

Court of Appeals Docket No. 05-2708

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SCHOOL DISTRICT OF THE CITY OF PONTIAC, et. al.,
Plaintiffs-Appellants,

v.

SECRETARY OF U.S. DEPARTMENT OF EDUCATION,
Defendant-Appellee.

On Appeal from an Order Granting Motion to Dismiss,
United States District Court, Eastern District of Michigan,
No. 2:05-cv-71535-BAF-WC, Hon. Bernard A. Friedman

**AMICUS CURIAE BRIEF OF JOE BACA, JR., JEREMY BACA,
RUDY BERMUDEZ, CHRISTINE CHAVEZ, MIKE DAVIS,
MARY HAYASHI, KELLY HAYES-RAITT, DR. ED HERNANDEZ,
JEROME HORTON, TONY MENDOZA, ALEX PADILLA,
CURREN PRICE, JOSE SOLORIO, AND DARRELL STEINBERG
SUPPORTING PLAINTIFFS-APPELLANTS AND REVERSAL**

JAMES C. HARRISON
KARI KROGSENG
REMCHO, JOHANSEN & PURCELL, LLP
201 Dolores Avenue
San Leandro, CA 94577
Phone: (510) 346-6200
FAX: (510) 346-6201

Attorneys for Amici Curiae

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INTRODUCTION

As state and local elected officials, teachers, education consultants, community activists, and parents of children enrolled in public schools in California, amici curiae understand the importance of setting high standards for our schools. Amici also understand, however, that high standards alone are insufficient to achieve the goal of ensuring that our children learn the skills they need to compete in a global economy. High standards, if they are to succeed, must be also accompanied by funding adequate to meet this goal.

The No Child Left Behind Act of 2001 (“NCLB”), while promoting this admirable goal, imposes vastly expanded requirements on state educators. If states and their public schools fail to meet the requirements of the Act, they face an escalating series of sanctions. Under the plain terms of NCLB, however, the federal government cannot sanction school districts for failing to comply with the requirements of the law unless the federal government provides the funds necessary for school districts to meet those requirements. Yet this is precisely what the Secretary of the Department of Education is doing. The Secretary’s actions are in contravention of the plain language of the Act, and inconsistent with the legislative record, which makes clear that Congress did not intend NCLB to impose an unfunded mandate on states and their school districts.

The Secretary’s actions also negate an important provision of the contract created by NCLB between the federal and state governments. This contract, upon which the states relied in accepting federal funding, includes a provision prohibiting unfunded mandates. The federal government’s proposed construction of NCLB, which was adopted by the district court, would read this provision out of existence. Under the Spending Clause, however, this cannot be done. The district court’s order should be reversed.

STATEMENT OF AMICI CURIAE INTEREST

Pursuant to Federal Rule of Appellate Procedure 29, amici curiae file this brief in support of plaintiffs-appellants to help the Court understand the impact of the federal government's failure to provide sufficient funding for states and school districts to meet NCLB's requirements, and to clarify why section 9527(a) of NCLB prohibits this unfunded mandate. Both plaintiffs-appellants and defendant-appellee have consented to the filing of this brief.

Amici are California state assemblymembers, city councilmembers, public school teachers, education consultants, community activists, and parents of children in public schools affected by NCLB. Based on their experience with state and local school funding legislation, public education, and activism on behalf of California children, they are well-suited to provide additional insight into the impact NCLB's unfunded mandate has on the nation's most populous state. Amici also have a vital interest in the outcome of this appeal, and in seeing that the federal government adequately funds the requirements NCLB has imposed on California's public schools. Amici are:

- Joe Baca, Jr. is a California State Assemblymember, serving the Inland Empire. He is a former high school teacher and probation officer. As a member of the Assembly, he is familiar with the funding problems that plague California's schools. As a former teacher he knows from firsthand experience how those funding problems, now exacerbated by NCLB, affect every classroom in the state.
- Jeremy Baca is project director for a private consulting firm that deals with college admissions practices and policies. In this capacity, he has seen the impact an inadequately funded public education may have on a child's future. He is concerned that California schools cannot cover the costs of complying with NCLB without adequate federal funding.
- Rudy Bermudez is a California State Assemblymember who supported a resolution and a bill regarding NCLB's unfunded

mandate. He previously served for eight years on the Norwalk-La Mirada School Board, where he worked to balance the school district's budget while providing children with a quality education. Without adequate funding, Mr. Bermudez believes that school programs cannot be implemented and serve the students they are meant to help.

