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'S OPENING BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

ISSUE 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

It is no small thing to commit to providing care and monitoring of a person with a severe developmental disability. It requires the sacrifice of other interests and pursuits to dedicate one's own labor to caring for a family member rather than place her in an institution. California's In-Home Supportive Services program assists families who nonetheless do so, and these State payments offset – though only partially – the very real costs to the rest of family.

The plain language of 24 C.F.R. § 5.609(c)(16), the regulation governing the calculation of "annual income" for families participating in federal housing subsidy programs, makes clear that the U.S. Department of Housing and Urban Development ("HUD") intended to exclude payments from a State to offset the costs to a family of caring for a family member with a developmental disability at home. It did not intend to limit the exclusion to reimbursement of a family's out-of-pocket expenses or other money owed by the family. HUD included phrases such as "reimbursement of out-of-pocket expenses" in other portions of the regulation, but did not

do so in 24 C.F.R. § 5.609 (c)(16), indicating that no such limited meaning was intended.

The regulation at issue in this case provides that public housing authorities must exclude payments made to family caregivers of individuals with developmental disabilities from a family's "annual income" calculation. The regulation itself demonstrates that this exclusion is one of many instances in which HUD has chosen to exclude a particular type of payment to families in order to avoid reducing the effectiveness of a specific public policy effort – in this case, protecting the ability of people with developmental disabilities to live at home with their families.

STATEMENT OF FACTS AND STATUTORY FRAMEWORK

Developmental disabilities are life-long mental or physical impairments that arise in childhood. Diagnostic and Statistical Manual of Mental Disorders, ("DSM-V") p.33 (Am. Psychiatric Ass'n 5th ed.) (2013); Cal. Welf. & Inst. Code § 4512(a). People with developmental disabilities have particular difficulty in intellectual functioning and adaptive functioning, such as communication, social participation and independent living. DSM-V at 33; Cal. Welf. & Inst. Code § 4512(*l*)(1).

Petitioner Kerrie Reilly lives with her adult daughter, who has a "severe developmental disability, such that she requires constant supervision." *Reilly v. Marin Hous. Auth.,* A149918, Slip Opinion at 1 (Cal. Ct. App. April 25, 2018) ("*Reilly*"). That "constant supervision" and care is provided on a daily basis by Ms. Reilly herself. *Id.*

Ms. Reilly and her daughter "participate in a state social services program designed to help incapacitated persons avoid institutionalization": the State of California's In-Home Supportive Services program. *Reilly* at 1; Cal. Welf. & Inst. Code § 12300(a); *Miller v. Woods*, 148 Cal.App.3d 862,

867 (1983) (recognizing that 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."). Through that program, the State makes payments for particular supportive services (such as bathing, oral hygiene, and grooming) for people who are unable to perform those services themselves and who cannot safely remain in their homes unless those services are provided. Cal. Welf. & Inst. Code § 12300. The State pays the person providing the service, whether they are a family member or a third party, directly. *Reilly* at 5.

In order for a person to be deemed eligible for In-Home Supportive Services, a licensed health care professional must certify that the person "is unable to perform some activities of daily living independently, and that without services to assist him or her with activities of daily living, the applicant or recipient is at risk of placement in out-of-home care." Cal. Welf. & Inst. Code § 12309.1. Local county social services departments then make a comprehensive assessment of applicants' need for In-Home Supportive Services in order to avoid being placed in an institution. Cal. Welf. & Inst. Code §§ 12309, 12309.1. The needs of people receiving In-Home Supportive Services are re-assessed at least once every twelve months. Cal. Welf. & Inst. Code § 12301.1(b)(1).

Local social services departments authorize the individuals they find to be at risk of institutionalization to receive services. Cal. Dep't Soc. Serv.'s Manual of Policies and Procedures[1] § 30-761 (providing that

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[1] 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

"Services shall only be authorized when ... [a] needs assessment establishes a need for the services ... [and] ... [p]erformance of the service by the recipient would constitute such a threat to his/her health/safety that he/she would be unable to remain in his/her home."). The precise number of hours of services a particular individual may receive are based on California Department of Social Services' hourly task guidelines. Cal. Welf. & Inst. Code § 12301.2. When a person needs constant supervision (as is the case with Ms. Reilly's daughter), payments for "protective supervision" may be authorized after review of all of the evidence regarding the need for protective supervision, including a physician's certification of the need for constant supervision. Cal. Welf. & Inst. Code § 12301.21; Cal. Dep't Soc. Serv.'s Manual of Policies and Procedures § 30-757.173 (authorizing protective supervision where "a need exists for twenty-four-hours-a-day of supervision in order for the recipient to remain at home safely").

