Case No. S249593

IN THE SUPEME 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

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AMICUS CURIAE BRIEF OF NATIONAL HOUSING LAW PROJECT AND WESTERN CENTER ON LAW AND POVERTY IN SUPPORT OF PETITIONER AND APPELLANT

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I. INTRODUCTION

The issue before the Court is whether it will honor HUD's 1995 promise to "encourage[], and not punish[]" lower income families that are striving to keep loved ones with developmental disabilities at home by means of family caregiving. Both Respondent and the Court of Appeal undermined this promise when they determined that State payments to *family* caregivers are *not* excluded under 24 C.F.R. § 5.609(c)(16) from the calculation of family income used to determine both initial eligibility for—and rent levels in—a myriad of federal housing assistance programs.

Petitioner has demonstrated that the language, structure and purpose of 24 C.F.R. § 5.609(c)(16) support the conclusion that HUD did intend to exclude such State payments to family caregivers, and *amici* will not repeat those arguments here. *Amici* write instead to briefly emphasize a few salient facts regarding the State and federal programs at issue that further support Petitioner's proper construction of HUD's regulation.

II. BACKGROUND

A. Deinstitutionalization And The Role Of In-Home Supportive Services

The movement to bring disabled Americans out of institutions and to integrate them into their families and local communities was and is one of the great social movements of the post-WWII era. It stems from a recognition of the rights and worth of all individuals, from an affirmation of

the centrality of the American family, and from the common sense understanding that deinstitutionalization potentially could reduce unnecessary public spending.[1]

For many developmentally disabled Americans, making deinstitutionalization a reality requires extensive domestic assistance, personal care and/or supervision in their homes. In most cases the person providing these services is another family member.[2]

For the express purpose of assuring that aged, blind and disabled Californians receive the services necessary for them to remain safely in their homes, the California Legislature created the In-Home Supportive Services program ("IHSS") in 1973.[3] Pursuant to the IHSS program, the State pays for the provision of up to 283 hours per month of services to program recipients by care providers.[4] In most instances family members can serve as the paid providers.[5] The IHSS program also offers respite

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[1] *See, e.g.*, Developmental Disabilities Assistance And Bill Of Rights Act, 42 U.S.C. §§ 15001, 15091(Congressional findings).

[2] *See, e.g.,* Sarah Thomason & Annette Bernhardt, U.C. Berkeley Labor Center, *California's Homecare Crisis* 6 (Nov. 2017), available at http://laborcenter.berkeley.edu/pdf/2017/Californias-Homecare-Crisis.pdf

[3] *See* Welf. & Inst. Code § 12300.

[4] *See* Welf. & Inst. Code §§ 12303.4(b); 14132.95(g).

[5] *See, e.g.*, *Miller v. Woods*, 148 Cal. App. 3d 862, 877 & n.15 (1983); Welf. & Inst. Code §§ 12300(e), 12301(a), 12350.

services, which by definition are designed to provide unpaid caregivers a break from their physically and emotionally taxing work.[6]

Beginning in 1981 under the Reagan Administration, changes to the Medicaid program have allowed States all across the nation to obtain federal funding for similar homecare programs.[7]

B. Deinstitutionalization And The Role Of Stable Housing

Successful deinstitutionalization, and the provision of supportive homecare services, both necessarily require that the disabled individual have a stable home. The severe nationwide shortage of affordable housing makes this very difficult to obtain for any "extremely low income" family—a category that HUD defines as a family earning no more than the higher of the federal poverty level (currently $25,100 for a family of four[8]) or 30% of the median income in the area where they live.[9] Tragically, some 8 million of these extremely low income households (or some 71% of the nationwide total) pay more than half of their meager incomes for

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[6] *See* Cal. Welf. & Inst. Code § 12300(f).

[7] *See* 42 U.S.C. § 1396n(c), (j); Medicaid.gov, "Home & Community-Based Services 1915(c)" available at https://www.medicaid.gov/medicaid/hcbs/authorities/1915-c/index.html

[8] *See* 83 Fed. Reg. 2642, 2643 (Jan. 18, 2018).

