IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

South Carolina Association of School Administrators, Plaintiff, vs. The Honorable Mark Sanford, in his official capacity as the Governor of the State of South Carolina; and The Honorable Jim Rex, in his capacity as the State Superintendent of Education of South Carolina, Defendants.	C.A. No. 3:09-1364-JFA **SOUTH CAROLINA ASSOCIATION OF SCHOOL ADMINISTRATORS' MEMORANDUM OF LAW ON JURISDICTION**

Plaintiff South Carolina Association of School Administrators ("SCASA") submits this memorandum of law as requested by this Court's Order of May 26, 2009 (ECF entry no. 4), wherein the Court requested, "input from the parties on its jurisdiction over the matters in this case." SCASA respectfully asserts that federal question jurisdiction does not exist and that this case should be remanded to the South Carolina Supreme Court.

As noted by the Governor, this case directly involves the allocation of State power between the General Assembly and the State's Constitution officers. This issue is fundamental to the State's sovereignty, which is the bedrock of federalism. No other issue is of more interest or concern to the State, and must be resolved by the State's Supreme Court.

I. THE COURT LACKS FEDERAL QUESTION JURISDICTION

A. Federal Question Removal Generally

SCASA's claims are founded on powers and responsibilities of the General Assembly, the Governor, and the Sate Superintendent of Education of the State of South Carolina, under the Constitution and statutes of the State of South Carolina, especially those laws

centered on the appropriation of funds for the State Budget, to be spent by school districts, other public schools and universities, and various state agencies of the State of South Carolina. These are among the most important and fundamental issues to South Carolina, and the Supreme Court of the State of South Carolina should decide these legal issues.

Because this case began in state court, federal jurisdiction depends on the propriety of removal, which in turn depends on the scope of the district court's original jurisdiction because the removal statute allows defendants to remove a case to federal court only if "the district courts of the United States have original jurisdiction" over it. Lontz v. Tharp, 413 F.3d 435, 439 (4th. Cir. 2005) (quoting 28 U.S.C. § 1441(a)). The court is obliged to construe removal jurisdiction strictly because of the significant federalism concerns implicated. Coll. of Charleston Found. v. Ham, 585 F. Supp. 2d 737, 741-42 (D.S.C. 2008). Therefore, "[i]f federal jurisdiction is doubtful, a remand to state court is necessary." Id. at 742. [1] The removing party bears the burden of establishing that the case was properly removed. Mulcahey v. Columbia Organic Chems. Co., 29 F.3d 148, 151 (4th Cir. 1994); Bennett v. Balley Mfg. Corp., 785 F. Supp. 559, 560 (D.S.C. 1992).

Section 1441 generally makes removal appropriate in three circumstances, demonstration of which is the burden of the party seeking removal. Lontz, 413 F.3d at 439. The first is diversity (not relevant here); the second is "federal question" jurisdiction on the face of the complaint; the third is "complete preemption" by federal law. Id. at 439-40.

SCASA's claims concern the allocation of State power and duties under State law, including the Constitution of South Carolina and the State Budget, R. 49, Act of 2009. No federal law forms the basis of SCASA's claim.

[1] It is entirely correct to determine jurisdiction and the propriety of removal prior to addressing discretionary consolidation. "[c]onsolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." Johnson v. Manhattan Ry. Co., 289 U.S. 479, 496-497 (1933); Intown Props. Mgmt., Inc. v. Wheaton Van Lines, Inc., 271 F.3d 164, 168 (4th Cir. 2001). A "court has no authority to consolidate an action of which it has jurisdiction with one of which it does not." Appalachian Power Co. v. Region Props., Inc., 364 F. Supp. 1273, 1277 (D.C. Va. 1973). Since the court believes removal is improper, it necessarily has no authority to consolidate." Id.