- Christine Chavez is the Political Director for the United Farm Workers. In this capacity, Ms. Chavez advocates on behalf of migrant children and their families. She has fought for better schools in poor neighborhoods and rural areas in California, and fears such schools will be overstretched and unable to comply with NCLB without adequate federal funding.
- Mike Davis is a Senior Deputy to Los Angeles County Supervisor Yvonne Burke. He is a former deputy for Congresswoman Maxine Waters. In both capacities, he has worked on education issues and has become familiar with the struggles of urban school districts and the students they serve. Mr. Davis is concerned that NCLB makes it more difficult for teachers to teach and will hurt the most at-risk youth.
- Mary Hayashi is a trustee of the Chabot College Foundation, a California community college. She campaigned against recent special election initiatives because they would have negatively affected California schools and children by decreasing state education funding. Ms. Hayashi believes the state's schools are inadequately funded to comply with NCLB.
- Kelly Hayes-Raitt is a community activist who has worked to support children's choice for bilingual education, to restore vocational programs at community colleges, and to recruit members for the California Faculty Association. She believes programs like bilingual education and vocational education will suffer if the state's schools must comply with NCLB without receiving adequate federal funding.
- Dr. Ed Hernandez is an optometrist in the San Gabriel Valley and teaches at the Southern California School of Optometry. His daughter attends local public schools. Dr. Hernandez knows that a good education brings opportunity and is concerned with the impact of NCLB's unfunded mandates on schools at the local level.

- Jerome Horton is a California State Assemblymember; a significant portion of his district is African-American, Latino and poor. Mr. Horton has supported a resolution and a bill regarding NCLB's unfunded mandate, dealt with issues relating to education funding, and fought for needed resources for poor urban school districts, like those he represents. He knows the struggles of children in poor school districts, as well as the difficulty of obtaining adequate education funding.
- Tony Mendoza is a fourth grade teacher at Brooklyn Avenue Elementary School in East Los Angeles, one of California's poorest school districts. He serves on the Board of Directors of United Teachers Los Angeles and is a representative to the California Teachers Association and the NEA. He has seen the detrimental effects of unfunded federal mandates as he has fought for school funding and more resources for classrooms.
- Alex Padilla is a Los Angeles City Councilmember and a proud graduate of the Los Angeles Unified School District (LAUSD). As chair of the Education and Neighborhood Committee, Mr. Padilla has witnessed the effects of the unfunded mandate of NCLB and presented a resolution to create a Commission on LAUSD Governance to reform and improve the district.
- Curren Price is an Inglewood City Councilmember and a credentialed community college instructor. He has fought for economic opportunity for poor neighborhoods and families. He is concerned about the unfunded mandate of NCLB, especially as it pertains to urban school districts like the ones he represents on the City Council.
- Jose Solorio is a Santa Ana City Councilmember who has advocated for better schools. He has been a leader in Santa Ana's efforts to teach English to all of its residents. The son of migrant farm workers, Mr. Solorio improved his life through education and believes all should have that opportunity. Mr. Solorio is concerned that compliance with NCLB puts a severe strain on California schools because they are not receiving adequate funding from the federal government.
- Darrell Steinberg was a California State Assemblymember from 1998-2004, and supported a resolution and a bill regarding NCLB's

unfunded mandate. As Chair of the Assembly Appropriations Committee, Mr. Steinberg was in the forefront of budget negotiations over school funding. He is committed to ensuring that all children have the resources they need for a quality education.