[9] *See* National Low Income Housing Coalition, "The Gap: A Shortage Of Affordable Homes" at 3 (Mar. 2018), available at https://nlihc.org/sites/default/files/gap/Gap-Report_2018.pdf (hereafter, "2018 NLIHC Gap Report"); 24 C.F.R. § 5.603(b) (defining "Extremely low income family").

housing,[10] which is HUD's threshold for labeling a household "severely housing cost burdened." This high rent burden in turn leads to increased risks of homelessness, as well as deleterious mental and physical health impacts even when homelessness is avoided.[11] People living with disabilities are disproportionately represented among these households living in poverty.[12]

A principal way that extremely low income families can obtain affordable housing is through one of the myriad of federal housing programs. All told, these federal housing programs assist over five million

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[10] *See* 2018 NLIHC Gap Report at 7, Fig. 4 (based on tabulations of 2016 census data). This same pattern, with minor variation, is present in every State and region of the Country. *See id.* at Appendix A.

[11] *See* California Department of Housing and Community Development, "California's Housing Future: Challenges and Opportunities" (January 2017) at App. A, p. 5-6 (citing research papers), available at http://www.hcd.ca.gov/policy-research/plans-reports/docs/California's-Housing-Future-Full-Public-Draft.pdf; Center on Budget and Policy Priorities, "How Housing Vouchers Can Help Address California's Rental Crisis" (updated Feb. 12, 2016) at text accompanying footnotes 8-9, 11, 14-15, available at https://www.cbpp.org/research/housing/how-housing-vouchers-can-help-address-californias-rental-crisis#_ftnref1 (hereafter, "2016 CBPP Whitepaper"); United States Conference of Mayors, "2014 Report on Status of Hunger and Homelessness" at 2 (citing survey of officials from 25 cities nationwide); Center for Housing Policy, "The Impacts of Affordable Housing on Health: A research Summary" (Apr. 2015), available at http://media.wix.com/ugd/19cfbe_d31c27e13a99486e984e2b6fa3002067.pdf.

[12] *See, e.g.*, Institute on Disability/UCED, "2017 Disability Statistics Annual Report" at 23, Fig. 27, available at https://disabilitycompendium.org/sites/default/files/user-uploads/2017_AnnualReport_2017_FINAL.pdf.

low-income households in the United States to obtain affordable housing, including 491,000 households in California.[13] Both nationally and in California, more than 20% of these households include a disabled person.[14]

The largest of these federal programs is the Section 8 Housing Choice Voucher program, the program in which Petitioner's family participates. As a general matter, the applicable statute and regulations require that at least 75% of all families admitted into this program be extremely low income, and that all remaining families admitted must be "very low income" (that is, their income must not exceed 50% of the median income calculated by HUD for the relevant area).[15] Each family admitted into the program then typically pays just 30% of its income, after adjustment, as its monthly share of the rent.[16]

Other federal housing programs follow a similar pattern, albeit with varying maximum income levels for eligibility, income targeting levels, and potential exceptions to a 30% of adjusted income rent level. For

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[13] *See* The Center on Budget and Policy Priorities, National and State Housing Fact Sheets, *available at*: https://www.cbpp.org/research/housing/nationaland-state-housing-fact-sheets-data

[14] *See id.*

[15] *See* 24 C.F.R. §§ 982.201(b)(1), (2)(i).

[16] *See* 24 C.F.R. §§ 982.503, .508, .515. If the initial rent exceeds the local maximum set by HUD and the PHA, the voucher holder may still rent the unit by paying the additional rent, so long as the voucher holder does not thereby pay more than 40% of household income for rent. *See* 24 C.F.R. § 982.508.

example, both the Section 8 project-based voucher program and the Public Housing program generally require that at least 40% of the families admitted into the program are extremely low income, that the remainder of the families be at least low income (that is, their income must not exceed 80% of the median income calculated by HUD for the relevant area), and that the families pay 30% of their income—after adjustment—as their rent.[17]

Because of the extreme demand for federal affordable housing assistance, wait times from application to occupancy can last for years.[18]

C. The Regulation At Issue And Its Role In The Federal Housing Assistance Programs

24 C.F.R. § 5.609 directly governs the calculation of a family's "annual income" for each of the Section 8 Housing Choice Voucher, Section 8 Project-Based Voucher, and Public Housing programs—as well as for a host of smaller programs.[19] Accordingly, the issue of whether or not 24 C.F.R. § 5.609(c)(16) excludes from family income any State payments to family caregivers has the potential to affect a caregiver

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[17] *See* 42 U.S.C. §§ 1437a(a)(1), (b)(2)(A); 42 U.S.C. §§ 1437n(a)(2)(A), (c).

