No. 13-246

In The Supreme Court of the United States

ONE AND KEN VALLEY HOUSING GROUP, *et al.*,

Petitioners,

v.

MAINE STATE HOUSING AUTHORITY AND SHAUN DONOVAN, SECRETARY, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF RESPONDENT MAINE STATE HOUSING AUTHORITY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state housing authority, in administering housing assistance contracts under the federal Section 8 program for low-income housing, may determine that a participating landlord is not entitled to an annual adjustment in rental rates when:

> the existing assisted rents as adjusted under the contracts were determined to be in excess of fair market rents for comparable unassisted units and the landlord did not produce a permitted rent comparability study showing this initial determination was incorrect;
>
> both the terms of those housing assistance contracts and of governing federal law require that an adjustment (even though otherwise denominated as automatic) is not permitted ("notwithstanding any other provisions of th[e] Contract") where such increases would result in "material differences between the adjusted rents under the contract and fair market rents for comparable unassisted units."

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are as stated in the Petition.

RULE 29.6 STATEMENT

Maine State Housing Authority is a governmental entity.

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STATUTES AND REGULATIONS

OTHER AUTHORITIES

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Maine State Housing Authority ("MaineHousing") hereby respectfully requests that this Court deny the Petition for a Writ of Certiorari in this case.

OPINIONS BELOW

The opinions below are as stated in the Petition.

JURISDICTION

The basis for jurisdiction in this Court is as stated in the Petition.

STATUTORY AND REGULATORY PROVISIONS

The statutes and regulations involved in the case are as cited in the Petition and reproduced in the Pet. App.

STATEMENT OF THE CASE

This case involves rent adjustments under housing assistance payment contracts ("HAP Contracts")

administered by a state housing agency under the Federal Section 8 housing program.[1]

The HAP Contracts, although providing for what are denominated as automatic annual rent adjustments for the project landlord, specifically conditions these "automatic" adjustments to at least two specific contractual conditions, which apply "notwithstanding any other provision of [the HAP] Contract." Most importantly for this case, the overall limitation provision of Section 1.9(d) of the HAP Contracts provides:

> Overall Limitation. ***Notwithstanding any other provision of this Contract***, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the [housing finance agency].

HAP Contracts, Section 1.9(d), *quoted in* the Recommended Decision of the Magistrate Judge ("Magistrate's Recommended Decision") (Pet. App. at 40a) (emphasis added).[2]

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[1] For a description of the federal Section 8 housing program, *see One and Ken Valley Hous. Group v. Maine State Hous. Auth.*, 716 F.3d 218, 219-23 (1st Cir. 2013) (Pet. App. at 1a-10a); *see also Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 12-15 (1993).

[2] Section 1.6(a) of the HAP Contracts ("Maximum Housing Assistance Commitment") contains another limitation that also applies notwithstanding any other provision of the contracts:

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Critically, nothing in Section 1.9 specifies how MaineHousing is to make the contractual determination whether any rent adjustment would result in material differences between the rents charged for assisted and comparable unassisted units. In 1994, Congress prescribed certain requirements to be used in applying the overall limitation provision of Section 8 HAP Contracts, and in 1995 the Department of Housing and Urban Development ("HUD") promulgated procedures for the purpose of implementing the 1994 Act.[3] MaineHousing has administered the HAP Contracts at issue in accordance with the 1994 Act and HUD Notice H 95-12 since 1995.[4]

"the [housing finance agency] shall not be obligated to make and shall not make any housing assistance payments under this Contract in excess of the amount per annum stated in Section 1.1(g)." HAP Contract Section 1.6(a), *quoted in* Magistrate's Recommended Decision (Pet. App. at 37a).

[3] Department of Veterans Affairs, Housing and Urban Development and Independent Agencies Appropriations Act, 1995, Pub. L. No. 103-327, 108 Stat. 2298, 2315 (1994) (the "1994 Act") (Brief of Appellee Maine State Housing Authority at MHA0059, *One and Ken Valley*, 716 F.3d 218 (No. 12-1952)); HUD Notice H 95-12 (Mar. 7, 1995) ("Notice H 95-12") (JA0365-0394). (References to "JA" are to the Joint Appendix submitted to the First Circuit by all the parties in this case.) The 1994 Act and HUD Notice H 95-12 have been extended by subsequent statutory enactments and HUD notices. *See One and Ken Valley,* 716 F.3d at 222 n.3 (Pet. App. at 8a).

