NO. 14-781

In the
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
CMS CONTRACT MANAGEMENT SERVICES, *et al.*,
Respondents.

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

BRIEF IN OPPOSITION FOR CMS CONTRACT MANAGEMENT SERVICES; THE HOUSING AUTHORITY OF THE CITY OF BREMERTON; NATIONAL HOUSING COMPLIANCE; ASSISTED HOUSING SERVICES CORP.; NORTH TAMPA HOUSING DEVELOPMENT CORP.; CALIFORNIA AFFORDABLE HOUSING INITIATIVES, INC.; SOUTHWEST HOUSING COMPLIANCE CORP.; AND NAVIGATE AFFORDABLE HOUSING PARTNERS

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QUESTION PRESENTED

The Federal Grant and Cooperative Agreement Act, 31 U.S.C. §6301 *et seq.*, was enacted to curb the inappropriate agency practice of using grants and other assistance agreements in lieu of procurement contracts to evade federal laws requiring fair and competitive processes to obtain property or services for the government's own benefit. To that end, the statute draws a clear line between procurement contracts and assistance agreements: An agency shall use a procurement contract when "the principal purpose of the instrument is to acquire (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government." 31 U.S.C. §6303. An agency shall use an assistance agreement when "the principal purpose of the relationship is to transfer a thing of value to the … recipient to carry out a public purpose of support or stimulation authorized by a law of the United States." *Id.* §§6304, 6305. The question presented is:

Whether the Court of Appeals correctly concluded that the "principal purpose" of the contracts through which the U.S. Department of Housing and Urban Development ("HUD") outsources certain administrative tasks associated with HUD's project-based housing assistance contracts is to procure contract administration services for HUD's direct benefit, not to transfer things of value to assist the contract administrators in advancing a public purpose.

PARTIES TO THE PROCEEDING

Petitioner is the United States of America, an appellee below and the defendant in the Court of Federal Claims.

Respondents are CMS Contract Management Services; the Housing Authority of the City of Bremerton; the Massachusetts Housing Finance Agency; National Housing Compliance; Assisted Housing Services Corp.; North Tampa Housing Development Corp.; California Affordable Housing Initiatives, Inc.; Southwest Housing Compliance Corporation; and Navigate Affordable Housing Partners, formerly known as Jefferson County Assisted Housing Corp. Massachusetts Housing Finance Agency was an appellee below and an intervenor-plaintiff in the Court of Federal Claims. All other respondents were appellants below and plaintiffs in the Court of Federal Claims.

CORPORATE DISCLOSURE STATEMENT

CMS Contract Management Services is a non-profit instrumentality of the Housing Authority of the City of Bremerton. CMS Contract Management Services does not have a parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

The Housing Authority of the City of Bremerton has no parent company, and no publicly held corporation owns 10 percent or more of its stock.

National Housing Compliance has no parent company, and no publicly held corporation owns 10 percent or more of its stock.

Assisted Housing Service Corporation is a wholly owned subsidiary of the Columbus (OH) Metropolitan Housing Authority, and no publicly held corporation owns 10 percent or more of its stock.

North Tampa Housing Development Corporation is a wholly owned subsidiary of Tampa (FL) Housing Authority, and no publicly held corporation owns 10 percent or more of its stock.

California Affordable Housing Initiatives, Inc. is a wholly owned subsidiary of the Oakland (CA) Housing Authority, and no publicly held corporation owns 10 percent or more of its stock.

Southwest Housing Compliance Corporation is a wholly owned subsidiary and instrumentality of the Housing Authority of the City of Austin, Texas, and no publicly held corporation owns 10 percent or more of its stock.

Navigate Affordable Housing Partners, Inc. is an instrumentality of the Jefferson County Housing

Authority. No publicly held corporation owns 10 percent or more of its stock.

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INTRODUCTION

This case involves a decidedly factbound question regarding the "principal purpose" of one agency's specific legal instrument—namely, the contract the Department of Housing and Urban Development ("HUD") uses to outsource the duties of administering the separate contracts with private property owners through which it provides project-based housing assistance. In the face of severe staff shortages and operational budget cuts, HUD turned to outside contract administrators in 1999 to take over the administration of the contracts through which HUD provides project-based housing assistance payments. HUD obtained those outside administrative services via contracts known as performance-based annual contribution contracts ("PBACCs"). HUD's repeated extension of the PBACCs beyond their initial five-year duration prompted concerns about mismanagement and waste, culminating in a 2009 inspector general report urging the agency to re-award the PBACCs through a competitive process.

HUD initially took those concerns to heart. In 2011, HUD used a competitive process to re-award the PBACCs, resulting in contracts that HUD estimated would yield $100 million in annual savings for the federal government. But HUD's effort to introduce competition was predictably unpopular with incumbents, including many state housing finance agencies. When roughly half of those agencies lost their contracts in the re-competition, they vociferously protested. HUD ultimately succumbed to those entrenched interests: HUD withdrew the contracts and one year later attempted to award them through

a non-competitive process that all but ensured that the PBACCs would be awarded to any state housing finance agency that sought one. HUD insisted that it could employ this new anti-competitive restriction because, contrary to HUD's practice for well over a decade, it labeled the PBACCs "cooperative agreements," not "procurement contracts," and declared them immune from the competitive requirements of procurement laws.

Both the Government Accountability Office ("GAO") and U.S. Court of Appeals for the Federal Circuit rejected HUD's tactic. They found that the PBACCs are designed to acquire contract administration services for HUD's direct benefit and use and thus are procurement contracts subject to competition. While the government takes issue with that splitless and factbound conclusion and invites this Court to engage in error correction, there is no error to correct—let alone the kind of manifest miscarriage that would justify this Court's intervention. Nor can the government credibly claim that the decision below is exceptionally important. Indeed, it has very little to say about the broader importance of the decision below because a factbound determination about the "principal purpose" of one government contract carries no obvious implication for the next one. But even if both the GAO and Court of Appeals erred in construing the PBACCs as procurement contracts, the consequence is that those contracts will be subjected to competitive processes that improve efficiency and save taxpayers money, instead of being steered to favored parties. Those are not the kind of consequences that would justify this

Court's review of a splitless and factbound resolution of an infrequently litigated question.

STATEMENT OF THE CASE

A. The Grant Act

Executive agencies generally must use one of two classes of legal instruments: procurement contracts and assistance agreements (*i.e.*, grants or cooperative agreements). When an agency uses the former, it must adhere to numerous statutory and regulatory requirements, including the Competition in Contracting Act ("CICA"), 41 U.S.C. §3301, and the Federal Acquisition Regulations ("FAR"), 48 C.F.R. ch. 1, designed to ensure that the process through which the contract is awarded is fair and competitive and achieves the best value for the government. An agency need not abide by those requirements, however, when it awards an assistance agreement.

