No. 02-73

In the Supreme Court of the United States

STUDENT LOAN FUND OF IDAHO, INC., PETITIONER

v.

DEPARTMENT OF EDUCATION, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's termination of its regulatory agreement to act as a guaranty agency in the federal student loan program required it to comply with the Secretary of Education's directive to turn over to a successor guaranty agency federally-owned reserve fund assets, outstanding loan guarantees, and defaulted student loans.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-31a) is reported, as amended, at 289 F.3d 599. The opinions of the district court (Pet. App. 32a-90a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 2001. A petition for rehearing was denied on April 15, 2002 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on July 15, 2002 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves the Federal Family Education Loan Program (FFELP), formerly known as the Guar-

anteed Student Loan Program. Under the FFELP, private lenders make loans to students attending post-secondary educational institutions. Repayment of the loans is insured by a "guaranty agency," which is either a state agency or a private nonprofit agency. If a borrower defaults on a FFELP loan, the guaranty agency uses federal funds to pay the lender and then tries to collect the loan. The Secretary of Education provides reinsurance on the loans to the guaranty agencies and pays interest subsidies on eligible loans to the lenders. 20 U.S.C. 1078. In addition, the Secretary has provided federal advances (essentially no-interest loans) and administrative cost allowances and has authorized guaranty agencies to retain payments from other program participants, such as insurance premiums paid by borrowers and a share of collections on defaulted loans. See 20 U.S.C. 1072, 1078.[1]

The relationship between the Secretary and the guaranty agencies is governed by: (1) the Higher Education Act of 1965 (the Act), Title IV, 20 U.S.C. 1071 *et seq.*; (2) the Secretary's regulations at 34 C.F.R. Part 682; and (3) a series of agreements between the agencies and the Secretary, see C.A. Excerpts of Record (E.R.) 183; Pet. App. 119a-133a. The agreements expressly provide that they "shall be construed in the light of * * * the Act and the Regulations thereunder." E.R. 183 2d para. 1; see Pet. App. 120a para. 1; *id.* at 132a para. 11. See also Pet. App. 120a para. 1 ("The Agency shall be bound by all changes in the Act or Regulations in accordance with their effective dates."); 34 C.F.R. 682.400(d) ("All of the agree-

[1] The Higher Education Amendments of 1998, Pub. L. No. 105-244, 112 Stat. 1581, made significant changes to the FFELP, but those changes did not affect the issues in this case.

ments are subject to subsequent changes in the Act, in other applicable Federal statutes, and in regulations that apply to the FFEL[P].").

The Act, regulations, and agreements require the guaranty agency to maintain FFELP funds in a reserve fund devoted to the program. See Pet. App. 7a. The regulations broadly define the scope of the assets that constitute the "reserve fund:" a guaranty agency must credit to its reserve fund virtually all funds connected with the FFELP, including gifts and grants from outside sources. See 34 C.F.R. 682.410(a).

In the Omnibus Budget Reconciliation Act of 1987, Congress required the Secretary to recover up to $250 million in excess reserve funds from the guaranty agencies so that the funds could be more efficiently used in the FFELP. See 20 U.S.C. 1072(e) (1988). In response to the Secretary's collection efforts, various guaranty agencies brought suits contending that the reserve funds were their private property. That contention was, however, rejected by every appellate court that considered the issue. See *Puerto Rico Higher Educ. Assistance Corp.* v. *Riley*, 10 F.3d 847 (D.C. Cir. 1993); *Colorado* v. *Cavazos*, 962 F.2d 968 (10th Cir. 1992); *Rhode Island Higher Educ. Assistance Authority* v. *Secretary, U.S. Dep't of Educ.*, 929 F.2d 844 (1st Cir. 1991); *Great Lakes Higher Educ. Corp.* v. *Cavazos*, 911 F.2d 10 (7th Cir. 1990); *Education Assistance Corp.* v. *Cavazos*, 902 F.2d 617 (8th Cir.), cert. denied, 498 U.S. 896 (1990); *Ohio Student Loan Comm'n* v. *Cavazos*, 900 F.2d 894 (6th Cir.), cert. denied, 498 U.S. 895 (1990); *South Carolina State Educ. Assistance Authority* v. *Cavazos*, 897 F.2d 1272 (4th Cir.), cert. denied, 498 U.S. 895 (1990). See also *Delaware* v. *Cavazos*, 723 F. Supp. 234 (D. Del. 1989), aff'd without opinion, 919 F.2d 137 (3d Cir. 1990) (Table).

