No. 13-

IN THE

# Supreme Court of the United States

ONE AND KEN 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**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether a housing authority, in administering contracts under the federal Section 8 program for low-income housing, may deny to participating landlords an annual adjustment in reimbursable rental rates because the owner did not produce a supporting "market comparability study"—when those contracts and federal law require that an adjustment is "automatic" unless the *authority* produces a supporting market study and affirmatively "determine[s]" on that basis that an adjustment is unwarranted.

## PARTIES TO THE PROCEEDINGS

Petitioners herein are: One and Ken Valley Housing Group, Two and Ken Valley Housing Group, Three and Ken Valley Housing Group, Five and Ken Valley Housing Group, and Six and Ken Valley Housing Group, which were plaintiffs-appellants below.

Respondents herein are: Maine State Housing Authority, which was defendant-appellee and third-party plaintiff-appellee below; and Shaun Donovan, Secretary, Department of Housing and Urban Development, who was third-party defendant-appellee below.

## RULE 29.6 STATEMENT

None of the petitioners herein has a parent company, and no publicly held corporation has a 10% or greater ownership interest in any petitioner herein.

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OTHER AUTHORITIES

## PETITION FOR A WRIT OF CERTIORARI

Petitioners, One and Ken Valley Housing Group, Two and Ken Valley Housing Group, Three and Ken Valley Housing Group, Five and Ken Valley Housing Group, and Six and Ken Valley Housing Group, petition for a writ of certiorari to review the judgment of the court of appeals in this case.

## OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the First Circuit is reported at 716 F.3d 218, and reproduced at Petition Appendix (Pet. App.) 1a-21a. The unpublished order of the First Circuit denying rehearing en banc is reproduced at Pet. App. 83a-84a. The unpublished opinion of the district court and recommended decision of the magistrate judge are reproduced at Pet. App. 22a-23a and Pet. App. 24a-82a.

## JURISDICTION

The court of appeals entered judgment on May 14, 2013, Pet. App. 1a, and denied a timely petition for rehearing en banc by order dated July 10, 2013, Pet. App. 83a. This Court has jurisdiction over this timely filed petition pursuant to 28 U.S.C. § 1254(1).

## STATUTORY AND REGULATORY PROVISIONS

Relevant provisions of the Housing and Community Development Act, 42 U.S.C. § 1437f, are reproduced at Pet. App. 85a-94a. Relevant regulations of the U.S. Department of Housing and Urban Development ("HUD"), 40 Fed. Reg. 16,933 (Apr. 15, 1975), are reproduced at Pet. App. 95a-98a.

## INTRODUCTION

This case is of critical importance to the millions of individuals and families nationwide who depend on the federal low-income housing program, generally referred to as "Section 8," to obtain a decent, safe, and affordable home. The decision below denies to housing and apartment owners participating in the program an annual increase in the maximum reimbursable rates they may charge as rent, even though that adjustment is guaranteed to them by federal contract and under federal law. Without that adjustment, which is designed to ensure that rental rates at low-income units keep pace with inflation and local market conditions, owners of Section 8 housing are forced either to rent their units at below-market rates or to withdraw from the program. Denied a reasonable return on investment, owners will be unable to upgrade and improve the properties available for rent and will eventually abandon the program altogether, drastically limiting the availability of decent low-income housing and threatening a program that has helped untold numbers to avoid homelessness and climb their way out of poverty.

It may come as no surprise, given these potentially disastrous consequences, that the First Circuit's decision conflicts with both opinions of this Court and others addressing this very question. Those opinions, including *Cisneros* v. *Alpine Ridge Group*, 508 U.S. 10 (1993), and *Haddon Housing Associates* v. *United States*, 711 F.3d 1330 (Fed. Cir. 2013), recognize that the same housing assistance contracts at issue here, mandated by federal regulation and incorporating federal statutory provisions, require by their plain language that an adjustment to the reimbursable rental rate is "automatic" and must be granted on at least an annual basis, with the only exception being

when the housing authority can produce an independent "market comparability study" demonstrating "material differences" between the adjusted rental rate and rates for comparable units in the area. *Alpine Ridge*, 508 U.S. at 20; *Haddon*, 711 F.3d at 1333-34.

The First Circuit, by contrast, held in this case that a state housing authority need not ever produce a market study but may deny an adjustment whenever the adjusted rate would exceed a generic "fair market rent" defined and published by HUD, and subject entirely to that agency's discretion. Pet. App. 9a. This holding, in effect, nullifies the statutory provisions—cited and relied upon in *Alpine Ridge* and *Haddon*—requiring that the housing authority produce a market study before denying a rate adjustment.

This case is of even greater concern in light of the unique ramifications of the split between the First and Federal Circuits. Housing contracts administered by HUD are subject to the exclusive jurisdiction of the Federal Circuit, and thus governed by the rule stated in *Haddon*, see 711 F.3d at 1336, whereas contracts administered by state housing authorities (the majority nationwide) are governed by the conflicting law of the First Circuit, and that of other regional circuits, see Pet. App. 15a-21a. As a result, a participating owner's entitlement to annual rent adjustments will depend on nothing more than the happenstance of whether the contracting authority is a state or a federal agency—introducing even more doubt into a program that relies on certainty and stability to function.

These issues are thus of extraordinary importance not only to the parties to this case, but to all participants in and beneficiaries of the Section 8 program, as well as the Nation as a whole. This is another

government contract case where the governmental contracting authority seeks to obtain short-term deficit-reduction by ignoring its contractual obligations at the expense of the long-term best interests of the government in promoting the importance of fulfilling contract obligations and the underlying objectives of Congress's statutory program. Particularly in light of the demonstrable conflict between the decision below and opinions of this Court and others, certiorari should be granted.

## STATEMENT OF THE CASE

Contracts governing participation in the Section 8 program, including those in this case, are drafted by HUD pursuant to regulations and administered by the relevant federal or state housing authority pursuant to federal statutory mandates. 42 U.S.C. § 1437f(c); 24 C.F.R. § 880.501 That statutory and regulatory structure is, for this reason, essential to understanding the issues presented here.

### A. Statutory and Regulatory Background.

Congress enacted the Section 8 housing 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(a)). Because the federal government "cannot through its direct action alone provide for the housing of every American citizen," 42 U.S.C. § 1437(a), Congress designed the program to, among other things, increase private-sector development and construction of affordable housing for low-income families. 42 U.S.C. § 1437f(a). To participate in the program, a property owner enters into a housing assistance contract with either HUD or a local

housing authority. *Id.* § 1437f(c)(1).[1] Families in the program pay a portion of their monthly rent based on their income and ability to pay, and the federal government subsidizes the remaining rent. *Id.* § 1437a(a).

1. The Act, as originally enacted (and still today), requires that HUD or the administering state housing authority make periodic "adjustments" to the monthly reimbursable rent guaranteed to participating owners. *Id.* § 1437f(c)(2)(B). These adjustments are intended to reflect changes in the local market for comparable rental units, *id.* § 1437f(c)(2)(A), and are based on a series of factors published annually by HUD since 1978, 24 C.F.R. §§ 888.201-.202. The adjustments are, as described in the statute and form contracts, "automatic" and granted on at least a yearly basis. 42 U.S.C. § 1437f(c)(2)(C); 24 C.F.R. § 888.203; see also Pet. App. 95a-98a (form contract).[2]

The only exception is set forth in the "overall limitation" clause. Pet. App. 96a. That clause, tracking the language of the Act, provides that an adjustment should not be granted when it would "result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the [housing authority]." Pet. App. 96a; cf. 42

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[1] Under the Section 8 program, the federal government provides either "tenant-based" or "project-based" assistance. 24 C.F.R. § 982.1(b)(1). The petitioners in this case participate in the project-based component, in which "rental assistance is paid for families who live in specific housing developments or units." *Id.*

[2] Section 1.9(b) of the standard housing assistance contract states that, "[o]n each anniversary date of the Contract, the Contract Rents shall be adjusted by applying the applicable Automatic Annual Adjustment Factor most recently published by the Government." Pet. App. 96a.

U.S.C. § 1437f(c)(2)(C) ("[an adjustment] shall not result in material differences between the rents charged for assisted units and unassisted units of similar quality, type, and age in the same market area, as determined by the [housing authority]").[3] However, although this provision clearly contemplates that an adjustment should be denied if an authority "determine[d]" that an adjustment would create "material differences," neither it nor other provisions of the assistance contract or the original legislation set forth any process by which an authority could make that "determin[ation]." See Pet. App. 96a; 42 U.S.C. § 1437f(c). As a result, in the early years of the Section 8 program, housing authorities routinely and consistently "applied the automatic annual adjustment factors published by HUD and granted regular rent increases to Section 8 landlords," without invoking the overall limitation clause. Pet. App. 5a.

2. This situation began to change with a series of amendments enacted by Congress in the 1980s and 1990s. Their apparent purpose was to provide a method by which housing authorities could make the requisite determination that an annual adjustment would create material differences between rates at assisted and non-assisted units, sufficient to support denial of an adjustment under the overall limitation clause. See, *e.g.*, Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, § 801(a), 103 Stat. 1987, 2057.

a. A first set of amendments, in 1988 and 1989, authorized housing authorities to conduct a market "comparability study" whenever the authority "has reason to believe that the application of the formula

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[3] Housing assistance contracts have contained this overall limitation clause since 1975. Pet. App. 95a-96a.

adjustments ... would result in such material differences." Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 142(c), 101 Stat. 1815, 1850 (1988); Pub. L. No. 101-235, § 801(c), 103 Stat. at 2058. These studies would be independent of the adjustment factors, and based on an individualized assessment and comparison of actual rental rates at similar properties in the local market. Pub. L. No. 101-235, § 801(a), 103 Stat. at 2057. If those rates were higher than the adjusted rate, the authority could make a "material differences" finding and invoke the overall limitation clause to deny an adjustment. 42 U.S.C. § 1437f(c)(2)(C). Congress directed, however, that the authority must submit the study to the participating owner at least 60 days before the adjustment would otherwise be due, and that if the authority failed to do so the adjustment "shall be applied." *Id.*

This modified practice was challenged by participating owners as a breach of the contractual and statutory provisions guaranteeing to them an "automatic" annual adjustment in reimbursable rental rates. See, *e.g.*, *Rainier View Assocs.* v. *United States*, 848 F.2d 988 (9th Cir. 1988) (per curiam). In *Cisneros* v. *Alpine Ridge Group*, 508 U.S. 10 (1993), this Court rejected the claim, holding that the overall limitation clause "affords the Secretary sufficient discretion to design and implement comparability studies as a reasonable means of effectuating its mandate.... [to make a] determination of whether there exist material differences between the rents charged for assisted and comparable unassisted units." *Id.* at 21. The Court emphasized, however, that "[t]he rent adjustments indicated by the automatic adjustment factors remain the presumptive adjustment called for under the contract." *Id.* at 19. It cited the statutory

provisions placing the burden on the housing authority to produce a market study within 60 days before an adjustment decision, and requiring that the adjustment otherwise be granted. *Id.* at 15 n.1. The overall limitation clause can thus be applied, the Court said, "only in those presumably *exceptional* cases where the [authority] has reason to suspect that the adjustment factors are resulting in materially inflated rents that a comparability study would ensue." *Id.* at 19 (emphasis added).[4]

b. A second set of amendments was enacted in 1994, a year after *Alpine Ridge*. Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act of 1995, Pub. L. No. 103-327, 108 Stat. 2298, 2315 (codified at 42 U.S.C. § 1437f(c)(2)(A)). These amendments did not, though, modify the framework this Court discussed. See *id.*; see also S. Rep. No. 103-311, at 6 (1994); H.R. Rep. No. 103-555, at 4 (1994). To the contrary, the amendments retained the provisions of the Act cited in *Alpine Ridge*—including the requirement that the housing authority conduct and produce a market report at least 60 days before denying an annual adjustment. 42 U.S.C. § 1437f(c)(2)(C). Nothing in the legislative history suggests that Congress sought to repeal those provisions or their requirements *sub silentio*.

Instead, the 1994 amendments added new provisions allowing participating owners to conduct and submit their own market report. These provisions

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[4] *See also Alpine Ridge*, 508 U.S. at 19-20 ("Because the automatic adjustment factors are themselves geared to reflect trends in the local or regional housing market, theoretically it should not be often that the comparability studies would suggest material differences between Section 8 and private market rents.").

(applicable only prospectively) stated that, if the authority determines that an adjusted rate would exceed the "fair market rate" for similar units, an adjustment should be allowed "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."[5] Pub. L. No. 103-327, 108 Stat. at 2315.

The amended provisions, although they permitted the owner to submit a market report, did not themselves state when an owner should or must do so. These questions were answered by the existing provisions enacted in 1988 and 1989, which were left in place by the 1994 amendments. Those provisions make clear that the housing authority bears the initial burden of producing a market report, and that if the authority fails to do so the automatic adjustment "shall" be granted, regardless of whether the owner offers its own report. 42 U.S.C. § 1437f(c)(2)(C). Only if and after the authority produces a timely report, and "determines" that the adjusted rate would "material[ly] differ[ ]" from rates at comparable properties (and thus exceed the "fair market" rate), is the owner then required to produce a counter-study, disputing the authority's assessment, in order to establish entitlement to an adjustment. *Id.* § 1437f(c)(2)(A), (C).

3. Notwithstanding that all provisions of the Act could be readily harmonized in this manner, HUD instead construed the 1994 amendments to supersede

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[5] The 1994 amendments also included other changes related to the administration of housing assistance contracts. For example, for units that did not turn over—meaning the property owner did not obtain new tenants during the prior contract year—Congress enacted a mandatory reduction of the applicable annual adjustment factor. *See* Pub. L. No. 103-327, 108 Stat. at 2315.

and displace the prior statutory framework—the one recognized in *Alpine Ridge*—and to relieve housing authorities of any burden to produce a market report as a prerequisite to denial of a rate adjustment. See U.S. Dep't of Hous. & Urban Dev., Notice H 95-12 (Mar. 7, 1995).[6] Those adjustments could now be denied, in HUD's view, whenever the adjusted rate would exceed a generic "fair market rent" published by the agency.[7] *Id.* at 8. The only exception would be when the *owner* (not the housing authority) could

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[6] By its terms, Notice H 95-12 expired on September 30, 1995, but later notices reinstated and made permanent its provisions. *See, e.g.,* U.S. Dep't of Hous. & Urban Dev., Notice 97-14 (Mar. 17, 1997); U.S. Dep't of Hous. & Urban Dev., Notice 00-14 (Aug. 9, 2000); U.S. Dep't of Hous. & Urban Dev., Notice H 2002-10 (May 17, 2002); *see also* 77 Fed. Reg. 22340, 22341 (Apr. 13, 2012). These notices were issued not as formal regulations but as agency guidance documents, without notice and comment.

[7] The generic "fair market rents" published by HUD differ from the "market comparability study" in purpose, methodology, and conclusions. The fair market rents reflect "gross rent estimates" based on the results of telephone surveys of owners of recently rented units in a broad geographic area; they are set at the 40th percentile of the total rent and utility costs charged to renters, as reported in the surveys. U.S. Dep't of Hous. & Urban Dev., *Fair Market Rents for the Section 8 Housing Assistance Payments Program* 1-2 (July 2007). For this reason, as Congress itself has recognized, these estimates often do not "accurately reflect true market rents" and, despite their title, are in actuality "neither fair nor market." *Cuyahoga Metro. Hous. Auth.* v. *United States*, 57 Fed. Cl. 751, 779 (2003) (quoting H.R. Rep. No. 104-461, at 100-01). A market comparability study, by contrast, takes into account a wide metric of factors—including the quality and condition of units and properties, available amenities and services, and proximity to retail services and employment locations—in determining the market rent for those units in the area that are actually "comparable" to the property under review. U.S. Dep't of Hous. & Urban Dev., *Section 8 Renewal Policy* §§ 9-9 to 9-15 (Feb. 2008).

produce a market report showing that the adjustment was warranted. *Id.*

This interpretation, adopted in HUD rules governing the administration of housing assistance contracts (including by state housing authorities), faced an unfavorable reception in the federal judiciary, as might be expected given its facial inconsistency with *Alpine Ridge*. Several courts, including most recently the Federal Circuit in *Haddon Housing Associates* v. *United States*, 711 F.3d 1330 (Fed. Cir. 2013), expressly rejected HUD's view, holding that the 1994 amendments could not properly be read to modify the *Alpine Ridge* framework or to excuse housing authorities from their statutory and contractual obligations to produce a satisfactory market comparability study or else allow the contract-mandated annual rate adjustment. *Id.* at 1336-37.

**B. Proceedings Below.**

This case was brought in 2009 by five owners of multifamily housing units participating in the Section 8 program, pursuant to HUD contracts executed between 1976 and 1979 and administered by the Maine State Housing Authority (known as "MaineHousing"). Pet. App. 2a, 29a n.2. The complaint alleged that the authority for several years improperly denied owners the annual rate adjustment guaranteed by the contracts, without submitting a supporting market comparability study. *Id.* at 25a-27a. The authority defended itself by citing the governing HUD rules, arguing that it was obligated to deny the adjustments because the adjusted rates would exceed the generic "fair market rents" published by HUD and that it was the owners—not the authority—that bore the burden of submitting a market study. *Id.* at 42a-47a. The authority also impleaded HUD as a third-party defendant, asserting that the federal

agency was ultimately liable for any breach caused by application of its rules. *Id.* at 25a-26a.

The district court, adopting the report of a magistrate judge, dismissed the complaint. Pet. App. 22a-23a. It acknowledged that the provisions of the Act enacted in 1988 and 1989, still in effect, required the *authority* to submit a market comparability study "'not later than 60 days before the anniversary date of the assistance contract,' or else the 'automatic annual adjustment factor shall be applied.'" *Id.* at 63a (quoting *Alpine Ridge*, 508 U.S. at 15 & n.1). It nevertheless concluded that those provisions had been superseded by the 1994 amendments, as interpreted by HUD, and were therefore no longer applicable in all circumstances. *Id.* at 64a-73a. Because those rules placed the burden of producing a market study on the owner, rather than the authority, the court found that the authority in this case had not breached its obligations by denying the adjustment. *Id.*

The First Circuit affirmed. Citing the same HUD rules, it held that the 1994 amendments "shift[ed] the onus onto landlords to demonstrate that adjusted rents would not exceed the market rent for comparable units." Pet. App. 8a. The panel recognized that its analysis differed from opinions of other courts, including *Alpine Ridge*, but deemed those opinions either wrongly decided or inapplicable in light of the 1994 amendments. *Id.* at 16a & n.9 (citing cases). Because the owners in this case had not submitted a market study, the authority had properly withheld the "otherwise-automatic annual adjustments in contract rents." *Id.* at 21a.

## REASONS FOR GRANTING THE PETITION

Review of the First Circuit's decision is urgently warranted. That decision creates a square split with the Federal Circuit, and conflicts with opinions of other lower courts, *infra* Part I, and it is directly contrary to—indeed effectively overrules aspects of—this Court's opinion in *Alpine Ridge*, *infra* Part II. The decision will, moreover, have potentially disastrous consequences for the Section 8 housing program and the millions of low-income individuals and families it serves, as landlords either restrict the number of units they make available for rent, reduce investments in those units, or refuse to participate in the program at all. *Infra* Part III. In sum, the Court should grant the petition.

### I. THE DECISION BELOW CREATES A SPLIT WITH THE FEDERAL CIRCUIT'S OPINION IN *HADDON HOUSING ASSOCIATES* v. *UNITED STATES*, 711 F.3d 1330 (FED. CIR. 2013), AND CONFLICTS WITH OTHER LOWER COURT OPINIONS.

That the First Circuit's decision conflicts with opinions of other courts cannot be doubted. Those conflicts alone justify this Court's review.

1. The most pronounced split is with the Federal Circuit. That court, addressing the same question and interpreting the same contractual and statutory language presented here, held in *Haddon Housing Associates* v. *United States*, 711 F.3d 1330 (Fed. Cir. 2013), that participating owners are presumptively entitled to an annual adjustment in their reimbursable rental rates, and that an adjustment may be denied only if HUD or the housing authority satisfies its burden to produce an independent market study demonstrating "material differences" between the ad-

justed rate and rates for comparable non-assisted units in the area. *Id.* at 1336 (adopting the trial court's "well-reasoned and meticulous opinion" addressing the issue); see also *Haddon Housing Assocs.* v. *United States*, 99 Fed. Cl. 311, 329-30 (2011). That approach, as discussed above (and in opinions cited with approval in *Haddon*), is the only one consistent with the statutory language. *Supra* pp. 6-9.

