No.

In the Supreme Court of the United States

PARK PROPERTIES ASSOCIATES, L.P., *and*
VALENTINE PROPERTIES ASSOCIATES, L.P.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Court of Federal Claims has jurisdiction under the Tucker Act over "any claim against the United States founded * * * upon any express or implied contract with the United States." 28 U.S.C. 1491(a)(1). The Federal Circuit (the only court of appeals with appellate jurisdiction over the Court of Federal Claims) has interpreted those words to mean that only parties "in privity" with the government may invoke the Court of Federal Claims' jurisdiction under the Tucker Act. It held that the Court of Federal Claims lacked jurisdiction in this case because petitioners are "in privity" only with a third-party "contract administrator" interposed by the government—despite that government officials negotiated and signed the contract.

As the government explained in its petition for rehearing en banc in a prior case, that holding conflicts with other Federal Circuit precedent holding that the exact same form contract at issue here imposes contractual obligations directly on the federal government. This conflict has been brought to the Federal Circuit's attention repeatedly, and it has consistently refused to convene en banc to bring clarity to its law. The enforceability of billions of dollars in government contracts hangs in the balance.

The question presented is whether the Court of Federal Claims has jurisdiction over a breach-of-contract claim against the government, where the government signs a contract that establishes contractual obligations for the government but interposes a third-party as a "contract administrator."

CORPORATE DISCLOSURE STATEMENT

Petitioners Park Properties Associates, L.P. and Valentine Properties Associates, L.P. do not have parent corporations, and no publicly traded corporation owns 10% or more of the stock of either Petitioner.

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Petitioners Park Properties Associates, L.P. and Valentine Properties Associates, L.P. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the Federal Circuit (App., *infra*, 1a-15a) is reported at 916 F.3d 998. The opinion of the Court of Federal Claims concerning liability (App., *infra*, 16a-27a) is reported at 128 Fed. Cl. 493. Its decision concerning damages (App., *infra*, 28a-37a) is not reported but is available at 2017 WL 1718751.

JURISDICTION

The court of appeals entered judgment on February 19, 2019. It denied a timely petition for rehearing on May 30, 2019. App., *infra*, 38a-39a. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS

The Tucker Act of 1887 provides in relevant part that "[t]he United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded * * * upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. 1491(a)(1).

INTRODUCTION

This case presents a question of tremendous practical importance over which the Federal Circuit is internally conflicted but which it has repeatedly refused to convene en banc to address. At issue is the meaning of the Tucker Act's broad waiver of sovereign immunity and grant of jurisdiction to the Court of Federal Claims with respect to "any claim against the United States

founded * * * upon any express or implied contract with the United States." 28 U.S.C. 1491(a)(1).

The Federal Circuit held in this case that the Court of Federal Claims lacks jurisdiction under the Tucker Act over claims relating to Section 8 housing assistance program (HAP) contracts in which the Department of Housing and Urban Development (HUD) interposes a state public housing authority (PHA) as a contract administrator. The court's decision rests on an indefensible interpretation of the Tucker Act and threatens to inflict deep and lasting harm on a $12 billion social welfare program.

The Section 8 public housing program authorizes HUD to pay rent subsidies to owners of private properties for providing qualified housing to low-income Americans. See 42 U.S.C. 1437f. Through that program, HUD entered into HAP contracts with petitioners (collectively, "Park Properties") in 1978. When the original contracts expired 30 years later, HUD negotiated and signed renewal contracts that included the New York State Housing Trust Fund Corporation as a "contract administrator." The use of PHAs as contract administrators for HAP contracts is HUD's current standard practice.

When Park Properties sued HUD in the Court of Federal Claims over the renewal rental rates, HUD asserted that the only parties to the renewal contracts were Park Properties and the State Housing Trust. Because, in its view, there was no "express or implied contract with the United States" (28 U.S.C. 1491(a)(1)), HUD took the position that it had not waived sovereign immunity with respect to the renewal contracts, and the court lacked jurisdiction.

The Court of Federal Claims rejected that argument, ruled for Park Properties on the merits, and

awarded nearly $8 million in damages. But the Federal Circuit reversed. It held that the Tucker Act permits claims only by parties "in privity" with the United States. To meet that standard, according to the court of appeals, a contract must explicitly label the federal government as a party to the contract. That is so even where (as here) the federal government negotiates the contract's terms and a federal government official signs the contract on behalf of a federal agency. The court of appeals held further that, notwithstanding unmistakably mandatory contract language—including the word *shall*—the renewal contracts imposed no direct duties on HUD to pay the required subsidies in the event of a default by the State Housing Trust.

That holding deserves this Court's review. As an initial matter, it conflicts with the Federal Circuit's recent decision in *CMS Contract Management Services* v. *Massachusetts Housing Finance Agency*, 745 F.3d 1379 (Fed. Cir. 2014). There, the Federal Circuit held that the exact same form renewal HAP contract *does* impose direct contractual duties on HUD. According to the court in that case, involvement of a PHA as a contract administrator introduces an intermediate service provider, and no more; it does not alter HUD's underlying contractual duties or relationships.

In light of this conflicting authority—which the Federal Circuit has twice been asked to reconsider en banc, but refused—Section 8 project owners cannot know whether or under what circumstances their HAP breach-of-contract claims will be heard.

