PRIVATE PROPERTY MANAGERS, UNCHECKED: THE FAILURES OF FEDERAL COMPLIANCE OVERSIGHT IN PROJECT-BASED SECTION 8 HOUSING

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Federally subsidized housing should be the foundation upon which much of our social safety net is built. It is supposed to be a core component of our public response to the intertwined crises of poverty and homelessness, funded by taxpayer dollars and executed by our public servants in the Department of Housing and Urban Development (HUD), as well as by state and local officials. Yet, in so many ways, this vision is a complete falsehood. In practice, our federally subsidized housing system is impossibly pockmarked and flawed. Affordable housing programs, built on public funds, too often abuse and humiliate tenants rather than protect and provide for them. Chronic underfunding and a neoliberal obsession with oversurveilling and overpolicing tenants are toxic twin undercurrents in most of our federally subsidized programs. Decades of disinvestment coupled with punishing statutory schemes squeeze every drop of discretionary income out of tenants and create a shared experience of suffering by tenants across each of the many federally subsidized housing programs. As a result, most tenants receiving the benefit of federal subsidized housing are the victims of financial insecurity, privacy violations, poor living conditions, and an ever-present threat of eviction.

In Project-Based Section 8 housing,[1] one of the main structural breakdowns affecting the everyday lives of tenants is the lack of a functioning accountability and oversight system for the private property managers who carry out the housing program. These property managers have deep access to tenants' private information and the power to make decisions of enormous consequence. HUD was originally respon-

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[1] Unlike tenant-based Section 8 programs, through which eligible tenants find their own housing, project-based housing is tied to specific projects. *See Policy Basics: Section 8 Project-Based Rental Assistance*, CTR. ON BUDGET & POL'Y PRIORITIES, https://www.cbpp.org/research/housing/section-8-project-based-rental-assistance [https://perma.cc/5YBZ-A42U]. This Note focuses on the latter.

sible for monitoring property managers' behavior and ensuring regulatory compliance to protect tenants from abuse.[2] However, HUD has contracted out that responsibility to public housing agencies (PHAs), many of whom have then further contracted it out to private service providers (PSPs). This system has proved wholly ineffective at actually policing property manager noncompliance. As a result, property manager abuse is endemic in Project-Based Section 8 housing. Tenants suffer the consequences in myriad ways, from overpaying hundreds of dollars of rent to facing improper evictions.[3] This failure to enforce tenants' rights is particularly egregious in a subsidy program that is designed to touch and control almost every aspect of tenants' financial lives, and where the majority of tenants are elderly or disabled.[4]

This Note first provides an overview of the history and creation of the Project-Based Section 8 housing system. It then describes how the neoliberal framework and reliance on private actors in Project-Based Section 8 housing leaves tenants especially vulnerable to abuse by property managers. This Note then describes the entrenched property manager noncompliance in these federally subsidized buildings and discusses the many ways in which HUD's dual-delegation system fails to deliver compliance oversight. Finally, submitting that the dual-delegation system is so flawed as to be unfixable, this Note proposes that, in order to effectively police Property Management practices, HUD should stop delegating these functions and revert all oversight and enforcement duties back to itself.

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[2] Holbrook v. Pitt, 479 F. Supp. 990, 992 (E.D. Wis. 1979) ("The heart of the assistance payment system is the contract entered into between HUD and the owner. The contract governs the relationship between the contracting parties and spells out the duties of the owner with respect to administration of the section 8 program.").

[3] *See, e.g.*, Anjali Kamat, *NYCHA Hires Private "Slumlord" to Run Public Housing*, WNYC (Feb. 6, 2019), https://www.wnyc.org/story/nycha-hires-private-slumlord-public-housing [https://perma.cc/Q4CE-CZCE]; Molly Parker, *"Pretty Much a Failure": HUD Inspections Pass Dangerous Apartments Filled with Rats, Roaches and Toxic Mold*, S. ILLINOISAN (Nov. 16, 2018), https://thesouthern.com/news/local/pretty-much-a-failure-hud-inspections-pass-dangerous-apartments-filled-with-rats-roaches-and-toxic/article_445a8e2a-d3c2-58f0-8229-5cf274f6ad04.html [https://perma.cc/VY49-VFHP].

[4] U.S. DEP'T OF HOUS. & URB. DEV., FISCAL YEAR 2021 CONGRESSIONAL JUSTIFICATIONS 21-2 (2020) ("Approximately 49 percent of assisted households are headed by elderly persons, 16 percent by persons with disabilities, and 24 percent are families with children.").

I. THE CURRENT PROJECT-BASED SECTION 8 HOUSING PROGRAM: LAYERS OF PRIVATIZATION

A. History and Creation of the Project-Based Section 8 Housing Program

The United States has never really considered affordable housing to be deserving of sustained, unprofitable federal investment.[5] Instead, federal money has generally been directed only into the construction of public housing as a means for achieving other specific societal ends.[6] Even the seminal U.S. Housing Act of 1937[7] was just one part of broader New Deal legislation,[8] largely intended to provide housing for middle-class workers to enable the broader public works efforts.[9] Financially, these large, federally subsidized developments were never designed to be an enduring social investment in poor people.[10] Rather, the public housing model as originally conceived relied on attracting middle-income families, whose rent contributions would easily cover the operating costs of the development, and whose contributions would therefore relieve the federal government of any further financial investment beyond the initial funds required to establish the property.[11] After these New Deal–era housing programs failed to maintain the middle-class population for which they were intended,[12] Congress created a variety

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[5] *See* Charles L. Edson, *Affordable Housing—An Intimate History*, 20 J. AFFORDABLE HOUS. & CMTY. DEV. L. 193, 194 (2011) (discussing how, historically, affordable housing has never been "an end in itself").

[6] Though the first federal investment in housing did situate the government as the provider, responsible for constructing, maintaining, and administering the housing stock, that role was never conceptualized as an end goal in and of itself. Even the preamble of the Housing Act of 1937, Pub. L. No. 75-412, 50 Stat. 888 (codified at 42 U.S.C. § 1437), the seminal legislation that created a skeletal structure for our current public housing, identified broadly economic goals; the "reduction of unemployment and the stimulation of business activity" are listed as primary goals of the legislation. *Id.* pmbl., 50 Stat. at 888.

[7] 42 U.S.C. § 1437.

[8] ALEX F. SCHWARTZ, HOUSING POLICY IN THE UNITED STATES 101 (3d ed. 2006) ("The program replaced a much smaller New Deal initiative that financed the development of low-income housing as part of a broader effort to support public works.").

[9] *See* Jaime Alison Lee, *Rights at Risk in Privatized Public Housing*, 50 TULSA L. REV. 759, 763–64 (2015) ("Public housing's original purposes included improving housing conditions for formerly middle-class workers left homeless by the Depression, as well as stimulating the economy.").

[10] *Id.*

[11] *Id.* at 764.

[12] This design failed, largely due to middle-class and working-class exodus to the suburbs and home ownership. This path was largely paved by heavy federal investment in Federal Housing Administration mortgage insurance. SCHWARTZ, *supra* note 8, at 105. As a result, the median income of tenants in public housing plummeted beginning in the 1950s onward, while operating costs continued to increase. *Id.* at 105, 113; *see also* Lee, *supra* note 9, at 764 ("Against this backdrop—an increased reliance on taxpayer dollars, and a resident community that was the object of hostility and fear—public housing development came to a standstill. Emphasis shifted to other

of programs in the 1950s and 1960s that embraced a public-private partnership model.[13] These programs were the blueprint for incentivizing the creation of affordable housing with public-private funding arrangements and financial incentives[14] and served as the predecessor of, and inspiration for, the Project-Based Section 8 program.[15]

The Project-Based Section 8 program is an umbrella term for a set of several different housing subsidy programs authorized by a 1974 amendment to the U.S. Housing Act of 1937, each using different variations of public-private funding models.[16] The most populous of these,[17] and the main focus of this Note, were the Substantial Rehabilitation (SR) and New Construction (NC) programs. For SR/NC developments, HUD entered into long-term subsidy contracts with private owners and developers willing to build new units, or substantially rehabilitate existing units, for the purpose of providing affordable housing.[18] Under these contracts, HUD covered the difference between 25% of the tenant's income (later raising it to 30%) and the "fair market rent" of a unit, with direct subsidy payments to the private owner.[19] Private

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housing programs and to finding alternatives to government-owned and operated housing." (footnote omitted)).

[13] For example, the Section 202 program, the Section 221(d)(3) Below Market Interest Rate (BMIR) housing program, the Section 236 and Section 235 programs, and the Section 23 program. *See* MAGGIE MCCARTY, LIBBY PERL & KATIE JONES, CONG. RSCH. SERV., RL34591, OVERVIEW OF FEDERAL HOUSING ASSISTANCE PROGRAMS AND POLICY 4, 13–15 (2019); *see also* NAT'L LOW INCOME HOUS. COAL., A BRIEF HISTORICAL OVERVIEW OF AFFORDABLE RENTAL HOUSING 1–7 (2015) ("Beginning in the late 1950s and continuing into the 1960s, Congress created a number of programs that leveraged private investment to create new affordable rental housing.").

