CASE NO. S249593

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KERRIE REILLY

Petitioner and Appellant,

v.

MARIN HOUSING AUTHORITY

Defendant and Respondent.

RESPONDENT'S CONSOLIDATED ANSWER TO THE AMICI CURIAE BRIEFS FILED ON BEHALF OF PETITIONER

After the Published Decision of the Court of Appeal for the First Appellate District, Division Two, No. A149918, Affirming the Judgment of the Superior Court for the State of California, County of Marin, Case No. CIV 1503896, Hon. Paul M. Haakenson

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REGULATIONS

Respondent Marin Housing Authority ("respondent") respectfully submits this consolidated answer to the amici curiae briefs submitted on behalf of the Association of Regional Center Agencies, Autism Society of Los Angeles, CASHPCR, Disability Voices United, Fairview Families and Friends, Inc., Housing Choices, Jewish Los Angeles Special Needs Trust (JLA Trust), National Disability Rights Network, Professor Alison Morantz, Public Counsel, (collectively identified as the ARCA amici) and the National Housing Law Project, the Western Center on Law and Poverty (collectively identified as the NHLP amici).

INTRODUCTION

Respondent does not dispute that caring for an adult child with developmental disabilities is a difficult job and does not dispute that public policy favors the placement of developmentally disabled persons in the family home. Similarly, respondent does not dispute that housing affordability affects many families who care for developmentally disabled family members, making some housing insecure. However, these contentions are a distraction, particularly the latter point given the cap on rent paid by participants in the Department of Housing and Urban Development ("HUD") Section 8 program which insulate these families from escalating rents that are endemic to California as a whole and particularly in the San Francisco Bay Area.

The issue before the Court is narrow and concerns the meaning of

definitions contained in a federal regulation that are used to implement means testing for HUD's Section 8 program. (24 C.F.R. § 5.609 (a)(1), (a)(3), (c)(16.) The Court should be guided by well-established rules of statutory construction and federal policy when it considers the meaning of the words contained in the federal statute and regulation, giving the words their plain and ordinary meaning. Indeed, in everyday living, the term, "cost" is "an amount paid or required in payment for a purchase, a price." (The American Heritage Dictionary of the English Language, (3d Edition 1992) p. 424.)[1] In the Section 8 context and in other federal statutes, designed to assist those in need,[2] any other meaning would be unworkable.

While sensitive to the situation, there is nothing in HUD's policy statements that evinces the intent to compensate a caregiver for lost opportunity or the caregiver's emotional toll. (60 Fed. Reg. 17388, 17389.) Similarly, there is nothing in the statute that requires the exclusion from

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[1] See also, Merriam-Webster's definition of cost: "the amount or equivalent paid or charged for something : PRICE." Webster's synonyms include: "charge, disbursement, expenditure, expense, outgo, outlay" (Dictionary by Merriam-Webster, https://www.merriam-webster.com/dictionary/cost)

[2] In addition to Section 8 housing, means testing is used to test for eligibility to Medicaid, Temporary Assistance for Needy Families (TANF), the Supplemental Nutrition Assistance Program (SNAP), Pell Grants, Federal Supplemental Educational Opportunity Grants, Federal Work-Study Programs, subsidized student loans as well as debtor relief under provisions of the Bankruptcy Code.

income opportunity costs or authorizes compensation to a caregiver for an emotional toll as urged by the amici. (42 U.S.C.A. § 1437a (b)(5).) Instead, the express words focus on real and tangible costs which are immediate and measurable. (*Id.*) Tangible and measurable costs are pertinent to means testing when determining whether the family possesses the means to do without the help requested. The concept of "opportunity costs" could never be incorporated into traditional means testing which is elemental to the functioning of not only Section 8 subsidies but also Medicaid, TANF, SNAP, subsidized student loans, and even the Bankruptcy Code. Acceding to the amici's contentions could have far reaching results and disrupt the functioning of these other programs.

In addition, accepting the amici's implied contention that state policy and state law should be the measure of the meaning of a federal statute creates the risk of inconsistent outcomes that would vary from state to state. The amici do not cite to any Congressional enactment that would authorize what they suggest. Further, the contention that state law and state policy should control the meaning of a federal regulation raises supremacy concerns.

