No. 13-246

In the Supreme Court of the United States

ONE AND KEN VALLEY HOUSING GROUP, ET AL.,
PETITIONERS

v.

MAINE STATE HOUSING AUTHORITY, 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

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Assistant Attorney General
RUTH A. HARVEY
KYLE A. FORSYTH
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a public housing agency committed a breach of contract under Maine law when it denied rent increases to certain landlords on the ground that the increases would yield materially above-market rents, based upon a contract provision stating that "adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by" the public housing agency?

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 716 F.3d 218. The order of the district court (Pet. App. 22a-23a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 2013. A petition for rehearing was denied on July 10, 2013 (Pet. App. 83a-84a). The petition for a writ of certiorari was filed on August 20, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In 1974, Congress created the housing subsidy program commonly known as "Section 8" "[f]or the purpose of aiding lower-income families in obtaining a decent place to live and of promoting economically mixed housing." Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 201(a), 88 Stat.

662 (42 U.S.C. 1437f) (amending United States Housing Act of 1937, ch. 896, 50 Stat. 888).

To achieve this objective, the U.S. Department of Housing and Urban Development (HUD) subsidizes housing rentals for qualifying tenants. In some cases, HUD itself enters into Housing Assistance Payments (HAP) contracts with landlords who agree to provide subsidized housing. In other cases, HAP contracts with state and local agencies to administer the program. In those cases, HUD provides "annual contributions" to the state or local agencies for rental subsidies and administrative fees. § 201(a), 88 Stat. 662; 24 C.F.R. 883.302 (1976). The state or local agencies then enter into HAP contracts with private landlords who agree to rent units to qualifying households.

HAP contracts specify the maximum rent that a landlord may charge for each unit. 42 U.S.C. 1437f(c)(1). Absent special circumstances, the initial monthly rent in a HAP contract "shall not exceed by more than 10 per centum the fair market rental established by the Secretary * * * for existing or newly constructed rental dwelling units of various sizes and types in the market area suitable for occupancy by persons assisted under this section." *Ibid.* Section 8 tenants pay a portion of this rent—determined based on income and other factors—and the housing agency pays the rest. 24 C.F.R. 883.302 (1976).

Congress has provided for Section 8 rents to be adjusted annually, according to a HUD-determined "reasonable formula," but has forbidden Section 8 rental rates from being increased above market levels. Since the program's creation, the statute has provided for adjustments "annually or more frequently * * * to reflect changes in the fair market rentals established

in the housing area for similar types and sizes of dwelling units or, if the [HUD] Secretary determines, on the basis of a reasonable formula." 42 U.S.C. 1437f(c)(2)(A) (1976); see also 42 U.S.C. 1437f(e)(1). These adjustments are capped by a limitation clause providing that "[a]djustments in the maximum rents * * * shall not result in material differences between the rents charged for assisted units and unassisted units of similar quality, type, and age in the same market areas, as determined by the Secretary." 42 U.S.C. 1437f(c)(2)(C).

b. Congress has amended the statute on several occasions to prescribe particular methods of ensuring that Section 8 rents track market rents. When the Section 8 program began, HUD increased Section 8 rents annually as a matter of course using an index known as the Automatic Annual Adjustment Factors, which drew from the Consumer Price Index. 24 C.F.R. 883.207(b) (1976), 888.203(b) (1977); 41 Fed. Reg. 49,440 (Nov. 8, 1976). In the early 1980s, however, HUD became concerned "that the assistance payments it was making to some landlords under the Section 8 program were well above prevailing market rates for comparable housing." *Cisneros* v. *Alpine Ridge Grp.*, 508 U.S. 10, 14 (1993). HUD began to conduct studies to compare rents for subsidized and market-rate units in particular areas, and it denied rent increases when the studies demonstrated that Section 8 landlords were receiving payments that were "materially out of line with market rents." *Ibid.*; Pet. App. 5a.