The practical ramifications of the Federal Circuit's holding in this case cannot be overstated. The Section 8 housing assistance program is immense. HUD spends nearly $12 billion annually on Section 8's project-based rent subsidy program, which provides housing to more than 1.2 million American households. To implement

the program, HUD contracts with thousands of PHAs to administer tens of thousands of HAP contracts. Yet HUD's view—and the view now approved by the Federal Circuit—is that it can dodge its contractual obligations under this sprawling program by simply interposing a PHA as a contract administrator.

That position is legally meritless and practically untenable. The Tucker Act waives sovereign immunity and confers jurisdiction to the Court of Federal Claims over all claims involving any "contract with the United States." The agreements at issue in this case are textbook "contracts." And they are plainly "with the United States." They were negotiated by HUD employees, they impose obligations on HUD itself, and they were signed by HUD officials. The Federal Circuit's contrary holding is wrong in every possible respect: It ignores the statutory and contractual language, leads to absurd results, and disregards the settled purposes of the Tucker Act. Worse, it is sowing confusion among program participants and discouraging property owners from continuing to participate in the Section 8 program. This Court's intervention is imperative.

STATEMENT OF THE CASE

A. Statutory background

1. The Section 8 program

Congress created the Section 8 housing assistance program in 1974 "[f]or the purpose of aiding lower-income families in obtaining a decent place to live." Housing and Community Development Act of 1974, Pub L. No. 93-383, § 201(a), 88 Stat. 633, 662 (codified as amended at 42 U.S.C. 1437f *et seq.*).

Section 8's project-based subsidies operate "by subsidizing private landlords who would rent to low-income tenants." *Cisneros* v. *Alpine Ridge Group*, 508 U.S. 10, 12 (1993). "Under the program, tenants make

rental payments based on their income and ability to pay," while landlords receive housing assistance payments from HUD under a contract "in an amount calculated to make up the difference between the tenant's contribution" and a maximum monthly rental rate "which the owner is entitled to receive." *Ibid*.; 42 U.S.C. 1437f(c)(1)(A). The subsidy contract with the property owner is referred to as a "HAP contract." *Alpine Ridge*, 508 U.S. at 20.

Early HAP contracts "established initial contract rents * * * and provided, consistent with the statutory authorization, that these rents would be adjusted regularly, on the basis of a reasonable formula, to keep pace with changes in rental values in the private housing market." *Alpine Ridge*, 508 U.S. at 13. The contracts included "Automatic Annual Adjustment Factors" to update the rent each year, consistent with factors the government published based on market trends. *Id.* at 13-14.

Concerned that subsidized rents were higher than warranted, Congress amended Section 8 in 1994 by permitting rent increases only "to the extent that the owner demonstrates that the adjusted rent would not exceed the rent for an unassisted unit of similar quality, type, and age in the same market area, as determined by the Secretary." Pub. L. No. 103-327, 108 Stat. 2298, 2315 (1994) ("the 1994 Act") (codified at 42 U.S.C. 1437f(c)(2)(A)). The 1994 Act also reduced the annual adjustment factor for units occupied by the same tenant during a prior year. *Ibid*.

HUD interpreted the 1994 Act as shifting the burden to property owners to provide a market report supporting an increase before a rate adjustment would be allowed. HUD Notice 95-12 (Mar. 7, 1995).

2. Renewal of expiring HAP contracts

By the late 1990s, the original terms of the HAP contracts with property owners were beginning to expire. Congress responded with the Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRA). Pub. L. No. 105-65, Tit. V, 11 Stat. 1343, 1384 (codified at 42 U.S.C. 1437f note).

Among other things, MAHRA authorized renewal of the expiring HAP contracts. See 42 U.S.C. 1437f note. MAHRA defined "renewal" as the "replacement of an expiring Federal rental contract with a new contract." *Ibid*. (MAHRA § 512(12)).

Initially, MAHRA provided that the "Secretary *may* use amounts available" to renew expiring Section 8 contracts. Pub. L. No. 105-65, Title V, § 524, 11 Stat. 1384, 1408 (1997) (emphasis added). Two years later, Congress amended the law again to make the language mandatory, providing that the "Secretary *shall*, at the request of the owner" and, if funds are available, "use amounts available for the renewal of assistance under section 8." Pub. L. No. 106-74, Title V, Subtitle C, § 531, 113 Stat. 1047, 1109-10 (1999) (emphasis added) (codified at 42 U.S.C. 1437f note, § 524).

3. The roles of PHAs

Section 8 originally authorized HUD to provide project-based assistance in two ways: through (1) HAP contracts with private owners of low-income housing, or (2) annual contribution contracts with state public housing authorities (PHAs), which routed funds through state agencies, which in turn would pay the project owners. See Pub. L. No. 93-383, 88 Stat. 633, 662–63. The first option was the more common approach; as of the mid-1990s, approximately 83 percent of the 24,200 project-based HAP contracts in effect were administered by HUD, while the remainder were

administered by PHAs under annual contribution contracts. *CMS Contract Mgmt. Servs.* v. *Mass. Housing Finance Agency*, 745 F.3d 1379, 1382 (Fed. Cir. 2014).

