No. 08-16661

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SONYA RENEE, et al.,

Plaintiffs-Appellants,

v.

MARGARET SPELLINGS, as Secretary of Education, and UNITED STATES DEPARTMENT OF EDUCATION,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
No. 07-cv-04299 PJA

BRIEF FOR THE APPELLEES

Of counsel:

KENT D. TALBERT
General Counsel
Department of Education
Washington, D.C. 20202

GREGORY G. KATSAS
Assistant Attorney General

SCOTT N. SCHOOLS
United States Attorney

MARK B. STERN
(202) 514-5089
ALISA B. KLEIN
(202) 514-1597
Attorneys, Appellate Staff
Civil Division, Room 7235
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

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STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. §§ 706 and 1331. The district court entered final judgment for the government on July 2, 2008. Plaintiffs filed a timely notice of appeal on July 18, 2008. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Plaintiffs challenge a federal regulation that established minimum standards that must be met for a teacher participating in an "alternative route to certification" program to be "highly qualified" within the meaning of the No Child Left Behind Act of 2001. The questions presented are:

1. Whether plaintiffs lack standing because the relief they seek would not redress their alleged injuries.

2. Assuming standing, whether the challenged regulation is a reasonable interpretation of the statute.

STATEMENT OF THE CASE

This case concerns the interpretation of provisions of the Elementary and Secondary Education Act of 1965 ("ESEA"), as amended by the No Child Left Behind Act of 2001 ("NCLB"). The No Child Left Behind Act was a comprehensive reform of the ESEA, the federal spending program that provides funds to assist the states and their local school districts in the education of elementary and secondary school children. States that receive

funds under the Act must comply with the Act's requirements and ensure the compliance of their school districts.

Under Title I, Part A of the Act ("Title I"), states allocate federal funds to school districts and schools in high poverty areas. Congress provided that, beginning with the first day of the 2002-2003 school year, school districts were required to ensure that all teachers hired to teach in programs supported by Title I funds were "highly qualified" as defined in the Act, and that by the end of the 2005-2006 school year, all teachers were highly qualified (whether or not they taught in Title I programs and whether they were new hires or veteran teachers). In addition, states and districts were required to develop plans that would ensure that all teachers of core academic subjects were highly qualified by the end of the 2005-2006 school year, and identify steps they would take to prevent the concentration of inexperienced, unqualified or out-of-field teachers in low-income or minority areas. States and districts were required to report annually on the percentages of classrooms taught by highly qualified teachers, and schools with Title I programs were required to notify parents when their children are taught for four consecutive weeks by a teacher who is not highly qualified.

Congress defined "highly qualified" to mean that a teacher has (1) a bachelor's degree, (2) demonstrated knowledge of the subjects he or she teaches, and, as particularly relevant here,

(3) "full State certification as a teacher (including certification obtained through alternative routes to certification)." 20 U.S.C. § 7801(23)(A). In the same legislation, Congress also enacted programs that expressly encourage the states and school districts to recruit teachers through alternative route programs, particularly to teach in high-need schools. See, e.g., id. § 6681. These programs "enable individuals to be eligible for teacher certification within a reduced period of time, relying on the experience, expertise, and academic qualifications of an individual, or other factors in lieu of traditional course work in the field of education." Id. § 6681(2).

In 2002, the Department of Education ("DOE") issued regulations implementing Title I. As relevant here, the regulations established minimum standards that must be met if a teacher participating in an alternative route to certification program is to be considered fully certified, and thus highly qualified, for purposes of NCLB. 34 C.F.R. § 200.56(a)(2)(ii) (the "alternative route regulation"). In issuing this regulation, the Department rejected the suggestion that, in enacting 20 U.S.C. § 7801(23)(A)(i), Congress intended to deny school districts implementing Title I programs the flexibility to recruit and hire participants in alternative route programs as teachers. 67 Fed. Reg. 71710, 71764 (December 2, 2002).

Plaintiffs are several California public school students and their parents, joined by two California-based organizations. They filed this lawsuit in 2007, five years after the alternative route regulation was issued, alleging that the regulation is inconsistent with the statute. Plaintiffs allege that they have been harmed by the regulation because, in the years since the regulation was issued, California and its school districts have hired thousands of alternative route participants, Amended Complaint ¶63 (ER756), allowed these teachers to be concentrated in low-income and minority areas, id. ¶64 (ER757), and treated the teachers as highly qualified for reporting and parental notification purposes, id. ¶¶17-40, 66-74 (ER734-745, 757-761).

Plaintiffs did not name California or its school districts as defendants. Instead, they sued the Secretary of Education, seeking a declaration that the alternative route regulation is invalid. ER763. They also sought to compel the Secretary to correct alleged inaccuracies in reports to Congress and to notify the states of the regulation's alleged invalidity. ER764-765.

The district court entered summary judgment for the government, holding that the challenged regulation was a reasonable interpretation of the statute. ER2. The court explained that the statutory definition of "highly qualified" was ambiguous because Congress did not define what it means to have "full State certification (including certification obtained

through alternative routes to certification)." ER9, 11-12. The court held that the agency's interpretation was reasonable and consistent with the statutory provisions in the Act that expressly encouraged the states to develop alternative route programs and authorized school districts to recruit teachers who participated in them. ER11-13.

STATEMENT OF FACTS

I. Statutory And Regulatory Background

A. The No Child Left Behind Act Of 2001

The No Child Left Behind Act of 2001 was signed into law on January 8, 2002. See Pub. L. No. 107-110 (2002), 115 Stat. 1425. The No Child Left Behind Act is a comprehensive reform of the Elementary and Secondary Education Act of 1965, the federal spending program that provides billions of dollars each year to assist the states and their local school districts in the education of elementary and secondary school children. As this Court has explained, the No Child Left Behind Act placed conditions on receipt of federal education funds that were designed to bring about "overall, gradual school improvement." Flores v. Arizona, 516 F.3d 1140, 1172 (9th Cir. 2008). The Act's various provisions, including the teacher qualification provisions at issue in this case, are means to that end.

