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

BRIEF OF THE NATIONAL COUNCIL OF STATE HOUSING AGENCIES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, the National Council of State Housing Agencies ("the Council"), is a nonprofit, nonpartisan organization comprised of the nation's state Housing Finance Agencies. Its members are the Housing Finance Agencies of every state, the District of Columbia, New York City, Puerto Rico, the U.S. Virgin Islands, and over 300 affiliate members in the affordable housing field. The Council's mission is to advance through advocacy and education the state Housing Finance Agencies' efforts to provide affordable housing to those who need it.

The Council's constituent Housing Finance Agencies are mission-based, publicly accountable, nonprofit entities created under state law to advance affordable housing in their states. They operate with statewide authority and qualify as Public Housing Agencies for purposes of administering federal housing assistance funded by the United States Department of Housing and Urban Development ("HUD"). As such, the Council's members have a strong stake in the proper functioning of HUD's

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[1] Pursuant to Rule 37.2, *amicus* notified all parties of its intent to file an *amicus curiae* brief at least ten days prior to the due date for the brief. The parties' letters of consent to this filing accompany this brief. Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to this brief's preparation or submission.

project-based rental assistance program and are directly affected by the decision at issue.

The Council participated in this matter as *amicus curiae* in both the United States Court of Federal Claims and the United States Court of Appeals for the Federal Circuit. In granting the Council's motion for leave to participate as *amicus curiae* in the Court of Federal Claims, the court found that "as the principal trade association for the nation's HFAs, [the Council] can provide the Court with useful information and context it might not otherwise receive regarding the statutory framework of project-based Section 8 programs and, in particular, the historical role of state HFAs within those programs." Order Granting Motion for Leave to File *Amicus* Brief at 2, *CMS Contract Mgmt. Servs. v. United States*, No. 12-cv-00852 (Fed. Cl. Feb. 1, 2013), ECF No. 54.

SUMMARY OF ARGUMENT

In the decision below, the United States Court of Appeals for the Federal Circuit held that the Federal Grant and Cooperative Agreement Act, 31 U.S.C. § 6301, et seq., requires that HUD use procurement contracts rather than cooperative agreements when partnering with Public Housing Agencies in each state to administer the Project-Based Rental Assistance Program under Section 8 of the Housing Act. This decision threatens the ability of the Council's members to fulfill the critical mission of providing housing assistance to low-income families. It also threatens more generally the use of cooperative agreements by the federal government

when entering into partnerships with state and local entities to fulfill important public purposes, with billions of dollars at stake.

The Federal Circuit exhibited a fundamental misunderstanding of the relationship between HUD and Public Housing Agencies in reaching the erroneous conclusion about what the Federal Grant and Cooperative Agreement Act requires. First, the Federal Circuit ignored that statewide Public Housing Agencies work in partnership with HUD to carry out a public purpose of support as authorized by Section 8 of the Housing Act. Second, the Federal Circuit failed to realize the true value of the cooperative agreements (also called "annual contribution contracts") and their concomitant administrative fees to statewide Public Housing Agencies in concluding they were not "thing[s] of value" under the statute.

If the decision below is allowed to stand, Public Housing Agencies could be seriously hampered in fulfilling their critical public function of providing housing assistance to low-income families. These agencies are already operating under severe funding constraints and should not have to devote their scarce resources to instituting the administrative procedures and compliance regimes that are required under the myriad of procurement-related statutes and regulations applicable to federal procurement contracts. Moreover, it is simply not appropriate to subject public agencies fulfilling a public purpose to the same requirements as private contractors. The decision below also threatens HUD's ability to

institute change to its housing assistance programs on a national scale. Under a procurement contract system, HUD would face endless bid protests and drawn-out disputes in attempting to award and administer assistance across all fifty states.

This Court's review is urgently needed to correct the erroneous decision of the Federal Circuit, which threatens not only the Section 8 Project-Based Rental Assistance Program, but also more generally the ability of the federal government to use the contracting procedures best suited to fulfilling critical public missions like ensuring that low-income families have decent, affordable housing.

