No. 08-16661

United States Court of Appeals For The Ninth Circuit

SONYA RENEE ET AL.,

Plaintiffs-Appellants,

v.

MARGARET SPELLINGS, in her official capacity;
UNITED STATES DEPARTMENT OF EDUCATION,

Defendants-Appellees

Appeal from the United States District Court for the Northern District of California
Case No. 3:07-cv-04299-PJH

APPELLANTS' CORRECTED OPENING BRIEF

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FED. R. APP. P. 26.1 CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellant Californians for Justice Education Fund is a non-profit corporation, is not owned by any parent corporation, has not issued any stock, and no publicly-held company owns any interest in it.

Plaintiff-Appellant California Association of Community Organizations for Reform Now (Cal. ACORN) is the statewide affiliate of the national Association of Community Organizations for Reform Now (ACORN), a national non-profit corporation which is not owned by any parent corporation, has not issued any stock, and in which no publicly-held company owns any interest.

Dated: October 6, 2008

Respectfully submitted,

/s/ John T. Affeldt

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INTRODUCTION

At issue in this case is the quality of teacher owed every public school student in the nation. When Congress passed the No Child Left Behind Act of 2001 ("NCLB", or "the Act"), it made a promise to all students—and especially poor and minority students—that they would be taught by fully-certified, "highly qualified" teachers. Through this Administrative Procedure Act challenge, Plaintiffs-Appellants school children, their parents, and community organizations ("Plaintiffs") seek to hold Secretary of Education Margaret Spellings and the United States Department of Education ("ED" or "Defendants") accountable for reneging on Congress' promise.

Congress built an unambiguous definition of the term "highly qualified" teacher into NCLB and created numerous overlapping provisions to ensure that states, districts, and schools would ultimately realize the promise of a fully prepared teacher for all students. Yet, by regulatory fiat, ED redefined this term to mean the opposite of what Congress directed. Where Congress defined as "highly qualified" only teachers who "ha[ve] obtained full State certification," (20 U.S.C. § 7801(23)(A)), ED's unlawful regulation labels "highly qualified" teachers as anyone "*participating in*" alternative certification programs and merely making "*progress toward* full certification as prescribed by the State" (34 C.F.R. §

200.56(a)(2)(ii)) (emphases added). Thus, by the regulation's own terms, novice teachers-in-training beginning to seek the statute's mandated full state certification standard are treated *as having already obtained it*. In issuing judgment in favor of ED, the lower court implausibly held that the regulation was not in obvious conflict with Congress's standard and, instead, was owed deference under the second prong of *Chevron v. NRDC*, 467 U.S. 837 (1984). Excerpts of Record ("ER") 11-13.

Alternative route teacher preparation programs differ from traditional university-based programs principally in that alternative route participants are hired by a school district to teach full-time as the sole teacher in a classroom *while completing teacher preparation coursework* from a local university or the district at night and on weekends. While current teacher shortages continue, well-run alternative route programs can serve as an additional pipeline to prepare future "highly qualified" teachers, but that fact cannot justify categorizing their participants, who are still learning how to teach, as if they were the most fully prepared and experienced of teachers.

As a result of the lower court's erroneous ruling, novice teachers-in-training—over 10,000 in California alone and over 100,000 nationally—are now deemed "highly qualified" the very first day they enter an alternative route

certification program and take full responsibility for a classroom. Contrary to NCLB, these underprepared teachers are mislabeled and misreported to parents and the public as "highly qualified" and are allowed to be hired and assigned without restriction. Also, contrary to the Act's requirements concerning placement of non-"highly qualified" teachers, these alternative route teachers-in-training (known as "interns" in California) are disproportionately placed in low-income, high minority schools. Nearly a quarter of California's 10,000 interns teach in schools whose students are 98-100% minority; as such, *these minority students are five times more likely to have intern teachers than students in schools with the lowest proportion of minority students.* Finally, ED's regulation, by mislabeling novices still working toward full certification as "highly qualified," absolves states and districts from having to include them in mandatory plans to redress "highly qualified" teacher shortages, exacerbating school inequalities.

Few issues can be as important to our nation as ensuring that all children have a fully prepared, high quality teacher as Congress mandated. Yet the District Court's decision significantly undercuts the standard of teacher NCLB requires every child receive and eviscerates the Act's core teacher quality provisions. Plaintiffs ask this Court to reverse the District Court's decision and enforce

Congress's mandate that all children have full and equal access to "highly qualified" teachers that are fully-certified as prescribed by the laws of each state.

JURISDICTION

The District Court had jurisdiction over this case pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 701-706 (Administrative Procedure Act actions).

Plaintiffs appeal under 28 U.S.C. § 1291 from the June 17, 2008 order of the District Court denying Plaintiffs' motion for summary judgment and granting Defendants' cross-motion for summary judgment and the July 2, 2008 final judgment in favor of Defendants and against Plaintiffs, dismissing the case. Plaintiffs timely filed the Notice of Appeal on July 18, 2008. FED. R. APP. P. 4.

QUESTIONS PRESENTED

1. Where the No Child Left Behind Act mandates that all children be taught by "highly qualified" teachers who "*ha[ve] obtained full State certification,*" did the District Court err in concluding that ED's regulation did not unambiguously conflict with that standard when it defined "highly qualified" teachers as those merely making "*progress toward* full certification as prescribed by the State"?
2. Assuming there exists ambiguity in whether ED's regulation violates Congress's "full State certification" standard, did the District Court

nonetheless err in finding the regulation reasonable and consistent with the purposes of NCLB's provisions to improve teacher quality when—in lieu of a requirement that all teachers *have completed* their pedagogical training before earning "highly qualified" status—the regulation permits, without any limitation or notice to the public, *all* teachers in a school, a district, or even an entire state to teach full time *while learning how to teach* in alternative route preparation programs at night and on weekends?

STANDARD OF REVIEW

The District Court's grant of summary judgment in favor of Defendants is subject to *de novo* review. *California Cosmetology Coalition v. Riley*, 110 F.3d 1454 (9th Cir. 1997). Where the issue in a case is an agency's interpretation of a statute—here, ED's regulatory interpretation of NCLB's "highly qualified teacher" definition—the case presents a question of law that an appellate court reviews *de novo*. *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 783 (9th Cir. 1995); *Conlan v. U.S. Dept. of Labor*, 76 F.3d 271, 274 (9th Cir. 1996).

STATEMENT OF THE CASE

In August 2007, Plaintiffs-Appellants—several California public school students and their parents as well as two grassroots community organizations—brought this Administrative Procedure Act ("APA") challenge against the United

States Department of Education and Secretary of Education Margaret Spellings challenging part of ED's regulatory definition of the term "highly qualified teacher" (specifically, all of 34 C.F.R. § 200.56(a)(2)(ii)) as in conflict with the definition of that term as provided by Congress in the NCLB Act itself. Plaintiffs requested declaratory and injunctive relief on the basis of their APA claims. Plaintiffs amended their complaint in November 2007 to add additional individual plaintiffs.

The parties stipulated that this case presented pure legal issues appropriate for decision on summary judgment. The District Court heard argument on cross-motions for summary judgment on April 23, 2008 and issued a decision on June 17, 2008 denying Plaintiffs' motion for summary judgment and granting Defendants' cross-motion. On July 18, 2008, Plaintiffs appealed from the District Court's June 17, 2008 order and July 2, 2008 final judgment dismissing the case in favor of Defendants.

On August 1, 2008, Plaintiffs filed in this Court a Motion to Expedite Briefing and Argument on the grounds that a normal schedule would have mooted the appeal for six of the nine student plaintiffs, who will graduate from high school within the next one to two years, and that all Plaintiffs—as well as hundreds of thousands of similarly situated students across California and millions across the

nation—are suffering irreparable educational harm as a result of ED's unlawful regulation. On August 26, 2008, this Court granted Plaintiffs' motion in part, accelerating the briefing schedule and ordering that the matter be calendared "as soon as possible."

STATEMENT OF FACTS

A. The No Child Left Behind Act Seeks to Ensure That Every Child is Taught by a "Highly Qualified" Teacher ("HQT") Who Has Obtained Full State Certification.

Since 2002, NCLB has served as the current version of the Elementary and Secondary Education Act, first enacted in 1965, and the foundation for federal K-12 education policy. The ultimate goal of NCLB is that all students attain proficiency in reading and math by 2014, eliminating the significant academic achievement gaps between students of different socioeconomic and racial/ethnic groups. 20 U.S.C. § 6311(b)(2)(F). An essential component of NCLB's promotion of academic achievement and accountability is that students be taught by "highly qualified" teachers. Secretary Spellings' official correspondence to states acknowledges the centrality of teacher quality to NCLB:

> [NCLB] recognizes that *teacher quality is one of the most important factors in improving student achievement and eliminating these achievement gaps*. As a result, the law set the important goal that all students be taught by a "highly qualified teacher" (HQT) who holds at least a bachelor's degree, *has obtained full State certification*, and has

> demonstrated knowledge in the core academic subjects he or she teaches.

ER447 (emphasis added). The Secretary's statements echo those of Senator Kennedy, chair of the Senate Health, Education, Labor and Pensions Committee and a chief architect of NCLB, in urging his colleagues to pass the Senate's parallel version of NCLB containing a "strong definition[]. . .of highly qualified teacher":

> Nothing in education is more important than ensuring a highly qualified teacher for every classroom. Research shows that what teachers know and can do is the most important influence on what students learn. Increased knowledge of academic content by teachers and effective teaching skills are associated with increases in student achievements.

147 CONG. REC. S4125, 4131 (May 2, 2001).

Accordingly, NCLB established a core "highly qualified" teacher definition and set forth over a dozen provisions relating to specific HQT requirements.

1. <u>NCLB Contains Numerous Overlapping Teacher Hiring, Distribution, Planning, and Reporting Requirements to Ensure That the 100% HQT Requirement is Met.</u>

NCLB's "highly qualified" teacher provisions can be divided into four major categories: (1) the core "highly qualified" teacher requirement, (2) equitable distribution requirements, (3) HQT "plan" requirements, and (4) public reporting and accountability requirements.