The Secretary of Education is vested with authority to enforce NCLB, and may withhold funds or take other enforcement

action if a state fails to comply substantially with the Act's requirements. Id. § 1234c. States are responsible for ensuring the compliance of their local school districts. Id. §§ 1232c, § 7844(a).

B. Teacher Qualifications

1. Empirical research linking teacher qualifications to student achievement

Congress understood that teachers play a key role in role in enabling school districts and schools to meet the benchmarks set by their states. Although research available to Congress confirmed that good teachers are an important factor in improving student achievement, see, e.g., SER81-88 (AR565-572) (Kati Haycock, Good Teaching Matters: How Well-Qualified Teachers Can Close The Gap (1998)), distinctions were drawn in the types of qualifications that make a teacher effective. Studies showed that a teacher's subject matter knowledge and verbal ability were the two most important factors in raising student achievement. See, e.g., SER89-91 (AR573-575) (Haycock); SER134-135 (AR1017-1018) (Kate Walsh, Teacher Certification Reconsidered: Stumbling For Quality (2001)).[1]

[1] The data on subject matter knowledge were especially clear in the areas of mathematics and science, where teachers with majors in the fields they taught routinely obtained higher student performance than teachers without such majors. SER90 (AR574) (Haycock). Verbal ability, which is usually measured by short vocabulary tests and is understood as a measure of a teacher's general cognitive ability (intelligence), was the attribute with the strongest positive link to student achievement. SER144, 146

By contrast, there was little rigorous evidence that teacher certification (also known as licensing) systematically related to student achievement. (SER111, 123) (AR595, 607) (Goldhaber & Brewer, Teacher Licensing and Student Achievement (1999)); SER133 (AR1016) (Walsh). Although state requirements vary, under the conventional certification model aspiring teachers generally must complete an accredited teacher education program that includes course work in pedagogical theory and practice teaching. SER218 (AR1766) (Frederick Hess, Tear Down This Wall: The Case For A Radical Overhall Of Teacher Certification (2001)). Yet according to empirical evidence available to Congress, "[e]ducation courses completed, advanced education degrees, scores on professional knowledge sections of licensing exams, even, interestingly, years of experience – none seem to have a clear relationship to student achievement." SER91 (AR575) (Haycock); see also SER220-225 (AR1768-1773) (Hess).

Research raised concerns that certification requirements could be counterproductive, by deterring individuals with the attributes most closely linked to student achievement (strong verbal ability and subject matter knowledge) from entering the teaching profession. See, e.g., SER226-227 (AR1774-1775) (Hess); SER146 (AR1029) (Walsh). Historically, students enrolled in schools of education generally have not been as academically

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(AR1027, 1029) (Walsh).

accomplished as other university students. SER22 (AR401) (Meeting the Highly Qualified Teachers Challenge: The Secretary's Annual Report on Teacher Quality (2002) (citing data). Moreover, under conventional certification requirements, undergraduates either must decide early in their programs to pursue an education degree or else face the time and expense of a post-graduate education program. SER22-24 (AR401-403) (citing Hess).

"Alternative route to certification" programs seek to reduce these barriers to entry into the teaching profession. Although programs vary, in general they allow individuals who wish to teach, such as liberal arts college graduates or military retirees, to begin in the classroom without having first completed a formal teacher education program. SER113 (AR597) (Goldhaber & Brewer); see also Pl. Br. 2. For example, Teach For America (TFA), a nonprofit organization, recruits high-achieving seniors from the nation's top colleges to serve as teachers in inner-city or rural schools while enrolled in alternative route to certification programs. SER246 (AR2278) (Raymond & Fletcher, The Teach For America Evaluation (2001)). Most Teach For America recruits serve in schools that qualify for funding under Title I of the ESEA due to their high concentrations of students living in poverty. Ibid.

2. NCLB teacher qualification provisions

Against this background, Congress enacted NCLB provisions that set standards for teacher qualifications and authorized grants to assist the states in meeting those standards.

Congress provided that, beginning with the first day of the 2002-2003 school year, school districts were required to ensure that all teachers hired to teach in programs supported by Title I funds were "highly qualified" to teach. 20 U.S.C. § 6319(a)(1). The school districts affected by this provision are located in low-income areas because Title I allocations are principally based on population income. Id. § 6333.

Congress also required states and school districts receiving Title I funds to develop plans to ensure that all teachers of core academic subjects were highly qualified by the end of the 2005-2006 school year, regardless of whether they were newly hired and regardless of whether they taught in Title I programs. Id. § 6319(a)(2) & (3).[2] States also were required to identify in their plans the steps that they would take to ensure that poor and minority students were not taught at higher rates than other children by inexperienced, unqualified, or out-of-field teachers. Id. § 6311(b)(8)(C).

[2] The Act defines "core academic subjects" to mean English, reading or language arts, mathematics, science, foreign languages, civics and government, economics, arts, history, and geography. 20 U.S.C. § 7801(1).

Congress defined the term "highly qualified" to require that a teacher (1) hold at least a bachelor's degree; and (2) have demonstrated, in specified manner, subject-matter competence in each subject the teacher would teach. 20 U.S.C. § 7801(23)(B) & (C). New middle or secondary school teachers, for example, needed to have an academic major in the field taught, equivalent course work, or advanced credentialing, or to have passed a rigorous state test. Id. § 7801(23)(B)(ii).

