THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

South Carolina Association of School Administrators,

Plaintiff,

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,

Defendants.

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF DECLARATORY AND EQUITABLE RELIEF AGAINST THE DEFENDANTS

The Plaintiff, South Carolina Association of School Administrators ("SCASA"), respectfully submits this brief in support of its request for declaratory and equitable relief against the Defendants. SCASA respectfully contends that the Appropriations Act for the 2010 Fiscal Year ("Appropriations Act"), R. 49, 118th Gen. Assem., Reg. Sess. (S.C. 2009)[1], enacted by the General Assembly over the veto of the Governor, properly requires the Governor to submit an application with the United States Department of Education ("USDOE") for State Fiscal Stabilization Fund ("SFSF") grant funds under the American Recovery and Reinvestment Act of 2009 ("ARRA") Pub. L. No. 111-5, 123 Stat. 115 (2009), as amended by Pub. L. No. 111-8, 123 Stat. 524. Defendant, the Honorable Jim Rex, Superintendent of Education, has completed the application, and the Governor need only sign the application and submit it to the USDOE. In light of the General Assembly's

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

veto override, the authority of the State Superintendent of Education under South Carolina law, and the specific language of the Appropriations Act, SCASA requests the Court to declare the application for SFSF funds as prepared by the State Superintendent of Education to constitute the application of the State, require the Governor to execute and submit the application, and in the event that he fails to do so, authorize the State Superintendent of Education to execute and submit the application on behalf of the State of South Carolina.

I. ISSUES PRESENTED

SCASA, through its claims, and the Governor, in his opposition to those claims, assert the following general issues for this Court's resolution:

1. Whether the Governor and the State Superintendent of Education must comply with the provisions of the Appropriations Act directing certain actions with respect to applying for funds with the USDOE under the ARRA; and

2. Whether the Appropriations Act is preempted by the ARRA and, hence, unenforceable against the Governor and/or the State Superintendent of Education under the Supremacy Clause of the United States Constitution.

II. ARGUMENT

Because of the urgency of this case and the need for expeditious briefing, and because the procedural history and facts behind this case are well known to the Court, SCASA does not believe it necessary to rehash for the Court at this time the procedural and factual background of this matter.

A. The Governor Must Comply With The State's Appropriations Act

SCASA's claim is that the Appropriations Act is the law of the State of South Carolina and is valid and enforceable according to its terms. The Appropriations Act appropriates federal funds, requires that they be used consistently with federal law, and mandates that the Governor and State Superintendent of Education take all action necessary

to secure the funds, including a command that the "Governor shall submit an application…." R. 49, Part III, § 1, 118th Gen. Assem., Reg. Sess. (S.C. 2009). The Governor used his constitutional power to veto relevant parts of the bill, and the General Assembly overrode the vetoes. The Governor now seeks to evade his duty to faithfully execute the laws by submitting the application, on the grounds that ARRA gives him "exclusive discretion" to both apply for and spend the federal funds. SCASA seeks declaratory and equitable relief, including a *writ of mandamus,* to compel the Governor's compliance with the Appropriations Act.

The South Carolina Attorney General has set forth accurately and exhaustively South Carolina law concerning the force and effect of the annual Appropriations Act, in both his opinion letter of March 31, 2009, 2009 WL 959646, and his Return (filed May 26, 2009) to the Petition for Original Jurisdiction in the Edwards and Williams case. It does not appear that the Governor disputes any aspect of South Carolina law presented by the Attorney General.

Simply put, the legal authority entitling SCASA to relief is straightforward:

1. The Governor's duty is to faithfully execute the laws of the State. (S.C. Const. Art. IV § 15)

2. The State Superintendent of Education is "the chief administrative officer of the public education system of the State" and his duties include "general supervision and management of all public school funds provided by the State and Federal Governments." (S.C. Const. Art. XI § 2; S.C. Code Ann. § 59-3-30(2))

3. Money can be drawn from the State Treasury "only in pursuance of appropriations made by law." (S.C. Const. Art. X § 8) The purpose of requiring an appropriation by law is "to prohibit expenditures of the public funds at the mere will and caprice of those having the funds in custody without legislative sanction." Grimball v. Beattie, 174 S.C. 422, 422, 177 S.E. 668, 672 (1934).