ARGUMENT

I. Public Housing Agencies Act In Partnership With HUD To Carry Out A Public Purpose Authorized By The Housing Act And The Cooperative Agreements With HUD Are Things Of Value.

The Federal Grant and Cooperative Agreement Act, 31 U.S.C. § 6301, et seq., sets forth the criteria federal agencies must use when deciding which of three methods of contracting to employ: (1) procurement contracts; (2) cooperative agreements; or (3) grants. As is relevant here, the statute requires that a federal agency 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(1). In contrast, a federal agency should use a

cooperative agreement when "the principal purpose of the relationship is to transfer a thing of value to the State, local government, or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States" and "substantial involvement is expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement." 31 U.S.C. § 6305(1)-(2).

Here, the Federal Circuit erred both by mischaracterizing the principal purpose of the relationship between Public Housing Agencies and HUD, and by discounting the true value of the annual contribution contracts and administrative fees paid to Public Housing Agencies under the Section 8 Program.

A. The Principal Purpose Of The Relationship Between HUD And Public Housing Agencies Is To Work In Partnership To Provide Housing Assistance Under The Housing Act.

The Federal Circuit's decision displays a profound misunderstanding of the relationship between HUD and its Public Housing Agency partners in providing project-based rental assistance to low-income families and individuals. In essence, the Federal Circuit treated Public Housing Agencies as nothing more than contract administrators who serve merely as functional intermediaries passing along funds from HUD to the owners of Section 8 projects. *See* Pet. App. 11a-12a. But Public Housing Agencies are much more than contract administrators. They are

mission-based, publicly accountable agencies created under state law for the very purpose of advancing affordable housing in their states or localities. Indeed, Public Housing Agencies are charged by Congress in the Housing Act with the mission of implementing the Section 8 Project-Based Rental Assistance Program. *See* 42 U.S.C. § 1437f(b)(1) (authorizing HUD "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 partnering with a Public Housing Agency in every state, HUD is not simply looking to outsource a function it would otherwise perform itself. HUD is looking for an experienced and committed partner to work with HUD to fulfill a critical public mission.

As is detailed in the Petition, the Section 8 Project-Based Rental Assistance Program is administered by HUD in partnership with a Public Housing Agency in every state. *See* Pet. 4-8. These state Public Housing Agencies vary widely in characteristics such as their relationship to state government, but most are independent entities that operate under the direction of a board of directors appointed by each state's governor. They are created with the mission of administering a wide range of affordable housing and community development programs, including oversight and regulation of public housing, administration of rent regulations and protection of rent-regulated tenants, and administration of state and federal grants and loans to housing developers to finance construction and

renovation of affordable housing. Statewide Public Housing Agencies such as the Council's members have a strong and well-established track record in the affordable housing field, and most have at least four decades of experience in successfully financing and managing affordable rental properties.

Public Housing Agencies bring to their role a well-developed understanding of their local housing markets and the specific housing needs in their states. They have deep knowledge of and longstanding relationships with property owners and managers operating within their states. Public Housing Agencies are also uniquely positioned to bring together and leverage the many other federal and state resources they administer—such as tax-exempt bonds, the HOME Investment Partnerships Program, and the Low Income Housing Tax Credit—to address the physical and financial challenges that Section 8 properties frequently confront.

The Section 8 Project-Based Rental Assistance Program is just one of the many affordable housing programs that statewide Public Housing Agencies administer. But it is one of the most important. This $9 billion program enables more than 2 million people in 1.2 million low-income households to afford a roof over their heads.[2] It does so by contracting with private owners to rent some or all of the units

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[2] Center on Budget and Policy Priorities, *Policy Basics: Section 8 Project-Based Rental Assistance* (Jan. 25, 2013), *available at* http://www.cbpp.org/cms/?fa=view&id=3891.

in private housing developments to low-income families or individuals.

