No. 20-1046

In the Supreme Court of the United States

MARIN HOUSING AUTHORITY, PETITIONER

v.

KERRIE REILLY

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

DAMON SMITH
General Counsel
BRIAN DUPRÉ
Associate General Counsel for Litigation
BATINA WILLS-WASHINGTON
Assistant General Counsel for Assisted Housing & Civil Rights Litigation
ALLEN VILLAFUERTE
Senior Trial Attorney
U.S. Department of Housing & Urban Development
Washington, D.C. 20410

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
NICOLE FRAZER REAVES
Assistant to the Solicitor General
ALISA B. KLEIN
BRAD HINSHELWOOD
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether payments made under California's In-Home Supportive Services program to a parent who personally provides care for her child who has developmental disabilities are "[a]mounts paid * * * to offset the cost of services and equipment needed to keep [a] developmentally disabled family member at home," 24 C.F.R. 5.609(c)(16), and therefore excluded from the family's annual income for purposes of calculating its Section 8 rent subsidy.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, and regulations:

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 20-1046

MARIN HOUSING AUTHORITY, PETITIONER

v.

KERRIE REILLY

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. a. Section 8 of the United States Housing Act of 1937, 42 U.S.C. 1437f, authorizes the United States Department of Housing and Urban Development (HUD) to provide rental assistance "[f]or the purpose of aiding low-income families in obtaining a decent place to live" and promoting "economically mixed housing." 42 U.S.C. 1437f(a). One form of assistance available under Section 8 is "tenant-based" assistance, commonly referred to as the Housing Choice Voucher program. 42 U.S.C. 1437f(f)(7) and (*o*); see 24 C.F.R. 982.1(a). HUD provides funding to local public housing agencies that

administer the tenant-based assistance program and distribute vouchers that eligible tenants can use to pay rent for privately-owned units of their choosing; if a tenant moves, the tenant-based assistance travels with her. 42 U.S.C. 1437f(f)(7); 24 C.F.R. 982.1. The majority of federal housing assistance that HUD provides is tenant-based. See HUD, *Department of Housing and Urban Development 2022 Congressional Justifications* 1-9 to 1-11 (May 28, 2021), https://go.usa.gov/xe36q.

Families that receive tenant-based assistance are required to pay a statutorily prescribed portion of their rent, typically equal to 30% of the family's "adjusted income" or ten percent of its gross income, whichever is greater. 42 U.S.C. 1437f(*o*)(2). The public housing agency then pays the balance of the rent with federal funds, up to a statutorily capped amount. See 42 U.S.C. 1437f(c) and (*o*). At present, federal law provides that the term "income" generally "means income from all sources of each member of the household, as determined in accordance with criteria prescribed by the Secretary" of HUD. 42 U.S.C. 1437a(b)(4). Congress thus has given the Secretary of HUD (Secretary) broad authority to define criteria for calculating income.

In the Housing Opportunity Through Modernization Act of 2016, Pub. L. No. 114-201, 130 Stat. 782, Congress adopted revised definitions of "income" and "adjusted income" that take effect at the beginning of the first calendar year after the Secretary has "issue[d] notice or regulations to implement" those changes. § 102(c) and (h), 130 Stat. 788, 791. As discussed in more detail below, see pp. 19-21, *infra*, the Secretary is currently engaged in that rulemaking process. The revised statutory definitions continue to make clear that, subject to certain specified exclusions from income, the Secretary

retains her broad statutory authority to set criteria for determining a program participant's "income." See § 102(c), 130 Stat. 788 ("The term 'income' means, with respect to a family, income received from all sources by each member of the household * * * as determined in accordance with criteria prescribed by the Secretary," subject to express statutory "requirements.").