[14] MCCARTY ET AL., *supra* note 13, at 4 ("By the end of the 1960s, subsidies to private developers had resulted in the creation of hundreds of thousands of rental housing units."). These programs often worked by reducing the debt-servicing expenses of nonprofit and for-profit private owners, allowing them to offer more affordable rent. The Section 221(d)(3) program, for example, offered owners below-market interest rates on mortgages, and the Section 236 program provided a direct annual subsidy to owners to functionally cap their mortgage interest rates at 1%. SCHWARTZ, *supra* note 8, at 130–32.

[15] *See* Mary L. Heen, *Due Process Protections for Tenants in Section 8 Assisted Housing: Prospects for a Good Cause Eviction Standard*, 12 CLEARINGHOUSE REV. 1, 1 (1978) ("The concept of Section 8 evolved from the Section 23 leased housing program established by the Housing and Urban Development Act of 1965.").

[16] Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 201(a), 88 Stat. 633, 662.

[17] Approximately 850,000 units were constructed under these two programs before the authorization was terminated. SCHWARTZ, *supra* note 8, at 133.

[18] *See id.* In 1978, a "moderate rehabilitation component" was included as well, authorizing HUD to subsidize projects in need of repairs costing at least $1000 per unit. CONG. RSCH. SERV., RL 32284, AN OVERVIEW OF SECTION 8 HOUSING PROGRAMS: HOUSING CHOICE VOUCHERS AND PROJECT-BASED RENTAL ASSISTANCE 3 (2014).

[19] SCHWARTZ, *supra* note 8, at 133.

owners and developers were also offered various tax breaks[20] and subsidized mortgages through Federal Housing Administration mortgage insurance programs,[21] to incentivize their participation. These financing mechanisms, paired with the promise of ongoing rental subsidies, were intended to incentivize private actors into building, or fixing and rehabilitating, far more affordable units than the government could afford to construct itself.[22]

To receive the ongoing rent subsidies, owners entered into Housing Assistance Payment (HAP) contracts with HUD.[23] HAP contracts also correspondingly bind private owners to applicable tenant's rights regulations.[24] The terms of HAP contracts were fixed and ranged between ten and forty years.[25] Congress later approved funding to continually renew existing HAP contracts upon their expiration, but revoked HUD's funding to enter into new HAP contracts in 1983, effectively making Project-Based Section 8 housing a legacy program.[26] When the HAP contract expires, private owners may choose not to renew, effectively "opting-out" of the Project-Based Section 8 program and destroying the affordability of those units.[27]

For the developments that chose to stay in the Project-Based Section 8 program, HUD served originally as the administrator and overseer. As a direct party to the original HAP contract and HAP contract renewals,[28] HUD was responsible for funneling federal subsidy money to private owners and overseeing their compliance with applicable regulations.[29] These regulations included detailed rules about who was eligible for admission into the development as tenants and about how to calculate the income and rent of current tenants.[30] Additionally, private owners were responsible for the physical upkeep of the developments,

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[20] *Id.*

[21] Moon Landrieu & Jane Lang McGrew, *HUD: The Federal Catalyst for Urban Revitalization*, 55 TUL. L. REV. 637, 642 (1981).

[22] *Id.* ("Congress has never authorized expenditures sufficient to cover the full costs of all new or substantially rehabilitated units built for lower-income families. Consequently, financing mechanisms, which provide an indirect subsidy to complement the direct rent subsidy, are essential to Section 8 development as they have been since the advent of assisted housing in 1937.").

[23] *See* 24 C.F.R. § 880.201 (2018).

[24] *See* Rita Burns et al., *Danger of the Opt-Out: Strategies for Preserving Section 8 Project-Based Housing in Philadelphia*, 26 J. AFFORDABLE HOUS. & CMTY. DEV. L. 83, 95–96 (2017). Some properties enter into a Project Rental Assistance Contract (PRAC) instead of a HAP contract. *See id.* at 93.

[25] MCCARTY ET AL., *supra* note 13, at 11.

[26] *See* Housing and Urban-Rural Recovery Act of 1983, Pub. L. No. 98-181, § 209, 97 Stat. 1153, 1183 (codified at 42 U.S.C. § 1437f) (repealing HUD's new construction authority).

[27] *See* Burns et al., *supra* note 24, at 93.

[28] Holbrook v. Pitt, 643 F.2d 1261, 1272–75 (7th Cir. 1981) (describing HUD's role as a direct party to the original HAP contracts with private owners).

[29] *Id.*

[30] 24 C.F.R. §§ 880–885 (2018).

maintaining them to a safe and habitable standard.[31] HUD was the compliance overseer, using the HAP contract and other regulatory enforcement mechanisms to ensure that private owners followed the rules.[32] Tenants could report any issues directly to HUD.

B. Project-Based Section 8 Housing's Two-Tiered Delegation System

1. Creation of Performance-Based Contract Administrators. — This structure, however, did not last. Beginning in the twentieth century, HUD began to delegate contract administration duties to public housing agencies. The first layer of delegation separating tenants from dealing directly with HUD is explicitly contemplated in the original authorizing statute for the Project-Based Section 8 program. That statute states that HUD need not directly manage the distribution of continuing subsidies, called assistance payments, to private owners.[33] Instead, HUD is permitted, but not required, to delegate that duty to a public housing agency, using another contractual vehicle called an Annual Contributions Contract (ACC).[34] Specifically, HUD is permitted to "enter into [ACCs] with public housing agencies pursuant to which such agencies may enter into contracts to make assistance payments to owners," of both existing[35] and newly constructed or substantially rehabilitated[36] Project-Based Section 8 housing. However, the statute explicitly states that HUD may delegate its responsibilities in this way only to a PHA, as defined by the statute.[37] HUD would pay the PHAs, using ACCs, to replace HUD as a party to the HAP contract with the private owner, and to assume HUD's corresponding role as the compliance overseer.[38] The ACC explicitly charges the PHA with administrative compliance oversight of the private owner and provides funds to the PHA to cover the administrative costs of that responsibility.[39] However, for newly constructed and substantially rehabilitated properties, situating a PHA as an intermediary in this way was optional.[40] Until the late 1990s,

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[31] *See id.* § 5 (2018).

[32] *Section 8 Program Background Information*, DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/housing/mfh/rfp/s8bkinfo [https://perma.cc/GXK2-8N36] (describing the owner's obligations under the HAP contract and the remedies available to the other party to the HAP contract, whether that be HUD or a Contract Administrator, in the event the owner violates the HAP contract).

[33] 42 U.S.C. § 1437f(b)(1)-(2).

[34] *Id.*

[35] *Id.*

[36] *Id.* § 1437f(b)(2).

[37] *Id.* § 1437f(b)(1)-(2).

[38] Meaning, the federal money to subsidize tenant rent would flow first from HUD to the PHA through the ACC, then from the PHA to the private owner through the HAP contract.

[39] 24 C.F.R. § 982.151(a)(1) (2018).

[40] For existing properties authorized under § 1437f(b)(1), the intermediary configuration was required unless HUD determined there was no qualified PHA to fill this role. *See* CMS Cont.

HUD largely chose not to exercise this option, entering instead into HAP contracts directly with private owners.[41] Between 1974 and 1983, for example, HUD entered into about 21,000 HAP contracts directly with private owners, while only about 4,200 HAP contracts originated with PHAs funded through ACCs.[42]

That approach changed abruptly in 1997, when then-HUD Secretary Andrew Cuomo unveiled a three-year plan to cut HUD's staff from 10,500 to 7,500 by the year 2000.[43] Cost savings took center stage as an administrative and congressional priority. Suddenly, "due to Federal budget constraints, the downsizing of [HUD], and diminished administrative capacity," Congress determined that HUD "lack[ed] the ability to ensure the continued economic and physical well-being of the stock of federally insured and assisted multifamily housing projects," as the direct administrator of HAP contracts.[44] For the first time, HUD announced its intention to use this statutorily provided delegation option, in the hopes of achieving compliance services at a lower cost.[45]

In 1999, HUD issued a nationwide Request for Proposal (RFP) seeking PHAs to step in and administer about 20,000 Project-Based Section 8 HAP contracts that, until then, HUD had administered directly.[46] When those HAP contracts were up for renewal, PHAs selected by HUD under this RFP, rather than HUD itself, would enter into the HAP agreement directly with the private owner.[47] Meanwhile, HUD would simultaneously enter with the PHA into a modified version of a traditional ACC, with added performance-based metrics.[48] PHAs were invited to offer proposals for areas no smaller than one state.[49] HUD employed thirty-seven PHAs under this RFP, using a modified performance-based ACC.[50] In their new role as administrators under these ACC contracts, the PHAs were called Performance-Based Contract Administrators (PBCAs).[51] These PBCAs were intended to fully stand in

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Mgmt. Servs. v. Mass. Hous. Fin. Agency, 745 F.3d 1379, 1382 (Fed. Cir. 2014) ("If no PHAs were available, HUD could then contract directly with project owners.").

41 CMS Cont. Mgmt. Servs. v. United States, 110 Fed. Cl. 537, 543 (2013) ("HUD entered into approximately 21,000 HAP contracts with owners who either constructed or substantially rehabilitated qualifying housing.").