In 1988, after the Ninth Circuit—alone among courts that considered HUD's practice—concluded that the terms of the HAP contracts did not allow

HUD's use of comparability studies, Congress responded by expressly authorizing the use of the studies to limit rent increases. Housing and Community Development Act of 1987 (1988 Amendment), Pub. L. No. 100-242, § 142(c)(2), 101 Stat. 1850. The 1988 Amendment provided that if a comparability study was not completed at least 60 days before the anniversary date of a HAP contract, the annual adjustment factor should be applied to increase rents. *Ibid.*

After the Ninth Circuit again held, following the 1988 Amendment, that HUD breached its contract when it denied rent increases to the landlords, this Court granted certiorari and reversed in a unanimous decision. Interpreting a clause indistinguishable from a clause in petitioners' contracts, this Court held that "the contract language is plain that no project owner may claim entitlement to formula-based rent adjustments that materially exceed market rents for comparable units." *Alpine Ridge*, 508 U.S at 21. With respect to the method of determining whether adjustments were warranted, the Court noted that the HAP contract "expressly assigns to 'the Government' the determination of whether there exist material differences between the rents charged for assisted and comparable unassisted units." *Ibid.* The Court concluded that the provision "affords the Secretary sufficient discretion" to use comparability studies in order to determine whether there existed material differences between market and Section 8 rents, "as a reasonable means of effectuating its mandate." *Ibid.*

c. In 1994, Congress amended the Section 8 statute to limit rent increases to landlords who HUD data indicated were receiving above-market rents, unless the landlord provided a comparability study to sup-

port the increase. Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1995 (1994 Amendments), Pub. L. No. 103-327, Tit. II, 108 Stat. 2315.

The initial sponsors of the change that was ultimately adopted through the 1994 Amendments explained the proposal by placing into the record a HUD report documenting the high percentage of Section 8 units that were receiving above-market rents. 140 Cong. Rec. 8693 (1994) (describing how "[r]oughly 75%" of the relevant classes of Section 8 units were receiving above-market rents). The HUD report noted that "years of cumulative rent increases based on [the automatic annual adjustment factors] are partly responsible for the current high rents in assisted properties that exceed the FMR [fair market rents]"—HUD's "benchmark" for local rents by unit type, *ibid.*, which is published in the Federal Register, see 24 C.F.R. 5.100. HUD therefore supported modifying the statute so that "Section 8 projects with contract rents that exceed the section 8 existing housing FMR should not receive automatic inflation adjustments to rent unless their owners can prove that the rents, as adjusted, would be in line with those in comparable, unassisted projects." 140 Cong. Rec. at 8693.

The precise language that the HUD report was submitted to explain was later added to a different bill and enacted during the same legislative session. Compare Housing Choice and Community Investment Act of 1994, S. 2049, 103d Cong. 2d Sess. § 801(a), with Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1995, Pub. L. No. 103-327, 108 Stat. 2315. That language states that where rent for a unit

"exceeds the fair market rental for an existing dwelling unit in the market area, the Secretary shall adjust the rent only to the extent that the owner demonstrates that the adjusted rent would not exceed the rent for an unassisted unit of similar quality, type, and age in the same market area, as determined by the Secretary." 42 U.S.C. 1437f(c)(2)(A). As originally enacted, the 1994 Amendments were applicable for one fiscal year.

In 1995, HUD promulgated an official notice to implement the 1994 Amendments. HUD, *Housing Notice H 95-12* (*Notice 95-12*).[1] In that notice, the Secretary directed housing authorities to ascertain whether a contract rent "exceeds the fair market rental for an existing dwelling unit in the market area" by consulting the fair-market-value data promulgated by HUD annually through notice and comment procedures. *Notice 95-12*; see Pet. App. 8a. HUD also directed that if a landlord had been receiving an above-market rent at the start of the contract, the rents should be adjusted upward above market rates to the extent necessary to preserve that initial difference. In the absence of evidence concerning the initial difference, HUD instructed housing authorities to presume that the initial HAP contracts had provided for rent ten percent above prevailing market rates. If application of the annual adjustment factors would raise rents above the published market rates to an extent greater than that of the initial difference, HUD provided that landlords could obtain a rent increase by presenting a comparability study supporting the increase.

