THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

Casey Edwards and Justin Williams. . . . . Petitioners,

v.

The State of South Carolina and
Governor Mark Sanford, ... Respondents.

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.

BRIEF OF GOVERNOR MARK SANFORD

Mark Sanford, in his official capacity as Governor of the State of South Carolina, respectfully submits this brief in response to the Court's order for briefing on the merits of the above-captioned actions.

INTRODUCTION

Both of these cases concern a dispute over which branch of South Carolina's state government—the Governor or the General Assembly—has proper authority to apply for and accept certain federal stimulus funds under the American Recovery and Reinvestment Act of 2009 ("ARRA"), Pub. L. No. 111-5, 123 Stat. 115 (2009) (copy attached). All of the issues raised by these actions are controlled by that federal law. No

party disputes that the South Carolina General Assembly has enacted a state law that purports to require Governor Sanford to apply for federal State Fiscal Stabilization Fund ("SFSF") funds. However, the SFSF provisions of ARRA expressly grant exclusive discretionary authority over the funds only to state governors, not to state legislatures. In accord, numerous federal agencies, including the Department of Education, the Congressional Research Service, and the Office of Management and Budget, have acknowledged that the SFSF provisions grant the authority to apply for and distribute SFSF funds *only* to state governors.

Thus, the central legal issue in these cases is whether the General Assembly may use a state law to appropriate Governor Sanford's exclusive discretionary authority under a federal law. That issue, which is one of federal preemption, is controlled by the United States Supreme Court's decision in *Lawrence County v. Lead-Deadwood School District*, 469 U.S. 256 (1985). In *Lawrence County*, the Supreme Court held that when the federal government grants a specific entity of state or local government discretionary authority over the use of federal funds, any attempt by a state legislature to dictate through state law how that federal money is spent is preempted by federal law.

On May 20, 2009, the South Carolina General Assembly attempted to do precisely what *Lawrence County* prohibits—it passed a state law that purports to dictate how Governor Sanford must apply for and distribute the SFSF funds. Two groups of plaintiffs have since filed separate actions in the original jurisdiction of this Court seeking to enforce that preempted state law. The first action was brought by the South Carolina Association of School Administrators ("SCASA") against Governor Sanford and Jim Rex, the State Superintendent of Education. The second action was brought by

two South Carolina school students, Casey Edwards and Justin Williams, against the State of South Carolina. Governor Sanford has intervened in that action.

STATEMENT OF THE FACTS

On February 17, 2009, President Barack Obama signed into law the American Recovery and Reinvestment Act of 2009 ("ARRA"), Pub. L. No. 111-5, 123 Stat. 115 (2009). Among other new spending programs, ARRA establishes the State Fiscal Stabilization Fund ("SFSF"). *See* ARRA § 14001, *et seq*., 123 Stat. 115, 279-86 (2009). The SFSF is administered by the United States Department of Education and, among other things, permits state governors to apply for approximately $48.6 billion in the aggregate for use by state educational systems, to be paid to state governors in two phases over the next two years.

The SFSF provisions expressly state that the U.S. Secretary of Education "shall make grants *to the Governor* of each State," ARRA § 14001(e), and that "*[t]he 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 Secretary may reasonably require," ARRA §14005(a). These and other provisions of ARRA expressly confer on Governor Sanford the *exclusive* authority, based upon his sole discretion, to apply for and receive SFSF funds on behalf of South Carolina. (The SFSF provisions of ARRA are attached.)

Various federal agencies have confirmed that the SFSF provisions provide discretionary authority to state governors. For example, the Department of Education's Guidance on the State Fiscal Stabilization Fund Program (attached hereto) repeatedly discusses state governors' discretion under the SFSF provisions. (*See id*. at 9, 15, 17.)

The Office of Management and Budget, in response to a request from South Carolina Senator Lindsey Graham, likewise determined that "for a State to access its allocation of the State Fiscal Stabilization Fund, the Governor must submit an application to the Secretary of Education and there is currently no provision in the Recovery Act for the state legislature to make such an application in lieu of the Governor for a State's allocation of the State Fiscal Stabilization Fund." (Letter from Director of OMB to the Honorable Lindsey Graham, United States Senator from South Carolina (March 31, 2009) (attached hereto).

