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

REPLY IN SUPPORT OF PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

California Cases

Federal Cases

California Statutes, Rules, and Regulations

Federal Statutes, Rules, and Regulations

Other Sources

INTRODUCTION

This case merits Supreme Court review because, at its heart, it involves the important right of people with developmental disabilities such as Kerrie Reilly's daughter to be able to live with their families in federally subsidized housing and avoid unnecessary institutionalization. As such, the Court of Appeal's erroneous interpretation of the DD income exemption raises an unsettled, important question of law pursuant to California Rules of Court Rule 8.500(b)(1).

This appeal turns on the correct interpretation of 24 C.F.R. section 5.609(c)(16), which Petitioner refers to as the DD income exemption because that is what it is. The United States Department of Housing and Urban Development (HUD) established regulations to determine income for the people in subsidized housing. 24 C.F.R. § 5.609(b). HUD enumerated sixteen income exemptions. 24 C.F.R.§ 5.609(c) ("[a]nnual income does not include the following…"). The income exemption at issue in this case excludes "[a]mounts paid by a State agency to a family with a member who has a developmental disability and is living at home to offset the cost of services and equipment needed to keep the developmentally disabled family member at home." 24 C.F.R.§ 5.609(c)(16). That is an unwieldy clause. So Petitioner refers to that income exemption—specifically for families with at least one member who has a developmental disability—as the DD income exemption.

The Superior Court and Court of Appeal both erroneously concluded that the DD income exemption did not exempt from income California In-Home Supportive Services payments to individuals for services they provide to keep their family members with developmental disabilities in their homes. Both lower courts decided this case as a pure issue of law; their error now requires this Court's review.

Equally significant for this Court's review is the fact that the Court of Appeal's decision on this issue of law will have a significant, adverse statewide, and potentially nationwide, impact on thousands of low-income children and adults with developmental disabilities who live with family members in subsidized housing. Although Respondent objects to evidence of the impact of the Court of Appeal's interpretation, there can be no real dispute about the large number of people affected, the housing crisis in California, the tragic history and danger of unnecessary institutionalization of people with developmental disabilities, and the practices of other agencies—such as the Internal Revenue Service—regarding exclusion of the same income. All bear on whether this is an important issue of law that requires this Court's review.

This Court should grant review to consider the proper interpretation of the DD income exemption in the income counting rules for federally subsidized housing and settle this important question of law.

ARGUMENT

I. Whether California In-Home Supportive Services payments are excluded from income under the DD income exemption is an important question of law.

This case presents an unsettled, important question of law. Cal. R. Ct. R. 8.500(b)(1). This Court should grant review because this case will affect thousands of similarly situated individuals who will face unnecessary institutionalization. *See* Petition at 7, 17-20. As the only reported decision interpreting the DD income exemption—24 C.F.R. section 5.609(c)(16)—its impact will be felt across the nation. Respondent seems to concede as much, arguing that the Court of Appeal's decision will provide "helpful guidance" to trial courts. Answer at 21.

Respondent incorrectly argues that "review is proper *only* where an

important issue has percolated in the courts of appeal." Answer at 17, emphasis added. This point is directed to the first prong of Rule 8.500(b)(1), permitting review "when necessary to secure uniformity of decision." Respondent largely ignores the second ground for review in Rule 8.500(b)(1): "or to settle an important question of law." Petitioner seeks review under that second prong because this is an unsettled, important question of law.

Respondent obfuscates the issue on appeal, suggesting that the dispute is whether California In-Home Supportive Services payments constitute income generally. Answer at 13. That point, which Petitioners do not dispute, does not settle the issue in this case: whether these payments are excluded from subsidized housing income calculations under HUD's DD income exemption. Given the plain language of the regulation, its history and context, and another federal agency—the Internal Revenue Service—addressing the same issue in favor of Petitioner's interpretation, the answer should be "yes."

This Court has viewed the "important questions of law" requirement broadly, granting review in cases in which the impact was far less widespread than the instant case. *See, e.g.*, *Rosales v. Depuy Ace Medical Co.*, 22 Cal.4th 279, 281-282 (2000) (parties settled the case, but this Court accepted for review the interpretation of the term "die" in Labor Code as an "issue[] of continuing public importance"); *In re Silverton*, 36 Cal.4th 81, 84 (2005) (despite denying the petition for review, this Court granted review on a different issue to settle "important questions of law" concerning the discipline of attorneys who had previously been disbarred); *State of Cal. ex rel. State Lands Com. v. Superior Court*, 11 Cal.4th 50, 62 (1995) (this Court denied parties' joint motion to dismiss petition for review, exercising its discretion to grant review of "important legal issue of statewide importance" in action between a landowner and the state concerning the artificial accretion rule).

