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..... Respondent.

REPLY

Through a concurrent resolution and a constitutionally-valid appropriations bill, the South Carolina General Assembly has applied for, certified and appropriated hundreds of millions of dollars of funds provided under the State Fiscal Stabilization Fund of the ARRA. Governor Sanford—who opposes both the ARRA and the Legislature's appropriation of funds related thereto—vetoed the General Assembly's budget but was overridden by sweeping majorities. Sanford then threatened to ignore both the concurrent resolution and the appropriations bill—going so far as to sue his own Attorney General in federal court to impede the execution of the laws of his own State.

Casey Edwards and Justin Williams—two South Carolina public school students and constituents of Governor Sanford—thereafter filed this suit to declare the actions of the General Assembly valid and binding. This Court permitted Sanford to intervene. Sanford immediately removed the case to federal court.

Once before a federal tribunal, Sanford argued that the State of South Carolina was only a "nominal party" to this action, that he was the only defendant of real interest,

and that the two public school students that brought this action were "simply a proxy for the interests of the General Assembly". The federal court promptly rejected Sanford's arguments and has remanded the case to this Court.

I. The clear language and statutory history of § 1607(b) and (c) supports an interpretation that gives the General Assembly the ability to apply for, certify and appropriate the Stimulus funds

"[S]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'n Fly v. Dollar Park & Fly*, 469 U.S. 189, 194 (1985). The plain language of § 1607 of the ARRA establishes that Congress intended for there to be two mechanisms by which a state can request, accept, and us any federal stimulus funds. First, Congress designated the governor as the appointed person who shall certify that a state will request and use the funds provided by the Act. § 1607(a). Subsection (b) allows for an alternative mechanism, "Acceptance by State Legislature," in two situations.

First, if the governor fails to make the certification provided in § 1607(a), the State legislature, by concurrent resolution, may accept the funds, and such acceptance "shall be sufficient to provide funding to such State." § 1607(b). If funds are accepted by the state legislature, then § 1607(c) outlines how the funds are to be distributed. § 1607(c). This structure is set forth within the statute's plain and ordinary meaning.

Second, § 1607(b) provides an additional avenue for the state to receive federal stimulus funds in the event the governor makes the required certification in § 1607(a), but fails (or refuses) to accept the funds provided in any provision of the ARRA. Specifically, section (b) states that "[i]f funds provided to any State in any division of this Act are not accepted for use by the Governor," then a state legislature's concurrent resolution shall be

sufficient to provide such funding to the state. § 1607(b). The plain language of the statute does not limit the applicability of subsection (b) to situations where the governor refuses to certify the funds. Rather, it clearly contemplates allowing the legislature to accept funds where a governor makes the certification but fails to "accept" the federal funding in a certain provision of the Act.

Congress also took care to extend the efficacy of § 1607(b) to the entirety of the ARRA, applying the subsection to funds "provided to any state in any division of this Act." *Id.* The sweeping applicability of the section is confirmed by its placement within title XVI of the ARRA, which is entitled "General Provisions—This Act." The Governor's limited interpretation of § 1607(b) and (c) renders meaningless the expanded application given to the subsections by Congress. "It is an 'elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.'" *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 510 n.22 (1986) (quoting *Colautti v. Franklin*, 439 U.S. 379, 392 (1979)).

Even if it were to be determined that § 1607 is unclear or ambiguous, legislative history must be considered to understand Congressional intent. The United States Supreme Court has noted that where doubt or ambiguity exists as to language used in a statute, legislative history and other tools of interpretation beyond a plain reading of the statute's words may be used. *See, e.g., United States v. Am. Trucking Ass'ns., Inc.*, 310 U.S. 534, 543 (1940) ("When [a statute's plain] meaning has led to absurd or futile results . . . this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this

Court has followed that purpose, rather than the literal words." (internal citations omitted)).[1]

The legislative history is "perfectly clear" regarding § 1607 of the ARRA. Prior to the enactment of the ARRA, Governor Sanford publicly stated his opposition to the federal government's economic stimulus efforts. *See* Rick Perry & Mark Sanford, Op., "Governors Against State Bailouts," WALL ST. J., Dec. 2, 2008 (Exhibit 1 to Complaint)(requesting that other governors join in opposition to further federal bailout intervention); Letter from Governor Mark Sanford, Governor of South Carolina, to President-Elect Obama, President-Elect of the United States of America (Dec. 2, 2008) (Exhibit 2 to Complaint) (urging President Obama to avoid "large scale spending increases."). In direct response, Congressman Clyburn proposed the "Clyburn Amendment," now § 1607, after working with the leadership of the South Carolina General Assembly "to ensure that South Carolinians receive the benefits of . . . federal investments." United States Congressman James E. Clyburn, Congressman Clyburn's Influence Seen in House Passed, http://clyburn.house.gov/pressroom-press-releases-detail.cfm?id=79 (Jan. 28, 2009) (last visited, June 2, 2009). Specifically, Congressman Clyburn "insisted" that the bill include "*provisions that allow the South Carolina General*

[1] *See also Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 627 (1993) (examining the "legislative purpose as revealed by the history of the statute" to resolve "textual ambiguity" in the statutory language); *Toibb v. Radloff*, 501 U.S. 157, 162 (1991) (noting that "a court appropriately may refer to a statute's legislative history to resolve statutory ambiguity"); *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 65 (2004) (Steven, J., concurring) ("In recent years, the Court has suggested that we should look at legislative history for the purpose of resolving textual ambiguities or to avoid absurdities. It would be wiser to acknowledge that it is always appropriate to consider all available evidence of Congress' true intent when interpreting its work product."), *vacated and remanded in part by* 478 F.3d 183 (4th Cir. 2007).

Assembly to receive and allocate federal investments if the Governor refuses to do so." *Id.* (emphasis added).

If there is *any* arguable ambiguity to the statute, then there can certainly be no ambiguity concerning the statute's legislative intent based on Congressman Clyburn's statements. Congressman Clyburn proposed §1607 based on his belief that Governor Sanford would oppose receipt of federal stimulus funds. This legislative history is undisputable and clearly supports the position that a state legislature has the authority to request, accept, and distribute federal funds available through the ARRA where the state's governor refuses to do so.

The Governor relies upon the language of § 14001, et seq. to insist that Congress intended to vest "exclusive discretionary authority" in the Governor to apply for, certify and accept SFSF funds. Apparently, this authority rests most clearly in § 14005, the initial provision of which provides as follows:

> SEC. 14005. STATE APPLICATIONS.
>
> (a) IN GENERAL.—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 Secretary may reasonably require.

Sanford insists that the "desire to receive an allocation" envisioned in § 14005 refers to his personal desire, rather than the desire of the State. While this case was in the removal jurisdiction of the federal court, however, Federal District Judge Joseph Anderson immediately latched onto the Governor's convenient oversight.

> Stop right there. You could make a very good statutory interpretation argument, it is really grammatical interpretation, that the modifier "desiring to receive an allocation," modified "State "and not "Governor." So it is

> the Governor of the State that wants to get the money, "shall." The State's will is expressed by the General Assembly.
>
> (Attached as **Exhibit A**—Transcript of June 1, 2009 Motion to Remand proceedings)(p. 45)

Judge Anderson's keen recognition of the details of § 14005 not only accords with the legislative history of the Clyburn Amendment (which was clearly inserted into the ARRA to prohibit the Governor from claiming exclusive discretion to apply for SFSF funds), but it also accords with the interpretation of the Department charged with administering the funds—the Department of Education. It is well-established that "[a]n agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress," *Rapanos v. U.S.*, 547 U.S. 715, 766 (2006).[2] Reading from the DOE's "Guidance on the State Fiscal Stabilization Fund Program" (attached as **Exhibit B**), it is clear that the Department envisioned the State—rather than the Governor—as being the body necessarily applying for SFSF funds.

> II-1. What is the Department's process for awarding Stabilization funds to Governors?
>
> The Department will award Stabilization funds to Governors in two phases. To receive its initial Stabilization fund allocation, ***a State*** must submit to the Department an application...

Id., p. 3 (emphasis supplied)

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[2] The plain text of XIV of the ARRA establishes that the State Fiscal Stabilization Fund "shall be administered by the Department of Education." This mandate is contained in a introductory clause immediately preceding § 14001, *et seq.*—the statutes upon which the Governor relies as the source of this supposed "exclusive discretionary authority."

The Governor goes to great lengths to cite other governmental sources of interpretation of the ARRA. Clearly, only the interpretation of the DOE is entitled to any deference.

Notably, even though the DOE specifically chose to denote the State—rather than the Governor—as the entity required to submit an application, it did recognize discretionary authority vested in the Governor's office *after* such funds were received.

> In determining the amount of Education Stabilization funds that a State must reserve for LEAs and the amount it must reserve for public IHEs, a State must follow the specific steps outlined in Illustration 6 and detailed in the worksheets in Appendix D of the Stabilization fund application. Once these amounts are determined, a Governor has some discretion in deciding when to release the funds to LEAs and public IHEs. (*See* Question III-B-10.) In addition, LEAs and public IHEs have some discretion in determining when to use any funds that they receive. (*See* Questions III-D-16 and III-E-11.)

Id., p. 9.

> "A Governor has the discretion to require an LEA to provide in its application additional information that the Governor may reasonably require. For example, because of the Governor's administrative responsibilities over the Stabilization program, the Governor may require an LEA to describe how it intends to use its Education Stabilization funds."

Id., p. 16.

> Once these amounts are determined, a Governor has some discretion in deciding when to release the funds to LEAs and public IHEs.

Id., p. 18.

> While a Governor should consider the immediate needs of LEAs and public IHEs, the Governor has some flexibility in the timing of the release of the funds.

Id., p. 24.

Thus, there can be no doubt that if the DOE recognized "exclusive discretionary authority" vested to governors and to governors alone (as Governor Sanford claims), it

knew how to express such authority within its interpretation of the ARRA. Such an expression of authority, however, is conspicuously absent from the "Guidance on the State Fiscal Stabilization Fund Program".

In sum, the clear language of the ARRA supports the notion that the General Assembly possesses the authority to apply for, certify and accept SFSF funds. But beyond the language itself, both the legislative history of the Clyburn Amendment and the interpretation of the ARRA by the Department of Education reject the Governor's claim that he possesses exclusive discretionary authority as to whether the SFSF funds should be requested.

II. The General Assembly's Concurrent Resolution does not violate the Tenth Amendment

Any constitutional analysis must begin with the rule that statutes are presumed to be constitutional. *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 944 (1983) ("We begin, of course, with the presumption that the challenged statute is valid."); *Heller v. Doe*, 509 U.S. 312, 321 (1993) ("A statute is presumed constitutional...."); *Hartford Steam Boiler Inspection & Ins. Co. v. Harrison*, 301 U.S. 459, 466 (1937) ("The presumption of constitutional validity must prevail unless the terms of the statute, or what we judicially know, or facts proved by the appellants, overthrow that presumption."). Therefore, a party challenging § 1607 bears the burden of establishing its unconstitutionality.

A. The application of § 1607 does not "commandeer" a State legislature for a federal purpose.

The cases of *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997) provide the best analysis of the Tenth Amendment's

prohibition on the federal government "commandeering" state government to serve a federal purpose. The case of *New York v. United States* involved Congress' attempt to regulate in the area of low-level radioactive waste. While Congress has the power to regulate in this area, the Constitutional question arose because Congress was seeking to require the States to perform the regulation. Specifically, in addition to various incentives designed to encourage the States to adopt the regulatory scheme, the Act also provided that if a State were unable to provide for the disposal of its low-level radioactive waste by a certain date, the State would "take title to the waste." This "take title" provision was held to violate the Tenth Amendment.

The Court held that "Congress may not simply commandeer the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program." *Id.* at 161. The "take title" provision presented the States with a choice of either accepting ownership of the waste or regulating according to Congress' instructions, and this "choice" crossed the line between encouragement and coercion. *Id.* at 175. The Court held that, standing alone, a requirement that State governments take title to the waste would be beyond the authority of Congress. *Id.* at 176. Additionally, it was beyond Congress' authority to order the States to regulate the waste. *Id.* Thus, since either action was impermissible, Congress could not force the States to make a choice between the two. *Id.*

The case of *Printz v. United States* involved a challenge to provisions in the Brady Handgun Violence Prevention Act which imposed requirements on chief law enforcement officers (CLEOs) to perform background checks on gun transferees. The Court held this provision to be unconstitutional because "[t]he Federal Government may

not compel the States to enact or administer a federal regulatory program" and the "[t]he mandatory obligation imposed on CLEOs to perform background checks on prospective handgun purchasers plainly runs afoul of that rule." 521 U.S. at 933.

The provisions of § 1607 of the ARRA do not result in a "commandeering" of the State Legislature. The ARRA seeks to provide federal stimulus funds to the various States. Some of the federal funds come with conditions and the imposition of such conditions is clearly constitutional. *See South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (holding that Congress may attach conditions on the receipt of federal funds). Section 1607(a) of the Act initially provides that a State's Governor must certify that the State will request and use the funds. Where a Governor chooses not to make this certification or makes the certification but refuses to accept funds, Congress chose to include a provision (§ 1607(b)) allowing the State's Legislature to accept the federal funds. The Act merely provides two alternative options that would allow a State to obtain the federal stimulus funds. It does not require that one of the options be taken. After all, the General Assembly could choose to follow the path of the Governor and reject the stimulus funding under this construct of the ARRA.[3]

Unlike the situation in *New York v. United States*, a State's failure to accept the funds is not coupled with a punitive result. Additionally, unlike the *Printz* case, there is no mandatory obligation imposed on either a Governor or a Legislature. Thus, Congress' decision to provide an alternative mechanism for a State to receive federal funds through

[3] The appeal of both the State and the Governor to *State v. Columbia Water Power Co.*, 90 S.C. 568, 74 S.E. 26 (1912) is, likewise, irrelevant. Undoubtedly, a concurrent resolution does not carry the same effect of law as does an Act. But the ARRA does not require an "act" to apply for SFSF funds. Indeed, if such were the case, the Governor's argument of "exclusive discretionary authority" to make such an application would, likewise, evaporate.

an act of its Legislature as opposed to an act of its Governor does not violate the Tenth Amendment.

