No. 09-852

In the Supreme Court of the United States

SCHOOL DISTRICT OF THE CITY OF PONTIAC, ET AL.,
PETITIONERS

v.

ARNE DUNCAN, SECRETARY OF EDUCATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the States and their local educational agencies must fulfill the commitments they make to secure federal grants under Title I, Part A of the No Child Left Behind Act of 2001, 20 U.S.C. 6301 *et seq.*, when federal funds do not cover the full costs of compliance.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 10a-74a, 78a-201a) are reported at 512 F.3d 253 and 585 F.3d 253. The decision of the district court (Pet. App. 1a-9a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 16, 2009. The petition for a writ of certiorari was filed on January 14, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The No Child Left Behind Act of 2001 (NCLB or Act), 20 U.S.C. 6301 *et seq.*, was a comprehensive reform

of the Elementary and Secondary Education Act of 1965 (ESEA), Pub. L. No. 103-382, 108 Stat. 3519, the federal spending program that provides funds to assist the States and their local educational agencies (LEAs) in the education of elementary and secondary school children. Title I, Part A of the ESEA, as amended by NCLB (Title I of NCLB), which is at issue in this case, provides federal grants to assist States and LEAs in efforts to improve the academic achievement of disadvantaged students, and to "ensur[e] that *all* students * * * meet high academic standards." H.R. Rep. No. 63, 107th Cong., 1st Sess. Pt. 1, at 281 (2001) (emphasis added). Participation is voluntary, but a State or LEA that chooses to participate in the program must comply with the statutory requirements. See *Bennett* v. *Kentucky Dep't of Educ.*, 470 U.S. 656, 666 (1985).

As this Court has recognized, "NCLB mark[s] a dramatic shift in federal education policy," *Horne* v. *Flores*, 129 S. Ct. 2579, 2601 (2009), in that it seeks to improve the academic achievement of disadvantaged students through a combination of flexibility and accountability. The Act "expressly refrains from dictating funding levels," *id.* at 2603, and instead "grants States and [LEAs] unprecedented flexibility to target federal dollars to meet State and local priorities," H.R. Rep. No. 63, *supra*, at 362. The Act does not require States or LEAs to implement specific curricula or methods of instruction. Instead, it allows participating States to set their own academic standards, 20 U.S.C. 6311(b)(1), to design their own assessments to measure student progress on those standards, 20 U.S.C. 6311(b)(3), and to decide what constitutes "adequate yearly progress" for their schoolchildren, 20 U.S.C. 6311(b)(2)(C).

This approach "reflects Congress' judgment that the best way to raise the level of education nationwide is by granting state and local officials flexibility to develop and implement educational programs that address local needs, while holding them accountable for the results." *Horne*, 129 S. Ct. at 2601. The Act focuses not on dollars and cents, but on improvement in the academic achievement of all of the State's public school students. See *id.* at 2603 (NCLB "focuses on the demonstrated progress of students through accountability reforms.").

A State that wishes to obtain federal funds under Title I of NCLB must submit a plan to the Secretary of Education stating that it will comply with all applicable requirements of the Act. 20 U.S.C. 6311(a). An LEA may, in turn, receive a subgrant by filing a plan with its State and obtaining approval from the state educational agency. 20 U.S.C. 6312(a). School districts and schools that do not receive Title I funds need not comply with certain of the Act's requirements. See, *e.g.*, 20 U.S.C. 6311(h)(2)(A) (not required to publish test results); 20 U.S.C. 6311(b)(2)(A)(ii) (not subject to certain statutory remedial measures). They are, however, required to test their students using the statewide assessments that are aligned with the established statewide academic standards. See 20 U.S.C. 6311(b)(1)(B) and (3)(A).

The Secretary of Education is vested with authority to enforce NCLB, and may withhold funds or take other enforcement action if a State fails to comply with the requirements of the Act. 20 U.S.C. 1234c.

2. Petitioners are nine school districts located in three States—Michigan, Texas, and Vermont—that have

elected to participate in the Title I, Part A program.[1] Petitioner school districts are joined by the National Education Association (NEA) and several NEA affiliates. None of the petitioner school districts' respective States have joined this litigation, and no State is before this Court.

