No. 19-268

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

At issue in this case is whether the government can insulate itself from liability for breaching a contract with a private party by including a third-party "contract administrator" in the agreement. This is a matter of enormous practical importance, affecting billions of dollars in contract obligations—a fact that the government does not deny. That the government does not deny this is no surprise, given that the government itself has previously petitioned for en banc review and certiorari in earlier cases that turned on this question.

Instead, the government responds primarily by arguing the merits—that because HUD enlisted a contract administrator, Park Properties purportedly does not have a contract with HUD in the first place. See Opp. 9-15. But the merits are for the Court to decide later, and are not grounds for denying the petition. In any event, the government is mistaken. "Contract Administrator" and "party" mean different things. Park Properties has asserted a claim for breach of a contract that HUD signed, and that expressly imposes an "obligation by HUD of [funds] * * * to provide housing assistance payments." C.A. App. 42.

This case is a suitable vehicle to address the question presented. Accordingly, this Court should grant certiorari and confirm the straightforward grant of jurisdiction that Congress provided in the Tucker Act.

A. The Federal Circuit has repeatedly refused to address its conflicting rulings.

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."

In the present case, the Federal Circuit answered 'no.' It held below that because the contract in question interposes the New York State Housing Trust Fund Corporation as contract administrator, Park Properties cannot sue the government for breach. See Pet. App. 14a (holding that the contract "does not obligate HUD"). But in other cases involving the *exact same* form HAP contract, the Federal Circuit reached the opposite conclusion: "HUD has a legal obligation to provide project owners with housing assistance payments under the HAP contracts." *CMS Contract Mgmt. Servs.* v. *Massachusetts Hous. Fin. Agency*, 745 F.3d 1379, 1386 (Fed. Cir. 2014). Likewise, the Federal Circuit held here that only the State Housing Trust (and not HUD) is in privity of contract with Park Properties. Pet. App. 2a, 11a. But the *CMS* decision emphasized that contract administrators such as the State Housing Trust merely "administer[] HAP contracts on behalf of HUD." 745 F.3d at 1386.[1]

The Federal Circuit's law on this question is in conflict. Indeed, the government sought rehearing en banc in the *CMS* case, asserting that "[t]he Panel's reliance upon the HAP contract's [Paragraph 11] 'PHA

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[1] This conflict reflects the confused nature of the Federal Circuit's privity jurisprudence as a whole. Indeed, the cases that the government cites demonstrate that there is neither a clear standard nor even a consistent requirement for privity. For instance, the government cites *Cienega Gardens* v. *United States,* 194 F. 3d 1231, 1239 (Fed. Cir. 1998) for the proposition that privity is jurisdictional and "[t]he government consents to be sued only by those with whom it has privity of contract." Opp. 10. Yet the government and the Federal Circuit both lack the confidence of their convictions on that score; sometimes a "plaintiff lacking privity of contract can nonetheless sue [the government] for damages under that contract." *Sioux Honey Ass'n* v. *Hartford Fire Ins. Co.*, 672 F.3d 1041, 1056 (Fed. Cir. 2012); Opp. 8, 19.

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)).

In an about-face from its earlier position, the government now downplays the conflict in the Federal Circuit's case law. Again, *CMS* held that HUD "has a legal obligation to provide project owners with housing assistance payments under the HAP contracts." 745 F.3d at 1386. The government responds only that "the court in that case did not suggest that HUD must satisfy that 'legal obligation' by contracting directly with property owners." Opp. 16-17. This is a non-sequitur: the *CMS* decision was not analyzing HUD's obligations in the abstract, but rather it held that HUD has an obligation to property owners *under this very contract*.

The Federal Circuit—the only court with Tucker Act jurisdiction—has repeatedly been asked to convene en banc to address the conflict, but it has declined every time. See Pet. App. 38a-39a (order denying rehearing en banc); *Normandy Apartments, Ltd.* v. *United States*, No. 14-5135 (Fed. Cir. Feb.10, 2016) at Docket No. 48 (same). It has likewise refused to convene en banc to reconcile its analysis in analogous situations, such as where a private broker is involved in administering the relationship between electric utilities and government agencies. *E.g., Pacific Gas & Electric Co.* v. *United States,* No. 15-5082 (Fed. Cir. Feb. 6, 2017) at Docket No. 123 (order denying rehearing en banc).

This is an entrenched conflict that the Federal Circuit will not resolve. Only this Court can clear up the confusion.