42 *Mass. Hous. Fin. Agency*, 745 F.3d at 1382.

43 *CMS Cont. Mgmt. Servs.*, 110 Fed. Cl. at 546.

44 Multifamily Assisted Housing Reform and Affordability Act of 1997, Pub. L. No. 105-65, § 511(a)(10), 111 Stat. 1384, 1386 (codified at 42 U.S.C. § 1437f).

45 *See* Request for Proposals; Contract Administrators for Project-Based Section 8 Housing Assistance Payments (HAP) Contracts, 64 Fed. Reg. 27,358, 27,358 (May 19, 1999).

46 *See id.*

47 *See id.*

48 *See id.*

49 *Id.* at 27,370.

50 CMS Cont. Mgmt. Servs. v. Mass. Hous. Fin. Agency, 745 F.3d 1379, 1382–83 (Fed. Cir. 2014).

51 *Id.* at 1383. PBCAs are also referred to as "Contract Administrators" or "CAs." U.S. DEP'T OF HOUS. & URB. DEV., CONTRACT ADMINISTRATION OF PROJECT-BASED SECTION 8

the shoes of HUD and "act as an agent for HUD"[52] to carry out most tasks involved in administering the Project-Based Section 8 program, including entering directly into HAP contracts with private owners.[53] Most critically for this Note, PBCAs were explicitly tasked with the responsibility to "enforce owner obligations to provide decent housing for eligible families."[54] They were directed to "[i]dentify and resolve areas of noncompliance with HUD regulations and other requirements,"[55] and "take prompt and vigorous action to enforce the terms of [HAP contracts]."[56] In implementing contract administration, HUD entirely shifted its responsibility to monitor private owners onto PBCAs.[57]

Under this system, PBCAs hold a critical role in the enforcement/accountability infrastructure of the Project-Based Section 8 housing program, and it is therefore important that advocates, tenants, and other stakeholders interested in management compliance identify the PHA serving as a PBCA in their state. Rarely is this information immediately discernible or obvious. Most PHAs that won PBCA contracts were in-state housing finance agencies. For example, in Massachusetts, the PBCA contract was awarded to MassHousing,[58] "an independent, quasi-public agency . . . charged with providing financing for affordable housing in Massachusetts."[59] In New York, the PBCA is the Housing Trust Fund Corporation (HTFC), a subsidiary of the New York Department of Homes and Community Renewal.[60] To add to the confusion, some PHAs won PBCA contracts outside of the state where they are based. CMS Contract Management Services, for example, is the Housing Authority for the city of Bremerton in Washington, but serves as the PBCA not only for Washington, but also for Nebraska and

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HOUSING ASSISTANCE PAYMENTS: PROPOSED MONITORING AND EVALUATION POLICIES AND PROCEDURES, at I-1 (2000), https://www.hud.gov/sites/documents/CA_MONITOR.PDF [https://perma.cc/X95L-LX9X].

[52] U.S. DEP'T OF HOUS. & URB. DEV., *supra* note 51, at I-1.

[53] *Id.* As parties to the HAP contracts, PBCAs are responsible for administering the continuing assistance payments to private owners, dealing with HAP renewals and any problems that arise with potential opt-outs. *Id.* at V-2 to V-4.

[54] Request for Proposals, *supra* note 45, at 27,358.

[55] *Id.* at 27,360.

[56] *Id.* at 27,380.

[57] *See id.* at 27,358.

[58] *MassHousing Update, October 2020*, MASSHOUSING (Oct. 2020), https://archives.lib.state.ma.us/bitstream/handle/2452/833379/ocm83298203-2020-10.pdf [https://perma.cc/W4B3-A24T].

[59] *About MassHousing*, MASSHOUSING, https://www.masshousing.com/en/about [https://perma.cc/XP6T-MPSN].

[60] *Background of the NY PBCA Program*, PBCANY HOME, http://www.pbcany.com/nyweb/tenant/background.html [https://perma.cc/3ZM3-CXAP]; *Housing Trust Fund Corporation: Overview*, N.Y. STATE HOMES & CMTY. RENEWAL, https://hcr.ny.gov/housing-trust-fund-corporation [https://perma.cc/648K-X8LH].

Utah.[61] The National Council of State Housing Agencies has compiled a chart of the PHAs that currently serve as PBCAs in each state, current as of 2019.[62]

2. PBCA's Further Delegation to Private Service Providers. — The chain of delegation, however, does not end at PBCAs. PBCAs themselves have also largely contracted out the most critical tenant-facing tasks to other, private entities called private service providers (PSPs). The PBCAs that employ PSPs generally delegate all of their critical contract administration responsibilities to the PSP.[63] PSPs assume full responsibility for auditing private owners, renewing HAP contracts, staffing tenant complaint call centers, and managing the ongoing subsidy payments to owners.[64] In the states where they are used, PSPs are the front-line administrators of the compliance/accountability system.

Unfortunately, there is no national list of PSPs, so it is impossible to describe exactly which PBCAs have subcontracted out and privatized their responsibilities in this way. Some states, like Massachusetts, do not employ a PSP.[65] There, the PBCA, in that case MassHousing, still operates as the direct tenant-facing entity available for receiving tenant complaints about property management performance.[66]

However, PSPs are common across the country. The largest is a private company called CGI Federal, Inc.,[67] which is "a subsidiary of CGI Technologies and Solutions Inc., which is in turn a subsidiary of the CGI Group, Inc."[68] CGI describes itself as "among the largest independent information technology and business process services firms in

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[61] *See About*, CMS, https://www.cms-results.com/about [https://perma.cc/YBB5-X5FC].

[62] *Performance-Based Contract Administrators (PBCA), U.S. States and Territories, 2019*, NAT'L COUNCIL OF STATE HOUS. AGENCIES, https://www.ncsha.org/wp-content/uploads/PBCA-Entities-by-State-Map.pdf [https://perma.cc/MHE7-RRBC].

[63] In New York, for example, the PSP was hired specifically to "manage all functions pertaining to contract administration and payment services for site-based multi-family housing assistance payments (HAP) in the State of New York." Press Release, CGI, CGI Selected by the Housing Trust Fund Corporation of New York (Nov. 21, 2005), https://www.cgi.com/en/cgi-selected-housing-trust-fund-corporation-new-york-cgi-becomes-largest-hud-processor-united-states [https://perma.cc/BY68-99B9].

[64] *See, e.g.*, *Housing Program Management: Performance Based Contract Administration*, CGI, https://www.cgi.com/us/en-us/federal/affordable-housing/PBCA-housing [https://perma.cc/QG33-R53E]; Complaint at 15, United States *ex rel.* Ashmore v. CGI Grp., Inc., No. 15-cv-04277 (S.D.N.Y. June 25, 2019) (describing how CGI "perform[s] nearly all of the day-to-day duties as PBCA" covering "upwards of 95% of HUD's [contracted] tasks").

[65] *Cf. Residents of MassHousing Communities*, MASSHOUSING, https://www.masshousing.com/en/renters/masshousing-residents [https://perma.cc/Y8JW-3CVC] (indicating that MassHousing directly handles PBCA responsibilities).

[66] *Id.* (stating that residents of properties in the MassHousing portfolio may email MassHousing directly if they feel property managers are not adequately addressing their complaints).

[67] *See* Complaint, *supra* note 64, at 3.

[68] *See* Ashmore v. CGI Grp. Inc., 138 F. Supp. 3d 329, 333 n.1 (S.D.N.Y. 2015).

North America,"[69] which offers "full outsourcing as a PBCA subcontractor [and] a suite of services to support critical PBCA functions."[70] Litigation against CGI has suggested that CGI "performs upwards of 95% of HUD's ACC [Incentive-Based Performance Standards] tasks" for PBCAs, leaving the PBCA "only the responsibilities of (1) communicating with HUD, (2) submitting documentation created by [CGI's] team to HUD, (3) performing limited quality assurance of CGI's work, and (4) managing HUD's annual compliance review of the PBCA ACC."[71] CGI is the PBCA subcontractor for about 25% of Project-Based Section 8 units across the country,[72] including those in New York, Ohio, Florida, northern California, and Washington, D.C.[73]

II. THE COMPLIANCE SYSTEM IS BROKEN

Thus far, this Note has reviewed the basics of the Project-Based Section 8 housing program from the perspective of the government and private actors who implement it. But it should not be forgotten that the ultimate purpose of the program is to provide affordable housing to hundreds of thousands of low-income, and frequently elderly and disabled, tenants. These tenants, by virtue of their participation in the program, are especially vulnerable to abuses of power and violations of privacy and other rights by the private property managers hired by the private owners of Project-Based Section 8 housing developments. This Part first discusses how the structure of the Project-Based Section 8 system — based in neoliberal narratives about poor people — raises the stakes of maintaining a functioning compliance/oversight system, then describes how that system is largely failing, and finally examines a few contractual flaws that may explain this systemic failure.

A. Power Concentrated in Property Managers

The stakes for ensuring property-manager compliance in Project-Based Section 8 housing are incredibly high. Property managers have both the power and the incentive to abuse tenants. This dynamic is

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[69] Press Release, *supra* note 63.