As the Court of Appeal acknowledged, the In-Home Supportive Services program will pay families for up to 65 hours per week in attendant care. *Reilly* at 5; Cal. Welf. & Inst. Code § 12303.4(b) (providing that the 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, generally a 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." Cal. Dep't Soc. Serv.'s

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Policies and Procedures, available at http://www.cdss.ca.gov/inforesources/Letters-Regulations/Legislation-and-Regulations/Adult-Services-Regulations (last visited September 28, 2018).

Form SOC 825,

http://www.cdss.ca.gov/cdssweb/entres/forms/English/soc825.pdf (last visited September 28, 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." In other words, a family receiving these funds must commit to ensuring that their family member will receive round-the-clock supervision, even though the vast majority of those hours are uncompensated.

The rent for the apartment where Ms. Reilly and her daughter live is subsidized through the federal Housing Choice Voucher program. *Reilly* at 1. Local public housing authorities receive funding from the U.S. Department of Housing and Urban Development ("HUD") and administer the Housing Choice Voucher program (commonly referred to as "Section 8") for each locality. 24 C.F.R. § 982.1(a). The Marin Housing Authority, the Respondent in this matter, administers the voucher subsidizing Ms. Reilly and her daughter's apartment. *Reilly* at 1.

In the Housing Choice Voucher program, the portion of the rent paid by the family varies depending on the family's income. "[T]he family generally pays 30 percent of adjusted monthly income in rent." 24 C.F.R. § 982.1(a)(3). HUD regulations define what funds coming into the household are included and what are excluded from a family's "annual and adjusted income" for this purpose. 24 C.F.R. § 5.601 et seq.

Among other exclusions, the regulations provide that "[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" are excluded from the definition of "annual income." 24 C.F.R. § 5.609(c)(16).

This provision is referred to throughout Petitioner's Opening Brief interchangeably as 24 C.F.R. § 5.609(c)(16) or as "the developmental disability State payments exclusion."

Notwithstanding the language of 24 C.F.R. § 5.609(c)(16), the Marin Housing Authority included the payments that Ms. Reilly received from the State of California to care for her daughter through the In-Home Supportive Services program in calculating her "annual income," and the household's rent level reflected those payments. *Reilly* at 2-3. Ms. Reilly asked the Marin Housing Authority to recalculate her rent and rectify its past failure to exclude the In-Home Supportive Services payments by letter dated April 7. 2015. *Id.* at 2. The Marin Housing Authority refused to do so, and instead moved forward with proceedings to terminate the Reilly family's housing voucher. *Id.* at 2-3.

PROCEDURAL HISTORY

On October 26, 2015, Ms. Reilly filed a petition for writ of mandate to compel the Marin Housing Authority to exclude the payments from the State's In-Home Supportive Services program from the housing authority's calculation of the household's annual income. *Reilly* at 3. The Superior Court upheld Marin Housing Authority's demurrer to the writ petition, holding that Ms. Reilly's interpretation of the developmental disability State payments exclusion was "wrong as a matter of law." *Id.* That decision was upheld by the Court of Appeal. *Id.* at 15. Both lower courts decided this matter as a pure legal issue; their error now requires this Court's de novo review of this question of law. *Imperial Merch. Servs., Inc. v. Hunt*, 47 Cal. 4th 381, 387, 212 P.3d 736, 740 (2009) (holding that the Court's review of questions of statutory construction is de novo).

ARGUMENT

I. The decision below is contrary to the plain language of the regulation.

The plain language of 24 C.F.R. § 5.609(c)(16) requires public housing authorities to exempt payments made to a family for the care of a developmentally disabled family member at home through programs such as California's In-Home Supportive Services program. In interpreting a statute or regulation, the Court must first "scrutinize the actual words of the statute, giving them a plain and commonsense meaning." *Gomez v. Superior Court*, 54 Cal. 4th 293, 300, 278 P.3d 1168, 1172 (2012) (citations omitted).

The developmental disability State payments regulation provides that public housing authorities must exclude the following from their calculation of a family's annual income:

> 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.

24 C.F.R. § 5.609(c)(16).

There can be no question that the funds at stake in this case were "paid by a State agency," since In-Home Supportive Services is a state-wide program of the State of California. Nor can there be any question that the funds were paid "to a family with a member who has a developmental disability and is living at home." Marin Housing Authority does not dispute that Ms. Reilly's daughter has a severe developmental disability, nor does it dispute that she lives at home with her mother. It is likewise undisputed that Ms. Reilly's care qualifies as "services ... needed to keep the

developmentally disabled family member at home." The Court of Appeal acknowledged that Ms. Reilly's daughter "requires constant supervision" and qualifies for a State program for "individuals incapable of caring for themselves." *Reilly* at 1.

A plain reading of the language of the regulation also compels the conclusion that the State's In-Home Supportive Services payments are "to offset the cost" of those services needed to keep Ms. Reilly's daughter at home. Due to the severity of her daughter's developmental disability, the costs to Ms. Reilly of keeping her adult daughter at home, rather than sending her to an institution, are steep. Because her daughter needs "constant supervision," Ms. Reilly must provide care and oversight of her 24 hours a day.