[4] HAP Contracts, the form of which are prescribed by HUD, cannot be entered into by a state housing agency without the approval of HUD, 42 U.S.C. § 1437f(b) (Pet. App. at 85a), and must be administered by the state housing agency pursuant to

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MaineHousing determined, using the fair market rents published by HUD, that Petitioners' rents were in excess of the rents charged for comparable unassisted units. Petitioners had the opportunity, under the procedures of HUD Notice H 95-12, to present a rent comparability study showing they were nonetheless entitled to rent adjustments; however, for all the years in dispute, Petitioners did not present rent comparability studies demonstrating that they were entitled to rent adjustments they did not receive, the unadjusted rents always being above rents for unassisted comparable units. (Depo. of Maureen Brown, 175:19-176:3 (JA0751)).[5] As found below, Petitioners' "evidentiary presentation fails to reveal that there was any act that . . . would have resulted in any of the rent increases they seek[.]" Magistrate's Recommended Decision (Pet. App. at 61a). Thus, this case, and the First Circuit's holding below, concerns not whether Petitioners were entitled to rent adjustments, but the procedure by which MaineHousing determined the undisputed fact that Petitioners were not entitled to any such rent adjustments.

In 2009, after more than 14 years of MaineHousing's use of these federally prescribed procedures for adjusting rents, Petitioners sued challenging the

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federal laws and regulations, *id*., and Annual Contributions Contract § 1.2 (JA0821, 0828, 0836, 0843, 0850).

[5] In a few of the years at issue, adjustments in rent were made under the Initial Difference proviso of Section 1.9(d), which adjustments are not otherwise discussed herein.

overall limitation procedures used by MaineHousing. Both the district court (adopting the Magistrate's Recommended Decision) (Pet. App. at 66a-68a & 22a-23a) and the First Circuit found that MaineHousing's overall limitation determinations were reasonable and consistent with the terms of the parties' contracts. "[W]e hold that the overall limitation clauses in each of the housing assistance payment contracts allow MaineHousing to withhold otherwise-automatic adjustments in contract rents where Maine Housing determines . . . that further adjustments would result in material differences. . . ." *One and Ken Valley*, 716 F.3d at 229 (Pet. App. at 21a).[6] This petition followed.

SUMMARY OF ARGUMENT

Contrary to Petitioners' assertions, review of the First Circuit's opinion by this Court is not warranted.

[6] Although federal jurisdiction pursuant to 28 U.S.C. § 1331 in the courts below was based on "federal ingredient jurisdiction," *One and Ken Valley,* 716 F.3d at 224-25 (Pet. App. at 11a-12a), applying *Grable & Sons Metal Products, Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2007), Petitioners' underlying claim is limited to a state law breach of contract ("[Petitioners'] only claims are for breach of contract, and they appear to acknowledge that their breach of contract claims arise under the laws of the State of Maine"). *One and Ken Valley,* 716 F.3d at 224 (Pet. App. at 11a).

There is no conflict between the courts of appeals. The First Circuit correctly decided *One and Ken Valley* based on the specific facts and the issues of that case. The state contract law questions addressed by the First Circuit were "whether the HAP Contracts allow MaineHousing to invoke the overall limitation clause" and "whether MaineHousing properly invoked the overall limitation by employing the Notice H 95-12 method." *One and Ken Valley*, 716 F.3d at 226 (Pet. App. at 15a). The First Circuit is the first federal appellate court to address these specific issues. In contrast, as acknowledged by both courts of appeals, the issues reviewed by the Federal Circuit in *Haddon Housing* involved the federal prevention doctrine. *Haddon Hous. Assocs. v. United States*, 711 F.3d 1330 (Fed. Cir. 2013).

The First Circuit's opinion does not conflict with this Court's holding in *Alpine Ridge,* as alleged by Petitioners. The First Circuit applied the holding of *Alpine Ridge* by finding that MaineHousing's application of the overall limitation in determining rent adjustments was reasonable and permitted under the parties' HAP Contracts. The First Circuit's decision is consistent with the conclusion of *Alpine Ridge*.

The issues presented in this case are not of sufficient national importance to merit review by this Court. The procedure challenged by Petitioners has been in place for nearly twenty years, with no dire consequences for the Section 8 program.

