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.

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

Petitioner and Appellant's Answer to the Brief of the United States as Amicus Curiae

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I. Introduction

This Court's invitation to the U.S. Department of Housing and Urban Development ("HUD") to submit amicus briefing was an opportunity for the federal agency to provide context for the regulation at issue in this case, to direct the Court's attention to contemporaneous statements of intent, and to otherwise bring the agency's specialized knowledge and expertise to bear in analyzing the question before the Court.

HUD did none of those things. The Brief of the United States as Amicus Curiae supporting Respondent ("U.S. Amicus Brief") offers no new nuance or insight into the question of whether California's In-Home Supportive Services payments to families for services they provide to keep family members with developmental disabilities in their homes are properly excluded as income pursuant to 24 C.F.R. § 5.609(c)(16). The analysis in the government's brief does not bring to bear any specialized understanding of, or experience with, the field of affordable housing for low-income people. The brief does not identify any new source of agency intent for this Court to review, nor does it provide any additional context for the development and promulgation of the regulation. Any of those would have been highly useful to this Court.

Instead, the United States directs this Court back to general sources (such as standard dictionaries) and to the opinion of the California Court of Appeal that is being appealed in this matter. As such, the U.S. Amicus Brief was not responsive to the amicus invitation extended by this Court and was not helpful to the Court or the parties.

II. The plain language of the regulation resolves the issue.

The United States concedes that the "straightforward understanding of the terms of the regulation resolves Reilly's case." U.S. Amicus Brief at

13. None of the authority cited by the United States, however, supports its proposed reading of those terms.

The United States acknowledges that the terms used in 24 C.F.R. § 5.609(c)(16) do not have a specialized meaning and do not require context from the field of subsidized housing to understand. Instead, the United States directs this Court to common dictionaries. For instance, the United States directs the Court to the first definition in the Oxford English Dictionary entry for "cost": "[t]hat which must be given or surrendered in order to acquire, produce, accomplish, or maintain something." *Oxford English Dictionary* 988 (2d. ed. 1989). But this definition is not limited to *money* that must be "surrendered in order to acquire, produce, accomplish, or maintain something." The definition can as easily encompass time, labor, or other things of value that must be surrendered in order to accomplish something. To illustrate the point, one of the example sentences immediately following that definition of the term "cost" in the Oxford English Dictionary is: "The aggregate amount of labour expended on objects and services is called the *cost of production*." *Id.* (emphasis in original). As such, it does not support the government's assertion that the word "cost" in 24 C.F.R. § 5.609(c)(16) must necessarily be limited to monetary costs.

The United States asserts throughout its brief that limiting the word "cost" solely to monetary payment is the "ordinary" meaning of the word. U.S. Amicus Brief at 12, 15, 16, 17. But the only authority the government cites in support of this proposition is the California Court of Appeal opinion in this case, and the Court of Appeal itself cited to no authority for that statement – it simply made the assertion. *Id.* at 16 (citing *Reilly v. Marin Hous. Auth.*, 23 Cal. App. 5th 425, 435 (2018). Nor can the United States

offer any reasons beyond those proffered by the Court of Appeal as to why the type of non-monetary costs that the United States acknowledges exist (and would otherwise be applicable here) such as "opportunity cost" would necessarily be excluded from the term "cost" in 24 C.F.R. § 5.609(c)(16). U.S. Amicus Brief at 16.

As the dictionary definitions demonstrate, the term "cost" itself is not inherently limited to monetary transactions. "Cost" can refer to labor, time, or other things that must be given up in order to accomplish something. The term "cost" is only confined to monetary payments when other limiting words are added (e.g., "cost *of medical expenses*"). No such limiting language appears in 24 C.F.R. § 5.609(c)(16).

The United States says that the State In-Home Supportive Services payments to Ms. Reilly "do not 'offset the cost of services' that Reilly provides; they compensate her for those services." U.S. Amicus Brief at 12. This is a distinction without a difference. The United States tries to distinguish the idea that the State payments to Ms. Reilly for the services she provides to keep her developmentally disabled family member at home "'offset the cost of services' that Reilly provides" – which would then require their exclusion from income – from the notion that they instead "compensate her for those services." But the dictionary sources cited in the government's brief establish that "compensate" and "offset" are essentially synonymous here.