The historical mistreatment of people with developmental disabilities and subsequent remedial efforts, including the DD income exemption, is precisely what makes this case so important. *See* Petition at 17-20. Indeed, in its landmark decision involving the rights of persons with developmental disabilities and mental health disabilities[1] to live in community settings rather than in institutions, the United States Supreme Court "granted certiorari in view of the importance of the question presented to the States and affected individuals." *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 593 & 596 (1999). Likewise, the fact that the Court of Appeal decision eviscerates the DD income exemption to avoid an inequitable result to families of individuals with other disabilities—groups which do not have a corresponding HUD income exemption—squarely places this sad history at issue here. *Reilly v. Marin Hous. Auth.*, A149918, Slip Opinion ("Slip Op.") at 13-14 (Cal. Ct. App. April 25, 2018). Respondent misses the point entirely when it says "this case has nothing to do with disability discrimination." Answer at 17.

Respondent further implies that a case of first impression cannot present an important question of law. Answer at 18-19. To the contrary, this Court has granted review to resolve other newly presented issues, such as it did in accepting *Today's Fresh Start, Inc. v. Los Angeles Cty. Office of Educ.*, 57 Cal. 4th 197 (2013). That case addressed whether the California Education Code's procedures to repeal a charter school's charter was constitutional. *Id*. at 205. The Charter Schools Act of 1992 was two decades old and the section at issue was nearly a decade old by the time it reached the Supreme Court. *Id*. Nonetheless, this Court "granted review to resolve important questions of first impression." *Id.* at 211.

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[1] *Olmstead* used the phrase "mental disabilities" to describe the two plaintiffs, both of whom had intellectual disability (then called mental retardation); "L.C. ha[d] also been diagnosed with schizophrenia, and E. W., with a personality disorder." 527 U.S. at 593.

Respondent is wrong in claiming that a lack of published cases on the DD income exemption "belies any contention" that this case presents an important issue of law. Answer at 19.

Respondent also misleadingly argues that this case is a challenge to the rule-making authority of HUD under *Chevron USA, Inc. v Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). Answer at 9, 18-19. Petitioner does not challenge HUD's authority to enact the DD income exemption, the scope of this regulation, or HUD's interpretation of the regulation. There is no dispute that regulation at issue proceeded properly through the formal rulemaking process. In fact, HUD's explanation of the purpose of the DD income exemption in the Federal Register supports Petitioner's position. 60 Fed. Reg. 17388-17389 (comments on publication of Interim Rule in 1995). Specifically, HUD recognized that "…families that strive to avoid institutionalization should be encouraged, not punished….." and thus added the DD income exemption. *Id*.

That the Court of Appeal considered the rulemaking record, found it "unhelpful" (Slip Op. at 12), and reached the wrong result does not suddenly transform Petitioner's case into a *Chevron* challenge. It remains the province of this Court to analyze the plain language of the regulation, its history, and context, anew. "[I]t is 'emphatically ... the province and duty of the judicial department ... to say what the law is.'" *Powers v. City of Richmond*, 10 Cal.4th 85, 115 (1995), quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803). The Court should ignore Respondent's misguided suggestion that this case invokes *Chevron* deference and presents "a policy decision better left for HUD." Answer at 18-19.

The Court of Appeal interpreted a federal regulation and reached an incorrect result that jeopardizes the housing of Petitioner and places her daughter—and thousands of other individuals with developmental disabilities—at risk of unnecessary institutionalization. Review is necessary for this Court to

settle this important question of law.

II. This case is well-suited for Supreme Court review because it presents a pure question of law, not a factual dispute.

This case presents a pure question of law: the interpretation of a regulation. Petitioner disagrees with Respondent's characterization of many of the facts below. Answer at 9-12. Most of those mischaracterizations are unsupported and do not appear in the decision of either lower court. But the underlying facts are not at issue on appeal because the trial court granted a demurrer. Slip Op. at 3. Respondent's attempt to prejudice this Court and raise a factual dispute has no bearing on whether this Court should grant review.