B. The Court should grant certiorari to ensure the reliable enforcement of contracts with the government.

There is no dispute that the stakes here are immense. The government does not disagree that HUD uses contract administrators with respect to tens of thousands of HAP contracts, or that HUD spends nearly $12 billion annually on Section 8 project-based rent subsidies that support housing for more than 1.2 million American households. In fact, the government's own petition for a writ of certiorari in the *CMS* case emphasized the scope of the Section 8 program. See U.S. Cert. Pet. 14-15, *CMS Contract Mgmt. Servs.* v. *United States*, No. 14-781 (January 2014). And the stakes here extend beyond public housing subsidy contracts. *E.g., Pacific Gas & Elec. Co.* v. *United States*, 838 F.3d 1341, 1363-1367 (Fed. Cir. 2016) (dissent arguing that "[i]t is contrary [to] fundamental law to exclude [the plaintiff's] claim from access to judicial review and remedy" based on the presence of a private intermediary in the plaintiff's contract with the government).

The government notes (Opp. 9) that the question presented "implicates no conflict among the courts of appeals." This is a diversion. Tucker Act cases are confined by statute to the Federal Circuit exclusively, so there can be no split. That Congress provided exclusive jurisdiction in one circuit does not insulate all Tucker Act rulings from this Court's review. *E.g., Hercules Inc.* v. *United States,* 516 U.S. 417 (1996) (affirming the Federal Circuit's decision in a Tucker Act case). As our petition notes (at 16), this Court frequently grants

review of important questions within the Federal Circuit's exclusive jurisdiction.

The government also argues (Opp. 19) that when HUD does not make the required payments to property owners, they can simply sue their contract administrators. But the possibility of a lawsuit against a contract administrator does not solve the problem:

First, this approach would nullify Congress's decision to provide exclusive venue in the Court of Federal Claims, effectively transferring these cases to scattered courts around the country.

Second, the government's proposed remedy is circular. The contracts in question establish an "obligation by HUD of [funds] * * * to provide housing assistance payments." C.A. App. 42. Thus contract administrators, when sued by HAP property owners, inevitably argue that all paths lead back to HUD. They argue that they have no control over the alleged breach of contract, and that HUD is an indispensable party in the litigation. See, *e.g., Evergreen Square of Cudahy* v. *Wisconsin Housing and Economic Development Authority,* No. 2:13-cv-00743 (E.D. Wisc. Aug. 29, 2013) at Docket No. 19 at 4 ("The [contract administrator] is obliged to administer the HAP Contract in accordance with HUD requirements and directives and *HUD is obliged to fund all housing assistance payments* that are owed pursuant to the HAP Contract." (Third Party Complaint against HUD (emphasis added))).

C. The decision below is wrong.

The government devotes much of its opposition to arguing the merits. It takes the position (Opp. 9-15) that Park Properties does not have "any express or implied contract with the United States" on which to sue under the Tucker Act. The merits are for the next stage of the case, after a grant of certiorari; this is not a basis

for denying review. If the Court grants the petition, we will respond to the government's merits arguments in full, in our merits brief. But two points warrant emphasis here:

1. First, the question presented accurately reflects the posture of the case. We have petitioned this Court to review whether Park Properties can sue the government under the Tucker Act where the government signs a contract that establishes contractual obligations for the government but interposes a third-party as a contract administrator. The agreements at issue are plainly contracts, the government signed them, and they expressly impose obligations on the government that run to Park Properties. With this, the Federal Circuit agrees. See *CMS*, 745 F.3d at 1386. So does the Government Accountability Office. See Assisted Hous. Servs. Corp., B-406738, et al. (Comp. Gen. Aug. 15, 2012), perma.cc/AP6S-5PNK (GAO Op.).

The government defends the decision below on the grounds that the Tucker Act's grant of jurisdiction is not available where the government's liability to the plaintiff is not sufficiently "direct." Opp. 14, 15; Pet. App. 7a ("Where the government contracts indirectly with a plaintiff * * * there is generally no privity."). This distinction between direct and indirect contracts is an invention without support in the Tucker Act. Neither the government nor the Federal Circuit's cases explain why it should matter whether a contract with the government is direct or indirect, or even what the difference is. The government nevertheless leans on this supposed distinction—without meaningful explanation—to address the holding in *CMS,* arguing that the HAP contract at issue in both cases imposes only an indirect and "two-tie[r]" obligation on HUD. Opp. 17. The government relies similarly on the undefined distinction between direct and indirect contracts to ex-

plain away the statutes and regulations that govern HUD's payments to project owners. As it must, the government acknowledges that federal law requires that HUD's "Secretary shall * * * use amounts available for the renewal" of earlier HAP contracts.[2] Appropriations Act § 524(a)(1), 113 Stat. 1110; see also 24 C.F.R. § 402.5 ("*HUD will* offer to renew project-based assistance." (emphasis added)). The government notes only that this statute and its implementing regulations do not expressly require it to pay such amounts "directly" to private landlords, and thus argues that landlords cannot sue HUD when HUD fails to make the required payments. Opp. 14.

