No. 16-72827

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE CITY OF SANTA MONICA,

Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION,

Respondent.

On Petition For Review Of A Final Agency Decision Of
The Federal Aviation Administration

BRIEF FOR PETITIONER CITY OF SANTA MONICA

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JURISDICTIONAL STATEMENT

The Federal Aviation Administration (FAA) issued its final agency decision on August 15, 2016. That decision resolved an FAA proceeding initiated pursuant to 14 C.F.R. § 16.23. The City of Santa Monica (City), a California municipal corporation, filed a timely petition for review on August 25, 2016. ER47. This Court has jurisdiction under 49 U.S.C. § 46110.

STATEMENT OF THE ISSUE

Whether by entering into a 2003 amendment to a 1994 grant agreement that expressly changed only the amount of the grant, the City also agreed to extend the maximum duration of its grant obligations from 20 years to 29 years, pushing the expiration date from 2014 to 2023.

INTRODUCTION

This petition for review concerns the FAA's attempt to rewrite a contract the agency reached with the City more than 20 years ago by unilaterally extending the City's obligations under that contract for an additional nine years.

In 1994, the City entered into a Grant Agreement with the FAA, accepting funds to improve the Santa Monica Airport. At that time, the City agreed to satisfy certain obligations, called "grant assurances." By the plain terms of the parties' contract, these assurances would endure for a period "in any event not to exceed twenty (20) years," and thus the assurances would expire no later than 2014.

Subsequently, in 2003, the City and the FAA executed an amendment to the 1994 agreement, with the FAA reimbursing the City for certain unanticipated costs incurred in completing the project funded by the grant. This 2003 amendment expressly provided that, aside from the grant amount, "[a]ll other terms and conditions of the Grant Agreement remain in full force and effect." The City therefore understood that the 2014 expiration of the grant assurances remained unchanged. It agreed to the amendment based on this understanding.

But in the agency decision on review here, the FAA rejected the City's straightforward interpretation of these unambiguous contractual provisions. Declaring that the 2003 amendment was actually a "new grant," the FAA asserted that the amendment had somehow restarted the 20-year clock set out in the original 1994 agreement and thereby extended the City's grant assurances for an additional nine years.

This determination cannot stand. The FAA's decision contravenes the most basic principles of contract law. Contracts are supposed to be interpreted according to their plain terms, but the FAA transformed the amendment's "remain in full force and effect" clause into one that said the City's obligations shall be extended, and converted the Grant Agreement's provision guaranteeing the City's obligations would not "exceed twenty (20) years" into a provision stating that they would endure for 29 years. Contracts are supposed to be interpreted according to

the contemporaneous intentions of the parties, but the FAA disregarded unrebutted evidence that both parties understood the 2003 amendment to leave the City's grant obligations unchanged, instead substituting the FAA's hindsight assessment of what it now wishes the amendment had accomplished. And contracts are supposed to be construed against the drafter—even where, as here, the drafter is the federal government; instead, the FAA erroneously declared its own interpretation of ordinary contractual terms entitled to deference.

For these reasons and others, the FAA's decision is contrary to law. It must be set aside.

STATEMENT OF THE CASE

A. Factual Background

1. The Santa Monica Airport

The City owns and operates the Santa Monica Airport, which lies on 227 acres of land that the City purchased between 1926 and 1941. ER3; ER67. At the time of the City's initial acquisition, the land around the airport was largely rural. ER67. But in the decades preceding World War II, the surrounding area developed into a residential neighborhood, populated by thousands of workers from Douglas Aircraft, which was then based at the airport. ER67.

In 1941, the City leased the airport to the United States to aid in the war effort. ER67. Together with the City, the federal government expanded and

reconfigured the airport. ER67. In 1948, with the war over, the federal government officially surrendered its leasehold interest to the City. ER67.

The City has continued to operate the airport since that date. But doing so has caused serious adverse consequences for residents of the densely populated surrounding neighborhood, who are subject to the airport's noise, pollution, and safety hazards. ER67; ER167.

The City has undertaken a number of efforts to mitigate these effects, including imposing noise limits, curfews, and banning certain types of aircraft. These efforts have generated substantial litigation. *E.g.*, *Santa Monica Airport Ass'n v. City of Santa Monica*, 659 F.2d 100, 102 (9th Cir. 1981) (upholding City ordinances imposing a night curfew, prohibiting low aircraft approaches on weekends, prohibiting helicopter flight training, and establishing a "maximum single event noise exposure level").

2. The 1984 Settlement Agreement

In 1981, the Santa Monica City Council adopted a resolution stating the City's intention to close the airport "as soon as possible." ER120. But in 1984, with various ongoing legal challenges, the City entered into a Settlement Agreement with the FAA. ER128. Pursuant to the Settlement Agreement, the City was required to "operate and maintain the Airport as a viable functioning facility . . . until July 1, 2015." ER132.

The Settlement Agreement also contained multiple provisions concerning what is known as the Airport Improvement Program (AIP). Under that program, Congress has authorized the FAA to provide financial assistance for the development and improvement of public-use airports like the Santa Monica Airport. 49 U.S.C. § 47101 *et seq.* By statute, the FAA is required to ensure that recipients of these "project grant[s]" provide "written assurances" that they will comply with certain obligations, including that the recipient airport will "be available for public use on reasonable conditions and without unjust discrimination." *Id.* § 47107(a), (a)(1). The FAA periodically publishes these requirements and other "grant assurances" that it includes in its agreements with AIP grant recipients. *E.g.*, Federal Aviation Admin., Grant Assurance and Agreement for Airport Improvement Program, 49 Fed. Reg. 35,282-02 (Sept. 6, 1984).

Regarding such AIP grants, the 1984 Settlement Agreement stated that "any future grant agreements between the City and the FAA which are designed to implement the programs covered by this Agreement, defined as those agreements for the federal funding of programs or improvements intended to further this Agreement executed prior to July 1, 1995, shall be consistent with this Agreement and shall not extend or alter the obligation of the City to operate the Airport under this Agreement, except as may be required by federal statute." ER131-32. The

Settlement Agreement further provided that "all actions of the parties during the duration of this Agreement, shall be interpreted consistently with this Agreement." ER128.

3. The 1994 Grant Agreement

On June 29, 1994, the City signed an agreement, entitled "Grant Agreement," prepared by the FAA, in which it accepted an AIP grant to fund certain airport enhancements, including the construction of a blast wall necessary to prevent jet blasts and debris from reaching residential areas. ER69, 73, 80. The FAA designated the contemplated airport enhancements as "Project No. 3-06-0239-06" and the Grant Agreement itself as "Contract No. DTFA08-94-C-20857." ER69. The Grant Agreement calculated the federal government's "maximum obligation" with respect to the work to be performed as $1,604,700. ER70. The agreement also acknowledged, however, that there might be "future grant amendments which may increase the foregoing maximum obligation," and provided that the "[f]inal determination of the United States share [of the project] will be based upon the final audit of the total amount of the allowable project costs and settlement will be made for any upward or downward adjustments to the Federal share of costs." ER70.

The Grant Agreement further "incorporated" the "Assurances" attached to the contract, making them "a part" of the agreement. ER72. These assurances

included the obligations Congress specifically required the FAA to include in any AIP grant agreement. *See* ER83-93; 49 U.S.C. § 47107(a). They also included Assurance (B)(1), a provision that set forth a 20-year limit on any grant obligations. It provided:

> 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, or throughout the useful life of the project items installed within a facility under a noise compatibility program project, *but in any event not to exceed twenty (20) years from the date of the acceptance of a grant offer of Federal funds for the project*.

ER83 (emphasis added).

Because of Assurance B(1), the City knew when it accepted the 1994 Grant Agreement that any obligations it incurred necessarily would expire on June 29, 2014, at the latest. ER53; ER59. This expiration date was crucial, as the City was determined not to subject itself to any requirement to operate the airport beyond the July 1, 2015 date set forth in the 1984 Settlement Agreement. ER53; ER59, 63.

