment is subsidized with a Section 8 voucher. In the Section 8 program, low-income participants pay 30% of their adjusted income for rent while the housing authority pays the remainder. 24 C.F.R. § 982.1(a).[6] A tenant's adjusted income is calculated using HUD income counting rules, which include the DD income exemption among others.

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[4] Notice 2014-7, 2014-4 I.R.B. 445 (January 3, 2014), https://www.irs.gov/irb/2014-4_IRB#NOT-2014-7.

[5] U.S. Department of Housing and Urban Development, Office of Policy Development and Research, *A Picture of Disability and Designated Housing*, p. 10, Table 3 (March 6, 2015) (reflecting over 20,000 people with disabilities that cause cognitive disabilities or deficits in independent living in HUD subsidized housing throughout the United States), https://www.huduser.gov/portal/sites/default/files/pdf/mdrt_disability_designated_housing.pdf.

[6] *See also* U.S. Dept. of Housing and Urban Development, *Housing Choice Vouchers Fact Sheet*, https://www.hud.gov/topics/housing_choice_voucher_program_section_8 (last visited June 24, 2018).

Ms. Reilly's daughter has a "severe developmental disability, such that she requires constant supervision." Slip op. at 1. Ms. Reilly's daughter qualifies for attendant care services through California In-Home Supportive Services (*id.*), which approves recipients for Protective Supervision when they require 24-hour care. *Id.* at 5. Despite the round-the-clock need of recipients of Protective Supervision, the lower court acknowledged that In-Home Supportive Services provides reimbursement for a maximum of only 65 hours per week in attendant care, or roughly 9.3 hours per day. *Id*. *See also,* Cal. Welf. & Inst. Code § 12303.4 (maximum number of hours a provider can receive for someone requiring "Protective Supervision" is 283 hours per month). To qualify for Protective Supervision, a recipient must have a primary caregiver, usually a parent or family member such as Ms. Reilly, who will sign a form promising to provide a "continuous 24-hour-a-day coverage plan" that must "be met regardless of paid In-Home Supportive Service (IHSS) hours."[7]

Ms. Reilly has paid a high personal cost to keep her daughter out of an institution: she herself provides the 24-hour care and monitoring required to keep her daughter safely at home. Slip op. at 1. She has sacrificed other interests and pursuits and dedicates her own labor to caring for her adult child rather than place her in an institution. As noted above, the payments that Ms. Reilly receives from In-Home Supportive Services offset only about nine hours per day of her daughter's care, leaving the remaining hours uncompensated.

The Marin Housing Authority did not exempt the payments that Ms. Reilly receives from In-Home Supportive Services to care for her daughter in

[7] *See* California Department of Social Services, Form SOC 825, http://www.cdss.ca.gov/cdssweb/entres/forms/English/soc825.pdf (last visited June 24, 2018). The form also requires the caregiver to acknowledge that a social worker has discussed the "appropriateness of out-of-home care as an alternative to 24-hour-a-day Protective Supervision."

calculating her income. Slip op. at 3. In 2015, Ms. Reilly filed a writ for administrative mandate and complaint for injunctive and declaratory relief requesting in relevant part that the Housing Authority exclude her In-Home Supportive Services payments from the calculation of her Section 8 rent pursuant to the DD income exemption. *Id.*

The Superior Court sustained Marin Housing Authority's demurrer to the petition and the Court of Appeal affirmed. *Id.* Both courts found that, as a matter of law, the DD income exemption does not exempt state payments for In-Home Supportive Services to keep a family member with a developmental disability in the home. *Id.* at 2, 3.

Ms. Reilly did not request a rehearing from the Court of Appeal. *See* Cal. R. Ct. 8.504(b)(3).

REASONS FOR GRANTING REVIEW

I. The decision below will affect thousands of low-income tenants in subsidized housing programs that use the HUD income counting rules.

Throughout California, housing authorities and subsidized housing projects use the HUD income counting rules to calculate rent for hundreds of thousands of tenants. These rules incorporate the DD income exemption at issue here. Unlike Respondent Marin Housing Authority, many subsidized housing providers currently exclude In-Home Supportive Services payments on behalf of family members with developmental disabilities. The Court of Appeal's decision will create chaos and confusion for these tenants and for the housing authorities and subsidized projects that must apply a regulation that is now shadowed by uncertainty.

The broad impact of the lower court's decision cannot be disputed. According to a 2011 report by the Center for Budget Policy and Priorities,

California has more than 303,200 low-income tenants who receive Section 8 housing choice vouchers.[8] These are administered by 104 housing authorities throughout California.[9] HUD estimates that 20,000 people with developmental disabilities live in subsidized housing nationwide.[10] Since California represents 12% of the U.S. population, this HUD estimate means that at least 2,500 individuals with developmental disabilities are in HUD subsidized housing in California.

Regarding California's In-Home Supportive Services program, more than 460,000 low-income people with disabilities qualify for this program.[11] Of these, an estimated 9%, or 42,000 people, have developmental disabilities.[12] For approximately 35% of the total caseload, or 163,000 people, the In-Home Supportive Services provider is a family member who lives in the same house as the recipient.[13] By any measure, a significant number of people in California are affected by the In-Home Supportive Services and its interaction with HUD's rent calculation rules.

Many housing authorities already exclude In-Home Supportive Services

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[8] *See* footnote 1, *supra*, *California Fact Sheet: Federal Rental Assistance*.
[9] U.S. Department of Housing and Urban Development, *Public Housing Authority (PHA) Contact Information*, https://www.hud.gov/program_offices/public_indian_housing/pha/contacts/ca.
[10] *See* U.S. Department of Housing and Urban Development, *A Picture of Disability and Designated Housing*, p. 10, Table 3 (March 6, 2015) https://www.huduser.gov/portal/sites/default/files/pdf/mdrt_disability_designated_housing.pdf.
[11] The average monthly number of recipients is estimated to be 467,000 in the 2015-2016 budget year. Public Policy Institute of California, *California's In-Home Support Program*, footnote 2, *supra.*
[12] California Legislative Analyst Office (LAO), *Considering the State Costs and Benefits: In-Home Supportive Services Program*, page 10 (January 21, 2010) http://www.lao.ca.gov/reports/2010/ssrv/ihss/ihss_012110.pdf.
[13] *Id.*

payments pursuant to the DD income exemption.[14] One such housing authority is Contra Costa Housing Authority in the Bay Area. In calculating adjusted income for a family receiving payments from In-Home Supportive Services, Contra Costa first verifies that the family member is a person with a developmental disability pursuant to the definition of "developmentally disabled" as set forth in the federal Developmental Disabilities Act.[15] Once developmental disability is verified, Contra Costa automatically excludes In-Home Supportive Services payments from the rent calculation.[16] Because Contra Costa is among the ten most populous counties in California,[17] a significant number of tenants are affected by this Housing Authority's interpretation of the DD income exemption.

In addition, many other subsidized housing projects also use the HUD income counting rules, including the DD income exemption in Section 5.609(c)(16). This includes housing complexes funded directly with HUD dollars[18] as well as housing subsidized by the United States Department of Agriculture and Rural Development.[19] Also, the California Tax Credit Allocation

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[14] *Amici* will provide additional information on this point in forthcoming letters of support.

[15] *See*, Contra Costa Housing Authority Verification Form, attached as Exhibit 1 pursuant to Cal. R. Ct. 8.504(e)(1)(C).

[16] *Id.*

[17] County of Contra Costa, *Recommended Budget, Fiscal Year 2018-2019* (April 1, 2018), p. 6, http://www.co.contra-costa.ca.us/DocumentCenter/View/49439/FY-2018-19-Recommended-Budget-for-web?bidId.