BACKGROUND

I. CONGRESS HAS RENEGED ON THE PROMISE OF NCLB

In an effort to improve public education through accountability, NCLB imposes a vastly expanded system of federal requirements on state education and corresponding sanctions if public schools do not meet these requirements. *See* 20 U.S.C. § 6301 *et seq.* (2002). In recognition of the increased burdens the Act places on the states, NCLB authorizes increasing amounts of Title I funding for its requirements for the fiscal years 2002 to 2007: \$13.5 billion in 2002, \$16 billion in 2003, \$18.5 billion in 2004, \$20.5 billion in 2005, \$22.75 billion in 2006 and \$25 billion in 2007. *See id.* § 6302(a). However, Congress' actual appropriations have fallen far short of this promise, from \$10.350 billion in 2002, \$11.688 billion in 2003, \$12.342 billion in 2004, \$12.739 billion in 2005 and \$12.713 billion in 2006, creating – to date – a total shortfall of over \$31 billion from what the Act initially authorized. *See* Budget Service, U.S. Dep't of Educ., *Fiscal Year 2001-2007 State Tables for the U.S. Department of Education*, at <http://www.ed.gov/about/overview/budget/statetables/index.html> (Mar. 2, 2006). Even more disturbing for states facing increasingly expensive obligations under NCLB, Congress cut funding for 2006 NCLB programs by \$1.4 billion from 2005 levels. *See id.*

II. CALIFORNIA STRUGGLES WITH NCLB

NCLB's requirements are extremely costly to implement, and the federal government has not provided the states with sufficient funds to meet the new requirements, much less adequately educate their disadvantaged students. At

the same time, rather than keeping pace with inflation and new program costs, the amount of total NCLB funding to California has actually decreased – from \$3 billion in 2004 to \$2.9 billion in 2006. *See* Budget Service, U.S. Dep’t of Educ., *Fiscal Year 2001-2007 State Tables for the U.S. Department of Education* at <http://www.ed.gov/about/overview/budget/statetables/index.html> (Mar. 2, 2006).

Despite recent federal regulations that allow states greater flexibility in assessing their students, California is still struggling to meet NCLB’s requirements. For example, in 2005, 1,772 California public schools – 19% of the state’s schools – failed to meet the Act’s Adequate Yearly Progress (AYP) goals for at least two consecutive years and were declared in need of improvement, meaning that they are subject to an escalating series of sanctions every year they fail to meet AYP.¹ *See* Pam Slater, *O’Connell Releases List of 2005-06 PI Schools & Districts*, Cal. Dep’t of Educ. News Release, at <http://www.cde.ca.gov/nr/ne/yr05/yr05rel112.asp> (Sept. 20, 2005); *compare to* Cal. Dep’t of Educ., *Factbook 2006*, at 8, at <http://www.cde.ca.gov/re/pn/fb/documents/factbook2006.pdf>). An increasing number have failed to meet AYP for several years, and hundreds are on NCLB-mandated corrective plans requiring state intervention. *See id.*

¹ Prior to the enactment of NCLB, California had already implemented rigorous accountability standards for its schools through its Academic Performance Index (API). *See* Public Schools Accountability Act of 1999, Cal. Educ. Code § 52050 *et seq.* (1999). The state must reconcile its API standards with the NCLB’s Adequate Yearly Progress (AYP) goals. While NCLB requires that a specific percentage of students be proficient in math and English every year until 100% meet these goals in 2014, California’s assessment system focuses on measurable school improvement. This year, 403 schools more than doubled their progress targets under California’s API, but still failed to make AYP under NCLB. *See* Cal. Dep’t of Educ., *Double API Growth Schools*, at <http://www.cde.ca.gov/nr/el/le/doubleapi.asp> (March 20, 2006).