4. Amendment No. 1

In 1999, the City and the FAA executed "Amendment No. 1" to the 1994 Grant Agreement. ER97. This amendment modified the agreement's description of the contemplated "airport development" to reflect changes in the work to be performed. ER97. The amendment continued to refer to the Grant Agreement

using the same contract number (DTFA08-94-C-20857), and to the project using the same project number (3-06-0239-06). ER97. And as the FAA confirmed in a decision issued the following year, the City's grant assurances continued to expire in 2014 as the Grant Agreement had provided. Director's Determination at 23, *SMAA v. City of Santa Monica*, FAA Docket No. 16-99-21 (Nov. 22, 2000) ("To the extent that Complainants . . . seek to prevent the future closure of the Airport or require the City to operate the Airport beyond July 1, 2015, that is a local land use matter. . . . When the City's last grant agreement expires in approximately 2014, the AIP grant sponsor assurances will no longer require the City to operate the Airport as an airport.").

5. Amendment No. 2

Due to necessary changes during construction of the blast wall and other improvements, the City incurred costs in completing the project exceeding those the parties initially estimated. Although the costs of the original project increased, the nature of the project facilities did not change nor did their useful life. ER102-06. Accordingly, in September 2002, the City sought reimbursement for an additional $240,600—a "modification to the grant" that the City asserted would defray the cost overruns on the completed project so the City could use its funds to "more effectively enhance and improve the overall condition and safety of the public-use areas of the Airport." ER102.

By May 2003, the FAA still had not acted on the request, having informed the City that it had "decided to withhold the grant reimbursement pending the outcome" of its investigation into an unrelated City proposal to reduce the length of the airport's runway. ER107. The City asked "the FAA to reconsider th[e] matter and approve the requested grant reimbursement so the funds can be used to enhance and maintain the Santa Monica Airport," referring to the Grant Agreement as "the last federally funded capital improvement project as recognized in the 1984 Settlement Agreement." ER107. As the City emphasized, the requested funds for the completed project would free up "a substantial amount of revenue that could be utilized for much-needed and differed airfield maintenance projects." ER107.

Responding to this letter, the FAA assured the City that while the Grant Agreement had been "financially and administratively closed," the agency was "processing the documentation to reopen the grant to amend the grant agreement, thereby increasing the maximum U.S. obligation." ER108. It asserted that "[t]he grant amendment should be offered to the city once the additional federal funds become available." ER108.

Subsequently, on August 23, 2003, the City and the FAA executed "Amendment No. 2" to the 1994 Grant Agreement. ER99-100. Like Amendment No. 1, Amendment No. 2 used the same contract and project numbers as the original grant. ER99. As requested, the amendment increased the grant amount by

$240,600. ER99. This sum was 14.99% of the federal share of the project calculated in the Grant Agreement (ER70), just slightly less than the 15% limit specified by Congress for upward adjustments to preexisting grants. 49 U.S.C. § 47108(b)(3)(A).

The amendment made no other changes to either the Grant Agreement or the project it covered. ER99. Rather, Amendment No. 2 expressly provided that "[a]ll other terms and conditions of the Grant Agreement remain in full force and effect." ER99.

Given this language, the City understood the 2003 amendment, like the 1999 amendment that preceded it, to preserve the 2014 expiration date of the City's grant assurances. After all, one of the critical "terms and conditions" of the 1994 Grant Agreement had been the 20-year limit on the City's obligations associated with the project. ER99; ER83. The FAA, meanwhile, had given the City no reason to think that the FAA interpreted the amendment in any other fashion. ER54. Thus, when then-City Manager Susan McCarthy signed Amendment No. 2 on behalf of the City, she "did not understand that the grant assurances accepted in the 1994 grant agreement were being extended nine years." ER54. Instead, she, along with other City officials including Airport Director Jeff Mathieu, understood the amendment to be consistent with the City's general policy of ensuring that any

airport obligations would expire *before* the July 2015 date established by the 1984 Settlement Agreement. ER54-55; ER60.

For its part, the FAA treated the amendment in the same manner. In its report to Congress, the agency did not count the additional $240,600 paid to the City in its list of "AIP Grants Awarded in FY 2003," instead including the sum in the $123 million it had disbursed that year for "increases in existing grant agreements." FAA, Report to Congress: Twentieth Annual Report of Accomplishments at 11, Figure C-9 (May 2004), *available at* http://www.faa.gov/airports/aip/grant_histories/media/annual-report-2001-03.pdf ("2003 Report to Congress"). Likewise, the FAA did not include the amount paid to the City in its "Grant Histories" database for grants awarded in 2003. *See* FAA, Fiscal Year 2003 Approved Grants, *available at* http://www.faa.gov/airports/aip/grant_histories/media/grants-2003.pdf.

B. Procedural Background

1. The Director's Determination

The present case commenced when various airport tenants, individuals who use the airport, and organizations of such users filed a complaint against the City with the FAA pursuant to 14 C.F.R. § 16.23. ER109-11. The complainants asserted that Amendment No. 2, despite having expressly disclaimed making any substantive changes to the 1994 Grant Agreement other than increasing the

amount, had extended the City's grant assurance obligations into August 2023. ER115.

The Director of Airport Compliance and Management Analysis agreed, issuing an initial agency determination concluding that the City's acceptance of Amendment No. 2 "trigger[ed]" the original grant assurances for another 20 years. ER45. The Director appeared to rely on a presumption that Amendment No. 2 must have required "an exchange of consideration," and that the "only consideration" the City could provide "would be the continued applicability of the grant assurances using the date of the signed second amendment as the starting date." ER42. In this respect, the Director continued, Amendment No. 2 was unlike Amendment No. 1 (which, the Director appeared to concede, had not effected any such extension of the grant assurances), but was instead "the equivalent of a new grant." ER42.

The Director cited nothing in the statutes governing federal airport grants, the FAA regulations, or the contractual agreement itself for the proposition that an amendment to a grant could be "akin to a new grant." ER42. Indeed, the Director acknowledged that the actual *text* of Amendment No. 2 was an "arguably contrary indicator" in that it provided that "the terms and conditions of the original grant would remain in force." ER43. Nevertheless, asserting that the "assurances are statutory requirements the language of which does not change from grant to grant,"

the Director concluded that the "plain language" of Assurance B(1) linked the duration of the assurances to "'*a* offer'" of funds—an apparent misquotation of Assurance B(1)'s reference to "the acceptance of a *grant* offer." *Compare* ER43-44, *with* ER83 (second emphasis added).

2. The FAA's Final Order

The Associate Administrator for Airports, in a final agency decision, affirmed the Director's Determination. ER19. Straining to reconcile the FAA's understanding of the City's obligations with the plain text of the agreement signed by the FAA and the City, the Administrator declared that Amendment No. 2's provision that "'[a]ll other terms and conditions of the Grant Agreement remain in full force and effect'" did not merely preserve the status quo but rather was "reasonably read to apply to the Grant Assurance (B)(1)." ER10. And under Assurance B(1), the Administrator asserted, "the acceptance of a new grant offer restarts the 20-year clock." ER11. The Administrator then characterized Amendment No. 2 as a "new grant offer," failing to explain why it was not instead what it stated it was—namely, merely an *amendment* to an existing grant agreement that was accepted in 1994. ER11. The Administrator also dismissed the importance of the parties' contemporaneous understanding of Amendment No. 2, deflecting the City's evidence that it would not have signed—and did not

sign—any agreement that was inconsistent with the July 1, 2015 termination of its obligations under the 1984 Settlement Agreement. ER11.