The core teacher quality provision requires that by the end of the 2005-2006[1] academic year, only "highly qualified" teachers will provide instruction in core academic classes.[2] 20 U.S.C. § 6319(a)(2). To ensure that states and districts would be on track to meet the 100% HQT requirement, NCLB also requires that, beginning with the 2002-03 school year, new hires in schools receiving Title I funds (*i.e.*, NCLB funding to supplement the educational needs of low-income students) must meet the "highly qualified" standard. 20 U.S.C. § 6319(a)(1)-(2).

Second, where states and districts fall short in meeting the 100% HQT requirement, NCLB mandates that poor and minority students not be taught by inexperienced and non-HQTs at higher rates than other students. 20 U.S.C. § 6311(b)(8)(C).

Third, to meet these mandates, the Act requires that every state and every school district develop plans to provide HQTs in all core academic classes and to arrange for the equitable distribution of these teachers. 20 U.S.C. §§ 6311(b)(8)(C), 6319(a)(2), 6311(a)(1) (state plans); §§ 6312(b)(1)(N), 6319(a)(3),

[1] Defendants have acknowledged that states and districts are not meeting this timeline and have stated they will not withhold federal funds as long as states and districts are making good faith efforts to satisfy the 100% HQT requirement. *See* ER447, 662.

[2] "Core academic subjects" are English, reading/language arts, math, science, foreign languages, civics and government, economics, arts, history, and geography. 20 U.S.C. § 7801(11); 34 C.F.R. § 200.55(c).

6312(c)(1)(I) (district plans). District plans specifically must ensure that "[t]hrough incentives for voluntary transfers, professional development, recruitment programs, or other effective strategies, minority students and students from low-income families are not taught at higher rates than other students by unqualified, out-of-field, or inexperienced teachers." 34 C.F.R. § 200.57(b)(2).

Finally, the Act sets forth several reporting requirements to ensure that parents, students, policy makers, and the public have accurate information regarding the presence, number and distribution of HQTs. Schools receiving Title I funds must inform individual parents when a non-"highly qualified" teacher teaches his or her child for more than four weeks. 20 U.S.C. § 6311(h)(6)(B)(ii). Annually, states and school districts are required to report publicly accurate information regarding the progress that schools, districts, and states are making towards meeting HQT requirements. 20 U.S.C. §§ 6311(h)(1)(C)(viii), 6311(h)(2), 6319(b)(1)(A). States, in turn, must provide this information to ED, (20 U.S.C. §§ 6311(h)(4)(G), 6319(b)(1)(B)), which then reports to Congress the nationwide statistics on "highly qualified" teachers (20 U.S.C. § 6311(h)(4)-(5)).

2. NCLB Defines a "Highly Qualified" Teacher as One Who "Has Obtained Full State Certification."

In addition to requiring that all HQTs have a B.A. and competence in their subject matter, Congress defined "highly qualified" to mean that:

> (i) the teacher has *obtained full State certification as a teacher (including certification obtained through alternative routes to certification) or passed the State teacher licensing examination, and holds a license to teach in such State*, except that when used with respect to any teacher teaching in a public charter school, the term means that the teacher meets the requirements set forth in the State's public charter school law; and
>
> (ii) the teacher has not had certification or licensure requirements waived on an emergency, temporary, or provisional basis.

20 U.S.C. § 7801(23)(A) (emphasis added). On its face, the statute requires that a "highly qualified" teacher already "*ha[ve] obtained full* State certification."[3]

B. Congress Assigned to States the Role of Establishing Critical NCLB Standards, Including Each State's Standard for Full Certification.

While NCLB mandates that all students achieve proficiency in math and English by 2014 (20 U.S.C. § 6311(b)(2)(F)), the Act leaves it to each state to determine the state academic content standards in those subjects that it wants students to learn (20 U.S.C. § 6311(b)(1)(A)), the state academic assessments it will use to assess students' progress (20 U.S.C. § 6311(b)(3)), and the test scores that signify "proficiency" in meeting the "state academic achievement standards" (20 U.S.C. §§ 6301, 6311(b)(3)(C)(ii), 6311(b)(3)(v)). Similarly, the Act expressly delegates to states the authority to determine teacher certification standards. 20

[3] California does not have a single, summative "state teacher licensing examination," nor do the great majority of states. Thus, the second option set forth in § 7801(23)(A)(i) rarely comes into play.

U.S.C. § 7801(23)(A) (HQT is one who "has obtained full *State* certification. . . or passed the *State* teacher licensing examination") (emphasis added); *see also* 20 U.S.C. § 6613 (teacher certification requirements should be "aligned with challenging *State* academic content standards") (emphasis added).

Although Congress deferred to each individual state to set the standard in each of these areas, it mandated that each state must deliver that standard to all of its children. *See, e.g.*, 20 U.S.C. § 6311(b)(1)(A)-(B); 20 U.S.C. § 6311(b)(3)(C)(i); 20 U.S.C. § 6319(a)(2).

C. ED's Regulation Defines the Term "Highly Qualified" Teacher to Include Teachers Participating in Alternative Certification Programs and Only Working Towards Full State Certification.

On December 2, 2002, ED issued final regulations redefining the term "highly qualified" teacher. These regulations permit individuals who are merely "*participating* in an alternative route to certification program" and making "satisfactory *progress toward* full certification as prescribed by the State" (34 C.F.R. § 200.56(a)(2)(ii) (emphasis added)) but who have not yet "obtained full state certification" (20 U.S.C. § 7801(23)(A)) to be deemed "highly qualified." The regulations expressly state that these individuals can only be certified to teach on a temporary basis not to exceed three years. 34 C.F.R. § 200.56(a)(2)(ii)(3). Specifically, the regulation provides:

(a) In general

(1) Except as provided in paragraph (a)(3) of this section, a teacher covered under § 200.55 [which reiterates the statutory deadlines for meeting the HQT requirement] must –

i. Have obtained full State certification as a teacher, which may include certification obtained through alternative routes to certification; or

ii. (A) Have passed the State teacher licensing examination; and (B) Hold a license to teach in the State.

(2) A teacher meets the requirement in paragraph (a)(1) of this section if the teacher –

i. Has fulfilled the State's certification and licensure requirements applicable to the years of experience the teacher possesses; or

ii. *Is participating in an alternative route to certification program* under which –

(A) The teacher –

(1) Receives high-quality professional development that is sustained, intensive, and classroom-focused in order to have a positive and lasting impact on classroom instruction, before and while teaching;

(2) Participates in a program of intensive supervision that consists of structured guidance and regular ongoing support for teachers or a teacher mentoring program;

(3) *Assumes functions as a teacher only for a specified period of time not to exceed three years*; and

(4) *Demonstrates satisfactory progress toward full certification as prescribed by the State*; and

(B) The State ensures, through its certification and licensure process, that the provisions in paragraph (a)(2)(ii) of this section are met.

(3) A teacher teaching in a public charter school in a State must meet the certification and licensure requirements, if any, contained in the State's charter school law.

> (4) If a teacher has had certification or licensure requirements waived on an emergency, temporary, or provisional basis, the teacher is not highly qualified.

34 C.F.R. § 200.56(a) (emphases added). Under these regulations, a teacher-in-training with no prior training or experience teaching is deemed "highly qualified" on the day she enters an alternative certification program and begins to serve as a full-time classroom teacher. A first-day participant in an alternative certification program working towards full state certification and a thirty-year, fully-certified teaching veteran are equally considered "highly qualified" under the regulation, and states and districts are permitted to treat them identically for purposes of hiring, distribution, planning and public reporting.

D. California Does Not Consider Alternative Route Participants to Have Obtained Full State Certification But Labels Them "Highly Qualified" Pursuant to ED's Regulation.

In California, prospective teachers initially earn full state certification (known as a "preliminary credential") by completing either a traditional or an alternative route teacher preparation program. Through either type of program, new teachers must complete three sets of requirements to obtain full certification: (1) pedagogical training covering, *inter alia*, how to teach their subject matter/grade level, design curricula, manage a classroom, and meet the needs of English learners and special education students; (2) demonstration of subject-

matter knowledge (typically a prerequisite requirement for program entry); and (3) completion of a practicum teaching students, either by "student teaching" as part of a traditional preparation program in which the candidate teaches alongside a "master teacher" or through an "internship" under an alternative program in which the individual teaches full-time as the sole classroom teacher. *See* CAL. EDUC. CODE § 44259 (citing CTC, *Standards for Quality and Effectiveness for Teacher Preparation Programs for Preliminary Multiple Subject and Single Subject Teaching Credentials* (March 2007), *available at* http://www.ctc.ca.gov/educator-prep/standards/AdoptedPreparationStandards.pdf, included at ER97). As noted, alternative programs differ from traditional programs primarily in that alternative route participants ("interns" in California) work full-time as the teacher of record while completing teacher preparation coursework at night and on weekends. By contrast, participants in traditional programs typically enroll in coursework full-time at a university and complete supervised clinical work teaching alongside a master teacher on a part-time basis where they are not the teacher of record. Participants in both routes receive the same "preliminary" credential upon completing their programs. CAL. EDUC. CODE §§ 44259(b); 44274.2.

Once new teachers complete two years of successful teaching on a preliminary credential and a teacher "induction" program, they become eligible for

the professional "clear" credential, which is the highest level of teaching credential issued by California and is only available to veteran teachers. CAL. EDUC. CODE §§ 44259(c); 44274.2. *See also* ER243.

The preliminary and professional clear credentials are California's only types of *full* state certification for teachers and signify that the holder has fully met all preparation requirements applicable to their years of experience (*i.e.*, as a brand new teacher or as a veteran). *See* CAL. EDUC. CODE §§ 44259; 44274.2. *See also* ER242-43. Below these full credentials, California issues several substandard teaching credentials and permits, including intern credentials, provisional intern permits, short term staff permits, and substitute permits. *See* ER245-61. As the chart in Plaintiffs' Exhibit 17 (ER220) indicates, in California as in other states, there is an inverse relationship between the level of preparation an individual has received and the temporal and geographic restrictions placed on an individual's credential: the greater the level of teacher preparation, the fewer restrictions placed on where and for how long one may teach.[4] The preliminary and professional clear credentials authorize holders to teach their approved subject matter and grade level anywhere in the state for five years (the latter can be

[4] In this way, the system of teacher licensing in California as well as in other states differs markedly from the licensing of attorneys. In contrast to teaching, there is no substandard legal license that permits a person to practice law as an independent attorney, even on a limited basis.

renewed). *See* CAL. EDUC. CODE § 44251(b). The "intern" credential is subordinate to these credentials as it permits individuals who have not completed their alternative teacher preparation program to teach *only* in a single school district and *only* for a period of two years. *See* CAL. EDUC. CODE §§ 44251(b); 44325; 44463; *see also, e.g.*, ER376 (example of official internship credential). Only after completing the alternative route program do interns graduate to obtain the preliminary credential which authorizes teaching statewide. *See* CAL. EDUC. CODE § 44259(b). *See also* ER93 (California Commission on Teacher Credentialing acknowledgement that interns are not "fully-credentialed" like preliminary and professional clear credential holders).