In the Student Loan Reform Act of 1993, Pub. L. No. 103-66, 107 Stat. 341-363, Congress codified the holdings in the "spend down" cases. The Reform Act provides:

> Notwithstanding any other provision of law, the reserve funds of the guaranty agencies, and any assets purchased with such reserve funds, regardless of who holds or controls the reserves or assets, shall be considered to be the property of the United States to be used in the operation of the program authorized by this part.

20 U.S.C. 1072(g)(1). Moreover, the Reform Act authorizes the Secretary to repossess reserve fund assets if the Secretary "determines that such return is in the best interest of the operation of the program." *Ibid.*

2. Petitioner is a private non-profit corporation that, beginning in the late 1970s, guaranteed student loans under the FFELP. Pet. App. 5a. In April 1994, petitioner notified the Secretary that it would terminate its guaranty agency agreements on July 1, 1994. *Id.* at 8a. In response, the Secretary instructed petitioner to transfer its federally-owned reserve fund assets, outstanding loan guarantees, and defaulted loans to the Northwest Education Loan Association (NELA), which the Secretary determined should act as successor guaranty agency. *Ibid.*

Petitioner, asserting that the only effect of its termination was to end its ability to guarantee new loans, refused to comply with the Secretary's directive. Pet. App. 8a. Petitioner transferred $81,841 in federal advances to the Secretary but refused to transfer any additional reserve fund assets. *Ibid.* The Secretary continued to pay reinsurance to petitioner until October

1994, when the Secretary instituted a procedure under which reserve funds due from petitioner were offset against reinsurance payments due to petitioner. *Ibid.*[2]

3. a. In September 1994, petitioner brought this action to challenge the legality of the Secretary's actions, and the Secretary counterclaimed. Pet. App. 8a. The district court, granting partial summary judgment to the Secretary, ordered petitioner to turn over certain assets in its reserve fund. *Ibid.* In the order, the district court also granted petitioner's motion to amend its complaint to include a breach of contract claim. *Id.* at 8a-9a.

b. Petitioner appealed, and the court of appeals reversed in an unpublished opinion. Pet. App. 93a-97a; 107 F.3d 17 (9th Cir. 1996) (Table). The court determined that there remained a genuine issue of material fact as to whether the Secretary had met the statutory requirements for requiring the return of the reserve fund assets. Pet. App. 9a, 93a-97a. Subsequently, in order to clarify the record in accordance with the suggestion in the court of appeals' decision, the Secretary issued a "best interest" letter, which, as described in 20 U.S.C. 1072(g)(1), is one method by which the Secretary can require a guaranty agency to return its reserve fund assets. Pet. App. 10a.

c. While the first appeal was pending, the Secretary sought to remove any doubt as to whether petitioner had terminated its guaranty agency status and instituted proceedings terminating petitioner's status for "good cause," an action authorized by 20 U.S.C. 1078(c)(9)(E). Pet. App. 9a. Petitioner challenged the Secretary's termination action, and the hearing official

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[2] The offset was temporarily suspended during January and February of 1995 but reinstated thereafter. Pet. App. 8a.

dismissed the action after petitioner stipulated that it had already terminated the agreements. *Id.* at 9a-10a.

d. On remand from the first appeal, the district court conducted a nine-day trial on petitioner's breach of contract claim. Pet. App. 10a. The district court interpreted the agreements to permit petitioner, upon termination, to decide whether to maintain its role as a guarantor of pre-termination loans. Although the district court agreed with the Secretary that, after termination, petitioner was no longer a "guaranty agency" within the meaning of the Act, it ruled that petitioner could nonetheless, as a "former guaranty agency" or as a "private loan guarantor," maintain guarantees that it had issued before termination of the agreements. Therefore, the court ruled, the Secretary could not order the return of petitioner's reserve fund assets. *Ibid.*; *id.* at 41a-48a.