The Administrator then turned to the Director's conclusion that reinitiating Assurance B(1)'s 20-year clock provided the necessary consideration for the FAA's 2003 reimbursement to the City. Although its discussion of the issue was not entirely clear, the Administrator did not appear to embrace the Director's presumption that the City must have provided consideration to receive these funds (a presumption that served as the principal foundation for the Director's construction of Amendment No. 2). ER12. Instead, the Administrator declared in conclusory fashion that "the extension of the grant assurance obligations until 2023 was appropriate consideration in exchange for additional federal funds." ER12. The Administrator acknowledged—but failed to actually address (ER12)—the City's argument that, if any exchange of consideration was necessary, the parties' course of dealing revealed what the City provided: its commitment to use the funds to "enhance and maintain the Santa Monica Airport." ER107.

The Administrator next rejected the City's argument that, by treating an amendment to an existing grant as a new grant, the Director "announce[d] an abrupt and arbitrary change in the FAA's treatment of grant obligations." ER13. The Administrator treated this as a semantic argument, asserting that by using the word "akin" in describing Amendment No. 2 as "akin to a new grant," the Director

had not intended to "creat[e] a new category of grant modification." ER13. But the Administrator accepted the substance of the Director's conclusion, declaring that while Amendment No. 2 was an amendment to an existing grant, it also was itself "an AIP grant." ER13. And like the Director, the Administrator pointed to no statute, regulation, or agency guidance for the proposition that a grant modification could be treated as a species of new grant, particularly when the original grant contemplated the very modification that occurred. ER13.

Finally, the Administrator dismissed the City's argument that any contractual ambiguity should be construed in the City's favor, or at least not in the FAA's favor. ER13-14. Instead, the Administrator asserted that because federal grants are "partly a creature of statute," the agency was entitled to deference even if the particular grant agreement and amendment provisions at issue did not embody any statutory requirements. ER14.

SUMMARY OF ARGUMENT

In concluding that the City remained obligated until 2023 by the terms of grant assurances to which it agreed in 1994, the FAA contravened governing principles of contract law. Its order therefore must be vacated.

First, the FAA's decision flouted the plain meaning of the agreement between the City and the agency, which made clear in no uncertain terms that any obligations the City incurred would expire in 2014 at the latest. Most pertinent

here, Amendment No. 2 expressly provided that, aside from an increase in the funds awarded, all other terms of the 1994 Grant Agreement would "remain" in effect. Given that the ordinary meaning of "remain" is to "continue unchanged," this provision forecloses any contention that the amendment also silently encompassed a nine-year grant assurance extension. That conclusion is supported by other aspects of Amendment No. 2, which gave no indication that it was the "new grant offer" the FAA later declared it to be, rather than the "amendment" it stated it was. And this conclusion is confirmed by the terms of the 1994 Grant Agreement itself, which provided that the duration of the grant assurances could not "in any event . . . exceed" 20 years, thus precluding the FAA's attempt to impose a 29-year term.

Second, this plain-meaning reading is confirmed by the parties' course of dealing, which unequivocally establishes that Amendment No. 2 was not intended to extend the City's grant assurance obligations. Unrebutted evidence demonstrated that the City did not understand the amendment to change the 2014 expiration of the grant assurances; indeed, the City never would have agreed to the amendment had it believed doing so would push back that end-date. In fact, the evidence indicates the FAA itself shared that same contemporaneous understanding: in 2003, the FAA treated Amendment No. 2 like an amendment, not the "new grant offer" the agency retroactively claims it was. In any event,

regardless of the FAA's intention, the City's contemporaneous understanding must govern because the City's interpretation was reasonable and the FAA had reason to know of it. In disregarding this evidence of the parties' intent, the FAA contravened settled principles of contract law.

Third, any lingering ambiguity (and there is none) should be resolved by the rule that a contract must be construed against the drafter—the FAA. In the challenged order, the FAA rejected this principle, asserting that its own understanding of the Grant Agreement was entitled to deference. But the FAA relied entirely on principles of statutory and regulatory interpretation that are inapplicable where, as here, the construction of a contract is at issue. Neither Amendment No. 2 nor the relevant Grant Agreement provision embodies statutorily-required terms or broadly applicable regulatory language. They are contractual provisions governing the bilateral agreement between the City and the agency, and they have legal effect because they are included in that agreement. Moreover, even if the contractual nature of these provisions were ignored, deference would still be inappropriate because the FAA's current interpretation both represents an abrupt and entirely unexpected change of position and conflicts with the plain meaning of the agreement.

STANDARD OF REVIEW

Under the Administrative Procedure Act (APA), this Court reviews agency action to determine whether it was "'arbitrary, capricious, an abuse of direction, or otherwise not in accordance with law.'" *Sauer v. U.S. Dep't of Educ.*, 668 F.3d 644, 650 (9th Cir. 2012) (quoting 5 U.S.C. § 706(2)(A)). This Court "review[s] de novo the questions of law at issue," and it "must set aside the [agency's decision] if it is not in accordance with law." *Id.* (internal quotation marks omitted). Findings of fact are reviewed for substantial evidence. 49 U.S.C. § 46110(c).

ARGUMENT

"Federal law governs the interpretation of contracts entered into pursuant to federal law where the government is a party," and the proper application of general "principles of contract interpretation" is a question of law. *O'Neill v. United States*, 50 F.3d 677, 682 (9th Cir. 1995). Where, as here, interpreting a contract does not require the interpretation of an underlying statute, no deference to an agency's interpretation of that contract is warranted. *Chickaloon-Moose Creek Native Ass'n, Inc. v. Norton*, 360 F.3d 972, 980 (9th Cir. 2004); *see, e.g., Clay Tower Apartments v. Kemp*, 978 F.2d 478, 480 (9th Cir. 1992) ("[T]he parties executed a contract, and our inquiry focuses on the contractual requirements. This focus does not demand deference to HUD's statutory interpretation."). That is

particularly true where the agency is a party to the agreement with an interest in its interpretation. *Chickaloon-Moose Creek*, 360 F.3d at 980.

Thus here—as in other cases involving application of "ordinary principles of contract law"—"the parties' intentions control." *M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 933 (2015) (internal quotation marks omitted). An examination of the text of the relevant agreement, the circumstances under which it was made, and the underlying legal principles reveal that the City never agreed to extend its grant obligations into 2023.

I. THE PARTIES' AGREEMENT UNAMBIGUOUSLY ESTABLISHES THE 2014 EXPIRATION DATE OF THE CITY'S GRANT ASSURANCES

A. The Plain Language Of Amendment No. 2 Preserved The Grant Assurances' 2014 Expiration Date

The intentions of the City and the FAA in adopting Amendment No. 2 to the 1994 Grant Agreement may be discerned, first, from the text of these documents themselves. "Where the words of a contract in writing are clear and unambiguous, its meaning is to be ascertained in accordance with its plainly expressed intent." *Id.* (internal quotation marks omitted). The contract must be "read as a whole," with "preference given to reasonable interpretations." *Wapato Heritage, L.C.C. v. United States*, 637 F.3d 1033, 1039 (9th Cir. 2011) (internal quotation marks omitted). Here, the plain language bears only one reasonable interpretation: the City's grant obligations expired in 2014.

The 1994 Grant Agreement itself unambiguously set forth a 2014 expiration date, as the FAA did not (and presumably does not) dispute. The City accepted the FAA's grant offer to fund the project in question in June 1994. ER69. Assurance B(1), which was incorporated into the Grant Agreement, provided that the City's obligations would not "exceed twenty (20) years from the date of the acceptance." ER83. Because the City accepted the grant offer in June 1994, its obligations could not have extended past June 2014.

Amendment No. 2 did not change this end date. To the contrary, Amendment No. 2 modified the 1994 Grant Agreement in only one respect, providing that the "maximum obligation stated on page 2, condition 1 [of the 1994 Grant Agreement] is hereby increased by $240,600.00, from $1,604,700.00 to $1,845,300.00." ER99. Such a modification had been expressly contemplated in the 1994 Grant Agreement itself, which, in recognition of the possibility of cost overruns of the sort that ultimately occurred, provided that a "[f]inal determination of the United States share [of the project] will be based upon the final audit of the total amount of the allowable project costs and settlement will be made for any upward or downward *adjustments* to the Federal share of costs." ER70 (emphasis added).