ARGUMENT

REASONS FOR DENYING THE PETITION

I. There Is No Conflict Between Circuits on the Issues Decided

There is no conflict between the First Circuit's decision below and the Federal Circuit's decision in *Haddon Housing* for at least three reasons:

> The courts of appeals were addressing and deciding, and each acknowledged they were addressing and deciding, different issues;
>
> The defendant contracting parties against which the claims were brought were differently situated (the HAP Contracts were with a state housing agency in *One and Ken Valley* and were with HUD in *Haddon Housing*), and entitled to different legal analysis and different results by virtue of HUD's federal sovereignty in the case of *Haddon Housing*; and
>
> The First Circuit in *One and Ken Valley* decided an issue of state contract law interpretation, not present in *Haddon Housing*; the Federal Circuit in *Haddon Housing* decided an issue under the federal prevention doctrine, not present in this case, not decided by the First Circuit and not applicable to a state housing agency.

The courts of appeals decisions, having addressed different legal issues, involving differently situated

parties, under different bodies of law, do not create a conflict requiring or justifying this Court's review.[7]

A. The Courts of Appeals Decided Different Issues

Though Petitioners claim that the Federal Circuit was "addressing the same question and interpreting the same contractual and statutory language" as the First Circuit (Pet. at 13), that is neither an accurate nor adequate assessment of these cases.

The First Circuit and the Federal Circuit were, in fact, addressing different legal issues. The state law contract issues addressed by the First Circuit were:

> whether the HAP Contracts allow MaineHousing to invoke the overall limitation clause to limit payments to [Petitioners] and . . . whether MaineHousing properly invoked the overall limitation by employing the Notice H 95-12 method to calculate the differences between [Petitioners'] contract rents and those of comparable unassisted units.

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[7] Moreover, even if these two cases constituted a conflict between the circuits, the legal issues presented in this case (as demonstrated by the lower court cases cited by Petitioners) are still developing. *See, e.g., McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J.) (*certiorari denied* because the issue requires "further study" in the lower courts "before it is addressed by this Court"). This Court should wait until at least another regional circuit decides the issue in the context of a case involving a state housing agency.

One and Ken Valley, 716 F.3d at 226 (Pet. App. at 15a). In its holding, the First Circuit confirmed it was deciding just these contract interpretation issues:

> we hold that the overall limitation clauses in each of the housing assistance payments contracts allow MaineHousing to withhold otherwise-automatic annual adjustments in contract rents where MaineHousing determines – based on the formula prescribed by HUD in Notice H 95-12 and the fair market rent data published by HUD – that further adjustments would result in material differences between contract rents and market rates.

One and Ken Valley, 716 F.3d at 229 (Pet. App. at 21a).

The First Circuit clearly distinguished its holding from the Federal Circuit's decision in *Haddon Housing*, saying, "In that case, the Federal Circuit expressed no view regarding the impact of the overall limitation clause on the landlord's HAP contract, as the issue was not preserved for appeal." *One and Ken Valley*, 716 F.3d at 226 n.8 (Pet. App. at 16a).[8]

The Federal Circuit in *Haddon Housing* recognized this same limitation of the scope of its opinion.

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[8] *See also One and Ken Valley,* 716 F.3d at 226 n.9 (Pet. App. at 16a) ("*Haddon Hous. Assocs., LLC v. United States*, 99 Fed. Cl. 311, 340 (2011) ('the overall-limitation clause did not survive the 1994 Amendments'), ***aff'd in part on other grounds*** *and rev'd in part*, 711 F.3d 1330 (Fed. Cir. 2013)") (emphasis added).

See Haddon Hous., 711 F.3d at 1336 n.1 ("the government does not appeal this conclusion"). In *Haddon Housing*, the government did not appeal the Court of Federal Claims' holding that the overall limitation clause was superseded by the 1994 Act and therefore could not serve as a cap on Haddon's damages. *Haddon Hous.*, 711 F.3d at 1336 n.2. The Federal Circuit, therefore, did not address or decide this issue. Rather, the Federal Circuit applied the federal prevention doctrine (whether federal legislation fundamentally affects performance of a contract with the federal government) which was not present and was not addressed by the First Circuit. *See* discussion of federal prevention doctrine, *infra* I.B.

Pursuant to the 1994 Act, Congress provided clear instructions for implementing the overall limitation with respect to contract rents that exceed fair market rents: no rent adjustments may occur unless the owners demonstrate that "the adjusted rent would not exceed the rent for an unassisted unit of similar quality, type and age in the same market area." 42 U.S.C. § 1437f(c)(2)(A) (Pet. App. at 88a). The five federal judges who have reviewed this case in the district court and the First Circuit have consistently found that MaineHousing's application of the HUD Notice H 95-12 method for making this determination was reasonable, and thus allowed under the parties' HAP Contracts. *One and Ken Valley*, 716 F.3d at 228 (Pet. App. at 20a) ("any reasonable means of ascertaining whether material differences in rents exists is authorized under the terms of the

contract" (*quoting Carmichaels Arbors Assocs. v. United States*, 789 F.Supp. 683, 689 n.6 (W.D. Pa. 1992)).[9]