Decades ago, agencies largely were left to their own devices in deciding which form of legal instrument to use. Over time, however, Congress became concerned that agencies were using "grants to avoid competition and certain requirements that apply to procurement contracts." S. Rep. No. 95-449, at 7 (1977). In an effort to curb these "inappropriate practices," *id.*, Congress enacted the Federal Grant and Cooperative Agreement Act ("Grant Act"), 31 U.S.C. §6301 *et seq.*, which creates a statutory standard for "distinguish[ing] Federal assistance relationships from Federal procurement relationships." Pub. L. No. 95-224, §2(a)(2) (1978).

Under the Grant Act, whether an agency must use a procurement contract or an assistance agreement depends on the "principal purpose" of the instrument

the agency proposes to enter. "[W]hen … the principal purpose of the instrument is to acquire (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government," then the "agency shall use a procurement contract." 31 U.S.C. §6303. By contrast, when the principal purpose of the instrument is "to transfer a thing of value to the … recipient to carry out a public purpose of support or stimulation authorized by a law of the United States," then the "agency shall use a grant" or "cooperative agreement." *Id.* §§6304, 6305. By drawing this clear distinction, Congress endeavored to eliminate the "inconsistencies, confusion, inefficiency, and waste," Pub. L. No. 95-224 §2(a)(3), that result when "agencies ignore the economies of competitive procurement and indiscriminately use grants in place of contracts." S. Rep. No. 97-180, at 1 (1981); *accord Henke v. U.S. Dep't of Commerce*, 83 F.3d 1445, 1451-52 (1996).

B. Housing Assistance Payment Contracts

Through Section 8 of the Housing Act of 1937, 42 U.S.C. §1437f *et seq*., Congress has charged HUD with providing rental assistance to low-income families and individuals. In 1974, Congress authorized HUD to offer subsidies through housing assistance payment contracts ("HAP contracts"), which are contracts that HUD enters into with owners of newly constructed or substantially rehabilitated housing projects to help subsidize their low-income tenants' rent. Pub. L. No. 93-383, §201(a) (1974) (codified at 42 U.S.C. §1437(a)(1) *et seq*.). HAP contracts enable project owners to get HUD or HUD-insured construction loans and assist them in paying their mortgages.

Pursuant to the 1974 amendments, HUD entered into some 21,000 HAP contracts with project owners selected directly by HUD. HUD also entered into approximately 4,200 contracts known as annual contributions contracts with public housing agencies. Through these statutorily authorized instruments, HUD provided public housing agencies with federal funding to enter into their own HAP contracts with project owners; in other words, HUD granted the public housing agencies broad discretion to determine how best to use federal funding to further the goals of the HAP contract program. *See* 42 U.S.C. §1437f(b). In 1983, Congress repealed HUD's authority to enter into any new HAP contracts—whether on its own or through agreements with public housing agencies. *See* Pub. L. No. 98-181, §209(a)(1)-(2) (1983). In doing so, however, Congress neither cancelled nor altered HUD's obligations under the existing HAP contracts, many of which had terms as long as 20 or even 40 years. Accordingly, although HUD no longer had any power to enter into *new* HAP contracts, it remained obligated to administer and provide billions of dollars annually in assistance payments under the tens of thousands of *existing* HAP contracts.

C. The PBACCs and the 1999 RFP

For the next 15 years, HUD continued to administer its HAP contracts itself. But HUD's efforts came under fire when, in 1999, its inspector general issued a report charging the agency with lax oversight and rampant mismanagement of the project-based rental assistance program. At the same time, HUD also found itself facing significant staffing and operational budget cuts. In response to these

pressures, HUD decided to begin outsourcing the bulk of its HAP contract administration duties. Accordingly, in its FY2000 budget request, HUD asked Congress for $209 million to cover the costs of hiring third parties to take on the task of administering HAP contracts. AR253. HUD explained to Congress that its "plans to *procure* the services of contract administrators to assume many of these specific duties [would] release HUD staff for those duties that only the government can perform." AR259 (emphasis added). HUD also explained that it hoped shifting to greater reliance on outsourcing would "improve … oversight" of and "increase accountability for" HAP contracts. AR258-59.

In 1999, HUD put its outsourcing plan into action by issuing a request for proposals ("RFP") to hire a performance-based contract administrator ("PBCA") in each state. HUD designated these new contracts performance-based annual contribution contracts ("PBACCs"). Although HUD borrowed the term "annual contributions contracts" from the earlier contracts through which it had authorized public housing agencies to enter into HAP contracts on their own, HUD has acknowledged that "the scope of responsibilities of a [Performance-Based] Contract Administrator is more limited than that of a Traditional Contract Administrator" under those traditional annual contributions contracts. AR1929. Most notably, PBACCs confer no authority on PBCAs to enter into, rescind, or modify HAP contracts. Instead, the PBCA's duties all relate to administering the preexisting HAP contracts, including monitoring and verifying project owners' compliance with their obligations under those HAP contracts and ensuring

that they timely receive the assistance payments that HUD owes them. AR1374-1400.

PBCAs have little to no discretion in deciding how to accomplish those tasks, as HUD has established comprehensive processes by which PBCAs must abide when administering HAP contracts. For instance, PBCAs must use detailed checklists developed by HUD to conduct management and occupancy reviews of the projects and must alert HUD to any health and safety deficiencies. PBCAs must verify the accuracy of monthly vouchers submitted by project owners before giving HUD the green light to transmit assistance payment funds. If a project owner fails to comply with its obligations under its HAP contract, a PBCA has no power to withhold assistance payments or take any other type of enforcement action. Instead, it just reports that non-compliance to HUD, which decides whether assistance payments should continue. When HUD does transfer funds to a PBCA for disbursement as assistance payments, the PBCA has no discretion as to how to use those funds; instead, it must ensure that the funds are transmitted to the designated project owner within one business day of receipt. AR1363, 1377-78, 1383. Any interest earned on those funds during the brief period in which they are in a PBCA-controlled account belongs to HUD or must be invested pursuant to requirements established by HUD. AR1363.

