

05-2708

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

No. 05-2708

**SCHOOL DISTRICT OF THE CITY OF PONTIAC, ET AL.,
Plaintiffs-Appellants**

v.

**SECRETARY OF U.S. DEPARTMENT OF EDUCATION,
Defendant-Appellee**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN**

**AMICI CURIAE BRIEF OF THE STATES OF CONNECTICUT,
DELAWARE, ILLINOIS, MAINE, OKLAHOMA, WISCONSIN,
AND THE DISTRICT OF COLUMBIA**

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STATEMENT OF THE AMICI CURIAE

The sovereign States of Connecticut, Delaware, Illinois, Maine, Oklahoma, Wisconsin, and the District of Columbia, (collectively, the “Amici States”) through their respective Attorneys General, submit this brief as amici curiae in support of the plaintiffs-appellants in this matter. Pursuant to Fed. R. App. P. 29(a), the Amici States are permitted to file this brief without the consent of the parties or leave of the Court.

The Amici States have a significant interest in the outcome of this case. 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 conspicuously absent from the federal constitution, nearly every state constitution requires the state to provide its children with an education.

Before passage of the No Child Left Behind (“NCLB”) Act, Pub. L. 107-110 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. Although the federal government provides only 5% to 8% of total educational funding, through the NCLB Act the federal government is now dictating educational policy on a wide variety of educational issues, from teacher qualifications to the timing of annual student assessments.

The Amici States respectfully disagree with the district court's determination that the Unfunded Mandates Provision of the NCLB Act, NCLB Act § 9527(a), 20 U.S.C. § 7907(a), merely means that the federal officials at the U.S. Department of Education cannot act *ultra vires* and add additional obligations beyond the requirements of the NCLB Act. See Pontiac v. Spellings, 2005 U.S. Dist. LEXIS 29253, *11-12 (E.D. Mich., November 23, 2005) ("District Court decision"). Certainly, that is not what Amici States understood when they opted to participate in the NCLB programs. Rather, Amici States understood, based on the plain language and statutory context of the Unfunded Mandates Provision, that neither states nor local school districts would be required to spend their own funds to comply with the NCLB mandates. The states' understanding of the plain meaning of the Unfunded Mandates Provision is significant, and should be given effect by

this Court in order to avoid the considerable constitutional difficulties raised by construing the NCLB in a manner that undermines the states' settled expectations.

ARGUMENT

The Unfunded Mandates Provision means that the federal government must pay the costs imposed upon the states and local school districts by the NCLB Act and that the Secretary and her staff cannot implement the NCLB Act's requirements in a manner that requires any state or local school district to "spend any funds" or to "incur any costs not paid for under this Act."

Ignoring the plain meaning of the Unfunded Mandates Provision, the repeated use of the verb "mandate" elsewhere in the Act, and the legislative intent behind the enactment of the Provision, the district court reduced the Unfunded Mandates Provision to a meaningless tautology: it posits that the Provision means the Secretary cannot act outside her statutory authority even though prior to the passage of the Provision, as a creature of statute, the Secretary never had any authority to act beyond those statutory boundaries.

Given that the states understood the Unfunded Mandates Provision to mean what it says, an interpretation at odds with the plain language raises constitutional concerns, for the constitutional restrictions upon Congress' spending power authority requires that "Congress speak with a clear voice." *See Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17-18 (1981).

The district court's interpretation of the NCLB Act's Unfunded Mandates Provision renders it a nullity and should be rejected.

I. The Amici States Participated In The NCLB Act With The Understanding That The Unfunded Mandates Provision Means That States Will Not Be Required To Spend Their Own Funds To Comply With The Mandates of the Act.

When the Amici States acted to accept NCLB Act funding and to adopt NCLB Act requirements, it was with the understanding that the Secretary of Education would comply with all of the provisions of the NCLB Act, including the Unfunded Mandates Provision. Thus the Secretary could not require the states or their local school districts to “spend any funds or incur any costs not paid for under this Act.” The plain language, context and legislative history of the Provision support the Amici States' interpretation.