B. There is no Federal Question Jurisdiction under § 1441(a) to Support Removal

"A suggestion of one party, that the other will or may set up a claim under the Constitution or laws of the United States, does not make the suit one arising under that Constitution or those laws." Louisville & N.R. Co. v. Mottley, 211 U.S. 149, 153 (1908) (quoting, Tennessee v. Union & Planters' Bank, 152 U.S. 454, 464 (1894)); see also Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 14 (1983); Pinney v. Nokia, Inc., 402 F.3d 430, 443 (4th Cir. 2005). Removal is appropriate if the face of the complaint raises a federal question. See § 1441(b). Under the "well-pleaded complaint rule, however, merely having a federal defense to a state law claim is insufficient to support removal, since it would also be insufficient for federal question jurisdiction in the first place." Lontz, 413 F.3d at 439. The Fourth Circuit has noted that the complaint must be read "unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose." Mid Atlantic Medical Services, LLC v. Sereboff, 407 F.3d 212, 217 n.5 (4th Cir. 2005) (quoting Taylor v. Anderson, 234 U.S. 74, 75-76 (1914)). Further, a defendant may not defend his way into federal court because a federal defense does not create a federal question under § 1331. In re Blackwater Security Consulting, LLC, 460 F.3d 576, 584 (4th Cir. 2006). Actions in which defendants merely claim a substantive federal defense to a state-law claim do not raise a federal question. Id.

Further, "[o]rdinary preemption has been categorized as a federal defense to the allegations. And as a mere defense, the preemptive effect of a federal statute will not provide a basis for removal. *Even if preemption forms the very core of the litigation, it is insufficient for removal.*" Lontz, 413 F.3d at 440-441 (emphasis added) (internal quotations and citations omitted). As well and truly stated,

> If a federal claim ["contention" in 2009 Supplement at 309] would have arisen only as a defense in an action for affirmative relief, a declaratory judgment action involving the claim is not within the federal court's original or removal jurisdiction.

> *This is true even when the initiator of the declaratory judgment action raises the federal question, because it would have been the defendant in a ripened action for affirmative relief.*
>
> This principle avoids the race to the courthouse that otherwise might result from permitting defendants to establish subject matter jurisdiction by commencing a declaratory relief action relying on matter that simply would be a federal defense to an affirmative action.

Wright, Miller & Cooper, 14B Fed. Prac. & Proc. Juris.3d § 3722, p. 417-419 (emphasis added).

Directly on this point, the first ground of the Governor's Notice of Removal attempts to create a federal issue out of the Complaint by characterizing the Complaint as follows:

> Specifically, [SCASA's] Complaint alleges (inter alia) that (1) [ARRA] does not preempt Part IlI [of the State Budget] which was recently enacted by the General Assembly of South Carolina over Governor Sanford's veto (see Complaint ¶ 22), and (2) if ARRA is interpreted to preempt Part III, Section 1 of the General Appropriations Law, ARRA to that extent violates the United States Constitution as interpreted in Printz v. United States, 521 U.S. 898 (1997) (see Complaint ¶ 22).

Notice of Removal of Civil Action, ¶ 3 (May 26, 2009). SCASA's Complaint ¶ 22 states in its totality:

> Nothing in the ARRA provides that a governor of any state must make his or her application for ARRA Stabilization Funds as a matter of personal choice as a matter of the applicant's state's own law. Further, a federal statute cannot change the constitution of a state. In other words, the ARRA does not change South Carolina law - it instead simply does not address South Carolina law. The General Assembly may require the Governor to take specific actions with regard to appropriated funds. State ex rel. Condon v. Hodges, 349 S.C. 232, 562 S.E.2d 623 (2002). This is exactly what Part III of the State Budget does. Yet, this does nothing to offend any part of the ARRA or other federal law. On the contrary, it would be a fundamental affront to states' dignity if Congress were able to rearrange the distribution of powers in a state government. An interpretation of ARRA as a federal statute whereby Congress gives the South Carolina Governor *more* power over revenue and appropriations *viz a viz* the South

> Carolina General Assembly, than the Governor has under the State Constitution, is clearly within the class of cases where Congress is forbidden to "commandeer" the machinery of the State *executive* functions of state government for federal ends. See, Printz v. United States, 521 U.S. 898 (1997). This is particularly acute in the field of public education, where our State Constitution and our Supreme Court are both uniquely explicit as to the extent of the General Assembly's authority and responsibility.

