THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

INI THE ORIGINAL JURISDICTION OF THE SUPREME COURT

Casey Edwards and Justin Williams, Petitioners,

v.

State of South Carolina and Mark Sanford, in his Official Capacity as Governor of the State of South Carolina, Respondents.

REPLY OF STATE OF SOUTH CAROLINA TO GOVERNOR SANFORD'S BRIEF

In response to the Governor's Brief and Answer, the State of South Carolina would more fully set forth it's position in this case as follows.

The State of South Carolina does not take sides in the policy dispute between the General Assembly and the Governor. The federal stimulus law (ARRA) and its need for enactment had and has even today very legitimate policy positions, both for and against. The State respects fully these public policy debates and the positions therein. The State strongly believes, however, that the Court should now resolve the legal issues before it in a way which is entirely consistent with state Constitutional law. One commentator has described conflicts

between the executive and legislative branches of a state regarding control of federal funds this way:

> [f]ederal grants have ... caused power conflicts between the legislature and executive in a number of states .... Such an action is often viewed by the state executive as a legislative attempt to prevent the governor from exercising unfettered control over the federal funds .... State courts have purported to resolve these interbranch disputes *purely by reference to state constitutional law*. ...

Schleef, "Federal Funds and Separation of Powers," 53 *U. Cinn. L. Rev*. 611 (1984).

The Commentator of this Law Review article referenced the Pennsylvania Supreme Court decision of *Shapp v. Sloan*, 391 A.2d 595, 602 (Pa. 1978), appeal dismissed *sub nom*. *Thornburgh v. Casey*, 440 U.S. 942 (1979) and the Colorado case of *McManus v. Love*, 499 P.2d 609 (1972) as examples, among others, concerning these interbranch conflicts between the executive and legislature regarding federal funds and how they are handled. In *Shapp*, a case referenced in the Attorney General's opinion of March 31, 2009, the Governor of Pennsylvania urged that provisions in the Appropriations Acts appropriating federal funds as part of the General Fund were violative of the Pennsylvania Constitution. It was contended that "the Executive, rather than the legislature, has the power to control expenditures of funds which the federal government has committed to state executive officers and agencies." Such assumption of power by the legislature, it was contended by the Governor, "has encroached upon the rightful sphere of the executive in violation of the doctrine of Separation of Powers embodied in our Constitution." 391 A.2d at 602.

The Pennsylvania Supreme Court rejected this argument. As part of its analysis, the Court noted that it strongly disagreed with the Colorado decision of *McManus v. Love*, *supra*,

which had concluded that federal funds received in that state could be expended by the executive branch without legislative appropriation or legislative input. The Pennsylvania Supreme Court resolved the constitutional conflict on the basis of the Pennsylvania Constitution, noting that "[i]t is fundamental within Pennsylvania's tripartite system that the General Assembly enacts the legislation establishing those programs which the state provides for its citizens and appropriates the funds necessary for their operation. The executive branch implements the legislation by administering the programs." In the Court's view,

> [t]he funds which Pennsylvania receives from the federal government do not belong to officers or agencies of the executive branch. They belong to the Commonwealth. The agency or official who is authorized to apply for federal funds does so on behalf of the Commonwealth.

Id.

Opinion of the Justices, 381 A.2d 1204 (N.H. 1978) also provides guidance to this Court in resolving this issue. There, the constitutional confrontation between legislative and executive branches centered upon the Legislature's designation in the appropriations act which required the Governor to make a particular designation of an agency to include the office of health planning and development pursuant to the federal Health Service Act. The Governor contended that the federal Act gave him the exclusive power to make such designation.

The New Hampshire Supreme Court referenced the *Shapp* case, discussed above and decided the case primarily on state constitutional grounds. In the Court's view, it was the Legislature which was responsible under the Constitution for enacting the laws and the Governor for executing those laws. Again, quoting *Shapp*, the Court noted that the

Constitution did not permit the executive to "execut[e] the laws of this Commonwealth ... free of any checks or balances ...." 381 A.2d at 1209.

