CASE NO. 16-72827

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE CITY OF SANTA MONICA,
Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION,
Respondent.

BRIEF OF AMICUS CURIAE AIRPORTS COUNCIL INTERNATIONAL – NORTH AMERICA

Review of Final Agency Decision and Order of the Federal Aviation Administration, Docket No. 16-14-04 (Aug. 15, 2016)

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CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1 & 29(c)(1), *amicus curiae* Airports Council International – North America states that it has no parent corporation and that there is no publicly held corporation that owns 10% or more of Airports Council International – North America.

/s/ W. Eric Pilsk
W. Eric Pilsk

STATEMENT REGARDING ADDENDUM OF STATUTES AND REGULATIONS

Pursuant to Circuit Rule 28-2.7, copies of the following statutes and pertinent authorities are set forth in the Addendum bound separately and filed with this Brief:

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INTEREST OF *AMICUS CURIAE*

Airports Council International – North America ("ACI-NA") represents the state, regional, and local government bodies that own and operate the principal commercial airports in North America.[1] ACI-NA's 181 United States airport

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[1] Pursuant to FRAP 29, the City of Santa Monica and the FAA consent to ACI-NA filing this Brief as Amicus Curiae. The prospective intervenors do not object.

Pursuant to FRAP Rule 29(c)(4), ACI-NA makes the following disclosures:

(A) No party's counsel authored the brief in whole or in part;

(B) No party or a party's counsel contributed money that was intended to fund preparing or submitting the brief, except to the extent that Morrison &

members operate over 340 airports, which serve approximately 95 percent of the domestic and virtually all of the international airline passenger and cargo traffic in the United States. ACI-NA's advocacy on behalf of its members includes participation as *amicus curiae* in order to ensure that applicable law promotes safe, efficient, hospitable, and fiscally sound airport operations. ACI-NA has participated as intervenor or *amicus* in a number of cases to protect the interests of airports in diverse federal regulatory contexts. *See, e.g., Nw. Airlines v. Cty. of Kent*, 510 U.S. 355 (1994) (challenge to airport rates and charges); *Air Transp. Ass'n of Am. v. U.S. Dep't of Transp.*, 613 F.3d 206 (D.C. Cir. 2010) (challenge to proprietary right of airport sponsor to set congestion-weighted landing fees); *Air Transp. Ass'n of Am. v. U.S. Dep't of Transp.*, 119 F.3d 38 (D.C. Cir. 1997) (challenge to the Department of Transportation's Final Policy Regarding Airport Rates and Charges).

ACI-NA and its members have a particular interest in this case because of the important role that FAA grant agreements play in the regulation of airports.

Foerster LLP, counsel to the City of Santa Monica, is a member of ACI-NA as a "World Business Partner" and its annual dues may have contributed to the funds used by ACI-NA to fund the preparation and submittal of this brief to the same extent as the annual dues and assessments of each of ACI-NA's members so contributed; and,

(C) No person – other than the *amicus curiae*, its members, or its counsel – contributed money that was intended to fund preparing or submitting this brief.

When an airport sponsor accepts an FAA grant to fund anything, no matter how modest in scope or cost, it must agree to a comprehensive set of conditions that last for up to twenty years. These conditions, referred to as "Sponsor Assurances," apply to aspects of airport operation and management that go well beyond grant administration or the construction and operation of the grant-funded project. The Sponsor Assurances address, among other topics, operation and maintenance of the entire airport, use of airport revenue, economic relations with airport tenants and users, and airport development and planning. Addendum of Statutes and Regulations ("Addendum") at 89-108. Accordingly, it is imperative for our airport members to know what their obligations are *before* entering into a grant agreement. It is equally important that FAA not be allowed to unilaterally revise the terms of the grant agreement after the fact.

FAA's Final Agency Decision ("FAD"), if allowed to stand, threatens the predictability and certainty that ACI-NA's members need in order to know what their grant obligations will be. ACI-NA's members and FAA regularly amend grant agreements to increase the level of federal funding at the end of a project. Most often, the increased funding is a "true up" to adjust the final grant amount to reflect actual project costs. At other times, the grant increase is simply to free up other airport funds for additional airport projects. These routine amendments are expressly permitted by statute. Based on a recent survey of ACI-NA members,

over half of ACI-NA members have obtained an Airport Improvement Program ("AIP") grant amendment to increase the dollar amount of the grant to reflect increased project costs without changing the scope of work, similar to the 2003 Amendment executed by Santa Monica. ACI-NA's members report, however, that FAA has never required additional consideration from them for such amendments. ACI-NA members also report that FAA has never stated that such an amendment extends or restarts the duration of the grant agreement, or constitutes a new grant.