When seen as a whole, the Complaint merely sets out the Governor's attempted pre-emption defenses under Federal law, and further explains why they are not valid defenses. As set out in Wright & Miller above, this does not create a federal question. A reading of the Complaint reveals that in no way does SCASA seek a ruling on the ARRA or base its claim on ARRA. Instead, SCASA's complaint notes that the Governor's anticipated federal affirmative defense – i.e., his preemption argument – will not succeed because it requires an unnecessarily unconstitutional construction of the ARRA.[2]

The gravamen of the Complaint is a declaration of State law; the Complaint ¶ 24 provides:

> 24. Plaintiff therefore seeks a declaratory judgment declaring the rights, status and other legal relations between the parties with regard to Part III of the State Budget. It

[2] As said by the Supreme Court:

> Another rule of statutory construction, however, is pertinent here: where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. This cardinal principle has its roots in Chief Justice Marshall's opinion for the Court in Murray v. The Charming Betsy, 2 Cranch 64, 118, 2 L.Ed. 208 (1804), and has for so long been applied by this Court that it is beyond debate. As was stated in Hooper v. California, 155 U.S. 648, 657 (1895), "the elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it. See Grenada County Supervisors v. Brogden, 112 U.S. 261, 269 (1884).

Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. and Const. Trades, 485 U.S. 568, 575 (1988) (internal citations omitted). Reference is made to SCASA's Memorandum in Support of Motion to Dismiss (May 26, 2009) in Sanford v. McMaster, C.A. No. 3:09-cv-01322-JFA for more on the statutory construction issue.

> further requests a declaration that the Governor must take the actions prescribed and required by Part III of the State Budget. It requests equitable relief appropriate to the declarations and sufficient to cause the Governor to perform the duties imposed upon the Governor by South Carolina law with regard to Part III of the State Budget.

The same grounds are reiterated in SCASA's Second Claim: "The Court should issue its writ of mandamus to compel the Governor immediately to submit an application to the United State's Secretary of Education to obtain Phase 1 State Fiscal Stabilization Funds in accordance with Part III of the State Budget." (Complaint ¶ 33).

Basically, the foregoing principles and a careful reading of the Complaint are all the law necessary for this Court to expediently and cleanly dispose of the Governor's improper attempt to remove this case.[3]

C. "Complete Preemption" Federal Question Jurisdiction Is Inapplicable

The third justification for removal is a narrow exception to the well-pleaded complaint rule known as the "complete preemption" doctrine,[4] which provides that if the subject matter of a putative state law claim has been totally subsumed by federal law – such that state law cannot even treat on the subject matter – then removal is appropriate. Lontz, 413 F.3d at 439-40. However,

> [c]omplete preemption is a jurisdictional doctrine, while ordinary preemption simply declares the primacy of federal law, regardless of the forum or the claim. The presence of ordinary federal preemption thus does not provide a basis

[3] Further the same jurisdictional principles that apply to the "anticipatory federal defense" issue in this matter also appear to apply to Sanford v. McMaster, C.A. No. 3:09-cv-01322-JFA, which the court may similarly dispose on its own motion. See, Fed. R. Civ. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.") Clearly that action is a textbook example of a "race to the courthouse" anticipatory defense-asserting declaratory judgment action to set up a federal preemption defense to some hypothetical future state claim by the Attorney General to enforce State law – it plainly says so.

[4] Further, it is instructive to note that the Governor has not alleged "complete preemption." SCASA addresses the issue for the sake of being able to encompass the whole subject in a single brief under the Court's orders. SCASA does not want the remand of this case delayed by the Court's having to request more briefing on an unmerited claim of "complete preemption" by the ARRA.

> for federal question jurisdiction, and, in a case removed from state court on the basis of federal question jurisdiction, is relevant only after the district court has determined that removal was proper and that it has subject matter jurisdiction over the case.