Providing care and supervision of a person with a severe developmental disability in lieu of putting him or her in an institution is no light duty. It is all the more serious of an undertaking when one commits, as Ms. Reilly has done, to doing so all day, every day. Family caregivers for people with severe developmental disabilities sacrifice their own time, freedom, and energy to the goal of keeping their family member in the home. *See, e.g.*, Henry G. Chambers & Jill A. Chambers, *Effects of Caregiving on the Families of Children and Adults with Disabilities*, 26 Physical Med. & Rehabilitation Clinics of N. Am. 1, 11 (2015), available at https://www.pmr.theclinics.com/article/S1047-9651(14)00101-6/pdf (last visited September 28, 2018) (recognizing that parents continuing to care for adult children with disabilities "can feel chronically exhausted, financially, physically and emotionally, from the years of direct caregiving and management of needs on multiple fronts with little time for self-care and adequate rest"); and Nancy P. Kropf & Roberta R. Greene, *Life Review*

with Families who Care for Developmentally Disabled Members: A Model, 21 J. Gerontological Soc. Work, 25, 29 (1993), available at https://scholarworks.gsu.edu/ssw_facpub/19/ (last visited September 28, 2018) (citing academic studies of the "multiple demands" faced by parents who continue to care for an adult child with a developmental disability).The payments that the State of California makes to such caregivers through the In-Home Supportive Services program offset – albeit incompletely – the very real costs to the family of providing such care.

The Court of Appeal's finding is premised on the idea that those costs are *not* real because they are incurred within the family rather than by third parties. With respect to Ms. Reilly, the Court found that, despite the fact that Ms. Reilly had committed herself to 24-hour care for her daughter, "the cost of services that Reilly provides to her daughter is, to Reilly, zero." *Reilly* at 10. "And because Reilly's services are free to the family, the family incurs no 'cost of services or equipment …' that the [In-Home Supportive Services] payments could be said to offset." *Id.*

Such an interpretation belies the heavy load that Ms. Reilly and others who care for family members with severe developmental disabilities at home carry, particularly those whose care must be constant. The cost of the services that such people provide to their family is not "zero" to them. And the fact that the In-Home Supportive Services program authorizes payments to people who are caring for a family member in the same household is a tacit acknowledgement of that cost. What other justification could there be for the State to pay family members for their services, if not to offset what the State recognizes is a real cost to those individuals?

The dictionary definitions for "cost" and "offset" identified by the Court of Appeal are consistent with this plain language reading of the

regulation. The Court of Appeal acknowledged that "cost" may mean "a loss or penalty incurred esp[ecially] in gaining something," but that it can also mean "price." *Reilly* at 9. But it just as true to speak in terms of the *loss* of time and freedom that Ms. Reilly has incurred by committed to 24-hour care of her adult daughter as it is to say that this is the *price* she has paid for keeping her daughter at home. And as the Court of Appeal recognized, the word "offset" is no different: "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* at 8 (citations in original).

The language of 24 C.F.R. § 5.609(c)(16) means what it says: payments made 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 are to be excluded from a family's "annual income." The only way to find that payments received through the In-Home Supportive Services program do not qualify for this exemption is to read in a limitation (i.e., "offset the costs of services" must be reimbursement for financial expenses and not other costs) that has no support in the language itself.

II. The language of the regulation is explicit in cases where only reimbursements for financial expenses are excluded, and no such language appears in the developmental disability State payments exclusion.

The Court of Appeal erred in finding that the developmental disability State payments exclusion would cover only State payments to

offset "amounts of *money* that the Reilly family pays." *Reilly* at 11 (emphasis added). There is nothing in the language of the developmental disability State payments exclusion to limit its coverage to reimbursement for such out-of-pocket expenses. However, such limiting language *does* appear elsewhere in the surrounding regulation.

Subsection (c) of 24 C.F.R. § 5.609, where the developmental disability State payments exclusion appears, is a list of sixteen different types of payments to families that must be excluded from a public housing authority's calculation of "annual income." The language in the rest of the list is explicit in instances where only reimbursements for financial expenses may be exempted. Because no such language appears in the developmental disability State payments exclusion, no limitation to out-of-pocket payments may be read into it.

