Supreme Court Case No. S249593

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KERRIE REILLY
Petitioner and Appellant,

v.

MARIN HOUSING AUTHORITY
Defendant and Respondent.

SUPREME COURT
FILED

MAY 22 2019

Jorge Navarrete Clerk

Deputy

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

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Consolidated Reply Brief to Marin Housing Authority's Answer to Amici Curiae Briefs in support of Petitioner and Appellant

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I. Introduction

Appellee Marin Housing Authority ("MHA")'s Consolidated Answer to the Amici Curie Briefs ("Answer to Amici") raises a number of new arguments that should have instead been raised in its Answer to Appellant Kerrie Reilly ("Ms. Reilly")'s Opening Brief on the Merits. However, none of the additional arguments advanced by MHA in its Answer to Amici provide valid support for MHA's position in this case.

II. The Developmental Disability State Payments Regulation Sets Up a Consistent National Standard that Must Then Be Applied to the Different In-home Services Programs in Each State

MHA contends that, if Ms. Reilly's position on 24 C.F.R. § 5.609(c)(16) is correct, then "the meaning of the federal regulation at issue is dictated by state law." Answer to Amici at 21. That argument misunderstands Ms. Reilly's position, which is that the meaning of 24 C.F.R. § 5.609(c)(16) is constant. The regulation means exactly what it says: public housing authorities may not include "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" in the calculation of the family's annual income. 24 C.F.R. § 5.609(c)(16).

A public housing authority may only exclude in-home services payments that meet the standard set forth in the regulation. To be properly excluded from annual income, the funds must be "paid by a State agency," they must go "to a family," the family must have "a member who has a developmental disability and is living at home," and the funds must be specifically targeted "to offset the cost of services and equipment needed to keep the developmentally disabled family member at home." 24 C.F.R. § 5.609(c)(16).

What changes from State to State is not the meaning of the regulation, but

its *application* to each State's in-home services program. In-home service programs such as IHSS are created and operated by States and not by the federal government. Each State designs its own program. The structure of that in-home services program differs from State to State as a result. A household receiving a federal housing subsidy in any given State will be able to exclude in-home service payments *only if* the State's program meets the standard set forth in 24 C.F.R. § 5.609(c)(16).

MHA is therefore correct that, "depending on the state laws in jurisdictions where IHSS-equivalent programs are provided to Section 8 households," recipients of federal housing subsidies located in different states are "potentially subject[] to different outcomes." Answer to Amici at 21. But that is not because the regulation means something different in each State; it is because it is applied to different State programs.

The in-home services program created by the State of Texas, for example, has been found not to meet the 24 C.F.R. § 5.609(c)(16) standard. While California's home care program makes payments directly to families for the In-Home Supportive Services they provide, the State of Texas only makes such payments to "private health maintenance organizations ('HMO')." *Anthony v. Poteet Housing Authority,* 306 Fed.Appx. 98, 99 (5th Cir. 2009). In the *Anthony* case, for instance, a for-profit HMO employed the plaintiff to provide in-home services to her developmentally disabled son. *Id.* at 100. Because she was the HMO's employee, the HMO required the plaintiff "to serve as back-up for other personal-care attendants" under the HMO's employ, required her to care for other clients besides her son, and had "the authority and discretion to assign *any* home health provider to care for" her son. *Id.* The Texas in-home services program described in *Anthony* is therefore different from the one in California, where the State makes payments directly to families.

That the application of the developmental disability State payments regulation[1] varies depending on the State is not a result to be avoided. It is inherent in the structure of 24 C.F.R. § 5.609(c)(16). For instance, the regulation specifies that the payment must go directly from "a State agency to a family," which may not cover payments that go from the State to third-party agencies rather than families. It specifies that the payment must be "to offset the cost of services and equipment needed to keep the developmentally disabled family member at home," which may not cover payments for more general care of a family member with a developmental disability (such as taking a family member with a developmental disability to have their hair cut).

In short, if a State's program does not meet the standard set forth in 24 C.F.R. § 5.609(c)(16), payments made will not be excluded from the calculation of income. As a result, the developmental disability State payments regulation sets up a consistent national standard for which home care payments shall be excluded, but the *application* of that standard necessarily varies, depending on how any given State has designed its system for providing the services necessary to keep people with developmental disabilities out of institutions.