Under the existing regulation governing income calculations, "annual income" is defined as "all amounts, monetary or not," that a family member receives unless an amount is "specifically excluded" by the regulation. 24 C.F.R. 5.609(a). The regulation provides an illustrative list of payments that fall within the general definition of "annual income," including "compensation for personal services" and "[p]ayments in lieu of earnings, such as unemployment and disability compensation." 24 C.F.R. 5.609(b)(1) and (5). As relevant here, the regulation excludes from "annual 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." 24 C.F.R. 5.609(c)(16). Such payments therefore are not taken into account when a public housing agency calculates the share of rent to be paid by a family receiving tenant-based assistance under Section 8.

b. California's In-Home Supportive Services program (IHSS), Cal. Welf. & Inst. Code § 12300 *et seq.* (West 2014), provides "supportive services * * * to aged, blind, or disabled persons * * * who are unable to perform the services themselves" and is designed to help such individuals avoid institutionalization by enabling them to "establish and maintain an independent living arrangement," *id.* § 12300(a)-(b); see *Basden* v.

Wagner, 181 Cal. App. 4th 929, 939 (2010). Under that program, in-home supportive services may be provided by a variety of persons and entities, including, in certain circumstances, the parent of a person who is disabled. Cal. Welf. & Inst. Code § 12300(e) (West 2014); see *id.* § 12301.6. A parent is eligible to receive payments for providing in-home supportive services "only when the provider leaves full-time employment or is prevented from obtaining full-time employment because no other suitable provider is available and where the inability of the provider to provide support services may result in inappropriate placement or inadequate care." *Id.* § 12300(e). Parent providers are compensated only for providing specific types of services. See *id.* § 12300(e)(1)-(5).

IHSS operates in part under the auspices of Medicaid, a cooperative federal-state program that provides benefits to certain persons "whose income and resources are insufficient to meet the costs of necessary medical services." 42 U.S.C. 1396-1. States that choose to participate in Medicaid develop a "plan for medical assistance" that must be approved by the Secretary of Health and Human Services. 42 U.S.C. 1396a(a); see 42 U.S.C. 1396a(b). As part of that plan, a State may develop home- and community-based care programs—such as IHSS—for individuals with disabilities and receive partial reimbursement from the federal government for the cost of those programs. See 42 U.S.C. 1396n(c).

2. In 1998, respondent Kerrie Reilly and her two daughters moved into an apartment in Marin County, California, and began receiving tenant-based assistance through the Housing Choice Voucher program. Pet. App. 2. Petitioner Marin Housing Authority administers

respondent's voucher pursuant to a contract with HUD. See *id.* at 3. One of respondent's daughters, K.R., has developmental disabilities, and respondent receives funds from IHSS to provide care for K.R. in their home. *Id.* at 2.

In 2004, respondent's other daughter moved out of their apartment to attend college, but respondent did not inform petitioner of her daughter's departure until 2009. Pet. App. 2-3. Petitioner then determined that the voucher respondent had received did not accurately reflect her household size over that five-year period—which violated program rules, cf. 24 C.F.R. 982.402—and required her to repay $16,011. Pet. App. 3, 70-71. Respondent entered into a repayment agreement with petitioner but missed a number of scheduled payments. *Id.* at 3; Resp. App. 6a-7a.

In 2015, respondent asked petitioner to recalculate her rent to exclude the payments she received from IHSS to care for K.R., contending that those payments were "[a]mounts paid by a State agency to a family * * * to offset the cost of services and equipment needed to keep [a] developmentally disabled family member at home." 24 C.F.R. 5.609(c)(16); see Pet. App. 3. Petitioner did not respond to that request, and instead sought to terminate respondent's voucher. Pet. App. 3. An administrative hearing officer subsequently found that respondent's breach of the repayment agreement constituted grounds to terminate her voucher, without addressing the question of whether Section 5.609(c)(16) applies to respondent's IHSS payments. *Id.* at 3, 71-72.

3. a. Respondent filed suit in Marin County Superior Court, seeking (1) a writ of mandate vacating petitioner's decision to terminate her voucher and requiring petitioner to exclude her IHSS payments from its

calculation of her income going forward, and (2) a writ of administrative action compelling petitioner to terminate the repayment plan and reinstate her voucher. Resp. App. 9a-11a. Both claims were premised on respondent's assertion that her IHSS payments fit within Section 5.609(c)(16)'s exclusion. *Ibid.* The Superior Court dismissed respondent's complaint, finding that IHSS payments do not fall within Section 5.609(c)(16). Pet. App. 92-95.

