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NO AMBIGUITY LEFT BEHIND: A DISCUSSION OF THE CLEAR STATEMENT RULE AND THE UNFUNDED MANDATES CLAUSE OF NO CHILD LEFT BEHIND

Andrew G. Caffrey*

INTRODUCTION

President George W. Bush, who at the time was Governor of Texas, never had any reason to doubt that he would prevail in the 2000 Iowa Republican caucuses.¹ This might explain why the ninety-minute debate in Johnston, Iowa, held prior to the caucuses, was no more than a fairly docile discussion between then-Governor Bush and five other candidates for the Republican nomination.² While there was one particularly heated exchange between Senator John McCain and the Governor, the candidates spent most of their time reiterating their respective positions instead of engaging one another in debate.³ Governor Bush seized the opportunity, in a non-threatening environment with a receptive audience, to lay the foundation for what would become the most well-known social policy of his first term, and ultimately his presidency.⁴ In discussing his education policy proposals, Governor Bush stated that his focus would be on providing for the “local control of schools.”⁵ He stated that his administration would “pass power back . . . to [the] states.”⁶ Consequently, a mere three days after assuming office, President George W. Bush sent a proposal to Congress that would later become the No Child Left Behind Act (NCLB).⁷

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¹ See Dan Balz & David S. Broder, *Bush Wins Iowa Poll; Forbes 2nd; Quayle, Alexander Lag As Dole Captures Third; Turnout Is a Record*, WASH. POST, Aug. 15, 1999, at A1; Richard L. Berke, *Bush Triumphs in a Straw Poll By Iowa G.O.P.*, N.Y. TIMES, Aug. 15, 1999, at A1.

² See Richard L. Berke, *McCain Leads the Way as Republican Rivals Attack Bush*, N.Y. TIMES, Jan. 16, 2000, at A18.

³ See *id.*; see also Thomas B. Edsall & Dan Balz, *Bush Calls McCain Plan a \$40 Billion Tax Hike; Exchanges Get Testy in GOP Presidential Hopefuls' Final Debate Before Jan. 24 Iowa Caucuses*, WASH. POST, Jan. 16, 2000, at A10 (detailing the exchange between Senator McCain and Governor Bush regarding tax policy).

⁴ The most well-known social policy proposal of President George W. Bush's time in office refers to his education policy proposals that resulted in the No Child Left Behind Act.

⁵ Sue Kirchhoff, *Schools Bursting With Issues*, CQ WEEKLY, Jan. 22, 2000, at 113 (quoting Governor George W. Bush).

⁶ *Id.*

⁷ JASON D. MYCOFF & JOSEPH A. PIKA, CONFRONTATION AND COMPROMISE: PRESIDENTIAL AND CONGRESSIONAL LEADERSHIP, 2001–2006, at 41 (2008). See generally 20 U.S.C.

The proposal itself was indicative of the rhetoric released on the campaign trail.⁸ Indeed, NCLB was crafted on promises of state and local government control, followed by accountability.⁹ Yet, the law would come to represent a significant departure from the long-standing tradition of limited federal involvement, a tradition historically adhered to by congressional conservatives.¹⁰ The bill that came out of committee in the House lacked certain priorities that had been emphasized in the President's original blueprint. Some have even suggested that these differences were material, significant, and embodied a new policy separate and distinct from the President's original plan.¹¹ However, the bill was the result of a bipartisan compromise, and not a partisan hijacking.¹² NCLB, when signed into law, was widely hailed as a significant achievement of bipartisan efforts.¹³

Whether the President had changed his position on federal involvement, or whether the law had taken a detour that led to a series of unintended consequences, remains uncertain. In its current form, NCLB represents a framework that forces federal mandates upon states, effectively reducing the local control of public schools.¹⁴ The law professes to provide the funding required for compliance with such mandates,¹⁵ yet more often than not such funding falls short.¹⁶ Accordingly, there has been

§§ 6301–7941 (2006) (codifying as amended the No Child Left Behind Act, Pub. L. No. 107-110, 115 Stat. 1425 (2002)).

⁸ See MYCOFF & PIKA, *supra* note 7, at 40–42 (“Congressional Republicans had reserved the legislative designations of S.1 and H.R.1 for the proposal, further evidence of its top billing.”).

⁹ See *id.* at 40.

¹⁰ LEE W. ANDERSON, CONGRESS AND THE CLASSROOM: FROM THE COLD WAR TO “NO CHILD LEFT BEHIND” 159–60 (2007).

¹¹ Some have analogized that NCLB “is to the president’s original proposal as Burger King is to a five-star restaurant.” Erik W. Robelen, *ESEA Passage Awaits a Deal On Spending*, EDUC. WEEK, Dec. 12, 2001, at 26 (quoting Chester E. Finn, Jr., Assistant Secretary of Education under President Reagan).

¹² See MYCOFF & PIKA, *supra* note 7, at 47. The Republican contingent was not able to attach vouchers or block grants to the bill, which had been priorities of the President’s plan. However, Democrats were unable to receive additional funding for class-size reduction or school construction. *Id.*

¹³ See *id.* at 57–58; see also PAUL MANNA, SCHOOL’S IN: FEDERALISM AND THE NATIONAL EDUCATION AGENDA 130–36 (2006).

¹⁴ In removing such local control, some have suggested that the law represents “coercive federalism.” See George F. Will, *Getting Past ‘No Child,’* WASH. POST, Dec. 9, 2007, at B7.

¹⁵ See 20 U.S.C. § 7907(a) (2006).

¹⁶ See Sch. Dist. of Pontiac v. Spellings, No. 05-CV-71535-DT, 2005 U.S. Dist. LEXIS 29253, at *3–6 (E.D. Mich. Nov. 23, 2005), *rev’d sub nom.* Sch. Dist. of Pontiac v. Sec’y of Educ., 512 F.3d 252 (6th Cir. 2008), *aff’d en banc*, 584 F.3d 253 (6th Cir. 2009) (plurality opinion affirming district court); Gina Austin, Note, *Leaving Federalism Behind: How the No Child Left Behind Act Usurps States’ Rights*, 27 T. JEFFERSON L. REV. 337, 340–42 (2005) (stating that according to “some estimates, the current level of . . . funding is as much as 11 billion dollars short of the promises made when the law was enacted”).

litigation challenging both congressional authority and the law itself.¹⁷ The most recent of such litigation sought to enjoin the federal government from enforcing the requirements of NCLB, or reducing states' Title I funding as a result of non-compliance.¹⁸

This Note will examine the recent litigation, as well as the consequences facing state and local governments in this new decade. The purpose of this Note is to demonstrate that NCLB, and specifically its unfunded mandates clause, is as unclear as it is untenable. As a result, courts should continue to entertain challenges and ought to place the proverbial ball back in Congress's court. Part I will discuss the specifics of NCLB, the unfunded mandates clause, and the challenges facing states in their attempts to meet the 2014 proficiency requirement.¹⁹ Part II will look at the clear statement analysis courts apply to check Congress's power under the Spending Clause. Part III will review the recent challenges states have raised, specifically detailing the Sixth Circuit Court of Appeals' ruling in *School District of Pontiac v. Secretary of the U.S. Department of Education*.²⁰ Finally, Part IV will offer some recommendations for reconstructing NCLB, and discuss the political feasibility of modifying current federal education policy so as to avoid the harm that awaits state and local governments as NCLB compliance requirements loom large.

I. THE NO CHILD LEFT BEHIND ACT (NCLB)

Signed into law in January of 2002, NCLB was widely hailed as a significant achievement at the federal level for much needed education reform.²¹ It passed overwhelmingly, with Republican and Democratic support in both legislative bodies.²² Its stated purpose was to increase the proficiency of students in underachieving school districts, while simultaneously "provid[ing] parents with options."²³ Even though these options would not appear unless and until a school district continuously failed to improve, the overall reform effort was viewed as consistent with its overarching theme of helping disadvantaged and underfunded schools, students, and parents alike.²⁴

¹⁷ See, e.g., *Sch. Dist. of Pontiac v. Sec'y of Educ.*, 584 F.3d 253 (6th Cir. 2009); *Connecticut v. Spellings*, 453 F. Supp. 2d 459 (D. Conn. 2006); see also Sam Dillon, *Connecticut Lawsuit Is Cut Back*, N.Y. TIMES, Sept. 28, 2006, at A18.

¹⁸ See *Spellings*, 2005 U.S. Dist. LEXIS 29253, at *3–6; see also Mark Walsh, *Federal Appeals Court Weighs Union's Suit Over NCLB*, EDUC. WEEK, Jan. 7, 2009, at 7.

¹⁹ Schools that have accepted funding under NCLB are expected to achieve one hundred percent academic proficiency by 2014. See MANNA, *supra* note 13, at 128 tbl.6.1.

²⁰ 584 F.3d at 253.

²¹ See MANNA, *supra* note 13, at 130–31.

²² MYCOFF & PIKA, *supra* note 7, at 51–52 (ultimately only forty-five House Representatives, and eight Senators voted against the respective House and Senate versions of the law).

²³ *Requirements of No Child Left Behind Act*, WASH. POST, Aug. 22, 2002, at T20 ("The idea . . . is to ensure that no child is trapped in a poorly performing school . . .").

²⁴ See 20 U.S.C. § 6301 (2006); see also MANNA, *supra* note 13, at 128 tbl.6.1. After two consecutive years of failing to make the requisite progress, a school is designated as a school

NCLB amended the 1994 reauthorization of the Elementary and Secondary Education Act of 1965 (ESEA).²⁵ It was structured to replace the failed Goals 2000 legislation, which was concocted by President Bill Clinton in 1994,²⁶ and to carry on the tradition of setting specific standards of academic achievement.²⁷ Goals 2000 itself was originally designed not just to enumerate certain specified performance-based standards, but to establish a framework of broad based goals that would benefit *all* students.²⁸ It was designed to increase the federal role of accountability, as the 1988 reauthorization of ESEA only reached “20 percent of the nation’s students,” those who at the time were eligible for Title I funding.²⁹ With NCLB, federal education policy took an even bolder step towards implementing broad-based standards

for improvement. Once designated as such, parents may request (1) a transfer for their child to another public school, and/or (2) funding for any supplemental education by a state-approved third party provider. *Id.*

²⁵ See MYCOFF & PIKA, *supra* note 7, at 33–34.

²⁶ Goals 2000: Educate America Act, Pub. L. No. 103-227, 108 Stat. 125 (1994); see MYCOFF & PIKA, *supra* note 7, at 38.