Petitioners are essentially asking this Court to rewrite the parties' contracts by imposing a particular procedure for making the determination under the overall limitation provision. The overall limitation, as implemented by the 1994 Act and Notice H 95-12, gives property owners whose contract rents exceed the fair market rents an opportunity to rebut the determination that a rent adjustment would result in a material difference between contract rents and comparable unassisted rents. *See generally Alpine Ridge*, 508 U.S. at 20-21. "MaineHousing's reliance on the Notice H 95-12 method – while not the same as the site-specific studies that the landlords seek – still does incorporate important considerations of comparability. This method, combined with the procedural safeguards . . . , certainly qualifies as 'reasonable.'" *One and Ken Valley*, 716 F.3d at 229 (Pet. App. at 21a).

Although Petitioners claim that their preferred method is the only method of determining rent adjustments, they overlook the fact that they would not

[9] "This [HUD Notice H 95-12 method used by MaineHousing] combined with the procedural safeguards . . . actually utilized in this case, certainly qualifies as 'reasonable' [and] [w]e do not read the contracts of the *Alpine Ridge* decision to demand more than that." *One and Ken Valley*, 716 F.3d at 229 (Pet. App. at 21a).

be entitled to adjustments under *any* method. "No one in this case has even suggested that the determination that [Petitioners'] rents exceeded the overall limitation was, in fact, unreasonable or even subject to reasonable dispute." Magistrate's Recommended Decision (Pet. App. at 68a). *See Alpine Ridge*, 508 U.S. at 18-19 ("we think it clear beyond peradventure that § 1.9(d) provides that contract rents 'shall not' be adjusted so as to exceed materially the rents charged for 'comparable unassisted units' on the private rental market – even if other provisions of the contracts might seem to require such a result").

The First Circuit clearly and specifically decided an issue not decided by the Federal Circuit, therefore there is no conflict between the circuits.

B. The Legal Status of Contracting Defendant Was Materially Different in the Two Cases

Although downplayed by Petitioners (Pet. at 16-17), it is of critical legal significance to the analyses and decisions of the First Circuit in *One and Ken Valley* and the Federal Circuit in *Haddon Housing* that the defendant contracting party in one case was a state housing agency and in the other was the federal government acting through HUD. As this Court has consistently held, in assessing a potential breach of contract claim the difference between the federal government and a state agency (or any private party) can be determinative.

Because *Haddon Housing* involved a claim against the United States, the prevention doctrine was applicable and decisive in the Federal Circuit's decision. The federal prevention doctrine is invoked where federal legislation fundamentally affects performance of a contract with the federal government. *See, e.g., First Nationwide Bank v. United States*, 431 F.3d 1342, 1350-51 (Fed. Cir. 2005).

The Federal Circuit in *Haddon Housing* adopted the Court of Federal Claims' opinion without presenting an independent analysis of the overall limitation issue. "[W]e see no reason to revisit [the Claims Court's analysis]. Thus, for the reasons set forth in the Claims Court's opinion, we agree that the 1994 Amendments and HUD's implementation thereof is a breach of the Haddon HAP Contract[.]" *Haddon Hous.*, 711 F.3d at 1336.

In *Haddon Housing*, the Court of Federal Claims relied primarily on the analysis in an earlier decision by that court, *Park Props. Assocs. v. United States*, 82 Fed. Cl. 162, 172 (Fed. Cl. 2008) ("*Park Properties II*"), to determine that "the 1994 Amendments and HUD's subsequent implementing actions, including the adoption of Notice 95-12, constitute a breach of plaintiffs' [HAP] Contract." *Haddon Hous.*, 99 Fed. Cl. at 330.[10] Applying its resolution of this federal

[10] "[B]ecause '*[t]he United States*, through Congress' passage of the 1994 [A]mendments, effectively prevented HUD from invoking [the overall limitation] clause *on behalf of the United States[,]* . . . [the government] prevented a condition precedent

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prevention doctrine issue – an issue not present, addressed or decided by the First Circuit in this case – the Court of Federal Claims determined that, as to the HAP Contracts to which HUD was a party in *Haddon*, "the overall-limitation clause did not survive the 1994 Amendments." *Haddon Hous.*, 99 Fed. Cl. at 340.