B. Section 1607 does not infringe upon the separation of powers between a State's legislative and executive branches.

One of the purposes of the ARRA is to provide federal stimulus funds to the States. To accomplish that purpose, in various provisions the ARRA provides that a Governor may apply for certain funds for that Governor's State, and § 1607(a) provides an overall certification requirement to be fulfilled by a Governor. This "power" to request and receive the funds is not an inherent power of a Governor and it does not stem from the various States' constitutions. Rather, it is Congress, through the ARRA, that vests this power with a State's Governor. Because Congress is the source of this "power," it can also vest a State's Legislature with the ability to request and receive the federal funds where the Governor refuses.

By establishing the alternative mechanism of a State Legislature accepting the funds, Congress is not removing the Governor from a State's legislative process.[4] The separation of powers between a States Legislative and Executive branches remains intact. By way of example, certain funds in the ARRA are available to the States to add to their unemployment trust funds. However, in order to receive these federal funds, a State must conform its formula for determining who is eligible for unemployment benefits to meet the standard set forth by Congress. A Governor may refuse to request these funds because the Governor does not want to meet this condition. If the Legislature, by concurrent

[4] The Governor speaks out of both sides of his mouth when protesting along these lines. On the one hand, he asserts that § 1607(b) and (c) threaten to remove him from the legislative process. On the other hand, he asserts that he possesses the "exclusive discretionary authority" to apply for the funds, which would remove the General Assembly from the legislative process—if, in fact, the process is actually implicated.

resolution, "overrides" the Governor's refusal and "accepts" the funds, this does not mean that the State law has been changed. Rather, the concurrent resolution is merely the act of the State indicating to Congress that the State wishes to accept the funds. In order to qualify to receive the funds, the State will still be required to change its law defining eligibility for the benefits. The State's legislative process in meeting any conditions on the funds remains unaffected. A bill accomplishing this necessary change will still be required to be passed by the Legislature. That bill will then need to be signed by the Governor, or the Legislature will need to override the Governor's veto.

Section 1607 does not grant a State Legislature with additional Legislative powers, nor does it remove Executive powers from a State's Governor. Rather, § 1607 prevents a Governor from unilaterally refusing possible federal assistance where the State's Legislature wishes to obtain that assistance. The States are still restricted by their respective Constitutions and must still follow their legislative process. Thus, the separation of powers between a States' Legislative and Executive branches is not infringed, and § 1607 does not run afoul of the Tenth Amendment.

III. The Appropriations Bill effectively forces the Governor to accept the stimulus funds.

The General Assembly's enactment of the Appropriations Bill—including the subsequent overriding of the Governor's veto—requires the Governor to apply for the stimulus funds for two reasons. First, the State Legislature has the authority to request and accept federal funds because it has broad authority with regard to appropriating funds in the State Treasury. South Carolina's Constitution establishes that "[m]oney shall be drawn from the treasury of the State or the treasury of any of its political subdivisions *only in pursuance of appropriations made by law.*" S.C. Const. art. X, § 8 (emphasis

added). Second, State law also makes it "unlawful for *any moneys* to be expended *for any purpose or activity* except that for which it is specifically appropriated." S.C. Code Ann. § 11-9-10 (Law. Co-op. 1976) (emphasis added). As stated by the South Carolina Supreme Court, "[t]he General Assembly has, beyond question, the duty and authority to appropriate money as necessary for the operation of the agencies of government and has the right to specify the conditions under which the appropriated monies shall be spent." *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 313-14, 295 S.E.2d 633, 637 (1982). These constitutional and statutory restrictions and limitations also apply to federal funds received by the state. *Id.*

The South Carolina Supreme Court has made it clear in prior cases that there is no constitutional impediment to the State Legislature specifying *how* and *in what manner* the funds it appropriates are spent. For example, *McInnis* also involved the power to expend funds received from the federal government, and in that case the court stated that the General Assembly possesses broad latitude "to determine programs and policy matters" and to determine "the total amount of money expended by state agencies." *Id.* at 314, 295 S.E.2d at 637.[5] The court stated further that "[i]n writing the appropriations bill, [the

[5] The issue in *McInnis* was the constitutionality of a statute that created the Joint Appropriations Review Committee ("JARC"), a committee that consisted of members of the State Legislature. *McInnis*, 278 S.C. 307, 295 S.E.2d 633 (1982). The committee was formed in response to the increase in federal government funds being received by South Carolina governmental entities *after* approval of the appropriations bill. *Id.* at 314, 295 S.E.2d at 637. The court stated that:

> [a]n 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.

General Assembly] *attempts as best it can to predict the needs of the various departments of state government.*" *Id.* (emphasis added).

Similarly, in *Knotts v. South Carolina Department of Natural Resources*, 348 S.C. 1, 558 S.E.2d 511 (2002), the court concluded that the State Legislature had full authority to mandate how funds of the Water Recreational Resource Fund (WRRF) must be spent. Although the Legislature does not have the power to create a law and then execute it, the Court in *Knotts* observed that "[t]he Legislature has the power to delineate how an executive department may fund a request under the W.R.R.F. The Legislature may statutorily outline how [the Department of Natural Resources] must expend money from the W.R.R.F." *Id.* at 8, 558 S.E.2d at 514-15.

For the State of South Carolina to receive the benefit of the federal stimulus funds, they must be appropriated from the State Treasury. This authority falls squarely within the appropriations function of the General Assembly. *McInnis*, 278 S.C. at 314-15, 295 S.E.2d at 637. The fact that the funds are provided through a federal program does not in any way alter this established South Carolina law. *Creative Displays, Inc. v. S.C. Highway Dep't.*, 272 S.C. 68, 73-74, 248 S.E.2d 916, 918 (1978) (concluding that a federal Act "cannot and does not change the South Carolina constitution and statutory law.").[6] As a result, the General Assembly has broad authority concerning use of the

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Id. (emphasis added).

Ultimately, the court held that even though formation of the JARC was understandable from an administrative standpoint, it was unconstitutional because the General Assembly is charged with appropriations. *Id.*

[6] In his letter, Attorney General McMaster also articulated his belief that "our Supreme Court would not treat federal funds differently from state generated funds, and would

funds as part of its role in predicting the needs of the various departments of state government and providing for those needs through the appropriations process. *McInnis*, 278 S.C. at 314-15, 295 S.E.2d at 637 (1982). Any position that the General Assembly does *not* have this authority is contrary to South Carolina law.

The South Carolina Supreme Court stated in *McInnis* that "[t]here is no forum for the settlement of [disputes relating to the usurpation of power by one of the three branches of government] other than the courts." *McInnis*, 278 S.C. at 313, 295 S.E.2d at 636. The court has shown a willingness in the past to enforce legislative appropriations by judicial order where executive officials have failed to implement them.

For example, in *Gilstrap v. South Carolina Budget and Control Board*, 310 S.C. 210, 423 S.E.2d 101 (1992), the court enjoined the South Carolina Budget and Control Board from making budget cuts based on growth in an agency's budget, instead of the "across the board" cuts permitted by the applicable statute. The court in *Gilstrap* emphasized that "[t]he appropriation of public funds is a legislative function" and that allowing the Board to choose a different method would "violate the separation of powers provision in the State Constitution." *Id.* at 216, 423 S.E.2d at 105.

Grimball v. Beattie, 174 S.C. 422, 177 S.E. 668 (1934) is an older case in which the court issued a mandamus requiring the Comptroller General and Treasurer to pay the unpaid balance of a Circuit Judge's salary. The court rejected the argument that the Great Depression justified paying the judge a lesser salary. *Id.* at 423, 177 S.E. at 677. Instead, the court referenced a statute that authorized a time, method and amount of payment. *Id.* at 427-28, 177 S.E. at 671. In the court's view, this statute was legally sufficient to

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thus require a legislative appropriation in order to expend such funds." McMaster Letter at 17.

require members of the executive branch to pay the judge's salary. *Id.* at 435, 177 S.E. at 673-74.

The case of *State ex rel. Condon v. Hodges*, 349 S.C. 232, 562 S.E.2d 623 (2002) addressed the question of "whether the combined actions of members of the executive branch violated the separation of powers doctrine by having funds that the General Assembly had specifically appropriated to the schools returned to the General Fund." *Id.* at 243, 562 S.E.2d at 629. The South Carolina Supreme Court emphasized that the State Legislature has "'the duty and authority to appropriate money as necessary for the operation of the agencies of government and has the right to specify the conditions under which the appropriated monies shall be spent.'" *Id.* at 244, 562 S.E.2d at 630 (quoting *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 313-14, 295 S.E.2d 633, 637 (1982)). In holding that the executive branch did *not* have the authority to make the transfer, the court recognized that

> 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 funds from those to whom the General Assembly has appropriated money. In fact, there is clear legislative intent that the ability to transfer appropriated money will lie only with the General Assembly.

Id. at 245, 562 S.E.2d at 630.

Similar to these cases, the instant controversy involves a situation where the State Legislature is deliberating over funds made available to it under the Act, and which the State Legislature had authority to accept by virtue of § 1607. The Governor's position is that the Governor has this authority to direct the use (or non-use) of such funds under these circumstances. This exercise of the Governor's power usurps the authority granted

to the General Assembly under South Carolina law. The General Assembly has the authority to "to determine programs and policy matters" and to determine "the total amount of money expended by state agencies." *McInnis*, 278 S.C. at 314, 295 S.E.2d at 637. The General Assembly has sent the Governor a General Appropriations bill with the stimulus funds included. The Governor's refusal of these funds encroaches on this fundamental authority granted to the General Assembly under South Carolina law, as the General Assembly has the exclusive authority to appropriate funds.

IV. The General Assembly's enactment of the Appropriations Bill does not violate the Supremacy cause

The Governor's Supremacy Clause argument rests upon the fundamentally flawed premise that the ARRA granted state executives "exclusive discretionary authority" over the use of stimulus funds. As shown above, absolutely nothing in the ARRA vests any such authority. What the Governor suggests is, in essence, that Congress has chosen to place $53,600,000,000 (the itemized expenditure of the SFSF) at the whim and whimsy of fifty individuals. Assuming, for the sake of argument, that this is true, one would think that Congress would have chosen to insert the words "exclusive discretionary authority" into the ARRA if it intended to extend such an astounding power to individual people. No such words exist.

The primary ruling of *Lawrence County v. Lead-Deadwood School Dist. No. 40-1*, 469 U.S. 256 (1985) is particularly inapplicable to this case. In *Lead-Deadwood*, the United States Supreme Court invalidated a state statute that required localities to appropriate federally-granted monies in a manner inconsistent with the statute that provided the grant. In this case, the Legislature has in no way altered the manner in which SFSF funds will be distributed. At most, the Legislature has ordered the Governor—

through constitutional state law—to take the steps necessary to apply for such funds. Whereas the ARRA vests no "exclusive discretionary authority" in the hands of the Governor, no actions of the Legislature conflict with the language of the ARRA or the intent of Congress. Therefore the Supremacy Clause is not implicated.

In reality, *Lead-Deadwood* provides additional support to the Plaintiffs' contention that Congress intended, through § 1607(b) and (c), to provide an alternate means of SFSF fund application through which the Legislature could speak on behalf of the State. More particularly, there the Supreme Court spent several pages discussing the legislative history of the statute at issue in that case and added that "[a] subsequent amendment to the Act provides additional support for" its final opinion. *Id.* at 267. Here, too, the legislative history and subsequently added Clyburn Amendment compel the Court to find that Congress intended § 1607(b) and (c) to operate as an alternative method for the State to apply for the SFSF funds.

CONCLUSION

The Plaintiffs respectfully request an order from this Court consistent with the relief requested in their complaint and all other relief the Court shall deem necessary.

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June 2, 2009.

ATTACHMENT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

IN RE: STIMULUS PACKAGE	)	CA. NO. 3:09-1322
	)	3:09-1364
	)	3:09-1385
	)	COLUMBIA, SC
	)	JUNE 1, 2009
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BEFORE THE HONORABLE JOSEPH F. ANDERSON, JR.
UNITED STATES DISTRICT COURT JUDGE
STATUS CONFERENCE HEARING

APPEARANCES:

FOR GOVERNOR SANFORD:	JOHN WITHERSPOON FOSTER, ESQ. ADAM H. CHARNES, ESQ. A. STEPHENS CLAY, ESQ.
FOR AG MCMASTER:	ROBERT COOK, ESQ. SONNY JONES, ESQ. HENRY MCMASTER, ESQ.
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FOR SC ASSOCIATION OF SCHOOL ADMINISTRATORS:	KEN CHILDS, ESQ. BICK HALLIGAN, ESQ. JOHN REAGLE, ESQ. KEITH POWELL, ESQ. FRANK HOLLEMAN, ESQ.
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STENOTYPE/COMPUTER-AIDED TRANSCRIPTION
*** *** *** *** ***

THE COURT: PLEASE BE SEATED. WE HAVE *PRO HAC VICE* MOTIONS PENDING BY FOUR OUT-OF-STATE LAWYERS FOR LEAVE TO PARTICIPATE IN THIS CASE. ARE THERE ANY OBJECTIONS TO THOSE MOTIONS?

MR. HARPOOTLIAN: NO OBJECTION, YOUR HONOR.

THE COURT: HEARING NO OBJECTION, I WILL GRANT THE MOTION BY THE FOUR LAWYERS. SPECIFICALLY, ADAM CHARNES, RICHARD DIETZ, STEPHENS CLAY, AND WILLIAM POPLIN. THEY ARE ALL ADMITTED TO PRACTICE IN THIS CASE.

BEFORE HEARING FROM COUNSEL, LET ME BRIEFLY SUMMARIZE THIS CASE, EXPLAIN HOW THESE CASES ARRIVED IN THIS COURTHOUSE, AND THEN MAKE A SUGGESTION. IF YOU WILL JUST BEAR WITH ME.