In a significant departure from practice and precedent, FAA here has transformed what historically has been a routine and common aspect of grant management into a new power for FAA to effectively rewrite grant agreements. ACI-NA understands that this case arises from an ongoing dispute between (1) FAA and certain airport users and (2) the City of Santa Monica, regarding whether/when the City can close Santa Monica Airport. ACI-NA takes no position on that dispute. ACI-NA is concerned, however, that FAA has departed from existing law in a manner that could set a precedent by which the agency could unilaterally rewrite the terms of a grant agreement long after it has been executed by the parties. Regardless of the merits of FAA's policy objectives, it simply lacks the authority to unilaterally rewrite the terms of an executed grant agreement.

FAA's decision in this case is particularly troubling for two reasons. First, ACI-NA members rely on the plain and historical understanding of the standard

Grant Agreement and typical grant amendments, in the context of the AIP statute and FAA's own AIP Order, in order to understand their grant obligations. FAA's willingness to change the apparent and settled meaning of those documents in a particular case suggests that FAA could make other changes to advance other policy objectives in other circumstances to the detriment of ACI-NA's airport members. Second, FAA seemingly takes the position that an amendment to a grant agreement requires consideration and that FAA can unilaterally and retroactively decide what the consideration was. That rule, if allowed to stand, would give FAA the power to add substantive grant obligations in an *ex post facto* analysis regardless of the actual agreement and intent of the parties.

Fundamentally, if FAA can take a provision as important as the duration of a grant agreement and find a way to change its long-understood meaning, it could apply this technique far beyond the particular circumstances of this case to add or revise *other* grant obligations not expressly provided by law in order to meet other policy objectives. ACI-NA respectfully submits this brief as *amicus curiae* to explain to the Court why FAA's decision is contrary to law and how it would adversely affect ACI-NA's members.

SUMMARY OF ARGUMENT

This case can be resolved by examining the plain language of the grant agreement and its amendment: the 2003 Amendment clearly modified the

maximum financial obligation of the United States *while leaving all other terms of the 1994 Grant Agreement intact,* including its duration. However, FAA claims that the amendment was in fact a new grant that started a new twenty-year term for the duration of the Sponsor Assurances. FAA's interpretation is not supported by the AIP statute, FAA's own AIP Order, or the plain language of the grant agreement and amendment. FAA's attempt to buttress its novel interpretation of unambiguous contract language by imputing new consideration to the grant amendment also lacks support in the law, and is undercut by the very cases FAA relies on.

FAA claims that the amendment must be supported by additional consideration. But federal law, including the very Comptroller General's opinion cited by FAA, is clear that grant amendments do not require new consideration, particularly where, as here, the statute allows for amendments without additional consideration. Indeed, FAA's own Order for administering the AIP Program does not require consideration for amendments.

Even if FAA were correct that consideration is required to amend a grant agreement, FAA was wrong to "supply" that consideration unilaterally and retroactively. FAA and Santa Monica acknowledged that there was sufficient consideration in the 2003 Amendment. No principle of law permits FAA to modify the terms of an existing agreement to supply the supposedly "missing"

consideration, and FAA offers no evidence other than its own *ex post facto* say-so to substantiate the consideration it now claims it should have received.

Finally, to bolster its self-serving construction of the grant documents, FAA claims that its interpretation of purely contractual terms of the grant agreement and amendment are subject to *Chevron* deference. Courts have recognized the fundamental unfairness of such a position, and this Court has refused to defer to an agency's interpretation of contract terms except where they are "intrinsically regulatory" and require the agency's unique expertise – which is not the case here. Finally, any ambiguous contract terms drafted by the government should be construed against the government under the doctrine of *contra proferentem* in order to protect the interests of grant recipients.

ARGUMENT

I. THE 2003 AMENDMENT WAS NOT A "NEW GRANT" UNDER THE CONTROLLING STATUTE AND THE UNAMBIGUOUS LANGUAGE OF THE 2003 AMENDMENT ITSELF

The 2003 Amendment and the 1994 Grant Agreement contain standard form language that ACI-NA members routinely sign. Accordingly, the meaning of that language is a matter of great concern to ACI-NA's members. Santa Monica and FAA both agreed on the principle that the plain language should control the outcome. FAA's position that the 2003 Amendment constituted a new grant that started a new twenty-year grant agreement term is contrary to the plain terms of the 2003 Amendment. Appellant's Excerpts of Record ("E.R.") at 12. Before turning

to the Grant Agreement itself, it may be helpful for the Court to understand the legal context in which the grant amendment arose.

A. The Applicable Law Shows that the 2003 Amendment Is Not a New Grant

The federal common law applicable to contracts with the United States presumes that modifications to an agreement do not result in a new contract:

> Especially in the case where the original contract contemplates administrative supplementation by later modification, . . . alteration of some details of a contract, while leaving undisturbed its general purpose, constitutes a mere modification of the original contract, and the latter remains in force as modified. The modifications did not create a new contract because the general purpose remained intact. Therefore, if the modifications do not effect a material change to the parties' rights and obligations, then the modifications – in and of themselves – are not thought to give rise to a new contract or agreement.

