No. 14-1352

In the Supreme Court of the United States

KENNETH EARMAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the provisions of a federal statute authorizing an agency to enter into a contract with private parties are necessarily incorporated into the resulting contract, regardless of the intent of the parties.

2. Whether a federal agency can contract on terms that contradict the provisions of the statute that authorizes the contract.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is not published in the *Federal Reporter* but is reprinted at 589 Fed. Appx. 991. The opinion of the United States Court of Federal Claims (Pet. App. 2a-72a) is reported at 114 Fed. Cl. 81.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2015. On March 27, 2015, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 13, 2015, and the petition was filed on May 12, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case is a breach-of-contract action in which petitioner seeks money damages based on the government's purported violation of two requirements allegedly embodied in his federal assistance agreement under the Conservation Security Program (CSP). First, petitioner argues (Pet. 13) that the government breached the agreement by paying him in accordance with the agreement's express terms, instead of in accordance with a statutory provision that petitioner now claims is inconsistent with that agreement. Second, petitioner argues (*ibid.*) that the government breached the agreement when Congress passed legislation abrogating a different statutory provision, addressing contract renewals, that was never expressly incorporated in the agreement. The United States Court of Federal Claims (CFC) rejected those arguments, Pet. App. 2a-72a, and the court of appeals affirmed without opinion, *id.* at 1a.

1. a. The CSP is a voluntary conservation program that provides federal financial and technical assistance to help farmers and ranchers adopt, maintain, and improve conservation practices on their land. 16 U.S.C. 3838a(a). Conservation practices that are eligible for assistance under the CSP include those aimed at conserving water, soil, and energy, as well as practices that restore wildlife habitat, control invasive species, and manage air quality. 16 U.S.C. 3838a(d)(4). Congress established the CSP in the Farm Security and Rural Investment Act of 2002 (2002 Farm Bill), Pub. L. No. 107-171, 116 Stat. 134, amending the Food Security Act of 1985, Pub. L. No. 99-198, 99 Stat. 1354. See 2002 Farm Bill § 2001, 116 Stat. 223-233. The CSP is administered by the Natu-

ral Resources Conservation Service (NRCS), an agency within the United States Department of Agriculture (USDA), using the authority and funds of the Commodity Credit Corporation (CCC). 7 C.F.R. 1469.1.[1]

To participate in the CSP, a farmer or rancher first submits a conservation security plan to NRCS for approval. 16 U.S.C. 3838a(b)(1)(A). A typical conservation security plan (1) identifies the land and resources that will be conserved under the plan; (2) describes the conservation practices that will be implemented, maintained, or improved; and (3) establishes a schedule for carrying out the required conservation practices. 16 U.S.C. 3838a(c).

If NRCS approves an applicant's conservation security plan, the parties then enter into a CSP contract. 16 U.S.C. 3838a(e)(1). Depending on the extent of conservation required, each contract is classified as Tier I, II, or III. See 16 U.S.C. 3838a(d)(5)(A)-(C). Under the CSP contracts, NRCS makes annual payments to farmers in exchange for implementation of their plans. See 16 U.S.C. 3838a(b)(1)(B) and (e). Those payments include three components: (1) adjusted base payments, (2) cost-sharing payments, and (3) enhanced payments. 16 U.S.C. 3838c(b); Pet. App. 7a-9a. In general, the adjusted base payments reward farmers and ranchers for conservation efforts already undertaken in the past, whereas the cost-sharing and enhanced payments compensate them for current and

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[1] The CCC is a federal corporation within USDA that, *inter alia*, finances conservation programs. 15 U.S.C. 714, 714c(g).

future conservation efforts mandated by their respective plans.[2]

b. This case involves the proper calculation of adjusted base payments. The CSP statute grants NRCS discretion in determining how to calculate an initial "base payment." 16 U.S.C. 3838c(b)(1)(A). Specifically, it provides:

> A base payment * * * shall be (as determined by the Secretary)—
>
> (i) the average national per-acre rental rate for a specific land use during the 2001 crop year; or
>
> (ii) another appropriate rate for the 2001 crop year that ensures regional equity.

16 U.S.C. 3838c(b)(1)(A)(i)-(ii). Under the statute, the adjusted base-payment rate is equal to a specified percentage of the base payment—five percent for Tier I contracts, ten percent for Tier II contracts, and 15 percent for Tier III contracts. 16 U.S.C. 3838c(b)(1)(C)(i), (D)(i), and (E)(i); Pet. App. 8a.

In June 2004, NRCS promulgated, through notice-and-comment rulemaking, a regulation that sets forth the agency's methodology for calculating adjusted base payments to farmers and ranchers. 7 C.F.R. 1469.23(a); 69 Fed. Reg. 34,502 (June 21, 2004). Exercising the authority conferred by Section 3838c(b)(1)(A)(ii), the agency declined to calculate the "average national per-acre rental rate for a specific land use during the 2001 crop year," instead choosing

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[2] See U.S. Gov't Accountability Office, GAO-06-312, *Conservation Security Program: Despite Cost Controls, Improved USDA Management Is Needed to Ensure Proper Payments and Reduce Duplication with Other Programs* 44 n.59 (2006).

to develop "another appropriate rate * * * that ensures regional equity." 16 U.S.C. 3838c(b)(1)(A)(i)-(ii).

