IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

STATE OF CONNECTICUT and the GENERAL ASSEMBLY OF THE STATE OF CONNECTICUT, Plaintiffs, v. MARGARET SPELLINGS, SECRETARY UNITED STATES DEPARTMENT OF EDUCATION, Defendant.	)	Civil No. 3:05-cv-01330 (MRK)

AMICUS BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AND CONNECTICUT EDUCATION ASSOCIATION IN SUPPORT OF CONNECTICUT AND THE GENERAL ASSEMBLY OF THE STATE OF CONNECTICUT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND LEGISLATIVE MATERIAL

MISCELLANEOUS

Interest of Amici Curiae

This brief amicus curiae is submitted on behalf of the National Education Association ("NEA"), and the Connecticut Education Association ("CEA"). NEA is a nationwide employee organization with more than 2.8 million members, the vast majority of whom are employed by public school districts throughout the United States. CEA, which is NEA's Connecticut state affiliate, is a statewide employee organization with more than 36,500 members, the vast majority of whom are employed by public school districts in Connecticut.

NEA and CEA are plaintiffs-appellants in the pending case of Pontiac School District, et al., v. Spellings, Case No. 05-2708 (6th Cir. appeal filed Dec. 23, 2005) ("Pontiac"), which raises the same question of statutory interpretation as this case – namely, whether Section 9527(a), 20 U.S.C. § 7907(a), of the No Child Left Behind Act ("NCLB"), prohibits the Secretary of the United States Department of Education, Margaret Spellings ("Secretary"), from requiring states and school districts to spend their own funds to comply with the extensive mandates of the NCLB. NEA and CEA, and the other associations and school districts that are plaintiffs-appellants in the Pontiac case, contend that the answer to this question is "yes," and have brought their lawsuit in an effort to redress the injuries that they and their members have suffered due to the Secretary's insistence, in violation of Section 9527(a), that states and school districts devote their own funds to NCLB compliance, diverting those funds from other education

programs and priorities. NEA and CEA seek leave to file this amicus curiae brief in order to protect their interest in the proper interpretation of Section 9527(a).[1]

Argument

The Secretary has moved to dismiss Connecticut's complaint on, inter alia, the ground that Section 9527(a) cannot reasonably be interpreted as Connecticut alleges because, in the Secretary's view, Section 9527(a) only "limit[s] the ability of *federal officials* to layer expensive and burdensome requirements at the agency level (e.g., the purchase of particular educational materials) on top of the broad conditions imposed by Congress." Docket 18, Attach. 1, Sec's Mem. in Support of M. to Dismiss at 32 ("Sec's Initial Mem."). In support of that assertion, the Secretary relies heavily (see id. at 33-34) on the decision of the district court in the Pontiac case, which dismissed Amici's Section 9527(a) claims on the ground that that provision "cannot reasonably be interpreted" to limit the obligations of states and school districts to comply with the requirements contained in the NCLB itself, but only prohibits federal officials "from imposing additional, unfunded requirements beyond those provided in the statute." Mem. Op. & Order of the Hon. J. Friedman in Pontiac at 7 (dated Nov. 23, 2005) ("Pontiac Dec."). As

[1] NEA and CEA have requested both parties' consent to the filing of this brief. The plaintiffs have so consented but the defendant is still considering NEA and CEA's request.

we demonstrate below, the interpretation of Section 9527(a) urged by the Secretary in this case, and adopted by the district court in Pontiac, cannot withstand scrutiny.[2]

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"

Because "'[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 purpose,'" the starting point for interpreting Section 9527(a) is the plain language of that provision. Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252 (2004) (quoting Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985)).

By its terms and location in the statutory framework, Section 9527(a) states the following general rule as to how the NCLB as a whole is to be construed and implemented:

> 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].]

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[2] In confining this brief to the meaning of Section 9527(a), Amici do not mean to suggest, even by implication, that we find any merit in the other arguments made by the Secretary in support of her Motion to Dismiss. We simply defer to Connecticut to demonstrate the fatal flaws in those arguments.

[3] Section 9527(a) appears in the "Uniform Provisions" subpart of the "General Provisions" Title of the NCLB, together with the other NCLB provisions that state

These words establish two analytically separate limitations on NCLB implementation, both 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 – 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 basis for Connecticut's first and second claims in this case, as well as Amici's claims in the Pontiac case.