It is also telling that the amici have turned their backs on the plain words of the regulation at issue. Instead, the ARCA amici invite the court to incorporate a new phrase, "the developmental disability state payments

exclusion." This invention ignores this Court's directive to first look to the words of the statute themselves. It is only by stating something that the regulation does not state that appellant's argument can be entertained. This is an invitation that the court should not accept.

Based on the amici's analytical flaws, the Court should reject their arguments and turn instead to the words of the statute and HUD policy when determining the meaning of the regulation at issue.

LEGAL ARGUMENT

A. The Amici Direct The Court Away From The Issue Before It.

This case concerns low-income households who benefit from the federal government's Section 8 program which *caps the family's rent at 30% of adjusted income*. (42 U.S.C.A. § 1437a (a)(1)(A).) This subsidy shields participants, such as appellant, from exploding market-rate rents. Contrary to the image portrayed by the amici, the population, who may be potentially impacted by the Court's decision, is impervious to increasing market rents.[3] The point is repeated because it is important. Because an

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[3] This is the case so long as the Section 8 participant occupies a unit whose size comports with HUD guidelines. Where a participant chooses a larger unit than authorized by the guidelines, such as a three-bedroom when HUD guidelines specify a smaller unit based on family size, the participant will be asked to contribute the marginal difference in market rent of the two units. This would be in addition to 30% of adjusted income that would be the family's obligation if it resided in a unit that met HUD guidelines.

(Continued...)

eligible family's contribution to rental expenses is measured by *family income*, rather than market rates, Section 8 participants are insulated from the market forces affecting housing costs. This is to be celebrated, not obscured in a faulty analysis.

The implication that the Court of Appeal's decision will result in homelessness for a vast number of families, who pay more than 50% of their income to purchase housing (ARCA Br. 9-10, 17.), is unsupportable because this is not the population potentially affected by this litigation. [4] That very contention evinces a faulty basis for the arguments advanced by the ARCA amici.

In addition, contrary to the amici's allegations (ARCA Br. 19), no Section 8 participant, who elects to care for a developmentally disabled family member at home, will face an increase in rent or be pushed into homelessness, absent other factors unrelated to the issues of this case. The claim that "the Court of Appeal decision jeopardizes the ability of families to keep disabled family members at home, and avoid institutionalization" (ARCA Br. 12) is similarly incorrect. Instead, the decision maintains the

(...Continued)

[4] Center on Budget and Policy Priorities, "Three Out of Four Low-Income Renters Do Not Receive Federal Rental Assistance," August 2017, https://www.cbpp.org/three-out-of-four-low-income-at-risk-renters-do-not-receive-federal-rental-assistance.

status quo, specifically, appellant and similarly situated Section 8 households will continue to contribute 30% of the adjusted household income toward their rent. (42 U.S.C.A. § 1437a (a)(1)(A).) The amici's predictions of loss of housing benefits, increased rent, housing insecurity and homelessness are simply inaccurate. No one who elects to care for her developmentally disabled child at home will be punished as the amici claim. (ARCA Br. 13-14.) The NHLP's consternation over the potential loss of 30% of compensation, should the Court of Appeal's decision be affirmed (NHLP Br. 17), suggests a lack of understanding of how Section 8 subsidies are calculated as well as lack of understanding of the true impact that the decision will have if affirmed which is to have no impact whatsoever for existing Section 8 participants who are providing in-home care for developmentally disabled family members.

Further, contrary to the amici's assertions, there is nothing in the lower courts' decisions that would reduce the amount or quality of supervision provided under state programs to the developmentally disabled. (ARCA Br. 19.). In fact, the issue was not before the Trial Court or the Court of Appeal; it is not properly before this Court. Similarly, the question of "who is the best place to provide round-the-clock care and support services that are of a very personal nature" (ARCA at 22-24) is a question that is now raised for the first time and as a result is not properly

before this Court.

Apparently realizing these analytical flaws, amici resort to anecdotal accounts of other families. (ARCA Br. 15-16, 19-20.) Because the factual assertions based on those anecdotes are outside the record, they should not be considered. (See *People v. Laster* (1971) 18 Cal.App.3d 381, 386.) To be sure, courts have entertained amicus briefs that present matters outside the record in limited circumstances. (See e.g., *Rivera v. Division of Industrial Welfare* (1968) 265 Cal.App.2d 576, 590 fn. 20 [acknowledging the "Brandeis brief" which "brings social statistics into the courtroom"].) But it is one thing to allow an amicus to present objectively-verifiable statistics that can be independently validated and it is totally another to use unverifiable anecdotes in seeking to shape the law.