For this reason, MHA's contention that using the plain language reading of 24 C.F.R. § 5.609(c)(16) advocated by Ms. Reilly would allow "state policy [to] dictate the outcome of eligibility determinations made under federal statute" in violation of supremacy or pre-emption[2] principles is incorrect. Answer to

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[1] Consistent with prior briefing, Ms. Reilly refers to 24 C.F.R. § 5.609(c)(16) alternatively as the C.F.R. citation and as "the developmental disability State payments regulation."

[2] MHA is also flatly incorrect that "subsidized housing is also not an area that has 'been traditionally occupied by the States,' including this state." Answer to Amici at 25. The State of California has historically promulgated statutes and regulations

Amici at 24. State payments to families that meet the standard set forth in 24 C.F.R. § 5.609(c)(16) must be excluded from a public housing authority's calculation of a household's annual income. Whether or not a State's in-home services program meets the standard in 24 C.F.R. § 5.609(c)(16) will depend on the structure of the State program, and each State inevitably structures its program based on its own policy priorities. (Texas, for instance, opted to make in-home service payments to private HMO's rather than individual families, presumably due to a policy preference for relying on private enterprise to carry out public goals.) But that circumstance is inherent in the structure of 24 C.F.R. § 5.609(c)(16) itself, and in no way represents an unwarranted State encroachment into an area exclusively regulated by federal law.

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and provided public assistance with the goal of increasing access to housing for low-income families. For example, the California Health and Safety Code gives the State's Department of Housing and Community Development ("HCD") the authority "[t]o enter into agreements or other transactions with any governmental agency, *including an agreement for administration of a housing or community development program*" and provides that it "is the principal state department responsible for implementation of the California Statewide Housing Plan." Cal. Health & Safety Code §§ 50406(h) and 50407 (emphasis added). HCD administers, among other programs, California's Multifamily Housing Program, which addresses the problem that "[l]arge numbers of California's renters face excessive housing costs and live in overcrowded or substandard units" and the Veterans Housing and Homelessness Prevention Program, which provides long-term loans for development or preservation of rental housing for low-income veterans and their families. Cal. Health & Safety Code § 50675 et seq. and Cal. Military and Veterans' Code § 987.001 et seq.

III. The Developmental Disability State Payments Regulation Uses the Term "Payments to Offset the Cost of Services and Equipment Needed to Keep a Developmentally Disabled Family Member at Home" instead of "Payments for the Care of a Developmentally Disabled Family Member" Because It Is Only Intended to Cover Payments for Specified *Services*, Not General *Care*

MHA contends that, if 24 C.F.R. § 5.609(c)(16) were intended to cover payments for the care of people with developmental disabilities, it would have used language similar to 24 C.F.R. § 5.609(c)(2) (which excludes "[p]ayments received for the care of foster children or foster adults") or to 24 C.F.R. § 5.609(c)(12) (which excludes "[a]doption assistance payments in excess of $480 per child"). Answer to Amici at 17-18. However, the language used in each of subsections (c)(2), (c)(12), and (c)(16) of 24 C.F.R. § 5.609 is different because the intended target of each subsection is different.

The broad language in 24 C.F.R. § 5.609(c)(12) covers *all* "adoption assistance payments" because the goal is to allow families to receive the full benefit of any payments designed to incentivize people to adopt, regardless of whether those payments are intended to offset the cost of care for adopted family members or to cover other costs (such as court fees). The provision in 24 C.F.R. § 5.609(c)(2) describes "[p]ayments received for the care of foster children or foster adults" because it only covers payments that are specifically for the *care* of foster children. The purpose of 24 C.F.R. § 5.609(c)(16) is yet more focused. It does not cover State payments for the general care of family members with developmental disabilities. Its coverage is limited to payments for the specific *services* that people with developmental disabilities require to stay in their own home, so it provides an exemption only for "[a]mounts paid by a State agency to a family with a member who has a developmental disability and is living at home to offset

the cost of services and equipment needed to keep the developmentally disabled family member at home." 24 C.F.R. § 5.609.

