In The Supreme Court of the United States

STATE OF CONNECTICUT and
GENERAL ASSEMBLY OF THE
STATE OF CONNECTICUT,

Petitioners,

v.

ARNE DUNCAN, in his official capacity
as Secretary of the United States Department
of Education, and CONNECTICUT STATE
CONFERENCE OF THE NAACP, INDIVIDUAL
MINORITY PARENTS AND STUDENTS IN CT,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

PETITION FOR A WRIT OF CERTIORARI

RICHARD BLUMENTHAL
Attorney General of Connecticut

*ROBERT J. DEICHERT
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
Tel. No. (860) 808-5020
Robert.Deichert@ct.gov
Counsel of Record

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED FOR REVIEW

Whether the doctrine of prudential ripeness can bar a State from obtaining a timely judicial determination of its obligations under Spending Clause legislation, where the federal government's legal interpretation of the State's obligations under that legislation is clear and imposes a hardship on the State?

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PETITION FOR A WRIT OF CERTIORARI

The State of Connecticut and the General Assembly of the State of Connecticut respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (App., *infra*, 1-23) is reported at 612 F.3d 107. The relevant opinions of the district court are reported at 549 F. Supp. 2d 161 (App., *infra*, 24-70) and 453 F. Supp. 2d 459 (App., *infra*, 71-166).

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on July 13, 2010. This Court has jurisdiction over this petition pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

Article I, Section 8, Clause 1 of the United States Constitution, known as the Spending Clause, provides, in relevant part, that: "The Congress shall

have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States. . . ."

Section 9527 of the No Child Left Behind Act of 2001, Pub. L. 107-110, 115 Stat. 1425 (2002) ("the NCLBA"), codified at 20 U.S.C. § 7907, provides that:

> **SEC. 9527. PROHIBITIONS ON FEDERAL GOVERNMENT AND USE OF FEDERAL FUNDS.**
>
> (a) GENERAL PROHIBITION. – Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.
>
> (b) PROHIBITION ON ENDORSEMENT OF CURRICULUM. – Notwithstanding any other prohibition of Federal law, no funds provided to the Department under this Act may be used by the Department to endorse, approve, or sanction any curriculum designed to be used in an elementary school or secondary school.
>
> (c) PROHIBITION ON REQUIRING FEDERAL APPROVAL OR CERTIFICATION OF STANDARDS. –

> (1) IN GENERAL. – Notwithstanding any other provision of Federal law, no State shall be required to have academic content or student academic achievement standards approved or certified by the Federal Government, in order to receive assistance under this Act.
>
> (2) RULE OF CONSTRUCTION. – Nothing in this subsection shall be construed to affect requirements under title I or part A of title VI.
>
> (d) RULE OF CONSTRUCTION ON BUILDING STANDARDS. – Nothing in this Act shall be construed to mandate national school building standards for a State, local educational agency, or school.

STATEMENT OF THE CASE

Five years ago, the State of Connecticut ("the State") was faced with a dilemma. Although the NCLBA's Unfunded Mandates Provision seemed to make clear that the State could not be forced to expend state funds to comply with federal NCLBA mandates and a former United States Secretary of Education publicly interpreted the statutory language the same way, the then-Secretary of Education took the position that she could force the State to spend its own funds on federal mandates, even where the State's educational experts believed those mandates were unnecessary and counterproductive.

Once it became clear that the Secretary would not change her position, the State filed suit seeking judicial guidance as to whose interpretation of the legislation – the State's or the Secretary's – was correct. The State hoped that a neutral federal judge would be able to resolve the straightforward, but critically important, legal question quickly so the parties could go forward with a clear understanding of their obligations under the NCLBA, which – as Spending Clause legislation – is effectively a contract.

It did not work out that way. After five years of litigation, the State is no closer to an answer. Instead of resolving the straightforward legal question, the district court and the Second Circuit concluded, on prudential ripeness grounds, that before the State can get a neutral judge to look at the issue, it has to initiate another set of administrative proceedings controlled by the Secretary – the opposing party to the Spending Clause "contract" – that everyone knows can only result in a ruling against the State given the Secretary's well-known and unwavering (at least since Secretary Paige's term[1]) legal position.

The absurdity of that result is best demonstrated by comparing it with a suit raising the same issue filed in Michigan in 2005 by school districts. Neither the Secretary nor the court initially expressed any

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[1] Both Secretary Spellings, the original defendant in this suit, and current Secretary Duncan have consistently maintained the position that the Unfunded Mandates Provision does not prevent them from forcing states to spend their own funds on NCLBA federal mandates.

concern about ripeness in that case, and the parties had the district court's answer on the merits (albeit not the one the plaintiffs wanted) within seven months.

Eventually, the *en banc* Sixth Circuit took the case and asked for briefing on the ripeness question. Thirteen of the sixteen judges concluded that the school districts' claims were ripe, even though the Secretary claimed at oral argument that the case was less ripe than Connecticut's.