The United States quotes the Oxford English Dictionary's definition of "offset" as "[t]o set off as an equivalent against something else or part of something else; to balance by something on the other side or of contrary nature." *Oxford English Dictionary* at 514. But the same dictionary's definition of "compensate" makes clear that the term "offset" addresses the

same concept as "compensate": "[t]o counterbalance, make up for, make amends for"; and "to be an equivalent, to make up for." *Id.* at 601. The United States even acknowledges that Webster's Dictionary uses the term "compensate" as a synonym for "offset." U.S. Amicus Brief at 12 (citing *Webster's Third New International Dictionary* 1566 (1967)). In other words, the idea that the State payments to Ms. Reilly for the services she provides to keep her developmentally disabled family member at home "compensate her for those services," as the United States says is true, necessarily means that those payments also "offset the cost of services" that she provides.

III. The United States cannot explain why the language of the regulation is explicit in cases where only reimbursements for out-of-pocket expenses are excluded, and no such language appears in the developmental disability State payments exclusion.

While there is nothing in 24 C.F.R. § 5.609(c)(16) to limit the term "cost" to monetary costs alone, such limiting language *does* appear elsewhere in the regulation. Petitioner's Opening Brief on the Merits at 16-18. This Court has consistently held that "[w]hen a body drafting a statute or regulation 'has employed a term or phrase in one place and excluded it in another, it should not be implied where excluded.'" *People v. Buycks*, 5 Cal. 5th 857, 880 (2018) (citation omitted); additional citations in Petitioner's Opening Brief on the Merits at 17-18.

The United States responds by citing to this Court's decision in *United Riggers & Erectors, Inc. v. Coast Iron & Steel*, 4 Cal. 5th 1082, 1093 (2018). U.S. Amicus Brief at 17. That case addressed the question of whether an entity that withheld payments due to a good-faith dispute with a

contractor was entitled under Section 8814 of the California Civil Code to withhold only the amount under dispute or could withhold a greater amount. *Id.*at 1090. While other statutes addressing such disputes used "language that plainly limits withholding to circumstances in which the dispute relates to the specific amount or payment at issue," Section 8814 did not. *Id.*at 1091.

In *United Riggers*, this Court acknowledged that the standard rule is that, if a drafting body includes limiting language in some parts of a statute or regulation, its decision not to include such limitation elsewhere reflects a deliberate choice. *See id.* ("In closely related statutes, such consistent textual distinctions would suggest the Legislature could be understood to have reasonably contemplated, by the inclusion or omission of such language, a different withholding rule for one category or another."). However, this Court did not apply the standard rule in *United Riggers* because it found that other factors demonstrated that the legislature's omission of limiting language did not reflect an intent to avoid the limitation that appeared in other statutes. First, this Court found that failing to read a limitation into Section 8814 would allow "the possibility of double withholding" which was "precisely the evil the Legislature sought to eliminate." *Id.* at 1092. Second, this Court found that legislative history, including an acknowledgement of "existing inconsistencies" in the language of California's mechanics lien law, indicated that "not every variation in the scheme's pre-2010 language reflected a considered difference in underlying purpose." *Id.* at 1093-94. And third, this Court found that "the historical details of how Civil Code Section 8812 and 8814 were enacted" provided further support for its conclusion. *Id.*at 1094.

None of the *United Riggers* factors are present here, and so the

standard rule should apply and "cost" in 24 C.F.R. § 5.609(c)(16) is not limited to out-of-pocket monetary expenses alone. First, unlike in *United Riggers*, following the standard rule by not reading a limitation (to reimbursement of out-of-pocket expenses) in to 24 C.F.R. § 5.609(c)(16) that is not present in the text would not render the regulation fundamentally incompatible with its stated purpose. Instead, applying the standard rule would further that purpose, which is to encourage families who are doing their best to keep family members with developmental disabilities at home and out of institutions. Second, unlike in *United Riggers*, there is no legislative history providing evidence that the variations in language in 24 C.F.R. § 5.609do not reflect "a considered difference in underlying purpose." And third, unlike in *United Riggers*, the United States has identified no "historical details" that suggest that a limitation should be read into 24 C.F.R. § 5.609(c)(16) that does not appear in the text. There is therefore no reason to depart from the standard rule that, where a drafting body has included limiting language in some portions of a statute or regulation but not others, the absence of such language reflects a deliberate choice.

