

No. 05-2708

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

SCHOOL DISTRICT OF THE CITY OF PONTIAC, et al.,

Plaintiffs and Appellants,

v.

SECRETARY OF EDUCATION,

Defendant and Appellee.

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

**BRIEF OF AMICI CURIAE CONNECTICUT CONFERENCE OF
THE NAACP ET AL. IN SUPPORT OF PETITION FOR
REHEARING AND REHEARING EN BANC**

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STATEMENT OF THE AMICI CURIAE

This brief is submitted on behalf of the Connecticut State Conference of the National Association for the Advancement of Colored People (“Connecticut NAACP”) and the individuals listed below.

Amicus Connecticut NAACP represents the individuals who are the direct beneficiaries of the No Child Left Behind Act (“NCLB” or “the Act”) – namely, low income, racial and ethnic minorities, English language learners and students with disabilities. The Connecticut NAACP is a non-profit organization that seeks to ensure the political, social, educational, and economic equality of rights of all persons, and to eliminate racial hatred and discrimination. Its members include minority children who attend public schools in the State of Connecticut – and, in particular, schools receiving funds under Title I of the Elementary and Secondary Education Act of 1965 (“ESEA”) – and the parents of those children.

Amicus Sonia Ruiz, aged 9, is a Latina student who lives with her family in Hartford, Connecticut. She attends Hartford’s Parkville Community School, which has not made adequate yearly progress (“AYP”) and is a “school in need of improvement” under Title I. Her mother is Brandie Marie Gonzalez.

Amicus Demont Murphy, aged 7, is a biracial (African-American and Hispanic) student who lives with his family in Hartford, Connecticut, and attends

Hartford's Simpson-Waverly Elementary School, which has not made AYP. His mother is Jacqueline D. Medina.

Amicus Manaicha Gonzalez, aged 14, is a disabled student who lives with her family in Hartford, Connecticut, and attends Hartford's Quirk Middle School, which has not made AYP and is a "school in need of improvement." Her mother is Elizabeth Villanueva.

Amici are intervenors in another federal lawsuit involving a challenge to NCLB conditions placed on grants made under Title I of ESEA, *Connecticut v. Spellings*, No. 05-1330 (D. Conn.). There, the State of Connecticut sued the U.S. Department of Education alleging that the State should not be required to comply with certain testing requirements under NCLB because, it claims, NCLB is an unfunded mandate. In September 2006, the District of Connecticut dismissed three of the four claims in the State's suit on jurisdictional grounds. The State's remaining claim, which is currently pending, asserts that the U.S. Department of Education arbitrarily and capriciously denied the State's requests for plan amendments in violation of the federal Administrative Procedure Act.

While it is not directly relevant to the remaining legal issue in *Connecticut v. Spellings*, the panel's decision in this case substantially affects Amicis' overarching interest in fostering and protecting educational opportunities for

minority and low-income children.¹ Accordingly, Amici urge this Court to grant the U.S. Government's petition for rehearing or rehearing en banc. Amici submit that rehearing is warranted to secure the enhanced educational opportunities and outcomes that Congress intended when it approved NCLB with overwhelming bipartisan support in 2001. These tangible benefits will be impaired if plaintiffs succeed in their campaign to evade their responsibilities under the Act.

BACKGROUND

A. State Education Systems Have Been Failing Minority and Low-income Students.

Despite the promise of *Brown v. Board of Education*, American public school systems – the “engine of the American dream” – generally have failed to provide minority and low-income students with an equal opportunity for success through quality education. NCLB-Conf. Report, 147 Cong. Rec. S13322-03, S13327 (2001). In far too many communities, our public school systems fail to

¹ The three civil rights organizations representing Amici – the NAACP, the Lawyers' Committee on Civil Rights Under Law, and the Law Office of William L. Taylor – have an interest not only because of the Connecticut case, but also because each has programs that operate nationally to protect and advance the interests of minority and other disadvantaged children. The NAACP, the nation's oldest and largest civil rights organization, has long pursued litigation designed to provide equal opportunity for children. The Lawyers' Committee and the Law Office of William L. Taylor (along with the Citizens' Commission on Civil Rights, which he chairs) have provided successful representation to children in desegregation and other law suits, in the Sixth Circuit and elsewhere, seeking to include school improvement measures in the relief obtained. All three organizations have been consulted by members of Congress and other policy-makers on issues regarding federal education reform.