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generally applicable rules as to how the NCLB is to be construed and implemented. See 20 U.S.C. §§ 7881-7916 (stating general rules 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 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), the authority of the Secretary to issue "necessary" regulations under the NCLB (NCLB § 9535, 20 U.S.C. § 7915), and the severability of NCLB provisions (NCLB § 9536, 20 U.S.C. § 7916), as well as general prohibitions against the use of NCLB funds for certain types of sex education programs (NCLB § 9526, 20 U.S.C. § 7906), and against discrimination (NCLB §§ 9533-34, 20 U.S.C. §§ 7913-14)).

Throughout this brief we cite to Section 9527(a) in the form in which it was enacted, rather than the form in which it is now codified. The only difference between the two provisions is that the codified form of Section 9527(a) replaces the word "Act" with the word "Chapter" in the first and last line of 20 U.S.C. § 7907(a).

By its terms, the no-state-or-local-funds proviso prevents the Secretary from requiring that states and school districts "spend any funds or incur any costs not paid for under th[e NCLB]." That prohibition applies without exception to all actions that states and school districts might be required to take to comply with the NCLB, regardless of whether the actions are taken to comply with the requirements of the NCLB itself, or to comply with agency requirements layered on top of the NCLB statutory requirements.

Under the reading of Section 9527(a) urged by the Secretary and adopted by the Pontiac court, however, the no-state-or-local-funds proviso does not apply at all to compliance actions required by the NCLB itself, but only to "additional, unfunded requirements, beyond those provided for in the statute," that may be imposed by federal enforcement authorities, such as the Secretary, acting without statutory authority. Pontiac Dec. at 7. See also id. at 6 (explaining that "[S]ection 9527(a) "simply means no federal 'officer o[r] employee' can require states or school districts to 'spend any funds or incur any costs not paid for under this Act.' This does not mean that Congress could not do so, which it obviously has done by passing the NCLB Act."). See also Sec's Initial Mem. at 31-33.

Both the Secretary and the Pontiac court reach that result on the theory that the no-state-or-local-funds proviso applies only to acts of "an officer or employee of the Federal Government." As the Pontiac court explained:

> Plaintiffs' reading of the statute is defeated by inclusion of the words "an officer or employee of." If Congress had meant that federal funding would pay for 100% of all NCLB requirements, then the inclusion of these words would have been unnecessary. . . . By including the words "an officer or employee of," Congress clearly meant to prohibit federal officers and

> employees from imposing additional, unfunded requirements, beyond those provided for in the statute.

Pontiac Dec. at 7. See also Sec's Initial Mem. at 32-33 (urging this Court to embrace the same reasoning).

But, as we will show, that reasoning is fatally flawed in four significant respects. First, as a threshold matter, it is error to read the officer-or-employee phrase as part of the no-state-or-local-funds proviso, when ordinary rules of syntax and punctuation dictate that the phrase is not part of that proviso. Second, even if the no-state-or-local-funds proviso could be read to apply only to compliance demands made by "an officer or employee of the Federal Government," there still would be no basis for assuming 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 adopted by the Pontiac court, which the Secretary urges this court to adopt, effectively deprives the no-state-or-local-funds proviso of all significance and renders the entirety of Section 9527(a) a meaningless tautology. And, fourth, although the Pontiac court seems to have credited the Secretary's argument, which she reiterates here, see Sec's Initial Mem. at 38-41, 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 Pontiac Dec. at 6, 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 below each of these four flaws in the reasoning of the Pontiac court, to show why this Court should not adopt that reasoning as its own.

1. In declaring that "plaintiffs' reading of the statute is defeated by the inclusion of the words 'an officer or employee of,'" Pontiac Dec. at 7, the Pontiac 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, 389-90 (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 Pontiac court and the Secretary view as "defeat[ing]" plaintiffs' construction of the no-state-or-local-funds proviso, Pontiac Dec. at 7, Sec's Initial Mem. at 32-33, are not even part of the no-state-or-local-funds 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 Pontiac court concluded and as the Secretary urges this Court to declare, 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 construed by the Pontiac court and the Secretary, 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.[4]

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[4] The Secretary's contention that the verb "mandate" in Section 9527(a) supports such a distinction is not well-founded. See Sec's Initial Mem. at 29-32. There is nothing in the ordinary meaning of the verb "mandate" – i.e., to "command, require by mandate; necessitate," The New Shorter Oxford English Dictionary Vol. I at 1683 (1993) – that supports the Secretary's view that a federal official does not "mandate" a state or school district to incur costs when the official requires the state or school district to comply with the requirements of the NCLB itself.