That focus reflects the goal of providing encouragement to "families that strive to avoid institutionalization" of people with developmental disabilities and HUD's explicit recognition of the fact that "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." Combined Income and Rent, 60 Fed. Reg. 17388, 17391-17393 (April 5, 1995). The language of the developmental disability State payments regulation was carefully drafted so that the *only* State payments that would be excluded from income were those that pertained to services and equipment needed to keep someone with a developmental disability out of an institution, and not payments for the more general care of that individual.

Payments received pursuant to California's In-Home Supportive Services ("IHSS") program with regard to family members with developmental disabilities meet this standard. IHSS does not pay families for all of the care that they provide, or all of the *types* of care they provide to family members with developmental disabilities. The State only provides IHSS payments for "those supportive services identified in this section to ... persons ... who are unable to perform the services themselves and *who cannot safely remain in their homes or abodes of their own choosing unless these services are provided.*" Cal. Welf. & Inst. Code § 12300 (a) (emphasis added). In other words, payments are only made for "services" needed to keep the family member in their own home and out of an institution.

In short, in each of the income exclusions listed in 24 C.F.R. § 5.609(c), the drafters of the regulation tailored the language used in order to describe

exactly what type of payments to the family should be excluded, and nothing more.

IV. MHA's Attempt to Distinguish Between "Tangible" and "Intangible" Costs in Federal Law is Without Merit

MHA concedes, as it must, "that caring for an adult child with developmental disabilities is a difficult job." Answer to Amici at 7. In other words, there is an actual and significant cost to Ms. Reilly of performing those services herself. To escape the conclusion that naturally flows from that fact – that the IHSS payments from the State of California to Ms. Reilly must therefore be "to offset the cost" of those services – MHA argues that the cost to Ms. Reilly is unlike any other cost recognized under federal law. More specifically, MHA contends that the cost to Ms. Reilly is "intangible, unquantifiable," and that federal statutes and regulations recognize only "tangible, verifiable, and quantifiable" costs. Answer to Amici at 14, 16-17, 23-24, and 30. This argument is without merit.

First, the cost to Ms. Reilly *is* verifiable and quantifiable. In compliance with IHSS regulations, Ms. Reilly and her daughter must verify to the State that she has accurately reported all of the time on services she has provided to her daughter that are compensable through IHSS. Cal. Dep't Soc. Serv.'s Manual of Policies and Procedures § 30-769.[3] The State of California and its county agents assigns a precise time and compensation rate to the specific services that IHSS workers provide (*id.* at §§ 30-757 and 30-764), and it is that exact payment from

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[3] The In-Home Supportive Services regulations implementing the relevant provisions of the Welfare and Institutions Code are found in Division 30, Chapter 30-700 of the California Department of Social Services' Manual of Policies and Procedures, available at http://www.cdss.ca.gov/inforesources/Letters-Regulations/Legislation-and-Regulations/Adult-Services-Regulations (last visited May 15, 2019).

the State that Ms. Reilly seeks to be excluded from the calculation of her annual income pursuant to 24 C.F.R. § 5.609(c)(16).

Second, the examples MHA gives of "tangible" costs recognized under federal law are from contexts unrelated to the one at issue in the case, and *none* of them establish that federal law does not recognize costs such as the ones at issue here. Answer to Amici at 23-24. MHA observes that a number of other federal statutes and regulations also use the term "offset the costs of . . . " *Id.* But in each case, the term "offset the costs of . . . " must be completed in order to have meaning. "The cost of providing health care" is different from "the cost of operation and maintenance" of a wastewater treatment project, which is in turn different from the cost to the FHC of processing certain information or the cost to an airline of collecting passenger service fees. *Id.* (citing 49 C.F.R. § 1510.13(c), 40 C.F.R. § 35.2140(f), 45 C.F.R. § 147.145(c)(1), 15 U.S.C. § 15855(b)(1), and 15 U.S.C. § 6307c(d)(3). To the extent that there is a difference in the nature of the cost of services needed to operate and maintain a wastewater treatment project versus the cost of services needed to keep a person with a developmental disability in their own home, for instance, it is due to the fact that the context itself is different. Given that difference, none of these statutes or regulations provide additional guidance to this Court on the question before it in this case.