Otherwise, Amendment No. 2 expressly disclaimed any substantive change to the 1994 Grant Agreement. Most significantly, it stated that "[a]ll other terms

and conditions of the Grant Agreement remain in full force and effect." ER99. Because one of the 1994 Grant Agreement's most important "terms and conditions" was that any obligation imposed by the agreement would expire in no more than 20 years, Amendment No. 2 thus made clear that the 2014 maximum expiration date "remain[ed] in full force and effect."

B. The FAA's Contrary Interpretation Conflicts With The Agreement's Terms

Attempting to evade this straightforward reading of the parties' agreement, the FAA asserted that Amendment No. 2's "remain in full force and effect" clause was "reasonably read to apply to" Assurance B(1), and that "the acceptance of a new grant offer restarts the 20-year clock" under that Assurance. ER10-11. But this newly minted interpretation suffers from three independent and equally fatal flaws.

First, the "remain in full force and effect" clause was plainly intended to *preserve* the then-existing status quo, not to change the City's obligations. The FAA's assertion that Amendment No. 2 reinvoked and extended these grant assurances might be defensible if the amendment declared that the assurances would "apply anew" to the City. But instead, Amendment No. 2 simply provided that these obligations—like all other terms of the 1994 Grant Agreement except the amount of funds—would "*remain*" in effect. ER99 (emphasis added). The plain meaning of "remain" is "to continue unchanged." Merriam-Webster's Collegiate

Dictionary 1052 (11th ed. 2003); *see also, e.g.*, American Heritage Dictionary 1475 (4th ed. 2006) (defining "remain" as "[t]o continue in the same state or condition"). Concluding, as the FAA did, that Amendment No. 2 nevertheless restarted the 20-year clock set forth in Assurance B(1) would be directly contrary to this ordinary meaning. Far from remaining "the same" and "unchanged," all of the City's obligations would begin anew in 2003, with their duration extended by nine years and the City effectively receiving no credit for the period between the 1994 grant acceptance and 2003.

Second, and in any event, Amendment No. 2 was not on its face a "new grant offer" that might trigger Assurance B(1)'s 20-year clock, as the FAA asserted. ER11. Instead, Amendment No. 2 expressly identified itself as an *amendment* to a preexisting grant agreement, one that did not change the scope of the project covered by the underlying agreement. It was entitled "*Amendment* No. 2 to Grant Agreement for Project No. No. [sic] 3-06-0239-06"—a name given to it by the FAA. ER99 (emphasis added). Not only did Amendment No. 2 employ the same project number as the 1994 Grant Agreement, it used the same contract number (DTFA08-94-C-20857), thereby identifying it as part of the very same grant offer and acceptance. ER99. It also referred to the 1994 agreement it amended as the "Grant Agreement"—a singular, proper noun. ER99. Even the amount of Amendment No. 2's modification made clear it was an amendment, not

a new grant: the $240,600 figure was 14.99% of the original grant amount, just below the 15% threshold that Congress established for amendments to existing grants. *See* 49 U.S.C. § 47108(b)(3)(A). Because Amendment No. 2 therefore was not a "grant offer" (ER83), it did nothing to modify the Grant Agreement's 2014 expiration date.

Third, the plain language of Assurance B(1) confirms this understanding. Assurance B(1) makes clear that only a new grant agreement—and not the mere reimbursement of additional costs related to an existing grant project—could trigger its 20-year clock. The provision states that the "assurances of the grant agreement" endure for a period measured by "the useful life of the facilities . . . but in any event not to exceed twenty (20) years from the date of the acceptance of a grant offer of Federal funds for the project." ER83. Thus, as the FAA observed, the provision "does not provide a time-certain date on which the assurances expire, but rather provides the methodology for determining that date." ER10. That makes sense, as Assurance B(1) is incorporated into many different grant agreements with different expiration dates.

But critically, Assurance B(1)'s "methodology" is to link the ending date of the obligations to one particular act and to limit the *total* duration of these obligations to 20 years thereafter. It does not state that the grant assurances' terms would begin again whenever the FAA provided additional funds for the project.

Far from it: Assurance B(1) provides that the duration of the obligations cannot "in any event . . . *exceed*" 20 years from "the acceptance of a grant offer . . . for *the* project." ER83 (emphases added). Extending the City's assurances under the 1994 Grant Agreement into 2023—for a total of 29 years—would contravene this provision. Their duration would "exceed twenty (20) years from the date of the acceptance of a grant offer" for the project, an event that occurred in June 1994. ER73. Indeed, Amendment No. 2 itself expressly recognized that the "Grant Agreement" had been "accepted by [the City] on the 29th day of June, 1994," and the parties were merely "execut[ing]" an "Amendment to said Grant Agreement." ER99.

In sum, Amendment No. 2 modified only the limited portion of the 1994 Grant Agreement that it stated it modified: the provision "on page 2, condition 1" setting the amount the United States might pay to complete the project. ER99. By executing this amendment, the City did not also thereby agree sub silentio to extend for an additional nine years the obligations the City incurred in 1994.

II. CONTEMPORANEOUS EVIDENCE OF THE PARTIES' INTENT CONFIRMS THAT AMENDMENT NO. 2 DID NOT ALTER THE 2014 END DATE

A. The Parties' Course Of Dealing Demonstrates That Amendment No. 2 Was Not Intended To Extend The City's Grant Assurances

The parties' course of dealing and the affidavits of those involved in the negotiations reinforce the plain meaning of Amendment No. 2. "Wherever

reasonable, the manifestations of intention of the parties to a promise or agreement are interpreted as consistent with each other and with any relevant course of performance, course of dealing, or usage of trade." Restatement (Second) of Contracts § 202(5) (1981).

1. Both parties' contemporaneous intent confirms that Amendment No. 2 did not extend the City's obligations

Here, the contextual evidence confirms that *both* parties recognized when they executed Amendment No. 2 that it did not restart the 20-year clock on the City's obligations. Where the parties to a contract have "attached the same meaning" to its terms, the contract "is interpreted in accordance with that meaning." Restatement (Second) of Contracts § 201(1).

For its part, the City plainly did not intend Amendment No. 2—which increased the amount of funds by a relatively small amount—to constitute a new grant agreement that would extend its grant obligations into 2023. The City's actions were taken in the context of, and understood to be consonant with, the 1984 Settlement Agreement, which provided that the City would "operate and maintain the Airport" only "until July 1, 2015." ER132. Consistent with that deadline, the Settlement Agreement further provided that all "grant agreements" entered by the parties before "July 1, 1995"—which includes the 1994 Grant Agreement at issue here—would not "extend or alter the obligation of the City to operate the Airport." ER131-32. This July 1, 1995 date was exactly 20 years before the expiration of the

Settlement Agreement, and reflected the City's intent not to enter any grant agreements that might extend its obligations past the Settlement Agreement's term.

The City understood Amendment No. 2 to be consistent with this overriding goal. The FAA recently had confirmed that Amendment No. 1 did nothing to extend the City's grant obligations, concluding in a 2000 Director's Determination that the Grant Agreement would expire in 2014. Director's Determination at 23, *SMAA*, FAA Docket No. 16-99-21. City officials involved in the negotiations understood Amendment No. 2 to be no different. The City's then-Airport Director, Mathieu, explained the City had a "policy" not to "approve any lease, license, contract, or agreement for the Airport that had a term ending after the expiration of the 1984 Agreement." ER60. He attested that, if the 2003 amendment had extended the City's obligations, he would have "taken aggressive steps to make sure that City staff not execute such an amendment." ER60. Likewise, McCarthy (then the City Manager) confirmed the City's "policy" of not extending the City's airport obligations past the date established in the Settlement Agreement. ER53. She further explained that, when she signed Amendment No. 2, she understood it to be entirely consistent with this policy. ER53-54. That was because she "believed" that, aside from the grant amount, Amendment No. 2 "did not change any of the other terms or conditions of the original 1994 grant agreement," and

thus did not extend "the grant assurances accepted in the 1994 grant agreement . . . nine years." ER54.