[70] *Housing Program Management: Performance Based Contract Administration*, CGI, https://www.cgi.com/us/en-us/federal/affordable-housing/PBCA-housing [https://perma.cc/YZF4-3P37].

[71] Complaint, *supra* note 64, at 15.

[72] *Housing Program Management*, *supra* note 70.

[73] Complaint, *supra* note 64, at 16. CGI has served as the PBCA contractor since 2005 for New York's PBCA, the HFTC, and was reprocured in 2010. *About NYS Homes and Community Renewal (HCR)–Part I / Introduction Project-Based Section 8 Performance Based Contract Administration (PBCA)*, CA Q. REV., Spring 2018, at 13; *see also* N.Y. STATE DEP'T HOMES & CMTY. RENEWAL, HOUSING TRUST FUND CORPORATION: MEETING OF THE MEMBERS 2 (2020), https://hcr.ny.gov/system/files/documents/2020/03/htfc-march-board-book-v2.pdf [https://perma.cc/TL9T-8GFQ].

largely because the regulations governing Project-Based Section 8 housing are animated by a federal, neoliberal priority to surveil and control poor people that gives private property managers tremendous power and access. Neoliberalism as an ideology seeks to protect capitalist profit generation by individualizing blame for poverty and rarifying market conditions.[74] Neoliberal policy commitments are animated by what Professor Jaime Alison Lee dubs "culturalism," or narratives that stigmatize poverty as a personal, moral failing.[75] These social narratives moralize the acceptance of government aid in any form, condemning recipients as undeserving.[76] These narratives validate the "construction of individualized blame" for poverty.[77] In this way, neoliberalism shields structural systems of capitalism from scrutiny by using these social narratives of undeserving welfare recipients to isolate blame for poverty firmly with the individual.[78]

In social programs, including Project-Based Section 8 housing, the impact of these neoliberal social narratives is intense federal surveillance and corresponding social control, executed by program administrators.[79] The social framing of welfare recipients as morally corrupt by extension presumes they will use any privacy that they are afforded for immoral purposes.[80] Accordingly, the regulations afford them almost none. Welfare regulations typically invade even the most private spheres of

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[74] *See* Jaime Alison Lee, *Poverty, Dignity, and Public Housing*, 47 COLUM. HUM. RTS. L. REV. 97, 107 (2015) (describing how culturalism individualizes responsibility for poverty to deflect attention from the true sources of poverty, which "include racial discrimination, racial segregation, the overall decline in low-skill jobs due to industrialization, technology, and globalization, grossly inadequate public schools, disproportionate rates of incarceration, language differences, the spatial mismatch between jobs and where people live, the unreliability of public transit, a lack of affordable child care, and inadequate access to medical care, to name just a few").

[75] *Id.* at 100 ("It is widely believed that poor people are responsible for their own poverty. Personal failings of character, morality, and ways of thinking are thought to lead to flawed behavior, which in turn causes unemployment, impoverishment, and government expense.").

[76] Heidi Affi & Patrick Schmidt, Book Review, 53 LAW & SOC'Y REV. 614, 614 (reviewing KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS (2017)) (noting that "society's moral construction of poverty . . . assumes that poor people are behaviorally and morally deficient").

[77] *Id.*

[78] *See* DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 65–66 (2005) ("Individual success or failure are interpreted in terms of entrepreneurial virtues or personal failings (such as not investing significantly enough in one's own human capital through education) rather than being attributed to any systemic property (such as the class exclusions usually attributed to capitalism).").

[79] *See* BARTON GELLMAN & SAM ADLER-BELL, CENTURY FOUND., THE DISPARATE IMPACT OF SURVEILLANCE 14–16 (2017); *see also* Seeta Peña Gangadharan & Aleta Sprague, *Poor People Deserve Digital Privacy, Too*, SLATE (Dec. 11, 2013, 7:30 PM), https://slate.com/technology/2013/12/low-income-people-forced-to-use-insecure-digital-systems-to-apply-for-government-benefits.html [https://perma.cc/8D98-SXPU].

[80] *See* Lee, *supra* note 74, at 104 (observing that current welfare programs presume poor people need "careful government oversight" because they are "responsible for poverty's harms").

recipients' lives and control the decisions they make there.[81] In subsidized housing, for example, the overwhelming presumption is that tenants will nefariously underreport their income to pay a lower rent, or otherwise attempt to scam the government out of money.[82] The regulations are therefore preoccupied with rooting out fraud,[83] and in service of that goal, they demand sustained, repeated, uncompromising, and total disclosure from tenants.[84] The deputized enforcers of this scheme are the private property managers.[85]

Private property managers are also incentivized to abuse tenants by way of overpolicing, not only by the neoliberal surveillance state but also by the private profit incentives under which they operate. Property Management companies are hired by private building owners. One of the few ways in which a private property manager can cost their employer money is by erroneously overpaying a HUD subsidy to a tenant.[86] Where the property manager admits fault, their employer is responsible

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[81] *Id*. at 102–04 ("Consequently, the state has sought to use aid programs to contain and control how 'undeserving' poor people live," *id.* at 102); *see also id.* at 126 ("Morality controls also remain part of life in public housing today so that benefits may be denied to the unworthy."); Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719, 719–20 (1992) (describing how proponents of "welfare reform" viewed women recipients of Aid to Families with Dependent Children as "dysfunctional mothers" responsible for their own poverty, *id.* at 719, and considered welfare benefits a means of controlling and correcting their behavior to bring them into "conformity with putative moral norms of society," *id.* at 720); Michele Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 CALIF. L. REV. 569, 578 (2001) (explaining that the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 "attempt[ed] to change the behavior and perceived lifestyle of welfare recipients").

[82] *See, e.g.*, Michael Grunwald, *Many Tenants in Subsidized Housing Suspected of Underreporting Income*, WASH. POST (Mar. 24, 2000), https://www.washingtonpost.com/archive/politics/2000/03/24/many-tenants-in-subsidized-housing-suspected-of-underreporting-income/7a3b029a-1334-421e-96e9-1c4c70c8375f [https://perma.cc/M9LV-FALA] (describing how HUD presumed one in every fifteen residents of subsidized properties underreported income in 1998 from discrepancies in tenant income reports and IRS data, without any further investigation or fact-finding process on an individual level).

[83] An entire section of the HUD Multifamily Handbook 4350.3 is dedicated to "discrepancies, errors, and fraud." U.S. DEP'T OF HOUS. & URB. DEV., HUD HANDBOOK 4350.3: OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS §§ 8-17 to -25, at 8-24 to -34 (2013), https://www.hud.gov/sites/documents/43503HSGH.PDF [https://perma.cc/2NZY-KEPA] [hereinafter HUD HANDBOOK 4350.3]. It largely describes how property managers must undertake rigorous efforts to investigate and remedy tenant error or fraud. *See id.* §§ 8-17 to -19, 8-22 to -24, at 8-24 to -28, 8-32 to -34.

[84] *See, e.g.*, *id*. at 8-26 (noting that households must report even income that is "uncertain, small in amount, and infrequent").

[85] Property managers are responsible for administering every aspect of the Project-Based Section 8 program. They decide whether a tenant meets the occupancy requirements to move in, calculate a tenant's rent levels yearly, process rent adjustments, approve or deny reasonable accommodation requests, and decide who to refer for eviction. *See* 24 C.F.R. § 880.601(b) (2018).

[86] *See* HUD HANDBOOK 4350.3, *supra* note 83, § 8-21.B.3, at 8-31. An alleged "overpayment" of a HUD subsidy can occur anytime the tenant pays less than they are required to pay in rent under the HUD regulations. *Id*. § 8-21.A.1.d, at 8-30.

for repaying HUD.[87] The property manager therefore has every incentive to foist blame for any errors or suspected errors onto the tenant. Further, when tenants are forced to repay HUD for alleged overpayments, the Property Management company is permitted to pocket up to 20% of that repayment, or their actual costs in enforcing it, whichever is less.[88] This provision is intended to compensate property managers for the effort of working out a payment agreement with tenants.[89]

This neoliberal program structure gives private property managers a dangerous amount of power and every incentive to overpolice and abuse tenants, the overwhelming majority of whom are elderly or disabled.[90] Without a functioning compliance check on property managers, the housing stability and basic dignity of tenants is directly threatened.[91]

B. Property Manager Abuse Is Prevalent

At least in New York City, it is already clear that Property Management noncompliance is not being reined in by the existing compliance system. PSPs like CGI are ostensibly the front-line contact for tenants wishing to report and correct property management noncompliance. However, tenants have reported barriers to accessing this aid. First, it is difficult for tenants to even find the number of the CGI helpline, which is often not listed in easily accessible areas, like the lobbies of buildings.[92] When tenants can find the number and manage to contact CGI, they experience long wait times and often don't receive a call back or any kind of follow-up on their concerns or complaints.[93] Finally, tenants who do persevere through these logistical hurdles report that CGI representatives are dismissive or skeptical of tenants' complaints.[94] CGI can be inflexible in how they go about the resolution process of

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[87] *See id.* § 8-21.B.3, at 8-31. Correspondingly, where the tenant is responsible for the error, by potentially not reporting income or otherwise not following the program rules, the tenant is responsible for the repayment. *Id.* § 8-21.A-B, at 8-30 to -31.