As a further example of "tangible" expenses, MHA points to 42 U.S.C. § 1437a (b)(5), the federal statutory provision regarding "adjusted income." Answer to Amici at 14-15. That provision mandates that, under certain circumstances, a public housing authority must deduct money that a family spends on unreimbursed medical expenses, unreimbursed attendant care, and unreimbursed child care expenses from a family's income. 42 U.S.C. § 1437a (b)(5)(ii) and (iii). MHA contends that these are further examples of costs that are "tangible, measurable, and discrete." Answer to Amici at 14. However, as

explained above, the cost of those services is no less actual or measurable than the ones at issue in this case.

Moreover, to the extent that MHA is attempting to argue that federal subsidized housing law *only* recognizes costs that involve a discrete and particular expenditure of funds by the family, the regulation implementing this statutory provision, 24 C.F.R. § 5.611,[4] itself precludes such an argument. That regulation provides that, after calculating a family's "annual income" pursuant to 24 C.F.R. § 5.609, public housing authorities should make a flat deduction of $480 per dependent and $400 "for any elderly family or disabled family." 24 C.F.R. § 5.611(a)(1) and (2). To qualify for the deductions, families do not need to demonstrate that they have made any specific expenditures; they just need to to be an "elderly family or disabled family" or have household members who are "dependent." *Id.* MHA is simply incorrect that federal law only recognizes what MHA terms "tangible" costs.

The cases cited by MHA regarding "opportunity cost" are likewise unhelpful to MHA's position. In *Sargon Enterprises, Inc. v. University of Southern California*, 55 Cal. 4th 747 (2012), this Court upheld the trial court's exclusion of testimony from an expert regarding the plaintiff's lost profits on the grounds that the expert's testimony was "based on speculative projections of future spectacular success" rather than "a company's actual profits, a comparison to the profits of similar companies, or other objective evidence to project lost profits." *Id.* at 781. This Court did not reject the idea of a party being compensated for opportunity costs such as lost profits – it merely required that

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[4] MHA erroneously asserts that 42 U.S.C. § 1437a (b)(5) is implemented at 24 C.F.R. § 5.609. However, Section 5.609 addresses funds coming into the household that are nonetheless *excluded* as annual income; the statutory provisions regarding *deductions from* annual income are instead implemented at 24 C.F.R. § 5.611.

expert opinion regarding opportunity costs be based on evidence rather than speculation.

Likewise, in *Grundy National Bank v. Tandem Mining Corp.*, 754 F.2d 1436 (4th Cir. 1985) and *Mira v. Nuclear Measurements Corp.*, 107 F.3d 466 (7th Cir. 1997), the federal appellate courts did not reject the concept of compensating plaintiffs for lost "opportunity costs." In *Grundy,* the Fourth Circuit merely ruled on the method for calculating the interest income to which the plaintiff was entitled. 754 F.2d at 1441. And in *Mira*, the Seventh Circuit made the unremarkable holding that, in order to be compensated under an opportunity cost theory, plaintiffs must demonstrate that they were actually harmed. 107 F.3d at 472-73 ("At the end of the day, the plaintiffs got exactly what they were promised under the terms of the employee benefit plan."). In short, even in the cases cited by MHA in its Answer to Amici, there is no support for MHA's theory that federal law does not recognize "opportunity cost" or other costs that MHA deems similarly "intangible."

For that matter, MHA never defines what it means when it categorizes certain costs as "tangible" versus "intangible." To agree, as MHA does, that the services Ms. Reilly provides "is a difficult job" is to concede that the cost of performing such services is real and substantial – as "tangible," in other words, as a cost can be. In lieu of a definition, MHA offers a number of examples of costs that it deems "tangible," such as the services required to operate and maintain a wastewater treatment project. Answer to Amici at 23. MHA observes that, in that instance, 40 C.F.R. § 35.2140(f) permits facilities to collect revenue so long as the funds are "used to offset the costs of operation and maintenance" of the project. *Id.* But MHA does not, and cannot, explain why the cost of services needed to operate and maintain a wastewater treatment project might be any less "tangible" than the cost of services needed to keep a person with a developmental disability

in their own home.

V. Caselaw Interpreting the Taxation of Costs Awarded to a Prevailing Party in Litigation Is Irrelevant to this Matter

MHA's contention that U.S. Supreme Court jurisprudence precludes Ms. Reilly's plain-language reading of the term "cost of services" in 24 C.F.R. § 5.609(c)(16) is in error. None of the cases put forward by MHA support its argument.