The California Court of Appeal affirmed. Pet. App. 69-89. The court found that, in order for payments to "offset the cost of services," they "must go to the same entity that incurs the costs of those services," and therefore "the costs these payments offset must be costs that the family itself incurs." *Id.* at 80. The court also found that the term "cost" "has to be understood in its most common and concrete sense": "'the amount or equivalent paid or charged for something; price.'" *Id.* at 81-82 (citation omitted). The court concluded that because respondent cares for her daughter instead of employing another person to do so, she incurs no costs that are offset by the IHSS payments, rendering Section 5.609(c)(16) inapplicable. *Id.* at 81-83.

b. i. The California Supreme Court granted discretionary review and reversed, holding that "a parent's IHSS compensation to provide care to keep a developmentally disabled child at home is excluded from income" under Section 5.609(c)(16). Pet. App. 34; see *id.* at 1-68.[1]

---

[1] At the California Supreme Court's invitation, the United States filed an amicus brief in which it argued that the IHSS payments that respondent receives are not payments "to offset the cost of services and equipment needed to keep [a] developmentally disabled family member at home," 24 C.F.R. 5.609(c)(16). Pet. App. 134-149.

The California Supreme Court found that the term "offset" did not necessarily "refer to compensation of specific, discrete amounts." Pet. App. 11. The court also found that the term "cost" "include[s] * * * the expenditure of something, such as time or labor, necessary for the attainment of a goal." *Id.* at 12 (citation and internal quotation marks omitted). Taking those definitions together, the court determined that, when a family uses "homecare payments to support itself so that it may care for a developmentally disabled member at home," the payments "'offset' the 'cost' of services and equipment needed to avoid institutionalization." *Ibid.* (citation omitted).

The California Supreme Court relied on its view of the rulemaking history of Section 5.609(c)(16) and what it perceived to be the purpose of the regulation. The court quoted supplementary information included as a preface to the interim rule that originally proposed that exclusion, which noted that "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 that family member in an institution." 60 Fed. Reg. 17,388, 17,389 (Apr. 5, 1995); see Pet. App. 13-14. On the court's reading, that statement "did not use 'cost' and 'offset' in terms of a specific monetary expense or amount a Section 8 family incurs, but in a broad sense with respect to describing the overall objective of the exclusion." Pet. App. 15. And the court concluded that distinguishing between families that use payments to provide care directly and those that use payments to compensate third parties for care would result in "unfair treatment," *id.* at 23, which would be inconsistent with the preface's observation that "families that strive

to avoid institutionalization should be encouraged, and not punished," 60 Fed. Reg. at 17,389. The court acknowledged that the Fifth Circuit and the Minnesota Supreme Court had more "narrow[ly] interpret[ed] * * * the exclusion as limited to out-of-pocket expenses that a state directly reimburses," but the court expressly "disagree[d] with" that approach. Pet. App. 20-21; see *Anthony* v. *Poteet Housing Authority*, 306 Fed. Appx. 98 (5th Cir. 2009); *In re Ali*, 938 N.W.2d 835 (Minn. 2020).

The California Supreme Court "remand[ed] the matter for further proceedings consistent with [its] opinion." Pet. App. 34. The court stayed its mandate pending the outcome of the petition for a writ of certiorari. Order, No. S249593 (Cal. Sept. 30, 2020).

ii. Three justices dissented. Pet. App. 35-68. In their view, interpreting Section 5.609(c)(16) to cover only "those state payments that reimburse a family's expenditures" was "the most straightforward reading of the relevant regulatory language." *Id.* at 35-36.

The dissenting justices reasoned that the term "offset" generally means to "counterbalance," and thus the regulation "anticipates that an equivalent cost has been or will be paid by the family for those services or equipment, since there would be nothing to counterbalance in the absence of such an expenditure." Pet. App. 44-45. The dissenters criticized the majority's reading of "offset," explaining that typically "[w]e do not refer to compensation for providing a service as 'offsetting the cost' of the service provider's own effort, much less the service provider's decision to take this job, rather than a different hypothetical job." *Id.* at 47. The dissenters also took issue with the majority's reading of the rulemaking history, noting that the preface did not "ex-

pressly address[] the issue before [the court]" and did "little more than parrot the language of the regulation." *Id.* at 52-53. And the dissenters emphasized that the majority's reading of the regulation would result in more favorable treatment of respondent's family than other similarly situated families—including "other low-income families with the same family income" and families with income earned outside the home that rely on third-party care to keep a family member who has developmental disabilities at home. *Id.* at 56; see *id.* at 60-66. The dissenters also noted that the majority's decision would simultaneously reduce the pool of voucher funds available for other families awaiting assistance. *Id.* at 66-67.

