No. 14-781

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CMS CONTRACT MANAGEMENT SERVICES, ET AL.

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

REPLY BRIEF FOR THE PETITIONER

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The court below misunderstood both the legal standard set forth in the Federal Grant and Cooperative Agreement Act (FGCAA) and the proper role of the courts in applying that standard. Its decision will disrupt the operation of the $9 billion Section 8 housing assistance program, and it threatens the government's ability to enter into grants and cooperative agreements in a wide array of other contexts. This Court's intervention is necessary to restore the proper understanding of the FGCAA and to avoid unwarranted interference with federal assistance agreements.

A. The Decision Below Is Wrong

The FGCAA allows the Department of Housing and Urban Development (HUD) to use a cooperative agreement when the "principal purpose" of its relationship with a State or local government is "to transfer a thing of value to the State [or] local government

* * * to carry out a public purpose of support or stimulation authorized by a law of the United States." 31 U.S.C. 6305. The court of appeals committed multiple legal errors in applying that standard.

1. Respondents do not dispute that an agency's decision to use a cooperative agreement is entitled to judicial deference. See Pet. 22-24; Br. in Opp. 27-28. Rather than reviewing HUD's decision deferentially here, however, the court of appeals treated the classification of an agreement under the FGCAA as "a question of law" that must be resolved "de novo," and it applied that de novo standard when conducting its own analysis of HUD's primary purpose. Pet App. 11a-13a. Respondents cite no statement by the court that either analyzed HUD's explanation or concluded that it was irrational, arbitrary, or capricious for purposes of the FGCAA, the Tucker Act, or the Administrative Procedure Act. See Pet. 22-24.

Respondents are also wrong to imply (Br. 27) that either HUD or the court of appeals owed deference to the Government Accountability Office's (GAO) analysis of the ACCs. The only decision respondents cite for that proposition recognized that courts have "no obligation to defer" to the GAO. *Delta Data Sys. Corp.* v. *Webster*, 744 F.2d 197, 201 (D.C. Cir. 1984) (Scalia, J.). GAO has statutory authority to offer only non-binding "recommendations," 31 U.S.C. 3554(b)(3), and GAO itself has often recognized that the FGCAA grants *agencies* discretion with respect to their choice of legal instrument. See Pet. 23 (citing authorities).

2. Respondents offer no persuasive justification for the court of appeals' holding that money "can be" a "thing of value" under the FGCAA only "in certain

circumstances." Pet. App. 13a. Instead, they assert (Br. 24-25) that here (1) the public housing agencies (PHAs) are required to pass along the housing payments to project owners, and (2) HUD does not pay the administrative fees to achieve a public purpose. But even if those statements were correct, they would not negate the fact that money—including the payments and fees at issue here—*always* constitutes a "thing of value" for FGCAA purposes. See Pet. 16-17; Pet. App. 105a (GAO conclusion that "HUD is clearly providing 'a thing of value' to the PHAs through HUD's payment of an administrative fee."). The court of appeals' rejection (Pet. App. 13a) of that straightforward proposition departs from the plain meaning of the statutory text.

3. Respondents offer no real defense of the court of appeals' failure to consider the objectives of the Housing Act and the Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRA) when analyzing HUD's purpose with respect to the ACCs. Those statutory goals are crucial to the FGCAA "principal purpose" inquiry, especially when (as here) the agency specifically invokes them as the reason for its choice of legal instrument. See Pet. 17-21; A.R. 80-82, 85.

Respondents correctly observe (Br. 26) that what matters under the FGCAA is the agency's principal purpose in entering a relationship with the recipient of federal funds. But respondents are wrong to imply (*ibid.*) that the "purpose of the statutory scheme under which the agency enters into that relationship" is therefore irrelevant. The statutory objectives that the agency pursues will often establish the agency's purpose with respect to the relationship. Here, for exam-

ple, the Housing Act and MAHRA both indicate that HUD's mission is to "assist" and "encourag[e]" the efforts of States and local governments to provide affordable housing to their citizens, including by "enter[ing] into" ACCs with PHAs and by "transfer[ring] and shar[ing] * * * loan and contract administration functions and responsibilities" with such entities. 42 U.S.C. 1437(a)(1)(A), (B) and (4), 1437f(b)(1); MAHRA § 511(a)(11)(C), 111 Stat. 1387. Those statutory purposes properly guided HUD's decision to classify the ACCs as cooperative agreements. See Pet. 19-21; A.R. 80-82, 85.