Like dozens of other state legislatures, California state legislators, including several amici here, have passed a Joint Resolution urging the President and Congress to fully fund the requirements of NCLB for the life of the Act, noting that “[t]he cost of implementing NCLB’s requirements will grow each year as NCLB requires the state to intervene in additional schools regardless of improvement, and yet there is simply not sufficient ongoing funding to cover the costs associated with implementing NCLB. . . .” A.J. Res. 88, 2003-2004 Sess. (Cal. 2004). The California Legislature also passed an act, later vetoed by Governor Schwarzenegger, which would have required California’s Superintendent of Public Instruction to determine whether NCLB provisions were fully funded, and if not, notify appropriate state and federal officials that California schools would not comply with the provisions to the extent that federal funds were not provided. *See* S. 471, 2003-2004 Sess. (Cal. 2004). The Legislature stated its intent was to implement NCLB, “but not to surrender California’s prerogative to determine the quality of our teachers, to measure the achievement of our pupils, or to direct the allocation of our citizen’s state tax dollars,” and that “no state funds be allocated to meet the unfunded mandates of the federal act except to the extent that the use of those funds is also authorized in accordance with state law to meet state priorities that coincide with the federal act.” *See id.* § 1(a)-(b).

Local California government agencies are similarly alarmed by NCLB’s unfunded mandate. The Los Angeles City Council, whose members include an amici here, has passed a resolution supporting “any legislation to increase funding for public education and for fully funding the amounts authorized in the No Child Left Behind Act.” Los Angeles Education and Neighborhoods Committee Resolution, File No. 04-0002-S132 (April 27, 2005). The Chief Legislative Analyst’s Report accompanying the resolution stated that the Los Angeles Unified School District was authorized to receive \$878 million in

2005 under the NCLB Act, but received only half that – about \$434 million. *See* accompanying Los Angeles Chief Legislative Analyst’s Report, available at http://clkrep.lacity.org/councilfiles/04-0002-s132_rpt_cla_4-18-05.pdf (April 18, 2005). The Report noted that “K-12 funding is not keeping pace with continually increasing federal mandates” and that

[t]he increased demands on school districts by NCLB and by IDEA without adequate funding require that districts spend their regular program dollars on federal mandates. This leads to reductions in critical services and programs. According to LAUSD staff, increased general program funds could be used to restore librarians, repair buildings, restore field trips, increase counselors, improve safety and security, and lower class size.

Id.

The lack of sufficient NCLB funding has impaired California’s efforts to devise and implement assessments that meld federal requirements with pre-existing California assessments, and it has impaired local efforts to improve student performance. Without sufficient federal funding, it will be impossible for the state to satisfy its obligation under NCLB to intervene in schools that repeatedly fail to meet NCLB’s requirements. The burden imposed on the state will grow even more severe if current federal funding trends and NCLB budget cuts continue.

ARGUMENT

I. NCLB PROHIBITS THE FEDERAL GOVERNMENT FROM IMPOSING UNFUNDED MANDATES

The No Child Left Behind Act of 2001 reauthorized the Elementary and Secondary Education Act of 1965 (“ESEA”), which provides Title I funding for disadvantaged public schools. Section 9527(a) of NCLB provides:

(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 education 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 chapter.*

20 U.S.C. § 7907(a) (2002) (emphasis added).

Congress first enacted the unfunded mandate provision in March 1994 in a floor amendment to the Goals 2000: Educate America Act, which was the precursor to the NCLB regime and which provided funding to encourage states to set academic standards. *See* Pub. L. No. 103-227, § 318, 108 Stat. 125, 186 (1994) (previously 20 U.S.C. § 5898). Congress then inserted the provision into the School to Work Opportunities Act in May 1994. *See* Pub. L. No. 103-239, § 604, 108 Stat. 568, 605 (1994) (previously 20 U.S.C. § 6234). Congress enacted the same provision a third time from an amendment offered to the Improving America’s Schools Act (“IASA”), which, like NCLB, was a reauthorization of ESEA, in October 1994. *See* Pub. L. No. 103-382, § 14512, 108 Stat. 3518, 3906 (1994) (previously 20 U.S.C. § 8902). Seven years later, Congress reenacted an identical version of these unfunded mandate provisions in NCLB.

A. The District Court’s Decision

The plain language of the second clause of the unfunded mandate provision makes clear that Congress intended to prohibit an unfunded mandate in NCLB: “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 chapter.” 20 U.S.C. § 7907(a). Citing the existence of the term “an officer or employee of” in the first clause of the provision, however, the district court held

that the second clause bars only federal officers and employees, not Congress, from placing an unfunded mandate on the states. (Order, pg. 7, Apx. pg. ___.)

