QUESTION PRESENTED

Whether this Court should review the Tenth Circuit Court of Appeal's decision affirming the United States Secretary of Education's application of 34 C.F.R. § 222, a regulation that is consistent with and was promulgated to implement the Impact Aid "disparity test" established under 20 U.S.C. § 7709.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 05-1508

ZUNI PUBLIC SCHOOL DISTRICT NO. 89, *et al.*,
Petitioners,

v.

DEPARTMENT OF EDUCATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the United States Court of Appeals for the Tenth Circuit (Pet. App. 1a-2a) is reported at 437 F.3d 1289 (2006). The initial, and now vacated, opinion of the Tenth Circuit dated December 30, 2004 is reported at 393 F.3d 1158.

The administrative case was docket number 99-81-I. The October 2001 opinion of the United States Secretary of Education (Pet. App. 34a-40a) is reported at 2001 WL 34798131 (EDDS). The April 2001 opinion of the Chief Administrative Law Judge (Pet. App. 43a-58a) is reported at 2001 WL 34402493 (ED.O.H.A.).

STATEMENT OF THE CASE

This proceeding is the Petitioners' attempt to challenge the manner in which the State of New Mexico uses state revenue dollars to voluntarily equalize operational funding in its public schools. In this manner, New Mexico guarantees each of its public school students equal access to programs and services appropriate to individual educational needs regardless of location or local economic conditions. Zuni Public School District No. 89 ("Zuni") and Gallup-McKinley County School District No. 1 ("Gallup") (collectively, the "Petitioners") are local education agencies ("LEAs"), school districts, in the State of New Mexico that receive special funding from the federal government through the Impact Aid program, a program that issues aid to compensate certain school districts for their inability to raise local property tax revenue due to the presence of federal government operations on land within the school district.[1] The law permits states that have been certified as equalized to consider Impact Aid funds that its LEAs receive when determining state allocations to LEAs. In essence, a certified equalized state is allowed to adjust the amount of *state* aid to such districts, in accordance with a federally mandated formula, to account for the receipt of a portion of the federal Impact Aid. The *amount of federal* Impact Aid the LEAs receive is never affected by this state decision making process which only determines state allocations to its LEAs. As a certified state, New Mexico properly considered the Impact Aid that Petitioners received in making its state allocation determinations.[2]

Understandably,
Aid they receive nc
its equalization. I
funds would flow t
nue per student fo
would result. As
lower share of Sta
receiving Impact Ai
ing to Petitioners
pacted districts for
Aid is reimbursing,

Petitioners erron
Secretary of Educ
statutory definition
employed in the e
(2) if the statutory
State would not q
would not be perm
making its allocati
Petitioners' argume
to Petitioners' distr
aid to Petitioners' d
do not receive Im
consistently uphold
application leading t
review by this honor

While Petitioners
their students, New
amount spent on stu
which LEAs they att

[1] The terms "LEA" and "school district" will be used interchangeably throughout this Brief in Opposition.

[2] Year at issue for this case is FY 2000. Petitioners, however, are in the process of challenging the Secretary's certification of the State for every FY since then as well. These cases have been stayed pending the outcome of the Petition.

[3] The four lower revie
first review was conduct
tary conducted the secon
Tenth Circuit Court of
Tenth Circuit Court of Ap

Understandably, Petitioners would prefer that the Impact Aid they receive not be considered when the State performs its equalization. In that scenario, a greater share of State funds would flow to Petitioners and thus a higher total revenue per student for students attending Petitioners' schools would result. As a consequence, however, a necessarily lower share of State funds would flow to those LEAs not receiving Impact Aid. Further, the unreduced state aid flowing to Petitioners would be partially reimbursing their impacted districts for the same loss of revenue that the Impact Aid is reimbursing, resulting in a double payment.

Petitioners erroneously argue that (1) the United States Secretary of Education (the "Secretary") mis-applied the statutory definition in promulgating interpretive regulations employed in the equalization certification process and that (2) if the statutory definition were properly applied, then the State would not qualify for certification and, accordingly, would not be permitted to take Impact Aid into account in making its allocations to LEAs throughout the State. By Petitioners' argument, the State should allocate more money to Petitioners' districts and, as a consequence of increasing aid to Petitioners' districts, less money to those districts that do not receive Impact Aid. Despite four lower reviews consistently upholding the Secretary's regulation and its application leading to certification, Petitioners seek additional review by this honorable Court.[3]

While Petitioners understandably desire to increase aid to their students, New Mexico's goal is to equalize the total amount spent on students throughout the State, regardless of which LEAs they attend. This is precisely why New Mexico

[3] The four lower reviews will be discussed in greater detail herein. The first review was conducted by an Administrative Law Judge. The Secretary conducted the second review. The third review was conducted by a Tenth Circuit Court of Appeals three judge panel and the fourth by the Tenth Circuit Court of Appeals on rehearing en banc.

equalizes its education funding, a voluntary State decision, and is also why New Mexico chooses to exercise its right to take Impact Aid into account.[4]

As discussed herein, Petitioners provide no justifiable reason for this Court to grant their Petition for Writ of Certiorari (the "Petition").

1. Statutory and Regulatory Framework. The federal Impact Aid program (20 U.S.C. §§ 7701-7714) provides financial assistance to local education agencies (LEAs) in areas where the federal government has adversely impacted an LEA's ability to provide educational services to school age children. Such adverse impact generally occurs when the LEA's ability to raise local revenues is limited due to the federal government's acquisition of real property (e.g., government buildings, military bases, Indian reservations), or because the LEA provides educational services to a large number of children residing on, or whose parents are employed on, federal property. *See* 20 U.S.C. §§ 7701-7714 et seq.