4. Appropriation of funds is exclusively a legislative power, subject to constitutional limitations, including the veto power, and includes federal funds. (State ex. rel. McLeod v. McInnis, 278 S.C. 307, 313-317, 255 S.E.2d 633, 637-638 (1982))

5. "The General Assembly shall appropriate all anticipated federal and other funds for the operation of state agencies in the Appropriations Act and must include a condition on the expenditure of these funds as part of the Appropriations Act consistent with federal laws and regulations." (S.C. Code Ann. § 2-65-20; see also 31 U.S.C. § 6503 (intergovernmental financing); see also State ex. rel. McLeod v. McInnis, 278 S.C. 307, 255 S.E.2d 633 (1982).

6. Part III of the Appropriations Act, as set forth in more detail in the Complaint, among other provisions:

   a. appropriates the State Fiscal Stabilization Fund of ARRA and for phase one of ARRA appropriates for this fiscal year, specific line items in the amount of $184 million to be distributed to school districts under the EFA, $105 million to public universities and schools, and $57 million for various state agencies, mostly concerning public safety, (S.C. R. 49, Part III, § 2);

   b. mandates that the Governor and State Superintendent "shall take all action necessary and required by ARRA and the U.S. Secretary of Education in order to secure the receipt of the funds" appropriated. (S.C. R. 49, Part III, § 1);

   c. requires within five days of the effective date of the Act that "the Governor shall submit an application" for the funds and the State Superintendent "shall take all action necessary and provide any information needed to assist the Governor in fulfilling his obligation to apply…." (S.C. R. 49, Part III § 1);

   d. provides that all funds must be used in a manner consistent with ARRA. (S.C. R. 49, Part III § 2(F))

7. Proviso 90.15 expresses the General Assembly's "intent to accept all available funds from State Budget Stabilization Fund…[of ARRA] and to authorize the expenditure of funds as delineated in this act." (S.C. R. 49, Proviso 90.15; see also S.C. R. 49, Proviso 90.16)

8. The Governor exercised his discretion by vetoing Part III and Provisos 90.15 and 90.16 of the Appropriations Act, which vetoes were overridden by more than two-thirds of each house, and thus Part III and Provisos 90.15 and 90.16 "have the same effect as if signed by the Governor" and became "part of the law notwithstanding the objections of the Governor." (S.C. Const. Art. IV § 21). Thus, the Governor now has no discretion and his signature on and submission of the ARRA application are purely ministerial duties, commanded by the Appropriations Act.

9. All discretion either has been exercised by the General Assembly in the Appropriations Act or is committed by law to the General Assembly or the State Superintendent pursuant to his constitutional and statutory power and duties, as vividly displayed by the fact the application has, in fact, been completed and awaits only the Governor's signature and submission to the federal government.

10. The funds must be spent as directed by the Appropriations Act. (See Condon v. Hodges, 349 S.C. 232, 245-246, 562 S.E.2d 623, 630-631 (2002))

11. The Governor "is subject to a *writ of mandamus* to compel the performance of a purely ministerial duty…." (Easler v. Maybank, 191 S.C. 511, 511, 5 S.E.2d. 288, 289 (1939)).

Based on these long-standing principles of the authority of State law, and the Governor's obligation to carry out the requirements of State law, the Appropriations Act, Part III, is a valid and lawful act in all respects.

SCASA's claims are well-founded and are directed against the appropriate parties for a decisive and comprehensive judgment of this Court to enforce the terms of the Appropriations Act, and thus to compel the executive to accomplish the legislative purposes of employing teachers and public safety officers as well as to minimize and avoid reductions in essential government services and counterproductive state and local tax increases.

B. The Appropriations Act Is Not Preempted By The ARRA

"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 ARRA provides for a "State Fiscal Stabilization Fund". 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) (emphasis added). South Carolina is a "State desiring to receive an allocation under section 14001(d)" of the ARRA, as expressed in Part III of the Appropriations Act.[2] See, Complaint ¶¶ 20-22; R. 49, 118th Gen. Assem., Reg. Sess. (S.C. 2009). Moreover, the Appropriations Act, Part III, expressly directs that the SFSF funds be spent in accordance with the applicable provisions ARRA as established by Congress, eliminating the problem presented by the South Dakota legislature in Lawrence County v. Lead-Deadwood School District No. 40-1, 469 U.S. 256 (1985); see also S.C. R. 49, Part IB, Provisos 90.15 and 90.16. Unlike Lawrence County, the Appropriations Act unquestionably serves to fulfill Congress' purpose for the SFSF funds. Frankly, these points 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