In all respects, then, HAP contracts and PBACCs remain separate and distinct legal instruments. HAP contracts are the preexisting contracts through which HUD has agreed to make some $9 billion in annual assistance payments to owners of low-income housing

projects. PBACCs, by contrast, are the contracts through which HUD uses its approximately $210 million annual outsourcing budget to hire third parties to "act as an agent of HUD" by administering those HAP contracts on its behalf. AR2412. HUD compensates PBCAs for performing that ministerial duty by paying them "administrative fees" to cover the costs of their services in administering the HAP contracts. The PBCAs also can earn "incentive fees" if their contract administration work exceeds a certain quality level. AR435. But with or without the PBCAs or the PBACCs under which they operate, HUD would remain just as obligated to ensure that project owners receive the assistance payments they are owed under HAP contracts.

Although HUD's 1999 RFP for PBACCs purported not to be "a formal procurement within the meaning of the Federal Acquisition Regulations (FAR)," HUD announced that it would "follow many of those principles"—and it did. 64 Fed. Reg. 27,358, 27,358 (Aug. 12, 1999). For instance, to assess proposals, HUD announced that it would use the FAR's "best value trade-off" process, whereby it would evaluate bidders' prices for their services and technical merit and award PBACCs to those offering "the best overall value, including administrative efficiency, to the Department." AR442; *see* 48 C.F.R. §15.101-1. HUD's instructions for organizing the proposal also followed that of a procurement process, including, among other things, a "statement of work" requirement and a list of "Factors for Award." AR430-46.

HUD also made clear that the RFP was a process through which "offerors w[ould] *competitively* bid to

perform contract administration services for properties with project-based Section 8 HAP Contracts." AR429 (emphasis added). Thus, although HUD accepted bids only from a "public housing agency"—a term that Congress has defined broadly to include state and local governmental entities as well as their agencies and instrumentalities, *see* 42 U.S.C. §1437a(b)(6)(A)—HUD solicited bids on a statewide basis and allowed bidders to compete for multiple contracts, thereby encouraging public housing agencies to operate across state lines. AR440. HUD also left successful bidders free to subcontract some or all PBACC duties to third parties, including non-profit and for-profit government contractors. HUD ultimately awarded 37 PBACCs through the 1999 RFP. Although HUD initially received no qualified proposals in 16 jurisdictions, it entered into 16 more PBACCs over the next six years.

D. HUD's 2011 PBACC Re-Competition

While the PBACCs awarded in 1999 were only for five-year terms, HUD did not re-compete any of these contracts for the next 10 years. Instead, it continued to renew PBACCs without regard to whether the entities awarded those contracts in 1999 continued to offer the best HAP contract administration services at the best value. Accordingly, notwithstanding the initial promise of HUD's outsourcing initiative, over time, serious mismanagement and inefficiencies in the administration of HAP contracts arose yet again.

These problems culminated in a damning 2009 audit report in which HUD's inspector general found that some PBCAs were pocketing profits ranging from 39% to 67%—and in one case, *198%*—of their

operating expenses. AR468, *available at* HUD Office of Inspector General Audit Report, 2010-LA-0001 at 9 (2009), http://perma.cc/9zt7-hhy2. The report criticized PBCAs for diverting PBACC funds to activities with no apparent connection to "the contract's stated purpose" and using funds to "repay millions of dollars" for prior misuse of other HUD-restricted funds. AR470. The report attributed these problems primarily to HUD's failure to re-compete the PBACCs, which it found had deprived HUD of "the cost/benefits of lower cost subcontractors" that could administer HAP contracts more efficiently than the existing PBCAs. AR468. The report concluded that HUD had failed to "ensure accountability for results and include appropriate, cost-effective controls" over its PBACCs and thus "did not obtain the best value for the $291 million spent in 2008 on contract administration services." AR465.

In response to the inspector general's report, HUD finally agreed to re-compete the PBACCs through a competitive and "market-driven" process that would promote more "cost effective outsourcing of contract administration services, cost efficiencies, and controls." AR490. Specifically, HUD vowed to require "[c]ost proposals … of all applicants to assess reasonable fee and associated profit margin[s]" and to "[p]rovide contract language that provides for recompeting the contract periodically to ensure market competition." AR490. HUD also noted the need to increase the number of applicants and recognized that "PBCAs operational in various geographical service areas can provide cost efficiencies with economies of scale." AR490.

HUD's plans met with swift outcry from incumbent state housing finance agencies, which adamantly opposed *any* re-competition of the contracts but at a minimum demanded a competitive preference. HUD stood firm, however, vowing that, "to ensure that the Government is getting the best value" and the "full benefit of a competitive action[,] there will be no priority or preference status." AR676. And HUD initially followed through on that promise, conducting a re-competition in 2011 through which it made "best value" determinations and announced new awards of all 53 PBACCs. Because bidders were, as in 1999, permitted to cross state lines and compete in multiple jurisdictions, some PBCAs—including respondents, who are public housing agencies that have provided HAP contract administration services in multiple jurisdictions throughout the country for years—were awarded multiple PBACCs. Meanwhile, roughly half of the incumbent state housing finance agencies were displaced by more competitive public housing agency bidders. In all, HUD estimated that the new contracts would save the federal government "more than $100 million per year." Pet.App.6a.

The 2011 re-competition sparked the filing of protests of the awards in 42 states with GAO, the agency tasked by Congress with ensuring that federal procurement processes comply with statutory and regulatory requirements. *See* 31 U.S.C. §§3551-3556; *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289, 1304 (D.C. Cir. 1971) (noting "the stature of the GAO in the procurement area"). All of the protestors—including 14 state housing finance agencies—took the position, consistent with long-settled understandings, that PBACCs are procurement contracts over which GAO

has jurisdiction. But HUD responded to these protests by moving to dismiss on the ground that PBACCs are actually "cooperative agreements," not procurement contracts, and thus fall outside GAO's jurisdiction. HUD took that litigation position even though it had never before characterized PBACCs as "cooperative agreements," and had never before listed them in the Catalogue of Federal Domestic Assistance, something that federal agencies must do whenever they use assistance agreements.

When GAO reserved ruling on HUD's motion and ordered briefing on the merits, HUD withdrew 42 protested awards and announced its intention to "revise its competitive award process." AR2843.

E. HUD's 2012 PBACC "Re-competition"

HUD's commitment to a more competitive process for awarding PBACCs proved short-lived. In 2012, in the wake of the 2011 protests and withdrawal of the protested awards, HUD issued a new solicitation for PBACCs. Unlike in its 1999 and 2011 solicitations, however, HUD expressly labeled the revised solicitation a "Notice of Funding Availability" ("NOFA"), a term typically reserved for cooperative agreements. Pet.App.40a. While the PBACCs' terms were essentially unchanged, moreover, HUD for the first time referred to the PBACC as a "cooperative agreement" in the instrument itself. AR1364. In conjunction with the new solicitation, HUD registered the PBCA program in the Catalogue of Federal Domestic Assistance for the very first time.

