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INTRODUCTION

This is an action for declaratory and injunctive relief brought by the State of Connecticut and its legislature (collectively the “State”) seeking only that the federal government’s Secretary of Education (the “Secretary”) adhere to the plain meaning and promise of the No Child Left Behind Act, Pub. L. No. 107-110, 20 U.S.C § 6301 et seq. (“NCLB Act”) -- in order to allow the State to continue its fundamental and constitutionally protected task of educating its children. In particular, the State seeks enforcement of the NCLB Act’s explicit provision requiring that any additional expenditures resulting from the federal government’s imposition of additional requirements based on the NCLB Act, above and beyond Connecticut’s longstanding and nationally recognized commitment to educational accountability and success, be paid by the federal government. Alternatively, the State seeks a judicial determination that the new federal requirements which would result in additional unfunded expenditures be waived, as is fully contemplated by the NCLB Act.

The Secretary’s adamant and unfounded refusal to acknowledge her legal duty to choose one of these two options, or a suitable mixture of the two, violates not only the letter, meaning and spirit of the NCLB Act, but also contravenes the federal government’s constitutional spending powers and the Tenth Amendment to the United States Constitution. The Secretary’s motion to dismiss this action employs selective citations to law and fact, illogical construction of the relevant statutes, and represents a coercive attempt to avoid Congress’ plainly stated commitment to this State and all States when they chose to participate in this federal program. Her unjustified attempt to avoid appropriate determination of these important issues on their merits should be rejected, so that the meaning of this law may be adjudicated, and Congress’ intent that this law foster and ensure a true and equitable federal-State partnership is vindicated.

BACKGROUND

Education historically has been the exclusive realm of the States. As the Supreme Court has repeatedly recognized, education is “perhaps the most important function of state and local governments,” Honig v. Doe, 484 U.S. 305, 309 (1988), *quoting* Brown v. Board of Education, 347 U.S. 483, 493 (1954), and is committed to state and local control. Board of Curators v. Horowitz, 435 U.S. 78, 91 (1978); Epperson v. Arkansas, 393 U.S. 97, 104 (1968). Although educational rights are absent from the federal constitution, the Connecticut Constitution grants children a free public elementary and secondary education, and directs the state legislature to “implement this principle by appropriate legislation.” Conn. Const. Art. Eighth.

The State of Connecticut and its legislature have taken this responsibility seriously. As codified in its statutes, the “educational interests of the state” include the concern that (1) each child have an equal opportunity to receive a suitable program of educational experiences; (2) each school district provide the reasonable financial resources to accomplish this; and (3) each school district provide educational opportunities to reduce racial, ethnic and economic isolation. Conn. Gen. Stat. § 10-4a. Long before the federal government conceived the concept of accountability in education, the State already annually required public school students in grades 4, 6, 8 and 10 to take the Connecticut Mastery Test (CMT). Complaint ¶ 47; Conn. Gen. Stat. § 10-14n. Designed to measure higher-level thinking and communication skills, the CMT utilizes short essays and written explanations as well as multiple choice questions. Complaint ¶ 47. Over its twenty-year history of student assessments, Connecticut has provided reasonable accommodations for the testing challenges faced by special education students and English language learner (“ELL”) students. Complaint ¶¶ 50-52; Conn. Gen. Stat. §§ 10-14n, 10-14q.

The Connecticut legislature has also directed substantial additional resources to school districts with high concentrations of students performing below proficiency. Complaint ¶ 54.

Since 1996-1997, the State has spent over \$600 million in new funds on preschools, early reading instruction, after-school programs and a wide variety of instructional support programs. Complaint ¶ 55. The State's extensive financial commitment to education and its rigorous statutory assessment scheme have borne results, for its students are among the top performing students in the nation. Complaint ¶ 56.

Before passage of the NCLB Act in 2002, the federal government's role in education generally was limited to providing supplemental resources to targeted groups of disadvantaged students, generally "Title I" students (with the most economic disadvantages, such as high poverty and homelessness) and special education students. By contrast, the ten Titles of the 670-page NCLB Act affect *all* students in the nation's public schools, not only special education students or those in public schools that qualify for and receive Title I funding.¹ The NCLB Act greatly expands federal involvement in the traditionally State-dominated realm of education.

In addition to dictating teacher certification standards, the NCLB Act requires that all public school students be assessed (tested), and that the results of those assessments be publicly reported. The results, by subgroups within each public school, must satisfy incrementally-increasing benchmarks, called "Adequate Yearly Progress" or "AYP," with the ultimate goal of 100% of the nation's students satisfying AYP by 2014. NCLB Act § 1111(b)(2)(F) (115 Stat. 1447-48) 20 U.S.C. § 6311(b)(2)(F).² The consequences for a school failing to make AYP are

¹ In order to better present the overall structure and meaning of the NCLB Act, the State cites to the Public Act as passed, rather than as codified. Therefore references to the Act within this Opposition will be to the Public Act sections and statutory ["Stat."] page citations, with cross-references to the codified statute. A searchable, electronic .pdf copy of the Government Printing Office's (GPO) official version of the entire 670 pages of the NCLB Act accompanies both the chambers copy of this Opposition and the courtesy copy provided to opposing counsel. Because the Act currently is being reprinted, paper copies from the GPO are on backorder and were not available at the time of filing.

² A school can fail to make AYP if one subgroup of students in one grade fails to test to level. Thus, if a subgroup of English language learners in 5th grade fails to make AYP, the entire school is deemed "failing." If the next year the 5th grade ELL students make AYP, but a subgroup of Hispanic students in

severe, ranging from mandatory tutoring, and providing school choice, to dismantling a school that fails to meet AYP for five years. *See* NCLB Act § 1116(b)(8) (115 Stat. 1485) 20 U.S.C. § 6316(b)(8).

What the States and localities need to do to comply with the requirements of the NCLB Act is complicated and confusing, and has resulted in extensive and repeated clarifications from the federal government to the States and local school districts. In the first two years after the Act's passage, the Secretary and her staff issued dozens of guidance documents, hundreds of letters, three sets of formal regulations, and several informal policy statements, a process that continues to this day. Complaint ¶ 27. Moreover, the Secretary, by and through her staff, has reviewed the accountability plans for the states, which were subjected to considerable negotiation, discussion and amendment. Complaint ¶ 29. Although the Secretary has broad statutory authority to waive any NCLB statutory or regulatory requirement, the Secretary has rejected most requests for waivers, favoring a rigid one-size-fits-all approach to the NCLB requirements. Complaint ¶¶ 58-92.

Nonetheless, the Secretary's authority to implement the NCLB Act is subject to express statutory limitations. Of particular relevance here, the Secretary is prohibited from requiring any State or local government to spend any funds or incur any costs to satisfy the requirements of the NCLB Act:

(a) GENERAL PROHIBITION. Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.

3rd grade fails to make AYP, the entire school again is deemed "failing" and the consequences for "failing" two years in a row are imposed upon the school, even though in both years all but 40 students achieved AYP.

NCLB Act § 9527(a), codified at 20 U.S.C. § 7907(a) (hereinafter the “Unfunded Mandates Provision”). At the heart of this litigation is the central, fundamental disagreement between the parties regarding the meaning of the NCLB Unfunded Mandates Provision. The Secretary contends that she can require the States and localities to spend their own funds to comply with the requirements of the NCLB Act, and the State respectfully submits that both the plain language of the statute and the operation of the federal constitution prohibit her from doing so.

The State’s understanding of the meaning of the Unfunded Mandates Provision was reflected in its own statutory implementation of the NCLB Act. In particular, when it passed Connecticut Public Act No. 03-168, codified at Conn. Gen. Stat. § 10-14n, the state legislature required the Connecticut Mastery Tests to be “in conformance” with the NCLB Act,

provided (1) any costs of such conformance to the state and local or regional boards of education that are attributable to additional federal requirements of the [NCLB Act] shall be paid exclusively from federal funds received by the state and local or regional board of education pursuant to the [NCLB Act.]

Conn. Gen. Stat. § 10-14n(g). At the same time, the state legislature required a study and report on whether federal funding was sufficient to meet the additional federal expense as follows:

The joint standing committee of the General Assembly having cognizance of matters relating to education shall, on or before February 1, 2004, evaluate the estimated additional cost to the state and its local and regional boards of education for compliance with the requirements of the [NCLB Act], net of appropriated federal funds for such purpose, and the comparable amount of estimated federal funds to be received by the state and its local and regional boards of education pursuant to the [NCLB Act] and report its findings and recommendations, if any, pursuant to the provisions of [Conn. Gen. Stat.] section 11-4a.

Conn. Gen. Stat. § 10-14n(g). This obligation to compare the additional costs of the NCLB federal requirements with federal funding was subsequently delegated to the State’s Office of Policy and Management and the State Department of Education. 2004 Conn. Pub. Act No. 254. In no small part due to the results of its statutorily-mandated studies, the State contends that

federal funding for NCLB requirements is substantially less than the additional costs attributable to the federal requirements of the NCLB Act. Complaint ¶¶ 5, 40-44.

The state legislative history of Conn. Gen. Stat. § 10-14n(g) demonstrates that the State relied upon the plain meaning of the Unfunded Mandates Provision when the State made the statutory changes required to comply with the NCLB Act.³ The state senate added the restrictive language of §10-14n(g) to the NCLB implementation bill due to its concern about the potentially enormous additional expense of complying with the NCLB Act. The senators also expressed a healthy skepticism about its utility in a state with an established accountability and assessment program.⁴ After outlining the millions of dollars necessary for implementation, State Sen. Sullivan noted that the State could “only pray that that one magic phrase [in] Leave No Child Behind that says if the feds don’t fund it, we don’t have to do it, turns out to be real.” 46 Conn. S. Proc., pt. 9, 2003 Sess. 2626 (May 21, 2003). State Sen. Freedman noted that passage of the restrictive language amendment “at least puts us in the position of being able to control what we have to do in this state. And if the money ain’t there, folks, we can’t do it.” *Id.* at 2632.

In an effort to harmonize a long-established, successful state assessment and accountability program with a nascent federal program, and with the knowledge that the allotted federal funds were insufficient to meet the additional federal requirements, the State requested waivers from the Secretary in a few targeted areas. Complaint ¶ 59. Specifically, it requested the ability to continue its successful, long-standing program of giving annual tests in alternate

³ The State Senate discussion of Conn. Pub. Act No. 03-168 is attached as Exhibit 1 to this Opposition.

⁴ “The problem develops when federal mandates come our way, whenever they try to impose a law uniformly for every state in the country. There is a world of difference between the educational level and the performance of the students in Connecticut and students in some parts of our country. Connecticut ... is at the very highest end.” 46 Conn. S. Proc., pt. 9, 2003 Sess. 2630 (May 21, 2003) (comments of State Sen. Herlihy). Thus, State Sen. Freedman noted that “we already lead the rest of the United States in most of the things that we do with education and we don’t want to lower our bar. We want to continue to raise the bar in Connecticut.” *Id.* at 2632. *See also id.* at 2634 (comments of State Sen. Gaffney) (same).

grades, to provide special education students with the option of being tested at instructional level rather than grade level, and to provide English language learner students up to three years in U.S. school systems before being required to take the assessments. Id. If the waivers were not granted, the federal funds would be woefully insufficient to meet the additional federal requirements. Complaint ¶¶ 61, 66, 72, 80, 86, 88, 89, 91. The Secretary categorically and absolutely refused to entertain any waiver requests due to insufficient federal funding. Complaint ¶ 58. She also flatly denied the above three waiver requests. Complaint ¶¶ 59-92. As a result, in March 2006 every 3rd, 5th, and 7th grader in Connecticut's public schools will be required to take the CMT and the State will be forced to pay to administer, score and evaluate those assessments.

Although the Secretary contends in her brief that the State's compliance with the NCLB Act requirements are "voluntary," the consequences for opting-out of the NCLB Act requirements reverberate well beyond NCLB funding. In response to an inquiry from the State of Utah on the issue of opting-out of the NCLB Act, the Secretary and her staff responded that not only would Utah forfeit its NCLB Act funds, it would also forfeit its Title I funds, and any federal educational funding that utilized a Title I formula. Complaint ¶ 35. Thus, funding for federal education programs that have no connection with NCLB, such as safe and drug free schools, after-school programs, and literacy programs for parents, would be completely eliminated. Id.⁵ Applying such opt-out consequences to Connecticut, the State would lose hundreds of millions of dollars in Title I funds and unrelated federal education funds if it opted out of the NCLB Act mandates as imposed by the Secretary and her staff. Complaint ¶ 36.

⁵ During the legislative consideration of Pub. Act. No. 03-168, State Sen. Gaffney thought that only Title I funds were implicated by an opt-out, and noted that forfeiting \$200 million in Title I monies presented an unacceptable Hobson's choice for the State. 46 Conn. S. Proc., pt. 9, 2003 Sess. 2635 (May 21, 2003).