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[2] Federal statutes typically bestow federal grants on state executive agencies or governors; outside the context of general revenue sharing, these laws are usually silent about the role of state legislatures. But such silence should not be read to exclude state legislatures' role in appropriating federal revenue. Federal agencies have occasionally taken such an extreme view, arguing that the statute's reference to the governor as the applicant for federal funds precludes legislative involvement in the allocation of such money. This extreme position, however, is hard to justify: nothing in the legislative history suggests a conscious congressional decision to exclude legislative involvement. Rather, the evidence suggests that Congress accidentally overlooked state legislatures rather than deliberately excluded them. As the OMB noted in 1980, Congress and federal agencies simply find it easier to locate a single state executive official in charge of policymaking relevant to some federal grant. Because the "interface" between federal and state governments takes the form of a state executive official, it is natural for federal agencies and Congress to assume that such an official really constitutes the state government when designing federal grant programs. Therefore, there seems little reason to exclude all legislative appropriation of federal grants as a matter of federal law. Congress simply has no history of deliberately favoring governors over state legislatures in the same way that Congress has favored local governments over state governments with certain direct federal-local grant programs.

Roderick M. Hills, Jr., Dissecting the State: the Use of Federal Law to Free State and Local Officials from State Legislatures' Control, 97 Mich. L. Rev. 1201, 1261 (1999). See also, Comptroller General of the United States Report GCD-81-3, Tear Sheet at ii ("The States' internal process should resolve the question of who speaks for the State in the grant process.")

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.[3] The construction of the phrase "of a State" as a mere modifier of "Governor" makes little to no sense. It is not needed to identify who a "governor" is in § 14005, since ARRA § 14001(e) already provides that, "[f]rom funds allocated under subsection (d), the Secretary shall make grants to the Governor of each State."[4]

The other use of "Governor of a State" in § 14005 is instructive, if not dispositive. In §14005(c), the ARRA refers to the "Governor of a State seeking a grant under section 14006 …." Grants under ARRA § 14006 are "grants *to States* that have made significant progress in meeting the objectives of paragraphs (2), (3), (4), and (5) of section 14005(d)." ARRA § 14006(a)(2) (emphasis added). Section 14005(d) contains the assurances of a "State desiring to receive an allocation under section 14001" under § 14005(b). If the *State* is not the applicant and recipient of ARRA Stabilization Fund money for purposes of § 14005(b), how can a State make progress under § 14005(d) to ever qualify for a § 14006 grant? The Governor's construction of ARRA utterly fails to capture reasonable Congressional intent.

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[3] Existing federal law provides the following: "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).

[4] A "State" is "each of the 50 States, the District of Columbia, and the Commonwealth of Puerto Rico." ARRA § 14013(5).

The Governor argues that the language of ARRA § 14005 is the statutory source of his claimed "exclusive authority" over the SFSF application. As noted above, § 14005 actually may be read to *command* 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 Appropriations Act, which was not only adopted as law, but was adopted over the Governor's veto.

The Governor also adverts to the USDOE's guidance documents. The USDOE 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).[5] 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." April 1, 2009, Guidance, at i ("Purpose of this Guidance" box).

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 a convenient agent of his or her state for administration of the grant program. 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, 2009, Guidance at p. 4) (emphasis added)

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

- "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)

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.

ARRA, read plainly, does not preempt South Carolina law, does not threaten federalism, and does not require resolution of any constitutional issue.

The Governor's proposed construction of ARRA as conferring on him discretionary authority over 700 million dollars in SFSF funds leads directly to a conflict with the Tenth Amendment to the United States Constitution. The Governor's Spending Clause argument is misplaced. 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 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. at 575 (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 and to federalism. Printz v. United States, 521 U.S. 898, 918-922 (1997).

The Spending Clause is a permissible method of encouraging a State to conform to federal policy choices, because the ultimate decision of whether to conform is retained by the States – who can always decline the federal grant. Madison v. Virginia, 474 F.3d 118, 124 (4th Cir. 2006). Congress has broad power to set the terms on which it disburses federal money to the States. Id. This power is, of course, not unlimited. Id. Because of the danger of shifting the federal-state balance, the Supreme Court in South Dakota v. Dole, 483 U.S. 203 (1987), placed several restrictions upon Congress' authority to persuade. Id. To be valid, Spending Clause legislation must meet several requirements: (1) the exercise of the spending power must be for the general welfare, (2) the conditions must be stated unambiguously, (3) the conditions must bear some relationship to the purpose of the federal spending, (4) the conditions must not violate some other constitutional command, and (5) the financial inducement offered by Congress must not be so coercive as to pass the point at which pressure turns into compulsion. Madison 474 F.3d at 124, citing, Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474, 491- 92 (4th Cir. 2005). The Governor's interpretation of ARRA does not satisfy the second and third requirements, which is among the many reasons his interpretation must be rejected. With regard to point (2) (ambiguity) -- Congress must be especially pointed when it seeks to derange State political functions via the Spending Clause: "It is a fundamental rule of statutory construction that where "Congress intends to alter the 'usual constitutional balance between the States and the

Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.' " Madison, 474 F.3d at 125, quoting Will v. Mich. Dep't of State Police, 491 U.S. 58, 65 (1989) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)); see also Com. of Va., Dept. of Educ. v. Riley, 106 F.3d 559, 566 n.6 (4th. Cir. 1997) (*en banc*), and The Federalist No. 39, at 245 (J. Madison) (C. Rossiter ed., 1961) (quoted in Printz, 521 U.S. at 922). The Governor's interpretation of the ARRA, being strained as a matter of English language, also require him to say that his "Federally Supersized Governor" view of the import of ARRA must have been "unmistakably clear in the language of the statute." Madison, 474 F.3d at 125. Not only is that not case on the face of the ARRA and otherwise basically risible as a matter of South Carolina constitutional history and politics, but more importantly it is contrary to the precise command given to the Governor in Part III of the Appropriations Act. It can hardly be clearer that the General Assembly did not comprehend ARRA to give the Governor the powers he seeks in his interpretation. The Governor's strained interpretation of ARRA therefore fails under the requirement to avoid an unconstitutional construction of the statute, because the ARRA appears to fail as Spending Clause legislation if the Governor's interpretation is correct.

Additionally, element (3) of the Spending Clause validity requirements -- that the conditions must bear some relationship to the purpose of the federal spending -- is also in serious jeopardy under the Governor's interpretation. Rearranging fundamental separation of powers in this State must be a "condition" of the ARRA Spending Clause legislation *if* it is anything; certainly it is *not* a benefit. Section 3(a) of the ARRA provides:

> SEC. 3. PURPOSES AND PRINCIPLES.
>
> (a) STATEMENT OF PURPOSES.—The purposes of this Act include the following:
>
> (1) To preserve and create jobs and promote economic recovery.

> (2) To assist those most impacted by the recession.
>
> (3) To provide investments needed to increase economic efficiency by spurring technological advances in science and health.
>
> (4) To invest in transportation, environmental protection, and other infrastructure that will provide long-term economic benefits.
>
> (5) To stabilize State and local government budgets, in order to minimize and avoid reductions in essential services and counterproductive state and local tax increases.

Further, the U.S. Secretary of Education's "Guidance on the State Fiscal Stabilization Fund Program," supra, states, in "Q&A" format:

> I-4. What overarching principles guide the distribution and use of all ARRA funds that the Department administers?
>
> The overall goals of the ARRA are to stimulate the economy in the short term and to invest in education and other essential public services to ensure the long-term economic health of our nation. Four principles guide the distribution and use of ARRA funds:
>
> 1. Spend funds quickly to save and create jobs. The Department is distributing ARRA funds quickly to avert layoffs and create jobs. States, local educational agencies (LEAs), and IHEs are urged to move rapidly to develop plans for using the funds, consistent with the ARRA's reporting and accountability requirements, and promptly to begin spending funds to help drive the nation's economic recovery.
>
> 2. Improve student achievement through school improvement and reform….
>
> 3. Ensure transparency and accountability and report publicly on the use of funds….

> 4. Invest one-time ARRA funds thoughtfully to minimize the "funding cliff". The ARRA is expected to be a one-time infusion of substantial new resources….

If placing the Governor in the exalted position he claims under ARRA was actually a "condition" of the ARRA, it bears no relationship to the "purposes" of the ARRA as expressed by either Congress or the Secretary of Education. The Congressional purpose to "stabilize State and local government budgets "clearly includes the participation of those who budget for those entities; the USDOE similarly says that "States, local educational agencies (LEAs), and IHEs are urged to move rapidly to develop plans for using the funds …."

ARRA § 14005(a) must therefore be read to confer no federal powers on the Governor with regard to the SFSF funds, because doing so implicates a reading of ARRA that has substantial constitutional shortcomings under the Spending Clause.