In response to Governor Sanford's stated intention not to apply for the SFSF funds unless the General Assembly agreed to commit an equivalent amount of state funds to pay down debt, the South Carolina General Assembly appropriated $350 million in SFSF funds in the 2009-2010 General Appropriations Law. H. 3560, Gen. Assem., 118th Sess. (S.C. 2009). Part III, Section 1 of that Appropriations Law also provides that:

> "(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."

Governor Sanford vetoed these provisions of the General Appropriations Law and the General Assembly voted to enact the General Appropriations Law over the Governor's veto. The General Assembly has also passed a concurrent resolution purporting to bypass the Governor and accept the SFSF funds directly. S. 577, 118th Sess. (S.C. 2009).

ARGUMENT

All relief requested by the Plaintiffs in these actions should be denied. The plain language of ARRA allows for only one reading, that the Governor has exclusive discretion to apply for SFSF funds. The state appropriations law to the contrary is therefore preempted under the Supremacy Clause of the United States Constitution. Moreover, the appropriations law also violates the Separation of Powers Clause of the South Carolina Constitution. To the extent that any plaintiffs rely on § 1607 of ARRA, that provision does not apply here for numerous reasons. Among other things, under its plain language it does not apply in these circumstances; the *Edwards* plaintiffs' § 1607 claim presents no justiciable controversy; and in any event if § 1607 means what the *Edwards* plaintiffs claim, it violates the Tenth Amendment to the U.S. Constitution.

I. The 2009-2010 Appropriations Law is Preempted by ARRA

Plaintiffs take the position that, under South Carolina state law, the General Assembly has the authority to direct the Governor to apply for the SFSF funds. They also assert that, once the SFSF funds are received by the state treasury, the General Assembly's appropriation of those funds in the Appropriations Law overrides any discretionary authority possessed by the Governor. Assuming *arguendo* that these positions are correct as a matter of *state law*, ARRA preempts these aspects of South Carolina law and they are therefore unenforceable under the Supremacy Clause.

The Supremacy Clause of the United States Constitution provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United

States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI. Pursuant to the Supremacy Clause, the Supreme Court has held that "state law is pre-empted when it actually conflicts with federal law. Such a conflict will be found . . . where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988).

The SFSF provisions in ARRA expressly provide the Governor with *exclusive* authority to apply for and disburse the stabilization funds. Section 14005(a) of ARRA states that "***[t]he 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 Secretary may reasonably require." Section 14005(b) and (c) then detail the information that ***"[t]he Governor***" must include in his application. Indeed, the Secretary of Education's formal application for SFSF funds requires the "Governor or Authorized Representative of the Governor" to sign the application seven separate times. (*See* Exhibit.) Once the Governor's application is approved, ARRA is clear that the funds are paid to *the Governor*: ARRA Section 14001(e) provides that: "From funds allocated under subsection (d), the Secretary shall make grants ***to the Governor*** of each State." Once the SFSF funds are received from the Secretary of Education, ARRA directs that *the Governor* use those funds in particular ways. *See* ARRA § 14002(a)(1) ("For each fiscal year, *the Governor* shall use . . ."); § 14002(a)(2)(A) ("*The Governor* shall first use the funds . . ."); § 14002(a)(2)(B) ("If *the Governor* determines that the amount of funds available under paragraph (1) is insufficient . . ., *the Governor* shall

allocate those funds . . ."); § 14002(a)(3) ("*the Governor* shall use any funds remaining . . ."); § 14002(b)(1) ("*The Governor* shall use . . ."). And if there are unused SFSF funds, ARRA provides: "***The Governor*** shall return to the Secretary any funds received under subsection (e) ***that the Governor does not award*** as subgrants or otherwise commit within two years of receiving such funds . . . ."

In total, these provisions could not be more clear: Congress intended for the Governor, and only the Governor, to apply for the SFSF funds and for the Governor, and only the Governor, to disburse those funds first according to the terms of ARRA and then according to his discretion. This interpretation of ARRA is confirmed by three additional things. First, in other respects ARRA refers not to the Governor of the state but the state itself. For example, states that receive SFSF funds must provide various reports to the Secretary of Education, and Congress imposed this responsibility *not* on the Governor, but on the state itself. *See* ARRA § 14008 ("For each year of the program under this title, *a State receiving funds under this title shall submit a report* to the Secretary, at such time and in such manner as the Secretary may require."). This provision, and others in ARRA, makes clear that Congress knows how to impose obligations and authority on the state generally when that is what it intends, and that in the SFSF provisions it specifically intended to provide responsibility to the governors of the states.