The district court further determined that it did not have to decide whether petitioner was nonetheless required to return the reserve funds because of the Secretary's "best interest" determination. Pet. App. 10a, 48a. In the court's view, after petitioner returned the $81,841 in federal advances, petitioner no longer had any federal reserve funds to return to the Secretary. *Id.* at 10a. The court agreed that, under the Secretary's regulations, capital infusions and support fees that had been paid to petitioner by the Student Loan Fund of Idaho Marketing Association (IMA), which operates a secondary market for student loans, were federally-owned reserve funds. *Id.* at 10a-11a, 83a-84a. The court ruled, however, that the Secretary's regulation classifying those funds as reserve funds is inconsistent with the statute to the extent that it defines funds from a private entity, like IMA, as part of the federal reserve fund. *Ibid.*

4. The court of appeals reversed. Pet. App. 3a-31a. The court first examined the language in the agreements that provides that "[t]ermination shall not affect obligations incurred under this Agreement by either party before the effective date of termination." E.R. 184 para. 7; Pet. App. 123a para. 12; *id.* at 132a para. 10. The court explained that petitioner read the phrase "before the effective date of termination" to modify the verb "incurred," so that the agreements provide that termination has no effect on loans guaranteed before termination. *Id.* at 13a-14a. The court further explained that the Secretary, in contrast, read the phrase to modify the verb "affect," so that the agreements provide that a termination has no effect on any loans until the termination is finalized. *Id.* at 14a. The court noted that the Secretary's interpretation is bolstered by the next sentence in the agreements, which provides the procedures under which terminations become final. *Ibid.* The court found that "the Secretary's reading is the more plausible of the two." *Id.* at 15a. Nonetheless, because the court believed that "the provision is not free from ambiguity," the court turned to the Act and regulations to see if they resolve the ambiguity, a course of action which the court noted is required by the agreements themselves. *Ibid.* See p. 2, *supra* (quoting E.R. 183 2d para. 1).

The court concluded that the Act and the regulations resolve the ambiguity in favor of the Secretary's interpretation. Pet. App. 15a-22a. The court first noted that, under petitioner's interpretation, there would be no statutory provisions or agreement governing the relationship between the federal government and petitioner as a former guaranty agency after petitioner had terminated the agreements, even though the government would remain the ultimate insurer of the loans

guaranteed before termination. *Id.* at 16a. The court also explained that, under petitioner's interpretation, a guaranty agency could circumvent the Secretary's statutory authority to require the agency to transfer its guarantees to another agency or to repay its reserve funds by unilaterally terminating its participation in the program before the Secretary could complete the steps necessary to terminate the agency's participation for good cause under 20 U.S.C. 1078(c)(9)(E) and (F). Pet. App. 16a-20a.

For similar reasons, the court also rejected petitioner's argument that 20 U.S.C. 1078(c)(1)(A) authorizes petitioner to retain its pre-termination loan guarantee commitments and the reserve funds connected to those guarantees. Pet. App. 20a-22a. That provision states that "[t]he guaranty agency shall be deemed to have a contractual right against the United States, during the life of [each] loan, to receive reimbursement [from the Secretary]." 20 U.S.C. 1078(c)(1)(A). The court noted that petitioner's reading of the clause would abrogate the Secretary's right to transfer guarantees from a guaranty agency, 20 U.S.C. 1078(c)(9)(F), and the Secretary's ability to require the agency to assign defaulted loans to the Secretary when the federal fiscal interest so requires, 20 U.S.C. 1078(c)(8). The court therefore agreed with the Secretary's alternative interpretation that the "contractual right" to receive reimbursement provided by Section 1078(c)(1)(A) runs with the loan guarantee, not the guaranty agency. Thus, if the Secretary transfers a loan guarantee to a different guaranty agency, the successor becomes the guaranty agency to which the Secretary is obligated to pay reinsurance. That interpretation, in the court's view, "harmonizes the various statutory provisions." Pet. App. 20a. Accordingly, the

court held that petitioner was required "to bow to the Secretary's directives" to transfer the outstanding loan guarantees, defaulted loans, and reserve fund assets to NELA "once [petitioner] had terminated its agreements." *Id.* at 22a.

The court next addressed whether the Secretary's position that federally-owned reserve funds consist of all funds arising out of or in support of the federal student loan program, including funds derived from non-federal sources, is consistent with the Act. Pet. App. 22a-31a. Noting that all the other courts of appeals that have addressed the issue have agreed with the Secretary, the court held that the Secretary's interpretation—which is embodied in his regulation at 34 C.F.R. 682.410(a)—is reasonable. Pet. App. 25a-26a. The court explained that the Secretary made a "persuasive case" for his position that, when Congress amended 20 U.S.C. 1072(g)(1) to state that the reserve funds belong to the government, Congress codified the "spend-down" cases that had uniformly so held and ratified the Secretary's regulations defining reserve funds on which those decisions relied. Pet. App. 26a-27a. The court therefore held that all of petitioner's reserve fund assets, including support fees and a capital infusion received from IMA, belong to the federal government. *Id.* at 22a.