In general, the law prohibits a state educational agency ("SEA") from considering an LEA's receipt of federal Impact Aid funds (referred to by Petitioners as "taking credit" for the Impact Aid funds (*see e.g.* Pet. at 4)) when determining the amount of financial assistance the State will provide to the LEA. 20 U.S.C. § 7709(a). There is, however, an exception to this general prohibition. An SEA is authorized by the Impact Aid statute to consider an LEA's receipt of federal Impact Aid funds if the Secretary certifies that the SEA has in

[4] New Mexico's state equalization guarantee funding formula was adopted in 1974 and has been refined and revised in the ensuing years. The underlying principle of educational equity for all students remains the cornerstone of the formula. The record is devoid of any evidence that supports a conclusion that New Mexico's decision to equalize is dependent on the fact that any of its LEAs receive Impact Aid.

effect a program of state aid that equalizes expenditures for free public education among all LEAs in the state. 20 U.S.C. § 7709(b).

In general, a state equalization program allows a state to make up the difference in funding levels for LEAs with lesser abilities to raise revenue. One reason some LEAs face such revenue raising difficulties is due to the same reasons that lead these LEAs to become Impact Aid recipients, i.e., the impact of federal facilities on land within the school district. Impact Aid receiving LEAs, however, are not the only LEAs that face great difficulty raising revenue. Other LEAs also face this problem, but because the reason for their difficulty is not the impact of federal facilities, they do not qualify under the Impact Aid program and therefore do not receive federal Impact Aid.

New Mexico has made the policy determination that the operational funding of its public education system will not be dependent on local resources. If New Mexico were to equalize without taking any notice of the Impact Aid that certain LEAs, such as the Petitioners, receive, those LEAs would virtually receive a double payment. These LEAs would realize the full revenues generated as Impact Aid payments as a result of the negative impact of the federal presence on the local tax base, while also receiving the full amount of the state equalization guarantee.

In essence, if New Mexico were to equalize without taking any notice of the Impact Aid that certain LEAs, such as the Petitioners, receive, those LEAs would receive a double payment. In addition to receiving federal Impact Aid to help compensate for this difficulty, these LEAs would still receive the full amount from the State (amount of equalization), which was designed to equalize regardless of the reason leading to the inequity. Thus, these Impact Aid receiving LEAs would receive double payments, one from the federal government and one from the State, to compensate them for

the same lost revenues due to the impact of a federal presence. Meanwhile, LEAs that do not qualify for Impact Aid but face equal challenges at raising revenue would receive only one payment from the State. Thus, to not take Impact Aid into account would create a great windfall and double payment to Impact Aid districts while leaving behind other revenue struggling LEAs. This is precisely the reason Congress created an exception allowing equalized states to consider Impact Aid in making their state aid determinations.

To determine whether a given state qualifies as operating such an equalized system of public education funding among its LEAs, the statute requires that the Secretary apply what we refer to as the "disparity test." *Id.* Specifically, the statute provides:

> . . . a program of State aid equalizes expenditures among local educational agencies if, in the second fiscal year preceding the fiscal year for which the determination is made, the amount of per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State with the highest such per-pupil expenditures or revenues did not exceed the amount of such per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State with the lowest such expenditures or revenues by more than 25 percent.

20 U.S.C. § 7709(b)(2)(A). The statute further requires the Secretary, when making the disparity determination under the above provision, to "disregard local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State." 20 U.S.C. § 7709(b)(2)(B)(i). The statute goes no further in addressing the specifics of how the Secretary is to apply the disparity test. It is the agency's longstanding interpretation of this test that the Petitioners ask this Court to overturn.

Because the statutory provision is open to multiple interpretations and does not provide a precise formula for making the exact disparity calculation, the United States Department of Education (the "Department") promulgated regulations clarifying the statute by detailing the methodology and precise formula for the disparity test. *See* 34 C.F.R. § 222.162(a); 34 C.F.R. pt. 222, subpt. K, app. Specifically, 34 CFR § 222.162(a), taken directly from the statutory language, provides:

> The Secretary considers that a State aid program equalizes expenditures if the disparity in the amount of current expenditures or revenues per pupil for free public education among LEAs in the State is no more than 25 percent. In determining the disparity percentage, the Secretary disregards LEAs with per pupil expenditures or revenues above the 95th or below the 5th percentile of those expenditures or revenues in the State. The method for calculating the percentage of disparity in a State is in the appendix to this subpart.

34 C.F.R. § 222.162(a). The appendix referenced by the regulation (the "Subpart K Appendix") was promulgated through notice-and-comment rulemaking with the main body of the regulation (*see* 60 Fed. Reg. 50,778 (Sept. 29, 1995)), and sets forth the Department's detailed methodology for calculating a State's disparity under 20 U.S.C. § 7709(b). In accordance with the Subpart K Appendix, the Secretary takes the following steps in applying the disparity test:

(1) Rank all LEAs on the basis of current expenditures or revenues per pupil;

(2) Identify the LEAs in each ranking that fall at the 95th and 5th percentiles of the total number of pupils in attendance in the schools of those LEAs; and,

(3) Subtract the lower current expenditure or revenue per pupil figure from the higher for those agencies

identified in step (2), and divide the difference by the lower figure.

See 34 C.F.R. pt. 222, subpt. K, app. Then, in accordance with the corresponding statute and regulation, if the resulting figure is 25 percent or less, that state's system qualifies as equalized. 20 U.S.C. § 7709(b)(2)(A); 34 C.F.R. § 222.162(a). The Petitioners contend that this Court should invalidate the Secretary's use of this process to determine equalization and require the Secretary to use a process suggested instead by the Petitioners.