In *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006), the U.S. Supreme Court addressed the question of whether the federal Individuals with Disabilities Education Act ("IDEA"), which provides that a court may award "reasonable attorneys' fees as part of the costs" to a prevailing party, allows the award of expert fees. The U.S. Supreme Court held that, in the context of taxation of costs in federal court to a losing party, the term "costs" was "a term of art that generally does not include expert fees," and that the list of costs referenced in IDEA "is obviously the list set out in 28 U.S.C. § 1920, the general statute governing the taxation of costs in federal court." *Id.* at 297-98 (internal citation omitted). It is just as obvious that the term "costs of services" in 24 C.F.R. § 5.609(c)(16) is not a reference to either IDEA or to 28 U.S.C. § 1920. As a result, the fact that the term "costs" in IDEA does not include travel and lodging expenses or lost wages due to time taken off work (none of which appear in 28 U.S.C. § 1920) has no bearing on this case.

The holdings in *Trope v. Katz*, 11 Cal. 4th 274 (1995)[5] and *Musaelian v. Adams*, 45 Cal.4th 512 (2009) are also inapposite. In *Trope v. Katz*, this Court concluded that Civil Code § 1717, which governs the award of attorneys' fees in

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[5] MHA cites to page 1092 of *PLCM Group v. Drexler*, 22 Cal.4th 1084 (2000). Consolidated Answer at 19-20. However, the entire page cited is a summary of this Court's holding in *Trope.*

situations where a contract provides for fee shifting, did not permit self-represented attorneys to be compensated for their lost opportunity cost. *Trope*, 11 Cal.4th at 279, 292 (summarized in *PLCM Group v. Drexler*, 22 Cal.4th 1084, 1092 (2000)). This Court based its opinion on the terms of Section 1717, including "incur," "fee," and "reasonable attorneys' fee" – none of which are at issue in this case – and on the fact that there was nothing in Section 1717 to suggest that attorneys who chose to represent themselves should be compensated when other individuals, such as doctors or architects, who chose to represent themselves were not likewise compensated. *Trope*, 11 Cal.4th at 284-86.

In *Musaelian,* this Court analyzed California Civil Code § 128.7, which authorizes sanctions (including reasonable attorneys' fees and other expenses incurred by a litigant) against parties who present frivolous pleadings to the court. 45 Cal.4th at 516. Following its reasoning in *Trope*, this Court found that the term "expenses *incurred*" in Section 128.7 "contemplates an obligation that a party has become liable to pay" and therefore did not allow a court to award sanctions for time that a self-represented party "lost from other employment." *Id.* at 520 (emphasis added).[6]

Neither this Court's nor the U.S. Supreme Court's interpretation of different terms than those found in 24 C.F.R. § 5.609(c)(16), in a completely different context (i.e., the taxation of attorneys' fees and costs when a party prevails or a party is found to have put frivolous pleadings before the court) have any bearing on the question on appeal in this case. Whether the State payments to Ms. Reilly "offset the costs of services and equipment needed to keep the developmentally disabled family member at home" under 24 C.F.R. §

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[6] The U.S. Supreme Court assumed that the term "expenses" alone *could* include the opportunity cost of "lost wages due to time taken off from work." *Murphy*, 548 U.S. at 297.

5.609(c)(16) is simply a different question from whether costs are recoverable by a prevailing party in litigation.

VI. The Fact that Regulations regarding USDA Home Loans Contain a Similar Provision Does Not Preclude the Plain-language Reading of the Regulation at Issue in this Case

MHA observes that federal regulations governing a lender's calculation of the ability of low-income rural families to repay USDA home loans use nearly identical language to 24 C.F.R. § 5.609(c)(16). Answer to Amici at 22-23. Those regulations are found at 7 C.F.R. §§ 3550.54(b)(10) and 3555.152(b)(5)(x). However, there is no basis for MHA's conclusion that those regulations therefore "could not possibly" also mean that lenders should disregard IHSS payments in calculating the ability of low-income rural families to repay USDA home loans. Answer to Amici at 23. MHA's protest that "it would provide no means to support the repayment of the loan" (*id.*) is simply to restate the premise of the loan regulations – that, along with other specified forms of income, lenders are to disregard State payments such as IHSS that are "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" in in calculating the ability of low-income rural families to repay USDA home loans.