Under the regulation, NRCS begins its calculation of a base-payment rate by averaging 2001 land rental rates, using data from the Agriculture Foreign Investment Disclosure Act Land Value Survey, the National Agriculture Statistics Service, and the Conservation Reserve Program. 7 C.F.R. 1469.23(a)(2)(i). NRCS then makes any necessary adjustments to ensure local and regional consistency and equity, in consultation with NRCS state offices. 7 C.F.R. 1469.23(a)(2)(ii)-(iii). Finally, NRCS applies a reduction factor to the adjusted regional rates, multiplying them by 0.25, 0.50, or 0.75 for Tier I, II, or III contracts, respectively. 7 C.F.R. 1469.23(a)(2)(iv).[3]

After NRCS determines an initial base-payment rate under Section 1469.23(a), the agency then follows a two-step process to determine the adjusted base payment that an agricultural producer will receive under his contract. First, NRCS multiplies the number of acres under contract by the base-payment rate. 7 C.F.R. 1469.23(a)(3). Second, NRCS adjusts that amount by the percentages that the CSP statute mandates for Tier I, II, and III contracts. *Ibid.*; see 16 U.S.C. 3838c(b)(1)(C)(i), (D)(i), and (E)(i).[4]

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[3] NRCS adopted the reduction factor to ensure an appropriate base-payment rate that also allowed a sufficient amount of the CSP's limited funding to be focused on cost-share and enhancement payments. 69 Fed. Reg. at 34,509. In NRCS's judgment, this approach would "result[] in more net environmental benefits accruing from the program" and "allow[] more producers to participate within the available funding." *Ibid.*

[4] The regulations further provide that, regardless of the adjusted base-payment rate or number of acres under contract, the CSP statute caps the amount of base payments an agricultural producer

c. This case also involves the rules governing renewal of CSP contracts. The CSP statute originally permitted such renewals in certain circumstances. See 16 U.S.C. 3838a(e)(4). As relevant here, Section 3838a(e)(4)(A) provides that, "at the option of a producer, the conservation security contract of the producer may be renewed for an additional period of not less than 5 nor more than 10 years." 16 U.S.C. 3838a(e)(4)(A).

In 2008, Congress passed the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill), Pub. L. No. 110-246, 122 Stat. 1651, which replaced the CSP with the Conservation Stewardship Program. See Tit. II, Subtit. D, 122 Stat. 1768. The 2008 Farm Bill amended Section 3838a to prohibit NRCS from entering into or renewing CSP contracts after September 30, 2008. 16 U.S.C. 3838a(g)(1). Congress nonetheless directed NRCS to satisfy its payment obligations under existing CSP contracts. 16 U.S.C. 3838a(g)(3).

2. Petitioner owns a cattle farm in Virginia. Pet. 11. In September 2005—more than a year after NRCS promulgated the regulations explaining its interpretation of the CSP statute—he entered into a Tier II CSP contract with the CCC. Pet. App. 16a. In 2007, NRCS agreed to convert petitioner's contract to a Tier III contract. *Ibid.*

The Appendix to petitioner's CSP contract expressly "incorporated, by reference," the CSP regulations set forth in Title 7, Part 1469 of the Code of Federal Regulations. C.A. Supp. App. SA16; see *id.* at SA8

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can receive per year at $5000 for Tier I contracts, $10,500 for Tier II contracts, and $13,500 for Tier III contracts. 7 C.F.R. 1469.23(e)(4); see 16 U.S.C. 3838c(b)(2)(B)(i)-(ii).

(incorporating Appendix as part of the contract); see also Pet. 11. Part 1469 includes 7 C.F.R. 1469.23(a), which sets forth NRCS's methodology, described above, for calculating the adjusted base payments due to farmers under the program. C.A. Supp. App. SA16; see pp. 4-5, *supra*. In accordance with that methodology, petitioner's original Tier II contract specified that he would receive a total of ten annual adjusted base payments of $442 each, and his modified Tier III contract increased that annual payment to $994. C.A. Supp. App. SA36-SA41, SA73-SA76. At no time before the contract was finalized did petitioner assert that the methodology set forth in the CSP regulations (and incorporated into the contract) was inconsistent with the CSP statute. On the contrary, petitioner agreed in the Appendix to the contract that "[a]ny ambiguities in this Contract and questions as to the validity of any of its specific provisions shall be resolved in favor of [the government]." *Id.* at SA16 (also stating that "[t]his Contract shall be carried out in accordance with all applicable Federal statutes and regulations").