A. The Plain Language of the Unfunded Mandates Provision Compels The Amici States' 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 Unfunded Mandates Provision is unique to the field of education -- it has not been enacted in any other area of law.¹

Using strong, absolute language, the statutory provision expressly commands that “nothing” in the Act permits the federal government to “mandate, direct or control” the “allocation of State or local resources,” or to “mandate” a state or any subdivision thereof to “spend any funds or incur any costs not paid for under this Act.” Thus 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 local school district to “allot” any resources or “spend” *any funds* or incur *any costs* to meet the NCLB Act’s requirements. Instead the Provision provides that all such costs shall be “paid for under this Act.”

“The preeminent canon of statutory interpretation requires us to ‘presume that [the] legislature says in a statute what it means and means in a statute what it says there.’” BedRoc Ltd., LLC v. United States, 541 U.S. 176, 183 (2004),

¹ The exact language of the NCLB Act’s Unfunded Mandate Provision was initially enacted in three 1994 education statutes: Goals 2000: Educate America Act, Pub. L. 103-227, Sec. 318, 108 Stat. 186, 20 U.S.C. § 5898 (“Goals 2000 Act”); School-to-Work Opportunities Act, Pub. L. 103-239, Sec. 604, 108 Stat. 605, 20 U.S.C. § 6234; and Improving America’s Schools Act (“IASA”), Pub. L. 103-382, Sec. 14512, 108 Stat. 3906, 20 U.S.C. § 8902. The IASA is the immediate predecessor of the NCLB Act. In the session immediately after the passage of the NCLB Act, the Provision was also included in the Educational Sciences Reform Act of 2002, Pub. L. 107-279, Title I, Sec. 182, 116 Stat. 1971, 20 U.S.C. § 9572(b). It does not appear anywhere else in the federal statutes.

quoting Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253-54 (1992). *See* Leocal v. Ashcroft, 543 U.S. 1, 14 (2004) (“Our analysis begins with the language of the statute”); Olden v. Lafarge Corp., 383 F.3d 495, 503-06 (6th Cir. 2004), *cert. denied*, 125 S. Ct. 2990 (2005) (courts must apply unambiguous statutes as written.) “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.” Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999). Courts must also 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 Unfunded Mandates Provision uses the word “any” twice in relation to costs -- a state or “any subdivision thereof” cannot be required to “spend any funds or incur any costs not paid for under this Act.” 20 U.S.C. § 7907(a) (emphasis added). “The term ‘any’ is generally used to indicate lack of restrictions or limitations on the term modified.” U.S. ex rel Barajas v. United States, 258 F.3d 1004, 1010-11(9th Cir. 2001) and citations therein. *See also* DeMaria v. Andersen, 318 F.3d 170, 176 (2d Cir. 2003) (interpreted “any” to mean “every”).

Similarly, the Unfunded Mandates Provision uses the verb “mandate” to explain how the NCLB Act is not to be construed. That same verb “mandate” is used nine other times in the NCLB Act, and in each instance, is used in its ordinary

sense as a check or limit upon the federal government requiring something of NCLB participants. A “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. Interpreting the verb “mandate” to mean to order, command or require is consistent with how the verb is used in the Act. In addition to the restrictions contained in the Unfunded Mandates Provision, the Secretary is prohibited from mandating specific tests or modes of instruction, and from mandating an educational approach for ELL students. 20 U.S.C. §§ 6311(b)(6), 6849. 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.” 20 U.S.C. §§ 6575, 7371, 7906. Nothing in the Act “shall be construed to mandate equalized spending per pupil,” or “to mandate national school building standards.” 20 U.S.C. §§ 6576, 7372, and 7907(d). Finally, state and local educational agencies are not required to “mandate, direct or control” the curriculum of a private or home school. 20 U.S.C. § 7886(d). Thus the verb “mandate” is consistently used in the sense of “to require” or “to command,” and there is nothing in its usage in the Act that indicates that Congress intended the verb to mean “piling on” or adding requirements.