There is no reason in law or logic why school districts in Michigan should be able to get the courts' view on a straightforward and important legal question regarding Spending Clause legislation while the State cannot. This Court should grant this petition, reverse the Second Circuit's decision, and allow the State to get an answer on the merits without more costly delay.

I. THE NO CHILD LEFT BEHIND ACT

Education historically was exclusively the realm of the States. *See, e.g.*, *Horne v. Flores*, ___ U.S. ___, 129 S. Ct. 2579, 2593 (2009) (recognizing that public education is a "core state responsibility"). As this Court has repeatedly recognized, education is "perhaps the most important function of state and local governments," *Honig v. Doe*, 484 U.S. 305, 309 (1988) (*quoting Brown v. Board of Education*, 347 U.S. 483, 493 (1954)), and it is generally committed to state and local control. *Board of Curators v. Horowitz*, 435 U.S. 78, 91 (1978); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). Connecticut's historic commitment to

education is reflected in the fact that, although the federal constitution does not enumerate educational rights, the Connecticut Constitution grants children a free public elementary and secondary education, and directs the state legislature to "implement this principle by appropriate legislation." Conn. Const. Art. Eighth.

The federal government began to reach into the educational sphere with the enactment of the Elementary and Secondary Education Act of 1965 ("the ESEA"), Pub. L. No. 89-10, 79 Stat. 27 (1965) (codified as amended at 20 U.S.C. § 2701 *et seq.*). It greatly expanded that reach with the enactment of the No Child Left Behind Act of 2001 ("the NCLBA"), which is the most recent iteration of the ESEA and provides for unprecedented federal involvement in, and oversight of, education at the state and local level.

The NCLBA reflects an agreement between the states and the federal government whereby the states agree to permit federal involvement in state and local education in exchange for federal funding. The conditions associated with that funding are onerous and extensive, reaching all aspects of the educational process.

For example, the NCLBA requires states to establish "challenging" standards for "academic content" and "student achievement." 20 U.S.C. § 6311(b)(1)(A), (D). They must also develop a state-wide testing regime, which requires the administration of seventeen different standardized tests – each of which must comply with detailed statutory criteria – to students of various grades. 20 U.S.C. § 6311(b)(3)(C)(i)-(xv).

They must then use those tests to grade the performance of all schools in the state based on the data obtained, and publicly report whether those schools have made "adequate yearly progress." 20 U.S.C. § 6311(b)(2), (h)(1)-(2), § 6316(a)(1)(A)-(B). Finally, if a school does not make "adequate yearly progress," the state is required to take action against the school but, instead of having discretion as to the appropriate action, the state must choose one of several statutory options. Those options include permitting all students to transfer out of the school, replacing the staff, converting the school into a charter school, or hiring a private company to run the school. 20 U.S.C. § 6316(b)(7).

Given the invasive and costly nature of the federal conditions imposed pursuant to the NCLBA, the issue of funding was critical to the State's agreement to accept federal funds.

The most fundamental provision of the NCLBA addressing the funding issue – and the one directly at issue in this case – is § 9527(a) (codified as 20 U.S.C. § 7907) ("the Unfunded Mandates Provision"), which provides that:

> (a) GENERAL PROHIBITION. – Nothing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of

> State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.

Based on the Unfunded Mandates Provision, soon after the NCLBA's enactment, then-Secretary Rod Paige publicly "stated that the Act 'contains language that says *things that are not funded are not required.*'" *Sch. Dist. of Pontiac v. Sec'y of the United States Dep't of Educ.*, 512 F.3d 252, 272 (6th Cir.), *vacated by*, 2008 U.S. App. LEXIS 12121 (6th Cir. 2008) (quoting Paige statement of September 4, 2003) (emphasis added in decision)). Then-Secretary Paige "[r]eiterat[ed] this point in a later speech, . . . reassur[ing] that 'if it's not funded, it's not required. There is language in the bill that *prohibits requiring anything that is not paid for.*'" *Id.* (quoting Paige statement of December 2, 2003) (emphasis added in decision)). The Secretary has since taken – and consistently maintained – the position that, contrary to then-Secretary Paige's public comments soon after the NCLBA's enactment, the Unfunded Mandates Provision poses no impediment to requiring states to expend state funds on federal mandates.

II. THE PROCEEDINGS IN DISTRICT COURT

In accordance with the NCLBA, Connecticut submitted a plan to the Secretary, which the Secretary approved in June 2003. At about the same time –

consistent with Connecticut's understanding of the plain meaning of the Unfunded Mandates Provision – the Connecticut General Assembly amended the State's testing statutes to comply with the NCLBA, expressly providing that all costs attributable to the additional federal requirements shall "be paid exclusively from federal funds." Conn. Gen. Stat. § 10-14n(g) (2006) (App. 169).

It soon became evident, however, that – notwithstanding the Unfunded Mandates Provision – the federal funding was insufficient to pay for the requirements the NCLBA imposed on Connecticut. For example, studies commissioned by the Connecticut General Assembly concluded that, from fiscal year 2003 through fiscal year 2008, there would be a $41.6 million gap in federal funding at the State level and a gap of hundreds of millions of dollars at the local level.