provide low-income and minority students with equal access to “challenging curricula and instruction, fair tests and testing practices, fair discipline rates and punishments, fair identification for special education and gifted programs, financial resources, human resources, race and social class diversity in schools and classrooms, and motivated, high achieving classmates who create an academic climate that sustains high achievement for all students.” C. Joy Farmer, *The No Child Left Behind Act: Will It Produce A New Breed Of School Financing Litigation?*, 38 Colum. J.L. & Soc. Probs. 443, 452 (2005); see Amy Reichbach, *The Power Behind the Promise: Enforcing No Child Left Behind to Improve Education*, 45 B.C. L. Rev. 667, 668-69 (2004) (“Despite the Supreme Court’s promise in *Brown* that once a state has undertaken to provide its children with an education, it must do so on equal terms, significant inequalities persist between high-poverty and low-poverty schools.”).

State education systems across the United States continue to be plagued by a substantial achievement gap between minority and low-income students and their non-minority and affluent counterparts. Historically, the vast majority of those “left behind” by these education systems were African American, Hispanic, English-learners, or from low-income families. These students under-perform on standardized tests, are under-represented in higher academic tracks, and are more likely be disciplined, held back, or drop out of school before obtaining high school

diplomas.² This achievement gap is dramatic and pervasive. It begins as early as pre-kindergarten and continues through the high school level.³

Public schools have also become more segregated in recent years, and students in predominantly minority school districts are “substantially more likely than others to be educated by uncertified or inexperienced teachers who lack the educational background to teach the subject matter they are teaching.” *E.g.*, Daniel J. Losen, *Challenging Racial Disparities: The Promise And Pitfalls Of The No Child Left Behind Act’s Race-Conscious Accountability*, 47 How. L.J. 243, 251 (2004). The effects of these disparities are far-reaching. *See id.* (explaining, for example, that many youths of color fall into a “a school-to-prison pipeline.”).

B. Congress Enacts NCLB to Close the Achievement Gap.

NCLB amended Title I of ESEA, which was enacted in 1965 to aid disadvantaged students. While ESEA achieved some positive results over time, it

² *See, e.g.*, Kevin Brown, *The Supreme Court's Role in the Growing School Choice Movement*, 67 Ohio St. L.J. 37, 41-42 (2006); Farmer, *supra*, 38 Colum. J.L. & Soc. Probs. at 450-452; *see generally* Comm. on Improving Measures of Access to Equal Educ. Opportunity, Nat'l Research Council, *Measuring Access to Learning Opportunities* (Willis D. Hawley & Timothy Ready eds., 2003), available at <http://books.nap.edu/books/0309088976/html/R1.html#pagetop>; *see generally*, U.S. Dep't of Ed., National Center for Education Statistics, *Status and Trends in the Education of Racial and Ethnic Minorities*, at 64 (September 2007), available at <http://nces.ed.gov/pubs2007/2007039.pdf>.

³ *E.g.*, Maurice R. Dyson, *Leave No Child Behind: Normative Proposals to Link Educational Adequacy Claims and High Stakes Assessment Due Process Challenges*, 7 Tex. F. on C.L. & C.R. 1, 2 (2002); Farmer, *supra*, 38 Colum. J.L. & Soc. Probs. at 450-452 (2005); NCLB-Conf. Report, 147 Cong. Rec. at S13324.

failed to close the achievement gap in American schools.⁴ In enacting NCLB in 2001, Congress recognized that “the failure to educate generation after generation of low-income children, especially children from minority backgrounds, was dividing our country. We were balkanizing ourselves based on education and the failure of ... large cultural segments of our population[] ... to be economically ... or socially successful[.]” NCLB-Conf. Report, 147 Cong. Rec. at S13327. New direction was needed to end “the soft bigotry of low expectations” in American public schools. George W. Bush, Remarks by the President in “Ask President Bush” Event (Fond Du Lac, Wis., July 14, 2004), in White House Press Releases and Documents (2004 WLNR 2541352).

NCLB seeks to “ensure that all children have a fair, equal and significant opportunity to obtain a high-quality education” by, *inter alia*, establishing “high-quality academic assessments [and] accountability systems ... so that students, teachers, parents, and administrators can measure progress”; by “meeting the educational needs of low-achieving children in our Nation’s highest-poverty schools, [including] limited English proficient children, migratory children, [and] children with disabilities”; and by closing “the achievement gaps between minority and nonminority students, and between disadvantaged children and their more advantaged peers.” 20 U.S.C. § 6301. The Act thus “rejects the poor academic

⁴ See, e.g., William L. Taylor, *The Continuing Struggle for Equal Educational Opportunity*, 71 N.C. L. Rev. 1693, 1697 (1993).

performance of any minority group as somehow either part of the natural order, or fair.” Losen, *supra*, 47 How. L.J. at 274.