[18] 24 C.F.R. § 5.6091(a) (articulating that the HUD income guidelines apply to Section 8 vouchers in addition to Project Based Section 8 and Public Housing).

[19] 7 C.F.R. § 3555.152(b)(5)(x) which adopts the DD income exemption language, excluding from income "[a]mounts paid by a State agency to a family with a developmentally disabled family member living at home to offset the cost of services and equipment needed to keep the developmentally disabled family member at home."

Committee lists well over 4,000 tax credit subsidized complexes in California.[20] The Tax Credit Allocation Committee's compliance section requires that for tax credit subsidized properties, "determination of annual income of individuals and area median gross income adjusted for household size must be made in a manner consistent with HUD Section 8 income definitions and guidelines."[21] The longstanding position of the Committee's compliance division, as expressed in trainings to housing providers, has been to exclude payments from In-Home Supportive Services to households with family members with developmental disabilities when calculating their income.

Review of the appellate court's decision is appropriate and necessary, given the vast number of Californians who will be impacted. This new interpretation of Section 5.609(c)(16) will upend the protections afforded to thousands of tenants with Section 8 vouchers and in other subsidized rental housing. Including homecare payments from In-Home Supportive Services in income calculations will make many previously eligible families ineligible for low-income housing and could double or triple the rent of those currently housed, possibly resulting in the termination of their subsidized housing entirely. Review should be granted.

II. The Court of Appeal's decision nullifies the DD income exemption and will cause exactly the harm that the regulation should prevent.

A. The decision below ignored the plain language of the regulation, making it a nullity.

The DD income exemption—24 C.F.R. § 5.609(c)(16)— excludes:

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[20] California Tax Credit Allocation Committee, *Project Mapping*, List of Projects, https://www.treasurer.ca.gov/ctcac/projects.asp (last visited June 13, 2018).
[21] California Tax Credit Allocation Committee, *Compliance Online Reference Manual*, part 4.3, p. 40 (January 2017), https://www.treasurer.ca.gov/ctcac/compliance/manual/manual.pdf.

"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." By its plain language, the regulation addresses only homecare payments for an individual with a developmental disability.

The Court of Appeal analyzed this language, and after considering both the language itself and the regulatory history, concluded that questions still remained. Slip op. at 12. The Court then "compar[ed] the results of the two proposed constructions." *Id.* The Court chose the interpretation advanced by the Marin Housing Authority in large part "because it achieves a measure of parity between a family with a developmentally disabled family member and a family with a member disabled by severe medical problems. . . .[This will] eliminate a disparity between the families of those with a developmentally disabled family member and families with a member disabled by medical problems." Slip op. at 13-14. The Court continued:

> By contrast, Reilly's construction of the regulation gives people in Reilly's position a benefit that comparable families do not receive. … By virtue of her daughter's disabilities being developmental rather than physical, Reilly's construction would allow her to exclude [In-Home Supportive Services] payments for parental care-giving, which a parent receiving [In-Home Supportive Services] payments for a child disabled by medical problems would not.

Slip op. at 14.

In its concern for "equity" and "parity," the Court of Appeal overrode the language of the regulation itself. The Court ignored that the plain language of the

regulation **does** confer a special advantage on families of individuals with developmental disabilities. In attempting to erase that special advantage, the Court negates the plain language, which indisputably singles out one category of people with disabilities for special treatment and not others. As discussed in greater length in Section III, *infra*., the drafters of Section 5.609(c)(16) had good reasons to accord special treatment for homecare payments to enable people with developmental disabilities to remain at home. In its concern for "equity," the Court of Appeal failed to consider the history of discrimination and needless institutionalization that has plagued people with developmental disabilities.

The Court also failed to consider that families that provide homecare for individuals with developmental disabilities are compensated for only a small portion of the care they actually provide because of the cap on In-Home Supportive Services hours. See page 6, *supra.* The Court was incorrect in its assertion that "[In-Home Supportive Services] payments substitute in the family's budget for the money the parent would have earned outside the home." Slip op. at 13. In fact, the homecare payment only offsets a portion of the hours and lost wages that a parent must forgo in order to care for his or her child at home.

There is another flaw in the Court's analysis. The opinion of the Court of Appeal suggests the DD income exemption would apply only in a situation in which a parent or family member worked outside the home, hired a third party to care for their family member with developmental disabilities, and received In-Home Supportive Services payments to pay that third party caregiver. The Court reasoned that in such a situation, the In-Home Supportive Services payment would be exempt but the family's outside income would be counted. Slip op. at 13. However, such a payment arrangement is extremely unlikely to occur. The California Department of Social Services, which administers In-Home Supportive Services, generally makes payments directly to the caregiver, not to a family

member on behalf of a different caregiver.[22]

The only other scenario in which the DD income exemption could be applied under the Court of Appeal's interpretation is if the family receives a payment from the state as reimbursement for an out-of-pocket medical expense. But this scenario is also highly unlikely. Generally, any state payments for medical expenses or equipment would come directly from Medi-Cal, which is a state medical assistance program for low-income people that pays for the cost of necessary medical services, including medically necessary equipment. Cal. Welf. & Inst. Code § 14132.95; Cal. Code Regs. tit. 22 § 51321.[23] Medi-Cal's practice is to provide reimbursement directly to the medical or equipment provider, not to the family. In addition, HUD has a separate income exclusion that exempts the cost of medical expenses, such as services of medical professionals and necessary equipment. 24 C.F.R. 5.609(c)(4).[24] Nothing remains that would then be

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[22] There is one exception in which providers are not paid directly, but it is inapplicable here. Some severely disabled recipients elect to participate in "Advance Pay," which allows the recipient to receive an advance payment for attendant care services and then pay their In-Home Supportive Services workers directly. Cal. Welf. & Inst. Code §12304. Advance pay does not fall within the situation contemplated by the Court of Appeal because the payment comes directly to the recipient, who must be capable of managing his or her financial and legal affairs. *See* California Department of Social Services, "Advance Pay Handout," http://www.cdss.ca.gov/agedblinddisabled/res/Advance_Pay_Handout.pdf (last visited June 24, 2018).

[23] In rare cases, expenses for medical care and equipment for a person with a developmental disability could be covered through regional centers under the Lanterman Act. As with Medi-Cal, the reimbursement is generally provided directly to the provider, not the family.

[24] *See also* I.R.S. publication 502, *Medical and Dental Expenses*, https://www.irs.gov/publications/p502#en_US_2017_publink1000178927 (last updated Dec. 8, 2017) (stating that HUD permits Public Housing Authorities to use IRS Publication 502 as guidance in defining eligible medical expenses). *See* U.S. Dept. of Housing and Urban Development, *Verification Guidance for the*

excludable under the DD income exemption, making it meaningless.

Section 5.609(c)(16) must be interpreted in a way that is consistent with the plain language of the regulation and the way the In-Home Supportive Services program is structured. Under the interpretation adopted by the Court of Appeal, the regulation would exempt homecare payments in only two situations, neither of which is likely to occur. Thus, the Court's interpretation renders the DD Income exemption useless and ineffective, as a practical matter. The decision itself acknowledged the well-settled principle that a court should give meaning to every section of a statute or regulation. Slip op. at 8, citing *Dyna-Med, Inc. v. Fair Employment & Housing Com.,* 43 Cal.3d 1379, 1386-87 (1987). That the Court below rendered the entire regulation meaningless is reason enough to grant review.

