No. 13-246

IN THE

Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

REPLY BRIEF

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REPLY BRIEF

This case clearly warrants review. Neither the Solicitor General nor the Maine State Housing Authority disagrees that the interpretation of the Housing Act adopted by the U.S. Department of Housing and Urban Development (HUD), and accepted by the court below, literally nullifies unambiguous statutory provisions requiring that owners in the Section 8 program receive an annual increase in rental rates unless the administering housing authority produces a "market comparability study" demonstrating the adjustment is unwarranted. Pet. 9-11 (citing 42 U.S.C. § 1437f(c)(2)(C)). Neither respondent disputes that *Cisneros* v. *Alpine Ridge Group*, 508 U.S. 10 (1993), considered precisely the same contractual and statutory provisions at issue in this case, and construed them—contrary to the First Circuit's holding—as imposing the burden on the housing authority to conduct a comparability study before denying a rate adjustment. Pet. 17-20. And respondents cannot reasonably deny, as indeed the Solicitor General acknowledges, U.S. Br. 17-18, that the decision below conflicts with *Haddon Housing Associates* v. *United States*, 711 F.3d 1330 (Fed. Cir. 2013), and other opinions squarely rejecting HUD's interpretation and holding that a housing authority breaches its contractual and statutory obligations by refusing a rate adjustment without first completing the requisite comparability study. Pet. 13-17.

Rather than challenge these points, which amply support certiorari, respondents instead try to change the subject. They assert that this case involves only "state law contract claims," U.S. Br. 10; Maine Br. 18, but elsewhere concede (as they must) that the contracts must be interpreted and applied pursuant to and in accordance with federal statutes and regula-

tions, U.S. Br. 1-2, Maine Br. 3 n.4. They contend that HUD's interpretation of the Housing Act was not "pressed or passed upon" in this case or others, U.S. Br. 14, even though a cursory review of the parties' briefs and courts' opinions proves the contrary, Pet. App. 8a, 18a n.10. And, although they repeatedly cite amendments to the Housing Act enacted in 1994 as supporting HUD's interpretation, and requiring the *owner* to produce a comparability study as a prerequisite to receiving a rate adjustment, U.S. Br. 15; Maine Br. 10-11, they ignore that those amendments left in place other provisions, enacted in 1998, unambiguously mandating that the *authority* must conduct the comparability study, and that if the authority fails to do so the adjustment "*shall* be applied," 42 U.S.C. § 1437f(c)(2)(C) (emphasis added).

Notwithstanding respondents' efforts to direct attention elsewhere, the First Circuit's interpretation of the Housing Act is flatly inconsistent with the statute's language, conflicts with opinions of this Court and others, and implicates issues of exceptional national importance concerning the administration of the federal low-income housing program. Certiorari should be granted.

I. THE FIRST CIRCUIT'S DECISION CONFLICTS WITH OPINIONS FROM OTHER CIRCUITS.

The decision of the First Circuit creates a direct split with the Federal Circuit and conflicts with opinions of other courts. Pet. 13-17.

1. There can be no doubt, notwithstanding the respondents' suggestions to the contrary, that the issue presented and decided in this case was also presented and decided—with a contrary result—in *Haddon*. In both cases participating owners alleged that the ad-

ministering authority had breached its contractual and statutory obligations by denying an annual adjustment in rental rates without producing a supporting "market comparability study," as required by 1988 amendments to the Housing Act. Pet. App. 15a-19a; *Haddon*, 711 F.3d at 1336-37; *Haddon Hous. Assocs., LLC* v. *United States*, 99 Fed. Cl. 311, 329-30 (2011). In both cases, the authority responded by asserting that 1994 amendments shifted to the owners the burden to conduct the comparability study. Pet. App. 8a; *Haddon*, 711 F.3d at 1333. The courts in *Haddon* agreed with the owners, holding that the authority had breached its obligations by failing to produce a comparability study, 711 F.3d at 1336-37, whereas the courts in this case agreed with HUD, holding that the 1994 amendments relieved the authority of that burden and allowed it to deny the adjustment without conducting a comparability study, Pet. App. 15a-19a. Those holdings are irreconcilable.

