IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

Mark Sanford, Governor of the State of South Carolina, Plaintiff, vs. Henry McMaster, in his official capacity as Attorney General of the State of South Carolina, and the South Carolina Association of School Administrators Defendants.	)	C.A. No. 3:09-1322-JFA **INTERVENOR/DEFENDANT SOUTH CAROLINA ASSOCIATION OF SCHOOL ADMINISTRATOR'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

Intervenor/Defendant South Carolina Association of School Administrators ("SCASA") offers this memorandum in support of its motion, pursuant to Rule 12, Fed. R. Civ. P., to dismiss both Count I and Count II of the Complaint.

1. Count I fails to state a claim upon which relief may be granted.

"We start, as always, with the language of the statute." Williams v. Taylor, 529 U.S. 420, 431 (2000). Courts must presume that the "legislature says in a statute what it means and means in a statute what it says there." Dodd v. U.S., 545 U.S. 353, 357 (2005), quoting Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253-254 (1992).

The American Recovery and Reinvestment Act of 2009, P.L. 111-5, 123 Stat. 115, as amended by P.L. 111-8, 123 Stat. 524 (hereafter the "ARRA") provides for a "State Fiscal Stabilization Fund" (hereafter the "SFSF"). ARRA, Division A, Title XIV (§§ 14001 et seq.). ARRA requires that the "Governor of a State desiring to receive an allocation under section 14001 shall submit an application at such time, in such manner, and containing such

information as the [U.S.] Secretary [of Education] may reasonably require." ARRA § 14005(a).

South Carolina is a "State desiring to receive an allocation under section 14001(d)" of the ARRA, as expressed in Part III of the State Budget. See, Complaint ¶¶ 20-22; South Carolina Act R.49 of 2009.[1] Frankly, this ought to be the end of the inquiry.

Nonetheless, the Governor proposes a construction of the ARRA that deletes or renders meaningless the words "of a State" in § 14005(a). In construing a statute, "[n]o clause, sentence or word shall be construed as superfluous, void or insignificant if a construction can be found which will give force to and preserve all the words of the statute." 2A Sutherland Statutory Construction § 46:6 (7th ed.). No provision of the ARRA or canon of statutory construction requires or even supports the Governor's theory that, in the ARRA, Congress preempted state law on the authority within each state for its state legislature to require its state governor to make the ARRA § 14005 application on behalf of the state, or otherwise intended to vest state governors with unfettered discretion under their states' laws to budget funds or adopt binding education public policy to the exclusion of their state legislatures.[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), "[t]he elementary rule is that every reasonable construction must be

[1] Available at http://www.scstatehouse.gov/sess118_2009-2010/appropriations2009/ta09ndx.htm.

[2] Existing federal law provides: "It is the intention of the Congress in the establishment of the Department [of Education] to protect the rights of State and local governments and public and private educational institutions in the areas of educational policies and administration of programs and to strengthen and improve the control of such governments and institutions over their own educational programs and policies. The establishment of the Department of Education shall not increase the authority of the Federal Government over education or diminish the responsibility for education which is reserved to the States and the local school systems and other instrumentalities of the States." 20 U.S.C. § 3403(a).

> 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. Florida Gulf Coast Bldg. and Const. Trades, 485 U.S. 568, 575 (1988) (internal citations omitted). This Court simply cannot follow the Governor down the path he asserts, and remain true to this bedrock principle of American constitutional law.

The Governor's Complaint (¶¶ 16, 17) adverts only to the language of ARRA § 14005 as the statutory source of his claimed "exclusive authority" (Id.) over the SFSF application. As noted above, § 14005 actually *commands* the Governor to carry out the desire of the State to apply. No clearer expression of the State's position can be found than Part III of the State Budget, which was not only adopted as law, but was adopted over the Governor's veto.

The Governor also adverts to the United States Department of Education's guidance documents. The U.S. Department of Education has issued a "Guidance on the State Fiscal Stabilization Fund Program" (April 1, 2009) and two different documents titled, "Modifications to Questions in the April 2009 Guidance on the State Fiscal Stabilization Fund Program" (April 7, 2009 and May 11, 2009).[3] A reading of the Guidance in no way suggests that the Secretary of Education has considered the Governor's legal position and endorsed it through his written statements. Further, the Guidance itself notes that it "does not impose any requirements beyond those included in the [ARRA] and other applicable laws and regulations [and] does not create or confer any rights for or on any person." Guidance, at i ("Purpose of this Guidance" box).

[3] All three are published by the USDOE at http://www.ed.gov/programs/statestabilization/applicant.html.