ARGUMENT

The decision of the court of appeals is correct. It does not conflict with any decision of this Court or any other court of appeals. This Court's review is therefore not warranted.

1. a. The court of appeals correctly rejected petitioner's contention (Pet. 24-29) that the only effect of its termination of its agreements with the Secretary was

that it could not guarantee new loans. Termination of the agreements ended petitioner's status as a guaranty agency, and, once that termination became effective, petitioner could no longer participate in the FFELP in any respect. An entity cannot be a guaranty agency under the FFELP, and therefore cannot guarantee new or old federal student loans, unless an agreement between the entity and the Secretary under 20 U.S.C. 1078(b)(1) is in full force and effect. See 20 U.S.C. 1085(j), 1078(b)(1). It also cannot receive reinsurance payments from the Secretary if no such agreement is in effect. See 20 U.S.C. 1078(c)(1) (the Secretary is authorized to pay reinsurance only to an entity that is a guaranty agency). There is therefore no basis under the Act for petitioner to continue to guarantee any loans under the FFELP or to retain the reserve funds associated with participation in the program.

Both the district court and the court of appeals agreed that, once petitioner terminated its agreements with the Secretary, it was no longer a "guaranty agency" under the Act. Pet. App. 16a, 81a para. 5. As the court of appeals noted, it would make no sense to interpret the agreements to provide, contrary to the Act, that petitioner could continue to guarantee loans issued before the termination and to retain the federally-owned reserve fund assets needed to guarantee those loans. Under that interpretation, the Secretary would have no statutory or contractual authority "to exercise oversight" over petitioner, even though "the federal government remains the ultimate insurer of those loans, and * * * it must continue to pay reinsurance on those loans to [petitioner]." Pet. App. 16a.

As the court of appeals explained, Pet. App. 13a-22a, petitioner's position that it can continue to guarantee

loans and retain the federally-owned reserve funds associated with those loans is not mandated by the provision in the agreements stating that "[t]ermination shall not affect obligations incurred under this Agreement by either party before the effective date of termination." E.R. 184 para. 7; Pet. App. 123a para. 12; *id.* at 132a para. 10. Rather, that provision is best interpreted as the Secretary interprets it—to provide that obligations under the agreements are not altered by termination of the agreements until the termination is finalized, at which time all obligations cease. The Secretary's interpretation is supported by the next sentence in the agreements, which details the steps necessary to finalize certain terminations. See *ibid.* And, the Secretary's interpretation accords with the statutory scheme, as described above.[3]

Petitioner's interpretation, in contrast, cannot be reconciled with the statutory scheme. If petitioner had an absolute contractual right to hold onto its pre-termination loan portfolio and guarantee commitments, to receive reinsurance payments on loans it guaranteed that later default, and to retain the federally-owned reserve funds that support those obligations and loans,

[3] Under the Secretary's interpretation, the termination sentence obliges the Secretary to pay reinsurance and petitioner to provide primary insurance on defaults that occur during the period between notice of termination and the effective date of the termination—which the Secretary and the court of appeals have referred to as the "wrap-up period." See Pet. App. 14a. Petitioner notes (Pet. 27 n.16) that the term "wrap-up" period is not mentioned in the Act or regulations. But the fact that the Act and regulations do not use that precise terminology (which the Secretary and the court of appeals used as shorthand) does not undermine the Secretary's interpretation, which flows from the very clause of the agreements on which petitioner relies and is consistent with the Act.

the Secretary would be barred from exercising authority expressly provided by the Act—the authority in 20 U.S.C. 1072(g)(1) to require return of reserve funds when that is in the "best interest" of the program and the authority in 20 U.S.C. 1078(c)(8) to order the guaranty agency to assign defaulted loans to the Secretary. Petitioner's interpretation would also impair the Secretary's authority under 20 U.S.C. 1078(c)(9)(E) and (F) to terminate guaranty agencies for "good cause" and to transfer their loan portfolios and reserve funds, because the Secretary would lose his transfer power if the guaranty agency beat the Secretary to termination. See Pet. App. 20a.[4]