Second, when Congress intends for state legislatures to appropriate grant money, it expressly says so in the statute. *See, e.g.*, 29 U.S.C. § 2941 ("Any funds received by a State under this chapter shall be subject to appropriation by the State legislature, consistent with the terms and conditions required under this chapter."). Nothing in ARRA suggests that Congress authorized state legislatures to appropriate the SFSF funds.

Third, the White House's Office of Management and Budget has definitively interpreted the SFSF provisions as delegating authority to the Governor specifically, and not to the states. (*See* Exhibit.)

Presumably, Plaintiffs will argue that nothing in ARRA denies the General Assembly the authority to direct that the Governor take the actions ARRA contemplates. But this argument is foreclosed by the United States Supreme Court's decision in *Lawrence County v. Lead-Deadwood School Dist*., 469 U.S. 256 (1985), which held that an analogous federal statute preempted a state legislature's authority to direct how federal funds are spent, and that such preemption did not violate the Tenth Amendment. *Lawrence County* involved the Payment in Lieu of Taxes Act, which compensates local governments for the loss of tax revenues resulting from the tax-immune status of federal lands and for the cost of providing services associated with these lands. The Act provides that the local government "may use the payment for any governmental purpose." *Id.* at 258. A South Dakota statute required local governments to distribute federal payments in lieu of taxes in the same way they distribute general tax revenues; since the plaintiff county allocated 60% of its general tax revenues to its school districts, the state statute required the county to give its school districts 60% of the payments it received. *Id.* at 259. The county sued the state, arguing that the state law was preempted by the Payment in Lieu of Taxes Act. The Supreme Court agreed.

The Court interpreted the statutory language providing that the local government "may use the payment for any governmental purpose" as endowing the county with the discretion to spend in-lieu payments for any governmental purpose of its choosing, *without interference by the state*. *Id.* at 260-68. Specifically, the Court found that

Congress was not only concerned with the amount of money local governments received; "[e]qually important was the objective of ensuring local governments the freedom and flexibility to spend federal money as they saw fit." *Id.* at 263. The Court then rejected the state's federalism objections to preempting state law. The Court explained: "It is far from a novel proposition that pursuant to its powers under the Spending Clause, Congress may impose conditions on the receipt of federal funds, absent some independent constitutional bar." *Id.* at 269-70. Thus, the Court held that the state law was preempted: "The attempt of the South Dakota legislation to limit the manner in which counties or other qualified local governmental units may spend federal in-lieu-of-tax payments obstructs [the] congressional purpose and runs afoul of the Supremacy Clause. Congress intended the affected units of local government, such as Lawrence County, to be the managers of these funds, not merely the State's cashiers." *Id.* at 270 .

Lawrence County applies fully in these cases. Just as the Court in *Lawrence* interpreted "may use for any governmental purpose" as barring the state from overriding the county's discretion as to how the in-lieu payments would be used, here ARRA's consistent references to "the Governor" bar the General Assembly from overriding the discretion that the federal stimulus law accords to Governor Sanford. Moreover, because *Lawrence County* expressly holds that such prohibitions on state inference with the county's use of federal funds are authorized by the Spending Clause and thus do not violate the Tenth Amendment, any federalism or Tenth Amendment argument against ARRA preemption are similarly meritless in these cases. Likewise, an argument that preemption would represent commandeering of state government under *Printz v. United States*, 521 U.S. 898, 917-18 (1997), is inconsistent with *Printz* itself. In that case the

Court expressly held that the commandeering principle was inapplicable to conditions imposed on federal spending pursuant to Congress' Spending Clause powers. *Id.*

II. Section 1607 Does Not Apply to Applications for SFSF Funds

The *Edwards* plaintiffs' contend that ARRA §§ 1607(b) and (c) authorize the General Assembly to apply for and distribute SFSF funds when the Governor has made the initial certification but does not apply for the funds within 45 days. This argument misconstrues the plain language of § 1607 and has already been rejected by the Office of Management and Budget.

