No. 98-1568

In the Supreme Court of the United States

TRAFALGAR CAPITAL ASSOCIATES, INC., ETC.,
PETITIONER

v.

ANDREW CUOMO, SECRETARY OF HOUSING AND
URBAN DEVELOPMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
DAVID W. OGDEN
Acting Assistant Attorney General
MICHAEL JAY SINGER
DANA J. MARTIN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the Department of Housing and Urban Development (HUD) properly declined to increase initial contract rents for petitioner's project under the Moderate Rehabilitation Program, 42 U.S.C. 1437f(e)(2) (1988) (repealed 1990), where the amount of the requested increase was more than offset by an error that, if corrected, would have decreased the contract rents.

2. Whether, in the course of recalculating contract rents under the Moderate Rehabilitation Program at petitioner's request, HUD could permissibly correct a prior erroneous determination by a HUD official that was favorable to petitioner but contrary to the applicable regulations.

3. Whether the six-year statute of limitations in 28 U.S.C. 2401(a) bars a claim that HUD should have used Fair Market Rents for 1986, rather than for 1985, to calculate contract rents for petitioner's project under the Moderate Rehabilitation Program.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-33a) is reported at 159 F.3d 21. The opinion of the district court (Pet. App. 36a-52a) is reported at 973 F. Supp. 214.

JURISDICTION

The judgment of the court of appeals (Pet. App. 34a-35a) was entered on October 29, 1998. A petition for rehearing was denied on December 30, 1998 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on March 30, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 8 of the United States Housing Act of 1937, 42 U.S.C. 1437f, authorizes a system of housing assistance payments to enable lower-income families to rent decent, safe, and sanitary housing. Several programs, known collectively as the Section 8 Housing Assistance Payments Programs, provide assistance payments to lower-income families for a variety of housing options. Under the Section 8 program at issue in this case, the Moderate Rehabilitation Program, the federal government subsidizes the rents that tenants pay for upgraded or rehabilitated housing. See 42 U.S.C. 1437f(e)(2) (1988). Congress eliminated the Moderate Rehabilitation Program effective October 1, 1991, but allowed existing projects to continue. See Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, Title II, § 289(a)(4) and (b), 104 Stat. 4128.

The Department of Housing and Urban Development (HUD) contracts with local public housing agencies to administer the Moderate Rehabilitation Program. See 42 U.S.C. 1437f(e)(2) (1988). Through those contracts, which are known as Annual Contributions Contracts, HUD allocates funds to the public housing agencies for housing assistance payments. 24 C.F.R. 882.102.

The local public housing agencies chose Moderate Rehabilitation Program projects through a competitive selection process, which included public solicitation of applications from owners seeking to rehabilitate multifamily dwellings for low-income rental. See 24 C.F.R. 882.503(a), 882.504(c). After the selection of a project, but before the rehabilitation began, the public housing agency and the owner entered into an initial contract, known as an Agreement to Enter into Housing

Assistance Payments Contract (AHAP contract). See 24 C.F.R. 882.505; see also 24 C.F.R. 882.402. After the rehabilitation was completed, the public housing agency and the owner executed a Housing Assistance Payments Contract (HAP contract), a 15-year contract that incorporated the terms of the AHAP contract and finalized the contract rents. See 24 C.F.R. 882.508, 882.403(c). Under the HAP contract, the public housing agency pays the owner the difference between the tenant's contribution to rent, which is a fixed percentage of the tenant's income, see 42 U.S.C. 1437a(a)(1), and the contract rent, calculated in accordance with HUD regulations. See 24 C.F.R. 882.102 (defining "housing assistance payment").

The AHAP contract establishes, among other things, the initial contract rents and the base rents for units in the rehabilitated building. See 24 C.F.R. 882.408. The initial contract rent is the amount that the owner may charge in rent for each unit after the rehabilitation. The initial contract rent consists of two components: (i) the base rent, which reflects the owner's pre-rehabilitation cost of owning, managing, and maintaining the property, plus a reasonable return on its investment, and (ii) the monthly rehabilitation debt service, which is the amount required each month to repay the principal and interest on the owner's indebtedness to finance the rehabilitation. 24 C.F.R. 882.408(c).