The Secretary also errs in offering as evidence of Congress' understanding of the meaning of the verb "mandate" in Section 9527(a), the fact that Congress, in compliance with the Unfunded Mandates Reform Act ("UMRA"), duly reported in the NCLB committee reports the Congressional Budget Office's conclusion that the bill did not contain a "federal intergovernmental mandate" as defined in one section of UMRA. See Sec's Initial Mem. at 31. Although one section of UMRA defines "federal intergovernmental mandate" in a manner that excludes spending clause statutes, see 2 U.S.C. § 658(5)(A)(i)(I), another section of UMRA defines "federal mandate" to include spending clause statutes. See 2 U.S.C. § 1555. If, as the Congressional Budget Office concluded, the NCLB does not contain "federal intergovernmental mandates" for purposes of one section of UMRA, it is equally the case that the NCLB does contain "federal mandates" for purposes of another section of UMRA. These two sections of UMRA simply define the circumstances in which particular provision of UMRA do and do not come into play; neither section adopts a particular definition of the term "mandate" for purposes of construing all the provisions of the NCLB, much less for the purpose of construing the particular language of Section 9527(a) – which has remained unchanged since the provision was first adopted in the NCLB's precursor statutes in 1994, before UMRA was even enacted.

Nor is it the case, as the Pontiac court erroneously declared and the Secretary urges, that reading the no-state-or-local-funds phrase as Connecticut proposes 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 (as is concretely illustrated in this case by the descriptions in the pleadings of the role the Secretary and her staff have played in overseeing Connecticut's implementation of the NCLB, see, e.g., Docket 46, Amended Compl. ¶¶ 38-40, 55-56, 90),[5] reading the no-state-or-local-funds proviso to 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.[6]

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[5] The central role the Secretary and her staff play in the implementation of the NCLB is also amply documented on the United States Department of Education ("Department") website, which contains no less than 336 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 Apr. 26, 2006) and no less than 276 links to policy documents issued by Department staff regarding the NCLB's implementation (http://www.ed.gov/policy/elsec/guid/list. jhtml as of Apr. 26, 2006).

[6] 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 to apply 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 any officer or employee as well as requirements "in the Act" which any officer or employee is enforcing.

3. Thus, the concerns that the Pontiac court expressed about Amici's construction of Section 9527(a), which the Secretary reiterates here as objections to Connecticut's interpretation, are illusory.[7] But even if there were some legitimate bases

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The Pontiac court also erred 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." Pontiac Dec. at 7. Such an indirect federal reimbursement scheme bears no resemblance to the construction of Section 9527(a) that is urged by Amici and Connecticut. Rather under Amici's and Connecticut's 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 Pontiac 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 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 at all about the very different approach it did enact in Section 9527(a).

[7] Nor can the additional concerns the Secretary raises regarding Connecticut's reading withstand scrutiny. See Sec's Initial Mem. at 31, 34-35. In this regard, the Secretary argues that there is a fundamental difference between "conditions of assistance" and "mandates," id. at 30-31, missing the point that Section 9527(a) modifies, and is part of, the conditions of assistance under the NCLB.

The Secretary also finds significant that certain provisions of the NCLB require states and school districts to provide matching or specified amounts in order to receive federal NCLB funding. See Sec's Initial Mem. at 34-35. But the fact that in the handful of instances to which the Secretary points, 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, cuts against, not in favor of the Secretary, by showing that "in those instances where Congress has intended the States to fund certain entitlements as a condition of receiving federal funds, it has proved capable of saying so explicitly." Pennhurst State Sch. v. Halderman, 451 U.S. 1, 17-18 (1981).

for those concerns, they pale in comparison to the manifest inconsistencies and absurdities that plague the construction that the Pontiac court adopted and that the Secretary urges this Court to appropriate as its own.

Most significantly, the Pontiac 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(a) (emphasis added). If, as the Pontiac court concluded (and as the Secretary urges here), 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