MOTION TO DISMISS STANDARD

The Secretary seeks to dismiss the State’s Complaint under Rules 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction and failure to state a claim. “[T]he standards for dismissal under 12(b)(6) and 12(b)(1) are substantively identical.” Lerner v. Fleet Bank, N.A., 318 F.3d 113, 128 (2d Cir.), *cert. denied*, 540 U.S. 1012 (2003). When considering a motion to dismiss under either Rule, the Court accepts “all of the plaintiff’s factual allegations in the complaint as true and draw[s] inferences from those allegations in the light most favorable to the plaintiff.” Courtenay Communications Corp. v. Hall, 334 F.3d 210, 213 (2d Cir. 2003). Dismissal is inappropriate “unless it appears beyond doubt, even when the complaint is liberally construed, that the plaintiff can prove no set of facts that would entitle him to relief.” Id. In making this determination, “[the Court’s] task is necessarily a limited one. The issue is not whether the plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims.” Scherer v. Rhodes, 416 U.S. 232, 236 (1974). For purposes of Rule 12(b)(1), the burden is on the plaintiff to establish that jurisdiction exists. Makarova v. U.S., 201 F.3d 110, 113 (2d. Cir. 2000). For purposes of Rule 12(b)(6), the burden is on the defendant to prove that no claim has been presented. Lerner v. Fleet Bank, N.A., 318 F.3d 113, 128 (2d Cir. 2003); Scholastic Corp. v. Kassem, 389 F. Supp. 2d 402, 404 (D. Conn. 2005). In the present case, dismissal is not warranted under either Rule.

Matters outside the pleadings generally are not permitted to be considered for purposes of a 12(b)(6) motion to dismiss, and are only permitted with a full evidentiary record for a 12(b)(1) motion. Fed. R. Civ. Pro. 12(b); Friedl v. City of New York, 210 F.3d 79, 84 (2d Cir. 2000). During the status conference with the Court, counsel for the Secretary represented that she was not relying upon any matters outside the pleadings for any purpose in her motion to dismiss.

Accepting that representation, the State does not address the referenced extrinsic materials and respectfully objects to their inclusion in any court consideration of the motion.

ARGUMENT

In her motion to dismiss, the Secretary seeks to avoid the NCLB Act's express provisions prohibiting unfunded mandates and assuring flexibility by interposing meritless jurisdictional challenges, misreading clear statutory terms, and obscuring unequivocal legislative intent. The Secretary maintains that she has every legal right to require the State and local school districts to spend their own funds to meet her distorted views of what the NCLB Act requires. The State is thus caught between the Secretary's illegal mandate to spend state funds (by administering every grade tests in March 2006, for example) and state law, which prohibits spending state funds for these purposes. The State lacks the luxury of postponing adjudication of these crucial issues until the money is expended and the testing and educational programs have been administered. The State bears the multiple responsibilities of obeying the law (both federal and state) *now*, while educating its children, supporting its schools, and still imposing accountability. Connecticut's schools and children need not suffer the harm of losing all federal education funds as a precondition to obtaining judicial relief from the Secretary's current, ongoing violations of the NCLB Act. The imminent harm to the State is real, and its claims are ripe.

The Secretary incorrectly suggests that Connecticut is attempting to avoid the goals and requirements of the NCLB Act. The State seeks only that the federal government obey the law by paying the additional costs imposed upon the State by the Secretary's rigid, misguided interpretations of the NCLB Act or grant the State the flexibility it needs to meet the NCLB Act's goals and requirements within the federal funding provided. The NCLB Act's twin principles of accountability and flexibility support this interpretation, and the NCLB Unfunded Mandate Provision compels it. The Secretary has chosen to implement her misreading of the

NCLB Act's requirements in violation of their plain meaning and the boundaries of constitutional conduct. Her actions are not exempt from judicial scrutiny and review.

I. THIS COURT HAS SUBJECT MATTER JURISDICTION OVER THE STATE'S CLAIMS.

The Secretary's erroneous assertion that this Court lacks subject matter jurisdiction over the State's claims fundamentally misconstrues the nature of the State's Complaint. In arguing that "the State seeks to challenge the Secretary's enforcement of certain statutory requirements before the Secretary has taken any enforcement action," Memorandum of Law in Support of Defendant's Motion to Dismiss (hereinafter "Def. Br."), p. 14, the Secretary incorrectly characterizes this case as a "pre-enforcement challenge" to the Secretary's authority to force the State to comply with the requirements of the NCLB Act when, and if, the State ceases to comply. *Id.* The issue, however, is not the State's possible, future noncompliance with the NCLB Act, but rather *the Secretary's noncompliance now*. By imposing mandates on the State without providing the necessary funding to pay for them, and denying the State's requests to waive compliance with those mandates, the Secretary is violating the express requirements of the Unfunded Mandates Provision of the NCLB Act and the Spending Clause of the United States Constitution. *See* Complaint ¶¶ 11-12. Moreover, these violations are not speculative concerns, relevant only to a possible future enforcement action against the State. Rather, these violations that have already occurred and burden the State daily as it struggles to both educate its children and satisfy the unfunded mandates imposed by the Secretary's rigid and unsupportable interpretation and implementation of the NCLB Act.

Because, as discussed below, nothing in the limited administrative review provisions of the NCLB Act bars this Court from reviewing the State's constitutional and statutory claims,

which are clearly ripe for review, the Secretary's assertion that this court lacks subject matter jurisdiction is wholly without merit.

A. The NCLB Act Does Not Preclude Judicial Review Of The State's Claims That The Secretary Is Violating An Express Statutory Mandate And The Federal Constitution.

The U.S. Supreme Court has long recognized a "strong presumption that Congress intends judicial review of administrative action." Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670 (1986), *citing* Marbury v. Madison, 5 U.S. 137, 163 (1803) ("[t]he very essence of civil liberty certainly consists of the right of every individual to claim the protection of the laws"). This means that "only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review." *Id.* at 671 (citations and internal quotation marks omitted); Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967). "[O]rdinarily [the Court] presume[s] that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command." Bowen, 476 U.S. at 681. In short, "judicial review of . . . administrative action is the rule, and nonreviewability an exception that must be demonstrated." Barlow v. Collins, 397 U.S. 159, 166-167 (1970).

Applying these principles, the Supreme Court has repeatedly refused to bar judicial review of the conduct of administrative officials -- whether "pre-enforcement" or otherwise -- in the absence of clear statutory language or legislative history barring judicial review of the precise type of claim asserted. For example, in McNary v. Haitian Refugee Center, Inc., 498 U.S. 479 (1991), the Court considered whether the statutory administrative and judicial review provisions of the Immigration and Nationality Act ("INA") precluded a federal district court from exercising general federal question jurisdiction over an action alleging a pattern of procedural due process violations by the Immigration and Naturalization Service ("INS") in its

administration of an amnesty program for special agricultural workers (“SAWs”). Although the administrative and judicial review provisions of the INA expressly prohibited judicial review of the denial of individual applications for SAW status unless and until the INS initiated deportation proceedings, the district court nonetheless concluded that it had jurisdiction over the plaintiffs’ suit prior to the initiation of such proceedings. The Court reached this conclusion because the precise language of the INA review provisions pertained solely to individual denials of SAW status and made no mention of review of the type of claim presented by the plaintiffs -- namely, that the practices and procedures employed by the agency in making its decisions were unconstitutional. If Congress had intended to bar judicial review of such claims, the Court reasoned, it could have used language barring judicial review of “all questions of law and fact,” as it had in other statutory schemes. The Court further noted that the administrative review provided by the INA was based on a very limited administrative record that would not adequately address procedural and constitutional claims of the type raised by the plaintiffs and thus it was doubtful whether the plaintiffs could ever get meaningful review of their claims. “[G]iven the absence of clear congressional language mandating preclusion of federal jurisdiction and the nature of the respondents’ requested relief,” the Court concluded that the district court had jurisdiction to hear respondents’ constitutional and statutory challenges. McNary, 498 U.S. at 483-484.

Similarly, in Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), the Court considered whether the Federal Food, Drug and Cosmetic Act barred pre-enforcement judicial review of a claim by drug manufacturers that the Commissioner of Food and Drugs lacked the authority to issue a regulation requiring the established name of a drug to accompany every reference to the drug’s proprietary name. Although the Act explicitly provided for judicial review of certain

kinds of regulations, the fact that it did not explicitly permit judicial review of the type of regulation at issue did not, in the Court's view, permit the conclusion that review was barred. According to the Court, "[t]he right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent." *Id.* at 141. Given the fact that the Act further included a savings clause, which stated that the remedies provided would be in addition to, and not in substitution for, other remedies provided by law, and the legislative history provided no evidence that Congress meant to preclude traditional avenues of judicial relief, the Court concluded that the Act did not bar the district court from exercising jurisdiction over the drug company's claims.

Applying the reasoning of McNary, Abbott, and similar cases, lower federal courts have repeatedly upheld district court jurisdiction in cases seeking pre-enforcement judicial review of agency conduct. *See, e.g., General Electric Co. v. EPA*, 360 F.3d 188 (D.C. Cir. 2004) (provision of environmental statute barring judicial review did not bar pre-enforcement judicial review of facial constitutional challenge); Kreschollek v. Southern Stevedoring Co., 78 F.3d 868 (3rd Cir. 1996) (district court could properly exercise jurisdiction over plaintiff's pre-enforcement constitutional claim); Rocky Mountain Radar, Inc. v. FCC, 158 F.3d 1118 (10th Cir. 1998), *cert. denied*, 525 U.S. 1147 (1999) (nothing in multi-step enforcement mechanism for FCC enforcement actions evidenced a legislative intent to forestall judicial review pending forfeiture process).

Only in the rare case in which Congressional intent to preclude review is clear and convincing will the Court conclude that federal subject matter jurisdiction is lacking. Such was the situation in Thunder Basin v. Reich, 510 U.S. 200 (1994), upon which the Secretary relies. In Thunder Basin, the Court concluded that the Federal Mine Safety and Health Amendments

Act (the “Mine Act”) precluded judicial review of a mining company’s pre-enforcement claim that a Department of Labor regulation adopted pursuant to the Act violated federal statutory and constitutional law. According to the Court, Congressional intent to preclude review was evident in the extremely comprehensive nature of the Mine Act’s administrative review provisions, which established “a detailed structure for reviewing violations of ‘*any mandatory health or safety standard, rule, order, or regulation promulgated*’ under the Act.” Thunder Basin, 510 U.S. at 207, *quoting* 30 U.S.C. § 814(a) (emphasis added). If the Secretary of Labor cited a mine operator for such a violation, the mine operator could challenge the citation before an administrative law judge, after which the Federal Mine Safety and Health Review Commission, which was independent of the Department of Labor, could exercise discretionary review over any case involving, among others, a “substantial question of law, policy or discretion” or any decision “contrary to law or Commission policy” or in which “a novel question of policy has been presented.” Thunder Basin, 510 U.S. at 208 n. 9, *citing* 30 U.S.C. § 823(d)(2). The Commission reviewed all proposed penalties *de novo* and could grant temporary relief of most orders, expedite review, and impose penalties recommended by the Secretary. In short, it functioned much like a district court.

The conclusion that Congress intended the Mine Act’s comprehensive administrative review scheme to preclude pre-enforcement district court challenges was buttressed by the legislative history of the Act, which made clear that the primary purpose of establishing the Commission was to streamline the enforcement process and eliminate the power of mine operators to challenge final penalty assessments *de novo* in district court and thereby delay the abatement of violations and endanger the safety of miners. Thunder Basin, 510 U.S. at 210-211.

The Court further determined that the issues presented were the type that Congress intended to be reviewed within the statutory scheme. In particular, the Court held that the mining company's statutory claims were appropriately reviewed by the Commission because one of the reasons Congress had established the Commission was to "develop a uniform and comprehensive interpretation" of the Mine Act. Thunder Basin, 510 U.S. at 214. With regard to the company's constitutional claims, the Court observed that although the "[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies," *id.* at 215, *citing* Oestereich v. Selective Service Commission Local Board No. 11, 393 U.S. 233 (1968), the Commission was not the agency itself, but an independent commission that had dealt with constitutional issues in the past. *Id.* These factors further supported the Court's conclusion that "the Mine Act's comprehensive enforcement structure, combined with the legislative history's clear concern with channeling and streamlining the enforcement process, establishe[d] a fairly discernible intent to preclude district court review." Thunder Basin, 510 U.S. at 216 (internal quotation marks omitted).