The decision below holds precisely to the contrary. Indeed, the First Circuit acknowledged this conflict in its opinion, but attempted to downplay it by suggesting that the Federal Circuit did not actually "express [a] view" on this issue, insofar as *Haddon* simply adopted by reference decisions of the U.S. Court of Federal Claims holding that—notwithstanding the 1994 amendments—the burden remains on the authority to justify denial of an adjustment by producing a satisfactory market study. Pet. App. 16a n.8. But, regardless of whether the Federal Circuit might have set out its reasoning in greater detail, that court clearly did "express[ a] view" on the issue: it explicitly agreed with and affirmatively adopted both the holding of the Court of Federal Claims *and* its rationale. *Haddon*, 711 F.3d at 1336. [8]

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[8] The issue of whether the 1994 amendments altered a housing authority's obligation to produce a market study before denying a rate adjustment was, contrary to the First Circuit's assumption, clearly raised and "preserved for appeal" in *Haddon*, as reflected in both the Federal Circuit's opinion and also the briefs of the parties. *See* 711 F.3d at 1336 (reciting issues on appeal, including whether "HUD breached the [housing assistance] contract by not granting rent adjustments"); Br. for Def.-Appellant U.S. at 2, *Haddon*, 711 F.3d 1330 (filed Apr. 30, 2013) (same); *see also Haddon*, 99 Fed. Cl. at 326-30 (addressing this issue). The separate issue that *Haddon* found to be waived was the different question of whether—assuming that the authority did in fact breach the agreement by denying adjustments with-

Stated plainly, there can be no doubt that a split now exists between the First and Federal Circuits on this issue. Review by this Court is necessary and warranted to address that split.

2. Other lower courts have likewise rejected HUD's and the First Circuit's approach. See, *e.g.*, *Cathedral Square Partners* v. *S.D. Hous. Dev. Auth.*, 875 F. Supp. 2d 952, 959 (D.S.D. 2012) (finding breach of contract in light of the authority's "failure to provide annual rent adjustments"); *Park Props. Assocs.* v. *United States*, 74 Fed. Cl. 264, 274 (2006) ("[T]he court concludes, 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 ... at least to the extent that it precluded required rent adjustments from being made."); *Statesman II Apts., Inc.* v. *United States*, 66 Fed. Cl. 608, 616-19 (2005); *Cuyahoga Metro. Hous. Auth.* v. *United States*, 57 Fed. Cl. 751, 759-60 & n.13 (2003); *Greenleaf Ltd. P'ship* v. *Ill. Hous. Dev. Auth.*, No. 08-C-2480, 2009 WL 5166225, at *5 (N.D. Ill. Dec. 23, 2009).

Those opinions recognize that the 1994 amendments cannot be read to alter or repeal the requirement that the housing authority conduct a market comparability study before denying a rate adjustment. *E.g.*, *Park Props. Assocs.*, 74 Fed. Cl. at 273-74; *Statesman*, 66 Fed. Cl. at 620. Instead, these courts hold, the amendments simply added another layer of process, under which an owner—when presented with a housing authority's market report

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out conducting a market study—the overall limitation clause still applied to cap the damages for which the authority may be liable. *See* 711 F.3d at 1336 & nn.1-2; *see also Haddon*, 99 Fed. Cl. at 338-40 (addressing this separate issue).

showing that an adjustment is unwarranted—must then conduct and submit its own competing report to rebut those conclusions and establish that an adjusted rate should be allowed. *E.g.*, *Park Props. Assocs.*, 74 Fed. Cl. at 273-74; *Statesman*, 66 Fed. Cl. at 620.

There is simply no way to reconcile those holdings with the First Circuit's analysis. The weight of authority in the lower courts clearly holds that the statutory provisions requiring the housing authority to conduct a market study remain in effect and must be applied. See, *e.g.*, *Cuyahoga*, 57 Fed. Cl. at 762; *Greenleaf*, 2009 WL 5166225, at *5. The decision below would nullify that requirement, deeming it superseded and repealed by implication through the 1994 amendments, Pet. App. 16a-17a. This conflict, square and deep, additionally justifies this Court review.

3. Beyond questions concerning the interpretation and validity of the Act, the decision below also violates fundamental tenets regarding the government's role as a contracting party. A long line of decisions from this Court and others, including *Cherokee Nation of Oklahoma* v. *Leavitt*, 543 U.S. 631, 636-38 (2005), *United States* v. *Winstar*, 518 U.S. 839, 895-98 (1996) (plurality), and *Lynch* v. *United States*, 292 U.S. 571, 580 (1934), admonish that the federal government cannot unilaterally modify or abrogate duties and obligations under contracts to which it is a party. Similarly, and more emphatically, the Contracts Clause of the U.S. Constitution generally prohibits States from interfering with existing contractual arrangements. U.S. Const. art. I, § 10, cl. 1.

These principles are directly applicable here. The housing assistance contracts by their plain language require—and were indisputably understood by the parties to guarantee—that the owners would be

granted an "automatic" annual adjustment in maximum reimbursable rental rates unless, in the "exceptional" circumstance noted by *Alpine Ridge*, the housing authority makes an affirmative "determination" that the adjusted rates would "material[ly] differ" from comparable non-assisted rates. 508 U.S. at 19-20. This contractual requirement cannot be modified by Congress, much less by a federal or state agency. See *Cherokee Nation*, 543 U.S. at 636-38; *Winstar*, 518 U.S. at 895-98; *Lynch*, 292 U.S. at 580.

Yet, that is precisely what HUD and the housing authority in this case have purported to do. They have effectively altered the contractual arrangement (in this case, established in the 1970s) so that rate adjustments are no longer "automatic," but are now contingent on the owner submitting a satisfactory market study. Pet. App. 7a, 16a-17a. This Court has not hesitated to stop government entities from shirking their contractual responsibilities to serve short-term fiscal interests in ways that will impair the long-term interests of government as contracting parties. See, *e.g.*, *Winstar*, 518 U.S. at 895-98. It should do so again here.

## II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S OPINION IN *CISNEROS* v. *ALPINE RIDGE GROUP*, 508 U.S. 10 (1993).

Review is also warranted in light of the demonstrable and direct conflict between the First Circuit's decision and this Court's opinion in *Cisneros* v. *Alpine Ridge Group*. That opinion, considering the same contractual and statutory provisions at issue in this case, concluded that the provisions establish a presumption that an adjustment will be allowed, with the burden falling on the housing authority to show (through the prescribed market study) why it should not. 508 U.S. at 20-21. Put differently, in the words

of the Court, denial of the adjustment would be restricted to "exceptional cases." *Id.* at 19. This framework makes sense, the Court explained, because the automatic adjustment factors are themselves designed to account for local market conditions, and for that reason should in the majority of cases avoid creating "material differences" between assisted and non-assisted rental rates without the need for an independent market report. *Id.* at 19-20.

The First Circuit's decision turns the *Alpine Ridge* framework on its head. It holds that the "automatic" adjustment is no longer "automatic" at all, but may be disallowed whenever the adjusted rate would exceed generic "fair market rents" published by HUD—unless the *owner* can produce a market comparability study showing that the adjusted rate would *not* create "material differences" with rents at non-assisted units. Pet. App. 9a, 17a. Under this approach, the presumption is no longer that an adjustment will be automatic, but rather that it will be denied, with the burden on the owner to prove otherwise through a market study. *Id.* Denial of the adjustment is, in other words, no longer the "exception[ ]," but the rule. *Id.* at 20a-21a n.11.

The court of appeals justified this flat rejection of *Alpine Ridge* on the basis of the 1994 amendments to the Act. Pet. App. 8a (finding that the 1994 amendments "shift[ed] the onus onto landlords to demonstrate that adjusted rents would not exceed the market rent for comparable units"). Nothing in the 1994 legislation or its legislative history states such a purpose, however, and those provisions do not lend themselves to such an extraordinary about-face in the regulatory scheme. Instead, they do nothing more than require that, if the authority submits a market comparability study showing "material differences"

between the adjusted rate and rates at non-assisted facilities (thus satisfying the authority's initial burden), the owner must then produce a competing study, in order to reestablish entitlement to an adjustment.[9] See, *e.g.*, *Park Props. Assocs.* v. *United States*, 82 Fed. Cl. 162, 174-75 (2008); *Greenleaf*, 2009 WL 5166225, at *4-5.

To hold otherwise—that the 1994 amendments entirely eliminated the housing authority's burden to conduct a market study—is not only contrary to the framework discussed in *Alpine Ridge*, but affirmatively nullifies provisions of the Act enacted in 1988 and 1989. Those provisions, left in place by the 1994 amendments (and cited in *Alpine Ridge*), state that the housing authority must conduct and submit a market study at least 60 days before annual adjustment date, and that if the authority fails to do so "the automatic annual adjustment factor *shall* be applied." 42 U.S.C. § 1437f(c)(2)(C) (emphasis added). There is simply no way to read these provisions other than as placing the initial burden of conducting a market study on the housing authority, and as mandating that an adjustment be granted "automatic[ally]" if the housing authority fails to do so. See *Alpine Ridge*, 508 U.S. at 19; *Haddon*, 711 F.3d at 1336-37. Nevertheless, and despite *Alpine Ridge* and scores of opinions admonishing against implied repeals,[10] the First Circuit held that these provisions could no long-

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[9] This type of burden-shifting system appears frequently in other federal statutes. *See, e.g.*, *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-05 (1973).

[10] *See, e.g.*, *Kremer* v. *Chem. Constr. Corp.*, 456 U.S. 461, 468 (1982) ("It is, of course, a cardinal principle of statutory construction that repeals by implication are not favored, and whenever possible, statutes should be read consistently.") (quotation marks and citations omitted).

er be applied, since (in its view) the 1994 amendments seemed to contemplate that the burden would instead fall on owners. Pet. App. 18a & n.10.

In all events, it is not the prerogative of a court of appeals to declare that a decision of this Court is no longer good law, either in whole or in part. See, *e.g.*, *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); see also E. Gressman et al., *Supreme Court Practice* § 4.5 (9th ed. 2007). That is particularly true in a case such as this one, where the court of appeals' holding is not unambiguously required by statutory language or congressional intent and would, further, dramatically upend existing statutory structures and upset (indeed, violate) settled contractual expectations of participants in a long-standing federal program. See Gressman, *supra*, § 4.5. Only this Court has the authority to consider the continued validity of *Alpine Ridge*, and to clarify and correct the lower courts' understanding and application of that opinion.

## III. THIS CASE PRESENTS ISSUES OF EXCEPTIONAL NATIONAL IMPORTANCE CONCERNING THE FEDERAL LOW-INCOME HOUSING PROGRAM.

This case would warrant review even in the absence of the above conflicts given the wide-ranging, and potentially devastating, consequences to the Section 8 program that will arise out of the First Circuit's decision. That holding, if allowed to stand, will not only deny these particular owners the annual rate adjustments to which they are entitled, but also

will encourage this and other state housing authorities routinely to refuse rate adjustments to participating owners across the country. With discretion to deny adjustments based on nothing more than a comparison to generic "fair market rents" published by HUD itself, and under ever-increasing pressure to reduce agency budgets, housing authorities will have every incentive, and effectively no impediment, to deny all adjustment requests.

The effect will be an exodus of participants in the low-income housing program. That program was designed from its inception to induce participation through the assurance of a reasonable profit to owners and renters, guaranteed largely through the promise of an automatic annual adjustment in rental reimbursements. See 42 U.S.C. § 1437f(a). If a housing authority is instead free to deny these adjustments whenever it deems the adjusted rate to exceed a hypothetical "fair market rent" of HUD's own crafting, without any study of comparable local units in the area or an actual "determination" concerning rates at those units, owners will be understandably reluctant to remain in the program, particularly when the market for private rental property is strong now because of the difficulties of the housing markets. See, *e.g.*, A. Kochera et al., AARP Pub. Pol. Inst., *Section 8 Project-Based Rental Assistance: The Potential Loss of Affordable Federally Subsidized Housing Stock* 1-3 (Feb. 2001) (noting risk that participating owners will "opt out" of the program if rent levels fall "below the prevailing market rents for comparable units").

The resulting harms, if these conditions persist, cannot be overstated. The Section 8 program serves millions of individuals and families across the Nation, ensuring that decent, safe, and affordable housing is

within reach and providing an essential and irreplaceable backstop against homelessness. See, *e.g.*, *id.* That success, and more importantly the lives and livelihoods of the millions who depend on the program, are put at risk by the decision below. As participation in the program wanes, fewer and fewer homes will be available, and more and more families will be forced to survive without safe and decent housing.

It was for these very reasons that the Solicitor General urged this Court—successfully—to review the same contractual and statutory provisions in *Alpine Ridge*. Despite the absence of a circuit split or demonstrable conflict with decisions of this Court (both of which are additionally present here), the Solicitor General argued that review was warranted because the opinion below had "nullif[ied]" provisions of the Act regarding the use of market comparability studies, "creating a climate of uncertainty for participants" and "threaten[ing] to inflict widespread harm on [this] major social welfare program." Pet. for Writ of Certiorari at 11, 16, 22, *Alpine Ridge*, 508 U.S. 10 (filed Sept. 25, 1992); see also *id.* at 22-23 ("The Section 8 project-based program is one of the largest housing programs administered by HUD[;] .... [o]ver 15,000 contracts are in effect nationwide, and all are governed by the statutory provisions and contractual procedures [at issue] in this case."). The Solicitor General noted in *Alpine Ridge*, further, that "this case raises important and unsettled questions about the ... limits on Congress's power to modify contractual rights in federal programs." Reply in Supp. of Pet. for Writ of Certiorari at 1, *Alpine Ridge*, 508 U.S. 10 (filed Oct. 2, 1992); see also *id.* at 9 ("Until this issue is definitively resolved, the stability, predictability, and efficiency of the Section 8 program will be

undermined."). Those statements apply with equal, if not greater, force in this case.

The uncertainty caused by the First Circuit's decision will be exacerbated by the unique ramifications of the split it creates with the Federal Circuit. The Federal Circuit has exclusive jurisdiction over claims relating to housing assistance contracts that are administered directly by HUD. See *Haddon*, 711 F.3d at 1332 (citing 28 U.S.C. § 1295(a)(3)). Contracts administered through a state housing authority are generally heard within the regional circuits. See Pet. App. 15a-16a. Although all of these contracts contain the same language (drafted and mandated by HUD), and although all are governed by the same statutory and regulatory provisions, they may now—as a result of the circuit split—be subject to contrasting interpretations depending solely on the identity of the administering housing authority. For contracts administered by HUD, adjustments will be presumptively allowed unless the agency submits a market study demonstrating "material differences" between the adjusted rate and rates for comparable non-assisted units, *Haddon*, 711 F.3d at 1336-37; for contracts administered by a state housing authority, however, an adjustment will be presumptively denied under the First Circuit's reasoning whenever the adjusted rate would exceed the generic "fair market rates" published by HUD, Pet. App. 15a-21a. Outcomes should be determined by a single legal standard dictated by the statute, not by the caprice that a particular housing unit is subject to state versus federal administration.

* * *

This case plainly warrants review. The decision below conflicts on its face with *Alpine Ridge*, and it creates a new and square split with the Federal Circuit.

Of greater concern, it threatens the viability of the Section 8 program, introducing doubt into a program that depends on certainty to function, and that serves for millions of individuals and families as an essential protection against homelessness. For all these reasons, as well as those urged by the Solicitor General and accepted by the Court as justifying review in *Alpine Ridge*, certiorari should be granted.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 20, 2013

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# APPENDIX

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FIRST CIRCUIT

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No. 12-1952

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ONE AND KEN VALLEY HOUSING GROUP, ET AL.,
*Plaintiffs, Appellants*,

v.

MAINE STATE HOUSING AUTHORITY,
*Defendant / Third-Party Plaintiff, Appellee*,

v.

SHAUN DONOVAN, SECRETARY, U.S. DEPARTMENT OF HOUSING & URBAN DEVELOPMENT,
*Third-Party Defendant, Appellee*.

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May 14, 2013

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Before LYNCH, Chief Judge, HOWARD, Circuit Judge, and CASPER,* District Judge

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Opinion

HOWARD, Circuit Judge.

The Section 8 program is a vast effort on the part of federal, state, and local authorities to provide decent, safe, and sanitary housing to low-income families, the elderly, and the disabled. The program

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* Of the District of Massachusetts, sitting by designation.

is administered by the U.S. Department of Housing and Urban Development ("HUD") in conjunction with state and local public housing agencies across the country. Under the part of the program at issue here,[1] state and local agencies enter into housing assistance payments ("HAP") contracts with private landlords, and the landlords agree to make units available to Section 8-assisted households. The assisted households, in turn, pay 30 percent of their monthly adjusted income to their landlords in rent; the landlords receive the remainder of the rent from the relevant public housing agency; and the public housing agencies are fully reimbursed by HUD.[2] The payments from the state and local agencies to the Section 8 landlords are adjusted periodically according to guidelines promulgated by HUD.

Plaintiffs-appellants are five limited partnerships that own multifamily housing rental projects in southern and central Maine. All of the partnerships have entered into HAP contracts with the Maine State Housing Authority ("MaineHousing") in order to participate in the Section 8 program. In December 2009, the partnerships sued MaineHousing in federal

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[1] Section 8 assistance may be either "project-based" or "tenant-based." *Park Vill. Apt. Tenants Ass'n v. Mortimer Howard Trust*, 636 F.3d 1150, 1152 (9th Cir.2011). This suit involves the project-based component of the program. According to HUD estimates, approximately 1.2 million low-income families live in units that receive project-based aid, and another 2.2 million families receive tenant-based assistance. U.S. Dep't of Hous. & Urban Dev., *FY 2013 Budget: Housing and Communities Built to Last* 17, 43 (2012).

[2] Where no public housing agency is able to implement the program, the Section 8 statute authorizes the HUD Secretary to enter into contracts with landlords directly. 42 U.S.C. § 1437f(b)(1) (2006).

district court for breach of contract, alleging that MaineHousing had wrongfully refused to grant them certain annual increases in their Section 8 payments (although MaineHousing has allowed some upward adjustments). MaineHousing, while denying the plaintiffs' allegations, impleaded HUD as a third-party defendant, arguing that if MaineHousing had breached its contracts with the partnerships, then it had done so only at HUD's direction. All parties sought summary judgment; a magistrate judge recommended judgment for MaineHousing and HUD on the grounds that no material breach of contract had occurred; and the district court adopted the magistrate's recommended decision. The partnerships appeal, and we affirm.

## I.

Although this case ultimately turns on a narrow question of contract law, it arises in the context of a complex web of statutes and regulations governing federal housing aid. In 1974, Congress amended the New Deal-era Housing Act to add the provision commonly known as "Section 8"; this provision authorized the HUD Secretary "to enter into annual contributions contracts with public housing agencies pursuant to which such agencies may enter into contracts to make assistance payments to owners of existing dwelling units." 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(b)(1)) (amending United States Housing Act of 1937, Pub. L. No. 75-412, 50 Stat. 888). While these "annual contributions contracts" make reference to particular projects, the only parties to the annual contributions contracts are HUD and the public housing agencies administering the Section 8 program.

Between 1975 and 1978, HUD and MaineHousing entered into annual contributions contracts covering each of the five sites at issue in the present litigation.

The original Section 8 statute provided that rents paid to landlords at program sites would be adjusted on at least an annual basis "to reflect changes in the fair market rentals established in the housing area for similar types and sizes of dwelling units or, if the Secretary determines, on the basis of a reasonable formula." 88 Stat. at 663 (codified at 42 U.S.C. § 1437f(c)(2)(A)). To guard against these rent adjustments producing a windfall for Section 8 landlords, the statute added the caveat that automatic adjustments "shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Secretary." *Id*. (codified at 42 U.S.C. § 1437f(c)(2)(C)). These statutory provisions remain in force today.

Pursuant to Section 8, HUD publishes "automatic annual adjustment factors" for specific Census regions and metropolitan areas that reflect changes in the Consumer Price Index for rent and utilities over the previous year. *See* 24 C.F.R. §§ 888.201-.204 (2012); 77 Fed. Reg. 22,340, 22,340-43 (Apr. 13, 2012). HUD regulations state that Section 8 rents should be calculated by multiplying the applicable annual adjustment factor for the appropriate Census region or metropolitan area by the rent stipulated by contract for each unit. 24 C.F.R. § 888.203.

HUD has also drafted a standard form contract for state and local agencies to use when entering into agreements with Section 8 landlords. Once HUD and MaineHousing had entered into annual contributions contracts covering the five sites in question, MaineHousing entered into housing assistance payments

contracts with owners of the five properties. The HAP contracts varied in duration, with the longest providing for renewals over the course of 40 years, until 2018. All of the HAP contracts contained a provision, section 1.9(b)(2), stating that each year, "the Contract Rents shall be adjusted by applying the applicable Automatic Annual Adjustment Factor most recently published by the Government." All of the contracts also included an "overall limitation clause" (section 1.9(d)), which states that:

> Notwithstanding any other provisions 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 authority] . . . ; provided, that this limitation shall not be construed to prohibit differences in rents between assisted and comparable unassisted units to the extent that such differences may have existed with respect to the initial Contract Rents.