[18] National Low Income Housing Coalition, "The Long Wait For A Home" at 3 (Fall 2016), available at https://nlihc.org/sites/default/files/HousingSpotlight_6-1.pdf.

[19] *See* 24 C.F.R. §§ 5.601(a), (c)-(e); .603(b) (definition of "annual income");

family's eligibility for admission to these program (i.e., whether the family's income is below the maximum permissible income for initial participation in the program); whether the family has a preference for admission to these programs (i.e., whether the family is included among the group of extremely low income applicant families that are entitled to no less than a minimum number of the available slots in each program); and—once the caregiver family is admitted into a program (as is the case with Petitioner)—what is the applicable rent (i.e., whether or not the family must pay as rent to the landlord 30% of any family caregiver payments received from the State).

III. ARGUMENT

As Petitioner has ably demonstrated, the language of 24 C.F.R. § 5.609(c)(16) is broad enough to encompass IHSS payments to a family member who provides services that allow a developmentally disabled loved one to remain living at home. Such payments plainly "offset the cost of [those] services" to the family, including the physical and emotional toll on the family caregiver providing those services, and the sacrifice of the family caregiver's time that she otherwise would spend in different pursuits (pursuits which in any particular case might or might not include, in whole or in part, paid employment outside the family home). As Petitioner likewise has ably demonstrated, this plain reading is confirmed by the language and structure of 24 C.F.R. § 5.609 as a whole. HUD did not

include in 24 C.F.R. § 5.609(c)(16) the language found elsewhere in the regulation that would have expressly limited the exclusion to payments that offset out-of-pocket costs incurred by the family.

Respondent seeks to avoid this reading of 24 C.F.R. § 5.609(c)(16) on the grounds that (1) IHSS payments to a family caregiver are not properly considered compensation for the various non-monetary and opportunity costs she incurs providing services to her developmentally disabled loved one, (2) excluding IHSS payments from the family's income does not further HUD's policy objectives in adopting the exclusion, and (3) interpreting the exclusion to extend to IHSS payments to family caregivers leads to unreasonable results. Respondent errs on all three counts.

A. IHSS Payments Offset The Non-Monetary And Opportunity Costs Incurred By Family Caregivers

Despite Respondent's stated position, it is not reasonably subject to dispute that IHSS payments to a family caregiver are compensation for—and thereby serve to "offset"—both the non-monetary costs and the opportunity costs she incurs in providing services necessary to keep a loved one at home. This is because the IHSS statute itself recognizes that family caregivers incur these costs. In particular, the statutory authorization of "respite care"—defined as "temporary or periodic service for eligible recipients *to relieve persons who are providing care without compensation*"—is an unmistakable recognition of the physical and

emotional costs incurred by family caregivers.[20] And the statutory directive that a legally-obligated parent (as well as a spouse performing certain services) can receive IHSS payments only if she "leaves full-time employment or is prevented from obtaining full-time employment because no other suitable provider is available" is an unmistakable recognition that family caregivers incur opportunity costs including, in some instances, loss of alternative employment opportunities.[21] Therefore, the IHSS payments that are made to most family caregivers irrespective of whether they lost an alternative employment opportunity—as well as the IHSS payments made only to those legally-obligated parents and those spouses who did lose an alternative employment opportunity—necessarily and intentionally offset these non-monetary costs and opportunity costs that are recognized by the IHSS statute itself.

B. Interpreting 24 C.F.R. § 5.609(c)(16) As Excluding From Family Income State Payments To Family Caregivers Better Promotes HUD's Stated Purpose Of Encouraging Families To Avoid Institutionalizing Family Members

HUD's stated purpose when adopting 24 C.F.R. § 5.609(c)(16) is straightforward: "Since families that strive to avoid institutionalization should be encouraged, and not punished, the Department is adding this

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[20] Welf. & Inst. Code § 12300(f) (emphasis added); *accord, e.g.*, 42 U.S.C. § 1396n(c)(4)(B) (authorizing payment by Medicaid for "respite care" pursuant a State waiver).