While the terms of the proposed PBACCs remained unchanged, the "NOFA" introduced sharp new restrictions on eligibility and competition. Most

notably, HUD announced that it would "consider applications from out-of-State applicants *only for States for which HUD does not receive an application from a legally qualified in-State applicant*." AR554 (emphasis added). As HUD acknowledged, this in-state preference would extinguish competition from out-of-state bidders in virtually all jurisdictions, as state housing finance agencies were likely to apply in all but a handful of states. In one fell swoop, HUD thus rendered ineligible a large segment of "public housing agencies" that are equally eligible to compete under the statute—including most of the very same contractors that it had only one year earlier found would provide the "best value" and most savings for HUD and taxpayers. HUD acknowledged that nothing in federal law required it to introduce this new in-state preference; instead, it defended its actions only by insisting that it need not award PBACCs through a competitive process because they are not procurement contracts.

After being effectively excluded from competition in 2012 even though HUD selected them as the "best value" PBCAs in 2011, respondents filed pre-award protests with GAO, arguing—as the state housing finance agencies had in their own protests the prior year—that PBACCs are procurement contracts and thus must be awarded in a manner consistent with federal procurement laws, which preclude unjustified anti-competitive restrictions. After reviewing the PBACCs and an extensive record, GAO agreed, concluding that, under the standard set forth in the Grant Act, the principal purpose of the PBACCs is to acquire contract administration services "for HUD's direct benefit and use," Pet.App.107a, not "to transfer

a thing of value to the … recipient to carry out a public purpose of support or stimulation authorized by a law of the United States," 31 U.S.C. §6305.

In reaching that conclusion, GAO rejected HUD's argument that it transfers a "thing of value" to PBCAs within the meaning of the Grant Act when it transfers to PBCAs the $9 billion in funds that they, in turn, transfer to project owners as the assistance payments owed under the HAP contracts. As GAO explained, the PBCAs "themselves have no rights to the payments (or control over them) once HUD authorizes the payments and transfers the funds to the[m] … for distribution." Pet.App.104a. Instead, the PBCAs "act only as a 'conduit' for the payments," transferring them from HUD to the project owner that is the other party to the HAP contract. Pet.App.104a.

GAO also rejected HUD's argument that the $210 million in administrative and incentive fees that HUD pays PBCAs for performing the administrative tasks counts as the "transfer [of] a thing of value … to carry out a public purpose" within the meaning of the Grant Act, as these "fees are paid … as compensation for their provision of service—*i.e.*, administering the HAP contracts," not to assist PBCAs in carrying out public purposes on their own. Pet.App.99a, 105a. Accordingly, GAO concluded that HUD's decision to use a cooperative agreement rather than a procurement contract "was unreasonable and in disregard of applicable statutory guidance," and recommended that HUD "cancel the NOFA and solicit the contract administration services … through a procurement instrument." Pet.App.107a-109a.

In an extraordinary move, HUD disregarded GAO's recommendation and announced that it would "'move forward'" and "'announce awards'" under the 2012 "NOFA." Pet.App.9a. That marked only the eleventh time over the preceding 15 years—during which time GAO issued more than 5,700 recommendations—that an agency disregarded a GAO recommendation concerning the conduct of a federal procurement. *Cf. Honeywell, Inc. v. United States*, 870 F.2d 644, 647 (Fed. Cir. 1989) ("Agencies traditionally have deferred to GAO recommendations … even when those views conflicted with the agency's original position"); 31 U.S.C. §3554(e)(2) (requiring formal reporting to Congress of any agency decision to disregard GAO).

F. Proceedings Below

After HUD ignored GAO's recommendation, respondents asked the Court of Federal Claims to enjoin HUD from proceeding with the 2012 "NOFA," arguing, *inter alia*, that the contracts are procurement contracts rather than cooperative agreements and therefore must be awarded in accordance with federal procurement laws and regulations. The court denied respondents' protests. In doing so, the court focused most of its analysis on whether HUD is *authorized* to enter into cooperative agreements. Pet.App.19a-20a. In effect, the court concluded that because HUD is authorized to assist states with carrying out public purposes relating to public housing, any contract with a public housing agency must involve the "transfer a thing of value … to carry out a public purpose." 31 U.S.C. §6305. With little analysis of the PBACC instruments themselves, the court thus concluded

that HUD may treat them as cooperative agreements because they are "a mechanism through which HUD, in cooperation with the states, carries out the statutorily authorized goal of supporting affordable housing for low-income individuals and families." Pet.App.76a.

In a unanimous decision, the Federal Circuit reversed. Placing repeated emphasis on the PBACCs' terms and "[t]he record in this case," the court found that "the primary purpose of the PBACCs is to procure the services of the PBCAs *to support HUD's staff and provide assistance to HUD*," not to provide assistance to PBCAs in advancing public purposes set forth in the Housing Act on their own. Pet.App.11a-12a. The court invoked numerous HUD statements, spanning decades, that reinforced its view. For instance, when HUD embarked on its outsourcing initiative in the late 1990s, it told Congress that it intended "'*to procure* the services of contract administrators … to release HUD staff for those duties'" and compensate for *its* "'major staff downsizing.'" Pet.App.11a-12a. HUD described the initiative as a way to "'conduct *its* business,'" "'improv[e] *its* performance,'" aid "'the *Department's efforts* to be more effective and efficient,'" and enlist "'support' *for HUD's* Field Staff." Pet.App.12a. At least until 2012, moreover, HUD selected awardees based on the "'best overall value … *to the Department*'" and lauded the program for "mak[ing] *HUD* a leader among Federal agencies in reducing improper payments." Pet.App.12a (emphasis added).