Moreover, as further indication of the inferiority of the intern credential, California state law requires that districts hire preliminary or clear credential holders whenever they are available ahead of intern credential holders. *See* ER93, 55; CAL. EDUC. CODE § 44225.7(a).[5]

According to the National Association of State Directors of Teacher Education and Certification ("NASDTEC"), and as described in ED's 2002 Annual

[5] Governor Schwarzenegger recently signed legislation amending CAL EDUC. CODE § 44225.7 to further clarify that preliminary and professional clear credential holders are to be accorded hiring priority over intern credential holders. *See* Senate Bill 1186 (Scott) at Section 1, signed and chaptered September 28, 2008, attached as Exhibit A to Plaintiffs-Appellants Request for Judicial Notice ("RJN") (October 6, 2008).

Report on Teacher Quality, *Meeting the Highly Qualified Teacher Challenge*, most states have similar credentialing structures to California's whereby individuals must complete pedagogical training in an approved traditional or alternative preparation program in order to receive the state's "full" initial level of certification, generically referred to as the "level one" credential. ER699; *see also* RJN, Exh. A (§ 5, CAL. EDUC. CODE § 44835(b) (referencing synonymously "a preliminary or level one credential"). Thereafter, after completing additional requirements, such as a few years of successful teaching and perhaps some additional courses, teachers typically receive a second tier or "level two" full credential. *Id.*

In California, the State Board of Education has adopted "highly qualified" teacher regulations in order to implement NCLB. In doing so, the Board has adopted the "highly qualified" teacher definition as set forth in Defendants' regulation—including defining participants in alternative route credentialing programs as "highly qualified" teachers for purposes of NCLB. CAL. CODE REGS. tit. 5, §§ 6101, 6110. The state regulations themselves acknowledge that interns do not hold a "full" credential. *See, e.g.,* CAL. CODE REGS. tit. 5, §§ 6110 ("A teacher who meets NCLB requirements" is one who *either* is "currently enrolled in an approved intern program for less than three years *or has a full credential*")

(emphasis added). Thus, although California does not consider intern teachers fully-certified, it takes full advantage of Defendants' regulation to consider them "highly qualified" for purposes of meeting NCLB's requirements.

E. ED's Regulation Undermines the Implementation of NCLB's "Highly Qualified" Teacher Provisions, Especially in California Where Alternative Route Participants Disproportionately Teach in Underperforming, Low-Income, High Minority Schools.

1. Defendants' Regulation Substantially Alters the Implementation of NCLB's HQT Provisions.

Defendants' regulation seriously impairs the implementation of the numerous provisions of NCLB designed to ensure that all children have access to "highly qualified" teachers, both nationwide and in California. *First*, as a result of Defendants' regulation, California, its districts and schools currently place over 10,000 alternative route participants in core classrooms—including in the schools and classrooms that Plaintiffs attend—and count them as "highly qualified" teachers on the first day they enroll in their alternate route training programs. CAL. CODE REGS. tit. 5, §§ 6101, 6110; ER518. *See also* ER371-72¶6, 10; ER380¶4; ER389¶4; ER397-398¶¶5-6, 10; ER410¶7; ER414¶¶4-5, 7; ER425¶¶4, 6; ER436¶¶4-5, 7; ER363-64¶¶9, 11; ER348-49¶¶10-11. Other states, districts and schools nationwide are given the same authority to label their alternative route

teachers-in-training as "highly qualified" by Defendants' regulation.[6]

Second, because teachers still participating in alternative routes are labeled "highly qualified," California and its districts are able to place interns disproportionately in low-income and high minority schools without regard to NCLB provisions requiring the equitable distribution of non-HQTs. *See, e.g.*, ER372¶10; ER398¶10; ER410¶7; ER414¶7; ER425¶6; ER436¶7; ER330¶¶11-13, 339-42). *See also* ER452-505 (California Department of Education data demonstrating the percentage of intern teachers at Plaintiffs' schools as well as these schools' disproportionate concentration of poor and minority students); ER467, 509, 511 (demonstrating intern teacher percentages at schools and in districts attended by members of organizational plaintiffs). Similar results are permitted nationwide as a result of Defendants' regulation.

Third, state and district plans for meeting the HQT requirement are substantially altered when teachers-in-training through alternative certification programs are considered "highly qualified." The data and the premises upon

[6] Defendants do not maintain data on how many HQTs nationally qualify as such through their participation in alternative route certification programs. Based on an annual graduation rate of 59,000 teachers from alternative route programs nationally, *see* ER756, and the fact that alternative route participants typically take two (and sometimes three) years to complete their programs, Plaintiffs estimate that over 100,000 individuals are participating in alternative route programs nationally at any one time and are considered "highly qualified."

which these plans are based ignore the significantly greater objectives that must be met were alternative route participants not deemed "highly qualified." In particular, Defendants' regulation deprives the Plaintiffs, the Plaintiff organizations and their members, and the public of the benefit of state and local district plans to redress the hiring and placement of non-"highly qualified" teachers. ER372¶11; ER381¶7; ER390¶9; ER398-99¶11; ER410 ¶8; ER415¶9; ER426¶8; ER437¶9; ER363-64¶11; ER348-49¶11.

Finally, as a result of Defendants' regulation, parents, students, policymakers and the public receive inaccurate information about students' access to HQTs. Parents in schools receiving Title I funds for low-income students—over half of all 9,000 odd public schools in California[7]—do not receive a letter notifying them when their child has been taught for four or more weeks by an alternative route participant, as would otherwise be required under NCLB. *See, e.g.*, ER389-90¶¶7, 9. District and state "annual report cards" containing information on the percentages of classes taught by HQTs and progress towards meeting the HQT goal show misleadingly higher numbers of HQTs because of ED's regulation. Similarly, the Secretary's annual report to Congress regarding the

[7] *See* Ed Source, *California's School Accountability System Under the Federal No Child Left Behind Act (NCLB)* (August 2007), *available at*: http://www.edsource.org/pub_edfct_ayp.cfm.

progress made towards meeting the HQT goal is based on numbers inflated by district and state counts of alternative route teachers-in-training as HQTs. All of the individual Plaintiffs in this action—as well as the organizational Plaintiffs and their members—are among those deprived of accurate information about non-"highly qualified" teachers in their school, district, state, and nation, thereby inhibiting their ability to hold schools accountable for delivering fully prepared teachers. *See* ER372¶11; ER381¶7; ER390¶9; ER398-99¶11; ER410¶8; ER415¶9; ER426¶8; ER437¶9; ER363-64¶11; ER348-49¶11.

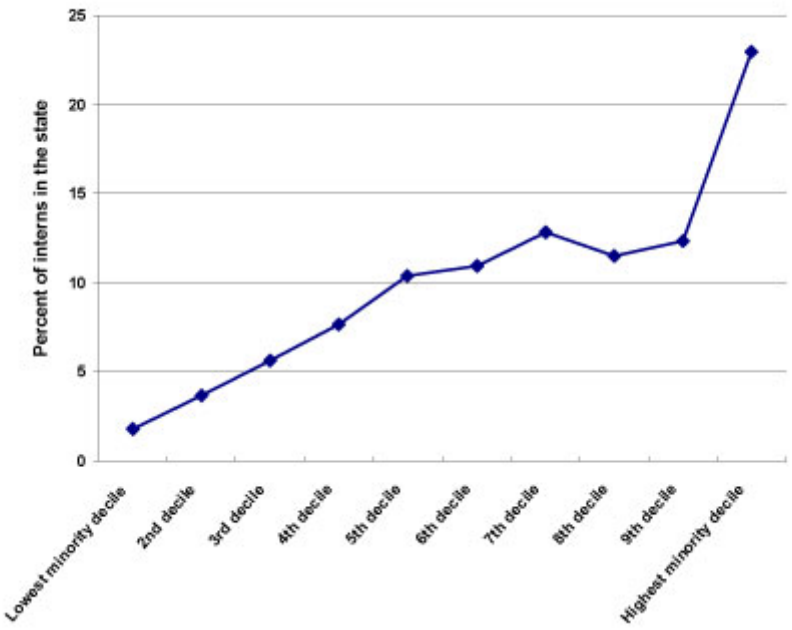
2. Since ED Issued the Challenged Regulation, the Number of Interns in California Has Significantly Increased, With These New Interns Disproportionately Assigned to Teach Low-income, Minority Students.

Since Defendants issued the challenged regulation in 2002, the number of interns in California has risen by approximately 50%, from 7,251 in 2001-2002 to 10,716 in 2006-2007. *See* ER516, 518. This significant increase has coincided with a significant decrease in the number of emergency-credentialed teachers, who are not considered "highly qualified" under NCLB or its implementing regulations. *See* ER524.

It is undisputed that California's intern teachers are inequitably distributed, with a disproportionate number assigned to teach in underperforming schools serving high concentrations of low-income, minority students. Indeed, nearly a

quarter of California's interns (23%) teach in the 10% of schools in the state serving the highest concentrations of minority students (98-100% non-white), while less than 2% teach in the decile of schools with the lowest minority concentration. ER330¶13, 340. One of the charts produced below by the state's leading teacher demographer, Dr. Patrick Shields, dramatically shows how the percentage of interns climbs as a school's minority population grows:

Percentage of Interns in California by Minority Decile (2006-07)



ER340; *see generally* ER327-330¶¶4-10. If interns in California were distributed without regard to student race, then the line on this chart would be flat or the data points would be randomly distributed. Instead, intern assignment increases sharply as the percentage of minority students in a school increases. Ultimately, students in the 10% of schools which are nearly entirely minority see five times as many

interns on staff as students in the decile with the lowest minority concentration. ER339-340.

Intern distribution by school achievement shows a similarly disturbing pattern. Sixty percent of interns serve in the lowest-performing 30% of schools in the state based on California's Academic Performance Index ("API"), while only 10% serve in the highest-performing 30% of schools. ER330¶13, 344.