In light of the substantial gap between the cost of the federal NCLBA mandates and the funds the federal government provided to pay for them, the State asked the Secretary to waive certain NCLBA requirements that the State's educational experts believed – based on scientific research and decades of experience – were unnecessary or, in some cases, counterproductive. The State also proposed plan amendments that were supported by experience

and scientific research, and that would have substantially reduced the cost to the State.

The Secretary ultimately refused to grant the State's waiver requests and plan amendments. Throughout the administrative process, the Secretary maintained the position that the Unfunded Mandates Provision imposed no obstacle to requiring the State to pay state funds to comply with the NCLBA's mandates. That position has remained unwavering throughout this litigation and other litigation challenging the Secretary's actions in connection with the NCLBA.

Faced with the Secretary's imposition of unfunded mandates in direct contravention of the NCLBA's clear text and the State's understanding of its obligations under the statute (confirmed by then-Secretary Paige's public comments), the State brought suit in August 2005 and later amended its Complaint to allege four claims: (1) a claim seeking a declaratory judgment that the Unfunded Mandates Provision of the NCLBA means that the State cannot be required to spend any of its funds or incur any costs that are not federally funded to comply with the NCLBA's mandates; (2) a claim that, to the extent the Secretary's interpretation of the NCLBA was correct, a state official would not clearly understand that the NCLBA required the state to expend state funds to comply with federal mandates, and the Secretary's application of the NCLBA therefore violates the Spending Clause and the Tenth Amendment; (3) a claim under the Administrative Procedures Act

("APA") alleging that the Secretary's denial of the State's waiver requests based on the lack of federal funding was contrary to law; and (4) an APA claim alleging that the Secretary improperly denied the State's plan amendments without providing the State an opportunity to revise its amendments, technical support or a hearing, and that the denial of the amendments was contrary to law.

The Secretary moved to dismiss the State's amended Complaint, and the district court granted the Secretary's motion in part. The district court began its decision by acknowledging that "the State and the Secretary have fundamental, important, and bona fide disagreements about the interpretation and implementation of the Act," but proceeded to hold that it lacked jurisdiction to resolve those disagreements. App. 72. Specifically, the district court rejected the Secretary's argument that the State lacked standing, holding that the State's allegation "that the *current* federal funds it receives under the Act fail to cover the costs of administering the tests required by the Act" established that the State was suffering an "immediate injury" sufficient to find standing. App. 113-14 (emphasis in the original).

Although the district court found that the State had properly alleged that the Secretary's interpretation of the NCLBA was causing the state "immediate injury," the district court went on to conclude that the State's efforts to obtain prompt judicial review of that

interpretation were not prudentially ripe.[2] In so holding, the district court acknowledged that the State's claims "entail[ ] statutory construction issues, and thus legal issues that are ordinarily fit for judicial determination," but concluded that the State should nonetheless be required to submit a new plan amendment request[3] reflecting its view of its obligations as informed by its position on the Unfunded Mandates Provision, which – in the district court's view – could somehow obviate the need for court involvement. App. 134. In the district court's view, despite the State's claims of "immediate injury," withholding judicial review of the Secretary's interpretation of the NCLBA would not impose a

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[2] The district court also held that this Court's decision in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), established that the federal courts lack jurisdiction over the State's pre-enforcement challenge to the Secretary's interpretation of the NCLBA. The State vigorously challenged that part of the district court's holding on appeal and the Secretary did not defend the district court's decision on that ground. The Second Circuit did not address the issue because it affirmed the district court on prudential ripeness grounds. App. 9.

[3] It is important to note that at the time of the district court's ruling, there was no administrative request pending before the Secretary. She had denied the State's waiver requests on February 28, 2005 and denied the State's updated plan amendment request and waiver request on June 20, 2005. Thus, although the district court talked of supplementing the administrative record, the Secretary had already denied State's pending requests. *See, e.g.*, App. 109, 165 (noting that "the Secretary's third and final denial of the State's requests . . . came in June 2005" and that "there apparently are no other plan amendments pending before the Secretary").

hardship on the State because "[t]he State remains in compliance with the Act and therefore faces no imminent enforcement action by the Secretary." App. 137. Thus, the district court granted the Secretary's motion to dismiss as to Counts I and II of the State's amended Complaint.

As to Count IV[4] of the State's amended Complaint, alleging that the Secretary's denial of the State's plan amendments violated the APA, the district court denied the Secretary's motion to dismiss as premature but concluded that the State's claim that the Secretary was required to provide a hearing before denying the plan amendments was moot, based on its understanding of the State's position. App. 163-65. The State subsequently sought to clarify its position in connection with Cross-Motions for Judgment on the Administrative Record, but the district court again declined to reach the hearing issue and ultimately granted the Secretary's motion and entered judgment in his favor. App. 42-47. The State appealed.

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[4] Count III of the State's amended Complaint challenged the Secretary's denial of the State's waiver requests. The district court granted the Secretary's motion to dismiss that count, holding that the Secretary's denial of a waiver request was not subject to review by the courts. App. 145-61. The State did not challenge that aspect of the district court's decision on appeal.