At the outset of the Section 8 program's existence, public housing agencies applied the automatic annual adjustment factors published by HUD and granted regular rent increases to Section 8 landlords; HUD, for its part, funded these rent increases through its annual contributions to the public housing agencies. In the early 1980s, however, officials at HUD became concerned that the automatic annual adjustments were pushing rents at some Section 8 sites well above the market rates for comparable unsubsidized units. In 1983, when HUD and a local housing authority sought to prevent an automatic annual adjustment from taking effect at a Section 8 site in Bremerton, Washington, the affected landlord filed a federal suit.

The Ninth Circuit held that—despite the overall limitation clause in the HAP contract between the Section 8 landlord and the local housing agency—the landlord was still entitled to automatic annual adjustments in rental payments. *Rainier View Assocs. v. United States*, 848 F.2d 988, 990-91 (9th Cir.1988), *cert. denied*, 490 U.S. 1066, 109 S.Ct. 2065, 104 L.Ed.2d 630 (1989). HUD refused to apply the *Rainier View* decision outside of the Ninth Circuit, and other courts disapproved of *Rainier View*'s holding. *See*, *e.g.*, *Carmichaels Arbors Assocs. v. United States*, 789 F.Supp. 683, 685, 688-89 (W.D.Pa.1992); *Sheridan Square P'ship v. United States*, 761 F.Supp. 738, 743-44 (D.Colo.1991); *Nat'l Leased Hous. Ass'n v. United States*, 22 Cl.Ct. 649, 652, 659-60 (Cl.Ct.1991).

With litigation over the HAP contracts pending in various federal courts, Congress passed a series of amendments addressing HUD's efforts to rein in rent increases. The first two of these amendments, enacted in 1988 and 1989, clarified the process by which the HUD Secretary could deny automatic annual adjustments at Section 8 sites. Under the amendments, HUD or a public housing agency could deny an automatic annual adjustment at a Section 8 site by submitting a "comparability study" to the project owner at least sixty days before the annual adjustment was set to take effect. *See* Housing and Community Development Act of 1987, Pub. L. 100-242, § 142(c)(2), 101 Stat. 1815, 1850 (1988) (codified at 42 U.S.C. § 1437f(c)(2)(C)); Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, § 801(c), 103 Stat. 1987, 2058 (same).

After the 1988 and 1989 amendments, Section 8 landlords in Washington and California brought suit again, claiming that their HAP contracts entitled

them to automatic annual adjustments without regard to the results of comparability studies conducted by HUD. The Ninth Circuit reiterated its holding in *Rainier View* and "rejected HUD's argument that an 'Overall Limitation' provision in the contracts permitted HUD to use market rates to cap rent adjustments." *Alpine Ridge Grp. v. Kemp*, 955 F.2d 1382, 1383-84 (9th Cir.1992) (citing *Rainier View*, 848 F.2d at 990-91). The Supreme Court granted certiorari and reversed the Ninth Circuit's decision. As Justice White wrote for a unanimous Court, "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." *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 21, 113 S.Ct. 1898, 123 L.Ed.2d 572 (1993). 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 rates. *Id*.

One year after the *Alpine Ridge* decision, Congress amended the Section 8 statute to place further limits on automatic annual adjustments. The 1994 law provided, in pertinent part, that:

> [W]here the maximum monthly rent . . . to be adjusted using an annual adjustment factor exceeds the fair market rental for an existing dwelling unit in the market area, the Secretary shall adjust the rent 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 (codified at 42 U.S.C. § 1437f(c)(2)(A)).[3]

Whereas the 1988 and 1989 amendments saddled HUD with the burden of producing a "comparability study" whenever it sought to withhold an automatic adjustment, the 1994 amendment seemed to shift the onus onto landlords to demonstrate that adjusted rents would not exceed the market rent for comparable units. *See Greenleaf Ltd. P'ship v. Ill. Hous. Dev. Auth.*, No. 08 C 2480, 2009 WL 5166225, at *4-5, 2009 U.S. Dist. LEXIS 119375, at *11-14 (N.D.Ill. Dec. 23, 2009). HUD addressed this apparent tension in 1995 with the promulgation of Notice H 95-12, which provided state and local housing authorities with detailed guidelines for implementing the previous year's statutory changes. Notice H 95-12 directed housing authorities to consult a document published annually by HUD that lists "fair market rents" for different unit types on a regional basis.[4] Where the rent for a Section 8 unit that would result from the automatic adjustment is higher than the corresponding fair market rent listed in the HUD-published tables, Notice H 95-12 instructs the public housing authority to presume that the contract rent is above-market. *See* U.S. Dep't of Hous. & Urban Dev., Notice

[3] Although the 1994 amendment only applied to rent adjustments for fiscal year 1995, Congress subsequently made the provision permanent. *See* Balanced Budget Act of 1997, Pub.L. No. 105-33, § 2003, 111 Stat. 251, 257 (codified at 42 U.S.C. § 1437f(c)(2)(A)).

[4] For the State of Maine, HUD publishes fair market rents for zero-, one-, two-, three-, and four-bedroom units in eight metropolitan areas and eleven non-metropolitan counties. U.S. Dep't of Hous. & Urban Dev., Schedule B: FY 2013 Fair Market Rents for Existing Housing, at 18-21 (2012), *available at* http://www.huduser.org/portal/datasets/fmr.html.

H 95-12 (Mar. 7, 1995); *see also* U.S. Dep't of Hous. & Urban Dev., Notice H 2002-10 (May 17, 2002) (carrying forward Notice H 95-12 method); 77 Fed. Reg. 22,340, 22,341 (Apr. 13, 2012) (carrying forward Notice H 2002-10).

In promulgating Notice H 95-12, HUD was aware that most Section 8 sites were subject to the same standard form HAP contracts, and HUD was likewise aware that under the overall limitation clause in those contracts, Section 8 landlords were entitled to receive above-market rents to the extent that such differences existed at the outset of their contracts. *See* Notice H 95-12, at 3 ("need to assure that the initial difference which existed in the initial contract rents is protected, as required by the [HAP] contract"). Accordingly, Notice H 95-12 prescribed a formula for calculating this "initial difference": 0.1 times the initial Section 8 contract rent. Put differently, HUD adopted an assumption that, from the outset, public housing agencies were paying Section 8 landlords 10 percent more than the fair market rents for comparable units.

As long as the difference between the adjusted rent and the fair market rent is less than this "initial difference," Notice H 95-12 allows state and local housing agencies to continue to grant rent increases based on the automatic annual adjustment factors. However, if the difference between the adjusted rent and the HUD-published fair market rate rises to more than 10 percent of the initial contract rent, Notice H 95-12 instructs housing authorities to deny further upward adjustments to Section 8 landlords. A Section 8 landlord can only escape from under this ceiling by submitting its own rent comparability study showing that, despite the discrepancy with

HUD's published fair market rents, the Section 8 unit is actually underpriced relative to comparable unsubsidized units in the area.

Up until the publication of Notice H 95-12, MaineHousing made rent adjustments at all five properties every year in accordance with the automatic annual adjustment factors published by HUD. For the first decade after Notice H 95-12 was promulgated, MaineHousing denied the landlords' requests for further upward adjustments, citing the limitations imposed by the HUD notice. In 2005, all five landlords submitted rent comparability studies to MaineHousing in an effort to show that the 10 percent formula underestimated the "initial difference" at their sites. Based on these studies, and at the urging of MaineHousing, HUD agreed to let the five landlords use an alternative method for calculating the initial differences at their sites. Rents rose at all five sites in 2005, with increases of up to $1,092 per unit per year (although the amount of the increase varied from unit to unit and site to site). Rents at three of the five sites have remained at 2005 levels, while HUD has allowed further upward adjustments at the two other sites in subsequent years.

II.

Despite the 2005 rent adjustments for all five sites and additional increases at two of the five sites in subsequent years, owners of the five sites filed a complaint against MaineHousing in federal district court in December 2009 alleging three counts of breach of contract. Before addressing the merits of the landlords' complaint, we pause to consider whether the suit belongs in federal court at all. Although none of the parties raise the issue on appeal, we have an obligation to inquire into our

subject matter jurisdiction *sua sponte*. *Liu v. Amerco*, 677 F.3d 489, 492-93 (1st Cir.2012).

In their complaint, the plaintiffs invoke federal subject matter jurisdiction pursuant to 28 U.S.C. § 1331, which grants district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Yet their 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. As a general rule, federal courts lack subject matter jurisdiction over state law breach-of-contract actions where, as here, the plaintiffs and the defendant hail from the same state. *See Mass. Universalist Convention v. Hildreth & Rogers Co.*, 183 F.2d 497, 499 (1st Cir.1950) (per curiam). Federal courts allow an exception to this rule only in the rare instance where the contract is governed by state law but a "federal issue is decisive" to the dispute and "the federal ingredient . . . is sufficiently substantial to confer the arising under jurisdiction." *E.g.*, *W. 14th St. Commercial Corp. v. 5 W. 14th Owners Corp.*, 815 F.2d 188, 196 (2d Cir.1987).

The federal ingredient doctrine applies in a "special and small category of cases" where a "state-law claim necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Gunn v. Minton*, — U.S. —, 133 S.Ct. 1059, 1065, 185 L.Ed.2d 72 (2013) (internal quotation marks omitted); *see also Rosselló-González v. Calderón-Serra*, 398 F.3d 1, 12-13 (1st Cir.2004). The Supreme Court recently reaffirmed the doctrine's vitality in *Grable & Sons Metal Products, Inc. v. Darue*

*Engineering & Manufacturing*, 545 U.S. 308, 125 S.Ct. 2363, 162 L.Ed.2d 257 (2005). And although we have emphasized that federal ingredient jurisdiction "should be applied with caution," *Metheny v. Becker*, 352 F.3d 458, 460 (1st Cir.2003) (internal quotation marks omitted), this is one of the few cases that fits squarely within the federal ingredient exception.

The dispute in this case involves a federal contractor's implementation of a federal program; the contracts at issue were drafted and approved by a federal agency and signed by a federal official; and the plaintiffs allege that the contractor (here, MaineHousing) was in breach of the agreement by following a guideline promulgated by a federal agency pursuant to a federal statute. Singly, none of these "federal ingredients"—a claim against a federal contractor; an agreement drafted and approved by a federal agency; a defense based on a federal statute or guideline—would be sufficient to establish "arising under" jurisdiction. *See*, *e.g.*, *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 699-701, 126 S.Ct. 2121, 165 L.Ed.2d 131 (2006); *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152-153, 29 S.Ct. 42, 53 L.Ed. 126 (1908); *Lindy v. Lynn*, 501 F.2d 1367, 1369 (3d Cir.1974); *Ippolito-Lutz, Inc. v. Harris*, 473 F.Supp. 255, 259 (S.D.N.Y.1979). Yet the scope of federal ingredient jurisdiction is determined by the totality of the circumstances, not by a single-factor test. *See Grable*, 545 U.S. at 313-14, 125 S.Ct. 2363. Based on the totality of the circumstances, we find that the federal ingredients of the case predominate.

It is of particular significance here that "[f]ederal jurisdiction is favored in cases that present 'a nearly pure issue of law that could be settled once and for

all and thereafter would govern numerous cases.'" *Bender v. Jordan*, 623 F.3d 1128, 1130 (D.C.Cir.2010) (quoting *Empire Healthchoice*, 547 U.S. at 700, 126 S.Ct. 2121) (alterations and some internal quotation marks omitted). We note that other Section 8 landlords have brought almost identical actions elsewhere.[5] 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. "The issue is potentially so important to the success of the [Section 8] program—since on its resolution may turn the amount of lower-income housing actually provided—that we believe that Congress, had it thought about the matter, would have wanted the question to be decided by federal courts applying a uniform principle." *Price v. Pierce*, 823 F.2d 1114, 1119-20 (7th Cir.1987) (Posner, J.); *see also Almond v. Cap. Props., Inc.*, 212 F.3d 20, 24 (1st Cir.2000) (First Circuit is "content to follow *Price* pending further enlightenment from the Supreme Court"). Moreover, "there is no discernable state interest in a state forum" that would outweigh the federal interest in uniformity. *See Bender*, 623 F.3d at 1131; *see also R.I. Fishermen's Alliance, Inc. v. R.I. Dep't of Envtl. Mgmt.*, 585 F.3d 42, 51-52 (1st Cir.2009).

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[5] *See*, *e.g.*, *Cathedral Square Partners Ltd. P'ship v. S.D. Hous. Dev. Auth.*, No. 07-4001, 2011 WL 43019, 2011 U.S. Dist. LEXIS 1703 (D.S.D. Jan. 5, 2011); *Greenleaf Ltd. P'ship*, 2009 WL 5166225, 2009 U.S. Dist. LEXIS 119375; *Arlington Hous. Partners, Inc. v. Ohio Hous. Fin. Agency*, 2012 Ohio 1412 (Ohio Ct.App.2012).

The decision to apply the federal ingredient doctrine in a particular case is necessarily fact-bound. *See Gully v. First Nat'l Bank in Meridian*, 299 U.S. 109, 117, 57 S.Ct. 96, 81 L.Ed. 70 (1936) (Cardozo, J.) (federal ingredient doctrine requires "common-sense accommodation of judgment to kaleidoscopic situations"). In the circumstances of this case, we conclude that federal question jurisdiction exists, as (1) "[t]he imposition of liability on Government contractors will directly affect the terms of Government contracts," *Boyle v. United Techs Corp.*, 487 U.S. 500, 507, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988); (2) the "dispute . . . turn[s] on the interpretation of a contract provision approved by a federal agency pursuant to a federal statutory scheme," *Almond*, 212 F.3d at 25; (3) the alleged breach occurred only because the contractor was following the federal agency's explicit instructions, *see Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 n.6, 122 S.Ct. 515 (2001); (4) the case presents a pure question of law that will govern numerous cases nationwide, *see Bender*, 623 F.3d at 1130; (5) the federal government has an overwhelming interest in seeing the issue decided according to a uniform principle, *see Price*, 823 F.2d at 1119-20; and (6) there is no countervailing state interest in having the dispute adjudicated in a state forum, *see Bender*, 623 F.3d at 1131; *R.I. Fishermen's Alliance, Inc.*, 585 F.3d at 51-52. Having satisfied ourselves that we have jurisdiction over the claims that remain live in this case, we move on to the merits.[6]

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[6] We need not address the propriety of federal jurisdiction over any claims against HUD. MaineHousing has not appealed from the district court's dismissal of its third-party complaint, and the landlords have waived any possible claims against HUD

## III.

The merits issues that we must decide are (1) whether the HAP contracts allow MaineHousing to invoke the overall limitation clause to limit payments to the plaintiffs and (2) if so, whether MaineHousing properly invoked the overall limitation by employing the Notice H 95-12 method to calculate the difference between the plaintiffs' contract rents and those of comparable unassisted units.[7] We are the first

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by not addressing those claims in their brief on appeal. *See DeCaro v. Hasbro, Inc*., 580 F.3d 55, 64 (1st Cir.2009) ("contentions not advanced in an appellant's opening brief are deemed waived").

[7] The magistrate judge's recommended decision noted that, if MaineHousing did not breach the HAP contracts by applying the Notice H 95-12 method, then there is no need to reach the additional question of whether the HAP contracts prohibit MaineHousing from applying a so-called "nonturnover deduction" to reduce the automatic annual adjustment by 1 percentage point at units that have not changed tenants. On appeal, the landlords have not argued that their nonturnover deduction argument remains relevant if the magistrate judge's primary recommendation is affirmed. *See DeCaro*, 580 F.3d at 64.

The landlords do devote a portion of their reply brief to the argument that "participation in the Section 8 program does not automatically constitute consent . . . to whatever terms Congress or HUD may come up with in the future." But the magistrate judge's recommended decision did not state that the landlords had consented to *whatever* terms Congress or HUD might conjure up. Rather, the magistrate concluded that the landlords had in fact consented to the overall limitation clause in the original HAP contracts and that MaineHousing properly invoked the overall limitation clause in denying further rent adjustments. Accordingly, we need not reach the question of when—if ever—subsequent changes to the Section 8 statute would excuse MaineHousing from its obligations under its contracts with the landlords.

federal appellate court to reach this question.[8] Although some federal trial courts in other circuits have answered this question in the negative,[9] we ultimately take our guidance from the Supreme Court's *Alpine Ridge* decision. There, a unanimous Court concluded that the terms of the overall limitation clause—which apply "notwithstanding any other provisions" of the HAP contract—"override conflicting provisions of any other section." *Alpine Ridge*, 508 U.S. at 18, 113 S.Ct. 1898. That

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The landlords' additional arguments address the calculation of damages and thus need not be addressed if we conclude that no material breach has occurred.

[8] After oral argument, the landlords and MaineHousing both filed letters directing our attention to the Federal Circuit's recent decision in *Haddon Housing Associates, L.P. v. United States*, 711 F.3d 1330 (Fed.Cir.2013). In that case, the Federal Circuit expressed no view regarding the impact of the overall limitation clause in the landlord's HAP contract, as the issue was not preserved for appeal. *Id*. at 1335-36 & nn. 1-2.

[9] *See*, *e.g*., *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); *Park Props. Assocs., L.P. v. United States*, 82 Fed.Cl. 162, 176 (2008) ("the effect of the repudiation of the pricing mechanism in the HAP contracts was to deprive the overall limitation of any continuing vitality"); *Cuyahoga Metro. Hous. Auth. v. United States*, 57 Fed.Cl. 751, 759-60 & n. 13 (2003) (*Cuyahoga I*) (HUD can only invoke overall limitation clause by conducting comparability study); *see also Cathedral Square Partners Ltd. P'ship*, 2011 WL 43019, at *12, 2011 U.S. Dist. LEXIS 1703, at *37-38. *But cf. Cuyahoga Metro. Hous. Auth. v. United States*, 65 Fed.Cl. 534, 560 (2005) (*Cuyahoga II*) (HUD's calculation of "material difference" under Notice H 95-12 is "reasonable, given the language of the HAP contracts, as amplified by the statute as it existed at the time those contract [sic] were executed").

conclusion survives the 1994 amendment to the Section 8 statute and controls our analysis here.

As we have noted, the overall limitation clause allows MaineHousing to withhold the otherwise-automatic annual adjustments in rental payments so long as MaineHousing has "determined" that the adjustments would "result in material differences between the rents charged for assisted and comparable unassisted units." The one caveat is that the overall limitation clause preserves the landlord's right to receive above-market rental payments to the extent of the initial difference between the contract rent and the market rate. MaineHousing argues that it has used the method set forth in Notice H 95-12 to "determine" that further automatic adjustments would result in "material differences" between contract rents and market rates. That method relies on the tables of fair market rents published annually by HUD: If the contract rent is higher than the corresponding fair market rent for comparable units in the region (and if the difference is more than 10 percent of the initial contract rent), then a Section 8 landlord cannot receive a further rent increase unless the landlord can show—based on "at least three examples of unassisted housing in the same market area of similar age, type and quality"—that the resulting rent level after application of the automatic annual adjustment will still be below the market rate. Notice H 95-12, at 3.

The landlords maintain that MaineHousing never "determined" that automatic adjustments would result in material differences between contract rents and market rates because the verb "determine" means "to reach a decision after *thought and investigation*," *Webster's New World Dictionary* (2d ed. 1986)

(emphasis added), whereas MaineHousing rotely applied the Notice H 95-12 formula without any independent inquiry. But to "determine" also means to "ascertain definitely by . . . calculation." *Oxford English Dictionary* (Online ed. 2013); *see also The American Heritage Dictionary* (2d College ed. 1982) ("ascertain definitely, as after . . . calculation"). MaineHousing certainly *calculated* that the adjusted rents at assisted units would rise above the fair market rents for comparable units, and it based this calculation on a HUD-prescribed formula and HUD-published data. The landlords' cherry-picked dictionary definitions do not convince us that MaineHousing's act of calculation was anything but a "determination."[10]

The landlords also argue that the fair market rents published by HUD cannot be used as a measure of "the rents charged for . . . comparable unassisted units." The landlords suggest that unassisted units are only "comparable" to Section 8 units if they are in a similar neighborhood and share other common

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[10] To support their position that the *only* way MaineHousing can invoke the overall limitation clause is by performing a site-specific rent comparability study, the landlords point to the 1988 amendment to the Section 8 statute—and, in particular, to a clause in that amendment that states: "If the [HUD] Secretary or appropriate State agency does not complete and submit to the project owner a comparability study not later than 60 days before the anniversary date of the assistance contract . . . , the automatic annual adjustment factor shall be applied." Pub.L. No. 100-242, § 142(c)(2), 101 Stat. at 1850 (codified as amended at 42 U.S.C. § 1437f(c)(2)(C)). But the sixty-day rule is not in the HAP contracts, which all state that automatic annual 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*.

characteristics such as size, age, physical configuration, amenities, and utilities. HUD's fair market rent figures, by contrast, are calculated on a county-wide or metropolitan-area-wide basis. HUD reports 40th-percentile rents for zero-, one-, two-, three-, and four-bedroom units in each area, but the fair market rent figures do not include a more fine-grained breakdown by unit type.