Fluor Enters. v. United States, 64 Fed. Cl. 461, 487 n.26 (2005) (citations and internal quotation marks omitted).

The AIP statute embodies that rule. Congress expressly authorized FAA to modify an existing grant to increase the level of funding for a grant *without* offering a "new grant." 49 U.S.C. § 47108(a) sets forth the procedure for the *initial award* of a grant: FAA makes an offer and the sponsor accepts the offer. Addendum 1. 49 U.S.C. § 47108(b)(1) authorizes FAA to increase the amount of a previously offered and accepted grant: "When an *offer* [of a grant] has been

accepted in writing, the amount stated in the offer as the maximum amount the Government will pay may be increased only as provided in paragraphs (2) and (3) of this subsection . . . ." (emphasis added). Addendum 1-2. Subsections (2) and (3) simply set percentage limits on the amount of the increase.

By expressly authorizing an amendment to increase the amount of federal funding, Congress made clear that such an amendment is part of the original grant and is not a new grant offer.[2] Further, Congress specifically requires FAA to

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[2] FAA cites a 1959 Comptroller General opinion for the proposition that when a grant is enlarged beyond its original scope, the amendment should be treated as a new grant. E.R. at 43 (quoting *Adm'r Small Bus. Admin.*, B-140808, 1959 U.S. Comp. Gen. LEXIS 65 (Oct. 19, 1959)). That opinion does not support FAA's position. The primary issue in that matter was "which fiscal year appropriations should be charged for amendments to grants . . . ." 1959 U.S. Comp. Gen. LEXIS 65, at *1. Under that grant program, the Small Business Administration had authority to make "[o]nly one . . . grant . . . within any one State in any one year, and no such grant shall exceed an aggregate amount of $40,000." *Id.* at *2. The Comptroller General held that "[w]e cannot agree that authority to make one grant in a fiscal year necessarily carries with it authority to amend that grant where the amendment would alter the scope of the original grant and require additional funds." *Id.* at *6. Because of that limitation, the Comptroller concluded that "[t]o enlarge such a grant beyond the scope of the original is to create an additional obligation and must be considered as giving rise to a new grant." *Id.* *See also Sec'y of Health, Educ.,* & Welfare, B-146522, 1961 U.S. Comp. Gen. LEXIS 77, at *7 (Aug. 23, 1961) (grant increase must be charged to a future budget year). As FAA concedes in the Director's Determination, however, the issue of the budget year in which grant funds are charged is irrelevant here, because AIP funds are "no year" funds. E.R. at 43 n.10. Moreover, the AIP statute does not limit the number of grants that may be awarded and Section 47108(b) expressly allows FAA to amend an existing grant agreement to increase the level of federal funding.

follow a formal notice and comment process if it wants to change the substance of grant obligations. 49 U.S.C. § 47107(h)(1).

The FAA Order on AIP grants in effect at the time of the 2003 Amendment makes the same distinction between (1) the offer and acceptance of a grant and (2) an amendment to a grant, and it does not in any way suggest that a grant amendment is a new grant. The Airport Improvement Program Handbook, FAA Order 5100.38B (May 31, 2002) ("AIP Handbook"), Chapter 11 is titled, "Grant Offer, Agreement, and Amendment." Addendum 6-27. Section 5 is titled "Grant Amendments" and describes the amendment procedures, the support an airport sponsor must provide to justify an amendment request, and FAA's approval criteria. *See* ¶¶ 1140-45 (Addendum 10-14). Nothing in the AIP Handbook provides, or even suggests, that a grant amendment is a new grant.[3]

FAA could have chosen a straightforward way to issue a new grant. Instead of agreeing to amend the existing grant for the completed project, it could have offered the City a new grant to fund additional projects the City said it intended to undertake. In that scenario, both the City and the FAA would have clearly

[3] This order was subsequently replaced by FAA Order 5100.38C (June 28, 2005), which, in turn, was replaced by Order 5100.38D (September 30, 2014). Like the 2002 Order, nothing in the subsequent orders indicates that a grant amendment is a new agreement. *See* FAA Order 5100.38C ¶¶ 1100-05, 1130-34, & 1140-45 (Addendum 17-19; 20-25); Order 5100.38D ¶¶ 5-23, 5-24 & 5-55-56 (Addendum 41-48; 66-75).

understood that if the City accepted a new grant offer, there would be a new starting point for the duration of the new grant agreement, namely the useful life of the new projects, but not to exceed twenty years. The City then could have made an informed choice as to whether or not to accept the new funds in exchange for a new set of grant assurances.

FAA did not follow this course of action. Instead, it followed the common practice of amending an existing grant to reflect final construction costs without giving any indication that it would treat the amendment as a new grant agreement with a new grant agreement term. Only years later, *ex post facto*, did FAA seek to impose new terms via that amendment to a previously awarded grant. This scheme is not authorized by the law. FAA cannot subvert the statutorily mandated process, its own procedures, and the settled expectations of airport sponsors in order to reach a particular result in a particular case.