[88] *Id.* § 8-21.B.2.a, at 8-31.

[89] *Id.*

[90] MCCARTY ET AL., *supra* note 13, at 30 ("The project-based Section 8 program primarily serves families headed by persons who are elderly or disabled, which account for over three-fourths (81%) of all households served in the program.").

[91] *See* Lee, *supra* note 74, at 108, 127–28 (arguing that the culturalist trend of welfare and aid programs rob recipients of dignity when left unchecked by other protections for recipients).

[92] Compiled Testimonials of Tenant Experiences with CGI (Lenox Hill Neighborhood House ed., Dec. 30, 2020) (unpublished draft) (on file with the Harvard Law School Library) [hereinafter Compiled Testimonials]. The number for CGI is publicly listed, subtly, at the bottom right corner of their industry-focused website, under the label "Contact Center." *See* PBCANY HOME, http://www.pbcany.com/ [https://perma.cc/WPG9-ETWV]. This website, however, caters to property managers rather than tenants, billing itself as an "informational resource for Owners and Agents of the NYS Housing Trust Fund Section 8 Project Based Portfolio." *Id.* There is no mention on this website of where tenants can go for information.

[93] Compiled Testimonials, *supra* note 92.

[94] *Id.*

tenants' complaints, including scheduling meetings without consulting tenants, or scheduling meetings when tenants are at work.[95] CGI will not interact with or receive complaints from tenants' advocates or lawyers,[96] and has a spotty history on providing language access to callers who do not speak English.[97] Gerri Collins, the president of the Phelps House Tenants Association, says that "most tenants have either not heard of CGI, or have given up on them. . . . Any issues we have with management, we bring to our elected officials because of the incompetence and disinterest of CGI."[98] Despite these concerns, as of 2009, CGI was entrusted with the administration of nearly 1,000 HAP contracts in New York State, covering 91,967 units.[99]

CGI's abnegation of these duties is especially concerning in New York, where CGI's own auditing of Project-Based Section 8 buildings shows that property management noncompliance is rampant.[100] Of all the properties CGI audited in Harlem and the Upper East Side in 2018, about 87.5% of them reported failing management practices.[101] Auditors had randomly selected approximately five to ten tenant files

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[95] *Id.*

[96] CGI Complaint Letter from Lenox Hill Neighborhood House to New York State Division of Housing and Community Renewal (Dec. 30, 2020) (unpublished draft) (on file with the Harvard Law School Library).

[97] *Id.*

[98] Compiled Testimonials, *supra* note 92.

[99] Gerald Lebovits et al., *Section 8: New York's Legal Landscape*, 37 N.Y. REAL PROP. L.J. 51, 52 (2009).

[100] These audits are called Management and Occupancy Reviews (MORs), and they are designed by HUD. *See* U.S. DEP'T OF HOUS. & URB. DEV., MANAGEMENT REVIEW FOR MULTIFAMILY HOUSING PROJECTS 1 (2016) (providing detailed instructions for "HUD staff, Performance Based Contract administrators (PBCA), Traditional Contract Administrators (CAs) and Mortgagees of Co-insured Projects (Mortgagees)" performing management reviews). They involve a granular, on-sight examination of Property Management practices. *See Management & Occupancy Reviews*, NAT'L HOUS. COMPLIANCE, https://www.nhcinc.org/ContractAdministrationOwnersAgents/ManagementOccupancyReviews/tabid/100/Default.aspx [https://perma.cc/G8CE-V65E]. MORs are statutorily required for most Project-Based Section 8 Buildings either "at least annually," 24 C.F.R. § 880.612(a) (2018); *see also id.* §§ 881.601, 883.701 (extending § 880.612's requirement to other types of Section 8 housing), or at "intervals as [HUD] deems necessary," *id.* § 884.224, to determine whether the private owner is in compliance with the HAP contract. Conducting MORs is one of the many responsibilities that was delegated first to the PBCA in New York and then to CGI. An open letter from six PBCAs to HUD published in 2014 suggests that the ACCs for those states required MORs of *every* project to be conducted yearly. *See* Letter from Kurt Wiest et al. to Kerry E. Hickman, Dir., Off. of Hous. Assistance Cont. Admin. Oversight, U.S. Dep't of Hous. & Urb. Dev. (June 13, 2014), https://www.navigatehousing.com/wp-content/uploads/2014/07/PBCA-Final-MOR-Letter-to-KH-June-13-2014.pdf [https://perma.cc/HV2B-UWRS].

[101] *See* Letter from Dean Santa, Div. Dir., NY/NJ Multifamily Asset Mgmt., to Mary Rockett, Lenox Hill Neighborhood House (Dec. 3, 2019) (on file with the Harvard Law School Library) (responding to Lenox Hill Neighborhood House's 2019 FOIA request for MORs conducted in Harlem and the Upper East Side). Twenty-one out of twenty-four failed Evaluation Criteria 22, "Summary of Tenant File Review." *Id.*

per property to review page-by-page, evaluating property manager performance in all tenant-related tasks from rent calculation to reasonable accommodation requests.[102] This detailed review uncovered a plethora of property management errors that led to this incredibly high fail rate.[103] CGI auditors listed problems with providing proper notice of recertification, failures to give tenants the rental deductions to which they were entitled, and improper calculations of rent amounts.[104] Many of these citations were repeat violations.[105]

C. Contractual Flaws in PBCA Program

The many failures of CGI as a private service provider beg the questions: Why do PBCAs continue to hire CGI? Why aren't PBCAs more motivated to intervene in CGI's poor delivery of compliance oversight services? Ideally, PBCAs' contractual relationship with HUD would prompt them to deliver effective, competent compliance oversight services, and they would take steps to ensure their subcontractor met those commitments. The fact that PBCAs tolerate failing subcontractors suggests breakdowns also exist in the contractual relationship between HUD and the PBCA.

While few PBCA ACC contracts are publicly available, several structural flaws can be identified through past litigation and an Office of the Inspector General (OIG) audit of the program. First, HUD's PBCA procurement process has generally failed to guarantee competition in bid selection between PHAs.[106] Proponents of government delegation and privatization praise competitive procurement processes as a market mechanism that can reliably ensure better performance and service delivery from the subcontractor ultimately selected.[107] Accordingly, federal procurement and subcontracting are typically highly regulated to ensure that the process is actually competitive.[108] However, HUD did not conduct a formal federal procurement process when it implemented the PBCA system. HUD hired the first set of PBCAs in two waves. The

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[102] *Id.*; *see also* U.S. DEP'T OF HOUS. & URB. DEV., *supra* note 100, at add. A (listing questions to be asked as part of the file review).

[103] *See* Letter from Dean Santa, *supra* note 101, *passim*.

[104] *See, e.g.*, *id.* at 19–22.

[105] *See, e.g.*, *id.* at 104–05 (repeated finding of miscalculated income and medical expenses).

[106] OFF. OF INSPECTOR GEN., U.S. DEP'T OF HOUS. & URB. DEV., HUD'S PERFORMANCE-BASED CONTRACT ADMINISTRATION CONTRACT WAS NOT COST EFFECTIVE, AUDIT REPORT NO. 2010-LA-0001, at 9–10, 19 (2009), https://hudoig.gov/sites/default/files/documents/audit-reports//ig1090001.pdf [https://perma.cc/P643-7MMR].

[107] Dru Stevenson, *Privatization of Welfare Services: Delegation by Commercial Contract*, 45 ARIZ. L. REV. 83, 83–84 (2003) ("Advocates of privatization argue that market forces automatically bring more efficiency to any government undertaking by introducing competition and profit incentives for those carrying out the tasks.").

[108] *See* Competition in Contracting Act of 1984, 41 U.S.C. § 3301 (detailing competition requirements for government procurement).

first wave of hiring came in 1999 when HUD issued a RFP for Contract Administration Services, which sought to hire a PBCA for each state and required applicants to submit proposals outlining their technical qualifications and expected costs.[109] Despite the fact that such proposals were required, an OIG audit of the PBCA program determined that HUD did not have procedures in place to rigorously evaluate the cost proposals received from PHAs.[110] Further, HUD did not — and could not — negotiate with any PBCAs to lower contract prices.[111] In fact, nearly two-thirds of the contracts awarded in the first two years of the program had no competition.[112] Ultimately, thirty-seven PBCAs were hired under this initial flawed RFP, and an additional seven were hired between 2001 and 2003 under a subsequent, but substantially similar, RFP.[113] HUD abandoned the RFP process in its second wave of PBCA acquisition between 2003 and 2005, instead issuing only an invitation for applications, with no cost proposal required at all.[114] Nine PBCA contracts were issued under this invitation.[115] Through these waves of PBCA acquisition, HUD employed a total of fifty-three PBCAs, with varying degrees of competition and cost negotiation.[116] Critically, HUD also failed to introduce any competition or price negotiation into its procedures for renewing PBCA contracts after they expired.[117] A typical contract had a term length of thirty-six months.[118] Rather than rebidding these contracts with a new RFP when they expired, however, HUD instead continually extended and amended existing contracts.[119] As a result, most PBCAs operate under ACC contracts that are almost twenty years old, and HUD still plans to extend the ACCs into 2021.[120]

Further, even after procurement, the ACC has proven to be an ineffective contractual vehicle. The first problem is the fee structure: the

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109 *See* Request for Proposals; Contract Administrators for Project-Based Section 8 Housing Assistance Payments (HAP) Contracts, 64 Fed. Reg. 27,358, 27,370 (May 19, 1999).