DISCUSSION

Petitioner seeks review of a California Supreme Court decision interpreting a federal regulation that is used to determine the amount of subsidies under the federal Housing Choice Voucher program. That the court remanded the case for further proceedings does not deprive its judgment of finality under 28 U.S.C. 1257. Any further proceedings will involve only issues concerning the calculation of the amount of payments owed by petitioner to respondent to redress past overpayments by respondent. As relevant here, the outcome of those proceedings is preordained and the court's interpretation of Section 5.609(c)(16) will control those proceedings—rendering the decision below final under this Court's longstanding approach to Section 1257.

On the merits, the California Supreme Court erred in determining that Section 5.609(c)(16) excludes IHSS payments from a Section 8 participant's income, misreading both the plain text and the context of that

regulation and rejecting HUD's interpretation of its own regulation. The court's decision conflicts with a non-precedential decision of the Fifth Circuit and a decision of the Minnesota Supreme Court.

Certiorari should nevertheless be denied because the question presented is of limited and diminishing importance. Before the California Supreme Court issued its decision, the Secretary began a rulemaking process that proposes material changes to Section 5.609(c)(16)'s text. Once the Secretary's changes to that exclusion are finalized, neither the decision below nor the split in authority will have any prospective effect. In addition, there is presently no indication that the temporary and limited lack of uniformity created by the decision below will have a significant impact warranting this Court's review.

A. This Court Has Jurisdiction To Review The Decision Of The California Supreme Court

Section 1257 of Title 28 grants this Court jurisdiction over certain "[f]inal judgments or decrees" of a state court that rest on federal law when the "final" decision is rendered by "the highest court of a State." 28 U.S.C. 1257(a). Section 1257 thus "establishes a firm final judgment rule." *Jefferson* v. *City of Tarrant*, 522 U.S. 75, 81 (1997). This Court has, however, "recurringly encountered situations in which the highest court of a State has finally determined the federal issue present in a particular case, but in which there are further proceedings in the lower state courts to come." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 477 (1975). The Court has recognized "at least four categories" of such cases in which it "has treated the decision on the federal issue as a final judgment" for purposes of Section 1257.

Ibid. This case satisfies the requirements of the first two *Cox* categories.

1. The first category under *Cox* involves "cases in which there are further proceedings * * * yet to occur in the state courts but where * * * the federal issue is conclusive or the outcome of further proceedings preordained." 420 U.S. at 479. Respondent here sought (1) a writ of mandate vacating her voucher termination and ordering petitioner to exclude her IHSS payments from its calculation of her income going forward, and (2) a writ of administrative action terminating her repayment plan and reinstating her voucher. Resp. App. 9a-11a. Those requests are premised on respondent's contention that her IHSS payments fit within the exclusion in Section 5.609(c)(16). See, *e.g.*, *id.* at 9a-10a.

Although the California Supreme Court remanded the case for further proceedings, Pet. App. 34, the federal issue it decided concerning the interpretation of the HUD regulation is conclusive. Neither party has identified any remaining dispute to be litigated in the state courts over how respondent's voucher payments should be calculated on an ongoing basis or whether petitioner is entitled to enforce the repayment agreement on other grounds. Respondent does not identify any specific legal issues to be litigated on remand, see Br. in Opp. 14, and petitioner has both implemented the decision below and expressly abandoned its alternative argument that its termination of respondent's voucher was valid regardless of the proper interpretation of Section 5.609(c)(16), Reply Br. 2-4. Similar representations have been taken into account in assessing whether a state-court judgment is final under Section 1257. See *American Export Lines, Inc.* v. *Alvez*, 446 U.S. 274, 277-279 & nn.5-7 (1980) (plurality opinion) (relying on a

party's representations—made at oral argument in this Court—regarding the abandonment of certain arguments in the state courts); see also *Local No. 438 Constr. & Gen. Laborers' Union, AFL-CIO* v. *Curry*, 371 U.S. 542, 551 (1963).