The same cannot be said of the NCLB Act. In stark contrast to the Mine Act, the NCLB Act has no comprehensive administrative review scheme. Whereas the Mine Act established "a detailed structure for reviewing violations of 'any mandatory health or safety standard, rule, order, or regulation promulgated' under the Act," Thunder Basin, 510 U.S. at 207, *quoting* 30 U.S.C. § 814(a)(emphasis added), the NCLB Act has no similarly broad provision. Indeed, *the NCLB Act itself does not establish any generally applicable administrative review scheme*, and specifically provides for judicial review in a few, specialized instances, none of which pertain to the State's claims. Specifically, the NCLB provides that:

- waivers of the requirement that local educational agencies provide educational services for immigrant children in nonpublic schools "shall be subject to

consultation, withholding, notice, and judicial review requirements in accordance with the provisions of title I.” NCLB Act § 3246 (115 Stat. 1727) 20 U.S.C. § 6966;

- when a person is aggrieved by a civil penalty or compliance order for violating the prohibition on smoking in facilities used for education or library services for children, the person may file “a petition for judicial review of the order with the United States Court of Appeals for the District of Columbia Circuit or for any other circuit in which the person resides or transacts business.” NCLB Act § 4303(d) (115 Stat. 1776) 20 U.S.C. § 7183(e)(5); and
- when the Secretary withholds funds or issues orders pertaining to noncompliance with the requirements for equitable provision of certain services to students enrolled in private schools, including special education services, the educational agency affected may file a petition for review by the United States Court of Appeals for the circuit in which the State is located. NCLB Act §§ 5142(h), 9504 (115 Stat. 1787, 1978-79) 20 U.S.C. §§ 7217a(h), 7884.

Totally absent from the NCLB Act is any provision for administrative and judicial review of the type of claim that the State presents -- namely, that the Secretary is administering the Act in blatant and unconstitutional violation of the directives of the Unfunded Mandates Provision. In addition, there are no review provisions pertaining to the Secretary’s denial of the State’s request for waivers of the Act’s statutory requirements and regulatory interpretations, and no provisions governing review of any decision by the Secretary to withhold non-Title I funds for state administration of the NCLB Act pursuant to NCLB Act § 1111(g) (115 Stat. 1457) 20 U.S.C. § 6311(g). *See* Def. br. 18 n.9.

Indeed, the Secretary concedes that there is no relevant scheme for administrative and judicial review in the NCLB Act and instead asserts that the General Education Provisions Act (“GEPA”) establishes the applicable procedures. *See* Def. br. 16 n.6 and 18 n.9, *citing* 20 U.S.C. § 1234 *et seq.* The GEPA provisions on which the Secretary relies, however, are limited solely to review of these situations in which the Secretary decides to recover funds from a grant recipient, withhold funds from a grant recipient, or seeks an order requiring a grant recipient to cease and desist violating any requirement of law applicable to such funds. 20 U.S.C. §§ 1234a,

1234d, 1234e and 1234c. Nowhere is there any provision for review of the Secretary's denial of the State's request for waivers of the Act's statutory requirements and regulatory interpretations or her plainly unconstitutional violation of the directives of the NCLB Unfunded Mandates Provision. Nor is there any provision for review of any actions withholding non-Title I funds for state administration pursuant to NCLB § 1111(g) (115 Stat. 1457) 20 U.S.C. § 6311(g). *See* Def. br. 18 n.19.

Even where the GEPA does establish a system of administrative review, the review provided is far less extensive than that of the Mine Act. Most significantly, unlike the Mine Act, the GEPA lacks any provision for an *independent commission* to review the determinations of the administrative law judge. Because the independent Federal Mine Safety and Health Review Commission established by the Mine Act functions much like a district court, the absence of any similar independent reviewing body in the GEPA provisions is significant, and undercuts the Secretary's argument that Congress intended the NCLB/GEPA provisions to preclude district court review.

The significance of the absence of an independent review commission in the NCLB/GEPA provisions is heightened by the fact that the Court in Thunder Basin specifically relied on the existence of the commission, a body independent of the agency which was intended to develop a uniform and comprehensive interpretation of the Mine Act, in concluding that the statutory and constitutional claims at issue were the type of claims that Congress intended to be reviewed under the Mine Act's statutory scheme. The GEPA's lack of such a Commission supports precisely the opposite conclusion.⁶

⁶ The Secretary has filed a supplemental brief indicating her reliance not only on Thunder Basin, but also on Doe v. FAA, 2005 WL 3369753 (11th Cir. Dec. 13, 2005). Doe is distinguishable from the present case for the same reasons that Thunder Basin is distinguishable -- it involves an Act with a

Indeed, because the Court “ordinarily presume[s] that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command,” Bowen, 476 U.S. at 681, the Supreme Court has repeatedly upheld federal court jurisdiction over claims that an administrative official is acting unconstitutionally or in violation of federal law. For example, in Oestereich v. Selective Service System Local Board No. 11, 393 U.S. 233 (1968), the Court held that the district court had jurisdiction over a theology student’s claim that the Selective Service Board had improperly denied him an exemption from military service. Although the Selective Service Act expressly barred pre-induction judicial review of such claims, the Court held that the student unquestionably qualified for an exemption under the Act and thus the case involved “a clear departure by the Board from its statutory mandate.” Id. at 238. Upholding the district court’s jurisdiction, the Court concluded that to require “a person deprived of his statutory exemption in such a blatantly lawless manner [to] either be inducted and raise his protest through habeas corpus or defy induction and defend his refusal in a criminal prosecution is to construe the Act with unnecessary harshness.” Id. at 238.

Similarly, in Leedom v. Kyne, 358 U.S. 184 (1958), the Court concluded that the district court had jurisdiction over a claim that the National Labor Relations Board had violated the National Labor Relations Act by including both professional and nonprofessional employees in one bargaining unit. Although the Act, at least by implication, precluded judicial review, the Court noted that the suit was “not one to ‘review,’ in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it [was] one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the

comprehensive statutory review scheme, including an independent review commission, that is wholly lacking from the NCLB Act.

Act.” Id. at 188. The Court concluded that “[s]urely, in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given.” Id. at 189.⁷

The same conclusion is warranted here. Given the explicit language of the Unfunded Mandates Provision, prohibiting “an officer or employee of the Federal Government to mandate, direct or control . . . allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under [the NCLB Act],” “surely . . . a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given.” *See Leedom*, 358 U.S. at 189.

Significantly, nothing in Bell v. New Jersey and Pennsylvania, 461 U.S. 773 (1983), like Leedom, suggests otherwise. Although the Secretary argues that “[a]ny doubt as to whether judicial review may occur outside the applicable statutory framework is erased by Bell,” Def. br. 18, the Secretary’s reliance is misplaced. Contrary to the Secretary’s implied assertions, Bell did not address the issue of pre-enforcement district court jurisdiction. Instead, Bell considered whether agency orders assessing deficiencies against two States for misusing Title I funds were sufficiently “final” to be reviewable by the United States Court of Appeals pursuant to the relevant statutory scheme. Applying a pragmatic view of finality, the Court concluded that the orders were sufficiently final to vest jurisdiction in the Court of Appeals, notwithstanding the possibility of further agency proceedings to determine the method of repayment. Thus, Bell concerned the issue of finality, which is relevant to the question of ripeness discussed below, not

⁷ Lower federal courts have repeatedly followed Leedom and Oestereich, *see, e.g., Dart v. U.S.*, 848 F.2d 217 (D.C. Cir. 1988), and, even in the extreme situation in which a federal statute bars *all* judicial review of agency conduct, have upheld judicial review of claims alleging constitutional violations or violation of a clear statutory mandate. *See, e.g., Murphy ex. rel. Estate of Payne v. U.S.*, 340 F. Supp. 2d 160, 174-178 (D. Conn. 2004), *aff’d*, 427 F.3d 158 (2d Cir. 2005); Czerkies v. U.S. Dept. of Labor, 73 F.3d 1435 (7th Cir. 1996).

the issue of district court jurisdiction prior to a determination by the agency that a violation of the Act has occurred.

In sum, nothing in Bell, Thunder Basin or Doe alters the conclusion that this Court has jurisdiction over the State's claims. Unlike the Acts at issue in Thunder Basin and Doe, the NCLB Act lacks a comprehensive scheme of administrative review or any other clear and convincing evidence of Congressional intent to preclude judicial review of the types of statutory and constitutional claims that the State presents. The Secretary contends that she has the legal right to require the State and localities to spend their own funds to meet the new federal educational requirements and has already acted accordingly. The State contends that the Unfunded Mandate Provision and the Tenth Amendment directly prohibit the Secretary's actions requiring the State and localities to spend their own funds to meet the NCLB Act requirements. Given the State's allegations that the Secretary is violating an express statutory command, and the presumption that "Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command," Bowen, 476 U.S. at 681, this Court has jurisdiction over the State's claims.

B. The State's Claims Are Ripe For Review.

The State's claims are not only within this Court's jurisdiction, but also ripe for review because the issue here is not the State's possible, future noncompliance with the NCLB Act, but rather *the Secretary's noncompliance now*. The two-part inquiry for determining whether a claim is ripe for judicial review requires the court to evaluate "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967). In the present case, both factors compel the conclusion that the State's claims are ripe.

First, the State's claims are fit for judicial resolution. In determining "the fitness of the issues for judicial resolution," the Court considers (1) whether the case presents purely legal issues that do not need further factual development; and (2) the finality of the agency action. Abbott, 387 U.S. at 149-150. With regard to the first factor, the State's two primary claims are almost entirely legal in nature. In particular, the issue whether the NCLB Unfunded Mandates Provision prohibits the Secretary from requiring the State to expend state funds in order to comply with the requirements of the NCLB Act is a purely legal question, turning on principles of statutory construction. The second issue -- whether the Secretary, who admits to requiring the State to expend its own funds to meet the requirements of the NCLB Act, has thereby violated the Spending Clause and the Tenth Amendment -- is likewise primarily legal, requiring consideration of whether the disparity between the plain language of the Unfunded Mandates Provision and the Secretary's interpretation of that provision misled or coerced the State within the meaning of South Dakota v. Dole, 483 U.S. 203 (1987). Contrary to the Secretary's assertion, the State is not asking the Court to determine, as a factual matter, the amount of federal funding that would be necessary to meet the State's obligations under the NCLB Act. Instead, what the State seeks is a declaratory judgment that the State is not required to expend its own funds to comply with the Act and an injunction prohibiting the Secretary from requiring it to do so. Whether the issuance of such relief is warranted requires a legal analysis, not a factual one.

Not only are the State's claims primarily legal in nature, but the Secretary's conduct in repeatedly denying the State's waiver requests constitutes "final agency action." As the Supreme Court explained in Abbott, cases dealing with judicial review of administrative actions have taken "a flexible view of finality." Abbott, 387 U.S. at 150; *see also* Bell v. New Jersey, 461 U.S. 773, 779 (1983) ("[o]ur cases have interpreted pragmatically the requirement of

administrative finality, focusing on whether judicial review at the time will disrupt the administrative process”). Thus, for example, the Supreme Court has held that an agency order that has no authority except to give notice of how the agency interprets a statute, and a regulation that could properly be characterized only as a statement of intent, are both sufficiently final to be reviewable. *Id.*, citing Frozen Food Express v. U.S., 351 U.S. 40 (1956) and Columbia Broadcasting System v. U.S., 316 U.S. 407 (1942); see also Ward v. Skinner, 943 F.2d 157, 159-161 (1st Cir. 1991), *cert. denied*, 503 U.S. 959 (1992) (court had jurisdiction to review Secretary of Transportation’s denial of waiver of safety regulation).

Applying this flexible approach to finality, the Court in Abbott held that the regulations at issue were sufficiently final to be reviewable because they were “definitive” statements of the agency’s position, with no indication that the agency intended further administrative proceedings, Abbott, 387 U.S. at 151, and had a “direct and immediate . . . effect on the day-to-day business” of the complaining parties. *Id.* at 152. The same is true in the present case. The Secretary’s repeated denials of the State’s formal requests for waivers of certain NCLB Act requirements, see Complaint ¶¶ 64, 76 and 81; Parties’ 26(f) Report, and her insistence that the State must comply with all requirements of the NCLB Act even if federal funding is inadequate to cover the State’s costs of compliance, are definitive statements of the agency’s position that are not subject to further administrative proceedings. Furthermore, they have a direct and immediate effect on the day-to-day business of the State. In particular, the State must now institute testing in grades 3, 5, and 7, and has hired private contractors to develop and pilot new tests, rather than maintain its current every-other-grade testing policy. See Complaint ¶¶ 66, 67. In March 2006, every 3rd, 5th, and 7th grader in the State must take the CMT examinations, and the State will need to pay to administer and grade those examinations. The State also must

develop an entirely new testing regime for certain special education students in each grade being tested, Complaint ¶¶ 80, 88, and faces the harsh dilemma of either spending millions of dollars in State funds to create, administer, and grade native language tests or suffer the draconian consequences of “failure” under the NCLB Act if its ELL students cannot understand the current tests. Complaint ¶ 86. Moreover, all of these direct and immediate effects are at considerable cost to the State and thus in contravention of state law and the Unfunded Mandates Provision of the NCLB Act. Complaint ¶¶ 89, 92.