The district court also found that the provision “cannot reasonably be interpreted to prohibit Congress itself from offering federal funds on the condition that States and school districts comply with the many statutory requirements” because if “Congress intended to prohibit unfunded mandates, it would have omitted the words ‘an officer or employee of’ or simply stated that the Federal Government will reimburse the States for all costs they incur in complying with the requirements of this statute.” (*Id.*) The court’s analysis, however, rests on ill-founded assumptions as to the language Congress would have used or should have used, and it ignores legislative history to the contrary.

B. Congressional Intent Is Clear From the Plain Language of the Provision, As Well As Legislative History

A court must give effect to the expressed intent of Congress and may not ignore congressional language and intent in the belief that a certain result would be unreasonable. *See Comm’r v. Asphalt Prods. Co., Inc.*, 482 U.S. 117, 121 (1987). The district court’s interpretation of section 9527(a) is contrary to the plain language of the provision and produces a result demonstrably at odds with the congressional intent reflected in the legislative history of the provision.

The statute clearly prohibits unfunded mandates on its face, whether such mandates are imposed by Congress, which appropriates funding for NCLB, or federal officers or employees, who implement the act. The district court splits hairs in making a false distinction between restrictions on mandates by officers and employees and mandates by Congress. Federal officers and employees, like the Secretary of the Department of Education, simply implement NCLB and give effect to policies expressed by Congress. *See, e.g.*, 20 U.S.C. §§ 6303(g), 7301, 7842, 7843, 7861 (2002). They have no authority, even when the Act permits

them to exercise discretion, to engage in conduct that is contrary to the Act. Whether it is applicable to Congress or the Secretary, section 9527(a) states that NCLB “shall not be construed” to mandate a state to “spend any funds or incur any costs not paid for under this chapter.” 20 U.S.C. § 7907(a).

To the extent that the district court read the statute in a different light, it ignored the spirit and intent behind the provision.² “[A] thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.” *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193, 201 (1979) (quoting *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892)) (reviewing legislators’ remarks in finding that statutory prohibition against racial discrimination must “be read against the background of the legislative history of Title VII and the historical context from which the Act arose” so as not to prohibit affirmative action). Where there may be a question of intent in the face of theoretically clear language, courts may review the legislative history. *See Briscoe v. LaHue*, 460 U.S. 325, 336 (1983) (“Nothing

² The district court’s construction of the statute ignores the “Act’s” prohibition against unfunded mandates. According to the district court, the subject of the provision is “federal officer and employee of the Federal Government.” Thus, a federal officer or employee may not (1) mandate, direct, or control state or local curriculum, programming or directing of resources; or (2) mandate states to spend funds not provided by NCLB. Because the two clauses are grammatically distinct, however, the proper subject of the provision is the “Act.” Under this reading, the “Act” may not be construed to (1) authorize state officers and employees to mandate, direct, or control state or local curriculum, programming or directing of resources; or (2) mandate states to spend funds not provided by NCLB. Even if the district court’s construction were reasonable, however, it would, at best, demonstrate that the language of the Act is ambiguous. In ascertaining congressional intent, courts look first to the language of the statute, and if the language is ambiguous, then to legislative history. *See Blum v. Stenson*, 465 U.S. 886, 896 (1984). Here, the legislative history demonstrates that Congress intended to prohibit unfunded mandates.

in the language of the statute suggests that such a witness belongs in a narrow, special category lacking protection against damages suits. We must ask, however, whether anything in the legislative history of [42 U.S.C.] § 1983 points to a different conclusion.”). The legislative record regarding NCLB is silent regarding the unfunded mandate provision, but NCLB reauthorized the ESEA by amending the IASA and Goals 2000 Act, so we may presume that Congress enacted the unfunded mandate provision for the same reasons it enacted the original provision in 1994.

[P]rovisions of the original act or section which are repeated in the body of the amendment, either in the same or equivalent words, are considered a continuation of the original law. . . . Words and provisions used in the original act or section are presumed to be used in the same sense in the amendment.