B. The interpretation of the regulation advanced by the Court below frustrates its purpose, which is to enable people with developmental disabilities to remain at home.

Although the Court of Appeal looked to the history and purpose of the DD income exemption, the interpretation it adopted frustrates that purpose. Specifically, the Court did review the rulemaking record from 1995, when HUD published as an interim rule the language that was promulgated as Section 5.609(c)(16). Slip op. at 11, citing 60 Fed. Reg. 17391-17393 (April 5, 1995). In the Federal Register, HUD explains the purpose of the income exemption:

> 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

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Public Housing & Housing Choice Voucher Programs, p. 28 (March 2004), https://www.hud.gov/sites/documents/DOC_9084.PDF).

> than placing the family member in an institution. **Since families that strive to avoid institutionalization should be encouraged, not punished,** the Department is adding this additional exclusion to income.

60 Fed. Reg. 17388-17389, I.A.8. (emphasis added). Although the Court of Appeal described this language as "unhelpful" (slip op. at 12), it clearly points to the remedial purpose of the regulation, which is to support families that wish to keep their loved ones at home.

Similarly, the purpose of In-Home Supportive Services is "to enable [the] aged, blind or disabled poor to avoid institutionalization by remaining in their homes with proper supportive services." *Miller v. Woods,* 148 Cal.App.3d 862, 867 (1983); *see also* Cal. Welf. & Inst. Code § 12300(a). The congruency between the purpose of the two programs indicates that payments from the In-Home Supportive Services program are precisely the types of homecare payments that the drafters of Section 5.609(c)(16) meant to exempt from HUD income calculations. There is no other way to read the regulation that would yield a sensible result.

Section 5.609(c)(16) should "encourage, not punish" families that attempt to keep their loved ones with developmental disabilities at home. Homecare payments from In-Home Supportive Services only offset a small part of the actual cost to the family of providing 24-hour care to keep a severely disabled family member out of an institution. Counting these payments as income would thwart the purpose of both the DD income exemption and the In-Home Supportive Services program itself.

C. The IRS excludes from taxable income the In-Home Supportive Services payments needed to keep a family member at home.

Under Section 131 of the Internal Revenue Code, payments for homecare services for a recipient living in the caregiver's home are exempt from income for federal income tax purposes. 26 U.S.C. § 131(c) ("Difficulty of care payments"). The statute itself refers to payments for "qualified foster individuals."[25] In 2014, the Internal Revenue Service issued a ruling that extended "qualified foster individuals" to include recipients of services such as personal care and attendant services.[26] The 2014 Notice states, "home care programs prevent the institutionalization of individuals with physical, mental, or emotional handicaps."[27] The Notice also articulates that home care payments are excludable from gross income because they have the objective of "enabling individuals who otherwise would be institutionalized to live in a family home setting rather than an institution, and … [they] compensate for the additional care required."[28]

California's In-Home Supportive Services program is a homecare services program for attendant care under 42 C.F.R. § 440.180. On March 1, 2016, the

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[25] Section 131(c)(1) of the Internal Revenue Code provides that "Difficulty of care payments" means payments to individuals which are not described in subsection (b)(1)(B)(i), and which (A) are compensation for providing the additional care of a qualified foster individual which is (i) required by reason of a physical, mental, or emotional handicap of such individual with respect to which the State has determined that there is a need for additional compensation, and (ii) provided in the home of the foster care provider, and (B) are designated by the payor as compensation described in subparagraph (A).

[26] Internal Revenue Service Notice 2014-7, 2014-4 I.R.B. 445 (January 3, 2014), (quoting 42 C.F.R. § 440.180), https://www.irs.gov/irb/2014-4_IRB#NOT-2014-7.

[27] *Id*.

[28] *Id.*

California Department of Social Services, which administers In-Home Supportive Services, received a ruling from the IRS that wages received by In-Home Supportive Services providers who live in the same home with the recipient of those services are also excluded from gross income for purposes of Federal income taxes as "Difficulty of Care" payments under Section 131(c).[29]

It is no accident that the purpose of the 2014 IRS notice corresponds with HUD's purpose in adopting Section 5.609(c)(16). The exclusion of homecare payments in income calculations for both programs supports efforts to keep people with disabilities in their own homes and minimizes the risk of unnecessary institutionalization.

III. The preferential treatment of people with developmental disabilities in Section 5.609(c)(16) is justified by the historical discrimination and needless institutionalization they have experienced.

A. California and federal legislation endeavor to integrate people with developmental disabilities into communities through family living arrangements whenever possible.

As discussed above, in a misguided pursuit of "equity," the Court of Appeal attempted to rewrite Section 5.609(c)(16) to eliminate any special treatment for people caring for loved ones with developmental disabilities, as compared to families of those with other disabilities. The plain language of the regulation belies that position. In addition, the history and unique risk of institutionalization for people with developmental disabilities demonstrate that the drafters intended this regulation to benefit only people with developmental disabilities, while offering other programs to people with different disabilities.

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[29] *See*, California Department of Social Services, *Live-In Provider Self-Certification Information*, http://www.cdss.ca.gov/inforesources/IHSS/Live-in-provider-self-certification (last visited June 24, 2018).

The approach in Section 5.609(c)(16) was intentional and consistent with other federal and state policies that differentiate the needs of people with developmental disabilities from individuals with other disabilities.

Turning first to history, developmental disabilities are life-long mental or physical impairments that arise in childhood.[30] People with developmental disabilities have particular difficulty in intellectual functioning and adaptive functioning, such as communication, social participation and independent living.[31] Until the mid-twentieth century, the only care and treatment "services" available for people with developmental disabilities were in institutions.[32] While at these institutions, people with developmental disabilities were often subjected to abuse and neglect and even inhumane medical experiments and forced sterilization.[33] In the 1950s, families of children with intellectual disabilities (then called mental retardation) began to organize and advocate for the creation of their own system that focused on providing help to keep their loved ones at home with community

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[30] Diagnostic and Statistical Manual of Mental Disorders, DSM-V, 5th Edition, (American Psychiatric Association, 2013), p 33. Note: the DSM-V now uses the term "Intellectual Disabilities" instead of the previously used "intellectual developmental disorders," though acknowledges they are equivalent.

[31] *Id*.

[32] Gretchen Engquist, Cyndy Johnson & William Courtland Johnson, *Trends and Challenges in Publicly-Finances Care for Individuals with Intellectual and Developmental Disabilities*, Center for Health Care Strategies, Inc., (September 2012), p. 4.

[33] 60 Minutes: *A Dark Chapter in Medical History* (CBS television broadcast, Feb. 9, 2005); See also LA Times Editorial Board, "Let's Compensate Victims of California's Forced Sterilization Program- quickly, before they die" (May 18, 2018), http://www.latimes.com/opinion/editorials/la-ed-senate-bill-eugenics-compensation-20180518-story.html; *Buck v. Bell*, 274 U.S. 200, 208 (1927) (Supreme Court upheld statute that permitted forced sterilization without due process of the plaintiff and her mother for being "feebleminded."). *Buck v. Bell* led to the sterilization of 65,000 Americans with mental health or developmental disabilities from the 1920s to the 1970s.

support and alternatives to large institutions.[34]

In the 1960s, the California legislature created a state-wide legislative scheme that focused on community-based services to individuals at risk of being placed in institutions.[35] This system was codified in the Lanterman Developmental Disability Services Act ("The Lanterman Act"). Cal. Welf. & Inst. Code §§ 4500 et seq. "The Lanterman Act was created to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community [], and to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community []."*Ass'n for Retarded Citizens v. Dep't of Developmental Servs*., 38 Cal. 3d 384, 388 (1985); Cal. Welf. & Inst. Code, §§ 4500–4846. The Lanterman Act creates special rights for Californians with developmental disabilities—rights that no other group enjoys.