A. The Plain Language of § 1607 Does Not Authorize Legislative Application

Section 1607 first sets out the initial requirement that, within 45 days of ARRA's enactment, the Governor certify that "the State will request and use funds provided by this Act" and that "the funds will be used to create jobs and promote economic growth." *See* §1607(a). It is uncontested that Governor Sanford made a certification pursuant to § 1607(a).

Section 1607(b) then applies if funds provided under ARRA "are not *accepted* for use by the Governor." In that circumstance, §1607(b) provides that "acceptance [of the funds] by the State legislature, by means of the adoption of a concurrent resolution, shall be sufficient to provide funding to such State." ARRA § 1607(b). Finally, § 1607(c) authorizes the state to distribute the funds accepted pursuant to §1607(b). What is notable about § 1607(b) and (c) is what they do not say: They do not authorize the General Assembly to *apply* for the funds; rather, they simply provide that the state legislature may *accept* ARRA funds from the Secretary of Education.

That §1607(b) and (c) omit reference to the *application* for ARRA funds demonstrates the fallacy in the *Edwards* plaintiffs arguments. For ARRA contains numerous provisions dealing with applications for SFSF funds, *see* ARRA § 14005, and as explained above all require that such application must be submitted by the Governor. Section 1607 and the other provisions of ARRA are not read in isolation but must be viewed together. *See Richards v. United States*, 369 U.S. 1, 11 (1962). In the absence of express statutory authority for the General Assembly to *apply for* the SFSF funds via concurrent resolution, that mechanism is simply unavailable. This Court, of course, is bound by the words Congress used in drafting ARRA, and cannot rewrite the statute to achieve a result speculated to be the intent of Congress but nowhere set forth in the statute it enacted. As the South Carolina Court of Appeals has explained:

> If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning. Where a statute is complete, plain, and unambiguous, legislative intent must be determined from the language of the statute itself. In construing a statute, its words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. Where the terms of a statute are clear, the court must apply those terms according to their literal meaning. Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language.

City of Camden v. Brassell, 326 S.C. 556, 560, 486 S.E.2d 492, 494-95 (S.C. Ct. App. 1997) (citations omitted).[1]

B. <u>The Obama Administration Has Interpreted § 1607 As Not Authorizing a State to Apply for SFSF Funds Via Concurrent Resolution; Consequently, the *Edwards* Plaintiffs Fail to Present a Justiciable Controversy Regarding § 1607.</u>

[1] For this same reason ARRA does not allow the General Assembly to authorize the South Carolina Secretary of Education to act in the Governor's stead, as suggested by the SCASA.

The above interpretation of § 1607 is also supported by the Executive Office of the President's Office of Budget and Management ("OMB"). OMB has stated that unlike other provisions of ARRA, "legislative action pursuant to Section 1607(b) would not suffice for a State to accept [SFSF] monies under Section 14005[.]" Letter from the Director of OMB to the Honorable Lindsey Graham, United States Senator from South Carolina (March 31, 2009) (attached hereto).

> [F]or a State to access its allocation of the State Fiscal Stabilization Fund, the Governor must submit an application to the Secretary of Education, and there currently is no provision in [ARRA] for the State Legislature to make such an application in lieu of the Governor for a State's allocation of the State Fiscal Stabilization Fund.

Id.

Indeed, OMB's interpretation of § 1607 not only supports the Governor's, it also means that the *Edwards* plaintiffs' complaint presents no justiciable controversy. Because OMB has opined that legislative application for SFSF funds is invalid, the Obama Administration has made clear that those funds will *not* be released to South Carolina absent an application *from Governor Sanford*. Even if this Court were to agree with the *Edwards* plaintiffs' interpretation of §1607, therefore, such a decision will have no practical effect. "A court renders an advisory opinion when commenting on an issue will have no practical effect on the outcome of the case." *Horry County v. Parbel*, 378 S.C. 253, 264, 662 S.E.2d 466, 472 (Ct. App. 2008). "'It is elementary that the courts of this State have no jurisdiction to issue advisory opinions.'" *Id.* (quoting *Booth v. Grissom*, 265 S.C. 190, 192, 217 S.E.2d 223, 224 (1975)). Thus, the *Edwards* plaintiffs claims related to §1607 present no justiciable controversy. *See Waters v. S.C. Land Resources Conservation Com'n*, 321 S.C. 219, 227, 467 S.E.2d 913, 917-18 (1996) ("A

justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute.").