In addition, and as particularly relevant here, Congress provided that a "highly qualified" teacher needed to have "obtained full State certification as a teacher (including certification obtained through alternative routes to certification)," and not have had "certification or licensure requirements waived on an emergency, temporary or provisional basis." Id. § 7801(23)(A)(i) & (ii). Congress did not define these phrases and, as plaintiffs acknowledge, their definition is left to the discretion of the states because certification is a matter of state law and policy. Pl. Br. 38. Congress did, however, specify that "full States certification" includes "certification obtained through alternative routes to certification." 20 U.S.C. § 7801(23)(A)(i). And, in Title II of the Act, which authorized various grant programs to increase "the number of highly qualified teachers in the classroom," id.

§ 6601, Congress expressly encouraged states and school districts to recruit teachers participating in alternative route programs.

For example, Congress authorized the "Transition to Teaching Program," which "encourage[d] the development and expansion of alternative routes to certification under State-approved programs that enable individuals to be eligible for teacher certification within a reduced period of time, relying on the experience, expertise, and academic qualifications of an individual, or other factors in lieu of traditional course work in the field of education." Id. § 6681(2). It provided funds to "recruit and retain highly qualified mid-career professionals" and "recent [college] graduates" to serve "as teachers in high-need schools, including recruiting teachers through alternative routes to certification." Id. § 6681(1). Similarly, the "Improving Teacher Quality State Grants Program," id. §§ 6601 et seq., authorizes states to use funds to "establish, expand, or improve alternative routes for State certification of teachers" by targeting individuals "with a baccalaureate or master's degree, including mid-career professionals from other occupations, paraprofessionals, former military personnel, and recent college or university graduates with records of academic distinction who demonstrate the potential to become highly effective teachers."

Id. § 6613(c)(3).[3] And the "Troops To Teachers Program" facilitates the employment of eligible former members of the Armed Services to serve as teachers in schools in high-need school districts experiencing a shortage of highly qualified teachers. Id. §§ 6672 & 6674(a)(1)(B).

C. The 2002 Department Of Education Regulations

In 2002, after notice and comment, the Department of Education issued a set of regulations implementing Title I of the ESEA, as amended by the No Child Left Behind Act. See 67 Fed. Reg. 71710 (December 2, 2002). As relevant here, the regulations established minimum standards that must be met for a teacher participating in an alternative route program to be "fully certified" for purposes of being considered "highly qualified" within the meaning of NCLB.

Like other teachers, alternative route participants must have at least a bachelor's degree, as well as demonstrated subject-matter competence in each subject the teacher would teach. 34 C.F.R. § 200.56(b) & (c). In addition, the regulations require that to be considered fully certified for

[3] The "Improving Teacher Quality State Grants Program" likewise authorizes school districts to use funds to "recruit qualified professionals from other fields," to "provide such professionals with alternative routes to teacher certification," and to "hir[e] highly qualified teachers, including teachers who become highly qualified through State and local alternative routes to certification,... in order to reduce class size, particularly in the early grades." Id. § 6623(a)(2)(C)(iii) & (a)(7).

purposes of the NCLB definition of "highly qualified," a state must ensure through its certification and licensing process that the teacher receives high-quality professional development that is sustained, intensive, and classroom-focused before and while teaching, as well as and intensive supervision; assumes the functions of a teacher for no more than three years; and demonstrates satisfactory progress toward full certification as prescribed by the state. Id. § 200.56(a)(2)(ii)(A) & (B).

In issuing this regulation, the Department of Education rejected the suggestion that, in enacting 20 U.S.C. § 7801(23)(A)(i), Congress intended that school districts implementing their Title I programs be denied the flexibility to hire teachers participating in alternative route programs. 67 Fed Reg. at 71764. The Department explained that "Congress has chosen both to authorize and fund two alternative route programs, Troops-to-Teachers and Transition to Teaching, in Title II, part C of the ESEA, and has permitted States and [school districts] to use Title II, part A formula grant funds to hire teachers in alternative route programs." Ibid. "Hence," the Department did "not believe that Congress intended that teachers in alternative route programs would be unable to teach until they had obtained full State certification." Ibid.

D. Subsequent appropriations and legislation.

In the years since the 2002 regulation was issued, Congress has repeatedly appropriated funds to support alternative route programs, both for the ESEA Title II Transition to Teaching, Troops to Teachers, and the Improving teacher quality State Grants Programs, and also specifically for Teach for America.[4]

In August 2008, as part of the Higher Education Opportunity Act, Congress enacted provisions that authorized a five-year grant to Teach for America, "the national teacher corps of outstanding recent college graduates who commit to teach for two years in underserved communities." Pub. L. No. 110-315, § 806, 122 Stat. 3390, 20 U.S.C.A. § 1161f. Congress specified that grant funds should be used to "provide highly qualified teachers to high-need local educational agencies in urban and rural communities," 20 U.S.C.A. § 1161f(c), and defined the term "highly qualified" to have the same meaning given in the No Child Left Behind Act. Id. § 1161f(a).

