

CASE NO. 05-2708

IN THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

PONTIAC SCHOOL DISTRICT, et al.,

Plaintiffs-Appellants,

v.

SECRETARY OF THE UNITED STATES
DEPARTMENT OF EDUCATION,

Defendant-Appellee.

On Appeal from the United States District Court
For the Eastern District of Michigan
(Honorable Judge Friedman)

PROOF OPENING BRIEF OF PLAINTIFFS-APPELLANTS
PONTIAC SCHOOL DISTRICT, et al.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

This case raises a question of first impression regarding the proper construction of Section 9527(a) of the No Child Left Behind Act, 20 U.S.C. § 7907(a), the resolution of which is of great importance not only to the twenty parties in this case but to states, school districts and education associations nationwide. No court, save the court below, has yet ruled on that important question of statutory interpretation. Plaintiffs-appellants believe that oral argument may be of assistance to the Court, and they respectfully request that the Court hear argument in this case.

STATEMENT OF JURISDICTION

The district court had jurisdiction, pursuant to 28 U.S.C. § 1331, over this lawsuit to prevent defendant-appellee from violating Section 9527(a) of the No Child Left Behind Act, 20 U.S.C. § 7907(a), and the Spending Clause of the United States Constitution, U.S. Const. art. I, § 8, cl. 1. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. The notice of appeal was timely filed on December 20, 2005, R. 21, from the November 23, 2005, district court order dismissing all of plaintiffs-appellants' claims. R. 20.

STATEMENT OF THE ISSUE PRESENTED

1. Section 9527(a) of the No Child Left Behind Act, 20 U.S.C. § 7907(a), provides that:

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.

The issue presented is whether the district court erred in holding that Section 9527(a) "cannot reasonably be interpreted" to mean that states and school districts are not obligated to spend their own funds to comply with the requirements of the No Child Left Behind Act.

STATEMENT OF THE CASE

A. The Nature of the Case

The No Child Left Behind Act (“NCLB” or “Act”) is the latest iteration of the Elementary and Secondary Education Act (“ESEA”), which is, and has been since its enactment in 1965, the principal federal statute regarding public elementary and secondary education. The NCLB imposes much “more specific and far reaching” requirements on states and school districts than any other past or present federal education statute. (R. 1, Compl. ¶ 21 (quoting Memorandum of the National Conference of State Legislatures on Legal Questions Regarding the NCLB (“NCSL Mem.”) pg. 3 (July 7, 2003), Apx pg. __). The NCLB requires states to revise their curriculum standards in core academic areas, establish student achievement standards for each standard, and develop standardized tests in math, language arts and science aligned with those core curriculum standards. (R. 1, Compl. ¶¶ 33-36, Apx. pg. __). School districts must administer the math and language arts standardized tests annually to virtually all students in each grade from 3-8 and, once more, to students in at least one of the grades from 10-12. (Id. ¶¶ 36-37, Apx. pg. __).¹ Based primarily on the performance of students on those standardized tests, both overall and within designated subgroups (viz., major racial

¹ States must also develop, and states and school districts must administer, tests of the English skills of all limited English proficient students. (R. 1, Compl. ¶ 38, Apx. pg. __).

and ethnic groups, low income students, students with limited English proficiency, and students with disabilities), states and school districts must determine and report on whether individual schools and school districts are making adequate yearly progress (“AYP”) in improving student performance. (Id. ¶¶ 46-50, Apx. pg. ___). If AYP is not made, for students as a whole or (with certain exceptions) for any of the designated subgroups, states and school districts must take specified actions against the schools and districts that fall short, ranging from implementing curriculum overhauls, to lengthening the school day or year, to wholesale restructuring. (Id. ¶¶ 46, 71-80, Apx. ___). In addition, states and school districts must ensure that school staffs (teachers and paraprofessionals) meet prescribed qualification requirements. (See R. 1, Compl. ¶¶ 81-83, Apx. ___).

The NCLB authorized Congress to appropriate unprecedented amounts of federal funds to enable states and school districts to comply with these extensive requirements. The Act specifies that Congress is authorized to appropriate grants to school districts to carry out the NCLB Title I mandates (including all the requirements described supra at 2-3) totaling \$13.5 billion in fiscal year (“FY”) 2002, \$16 billion in FY 2003, \$18.5 billion in FY 2004, \$20.5 billion in FY 2005, \$22.75 billion in FY 2006 and \$25 billion in FY 2008. See 20 U.S.C. § 6302(a). These unprecedented authorization levels reflected Congress’ understanding that “significant and annual increases in Title I authorizations” were required to provide

states and school districts with the federal resources needed “to implement fully the reforms incorporated in the [NCLB].” H.R. Conf. Rep. No. 107-334, at 693 (2001).²

Congress also expressly provided that if sufficient federal funds were not appropriated to enable states and school districts to fully comply with the NCLB, states and school districts would not be required to use their own funds to make up the shortfall. To that end, Congress included in the “General Provisions” of the NCLB, a provision – Section 9527(a) – which states, in full, as follows:

**PROHIBITIONS ON FEDERAL GOVERNMENT
AND USE OF FEDERAL FUNDS.**

- (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. [20 U.S.C. § 7907(a).]³

² In contrast, the funding authorization in the 1994 version of the ESEA, which was titled the Improving America’s Schools Act, was for far less in the initial year and was far less specific for the out years of the program, authorizing the appropriation of \$7.4 billion in FY 1995 for purposes of carrying out the statute’s Title I mandates, and “such sums as may be necessary for each of the four succeeding fiscal years.” Act of Oct. 20, 1994, Pub. L. No. 103-382, § 1002, 1994 U.S.C.C.A.N. (108 Stat.) 3522.

³ The remainder of section 9527 reads as follows:

In the years following the enactment of the NCLB, Congress has not provided states and school districts with sufficient federal funds to comply fully with the Act – appropriating \$30.8 billion dollars less for Title I grants to school districts over the five years from FY 02–FY 06 than it authorized for those

(b) PROHIBITION ON ENDORSEMENT OF CURRICULUM. – Notwithstanding any other prohibition of Federal law, no funds provided to the Department under this Act may be used by the Department to endorse, approve, or sanction any curriculum designed to be used in an elementary school or secondary school.

(c) PROHIBITION ON REQUIRING FEDERAL APPROVAL OR CERTIFICATION OF STANDARDS. –

(1) IN GENERAL. – Notwithstanding any other provision of Federal law, no State shall be required to have academic content or student academic achievement standards approved or certified by the Federal Government, in order to receive assistance under this Act.

(2) RULE OF CONSTRUCTION. – Nothing in this subsection shall be construed to affect requirements under title I or part A of title VI.

(d) RULE OF CONSTRUCTION ON BUILDING STANDARDS. – Nothing in this Act shall be construed to mandate national school building standards for a State, local educational agency or school. [20 U.S.C. § 7907(b-d).]