²⁷ This tradition was established in the early 1980s, when there was a fast-growing concern regarding the quality of public education in the United States. In 1983 the National Commission on Excellence in Education published a report entitled *A Nation at Risk: The Imperative for Educational Reform*. NAT’L COMM’N ON EXCELLENCE IN EDUC., U.S. DEP’T OF EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* (1983), available at <http://www.ed.gov/pubs/NatAtRisk/index.html>. This report detailed the disturbing inadequacies that plagued the educational system at the time, and has been linked with the “blizzard of state reforms in the 1980s.” MANNA *supra* note 13, at 12. In the years that followed its publication, education reform was viewed, at ever increasing rates, as one of the more pressing issues of the day, finally spiking in the mid-to-late 1990s. See *id.* at 4 fig.1.1; Kamina Aliya Pinder, *Using Federal Law to Prescribe Pedagogy: Lessons Learned From the Scientifically-Based Research Requirements of No Child Left Behind*, 6 GEO. J.L. & PUB. POL’Y 47, 72 (2008) (noting that by the late 1980s “the nation seemed to have responded to the growing call for accountability in education”). What resulted was the call for specified performance-based standards in education reform efforts, as most Americans at the time “believed that the federal government should require states . . . to meet minimum academic standards.” *Id.* With *A Nation at Risk* still fresh in many voters’ minds, politicians began to focus their education platforms on the basis of improved performance and accountability standards. This led to the popularization of the “standards movement” in the 1990s, and ultimately resulted in Goals 2000. See *id.*; MANNA *supra* note 13, at 12–13.

²⁸ See MYCOFF & PIKA, *supra* note 7, at 38–39. The framework was based upon ten goals:

1. Raising education standards and improving the quality of teachers;
2. Launching a major reading initiative;
3. Expanding Head Start;
4. Expanding parental choice [using] charter schools;
5. Teaching character education;
6. Renovating old schools;
7. Building new schools;
8. Making completion of junior college rather than high school the universal standard;
9. Encouraging lifetime learning; and
10. Connecting all schools to the Internet.

Id. at 39 (internal citations omitted).

²⁹ MANNA, *supra* note 13, at 75.

that would reach all, or substantially all, of the nation's students. It did so by requiring proficiency reports based on the yearly testing of students between grades three and eight.³⁰ The law also provided that the states must administer a National Assessment of Educational Progress (NAEP) test every other year to allow the federal government to publish a national report card for the nation's schools.³¹ All of these requirements were designed as conditions placed upon a state's receipt of Title I funding, which remains "the largest source of states' elementary education funding from the federal government."³² The most notable condition placed on the receipt of Title I funding is that each state must design and comply with an Adequate Yearly Progress (AYP) program for improvement in student academic proficiency rates.³³

A. Adequate Yearly Progress (AYP)

AYP is determined by each state and submitted to the Secretary of Education.³⁴ Despite potential economic heterogeneity within a state, the AYP program for each state is required to apply each individual AYP measurement to all school districts equally.³⁵ This means that notwithstanding the original design of Title I funds,³⁶ or the publicly stated purpose of NCLB Title I expenditures,³⁷ the law is written in a manner that requires states to enter into a "high-stakes accountability system for *all* schools and students."³⁸ While the law does require separate AYP measurements for particular groups,³⁹ the equal weight of these individual AYP levels across the state, coupled

³⁰ NAT'L CENTER FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., MAPPING 2005 STATE PROFICIENCY STANDARDS ONTO THE NAEP SCALES iii (2007).

³¹ *Id.*; see also Nat'l Assessment of Educ. Progress, Nation's Report Card, available at <http://nationsreportcard.gov/> (last visited Feb. 12, 2010); Note, *No Child Left Behind and the Political Safeguards of Federalism*, 119 HARV. L. REV. 885, 887–88 (2006).

³² Note, *supra* note 31, at 887.

³³ See 20 U.S.C. § 6311(b)(2) (2006).

³⁴ See 20 U.S.C. § 6311(b)(2)(B); see also ANDERSON, *supra* note 10, at 161; Note, *supra* note 31, at 887.

³⁵ 20 U.S.C. § 6311(b)(2)(G)(ii); see also ANDERSON, *supra* note 10, at 161.

³⁶ See ANDERSON, *supra* note 10, at 63 ("Title I has been the most reliable source of 'compensatory' education funds in the United States—money to supplement state and local revenues for schools serving students from poor families."). Title I was created to be the major portion of "ESEA directed at improving schools in economically disadvantaged areas." Kathleen Sebelius & Ned Sebelius, *Bearing the Burden of the Beltway: Practical Realities of State Government and Federal-State Relations in the Twenty-First Century*, 3 HARV. L. & POL'Y REV. 9, 17 (2009).

³⁷ See ANDERSON, *supra* note 10, at 161.

³⁸ See *id.* (emphasis added).

³⁹ See 20 U.S.C. §§ 6311(b)(2)(C)(v), (b)(3)(C)(xiii), (h)(1)(C); Nicole Liguori, Note, *Leaving No Child Behind (Except in States That Don't Do As We Say): Connecticut's Challenge to the Federal Government's Power to Control State Education Policy Through the Spending Clause*, 47 B.C. L. REV. 1033, 1048 (2006) ("States must make the test results

with the 2014 deadline for complete proficiency, suggests that the AYP requirements of NCLB are unsustainable.⁴⁰

AYP levels and testing requirements were the main focus of debates during the early stages of NCLB's drafting in Congress.⁴¹ While supporters of the respective House and Senate bills touted the flexibility in designing AYP proficiency levels, there was growing concern over the practicality of some of the federal requirements—namely the one hundred percent proficiency achievement by 2014.⁴² At one point it was determined that the initially proposed AYP formula, a formula to be applied to all states, was significantly flawed.⁴³ The Senate committee discussing the bill, the Committee on Health, Education, Labor, and Pensions, took the proposed AYP formula and “applied [it] . . . retroactively to Connecticut, North Carolina, and Texas.”⁴⁴ All three states had unquestionably made significant progress in “narrowing achievement gaps between student groups,” and yet all three states would have been labeled as needing improvement when the committee applied the proposed AYP formula.⁴⁵ Needless to say, this created much concern within the Senate, and stalled the bill for many weeks.⁴⁶ While the proposed formula was adjusted to reflect some desired changes, the initial problem regarding its application was never corrected.⁴⁷ States were given control of the scheduling, but the final requirements remained complex.⁴⁸

When NCLB was drafted there were two major categories of AYP measurements: proficiencies in mathematics and reading.⁴⁹ Each individual AYP plan may vary, since the states are required to develop separate AYP levels for all students, as well

available to the public annually, disaggregated within every state, district, and school by gender, major racial and ethnic groups, English proficiency, migrant status, disability, and status as economically disadvantaged . . .”).

⁴⁰ See ANDERSON, *supra* note 10, at 193 (“By not correctly distinguishing between schools that are truly struggling and those that are not, [NCLB] may divert our concern from high-poverty schools that need immediate help to the public education system as a whole. . . . [E]rosion of public support is likely if schools are presumed to have failed simply because the bar for success is set unrealistically high.” (citation omitted)).

⁴¹ See MANNA, *supra* note 13, at 129 (“Testing and AYP captured much of the spotlight during 2001.”).

⁴² See *id.* at 124–30.

⁴³ See *id.* at 124–25.

⁴⁴ *Id.*

⁴⁵ *Id.* at 125.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 129 (“[T]he final result still remained technically complex. . . . NCLB included safe harbor provisions that allowed schools to comply with AYP rules even if achievement for all pupil groups did not increase on schedule.” (citation omitted)).

⁴⁹ *Id.* at 127–28 & tbl.6.1. In 2006, a third AYP category was added to measure proficiency in science. Phillip T.K. Daniel, “*Some Benefit*” or “*Maximum Benefit*”: *Does the No Child Left Behind Act Render Greater Educational Entitlement to Students with Disabilities*, 37 J.L. & EDUC. 347, 351 (2008).

as “economically disadvantaged students; . . . students from major racial and ethnic groups; . . . students with disabilities; and . . . students with limited English proficiency.”⁵⁰ At first glance, this language might suggest that states have increased flexibility insofar as they could determine differing AYP levels for each distinguishable category of students. Unfortunately, this is not the case. Each proficiency rating has an ultimate requirement of one hundred percent proficiency achievement by the year 2014.⁵¹ In this respect, states are extremely limited by NCLB.⁵²

Despite the fact that states design the AYP schedule they must ultimately follow, each school district must strictly adhere to the schedule or face serious consequences in the form of corrective action. NCLB “does not prescribe how States must officially designate schools that do not meet AYP requirements,”⁵³ but it does require action following the second year of failure to achieve the AYP level scheduled.⁵⁴ Specifically with regard to Title I funding, should a school fail to attain AYP two years in a row, *all* students must be given the option to attend a different school in the district.⁵⁵ If a school fails three years in a row, the law requires that the district provide free tutoring and other supplemental academic enhancement programs.⁵⁶ Eventually, after four consecutive years of failure to achieve AYP, the state must make significant modifications to the school, or district, in order to receive federal

⁵⁰ 20 U.S.C. §§ 6311(b)(2)(C)(v)(I)–(II) (2006).

⁵¹ See MANNA, *supra* note 13, at 128 tbl.6.1.

⁵² Compare the AYP requirements of NCLB with statements made by President George W. Bush during his first address to a joint session of Congress: “We should not and we will not run public schools from Washington, D.C. Yet when the federal government spends tax dollars, we must insist on results.” George W. Bush, Address Before a Joint Session of Congress on Administrative Goals, 2001 PUB. PAPERS 140, 141 (Feb. 27, 2001); see also Sebelius & Sebelius, *supra* note 36, at 16–17. The program itself is consistent with accountability, but the restrictions imposed by the seemingly arbitrary 2014 complete proficiency deadline causes one to question whether the schools are being constrained by this federal law.

⁵³ Letter from Rod Paige, Secretary of Education, to Education Officials (July 24, 2002), available at <http://www.ed.gov/policy/elsec/guid/secletter/020724.html>.

⁵⁴ See MANNA, *supra* note 13, at 128.

⁵⁵ See U.S. Dep’t of Educ., Adequate Yearly Progress, <http://answers.ed.gov/> (follow link for 15: Schools not making adequate yearly progress) (last visited Feb. 12, 2010).

⁵⁶ See 20 U.S.C. § 6316(e)(12)(C) (2006) (defining “supplemental educational services” (SES)). In addition, the school will “be required to make major changes [to its] . . . personnel and possibly its organization.” MANNA, *supra* note 13, at 128 tbl.6.1. There is a certain moral hazard created by SES requirements at this stage of corrective action. This is because those who tutor under an SES program are typically the teachers in the school district that has failed to make AYP. While it is not suggested that teachers would purposely fail to achieve AYP in their classrooms in order to supplement their income with SES tutoring programs, it is odd that NCLB would consider SES tutoring provided by the same individuals who failed to make AYP a *corrective* action. For a further discussion of this issue, see Frederick M. Hess & Chester E. Finn, Jr., *Conclusion: Can This Law Be Fixed? A Hard Look at the NCLB Remedies*, in NO REMEDY LEFT BEHIND: LESSONS FROM A HALF-DECADE OF NCLB 309, 315 (Frederick M. Hess & Chester E. Finn, Jr. eds., 2007).

funds.⁵⁷ Such changes include reopening the school as a public charter school, replacing all or most of the staff, hiring a private management company to take over the school, or forcing the state to run the school.⁵⁸ Obviously such changes are potentially drastic, and extremely costly.