The district court's interpretation also ignores the specific limitation in the final phrase of the Provision, that states and local school districts not be required to incur costs, or expend funds, "not paid for under this Act." This phrase can only be reasonably read to mean one thing -- states and local school districts may not be required to spend their own funds to comply with NCLB mandates that are not being "paid for" under the NCLB Act.

In its decision dismissing the plaintiffs' claims, the district court focused solely on the phrase "officer or employee of the Federal government" thereby ignoring the meaning of the balance of the Provision and ultimately rendering the entire Provision a nullity. The phrase "officer or employee of the Federal government" does not negate the plain meaning of the remainder of the Provision. Rather, the phrase dictates and constrains how the Act is to be implemented and administered by the Secretary of Education.

The full ten Titles of the NCLB Act comprise a 670 page piece of complex legislation, which for the first time imposes federal requirements on all public schools nationwide.² Not surprisingly, the Secretary of Education and her staff are charged with administering and implementing this complicated Act. For example, the Secretary establishes the criteria and procedures for state plans required under

² The terms and conditions of complying with the NCLB Act are substantially more complicated than simply changing a minimum drinking age. *Compare South Dakota v. Dole*, 483 U.S. 203 (1987).

the Act, 20 U.S.C. § 7842, and she is required to make grants to the states to enable the states to develop and administer the assessments required under the Act. 20 U.S.C. § 7301. The Secretary also determines how many of the requirements are implemented. *See, e.g.*, 20 U.S.C. §§ 7842, 7843.

The Secretary is required to implement all of the provisions of the NCLB Act, including the Unfunded Mandates Provision. How she implements and administers these requirements has a direct impact upon costs. For example, the NCLB Act requires that “reasonable accommodations” be provided when special education and limited English proficient students are assessed. 20 U.S.C. § 6311(b)(3)(C)(ix). The Secretary has interpreted the “reasonable accommodations” language so as to require substantial additional expenditures, and has rejected waiver requests that would have provided such reasonable accommodations in a cost-neutral fashion. However, the Secretary has all the statutory tools necessary to reconcile and balance the various provision of the Act. With a few limited exceptions, the Secretary has the authority to waive any statutory or regulatory requirement of the Act. 20 U.S.C. § 7861.

Given the breadth of the Secretary’s waiver authority and overall authority over the implementation of the Act, there is simply no reason why the requirements of the Act cannot be implemented within the constraints of the Unfunded Mandates Provision. The Amici States’ interpretation of the Provision

would not, as the district court asserts, permit the states to “avoid the requirements simply by claiming that they have to spend some of their own funds.” *See* District Court decision at *11. Rather, it requires the Secretary to tailor her implementation of the Act to the federal funding provided.

The district court’s interpretation, by contrast, renders the Unfunded Mandates Provision meaningless. As is true for all administrative agencies, the Secretary and her department are statutory creations, and thus may only act within the confines of their statutory powers. *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 212-14 (1976); FCC v. American Broadcasting Co., 347 U.S. 284, 296 (1954); Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129, 134 (1936). Given that the Secretary has no authority to add to statutory requirements, and any actions that she would take would be beyond the confines of her statutory authority, Congress had no reason to prohibit the Secretary from doing what she already had no authority to do. Congress is presumed to not pass meaningless legislation and thus the district court’s interpretation should be rejected. *See* Halverson v. Slater, 129 F.3d 180, 185 (D.C. Cir. 1997) (rejecting Secretary of Transportation’s statutory interpretation of provision as merely confirming existing authority as it “plainly violates the familiar doctrine that Congress cannot be presumed to do a futile thing”); Coyne & Delany Co. v. BCBS, 102 F.3d 712, 715

(4th Cir. 1996) (absent clear congressional intent to the contrary, the courts will not assume that Congress intended to pass vain or meaningless legislation.)