Throughout this brief, we cite to Section 9527(a) in the form in which it was enacted, rather than its codified form. The only differences between the two versions are that the codified version substitutes the word “Chapter” for the word “Act” throughout, conforms the titles to the U.S. Code format, and substitutes for the last phrase of subsection (c)(2) beginning with the word “title,” the phrase “subchapter I of this chapter or part A of subchapter VI of this chapter.”

purposes in the NCLB (see R. 1, Compl. ¶ 25, Apx. pg. ___). Despite that fact, and despite the assurances of former United States Department of Education Secretary Roderick Paige to NCLB participants that “[t]he [NCLB] contains language that says things that are not funded are not required,” (id. ¶ 15, Apx. pg. ___), the current Secretary of the Department of Education, defendant Margaret Spellings (“Secretary”), has insisted that states and school districts comply fully with all of the NCLB mandates notwithstanding the lack of adequate federal funding. (Id. ¶¶ 1, 16-19, Apx. pg. ___). This lawsuit challenges that position.

B. Course of Proceedings and Disposition Below

1. Plaintiffs-Appellants’ Complaint

Plaintiffs-appellants (“plaintiffs”) are nine school districts (one from Michigan, one from Texas and seven from Vermont) and ten education associations (one national association, eight state associations and one local association). (R. 1, Compl. ¶¶ 4-10, Apx. pg. ___).⁴ Plaintiffs filed this lawsuit on

⁴ The nine school district plaintiffs are the Pontiac School District in Michigan (which educates approximately 10,858 students), the Laredo Independent School District in Texas (which educates approximately 23,421 students), and Vermont school districts Rutland Northeast Supervisory Union, Leicester Town School District, Neshobe Elementary School District, Otter Valley Union High School District, Pittsford Town School District, Sudbury Town School District and Whiting Town School District (which collectively educate approximately 2,000 students). (R. 1, Compl. ¶¶ 4-7, Apx. pg. ___).

April 20, 2005, against the Secretary, claiming (1) that the Secretary was violating Section 9527(a) by requiring states and school districts “to spend . . . funds or incur . . . costs not paid for under the [NCLB]” to comply with the NCLB; and (2) that, by so doing, the Secretary was violating the Spending Clause of the United States Constitution by abrogating the bargain that Congress made with states and school districts who opted to participate in the NCLB. (*Id.* ¶¶ 92-97, Apx. pg. ___).

In support of their claims, plaintiffs explained that the NCLB has been drastically underfunded since its inception (*id.* ¶¶ 21-31, 40-45, 52-54, 62-70, 73, 75, 77, 79, 85-86, Apx. pg. ___), that the Secretary has violated Section 9527(a) by insisting that states and school districts comply fully with the NCLB regardless of the amount of federal funding provided (*id.* ¶¶ 1, 16-19, Apx. pg. ___), and that, as a consequence, plaintiffs have been harmed by, *inter alia*, being forced to divert non-NCLB funds to NCLB compliance. (*Id.* ¶¶ 4-7, 87-89, 91, Apx. pg. ___). To redress their injuries, plaintiffs sought a declaration that Section 9527(a) means

The ten education association plaintiffs are the National Education Association (“NEA”) (the vast majority of whose approximately 2.8 million members are employees of public elementary and secondary schools), eight NEA state affiliates (the Connecticut Education Association, Illinois Education Association, Indiana State Teachers Association, Michigan Education Association, NEA-New Hampshire, Ohio Education Association, Texas State Teachers Association, Utah Education Association and Vermont-NEA, the vast majority of whose approximately 425,000 members are employees of public elementary and secondary schools) and one NEA local affiliate (the Reading Education Association, which represents the approximately 1,100 teachers of the Reading, Pennsylvania, School District). (*Id.* ¶¶ 8-10, Apx. pg. ___).

that states and school districts are not required to spend non-NCLB funds to comply with the NCLB and may not lose federal NCLB funding if they fail to comply fully with the NCLB for that reason. (Id. at pgs. 58-58, Apx. pg. ___). In addition, plaintiffs sought an injunction preventing the Secretary from withholding NCLB funds from states and school districts that do not fully comply with the NCLB due to inadequate federal funding. (Id., Apx. pg. ___).

2. The Secretary's Motion to Dismiss

The Secretary responded by moving to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) and (6), arguing that none of the nineteen plaintiffs had standing to bring the lawsuit and that, in any event, Section 9527(a) did not support plaintiffs' claims. (R. 7, Defs. Mem. in Support of M. to Dismiss pgs. 1-2).

In the latter regard, the Secretary took the position that the “conditions [of assistance] imposed by Congress [in the NCLB] and accepted by states and school districts [who opt into the NCLB],” were not affected in any respect by Section 9527(a). (Id. pg. 1). The only purpose of that Section, the Secretary contended, is “to protect against expansive construction of ambiguous provisions in the [NCLB], or the addition of requirements not in the statute, by the federal officials charged with implementing those provisions.” (Id. pg. 18). In support of that position, the Secretary asserted that the word “mandate” in Section 9527(a) did not refer to the conditions that the NCLB itself requires states and school districts to satisfy in

exchange for federal financial assistance (id. pgs. 18-19), but solely to any additional requirements federal officials might attempt to superimpose on the statute. The Secretary also contended that her interpretation took account of the phrase “officer or employee of the Federal government” at the beginning of Section 9527(a), positing that the phrase would be drained of meaning if the Section were meant to limit the reach of the NCLB itself. (Id. pgs. 19-20).

The Secretary did not dispute plaintiffs’ characterization of her position regarding compliance with the NCLB – viz., that states and school districts must comply fully with the NCLB regardless of how far short federal funding falls from covering the actual costs of such compliance.

3. The Decision of the District Court

The district court (Judge Bernard A. Friedman presiding) denied the Secretary’s motion to dismiss the complaint for lack of standing. (R. 20, Mem. Op. & Order pg. 6 (dated Nov. 23, 2005) (“Mem. Op.”), Apx. pg. ___). Recognizing the “relatively modest” burden, Bennett v. Spear, 520 U.S. 154, 171 (1997), that a plaintiff bears to establish standing at the pleading stage, the court concluded that plaintiffs had “adequately alleged” in their detailed and lengthy complaint the basis for their standing to sue, by describing the nature of the injuries that each of the nineteen plaintiffs had suffered due to the Secretary’s challenged

action, which injuries would likely be redressed by the relief sought. (Id., Apx. pg. ___).

But the court granted the Secretary’s motion to dismiss for failure to state a claim, finding “convincing” her argument that Section 9527(a) only bars unauthorized actions by federal “officer[s] or employee[s],” and does not in any way limit the obligation of states and school districts to comply fully with the substantive requirements of the NCLB itself. (Id. pgs. 6-7, Apx. pg. ___).

According to the court, plaintiffs’ contrary reading is defeated by inclusion of the words “an officer or employee of” after the first phrase of Section 9527(a). (Id. pg. 7, Apx. pg. ___). The court declared that, “[i]f Congress had meant that federal funding would pay for 100% of all NCLB requirements, then the inclusion of these words [i.e., “an officer or employee of”] would have been unnecessary.” (Id., Apx. pg. ___). And, the court added that “[i]f Congress meant to prohibit ‘unfunded mandates’ in the NCLB, it would have phrased [Section 9527(a)] to say so clearly and unambiguously,” by “simply stat[ing] that the Federal Government will reimburse the States for all costs they incur in complying with the requirements of this statute.” (Id., Apx. pg. ___). The court also found significant that the “plaintiffs ha[d] pointed to no statutory provision other than [Section 9527(a)] to support their argument that Congress intended for these requirements to be paid for *solely* by the federal appropriations.” (Id., Apx. pg. ___).