IN AN EFFORT TO PROMOTE RECOVERY FROM THE ECONOMIC RECESSION, CONGRESS ENACTED THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 LAST FEBRUARY. AMONG A SERIES OF NEW FEDERAL SPENDING PROGRAMS, THE ARRA ESTABLISHED A ONE-TIME APPROPRIATION IN TITLE XIV OF THE ARRA CALLED THE STATE FISCAL STABILIZATION FUND, WHICH CONSISTS OF APPROXIMATELY 48 BILLION DOLLARS NATIONALLY. THE VAST MAJORITY OF THE STATE'S ALLOCATION FOR THIS FUND MUST BE USED FOR THE SUPPORT OF ELEMENTARY, SECONDARY, AND POSTSECONDARY EDUCATION. AND THE REMAINING 18.2 PERCENT MUST BE USED FOR PUBLIC SAFETY AND OTHER GOVERNMENT SERVICES. THE STATE OF SOUTH CAROLINA'S ALLOCATION OF THE FEDERAL STIMULUS FUND IS APPROXIMATELY 700 MILLION DOLLARS, ADMINISTERED BY THE

DEPARTMENT OF EDUCATION TO BE PAID IN TWO PHASES OVER THE NEXT TWO YEARS.

THE GOVERNOR OF SOUTH CAROLINA, MARK SANFORD, OPPOSES THE USE OF THESE FUNDS FROM THE DEPARTMENT OF EDUCATION UNLESS THE SOUTH CAROLINA GENERAL ASSEMBLY AGREES TO USE AN EQUIVALENT AMOUNT OF STATE FUNDS TO PAY DOWN STATE DEBT. IN RESPONSE TO GOVERNOR'S SANFORD PUBLIC ANNOUNCEMENT THAT HE INTENDS NOT TO APPLY FOR THE SFSF FUNDS, THE GENERAL ASSEMBLY PASSED THE 2009-2010 GENERAL APPROPRIATIONS LAW THAT INCLUDED 350 MILLION DOLLARS IN THESE FUNDS. THE APPROPRIATIONS LAW ALSO INSTRUCTED GOVERNOR TO APPLY FOR THE FUNDS. SPECIFICALLY, THE STATE BUDGET PROVIDED:

> "WITHIN FIVE DAYS OF THE EFFECTIVE DATE OF THIS PART, THE GOVERNOR SHALL SUBMIT AN APPLICATION TO THE UNITED STATES SECRETARY OF EDUCATION TO OBTAIN PHASE ONE STATE FISCAL STABILIZATION FUNDS, AND WITHIN 30 DAYS OF PHASE TWO STATE FISCAL STABILIZATION FUNDS BECOME AVAILABLE, OR 30 DAYS FOLLOWING THE EFFECT DATE OF THIS ACT, WHICHEVER IS LATER, THE GOVERNOR SHALL SUBMIT AN APPLICATION TO THE SECRETARY OF EDUCATION TO OBTAIN PHASE TWO

FUNDS."

OVER GOVERNOR SANFORD'S VETO, THE GENERAL ASSEMBLY ENACTED THE APPROPRIATIONS LAW ON MAY 20TH, 2009. THE GENERAL ASSEMBLY ALSO PASSED A CONCURRENT RESOLUTION, QUOTE, TO PROVIDE THAT HR-1 OF 2009, THE AMERICAN RECOVERY AND REINVESTMENT ACT, THE GENERAL ASSEMBLY ACCEPTS THE USE OF FEDERAL STIMULUS FUNDS PROVIDED TO THIS STATE IF THE GOVERNOR OF SOUTH CAROLINA WITHIN THE REQUIRED 45-DAY PERIOD FAILS TO CERTIFY THAT HE WILL REQUEST AND USE THOSE FUNDS.

THEN THE LITIGATION BEGAN. ON MAY 20TH, IMMEDIATELY AFTER THE GENERAL ASSEMBLY ENACTED THE BUDGET OVER HIS VETO, GOVERNOR SANFORD FILED SUIT IN THIS COURT AGAINST ATTORNEY GENERAL HENRY MCMASTER. I WILL REFER TO THAT AS THE "SANFORD CASE." IN THIS SUIT, GOVERNOR SANFORD ASSERTS THAT THE PROVISIONS OF THE LAW, THE APPROPRIATIONS LAW, THE STATE LAW, THAT DIRECT HIM TO APPLY FOR AND DISPERSE THE FISCAL STABILIZATION FUNDS ARE PREEMPTED BY THE LANGUAGE OF THE ARRA, THE FEDERAL LAW, WHICH HE ARGUES EXPRESSLY GRANTS HIM DISCRETIONARY AUTHORITY OVER THE FUNDS ONLY TO STATE GOVERNORS, NOT TO STATE LEGISLATORS. SO SINCE GOVERNOR SANFORD SEEKS A DECLARATORY JUDGMENT THAT PART THREE, SECTION ONE OF THE STATE BUDGET BILL, IS PREEMPTED BY THE FEDERAL LAW OR PERHAPS SUPERSEDED BY THE FEDERAL LAW UNDER THE SUPREMACY CLAUSE. AT ISSUE IN THE GOVERNOR'S SUIT IS SECTION 1607 OF THE FEDERAL LAW, WHICH CONTAINS LANGUAGE THAT GOVERNOR SANFORD

SUGGESTS SHOULD BE READ THAT GOVERNORS AND GOVERNORS ALONE SHOULD BE ALLOWED TO APPLY FOR OR TO DECIDE WHETHER TO APPLY FOR, ACCOUNT FOR, AND ADMINISTER THESE FUNDS.

TWO DAYS AFTER THE SANFORD CASE WAS FILED, TWO ACTIONS WERE FILED IN THE ORIGINAL JURISDICTION OF THE SOUTH CAROLINA SUPREME COURT AND SUBSEQUENTLY REMOVED TO THIS COURT. THOSE CASES ARE THE SOUTH CAROLINA ASSOCIATION OF SCHOOL ADMINISTRATORS OR SCASA AGAINST SANFORD, AND EDWARDS VERSUS THE STATE OF SOUTH CAROLINA. AFTER THE SCASA ACTION, THAT CASE WAS FILED ON MAY 22ND, BY THE ASSOCIATION OF SCHOOL ADMINISTRATORS, A PETITION FOR THE ORIGINAL JURISDICTION OF THE SUPREME COURT ATTACHING A COMPLAINT AGAINST GOVERNOR SANFORD, AND AS AN ADDITIONAL DEFENDANT, SUPERINTENDENT OF EDUCATION JIM REX. SCASA SEEKS IN THAT CASE A DECLARATORY JUDGMENT AS TO THE, "RIGHTS, STATUS AND OTHER LEGAL RELATIONS BETWEEN THE PARTIES WITH REGARD TO PART THREE OF THE STATE BUDGET," AND REQUESTING THAT THE STATE COURT DECLARE GOVERNOR SANFORD MUST TAKE ACTIONS PRESCRIBED THEREUNDER AND ALSO SEEKS A WRIT OF MANDAMUS TO COMPEL HIS PERFORMANCE. GOVERNOR SANFORD REMOVED THAT CASE, THE SCASA CASE, TO THIS COURT ON MAY 26TH, 2009 ASSERTING THIS COURT'S FEDERAL QUESTION JURISDICTION.

IN THE EDWARDS CASE, WHICH WAS ALSO FILED IN THE SUPREME COURT, THE PLAINTIFFS ARE CASEY EDWARD AND JUSTIN WILLIAMS, TWO STUDENTS IN SOUTH CAROLINA, WHO ASKED THE STATE SUPREME

COURT TO DECLARE THAT THE GENERAL ASSEMBLY'S CONCURRENT RESOLUTION PERMITTED THE LEGISLATURE TO ACCEPT AND DISTRIBUTE ARRA FUNDS, OR IN THE ALTERNATIVE THAT THE GENERAL ASSEMBLY MAY REQUEST AND ACCEPT AVAILABLE STIMULUS FUNDS, AND WHERE THE LEGISLATURE, THROUGH THE CONSTITUTIONALLY PRESCRIBED LEGISLATIVE PROCESS, APPROPRIATES THE FUND, THE GOVERNOR AND THE EXECUTIVE BRANCH MUST PERFORM ACTS REQUIRED TO ACCEPT THE FUNDS.

ON MAY 27TH, 2009 THE SUPREME COURT GRANTED GOVERNOR SANFORD'S REQUEST TO INTERVENE IN THE EDWARDS ACTION, AND THEREAFTER GOVERNOR SANFORD REMOVED THE EDWARDS ACTION TO THIS COURT ON FEDERAL QUESTION GROUNDS WITHOUT THE STATE'S CONSENT, ARGUING THAT THE STATE'S CONSENT IS NOT REQUIRED BECAUSE IT IS A MERE NOMINAL PARTY.

WHEN THOSE CASES ARRIVED HERE, WE ISSUED OUR ORDER REQUIRING ALL PARTIES TO BRIEF THE JURISDICTIONAL ISSUES OF WHETHER THIS COURT SHOULD PROCEED TO HEAR THESE CASES. WE SPECIFICALLY ASKED AND IN RESPONSE THE PARTIES HAVE BRIEFED THOSE ISSUES AND IN SOME CASES FILED A MOTION TO REMAND THE TWO CASES TO THE STATE SUPREME COURT. IN THE SANFORD SUIT, ATTORNEY GENERAL MCMASTER HAS FILED A MOTION SUGGESTING THAT THE COURT SHOULD DISMISS THE ACTION OR PERHAPS ABSTAIN.

SO, THERE WE ARE. THIS CASE INVOLVES, AMONG OTHER THINGS, QUESTIONS OF SEPARATION OF POWERS WITHIN THE STATE OF SOUTH CAROLINA. IT INVOLVES IMPORTANT QUESTIONS OF STATE

FEDERAL RELATIONS, THAT IS THE DEGREE OF DEFERENCE THIS COURT SHOULD SHOW TO THE STATE COURTS OF SOUTH CAROLINA IN TERMS OF RESOLVING STATE LAW ISSUES. IT INVOLVES THIS COURT'S REMOVAL JURISDICTION IN TERMS OF THE TECHNICAL ASPECTS OF REMOVAL, AS WELL AS WHETHER A SUBSTANTIAL RIGHT -- A SUBSTANTIVE RIGHT OF REMOVAL IS INVOLVED. IT ALSO INVOLVES A QUESTION OF STATUTORY INTERPRETATION OF THE ARRA, A HASTILY PASSED MEASURE BY CONGRESS, THAT ARGUABLY HAS SOME DRAFTING PROBLEM. AND IT INVOLVES FEDERAL INTEREST REGARDING THE SUPREMACY CLAUSE OR PERHAPS PREEMPTION ISSUES, AS WELL AS THE TENTH AMENDMENT TO THE CONSTITUTION.

IN OTHER WORDS, THIS CASE PRESENTS A CONSTITUTIONAL LAW PROFESSORS' DREAM. AND IN THAT LIGHT, I SEE MY OLD CONSTITUTIONAL LAW PROFESSOR HOWARD STRAVITZ HERE WITH HIS PENCIL SHARPENED. SOME OF YOU OWE HIM A FINDER'S FEE FOR HIS NEXT EXAM.

BEFORE CONCLUDING, LET ME STRESS WHAT THIS CASE DOES NOT INVOLVE. THIS CASE DOES NOT INVOLVE THE QUESTION OF THE POLITICAL WISDOM OF ACCEPTING OR REJECTING THE STIMULUS MONEY. THE ESSENTIAL QUESTION PRESENTED IN ALL THREE OF THESE CASES IS THE QUESTION OF WHO IS ENTITLED TO SPEAK FOR THE STATE OF SOUTH CAROLINA IN TERMS OF APPLYING FOR, ADMINISTERING, AND ACCOUNTING FOR THESE FUNDS. THE CRITICAL QUESTION THIS MORNING IS WHETHER TO REMAND BOTH THE SCASA ACTIONS AND THE EDWARDS ACTION TO THE STATE SUPREME COURT, AND WHETHER TO

DISMISS THE OUTRIGHT -- DISMISS OR OUTRIGHT ABSTAIN IN THE SANFORD ACTION ARE THE QUESTIONS BEFORE ME.

LET ME SAY AT THE OUTSET THAT I HAVE A FUNDAMENTAL BELIEF THAT THE STATE LAW QUESTIONS PRESENTED IN THESE CASES SHOULD, IF POSSIBLE, BE DECIDED BY THE SOUTH CAROLINA SUPREME COURT. THAT COURT HAD ALREADY RECEIVED BRIEFS AND WAS PREPARED TO HEAR TWO OF THE CASES LAST WEEK. QUITE OBVIOUSLY, THAT COURT IS IMMINENTLY QUALIFIED AND MOST WOULD AGREE IS THE BEST BODY TO DECIDE THE STATE'S STATUTORY AND CONSTITUTIONAL ISSUES IN THESE CASES.

OUR FEDERAL SYSTEM OF GOVERNMENT INVOLVES DUAL SOVEREIGNTY. THE FEDERAL COURT SHOULD BE WARY OF INVOLVING ITSELF IN PURELY STATE LAW ISSUES. ESPECIALLY, THOSE ISSUES THAT INVOLVE THE ALLOCATION OF POWER BETWEEN THE BRANCHES OF STATE GOVERNMENT AND THE PROVISION OF SERVICES TO SOUTH CAROLINA RESIDENTS.

I THINK I SHOULD ALSO NOTE THAT WE SIT IN THE FOURTH CIRCUIT, A CIRCUIT THAT HAS BEEN IN THE VANGUARD OF THE NOTION THAT FEDERAL GOVERNMENT -- FEDERAL COURTS OUGHT LEAVE THE STATES ALONE, PARTICULARLY IN MATTERS OF STATE GOVERNANCE.

NOW, THAT HAVING BEEN SAID, I AM MINDFUL OF THE FACT THAT THERE MAY BE AT LEAST ONE SIGNIFICANT FEDERAL SUPREMACY CLAUSE OR PREEMPTION ISSUE PRESENTED IN THESE CASES OR AT LEAST IN THE SANFORD CASE. AND FEDERAL COURTS HAVE WHAT HAS BEEN DESCRIBED AS AN UNFLAGGING OBLIGATION TO RESOLVE DISPUTES

IN QUESTIONS THAT ARE PROPERLY BROUGHT BEFORE THEM.