The second prong of the two-part ripeness inquiry requires consideration of “the hardship to the parties of withholding court consideration.” Abbott, 387 U.S. at 149. In Abbott, the plaintiff drug companies had to comply with the agency’s regulation, which would have entailed changing their labels, advertisements and promotional materials, destroying stocks of printed matter, and investing heavily in new printing type and supplies, or risk serious criminal and civil penalties for distributing “misbranded” drugs. The Court concluded that, under the circumstances, the hardship to the companies was sufficient to warrant review.

To require [the companies] to challenge these regulations only as a defense to an action brought by the Government might harm them severely and unnecessarily. Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs’ conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the Administrative Procedure Act and the Declaratory Judgment Act must be permitted, absent a statutory bar or some other unusual circumstance.

Id. at 153. See also Rocky Mountain Radar, Inc. v. FCC, 158 F.3d 1118, 1123 (10th Cir. 1998), *cert. denied*, 525 U.S. 1147 (1999) (FCC decision that left plaintiff with the “Hobson’s choice” of obeying the order and thus foreclosing review or incurring the risks attendant upon noncompliance was ripe for review).

Similarly, in the present case, the hardship to the State of withholding Court review would be severe. Without review, the State would be required to either continue expending vast amounts of its own money in order to meet the myriad requirements of the NCLB Act, with no way of compelling the Secretary to comply with the Unfunded Mandates Provision, or intentionally violate the NCLB Act, and thereby jeopardize funding for countless vital educational and school-related programs that rely on Title I funding and Title I formula funding, in the hope that the Secretary would initiate enforcement proceedings that could eventually be challenged in court. If the State opted for the latter approach, and the Secretary initiated enforcement proceedings under GEPA and the NCLB to withhold federal funding, any possible stay of the Secretary's action would only affect Title I funding and would not apply to any non-Title I federal funding. *See* Def. br. 22 n.11. The result, as Utah's experience suggests, *see* Complaint ¶ 35, would be that the State could lose vast amounts of formula and categorical education funds, in addition to non-Title I NCLB funds, as soon as enforcement proceedings were initiated. Given the severity of the hardship of withholding review, not only to the State, but most significantly to its children, this case is ripe for review.

C. The State Has Standing And The Secretary's Reliance On Disputed Facts Defeats Her Claims.

Relying upon disputed facts, the Secretary contends that the State lacks standing, and fails to state a claim upon which relief can be granted. Def. br. 23-29. The State clearly has alleged sufficient facts to support its standing. Further, the Secretary's reliance on disputed facts defeats both her standing and 12(b)(6) claims at the motion to dismiss pleading stage.⁸

⁸ The Secretary has assured the Court and the State at the status conference call that she is not relying upon the materials outside the pleadings referenced in her motion. Therefore, the State will not address the incomplete and misleading nature of those materials but will simply note the fact that the Secretary included those materials in her motion illustrates that these challenges are not suitable for resolution at the motion to dismiss stage.

Standing focuses upon who may bring a claim, rather than on the merits of the claim itself. United States v. Vazquez, 145 F.3d 74, 80-81 (2d Cir. 1998). The “irreducible constitutional minimum” of standing requires: (1) that the plaintiff has suffered an “injury in fact”; (2) that there be a “causal connection” between the injury and the challenged conduct; and (3) that it be likely that the injury will be redressed by a favorable decision. Bennett v. Spear, 520 U.S. 154, 167 (1997); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992).

“For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.” Warth v. Seldin, 422 U.S. 490, 500-01 (1975); Pennell v. San Jose, 485 U.S. 1, 7 (1988). At the pleading stage, plaintiffs’ burden of alleging injury, causation and redressability is “relatively light”. School District of the City of Pontiac v. Spellings, 2005 U.S. Dist. LEXIS 29253 *7-*10 (E.D. Mich. Nov. 23, 2005) (for purpose of challenge to the Secretary of Education’s interpretation of the NCLB Unfunded Mandates Provision, local school districts and teachers’ unions have standing). If one of the plaintiffs has standing, the Court need not inquire into the standing of the remaining plaintiffs. U.S. Dept. of Labor v. Triplett, 494 U.S. 715, 719 (1990); Bowsher v. Synar, 478 U.S. 714, 721 (1986).

The Secretary contends that the State fails to properly allege injury or causation because the State’s injury purportedly is caused by its own high-quality assessments, not her requirements, and the State’s actions regarding special education and ELL assessments are “voluntary.” *See* Def. br. 23-29.⁹ The State disputes, as a matter of fact, that its tests exceed the requirements of the Act, that the federal funding covers the cost of the NCLB Act requirements as interpreted by the Secretary, and that its actions regarding the assessments for special

⁹ The Secretary does not appear to contest redressability.

education and ELL students are “voluntary.”¹⁰ While resolving these issues may well require a full adjudication of the merits of this action, the State’s allegations more than meet its burden of establishing standing. Because all factual inferences must be resolved in favor of the State, the Court should decline the Secretary’s invitation to merge the claims on the merits with a standing challenge. *See* Warth, 422 U.S. at 501; Pennell, 485 U.S. at 7.

Moreover, the State of Connecticut clearly is a proper party to bring this challenge to the Secretary’s unlawful acts. The NCLB Act funds and requirements are administered by and between the Secretary of Education and the individual States. When the State of Connecticut and its legislature acted to accept the NCLB Act funding and to adopt NCLB Act requirements, it was with the express and explicit understanding that the Secretary would comply with the NCLB Unfunded Mandates Provision, and that any costs “attributable to additional federal requirements” of the NCLB Act would “be paid exclusively from federal funds.” *See* Conn. Gen. Stat. § 10-14n(g). The State and its legislature are directly injured to the extent the State is required to expend its funds to satisfy the additional costs of complying with the NCLB Act. The State is also injured in that it cannot comply with both Conn. Gen. Stat. § 10-14n(g) and the Secretary’s implementation of the NCLB Act. *See* Complaint ¶ 10. As alleged in the complaint, the State’s injury is directly caused by the Secretary’s illegal actions, and can be redressed only by the Court’s order directing the Secretary to comply with the plain language of the Unfunded Mandates Provision. *See* Complaint ¶¶ 5-10, 22-36, 41-46, 57-92, prayers for relief 1-10. The Secretary’s misguided interpretation of the Unfunded Mandates Provision -- that she is permitted to require States and localities to spend state and local funds to comply with the requirements of

¹⁰ The Secretary’s “suggestions” regarding the quality of Connecticut’s assessments are also unlawful. Under the NCLB Act, the Secretary and her staff are expressly and repeatedly prohibited from mandating, directing or controlling the contents of any State assessment. NCLB Act § 1111(b)(6) (115 Stat. 1453) 20 U.S.C. § 6311(b)(6); NCLB Act § 1905 (115 Stat. 1619) 20 U.S.C. § 6575; NCLB Act § 6301 (115 Stat. 1897-98) 20 U.S.C. § 7371.

the NCLB Act -- and her actions implementing that misguided interpretation, are the direct cause of the State's injury. *See Khodara Environmental Inc. v. Blakey*, 376 F.3d 187, 194-95 (3d Cir. 2004) (causation established for declaratory judgment purposes where defendant's actions are one of the causes of the plaintiff's injury). The State has alleged sufficient causation for purposes of establishing standing and the Secretary's standing and 12(b)(6) challenges must be rejected.¹¹

II. THE STATE'S CLAIMS ON THE MERITS ARE LEGALLY SUFFICIENT AS A MATTER OF LAW.

The State claims that the Secretary's implementation and administration of the NCLB Act violates not only the express language of the Unfunded Mandates Provision, but also is an unconstitutional intrusion into the State's Tenth Amendment sovereignty by violating the Spending Clause. The Secretary's challenge to the legal sufficiency of the State's claims fails as a matter of law and fact.

A. The Unfunded Mandates Provision's Express Language Precludes the Secretary From Requiring the State to Spend Any Funds Or Incur Any Costs To Satisfy The NCLB Act Requirements.

The Unfunded Mandates Provision means that the federal government must pay the entire additional costs imposed upon the States and localities by the NCLB Act requirements. It says and means that the Secretary and her staff cannot implement the NCLB Act requirements in such a fashion as to require any State or locality to "spend any funds" or to "incur any costs."

¹¹ The state legislature also has standing. *Cf.* Def. br. 28 n.16. This is not a case where individual legislators who voted against a piece of legislation subsequently attempt to challenge the constitutionality of the passed legislation. *Compare Raines v. Byrd*, 521 U.S. 811 (1997) (challenge to Line Item Veto Act). Rather, the Connecticut General Assembly as a body voted to authorize this suit on behalf of the State and on its own behalf, and that legislation was signed and ratified by the Governor. Conn. Pub. Act. No. 05-2. *See also* Conn. Gen. Stat. § 3-5. The General Assembly has a state constitutional mandate regarding public elementary and secondary schools. Conn. Constitution Art. 8th, Sec. 1. It is vested with the legislative power of the State and determines the expenditures of state funds. Complaint ¶ 16. It has an interest in ensuring that its statutes and directives regarding state education funds are not circumvented, negated or violated by the misguided actions of a federal official. *See* Complaint ¶ 10. Although the court need not address the issue if it finds that the State has standing, the Connecticut General Assembly also satisfies the jurisdictional requirements for standing in this matter.

Ignoring both the plain meaning of the Unfunded Mandates Provision and the legislative intent behind its enactment, the Secretary seeks to reduce the Unfunded Mandates Provision to a meaningless tautology: she asserts that the Provision means she cannot act outside her statutory authority even though, as a creature of statute, the Secretary never had any authority beyond those statutory boundaries. The Court should reject the Secretary's efforts to avoid the plain meaning and intent of the Unfunded Mandates Provision.

1. The Plain Language of the Unfunded Mandates Provision Compels The State's Interpretation.

The language of the Unfunded Mandates Provision is unusually clear:

(a) GENERAL PROHIBITION. Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.

NCLB Act § 9527(a) (115 Stat. 1983) 20 U.S.C. § 7907(a). The statute expressly prohibits the federal government from "mandating, directing or controlling" the "allocation of State or local resources," and from "mandating" that a State or locality "spend any funds or incur any costs not paid for under this chapter." The Unfunded Mandates Provision is unique to the field of education -- it has not been enacted in any other area of law. On its face, the Provision plainly and clearly states that if the federal government does not pay for a requirement of the NCLB Act, the federal government cannot require a State or locality to "allot" any resources or "spend" *any funds* or incur *any costs* to meet the NCLB Act's requirements.

The Secretary seeks to avoid the plain meaning of the Unfunded Mandates Provision by contending that (1) there are no "mandates" in the NCLB Act, only "conditions of assistance;" and (2) the provision only bars an "officer or employee," not Congress. Neither argument is supported by the language, structure or context of the NCLB Act. Moreover, the State is

challenging the Secretary's misguided actions in her implementation of the NCLB Act, not the Congressional enactment itself.

“When examining a statute, courts must begin – and often must end – with the language of the statute itself.” Cashman v. Dolce International Inc., 225 F.R.D. 73, 85 (D. Conn. 2004). See Leocal v. Ashcroft, 543 U.S. 1, 14 (2004) (“Our analysis begins with the language of the statute”); Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999) (“As in any case of statutory construction, our analysis begins with the language of the statutes and where the statutory language provides a clear answer, it ends there as well.”) The courts also must give the words of a statute their “ordinary or natural meaning,” and “give effect to every word of a statute wherever possible.” Leocal, 543 U.S. at 16, 21.

“The text’s plain meaning can best be understood by looking to the statutory scheme as a whole and placing the particular provision within the context of that statute.” Saks v. Franklin Covey Co., 316 F.3d 337, 345 (2d Cir. 2003). See Leocal, 543 U.S. at 15 (“We construe language in its context and in light of the terms surrounding it.”); Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997) (“The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.”)

In an effort to shoehorn the plain language of the Unfunded Mandates Provision into 10th Amendment and Spending Clause case law, the Secretary proffers that the word “mandate” in the NCLB Act, and more specifically in the Unfunded Mandates Provision, really means “condition of assistance.” Def. br. 30-31. While the State also disagrees with the Secretary’s legal arguments regarding the State’s constitutional claims (see discussion, *infra* at section II.B),

for purposes of statutory interpretation, the Secretary’s definition of “mandate” lacks any support in the plain meaning of the word and how the word is used elsewhere in the Act.

The plain meaning of the word “mandate” is “an authoritative order or command,” or a “command, order or direction.” Webster’s New World Dictionary (1986); Black’s Law Dictionary, 6th ed. The word “mandate” serves as the root for the word “mandatory,” meaning a requirement, obligation or command. Id. Interpreting the verb “mandate” to mean to order, command or require is consistent with the ordinary meaning of the word.