B. The Plain Language of the 1994 Grant Agreement and the 2003 Amendment Shows that the Amendment Is Not a New Grant

The plain language of the grant agreement does not support the FAA's decision. The 1994 Grant Agreement specifies the duration of the grant:

> The terms, conditions and assurances of the grant agreement shall remain in full force and effect throughout the useful life of the facilities developed or equipment acquired for an airport development or noise compatibility program project, . . . *but in any event not to exceed twenty (20) years from the date of acceptance of a grant offer of Federal funds for the project*.

Assurance B(1), E.R. 83 (emphasis added). Consistent with that provision, and with 49 U.S.C. § 47108, the 1994 Agreement (and the standard grant agreement that ACI-NA members and other airport sponsors routinely accept) explicitly stated that it was a "grant offer," specified the "Date of Offer," and explicitly stated that by executing the "Acceptance" the airport sponsor "does hereby *accept this Offer* and by such acceptance agrees to comply with all of the terms of conditions in this Offer and in the Project Application." E.R. 69, 73 (emphasis added).

The simple question presented is whether the 2003 Amendment is itself an "acceptance of a grant offer" that started a new grant agreement term. Even a cursory review of the 2003 Amendment shows that it is not.

First, the 2003 Amendment contains no text to suggest it is a "grant offer" or "acceptance." It is called an "Amendment" to an existing grant and retains the original grant number. E.R. 99. The key words necessary to start the twenty-year duration – "acceptance of a grant offer" – do not appear anywhere in the 2003 Amendment, nor do any variants of those words. On its face, the 2003 Amendment is intended to modify a "grant offer" that has already been "accepted," and is not itself a new grant offer.

Second, the 2003 Agreement makes clear that it is not intended to change or replace the 1994 "acceptance of a grant offer." Other than changing the amount of

federal funds, the 2003 Amendment states that "all other terms and conditions of the Grant Agreement remain in full force and effect." E.R. 99. Similarly, the 2003 Amendment expressly acknowledges that Santa Monica had *already* accepted the grant in 1994: FAA has "determined it to be in the interest of the United States that [the 1994 Grant Agreement] *accepted by said sponsor on the 29th day of June, 1994*, be amended in conformance with Sponsor's letter dated September 27, 2002." *Id.* (emphasis added).

The 2003 Amendment plainly preserved the fundamental terms and conditions of the 1994 Grant, including the prior "acceptance of a grant offer" necessary to start the twenty-year agreement term. Nothing about the plain language of the 2003 Amendment supports FAA's current claim that it was a "new grant." Grant amendments executed by ACI-NA members contain the same language, and ACI-NA members have never understood that executing a grant amendment was the execution of a new grant.

II. AN AMENDMENT TO A GRANT AGREEMENT DOES NOT REQUIRE ADDITIONAL CONSIDERATION

Having ignored the controlling statutory framework and misconstrued the plain language of the grant agreement, FAA attempted to bolster its position by finding that the 2003 Amendment required additional consideration because FAA was providing more funds while Santa Monica was not providing additional improvements. E.R. 12. FAA went on to "find" that the additional consideration

was the extension of the grant duration. *Id.* That premise is false, however, because there is no requirement that an amendment to a grant agreement be supported by new or additional consideration.

This Court holds that "[f]ederal law governs the interpretation of contracts entered pursuant to federal law where the federal government is a party. *Chickaloon-Moose Creek Native Ass'n v. Norton*, 360 F.3d 972, 980 (9th Cir. 2004); *see also Clay Tower Apartments v. Kemp*, 978 F.2d 478, 480 (9th Cir. 1992) ("We use federal law to interpret a government contract" implementing a HUD-administered Section 8 housing assistance program).

Consistent with the general trend in the law, Federal law makes clear that amending a grant agreement does not require additional consideration. The Comptroller General explained this principle in a 1961 opinion, subsequently adopted by the Government Accountability Office ("GAO"),[4] addressing whether the Department of Health and Human Services "may properly increase a grant" without receiving additional consideration even though the scope of work had not changed and the government was not obligated to provide additional funds. 1961

[4] 2 GAO, *Principles of Federal Appropriations Law* (3d ed. 2006) ("Red Book"), http://www.gao.gov/products/GAO-06-382SP. [T]he opinions of the General Accounting Office . . . as expressed in [the Red Book] . . . while not binding, are 'expert opinions, which we should prudently consider.'" *Thompson v. Cherokee Nation*, 334 F.3d 1075, 1084 (Fed. Cir. 2003) (quoting *Delta Data Sys. Corp. v. Webster*, 744 F.2d 197, 201 (D.C. Cir. 1984)); *see also Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) (relying on the Red Book).