Additionally, one is left to speculate as to whether actions taken by other housing authorities represent anything other than litigation avoidance or the exercise of the discretion vested to the individual housing authority based on factors unrelated to the issue before the Court. (See e.g., 42 U.S.C.A. § 1437a (b)(5)(A)(ii)(II), (b)(5)(B)(ii).) The amici's overly simplistic analysis implies that the regulation at issue is the only determinative factor pertinent to means testing under the Section 8 program. In sum, there is no substance to support the amici's claim that similarly situated Section 8 households will become housing insecure or

become homeless as the result of the Court of Appeal's decision.

B. The Amici Fail To Focus On The Narrow Issue Presented In This Case.

1. Income Is Defined By Federal Statute.

When evaluating the amici's arguments supporting the proposition that In-Home Supportive Services ("IHSS") wages should be excluded as they represent the value of the caregiver's emotional toll and lost opportunity, the Court must first look at the language of the statute which defines adjusted income. (*RCJ Medical Services, Inc. v. Bonta* (2001) 91 Cal.App.4th 986, 1006.) Because the court is considering a federal statute, the rules enunciated by the U.S. Supreme Court control. (*Id.*, citing *Kaiser Aluminum & Chemical Corp. v. Bonjorno* (1990) 494 U.S. 827, 835 [110 S.Ct. 1570, 108 L.Ed.2d 842].) For the purposes of the Section 8 program, 42 U.S.C.A. § 1437a (b)(5) defines income exclusions which may be applied when determining eligibility and conducting means testing. Throughout, the excluded costs are tangible, measureable and discrete. While some are expressed in specific dollar amounts, others are simply descriptive. (*Id.*) However, the descriptions are specific and quantifiable. For instance, the statute excludes unreimbursed medical care, unreimbursed attendant care and auxiliary apparatus expenses for handicapped individuals, to the extent necessary to enable any member of such family to be employed. The statute also excludes reasonable child care expenses

necessary to enable a member of the family to be employed. (42 U.S.C.A. § 1437a (b)(5)(A)(ii), (iii).) The second and third exclusions are instructive here in that they show that Congress recognizes the need to purchase services and equipment to care for handicapped persons as well as the need to obtain protective supervision for children who lack sufficient capacity to look after themselves. Recognizing these needs, the statute allows for these expenses to deducted from income. (*Id.*)

The regulation at issue recognizes these needs in the context of developmentally disabled persons and allows for exclusion of *reimbursed* costs of services and equipment needed to keep the developmentally disabled person at home. This more generous provision demonstrates HUD's intention to encourage home placement by not punishing the family for obtaining these services. (60 Fed. Reg. 17388, 17389 (April 5, 1995).) Without doubt, the regulation is a reasonable application of parallel provisions in the statute. Because the legislative delegation on this particular question is implicit, the court may not substitute its own construction for the Secretary's reasonable interpretation when HUD published 60 Fed. Reg. 17388 and the regulation at issue. (See *RCJ Medical Services, Inc. , supra,* 91 Cal.App.4th 986, 1005, citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.* (1984) 467 U.S. 837, 845 [104 S.Ct. 2778, 81 L.Ed.2d 694].)

In addition, it is noteworthy that the statute does not expressly exclude the value of lost opportunity or the value of a caregiver's emotional toll. Importantly, the amici cite to no other portion of the federal statute to support the contention that these costs are excluded from income when eligibility is determined. Consequently, the NHLP amici's assumption (NHLP Br. 13, 14) that the meaning of "cost" encompasses the family's emotional toll and lost opportunity, is a faulty assumption that must be rejected. This same assumption generally underlies the ARCA brief and must also be disregarded.

In addition, NHLP contends that respondent's interpretation of section (c)(16) is incorrect because other parts of section 5.609(c) "expressly limited the exclusion to payments that offset out-of-pocket costs incurred by the family." (NHLP Br. 14.) The only reference to such "out-of-pocket" expenses, found in section 5.609(c)(8)(iii), excludes from income the amounts "received by a participant in other publicly assisted programs which are specifically for or in *reimbursement of out-of-pocket expenses* incurred (special equipment, clothing, transportation, child care, etc.)."