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

B. The Overall Structure of the NCLB Act Supports the Amici States' Interpretation.

The Court “must construe a statute as a whole, and, in so doing, [the court] must strive to ‘interpret provisions so that other provisions in the statute are not rendered inconsistent, superfluous, or meaningless.’” Chrysler Corp. v. Comm’r of Internal Revenue, 436 F.3d 644, 654-55 (6th Cir. 2006), *quoting* Broadcast Music, Inc. v. Roger Miller Music, Inc., 396 F.3d 762, 769 (6th Cir.), *cert denied*, 126 S. Ct. 374 (2005). *See also* 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.”)

The Unfunded Mandates Provision is contained in the “General Provisions” Title of the NCLB Act (Title IX). Unlike the few specific funding provisions

contained in the Act, the Unfunded Mandates provision is a general rule applicable to all ten Titles.

In Title I, Congress included two funding provisions. For fiscal years 2002 through 2007, Congress authorized appropriation levels for a variety of specific programs -- for local educational agency grants, the authorized levels ranged from \$13.5 billion to \$25 billion annually. 20 U.S.C. § 6302. Although Congressional appropriations almost reached authorized levels in the first year, they are now approximately half of the authorized levels. Congress also established threshold funding levels within the assessment section in Title I of the Act -- no state was required to commence or administer the NCLB mandated assessments unless and until Congress allotted a minimum level of funding for state assessments, ranging from \$370 million to \$400 million. *See* 20 U.S.C. § 6311(b)(3)(D). Neither of these provisions are provisions of general applicability, and neither provision repeals the Unfunded Mandates Provision.

More importantly, neither of these provisions requires the states and local school districts to spend their own funds to meet the overall requirements of the Act. Indeed, no where in the NCLB Act is there a statutory provision that requires that the states and local school districts will be required to spend their own funds to meet the requirements of the entire NCLB Act. *See Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981) (“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.”³

When Congress intended for states and local school districts to spend their own funds for a particular grant program contained within the NCLB Act, it expressly so stated. In the Act, matching funds are required only for specific grants for “innovative” or optional programs. In Title I, only two specific programs have “matching” requirements that require state or local funding. *See* 20 U.S.C. § 6381a(c)(5) (state matching requirement for migrant, outlying areas and Indian tribes grants); 20 U.S.C. § 6535(c)(3) (advanced placement incentive program grants). Matching funds from “entities,” local educational agencies, public-private “consortia,” or nonprofit organizations only are required in the innovative grant programs in Titles IV and V of the Act, and most may be satisfied by “in-kind” contributions. *See, e.g.,* 20 U.S.C. §§ 1042(c) (tomorrow’s teachers technology grant), 7133(b)(4)(B) (hate crime prevention grant), 7243b(c) (improvement of education grant), 7255d (statewide technology network grant), 7257c (digital education grant), 7263a(c) (community technology grant),

³ The NCLB Act does contain standard “non-supplanting” provisions, namely that state and local funds for free public education and Title I schools cannot be replaced by federal funds. *See* 20 U.S.C. §§ 6321, 7217, 7901. These “maintenance of effort” 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). They do not, however, require state and local school districts to use their own funds to meet the requirements of the NCLB Act.

7267d(c)(2) (excellence in economic education grant), 7273d(a) (parental assistance and local family information centers grant).

These specific matching grant provisions only confirm the Amici States' position that the states and local school districts are not required to spend their own funds to pay for the overall requirements of the Act. When Congress intended to require non-Federal funding, it expressly did so. For the overall expenses of the Act, not only did Congress not require non-Federal funding, it expressly provided that no state or subdivision thereof would be required to "spend any funds or incur any costs not paid for under this Act." 20 U.S.C. § 7907(a).