Interns are also disproportionately concentrated in schools serving predominantly poor students. Sixty-two percent of interns are concentrated in the poorest half of the state's schools, whereas only 13% of interns are in the least poor quartile. ER330¶11, 634; *see also* ER330¶13, 342.

Plaintiffs' experiences are reflected in these statistics. ER452-505, 665-669; *see also* ER757-760¶¶66-71. Indeed, five of the individual high school student plaintiffs have already been taught by more than one intern teacher. ER414¶¶4-5; ER425¶4; ER436¶¶4-5; ER397¶¶5-6; ER371¶6. Plaintiff Jazmine J. was taught by three intern teachers in her freshman year alone. ER414¶5.

In short, Defendants' inclusion of novice teachers-in-training still working towards full certification as "highly qualified" has significantly increased the number of novice, under-certified teachers, particularly in poor, poor-performing and minority-dominated schools.

SUMMARY OF ARGUMENT

The District Court erred in concluding both that Congress's definition of the term "highly qualified" teacher as one who "has obtained full State certification as a teacher" was ambiguous and that ED's regulation redefining this term to include individuals "participating in" alternative certification programs and merely making "progress toward" full state certification was a reasonable exercise of agency authority.

The District Court erroneously reasoned that Congress did not define what it meant by "full State certification as a teacher (including certification obtained through alternative routes to certification)," and thus Congress's definition of the term "highly qualified" teacher was ambiguous and left a policy gap for ED to fill through regulation. The statute's plain language, legislative history, structure, and purpose demonstrate Congress's unambiguous intent that all children—and especially poor and minority children—be taught by teachers who have obtained what their *state* considers the state's *full* level of teacher certification—not by provisionally-certified teachers who are only making "progress toward full certification as prescribed by the State". *See* Argument § I.A.

The District Court misread the statute's parenthetical, which does not create any ambiguity but rather clarifies that both traditional and alternative certification

programs are equally satisfactory routes to obtaining "full State certification" (20 U.S.C. § 7801(23)(A)). *See* Argument § I.B.

The District Court also ignored the plain language of NCLB precluding from "highly qualified" designation teachers like California's interns with only temporary or provisional certifications. The court below further ignored ED's damning pre-litigation positions in the Administrative Record which explicitly acknowledge that "full State certification" is not ambiguous, that alternative route teachers do not have "full State certification," and that ED's regulation qualifies these teachers-in-training only by creating an administrative exception to the statutory HQT standard. *See* Argument § I.A.5 and I.C. Because there is no statutory authority for ED's exception, the regulation must be struck down as in conflict with the unambiguous and exclusive "full State certification" standard.

Even if Congress's HQT definition were ambiguous, the District Court erred in finding ED's regulatory redefinition of the term reasonable and consistent with NCLB's purposes. By mislabeling tens of thousands of novice teachers-in-training as "highly qualified," the regulation perverts Congress's statutory vision of ensuring equity and accountability with respect to students' access to fully-prepared, "highly qualified" teachers and thus disserves the children and parents whom the Act sought to benefit. *See id.* § II.A. Further, Congress's support for

specific alternative route certification programs elsewhere in the Act—by funding a pipeline to train new teachers who are en route to becoming fully-certified and "highly qualified"—is entirely consistent with its goal of helping schools, districts, and states meet NCLB's 100% HQT goal as quickly as possible. *See id.* § II.B.

Finally, the District Court erred in imputing legislative acquiescence to the challenged regulation based on Congress's failure to reverse it in the past five years. The issue here has never been expressly considered and rejected by Congress, and Defendants' regulation distorted the reporting to Congress that might have prompted a response. *See id.* § III.

ARGUMENT

Chevron v. Natural Resources Defense Council sets forth the applicable legal standard for judicial review of an administrative agency's construction of a statute it administers. *Chevron, U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984). This standard involves a two part test. First, a court must consider "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-843. *See also Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997).

Second, and only *if* the statute is silent or ambiguous on the question at issue, courts must defer to the agency's reasonable interpretation of the statute as long as that interpretation is consistent with the purpose of the statute. *Chevron*, 467 U.S. at 843-45. However, "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." *MCI Telecomms. Corp. v. AT & T Co.*, 512 U.S. 218, 229 (1994).

As set forth below, this Court need look no further than the unambiguously expressed intent of Congress under the first prong of *Chevron*. Doing so leads to the ineluctable conclusion that ED's regulation permitting teachers still "participating in" training programs and only making "progress toward full [State] certification" unambiguously conflicts with the higher Congressional HQT standard of "full State certification". This is so regardless of how any given state may define full certification and requires that ED's regulation be voided. Should the Court for any reason consider the plain language of the statutory standard ambiguous, even under *Chevron*'s deferential second prong, ED's regulation cannot be upheld as a reasonable interpretation consistent with the Act's purposes.

I. THE DISTRICT COURT ERRED IN CONCLUDING THAT CONGRESS'S DEFINITION OF A "HIGHLY QUALIFIED" TEACHER AS ONE WHO "HAS OBTAINED FULL STATE CERTIFICATION AS A TEACHER" IS AMBIGUOUS.

A. Congress's Use of the Term "Full State Certification" Established an Unambiguous Standard for HQTs.

1. The District Court Erred in Ignoring the Plain Language of the Phrase "Full State Certification."

In a single paragraph of analysis**,** the District Court concluded that NCLB's term "full State certification" was ambiguous. The sum total of the District Court's analysis under the first *Chevron* prong was as follows:

> Congress did not define "full State certification as a teacher (including certification obtained through alternative routes to certification)." Nor did Congress establish standards for determining which teachers will be considered to have "full State certification," or unambiguously state that a teacher who is participating in an "alternative route" program cannot be highly qualified because he/she has not yet completed that program. Thus, Congress has not "directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. Because it is not clear what is meant by "full State certification," the court must proceed to the second step of the *Chevron* analysis.

ER9:13-20. In failing to apply any of the common tools of statutory construction in its analysis under *Chevron*'s first prong and instead basing its conclusion on erroneous inferences drawn from what Congress did *not* do, the District Court committed reversible error.

It is well-settled that courts must apply "traditional tools of statutory construction" to determine whether "Congress had an intention on the precise question at issue." *Chevron*, 467 U.S. at 843 n.9. Where an issue of statutory construction has come to litigation, rarely will Congress's intent be explicitly spelled out in marquee letters, a standard the District Court erroneously applied.

ER9 ("Congress did not. . . unambiguously state that a teacher who is participating in an "alternative route" program cannot be highly qualified"). Rather, a court must look to the plain, ordinary meaning of the statute's words, its legislative history, and its overall purpose and structure to determine Congress's intent. *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 600 (2004).

The District Court disregarded the cardinal rule of statutory construction which requires a court to turn first to the plain language of a statute itself. *See e.g., Russello v. United States*, 464 U.S. 16, 20-21 (1983); *Johnson v. Aljian*, 490 F.3d 778, 780 (9th Cir. 2007) (following "the common practice of consulting dictionary definitions to clarify their ordinary meaning" (internal citations omitted)). Here, the court explicitly *rejected* according a common, ordinary meaning to the term "full," (*see* ER12, n.3). In fact, the word "full" has a plain, commonly understood and unambiguous meaning: "(1) completely filled; containing all that can be held; filled to the utmost capacity…(2) complete; entire; maximum…."[8] As the Supreme Court has noted, "[a]n obviously broad word that [Congress] went out of its way to add to an important statutory definition"—here, the term "full"—"is

[8] *Dictionary.com Unabridged (v 1.1)*. Random House, Inc., *available at* http://dictionary.reference.com/browse/full (last visited Mar. 6, 2008).

precisely the sort of provision that deserves a respectful reading." *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 705 (1995).

The term "full" in turn modifies "State certification as a teacher." 20 U.S.C. § 7801(23)(A)(i). This latter phrase—also ignored by the District Court—unambiguously references the teacher certification laws established by each state. Applying the common, ordinary meaning of "full" to the phrase "State certification as a teacher" reveals Congress's unambiguous intent from the statute's plain language: that all children receive instruction from teachers who (in addition to a B.A. and subject matter competence) have obtained the full, maximum, most complete level of certification granted by the state in which the children attend school.

2. The District Court Erred in Ignoring the Direct Conflict Between ED's Regulation and the Statute's Plain Language Awarding "Highly Qualified" Status Only to Individuals Who "Ha[ve] Obtained" Full State Certification.

In reaching the erroneous conclusion that "the regulation does not conflict with the statute" (ER11), the District Court failed entirely to consider the most fundamental and direct conflict of all: the statute's explicit requirement that HQTs "*have obtained* full State certification." Nowhere does the District Court's order address the unambiguous conflict between the statutory requirement that HQTs "*have obtained* full state certification" (20 U.S.C. § 7801(23)(A)(i)) (emphasis

added)) and the challenged regulation, which grants HQT status to an individual who "*is participating*" in an alternate route and merely making "*progress toward* full certification as prescribed by the State" (34 C.F.R. § 200.56(a)(2)(ii)) (emphases added).

That Congress discussed full State certification entirely in the present perfect or past tense—"*has obtained*" or "*obtained*" through alternative routes—obviously confirms that "full certification" here cannot connote an inchoate or incipient status as Defendants' regulation would have it. Simply put, being or having become is not the same as becoming; full is not the same as becoming filled. *Having obtained* full state certification is a more advanced state of being than "demonstrat[ing] satisfactory progress" toward it, and the lower court erred in ignoring the plain implication of the verb tenses Congress chose.

3. The District Court Erred in Ignoring the Legislative History Underlying the Phrase "Full State Certification."

The legislative history confirms Plaintiffs' reading of the phrase "full State certification" and the importance of the word "full." Both H.R. 1 (the House version eventually signed into law) and S. 1 (the parallel Senate version that supplied key provisions to the final Act) contained a heightened standard for teachers by requiring that teachers who are "fully qualified" (the House's term) or "highly qualified" (the Senate's) have state certification. H.R. 1 at 782-83

(introduced Mar. 22, 2001) (defining "fully qualified" to mean "the teacher has obtained State certification") (*see* ER281-282); S. 1 at 283-84 (introduced Mar. 28, 2001) (defining "highly qualified" to mean the teacher "is certified or licensed by the State involved") (*see* ER284-285).[9] When the Conference Committee came together to hammer out the final legislation, it adopted the Senate's term "highly qualified" and clarified its intent by inserting the word "full" before "State certification" and adding the provision (now codified at 20 U.S.C. § 7801(23)(A)(ii)) excluding individuals who have had regular certification requirements waived on an emergency, temporary, or provisional basis from "highly qualified" teacher status. CONF. REP. NO. 107-334 to accompany H.R. 1 at 544-45, 1032-34 (Dec. 12, 2001) (*see* ER290, 293-94).