These affidavits provide critical evidence of the City's contemporaneous interpretation of Amendment No. 2. *See Chickaloon-Moose Creek*, 360 F.3d at 982 (relying on testimony of contract's negotiators regarding their understanding of contract). The affidavits confirm that the City did not, and never would have, accepted the small amount of additional funds the FAA offered in 2003 had it understood that (contrary to the plain language of the agreement itself) it thereby committed itself to operating the airport into 2023.

In 2003, the FAA likewise did not claim or even suggest that Amendment No. 2 represented a "new grant offer." ER11. To the contrary, the FAA gave every indication that it was treating Amendment No. 2 as an ordinary *amendment* to a grant offer, just like Amendment No. 1—which had not extended the City's grant obligations. The FAA's AIP Handbook effective in 2003 detailed the specific procedures required for the offer and acceptance of a new grant, procedures that included a detailed application process. *See* FAA, Airport Improvement Program Handbook, Order 5100.38B §§ 11:1, 11:4 (2002). But the FAA did not require the City to submit a new grant application or anything approaching such an application before approving Amendment No. 2. *See* ER107-08. Instead, the FAA followed its routine process for increasing the funding under

an existing grant, a process described in a *separate* section of the FAA's AIP Handbook. *See* FAA, Airport Improvement Program Handbook, Order 5100.38B § 11:5 ("Grant Amendments"). This section of the Handbook specifically recognized that a grant agreement may be modified by increasing the grant amount. *Id.* Nowhere did the Handbook state that simply increasing funding for an existing grant would restart the grant assurances' 20-year lifespan.[1]

In its 2003 report to Congress, the FAA confirmed Amendment No. 2's status as an ordinary amendment to a preexisting grant. The FAA did not list its reimbursement to the City in the category of "new grant agreements." 2003 Report to Congress at 11. Instead, the agency included those funds as part of the $123 million dispersed that year for "increases in *existing* grant agreements"—a categorization it reiterated in that year's "Grant Histories" database. *Id.* at 11, Figure C-9 (emphasis added); *see supra* p. 11.

[1] The distinctions between new grants and amendments to existing grants drawn by the FAA's Handbook reflected the line drawn by Congress. Congress expressly recognized that an existing grant for an airport project may be augmented to provide additional funding, specifying that the maximum federal grant obligation "for an airport development project" may be increased by "not more than 15 percent." 49 U.S.C. § 47108(b)(3)(A). Again, Amendment No. 2 increased the federal share of the project covered by the Grant Agreement by almost exactly this amount. Moreover, in the context of authorizing the FAA to take corrective action for violations of grant assurances, Congress separately listed "new grant application[s]" and "proposed modification[s] to an existing grant that would increase the amount of funds made available." *Id.* § 47111(e).

2. In any event, regardless of the FAA's intent, the City's intent governs under the circumstances here

Even assuming arguendo that, contrary to this contemporaneous evidence, the FAA did not share this understanding of Amendment No. 2, the City's interpretation *still* must govern under the circumstances here. "It is hornbook contract law that the proper construction of an agreement is that given by one of the parties when 'that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.'" *United States v. Stuart*, 489 U.S. 353, 367 n.7 (1989) (quoting Restatement (Second) of Contracts § 201(2)); *see Johnston v. Comm'r*, 461 F.3d 1162, 1164-65 (9th Cir. 2006) (treating this rule as an "ordinary principle[] of contract law").

Those requirements are met here. The unrebutted declarations of those who negotiated Amendment No. 2 on behalf of the City establish the meaning the City attributed to the amendment, including its "remain in full force and effect" clause. Specifically, the City understood that its grant obligations continued to expire in June 2014. ER60; ER54.

To the extent the FAA then attributed a different meaning to Amendment No. 2, the City had no reason to know of it. As explained above, the plain language of Amendment No. 2 accords with the City's interpretation. *See supra* pp. 20-24. The FAA gave the City no inkling that—more than a decade later—the

FAA would deem the amendment a "new grant offer" that restarted Assurance B(1)'s 20-year clock. *See* ER54.

Finally, the FAA had good reason to know of the City's understanding that Amendment No. 2 would not extend the City's grant obligations an additional nine years. The FAA had been directly involved in the City's past efforts to limit use of its airport. It was well aware that, under the Settlement Agreement between the FAA and the City, the City's obligation to operate the airport would end on July 1, 2015. *E.g.*, Director's Determination at 23, *SMAA*, FAA Docket No. 16-99-21 (emphasizing that the City's long-term leases of airport space were "timed to expire in 2015 when the City would no longer be obligated to operate the Airport"). With respect to Amendment No. 2 specifically, the City's request for reimbursement referred to the 1994 Grant Agreement as "the last federally funded capital improvement project as recognized in the 1984 Settlement Agreement," thus further putting the FAA on notice of the City's continued understanding of the temporal duration of its obligations and its intent not to change them. ER107. Accordingly, because (at the very least) the FAA had "reason to know" the City understood Amendment No. 2 to preserve the 2014 expiration of the City's grant assurance obligations, this meaning prevails even assuming (counterfactually) that the FAA did not share it. Restatement (Second) of Contracts § 201(2).

B. The FAA's Disregard Of This Evidence Is Contrary To Basic Principles Of Contract Law

The FAA's recent rejection of the parties' once-shared understanding cannot be supported. The FAA made no factual findings that the City's affidavits were not credible, that the City actually intended to extend its grant assurances, or even that the FAA itself then had understood Amendment No. 2 in this fashion. Nevertheless, the agency attempted to brush aside this unrebutted evidence of the parties' contemporaneous intent.

With respect to the 1984 Settlement Agreement, the FAA asserted that it was "not persuaded" that the Agreement "arbitrarily controlled the expiration date of an amendment to the 1994 grant," emphasizing that the Agreement's specific provision governing grant agreements applied only to those entered before July 1, 1995. ER11. But the point is not that the Settlement Agreement necessarily *controlled* the scope of Amendment No. 2. Rather, the Settlement Agreement was the backdrop against which the parties negotiated Amendment No. 2, and thus provides important context for understanding the parties' intent—including, most importantly, the City's intent to retain the Settlement Agreement's 2015 end-date. *See* Restatement (Second) of Contracts § 202(1) ("Words and other conduct are interpreted in the light of all the circumstances . . . ."). The Settlement Agreement itself required such context to be considered, providing that "all actions of the parties during the duration of this Agreement"—which, again, was through July 1,

2015, after the acceptance of Amendment No. 2—"shall be interpreted consistently with this Agreement." ER128. In ignoring that relevant context, the FAA disregarded both this obligation and more general principles of contract law.

The FAA's casual dismissal of the two affidavits reflects an even greater disregard for these governing principles of law. The FAA acknowledged these declarations were "helpful in clarifying the City's position." ER11. But lumping them together with its dismissal of the 1984 Settlement Agreement, the FAA declared that "the fact remains that the City executed an amendment in 2003"—apparently dismissing the relevance of the City's understanding of the amendment altogether. ER11. In so doing, the FAA directly contravened settled contract law, under which the parties' intent is not just relevant but paramount. *E.g.*, *M&G Polymers USA*, 135 S. Ct. at 933; Restatement (Second) of Contracts §§ 201, 202.