With respect to the Governor's argument that the Supremacy Clause was violated, because the state act was in conflict with the federal law, the New Hampshire Supreme Court concluded that allowing the federal government to rearrange the state's constitutional structure would raise serious Tenth Amendment concerns. According to the Court:

> [t]he policy function that gives rise to the questions before us is essential to the separate and independent existence of State government sovereignty. Consequently, if the General Court [term for New Hampshire Legislature] were interdicted from assigning the regulatory responsibility for heath care to its chosen agency, the Federal Act would be in conflict with the policies underlying the tenth amendment to the Constitution ....
>
> If any doubt exists, the federal law should not be interpreted to infringe upon those powers of the states that are essential to their "ability to function effectively in a federal system." *Fry v. United States*, 421 U.S. 542, 547, n. 7, ...; accord, *National League of Cities of Usery*, 426 U.S. at 852 .... As stated by the Court some years earlier:
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>> "In a dual system of government in which, under the Constitution, the states are sovereign ... an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Parker v. Brown*, 317 U.S. 341, 351, 63 S.Ct. 313, 87 L.Ed. 315 (1943).

Id. at 18-19.

The Court is not bound by these decisions, of course. Yet, they are instructive here, emphasizing that federal funding statutes may not alter or rearrange a state's constitution or change state law. In this instance, Congress can neither bestow upon the Governor powers not given by or in conflict with the Constitution or legislative acts, nor may it authorize the General Assembly to bind the state through the mechanism of a concurrent resolution, a

mechanism which bypasses South Carolina's constitutional processes and which excludes executive input. This Court has itself expressed these same sentiments in *Creative Displays, Inc. v. S.C. Highway Dept.*, 272 S.C. 68, 73-74, 248 S.E.2d 916 (1978), emphasizing that a federal funding program "cannot and does not change the South Carolina Constitution and statutory law."

State ex rel. Condon v. Hodges, 349 S.C. 232, 246, 562 S.E.2d 623, 631 (2002) emphasizes that "the authority to transfer appropriated money lies with the General Assembly and not the executive branch." There, in concluding that a transfer of funds by the executive branch contrary to a legislative appropriation violated the separation of powers provision of the South Carolina Constitution, the Court said:

> [t]he Governor has the ability, after the General Assembly has passed an appropriation act, of vetoing items or sections contained within the act. S.C. Const. Art. IV, § 21. If he vetoes any items or sections, the General Assembly, within each house, has the ability to override the Governor's vetoes by having the requisite number of votes to do so ... .
>
> However, there is no provision in the South Carolina Code or constitution which provides that the members of the executive branch have the ability to transfer from those to whom the General Assembly has appropriated money.

Condon quoted with approval this Court's language in *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 312, 295 S.E.2d 633, 636 (1982) which emphasized that

> [o]ne of the prime reasons for separation of powers is the desirability of spreading out the authority for the operation of the government. It prevents the concentration of power in the hands of too few, and provides a system of checks and balances. The legislative department makes the laws; the executive department carries the laws into effect; and the judicial department interprets and declares the laws.

This expounding of South Carolina's Constitution should serve this Court well in resolving the novel and virtually unprecedented situation which it faces in this case.

Contrary to the Governor's arguments, federal monies must be appropriated by the Legislature pursuant to Art. X, § 8 of the Constitution and may not be spent until appropriated. Such monies do not have to be in the State Treasury in order for them to be appropriated. *McInnis* addresses this precise issue. This Court recognized fully that the legislative session, the Appropriations Act process and the receipt of federal funds do not necessarily operate for the same clock. The Court stated as follows:

> Typically, a department would spend all that the legislature meant for it to have, plus those amounts it could procure by way of application for grants to the federal government. A report of the Legislative Audit Council in the record shows that various executive agencies were supplementing their state appropriations with millions of dollars in grants of which the General Assembly was not always aware. The effect of all this brought about a result obviously inconsistent with the right and duty of the legislature to determine the appropriations of agencies and the programs undertaken.
>
> An agency, by applying for and receiving grants, for all intents and purposes was, by indirection, coming to determine programs and policy matters which were the province of the General Assembly. The net effect was that the Assembly was not, in the last analysis, determining the total amount of money expended by state agencies. JARC, by exercising the powers allocated to it, makes determinations that should be those of the entire General Assembly. This it undertakes to do, not through a legislative process, as it surely could, but through the administration of appropriations which is the function of the executive department. The desirability of the General Assembly's "getting a handle" on these matters is understandable and appropriate but its effort to control these matters through a committee composed of twelve of its members is constitutionally impermissible.