III. THE PROCEEDINGS IN THE SECOND CIRCUIT

The Second Circuit correctly recognized that "[t]he crux of the State's lawsuit boils down to one core allegation: the Unfunded Mandates Provision of the NCLBA requires the State to be funded the full amount of any costs required to comply with the Act, but the State is nevertheless currently paying more to comply than it is receiving in Title I educational grants." App. 7. The court also correctly recognized that "the State is correct that the Secretary's interpretation of the Unfunded Mandates Provision is clear and that the parties have a concrete dispute about its meaning and constitutionality" and that the parties had fully briefed the issue on appeal. App. 8, 13. It nonetheless substantially affirmed the district court's holding that the State's claims were not prudentially ripe and did not address the merits of the State's claims.

In so holding, the Second Circuit acknowledged that its conclusion that the State's claims were not prudentially ripe was directly contrary to an *en banc* Sixth Circuit decision involving a similar challenge to the Secretary's interpretation of the NCLBA's Unfunded Mandates Provision. App. 15 n.4 (citing *Sch. Dist. of Pontiac v. Sec'y of U.S. Dep't of Educ.*, 584 F.3d 253 (6th Cir. 2009) (*en banc*), *cert. denied*, 130 S. Ct. 3385 (2010)). It also acknowledged that "'[e]ven if resolution of a dispute could be facilitated if a court waited for a specific application of the

issues in contention, the question may, nonetheless, perhaps be justiciable'" if a "sufficiently weighty" hardship would result from delaying judicial review. App. 15 (quoting *Nutritional Health Alliance v. Shalala*, 144 F.3d 220, 226 (2d Cir. 1998)). However, the court concluded that "the only potential material hardship to Connecticut is any state funds it must continue to expend on compliance" and that the loss of those funds – which the State alleged amounted to millions of dollars that could not be recovered – was not a sufficient hardship to warrant timely judicial review. App. 16. In the Second Circuit's view, five years after the State filed suit seeking only judicial review of the Secretary's unwavering position on this important and straightforward legal issue, initiating "further administrative proceedings may be the most effective way to save the State this money." App. 16.

Although the Second Circuit agreed with the district court that the State's claims were not prudentially ripe, it did conclude that "the State has a strong argument that it was entitled to a hearing on its plan amendments" and that the district court incorrectly concluded that the State had abandoned its request for a hearing. App. 17-23. The Second Circuit nevertheless declined to even resolve that issue. App. 23. Thus, the Second Circuit left the State to re-start the administrative process anew five years after this litigation commenced without any definitive guidance on either the meaning of the Unfunded Mandates Provision or whether, in fact, the Secretary would

even be required to provide the State a hearing on any plan amendment it filed.

REASONS FOR GRANTING THE WRIT

I. THERE IS A CLEAR SPLIT AMONG THE CIRCUITS ON WHETHER PURELY LEGAL QUESTIONS INVOLVING THE SCOPE OF AGENCY AUTHORITY ARE PRESUMPTIVELY RIPE FOR JUDICIAL REVIEW

This case is emblematic of a larger split among the circuits on whether a purely legal question involving an agency's interpretation of a statute it enforces is presumptively ripe for judicial review. Facing similar challenges to the Secretary's interpretation of the NCLBA's Unfunded Mandates Provision, both the Second Circuit and the Sixth Circuit correctly recognized "that the Secretary's interpretation of the Unfunded Mandates Provision is clear and that the parties have a concrete dispute about its meaning and constitutionality." App. 13; *see also Sch. Dist. of Pontiac v. Sec'y of the United States Dep't of Educ.*, 584 F.3d 253, 279 (6th Cir. 2009) (*en banc*), *cert. denied*, 130 S. Ct. 3385 (2010) (Sutton, J., concurring) ("Because this dispute raises an unvarnished question of law that will not benefit from further factual development, it presumptively is ripe for review." (citing *Dixie Fuel Co. v. Comm'r of Social Sec.*, 171 F.3d 1052, 1058 (6th Cir. 1999), *overruled on other grounds by Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 157 (2003)). They reached the opposite conclusions on the question of

ripeness, however, because the Second Circuit applied no presumption in favor of judicial review of legal questions, while the Sixth Circuit did.

In so holding, the Second and Sixth Circuits highlighted a divide among the circuits on whether courts should presume that they have authority to provide timely judicial guidance where there are challenges to an agency's interpretation of a statute it administers or whether impacted entities should be forced to submit to administrative proceedings premised on the correctness of the agency's legal interpretation before a court can address the purely legal issue raised. This issue is critical to the proper application of the ripeness analysis this Court promulgated in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), and that lower courts have applied thousands of times since.

In *Abbott Labs.*, this Court established that determining whether administrative action is ripe for judicial review requires a court to evaluate (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration. *Id.* at 149. Although the application of the *Abbot Labs.* test requires balancing of those factors, the first is "the more important" and the second "is less clear and less important." *Nat'l Park Hospitality Ass'n v. DOI*, 538 U.S. 803, 814 (2003) (Stevens, J., concurring).