When 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, 422 P.3d 531, 541 (2018) (citation omitted); *Scher v. Burke*, 3 Cal. 5th 136, 144–45, 395 P.3d 680, 685–86 (2017), as modified on denial of reh'g (Aug. 9, 2017) ("As a general rule, when the Legislature uses a term in one provision of a statute but omits it from another ... we generally presume that the Legislature did so deliberately, in order to convey a different meaning.") (citation omitted). In *Wasatch Property Management v. Degrate*, for instance, the California Legislature stated explicitly in the language of a bill that the reach of one section of the bill was limited to rent-controlled jurisdictions. 35 Cal. 4th 1111, 1118, 112 P.3d 647, 650 (2005), as modified (July 27, 2005). This Court declined to read a similar limitation into a different section of the bill, holding that "[h]ad the Legislature intended to also limit the scope of [the

latter section] in the same manner, it would have included similar language doing so." *Id.*

In this case, one of the other exclusions in the list covers payments to a family "*specifically for or in reimbursement of out-of-pocket expenses* incurred" for certain publicly assisted programs. 24 C.F.R. § 5.609(c)(8)(iii) (emphasis added). Another exclusion addresses "[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) (emphasis added). In other words, where only reimbursements for out-of-pocket expenses (i.e., situations where the family has to pay money, or would be obligated to pay money, to a third party) are covered, the regulation says so. It does it in plain language, using words such as "in reimbursement of out-of-pocket expenses."

The developmental disability State payments exclusion, by contrast, makes no reference to "out-of-pocket," "expenses," "reimbursement," or similarly limiting language found in other exclusions in the same list. As was the case with *Degrate*, if the body drafting the HUD regulation intended to also limit the scope of the developmental disability State payments exclusion to reimbursement for financial expenses, "it would have included similar language doing so." The fact that it did not compels the conclusion that no such limitation was intended.

The Court of Appeal, then, had the rule backward. The Court of Appeal found that, because one item on the same list (24 C.F.R. § 5.609(c)(4)) referred to amounts "*specifically for or in reimbursement of* the cost of medical *expenses*" (emphasis added), the drafters of the regulation must have *also* intended to limit the developmental disability State payments exclusion in the same way, even though the latter provision

does not contain the same limiting language. *Reilly* at 10. Instead the reverse is true. Subsection (c)(4) of 24 C.F.R. § 5.609 refers to "reimbursement" and "expenses," which means that the exclusion is limited to reimbursement of or other payment for expenses. Subsection (c)(16) of 24 C.F.R. § 5.609 contains no such language, which means that it is not limited to reimbursement of expenses. The Court of Appeal's finding to the contrary was in error.

The Court of Appeal extended the error by looking at an item in a different list in 24 C.F.R. § 5.609, subsection (b). *Reilly* at 10. Subsection (b) describes payments that must be *included* in a public housing authority's calculation of rent and is of lesser analytical value than reference to the subsection (c) list. The Court of Appeal focused on one item in the subsection (b) list, 24 C.F.R. § 5.609 (b)(6)(ii),[2] which was created to address the situation where a welfare recipient's income varies based on actual rent – a complex event for tenants whose actual rent is supposed to vary based on their income, and one that has little bearing on the developmental disability State payments exclusion. *Id.* Again, the Court of Appeal had the analysis backwards, finding that, because 24 C.F.R. § 5.609(b)(6)(ii) contains additional language to make it clear that the regulation concerns concrete amounts of money, 24 C.F.R. § 5.609(c)(16), which does not have such language, must also be limited in the same way. *Id.* Again, the reverse is true – the fact that the drafters of 24 C.F.R. § 5.609 were highly specific when they intended to address concrete amounts of money, and did not include *any* such language in subsection (c)(16),

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[2] The Court of Appeal mis-cites this as 24 C.F.R. § 5.609(b)(6)(**B**)(**ii**) but the quoted language is in subsection (b)(6)(**ii**).

militates against reading that type of limitation into to the developmental disability State payments exclusion.

The Court of Appeal found that the developmental disabilities State payments exclusion was limited to reimbursement for "amounts of money that the Reilly family pays" on the grounds that "[g]enerally '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,'" and the word "cost" appears two other times in provisions that specifically address amounts of money. *Reilly* at 10-11 (citing *People v. Valencia*, 3 Cal.5th 347, 381, 397 P.3d 936, 960-61, (2017)) (emphasis added). However, this canon of statutory instruction is inapplicable here.

To begin with, the canon may only be applied where the operative word or phrase is actually the same throughout the statute. Here, the word "cost" cannot be analyzed independently of the phrases in which it appears in the regulation, and it appears in different terms each time. The Court of Appeal looked at the terms "cost of shelter and utilities" (24 C.F.R. § 5.609(b)(6)(ii)) and "cost of medical expenses" (24 C.F.R. § 5.609(c)(4)) elsewhere in the regulation and applied their meaning to the term "cost of services and equipment" (24 C.F.R. § 5.609(c)(16)). *Reilly* at 10. But each of these terms is discrete, and requires each word in the phrase to having meaning. The Court of Appeal admitted as much when it said that its conclusion about the meaning of the phrase "cost of medical expenses" was "because 'medical expenses' are specific amounts paid for medical products or services." *Id.* In other words, the words "medical expenses" are necessary to give meaning to the term "cost of medical expenses." As a result, "cost of medical expenses" (and similarly, "cost of shelter and utilities") must be reviewed as discrete phrases. They are *different* terms

from the phrase "cost of services and equipment" used in the developmental disability State payments exclusion, and the canon of statutory interpretation cited by the Court of Appeal does not apply.