In practice, the law's inevitable implosion is the consequence of a certain moral hazard created by the reauthorization requirements. It is recognized that "NCLB contains incentives for perverse behavior," and as a result, the states have been taking significant risks.⁵⁹ States, aware that they would need to achieve one hundred percent proficiency by 2014, essentially gambled on whether or not the requirements would be reconsidered in 2007, when the law was up for reauthorization.⁶⁰ As a result, most schools self-scheduled their yearly proficiency levels to be low in the early years.⁶¹ Twenty-three states structured their achievement plans in accordance with this supposition, requiring smaller gains in the earlier years, and steeper gains following 2007.⁶² California was one such state, and is currently experiencing some of the most drastic increases.⁶³ In 2001, the state had "13.6 percent of [its] students proficient in reading."⁶⁴ In response, it promised a yearly progress rate of 2.2% between 2002 and 2007.⁶⁵ Afterwards, the rate would balloon near eleven percent each year until the 2014 deadline.⁶⁶ Even former Secretary of Education Margaret Spellings has acknowledged that this problem is serious, and "something we need to address."⁶⁷

While some schools are engineering lower expectations,⁶⁸ others are asking simply for more time. With the 2007 reauthorization date having come and gone, and the AYP requirements remaining intact, states are scrambling in their efforts to comply with NCLB in order to maintain their source of federal education funding. While publicly offering steadfast support for the 2014 deadline for proficiency,⁶⁹ the Department of Education has been flexible in allowing the states to strategically

⁵⁷ See MANNA, *supra* note 13, at 128 tbl.6.1.

⁵⁸ U.S. Dep't of Educ., No Child Left Behind, Accountability and Adequate Yearly Progress (AYP), <http://www.ed.gov/admins/lead/account/ayp203/edlite-slide018.html> (last visited Apr. 17, 2010).

⁵⁹ See Will, *supra* note 14 (suggesting that the law will be reauthorized, "because doubling down on losing bets is what Washington does").

⁶⁰ See Sam Dillon, *Under 'No Child' Law, Even Solid Schools Falter*, N.Y. TIMES, Oct. 13, 2008, at A1.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ See Sam Dillon, *Federal Researchers Find Lower Standards in Schools*, N.Y. TIMES, Oct. 30, 2009, at A22.

⁶⁹ Dillon, *supra* note 60.

achieve the requisite AYP.⁷⁰ For example, many states have requested and received approval for the use of confidence intervals in the statistical calculations of student proficiency.⁷¹ Applying these confidence intervals to student proficiency levels allows for some “wiggle room,” making it far easier to demonstrate that the academic proficiency within a district falls in the margin of error allowed by the AYP plan.⁷² Some states continue to maneuver in hopes that the law will be changed,⁷³ while others have sought to enforce the unfunded mandates clause which could conceivably be read as requiring the federal government to pay for statewide AYP compliance.⁷⁴

B. Unfunded Mandates Clause

Section 7907(a), or the unfunded mandates clause, is one of the more highly controversial provisions of NCLB. It 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 funds or incur any costs not paid for under this Act.⁷⁵

A casual reading could lead one to assume that nothing resulting from NCLB, whether it be by statute or regulation, could force an unfunded mandate upon the states. Indeed, this is what some have argued, particularly pointing out that this provision prevents the states or school districts from having to spend additional funds to pay for NCLB compliance.⁷⁶ Those that have made such claims conclude that states are

⁷⁰ Center on Education Policy, *States Test Limits of Federal AYP Flexibility: Process for Amending State NCLB Accountability Plans Needs to be More Transparent, Report Charges*, Nov. 17, 2005, <http://www.cep-dc.org/index.cfm?fuseaction=feature.showFeature&FeatureID=15&varuniqueuserid=73007196965> [hereinafter *States Test Limits*].

⁷¹ *See id.*; Daniel deVise, ‘Safe Harbor’ Offers Shelter From Strict ‘No Child’ Targets, WASH. POST, April 7, 2008, at B1.

⁷² *States Test Limits*, *supra* note 70. Looking at New Mexico as an example: Prior to the introduction of a confidence interval, a New Mexico school had to have 37 percent of its students scoring at the proficient level or higher . . . to make AYP. But now, with the confidence interval, a high school in New Mexico with 300 students can make AYP if [only] 31 percent of its students score at the proficient level.

Id.

⁷³ Dillon, *supra* note 60.

⁷⁴ *See infra* notes 127–33 and accompanying text.

⁷⁵ 20 U.S.C. § 7907(a) (2006).

⁷⁶ *See infra* notes 127–33 and accompanying text; *see also* Sam Dillon, *Judge Dismisses Connecticut’s Challenge to Education Law*, N.Y. TIMES, Apr. 30, 2008, at A13.

neither required to fund AYP testing, nor take any such corrective action resulting from non-compliance. “Connecticut, for example, claim[ed] that it lack[ed] the \$41.6 million necessary to comply with the Act’s requirement that testing be conducted every year for elementary school students.”⁷⁷ While this particular argument has yet to persuade a court,⁷⁸ it has fueled the similar claim that the unfunded mandates clause in and of itself is ambiguous and potentially misleading.⁷⁹ With so much money on the line, some states have abandoned their own testing systems entirely in favor of a national standard.⁸⁰ There can be no doubt as to the effect that NCLB has had on states and school districts, but the question becomes whether this clause in conjunction with the requirements of the law suggests that those effects have been coercive or voluntary.

II. CLEAR STATEMENT ANALYSIS FOR CONDITIONAL GRANTS

Once they accept federal funds proffered by NCLB, states and their respective school districts become “prisoners of th[e] law.”⁸¹ The obligations imposed by the

⁷⁷ Liguori, *supra* note 39, at 1035. Connecticut was also required by state law to use Connecticut Mastery Tests (CMT) to evaluate its students. There were inconsistencies with the application of the federal testing requirements and the CMT requirements. For instance, the CMTs at the time were administered in alternate years instead of annually. *See id.* at 1053–54 (“Connecticut requires public school students in fourth, sixth, and eighth grades to take the CMT . . .”). As a result Connecticut was compelled to spend a significant portion of its own state funds to bring its own testing into compliance with NCLB. This was required despite the fact that the CMTs were widely viewed as successful testing devices, and Connecticut students typically “rank among the highest . . . in the nation.” *Id.* at 1053. In fact, commenting on the lawsuit shortly after it was filed, Connecticut Attorney General Richard Blumenthal pointed out the success of the CMT program. *News & Notes: Connecticut Sues Over ‘No Child Left Behind’* (NPR radio broadcast Aug. 24, 2005), transcript available at <http://www.npr.org/templates/story/story.php?storyId=4813502> (commenting that “for more than two decades [Connecticut] has done testing every other year and we have a proud record of improving educational achievement in our state, of narrowing the gaps that exist in achievement, of raising the bar and the standards here in Connecticut, through alternate-year testing. And if the federal government wants to impose those mandates [that require annual testing], it should fund them”). The CMTs have since been modified to comply with NCLB’s annual testing requirements, and now test students in grades three, four, five, six, seven, and eight. *See* CONNECTICUT STATE DEP’T OF EDUC., *CONNECTICUT MASTERY TEST: FOURTH GENERATION: MATHEMATICS HANDBOOK* vii (2006), available at <http://www.sde.ct.gov/sde/lib/sde/pdf/curriculum/math/cmtgeneralinformation.pdf>.

⁷⁸ Dillon, *supra* note 76.

⁷⁹ *See infra* Part III.B.

⁸⁰ *Sebelius & Sebelius, supra* note 36, at 17 (“NCLB led Kansas to abandon a successful statewide protocol in favor of additional national tests because of the fear of losing federal funding.”).

⁸¹ *See* Walsh, *supra* note 18, at 7 (quoting Robert H. Chanin, general counsel of the National Education Association).

law often escalate, along with the costs of compliance, and federal funds too often fall short.⁸² In an ideal situation, there would be no informational asymmetry, and all interested parties would understand the consequences of entering into a government program. Yet, with a program as large as NCLB, it is often understood that unintended consequences and unanticipated costs, particularly at the local level, are likely to arise. Over the past three decades it has become the norm for federal education policies to engender costs that must be absorbed at the local level.⁸³ For this very reason, there was a significant fear of unfunded mandates being levied on the states, spurring lengthy discussions during the original debate over NCLB.⁸⁴ The end result was the above-mentioned statutory language contained in § 7907(a), the unfunded mandates clause.⁸⁵ The outrage expressed by those who challenge the unfunded mandates clause is not that the costs of compliance are staggeringly high, although that certainly helps fuel the fire, but rather that Congress had been wary of such costs and drafted the specific language to ease the tension. The most recent challenge argued first that the clause suggests the federal government must pay for these costs.⁸⁶ In the alternative, the school districts challenged NCLB on the whole as being poorly drafted and unconstitutionally ambiguous, relying on § 7907(a).⁸⁷

Both the federal government and the states have acknowledged that the unfunded mandate clause is ambiguous in some regards.⁸⁸ The Department of Education has interpreted these ambiguities as merely reflective of Congress's decision to defer to the Department when forcing states to spend their own money.⁸⁹ On the other hand, many states have suggested that such ambiguities necessarily trigger the clear statement rule discussed in *Arlington Central School District Board of Education v. Murphy* and similar cases.⁹⁰ The clear statement rule is designed to act as a limitation on the congressional power to spend, and it has been suggested that, insofar as NCLB is concerned, the time has come for Congress to stop attempting to skirt this limitation by coercing compliance and state expenditures.⁹¹

⁸² *See id.*

⁸³ *See* ANDERSON, *supra* note 10, at 100.

⁸⁴ *Id.*

⁸⁵ 20 U.S.C. § 7907(a) (2006).

⁸⁶ *See infra* Part III.B.

⁸⁷ *See infra* Part III.B.

⁸⁸ *See* Walsh, *supra* note 18.

⁸⁹ *See id.*

⁹⁰ *See* *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006); *see also* *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 24–25 (1981) (“Congress must express clearly its intent to impose conditions on the grant of federal funds so that states can knowingly decide whether or not to accept those funds.”); *Mowbray v. Kozlowski*, 914 F.2d 593, 598 (4th Cir. 1990) (noting that “the states must not be left to guess at federal intentions in their own budgetary planning process”).

⁹¹ ANDERSON, *supra* note 10, at 169–70 (“It is time Congress stopped trying to circumvent the constitutional limitations on its authority by using the people’s own money to bribe [states] into complying with unconstitutional federal dictates.” (quoting Rep. Ron Paul (R-TX))).