The Guidance largely uses "Governor" and "the State" interchangeably, which is consistent with the clear meaning of § 14005(a) that a state governor is acting as an agent of his or her state. The Guidance is replete with references to "State" authority and responsibility (not just "Governor") for both the application process and the use of SFSF funds, such as:

- "In phase one, within two weeks of receipt of an approvable Stabilization fund application, the Department will award *a State* 67 percent of its total Stabilization allocation." (April 1 Guidance at p. 4) (emphasis added)

- "The Department will use the data *that a State provides in the phase one application* to determine whether to release more than 67 percent of the State's total Stabilization allocation in phase one." (id., at 5) (emphasis added)

- "When a *State awards* Education Stabilization funds to LEAs through the State's primary funding formulae, the State may provide funds only to those LEAs (including any charter school LEAs) that also receive State funds through the State's primary funding formulae." (id., at 8) (emphasis added)

- "The statute *provides States* with some flexibility in determining which of their elementary and secondary education funding formulae are their primary funding formulae for elementary and secondary education. At a minimum, a Governor must include the State formula(e) that provide(s) basic support to LEAs (i.e., the State's foundation or base formula(e))." (id. at 11) (emphasis added)

- In calculating the amounts of Stabilization funds that must be awarded to LEAs and to public IHEs, *a State* must first determine the amounts of funds needed to restore fully the levels of State support for elementary and secondary education and for public IHEs for FY 2009 to the greater of the FY 2008 or FY 2009 levels. (id. at 12) (emphasis added)

- If there are any Education Stabilization funds remaining *after a State determines* the amounts that LEAs and public IHEs will receive on the basis of the FY 2009 restoration calculations, *the State then determines*, on the basis of the FY 2010 restoration calculations (taking into account any increases or adjustments referenced in Question IIIB-1), the amount of the remaining funds that will be awarded to LEAs and IHEs in order to restore the levels of State support for elementary and secondary

> education and for public IHEs for FY 2010. Next, *it* restores the levels of State support for FY 2011. (id. at 12) (emphasis added)
>
> - For example, *a State may not use its Government Services Fund allocation* to pay debt obligations arising from State-issued bonds or relating to the under-funding of the State's Unemployment Compensation Trust Fund or of its pension fund for State employees. (id. at 33) (emphasis added)
>
> - If a *State is unable to confirm in its Stabilization fund application* that it will meet both the elementary and secondary education MOE requirements and the public higher education MOE requirements for FY 2009, 2010, and 2011, it must provide in Part 4, Section B of its application the MOE waiver assurance. (id. at 39 (item VI-A-6) (emphasis added)

Finally, even if the Governor's interpretation of the ARRA has any plausibility at all, the principles of avoiding an unconstitutional meaning, Edward J. DeBartolo Corp., *supra*, forbid Congress to use the ARRA to preempt state law concerning the separation of powers within the state regarding the power to appropriate funds.

The Governor's interpretation of the ARRA would make him the instrument of Congress to decide whether or not the State may access and appropriate hundreds of millions of dollars, against the will of the General Assembly. Under his construction, presumably a state governor could accept and spend ARRA SFSF funds without the consent of a state legislature or any other state officials, in order to carry out the ARRA. This "federalization" of the governors' offices of the states is the antithesis of federalism. The United State Supreme Court has covered this ground, and it is frankly ironic that the Governor of South Carolina, of all people in all places, would be at odds with the following principles:

> It is incontestible that the Constitution established a system of "dual sovereignty." Gregory v. Ashcroft, 501 U.S. 452, 457 (1991). Although the States surrendered many of their powers to the new Federal Government, they retained "a residuary and inviolable sovereignty," The Federalist No. 39, at 245 (J. Madison).

> This is reflected throughout the Constitution's text…. Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, § 8, which implication was rendered express by the Tenth Amendment's assertion that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." …
>
> It suffices to repeat the conclusion: "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." [New York v. United States, 505 U.S.,] at 166, 112 S.Ct., at 2423. The great innovation of this design was that "our citizens would have two political capacities, one state and one federal, each protected from incursion by the other"-"a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (KENNEDY, J., concurring). The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens. See New York, *supra*, at 168-169 ….
>
> This separation of the two spheres is one of the Constitution's structural protections of liberty. "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." 501 U.S., supra, at 458. To quote Madison once again: "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." The Federalist No. 51, at 323. See also The Federalist No. 28, at 180-181 (A.Hamilton).

Printz v. United States, 521 U.S. 898, 918-922 (1997).

The Governor's Count I is premised on the Supremacy Clause. (Complaint ¶¶ 24, 28). In Printz, the Supreme Court said, the "Supremacy Clause, however, makes 'Law of the Land' only 'Laws of the United States which shall be made in Pursuance [of the Constitution],'

Art. VI, cl. 2, so the Supremacy Clause merely brings us back to the question discussed earlier, whether laws conscripting state officers violate state sovereignty and are thus not in accord with the Constitution." 521 U.S. at 925. The Printz opinion concludes:

> We held in New York that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.