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[1] *Notice 95-12* has been superseded by *Notice H 2002-10*, but that notice contains the same relevant terms.

After HUD promulgated the 1995 notice, Congress made permanent the 1994 Amendments that the notice implemented. See Balanced Budget Act of 1997, Pub. L. No. 105-33, § 2003, 111 Stat. 257.

2. Petitioners are limited partnerships that own rental housing projects in Maine. Pet. App. 2a. Each of the partnerships entered into a HAP contract with respondent Maine State Housing Authority to participate in the Section 8 program. *Ibid.*; *id.* at 30a-31a.[2] Each HAP contract "describes the mechanism for automatic annual adjustment of contract rents, and imposes an overall limitation on the same." *Id.* at 39a. Specifically, each contract provides that the government will determine automatic annual adjustment factors, which will be published in the Federal Register. *Ibid.* Then, "[o]n the anniversary date of the Contract, the Contract Rents shall be adjusted by applying the applicable Automatic Annual Adjustment Factor most recently published by the Government." *Id.* at 40a. However, those adjustments would not be applied when they led to material differences between rent for market units and subsidized units, due to the contract's overall limitation clause:

> Notwithstanding any other provisions of this Contract, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the [housing authority] . . . ; provided, that this limitation shall not be

[2] HUD supplies funds for the rent subsidies in these contracts and sets terms for the program, under annual contributions contracts between HUD and the Maine State Housing Authority. Pet. App. 3a; 28a-30a. Federal respondent Shaun Donovan is the Secretary of HUD. *Id.* at 28a.

> construed to prohibit differences in rents between assisted and comparable unassisted units to the extent that such differences may have existed with respect to the initial Contract Rents.

Ibid.; *id.* at 95a-96a.

The Maine State Housing Authority increased petitioners' rents every year under these contracts for more than 15 years. By the 1990s, however, petitioners were receiving rents that far exceeded the market rates in their area. See Pet. App. 10a, 47a, 66a-67a, 70a. For instance, One and Ken Valley was receiving $832 per month for its one-bedroom units in 1999, while HUD's table of market rents for that area—nonmetropolitan Somerset County—determined that the market rent for comparable units was $381. *Id.* at 66a.

After the publication of *Notice H 95-12*, the Maine State Housing Authority denied rent increases to petitioners in certain years. For the first ten years after the notice was issued, the housing authority denied rent increases based upon its comparisons of current contract rents to market rates. Pet. App. 10a. Thereafter, the housing authority permitted some increases but not others. In 2005, petitioners submitted studies to show that the housing authority could grant rent increases without violating the overall limitation clause. *Ibid.*; *id.* at 47a. HUD and the housing authority agreed, following receipt of the studies, to let petitioners use an alternative method for calculating the initial difference at their sites, so that petitioners could receive rents more than ten percent above the market rate in order to preserve the initial difference between subsidized and market-rate rents under petitioners' HAP contracts. *Id.* at

10a, 47a; C.A. J.A. 1412-1414, 1485-1486, 1510, 1522, 1566-1568, 1687-1691. Rents accordingly increased by as much as $1092 per unit per year at petitioners' sites. The housing authority has also granted further annual rent increases at some properties. Pet. App. 10a, 48a-49a, 70a-72a.

3. Petitioners filed suit in federal district court against the Maine State Housing Authority, contending that the housing authority had breached its contracts with petitioners under Maine law in the years in which it refused to grant rent increases. Pet. App. 2a-3a, 11a, 18a n.10, 62a-63a. The housing authority denied the allegations, but impleaded the Secretary of HUD as a third-party defendant, arguing that if the housing authority had breached its contracts with petitioners, it had done so at HUD's direction. *Id.* at 14a.

The district court granted summary judgment for the Maine State Housing Authority and the Secretary of HUD, adopting the recommended decision of a magistrate judge. Pet. App. 3a, 22a-23a. After describing the requirements for a breach of contract under Maine law, *id.* at 56a, the court found no breach. It held that the "plain language of the HAP Contracts" allowed the housing authority to deny rent increases to petitioners based on HUD's determination that the increases would result in unjustified material differences from market rates. *Id.* at 59a; see *id.* at 59a-65a. The court indicated that petitioners had not shown either a material breach or that petitioners had suffered damages from a breach. *Id.* at 65a; see also *id.* at 71a, 78a.