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Finally, the Secretary makes much of the fact that Congress specified in one subpart of Title I that states could defer the commencement or suspend the administration, but "not cease the development" of certain NCLB assessments, if funding for certain NCLB assessment grants (those set forth at 20 U.S.C. § 7301b(2)) fall below certain levels in any given year. See Sec. Initial Mem. at 34-35 (discussing 20 U.S.C. § 6311(b)(3)(d)). The evident intent of that provision is to establish a priority of actions for states to take when funding for that particular grant program drops below the specified levels, by specifying that, in that circumstance, the states will not be expected to administer new assessments, but will be required to continue to use the grant funds to work on the development of the new assessments, rather than "ceas[ing]" such development work altogether. In providing that the states cannot "cease" all work on assessment development simply because the funding of these particular grant programs drops below the specified levels (approximately $400 million per year) the statute does not imply that states must devote their own resources to conducting assessment development. On the contrary, other NCLB funding, beyond that provided under the specific assessment grant that is the subject of 20 U.S.C. § 6311(b)(3)(d), may be used for the development of NCLB assessments. In the unlikely event that funding for that specific grant program were to fall to zero, states would still have other NCLB funds from which they could draw so as not to have to "cease" all development of NCLB assessments. In short, the implication that the Secretary attempts to read into 20 U.S.C. § 6311(b)(3)(d) – viz., that states must use their own funds for NCLB assessment development if Congress provides less than the specified level of targeted assessment development grants – simply is not there.

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.[8]

Furthermore, if the no-state-or-local-funds proviso was intended to apply only to requirements "beyond" those provided in the "statute," Pontiac Dec. at 7, 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 Pontiac court and the Secretary's construction, the no-state-or-local-funds proviso obligates state and local governments to comply with a category of enforcement requirements – not "provided [for] in the statute" and yet "paid for under this Act" – which is effectively a null set.

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[8] 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 (which was the precursor to some of the NCLB's provisions), the School to Work Opportunities Act and the Improving America Schools Act (which was the last reauthorization of the ESEA prior to the NCLB). See infra at 18.

Moreover, the Pontiac 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.[9]

In all of these respects, the Pontiac court's construction of Section 9527(a), which the Secretary urges that this Court adopt, 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.

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[9] 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)). Cf. Allen Oil Co., Inc. v. Comm'r, 614 F.2d 336, 339 (2d Cir. 1980) ("Normally a statute must, if reasonably possible, be construed in a way that will give force and effect to each of its provisions rather than render some of them meaningless.").

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 n. 3, the Pontiac court also erred in finding significant 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. After all, that 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.

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"); Chen v. United States Dep't of Justice, 434 F.3d 144, 152 (2d Cir. 2006) ("[W]e do not assume Congress intended to include pure 'surplusage' in its enactments."); State Street Bank & Trust Co. v. Salovaara, 326 F.3d 130, 139 (2d Cir. 2003) ("It is well-settled that courts should avoid statutory interpretations that render provisions superfluous.").

4. The Pontiac court also appeared to credit the Secretary's argument, which she reiterates here, "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." Pontiac Dec. at 6-7.

Amici agree that that would make no sense, but respectfully submit that neither they nor Connecticut are 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. Rather, the position of Amici and Connecticut 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, the construction of Section 9527(a) urged by Connecticut and by Amici makes eminently good sense – and certainly more sense than the construction adopted by the Pontiac court and urged by the Secretary. 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]." H.R. Conf. Rep. No. 107-334, at 693 (2001).

In contrast, under the Pontiac 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 Pontiac court's reading of Section 9527(a) 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). 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) Were 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 foregoing argument is dispositive, as the task of statutory construction not only "begins with the statutory text" but "ends there as well if the text is unambiguous." BedRoc, Ltd., LLC v. United States, 541 U.S. 176, 183 (2004). But even if the Court were to find some ambiguity in the terms of Section 9527(a), the two relevant sources to which the Court could turn to choose between the competing interpretations of the provision – the relevant legislative history and the constitutionally mandated clear statement rule – both point decisively in favor of Connecticut's view.

A. The Relevant Legislative History Supports Connecticut's Position

Evidently recognizing that the relevant legislative history cuts directly against its position in this lawsuit, the Secretary did not even broach the difficult issue of how she might reconcile that history with her strained reading of Section 9527(a). In her reply brief, the Secretary then attempted to shrug off Connecticut's comprehensive showing that the relevant legislative history supports its view (see Docket 25, Conn.'s Opp. to Sec's M. to Dismiss ("Conn. Opp.") at 37-43), by asserting that the legislative history of a precursor to a provision is not a reliable indicator of the intended meaning of the provision, see Docket 28, Secretary's Reply Mem. ("Sec's Reply") at 12-13, and positing

that, in any event, the legislative history of the precursor provisions to Section 9527(a) supports the Secretary's view. Id. at 13. The Secretary is wrong on both scores.

First, as a threshold matter, it is appropriate and probative of Section 9527(a)'s meaning for this Court to consider the detailed legislative history that surrounds the insertion of the exact language, which Congress subsequently reenacted without change as NCLB Section 9527(a), into three separate education laws in 1994 – the Goals 2000 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"). See, e.g., Western Pac. R.R. Corp. v. Western Pac. R.R. Co., 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).