It therefore appears that the state courts' only remaining task is to calculate the amount of "subsidies petitioner must pay for the appropriate limitations period preceding the state Supreme Court's decision." Reply Br. 3. In similar situations, the Court has found that it has jurisdiction because "the outcome of further proceedings [is] preordained." *Cox*, 420 U.S. at 479. For example, in *Duquesne Light Co.* v. *Barasch*, 488 U.S. 299 (1989), the Court found that there was no jurisdictional impediment to considering whether a state law regulating utility ratemaking constituted a Fifth Amendment taking, even though the state supreme court had remanded the case to a state commission "for further proceedings to revise the relevant rate orders." *Id.* at 306. This Court found that the state supreme court had provided "the State's last word on the constitutionality of [the state law] and that all that remain[ed] [wa]s the straightforward application of its clear directive to otherwise complete rate orders." *Id.* at 307. Here, the California Supreme Court has provided "the State's last word" on the interpretation of Section 5.609(c)(16), and all that remains is for the lower courts to apply that "clear directive" and determine the amount of any payments that petitioner owes respondent as a result of its past refusal to apply Section 5.609(c)(16) to her IHSS payments. *Ibid.* See *American Export Lines*, 446 U.S. at 277-278 & n.5 (plurality opinion) (finding that a state-court decision was final under the first *Cox* category even though the amount of

damages awarded still might be reduced on remand); see also *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 611-612 (1989); *Mills* v. *Alabama*, 384 U.S. 214, 217-218 (1966).

2. For similar reasons, the decision below is final under the second *Cox* category, which involves cases "in which the federal issue * * * will survive and require decision regardless of the outcome of future state-court proceedings." 420 U.S. at 480. The California Supreme Court's interpretation of Section 5.609(c)(16) will survive the remand here for further calculation of the amount petitioner may owe respondent. Respondent has not identified any concrete manner in which that federal issue will become unnecessary to the resolution of this case, see Br. in Opp. 14, and, as discussed, petitioner has disclaimed any intention to advance arguments unrelated to the calculation of payments that it owes respondent. This Court has concluded that state-court judgments were final in similar circumstances. See, *e.g.*, *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 907 n.42 (1982) ("Although the Mississippi Supreme Court remanded for a recomputation of damages, its judgment is final for purposes of our jurisdiction."); see also *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 370 n.11 (1988); *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 310 n.3 (1987).[2]

---

[2] Respondent also sought attorney's fees and costs, which would remain to be calculated on remand. See Resp. App. 12a. It is well settled that a remand to calculate attorney's fees does not deprive a judgment of finality. *Washington State Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 381 n.5 (2003).

B. The California Supreme Court Erred In Holding That Section 5.609(c)(16) Excludes From Income Payments Received By A Family To Care For A Family Member Who Has Developmental Disabilities When The Family Does Not Incur Corresponding Costs

1. a. In determining that Section 5.609(c)(16) excludes IHSS payments from "income" for purposes of calculating the amount of rent that a Section 8 voucher recipient must pay, the California Supreme Court did not properly take account of the text and context of that regulation. Section 5.609(c)(16) provides that when calculating a family's annual income, a public housing agency must exclude "[a]mounts paid by a State agency to a family with a member who has a developmental disability and is living at home to offset the cost of services and equipment needed to keep the developmentally disabled family member at home." 24 C.F.R. 5.609(c)(16). That regulation does not provide for excluding the IHSS payments that are made directly to respondent for the care of her daughter because the payments do not "offset the cost of services and equipment." *Ibid.* Instead, the payments compensate respondent for the services she provides.