The United States observes that 24 C.F.R. § 5.609(c)(4)[1] and § 5.609(c)(8)(iii),[2] both of which contain language limiting their application to payments "specifically for or in reimbursement of" particular

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[1] 24 C.F.R. § 5.609(c)(4) exempts "Amounts received by the family that are specifically for, or in reimbursement of, the cost of medical expenses for any family member."

[22] 24 C.F.R. § 5.609(c)(8)(iii) exempts "Amounts received by a participant in other publicly assisted programs which are specifically for or in reimbursement of out-of-pocket expenses incurred (special equipment, clothing, transportation, child care, etc.) and which are made solely to allow participation in a specific program."

"expenses," "predated HUD's addition of § 5.609(c)(16)." U.S. Brief at 17. But this chronology weighs *in favor of* the idea that the omission of language limiting the application of 24 C.F.R. § 5.609(c)(16) was a deliberate choice. When the agency set out to draft the developmental disability State payments exclusion, the drafters would have had the limiting language appearing in 24 C.F.R. § 5.609(c)(4) and § 5.609(c)(8)(iii) regarding payments "specifically for or in reimbursement of" particular "expenses" right in front of them because those provisions had already been added to the regulation at issue. The omission of comparable language limiting the application of 24 C.F.R. § 5.609(c)(16) to payments "specifically for or in reimbursement of" expenses needed to keep a family member with a developmental disability at home rather than in an institution must therefore have been a deliberate choice on the part of the drafters and reflected an intent not to limit 24 C.F.R. § 5.609(c)(16) in that way.

IV. The United States' position is premised on an erroneous understanding of the California In-Home Supportive Services program.

The question on review before this Court addresses the application of a federal regulation to a State program: the application of 24 C.F.R. § 5.609(c)(16) to California's In-Home Supportive Services program. However, the U.S. Amicus Brief makes clear that the United States does not understand that State program.

To begin with, the position of the United States in this case relies on the idea that "the cost of services that Reilly provides, is, to Reilly, zero." U.S. Amicus Brief at 11, 13. This idea is foundational to the United States' argument: if there is a cost to Ms. Reilly for providing those services, then

the payments she receives from the State must necessarily be to "offset" that cost, and the payments must therefore be excluded under 24 C.F.R. § 5.609(c)(16). The United States' position, therefore, depends on the premise that there is no cost to Ms. Reilly.

The facts of this case and the structure of California's In-Home Supportive Services program, however, establish that there *is* a real and undeniable cost to Ms. Reilly. Her time and efforts are not her own; she has committed to the stressful and constant work of providing protective supervision to her adult daughter. Petitioner's Opening Brief on the Merits at 14-15; *see also* Amici Curiae Brief on behalf of Association of Regional Center Agencies, et al. at 15, 19-20, and 22-23 for examples of the time and efforts expended by others in Ms. Reilly's situation.

The United States suggests that there is nonetheless no cost to Ms. Reilly because she "is compensated by IHSS for the time she spends caring for her daughter." U.S. Amicus Brief at 13, 14. That argument begs the question: the entire reason that the In-Home Supportive Services payments should be excluded under 24 C.F.R. § 5.609(c)(16) is *because* they are for the services that Ms. Reilly provides to keep her developmentally disabled daughter at home. But the government's proposition also reflects an erroneous understanding of California's In-Home Supportive Services program. Under In-Home Supportive Services rules, Ms. Reilly is required to commit to providing round-the-clock supervision of her adult daughter even though she is not compensated for the majority of that time. Petitioner's Opening Brief at 10-11. The cost to Ms. Reilly, and to others in her situation, is not merely real but is only partially compensated through the State payments they receive. She is therefore not "compensated by IHSS for the time she spends caring for her daughter," as the United States

suggests, but is instead compensated for a *portion* of the time it takes to provide the services necessary to keep her daughter at home rather than in an institution.

The position of the United States in this case is also premised on the erroneous idea that IHSS payments are only available when a parent "leaves full-time employment or is prevented from obtaining full-time employment." U.S. Amicus Brief at 9-10, 14. The United States relies on this requirement, which is found in California Welfare and Institutions Code § 12300(e), to assert that IHSS "compensation substitutes for income Reilly could otherwise earn for working outside the home." U.S. Amicus Brief at 14. However, Section 12300(e) only applies to parents caring for minor children, *not* to parents caring for adults, as Ms. Reilly is. Cal. Dep't Soc. Serv.'s Manual of Policies and Procedures[3] § 30-763.45; Cal. Dep't Soc. Serv., All-County Letter No. 19-02, "Clarification of Regulations regarding Minor Recipients Living with Parent(s)," January 9, 2019, available at http://www.cdss.ca.gov/Portals/9/ACL/2019/19-02.pdf?ver=2019-01-11-144036-720 (last visited June 14, 2019).