2. Procedural History. On October 5, 1999, the Assistant Secretary for Elementary and Secondary Education, based on the results of the above analysis, certified that New Mexico qualified as an equalized state under section 8009(b) of the Impact Aid law for FY 2000.[5] Accordingly, New Mexico was entitled to consider a portion of the federal Impact Aid funds received by its LEAs when determining state aid for LEAs in the State and making those disbursements for free public education for FY 2000. *See* 20 U.S.C. § 7709(b)(1).

The Department's certification of New Mexico's equalization program has undergone numerous reviews, each review concluding that the Department's certification of the State's voluntary equalization program met the requirements of federal law. Both the administrative law judge (the "ALJ") assigned to hear the case and the Secretary concluded that New Mexico's program complied with the statutory requirements and that the Department correctly certified New Mexico as an equalized state under 20 U.S.C. § 7709(b). Zuni Public School District No. 89, Dkt. No. 99-81-I (Dep't Education Initial Decision April 17, 2001), 2001 WL

[5] Section 8009(b) of the Impact Aid law is codified at 20 U.S.C. § 7709.

34402493 (ED.O.H.A.) (Pet. App. 43a-58a.); Zuni Public School District No. 89, Dkt. No. 99-81-I (October 11, 2001), 2001 WL 34798131 (EDDS) (Pet. App. 34a-40a). On appeal from the ALJ decision, the Secretary specifically addressed Petitioners' allegation that the regulation at 34 C.F.R. § 222.162(a), including the appendix thereto, failed to properly implement the disparity test set forth at 20 U.S.C. § 7709(b). The Secretary concluded that because the statute is ambiguous and because the regulations are consistent with the statute, the Department's regulatory scheme for determining disparity under 20 U.S.C. § 7709(b) is a reasonable and permissive implementation of the statute and must be upheld. (Pet. App. at 37a-40a.) Regarding the Department's promulgation of a specific methodology for calculating a state's disparity, as set forth in the Subpart K Appendix, the Secretary correctly and unambiguously noted, "There is nothing within the text of the statute that precludes this interpretation or *requires* another result." (Pet. App. at 39a.)

On Petition for Review, a Tenth Circuit panel also considered and upheld the Department's certification of the State's equalization program. *Zuni Pub. Sch. Dist. No. 89 v. U.S. Dep't of Educ.*, 393 F.3d 1158 (10th Cir. 2004). (Pet. App. 3a-33a.) After a thorough analysis of the statutory and regulatory scheme, the Tenth Circuit panel also found the statute to be ambiguous, and concluded that the Department's construction of 20 U.S.C. § 7709(b)(2), through its application of the disparity calculation methodology laid out in the regulation, is permissible.[6] *Id.* at 1168. (Pet. App. at 18a-19a.)

---

[6] Two of the three judges on the panel endorsed and signed the opinion. The third judge on the panel issued a dissenting opinion in the case. In line with Tenth Circuit Rule 35.6 and as directed by specific order issued by the Tenth Circuit Court of Appeals, those opinions were vacated upon the granting of rehearing en banc.

Next, Petitioners filed a Motion for Rehearing En Banc before the Tenth Circuit, which was granted. After reviewing all briefs filed in the matter and hearing oral argument on the merits, the Tenth Circuit again upheld the Secretary's decision stating that "the decision of the Secretary is affirmed by an equally divided court."[7] *Zuni Pub. Sch. Dist. No. 89 v. U.S. Dep't of Educ.*, 437 F.3d 1289 (10th Cir. 2006) (en banc). (Pet. App. 1a-2a.)

Petitioners now ask the United States Supreme Court to review the Secretary's process for certifying New Mexico's equalization program, a detailed and carefully constructed agency process, which already has been administratively reviewed twice and judicially reviewed twice and consistently upheld on each of these four prior occasions.

ARGUMENT: REASONS TO DENY THE PETITION

The Court of Appeals decision is correct and, based on this Court's rules, should not be reviewed by this Court on a writ of certiorari.[8] First, this decision does not conflict with any

[7] Petitioners critique the Court of Appeals en banc decision saying the justices "could not issue a decision on the merits" and treat the rehearing as lacking "meaningful review." (Pet. at 15-16.) Petitioners curiously and without explanation cite the dissenting opinion in *Ratchford v. Gay Lib*, 434 U.S. 1080, 98 S. Ct. 1276 (1978), apparently for the mistaken proposition that the courts of appeals are prohibited from issuing anything less than a detailed memorandum opinion detailing the reasoning behind their decisions. In fact, the cited excerpt from that opinion simply regards the U.S. Supreme Court's right to deny certiorari, i.e., the right to choose to not even hear a case, without explaining its reasons for doing so. The Tenth Circuit did in fact hear the case—it even afforded Petitioners the luxury of hearing their case twice. Under Tenth Circuit Rule 36.1, the Tenth Circuit is not required to issue a detailed opinion in every case.

[8] Supreme Court Rule 10 provides guidance as to what this Court shall consider in evaluating petitions for a writ of certiorari. This Rule provides:

> Review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for

decision of this Court or any other United States court of appeals. In fact, Petitioners make no mention of any other court having ever even addressed this issue. Second, the rule of law that governs this case, found in *Chevron* and its progeny, is settled and was applied correctly in all prior reviews of this matter. The errors Petitioners assert solely regard factual findings. Third, Petitioners' complaints do not raise a question of federal law that must be settled by this Court. Finally, Congress, and not the United States Supreme Court, is best suited to address Petitioners concerns and the redress they seek. There is simply no justification that warrants further review.