In 2005, petitioners filed suit against the Secretary of Education alleging, based on 20 U.S.C. 7907(a) (Section 9527(a) of NCLB), that NCLB does not require States and LEAs that accept federal funds under Title I to comply with the statutory requirements of the Act if those funds do not cover the full costs of compliance. Pet. App. 2a. Petitioners alleged, in the alternative, that the Act is ambiguous in this respect and, accordingly, the Secretary could not require States and LEAs to expend state and local funds without violating the Spending Clause. *Id.* at 2a-3a. Section 7907(a), on which petitioners rely, is one of the ESEA's general provisions contained in Title IX of the Act. It states:

> 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).

Petitioners did not seek administrative review before filing this lawsuit. They did not ask their respective

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[1] Petitioner Otter Valley Union High School District receives no Title I funds based on a decision to use Otter Valley's funds to benefit elementary schools rather than high schools. See Gov't C.A. Post-Argument En Banc Br. 6-7.

States to propose an amendment to the State plan, nor did they propose an amendment to their LEA plans on file with the State. Instead, they asked the district court for declaratory and injunctive relief. Pet. App. 4a-5a. Respondent moved to dismiss petitioners' claims for lack of standing and for failure to state a claim. *Id.* at 5a.

The district court concluded that, at least at the pleading stage, petitioners had sufficiently alleged standing. Pet. App. 6a-7a. The court, however, rejected petitioners' argument on the meaning of Section 7907(a) and dismissed the complaint. *Id.* at 7a-9a. The court explained that Section 7907(a) restricts the ability of agency officials to add to the statutory conditions on receipt of federal funds, but it does not excuse noncompliance with the statutory conditions themselves or guarantee that Congress will reimburse States for all costs incurred in complying with the Act. *Id.* at 8a-9a.

3. In a split decision, a panel of the court of appeals reversed. Pet. App. 10a-74a. The panel majority agreed, as a threshold matter, that petitioners had standing based on allegations that petitioner school districts had already spent and will continue to spend state and local funds to comply with NCLB. *Id.* at 20a-25a.

On the merits, the panel majority observed that States must have clear notice of their obligations under federal spending programs, Pet. App. 26a-32a, and recognized that NCLB puts States "on clear notice" of their obligations to "fulfill [NCLB's] various educational and accountability requirements, such as submitting plans to the Secretary, effectively tracking student achievement, and so forth," *id.* at 42a. Nonetheless, the majority concluded that Section 7907(a) creates an ambiguity as to whether a State, "if it chooses to participate, will have to pay for whatever additional costs of implementing the

Act that are not covered by the federal funding provided for under the Act." *Id.* at 32a. While acknowledging that the Secretary's interpretation of Section 7907(a) may be "correct," the majority concluded that "a state official could plausibly contend that she understood" that provision to mean that "her State need not comply with NCLB requirements for which federal funding falls short." *Id.* at 32a-33a.

In his dissent, Judge McKeague found no ambiguity in the statutory scheme. Pet. App. 52a-53a. He observed that in "determining whether the clear-statement rule is satisfied, a court must not let itself focus myopically on one phrase or provision." *Id.* at 64a. Petitioners' argument, he explained, would allow a State (or LEA) to "divert federal funds *away* from [a failing] program, declare the program 'under funded,' and wipe their hands (but not pay back the federal dollars)." *Id.* at 73a. Judge McKeague concluded that it would "def[y] commonsense 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." *Id.* at 57a. And he further found it "nonsensical" that States would believe "Congress intended to pay in full for a testing and reporting regime of indeterminate cost, designed and implemented by States and school districts, not federal agencies." *Id.* at 59a.