Moreover, when Congress intended to make a specific requirement a "condition" of receiving federal educational funding, it expressly did so. Here, none of the specific "conditional" sections of the Act require the expenditure of state or local funds. *See, e.g.*, 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]"); 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."); 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.); 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 specific “terms and conditions” within the context of certain programs and grants. *See, e.g.*, 20 U.S.C. §§ 6381a(a), 6702, 7183, 7251, 7269, 7271, 7455, 7514, 7515; 25 U.S.C. § 2020. Notably there is not a single “conditional” statutory provision in the Act that explicitly states that state or local funds must be spent. Instead, in the General Provisions applicable to the entire Act, Congress expressly stated the direct contrary -- that states and local school districts should not be required to “spend any funds or incur any costs not paid for under this Act.”

C. The Legislative History of the Unfunded Mandates Provision Confirms the Amici States’ Interpretation.

The foregoing should be dispositive of the issue before the Court in this case. The Unfunded Mandates Provision by its terms can only be read to prohibit the imposition of costs on the states and local school districts that are “not paid for under” the NCLB Act. If the Court nonetheless concludes that any ambiguity remains, such ambiguity would be eliminated by review and consideration of the legislative history of the Unfunded Mandates Provision.

When the court’s “reading results in ambiguity or leads to an unreasonable result, the court may look to the legislative history.” Chrysler Corp. v. Comm’r of Internal Revenue, 436 F.3d 644, 655-56 (6th Cir. 2006); Patel v. Gonzales, 432 F.3d 685, 691 (6th Cir. 2005); OfficeMax, Inc. v. United States, 428 F.3d 583, 592

(6th Cir. 2005); The Limited, Inc. v. Comm’r of Internal Revenue, 286 F.3d 324, 332 (6th Cir. 2002).

With education reform as one of the top priorities of the newly-elected President, the House and the Senate of the 107th Congress in 2001 both 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 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). Although the legislative history of both bills is replete with declarations that the law could not result in the massive financial burden on states and local school districts that resulted from the Individuals with Disabilities Education Act (IDEA), the legislative history of the NCLB Act is silent as to the meaning of the Unfunded Mandates Provision that was carried over from the prior ESEA reauthorization act.⁴

Because the Unfunded Mandates Provision was carried over unchanged and without comment from the three major education statutes enacted in 1994, it is

⁴ The legislative history of the subsequently-enacted Educational Sciences Reform Act of 2002, Pub. L. 107-279, also lacks any discussion of its Unfunded Mandate Provision.

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 Act. Like the NCLB Act, the Goals 2000 Act sought to increase accountability and flexibility in 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 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* Pub. L. 103-227, Sec. 318, 108 Stat. 186, 20 U.S.C. § 5898.

The first three lines of the Goals 2000 Unfunded Mandates Provision were introduced on the floor of the House by Reps. Goodling and Condit as follows:

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). 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 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 argument 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 explicit 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.*⁵ The Senate version was accepted at conference and became the enacted language of the Goals 2000 Act Unfunded Mandates Provision. H. Conf. Rpt. 107-446 (Mar. 21, 1994) (Sec. 318 discussion).

The School-to-Work Opportunities Act. A companion bill to the Goals 2000 bill, pending at the same time, the initial bills for the School-to-Work Opportunities Act did not contain an unfunded mandate provision. The Senate passed a version requiring no unfunded mandates, a feature the House version

⁵ Senator Gregg’s original proposed language provided “no provision of Federal law shall require a State, in order to receive funds under this Act, to comply with any federal requirement, *other than a requirement of this Act as in effect on the effective date of this Act.*” 140 Cong. Rec. S6501-01, 622 (daily ed. February 22, 1994). Four pages later, Sen. Gregg amended his proposal to the adopted language, notably eliminating both the conditional nature and the highlighted language and adopting the House proposal, with the additional language. 140 Cong. Rec. S626. His comments referred to the language passed in the statute.