Despite the wide array of services the Lanterman Act funds, it does not subsidize rent or pay for independent housing. This is where programs such as Section 8 vouchers are critical parts of the continuum of services that enable families of people with developmental disabilities to support them at home rather than in institutions.

In 1975, Congress enacted the first of several statutes that also created special programs for people with developmental disabilities.[36] The most recent

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[34] Catherine Thornberry & Karin Olson, *The Abuse of Individuals with Developmental Disabilities*, Developmental Disabilities Bulletin (2005), Vol. 33, No. 1 & 2, p 3, https://files.eric.ed.gov/fulltext/EJ844468.pdf (last visited June 24, 2018).

[35] Frank D. Lanterman Regional Center, *The Ever-Widening Circle of Inclusion*: *Regional Centers, a historical perspective*, https://www.dds.ca.gov/LantermanAct50thAnniversary/docs/EverWideningCircleOfInclusion.pdf (last visited June 24, 2018).

[36] Administration for Community Living, *History of the DD Act*, https://www.acl.gov/node/105 (last modified December 1, 2017).

version, the Developmental Disabilities Assistance and Bill of Rights Act of 2000, ensures that individuals with developmental disabilities have access to community services and support to achieve "self-determination, independence … integration and inclusion in all facets of community life." 42 U.S.C. §15001. It includes a finding that "individuals with developmental disabilities are at greater risk than the general population of abuse, neglect, financial and sexual exploitation, and the violation of their legal and human rights." 42 U.S.C. §15001(a)(5).

B. HUD funds other housing programs that similarly target the needs of specific disability groups.

The Court of Appeal was troubled that Section 5.609(c)(16) specifically benefited people with one type of disability, and tried to interpret the regulation to avoid this special benefit. This concern was misplaced, because the DD income exemption is just one of many aspects of HUD's housing programs that target specific disabilities, such as mental illness, or specific categories of tenants, such as seniors.

For example, HUD created its Section 811 housing program to serve only people with disabilities. 24 C.F.R. § 891.100(a). HUD provides Section 811 funding to housing complexes with supportive services for low and very low-income tenants with three major categories of disabilities: Physical Disabilities, Developmental Disabilities, and Chronic Mental Illness. 24 C.F.R. § 891.305.[37] HUD funds rental properties created solely for people with developmental

[37] *Section 811 Supportive Housing for Persons with Developmental Disabilities*, U.S. Dept. of Housing and Urban Development, https://www.hud.gov/program_offices/housing/mfh/progdesc/disab811 (last visited June 24, 2018).

disabilities under its Section 811 housing program.[38] The purpose of Section 811 is to "allow persons with disabilities to live as independently as possible in the community by subsidizing rental housing opportunities which provide access to appropriate supportive services."[39] Regarding the Section 811 housing program's predecessor, HUD explained that of the three categories of people with disabilities who qualified for housing assistance, "each group has distinct needs. Accordingly, [these] developments are custom tailored to the specific client population or populations the sponsor was approved by HUD to serve."[40] HUD concluded that these distinctions do not violate federal antidiscrimination laws.[41]

IV. The question of law presented in this case is an important issue of public policy because it addresses California's affordable housing crisis for a large population—low-income people with developmental disabilities.

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[38] *See e.g.* 42 properties in Los Angeles county subsidized by HUD for people with developmental disabilities, http://www.homeopeningdoors.org/ourmission/ (last visited June 24, 2018); eleven HUD-subsidized rental units in Southern California for people with developmental disabilities, https://www.ucpla.org/programsservices/affordable-housing-for-adults-with-developmental-disabilities/ (last visited June 24, 2018); 15-unit HUD-subsidized development in San Jose for adults with developmental disabilities, https://www.edenhousing.org/property/edenvale-special-needs (last visited June 24, 2018); out of 66 subsidized affordable rental units in San Francisco, 14 funded specifically by HUD for people with developmental disabilities, https://www.mercyhousing.org/CA-billsorro (last visited June 24, 2018); 15 HUD-subsidized rental units in San Francisco for people with developmental disabilities: https://www.mercyhousing.org/california/arc-mercy-community (last visited June 24, 2018).

[39] *Id.*

[40] Nondiscrimination Based on Handicap in Federally Assisted Programs and Activities of the Department of Housing and Urban Development, 53 Fed. Reg. 20216, 20220 (June 2, 1988).

[41] *Id.*

California is in the midst of an affordable housing crisis.[42] Poor people in California have no alternative but to rely on subsidized housing programs, such as Section 8, to access safe, decent and affordable housing. For people with disabilities, the situation is even worse.[43] People with developmental disabilities who receive In-Home Supportive Services have been determined to need home care to reside safely in the community. Surviving the housing crisis for people with developmental disabilities then, means not being penalized for utilizing those important services that keep them safely at home—regardless of whether the care provider is a third party provider or a family member. The history and unique circumstances of low-income families caring for developmentally disabled family members supports the need for the DD income exemption.

Given the dark and troubling history of the treatment of people with developmental disabilities in this country, and the laws created to encourage societal integration, the promulgation of the HUD regulation at issue makes sense. In the passage of the Federal Developmental Disabilities Act, Congress found that nationally, 88% of individuals with developmental disabilities live with their families and that family members can enhance the lives of individuals with developmental disabilities when "provided with the necessary community services, individualized supports, and other forms of assistance." 42 U.S.A. § 15001(a)(9)-(10). The DD income exemption supports those efforts.

V. If review is granted, this Court should issue an order that the Court of Appeal's decision is not citable to avoid the inevitable confusion that

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[42] Mac Taylor, *California's High Housing Costs: Causes and Consequences*, Legislative Analyst's Office (March 17, 2015), http://www.lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.pdf.

[43] Gina Schaak, et al., *Priced Out: The Housing Crisis for People with Disabilities*, Technical Assistance Collaborative, Inc., (December 2017), http://www.tacinc.org/media/59493/priced-out-in-2016.pdf.

will result otherwise.

California Rule of Court 8.1115(e)(3) permits the California Supreme Court, at any time after granting review, to order that all or part of a published opinion is not citable. Without such an order, the published decision may still be cited for persuasive value while review is pending. Cal. R. Ct. 8.1115(e)(1). In this case, allowing the Court of Appeal decision to remain citable as persuasive authority will lead to confusion and detrimental results for applicants and families in subsidized housing who currently benefit from the DD income exemption.

CONCLUSION

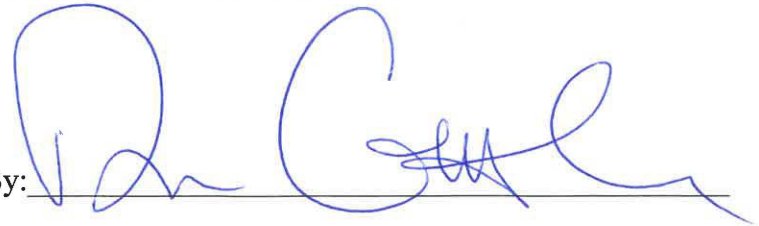
For people with developmental disabilities, the housing crisis in California threatens their independence and ability to remain in the community, cared for by family. If the decision of the Court of Appeal is not reversed, thousands of family care providers in California will face increased rents, housing instability and homelessness, while threatening their developmentally disabled loved ones with the risk of institutional placement.

This Court should grant review.