Consistent with the primacy of the fitness inquiry, the D.C. Circuit "has long understood the

approach in *Abbott Labs.* to incorporate a presumption of reviewability" where legal questions are raised, *Sabre, Inc. v. DOT*, 429 F.3d 1113, 1119 (D.C. Cir. 2005), and the Fifth and Sixth Circuits have likewise recognized an explicit presumption. *See, e.g.*, *Sch. Dist. of Pontiac*, 584 F.3d at 279 (Sutton, J., concurring); *Texas v. United States*, 497 F.3d 491, 498 (5th Cir. 2007), *cert. denied*, 129 S. Ct. 32 (2008) ("[a] case is generally ripe if any remaining questions are purely legal ones."). As the D.C. Circuit has recognized, "[c]ourts confronted with close questions of ripeness are appropriately guided by the presumption of reviewability, especially when the affected person is confronted with the dilemma of choosing between disadvantageous compliance or risking imposition of serious penalties." *Ciba-Geigy Corp. v. United States EPA*, 801 F.2d 430, 434 (D.C. Cir. 1986).

The express presumption in favor of providing timely judicial review of legal questions recognized by those circuits is consistent with the hierarchy of *Abbot Labs.* factors and is critical to proper application of the analysis. A comparison of the Sixth Circuit's decision in *School Dist. of Pontiac* with the Second Circuit's decision in this case illustrates why.

Both courts recognized that the issues presented were legal. Based on that premise, the Sixth Circuit concluded that the claims were "presumptively . . . ripe for review." *Sch. Dist. of Pontiac*, 584 F.3d at 279 (Sutton, J., concurring). It then concluded that "[w]hile further administrative proceedings might sharpen the nature of some of the school districts' claims," *id.*,

requiring them to submit to additional administrative proceedings – the result of which would be a foregone conclusion given the Secretary's settled interpretation of the Unfunded Mandates Provision – would impose a hardship sufficient to support a ripeness finding because "unless we decide this matter, school district Plaintiffs will be forced to continue expending limited state resources to comply with NCLB." *Id.* at 263 (opinion of Cole, J.).[5]

By contrast, the Second Circuit recognized that the "crux of the State's lawsuit boils down to one core allegation," whether, as a matter of statutory construction, "the Unfunded Mandates Provision of the NCLBA requires the State to be funded the full amount of any costs required to comply with the Act." App. 7. However, it did not apply the presumption of reviewability and that led it to incorrectly conclude – directly contrary to the Sixth Circuit – that the hardship to the State resulting from delayed judicial review of this purely legal question was insufficient to establish ripeness.

That was clearly wrong. The Secretary's incorrect interpretation of the NCLBA put the State in the position where it was forced to either comply with the

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[5] Although Judge Cole's opinion did not expressly refer to the presumption in favor of judicial review, Judge Sutton's concurring opinion did – citing a prior Sixth Circuit decision – and it appears clear that both opinions applied the presumption, either explicitly or implicitly. *Sch. Dist. of Pontiac*, 584 F.3d at 279 (Sutton, J., concurring).

Secretary's unlawful mandates or risk the loss of hundreds of millions of dollars in much-needed education funding. Unwilling to gamble on the educations of its children, the State took the only responsible course and complied with the Secretary's unlawful demands and "eliminated the imminent threat of harm by simply not doing what [it] claimed the right to do," namely, spend its own state education funds as its experts saw fit based on the science and decades of experience. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007).

Contrary to the Second Circuit's decision, the State's decision to comply with the Secretary's unlawful dictates "did not preclude subject-matter jurisdiction because the threat-eliminating behavior was effectively coerced." *Id.* at 129. The Second Circuit was dismissive of the hardship resulting from the State's forced compliance, claiming that the State could eventually receive judicial review after initiating another set of administrative proceedings before the Secretary – the outcome of which would have been preordained – and that the resulting "delay *itself* is not the cause of any constitutional infringement that cannot otherwise be addressed in due course." App. 17 n.5 (emphasis in original). However, that conclusion is inconsistent with the facts and this Court's precedent.

Every day the State has been forced to wait for judicial review of the Secretary's incorrect interpretation of the NCLBA is a day that it has been "forced to continue expending limited state resources to comply

with NCLB." *Sch. Dist. of Pontiac*, 584 F.3d at 263. That has resulted in millions of dollars of additional costs to the State and its citizens that they can ill-afford. That is a clear hardship. As this Court recently recognized in an analogous context, "[f]ederalism concerns are heightened when . . . a federal court decree has the effect of dictating state or local budget priorities. States and local governments have limited funds. When a federal court orders that money be appropriated for one program, the effect is often to take funds away from other important programs." *Horne v. Flores*, ___ U.S. ___, 129 S. Ct. 2579, 2593-94 (2009).