Petitioner's CSP contract specified that the contract would expire on September 30, 2014. C.A. Supp. App. SA9. The contract did not address whether either party had a right to renew the contract, and it did not expressly incorporate Section 3838a(e)(4)(A)'s language authorizing renewals.[5]

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[5] Petitioner's CSP contract authorized the government to terminate the contract, "in whole or in part, without liability," if the government determined "that continued operation of th[e] Contract will result in the violation of a Federal statute or regulation." C.A. Supp. App. SA15. The contract also stated that, "[i]n the event that a statute is enacted during the period of this Contract

3. In September 2011, petitioner filed suit against the United States in the CFC pursuant to the Tucker Act, 28 U.S.C. 1491. Pet. App. 3a-4a, 20a-21a. Count 2 of his complaint alleged that the government had breached the CSP contract "by paying lower base payments than were required by his contract." *Id.* at 39a. Petitioner did not deny that the government had paid him the precise amounts he was due under both the express terms of his contract and the methodology set forth in the regulations. *Id.* at 40a. Instead, he argued that the payments were insufficient under the terms of the CSP statute itself, which he claimed were incorporated into the contract either expressly or by operation of law. *Id.* at 40a-41a. In the alternative, petitioner argued that the methodology set forth in the regulations (and incorporated into the contract) violated the statute, and that the CFC should reform the contract to mandate a higher payment based on petitioner's interpretation of the statute. *Id.* at 50a n.12.

Count 4 of petitioner's complaint asserted that Section 3838a(e)(4)(A) of the CSP statute gave him a right to renew the CSP contract at his sole option. Pet. App. 65a-66a. Petitioner argued that this statutory right was incorporated into his CSP contract, and that the government had anticipatorily breached that right when the 2008 Farm Bill amended the CSP to prohibit such renewals. *Ibid.*; see 16 U.S.C. 3838a(g)(1).[6]

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which would materially change the terms and conditions of this Contract, the CCC may require the Participant to elect between modifying this Contract consistent with the provisions of such statute or Contract termination." *Ibid.*

[6] The other counts set forth in petitioner's complaint are no longer at issue in this case. Pet. 13.

4. In December 2013, the CFC granted the government's motions to dismiss Count 2 and for summary judgment on Count 4. Pet. App. 2a-72a.

With respect to Count 2, the CFC rejected petitioner's contention that the government had breached his CSP contract by making base payments lower than his contract required. Pet. App. 39a-50a. The CFC noted that "there [was] no dispute that [petitioner] and similarly situated CSP participants have received payments in accordance with the express terms of their contracts." *Id.* at 40a. The court held that the CSP statutory provisions addressing the calculation of adjusted base payments, which in petitioner's view called for payments greater than those specified in the contract itself, had not been incorporated into the CSP contracts, either expressly or by implication. *Id.* at 41a. The court explained that, "under binding precedent, this court may not read provisions of the CSP statute into [petitioner's] contract unless those provisions are expressly incorporated into his contract." *Id.* at 47a (citing *St. Christopher Assocs., L.P.* v. *United States*, 511 F.3d 1376, 1384 & n.4 (Fed. Cir. 2008), and *Texas* v. *United States*, 537 F.2d 466, 471 (Ct. Cl. 1976)). The court concluded that, because "the CSP statute is not incorporated into [petitioner's] contract," *id.* at 49a, petitioner had "failed to identify a contractual provision which plausibly entitles him to the additional payments he seeks in Count [2]," *id.* at 50a.

The CFC also rejected petitioner's alternative argument, which sought reformation of the CSP contract on the theory that the contract's calculation of the adjusted base payments was "based on regulations which are contrary to the CSP statute." Pet. App. 50a

n.12 (incorporating subsequent discussion appearing at 53a-56a). The court held that it lacked jurisdiction to consider petitioner's argument because "there is no money-mandating source of law which would allow the court to reach the predicate issue of whether the [NRCS's] methodology for calculating base payments and adjusted base payments, as expressed in the implementing regulations and in [petitioner's] contract, violates the CSP statute." *Id.* at 51a n.12. In reaching that conclusion, the CFC relied on its prior decision in *Meyers* v. *United States*, 96 Fed. Cl. 34 (2010), appeal dismissed, 420 Fed. Appx. 967 (Fed. Cir. 2011), which held that the CSP statute does not "constitute a money-mandating source of law that provides a sufficient basis for the exercise of subject matter jurisdiction over plaintiffs' suit under the Tucker Act." *Id.* at 43; see Pet. App. 53a-56a (distinguishing other cases brought under the Contract Disputes Act of 1978, 41 U.S.C. 7101-7109); see generally *Meyers*, 96 Fed. Cl. at 43-60.

