No. 19-268

In the Supreme Court of the United States

PARK PROPERTIES ASSOCIATES, L.P., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Federal Claims' Tucker Act jurisdiction over "any claim against the United States founded * * * upon any express or implied contract with the United States," 28 U.S.C. 1491(a)(1), extends to claims based on contracts that expressly identify as parties private property owners and a state public housing authority, but not the United States or a federal agency.

ADDITIONAL RELATED PROCEEDINGS

United States Court of Federal Claims:

Park Properties Assocs., L.P. v. *United States*, No. 04-cv-1757 (Nov. 4, 2014)

Park Properties Assocs., L.P. v. *United States*, No. 15-cv-554 (May 10, 2017)

United States Court of Appeals (Fed. Cir.):

Park Properties Assocs., L.P. v. *United States*, No. 15-5102 (Feb. 15, 2017)

Park Properties Assocs., L.P. v. *United States*, No. 17-2279 (Feb. 19, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 916 F.3d 998. The opinion and order of the United States Court of Federal Claims (CFC) with respect to liability (Pet. App. 16a-27a) is reported at 128 Fed. Cl. 493. The opinion of the CFC with respect to damages (Pet. App. 28a-37a) is not published in the Federal Claims Reporter but is available at 2017 WL 1718751.

JURISDICTION

The judgment of the court of appeals was entered on February 19, 2019. A petition for rehearing was denied on May 30, 2019 (Pet. App. 38a-39a). The petition for a writ of certiorari was filed on August 28, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves the administration of federal housing assistance to low-income families pursuant to Section 8 of the United States Housing Act of 1937 (Housing Act), ch. 896, § 8, 50 Stat. 891 (as amended, 42 U.S.C. 1437f). Petitioners, Park Properties Associates, L.P., and Valentine Properties Associates, L.P., filed a breach-of-contract action against the United States in the United States Court of Federal Claims (CFC). Their complaint alleged that the United States Department of Housing and Urban Development (HUD) had violated several housing assistance payment (HAP) renewal contracts. The CFC determined that HUD had breached those contracts, Pet. App. 16a-27a, and awarded several million dollars in damages, *id.* at 28a-37a. The court of appeals reversed, holding that neither HUD nor the United States was a party to the HAP renewal contracts, and that the case therefore did not come within the CFC's Tucker Act jurisdiction to hear "claim[s] against the United States founded * * * upon any express or implied contract with the United States," 28 U.S.C. 1491(a)(1). See Pet. App. 1a.-15a.

1. Pursuant to Section 8 of the Housing Act, HUD provides rental assistance payments on behalf of low-income tenants who reside in privately owned dwellings. 42 U.S.C. 1437f (2012 & Supp. V 2017). HUD often provides this assistance through a two-tiered structure, in which HUD enters into an "annual contributions contract[ ]" with a state or local public housing agency (PHA), and the PHA enters into a related HAP contract with the private owner of rental housing. 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 accordance with this section"). However, "[i]n areas where no public housing agency has been organized or where the Secretary determines that a public housing agency is unable to implement the provisions of this section," HUD may enter into HAP contracts directly with the private owners of such rental housing to provide these rental assistance payments. *Ibid.*

Each HAP contract specifies the "maximum monthly rent * * * which the owner is entitled to receive for each dwelling unit." 42 U.S.C. 1437f(c)(1)(A) (Supp. V 2017). The owner receives a portion of that maximum monthly rent from the tenant (with the amount varying based on the tenant's income) and receives the remainder of the payment from the PHA under the HAP contract. 42 U.S.C. 1437f(c)(4). HUD provides the funds for these latter payments through its "annual contributions" to the PHA pursuant to the annual contributions contract. See 42 U.S.C. 1437f(b)(1).

In 1997, Congress enacted the Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRA), which authorized renewal contracts with owners whose original Section 8 HAP contracts were expiring. Pub. L. No. 105-65, Tit. V, § 524, 111 Stat. 1408 (42 U.S.C. 1437f note). Following amendments in 1999, Section 524(a)(1) of MAHRA now provides that:

> upon termination or expiration of a contract for project-based assistance under section 8 for a multifamily housing project * * * the Secretary shall, at the request of the owner of the project and to the extent sufficient amounts are made available in appropriation Acts, use amounts available for the renewal of assistance under section 8 of such Act to provide

> such assistance for the project. The assistance shall be provided under a contract having such terms and conditions as the Secretary considers appropriate.

Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 2000 (Appropriations Act), Pub. L. No. 106-74, Tit. V, Subtit. C, sec. 531, § 524(a)(1), 113 Stat. 1110. As relevant here, rents under the renewal contracts are calculated by adjusting the "existing rents under the terminated or expiring contract * * * by an operating cost adjustment factor established by the Secretary," subject to the limitation that adjusted rents cannot exceed comparable market rents. § 524(a)(4)(C), 113 Stat. 1111.

2. In 1978, HUD itself entered into several long-term HAP contracts with petitioners. See *Park Properties Assocs., L.P.* v. *United States*, 74 Fed. Cl. 264, 266 (2006) (*Park Properties I*). In 1994, while those HAP contracts were still in force, Congress amended the Housing Act to change the way that a project's maximum monthly contract rent would be adjusted over time, based on congressional "concern[] that subsidized rents were higher than warranted." *Id.* at 268. In 2004, petitioners sued, alleging that the statutory change and a regulatory change that implemented it had breached provisions of their HAP contracts that they claimed entitled them to automatic annual rent adjustments (which would have increased the total payments they received). See *id.* at 270.

In 2006, the CFC determined that HUD's application of the 1994 amendments had breached the agency's HAP contracts with petitioners. *Park Properties I*, 74 Fed. Cl. at 272-276. The court granted summary judgment to petitioners on liability and ordered the parties

to stipulate to damages for breach of contract. See *id.* at 274. The parties submitted a joint stipulation quantifying damages pursuant to the court's opinion, and in 2014, the CFC entered final judgment awarding more than $5.4 million for breach of the original HAP contracts. *Park Properties Assocs., L.P.* v. *United States*, No. 04-1757 (Fed. Cl. Nov. 4, 2014).

While that suit was pending, the original HAP contracts between HUD and petitioners expired. See Pet. App. 17a. As contemplated by MAHRA, petitioners entered into several short-term HAP renewal contracts, and ultimately entered into long-term HAP renewal contracts in 2011. See C.A. App. 38-150.

Each of the HAP renewal contracts was executed using a form contract that could be modified to reflect the specific details of the transaction. The form set out, at the very beginning, a section describing the "PARTIES TO RENEWAL CONTRACT." C.A. App. 42 (emphasis omitted); see, *e.g.*, *id.* at 57 (same). That section of the form provided a place for the "Name of Owner," and another place for the "Name of Contract Administrator." *Id.* at 42. The form elsewhere made clear that in some cases, HUD could be the "Contract Administrator" identified as a party to the contract. See *id.* at 44 (providing that, "[i]f HUD is the Contract Administrator, HUD may assign the Renewal Contract to a public housing agency * * * for the purpose of PHA administration," but that "[n]otwithstanding such assignment, HUD shall remain a party to the provisions of the Renewal Contract that specify HUD's role pursuant to the Renewal Contract"). None of the HAP renewal contracts at issue here, however, identified HUD as the Contract Administrator or listed HUD in the "PARTIES TO RENEWAL CONTRACT" section.

Instead, each contract identified just two parties. One was the owner of the property in question, and the other was the New York State Housing Trust Fund Corporation (NYSHTFC), a PHA that the contracts designated as the "Contract Administrator." See, *e.g.*, C.A. App. 42, 57. Each of the contracts also specifically defined a "HAP contract" as "[a] housing assistance payments contract between the Contract Administrator and the Owner." See, *e.g.*, *id.* at 58 (emphasis omitted). And each contract further defined the "Renewal Contract" itself—*i.e.*, the contract that the parties were entering into—as "a housing assistance payments contract ('HAP Contract') between the Contract Administrator and the Owner of the Project." See, *e.g.*, *id.* at 59. In other respects, the renewal contracts referred back to the expiring contracts, providing that "all provisions of the Expiring Contract are renewed" unless they were "specifically modified by the Renewal Contract." See, *e.g.*, *id.* at 45.