1. The decision of the United States Court of Appeals for the Tenth Circuit is not in conflict with any decision by any other court. There is simply no conflict between this decision

---

compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals . . . decision . . . conflicts with the decision of another United States court of appeals . . . [or] a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or a United States court of appeals; [and,]

(c) a . . . court . . . has decided an important question of federal law that has not been, but should be settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Sup. Ct. R. 10. Reviewing the Petition in light of Supreme Court Rule 10, the Petition should be denied.

and the decision of any other court. Petitioners attempt to create the appearance of a 'conflict' by pointing out that the Tenth Circuit decisions (the decisions from both the three judge panel and the rehearing en banc) were not unanimous. Specifically, Petitioners cite the fact that one of the judges from the original three judge panel issued a dissenting opinion and that the court was split in its decision en banc. (*See* Pet. at 15-16.) By definition, a dissenting opinion will necessarily conflict to some extent with the majority opinion from which it 'dissents.' Petitioners' reasoning seems to ask this Court to widen the scope of cases it deems certworthy to any case in which the judges of a Court of Appeals do not issue a unanimous majority opinion.[9]

This is not at all what is intended by Supreme Court Rule 10(a) which provides that situations where "a US court of appeals has entered a decision in conflict with the decision of another US court of appeals on the same important matter . . ." as an example of when it might be appropriate for the Court to grant a petition for writ of certiorari. Sup. Ct. R. 10(a). Accordingly, there are no grounds based on the idea of a

[9] Petitioners write, "One consideration in determining whether a petition for certiorari should be accepted is a divided appellate court," and cite three cases for this statement. (Pet. at 15.) In fact, none of the cases Petitioners cited include such holdings, not even in dicta. At best, these cases demonstrate that this Court has heard cases that happen to have arisen from lower court decisions that included divided panels and split en banc rulings. None of these cases, however, suggest that such division, in any way, effected this Court's decision to grant certiorari. The three cited cases were opinions on the merits and barely discuss the Court's reasoning for granting certiorari. One of the cited opinions, *Communications Workers of America v. Beck*, 487 U.S. 735, 108 S. Ct. 2641 (1988), does mention the reasons for granting certiorari to be the need to "resolve important question concerning the validity of such agreements" [regarding certain labor bargaining agreements] and mentions that the Fourth Circuit Court of Appeals' decision at issue in the case "directly conflicts with that of the United States Court of Appeals for the Second Circuit." *Id.* at 741.

'conflict' within the courts for this Court to grant the petition.[10]

2. The Court should not grant the Petition for Writ of Certiorari because the rule of law at issue in this case is settled, undisputed, and was applied correctly; Petitioners' complaints merely focus on factual determinations made in lower decisions. In essence, all Petitioners ask this Court to review is the reasoning of lower decisions that found that the language of the Subpart K Appendix is not inconsistent with the statutory language. This is a factual determination—no rule of law is at issue. Looking at either the ALJ's opinion, the Secretary's decision, the vacated Tenth Circuit panel opinion, or the Tenth Circuit en banc opinion, there is simply no legal question at issue. The factual nature of the issue is evidenced throughout the Petition, including Petitioners' need to re-hash the merits of the case in full therein.[11]

Looking to the merits, the Tenth Circuit Court of Appeal's was correct in its decision to affirm the Secretary's well reasoned opinion that New Mexico satisfies the disparity requirements of 20 U.S.C. § 7709(b) based on the factual finding that the Department's implementing regulation (insofar as it includes the methodology of the Subpart K Appen-

---

[10] As such, any discussion of 'conflict' does not aid Petitioners' argument. In fact, if the idea of 'conflict within the 10th Circuit' aids any of the parties, it aids the responding parties at least in so far as it evidences the ambiguous nature of the statute, which will be discussed in greater detail below.

[11] While "Petitioners understand that a detailed analysis of the merits of a case is not always the appropriate vehicle for convincing this Court to accept a Petition for Writ of Certiorari," Petitioners nonetheless continue on to argue the merits. (Pet. at 8-9.) As Supreme Court Rule 15.2 obligates counsel "to point out in the brief in opposition, and not later, any perceived misstatement made in the Petition," we now turn to address the merits of the case as well. Other misstatements in the Petition are listed in Appendix B.

dix) is reasonable, permissible, and does not conflict with the statute. Applying well settled principles of administrative law, as discussed below, the Secretary clearly had the authority to promulgate the regulations at issue, including the Subpart K Appendix. Then, because the Secretary properly applied the statutory disparity test as detailed in the regulations, a fact which is not in dispute, the Secretary was correct in certifying New Mexico as an equalized state.

a. Where the decision of a federal agency is at issue and involves the agency's interpretation of federal statutes, as in the case at bar, the Court's review is guided by the principles established in Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984), and its progeny. Applying the *Chevron* test requires a two-step analysis. The threshold issue requires the Court to ask "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If the legislative intent on that precise question is clearly and unequivocally spelled out in the statutory language, the reviewing court must give effect to that intent and "that is the end of the matter." *Id.* at 842-43; *see also Udall v. Tallman*, 380 U.S. 1, 16 (1965). However, when the legislation is silent or ambiguous, the courts are generally required to defer to the agency's interpretation if it is based on a permissible construction of the statute. *Chevron*, 467 U.S. at 843. Thus, the second step requires the court to ask whether the agency's interpretation is permissible and reasonable. *Id.*

i. Applying step one, 20 U.S.C. § 7709 is clearly open to multiple interpretations and therefore qualifies as "ambiguous." More specifically, 20 U.S.C. § 7709 is silent as to the precise question of what exact methodology is required to calculate the disparity test. The statute allows states to exclude LEAs above the 95th percentile or below the 5th percentile when determining disparity, but fails to provide a precise formula for calculating disparity between LEAs in a state. While it may be clear that some number of LEAs must

be disregarded before performing the disparity test, the statutory language is unclear as to how to calculate exactly which LEAs are disregarded because what is meant by "per pupil expenditures or revenues above the 95th or 5th percentile of those expenditures or revenues in the State" is open to multiple interpretations. As the Secretary noted,