II. District Court Proceedings.

Plaintiffs are several California public school students and their parents, joined by two organizations, California Association of Community Organizations for Reform Now ("ACORN")

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[4] See, e.g., H.R. Conf. Rep. No. 108-10 (2003), 2003 U.S.C.C.A.N. 10, 200, 321; H.R. Conf. Rep. No. 108-401 (2003), 2003 U.S.C.C.A.N. 3, 248; H.R. Conf. Rep. 108-792 at 1233 (2004); H.R. Conf. Rep. No. 109-337, at 114 (2005), 2006 U.S.C.C.A.N. 1531.

and Californians for Justice Education Fund. They filed this lawsuit in 2007 – five years after the alternative route regulation was issued – alleging that the regulation is inconsistent with the statute. Plaintiffs allege that they have been harmed by the regulation because, in the years since the regulation was issued, California and its school districts have hired thousands of alternative route participants, Amended Complaint ¶63 (ER756), allowed these teachers to be concentrated in low-income and minority areas, id. ¶64 (ER757), and treated the teachers as highly qualified for reporting and parental notification purposes, id. ¶¶17-40, 66-74 (ER734-745, 757-761). Specifically, plaintiffs contend that alternative route participants who hold teaching credentials under California's district intern and university intern programs do not have "full State certification" under California law. Amended Complaint ¶8 (ER731); see also Cal. Educ. Code §§ 44325 et seq. (district intern program); id. §§ 44450 et seq. (university intern program).

Plaintiffs did not name the State of California or its school districts as defendants, implicitly recognizing that the No Child Left Behind Act does not confer individual rights enforceable against a state or local government. ACORN v. New York City Department of Education, 269 F. Supp. 2d 338 (S.D.N.Y. 2003). Instead, plaintiffs sued the Secretary of Education,

seeking to invalidate the alternative route regulation. ER763. Plaintiffs also sought to compel the Secretary both to correct allegedly inaccurate reports to Congress, ER764, and to notify states and school districts of the regulation's alleged invalidity, ER764-765.

The district court entered summary judgment for the government, holding that the regulation was a reasonable interpretation of NCLB. The court explained that Congress did not define the phrase "full State certification as a teacher (including certification obtained through alternative routes to certification)." ER9. "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." Ibid. Accordingly, the court held that the statutory definition was, at best, ambiguous. Ibid. The court held that the agency's interpretation was reasonable, explaining that it was consistent with the NCLB provisions that encouraged states and school districts to recruit teachers through alternative route programs. ER11-13. And the court explained that Congress's failure to reverse the Secretary's regulation after more than five years suggests that Congress does not believe the regulation exceeds the scope of the Act. ER13.

SUMMARY OF ARGUMENT

Under the Elementary and Secondary Education Act of 1965, as amended by the No Child Left Behind Act of 2001, Congress provides funds to assist the states and localities in improving the academic achievement of their students. To that end, Congress required that as of the start of the 2002-2003 school year all teachers hired to teach in programs funded under Title I be "highly qualified." As of the end of the 2005-2006 school year, all school district teachers of core academic subjects (whether or not working in a Title I program and whether or not a new hire) were to be highly qualified. Congress defined "highly qualified" teachers to be those who have a bachelor's degree, demonstrated subject matter competence, and "full State certification." Congress did not define "full state certification," but specifically included "certification obtained through alternative routes to certification."

The Department of Education, in formal rulemaking proceedings, reasonably concluded that "highly qualified" teachers under Title I of the Act include participants in "alternative route" programs funded under Title II of the Act, such as teachers funded under the Transition to Teaching and Troops-to-Teachers programs. Indeed, the express purpose of these Title II grant programs was to increase "the number of highly qualified teachers in the classroom." 20 U.S.C. § 6601

(emphasis added). The agency properly declined to adopt an understanding of Title I that would impede that goal.

The reasonableness of the agency's regulations is underscored by the enactment of the Higher Education Opportunity Act, which was signed into law in August 2008. That statute authorized a five-year grant to Teach for America, which Congress described as "the national teacher corps of outstanding recent college graduates who commit to teach for two years in underserved communities." 20 U.S.C.A. § 1161f. Congress specified that these grant funds should be used to "provide highly qualified teachers to high-need local educational agencies in urban and rural communities," id. § 1161f(c), and defined "highly qualified" to have the same meaning that the term is given in NCLB, id. § 1161f(a). Plaintiffs cannot plausibly contend that these alternative route teachers are not highly qualified within the meaning of NCLB.

The district court was thus correct to reject plaintiffs' challenge to the alternative route regulation. Moreover, as a threshold matter, plaintiffs cannot demonstrate standing to sue. They assume that a decision to "void" the regulation would cause California to alter its treatment of alternative route participants. But as they recognize, the question whether a teacher holds "full State certification" is a matter of state law, determined by reference to the laws of the fifty states.

Congress did not authorize the federal courts to offer opinions on state credentialing laws, much less to do so in the absence of a state defendant. The only concrete result of a decision to invalidate the alternative route regulation would be to void the minimum standards to which states now must adhere if their alternative route participants are to be highly qualified under NCLB. That result would impede, rather than advance, plaintiffs' stated interests.

STANDARD OF REVIEW

The entry of summary judgment is subject to de novo review in this Court. Center for Biological Diversity v. U.S. Fish & Wildlife Service, 450 F.3d 930, 941 n.17 (9th Cir. 2006).

ARGUMENT

I. Plaintiffs Lack Standing Because The Relief They Seek Would Not Redress Their Alleged Injuries.

As we explain below in Part II, the alternative route regulation was a reasonable interpretation of ambiguous statutory language and thus should be sustained. As a threshold matter, plaintiffs lack standing because the relief they seek would not redress their alleged injuries and, instead, would undermine their stated concerns.

Plaintiffs allege that they have been harmed by the alternative route regulation because California and its school districts have thereby hired alternative route participants as highly qualified classroom teachers, allowed these teachers to be

concentrated in low-income and minority areas, and treated these teachers as highly qualified for purposes of various state and local plans, reports, and parental notification requirements.