The fallacy of NHLP's argument is that, in contrast to lost opportunity, out-of-pocket expenses are, by definition, tangible, verifiable and quantifiable. By incurring an out-of-pocket expense, one necessarily

incurs a measureable cost by having to pay money to meet that expense. In contrast, no monetary cost or actual charges are incurred by virtue of having a lost opportunity when providing care to a family member. As a consequence, opportunity cost and the caregiver's emotional toll are not only not enumerated in the statute but are also unlike those which are specified.

The rulemaking record provides some additional insight into the policy behind income exclusions, particularly those regarding the care of children, who like many developmentally disabled persons require continuous protective supervision. Among the discretionary exclusions adopted by HUD in the 1995 revisions were "income payments received for the care" of adopted children (60 Fed. Reg. 17389) which HUD analogized to income payments for the care of foster children and foster adults both of which were already excluded.[5] (*Id.*) Unlike families caring for adopted and foster children, nothing in the statute, regulation or Federal Register provides for the exclusion of income earned from providing care for developmentally disabled *family members.* (42 U.S.C.A. § 1437a (b)(4); 24 C.F.R. § 5.603(a)-(c); 60 Fed. Reg. 17389.) Had HUD intended to exclude "income payments received for the care" of developmentally disabled family members, it would have simply stated that as it for income received

[5] 24 C.F.R. § 5.609(c)(2).

for the care of foster children and foster adults. (24 C.F.R. § 5.609(c)(2).) Instead, the exclusion pertains to "cost of services and equipment" paid by the state to keep the developmentally disabled person at home. (24 C.F.R. § 5.609(c)(16).) The NHLP amici argue that this result creates an "unreasonable disparate treatment" between households receiving government assistance to take care of non-related, disabled foster adults and those paid to take care of disabled family members. (NHLP Br. 20.) In making this assertion, the amici ignore the significant distinction that exists between these two groups. While one has no legal obligation to take care of a stranger who is disabled, the parent does have a legal obligation to provide for a disabled child. (Fam. Code, § 3900; see also, Fam. Code, § 4300 [spousal support].) This distinction is recognized in the plain words of the regulation.

2. Analogous Cases Decided By The U.S. Supreme Court And This Court Preclude Amici's Interpretation Of "Cost of Services."

Quoting the Secretary's comments regarding the federal regulation at issue, the amici contend the Court of Appeal's decision punishes those who provide in-home supportive services for disabled family members. (ARCA Br. at p. 14 (citing 60 Fed. Reg. 17388, 17391-17393 (Apr. 5, 1995).) In explaining the adoption of the subject regulation, however, the Secretary noted that states which provided "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." (60 Fed. Reg. at 17389 [emphasis added].) Rather than focusing on the legal meaning of "costs," the amici merely *assume* this phrase encompasses lost opportunity costs without citation to any authority and when doing so reach the incorrect conclusion that the "full encouragement" was intended to exclude payments received to provide care for developmentally disabled family members. (ARCA Br. 22.)

Not only is their argument incorrect, it is also contrary to the U.S. Supreme Court's assessment when considering the award of costs to the prevailing party under the Individuals with Disabilities Education Act. (20 U.S.C.A. § 1415(i)(3)(B); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy* (2006) 548 U.S. 291, 297 [126 S.Ct. 2455, 2459–2460, 165 L.Ed.2d 526].).) There, the court acknowledged that the term "costs," was not so open-ended that it made participating states liable for all expenses incurred by prevailing parents, "for example, travel and lodging expenses or lost wages due to time taken off from work." (*Id.* at 297, 126 S.Ct. 2455, 2459, 165 L.Ed.2d 526.)

Consistent with *Murphy,* this Court reached a similar conclusion when it recognized that a *pro se* litigant, whether an attorney or not, may

not recover the value of his lost opportunity, specifically lost income, to pursue litigation. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1092, *as modified* (June 2, 2000); accord, *Musaelian v. Adams* (2009) 45 Cal.4th 512, 520 ["the phrase 'expenses incurred' contemplates an obligation that a party has become liable to pay. Section 128.7 does not provide for compensation for time lost from other employment"].)