In 1983, Congress repealed HUD's authority to enter into new HAP contracts for new construction. *Ibid*. As HUD has described it, "HUD has primary responsibility for contract administration but has assigned portions of these responsibilities to other organizations that act as Contract Administrators for HUD." See *HUD Handbook 4350.3: Occupancy Requirements of Subsidized Multifamily Housing Programs* § 1-4(B), at 1-8 (June 23, 2009), perma.cc/X6WE-EW7U. Contract administrators "are responsible for asset management functions and HAP contract compliance and monitoring functions." *Ibid*.

The purpose of involving PHAs in renewal contracts was thus to "transfer and share many of the loan and contract administration functions and responsibilities of the Secretary to and with capable State, local, and other entities." *CMS Contract Mgmt. Servs.*, 745 F.3d at 1382 (quoting MAHRA § 511(11)(C)).

B. Factual and procedural background

1. Park Properties provides federally subsidized Section 8 housing for low-income tenants in two apartment buildings in Yonkers, New York. App., *infra*, 17a. Park Properties began participating in the Section 8 program in 1979 under two long-term HAP contracts with HUD. C.A. App. 152, 159.

In 2004, before the original contracts expired, Park Properties sued the United States in the Court of Federal Claims, alleging that the 1994 Act and 1995 HUD guidance concerning rate adjustments breached the contracts because they "alter[ed] the way in which rent increases were to be determined," C.A. App. 161, resulting in no annual rent increases in most years after

1994. App., *infra*, 20a. The court agreed, holding that the government had breached the contracts. *Ibid*.

The court issued its decision on liability in 2006, but it took the court another 11 years to adjudicate the question of damages and enter a final judgment. See App., *infra*, 20a-21a. Petitioners were awarded nearly $5 million in damages, and in 2017, the Federal Circuit affirmed. See *Park Properties Assocs., L.P.* v. *United States*, 677 F. App'x 676 (Fed. Cir. 2017).

2.a. During the pendency of the 2004 lawsuit, Park Properties' original HAP contracts expired. App., *infra*, 17a. Between 2009 and 2011, Park Properties therefore entered a series of renewal HAP contracts. App., *infra*, 17a. Although the duration and rates for the contracts were negotiated with HUD, the contracts themselves were standard form contracts and bore the same project numbers as the contracts they renewed. C.A. App. 41-49. The renewal contracts included the State Housing Trust as the "contract administrator." An employee of a private contractor (CGI) apparently signed on behalf of the State Housing Trust. An "authorized representative" of HUD also signed the contract (App., *infra*, 5a):

SIGNATURES

Contract administrator (HUD or PHA)

Name of Contract Administrator

New York State Housing Trust Fund Corporation
38-40 State Street, Hampton Plaza, Albany, NY 12207

By: _____
Signature of authorized representative

James Van Loan, State Manager New York, CGI
Name and official title

Date 6/18/09

U.S. Department of Housing and Urban Development

By: _____
Signature of authorized representative

Diane Lima, Director, Project Management, New York Multifamily HUB
Name and official title

Date 6/22/9

RECEIVED
JUN 26 2009
CGI Albany

Owner

Name of Owner Park Properties Associates LP

By: _____
Signature of authorized representative

JEROME Z. GINSBURG Pres of GP
Name and title

Date 6/12/09

The contract states that all provisions from the original contracts between Park Properties and HUD (except those expressly exempted by Sections 5(b)(1) through (4) of the contract) "are renewed" and "[t]he Renewal Contract includes those provisions" by reference. C.A. App. 45.

The contract also establishes certain duties for HUD. In particular, it states that "Execution of the Renewal Contract by the Contract Administrator is an obligation by HUD of [funds] * * * to provide housing assistance payments." C.A. App. 42. And Paragraph 11 (the "PHA Default" clause) provides:

> If HUD determines that the PHA has committed a material and substantial breach of the PHA's obligation, as Contract Administrator, to make housing assistance payments to the Owner in accordance with the provisions of the Renewal Contract, and that the Owner is not in default of its obligations under the Renewal Contract, HUD *shall* take any action HUD determines necessary for the continuation of housing assistance payments to the Owner in accordance with the Renewal Contract.

App., *infra*, 4a-5a (emphasis added).

b. The 2004 lawsuit had corrected HUD's refusal to grant statutorily-required rent increases and, in turn, determined the correct rent level. Those same judicially determined rates should have applied to the renewal contracts as well. Nevertheless, HUD set the beginning rents in the renewal contracts at a depressed, pre-lawsuit level.

Park Properties initially sought to address the question of the renewal rental rates as part of the damages calculation in the original litigation, but the Court of Claims held that the renewal contracts were

not properly before it. *Park Properties Assocs., L.P.* v. *United States*, 2014 WL 4667212, at *2 (Fed. Cl. Sept. 19, 2014).

Accordingly, Park Properties filed a complaint in this case in 2015, seeking damages and to reform the renewal contracts consistent with the outcome of the original 2004 litigation.