Plaintiffs have not named California or its school districts as defendants. The reason for that decision is evident: every court to address the issue has held that NCLB does not create individual rights enforceable against a state or local government. See Alliance for Children, Inc. v. City of Detroit Public Schools, 475 F. Supp. 2d 655 (E.D. Mich. 2007) (collecting cases) (cited in Flores v. Arizona, 516 F.3d 1140, 1176 n.47 (9th Cir. 2008)). Indeed, ACORN itself (the national organization of plaintiff California ACORN) tried, unsuccessfully, to sue the New York City Department of Education to enforce NCLB, and did not appeal the adverse determination that NCLB cannot be enforced under § 1983. ACORN v. New York City Department of Education, 269 F. Supp. 2d 338 (S.D.N.Y. 2003).

As the Supreme Court explained, where statutory provisions "have an 'aggregate' focus, they are not concerned with 'whether the needs of any particular person have been satisfied,' and they cannot 'give rise to individual rights.'" Gonzaga University v. Doe, 536 U.S. 273, 288 (2002) (quoting Blessing v. Freestone, 520 U.S. 329, 343, 344 (1997)) (citations omitted). That principle would doom any private attempt to enforce NCLB against a state, because NCLB aims to raise student achievement at an "aggregate,"

rather than individual, level. ACORN, 269 F. Supp. 2d at 345 (quoting Gonzaga, 536 U.S. at 290). Although, in Flores, this Court did not decide the § 1983 issue, which was not directly presented, this Court pointedly contrasted the structure of NCLB with the structure of a rights-conferring statute. Flores, 516 F.3d at 1172-1176. This Court explained that NCLB "packages federal grants with discrete, incremental achievement standards as part of a general plan gradually to improve overall performance. It does not deal in the immediate, rights-based framework inherent in civil rights law, although it is intended to ameliorate over the longer haul the conditions that lead to civil rights violations." Id. at 1173.

Plaintiffs cannot circumvent these principles by declining to name the State as defendant. Nor would the relief that plaintiffs seek redress their alleged injuries. Plaintiffs seek a declaration that the alternative route regulation is "unlawful and void." Prayer For Relief ¶1 (ER763). The implicit assumption is that such a declaration would likely cause California to cease treating alternative route participants as highly qualified. But as plaintiffs recognize, the question whether alternative route participants hold "full State certification as a teacher (including certification obtained through alternative routes to certification)" is a matter of state law. Pl. Br. 36-39. The meaning of these terms "is

determined by the laws of each of the fifty states as to how a teacher may be considered fully-certified by that state." Pl. Br. 38. This would be true whether or not the Secretary had issued the challenged regulation.

Plaintiffs thus invite the Court to examine the nuts and bolts of California education law, urging that the teaching credentials issued under California's "district internship" and "university internship" programs do not amount to full certification under California law and that only "preliminary" and "professional clear" credentials suffice. Pl. Br. 14-19, 38-39. As we explain in Part II, Congress did not expect the federal courts to offer opinions about what state law means by certification or full certification. As a threshold matter, a court cannot properly issue judgments on such matters in the absence of a state defendant.[5]

Invalidation of the alternative route regulation would have one concrete result, but it is far from the result that plaintiffs intend. If the regulation were declared "void" (ER763), states no longer would have to adhere to the minimum standards set out in the regulation, such as the requirement that alternative route participants receive intensive professional

[5] In district court, we explained our belief that alternative route participants do, in fact, have "full State certification" under California law. The district court did not decide this state law issue, and, as just explained, this Court also should not decide it.

development before beginning to teach as well as intensive supervision afterwards. 34 C.F.R. § 200.56(a)(2)(ii)(A) & (B).[6] Invalidation of the regulation thus would undermine, rather than advance, plaintiffs' stated interests.

Plaintiffs' other requests for relief are similarly unavailing. They seek an order requiring the Secretary to "notify" states that the alternative route regulation is "unlawful and void." ER764. Even assuming that the Secretary could be compelled to take such action, it would not redress any of plaintiffs' asserted injuries because, as just explained, certification is a matter of state law. Plaintiffs' attempt to compel the Secretary to correct reports to Congress (ER764) fails for the same reason and also for a more general reason: private parties lack standing to challenge the accuracy of an agency's reports to Congress. Guerrero v. Clinton, 157 F.3d 1190, 1191 (9th Cir. 1998).

[6] These requirements were designed to ensure that alternative routes to certification do not become vehicles for granting long-term waivers of certification requirements, and also with the understanding that for these teachers to be effective, those in alternative route programs need to be prepared to teach their students from the moment they step into their classrooms, and receive the follow-up support they need as beginning teachers. See 67 Fed. Reg. at 71764.

II. The Alternative Route Regulation Is A Reasonable Interpretation Of The Statutory Requirements.

A. Under Chevron and Pennhurst, The Regulation Must Be Sustained Unless It Is Directly Foreclosed By The Statutory Text.

For the reasons just discussed, the complaint should be dismissed for lack of standing. If the Court reaches the merits, it should affirm the judgment of the district court. As the district court explained, the alternative route regulation was a reasonable interpretation of the statutory requirements.

Under settled administrative law principles, a federal agency's interpretation of the statute it is charged with administering is entitled to deference. Center for Biological Diversity v. National Highway Traffic Safety Administration, 538 F.3d 1172, 1194 (9th Cir. 2008) (citing Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)). Unless Congress has directly spoken to the precise issue, the agency's reasonable interpretation must be sustained. Ibid.

Moreover, under spending clause principles, a state must have "clear notice" of the obligations that flow from receipt of federal funds. Arlington Central School District Board of Education v. Murphy, 548 U.S. 291, 296 (2006) (citing Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981)). This "clear notice" requirement does not mean that Congress must "prospectively resolve every possible ambiguity" that could arise under a spending program, Bennett v. Kentucky Department of

Education, 470 U.S. 656, 669 (1985); see also Mayweathers v. Newland, 314 F.3d 1062, 1067 (9th Cir. 2002). And the requisite clarity may be supplied by the federal agency charged with implementing the spending program. Bennett, 470 U.S. at 669, 672. Here, however, the Department of Education rejected the contention that, in enacting 20 U.S.C. § 7801(23)(A)(i), Congress intended to deny school districts implementing their Title I programs the flexibility to hire teachers participating in alternative route programs. 67 Fed Reg. at 71764. "It would take an extraordinary view of Pennhurst and Chevron" to "fasten large ... obligations on the states in violation of the statutory interpretation of the federal implementing agency." Maryland Psychiatric Society v. Wasserman, 102 F.3d 717, 721 (4th Cir. 1996).