"The trial court concluded that Reilly's interpretation of section 5.609(c)(16) was "wrong as a matter of law."" *Id*. (quoting the order granting Respondent's demurrer). The Court of Appeal "agree[d] with the trial court" that Petitioner was wrong as a matter of law and sustained the demurrer. *Id*. at 15. This Court should ignore Respondent's misrepresentation that a denial of a demurrer "as a matter of law" is instead a factual dispute. Answer, *passim*.

Respondent also argues that the supporting material and contextual information Petitioner offers as evidence of the statewide impact of the Court of Appeal's decision raise new issues that are waived because not presented below. Answer at 15-17, 20. As noted above, this Court has looked to statewide impact to determine whether the Petition presents an important issue of law and found important questions when fewer people are affected; evidence of the harm to thousands of affected individuals and families, the dire lack of housing for people with disabilities in California, and the IRS ruling all bear on that question.

Moreover, the scholarly articles and other material cited by Petitioner for the purpose of highlighting the background, purpose, and context of the regulation at issue are entirely proper here. *See Rivera v. Division of Industrial Welfare,* 265

Cal.App.2d 576, 589 (1968) ("Even in the relatively strict precincts of judicial inquiry, published research material on social and economic conditions is habitually used without entering it in evidence…"). Respondent completely mischaracterizes the Petition as a request for "fact finding" and an "evidentiary appeal." Answer at 15-17.

Even assuming *arguendo* that the Petition does raise new issues, this Court has discretion to consider a new issue that it deems important or integral to the issues presented. In *Cedars-Sinai Medical Center v. Superior Court*, this Court was asked to review whether tort remedies should exist for acts of spoliation despite the fact that this issue was not raised in the courts below. 18 Cal.4th 1, 6 (1998). Over that plaintiff's objection, this Court granted review, stating: "Our power of decision, of course, extends to the entire case…" *Id*. In *Cedars-Sinai*, as in the present case:

> "[t]he petition for review…squarely raised the issue [sought to be decided]…, and the issue has been extensively briefed…by numerous amici curiae. It is an issue of law that does not turn on the facts of this case, it is a significant issue of widespread importance, and it is in the public interest to decide the issue at this time."

Id.; s*ee also Fisher v. City of Berkeley,* 37 Cal.3d 644, 654-655 (1984) (Court expanded scope of review beyond facial validity of ordinance to consider additional antitrust issues raised by amici because of the "extreme importance of the issues presented"); *Lakin v. Watkins Associated Industries,* 6 Cal.4th 644, 662 (1993) (new issue not raised previously involving prejudgment interest on punitive damages is "integrally related to the principal issues on review"); *and see, People v. Birks,* 19 Cal.4th 108, 116 n. 6 (1998) (petitioner was excused for failing to argue in the court of appeal that Supreme Court precedent should be

overruled).

Petitioner's argument throughout these proceedings has been that Respondent improperly counted her California In-Home Supportive Services payments as income despite the DD income exemption. Slip Op. at 3. Because the Superior Court found that Petitioner's claims were wrong as a matter of law, she could not cure that defect. *Id*. at 4. Respondent is off-point in arguing that Petitioner cannot correct this defect through appeal, however. Answer at 19-20. If this Court grants review and finds for Petitioner, then the finding of the lower courts that she was wrong as a matter of law will be reversed, curing the defect in her underlying writ petition.

CONCLUSION

This case presents an important question of law for low-income Californians trying to keep family members with developmental disabilities out of institutions. Without review, the Reilly family will lose their home of almost two decades and Ms. Reilly's daughter will face otherwise unnecessary institutionalization. Thousands of other California families will face the same fate.

This Court should grant review and correct the Court of Appeal's error.

Respectfully submitted,

Dated: July 23, 2018

DISABILITY RIGHTS CALIFORNIA

By: _____

BEN CONWAY

CERTIFICATE OF WORD COUNT

As required by Rule 8.504, subdivision (d)(1), of the California Rules of Court, I certify that this Reply in Support of Petition for Review contains 2,320 words, including footnotes, according to the computer program used to generate the document.

Dated: July 23, 2018

DISABILITY RIGHTS CALIFORNIA

By: _____

BEN CONWAY

PROOF OF SERVICE

I am over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 350 South Bixel Street, Suite 290, Los Angeles, California 90017. On July 23, 2018, I served **Petitioner's Reply in Support of Review** 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 carrier 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 an office or a regularly utilized drop box of the overnight delivery carrier in time for overnight delivery.

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By mail: I enclosed a true copy of the document identified above in an envelope for each recipient below. 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 July 23, 2018, at Los Angeles, California.

Ben Conway