Though presented below, the District Court utterly failed to consider this critical legislative history in reaching its crucial initial determination under the first *Chevron* prong. *See* ER9:13-20. In fact, the legislative history only further underscores Congress's unambiguous intent. In making final amendments to the bill, Congress clarified and emphasized that only teachers with "full" State

[9] *See also* H.R. Rep. No. 107-63, at 223-224 (May 14, 2001) (ER298), H.R. 1, 107th Cong., at 921-922 (1st Sess. 2001) (May 23, 2001) (ER302-303) and S. Rep. No. 107-7, at 283-284 (June 14, 2001) (ER306-307) (later drafts of these bills maintaining, in pertinent part, their respective definitions pre-Conference Committee).

certification and without "emergency, temporary, or provisional" certification should be considered "highly qualified." Because "a conference report represents the final statement of terms agreed to by both houses, next to the statute itself it is the most persuasive evidence of congressional intent," *Demby v. Schweiker*, 671 F.2d 507, 510 (D.C. Cir. 1981); *accord Sierra Club v. Clark*, 755 F.2d 608, 615 (8th Cir. 1985), and should be accorded great weight. *Id.* In failing to give Congress's addition of the term "full" and its explicit prohibition against "emergency, temporary, or provisional" teachers any meaning at all, the District Court committed legal error.

Subsequent comments by the House and Senate Education Committees reinforce the conclusion that Congress's actions in conference were not idle ones. Both the House and Senate Education Committees strongly opposed ED's proposed regulation defining the term "highly qualified teacher" when it was noticed in the Federal Register (*see* ER677). Comments on ED's proposed regulations by the majority members of the Senate Health, Education, Labor and Pensions Committee (HELP) stated that: "[t]he provision exempts teachers with alternative certification from the certification requirement. *This directly contradicts the statute. The statutory language is clear that all teachers must be*

certified. This should be struck." ER692 (emphasis added). The House Democratic Committee Staff expressed similar concerns:

> This provision. . . specifically exempts teachers in alternative certification programs from obtaining certification if a State deems they are permitted to teach in the classroom. This would allow uncertified teachers to be considered highly qualified. This contradicts the statute. . . .

ER684 (emphasis in original). Additionally, Senator Kennedy, chairman of the HELP Committee and a key player in securing NCLB's passage, sharply criticized ED's earlier June 2002 draft guidance (*see* ER702) defining the HQT term similar to the proposed regulation: "In the draft guidance. . . .[a]lternate route teachers can be considered highly qualified while holding a provisional certification while they are working to obtain full certification. *This is inconsistent with the definition in [NCLB] which holds the same standards for all teachers."* 148 CONG. REC. S 5341, 5342-43 (June 11, 2002) (emphasis added) (*see* ER310).

It is a fundamental canon of statutory construction that courts must "give effect, if possible, to every clause and word of a statute rather than to emasculate an entire section." *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 975 (9th Cir. 2003) (internal citations omitted) (finding against agency under the first *Chevron* prong). Here, the District Court's reading ignored Congress's purposeful and critical addition of the word "full" and the

related provision prohibiting provisionally certified teachers as HQTs. *See also* Argument, *infra*, at I.C. (further explicating the meaning of the latter provision).

4. The District Court Failed to Understand that Congress's Requirement of "Full State Certification" References the Laws of All Fifty States.

As noted, the District erred in wholly disregarding a second key adjective modifying the word "certification": the requirement that "highly qualified teachers" have "full *State* certification." ER9, 11-12 (emphasis added). In doing so, the lower court fatally misunderstood the longstanding relationship between the federal government and the states with respect to public schools as further reflected in NCLB itself. Public education in the United States has historically been a matter of state and local control, with the federal government taking only a limited role.[10] NCLB, while perhaps the most expansive piece of federal education legislation in the past forty years, continues this tradition of federalism by leaving to each state the authority to determine the critical academic content, proficiency, and teacher quality standards at the core of the Act. Facts, *supra*, at B; *see also* Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 401-402, n.340-342 ("[T]he operative provisions of the statute—in particular, its testing and accountability requirements—address student 'proficiency on

[10] *See, e.g., Freeman v. Pitts*, 503 U.S. 467, 490 (1992) ("As we have long observed, local autonomy of school districts is a vital national tradition" (citations omitted)).

challenging *state* academic achievement standards and *state* academic assessments.' . . .[E]ach state has virtually unfettered discretion to define and revise the standards for measuring proficiency.") (internal citations omitted; emphasis in original); *see also* 20 U.S.C. § 7801(23)(A) (as to teacher certification standards).

ED has always understood each state to have autonomy over what it decides are the requirements a teacher must complete to obtain "full *State* certification" as a teacher. The best indication of this is *the challenged regulation itself*, which concedes that alternate route teachers are only making "progress toward full certification *as prescribed by the State*." 34 C.F.R. § 200.56.(a)(2)(ii)(A)(4) (emphasis added).

Repeatedly, Defendants' pre-litigation discussions of "full state certification" in the Administrative Record and in their subsequent guidance to states echo this conclusion. ED rejected criticisms that its proposed regulations failed to define more fully what it means to have licensure "waived on an emergency, temporary, or provisional basis," reasoning that "[s]tate certification and licensure is a matter of State law and policy, and hence the definition of these terms is left to State decisionmaking." ER680.

Defendants' guidance to states has explicitly clarified that the term "full State certification" is an unambiguous term whose meaning is determined by the laws of each of the fifty states as to how a teacher may be considered fully-certified by that state. An example of such guidance provides:

> C-6. What is meant by "full State certification"?
> *Full State certification is defined by State policy*. . . . States are free to redefine, in accordance with State law, their certification requirements (for example, they may streamline requirements if they determine that they are too onerous) or create non-traditional approaches to certification. . . .

ER278 at C-6 (emphasis added).[11]

Contrary to Congress's clear intent and NCLB's entire legislative scheme—and indeed the history of federal legislation in public education—the District Court's decision erroneously permits the U.S. Department of Education to lower an unambiguous "full certification" state standard. Where California—and most states—award "full State certification" only to individuals who have *completed* a teacher preparation program, Defendants' regulation impermissibly overrides this state determination by permitting mere program participants to receive HQT status.

[11] Plaintiffs relied below on this September 2003 guidance manual for states and districts, which Defendants voluntarily produced, and do so again on appeal. Such extra record evidence, from the agency itself no less, is appropriate to explain technical terms and avoid a frustration of judicial review. *Southwest Ctr. for Biological Diversity v. U.S. Forest Service*, 100 F.3d 1443, 1450 (9th Cir. 1996).

In California, where all of the Plaintiffs reside and attend school, "full State certification" requires completion of either a traditional or an alternative teacher preparation program. *See* Facts, *supra*, at D. The challenged regulation is illegal precisely because it permits a state like California, which requires completion of a teacher preparation program for full state certification, to report and treat as "highly qualified" those teachers who have not yet achieved California's level of full certification.

5. ED Consistently Agreed Pre-Litigation That "Full State Certification" Unambiguously Means an Individual Who Has *Fully Met* the State's Certification Requirements Relative to the Individual's Years of Experience and Does Not Encompass Alternate Route Participants.

The court below adopted wholesale Defendants' new post-litigation position that the phrase "full State certification" is ambiguous as to whether it includes alternative route program participants. ER9:13-20. In fact, neither the court below nor this Court owe any deference to Defendants' "*post hoc* litigating position, adopted by counsel for [the agency]" (*Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-213 (1988)), particularly where this position "is flatly contradicted by [the agency's] past actions" (*Int'l Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 565-568 (1979)).

Incredibly, without explanation or analysis, the District Court ignored the avalanche of record evidence confirming the lack of ambiguity over the meaning

of the phrase at the center of this case. Prior to this litigation, ED consistently took the position that Congress's "full State certification" standard was readily discernible—indeed that there was a national consensus that states typically require pedagogical program *completion* to earn "full" certification. Facts, *supra*, at D; ER699 (*Meeting the Highly Qualified Teachers Challenge: The Secretary's Annual Report on Teacher Quality* (2002)).[12] ED consistently explained to states and districts that to obtain "full State certification," individuals must fully meet their state's certification requirements relative to the individual's years of experience. Consistent with this position (and with Plaintiffs'), ED always acknowledged that "full State certification" *does not* include individuals participating in an alternative route program.

In its draft guidance to states issued in June 2002, for example, in response to the question "What is meant by 'full State certification'?," ED stated:

> In the context of the definition of a highly qualified teacher, "full State certification" means that the teacher has *fully met* those State requirements that apply to the years of experience the teacher possesses. For example, these requirements may vary for first year teachers and veteran teachers.

ER709 at C-2 (emphasis added). As noted, in California, the only credential that can be obtained by a brand new teacher who has *fully* met all certification

[12] Thus, Congress did not need to fill out the phrase "full State certification" any further. *See Miles v. Apex Marine*, 498 U.S. 19, 32 (1970) ("We assume that Congress is aware of existing law when it passes legislation.").

requirements is a "preliminary" credential, while a fully-certified veteran receives a "professional clear" credential. *See* Facts, *supra*, at D. Alternate route program *participants* in California, by definition, have not "fully met" the certification requirements applicable to brand new teachers precisely because they have not yet completed their pedagogical training and satisfied that core certification requirement.

Indeed, the challenged regulation itself proves the point by conceding that teachers "participating in alternative route[s]" are only making "progress toward full certification" as prescribed by the various states' standards. 34 C.F.R. § 200.56.(a)(2)(ii)(A)(4).[13] Similarly, 34 C.F.R. § 200.56(a)(2) sets out two ways a teacher with a B.A. and subject matter competence may be considered "highly qualified." The first, clarifying Congress's definition, provides that a "highly qualified" teacher is one who "[h]as fulfilled the State's certification or licensure requirements applicable to the years of experience the teacher possesses." 34 C.F.R. § 200.56(a)(2)(i). The second—the unlawful provision challenged in this suit—provides that a "highly qualified teacher" is one "participating in an

[13] *See also* ER709 Response to Question C-3 (where Defendants also describe alternate route teachers as "making…progress toward full certification") and *also id.* Response to Question C-2 (where Defendants did not include alternate route teachers within the definition of "full state certification" but left them for separate treatment under Question C-3).

alternative route to certification program. . . ." 34 C.F.R. § 200.56(a)(2)(ii). Notably, these two different routes are separated by the disjunctive "or," making it clear that an individual "participating in" an alternative route program, by definition, has not "fulfilled the State's certification and licensure requirements."