To avoid those perceived problems with plaintiffs’ construction of Section 9527(a), the court interpreted the provision as serving only to “prohibit federal officers and employees from imposing additional, unfunded requirements, beyond those provided for in the statute.” (*Id.*, Apx. pg. __). Although plaintiffs had noted several respects in which that interpretation is contrary to the plain language of Section 9527(a) and to well-established canons of construction, the court below did not address any of those arguments in its decision.

Concluding that Section 9527(a) “cannot reasonably be interpreted to prohibit Congress itself from offering federal funds on the condition that States and school districts comply with the many statutory requirements” of the NCLB regardless of the level of federal funding provided, the court dismissed plaintiffs’ complaint for failure to state a claim. (*Id.*, pgs. 7-8, Apx. pg. __).

On December 20, 2005, all nineteen plaintiffs filed a timely notice of appeal to this Court from the district court’s November 23, 2005, decision. (R. 21. Apx. pg. __).

SUMMARY OF ARGUMENT

I.

The plain meaning of Section 9527(a) is that states and school districts may not be required, in complying with the NCLB, “to spend any funds or incur any costs not paid for under this Act [*i.e.*, the NCLB].” 20 U.S.C. § 7907(a). The

district court refused to accept that plain meaning, holding that states and school districts can be required to “spend . . . funds [and] incur. . . costs not paid for under [the NCLB],” as long as the compliance actions on which a state or school district is forced to spend its own funds are required by the NCLB itself rather than by enforcement officials seeking to exceed the bounds of the statute.

The justification the district court offered for its reading of the statute cannot withstand scrutiny. The court’s explanation that its reading was necessary to give effect to the “officer or employee” phrase in Section 9527(a) fails at the threshold, because, under normal rules of syntax and punctuation, the “officer or employee” phrase does not even apply to the final portion of Section 9527(a) which prohibits the imposition of costs on states and school districts. And, in any event, all of the NCLB compliance costs of which plaintiffs complain are imposed by federal enforcement officers, and there is nothing in the statute to support the district court’s conclusion that the prohibition against requiring states or school districts “to spend any funds or incur any costs not paid for under th[e NCLB]” is confined to compliance requirements that stem from unauthorized acts of individual officers, as distinguished from requirements of the NCLB itself that individual officers are seeking to enforce. See infra at 18-22.

If, as the district court hypothesized, Congress only intended to provide that states and school districts cannot be required to spend funds or incur costs for

activities not authorized by the Act, Congress would have said so. But the prohibition Congress enacted applies to all activities “not paid for,” not simply to activities that are not authorized. See infra at 23-25. What is more, under the district court’s reading, Section 9527(a) would be reduced to providing that “[n]othing in this Act shall be construed to authorize [anything that is not authorized by this Act]” a meaningless tautology that, under well-established canons of construction, cannot plausibly be taken as reflecting Congress’ intent. See infra at 25-26.

To the extent that the district court deemed this tortured reading to be necessary in order for the NCLB to operate sensibly, the court’s concern was both misplaced and unfounded. It is the district court’s construction that would subvert the statutory scheme, by leaving the federal government free to shift to states and school districts whatever portion of the NCLB compliance costs Congress chooses not to fund, thereby abrogating the terms on which states and school districts agreed to participate in the statutory program. See infra at 26-28.

II.

Although we submit that plaintiffs’ construction of Section 9527(a) is the only permissible reading of the provision, if the Court were to conclude that any ambiguity exists, reversal would be required for two additional reasons.

First, the relevant legislative history confirms that Section 9527(a) was intended to bar the imposition of costs on states and school districts from legislative mandates that Congress failed to fund. See infra at 31-38.

And second, the constitutionally-compelled “clear statement” rule that this Court and the Supreme Court have recognized is “key” to construing a Spending Clause statute compels the conclusion that Section 9527(a) must be interpreted in a manner that does not shift – based on mere statutory ambiguity – the massive costs of the unfunded NCLB mandates to states and school districts. Coleman v. Glynn, 983 F.2d 737 (6th Cir. 1993) (Merritt, J., concurring); Pennhurst State Sch. v. Halderman, 451 U.S. 1, 17 (1981). The only reading of the statutory language that is consistent with that constitutional rule is the one plaintiffs have advanced. See infra at 39-43.

STANDARD OF REVIEW

The applicable standard of review is de novo. Marks v. Newcourt Credit Group, Inc., 342 F.3d 444, 451 (6th Cir. 2003).

ARGUMENT

I. By its Terms, Section 9527(a) Provides that the NCLB is Not to Be Implemented in a Manner that Requires States or School Districts “to Spend Any Funds or Incur Any Costs Not Paid for under this Act”

The starting point for our analysis is the plain language of Section 9527(a), for “[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purposes.” Engine Mfrs. Ass’n v. South Coast Air Quality Mgmt. District, 541 U.S. 246, 252 (2004) (quoting Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985)). See also Henry Ford Health Sys. v. Shalala, 233 F.3d 907, 910 (6th Cir. 2000) (“We read statutes . . . with an eye to their straightforward and commonsense meanings.”). And because, as will be shown, the language of Section 9527(a) is clear and unambiguous, that language should also be the ending point of the inquiry. See, e.g., United States v. Boucha, 236 F.3d 768, 774 (6th Cir. 2001) (“[T]he language of the statute is the starting point for interpretation, and it should also be the ending point if the plain meaning of that language is clear.”) (quoting United States v. Choice, 201 F.3d 837, 840 (6th Cir. 2000)); BedRoc, Ltd., LLC v. United States, 541 U.S. 176, 183 (2004) (“[O]ur inquiry begins with the statutory text, and ends there as well if the text is unambiguous.”)

Section 9527 is part of the “Uniform Provisions” subsection of the “General Provisions” of the NCLB, which sets out rules that apply across the board to the interpretation and implementation of the statute.⁵ As such, and by its terms (“Nothing in this Act shall be construed . . . ,” 20 U.S.C. § 7907(a)), Section 9527(a) indicates how the NCLB, as a whole, is to be construed.

Specifically, Section 9527(a) establishes two analytically separate limitations on NCLB implementation that are designed to protect the prerogatives of states and school districts. One limitation – set forth in the first portion of Section 9527(a) and to which we will refer as the no-federal-control proviso – states that “[n]othing 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.” The other limitation – set forth in the final portion of Section 9527(a) and to which we will refer as the no-state-or-local-funds proviso –

⁵ See 20 U.S.C. §§ 7881 – 7916 (stating generally applicable rules under the NCLB regarding, for example, the provision of services to private school students (NCLB §§ 9501-06, 20 U.S.C. §§ 7881-7886), the obligations of school districts to continue to maintain a certain level of fiscal effort to receive federal funds (NCLB § 9521, 20 U.S.C. § 7901), the privacy of assessment results (NCLB § 9523, 20 U.S.C. § 7903), prohibitions against the use of NCLB funds for certain types of sex education programs (NCLB § 9526, 20 U.S.C. § 7906), prohibitions against discrimination (NCLB §§ 9533-43, 20 U.S.C. §§ 7913-14), the general authority of the Secretary to issue “necessary” regulations under the NCLB (NCLB § 9535, 20 U.S.C. § 7915), and the general NCLB severability provision (NCLB § 9536, 20 U.S.C. § 7916)).

states that “[n]othing in this Act shall be construed to . . . mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.” Id. The no-state-or-local-funds proviso is the focus of this appeal.