Petitioner's reliance (Pet. 14 n.5) on 20 U.S.C. 1078(c)(1)(A) is similarly unavailing. That provision states that "[t]he guaranty agency shall be deemed to have a contractual right against the United States, during the life of [each] loan, to receive reimbursement [from the Secretary]." 20 U.S.C. 1078(c)(1)(A). As the court of appeals explained (Pet. App. 20a-21a), petitioner's reading of that provision to prevent the Secre-

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[4] Petitioner incorrectly contends (Pet. 28 n.17) that *Education Assistance Corp.*, 902 F.2d at 621, supports its position that it may choose to retain its pre-termination loan guarantees. *EAC* did not address the effect of termination of agreements. The only issue before the court was whether the reserve fund belonged to the Secretary, and the court held that it did. In discussing the factual background of the case, the court observed that EAC had terminated its agreements but, at the time of the litigation, was apparently retaining its outstanding loan guarantees while another guaranty agency was insuring new loans. *Ibid.* The court's observation, however, did not indicate that the Secretary had approved that status on a permanent basis. Nor was the court's observation a ruling that the Act or agreements authorized that status. Furthermore, the Secretary informs us that, shortly after EAC lost the litigation, it signed new agreements.

tary from ordering petitioner to transfer its defaulted loans and guarantees, as well as the reserve funds associated with those obligations, conflicts with the Act, which authorizes the Secretary to require a guaranty agency to assign defaulted loans to the Secretary when the federal fiscal interest so requires, 20 U.S.C. 1078(c)(8). As the court of appeals held, the "contractual right" to receive reimbursement provided by Section 1078(c)(1)(A) runs with the loan guarantee, not the guaranty agency. If the Secretary transfers a loan guarantee or defaulted loan to a different guaranty agency, the successor becomes the guaranty agency to which the Secretary is obligated to provide reinsurance. That interpretation, unlike petitioner's, "harmonizes the various statutory provisions." Pet. App. 20a.

b. The court of appeals also correctly rejected petitioner's contention (Pet. 29) that funds it received from non-federal sources are not part of the reserve funds. As the court of appeals explained (Pet. App. 24a-31a), the Act does not define what assets make up the reserve funds, and 34 C.F.R. 682.410(a) reasonably defines the "reserve fund" to include funds received by the guaranty agency from any source if they are used to support the agency's FFELP functions.

The regulation is consistent with every court of appeals decision that has addressed the composition of the "reserve fund." See p. 3, *supra* (citing "spend down" cases). In the "spend down" cases, numerous courts of appeals considered the constitutionality of the Secretary's claims to reserve funds held by guaranty agencies. All those courts held that reserve funds belong to the federal government and squarely rejected the constitutional challenges to that claim of ownership. Although the issue in those cases—whether application of amendments to the Act requiring the transfer to the

Secretary of certain "excess" reserve fund assets violated due process or the "takings" clause of the Fifth Amendment—was slightly different from the issue here, the cases applied the Secretary's broad regulatory definition of reserve funds in reaching their results. See Pet. App. 27a; *e.g.*, *Puerto Rico Higher Educ. Assistance Corp.*, 10 F.3d at 849, 850-851; *Colorado*, 962 F.2d at 969-970; *Great Lakes Higher Educ. Corp.*, 911 F.2d at 14; *Education Assistance Corp.*, 902 F.2d at 626. The cases established that the guaranty agency's "interest in the [reserve] fund is analogous to that of a trustee holding money for the benefit of [the Secretary]." *Education Assistance Corp.*, 902 F.2d at 627; accord *Ohio Student Loan Comm'n*, 900 F.2d at 899. One decision specifically held that funds that originated in a capital contribution by the student loan agency's parent corporation were federally-owned funds. *Puerto Rico Higher Educ. Assistance Corp.*, 10 F.3d at 851.

The reserve fund regulation is also consistent with 20 U.S.C. 1072(g)(1), which provides that, "[n]otwithstanding any other provision of law, the reserve funds of the guaranty agencies, and any assets purchased with such reserve funds, * * * shall be considered to be the property of the United States." As the court of appeals explained (Pet. App. 26a-27a), when Congress enacted that language in 1993, the regulations broadly defining the reserve funds were well established, and all but one of the spend down cases had been decided. Section 1072(g)(1) is thus reasonably read as a codification of the spend down cases and a ratification of the regulations on which they relied. See, *e.g.*, *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978).