In re Blackwater Security Consulting, LLC, 460 F.3d at 584 (internal quotation marks and citation omitted). The Fourth Circuit has,

> noted our obligation to construe removal jurisdiction strictly because of the significant federalism concerns' implicated by it. Federalism concerns strongly counsel against imputing to Congress an intent to displace a whole panoply of state law absent some clearly expressed direction. Consistent with these principles, we have recognized that state law complaints usually must stay in state court when they assert what appear to be state law claims. The presumption, in other words, is against finding complete preemption.

Lontz, 413 F.3d at 440. The "Supreme Court has made clear that it is 'reluctant' to find complete preemption." Id. at 441 (citing Metro Life Ins. Co. v. Taylor, 481 U.S. 58 (1987)). The Court has, in fact, found complete preemption in only three statutes: the National Bank Act, ERISA § 502(a), and the Labor Management Relations Act § 301. Id. See also Rosciszewski v. Arete Assoc., Inc., 1 F.3d 225, 232 (4th Cir.1993) (Copyright Act). The Supreme Court has articulated exacting standards that must be met before it will find complete preemption, "[m]ost notably, the congressional intent that state law be entirely displaced must be clear in the text of the statute." Lontz, 413 F.3d at 441. There is no indication that the ARRA's State Fiscal Stabilization Fund provisions create any kind of federal cause of action, let alone "displace a whole panoply of state law," Lontz, 413 F.3d at 440, particularly with regard to adjudications implicating the exercise of sovereign functions of a state. See, e.g., New York v. United States, 505 U.S. 144, 162-163 (1992).

II. SUPPLEMENTAL JURISDICTION OVER STATE CLAIMS

The court should not exercise supplemental jurisdiction over SCASA's state claims. First, as shown *supra*, there is no underlying claim that gives original jurisdiction, and

hence supplemental jurisdiction would be improper. See, 28 U.S.C. § 1367(a).[5]

Even if the federal Court takes jurisdiction of a federal claim, under 28 U.S.C. § 1367(c), the federal court may decline to exercise supplemental jurisdiction over a State claim if: (1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction. The Supreme Court has said that,

> Depending on a host of factors, then-including the circumstances of the particular case, the nature of the state law claims, the character of the governing state law, and the relationship between the state and federal claims-district courts may decline to exercise jurisdiction over supplemental state law claims. The statute thereby reflects the understanding that, when deciding whether to exercise supplemental jurisdiction, a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity.

City of Chicago v. International College of Surgeons, 522 U.S. 156, 173 (1997). Dismissal of supplemental claims is warranted pursuant to 28 U.S.C. § 1367(c)(1) and (4), and pursuant to 28 U.S.C. § 1441(c) (court may remand "all matters in which State law predominates").

The principle that State Supreme Courts are the arbiters of their own state constitutions is long and well established: "It is undoubtedly true in general, that this court does follow the decisions of the highest courts of the States respecting local questions peculiar to themselves, or respecting the construction of their own constitutions and laws." Olcott v. Fond du Lac County, 83 U.S. 678, 689 (1872). As noted by three Justices in Bush v. Gore, 531 U.S. 98 (2000):

> In most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state

[5] Further, it is far from clear that SCASA's third claim, pertaining to the powers of the State Superintendent of Education, arises from the "same case or controversy" as do the first two claims involving the Governor. Id.

> law. That practice reflects our understanding that the decisions of state courts are definitive pronouncements of the will of the States as sovereigns. Cf. Erie R. Co. v. Tompkins, 304 U.S. 64 (1938). Of course, in ordinary cases, the distribution of powers among the branches of a State's government raises no questions of federal constitutional law, subject to the requirement that the government be republican in character. See U.S. Const., Art. IV, § 4.