The First Circuit did not review or determine whether the passage of the 1994 Act or the promulgation of Notice H 95-12 by the federal government would result in the federal government being prevented from invoking the overall limitation provision, because that issue was not present in this state housing agency case. The First Circuit, applying this Court's holding in *Alpine Ridge*, determined that, while not providing a particular means by which the overall limitation decision should be made, the HAP Contracts "expressly assign[ed] to [the agency] the determination" under § 1.9(d). *One and Ken Valley*, 716 F.3d at 228 (*quoting Alpine Ridge*, 508 U.S. at 21) (Pet. App. at 20a); *see also* Magistrate's Recommended Decision (Pet. App. at 65a) ("The overall limitation clause does not assign any burden to either contracting party to conduct any particular study on any particular schedule").

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from occurring that might or might not have limited its liability in this breach action.'" *Haddon Hous.*, 99 Fed. Cl. at 340 (*quoting Park Properties II*, 82 Fed. Cl. at 172) (emphasis added).

Petitioners complain that the purported differences between the Federal Circuit and First Circuit opinions will result in Section 8 landlords being subject to differing rent adjustment procedures depending on the "happenstance" of whether their particular HAP contracts are with HUD or a state housing agency. (Pet. at 3). Any such potential difference is not, however, a result of these courts of appeals rulings. As this Court has long recognized, the federal government's ability to modify private or state contracts is inherently different from its power to change or alter federal obligations when a party has contracted directly with the United States.

> The instant cases involve contracts between private parties, but the question necessarily relates as well to the contracts or obligations of states and municipalities, or of their political subdivisions; that is, to such engagements as are within the reach of the applicable national power. The government's own contracts – the obligations of the United States – are in a distinct category, and demand separate consideration.

Norman v. Baltimore & O.R. Co., 294 U.S. 240, 306 (1935), *see also id*., at 307-08 ("when contracts deal with a subject-matter which lies within the control of the Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them"). *Accord Perry v. United States*, 294 U.S. 330, 350 (1935) ("There is a clear distinction between the power of Congress to control or interdict the

contracts of private parties when they interfere with the exercise of its constitutional authority").[11] This well-established constitutional difference between contract breach cases against the United States and any cases against a state housing agency or other private party does not demonstrate a split in the circuits or any need for this Court's review.[12]

Much of Petitioners' argument is framed as if the action below were against the United States (which enacted the 1994 Act and promulgated Notice H 95-12), and not MaineHousing. Like any private party, including government contractors and state agencies administering federal programs, MaineHousing is, by both contract and law, subject to changing federal laws and regulations. (*See* Pet. at 16 ("the *federal government* cannot unilaterally modify or abrogate duties and obligations under *contracts to which it is party*") (emphasis added)). Inherently, cases against HUD as a party to a HAP Contract in the Court of

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[11] *See also Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 471 (1985) ("our focus shifts from a case in which we confront an alleged impairment, by the Government, of its own contractual obligations, to one in which we face an alleged legislative impairment of a private contractual right.").

[12] Even assuming *Haddon Housing* was correctly decided (an assumption with which MaineHousing does not necessarily agree), its holding results in a windfall – rent adjustments not limited by comparable market rents – to Section 8 landlords who happened to have a HAP Contract directly with HUD. There is no basis in law or logic for extending that windfall to other Section 8 landlords.

Federal Claims, reviewed in the Federal Circuit, may well have different results than cases against state housing agencies in federal district courts, reviewed in regional courts of appeals, without there being any conflict in the courts of appeals' rulings.

For the same reason, Petitioners' implication that the First Circuit's decision is in conflict with other Supreme Court cases (Pet. at 16), is simply incorrect; all the cases cited in Pet. Part I.3 deal with contracts and obligations of the United States, not a state agency. Thus, the difference between Petitioners' claims against a state housing agency and Haddon Housing's claims against the United States does not result in a conflict on the same legal issue.[13] Petitioners further contend that the First Circuit's opinion cannot be reconciled with other lower court decisions. (Pet. at 16). However, these lower court decisions do not create or demonstrate a split in the circuits, and

[13] The so-called conflict identified by Petitioners would not be dispositive of this case in any event, because of the defense of legal impossibility. The First Circuit did not reach the issue of the effect of a change in law – Congress' enactment of the 1994 Act and HUD's promulgation of HUD Notice H 95-12, each requiring MaineHousing to use the overall limitation procedure employed here – because it concluded use of these procedures did not breach the terms of the HAP Contracts. However, this Court has made clear that where there has been a change in law, it is only the United States itself to which the defense of legal impossibility would not apply. *Perry v. United States*, 294 U.S. at 350.

can generally be explained by the same state housing agency/federal government dichotomy.[14]

C. The First Circuit Decided a State Law Contract Issue

The issues in *One and Ken Valley* at root are ***state law contract claims***.