The appendix to the final regulation further demonstrates that ED's true understanding of the term "full State certification" accords with Plaintiffs', and that prior to this litigation, Defendants never considered alternate route teachers to have full state certification. When comments to the proposed regulation criticized ED for labeling alternate route teachers as "highly qualified," ED responded in the Federal Register: "we do not believe that Congress intended that teachers in alternative route programs would be unable to teach *until they had obtained full State certification*," ER680 (emphasis added). As such, Defendants then reasoned, they felt compelled to create "one exception" to the requirements of full state certification and no provisional certification. ER680-681.

Further, in the September 2003 guidance to states on NCLB teacher quality provisions, ED explained in response to the question "What is meant by 'full State certification'?":

> Full State certification is defined by State policy. . . . For example, if State law so permits, a State may determine that an individual is fully certified if he or she has passed a rigorous assessment of his or her subject matter mastery, such as one of the assessments currently being developed by the

> American Board for Certification of Teacher Excellence. *Such non-traditional approaches to full State certification are different from alternative route to certification programs (see C-7 below) because, in the former, the candidate is fully certified before he or she starts teaching.*

ER278 at C-6 (emphasis added). Thus, ED again expressly and unambiguously acknowledges that teachers participating in alternate route programs are *not* within the definition of "full State certification" but exist as an administrative creation outside of it.

Based on these Record statements, it is clear that there is no true dispute over the intent and meaning of "full State certification." The phrase means a teacher has fully met the state's certification requirements applicable to his or her years of experience. Unless and until a state makes the unlikely decision to give mere alternate route program participants the same full credentials as teacher preparation program graduates, teachers still completing their pedagogical training in alternative certification programs have not fully met their state's certification requirements.[14]

[14] Note, ED agrees that the "full State certification" phrase obviously also includes brand new teachers who fully meet the certification requirements applicable to new teachers with no experience (like new preliminary credential holders in California) and not just veteran teachers (like professional clear credential holders). This reading (set forth in the unchallenged portion of the regulation, *see* 34 C.F.R. § 200.56(a)(2)(i)) makes perfect sense and, indeed, is the only possible reading of Congress's requirement that HQTs have "full State certification." Otherwise, no state or district would ever be able to develop a supply of new teachers to fill

B. The District Court's Interpretation of the Parenthetical "(Including Certification Obtained Through Alternative Routes to Certification)" Is Erroneous and Conflicts With ED's Prior Interpretations in the Record.

The District Court rejected Plaintiffs' interpretation of the parenthetical modifying "full State certification" as rendering the parenthetical superfluous, reasoning:

> If. . . Congress intended that participants in "alternative route" programs have already completed a teacher-training program [before being labeled "highly qualified"], that objective could have been accomplished by the words "full State certification". . . Alternatively, if Congress wanted to preclude participants in "alternative route" programs from obtaining "full State certification," it could have done so by inserting the word "after" in place of "through."

ER12. The court's interpretation of the parenthetical ignores the principles of statutory construction and Defendants' own prior interpretation of the parenthetical in the Administrative Record.

A plain reading of the parenthetical recognizes that it serves to illustrate only the phrase "full State certification as a teacher." That fact and its use of "including" makes clear that whatever exists within the parenthetical is but a

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openings when veterans retire, move or pass away and at the same time comply with NCLB's 100% HQT requirement. Such a reading also prevents rendering other provisions of NCLB superfluous. For example, NCLB requires that poor and minority students have equal access to *experienced*, as well as highly qualified teachers. 20 U.S.C. § 6311(b)(8)(C). If HQTs were, by definition, experienced, such a requirement would be unnecessary.

subset of the referenced "full State certification" standard. It makes perfect sense that Congress sought to clarify that *non-traditional*, alternative routes were equally satisfactory routes to earning "full State certification" as traditional teacher certification programs. Whichever equally satisfactory route a prospective teacher chose to pursue, however, Congress's definition of the term "highly qualified teacher" is clear: one had to first complete the requirements for "full State certification"—which in California means (and which ED has always understood to mean in other states) *completion* of either a traditional or an alternative teacher preparation program—in order to be considered "highly qualified."

In ED's guidance to states implementing NCLB, ED has always taken the same position as Plaintiffs: that the parenthetical merely clarifies that full state certification can be obtained through either traditional or alternative routes. *See* ER709 (June 2002 Guidance) (clarifying that a "highly qualified" teacher is one "who has obtained full State certification (whether he or she has achieved certification through traditional or alternate routes"); ER236 at B-2 (same).

At most, the parenthetical can be read to mean that if a state accords an individual full state certification *during participation* in an alternative route program (and Plaintiffs are aware of none that do), that individual is fully-certified. If, however, a state grants full certification only after *completion* of an alternative

route program (as California does), the individual must complete that alternative route in order to be considered fully-certified. What the parenthetical *cannot* mean is what the court below concluded: even where a state has precluded alternative route participants from its full level of certification, the state may nonetheless consider teachers-in-training through alternative routes as having obtained full certification under the laws and policies of that state. This non-sequiter would allow the clarification provided in the parenthetical to vitiate the core point of the statutory provision in question.

C. The District Court Ignored the Direct Conflict Between ED's Regulation and Congress's Explicit Exclusion of Teachers Who Have "Emergency, Temporary, or Provisional" Certification From the "Highly Qualified" Definition.

The District Court's opinion failed to address yet another obvious conflict between the statute and the challenged regulation. The Act specifically excludes from the definition of "highly qualified" those teachers who have had "certification or licensure requirements waived on an emergency, temporary, or provisional basis." 20 U.S.C. § 7801(23)(A)(ii). This provision emphasizes the clear congressional declaration in section 7801(23)(A)(i) that teachers must have already "obtained *full* State certification" or licensure to be deemed "highly qualified." *Id.* (emphasis added). Yet ED's regulation permits participants in alternative route teacher certification programs to be deemed "highly qualified" only on a

provisional basis "not to exceed three years." 34 C.F.R. § 200.56(a)(2)(ii)(A)(3). The notion that a temporary or provisional certification "not to exceed three years" is equivalent to "full State certification" is refuted merely by stating it.[15]

ED itself admits this irreconcilable conflict between its regulation—certifying alternative route participants as "highly qualified" for a limited period of only three years—and Congress's exclusion of "emergency, temporary, or provisional[ly]" certified teachers from the definition of "highly qualified." In the rulemaking history, ED concedes that its regulation permitting alternative route participants to be labeled "highly qualified" for up to three years is the "one exception" to the statutory exclusion of "emergency, temporary, or provisional[ly]" credentialed teachers from the definition of "highly qualified":

> We add only that with one exception the Secretary interprets the phrase "waived on an emergency, provisional, or temporary basis," to encompass any form of a waiver, by whatever name a State uses, under which the State

[15] Indeed, in California, it is indisputable that intern credentials are both "temporary" in that they authorize service for only two years (*see* CAL. EDUC. CODE §§ 44251, 44325, 44455) and "provisional" in that they limit service to a single school district (*see* CAL. EDUC. CODE §§ 44325, 44463). In contrast, full certification in California comes in the form of preliminary and professional clear credentials, which have no geographic limit and are valid for a period of 5 years (renewable for clear credential holders). *See* CAL. EDUC. CODE §§ 44259, 44274.2; CAL. CODE REGS. tit. 5, § 80413. The five-year duration of the validity of preliminary and professional clear credentials is the *maximum* duration of any credential currently issued in the state. All of California's other teaching authorizations—valid for only one or two years—must be considered "temporary" by comparison. *See* ER 220.

> permits a teacher to teach without having obtained full certification or licensure applicable to the years of experience the teacher possesses. That exception is for teachers in alternative routes to certification consistent with § 200.56(a)(2)(ii).

ER680-681. ED's rationalization of the regulation goes further:

> …in order to ensure that alternative route programs do not become long-term vehicles for waiving State requirements for full certification, it is reasonable to establish a maximum period—three years—in which a teacher in an alternative route can be considered to be fully certified without having received State certification.

Id.

ED's public rationale for the challenged regulation is notable for three reasons. First, ED acknowledges that the challenged regulation grants participants in alternative route programs *a waiver* of state requirements for full certification, and justifies the three year limitation as a safeguard to prevent long-term misuse of this loophole. Second, ED concedes that the challenged regulation has created "an exception" to Congress's explicit statutory prohibition on waivers of the "full State certification" requirement—one for which the Appendix provides policy rationales but no legal authority. Third, ED—as it has consistently done throughout the Administrative Record—once again recognizes that alternative route participants have not yet obtained full state certification. In failing to address this damning regulatory history in which ED blatantly and publicly acknowledged the obvious

conflict between the statute and the regulation, the District Court committed legal error.

In sum, Congress's definition of the term "highly qualified teacher" as one who "has obtained full State certification as a teacher (including through alternative routes to certification)" and who "has not had certification or licensure requirements waived on an emergency, temporary, or provisional basis," (20 U.S.C. § 7801(23)(A)) is unambiguous. The statute's plain language, legislative history, structure, and purpose demonstrate Congress's unambiguous intent that all children, but especially poor and minority children, be taught by teachers who have obtained their state's fullest level of teacher certification based on their years of experience—not by teachers-in-training who are still making "progress toward full certification" (34 C.F.R. § 200.56(a)(2)(ii)). The lower court's finding of ambiguity—which failed to utilize traditional tools of statutory interpretation, neglected to address the fundamental conflict between the statute and the regulation itself, and ignored ED's damning pre-litigation positions in the Administrative Record—constitutes manifest legal error.

II. EVEN ASSUMING THE STATUTE IS AMBIGUOUS, THE DISTRICT COURT ERRED IN CONCLUDING THAT ED'S REGULATION DEFINING A TEACHER-IN-TRAINING AS "HIGHLY QUALIFIED" IS REASONABLE AND CONSISTENT WITH NCLB.