The Court of Appeals also invoked "[t]he record" to refute HUD's claims that the assistance payments and administrative fees render the PBACCs

cooperative agreements. The assistance payments, the court explained, are payments to project owners, not PBCAs, and are made "under the HAP contracts," not the PBACCs. Pet.App.13a. Thus, although HUD transferred the assistance payments under the HAP contracts to owners *through* the PBCAs, HUD was not thereby conferring something of value *on the PBCAs*, which "have no rights to, or control over, those funds" and "must remit any excess funds and interest earned back to HUD." Pet.App.13a. The administrative fees, meanwhile, "cover[] the operating expenses of administering HAP contracts on behalf of HUD," and thus do not provide PBCAs with "a thing of value … *to carry out a public purpose*," 31 U.S.C. §6305 (emphasis added). Pet.App.13a. In short, the court found that HUD and the PBCAs have "[a]t most" an "intermediary relationship," whereby the PBCAs "merely … provide a service to another entity which is eligible for assistance." Pet.App.13a. Accordingly, the court concluded that the PBACCs are procurement contracts and must be awarded in a manner consistent with federal procurement laws.

The government filed a petition for rehearing en banc, which was denied without dissent. Pet.App.16a.

REASONS FOR DENYING THE PETITION

This petition is as factbound and splitless as petitions come. The government must concede that federal agencies are not free to choose to avoid the competitive constraints that Congress has imposed on procurement contracts, as the whole point of the Grant Act was to preclude agencies from simply opting out of competitive constraints. HUD's decision to re-classify its agreements with third parties to obtain

administrative services as something other than procurement contracts thus is clearly subject to review for compliance with the Grant Act. And the government cannot credibly claim that the Court of Appeals was manifestly wrong in concluding that those agreements are procurement contracts subject to competitive constraints. Three neutral evaluators—GAO, the Court of Federal Claims, and the Federal Circuit—have considered these contracts, and two of the three have classified them as procurement contracts. That conclusion is entirely correct and is certainly not so manifestly incorrect as to warrant an extraordinary exercise in error correction by this Court.

The government's effort to exaggerate the importance of this case also rings hollow. The government can claim significant impact only by emphasizing the total amount of assistance payments transferred to project owners pursuant to its HAP contracts. But the relevant focus is not on that $9 billion in assistance funding, which will find its way to owners no matter how PBACCs are classified. This case is about only the $210 million in administrative fees that PBCAs receive in exchange for providing the services necessary to deliver the separate HAP funds efficiently to project owners. And the ultimate consequence of the decision below is that contracts for providing those services will be awarded competitively to the most efficient service providers. Even if (contrary to fact) that decision were reached in error, it would hardly constitute a catastrophe for either the government or the federal fisc.

I. The Factbound Decision Below Is Correct And Does Not Warrant This Court's Review.

A. The Decision Below Is Correct.

The Court of Appeals' conclusion that the PBACCs through which HUD outsources contract administration services are procurement contracts does not satisfy any of this Court's criteria for *certiorari*. *See* Sup. Ct. R. 10. The government does not attempt to identify any decisions—whether from this Court or otherwise—with which the factbound decision below purportedly conflicts. *Cf.* U.S. BIO 11, *Baltimore Cnty., Md. v. EEOC*, No. 14-7 (U.S. Oct. 2, 2014) (asserting that failure to "allege that the court of appeals' holding conflicts with any decision by this Court or by any other court of appeals … alone is a sufficient basis to deny further review"). Nor does the government attempt to identify any broader confusion about the applicable legal standards for determining whether an agency must proceed through a procurement contract or may use an assistance agreement. Instead, the government just makes an unadorned plea for error correction on what it concedes is an "'essentially factual determination,'" Pet.23, that will have little or no impact on anything other than this case, *see* Part II *infra*. Even assuming that were a sufficient basis to seek *certiorari*, there is simply no error for this Court to correct.

The basic legal standard that governs this case is not in dispute. "[W]hen ... the principal purpose of the instrument is to acquire (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government," the Grant Act dictates that an agency must use a procurement contract. 31

U.S.C. §6303. "[W]hen ... the principal purpose of the relationship is to transfer a thing of value to the … recipient to carry out a public purpose of support or stimulation authorized by a law of the United States," the agency may use a cooperative agreement. *Id.* §6305. An agency's discretion in determining which legal instrument to use is by no means absolute. To the contrary, the whole point of the Grant Act is to prevent an agency from labeling legal instruments assistance agreements in order "to avoid competition and certain requirements that apply to procurement contracts" when the contractual relationship at issue is plainly one to procure property or services. S. Rep. No. 95-449 at 7.

The Court of Appeals correctly concluded that HUD sought to do just that here. The manifest purpose of the PBACCs is "to acquir[e] … services for the direct benefit or use of the United States Government," 31 U.S.C. §6303—namely, contract administration services to relieve HUD of the burdens of administering HAP contracts itself. PBCAs are, after all, "Performance-Based *Contract Administrators*," and PBACCs unequivocally state that a PBCA "shall provide contract administration services" for HUD-selected housing projects for the specified contract term. AR1360; *see also* 64 Fed. Reg. at 44,039 (seeking bids from "sources interested in providing contract administration services for project-based Housing Assistance Payment Contracts under Section 8"). Each PBACC lists as its "Objectives" the "Programmatic Objectives[] *HUD seeks to achieve*" and "Administrative Objectives[] *HUD seeks to achieve*," which include "administer[ing] project-based Section

8 HAP Contract[s] consistently." AR1374 (emphases added).

The tasks PBCAs perform under PBACCs are limited to contract administration duties, which must be performed in the manner that *HUD* has directed. Those tasks include monitoring project owners' compliance with occupancy requirements and other HUD-imposed obligations, and ensuring that assistance payments under HAP contracts are transferred to project owners who remain in compliance "by the first business day after" HUD transfers those funds to the PBCA. AR1383. HUD's own Occupancy Handbook makes clear that HUD, not the PBCA, bears the "legal obligation to provide project owners with housing assistance payments under the HAP contracts." Pet.App.12a-13a. HUD, not the PBCA, dictates the obligations with which project owners must comply under the HAP contracts, and HUD, not the PBCA, decides whether to withhold assistance payments under a HAP contract. It is HUD, not the PBCA, that must sign HAP contract renewals, and, if a PBCA "is unable to provide contract administration services," HUD retains responsibility for doing so itself. AR2851.

As GAO, with its considerable expertise on the subject, concluded (and both of Congress' appropriations committees have since agreed[1]), the

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[1] *See* H. Rep. No. 113-464, at 86-87 (2014) ("The Committee concurs with decisions by [GAO] ... and … the Federal Circuit that HUD's contracts for performance-based contract administrator ... services are procurement contracts."); S. Rep. No. 113-182, at 131 (2014) ("The Department is directed to ensure

PBACC is a quintessential procurement contract. HUD does not enter into PBACCs to award government funds that PBCAs may use to further some broad "public purpose," 31 U.S.C. §6305, as they best see fit. Rather, HUD enters into PBACCs to hire PBCAs to act as a "conduit" in getting the $9 billion in annual assistance payments that HUD owes *under HAP contracts* from HUD to project owners, AR2849, so that HUD does not have to perform those administrative tasks itself. That is the very model of a contract "to acquire … services for the direct benefit or use of the United States Government." 31 U.S.C. §6303.