THERE IS ONE THING THAT EVERYBODY IN THIS CASE AGREES ON, PERHAPS THE ONLY THING EVERYBODY AGREES ON, AND THAT IS THAT TIME IS OF THE ESSENCE. SO BEFORE GETTING INTO THE ARGUMENTS, LET ME SUGGEST SOMETHING FOR YOUR CONSIDERATION. AS TO REMAND, A DECISION TO REMAND IN THE FEDERAL SYSTEM IS NOT APPEALABLE. THERE IS LAW, HOWEVER, THAT THE DISAPPOINTED LITIGANT, THE LOSING LITIGANT, ON A REMAND DECISION, MAY SEEK THE EXTRAORDINARY WRIT OF MANDAMUS IN THE FOURTH CIRCUIT. THAT MEANS THAT IF AFTER ARGUMENT TODAY I REMAND THE TWO CASES, GOVERNOR SANFORD COULD SEEK MANDAMUS; IF I DENY REMAND, POSSIBLY THE OTHER SIDE COULD SEEK MANDAMUS. EITHER WAY THE LITIGATION IS SLOWED DOWN AS THE PARTIES ENGAGE IN PROCEDURAL FENCING OVER WHERE THESE ISSUES SHOULD BE DECIDED.

BUT THERE IS ANOTHER OPTION AVAILABLE TO ME. IF I CERTIFY THE STATE LAW QUESTIONS TO THE STATE SUPREME COURT, IT WOULD PUT THE STATE ISSUES BEFORE THE STATE'S HIGHEST COURT WHERE I THINK THEY BELONG. THE FEDERAL ISSUE PRESENTED IN THE SANFORD SUIT TO REMAIN HERE TO BE DECIDED, IF NECESSARY, DEPENDING UPON WHAT THE SUPREME COURT DECIDES, WE COULD HOLD THAT HEARING AS SOON AS POSSIBLE AFTER THE SUPREME COURT DECISION.

WHAT ABOUT THAT? LET ME HEAR FIRST FROM THE GOVERNOR.

MR. FOSTER: YOUR HONOR, I WOULD LIKE TO TAKE A

MOMENT OF THE COURT'S TIME TO INTRODUCE MY PARTNER ADAM CHARNES. HE IS FROM WINSTON SALEM. HE IS A GRADUATE OF THE HARVARD LAW SCHOOL, AND FORMER CLERK FOR JUDGE WILKINSON ON THE FOURTH CIRCUIT AND JUSTICE KENNEDY ON THE SUPREME COURT.

THE COURT: VERY GOOD. NICE TO HAVE YOU HERE. BE GLAD TO HEAR FROM YOU. WHAT ABOUT MY PROPOSAL?

MR. CHARNES: YOUR HONOR, I THINK FOR CERTIFICATION --

THE COURT: FOR THE COURT REPORTER'S BENEFIT, ALL LAWYERS NEED TO COME UP TO THE PODIUM TO SPEAK.

I APOLOGIZE FOR SPRINGING THIS ON YOU, BUT THINGS HAVE BEEN MOVING SO FAST. WHAT ABOUT THAT IDEA?

MR. CHARNES: IN THE ABSTRACT, YOUR HONOR, I THINK WE THINK THAT CERTIFICATION IS PROBABLY A SUPERIOR MECHANISM TO A REMAND OR DISMISSAL. I WILL SAY, HOWEVER, THAT I THINK THE GOVERNOR'S POSITION IS THAT THE OVERRIDING LEGAL QUESTIONS IN THE CASE ARE FEDERAL QUESTIONS. IF THE COURT IS INCLINED TO CERTIFY -- CERTAINLY, THE GOVERNOR HAS ASSERTED TWO CLAIMS, ONE OF THEM IS A STATE CLAIM, A STATE SEPARATION OF POWER CLAIMS. IF THE COURT IS INCLINED TO CERTIFY THAT OR OTHERWISE SEND THAT BACK TO THE STATE SUPREME COURT IN ORDER TO EXPEDITE THE PROCEEDINGS AND AVOID THE MULTIPLICATION OF PROCEEDINGS, THE GOVERNOR WILL DISMISS THAT CLAIM WITHOUT PREJUDICE IN ORDER TO ALLOW THE COURT TO FOCUS ON THE FEDERAL CLAIM.

AS BETWEEN -- AS YOU YOUR SPECIFIC INQUIRY, I THINK CERTIFICATION IS A FINE MECHANISM AS COMPARED TO DISMISSAL OR REMAND.

THE COURT: I JUST HAVE TO ASK THIS. DOES YOUR OLD BOSS, JUDGE WILKINSON, KNOW THAT YOU ARE DOWN HERE ARGUING FOR FEDERAL INVOLVEMENT IN THE STATE LAW CASE?

MR. CHARNES: I DON'T THINK I AM GOING TO TELL HIM YET.

THE COURT: ALL RIGHT. WHAT ABOUT IT? WHO IS NEXT? HOW ABOUT SCASA? MR. CHILDS?

MR. CHILDS: MAY IT PLEASE THE COURT. I THINK THAT THE SUGGESTION THE COURT HAS MADE IS A VERY CONSTRUCTIVE AND APPROPRIATE ONE. YOU KNOW, FOR THE RECORD, OUR POSITION IS SOLIDLY THAT THERE IS NO FEDERAL JURISDICTION. BUT I THINK WHAT YOU HAVE SUGGESTED IS A WAY TO AVOID DELAY. I AM ASSUMING THAT YOU WOULD -- EVERYTHING WOULD BE PLACED ON HOLD WHILE YOU CERTIFIED THESE QUESTIONS AND.

THE COURT: PLACED ON HOLD, BUT WE WOULD BE POISED FOR IMMEDIATE HEARING IF NECESSARY. IF THE SUPREME COURT GOES ONE WAY, THERE WOULD BE NOTHING LEFT FOR ME TO DECIDE. IF THE SUPREME COURT SAYS THE GENERAL ASSEMBLY DID NOT HAVE THE AUTHORITY TO FORCE THE GOVERNOR'S HAND --

MR. CHILDS: CORRECT.

THE COURT: -- MY SANFORD CASE IS OVER. IF IT GOES THE OTHER WAY, THEN WE GET INTO THE VERY THORNY ISSUE OF HOW

TO INTERPRET THE ARRA SECTION 1607 OR 1907 -- YOU KNOW WHAT I AM TALKING ABOUT.

MR. CHILDS: I REALLY DIDN'T ANTICIPATE THE MANDAMUS OPTION. WE VERY RESPECTFULLY, YOU KNOW OUR POSITION.

THE COURT: IT IS RARELY USED AND RARELY GRANTED, BUT IT COULD GUM UP THIS CASE FOR ANOTHER WEEK OR TWO.

MR. CHILDS: I RESPECT THAT AND I THINK THE COURT HAS MADE A VERY CONSTRUCTIVE AND APPROPRIATE SUGGESTION.

THE COURT: LET ME ASK YOU. DOES YOUR CASE, AS BETWEEN THE TWO, YOUR CASE, THE SCASA CASE, YOU SEEM TO HAVE VERY CAREFULLY CRAFTED YOUR COMPLAINT TO RAISE ONLY STATE LAW ISSUES.

MR. CHILDS: CORRECT. THAT IS ABSOLUTELY OUR POSITION. THERE IS NO FEDERAL QUESTION IN OUR COMPLAINT.

THE COURT: WHAT ABOUT THE FEDERAL QUESTION IN THE SANFORD CASE? TO MY MIND, IT IS A VERY TOUGH ISSUE ON THAT DISPUTED PROVISION OF THE LAW. THE AMENDMENT, I THINK EVERYONE WOULD AGREE, WAS DESIGNED TO ALLOW STATE LEGISLATURES TO OVERRIDE THEIR GOVERNORS, BUT IT WAS, I THINK, INARTFULLY DRAFTED, BECAUSE IT DOES NOT COVER THE FULL SCOPE OF THE LEGISLATION.

MR. CHILDS: WELL, YOUR HONOR, IN ABSOLUTE CANDOR, MY PREFERENCE WOULD BE THAT YOU REMAND OUR CASE IMMEDIATELY TO THE SUPREME COURT. OBVIOUSLY, I THINK YOU HAVE SUGGESTED A CONSTRUCTIVE ALTERNATIVE, ONE THAT WILL SERVE THE BEST

INTEREST OF THE COURT SYSTEM, AND THE COMMUNITY, AND THE STATE. I WOULD PREFER THAT THE ATTORNEY GENERAL'S OFFICE ADDRESS THE SANFORD QUESTION.

THE COURT: I WILL ASK YOU, BECAUSE YOU FILED TO INTERVENE IN THE SANFORD CASE.

MR. CHILDS: RIGHT. I AGREE WITH THE COURT'S CHARACTERIZATION OF THAT. THERE IS, OBVIOUSLY, YOU KNOW, WE ARE PREPARED TO ARGUE THAT CASE SHOULD BE DISMISSED. BUT WE RECOGNIZE THAT A DISMISSAL WOULD BE APPEALABLE. AND I THINK IT WOULD BE MUCH MORE EFFICIENT, I THINK EVERYBODY WILL FEEL MORE COMFORTABLE IN THIS CASE WHEN THE SOUTH CAROLINA SUPREME COURT IS GIVEN AN OPPORTUNITY TO OPINE ON THE ISSUES, THE FUNDAMENTAL ISSUES.

THE COURT: BUT AS TO THE STATE LAW, WHAT I AM GETTING AT IS, I MAY HAVE TO WEIGH IN ULTIMATELY ON THE FEDERAL ISSUE. AND I AM JUST STRUGGLING, IS THERE ANY WAY THAT THE STATE SUPREME COURT, THEY CAN RULE ON U. S. CONSTITUTION, AS WELL.

MR. CHILDS: ABSOLUTELY. THAT IS OUR POSITION. OF COURSE, AGAIN, WE SAY THERE IS NO FEDERAL JURISDICTION. WE UNDERSTAND THE GOVERNOR IS GOING TO RAISE AND HAS ALREADY RAISED A FEDERAL DEFENSE TO OUR COMPLAINT. THE LONTZ CASE IS VERY CLEAR THAT THAT DOESN'T AFFECT THE RIGHT TO REMOVE IT. AND I THINK IT SHOULD BE CLEAR TO THE PEOPLE OF THE STATE, AND IT IS CLEAR TO YOUR HONOR THAT THE SOUTH CAROLINA SUPREME

COURT IS PERFECTLY CAPABLE OF ADDRESSING FEDERAL ISSUES. AND MOST IMPORTANTLY, IF ONCE THEY ADDRESS THOSE ISSUES, THEIR DECISION IS REVIEWABLE BY THE U.S. SUPREME COURT. SO, THAT WOULD BE CERTAINLY THE MOST EFFICIENT WAY TO HANDLE THIS CASE.

THE COURT: ALL RIGHT.

WHO WILL SPEAK FOR THE EDWARDS CASE?

MR. HARPOOTLIAN: PLEASE THE COURT, YOUR HONOR.

THE COURT: MR. HARPOOTLIAN.

MR. HARPOOTLIAN: YOUR HONOR, AS YOU CAN SEE WE ARE CHATTERING OVER THERE ABOUT THE PROPOSAL.

THE COURT: I MEANT TO SAY, I THOUGHT ABOUT SENDING THIS OUT OVER THE WEEKEND FOR YOU TO CONSIDER, I APOLOGIZE FOR SPRINGING IT ON YOU AT THE LAST MINUTE. BUT WE NEED TO THINK IT ALL THROUGH VERY CAREFULLY.

MR. HARPOOTLIAN: YES, SIR. I THINK INITIALLY, I SAID, WELL, THAT SOUNDS PRETTY GOOD. AS WE THOUGHT ABOUT IT, I AM REMINDED WHAT HAPPENED LAST WEEK. WHAT HAPPENED LAST WEEK WAS, STARTING THE WEEK BEFORE, AND I WANT TO TAKE JUST A SECOND TO REVIEW THIS WAS THAT THE SUPREME COURT GRANTED ORIGINAL JURISDICTION ON CASEY EDWARDS AND JUSTIN WILLIAMS' PETITION. SENT OUT AN ORDER FRIDAY A WEEK AGO INSTRUCTING THE ATTORNEY GENERAL TO ANSWER AND ANYONE THAT WANTED TO INTERVENE, INCLUDING THE GOVERNOR, TO DO SO BY 1:00 O'CLOCK ON LAST TUESDAY. THE GOVERNOR -- ATTORNEY GENERAL ANSWERED AND AGREED THAT THE -- THE PROPERTIES WERE -- THE PARTIES WERE

PROPER. THAT THERE WAS NO QUESTION ABOUT THERE BEING A CASE IN CONTROVERSY. AND WE SHOULD HAVE -- THE SUPREME COURT SHOULD TAKE ORIGINAL JURISDICTION, NOT ONLY ON THE STATE ISSUES, BUT ON THE FEDERAL ISSUES ALSO.

THE COURT: YOU WOULD SUBMIT YOUR CASE RAISES A FEDERAL ISSUE, AS WELL?

MR. HARPOOTLIAN: YES, SIR. ABSOLUTELY. EVERY ISSUE THAT NEEDS TO BE DECIDED IN THIS CASE CAN BE DECIDED IN THE EDWARDS CASE. THE GOVERNOR WROTE BACK TO THE SUPREME COURT AND SAID THAT HE WAS -- TO THE COURT:

> "WE REPRESENT MARK SANFORD IN THE ARRA CASE. SINCE GOVERNOR SANFORD IS NOT A PARTY TO THE ABOVE-DESCRIBED CASE, HE WILL NOT BE MAKING RESPONSIVE PLEADING OR APPEARING IN IT."

THAT WAS ON LAST TUESDAY. ON WEDNESDAY, AFTER THE DEADLINE HAD PASSED, AND, BY THE WAY, THE COURT HAD SET A HEARING FOR 2:30 ON THURSDAY, THE ATTORNEY GENERAL HAD ANSWERED, WE HAD NOT -- WE WERE ASKED NOT TO BRIEF IT, THERE WERE NO BRIEFS FILED, BUT WE WERE WORKING VERY HARD TO GET READY TO ARGUE EVERY ISSUE, FEDERAL AND STATE, BEFORE THE SOUTH CAROLINA SUPREME COURT.

THE COURT: THERE WERE NO BRIEFS FILED IN YOUR CASE?