VII. The Impact of this Issue Is Far Wider than MHA Acknowledges

MHA contends – incorrectly – that "the population, who may be potentially impacted by the Court's decision, is impervious to increasing market rents." Answer to Amici at 10. This Consolidated Reply will not elaborate upon the facts that the outcome of this matter necessarily affects the ability of families receiving IHSS payments from the State to maintain their eligibility for

subsidized housing (whether the family is already in the program or is on a long waiting list for such housing) or that being required to put one-third of IHSS payments towards rent can be a tremendous burden on a family facing significant expenses associated with a family member with a developmental disability.[7] Appellant writes separately only to add that MHA fails to inform this Court in its Answer to Amici that each public housing authority has its own "payment standard" and that, in instances where a family with a Section 8 voucher must rent a unit that exceeds the payment standard for that public housing authority, the family must pay the difference in rent in addition to 30% of their annual income. 24 C.F.R. §§ 5.628(a)(1), 982.4, 982.503(a), and § 982.505(b)(1). Rising rents therefore can have a direct impact even on families who are able to maintain their eligibility for a subsidized housing program.

VIII. Conclusion

None of the additional arguments put forward in MHA's Answer to Amici assist this Court's analysis of the issue on appeal before this Court in this case. For the foregoing reasons, and for all of the reasons presented in the briefing on the merits in this case, Ms. Reilly respectfully requests this Court to find that the developmental disability state payments regulation means what it says, and that payments to families from California's In-Home Supportive Services program to keep a family member with a developmental disability at home are excluded from that family's annual income.

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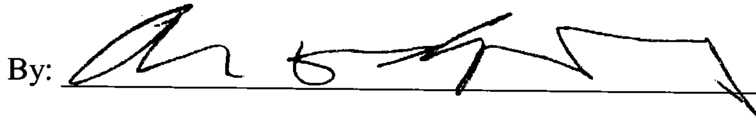
[7] Appellant is in agreement with these points as made by amici but, in keeping with this Court's procedure, will allow the amici briefs to speak for themselves.

Respectfully submitted,

Dated: May 16, 2019

DISABILITY RIGHTS CALIFORNIA

By: 

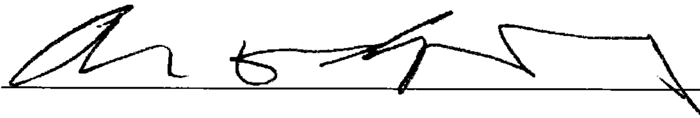
Autumn M. Elliott

Certificate of Word Count

As required by Rule 8.504, subdivision (d)(1), of the California Rules of Court, I certify that this Consolidated Reply in Support of Reply Brief in support of the Amici Curiae Briefs in support of Petitioner and Appellant contains 4824 words, including footnotes, according to the computer program used to generate the document.

Dated: May 16, 2019

DISABILITY RIGHTS CALIFORNIA

By: 

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PROOF OF SERVICE

I am 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 May 16, 2019, I served the **Consolidated Reply Brief to Marin Housing Authority's Answer to Amici Curiae Briefs in support of Petitioner and Appellant** on the interested parties as follows.

By overnight delivery: I enclosed a true copy of the document identified above in an envelope or package provided by an overnight delivery service and addressed to the interested parties listed below. I ensured that overnight postage was prepaid. I placed the envelope or package for collection and overnight delivery at the office located at 500 12th Street, Suite 139, Oakland California 94612 in time for overnight delivery.

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By mail: I enclosed a true copy of the document identified above in an envelope. I placed those envelopes in my office's outgoing mail box. I am familiar with my office's practice of processing mail. Under this practice, envelopes in the outgoing mail box are daily posted for U.S.P.S. first class mail and are then deposited with the U.S.P.S.

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Marin County Superior Court
3501 Civic Center Drive
San Rafael, CA 94903

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Court of Appeal
350 McAllister Street
San Francisco, CA 94102

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

Executed on May 16, 2019, at Oakland, California.

Jamie C. Parkin