Finally, the FAA made no effort to reconcile its current interpretation of Amendment No. 2 with its 2003 treatment of that amendment. Instead, it simply restated its novel conclusion that the amendment was actually an "AIP grant and funds offer." ER13. But to reiterate, it is the parties' understanding at the time they reached the agreement that is relevant. Restatement (Second) of Contracts § 201(2). In ignoring the evidence demonstrating that its own contemporaneous understanding of Amendment No. 2 was the same as the City's, the FAA once again contravened the law.

C. The City Did Not Agree To Extend It Obligations As "Consideration" For The FAA's Reimbursement

The FAA's decision cannot be salvaged by its discussion of consideration. The FAA's final decision did not appear to rely on any presumption that Amendment No. 2 *must* have involved an exchange of consideration. *See* ER12. Such a presumption, which was advanced in the Director's Determination, would have been mistaken for two reasons. First, a modification to a contract does not require consideration. *E.g.*, U.C.C. § 2-209(1); *see O'Neill*, 50 F.3d at 684 ("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."). Application of that principle would be especially appropriate here given that Amendment No. 2 represented a fulfillment of the FAA's earlier contractual promise to make "settlement" for additional costs following "final audit." ER70; *see* Restatement (Second) of Contracts § 82 (promise to pay antecedent contractual indebtedness is enforceable even without additional consideration). If the "consideration" necessary for the 2003 modification was not already contained in the 1994 Grant Agreement, then the FAA's commitment in that agreement to make "settlement" would have been an empty and meaningless promise. Second, and in any event, the absence of consideration would at most mean only that the FAA's promise to reimburse the City for the cost overruns was *unenforceable*; but there is no reason to presume consideration to avoid that conclusion, as there is no reason

to assume that the City needed to be able to sue to enforce this promise. *See, e.g.*, *Dougherty v. Salt*, 227 N.Y. 200, 202 (1919).

Instead of embracing the Director's mistaken presumption, the FAA's final decision simply asserted that the extension of the City's grant assurances *was* consideration for the additional funds. ER12. But that is nothing more than a restatement of the FAA's interpretation of Amendment No. 2. That interpretation is wrong for all the reasons previously given. *See supra* pp. 20-30.

Moreover, the FAA's conclusory assertion regarding consideration again demonstrates the agency's disregard for both the evidence before it and general principles of contract law. To the extent that Amendment No. 2 did require any additional City consideration, the parties' negotiations over that amendment reveal what the City provided. As the City expressly noted in requesting reimbursement, if the FAA helped defray the cost overruns on the already completed project, that would free up "a substantial amount of revenue that could be utilized for much-needed and differed airfield maintenance projects," and the City promised to use these funds to "enhance and maintain the Santa Monica Airport." ER107; *see also* ER102 (stating that the reimbursement would "enhance and improve the overall condition and safety of the public-use areas of the Airport"). That promised performance was itself beneficial to the FAA, which is charged with ensuring that "the airport and facilities on or connected with the airport will be operated and

maintained suitably." 49 U.S.C. § 47107(a)(7); *see* 2 Government Accountability Office, Principles of Federal Appropriations Law 10-9 (3d. ed. 2006) (observing that this sort of benefit to the public constitutes adequate consideration in the context of federal grant agreements). In the decision under review, the FAA gave no justification for ignoring this evidence of the parties' actual exchange, or for disregarding the general principles of contract law that required it to consider such evidence. *E.g.*, Restatement (Second) of Contracts § 202(5).

III. THE CONTRACT SHOULD BE CONSTRUED IN FAVOR OF THE CITY AND AGAINST THE FAA

A. Bedrock Principles of Contract Law Require The Agreement To Be Construed Against The FAA

As noted above, neither the terms of the parties' agreement nor the evidence of their contemporaneous intent leaves room for doubt: Amendment No. 2 did not erase the nine years between the 1994 Grant Agreement and the 2003 amendment, nor did it restart the City's grant obligations afresh for an additional 20 years. But even if any ground for reasonable disagreement remained, it would have to be resolved in the City's favor.

That follows from the rule of *contra proferentem*. When there are multiple "reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds." Restatement (Second) of Contracts

§ 206. Here, the FAA drafted both Amendment No. 2 and the 1994 Grant Agreement. *See* ER69; ER99. The federal government, like any other contracting party, is subject to this "general maxim" of contract law. *United States v. Seckinger*, 397 U.S. 203, 210 (1970). Indeed, the maxim is "appropriately accorded considerable emphasis" given "the Government's vast economic resources and stronger bargaining position in contract negotiations." *Id.* at 216. Accordingly, if any ambiguity as to the duration of the City's grant obligations remains, the City's "reasonable" interpretation must prevail. Restatement (Second) of Contracts § 206.

The City's interpretation reflects a straightforward reading of Amendment No. 2's terms. By providing that "[a]ll other terms and conditions of the Grant Agreement remain in full force and effect," the amendment retained the 2014 expiration date established by the 1994 Grant Agreement—which was never to "exceed" 20 years from the date of the City's acceptance. ER99; ER83; *see supra* pp.20-24. This interpretation of Amendment No. 2 is reasonable and therefore must govern.

B. The FAA Erroneously Relied On *Bennett*, Which Sets Forth An Inapposite Rule Of Statutory Interpretation

In rejecting this proposition, the FAA relied primarily on *Bennett v. Kentucky Department of Education*, 470 U.S. 656 (1985). The agency asserted that *Bennett* established that because federal grants are "partly a contract in terms

of voluntary offer, acceptance, and consideration, and partly a creature of statute," the maxim of *contra proferentem* was inapplicable. ER14.

But *Bennett* did not hold that *contra proferentem* never applies to federal grant agreements. *Bennett* addressed a much narrower question of statutory interpretation. In *Bennett*, the Supreme Court considered the scope of a statutory provision that required all funds awarded to States pursuant to Title I of the Elementary and Secondary Education Act of 1965 be spent to "supplement," and not "supplant," State educational funds. 470 U.S. at 660 (quoting 20 U.S.C. § 241e(a)(3)(B) (1970)). The Secretary of Education, charged with administering the Title I program, found that Kentucky had violated this provision. *Id.* at 661-62. Appealing that determination, Kentucky contended that any ambiguities in its Title I obligation should be resolved against the government, invoking decisions that used contract principles to interpret Spending Clause legislation. *Id.* at 666; *see, e.g.*, *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 24 (1981). The *Bennett* Court rejected this contention, holding that while it "agree[d] with the State that Title I grant agreements had a contractual aspect, the program cannot be viewed in the same manner as a bilateral contract governing a discrete transaction." 470 U.S. at 669 (internal citation omitted). Emphasizing that the federal government could not "prospectively resolve every possible ambiguity concerning particular applications of the requirements of Title I," the Court rejected the notion

that "ambiguities in the requirements should invariably be resolved against the Federal Government." *Id.*

Thus, *Bennett* held that the rule of *contra proferentem* does not "invariably" apply when an agency construes statutory requirements that, though *analogous* to contractual provisions, are nevertheless broadly applicable provisions of law. *Id.*; *see also, e.g.*, *Barnes v. Gorman*, 536 U.S. 181, 186 (2002) (describing *Bennett* as establishing that not "*all* contract-law rules apply to Spending Clause legislation"); *Chauffeur's Training Sch., Inc. v. Spellings*, 478 F.3d 117, 128 n.14 (2d Cir. 2007) (same). But *Bennett* did not hold that this contract-law maxim should be discarded when what is at issue *is* a "bilateral contract governing a discrete transaction." 470 U.S. at 669.

That is the case here. Amendment No. 2 (with its recitals to 1994 as being when the Grant Agreement was accepted, its use of the 1994 project and contract numbers, and its "remain in full force and effect" clause) is the principal source of the dispute in this case. Its operative language does not set forth or embody some broad statutory mandate. Instead, it governs the particular agreement between the FAA and the City alone. Thus, Amendment No. 2 is purely contractual in nature, and it should be interpreted as such. Because Amendment No. 2 itself forecloses the interpretation adopted by the FAA's challenged order (especially if the rule of *contra proferentem* is applied, as it must be), that order must be set aside.