MaineHousing and HUD counter that the fair market rent figures are designed to reflect "the rent, including the cost of utilities (except telephone) . . . , that must be paid in the market area to rent privately owned, existing, decent, safe and sanitary rental housing of modest (non-luxury) nature with suitable amenities." 24 C.F.R. § 888.111(b). The figures are adjusted to "exclude public housing units, newly built units and substandard units." *Id*. § 888.113(a). Thus, the fair market rent figures *do* provide a basis for comparing rents at privately owned Section 8 sites to rents for other units in the general vicinity, taking account of unit quality, amenities, utilities, and (to some extent) age. Since HUD reports rents at the 40th percentile in each county or metropolitan area, this means that contract rents will only be deemed above-market for purposes of Notice H 95-12 if rents at the Section 8 site are more expensive than rents for four out of ten existing decent, safe, and sanitary units in the area with the same number of bedrooms, same ownership status, and roughly the same amenities. 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. *See* Notice H 95-12, at 5-6; *see also* U.S.

Dep't of Hous. & Urban Dev., *Estimates of Market Rent by Comparison (Form HUD-92273)* (July 2003). Indeed, the plaintiffs all took advantage of this mechanism when they submitted their own comparability studies to MaineHousing and HUD in the mid-2000s, and HUD responded by approving upward adjustments at all five sites.

Ultimately, we need not decide whether the Notice H 95-12 method is the best way to calculate rents for "comparable unassisted units" under the HAP contracts. The contracts construed by the Supreme Court in *Alpine Ridge* are in all relevant respects identical to the contracts at issue here, and 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 between the rents charged for assisted and comparable unassisted units." *See Alpine Ridge*, 508 U.S. at 21, 113 S.Ct. 1898. Thus, our role is not to determine *de novo* whether this calculation was correct. Rather, our role is to determine whether the Notice H 95-12 method represents a "reasonable means" of making the comparison. *Id.*; *accord Carmichaels Arbors Assocs.*, 789 F.Supp. at 689 n. 6 ("Under our interpretation of the HAP contract, . . . any reasonable means of ascertaining whether material differences in rents exist is authorized under the terms of the contract."); *Nat'l Leased Hous. Ass'n*, 22 Cl.Ct. at 659 ("the HAP contracts do not contain any provision limiting HUD to any particular methodology for making its comparability determination").[11] We have already explained

[11] The *Alpine Ridge* Court did say that "rent adjustments indicated by the automatic adjustment factors remain the presumptive adjustment called for under the contract," and that automatic annual adjustments would be withheld "only in those

that 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 which we described above (and which were actually utilized in this case), certainly qualifies as "reasonable." We do not read the contracts of the *Alpine Ridge* decision to demand more than that.

IV.

In sum, 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. The district court's decision granting MaineHousing's motion for summary judgment with respect to the plaintiffs' complaint is *affirmed*.

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presumably exceptional cases where the Secretary has reason to suspect that the adjustment factors are resulting in materially inflated rents." 508 U.S. at 19-20, 113 S.Ct. 1898. But 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. And 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.

**APPENDIX B**

UNITED STATES DISTRICT COURT
D. MAINE

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Civil No. 1:09-cv-642-DBH

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ONE AND KEN VALLEY HOUSING GROUP, ET AL.,
*Plaintiffs*

v.

MAINE STATE HOUSING AUTHORITY,
*Defendant and Third-Party Plaintiff*

v.

SHAUN DONOVAN, SECRETARY, UNITED STATES DEPARTMENT OF HOUSING & URBAN DEVELOPMENT,
*Third-Party Defendant*

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July 20, 2012

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ORDER AFFIRMING RECOMMENDED DECISION OF THE MAGISTRATE JUDGE

D. BROCK HORNBY, District Judge.

On April 17, 2012, the United States Magistrate Judge filed with the court, with copies to counsel, her Recommended Decision on the parties' motions for summary judgment. The plaintiffs filed their objection to the Recommended Decision on May 4, 2012, and the defendant Maine State Housing Authority filed its objection on the same date. Oral argument was held on July 16, 2012.

I have reviewed and considered the Recommended Decision, together with the entire record; I have made a *de novo* determination of all matters adjudicated by the Recommended Decision; and I concur with the recommendation of the United States Magistrate Judge for the reasons set forth in the Recommended Decision, and determine that no further proceeding is necessary.

It is therefore *ORDERED* that the Recommended Decision of the Magistrate Judge is hereby *ADOPTED*. Summary judgment is *GRANTED* to the defendants Maine State Housing Authority and the United States Department for Housing and Urban Development. The plaintiffs' motion for summary judgment is *DENIED*.

SO ORDERED

**APPENDIX C**

UNITED STATES DISTRICT COURT
D. MAINE

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No. 1:09-cv-00642-DBH

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ONE AND KEN VALLEY HOUSING GROUP, ET AL.,
*Plaintiffs*,

v.

MAINE STATE HOUSING AUTHORITY,
*Defendant and Third-Party Plaintiff*,

v.

SECRETARY, UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,
*Third-Party Defendant*.

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April 17, 2012

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RECOMMENDED DECISION

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MARGARET J. KRAVCHUK, United States Magistrate Judge.

Each of the plaintiffs in this action is a limited partnership that owns a multifamily, "Section 8" housing project. Each plaintiff is party to a Housing Assistance Payments Contract ("HAP Contract") with the defendant and third-party plaintiff, Maine State Housing Authority. For each of these contracts, the Authority is party to a related Annual Contributions Contract ("ACC") with the third-party defendant, the

United States Department of Housing and Urban Development. Plaintiffs have filed a motion for summary judgment on their claims against the Authority for breach of contract (Doc. No. 90). The Authority has filed a motion for summary judgment against Plaintiffs' claims (Doc. No. 88) and a motion for summary judgment against the Department ("HUD") (Doc. No. 87), which latter motion is contingent upon a lack of complete success in the motion against Plaintiffs' claims. HUD has filed a motion for summary judgment against "Count II and as to limits on damages imposed by the statute of limitations and the 'Overall Limitation' clause in the [Plaintiffs'] contracts with [the Authority]." (Doc. No. 89 at 1-2.) The Court referred the motions for report and recommendation. For reasons that follow, I recommend that the Court grant summary judgment to the Authority and HUD and dismiss Plaintiffs' contract action with prejudice based on Plaintiffs' failure to demonstrate a material breach.

## I. SUMMARY OF THE DISPUTE

The contracts in issue were executed by the parties in the 1970s and are creatures of the federal Section 8 housing program. The Annual Contributions Contracts between the Authority and HUD authorize the Authority to enter into contract with Plaintiffs, to administer housing assistance payments program and contracts locally, and to receive and distribute federal funds to Plaintiffs. Each Housing Assistance Payment Contract ("HAP Contract") between the Authority and a plaintiff has an extended term, in excess of 30-years. The contracts establish certain initial contract rents, to be paid monthly, and formulae for the adjustment of contract rents in the future. The HAP Contracts recognize that Plaintiffs may

receive above-market-rate rents in exchange for their role in administering the Section 8 program at the ground level.

In time, Congress recognized that years of automatic increases in contract rents resulted, in some instances, in the payment of contract rents well in excess of prevailing market rates for comparable, non-assisted housing. As a consequence of congressional action in 1994, and related administrative rulings issued by HUD in 1995, Plaintiffs stopped receiving automatic increases in their contract rents and, when they did receive upward adjustments in their contract rents, the adjustment factors were reduced by 0.01 for those units that did not "turn over" from the prior year. Additionally, the upward adjustments were conditioned on Plaintiffs showing how their contract rents compared to market rents in the area.

The Plaintiffs' action consists of three claims for breach of contract:

> Count I, alleging breach based on the Authority's failure to provide annual increases in every year following the 1994 amendment of the Section 8 program;
>
> Count II, alleging breach based on the use of a reduced factor for non-turnover units; and
>
> Count III, alleging breach based on the requirement that Plaintiffs conduct a local rate study to justify an increase in contract rents.

(Compl., Doc. No. 1.) In addition to these claims, the Authority has a third-party claim against HUD for breach of contract and contribution. (Third-Party Compl., Doc. No. 48.)

Through prior recommended decisions and orders adopting the same, the Court has dismissed third-party claims for indemnification and for prospective injunctive/declaratory relief and has ruled that the contract claims are subject to a six-year statute of limitation. (Rec. Dec. on Authority's Mot. to Dismiss and Order Adopting, Doc. Nos. 35/44; Rec. Dec. on HUD's Mot. for Partial Dismissal of Third-Party Compl. and Order Adopting, Doc. Nos. 65/82.)

## II. UNDISPUTED FACTS

Each party has supplied the Court with a statement of material fact in accordance with Local Rule 56. The Authority, in fact, has supplied two; one in support of each of its motions. A review of these four statements reveals a host of redundant background statements related to party identification, the terms of the contracts, statutory amendment of the Section 8 program, and the regulatory notices that resulted from the statutory amendment. While the parties have largely admitted one another's statements on these background facts, it is unproductive to have them repeated in four different statements, each using slightly modified language. I pause to note this only to observe that this is a model case for application of the Court's new Local Rule 56(h), calling for a pre-motion conference to address issues such as these. Alas, the new rule was not applicable to the instant motions. Ideally, the parties could have stipulated to a preliminary statement on all of the issues listed above and restricted their individual statements to address other matters. I begin with a recitation of the undisputed material background facts, drawing on the parties' statements, but also drawing on relevant statutes, regulations, and the subject contracts.

A. The Parties

One and Ken Valley Housing Group owns Island Apartments, a multifamily rental property in Fairfield. Two and Ken Valley Housing Group owns Lisbon Senior Village Apartments, a multifamily rental property in Lisbon. Three and Ken Valley Housing Group owns Meadowbrook Apartments, a multifamily rental property in Livermore Falls. Five and Ken Valley Housing Group owns Sherwood Forest Apartments, a multifamily rental property in Skowhegan. Six and Ken Valley Housing Group owns Washington House Apartments, a multifamily rental project in Bath.

The Maine State Housing Authority is a state agency created by Maine law, exercising powers and duties set forth in Maine law. 30-A M.R.S. §§ 4722, 4741. The Authority participates in the federal Section 8 housing program as a "public housing agency" and primarily serves the role of contract administrator.

The Department of Housing and Urban Development (HUD) is an executive department of the United States Government, headed at present by Secretary Shaun Donovan. 5 U.S.C. § 101; 42 U.S.C. § 3532. The Congress established HUD for multiple purposes, including to administer "the principal programs of the Federal Government which provide assistance for housing and for the development of the Nation's communities." 42 U.S.C. § 3531.[1]

[1] In addition to the legal citations, see, generally, Pls. Statement ¶¶ 1-5, 7-8, Doc. No. 90-1; Authority Statements ¶¶ 1-4, Doc. Nos. 91 & 92; HUD Statement ¶¶ 1-11, Doc. No. 89-1.

### B. The Section 8 Housing Assistance Payments Program

Among the programs administered by HUD is the "Section 8" housing program codified in Chapter 8 of Title 42 of the United States Code. The Section 8 program exists to, among other things, "assist States and political subdivisions of States to address the shortage of housing affordable to low-income families." 42 U.S.C. § 1437. This objective is addressed primarily "through the use of a system of housing assistance payments," 24 C.F.R. § 883.101(a), funded by the federal government, 42 U.S.C. § 1437f(a). The Section 8 program authorizes the Secretary "to enter into annual contributions contracts with public housing agencies pursuant to which such agencies may enter into contracts to make assistance payments to owners of existing dwelling units in accordance with this section." *Id*. § 1437f(b).

Each plaintiff participates in the Section 8 program. For each housing project owned by one of the plaintiffs, there are two related contracts: an annual contributions contract (ACC) between HUD and the Authority, which contract references the specific housing project, and a housing assistance payments contract ("HAP Contract") between the Authority and one of the plaintiffs, which contract is also specific to the project.[2] These contracts set forth how low-income

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[2] Plaintiffs' contracts were executed between 1976 and 1979. Plaintiffs were not party to the original HAP contracts, but purchased the subject projects in 1988 or 1989. Plaintiffs are successors-in-interest to rights arising from the contracts based on assignments approved by HUD and the Authority. Authority Statement ¶¶ 8, 12, 14, 17, 20, 23, 27, 30, 33, 36, 39, 53-57. Plaintiffs acquired the properties with assistance in the form of mortgage financing from the Authority, but refinanced with

housing assistance will be delivered in these projects. Both the ACCs and the HAP Contracts were drafted by HUD. Plaintiffs are careful to assert that they are entitled to Section 8 revenue pursuant to their HAP Contracts and not, technically, pursuant to "the program" as it currently exists in federal law and regulations. (*E.g.*, Pls. Response to Authority's Statement ¶ 42, Doc. No. 98.)

C. The Contracts

Plaintiffs agree that the contracts are the best source to determine the material terms, rather than the statements offered by the parties. (*E.g.*, *id.* ¶¶ 79-81.) Particulars of the contracts follow, for ease of reference.

"Island Apartments," Fairfield, Maine (One and Ken Valley)

ACC (Doc. No. 14-7)[3]

HAP Contract (Doc. No. 14-2)

Anniversary date: May 11

Terminated May 11, 2009 (*renewed on new terms*)

"Lisbon Senior Village," Lisbon, Maine (Two and Ken Valley)

ACC (Doc. No. 14-9)

HAP Contract (Doc. No. 14-3)

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another lender in 2002. *Id.* ¶ 42; Klebanoff Decl. ¶ 3, Doc. No. 97-5.

[3] These contracts can be found elsewhere on the docket, including as exhibits to Plaintiffs' Statement.

Anniversary Date: Dec. 30

Continuing through 40-yr. term ending Dec. 30, 2017

"Meadowbrook Apartments," Livermore Falls, Maine (Three and Ken Valley)

ACC (Doc. No. 14-10)

HAP Contract (Doc. No. 14-4)

Anniversary Date: Sept. 19

Continuing through 40-yr. term ending Sept. 19, 2018

"Sherwood Forest Apartments," Skowhegan, Maine (Five and Ken Valley)

ACC (Doc. No. 14-11)

HAP Contract (Doc. No. 14-5)

Anniversary Date: December 30

Continuing through 37.5-yr. term ending approx. June 30, 2014

"Washington House Apartments," Bath, Maine (Six and Ken Valley)

ACC (Doc. No. 14-12)

HAP Contract (Doc. No. 14-6)

Anniversary Date: May 16

Continuing through 36-yr., 5-mo. term ending approx. October 16, 2013

1. The Annual Contributions Contracts[4]

The ACCs begin by identifying the project in question and stating that the HFA [Authority] proposes to enter into a HAP contract. The ACC itemizes the number and size of the residential units to receive the subsidy and states: "The HFA shall not enter into any Agreement or Contract or take any other action which will result in a claim for a total Annual Contribution in respect to the Project in excess of the maximum amount stated in Section 1.4(a)." (ACCs § 1.1.) The ACCs expressly authorize the HFA to enter into contract, make housing assistance payments on behalf of families, and take other necessary actions, "[p]rovided, however, that the HFA shall take no action which would result in any obligation of the Government beyond that provided in the Government-approved Agreement and Contract." (*Id*. § 1.2.)

After setting out the term of the contract, the ACCs describe the annual contributions that the Government agrees to provide. (*Id*. §§ 1.3, 1.4.) The Annual Contributions section states that the "Government shall not be obligated to make any Annual Contribution or any other payment with respect to any Fiscal Year in respect to the Project in excess of" a specified

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[4] Much of the ACC language related here is cited by the Authority (Authority Statement Against Pls. ¶¶ 78-84, Doc. No. 91), but not all. The movement of money from HUD to the Authority and then from the Authority to Plaintiffs, is also indicated in the Authority's statements (*e.g*., *id*. ¶¶ 58-59). Plaintiffs admit that the Authority receives its money from HUD (Pls. Response ¶ 58, Doc. No. 98), but deny the statement that they then receive payment from the Authority, presumably because the statement says that the payments are made "pursuant to HUD regulations and the HAP Contracts" and not simply pursuant to the HAP Contracts (*id*. ¶ 59).

dollar amount per year, described as the "Maximum ACC Commitment." (*Id*. § 1.4(a).) "Subject to the Maximum ACC Commitment, the Government shall pay for each Fiscal Year an Annual Contribution to the HFA in respect to the Project in an amount equal to the amount of housing assistance payments payable during each Fiscal Year . . . by the HFA pursuant to the Contract, as authorized by Section 1.2 . . . " (*Id*. § 1 .4(c).) Section 1.2 authorizes the UFA to contract with the project owner "in accordance with the forms, conditions and requirements prescribed or approved by the Government." (*Id*. § 1.2.)

The ACC does not state that the project will receive the maximum ACC commitment every year. Rather, housing assistance payments are made in relation to, among other variables, the amount of assistance provided to low-income families occupying the identified units, which is governed by certain "schedules and criteria established by the Government." (*Id*. § 2.3(c).) Periodic payments of annual contributions from the Government to the HFA are based on estimates prepared by the HFA. (*Id*. §§ 1.4, 2.11.) The Government sets aside additional funds in a project account, allowing for an increase in the Government's periodic contribution payment to the HFA should the HFA's estimate of need increase. (*Id*. § 1.4(d)(1).) However, if the HFA's estimates come to exceed "the Maximum ACC Commitment *then in effect*" the ACC provides that "the Government shall, within a reasonable period of time, take such additional steps authorized by section 8(c)(6) of the Act as may be necessary to carry out this assurance, including . . . 'the reservation of annual contributions authority for the purpose of amending housing assistance contracts or the allocation of a portion of new authorizations for the

purpose of amending housing assistance contracts.'" (*Id*. §§ 1.4(d)(2) (emphasis added).) The provisions of subsection (d)(1) and (d)(2) are in place, according to the ACCs, "[i]n order to assure that housing assistance payments will be increased on a timely basis to cover increases in Contract Rents or decreases in Family Incomes." (*Id*. § 1.4.)

Section 1.6 of the ACC provides for "periodic adjustment of contract rents" as follows: "The Contract may provide for periodic adjustments in the Contract Rents chargeable by the Owner and commensurate increases in amounts of housing assistance payments, in accordance with applicable Government regulations, up to the Maximum ACC Commitment."

Pursuant to the ACC, the HFA maintains depositary agreements with one or more banks and must deposit all funds received from the Government pursuant to the ACC with the depositary. The HFA may only make withdrawals for "payments pursuant to the [HAP] Contract" and for "other purposes specifically approved by the Government." (*Id*. § 2.14(a), (c).)

The ACC has a default section. (*Id*. § 2.16.) The section describes, among other things, the rights of the project owner in the event of a default by the HFA under the HAP Contract. (*Id*. § 2.16(a)(1).) The section also describes the rights of the Government if the HFA defaults under either the ACC or the HAP Contract. (*Id*. § 2.16(b)(1).) The default section does not posit a default on the part of the Government. However, it does state that the owner may "proceed against the Government by suit at law or in equity," but only upon a determination by the Government that there exists a "Substantial Default." (*Id*.

§ 2.16(a)(3).) Though I have included a reference to this section, Plaintiffs have not relied on the default provision of the ACC.

2. The Housing Assistance Payments Contracts[5]

In each HAP Contract, the owner promises that the contract units will be leased to eligible lower-income families for private dwellings. (HAP Contracts § 1.3a.) The Authority promises to "make housing assistance payments on behalf of Families for the Contract Units, to enable such Families to lease Decent, Safe, and Sanitary housing." These payments "shall equal the difference between the Contract Rents for units leased by Families and the portion of such rents payable by Families as determined by the Owner in accordance with schedules and criteria established by the Government." (*Id*. § 1.3b(1).)

While the Authority promises to make payments equal to the difference between contract rents and the family contributions, it does not pledge any state revenues, only federal contributions received through the ACCs. Each HAP Contract references the corresponding ACC Contract expressly, in the heading, in its preliminary recitals (§ 1.1f, g), and in a section labeled "Annual Contributions Contract" (§ 1.5). At section l.lg, the HAP Contract specifies the "Maximum Housing Assistance Commitment" and both cross references the ACC and incorporates that dollar amount stated therein. Sections 1.5 and 1.6 describe the relationship between the HAP Contract and the ACCs and describe *the Government's* obligation to amend the maximum contribution stated in the HAP

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[5] *See, generally*, Pls. Statement ¶¶ 15-16; HUD Statement ¶ 39; Authority Statement Against HUD ¶¶ 65-71; Authority Statement Against Pls. ¶¶ 65-71.