A. *The Clear Statement Rule*

The Supreme Court has long recognized that Congress enjoys a fairly broad power to spend in furtherance of the nation's general welfare.⁹² Indeed, the Court has consistently permitted the congressional conditioning of federal funds.⁹³ When developing legislation, the Spending Clause allows Congress to induce behavior by attaching conditions to any financial support it provides.⁹⁴ The Supreme Court has also acknowledged that such powers to condition funding are subject to certain restrictions.⁹⁵ Chief among these restrictions is that such conditions must be expressly stated, and have some legitimate relation to the federal interest at stake.⁹⁶

In *South Dakota v. Dole* the Court was asked to determine the validity of a condition imposed upon a particular state grant.⁹⁷ Specifically, the Court upheld a federal statute that conditioned the receipt of federal highway funds, authorizing only those states with a valid minimum drinking age to receive the funds in full.⁹⁸ In doing so, the Court cautiously noted that Congress, should it desire to impose conditions upon "the States' receipt of federal funds, it 'must do so unambiguously . . . , [allowing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.'"⁹⁹ This limitation has been referred to as the clear statement rule.¹⁰⁰

As a result of this rule, Congress must be clear and precise when it dictates conditions for state receipt of federal funds. The operative language, which the Court continues to apply, is whether the state entering into the federal agreement does so "knowingly" and "voluntarily."¹⁰¹ Such an agreement is often viewed as a contract

⁹² See, e.g., *United States v. Butler*, 297 U.S. 1, 64–66 (1936).

⁹³ See *New York v. United States*, 505 U.S. 144, 166 (1992) ("Our cases have identified a variety of methods . . . by which Congress may urge a State to adopt a legislative program consistent with federal interests."); see also, e.g., *Rosado v. Wyman*, 397 U.S. 397, 427 (1970); *King v. Smith*, 392 U.S. 309 (1968); *Oklahoma v. Civil Serv. Comm.*, 330 U.S. 127 (1947).

⁹⁴ *New York*, 505 U.S. at 166–67; *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) ("Congress may attach conditions on the receipt of federal funds.").

⁹⁵ See *Dole*, 483 U.S. at 207–08.

⁹⁶ ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 203 (1997). Also, of particular interest in NCLB commentary, another such limitation is that Congress must not make the financial inducement "so coercive as to pass the point at which 'pressure turns into compulsion.'" Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 355 (2008) (quoting *Dole*, 483 U.S. at 211).

⁹⁷ 483 U.S. at 205.

⁹⁸ *Id.* The statute withheld five percent of the federal highway funds allocable to the state, unless the state in question had a law on the books requiring the minimum age for purchase or possession of alcoholic beverages to be no less than twenty-one. *Id.* at 205, 211; see also 23 U.S.C. § 158 (2006) (amended in 1998 to withhold ten percent).

⁹⁹ *Dole*, 483 U.S. at 207 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (alteration in original)).

¹⁰⁰ See Brian Galle, *Federal Grants, State Decisions*, 88 B.U. L. REV. 875, 878 (2008).

¹⁰¹ *Pennhurst*, 451 U.S. at 17 ("The legitimacy of Congress's power to legislate under the

between the federal government and the state accepting the funds.¹⁰² The knowing and voluntary aspect of that particular contract ceases to exist, and there can be no acknowledgeable agreement, should its terms and conditions leave a state unaware of its obligations.¹⁰³ Typically this requirement can be satisfied upon a finding by a court that the conditions upon which a state is to receive federal funding “could not be more clearly stated.”¹⁰⁴ This is not to suggest that the requirement ought to be construed in the light most favorable to Congress. Rather, courts have interpreted the clear statement rule to require the resolution of ambiguities in favor of the states.¹⁰⁵ If such ambiguities were not construed against the drafter, namely Congress, the federal government would otherwise be able to hamper state governments in their ability to budget their own spending obligations.¹⁰⁶

Congress, in enacting NCLB pursuant to its authority derived from the Spending Clause, was obligated to adhere to the clear statement rule. Congress was not required to detail the expected costs of compliance over the lifespan of NCLB, or even remove any potential unfunded mandates. It needed only to ensure that the statute was devoid of ambiguous clauses in those sections that imposed conditions on the receipt of Title I funds. Consequently, the language of NCLB had to be specific enough such that a court could find that the law “could not [have been] more clearly stated.”¹⁰⁷ The clear statement rule was later explained to require that, in cases of voluntary programs with conditional congressional spending, such conditions must be specified so that a state official would reasonably have been put on notice of the obligations such conditions would entail.¹⁰⁸ Specifically, the unfunded mandates clause violates the clear statement rule if a state official could not have been placed on such reasonable notice.¹⁰⁹

B. Recent Clear Statement Application and the Unfunded Mandates Clause

In 2006, the Supreme Court ruled on a case involving a federal education statute, and found it lacked the degree of notice required by the clear statement rule.¹¹⁰ In *Arlington Central School District Board of Education v. Murphy*, the Court reviewed a provision of the Individuals with Disabilities Education Act (IDEA) that allowed

spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the ‘contract.’”).

¹⁰² See *id.*; Celestine Richards McConville, *Federal Funding Conditions: Bursting Through the Dole Loopholes*, 4 CHAP. L. REV. 163, 183 (2001).

¹⁰³ *Pennhurst*, 451 U.S. at 17.

¹⁰⁴ See *Dole*, 483 U.S. at 208; see also McConville, *supra* note 102, at 183.

¹⁰⁵ *Coleman v. Glynn*, 983 F.2d 737, 737 (6th Cir. 1993) (Merritt, C.J., concurring).

¹⁰⁶ *Id.*

¹⁰⁷ *Dole*, 483 U.S. at 208.

¹⁰⁸ *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006).

¹⁰⁹ See *id.*

¹¹⁰ *Id.* at 300.

for parents to recover “reasonable attorneys’ fees as part of [their] costs” in successful IDEA actions.¹¹¹ At issue was whether this provision extended recovery for services rendered by an expert in any given IDEA action.¹¹² The focus of this inquiry was on the definition of the term “costs,” and whether that term included expert services.¹¹³ In determining that IDEA did not extend such recovery to plaintiffs, the Court relied on clear statement concerns.¹¹⁴ Although “costs” might be viewed as a straightforward term, the Court found it ambiguous enough to prevent the inclusion of expert services in its definition.¹¹⁵

It has since been suggested that *Arlington* indicates a more expansive role that the Court intends to take with regard to Spending Clause litigation.¹¹⁶ The Court “went out of its way” to address the Spending Clause issues in IDEA,¹¹⁷ when it could have otherwise determined that the provision did not apply to expert services under simple statutory construction.¹¹⁸ If inclusion of the word “costs” led to ambiguity in IDEA, similar usage of the term in § 7907(a) might also create uncertainty.¹¹⁹ “Costs” was a restrictive term in *Arlington*, such that it excluded expert fees, because such ambiguities are construed in favor of the states.¹²⁰ Should the term in the unfunded mandates clause become an issue, it too would be construed in favor of the states, resulting in an *inclusive* reading. This would suggest that the prohibition in § 7907(a) ought to apply to a wide range of costs. This term, however, is not the underlying controversy in the litigation that states have undertaken to challenge the clarity of NCLB. It merely serves as an illustration that potential ambiguity abounds in § 7907(a). Indeed, the linchpin phrase appears to be that nothing shall “authorize an officer or employee of the Federal Government to mandate.”¹²¹ In recent years, states and their school districts have sought to litigate this issue in order to escape the confines of NCLB.

III. *PONTIAC V. SPELLINGS* AND OTHER STATE CHALLENGES

By adding the unfunded mandates language, Congress created significant ambiguity as to how the states themselves ought to finance their NCLB compliance. When

¹¹¹ *Id.* at 293–94 (citing 20 U.S.C. § 1415(i)(3)(B) (2006)).

¹¹² *Id.*

¹¹³ *Id.* at 296–98.

¹¹⁴ *See id.* at 296–300.

¹¹⁵ *Id.* at 300.

¹¹⁶ Bagenstos, *supra* note 96, at 408–10.

¹¹⁷ *Id.* at 350–51.

¹¹⁸ *See Arlington*, 548 U.S. at 304–05 (Ginsburg, J., concurring).

¹¹⁹ *See* 20 U.S.C. § 7907(a) (2006) (“Nothing in this [Act] shall be construed to . . . mandate a State . . . to spend any funds *or incur any costs* not paid for under this [Act].” (emphasis added)).

¹²⁰ *See Arlington*, 548 U.S. at 301–03.

¹²¹ *See* 20 U.S.C. § 7907(a); *see also* Michael J. Pendell, *How Far is Too Far?: The Spending Clause, the Tenth Amendment, and the Education State’s Battle Against Unfunded Mandates*, 71 ALB. L. REV. 519, 537 (2008); *infra* Part III.B.

coupled with the lofty, and often penalizing, requirements of NCLB, the unfunded mandates clause creates non-trivial budgeting concerns in many states.¹²² Though the onus has thus far been placed upon the states to take any financial hit for additional funding, the unfunded mandates clause, as currently written, would lead one to question whether this particular burden was intended to be placed on the states. As these types of ambiguities are typically read in favor of the states,¹²³ if a question remains as to who should pay for compliance, the state or the federal government, it is the federal government who must pony up.¹²⁴ If one thing is clear from the recent challenges discussed below, it is that NCLB is itself unclear.¹²⁵

A. State Challenges to NCLB Clarity

States have sought to challenge NCLB, and specifically the unfunded mandates clause, as being overly burdensome and ambiguous.¹²⁶ Not only does NCLB leave doubt as to how states are to obtain federal education funding, but it is also unclear with respect to the impact on states opting out of the law. Indeed, when Utah sought to opt out in 2004, the “Secretary of Education [had to inform] the Utah Legislature that opting out of NCLB would result in not only a loss of \$43 million in Title I funds, but also a forfeiture of any funds that rely on the Title I formula.”¹²⁷ That the Secretary of Education had to inform the State of Utah of this fact further indicates that the law itself is not clearly defined. Some have argued that mere opting out uncertainty is enough to strike down NCLB.¹²⁸

In 2005 the State of Connecticut sued the federal government challenging, *inter alia*, the unfunded mandates clause and its application.¹²⁹ The main allegation was

¹²² This is particularly true with respect to those school districts that have consistently failed to achieve AYP in consecutive years, an ever increasing number. *See, e.g.*, Dillon, *supra* note 60.

¹²³ *See* Coleman v. Glynn, 983 F.2d 737, 737 (6th Cir. 1993) (Merritt, C.J., concurring) (stating that unless “ambiguous language [is construed] in favor of the states, states will be unable to plan, and adopt intelligently, budgets itemizing their spending obligations”); *see also* Galle, *supra* note 100, at 876 (“[T]he Supreme Court has held that conditions attached by Congress to federal grants . . . should be interpreted strictly against Congress . . .”) (citing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

¹²⁴ For a detailed discussion of the argument that the unfunded mandates clause “is ambiguous on the question [of] whether states and school districts can be required to use their own funds for . . . compliance,” see Supplemental Brief of Plaintiff-Appellants at 23, Sch. Dist. of Pontiac v. Sec’y of the U.S. Dep’t of Educ., 512 F.3d 252 (6th Cir. 2008) (No. 05-2708).

