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)

RESPONSE TO PETITION FOR REHEARING AND REHEARING EN BANC

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INTRODUCTION

The Secretary of Education ("Secretary") asserts that the panel decision raises a "question of exceptional importance" as to "whether states and their school districts *must fulfill the commitments that they make* to secure federal grants under the No Child Left Behind Act of 2001 ("NCLB"), 20 U.S.C. §§ 6301, *et. seq.*, regardless of whether federal funds cover the full cost of compliance." Rehearing Petition ("Pet.") at 1 (emphasis added). But the question presented by this case is *not*, as the Secretary would have it, whether states and school districts "must fulfill the commitments that they make." The question is whether – in light of NCLB Section 7907(a), and the requirement that conditions imposed on the acceptance of federal funds must be set forth "unambiguously" in the statute, *see Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455, 2456 (2006) – states and school districts actually make a commitment to use their own funds to pay for the costs of NCLB compliance, that are not paid for by the federal government, when they choose to accept NCLB federal funds.

NCLB Section 7907(a) provides as follows:

> (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) (emphasis added).]

As we demonstrate below, the panel was plainly correct in holding that, by virtue of this statutory language, the NCLB does not "unambiguously" put states and school districts on notice that their acceptance of NCLB federal funds commits them to spend undefined and unlimited amounts of their own funds on NCLB activities. That being so, the states and school districts never made the "commitments" that are assumed in the Secretary's formulation of the question presented, and the Secretary's argument that it "defies commonsense," Pet. at 2, and is "absurd," *id.* at 9, to construe the NCLB as allowing states and school districts to break "the commitments that they make" collapses like a house of cards. One may believe – as, indeed, the panel and plaintiffs do – that the NCLB "rests on the most laudable of goals," Op. at 18, and nevertheless conclude that the funds necessary to comply with the statute must come from the federal government rather than from states and school districts.

ARGUMENT

A. As the panel correctly recognized, Op. at 8-10, the question whether, by accepting NCLB federal funds, states and school districts commit themselves to spend their own funds whenever federal funds fall short of paying for NCLB activities, is governed by the "clear statement" rule of *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981), as elaborated in subsequent cases, including most powerfully in the recent *Arlington* decision, *supra*. That rule

protects our federal system by requiring Congress to "unambiguously" put state and local officials on notice when the federal government seeks "to impose massive financial obligations on the States," *id.* at 16-17, and their school districts.[1]

B. The Secretary does not dispute that the clear statement rule applies to this case, but she maintains that the rule is satisfied because "there is no ambiguity in the statutory scheme." Pet. at 3. Yet the Secretary's analysis – which under *Pennhurst/Arlington* should begin (and normally end) with the language of the only statutory provision in the NCLB that specifically addresses whether a state or school district may be required "to spend any funds or incur any costs not paid for under this Act" *(i.e.*, Section 7907(a))[2] – instead defers any discussion of that

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[1] The force of the clear statement rule in the context of public education is well illustrated by *Arlington*, where the Supreme Court held that school districts could not be required to bear certain expenses even though such a requirement was supported by clear legislative history and would serve the "overarching goal" of the statute, because the statute itself was not unambiguous as to the requirement. *See* 126 S.Ct. at 2457-58, 2460, 2463. *See also Virginia Dep't of Educ. v. Riley*, 106 F.3d 559, 561, 566 (4th Cir. 1997) (*en banc*) (refusing to construe statute to require state to provide educational services to students expelled from school for reasons other than their disabilities, even though that result would further the overarching statutory goal, because the statutory language was not sufficiently clear).

[2] As the panel recognized, no other provision in the NCLB expressly speaks to the question of whether the costs of NCLB compliance are to be borne solely by the federal government, or by states and school districts as well. Op. at 9 n.3; *see also id.* at 21 (McKeague, dissenting). Both by its terms, and its position in the overall statutory framework as one of the "uniform provisions" that apply across the board to the NCLB's interpretation, Section 7907(a) governs that issue. *See* 20 U.S.C. §§ 7881 – 7916.

controlling provision until the end of her petition. And, when the Secretary finally does attempt to grapple with Section 7907(a), she does not even *mention*, much less overcome, the most glaring defect in her reading of that provision – namely, that her reading would rewrite Section 7907(a) to protect states and school districts only from paying for activities not *required* by the Act, *see* Pet. at 13-14, whereas the provision by its plain terms protects states and school districts from paying for activities "*not paid for under this Act*." *See* Op. at 12 (emphasis by the panel).

