No. 10-489

In the Supreme Court of the United States

STATE OF CONNECTICUT, ET AL., PETITIONERS

v.

ARNE DUNCAN, SECRETARY OF EDUCATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECRETARY OF EDUCATION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that petitioners' claims—premised on the disputed and untested allegation that federal funds are insufficient to cover the full costs of Connecticut's compliance with Title I, Part A of the Elementary and Secondary Education Act of 1965, 20 U.S.C. 6301 *et seq.*—were not yet ripe for judicial review.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 612 F.3d 107. The opinions of the district court (Pet. App. 24-70, 71-166) are reported at 549 F. Supp. 2d 161 and 453 F. Supp. 2d 459, respectively.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 2010. The petition for a writ of certiorari was filed on October 8, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The No Child Left Behind Act of 2001 (NCLB), Pub. L. No. 107-110, 115 Stat. 1425, was a comprehen-

sive reform of the Elementary and Secondary Education Act of 1965 (ESEA), 20 U.S.C. 6301 *et seq.*, the federal spending program that provides funds to assist the States in the education of elementary and secondary schoolchildren. Title I, Part A of the ESEA, as amended by NCLB, which is at issue in this case, provides federal grants to assist States in efforts to improve the academic achievement of disadvantaged students, and to "ensur[e] that *all* students * * * meet high academic standards." H.R. Rep. No. 63, 107th Cong., 1st Sess. Pt. 1, at 281 (2001) (*House Report*) (emphasis added). Participation is voluntary, but a State that chooses to participate in the program must comply with the statutory requirements. See *Bennett* v. *Kentucky Dep't of Educ.*, 470 U.S. 656, 666 (1985).

As this Court has recognized, "NCLB mark[s] a dramatic shift in federal education policy," *Horne* v. *Flores*, 129 S. Ct. 2579, 2601 (2009), in that it seeks to improve the academic achievement of disadvantaged students through a combination of flexibility and accountability. The Act "expressly refrains from dictating funding levels," *id.* at 2603, and instead "grants States and local educational agencies [(LEAs)] unprecedented flexibility to target federal dollars to meet State and local priorities," *House Report* 362. The Act does not require States to implement specific curricula or methods of instruction. Instead, it allows participating States to set their own academic standards, 20 U.S.C. 6311(b)(1), to design their own assessments to measure student progress on those standards, 20 U.S.C. 6311(b)(3), and to decide what constitutes "[a]dequate yearly progress" for their schoolchildren, 20 U.S.C. 6311(b)(2)(C).

This approach "reflects Congress' judgment that the best way to raise the level of education nationwide is by

granting state and local officials flexibility to develop and implement educational programs that address local needs, while holding them accountable for the results." *Horne*, 129 S. Ct. at 2601. The Act focuses on improvement in the academic achievement of all of a State's public school students. See *id.* at 2603 (NCLB "focuses on the demonstrated progress of students through accountability reforms.").

A State that wishes to obtain federal funds under Title I, Part A of the ESEA must submit a plan to the Secretary of Education (Secretary) stating that it will comply with all applicable requirements of the Act. 20 U.S.C. 6311(a), 7844(a)(1). Among other things, those requirements include (1) adopting challenging academic standards that apply "to all schools and children in the State," 20 U.S.C. 6311(b)(1)(B); see 20 U.S.C. 6311(b)(1)(A); (2) implementing a set of annual academic assessments in reading, math, and science that are aligned with the State's academic standards and that are used "to measure the achievement of all children" in the State, 20 U.S.C. 6311(b)(3)(C)(i) and (ii); see 20 U.S.C. 6311(b)(3)(A); and (3) applying a single, statewide accountability system that will be effective in ensuring that all schools and LEAs make adequate yearly progress, 20 U.S.C. 6311(b)(2)(A). Each year, participating States are informed of the annual allotment of federal funds and, after receiving that information, decide whether to continue participating in the federal program.

The Secretary is vested with authority to enforce the ESEA, and may withhold funds or take other enforcement action if a State fails to comply with the requirements of the Act. 20 U.S.C. 1234c. The Secretary may

also grant waivers of the Act's requirements, with certain specified exceptions. 20 U.S.C. 7861.