Petitioner incorrectly argues (Pet. 18-19) that the Secretary's regulation conflicts with the last sentence

in 20 U.S.C. 1072(a)(2), which states that, "[e]xcept as provided in section 1078(c)(9)(E) or (F) of this title, [the] unencumbered non-Federal portion [of a reserve fund] shall not be subject to recall, repayment, or recovery by the Secretary." By the terms of Section 1072(a), however, the "unencumbered non-Federal portion" only comes into existence when a guaranty agency has received advances under Section 1072(a)(2). See 20 U.S.C. 1072(a). It is undisputed that petitioner never received any such advances. See Pet. App. 29a-30a; Pet. 20 n.11. The sentence on which petitioner relies, therefore, has no application in this case.

Even if Section 1072(a)(2) could be construed to provide that some portion of petitioner's reserve fund did not belong to the Secretary, Section 1072(g)(1) would override that provision. As described above, Section 1072(g)(1) codified the rulings in the "spend down" cases that the reserve funds, including those derived from non-federal sources, belong to the federal government. Section 1072(g)(1) expressly provides that its terms govern "[n]otwithstanding any other provision of law," such as Section 1072(a)(2). See *Cisneros* v. *Alpine Ridge Group*, 508 U.S. 10, 18 (1993) (use of that language clearly signifies drafters' intention to override conflicting provisions of any other section). Petitioner's contrary argument—which is based in part on the erroneous statement that Sections 1072(a)(2) and 1072(g)(1) were "concurrent statements of congressional intent" (Pet. 23)—is incorrect. The relevant portion of Section 1072(g)(1) was added to the law in 1993; the last sentence of Section 1072(a)(2), upon which petitioner relies, was added a year earlier in 1992. See Pet. App. 28a-31a.

2. Petitioner incorrectly contends (Pet. 10-16) that the court of appeals' decision conflicts with decisions of

this Court and other courts of appeals that hold that ambiguous contractual provisions are construed against the drafter, even when the drafter is the government. Contrary to petitioner's suggestion, the court of appeals did not "refuse[] to apply" (Pet. 13) that principle of statutory construction, which the court's opinion does not even discuss. Rather, the court had no occasion to resort to the principle because the meaning of the agreements between petitioner and the Secretary was clarified by the Act and regulations. See Pet. App. 21a-22a ("We hold that in light of the Act and the regulations, [petitioner] was required by the termination clause in the agreements entered between itself and the Secretary to bow to the Secretary's directives once [petitioner] had terminated its agreements.").

The court of appeals noted that the termination clause, when considered in isolation, "is not free from ambiguity" (although the court thought the Secretary's reading "more plausible" than petitioner's). Pet. App. 15a. But the ambiguity of the termination clause *in isolation* did not require resort to background rules concerning the construction of ambiguous contracts because the court was able "to resolve [the] ambiguit[y] by consulting the Act, the regulations, and the policies behind them." *Ibid.* As the court of appeals noted, *ibid.*, that course of action was dictated by the agreements themselves, which provide that they "shall be construed in the light of * * * the Act and the Regulations thereunder." E.R. 183 2d para. 1; see Pet. App. 120a para. 1; *id.* at 132a para. 11.[5]

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[5] The cases cited by petitioner (Pet. 13, 15) are inapposite for the related reason that they involve commercial contracts rather than agreements implementing a regulatory program such as the one at issue here. See *United States* v. *Seckinger*, 397 U.S. 203

Nor is there any inconsistency between the reasoning of the court of appeals and cases establishing that government contracts are "governed generally by the law applicable to contracts between private individuals." *Lynch* v. *United States*, 292 U.S. 571, 579 (1934); see *Perry* v. *United States*, 294 U.S. 330 (1935); *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996). The court of appeals merely recognized that a contract entered into by a government agency to carry out a regulatory program must, unlike commercial contracts between private parties, be interpreted in light of the regulatory program and the statutory provisions that authorize it. See Pet. App. 15a (citing *Peterson* v. *United States Dep't of Interior*, 899 F.2d 799, 807 (9th Cir.) (holding that governmental contracts "must be interpreted against the backdrop of the legislative scheme that authorized them, and our interpretation of ambiguous terms or implied covenants can only be made in light of the policies underlying the controlling legislation")), cert. denied, 498 U.S. 1003 (1990). That approach was particularly appropriate here, because, as noted above, the agreements themselves provide that they should be