¹²⁵ This is likely a result of the language contained in the unfunded mandates clause. *See* 20 U.S.C. § 7907(a) (2006).

¹²⁶ *See, e.g.*, Liguori, *supra* note 39, at 1035.

¹²⁷ Pendell, *supra* note 121, at 537.

¹²⁸ *See id.*

¹²⁹ *See* Connecticut v. Spellings, 453 F. Supp. 2d 459, 480 (D. Conn. 2006). For a discussion of the rationale underlying the original complaint, see Liguori, *supra* note 39, at 1052–59.

that the federal government was not providing the state with an adequate level of funding, thereby violating the unfunded mandates clause.¹³⁰ The state accused the President and his “administration of being ‘rigid, arbitrary and capricious’ in the enforcement” of NCLB.¹³¹ It also argued that it was being denied “due process by refusing [its] request to continue its 20-year tradition of testing in alternate years, instead of every year from grades three through eight.”¹³² The court, however, dismissed Connecticut’s claim for lacking subject matter jurisdiction.¹³³ Thus, the court did not clarify the meaning of the unfunded mandates clause, nor did it address the issue of whether the clause itself was ambiguous enough in its language to indicate a constitutional violation.¹³⁴ As a result, the National Education Association (NEA), and several school districts brought another such suit.¹³⁵

B. Pontiac v. Spellings

The plaintiffs in *Pontiac*, nine school districts and multiple education associations from various states,¹³⁶ alleged that the unfunded mandates clause does not require states to cover the additional costs of compliance.¹³⁷ Specifically, the plaintiffs contended that the clause is violated if the federal government requires the “states and school districts to comply fully with all of the NCLB mandates even though [they] have not been provided with sufficient federal funds to pay for such compliance.”¹³⁸

¹³⁰ Liguori, *supra* note 39, at 1052–53.

¹³¹ Sam Dillon, *U.S. is Sued by Connecticut Over Mandates on School Tests*, N.Y. TIMES, Aug. 23, 2005, at B1.

¹³² Joan Indiana Rigdon, *No Child Left Behind Act*, WASH. LAW., April 2008, available at http://www.dobar.org/for_lawyers/resources/publications/washington_lawyer/april_2008/no_child.cfm.

¹³³ *Spellings*, 453 F. Supp. 2d at 489.

¹³⁴ Initially the court noted that “nothing in this decision should be construed as determining (one way or the other) whether the State’s arguments regarding the Unfunded Mandates Provision and the Constitution are properly before the Court.” *Id.* at 502. On a subsequent motion for judgment on the administrative record, the court stated that it “wishes to be clear that it has not ruled on the merits of the State’s Unfunded Mandates Provision claim because the argument was never made.” *Connecticut v. Spellings*, 549 F. Supp. 2d 161, 181 (D. Conn. 2008); *see also* Dillon, *supra* note 76.

¹³⁵ *See* Sch. Dist. of Pontiac v. Spellings, No. 05-CV-71535-DT, 2005 U.S. Dist. LEXIS 29253 (E.D. Mich. Nov. 23, 2005), *rev’d sub nom.* Sch. Dist. of Pontiac v. Sec’y of Educ., 512 F.3d 252 (6th Cir. 2008), *aff’d en banc*, 584 F.3d 253 (6th Cir. 2009) (plurality opinion affirming district court); *see also*, Sam Dillon, *Teachers’ Union and Districts Sue Over Bush Law*, N.Y. TIMES, Apr. 21, 2005, at A1.

¹³⁶ There were eight distinguishable school districts and Rutland Northeast Supervisory Union, which included eleven other school districts. *Sch. Dist. of Pontiac v. Sec’y of Educ.*, 584 F.3d 253, 256 & n.1 (6th Cir. 2009).

¹³⁷ *See* Sch. Dist. of Pontiac v. Sec’y of Educ., 512 F.3d 252, 256–57 (6th Cir.), *vacated*, 2008 U.S. App. LEXIS 12121 (6th Cir. 2008).

¹³⁸ *See* *Pontiac*, 2005 U.S. Dist. LEXIS 29253 at *3 (quoting language from the Plaintiffs’ Complaint).

As one example, the plaintiffs pointed out that Illinois will spend \$15.4 million in order to comply with NCLB testing requirements each year, while only \$13 million will be provided to the state by the federal government for testing purposes.¹³⁹ Another example exists in the State of Connecticut, where federal funding for “technical assistance” accounts for approximately one percent of the total cost of NCLB compliance.¹⁴⁰ Such significant shortfalls suggest that federal funding is “woefully inadequate,” and consequently inhibits, more than it advances, compliance with NCLB.¹⁴¹ In the alternative, the plaintiffs argued that the unfunded mandates clause was unclear and ambiguous, and was thereby unenforceable as a violation of Congress’s powers pursuant to the Spending Clause.¹⁴² They sought injunctive relief, prohibiting the federal government from either forcing compliance with NCLB, or withholding Title I funding as a result of their noncompliance.¹⁴³

The District Court for the Eastern District of Michigan dismissed the case for failure to state a claim.¹⁴⁴ In doing so, however, the court interpreted the unfunded mandates clause in a rather inconsistent manner. It determined that the unfunded mandates clause did not claim that “federal funding would pay for 100% of all NCLB requirements.”¹⁴⁵ The court stated that if this is what Congress had intended, it would have phrased the clause “to say so clearly and unambiguously.”¹⁴⁶ While this may be true, it ignores the fundamental point that the plaintiffs had also argued—that the clause is itself unclear and ambiguous. The district court appears to have concluded that the correct interpretation is one suggested by the Secretary,¹⁴⁷ that the clause merely prohibits “officers or employees” from incurring costs not paid for under NCLB; but the district court never explicitly stated that the unfunded mandates clause is consistent with the constitutional requirements of being clearly stated.

The plaintiffs would later argue on appeal that the Sixth Circuit Court of Appeals was not required to settle on one particular interpretation of the unfunded mandates clause in order to find a constitutional violation.¹⁴⁸ Both the original panel opinion and the plurality opinion when the case was reheard devoted significant amounts of space to the multiple ways in which the statute could be read.¹⁴⁹ The following

¹³⁹ *Id.* at *5.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at *4–5.

¹⁴² *See id.* at *5–6; *Pontiac*, 512 F.3d at 257.

¹⁴³ *Pontiac*, 2005 U.S. Dist. LEXIS 29253, at *6.

¹⁴⁴ *Id.* at *13.

¹⁴⁵ *Id.* at *12.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at *11–13.

¹⁴⁸ Final Opening Brief of Plaintiffs-Appellants at 29, *Sch. Dist. of Pontiac v. Sec’y of Educ.*, 512 F.3d 252 (6th Cir. 2008) (No. 05-2708) (stating that if the court simply finds any ambiguity then “plaintiffs’ construction surely would have to be viewed as another permissible reading” as a result of the “clear statement rule”).

¹⁴⁹ *See Sch. Dist. of Pontiac v. Sec’y of Educ.*, 584 F.3d 253, 271–76 (6th Cir. 2009); *Sch.*

section details the ways in which the unfunded mandates clause may be interpreted, relying primarily on the original opinion of the Sixth Circuit.¹⁵⁰ While this opinion was subsequently vacated upon a successful petition for a rehearing *en banc*, the logic remains the exact same in the subsequent plurality opinion issued following the rehearing.¹⁵¹

1. The Unfunded Mandates Clause and its Many Interpretations

In its analysis, the court discussed three distinct interpretations of the provision.¹⁵² Two of the three possible interpretations of the statutory language were offered by the Secretary of Education (the “Secretary”), the first of which was ultimately granted primacy by the district court.¹⁵³ While these first two interpretations are not necessarily mutually exclusive, the simple fact that the Secretary herself offered more than one possible reading indicates the high probability for ambiguity.

First, the court reviewed the district court’s interpretation of the unfunded mandates clause.¹⁵⁴ This reading was the first of two interpretations that represented the Secretary’s argument with respect to the provision, and was labeled the “Rogue . . . Officers or Employees” interpretation.¹⁵⁵ The district court ruled that the inclusion of the words “authorize an officer or employee” would necessarily entail that “Congress clearly . . . [intended] to prohibit federal officers and employees from imposing additional, unfunded requirements, beyond those provided for in the statute.”¹⁵⁶ The Secretary, in agreement, argued that the intention of the clause was to prohibit these officers or employees from effectively micromanaging the affairs of school districts, and to disallow specific expenditures unauthorized by the law.¹⁵⁷ In this regard, the Secretary reasoned that the unfunded mandates clause was crafted to forbid mandates upon curriculum or staffing changes, and prohibit any forced expenses related

Dist. of Pontiac v. Sec’y of Educ., 512 F.3d 252, 264–69 (6th Cir.), *vacated*, 2008 U.S. App. LEXIS 12121 (6th Cir. 2008).

¹⁵⁰ *Pontiac*, 512 F.3d at 252.

¹⁵¹ *Compare id.*, with Sch. Dist. of Pontiac v. Sec’y of Educ., 584 F.3d 253 (6th Cir. 2009). The two opinions were written by the same author, but this plurality opinion has no bearing on the ultimate *Pontiac* decision. For a discussion of why, see *infra* notes 199–202 and accompanying text.

¹⁵² *See Pontiac*, 512 F.3d at 264–69.

¹⁵³ *Id.* at 265–66.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 265.

¹⁵⁶ *Pontiac v. Spellings*, No. 05-CV-71535-DT, 2005 U.S. Dist. LEXIS 29253, at *12 (E.D. Mich. Nov. 23, 2005).

¹⁵⁷ Supplemental Brief for the Secretary of Education on Rehearing *En Banc* at 10, Sch. Dist. of Pontiac v. Sec’y of Educ., 584 F.3d 253 (6th Cir. 2009) (No. 05-2708). This particular brief, written after the court of appeals discredited the rogue officer or employee interpretation, argues that § 7907(a) ought to be read so as to disallow specific expenditures.

to per pupil spending, teacher salaries, or education equipment.¹⁵⁸ This, of course, suggests that the clause does not reach broader issues of AYP compliance or district-wide annual testing.

In its analysis, the court found two substantive problems with this first interpretation.¹⁵⁹ One problem, the court argued, was that the phrase “officer or employee” was included to modify only the first part of the clause.¹⁶⁰ The court found that the unfunded mandates clause has two parts, leading towards two separate conclusions: (1) Officers or employees may not “mandate, direct, or control a State, local educational agency, or school’s curriculum, program of instruction, or allocation of State or local resources . . . ;”¹⁶¹ and (2) “[n]othing 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.”¹⁶² Part (1) leads to a conclusion that is consistent with the Secretary’s first argument, that the clause seeks to merely prohibit micromanagement by officers or employees. Part (2), however, tailors itself to the argument made by the plaintiffs.¹⁶³ In this respect, the district court erred in determining that the Secretary’s interpretation, Part (1), was the *only* reasonable interpretation.