110 OFF. OF INSPECTOR GEN., *supra* note 106, at 10.

111 *Id.*

112 *Id.*

113 *Id.* at 4.

114 *Id.* at 4, 9.

115 *Id.* at 4.

116 *See id.*

117 *Id.* at 9.

118 *See, e.g.*, *State of Hawaii Requisition & Purchase Order*, HAW. PUB. HOUS. AUTH. (Aug. 30, 2019), http://www.hpha.hawaii.gov/procurement/rfp_co_2019_30/rfp_co_2019_30_addno9_exhibits1_5.PDF [https://perma.cc/ADY8-67M2].

119 *See* Complaint at 3, Ashmore v. CGI Grp. Inc., 138 F. Supp. 3d (S.D.N.Y. 2015) (No. 11-cv-08611) (alleging that "as of 2009, HUD had never rebid any of the Annual Contributions Contracts and each of the original PHAs continued to administer the Section 8 contracts in their states under the original fee schedules despite the fact that most PHAs were able to make substantial profits over the amounts they were paying to their Section 8 Subcontractors to perform the work").

120 *See* U.S. DEP'T OF HOUS. & URB. DEV., *supra* note 4, at 21-2 ("Continued extension of the existing PBCA agreements is estimated to cost up to $370 million in 2021.").

performance-based ACC rewards PBCAs with extra money for completing basic tasks on time instead of completing them competently.[121] This structural flaw was uncovered by an OIG audit investigating how HUD paid PBCAs yearly for their work according to the performance-based ACC.[122] The performance-based ACC funneled money from HUD to PBCAs in two ways: first through basic fees, and second through incentive fees. An OIG audit found that HUD paid the PBCA basic fees for completing a list of monitoring and administration tasks for each HAP contract in its portfolio.[123] Incentive fees were intended to reward PBCAs that exceeded the "Acceptable Quality Level" (AQL) of performance on basic-fee tasks or punish those that fell below the AQL.[124] However, the incentive fees failed to fulfill that function because HUD awarded incentive fees to PBCAs merely for completing basic-fee tasks within the contractually allotted timeframe.[125] PBCAs earned a great deal of money in incentive fees for simply completing on time the tasks they were already required to perform.[126] Functionally, PBCAs were paid twice for the same tasks for almost ten years.[127] In 2008 alone, HUD paid $107 million in incentive fees to PBCAs just for carrying out basic-fee tasks on time.[128] Correspondingly, PBCAs were charged disincentive fees when tasks were submitted late, rather than, for example, when they were performed poorly.[129] In that way, there was no quality control mechanism built into the contract, only a timeliness control. Essentially, "[t]his practice rewarded contract administrators for meeting contract requirements and complying with quantity and timeliness requirements rather than for inducing better quality performance."[130] OIG also uncovered other contractual inadequacies relating primarily to the lack of reporting guidelines built into the contracts, which make it difficult or impossible for HUD to evaluate PBCA performance accurately.[131]

HUD also failed to capture and control the profit incentives of PBCAs. HUD generally attempts to cap ACC profits for PCBAs at ten

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121 OFF. OF INSPECTOR GEN., *supra* note 106, at 7.

122 *Id.* at 1.

123 *Id.* at 4–5. Such tasks include occupancy reviews, rent adjustments, payment processing, health and safety responses, Section 8 budget submissions, financial audits, and physical inspections. *Id.*

124 *Id.* at 7.

125 *Id.* at 6.

126 *Id.* at 7.

127 *See id.*

128 *Id.*

129 *Id.*

130 *Id.*

131 For example, "HUD could not tell whether PBCAs were reducing payment errors because the contract did not contain a mechanism to quantify payment errors." *Id.* at 16.

percent of a contract's price.[132] Practically, however, at least some PBCAs squeezed HUD for profits well in excess of that cap by charging HUD higher rates for basic fees than were required to complete those tasks.[133] One PBCA received basic fees so high that it earned a profit of over twenty-one percent of the contract price.[134] Other PBCAs inflated their profit margins by further subcontracting out their duties under the performance-based ACC at a lower rate.[135] OIG highlighted an emblematic example of this trend by noting that one PBCA pocketed almost $5.8 million in unrestricted additional profit in 2008, by rebidding its subcontractor for a cheaper price.[136]

III. PROPOSED SOLUTION: REVERT ADMINISTRATIVE DUTIES TO HUD

HUD should eliminate its current structure of delegating to PBCAs/PSPs and revert all administrative duties to itself. The PBCA/PSP system is ineffective and not worth the time and money it would take to fix. In its audit of that system, OIG reached a similar conclusion, arguing that bringing administration of the program back in-house would allow HUD to "eliminate[the] layers of management and profit that are inherent in the other methods of obtaining these services."[137] Tenants' groups have also advocated this approach from the beginning.[138] Even as the contract administration system was first emerging in 2001, the National Alliance of HUD Tenants urged HUD to redirect the $196 million cost of the PBCA program instead towards doubling in-house HUD staff dedicated to the program, which they argued would improve the quality of oversight services and save HUD $81 million in yearly cost savings.[139]

Logistically, the process for ending the PBCA/PSP delegation structure would likely be relatively simple and require no additional rulemaking or legislative amendment. As previously discussed, HUD's statutory power to delegate administrative responsibility out to PBCAs

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[132] *Id.* at 8.
[133] *Id.*
[134] *Id.*
[135] *Id.* at 9.
[136] *Id.*
[137] *Id.* at 17; *see also id.* ("Currently, for most of the larger PBCAs, HUD monitors the PBCAs that monitor their subcontractors that monitor their lower tier subcontractors. There is also profit built into each layer.").
[138] *See Multifamily Assisted Housing Reform and Affordability Act of 1997: Hearing Before the Subcomm. on Hous. & Transp. of the Comm. on Banking, Hous., & Urb. Affs.*, 107th Cong. 91 (2001) (statement of Geraldine Thomas, Vice President, National Alliance of HUD Tenants) (opposing the "contracting out" of HUD functions).
[139] *Id.*

using ACCs is permissive, not mandatory. Currently, HUD is voluntarily renewing its flawed ACC contracts.[140] First, HUD could continue to renew these ACC contracts and take time to build up its own staffing capacity, likely under the umbrella of its Office of Multifamily Housing. The Office of Multifamily Housing is already subdivided by region, with a Regional Center and designated Regional Satellite office in each subdivision.[141] Each region also has an Asset Management subdivision, which oversees a team of Account Executives responsible for overseeing specific Project-Based Section 8 Housing developments in their regions.[142] These teams could be retrained and supplemented with new hires. There is precedent for such a structure. Before the PBCA program emerged in the early 2000s, HUD carried out all HAP contract administration duties using its own field office network.[143] Second, after staffing up, HUD could then simply choose not to renew its various ACC contracts and offer no new ACC contracts going forward. HUD would then step in and replace PBCAs as a direct party to the HAP contracts with private owners.

A. The PBCA/PSP System Is Not Worth Trying to Save

Reforming or fixing the PBCA/PSP system is not feasible or desirable.[144] Currently, the ACC contracts regulating PBCAs are an administrative disaster. Yet, fixing the system may not be worth the effort[145]: HUD has been mired in attempts to introduce a new system and a new contract to remedy this situation for almost ten years.[146] The scope of

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[140] *See, e.g.*, *State of Hawaii Requisition & Purchase Order*, *supra* note 118.

[141] *Multifamily Regional Centers and Satellite Office*, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/housing/mfh/hsgmfbus/abouthubspcs [https://perma.cc/4TDK-6LGU].

[142] *Id.* Tenants or advocates who wish to contact their local Account Executives can do so by navigating to the HUD webpage for the HUD Regional Center that encompasses their state and downloading a spreadsheet with their state's Account Executives' contact information from the "Multifamily Property Listings with Assigned Account Executives" list. *See, e.g.*, *Multifamily Housing: Northeast Region*, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/states/shared/working/northeast/mf [https://perma.cc/DA6N-96VY].

[143] Complaint, *supra* note 64, at 9.

[144] Some might argue that a more appropriate step would be to eliminate only the second level of delegation from PBCAs to PSPs, rather than fully revert responsibilities to HUD. Indeed, the mere existence of PSPs is arguably in contravention of statutory intent, and PSPs are also arguably more dangerous than PBCAs because they are fully private and subject to profit motivation. However, my argument shows that the problem is not simply with PSPs or multiple steps of delegation, but with the high costs of delegating at all and of reforming the current system of delegation.

[145] Lynne B. Sagalyn, *Public-Private Partnerships and Urban Governance: Coordinates and Policy Issues*, *in* GLOBAL URBANIZATION 191, 207 (Eugenie L. Birch & Susan M. Wachter eds., 2011) (noting how the expense of the contractual design and procurement bidding process can reduce any alleged efficiency advantage from public-private partnerships).