2. The State of Connecticut has elected to participate in the Title I, Part A program and, since 2002, has had a state plan on file with the United States Department of Education (Department). Pet. App. 5. From 2002 through 2010, Connecticut received nearly one billion dollars under Title I, Part A of the ESEA. See U.S. Department of Education, *State Funding History Tables By State*, http://www.ed.gov/about/overview/budget/history/sthistbyst01to08.pdf (2002-2008); *Funds for State Formula-Allocated and Selected Student Aid Programs*, *U.S. Department of Education Funding, Connecticut*, http://www.ed.gov/about/overview/budget/statetables/11stbystate.pdf (2009-2010); U.S. Department of Education, *Fiscal Year 2009-FY 2011 President's Budget State Tables for the U.S. Dep't of Education*, http://www.ed.gov/about/overview/budget/statetables/index.html#update (2010 allocations are considered final).

In 2005, the State proposed two amendments to its state plan: (i) to exclude students with limited English proficiency from the statewide assessments for three years after their arrival in the United States, and (ii) to assess students with disabilities at their instructional level (rather than grade level) when "deemed 'most appropriate.'" Pet. App. 5-7, 38-40, 100-101. The State did not argue that a failure to approve the proposed amendments would violate 20 U.S.C. 7907(a) (Section 9527(a) of the ESEA), which petitioners refer to as the "Unfunded Mandates Provision," or that it would run afoul

of the Constitution. Pet. App. 8, 62-68.[1] Nor did the State "explain to the Secretary what portion of the Secretary's special education or [English proficiency] 'mandates' would be unfunded." *Id.* at 65-66. Rather, "the State sought to justify its requests on the basis of reasons other than cost." *Id.* at 66. Accordingly, when the Department rejected the proposed plan amendments as inconsistent with the requirements of the Act and its implementing regulations, *id.* at 6-7, 40-41, 66-67, 109, the agency made no mention of 20 U.S.C. 7907(a).[2]

3. In August 2005, petitioners filed suit against the Secretary. As relevant here, petitioners alleged that the Secretary violated Section 9527(a) of the ESEA by requiring the State to expend its own funds in order to comply with the statutory requirements of the Act. Petitioners also alleged that the Secretary's interpretation of the Act violates the Spending Clause and the Tenth Amendment. Finally, petitioners alleged that the Secre-

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[1] Section 9527(a) of the ESEA provides:

> Nothing in this [Act] shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this [Act].

20 U.S.C. 7907(a).

[2] The State also asked the Department to waive certain statutory testing requirements relating to students with limited English proficiency and students with disabilities, as well as the statutory requirement that testing be performed annually. Pet. App. 5-6. The Department denied the waiver requests (*id.* at 6, 107-109), the district court upheld the denial (*id.* at 145-161), and the State did not challenge that denial on appeal (Pet. 13 n.4). The State also failed to raise its current funding-based arguments as part of these waiver requests. See Pet. App. 8.

tary violated the Administrative Procedure Act (APA), 5 U.S.C. 701-706, by denying the State's two proposed plan amendments and by improperly denying the State a hearing on those amendments. Pet. App. 72, 163-165.

The district court granted the Secretary's motion to dismiss petitioners' Section 9527(a) claim and the related constitutional claims, found petitioners' request for a hearing on the proposed plan amendments moot, and declined to dismiss the remaining APA claims without further development of the record. Pet. App. 110-166. With respect to the Section 9527(a) and related constitutional claims, the district court held, among other things, that the issues presented were not ripe for judicial review. *Id.* at 132-138, 144-145. Applying the test set forth in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), the court concluded that "further development of the record would assist [the] court," because there remained "hotly disputed" issues of fact on claims that were never presented to the Department of Education. Pet. App. 131, 133-134.