Interpreting the verb “mandate” to mean to order, command or require also is consistent with how the word is used elsewhere in the Act. In addition to the Unfunded Mandates Provision, the verb “mandate” is used nine times in the Act, all in the context of prohibiting a command, order or requirement and thereby limiting governmental intrusions. For example, the Secretary is prohibited from mandating specific tests or modes of instruction, and from mandating an educational approach for ELL students.¹² No “officer or employee of the Federal Government” may “mandate, direct or control” a “State, local educational agency or school’s specific instructional content, academic achievement standards and assessments, curriculum, or program of instruction.”¹³ Nothing in the Act “shall be construed to mandate equalized spending per pupil,” or “to mandate national school building standards.”¹⁴ Finally, State and local educational agencies are not required to “mandate, direct or control” the curriculum of a private or home school. NCLB Act § 9506(d) (115 Stat. 1980) 20 U.S.C. § 7886(d). The Act’s uses of the verb “mandate” do not indicate “conditions;” rather, they express commands or requirements.

¹² NCLB Act § 1111(b)(6) (115 Stat. 1453) codified at 20 U.S.C. § 6311(b)(6); NCLB Act § 3129 (115 Stat. 1706) 20 U.S.C. § 6849.

¹³ NCLB Act § 1905 (115 Stat. 1619) 20 U.S.C. § 6575; NCLB Act § 6301 (115 Stat. 1897-98) 20 U.S.C. § 7371; NCLB Act Sec. 9526 (115 Stat. 1982) 20 U.S.C. § 7906.

¹⁴ NCLB Act § 1906 (115 Stat. 1619) 20 U.S.C. § 6576; NCLB Act § 6302 (115 Stat. 1898) 20 U.S.C. § 7372, or NCLB Act § 9527(d) (115 Stat. 1983) 20 U.S.C. § 7907(d).

If, as the Secretary contends, the Unfunded Mandates Provision has no meaning because there are no “mandates” within the statute, then Congress enacted ten meaningless statutory provisions. Obviously, determining that the ten “mandate” provisions within the statute are meaningless is contrary to the well-established rule of statutory construction that a statute must be interpreted to give meaning to all provisions. *See, e.g., Leocal*, 543 U.S. at 16.

There also is no support for Secretary’s argument that when Congress passed the NCLB Act, it intended its use of “mandate” to adopt the specific statutory definition of “Federal intergovernmental mandate” as set forth in the Unfunded Mandates Reform Act of 1995 (“UMRA”), Pub. L. No. 104-4, codified at 2 U.S.C. § 1501, *et seq.* First, the language of the Unfunded Mandates Provision predates the passage of UMRA (see Unfunded Mandates Provision legislative history discussion, *infra*). Second, in relevant part the UMRA requires the Congressional Budget Office (CBO) to issue estimates on the cost of compliance of a proposed act and the amount of money appropriated for the proposed legislation, “when feasible.” UMRA §§ 423, 424; 2 U.S.C. § 658b, 658c. Unlike the NCLB Act, the UMRA has no real teeth. It neither prohibits unfunded mandates, nor restricts any actions by the federal government. Rather, Congress simply has to “consider” the issue and obtain the information as part of the legislative process. *Id.* Thus, when the NCLB bills were introduced, the CBO was charged with estimating costs and expenses for the House and Senate bills for purposes of the required UMRA statutory analysis, not with interpreting the subsequently-enacted NCLB Unfunded Mandates Provision, or applying constitutional case law. *Cf.* Def. br. 31.

Moreover, there is simply no basis for Secretary’s assertion that the Court should exchange the plain meaning of “mandate” in the statute for “condition.” The dictionary

definitions differ significantly.¹⁵ Further, when Congress intended to make a requirement a “condition” of obtaining funding under the Act, it clearly knew how to do so, and it explicitly did in the Act. *See, e.g.*, NCLB Act § 9532(b) (115 Stat. 1985) 20 U.S.C. § 7912 (“As a *condition* of receiving funds under this Act, a State shall certify in writing to the Secretary that the State is in compliance with this section [the unsafe school choice policy]); NCLB Act § 2364 (115 Stat. 1668) 20 U.S.C. § 6734 (“This subpart [Teacher Liability Protection] shall only apply to States that receive funds under this Act, and shall apply to such a State as a *condition* of receiving such funds.”); NCLB Act § 9524(b) (115 Stat. 1981) 20 U.S.C. § 7904(b) (“As a *condition* of receiving funds under this Act, a local education agency shall certify in writing to the state education agency” that they permit constitutionally protected prayer in public schools.); NCLB Act § 1140(g) (115 Stat. 2060-61) 25 U.S.C. § 2020(g) (terms, *conditions* and requirements for a tribe to receive a grant under the Act). The Act also authorizes the Secretary to establish certain “terms and conditions” within the context of specific programs and grants.¹⁶ The Act does not authorize the Secretary to require a State to spend its own funds to meet the requirements of the NCLB Act. Despite the Secretary’s singular reliance upon the phrase “conditions of assistance,” that phrase appears nowhere in the 670 pages of the NCLB Act.

¹⁵ “Condition” is defined in relevant part as a “prerequisite,” or requirement “before the performance or completion of something else.” Webster’s New World Dictionary. Black’s defines “condition” in relevant part as “a future and uncertain event upon the happening of which is made to depend the existence of an obligation.” Black’s Law Dictionary, 6th ed.

¹⁶ *See* NCLB Act § 1232(a)(1) (115 Stat. 1556) 20 U.S.C. § 6381a(a)(programs for migrants, outlying areas and Indian tribes); NCLB Act § 2332(b)(3) (115 Stat. 1660) 20 U.S.C. § 6702 (national writing project); NCLB Act § 4303(e)(4) (115 Stat. 1775) 20 U.S.C. § 7183 (conditions on penalties for violations of nonsmoking policy); NCLB Act § 5451(c)(6) (115 Stat. 1825) 20 U.S.C. § 7251 (inexpensive book distribution program); NCLB Act § 5541(e)(2) (115 Stat. 1852) 20 U.S.C. § 7269 (grants for integration of schools and mental health systems); NCLB Act § 5551(f) (115 Stat. 1856) 20 U.S.C. § 7271 (assistance for arts education program); NCLB Act § 7135(a)(4)(B) (115 Stat. 1928) 20 U.S.C. § 7455 (grants to tribes for education administrative planning and development); NCLB Act § 7204(c) (115 Stat. 1937) 20 U.S.C. § 7514 (Native Hawaiian Education Council); NCLB Act § 7205(a)(4) (115 Stat. 1941) 20 U.S.C. § 7515 (college scholarship conditions for Native Hawaiians); NCLB Act § 1140(g) (115 Stat. 2060-61) 25 U.S.C. § 2020 (grants for tribal departments of education).

In her second attack upon the plain meaning of the NCLB Unfunded Mandates Provision, the Secretary contends that the provision only controls the conduct of a federal “officer or employee,” not Congress, and that the State is seeking to “avoid” conditions imposed by Congress, and not the Secretary. In addition to misreading the statute, the Secretary’s position is premised upon a fundamental misrepresentation of the State’s claims.

As set forth in greater detail in the introduction and background above, the State does not seek to avoid the goals or methods of the NCLB Act -- indeed, the State has been a pioneer in the area of educational assessment, accountability, and flexibility, resulting in some of the best educated students in the country. Taking the State’s allegations as true, as required at this stage of the litigation, the State contends that the Secretary (both individually and through her staff of federal officials and employees) has administered and interpreted the NCLB Act requirements in such a manner as to require States and localities to spend their own funds. *See, e.g.*, Complaint ¶¶ 8, 27, 29, 33, 35, 51, 59-92. Indeed, in her brief and during the Rule 26(f) discussions in this matter, the Secretary has contended that she has the legal right to require State and local school districts to spend their own funds to meet the requirements of the NCLB Act, notwithstanding the Unfunded Mandates Provision.

Thus the Secretary’s argument that her rigid, one-size-fits-all mandates upon the State are simply “Congressional” “conditions” is baseless. For example, there is absolutely nothing in the statutory language of the Act that requires that ELL students be tested in English within their first year in a U.S. school system, or requires special education students to be tested at grade level rather than having the option of being tested at instructional level. *See* NCLB Act § 1111(b)(3)(ix),(x) (115 Stat. 1450-51) 20 U.S.C. § 6311(b)(ix),(x). While there is a statutory provision for testing in every grade (NCLB § 1111(b)(3)(C)(v)(II)), there are also many statutory

provisions permitting flexibility and waivers. *See, e.g.*, NCLB Act § 9401 (115 Stat. 1972-75) 20 U.S.C. § 7861. The State contends that it could fully meet the letter and intent of the NCLB Act, and the Secretary could comply with the Unfunded Mandates Provision, if the Secretary granted the requested waivers, or simply administered and applied the requirements of the NCLB Act in a manner so as to give effect to the statutory restriction upon the Secretary's authority imposed by the Unfunded Mandates Provision.

The Court's decision in School District of the City of Pontiac v. Spellings, 2005 U.S. Dist. LEXIS 29253 (E.D. Mich. Nov. 23, 2005) (attached to Defendant's brief) that the Unfunded Mandates Provision simply means that "federal officers and employees" are prohibited from "imposing additional, unfunded requirements" ignores both the complex realities of implementing a comprehensive, complicated, 670 page piece of legislation, and the central statutory role granted to the Secretary of Education and her staff in the implementation of the statute. For example, the Secretary establishes the criteria and procedures for State plans required under the Act (Sec. 9302, 115 Stat. 1968-1969), and is required to make grants to the States to enable the states to develop and administer the assessments required under the Act. NCLB Act. § 6111 (115 Stat. 1873-74) 20 U.S.C. § 7301. The Secretary not only has the authority to waive any statutory or regulatory requirement, she also establishes how many of the requirements are implemented. NCLB Act §§ 9302-03, 9401 (115 Stat. 1968-75) 20 U.S.C. §§ 7842, 7843, 7861. Indeed, in the first two years after passage of the NCLB Act, the Secretary and her staff have issued dozens of guidance documents, hundreds of letters and at least three sets of formal regulations, a process that continues to this day. Complaint ¶ 27. *See also* Complaint ¶¶ 8, 29, 33, 35, 51, 59-92. However, what is clear is that the Secretary's jurisdiction

and discretion stops at requiring States and localities to spend their own funds to meet the additional costs and expense of the NCLB Act requirements.

The plain and remarkably clear language of the Unfunded Mandates Provision means what it says: the federal government cannot oblige the State or localities to spend their own funds to meet the requirements of the NCLB Act. Accordingly, the Court should reject the Secretary's efforts to render meaningless the plain language of the Provision.

2. The Overall Structure of the NCLB Act Supports the State's Interpretation of the Unfunded Mandates Provision.

The Secretary contends that other provisions of the NCLB Act contradict the State's interpretation of the Unfunded Mandates Provision. *See* Def. br. 34-38. In so stating, the Secretary ignores the overall structure of the Act, misinterprets the significance of her cited sections, and, again, misrepresents the State's claim.

The State does not contend that the NCLB Unfunded Mandates Provision means that the federal government must pay all education expenses in the State of Connecticut. It does not contend that the federal government must pay anything toward State goals and State educational standards. It does not even contend that the federal government must pay for all testing expenses in the State of Connecticut. What the State *does contend* is that by operation of the NCLB Unfunded Mandates Provision, the federal government obligated itself to pay all the additional expenses imposed upon the States by the requirements of the NCLB Act. *See* Conn. Gen. Stat. § 10-14n(g) (any costs "attributable to additional federal requirements" of the NCLB Act "shall be paid exclusively from federal funds" and the State must study the "estimated additional cost" of compliance with the NCLB Act) (emphasis added). Thus, other provisions of the NCLB Act that address state expenditures and the level of federal funding do not negate the State's claims regarding the Unfunded Mandates Provision.

The statutory provisions for optional, additional programs are a case-in-point. The Unfunded Mandates Provision is in the “General Provisions” Title (Title IX) of the NCLB Act. As such, it is a general rule applicable to all ten Titles of the Act. This does not mean, however, that there are no exceptions to the general rule, particularly for specific optional programs. *See Morales v. TWA*, 504 U.S. 374, 384-85 (1992) (“it is commonplace of statutory construction that the specific governs the general”); *U.S. v. LaPorta*, 46 F.3d 152, 156 (2d Cir. 1994) (same). Thus a requirement for state financial support for grants to launch a family literacy program, a statewide telecommunications network program, or the Advanced Placement Incentive Program do not render the Unfunded Mandates Provision inoperative -- they are optional programs with specific requirements, apart and separate from the general requirements of the overall Act.¹⁷ In a similar vein, having a completely separate private company testing program that is part of a separate statutory scheme (National Education Statistics Act), where the federal government is required to fully fund the costs, again does not negate or even impinge upon the general federal requirement to cover all additional expenses made applicable to the overall Act by the Unfunded Mandates Provision. *See* NCLB Act § 1111(c)(2) (115 Stat. 1454) 20 U.S.C. § 6311(c)(2).