> [A]lthough the impact aid statute sets forth the parameters for calculating state public education expenditures or revenues under the disparity test, the statute does not contain a specific implementation of the disparity test; instead, Congress left that gap to be filled by regulations, which has been duly promulgated at an appendix to Subpart K of 34 C.F.R. Part 222.

(Pet. App. at 37a.) Because the statute merely provides parameters for determining disparity, the methodology is unclear and susceptible to differing interpretations. This is precisely the source of the ambiguity.

The statute's ambiguity is also evident from both the arguments and the decisions in the prior proceedings below. Even by Petitioners' own admission, there are multiple possible interpretations of the statutory text. *See e.g.*, Zuni Petition for Review of ALJ Decision at 4 (App. at 4a). From the outset, Petitioners proffered two different approaches for making the disparity calculation. Before the Panel, Petitioners continued to argue this position contending § 7709 would permit the Secretary to follow two different approaches, neither methodology which the statute specifically identifies. Then, in the (vacated) dissent, which Petitioners stress and rely upon so heavily in the Petition, Judge O'Brien actually developed a third specific methodology that differed from the Secretary's methodology as well as the two alternative methodologies proffered by Petitioners. *See Zuni Dissent*, 393 F.3d at 1170-1172. (Pet. App. at 24a) Petitioners do not argue that one of their methods is the correct method; rather, they simply argue that either of its methods is better than the Secretary's

method. In contrast, Judge O'Brien argued in dissent that his new methodology was the only possible correct interpretation. *See Id.* Once presented with this new methodology, Petitioners decided that this new interpretation of the ambiguous statute was the correct one, notwithstanding the two possibilities they initially identified. *See e.g.*, App. at 4a. As the Secretary explained, the fact that Petitioners disagree with the regulation does not render the Department's interpretation of the statute invalid or unreasonable, the regulatory appendix is binding unless procedurally defective. (*See* Pet. App. at 39a.)

In addition to at least four different interpretations being identified over the course of this case, the differing opinions of the Court of Appeals judges as to the meaning of the statute further supports its ambiguous nature. For example, although we recognize that the Tenth Circuit panel decision is void, the disagreement among the panel, is certainly illustrative of the fact that this statute is unclear. Although the dissenting judge considered the statute to be unambiguous, the other two judges on the panel agreed with the Secretary and found the statute to indeed be ambiguous:

> We agree with the Secretary's determination that the statute is ambiguous . . . we do not know what calculations Congress intended by 'such [per pupil] expenditures in the State.' Even Zuni conceded in its argument before the ALJ that the statute 'may be ambiguous [as] to the precise formula that is to be used.' *Id.*, doc. 16 at 10. The statute's ambiguity, coupled with the gap left by Congress regarding the specific means by which to implement the disparity test, requires us, in accordance with the well-established rule laid out in *Chevron*, to give deference to the Secretary's interpretation of the statute if we deem that interpretation to be reasonable or [permissible].

Zuni, 393 F.3d at 1166-1167. (Pet. App. at 16a-17a.) The difference in opinion between the judges on the panel is

prima facie evidence of the lack of clarity and the Secretary's corresponding authority to promulgate regulations in this area. The judges rehearing the case en banc were similarly split in their opinion further evidencing the statute's lack of clarity.[12]

Petitioners erroneously argue that the Secretary "glided over step one" and failed to identify the source of authority for the Department to promulgate the regulations at issue.[13] In *Chevron*, this Court reasoned that "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps, the Court explained, involves difficult policy choices that agencies are better

---

[12] Petitioners take extreme liberty in casting the Tenth Circuit Court of Appeals as failing to provide "a substantive and definitive review of the Secretary's Action." (Pet. at 15.) Petitioners go so far as suggesting that "six of the judges did not want to disturb the status quo but could not author a credible decision which supported the Secretary's actions." (Pet. at 16.) This suggestion is a fanciful reading of the minds of the six judges. Not only did the Court of Appeals grant rehearing en banc to consider the case beyond Petitioners' review by the three judge panel, an opportunity rarely offered and that Petitioners are not automatically entitled to as right, but also the Court of Appeals dedicated even further time and thought to the matter by granting an actual hearing after reviewing the briefs. Again, this is not something Petitioners were entitled to by right. A more reasonable and likely assessment of the Tenth Circuit's standing opinion is that the court was simply divided, differing in opinion for legitimate reasons similar to the reason the three judge panel was split in their decision—the statute lacks clarity and can be interpreted in multiple ways. The statute's ambiguity, and not indifference from the Court of Appeals to seriously consider the case, is what likely lead to the difference in opinion and resulting split decision.