The district court explained that petitioners' "[f]undamental[]" complaint is that "strict adherence to the requirements of the Act * * * will cost more than the federal government provides to the State for those purposes," Pet. App. 101-102, but that the Secretary maintains the State could comply with the statutory assessment requirements without expending more than the federal funds available, *id.* at 112-113. The district court recognized that "knowing whether the State will have to spend its own money in order to comply with the requirements imposed by the Act will determine whether a court even needs to decide the statutory" and constitutional questions presented. *Id.* at 134, 144-145. After concluding that petitioners would not face significant

hardship because the State remained in compliance with the Act and, thus, faced no imminent enforcement action by the Secretary, *id.* at 137, the district court dismissed the claims on ripeness grounds and suggested that the State consider "return[ing] to the Secretary to develop a detailed record regarding [its] unfunded mandates argument," *id.* at 70.

The State declined to do so and instead continued to litigate its remaining APA claims. The district court ultimately granted the Secretary's motion for judgment on the administrative record, holding that the Secretary's disapproval of the State's proposed plan amendments was not arbitrary or capricious. Pet. App. 47-61. The court expressed how "truly unfortunate" it was that the State was "no closer to a determination" on the Section 9527(a) question because it had "decided to continue to litigate the issue in this Court" rather than heed the court's prior suggestion that the State raise and develop its claim in an administrative proceeding. *Id.* at 69-70.

4. The court of appeals affirmed, modifying the judgment to clarify that the dismissal was without prejudice and that the State was free to request an administrative hearing. Pet. App. 1-23.

With respect to the Section 9527(a) and related constitutional claims, the court of appeals applied *Abbott Laboratories*, *supra*, and agreed that the claims "would benefit from a more developed administrative record" and were "not yet fit for review." Pet. App. 10-11, 13. As the court explained, "[t]he State did not raise these statutory and constitutional arguments to the Secretary when it requested its proposed waivers and plan amendments," *id.* at 8, and thus "we do not yet have a clear picture of solutions the Secretary might propose, or, * * * the State's position on any such solutions," *id.* at

13. The court of appeals continued: "The Secretary contends that 'the State's cost estimates [for compliance with [NCLB]] reflect a misunderstanding of its statutory obligations,'" and that "the State can meet its responsibilities under the Act using its current Title I grants." *Id.* at 13-14 (first pair of brackets in original). The court of appeals recognized that the State disagreed, but determined that "administrative proceedings are a more suitable venue" for "resolving this factual and legal dispute" "because they will allow for fact-intensive inquiries related to educational finance, the agency's area of expertise," and will "provide an opportunity for the parties to design an amended plan that satisfies the State's specific fiscal objections." *Id.* at 14. The court of appeals concluded that "[t]his case therefore differs from *Abbott*" which, in contrast, involved "purely legal" issues that would not benefit from further administrative proceedings. *Id.* at 15 (quoting *Abbott*, 387 U.S. at 149).

Although the court of appeals acknowledged that the State could face a potential loss of state funds if forced to comply with the Act in the interim, it determined that "further administrative proceedings may be the most effective way to save the State this money." Pet. App. 16. The court also noted the district court's suggestion, in 2006, that the State develop its claims before the Secretary in the first instance and, like the district court, found it unfortunate that, because it declined to do so, "now, more than three years later, the State finds itself in essentially the same position." *Id.* at 22.

ARGUMENT

Petitioners contend that the court of appeals erred in concluding that their claims are not ripe for judicial re-

view. The case-specific decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. As an initial matter, petitioners' Section 9527(a) and related constitutional claims are not subject to review at this time because there was no "final agency action" addressing these claims. The APA, which provides the waiver of sovereign immunity that allows this suit against the Secretary to go forward, provides for review only of "final agency action." 5 U.S.C. 704; *Dalton* v. *Specter*, 511 U.S. 462, 469 (1994). That necessary prerequisite to suit is missing here.