Id. at 112 (Rehnquist, J., concurring).[6] In the same case, others subscribed to the statement, "Federal courts defer to a state high court's interpretations of the State's own law. This principle reflects the core of federalism, on which all agree." Id., at 142 (Ginsburg, J., dissenting). Accordingly, federal courts do not interfere with the internal affairs of states, unless there is a plain necessity for doing so, and no such necessity exists here. Rather, the necessity here is to allow the South Carolina Supreme Court to address SCASA's claims concerning the Governor's obligations, under South Carolina law. "How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself." Highland Farms Dairy v. Agnew, 300 U.S. 608, 612 (1937).

III. ABSTENTION IS PROPER

The foregoing analysis provides a sound, complete, and – given the urgency of the issues – an *un-appealable* basis for this Court to remand the entire case to the South Carolina Supreme Court, where it belongs, pursuant to 28 U.S.C. § 1446(c)(4).[7] Under the proper application of jurisdictional principles, the Court's remand should be comprehensively covered by § 1447(c).

Nonetheless, it is also appropriate to apply federal abstention principles to decline to exercise jurisdiction over SCASA's Complaint as removed, if (or hypothetically if) any claim

[6] In the Governor's own words: "'Our suit is fundamentally about the balance of power and separation of powers in our state, and whether or not the legislature is going to be allowed to erode the Executive Branch even further in South Carolina,' Gov. Sanford said." Press Release of May 26, 2009, infra at 11. Importantly, this question as framed by the Governor is non-justiciable in federal courts. Dreyer v. Illinois, 187 U.S. 71 (1902); Hunt v. Anderson, 794 F.Supp. 1557 (M.D. Ala. 1992).

[7] See 28 U.S.C. 1447(d) and Quackenbush v. Allstate Insurance Company, 517 U.S. 706 (1996).

therein provides the Court with original or supplemental jurisdiction. Unlike § 1447(c) remand, however, remand on the basis of abstention alone would create an appealable order. Quackenbush, 517 U.S. at 711-715.

> In addition to their discretion under § 1367(c), district courts may be obligated not to decide state law claims (or to stay their adjudication) where one of the abstention doctrines articulated by this Court applies. Those doctrines embody the general notion that federal courts may decline to exercise their jurisdiction, in otherwise exceptional circumstances, where denying a federal forum would clearly serve an important countervailing interest, for example where abstention is warranted by considerations of proper constitutional adjudication, regard for federal-state relations, or wise judicial administration.

City of Chicago, 522 U.S. at 174. (Citation omitted.) Abstention is not limited to equity cases, but also can be applied to declaratory judgment actions. Quackenbush, 517 U.S. at 718

Types of federal abstention are not "pigeonholes," Pennzoil Co. v. Texaco Inc., 481 U.S. 1 (1987), but the comity concerns in this case present a "Younger type" basis for abstention pursuant to Younger v. Harris, 401 U.S. 37 (1971). Younger "was based partly on traditional principles of equity but rested primarily on the even more vital consideration of comity." New Orleans Public Service, Inc. v. Council of the City of New Orleans, 491 U.S. 350, 363 (1989) (internal quotations and citations omitted). Further,

> *Younger v. Harris* and its progeny espouse a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances. The policies underlying Younger abstention have been frequently reiterated by this Court. The notion of "comity" includes "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. Minimal respect for the state processes, of course, precludes any presumption that the state courts will not safeguard federal constitutional rights.

Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423, 431 (1982)

(internal quotation and citations omitted). Younger abstention "contemplates the outright dismissal of the federal suit, and the presentation of all claims, both state and federal, to the state courts. Such a course naturally presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." Gibson v. Berryhill, 411 U.S. 564, 577 (1973).

This case raises fundamental questions of State Constitutional law that are the unique province of the State Supreme Court. The State obviously has important interests at stake. As the Fourth Circuit has said:

> Assuming the other requirements are met, if the State's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government, abstention is proper. The list of areas in which federal judicial interference would "disregard the comity" that Our Federalism requires is lengthy. It encompasses those interests that the Constitution and our traditions assign primarily to the states. *Functions which make our states self-governing sovereigns, rather than "mere political subdivisions" or "regional offices" of the federal government, are inherently "important state interests" that may warrant Younger abstention.*

Harper v. Public Service Com'n of WVA, 396 F.3d 348, 352 (4th Cir. 2005) (emphasis added) (internal citations and quotations omitted). *According to the Governor himself:*

> Our suit is fundamentally about the balance of power and separation of powers in our state, and whether or not the legislature is going to be allowed to erode the Executive Branch even further in South Carolina," Gov. Sanford said.