On its face, the no-state-or-local-funds proviso applies without exception to all actions that states and school districts might be required to take to comply with the NCLB. The district court, however, construed the proviso to have no application whatsoever to compliance actions required by the NCLB itself, but only to “additional, unfunded requirements, beyond those provided for in the statute,” imposed by federal enforcement authorities, such as the Secretary, acting without statutory authority. (R. 20, Mem. Op. pg. 7, Apx. pg. __). According to the court, that is the correct construction because the statutory language makes the no-state-or-local-funds proviso applicable only to acts of “an officer or employee of the Federal Government.” (Id., Apx. pg. __).

As we now show, the district court’s analysis is fatally flawed in four respects. First, the district court erred at the threshold in reading the officer-or-employee phrase as part of the no-state-or-local-funds proviso, when it is not part of that proviso. Second, even if the no-state-or-local-funds proviso were read to apply only to compliance demands made by “an officer or employee of the Federal Government,” there would be no basis for the district court’s assumption that only demands that seek to impose “additional requirements, beyond those provided for

in the statute,” as distinguished from demands for compliance with the requirements of the NCLB itself, are subject to the proviso. Third, the construction advocated by the Secretary and adopted by the district court effectively deprives the proviso of all significance and renders the entirety of Section 9527(a) a meaningless tautology. And, fourth, although the district court seems to have credited the Secretary’s argument that “it would make no sense” to read the NCLB as excusing states and school districts from complying with requirements that the federal government has failed to fund, see infra at 26, it would hardly make sense to read the statute as leaving the federal government free to renege on its commitment to provide adequate funding, and by so reneging, to shift to states and school districts whatever portion of the NCLB compliance costs – even up to 100% – the federal government decides after the fact not to pay. We detail in turn below each of these fatal flaws in the district court’s analysis.

1. In declaring that “plaintiffs’ reading of the statute is defeated by the inclusion of the words ‘an officer or employee of,’” (see R. 20, Mem. Op. pg. 7, Apx. pg. ___), the district court posited that Section 9527(a) should, in pertinent part, be read as follows:

Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to . . . mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.

But normal rules of syntax and construction direct that the Section should be read as follows:

Nothing in this Act shall be construed to . . . mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.

Under the latter reading, the officer-or-employee phrase applies only to the no-federal-control proviso it immediately precedes, and not to the more distant no-state-or-local-funds proviso. That reading accords with the fact that a final series comma separates the officer-or-employee phrase from the no-state-or-local-funds proviso, whereas no such comma separates that phrase from the no-federal-control proviso. Congress' decision to punctuate the provision in that manner signifies that the officer-or-employee phrase "stands independent" of, United States v. Ron Pair Enters., 489 U.S. 235, 241-42 (1989), and is not "part of" the no-state-or-local-funds proviso. House Legislative Counsel's Manual on Drafting Style at 58 (Nov. 1995) ("The last 2 elements of a series should be separated by a comma before the conjunction. This prevents any misreading that the last item is part of the preceding one.").

Moreover, reading the no-state-or-local-funds proviso to refer back to the distant officer-or-employee phrase would be at odds with "the grammatical 'rule of the last antecedent,' according to which a limiting clause or phrase (here, [the 'spend any funds or incur any costs' phrase]) should ordinarily be read as

modifying only the noun or phrase that it immediately follows (here [the ‘mandate a State or any subdivision thereof’ phrase, not the more distant officer-or-employee phrase]).” Barnhart v. Thomas, 540 U.S. 20, 26 (2003). See also FTC v. Mandel Bros. Inc., 359 U.S. 385, 386-87 (1959) (refusing to read concluding phrase of statutory provision, which was separated, as here, from the preceding phrases by a comma and the disjunctive “or,” to refer back to the preceding phrases).

In short, “the words ‘an officer or employee of,’” which the district court viewed as “defeat[ing]” plaintiffs’ construction of the no-state-or-local-funds proviso (R. 20, Mem. Op. pg. 7, Apx. pg. ___), are not even part of that proviso.

2. But even if one were to conclude that the officer-or-employee phrase is part of the no-state-or-local-funds proviso, it would not follow, as the district court concluded, that the proviso only prohibits federal officers or employees from imposing “additional requirements” on states and school districts over and above those imposed by the NCLB itself. Even as deconstructed by the district court, the proviso states without reservation that “[n]othing in this Act shall be construed to authorize an officer or employee of the Federal Government to . . . mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.” There is nothing in this language to suggest that the prohibition is confined to requirements stemming from unauthorized acts of individual officers

and employees, as distinguished from requirements of the NCLB itself that an officer or employee is seeking to enforce.⁶

Nor is it the case, as the district court erroneously declared, that reading the no-state-or-local-funds phrase as plaintiffs propose renders the officer-or-employee phrase superfluous. The effect of reading that phrase into the proviso is to make the proviso not just a general interpretative rule to be applied by the courts, but a direct limitation on the actions of federal officers and employees in implementing the NCLB. Given that, as a practical matter, the NCLB requirements with which states and school districts must comply are imposed on them by the Secretary and her staff, not by the statute directly,⁷ reading the no-state-or-local-funds proviso to

⁶ Certainly, nothing in the verb “mandate” supports such a distinction. The ordinary meaning of that verb is to “command, require by mandate; necessitate.” The New Shorter Oxford English Dictionary Vol. I at 1683 (1993).

⁷ The central role the Secretary and her staff play in the implementation of the NCLB is amply documented on the United States Department of Education (“Department”) website, which contains no less than 332 links to regulatory documents issued by Department staff regarding the NCLB’s implementation (see <http://www.ed.gov/policy/elsec/reg/list.jhtml> as of Mar. 7, 2006) and no less than 242 links to policy documents issued by Department staff regarding the NCLB’s implementation (<http://www.ed.gov/policy/elsec/guid/list.jhtml> as of Mar. 7, 2006).

apply to any and all “mandates” the Secretary and her staff may seek to impose does not evince an intent to narrow the reach of the proviso.⁸

The district court also missed the mark in reasoning that “[i]f, as plaintiffs contend, Congress intended to prohibit unfunded mandates, it would have . . . simply stated that the Federal Government will reimburse the States for all costs they incur in complying with the requirements of this statute.” (R. 20, Mem. Op. pg. 7, Apx. pg.____). Such a reimbursement scheme bears no resemblance to plaintiffs’ construction of Section 9527(a), and Congress’ failure to enact such a scheme therefore is of no relevance here. Under plaintiffs’ construction, when (as has been the case to date) Congress chooses not to provide states and school districts with sufficient federal funds to fully comply with the NCLB, Congress cannot be required to provide additional funds, but the states and school districts are not required to comply to the extent of the shortfall. In contrast, the approach that the district court suggested that Congress could have taken – viz., to provide in the statute that there must be full compliance even if adequate federal funds are not appropriated, with the federal government on the hook to reimburse states and

⁸ If anything, the prohibition against “mandat[ing] a State or any subdivision thereof to spend any funds or incur any costs” arguably is broader if it is read as applying not only to requirements “in this Act,” but to all requirements sought to be imposed by a federal “officer or employee” – precisely because the latter class includes requirements devised by a particular officer or employee as well as requirements “in the Act” which the officer or employee is engaged in enforcing.

school districts for their out-of-pocket costs – would in effect obligate Congress to appropriate indirectly, in the form of “reimbursement,” a higher level of NCLB funding than Congress chooses to provide directly. That Congress did not adopt such a back-handed funding scheme says nothing about the very different approach it did enact in Section 9527(a).