The court of appeals affirmed, finding no breach of the HAP contracts. Pet. App. 1a-21a. The court be-

gan by considering its subject matter jurisdiction, since petitioners raised only state law claims and the parties were not diverse. *Id.* at 10a-11a. The court concluded that the suit fell within the "special and small category of cases" in which federal jurisdiction over a state contract dispute between non-diverse parties was justified because petitioners' state-law claims had a number of "federal ingredients." *Id.* at 11a-13a.

The court of appeals then turned to the merits, which it found "turn[ed] on a narrow question of contract law." Pet. App. 3a. In considering whether the housing authority was entitled to deny rent increases to petitioners under the relevant contracts, the court "t[ook its] guidance from [this] Court's *Alpine Ridge* decision," which had construed an overall limitation clause in contracts that were "in all relevant respects identical to the contracts at issue here." *Id.* at 16a, 20a. *Alpine Ridge*, the court explained, had determined that the contract authorized a housing authority to decline to allow rent increases that the authority determined would raise rents above market rates. *Id.* at 17a. In *Alpine Ridge*, this Court emphasized that the government was the entity charged with selecting the method for rent comparisons, because the contract "expressly assigns to 'the Government' the determination of whether there exist material differences between the rents charged for assisted and comparable unassisted units." 508 U.S. at 21.

The court of appeals found this analysis controlling with respect to the virtually identical contracts in this case. As in *Alpine Ridge*, petitioners' contracts authorized the housing authority to withhold an automatic annual adjustment if the housing authority "has

'determined' that the adjustments would 'result in material differences between the rents charged for assisted and comparable unassisted units.'" Pet. App. 17a (quoting contract). Mirroring *Alpine Ridge*, the court concluded that since the HAP contracts "expressly assign[ed]" to the housing authority "the determination of whether there exist material differences between the rents charged for assisted and comparable unassisted units," the court's task was simply to decide "whether the Notice H 95-12 method represents a 'reasonable means' of making the comparison." *Id.* at 20a (quoting *Alpine Ridge*, 508 U.S. at 21). The court concluded that the fair market rent comparison procedures embodied in *Notice H 95-12* represented, at a minimum, "a 'reasonable means' of making the comparison" of contract and market rents, and were therefore valid. *Ibid.* In reaching that conclusion, the court stated that it was "the first federal appellate court to reach [the] question" of whether the overall limitation clause in HAP contracts authorized housing authorities to limit rent increases that would bring adjusted rents above HUD's published fair market values. *Id.* at 15a-16a.

ARGUMENT

Petitioners seek review of their state contract law claims, contending that the Maine State Housing Authority was not authorized under its contracts with petitioners to deny annual rent increases that would have brought Section 8 rents materially above the levels of the fair market rents published by HUD. The court of appeals correctly rejected that argument on what it termed "a narrow question" of contract interpretation. Pet. App. 3a. Its decision, which followed directly from this Court's decision in *Cisneros*

v. *Alpine Ridge Group*, 508 U.S. 10 (1993), does not present a clear conflict with the decision of any court of appeals. And it concerns a question of diminishing importance, because housing authorities no longer enter into HAP contracts that contain the language at issue in this contract dispute. Further review is therefore unwarranted.

1. a. The court of appeals correctly determined that the Maine State Housing Authority did not breach its contracts with petitioners. Petitioners' contracts expressly permitted the housing authority to deny annual adjustments that would "result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the" housing authority, except as necessary to preserve an initial difference between market rates and rents under the contract. Pet. App. 40a; *id.* at 95a-96a. That is just what the housing authority did in the years when it denied rent increases—it determined, based on a comparison to published fair-market-value data, that further increases would raise rents well above market rates.