[13] Actually, Petitioners argumentatively, and rather oratorically, claim the Secretary failed to "identify the source of his authority to countermand a federal statute." Clearly and not in dispute, there is no authority to "countermand" a federal statute. As discussed herein, the regulations at issue clarify, and do not countermand, the corresponding statute.

equipped to make than courts." *Nat'l Cable & Telecomm. Assn. v. Brand X Internet Services*, 125 S. Ct. 2688, 2699 (2005) (relying on *Chevron*, 467 U.S. at 865-66). *See also Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996). "[T]he whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency." *Nat'l Cable & Telecomm. Assn.*, 125 S. Ct. at 2699 (quoting *Smiley*, 517 U.S. at 742 (1996)).

In the instant case, while there is no express delegation of authority to the Department to define the methodology for determining disparity under 20 U.S.C. § 7709(b), there is an explicit delegation to the Department to evaluate a State's equalization of public school funding using the disparity standard. *See* 20 U.S.C. §§ 7709(b)(2)(B), 7709(b)(3) and 7709(c). The governing statute, as described above, lacks a precise methodology that the Department or states should utilize to make the required disparity determination (i.e., how to specifically determine the 95th and 5th percentiles of per-pupil expenditures in the State). However, it is obvious that some methodology is necessary. This constitutes an implicit delegation to the Department to set out the precise methodology to be employed, which, if reasonable, must be sustained under the *Chevron* doctrine.

The statute's failure to provide an exact formula for computing disparity, the various possible methodologies identified for computing disparity, the consistent findings throughout the proceedings, and the Court of Appeal's varying opinions, all illustrate the lack of clarity in the statute. These facts, including that at least four different interpretations of the same statute have been placed before the Court through the record, proves that the statute qualifies as "ambiguous" under the first prong of the *Chevron* doctrine. Thus, because the statute is ambiguous, the Department was authorized to fill the statutory gap with interpreting regu-

lations—so long as such regulations pass the second prong of the *Chevron* analysis, permissible and reasonable.

ii. Because the statute is ambiguous and the Department of Education is thus authorized to promulgate regulations regarding this matter, this Court now considers the second part of the Chevron test, whether the Secretary's regulatory scheme is a reasonable and permissive interpretation of the statutory language and congressional intent. See Chevron, 467 U.S. at 843. The degree of deference to administrative agencies on this prong of the test is significant. In cases where the relevant statute is "silent or ambiguous", courts are generally required to defer to the agency's interpretation if it is "based on a permissible construction of the statute." *Id.* at 843. The agency's construction need only be "rational and consistent with the statute." *See NLRB v. United Food and Commercial Workers*, 484 U.S. 112, 123 (1987). An agency's interpretation of a statute must be "given controlling weight unless it is arbitrary, capricious or manifestly contrary to the statute." *Sac and Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1261 (10th Cir. 2001) (citing *Chevron*, 467 U.S. at 843-44), *cert. denied*, 534 U.S. 1078 (2002). *See also Swonger v. Surface Trans. Bd.*, 265 F.3d 1135, 1140 (10th Cir. 2001), *cert. denied*, 535 U.S. 1053 (2002); *Maier, P.E. v. United States Envtl. Prot. Agency*, 114 F.3d 1032, 1040 (10th Cir. 1997), *cert. denied*, 522 U.S. 1014 (1997). Because the regulations at issue, including the Subpart K Appendix, are reasonable and permissible interpretations of the statute by their plain meaning, because congressional intent further supports this interpretation, and because Congress has chosen to not alter the regulatory scheme, the regulations pass the *Chevron* test and must be upheld.

(a.) By its plain meaning, the regulatory scheme for determining disparity that Petitioners here challenge is a reasonable and permissive interpretation of the statutory language and Congressional intent. The statute requires that the Secre-

tary, in making the disparity determination, "disregard local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State." 20 U.S.C. § 7709(b)(2)(B). The Secretary's interpretation clearly does just this. The statutory phrase "with per-pupil expenditures or revenues above . . . or below" describes which LEAs must be disregarded in completing the disparity determination. Therefore, in order to determine which LEAs will be disregarded, a mandatory prerequisite step requires determining what is the State's per-pupil expenditures or revenues at the 95 and 5th percentiles.

As the Secretary's interpretation spelled out in the regulation's details, the 95th and 5th percentiles are determined based on the total student enrollment.[14] *See* 34 C.F.R. pt. 222, subpt. K, app. First, per district (or LEA) averages for per-pupil expenditure or revenues are established and the LEAs are ranked in this order from highest to lowest.[15] Next, the Secretary considers total student population and determines in which LEA the 95th and 5th percentiles of total students, as they are ranked in order by their LEA's average revenue per-pupil, fall.[16] LEAs ranked respectively above

[14] Any interpretation that ignores the number of students in each district could create great flaws and inconsistencies in comparing true per student expenditures or revenues across the entire State.

[15] New Mexico employs per-pupil revenues and abbreviates these LEA figures as "revenue per MEM."

[16] Because every individual student has a corresponding per-pupil revenue determined by the LEA in which that student attends school, selecting the 95th and 5th percentiles of total membership in the manner prescribed by the regulations is the equivalent of selecting the 95th and 5th percentiles of total per-pupil revenues directly corresponding to each student in the state. In other words, in selecting the 95th and 5th percentiles of total students, the State selects the 95th and 5th percentile of the total number of per-pupil revenues corresponding to each student in the State.

and below the identified LEAs, that, according to the precise statutory language, are "with per-pupil expenditures or revenues above the 95th or below the 5th percentile of such revenues in the State," are disregarded before making the disparity determination. I.e., Once the 95th and 5th percentiles of per pupil expenditures or revenues are identified, the Secretary must proceed to exclude, or disregard, the LEAs above and below the respective cutoff points. The LEAs containing the actual cutoff points are not excluded which is a type of rounding that favors the Petitioners and makes it more difficult to meet equalization.