3. Thus, the concerns that the district court expressed about plaintiffs’ construction of Section 9527(a) are illusory. But even if there were some legitimate basis for those concerns, they pale in comparison to the manifest inconsistencies and absurdities that plague the construction offered by the Secretary and adopted by the district court – all of which were noted in the briefing below, but none of which was so much as mentioned by the court in its decision.

Most significantly, the district court’s construction of Section 9527(a) fails to give any effect at all to the detailed specification at the end of the Section that states and school districts are not required “to spend any funds or incur any costs not paid for under this Act.” 20 U.S.C. § 7907(d) (emphasis added). If, as the district court concluded, all Congress intended was that states and school districts could not be required to spend funds or incur costs for any purpose not required by the NCLB, it “surely would have said so more simply,” Moreau v. Klevenhagen, 508 U.S. 22, 33 (1993), by including a straightforward prohibition against requiring a state or school district to spend funds or incur costs “for any purpose

not required by this Act.” But Congress chose instead to use very different language that it has seen fit to insert into only a handful of other statutes, and which is directed not at the purpose of a particular federal mandate but at whether the costs of complying with the mandate have been “paid for” by the federal government.⁹

Furthermore, if the no-state-or-local-funds proviso were intended to apply only to requirements “beyond” those provided in the “statute,” (R. 20, Mem. Op. pg. 7, Apx. pg. __), Congress would not have provided that such unauthorized requirements must be complied with if they are “paid for under this Act.” If Congress has not authorized a particular compliance activity in the NCLB, it most certainly will not have appropriated funds for that activity. Consequently, under the district court’s construction, the no-state-or-local-funds proviso obligates state and local governments to comply with a category of enforcement requirements –

⁹ There is only one other provision in the current U.S. Code that includes the same language as the no-state-or-local-funds proviso of Section 9527(a) – the Educational Science Reform Act of 2002, Pub. L. 107-729. See 20 U.S.C. § 9572(b). In 1994, that same language was inserted into three other federal education laws – the Goals 2000 Education Act, the School to Work Opportunities Act and the Improving America Schools Act (which reauthorized the ESEA). As we detail infra at 31-38, the legislative history regarding the insertion of the specific language of Section 9527(a) into those statutes squarely supports plaintiffs’ view that the proviso prohibits the federal government from requiring states and school districts to comply with any unfunded NCLB mandates, including those in the NCLB itself.

not “provided for in the statute” and yet “paid for under this Act” – which is effectively a null set.

Moreover, the district court’s reading reduces Section 9527(a), as a whole, to the meaningless tautology that “[n]othing in this statute shall be construed to authorize [anything that is not authorized by this Act].” One wonders why Congress would have gone to all the effort of setting forth the particular prohibition against mandating states or school districts to spend any funds or incur costs “not paid for under this Act,” if all that Congress intended to do was to confirm that federal officers and employees have no authority to take actions that they are not authorized to take. Certainly, one cannot assume that Congress intended to enact such a meaningless provision.¹⁰

¹⁰ Furthermore, under the district court’s tautological reading, the no-state-or-local-funds proviso adds nothing to the no-federal-control proviso. This violates the “‘basic principle of statutory construction that terms joined by the disjunctive ‘or’ must have different meanings because otherwise the statute or provision would be redundant.’” *Cowherd v. Million*, 380 F.3d 909, 913 (6th Cir. 2004) (quoting *United States v. Hill*, 79 F.3d 1477, 1482-83 (6th Cir. 1996)).

Because Section 9527(a) is part of the “General Provisions” of the NCLB, which apply “uniform[ly]” to all of the Act’s provisions, *see supra* at 16, the district court erred in finding significance in the fact that other NCLB provisions do not specifically reference the Section 9527(a) limitations. None of the “Uniform” NCLB provisions set forth in the “General Provisions” section of the statute are specifically referenced in the preceding NCLB provisions; that, after all, is the very point of having a “general provisions” section at the end of a statute so that Congress need not reiterate the general rules of interpretation in each and every one of the hundreds of preceding provisions.

In all of these respects, the district court’s construction of Section 9527(a) violates the “‘cardinal principle of statutory construction’ that ‘a statute ought, upon the whole, to be so construed’” so that “‘no clause, sentence, or word shall be superfluous, void, or insignificant.’” TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) (quoting Duncan v. Walker, 533 U.S. 167, 174 (2001)); Leocal v. Ashcroft, 543 U.S. 1, 12 (2004) (refusing proffered interpretation that left statutory provision “‘practically devoid of significance’”); United States v. Cole, 418 F.3d 592, 597-98 (6th Cir. 2005) (refusing to “‘depart[] from the basic canon . . . that a court should not interpret a statute to render meaningless certain parts of th[e] statute’”); United States v. Perry, 360 F.3d 519, 537 (6th Cir. 2004) (any statutory interpretation that “‘makes one [of] its provisions irrelevant is presumptively incorrect’”); Halverson v. Slater, 129 F.3d 180, 188 (D.C. Cir. 1997) (refusing to construe statute in a manner that would simply reaffirm already established law regarding the agency’s authority to act).

4. The district court appeared to credit the Secretary’s argument “that it would make no sense for Congress to pass this elaborate statute – which does require many things of States and school districts as a condition of receiving federal education funds – if the States could avoid the requirements simply by claiming that they have to spend some of their own funds in order to comply with those requirements.” (R. 20, Mem. Op. pg. 6-7, Apx. pg. __). Plaintiffs agree that

that would make no sense, but Plaintiffs are not suggesting that a state or a school district should be excused from NCLB compliance simply by “claiming” that it is being required to spend its own funds. Plaintiffs’ position is that compliance can not be required to the extent that a state or school district could in fact prove that it would have to spend its own funds to comply with NCLB requirements.