The other problem results if the phrase “authorize an officer or employee” is read to modify the second part of the clause. This phrase, coupled with the Secretary’s argument that the provision is intended to prohibit unauthorized management, leads the reader to inconsistent language. The Secretary’s interpretation would have the reader assume the unfunded mandates clause to state something that it does not actually state. Namely, that “[n]othing in this Act shall be construed to authorize an officer or employee of the Federal Government to . . . mandate . . . costs not [*authorized under this Act*].”¹⁶⁴ In actuality, the text reads “[n]othing in this [Act] shall be construed to authorize an officer or employee of the Federal Government to mandate . . . costs not *paid for under this [Act]*.”¹⁶⁵ Because the current status of the law is to allow “officers or employees” to require that states fund AYP compliance and annual testing out of funds that are not provided by NCLB, clearly these “officers or employees” are able to mandate that states pay for costs not “paid for” by NCLB. The rogue officer or employee interpretation only makes sense if you read into the

¹⁵⁸ *Id.* These are just a few examples offered by the Secretary.

¹⁵⁹ *See Pontiac*, 512 F.3d at 265–66.

¹⁶⁰ *Id.*

¹⁶¹ 20 U.S.C. § 7907(a) (2006).

¹⁶² *Pontiac*, 512 F.3d at 266 (quoting 20 U.S.C. § 7907(a)).

¹⁶³ Final Opening Brief of Plaintiffs-Appellants Pontiac School District at 29, Sch. Dist. of Pontiac v. Sec’y of Educ., 512 F.3d 252 (6th Cir. 2008) (No. 05-2708) (stating that if the court simply finds any ambiguity then “plaintiffs’ construction surely would have to be viewed as another permissible reading” as a result of the “clear statement rule”).

¹⁶⁴ *Pontiac*, 512 F.3d at 266 (rewriting the language of 20 U.S.C. § 7907(a) to match the argument made by the Secretary, and upheld by the district court) (alterations in original).

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

“paid for” language the additional language of authorization. This, however, indicates that the Secretary’s argument would lead to an inevitable tautology, namely that the law does not authorize an officer or employee from doing that which is unauthorized. To use some of the district court’s logic, if Congress had actually intended to include the circular language necessary to reach the Secretary’s initial interpretation, it could have expressly done so with the aforementioned modification suggested by the court.¹⁶⁶ The fact that it had not done so led the court to find the rogue officer or employee interpretation to be unconvincing.¹⁶⁷

Second, the court analyzed the defendant’s other suggested reading of the unfunded mandates language.¹⁶⁸ This interpretation, advanced by the Secretary, emphasized the overall voluntary nature of NCLB.¹⁶⁹ The suggestion is that the unfunded mandates clause simply restates the fact that states may choose to accept NCLB funding, along with its terms and conditions, on a voluntary basis.¹⁷⁰ Emphasis was put on the term “mandate” so that the clause itself became a simple reiteration of the notion that the federal government cannot, by its officers or employees, compel the states to spend money.¹⁷¹ Of course, once the states voluntarily became complicit with NCLB itself, this point becomes moot.¹⁷² In many respects, the unfunded mandates language, according to this second interpretation, exists solely for the benefit of states not adhering to NCLB, or receiving its funds.

The Secretary attempted to make this second reading clear by comparing the unfunded mandates language, and its underlying purpose, to the Unfunded Mandates Reform Act of 1995 (UMRA).¹⁷³ That particular law was drafted in response to a growing desire for more oversight of the costs placed upon state and local governments that were mandated by the federal government.¹⁷⁴ The UMRA introduced new procedures designed to increase clarity when Congress conditioned federal funding.¹⁷⁵ While it was not argued that NCLB would fall under the purview of the UMRA, the Secretary suggested that NCLB was decisively excluded from the UMRA because of its voluntary nature.¹⁷⁶ The UMRA excludes from the requirements placed upon

¹⁶⁶ *Pontiac*, 512 F.3d at 266.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *See id.*; *see also* Supplemental Brief for the Sec’y of Educ., *supra* note 157, at 15–17.

¹⁷⁰ Supplemental Brief for the Sec’y of Educ., *supra* note 157, at 15–17.

¹⁷¹ *Pontiac*, 512 F.3d at 266–67 (alluding to language specific to the unfunded mandates clause at 20 U.S.C. § 7907(a)).

¹⁷² Supplemental Brief for the Sec’y of Educ., *supra* note 157, at 15–17.

¹⁷³ *See* 2 U.S.C. § 658(5) (2006).

¹⁷⁴ U.S. GEN. ACCOUNTING OFFICE, UNFUNDED MANDATES: ANALYSIS OF REFORM ACT COVERAGE 3 (2004).

¹⁷⁵ *See id.* at 1–3.

¹⁷⁶ *See* Final Brief for the Appellee at 22, *Pontiac*, 512 F.3d 252 (6th Cir. 2008) (No. 05-2708).

“federal intergovernmental mandate[s]” those programs that are voluntary in participation.¹⁷⁷ Using this language, the Secretary attempted to draw parallels between the two laws, and to argue that the reason to include “unfunded mandates” language in NCLB was to distinguish the law as one such voluntary program that falls outside the scope of the UMRA.¹⁷⁸

The court did not buy this argument, and suggested that the language would be severely different had it been the intention of the clause to reflect and reiterate the voluntariness of the program.¹⁷⁹ In addressing this issue, the court drew its own parallels between NCLB and the language found in another law, the Perkins Vocational Education Act (the “Perkins Act”).¹⁸⁰ The language of section 2306a(a) of the Perkins Act closely mirrors that of the unfunded mandates clause: “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 Act, except as required under sections 112(b), 311(b), and 323 [of this Act].”¹⁸¹ Not only are the two unfunded mandates clauses similar, but the court found particular importance in the fact that the Perkins Act expressly excepts certain instances where a state is expected to spend its own funds.¹⁸² The fact that no such exceptions exist in NCLB’s unfunded mandates language suggests a broader reading of the clause.¹⁸³ Consequently, the court found this second interpretation posed by the Secretary to be narrow, mistaken, and equally unconvincing.¹⁸⁴

Third, the court reviewed yet another interpretation of the unfunded mandates clause that had been offered by the plaintiffs.¹⁸⁵ The plaintiffs contended that there are, in fact, two separate and distinct limitations on NCLB conditional requirements indicated by the unfunded mandates clause:¹⁸⁶ one, that “[n]othing in this Act shall be construed to authorize an officer or employee . . . to mandate, direct, or control, a State, local educational agency, or school’s curriculum, program of instruction, or allocation of State or local resources,” which the plaintiffs referred to as the “no-federal-control proviso”; and two, that “[n]othing 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

¹⁷⁷ See 2 U.S.C. § 658(5).

¹⁷⁸ See Final Brief for the Appellee, *supra* note 176, at 22.

¹⁷⁹ *Pontiac*, 512 F.3d at 267 (The court also noted that the plaintiffs did not dispute their own voluntary acceptance of the program.).

¹⁸⁰ *Id.* (citing 20 U.S.C. §§ 2301-2471 (1988)).

¹⁸¹ Carl D. Perkins Career and Technical Educ. Act of 2006, Pub. L. No. 109-270, 120 Stat. 683, 690–91 (codified at 20 U.S.C. § 2306a(a) (2006)).

¹⁸² See *Pontiac*, 512 F.3d at 268 (“In the Perkins Act, the 62-word provision is followed by exceptions to the provision. In NCLB, the 62-word provision is followed by no exceptions. The difference between the Perkins Act and NCLB in this regard shows that Congress is capable of explicitly stating when States must provide funding . . .”).

¹⁸³ See *id.*

¹⁸⁴ *Id.* at 268–69.

¹⁸⁵ *Id.*

¹⁸⁶ Final Opening Brief of Plaintiffs-Appellants, *supra* note 163, at 15–17.

this Act,” referred to as the “no-state-or-local-funds proviso.”¹⁸⁷ Both of these identifiable provisions work in tandem with the court’s above-mentioned discussion of how the phrase “officer or employee” actually modifies the text.¹⁸⁸ The court determined that the plaintiffs’ interpretation, insofar as it acknowledged that the states were not required to comply with NCLB conditions that were not fully funded, was at the very least, a reasonable interpretation.¹⁸⁹

In efforts to provide an auxiliary analysis of the unfunded mandates clause, the court discussed at length the legislative history supporting this third suggested interpretation. The language of the unfunded mandates clause predates NCLB, and was included in three separate education statutes passed in 1994.¹⁹⁰ The court cited statements made by certain House representatives in order to demonstrate that Congress never intended to hold states and localities responsible for requirements that were unfunded or underfunded by the federal government.¹⁹¹ NCLB’s sponsor in the Senate, Sen. Judd Gregg, explained that the proposed amendment, which would later become the unfunded mandates clause, was introduced “to assure that [NCLB would] . . . not become an unfunded mandate” and further, that “the Federal Government w[ould] have to pay for the costs of that mandate” on states.¹⁹²

Moreover, when the original language of the amendment was considered prior to the inclusion of the unfunded mandates provision in the Improving America’s Schools Act (IASA),¹⁹³ similar discussions were held on the floor of both the Senate and the House. Indeed, the early debates and discussions of the IASA were “rife with criticisms that the bill ‘provide[d] all the mandates, but no money to pay for them.’”¹⁹⁴ Once the appropriate language, not dissimilar to the unfunded mandates clause of NCLB, was added to the IASA bill, the friction quickly dissolved.¹⁹⁵ Indeed, before the vote on the conference report, it was mentioned that the language of the new provision, “clearly states that if any requirement in this bill results in an unfunded mandate, affected States and communities do not have to comply.”¹⁹⁶ In considering this history, the court noted that the evidence lent itself more persuasively towards the plaintiffs’ interpretation of the unfunded mandates clause.¹⁹⁷ All the evidentiary

¹⁸⁷ *Id.* (quoting language from 20 U.S.C. § 9527(a)).

¹⁸⁸ *Pontiac*, 512 F.3d at 265–66.

¹⁸⁹ *Id.* at 267. That is not to say, however, that this particular interpretation is the only correct reading of the statute.

¹⁹⁰ *Id.* at 269–70.

¹⁹¹ *Id.* at 270.

¹⁹² *Id.* (quoting 140 Cong. Rec. S626 (daily ed. Feb. 2, 1994) (amendment no. 1358, as modified)).

¹⁹³ See Pub. L. No. 103-382, 108 Stat. 3518 (1994).