Contracts based on certain requirements. In its opening recitals, the HAP Contract clearly identifies "the United States of America acting through the Department of Housing and Urban Development" as "the Government."

1.5 *ANNUAL CONTRIBUTIONS CONTRACT*.

a. *Identification of Annual Contributions Contract*. The HFA has entered into an Annual Contributions Contract with the Government, as identified in Section 1.1(f) under which *the Government will provide* financial assistance to the HFA pursuant to section 8 of the Act for the purpose of making housing assistance payments. A copy of the ACC shall be provided upon request.

b. *HFA Pledge of ACC Payments*. The HFA hereby pledges to the payment of housing assistance payments pursuant to this Contract *the annual contributions payable under the ACC* for such housing assistance payments. The HFA shall not, without the consent of the Owner, amend or modify the ACC in any manner which would reduce the amount of such annual contributions, except as authorized in the ACC and this Contract.

c. *Government Approval of Housing Assistance Payments Contract*. The approval of this Contract by the Government signifies that the Government has executed the ACC and that the ACC has been properly authorized; *that the faith of the United States is solemnly pledged to the payment of annual contributions pursuant to said ACC; and that funds have been obligated by the Government* for such payments to assist the HFA

in the performance of its obligations under the Contract.

(HAP Contract § 1.5 (emphasis added).)

1.6 *MAXIMUM HOUSING ASSISTANCE COMMITMENT; PROJECT ACCOUNT*

a. *Maximum Housing Assistance Commitment*. *Notwithstanding any other provisions of this Contract* (other than paragraph b of this Section) or any provision of any other contract between the HFA and the Owner, *the HFA 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 1.1g*; Provided, however, that this amount shall be reduced commensurately with any reduction in the number of Contract Units or in the Contract Rents or pursuant to any other provisions of the ACC or this Contracts (except reductions in Contract Rents pursuant to Section 1.9e(1)).

b. *Project Account*. As provided in the ACC, in order to assure that housing assistance payments will be increased on a timely basis to cover increases in Contract Rents or decrease in Family Incomes:

(1) A Project Account shall be established and maintained, *in an amount as determined by the Government* consistent with its responsibilities under section 8(c)(6) of the Act, out of amounts by which the Maximum ACC Commitment per year . . . exceeds amounts paid under the ACC for any Fiscal Year. . . . To the extent funds are available in said account, the maximum total annual housing assistance payments for any Fiscal Year may exceed the maximum amount

> stated in paragraph a of this Section to cover increases in Contract Rents or decreases in Family Incomes (*see* Section 1.9). Any amount remaining in said account after payment of the last housing assistance payment with respect to the project shall be applied by the Government in accordance with law.
>
> (2) Whenever *the Government approved* estimate of the required Annual Contribution exceeds the Maximum ACC Commitment then in effect . . . and would cause the amount in the Project Account to be less than an amount equal to 40 percent of such Maximum ACC Commitment, *the Government shall*, within a reasonable period of time, *take such additional steps authorized by section 8(c)(6) of the Act as may be necessary to carry out this assuranc*e including (as provided in that section of the Act) "the reservation of annual contributions authority for the purpose of amending housing assistance contracts or the allocation of a portion of new authorizations for the purpose of amending housing assistance contracts."

(HAP Contract § 1.6 (emphasis added).)

Section 1.7 explains that housing assistance payments are paid to the owner "for units under lease by Families in accordance with the Contract." These payments "cover the difference between the Contract Rent and that portion of said rent payable by the Family as determined in accordance with the Government-established schedules and criteria." (*Id*. § 1.7a(1).) Changes in family income, family composition, and other factors affecting the resident families will result in a change in the amount of housing assistance payments. (*Id*. § 1.7a(2).) Vacancies also

reduce the amount of housing assistance payments, limiting payment to 80 percent of contract rent for up to a 60-day vacancy. (*Id*. § 1.7b, c.)

Finally, for present purposes, Section 1.9 describes the mechanism for automatic annual adjustment of contract rents,[6] and imposes an overall limitation on the same:

> 1.9 *RENT ADJUSTMENTS*.
>
> a. *Funding of Adjustments*. Housing assistance payments will be made in increased amounts commensurate with Contract Rent adjustments under this section up to the maximum amount authorized under Section 1.6 of this Contract.
>
> b. *Automatic Annual Adjustments*.
>
> (1) Automatic Annual Adjustment Factors will be determined by the Government at least annually; interim revisions may be made as market conditions warrant. Such Factors and the basis for their determination will be published in the Federal Register. These published Factors will be reduced appropriately by the

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[6] Section 1.1g also provides for increased payments, but its language does not apply to the claim presented by Plaintiffs: "This amount shall be subject to increase pursuant to . . . Section 1.9e(3) of this Contract, as appropriate." (HAP Contract § 1.1g.) As for the reference to Section 1.9e(3) of the HAP Contract, that section provides a basis for increase in relation to the "actual cost of permanent financing," something that is unrelated to Plaintiffs' case. The language replaced by the ellipses references "Section 1.5e(2) or 1.5f(3) of the Agreement," but "the Agreement" is a reference to a document that is not before the Court, presumably a prior agreement to enter into the HAP Contracts. The ACCs do not include a Section 1.5e(2) or a Section 1.5f(3).

> Government where utilities are paid directly by the Families.
>
> (2) On each anniversary date of the Contract, the Contract Rents shall be adjusted by applying the applicable Automatic Annual Adjustment Factor most recently published by the Government. Contract Rents may be adjusted upward or downward, as may be appropriate; however, in no case shall the adjusted Contract Rents be less than the Contract Rents on the effective date of the Contract.
>
> . . .
>
> d. *Overall Limitation*. Notwithstanding any other provisions 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 HFA . . . ; provided, that this limitation shall not be construed to prohibit differences in rents between assisted and comparable unassisted units to the extent that such differences may have existed with respect to the initial Contract Rents.

(*Id*. § 1.9 (emphasis added).)

D. Pre-1994 Rent Adjustments[7]

Pursuant to Section 1.9b(1) of the HAP Contracts, contract rents are to be adjusted annually by automatic application of "automatic annual adjustment factors" (AAAFs). These factors have been published in the Federal Register on an annual basis. (*See*, *e.g*.,

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[7] Pls. Statement ¶¶ 17-21; Authority Statement Against HUD ¶¶ 72, 73; Authority Statement Against Pls. ¶¶ 72, 73.

Section 8 Housing Assistance Payments Program—Contract Rent Annual Adjustment Factors, 24 C.F.R. Part 888 (Apr. 26, 1994), 21862-64 (Doc. No. 95-1).) Through 1994, the Authority would grant rent increases to Plaintiffs on an annual basis by multiplying contract rents by the applicable factor found in the Federal Register.[8] Throughout the 1980s, the Authority did not conduct any rent comparability studies. In 1989, HUD directed the Authority to not perform comparability studies while HUD prepared new regulations. That directive grew out of the following developments:

> In the early 1980s, HUD began to conduct "comparability studies" in those markets in which it believed automatic adjustments to assisted units had resulted in materially higher rents than those for comparable unassisted units. *See Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 14, 113 S.Ct. 1898, 123 L.Ed.2d 572 (1993). HUD would select three to five unassisted units it considered comparable to a given assisted unit and use the rents of the former to test whether rents for the latter should be capped. *Id*. After landlords successfully contested this action by HUD in a court of appeals, *see Rainier View Assoc. v. United States*, 848 F.2d 988 (9th Cir.1988), Congress enacted an amendment to

[8] The factors are region-specific and vary depending on whether utilities are included in the rent. For example, the April 1994 factors for HUD Region I (including Maine), metropolitan were 1.010 (utility included) and 1.006 (utility excluded), and non-metropolitan were 1.010 (utility included) and 1.005 (utility excluded). 24 C.F.R. § Part 888, 21843-44, 21862. Some of the factors published for 1994 are less than 1.0 (though not in Region I).

> the Housing Act explicitly authorizing HUD to use comparability studies prospectively to limit automatic annual adjustment factor increases. Department of Housing and Urban Development Reform Act of 1989, Pub.L. No. 101-235, § 801(c), 103 Stat.1987, 2058 (1989). The Supreme Court subsequently held that the 1989 amendment did not constitute a breach of the owners' HAP contracts because those contracts authorized HUD to conduct comparability studies and use those studies to limit increases in rent adjustments. *Cisneros*, 508 U.S. at 21.

*Haddon House Assocs., LLC v. United States*, 92 Fed. Cl. 8, 12 (2010).

One of the objectives of the 1989 Reform Act was to establish a standard for how HUD could devise a "modified annual adjustment factor" based on "comparability studies" for a geographical area smaller than the otherwise applicable AAAF areas, including project-specific factors. Pub.L. No. 101-235 § 801(c), 103 Stat.1987, 2058 (1989). Under this provision, a project owner subject to a determination that the published AAAF would yield a material difference between assisted and unassisted rents can request a study to obtain a "modified annual adjustment." *Id*. In such a case the Secretary is required to "complete and submit to the project owner a comparability study not later than 60 days before the anniversary date of the assistance contract under this section," or "the automatic annual adjustment factor shall be applied." *Id*.

There is no evidence of any rent comparability studies being performed in regard to Plaintiffs' projects through 1994 (when Plaintiffs received the AAAF), or thereafter (when Plaintiffs were denied

the AAAF). To this, Plaintiffs would add the following statement:

> Even if it had wanted to do so, however, the reality is that [the Authority] could not have performed any substantive comparability analysis, because [the Authority] had no information about a critical component of that analysis—the "initial difference," referred to in § 1.9(d) of the HAP Contracts as the difference between original contract rent and then-existing comparable rents. [The Authority] had no records as to what the "initial difference" was for its Section 8 properties and this was a pre-requisite for invoking the overall limitation provision of the HAP Contract. Owners also had no accurate records of the initial difference.

(Pls. Statement ¶ 21 (citations omitted).) Plaintiffs' assertions that no study could be performed and that the overall limitation could not possibly be invoked are both legal conclusions rather than undisputed facts. This contention is a primary focus of the discussion, below.

E. Pre-1995 HAP Contract Amendments

In the years leading up to 1994, the Authority and Plaintiffs would execute an amendment to the HAP Contracts each time a rent increase occurred. (Authority Statement Against HUD ¶ 76; Authority Statement Against Pls. ¶ 76.) Plaintiffs and HUD admit this statement. The cited deposition testimony relates that these amendments were performed under Section 1.6 of the HAP Contract. The amendments were executed so that the maximum commitment under the HAP Contract might keep pace with

the adjustment in contract rents. (Dep. of Maureen Brown at 162-64, Doc. No. 88-4.)

F. 1994 Amendment of the Section 8 Program[9]

In 1994, Congress amended Section 8(c)(2)(A) of the Housing Act, 42 U.S.C. § 1437f(c)(2)(A), to modify the manner "under which rents are adjusted . . . by applying an annual adjustment factor." Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act of 1995, Pub.L. No. 103-327, 108 Stat. 2298, 2315 (1994). The amendment resulted in two changes. First, "where the maximum monthly rent . . . exceeds the fair market rental for an existing dwelling unit in the market area, the Secretary shall adjust the rent 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." *Id*. Second, "[f]or any unit occupied by the same family at the time of the last annual rental adjustment . . . , 0.01 shall be subtracted from the amount of the factor, except that the factor shall not be reduced to less than 1.0." *Id*. As initially enacted, said changes were to be effective "only during fiscal year 1995." *Id*. However, the changes were continually enacted to apply in fiscal years 1996 through 1998, and were made permanent beginning with fiscal year 1999.

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[9] Pls. Statement ¶¶ 22-24; Authority Statement Against Pls. ¶¶ 88-89, 100; Authority Statement Against HUD ¶ 100. HUD denies that Congress reenacted the amendment for 1996 on, noting the absence of any citation to record evidence. Authority Statement ¶ 89; HUD Response ¶ 89, Doc. No. 96. Clearly, the language of the 1994 Amendment remains in Section 8(c)(2)(A) of the Act.

G. Notice H 95-12[10]

As part of its implementation effort, HUD issued Notice H 95-12 on March 7, 1995, to interpret and apply the annual rent adjustment directives enacted by Congress. One objective of the Notice was to effectuate the overall limitation clause: "Under this Notice, review of [A]AAFs under the Overall Limitation clause of the HAP Contract would apply to Section 8 . . . Properties where Section 8 rent levels for a unit type presently exceed the published Existing Housing Fair Market Rents (FMR)." (Notice H 95-12 at 1, Doc. No. 89-15.) Where contract rents do not exceed the FMR, the preexisting "method of rent adjustment" was to remain the same. (*Id*.)

Notice H 95-12 (and subsequent implementing notices issued by HUD) required that if an owner wished to receive an annual rent adjustment, the owner was required to submit an "Estimate of Market Rent by Comparison" on form HUD-92273 ("Form 92273") at least sixty days before the anniversary date of the owner's HAP Contract, but only if the property's contract rents exceeded the applicable fair market rents (FMRs) published by HUD. Notice H 95-12 directed housing authorities to use ten percent of the initial contract rent as a substitute for the initial difference between contract rents and market rents, "if the owner does not submit evidence of this figure to HUD and the initial difference is not documented in the project file." (*Id*. at 4.)

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[10] Pls. Statement ¶¶ 25, 27-29; Authority Statement Against Pls. ¶¶ 90-91; Authority Statement Against HUD ¶¶ 90-91. HUD objects to certain language offered in Plaintiffs' statements and I have attempted to address the objection with my wording.

Notice H 95-12 additionally addressed the statutory requirement of the 0.01 non-turnover reduction. (*Id*. at 5-6.) It indicated that contract rents be calculated with a weighted average approach to account for the non-turnover rates. Instead of specific units falling behind in terms of the contract rate because the occupying family was the same from the year before, the increases (turnover and non-turnover) were averaged across units of a given kind and the average rent became the new contract rent for the following contract year for units of the kind.

H. Rent Increases and Contract Amendments in 1995 and After[11]

The Authority has followed HUD's Notice in respect to Plaintiffs' properties from 1995 forward. Plaintiffs did not receive automatic annual adjustments in their contract rents following implementation of the 1994 Amendment under the 1995 Notice, continuing through 2005. In 2005 and after, increases have not been granted at all of the subject projects, but have been granted on some as set forth below.

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[11] Pls. Statement ¶ 26-27, 30, 33-35; Authority Statement Against Pls. ¶¶ 92-93, 99, 101, 106-118; Authority Statement Against HUD ¶¶ 92-93, 99, 101. Note that Plaintiffs object to the wording offered by the Authority in many of its statements. Plaintiffs have also denied certain statements offered by the Authority in which the Authority cites its answer admitting a fact alleged in Plaintiffs' complaint. I have treated admitted allegations as established facts for summary judgment purposes, contrary to Plaintiffs' request. *See*, *e.g*., Authority Statement Against Pls. ¶ 101; Pls. Response ¶ 101 & p. 2 n. 1, Doc. No. 98; Compl. ¶ 71; Authority Ans. ¶ 71, Doc. No. 45. Several of Plaintiffs' statements have been modified to remove argumentative language. *See*, *e.g*., Pls. Statement ¶¶ 29-35.

Had Plaintiffs received adjustments in their contract rents, the applicable AAAFs published by HUD in those years provided separate tables for turnover and non-turnover units. The AAAF for non-turnover units was 0.01 less than the AAAF for turnover units (except no factor was reduced below 1.0). Over time, the weighted average resulting from the 0.01 difference would compound.

The Authority puts forward a number of statements explaining its efforts to obtain some rent increases in Maine starting in 2002, in particular by obtaining permission to use an alternative method of calculating the initial difference. As it stood at the time, according to the Authority, even using ten percent of initial contract rents as the presumptive initial difference, it was not possible for Maine projects to receive rent increases under the 1994 amendments and Notice H 95-12 because Plaintiffs' contract rents were too high in relation to the FMR figures published by HUD. Plaintiffs qualify many of these statements, but admit that, in 2005, the Authority obtained permission from HUD to use a different initial difference calculation method for Plaintiffs' projects and that rent increases were granted in that year.[12] This effort included rent comparability studies performed by the Signal Group on Plaintiffs' projects. Only two of the subject projects received rent increases after 2005. Project specific details follow.

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[12] It is unclear whether these adjustments were actually "special additional adjustments" under HAP Contract § 1.9(c), which allows for consideration of certain project expenses that add to a projects operating costs.

1. Contract Rents and Rent Adjustments, by Property[13]

Island Apartments (One and Ken Valley)

23 one-bedroom units

| | |
|---|---|
| 1996-2005: | $832 |
| Dec. 2005: | $855 |
| May 2006: | $882 |
| May 2007 | $918 |
| May 2008 | $955 |
| May 2009: | $988 |
| May 2010: | $1032 |
| May 2011: | $1032 |

Lisbon Senior Village (Two and Ken Valley)

20-units, five classes of one-bedroom units and three classes of two-bedroom units

| | |
|---|---|
| 1994-2005: | $667-$680 (one-bedroom),<br>$752-$743 (two-) |
| Dec. 2005: | $726-$729 (one-bedroom),<br>$807-$815 (two-) |

Meadowbrook Apartments (Three and Ken Valley)

24 units, two-, three-, and four-bedroom

| | |
|---|---|
| 1994-2005: | $628 (two-bedroom),<br>$715 (three-),<br>$824 (four-) |
| Dec. 2005: | $628 (two-bedroom),<br>$743 (three-),<br>$856 (four-) |

[13] Pls. Statement ¶¶ 1-5, 47, 58, 69, 80, 90.

Sherwood Forest Apartments (Five and Ken Valley)

26 units, one-, two-, and three-bedroom

| | |
|---|---|
| 1994-2005: | $676 (one-bedroom),<br>$685 or $742 (two-),<br>$757 (three-) |
| Dec. 2005: | $682 (one-bedroom),<br>$716 or $783 (two-),<br>$813 (three-) |

Washington House Apartments (Six and Ken Valley)

53 units, zero-, one-, and two-bedroom

| | |
|---|---|
| 1996-2005: | $764 (0-bedroom),<br>$852 (one-),<br>$864 (two-) |
| Mar. 2005: | $847 (0-bedroom),<br>$943 (one-),<br>$952 (two-) |
| May 2006: | $879 (0-bedroom),<br>$976 (one-),<br>$982 (two-) |
| May 2007: | $918 (0-bedroom),<br>$1019 (one-),<br>$1027 (two-) |
| May 2008 | $954 (0-bedroom),<br>$1060 (one-),<br>$1066 (two-) |
| Nov. 2009: | $985 (0-bedroom),<br>$1094 (one-),<br>$1097 (two-) |
| Nov. 2010: | $1020 (0-bedroom),<br>$1137 (one-),<br>$1148 (two-) |

Note that the Authority does not make full housing assistance payments on vacant units. (Authority Add'l Statement ¶ 1, Doc. No. 103; HAP Contract § 1.7(c).) The Authority observes that Plaintiffs had vacancies of varying lengths in their projects, something that Plaintiffs do not deny. The Authority also flags the fact that Island Apartments has been under a different contract since May 11, 2009, and that Washington House has been since January 1, 2012. (Authority Add'l Statement ¶¶ 3-4.) Plaintiffs maintain that their calculations account for these other concerns. (Pls. Reply Statement, Doc. No. 112.) Plaintiffs' statement also supplies the applicable AAAFs for the projects in the relevant years, but these are not reproduced here. (Pls. Statement ¶¶ 46, 57, 68, 79, 89.)

2. Rent Comparability Study Costs[14]

Based on the Declaration of Steven Klebanoff[15], Plaintiffs have expended $26,575.00 to conduct rent comparability studies required by the Authority.

## III. DISCUSSION

There are four motions for summary judgment before the Court. Plaintiffs seek summary judgment on their claims against the Authority for breach of the HAP Contracts. They maintain that the Authority breached the contracts by failing to automatically adjust rents on an annual basis and by following, instead, Notice H 95-12; that application of the non-turnover deduction to the AAAFs would breach the

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[14] Pls. Statement ¶ 91.

[15] Mr. Klebanoff is president of Sumner Realty, a general partner of each Plaintiff-partnership. (Klebanoff Decl. ¶ 2, Doc. No. 25-1.)