The ordinary meaning of the terms "cost" and "offset" establishes that Section 5.609(c)(16) does not encompass payments that compensate a family member for services that she provides. Generally, the "cost" of something is the amount paid for it—its monetary price. See *The American Heritage Dictionary of the English Language* 424 (3d ed. 1992) (*American Heritage*) ("[a]n amount paid or required in payment for a purchase; a price"); *Webster's Third New International Dictionary of the English Language* 515 (1993) (*Webster's*) ("the amount or equivalent paid or given or charged or en-

gaged to be paid or given for anything bought or taken in barter or for service rendered: charge, price") (capitalization omitted); 3 *The Oxford English Dictionary* 988 (2d ed. 1989) (*Oxford*) ("[t]hat which must be given or surrendered in order to acquire, produce, accomplish, or maintain something; the price paid for a thing"). And to "offset" something means to "counterbalance, counteract, or compensate for" it. *American Heritage* 1256; see *Webster's* 1567 ("counterbalance, compensate") (capitalization omitted); 10 *Oxford* 738 ("[t]o set off as an equivalent against something else[;] * * * [t]o counterbalance, compensate") (emphasis omitted). It follows that a payment to "offset the cost of services and equipment," 24 C.F.R. 5.609(c)(16), must be a payment that is made to counterbalance or compensate for a monetary cost actually incurred by the family—for example, an expenditure on third-party care for a family member in the home or on a piece of equipment used to provide care. That Section 5.609(c)(16) applies to the "cost" of both "services and equipment," *ibid.*, confirms that reading of "cost." Because "the cost of equipment is calculated in monetary terms—such as the cost to buy or lease"—the use of the term "'and' between the words services and equipment suggests that the same" monetary measurement "is used for each." *In re Ali*, 938 N.W.2d 835, 839 (Minn. 2020).

Respondent did not incur a monetary cost by providing care directly to her daughter. Nor did the IHSS payments that respondent received reimburse or offset the monetary cost "of services and equipment needed to keep" her daughter "at home," 24 C.F.R. 5.609(c)(16); rather, respondent was able to use those funds as traditional income and pay for other necessities. Both the

Fifth Circuit and the Minnesota Supreme Court have adopted that straightforward reading of the text of Section 5.609(c)(16). See *Anthony* v. *Poteet Housing Authority*, 306 Fed. Appx. 98, 101 (5th Cir. 2009) (finding that a parent who received state funding to personally care for her child "ha[d] incurred no costs which must be offset with state funds"); *Ali*, 938 N.W.2d at 840 (concluding that amounts a parent "received as compensation for her services in caring for her child were not amounts paid to offset the cost of services and equipment because [she] incurred no actual monetary expense").

That conclusion is reinforced by Section 5.609(c)(16)'s context. Subsection 4 is the only other provision in Section 5.609(c)'s list of exclusions that uses the term "cost"—and it unambiguously refers to a monetary price. See 24 C.F.R. 5.609(c)(4) (excluding from the definition of "income" "[a]mounts received by the family that are specifically for, or in reimbursement of, the cost of medical expenses for any family member"). Because "this Court normally presumes consistent usage" "absent contrary evidence," *HollyFrontier Cheyenne Ref., LLC* v. *Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2177 (2021), the fact that Subsection 4 uses "cost" to refer to a price paid indicates that "cost" in Subsection 16 carries the same meaning. See *Ali*, 938 N.W.2d at 839 (crediting that argument). And that Congress could have used another term, such as "reimburse," instead of "offset," see Br. in Opp. 26-28, does not undermine the conclusion that—in the context of Section 5.609(c)(16)—"cost" is best read to refer only to actual monetary costs.

b. The California Supreme Court erred in rejecting that straightforward reading of Section 5.609(c)(16)'s text. As an initial matter, the majority concluded that

the regulation employed a secondary meaning of "cost": the general "expenditure of something, such as time or labor, necessary for the attainment of a goal." Pet. App. 12 (citation omitted). The court concluded that under that reading, when a family uses "homecare payments to support itself so that it may care for a developmentally disabled family member at home," those payments "'offset' the 'cost' of services and equipment needed to avoid institutionalization." *Ibid.* That reading, however, does not account for the fact that "cost" applies to both "services and equipment." 24 C.F.R. 5.609(c)(16). See p. 15, *supra*.