Sierra Club v. Sec’y of Army, 820 F.2d 513, 522 (1st Cir. 1987) (citations omitted).

The original enactment of the unfunded mandate provision in the 1994 education legislation and the conditions under which it was enacted may thus be considered in interpreting the provision as it now exists in NCLB. *United States v. Wong Kim Ark*, 169 U.S. 649, 653-54 (1898) (“In construing any act of legislation, . . . regard is to be had, not only to all parts of the act itself, and of any former act of the same lawmaking power, of which the act in question is an amendment, but also to the condition and to the history of the law as previously existing, and in the light of which the new act must be read and interpreted.”)

Review of the debate surrounding the floor amendments that added the unfunded mandate provisions to the 1994 education legislation makes clear that Congress was responding to concerns regarding federal, *i.e.*, congressional, imposition of unfunded mandates on the states. *See* Proof Opening Brief of

Plaintiffs-Appellants, pg. 32-38; *Taylor v. United States*, 495 U.S. 575, 582-86 (1990) (extensively consulting sponsors’ statements, congressmembers’ remarks in debates, and witness statements in hearings regarding a provision in the Career Criminals Amendment Act of 1986, as well as its predecessors, the Armed Career Criminal Act of 1984 and the Firearms Owners’ Protection Act, to ascertain congressional intent regarding the Act’s definition of burglary); *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 283-86, 289 nn.12-14, 18-23 (1987) (extensively consulting hearings, debates, sponsor’s statements and congressmembers’ remarks to “examine the [Pregnancy Discrimination Act]’s language against the background of its legislative history and historical context” to determine legislative intent regarding preemption of state laws).

Sponsors and supporters of the amendment to include the unfunded mandate provision in the 1994 legislation made it clear that:

- The provision will “put to rest the concern that we are going to dictate from the Federal level that somewhere, some way, the local and State Governments will find money for our dictates.” 139 Cong. Rec. H7741 (daily ed. Oct. 13, 1993) (remarks of amendment co-sponsor Rep. Goodling on Goals 2000 Act).
- “I believe that it is wrong for us on the Federal level to pass legislation but shift the costs of implementation and compliance to our State and local governments.” *Id.* at H7769 (remarks of amendment co-sponsor Rep. Condit on Goals 2000 Act).
- “The purpose of the amendment is to assure that this bill will not become an unfunded mandate . . . to make it clear that if the Federal Government tells the State to do something or tells the local community to do something, the Federal Government will have to pay for the costs of that mandate.” 140 Cong. Rec. S626 (daily ed. Feb. 2, 1994) (remarks of amendment sponsor Sen. Gregg on Goals 2000 Act).

- The “amendment regarding unfunded mandates is now part of this legislation. It is clearly stated that if any requirement in this bill results in an unfunded mandate, affected States and communities do not have to comply.” 140 Cong. Rec. S14751 (daily ed. Oct. 7, 1994) (remarks of Sen. Durenberger on IASA).

There is no indication from the record that Congress was concerned about federal employees overstepping their bounds; it is clear Congress intended to limit its own ability to impose requirements on states unless Congress provided the funds necessary to meet those requirements.

II. THE CONTRACT BETWEEN FEDERAL AND STATE GOVERNMENTS HAS BEEN BREACHED

The Supreme Court has held that federal legislation based on the Spending Clause, like NCLB, essentially creates a contract with states that accept the federal funding offered in the legislation. *See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981); *see also West Virginia v. United States Dep’t of Health & Human Svcs.*, 289 F.3d 281, 286-87 (4th Cir. 2002). While Congress has the power to condition the provision of funds to states in order to serve the general welfare, the conditions of acceptance, *i.e.*, the terms of the contract, must be stated clearly and unambiguously so that states may knowingly and reasonably choose whether to participate in federally funded programs. *See South Dakota v. Dole*, 483 U.S. 203, 207 (1987). “[I]nsistence 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.” *Virginia Dep’t of Educ. v. Riley*, 106 F.3d 559, 566 (4th Cir. 1997)

(superseded by statute) (considering the Individuals with Disabilities Education Act) (citing *Honig v. Doe*, 484 U.S. 305, 309 (1988)).