In addition, this Court has held that claims of lost opportunity must be more than aspirational. (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 781 (noting that "it is inherently difficult to accurately predict the future or reconstruct a counterfactual past.") If opportunity costs are to be recoverable, they must be measurable. (See e.g., *Grundy Nat. Bank v. Tandem Min. Corp.* (4th Cir. 1985) 754 F.2d 1436, 1441 [opportunity costs recoverable to "provide the creditor with the value of his bargained for rights."].) Similarly, the claim for opportunity costs fails for lack of proof of an actual economic loss, a sum certain subject to proof. (*Mira v. Nuclear Measurements Corp.* (7th Cir. 1997) 107 F.3d 466, 473.) In each instance where recovery was permitted, there was an actual measurable loss that is absent here. As the *Sargon* court observed, there must be some logical basis to infer that appellant would have followed an alternative path. (*Sargon, supra,* 55 Cal.4th at 781.) Here, there is none. Disregarding these authorities, amici ask this Court to

interpret "costs" to include lost opportunity. Because the amici cite to no authority to support this position, it should be rejected.

3. Allowing State Policy To Dictate The Application Of Federal Law Would Lead To Inconsistent Results In Different States, Incongruent Results And Raise Serious Preemption Concerns.

Amici argue that "the Court of Appeal's failure to appreciate the importance of family care undermines the purpose of the IHSS program." (ARCA Br. 24.) While the validity of this assertion is certainly disputed, the argument erroneously assumes that the meaning of the federal regulation at issue is dictated by state law. If that were true, this regulation would potentially be subject to conflicting interpretations, depending on the state laws in jurisdictions where IHSS-equivalent programs are provided to Section 8 households, potentially subjecting Section 8 recipients located in different states to different outcomes. For instance, should this Court adopt the amici's interpretation, a California Section 8 recipient would not include the IHSS payments as income while a resident of another state, receiving compensation for providing in-home care to a developmentally disabled family member, would. (See e.g., *Anthony v. Poteet Housing Authority* (5th Cir. 2009) 306 Fed.Appx. 98,

102.)[6] Neither amici has cited any authority to establish that when Congress adopted the enabling statute, it intended differing treatment of Section 8 recipients depending on the recipient's state of residence. (42 U.S.C.A. § 1437f.) Similarly, the amici cite to no authority to support the conclusion that HUD intended differing applications, dictated by the state of residence, when it adopted the regulation at issue.

Adopting the amici's position would potentially cause a disruption in the implementation of other federal regulations intended to assist the poor, yielding unintended results when applying nearly identical language. For example, the regulation, used to evaluate a low-income rural family's ability to repay USDA home loans, excludes from income "[a]mounts paid by a State agency to a family with a developmentally disabled family member living at home to offset the cost of services and equipment needed to keep the developmentally disabled family member at home." (7 C.F.R. § 3550.54(b)(10) (2018).) Likewise, another regulation excludes from the loan applicants' repayment income "[a]mounts paid by a State agency to a family with a developmentally disabled family member living at home to offset the cost of services and equipment needed to keep the developmentally disabled family member at home." (7 C.F.R. §

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[6] As of the filing of this answer, *Anthony* is the only other opinion known to have considered the meaning of 24 C.F.R. § 5.609(c)(16) in a similar context.

3555.152(b)(5)(x) (2018).) Adopting amici's theory would mean that these virtually identical regulations have two sets of meanings. While section 5.609 would include lost opportunity costs, sections 3550.54 and 3555.152 could not possibly do so as it would provide no means to support the repayment of the loan.

Other federal regulations using the phrase at issue also refer exclusively to *tangible* economic costs. (See e.g., 49 C.F.R. § 1510.13(c) (2018) [prohibiting airlines from retaining fees "to offset the costs of collecting… passenger security service fees"]; 40 C.F.R. § 35.2140(f) (2018) [revenue associated with wastewater treatment project must be "used to offset the costs of operation and maintenance"]; 45 C.F.R. § 147.145(c)(1) (2018) [student administrative health fee is charged "to offset the cost of providing health care"]; 7 C.F.R. § 3550.62 (2018) [fee collected are "paid to the contractor at closing to offset the cost of the real estate appraisal"]