U.S. Comp. Gen. LEXIS 77, at *7. The Comptroller General recognized that the United States could modify an agreement without additional consideration "where statutory authority exists for the payment of funds without consideration other than the benefits to accrue to the public" from the grant-funded project. *Id.*[5] The 1961 Comptroller General's Opinion has been expressly incorporated into the Red Book to illustrate that the "use of the funds to construct the desired facilities" is itself adequate consideration. Red Book at 10-9.[6]

Applying those principles to the AIP program makes clear that FAA cannot demand new consideration for grant amendments that increase the grant amount. 49 U.S.C. § 47108(b) authorizes FAA to increase its maximum share of project

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[5] FAA incorrectly attempts to distinguish that opinion on the ground that the project had not been completed, such that completion of the work was sufficient consideration. E.R. at 43. In fact, however, the project had been completed, although final inspection was not complete. 1961 U.S. Comp. Gen. LEXIS 77, at *7.

[6] Other principles of law further underscore that FAA incorrectly claimed the power to require consideration for a grant amendment. "The Uniform Commercial Code is a source of federal common law and may be relied upon in interpreting a contract to which the federal government is a party," even when the contract is not for the sale of goods. *O'Neill v. United States*, 50 F.3d 677, 684 (9th Cir. 1995). The Uniform Commercial Code expressly does not require consideration for the amendment of an agreement. UCC § 2-209(1) ("An agreement modifying a contract within this Article needs no consideration to be binding."). Addendum 4. Similarly, the Restatement (Second) of Contracts recognizes that a contract amendment does not require additional consideration under several circumstances, including "to the extent provided by statute." Restatement (Second) of Contracts § 89 (1981). Addendum 4.

costs, subject only to certain limits on the percentage increase in the amount of federal participation, without requiring or authorizing additional obligations from the sponsor. *See also id.* § 47108(c) (same rule applied to a related grant program).

FAA's own guidance does not indicate any need for additional consideration for a grant amendment:

> If total actual allowable project costs for airport development or noise development projects or land acquisition exceed the total estimated project costs upon which the maximum obligation is based, the maximum obligation of the U.S. specified in the grant agreement may be increased by 15 percent.

AIP Handbook ¶ 1142.c. Addendum 12. In detailing the criteria necessary to approve an increase in a grant, The AIP Handbook does not indicate any requirement that the sponsor provide additional consideration:

> For approval of increases, the FAA Airports Offices shall review the sponsor's request and supporting documentation and may approve increases to the maximum U.S. obligation if:
>
> (1) The funds are available;
>
> (2) The increased costs appear allowable; and
>
> (3) The amendment will result in a change to the maximum U.S. Obligation that is otherwise consistent with this paragraph [*i.e.* increase no greater than fifteen percent].

AIP Handbook ¶ 1142.h. Addendum 13.[7]

ACI-NA members are not aware of any other instance when FAA has required additional or new consideration for a grant amendment, including an amendment that only increases the grant amount. *Supra*, at 3-4. Indeed, such a requirement would be inconsistent with the terms of the statute, FAA's historical practice, and the general grant principles discussed above. If FAA's new position were to become law, FAA could retroactively claim that numerous airport sponsors, including ACI-NA members, who agreed to grant amendments over the past twenty years, had unknowingly obligated themselves to FAA via previously undisclosed "consideration" that FAA later unilaterally determines to be appropriate in order to advance some agency policy. Such a result could disrupt hundreds of existing grant agreements, and would clearly violate the basic principle that a grantee know what its obligations are *before* accepting the grant. *See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.").

[7] The current version of the AIP Handbook also does not require that an airport sponsor provide consideration for a grant amendment. FAA Order 5100.38D ¶ 5-55. Addendum 66-74.

III. EVEN IF THE GRANT AGREEMENT WERE AMBIGUOUS AND EVEN IF A GRANT AMENDMENT REQUIRED CONSIDERATION, FAA COULD NOT SUPPLY THAT CONSIDERATION RETROACTIVELY

Even if there were a requirement that a grant amendment be supported by consideration, FAA's decision would still be contrary to law because FAA's determination that the "missing" consideration must be an extended grant term violates several principles of law.

First, there was in fact consideration for the 2003 Amendment. The 2003 Amendment expressly states it is made "in consideration of the benefits to accrue to the parties hereto. . . ." E.R. 99. FAA acknowledged that there was consideration for the 2003 Amendment when it found that FAA agreed to reopen the grant and increase the maximum obligation based on the City's representation that the dedication of grant funds to the grant project would allow the City to use other funds for other airfield projects. E.R. 41. Under established principles of law, that should have ended FAA's inquiry. As this Court has explained, "[w]e recall the first lesson in contracts, the peppercorn theory – that courts will not inquire into the adequacy of consideration, so long as it was true and valuable." *Pope v. Sav. Bank of Puget Sound*, 850 F.2d 1345, 1356 (9th Cir. 1988). Applying that lesson, courts have rejected attempts to impose a separate obligation as consideration when the agreement recited "good and valuable consideration"

because it would alter the writing in violation of the parol evidence rule. *E.g.*, *Schron v. Troutman Saunders LLP*, 986 N.E.2d 430, 433 (N.Y. 2013).