Alpine Ridge confirms that reading of the contracts. In *Alpine Ridge*, as here, landlords contended that they were entitled to rent increases notwithstanding a contractual provision permitting the housing authority to deny increases that would result in material differences between contract rents and market rents. This Court unanimously held that the housing authority was entitled to deny the increases based on a contract provision materially undistinguishable from a provision in petitioners' contracts. 508 U.S. at 14. It found the plaintiffs' claim of entitlement to rent increases to be "precluded by the plain language of

the assistance contracts" that provided, like the contracts in this case, that "rents 'shall not' be adjusted so as to exceed materially the rents charged for 'comparable unassisted units' on the private rental market." *Id.* at 17-18. Noting that the contracts "expressly assign[ed] to 'the Government' the determination of whether there exist material differences between the rents charged for assisted and comparable unassisted units," the Court concluded that denial of adjustments based on comparability studies was permissible because the studies were "a reasonable means of effectuating [the housing authority's] mandate" to compare market and subsidized rents. *Id.* at 21.

The court of appeals was correct that the *Alpine Ridge* analysis controls. Petitioners' contracts "expressly assign[] to the Government the determination of whether there exist material differences between the rents charged for assisted and comparable unassisted units." 508 U.S. at 21 (internal quotation marks omitted). And the court of appeals correctly determined that use of HUD's annual market rent publications was a "reasonable means" of comparing market and non-market rates, given that the published data take into account, among other considerations, "unit quality, amenities, utilities, and (to some extent) age," and that procedural safeguards permit landlords to challenge the resulting calculations. Pet. App. 19a; see also 24 C.F.R. 888.111, 888.113, 888.115. Under *Alpine Ridge*, because comparison to published fair-market-value data was "a reasonable means of effectuating [the housing authority's] mandate" under its contract to compare market and subsidized rents, 508 U.S. at 21, the housing authority did not breach its contracts.

b. Petitioners' contrary view finds no support in petitioners' contracts. While petitioners suggest that the housing authority was contractually permitted to deny rent adjustments only based on comparability studies, petitioners' contracts with the housing authority do not mention comparability studies or any particular method of measuring differences between market and subsidized rents. Instead, as the court of appeals noted, Pet. App. 18a n.10, they "assign[] to 'the Government' the determination of whether there exist material differences," *Alpine Ridge*, 508 U.S. at 21.

Petitioners' alternative contention that the housing authority committed statutory violations because it denied rent increases without performing comparability studies was not pressed or passed upon below, and is in any event not supported by the statutory text. Before the court of appeals, petitioners agreed that the 1994 Amendments shifted the burden of performing comparability studies to landlords in some cases, and simply contended that this statutorily permitted shift had been a breach of contract. See, *e.g.*, Pet. C.A. Br. 33 ("[T]he 1994 Act breached the HAP Contract by negating the automatic adjustment provision by requiring the owner—not MaineHousing—to prepare a [comparability study]."); see also *id.* at 7, 14, 16, 23. Petitioners' contentions that the housing authority actually violated the post-1994 statute were therefore "not pressed or passed upon below," *United States* v. *Williams*, 504 U.S. 36, 41 (1992), and do not warrant review in this Court, see, *e.g.*, *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

In any event, petitioners' newfound statutory argument lacks merit. Since 1988, the Section 8 statute has called for rent increases annually in one provision, 42 U.S.C. 1437f(c)(2)(A), and permitted an override of "[a]djustments * * * under subparagraph[] (A)" based on comparability studies in another provision, 42 U.S.C. 1437f(c)(2)(C). Faced with evidence that Section 8 rents were routinely exceeding market rents, however, Congress amended the portion of the statute that provided for annual increases—Subparagraph (A)—to provide that the increases would not be triggered at all if they would raise rents above market rates, unless the landlord supplied a study to support the increase. 42 U.S.C. 1437f(c)(2)(A). In particular, Subparagraph (A) was amended to provide that "where the maximum monthly rent * * * exceeds the fair market rental for an existing dwelling unit in the market area, the Secretary shall adjust the rent only to the extent that the owner demonstrates that the adjusted rent would not exceed the rent for an unassisted unit of similar quality, type, and age in the same market area, as determined by the Secretary." *Ibid.* Nothing in this categorical bar requires a housing authority to perform comparability studies before rejecting an increase that would raise rents above "fair market" levels. Rather, under the 1994 Amendments, if adjusted rents would "exceed[] the fair market rental" rates and the landlord did not submit a comparability study, an annual adjustment is not triggered at all under Section 1437f(c)(2)(A), and the mechanisms to override the adjustment under Section 1437f(c)(2)(C) based on government studies need not be employed.