521 U.S. at 935. The Governor's construction of the SFSF provisions of the ARRA veers directly into the prohibition against "commandeering" set forth in Printz.[4] Given that the State of South Carolina has adopted State law by which it freely elected to participate in the SFSF, the Governor's misinterpretation of the law as aggrandizing the nations' governors' power so as to place all of them, unfettered by any state legislature (and apparently by any state court, given the relief the Governor seeks), between the Federal and State governments, is the real Tenth Amendment problem to arise from the "stimulus crisis" of this year. A court asked to construe the statutes should, however, avoid the unconstitutional outcome, particularly where other (indeed better and less strained) readings of the statute present themselves which do no harm to the federal system. See, Edward J. DeBartolo Corp., *supra*.

For all these reasons, the plain meaning of ARRA § 14005(a) confers no federal powers on the Governor with regard to the SFSF. The ARRA is entirely consistent, and not in conflict with, each states' own legal processes and institutions by which it may deliberate

[4] And the unconstitutionality of the ARRA, rather than the aggrandizement of the Governor's powers, may indeed be the Governor's real goal.

whether to access SFSF funds and, if so, thereafter (or thereby) direct or request (as the case may be under its own state law) its own governor to file the requisite application under ARRA § 14005(a).

2. This Court should dismiss Count II.

Count II is concerned solely with interpreting the Constitution of the State of South Carolina. The Governor claims supplemental jurisdiction pursuant to 28 U.S.C. § 1367. (Complaint ¶ 12). Subsection (c) of § 1367 provides that:

> district courts may decline to exercise supplemental jurisdiction over a 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.

28 U.S.C. § 1367(c). 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). Supplemental jurisdiction over Count II is unwarranted.

First, if the Court grants the Intervenor-Defendant's motion to dismiss Count I, then declining supplemental jurisdiction is proper pursuant to 28 U.S.C. § 1367(c)(3) (district court has dismissed all claims over which it has original jurisdiction). E.g., Kendall v. City of Chesapeake, Va., 174 F.3d 437, 444 (4th Cir. 1997).

Second, Regardless of whether this Court proceeds with Count I, dismissal of

Count II *immediately* is warranted pursuant to 28 U.S.C. § 1367(c)(1) and (4). Count II raises a complex issue of State law – indeed it goes to the heart of State government. Further, the current pendency in the original jurisdiction of the South Carolina Supreme Court of litigation on the same issues constituting "exceptional circumstances" that provides sufficient "compelling reasons for declining jurisdiction," pursuant to 28 U.S.C. § 1367(c)(4). 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 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, 58 S.Ct. 817, 82 L.Ed. 1188 (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 113 (Rehnquist, J., concurring).[5] "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). "Federal courts do not interfere with the internal affairs of the several states, unless there is a plain necessity for such a course, and no such necessity here exists." Liberty Cent. Trust Co. v. Greenbrier College for Women, 50 F.2d 424, 429 (D.C.W.Va. 1931) aff'd 283 U.S. 800 (1931).

[5] The Governor's interpretation of the powers given to him, and him alone, over the ARRA funds and South Carolina public education policy by Congress, hardly promote a "republican form of government." In addition to the Tenth Amendment issue raised *supra*, this is another way in which the Governor's argument fails to overcome the principle that the statute should not be construed to create constitutional problems when it need not be.

To the extent that dismissal of Count II is not wholly encompassed by the Court's exercise of its authority to dismiss pursuant to 28 U.S.C. § 1367(c), the Court should dismiss Counts I and II pursuant to federal abstention principles. "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.

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. As we explained, this 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." New Orleans Public Service, Inc. v. Council of the City of New Orleans, 491 U.S. 350, 363 (1989) (internal quotations and citations omitted). There are two ongoing State proceedings in the original jurisdiction of the South Carolina Supreme Court that arise from both the ARRA and state "separation of powers" under the South Carolina Constitution.[6] As the State case raises

[6] Casey Edwards and Justin Williams, Petitioners, v. State of South Carolina, Respondent and South Carolina Association of School Administrators, Petitioner, v. The Honorable Mark Sanford, in his official capacity as the Governor of the State of South Carolina, and The Honorable Jim Rex, in his official capacity as the State Superintendent of Education of South Carolina, Respondents. See South Carolina Supreme Court Order 2009-05-22-03 (May 22, 2009) (http://www.judicial.state.sc.us/whatsnew/displayWhatsNew.cfm?indexId=534)

fundamental questions of State Constitutional law that are the unique province of the State Supreme Court, the State obviously has important interests at stake. Finally, should this Court wish to abstain from both Count I and Count II, the South Carolina Supreme Court is competent to determine the federal law claims that are raised in Count I.

For the above-stated reasons, the Court should dismiss Counts I and II.

Respectfully submitted,

CHILDS & HALLIGAN, P.A.

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May 26, 2009

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CERTIFICATE OF SERVICE BY MAIL

The undersigned of Childs & Halligan, P.A., hereby certifies that she has served the following counsel of record with the foregoing **INTERVENOR/DEFENDANT SOUTH CAROLINA ASSOCIATION OF SCHOOL ADMINISTRATOR'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS** by mailing a copy of same, postage prepaid and return address clearly indicated, to the following on this _____ day of May, 2009:

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