States that choose to accept NCLB funding must provide specified educational resources to students, including:

- (a) State-administered annual assessments in English and mathematics, with results provided to parents;
- (b) Report cards on student test scores and other measures, with information reported by school, school district, and the State;
- (c) Provisions requiring school officials to keep parents informed on such matters as school improvement, English proficiency, and school safety;
- (d) An effective state accountability and school improvement system to ensure that students attain the State’s “proficient” standards of achievement by 2014;
- (e) Parental options to transfer children to a better school or to obtain tutoring when schools fail to make sufficient progress; and
- (f) Qualified teachers who meet rigorous requirements for subject-matter knowledge and State certification.⁵

20 U.S.C. §§ 6311(h)(1)(C), 6311(h)(2)(B), 6311(h)(2)(E), 6316.

The touchstone of NCLB is accountability. The law requires schools and school districts that receive Title I funding to show “adequate yearly progress” (“AYP”) for students in historically-disadvantaged groups. If AYP is not met, the Act prescribes a set of remedies for schools and school districts. 20 U.S.C. § 6316. The Act requires school districts to confront and address the achievement gap directly by disaggregating the achievement scores of low-income and minority

⁵ See Gordon Whiteman, *Making Accountability Work*, 28 N.Y.U. L. & Soc. Change 361, 366-367 (2003) (discussing the importance of this provision to improving the education of poor and minority children).

students, and those with limited English proficiency or disabilities. Schools can thus no longer bury the performance of these students beneath misleading averages. *See, e.g.*, NCLB-Conf. Report, 147 Cong. Rec. at S13328 (“No more burying the child who maybe does not make it in a group of people who do not make it covered by a group of people who do make it.”). And schools in which minority or low-income students persistently fail to meet achievement benchmarks must make “fundamental reforms,” which may include remedies as broad as replacing all or most of the school staff, or reopening the school as a public charter school. 20 U.S.C. § 6316(b).

All told, NCLB is the most far-reaching civil rights law in recent history. *See, e.g.*, Cynthia G. Brown, *Federal Nagging: How Congress Should Promote Equity and Common High Standards in Public Schools*, 116 YLJPP 163 (2006) (“NCLB’s education goals were the most equitable – in the sense of fostering greater equality across incomes and races – since the Civil Rights Act of 1964 and the federal legislation of the 1970s that established the educational rights of women, girls, and students and teachers with disabilities.”).

C. Michigan, Texas, and Vermont Are Among the States that Continue to Show Achievement Gaps.

According to the most recent results on the Nation’s Report Card, or National Assessment of Educational Progress (“NAEP”), achievement scores for African American, Hispanic American, and low-income students have risen

significantly across the board, demonstrating that NCLB has begun to work. *See* Secretary Spellings' Prepared Statement Before the U.S. House of Representatives Appropriations Subcommittee on Labor, HHS, and Education (March 12, 2007), available at <http://www.ed.gov/news/speeches/2005/09/09292005.html> ("African-American and Hispanic students are reaching all-time highs in reading and math. Achievement gaps between poor and minority students and their peers are finally beginning to close. More than 60,000 schools—over 70 percent overall—are meeting No Child Left Behind's annual performance goals."); *see generally* 2007 NAEP, available at <http://nces.ed.gov/nationsreportcard> ("2007 NAEP").

Unfortunately, however, school districts in Michigan, Texas, and Vermont (the very States in which plaintiff school districts are located) are continuing to leave behind their most disadvantaged children. The 2007 NAEP shows a persistent chasm in student achievement in each of these states. *See* 2007 NAEP, *supra*. For example, there has not been a significant improvement in the achievement gap between minority and non-minority students in either Michigan or Texas between 2003 and 2007, and the achievement gap among some of these students has actually *increased* in between 2005 and 2007. The same is true of the gap between low-income and more affluent students.⁶ Vermont has not released

⁶ In addition, in Texas there is a well-documented teacher credential and experience gap. Low-income, African-American, and Hispanic students are far less likely to attend schools with qualified teachers than high-income and white

data on the achievement gap between minority and non-minority students, but continues to show a significant gap between low-income and affluent students in every reported grade and subject matter. *See* 2007 NAEP, *supra*.