FAA clearly violated that principle. Rather than follow the traditional "peppercorn" theory and accept that parties' agreement that there was adequate consideration, FAA unilaterally concluded that that consideration was inadequate and looked for "better" consideration. The FAD endorsed that effort by concluding that the "Director did not err in finding that the extension of the grant assurance obligations until 2023 was *appropriate consideration* in exchange for additional federal funds provided to the City." E.R. 12 (emphasis added). That kind of *ex post facto* second-guessing of the terms of a contract is precisely what the "peppercorn" rule is intended to avoid, and highlights the clear error of FAA's decision.

Second, even if one accepts the notion that there was no consideration for the 2003 Amendment, the remedy for missing consideration is to declare the contract void:

> If there is no consideration at the moment of the agreement, there is no contract. Furthermore, consideration to support a contract must exist at the time of the formation of the contract, and may not be 'supplied' later. There is no contract in existence at the time of its attempted formation, and neither is the contract formed at a later date, by an attempt to support the previous invalid contract with consideration.

In re Gem de P.R., Inc., 79 B.R. 142, 144 (D.P.R. 1987); *see also Dougherty v. Salt*, 125 N.E. 94, 95 (N.Y. 1919) (a simple donative promise is "unenforceable"). If FAA were correct that the 2003 Amendment lacked consideration, FAA should have declared the 2003 Amendment void; no principle of law allows FAA to modify the terms of an existing agreement to supply the "missing" consideration.

Third, to the extent FAA was permitted under the circumstances to determine what the consideration for the amendment was, FAA was required to use parol evidence to determine what consideration the parties had agreed to; FAA was not licensed to make its own *de novo* and *ex post facto* determination. *See* Restatement (Second) of Contracts § 218 (providing an exception to the parol evidence rule "to prove whether or not there is consideration for a promise"). Addendum 5.

Here, the only parol evidence offered was from Santa Monica and that evidence showed that the City did ***not*** agree to extend the term of the 1994 Grant Agreement in exchange for the 2003 Amendment. E.R. 41. If anything, that evidence showed that the consideration for the amendment, if any was required, was that increasing the grant would allow Santa Monica to spend non-AIP funds on other airport improvement projects. *Id.* That is adequate consideration and shows a direct benefit to the national aviation system.

FAA offered no evidence to rebut that evidence. Instead, FAA decided *ex post facto* that the supposedly "missing" consideration was to extend the duration of the grant based on nothing more than FAA's apparent objective to prevent the closure of the Santa Monica Airport. FAA cannot twist long-established principles of law or the unambiguous terms of the contract document, and ignore unrebutted evidence, even if doing so advances policy goals important to the agency. FAA's willingness to distort the law and ignore the facts – including the grant agreement, grant amendment, and the sworn testimony of the airport sponsor – in order to advance its policy objectives is one of the most disturbing aspects of FAA's decision to ACI-NA and its members.

IV. FAA CANNOT RELY ON DEFERENCE UNDER *CHEVRON* AND *AUER* TO CHANGE THE TERMS OF GRANT AGREEMENTS AND, MOREOVER, ANY AMBIGUITY IN THE GRANT AGREEMENTS MUST BE RESOLVED AGAINST FAA BECAUSE FAA DRAFTED THEM

Seeking authority to impose requirements on Santa Monica far beyond what the law authorizes, FAA claims authority under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and *Auer v. Robbins*, 519 U.S. 452 (1997) to "interpret" Assurance B(1). E.R. 14. In apparent conflict with its earlier position, FAA claims that ordinary contract principles, such as the principle that contract ambiguities are resolved against the drafter, do not apply in the grant context. *Id.* Because FAA both drafts the mandatory language of grant

agreements and adjudicates disputes under grant agreements, this claim allows FAA to "find" ambiguity when it feels the need to exercise interpretive license and then claim near infallibility for its interpretation. The net result is that airport sponsors would have no assurance of the extent of their obligations under a given grant agreement because the nature and extent of those obligations would be, under FAA's formulation, subject to subsequent unreviewable, unilateral interpretation by FAA itself. As with other aspects of the FAA's decision, FAA's position is both unfair and contrary to well-established legal principles.