MR. HARPOOTLIAN: NO BRIEFS. WE FILED MEMORANDUMS

WITH OUR RESPECTIVE MOTIONS. WE HAD OUTLINED OUR POSITIONS, MEMORANDA ON THE MOTION FOR ORIGINAL JURISDICTION AND THE ATTORNEY GENERAL FILED A MEMORANDUM ALSO. SO, IT HAD BEEN FULLY BRIEFED, I DON'T WANT TO GIVE THE IMPRESSION, BUT THEY DIDN'T REQUIRE ADDITIONAL BRIEFS. ON FEDERAL AND STATE ISSUES, THE INTERPRETATION OF THE FEDERAL STATUTE AND ON THE STATE ISSUES.

ON WEDNESDAY, THE GOVERNOR FILED A MOTION TO INTERVENE. NOW, WE DIDN'T GET NOTICE OF IT BECAUSE IF WE HAD WE WOULD HAVE RAISED SOME ISSUE WITH THE SUPREME COURT ABOUT HOW TO GRANT THAT IF THEY -- WE WANTED THEM IN IT, BUT HOW TO GRANT IT. AND THE SUPREME COURT DID GRANT IT. AND THEY SAID, IN A FOOTNOTE:

> "WE ASSUME THE GOVERNOR WILL CONTINUE TO MEET THE REQUIREMENTS OF INTERVENTION AND JOINDER, INCLUDING THE REQUIREMENT THAT HIS JOINDER NOT DEPRIVE THIS COURT OF JURISDICTION OVER THE SUBJECT MATTER OF THIS ACTION."

WHICH IS CONSISTENT WITH RULE 19. AND WHAT DID HE DO WITHIN FIFTEEN MINUTES OF GETTING HIS MOTION FOR INTERVENTION GRANTED? REMOVED IT TO FEDERAL COURT, VIOLATING SOUTH CAROLINA RULES OF PROCEDURE, WHICH I DON'T THINK ARE BINDING ON THIS COURT IN TERMS OF A REMAND, BUT CERTAINLY IT INDICATES IN MY

OPINION, YOUR HONOR, SOME SENSE, SOME EFFORT TO NOT HAVE THIS RESOLVED.

SO LET'S WALK THROUGH THE DIFFERENT SCENARIOS VERY QUICKLY. IF YOU REMAND THIS CASE ON THE ISSUE OF WHETHER OR NOT THE STATE OF SOUTH CAROLINA IS A NOMINAL PARTY, AND WHETHER IF THEY ARE NOT, WE SUBMIT THEY ARE NOT, THEN IT GOES BACK TO -- THEY DIDN'T GET THEIR CONSENT, THEY DON'T CONSENT, IT GOES BACK TO THE SOUTH CAROLINA SUPREME COURT TODAY. AND THEY CAN ARGUE THIS BEFORE THE END OF THE WEEK. THE ONLY APPEAL TO THAT IS TO THE -- FROM THAT IS TO THE UNITED STATES SUPREME COURT. AND MY STUDY OF THE LAW IS THAT WOULD NOT STAY THE STATE FROM GOING AHEAD AND APPLYING FOR AND GETTING THE FUND, IF THEY RULE OUR WAY. IF THEY RULE AGAINST US, THEN THE LEGISLATURE WILL NEED TO MEET AND CUT SEVERAL HUNDRED MILLION DOLLARS OUT OF THE BUDGET TO GET IT RESOLVED. EITHER ONE OF THOSE OPTIONS HAS TO HAPPEN SOONER THAN LATER.

IF YOUR HONOR CERTIFIES QUESTIONS BACK TO THE SUPREME COURT AND RETAINS JURISDICTION OVER THE FEDERAL ISSUES, AND THE FEDERAL ISSUES ARE NOT RESOLVED, IF YOU CERTIFY SPECIFIC QUESTIONS OF STATE LAW, THE FEDERAL ISSUES STILL REMAIN WITH YOU, IT COMES BACK HERE BY THE END OF THE WEEK FOR SAKE OF ARGUMENT, YOU DECIDE WE ARE GOING TO RICHMOND. MY EXPERIENCE WITH RICHMOND IS WE COULD NOT GET THAT RESOLVED BEFORE JULY 1. AND AGAIN WHAT THE GOVERNOR HAS DONE IS DELAYED IT BEYOND THE JULY 1 APPLICATION DATE.

THE COURT: YOU SKIPPED OVER MY CONCERN THAT IF I REMAND THE CASE, YOU MAY BE GOING TO RICHMOND, TOO.

MR. HARPOOTLIAN: ON MANDAMUS? WELL, I THINK TWO THINGS. NUMBER ONE, MANDAMUS I DO NOT BELIEVE WOULD ENJOIN, UNLESS IT IS GRANTED, WOULD NOT ENJOIN IT GOING TO THE STATE SUPREME COURT PROCEDURALLY. AND, TWO, I THINK IT IS SANCTIONABLE IN THIS CASE AND I WILL ASK FOR SANCTIONS SHOULD THEY DO THAT. AND THERE ARE PLENTY OF CASES INDICATING WHERE THERE IS NO ISSUE. IF THEY ARE NOT A NOMINAL PLAINTIFF -- A DEFENDANT, AND THEY DIDN'T GET THEIR CONSENT, THAT IS AS SIMPLE AN ISSUE AS THERE CAN BE AND I DON'T BELIEVE ANYBODY ON THE FOURTH CIRCUIT, ESPECIALLY IN LIGHT OF -- THE FOURTH CIRCUIT HAS TAKEN THE POSITION THAT SOMETIMES, OVERWHELMINGLY, MANY TIMES OVERWHELMINGLY, THAT THE FEDERAL COURTS OUGHT TO LET THE STATES RESOLVE THEIR PROBLEMS. THE FEDERAL ISSUE IN THIS CASE IS ALMOST TANGENTIAL. THERE IS AN INTERPRETATION NEEDED, BUT YOU NEVER GET TO THAT ISSUE IF THEY FIND THAT THE GENERAL ASSEMBLY DIDN'T HAVE THE AUTHORITY TO DO WHAT THEY DID.

SO, YOUR HONOR, I FIND IT BIZARRE TO BE STANDING UP HERE ARGUING AGAINST THE REPUBLICAN GOVERNOR OF THE STATE OF SOUTH CAROLINA, THAT THE FEDERAL COURTS OUGHT TO ABSTAIN FROM INVOLVING HIMSELF IN STATE MATTERS. I MEAN, THIS IS -- MR. MCMASTER SAID THE OTHER DAY, THESE ARE STATE'S RIGHTS. HENRY AND I MAY NOT AGREE ON A LOT, BUT WE AGREE ON THIS.

I WOULD SAY TO YOU THAT EXPEDITIOUSLY, THE BEST WAY TO DO THIS IS HEAR THAT VERY NARROW ISSUE THIS MORNING, IS THE STATE OF SOUTH CAROLINA A NOMINAL PARTY? IF THEY ARE NOT, THEN WE ARE GOING BACK TO STATE COURT AND LET THE STATE SUPREME COURT RESOLVE ALL OF THESE ISSUES. THEY WANT TO GO TO RICHMOND ON MANDAMUS? THAT IN NO WAY CONCERNS ME ON THESE ISSUES. THE NOMINAL PARTY ISSUE, YOUR HONOR, I THINK IS OVERWHELMINGLY IN THE FAVOR OF THE STATE OF SOUTH CAROLINA. SO, I WOULD SUGGEST, PLEASE --

THE COURT: JUST TO THINK IT THROUGH, THE STATE SUPREME COURT SET ARGUMENT YOU SAID WITHOUT EVEN BRIEFING, THEY WERE POISED TO ACT VERY RAPIDLY. IT IS LIKELY IF I DID REMAND IT, THE STATE SUPREME COURT WOULD HEAR THE CASE BEFORE THE FOURTH CIRCUIT COULD CONSTITUTE A PANEL TO LOOK AT THE MANDAMUS.

MR. HARPOOTLIAN: I SUGGEST IF YOU RULE TODAY WE WILL BE ARGUING TOMORROW OR THURSDAY. BY THE WAY, WE WERE READY TO ARGUE LAST THURSDAY. WE ARE READY TO ARGUE RIGHT NOW. WE HAD TO STOP WHAT WE WERE DOING AND GET READY FOR THIS, AGAIN, DELAYING. ALL OF THIS COULD HAVE BEEN RESOLVED LAST THURSDAY, BUT FOR THE GOVERNOR'S REMOVAL. THIS CASE WOULD BE OVER, BUT FOR HIS REMOVAL.

SO, I THINK THAT, YOU KNOW, THERE IS A STRATEGY HERE ON THE PART OF THE GOVERNOR TO DELAY THIS MATTER RATHER THAN ALLOWING IT TO GET TO ITS FRUITION LEGALLY, ONE WAY OR THE

OTHER. I AM NOT CRITICIZING THAT EXCEPT THAT IT MAY BE VERY -- IT MAY BE HIS LEGAL STRATEGY TO DO THAT. WE HAVE ALL SEEN LITIGATION WHICH DELAYS TURNED OUT TO BE SOMEBODY'S FRIEND. THIS ISSUE NEEDS TO BE RESOLVED BEFORE JULY 1 OR THE MONEY GOES AWAY.

THE COURT: LET'S FOCUS ON THE FEDERAL ISSUE FOR JUST A MINUTE. GRANTED, AS I SAID, THERE ARE MANY, MANY STATE LAW ISSUES, STATUTORY AND CONSTITUTIONALLY MAYBE, THAT I SAID CLEARLY NEED TO BE DECIDED BY THE STATE SUPREME COURT. BUT THERE IS A FEDERAL ISSUE THAT THE GOVERNOR RAISED IN HIS SUIT THAT HE FILED HERE THAT HE FILED FIRST. SO, I MEAN, IS THERE NOT SOME CORRESPONDING FEDERALISM ISSUE WHERE THE FEDERAL COURTS OUGHT TO RESOLVE THE FEDERAL ISSUE?

MR. HARPOOTLIAN: THE CASES ARE CLEAR THAT STATE SUPREME COURT HAS --

THE COURT: THEY CAN. CERTAINLY. THEY CAN RULE ON A U. S. CONSTITUTION JUST AS I CAN. BUT THE GOVERNOR PAID HIS FILING FEE AND BROUGHT A SUIT HERE, AND I HAVE AN UNFLAGGING OBLIGATION TO RULE ON ISSUES PROPERLY BEFORE ME. NOW, WE STILL HAVE THE ELEVENTH AMENDMENT ISSUE WE STILL NEED TO ADDRESS. I REALIZE THAT.

MR. HARPOOTLIAN: I MEAN, FIRST OF ALL, HE SUED THE ATTORNEY GENERAL AS A STAND-IN FOR THE STATE OF SOUTH CAROLINA. THAT IS LIKE SUING -- WANTING TO SUE MICROSOFT AND SUE THEIR LAWYER. I THINK IT IS CUTE, BUT, YOUR HONOR, I

WOULD SUBMIT TO YOU THAT THERE IS THE 11TH AMENDMENT, THE ISSUE OF WHETHER IT IS THE PROPER PARTY -- WHAT I WOULD ASK YOU TO DO ON THAT CASE IS STAY IT. AND IF THE SOUTH CAROLINA SUPREME COURT DOES NOT RESOLVE ALL OF THE ISSUES IN THE EDWARD CASE AND I DON'T KNOW THAT YOU NEED TO REMAND THE OTHER CASE BACK TOO IF YOU WANT, I MEAN, THERE IS A LITTLE DIFFERENT ISSUE ABOUT --

THE COURT: WELL, MR. CHILDS JUST TOLD ME THEY DIDN'T PLEAD THE FEDERAL ISSUE IN THEIR CASE.

MR. HARPOOTLIAN: THAT IS RIGHT. SO, IF YOU SENT THAT BACK, IT WOULD NOT RESOLVE THE FEDERAL ISSUE. WE HAVE BOTH PLED IN OUR CASE. IF YOU SENT US BACK, THE SUPREME COURT CAN CERTAINLY RESOLVE THE STATE ISSUES, AND I THINK CAN RESOLVE THE FEDERAL ISSUES. BUT IF THEY DON'T, YOU STILL HAVE THE SANFORD VERSUS MCMASTER SUIT PENDING, AND YOU COULD REV THAT UP FOR LATER ON IN THE WEEK. BUT GIVE THE SOUTH CAROLINA SUPREME COURT A CHANCE TO RESOLVE IT. AND IF THEY DON'T RESOLVE ALL OF THE ISSUES IN A FASHION THAT YOU DEEM APPROPRIATE, THEN YOU -- IN TERMS OF FEDERAL ISSUE, CERTAINLY YOU WOULD STILL HAVE THE MATTER PENDING BEFORE YOU.

THE COURT: WELL, THE CONCERN I HAVE ABOUT CERTIFYING THE QUESTION IS PROFESSOR STRAVITZ MAY GIVE ME BAD GRADES FOR CERTIFYING A QUESTION IN A CASE WHERE MY JURISDICTION IS QUESTIONED WITHOUT RESOLVING THAT QUESTION.

MR. HARPOOTLIAN: I TALKED TO HIM RIGHT BEFORE THE

HEARING, THAT IS EXACTLY WHAT HE SAID.

THE COURT: THE POINT IS, I CAN CERTIFY QUESTIONS, CLEARLY, BUT CAN I DO SO IN A CASE THAT MIGHT NOT NEED -- MAYBE IS NOT SUPPOSED TO BE HERE?

MR. HARPOOTLIAN: THAT IS WHY I SUGGEST WE DEAL WITH THE NOMINAL DEFENDANT WAIVER ISSUE BEFORE WE GET TO ANYTHING ELSE. IT SEEMS TO ME IF WE DO THAT, YOU RESOLVE THAT IN FAVOR OF THE ATTORNEY GENERAL, THEN WE ARE GOING BACK TO STATE COURT. OF COURSE, YOU STAY THE GOVERNOR'S LAWSUIT AGAINST THE ATTORNEY GENERAL, IN TERMS OF THE REX LAWSUIT, I REALLY DON'T HAVE A DOG IN THAT FIGHT, BUT IF IT STAYS UP HERE OR GOES BACK, IT REALLY DOESN'T MATTER. IF YOU GO AHEAD AND SEND US BACK, IF THAT IS WHAT YOU DEEM IS APPROPRIATE UNDER THE REMOVAL STATUTE IN CASES THAT THEY ARE NOT A NOMINAL PLAINTIFF, THEN I WOULD SUBMIT TO YOU IT RESOLVES ALL OF THESE ISSUES.