The phrases are different because the items in the 24 C.F.R. § 5.609 regulation were *meant* to be different. In the *Valencia* case cited by the Court of Appeal, it was natural to find that a statute using the word "petitioner" to mean "a person who would have been guilty of a misdemeanor under Proposition 47 and has asked to be resentenced" eight times would not mean something different by the word "petitioner" in a ninth instance. 3 Cal.5th at 381, 397 P.3d at 960-61. Here, by contrast, there is good reason to distinguish among the provisions in the regulation.

The very purpose of the list of exclusions in 24 C.F.R. § 5.609(c) is to describe discrete, segregable categories of payments in individual detail. There is no obligation to interpret different portions of a statute or regulation "in a similar manner when their language indicates that they should be interpreted independently." *Gomez*, 54 Cal. 4th at 304, 278 P.3d at 1175 (finding that the California legislature used different language to indicate that a commissioner's authority was not limited in one subdivision of a statute in the manner it was limited in other subdivisions). Here, the language of the regulation is clear that each paragraph was drafted to describe a separate and particular type of payment. The drafters of the regulation used specific language (such as "reimbursement of out-of-pocket expenses") to indicate where only reimbursement for out-of-pocket expenses was covered (such as 24 C.F.R. § 5.609(c)(8)(iii)) and did not use such language where, as with the developmental disability State payments exclusion, something broader was intended. As was the case with *Gomez*, the separate items in the list should be analyzed with due regard to their

own terms.

In an unpublished decision, the federal Fifth Circuit Court of Appeals concluded without analysis that the term "costs of services and equipment" in the developmental disability State payments exclusion meant "out of pocket expenses." *Anthony v. Poteet*, 306 Fed.Appx. 98, 102 (5th Cir. 2009). When the plain language of the regulation and the terms used in the other items listed in 24 C.F.R. § 5.609(c) are attended to, however, it becomes clear that the drafters of the regulation knew how to make it clear when only "reimbursement of out-of-pocket expenses" was covered, and that they meant to give the developmental disability State payment exclusion no such limitation.

III. The content of the other exclusions in the regulation indicate that the developmental disability State payments exclusion should be given its plain-language meaning.

The content of the remainder of the regulation also supports giving the developmental disability State payments exclusion its plain-language meaning. Subsection (c) of 24 C.F.R. § 5.609 is a laundry list of sixteen highly specific types of payments to families that must be excluded from a public housing authority's calculation of "annual income." The exclusions include one-off payments (24 C.F.R. § 5.609(c)(3), (9), and (14)) and funds received by children or students (24 C.F.R. § 5.609(c)(1), (6), and (11)). Most of the exclusions, however, cover specific payments made by the government to further a particular public policy or goal that would be at least partially hindered if receipt of the payments resulted in a rent increase for the family.

The following types of payments are all excluded from the calculation of "annual income":

- "Payments received for the care of foster children or foster adults," 24 C.F.R. § 5.609(c)(1);
- "The special pay to a family member serving in the Armed Forces who is exposed to hostile fire," 24 C.F.R. § 5.609(c)(7);
- "Amounts received under training programs funded by HUD," 24 C.F.R. § 5.609(c)(8)(i);
- Amounts that "are set aside under a Plan to Attain Self-Sufficiency," 24 C.F.R. § 5.609(c)(8)(iii);
- "Amounts received ... by a resident for performing a service for the P[ublic] H[ousing] A[uthority] or owner" such as "fire patrol, hall monitoring, lawn maintenance, resident initiatives coordination, and serving as a member of the PHA's governing board," 24 C.F.R. § 5.609(c)(8)(iv);
- "Amounts ... received under employment training programs with clearly defined goals and objectives," 24 C.F.R. § 5.609(c)(8)(v);
- "Reparation payments paid by a foreign government pursuant to claims filed under the laws of that government by persons who were persecuted during the Nazi era," 24 C.F.R. § 5.609(c)(10); and
- "Adoption assistance payments," 24 C.F.R. § 5.609(c)(12).

Each of these exclusions covers payments made by the federal or state (or, in one case, a foreign) government in order to further a particular public policy (such as the defense of our nation by individuals members of the Armed Forces). Foster care payments, for instance, incentivize people to take in foster children, in furtherance of a public policy promoting the care of children within families in private homes rather than in institutions when the children's own parents are incapable of caring for them.