The respondents nevertheless argue that the cases are distinguishable because the administering authority in *Haddon* was HUD while the contract in this case was administered by a state agency. U.S. Br. 18-19; Maine Br. 12-18. This is a distinction without a difference. *All* housing contracts under the Section 8 program, whether with a state agency or with HUD, include the same basic terms (prescribed by HUD) and must be interpreted and administered pursuant to the same federal statutes and regulations. 42 U.S.C. § 1437f(b); Maine Br. 3 n.4. The identity of the administering authority therefore does not and cannot have any impact on the parties' obligations under the contract—even if it might be relevant (as Maine contends, Maine Br. 13-14) to *other* issues in these cases, for example in assessing

whether damages might be capped under common law "prevention" or "legal impossibility" doctrines.

The respondents also assert that the conflict with *Haddon* is not sufficiently "clear" because the Federal Circuit's discussion of this issue was "cursory," U.S. Br. 18-19—with Maine going so far as to suggest (like the panel below, Pet. App. 16a n.8) that the Federal Circuit "did not address or decide this issue" but instead found it to be waived, Maine Br. 10. This misreads *Haddon*. The issue that the Federal Circuit found to be waived was not the one presented here—*i.e.*, whether the housing authority breached its obligations by denying a rate adjustment without producing a comparability study—but instead the separate issue of whether the "overall limitation clause" of the housing contract otherwise capped the damages that might be awarded. 711 F.3d at 1336 nn.1-2; see *Haddon*, 99 Fed. Cl. at 338-40 (holding that clause does not cap damages). The Solicitor General acknowledges this point, correctly explaining (contrary to Maine's position) that the Federal Circuit found only this separate issue to be waived. U.S. Br. 18-19. By contrast, on the issue of breach, the Federal Circuit's opinion expressly adopts the "careful analysis" of the Court of Federal Claims, and holds that HUD's denial of a rate adjustment constitutes "a breach of the [housing c]ontract." 711 F.3d at 1336-37. It is thus "clear" that *Haddon* addressed the same issue presented here, and reached a result contrary to the First Circuit.

In a final effort to sidestep this split, the Solicitor General argues that the issue presented in this case—the proper interpretation of the Housing Act—was not "pressed or passed upon" in the courts below. U.S. Br. 14. That contention is groundless. In their briefs on appeal the petitioners argued that the 1988

amendments "put the burden on rent-setting agencies … to perform an actual [comparability study], and to pay the full [a]djusted rent if they failed to do so on a timely basis," and further that HUD's interpretation of the "1994 [amendments] subverted the established Section 8 rent adjustment mechanism, by switching the default from 'automatic' adjustment to no adjustment absent action by the owner." Appellants' Br. 23, No. 12-1952 (1st Cir.).[1] The First Circuit rejected those arguments, agreeing with HUD's position that "the 1994 amendment[s] ... shift[ed] the onus onto landlords to demonstrate [through a comparability study] that adjusted rents would not exceed the market rent for comparable units." Pet. App. 8a, 18a n.10.

The interpretation of the Housing Act was clearly raised in both this case and *Haddon*, and resolved differently by the two courts of appeals. Pet. 13-15. That split, which means that the right to rent adjustments turns solely on the fortuity of whether HUD or a state agency is the contracting party, warrants review by this Court.

2. The decision below also conflicts with a number of other federal court opinions. Pet. 15-17. Those opinions, following the analysis in *Haddon*, hold that the 1994 amendments cannot be read to alter or repeal the requirement that the housing authority con-

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[1] The petitioners certainly did not, as the Solicitor General asserts, "agree[ ] that the 1994 amendments shifted the burden of performing comparability studies to landlords." U.S. Br. 14. Rather, the cited section of the appeals court brief merely assumes for purposes of argument that HUD's interpretation is correct—in which case the statute itself would represent an impermissible interference with the contract. Appellants' Br. 32-33. Other parts of the brief explicitly challenge HUD's interpretation as "inconsistent with the … statute[ ]." *Id.* at 23.