Office of the Governor, "Governor's Counsel Responds to Suit, FILES TO REMOVE SCASA SUIT TO FEDERAL COURT, WILL NOT RESPOND TO HARPOOTLIAN-DRAKE SUIT" (May 26, 2009) (attached as Exhibit 1). SCASA concurs in the Governor's focus on the centrality and fundamental nature of the State "sovereign functions" that are implicated by the litigation springing from the FY 2009-10 South Carolina State Budget Act. See, e.g., Complaint ¶¶ 3-5, 7-8, 19-21. It is hard to imagine a more fundamental governance crisis than the State

governor flat-out refusing to execute the law of the State, and this has provoked an inquiry into the relationship of the branches of government under the State Constitution, as well as the State Constitutional and statutory powers of the State Superintendent of Education. And, all of this concerns *public education*, which "is perhaps the most important function of state and local governments." Brown v. Board of Education, 347 U.S. 483, 493 (1954); see also, Complaint ¶¶ 4-6, 9-10, 19-20.

The South Carolina Supreme Court, in its original jurisdiction pursuant to S.C. Const. Art. V, § 5, has jurisdiction to hear the Governor's federal affirmative defense theories, see, Tafflin v. Levitt, 493 U.S. 455, 458-459 (1990) (concurrent jurisdiction of state courts over laws of the United States unless Congress otherwise provides), and from there *certiorari* upon the question of "validity of a statute of any State … on the ground of its being repugnant to the Constitution, treaties, or laws of the United States" may be requested. 28 U.S.C. § 1257(a).

For the above-stated reasons, the federal courts should refrain from exercising jurisdiction (if any) over SCASA's case against the Governor and the State Superintendent of Education.

IV. THE COURT SHOULD NOT ENTERTAIN THIS DECLARATORY JUDGMENT REQUEST

The court should abstain from exercising any discretionary jurisdiction over this declaratory judgment action – and however many others the Governor brings before it on these same matters – pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. § 2201. This statute provides in part: "In a case of actual controversy within its jurisdiction, ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201. In effect, assuming SCASA's claims raise a substantial federal question (which SCASA denies), a removal of SCASA's claims brings SCASA's action within 28 U.S.C. § 2201. The United States Supreme Court has "repeatedly characterized the Declaratory Judgment Act as an enabling act, which confers a discretion on the courts rather than

an absolute right upon the litigant." Wilton v. Seven Falls Co., 515 U.S. 277, 287 (1995) (internal quotation omitted). To determine whether to proceed with a federal declaratory judgment action when a related state court proceeding is underway, the Fourth Circuit has focused on the following four factors for guiding the analysis: "(1) whether the state has a strong interest in having the issues decided in its courts; (2) whether the state courts could resolve the issues more efficiently than the federal courts; (3) whether the presence of "overlapping issues of fact or law" might create unnecessary "entanglement" between the state and federal courts; and (4) *whether the federal action is mere "procedural fencing," in the sense that the action is merely the product of forum-shopping.*" Gressette v. Sunset Grille, Inc., 447 F.Supp.2d 533, 537 (D.S.C. 2006) (emphasis added) (citations omitted).

Clearly these factors are present, as with both the 28 U.S.C. § 1367 and abstention discussions, *supra*. That the Governor is goaltending at the South Carolina Supreme Court Clerk's desk in order to remove anything that comes near on his unfounded federal defense theory (Section I, *supra*) should not defeat these prudential considerations due to lack of a pending State case; indeed *this* is a State case (as is Edwards v. State) but for the forum-shopping being employed in it. See Wisconsin Dept. of Corrections v. Schacht, 524 U.S. 381, 390 (1998) (for purposes of removal jurisdiction courts look at the case as of the time it was filed in state court).