With respect to Count 4, the CFC held that petitioner's contract did not incorporate the CSP statutory provision authorizing contract renewals, 16 U.S.C. 3838a(e)(4)(A). Pet. App. 67a. The court rejected petitioner's argument that his contract should be construed as impliedly incorporating those statutory provisions. *Id.* at 67a-68a. The court acknowledged that, under the "*Christian* Doctrine," parties to a government procurement contract are deemed to have incorporated "mandatory contract clauses which express a significant or deeply ingrained strand of public procurement policy." *Id.* at 68a (quoting *General Eng'g & Mach. Works* v. *O'Keefe*, 991 F.2d 775, 779 (Fed. Cir. 1993)). The court found that doctrine inap-

plicable here, however, because "the CSP involves financial assistance agreements, not procurement contracts." *Id.* at 69a.[7]

5. Petitioner appealed. With respect to Count 2, petitioner's opening brief did not appear to challenge the CFC's conclusion that the relevant statutory provisions were not incorporated into his contract. Rather, he argued that, "[w]hether or not the enabling statute is incorporated into the contract, an agency can neither write nor carry out a contract that contravenes statutes or valid regulations governing the permissible actions of the agency." Pet. C.A. Br. 13; see *id.* at 1 (framing questions presented as turning on whether an agency is permitted to contract on terms that "contradict" or are "contrary to" a statute); *id.* at 12-19. Petitioner asked the court of appeals to remand Count 2 to the CFC for that court to address whether the contractual terms contradict the CSP statute and, if so, for the CFC to reform the contract in accordance with the statute and to award appropriate compensation. *Id.* at 23; Pet. C.A. Reply Br. 29. Although petitioner sought an appellate ruling that would ultimately lead to contract reformation, he did not challenge the CFC's independent conclusion, based on *Meyers*, that it lacked jurisdiction to consider his request for reformation of the contract based on

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[7] With respect to Counts 2 and 4, the CFC noted that the government had conceded in its reply brief that "the CSP statute is incorporated into [petitioner's] contract." Pet. App. 48a (citation omitted); *id.* at 66a. The CFC declined to accept that concession, however, on the ground that it reflected an erroneous view of the law. *Id.* at 48a, 67a.

any conflict with the statute. See Pet. App. 50a n.12, 53a-56a.[8]

The court of appeals affirmed the CFC's decision in a one-sentence, unpublished decision containing no substantive analysis. Pet. App. 1a (citing Fed. Cir. R. 36, which indicates that such decisions "have no precedential value").

ARGUMENT

Petitioner seeks money damages for the government's alleged breach of two statutory provisions that the parties did not expressly incorporate into his CSP contract. He asks this Court to grant review to hold either that those provisions are impliedly incorporated into his contract, or that the contract should be reformed in order to avoid a conflict with the statute. The courts below correctly rejected petitioner's arguments, and their decisions do not give rise to any conflict in authority. Further review is not warranted.

1. Petitioner's primary argument is that the CSP statutory provisions governing the calculation of adjusted base payments and contract renewals are incorporated into petitioner's CSP contract by implication or operation of law. But the parties did not intend for those statutory provisions to give rise to contractual rights, and there is no justification for interpreting the contract in a manner that contravenes their intent. See, *e.g.*, *In re Binghamton Bridge*, 70 U.S. (3 Wall.) 51, 74 (1866) ("All contracts are to be construed to accomplish the intention of the

[8] Unlike his argument with respect to Count 2, petitioner argued with respect to Count 4 that the statutory provision governing renewals "should be implied into the contract." Pet. C.A. Br. 22-23 (also seeking, in the alternative, reformation of the contract "to correct any contradiction with the statute").

parties."). Although this Court's decisions recognize that statutory provisions can often be relevant to the proper interpretation of a contract, they do not support petitioner's view that all relevant statutory provisions are incorporated as a matter of law into every related contract, regardless of the intent of the contracting parties.

a. Petitioner's breach-of-contract argument with respect to Count 2 turns on his assertion (Pet. 8-10) that the method for calculating the adjusted base payment set forth in the regulations violates the CSP statute. The government explained below why petitioner's interpretation of the statute lacks merit. See Gov't C.A. Br. 28-38.[9] But even if petitioner's construction of the statute were correct, the conflict between the statute and petitioner's own contract would not give rise to a claim for money damages. The parties did not intend their contract to incorporate the pertinent statutory provisions or to create a contractual right to obtain money damages based on a claim that the regulations are invalid.