Two-thirds of the households in the Section 8 Project-Based Rental Assistance Program are headed by senior citizens or persons with disabilities.[3] An additional 26 percent are households with children.[4] The Program helps these individuals and families afford modest housing and avoid homelessness or other kinds of housing instability. For seniors and people with disabilities, the Program enables these individuals to continue living at home rather than in an institutional setting that would be much more costly for both their families and the state and federal governments.[5]

In holding that statewide Public Housing Agencies administering the Section 8 Project-Based Rental Assistance Program were doing no more than fulfilling an "intermediary relationship" as mere "contract administrators," passing along funds from HUD to rental housing owners, Pet. App. 11a, 13a, the Federal Circuit completely misapprehended the nature of the relationship between HUD and statewide Public Housing Agencies under their cooperative agreements. HUD and Public Housing Agencies work together as partners in each state with the principal purpose of supporting affordable

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[3] *Id.*

[4] *Id.*

[5] *Id.*

housing for millions of low-income Americans in accordance with Sections 2(a) and 8(b)(1) of the Housing Act, 42 U.S.C. §§ 1437(a), 1437f(b)(1). Indeed, Congress specifically called on Public Housing Agencies to fulfill this mission. *See* 42 U.S.C. § 1427f(b)(1).

To be sure, Public Housing Agencies also relieve some administrative burden from HUD and its staff, Pet. App. 11a, but that is not the "principal purpose" of the relationship. HUD is not looking for simply an "intermediary" or a "contract administrator" for its programs. Rather, HUD requires an experienced partner who is on the ground in the states and is completely committed—indeed duty bound—to work with HUD to accomplish their shared "public purpose of support[ing]" affordable housing. 31 U.S.C. § 6305. That is what state Public Housing Agencies do and it is why a cooperative agreement is the most appropriate contracting vehicle for the relationship between the agencies and HUD. See 31 U.S.C. § 6305(1)-(2).

B. The Annual Contribution Contracts And The Funding They Provide Are Valuable To State Public Housing Agencies.

The Federal Circuit not only misconstrued the nature of the relationship between HUD and its Public Housing Agency partners, but also displayed no understanding whatsoever about the value of that relationship to the Public Housing Agencies. The court found that neither the Section 8 Project-Based Rental Assistance payments nor the fees paid to state Public Housing Agencies under the annual

contribution contracts for administering the Project-Based Rental Assistance Program were "thing[s] of value" within the meaning of the Federal Grants and Cooperative Agreements Act, 31 U.S.C. § 6305. Pet. App. 13a. But both the program payments and the administrative fees are extremely valuable to Public Housing Agencies. Indeed, being selected to partner with HUD on the Project-Based Rental Assistance Program is in and of itself a "thing of value" as it allows Public Housing Agencies to leverage their staff and resources to better serve their communities and to fulfill their own missions.

Setting aside for a moment the Federal Circuit's puzzling conclusion that "money" is only a "thing of value" in "certain circumstances," Pet. App. 13a, it is readily apparent that the money that Public Housing Agencies receive from HUD to administer the Section 8 Project-Based Rental Assistance Program is absolutely a "thing of value" in *these* circumstances. The Federal Circuit nonetheless dismissed the value of these contracts to Public Housing Agencies, asserting that "[t]ransferring funds to the [Public Housing Agencies] to transfer to the project owners is not conferring anything of value on the [Public Housing Agencies], especially where the [agencies] have no rights to, or control over, those funds." *Id.* The court likewise gave short shrift to the administrative fees received by the Public Housing Agencies, concluding they were not "thing[s] of value" since "the administrative fee here appears only to cover the operating expenses of administering HAP contracts on behalf of HUD." *Id.*

The Council can attest to how valuable the annual contribution contracts are to its members. These contracts support the hiring of critical staff for resource-tight statewide Public Housing Agencies. They enable these agencies to more effectively track their rental portfolio's performance and quality throughout the state. Under the cooperative agreements at issue, Public Housing Agencies can more easily develop proactive preservation strategies, including plans to preserve affordable housing that might otherwise be lost due to deterioration or conversion to market rents. And because HUD cooperative agreements provide an additional way for Public Housing Agencies to monitor the properties they finance, the agencies can prioritize scant resources to better serve the public in their jurisdictions. Acting as HUD's partner also enhances the ability of Public Housing Agencies to work with owners, managers, tenants, and stakeholders to implement other state and local affordable housing programs more effectively.