That being the case, plaintiffs’ construction of Section 9527(a) makes eminently good sense – and certainly more sense than the construction adopted by the district court. To read Section 9527(a) as reflecting Congress’ decision that the federal government will pay the full costs of complying with the extensive new mandates imposed on states and school districts by the NCLB is perfectly reasonable. Indeed, in discussing the provisions of the NCLB that authorize specific levels of federal appropriations, the House Conference Report noted that such federal funding would have to be provided in order “to implement fully the reforms incorporated in the [NCLB].” See supra at 4.¹¹

¹¹ In those few instances in which NCLB funding is conditioned on states and school districts agreeing to share with the federal government a portion of the costs of the new requirements, the NCLB expressly so provides. See 20 U.S.C. §§ 6381a(c)(5), 6535(c)(3), 7255d(b)(3). By negative implication, these provisions indicate that in all other areas such cost-sharing is not a condition of NCLB funding. Cf. Pennhurst, 451 U.S. at 17-18 (“[I]n 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 contrast, under the district court’s construction of Section 9527(a), states and school districts could be compelled to bear, with their own funds, anywhere from zero to 100% of the substantial costs of carrying out the extensive new mandates in the NCLB – depending solely on the extent to which Congress chooses to fund the statute from year to year. If, in any particular year, Congress were to decide that its priorities are such as to warrant funding only a relatively small portion of the NCLB compliance costs, under the district court’s reading of the Act the consequence would be a sudden and unanticipated increase in the costs to be borne by states and school districts. It hardly is sensible to construe the NCLB as giving the federal government the unfettered right to engage in such cost-shifting at the expense of states and school districts and their own state and local education priorities.

In any event, differences of opinion about the reasonableness vel non of a particular statutory interpretation “cannot justify disregard of what Congress has plainly and intentionally provided.” Commissioner of IRS v. Asphalt Prods., 482 U.S. 117, 121 (1987). See also Koenig Sporting Goods v. Morse Road Co., 203 F.3d 986, 988 (6th Cir. 2000). Here, the language of Section 9527(a) leaves no doubt as to “what Congress has plainly and intentionally provided”: the NCLB cannot be implemented in a manner that requires states and school districts “to

spend any funds or incur any costs not paid for under th[e NCLB].” 20 U.S.C. § 7907(a).

II. Even if Section 9527(a) is Ambiguous, the Relevant Legislative History and the Constitutionally Mandated Clear Statement Rule Confirm that States and School Districts Cannot Be Required to Spend Their Own Funds on NCLB Compliance

The district court concluded that Section 9527(a) “clearly” means what the Secretary says it means, and “cannot reasonably be interpreted” to mean what plaintiffs say it means. (R. 20, Mem. Op. pg. 7, Apx. pg. __). The court is wrong on both counts: for the reasons discussed to this point, we submit that plaintiffs’ construction of Section 9527(a) is correct, and the district court’s construction is insupportable. But even if this Court were to find the matter less clear, the district court’s construction could at best be viewed as one permissible reading of Section 9527(a), and plaintiffs’ construction surely would have to be viewed as another permissible reading.

The latter conclusion is confirmed by the fact that plaintiffs’ construction is the same one that former Secretary of Education Paige embraced. As plaintiffs recounted in their complaint, during the initial years of the NCLB’s implementation, Secretary Paige reassured NCLB participants that “the [NCLB] contains language that says things that are not funded are not required,” (R. 1, Compl. ¶ 15 (Paige statement of September 4, 2003), Apx. pg. __), and that

“[t]here is language in the bill that prohibits requiring anything that is not paid for.” (Id. (Paige Statement of December 2, 2003), Apx. pg. ___).

Plaintiffs’ construction also is one that numerous other knowledgeable observers, including the nonpartisan National Conference of State Legislators, the State of Connecticut and the Wisconsin Attorney General, have reached by applying “the basic rules of statutory construction” to Section 9527(a).¹²

¹² The National Conference of State Legislators explained that, “under the basic rules of statutory construction, the plain meaning of the statutory language [in Section 9527(a)] is fairly clear – states, or local subdivisions, do not have to spend funds on the costs of the NCLB that are not paid for by the Act itself.” NCSL Mem. at 7 (emphasis in original) (available as of March 22, 2006 at <http://www.ncsl.org/statefed/nclblegal.htm>).

The Wisconsin Attorney General has issued a formal opinion letter reaching the same conclusion:

The language [of Section 9527(a)] . . . seems to bear only one reasonable interpretation: federal agencies and officials lack authority to require any State, or State subdivision, to take any action under the [NCLB] that is not fully funded by federal monies. . . . The language can only reasonably be read as tying the program standards and obligations of a federal funding recipient under the ESEA directly to whether federal monies are available to discharge those obligations. [Wisc. Atty. Gen. Op. at 4 (May 12, 2004) (available as of March 22, 2006 at <http://www.nsba.org/site/docs/33800/33758.pdf>).]

The same construction of Section 9527(a) underlies a pending lawsuit Connecticut has filed against the Secretary, challenging the Secretary’s insistence that Connecticut comply with certain NCLB requirements, despite the fact that the state has not been provided with sufficient federal funds to do so. See State of Conn. & the Gen. Assembly of the State of Conn. v. Margaret Spellings, Secretary of Educ., No. 3:05CV01330 (D. Conn. filed Aug. 22, 2005). As Connecticut has

These various authorities make plain that plaintiffs’ reading of Section 9527(a) is a permissible reading that follows from the application of the ordinary rules of statutory construction. If this Court were to conclude that the district court’s reading of section 9527(a) also is a plausible one, the Court would then be faced with the question of how to resolve the resulting ambiguity in Section 9527(a). Although resolving such ambiguity in a Spending Clause case might be complicated if the legislative history of the statute pointed in one direction and the constitutionally mandated clear statement rule, see infra at 39-43, pointed in another, this case presents no such conundrum. As we next will show, both the relevant legislative history and the constitutionally mandated clear statement rule confirm that Section 9527(a) prohibits the federal government from requiring states and school districts to spend their own funds to comply with NCLB mandates.

A. The Relevant Legislative History Supports Plaintiffs’ Position

The language that appears in Section 9527(a) of the NCLB was included in three earlier education statutes enacted by Congress in 1994 – the Goals 2000

explained in its papers in that case, “[o]n its face, [Section 9527(a)] 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.” Connecticut’s Opp. to Secretary’s M. to Dismiss at 28 (filed in Conn. Case on Dec. 23, 2005) (emphasis in original).

Education Act (enacted in March 1994 to provide funding for states to set certain of the academic standards that were ultimately mandated by the NCLB), the School to Work Opportunities Act (enacted in May 1994 to provide funding for certain work-related education programs), and the October 1994 reauthorization of the ESEA, titled the Improving America Schools Act (“IASA”). Because the language of Section 9527(a) in the 2001 ESEA reauthorization (i.e., the NCLB) was carried over without change from those 1994 education statutes, it is appropriate to look to the 1993-94 legislative debates for guidance as to the provision’s meaning.¹³ Those debates make it abundantly clear that Congress intended Section 9527(a) to bar any attempt to require states and school districts to spend their own funds to comply with the ESEA statutory requirements.