The Secretary did issue decisions regarding the State's proposed plan amendments and waiver requests, and those decisions constituted final agency action. But the State never raised these funding-based claims with the Secretary in seeking approval of the plan amendments and waivers. See Pet. App. 8, 62-68. The State cannot remedy its failure to present these issues to the Secretary, and its failure to exhaust administrative remedies with respect to them, by bringing a general declaratory judgment action against the Secretary entirely divorced from review of any final agency action. *Id.* at 135 ("[T]he State simply asks the Court to issue a general declaratory judgment not grounded in any concrete agency action."); *id.* at 14 ("The Secretary has taken no final action attributed directly to his interpretation of the Unfunded Mandates Provision."). For this reason alone, further review is not warranted.

2. The ripeness doctrine is intended "to prevent the courts * * * from entangling themselves in abstract disagreements over administrative policies," and "to protect the agencies from judicial interference until an

administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 148-149 (1967). The ripeness inquiry turns on a pragmatic assessment of the institutional interests of both the agency and the courts in avoiding premature or advisory adjudication, and the interests of affected parties in obtaining a timely resolution of the issue in dispute. Determining whether an agency action is ripe for judicial review generally requires a court to evaluate the fitness of the issues for judicial decision and the hardship to the parties of withholding immediate court consideration. *Ibid.*

Applying these settled principles, both the district court and the court of appeals correctly concluded that petitioners' Section 9527(a) and related constitutional claims are not ripe for judicial resolution. The critical premise underlying petitioners' legal claims is the disputed and untested allegation that federal grants are insufficient to cover the State's full costs of complying with the requirements imposed by NCLB. But, "according to the Secretary, the State can meet its responsibilities under the Act using its current Title I grants." Pet. App. 14; see *id.* at 13-14 (quoting the Secretary's contention that "the State's cost estimates [for compliance with [NCLB]] reflect a misunderstanding of its statutory obligations") (first brackets in original); *id.* at 134 (noting the Secretary's assertion that the State could "satisfy the testing requirements of the Act in a manner that is fully funded by the federal [g]overnment"). As the courts below understood, absent resolution of this dispute, it would be premature (and perhaps entirely unnecessary) to decide whether the Act requires the State to spend its own funds to comply with its requirements when federal grants are inadequate,

and especially whether an affirmative answer to that question would violate the Constitution.

The court of appeals' decision makes abundant sense in light of the statutory scheme. The costs of compliance that petitioners contend far exceed federal funds (Pet. 9) are neither dictated by Congress nor identified by the State in its plan. And the State never "explain[ed] to the Secretary what portion of the Secretary's special education or [English proficiency] 'mandates' would be unfunded." Pet. App. 65-66. Without some factual development in connection with a concrete submission, and some understanding of what it would mean for a State unilaterally to identify which obligations lack sufficient federal funding, the legal question presented has such an abstract quality that it would be exceedingly difficult for a court to arrive at the correct resolution. As the court of appeals recognized (*id.* at 14), administrative proceedings would allow "for fact-intensive inquiries related to educational finance, the agency's area of expertise," and would "provide an opportunity for the parties to design an amended plan that satisfies the State's specific fiscal objections." Neither "are undertakings readily accomplished in the district court in the first instance." *Ibid.*

Because the State never invoked Section 9527(a) before the Department of Education, and because it justified its proposed plan amendments with "reasons other than cost" (Pet. App. 66), the Department never had an opportunity to engage in such factfinding, to consider a concrete submission identifying which obligations lacked sufficient federal funding, and to interpret and apply in the first instance the relevant statutory provisions that govern the State's obligations. Especially in these circumstances, where administrative proceedings "might

moot the entire lawsuit" (*id.* at 14), the court of appeals correctly concluded that petitioners' claims are not yet ripe for judicial review.

3. Petitioners contend (Pet. 20) that the court of appeals was "dismissive of the hardship" the State assertedly will face while it first submits its claims to administrative proceedings. In particular, petitioners argue that "after five years of litigation—[it] will be sent back to square one," Pet. 24, and that it will be "forced to continue expending limited state resources to comply with NCLB" in the interim, Pet. 20-21 (citation omitted). Neither "hardship" compels a different result and the court of appeals' case-specific ruling does not warrant further review.