Indeed, HUD itself has recognized repeatedly that PBACCs procure a service for HUD's direct benefit. At the very inception of its outsourcing initiative, HUD told Congress of its "plans to *procure the services* of contract administrators to assume many of these specific duties." Pet.App.5a (emphasis added). Likewise, HUD consistently has articulated the PBACCs' principal purpose in terms of their benefits *to HUD*. For instance, HUD initially justified its outsourcing initiative as an effort to "relieve HUD staff of many duties they currently perform." AR253. HUD pledged to "follow many of th[e] principles" of "a formal procurement within the meaning of the [FAR]" in its very first RFP, AR428, and—at least until now—selected PBCAs based on which present "the best overall value … *to the Department*." Pet.App.12a. "[A]s recently as 2013," moreover, HUD praised PBCAs as "'hav[ing] helped *make HUD* a leader

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that the PBCA selection process be, to the greatest extent legally permissible, full, open, and fair.").

among Federal agencies in reducing improper payments,'" and as "'integral to *the Department's* efforts to be more effective and efficient in the oversight and monitoring of [the HAP] program,'" Pet.App.12a (emphases added); *see also* Pet.App.12a (HUD noting that PBCAs "improve *its* performance of the management and operations"); AR2412 (HUD describing PBCAs as "agent[s] of HUD").

"Based on this record," the Court of Appeals had little trouble concluding that "the primary purpose of the PBACCs is to procure the services of the PBCAs to support HUD's staff and provide assistance to HUD with the oversight and monitoring of Section 8 housing assistance." Pet.App.11a. The court did not reach that conclusion based on a mistaken belief that a procurement contract must be used any time "the responsibilities imposed on the non-federal entity could have been performed by federal employees," or any time the government receives some benefit from an agreement. Pet.25. It did so because the particular facts at hand readily confirm that PBACCs are in fact contracts "to acquire … services for the direct benefit or use of the United States Government." 31 U.S.C. §6303. There is no reason for this Court to disturb that manifestly correct result.

B. The Government's Contrary Arguments Were Fully Considered and Correctly Rejected Below.

The government's efforts to conjure up errors in the Court of Appeals' reasonable and record-based opinion are unavailing. Indeed, the court's record-based decision consciously eschewed the kind of sweeping or categorical approach on which the

government's arguments rely. The court simply found, based on the record before it, that the purpose of the PBACCs is principally one of PBCAs assisting HUD, not vice versa.

1. First, both the Court of Appeals and GAO correctly rejected the government's utterly circular argument that every contract that involves an exchange of money necessarily involves the "transfer [of] a thing of value … to carry out a public purpose" under the Grant Act. *See* Pet.15-17, 26-27. They did not reject that argument because they failed to recognize that the "nearly $9 billion in federal funds being transferred under the program" can be considered "a 'thing of value.'" Pet.14. They did so because they recognized that "[t]ransferring funds to the PBCAs *to transfer to the project owners* is not conferring anything of value *on the PBCAs*, especially where the PBCAs have no rights to, or control over, those funds." Pet.App.13a (emphases added). In other words, both the court and GAO reached the patently correct conclusion that the mere act of transferring money to a third party is not enough in and of itself to constitute "a 'thing of … value' *within the ambit of 31 U.S.C. §6305*." Pet.App.12a (emphasis added).

HUD's contrary argument mistakenly conflates the HAP contracts and their payment obligations, on the one hand, and the PBACCs and their service obligations, on the other. At most, *the assistance payments made under the HAP contracts* are a form of government assistance, provided in accordance with HUD's statutory mandate to make federal assistance available to low-income tenants through the owners of low-income housing projects. But HAP contracts and

PBACCs are two fundamentally different things—as reflected in HUD's own budget, which explicitly distinguishes the $9 billion in funding for assistance payments owed under HAP contracts from the $210 million in funding for fees owed under PBACCs. *See* Pub. L. No. 113-235, Div. K, tit. II (2014). HUD cannot convert the PBACCs into assistance agreements by treating a service provided in aid of administering HAP contracts as indistinguishable from the HAP contracts themselves.

The government's related argument that the administrative fees received by PBCAs "also qualify as a 'thing of value,'" Pet.17 n.11, Pet.26-27, fails for the same reason. In rejecting that argument, the Court of Appeals readily acknowledged that "money can be a 'thing of value' under 31 U.S.C. §6305 in certain circumstances." Pet.App.13a. It just concluded that this was not one of those circumstances because those fees are paid "to cover the operating expenses of administering HAP contracts on behalf of HUD," not to assist PBCAs in furthering public purposes on their own. Pet.App.13a; *see also* AR1363 (PBCAs "shall use the Administrative Fees to pay the operating expenses … to administer the HAP Contracts"). Indeed, HUD has deemed any excess fees that accrue to PBCAs "non-program income" exempt from HUD restrictions or oversight, AR1310—a plain indication that HUD is not disbursing those funds as assistance to achieve a public purpose. "[T]he common-sense conclusion that money is inherently a 'thing of value,'" Pet.16, is therefore entirely beside the point, as no one has suggested otherwise. But just as surely as money *can* be a thing of value under the Grant Act in the right circumstances, the mere fact that the government

actually *pays* a third party for the services it procures cannot be enough to relieve it of the obligation to comply with procurement requirements.

2. The government alternatively contends that the Court of Appeals and GAO failed to grasp the "principal purpose" of the legal instruments at hand. *See* Pet. 17-21. But the government itself conflates the "principal purpose" of *the Housing Act* with the "principal purpose" of *the PBACCs*. To be sure, at a very broad level, the Housing Act is intended to enable HUD to "work closely and collaboratively with state and local governments to ensure that all Americans have access to affordable housing." Pet.18. But as GAO has explained, "'the choice of instrument'" under the Grant Act "'depends solely on the principal federal purpose *in the relationship with the intermediary*,'" not the principal purpose of the statutory scheme under which the agency enters into that relationship. Pet.App.101a; *see also* 2 GAO, *Principles of Federal Appropriations Law* 10-17 (3d ed. 2004) ("Once the necessary underlying authority is found, the legal instrument (contract, grant, or cooperative agreement) that fits the arrangement as contemplated must be used, using the statutory definitions for guidance as to which instrument is appropriate.").