Contrary to the Second Circuit's blandishment "that any constitutional infringement" resulting from the delay in correcting the Secretary's incorrect interpretation can "be addressed in due course," it seems highly unlikely that the Secretary will return that money if the State's position is eventually vindicated in the courts. App. 17 n.5. Thus, any delay – including the delay that would result from additional administrative proceedings – results in direct costs to Connecticut and its citizens due to the State being forced to conform its educational system to the requirements the Secretary imposes based on his erroneous view of the law. *See, e.g.*, *New York v. United States*, 505 U.S. 144, 175 (1992) (holding that New York's challenge to Spending Clause legislation was ripe even though legislation had not taken effect, where the state had to take immediate action due to its pending operation).

The Second Circuit ignored those real costs, and concluded that the State can only obtain judicial review on this important legal question if it incurs yet another hardship and further delay by going through the motions to submit yet another amended plan to the Secretary so the Secretary can reject that plan in his administrative process, glibly asserting that "further administrative proceedings may be the most effective way to save the State this money." App. 16.[6]

That demonstrates the fundamental unreality of the Second Circuit's opinion. The best way for the State to save the money it has been forced to expend as a result of the Secretary's unlawful actions – or at least stop the bleeding – is not to waste time initiating yet another administrative proceeding asking the Secretary to re-consider his hardened legal position, but rather to have a court correct the Secretary's unlawful interpretation through judicial review. The State was entitled to that review when it filed this

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[6] The Second Circuit distinguished this case from *Abbott Labs.* on the ground that here – unlike in *Abbott* – "'further administrative proceedings are contemplated.'" App. 15 (quoting *Abbott Labs.*, 387 U.S. at 149). However, the Secretary has already denied the State's administrative requests and the State has consistently – and vociferously – taken the position that no further administrative proceedings were necessary. *See, e.g.*, App. 109, 165 (noting that "the Secretary's third and final denial of the State's requests . . . came in June 2005" and that "there apparently are no other plan amendments pending before the Secretary"). Only the Secretary contemplates further administrative proceedings, to avoid judicial review of his legal position, and the courts wrongly abetted that avoidance.

suit in 2005, and the Sixth Circuit correctly recognized as much. *Sch. Dist. of Pontiac*, 584 F.3d at 279 (Sutton, J., concurring). The Second Circuit's decision holding that the State must further delay that review and submit to the Secretary's jurisdiction is incorrect and this Court should reverse it. *Cf. Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, ___ U.S. ___, 130 S. Ct. 1758, 1767 n.2 (2010) (holding that challenge to arbitration panel's award was ripe where it "means that petitioners must now submit to class determination proceedings before arbitrators who, if petitioners are correct, have no authority to require class arbitration absent the parties' agreement to resolve their disputes on that basis.").

II. THE SECOND CIRCUIT'S DECISION IS INCONSISTENT WITH THIS COURT'S SPENDING CLAUSE DECISIONS

This Court has long recognized that "'[l]egislation enacted pursuant to the spending power is much in the nature of a contract,' and therefore, to be bound by 'federally imposed conditions,' recipients of federal funds must accept them 'voluntarily and knowingly.'" *Arlington Central School Dist. v. Murphy*, 548 U.S. 291, 296 (2006) (quoting *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981)). Thus, in determining whether the Secretary can validly force Connecticut – and other states – to expend state funds to comply with unfunded NCLBA mandates, the courts "must view the [NCLBA] from the perspective of a state official

who is engaged in the process of deciding whether the State should accept [NCLBA] funds and the obligations that go with those funds" and "ask whether a state official would clearly understand that one of the obligations of" accepting NCLBA funds is that the State would be required to expend state funds on federal requirements that the State's experts believe are not the best use of the money. *Id.*

All the State seeks through this litigation is for a neutral court to review the parties' respective positions on the straightforward – though critically important – issue presented and set the correct ground rules for the parties to the Spending Clause "contract" going forward. The school district plaintiffs in Michigan had an answer from the district court within seven months and now have a definitive – though frustrating[7] – answer from the Sixth Circuit. They may not like that answer (and the State believes that the answer is incorrect), but at least it is an answer.

By contrast, if this Court allows the Second Circuit's decision to stand, the State – after five years of litigation – will be sent back to square one. Instead of having a timely review of the core legal issue by an impartial federal judge, the State will be forced to

[7] Although a majority of the *en banc* Sixth Circuit agreed with the school districts' position on the merits, overall the court split 8-8, which had the effect of leaving in place the district court's decision ruling in the Secretary's favor on the merits.

initiate yet another administrative process before the Secretary where it is unclear whether the State will be entitled to a hearing and the deadlines for the Secretary's action are amorphous but the result is pre-ordained. Only after enduring that futile and costly process will the State be able to present its good-faith dispute as to the Secretary's legal authority to a court.

Prudential ripeness does not require this result, particularly where a state is seeking only impartial judicial guidance on the proper legal interpretation of legislation enacted pursuant to the spending power. *Cf. New York v. United States*, 505 U.S. 144, 175 (1992) (holding that New York's challenge to Spending Clause legislation was ripe even though legislation had not taken effect, where the state had to take immediate action due to its pending operation). The presumption in favor of reviewability of legal questions embodied in *Abbott Labs.* and discussed above should apply with even greater force in these circumstances. Put simply, it defies common sense to require one party to what is, in effect, a contractual dispute to submit to a process controlled by the opposing party before it can obtain access to a neutral arbiter. The Sixth Circuit recognized this, and the Second Circuit did not.