3. In 2015, after the CFC had entered judgment in petitioners' earlier suit regarding the original HAP contracts between petitioners and HUD, petitioners filed this new suit in the CFC. See *Park Properties Assocs., L.P.* v. *United States*, No. 15-554C (filed May 29, 2015) (*Park Properties II*). Based on the CFC's determination in the earlier case, petitioners argued that the rent levels in the HAP renewal contracts, which were based on the rents from the original HAP contracts, should be reformed to the rent levels that would have been in place if there had been no breach of the original HAP contracts. See Pet. App. 21a. The government argued that the CFC lacked jurisdiction over the suit because "HUD is not a party to the renewal contracts." *Id.* at 23a. The government also argued, on the merits, that the rent increase the

court had ordered in the earlier suit was not required to be incorporated into the renewal contracts, which had been formed after the 1994 Housing Act amendments were enacted. See *id.* at 25a.

In 2016, the CFC granted partial summary judgment to petitioners, holding that the HAP renewal contracts "should have been adjusted to reflect" the increased rents the CFC had previously found were required under the original HAP contracts. Pet. App. 26a-27a. In doing so, the CFC rejected the government's argument (made in a motion to dismiss) that the CFC's jurisdiction over "any claim against the United States founded * * * upon any express or implied contract with the United States," 28 U.S.C. 1491(a)(1), did not apply here because neither HUD nor the United States was a party to the HAP renewal contracts, Pet. App. 23a-24a. The CFC concluded that "[t]he terms of the contract create privity between the owners and HUD." *Id.* at 23a. In particular, it concluded that Section 4(a)(2) of the renewal contracts, which authorizes HUD to assign the contract to a PHA "[i]f HUD is the Contract Administrator," C.A. App. 44, means "that HUD is party to provisions of the renewal contract." Pet. App. 23a. The CFC also pointed to Section 11 of the renewal contracts, describing that provision as one "in which HUD agrees to correct any default if the [PHA] breaches the contract, as well as agrees to continue assistance payments to the owners." *Ibid.* Finally, the CFC observed that, "although the NYSHTFC is listed as the Contract Administrator, HUD is a signatory to this contract." *Id.* at 24a.

In 2017, after receiving additional submissions from the parties regarding the damages calculation, the CFC

determined that petitioners were entitled to more than $7.8 million in damages. Pet App. 28a-37a.

4. The government appealed, challenging the CFC's rulings on both jurisdiction and the merits. See Pet. App. 6a. The court of appeals reversed in part and vacated in part the CFC's judgment. *Id.* at 1a-15a.

a. The court of appeals held that the CFC had lacked jurisdiction. Pet. App. 2a, 6a-15a. It explained that "[t]he parties agree that the [CFC] has jurisdiction only if the parties were in privity of contract." *Id.* at 2a. Under that agreed-upon framework, the court found that "[t]he salient facts" did not support jurisdiction. *Ibid.*

The court of appeals observed that none of the contracts at issue "explicitly named both the government and the landlord-plaintiffs as directly contracting parties." Pet. App. 2a. Instead, "Section 1 of each contract clearly identifies the parties as the 'Contract Administrator' and 'Owner' of each project," and "[h]ere, every contract identifies the Contract Administrator as the NYSHTFC and the Owners as either Park or Valentine." *Id.* at 11a. The court found that fact particularly significant because the instructions in the form contract provide that, "If HUD is the Contract Administrator, enter [HUD]." *Ibid.* (brackets in original). The court explained that, in the contracts at issue here, "HUD is not listed in that field, and therefore it is not the Contract Administrator." *Ibid.*

The court of appeals rejected the position of petitioners and the CFC that other provisions of the contracts subject HUD to obligations that "create privity between the government and the plaintiffs." Pet. App. 14a. It held that Section 11 "does not obligate HUD," but instead "gives HUD tremendous discretion" about how to proceed if NYSHTFC breaches a contract. *Ibid.*

The court further explained that the other provisions on which petitioners relied similarly conferred significant discretion on HUD, which the court held was insufficient "to trigger a waiver of sovereign immunity." *Id.* at 15a.

b. The court of appeals denied rehearing and rehearing en banc. Pet. App. 38a-39a.

ARGUMENT

Petitioners contend that the particular contracts at issue here are "express or implied contract[s] with the United States" for purposes of the Tucker Act, 28 U.S.C. 1491(a)(1). The court of appeals correctly rejected that contention. Its decision is consistent with decades of Federal Circuit precedent, and it implicates no conflict among the courts of appeals. To the extent petitioners contest the Federal Circuit's settled precedent regarding the need for contractual privity under 28 U.S.C. 1491(a)(1), this case would be a poor vehicle for considering that challenge because petitioners expressly embraced that precedent below. Further review is not warranted.