Respectfully submitted,

Dated: June 25, 2018

DISABILITY RIGHTS CALIFORNIA

By: 

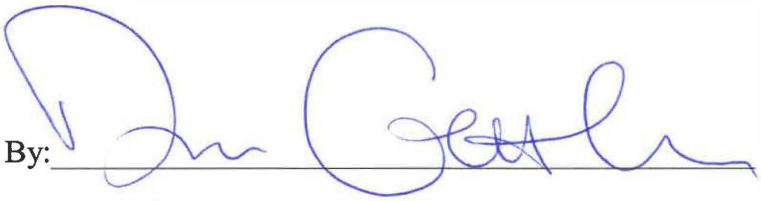
DEBORAH GETTLEMAN

CERTIFICATE OF WORD COUNT

As required by Rule 8.504, subdivision (d)(1), of the California Rules of Court, I certify that this Petition for Review contains 6088 words, including footnotes, according to the computer program used to generate the document.

Dated: June 25, 2018

DISABILITY RIGHTS CALIFORNIA

By: 

DEBORAH GETTLEMAN

Exhibit 1

HOUSING AUTHORITY
OF THE
COUNTY OF CONTRA COSTA

PART I – VERIFICATION OF DEVELOPMENTAL DISABILITY RELEASE

Head of Household Name _____ **Date of Birth:** _____

Address: _____ **Phone Number:** _____

Instructions: This form may be used by clients to verify developmental disability for a family member to exclude IHSS wages under 24 C.F.R. 5.609

The following household member, _____has a developmental disability as defined below:

(1) A severe, chronic disability of an individual that –
- (i) Is attributable to a mental or physical impairment or combination of mental and physical impairments;
- (ii) is manifested before the individual attains age 22:
- (iii) is likely to continue indefinitely;
- (iv) Results in substantial functional limitations in three or more of the following areas of major life activity:
  - (A) Self-care:
  - (B) Receptive and expressive language;
  - (C) Learning;
  - (D) Mobility;
  - (E) Self-direction;
  - (F): Capacity for independent living;
  - (G) Economic self-sufficiency; and
- (v) Reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic services, individualized supports, or other forms of assistance that are of lifelong or extended duration and are individually planned and coordinated.

(2) An individual from birth to age 9, inclusive, who has a substantial developmental delay or specific congenital or acquired condition, may be considered to have a developmental disability without meeting three or more of the criteria described in paragraphs (1) (i) through (v) of the definition of "developmental disability" in this section if the individual, without services and supports, has a high probability of meeting those criteria later in life. [24 CRF 583.5]

List the name of the individual who can verify the developmental disability. This should be the individual providing professional services that relate to the disability.

Name: _____ **Position**: _____

Address: _____

Fax Number: _____ **Phone Number:** _____

Authorization to Release Information: I authorize the care provider listed above to disclose relevant information to the Housing Authority of the County of Contra Costa regarding the need for a reasonable accommodation. I understand the information the Housing Authority obtains will be kept confidential and used solely to determine if an accommodation should be provided. I hereby authorize my health care provider (name above to release the requested information on the reverse of this form.

Signature: _____ **Date:** _____

Exhibit 2

Filed 4/25/18; Certified for publication 5/15/18 (order attached)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

KERRIE REILLY, Plaintiff and Appellant, v. MARIN HOUSING AUTHORITY, Defendant and Respondent.	A149918 (Marin County Super. Ct. No. CIV 1503896)

Kerrie Reilly lives with her severely disabled adult daughter in housing subsidized by the Marin Housing Authority (MHA). The family participates in the Housing Choice Voucher program, commonly known as Section 8, which MHA administers according to the rules and regulations of the United States Department of Housing and Urban Development (HUD). As a Section 8 participant, Kerrie Reilly receives a monthly rent subsidy, or "housing assistance payment," the size of which varies depending on her income.

The Reillys also participate in a state social services program designed to help incapacitated persons avoid institutionalization. The In-Home Supportive Services (IHSS) program compensates those who provide care for aged, blind, or disabled individuals incapable of caring for themselves. (*Norasingh v. Lightbourne* (2014) 229 Cal.App.4th 740, 744 (*Norasingh*).) Reilly's daughter suffers from a severe developmental disability, such that she requires constant supervision, and IHSS pays Reilly for providing her daughter with care-giving services. The question this case presents is whether the money Reilly receives from IHSS is "income" within the meaning

of HUD regulations, such that MHA should include it in calculating the size of Reilly's housing assistance payment. We hold that it is, and affirm the trial court in sustaining MHA's demurrer on this basis.

FACTUAL AND PROCEDURAL BACKGROUND

According to the verified petition that is the operative pleading in this case, Reilly and two daughters moved into a three-bedroom apartment in Novato in 1998 and began receiving Section 8 housing assistance payments. In 2004 one daughter moved out, but Reilly failed to inform MHA of her departure. Five years later, when Reilly told MHA that this daughter no longer lived with her, MHA informed Reilly that her failure to report the departure earlier was a violation of program rules and that she could stay in the apartment only if she paid damages to MHA in the amount of $16,011. Reilly and MHA memorialized a settlement that called for Reilly to make monthly payments, initially of $486, toward that sum. Because Reilly was unable to afford these payments, the parties revised the plan several times, eventually reducing Reilly's obligation to $150 per month. Still, Reilly missed multiple payments.

By letter dated April 7, 2015, Reilly requested that MHA recalculate her rent and exclude her income from IHSS. MHA did not respond to that request, but soon thereafter served Reilly with notice of a proposed termination of her Section 8 voucher. A hearing officer determined that this first proposed termination was defective, but on July 31, 2015, MHA issued a second termination notice, this time alleging that Reilly failed to make multiple payments under the repayment plan. At an informal hearing on August 25, 2015, Reilly argued that MHA had improperly included her IHSS payments as income and that, excluding these payments, there was no lawful basis for MHA to have demanded $16,000 from her.

On September 8, 2015, the hearing officer issued a short, written decision upholding MHA's decision to terminate Reilly's housing voucher. The hearing officer made the following factual findings: Reilly failed to promptly notify MHA when one daughter moved out of the subsidized apartment, then entered into a repayment agreement in 2009; Reilly breached that agreement in 2010, and at a hearing following

the breach was warned that any future failure to make payments would result in the termination of her housing assistance; Reilly breached the agreement again in 2012, and in 2014 and 2015 when she missed payments for 16 months. The hearing officer concluded that Reilly's failure to pay the amounts required under the agreement was grounds for terminating assistance under a HUD regulation (see 24 C.F.R. § 982.552(c)), and under an MHA policy requiring termination after three missed payments in a 12-month period. The hearing officer did not address the issue of whether IHSS payments were properly counted as income, observing only that Reilly did not dispute her non-payment of the debt but instead presented a case "based on factors not related to the actual cause of termination."

On October 26, 2015, Reilly filed in the Marin Superior Court a verified petition for writ of mandate and, on July 20, 2016, an amended verified petition (hereafter petition). The petition alleges two related causes of action, both premised on the theory that counting IHSS payments as income violates the governing HUD regulation, 24 Code of Federal Regulations part 5.609(c)(16) (hereafter section 5.609(c)(16)). Reilly's first cause of action seeks an administrative writ, specifically an order requiring MHA to terminate Reilly's repayment plan and reinstate her Section 8 voucher. (See Code Civ. Proc., § 1094.5.) The second cause of action seeks a writ of mandate directing MHA to terminate the repayment plan and exclude Reilly's IHSS payments in calculating income going forward. (See Code Civ. Proc., § 1085.) Both causes of action include a request for attorney's fees and costs, asserting the action will benefit the public. (See Code Civ. Proc., § 1021.5.)