A comparison of the proceedings in the Second and Sixth Circuits vividly illustrates why the Second Circuit's decision cannot stand. The State of Connecticut brought this suit in 2005, within months of a suit filed against the Secretary in the United States

District Court for the Eastern District of Michigan raising the same core issues. Both suits sought judicial guidance on the same legal question which, though straightforward, has substantial consequences for the entities involved and the children they have the responsibility to educate.

In Michigan, the Secretary moved to dismiss the Complaint based on an alleged lack of standing and failure to state a claim. Tellingly, the Secretary did not even bother to raise a ripeness argument and the district court did not see a need to raise the ripeness issue *sua sponte*. *See, e.g.*, *Nat'l Park Hospitality Ass'n v. DOI*, 538 U.S. 803, 808 (2003) (noting that "[t]he ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction, but, even in a case raising only prudential concerns, the question of ripeness may be considered on a court's own motion" (quotation marks omitted)).

The district court correctly concluded that the plaintiffs had standing and addressed the merits of their argument, ruling, incorrectly, that the Unfunded Mandates Provision did not preclude the Secretary from requiring the expenditure of state and local funds to comply with the NCLBA's mandates. Thus, in Michigan, the school district plaintiffs obtained judicial review of their challenge to the Secretary's interpretation of the NCLBA within approximately seven months of filing their Complaint.

Plaintiffs appealed the district court's decision to the Sixth Circuit. On appeal, the Secretary again did not raise an issue as to ripeness and the court, again, did not raise it *sua sponte*. Indeed, even Judge McKeague – on whose *en banc* opinion the Second Circuit relied to find the State's claims unripe – found no jurisdictional impediment to judicial review of the plaintiffs' claims in his initial panel dissent. *Sch. Dist. of Pontiac v. Sec'y of the United States Dep't of Educ.*, 512 F.3d 252, 273-84 (6th Cir.), *vacated by*, 2008 U.S. App. LEXIS 12121 (6th Cir. 2008) (McKeague, J., dissenting).

The Sixth Circuit panel divided on the merits, with Judge Cole and District Judge Breen[8] correctly holding "that NCLB, by its terms, fails to provide clear notice of the States' obligation to incur additional costs to comply with the Act's requirements." *Id.* at 261. In so holding, the court "note[d] that even the Defendant in this matter previously expressed a view of the contested funding provision that coincides with the interpretation that Plaintiffs urge here," referring to statements by then-Secretary Rod Paige "stat[ing] that the Act 'contains language that says *things that are not funded are not required.*'" *Id.* at 271-72 (quoting Paige statement of September 4, 2003) (emphasis added in decision)). The Court noted that then-Secretary Paige "[r]eiterat[ed] this point in a later

[8] Of the United States District Court for the Western District of Tennessee, sitting by designation.

speech, . . . reassur[ing] that 'if it's not funded, it's not required. There is language in the bill that *prohibits requiring anything that is not paid for.*'" *Id.* (quoting Paige statement of December 2, 2003) (emphasis added in decision)).[9]

The Secretary requested re-hearing *en banc* and the Sixth Circuit granted the request and vacated the panel's decision. Although the Secretary had not raised or briefed the ripeness issue before the district court or the panel, "[i]n accordance with its institutional role, after oral argument the *en banc* court asked the parties to submit supplemental briefs addressing" whether plaintiffs' claims were ripe and whether the court "can . . . properly resolve this case without the presence of the relevant States (Michigan, Texas, and Vermont) as parties or at least without knowing the views of the States on the issues presented?" *Sch. Dist. of Pontiac v. Sec'y of the United States Dep't of Educ.*, 584 F.3d 253, 298 (6th Cir. 2009) (*en banc*), *cert. denied*, 130 S. Ct. 3385 (2010) (McKeague, J., concurring) (quotation marks omitted).

A 13-3 majority of the *en banc* Sixth Circuit disagreed with the Second Circuit's decision in this case and held that prudential ripeness did not preclude the federal courts from addressing the merits of the challenge to the NCLBA. Specifically, Judge Cole –

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[9] The Secretary did not dispute that then-Secretary Paige made the quoted statements, but sought to minimize them at oral argument as "stray comments." *Id.*

joined by seven other Judges – concluded that the concerns underlying the prudential ripeness doctrine were "not present here" because "Plaintiffs present a straightforward, concrete question of statutory interpretation, the answer to which is not dependent on further development of facts or further administrative action." *Id.* at 263. "In short, unless we decide this matter, school district Plaintiffs will be forced to continue expending limited state resources to comply with NCLB." *Id.*

Judge Sutton – joined by four other Judges – agreed with Judge Cole's decision on the ripeness issue, concluding that "[t]he claims are fit for judicial review, and the districts would suffer hardship if we declined to consider them." *Id.* at 279 (Sutton, J., concurring). "'Nothing would be gained by postponing a decision' when '[t]he issue presented is purely legal, . . . will not be clarified by further factual development' and hardship to the parties exists." *Id.* at 279 (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581-82 (1985)).