1. a. The Tucker Act, 28 U.S.C. 1491, allows private litigants to bring a limited class of claims against the United States. As relevant here, it vests the CFC with jurisdiction over "claim[s] against the United States founded * * * upon * * * any express or implied contract with the United States," 28 U.S.C. 1491(a)(1), and waives the United States' sovereign immunity with respect to claims that come within that scope. See *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983) (explaining that, by conferring "jurisdiction over specified types of claims against the United States, the Tucker Act constitutes a waiver of sovereign immunity with respect to those claims") (footnote omitted).

Because the Tucker Act refers specifically to claims "against" the United States that are "founded * * * upon" a "contract *with* the United States," 28 U.S.C. 1491(a)(1) (emphasis added), "it is settled that a contract claim under the Tucker Act requires that the claimant be in privity with the Government; to find privity 'is to find a waiver of sovereign immunity,'" 14 Charles Alan Wright et al., *Federal Practice and Procedure* § 3657, at 421-422 (4th ed. 2015) (citation and footnote omitted). That rule has been in place for well over half a century, dating back to decisions of the CFC's predecessor court, the United States Court of Claims. See, *e.g.*, *Continental Ill. Nat. Bank & Trust Co.* v. *United States*, 81 F. Supp. 596, 598 (Ct. Cl. 1949) ("While the quoted provisions of the contract specifications come near to creating a privity of contract between the Government and the subcontractors, they are in our judgment not sufficient to do so and this court is therefore without jurisdiction under the Tucker Act."). The Federal Circuit has exclusive appellate jurisdiction over appeals from the CFC in Tucker Act cases, see 28 U.S.C. 1295(a)(3), and it has long held that "[t]he government consents to be sued only by those with whom it has privity of contract." *Cienega Gardens* v. *United States*, 194 F.3d 1231, 1239 (1998) (quoting *Erickson Air Crane Co. of Wash., Inc.* v. *United States*, 731 F.2d 810, 813 (Fed. Cir. 1984)), cert. denied, 528 U.S. 820 (1999); see also, *e.g.*, *National Leased Hous. Ass'n* v. *United States*, 105 F.3d 1423, 1435 (Fed. Cir. 1997) (describing "privity of contract with the United States" as "an undisputed prerequisite for standing to sue in the Court of Federal Claims under the Tucker Act").

b. The court of appeals correctly applied that settled standard here. To do so, it carefully examined the HAP

renewal contracts in question to determine whether the United States (or HUD) is a party to those contracts—that is, whether they are contracts "with the United States," 28 U.S.C. 1491(a)(1). See Pet. App. 3a-6a, 11a-15a. Several provisions of the HAP renewal contracts directly answer that question.

First, Section 1 of each of the HAP renewal contracts specifically identifies the "PARTIES TO RENEWAL CONTRACT" as the respective property owner and NYSHTFC. See, *e.g.*, C.A. App. 42 (emphasis omitted). None of them identifies HUD or the United States as a party. See Pet. App. 2a-3a.

Second, Section 4(a)(1) of each of the contracts provides that "[t]he Renewal Contract is a housing assistance payments contract ('HAP Contract') between the Contract Administrator and the Owner of the Project," with a note to "see section 1." See, *e.g.*, C.A. App. 44. In Section 1 of each contract, the spot to identify the "Contract Administrator" has been filled in with information about NYSHTFC. See, *e.g.*, *id.* at 42. The form contracts direct that, "[i]f HUD is the Contract Administrator," then the person filling in the form should "enter [HUD]." Pet. App. 11a; see C.A. App. 51 n.4 (second set of brackets in original). The court of appeals correctly recognized that "HUD is not listed in that field, and therefore it is not the Contract Administrator." Pet. App. 11a.

Third, other provisions make clear that the only parties to the contract are the Contract Administrator and the Owner. For example, Section 13(a) provides that "[a]ny notice by the Contract Administrator or the Owner to the other party pursuant to the Renewal Contract shall be given in writing." C.A. App. 48.