Even to the extent this case involves the interpretation of Assurance B(1), *Bennett* remains inapplicable. To be sure, unlike the operative language of Amendment No. 2 itself, Assurance B(1) is not specific to the Grant Agreement between the City and the FAA, as it also is incorporated into grant agreements the FAA enters into with other parties. But crucially, Assurance B(1) does not implement a specific condition Congress required of all grant recipients; indeed, the relevant language—"the useful life of the facilities . . . but in any event not to exceed twenty (20) years from the date of the acceptance of a grant offer of Federal funds for the project," ER83—is not included in the operative statute at all. *See* 49 U.S.C. § 47107. Because Assurance B(1) is not a statutory condition, it is not subject to statutory interpretation principles. *Cf. City & County of San Francisco v. FAA*, 942 F.2d 1391, 1396 (9th Cir. 1991) (applying rules of statutory interpretation where the language of the grant assurance "track[ed] the statute," so whether San Francisco "violated this assurance depends upon whether its regulation conflicted with the statutory condition imposed by [49 U.S.C. App. §] 2210(a)(1)").

This Court has reached a similar conclusion in previous cases. In *Chickaloon-Moose Creek*, for example, this Court confronted a dispute between Alaska Native corporations and the Department of the Interior regarding the implementation of the Alaska Native Claims Settlement Act of 1971 (ANCSA), 43

U.S.C. § 1601 *et. seq.* *Chickaloon-Moose Creek*, 360 F.3d at 974-75. ANSCA granted Native villages land in Alaska, subject to statutory conditions. *Id.* To facilitate this transfer, Interior and the Alaska Native corporations entered into a contract called the "Deficiency Agreement." *Id.* at 977-78. Interior contended that "because it [was] the Agency responsible for administering ANCSA," this Court should "defer to its interpretation of contracts made under ANCSA." *Id.* at 980. Although acknowledging that the agency's interpretations of the *statute* would be entitled to deference, this Court rejected the agency's argument. *Id.* It explained that Interior was not "interpreting ANCSA but a separate agreement," and that while "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." *Id.* Moreover, this Court continued, "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." *Id*.

All of the same factors are present here. The FAA interpreted a contract, not a statute; the FAA's interpretation of that contract required no particular expertise in understanding statutory terms; and the FAA is a party to the contract with an interest in extending the City's obligations under it. Accordingly, as in *Chickaloon-Moose Creek*, "the agency should not be accorded any deference";

rather, this Court should treat the agreement between the FAA and the City as just what it was—a contract. *Id.*; *see also, e.g.*, *Clay Tower Apartments*, 978 F.2d at 480 (declining to defer to the Department of Housing and Urban Development's interpretation of a contract between the agency and a developer that governed the financing the developer had obtained from the federal government pursuant to Section 8 of the United States Housing Act of 1937 (42 U.S.C. § 1437 *et. seq.*)).

C. Even If Applicable, *Bennett* Would Not Require Deference To The FAA

Even if *Bennett* were relevant here, its application would mean at most that the *contra proferentem* canon is inapplicable, not that the FAA's interpretation should receive deference. In *Bennett*, the Court declined to adopt the government's position that, in accepting grants under Title I, "the States guaranteed that their performance under the grant agreements would satisfy whatever interpretation of the terms might later be adopted by the Secretary [of Education], so long as that interpretation is not 'arbitrary, capricious, or manifestly contrary to [Title I].'" 470 U.S. at 670 (quoting *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984)) (second alteration in original). Instead, recognizing the potential unfairness inherent in such a rule of deference, the Court specifically reserved the question whether a grant recipient "may be held liable where its interpretation of an ambiguous requirement is more reasonable than an interpretation advanced by the Secretary after the grants were made." *Id.*

The City now finds itself in that very situation. The FAA has attempted to subject the City to additional obligations based on an interpretation the FAA first advanced long *after* the agreement was made. *See supra* pp. 27-28. Giving deference to such a post hoc interpretation—especially when the City's interpretation is more reasonable (and indeed is compelled by contractual language)—would result "in precisely the kind of 'unfair surprise'" the Supreme Court long has warned against. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012) (refusing to accord deference where agency interpretation of regulation would cause "unfair surprise").

Granting deference to such post hoc interpretations also would contravene the basic principle of clear notice that underlies all federal grant agreements. "[T]o impose a condition on the grant of federal moneys, [the government] must do so unambiguously," so that the recipient may be cognizant of the obligations incurred. *Clovis Unified Sch. Dist. v. Cal. Office of Admin. Hearings*, 903 F.2d 635, 646 (9th Cir. 1990) (quoting *Pennhurst*, 451 U.S. at 17) (internal quotation marks omitted); *see id.* (recognizing "the unfairness of requiring school districts to pay for hospitalization on the basis of broad interpretations of ambiguous language"). Allowing the government to clarify (or, here, augment) the grant conditions *after* the recipient's acceptance of those conditions would contravene this basic requirement.

Finally, declining deference would be warranted here because the FAA's change in position violated the agency's required statutory procedures. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) ("*Chevron* deference is not warranted . . . where the agency errs by failing to follow the correct procedures."). Section 47107(h) requires the FAA to provide notice and an opportunity for comment before modifying or imposing additional assurances on any grant recipient. 49 U.S.C. § 47107(h). As the FAA has recognized, this provision "clarifie[s] that airport sponsors are entitled to advance notice so that they can voluntarily agree with the terms of receipt of AIP grants" and prohibits the agency from retroactively imposing obligations not previously made clear to grant recipients. *See* FAA Final Decision and Order, *Air Transp. Ass'n. of Am. v. City of Los Angeles*, FAA Docket No. 13-95-05, 2009 FAA LEXIS 212, at *90-91 (June 1, 2009) ("In light of FAA's obligations under section 47107(h), the Director properly concluded that the agency itself was 'bound' by the terms of its orders, in the sense that the agency could not compel the City to comply with new policy expanding its grant obligations . . . .").

Here, in the challenged order, the FAA insisted it was in compliance with this obligation because it purportedly was not announcing an "abrupt and arbitrary change in the FAA's treatment of grant obligations." ER13. The agency provided no support for that bald assertion. ER13. Nor could it. As explained above (*supra*

pp. 26-28), when the City accepted Amendment No. 2, the FAA had never previously suggested that mere amendments to grant agreements—in amounts contemplated by both the grant itself and federal law—could themselves be deemed "new" grants triggering the restarting of the grant assurances. The FAA's newly announced interpretation is all the more problematic because it may be applied to other grant recipients that likewise had no reason to know of the obligations they were incurring—the additional $240,600 at issue here was only a very small fraction of the $123 *million* in grant disbursement increases the FAA approved in 2003. 2003 Report to Congress at 11. The FAA's failure to follow the statutorily mandated procedure for imposing such a far-reaching change is yet another reason not to accord deference to its new interpretation.

D. *Auer* Deference Is Inapplicable Because No Regulations Are At Issue And Because The FAA's Novel Interpretation Of The Agreement Represents A Sudden And Unexpected Change

Apart from its reliance on *Bennett*, the FAA also declared that "courts have held that FAA is entitled to deference in interpreting its grant assurance obligations," citing only the unpublished opinion in *BMI Salvage Corp. v. FAA*, 488 F. App'x 341 (11th Cir. 2012). ER14. There, the Eleventh Circuit addressed Grant Assurance 22 (which incorporates the nondiscrimination obligation contained in 49 U.S.C. § 47107(a)) and accorded the FAA's interpretation of that assurance deference pursuant to *Auer v. Robbins*, 519 U.S. 452 (1997). *BMI*, 488

F. App'x at 345-46 & n.5. Under *Auer*, an agency's interpretation of its "own regulation[]" is "controlling unless plainly erroneous or inconsistent with the regulation." 519 U.S. at 461 (internal quotation marks omitted).