Both the base rent and the initial contract rent in the AHAP contract are subject to a market-based ceiling. Ordinarily, the base rent for a unit is capped at the Existing Housing Fair Market Rent for a unit of the same size, and the initial contract rent is capped at 120% of that amount. 24 C.F.R. 882.408(a). The Existing Housing Fair Market Rents, published annually by

HUD, reflect the average rent charged for standard units of various sizes in a particular geographic area. 42 U.S.C. 1437f(c); 24 C.F.R. 888.113.

An "exception rent" above those ceilings is permitted under certain circumstances. A public housing agency, with approval of the HUD field office, may allow an exception rent of up to 10% over the normally permissible initial contract rent. 24 C.F.R. 882.408(b). Such an exception rent is proper only where HUD has determined that the rents for standard units suitable for the Existing Housing Program in the same area are more than 10% higher that the Existing Housing Fair Market Rents. *Ibid.*

The HAP contract, executed after rehabilitation is completed, sets forth the final base rents and contract rents for units in the building. See 24 C.F.R. 882.408(d). The estimated rents in the AHAP contract generally become the final rents in the HAP contract. *Ibid.* However, under certain limited circumstances peculiar to the project, such as when unanticipated changes are required in the rehabilitation work, the rents stated in the HAP contract may exceed the rents stated in the earlier AHAP contract. 24 C.F.R. 882.408(d)(1). The increases permitted under that provision are capped at an additional 20% of the normally permissible contract rents. 24 C.F.R. 882.408(d)(3). HUD approval of such increases is required. *Ibid.*

The Secretary of HUD is authorized, under 42 U.S.C. 1437f(e)(2) (1988), to set necessary terms and conditions for contracts under, *inter alia*, the Moderate Rehabilitation Program. Congress has, however, prohibited the Secretary from "reduc[ing] the contract rents in effect on or after April 15, 1987, for newly constructed, substantially rehabilitated, or moderately rehabilitated projects." 42 U.S.C. 1437f(c)(2)(C).

2. Petitioner is the managing general partner of the Heywood-Wakefield Associates Limited Partnership, which owns the rental project at issue in this case. Pet. App. 4a.[1] In February 1984, petitioner filed its proposal with HUD to convert an abandoned furniture factory in Gardner, Massachusetts, into subsidized rental housing under the Moderate Rehabilitation Program. *Id.* at 6a-7a.

Although HUD regulations require the execution of an AHAP contract before the owner begins rehabilitation of a building, see 24 C.F.R. 882.505, petitioner started work before an AHAP contract was executed. When the public housing agency overseeing the project discovered that there was no AHAP contract, the agency ordered the rehabilitation halted. The parties ultimately executed an AHAP contract, which was backdated by agreement to February 1986. Pet. App. 9a.

The AHAP contract included the initial base and contract rents for the project, which were capped by the 1985 Existing Housing Fair Market Rents that were then in effect. HUD rejected petitioner's request to use the 1986 Fair Market Rents, which had not yet been issued, citing the regulatory requirement that the Fair Market Rents in effect on the date that the AHAP contract is executed must be used. Pet. App. 27a; see 24 C.F.R. 882.408.

The rents in the AHAP contract reflected the HUD regional administrator's approval of an exception rent

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[1] We use the term "petitioner" herein to refer to both Trafalgar Capital Associates, Inc., and its general partner, Heywood-Wakefield Associates Limited Partnership. The distinction between the entities is not material to the resolution of the issues presented in the petition.

for the project of 132% of the Existing Housing Fair Market Rents. That represented a 10% increase over the 120% of Existing Housing Fair Market Rents that would normally be the maximum contract rents permitted under the Moderate Rehabilitation Program. Pet. App. 15a, 50a; see 28 C.F.R. 882.408(a).

The rehabilitation was completed in four stages. After each stage, a HAP contract was executed for the completed rental units. The final HAP contract was executed on April 17, 1990. Pet. App. 7a, 39a.