MHA demurred to the petition, and the trial court sustained the demurrer after a hearing on November 4, 2016. The trial court concluded that Reilly's interpretation of section 5.609(c)(16) was "wrong as a matter of law." The HUD regulation broadly defines income, subject to exceptions including an exception for payments from a state agency "to offset the cost of services and equipment needed to keep [a] developmentally disabled family member at home." (§ 5.609(c)(16).) The trial court concluded that this exception did not apply, reasoning that Reilly " 'has not incurred out-of-pocket expenses

that are being 'offset' by the IHSS payment.' " Instead, "[s]he is being paid for her services." Thus, Reilly's IHSS payments count as income. In reaching this conclusion, the trial court relied on a federal case involving the earnings of a Texas mother whose son was the beneficiary of a somewhat similar state program. (See *Anthony v. Poteet Housing Authority* (5th Cir. 2009) 306 Fed. Appx. 98 (*Anthony*).)

Given the trial court's reading of the HUD regulation, the court concluded that no amendment to Reilly's petition would cure the defect the court had identified, so it sustained the demurrer without leave to amend and dismissed Reilly's petition with prejudice. This appeal timely followed. While the case is pending this court ordered, as did the trial court before us, a stay in the enforcement of the administrative order terminating Reilly's Section 8 benefits.

DISCUSSION

We review de novo the trial court's order sustaining MHA's demurrer. (*Williams v. Housing Authority of Los Angeles* (2004) 121 Cal.App.4th 708, 718; *Coopers & Lybrand v. Superior Court* (1989) 212 Cal.App.3d 524, 529.) "[G]iving the pleading the benefit of all facts properly alleged" or judicially noticed, "and all reasonable inferences drawn therefrom," we must determine "whether the pleading has stated a cause of action." (*Busse v. United PanAm Financial Corp.* (2014) 222 Cal.App.4th 1028, 1035; see also *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Even where a pleading fails to state a cause of action, for the trial court to sustain a demurrer without leave to amend is an abuse of discretion if a plaintiff shows "there is a reasonable possibility that the defect can be cured by amendment." (*Ibid*.)

The IHSS Program

IHSS is a "state and federally funded program developed to permit persons with disabilities to live safely in their own homes." (*Calderon v. Anderson* (1996) 45 Cal.App.4th 607, 610.) Counties administer the program, pursuant to the requirements of Welfare and Institutions Code section 12300 et seq. and regulations

promulgated by the California Department of Social Services. (*Basden v. Wagner* (2010) 181 Cal.App.4th 929, 933–934 (*Basden*).) The program pays for severely impaired Californians to receive up to 65 hours per week in supportive services, including domestic services, personal care services, protective supervision, and other specifically enumerated categories of service. (*Id*. at p. 934; Welf. & Inst. Code, § 12300, subd. (b).) "Protective supervision" is monitoring of the behavior of a mentally impaired or mentally ill recipient to safeguard him or her from injury or accident. (*Norasingh*, *supra*, 229 Cal.App.4th at p. 745.) It is " 'nonmedical oversight, akin to baby-sitting.' " (*Ibid*.)

Those who provide services to IHSS beneficiaries "work pursuant to various arrangements. Some are civil service employees of a county; some are employees of an entity that contracts with the county; some contract directly with the county or authorized entity; some are referred to the recipient by the authorized entity; and some contract directly with the recipient. ([Welf. & Inst. Code] §§ 12301.6, 12302, 12302.1, 12302.25.)" (*Basden*, *supra*, 181 Cal.App.4th at p. 940.) Sometimes, as in this case, a recipient's parent receives compensation for providing care through the IHSS program, although the law limits both the circumstances in which a parent can receive such compensation and the categories of service for which the parent can receive compensation. (*Id*. at pp. 934–935; Welf. & Inst. Code, § 12300, subd. (e).)[1]

[1] Welfare and Institutions Code section 12300, subdivision (e), provides: "Where supportive services are provided by a person having the legal duty pursuant to the Family Code to provide for the care of his or her child who is the recipient, the provider of supportive services shall receive remuneration for the services only when the provider leaves full-time employment or is prevented from obtaining full-time employment because no other suitable provider is available and where the inability of the provider to provide supportive services may result in inappropriate placement or inadequate care." Family Code section 3910, subd. (a) places on each parent "responsibility to maintain, to the extent of their ability, a child of whatever age who is incapacitated from earning a living and without sufficient means."

The Language of the HUD Regulation

The applicable HUD regulation defines income broadly, as "all amounts, monetary or not," that a Section 8 program participant receives or anticipates receiving, unless such amounts are specifically excluded. (24 C.F.R. § 5.609(a).) Income includes, for example, "compensation for personal services" and "[p]ayments in lieu of earnings, such as unemployment and disability compensation" (24 C.F.R. § 5.609(b)), except that income does not include any of the 16 categories expressly excluded in paragraph (c) of the regulation. Most importantly for our purposes, income does not include "[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." (§ 5.609(c)(16).)

MHA does not dispute that, to the extent the IHSS program pays for Reilly's daughter to attend a day program for special needs individuals or to receive assistance from a care-giver other than her mother, the value of those benefits must be excluded when calculating the Reilly family's income. According to MHA, such expenditures are precisely the sort of benefits that section 5.609(c)(16) is designed to cover—reimbursement for out-of-pocket expenses the Reillys incur for services necessary to having Reilly's daughter live at home.[2] The dispute in this case is whether, to the extent IHSS pays Reilly, rather than a third party, to care for her daughter, those amounts are excludable under section 5.609(c)(16). Reilly argues they are, on the grounds that the services she provides are necessary for her daughter to live at home, and the IHSS payments offset the costs of those services. MHA argues that one must incur an expense

[2] With no citation to the record, MHA asserts that the Reillys receive IHSS payments to cover costs for attendant care and participation at a YMCA day program, in addition to payments to compensate Reilly for her care-giving services. As these are not facts in the petition or of which the court has taken judicial notice, we ignore this information except to emphasize that nothing in our decision should be understood to include any such expenses in Reilly's income.

before it can be offset with a reimbursement payment, so the services Reilly provides cannot be characterized as offsetting the costs of the services her daughter needs.

We are aware of only one other case that has construed the language of section 5.609(c)(16), and it is the case on which the trial court relied. In *Anthony*, the Fifth Circuit considered the earnings of a tenant in public housing whose son was disabled by multiple sclerosis. (306 Fed. Appx. at p. 99.) The son received in-home care services from a for-profit company, which the State of Texas and the federal government reimbursed through Medicaid. (*Id*. at p. 100.) The for-profit company employed Anthony, the young man's mother, to care for her son (and other clients) and paid her approximately $13,156 annually. (*Ibid*.) Anthony paid federal income taxes on these earnings, but argued that under section 5.609(c)(16) the local housing authority should exclude them from her income when calculating her rent. (*Ibid*.)

In an unpublished decision, the Fifth Circuit disagreed. The court noted at the outset that "all state-funded in-home attendant-care services in Texas are provided by private intermediaries, and Texas does not provide any amounts directly to families . . . ." (*Anthony*, *supra*, 306 Fed. Appx. at p. 101.) Overlooking this obstacle, the court assumed section 5.609(c)(16) would reach such pass-through funds in an appropriate case. (*Ibid*.) Yet the court refused to exclude Anthony's earnings because it concluded "Anthony has incurred no costs which must be offset with state funds." Equating "costs" with "out-of-pocket expenses," the court concluded "[o]ne must incur costs before they can be offset." (*Id*. at pp. 101–102.) Because the court affirmed a judgment in favor of the local housing authority on the basis of what it called the plain language of section 5.609(c)(16), it declined to consider a letter from HUD that the housing authority proffered as the agency's construction of the regulation. (*Id*. at p. 101.)