In addition, the purpose of the Act was to increase resources for education, not decrease them. The Unfunded Mandates Provision covers additional expenditures imposed by the NCLB Act. It is not and was not intended to be an opportunity for States and localities to replace their state education budgets with federal funds. Thus the statutory prohibition precluding States and localities from cutting back on their level of education spending is neither remarkable nor

¹⁷ *See* NCLB Act Sec. 1232 (115 Stat. 1556) 20 U.S.C. § 6381a(c)(5); NCLB Act Sec. 5475 (115 Stat. 1834) 20 U.S.C. § 7255d(b)(3); NCLB Act Sec. 1705 (115 Stat. 1608) 20 U.S.C. § 6535(c)(3).

inconsistent with the State’s position.¹⁸ Indeed, “maintenance of effort” provisions, also known as “non-supplanting” provisions are common, routine provisions in federal funding statutes. *See, e.g.,* 7 U.S.C. § 2009f(d) (rural community advancement program); 42 U.S.C. § 3030s-2 (national caregiver support program).

Finally, Congress provided an overall threshold funding requirement within the NCLB Act -- no State was required to commence or administer the NCLB mandated assessments set forth in Sec. 1111(b)(3) unless and until Congress allotted a minimum level of funding. *See* NCLB Act § 1111(b)(3)(D) (115 Stat. 1452) 20 U.S.C. § 6311(b)(3)(D). The minimum funding requirement serves as a check upon *Congress* by binding *future Congresses* (absent an amendment to the statute) to allot a threshold level of funds for the assessment piece of Title I of the ten titles in the NCLB Act. It does not diminish or excuse the federal government’s obligation to administer all ten titles of the NCLB Act in a manner that ensures that no State or locality is directed how to allocate their resources or to spend any funds or incur any costs not paid for by the federal government.

3. The Legislative History of Identical Unfunded Mandates Provisions in Prior Education Statutes Supports the State’s Interpretation of the NCLB Unfunded Mandates Provision.

The plain language of the Unfunded Mandates Provision dictates that the Secretary and her staff cannot require the States and localities to spend their own funds to meet the costs and expenses of the NCLB Act requirements. The Secretary’s contention that the purpose is to “limit the ability of federal officials to layer expensive and burdensome requirements at the agency level (*e.g.,* the purchase of particular educational materials) on top of the broad conditions established by Congress,” (Def br. 32) would reduce the Provision to a tautology -- as a creature

¹⁸ *See* NCLB Act § 1120A (115 Stat. 1511) 20 U.S.C. § 6321; NCLB Act § 1125AA (115 Stat. 1525) 20 U.S.C. § 6336; NCLB Act § 5141 (115 Stat. 1784) 20 U.S.C. § 7217; NCLB Act § 9521 (115 Stat. 1980) 20 U.S.C. § 7901.

of statute, the Secretary *has* no authority outside her statutory confines, and thus there is no need for a statutory provision that precludes her from acting outside her statutory authority. The Secretary's proposed interpretation bears no relationship to the actual statutory language and fails to explain why Congress saw fit to prohibit any mandates, directions or controls over State or local resources, or to prohibit the federal government from requiring a State or locality to spend any funds or incur any costs.

The Secretary's meaningless interpretation also lacks any support in the relevant legislative history. Congress was not concerned about the federal Department of Education "piling" onto the requirements of its federal statutory enactments, or acting *ultra vires*. Rather, Congress was strongly committed to avoiding the imposition of yet another unfunded federal mandate upon the States -- *i.e.*, imposing federal statutory duties and requiring the States to fund the expenses incurred in complying with such duties.

When the plain language of a statute is clear, the judicial inquiry generally ends there. Nonetheless, "when authoritative legislative history is available, courts may in appropriate circumstances cautiously look to that history to confirm an interpretation that is otherwise grounded in the text and structure of the act itself." Murphy ex rel. Estate of Payne v. United States, 340 F. Supp. 2d 160, 171 (D. Conn. 2004). *See Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991); United States v. Gayle, 2003 U.S. App. LEXIS 26673 (2d Cir. Aug. 27, 2003) ("resort to authoritative legislative history may be justified where there is an open question as to the meaning of a word or phrase in a statute, or where a statute is silent on an issue of fundamental importance to its correct application. As a general matter, we may consider reliable legislative history where ... the statute is susceptible to divergent understandings and, equally important, where there exists authoritative legislative history that assists in discerning what

Congress actually meant.”); United States v. Nelson, 277 F.3d 164, 186 (2d Cir. 2002) , *cert. denied*, 537 U.S. 835 (2002).

With education reform as one of the top priorities of the newly-elected President, both the House and the Senate of the 107th Congress in 2001 proposed competing bills to reauthorize the Elementary and Secondary Education Act of 1965 (“ESEA”): House bill H.R. 1 (the No Child Left Behind Act) and Senate bill S.1 (the Better Education for Students and Teachers Act). Both introduced bills included the same Unfunded Mandates Provision that was enacted in the final version of the bill. *See* H.R. 1, Title VIII, Sec. 8515 (as introduced Mar. 22, 2001); S.1, Sec. 15 (as introduced Mar. 28, 2001). The legislative history of both bills are silent as to the meaning of the Unfunded Mandates Provision.¹⁹

Nonetheless, the statutory language of the NCLB Unfunded Mandates Provision comes directly from identical prohibitions against unfunded mandates that were included in three prior education statutes, all enacted in 1994: the Goals 2000: Educate America Act, Pub. L. 103-227, Sec. 318, 108 Stat. 186, codified at 20 U.S.C. § 5898 (“Goals 2000 Act”) (enacted in March 1994 to provide funding to states to set academic standards); the School-to-Work Opportunities Act, Pub. L. 103-239, Sec. 604, 108 Stat. 605, codified at 20 U.S.C. § 6234 (enacted in May 1994 to provide funding for certain work-related education programs and now ended pursuant to its sunset provisions); and the Improving America’s Schools Act (“IASA”), Pub. L. 103-382, Sec. 14512, 108 Stat. 3906, codified at 20 U.S.C. § 8902 (enacted in October 1994 to reauthorize the Elementary and Secondary Education Act (“ESEA”)). The statutory provisions and legislative history excerpts for each Act are attached as Exhibits 2-4 hereto.

¹⁹ In the next session immediately after the passage of the NCLB Act, Congress included an identical Unfunded Mandates Provision as part of the Educational Sciences Reform Act of 2002, Pub. L. 107-279, Title I, Sec. 182 (116 Stat. 1971) 20 U.S.C. § 9572(b), also without discussion in the legislative history.

Because the Unfunded Mandates Provision was carried over without change from the three major education statutes enacted in 1994 without comment in the lengthy legislative of the NCLB Act, it is instructive to review the legislative histories of the three 1994 education acts for insight into its intended meaning.

Goals 2000: Educate America Act. The objectives, structure and much of the language of the NCLB Act find their origins in the 1994 Goals 2000: Educate America Act. Like the NCLB Act, the Goals 2000 Act sought to increase accountability and flexibility to the educational process, while respecting the States' rights to self-governance in educational matters. Although the Goals 2000 Act lacked the NCLB Act's mandatory testing and severe penalty structure, it required States to submit plans to the federal government on how they would achieve high academic goals for their students, identify low-performing schools, and set goals for teacher certification. It also permitted the Secretary to grant waivers from its requirements. The NCLB Unfunded Mandates Provision had its genesis in the identical Unfunded Mandates Provision enacted in the Goals 2000 Act. (See Exhibit 2).

The first three lines of the Goals 2000 Unfunded Mandates Provision were introduced on the floor of the House by Representatives Goodling and Condit.²⁰ Rep. Goodling explained that the additional language prohibiting federal government control over the "allocation of State and local resources" was intended to "put to rest the concern that we are going to dictate from the Federal level that somewhere, some way, the local and State Governments will find money for our dictates." 139 Cong. Rec. H7741 (daily ed. Oct. 13, 1993). As a member of the congressional caucus on unfunded mandates, Rep. Condit noted that "there are few issues that I

²⁰ "Nothing in this section shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State and local resources." 139 Cong. Rec. H7769 (daily ed. Oct. 13, 1993).

feel more strongly about than unfunded Federal mandates. I believe that it is wrong for us on the Federal level to pass legislation but shift the costs of implementation and compliance to our State and local governments.” 139 Cong. Rec. H7769 (daily ed. Oct. 13, 1993).

Rep. Condit rejected the arguments that the bill’s requirements were not “mandates,” declined to rely upon conference committee language that the bill was not intended to impose a federal mandate, and insisted that statutory language to that effect be incorporated. *Id.* at H7770. Notably, Rep. Condit insisted on including the amendment notwithstanding the fact that states could always opt out of the legislation if they found it too onerous. With remarkable prescience, Rep. Condit explained that it was never the intent of Congress to require states to choose among “tak[ing] the requirement seriously and end[ing] up with a multimillion-dollar unfunded Federal mandate,...lower[ing] their standards so that all schools can meet them; or ... refus[ing] to participate in the program.” *Id.* at H7769-70.

The final language of the Goals 2000 Unfunded Mandates Provision came from the Senate, incorporating the Goodling-Condit House amendment and adding the phrase “or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.” 140 Cong. Rec. S626 (daily ed. Feb. 2, 1994) (amendment no. 1358, as modified). As explained by its sponsor Sen. Gregg, the purpose of the amendment was “to assure that this bill will not become an unfunded mandate, ... to make it clear that if the Federal Government tells the State to do something or tells the local community to do something, the federal Government will have to pay for the costs of that mandate.” *Id.* The Senate version was accepted at conference and became the enacted language of the Goals 2000 Act Unfunded Mandates Provision. House Conference Report 107-446 (Mar. 21, 1994) (Sec. 318 discussion).

The School-to-Work Opportunities Act. A companion bill to the Goals 2000 bill and pending at the same time, the initial bills for School-to-Work Opportunities Act did not contain an unfunded mandate provision. The Senate passed a version requiring no unfunded mandates that the House version lacked. In conference, agreement was reached to “replace the Senate language with the exact language that was included in Goals 2000 regarding unfunded federal mandates.” H. Conf. Rept. 103-480 (Apr. 19, 1994) (see Exhibit 3).

Improving America’s Schools Act (IASA). Designed to fit the framework established by the Goals 2000 Act, the “heart” of the 1994 IASA Act was to “demand greater educational achievement in exchange for much more freedom in the use of Federal funds. The whole bill can be summed up in two words: flexibility and accountability.” House Rpt. No. 103-425 at 4; 1994 USSCAN, vol. 5 2807, 2810 (see Exhibit 4). Nonetheless the bill as introduced in the House lacked the Unfunded Mandates Provision and the early debates on the IASA in the House were rife with criticisms that the bill “provided all the mandates, but no money to pay for them. The Federal Government makes a multitude of new demands, but it is accountable for none.”²¹

Once the Unfunded Mandates Provision was added by the Senate and accepted in conference, concerns about unfunded mandates disappeared. Referring to that provision -- which he termed the “mandate section” -- Rep. Green explained: “People have been asking for years, do not send us mandates unless you send the money. We are not doing it in this bill For the first time, we actually are not sending mandates without money.” 140 Cong. Rec. H10390 (daily ed. Sept. 30, 1994).

²¹ 140 Cong. Rec. H807 (daily ed. Feb. 24, 1994) (Rep. Barrett). See 140 Cong. Rec. H810 (daily ed. Feb. 24, 1994) (Rep. Cunningham announcing that “all of us talk about unfunded mandates, and we will not support them.”); 140 Cong. Rec. H812 (daily ed. Feb. 24, 1994) (Rep. Fawell noting that the bill was “precisely the type of unfunded mandate which our Governors and Mayors have rebelled against.”)

Sen. Kassebaum expressed a similar sentiment on the floor of the Senate, explaining that she supported the bill because it “include[d] specific language assuring that its provisions will not lead to the imposition of unfunded mandates,” which would ensure that nothing in the bill “would dictate how the State and local funds are spent on education.”²² That same understanding was reiterated by Sen. Durenberger just before the final Senate vote on the conference committee report. He noted that the “amendment regarding unfunded mandates, which is now part of this legislation, clearly states that if any requirement in this bill results in an unfunded mandate, affected States and communities do not have to comply.”²³

As plainly evidenced by this history, when Congress enacted the Unfunded Mandates Provision in the 1994 Education Acts and adopted it verbatim into the NCLB Act, it intended that the States and local communities not have to comply with the requirements of the Acts unless and until the additional costs imposed by the federal requirements were fully funded by the federal government. It is equally clear that Congress considered the requirements of its education statutes as “mandates,” not “conditions of assistance.” Congress wanted to protect States and localities from having to pay the substantial additional costs of complying with new federal educational requirements.