According to *Chevron*, given the clarity of NCLB's HQT definition, this Court need look no further to reverse the lower court's decision and rule in favor of Plaintiffs. Nonetheless, even if the Court were to find some ambiguity in Congress's "highly qualified" teacher definition, ED's regulation should not be accorded deference under the second prong of the *Chevron* analysis as it conflicts with NCLB's overall goals and leads to absurd results, rendering it "manifestly contrary to the statute." *Chevron*, 467 U.S. at 843-44. *See also Hawaii v. FEMA*, 294 F.3d 1152, 1159 (9th Cir. 2001) (rejecting agency interpretation under *Chevron*'s second prong where it is unreasonable, leads to absurd results and does not advance Congress's purposes).

A. ED's Regulation is Wholly Inconsistent With the Statutory Scheme and Undermines NCLB's Goals of Improving Access to, Distribution of, and Public Accountability for Better Prepared Teachers.

The Supreme Court has long recognized that administrative regulations that are inconsistent with their statutory mandate or that frustrate the policies that Congress sought to implement must be rejected. *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981); *Kaiser Aluminum & Chem. Corp. v. Bonneville Power Admin.*, 261 F.3d 843, 848-49 (9th Cir. 2001). As the lower court itself recognized, "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." ER8:26-28

(citing *MCI Telecomms. Corp. v. AT & T Co.*, 512 U.S. 218, 229 (1994)). The District Court's opinion, however, devotes just two sentences to its duty under the second prong of *Chevron* to analyze the reasonableness of the regulation:

> The regulation simply adds the provision that an individual who "is participating in an alternative route to certification program" that fulfills certain requirements may be considered to have "obtained full State certification as a teacher." The Secretary's interpretation is also consistent with the other provisions of the NCLB Act—in particular, the provisions regarding the "alternative route" programs.

ER13:1-5. Nowhere does the court's opinion ever address Plaintiffs' arguments below that the challenged regulation, by allowing teachers-in-training to be labeled "highly qualified," wholly undercuts NCLB's goals of improving teacher quality, and ensuring equity and accountability with respect to students' access to fully-prepared teachers.

1. ED's Regulation Frustrates Congress's Intent that Poor and Minority Students Have Equal, if Not Greater, Access to Fully-prepared, Well-qualified Teachers.

The primary goals of NCLB are to bring all students to the level of "proficient" in reading and math by 2014 and to close the achievement gap between low-income and minority students and their more affluent, white peers. *See* 20 U.S.C. §§ 6301, 6311(b)(2)(F), 6311(b)(2)(B). As stated by Secretary Spellings (*see* ER447), a cornerstone of NCLB's accountability scheme for ensuring that these ambitious goals are met is that all children must be taught by

"highly qualified" teachers as that term is defined in the statute. Delivering these teachers to all children, especially poor and minority students, in turn relies on the Act's hiring, distribution, planning and reporting requirements. *See* Facts, *supra*, at A.[16]

Even if this Court were somehow to find ambiguity in the statutory definition of a "highly qualified" teacher, there can be no dispute that the Act seeks to *improve* students' access to better prepared, more qualified teachers, not to worsen it. It strains credulity to assert that, as a general matter, ED's regulation increases access to better prepared teachers when by definition it enacts a standard that awards, without limitation, HQT status to teachers who have not yet completed their pedagogical training—indeed, who may have just enrolled in a preparation program—in place of the *higher* standard that would be in place without the regulation. That standard, absent ED's offending regulation, would require all teachers to have completed all certification requirements, including their

[16] *See also, e.g.,* 147 CONG. REC. H2611-01, at *H2626 (May 23, 2001) (comments of Congressman Miller (Martinez) stating "the poorest school districts with the poorest children, as the President will point out, and the poorest performing children, under this legislation, within 4 years they are going to have to have a qualified teacher in every classroom.") (*see* ER315);147 CONG. REC. H4121-01, at *H4127-H4128 (July 18, 2001) (comments of Congresswoman Solis (Los Angeles) criticizing the "overabundance of teachers who do not have credentials" in her district and its impact on "low income students") (*see* ER312-313).

traditional or alternate route pedagogical training, prior to obtaining HQT status. Instead, under Defendants' regulation, the teaching force of an entire school, school district, or even *of an entire state* could lawfully consist of 100% alternative route program participants teaching full-time while still learning how to teach at night and on weekends. Far from "reasonable," ER13:1, this proposition so fundamentally undermines the core promise of NCLB to improve teacher quality as to be rendered absurd.

And in California, the regulation has led to absurd results. Low-performing, low-income and minority students—the students whom Congress intended would reap the greatest benefits from NCLB—are the ones disproportionately taught by interns still learning how to teach. *Indeed, 23% of California's 10,000 interns teach in schools whose students are 98-100% minority.* ER330¶13, 340; *see also* Facts, *supra* at E.2.

Even if one of the sub-goals of the Act can be said to be fostering experimentation with alternative routes of certification, that conclusion cannot justify ED, within its discretion under prong two of *Chevron*, so favoring such a goal as to jettison other core teacher quality goals of the Act—like improving access to better prepared teachers and the accurate and meaningful reporting of teacher quality information to the public. In other words, the agency may try to

harmonize the Act's various goals, but it is not free to undercut any, even if faced with language that it views as ambiguous or problematic.

2. ED's Regulation Frustrates Congress's Intent that Schools, Districts, and States Provide Accurate, Meaningful Information to Parents and the Public Regarding Students' Access to Better Prepared Teachers.

It bears emphasizing the extent to which ED's regulation eviscerates the public transparency and accountability provisions so central to the Act's purpose of improving the academic achievement of all students. *See* 20 U.S.C. § 6301(4). Parents' "right-to-know" when their child is being taught by a non-HQT is substantially undermined. 20 U.S.C. § 6311(h)(6)(B)(ii). Under ED's regulation, districts are under no obligation to inform parents when their child is being taught by a teacher-in-training through an alternative route program—even though that teacher is not yet fully-certified and, indeed, may have only just begun an alternative teacher preparation program. Without this critical information, parents—such as the parents of the plaintiffs in this case—are unable to make important decisions regarding their child's education as the Act intends.

NCLB also mandates that schools, districts, states and the Department of Education report on their numbers of HQTs and the progress they are making towards meeting the 100% HQT goal. *See* Facts, *supra*, at A.1. Armed with this information, the Act intends that parents and the public hold their schools, districts,

and ultimately their state accountable for providing access to fully-certified, HQTs. With this data, districts can monitor individual schools' progress toward meeting the 100% HQT goal and equitable distribution requirements, and where necessary, develop local policies to increase access to HQTs. States can monitor and respond to district data, and ED can in turn monitor and respond to state-level data. The structure of NCLB's HQT public reporting requirements contemplates that each of these entities take steps to meet the HQT requirement, and that—if the nation falls short of meeting the 100% HQT goal—Congress will receive this information from ED and prepare informed education policy and budget responses.

By reporting over 10,000 California alternative route teachers-in-training and over 100,000 such individuals nationally as "highly qualified", ED's regulation masks meaningful differences in the true quality and preparation of teachers contrary to the Act's purposes. For example, if a low-income, high minority school had 100% alternative route teachers-in-training and a cross-town affluent, low minority school had 100% fully prepared and fully-certified teachers, the two schools would, under ED's regulation, be reported as having the exact same number of "highly qualified" teachers. ED's regulation thus improperly insulates schools, districts and states from the very political pressures Congress intended be visited upon them to improve the qualifications of their teachers.

3. ED's Regulation is Also Unreasonable Because it Usurps States' Longstanding Authority over Teacher Certification, Which NCLB Explicitly Sought to Reinforce.

Whatever ambiguity a court might possibly find in the Act also cannot justify ED's subversion of NCLB's traditional delegation to states the sole role of determining state teacher certification standards.

Courts "ordinarily expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority." *Rapanos v. United States*, 547 U.S. 715, 737-38 (2006) (plurality opinion by Scalia, J.). Public education and the establishment of state teacher certification standards certainly falls into this domain. Yet, as noted above, rather than authorizing ED's intrusion, Congress's "clear and manifest" HQT definition explicitly continues the traditional federal role of deferring to each of the fifty states to determine what full teacher certification in that state means. *See* Argument, *supra*, at § I.A.4. ED's regulation intruding in this traditional state domain thus not only violates the plain language of the Act under *Chevron*'s first prong, it is also unreasonable, inconsistent with the structure and purposes of NCLB, and entitled to no deference under *Chevron*'s second prong. *See Rapanos*, 547 U.S. at 737-38 (agency's interpretation unreasonable because it resulted in "a significant impingement of the States' traditional and primary power over land and water use").

B. The District Court Erroneously Concluded That Reading NCLB's HQT Definition as Requiring "Full State Certification" Is Inconsistent With Congress's Support for Alternative Route Certification Programs.

After devoting nearly a page to summarizing only Defendants' arguments on this point, ER11:7-25, the District Court concluded—without a single word of analysis—that it would be inconsistent for Congress to have authorized funding to support alternative route programs such as "Troops to Teachers" and "Transition to Teaching," while simultaneously excluding participants in these programs from HQT status. ER13:4-5. In fact, as demonstrated below, these provisions are entirely consistent with each other and demonstrate that Congress was not merely mandating standards, but providing interim means to satisfy them.

1. The District Court and ED Erred As a Matter of Law in Presuming that Congress *Inadvertently* Excluded Alternate Route Participants from "Highly Qualified" Status.

As this Court has stated, courts "must presume that Congress acts with deliberation, rather than by inadvertence, when it drafts a statute." *California Cosmetology Coalition v. Riley*, 110 F.3d 1454, 1460 (9th Cir. 1997) (citing *United States v. Motamedi*, 767 F.2d 1403, 1406 (9th Cir. 1985)). In defining the term "highly qualified" teacher, Congress's intent was unmistakable: only a teacher who "has obtained full State certification"—whether that certification was obtained through a traditional or an alternative route program— or "passed the State teacher

licensing examination, and holds a license to teach in such State," is "highly qualified." 20 U.S.C. § 7801(23)(A)(i). Though Congress's "highly qualified" teacher definition sets forth only these two avenues for meeting the HQT standard, ED's regulation adds an unauthorized *third* avenue: individuals "participating in an alternative route" and making "progress toward full certification." It is well-settled that "[a] regulation may not serve to amend a statute, *Koshland v. Helvering*, 298 U.S. 441, 447 (1936), nor add to the statute 'something which is not there.' *United States v. Calamaro*, 354 U.S. 351 (1957).