The corollary to this rule is also true: where Congress clearly and unambiguously prohibits unfunded mandates, that prohibition is important to determining whether a state has knowingly and reasonably chosen to participate in the federal program. The unfunded mandate provision in NCLB provides states with the assurance that they will not be forced to pay for the cost of complying with the NCLB's requirements with their own funds. To the extent that the statute is unclear, the legislative history demonstrates this intent.

The contract between the federal and state governments created by NCLB includes all provisions of the act, not just those that are convenient to the federal government. The express language in the unfunded mandate provision is a key part of that contract upon which the states relied in accepting the funding. In deciding to accept the NCLB "contract," states took into consideration the unfunded mandate provision, along with the increasing yearly authorization provision and the waiver provisions, which would allow them flexibility if NCLB was not sufficiently funded. It is possible that if the provision had not been in the act, states would not have agreed to accept the funding. States must thus be found to have agreed to NCLB in light of the unfunded mandate provision, and the federal government must be bound by that same provision.

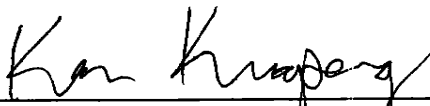
CONCLUSION

Section 9527(a) of NCLB plainly prohibits unfunded mandates. Accordingly, amici curiae respectfully urge this Court to reverse the district court's dismissal of plaintiffs-appellants' case.

Dated: March 31, 2006

Respectfully submitted,

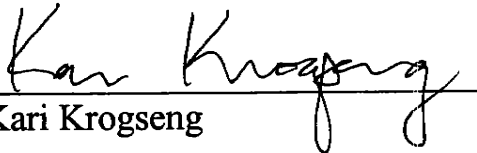
REMCHO, JOHANSEN & PURCELL

By: 

Kari Krogseng
Remcho, Johansen & Purcell
201 Dolores Avenue
San Leandro, CA 45777
Phone: (510) 346-6200
FAX: (510) 346-6201

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation provided in Fed. R. App. P. 32(a)(7)(B). The foregoing brief contains 4,672 words of Times New Roman (14 point) proportional type. The word processing software used to prepare this brief was Word 2002.


Kari Krogseng

PROOF OF SERVICE

I, the undersigned, declare under penalty of perjury that:

I am a citizen of the United States, over the age of 18, and not a party to the within cause or action. My business address is 201 Dolores Avenue, San Leandro, CA 94577.

On March 31, 2006, I served a true copy of the following document(s):

Amicus Curiae Brief

on the following party(ies) in said action:

Robert H. Chanin
NEA General Counsel
1201 – 16th Street, N.W.
Washington, DC 20036
Phone: (202) 822-7035
E-Mail: rchanin@nea.org

*Counsel for All Plaintiffs-
Appellants*

Jeremiah A. Collins
Alice O'Brien
Bredhoff & Kaiser, P.L.L.C.
Washington, DC 20005-2207
Phone: (202) 842-2600
E-Mail: aobrien@bredhoff.com

*Counsel for All Plaintiffs-
Appellants*

Dennis Pollard
Thrun Law Firm, P.C.
Bloomfield Hills Office
38505 Woodward Avenue, Suite 2300
Bloomfield Hills, MI 48304
Phone: (248) 258-2850
E-Mail: dpollard@thrunlaw.com

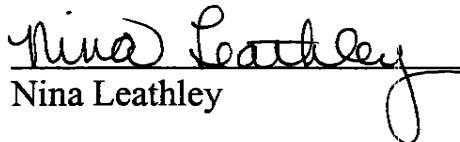
*Counsel for Plaintiff-Appellant
Pontiac School District*

Alisa B. Klein
Mark B. Stern
U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Avenue N.W.,
Room 7235
Washington, D.C. 20530
Phone: (202) 514-1597
E-Mail: Alisa.Klein@usdoj.gov

Counsel for Defendant-Appellee

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I declare, under penalty of perjury, that the foregoing is true and correct. Executed on March 31, 2006, in San Leandro, California.


Nina Leathley