First, the five-year delay is of the State's own making. The State has opted to participate in the federal program for each of the last eight years, after learning of its annual funding allotments under Title I, Part A programs, and yet has never presented its current funding-based objections (premised on Section 9527(a)) to the Department through a proposed plan amendment, a waiver request, or other concrete submission. Instead, petitioners opted to sue directly in federal court. In 2006, immediately after the district court granted the Secretary's motion to dismiss, the court "suggested to the State that it consider * * * return[ing] to the Secretary to develop a detailed record regarding the State's unfunded mandates argument." Pet. App. 69-70. It is because the State opted not to "pursue that suggestion," that four more years of litigation ensued. *Id.* at 22. Such "hardship" is not a cognizable basis for judicial review of a premature claim.

Second, petitioners argue (Pet. 20-21) that they have expended, and will continue to expend, state funds to

comply with the statutory requirements and that this hardship should warrant immediate judicial review. But whether the State's alleged expenditure of its own funds is actually necessary to comply with the Act is the very question on which factual and legal determinations by the Department are needed in the first instance. See Pet. App. 13-15.

4. Petitioners assert (Pet. 16-23) that this case implicates a conflict in the circuits "on whether a purely legal question involving an agency's interpretation of a statute it enforces is presumptively ripe for judicial review." That is incorrect.

As an initial matter, this case does not implicate any such purported conflict. Contrary to petitioners' contentions (Pet. 16, 18), the court of appeals concluded that this case does not present "a purely legal question." Indeed, the court specifically distinguished *Abbott Laboratories*, *supra*, because, unlike this case, it did present "a purely legal" issue. Pet. App. 15. In contrast, petitioners' legal claims would present a concrete controversy only if the federal grants were in fact insufficient to cover the costs of complying with the requirements of the Act, as they would be construed and applied by the Department in response to a submission by the State. The actual costs of compliance are disputed and appropriate for expert agency factfinding and review in the first instance. Thus, the court of appeals never rejected a presumption of reviewability for purely legal issues; it simply found that such a presumption had no application here. Cf. *Ciba-Geigy Corp.* v. *Sidamon-Eristoff*, 3 F.3d 40, 47 (2d Cir. 1993) ("a 'purely legal question' . . . is 'presumptively reviewable'") (citations omitted).

Petitioners are correct that a number of judges on the en banc Sixth Circuit found a similar NCLB chal-

lenge ripe for judicial review. See *School Dist. of the City of Pontiac* v. *Duncan*, 584 F.3d 253, 262-264 (2009) (opinion of Cole, J.), cert. denied, 130 S. Ct. 3385 (2010); *id.* at 279 (opinion of Sutton, J.). But the Sixth Circuit ultimately affirmed the district court's dismissal of the NCLB challenges by an equally divided court, and this Court recently denied a writ of certiorari. See 130 S. Ct. 3385 (No. 09-852). In light of the Sixth Circuit's ultimate disposition, the precedential effect of that disposition with respect to the particular issue of ripeness is unclear. See *Stupak-Thrall* v. *United States*, 89 F.3d 1269, 1269 (6th Cir. 1996) (Moore, J., concurring in the order) (judgment by equally divided court is not binding precedent), cert. denied, 519 U.S. 1090 (1997); *id.* at 1272 (Boggs, J., dissenting) (noting "usual practice * * * is to issue a simple order affirming the district court's opinion by an equally divided court"); *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 215 n.1 (1995); *Durant* v. *Essex Co.*, 74 U.S. (7 Wall.) 107, 110 (1869). There accordingly is no concrete and cognizable conflict, much less one of the sort that would warrant review by this Court—especially because the Sixth Circuit in the *City of Pontiac* case and the Second Circuit in this case both affirmed the dismissal of the plaintiffs' challenges. Moreover, the disagreement between the Sixth Circuit judges and the Second Circuit panel was not about whether a presumption of reviewability should apply to "purely legal question[s]," but whether the specific case presented "a purely legal question." Compare Pet. App. 14-15 (concluding that factual disputes remain), with 584 F.3d at 263 (Cole, J.) (concluding that the statutory question was not "dependent on further development of facts or further administrative action"); *id.* at 279 (Sutton, J.) (same).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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