HUD asserted in response that, although it was a party to the original contracts, and although it had negotiated, drafted, and signed the renewal contracts, it is not a party to the renewal contracts and has no obligations to Park Properties under their terms. App., *infra*, 23a. Instead, HUD argued, the only parties to the renewal contracts are Park Properties and the State Housing Trust. *Ibid*. Thus, its nutshell position was that it could avoid its obligation to adjust the rental rates on the renewal contracts because it interposed a contract administrator between itself and Park Properties.

i. The Court of Federal Claims rejected that defense. App., *infra*, 16a-27a. The court noted that "Section 4(a)(2) of the contract provides that HUD is party to provisions of the renewal contract," and Paragraph 11's PHA Default clause imposes a duty on HUD "to correct any default if the Public Housing Agency ('PHA') breaches the contract, as well as agrees to continue assistance payments to the owners." App., *infra*, 23a. Thus, "HUD has not escaped privity with the property owners." App., *infra*, 24a.

The court thus denied the government's motion to dismiss, granted summary judgment to Park Properties, awarded $7.9 million in damages, and reformed the 20-year renewal contracts to reflect the correct rent going forward. App., *infra*, 2a.

ii. The Federal Circuit reversed. App., *infra*, 1a-15a. It held that "there is * * * no privity here." App., *infra*, 11a.

The court of appeals stressed that Section 1 of the renewal contracts "specifically identified the parties" as including the State Housing Trust but not HUD. App., *infra*, 2a-3a. The court acknowledged that "HUD also signed each renewal contract" (App., *infra*, 5a), but because the HAP contracts do not expressly identify HUD as either a party or the contract administrator, the proper way to construe the contracts is that "HUD contracted with a PHA who in turn contracted with [Park Properties] with HUD's approval" (App., *infra*, 11a). The contracts thus create only an indirect relationship between Park Properties and HUD. App., *infra*, 11a. And a plaintiff "that ha[s] not directly contracted with the government for housing projects did not have privity." *Ibid*.

The court also held that the renewal contracts do not impose "the type of direct, unavoidable contractual liability necessary to trigger a waiver of sovereign immunity" under the Tucker Act. App., *infra*, 15a. The court acknowledged that Paragraph 11 provides that, in the event of a default by the State Housing Trust, "HUD *shall* take any action HUD determines necessary for the continuation of housing assistance payments to the Owner in accordance with the Renewal Contract." App., *infra*, 4a-5a (quoting contract language) (emphasis added). But because Paragraph 11 gives HUD exclusive authority to determine when a breach has taken place, the Federal Circuit concluded that Paragraph 11 in fact gives HUD "tremendous discretion" and "does not obligate HUD" under any circumstance. App., *infra*, 14a-15a.

iii. Park Properties petitioned for panel rehearing and rehearing en banc. See App., *infra*, 38a-39a. The

petition asserted, among other things, that the panel's holding conflicts with *CMS Contract Management Services*, which had construed the same form HAP contract and held that it does impose contractual duties directly on HUD. The court called for a response from the United States, and the full court was polled. *Ibid*. The court denied the petition. *Ibid*.

REASONS FOR GRANTING THE PETITION

The Federal Circuit held in this case that the Court of Federal Claims lacks jurisdiction over all claims relating to HAP renewal contracts in which HUD interposes a state PHA as a contract administrator. The court's decision rests on a deeply flawed construction of the Tucker Act and threatens to inflict widespread harm on a major social welfare program. More generally, government agencies will be free under the decision in this case to breach their contracts unconstrained by judicial oversight simply by using third parties as "contract administrators." Further review of that decision is plainly warranted.

That is so despite the absence of a circuit conflict. Appeals from the Court of Federal Claims are taken exclusively to the Federal Circuit, meaning that no circuit conflict is possible. Yet the Federal Circuit's own case law is in disarray. Absent this Court's intervention, the resulting uncertainty will further impair the Section 8 project-based subsidy program.

A. The Federal Circuit's case law is internally conflicted

The Federal Circuit held in this case that Park Properties has no "contract with the United States" within the meaning of the Tucker Act because HUD is not explicitly labeled as a "party" in the contracts, and the contracts impose no direct contractual obligations on HUD. App., *infra*, 10a, 14a-15a.

Those conclusions are wrong on their own terms, as we demonstrate in Part C. In addition, they squarely conflict with the Federal Circuit's own precedent concerning the precise same form renewal contracts. The result is an untenable state of affairs in which program participants cannot know whether their contracts with the government will be enforceable in court.

1. In *CMS Contract Management Services*, the Federal Circuit was called upon to decide whether HUD's annual contributions contracts with PHAs under the Section 8 housing program are "procurement contracts" subject to federal procurement laws or instead "cooperative agreements" that may be entered into outside the requirements of federal procurement laws. The answer to that question turned principally on the question whether the rent subsidy payments that HUD pays to PHAs (which they in turn pass on to HAP project owners) are a "thing of value" to the PHAs. *CMS Contract Mgmt. Servs.*, 745 F.3d at 1381. The court held that they were not. *Id*. at 1386.

As relevant here, the court explained that "[t]ransferring funds to the [PHAs] to transfer to the project owners is not conferring anything of value on the [PHAs]" because "the [PHAs] have no rights to, or control over, those funds." *CMS Contract Mgmt. Servs.*, 745 F.3d at 1386. Instead, "HUD has merely created an intermediary relationship with the [PHAs]," whereby the PHAs receive funds from HUD and then pass them on to the HAP property owners. *Ibid*. Interposing a PHA as an intermediary in this way does not change the parties' underlying duties or relationships: "HUD [continues to have] a legal obligation to provide project owners with housing assistance payments under the HAP contracts," and project owners alone are "eligible for assistance." *Ibid*. The PHAs simply "administer[] HAP contracts on behalf of HUD." *Ibid*.