The CSP contract at issue unambiguously reflects the parties' intent that the adjusted base payments would be calculated in accordance with the CSP regu-

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[9] The CSP statute's base-payment provisions authorize NRCS to set base-payment rates at "the average national per-acre rental rate for a specific land use during the 2001 crop year" *or* at "another appropriate rate for the 2001 crop year that ensures regional equity." 16 U.S.C. 3838c(b)(1)(A)(i)-(ii). Opting for the latter, NRCS promulgated 7 C.F.R. 1469.23(a), which sets forth the agency's methodology for calculating base-payment rates at another appropriate rate for the 2001 crop year that ensures regional equity. Section 1469.23(a) is a valid and lawful regulation that is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

lations. The parties expressly incorporated the regulations into their contract; those regulations set forth the precise methodology to be used for calculating the formula; and the contract itself correctly identified the payments due to petitioner in accordance with that methodology. See pp. 4-7, *supra*. And, as the CFC recognized, "there is no dispute that [petitioner] and similarly situated CSP participants have received payments in accordance with the express terms of their contracts." Pet. App. 40a. Petitioner's claim for contract damages depends on a purported conflict between the regulations and the statute, but proof of any such conflict would not change the fact that the parties unambiguously agreed to the calculation set forth in the *regulations*. Nothing in the agreement suggests that the parties intended petitioner to have a contractual right to payments greater than those that the contract and regulations specified.

Other provisions of the CSP contract confirm that the government did not promise to pay contract damages if the payment formula specified in the contract were found to conflict with the statute. The parties agreed that any "questions as to the validity of any of [the contract's] specific provisions shall be resolved in favor of [the government]." C.A. Supp. App. SA16. The parties also granted the government the right to unilaterally terminate the contract, "in whole or in part, without liability," if the government "determines that continued operation of this Contract will result in the violation of a [f]ederal statute or regulation." *Id.* at SA15. Those contractual provisions refute petitioners' contention that he is entitled to contract damages

based on an alleged conflict between his contract and the CSP statute.[10]

b. Petitioner is also wrong to argue, with respect to Count 4, that the parties intended his agreement with NRCS to incorporate a contractual right to renew that agreement upon its expiration in 2014. When the parties entered into the CSP contract in 2005, contract renewals were authorized by 16 U.S.C. 3838a(e)(4)(A). So long as that provision remained in effect, it created (at most) a *statutory* renewal right. The parties did not expressly incorporate that statutory right into the contract, however, and nothing in the contract's text or history suggests that they understood that right to be incorporated by implication.[11]

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[10] The nature of the CSP statute's base-payment provisions further confirms that the parties did not intend to incorporate those provisions into their contract in the manner petitioner suggests. As explained above, the CSP statute does not mandate a single method of calculating adjusted base payments. Rather, it authorizes the Secretary of Agriculture to calculate payments based on *either* (1) the "average national per-acre rental rate for a specific land use" *or* (2) "another appropriate rate * * * that ensures regional equity." 16 U.S.C. 3838c(b)(1)(A)(i)-(ii). Even if petitioner could establish that the base-payment rates established by the USDA's regulations are "not 'appropriate'" (Pet. 8) within the meaning of that provision, the authority to choose an alternative "appropriate" methodology would remain with the Secretary. Allowing petitioner to collect breach-of-contract damages on the ground that the Secretary had unreasonably exercised his statutory discretion would be highly unusual, if not unprecedented. There is no basis for concluding that the parties intended such a result.

[11] Contrary to petitioner's arguments below, the original CSP statute did not grant farmers and ranchers the unilateral right to renew their contracts. That statute provided that, "at the option of a producer, the conservation security contract of the producer *may* be renewed for an additional period of not less than 5 nor more

In fact, the CSP contract is most naturally read to provide that it will be implemented in a manner consistent with the law in effect at the time of such implementation. The contract states that it "shall be carried out in accordance with all applicable [f]ederal statutes and regulations." C.A. Supp. App. SA16. That provision contemplates that, if the laws governing the contract's implementation change while the contract is in effect, the parties will conform their implementation of the contract to the newly enacted laws.

Other provisions of the contract confirm that the parties did not intend the government to be liable for contract damages if an intervening statute rendered contract performance impossible. The contract authorizes the government to terminate the Contract, "in whole or in part, without liability," if the government "determines that continued operation of this Contract will result in the violation of a Federal statute or regulation." C.A. Supp. App. SA15. It also empowers the government to require the farmer to choose between modifying or terminating the contract "[i]n the event that a statute is enacted during the period of this Contract which would materially change the terms and conditions of this Contract." *Ibid.* Even if the contract itself had granted petitioner an explicit right to renew, those provisions would have protected the government from damages liability when the 2008 Farm Bill prevented it from honoring that promise. Because the CSP contract, properly

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than 10 years." 16 U.S.C. 3838a(e)(4)(A) (emphasis added). The use of the word "may" (instead of "shall") indicates that Congress did not intend renewal to be automatic or mandatory simply at the discretion of the farmer.

understood, did not expressly or impliedly incorporate the alleged right to renew previously conferred by Section 3838a(e)(4)(A), it is particularly clear that petitioner cannot obtain money damages based on the government's purported violation of that right.

c. The petition for certiorari largely ignores the terms of the agreement that petitioner reached with NRCS. Instead, petitioner reads this Court's precedents to establish a categorical rule that "relevant laws which exist at the time of contract formation are incorporated into the contract by operation of law." See Pet. 15-17 (citing cases). According to petitioner, the CFC violated that rule by declining to incorporate the CSP provisions governing adjusted base payments and contract renewals into his contract.