4. The court of appeals granted rehearing en banc, and affirmed the judgment of the district court by order of an evenly divided court. Pet. App. 78a-79a.

a. Judge McKeague, joined by Judges Rogers and Griffin, concluded that the case is not justiciable. Pet. App. 168a-194a. Judge McKeague explained that although the States of Michigan, Texas, and Vermont

"have an obvious interest in the subject of this litigation because each has agreed that it and its public schools will accept federal funds under the Act and be bound by its requirements," *id.* at 175a, they are not parties to this action. He explained further that while "the absence of the States might not be a concern" if "this [were] a more narrow, concrete challenge by a school district seeking an amendment to a plan and having exhausted administrative review," petitioners had "made the strategic decision to bring a sweeping" challenge to NCLB. *Id.* at 173a. Looking to Federal Rule of Civil Procedure 19, Judge McKeague concluded (Pet. App. 176a-183a) that the States were "required parties" because "[o]nly the State can decide in the first instance whether * * * to accept the funds and associated requirements for the benefit of the State's public-school students," *id.* at 180a, because the States might prefer to "have final authority to determine whether any program or requirement is underfunded," *id.* at 182a, and because the declaratory and injunctive relief petitioners seek would call into question the validity and enforceability of statewide plans, *id.* at 180a-182a. Even if not strictly "required" parties, Judge McKeague concluded that dismissal would be appropriate for prudential reasons because, given the absence of the States as parties, the inclusion of school districts outside the Sixth Circuit, and the presentation of a sweeping claim without the benefit of administrative review, "there are just too many elephants in the room." *Id.* at 190a-195a.[2]

b. Judge Sutton, joined by Chief Judge Batchelder, Judges Boggs, Cook, and Kethledge, and Judge Mc-

[2] Because a majority of the en banc court concluded that the case is justiciable, Judge McKeague also addressed the merits and concurred in Part II of Judge Sutton's opinion. Pet. App. 168a.

Keague in relevant part, decided that the case is justiciable, Pet. App. 127a-137a, but rejected petitioners' argument on its merits, *id.* at 137a-165a. Judge Sutton recognized that under this Court's precedents, including *Arlington Central School District Board of Education* v. *Murphy*, 548 U.S. 291 (2006), "Spending clause conditions * * * bind the States only when Congress spells them out clearly in the text of the law." Pet. App. 140a. But he also recognized that, under the same case law, "[w]hat matters" is whether a provision "is ambiguous when read in context," and that "the implausibility of an alternative interpretation of a statute" does not give rise to ambiguity that would deprive a State of clear notice. *Id.* at 140a-141a. "Measured by these yardsticks," Judge Sutton concluded that NCLB "clearly requires the States (and school districts) to comply with its requirements, whether doing so requires the expenditure of state and local funds or not." *Id.* at 141a. He further concluded that Section 7907(a) is a "rule of construction" that prevents agency officials from depriving States of the flexibility afforded under the Act. *Id.* at 155a-160a.

Judge Sutton rejected petitioners' contrary reading of Section 7907(a) as inconsistent with the Act's accountability requirements (Pet. App. 142a-145a), with the flexibility given to States and LEAs (*id.* at 145a-148a), with the focus on results rather than costs of compliance (*id.* at 149a-151a), and with other provisions of the Act (*id.* at 152a-154a). He concluded that "[t]he express and unprecedented flexibility the Act gives to the States * * * cannot coexist with an interpretation of the statute that allows school districts to exempt themselves from the accountability side of the bargain whenever *their* spending choices do not generate the requisite achievement." *Id.* at 147a. Indeed, he observed, the

Act's "spending flexibility necessarily makes it impossible to calculate or even define the costs of complying with the Act's requirements." *Id.* at 148a. Judge Sutton also found that, to the extent there was any ambiguity when the Act was passed in 2002, the States and the petitioner school districts were clearly on notice of the conditions of participation by the time they filed this lawsuit in 2005, yet they continued to accept federal dollars each year. *Id.* at 154a-155a.