That holding—made in reference to the *exact same* form contracts that are at issue in this case[1]—is irreconcilable with the decision below, in two ways.

First, the court in this case held that, because the State Housing Trust has been named as the contract administrator, the contract is with the State Housing Trust only, and Park Properties has no contractual relationship with HUD. App., *infra*, 12a-13a. Not so according to *CMS Contract Management Services*, which held that the project owners' agreements are with HUD, and the PHA simply "administer[s] HAP contracts on behalf of HUD." 745 F.3d at 1386.

Second—and even more troubling—the court held that the HAP renewal contracts at issue here "[do] not obligate HUD" to make rent subsidy payments if the State Housing Trust defaults on the payments. App., *infra*, 14a. Again, not so according to *CMS Contract Management Services*, which held that "HUD has a legal obligation to provide project owners with housing assistance payments under the HAP contracts." 745 F.3d at 1386.[2]

2. The holdings in this case and in *CMS Contract Management Services* are in undeniable conflict. But the Federal Circuit cannot be counted on to resolve the

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[1] Compare C.A. App. 241-252 (HAP renewal contract at issue in this case) with Dkt. 81, at AR 2267-2278, *CMS Contract Mgmt. Servs.* v. *United States*, No. 13-5093 (Fed. Cir. June 23, 2014) (same contract at issue in *CMS*).

[2] The decision in this case also conflicts with a decision of the General Accounting Office. Construing the same form contract, that office has held that "the Project-Based Section 8 HAP 'Basic Renewal Contract' provided by HUD specifically obligates HUD, and not the contract administrator, to provide the housing assistance payments." Assisted Hous. Servs. Corp., B-406738 et al. (Comp. Gen. Aug. 15, 2012), perma.cc/AP6S-5PNK.

conflict on its own. On at least two occasions, it has had an opportunity to clarify its precedents en banc, and it has declined both times.

The government itself sought rehearing en banc in *CMS Contract Management Services*. It argued, among other things, that "[t]he Panel's reliance upon the HAP contract's [Paragraph 11] 'PHA Default' clause conflicts with the Federal Circuit's previous holding that this provision does not create privity between HUD and the owner." U.S. Reh'g Pet. 11, *CMS Contract Mgmt. Servs.* v. *United States*, No. 13-5093 (Fed. Cir. June 23, 2014) (citing *New Era Construction* v. *United States*, 890 F.2d 1152, 1156-1157 (Fed. Cir. 1990)). The government stressed its view that, under circuit precedent, "the 'PHA Default' provision contains no legally enforceable obligation running from HUD to the project owner." *Ibid*. The court denied the petition.

Park Properties also petitioned for rehearing en banc in this case. It too brought the conflict to the Federal Circuit's attention, explaining that "the panel here reached the opposite conclusion as to the same provision addressed in *CMS*." Reh'g Pet. 8. Once again, the Federal Circuit denied review.

Against this background, only this Court can bring clarity and predictability to this critically important area of law. This Court often grants review of cases arising from the Federal Circuit's exclusive docket. *E.g.*, *Return Mail, Inc.* v. *United States Postal Serv.*, 139 S. Ct. 1853 (2019); *SAS Inst., Inc.* v. *Iancu*, 138 S. Ct. 1348 (2018); *SCA Hygiene Prod. Aktiebolag* v. *First Quality Baby Prod., LLC*, 137 S. Ct. 954 (2017); *Cuozzo Speed Techs., LLC* v. *Lee*, 136 S. Ct. 2131 (2016). It should do so in this case as well.

B. The question presented is important

Further review is warranted because the question presented is important.

1. The question presented arises frequently and affects billions of dollars in federal contract obligations

a. To begin with, proper resolution of the question here dictates whether HUD's obligations under HAP renewal contracts are enforceable against it *at all*. If, as the Federal Circuit held, HUD is not in privity with HAP renewal property owners, the Court of Claims is divested of jurisdiction and HUD is entitled to sovereign immunity, no matter how clear and obvious HUD's violation of the contract.

The sheer volume of relevant contracts makes this a matter of enormous practical consequence. HUD has engaged hundreds of state and local PHAs to manage thousands of HAP contracts. See *CMS Contract Mgmt. Servs.*, 745 F.3d at 1382. Through those contracts, HUD spends nearly $12 billion annually on Section 8 project-based rent subsidies, which support housing for more than 1.2 million American households. Alison Bell, *2019 Bill Largely Sustains 2018 HUD Funding Gains*, Ctr. on Budget & Policy Priorities, perma.cc/47HJ-DUP4. The question whether thousands of contracts, obligating the government to pay billions of dollars in federal subsidies, are enforceable against the federal government in the Court of Claims is manifestly a matter of significant importance.

b. If the decision in this case is allowed to stand, property owners will be unable to enforce their rights against HUD under their HAP renewal contracts, and they therefore will be less likely to continue participating in the program. HUD's view is that it owes no duty to property owners to make good on agreed subsidy

payments if the PHA administering the contract breaches the agreement. Worse, HUD believes that it does not owe a duty to draft HAP renewal contracts consistent with its statutory obligations. In its view, it is free to write and enter into contracts under the Section 8 housing assistance program unconstrained by either congressional or judicial oversight—all because it uses state and local PHAs as "contract administrators."