HAP Contracts; and that requiring Plaintiffs to submit rent comparability studies was a breach of the contracts and requires reimbursement. Plaintiffs seek to have their current contract rents recalibrated by assuming annual adjustments pursuant to the published AAAFs and they seek back rents based on these same factors. Plaintiffs additionally attempt to demonstrate damages in a sum certain for unpaid rents through November 30, 2011, in the amount of $823,607.00, plus $513.00 per day, plus another $26,575.00 for their expenditures on market rent studies. (Pls. Mot. at 34-36, Doc. No. 90.) As support for the calculation of back rents, Plaintiffs cite their "Exhibit 3." However, it appears that the relevant exhibits are exhibits 13 through 17. (Doc. No. 90-4.) Plaintiffs' presentation of their case reflects that their calculation of contract damages rests heavily, if not entirely, on the legal argument that the 1994 Amendment and HUD's resulting notice served to negate, or nullify, the overall limitation clause.

In its motion papers, the Authority complains that it is caught in the middle of this dispute and that, if it is found liable to Plaintiffs, it is only because it was following directives issued by Congress and HUD. The Authority states that it neither had nor has the authority to grant the desired rent increases because HUD is the party that controls the process. In its view, HUD is necessarily liable to the Authority, but only if the Authority is liable to Plaintiffs. (Authority Mot. Against HUD, Doc. No. 87.) As for liability to Plaintiffs, the Authority maintains that it cannot be liable under the circumstances because it had no choice in the matter and performance as requested was rendered impracticable. Should that argument fail, the Authority disputes Plaintiffs' calculation of damages and maintains that the overall limitation

clause sets a cap on any recovery. (Authority Opposition to Pls. Mot., Doc. No. 102.) The Authority takes the position that the HAP Contracts must be read in tandem with the Annual Contributions Contracts and that it is unambiguously stated that the Authority has no independent authority to make payments other than as HUD directs. If impracticability does not suffice as a defense, the Authority further maintains that the overall limitation clause applies, that the non-turnover deduction is not a breach, and that Congress was free to change the playing field by requiring rent comparability studies for rent increases under the circumstances. (Authority Mot. Against Pls., Doc. No. 88.)

HUD requests a summary judgment ruling that dismisses the claim stated by Plaintiffs in Count II (the non-turnover deduction claim), that recognizes a particular application of the statute of limitation, and that enforces the overall limitation clause. HUD requests judgment against the third-party claim to the same extent as judgment enters against Plaintiffs and in favor of the Authority. (HUD Mot., Doc. No. 89.)

The following discussion begins with a concern expressed by Plaintiffs related to the law of the case doctrine and then proceeds with an assessment of the core issue of whether Plaintiffs have demonstrated a breach of contract. The assessment offered herein is that there is no breach on this record. One reason for this is that the duty allegedly breached was not a duty owed by the Authority. The other reason is that, even if the duty is owed by the Authority, Plaintiffs have failed to demonstrate a material breach. Because there is no demonstrated breach, this

recommendation does not ultimately reach the impossibility/impracticability doctrine.

A. Law of the Case

This case commenced with a jurisdictional tightrope show that took place in relation to the Authority's motion to dismiss. As part of that show, the Authority argued that "the face of the complaint and the referenced contracts establish there is no breach." (Def.'s Mot. to Dismiss at 9, § III, Doc. No. 14.) The Authority's position was that the Court could simply review the unambiguous language of the HAP Contracts and the Annual Contributions Contracts, observe that they cross-reference one another, and conclude that certain provisions made it clear that the Authority had not breached any duty described in the HAP Contracts because all of the critical duties were reposed in HUD. (*Id*. at 9-10.) Additionally, in a reply memorandum, the Authority introduced the idea that, even if a breach occurred, the Authority was excused from liability because congressional amendment of the Section 8 program and HUD's related regulatory measures made contract performance impossible. (Doc. No. 29 at 3-4, § II.) In the Recommended Decision on the Authority's motions to dismiss, I recommended that the Court reject these arguments. (Doc. No. 35 at 23-24.) Plaintiffs contend that the Court's acceptance of that recommendation should foreclose further consideration of these and other arguments.

As for the Authority's contention that the language of the contracts precludes a finding of breach, the recommendation was that this theory was not "supported merely from an assessment of the complaint and the contract provisions, at least not on the basis of the Authority's limited legal analysis."

(*Id*.) In other words, the recommendation was to leave for another day the question of whether a breach could be established. There is no room for law of the case with respect to the core contract claim. Upon further analysis, I agree with the Authority's core contention that it has not materially breached the HAP Contracts because the contract-payment expectations that Plaintiffs want to have fulfilled are not based on any duty to fund or other performance duty assumed by the Authority.

As for the supervening impracticability or impossibility doctrine, my assessment was as follows:

> In effect, the Authority is arguing that the United States can contract with an agent to have the agent contract with a third party, so that when the United States decides it no longer wants to honor the contractual obligation, the third party will have no remedy. Hornbook law would suggest, to the contrary, that an agent is not free to breach a contract executed in his own name, simply because he has entered the contract in reliance on promises by a principal and the principal has taken an action that forces a breach. From the face of the complaint and the face of the HAP Contracts, the Authority is a contracting party, not merely a disclosed agent of HUD. *See* Restatement (Second) Agency § 323 (concerning agents who are parties to transactions conducted by themselves). Moreover, with regard to contract frustration based on government regulation or order, it is recognized that, although "[i]t is not necessary that the regulation or order be valid, . . . a party who seeks to justify his non-performance . . . must have observed the duty of good faith and fair

> dealing . . . in attempting, where appropriate, to avoid its application." Restatement (Second) Contracts § 264 cmt. b. . . . The obligation of good faith and fair dealing calls upon the Authority to cooperate to secure performance rather than attempt to bar Plaintiffs from any potential recovery based on an alleged impossibility of performance.

(*Id*. at 24 (footnotes omitted).) In a footnote to the foregoing excerpt, I also wrote that the general rule associated with excusing a contract breach based on impossibility of performance "does not excuse a contracting party from taking those steps that are possible to secure performance" and that, as described in the Restatement, the rule "does not address the present scenario where the regulatory body [HUD] is attempting to change the playing field of a program in which its own agents, allegedly, have become contractually bound to third parties." (Doc. No. 35 at 24, n. 10.)

In the course of briefing the pending motions, Plaintiffs maintain that the foregoing rationale for denying the Authority's motion to dismiss should preclude further consideration of certain arguments advanced in the Authority's summary judgment motion. (*See*, *e.g*., Pls. Consol. Opposition at 15, 16-17, 34 n. 20.) Nothing in the prior Recommended Decision even suggests that the Court should reject the possibility that there was, in fact, no actual breach of contract. As for the doctrine of impracticability or impossibility (which doctrine assumes the existence of a breach), nothing contained in the current briefs and supplemental citation of authority has changed my view. However, the issue of the im-

practicability of performance is moot because there was no breach by the Authority.

Finally, it bears stating that the doctrine of law of the case "directs a court's discretion," but does not limit its power. *Harlow v. Children's Hosp*., 432 F.3d 50, 55 (1st Cir.2005). There is no rule precluding reconsideration of arguments rejected in an interlocutory order on a motion to dismiss. *Perez-Ruiz v. Crespo-Guillen*, 25 F.3d 40, 42 (1st Cir.1994).

B. Breach of Contract

Proof of a breach of contract action consists of three elements: (1) breach of a material contract term; (2) causation; and (3) damages. *Wetmore v. MacDonald, Page, Schatz, Fletcher & Co. LLC*. 476 F.3d 1, 3 (1st Cir.2007) (citing *Me. Energy Recovery Co. v. United Steel Structures, Inc*., 1999 ME 31, ¶ 7, 724 A.2d 1248, 1250). To determine the materiality of the breach, Maine courts use "traditional contract principles," including: (a) whether a party will not receive a reasonably expected benefit; (b) whether a party can be compensated for deprivation of the benefit; (c) whether the breaching party will suffer forfeiture; (d) whether a breaching party is likely to cure his nonperformance; and (e) whether the breaching party's conduct "comports with standards of good faith and fair dealing," *Acoustic Processing Tech., Inc. v. KDH Elec. Sys. Inc*., 697 F.Supp.2d 146, 154 (D.Me.2010) (citing *Associated Builders, Inc. v. Coggins*, 1999 ME 12, 722 A.2d 1278, 1280 n. 1 and the Restatement (Second) of Contracts § 241 (1981)). Although materiality is generally a question of fact, "if the question admits of only one reasonable answer (because the evidence on the point is either undisputed or sufficiently lopsided), then the court must intervene and address what is ordinarily a factual

question as a question of law." *Gibson v. City of Cranston*, 37 F.3d 731, 736 (1st Cir.1994).

"When interpreting whether a contractual provision was breached, courts must first determine as a matter of law whether the provision is ambiguous." *Id*. (quoting *Halco v. Davey*, 2007 ME 48, ¶ 9, 919 A.2d 626, 629). If there are two or more reasonable interpretations of a provision, or its meaning is unclear, then there is ambiguity. *Id*. If there is no ambiguity, then the provision at issue receives its "plain, ordinary, and generally accepted meaning." *Id*. (quoting *Reliance Nat'l Indem. v. Knowles Indus. Servs. Corp*., 2005 ME 29, ¶ 24, 868 A.2d 220, 228). When assessing whether a particular construction proposed by a party is reasonable, the Court should avoid a construction that would render a provision meaningless or mere surplusage. *Crowe v. Bolduc*, 365 F.3d 86, 97 (1st Cir.2004); *Richardson v. Winthrop Sch. Dep't*, 2009 ME 109, ¶ 9, 983 A.2d 400, 403. "A contract must be interpreted to effect the parties' intentions as reflected in the written instrument, construed with regard for the subject matter, motive, and purpose of the instrument, as well as the object to be accomplished." *Briggs v. Briggs*, 1998 ME 120, ¶ 6, 711 A.2d 1286, 1288-89.

"Contract interpretation, when based on contractual language without resort to extrinsic evidence, is a 'question of law.'" *OfficeMax, Inc. v. Levesque*, 658 F.3d 94, 97 (1st Cir.2011). On the other hand, if a material provision of a contract is ambiguous, that ambiguity is typically resolved based on findings of fact. But where there is no genuine factual dispute, the interpretation of a contract remains a question of law for the court. *Canal Elec. Co. v. Westinghouse Elec. Co*., 973 F.2d 988, 992 (1st Cir.1992).

When two different contracts are related, form part of the same transaction or undertaking, include express references to one another, and are executed contemporaneously, there is no rule preventing them from being read harmoniously, as the Authority requests. *Kandlis v. Houtari*, 678 A.2d 41, 43 (Me.1996). However, "the doctrine applies primarily in cases of uncertainty and cannot undo plain language which makes perfect sense in context." *Happ v. Corning, Inc.*, 466 F.3d 41, 46 (1st Cir.2006) (applying Delaware law but citing the Restatement (Second) of Contracts § 202(2) and 11 R. Lord, Williston on Contracts 30:26, at 239-53 (4th ed.1999)).

There is some debate in the motion papers about whether, and for what purpose, the Court might look to the language of the ACCs to evaluate the merits of a contract claim based on the HAP Contracts. For example, the Authority points to the ACCs to further bolster its argument that it is not the final arbiter when it comes to how much of a financial commitment the Government will make to Plaintiffs' projects. There is nothing inherently wrong with considering the ACCs to understand the relationship among the parties or their respective obligations. The ACCs and the HAP Contracts expressly reference one another. Plaintiffs understood that they were participating in a federal housing assistance program on contract terms drawn by HUD, and HUD executed an "approved" signature line expressly reserved for it on the face of the HAP Contracts. In any event, even though the language of the ACCs is there for the Court's consideration, when construing the contractual obligations running from the Authority to Plaintiffs, the material terms are found in both the ACCs and the HAP Contracts, and there is no essential

language in the ACCs that is not also found in the HAP Contracts.

Ultimately, the question of contract construction determines the outcome of Plaintiffs' claims. Although many contract disputes revolve around the interpretation of ambiguous contract language, this dispute does not. Plaintiffs have not rested their case on an argument that any particular provision is ambiguous and that the ambiguity carries the day for them. To the contrary, Plaintiffs maintain that the relevant contract language is unambiguous, but that regulatory measures introduced by HUD and applied by the Authority *necessarily* resulted in a breach or repudiation of those unambiguous contract terms. (*E.g.*, Pls. Mot. at 14, Doc. No. 90; Pls. Consol. Opposition at 11, Doc. No. 11.) The following discussion explains why the historical facts of record do not support an inference that the Authority committed a material breach of the HAP Contracts, based on (1) a construction of the plain language of the HAP Contracts and (2) based on an assessment of the materiality of Plaintiffs' showing on the issue of breach.

1. The HAP Contracts Do Not Impose the Allegedly Breached Duty on the Authority

In Count I of their complaint, Plaintiffs allege the following:

> 66. Under the HAP Contracts between Plaintiffs and [the Authority], Plaintiffs are entitled, on the anniversary date of each stage of their Contracts, to an annual rent adjustment according to the AAAF published by HUD, in the Contract Rents at Plaintiffs' Properties.

> 67. Notwithstanding the terms of the HAP Contracts between Plaintiffs and [the Authority], [the Authority] has not increased the Contract Rents at Plaintiffs' projects annually, as required by the HAP Contracts, since HUD issued Notice H 95-12 on March 7, 1995. In addition, the increases to the Contract Rents at the Plaintiffs' Properties made by [the Authority] since Notice H 95-12 was issued were for an amount less than the amount to which Plaintiffs were entitled under their HAP Contracts with [the Authority].
>
> 68. [The Authority]'s failure to increase the Contract Rents at Plaintiffs' projects in accordance with the terms of Plaintiffs' HAP Contracts since HUD issued Notice H 95-12 constitutes a breach of the HAP Contracts between Plaintiffs and [the Authority].

With these allegations, Plaintiffs seek to realize the "maximum housing assistance payments commitment" that the most generous reading of the HAP Contracts could possibly provide, assuming that the overall limitation clause were a nullity. These allegations fail, quite simply, because the Authority has never assumed a contractual obligation to fund Plaintiffs' housing assistance payments under the HAP Contracts. It has promised only to make payments equal to "the difference between the Contract Rents for units leased by Families and the portion of such rents payable by Families" (HAP Contract § 1.3b(1)), by paying over annual contributions received under the ACC (*id*. § 1.5b) that "the Government will provide" (*id*. § 1.5a). These funds are to be routed through a project account that contains funds "in an amount as determined by the Government" (*id*. § 1.6b(1)) and subject to "such additional steps

authorized by section 8(c)(6) of the Act" that only Congress can fulfill (*id*. § 1.6b(2)).

As for Plaintiffs' allegation that the Authority administered the HAP Contracts in violation of the terms of the agreement, Plaintiffs' evidentiary presentation fails to reveal that there was any act that the Authority failed to undertake that would have resulted in any of the rent increases they seek through this action. In the absence of such proof, Plaintiffs fail to demonstrate a material breach of any performance obligation assumed by the Authority.

Although this recommendation differs from the prior recommendation on the Authority's motion to dismiss, that preliminary assessment was focused on the Authority's assertion of the impossibility doctrine. While I remain skeptical about the applicability of that doctrine for reasons previously stated, I am persuaded that suits like these are not properly brought against the local housing authority because it has not assumed the contractual obligation allegedly breached, *i.e*., to make assistance payments other than in the amount allowed and funded by HUD. *Cf. Arlington Hous. Partners, Inc. v. Ohio Hous. Fin. Agency*, No. 10AP-764, 2012 Ohio App. Lexis 1263, *23, 2012 WL 1078835, *8 (Ohio Ct.App., Mar. 30, 2012) (finding (1) that "there was no breach because the language of the contract expressly incorporated HUD's regulatory framework, and contemplated that changes in HUD's annual adjustment factors and the manner of their determination would constitute a variable term in the contract" and (2) that "performance under the contract was excused by the doctrine of impossibility.")

2. A Material Breach is Not Demonstrated

In their motion for summary judgment, Plaintiffs explain the basis for their action: "In a series of decisions, the Court of Federal Claims and the federal district courts have concluded that the 1994 Amendments and Notice H 95-12 breached the very rent adjustment provisions that are the subject of this litigation." (Pls. Mot. at 9, Doc. No. 90 (citing *Park Props. Assocs. L.P. v. United States*, 74 Fed. Cl. 264, 272-74 (2006); *Statesman II Apts. Inc. v. United States*, 66 Fed. Cl. 608, 615-20 (2005); *Cuyahoga Met. Hous. Auth. v. United States*, 57 Fed. Cl. 751, 759-62 (2003); *Cathedral Square Partners Ltd. P'ship v. S.D. Hous. Dev. Auth.*, No. 1:07-C-4001, 2011 U.S. Dist. Lexis 1703, 2011 WL 43019 (D. S.D. Jan 5, 2011); *Greenleaf Ltd. P'ship v. United States*, No. 08-C-2480, 2010 U.S. Dist. Lexis 104574, 2010 WL 3894126 (N.D.Ill. Sept.30, 2010).) Despite the fact that the 1994 Amendment and Notice H 95-12 are identified as essential to the breach in this language, Plaintiffs maintain that the Authority could not simply "determine" that the overall limitation clause applied in a given year, as the HAP Contract language states, but had to "invoke" the overall limitation clause in every year by performing a comparability study on a specific timetable or else the clause would be negated. (Pls. Mot. at 15-16.) Thus, Plaintiffs maintain:

> (1) that HAP Contract Section 1.9b mandated automatic annual adjustments based on the published AAAFs alone (*id*. at 10-12);
>
> (2) that the 1994 Amendment and Notice H 95-12 breached the annual adjustment provision by conditioning rent increases on proof of rent comparability by Plaintiffs (*id*. at 12); and

> (3) that the Authority lost the opportunity to invoke the overall limitation clause in Section 1.9(d) because it failed to determine the initial difference when the contracts were first executed and because it failed to take "affirmative action" each year to "invoke" the overall limitation clause, which provision it describes as "not self-executing" (*id*. at 14-16).

The Plaintiffs' reasoning relies heavily on decisions issued by the Court of Claims, which reasoning has, generally, been followed by district courts that have considered it. The argument assumes mandatory regulatory adherence, in all cases, to the Department of Housing and Urban Development Reform Act of 1989, 103 Stat.2057 (*see*, *supra*, Section II.D), notwithstanding the 1994 Amendment (*see*, *supra*, Section II.F). Based on the 60-day rule related to the 1989 Reform Act, which provided "that HUD may limit automatic rent adjustments in the future through the use of independent comparability studies," but required HUD to conduct a study "not later than 60 days before the anniversary date of the assistance contract," or else the "automatic annual adjustment factor shall be applied," *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 15 & n. 1, 113 S.Ct. 1898, 123 L.Ed.2d 572 (1993), Plaintiffs say the overall limitation is not self-effectuating and is waived if not invoked, regardless of whether their contract rents were, in fact, materially in excess of rents at comparable, unassisted units.[16]

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[16] In essence, Plaintiffs are relying on the idea that Congress enhanced their HAP Contracts by passage of the Reform Act of 1989, 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

The 60-day provision remains in the Housing Act to this date. 42 U.S.C. § 1437f(c)(2)(C). However, due to the 1994 Amendment and subsequent amendments, the Housing Act also states that "where the maximum monthly rent to be adjusted using an annual adjustment factor exceeds the fair market rental for an existing dwelling unit in the market area, the Secretary shall adjust the rent 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." *Id*. § 1437f(c)(2)(A). Faced with these seemingly opposed congressional mandates, HUD issued Notice H 95-12. In effect, pursuant to the Notice, HUD would use its published figures for regional fair market rents ("FMRs") and the owner of a project with contract rents exceeding the applicable FMR by more than the initial difference would be subject to the burden of coming forth with their own rent comparability studies to challenge application of the overall limitation. The presumptive "initial difference" measure would be based on ten percent of the initial contract rents. In other words, whether the burden-shift applies was made a function of a comparison to the FMRs. Annual adjustments for projects with contract rents materially above the FMRs would be handled under Section 8(c)(2)(A); those with rents at, near, or under would be handled under Section 8(c)(2).

The facts of some of the cases relied on by Plaintiffs involve claims by project owners who were able to demonstrate that their rents were actually at or

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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.

within the margin of the material difference. Nevertheless, the courts considering these claims have now come to rule, it appears, that the Government's use of Section 8(c)(2)(A) and/or HUD's decision to use FMRs as the divining rod between Section 8(c)(2)(A) and Section 8(c)(2)(C), constitutes a breach of the automatic annual adjustment provision, *as a matter of law*. It is not clear, however, that the apparent development of this rule has occurred in the context of cases in which the plaintiffs have not bothered to make *any* presentation to show that their rents were not actually materially different from unassisted rents. With all due respect to this line of authority, I cannot advise the Court to assume a material breach in this case, as a matter of law, based on the Plaintiffs' factual presentation, which is devoid of any evidence showing the relationship to unassisted rental rates.

a. The 60-day rule of Section 8(c)(2)(C) is not mandatory in all factual scenarios

As the Supreme Court observed in *Alpine Ridge*, the overall limitation clause applies "notwithstanding any other provision of [the] Contract" and prohibits a "result" in which there are "material differences between the rents charged for assisted and comparable unassisted units," beyond the initial difference. The overall limitation clause does not assign any burden to either contracting party to conduct any particular kind of study on any particular schedule, but rather assigns to the Authority the task of determining the market rents, subject to HUD approval. (HAP Contract Section 1.9d.) There is no 60-day rule in the HAP Contract. Nor is one found in the FMR provision added to the Housing Act as a consequence of the 1994 Amendment. 42 U.S.C.