THE COURT: LET'S GO AHEAD AND HEAR THE REMAND QUESTION. WHICH WAS FILED FIRST, SCASA OR EDWARDS?

MR. HARPOOTLIAN: EDWARDS WAS FILED FIRST. YOUR HONOR, LET ME, IF I MIGHT JUST ADD THIS. AS I UNDERSTAND THE CASE LAW, AND I DIDN'T BRING IT UP HERE WITH ME, BUT AS WE READ IT THE BURDEN IS ON THE GOVERNOR TO SHOW THAT REMOVAL WAS PROPER.

THE COURT: ANY DOUBTS ABOUT REMOVAL RESOLVED IN FAVOR FOR REMAND?

MR. HARPOOTLIAN: YES, SIR. UNLESS MR. COOK OR MR. JONES OR ATTORNEY GENERAL DISAGREE, I WOULD SUBMIT THAT PERHAPS -- AND WE WILL BE HAPPY TO GO FIRST.

THE COURT: I NEED TO HEAR FROM THE AG AND DR. REX ON THE CERTIFICATION QUESTION. THEY MIGHT HAVE SOME INSIGHT THAT WE HAVEN'T TALKED ABOUT. ANY INPUT FROM --

MR. HARPOOTLIAN: THANK YOU, YOUR HONOR.

MR. COOK: GOOD MORNING, YOUR HONOR.

THE COURT: MR. COOK.

MR. COOK: ON THE SANFORD CASE, OF COURSE, WE AGREE WITH THE PLAINTIFF IN THE EDWARDS CASE. WE THINK THAT MATTER IS -- CAN BE STAYED OR RESERVED OR HELD IN ABEYANCE BECAUSE WE ARE GOING TO RAISE THE ELEVENTH AMENDMENT IN THAT CASE, AS WELL AS A NUMBER OF OTHER DEFENSES. AND I AGREE WITH WHAT YOU JUST SAID, THAT IT RAISES A SEVERE QUESTION OF CERTIFICATION IF YOU DO NOT HAVE JURISDICTION UNDER THE ELEVENTH AMENDMENT. THAT IS GOING TO BE AN ISSUE IN THE SANFORD CASE. SO --

THE COURT: I GUESS I COULD TECHNICALLY. I COULD LET EVERYBODY TODAY ORALLY MOVE TO INTERVENE IN THE SANFORD CASE. ALLOW INTERVENTION AND THEN CERTIFY IT MAYBE. IT IS HAPPENING PRETTY FAST.

MR. COOK: YES, SIR. IT IS HAPPENING FAST. BUT WE WOULD ASK THAT THAT CASE BE DEFERRED. ON THE EDWARDS CASE, WE AGREE WITH MR. HARPOOTLIAN THAT REMAND IS REQUIRED. WE

HAVE A VERY STRONG, WE THINK, ELEVENTH AMENDMENT ARGUMENT, BUT THE FACT OF THE MATTER, YOUR HONOR, WE NEVER CONSENTED TO REMOVAL. EMORY SMITH AND I WERE PREPARING FOR THE ARGUMENT THE NEXT DAY WHEN WE WERE SERVED WITH THE REMOVAL PAPERS. WE DID NOT CONSENT. THE GOVERNOR'S OFFICE HAD ASKED US SEVERAL TIMES DURING THE COURSE OF ALL OF THESE PROCEEDINGS IN EDWARDS IF WE WOULD CONSENT AND WE DID NOT. WE SAID WE WOULD NOT CONSENT BECAUSE OF THE ELEVENTH AMENDMENT. SO, WE NEVER CONSENT REMOVAL TO FEDERAL COURT AS THE STATE OF SOUTH CAROLINA, THAT IS JUST AN ABSOLUTE. AND SO TO CALL THE STATE OF SOUTH CAROLINA A NOMINAL PARTY HERE IS BASICALLY JUST WRONG. WE ARE SUED ALL THE TIME IN THE STATE SUPREME COURT AS AN INTERESTED PARTY. THE CONDON VERSUS HODGES CASE, WHICH I PARTICIPATED IN, SAYS THAT THE STATE IS ALWAYS AN INTERESTED PARTY IN MATTERS INVOLVING SERIOUS QUESTIONS OF STATE LAW AND STATE CONSTITUTIONAL LAW. AND SO WE ARE NOT -- THE STATE OF SOUTH CAROLINA, THIS IS NOTHING NEW THAT THE STATE IS SUED. TO HOLD IN THIS CASE THAT THE STATE IS A NOMINAL PARTY IS JUST, IN MY JUDGMENT, ERRONEOUS.

AND IF I COULD, YOUR HONOR, JUST ONE MINUTE READ YOU WHAT THE SUPREME COURT SAID IN CONDON VERSUS HODGES, AND I THINK YOU WILL SEE WHY THE STATE IS NOT A NOMINAL PARTY IN THIS CASE. AS YOU RECALL IN CONDON, THE ATTORNEY GENERAL BROUGHT A LAWSUIT AGAINST THE GOVERNOR FOR UNCONSTITUTIONAL TRANSFER OF FUNDS THAT HAD BEEN APPROPRIATED FOR A CERTAIN

PURPOSE IN THE APPROPRIATIONS ACT. THE GOVERNOR TRANSFERRED THOSE FUND TO ANOTHER PURPOSE. AND THE COURT TOOK ORIGINAL JURISDICTION IN THAT CASE ON BEHALF OF THE ATTORNEY GENERAL REPRESENTING THE STATE OF SOUTH CAROLINA. AND HERE IS WHAT THE COURT SAID:

> "THE STATE IS AN INTERESTED PARTY IN THIS ACTION. THE WAY IN WHICH PUBLIC FUNDS ARE HANDLED AND WHETHER A VIOLATION OF SEPARATION OF POWERS DOCTRINE HAS OCCURRED ARE CLEARLY QUESTIONS IN WHICH THE STATE HAS AN INTEREST. BY BRINGING THE ACTION AGAINST THE GOVERNOR, THE ATTORNEY GENERAL IS SIMPLY DOING WHAT SECTION 1-7-40 ALLOWS, WHICH IS TO APPEAR FOR THE STATE IN TRIAL AND ARGUMENT OF A CASE IN WHICH THE STATE IS INTERESTED."

SO, WE DON'T THINK WE ARE HERE PROPERLY. WE DID NOT CONSENT TO BE HERE. UNDER THE REMAND STATUTES, IT IS VERY CLEAR THAT THIS CASE NEEDS TO GO BACK BECAUSE ALL OF THE PARTIES DID NOT CONSENT AND THE STATE IS NOT A NOMINAL PARTY.

THE COURT: ALL RIGHT. THANK YOU, SIR.

WHAT ABOUT DR. REX?

MS. KELLY: MAY IT PLEASE THE COURT.

THE COURT: YES, MA'AM.

MS. SPEARMAN: LIKE THE STATE OF SOUTH CAROLINA --

THE COURT: GIVE ME YOUR NAME.

MS. KELLY: SHELLY KELLY.

THE COURT: MS. KELLY. VERY GOOD.

MS. KELLY: THE REMOVAL IN THIS CASE WAS DEFECTIVE, AS WELL. THE SUPERINTENDENT DID NOT CONSENT TO THE REMOVAL. HE IS NAMED AS A DEFENDANT. HE IS NOT A NOMINAL DEFENDANT AS HAS BEEN ALLEGED. THERE IS A SEPARATE CAUSE OF ACTION, CAUSE OF ACTION NUMBER THREE IN SCASA'S COMPLAINT, THAT SPECIFICALLY ASKS FOR THE COURT TO DECLARE THAT HE HAS AUTHORITY -- THAT HE IS ACTUALLY EMPOWERED BY THE GENERAL ASSEMBLY TO ACT ON BEHALF OF THE GOVERNOR. AND THIS SEPARATE CAUSE OF ACTION IS SOMETHING THAT WOULD REQUIRE PROOF, INTERPRETATION OF THE STATE STATUTES. IT IS NOT SOMETHING THAT HE WOULD CONSENT TO BE REMOVED INTO FEDERAL COURT.

I AM CONCERNED AS WELL ABOUT THE TIMELINESS. WE DO ANTICIPATE, IF YOUR HONOR KEEPS JURISDICTION, THAT WHATEVER THE RESULT THERE IS LIKELY TO BE AN APPEAL. SO THE QUESTION OF WHETHER THERE BE A MANDAMUS REQUEST BASED ON THE REMAND TO THE SUPREME COURT, I DON'T THINK WOULD DELAY ANY MORE THAN IF YOU WERE TO RULE ON THE MERITS OF THE CASE. SO WE WOULD --

THE COURT: YOU DO NOT FAVOR CERTIFICATION, IN OTHER WORDS?

MS. KELLY: NO, SIR. I WOULD RATHER REMAND TO THE

SUPREME COURT. AGAIN, WE BELIEVE THAT THE REMOVAL IS DEFECTIVE BECAUSE THERE WAS NO CONSENT. DR. REX IS NOT A NOMINAL PARTY.

THE COURT: LET ME GO BACK TO MR. CHARNES, I'M SORRY.

AS GOOD AS IT SOUNDED, I AM JUST CONCERNED THAT BY CERTIFYING I WOULD BE ACTING TO EXERCISE JURISDICTION IN A CASE WHERE MY JURISDICTION IS REASONABLY CHALLENGED AND WITHOUT DECIDING A JURISDICTIONAL QUESTION.

MR. CHARNES: I CERTAINLY UNDERSTAND THAT CONCERN, YOUR HONOR.

THE COURT: I AM STRUGGLING WITH A WAY TO GET THIS CASE RESOLVED FINALLY WITH THE MINIMUM OF DISRUPTION IN PROCEDURAL FENCING.

MR. CHARNES: LET ME, I THINK THAT THE PRIMARY STATE LAW QUESTION THAT IS NOW EXISTING IN THE THREE CASES IS THE GOVERNOR'S SEPARATION OF POWERS CLAIM IN THE SANFORD VERSUS MCMASTER CASE, AND WE DISMISS THAT CLAIM.

THE COURT: YOU ARE NOW MOVING TO DISMISS IT?

MR. CHARNES: WE MOVE TO DISMISS THAT CLAIM.

THE COURT: ANY OBJECTION?

THE GOVERNOR'S SECOND CLAIM, SEPARATION OF POWERS CLAIM, WHICH IS A PURE STATE LAW QUESTION, RAISED IN HIS COMPLAINT, UNLESS I HEAR OBJECTION IS DISMISSED WITHOUT PREJUDICE.

MR. CHARNES: THANK YOU, YOUR HONOR.

WITH RESPECT TO THE OTHER STATE LAW QUESTIONS, WE REALLY THINK THAT THEY ARE RELATIVELY INSUBSTANTIAL. THE APPROPRIATIONS STATUTE IS PRETTY CLEAR. THE GENERAL ASSEMBLY WAS PRETTY STRAIGHTFORWARD IN WHAT IT REQUIRED. WE SIMPLY DON'T SEE ANY DIFFICULT QUESTIONS OR UNRESOLVED QUESTIONS OF STATE LAW. BE HAPPY TO HEAR WHAT MY COLLEAGUES THINK ARE THOSE STATE QUESTIONS THAT SHOULD BE SENT TO THE STATE SUPREME COURT. BUT WE CERTAINLY UNDERSTAND WHY THIS COURT WOULD BE CONCERNED ABOUT DECIDING SEPARATION OF POWERS CLAIM WHEN EVEN THOUGH THE COURT CLEARLY HAS JURISDICTION TO DO SO.

THE COURT: I DIDN'T MENTION JUDGE WILKINSON FACETIOUSLY. YOU WOULD AGREE THAT THE FOURTH CIRCUIT ALMOST ALONE AMONG CIRCUITS HAS REALLY STRONGLY ISSUED OR SENT SIGNALS TO TRIAL JUDGES TO STAY OUT OF THE STATE'S BUSINESS, ESPECIALLY ON MATTERS OF STATE GOVERNANCE, HAVEN'T THEY?

MR. CHARNES: I THINK THAT IS GENERALLY TRUE, BUT HERE CONGRESS HAS SPOKEN IN ARRA, I WILL CALL IT ARRA. AND CONGRESS HAS CLEARLY SAID, WE THINK, THAT WITH RESPECT TO THE STABILIZATION OF FUND MONIES THAT THE GOVERNOR OF THE STATE IS THE OFFICIAL WHO IS RESPONSIBLE FOR DECIDING, A, WHETHER TO REQUEST THE MONEY, B, HOW TO SPEND IT. AND CONGRESS HAS SPOKEN IN THIS WAY UNDER THE SPENDING CLAUSE, THERE ARE A LEGION OF CASES THAT SAY THAT CONGRESS CAN DICTATE TO THE STATES IF THEY ACCEPT THE MONEY THE CONDITIONS THAT GO WITH IT.

THE COURT: LET'S GO INTO THE REMAND QUESTION. YOU ARE ON YOUR FEET, YOU REPRESENT THE GOVERNOR. THE BURDEN IS ON YOU TO SHOW THAT REMOVAL WAS PROPER IN BOTH OF THESE CASES. LET'S -- EVERYBODY IS HERE. IT HAS BEEN BRIEFED. I STILL RESERVE THE OPTION TO CONSIDER CERTIFICATION, BUT I THINK I NEED TO HEAR ARGUMENT ON WHETHER I HAVE JURISDICTION OVER THE TWO REMOVED CASES.

MR. CHARNES: WHY DON'T I START WITH THE EDWARDS CASE?

THE COURT: ALL RIGHT.