V. REMOVAL IS IMPROPER BECAUSE DR. REX HAS NOT CONSENTED

Because removal jurisdiction raises significant federalism concerns, the court must strictly construe removal jurisdiction. Gressette v. Sunset Grille, Inc., 447 F.Supp.2d 533, 535 (D.S.C.,2006). If federal jurisdiction is doubtful, a remand is necessary. Actions must be removed "by the defendants." 28 U.S.C. § 1441(a). The phrase "'the defendants" as used in § 1441(a) must be interpreted narrowly, to refer to "defendants in the traditional sense of parties against whom the original plaintiff asserts claims." Palisades Collections LLC v. Shorts, 552 F.3d 327, 333 (4th Cir. 2008) (citing First Nat'l Bank of Pulaski v. Curry, 301 F.3d 456 (6th Cir.

2002)). For purposes of removal jurisdiction, courts look at the case as of the time it was filed in state court. Wisconsin Dept. of Corrections, 524 U.S. at 390.

As noted in both the Governor's Notice of Removal and the Court's Order (ECF Entry No. 4), Defendant Rex has not consented to removal of the action to Federal court. Citing U.S. Fid. & Guar. Co. v. A & S Mfg. Co., 48 F.3d 131 (4th Cir.1995), the Governor urges this Court to "realign" Dr. Rex as a plaintiff, "[b]ecause Superintendent Rex is adverse to Governor Sanford in this action." (Notice of Removal ¶ 9). The Fourth Circuit uses the "principal purpose" test for determining whether realignment of the parties is appropriate. Pursuant to the "principal purpose" test, the court must (1) determine the primary issue in controversy in the litigation and (2) align the parties with respect to this primary issue. U.S. Fid. & Guar. Co., 48 F.3d at 133.

The primary issue in the case is a declaration of the rights and powers of the General Assembly, the Governor, and the State Superintendent of Education with respect to funds in the State Budget for public education. Dr. Rex's being "adverse" to the Governor on the wisdom of the ARRA as a public policy matter, or even Dr. Rex's agreement with SCASA on many of their allegations and legal theories concerning the Governor's legal duty under State law, do not necessarily mean that Dr. Rex and SCASA are not adverse in sufficient respects that the Court should deem the State Superintendent of Education to be a plaintiff. South Carolina's State Budget for FY 2010 directs the activities of not just Defendant Sanford, but also Defendant State Superintendent of Education:

> In order to fund the appropriations provided by this Part, the Governor and the State Superintendent of Education shall take all action necessary and required by the ARRA and the U. S. Secretary of Education in order to secure the receipt of the funds recognized and authorized for appropriation pursuant to this section. The action required by this Part includes *but is not limited to*: (1) within five days of the effective date of this Part, the Governor shall submit an application to the United State's Secretary of Education to obtain phase one State Fiscal Stabilization Funds, and (2) within thirty days of phase two State Fiscal Stabilization Funds becoming available or thirty days

> following the effective date of this act, whichever is later, the Governor shall submit an application to the United State's Secretary of Education to obtain phase two State Fiscal Stabilization Funds. The State Superintendent of Education shall take all action necessary and provide any information needed to assist the Governor in fulfilling his obligation to apply for State Fiscal Stabilization funds pursuant to this Section.[8]