Rather than confront that problem, the only part of Section 7907(a)'s language that the Secretary discusses is the reference at the outset of the provision to federal "officer[s] or employee[s]." *See* Pet. at 13. But, as the panel correctly observed, even if the "officer or employee" language were to be read as modifying the final clause of Section 7907(a) – which itself is far from clear[3] – the Secretary's argument still would fail, because it would remain the case that no federal officer or employee could require a state "to spend any funds or incur any costs not paid for under this Act." *Id.* The Secretary cannot read that portion of Section 7907(a) out of the statute without violating the "'cardinal principle of statutory

[3] *See* Op. at 12. Notably, the Secretary's argument on this point finds no support in the panel dissent, which does *not* read the "officer or employee" language as modifying the final clause of Section 7907(a). *See id.* at 20 ("Section 7907(a) states in relevant part: "Nothing in this Chapter shall be construed to . . . mandate a State [etc.]" (ellipsis in original); *id.* at 25 (again referring to "the language in § 7907(a) that "[n]othing in this Chapter shall be construed to . . . mandate a State [etc.]'").

construction' that 'a statute ought, upon the whole, to be . . . construed'" so that "no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

C. Unable to tender a reading of Section 7907(a) that "unambiguously" puts states and school districts on notice that the provision means precisely the opposite of what it appears to say, the Secretary argues that plaintiffs' interpretation of Section 7907(a) conflicts with other provisions in the NCLB – and even with one provision in an entirely separate statute (*i.e.*, the Unfunded Mandates Act of 1995 ("UMRA")). As we now show, this effort is misguided because the conflicts the Secretary purports to find simply do not exist. But even if there were some doubt in this regard, the ambiguity the Secretary seeks to inject into the statutory scheme would only confirm the correctness of the panel's conclusion that the NCLB does *not,* as the *Pennhurst/Arlington* clear statement rule dictates, "*unambiguously*" require states and school districts "to spend any funds or incur any costs not paid for under th[e NCLB]." *See supra* at 2-3. "It is axiomatic that statutory ambiguity defeats altogether a claim by the Federal Government that Congress has unambiguously conditioned the States' receipt of federal monies in the manner asserted." *Riley*, 106 F.3d at 567.

1. The NCLB provision that allows states to "defer the commencement, or suspend the administration, but not cease the development, of" NCLB

assessments if certain grants fall below specified levels, Pet. at 11 (quoting 20 U.S.C. § 6311(b)(3)(D)), does not conflict with the panel's construction of Section 7907(a). The quoted provision simply sets a priority order for assessment work if certain NCLB grants fall below a specified level (approximately $400 million a year); it does not suggest, much less require, that states must devote their own funds to that assessment work. (Moreover, because those assessment grants can be used by states to defray school districts' test administration costs, there is nothing to the Secretary's suggestion that the NCLB, by its terms, requires school districts such as Otter Valley to administer NCLB assessments yet withholds all NCLB funding for those assessments. *See* Pet. at 10-11.)

2. Nor does the NCLB provision that requires states to participate in certain biennial "National Assessment of Educational Progress" ("NAEP") assessments "if the Secretary pays the costs of administering" them, Pet. at 12-13 (quoting 20 U.S.C. § 6311(c)(2)), conflict with the panel's construction of Section 7907(a). The former provision merely clarifies that NAEP participation, which previously resulted from state-by-state agreements with the Secretary (*see* 20 U.S.C. § 9622(d)(3)), is now conditioned on a uniform requirement of federal funding.

3. Reaching well beyond the bounds of anything that could even remotely satisfy the clear statement rule, the Secretary attempts to make something

out of the uses of the word "mandate" in the UMRA. But as the panel points out, the word "mandate" is used in that statute "to *include* a duty arising from voluntary participation in federal programs." Op. at 14 (emphasis by the panel). That Congress saw fit in one portion of UMRA to define the term "mandate" in that manner, while defining the term of art "federal intergovernmental mandate" more narrowly in another UMRA provision, 2 U.S.C. § 1555, *id.*, says nothing at all about the meaning of the verb "mandate" in Section 7907(a). And, in any event, the Secretary's contention that Congress did not regard the NCLB as imposing "unfunded mandates" on states and school districts is consistent with plaintiffs' position that the statute does not require states or school districts to spend their own funds.[4]