[21] Welf. & Inst. Code §§12300(e), 12301(a).

additional exclusion to income."[22] This purpose is reflective of and consistent with longstanding federal policy—dating back at least as far as the beginnings of the Reagan administration—to encourage deinstitutionalization both as a means of reducing unnecessary public expenditures, and as a means of strengthening American families.[23] Indeed, Congress reaffirmed this policy twice in 1994 with its passage of both the Developmental Disabilities Assistance and Bill of Rights Act Amendments of 1994,[24] and the Families of Children With Disabilities Support Act of 1994.[25]

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[22] 60 Fed. Reg. 17388, 17389 (Apr. 5, 1995).

[23] For example, at a November 10, 1981 news conference, President Reagan spoke about the case of Katie Beckett—a child with a chronic disability who was in a hospital, even though it cost more and her doctors confirmed she would be better off at home—because Medicaid would not cover her treatment at home given her parents' assets (but would in a hospital setting where parental assets are not considered). This led to the passage in 1982 of a law adding the Katie Beckett State Option Plan to Medicaid whereby State's can elect to ignore parental assets and provide home care in such situations. *See* NBC News "From the Archives: President Reagan Invokes Katie Beckett", available at https://www.nbcnews.com/video/from-the-archives-president-reagan-invokes-katie-beckett-43496003918; Center for Advancing Health Policy and Practice, "TEFRA", available at http://cahpp.org/project/the-catalyst-center/financing-strategy/tefra/.

[24] *See, e.g.*, Pub. L. 103-230 § 1.01(a)(10), 108 Stat. 284 (1994) (Congressional findings).

[25] *See, e.g.*, PL 103–382 § 702(a)(1), (4), (6)-(7), (10), 108 Stat 3518 (1994) (Congressional findings).

Exclusion of State payments to family caregivers of the developmentally disabled furthers this policy in two ways. First, with respect to those families already in a federal housing program, it allows them to keep the full measure of IHSS compensation for their caregiving services that financially better off families outside any federal housing program would receive. While it cannot be known whether loss of 30% of this compensation as rent would cause any particular family to place a developmentally disabled loved one back into an institution, the stresses faced by extremely low income families—even with federal housing assistance—certainly could lead to that result. As the Court of Appeal observed in *Miller v. Woods*, 148 Cal. App. 3d 862, 877-78 (1983), a case overturning a California regulation denying IHSS payments to family caregivers of protective services:

> in *Waits v. Swoap* (1974) 11 Cal.3d 887, the California Supreme Court struck down welfare regulations reducing grants to children who shared housing with nonneedy relatives. The rationale is in point and most persuasive here. "The objective of the challenged regulation is apparently to reduce state expenditures for AFDC children at the expense of relatives who willingly take such children into their homes. In promulgating this unauthorized measure, the department is in reality gambling that close relatives acting as caretakers will feel a moral obligation to keep an AFDC child even though the child can no longer contribute the AFDC grant

> which the Legislature guaranteed. If the department 'wins' its gamble, the state will save money but only at the expense of depriving children of essential need items and subjecting their generous relatives to unwarranted hardships. If the department loses its gamble, as is all too possible, the children will lose the close family environment sought to be achieved by the act and the state will have to pay the higher cost of foster care." (*Waits v. Swoap, supra.*, at pp. 895-896;fn. omitted.)

Second, exclusion from family income of State payments to family caregivers of the developmentally disabled furthers HUD's policy of encouraging deinstitutionalization among caregiving families still seeking entry into a federal housing program. As explained above, an overwhelming majority of the vouchers in the Section 8 Housing Choice Voucher program (as well as a substantial portion of project-based vouchers and public housing units) have to be given by law to extremely low income families. Maintaining the family's eligibility for the extremely low income preference throughout the potentially quite lengthy waiting period could be critical to the future well-being of the family. If IHSS payments to family caregivers are not excluded from family income, some extremely low income families awaiting admission into one or more of these programs might choose institutionalization over either (1) accepting IHSS payments that could or would cause them to lose their preferential

status as extremely low income, or (2) foregoing some or all of the IHSS payments to maintain their preferential status while still taking on the heavy burdens of home caregiving despite being mired in poverty.[26]