Similarly, federal statutes using the phrase at issue refer to tangible economic costs, as opposed to denoting lost opportunity costs. (See e.g., 12 U.S.C.A. § 2294(b) [federal agency guaranteeing certain obligations may make periodic payments "sufficient to offset the costs to the Bank of purchasing obligations of local public bodies or agencies"]; 40 U.S.C.A. § 8906(b)(1) [conditioning construction permit on mandatory contribution of

10% of estimated cost of construction "to offset the costs of perpetual maintenance and preservation of the commemorative work" constructed]; 42 U.S.C.A. § 15855(b)(1) [federal grant awarded to facility operator "to offset the costs incurred to purchase biomass"]; 15 U.S.C.A. § 6307c(d)(3) [FTC may assess a "fee to offset the costs it incurs" to process certain information].) The amici's creative argument would yield an intolerable double standard and create havoc in other applications.

More fundamentally, the amici assume that state policy should dictate the outcome of eligibility determinations made under federal statute, specifically HUD's Section 8 program. (ARCA Br. 13-14; NHLP Br. 13-14.) However, neither cite to any statute that defines the state's role or authorizes the state to participate in the determination of eligibility of participants in the Section 8 housing program. Even if so, interference to the extent advocated by the amici, raise supremacy concerns. (See *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 814, citing U.S. Const., art. VI, cl.2 [Medicaid law preempted state lien statutes].) Both federal statutes and regulations may have preemptive effect, leaving "state law that conflicts with federal law "without effect." (*Id.*, citing *Smiley v. Citibank* (1995) 11 Cal.4th 138, 147.)

While the federal laws and regulations governing Section 8 do not expressly provide for preemption of state law (*Stevenson v. San Francisco*

Housing Authority (1994) 24 Cal.App.4th 269, 2800), even in the absence of an explicit statutory language, congressional intent to preempt state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation. (*California Federal Sav. and Loan Assn v. Guerra* (1987) 479 U.S. 272, 280–281 [107 S.Ct. 683, 689, 93 L.Ed.2d 613].) Similarly, preemption will be found where an Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." (*Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230 [67 S.Ct. 1146, 1152, 91 L.Ed. 1447].) In this instance subsidized housing is also not an area that has "been traditionally occupied by the States," including this state. (See *English v. General Elec. Co.* (1990) 496 U.S. 72, 79 [110 S.Ct. 2270, 2275, 110 L.Ed.2d 65].)

In this case, state and federal law occupy similar fields but do not occupy the same field. While the state regulates institutions and group homes for the developmentally disabled, which are important to be sure, the state's oversight relates to quality of care and housing in an institutional setting. This is separate and apart from the matters governed under the HUD regulations at issue in this case which pertain to subsidized housing

irrespective of developmental disabilities. HUD alone occupies the field of subsidized housing. In fact, the Department of Disabilities Services ("DDS") website, which lists a broad range of resources available to the developmentally disabled, refers those seeking existing, subsidized housing resources to the local Public Housing Authorities which administer HUD's subsidized housing programs.[7] The matters of state concern, specifically quality of care and housing in an institutional setting, do not intersect with HUD's goal to provide the opportunity to low income families to enjoy safe, decent and affordable housing.

Moreover, it also cannot be said that the state has a legitimate interest in overseeing the qualification or selection of Section 8 participants or the application of income eligibility standards unique to this program. Yet, this is exactly what the amici seek to accomplish even though it is undeniable that the state regulation cited by the amici, Welfare & Institutions Code § 12300, defines only the services for which the state is willing to pay IHSS workers who provide in-home care to the disabled. IHSS workers and their families who benefit from the caregiver's services are a separate and distinct group. Some may also be Section 8 participants, but most are not. One is a group of recipients of benefits under federal statute; the others are employees who provide a service, controlled by state

[7] [7] https://www.dds.ca.gov/AH/Resources.cfm

statute. There is simply a disconnect between the amici's contentions and realty which weigh against the amici's state law arguments and weigh in favor of exclusivity of the federal statutory and regulatory scheme.

That said, if one accepts the amici's arguments, then we are faced with a situation *where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."* (*English v. General Electric Co., supra,* 496 U.S. 72, 79 [110 S.Ct. 2270, 2275].) What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute and identifying its purpose and intended effects. (*Id.*) It is plain that the amici's interpretation of state law seeks to interject intangible and unquantifiable opportunity and emotional costs. This inclusion would create an insurmountable obstacle to determining whether the family possesses the means to do without the help requested and as a result strikes at the heart of HUD's subsidized housing program. Because the amici's position is deeply flawed, it should be rejected.