This is not a hypothetical concern: Petitioners were awarded approximately $5 million for HUD's breaches of the original HAP contracts. According to the Court of Federal Claims, they are entitled to nearly $8 million more (and additional millions with respect to the remaining term of the reformed 20-year contracts) for HUD's repeated violations of its legal duties in the HAP renewal contracts. But, according to the Federal Circuit, the Court of Federal Claims lacks jurisdiction over those claims, rendering HUD immune from judgment in this case and scores of others like it. If that is truly the law, fewer property owners will be willing to continue on with the program.

2. The Federal Circuit's atextual "privity" requirement is inhibiting proper enforcement of the Tucker Act

The question presented is important also because it is interfering with the proper administration of the Court of Federal Claims' jurisdiction.

According to the Federal Circuit, "the Court of Federal Claims has jurisdiction only if there is *privity of contract* between plaintiffs and the government." App., *infra*, 7a (emphasis added) (citing *Cienega Gardens* v. *United States*, 194 F.3d 1231, 1239 (Fed. Cir. 1998)). But the word "privity" does not appear in the Tucker Act, and it is a concept devoid of substance.

See 9 *Corbin on Contracts* § 41.2 (2019) (describing the concept of "privity" as "circular" and lamenting that "[i]ts continuation, as if it had analytical merit, is not only useless; it exacerbates * * * confusion" in contract law).

The myriad practical problems with the principle of "privity" are clear from the Federal Circuit's own talismanic standards.

For example, the court held in this case there was no privity (and thus no jurisdiction in the Court of Federal Claims) because the renewal contracts did not "explicitly name[]" HUD as a party to the contract. App., *infra*, 2a. But labels do not make for contracts—substance does. And here the agreements explicitly renew contracts that had been entered into by HUD itself; they explicitly reference and renew HUD's obligations under the original contracts, and they were negotiated and signed by HUD itself. On their face, these form agreements constitute "express or implied contract[s] with the United States" (28 U.S.C. 1491(a)(1)), regardless of how HUD and its contractual counterparties may have chosen to describe themselves. To say otherwise would be to elevate form over substance, contrary to congressional intent.

The Federal Circuit also thought it relevant to the "privity" analysis that HUD purportedly contracted "indirectly" with Park Properties. App., *infra*, 7a. In other words, according to the court of appeals, HUD contracted with the State Housing Trust, which in turn contracted with Park Properties. App., *infra*, 2a. But here again the court has fixated on form rather than substance. Regardless whether there are two "tiers" of contracting or one hundred, HUD assumed duties under the renewal contracts, obligating itself to pay Park Properties under the terms agreed. *And a HUD official signed the agreements.* It blinks reality to say that

these were not "contracts with the United States" within the meaning of the Tucker Act.

None of the limitations that the Federal Circuit has read into the concept of "privity" appear anywhere in the Tucker Act's language. There is no textual requirement that a contract explicitly label the government a "contracting party," nor is there any textual distinction between "direct" and "indirect" contracts for triggering jurisdiction in the Court of Federal Claims. Simply put, the decision below can't be squared with the statute or common sense.

b. The Federal Circuit's focus on "privity" is inconsistent with the statutory text in another way: it would deny jurisdiction over claims by third-party beneficiaries to contracts with the government.

If privity means anything, it means the relationship between the contracting parties as contrasted with the relationship between a contracting party and a non-contracting third party. See "Privity of Contract," *Black's Law Dictionary* (11th ed. 2019) ("The relationship between the parties to a contract, allowing them to sue each other but preventing a third party from doing so."). If the Federal Circuit were correct that the Tucker Act grants jurisdiction to the Court of Federal Claims only over claims involving parties "in privity" with the government, therefore, third-party beneficiaries of government contracts would never have standing to file suit under the Act.

But that is not what the Act says. Rather, Congress granted jurisdiction and waived sovereign immunity with respect to "*any* claim against the United States *founded* * * * *upon* any express or implied contract with the United States." 28 U.S.C. 1491(a)(1) (emphasis added). That language plainly authorizes claims by third-party beneficiaries. After all, claims of third-

party beneficiaries of government contracts are "founded * * * upon" government contracts just the same as are claims by direct contracting parties. And "Congress' use of the word 'any' suggests an intent to use that term 'expansively,'" not in an artificially limited way. *Smith* v. *Berryhill*, 139 S. Ct. 1765, 1774 (2019) (brackets omitted).

Remarkably, the Federal Circuit's own cases recognize that third-party beneficiaries may bring suit under the Tucker Act. See, *e.g.*, *FloorPro, Inc.* v. *United States*, 680 F.3d 1377, 1380 (Fed. Cir. 2012). Thus, not even the Federal Circuit appears to have the conviction to stand by "privity" as a jurisdictional prerequisite under the Tucker Act.

The Federal Circuit's case law is thus in tatters—it fixates on the outmoded concept of "privity" in some contexts and ignores it in others, willy nilly. This is not a sustainable state of affairs, particularly in light of "the need for judicial administration of a jurisdictional statute to remain as simple as possible." *Hertz Corp.* v. *Friend*, 559 U.S. 77, 80 (2010).

c. The Federal Circuit's convoluted approach to "privity" in circumstances like these is certain to affect other statutory regimes as well.