[146] HUD first introduced a new RFP in 2011, but it was invalidated after years of litigation because it framed ACCs as cooperative contracts rather than procurement contracts, and did not

the task is enormous and the stakes are astronomically high.[147] To continue delegating these administrative responsibilities to PHAs, HUD must design, introduce, and implement an entirely new contract, a notoriously difficult task.[148] This contract between HUD and the PBCA will be the only source of direction and authority that will guide the PHA's behavior, and the only vehicle through which HUD can hold PBCAs accountable,[149] just as the flawed ACC contracts are now. The PHAs have no independent statutory duty to be involved in this housing program; their actions and involvement will be governed solely by the contract. Therefore, as in most instances of subcontracting out government services, there is "great pressure on contractual design and contractual remedies."[150] Yet, it is precisely this pressure on the contract and required scope of the contract that make these instruments fiendishly difficult to draft successfully.[151] Contracts must function as "full-blown accountability mechanisms designed to monitor quality, provide access to decisionmaking, and ensure procedural fairness, not just as accounting tools for monitoring the award of huge sums of money."[152] Further, the accountability gains of even the most flawlessly drafted and executed contract are limited because "no contract can be sufficiently specific to anticipate any and all situations that parties might encounter."[153] Finally, even if HUD could competently design and implement such a contract, it would then be responsible for rigorous ongoing monitoring of PBCA performance and enforcement of contract terms. The staffing time and financial resources involved in both endeavors would be enormous and would further undercut the cost effectiveness of the

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comply with Federal Acquisition Regulations. *See* CMS Cont. Mgmt. Servs. v. Mass. Hous. Fin. Agency, 745 F.3d 1379, 1383 (Fed. Cir. 2014).

147 *See* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 619 (2000) ("[S]tandard setting through contracts holds unprecedented enforceability implications, because of the legal consequences of drafting error or omission on the agency's part." (footnote and citation omitted)).

148 The General Accounting Office has warned about the challenges of drafting a contract that really delivers accountability. U.S. GEN. ACCT. OFF., SOCIAL SERVICE PRIVATIZATION: EXPANSION POSES CHALLENGES IN ENSURING ACCOUNTABILITY FOR PROGRAM RESULTS 2 (1997).

149 *See* Freeman, *supra* note 147, at 667–71 (discussing the importance and limits of the contractual vehicle for enforcing accountability when the government privatizes or subcontracts out services and regulation).

150 Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155, 212 (2000).

151 *See* Gilman, *supra* note 81, at 573 ("[E]mpirical evidence suggests that privatization is ill-fitted for the complex, long-term tasks associated with welfare delivery after the PRA. This area lacks the definable yardsticks and competition necessary to sustain accountability to taxpayers and to service beneficiaries.").

152 Freeman, *supra* note 150, at 212.

153 Freeman, *supra* note 147, at 668.

PBCA structure.[154] Without a robust and functioning PBCA system, there is no hope of reining in the private service providers.[155]

B. HUD's Advantages over PBCAs as Contract Administrator

1. Uniformity and Nationalization of Enforcement and Compliance Standards. — All tenants living in Project-Based Section 8 housing are subject to the same set of nationwide federal regulations. The rules governing their income calculations, deductions, reasonable accommodations, household composition changes, and everything else are wickedly complicated — but they are also nationally uniform. Despite this fact, HUD's current PBCA-to-PSP delegation system requires fifty-three PBCAs nationally to oversee dozens of PSPs, all of whom must separately but simultaneously learn and train their staff on these intricate rules. For that reason, PBCA and PSP knowledge and expertise can vary wildly by state, based on the effectiveness or intricacy of the particular training program or employment standard used locally.[156] Inefficacy is built into this system. Beyond that, a fractured service model makes it more difficult for both HUD and tenant advocates to aggregate performance data nationally, communicate quickly to developments, and recognize problematic trends. Even a Deloitte report commissioned by HUD acknowledges that much of the contract administration work could benefit from some kind of "cross-cutting national oversight."[157] Further, federal employees conducting this work could be better paid and better resourced than their private counterparts.[158]

2. Public Scrutiny and Greater Accountability to Tenants. — HUD would be more responsive and accountable to tenants because of the disclosure requirements it is subject to and its close proximity to elected legislators. The disclosure requirements would give tenants and advocates the information needed to scrutinize and evaluate HUD's perfor-

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[154] Jeffrey Manns, *Private Monitoring of Gatekeepers: The Case of Immigration Enforcement*, 2006 U. ILL. L. REV. 887, 890 (describing how difficult it is for public enforcers to monitor the compliance of subcontracted "gatekeepers").

[155] Using PSPs at all also may contravene legislative intent. Congress specifically permitted HUD to delegate its administrative authority to public housing agencies, but never contemplated an additional layer of delegation down to fully private actors with no connection to democratic accountability mechanisms. *See* 42 U.S.C. § 1437f(b)(1)-(2).

[156] *See* Sagalyn, *supra* note 145, at 197 (noting that "fragmentation of policy coordination" is a potential problem when public-private partnerships are "carried out by numerous independent public agencies").

[157] DELOITTE, HUD SECTION 8 PBRA FINAL RECOMMENDATION REPORT vii (2016).

[158] *See* Gilman, *supra* note 81, at 597 ("Indeed, much of the cost savings of privatization derives from the ability to pay lower wages to nonunionized and/or nongovernment employees.").

mance; HUD's congressional proximity would allow tenants and advocates an avenue through which to press for any changes needed based on that information.

One major advantage to reverting all administrative responsibilities to HUD is that HUD is subject to rigorous disclosure requirements that do not apply to private actors. Under the Freedom of Information Act,[159] (FOIA) HUD is required to publicly report and describe its general structure, employees, methods, procedures, and rule-making processes.[160] These mandates "guard against the dangers of secret and thus unchecked government, and enable the public to gain information essential to monitoring the conduct of government."[161] In contrast, tenants and advocates have barely any publicly accessible information about how PBCAs and PSPs actually operate. There is virtually no publicly available information, for example, about PSP costs, structures, profits, and policies.[162] All this information is needed to identify specific points of programmatic breakdown that leave tenants subject to indiscriminate abuse by property managers. Further, it would be legally challenging to extract this information from PSPs using state sunshine and FOIA laws as they are now conceived.[163] The federal FOIA statute, in particular, "as originally conceived and drafted, is ill-suited to provide access to privately-created or privately-held information — regardless of the public nature, importance, or funding of the information."[164] Reverting these responsibilities back to HUD is the simplest, most effective way of bringing all these details fully into the purview of public scrutiny.[165]

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159 5 U.S.C. § 552.

160 *Id.* §§ 552a–552b.

161 Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121, 1190 (2000).

162 Some of this information may even be protected as proprietary. *See* Sagalyn, *supra* note 145, at 208–09 (noting the lack of transparency in public-private partnerships, especially in the bidding process).

163 Alfred C. Aman, Jr. & Landyn Wm. Rookard, *Private Government and the Transparency Deficit*, 71 ADMIN. L. REV. 437, 437 (2019) (arguing for the adoption of a statute that would "require agencies to retain ownership of information created pursuant to a contractual relationship," to bring that information under the purview of FOIA).

164 *Id.* at 441 (citing Craig D. Feiser, *Privatization and the Freedom of Information Act: An Analysis of Public Access to Private Entities Under Federal Law*, 52 FED. COMMC'NS L.J. 21, 23 (1999)).

165 Some have also brought up the possibility of extending the reach of FOIA and sunshine laws at least to cover materials created by private corporations pursuant to government contract, arguing that this would get "at the heart of the problem of privatization by injecting public authority into an otherwise private state." *Id.* at 466. However, such a proposal would require federal legislative action and would raise serious questions about enforcement and remedy options, if private actors refused to comply or otherwise attempted to dodge their responsibility to disclose. It is simpler to place the important functions of government in the hands of a public actor that is already clearly and unquestionably bound by FOIA.

If problems do arise in HUD's performance, the simple structure and close proximity of HUD to legislative and executive oversight would make it easier for advocates and tenants to correct HUD's behavior.[166] First, of course, tenants and advocates can change the general character of HUD by voting.[167] HUD's employees either "face routine electoral pressures or are controlled by those who face regular elections."[168] Second, HUD's employees are more easily subject to direct, informal pressure from elected officials than are private actors. If serious problems arise with HUD's administration of this program, tenants could call their local elected congressional officials, most of whom have constituent services staff that can mediate issues directly with HUD.[169]

3. Legal Accountability and Government Oversight. — Beyond utilizing electoral pressure through elected representatives, tenants would have more legal avenues and options to hold HUD accountable if it fails to enforce tenants' rights regulations or fails to ensure that owners comply with the HAP contract. First, tenants could challenge HUD action or inaction under the Administrative Procedure Act.[170] Tenants would have standing for such a challenge if (1) HUD's failures to enforce regulations (2) cause tenants an economic (or other) injury in fact, and (3) the interest tenants are attempting to protect "is arguably within the zone of interests to be protected or regulated by the statute . . . in question."[171] Tenants' ability under the APA to challenge the actions of private service providers, or even state-based PBCAs, is less clear.[172] Further, HUD's employees are held accountable by ethical standards

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166 *Cf.* Sagalyn, *supra* note 145, at 205 (noting that complexity in public-private partnerships can shield them from public accountability).