Of course, Congress may well authorize HUD to enter into assistance agreements in some circumstances. But that does not mean that every agreement into which HUD enters pursuant to the Housing Act necessarily is imbued with the same overarching purpose of the statute itself, or necessarily reflects an effort to "facilitate … federal-state cooperation," Pet.20, rather than to procure

services for HUD's direct benefit. Here, HUD is not enlisting assistance in determining what policies will best support or stimulate fair housing practices, or how best to allocate funds to further those policies. It is enlisting aid in administering contracts that *HUD itself* has entered into with third parties, under terms that *HUD itself* has established for providing assistance to those third parties. The government cannot convert that procurement of a defined service into an assistance agreement by pointing to the bare fact that the Housing Act is designed to advance "public policy."

3. The government fares no better with its extended appeal for deference. *See* Pet.22-24. As an initial matter, that plea is undercut substantially by HUD's own nearly unprecedented refusal to defer to the "expert opinion" of GAO that PBACCs are procurement contracts, not cooperative agreements. *Delta Data Sys. Corp. v. Webster*, 744 F.2d 197, 201 (D.C. Cir. 1984) (Scalia, J.). Moreover, unlike GAO, HUD has no particular expertise in applying the Grant Act, the whole point of which is to make clear that agencies do *not* get absolute deference in choosing which type of legal instrument to use—and in particular do *not* have discretion to avoid competitive constraints by "indiscriminately us[ing] grants in place of contracts" when they are procuring services for the government's direct benefit. S. Rep. No. 97-180 at 1. Indeed, Congress enacted the Grant Act notwithstanding protests that its classifications would "impair[]" and "limit[] the flexibility of Federal agencies." S. Rep. No. 95-449 Apps. B, D. When Congress passes a statute for the specific purpose of limiting federal agencies' ability to evade competitive

constraints by labeling arrangements something other than a procurement contract—over federal agencies' objections, no less—the scope for deference to those agencies' labeling decisions surely is limited.

In any event, the Court of Appeals and GAO did credit HUD's explanation of the PBACCs' "core purpose." Pet.25. They just found HUD's contemporaneous explanations of the principal purpose of the PBACCs more credible than HUD's self-serving, post hoc representations in litigation. *Cf. Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate."). As the Court of Appeals emphasized, until HUD's recent efforts to avert the 2011 protests and justify its blatant restriction of competition in the 2012 "NOFA," HUD had *never* described the PBACCs as cooperative agreements. To the contrary, for well over a decade, HUD repeatedly applied procurement principles in awarding those contracts, and made clear that it did so because PBACCs are contracts to supply a service to HUD—namely, efficient HAP contract administration. It requires no inordinate scrutiny to reject HUD's belated attempt to recharacterize these legal instruments as agreements "to assist PHAs in providing housing to low-income families." That representation is sorely out of step with the PBACCs themselves and the broader record of HUD's statements and practices as a whole.

4. Finally, the government attempts to broaden the impact of the narrow decision below by arguing that the Court of Appeals "attach[ed] unwarranted

significance to the PHAs' status as intermediaries that retransmit federal funds to project owners." Pet.14. Once again, the government reads isolated statements entirely out of context. *Cf. Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956) (this Court "reviews judgments, not statements in opinions"). The court did not conclude that intermediary status "by itself" always suffices to establish a procurement relationship. Pet.28. It simply acknowledged the guidance that Congress and GAO have provided on this matter: When the recipient of a contract is "'merely used to provide a service to another entity which is eligible for assistance,'" the contractual relationship is better viewed as one to procure that intermediary *service*, not to assist the entity in carrying out the underlying public purpose of the assistance at hand. Pet.App.13a (quoting S. Rep. No. 97-180 at 3); *see also 360Training.com, Inc. v. United States*, 104 Fed. Cl. 575, 580 (2012).

Of course, that does not mean, as the government suggests, *see* Pet.28, that agencies must use procurement contracts every time the recipient of federal funds ultimately will use that money to provide assistance to a third party. It just means that, consistent with the plain terms of the Grant Act, an agency must be guided by whether it seeks "to acquire the intermediary's *services*, which may happen to take the form of producing a product or carrying out a service that is then delivered to an assistance recipient," or "to *assist* the intermediary to do the same thing." S. Rep. No. 97-180 at 3 (emphasis added). Here, the answer is crystal clear: HUD is not providing PBCAs with funds to assist them in carrying out the PBCAs' own public purposes. HUD is

acquiring the PBCAs' services in delivering federal funds to the recipients of HAP contracts entered into by HUD itself. Accordingly, as both the Court of Appeals and GAO correctly concluded, "the proper instrument is a procurement contract." *Id*.

At bottom, the government's efforts to find fault in the decision below rest on mischaracterization of the facts and the decision's reasoning. The Court of Appeals did not make any sweeping pronouncements about the circumstances in which procurement contracts must be used. It simply found that, under a straightforward application of the straightforward test that Congress has articulated for "distinguish[ing] Federal assistance relationships from Federal procurement relationships," Pub. L. No. 95-224 §2(a)(1), PBACCs are procurement contracts. That the government continues to disagree with that result is not nearly enough reason for the Court to reconsider it.

II. The Decision Below Lacks Exceptional Importance.

As a straightforward application of the "principal purpose" test to a specific program—one that HUD long and repeatedly has emphasized is intended to provide HUD with administrative services for its own direct benefit—the decision below has far less practical or legal significance than the government suggests. Even the government's own suggestions of broader impact are surprisingly tepid, as it seems to recognize its ability to distinguish this factbound decision if and when other arrangements are challenged, and it fully reserves the right to do just that. Indeed, the government refuses to concede that

the decision will have important ramifications even for *this program*, or that it will preclude HUD from achieving the exact same result in its re-competition of the PBACCs. In short, even the government seems to recognize that it is not clear that the decision below will have *any* impact whatsoever beyond this particular case, let alone the kind of exceptionally important impact that warrants this Court's intervention.

To the extent the government suggests that the decision below somehow jeopardizes the $9 billion that HUD pays out under HAP contracts each year, that is simply not so. This case is not about whether payments under the HAP contracts will continue. They will. This case is solely about how HUD determines who will perform the ministerial tasks of *administering* those HAP contracts. Should incumbent PBCAs find themselves unable to win that right under a competitive procurement process, more efficient contractors will assume their place.[2] Indeed, HUD itself already recognized as much when it awarded numerous PBACCs to respondents in 2011. Accordingly, the only relevant dollar figure here is the $210 million in fees to be paid out to winning bidders *under the PBACCs*—a sum that, while certainly not insubstantial, pales in comparison to the $9 billion figure that the government misleadingly trumpets.