¹⁹⁴ Final Opening Brief of Plaintiffs-Appellants, *supra* note 163, at 37 (quoting 140 Cong. Rec. H807 (daily ed. Feb. 24, 1994) (Representative Barrett)).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 38 (quoting 140 Cong. Rec. S14205 (daily ed. Oct. 5, 1994) (Senator Durenberger)).

¹⁹⁷ *Pontiac*, 512 F.3d at 271.

support, coupled with a few questionable interpretations, led the court to acknowledge that the plaintiffs' interpretation was at the very least reasonable. Recall that the standard, as restated in *Arlington*, is whether it can be said that a state official would clearly understand his or her obligations upon entering into the federal program.¹⁹⁸ That a reasonable reading of the unfunded mandates clause *could* be one in which states are not required to fund NCLB compliance suggests that a reasonable state official would not clearly understand his or her state's obligations in accepting Title I funds.

2. The Sixth Circuit Suggests a Clear Statement Violation

Although the original panel decision written by Judge R. Guy Cole, Jr. was vacated when the petition for a rehearing *en banc* was granted,¹⁹⁹ the plurality opinion issued following the rehearing adhered to the same logic. This comes as no surprise, as it too was authored by Judge Cole.²⁰⁰ Seven other judges agreed with his logic, which suggests that the Sixth Circuit might entertain such a claim brought by states and school districts.²⁰¹ However, the decision of the district court dismissing the claim was upheld by rule, since the court did not have more than eight members joining Judge Cole's plurality opinion.²⁰² While it remains the opinion of the court, it is important to note that Judge Cole's analysis of the many interpretations holds no weight in *Pontiac* since the case itself was dismissed.²⁰³ Nevertheless, the record prevails as the Sixth Circuit's analysis of the unfunded mandates clause. As a result, should this issue be re-litigated, there is significant evidence of the many ambiguities contained in NCLB. The Supreme Court ought to seize this as an opportunity to address congressional spending,²⁰⁴ and the plaintiffs in *Pontiac* should likewise appeal to the Court.

During oral arguments when *Pontiac* was reheard, Judge McKeague referenced other language in Title I and suggested that "Congress anticipated there may well be costs not reimbursed"; while Judge Sutton further stated that "the [Secretary] gets to fill in the gaps" with regard to any ambiguity.²⁰⁵ Still, despite these statements, the constitutional issue remains whether *states* anticipated that there would be costs not fully funded or otherwise reimbursed. Were Congress to have equivocated, or purposely left in ambiguities in which states should reasonably anticipate that the

¹⁹⁸ See *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006).

¹⁹⁹ *Sch. Dist. of Pontiac v. Sec'y of Educ.*, No. 05-2708, 2008 U.S. App. LEXIS 12121 (6th Cir. May 1, 2008).

²⁰⁰ *Sch. Dist. of Pontiac v. Sec'y of Educ.*, 584 F.3d 253 (6th Cir. 2009).

²⁰¹ See Mark Walsh, *NCLB Suit's Dismissal Intact After Deadlock By 6th Circuit Judges*, EDUC. WEEK, Oct. 28, 2009, at 8.

²⁰² *Pontiac*, 584 F.3d 253; Walsh, *supra* note 201.

²⁰³ Walsh, *supra* note 201.

²⁰⁴ For a discussion of why the Court is apt to review cases involving challenges to congressional spending, see Bagenstos, *supra* note 96, at 408–10.

²⁰⁵ Walsh, *supra* note 18.

Department of Education would “fill in the gaps,” there would be no clear statement rule violation. Yet, the unfunded mandates clause has left ambiguity that allows the states to reasonably deduce multiple meanings, separate and distinct from any suggestions made by the Secretary. In this respect, the states cannot be said to have received the *Arlington* standard of clear notice, nor can they be said to have knowingly entered into the voluntary program.

The court in *Pontiac* considered *Arlington* to be a persuasive indication that if a state is not placed on clear notice of the consequences of acceptance, congressional intent is of no consequence.²⁰⁶ The fact that a court could reasonably interpret the unfunded mandates clause to mean what the plaintiffs in *Pontiac* had argued is not as important as the sheer volume of possible interpretations, some of which conflict. The court, restating the *Arlington* concurrence, mentioned that “the ball is properly left in [Congress’s] court.”²⁰⁷ In order for the law to conform to the clear notice requirement, it need only be modified to remove the ambiguity discussed, or place states on notice that the Secretary has authority to impose financial mandates. Either a section containing exceptions, similar to the aforementioned Perkins Act, or an outright removal of the unfunded mandates clause would be sufficient.²⁰⁸ The Sixth Circuit has already gone out of its way to note the importance of construing federal legislation “so as to resolve ambiguous language in favor of the states.”²⁰⁹ There is no foreseeable reason it would deviate from this determination should the argument be made once again.

Although all of the *Pontiac* litigation to date has addressed the sole issue of whether the plaintiffs have stated a claim for which they may seek relief, the opinions were able to discuss, in broad terms, the unfunded mandates clause.²¹⁰ Consequently, there exists a record that represents the many manners in which the clause may be reasonably read.²¹¹ Courts should recognize this interpretive ambiguity and allow states to bring constitutional challenges to NCLB under the auspices of the clear statement rule. Disallowing such challenges would either undercut the case law surrounding the Spending Clause, or deny that a court could infer that a reasonable reading of the language supports the hypothesis that states need not comply with conditions not fully funded by the federal government.

IV. RECOMMENDATIONS AND POLITICAL PRACTICALITY

NCLB, once widely praised as a bipartisan achievement, has dwindled down to become “the most negative brand in America.”²¹² In his first month as Secretary of

²⁰⁶ See *Sch. Dist. of Pontiac v. Sec’y of Educ.*, 512 F.3d 252, 264 (6th Cir. 2008).

²⁰⁷ *Id.* at 272.

²⁰⁸ See *supra* text accompanying notes 188–201.

²⁰⁹ See *Coleman v. Glynn*, 983 F.2d 737, 737 (6th Cir. 1993) (Merritt, C.J., concurring).

²¹⁰ See *Pontiac*, 512 F.3d at 254; *Sch. Dist. of Pontiac v. Spellings*, No. 05-CV-71535-DT, 2005 U.S. Dist. LEXIS 29253, at *2 (E.D. Mich. Nov. 23, 2005).

²¹¹ See, e.g., *Pontiac*, 512 F.3d at 272.

²¹² Sam Dillon, *Rename Law? No Wisecrack is Left Behind*, N.Y. TIMES, Feb. 23, 2009, at A12 (quoting Rep. George Miller (D-CA)). Comedian Jay Leno stated that the law was

Education, Arne Duncan stressed the need to reshape, or at least rename, the law.²¹³ A few were quick to quip that the law ought to be renamed “No Child Left Untested,” or “No School Board Left Standing.”²¹⁴ Many state and local officials expected that the law would be reauthorized in 2007, but the negotiations reached a standstill. Those who believe that NCLB ought to be restructured are concerned about throwing the baby out with the bathwater. Regardless, the constitutional concerns require Congress to review NCLB and amend it to comply with the clear statement rule. The states must be given the opportunity to knowingly and voluntarily consent to the Title I funding terms and conditions. One suggested new name for the law was most on point, recommending NCLB be renamed the “Could We Start Again Please Act.”²¹⁵

A. Recommendations for Reshaping NCLB

It is widely acknowledged that NCLB has two major problems, in addition to the constitutional concerns of congressional vagueness, that require attention and revision.²¹⁶ First, the accountability issues are viewed by many as either too optimistic or altogether misguided.²¹⁷ It is quite clear that the AYP requirements, especially the 2014 deadline for one hundred percent academic proficiency, have placed an undue burden on many states.²¹⁸ Second, the program is viewed by many in the Senate as being vastly under-funded.²¹⁹ Both of these problems deserve and require swift resolution for NCLB to be considered a successful program. It has been suggested that the Department of Education focus on measuring actual growth, and rewarding progress instead of punishing failure.²²⁰ Accountability in this manner may seem indirect, but at the very least it would remove the failed policies of the past and the impending implosion that is destined to occur as we near 2014. This system would also provide for a fairer application of AYP requirements, as schools will receive credit for those cognizable groups making actual progress.²²¹ In this scenario schools that make such progress are not penalized, and states might not resort to redefining the level of proficiency.²²²

so interconnected with President Bush’s low approval rating that “even the children left behind are going, ‘You go ahead, we’re fine.’” *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ See ANDERSON, *supra* note 10, at 188–92.

²¹⁷ See MANNA, *supra* note 13, at 125.

²¹⁸ See Dillon, *supra* note 60.

²¹⁹ David J. Hoff, *Bush Presses NCLB Renewal on His Terms*, EDUC. WEEK, Jan. 16, 2008, at 16, 18.

²²⁰ See JOHN E. CHUBB, LEARNING FROM NO CHILD LEFT BEHIND: HOW AND WHY THE NATION’S MOST IMPORTANT BUT CONTROVERSIAL EDUCATION LAW SHOULD BE RENEWED 26–31 (2009).

²²¹ See *id.* at 29.

²²² For a discussion of what states have been doing recently to lower the standard of proficiency, see *infra* notes 234–36 and accompanying text.

Yet even if incentives are modified in this manner, the unfunded mandates clause ambiguities *must* be addressed in order for the legislation to be a constitutionally valid exercise of the congressional spending power. If NCLB is reauthorized in its current form, challenges invoking the clear statement rule should be successful.²²³ An outright removal of the unfunded mandates clause itself would remove the clear statement rule dilemma.²²⁴ Though this removal would be sufficient to quash any claims of ambiguity, it is certainly not necessary to assuage the current problems of the unfunded mandates clause. Another suggestion is to pass an amendment upon the reauthorization of NCLB that would include a cost schedule for any possible mandates, relating to AYP calculations or otherwise. Recall the UMRA goal, allowing for federal legislation that “would force Congress to assess costs of new mandates and take a separate vote when they impose large uncompensated costs.”²²⁵ Similar steps to modify NCLB could adequately alleviate the ambiguity concerns.

UMRA mandates that committees considering legislation, and the Congressional Budget Office (CBO), estimate the costs of any federal mandate on state or local governments.²²⁶ Although, as it remains a voluntary government program, NCLB does not fall within the confines of UMRA,²²⁷ the latter piece of legislation would serve as a useful guideline. Namely, should Congress expressly amend NCLB so as to fall under the purview of the UMRA and its limitations, all federal mandates on the states would require CBO review.²²⁸ UMRA states that “any mandate . . . cost[ing] state or local governments more than \$50 million a year . . . would be subject to a point of order during debate.”²²⁹ This can lead to reconsideration and indirect defeats to proposed expenditures.²³⁰ More importantly, however, the process would become transparent to the states, such that their consent to the program could be construed as both voluntary *and* knowing.²³¹ The UMRA guidelines, if applied in this context,

²²³ Indeed, they may very well be successful in the Supreme Court. *See, e.g.*, Bagenstos, *supra* note 96, at 355.