> [Petitioners'] only claims are for breach of contract, and they appear to acknowledge that their breach-of-contract claims arise under the laws of the State of Maine.

One and Ken Valley, 716 F.3d at 224 (Pet. App. at 11a).

Although jurisdiction in this case comes from "federal ingredient" jurisdiction, the actual issue decided by the First Circuit is one of simple state law contract interpretation, specifically whether MaineHousing's implementation of the overall limitation provision was reasonable under the terms of the parties' non-federal law contract. Indeed, in their motion for summary judgment before the District

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[14] For example, Petitioners quote extensively from the Court of Federal Claims' first *Park Properties* opinion, which concluded "as a matter of law, that *in passing the 1994 amendments and issuing the HUD directive, defendant [United States] repudiated the housing contracts here*, which repudiation eventually ripened into a breach . . . [.]" *Park Props. Assocs. v. United States*, 74 Fed. Cl. 264, 274 (2006) (emphasis added) (Pet. at 15). Most of Petitioners' "other lower court decisions" involved contracts to which HUD was a party.

Court and their Brief submitted to the First Circuit, Petitioners relied on Maine state law in support of their contract interpretation argument. Brief of Appellants at 59-60, *One and Ken Valley*, 716 F.3d 218 (No. 12-1952).

Nothing in the First Circuit's resolution of this state law contract interpretation issue (that the procedure used by MaineHousing was permissible and reasonable under the terms of the HAP Contracts) even possibly raises a conflict with the Federal Circuit's decision in *Haddon Housing*, or any issue that this Court should review on certiorari.[15]

II. The First Circuit Opinion Correctly Applied, and Did Not Conflict With, this Court's *Alpine Ridge* Decision

The First Circuit's decision is clearly consistent with this Court's holding in *Alpine Ridge*. To reach this conclusion, one need look no further than the First Circuit's statement that

> consistent with *Alpine Ridge*, we read the overall limitation clause as "expressly assign[ing] to [the agency] the determination of whether there exist material differences

[15] The Court of Federal Claims cases cited by Petitioners involving HUD as the HAP contracting party all rely upon federal law, rather than state law. *See Boyle v. United Technologies Corp*., 487 U.S. 500, 504 (1988) ("obligations to and rights of the United States under its contracts are governed exclusively by federal law").

> between the rents charged for assisted and comparable unassisted units."

One and Ken Valley, 716 F.3d at 228, *quoting Alpine Ridge*, 508 U.S. at 21 (Pet. App. at 20a). In no way is the First Circuit's opinion a "flat rejection" of *Alpine Ridge* as alleged by Petitioners. (Pet. at 18).[16]

In *Alpine Ridge*, this Court determined that the HAP Contracts at issue "do not prohibit the use of comparability studies to impose an *independent cap* on formula-based rent adjustments[,]" *Alpine Ridge*, 508 U.S. at 17, and that the property owners' "claimed entitlement to formula-based rent adjustments without regard to independent comparisons to private market rents is precluded by the plain language of the assistance contracts." *Id*. The First Circuit's decision is consistent with this conclusion. The First Circuit recognized that this holding "survives the 1994 amendment to the Section 8 statute and controls our analysis here." *One and Ken Valley*, 716 F.3d at 226 (Pet. App. at 16a-17a).

"In sum, we think the contract language is plain that no project owner may claim entitlement to formula-based rent adjustments that materially exceed market rents for comparable units." *Alpine*

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[16] Regarding the priority of the overall limitation clause in the HAP Contracts, this Court in *Alpine Ridge* held that "[t]he use of such a 'notwithstanding' clause clearly signifies the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section." *Alpine Ridge*, 508 U.S. at 18.

Ridge, 508 U.S. at 21. The *Alpine Ridge* opinion upheld application of the overall limitation clause and any "reasonable" means to make the overall limitation determination. *Alpine Ridge*, 508 U.S. at 21. The plain language of the HAP Contracts "does not foreclose corrective adjustments independent of the factors." *Alpine Ridge*, 508 U.S. at 20 n.2. The First Circuit properly interpreted and applied this holding in *One and Ken Valley*. "The *Alpine Ridge* Court concluded that the overall limitation clause affords HUD 'sufficient discretion' to design and implement a method for ensuring that contract rents do not rise above market rents." *One and Ken Valley*, 716 F.3d at 222, *quoting Alpine Ridge*, 508 U.S. at 21 (Pet. App. at 7a).