Judge Sutton then directly addressed, and forcefully rejected, the reasoning underlying the Second Circuit's decision, noting that "[w]hile further administrative proceedings might sharpen the nature of some of the school districts' claims, they would not alter or make more concrete the nature of the legal question." *Id.* The Secretary has made his position clear and

> Requiring the school districts to seek waivers or propose plan revisions that the Secretary has confirmed he will not grant – because his interpretation of the Act prevents him from doing so – would merely prolong this litigation, already entering its fifth year. Nor would it help any of the participants in this case, least of all the students attending the affected schools, which is presumably why no party raised this issue on its own. No Lawyer Left Behind is not the name of the Act.

Id. (citation omitted). Thus, an overwhelming majority of the *en banc* Sixth Circuit concluded that the school district plaintiffs were entitled to timely judicial review of the Secretary's interpretation of the NCLBA and that forcing them to submit to further administrative proceedings would be an unnecessary and undue hardship to the districts and the students they educate.

In stark contrast, the Second Circuit concluded – after five years of litigation – that "[a]lthough the State is correct that the Secretary's interpretation of the Unfunded Mandates Provision is clear and that the parties have a concrete dispute about its meaning and constitutionality," the courts would not review that straightforward legal question because further administrative proceedings before the Secretary "might moot the entire lawsuit." App. 14. The court was under no illusion that the Secretary would change his legal position. Rather, the court understood that the administrative proceedings would be premised on the correctness of the Secretary's interpretation but

nonetheless "[r]equir[ed] the [State] to . . . propose plan revisions that the Secretary has confirmed he will not grant[ ] because his interpretation of the Act prevents him from doing so" before the State could obtain judicial review. *Sch. Dist. of Pontiac*, 584 F.3d at 279 (Sutton, J., concurring).

The Second Circuit was able to reach this anomalous result only by ignoring the presumption in favor of reviewability of legal questions the Sixth Circuit recognized and by disregarding the hardship the delay imposed on the State. *Id.* at 279 (Sutton, J., concurring). It recognized that its conclusion was inconsistent with the Sixth Circuit's but "disagree[d]" with that court and – without responding to any of the arguments by the 13-3 majority of the *en banc* Sixth Circuit – simply stated that it was "more persuaded by Judge McKeague's concurrence." App. 15 n.4.

That conclusion is striking, both for its dismissive attitude toward the strong Sixth Circuit majority and for its failure to account for the fact that Judge McKeague – whom the Second Circuit found persuasive – expressly noted that "there is at least one fundamental difference between" the Second Circuit and Sixth Circuit cases, namely, that in the Sixth Circuit "none of the respective States are involved." *Sch. Dist. of Pontiac*, 584 F.3d at 299 (McKeague, J., concurring). "In fact, during oral argument before the *en banc* [Sixth Circuit], counsel for the Secretary argued that *[the Sixth Circuit] case was 'less fit for review' than the* Connecticut v. Spellings *case because, unlike in that case, no State is a party here.*" *Id.* at

300 (emphasis added).[10] Thus, the Second Circuit not only failed to respond to the *en banc* Sixth Circuit's analysis and shrugged it off in a footnote, it failed to even mention that the concurrence on which it explicitly relied saw the cases as fundamentally different and that the Secretary *conceded* in the Sixth Circuit that Connecticut's argument on ripeness was stronger than the school districts' argument, which prevailed 13-3 before that court.

The Second Circuit's decision defies the law and common sense. This Court has never applied the prudential ripeness doctrine to prevent a state from obtaining timely judicial guidance as to its obligations under Spending Clause legislation, and the Sixth Circuit correctly recognized that requiring the State to submit to more administrative proceedings that will "not alter or make more concrete the nature of the legal question" does not "help any of the participants in this case, least of all the students attending the affected schools." *Id.* at 279 (Sutton, J., concurring). Ultimately, courts in the Second Circuit – like courts in the Sixth Circuit – should allow parties

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[10] The Secretary continued to recognize this distinction in opposing the school districts' request that this Court review the Sixth Circuit's decision, arguing that the case was not justiciable, in part, because the school districts sued "without the participation of their respective States." *Brief for the Respondent in Opposition in School Dist. of the City of Pontiac v. Duncan*, No. 09-852, p. 10 (May 7, 2010) (App. 172-73); *see also id.* at p. 13 (App. 173) (arguing that this Court should not address the merits "without the participation of the responsible States").

raising legal questions as to the proper interpretation of Spending Clause legislation to obtain timely judicial review.

CONCLUSION

For all of the foregoing reasons, the petitioner respectfully submits that this Court should grant this Petition and issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

Petitioner
State of Connecticut and
General Assembly of the
State of Connecticut

RICHARD BLUMENTHAL
Attorney General of Connecticut

*ROBERT DEICHERT
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
Tel. No. (860) 808-5020
Robert.Deichert@ct.gov

**Counsel of Record*

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