Clearly, by their plain meaning, the regulations, in accordance with the statute, require the Secretary to "disregard local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State." 20 U.S.C. § 7709(b)(2)(B); 34 C.F.R. § 222.162(a). The Secretary's interpretation excludes such LEAs and is undoubtedly "rational and consistent with the statute" (*United Food and Commercial Workers*, 484 U.S. at 123) and "based on a permissible construction of the statute" (*Chevron*, 467 U.S. at 843). The regulations being far from arbitrary or capricious, the Court must defer to the agency's interpretation.

(b.) Moreover, looking beyond plain meaning to legislative history and policy behind the statute further supports the reasonableness of the Secretary's regulatory scheme. When reviewing an ambiguous statute, the Court should "look to the provisions of the whole law, and to its object and policy," rather than the specifically disputed provisions in isolation. *Aulston v. United States*, 915 F.2d 584, 589 (10th Cir. 1990), *cert. denied* 500 U.S. 916 (1991). When Congress promulgated the current statute, it decided that disparity should be the sole standard for determining equalization under 20 U.S.C. § 7709(b), but failed to prescribe a precise methodology for calculating disparity. By leaving a gap in the statute,

Congress delegated authority to the Department to fill the statutory gap. *See National Cable & Telecommunications Assoc.*, 125 S. Ct. at 2699 (analyzing *Chevron*, 467 U.S. at 865-866). The Department responded to Congress' directive by promulgating 34 C.F.R. § 222.162, which includes 34 C.F.R. pt. 222, subpt. K, app.

The statutory provision at issue in this case was originally enacted as part of the Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 484 (1974). As expressed by the legislative history, states have the responsibility of providing an equal minimum educational opportunity for all public school students while also spreading the tax burden for such opportunities equitably. *See* House of Representatives Comm. on Education and Labor, Public Law 874 and State Equalization Plans: The Problems of the Legislative Prohibition of Section 5(d)(2) (Comm. Print 1974). In other words, an equalized system of state funding for public education should be equitable for both the children who attend public schools and the taxpayers who pay the costs of public education. *See* A.R. Odden & L.O. Picus, *School Finance: A Policy Perspective* (2d ed., McGraw Hill 2000). The measurement of disparity across 90 percent of the State's student population—as reflected by the Subpart K Appendix—is therefore consistent with Congress' intended framework for assessing a state's school finance structure.

The regulation reflects congressional intent. This point is illustrated by a response the Commissioner of Education made to comments on the proposed regulations in 1974. Specifically, the Commissioner was asked whether pupils or school districts are to be considered when determining the 95th and 5th percentile exclusions. After considering the methodology to be used, the Commissioner responded that the percentiles will be determined on the basis of numbers of pupils and not on the basis of numbers of districts. The Commissioner reasoned:

> . . . basing *an exclusion on numbers of districts would act to apply the disparity standard in an unfair and inconsistent manner among States. The purpose of the exclusion is to eliminate those anomalous characteristics of a distribution of expenditures.* In States with a small number of large districts, an exclusion based on percentage of school districts might exclude from the measure of disparity a substantial percentage of the pupil population in those States. Conversely, in States with large numbers of small districts, such an approach might exclude only an insignificant fraction of the pupil population and would not exclude anomalous characteristics.

See 41 Fed. Reg. 26,323-24 (Jun. 25, 1976) (emphasis added). The Department's current regulation, and the appendix to Subpart K expressly adopted therein, maintains the disparity standard and methodology described above. *See* 34 C.F.R. § 222.162; 34 C.F.R. pt. 222, subpt. K, app. Basing the disparity calculation on the number of pupils, as set forth in the regulation, complies with congressional intent. Because the methodology is based on the expressed intentions of Congress and the agency's unique understanding of school finance issues, the Department's regulation is a reasonable and permissive implementation of the statutory requirements.

(c.) Furthermore, the underlying legislative intent of the Impact Aid regulations did not change when Congress amended the statute in 1994.[17] While Congress was aware of

---

[17] Petitioners make the conclusory allegation that "The 1994 legislation makes clear that the Secretary was divested of his authority to continue using the old equalization formula in diverting Impact Aid funds from impacted districts to the State" confusingly citing *Gonzales v. Oregon*, __ U.S. __, 126 S. Ct. 904 (2006). (Pet. at 13.) *Gonzales* regards an interpretive rule by the U.S. Attorney General regarding assisted suicide and makes no reference whatsoever to the 1994 amendments, the Secretary of Education, or to the Impact Aid laws in any way. Similarly, Petitioners' accusation that the Secretary "ignore[s]" congressional statutes is baseless.

how the Department had historically applied the disparity standard—reflected at 34 C.F.R. § 222.63 (App.) (1993)—it did not adopt or preclude that precise methodology in the 1994 statutory amendments.[18] Congress presumably determined that while disparity should be the sole standard for determining equalization under 20 U.S.C. § 7709(b), the precise methodology for applying the disparity standard was an issue that should remain within the Department's discretion. As a result of this implicit acknowledgment by Congress of the Department's administrative expertise on the question of calculating disparity, the Secretary's decision below must be affirmed if the underlying regulatory scheme is a reasonable and permissive interpretation of the statutory language and Congressional intent.