The Federal Circuit's rule, broadly stated, is that the United States may avoid liability for a contract that a federal agency negotiates and signs by utilizing a simple expedient: a "local agency [to] act[] merely as a conduit for the federal funds." *Katz* v. *Cisneros*, 16 F.3d 1204, 1210 (Fed. Cir. 1994) (quoting *Marshall N. Dana Constr., Inc.* v. *United States*, 229 Ct. Cl. 862 (1982)). Applying that basic principle, the Federal Circuit has refused Court-of-Claims jurisdiction in cases involving, for example, the sale of electricity by a federal agency over an intermediate commodity exchange.

See *Pacific Gas & Electric Co.* v. *United States*, 838 F.3d 1341, 1365 (Fed. Cir. 2016) (Newman, J., dissenting) (characterizing the majority as holding that "only the broker 'middle-man' is in privity with the government," which is "not the law of contracts").

Thus, this Court's resolution of the question presented will provide much needed guidance with respect to the Court of Federal Claims' jurisdiction in other contexts as well.

C. The decision below is indefensible

Further review is essential because the decision below is indefensible. HUD negotiated and signed a number of HAP renewal contracts with Park Properties but now denies that it is "in privity" with Park Properties, and thus that the Court of Federal Claims has no authority to enforce the agreement under the Tucker Act. But privity is not a jurisdictional prerequisite under the plain text of the Act. And even if it were, Park Properties plainly *is* in privity with the United States on the HAP renewal contracts. The Federal Circuit's contrary holding is at odds with the text of both the Tucker Act and MAHRA and those acts' purposes.

1. The decision below is inconsistent with the text of the Tucker Act and MAHRA

"The starting point in discerning congressional intent is the existing statutory text." *Lamie* v. *United States Trustee*, 540 U.S. 526, 534 (2004). The Court "must enforce plain and unambiguous statutory language according to its terms." *Hardt* v. *Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010).

a. The Tucker Act waives sovereign immunity and establishes jurisdiction in the Court of Federal Claims for "any claim against the United States founded * * * upon any express or implied contract with the United

States." 28 U.S.C. 1491(a)(1). This language plainly covers the contracts at issue in this case.

As an initial matter, the HAP renewal contracts are *contracts*. A contract is "[a]n agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law." *Black's Law Dictionary* (11th ed. 2019). The HAP renewal contracts meet that description: They obligate Park Properties to provide qualified housing to low-income residents in exchange for Section 8 rent subsidy payments. No surprise, Section 1437f consistently refers to these agreements as "contracts." *E.g.*, 42 U.S.C. 1437f(c) (defining the content and purpose of "assistance contracts" between HUD and property owners).

The HAP renewal contracts are also "with the United States." 28 U.S.C. 1491(a)(1). HUD negotiated and agreed to the terms of the HAP renewal contracts. C.A. App. 41-49. It obligated itself under Paragraph 11 to make Park Properties whole on the terms of the contract, including the required subsidy payments, if HUD determines that the State Housing Trust has breached the contract. App., *infra*, 4a-5a ("HUD shall take any action HUD determines necessary * * *."). Section 2(b) of the contracts states that "[e]xecution of the Renewal Contract by the Contract Administrator is an obligation by HUD of [a sum certain]." C.A. App. 135.

Perhaps most notably, an official representative of HUD signed the contract. App., *infra*, 5a. The general rule is that a signature on a written instrument is a "[m]anifestation of mutual assent," which is to "make a promise." *Restatement (Second) of Contracts* § 18 (1981). It takes no legal creativity to appreciate that, absent some fraud, the signatories to a contract are parties to the contract who are bound by its terms. See *Anderson* v. *United States,* 344 F.3d 1343, 1351 (Fed.

Cir. 2003) ("[A] signatory to the contractual documents may bring a direct suit for breach of contract.").

That the contract is "with" the United States (or more specifically, HUD) within the meaning of the Tucker Act follows also from MAHRA's plain text. In Section 524(a), Congress directed that "the Secretary [of HUD] *shall* * * * use amounts available for the renewal" of contracts for eligible projects at specified rent levels. 42 U.S.C. 1437f note (emphasis added). Similar language appears in the regulations that HUD promulgated to implement Section 524, which provide that "*HUD will* offer to renew project-based assistance." 24 C.F.R. § 402.5 (emphasis added). An offer is, of course, the first step in the formation of a contract. See *Restatement (Second) of Contracts* § 24 (1981) ("An offer is the manifestation of willingness to enter into a bargain."). And the words "shall" and "will" constitute "mandatory language," which "creates the necessary 'money-mandate' for Tucker Act purposes." *Britell* v. *United States*, 372 F.3d 1370, 1378 (Fed. Cir. 2004).[3]

b. Even on its own terms, the decision below ignores the general rule that privity exists between two parties, regardless of a direct contractual relationship, when an agent manages transactions between the parties on their behalves. *E.g.*, *Kern-Limerick* v. *Scurlock*, 347 U.S. 110, 119-121 (1954); *Restatement (Third) of Agency* § 3.14 cmt. c (2006).