The Council can likewise attest to the value of the fees received by its members for administering the Section 8 Project-Based Rental Assistance Program. Public Housing Agencies regularly reinvest the fees they receive from their partnership with HUD into the housing needs of low-income residents in their respective states, including, for example, by making available short-term bridge loans for properties in distress. Public Housing Agencies also redirect the net revenue they earn to other affordable housing activities, including affordable housing preservation, homeless assistance, and first-time homebuyer help,

thus further advancing the affordable housing mission they share with HUD.

As just one example of such reinvestment by a Public Housing Agency, New York State Homes and Community Renewal has used administrative fees earned from administering the Section 8 Project-Based Rental Assistance Program to create the "Main Street Program," which provides financial resources and technical assistance to communities in New York to strengthen the economic vitality of the state's traditional Main Streets and neighborhoods through targeted commercial and residential improvements such as façade renovations, interior commercial and residential building upgrades, and streetscape enhancements. New York's "Access to Home Program," also funded through administrative fees earned from HUD, provides financial assistance to property owners to make dwelling units accessible for low- and moderate-income persons with disabilities. Providing assistance with the cost of adapting homes to meet the needs of those with disabilities enables individuals to safely and comfortably continue to live in their residences and avoid institutional care.

Clearly the administrative fees are not only "cover[ing] the operating expenses of administering HAP contracts on behalf of HUD," Pet. App. 13a, but are providing a significant value as they are reinvested to help Public Housing Agencies further their own missions of serving their local communities. The Federal Circuit therefore erred in concluding that nothing of value is transferred to

Public Housing Agencies when they are selected to partner with HUD to implement HUD programs in their states. Both the HUD program funds themselves and the fees earned for administering the programs confer significant value on state Public Housing Agencies.

II. Both Public Housing Agencies And HUD Will Be Impeded From Fulfilling Their Critical Public Missions If HUD Is Forced To Use Procurement Contracts Rather Than Cooperative Agreements For The Section 8 Project-Based Rental Assistance Program.

If the Federal Circuit's decision that HUD is required to use procurement contracts rather than cooperative agreements when implementing the Section 8 Project-Based Rental Assistance Program is allowed to stand, it will impede the ability of Public Housing Agencies to fulfill their critical public mission of providing housing assistance to low-income families and individuals. To force these agencies, which are already starved for resources, to use what little they have in order to implement the various administrative procedures and compliance regimes required for government contractors under the Federal Acquisition Regulation and the Competition in Contracting Act, 31 U.S.C. § 3551, et seq., would be wasteful and counterproductive. It is simply not appropriate to subject Public Housing Agencies—which are, of course "public" agencies—to the same requirements as private contractors. Nor is it appropriate to require HUD to select its agency partners under procedures that were designed

primarily to address issues relating to private sector federal government contractors.

A. Subjecting State Public Housing Agencies To Procurement Statutes and Regulations Meant To Govern Private Entities Is Not Appropriate And Will Impede Agencies From Fulfilling Their Missions.

Currently, no statewide Public Housing Agency has a procurement contract with the federal government. Rather, all of the relationships between Public Housing Agencies and federal agencies are governed by cooperative agreements or grants. These relationships encompass not only the Section 8 Project-Based Rental Assistance Program, but also the Tenant-Based Housing Assistance Program, the HOME Investment Partnerships Program, Section 811 Program Rental Assistance, the Housing Choice Voucher Annual Contributions Contract, Housing Counseling, and the Housing Finance Agency Innovation Fund for the Hardest Hit Housing Markets. Moreover, these cooperative agreements are not just between Public Housing Agencies and HUD, but also between Public Housing Agencies and the Department of Treasury, the Department of Agriculture, and the Department of Energy. The Federal Circuit's decision potentially puts all of these programs at risk.