The developmental disability State payments exclusion, 24 C.F.R. § 5.609(c)(16), falls into this category. The language of the regulation is explicit that it addresses payments intended to further a particular public policy: payments from the State are excluded from "annual income" to the extent that they further the public policy of "keep[ing] the developmentally disabled family member at home" rather than in an institution. *Id.*

Each of the sixteen exclusions listed in 24 C.F.R. § 5.609(c) mean that the specified payment to the family does not count as "annual income." As a result, receiving that particular type of payment does not increase the amount of rent that the family is required to pay each month. Were it otherwise, a family who accepted an adoption assistance payment or a stipend for assisting with fire patrol would find the benefit of receiving the payment partially diminished by the fact that the family's rent would increase. Excluding such payments from the calculation of "annual income" means that families who receive such payments will *not* see a corresponding increase in rent. They are able to realize the full benefit of the payment, and the public policy goal is allowed to proceed unimpeded. The list of exclusions in 24 C.F.R. § 5.609(c), in other words, is a method of ensuring that the way that a public housing authority determines a family's rent level does not stand in the way of these particular policy goals.

For this reason, the Court of Appeal erred in its analysis of the equity of the regulation. The Court of Appeal started with the presumption that "a family with a developmentally disabled family member and a family with a member disabled by severe medical problems" needed to be treated equally under the developmental disability State payments exclusion. *Reilly* at 13. Consequently, it found that the developmental disability State

payments exclusion could not mean what the plain language says it does, because that reading would result in different treatment of the two types of families. A family receiving State payments because someone in the household was caring for a family member with a developmental disability would not receive a rent increase, but a family receiving payments for caring for a family member with a different type of disability would.

The structure of the list of exclusions in 24 C.F.R. § 5.609(c), however, makes it clear that such disparities are very much intended. Amounts paid for doing lawn maintenance at a private golf course count as "annual income"; amounts paid for doing lawn maintenance for the public housing authority do not. Income received from service in the Armed Forces counts as "annual income," but the "special pay to a family member serving in the Armed Forces who is exposed to hostile fire" does not. Families receiving payments for foster children or adopted children are treated differently than other families. The regulation treats families receiving each of the types of government payments listed in 24 C.F.R. § 5.609(c) differently because doing so allows the public policy behind those payments to proceed unimpeded.

IV. HUD was explicit that it intended to shield families receiving these payments from receiving rent increases by excluding the payments from "annual income."

Should the Court find that the language of the regulation permits more than one reasonable interpretation, it may properly consider "the statute's purpose, legislative history, and public policy" as interpretive aids. *Coalition of Concerned Communities, Inc. v. City of Los Angeles,* 34 Cal.4th 733, 737, 101 P.3d 563, 565 (2004). Here, even if the developmental disability State payments exclusion was not explicit about

the goal of "keep[ing] the developmentally disabled family member at home" rather than in an institution (24 C.F.R. § 5.609(c)), and even if the exclusion did not appear in a long list of other types of payments designed to promote public policy goals, there would be no need to speculate about HUD's intent. HUD explained the purpose of the developmental disability State payments exclusion in a statement in the Federal Register:

> 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) (emphasis added).[3] The purpose of the exclusion was to allow families receiving "homecare payments" (such as California's In-Home Supportive Services payments) to receive the full "encouragement" intended by the homecare payment program, and not to experience a corresponding "punishment" of a rent increase (as is inevitable when such payments are included in the calculation of the family's "annual income").

The Court of Appeal missed the significance of this explanation from HUD because it failed to analyze the structure and content of the 24 C.F.R. § 5.609(c) list of exclusions. *Reilly* at 12 (finding HUD's explanation "too summary to be enlightening"). Consequently, the fact that the developmental disability State payments exclusion is one of a number

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[3] The language that was promulgated as Section 5.609(c)(16) was first published as an interim rule, and the explanation of the purpose appears with the interim rule. *Reilly* at 11, citing 60 Fed. Reg. at 17391-17393.

of ways that HUD ensures that its method of calculating rent does not undercut the goals of certain specified programs played no part in the Court of Appeal's analysis. The Court of Appeal failed to recognize that the HUD statement that "the Department is adding this additional exclusion to income" because "families that strive to avoid institutionalization *should be encouraged, not punished*" was an acknowledgement that an increase in rent can undermine the purposes of homecare payments to such families, and that when such payments are excluded, the public policy goals behind those payments can operate unimpeded.

V. The federal government has acknowledged the importance of the public policy of keeping people with developmental disabilities in their home given the historical segregation, abuse, and neglect of people with developmental disabilities in institutions.

The fact that the developmental disability State payments exclusion treats families keeping a family member with a developmental disability in the home rather than an institution differently than other families caring for a member with medical issues is not a result to avoid. Acknowledgement of the need for differential treatment of people with developmental disabilities, and provision of particular support for their ability to live in the community, is not anomalous in the context of modern federal law.