Even if it were the case that In-Home Supportive Services payments were limited to compensating Ms. Reilly for her opportunity costs of lost employment, the purpose of those State payments would still be to "offset" those costs, and the payments would still therefore be exempt under 24 C.F.R. § 5.609(c)(16). However, the fact is that Ms. Reilly is providing

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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 June 14, 2019).

services for an *adult* daughter (who will therefore need such services for the rest of her natural life), so California Welfare and Institutions Code § 12300(e) is inapplicable. The IHSS payments Ms. Reilly receives are to offset the full range of costs to her of providing those services, and are not limited to offsetting her opportunity costs regarding lost employment opportunities.

Because it is premised on an erroneous understanding of California's In-Home Supportive Services program (i.e., that providing services to developmentally disabled family members carries no "cost" to the family and that In-Home Supportive Service payments are only available to parents if the parents must leave full-time employment due to the needs of an adult child), the United States' position on the question before this Court has no persuasive value.

V. The United States brings no specialized knowledge or expertise to its analysis of the issue before this Court.

In directing this Court to standard dictionaries and the Court of Appeal decision that is being appealed in this case, the United States concedes that no specialized knowledge or expertise is needed to interpret the plain language of 24 C.F.R. § 5.609(c)(16) or its surrounding terms, and it brings none to its analysis of the language of the regulation. Such expertise or knowledge is likewise absent from the United States' discussion of the context for the regulation.

A. The United States cannot explain why the contemporaneous statement of purpose is inconsistent with its current interpretation.

The authors of 24 C.F.R. § 5.609(c)(16) provided a contemporaneous statement regarding the purpose of the developmental

disability State payments exclusion, as follows:

> 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, not punished, the Department is adding this additional exclusion to income.

Combined Income and Rent, 60 Fed. Reg. 17388, 17391-17393 (April 5, 1995). In other words, the purpose of the regulation is to exempt State "homecare payments" to families so as to "encourage" and not to "punish" families that strive to avoid institutionalization.

In its amicus brief, the United States takes the position that 24 C.F.R. § 5.609(c)(16) applies only to families that are reimbursed by the State for their out-of-pocket expenses. But if that were true, the purpose of the regulation would be different from the contemporaneous description in the Federal Register. Instead of allowing State homecare programs to pursue their goal of incentivizing families to keep family members with developmental disabilities at home, the goal would be to address the issue of counting as "income" (that could be used toward rent) funds that a family was already obliged to pay to a third party.

If the regulation had that specific purpose, however, then the contemporaneous statement of intent itself would have been markedly different. One would expect the statement of purpose in that case to make reference to public housing authorities erroneously counting State reimbursement payments as income, or to some similar factor giving rise to the regulation. One would also expect the statement of purpose to say that the agency's intent was to clarify that funds provided so that the family can

pay third parties for services and equipment are not "income" to the family because those funds are not available to pay rent.

The United States is in a unique position to explain why, if its proposed reading of 24 C.F.R. § 5.609(c)(16) is accurate, the contemporaneous statement of intent did not reflect that particular purpose. For instance, it could have directed this Court to alternative statements of purpose that supported the United States' argument. Or it could have provided an explanation, based on its knowledge of the agency's work in this field, for why HUD did not reference the issue of counting funds received as reimbursement in its contemporaneous statement. The fact that the United States did not do so suggests that there are no such alternative sources or explanations to support its position.

Instead, the United States makes the illogical assertion that counting In-Home Supportive Services payments as income unless they provide reimbursement to families for out-of-pocket expenses *furthers* the purpose articulated in the Federal Register. The United States contends that the goal of encouraging, rather than punishing, families incentivized by State homecare payment programs to keep a developmentally disabled family member at home is furthered by its more limited reading of 24 C.F.R. § 5.609(c)(16). The United States' proposed reading treats "families that choose different means of keeping the developmentally disabled family member at home . . . evenhandedly" in the sense that it would treat In-Home Supportive Services payments to family members for the services they provide the same as other types of income, including income earned outside the home by families who have a third party provide in-home supportive services. U.S. Amicus Brief at 14.