This is beside the point. The question is whether Park Properties can enforce its contract with HUD, notwithstanding the additional presence of a contract administrator. Only the answer *yes* is consistent with the plain language and purpose of the Tucker Act, which "has long been recognized * * * as perhaps the widest and most unequivocal waiver of federal immunity from suit." *United States* v. *Mitchell*, 463 U.S. 206, 215 (1983) (citations and quotations omitted).

2. Second, the government is mistaken that labels and formalities trump the reality that Park Properties is suing under a contract with the government.[3] For in-

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[2] The government agrees that HUD was a party and in privity with Park Properties under the earlier contracts, and that the contracts at issue renewed those earlier contracts. Opp. 6.

[3] Even while focusing on formalities, the government argues that it means nothing that HUD *signed* the contracts. The government speculates that this signature was only to indicate HUD's approval as a regulator. Opp. 12. There is no support for this conjecture. When the government wants to sign an agreement merely to show its approval as a regulator, it knows how to do so. For instance, in *New Era Const.* v. *United States*, 890 F.2d 1152 (Fed. Cir. 1989),

stance, the government notes that the contracts in question do not describe HUD as a "party" and that they identify the State Housing Trust as the "Contract Administrator." Opp. 5. But the Tucker Act has no such requirements. Not only is there no requirement that the contract expressly call the government a "party"—there is no requirement for an express or written contract in the first place. See *Hercules Inc.*, 516 U.S. at 424 (discussing the requirements for an implied-in-fact contract claim under the Tucker Act).

Nor does the government's decision to interpose the State Housing Trust as a contract administrator defeat jurisdiction. "Contract Administrator" is not synonymous with "party." See, *e.g.*, *Agility Logistics Servs. Co. KSC* v. *Mattis*, 887 F.3d 1143, 1151 (Fed. Cir. 2018) (in a procurement case, "we find that even if an executive agency issued [the purchase orders], it did so as a contract administrator and not as a contracting party."). The government ignores this distinction. Its approach would allow an agency like HUD to annul the Tucker Act's grant of jurisdiction by delegating ministerial responsibilities to a contract administrator—even where, as here, the contractual requirements on HUD spring from statutory obligations.

Our petition cited the Government Accountability Office's analysis of the exact contract in question, explaining the limited role of contract administrators.

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the court of appeals explained that while HUD signed the contract in question, HUD included language to indicate that it was signing only to show its approval of the terms. *Id*. at 1254 (explaining that the "contract specified that [HUD's] approval indicated only that the housing project satisfied the criteria"), citing Form HUD-53015 at § 1.9, perma.cc/LM34-DU9Z. Here, HUD signed together with the other parties, with no indication that its signature was merely to show regulatory approval, and other language in the contracts expressly places obligations on HUD. See C.A. App. 42.

See GAO Op. The GAO's opinion emphasized that the "PHAs, consistent with their roles as contract administrators, act only as a 'conduit' for the payments" and thus "HUD is legally obligated to pay the property owners under the terms of the HAP contracts." *Id.* at 12, 13. The government musters only that "[i]t does not follow from [the] GAO finding about HUD's purposes and general practices, however, that HUD was a party to the specific contracts at issue in this case." Opp. 15 n.2. But as the contract "specifically obligates HUD, and not the contract administrator, to provide the housing assistance payments" (GAO Op. 13), there should be no reasonable debate that Park Properties' claim for breach arises from a contract with the government. The additional presence of a contract administrator does not excuse HUD's liability for breaching its obligations to project owners.

D. There has been no waiver, and the question is cleanly presented.

Finally, the government suggests in passing that because Park Properties argued in the trial court and on appeal that it was in privity with HUD, it has waived the argument that the Federal Circuit's application of the privity doctrine with respect to contract administrators is inconsistent with the Tucker Act. Opp. 17-18.

That is silly. Park Properties' contention before this Court is that HUD's inclusion of a contract administrator in its HAP contracts does not destroy Tucker Act jurisdiction. That contention was thoroughly briefed (Pet. C.A. Br. 1, 14, 28) and expressly decided below (Pet App. 11a-15a). Even if that were not so, waiver would not be an issue. A party's decision not to challenge binding circuit precedent "does not suggest a waiver; it merely reflects counsel's sound assessment

that the argument would be futile." *MedImmune, Inc.* v. *Genentech, Inc*., 549 U.S. 118, 125 (2007).

Aside from its misplaced waiver objection, the government does not otherwise challenge that this case presents an excellent vehicle. Indeed, the Federal Circuit's conflicting decisions on the question at issue are cleanly presented for review.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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