B. The State’s Spending Clause and Tenth Amendment Claims Are Legally Sufficient.

The Supreme Court’s landmark opinion in South Dakota v. Dole, 483 U.S. 203 (1987) set forth both the recognized limits on the federal government’s Spending Clause powers, and reiterated that the financial “inducements” offered by the federal government to the States to enlist their participation in particular federal programs can become so coercive as to violate the Tenth Amendment’s provision that “[t]he powers not delegated to the United States by the

²² 140 Cong. Rec. S9873 (daily ed. July 27, 1994) (Sen. Kassebaum).

²³ 140 Cong. Rec. S14205 (daily ed. Oct. 7, 1994) (Sen. Durenberger).

Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” As described by the Court in West Virginia v. U.S. Dept. of Health & Human Services, 289 F.3d 281, 286-287 (4th Cir. 2002), “while Congress may use its spending powers to encourage the states to act, it may not coerce the states into action. If the Congressional action amounts to coercion rather than encouragement, then that action is not a proper exercise of the spending powers but is instead a violation of the Tenth Amendment.” Therefore judicial determinations as to whether the federal government has exceeded its Spending Clause powers are often inextricably linked to judicial analyses of whether a Tenth Amendment violation has occurred. Dole, 483 U.S. at 208-211; West Virginia, 289 F.2d at 287-293; Virginia v. Riley, 106 F.3d 559 (4th Cir. 1997).

In asserting that the Court should deny the State the opportunity to prove its Spending Clause and Tenth Amendment claims, the Secretary acknowledges that conditions placed on the States’ receipt of federal financial assistance must be clear and unambiguous so that states may exercise knowing and reasoned choice in determining whether to participate in particular federal programs. Def. br. 42-43, *citing* South Dakota v. Dole, 483 U.S. at 207 (*citing* Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 17 (1981)). *See also* Board of Education of the Hendrik Hudson Central School District v. Rowley, 458 U.S. 176, 204 (1982). The Secretary further acknowledges that federal legislation under the Spending Clause is viewed by the courts as being in the nature of a contract with the states. Def. br. 44, *citing* Pennhurst, 451 U.S. at 17. *See also* West Virginia, 289 F.3d at 286. Having appropriately acknowledged these legal realities, however, the Secretary then “cherry picks” selected excerpts from the NCLB statutory scheme, the relevant case law, and potential evidentiary facts to reach the unjustified conclusion

that the State's claims do not warrant a hearing. The Court should decline to follow the Secretary's misleading roadmap.²⁴

The Secretary would have this Court believe two things -- that the State has refused to comply with the requirements set forth in the NCLB Act, and that the Secretary has correctly interpreted and construed the statutory provisions setting forth those requirements. Both of these premises are false. The State, in accordance with the plain meaning of these and other provisions of the NCLB, has simply sought to have the federal government comply with the Unfunded Mandates Provision by either paying the extra costs incurred in complying with new NCLB Act mandates, or granting the State the waivers it requested so as to prevent the expenditure of State funds to meet the new mandates. In furtherance of her misconstruction of the applicable statutes, the Secretary would have the Court read the provisions of NCLB § 1111 (115 Stat. 1444-62) 20 U.S.C. § 6311, covering the annual testing of students, in isolation from both the Unfunded Mandates Provision and the waiver provisions of NCLB § 9401 (115 Stat. 1972-75) 20 U.S.C. § 7861, and, indeed for purposes of the plaintiffs' second count, ignore the latter two provisions altogether. However, all three statutes were part of the legal landscape -- and hence conditions -- under which the plaintiffs exercised their choice to participate in this federal program. In other words, Connecticut's choice was informed by all of these statutory provisions taken together, and thus while annual testing in all grades was a general expectation, under no circumstances would the State be required to expend any additional state resources to comply with any of the federal expectations or requirements (including annual testing), and the State would always have the right to seek waivers of *any* of the federal requirements. Surely implicit in this last statutory

²⁴ In the watershed opinion in Pennhurst, 451 U.S. at 17-18, the Court, citing King v. Smith, 392 U.S. 309, 333 (1968), noted that "in those instances where Congress has intended the States to fund certain entitlements as a condition of receiving federal funds, it has proved capable of saying so explicitly." In this case, Congress has stated explicitly just the opposite -- that the States need *not* fund specific additional federal requirements. *See* NCLB Unfunded Mandates Provision.

assurance was the notion that the Secretary would provide genuine and meaningful consideration, on a case-by-case basis, of all requests for such waivers.

Notwithstanding this clear legislative scheme, the Secretary has informed Connecticut that despite its plain language, the Unfunded Mandates Provision does not mean what it says, and that in accepting the federal funds under the ESEA, as amended by the NCLB Act, Connecticut has agreed to expend its own funds to comply with the new federal requirements. The Secretary also claims that notwithstanding the existence of the waiver provisions of NCLB § 9401 (115 Stat. 1972-75) 20 U.S.C. § 7861, she has acted within her statutory powers under the Act in denying any meaningful, individualized consideration to repeated requests for waivers of certain provisions, including annual testing. She makes this claim despite the State's unrefuted contention that compliance with such provisions will disrupt and degrade the State's historic and highly successful testing program, and will force the State to incur substantial and unnecessary expenditure of its own funds. If these statutes have the implausible meanings and constructions the Secretary ascribes to them -- which they do not -- they would have surely misled the State, in violation of the Spending Clause limitations described in the case law.

In this same vein, the Secretary trumpets the statement of assurances that the State signed, describing this as "an express, unqualified commitment by the State to perform the conditions established by the Act in order to obtain federal funding." Def. br. 47. This of course begs the real question. The State did not assure that it would comply with the Secretary's improbable and indeed misguided construction of these various statutes, which plainly *protected* the State by ensuring it would not have to expend its own funds to comply with the new mandates, and would receive meaningful consideration of requests for waivers on *any* provision of the Act. Moreover, given the extensive clarification and guidance pronouncements the

Secretary has deemed necessary to issue to instruct the States on NCLB requirements, it can scarcely be claimed that the conditions placed on the States' receipt of NCLB Act funds were wholly clear and unambiguous. *See* Complaint ¶ 27.

Just as the Secretary has selectively cited one part of the Act (the annual testing provision), thereby ignoring other relevant statutory provisions, she has similarly ignored significant relevant case law, particularly with regard to the State's Tenth Amendment claims. These Tenth Amendment claims not only challenge the clarity of federal conditions, but also their coercive nature. Whether the federal "inducements" and conditions here have crossed the line into coercion is obviously a question of fact dependent upon the development of an appropriate evidentiary record -- thus the Secretary seeks to convince the Court that the coercion theory is moribund, if not dead, as a matter of law. Her efforts are unavailing.

While the Secretary touts cases wherein courts have noted the sparse case law on the coercion limitation on federal spending power (Def. br. 50-51), she notably avoids mention of cases which have recognized the efficacy of the coercion standard and articulated its application. Not only does South Dakota v. Dole, 483 U.S. at 211, remain viable (citing Stewart Machine Co. v. Davis, 301 U.S. 548, 590 (1937)), several decisions underscore the vitality of Dole's assertion that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion,'" in violation of the Tenth Amendment. Dole, 483 U.S. at 211 (quoting Stewart, 301 U.S. at 590). While the Eighth Circuit in Jim C. v. Atkins School District, sitting *en banc*, ultimately reversed an earlier panel of the Court that had found that the federal financial inducements coercive in the context of that case, the Court nonetheless recognized and endorsed the viability of the coercion standard. 235 F.3d 1079, 1081-1082 (8th Cir. 2000), *cert. denied*. 533 U.S. 949 (2001). Similarly, the Fourth

Circuit, after noting that other courts had called into question the continued vitality of the standard, or had simply failed to apply it, concluded the standard was viable, despite the fact that it found no impermissible coercion in the matter before it. West Virginia, 289 F.3d at 286-290. Crucial to the Court’s decision in West Virginia was the Circuit’s earlier decision in Virginia v. Riley.

Like West Virginia, Riley involved *en banc* review of an earlier panel decision. However, unlike West Virginia, and indeed most of the cases cited by the Secretary, Riley, like this case, involved a conflict between federal and state educational authorities regarding how the state’s educational mission would be carried out.²⁵ At issue was the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq. (“IDEA”), the federal monies flowing to Virginia under it, and the degree to which the Secretary of Education, by threatening to withhold all federal funding could prevent Virginia from carrying out its educational mission as it saw fit. In particular, Virginia had adopted a policy whereby special education students who were expelled from school for misconduct appropriately determined (in compliance with IDEA mandates; only 126 out of 128,000 special education students) not to stem from their disabilities, were not provided with special education services while expelled. The Secretary threatened to withhold all of Virginia’s IDEA monies unless the policy was effectively revoked. While an original divided panel of the Court had found no constitutional infirmity with the Secretary’s *modus operandi*, upon *en banc* review, the Court reversed itself and adopted Judge Luttig’s prior dissenting opinion as the opinion of the Court.

Judge Luttig’s analysis begins with the observation that under well settled law “in order for the States to be bound by a condition upon the receipt of federal monies, the Congress must

²⁵ For example, Kansas v. U.S. Dept. of Health & Human Services, 214 F.3d 1196 (10th Cir. 2000), *cert. denied* 531 U.S. 1035 (2000), cited by the defendant, is neither an education case nor one in which the clarity of the statutory language was at issue.

have affirmatively imposed the condition in clear and unmistakable statutory terms. An adjustment to the critical balance of power between the Federal Government and the States cannot be authorized implicitly.” Riley, 106 F.3d at 563. Noting that only 126 of 128,000 special education students were not receiving special education services under Virginia’s policy, Judge Luttig further opined that

[i]n order to require the States to provide private education to students expelled for reasons unrelated to their handicaps, and thus commandeer from the States their core function of ensuring order and discipline in their schools, Congress would have to have spoken in *affirmative and unambiguous terms*, so that there could be no question whatsoever of its intent. Not only did the Congress not unambiguously require the States to provide the continuing education at issue, it all but codified the common sense proviso that it not be extended to such students.

Id. at 562 (emphasis added). At issue was the language of 20 U.S.C. § 1412(1) under which mandated IDEA State Plans were required “to have in effect a policy that assures all children with disabilities the right to a free and appropriate public education.” The Secretary claimed Virginia violated this statutory provision. Judge Luttig disagreed. While Judge Luttig’s opinion chastises the Secretary for repeatedly ignoring the words “right to” a free appropriate public education in 20 U.S.C. § 1412(1), it goes on to note that

[w]hether the majority’s [later minority’s] interpretation of the statute or that which I believe Congress intended is the better, however, is not even the question. The question is whether, in *unmistakably clear terms*, Congress has conditioned the States’ receipt of federal funds upon the provision of educational services to those handicapped students expelled for misconduct unrelated to their handicap....If Congress has not *unequivocally* conditioned receipt of federal funds in the manner claimed by the Department of Education, and by the Department of Justice on its behalf, then our inquiry is at an end.

Id. at 566 (emphases added). According to the Riley Court, “[i]nsistence upon a clear, unambiguous statutory expression of Congressional intent to condition the States’ receipt of federal funds in a particular manner is especially important where, as here, the claimed condition requires the surrender of one of, if not the most significant of, the powers or functions reserved

to the States by the Tenth Amendment -- the education of our children.” Id. (citing Honig v. Doe, 484 U.S. 305, 309 (1988) (quoting Brown v. Board of Education, 347 U.S. 483, 493 (1954)); Milliken v. Bradley, 418 U.S. 717, 741 (1974); U.S. v. Lopez, 514 U.S. 549 (1995)).

The Riley Court also resoundingly rejected the defendant’s apparent fall back argument that if the language of the statute were somehow ambiguous, the Court should

defer to a reasonable interpretation by the agency, as if we were interpreting a statute which has no implications for the balance of power between the Federal Government and the States. We do not. It is axiomatic that statutory ambiguity defeats altogether a claim by the Federal Government that Congress has unambiguously conditioned the States’ receipt of federal monies in the manner asserted.

Riley, 106 F.3d at 567. Citing the 126 students out of 128,000, the Court further concluded that the Secretary’s threat to withhold all of Virginia’s IDEA funds also constituted coercion impermissible under the Tenth Amendment, noting that this condition was “considerably more pernicious than the ‘relatively mild encouragement’ at issue in Dole.” Id. at 569. In Judge Luttig’s words,

[u]ltimately, if the Court meant what it said in Dole, then I think that a Tenth Amendment claim of the highest order lies where, as here, the Federal Government ... withholds the entirety of a substantial federal grant on the ground that the States refused to fulfill their federal obligation in some insubstantial respect rather than submit to the policy dictates of Washington in a matter peculiarly within their powers as sovereign States. In such a circumstance, the argument as to coercion is more than rhetoric; it is an argument of fact.