While there is much debate over how to improve ESEA and NCLB, these statutes have benefited many disadvantaged children by increasing the availability of educational resources⁷ and by holding state and local recipients accountable for improving student performance.⁸ The panel's decision in *Pontiac*, if allowed to

students. *See* The Education Trust, *Their Fair Share: How Texas-Sized Gaps in Teacher Quality Shortchange Low-Income and Minority Students* (2008), available at <http://www2.edtrust.org/NR/rdonlyres/0E68E606-0371-4C7D-BEF5-9D07CA415171/0/TXTheirFairShare.pdf>; *see also* Mary C. Bredan, *Teacher-Quality Gap Examined in Texas*, *Educ. Wk.*, February 13, 2008, at 5, available at www.edweek.org.

⁷ The enactment of NCLB brought the largest increase in appropriations in the 35-year history of ESEA. In 1980, the Title I appropriation was only \$2.7 billion. In 2001, the Title I appropriation was \$8.7 billion. In 2002 it increased by \$1.6 billion to \$10.35 billion and in 2003 it increased again to \$11.7 billion. *See* Education Department Budget History Tables: FY1980—Present, available at <http://www.ed.gov/about/overview/budget/history/edhistory.pdf>.

⁸ In light of the continuing “yawning gap between the performance of minority and white schoolchildren on standardized tests” in these states, commentators have questioned why certain plaintiffs choose to challenge NCLB instead of challenging the States to meet their obligations. *See, e.g.,* DeWayne Wickham, *NEA Picks Wrong Fight on Bush Education Funding*, *USA TODAY*, Apr. 26, 2005, at 13A, available at 2005 WLNR 6523983. The States have always had ultimate responsibility for providing and funding public education, which is guaranteed by state constitutions and includes an obligation to provide adequate public education to low-income and minority students. *See* Mich. Const. art. VIII, §§ 1-2; Tex. Const. art. VII, § 1; Vt. Const. ch. II, § 68; *see also, e.g.,* *Edgewood Independent School Dist. v. Kirby*, 777 S.W.2d 391, 397 (Tex. 1989) (“Children who live in poor districts and children who live in rich districts must be afforded a substantially equal opportunity to have access to educational funds.”).

stand, threatens to curtail these advances and undermine the progress achieved through NCLB. Further, as we explain, the effect of the decision is not limited to NCLB. Its reasoning could imperil numerous other federally funded programs, including those that benefit low income and minority children. The panel should reconsider its opinion. Alternatively, the Court should rehear the decision en banc.

LEGAL ARGUMENT

THE PANEL’S OPINION INVITES STATES THAT ELECT TO RECEIVE FEDERAL FUNDING TO USE “AMBIGUOUS” STATUTORY LANGUAGE AS A MEANS OF RENEGING ON THEIR OBLIGATIONS – AT THE EXPENSE OF LOW-INCOME AND MINORITY CHILDREN.

For over a century, and increasingly since the 1960’s and 70’s, the U.S. Government has enacted hundreds of grant-in-aid programs that provide funding to States to benefit a targeted group of individuals. *See, e.g.,* Lisa Key, *Private Enforcement of Federal Funding Conditions Under Section 1983: The Supreme Court’s Failure to Adhere to the Doctrine of Separation of Powers*, 29 U.C. Davis L. Rev. 283, 293-94 (1996). These programs require that participating States meet certain statutory conditions, which often entail spending by the States themselves. *See id.* Before the panel decision in this case, no court has permitted States to refuse to meet their obligations on the grounds they received inadequate notice of the cost of compliance. But the panel’s decision does just that, holding that States that choose to accept NCLB funding may keep their federal dollars even if they fail

to meet the statutory conditions, so long as NCLB is not fully funded by the federal government.

The panel majority relies primarily on the wording of a single provision of the Act that it deems ambiguous as to the States' responsibility to participate in the funding of NCLB. (Majority opin. at 10-15, citing 20 U.S.C. § 7907 (a).) The majority also suggests, in a footnote, that, because "there is no mention of the cost of compliance" in the statute, Congress has failed to make clear that states and local governments must expend their own funds to ensure the success of NCLB. (Majority opin. at 9, fn.3.) According to the majority, States are therefore relieved of any obligation to comply with the conditions explicitly set forth in NCLB. (*Id.* at 18.) As Judge McKeague points out in his dissent, however, "It simply defies common sense to suggest that Congress intended to relieve States and school districts from compliance with the NCLB's requirements when the cost of compliance – which Congress *does not control* – exceeds appropriations[.]" (Dissenting opin. at 21, original emphasis.)