The first time a portion of the language that would become Section 9527(a) was introduced on the floor of the House (which occurred during the debate over Goals 2000), its sponsor, Representative Goodling, explained that the provision was prompted by concerns that “the bill could be interpreted to be a mandate on States to meet standards required by the act, even though Federal funds will never come close to covering it.” 139 Cong. Rec. H7769 (daily ed. Oct. 13, 1993). To

¹³ See Western Pac. R.R. Corp. v. Western Pac. R.R., 345 U.S. 247, 251 (1953) (looking to legislative debate regarding earlier proposal to construe subsequently enacted proposal on the same subject); Huffman v. Office of Pers. Mgmt., 263 F.3d 1341, 1347-48 (Fed. Cir. 2001) (looking to legislative history of precursor of provision to construe provision).

allay those concerns, Goodling and Representative Condit introduced an amendment, consisting of what now is the no-federal-control proviso of Section 9527(a), to make clear that the legislation did not “create such an unfunded mandate on States.” Id. Representative Goodling explained that the thrust of his amendment was 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. H7740 (daily ed. Oct. 13, 1993).

The debate on the Goodling amendment consisted entirely of supporters proclaiming that the amendment would ensure that the Goals 2000 legislation would not result in the imposition on states and school districts of any costs not covered by federal funds. As Congressman Hefley put it, “[t]he Federal Government, if they cannot pony up the bucks, should not expect the States to do it.” 139 Cong. Rec. H7769 (daily ed. Oct. 13, 1993). Similarly, Congressman Condit explained that he “got involved in H.R. 1804, Goals 2000 . . . because I felt that the legislation had the potential to become an enormous unfunded mandate upon our States,” and that the Goodling amendment would prevent that from occurring by “clarif[ying] that nothing in this legislation will mandate how a State or local education agency should organize itself or spend its own money.” Id.¹⁴

¹⁴ Notably, Congressman Condit supported the amendment notwithstanding the fact that states could always opt out of the legislation if they found it too

The Goodling amendment passed unanimously. 139 Cong. Rec. H7770 (daily ed. Oct. 13, 1993).

As noted, the supporters of the Goodling amendment were explicit in stating that the language they were supporting would ensure that the mandates contained in the legislation they were enacting would not impose any costs on the states. The concern was not with unanticipated requirements that might be devised by individual enforcement officers, but rather with mandates contained in “the legislation” itself, i.e., “our dictates.” See supra at 33.

The debate in the Senate, which occurred subsequent to the House’s passage of the Goodling amendment, followed a similar trajectory. Senator Gregg initially proposed an amendment which stated that “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. S622 (daily ed. Feb. 2, 1994).

Although the amendment’s stated purpose was “to ensure that funds provided under this Act cannot be utilized by the Federal Government to contribute to an unfunded Federal mandate,” id., the language of the proposed amendment failed to

onerous. Condit explained that it was never the intent 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.” 139 Cong. Rec. H7769 (daily ed. Oct. 13, 1993).

address that subject with any clarity: it did not even mention the spending of funds or incurring of costs by states, but merely stated that the “Federal requirement[s]” with which a state would have to “comply” in order to receive funds under the Act were only those contained in the Act, and not any requirements that might be found in other “provision[s] of Federal law.”

Thus, the original Gregg amendment was somewhat similar to the district court’s construction of Section 9527(a), in that it was aimed at protecting states only from the costs of requirements other than those imposed by the Act itself. But, the original Gregg amendment was never acted upon. Instead, the Senate moved quickly to clarify that states and school districts would not be required to spend their own funds to comply with the mandates imposed by the Act itself. After conferring with the Senate leadership, Senator Gregg completely modified his amendment by withdrawing the original language and substituting for it language that is identical in all respects to the language of Section 9527(a). 139 Cong. Rec. S626 (daily ed. Feb. 2, 1994). “The purpose of the [revised] amendment,” Senator Gregg explained, “is to assure that this bill will not become an unfunded mandate,” by including “very specific and very, I believe, effective language . . . 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.* (emphasis added). The co-

sponsors of the Goals 2000 legislation supported the modified Gregg amendment, proclaiming that “it was never our intent to establish in this legislation an unfunded mandate or to require . . . of the States expenditures that the States did not desire,” 139 Cong. Rec. S627 (daily ed. Feb. 2, 1994) (Senator Kennedy) (emphasis added), and that the “the last thing we want to do is mandate additional expenditures at State levels with all of the crises they are having now in funding.” Id. (Senator Jeffords).

After those brief comments, the Gregg amendment was adopted, id., and the House agreed to its inclusion in the final bill. See Goals 2000 House Conf. Rep. No. 103-446 at 191 (103rd Cong. 1994)(reprinted in 3 U.S.C.C.A.N. 1994 Legislative History Section pg. 123). Pointing specifically to the newly expanded language (identical in all respects to Section 9527(a)), a strong supporter of the final bill explained it had been included “as a final measure,” “an overall prohibition on Federal mandates,” that “makes it very, very clear we are not putting new mandates for spending in this bill.” 139 Cong. Rec. S3864 (daily ed. Mar. 25, 1994) (Sen. Jeffords) (emphasis in original).

This legislative history explaining why the Gregg Amendment was revised in the course of enactment of Goals 2000 leaves no doubt that Section 9527(a) should be read as plaintiffs have urged –to prohibit the federal government from

requiring that states and school districts comply with NCLB requirements that are not funded.

That conclusion is confirmed by the subsequent debate over the inclusion of the same provision in the IASA – the direct predecessor of the NCLB.

The early debates on the IASA in the House, prior to the amendment adding Section 9527(a), were rife with criticisms that the bill “provides 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.”¹⁵ Once the provision that is now Section 9527(a) was added to the IASA, however, those criticisms evaporated. Referring to that provision – which he termed the “mandate section” – Representative 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).

Senator Kassebaum expressed a similar sentiment on the floor of the Senate, explaining that she supported the bill because it “include[d] specific language

¹⁵ 140 Cong. Rec. H807 (daily ed. Feb. 24, 1994) (Representative Barrett). See also, e.g., 140 Cong. Rec. H810 (daily ed. Feb. 24, 1994) (Representative 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) (Representative Fawell expressing concern that the bill presented “precisely the type of unfunded mandate which our Governors and mayors have rebelled against”).

assuring that its provisions will not lead to the imposition of unfunded mandates,” and thus would ensure that nothing in the bill “would dictate how the State and local funds are spent on education.”¹⁶ That same understanding was reiterated by Senator Durenberger just before the final Senate vote on the conference committee report: 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.”¹⁷

This legislative history of the 1994 predecessors to Section 9527(a) thus confirms what is readily apparent from the plain language of that provision – that the provision is intended to impose a broad prohibition against requiring states or school districts to spend their own funds for NCLB compliance, including compliance with requirements that are imposed by the NCLB itself. And, this legislative history is fundamentally inconsistent with the district court’s conclusion that Section 9527(a) is only intended to impose a narrow prohibition against the imposition on states and school districts of costs resulting from unauthorized demands by federal officers and employees.

¹⁶ 140 Cong. Rec. S9873 (daily ed. July 27, 1994) (Senator Kassebaum).

¹⁷ 140 Cong. Rec. S14205 (daily ed. Oct. 5, 1994) (Senator Durenberger) (emphasis added).