Because all relationships between Public Housing Agencies and federal agencies have been governed by cooperative agreements or grants, to date, no Public Housing Agency has been subject to the Competition in Contracting Act or the Federal Acquisition

Regulation, which apply only to procurement contracts and not cooperative agreements. If the Federal Circuit's decision is upheld, that will necessarily change. The Competition in Contracting Act and the Federal Acquisition Regulation govern all agency actions in soliciting bids or proposals for procurement contracts, awarding procurement contracts, and administering procurement contracts. *See* 41 U.S.C. § 3101, et seq., 48 C.F.R. § 1.000, et seq. Accordingly, if the Federal Circuit is correct that HUD must solicit program assistance through procurement contracts, then Public Housing Agencies will—for the first time in their history—become subject to these onerous statutory and regulatory requirements.

That could deal a crushing blow to agencies already struggling to make the most of scarce resources. Through its procurement laws and regulations, the federal government proscribes to its contractors a complicated and demanding set of business practices, ethical responsibilities, and socioeconomic obligations. The Federal Acquisition Regulation alone has 53 separate parts, covering competition and acquisition planning; contracting methods and contract types; socioeconomic programs; general contracting requirements; special categories of contracting; contract management; and a section on clauses and forms. *See generally* 48 C.F.R. § 1.000, et seq. The government itself refers to the Federal Acquisition Regulation as "substantial and complex" and warns that when dealing with the Federal Acquisition Regulation "[m]any new contractors . . . are unprepared for the rules and

regulations they must follow, which can lead to costly errors and potential legal problems."[6] As just one example, the Federal Acquisition Regulation requires contractors to establish and implement very detailed and specific codes of ethics and conduct. 48 C.F.R. § 52.203-13(b). Contractors must develop and enforce an internal controls system, often requiring the entity to substantially restructure its organization and hire additional personnel to comply with this requirement. And compliance, of course, comes with substantial costs.

The policies underlying this requirement and others are no doubt laudable, but these policies were implemented to compel for-profit private companies to become public-minded and to protect the public fisc. These goals are inapplicable to entities like Public Housing Agencies, which are already publicly funded, publicly regulated, and publicly accountable. It is simply not appropriate to subject publicly accountable state actors to statutory and regulatory requirements that were designed primarily to address issues that arise when private companies compete for and perform federal procurement contracts. *See, e.g., 60 Key Centre Inc. v. Admin. of Gen. Servs. Admin. (GSA),* 47 F.3d 55, 59 (2d Cir. 1995) (describing application of Competition in Contracting Act to procurement involving competition among private companies to lease space

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[6] U.S. Small Business Admin., *Federal Acquisition Regulations (FAR)*, *available at* https://www.sba.gov/content/federal-acquisition-regulations-far (last visited Feb. 3, 2015).

to the government and noting that the "predominant purpose" of the statute "was to augment competition" among those private companies).

Moreover, under the Federal Circuit's decision, it is at least theoretically possible that these publicly accountable state actors could be facing competition from private companies. In the court below, Respondents took the position that putting the Section 8 Project-Based Rental Assistance Program out for bid under a procurement contract subject to the Competition in Contracting Act would require opening up the competition to anyone who wanted to bid, and that the competition could not be limited to Public Housing Agencies. *See* CMS Contract Mgmt. Servs., et al. Pl.-Appellant Br. at 53, *CMS Contract Mgmt. Servs. v. United States*, No. 13-5093 (Fed. Cir. June 7, 2013), ECF No. 59. While the Council vigorously disputes that position, the Council nonetheless recognizes that this is a real danger the Federal Circuit's decision introduced. The work that Public Housing Agencies perform is not a job that just anyone can do. It would simply be wrong to put the fate of more than two million people currently living in Section 8 project-based rental housing out for open bid as a standard procurement. As one of the Council's members recently stated: "Our mission is our people. That's hard to replace."