§ 1937f(c)(2)(A). For these reasons, I reject the argument that there was a waiver of the overall limitation based on the Authority's failure to conduct independent market studies under Section 8(c)(2)(C). The 60-day rule is not stated in the HAP Contract and the FMR analysis that arose from the 1994 Amendment placed Plaintiffs in a category different than the one for which the statutory 60-day rule applies. The question is whether the determination to place Plaintiffs in this category was a reasonable application of the HAP Contracts' overall limitation clause.

b. Plaintiffs fail to demonstrate an unreasonable application of the overall limitation clause as to their projects

Whether a given "result" (to use the language of HAP Contract § 1.9d) can fairly be determined by the Authority to be a material difference presents a *question of fact*. This is best illustrated by means of an example. In 1998, the FMRs for Maine were broken into four metropolitan areas and sixteen nonmetropolitan-county areas. Island Apartments, in Fairfield, falls under Somerset County's nonmetropolitan category. The FMR for one-bedroom apartments in Somerset County for 1999 was $381.[17] 63 Fed.Reg. 52858 (Oct. 1, 1998). The undisputed facts in this case reflect that One and Ken Valley's contract rents had grown to $832 in 1999, more than twice the FMR. Even by 2002, Island Apartments received contract rents more than double the then-applicable FMR of $405. 66 Fed.Reg. 50,024 (Oct. 1, 2001). On

[17] There is no evidence that Plaintiffs ever challenged the FMRs published by HUD or engaged an independent study to prove that the FMRs were unreasonable as applied in their respective market areas.

the basis of the overall limitation language and contract rents like these, and in the absence of any counter-showing by Plaintiffs, I fail to understand how the overall limitation can fairly be regarded as inapplicable, let alone unreasonable as applied.

In *Alpine Ridge*, the Supreme Court considered whether Congress's authorization of independent comparability studies violated due process by depriving the owners of vested property interests. The Court held that the contracts "do not prohibit the use of comparability studies to impose an independent cap on the formula-based rent adjustment," given the plain language of the overall limitation clause, and the Court highlighted the fact that the overall limitation clauses is expressly operative "notwithstanding any other provision of this Contract." *Alpine Ridge*, 508 U.S. at 17-18. In the Court's words:

> Thus, we think it clear beyond peradventure that § 1.9d 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. This limitation is plainly consistent with the Housing Act itself, which provides that "adjustments in the maximum rents," whether based on market surveys or on a reasonable formula, "shall not result in material differences" between Section 8 rents and the rents for comparable housing on the private market. 42 U.S.C. § 1437f(c)(2)(C) (1988 ed., Supp. III).

*Id*. at 18-19. It is clear from the Court's holding that the overall limitation clause is not overridden by the automatic nature of the adjustment factors. To the contrary, the Court pointedly noted that "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*." *Id*. at 21 (emphasis added). Additionally, the Court observed that the HAP Contract assigns *to the Government* the discretion to assess material differences, overriding any "contract right to unobstructed formula-based rent adjustments." *Id*. By logical extension, the Government's use of FMRs to help identify contract rents subject to the overall limitation is perfectly consistent with the HAP Contract, at least in every case in which the Government's use of the FMR divining rod actually identifies contract rents that are materially different from rents received by comparable, unassisted units. It simply is not an accurate statement to say, as the Plaintiffs do, that "MaineHousing is required to grant the full AAAF-based rent adjustment, unless the agency conducted a competent RCS." (Pls. Consol. Opposition at 21.) No one in this case has even suggested that the determination that Plaintiffs' rents exceeded the overall limitation was, in fact, unreasonable or even subject to reasonable dispute. That is a serious evidentiary hole in a contract case that requires evidentiary (*i.e*., factual) demonstration of a material breach.

c. Uncertainty over the initial difference does not warrant a ruling barring application of the overall limitation clause

Plaintiffs next argue that the overall limitation simply cannot be operative—no matter what—because the Authority "does not know what the initial difference is." (Pls. Mot. at 20.) This argument is not persuasive, either. What the initial difference was is a factual question that is subject to proof and

it is not inherently different from other financial questions that are proven through reliable estimation. *See*, *e.g.*, *Statesman II Apts.*, 66 Fed. Cl. at 614 & n. 9 (reflecting studies by the plaintiffs' expert and opinion evidence of the initial difference despite the passage of roughly 20 years). Plaintiffs implicitly recognize that an approximation could be achieved because they insist that the ten-percent factor "concocted" by HUD "was manifestly *not* the historical difference." (Pls. Mot. at 21 (emphasis in original).) Reasonableness is the usual standard that Courts attempt to apply in cases where estimation is required. That Plaintiffs insist on a waiver rule designed to nullify an essential contract provision suggests that a reasonable inquiry directed at the "material difference" standard would not bear fruit for them, possibly because their historic contract rents substantially exceeded fair market rents in their areas, or else came to after roughly fifteen years of automatic increases. Ultimately, unless Plaintiffs make a showing that the overall limitation clause was not reasonably implemented in a given year by reliance on the FMR tables, they fail to raise a genuine issue of breach by the Authority.

Plaintiffs have failed to develop a summary judgment record that would allow the Court to look at any particular year inside the statute of limitation to assess whether a finder of fact could conclude, based on reasonable inference, that one or more of the projects were entitled to an automatic annual increase in rents that would not result in a material difference between a particular project's contract rents and the unassisted market rents in the area, which difference would not exceed the initial difference received by the original owners in the first

contract year. To further illustrate this point, consider the following facts:

The original contract rents at Island Apartments were $426, which resulted in an original maximum commitment of $117,576 (23 apartments x $426 x 12 months). For purposes of this litigation, the "initial difference" between unassisted market rents and contract rents for this property was obviously less than $117,576, but at least as much as $11,757.60 (HUD's ten percent rule). Using HUD's FMR figures for 1999, One and Ken Valley's contract rents in 1999 ($227,148) exceeded the FMR ($105,156) by more than 100 percent of the entire initial contract rents, which obviously does not comport with the overall limitation clause. I have used 1999 figures, which are outside of the statute of limitation period, but the point is that Plaintiffs have made no effort to illustrate how it is that an automatic increase in their rents would not offend the overall limitation's material difference or initial difference standards[18] in any of the years inside the limitation period, whether by reference to the FMRs or to any other reasonable measure of their choosing.

d. "Determination" and "application" equal "invocation"

The 1994 Amendment extended the FMR into the housing assistance payments program to be used as a yard stick to measure whether contract rents were materially different from the rents at non-assisted units. 42 U.S.C. § 1437f(c)(2)(A). Where contract rents exceed market rents for an existing dwelling unit in

[18] The initial difference metric is not necessarily at odds with the material difference metric. Under either metric there is room for above-market rents.

the market area, the overall limitation is put in play. Where the overall limitation is in play, the Authority will adjust the contract rents only if 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." *Id*. § 1437(c)(2)(A) (emphasis added). Whether this congressional calibration of the contract standards resulted in a breach of every HAP Contract in the land that is similar to Plaintiffs' HAP Contracts, is not something that can be determined as a universal proposition, as the materiality of a breach is a question of fact. On the existing record, Plaintiffs simply fail to demonstrate that there was any objectively reasonable basis to believe that the Plaintiffs' contract rents did not substantially exceed market rents. Without such a showing, there is an insufficient factual basis for the finder of fact to infer that the Authority's *application* of the overall limitation resulted in a material breach of contract. Indeed, Plaintiffs here have not even put forward a showing that *application* of the overall limitation in any particular year, at any particular property, even presented a close question.

The word "application" in the preceding paragraph might as readily read "invocation." There is a more recent line of case law in this area finding that the overall limitation clause must be "invoked" in a given year to prevent automatic annual adjustments and that the overall limitation clause is negated in cases like this one, where HUD or the housing agency simply refused automatic increases without performing an independent study pursuant to 42 U.S.C. § 1437(c)(2)(C). *See Cathedral Square Partners*, 2011 U.S. Dist. Lexis 1703, *34, 2011 WL 43019, *11 (collecting cases). I have already explained why I

think that use of Section 8(c)(2)(C) is mistaken, as far as being applied as an across-the-board legal conclusion. In fact, it is difficult to conceive of the regulatory changes brought on by the 1994 Amendment as anything other than a wide-scale "invocation" of the overall limitation, as Congress was clearly persuaded that contract rents for a substantial percentage of projects were materially higher than rents in the unassisted market. Particularly in the circumstances of this case, where there has never been a showing by Plaintiffs that would disprove the material difference, it seems highly indulgent to negate the overall limitation clause, a clause that applies "notwithstanding" any other contract provision and does not include any language calling for an "invocation" on the Government's part. Moreover, there is an appearance from the factual presentation that the historical administration of Plaintiffs' HAP Contracts proceeded as it did precisely because it was understood by the Authority that Plaintiffs' contract rents materially exceeded market rents. How can the administration of that exact determination be anything other than an "invocation" of the overall limitation clause? *But see Park Props. Assocs.*, 82 Fed. Cl. at 167-173 (Allegra, J.) (contradicting the approach taken in *Cuyahoga II*, based on an exegesis about conditions precedent and the prevention principle).[19] In my

[19] In his *Park Properties* decision, Judge Allegra describes the 1994 Amendment as an act that prevented the occurrence of a condition precedent, but obviously Congress did not "prevent" Plaintiffs' contract rents from being materially different from rents in the unassisted market, if Plaintiffs' rents were already materially different. Paraphrasing Justice Holmes, whom Judge Allegra quotes, neither HUD nor the Authority is a party who, "by his fault, prevent[ed] the other party to a contract from entitling himself to a benefit," because Plaintiffs have never

view, the Authority invoked the overall limitation clause.

e. Judgment should enter against Plaintiffs and this case should be dismissed

An essential showing of material breach has not been made in this case and summary judgment should enter, therefore, against Plaintiffs' action. Because the third-party action depends on Plaintiffs' success, both the primary action and the third-party action should be dismissed, with prejudice.

C. Alternative Recommendations

In the event that the Court disagrees with the foregoing recommendation and decides that Plaintiffs are entitled to recover from the Authority based on a

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been entitled under the contract to rents materially different from rents in the unassisted market. 82 Fed. Cl. at 171 (quoting *St. Louis Dressed Beef & P. Co. v. Maryland Cas. Co*., 201 U.S. 173, 180-81, 26 S.Ct. 400, 50 L.Ed. 712 (1906)). Ultimately, it makes little sense to contend that the Government repudiated the contract, *id*. at 173, when the 1994 Amendment and Notice H 95-12 were designed to effectuate the very result dictated by the overall limitation clause. Perhaps in some cases this did amount to a repudiation, but not in every case as a matter of law.

The cases relied on by Plaintiffs have also followed the rationale offered by Judge Allegra in the *Cuyahoga* case. The plaintiff in that case, however, supported its action with studies of "comparable rents plus the initial difference" in the market area, showing that the automatic annual increases would not have exceeded the material difference standard. 57 Fed. Cl. at 758. Judge Allegra went on to explain why he believed a "general breach" was established in that case—based on *dicta* from *Alpine Ridge*, which he construed to require a special "invocation" of the overall limitation clause—but there was, nevertheless, a *prima facie* showing of a material breach. *Id*. at 760, 780. There is no similar showing here.

retroactive adjustment in contract rents, the parties' remaining arguments are discussed in brief.

1. The NonTurnover Rate is Not an Independent Material Breach

Congress's introduction of the non-turnover rate for 1995 and after was not in breach of the HAP Contracts. Plaintiffs argue that the non-turnover rate should not be applied because it reflects "a huge deduction to already limited rent increases, based on a mistaken notion that the cost of operating a unit that does not turn over in a given year is less than the cost of a unit that does turn over." (Pls. Mot. at 23.) According to Plaintiffs, it might have been sensible for Congress to increase the AAAF by 0.01 for turnover units, but not to reduce the AAAF for non-turnover units. (*Id*.) Plaintiffs spend several pages providing a picture of the long-term effect that the non-turnover rate has on contract rents, explaining that "these enormous and accelerating reductions necessarily mean that fewer funds were and will be available for property maintenance and improvements to Section 8 buildings, further reducing the amount and quality of housing available for the lower income families." (*Id*. at 29.) These policy considerations do not, in my view, advance the contract claims. Plaintiffs also argue that the express language of Section 1.9b(1) allows for only two AAAFs: one for units in which utilities are included in the rent and one for units that leave utility payments to the tenants. (*Id*. at 23-24.) Section 1.9b(1) reads:

> Automatic Annual Adjustment Factors will be determined by the Government at least annually; interim revisions may be made as market conditions warrant. Such Factors and the basis for their determination will be published in the

> Federal Register. These published Factors will be reduced appropriately by the Government where utilities are paid directly by the Families.

Contrary to Plaintiffs' contention, the HAP Contract does not impose any restriction on HUD's ability to determine that multiple adjustment factors, or AAAFs, be applied. It simply states that "[f]actors will be determined by the Government" and that they will be reduced "where utilities are paid directly by the Families." The fact that the Contract directs a utility reduction does not mean that it has forbidden any other reduction. Moreover, "the Government" has obviously "determined" that the non-turnover reduction be included in the AAAF and, based on persuasive precedent addressing the legislative history behind the 1994 Amendment, Plaintiffs received sufficient notice of the "basis" for that determination. *See Parks Props. Assocs. LP.*, 74 Fed. Cl. at 275 ("[T]he contract permits HUD to describe the 'basis' for its determination in either factual or legal terms—as it did here, in indicating that the basis for the lower AAAFs for non-turnover units was the 1994 amendments"); *Cuyahoga II*, 65 Fed. Cl. at 542 ("Nothing in this language suggests that there will be a single, monolithic factor for all units at a given property or that Congress could not authorize HUD, in determining the AAAF for a given unit, to make a different adjustments for those in which no turnover had occurred."); *Greenleaf Ltd. P'ship*, 2010 U.S. Dist. Lexis 104574, *18, 2010 WL 3894126, *6 (observing that "nothing in the contract requires factual findings or a demonstration that costs are lower for holdover tenants" and that "the congressional record suggests that HUD did have a factual basis underlying the .01 reduction for Non-Turnover Units"); *Cathedral*

*Square Partners Ltd. P'ship*, 2011 U.S. Dist. Lexis 1703, *53, 2011 WL 43019, *17 (following *Cuyahoga II, Park Properties,* and *Greenleaf*); *but see Statesman II Apts. Inc*., 66 Fed. Cl. at 625 (concluding that the non-turnover factor could not be applied because HUD did not "publish[ ] any findings" and "merely adopted the statutory reduction").

2. Assuming the Record Establishes a Breach, Is the Breach Excused?

The principal assertion in the Authority's motion for summary judgment against Plaintiffs is that it was merely caught in the middle; that, given its status as a "conduit between Plaintiffs and HUD," it "should not be held responsible for a change in law or matters outside of its control." (Authority Mot. Against Pls. at 2, Doc. No. 88.) The Authority argues that Plaintiffs must have understood that, by contracting with the Authority rather than with HUD, they would not have recourse against the Authority if Congress, the "superior sovereign," made changes in the Section 8 program. (*Id*. at 10-11, citing *SC Testing Tech., Inc. v. Dep't of Envtl. Prot*., 688 A.2d 421, 424 (Me.1996); *see also id*. at 6, citing Restatement (Second) of Contracts § 264 (1981).). With this, the Authority reasserts the impossibility doctrine to, in theory, negate a finding of breach.

The citation to the Law Court's decision in *SC Testing* does not advance the Authority's point. In that case, the contract in question—actually the agency's request for proposals—provided: "Note: In the event the Maine Legislature repeals all or part of the program, the Department and the State of Maine shall bear no responsibility to compensate the Contractor." 688 A.2d at 423. The parties' contract also

included a rider expressing the intention of incorporating the provisions of the RFP. *Id*. at 424. The Court construed the rider to incorporate the RFP's notice and, on that basis, affirmed the entry of summary judgment. *Id*. at 427 (Lipez, J., dissenting).

The Court previously considered this argument in conjunction with the earlier recommended decision on the Authority's motion to dismiss. (Oct. 19, 2010, Rec. Dec. at 23-24, Doc. No. 35.) The assessment at that time was that the proper way to address this theory was not to treat the Authority's alleged breach as excused by supervening "impracticability" or "illegality" or "impossibility," but to recognize that the Authority's third-party action (or a separate, later action for contribution) supplied the means of its performance of the alleged obligation to pay. Additionally, my view was that the Claims Court decisions addressing HUD's direct liability under HAP contracts with project owners was a good indication that HUD is not excused of its housing assistance payment obligations whenever Congress passes a law that frustrates its own contract performance. *See*, *e.g*., *Cuyahoga I*, 57 Fed. Cl. at 767-77 (discussing the unmistakability doctrine at length). If HUD would not be excused of its financial obligations to the Authority, its contractual agent, for actions the Authority undertook at HUD's direction, then, in effect, there would be no reason to treat substitute performance in damages as impracticable. Indeed, HUD does not even contend in its own motion for summary judgment that it would not have contributory liability to the Authority on the third-party claim. I am not persuaded that that analysis was wrong, but believe that the point is moot because

there is no breach by the Authority to excuse by application of this common law doctrine.

3. The Overall Limitation Clause as a Cap on Damages

Even if the Court concludes that a genuine issue of breach is demonstrated on this record, it does not necessarily follow that the overall limitation would not restrict a damages calculation. HUD asserts that the overall limitation imposes a limitation on expectancy damages, should the Court reach the issue of damages. (HUD Mot. at 18-19 (collecting cases).) Plaintiffs oppose this idea. (Pls. Consol. Opposition at 21-23 (collecting cases).) For reasons already explained, Plaintiffs simply are not entitled to automatic adjustments for contract rents that are materially different from market rents for comparable unassisted units, so any attempt to measure their expectations at the time of contracting would have to consider the overall limitation. *See Statesman II*, 66 Fed. Cl. at 620-24 (applying the overall limitation clause as a "cap" on expectancy damages and finding a genuine issue for trial based on the parties' disagreement over the initial difference); *Cuyahoga II*, 65 Fed. Cl. at 551-52 (considering how to apply the material difference limitation in relation to measuring the plaintiff's "expectancy damages," but doing so where the plaintiff conceded application of the overall limitation); *but see Park Props.*, 82 Fed. Cl. at 169-74 (negating the provision by means of a prevention analysis).[20]

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[20] The plaintiff in the Cuyahoga case was a local housing authority that owned and/or operated its own section 8 housing projects. In a later decision on the plaintiff's damages, Judge Allegra explained how the breach at issue was the sanction of disallowing retroactive rent increases based on a "timely

4. Calculation Disputes

The Authority asserts that Plaintiffs' presentation fails to make any adjustment for unit vacancies; fails to acknowledge that the contract for Island Apartments was renewed in 2009; and fails to account for certain payments to Washington House. (Authority Opposition to Pls. Mot. at 15-16, Doc. No. 102; Authority Statement of Additional Material Facts in Opposition to Pls. Statement, Doc. No. 103.) In short, it does not appear that there is an undisputed sum certain that the Court might reduce to a finding of fact at present. Although two challenges are limited to specific projects and would not prevent an award for the other projects, the concern over accounting for vacancies, which Plaintiffs do not deny

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request" rule established in Notice H 95-12, *despite a showing on the part of the plaintiff that it qualified for the adjustments. Cuyahoga Metro. Hous. Auth. v. United States*, 65 Fed. Cl. 534, 539-40 & n. 5 (2005) ("*Cuyahoga II*"). Although Judge Allegra concluded that Congress and HUD flatly "repudiated" the HAP Contracts in 1994 and after, *id*. at 541, this recommendation rejects the idea that there was necessarily an across-the-board repudiation of the contracts of every project in the country receiving housing assistance payments pursuant to a similarly worded HAP contract. Note, as well, that despite the outcome and analysis in *Cuyahoga I* Justice Allegra still treated the overall limitation as operative in the context of calculating contract expectancy damages and considered at some length how it might reasonably be applied, although the plaintiffs there conceded the application of the overall limitation clause. *Id*. at 543, 549-553. Plaintiffs' insistence that the overall limitation be treated as a nullity begs the question of whether they could possibly prove contract rents that are not materially different from the market rents in their areas. I conclude that this failure of proof runs to the issue of material breach and not just to the issue of measuring damages.