4. The Authorities On Which The Amici Rely Are Not Helpful To Their Position.

The authority on which the NHLP amici rely, *Miller v. Woods* (1983) 148 Cal.App.3d 862 (Br. 17-18) and *Waits v. Swoap* (1974) 11 Cal.3d 887, disapproved state regulations which had misapplied state statute, not facts which are similar to those before the court. Neither case

supports the notion that IHSS wages constitute a measure of emotion costs or lost opportunity.

In *Miller,* state regulations denied payment to a housemate who provided protective supervision services. (*Miller, supra,* 148 Cal.App.3d at 876–878 [IHSS].) The court recognized that the state's reduction in IHSS wages was contrary to the statute, which provided for payment to all persons with the exception of those who had an independent duty to support the recipient. (*Id.* at p. 877.) The court's discussion recognized the undue financial hardship placed on the household which had been created by the state's refusal to pay the housemate who had given up her employment to care for the recipient. (*Id.* at p. 870.) The courts' reasoning in this case speaks against the amici's contention that IHSS wages are a measure of non-monetary costs, specifically personal sacrifices and lost opportunities about which the amici write so passionately. Instead, the court was focused on the financial hardship created by the misapplication of the statute. (*Id.*)

The NHLP amici similarly rely on this Court's decision in *Waits v. Swoap* (1974) 11 Cal.3d 887 (Br. 17-18) Here, the majority invalidated a state regulation that mechanically included a "fictional value," without quantifying the *actual value,* received by a child when placed with a "nonneedy relative," when evaluating her eligibility for welfare benefits. (*Id.* at pp. 894-895.) In addition to the rejection of the "fiction," the court

expressed concern about the financial burden placed on the household if not compensated for costs associated with the care of this child. It is difficult to find support for the contention that *Waitz* places an intrinsic value on lost opportunity or the emotional cost. Instead, the court rejected a fiction and focused on real monetary costs associated with caring for the child.

In a companion case, *Cooper v. Swoap* (1974) 11 Cal.3d 856, this Court reached the same conclusion, rejecting the notion that "noncash economic benefits," enjoyed by a welfare recipient, should be treated as "income," and disapproved the reduction of AFDC payments based on this perceived benefit. (*Id.* at 860, 863-864.). Recognizing the emotional benefit, derived from being welcomed into the home of an extended family member, the Cooper Court characterized "noncash economic benefit" as an, "arbitrary fictitious measure of income not permitted under federal or state law" and not a measure the actual income. (*Id.* at 860.) Extending the reasoning in *Waitz* and *Cooper*, one must conclude that the inverse is also true, the "emotional cost" discussed by the amici is an arbitrary fictitious measures of cost not permitted under federal or state law. (*See id.*)

Although respondent disputes that a state statute should ever control means testing conducted by HUD in the manner suggested by the amici, (ARCA Br. 13-14, 21; NHLP Br. 14-15), the state statute, cited by the amici directs this Court to reach a conclusion similar to that reached in

Waitz and *Cooper*. (Welf. & Inst. Code § 12300, subd. (e).) Rather than supporting the argument that IHSS payments are reflective of the human toll and opportunity costs, the statute states quite the opposite and instead provides "these providers shall be paid *only* for" domestic services, personal care serves, accompaniment to health-related appointments, protective supervision and paramedical services. (*Id.* [emphasis in original].) Absent is any intention to compensate for opportunity costs or the emotional toll of caregiving.

In addition, the legislature's goal of constraining state expenditures is expressed unequivocally in portions of the statute pertaining to respite care which is provided for unpaid caregivers only "*to encourage maximum voluntary services, so as to reduce governmental costs.*" (Welf. & Inst. Code, § 12300, subd. (f) [emphasis added].) Not only does the statute not support NHLP's premise (Br. 14), it does not answer the question as to whether the *federal regulation* encompasses intangible, unquantifiable costs in its income exclusion. In sum, the amici's analysis is faulty and should be disregarded.