Consequently, the plain meaning of the ARRA is fully consistent with the Appropriations Act, which unquestionably carries out ARRA's purposes; the Appropriations Act, therefore, is not preempted by federal law.

C. Equitable Relief Is Appropriate Against the Governor

It is now well established that the Governor is subject to a *writ of mandamus* to compel him to carry out ministerial duties under the law. Easler v. Maybank, 5 S.E.2d 288, 289 (1939) (stating "[t]hat the Governor of South Carolina is subject to a *writ of mandamus* to compel the performance of a purely ministerial duty is no longer a controversial question"). The requirements for a *writ of mandamus* are: (1) a duty of a respondent to perform the act; (2) the ministerial nature of the act; (3) the petitioner's specific legal right for which the discharge of the duty is necessary; and (4) a lack of any other legal remedy. See *Id.* Here, the Appropriations Act establishes directly and affirmatively the

Governor's duty to perform the act of executing the ARRA application, which is a direct and positive command of the law and requires no exercise of discretion by the Governor.

Further, the Governor's action is purely ministerial because all discretionary details of how SFSF funds will be applied for are well established and have been accomplished. Notably, attached to the State Superintendent of Education's Answer in this matter, is a copy of the fully completed application with the signature of the State Superintendent of Education. This application wants only the signature of the Governor and to be physically delivered to the USDOE by July 1, 2009, for the application process to be completed. No discretion by the Governor is required to complete the application process. Additionally, all details of how ARRA funds will be used for the Article XI education system are the duty, under State law, of the State Superintendent of Education under South Carolina Code, § 59-3-30(2), except as otherwise directed by the General Assembly under current law or future legislation, including State educational funding formulas. Accordingly, any discretionary details have been resolved or are outside of the authority of the Governor.

In this regard, the State Superintendent of Education has general supervision over the management of all public school funds provided by both the State and federal governments under § 59-3-30(2). The State Superintendent has done, and is willing to do all things yet to be done, that are prescribed for the State Superintendent of Education in order to carry out Part III of the Appropriations Act and as required by the Appropriations Act to "take all action necessary and provide any information needed to assist the Governor fulfilling his obligation to apply for the State Fiscal Stabilization Funds pursuant to this Section…."

Likewise, SCASA and its members have legal rights and property interests that are impaired by the Governor's lack of compliance with the ministerial duties imposed on him by the Appropriations Act.

Finally, to the extent that this Court does not enter effectual and appropriate declaratory and affirmative equitable relief, SCASA and its members have no other remedy at law for the failure of the Governor to perform legal duties required of him. Accordingly, SCASA respectfully asks the Court to issue appropriate declaratory relief and a *writ of mandamus* to compel the Governor immediately to submit the application to the USDOE to obtain SFSF funds in accordance with Part III of the Appropriations Act.

SCASA asks the Court with respect to declaratory and injunctive relief, and in light of the urgency of ensuring that the State's application for the SFSF funds is timely submitted to the USDOE, for comprehensive and declaratory and mandatory injunctive relief against the Governor and State Superintendent of Education. Specifically, the Court is respectfully asked to declare: (1) that Part III of the Appropriations Act is constitutional under both the Constitutions of the United States and South Carolina; (2) that it is the lawful duty of the Governor and State Superintendent of Education to follow the directives set forth in Part III of the Appropriations Act; (3) that pursuant to S.C. Code Ann. § 59-3-30(2) and Part III of the Appropriations Act, and Article XI of the Constitution of South Carolina, the State Superintendent has the authority to execute and submit to the USDOE the SFSF application for funds before June 30, 2009, in the event the Governor fails to do so within five days of the Court's decision in this matter; and (4) order by a *writ of mandamus* that the Governor execute and timely submit to the USDOE the State's application for SFSF funds on behalf of the State of South Carolina within five days of the issuance of the *writ of mandamus*.

III. CONCLUSION

For the foregoing reasons, the Governor and the State Superintendent of Education must comply with the Appropriations Act, and the State has acted constitutionally in directing that they do so. State officials must comply with their duties under South Carolina law, and the Appropriations Act is not preempted by the ARRA under the Supremacy Clause of the United States Constitution. Rather, the directives of the Appropriations Act are fully consistent with the purposes of the ARRA, and this Court should enter appropriate declaratory and affirmative equitable relief in order to ensure that the directives of the Appropriations Act and the purposes of the ARRA are carried out for the benefit of the citizens of the State of South Carolina.

Respectfully submitted,

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June 2, 2009
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