Id. at 570. “In the end,” the Riley Court observed,

[t]his case is about the permissible reach of federal power under the Spending Clause in a time when the several States have become increasingly dependent upon the Federal Government for funds, because the Federal Government has increasingly become dependent upon the revenues from taxation it receives from citizens of the several States. In particular it is about the extent to which the Federal Government may, in our system of federalism, impose its policy preferences upon the States by placing conditions upon the return of revenues that were collected from the States’ citizenry in the first place.

Id. For obvious reasons, the Secretary would rather this Court ignore the holding in Riley.²⁶

Finally, the Secretary has improperly introduced selective evidential material into her arguments. *See* Def. br. 49. Not only is this inappropriate in the context of Secretary's motion to dismiss for plaintiffs' alleged failure to state viable claims, this improper presentation of selective "facts" underscores why the State is entitled to an evidentiary hearing on their claims to allow the complete universe of relevant facts to be brought to light.

In short, these statutory provisions mean what they plainly say. The Act contains no unfunded mandates, and meaningful consideration of requests for waiver of any provision of the law -- including the annual testing expectation -- is guaranteed. The Secretary's erroneous construction of these statutes and inflexible imposition of her requirements violates the conditions under which the State elected to participate in the program, and as a matter of fact, are coercive. The State respectfully submits it is entitled to both the discovery and the evidentiary hearing necessary to prove these claims.

III. THE SECRETARY'S DECISIONS TO DENY WAIVERS ARE SUBJECT TO JUDICIAL REVIEW.

The Secretary seeks to avoid judicial review of her clearly illegal actions by invoking 5 U.S.C. § 701(a)(2), asserting that the statute under which the waivers were sought, 20 U.S.C. §7861, leaves the decision as to whether to grant such waivers solely to her discretion, without any statutory or regulatory guidance whatsoever. Even if this were the case -- which it is not -- the Secretary cannot, as she did here, refuse to exercise her discretion at all.

It is well settled that Section 701(a)(2)'s exception from judicial review is a narrow one. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410-411 (1971); Abbott

²⁶ It is especially noteworthy that in Riley a state *policy* was in conflict with the Secretary's construction of the IDEA provision. In this case the conflict raises even greater concerns for state sovereignty in our federal system, in that the conflict is between the Secretary's construction of the federal statute (which the State views as wrong and misguided) and state *statute*.

Laboratories v. Gardner, 387 U.S. 136, 141 (1967); Dunlop v. Bachowski, 421 U.S. 560 (1975). Before applying this narrow exception courts require “clear and convincing evidence” of legislative intent to restrict judicial review. Volpe, 401 U.S. at 410; Abbott Laboratories, 387 U.S. at 141; Shaughnessy v. Pedreiro, 349 U.S. 48, 51 (1955) (Administrative Procedures Act review provisions must be given “hospitable” interpretation); U.S. v. Interstate Commerce Comm’n., 337 U.S. 426, 433-435 (1949); Brownell v. Tom We Shung, 352 U.S. 180 (1956).²⁷ See also, Barlow v. Collins, 397 U.S. 159, 166 (1970) (need clear and convincing evidence of Congressional intent to preclude judicial review; preclusion cannot be inferred); Holmes v. NYC Housing Authority, 398 F.2d 262, 265 (2d Cir. 1968). In discussing this exception, the Second Circuit in Holmes stated that “[i]t hardly need be said that the existence of an absolute and uncontrolled discretion in an agency of government vested with the administration of a vast program, such as public housing, would be an intolerable invitation to abuse.” Id.

A 1993 decision from this Circuit, not cited by the Secretary, is particularly instructive as to the scope of § 701(a)(2)’s exception to judicial review. In Christianson v. Hauptman, the plaintiff challenged a National Park Service regulation prohibiting the operation of seaplanes in a

²⁷ The Heckler Court’s opinion, relied on by the Secretary, concluded the agency decision was unreviewable under § 701(a)(2), but reiterated that § 701(a)(2)’s exception “remains a narrow one.” Heckler, 470 U.S. at 838. Indeed, Greater New York Hospital Ass’n. v. Mathews, 536 F.2d 494, 497 (2d Cir.1976), also heavily relied upon by the defendant, similarly described itself as correctly applying the Volpe standard in a situation that was one of “a very limited number of cases where” § 701(a)(2)’s exemption would apply. See also Barlow et al v. Collins, 397 U.S. 159, 166 (1970) (Need clear and convincing evidence of Congressional intent to preclude judicial review; preclusion cannot be inferred).

A careful reading of Heckler reveals that the opinion is quite a bit narrower than the defendant would have this Court believe. In Heckler, Justice Rehnquist’s opinion parts company with the Court of Appeals decision in large measure on the basis that the agency action at issue was the agency’s decision not to undertake certain enforcement actions. The decision goes on to discuss the various balancing of factors that goes into such decisions. Heckler, 470 U.S. at 830-831. Of course, a decision on the granting of waivers is not enforcement action, and the Heckler Court, in apparently establishing a presumption of non-reviewability for enforcement action decisions, noted that “Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers.” Id. at 833.

particular locale. 991 F.2d 59 (2d Cir. 1993). As in this case, the defendant, citing Heckler, 470 U.S. at 821, 830, claimed that its actions were not subject to judicial review under § 701(a)(2) because of the broad grant of authority to the agency. The Christianson Court rejected this argument, concluding that the defendant had failed to show clear and convincing evidence of legislative intent to restrict access to judicial review, and that there were indeed standards by which the agency's actions could be evaluated by the Court. Christianson, 991 F.2d at 63. In the Court's view, it had "jurisdiction to review whether the Service's actions were undertaken without adequate investigation or whether the actions taken were detrimental or completely unrelated to conserving and preserving ... [the] environment." Id. Although the Court ultimately did not overturn the agency action, the action was not immune from judicial review. Id.

In asserting that § 701(a)(2)'s exception applies here, the Secretary claims that there are no statutory or regulatory provisions that can provide standards against which the supposed exercise of her discretion in denying the waivers can be measured or evaluated. Def. br. 52-53. However, in making this assertion, the Secretary cites only the waiver provisions of NCLB § 9401 (115 Stat. 1972-75) 20 U.S.C § 7861, claiming that at least with respect to initial requests for waivers (as opposed to requests to renew waivers), "so long as the request contains the information specified in [§ 7861] subsection (b) and does not request a waiver of one of the provisions listed in subsection (c), the Secretary is free to grant or deny the request as she sees fit." Def. br. 52. In so arguing, the Secretary ignores both other relevant provisions of NCLB and the State's allegations in the complaint, which must be taken as true for purposes of Secretary's motion, that the Secretary, notwithstanding her statutory duty to do so, has proclaimed that she will not exercise *any* discretion with respect to a whole category of waiver requests, namely, those seeking waiver of the statute's general expectation of annual

standardized testing in grades three through eight (20 U.S.C. § 6311) and those based on inadequate federal funding. The Secretary's stated *categorical* refusal to consider waiver requests on this statutory provision, which the State intends to prove at trial, provides a clear statutory and factual benchmark against which the Secretary's actions can be reviewed by the Court. See Christianson, 991 F.2d at 63; Lincoln v. Virgil, 508 U.S. 182, 193 (1993) (agency is not free under a Heckler analysis, to "simply disregard statutory responsibilities."); Greater New York Hospital Ass'n., 536 F.2d at 500 (if the *timing* of Medicare reimbursement were in violation of a statutory right, the agency decision would "of course" be reviewable); Volpe, 401 U.S. at 410, 413 (statutory directive intended to limit use of parklands for new highways provides a statutory benchmark by which to judge agency's actions, thus there is "law to apply.").

Such a categorical refusal to consider meaningfully waiver requests on this statutory provision not only violates the law, it is the antithesis of the exercise of discretion. Discretion has not been properly exercised, or, stated another way, the Secretary abused her discretion because the agency has relied on factors Congress did not intend it to consider or has failed to consider relevant factors or an important aspect of a problem. Motor Vehicle Manufacturers' Ass'n. v. State Farm Mutual, 463 U.S. 29, 43 (1983) (*citing* Volpe, 401 U.S. at 416; Bowman Transportation Systems, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 285 (1974)); Hanly v. Mitchell, 460 F.2d 640, 648 (2d Cir. 1972), *cert. denied* Hanly v. Kleindienst, 409 U.S. 990 (1972) (*citing* Volpe, 401 U.S. at 416). See also City of Hartford v. Town of Glastonbury, 561 F.2d 1032, 1043 (1976), *cert. denied* 434 U.S. 1034 (1978) (abuse of discretion to fail to consider relevant factors); U.S. v. Garner, 767 F.2d 104, 116 (5th Cir. 1985) (*citing* Motor Vehicle Manufacturers, 463 U.S. at 43 (administrative decision is arbitrary and capricious where

agency relies on factors not intended for it to consider or failed to consider important aspect)). The Secretary's categorical decision to refuse to grant waivers regarding this particular statutory provision flies in the face of Congress' stated intent that waivers on "any" provision ought to be available (20 U.S.C § 7861), and represents a decision on the basis of an *irrelevant* factor -- namely the Secretary's arbitrary and unauthorized "rule" that this particular category of waiver requests are not even entitled to consideration on their merits.

Another statutory benchmark that provides this Court with judicially cognizable standards against which it may judge whether the Secretary has properly exercised her discretion is provided by the Unfunded Mandates Provision. As discussed at length in section II.A *supra*, this provision assures that States participating in the federal program will not be required to expend State funds to meet NCLB's requirements. While the parties have a legal dispute as to the meaning and applicability of this provision, the State has alleged, and ought be entitled to establish, that the provision means what it says, and that given the Secretary's misreading or misinterpretation of this provision, she failed to properly consider the provision's impact on the State's waiver requests. Indeed, as oft-stated, one of the State's essential claims is that given the legal rule embodied in this provision, the Secretary was required by law to either waive the requirements that, as a matter of fact, will force the State to expend State funds in violation of the Unfunded Mandates Provision and the parallel state law, Conn. Gen. Stat. § 10-14n(g), or she must grant the State's waiver requests so as to ensure that such State funds need not be expended in violation of these federal and state laws.²⁸

²⁸ It is also well settled that where, as here, in determining whether the Secretary acted unlawfully in denying the waiver requests, the principal disputes involve the meaning of statutory terms, the controversy is resolved "not on matters within the special competence of the Secretary, but by judicial application of canons of statutory construction." In such circumstances the role of the courts must be viewed "hospitably." Barlow, 397 U.S. at 166 (*citing Texas Gas Transmission Corp. v. Shell Oil Co.*, 363 U.S. 263, 268-270 (1960) and *quoting Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 14 (1968) (Harlan, J.,

It is remarkable that the Secretary, in support of her argument that her alleged “exercise of discretion” in denying the waiver requests is judicially unreviewable, cites to cases that qualitatively describe the exercise of agency discretion as a complicated balancing of a number of factors, not within a court’s sphere of understanding or expertise, and otherwise not conducive to judicial review. Def. br. 53-54. More ironic still is that the Secretary relies upon San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) and Board of Education of Hendrick Hudson School Dist. v. Rowley, 458 U.S. 176 (1982). As discussed above, not only is the Secretary’s categorical refusal to meaningfully consider waivers on a principal provision of the law an obvious rejection of the complicated balancing of various factors (whether monetary, educational or otherwise) that is the hallmark of matters committed to agency discretion, these decisions, like Riley, 106 F.3d at 559, stand for the proposition that in the realm of sound educational policy and decision-making, state viewpoints and determinations should be honored and respected, because “courts must be careful to avoid imposing their view of preferable educational methods upon the States.” Rowley, 458 U.S. at 207.²⁹

Contrary to the Secretary’s contention, 5 U.S.C. § 701(a)(2) does not apply here, and the State is entitled to the opportunity to prove its properly alleged claims that the Secretary’s denials of its waiver requests were an unlawful abuse of discretion, and indeed, at least in part, a complete abrogation of the exercise of such discretion.

CONCLUSION

For the reasons set forth above, the State respectfully requests that the court deny the Secretary’s Motion to Dismiss.

dissenting)); *accord*, Southern Packaging & Storage v. U.S., 458 F. Supp. 726 (D.S.C.1978), *aff’d*. 618 F.2d 1088 (4th Cir. 1980).

²⁹ In ruling that there is no federal constitutional right to education, the San Antonio Court observed that in our federal system matters of sound educational policy are best left to the states. San Antonio, 411 U.S. at 57-58.

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CERTIFICATION OF SERVICE

I hereby certify that on December 23, 2005, a copy of the foregoing State's Opposition to the Secretary's Motion to Dismiss was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of electronic Filing. Parties access this filing through the court's CM/ECF System. Courtesy copies were also sent to chambers by overnight mail and to opposing counsel, Elizabeth Goitein, Trial Attorney. A courtesy copy of the brief (without attachments) was also sent by email to Elizabeth Goitein, counsel for the defendant.

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