B. Requiring HUD To Use Procurement Contracts Rather Than Cooperative Agreements Will Impede HUD From Fulfilling Its Mission.

As established above, imposing a requirement that HUD use procurement contracts rather than cooperative agreements will gravely impact state Public Housing Agencies, which will be forced to devote already scarce resources to implementing cost-intensive compliance programs necessary to become federal government procurement contractors, and thus may face the choice of whether to even continue participation with the Section 8 program. Such a change does not affect only the Public Housing Agencies, however. It will also gravely impact HUD and its ability to carry out programmatic change on a national scale.

Under the system of cooperative agreements that existed prior to the Federal Circuit's decision, HUD enjoyed great flexibility in administering its programs. When there was a need to adjust the Section 8 Project-Based Rental Assistance Program based on a change in legislation or a change in conditions, HUD could make this adjustment simply by notifying its state Public Housing Agency partners of the change. Such adjustments were thus made on a national scale without going through any formal amendment of each cooperative agreement. Moreover, HUD regularly worked collaboratively with its Public Housing Agency partners to make adjustments to the Section 8 program when such adjustments were needed by the agencies.

Pursuant to the Federal Circuit's decision, all of that will change. HUD will now have to solicit formal proposals for procurement contracts for each state. In each state, there will be the potential for a disappointed bidder to protest the award of the contract and to drag the process through multiple administrative and judicial proceedings. *See* 31 U.S.C. § 3552 (permitting interested parties to prosecute bid protests before the Government Accountability Office); 28 U.S.C. § 1491(a)-(b) (granting the Court of Federal Claims jurisdiction over bid protests). Moreover, once the contracts are awarded, if HUD wants to implement some change to the contract or to the contractor's responsibilities, it must negotiate that change individually with each contractor in each state, again with the potential for the contractor to dispute the impact of each change through the processes set forth under the Contracts Disputes Act, 41 U.S.C. § 7101 et seq. *See, e.g.*, 48 C.F.R. subpt. 43.2 (setting forth requirements for federal agency to implement a change to a procurement contract). HUD also would have to renegotiate the contractor's compensation for performing the changed task. *See* 48 C.F.R. §§ 43.204, 52.243-1(b). And if the change actually constitutes a "cardinal change" to the original contract, HUD would be required to put that change out to bid in the marketplace. *AT&T Commc'ns, Inc. v. Wiltel, Inc.*, 1 F.3d 1201, 1205 (Fed. Cir. 1993).

This would drastically limit HUD's ability to adapt its programs to changing conditions, to new legislation, and to conditions on the ground. In essence, HUD would no longer be administering a

national program, but would instead be required to negotiate and renegotiate at least fifty separate state contracts. That is not what Congress envisioned when it enacted the national Section 8 Project-Based Rental Assistance Program and this Court should not allow that to happen.

Finally, this Court's review is needed not only because of the potentially devastating consequences the Federal Circuit's decision will have for the Section 8 Project-Based Rental Assistance Program, but also because of the potentially dramatic sweep of the decision. If HUD is forbidden from using a cooperative agreement in this situation in which it is so abundantly clear that "the principal purpose of the relationship" between HUD and the state Public Housing Agencies "is to transfer a thing of value" in order "to carry out a public purpose of support or stimulation authorized by a law of the United States," 31 U.S.C. § 6305, then it is difficult to imagine any situation, in which any federal agency *would* be permitted to use a cooperative agreement rather than a procurement contract. This would take away one of the federal government's most useful tools to partner with public agencies to fulfill critical public missions. The Court should not allow the Federal Circuit's decision to stand.

CONCLUSION

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

Respectfully submitted,

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