As petitioner notes, this Court has stated that "[l]aws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form part of it, as fully as if they had been expressly referred to or incorporated in its terms." Pet. 16-17 (quoting *Norfolk & W. Ry. Co.* v. *American Train Dispatchers' Ass'n*, 499 U.S. 117, 130 (1991)). But as petitioner elsewhere acknowledges, that principle does not apply "*when a contrary intent is evident*." Pet. 18 (emphasis added) (quoting 11 Richard A. Lord, *Williston on Contracts* § 30:19, at 250 (4th ed. 2012)) (*Williston*). Indeed, as petitioner's cited treatise explains, fidelity to the intent of the contracting parties is the whole purpose of the principle:

> The rationale for this rule is that the parties to the contract would have expressed that which the law implies had they not supposed that it was unnecessary to speak of it because the law provided for it.

> Consequently the courts, in construing the existing law as part of the express contract, are not reading into the contract provisions different from those expressed and intended by the parties, * * * but are merely construing the contract in accordance with the intent of the parties.

Williston § 30:19, at 274 (quoting *Schiro* v. *W.E. Gould & Co.*, 165 N.E. 2d 286, 290 (Ill. 1960)) (internal quotation marks omitted).

For the reasons explained above, petitioner's contract cannot plausibly be read to reflect the parties' intent that the amount of monthly payments owed to petitioner would depend on a court's interpretation of the CSP statute. On the contrary, the contract made clear that the CSP regulations would govern NRCS's payment obligations, and it specified the monthly payment that petitioner would receive. The contract was silent on the question of renewal, leaving that question to be resolved by reference to whatever statutory and regulatory provisions were in effect at the time renewal was sought. The contract further authorized the government to terminate the agreement without liability if the government determined that its continued implementation would violate a statute or regulation. Thus, whatever the rule may be in other circumstances, the parties to *this* contract clearly did not contemplate that the government could be held liable for breach of a purported implied promise to make monthly payments greater than those the contract specified, or to allow the contract to be renewed. See pp. 4-7, 13-15, *supra*.

Petitioner identifies no decision of this Court that has addressed circumstances analogous to those presented here or that supports incorporation of the CSP

statute into petitioner's contract. Petitioner cites no decision that has required a defendant to pay breach-of-contract damages for violating a provision that appeared only in a related statute, not in the contract itself. And none of the decisions that petitioner invokes involved a circumstance where, as here, incorporating a statutory provision would violate the clear intent of the parties.[12]

Contrary to petitioner's contention (Pet. 15), this Court's decisions do not establish a categorical rule that all "relevant laws which exist at the time of contract formation" are necessarily "incorporated into the contract by operation of law." See *General Motors Corp.* v. *Romein*, 503 U.S. 181, 189 (1992) (explaining that the Court "ha[s] not held that all state regulations are implied terms of every contract entered into while they are effective, especially when the regulations themselves cannot be fairly interpreted to require such incorporation"). Still less do they establish that the violation of a statutory provision necessarily constitutes a breach of contract—remediable by money damages—simply because the statute and contract address the same subject matter. Petitioner is therefore wrong to argue that the judgment below conflicts with either (1) this Court's precedents ad-

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[12] See, *e.g.*, *General Motors Corp.* v. *Romein*, 503 U.S. 181, 188-189 (1992) (declining to incorporate a statutory right into a contract in part because "such right does not appear to be so central to the bargained-for exchange between the parties"); *Wood* v. *Lovett*, 313 U.S. 362, 369-371 (1941) (treating a statutory right as an implied provision of a contract because it was an "important assurance" that the State granted the other party in the course of striking the bargain).

dressing incorporation, or (2) various court of appeals decisions invoking those precedents.

d. Petitioner also argues (Pet. 21) that the CFC based its decision on an apparently categorical rule that it is *never* appropriate to treat a statutory provision as part of a contract except by express reference in the contract itself. See Pet. App. 47a (stating this principle); but see *id.* at 68a-69a (also acknowledging that, under the so-called "*Christian* Doctrine," parties to a government procurement contract are deemed to have incorporated "mandatory contract clauses which express a significant or deeply ingrained strand of public procurement policy") (quoting *General Eng'g & Mach. Works* v. *O'Keefe*, 991 F.2d 775, 779 (Fed. Cir. 1993)). The government agrees with petitioner that no such categorical rule applies. Rather, as explained above, the determination whether a particular statutory requirement is incorporated into a particular contract turns on the intent of the contracting parties, as understood in light of all relevant circumstances.[13]

Although the Federal Circuit affirmed the CFC's bottom-line conclusion that the government was entitled to dismissal of Count 2 and summary judgment on Count 4, it did so in an unpublished decision without