B. The Regulation Is Fully Consistent With The Statutory Definition Of "Highly Qualified" Teacher And With Other Relevant Provisions.

1. As the district court explained, NCLB does not define what it means to have "full State certification as a teacher (including certification obtained through alternative routes to certification)." ER9. "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 the program."

Ibid. "Thus, Congress has not 'directly spoken to the precise question at issue.'" Ibid. (quoting Chevron, 467 U.S. at 842).

Instead, as plaintiffs recognize, Congress left matters of certification to the states, which are "'free to redefine, in accordance with State law, their certification requirements ... or create non-traditional approaches to certification.'" Pl. Br. 38 (quoting Department of Education's 2003 guidance (ER278 at C-6)). Indeed, Congress barred the Department of Education from requiring any particular method of teacher certification. 20 U.S.C. § 7910(a) & (b).

In implementing the statute, DOE reasonably concluded that Title I does not preclude states like California from choosing to allow their school districts to employ teachers with certification obtained "through alternative routes." Under California law, alternative route participants receive teaching credentials issued under the State's "district internship" or "university internship" programs. See Cal. Educ. Code § 44325 et seq. (district intern credentials); id. § 44450 et seq. (university intern credentials). To be eligible for such teaching credentials, applicants must (1) pass the California Basic Education Skills Test ("CBEST"); (2) hold at least a bachelor's degree; and (3) demonstrate subject matter competence. See Cal. Educ. Code §§ 44325(c)(1)-(3), 44453; see also ER123-124, ER220 (chart). These requirements are more stringent than

the requirements for entry into a traditional teacher preparation program, precisely because the internship credentials allow their holders to serve as full classroom teachers. ER108.

Alternative route participants in California thus satisfy the plain terms of the statutory parenthetical: they have "certification obtained through alternative routes to certification." Nor have these teachers had certification requirements "waived on an emergency, temporary, or provisional basis," 20 U.S.C. § 7801(23)(A)(ii). What California regards as "emergency permits" are governed by different provisions of California law that do not apply to intern credentials. See Cal. Educ. Code §§ 44300 & 44301 (emergency teaching permits).

The California legislature expressly directed the state Commission on Teacher Credentialing to "ensure that each district internship program in California provides program elements to its interns as required by the federal No Child Left Behind Act of 2001 (20 U.S.C. Sec. 6301 et seq.) and its implementing regulations." Cal. Educ. Code § 44325(f); see also id. § 44453(b) (university internship program). Accordingly, the State's alternative route participants are fully certified (and thus highly qualified) for purposes of NCLB.

2. Plaintiffs nevertheless urge that the statutory reference to "full" certification cannot encompass alternative route teachers, relying on the following "dictionary" definition:

"'(1) completely filled; containing all that can be held; filled to the utmost capacity...(2) complete; entire; maximum....'" Pl. Br. 30 (quoting Dictionary.com Unabridged (v. 1.1), Random House, Inc.).

As plaintiffs' argument makes plain, however, recourse to the dictionary cannot, by itself, resolve the proper implementation of the statute. Plaintiffs offer no sound basis for their contention that all children must "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." Pl. Br. 31. To the contrary, as plaintiffs themselves recognize, Congress did not require that teachers have obtained "the full, maximum, most complete level of certification granted by the state." In California, veteran teachers receive "professional clear" credentials, which are valid for "the life of the holder." Cal. Educ. Code § 44251(b)(3). In contrast, beginning teachers who have completed traditional education programs receive only "preliminary" credentials, which are valid for five years. Id. § 44251(b)(2). Beginning teachers thus have not obtained the "full, maximum, most complete level of certification granted by the state in which the children attend school." Pl. Br. 31. Plaintiffs acknowledge that these teachers "obviously" have "full State certification" as that term was used

by Congress, Pl. Br. 43 n.14, and they are doubtless correct. It is equally clear, therefore, that Congress did not adopt their "dictionary" definition, and that their "plain language" argument is without merit.

Plaintiffs likewise err in asserting that teachers credentialed under an alternative route program are only highly qualified after they have completed the program. As the district court explained, Congress defined "highly qualified" to include teachers who have obtained certification "through" alternative route programs, not "after" those programs were "complete." ER12.

Plaintiffs are on no firmer ground in noting that California imposes restrictions on the teaching credentials issued under the district and university internship programs. As plaintiffs observe, the credentials are valid for only two years and are subject to geographic restrictions. Pl. Br. 16-17. But, as noted above, the "preliminary" credentials issued to beginning teachers in California are only valid for a term (5 years). Cal. Educ. Code § 44251(b)(2). And "single subject instruction" credentials only allow the holder to teach specified subject matter courses. Id. § 44256(a). Plaintiffs do not suggest that these restrictions render the teacher not highly qualified for purposes of NCLB. The Department of Education was not obliged by

federal law to distinguish among these gradations in the conditions imposed on teaching credentials.