In 1993, petitioner asked HUD to increase the initial contract rents to correct specified errors in HUD's calculations. Petitioner contended that HUD had used an erroneous debt-service constant for a loan that petitioner received from the Massachusetts Housing Finance Agency and had failed to account for certain financing fees and expenses associated with changes in rehabilitation costs. After reviewing the contract rents, HUD acknowledged that it had used an incorrect debt-service constant and that certain rehabilitation costs could have been included in the rent calculations. In the course of its review, however, HUD also discovered that its grant of an exception rent was erroneous because the applicable regulatory criteria were not satisfied. Pet. App. 15a-16a & n.7.

HUD decided that the most appropriate course was to correct all errors in its rent calculations, including the erroneous debt-service constant and related calculations (the correction of which would operate to petitioner's benefit) and the erroneous exception rent (the elimination of which would operate to petitioner's detriment). But HUD recognized that the correction of those errors would have the net result of lowering the contract rents, because the correction of the error in the debt-service constant would be more than offset by

the elimination of the exception rent. In view of the statutory prohibition against reducing contract rents, see 42 U.S.C. 1437f(c)(2)(C), HUD chose to maintain the status quo by leaving the contract rents at the levels already in effect, rather than reducing them. Pet. App. 16a-17a.

3. In 1995, petitioner filed suit in federal district court, challenging various aspects of HUD's calculation of rents for the project. Pet. App. 39a. The court granted summary judgment in favor of HUD on one issue and granted summary judgment in favor of petitioner on the other issues. *Id.* at 52a.

The district court held that the six-year statute of limitations in 28 U.S.C. 2401(a) barred petitioner's claim that HUD erred in using 1985, rather than 1986, Fair Market Rents to calculate the rents for the project. The court explained that petitioner's claim accrued no later than August 29, 1986, the latest date on which petitioner would have become aware that HUD intended to use the 1985 Fair Market Rents, and that petitioner did not file suit within six years after that date. Pet. App. 40a-44a.

The district court held that HUD acted arbitrarily and capriciously in refusing to increase the rents to reflect the correct debt-service constant for the Massachusetts Housing Finance Agency loan. Pet. App. 49a-50a. The court also held that HUD could not offset an error in the rent calculation that operated to petitioner's benefit (*i.e.*, the erroneous grant of an exception rent) against an error that operated to petitioner's detriment (*i.e.*, the use of the erroneous debt-service constant). *Id.* at 50a-52a. The court deemed that conclusion to be compelled by the "plain language" of 42 U.S.C. 1437f(c)(2)(C), which prohibits HUD from "reduc[ing] the contract rents in effect on or after April

15, 1987," even though the rents were not being reduced below the amounts set forth in the AHAP and HAP contracts. Pet. App. 51a-52a. The court reasoned that "keeping the contract rent at its current level, after the recognition that corrections require it to be higher, is a de facto lowering of the contract rent from the level at which it should be set." *Id.* at 51a.

The district court further held that HUD acted arbitrarily and capriciously in classifying certain funds that petitioner received from the Massachusetts Housing Finance Agency as a grant, rather than a loan, and in failing to include in its rent calculations certain rehabilitation costs that petitioner incurred before the execution of the AHAP contract. Pet. App. 44a-48a.

4. The court of appeals affirmed in part and reversed in part. Pet. App. 3a-33a.

The court of appeals affirmed the district court's ruling that the six-year statute of limitations in 28 U.S.C. 2401(a) barred petitioner's challenge to HUD's use of the 1985 Fair Market Rents. Pet. App. 26a-32a. The court applied the well-settled rule that "[a] cause of action against an administrative agency 'first accrues,' within the meaning of § 2401(a), as soon as . . . the person challenging the agency action can institute and maintain a suit in court." *Id.* at 28a (quoting *Spannaus* v. *United States Dep't of Justice*, 824 F.2d 52, 56 (D.C. Cir. 1987)). The court concluded that HUD's decision to use the 1985 Fair Market Rents became "final agency action," which petitioner could challenge in court, either in April 1986, when the AHAP contract using the 1985 Fair Market Rents was executed, or in August 1986, when HUD issued the 1986 Fair Market Rents and did not apply them retroactively to the date of the AHAP contract. *Id.* at 29a-30a. The court noted that both of those actions

"occurred well outside the statute of limitations." *Id.* at 30a.