MR. CHARNES: OUR POSITION IS, OF COURSE, THAT THE STATE CONSENT -- FIRST OF ALL, WE CONCEDE IN ORDINARY CIRCUMSTANCES ALL DEFENDANTS MUST CONSENT TO REMOVAL, THAT IS CIVIL PROCEDURE 101. THERE ARE ALSO WELL-ESTABLISHED EXCEPTIONS TO THAT RULE. ONE OF THE EXCEPTIONS IS THAT NOMINAL PARTIES NEED NOT CONSENT. ANOTHER EXCEPTION IS THAT FRAUDULENTLY JOINED PARTIES NEED NOT CONSENT. AS WE POINTED OUT IN OUR BRIEF, FRAUDULENT JOINDER DOESN'T REALLY MEAN FRAUD, IT IS A LEGAL TERM OF ART. WE ARE NOT SUGGESTING THAT ANYBODY COMMITTED FRAUD HERE IN THEIR PLEADINGS. OUR POSITION IS THAT BOTH EXCEPTIONS TO THE CONSENT REQUIREMENT APPLY WITH RESPECT TO THE STATE AS DEFENDANT IN THE EDWARDS CASE. THE REASON IS THAT, FIRST OF ALL, I SHOULD SAY THAT THE QUESTION OF WHO IS A NOMINAL PARTY IS A QUESTION OF FEDERAL LAW NOT STATE LAW. SO, WHATEVER THE STATE SUPREME

COURT HAS SAID WITH RESPECT TO THE ATTORNEY GENERAL'S RIGHT TO LITIGATE ON BEHALF OF THE STATE OR IN THE NAME OF THE STATE IN STATE COURT IS NOT THE ISSUE IN FEDERAL COURT. IN FEDERAL COURT, THE QUESTION IS WHETHER UNDER FEDERAL LAW THE STATE IS A REAL PARTY IN INTEREST OR NOT.

WHAT THE FEDERAL COURTS HAVE SAID IS THAT FOR A STATE TO BE MORE THAN NOMINAL, FOR A STATE TO BE A REAL PARTY AT INTEREST, THE JUDGMENT REQUESTED BY THE PLAINTIFF MUST HAVE A COERCIVE EFFECT ON THE DEFENDANT IF IT IS GRANTED. THE PLAINTIFF MUST SEEK A REMEDY THAT WOULD ORDER THE DEFENDANT TO PAY MONEY OR TAKE CERTAIN ACTION OR NOT TAKE CERTAIN ACTION OR OTHERWISE AFFECT THE STATES, IN THIS CASE THE STATE'S LEGAL RIGHTS, OR ITS OBLIGATIONS AS A STATE. CERTAINLY, THE STATE, IN A GENERAL SENSE, IS INTERESTED IN -- HAS AN INTEREST IN WHETHER THE STIMULUS MONEY IS PAID TO THE STATE TREASURY, BUT THAT IS NOT THE QUESTION. THE QUESTION IS WHETHER ITS LEGAL RIGHTS OR LEGAL INTERESTS WILL BE AFFECTED. WE THINK THAT UNDER THIS STANDARD THE STATE IS ONLY A NOMINAL PARTY. BUT ESSENTIALLY THIS IS A LEGAL DISPUTE WITH RESPECT TO BETWEEN THE AUTHORITY OF THE GENERAL ASSEMBLY OF THE STATE AND THE AUTHORITY OF THE GOVERNOR UNDER THE FEDERAL STIMULUS LAW.

THE COURT: WOULD YOU SAY THE STATE IS AT WAR WITH ITSELF?

MR. CHARNES: I THINK WHAT WE PUT IN OUR BRIEF IS THAT THE STATE IS IN LITIGATION WITH ITSELF. I THINK THAT IS

ABSOLUTELY RIGHT. IT DOESN'T MAKE ANY SENSE TO US TO SAY THE STATE, SEPARATE AND APART FROM THE GENERAL ASSEMBLY AND THE GOVERNOR HAS A LEGAL DOG IN THIS FIGHT. IT SIMPLY DOESN'T.

THE COURT: WHAT ABOUT THE LANGUAGE MR. COOK JUST READ TO ME A MOMENT AGO?

MR. CHARNES: THAT IS FROM A STATE SUPREME COURT CASE ADDRESSING WHETHER UNDER STATE LAW IN STATE COURT THE ATTORNEY GENERAL CAN LITIGATE ON BEHALF OF THE STATE. THAT IS NOT THE LEGAL QUESTION BEFORE THIS COURT. THIS COURT IS FACED WITH UNDER FEDERAL LAW WHETHER THE STATE IS A REAL PARTY IN INTEREST OR NOT. IN FACT, WE WOULD POINT THE COURT TO ARTICLE FOUR SECTION 15 OF THE STATE CONSTITUTION WHICH PROSCRIBES, PROHIBITS THE ATTORNEY GENERAL FROM LITIGATING AGAINST THE GENERAL ASSEMBLY. I THINK THAT CERTAINLY APPLIES IN THIS CIRCUMSTANCE, AS WELL. THE STATE ESSENTIALLY IS ON BOTH SIDES OF THE V. AND THAT REALLY MEANS THAT ITS LEGAL INTERESTS ARE NOT IN PLACE HERE. WE CERTAINLY HAVE NO OBJECTIONS FROM THE ATTORNEY GENERAL BRIEFING THE LEGAL QUESTIONS AND PRESENTING HIS OWN VIEW ABOUT WHAT THE LAW IS. BUT THE QUESTION IS WHETHER HE IS REPRESENTING THE STATE AS THE STATE. AND WHEN THE -- ESSENTIALLY THE QUESTION BEFORE THE COURT IS THE AUTHORITY OF THE GENERAL ASSEMBLY VERSUS THE AUTHORITY OF THE GOVERNOR, IT DOESN'T MAKE ANY SENSE, IN OUR VIEW, TO SAY THE STATE HAS AM INDEPENDENT LEGAL INTEREST.

THE COURT: LET ME ASK YOU THIS. I KNOW THIS WAS

BRIEFED IN A HURRY. I TOLD MY LAW CLERK LAST NIGHT, I WOULD THINK THERE WOULD BE CASE LAW SOMEWHERE IN THIS COUNTRY WHERE THE GOVERNOR AND GENERAL ASSEMBLY ARE AT ODDS WITH EACH OTHER OVER WHAT TO DO, AND ONE SIDE OR THE OTHER WANTS TO GET IN FEDERAL COURT AND RULING ON THE ELEVENTH AMENDMENT ISSUE. THERE IS NOTHING OUT THERE?

MR. CHARNES: ON THE NOMINAL PARTY QUESTION, YOUR HONOR, WE WERE NOT ABLE TO LOCATE ANYTHING. MAYBE YOUR LAW CLERKS WERE ABLE TO FIND SOMETHING.

THE COURT: NO.

MR. CHARNES: WE WERE NOT ABLE TO FIND ANYTHING. I JUST ALSO POINT OUT --

THE COURT: WE ARE UNIQUE IN THIS WAR BETWEEN -- WAR -- THE DISPUTE BETWEEN THE GOVERNOR AND LEGISLATURE, IT IS JUST UNPRECEDENTED IN TERMS OF THE ELEVENTH AMENDMENT JURISPRUDENCE.

MR. CHARNES: I THINK THAT IS RIGHT. THE REASON THAT THE STATE IS A NOMINAL PARTY CAN BE LOOKED AT -- YOU SEE THAT WHEN YOU LOOK AT SORT OF THE UNUSUALNESS OF THE EDWARDS' COMPLAINT. NORMALLY, YOU SUE A STATE, PARTY SUES A STATE TO ALLEGE THE STATE IS VIOLATING THE LAW. TO ALLEGE A STATE STATUTE IS UNCONSTITUTIONAL. HERE THE EDWARDS PLAINTIFFS ARE SUING THE STATE TO DECLARE THAT A STATE STATUTE IS LAWFUL AND BINDING. AND THAT JUST SHOWS THAT THE STATE IS NOT THE PROPER DEFENDANT HERE. WHAT THE EDWARDS PLAINTIFF SHOULD

HAVE DONE, WE THINK, IS SUE THE GOVERNOR. THE GOVERNOR IS THE ONE SAYING I AM NOT BOUND BY THE APPROPRIATIONS LAW, PART THREE, SECTION ONE, BECAUSE IT IS PREEMPTED BY ARRA. AND THE OBVIOUS DEFENDANT IS THE GOVERNOR. THEY SHOULD HAVE SUED THE GOVERNOR AND SAID YOU ARE REQUIRED TO FOLLOW THIS STATE STATUTE. AND THE GOVERNOR WOULD SAY, AS HE IS SAYING NOW, WE ARE NOT BECAUSE IT IS PREEMPTED, AND, THEREFORE, IT VIOLATES THE SUPREMACY CLAUSE. BUT THE STATE REALLY DOESN'T HAVE AN INTEREST IN THAT.

WE FOUND ONE CASE THAT IS WOEFULLY ON POINT, IT IS NOT A DISPUTE BETWEEN THE GOVERNOR AND THE GENERAL ASSEMBLY AS IT IS HERE. WE CITED IN OUR BRIEF, NORMAN VERSUS CUOMO, FROM THE SOUTHERN DISTRICT OF NEW YORK. AND THAT COURT RELIED ON TWO FACTORS IN FINDING THAT THE STATE DEFENDANTS, THE OFFICIAL DEFENDANTS WERE NOMINAL PARTIES. IT SAID, NUMBER ONE, THE COMPLAINT SOUGHT NO AFFIRMATIVE RELIEF AGAINST THEM, BUT MERELY A DECLARATION THAT THE LAW WAS VALID. AND THAT IS EXACTLY THE SITUATION HERE. EDWARDS PLAINTIFFS ARE NOT SEEKING ANY SORT OF AFFIRMATIVE RELIEF, COERCIVE RELIEF, OR COERCIVE REMEDY AGAINST THE STATE. THEY ARE SEEKING A DECLARATION FROM A COURT THAT THE STATE STATUTE IS VALID.

AND SECOND, THEY ASSERTED THAT THE DEFENDANTS HAVE NOT ASSERTED POSITIVE -- EXCUSE ME, DID NOT ASSERT A LEGAL POSITION HOSTILE TO THAT OF THE PLAINTIFFS. AND THAT IS TRUE, TOO, HERE. THE ATTORNEY GENERAL, IN AN OPINION LETTER FILED

A COUPLE OF MONTHS AGO, TOOK THE POSITION THAT, IF THE GENERAL ASSEMBLY DID WHAT THEY ULTIMATELY DID IN THE APPROPRIATIONS STATUTE AND DIRECTED THE GOVERNOR TO REPLY, THAT THAT WOULD BE VALID. AND, THEREFORE, THE ATTORNEY GENERAL ESSENTIALLY AGREES ON THE PIVOTAL POINT IN THIS CASE, IN THE EDWARDS CASE, WITH THE PLAINTIFF. I THINK, AGAIN, THAT SHOWS WHY THIS IS NOT REALLY A PROPER DESIGNATION OF THE STATE AS A REAL PARTY IN INTEREST.

ON THE ELEVENTH AMENDMENT QUESTION, YOUR HONOR, WE FILED -- WE WERE NOT AWARE THAT THE ELEVENTH AMENDMENT WAS GOING TO COME UP, WE APOLOGIZE FOR THAT. WE FILED A SUPPLEMENTAL -- SHORT SUPPLEMENTAL BRIEF ON SATURDAY ON THE ELEVENTH AMENDMENT. ONE OF THE THINGS WE POINTED TO WAS CASES THAT ESSENTIALLY SAY THAT THE HOLD -- THAT WHEN A STATE IS MERELY A NOMINAL PARTY, THE ELEVENTH AMENDMENT HAS NO ROLE. AND, THEREFORE, WE THINK THE NOMINAL PARTY QUESTION DICTATES BOTH THIS COURT'S REMOVAL JURISDICTION AND THE ELEVENTH AMENDMENT. AND UNDER THE ELEVENTH AMENDMENT I WOULD JUST REFER THE COURT TO RESPECT TO A CASE CALLED JOHNS VERSUS TEXAS WORKFORCE COMMISSION, DECIDED BY THE SOUTHERN DISTRICT OF TEXAS IN 2000, WHICH IS EXACTLY FACTUALLY ON POINT. THERE THE PLAINTIFF SUED HIS FORMER EMPLOYER AND THE TEXAS WORKFORCE COMMISSION IN STATE COURT. THE FORMER EMPLOYER REMOVED THE CASE TO FEDERAL COURT. AND THE PLAINTIFF SAID, ELEVENTH AMENDMENT. YOU CAN'T REMOVE IT. THE TEXAS WORKFORCE COMMISSION IS A PARTY. AND

WHAT THE DISTRICT COURT SAID WAS, THE ELEVENTH AMENDMENT IS A RED HERRING. IF -- THE TEXAS STATE AGENCY DID NOT CONSENT TO REMOVAL, SO IF THEY ARE NOT A NOMINAL PARTY, I MUST REMAND THE CASE. IF THEY ARE A NOMINAL PARTY, THEN THEY DON'T MATTER FOR ELEVENTH AMENDMENT PURPOSES. IT DOESN'T VIOLATE THE ELEVENTH AMENDMENT TO BRING A NOMINAL PARTY -- A STATE NOMINAL PARTY INTO FEDERAL COURT.

SO, WE THINK THE NOMINAL PARTY QUESTION SHOULD BE DECIDED AND WILL BE DECIDED BY THE COURT AS A QUESTION OF REMAND OR COURT REMOVAL JURISDICTION, NOT A QUESTION OF ELEVENTH AMENDMENT.

WE ALSO THINK, IN ADDITION TO THE FACT THE STATE IS ONLY A NOMINAL PARTY, WE ALSO BELIEVE THE STATE WAS FRAUDULENTLY JOINED IN THE CASE TO DEFEAT REMOVAL. AS I INDICATED A COUPLE OF MINUTES AGO, THE GOVERNOR WAS REALLY THE OBVIOUS, ONLY APPROPRIATE DEFENDANT IN THE EDWARDS ACTION. AND WE BELIEVE HE WAS NOT NAMED IN THAT ACTION IN ORDER TO DEFEAT REMOVAL. THEY ARE SEEKING COERCIVE RELIEF, EXPRESSLY SEEKING COERCIVE RELIEF AGAINST THE GOVERNOR AND ONLY THE GOVERNOR, AND THEREFORE HE IS THE PROPER PARTY AND SHOULD HAVE BEEN NAMED AS THE DEFENDANT, AS THE ONLY REAL DEFENDANT.

UNLESS THE COURT HAS QUESTIONS ABOUT THE EDWARDS CASE, I WILL TURN BRIEFLY TO THE SCHOOL ADMINISTRATORS' CASE, WHICH I THINK IS -- THE CONSENT QUESTION IS REALLY QUITE STRAIGHTFORWARD IN THAT CASE.