MHA urges us to follow *Anthony* in construing section 5.609(c)(16). The plain meaning of "[a]mounts paid . . . to *offset the cost* of services . . ." is that a family must have incurred a cost, or expense, for services before that cost can be offset, or

reimbursed, by a state agency's payment, MHA argues. (24 C.F.R. § 5.609(c)(16) (italics added).) To construe the regulation otherwise is to ignore the phrase "to offset the cost of services . . . ," and with it the interpretive maxim that instructs us to construe a statute or regulation in a manner that gives meaning to every word or phrase if possible, says MHA. (See, e.g., *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386–1387.)

Reilly argues that MHA's construction of section 5.609(c)(16) violates another interpretive maxim—that MHA reads into the regulation limitations that are not there, a practice courts should avoid if possible. (See *People v. Bautista* (2008) 163 Cal.App.4th 762, 777.) To "offset" means generally to counterbalance or compensate for something, not only to reimburse for out-of-pocket expenses previously incurred. (See *Steinmeyer v. Warner Cons. Corp.* (1974) 42 Cal.App.3d 515, 518 [citing dictionary].) Reilly argues that if HUD had intended the narrower concept, it would have used language like "reimburse" and "out-of-pocket," as it did in defining other exemptions from income. For example, another paragraph in the same regulation exempts "[a]mounts received by the family that are specifically for, or in reimbursement of, the cost of medical expenses for any family member." (24 C.F.R. § 5.609(c)(4); see also 24 C.F.R. § 5.609(c)(8)(iii) [exempting amounts "specifically for or in reimbursement of out-of-pocket expenses incurred" for certain publicly assisted programs].) Reilly also argues that in section 5.609(c)(16) the phrase "cost of services . . . to keep the developmentally disabled family member at home" should be read broadly to include costs that the State of California would incur in the absence of payments such as those to Reilly, as well as Reilly's " 'opportunity cost,' " meaning the income she could have been earning at another job had she not given up opportunities for outside employment in order to care for her daughter.

We agree with Reilly as to the interpretation of "offset." Section 5.609(c)(16)'s exemption from income appears to reach money paid to a family so that the family can go

out and hire services or purchase equipment necessary for the developmentally disabled family member. Such payments "offset the cost of services and equipment" that would otherwise fall on the family. But they are not reimbursement for out-of-pocket expenses if the family receives payment before, rather than after, incurring the expense. For this reason, Reilly is persuasive that MHA has too narrowly defined "offset," but this is a comparatively small point that does not mean we agree with Reilly's construction of the regulation.

Considering further the meaning of "offset," we uncover the first of two problems with Reilly's construction of the phrase "cost of services . . . ." If a payment is to "offset the cost of services," the payment must go to the same entity that incurs the cost of those services. Otherwise the payment does not counterbalance or compensate for the cost of services. Here, section 5.609(c)(16) addresses amounts paid "to a family . . . to offset the cost of services . . . ." This means that the costs these payments offset must be costs that the family itself incurs. We recognize that in caring for her daughter Reilly performs services that are of great value to the State of California, but we do not think that the meaning of "cost of services . . . to keep the developmentally disabled family member at home" can be stretched to reach cost savings to the state from the provision of these services. To the extent that Reilly construes "cost of services . . ." to include costs to the State of California, we reject her construction.

Reilly raises a closer question with her argument that the "cost of services . . ." includes the opportunity cost to Reilly of providing those services. IHSS payments to Reilly do counterbalance or compensate for her loss of income in staying home to care for her daughter. And under one definition of the word "cost," this loss of income is a cost to Reilly. "Cost" can mean a "loss or penalty incurred esp[ecially] in gaining something." (Merriam-Webster's Collegiate Dict. (10th ed. 2001) p. 262.) One speaks, for example, of the human cost of a military campaign. Here, the loss that Reilly suffers in order to care for her daughter is the lost opportunity to earn income outside the home.

Reilly plausibly argues that the IHSS payments offset this cost to Reilly of foregoing a job by compensating her for providing in-home care.

There is, however, another more common and concrete meaning of the word "cost," namely "the amount or equivalent paid or charged for something; price." (Merriam-Webster's Collegiate Dict., *supra,* at p. 262.) If "cost" means "price," then the cost of services that Reilly provides her daughter is, to Reilly, zero. And because Reilly's services are free to the family, the family incurs no "cost of services or equipment . . ." that the IHSS payments could be said to offset.

In choosing between these two plausible constructions of section 5.609(c)(16), we look more broadly to the language of the regulation of which paragraph (c)(16) is a part. Reilly reminds us, words " 'that relate to the same subject matter " 'must be harmonized to the extent possible.' " ' " (*People v. Gonzales* (2008) 43 Cal.4th 1118, 1127.) The word "cost" appears two other places in section 5.609, one of which is the regulation's exemption from income for medical expenses. That exemption covers "[a]mounts received by the family that are specifically for, or in reimbursement of, the cost of medical expenses for any family member." (24. C.F.R. § 5.609(c)(4) (§ 5.609(c)(4)).) In this context, the word "cost" has to be understood in its most common and concrete sense, as referring to an amount charged or paid. We reach that conclusion because "medical expenses" are specific amounts paid for medical products or services. And the phrase "specifically for, or in reimbursement of" likewise suggests that a family anticipates incurring, or has already incurred, a medical expense. Similarly in the other place that section 5.609 uses "cost," the word means an amount of money paid, as in "the actual cost of shelter and utilities" for a welfare recipient. (24 C.F.R. § 5.609(b)(6)(B)(ii) (§ 5.609(b)(6)(B)(ii)).) Because "cost" has this concrete and specific meaning in section 5.609(c)(4) and section 5.609(b)(6)(B)(ii), we presume it has the same meaning in section 5.609(c)(16). Generally " 'words or phrases given a particular meaning in one part of a statute must be given the same meaning in other parts of the statute' " (*People v.*

Valencia (2017) 3 Cal.5th 347, 381), and "[t]he same rules of construction apply to administrative rules as to statutes" (*Exelon v. Local 15, Intern. Broth. of Elec.* (7th Cir. 2012) 676 F.3d 566, 570 (*Exelon*)). Applying this canon to construe section 5.609(c)(16), the "cost of services and equipment needed to keep the developmentally disabled family member at home" must refer to amounts of money that the Reilly family pays, rather than lost opportunities or other non-financial penalties it incurs.

History, Policy, and Deference to Agency Interpretation

The parties agree that where the language of a regulation lends itself to more than one plausible reading, we must consider other interpretive methods. To the extent the language of section 5.609(c)(16) leaves room for ambiguity, we look to the history of the regulation's enactment and the reasonableness of the competing proposed constructions, and we defer to an agency's authoritative interpretation of its own regulations. (See *Mt. Hawley Ins. Co. v. Lopez* (2013) 215 Cal.App.4th 1385, 1396–1397; *Bialo v. Western Mutual Ins. Co.* (2002) 95 Cal.App.4th 68, 76–77; *Exelon*, *supra*, 676 F.3d at p. 570; *Robinson v. District of Columbia Housing Authority* (D.D.C. 2009) 660 F.Supp.2d 6, 17.) The parties disagree on whether the language of the regulation is sufficiently ambiguous that the court must engage in this process. We need not settle that dispute, since our analysis of these other issues, like our analysis of the language of the regulation, leads us to conclude that MHA's interpretation of section 5.609(c)(16) is correct.