But *Auer* is inapplicable here for multiple reasons. First, and most fundamentally, Amendment No. 2 is not a "regulation" at all. Rather, it is a bilateral contractual agreement between the FAA and the City entered following private negotiations between the parties. *See supra* p. 38. And because Amendment No. 2 is the controlling document in question, *Auer* is beside the point. *See Chickaloon-Moose Creek*, 360 F.3d at 980.

Second, to extent there is any need to address the issue, Assurance B(1) is likewise a contractual provision, not a regulation to which *Auer* might apply. That is because the FAA's grant assurances (which are not included in the Code of Federal Regulations) are not imposed on AIP grant recipients through the federal government's exercise of its sovereign power. *See Commonwealth Edison Co. v. U.S. Dep't of Energy*, 877 F.2d 1042, 1045-46 (D.C. Cir. 1989) (explaining the difference between contractual and regulatory provisions, and holding that a provision contained in the Code of Federal Regulations was a "regulation" only because the provision necessarily applied to any entity creating nuclear waste).

Instead, the grant assurances are "incorporated" into each individual grant agreement by the federal government acting as a contracting party. ER72; *see* 49

U.S.C. § 47107(a) (requiring that the FAA "*receive*[] written assurances" from the grant recipients sufficient to satisfy Congress's requirements (emphasis added)). And "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Lynch v. United States*, 292 U.S. 571, 579 (1934). In this respect, the FAA's grant assurances parallel the contract provisions the Supreme Court considered in *United States v. Seckinger*, 397 U.S. 203. There, the provisions were published and promulgated for general incorporation into the federal government's construction contracts, but they were treated by the Supreme Court as contractual provisions, not regulatory ones. *Id.* at 210 & n.13.[2]

Third, even if any "regulations" were at issue, deferring to the FAA's interpretation under *Auer* would still be inappropriate. "*Auer* deference is not an

[2] Treating the FAA's grant assurances in this fashion would appear to be in tension with the Eleventh Circuit's approach in the unpublished *BMI* decision. 488 F. App'x at 345-46. But in that case, the Eleventh Circuit simply accepted without analysis the government's uncontested assertion that *Auer* applied. *See, e.g.*, Reply Brief of Petitioners BMI Salvage Corp., et al., *BMI*, 488 F. App'x 341, No. 11-12583, 2011 WL 6741954 (Dec. 16, 2011) (failing to discuss the proper treatment of the grant assurances at all). Moreover, because the particular dispute in that case turned on the meaning of the term "aeronautical activity"—which appears in both the assurances and the governing statute—the Eleventh Circuit's decision is perhaps best explained not as an application of *Auer* deference, but rather the species of *Chevron* deference this Court has accorded to the interpretation of contract provisions incorporating statutory terms. *E.g.*, *San Francisco*, 942 F.2d at 1396. As explained above, no such deference is warranted to the FAA's interpretation of the agreement at issue here. *See supra* pp. 39-41.

inexorable command in all cases." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1208 n.4 (2015). Instead, a court should decline deference to an agency's interpretation where that interpretation appears to be merely a "*post hoc* rationalization" or would cause regulated parties "unfair surprise." *Christopher*, 132 S. Ct. at 2166-67 (internal quotation marks and brackets omitted).

Both of those factors are present here. Again, as explained above (*supra* pp. 27-28), at the time the City agreed to Amendment No. 2, nothing in the FAA's guidance or elsewhere provided any indication the FAA might deem such an amendment to be a "new grant" that would trigger a new 20-year duration of the City's grant obligations. The FAA's attempt to assert years afterward that the City incurred the obligations associated with a new grant offer merely by executing Amendment No. 2 is the sort of change of position that, because it "pulls the rug out from under" those that have "relied" on the agency's contrary representation, is entitled to no *Auer* deference. *Indep. Training & Apprenticeship Program v. Cal. Dep't of Indus. Relations*, 730 F.3d 1024, 1034-35 (9th Cir. 2013) (refusing to apply *Auer* where regulated parties "surely relied on the prior interpretation in guiding their conduct at the time the instant controversy arose, only to have the [agency] change the interpretation several months after").

E. Even If Any Level Of Deference Were Appropriate, The City Still Should Prevail

In any event, even were this Court to apply *Auer* or some other form of deference, the FAA's interpretation of the parties' agreement nevertheless cannot stand. Deference, after all, "is warranted only when the language of the regulation is ambiguous." *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000). As explained above, the plain text of the Grant Agreement provisions in question forecloses the FAA's convoluted reading. *See supra* pp. 20-24.

Moreover, even assuming that Amendment No. 2 or Assurance B(1) leaves any uncertainty (and neither does), applicable principles of interpretation require that the provisions be construed to eliminate the unfair surprise inherent in the FAA's newly advanced interpretation. As noted previously (*supra* p. 42), the Supreme Court has imposed a clear-statement rule on federal grant requirements, providing that any "condition on the grant of federal moneys" must be set forth "unambiguously." *Pennhurst*, 451 U.S. at 17; *see also Sauer*, 668 F.3d at 652-53 ("If legislation compels a state to participate in a federal program without its knowing agreement to the conditions of participation, it may conflict with the Tenth Amendment principle that Congress may not directly commandeer the states 'to administer or enforce a federal regulatory program.'" (quoting *Printz v. United States*, 521 U.S. 898, 935 (1997))). Grant requirements are generally construed so as to render them consistent with this clear-statement obligation. *E.g.*, *Davis v.*

Monroe Cty. Bd. of Educ., 526 U.S. 629, 649 (1999) (construing statutory term "discrimination" in light of "[t]he requirement that recipients receive adequate notice of Title IX's proscriptions").

Here, nothing in Amendment No. 2 or the Grant Agreement itself provided the City with notice that acceptance of additional funds would subject the City to an additional nine years of grant obligations. *See Pennhurst*, 451 U.S. at 17 ("There can, of course, be no knowing acceptance if a [recipient] is unaware of the conditions or is unable to ascertain what is expected of it."). Consistent with the clear-statement rule, these provisions therefore must be construed not to have effected that wholly unexpected result.

Application of this principle precludes any remaining possibility that the FAA's interpretation might be deemed permissible. Only *after* employing the "'tools'" of construction can there be sufficient ambiguity that an agency's interpretation is entitled to deference. *INS v. St. Cyr*, 533 U.S. 289, 320 n.45 (2001) (quoting *Chevron*, 467 U.S. at 843 n.9). Thus, for example, this Court has concluded that application of the rule of lenity, which requires that ambiguity in criminal statutes be resolved in the defendant's favor, may foreclose an agency's otherwise-reasonable construction of a statute. *United States v. Arm*, 788 F.3d 1065, 1079 (9th Cir. 2015); *see also Bayview Hunters Point Cmty. Advocates v. Metro. Transp. Comm'n*, 366 F.3d 692, 703-04 (9th Cir. 2004) (applying similar

approach to interpretation of an agency regulation). Here, likewise, application of the clear-statement rule conclusively confirms what the text of the parties' agreement already made abundantly clear: the City never agreed to extend its grant assurance obligations into 2023.

CONCLUSION

For the foregoing reasons, this Court should grant the City's petition for review, hold that its grant assurances expired in 2014, and set aside the FAA's contrary decision.

Dated: December 16, 2016

Respectfully submitted,

s/ Deanne E. Maynard

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STATEMENT OF RELATED CASES PURSUANT TO CIRCUIT RULE 28-2.6

Counsel for the City of Santa Monica is unaware of any related cases pending in this Court.

Dated: December 16, 2016 s/ Deanne E. Maynard

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 16, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: December 16, 2016 s/ Deanne E. Maynard

sf-3710392

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Signature of Attorney or Unrepresented Litigant: s/ Deanne E. Maynard

Date: Dec 16, 2016

("s/" plus typed name is acceptable for electronically-filed documents)