Petitioners further attempt to demonstrate that the First Circuit's decision somehow endorses the repeal of the Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 142(c)(2), 101 Stat. 1815, 1850 (1988) (codified at § 1437f(c)(2)(C)) (the "1988 Amendment") by implication by holding that the 1994 Act entirely eliminated the housing authority's burden to conduct a market study. But again, Petitioners are mistaken. (Pet. at 19). The First Circuit decision simply discusses how the 1994 Act confines the parameters of the 1988 Amendment. The court noted that the rule favored by Petitioners "is not in the HAP [C]ontracts, which all state that automatic adjustments should not go forward if MaineHousing determines that the adjustments would lead to material differences between contract

rents and market rates notwithstanding any other provision." *One and Ken Valley*, 716 F.3d at 227 n.10 (Pet. App. at 18a).

Even if the 1988 Amendment's rent comparability study requirement could theoretically support a breach of contract claim against MaineHousing, the later-enacted, more specific provisions of the 1994 Act control situations where, as here, contract rents exceed fair market rents. The Magistrate Judge recognized that Petitioners were attempting to cherry-pick the most favorable provisions of the statutes by

> relying on the idea that Congress enhanced their HAP Contracts by [the 1988 Amendment], and that *the Authority* became financially liable for any failure to comply with new statutory promises that *the Government* made. At the same time, they argue that the 1994 Amendment, which was designed to effectuate the overall limitation, is of absolutely no effect at all. This is a perplexing approach to contract construction and enforcement.

Magistrate's Recommended Decision at n.16 (Pet. App. at 63a-64a) (emphasis in original).

Petitioners rely heavily upon this Court's comment in *Alpine Ridge* that "[i]t is only in those presumably exceptional cases where the Secretary has reason to suspect that the adjustment factors are resulting in materially inflated rents that a comparability study would ensue" to show that the First

Circuit opinion conflicts with this Court's holding. *Alpine Ridge*, 508 U.S. at 19. Indeed, this Court did not limit application of the holding to "exceptional" cases. "*[T]heoretically*, it should not be often that the comparability studies would suggest material differences between Section 8 and private market rents." *Id*. at 19-20 (emphasis added).[17] Whether the circumstances discussed in *Alpine Ridge* are still infrequent or whether this case is one of those "exceptional" cases does not create a conflict with the holding of *Alpine Ridge* and does not warrant review by this Court.

III. This Case Does Not Present an Issue of National Importance

The Petitioners argue that this case warrants review by this Court because it presents issues of exceptional national importance concerning the federal low-income housing program. (Pet. at 20-21). In

[17] The First Circuit correctly noted that "the *Alpine Ridge* Court was not asked to decide what would happen if HUD and the state and local housing agencies – applying HUD-mandated methods – found 'materially inflated rents' to be not 'exceptional' but rather quite common." *One and Ken Valley*, 716 F.3d at 228 n.11 (Pet. App. at 20a-21a). The First Circuit went on to note that "the *Alpine Ridge* Court certainly did *not* say that in such a scenario, HUD or the state and local housing agencies would be contractually obligated to grant automatic annual adjustments even after finding that the resulting rents would be materially above the calculated market rates." *One and Ken Valley*, 716 F.3d at 228 n.11 (Pet. App. at 20a-21a) (emphasis in original).

so doing, Petitioners are grossly exaggerating the national scope and importance of the issues presented herein.

Petitioners complain that the First Circuit decision in *One and Ken Valley* will cause less subsidized housing to be available to low-income tenants. They argue that if this decision is allowed to stand, landlords will flee the Section 8 program, leaving low-income tenants without housing options. However, Petitioners conveniently overlook the fact that the statutory provisions complained of have been in place since 1994 and the regulatory provisions since 1995, *nearly twenty years*, with no such disastrous results. The First Circuit decision merely confirms the procedure that has been in effect since 1994.

Furthermore, by their own actions Petitioners demonstrate that landlords will not abandon the Section 8 program. At no time have the Petitioners attempted to terminate their HAP Contracts with MaineHousing or failed to renew them. They have shown no inclination to leave the Section 8 program. They have, in fact, renewed two of their HAP Contracts under the Multifamily Housing Reform and Affordability Act of 1997, Pub. L. No. 105-65, 111 Stat. 1344, 1384 (1997) ("MAHRA").[18] MAHRA established

[18] The HAP Contracts of two of the Petitioners have been renewed under MAHRA; the other Petitioners' HAP Contracts are due to expire between 2014 and 2018. Magistrate's Recommended Decision (Pet. App. at 30a-31a). Similarly, the HAP Contracts at issue in *Haddon* were terminated on March 16, 2011. *Haddon Hous.*, 711 F.3d at 1334.

new policies for the renewal of Section 8 project-based contracts based on market rents.