In the end, Judge Sutton rejected the notion that Section 7907(a) "suddenly transformed the Act into a no-strings-attached grant program, or for that matter an outright gift program," and held that "no state official who read the Act could plausibly think" otherwise. Pet. App. 163a.

c. Judge Cole, joined by Judges Martin, Daughtrey, Moore, Clay, Gilman, and White, concluded that the case is justiciable, Pet. App. 90a-112a, and that petitioners' complaint should not have been dismissed for failure to state a claim, *id.* at 112a-126a. Judge Cole acknowledged that a State that elects to accept federal funds "must comply with NCLB requirements," and did not question the clarity of the statutory testing and other accountability requirements. *Id.* at 84a-87a. He also recognized that Section 7907(a) could be understood as "limiting agency authority in administering NCLB," *id.* at 115a, rather than excusing noncompliance with the statutory requirements themselves, *id.* at 113a. He ultimately concluded, however, that "a state official would not clearly understand that accepting federal NCLB funds meant agreeing to use state and local funds to meet goals rendered otherwise unreachable by deficient federal funding." *Ibid.* Judge Cole indicated that he would remand for further proceedings to apply his un-

derstanding of the statutory scheme to petitioners' factual circumstances. *Id.* at 126a.[3]

ARGUMENT

Petitioners renew their argument that the States lacked clear notice that if they accepted federal funds under Title I of NCLB, they would be required to comply with the statutory conditions even if compliance would require the expenditure of state or local funds. This is not a proper vehicle to review that proposition because this case does not present a properly justiciable controversy. In any event, petitioners' argument fails on its merits, and the decision below does not conflict with any decision of this Court or any other court of appeals. Indeed, no other court has decided this issue in the eight years since NCLB was first enacted, and the judgment of the court of appeals in this case—affirming the district court's judgment by an equally divided court—presumably would not be regarded as binding precedent even in the Sixth Circuit. Further review of the decision below is not warranted.

1. This case is not a proper vehicle to review the question presented because it does not present a properly justiciable controversy. Petitioners assert an abstract and sweeping challenge to NCLB, and they do so without the participation of their respective States. There are simply "too many elephants in the room," Pet. App. 194a, to make this a suitable vehicle for review.

First, petitioners assert broadly that the costs of compliance "far exceed" the federal funding, ask for "an order declaring that states and school districts are not required to spend non-NCLB funds to comply with the

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[3] Judge Gibbons wrote separately, indicating that she would remand for further record development. Pet. App. 196a-201a.

NCLB mandates," and seek an injunction precluding the United States Department of Education from withholding funds "from states and school districts" if their failure to comply "is attributable to a refusal to spend non-NCLB funds to achieve such compliance." Pet. App. 3a-5a. But petitioner school districts did not propose an amendment to their own plans that would relieve them of particular obligations they claim are "underfunded," nor did they ask their respective States to propose such an amendment to the statewide plan. See *id.* at 170a-172a, 187a. The "costs of compliance" are neither dictated by Congress nor identified by the States or LEAs in their respective plans. Without some factual development in connection with a concrete submission, and some understanding of what it would mean for an LEA to unilaterally identify which obligations are "underfunded," the legal question presented has such an abstract quality that it would be exceedingly difficult for a court to arrive at the "correct resolution." *Id.* at 191a; see *id.* at 149a ("Once Congress decided to measure accountability by educational outputs (gauged by test scores), as opposed to educational inputs (gauged by dollars), it made objective measurements of compliance costs virtually impossible."); *id.* at 182a (noting that "one issue that has come up repeatedly in this case is how to determine whether a particular requirement has been 'underfunded[,]' * * * an issue that might have benefitted from some development at the administrative level").

Second, "[a] more narrow, concrete challenge by a school district seeking an amendment to a plan and having exhausted administrative review," Pet. App. 173a, would have had the added benefit of providing the school district's State with an opportunity to consider the dis-

trict's proposal and address factual issues in the first instance. The federal spending program in this case offers federal financial assistance to States, conditioned on agreements made by the States to comply with the statutory requirements. See *id.* at 180a ("Only the States can decide in the first instance whether, after reading the offer sheet (*i.e.*, the Act), to accept the funds and associated requirements for the benefit of the State's public-school students."); see also 20 U.S.C. 6311. The commitments made by the State bind its LEAs, and it is the State's responsibility to ensure that its LEAs comply with the statutory requirements as embodied in the State plan. 20 U.S.C. 1232c, 7844(a)(1) and (a)(3); 34 C.F.R. 80.40.