Especially when taken together, those provisions establish that the HAP renewal contracts were contracts by petitioners "with" NYSHTFC, not "with the United States." 28 U.S.C. 1491(a)(1).

c. Petitioners' contrary arguments (Pet. 23-26) are incorrect.

i. Petitioners contend that the contracts are "'with the United States'" because "HUD negotiated and agreed to the terms of the HAP renewal contracts," and an authorized representative of HUD signed them. Pet. 23 (citation omitted). But in approving the terms at issue, HUD did not act as a counter-party. Rather, it acted as the federal regulator that oversees the Section 8 program and that has contracted with PHAs (including NYSHTFC) to help provide affordable housing for low-income families. See *Housing Corp. of America* v. *United States*, 468 F.2d 922, 924 (Ct. Cl. 1972) (recognizing that the "principle has been settled for some time" that, where the government "does not make itself a party" to a public-housing contract, the government's "approval" of that contract expressed through its "signature of approval at the bottom of the document" is "performed in [the government's] capacity as sovereign"). It is true that, in appropriate circumstances, HUD itself could enter into contracts with property owners as the Contract Administrator—and the form contract contains provisions to deal with that scenario. See C.A. App. 44 (setting out terms that apply "[i]f HUD is the Contract Administrator"). But the contracts at issue in this case show that HUD did not do that here. *See* pp. 11-12, *supra*.

Petitioners also contend (Pet. 23) that HUD "obligated itself under" Sections 11 and 2(b) of the contracts. Section 11 provides that, "[i]f HUD determines that the

PHA has committed a material and substantial breach," then "HUD shall take any action HUD determines necessary for the continuation of housing assistance payments." C.A. App. 47. As the court of appeals observed, that provision does not impose a contractual obligation on HUD, but instead gives HUD "tremendous discretion" to take steps to mitigate the effects of the PHA's breach if it determines that such a breach has occurred, free from interference by the parties. Pet. App. 14a.

Section 2(b) states that "[e]xecution of the Renewal Contract by the Contract Administrator is an obligation by HUD of [a designated sum], an amount sufficient to provide housing assistance payments for approximately [a designated portion] of the Renewal Contract term." C.A. App. 42. That provision likewise does not create a contractual obligation running from HUD to the property owner, but rather acknowledges that, for purposes of federal appropriations law, HUD has established a budgetary "obligation" of the funds that it will transfer to the PHA to enable the PHA to make assistance payments. Cf. *Housing Corp. of America*, 468 F.2d at 925-926 (holding that a provision of a public-housing contract stating that "funds have been reserved by the Government and 'will be available to effect payment and performance by the Purchaser'" was not a contractual "provision obligating the United States to pay the seller (plaintiff) anything") (emphases omitted). The next provision of the contract, Section 2(c), makes clear that the term "obligation" is being used in this appropriations-law sense, stating that if "sufficient appropriations * * * are available, HUD will obligate additional funding." C.A. App. 43.

The CFC relied primarily on a different provision, stating that "Section 4(a)(2) of the contract provides

that HUD is party to provisions of the renewal contract." Pet. App. 23a. Petitioners, by contrast, do not rely on that provision. Compare Pet. 23-24 (not mentioning Section 4(a)(2)), with Pet. App. 23a. Section 4(a)(2) applies only "[i]f HUD is the Contract Administrator," C.A. App. 44, but petitioners now concede that "[t]he renewal contracts" at issue in this case "included [NYSHTFC] as the 'contract administrator,'" Pet. 8. See also Pet. App. 11a (court of appeals' explanation that the contracts make NYSHTFC, not HUD, the Contract Administrator).

The court of appeals thus correctly held that, under the terms of the specific contracts at issue here, the parties to the contracts were NYSHTFC and the property owners, not HUD.

ii. In arguing that the contracts at issue here are "'with' the United States," petitioners rely in part on "MAHRA's plain text," and on "language * * * in the regulations that HUD promulgated to implement Section 524" of MAHRA. Pet. 24. That argument is likewise incorrect.