From 1975 forward, Congress has enacted a number of statutes that created particular programs for people with developmental disabilities. Developmentally Disabled Assistance and Bill of Rights Act, Pub. L. 94-103, 89 Stat. 486 (1975); Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments Act of 1978, Pub. L. 95-602, 92 Stat. 2955; Developmental Disabilities Act of 1984, Pub. L. 98-527, 98 Stat. 2662; Developmental Disabilities Assistance and Bill of Rights Act

Amendments of 1987, Pub. L.100-146, 101 Stat. 840; Developmental Disabilities Assistance and Bill of Rights Act of 1990, Pub. L. 101-469, 104 Stat. 1090. Just a year before HUD adopted the regulation at issue here, Congress reaffirmed that "the goals of the Nation properly include the goal of providing individuals with developmental disabilities with the opportunities and support to ... live in homes and communities." Developmental Disabilities Assistance and Bill of Rights Act Amendments of 1994, Pub. L. 103-230 § 101(1)(10), 108 Stat. 284.

Congress has repeatedly passed such laws because it has found 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). This "greater risk" is due to the historical bias against people with developmental disabilities and their consequent exclusion from mainstream society. *See, e.g., Buck v. Bell*, 274 U.S. 200, 208 (1927) (upholding statute that permitted forced sterilization without due process of the plaintiff and her mother for being "feebleminded.") Until the mid-twentieth century, the only care and treatment "services" available for people with developmental disabilities were in institutions. Gretchen Engquist *et al.*, Center for Health Care Strategies, Inc., *Trends and Challenges in Publicly-Finances Care for Individuals with Intellectual and Developmental Disabilities*, 4 (2012), available at http://www.chcs.org/media/IDD_Service_Delivery_Systems_082812.pdf (last visited September 28, 2018). While at these institutions, people with developmental disabilities were often subjected to abuse and neglect and even inhumane medical experiments and forced sterilization. *See, e.g.,* "Remembering an Infamous New York Institution," National Public Radio

(Mar. 7, 2008), available at https://www.npr.org/templates/story/story.php?storyId=87975196 (last visited September 28, 2018); Los Angeles Times Editorial Board, *Let's compensate victims of California's forced sterilization program – quickly, before they die* (May 18, 2018), available at http://www.latimes.com/opinion/editorials/la-ed-senate-bill-eugenics-compensation-20180518-story.html (last visited September 28, 2018).

By contrast, Congress has found that "with education and support, communities can be accessible to and responsive to the needs of individuals with developmental disabilities and their families and are enriched by full and active participation in community activities, and contributions, by individuals with developmental disabilities and their families." 42 U.S.C. § 15001(c)(7). It has further found 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.C. § 15001(a)(9). And it has passed legislation "to assure that individuals with developmental disabilities and their families . . . have access to needed community services, individualized supports, and other forms of assistance that promote self-determination, independence, productivity, and integration and inclusion in all facets of community life." 42 U.S.C. § 15001(b). The result of the plain language reading of the developmental disability State payments exclusion – that no family receiving In-Home Supportive Services payments to offset the cost of keeping a family member with a developmental disability at home will receive a corresponding rent increase – is utterly reasonable and is part of a broader effort to redress the historical exclusion of people with developmental disabilities and allow them a place in the community and in

their own family homes.

VI. The developmental disabilities State payments exclusion properly excludes both payments to family members and payments to third parties from the calculation of "annual income."

The Court of Appeal's concern that the plain-language reading of the developmental disability State payments exclusion would result in different treatment of "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," was also in error. *Reilly* at 13. In fact, the plain language of the regulation treats those families the same.

In both cases, the family's rent will not increase if amounts 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 a situation where "a third party cares for the disabled person," the family's rent stays the same, because the payment do not affect the family's "annual income." Likewise, in a situation "in which a parent does," the family's rent also stays the same, because under the plain language of the regulation, the State payments are still not "annual income" even though they are paid to the family rather than to a third party.

The Court of Appeal erred because it assumed that In-Home Supportive Services "payments substitute in the family's budget for the money the parent would have earned outside the home," and that therefore those State payments must necessarily "substitute for those foregone wages in being counted as income." *Reilly* at 13. Both parts of that assumption are invalid.