C. Even If Authorized The Present Legislative Measures Are Ineffective

Even if the plain language of § 1607 could be stretched to authorize the General Assembly to apply for the funds, which it cannot, and even if the federal government recognized an application from the General Assembly, which it has stated it will not, the concurrent resolution and the Appropriations Law do not qualify as valid applications. Section 14005 requires the application for SFSF funds to contain numerous assurances about several aspects of the state education system and the intended use of the funds. *See* ARRA § 14005(b), (d) (requiring assurance regarding educational support levels, equitable distribution of teachers, and improved collection and use of data). The application must also contain baseline data about the state's current status in each area and a description of how the allocated funds will be used. ARRA § 14005(b)(2), (3). The concurrent resolution fails in all respects. *See* Concurrent Resolution, S. 577, 118th Sess. (S.C. 2009). Although Part III, Section 2 of the Appropriations Law contains a detailed statement of how the funds are to be used, it lacks the other required information and assurances. Therefore, even assuming § 1607 functions as the *Edwards* Plaintiffs contend, which the Governor expressly disputes, neither of the measures at issue is effective to apply for the funds.

D. Section 1607, as Interpreted by the *Edwards* Plaintiffs, Violates the Tenth Amendment.

In all events, the interpretation of §1607 advanced by the *Edwards* plaintiffs would violate the Tenth Amendment to the United States Constitution. The Tenth

Amendment reflect the core principles of federalism that inhere in the constitutional structure of our federal system. It provides: "The 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." U.S. Const. amend. X. The Spending Clause of the federal Constitution permits Congress to alter a state Constitution's allocation of authority between the branches of state government or between the state government and local governments when such alterations are conditions on federal spending voluntarily accepted by the states, *see Lawrence County, supra*; *South Dakota v. Dole,* 483 U.S. 203 (1987). In determining whether a state has voluntarily accepted such congressional conditions on federal spending, however, ordinary principles of state law apply; a state must accept those conditions through mechanisms permissible under state law.

Here, these principles mean that the concurrent resolution can be effective at accepting the SFSF funds *only* if, under South Carolina law, a concurrent resolution has independent legal import. There can be little doubt that under South Carolina law, a concurrent resolution—*i.e.*, a resolution passed by both houses of the General Assembly but not submitted to the Governor for his signature or veto—has no binding effect as law. *See State v. Columbia Water Power Co*., 90 S.C. 568, 74 S.E. 26 (1912); *Stolbrand v. Hoge,* 5 S.C. 209 (1874) ("A concurrent resolution is understood to be one which is passed without the customary readings in the respective houses, which, by the Constitution, (Art. 2, Sec. 21,) are requisite, in order to give to the action of the Legislature the force of law."); Am. Jur. Statutes § 2 ("although joint or concurrent resolutions of a legislature may bind members of the legislative body, they do not have the force of law, are not statutes, and are not effective for purposes requiring the exercise

of legislative authority. … [W]hen the legislature wishes to act in an advisory capacity it may act by resolution, but if it wishes to take action having a binding effect on those outside the legislature, it may do so only by following the enactment procedure set forth in the state constitution.").

In sum, Congress cannot attach greater legal significance to a concurrent resolution than exists under state law. Because nothing in the South Carolina Constitution accords legislative significance to a concurrent resolution, the *Edwards* plaintiff's interpretation of §1607(b) and (c), if adopted by this Court, violates the Tenth Amendment.

III. Part III, Section 1 of the 2009-2010 Appropriations Law Violates The Separation of Powers Established by the South Carolina Constitution

Part III, Section 1 of the Appropriations Law purports to direct Governor Sanford to apply for SFSF funds available under ARRA. In so doing, Part III, Section 1 violates the Separation of Powers Clause of the South Carolina Constitution.

South Carolina's General Assembly holds broad powers within this State. However, those powers are not without limit. The principle of separation of powers is enshrined in Article I, § 8 of the South Carolina Constitution, which states:

> In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and apart from each other, and no person or person's exercising the functions of one of said departments shall assume or discharge the duties of any other.

"One 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." *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 312, 295 S.E.2d 633, 636 (1982). Under the Separation of Powers Clause, the General Assembly "cannot reserve for itself powers given solely to the executive branch." *Knotts v. S.C. Dept. of Natural Resources*, 348 S.C. 1, 7, 558 S.E.2d 511, 514 (2002).