Similarly, the federal Developmental Disability Assistance and Bill of Rights Act of 1994, PL 103–230, April 6, 1994, 108 Stat 284), codified as 42 U.S.C.A. § 15001, *et seq.* is equally unhelpful. (ARCA Br. 18; NHLP Br. 8, 19.) This act does not address means testing for federal

housing vouchers. In fact, this act does not pertain to housing at all. Instead its purpose is to ensure that individuals with developmental disabilities obtain comprehensive, individualized community-focused supportive services. (42 U.S.C.A. § 15043(a)(1)). The act also charges the states to construct programs "to protect and advocate for the rights of individuals with developmental disabilities" and to investigate incidents of abuse and neglect. (42 U.S.C.A. § 15043(a)(2)(B).) The purposes of the act are not in dispute, but the scope of the act does not encompass subsidized housing.

The amici also cite to Families with Disabilities Support Act of 1994. (IMPROVING AMERICA'S SCHOOLS ACT OF 1994, PL 103–382, October 20, 1994, 108 Stat 3518.) While worthy, the statute pertains to education and has nothing to do with the issues before the court.

In sum, the amici fail to cite authority that supports the contention that IHSS payments to appellant are anything other than income, not only to her but to her household as well.

C. The Amici's Interpretation Of The Regulation Is Inconsistent With Federal Statute And Regulations.

When responding to the amici's contentions, we are reminded to first look at the language of the regulation, reading the provisions together to ascertain HUD's intent (see, *United States v. Morton* (1984) 467 U.S. 822, 828 [104 S.Ct. 2769, 81 L.Ed.2d 680], fn. omitted), avoiding "absurd"

"odd" or "unreasonable results" whenever possible. (See *RCJ Medical Services, Inc., supra,* 91 Cal.App.4th 986, 1007.) The regulation when read together states in pertinent part:

Annual income means "all amounts, monetary or not" which are not "specifically excluded in paragraph (c)." (24 C.F.R. §5.609(a)(1), (a)(3).) Paragraph (c) *specifically* excludes:

> 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).)

Not only do the amici ignore the express instruction to only exclude costs "specifically excluded," they seek to change the words of the regulation by suggesting a new phrase, "the developmental disability State payments exclusion." This phrase differs markedly from the regulation as written and infuses a new and different meaning. Just as the rules of statutory construction do not permit the exclusion of words, adding new words from whole cloth is also not permitted. To do so would be to alter the meaning of the regulation, changing its meaning to exclude all sums caregivers are paid to provide care for their developmentally disabled family members. This is the same outcome that would have occurred had the Trial Court accepted the request to delete the phrase, "to offset the cost

of services and equipment." The amici's attempts to breathe an new and different meaning into the regulation must be rejected.

CONCLUSION

Contrary to the amici's passionate arguments, affirming the Court of Appeal's decision will not result in wholesale displacement of Section 8 families who care for their developmentally disabled loved ones at home. Affirming the Court of Appeal will not cause Section 8 families, who provide in-home care for a developmentally disabled family member, to experience an increase in the current level of contribution, *30% of adjusted income*, toward rent, absent factors unrelated to the issues before the Court. In contrast, vacating the Court of Appeal's decision and adopting the construction sought by the amici raises the real risk of inconsistent interpretation of Section 8 income eligibility standards from state to state and may also impact other federal regulations which employ that same phraseology as used here. Respondent asks this Court to remain focused on the words of the federal statute and regulations, giving each word its plain and ordinary meaning, avoid the absurd result sought by the amici.

Dated: April 15, 2019

Respectfully submitted
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Case No. S249593
IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

Dated: April 15, 2019

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Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, the enclosed brief is produced using 13-point Roman type including footnotes and contains approximately 6,016 words which is less than the total words permitted by the rules of court. The text of this brief was counted by the MICROSOFT WORD 2010 word-processing program used to generate the brief.

Dated: April 15, 2019

Respectfully submitted
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PROOF OF SERVICE
Kerrie Reilly v. Marin Housing Authority
Supreme Court Case No.: S249593
Our Client: Marin Housing Authority

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 San Francisco, State of California. My business address is 601 Montgomery Street, Ninth Floor, San Francisco, CA 94111-2612.

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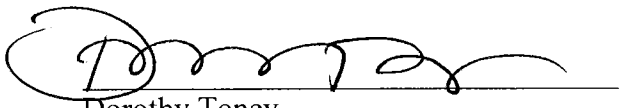

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