²²⁴ As of this publication, there has not been any prominent litigation suggesting that other language contained in NCLB violates the constitutional “clear statement rule.”

²²⁵ Helen Dewar, *Senate Votes to Limit Unfunded Mandates*, WASH. POST, Jan. 28, 1995, at A1; *see also supra* notes 173–78 and accompanying text.

²²⁶ U.S. GEN. ACCOUNTING OFFICE, *supra* note 174, at 3.

²²⁷ David S. Broder, *Those Unfunded Mandates*, WASH. POST, Mar. 17, 2005, at A25.

²²⁸ *See* U.S. GEN. ACCOUNTING OFFICE, *supra* note 174, at 3.

²²⁹ Broder, *supra* note 227; *see* 2 U.S.C. § 658d (2006).

²³⁰ Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism?: The Unfunded Mandates Reform Act of 1995*, 45 U. KAN. L. REV. 1113, 1117–18 (1997) (commenting that “legislation [lacking] a cost estimate or that includes certain unfunded intergovernmental mandates is out of order, and any member of Congress can object to its consideration. Only if the objection is waived by a simple majority can the chamber continue to debate the bill.”).

²³¹ *See* Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 296 (2006). (“States cannot knowingly accept conditions of which they are ‘unaware’ or which they are ‘unable to ascertain.’” (quoting *Penhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981))).

would adequately place the states on notice as to both the process and potential for increased responsibility.

Further, implementing a cost schedule whereby Congress would be required to authorize any federal mandate compelling a state to spend its own money, beyond a certain statutory level, would allow for federal mandates while simultaneously removing the clear statement rule dilemma. It would add a significant amount of clarity to the law, which in turn would allow the states to make informed decisions. In addition, were Congress to create a commission akin to the Advisory Commission on Intergovernmental Relations, which studies the costs and benefits of each mandate as per the UMRA requirements,²³² still more information will be available to the states.²³³ Though Congress could ignore the commission's recommendation and vote to sustain the unfunded expenditure, the states would still have a plethora of legislative history detailing the ultimate decision with respect to each mandate.

B. Potential Changes and Political Practicality of NCLB Reauthorization

Not only is NCLB unclear, it is also unsustainable. The AYP compliance requirements, coupled with the under-funding in Title I, have placed considerable fiscal pressure on many states—some of which are on the brink of bankruptcy.²³⁴ California recently sought a taxpayer bailout, citing federal mandates as a factor in the decision.²³⁵ Having gambled on a 2007 reauthorization and subsequent change in NCLB conditions,²³⁶ states are now doing whatever they can to comply with the law, including lowering standards.²³⁷ Fifteen states have lowered one or more testing standards, and as a result have changed what is required of the local school districts in order to achieve the requisite AYP.²³⁸ States can do this quite easily as the NCLB requires only that students be academically “proficient” by the 2014 deadline, a term the law neglects to define.²³⁹

²³² See 2 U.S.C. § 1551 (2006).

²³³ Such information would be contained in the commission reports, as well as press releases.

²³⁴ California is one such example. See Stu Woo & Jim Carlton, *California Requests Billions From U.S.*, WALL ST. J., Jan. 9, 2010, at A3 (“Arnold Schwarzenegger asked for \$6.9 billion in federal funds in his state-budget proposal Friday and warned that state health and welfare programs would be threatened without the emergency help.”).

²³⁵ *Id.* (“Federal mandates . . . ‘force [California] to spend money that we do not have.’” (quoting Gov. Schwarzenegger)).

²³⁶ See *supra* notes 59–67 and accompanying text.

²³⁷ Dillon, *supra* note 68 (reviewing a study published by the U.S. Dep’t of Educ., Nat’l Center for Education Statistics, *supra* note 30).

²³⁸ *Id.* (“The 15 states that lowered one or more standards were Delaware, Georgia, Hawaii, Illinois, Kentucky, Maine, Michigan, Missouri, New York, Ohio, Oklahoma, Oregon, Virginia, West Virginia, and Wyoming.”).

²³⁹ Rigdon, *supra* note 132.

During the 2008 presidential election, little was mentioned regarding educational policy or NCLB, particularly by President Obama.²⁴⁰ This was likely a tactical campaign decision. According to a recent poll, over two-thirds of Americans believe that the law should be overhauled in some way, and twenty-two percent believe the law is hurting public education.²⁴¹ The spike in popular opinion surrounding a proactive federal education policy is unlikely to subside in the near future,²⁴² yet most Americans appear to be looking for real reform. Indeed, at one point during his campaign President Obama called “No Child Left Behind ‘one of the emptiest slogans in the history of politics’ and . . . [said that] it needs more funding.”²⁴³ Thankfully, it received some more funding as a result of the economic stimulus package enacted last February.²⁴⁴

The law itself grants power to the administration in deciding whether to implement any administrative changes.²⁴⁵ In this respect, the current Secretary of Education, Arne Duncan, enjoys significant discretion in terms of accountability overhauls. Both with the \$4 billion “Race to the Top Fund” and his recent comments, it appears that Secretary Duncan plans to move the federal policy more in line with the above-mentioned suggestion of financial incentives.²⁴⁶ The administration also has suggested that it will seek to define proficiency by using “growth models, in which schools get credit for improving the progress of individual students.”²⁴⁷ In doing so, the administration has recommended that Congress adopt new standards using language such as “college- and career-ready.”²⁴⁸ Indeed, the President’s 2011 budget request proposed an overhaul of the AYP system itself.²⁴⁹ Any new reauthorization of NCLB must provide added clarity, and the new administration seems poised to provide some. Yet, considering the mid-term elections that will be held this November and the

²⁴⁰ Maria Glod, *In Rush to White House, ‘No Child’ Is Left Behind; Obama, McCain Reveal Little on Updates for Plan*, WASH. POST, Sept. 15, 2008, at A4.

²⁴¹ *Id.*

²⁴² MANNA, *supra* note 13, at 4 fig.1.1 (displaying the general trend of public demand for federal education policy).

²⁴³ Glod, *supra* note 240.

²⁴⁴ Alyson Klein, *Duncan Aims to Make Incentives Key Element of ESEA; Education Secretary Weighs Priorities for Law’s Renewal*, EDUC. WEEK, Dec. 9, 2009, at 1.

²⁴⁵ *Id.*

²⁴⁶ *Id.* His department is also seeking “to build on the emphasis on teacher quality, data, standards, and support of low-performing schools.” *Id.*

²⁴⁷ *Id.*; see also Nick Anderson, *Obama Would Scrap ‘No Child’ Standard*, WASH. POST, Feb. 2, 2010, at A11 (stating that the President’s proposed 2011 budget would require any reauthorization of NCLB to “replace [the AYP model] with a broader picture of school performance that looks at student growth and school progress”).

²⁴⁸ Sam Dillon, *Obama to Propose New Reading and Math Standards*, N.Y. TIMES, Feb. 22, 2010, at A13.

²⁴⁹ See *id.*; Anderson, *supra* note 247.

current agenda of Congress,²⁵⁰ any such reauthorization would be difficult to accomplish this year.

CONCLUSION

The many interpretations discussed in the *Pontiac* opinions indicate that the unfunded mandates clause is ambiguous at best, and coercive at worst.²⁵¹ The clear statement rule requires congressional linguistic precision, at least to the point where a court could not determine that a reasonable interpretation of such language would lead to ambiguity.²⁵² One commentator is steadfast in his prediction that the Supreme Court, now more than ever, is willing to tackle issues and complaints related to Congress's violation of the Spending Clause.²⁵³ He suggests that the Court, quite possibly for ideological reasons, will curtail conditional spending by using doctrines such as the clear statement rule.²⁵⁴ As a result, if the executive or legislative branches remain unwilling to remedy these state concerns regarding NCLB's language, and reauthorize it in its current form, eventually the judicial branch will strike down the law relying on the unfunded mandates clause.

Despite the significant practical and constitutional problems with NCLB, neither Congress nor the Department of Education has acted in a way that would alleviate these concerns. Before leaving office, Secretary Spellings released a "Blueprint for Strengthening" NCLB.²⁵⁵ In it, the Department sought to increase "meaningful flexibility to states and districts" with respect to the provisions regarding Title I funding.²⁵⁶ The previous administration's willingness and complicity with state AYP recalculation requests, coupled with its inflexibility with regard to the 2014 proficiency deadline, has only compounded the predicament. States procrastinating with their achievement rates are now facing alarmingly heightened AYP requirements that are next to impossible to attain.²⁵⁷ In order for there to be any kind of success with a new NCLB law, the 2014 deadline will inevitably be forced to a much later date, if it even survives reauthorization. The alternative, a lower than one hundred percent proficiency

²⁵⁰ Gerald F. Seib, *In 2010, Economy Again to Crowd Domestic Stage—Deep Federal Deficit Levels Will Rein in Policy Makers' Ambitions—and Could Reshape Political Landscape in November*, WALL ST. J., Jan. 4, 2010, at A2.

²⁵¹ See *supra* Part III.B.

²⁵² *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

²⁵³ See Bagenstos, *supra* note 96, at 350.

²⁵⁴ *Id.* at 350–51 (stating that "it is wrong to expect the Roberts Court to be so charitable about Congress's exercise of the spending power").

²⁵⁵ U.S. DEP'T OF EDUC., BUILDING ON RESULTS: A BLUEPRINT FOR STRENGTHENING THE NO CHILD LEFT BEHIND ACT 3–15 (2007), available at <http://www2.ed.gov/policy/elsec/leg/nclb/buildingonresults.pdf>.

²⁵⁶ *Id.* at 8.

²⁵⁷ See Dillon, *supra* note 60.

requirement, although realistic, would do away with the original intention of the proposal by former President George W. Bush back in 2001.²⁵⁸

Although he surely has not acted as quickly as his predecessor,²⁵⁹ President Obama and his administration are, and will continue to be, the most influential players in NCLB restructuring. Because it has already been made clear by leaders in both the Senate and the House that bolstering the economy and healthcare reform will be the primary objectives in 2010,²⁶⁰ the only means by which states may seek funds despite non-compliance might very well be through the Secretary of Education's permissible dispensations. By allowing some to reasonably assume that certain NCLB conditions would be fully funded by the federal government, the unfunded mandates clause has created ambiguity indicating that Congress has overstepped its Spending Clause boundaries. Congress has heretofore displayed its unwillingness to change the law, but even were it to reauthorize NCLB according to the President's 2011 budget proposal, the constitutional problem would remain. Consequently, the courts must resolve this dilemma by applying the clear statement rule and striking down the unfunded mandates clause and NCLB.

²⁵⁸ See MYCOFF & PIKA, *supra* note 7, at 33–36.

²⁵⁹ See *id.* at 33.

²⁶⁰ See Seib, *supra* note 250; *Healthcare, Economy, Security on Obama's 2010 Agenda*, REUTERS, Jan. 4, 2010, available at <http://www.reuters.com/assets/print?aid=USTRE6033BD20100104>.