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 SUPPLEMENTAL MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS**

Intervenor/Defendant South Carolina Association of School Administrators ("SCASA") has moved, pursuant to Rule 12, Fed. R. Civ. P., to dismiss both Count I and Count II of the Complaint, on the following grounds, all as more fully explained in the Intervenor/Defendant South Carolina Association of School Administrators' Memorandum in Support of Motion to Dismiss. SCASA respectfully submits this supplemental memorandum in further support of its motion.

I. The Eleventh Amendment Bars the Governor's Suit

An unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State, and the Eleventh Amendment protects state agents and state instrumentalities as well as the States themselves. Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474, 479 (4th Cir. 2005).[1] However, Ex parte Young, 209 U.S. 123 (1908). "abrogates a state official's Eleventh Amendment immunity when a suit

[1] "Eleventh Amendment immunity has attributes of both subject-matter jurisdiction and personal jurisdiction. … Like other issues relating to subject-matter jurisdiction, Eleventh Amendment immunity may be asserted at any time in litigation." Id. at 480-481.

challenges the constitutionality of a state official's *action*." Children's Healthcare is a Legal Duty, Inc. v. Deters, 92 F.3d 1412, 1415 (6th Cir. 1996) (emphasis in original) (citing Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 102 (1984)). Banas v. Dempsey, 742 F.2d 277, 287 (6th Cir. 1984). Under Ex parte Young,

> individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.

209 U.S. 123, 155-56 (1908). However, "Young does not apply when a defendant state official has neither enforced nor threatened to enforce the allegedly unconstitutional state statute." Deters, 92 F.3d at 1415 (citing 1st Westco Corp. v. Sch. Dist. of Phila., 6 F.3d 108, 113 (3d Cir. 1993).

> General authority to enforce the laws of the state is not sufficient to make government officials the proper parties to litigation challenging the law. Holding that a state official's obligation to execute the laws is a sufficient connection to the enforcement of a challenged statute would extend Young beyond what the Supreme Court has intended and held.

Deters, 92 F.3d at 1416 (internal quotations and citations omitted).

The Attorney General of South Carolina

> has the authority to sue the Governor when he is bringing the action in the name of the State for the purpose of asserting that a separation of powers violation has occurred. Moreover, as stated previously, the Attorney General can bring an action against the Governor when it is necessary for the enforcement of the laws of the State, the preservation of order, and the protection of public rights.

State ex rel. Condon v. Hodges, 349 S.C. 232, 241 562 S.E.2d 623, 628 (2002). Note that the South Carolina Supreme Court in Hodges said the Attorney General "can and should" address

"separation of powers" issues caused by the Governor, id. at n. 6, but only said the Attorney General "can" bring an action for enforcement of the laws of the State. Id. In other words, the Attorney General is by no means required to sue the Governor to enforce the laws of the State. Further, the Complaint absolutely fails to allege that the Attorney General "threaten[s] and [is] about to commence proceedings" against the Governor. The Complaint states merely,

> Defendant Henry McMaster, sued in his official capacity, is South Carolina Attorney General and has authority to enforce the laws of the State of South Carolina, including the provisions of the 2009-2010 General Appropriations Law concerning the SFSF funds.

(Complaint ¶ 10). There is no allegation in the complaint, or anywhere else as far as is known to SCASA, that the Attorney General has threatened to commence any legal action against the Governor on the basis of the State Budget, Part III. This is exactly the same situation as described by the Sixth Circuit:

> What we have here is not action, but inaction, and Young does not apply. The Attorney General did not threaten to commence and was not about to commence proceedings against the plaintiffs, much less proceedings to enforce an allegedly unconstitutional act.

Deters, 92 F.3d at 1415. "The requirement that there be some actual or threatened enforcement action before Young applies has been repeatedly applied by the federal courts." Okpalobi v. Foster, 244 F.3d 405, 415 (5th Cir. 2001).

Finally, as far as is known to SCASA, the Attorney General has not given consent to the suit. The Eleventh Amendment therefore makes him immune from suit, and Ex parte Young is not applicable until and unless the Attorney General of South Carolina threatens an action to enforce Part III of the State Budget against the Governor.[2]

[2] The Fourth Circuit has noted, "We have stated in dicta, however, that 'because of its jurisdictional nature, a court ought to consider the issue of Eleventh Amendment immunity at any time, even *sua sponte*.'" Constantine, 411 F.3d at 481 n.3, (quoting Suarez Corp. Indus. v. McGraw, 125 F.3d 222, 227 (4th Cir.1997)).

II. Additional Supplemental Arguments

For the sake of brevity, SCASA incorporates here its federal question jurisdiction arguments set forth at Section I.B. of its Memorandum of Law on Jurisdiction filed in C.A. No. 3:09-1364-JFA. Additionally, SCASA believes it is important to highlight here that, as a declaratory judgment action, this Court does not have original jurisdiction over the Governor's preemptive claim for relief.

> If a federal claim 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). Accordingly, the Governor simply cannot create a federal claim by recasting his excuse for failing to carry out his duties under State law as a federal declaratory judgment action.

Respectfully submitted,

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