Treating In-Home Supportive Services payments to family members

for the services they provide the same as other types of income, however, does not further the purpose articulated in the Federal Register. It furthers a *different* purpose, which is to encourage families with a developmentally disabled family member to work outside the home. If In-Home Supportive Services payments are treated the same as other income, then families will be incentivized to work outside the home, if possible, rather than to provide In-Home Supportive Services directly to their family member. This is because In-Home Supportive Services wage rates are set county-by-county and are at or near minimum wage across the board. Amici Curiae Brief on behalf of Association of Regional Center Agencies et al. at 17 (observing that caregivers assisting people with developmental disabilities received an average hourly wage of $11.41); "Recent Changes to State and County IHSS Wage and Benefit Costs," California Legislative Analyst's Office, Dec. 14, 2018, available at https://lao.ca.gov/Publications/Report/3913 (last visited June 14, 2019). If In-Home Supportive Services payments must be included in a family's income, thereby increasing the family's monthly rent payment, then family members will be encouraged to find work outside the home where there is the prospect of earning more than minimum wage.

Incentivizing family members to work outside the home for a higher wage furthers the goal of "self-sufficiency" that is a priority of the *current* United States administration. *See, e.g.*, March 5, 2018 Briefing Memorandum from Amy C. Thompson to HUD Senior Staff, available at http://files.pfaw.org/uploads/2018/03/HUD-memo-2018.pdf, last visited

June 14, 2019).[4] However, it was not the focus of HUD when the regulation was promulgated, nor was it mentioned in the Federal Register in 1995 as a purpose of the regulation.

Encouraging family members to work outside the home for a higher wage rather than spending those hours providing services to a family member with a developmental disability does not further the goal of keeping people with developmental disabilities at home with their families; nor does it further the goal of encouraging families who "strive to avoid institutionalization" of their family members. Instead, it undermines those goals, which were the only goals expressed in the contemporaneous expression of purpose.

First, as a practical reality, many families will not be able to find a third party to care for a family member with a developmental disability while they work outside the home. Amicus Brief on behalf of Association of Regional Center Agencies et al. at 16-17. Counting In-Home Supportive Services payments as income therefore provides an incentive to those families to instead place their family member in an institution so that they can work outside the home. Second, family members provide a higher

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[4] The 2018 HUD memo explains that "[i]n an effort to align HUD's mission with the Secretary's priorities and that of the Administration," the mission statement is changed to "HUD's mission is to ensure Americans have access to fair, affordable housing and opportunities to achieve self-sufficiency, thereby strengthening our communities and nation." The change in mission removes the commitment to "build inclusive and sustainable communities free from discrimination" that appeared in the prior HUD mission, which remains available at https://www.hud.gov/about/mission (last visited June 14, 2019). *See also* "Don't Make Housing for the Poor Too Cozy, Carson Warns," New York Times (May 3, 2017), available at https://www.nytimes.com/2017/05/03/us/politics/ben-carson-hud-poverty-plans.html (quoting the current HUD Secretary as advocating against providing impoverished people with "a comfortable setting that would make somebody want to say: 'I'll just stay here. They will take care of me.'").

quality of in-home supportive services than third parties because such services are of a highly personal nature and require a significant degree of trust from the person with the developmental disability in order to succeed. *Id.* at 21-24. As a result, encouraging family members to work outside the home rather than provide such services themselves reduces the quality of services provided to the person with a developmental disability and undermines the goal of ensuring that the person's placement in the family home, rather than in an institution, is successful.

B. The United States cannot explain why federal Internal Revenue Service regulations are inconsistent with its position.

In the Opening Brief on the Merits, Ms. Reilly explains that even if it were true that In-Home Supportive Services payments "substitute in the family's budget for money the parent would have earned outside the home," it does not necessarily follow that those State payments must be counted as income. Petitioner's Opening Brief on the Merits at 32-33. The Opening Brief provides the example of IRS regulations, which exclude wages received by In-Home Supportive Services providers who live in the same home with the recipient of those services from gross income for purposes of federal income tax because such payments "enabl[e] individuals who otherwise would be institutionalized to live in a family home setting rather than an institution, and . . . compensate for the additional care required." *Id.* at 33.

The amicus brief was an opportunity for the United States to respond to this point. If the United States is correct that counting In-Home Supportive Services payments as income furthers the goal of encouraging families who strive to avoid institutionalization of developmentally

disabled family members, then why would a different position be reflected in the IRS regulations? The United States provides no answer to that question in its amicus brief. Instead, it simply responds that IRS regulations do not control the calculation of income by public housing authorities. U.S. Amicus Brief at 19. That statement is true – but entirely unresponsive to Ms. Reilly's point.