ED's justification for adding this "one exception" "for teachers in alternative routes to certification" was that "we do not believe that Congress intended that teachers in alternative route programs would be unable to teach until they had obtained full State certification." ER680-681 (67 Fed. Reg. 71764-71765 (Dec. 2, 2002). Thus, Defendants—who in this same sentence and elsewhere repeatedly concede that alternate route participants lack the necessary "full State certification"—acknowledge their belief that Congress inadvertently excluded alternative route teachers-in-training from the "highly qualified" definition, necessitating the challenged regulation. As *California Cosmetology* teaches, however, Congress acts by deliberation, not inadvertence, and the agency's duty here was to find harmony among provisions, not to override one. *See Cosmetology*

Coalition v. Riley, 110 F.3d at 1457-1459 (Secretary of Education's perceived conflict necessitating certain student financial aid regulations did not exist; instead, regulations conflicted with the clear and unambiguous language of the statute.).

2. Because Participation in the Various Alternate Route Programs is Voluntary, not Mandatory, and Because Congress has Delegated to States the Role of Defining "Full State Certification," There is No Irreconcilable Conflict Between the Two.

As an initial matter, despite ED's best efforts to manufacture discord, it must be conceded that *on its face* there is no conflict between Congress's support for some alternative route programs and the "full State certification" standard. Defendants and the court below fail to recognize that NCLB's provisions governing alternative route programs such as "Troops to Teachers" and "Transition to Teaching" are entirely permissive. *NCLB does not require any state or district to use these voluntary programs.* Thus, even assuming a state wanted to ensure that only HQTs were hired by its districts, it would remain the case that, by setting their own "full State certification" standard, states are able to decide whether they want their schools to utilize teachers in alternative route programs.

3. NCLB's Statutory Scheme Fully Accepts that Non-HQTs Will Continue to Teach in Areas Where There Are Teacher Shortages and Supports Alternative Route Programs as One Way to Help Transition Districts Into Compliance With the 100% HQT Requirement.

Although NCLB posits an ultimate goal that all children have fully-certified, HQTs in core courses, the statute recognizes that it will likely take years to reach this 100% HQT goal and that, in the meantime, children will continue to be taught by non-HQTs. Thus, NCLB requires that, *even after* the Act's 100% HQT deadline of 2005-06, state and local education agencies must continue to have plans for how they will meet the 100% HQT requirement (*see* 20 U.S.C. §§ 6311(a), 6312(c)(1)(I)); states, districts, and schools must continue to work to distribute equitably non-HQTs (*see* 20 U.S.C. § 6311(b)(8)(C)); states, districts, and schools must continue to report on the progress they are making towards meeting the 100% HQT requirement (*see* 20 U.S.C. §§ 6311(h)(1)(C)(viii), 6311(h)(2), 6319(b)(1)(A)); and states and districts may seek to obtain Title II, Parts A and C grant funds to redress these ongoing HQT shortages with alternative route participants who commit to remain in the high need school or district after transitioning to full certification (*see* 20 U.S.C. § 6671 *et seq.*, 20 U.S.C. § 6681 *et seq.*). All of these requirements would have been unnecessary and idle acts by Congress if it actually expected full 100% HQT compliance by the end of 2005-06.

Defendants do not dispute that Congress intended alternative route programs to redress longstanding HQT shortages in high-need districts and schools. *See* Defs. Opp. at 5:1-3 (Docket No. 60). By statutory mandate, "Troops to Teachers"

and "Transition to Teaching" participants must be assigned to "high-need" districts and/or schools experiencing teacher shortages that, by definition, *are already out of compliance* with NCLB's 100% HQT requirement. *See* 20 U.S.C. §§ 6674, 6682-83. *See also* 20 U.S.C. §§ 6613, 6623 (Title II, Part A grant funds may be used, *inter alia*, to redress teacher shortages through alternative route programs). Because these districts are already out of compliance, hiring non-"highly qualified" alternative route participants does not put them in further violation of NCLB. Instead, districts with teacher shortages are able to fill teacher vacancies and replace substitute or other underprepared teachers with alternative route participants who—though they are not yet fully-certified, HQTs—have subject matter knowledge, are in a fast-track program to obtain full certification and become "highly qualified," and have committed to stay in the district for at least three years. 20 U.S.C. §§ 6674, 6683.

Secretary Spellings agrees that the 100% HQT requirement is a goal that will take time to achieve beyond NCLB's 2005-06 100% HQT timeline. The Secretary notified states in October 2005 that "[s]tates that do not quite reach the 100 percent goal by the end of the 2005-06 school year *will not lose federal funds* if they are implementing the law and making a good-faith effort to reach the HQT goal in NCLB as soon as possible." ER447 (emphasis added). Thus, contrary to

Defendants' contention, states and districts would not be categorically prohibited by NCLB from hiring alternative route program participants were these teachers deemed not "highly qualified." To the contrary, this practice is recognized by the statutory scheme as inevitable and would serve as evidence of "good faith" interim efforts to meet the 100% HQT goal in high-need schools and districts.

III. THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT CONGRESS'S FAILURE TO AMEND NCLB'S HQT DEFINITION INDICATES CONGRESSIONAL APPROVAL OF ED'S REGULATION.

The District Court erred in imputing legislative acquiescence to the challenged regulation based on "Congress's failure to reverse the Secretary's regulation after more than five years since its promulgation." ER13 (Op. at 12:6-8). As an initial matter, it is clear from the regulatory history that members of Congress—including the majority members of the Senate Health Education Labor and Pensions Committee and Senator Kennedy, one of NCLB's key authors—expressly disapproved of the challenged regulation when first proposed. *See* ER684, ER692, 148 CONG. REC. S 5341, 5342-43 (June 11, 2002) (comments of Sen. Kennedy) (*see* ER309-310), discussed *supra* at I.A.3.

Furthermore, the case law is clear that congressional acquiescence may only be assumed in certain limited circumstances not applicable here. Generally, courts follow the rule that "Congress takes no governmental action except by legislation."

Rapanos, 547 U.S. at 750. Congressional acquiescence may only be assumed in the rare circumstance "when there is evidence that Congress considered and rejected the '*precise* issue' presented before the Court." *Id.* (emphasis in original), *citing SWANCC v. United States Army Corps of Eng'rs*, 531 U.S. 159, 169-170 n.5 (2001). *See also Aaron v. SEC*, 446 U.S. 680, 694 n.11 (1980)) (even where Congress had been expressly informed of agency's interpretation on two occasions when relevant law was amended, Congress's failure to overturn agency's interpretation fails to indicate acquiescence with agency's interpretation where amendments concern other unrelated matters). Here, Congress has failed to make a single amendment to NCLB since it was first passed in 2001, much less considered and rejected any amendment to NCLB's definition of a "highly qualified" teacher. Indeed, as a reauthorization statute, NCLB presents a regular schedule for revisiting and amending, and thus, it is not surprising that Congress would defer tinkering with individual provisions until it undertakes reauthorization of the Act as a whole. The District Court thus erred in presuming legislative acquiescence based on Congress's failure to reverse the regulation.

NCLB is currently due for reauthorization. When this will happen and whether NCLB will retain its current structure or be completely overhauled will depend on the new Congress and President. Whatever the outcome, however,

Congress deserves a prompt and final judicial determination interpreting the original NCLB statute with respect to "highly qualified" teachers so that it may make any amendments it deems necessary as part of a larger reauthorization.

CONCLUSION AND REMEDY REQUESTED

For the reasons stated above, Plaintiffs ask this Court to rule that ED's regulation plainly conflicts with Congress's unambiguous definition of the term "highly qualified" teacher as one who "has obtained full State certification". In the alternative, Plaintiffs ask this Court to rule that ED's regulation is an unreasonable exercise of agency authority and inconsistent with the purposes of the Act. Plaintiffs respectfully request that this Court reverse the District Court's Order and the accompanying judgment and remand with instructions to void 34 C.F.R. § 200.56(a)(2)(ii), enter judgment for Plaintiffs, and provide additional relief consistent with this Court's judgment and opinion and Plaintiffs' Prayer for Relief.

Dated: October 15, 2008

Respectfully submitted,

s/ John T. Affeldt
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STATEMENT OF RELATED CASES

Circuit Rule 28-2.6

Plaintiffs know of no other related cases pending before this Court.

Dated: October 6, 2008

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 32 (A)(7)(C) AND CIRCUIT RULE 32-1
FOR CASE NUMBER 08-16661

I certify that: (check appropriate option(s))

_X_ 1. Pursuant to Fed. R. App. P. 32 (a) (7) (C) and Ninth Circuit Rule 32-1, the attached **corrected** opening/answering/reply/cross-appeal brief is

- Proportionately spaced, has a typeface of 14 points or more and contains **13,989** words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words),
  or is
- Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14, 000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

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- This brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages;
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- This brief is being filed in a capital case pursuant to the type-volume limitations set forth at Circuit Rule 32-4 and is

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__ 4. *Amicus Briefs*

- Pursuant to Fed. R. App. P. 29 (d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7000 words or less,
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Dated: October 15, 2008

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CERTIFICATE OF SERVICE
Case No. 08-16661

My business address is 131 Steuart Street, Suite 300, San Francisco California 94105-1241 and I am employed in the City and County of San Francisco, State of California. I am over the age of 18 and not a party to this action.

I hereby certify that on October 15, 2008, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system:

APPELLANTS' CORRECTED OPENING BRIEF

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I further certify that I served a copy of the foregoing document on the following counsel:

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directly by electronic mail and by overnight mail by sealing a package containing a true and correct copy of this document, with proper postage affixed, addressed to the person above, and by placing this day at the above business address said envelopes for collection, and mailing by overnight U.S. mail following ordinary business practices. I am readily familiar with the regular practice of collection and processing of correspondence for mailing of United States mail.

I further certify that **APPELLANTS' INITIAL EXCERPTS OF RECORD** was served on the above named counsel by overnight mail on October 6, 2008.

I declare under penalty of perjury the foregoing is true and correct, and that I executed this proof of service in San Francisco, California this 15th day of October, 2008.

s/ Tara Kini
Tara Kini