Understanding that the intent did not change, the Department mirrored the pre-1994 regulations, which included a specific methodology for applying that standard, in the current appendix to subpart K. *See* 34 C.F.R. § 222.63 (App.) (1993). By changing language from pupil to LEA, the new statute simply clarified what the Department was already doing. The Secretary's disparity test removes LEAs, but in determining which LEAs to remove, the Department considers all students state-wide. The Department's current regulation contains the same per-pupil expenditure percentile ranking method as outlined in earlier appendices, and details the same methodology for calculating the twenty-five percent disparity test. The agency has not altered the methodology

[18] From 1974 until 1994, the Impact Aid law provided the Department with near-total discretion to establish multiple standards by which States could obtain certification of equalization. One of three standards promulgated by the Department was the 25 percent disparity test, then set forth at 34 C.F.R. § 222.63 (1993). In 1994, Congress adopted the disparity test as the sole statutory standard for determining whether a State equalized its expenditures for all LEAs. The pre-1994 regulations also included a specific methodology for applying that standard, which is mirrored by the current Subpart K Appendix. *See* 34 C.F.R. § 222.63 (App.) (1993).

for calculating
never changed
dard. Duplicati
to subpart K cor

Because the r
fies and does n
regulation is ba
legislative histc
standing of schc
is a reasonable
tory requiremer
ulgating this r
statute. Therefc
permissible, anc

3. Petitioner
Impact Aid pro
grant their Peti
serves a valuab
school districts
limited in scope
is directly impa
tions at issue i
program. Sinc
Kansas, and
certified by th
programs. Ins
ered relevant

[19] New Mexic
regulation for det
fact. Then, since
tion of 20 U.S.C.
and the Departm
that the formula
merit, and the Sec

for calculating disparity since 1976 because Congress has never changed its intent to administer a fair disparity standard. Duplicating the pre-1994 computation in the appendix to subpart K conforms to congressional intent.

Because the regulation, by its plain meaning, simply clarifies and does not conflict with the statute, and because the regulation is based on and supported by congressional intent, legislative history, and the agency's comprehensive understanding of school finance issues, the Department's regulation is a reasonable and permissive implementation of the statutory requirements. The Secretary acted reasonably in promulgating this regulatory scheme to clarify the ambiguous statute. Therefore, the Secretary's decision is reasonable and permissible, and should be upheld.[19]

3. Petitioners' arguments regarding the importance of the Impact Aid program do not justify a reason this Court should grant their Petition. While the Impact Aid program certainly serves a valuable purpose and is of great importance to those school districts affected by it, the program is significantly limited in scope and size. Considering how little of the nation is directly impacted by the statute and corresponding regulations at issue in this case highlights the limited nature of the program. Since Fiscal Year 1994, only three states (Alaska, Kansas, and New Mexico) have come before and been certified by the Secretary as operating equalized school aid programs. Insofar as Petitioners' arguments may be considered relevant to the example presented in Supreme Court

---

[19] New Mexico properly applied the methodology established in the regulation for determining equalization, and Petitioners do not dispute this fact. Then, since the regulation is a reasonable and permissible construction of 20 U.S.C. § 7709(b), the New Mexico's disparity determination and the Department's certification thereof is proper. Petitioners' claim that the formula does not comply with 20 U.S.C. § 7709(b) is without merit, and the Secretary's decision should be affirmed.

Rule 10(c), the case at issue does not regard an important question of federal law that must be settled by this Court.

4. Finally, review by this Court is not the appropriate recourse for Petitioners to address their concerns; Congress has the ability to address such concerns and the means by which Petitioners should seek recourse. Congress is best suited to settle and address Petitioners' concern. Congress has the power and has had the opportunity to address this matter but has decided to permit the Secretary's interpretation to remain the governing law.

Congress has expressed no concern about the Department's regulatory implementation of 20 U.S.C. § 7709(b) despite multiple and recent opportunities to do so. In spite of recent legislative activity concerning the Impact Aid law generally, including statutory amendments, Congress has not indicated in any manner that the Department's regulatory implementation of 20 U.S.C. § 7709(b) is inappropriate or otherwise flawed. In October 2000, Congress reauthorized the overall Impact Aid statute without altering or commenting on the disparity standard whatsoever. *See* Impact Aid Reauthorization Act of 2000, Pub. L. No. 106-398, 114 Stat. 1654A-368 (2000). Most recently, the 107th Congress amended the Impact Aid law as part of the No Child Left Behind Act, Pub. L. No. 107-110, 115 Stat. 1425 (Jan. 8, 2002). Once again, there were no changes to the statutory provisions at issue in this case.

When Congress "re-enacts a statute without change," it is "is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation." *See, e.g., Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978) (citing numerous cases). Considering the recent legislative history discussed above, Congress appears perfectly satisfied with the Secretary's interpretation of 20 U.S.C. § 7709(b). For the Court, then, to act would exceed its role and power in our nation's system of checks and balances.

Accordingly, Petitioners' complaint is not properly with this Court. They disagree with a longstanding duly promulgated regulatory interpretation of a Congressional statute. They are adamant that their interpretation of this statute is a better one than that of the regulatory agency assigned the responsibility of the administration of this law. Their remedy is with the Congress, not this honorable Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

LEIGH M. MANASEVIT *
Special Assistant Attorney General
for the State of New Mexico
JENNIFER S. MAUSKAPF
BRUSTEIN & MANASEVIT
3105 South Street, NW
Washington, DC 20007
(202) 965-3652

WILLIE R. BROWN
General Counsel
NEW MEXICO PUBLIC EDUCATION
DEPARTMENT
Jerry Apodaca Education Building
300 Don Gaspar Avenue
Santa Fe, NM 87501

* Counsel of Record

Counsel for the New Mexico
Public Education Department

July 31, 2006