2. Petitioners argue that certiorari is warranted because the decision below conflicts with *Alpine Ridge*. Pet. 17-20. *Alpine Ridge*, however, unanimously affirmed a housing authority's invocation of a contract's overall limitation clause to limit rent increases. The court of appeals here, far from rejecting *Alpine Ridge*, applied its central holding "that the terms of the overall limitation clause—which apply 'notwithstanding any other provisions' of the HAP contract—'override conflicting provisions of any other section.'" Pet. App. 16a (quoting *Alpine Ridge*, 508 U.S. at 18).

Petitioners' claim of a conflict is based on the premise that *Alpine Ridge* concluded that only comparability studies could support an invocation of a contract's overall limitation clause. See Pet. 17. As the discussion of *Alpine Ridge* above illustrates, that is not correct. While comparability studies were the particular method of assessing rents before the Court in *Alpine Ridge*, the Court's reasoning was general, as it held that those studies could be used because the Secretary had "discretion" under the contracts to select the method for measuring material difference. 508 U.S. at 21; see also *ibid.* (approving studies as "a reasonable means" of making "some comparison" between market and contract rents). Although the Court predicted that "presumably" and "theoretically" the overall limitation clause would be invoked rarely, "[b]ecause the automatic adjustment factors are themselves geared to reflect trends in the local or regional housing market," it did not condition its rule on those predictions. *Id.* at 19. Rather, *Alpine Ridge* noted that the contract was "plain" that landlords may not "claim entitlement to formula-based rent adjust-

ments that materially exceed market rent for comparable units." *Id.* at 21.[3]

Petitioners also contend that the decision below creates a circuit conflict. That contention does not warrant review. In *Haddon Housing Associates, Ltd.* v. *United States*, 711 F.3d 1330 (Fed. Cir. 2013), the lone case that petitioners cite for a circuit split, landlords claimed a breach of their Section 8 contracts after HUD declined to increase their rents. In its defense, the government placed principal reliance on a provision in the *Haddon* contracts that required landlords to submit requests for rent increases in advance (which the plaintiffs had not done), but also argued in the trial court that the overall limitation clause permitted HUD to deny rent increases and served as a cap on damages. The trial court determined that HUD had breached the contracts by requiring the landlords to submit a comparability study in order to obtain rent increases. *Haddon Hous. Assocs.* v. *United States,* 99 Fed. Cl. 311, 329-330 (2011). Then, in a discussion of the overall limitation clause, *id.* at 338-340, the trial court concluded that the 1994 Amendments had repudiated the overall limitation clause and

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[3] As the court of appeals put it, the *Alpine Ridge* Court simply "was not asked to decide what would happen if HUD and the state and local housing agencies—applying HUD-mandated methods—found 'materially inflated rents' to be not "exceptional" but rather quite common," and "certainly did *not* say that in such a scenario, HUD or the state and local housing agencies would be contractually obligated to grant automatic annual adjustments even after finding that the resulting rents would be materially above the calculated market rates." Pet. App. 21a n.11. The background of the 1994 Amendments, enacted after *Alpine Ridge*, showed that rents in fact exceeded market rates under the program on a widespread basis. See p. 5, *supra*.

"had the effect of precluding HUD from invoking the clauses originally included in the HAP contracts," *id.* at 340. The trial court added that since "the court is convinced that, as a matter of law, the overall-limitation clause did not survive the 1994 Amendments," the clause could not "serve as a cap on plaintiffs' damages." *Ibid.* The government did not challenge that conclusion on appeal. See *Haddon*, 711 F.3d at 1335-1336 & n.1.