The California Supreme Court also erred in relying on the policy goal it perceived in Section 5.609(c)(16) to stretch that exclusion beyond the limits of its plain text. When HUD promulgated that exclusion, it noted in the preface to the interim rule that it was "adding this additional exclusion to income" because "families that strive to avoid institutionalization should be encouraged, and not punished." 60 Fed. Reg. at 17,389. Nowhere in the preface did HUD suggest that "cost" and "offset" should be interpreted contrary to their most natural reading in this context. And when read according to its plain text, Section 5.609(c)(16) pursues its goal of avoiding institutionalization in a specific and limited manner: by ensuring that families that rely on third-party care can exclude their costs for services (and by permitting all families to exclude their costs for equipment) from income for the purpose of calculating the amount of their housing vouchers. As the dissenting justices noted below, that approach ensures that the "acceptance of state aid" by families that rely on third-party care "does not inflate their annual income and result in a diminished Section 8 subsidy"—and that they

are treated similarly to "other Section 8 families having a similar disposable income." Pet. App. 55. Families like respondent's—that receive compensation for the care that they provide directly to a family member, without any corresponding outlay—are not "punished" by having that compensation counted as income. 60 Fed. Reg. at 17,389. The regulation leaves them in the same place as families that earn the same amount working outside the home, while paying for third-party care to keep a disabled family member at home and receiving payments to offset the costs of those services. See 24 C.F.R. 5.609(a)(3) (defining "annual income" as "all amounts, monetary or not," unless an amount is "specifically excluded") (emphasis omitted).

2. The California Supreme Court's decision conflicts with a non-precedential decision of the Fifth Circuit and a decision of the Minnesota Supreme Court. See *Anthony*, *supra*; *Ali*, *supra*; see also Pet. App. 20-21; p. 8, *supra*. Respondent mistakenly asserts (Br. in Opp. 15-18) that those decisions are distinguishable based on the specific contours of different state programs. Under the state program in *Anthony*, the parent was hired as an employee by a private provider of homecare services and assigned to care for her own child. 306 Fed. Appx. at 100-101. The parent was paid to care for her son by state funds that passed through the private provider, and the Fifth Circuit found that those payments did not offset qualifying costs and therefore could not be excluded from income under Section 5.609(c)(16). *Id.* at 100-102. Respondent suggests (Br. in Opp. 16) that *Anthony* is meaningfully different from the decision below because the court there "did not address whether payments made by a state agency directly to a parent who cares for her developmentally disabled child

qualif[y] under" Section 5.609(c)(16). But Section 5.609(c)(16) makes no distinction based on whether funds are provided directly by the State or paid as wages to a parent by a third party that is administering state funds. And, in any event, the court in *Anthony* "assum[ed]" that for purposes of Section 5.609(c)(16) the "pass-through" payments would be treated the same as payments made directly by the State. 306 Fed. Appx. at 101.

Respondent also contends (Br. in Opp. 16-18) that the programs in *Anthony* and *Ali* are distinguishable because, unlike California's IHSS program, they did not require a determination by the State, as a condition for reimbursement, that "no other suitable provider is available" and that "the inability of the provider to provide support services may result in inappropriate placement or inadequate care." Cal. Welf. & Inst. Code § 12300(e) (West 2014). But nothing in Section 5.609(c)(16)'s text suggests that such a distinction makes any difference in determining whether payments to a parent to personally provide care to her child are amounts "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).

C. The Question Presented Does Not Warrant Review

1. Although the California Supreme Court's decision is erroneous, further review is unwarranted because the question presented is of limited and diminishing importance in light of HUD's pending rulemaking proceedings. As explained above, see pp. 2-3, *supra*, Section 5.609(c)(16) is a discretionary exclusion from income created under the Secretary's broad authority conferred by Congress to define criteria for calculating income. Such discretionary exclusions under the regu-

lation address a range of situations that arise in calculating program participant income and embody policy judgments by the Secretary about the appropriate treatment of certain payments that participants receive. Here, there is ample room for policy judgments by the Secretary about how best to address the needs of families that receive Section 8 vouchers and furnish care in the home for a family member who has developmental disabilities—as well as how to balance their needs against the overall needs of the Housing Choice Voucher program, which annually has far more qualified applicants than available vouchers. Cf. Pet. App. 16-17, 60 (majority opinion and dissent discussing policy goals and methods by which they could be achieved).