The States of Michigan, Texas, and Vermont have elected to participate in the Title I, Part A program, and each has a plan on file with the United States Department of Education. Each year, these States are informed of the annual allotment of federal funds and, after receiving that information, each has determined that receipt of such funds warrants continued participation in the program. The States of Michigan, Texas, and Vermont "have an obvious interest in the subject of this litigation because each has agreed that it and its public schools will accept federal funds under the Act and be bound by its requirements." Pet. App. 175a. The relief that petitioners seek would "undoubtedly call into question the viability and legality of the current statewide plans." *Id.* at 185a; see *id.* at 100a (acknowledging that "statewide plans" "may need to be amended following the disposition of this case").

At bottom, petitioners argue that "after the federal government appropriates funds, after the Department of Education sets its priorities, after the States set their

own priorities and spending, then someone gets to decide whether a particular program or requirement is or becomes 'underfunded' and, if so, then the district need not spend any funds on that program or requirement." Pet. App. 189a. Whether or not the courts below should have dismissed this case on justiciability grounds, this Court should not address the meaning of important federal spending legislation at this level of abstraction without the participation of the responsible States and submission of concrete proposals for administrative review.

2. In any event, petitioners' argument fails on its merits, and the order affirming the judgment of dismissal does not conflict with any decision of this Court or any other court of appeals. Indeed, even though every State has accepted federal funds under NCLB on an annual basis since its passage in 2002, no other court has decided the question presented.[4] Further review of the decision below is not warranted.

a. Petitioners' argument rests entirely on 20 U.S.C. 7907(a), which appears in Title IX of the Act and provides 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, or mandate a State or any subdivision thereof to spend any

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[4] The State of Connecticut raised a similar claim, but the district court dismissed that claim as non-justiciable because the State failed to present the Spending Clause challenge to the Secretary in the context of a proposed amendment to the State plan. See *Connecticut* v. *Spellings*, 549 F. Supp. 2d 161, 179-180 (D. Conn. 2008). An appeal in that case is currently pending before the Second Circuit. See *Connecticut* v. *Duncan*, No. 08-2437 (argued Sept. 17, 2009).

funds or incur any costs not paid for under [the Act]." Petitioners contend that the second clause of this provision means that "States and school districts should *not* be obligated to divert their own funds to meet all of the Federal Government's NCLB educational priorities." Pet. 30. Contrary to petitioners' assertion, the language and structure of the Act as a whole leave no doubt that the States were well aware when accepting federal funds year after year that such was not Congress's intent.

As Judge Sutton explained (Pet. App. 156a-157a), Section 7907(a) does not excuse noncompliance with the statutory conditions themselves; it limits the discretionary authority of the United States Department of Education to micro-manage a State's educational program by mandating specific actions (such as curriculum or staffing requirements) or specific expenditures (such as per pupil spending, teacher salaries, or the purchase of equipment) not paid for under the Act. See *id.* at 115a (opinion of Cole, J.) (acknowledging that "Congress may have intended to prohibit the expansion of any of the requirements under NCLB to micro-manage state officials in any way not expressly provided for under NCLB."). This interpretation is buttressed by the location of the provision within the Act. As Judge Sutton noted (*id.* at 159a) and Judge Cole acknowledged (*id.* at 114a-115a), Section 7909(a) is included alongside a series of other ESEA provisions that indisputably define the scope of agency authority. See, *e.g.*, 20 U.S.C. 7906(b)(1) (Department may not use funds to endorse a particular curriculum); 20 U.S.C. 7910(b) (Secretary may not withhold funds on the basis of a failure to adopt a specific method of teacher or paraprofessional certification). Moreover, Title I has its own federal mandates provision, which conspicuously omits the language upon

which petitioners' submission rests. Compare 20 U.S.C. 6575 with 20 U.S.C. 7907(a).

In arguing, from the single clause in Title IX, that the States understood that they had license to accept federal funds and then unilaterally decide not to comply with whatever obligations they determine are "underfunded," petitioners fundamentally misunderstand the statutory scheme and misapprehend Congress's obligation to provide fair notice.