The government does not contend that "every agreement into which HUD enters pursuant to the Housing Act necessarily is imbued with the same overarching purpose of the statute itself." Br. in Opp. 26. Rather, the salient point is that the particular agreements at issue here plainly reflect HUD's effort to fulfill the Housing Act's goal of working collaboratively with States and local governments to provide affordable housing to low-income families. The Notice of Funding Availability (NOFA) makes that purpose explicit. And respondents offer no explanation for why HUD would limit the competition for ACCs to PHAs if HUD's only objective were to provide housing benefits directly to low-income families as cheaply and efficiently as possible. See Pet. 20-21. That restriction confirms HUD's purpose to assist PHAs in accomplishing the shared mission of assisting such families.

4. Respondents agree (Br. 29-30) with the government that a federal agency may properly use a cooperative agreement to establish an intermediary relationship when the purpose of that relationship is to

assist the intermediary in carrying out a public purpose. See Pet. 27-29. That shared understanding conflicts with the court of appeals' statement that, "[i]n the case of an intermediary relationship, the proper instrument is a procurement contract." Pet. App. 13a. (citation and internal quotation marks omitted). Respondents assert (Br. 28-29) that the court of appeals intended to require procurement contracts for some, but not all, intermediary relationships. But the relevant language in the court's decision appeared to articulate a categorical rule applicable to intermediary relationships generally. That is how the Court of Federal Claims (CFC) applied that decision in *Hymas* v. *United States*, 117 Fed. Cl. 466, 487 (2014) (citing statement that "[i]n the case of an intermediary relationship, the proper instrument is a procurement contract") (internal quotation marks omitted).

5. For the reasons set forth above, respondents cannot persuasively defend the court of appeals' reasoning. Although respondents offer alternative rationales for the court's judgment, their arguments lack merit.

a. Respondents emphasize (Br. 20) that the ACCs "relieve HUD of the burdens of administering [housing assistance payment (HAP)] contracts itself" and improve the effectiveness and efficiency of the Section 8 housing program. But as the petition explains (Pet. 25-26), it will virtually always be true—under *any* type of federal-state relationship—that the duties imposed on the non-federal entity could have been performed by federal employees instead. The potential for a particular arrangement to reduce the demands placed on the federal workforce is therefore of little

help in distinguishing between procurement contracts and cooperative agreements.

b. Respondents also argue (Br. 20-21) that, because the ACCs require the PHAs to perform "contract administration services," the principal purpose of those agreements must be "to acquir[e] * * * services for the direct benefit or use of the United States Government" in accordance with the FGCAA's definition of "procurement contract." See 31 U.S.C. 6303(a). But neither the fact that PHAs are required to perform certain services in exchange for federal funds, nor the fact that the ACCs require PHAs to administer HAP contracts "in the manner that *HUD* has directed," Br. in Opp. 21, prevents the PHAs' relationship with the federal government from qualifying as a cooperative agreement under the FGCAA.

Nothing in the FGCAA's definition of "cooperative agreement" states or implies that the federal funds must be transferred to the recipient with no strings attached. In fact, the FGCAA permits agencies to use cooperative agreements only when "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(2); see 43 Fed. Reg. 36,863 (Aug. 18, 1978) (Office of Management and Budget guidance emphasizing extensive scope of agency involvement). There is consequently no basis for respondents' suggestion (Br. 22) that, under cooperative agreements, recipients of federal funding must have authority to use those funds "as they best see fit."