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[2] *Amicus* National Council of State Housing Agencies ("NCSHA"), the state housing finance agencies' trade association, similarly ignores that if its members are unable to provide the "best value" services, those services will simply be provided by a more efficient "public housing agency."

The government fares no better in complaining that the decision below will force HUD to abide by the "demanding requirements of both CICA and the FAR." Pet.31.[3] First, it is Congress, not the Court of Appeals, that made the judgment that procurement relationships must comport with federal procurement laws. Congress did so because it concluded that the public is best served by requiring federal agencies to employ fair and competitive procedures when contracting for goods and services. Congress enacted the Grant Act, moreover, because it sought to eliminate the "inconsistencies, confusion, inefficiency, and waste" that result when, as here, an agency fails to use procurement contracts to acquire goods or services. Pub. L. No. 95-224 §2(a)(3). HUD can hardly complain that it should be relieved of the burden of complying with federal law just because it finds Congress' regulatory requirements cumbersome. And HUD certainly should not be heard to raise such complaints when HUD's own inspector general found that HUD had created exactly the kind of waste and inefficiency that Congress enacted the Grant Act to reduce by failing to re-award PBACCs through a competitive process years ago.

In any event, while the government bemoans the burdens of complying with the "strictures of federal procurement law," Pet. 30, it conspicuously stops short

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[3] *Amicus* NCSHA erroneously suggests that procurement laws are intended only for private contractors, not public entities. This ignores the broad statutory definition of "public housing agency," 42 U.S.C. §1437a(b)(6)(A), as well as the countless public entities, such as public colleges and universities, that routinely compete for procurement contracts.

of conceding that doing so will necessarily change how HUD awards PBACCs. The government notes that "*it is not clear* whether HUD would be permitted to" continue limiting its competitions to public housing agencies, but it also readily acknowledges that both CICA and the FAR permit "departures" from their full and fair competition requirements when a conflicting statutory mandate is at issue. Pet.32 (emphasis added); *see, e.g.*, 41 U.S.C. §3304(a)(5) (providing an exception "when … a statute expressly authorizes or requires that the procurement be made … from a specified source"). Thus, to the extent the government means to suggest that the Housing Act precludes HUD from contracting with anyone other than a public housing agency—a matter on which the government is just as equivocal—its professed concern that HUD cannot hold a competitive procurement process without being forced to violate that statutory limitation appears illusory.

The government is equally noncommittal in its suggestions that the decision below might affect HUD's tenant-based rental assistance program. *See* Pet.33-34. And for good reason, as the tenant-based program does not include any outsourcing initiative comparable to the PBACCs through which HUD administers its project-based program. Instead, the agreements HUD enters into through the tenant-based program—agreements that HUD has listed as assistance agreements in the Catalogue of Federal Domestic Assistance for nearly three decades—are agreements under which a public housing agency is authorized to enter into assistance agreements *on its own behalf*. The public housing agency, not HUD, decides who should receive the funding that HUD has

made available, and the public housing agency, not HUD, decides whether to terminate that assistance. All of that stands in stark contrast to the PBACCs, under which PBCAs have *no* discretion to enter into HAP contracts on their own, *no* discretion to terminate HAP contracts into which HUD entered, and *no* rights or obligations other than administering HAP contracts. Unsurprisingly, the government itself is thus quick to acknowledge that "it may be possible to distinguish the project- and tenant-based programs in various ways." Pet.34.

Finally, even assuming there were anything remotely dire about the government's suggestion that "federal agencies may be reluctant to employ cooperative agreements" after the decision below, Pet.34, once again, the government's argument is readily refuted by the narrow scope of that decision. Indeed, the decision stands for little more than the unremarkable proposition that an agency's discretion to determine what type of legal instrument to use is constrained by the Grant Act. The government notes that the Court of Federal Claims "will be bound to apply the court of appeals' analysis" in future bid protest cases, Pet.34, but that makes little difference when the decision of which the government complains simply applies settled legal principles to a particular set of facts.

The government highlights a single case—which the government is appealing—in which the Court of Federal Claims was "informed" by the decision below in concluding that the Department of Interior erroneously used a cooperative agreement where a procurement contract was required. *See Hymas v.*

United States, 117 Fed. Cl. 466, 486-87, 500-01 (2014). But that hardly suggests that the decision below is a groundbreaking one—indeed, it would be far more noteworthy if the court were *not* informed by the decision below, as this case appears to be one of only two times in history that a Court of Appeals has had occasion to resolve a dispute over whether a legal instrument is a procurement contract or a cooperative agreement.[4] Nevertheless, it just so happens that the most recent Court of Federal Claims decision addressing whether a contract was a cooperative agreement under the Grant Act did *not* cite the decision below. *See Anchorage v. United States*, No. 14-166C (C.F.C. Jan. 22, 2015).

In any event, the more notable aspect of *Hymas* is its absence of any suggestion that the decision below broke new legal ground. Instead, *Hymas* relied on factual similarities between the two programs to conclude that "[t]he Administrative Record" before it "demonstrate[d] that the Service contracted with farmer-cooperators, not to benefit them financially, but to obtain their services." 117 Fed. Cl. at 487. That is far from compelling support for the government's effort to portray this case as having revolutionized government contracting law. That *Hymas* reached the same result as this case simply indicates that HUD may not be the only federal agency that has ever used a cooperative agreement where a procurement

[4] The only other case of which respondents are aware is *Rick's Mushroom Service, Inc. v. United States*, 521 F.3d 1338, 1343-44 (Fed. Cir. 2008), which cursorily deemed the lower court's resolution of the issue "sound."

contract was required—which is precisely why Congress enacted the Grant Act in the first place.

Given its vast array of responsibilities, the federal government sometimes can point to extraordinary consequences from an adverse decision. Here, however, the ultimate consequence of the decision below is that the government will not be able to evade the competitive process Congress has required for procurement contracts. While HUD insists that the PBACCs have been misclassified, both GAO and the Court of Appeals disagreed. But even on the unlikely assumption that HUD is correct, the consequence of letting the decision below stand would merely be a competitive process through which PBACCs are awarded to the most efficient providers. If both GAO and the Court of Appeals have somehow erred in insisting on such competition and efficiency, surely that is not the kind of error that would justify this Court taking an extraordinary detour into error correction.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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March 6, 2015