Reilly cites several passages from the rulemaking record that we think are unhelpful in resolving the interpretive issue before us. On April 5, 1995, HUD published as an interim rule the exact language defining an exclusion from income that later became section 5.609(c)(16). (See 60 Fed. Reg. 17391–17393 (Apr. 5, 1995).) The explanation for HUD's proposal was brief: "This exclusion exempts amounts paid by a State agency to families that have developmentally disabled children or adult family members living at home. 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. The Department wishes to point out that today's interim rule does not define 'developmentally disabled' since whether a family member qualifies as developmentally disabled, and is therefore eligible for homecare assistance, is determined by each individual State." (60 Fed. Reg. 17389 (Apr. 5, 1995).) We view this explanation as too summary to be enlightening. It speaks in generalities, and does not address the specific issue of whether all amounts paid by a state agency to a family with a developmentally disabled person living at home are excluded, or only those amounts that offset the family's expenditures for necessary services and equipment.

Equally unhelpful is the only comment added to the federal register when the rule became final. In response to a suggestion that HUD clarify the terms "developmentally disabled children" and "adult family members," HUD declined. HUD explained that its rule defers to the definitions used by the State program providing payments, so that where a family receives payments the housing authority should consider the family eligible for the exclusion. (61 Fed. Reg. 54497 (Oct. 18, 1996).) This portion of the rule-making record also does not speak to the interpretive issue before us, as both parties agree that Reilly's daughter is a person whose disability makes the family eligible for the exclusion. The question is the scope of payments to the Reilly family that section 5.609(c)(16) excludes, specifically whether or not payments for services that Reilly provides her daughter are excludable as payments "to offset the cost" of necessary services. (§ 5.609(c)(16).)

The rule-making record having failed to answer the question before the court, we turn now to comparing the results of the two proposed constructions. If a regulation " 'is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed.' " (*Greening v. Johnson* (1997) 53 Cal.App.4th 1223, 1229; see also *Exelon*, *supra*, 676 F.3d at 570.)

If the court adopts MHA's construction of the regulation, then families with a developmentally disabled family member at home will be able to exclude IHSS payments from income only to the extent the payments go to provide services and equipment for which the family pays. For example, if the family pays an in-home service provider to care for a disabled child while an able parent works outside the home, IHSS payments to cover the cost of that homecare aide are not counted toward the family's income. Only the parent's outside income counts. If instead the parent takes on the job of providing the child's homecare, as occurred in this case, then the IHSS payments to compensate for parental care count toward income, but the parent has no outside income. Just as IHSS payments substitute in the family's budget for the money the parent would have earned outside the home, so, too, they substitute for those foregone wages in being counted as income.

We believe this result is a reasonable outcome. First, the regulation so construed treats comparably two families with a developmentally disabled family member: one family in which a third party cares for the disabled person, and the other in which a parent does. Presumably the HUD regulation, like the IHSS program, seeks to assist both families, and to assist them equally. A second reason we think the result is reasonable is that it achieves a measure of parity between a family with a developmentally disabled family member and a family with a member disabled by severe medical problems. Under MHA's proposed construction, a family's out-of-pocket costs to provide protective supervision for a developmentally disabled family member are exempted from income under section 5.609(c)(16), just as medical expenses for a medically fragile family member are exempted under section 5.609(c)(4). But IHSS payments that compensate a parent who provides care for her developmentally disabled child are not exempted, just as they would not be for a parent providing care for a physically disabled family member. In this respect, section 5.609(c)(16) as MHA construes it eliminates a disparity between

the families of those with a developmentally disabled family member and families with a member disabled by medical problems.

By contrast, Reilly's construction of the regulation gives people in Reilly's position a benefit that comparable families do not receive. Reilly would have her rent calculated as if she had no income from work at all, while another family with a disabled family member in which the parent works outside the home and pays a third party to provide homecare would have to pay rent calculated to include the parent's outside income. Also inequitable would be the result that, by virtue of her daughter's disabilities being developmental rather than physical, Reilly's construction would allow her to exclude IHSS payments for parental care-giving, which a parent receiving IHSS payments to care for a child disabled by medical problems could not do.

In sum, comparing the results of the competing constructions confirms our conclusion that MHA and the trial court correctly construe section 5.609(c)(16). We reach this conclusion without the benefit of the final interpretive tool the parties have urged upon us—deference to an agency's interpretation of its own regulation—because neither party points us toward an authoritative HUD interpretation of section 5.609(c)(16). MHA attempts to do so in its request for judicial notice filed on May 30, 2017, but we deny that request.

MHA requests this court take judicial notice of a short letter dated May 10, 2017, to MHA's general counsel from the Director, Office of Public Housing, U.S. Department of Housing and Urban Development, San Francisco Regional Office – Region IX. The letter attaches a 2007 letter from HUD's Office of General Counsel – Assisted Housing Division opining that the mother in *Anthony* could not exclude her wages from income under section 5.609(c)(16), representing that this decade-old opinion is "our current interpretation of 24 C.F.R. section 5.609(c)(16)." If the 2017 letter could be characterized as an official act of the executive branch, we could choose to take judicial notice of it (see Evid. Code, § 452, subd. (c); § 459, subd. (a)), but we decline to do so.

"Litigation-inspired opinions have no authority" where "the administrative agency is a party to the litigation." (*People ex rel. Lungren v. Cotter & Co.* (1997) 53 Cal.App.4th 1373, 1393.) On its face, the 2007 opinion is litigation-inspired, and like the *Anthony* court we construe section 5.609(c)(16) without reference to it. (See *Anthony*, *supra*, 306 Fed. Appx. at p. 101.)

Because we agree with the trial court and MHA on the meaning of section 5.609(c)(16), we find no error in the trial court's order sustaining MHA's demurrer to the petition. Reilly has shown no reasonable possibility that she could cure the defect if granted leave to amend, so we find no abuse of discretion in the trial court's decision to dismiss the petition with prejudice.

DISPOSITION

The decision of the trial court is affirmed. In the interests of justice, each party shall bear its own costs on appeal.

_____
Tucher, J.*

We concur:

_____
Kline, P.J.

_____
Richman, J.

A149918, *Reilly v. Marin Housing Authority*

* Judge of the Alameda County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Filed 5/15/18 after nonpublished opinion filed 4/25/18

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

KERRIE REILLY, Plaintiff and Appellant, v. MARIN HOUSING AUTHORITY, Defendant and Respondent.	A149918 (Marin County Super. Ct. No. CIV 1503896)

BY THE COURT:

The opinion in the above-entitled matter filed on April 25, 2018, was not certified for publication in the Official Reports. For good cause and pursuant to California Rules of Court, rule 8.1105, it now appears that the opinion should be published in the Official Reports, and it is so ordered.

Dated: _____

_____
Richman, Acting P.J.

Court: Marin County Superior Court

Trial Judge: Hon. Paul M. Haakenson

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A149918, *Reilly v. Marin Housing Authority*

S249593

PROOF OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Alameda, State of California. My business address is 1330 Broadway, Suite 500, Oakland, California, 94612.

On June 25, 2018, I served the foregoing document(s):

PETITION FOR REVIEW

on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes as follows:

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X	**(BY OVERNIGHT DELIVERY)** I enclosed a true copy of each document identified above in an envelope or package provided by an overnight delivery carrier and addressed to the interested parties listed above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 25, 2018, at Oakland, California.

Hayley Jones