C. Interpreting 24 C.F.R. § 5.609(c)(16) As Excluding From Family Income Any State Payments To Family Caregivers Does Not Create—But Rather Is Necessary To Avoid—An Unreasonable Result

Respondent, like the Court of Appeal, asserts that it is unreasonable to interpret 24 C.F.R. § 5.609(c)(16) to exclude from family income any State payments to family caregivers because doing so places families caring for developmentally disabled loved ones in a more favorable situation than families caring for "physically disabled" or "medically disabled" family members. However, as Petitioner already demonstrated, HUD's decision to focus on avoiding the institutionalization of the developmentally disabled is consistent with longstanding federal policy to provide special assistance to this particularly vulnerable population, as set forth in the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. § 15001 et seq.).

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[26] The possibility that a family could hire a third-party caregiver, and exclude from family income the IHSS funds paid to that third-party, does not eliminate this problem. There is no guarantee a suitable third-party caregiver is available, as the IHSS statute expressly recognizes. *See* Welf. & Inst. Code §§12300(e), 12301(a) (conditioning payment to legally-liable parent, and to spouse for some services, on determination that "no other suitable provider is available"). And there is no guarantee that the family is willing, while mired in poverty, to provide caregiving during the many hours when IHSS would not pay for a third-party caregiver.

By contrast, Respondent's and the Court of Appeal's position *does* create unreasonable disparate treatment. 24 C.F.R. § 5.609(c)(2) excludes from a family's income "[p]ayments received for the care of . . . foster adults (usually persons with disabilities, *unrelated to the tenant family*, who are unable to live alone)." (Emphasis added.) In other words, if a family takes into their home an *unrelated* disabled adult who cannot live on his own, and then receives payment from the State for providing caregiving to that unrelated household member, the family need not include the State payments as income. But, if Respondent and the Court of Appeal's construction of 24 C.F.R. § 5.609(c)(16) were adopted, then that exact same family providing the exact same care in the exact same home to a *related* developmentally disabled family member would have to include the State payments received for that care as income (and thereby would have to pay 30% of the State payments as rent if already in a housing program). To ascribe to HUD an intention to impose a financial penalty on a caregiving family simply because the care is provided to a disabled family member—rather than a disabled stranger—is wholly unreasonable, particularly given HUD's stated desire to "encourage[], rather than punish[]" family caregivers; given HUD's application to its regulation of President Reagan's Executive Order 12606, The Family; and given the strong and clear statements of Congress in the Families of Children With Disabilities Support Act of 1994 that "[i]t is in the best interest of our Nation to

preserve, strengthen, and maintain the family" and that "[t]he goals of the Nation properly include the goal of providing families of children with disabilities the family support necessary . . . (A) [t]o support the family[, and] (B) [t]o enable families of children with disabilities to nurture and enjoy their children at home."[27]

IV. CONCLUSION

For the foregoing reasons, *amici* request that the Court reverse the Court of Appeal and declare that 24 C.F.R. § 5.609(c)(16) excludes from a family's income all State payments to family caregivers for the services they provided to keep a developmentally disabled loved one in the home.

DATED: December 19, 2018 MUNGER, TOLLES & OLSON LLP
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[27] *See, e.g.*, PL 103–382 § 702(a)(1), (10)(A)-(B), 108 Stat 3518 (1994) (Congressional findings).

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface.

According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 3,377 words up to the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on December 19, 2018.

DATED: December 19, 2018 MUNGER, TOLLES & OLSON LLP
MICHAEL E. SOLOFF

By: */s/ Michael E. Soloff*
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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 Los Angeles, State of California. My business address is 350 South Grand Avenue, Fiftieth Floor, Los Angeles, CA 90071-3426.

On December 19, 2018, I served true copies of the following document(s) described as **AMICUS CURIAE BRIEF OF NATIONAL HOUSING LAW PROJECT AND WESTERN CENTER ON LAW AND POVERTY IN SUPPORT OF PETITIONER AND APPELLANT** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on December 19, 2018, at Los Angeles, California.

/s/ Laurie E. Thoms

Laurie E. Thoms

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