B. The Constitutionally-Mandated Clear Statement Rule Compels the Conclusion that Plaintiffs' Interpretation is Correct

“The key to the analysis [of a Spending Clause statute] should be the following principle of statutory construction arising from our system of federalism: ‘[i]n return for federal funds, the states agree [by contract] to comply with federally imposed conditions’ and such conditions must be imposed ‘unambiguously’ and ‘with a clear voice.’” Coleman v. Glynn, 983 F.2d 737, 737 (6th Cir. 1993) (Merritt, J., concurring) (all alterations but first in original) (quoting Pennhurst State Sch. v. Halderman, 451 U.S. 1, 17 (1981)). See also, e.g., Cutter v. Wilkinson, 423 F.3d 579, 585 (6th Cir. 2005); United States v. Miami Univ., 294 F.3d 797, 803 (6th Cir. 2002); Westside Mothers v. Haveman, 289 F.3d 852, 859 (6th Cir. 2002). Accordingly, where as here, a construction of a Spending Clause statute is urged that, even if deemed plausible, would “result in a substantial increase in the obligations of the state[s] without any clear statement from Congress to provide notice” thereof, that construction must be rejected. Coleman, 983 F.3d at 741 (Merritt, J., concurring).¹⁸

¹⁸ Because no other judge joined Judge Merritt’s concurrence, his opinion is not binding on this Court. We cite it here because it is particularly clear and wholly consistent with the Supreme Court’s decision in Pennhurst and with this Court’s subsequent decisions in Cutter, Miami University and Westside Mothers.

That constitutionally mandated clear statement rule is firmly grounded in the Supreme Court’s decision in Pennhurst. At issue in Pennhurst was whether the Developmentally Disabled Assistance and Bill of Rights Act should be interpreted to impose on states an obligation to fund the rights recognized in the Act. 451 U.S. at 16-17. The Court rejected that interpretation of the Act, which was ambiguous on the point, explaining that “we may assume that Congress will not implicitly attempt to impose massive financial obligations on the States.” Id.

The Court has reasoned that the clear statement rule both ensures that participants in a Spending Clause program (here states and school districts) are aware “of the conditions” of the program, id. at 17, and that the Congress that enacts a statute – not the judicial or executive branches – will make the fundamental choice regarding the extent to which, if at all, a federal program is intended to intrude upon and displace state and local prerogatives. Gregory v. Ashcroft, 501 U.S. 452, 460-61, 464 (1991).

For that last reason, the clear statement rule applies with particular force where, as here, the federal government is seeking to intrude upon and displace state and local authority in an area, such as public education, over which states and their

subdivisions have long held sway.¹⁹ As the en banc Fourth Circuit explained in Virginia Dep’t of Educ. v. Riley, 106 F.3d 559, 566 (4th Cir. 1997) (en banc):

Insistence 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. See, e.g., Honig[v. Doe.], 484 U.S. [305,] 309 [(1988)] (“[E]ducation [is] ‘perhaps the most important function of state and local governments.’” (quoting Brown v. Board of Educ., 347 U.S. 483, 493 . . . (1954)); Milliken v. Bradley, 418 U.S. 717, 741 . . . (1974) (“No single tradition in public education is more deeply rooted than local control over the operation of schools . . .”); United States v. Lopez, 514 U.S. 549 . . . (1995) (“[Education is an area] where States historically have been sovereign.”). [Riley, 106 F.3d at 566 (full citations added) (all other alterations in original).]²⁰

Adhering to the clear statement rule, the en banc Fourth Circuit in Riley went on to reject a plausible interpretation of the Individuals with Disabilities Act

¹⁹ As the complaint alleges, requiring states and school districts to spend their own funds on NCLB compliance means that those funds are being diverted from state and local educational programs and priorities. (See R. 1, Compl. ¶¶ 4-10, 87-90, Apx. pg. ___).

²⁰ Even outside of the Spending Clause context, the Supreme Court and this Court – consistent with our federal system of government – have refused to read ambiguities in federal statutes “to displace traditional state regulation” unless the “federal statutory purpose [to do so is] ‘clear and manifest.’” BFP v. Resolution Trust Corp., 511 U.S. 531, 544-45 (1994) (quoting English v. General Elec. Co., 496 U.S. 72, 79 (1990)). See also Rush Prudential Health Maint. Org. v. Moran, 536 U.S. 355, 365, 387 (2002); New York State Conference of Blue Cross & Blue Shield Plans v. Travelers, Ins. Co., 514 U.S. 645, 654-55, 661-62 (1995); Sandusky County Democratic Party v. Blackwell, 387 F.3d 565, 578 (6th Cir. 2004).

(“IDEA”) advanced by the Department of Education, which would have required Virginia to continue to provide education services to IDEA students who had been expelled from school for reasons other than their disabilities. Id. at 561. The court did so because the IDEA was ambiguous on the point, and “[i]t 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.” Id. at 567 (citing Gregory, 501 U.S. at 464). As the Riley court correctly reasoned, if the language of a Spending Clause statute is ambiguous regarding the requirement that the federal government seeks to enforce, it necessarily follows that the statute does not provide the “clarity and the degree of specificity required for [the court] to conclude that the States’ receipt of” funds was unambiguously conditioned on compliance with the requirement. Id.

In this case, the district court turned the clear statement rule on its head, and applied exactly the opposite presumption. (See R. 20, Mem. Op. pg. 7, Apx. pg. ___) (“If Congress meant to prohibit ‘unfunded mandates’ in the NCLB, it would have phrased [section 9527(a)] to say so clearly and unambiguously.”). In so doing, the court below clearly erred. Because Section 9527(a) does not “unmistakably,” “unambiguously” or “explicitly” condition the states’ and school districts’ receipt of federal funds on the use of their own funds to pay for the NCLB’s unfunded mandates, the constitutionally mandated clear statement rule

compels the conclusion that that massive and fundamentally new obligation cannot be imposed on states and school districts.²¹

CONCLUSION

For the foregoing reasons, the decision of the district court should be reversed and this case should be remanded for further proceedings.

Respectfully submitted,

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²¹ Under the clear statement rule, the district court's interpretation of the Act would be impermissible even if there were legislative history to support that interpretation; the cases just cited require that the statutory language itself must provide a clear statement. But in any event, as we have shown, in this case the legislative history cuts directly against the interpretation adopted by the district court.

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**CERTIFICATE OF COMPLIANCE WITH THE TYPE VOLUME
LIMITATIONS OF FRAP RULE 32(A)(7)**

I hereby certify that this brief complies with the type volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(7). The brief was prepared on a computer using the Microsoft Wordprocessing program in a proportionately spaced 14 point font. According to the word count function of that program, the brief contains 11,000 words.

Alice O'Brien

**PLAINTIFFS-APPELLANTS' DESIGNATION OF APPENDIX
CONTEXTS**

Plaintiffs-Appellants hereby designate the following documents for inclusion
in the appendix.

Docket Sheet Showing the Proceedings Below

R. 1, Plaintiffs' Complaint

R. 20, Mem. Op. & Order of Judge Friedman (Nov. 23, 2005)

R. 21, Plaintiffs' Notice of Appeal

CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing Proof Brief of Plaintiffs-Appellants was served this 22nd day of March of 2006 by electronic mail on counsel for defendant-appellee at the following electronic address, and another copy of that Proof Brief was served by overnight mail on counsel for defendant-appellee, at the following address:

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