To begin with, the In-Home Supportive Services program is designed to pay for only a portion of the care that people with developmental disabilities living at home need. People who are authorized to receive Protective Supervision always have a significant amount of unmet need. Protective Supervision is only authorized when "a need exists for twenty-four-hours-a-day of supervision in order for the recipient to remain at home safely." Cal. Dep't Soc. Serv.'s Manual of Policies and Procedures § 30-757.173(a). A person needing 24-hour supervision would need care for 720 hours in a thirty-day month. However, the In-Home Supportive Services program has a statutory cap of 283 hours per month in attendant care, leaving a large shortfall. Cal. Welf. & Inst. Code §§ 12303.4(b); 14132.95(g). Additionally, there are people with developmental disabilities who need 24-hour care but for reasons that disqualify them from receipt of Protective Supervision, such as a person with cerebral palsy who is not physically able to cause harm to himself but cannot be left alone in case of fire, due to unpredictable bathroom needs, or other reasons. *See* Cal. Dep't Soc. Serv.'s Manual of Policies and Procedures § 30-757.172 ("Protective Supervision shall not be authorized: (a) For friendly visiting or other social activities; (b) When the need is caused by a medical condition and the form of the supervision required is medical. (c) In anticipation of a medical emergency; (d) To prevent or control anti-social or aggressive recipient behavior. (e) To guard against deliberate self-destructive behavior, such as suicide, or when an individual knowingly intends to harm himself/herself.") People in this situation likewise have a tremendous gap between the hours compensated by In-Home Supportive Services and the actual hours of care needed. And even people with developmental disabilities who do not need 24-hour care are

likely to have unmet need because the In-Home Supportive Services program does not cover a number of services that are a necessary part of the job of a caregiver, such as accompaniment to non-medical appointments like going to the bank, purchasing clothing, or getting a haircut. *See* Cal. Dep't Soc. Serv.'s Manual of Policies and Procedures § 30-757 (listing covered services).

As a result, a family who provides services to a family member with a developmental disability at home is frequently only paid for a fraction of the time they spend. The payments in such cases cannot be said to "substitute in the family's budget" for money that would otherwise be earned outside the home, where people are compensated for every hour they work.

Moreover, there is no evidence that a family member who is paid to provide care through In-Home Supportive Services to care for a family member with a disability could necessarily instead choose to work outside the home; nor is there evidence that families who hire a third party to provide care are necessarily using the time to earn outside income. The In-Home Supportive Services program is designed to provide payments based on the authorized needs of the individual and the State's estimates of how long meeting those specific needs will take. Cal. Welf. & Inst. Code § 12301.2. It is not designed to meet the schedule of someone working a regular job outside the home. Whether or not it does so (i.e., whether sufficient hours are allotted to allow a family member to accept outside employment, and whether the authorized caregiving tasks may be carried out during those hours or need to be more spread out) is purely incidental.

But even if the Court of Appeal were correct that In-Home Supportive Services "payments substitute in the family's budget for the

money the parent would have earned outside the home," it would not necessarily follow that those State payments must "substitute for those foregone wages in being counted as income." *Reilly* at 13. For example, the Internal Revenue Service excludes 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 taxes as "Difficulty of Care" payments under Section 131(c) of the Internal Revenue Code. Cal. Dep't Soc. Serv.'s, Live-In Provider Self-Certification Information, http://www.cdss.ca.gov/inforesources/IHSS/Live-in-provider-self-certification (last visited September 28, 2018). In a 2014 Service Notice, the Internal Revenue Service stated 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 ... compensate for the additional care required." I.R.S. Service Notice 2014-7, 2014-4 I.R.B. 445 (January 3, 2014), (quoting 42 C.F.R. § 440.180), available at https://www.irs.gov/irb/2014-4_IRB#NOT-2014-7 (last visited September 28, 2018).

In this case, HUD has made it clear, through the language of the regulation and the legislative history, that *any* State payments to families to offset the costs of keeping a family member with a developmental disability at home are not "annual income" for the purposes of rent calculations. There is no valid reason to read a limitation into the developmental disability State payments exclusion to reimbursement of out-of-pocket expenses or other "amounts of money that the Reilly family pays" that HUD did not intend to be there.

CONCLUSION

Each of the premises underlying the decision of the Court of Appeal is in error. The "costs" to the family of caring for a family member with a developmental disability are real, and are ones that the State of California offsets by its payments to family members who provide that care. The correct rule of statutory interpretation is that specific language (such as "reimbursement" or "expenses") in some items in a list means that the drafters knew how to use that language where they intended such meaning, and intended something *different* when they chose not to. And the language, structure, and content of the regulation, as well as the legislative history and other context, make it clear that the regulation is intended to ensure that the policy of encouraging, rather than penalizing, families who keep a family member with a developmental disability at home rather than in an institution proceeds unimpeded. The regulation does so by ensuring that accepting homecare payments will not cause a rent increase for families that participate in the Housing Choice Voucher program.

Petitioner respectfully requests this Court to find that the developmental disability State payments exclusion regulation means what it says it does, 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 covered by that exclusion.

Dated: September 28, 2018

Respectfully submitted,

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 Reply in Support of Petition for Review contains 8,818 words, including footnotes, according to the computer program used to generate the document.

Dated: September 28, 2018

By: 
Autumn M. Elliott

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 September 28, 2018, I served the foregoing document(s):

PETITIONER'S OPENING BRIEF

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 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.

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

Executed on September 28, 2018, at Oakland, California.

Hayley Jones