3. The Department of Education properly implemented the requirement that states employ "highly qualified" teachers in a manner that did not undermine the operation of related statutory provisions. As discussed above, several provisions of the NCLB expressly encourage the states and school districts to recruit teachers through alternative route programs. The "Transition to Teaching Program" encourages "the development and expansion of alternative routes to certification under State-approved programs that enable individuals to be eligible for teacher certification within a reduced period of time, relying on the experience, expertise, and academic qualifications of an individual, or other factors in lieu of traditional course work in the field of education." Id. § 6681(2). That program provides funds to "recruit and retain highly qualified mid-career professionals" and "recent [college] graduates" to serve "as teachers in high-need schools, including recruiting teachers through alternative routes to certification." Id. § 6681(1).

Similarly, the "Improving Teacher Quality State Grants Program," id. §§ 6601 et seq., authorizes states to use funds to "establish, expand, or improve alternative routes for State certification of teachers" by targeting individuals "with a baccalaureate or master's degree, including mid-career

professionals from other occupations, paraprofessionals, former military personnel, and recent college or university graduates with records of academic distinction who demonstrate the potential to become highly effective teachers." Id. § 6613(c)(3).[7] And the "Troops To Teachers Program" facilitates the employment of eligible former members of the Armed Services to serve as teachers in schools experiencing a shortage of highly qualified teachers. Id. § 6672.

In plaintiffs' view, Congress intended to preclude the states and school districts from treating participants in these programs as "highly qualified." They declare that the programs are merely a "pipeline" for future teachers. Pl. Br. 27. And, in response to the evident tension that these assertions create, they insist that their position does not, "on its face," create a conflict with NCLB's alternative route programs because programs such as "Transition to Teaching" and "Troops to Teachers" are "entirely permissive." Pl. Br. 59 (plaintiffs' emphasis). They stress that "NCLB does not require any state or district to use these voluntary programs." Pl. Br. 59 (plaintiffs' emphasis).

[7] The "Improving Teacher Quality State Grants Program" likewise authorizes school districts to use funds to "recruit qualified professionals from other fields," to "provide such professionals with alternative routes to teacher certification" and to "hir[e] highly qualified teachers, including teachers who become highly qualified through State and local alternative routes to certification,... in order to reduce class size, particularly in the early grades." 20 U.S.C. § 6623(a)(2)(C)(iii) & (a)(7).

Plaintiffs do not and cannot explain why Congress would require states and school districts to choose between complying with the "highly qualified" teacher requirements set out in Title I, and implementing the alternative route programs that Congress authorized in Title II of the same legislation. The express purpose of the Title II grant programs was to increase "the number of highly qualified teachers in the classroom." 20 U.S.C. § 6601 (emphasis added). Congress surely believed that the "highly qualified" teachers funded under Title II would also be regarded as "highly qualified" in determining a state or school district's compliance with its obligations under Title I.

Indeed, under plaintiffs' view, the Title I requirements would significantly frustrate the operation of the programs that Congress funds under Title II. As plaintiffs recognize, "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." Pl. Br. 2 (some emphasis added); see also, e.g., SER113 (AR597) (Goldhaber & Brewer). Under Teach For America, for instance, high-achieving college seniors are recruited from the nation's top colleges to serve as teachers in inner-city or rural schools. SER246 (AR2278) (Raymond & Fletcher). The hallmark of an alternative route program is that its participants serve as full classroom

teachers. The programs thus reduce barriers to entry into teaching for recent college graduates, mid-career professionals, and others with relevant skills, knowledge and motivation, while at the same time relieving teacher shortages. Congress plainly did not intend to diminish state and local incentives to hire alternative route participants as full time teachers, and thus undermine the vitality of these programs.[8]

The question is not, as plaintiffs suggest (Pl. Br. 61-62), whether states and school districts would be sanctioned by the Secretary of Education for hiring or retaining alternative route participants. The imposition of sanctions is, of course, discretionary. Port of Seattle, Washington v. FERC, 499 F.3d 1016, 1026-1027 (9th Cir. 2007) (citing Heckler v. Chaney, 470 U.S. 821, 831 (1985)). And the discretionary nature of NCLB enforcement confirms that plaintiffs cannot obtain relief for their asserted injuries. The discretionary nature of sanctions does not, however, make plaintiffs' statutory position any more

[8] Indeed, Congress favored the Troops to Teachers program precisely because it successfully promoted the recruitment and quick placement of former military personnel with subject-matter knowledge as teachers in high-need school districts. See, e.g., 147 Cong. Rec. S4145, at S4147 (daily ed. May 2, 2001) (Sen. Hutchinson) (noting the need to get military personnel into classroom in their areas of expertise "although they don't have educational certificates or educational degrees"); id. at S13340 (daily ed. Dec. 17, 2001) (Sen. DeWine) (noting the need to involve members of the military and individuals from other fields "with real world jobs" and to "make it easy for them to enter the classroom").

plausible: Congress did not expose the states and their school districts to the possibility of sanctions for hiring Teach For America recruits or other alternative route participants.[9]

If there were any doubt on this point, it was removed on August 14, 2008, when the Higher Education Opportunity Act was signed into law. In that statute, Congress authorized a five-year grant to Teach for America, which Congress described as "the national teacher corps of outstanding recent college graduates who commit to teach for two years in underserved communities." Pub. L. No. 110-315, § 801, 122 Stat. 3390, 20 U.S.C.A. § 1161f. Congress specified that these grant funds should be used to "provide highly qualified teachers to high-need local educational agencies in urban and rural communities." 20 U.S.C.A. § 1161f(c) (emphasis added). And Congress defined "highly qualified" to have the same meaning that the term is given in NCLB. Id. § 1161f(a).