167 The President has power to appoint a Secretary of HUD, and the Secretary has enormous power to shape the priorities of the agency. In contrast, "the course of unsatisfactorily-performing private companies is not as easily changed as by an annual or biannual election." Aman & Rookard, *supra* note 163, at 483.

168 *Id.* at 484.

169 Private actors are more difficult to access. First, they are so obscure that many constituent services staff at congressional offices will not know or understand their role in the bureaucracy if a tenant calls to complain about their behavior. They "may be held only indirectly accountable through multiple levels of decision makers, and frequently only after messy and expensive litigation." *Id.*

170 5 U.S.C. §§ 551, 553–559, 701–706; *see id.* § 702 ("A person suffering legal wrong because of agency action . . . is entitled to judicial review thereof.").

171 Knoxville Progressive Christian Coal. v. Testerman, 404 F. Supp. 783, 788 (E.D. Tenn. 1975) (citing Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 152–53 (1970)).

172 *See* Diller, *supra* note 161, at 1190 (observing that state-enacted APAs are generally not binding on private contractors).

that do not apply to private sector employees, including prohibitions on personal conflicts of interest.[173]

C. Drawbacks to Federal Enforcement

Reverting enforcement and compliance responsibilities to HUD would not solve all the ills of the Project-Based Section 8 housing program. First, HUD may not demonstrate any more motivation or excitement to enforce tenants' rights rigorously and monitor compliance aggressively than PBCAs or PSPs.[174] However, at least the incentives acting on HUD would originate directly from Congress rather than from a flawed and inadequate contract.

Second, even if HUD were once again a direct party to the HAP contracts and acted with proper motivation to defend tenants, it would have the same limited arsenal of enforcement options at its disposal when private owners failed to comply with tenants' rights regulations.[175] The contractual remedies available to HUD to sanction noncompliant owners are limited by HUD's competing desire to keep private owners as participants in the Project-Based Section 8 program. HUD cannot threaten to terminate a HAP contract with a private owner without also risking losing those subsidized units forever if that owner were to exit the Project-Based Section 8 program.[176] Even less extreme remedies like civil sanctions or monetary penalties could threaten the long-term ability or willingness of the private owner to participate in the program. HUD would have to balance the competing incentives of ensuring tenants' rights while also incentivizing the long-term participation of private owners in the Project-Based Section 8 program.

However, this tension is built structurally into the model of this housing program, which is at its core still a public-private partnership. HUD would still be able to exercise soft remedies such as increasing the frequency or detail of MOR audits, heightening informal scrutiny on private management practices, providing more formal avenues to receive tenant complaints, and requiring attendance at specific or additional

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173 Collin D. Swan, Note, *Dead Letter Prohibitions and Policy Failures: Applying Government Ethics Standards to Personal Services Contractors*, 80 GEO. WASH. L. REV. 668, 670–71 (2012) (noting that federal contractors are not subject to the same ethical requirements as federal employees).

174 *See* Gilman, *supra* note 81, at 577 ("Indeed, there is ample evidence that government welfare bureaucracies are quite capable of acting without regard to the rule of law and contrary to the interests of the disenfranchised persons they are supposed to serve.").

175 *But see* Andrea J. Boyack, *Responsible Devolution of Affordable Housing*, 46 FORDHAM URB. L.J. 1183, 1250 (2019) (arguing that since HUD is the provider of the continuing subsidy, it can incentivize standards of behavior among PHAs by attaching conditions and strings to the use of federal funds).

176 *See* Lee, *supra* note 9, at 793 ("[S]trong contractual remedies exist, but face such steep implementation challenges that they are likely to be exercised only when violations are especially egregious. In the vast majority of situations, these remedies may be too risky or costly.").

property management trainings. HUD could also focus its remedial attention on private property management companies rather than on private owners. HUD could try to force private owners to switch management companies, for example, blacklist management companies for repeated misconduct, and reward management companies with good practices. Targeting the management companies rather than the owners themselves would allow HUD to preserve its collaborative relationship with owners and take more aggressive enforcement action that would potentially be less threatening to an owner's long-term participation in the program.

Finally, the solution proposed in this Note is not fundamentally transformative. True transformation of Project-Based Section 8 housing would begin with the structure of the program itself, not merely the compliance system enforcing that structure. It would necessitate a reexamination of the surveillance and intrusion demanded of tenants in exchange for a safe, decent, affordable place to live. Instead, this Note considers only how to ensure as much accountability as possible within the existing system. These considerations are limited to what Professor Wendy Bach describes as the "old" mechanisms of government oversight, which, while not transformative, at least "support a crucial defensive project that yields some degree of accountability by ensuring that programs are governed by clear rules, and by ensuring fair and consistent application of rules."[177] Advocates would be justifiably suspicious, however, about whether or not the agency that designed and wrote these culturalist regulations is ultimately ideologically equipped to check them through rigorous compliance monitoring and enforcement of tenants' rights.[178]

IV. CONCLUSION

Much hope for the future of federally subsidized affordable housing is pinned on the Project-Based Section 8 program and similar public-private partnerships. With public housing being slowly strangled by persistent disinvestment, the pendulum of public opinion has swung back to the private sector for answers and hope.[179] Nationally, public housing needs about $50 billion to cover outstanding repair and rehabilitation needs, and that does not account for future expenses such as

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[177] Wendy A. Bach, *Governance, Accountability, and the New Poverty Agenda*, 2010 WIS. L. REV. 239, 261.

[178] *See* Lee, *supra* note 74, at 98–99, 129–34 (arguing that true dignity comes from tenant voice, tenant representative power, and tenant participatory control rather than from a more benevolent compliance system).

[179] *See* Anne Marie Smetak, *Private Funding, Public Housing: The Devil in the Details*, 21 VA. J. SOC. POL'Y & L. 1, 3 (2014).

modernizing, upgrading, or improving.[180] To raise that money, Congress created the Rental Assistance Demonstration (RAD) program,[181] which would allow public housing authorities to convert their publicly owned housing stock into Project-Based Section 8 units by functionally selling it to private owners in exchange for repairs funding on the properties. RAD is promoted as a budget-neutral method of funding repairs and rehabilitation costs without any additional investment of federal money.[182] The program is touted as a "politically feasible alternative" to public housing, attractive in part because "private landlords enjoy access to a broader range of financing sources" that are not available to public housing after years of federal disinvestment.[183] RAD Component I converts public housing units managed by PHAs into project-based Section 8 units, either with Project-Based Rental Assistance (PBRA) or Project-Based Vouchers (PBV).[184] Though the program has only existed since 2011, already public housing authorities "have used RAD for about 110,000 units," about 10% of the 1.1 million that were in the public housing portfolio in 2012.[185] NYCHA alone plans to convert 62,000 units under RAD in the next ten years.[186]

The breakdown of enforcement and compliance in Project-Based Section 8 housing is already a crisis for the 1.2 million tenants living in this program. This impending wave of new Project-Based Section 8 units adds urgency to these critical questions of reform.

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[180] Harvard Joint Center for Housing Studies, *The Future of Public Housing* at 11:50, YOUTUBE (Apr. 25, 2019), https://youtu.be/O2Ax_MiwGpo [https://perma.cc/RWA8-4X54] [hereinafter *Future of Public Housing*].

[181] Consolidated and Further Continuing Appropriations Act of 2012, Pub. L. No. 112-55, 125 Stat. 552, 673–75.

[182] Boyack, *supra* note 175, at 1225 ("Because the RAD program uses private equity and debt funding, albeit in concert with public funds and government credit, the program is ostensibly more 'cost neutral' — a politically attractive selling point.").

[183] Lee, *supra* note 9, at 767; *see also id.* ("[P]rivatization is widely viewed as the only politically viable option for raising desperately needed funds for both capital and operating purposes."); James Hanlon, *The Origins of the Rental Assistance Demonstration Program and the End of Public Housing*, 27 HOUS. POL'Y DEBATE 611, 613 (2017) ("RAD entails the sale of public housing. Once sold, it is no longer *public* housing.").

[184] *See Future of Public Housing, supra* note 180, at 13:45. RAD Component II converts five smaller legacy subsidy programs into project-based Section 8 units, again using either PBRAs or PBVs. *See* HUD, *RAD for Mod Rehab, Rent Supp and RAP*, https://www.hud.gov/RAD/rad2/program-details2 [https://perma.cc/6887-RDMP]. Those projects are Section 8 Moderate Rehabilitation, Rental Assistance Payment, Rent Supplement, PRAC for Sec. 202, and McKinney-Vento SRO. *Id.*; *see also* HUD, *RAD for Section 202 Project Rental Assistance Contracts (PRACS)*, https://www.hud.gov/RAD/rad2/RAD202PRAC [https://perma.cc/W26Y-U7J9].

[185] *Future of Public Housing, supra* note 180, at 24:50.

[186] *Id.* at 56:09.