Contrary to petitioners' assertion (Pet. 4), there are no "federally mandated compliance costs." In enacting NCLB, Congress did not tell participating States and LEAs to administer Test X, or to spend Y dollars on testing; it told States that if they wanted to participate in the federal program, they should craft a statewide plan that would "define performance standards and * * * make regular assessments of progress toward the attainment of those standards." See *Horne* v. *Flores*, 129 S. Ct. 2579, 2601 (2009); *id.* at 2603 ("NCLB expressly refrains from dictating funding levels."). "[T]he Act moves from a dollars-and-cents approach to education policy to a results-based approach that allows local schools to use substantial additional federal dollars as they see fit in tackling local educational challenges in return for meeting improved benchmarks." Pet. App. 150a; see H.R. Rep. No. 63, *supra*, at 362 (The Act "grants States and [LEAs] unprecedented flexibility to target federal dollars to meet State and local priorities."). Because each State retains control over its "costs of compliance," Pet. App. 148a-149a, it is inconceivable that States would believe that the Act allows LEAs "to exempt themselves from the accountability side of the bargain whenever *their* spending choices do not generate the requisite achievement," *id.* at 147a.

Indeed, petitioners' interpretation would allow a State or school district to target, for example, much of its resources at improving teacher quality, and then evade NCLB's mandatory assessment requirements by contending that it lacks sufficient funds to administer assessments. Or, if "school districts decided they were not given enough money to test all children, they could test just some children." See Pet. App. 144a-145a. That is not a plausible reading of the statutory framework. See *id.* at 140a ("rejecting a reading of a statute as 'no more than remotely plausible' in favor of a better reading of the law even though it imposed additional obligations on the States") (quoting *Bell* v. *New Jersey*, 461 U.S. 773, 783 n.3 (1983)).

Congress knew how to make a State's obligations under the Act contingent upon specified levels of federal funding. And in the limited instances in which Congress intended to do so, it said so explicitly. "The Act, for instance, allows States to 'suspend the administration of, but not cease the development of,' annual tests if federal funding falls below certain levels." Pet. App. 151a (quoting 20 U.S.C. 6311(b)(3)(D)). Another provision "requires States to 'participate in biennial state academic assessments of 4th and 8th grade reading and mathematics under the National Assessment of Educational Progress,' but only if 'the Secretary pays the costs of administering such assessments.'" *Id.* at 152a (quoting 20 U.S.C. 6311(c)(2)). In contrast, Congress imposed certain testing obligations on *all* school districts and schools in participating States, regardless of whether the individual school district or school received any Title I funds. See p. 3, *supra*. In light of this statutory structure, the States were on clear notice that statutory obligations *not* defined in terms of expenditures must be

complied with, and that such compliance would not be excused simply because the expenditure of state or local funds turned out to be necessary. Inclusion of a single clause in a general provision in Title IX serving other purposes does not compel a different result.

b. Petitioners nonetheless assert (Pet. 23) that the reasoning of Judge Sutton's opinion is inconsistent with *Arlington Central School District Board of Education* v. *Murphy*, 548 U.S. 291 (2006) (*Arlington*). *Arlington* reiterates the general principles articulated in this Court's previous Spending Clause cases and applies them to a statutory provision that is distinguishable from the provision upon which petitioners rely in this case. There is no conflict.

In *Arlington*, this Court explained that, under the Spending Clause, "States cannot knowingly accept conditions of which they are 'unaware' or which they are 'unable to ascertain.'" 548 U.S. at 296 (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 7 (1981) (*Pennhurst*)). Using the ordinary tools of statutory interpretation, the Court held that the fee-shifting provision of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, does not allow prevailing parties to recover fees for services rendered by experts. *Arlington*, 548 U.S. at 296-304. The Court explained that IDEA's plain terms "overwhelmingly support the conclusion that prevailing parents may not recover the cost of experts or consultants." *Id.* at 300. The Court further explained that its prior precedents "confirm[ed] even more dramatically that the IDEA does not authorize an award of expert fees." *Id.* at 301. And it concluded that, "in the face of the unambiguous text of the IDEA and the reasoning in [its prior decisions], [it could not] say that the legislative history

on which respondents rely is sufficient to provide the requisite fair notice." *Id.* at 304.