[9] Plaintiffs assert states and school districts do not, in fact, face the possibility of sanctions, noting that the Secretary has provided additional time beyond the end of the 2005-2006 school year to reach the goal of having 100% highly qualified teachers. However, as noted above, Congress provided that since the beginning of the 2002-2003 school year, all newly hired teachers in Title I programs were to be highly qualified. 20 U.S.C. § 6319(a)(1). And as explained, the Transition to Teaching and Troops to Teachers Programs place new alternative route teachers in high-need schools and school districts, so these placements often will be in Title I programs. Whatever means the Secretary may be using to achieve full compliance with the 100% requirement does not alter the requirements of Title I.

Plaintiffs make no attempt to reconcile their position with these provisions, which their brief does not discuss. In plaintiffs' view, TFA recruits are not "highly qualified" and cannot be hired without bringing states and school districts out of compliance with NCLB. Congress, however, just confirmed that TFA recruits are "highly qualified" within the meaning of NCLB, even though they serve as full classroom teachers before their alternative route programs are complete. Thus, even assuming for the sake of argument that plaintiffs' position was once plausible, it is not plausible today.

C. Plaintiffs' Reliance On California Law Is Misplaced.

Plaintiffs invite the Court to examine California's credentialing system, urging that the teaching credentials held by alternative route participants fall into the same "substandard" category as "provisional intern permits," "short term staff permits," and "substitute permits." Pl. Br. 16. Their reliance on state law is misplaced.

Even a cursory review of California law shows that plaintiffs misunderstand the provisions that they invoke. For instance, the chart they cite places intern credentials in a different category from provisional intern permits, short term staff permits, and substitute permits. ER220.

More fundamentally, Congress did not expect the federal courts to review the education codes of the fifty states to

ascertain whether teachers hold the requisite credentials. As of 2002, most states offered more than 50 different types of teaching credentials. SER32 (AR411). Alaska led the way with 229. Ibid. Under ordinary principles of federalism, the task of ensuring state compliance with state law is reserved to a state's own institutions, not assigned to the federal courts. Indeed, the Supreme Court has stressed that "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 106 (1984).

As plaintiffs acknowledge, NCLB respects historic prerogatives of the states in the area of education, and many of the Act's provisions incorporate state law. Pl. Br. 36-37. Congress did not thereby authorize the federal courts to police a state's compliance with state law.

Congress did not define what it means to have "full State certification ... (including certification obtained through alternative routes to certification)," or what it means to have certification requirements "waived on an emergency, temporary, or provisional basis." Instead, Congress left matters of certification to the discretion of the states, and prohibited the Secretary of Education from withholding funds on the basis of a failure to adopt a particular method of teacher certification,

20 U.S.C. § 7910(b). As plaintiffs recognize, the phrase "full State certification" thus reflects a delegation of authority to the states. "'Full State certification is defined by State policy.'" Pl. Br. 38 (quoting Department of Education's 2003 guidance (ER278 at C-6)) (emphasis omitted). Accordingly, "'States are free to redefine, in accordance with State law, their certification requirements ... or create non-traditional approaches to certification.'" Ibid.[10]

Inexplicably, plaintiffs contend that the alternative route regulation "overrides" this delegation to the states. Pl. Br. 38. But as plaintiffs acknowledge, no state is compelled to hire alternative route participants. Pl. Br. 59. The regulation established minimum standards that must be met for an alternative route participant to be highly qualified for purposes of NCLB. If a state wishes for its alternative route participants be highly qualified for purposes of NCLB, the state must ensure "through its certification and licensing process" that these minimum standards are met. 34 C.F.R. § 200.56(a)(2)(ii)(B).

[10] Although plaintiffs invoke DOE's own 2003 guidance, they claim that DOE's position on alternative route participants has changed over time. Pl. Br. 40. It has not. The draft 2002 guidance that plaintiffs cite (Pl. Br. 40) specifically stated that teachers in alternative route programs could be considered highly qualified (ER709).

The California legislature has done exactly that, by directing the state Commission On Teacher Credentialing to "ensure that each district internship program in California provides program elements to its interns as required by the federal No Child Left Behind Act of 2001 (20 U.S.C. Sec. 6301 et seq.) and its implementing regulations." Cal. Educ. Code § 44325(f); see also id. § 44453(b) (university internship program). The requirements of federal law have thus been met.

CONCLUSION

For the foregoing reasons, the complaint should be dismissed for lack of standing. In the alternative, the judgment on the merits should be affirmed.

Respectfully submitted,

GREGORY G. KATSAS
Assistant Attorney General

SCOTT N. SCHOOLS
United States Attorney

MARK B. STERN
(202) 514-5089
ALISA B. KLEIN /s/
(202) 514-1597
Attorneys, Appellate Staff
Civil Division, Room 7235
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

Of counsel:

KENT D. TALBERT
General Counsel
Department of Education
Washington, D.C. 20202

NOVEMBER 2008

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)
OF THE FEDERAL RULES OF APPELLATE PROCEDURE**

I hereby certify pursuant to Fed. R. App. P. 32(a)(7)(C) that the foregoing brief is monospaced, has 10.5 or fewer characters per inch and contains 8,010 words, according to the count of Corel WordPerfect 12.

_____/s/_____
Alisa B. Klein

STATEMENT OF RELATED CASES

We are not aware of any pending related cases.

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of November, 2008, I caused copies of the foregoing brief to be sent to the following counsel by federal express, overnight mail and by email, and caused the accompanying supplemental record excerpts to be sent to the following counsel by federal express, overnight mail:

John T. Affeldt
Managing Attorney
Public Advocates, Inc.
131 Steuart Street, Suite 300
San Francisco, CA 94105
jaffeldt@publicadvocates.org

Charles T.C. Compton
Wilson Sonsini Goodrich & Rosati, P.C.
650 Page Mill Road
Palo Alto, CA 94304
tel: 650-493-9300
ccompton@wsgr.com

_____/s/_____
Alisa B. Klein
Attorney