Section 524 states that the "Secretary shall, at the request of the owner[,] * * * use amounts available for the renewal of assistance under section 8 of such Act to provide such assistance for the project." Appropriations Act § 524(a)(1), 113 Stat. 1110. The applicable regulation similarly provides that "HUD will offer to renew project-based assistance for a project eligible for exception rents under section 524(b) of MAHRA at rent levels" determined by the regulations. 24 C.F.R. 402.5(a). Neither of those provisions requires that, in offering to renew assistance, HUD must contract directly with the property owner rather than providing funds for use by a PHA. On the contrary, Section 524(a) states that the

contract shall have "such terms and conditions as the Secretary considers appropriate." Appropriations Act § 524(a)(1), 113 Stat. 1110. And a separate provision makes clear that one available set of "terms and conditions," *ibid.*, utilizes the two-tiered contracting structure that HUD employed here, see 42 U.S.C. 1437f(b)(1).[1]

Thus, while the applicable statutory and regulatory provisions address the need to provide rent assistance and to calculate rents in particular ways, they do not require that such assistance be offered through direct contracts with HUD. Rather, "[t]he regulations simply indicate that HUD *can* be a party to the renewal contracts. Permission is not the same as a mandate." Pet. App. 14a.[2]

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[1] Petitioners contend (Pet. 25) that "Paragraph (b)(1) does not apply to HAP renewal contracts," but instead applies only "to *new* HAP contracts." Petitioners' attempt to distinguish between new and renewal contracts is contrary to Section 512(12) of MAHRA, which states that "'renewal' means the replacement of an expiring Federal rental contract *with a new contract* under section 8 of the United States Housing Act of 1937, consistent with the requirements of this subtitle." § 512(12), 111 Stat. 1389 (emphasis added).

[2] Petitioners' reliance (Pet. 25-26) on a U.S. Government Accountability Office (GAO) decision on a bid protest regarding the annual contribution contracts between HUD and PHAs is likewise misplaced. The GAO determined that HUD's "principle [sic] purpose" in entering into those annual contribution contracts with PHAs was to obtain contract administration services for HUD's benefit. See GAO, B-406738, Matter of: Assisted Hous. Servs. Corp., 13 (Aug. 15, 2012), perma.cc/AP6S-5PNK. In making that determination, the GAO emphasized that HUD's standard form contract provides for scenarios in which HUD is a party to the HAP contract with property owners, and the PHA merely provides contract administration services as a non-party. See *ibid.* It does not follow from that GAO finding about HUD's purposes and general practices, however, that HUD was a party to the specific contracts at issue in this case. Likewise, the agency handbook to which petitioners point (Pet. 26)

2. The court of appeals' contract-specific decision here does not implicate any division in appellate authority or any broader legal issue that requires resolution by this Court.

a. Petitioners contend (Pet. 13-16) that the decision below conflicts with the Federal Circuit's earlier decision in *CMS Contract Management Services* v. *United States*, 745 F.3d 1379 (Fed. Cir. 2014), cert. denied, 135 S. Ct. 1842 (2015). No such conflict exists.

CMS Contract Management Services dealt solely with the question whether the annual contribution contracts for contract administration services between HUD and PHAs, such as NYSHTFC, were procurement contracts subject to Federal contracting laws. See 745 F.3d at 1382-1386. As discussed above, those annual contribution contracts are distinct from the HAP renewal contracts at issue in this case. See pp. 2-3, *supra*. The Federal Circuit in *CMS Contract Management Services* therefore had no occasion to decide whether HAP renewal contracts—let alone the specific HAP renewal contracts at issue in this case, see pp. 11-12, *supra*—are contracts "with the United States" for purposes of the Tucker Act, 28 U.S.C. 1491(a)(1).

Petitioners rely (Pet. 14) on the Federal Circuit's statement in *CMS Contract Management Services* that HUD "has a legal obligation to provide project owners with housing assistance payments under the HAP contracts." 745 F.3d at 1386. But the court in that case did

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makes a general statement about HUD's "primary responsibility for contract administration," but does not suggest that HUD must carry out that responsibility by entering directly into contracts with property owners. HUD, *HUD Handbook 4350.3: Occupancy Requirements of Subsidized Multifamily Housing Programs* § 1-4, at 1-8 (June 23, 2009), perma.cc/X6WE-EW7U.

not suggest that HUD must satisfy that "legal obligation" by contracting directly with property owners. To the contrary, the court's decision was premised on the same two-tiered contracting structure that is at issue here, in which HUD first transfers funds to the Contract Administrator, and the Contract Administrator later transfers the assistance payments to the owners through separate HAP contracts. See *ibid.*; cf. pp. 2-3, *supra*.

b. Petitioners contend more generally (Pet. 21) that "[t]he Federal Circuit's case law" regarding Tucker Act jurisdiction over contract claims is "in tatters," "fixate[d] on the outmoded concept of 'privity.'" That argument is also incorrect.