As a result of the Court's conclusion in *McInnis,* declaring the Legislature's delegation to JARC to approve federal funds which were not part of the Appropriations Act process, the General Assembly enacted § 2-65-20 which provides that

> [t]he General Assembly shall appropriate all *anticipated federal and* other funds for the operations of state agencies in the appropriations act and must include any conditions on the expenditure of these funds as part of the appropriations act, consistent with federal laws and the regulations.

(emphasis added). As in *Shapp* and in other jurisdictions, the Legislature, therefore, has responded to the commands of the State Constitution and *McInnis* through the enactment of § 2-65-20. All *anticipated federal funds* are appropriated as required by the South Carolina Constitution and state law.

As previously stated, the State does not take sides in the policy dispute between two of the branches of the State's government. The third branch, this Court, must resolve the dispute with clarity and finality.

That said, we believe it is important that any interpretation of the federal ARRA should be in a manner consistent with preserving and protecting the principles of the State Constitution, as outlined above. Congress cannot, consistent with the Tenth Amendment, use a funding statute, such as this one, to rearrange the State's Constitutional structure. All doubt must be resolved against such a step having been taken by Congress. These principles are fully set forth in our earlier Return to this Court.

We have discussed this Court's relevant decisions, such as *Condon, McInnis, Gilstrap v. Budget and Control Bd*., 310 S.C. 210, 423 S.E.2d 101 (1992), and others from this State and elsewhere in our previous Return and herein. *See also*, *State ex rel. Coleman v. Lewis*, 181 S.C. 10, 186 S.E. 625, 631 (1936) ["'the conformity with the state Constitution of the proceedings in the enactment of a law is a determination for the state court, and its judgment is final.'"]. These decisions, viewed as a group and in their entirety, provide

considerable guidance to the Court with respect to the existing law in this State concerning the separation of powers as required by the South Carolina Constitution. See Art. I, § 8.

However, this Court still must resolve the federal Supremacy Clause and preemption issues raised by the Governor. Each federal law must be considered on its own merits and the Court must evaluate whether Congress sought to supersede state authority in a given area. Courts should "not presume that Congress has intruded upon a core area of State Sovereignty unless the relevant statute is clear and unambiguous." *Nat. Assn. of Regulatory Utility Commr's. v. FERC*, 475 F.3d 1277, 1289 (D.C. Cir. 2007).

We do not deem the decision of *Lawrence County v. Lead-Deadwood School District*, 469 U.S. 256 (1985) to be on point. *Lawrence* is much more like a county's use of federal funds through a state statute, inconsistently with the purpose for which Congress appropriated those funds in contrast to the situation in this case involving whether Congress sought to give the Governor of South Carolina power and authority to act contrary to a state legislative enactment. There is no doubt that South Carolina would use these funds consistently with ARRA's purposes, as the Appropriations Act specifies.

We believe this Court's cases regarding separation of powers issues are quite clear. These cases delineate the Legislature's power to appropriate funds (including federal funds) and the executive's obligation to execute the law in this regard. In none of these decisions, however, was there a Supremacy Clause challenge, and even had there been, the particular language of the federal statute would be unique to that particular situation, and might not be relevant here. Thus, the principal issue for the Court to determine in this case, is whether the federal ARRA in any way alters the resolution of the separation of powers issues under the

South Carolina Constitution and the clear case law decided thereunder. All doubt would favor the preservation of state sovereignty under the state Constitution and state law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served the Reply of State of South Carolina to Governor Sanford's Brief herein upon counsel for the Petitioners and Respondent Mark Sanford by mailing copies to them at the address below via the United States Mail this June 2, 2009 :

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