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(1970) (contract to do plumbing work at a United States Marine base); *Hunt Constr. Group, Inc.* v. *United States*, 281 F.3d 1369 (Fed. Cir. 2002) (contract to build hospital); *P.R. Burke Corp.* v. *United States*, 277 F.3d 1346 (Fed. Cir. 2002) (contact to repair and improve sewage treatment plant); *Metric Constructors, Inc.* v. *NASA*, 169 F.3d 747 (Fed. Cir. 1999) (contract to construct the Space Station Processing Facility consisting *inter alia* of office space, computer and communications facilities, and bays to process space station payloads); *H.B. Mac, Inc.* v. *United States*, 153 F.3d 1338 (Fed. Cir. 1998) (contract for reinforced concrete motor vehicle maintenance and wash rack facilities); *Lockheed Martin IR Imaging Systems, Inc.* v. *West*, 108 F.3d 319 (Fed. Cir. 1997) (contract to provide certain imaging products to the Army).

interpreted in light of the Act and implementing regulations.

3. Petitioner also errs in contending (Pet. 16-24) that this Court's review is warranted because the court of appeals incorrectly deferred to the Secretary's interpretation of the statutory term "reserve fund" or "reserve funds." See 20 U.S.C. 1072(a)(2) and (g)(1). The court of appeals properly deferred to the Secretary's regulation defining that term, which, as the court of appeals noted (Pet. App. 24a), is not defined in the Act. The Act authorizes the Secretary to promulgate regulations necessary to carry out the Act's purposes, 20 U.S.C. 1082(a)(1), and the reserve fund regulation, 34 C.F.R. 682.410(a), was promulgated pursuant to that authority. The Secretary's regulatory definition of "reserve fund" is therefore entitled to deference from the courts. See *United States* v. *Mead Corp.*, 533 U.S. 218, 228-230 (2001).

Petitioner mistakenly argues (Pet. 16-18) that the Secretary's definition is not entitled to deference as an interpretation of Section 1072(g) because that Section was added to the Act after the "reserve fund" definition had already been promulgated. That argument ignores that the term "reserve fund" also appears in Section 1072(a), which predates promulgation of the reserve fund definition. Thus, deference to the Secretary's interpretation of the Act's use of "reserve fund" is nowise inconsistent with *Mead*, which, as petitioner acknowledges, "allows the Secretary to fill gaps in the statute through the promulgation of 'ensuing regulations.'" Pet. 17. As the court of appeals recognized, the fact that the regulatory definition of "reserve fund" was already well established when Section 1072(g) was enacted bolsters the case for deference to the Secretary's definition. See Pet. App. 25a-27a. It is well

settled that "Congress is presumed to be aware of an administrative * * * interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change" or "adopts a new law incorporating sections of a prior law." *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978). The court of appeals' decision fully accords with that principle.

Petitioner also incorrectly contends (Pet. 19) that the Secretary's definition of "reserve funds" is not entitled to deference because it is inconsistent with the final sentence of Section 1072(a)(2), added as an amendment in 1992. As described above, see pp. 14-15, *supra*, there is no conflict between the Secretary's definition and that provision, which has, in any event, been overridden by Section 1072(g)(1), which applies "[n]otwithstanding any other provision of law" and was added to the Act in 1993.[6]

Petitioner also incorrectly contends (Pet. 20-21) that the Secretary's regulation is not entitled to deference because, in a response to a GAO report in 1986, an official in the Department of Education took a position that appears to be inconsistent with the Secretary's current position. Petitioner refers to an attachment (Pet. App. 139a) to a response of a Department official to the 1986 GAO report that preceded the legislation leading to the "spend down" cases. That document,

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[6] Petitioner also errs in asserting (Pet. 19) that the Secretary admitted that his regulation, 34 C.F.R. 682.410(a), was superseded by Section 1072(a)(2). The Federal Register passage cited by petitioner states only that, to the extent the 1992 amendments were inconsistent with any particular regulation published by the Secretary that day, the inconsistent regulation was superseded. As explained in the text above, the regulation relating to reserve funds is not inconsistent with Section 1072(a)(2) as it applies to petitioner.

however, did not purport to interpret, much less establish a binding agency interpretation of, either the Secretary's regulation or the statutory term "reserve fund." Therefore, it cannot be said to be inconsistent with the Secretary's regulations. See *Smiley* v. *Citibank (South Dakota) N.A.*, 517 U.S. 735, 742-743 (1996). In any event, an agency may change its interpretation of a statute or regulation without forfeiting *Chevron* deference. See *id.* at 742.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2002