duct a comparability study before denying a rate adjustment. *Id.* They recognize, further, that allowing a housing authority to unilaterally modify its obligations under a housing contract, as does HUD's interpretation, would violate constitutional limitations on the power of state and federal governments to interfere with existing contractual arrangements. *Id.*

The respondents do not seriously dispute that the decision below conflicts with these opinions. Nor could they: those opinions—addressing claims against both state authorities and HUD—reject the First Circuit's approach and adopt the same interpretation of the Housing Act proposed by petitioners. Pet. App. 16a n.9; *e.g.*, *Cathedral Square Partners* v. *S.D. Hous. Dev. Auth.*, 875 F. Supp. 2d 952, 959 (D.S.D. 2012); *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). These conflicts would justify this Court review even in the absence of a circuit split (which, of course, is also present here).

II. THE FIRST CIRCUIT'S DECISION CONFLICTS WITH *CISNEROS* V. *ALPINE RIDGE GROUP*, 508 U.S. 10 (1993).

This case is the rare one that presents not only a circuit split but also a square conflict with an opinion of this Court. Pet. 17-20. In *Alpine Ridge* this Court considered contractual and statutory provisions "indistinguishable" (U.S. Br. 4) from those at issue here, and it interpreted those provisions—citing the 1988 amendments—as requiring that an annual adjustment must be granted in all but the "exceptional" situation where the *housing authority* can produce a comparability study demonstrating that the adjustment is unwarranted. 508 U.S. at 20-21. Notwith-

standing this seemingly clear statement of federal law, the First Circuit held to the contrary in this case, ruling that an adjustment can be denied whenever the adjusted rates would exceed generic "fair market rents" published by HUD, with no need for the authority to produce a comparability study. Pet. App. 9a, 17a.[2] There is no way to reconcile that holding with the statutory framework described in *Alpine Ridge*.

Rather than argue otherwise, the respondents contend that this discussion in *Alpine Ridge* can be ignored because it was not necessary to the Court's holding and was, they say, merely intended to provide "general" guidance regarding one method an authority *might* use to deny an adjustment, without limiting the authority's "discretion … to select [a different] method." U.S. Br. 16. Nothing in this Court's opinion, however, suggests that these statements

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[2] Throughout their briefs, the respondents improperly conflate the concepts of "fair market rent" and "market comparability study," when those terms are defined differently by HUD itself. Pet. 10 n.7. The "fair market rents" are generic figures published by HUD, selected in its discretion, based on telephone surveys of apartment owners in an area. HUD, *Fair Market Rents for the Section 8 Housing Assistance Payments Program* 1-2 (July 2007). A "market comparability study," by contrast, involves an independent assessment of the properties in a particular vicinity to identify those units that are actually "comparable" to the property under review, under a range of metrics, and thereby determine the standard rates in the locality. HUD, *Section 8 Renewal Policy* §§ 9-9 to 9-15 (Feb. 2008). Thus, the fact that a unit's rental rate exceeds the "fair market rent" published by HUD does not and cannot establish that "material differences" exist between the rates at "comparable" assisted and unassisted properties, such that an adjustment could properly be denied. *Haddon*, 711 F.3d at 1336-37. Only by conducting the comparability study, as required by the 1988 amendments, can that determination be made. *Id.*

were anything other than a carefully considered and definitive description of the statute's operation that, even if not technically binding as a matter of *stare decisis*, should be followed by the lower courts. See *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 737-38 (2007). At the very least, *Alpine Ridge* makes clear that housing contracts must be administered in a manner consistent with the statutory requirements, and that neither HUD nor state authorities possess unfettered discretion—of the type claimed here, U.S. Br. 16; Maine Br. 21-22—to ignore those requirements in favor of their own preferred method for determining that an adjustment is unwarranted. 508 U.S. at 20-21. In particular, as mandated by the 1988 amendments, the authority must complete a comparability study before it can deny an adjustment.

The 1994 amendments did not overrule *Alpine Ridge*, as respondents would have it. Those amendments did not repeal the 1988 amendments, or modify the requirement that the housing authority conduct the comparability study, and nothing in the legislative record—including the materials cited by the respondents, U.S. Br. 5; Maine Br. 21-22—suggests that they were intended to modify or supersede the framework discussed in *Alpine Ridge*. To the contrary, the 1994 amendments left in place the provisions of the 1988 amendments stating that the housing authority must conduct and submit a comparability study at least 60 days before the 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).