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[13] In the court of appeals, the government generally agreed with the CFC's analysis, arguing both (1) that "[s]tatutory requirements should not be read into the terms of a contract unless the contract expressly states that they ought to be construed as part of the contract," and (2) that, under the *Christian* doctrine, it is appropriate to incorporate statutory provisions into procurement contracts (even if the contract itself contains no express cross-reference) when the statutory provision requires a "'mandatory contract clause[] which express[es] a significant or deeply ingrained strand of public procurement policy.'" Gov't C.A. Br. 21, 44 (quoting *General Eng'g & Mach. Works*, 991 F.2d at 779).

an opinion under the circuit's Rule 36. See Pet. App. 1a. Under that rule, the court of appeals is permitted to "enter a judgment of affirmance without opinion"—with "no precedential value"—if it concludes that "the judgment, decision, or order of the trial court appealed from is based on findings that are not clearly erroneous"; "the record supports summary judgment, directed verdict, or judgment on the pleadings"; or "a judgment or decision has been entered without an error of law." Fed. Cir. R. 36(a), (c), and (e). There is consequently no sound basis for inferring that the court of appeals endorsed all aspects of the CFC's reasoning, or for imputing to the court of appeals any subsidiary holdings that could conflict with decisions of other circuits.

Petitioner asserts that the Federal Circuit has previously endorsed the same categorical rule upon which the CFC based its decision here. Pet. 21-25 (citing *St. Christopher Assocs., L.P.* v. *United States*, 511 F.3d 1376 (Fed. Cir. 2008), and other cases). But, as petitioner recognizes (Pet. 23 n.13), the court of appeals has also applied the *Christian* doctrine, under which certain mandatory contract clauses required by statute or regulation may be incorporated into government procurement contracts even without an express reference in the contract itself. This case is a poor vehicle for clarifying the precise circumstances under which such incorporation will be deemed to have occurred. In his court of appeals briefs, petitioner did not invoke any of the decisions that he now cites in support of a purported general rule that "relevant laws which exist at the time of contract formation are incorporated into the contract by operation of law." Pet. 15; see Pet. 16-17 & nn.7-8. The court of appeals

therefore had no opportunity to address those precedents or to consider how they might apply to the facts of this case. Its unpublished, non-precedential affirmance neither deepens any prior division of authority nor impedes the court of appeals' ability to clarify these issues in a future case. And, as explained above, it would be particularly inappropriate to construe petitioner's CSP contract to incorporate a purported statutory requirement that squarely conflicts with the contract's express terms governing the payment amounts that petitioner was entitled to receive.

2. Petitioner's second question presented asks (Pet. i) this Court to review "[w]hether a federal agency can contract on terms that contradict the provisions of the statute that authorizes the contract." That question is not properly presented in this case.

a. Neither the CFC nor the court of appeals held that an agency may contract on terms that violate a federal statute. The government agrees with petitioner (Pet. 25-27) that federal contracting officers and contracts must fully comply with the law. Rather, with respect to Count 2 of petitioner's complaint, the dispute concerns the *remedies* available when a contractual term is alleged to be inconsistent with an applicable statute.[14]

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[14] Petitioner's second question does not implicate Count 4, relating to contract renewals. That question addresses (Pet. i) contracts containing "terms that contradict the provisions of the statute that authorizes the contract." As the CFC correctly recognized, petitioner's CSP contract is silent with respect to whether (and under what circumstances) contract renewals are authorized. See Pet. App. 67a-69a; pp. 6-7, 15-17, *supra*. Petitioner's claim for damages based on Count 4 fails not because any contractual provision trumps the CSP statute by prohibiting renewals, but because whatever rights to renew petitioner may have enjoyed under the

In the CFC, petitioner principally argued that he was entitled to damages for breach of contract, on the theory that the statutory requirements governing the calculation of base payments were impliedly incorporated into petitioner's CSP contract and that the government had failed to pay the required amounts. In rejecting that argument, the CFC noted that "there [was] no dispute that [petitioner] and similarly situated CSP participants have received payments in accordance with the express terms of their contracts." Pet. App. 40a. The court further held that, because "the CSP statute is not incorporated into [petitioner's] contract," *id.* at 49a, petitioner had "failed to identify a contractual provision which plausibly entitles him to the additional payments he seeks in Count [2]," *id.* at 50a.

"In the alternative to his claim for damages, [petitioner] also argue[d] [in the CFC] that he is entitled to reformation of his contract because it is based on regulations which are contrary to the CSP statute." Pet. App. 50a n.12. In rejecting petitioner's request for that alternative remedy, the CFC did not hold that NRCS has the right "to enter into contracts that directly contradict the terms of the underlying [CSP] statute" with respect to the calculation of base payments. Pet. 25. Rather, relying upon its prior decision in *Meyers* v. *United States*, 96 Fed. Cl. 34 (2010), appeal dismissed, 420 Fed. Appx. 967 (Fed. Cir. 2011), the CFC held that it lacked jurisdiction under the Tucker Act to determine whether any such conflict

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original CSP statute were eliminated by the 2008 Farm Bill. See 16 U.S.C. 3838a(g)(1); p. 6, *supra*. Petitioner briefly asserts (Pet. 29-30) that his second question implicates the contract-renewal issue, but he never explains why that is so.

existed. See Pet. App. 51a n.12 (rejecting petitioner's request for reformation of his contract because "there is no money-mandating source of law which would allow the court to reach the predicate issue of whether the [NRCS's] methodology for calculating base payments and adjusted base payments * * * violates the CSP statute"); *id.* at 53a-56a.