Indeed, the HAP Contracts of the type on which Petitioners' complaint is based are being phased out by HUD pursuant to MAHRA. MAHRA required that since at least 1998, expiring Section 8 project-based assistance contracts be renewed under MAHRA. 78 Fed. Reg. 45,948 (July 30, 2013).

The rent adjustment terms of the MAHRA renewal contracts are identical to the procedures under the 1994 Act of which Petitioners complain. (Section 8 Renewal Policy Guide Book,[19] § 1-1, Feb. 15, 2008, as amended). The HAP Contracts in controversy and the issues present in this case are now almost fully phased out, and the horrors envisioned by Petitioners have not occurred in the nearly twenty years since the adoption of the 1994 Act and the HUD Notice H 95-12; disaster is no more likely to occur in the few years remaining for use of the HAP Contracts that even raise this issue. Thus, there is no issue of national importance threatening the vitality of the Section 8 Program that this Court must now address.

Moreover, to serve their purpose, Petitioners distort the arguments made in the Solicitor General's Petition for Writ of Certiorari in *Alpine Ridge*

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[19] Available at http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/mfhsec8.

regarding preservation of the Section 8 program. (Pet. at 22). The Question Presented in *Alpine Ridge* was whether the change in law violated the Due Process Clause of the Fifth Amendment by abrogating the landlords' contract rights to certain rental subsidies, where the United States was both the contracting party and the sovereign enacting the change in law, circumstances not present here. Petitioners cannot allege a Fifth Amendment taking against MaineHousing. Thus, the constitutional reasons for this Court's having granted the Petition in *Alpine Ridge* are not present in this case. Simply put, MaineHousing is not the United States.

The Supreme Court in *Alpine Ridge* and the First Circuit in this case both addressed whether government subsidized landlords should be entitled to above-market rents. It is a policy choice that should be left to Congress as to how limited federal housing dollars should be directed. The Solicitor General's Petition in *Alpine Ridge* argued that the changes resulting from Section 801, including the requirement of a comparability study, "ensure that developers do not reap non-market justified gains." Pet. for Writ of Certiorari at 21.

In the District Court, the Magistrate Judge concluded that the undisputed facts in the case showed that Petitioners were collecting contract rents of more than double the applicable fair market rents. Magistrate's Recommended Decision (Pet. App. at 66a). "The outcomes of the legal questions in these cases will dictate whether HUD and/or the

public housing agencies that administer Section 8 must pay millions of dollars in additional rents to landlords, which – in turn – could require the agencies to scale back the scope of the Section 8 program." *One and Ken Valley*, 716 F.3d at 225 (Pet. App. at 13a). Petitioners' asserted interpretation "of the contract – under which Section 8 project owners could demand payment of materially inflated rents . . . – is almost precisely backwards." *Alpine Ridge*, 508 U.S. at 19.

Petitioners also contend that the First Circuit's holding cannot be allowed to stand because it gives housing authorities far too much discretion over granting or denying rent adjustments. Yet the overall limitation was in the HAP Contracts executed by the parties. This discretion was afforded to the housing authority at the time the parties executed the HAP Contracts. Prior to the 1994 Act, HUD was allowed to "selectively" conduct comparability studies under the 1988 Amendment and the *Alpine Ridge* opinion. That is far more discretionary than the procedure of which Petitioners here complain.

"Moreover, HUD has established a procedural mechanism by which landlords can challenge the results of the Notice H 95-12 calculation: by submitting an appraiser's market rent estimates – based on at least three comparable units – showing that adjusted rents would be consistent with prevailing market rates." *One and Ken Valley*, 716 F.3d at 228 (Pet. App. at 19a). The presumptive use of the fair market rents for existing housing published by HUD,

as required by law, does not conflict with the terms of the HAP Contracts and does not prevent Petitioners from obtaining rent adjustments if they submit information or documentation showing them to be so entitled, such as a comparability study, something they chose not to do. Under either procedure, Petitioners' contract rents would be the same.

There being no issue of national importance resulting from the First Circuit's ruling on a law and implementing procedure that have been in place for twenty years, the Petition for a Writ of Certiorari should be denied.

CONCLUSION

Because the Petition does not present any reason for this Court to review the decision of the Court of Appeals in this case, the Petition for writ of certiorari should be denied.

Respectfully submitted,

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