Judge Sutton recognized and applied the rule, reiterated in *Arlington*, that Congress must state the conditions of participation in a federal spending program "unambiguously in the text of the statute." Pet. App. 139a (internal quotation marks and citation omitted). But he also recognized, consistent with this Court's precedents, that the traditional tools of statutory interpretation apply and that an "implausible" alternative reading does not deprive a participating State of fair notice. *Id.* at 140a-141a. Applying "these yardsticks," *id.* at 141a, he concluded that the States were on notice that they had to comply with the clearly delineated statutory obligations even if doing so required the expenditure of state or local funds. Unlike in *Arlington*, where the statute's "terms" and this Court's precedents "overwhelmingly support[ed]" the school district's interpretation, 548 U.S. at 300-301, here even Judge Cole recognized that the Secretary's reading may well be the "correct" one, Pet. App. 33a. Cf. *Pennhurst*, 451 U.S. at 24 (finding that the plaintiff's interpretation "defies common sense"). For the reasons set forth above and explained further by Judge Sutton (Pet. App. 141a-164a), the Act provided participating States with clear notice that if they wanted to participate in the funding program, they had to comply with the statutory obligations— regardless of the precise level of federal funding available.

This case differs from *Arlington* in another crucial respect: "Title I [is] an ongoing, cooperative program," and, accordingly, "grant recipients ha[ve] an opportunity to seek clarification of the program requirements." *Bennett* v. *Kentucky Dep't of Educ.*, 470 U.S. 656, 669 (1985). To the extent any confusion remained after the

Act's passage, the program requirements were crystal clear when petitioners filed this suit. Petitioners are quite wrong when they assert that "a State that chooses to participate in the NCLB program has no way of knowing how 'substantial' the Federal funds will prove to be." Pet. 24. To the contrary, each year the States are informed of their annual funding allotments under NCLB programs. See 20 U.S.C. 6333-6336; Gov't En Banc Supp. C.A. Br. 3. And, knowing that compliance would not be excused if those federal funds proved insufficient to cover the full costs of complying with certain requirements, each State voluntarily accepted those federal funds. Thus, the hypothetical "zero to one hundred percent" of funding provided by the federal government is not the black box petitioners posit. See Pet. 28; see also Pet. 24 (suggesting States would be forced to comply with statutory obligations without knowing whether the federal funds will be "remotely sufficient"). Nothing in *Arlington* or this Court's other Spending Clause jurisprudence suggests that a State can accept federal funds with full knowledge that they are insufficient to cover all of its statutory obligations, promise to abide by those obligations, and then refuse to do so because the funds are insufficient.

c. The decision below does not conflict with any decision of another court of appeals, and petitioners do not contend otherwise. Cf. *Arlington*, 548 U.S. at 295 (granting certiorari "to resolve the conflict among the Circuits"). Indeed, since NCLB was enacted in 2002, no other court has addressed the question presented here, and the judgment of the court of appeals in this case —affirming the district court's judgment by an equally divided court, see Pet. App. 78a-79a—presumably would not be regarded as binding precedent even in the Sixth

Circuit. See *Stupak-Thrall* v. *United States*, 89 F.3d 1269, 1269 (6th Cir. 1996) (Moore, J., concurring in the order), cert. denied, 519 U.S. 1090 (1997); *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 215 n.1 (1995); *Durant* v. *Essex Co.*, 74 U.S. (7 Wall.) 107, 110 (1869). Only one other case has raised this question, and it was dismissed by the district court on justiciability grounds. See *Connecticut* v. *Spellings*, 549 F. Supp. 2d 161 (D. Conn. 2008), appeal pending, No. 08-2437 (2d Cir. argued Sept. 17, 2009). And in the intervening eight years, all States have opted to participate in the federal program year after year—*after* learning of the federal funds allocated. This Court's review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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