As an initial matter, petitioners waived any such argument in the court of appeals. In their opening brief below, petitioners distinguished unfavorable out-of-circuit precedent on the ground that it "concerned a contract with a Public Housing Authority, rather than a contract with HUD directly." Pet. C.A. Br. 25 n.4. Petitioners explained that, in that prior case, "[t]he absence of a contract directly with HUD" was significant because it meant that "there [was] a lack of the contractual privity necessary to sue" in the CFC, requiring such a case to be "tried in federal district court rather than in the United States Court of Federal Claims." *Ibid.* Having affirmatively relied on the argument that "[t]he absence of a contract directly with HUD" would preclude CFC jurisdiction, *ibid.*, petitioners cannot now contend that jurisdiction in the CFC is proper notwith-

standing the absence of such a direct contractual relationship here. See, *e.g.*, *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 56 n.4 (2002).[3]

In any event, the Federal Circuit's requirement of privity is correct, and it has been "settled," Wright § 3657, at 421, for more than half a century. See pp. 9-10, *supra*. "[T]he no-privity rule is synonymous with a finding that there is no express or implied contract between the government and a subcontractor." *United States* v. *Johnson Controls, Inc.*, 713 F.2d 1541, 1550 (Fed. Cir. 1983). It thus gives effect to the Tucker Act's requirement that a plaintiff's claims be "founded" on a contract "with the United States," 28 U.S.C. 1491(a)(1), rather than a contract with a different entity that has itself contracted with the United States.

Petitioners appear to construe the Tucker Act to allow a party that has no contract with the federal government to bring suit against the United States in the CFC if the plaintiff has a contract with another entity that in turn is contractually bound to the United States. See Pet. 18-20. Adoption of that approach would violate the established rule that waivers of the sovereign immunity of the United States must be "unequivocally expressed." *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 95 (1990) (quoting *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980), and *United States* v. *King*, 395 U.S. 1, 4 (1969)). The Tucker Act contains no "unequivocal[] express[ion]" allowing contract claims against the United States in two-tiered contracting structures like the one at issue here.

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[3] Petitioners likewise did not challenge the Federal Circuit's case law requiring privity in their petition for rehearing en banc. Instead, they claimed that the contracts here established privity with the United States. See C.A. Reh'g Pet. 9.

Petitioners contend (Pet. 20) that the Federal Circuit's "focus on 'privity' * * * would deny jurisdiction over claims by third-party beneficiaries to contracts with the government." That is incorrect. The Federal Circuit has held that "[a] plaintiff lacking privity of contract can nonetheless sue for damages under that contract if it qualifies as an intended third-party beneficiary." *Sioux Honey Ass'n* v. *Hartford Fire Ins. Co.*, 672 F.3d 1041, 1056, cert. denied, 568 U.S. 816 (2012). The third-party beneficiary's claims in that case are still "founded" on a contract "with the United States," even though the third-party beneficiary is not a party to that contract. See, *e.g.*, *FloorPro, Inc.* v. *United States*, 680 F.3d 1377, 1380 (Fed. Cir. 2012); *D & H Distrib. Co.* v. *United States*, 102 F.3d 542, 547 (Fed. Cir. 1996). Here, by contrast, there is no question that petitioners are parties to the contracts on which their claims are "founded"; the jurisdictional flaw correctly identified by the court of appeals is that the United States is not. The Federal Circuit's decisions allowing third-party beneficiaries to sue under the Tucker Act therefore are inapposite here.

3. Contrary to petitioners' contention (Pet. 17-18), the court of appeals' decision will not deprive property owners of the opportunity to obtain redress for potential breaches of HAP renewal contracts. Property owners who are parties to HAP renewal contracts have brought actions against state PHAs for alleged breaches of those agreements. See, *e.g.*, *Evergreen Square of Cudahy* v. *Wisconsin Hous. & Econ. Dev. Auth.*, 848 F.3d 822 (7th Cir. 2017). Petitioners' inability to sue HUD directly therefore does not leave them without a judicial remedy for any breach of the HAP renewal contracts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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