The court of appeals reversed the district court's ruling that HUD could not offset its errors in rent computation against its error in granting an exception rent. Pet. App. 15a-20a. The court concluded that HUD's decision to maintain the status quo, where the net result of correcting all errors would be to reduce the contract rents in effect, did not violate the statutory prohibition against rent reductions. The court noted that the statute bars HUD only from "reduc[ing] the contract rents in effect," 42 U.S.C. 1437f(c)(2)(C)—a phrase that the court construed as referring to the rents "under which the parties have been operating," *i.e.*, the status quo rents. Pet. App. 20a. The court observed that HUD was not proposing to reduce those rents; HUD was simply declining to increase the rents to correct only those errors that were disadvantageous to petitioner. *Ibid.* The court added that "[t]he plain language [of Section 1437f(c)(2)(C)] barring reductions does not require HUD to *raise* the contract rent in this situation." *Ibid.*

The court of appeals also reversed the district court's ruling that HUD erred in not including in its rent calculations certain rehabilitation costs that petitioner incurred before the execution of the AHAP contract. Pet. App. 9a-14a. And the court of appeals affirmed the district court's ruling that HUD erred in classifying the funds that petitioner received from the Massachusetts Housing Finance Agency as a grant rather than a loan. *Id.* at 21a-26a.[2]

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[2] The petition for a writ of certiorari does not challenge any aspect of the court of appeals' rulings on either the recovery of rehabilitation costs incurred before the execution of the AHAP

ARGUMENT

The court of appeals' decision is correct on each issue raised by petitioner and does not conflict with any decision of this Court or any other circuit. The petition presents no questions of general and continuing significance. It instead contests the lower courts' case-specific determinations concerning the calculation of rents for one project under a discontinued federal housing program. This Court's review is therefore not warranted.

1. Petitioner first challenges (Pet. 11-18) the court of appeals' conclusion that HUD did not act arbitrarily or capriciously in leaving the contract rents at their existing levels after HUD discovered that multiple errors had been made in setting the contract rents that, if corrected, would reduce those rents below their existing levels. As explained above, HUD determined that the correction of the erroneous debt-service constant, which would have increased the contract rents for petitioner's project, would have been more than offset by the elimination of the erroneously granted exception rent. HUD consequently chose to maintain the status quo.

Contrary to petitioner's assertions (Pet. 9-10, 11, 14-18), the court of appeals' decision sustaining HUD's action does not conflict with decisions of the Fourth, Fifth, and Tenth Circuits. In each of those cases, HUD initiated audits years after the HAP contracts were executed, concluded that the initial contract rents had been set too high, and then attempted to reduce the rents currently in effect in order to correct the prior errors. The courts of appeals found that such reduc-

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contract or the characterization of the funds received from the Massachusetts Housing Finance Agency.

tions in rent were barred under the plain language of 42 U.S.C. 1437f(c)(2)(C), which prohibits HUD from "reduc[ing] the contract rents in effect on or after April 15, 1987, for * * * moderately rehabilitated projects." See *2225 New York Ave. Ltd.* v. *Cisneros*, 38 F.3d 210, 211 (5th Cir. 1994) (rejecting HUD's correction of errors in initial contract rents that would have had the effect of reducing existing contract rents); *Foxglenn Investors Ltd. Partnership* v. *Cisneros*, 35 F.3d 947, 950 (4th Cir. 1994) ("it is *reductions* in rent that are expressly proscribed by section (c)(2)(C)") (emphasis added); *Terrace Housing Assocs., Ltd.* v. *Cisneros*, 32 F.3d 461, 463 (10th Cir. 1994) ("We find that the 1987 amendment [*i.e.*, Section 1437f(c)(2)(C)] explicitly prohibits all *reductions* of contract rents.") (emphasis added).