D. Finding no support for her position in the language of Section 7907(a), the Secretary argues – as does the panel dissent – that it "defies commonsense" to think that Congress would assume the burden of paying all of the costs of complying with the NCLB because the federal government cannot control those costs. *See* Pet. at 9, 12. But the federal government has extensive control over NCLB compliance costs, including the power to approve or disapprove state NCLB compliance plans (which are based on school district

[4] The Secretary invokes legislative history in discussing the irrelevant question of whether the NCLB contains unfunded "mandates" within the meaning of UMRA, *see* Pet. at 14, while ignoring the more relevant legislative history that supports the panel's decision. *Compare* Pet. at 15 n.3 *with* Op. at 15-17.

compliance plans). *See* 20 U.S.C. § 6311.[5] And, in any event, if there is to be an appeal to the "commonsense" of not subjecting a government to costs over which it lacks "control," the Secretary fails to account for the fact that, under her theory, the costs *a state or school district* would be required to bear would be dependent on the vagaries of the congressional appropriations process. In fact, under the Secretary's theory, the federal government could reduce its NCLB appropriation to zero, and shift all compliance costs to the states and school districts.[6]

Whatever else one might say of the Secretary's appeal to "commonsense," it hardly is so compelling that states and school districts, in deciding whether to accept NCLB federal funding, could not reasonably have interpreted Section 7907(a) to mean that they are not required to use their own funds to pay for NCLB

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[5] The Secretary's assertion that states and school districts will use the limited NCLB funding provided as an excuse to not comply with those NCLB mandates they find most burdensome, Pet. at 4, assumes that the Secretary could not clearly define the NCLB compliance obligations of states and school districts in light of the limited funding provided. Surely, the Secretary – who has issued reams of NCLB guidance and regulations (*see* http://www.ed.gov/policy/ landing. jhtml?src=rt) – would not abandon her ample NCLB enforcement authority in such an unprecedented manner.

[6] The Secretary's contention that, because participation in the NCLB is voluntary, states and school districts may opt-out in any particular year if they believe federal funding is inadequate, Pet. at 1, 15, ignores the reality that states and school districts have had to fundamentally overhaul their educational systems in order to participate in the NCLB. And, having done so, those states and school districts cannot now opt out of the statute without seriously damaging their education systems. *See* Brief *Amicus Curiae* of the American Association of School Administrators at 24 (filed April 3, 2006); Brief *Amicus Curiae* of Pennsylvania Governor Rendell at 19-20 (filed April 6, 2006).

compliance costs for which they do not receive federal funds. Indeed, Rod Paige, the defendant Secretary's predecessor, who was Secretary of Education when the NCLB was enacted, read Section 7907(a) as the panel did and plaintiffs do, explaining that the NCLB "contains language that says things that are not funded are not required," and that "if it's not funded, it's not required. There is language in the bill that prohibits requiring anything that is not paid for." *See* Op. at 17. And seven states – Connecticut, Delaware, Illinois, Maine, New Mexico, Oklahoma, and Wisconsin – as well as the District of Columbia filed a brief *amicus curiae* in this case affirming that they all accepted NCLB federal funds on the understanding that Section 7907(a) "means that states will not be required to spend their own funds to comply with the mandates of the [NCLB]." Brief *Amicus Curiae* of Connecticut, *et al.,* at 4 (filed April 3, 2006).

* * *

In sum, we end where we began. The Secretary's position is that a statute which provides that a state or school district cannot be "mandate[d] . . . to spend any funds or incur any costs not paid for under this Act" actually means that a state or school district *can* be so mandated, as long as the activity for which it is being required to "spend . . . funds or incur . . . costs" is one which, although not "paid for under this Act," is in some way authorized by the Act. And, the Secretary asserts – as she must if she is to prevail under the *Pennhurst/Arlington* rule – that

this tortured construction is in fact "unambiguous." Plainly, the panel was correct in holding that the NCLB does not unambiguously put states and school districts on notice that, if they accept NCLB federal funds, they will be required "to spend… funds or incur … costs not paid for under this Act." And, as the panel aptly put it, if Congress intends for states and school districts "to comply with the Act's requirements regardless of federal funding … the ball is properly left in [Congress'] court to make that clear." Op. at 18.

CONCLUSION

The Secretary's petition for rehearing should be denied.

Respectfully submitted,

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Dated: March 18, 2008

CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing Response of Plaintiffs-Appellants will be served on the 19th day of March of 2008 by electronic mail on counsel for defendant-appellee at the following electronic address, and two additional copies of that Response were served on the 18th day of March of 2008 by overnight mail on counsel for defendant-appellee, at the following address:

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