The courts of this state have repeatedly invalidated statutes when the General Assembly has improperly assumed executive control over the state's funds. *See State ex rel. McLeod v. McInnis, supra*; *Tucker v. S.C. Dep't of Highways & Pub. Trans.*, 309 S.C. 395, 440 S.E.2d 375 (1992) (invalidating statute requiring legislative approval for expenditure of construction funds); *Gunter v. Blanton*, 259 S.C. 436, 192 S.E.2d 473 (1972) (holding unconstitutional a statute that impermissibly empowered legislative delegation to veto tax increases); *Bramlette v. Stringer*, 195 S.E. 257, 264 (S.C. 1938) (invalidating a statute delegating the power to administer the details of a road bond project to members of the legislative). The rationale underlying these decisions is that the legislature may not undertake to both pass the laws and to execute them. *See Aiken County Bd. of Ed. v. Knotts*, 274 S.C. 144, 149-50, 262 S.E.2d 14, 17 (1980).

Pursuant to Article IV, § 1 of the South Carolina Constitution, the Governor is the "supreme executive authority of this State[.]" If the executive authority granted to the Governor by the Constitution means anything, then the Governor must have the authority to use his independent judgment to determine the appropriateness of applying for the SFSF funds made available under ARRA. By eliminating the entirety of the Governor's discretion, the General Assembly has crossed the line from enacting the laws to executing them.

It is true that federal funds provided to the State must be deposited in the State treasury and thereafter are subject to appropriation by the General Assembly. *See State v. McLeod*, 278 S.C. 307, 295 S.E.2d 633 (1982). But the General Assembly's power to appropriate federal funds begins only once those funds are actually in the treasury. There are no cases that hold that the legislature has the power to compel the Governor to apply for and receive federal funds, even when he determines that acceptance of such funds—along with the concomitant conditions imposed by the federal government—is contrary to the interests of the people of South Carolina. In short, the decision whether to request SFSF funds from the Secretary of Education is a quintessential executive function.

CONCLUSION

For the foregoing reasons, Governor Mark Sanford respectfully requests that the Court deny all relief requested by the Plaintiffs in these actions, and dismiss the complaints with prejudice.

Respectfully submitted, this the 2nd day of June, 2009.

John W. Foster (S.C. Bar No. 2087)
KILPATRICK STOCKTON LLP
1201 Hampton Street, No. 3A
Columbia, SC 29201
Telephone: (803) 744-3400

Adam H. Charnes (pro hac vice pending)
Richard D. Dietz (pro hac vice pending)
KILPATRICK STOCKTON LLP
1001 West Fourth Street
Winston-Salem, NC 27101
Telephone: (336) 607-7300
Telecopier: (336) 607-7500
ACharnes@KilpatrickStockton.com
RDietz@KilpatrickStockton.com

A. Stephens Clay (pro hac vice pending)
William R. Poplin, Jr. (pro hac vice pending)
KILPATRICK STOCKTON LLP
1100 Peachtree Street, Suite 2800
Atlanta, GA 30309-4530
Telephone: (404) 815-6500
Telecopier: (404) 815-6555
SClay@KilpatrickStockton.com
RPoplin@KilpatrickStockton.com

Counsel for Governor Mark Sanford

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing brief was served upon the following via hand delivery:

Richard A Harpootlian
Graham Lee Newman
1720 Main Street, Suite 304
Columbia, SC 29201

Henry Dargan McMaster
James Emory Smith , Jr
Robert Dewayne Cook
Clyde Havird Jones , Jr
SC Attorney General's Office
Rembert Building
1000 Assembly Street, Room 519
Columbia, SC 29201

Barbara A. Drayton
Karla McLawhorn
Shelly Bezanson Kelly
Wendy Bergfeldt Cartledge
SC Department of Education
1429 Senate Street
Columbia, SC 29201

John M Reagle
Keith Robert Powell
Kenneth Lendrem Childs
William F Halligan
Childs & Halligan, P.A.
1301 Gervais Street, Suite 900
Columbia, SC29201

This the 2nd day of June, 2009.

_____
John W. Foster (S.C. Bar No. 2087)

KILPATRICK STOCKTON LLP
1201 Hampton Street, No. 3A
Columbia, SC 29201
Telephone: (803) 744-3400

Counsel for Governor Mark Sanford