By contrast, this case does not involve any reduction in contract rents. The First Circuit instead resolved a question that the Fourth, Fifth, and Tenth Circuits had no occasion to consider: whether HUD may offset subsequently discovered errors that were made in setting contract rents—some of which errors operate to the property owner's benefit and some of which operate to its detriment—provided that HUD does not reduce those rents below the amounts specified in the HAP contract. Petitioner attempts (Pet. 10, 12-13) to manufacture a conflict among the circuits by equating an offset with a rent reduction. But the unavoidable fact remains that the contract rents in this case were never reduced. See Pet. App. 20a ("The contract rent in effect has been neither reduced nor increased."). That fact

sets this case apart from the cases on which petitioner relies.[3]

In reality, petitioner's complaint is that HUD decided not to increase the contract rents as petitioner had requested. But, as the court of appeals recognized, "the plain language [of the statute] barring rent reductions does not require HUD to *raise* the contract rent in this situation." Pet. App. 20a. The statute deals only with "reduc[tions]" in contract rents already "in effect." 42 U.S.C. 1437f(c)(2)(C). Thus, because the contract rents in effect under the HAP contracts executed by petitioner were not reduced, HUD's action was fully consistent with the statute and with the decisions of the other courts of appeals.

2. Petitioner next contends (Pet. 19-21) that the court of appeals erred in permitting HUD to reexamine whether petitioner was entitled to an exception rent. That argument has no merit.

Petitioner does not even attempt to demonstrate that the HUD regional administrator properly granted an exception rent for petitioner's project in 1986. See Pet. App. 16a n.7 (noting that petitioner "does not argue that the Regional Administrator's decision was correct, but rather that HUD is bound by that decision, correct or not"). Nor could petitioner successfully do so. As the court of appeals recognized (*id.* at 15a-16a n.7), the regional administrator's decision to grant an exception

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[3] Moreover, the policy concerns underlying Congress's enactment of Section 1437f(c)(2)(C)—"to prevent HUD from * * * unsettling settled investment expectations," *Foxglenn*, 35 F.3d at 951—are not implicated in these circumstances. A property owner may have "settled investment expectations" in receiving the rents specified in the HAP contract. But a property owner such as petitioner cannot have any "settled investment expectations" in receiving rents higher than those specified in the HAP contract.

rent was erroneous for two reasons. First, the regional administrator based that decision on predictions about future regional housing costs, rather than on current regional housing costs, as the regulations require. *Id.* at 15a n.7 (citing 24 C.F.R. 882.408(b)). Second, the regional administrator granted the exception rent only for petitioner's particular project, rather than for an entire neighborhood or a larger geographic area, as required by the regulations and the HUD Handbook. *Id.* at 16a n.7 (citing 24 C.F.R. 882.408(b) and Public & Indian Housing, U.S. Dep't of Housing & Urban Development. *Public Housing Development Handbook* ch. 10, para. 10-2(c)(1), at 10-1 (reprint Dec. 1991) (May 1988) (HUD Handbook)).

Petitioner's argument (Pet. 20) that HUD is "bound" by the regional administrator's decision in violation of the regulatory requirements is baseless. Contrary to petitioner's contention, an agent of the United States, although acting pursuant to delegated authority, cannot bind the United States to decisions that do not comport with the governing statute or regulations. See, *e.g.*, *Heckler* v. *Community Health Servs.*, 467 U.S. 51, 53 (1984) (Secretary of Health and Human Services was not precluded from recovering federal funds expended by Medicare provider, in contravention of applicable regulations, although provider "relied on the express authorization of a responsible Government agent in making the expenditures"); *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 383-385 (1947) (Federal Crop Insurance Corporation was not bound by its agent's representation, contrary to applicable regulations, that farmers could obtain federal crop insurance for reseeded wheat); cf. *OPM* v. *Richmond*, 496 U.S. 414, 424-434 (1990) (government cannot be estopped to deny claim for payment of public funds, in contravention of

terms of statutory appropriation, although claimant relied on misinformation provided by government official).

Nothing in the cases on which petitioner relies (Pet. 19-20) suggests that officials acting pursuant to delegated authority may bind the government to decisions contrary to the substantive requirements of applicable regulations. To the contrary, those cases support the general proposition that agency officials are required to follow such regulations. See *United States* v. *Nixon*, 418 U.S. 683, 695-696 (1974) (Executive Branch was bound by regulation promulgated by Attorney General delegating authority to Special Prosecutor); *Superior Oil Co.* v. *Udall*, 409 F.2d 1115, 1119-1120 (D.C. Cir. 1969) (Secretary of the Interior could not excuse noncompliance with regulations governing competitive bidding process).[4]

Accordingly, in conducting the review of the contract rent calculations that had been initiated at petitioner's request, HUD was not precluded from reviewing the regional administrator's grant of an exception rent that did not conform with the requirements of the applicable regulations and HUD Handbook.