C. The United States fails to engage with, or bring any expertise to, Ms. Reilly's and amici curiae's points about federal policy regarding community integration of people with developmental disabilities and the impact on low-income families in need of affordable housing.

This Court's amicus invitation was an opportunity for the United States to address the points made in Ms. Reilly's Opening Brief regarding consistent U.S. legislative recognition of the importance of keeping people with developmental disabilities out of institutions and respond to the discussions in the other amici curiae briefs filed in this case regarding the broader impact on low-income people. The United States, however, offers no response in its amicus brief.

In the Opening Brief on the Merits, Ms. Reilly explains that acknowledging the need to take particular steps to ensure that people with developmental disabilities are able to live at home rather than in an institution and the need to provide additional support to families with a developmentally disabled family member at home is not anomalous in federal law. Petitioner's Opening Brief on the Merits at 27-30. The United States does not provide any further facts or analysis to this Court on that issue in its amicus brief; in fact, the government completely fails to engage with the topic.

The United States likewise does not bring any expertise to, or even engage with, the points raised in the other amicus curiae briefs regarding the impact of its proposed reading of 24 C.F.R. § 5.609(c)(16) on low-income families. The amici curiae brief filed on behalf of the National Housing Law Project and Western Center on Law and Poverty explains that the reading of 24 C.F.R. § 5.609(c)(16) endorsed by the United States could cause families providing services to keep a developmentally disabled family member at home to lose their eligibility for subsidized housing, including during the lengthy waiting period for such housing. Amicus Curie Brief of National Housing Law Project and Western Center on Law and Poverty in support of Petitioner and Appellant at 17-19. Their brief also explains that the reading endorsed by the United States would essentially impose a financial penalty on families who provide care for a family member with a developmental disabled rather than an unrelated foster adult. *Id.* at 20. Despite the fact that HUD is the federal agency charged with responding to the need for affordable housing for low-income people, the United States has no response to these points and provides no additional insight on these topics for this Court to review.

VI. No deference is due to the United States' position on this question.

The United States concedes that the "straightforward understanding of the terms of the regulation resolves Reilly's case" (U.S. Amicus Brief at 13) and does not claim that this Court has any obligation to defer to its interpretation of 24 C.F.R. § 5.609(c)(16) under *Auer v. Robbins* or related doctrines of judicial deference. As a result, no judicial deference to the government's position is warranted.

In *Auer v. Robbins*, the U.S. Supreme Court held that a court should

generally defer to a federal agency's interpretation of its own regulations. 519 U.S. 452, 462 (1997). However, "*Auer* deference is warranted only when the language of the regulation is ambiguous." *Christensen v. Harris County*, 529 U.S. 576, 588 (2000). Here, as the United States itself admits, the "straightforward understanding of the terms of the regulation resolves Reilly's case." U.S. Amicus Brief at 13. This Court need only review the plain language of 24 C.F.R. § 5.609(c)(16), as well as the surrounding language in 24 C.F.R. § 5.609, to properly apply its terms to California's In-Home Supportive Services payments to families for the services they provide to keep developmentally disabled family members at home rather than in institutions.

In apparent recognition of this fact, the United States does not claim that this Court has any obligation to defer to its interpretation of 24 C.F.R. § 5.609(c)(16). When the United States does believe that judicial deference is merited, by contrast, it will say so directly in its amicus brief. *See, e.g.*, Brief for the United States as Amicus Curiae, *Paulk v. Georgia Department of Transportation*, Sep. 6, 2016, at 16-19, available at https://www.justice.gov/crt/file/890451/download (last visited June 14, 2019); Brief for the United States as Amicus Curiae, *G.G. v. Gloucester County School Board*, at 24-25, Oct. 28, 2015, available at https://www.justice.gov/crt/file/788971/download (last visited June 14, 2019); and Brief for the United States as Amicus Curiae, *McGann v. Cinemark USA, Inc.*, at 14, July 18, 2016, available at https://www.justice.gov/crt/file/881816/download (last visited June 14, 2019). The United States' failure to assert an entitlement to judicial deference in this case is significant. *Cf. Yamaha Corp. of Am. v. State Bd. of Equalization*, 19 Cal. 4th 1, 9 (1998) (limiting deference to an interpretation

of the State Board of Equalization where "the Board does not contend for any greater judicial weight for its annotations").