In this respect, the arrangement here is like a lender engaging a mortgage servicer to administer a mortgage contract. The lender remains a party on the underlying mortgage contract but hires the servicer to

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[3] The court of appeals held that the word "will" means only that "HUD *can* be a party to the renewal contracts." App., *infra*. 14a. It did not attempt to explain that counterintuitive interpretation.

collect payments from the borrower and remit them to the lender, administer an escrow account, and handle collection and foreclosure proceedings. Engaging a mortgage servicer in this way does not interrupt the underlying contractual relationship between the lender and borrower. Cf. *Agility Logistics Servs. Co. KSC* v. *Mattis*, 887 F.3d 1143, 1151 (Fed. Cir. 2018) (distinguishing an entity acting "as a contract administrator" from one acting "as a contracting party").

The Federal Circuit took a different view, describing the contract here as "two-tiered." App., *infra*, 2a. But in support of that proposition, the court relied principally upon 42 U.S.C. 1437f(b)(1), which provides that HUD "is authorized to enter into annual contributions contracts with [PHAs] pursuant to which [PHAs] may enter into contracts to make assistance payments to owners of existing dwelling units in accordance with this section." App., *infra*, 12a.

There is an obvious problem with that analysis: Paragraph (b)(1) does not apply to HAP renewal contracts; it applies to *new* HAP contracts. HAP renewal contracts are authorized under Section 524 of MAHRA. See C.A. App. 241 (confirming contracts were renewed under MAHRA § 524). And Section 524(a) of MAHRA provides that HUD "shall" renew eligible projects at specified rent levels, so long as funds are available. 42 U.S.C. 1437f note (emphasis added). With respect to these renewal contracts under MAHRA § 524, HUD simply engages PHAs as third parties to "share many of the loan and contract administration functions and responsibilities" of HUD itself. MAHRA § 511(11)(C) (codified at 42 U.S.C. 1437f note).

The Court need not take our word for it. Construing the same form renewal contract at issue here, the General Accounting Office has concluded that "HUD is legally obligated to pay the property owners under the

terms of the HAP contracts" and "has primary responsibility for contract administration." Assisted Hous. Servs. Corp., B-406738 et al. (Comp. Gen. Aug. 15, 2012), perma.cc/AP6S-5PNK. HUD has merely "assigned portions of [its] responsibilities to PHAs," which it has engaged to "administer[] the HAP contracts." *Ibid*. "The PHAs, consistent with their roles as contract administrators, act only as a 'conduit' for the payments." *Id*. at 12. Thus, "the circumstances here most closely resemble the intermediary or third party situation," *not* two-tiered contracting. *Id*. at 13.

Even HUD has acknowledged this basic fact. According to its own handbook, "HUD has primary responsibility for contract administration but has assigned portions of these responsibilities to [PHAs] that act as Contract Administrators for HUD." See *HUD Handbook 4350.3: Occupancy Requirements of Subsidized Multifamily Housing Programs* § 1-4, at 1-8 (June 23, 2009), perma.cc/X6WE-EW7U. Such contract administrators "are responsible for asset management functions and HAP contract compliance and monitoring functions," but no more. *Ibid*.

In holding otherwise, the Federal Circuit simply flubbed the statute. Such an unmistakable error of statutory construction with respect to so important an issue cries out for this Court's review.

2. The decision below is at odds with the Tucker Act's recognized purposes

That is not all. Statutory text must be read "holistic[ally]" and in light of its "history and purpose." *Gundy* v. *United States*, 139 S. Ct. 2116, 2126 (2019) (plurality). Here, the Tucker Act's history and purpose support Park Properties.

President Lincoln's 1861 State of the Union address declared that it is "as much the duty of Govern-

ment to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals." *United States* v. *Mitchell*, 463 U.S. 206, 213 (1983) (quoting from Cong. Globe, 37th Cong., 2d Sess., app. 2 (1862)). Congress' response several years later was the broadly worded Tucker Act.

Deliberating on the bill that would become the Tucker Act, the House committee report stated that the bill was a "comprehensive measure by which claims against the United States may be heard and determined." *Mitchell*, 463 U.S. 213 (quoting H.R. Rep. No. 1077, 49th Cong., 1st Sess. 1 (1886)). The Act was designed "to give the people of the United States what every civilized nation of the world has already done—the right to go into the courts to seek redress against the Government for their grievances." *Id.* at 213-214 (quoting 18 Cong. Rec. 2680 (1887) (remarks of Rep. Bayne)).

Congress enacted the Tucker Act the following year. *Mitchell*, 463 U.S. 214. The jurisdiction that it established in the Court of Federal Claims "has long been recognized, and government liability in contract is viewed as perhaps the widest and most unequivocal waiver of federal immunity from suit." *Mitchell*, 463 U.S. 215 (citations and quotations omitted). The reasons for that waiver are self-evident: Who would contract with the government if they cannot resort to the courts when and if the government violates the contract?

The Federal Circuit's holding in this case guts the Tucker Act's promise of judicial review. According to this decision below, the United States may avoid liability for a contract that a federal agency negotiates and signs by simply involving a state or local "agency [to] act[] merely as a conduit for the federal funds." *Katz*, 16 F.3d at 1210.

That is not the promise of redress that Congress made with the Tucker Act. And if that startling conclusion is to be the law of the land, it should be this Court that says so.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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