Petitioner's briefs in the court of appeals did not address either (1) the CFC's interpretation or application of *Meyers*; (2) the CFC's holding that it could exercise jurisdiction over petitioner's request for reformation of the contract only if the CSP statute is a "money-mandating" source of law; or (3) the CFC's determination that the CSP is not such a statute. Petitioner also did not address the significance, in determining the availability of a judicial reformation remedy, of the language in petitioner's CSP contract that authorized the government to terminate the contract without liability if it determined that the contract violated a statute. The petition for a writ of certiorari likewise does not discuss those issues. This case therefore would be an unsuitable vehicle for this Court to decide whether, and in what court, a reformation remedy is available in circumstances like these.

b. Contrary to petitioner's contention (Pet. 27-28), the decisions below do not conflict with this Court's decision in *Glavey* v. *United States*, 182 U.S. 595 (1901), or with the Court of Claims' decision in *Art Center School* v. *United States*, 142 F. Supp. 916 (1956). Each of those cases involved the government's alleged violation of a statutory or regulatory provision that granted a class of individuals a specified payment in exchange for certain services. See *Glavey*, 182 U.S.

at 596 (asserting statutory violation); *Art Ctr. Sch.*, 142 F. Supp. at 917-920 (regulatory violation). In each case, the court held that the plaintiff was not estopped from asserting its statutory or regulatory rights simply because it had agreed to contractual terms that were inconsistent with those rights. *Glavey*, 182 U.S. at 610; *Art Ctr. Sch.*, 142 F. Supp. at 920-921.

The courts in both *Glavey* and *Art Center School* held that the plaintiffs in those cases were entitled to relief because the United States had violated their *statutory or regulatory* entitlement to specified payments.[15] Neither decision turned on the alleged breach of a contractual obligation. Accordingly, neither case required the courts to confront the issues presented here—*i.e.*, whether a plaintiff can recover breach-of-contract damages on the theory that his contract impliedly incorporated purported statutory requirements inconsistent with the contract's plain text, and whether the Tucker Act grants the CFC jurisdiction to reform a contract based on its alleged inconsistency with a statute. Thus, even if the Federal Circuit could appropriately be assumed to have adopted the reasoning of the CFC, there is no conflict

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[15] See, *e.g.*, *Glavey*, 182 U.S. at 596 (describing case as an appeal from Court of Claims' dismissal of plaintiff's petition for salary); *id.* at 608 (stating that, because the statute that established the plaintiff's office provided for a "fixed annual salary for the incumbent," the plaintiff's appointment to the office and discharge of its duties "entitled [him] to demand the salary attached by Congress"); *Art Ctr. Sch.*, 142 F. Supp. at 920 (explaining that, "[i]nasmuch as the plaintiff's claims are founded upon statute, rules, and regulations, we do not think [plaintiff] thereby relinquished the right to claim the further compensation [beyond a contractually-agreed payment] allowed by law").

between the CFC's decision in this case and the principles set forth in *Glavey* and *Art Center School*.

c. Petitioner is also wrong to assert (Pet. 30) that, if the decisions below are permitted to stand, contractors will "have little recourse when executive agencies contract on terms that contradict those prescribed by Congress." In such circumstances, contractors would have the right to challenge any final agency action they believe to be unlawful under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* Although the APA does not authorize money damages, see 5 U.S.C. 702, any contractor who succeeds in establishing that an agency acted in violation of a statute would be entitled to a declaration to that effect, and the agency would be required to comply with the statute in the future. The availability of such relief refutes petitioner's claim (Pet. 25-26) that the court of appeals' unpublished decision below is "antithetical to established principles of administrative law and separation of powers."

Indeed, precisely because money damages are typically available when the federal government breaches its contracts, see generally *United States* v. *Winstar Corp.*, 518 U.S. 839, 885 (1996) (opinion of Souter, J.), while the court in an APA suit is authorized to award "relief *other than* money damages," 5 U.S.C. 702 (emphasis added), it is particularly important to distinguish as precisely as possible between the government's contractual and statutory obligations. Petitioner's broad rule of incorporation, under which agreements that are silent on the matter would routinely be construed as contractual promises that the government will obey related laws, would significantly expand the range of circumstances under which the

government's breach of statutory requirements will give rise to damages claims. That result would subvert the balance struck by Congress in limiting the relief available in APA suits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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