Where, as here, the language of the regulation is clear, deferring "to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Christensen*, 592 U.S. at 588. *Auer* deference is likewise inappropriate where, as here, "an 'alternative reading is compelled by . . . other indications of the [agency's] intent at the time of the regulation's promulgation.'" *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994).

In this case, deferring to the position of the United States would allow the current U.S. administration to substitute the regulation as written (which allows the goals of "States that provide families with homecare payments" to proceed unimpeded) for a new, far more limited one (that instead serves the goal of promoting "self-sufficiency"). The change would essentially eviscerate the regulation, since very few families that qualify for subsidized housing actually receive such State homecare payments as reimbursement for money they pay service providers out of pocket.

Auer deference is likewise inappropriate "when there is reason to suspect that the agency's interpretation 'does not reflect the agency's fair and considered judgment on the matter in question' . . . . or when it appears that the interpretation is nothing more than a 'convenient litigating position.'" *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012); *accord Price v. Stevedoring Services of America, Inc.*, 697 F.3d 830 (9th Cir. 2012) ("An agency can ordinarily change its litigating position from one case to another, without any party having grounds to complain that doing so violates the 'law.'"). In this case, there is no indication that the United States' position on this question is anything more than a

litigating stance. The government's amicus brief provides no nuance or insight into the question before the Court; it merely affirms its agreement with the opinion of the Court of Appeals decision being appealed in this case and with the position advocated by the Marin Housing Authority. The government's analysis does not discuss or incorporate any of the thought and judgment that went in to the drafting of the original regulation. As such, it is due no deference.

The U.S. Supreme Court is currently considering whether it should abandon the principle of *Auer* deference completely. *Kisor v. Wilkie*, 139 S.Ct. 657 (2018); docket entry reflecting question presented for review available at https://www.supremecourt.gov/docket/docketfiles/html/qp/18-00015qp.pdf (last visited June 14, 2019). Oral argument in *Kisor* took place on March 27, 2019; the U.S. Supreme Court's decision in the case will follow. Oral argument transcript available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/18-15_3314.pdf (last visited June 14, 2019). If, despite the clarity of the language of the regulation at issue here and the fact that the United States itself does not take the position that this Court owes deference to its interpretation, this Court is nonetheless inclined to defer to the position of the United States in this case, this Court should defer ruling in this case until the U.S. Supreme Court issues its opinion in *Kisor*.

VII. Conclusion

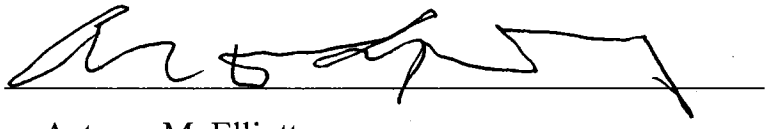
None of the arguments put forward in the Amicus Brief of the United States assist this Court's analysis of the issue on appeal before this Court in this case. As a result, and for all of the reasons presented in the briefing on the merits in this case, Ms. Reilly respectfully requests this Court to find that the developmental disability state payments exclusion

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.

Respectfully submitted,

Dated: June 14, 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 Answer to the Brief of the United States as Amicus Curiae contains 6,035 words, including footnotes, according to the computer program used to generate the document.

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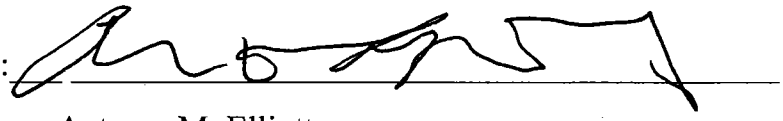
By: 

Autumn M. Elliott

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 June 14, 2019, I served the **Petitioner and Appellant's Answer to the Brief of the United States as Amicus Curiae** on the interested parties as follows.

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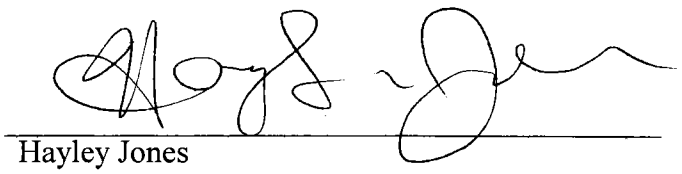
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 14, 2019, at Oakland, California.



Hayley Jones