In any event, respondents are wrong to imply that PHAs lack discretion and the ability to advance their

own public-policy objectives by serving as counterparties to the ACCs. Under those agreements, PHAs are responsible for the day-to-day management and oversight of the Section 8 housing program. See, *e.g.*, A.R. 1360-1362, 1376-1400. In carrying out those functions under the ACCs, PHAs exercise considerable discretion and advance their *own* public purpose of "engag[ing] in or assist[ing] in the development [and] operation of public housing." 42 U.S.C. 1437a(b)(6)(A).[1]

c. Respondents seek to minimize the significant role that PHAs play in the Section 8 project-based housing program by asserting that (1) PHAs are neither signatories nor parties to HAP contracts administered under the ACCs, (2) HUD is legally obligated to make HAP payments to project owners under the HAP contracts, and (3) PHAs are merely "agents" of HUD with respect to the program. See, *e.g.*, Br. in Opp. 4, 7, 8, 21, 22, 27, 30. None of those assertions is correct.

First, PHAs are both signatories and counterparties to the vast majority of the underlying HAP contracts with private owners that are subject to the ACCs in this case.[2] Although HUD was originally the

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[1] Respondents emphasize (Br. 6-7) a purported distinction between the authorities exercised by PHAs under ACCs concluded before and after 1999. But respondents do not identify any actual differences between the relevant ACCs. Respondents are wrong to imply (Br. 6) that PHAs ever had unilateral authority to "rescind" or "modify" HAP contracts under pre-1999 ACCs. They are also wrong to say (*ibid.*) that PHAs lack the authority to "enter into" HAP contracts under the post-1999 ACCs. See p. 8-9, *infra*.

[2] See HUD CFC Resp. & Reply Br. at 5 n.7 (noting that PHAs are the parties to approximately 15,050 HAP renewal contracts,

counter-party to HAP contracts signed in the 1970s, Congress ended HUD's authority to enter into new HAP contracts in 1983. Since then, most of the original contracts have expired and have been renewed as "new" contracts, MAHRA § 512(12), 111 Stat. 1389, directly between PHAs and the project owners. See Pet. 3; A.R. 2268, 2281, 2604-2606. HUD is not a party to those renewal contracts. A.R. 2604-2606; see *Normandy Apartments, Ltd.* v. *United States*, 100 Fed. Cl. 247, 254-258 (2011). The NOFA and ACCs also make clear that the PHA rather than HUD is the entity responsible for "enter[ing] into a renewal contract with Section 8 owners" with respect to "HAP Contracts that expire during the ACC term." A.R. 94; see A.R. 102, 104, 106, 125-126.

Second, HUD is not directly obligated to make payments to project owners under the vast majority of the HAP contracts at issue here. The ACCs provide that the PHA "shall enter into or assume HAP Contracts with owners of Covered Units to make [HAP] payments to the owners of such units during the HAP Contract term." A.R. 126. The ACCs also state that, "[u]pon assignment by HUD, the PHA immediately and automatically assumes, during the ACC Term, the contractual rights and responsibilities of HUD, or of any PHA that is or was party to the HAP Contract." *Ibid.* In keeping with those provisions, the CFC has held that HUD is not in privity of contract with project owners and therefore may not be sued for an alleged violation. *Normandy*, 100 Fed. Cl. at 254-258.[3]

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whereas HUD is a party to and directly administers approximately 400 such contracts); HUD CFC Supp. Br. at 10.

[3] The HAP renewal contracts provide that, if HUD determines that the PHA has defaulted on its obligations to make HAP pay-

Third, respondents are wrong to assert (Br. 8, 23) that PHAs act merely as "agents" of HUD with respect to the HAP contracts. Respondents' only support for that characterization is a HUD policy manual dated August 2000. See A.R. 2412. But the HAP renewal contracts at issue state that, when a PHA is "acting as Contract Administrator pursuant to an [ACC] between the PHA and HUD, the Contract Administrator is not the agent of HUD." A.R. 2276; see *Normandy*, 100 Fed. Cl. at 256.

d. Finally, respondents assert that HUD's treatment of the ACCs as cooperative agreements is "contrary to HUD's practice for well over a decade" of labeling the agreements "procurement contracts." Br. 2; see Br. 8, 11, 17-18, 28 (accusing HUD of changing its position). But HUD has *never* treated its Section 8 ACCs as procurement contracts, and it has never considered itself bound by the Competition in Contracting Act (CICA) or the Federal Acquisition Regulations (FAR) when awarding or implementing the ACCs. In fact, it has consistently taken the opposite view. As HUD stated when requesting proposals for the ACCs in 1999, "[t]his solicitation is not a formal procurement within the meaning of the Federal Ac-