3. Finally, petitioner briefly contends (Pet. 21-22) that the court of appeals erred in holding that the six-year statute of limitations in 28 U.S.C. 2401(a) barred petitioner's challenge to HUD's use of 1985 Fair Market Rents, rather than 1986 Fair Market Rents, to calculate the rents for the project.

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[4] Petitioner also cites *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), and *Manhattan-Bronx Postal Union* v. *Gronouski*, 350 F.2d 451 (D.C. Cir. 1965), cert. denied, 382 U.S. 978 (1966). Those cases, which concern questions of sovereign immunity, have no application here.

As the court of appeals observed (Pet. App. 28a), a cause of action under the Administrative Procedure Act accrues upon the issuance of "final agency action," 5 U.S.C. 704, *i.e.*, a definitive statement of the agency's position that is intended to govern the matter at issue. Pet. App. 28a (citing, *inter alia*, *Franklin* v. *Massachusetts*, 505 U.S. 788, 797 (1992) ("The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties.")). Applying that standard, the court held that petitioner's claim accrued either in April 1986, when the AHAP contract using the 1985 Fair Market Rents was executed, or, at the latest, in August 1986, when the 1986 Fair Market Rents took effect. Pet. App. 29a-30a. Either date was "well outside the statute of limitations." *Id.* at 30a. The court's disposition of petitioner's claim thus involved nothing more than the application of settled legal rules to the particular facts of this case. Such decisions ordinarily do not warrant this Court's review. See Sup. Ct. R. 10.

In any event, the court of appeals, like the district court, was correct in concluding that petitioner's claim was time-barred. The applicable HUD regulation states that the Fair Market Rents in effect "on the date that the [AHAP contract] is executed" are to be used to establish the initial contract rents. 24 C.F.R. 882.408(c)(i). The Fair Market Rents used in the AHAP contract are also to be used in the final HAP contract, which is not to be executed until months or years later, when the rehabilitation is completed and the building is ready for occupancy. See 24 C.F.R. 882.408(c) and (d). Given that regulatory scheme, petitioner was on notice by no later than August 1986 that HUD would use the 1985 Fair Market Rents, not the 1986 Fair Market Rents, to calculate the contract rents

for the project. The AHAP contract, executed on April 30, 1986, used the 1985 Fair Market Rents, which were the only Fair Market Rents then in effect and, consequently, the only Fair Market Rents that could properly have been used.[5] Any conceivable doubt on that score was eliminated on August 29, 1986, when HUD announced that the 1986 Fair Market Rents became effective on that date, and consequently not on an earlier date that preceded the execution of the AHAP contract. See 51 Fed. Reg. 31,014 (1986).[6] Yet, petitioner waited some nine years before filing suit to challenge HUD's use of the 1985 Fair Market Rents to calculate the contract rents. As the courts below recognized, petitioner waited too long.

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[5] Indeed, the record demonstrates that even before the AHAP contract was executed, HUD expressly informed petitioner that the 1986 Fair Market Rents would not be used. Pet. App. 29a n.12.

[6] Petitioner contends (Pet. 21-22) that its claim did not accrue until the final HAP contract was executed in 1990, because HUD could have changed the contract rents between the dates of execution of the AHAP contract and the HAP contract. The court of appeals correctly rejected that argument. See Pet. App. 30a. The pertinent regulation allows HUD to change contract rents between the dates of the AHAP contract and the HAP contract only under certain limited circumstances (*e.g.*, if unanticipated increases occur in rehabilitation costs). 24 C.F.R. 882.408(d)(1). Those circumstances do not include an annual increase in the Fair Market Rents after the AHAP contract is executed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
DAVID W. OGDEN
Acting Assistant Attorney General
MICHAEL JAY SINGER
DANA J. MARTIN
Attorneys

MAY 1999