A. FAA's Interpretation of the Grant Agreement and Amendment Are Not Entitled to Deference

Courts have recognized the fundamental unfairness of deferring to an agency's interpretation of a contract to which it is a party. "[I]f the agency itself were an interested party to the agreement, deference might lead a court to endorse self-serving views that an agency might offer in a post hoc reinterpretation of its contract." *Nat'l Fuel Gas Supply Corp. v. Fed. Energy Regulatory Com.*, 811 F.2d 1563, 1571 (D.C. Cir. 1987). Accordingly, *Chevron* deference does not control how courts review an agency's construction of its own contracts. *Meadow Green-Wildcat Corp. v. Hathaway*, 936 F.2d 601, 605 (1st Cir. 1991) (Breyer, J.). "[I]t would seem surprising and unfair if the terms of this document, without so stating, bind the permittee but leave the other party (the Service) free to interpret those same terms as it wishes (limited only by the bounds of 'reasonableness')." *Id.* at

604. These cases describe the exact circumstances that ACI-NA seeks to avoid for its member airports that have signed or will sign grant agreements and amendments with FAA.

This Court has likewise refused to defer to an agency's interpretation of contract terms even where the contract implements a statute:

> Although ANCSA may have provided the context for the agreement, the Deficiency Agreement neither calls for Interior to interpret ANCSA in any way nor to use its expertise in its understanding of that statute. In addition, as an interested party to the Deficiency Agreement that stands to gain or lose depending on the outcome of this litigation, the agency should not be accorded any deference.

Chickaloon-Moose, 360 F.3d at 980. Deference is only warranted if the contract language involves "intrinsically regulatory terms" and if the agency "frequently employs its expertise in reviewing" them. *Wolkowitz v. FDIC*, 527 F.3d 959, 969 (9th Cir. 2008) (quoting *MCI Telecomms. Corp. v. F.C.C.*, 822 F.2d 80, 84-85 (D.C. Cir. 1987)). ACI-NA does not dispute this principle and recognizes that FAA may appropriately exercise its discretion and particular expertise to construe the meaning of the substantive, and statutorily based, Sponsor Assurances.

Deference is not warranted here because Assurance B(1) is not statutorily mandated, and the AIP statute is silent regarding the duration of a grant agreement. 49 U.S.C. § 47101 *et seq.* Because FAA's interpretation of Assurance B(1) and the 2003 Amendment does not require FAA to interpret or apply the statute, FAA

is not entitled to any deference in its interpretation of the 1994 Grant Agreement or the 2003 Amendment under Circuit law. Moreover, there is nothing "intrinsically regulatory" about the duration of the agreement, which is a fundamental term of every contract. Indeed, courts have far more expertise in interpreting such standard contract terms than does FAA. Similarly, there is nothing intrinsically regulatory about the phrase "from the date of acceptance of a grant offer of Federal funds," and the interpretation of that phrase – even assuming some interpretation is necessary – does not require any expertise unique to FAA. Accordingly, there is nothing "intrinsically regulatory" about Assurance B(1) that would compel the Court to defer to FAA's expertise.[8]

FAA's attempt to retroactively reinterpret the grant agreement and amendment is further barred by general limits on government authority under the Spending Clause. As the Supreme Court explained in *Pennhurst*:

> [L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal

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[8] The case FAA cites to support its claim of deference is also inapposite. *See* E.R. at 14 n.5. In *BMI Salvage Corp. v. Fed. Aviation Admin.*, 488 Fed. App'x 341 (11th Cir. 2012), the court deferred to the FAA's interpretation of whether a particular activity constituted an "aeronautical activity" under the Sponsor Assurances. Applying *Auer*, the court noted the complex, technical definition of the term "aeronautical," as well as the FAA's history of refining this definition over nearly fifty years. *Id.* at 345-46. By contrast, the FAA has never previously construed the phrase "acceptance of a grant offer for Federal funds" to include amendments, and there is nothing remotely technical about this phrase that warrants deference to the FAA's unique aviation expertise.

> funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'

451 U.S. at 17. Thus, "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Id*.

One important purpose of that rule is to prevent granting agencies from imposing new conditions *after* acceptance of a grant: "Though Congress' power to legislate under the spending power is broad, *it does not include surprising participating States*[9] *with postacceptance or 'retroactive' conditions.*" *Id.* at 25 (emphasis added); *see also Jackson v. Birmingham Bd. of Ed.*, 544 U.S. 167 (2005) (same). Congress specifically incorporated the need for FAA to provide express, advance notice and the opportunity to comment before FAA can adopt changes or additions to grant obligations. 49 U.S.C. § 47107(h)(1).

Here, Congress has spoken unambiguously by allowing FAA to modify existing grant agreements to increase funding, by not requiring any consideration for a grant or grant amendment, and by requiring that changes in grant obligations be preceded by notice and comment. Under *Pennhurst* and *Jackson*, FAA does not

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[9] Airport sponsors, including Santa Monica, are political subdivisions of States or federally-authorized multi-State authorities.

have the authority to ignore Congress' express commands through *ad hoc* interpretation.