It also "defies reason and history" to suggest that States would have been lured by a single, arguably ambiguous provision into believing that they would not have had to expend their own funds to implement NCLB, notwithstanding the explicit conditions undisputedly mandated by the statute. (Dissenting opin. at 22; *see* majority opin. at 2-4 [recognizing these conditions].) The federal

government's share of educational funding has *never* exceeded 10%. See Tom Loveless, *The Peculiar Politics of No Child Left Behind*, The Brookings Institution (2006) at 20-21, available at www.brookings.edu/~media/Files/rc/papers/2006/08k12education_loveless.pdf. The only way to conclude, as the panel did here, that States could have been surprised to learn they would have to spend money on NCLB is by placing undue emphasis on a single line of a complex statute and disregarding the history of educational funding and the overarching purpose of the statute. The result, as Judge McKeague pointedly observes, is nonsensical:

[I]f [school officials] find their students failing in one program, rather than redoubling their efforts, trying something different, or asking the State and local citizenry for more money, they can simply divert federal funds away from the program, declare the program “underfunded,” and wipe their hands (but not pay back the federal dollars).

(Dissenting opin. at 28.) “Voila, problem solved, at least for the State and local officials, *if not for the struggling students*.” (*Id.*, emphasis added.) This flies in the face of the established understanding that, “where a State obtains grants by providing assurances that the funds will be used on programs that comply with Title I, the State has no right to retain funds that are in fact misused.” *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 664 (1985) (holding that the State of Kentucky could not use federal funds to supplant State educational money, even if it did so in “good faith”). While “Congress must express clearly its intent to impose

conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds,’ ... [t]he requisite clarity in this case [and in the case at bar] is provided by Title I; States that chose to participate in the program agreed to abide by the requirements of Title I as a condition for receiving funds.” *Id.* at 665-66 (quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 24 (1981), and citing *Bell v. New Jersey*, 461 U.S. 773, 790 (1983).)

If the panel opinion is allowed to stand, the real losers in this case will be minority and low-income children like amici, who will be deprived of the benefits of NCLB if recipients are relieved of the obligation to use their Title I funds to account for and improve student performance.

These students stand to lose in other ways as well. Low-income minority and disabled children are dependent on numerous grant-in-aid programs – school lunches, foster care, education for persons with disabilities, to name only a few – that condition the use of federal money on specific requirements.⁹ The panel opinion invites States that are struggling with their budgets to try to escape the conditions to which they agreed when they accepted federal funding by finding statutory language that may be characterized as ambiguous – if not specifically as

⁹ See, e.g., National School Lunch Act, 42 U.S.C. §§ 1751-1769; Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 620-628, 670-679(a); Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1461. Many grant-in-aid programs were enacted during the 1930s and 1940s to help States and localities protect the health, housing and educational opportunities of the neediest members of society.

to the sources of funding, then as to the conditions themselves or proscriptions on the use of federal funds. The actual “cost of compliance” is rarely (if ever) known in advance, even when the federal government promises to pay a percentage of the cost of funding a program. (*See* majority opin. at 9, fn.3, suggesting that failure to specify the “cost of compliance” could constitute lack of “clear notice” justifying a State’s refusal to comply with conditions.) The panel’s unprecedented expansion of the “clear statement” test threatens the integrity of many well-established federal programs, at the expense of the most vulnerable members of society.

CONCLUSION

For the foregoing reasons and the reasons stated in the Secretary’s petition, this Court should grant rehearing or rehearing en banc.

Respectfully submitted,

Dated: February ²²__, 2008

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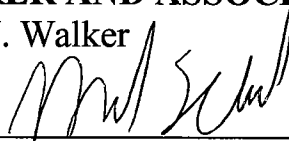
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CERTIFICATE OF SERVICE

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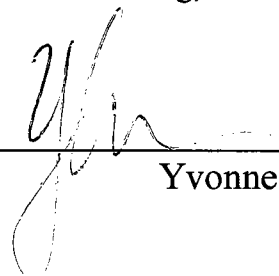
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