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. Rpt. 103-480 (Apr. 19, 1994). *See* Pub. L. 103-239, Sec. 604, 108 Stat. 605, 20 U.S.C. § 6234.

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. Like its successor the NCLB Act, the whole IASA bill could “be summed up in two words: flexibility and accountability.” House Rpt. No. 103-425 at 4; 1994 USSCAN, vol. 5 2807, 2810. 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 criticism 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.” 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.”)

Once the Unfunded Mandates Provision was added by the Senate and accepted in conference, concerns about unfunded mandates disappeared. *See* Pub. L. 103-382, Sec. 14512, 108 Stat. 3906, 20 U.S.C. § 8902. Referring to the 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).

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.” 140 Cong. Rec. S9873 (daily ed. July 27, 1994) (Sen. Kassebaum). 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.” 140 Cong. Rec. S14205 (daily ed. Oct. 7, 1994) (Sen. Durenberger).

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 school districts need not 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. There is no support for the district court’s unreasonable interpretation that the Provision simply was a check on the federal government to prevent federal officials from “piling on” additional requirements. Rather, the legislative history makes clear that Congress was deeply concerned with the costs of complying with the Act, and wanted to ensure that the Act was implemented and administered so as to ensure that the states and local school districts would not need to “spend any funds or incur any costs not paid for under this Act.”

II. The Unfunded Mandates Provision Should Be Interpreted According To Its Plain Terms In Order To Avoid Constitutional Difficulties.

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 the constitutional limits on the financial “inducements” offered by the federal government to the states to enlist their participation in particular federal programs. 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 v. U.S. Dept. of Health & Human Services, 289 F.3d 281, 287-93 (4th Cir. 2002); Virginia Dept. of Ed. v. Riley, 106 F.3d 559 (4th Cir. 1997).

Therefore the 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. 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 v. Rowley, 458 U.S. 176, 204 (1982).

In the watershed opinion in Pennhurst, 451 U.S. at 17-18, the Supreme Court, citing King v. Smith, 392 U.S. 309, 333 (1968), noted that

There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation. Indeed, 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.

Pennhurst, 451 U.S. at 17-18 (internal citations omitted).

Not only did Congress not say that the states must fund the requirements of the NCLB Act in order to receive federal funds, Congress expressly stated that the states and local school districts did not have to “spend any funds or incur any costs”

not paid for under this Act.” Unfunded Mandates Provision. There is nothing in the NCLB Act or the NCLB Unfunded Mandates Provision that would inform the states that the Provision did not mean what it said. Indeed, the states rightly assumed that it meant what it said. *See, e.g.*, Conn. Gen. Stat. § 10-14n(g); 46 Conn. S. Proc., pt. 9, 2003 Sess. 2626, 2632 (May 21, 2003) (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,” for “if the money ain’t there folks, we can’t do it.”)

Under the Pennhurst “clear and unambiguous” rule, the Unfunded Mandates Provision must be given effect in accordance with its plain terms. If this Court were to agree with the district court that the Unfunded Mandates Provision does not mean what it plainly says -- that no state or local school district is required to “spend any funds or incur any costs not paid for under this Act -- then a substantial constitutional problem would result. The states opted into the NCLB Act based upon the plain meaning of the Unfunded Mandates Provision and that acceptance is undermined if the Unfunded Mandates Provision is rendered meaningless.

CONCLUSION

For the foregoing reasons, the Amici States respectfully request the Court to reverse the district court’s dismissal of the plaintiffs-appellants’ claims.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 29(c)(5) and 32(a)(7), the undersigned counsel hereby certifies that the foregoing Amicus Brief complies with the type-volume limitations of Fed R. App. P. 32(a)(7)(B) because this brief contains 6,330 words, less than the 7,000 words permitted, excluding the parts of the brief exempted by Fed R. App. P. 32(a)(7)(B)(iii).

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