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ments to project owners, "HUD shall take any action HUD determines necessary for the continuation of [HAP payments] to the Owner in accordance with the [HAP] Renewal Contract." A.R. 2276. That provision does not change the fact that the PHA rather than HUD has the primary responsibility to pay project owners the amounts specified by the HAP contracts. It simply shows that HUD has agreed to act as a backstop or guarantor in situations where the PHA breaches its own responsibilities to make HAP payments. The collaborative nature of the relationship between HUD and the PHAs reinforces the conclusion that the ACCs qualify as cooperative agreements under the FGCAA.

quisition Regulations, but will follow many of those principles." A.R. 428; see A.R. 1-2, 6, 463, 469, 2607-2609. That statement disproves the existence of any "long-settled understanding[] that [ACCs] are procurement contracts." Br. in Opp. 8, 11.

B. This Court's Intervention Is Warranted

Respondents contend (Br. 18) that, even if the decision below is incorrect, it "hardly constitute[s] a catastrophe for either the government or the federal fisc." In fact, the decision is likely to have significant disruptive consequences, both for the Section 8 housing program and for federal assistance agreements more generally. See Pet. 29-35.

1. If the decision below stands, HUD will be required for the first time to comply with CICA and the FAR when awarding and implementing ACCs under the Section 8 project-based housing program. That will be extremely disruptive. Respondents' position in this case has been that CICA prohibits HUD from limiting ACC awards to PHAs, and that even if a PHA-only restriction were permissible, HUD could not limit such awards to *in-state* PHAs. See Pet. 10, 31-32; Resp. C.A. Br. 53, 55, 61. If respondents are correct, HUD would be required to implement the program in a way that violates both (1) the Housing Act's directive that the Section 8 program be implemented only with PHAs, and (2) the legal determination of many States' Attorneys General that out-of-state PHAs cannot lawfully operate within their own States under state law. See 42 U.S.C. 1437f(b)(1), Pet. 10. The result would be to change the basic character of the Section 8 program, which would no longer advance the goals of federal-state collaboration envi-

sioned by the Housing Act, 42 U.S.C. 1437(a)(1)(A), (B) and (4).

Respondents assert (Br. 31) that "[t]his case is solely about how HUD determines who will perform the ministerial tasks of *administering* th[e] HAP contracts." In fact, requiring compliance with CICA and the FAR would also transform the way in which HUD *implements* the ACCs. Most notably, HUD would be required to negotiate and/or litigate any change to the ACCs individually with each PHA. Pet. 32-33; A.R. 3. And to the extent that any such change is outside the scope of the original ACC, HUD would be required to offer the new task separately to the marketplace for competition. *Ibid.* The result would be extremely costly and burdensome to HUD, and it would make it virtually impossible to maintain nationwide uniformity with respect to the Section 8 program. *Ibid.*

2. Respondents argue (Br. 33) that the decision below will have no spillover consequences for the $15 billion Section 8 tenant-based assistance program because in that program a PHA "is authorized to enter into assistance agreements *on its own behalf*." As explained above, however, when HUD awards ACCs to PHAs under the project-based program at issue here, the PHAs *also* enter into and assume HAP contracts with private owners on their own behalf. See pp. 8-9, *supra*; see also A.R. 126 (noting that, when HUD assigns a pre-existing HAP contract to a PHA, the PHA "automatically assumes * * * the contractual rights and responsibilities of HUD, or of any PHA that is or was party to the HAP Contract").

3. Finally, respondents argue (Br. 34-36) that the decision below is narrow and fact-bound and will not hamper the government's ability to use cooperative

agreements outside the Section 8 program. That assessment rests on the premise (Br. 34) that the decision below "simply applie[d] settled legal principles" to the 2012 NOFA.

In fact, as explained at length in the petition and above, the court of appeals established new law that misconstrues the FGCAA in various fundamental ways. The legal errors in the court's decision will constrain agencies and guide courts in future cases, and it will potentially impact the management of government programs involving hundreds of billions of dollars. This Court's review is warranted to correct these legal errors and to vindicate the proper understanding of the FGCAA.

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For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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