(Pls. Reply to Authority Additional Statement ¶ 2, Doc. No. 112), extends to every project.

5. Statute of Limitation

In addition to these concerns, there is a legal dispute over the application of the six-year statute of limitation. (HUD Mot. at 13-18 (collecting cases); Pls. Consol. Opposition at 23-26 (collecting cases).) Plaintiffs filed their action on December 28, 2009. With a statute of limitation cut-off of December 28, 2003, the question is whether Plaintiffs would be entitled to recover unpaid rents under any contract for the period between December 28, 2003, and the contract's anniversary date. HUD asserts that the claim for any alleged breach would have accrued as of the anniversary date, so that the claim for an automatic adjustment in that year has expired. If accurate, then this analysis means that the damages for any project would not begin to accumulate until the first anniversary date after December 28, 2003. Plaintiffs, on the other hand, argue that the right to retroactive readjustment of contract rents is a right to be made whole for the entirety of the limitation period. This time around, Plaintiffs look to Notice H 95-12 to support their claim, observing that it allows for rent increases on dates other than the anniversary date and that HUD has historically allowed for adjustments to become effective on dates other than the anniversary date. (*Id*. at 24 n. 13.)

Pursuant to Maine law, a contract claim "accrues at the time of breach." *Dunelawn Owners' Ass'n v. Gendreau*, 2000 ME 94, ¶ 11, 750 A.2d 591, 595. Plaintiffs' alleged right to an automatic annual adjustment arose, by contract, on the anniversary date and, by extension, their related contract claim

for denial of the automatic adjustment accrued on that date as well. Although the regulatory scheme allowed for adjustment on a date other than the anniversary date, that scheme required a request and Plaintiffs have not shown that any resulting adjustment would have been applied retroactively. Thus, while it is all well and good to enhance the contract terms in Plaintiffs' favor by reference to HUD's regulatory framework, that framework called for requests and Plaintiffs have not presented evidence of a request made on the anniversary date, or at the end of the "stub period," as they call it, or on any date in between. For this reason, their claims are restricted to the contract provision that calls for automatic adjustment on the anniversary date. The contract claim for automatic adjustment in the stub period accrued outside of the limitation period and is time barred. *See Greenleaf Ltd. P'ship*, 2010 U.S. Dist. Lexis 104574, *24-25, 2010 WL 3894126, *8; *but see Pennsauken Senior Towers Urban Renewal Assocs. v. United States*, 83 Fed. Cl. 623, 629 (2008) (ruling otherwise on a motion to dismiss because "HUD contemplated mid-year adjustments to contractual rents under HAP Contracts."). Additionally, the statute of limitation would prevent Plaintiffs from obtaining the adjustments for those years outside of the limitation period in which they were denied. In other words, beyond just losing the "stub period," the Plaintiffs would not be able to calculate their damages based on the notion that the AAAFs for 1995 through 2002 are to be retroactively factored in to determine contract rents in 2004 and after. *See Statesman II*, 66 Fed. Cl. at 626. For the record, it does not appear that Plaintiffs have attempted to increase their claim based on retroactive application of AAAFs for 1995 through 2005.

## CONCLUSION

For the reasons set forth above, I RECOMMEND that the Court grant summary judgment to the Authority and to HUD and deny Plaintiffs' motion.

## NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, and request for oral argument before the district judge, if any is sought, within fourteen (14) days of being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within fourteen (14) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

**APPENDIX D**

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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No. 12-1952

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ONE AND KEN VALLEY HOUSING GROUP;
TWO AND KEN VALLEY HOUSING GROUP;
THREE AND KEN VALLEY HOUSING GROUP;
FIVE AND KEN VALLEY HOUSING GROUP;
SIX AND KEN VALLEY HOUSING GROUP
*Plaintiffs-Appellants*

v.

MAINE STATE HOUSING AUTHORITY
*Defendant / Third Party Plaintiff-Appellee*

SHAUN DONOVAN, SECRETARY,
US DEPARTMENT OF HOUSING & URBAN DEVELOPMENT
*Third Party Defendant-Appellee*

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Before

Lynch, *Chief Judge*,
Torruella, Howard, Thompson,
Kayatta, *Circuit Judges*,
and Casper,* *District Judge*.

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ORDER OF COURT

Entered: July 10, 2013

The petition for rehearing having been denied by the panel of judges who decided the case, and the

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* Of the District of Massachusetts, sitting by designation.

petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be *denied*.

By the Court:

/s/ Margaret Carter, Clerk

# APPENDIX E

## FEDERAL STATUTE

### 42 U.S.C.A. § 1437f. Low-income housing assistance

(a) Authorization for assistance payments

For the purpose of aiding low-income families in obtaining a decent place to live and of promoting economically mixed housing, assistance payments may be made with respect to existing housing in accordance with the provisions of this section.

(b) Other existing housing programs

(1) In general

The Secretary is authorized to enter into annual contributions contracts with public housing agencies pursuant to which such agencies may enter into contracts to make assistance payments to owners of existing dwelling units in accordance with this section. In areas where no public housing agency has been organized or where the Secretary determines that a public housing agency is unable to implement the provisions of this section, the Secretary is authorized to enter into such contracts and to perform the other functions assigned to a public housing agency by this section.

(2) The Secretary is authorized to enter into annual contributions contracts with public housing agencies for the purpose of replacing public housing transferred in accordance with subchapter II-A of this chapter. Each contract entered into under this subsection shall be for a term of not more than 60 months.

(c) Contents and purposes of contracts for assistance payments; amount and scope of monthly assistance payments

(1) An assistance contract entered into pursuant to this section shall establish the maximum monthly rent (including utilities and all maintenance and management charges) which the owner is entitled to receive for each dwelling unit with respect to which such assistance payments are to be made. The maximum monthly rent shall not exceed by more than 10 per centum the fair market rental established by the Secretary periodically but not less than annually for existing or newly constructed rental dwelling units of various sizes and types in the market area suitable for occupancy by persons assisted under this section, except that the maximum monthly rent may exceed the fair market rental (A) by more than 10 but not more than 20 per centum where the Secretary determines that special circumstances warrant such higher maximum rent or that such higher rent is necessary to the implementation of a housing strategy as defined in section 12705 of this title, or (B) by such higher amount as may be requested by a tenant and approved by the public housing agency in accordance with paragraph (3)(B). In the case of newly constructed and substantially rehabilitated units, the exception in the preceding sentence shall not apply to more than 20 per centum of the total amount of authority to enter into annual contributions contracts for such units which is allocated to an area and obligated with respect to any fiscal year beginning on or after October 1, 1980. Proposed fair market rentals for an area shall be published in the Federal Register with reasonable time for public comment, and shall become effective upon the date of publication in final form in the

Federal Register. Each fair market rental in effect under this subsection shall be adjusted to be effective on October 1 of each year to reflect changes, based on the most recent available data trended so the rentals will be current for the year to which they apply, of rents for existing or newly constructed rental dwelling units, as the case may be, of various sizes and types in the market area suitable for occupancy by persons assisted under this section. Notwithstanding any other provision of this section, after October 12, 1977, the Secretary shall prohibit high-rise elevator projects for families with children unless there is no practical alternative. The Secretary shall establish separate fair market rentals under this paragraph for Westchester County in the State of New York. The Secretary shall also establish separate fair market rentals under this paragraph for Monroe County in the Commonwealth of Pennsylvania. In establishing fair market rentals for the remaining portion of the market area in which Monroe County is located, the Secretary shall establish the fair market rentals as if such portion included Monroe County. If units assisted under this section are exempt from local rent control while they are so assisted or otherwise, the maximum monthly rent for such units shall be reasonable in comparison with other units in the market area that are exempt from local rent control.

(2)(A) The assistance contract shall provide for adjustment annually or more frequently in the maximum monthly rents for units covered by the contract to reflect changes in the fair market rentals established in the housing area for similar types and sizes of dwelling units or, if the Secretary determines, on the basis of a reasonable formula. However, where the maximum monthly rent, for a unit in a new

construction, substantial rehabilitation, or moderate rehabilitation project, to be adjusted using an annual adjustment factor exceeds the fair market rental for an existing dwelling unit in the market area, the Secretary shall adjust the rent 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. The immediately foregoing sentence shall be effective only during fiscal year 1995, fiscal year 1996 prior to April 26, 1996, and fiscal years 1997 and 1998, and during fiscal year 1999 and thereafter. Except for assistance under the certificate program, for any unit occupied by the same family at the time of the last annual rental adjustment, where the assistance contract provides for the adjustment of the maximum monthly rent by applying an annual adjustment factor and where the rent for a unit is otherwise eligible for an adjustment based on the full amount of the factor, 0.01 shall be subtracted from the amount of the factor, except that the factor shall not be reduced to less than 1.0. In the case of assistance under the certificate program, 0.01 shall be subtracted from the amount of the annual adjustment factor (except that the factor shall not be reduced to less than 1.0), and the adjusted rent shall not exceed the rent for a comparable unassisted unit of similar quality, type, and age in the market area. The immediately foregoing two sentences shall be effective only during fiscal year 1995, fiscal year 1996 prior to April 26, 1996, and fiscal years 1997 and 1998, and during fiscal year 1999 and thereafter. In establishing annual adjustment factors for units in new construction and substantial rehabilitation projects, the Secretary shall take into account the fact that debt service is a fixed expense. The

immediately foregoing sentence shall be effective only during fiscal year 1998.

(B) The contract shall further provide for the Secretary to make additional adjustments in the maximum monthly rent for units under contract to the extent he determines such adjustments are necessary to reflect increases in the actual and necessary expenses of owning and maintaining the units which have resulted from substantial general increases in real property taxes, utility rates, or similar costs which are not adequately compensated for by the adjustment in the maximum monthly rent authorized by subparagraph (A). The Secretary shall make additional adjustments in the maximum monthly rent for units under contract (subject to the availability of appropriations for contract amendments) to the extent the Secretary determines such adjustments are necessary to reflect increases in the actual and necessary expenses of owning and maintaining the units that have resulted from the expiration of a real property tax exemption. Where the Secretary determines that a project assisted under this section is located in a community where drug-related criminal activity is generally prevalent and the project's operating, maintenance, and capital repair expenses have been substantially increased primarily as a result of the prevalence of such drug-related activity, the Secretary may (at the discretion of the Secretary and subject to the availability of appropriations for contract amendments for this purpose), on a project by project basis, provide adjustments to the maximum monthly rents, to a level no greater than 120 percent of the project rents, to cover the costs of maintenance, security, capital repairs, and reserves required for the owner to carry out a strategy acceptable to the Secretary for addressing

the problem of drug-related criminal activity. Any rent comparability standard required under this paragraph may be waived by the Secretary to so implement the preceding sentence. The Secretary may (at the discretion of the Secretary and subject to the availability of appropriations for contract amendments), on a project by project basis for projects receiving project-based assistance, provide adjustments to the maximum monthly rents to cover the costs of evaluating and reducing lead-based paint hazards, as defined in section 4851b of this title.

(C) Adjustments in the maximum rents under subparagraphs (A) and (B) shall not result in material differences between the rents charged for assisted units and unassisted units of similar quality, type, and age in the same market area, as determined by the Secretary. In implementing the limitation established under the preceding sentence, the Secretary shall establish regulations for conducting comparability studies for projects where the Secretary has reason to believe that the application of the formula adjustments under subparagraph (A) would result in such material differences. The Secretary shall conduct such studies upon the request of any owner of any project, or as the Secretary determines to be appropriate by establishing, to the extent practicable, a modified annual adjustment factor for such market area, as the Secretary shall designate, that is geographically smaller than the applicable housing area used for the establishment of the annual adjustment factor under subparagraph (A). The Secretary shall establish such modified annual adjustment factor on the basis of the results of a study conducted by the Secretary of the rents charged, and any change in such rents over the previous year, for assisted units and unassisted units

of similar quality, type, and age in the smaller market area. Where the Secretary determines that such modified annual adjustment factor cannot be established or that such factor when applied to a particular project would result in material differences between the rents charged for assisted units and unassisted units of similar quality, type, and age in the same market area, the Secretary may apply an alternative methodology for conducting comparability studies in order to establish rents that are not materially different from rents charged for comparable unassisted units. If the Secretary or appropriate State agency does not complete and submit to the project owner a comparability study not later than 60 days before the anniversary date of the assistance contract under this section, the automatic annual adjustment factor shall be applied. The Secretary may not reduce the contract rents in effect on or after April 15, 1987, for newly constructed, substantially rehabilitated, or moderately rehabilitated projects assisted under this section (including projects assisted under this section as in effect prior to November 30, 1983), unless the project has been refinanced in a manner that reduces the periodic payments of the owner. Any maximum monthly rent that has been reduced by the Secretary after April 14, 1987, and prior to November 7, 1988, shall be restored to the maximum monthly rent in effect on April 15, 1987. For any project which has had its maximum monthly rents reduced after April 14, 1987, the Secretary shall make assistance payments (from amounts reserved for the original contract) to the owner of such project in an amount equal to the difference between the maximum monthly rents in effect on April 15, 1987, and the reduced maximum monthly rents, multiplied by the number of months

that the reduced maximum monthly rents were in effect.

(3) The amount of the monthly assistance payment with respect to any dwelling unit shall be the difference between the maximum monthly rent which the contract provides that the owner is to receive for the unit and the rent the family is required to pay under section 1437a(a) of this title. Reviews of family income shall be made no less frequently than annually.

(4) The assistance contract shall provide that assistance payments may be made only with respect to a dwelling unit under lease for occupancy by a family determined to be a lower income family at the time it initially occupied such dwelling unit, except that such payments may be made with respect to unoccupied units for a period not exceeding sixty days (A) in the event that a family vacates a dwelling unit before the expiration date of the lease for occupancy or (B) where a good faith effort is being made to fill an unoccupied unit, and, subject to the provisions of the following sentence, such payments may be made, in the case of a newly constructed or substantially rehabilitated project, after such sixty-day period in an amount equal to the debt service attributable to such an unoccupied dwelling unit for a period not to exceed one year, if a good faith effort is being made to fill the unit and the unit provides decent, safe, and sanitary housing. No such payment may be made after such sixty-day period if the Secretary determines that the dwelling unit is in a project which provides the owner with revenues exceeding the costs incurred by such owner with respect to such project.

(5) The Secretary shall take such steps as may be necessary, including the making of contracts for assistance payments in amounts in excess of the amounts required at the time of the initial renting of dwelling units, the reservation of annual contributions authority for the purpose of amending housing assistance contracts, or the allocation of a portion of new authorizations for the purpose of amending housing assistance contracts, to assure that assistance payments are increased on a timely basis to cover increases in maximum monthly rents or decreases in family incomes.

(6) Redesignated (5)

(7) Repealed. Pub.L. 105-276, Title V, § 550(a)(3)(C), Oct. 21, 1998, 112 Stat. 2609

(8)(A) Not less than one year before termination of any contract under which assistance payments are received under this section, other than a contract for tenant-based assistance under this section, an owner shall provide written notice to the Secretary and the tenants involved of the proposed termination. The notice shall also include a statement that, if the Congress makes funds available, the owner and the Secretary may agree to a renewal of the contract, thus avoiding termination, and that in the event of termination the Department of Housing and Urban Development will provide tenant-based rental assistance to all eligible residents, enabling them to choose the place they wish to rent, which is likely to include the dwelling unit in which they currently reside. Any contract covered by this paragraph that is renewed may be renewed for a period of up to 1 year or any number or years, with payments subject to the availability of appropriations for any year.

(B) In the event the owner does not provide the notice required, the owner may not evict the tenants or increase the tenants' rent payment until such time as the owner has provided the notice and 1 year has elapsed. The Secretary may allow the owner to renew the terminating contract for a period of time sufficient to give tenants 1 year of advance notice under such terms and conditions as the Secretary may require.

(C) Any notice under this paragraph shall also comply with any additional requirements established by the Secretary.

(D) For purposes of this paragraph, the term "termination" means the expiration of the assistance contract or an owner's refusal to renew the assistance contract, and such term shall include termination of the contract for business reasons.

(9) Repealed. Pub.L. 113-4, Title VI, § 601(b)(2)(A), Mar. 7, 2013, 127 Stat. 107

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# APPENDIX F

MODEL CONTRACT
40 Fed. Reg. 16933 (Apr. 15, 1975)

* * * *

APPENDIX III – Housing Assistance Payments Contract

Part I

This Housing Assistance Payments Contract ("Contract") is entered into by and between the _____ a housing finance agency ("HFA"), which is a public housing agency as defined in the United States Housing Act of 1937, 42 U.S.C. 1437, *et seq*. ("Act"), at section 1437a(6), and _____ ("Owner"), and approved by the United States of America acting through the Department of Housing and Urban. Development ("Government") pursuant to the Act and the Department of Housing and Urban Development Act, 42 U.S.C. 3531, *et seq*.

The parties hereto agree as follows:

* * * *

1.9 *Rent adjustments—a. Funding of Adjustments*. Housing assistance payments will be made in increased amounts commensurate with Contract Rent adjustments under this Section up to the maximum amount authorized under Section 1.6 of this Contract.

b. *Automatic Annual Adjustments*. (1) Automatic Annual Adjustment Factors will be determined by the Government at least annually; interim revisions may be made as market conditions warrant. Such Factors and the basis for their determination will be published in the Federal Register. These

published Factors will be reduced appropriately by the Government where utilities are paid directly by the Families.

(2) On each anniversary date of the Contract, the Contract Rents shall be adjusted by applying the applicable Automatic Annual Adjustment Factor most recently published by the Government. Contract Rents may be adjusted upward or downward, as may be appropriate; however, in no case shall the adjusted Contract Rents be less than the Contract Rents on the effective date of the Contract.

c. *Special Additional Adjustments*. Special additional adjustments may be granted, when approved by the Government, to reflect increases in the actual and necessary expenses of owning and maintaining the Contract Units which have resulted from substantial general increases in real property taxes, utility rates, or similar costs (i.e., assessments, and utilities not covered by regulated rates), but only if and to the extent that the Owner or the HFA clearly demonstrates that such general increases have caused increases in the Owner's operating costs which are not adequately compensated for by automatic annual adjustments. The Owner or the HFA shall submit to the Government financial statements which clearly support the increase.

d. *Overall Limitation*. Notwithstanding any other provisions 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 HFA (and approved by the Government, in the case of adjustments under paragraph c of this Section).

e. *Adjustment to Reflect Actual Cost of Permanent Financing*. This paragraph e shall apply if the project is not permanently financed until after the effective date of the Contract. After the project is permanently financed, the HFA shall submit a certification to the Government as to the actual financing terms and the following provisions shall apply:

(1) If the actual debt service under the permanent financing is lower than the anticipated debt service on which the Contract Rents were based, the Contract Rents currently in effect shall be reduced commensurately, and the amount of the savings shall be credited to the Project Account. The Maximum ACC Commitment shall not be reduced except by the amount of the contingency, if any, which was included for possible increases under paragraph e(2) of this Section.

(2) If the actual debt service under the permanent financing is higher than the anticipated debt service on which the Contract Rents were based, and the HFA is using its set-aside for the project, the Contract Rents currently in effect shall be increased commensurately, not to exceed the limitations in this paragraph e(2) and the amount of the Financing Cost Contingency in the ACC, if the projected borrowing rate (net interest cost) was not less than the average net interest cost for the preceding quarter (at the time the projection was submitted to the Government) of the "20 Bond Index" published weekly in the *Bond Buyer*, plus 50 basis points. An adjustment under this paragraph e(2) shall not be more than is necessary to reflect an increase in, debt service (based upon the original projected capital cost and the actual term of the permanent financing for the

project) resulting from an increase in interest rate of not more than:

(i) One and one-half percent if the projected spread as submitted to the Government was three-fourths of one percent or less, or

(ii) One percent if such projected spread was more than three-fourths of one percent but not more than one percent, or

(iii) One-half of one percent if such projected spread was more than one percent.

(3) After Contract Rents have been adjusted in. accordance with paragraph e(1) or e(2) of this section, the maximum amount of the ACC commitment shall be reduced by the amount of any unused portion of the Financing Cost Contingency, and such portion shall be reallocated to the then current set-aside of the HFA, if any. At the same time, if the Contract Rents have been increased in accordance with paragraph e(2) of this section, the maximum Contract amount specified In section 1.1g shall be increased commensurately.

f. *Incorporation of Rent Adjustment*. Any adjustment in Contract Rents shall be incorporated into Exhibit A by a dated addendum to the exhibit establishing the effective date of the adjustment.

* * * *