That history, as Connnecticut already has shown, can only be read to support the conclusion 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 Secretary attempts to stave off that conclusion by seizing on the initial wording of the amendment presented by Senator Gregg to the Goals 2000 legislation, which stated in relevant part 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." Sec's Reply at 13 (quoting 140 Cong. Rec. S605-01, 622 (daily ed. Feb. 22, 1994) (Sen. Gregg).

But the dispositive fact is that no action was ever taken on Gregg's original amendment. See 140 Cong. Rec. S622 (daily ed. Feb. 2, 1994). Instead, after conferring with the Senate leadership, Senator Gregg completely modified his amendment by substituting language that is identical in all respects to the language of Section 9527(a) See 139 Cong. Rec. S626 (daily ed. Feb. 2, 1994). And Senator Gregg proceeded to explain to the Senate the exact purpose of his revised amendment: "The purpose of the [revised] amendment . . . is to assure that this bill will not become an unfunded mandate," by including "very specific and very, I believe, effective language . . . to make 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." The co-sponsors of the Goals 2000 legislation supported the modified Gregg amendment, proclaiming "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) (Sen. Kennedy), and that "the last thing we want to do is mandate additional expenditures at State levels with all of the crisis they are having now in funding." Id. (Sen. Jeffords).

After these brief comments, the Gregg amendment was adopted, id., and the House agreed to its inclusion in the final bill. See House Conf. Rep. No. 103-446 at 191 (reprinted in Vol. 3 U.S.C.C.A.N. at 123 (103rd Cong. 1994)). Pointing specifically to the newly expanded language (identical in all respects to Section 9527(a)), a strong supporter

of the final bill explained that 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).

The full legislative history surrounding the Gregg Amendment – which the Secretary ignores – leaves no doubt that Connecticut's view of Section 9527(a) is correct. And that conclusion is confirmed by the subsequent debate over the inclusion of the same provision in the IASA – the direct predecessor of the NCLB – which Connecticut chronicled in its responsive brief, and as to which, the Secretary has never offered any response. See Conn.'s Opp. at 42-43.

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

The Secretary concedes, as she must, that conditions on spending must be stated clearly and unambiguously so that states and school districts have notice of the conditions imposed on any financial assistance they accept from the federal government. See Sec's Initial Mem. at 42-43. But the Secretary argues that the NCLB, as a whole, complies with that constitutionally mandated clear statement rule on the theory that the conditions on NCLB assistance are both unambiguous and unaffected by the prohibitions in Section 9527(a). Id. at 46-47.

The Secretary's argument is misguided, for it rests on the mistaken assumption that Section 9527(a) is not part of the conditions of assistance to which states and school districts agree when they accept NCLB funds. By its terms and its place in the statutory

framework, Section 9527(a) is part of the conditions on assistance. See supra at 3-4. And, if there be any ambiguity in its terms, Section 9527(a) must be construed, consistent with our system of federalism and the constitutionally mandated clear statement rule, in a manner that does not substantially increase the obligations of the states based on mere statutory ambiguity.

That constitutionally mandated clear statement rule of statutory construction follows directly from the Supreme Court's decision in Pennhurst State Sch. v. Halderman, 451 U.S. 1 (1981). At issue in that case 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 ensures both that participants in a Spending Clause program 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. 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).] [10]

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 ("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

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[10] Even outside of the Spending Clause context, the Supreme Court – consistent with our federal system of government – has refused to read ambiguities in federal statutes "[t]o 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).

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 the Pontiac case, the district court turned the clear statement rule on its head, and applied exactly the opposite presumption. See Pontiac Dec. at 7 ("If Congress meant to prohibit 'unfunded mandates' in the NCLB, it would have phrased [section 9527(a)] to say so clearly and unambiguously."). This Court should not follow the Pontiac court in that mistaken analysis. Rather, because Section 9527(a) does not "unambiguously" 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, this Court should apply the constitutionally mandated clear statement rule to hold that Section 9527(a) prevents the Secretary from attempting to shift to states and school districts, based on mere statutory ambiguity, the massive and fundamentally new obligation of funding whatever portion of funding for NCLB compliance the federal government declines to pay.

CONCLUSION

For the foregoing reasons, this Court should reject the interpretation of Section 9527(a) urged by the Secretary, adopt instead Connecticut's interpretation of that provision, and deny the Secretary's motion to dismiss for failure to state a claim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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