Even before the California Supreme Court decided this case, the Secretary had begun to reconsider the policy judgments reflected in Section 5.609(c)(16). In 2016, Congress passed the Housing Opportunity Through Modernization Act of 2016, which makes substantial changes to the way income is calculated under the Section 8 program. See pp. 2-3, *supra*. The Secretary has initiated a rulemaking to revise the relevant regulations to reflect those changes. See 84 Fed. Reg. 48,820 (Sept. 17, 2019). In conjunction with that rulemaking, the Secretary has proposed various amendments to the exclusions from income. See *id.* at 48,836-48,837. Those amendments propose to replace Section 5.609(c)(16) with an exclusion that would exclude from income "[p]ayments provided by a State Medicaid managed care system to a family to keep a member who has a disability living at home." *Id.* at 48,836 (proposed new Section 5.609(b)(19)). The proposed exclusion thus would remove the limitation that restricts the exclusion to amounts paid "to offset the cost of services and

equipment," 24 C.F.R. 5.609(c)(16), and instead exclude all payments provided by a qualifying Medicaid managed care system. HUD has received comments on the proposed exclusion and is currently considering what policy would be appropriate in light of those comments.[3] HUD has informed this Office that, as of now, it plans to promulgate a final rule in 2022.

Because of HUD's pending rulemaking, the question presented does not merit further review at this time. The decision below is based on Section 5.609(c)(16)'s current text, and HUD has proposed a change that would materially alter that text and restore nationwide uniformity to the treatment of covered payments. Although any final rule would not be applied retroactively, see Housing Opportunity Through Modernization Act of 2016, § 102(h), 130 Stat. 791, if the revision of the exclusion here is finalized as proposed, or the current exclusion is replaced in some other manner, HUD's action will ensure that the erroneous decision below has no prospective effect.

2. Petitioner asserts (Pet. 25-31 & n.6; Reply Br. 10-12) that the California Supreme Court's decision could result in substantial liability for public housing agencies in California and elsewhere based on claims that those agencies miscalculated voucher amounts in the past.

---

[3] The comments that HUD is considering include ones regarding the proposed rule's language limiting the exclusion from income to payments provided by a "State Medicaid managed care system," 84 Fed. Reg. at 48,836, rather than more generally excluding "[a]mounts paid by a State agency," 24 C.F.R. 5.609(c)(16). See, *e.g.*, Autumn M. Elliott, Senior Counsel, Disability Rights California, *Re: Docket No. FR-6057-P-01: Housing Opportunity Through Modernization Act of 2016: Implementation of Sections 102, 103, and 104 [HUD-2019-0078, RIN: 2577-AD03]* (Nov. 18, 2019), https://go.usa.gov/xeaPs; cf. Resp. Letter (Oct. 5, 2021).

Those concerns do not warrant a grant of certiorari at this time.

As an initial matter, the decision below only binds public housing agencies applying Section 5.609(c)(16) in California. Agencies in other States can continue to follow HUD's interpretation of that regulation. Moreover, this case only involves the claims of a single program participant—and, at this juncture, the litigation has focused on the termination of respondent's voucher and the calculation of her voucher amount going forward. At this point, it is unknown how many Section 8 participants in California might be affected by the California Supreme Court's decision and the extent of the liability that public housing agencies might face. Petitioner has not provided precise estimates in either of those categories, and the United States likewise does not have projections regarding the likely impact of the decision below.

Even if a number of families bring claims related to voucher payments that were miscalculated under the California Supreme Court's rule, it is unclear whether and to what extent other defenses and arguments might be available to housing agencies facing those hypothetical claims—including statutes of limitations and arguments against class certification. See Pet. 26 n.6. And for reasons similar to those just discussed, the prospect that the California courts will apply the decision below to other programs that rely on the definitions in Section 5.609(c)(16), see Pet. 22-25, does not warrant a grant of certiorari.

At a minimum, those uncertainties militate against review at this time. If it becomes apparent later that the issue in this case has a broader or more significant impact, the Court could revisit whether to grant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DAMON SMITH
General Counsel
BRIAN DUPRÉ
Associate General Counsel for Litigation
BATINA WILLS-WASHINGTON
Assistant General Counsel for Assisted Housing & Civil Rights Litigation
ALLEN VILLAFUERTE
Senior Trial Attorney
U.S. Department of Housing & Urban Development

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN M. BOYNTON
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
NICOLE FRAZER REAVES
Assistant to the Solicitor General
ALISA B. KLEIN
BRAD HINSHELWOOD
Attorneys

NOVEMBER 2021