B. As the Drafter of Non-Regulatory Contract Terms, FAA Is Subject to the *Contra Proferentem* Doctrine

In addition to claiming deference under *Chevron*, moreover, FAA claims that it is not subject to the generally applicable *contra proferentem* doctrine, which provides that an ambiguous contract term will be construed against the drafter of the term. Restatement (Second) of Contracts § 206 (Addendum 5); *see also Ace Constructors, Inc. v. United States*, 70 Fed. Cl. 253, 288 n.40 (2006) ("Unless the non-drafting party knew or should have known of an ambiguity (*i.e.*, the ambiguity was patent), the risk of ambiguities in contract language is generally allocated to the drafting party."). Because FAA drafted all of the disputed language here, FAA cannot claim the powers to latch onto ambiguities it created and construe those ambiguities against the airport sponsor. Such an amalgamation of power would both be unfair to airport sponsors who are powerless to oppose it, and contrary to the law.

The principle behind the *contra proferentem* doctrine is one of basic fairness and the Supreme Court and virtually every federal court that has addressed the issue have applied the *contra proferentem* doctrine against the government:

> [A]s between two reasonable and practical constructions of an ambiguous contractual provision, such as the two proffered by the Government, the provision should be

> construed less favorably to that party which selected the contractual language. This principle is appropriately accorded considerable emphasis in this case because of the Government's vast economic resources and stronger bargaining position in contract negotiations.

United States v. Seckinger, 397 U.S. 203, 216 (1970); *see also Peter Kiewit Sons' Co. v. United States*, 109 Ct. Cl. 390, 418 (1947) ("this rule is especially applicable to Government contracts where the contractor has nothing to say as to the provisions.").[10]

FAA attempts to avoid application of the *contra proferentem* doctrine by relying on *Bennett v. Ky. Dep't of Ed.*, 470 U.S. 656, 669 (1985). E.R. 14. But *Bennett* did not hold that *contra proferentem never* applies to grant agreements. The Court simply stated that it does not *always* apply to grant agreements: "we do not believe that ambiguities in the requirements [of grant agreements] should *invariably* be resolved against the Federal Government as the drafter of the grant agreement." 470 U.S. at 669 (emphasis added). At most, *Bennett* held that *contra*

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[10] Courts recognize that the doctrine does not apply where the non-drafter has reason to know of the drafter's intended meaning. *Perry & Wallis, Inc. v. United States*, 427 F.2d 722, 726 (Ct. Cl. 1970). Here, the unrebutted evidence from the City shows that Santa Monica had no understanding that FAA intended the 2003 Amendment to reset the twenty-year grant agreement duration. E.R. at 11, 53-55, 58-60. Santa Monica's understanding is consistent with the understanding of ACI-NA members when they sign such amendments. *Supra*, at 3-4. Moreover, there is nothing in the statute, the AIP Handbook, or other FAA document that warns airport sponsors that signing a grant amendment for additional funds extends the duration of the grant agreement.

proferentem does not apply to the interpretation of contract terms that incorporate the substance of the statutory grant program itself. *Id.*

The factors that led the Court in *Bennett* to decline to apply the doctrine are not present here. Congress did not address the duration of grant agreements in the AIP statute and the duration is not part of the substance of the program. Moreover, the grant program in *Bennett* relied on federal-state cooperation, indicating that the grant terms had not been imposed by regulatory fiat. *Id.* Here, the duration clause was imposed by FAA and was not the result of a cooperative process. Finally, construing the duration language does not require any FAA expertise to which deference is appropriate. The rationale of *Bennett* does not apply to terms of the grant agreement that relate solely to the contractual framework of the agreement and not the substantive requirements of the grant program.

Moreover, even where *Bennett* applies, it does not confer *carte blanche* on the agency to impose any interpretation on the contract. The Court expressly declined to "adopt the Government's suggestion that the Secretary may rely on *any* reasonable interpretation of the requirements of Title I to determine that previous expenditures violated the grant conditions." *Id.* at 670. Indeed, the Court was "reluctant to conclude that the States guaranteed that their performance under the grant agreements would satisfy whatever interpretation of the terms might later be adopted by the Secretary, so long as that interpretation is not arbitrary,

"'capricious, or manifestly contrary to [Title I].'" *Id.* (quoting *Chevron*, 467 U.S. at 844). As discussed above, FAA's interpretation of the Santa Monica grant agreements is not reasonable under any rational understanding of the statute, the AIP Handbook, the express contract language, and other law, and cannot be sustained even if FAA has some interpretive discretion.

CONCLUSION

For the foregoing reasons, the Court should vacate FAA's decision in FAA Docket No. 16-14-04.

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Signature of Attorney or Unrepresented Litigant [S/ W. Eric Pilsk] Date [Dec. 23, 2016]

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of December, 2016, I electronically filed the foregoing BRIEF OF AMICUS CURIAE AIRPORTS COUNCIL INTERNATIONAL – NORTH AMERICA with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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