(Emphasis added). Dr. Rex is sued in his official capacity as State Superintendent of Education, not in his individual capacity. Even though Dr. Rex has prepared the Phase 1 application and tendered it to the Governor, this is only one task. In the future, there is "Phase 2," at which time there is no guarantee that Dr. Rex the individual will still be the State Superintendent of Education, or that he will even remain in office tomorrow, for that matter, prior to the successful filing of the Phase 1 application. In other words, SCASA is grateful Dr. Rex shares many of its views, but SCASA's legal interest is that the office of the State Superintendent of Education be bound to the declarations sought, and that the courts may enforce the declarations as necessary. Dr. Rex might not need to be enjoined or have a writ of mandamus issued against him, but any successor might because the General Assembly has given new duties and responsibilities (some of which need to be defined by this very case) to the office of the State Superintendent of Education under the State Budget for FY 2010, and with regard to those, SCASA's rights are insecure unless the office of the State Superintendent of Education is included in the declaratory and, if necessary, injunctive relief. As the Complaint sets forth, the State Superintendent occupies a unique and constitutional office in South Carolina, that has attributes of executive authority, yet the office is also subject to the General Assembly's definition of its powers and duties, and the office may also be subject to some control by the State Board of Education. Finding the State Superintendent of Education's precise "rights, status and other legal relations" will not necessarily be simple for the arbiter of State law in this matter.

This is plainly stated in the Complaint's first claim: "Plaintiff therefore seeks a

[8] As of the filing of SCASA's Petition for Original Jurisdiction and Complaint, Dr. Rex had not sent the Governor the proposed Phase 1 application. (Answer of Defendant Rex, ¶ 30).

declaratory judgment declaring the rights, status and other legal relations between the parties with regard to Part III of the State Budget." (Complaint, ¶ 24). Defendant Rex's Prayer for Relief is for "the Court to declare that he as Superintendent of Education has complied with the law in providing the completed [Phase 1] application to Governor Sanford and that the Court order such other and further relief as is just and proper." (Answer of Defendant Rex, ¶ 8).

Furthermore, Defendant Rex is very clearly not aligned with SCASA with regard to SCASA's third claim requesting a declaration under South Carolina law that Defendant Rex has sufficient executive authority, against the South Carolina legal background, to make the Phase 1 application himself by virtue of his office, in order to carry out the General Assembly's command that he "take all action necessary and required by the ARRA and the U. S. Secretary of Education in order to secure the receipt of the funds recognized and authorized for appropriation." Indeed, Defendant Rex denies in his Answer, the Complaint's allegation, ¶ 35, which seeks a declaration that:

> …the State Superintendent has been empowered by the General Assembly to act in the name of the Governor…[and that] the State Superintendent of Education and the General Assembly together, have or can make all statements and assurances necessary for purposes of South Carolina's ARRA Stimulus Fund application….

Accordingly, although Defendant Rex is not wholly opposed to SCASA with regard to SCASA's requested relief vis-à-vis the Governor, he is opposed to SCASA's requested relief as may affect his office and the scope of his constitutional and statutory authority.

For these reasons, Defendant Rex and/or the incumbent of the office of State Superintendent of Education is a proper defendant, and consequently it would be improper for the Court to realign him as a plaintiff for purposes of the Governor's attempted removal.

VI. CONCLUSION

The foregoing sound a common drumbeat: this matter does not belong in federal court. The Court, first and foremost, simply lacks subject matter jurisdiction for want of a federal question. Exercise of jurisdiction, even if the Court thinks it might exist, is strongly

counseled against again and again in the jurisprudence summarized in this memorandum. The Court has a multitude of jurisprudence available to send this matter back to the South Carolina Supreme Court, where it belongs. Meanwhile, while the Governor engages in these juridical antics (or should one say, fiddles) precious time is slipping away. SCASA therefore respectfully requests an immediate remand, certainly including at least denying remand under 28 U.S.C. § 1447(c), and that remand take effect as soon as possible so that proceedings may continue in the South Carolina Supreme Court.

Respectfully submitted,

CHILDS & HALLIGAN, P.A.

By: /s/ Kenneth L. Childs

Kenneth L. Childs, Fed. I.D. No. 122
William F. Halligan, Fed. I.D. No. 1680
John M. Reagle, Fed. I.D. No. 7723
Keith R. Powell, Fed. I.D. No. 10115

kchilds@childs-halligan.net
bhalligan@childs-halligan.net
jreagle@childs-halligan.net
kpowell@childs-halligan.net

P.O. Box 11367
Columbia, South Carolina 29211
(803) 254-4035

Attorneys for Plaintiff

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Columbia, South Carolina