In light of this history, and the long-standing presumption against implied repeals, *Kremer* v. *Chem. Constr. Corp.*, 456 U.S. 461, 468 (1982), there was no

basis for the First Circuit to conclude that the 1994 amendments fundamentally altered the *Alpine Ridge* framework or nullified *sub silentio* the comparability study requirement. If clear statements of this Court are to be rendered a nullity, that should be a matter for this Court, and not the First Circuit. In any event, the lower court's misconception of *Alpine Ridge* should be addressed by this Court.

III. THIS CASE PRESENTS ISSUES OF EXCEPTIONAL NATIONAL IMPORTANCE.

This case would merit review even in the absence of the above conflicts because it concerns matters of exceptional national importance. Pet. 20-24. The First Circuit's decision, if allowed to stand, will enable and encourage state authorities across the Nation to continue to deny rate adjustments to participating owners whenever the adjusted rate would exceed a hypothetical "fair market rent" of HUD's own crafting, without any study of comparable local units. *Id.* No longer assured of the rate adjustments guaranteed them under federal law, housing owners will continue to refuse to renew their housing assistance contracts, dramatically decreasing the number of low-income units available and putting at risk the millions of individuals and families who rely on the program to obtain decent, safe, and affordable housing. *Id.*

The respondents assert that there is no reason to believe these harms will come to pass because HUD's interpretation has been in effect for "nearly two decades" with no "evidence of an exodus [of participating owners] during that time." U.S. Br. 20; Maine Br. 24-25. That assertion is belied by HUD's own data. The agency reported in 2006—seven years ago—that nearly 100,000 units had been lost between 1998 and 2004 alone due to owners opting out of the Section 8 program when their contracts expired. HUD, *Multi-*

family Properties: Opting In, Opting Out and Remaining Affordable 14 (2006). The majority of these units were, moreover, located in "metropolitan areas" and "in neighborhoods with relatively higher median incomes, higher median rents, and lower poverty rates." *Id.* at 27; U.S. Gov't Accountability Office, *Project-Based Rental Assistance: HUD Should Update Its Policies and Procedures to Keep Pace With the Changing Housing Market* 22 (2007). In other words, the properties most likely to opt out of the program are those in the most densely populated and affluent areas, where affordable housing is in greatest need.

The respondents argue further that the issues presented here are of "diminishing importance" because HUD revised its housing assistance contracts to reflect its preferred interpretation of the statute. U.S. Br. 19. But that fact simply reinforces the need for immediate review. Property owners wishing to renew their participation in the Section 8 program can only do so by executing the revised contracts, with the language mandated by HUD, see 42 U.S.C. § 1437f(c), and by doing so they may be seen as agreeing with and accepting HUD's underlying interpretation of the Housing Act as to rent levels. As a result, they may be precluded—on grounds of waiver or estoppel—from bringing *any* future claim challenging that interpretation or alleging that an adjustment is required by the statute even if not mandated by the contracts. This case, in other words, may offer among the last vehicles to cleanly present this issue for the Court, before HUD's misinterpretation of the statute is enshrined in all contracts across the country.

In all events, regardless of how the First Circuit's decision affects the Section 8 program prospectively, it will undoubtedly produce immediate and lasting impacts for the thousands of properties that remain

subject to their original, long-term housing contracts. Owners of those properties, denied anticipated rent adjustments, are being and will continue to be forced to reduce funding available for improvements and care of the units and facilities. *Project-Based Rental Assistance*, *supra*, at 38-39. The burden will ultimately fall, again, on the residents, as amenities are reduced, repairs delayed, and upgrades abandoned. Whatever losses are incurred by owners as a result of HUD's interpretation, the toll on the hundreds of thousands of families who live in affordable housing will be negative and severe.

CONCLUSION

For these reasons and those presented in the petition, certiorari should be granted.

Respectfully submitted,

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