The Federal Circuit's affirmance of the trial court's decision in *Haddon* does not create a clear circuit conflict because the import of that court's cursory contract discussion is itself not clear—and indeed, the First Circuit in this case understood the Federal Circuit to have treated any argument based on the overall limitation clause as waived. Pet. App. 16a n.8. While the government in *Haddon* included arguments concerning the overall limitation clause in its briefing on appeal, the Federal Circuit stated twice that "[t]he government [did] not appeal" the determination that "the overall limitation in the Haddon HAP Contract does not serve as a cap on Haddon's damages because it was superseded by the 1994 Amendments." 711 F.3d at 1335-1336 & n.1; see also *id.* at 1336 n.2. Apparently because the meaning of the overall limitation clause would not have been before the appellate court if the government was understood not to have appealed a determination that the clause "was superseded by the 1994 Amendments," *ibid*, the First Circuit concluded that the Federal Circuit "expressed no view regarding the impact of the overall limitation clause in the landlord's HAP contract, as the issue was not preserved for appeal." Pet. App. 16a n.8. But regardless of which issues might technically have been be-

fore the Federal Circuit or waived in *Haddon*, the fact remains that the Federal Circuit's brief discussion of the HAP contracts in the merits portion of its opinion did not analyze the overall limitation clause—the provision on which this Court's discussion in *Alpine Ridge* and the First Circuit's decision in this case both turned. 711 F.3d at 1336 (stating only that the court "agree[d] that the 1994 Amendments and HUD's implementation thereof is a breach of the Haddon HAP Contract for all years at issue here"). Accordingly, issues concerning the meaning and application of the overall limitation clause do not warrant review at this time, but would instead benefit from further percolation and consideration in the lower courts. And this case would not be an appropriate vehicle for considering these issues, because a principal argument in the certiorari petition—that the housing authority misconstrued the 1994 Amendments and violated the Section 8 statute—was not pressed or passed upon below. Indeed, that argument was also not considered in *Haddon*, the case on which petitioners rely for a circuit split.

3. In any event, the question presented is one of diminishing importance and does not warrant this Court's review for that reason as well. The case turns on "a narrow question of contract law" concerning the interpretation of language in particular contracts, Pet. App. 3a, and housing authorities no longer enter into contracts containing that language. In particular, the Multifamily Assisted Housing Reform and Affordability Act of 1997, Pub. L. No. 105-65, Tit. V, 111 Stat. 1384, imposed new rules concerning the renewal of Section 8 contracts and the calculations of rent to be paid to Section 8 landlords. Consequently, HUD has

developed new contracts for all Section 8 renewals, and neither HUD nor local authorities now enter into contracts containing the terms in dispute in this case. See HUD, *Section 8 Renewal Policy: Guidance for the Renewal of Project-Based Section 8 Contracts*, ch. 3-7, 2008, http://www.hud.gov/offices/hsg/mfh/exp/guide/s8renew.pdf (last visited Nov. 22, 2013); HUD, *Section 8 Renewal Contracts*, http:// portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/exp/guide/s8guideatt (last visited Nov. 22, 2013); see also C.A. J.A. 0960-0988 (2009 renewal contract executed by petitioner One and Ken Valley Housing Group containing revised terms).

Petitioners' suggestion that the court of appeals' decision effects a major change in Section 8 administration that threatens "potentially devastating" consequences, see Pet. 20, is without merit. Far from changing how the Section 8 program operates, the court of appeals merely sustained the way in which HUD and public housing agencies have been implementing the 1994 Amendments for nearly two decades. Pet. App. 10a, 21a. Petitioners adduce no evidence of an exodus during that time. And because the language at issue in this case is no longer included in Section 8 contracts, it is hard to see how judicial interpretation of this language would meaningfully affect landlords' decisions concerning whether to renew their participation in the program.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
STUART F. DELERY
Assistant Attorney General
RUTH A. HARVEY
KYLE A. FORSYTH
Attorneys

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