FIRST OF ALL, YOUR HONOR, YOU ALLUDED TO THIS BEFORE, BUT WE THINK THE SCHOOL ADMINISTRATOR CASE PLAINLY STATES A FEDERAL QUESTION. I DON'T KNOW IF THE COURT WANTS ME TO GO INTO THAT NOW. JUST REFER THE COURT TO PARAGRAPH 22 OF THEIR COMPLAINT, WHICH IS IN THEIR FIRST CAUSE OF ACTION, IN WHICH THEY EXPRESSLY PLEAD FIVE OR SIX DIFFERENT TIMES IN THAT ONE PARAGRAPH THE CONTENTS OF ARRA AND WHAT ARRAY REQUIRES. AND BEING AN ESSENTIAL PART OF THEIR CAUSE OF ACTION, THAT MEANS THAT IF IT IS A STATE LAW CLAIM, IT NECESSARILY RAISES A FEDERAL QUESTION OVER WHICH THIS COURT HAS JURISDICTION.

ON THE CONSENT QUESTION, ANOTHER EXCEPTION TO THE CONSENT REQUIREMENT IS THAT THE COURT IS NOT BOUND BY HOW THE PARTIES IN THEIR STATE COURT COMPLAINT ALIGNED THE DIFFERENT PARTIES.

THE COURT: I AM AWARE THAT SECRETARY REX HAS MADE STATEMENTS OPPOSING THE GOVERNOR ON THE POLICY QUESTION AND HIS PLEADING THAT HE FILED ASKED THAT THE GOVERNOR LOSE THE CASE. BUT THE OTHER SIDE POINTS OUT THAT HE IS NAMED IN HIS OFFICIAL CAPACITY, NOT AS AN INDIVIDUAL, AND IT IS THE STATE OFFICE THAT THEY WANT TO HAVE BOUND BY THIS LITIGATION. THAT OFFICIAL, THE STATE SUPERINTENDENT OF EDUCATION, HAS CERTAIN THINGS HE HAS TO DO TO GET THE FEDERAL MONEY. WHAT ABOUT THAT?

MR. CHARNES: WELL, I DON'T THINK THERE IS ANY AUTHORITY THAT WE HAVE SEEN THAT SUGGESTS THAT THAT IS A GROUNDS FOR NOT REALIGNING HIM. AS YOUR HONOR JUST SAID,

THEY AGREE WITH THE PLAINTIFF IN A CASE IN WHICH THEY HAVE BEEN SUED AS THE DEFENDANT.

THE COURT: BUT HE PERSONALLY AGREED, BUT THEY POINT OUT HE MAY NOT BE THE SECRETARY OF EDUCATION NEXT MONTH. WE HAVE A HISTORY IN THIS STATE OF STATE CONSTITUTIONAL OFFICERS NOT SERVING OUT THEIR FULL TERM.

MR. CHARNES: WHAT I DIDN'T SAY, HE DIDN'T PERSONALLY AGREE, HE IN HIS OFFICIAL CAPACITY HAS FILED PLEADINGS THAT SAYS HE AGREES WITH THE PLAINTIFF AND THE MAIN ISSUE PRESENTED.

THE COURT: SO, THE OCCUPANT IN OFFICE IN HIS OFFICIAL CAPACITY AGREES WITH THE PLAINTIFF.

MR. CHARNES: THE QUESTION, YOUR HONOR, IS NOT WHETHER THE OFFICE WILL BE BOUND OR NOT. IF THEY ARE A PLAINTIFF, IF THEY ARE REALIGNED AS A PLAINTIFF AND THE CASE PROCEED TO JUDGMENT, THEY ARE BOUND JUST LIKE THEY WOULD BE AS IF THEY WERE A DEFENDANT. I THINK IT IS SORT OF A RED HERRING TO SUGGEST THAT IF YOU REALIGN THE SUPERINTENDENT AS A PLAINTIFF HE -- HIS SUCCESSOR, HIS OR HER SUCCESSOR -- HIS SUCCESSOR WILL NOT BE BOUND SOME WAY. HIS SUCCESSOR WILL BE BOUND AS LONG AS HE IS A PARTY TO THE CASE. AND BECAUSE HE EXPRESSLY AGREED WITH THE RELIEF SOUGHT BY THE PLAINTIFF IN THAT CASE, WE JUST SIMPLY DON'T SEE HOW HE CAN BE AN APPROPRIATE DEFENDANT, AT LEAST FOR REMOVAL PURPOSES.

ONE OTHER POINT TO MAKE, YOUR HONOR, ON THE CONSENT

QUESTION, IN HIS BRIEF, SUPERINTENDENT REX HAS SUGGESTED THAT THERE IS ONE ISSUE IN THE CASE IN WHICH HE ACTUALLY DISAGREES WITH THE SCHOOL ADMINISTRATORS ON. AND WE THINK THAT IS NOT RELEVANT. THE QUESTION, AS THIS COURT HAS SAID FOR REALIGNING PURPOSES, IS THE COURT SHOULD LOOK AT THE PRIMARY ISSUE IN THE CASE. IF THE PRIMARY ISSUE AND THE COURT REALIGNS THE PARTIES ACCORDING TO THE PRIMARY ISSUE, AND HERE THE PRIMARY ISSUE, CLEARLY AS YOUR HONOR JUST ALLUDED TO, CLEARLY AGREES WITH THE PLAINTIFF'S CLAIMS, AND THEREFORE IT SHOULD BE REALIGNED AS A PLAINTIFF FOR PURPOSES OF REMOVAL.

THE COURT: GO BACK TO EDWARDS JUST A MINUTE. THAT IS THE ONE THE GOVERNOR WAS ALLOWED TO INTERVENE AT THE VERY LAST MINUTE. THE STATE SUPREME COURT DID NOT HAVE TO ALLOW THE GOVERNOR TO INTERVENE. THEN THEY DROPPED THE FOOTNOTE SUGGESTING THAT THEY WERE GOING TO COUNT ON HIM TO NOT DESTROY THE JURISDICTION AND HE DID. AND SEEMS LIKE TO ME I NEED TO -- I OWE SOME RESPECT TO THE STATE SUPREME COURT ON WHAT HAPPENED THERE, DON'T I?

MR. CHARNES: THANK YOU FOR --

THE COURT: THEY DIDN'T MAKE IT A CONDITION. I DON'T THINK THEY MADE IT A CONDITION, BUT IT WAS CLEARLY THEIR EXPECTATION THEY WOULD KEEP THE CASE IF THEY LET HIM IN.

MR. CHARNES: THANK YOU FOR RAISING THAT SUBJECT. I MEANT TO DISCUSS THAT AT THE OUTSET. ANY SUGGESTION -- I GUESS A COUPLE OF THINGS. ANY SUGGESTION THE GOVERNOR HAS

SOUGHT TO DELAY THESE LEGAL PROCEEDINGS IS FLATLY WRONG.

THE COURT: I DIDN'T MEAN TO SUGGEST THAT, IF I DID I APOLOGIZE. I AM JUST SAYING --

MR. CHARNES: I UNDERSTAND.

THE COURT: -- THE COGS AND GEARS OF THE COURT SYSTEM OFTEN OPERATE SLOWLY. AND THE MORE COURTS THAT GET INVOLVED IT JUST SLOWS IT DOWN.

MR. CHARNES: THAT IS WHY WE DISMISSED THE SECOND CLAIM. MR. HARPOOTLIAN SUGGESTED OUR STRATEGY WAS DELAY. WE FILED THE FIRST LAWSUIT, AS YOUR HONOR ALLUDED TO. WE FILED A MOTION TO EXPEDITE THE PROCEEDINGS BEFORE YOUR HONOR. WE AGREE THESE DISPUTES NEED TO BE RESOLVED EXPEDITIOUSLY.

WITH RESPECT TO THE REMOVAL QUESTION, THE SOUTH CAROLINA SUPREME COURT DID NOT HAVE TO ALLOW THE GOVERNOR TO INTERVENE AS A PARTY. IT CHOSE TO DO SO. FRANKLY, I DON'T QUITE UNDERSTAND WHAT THAT FOOTNOTE MEANS IN THE SUPREME COURT'S DECISION, BUT THE FACT OF THE MATTER IS, THE STATE COURT HAS NO POWER TO TELL THE PARTIES BEFORE IT WHETHER THEY CAN OR CANNOT REMOVE. REMOVAL IS A FEDERAL RIGHT SET FORTH BY CONGRESS.

THE COURT: THEY CAN'T. BUT THEY HAVE POWER OVER WHO THEY LET INTERVENE.

MR. CHARNES: THAT IS ABSOLUTELY TRUE. BUT THEY LET THE GOVERNOR INTERVENE AFTER THE GOVERNOR HAD ALREADY REMOVED THE SCHOOL ADMINISTRATOR'S CASE. I THINK THAT THEY PROBABLY

UNDERSTOOD WHAT THE GOVERNOR'S POSITION WAS GOING TO BE WITH RESPECT TO WHICH COURT SHOULD RESOLVE THIS CASE.

THE ONLY THING I WILL CONCLUDE WITH YOUR HONOR, UNLESS YOU WANT ME TO ADDRESS ANY OF THE MANY OTHER ISSUES THAT ARE BEFORE YOU RIGHT NOW, IS THAT WE BELIEVE THE REMAINING ISSUES WITH THE DISMISSAL OF THE SEPARATION OF POWERS CLAIM ARE OVERWHELMINGLY FEDERAL ISSUES. FRANKLY, I AM NOT EVEN SURE AT THIS POINT WHAT THE COURT WOULD CERTIFY TO THE STATE SUPREME COURT. AND WE WOULD SUGGEST THAT THIS COURT IS THE MOST APPROPRIATE FORUM AND GO AHEAD AND RESOLVE IT.

THE COURT: WHILE YOU ARE ON YOUR FEET, AS TO THE FEDERAL CLAIM, LET'S TALK ABOUT THAT A MINUTE. IT IS NOT TECHNICALLY CENTRAL TO THE REMAND QUESTION. BUT SECTION 1607, WOULD YOU AGREE IT IS INARTFULLY DRAFTED?

MR. CHARNES: I CERTAINLY WOULD.

THE COURT: YOU KNOW, WHAT I REMEMBER ABOUT THE STIMULUS BILL WAS IT WAS PASSED SO QUICKLY NOBODY IN CONGRESS GOT TO READ IT. AND THOSE OF US WITHIN THE RAIL OF THIS COURTROOM MAY BE SOME OF THE FEW PEOPLE IN THE COUNTRY WHO HAVE ACTUALLY HAD TO READ IT. AND IT SEEMS TO ME THAT IT WAS INARTFULLY DRAFTED, BUT IT IS CLEAR THE SPONSOR OF THAT AMENDMENT WANTED TO PROVIDE A MECHANISM BY WHICH THE STATE LEGISLATURE COULD OVERRIDE A GOVERNOR. BUT THE PROBLEM IS THAT THE AMENDMENT ONLY APPLIED TO THE CERTIFICATION ISSUE. AND IT LET THE LEGISLATURE OVERRIDE THE GOVERNOR AS TO THE

CERTIFICATION QUESTION, WELL WE ARE BEYOND THAT NOW. WE ARE DOWN TO THE APPLICATION AND ALL OF THE ACCOUNTING AND FORMULAS AND ALL THAT THE LEGISLATION SEEMS TO ALLOW THE GOVERNOR AND THE GOVERNOR ALONE TO DO.

IF YOU JUST STEP BACK AND LOOK AT THE BIG PICTURE, I THINK CONGRESS'S INTENT WAS TO ALLOW THE LEGISLATURE TO OVERRIDE THE GOVERNOR, WHICH INTERESTINGLY, IN MY MIND, RAISES A TENTH AMENDMENT ISSUE GOING THE OTHER WAY.

MR. CHARNES: WE AGREE WITH THAT, YOUR HONOR. IF THAT COMES TO THE FLOOR, WE WILL CERTAINLY BRIEF AND ARGUE TO THE COURT. BUT LET ME STEP BACK ON THAT ISSUE FOR A SECOND. WE READ 1607 EXACTLY AS YOU DO. THAT IT IS REALLY NOT RELEVANT HERE. THE LANGUAGE DOESN'T APPLY. WE ALSO THINK --

THE COURT: I DIDN'T SAY THAT. I SAID IT IS INARTFULLY DRAFTED. I MEAN, I HAVE TO FIGURE OUT WHAT IS INTENDED BY SOMETHING THAT GIVES THE GOVERNOR -- GIVES THE LEGISLATURE AUTHORITY ON THE INITIAL CERTIFICATION, BUT THEN FROM THERE ON DOWN THEY DIDN'T COVER IT.

MR. CHARNES: I AGREE, YOUR HONOR. I APOLOGIZE IF I OVERSTATED YOUR STATEMENT. BUT WE KNOW WHAT THE FEDERAL GOVERNMENT BELIEVES OF SECTION 1607. THE CONGRESSIONAL RESEARCH SERVICE HAS LOOKED AT IT, AND I THINK THAT HAS BEEN SUBMITTED TO THE COURT, IF NOT, CERTAINLY WE CAN. MORE IMPORTANTLY, THE OFFICE OF MANAGEMENT AND BUDGET HAS GIVEN AN

OPINION. WE ATTACHED THIS, I THINK IT IS EXHIBIT 3 TO THE BRIEFING FILED ON FRIDAY. THE OFFICE OF MANAGEMENT AND BUDGET IS A COMPONENT IN THE EXECUTIVE OFFICE OF THE PRESIDENT. AND THEY READ 1607 AS NOT AUTHORIZING STATE LEGISLATURES TO REQUEST THESE FUNDS. THEY SAY EXPRESSLY, THE GOVERNORS HAVE TO REQUEST THEM. AND THAT REALLY MEANS THAT, IN OUR VIEW, THE EDWARDS CASE PRESENTS NO CASE OR CONTROVERSY.

THE COURT: WHAT WAS THE PURPOSE OF 1607? WHY GIVE THE GENERAL ASSEMBLY THE AUTHORITY TO PARTICIPATE IN THE CERTIFICATION -- AM I USING THE RIGHT -- IS IT THE CERTIFICATION YOU DO FIRST?

MR. CHARNES: YES.

THE COURT: WHY GIVE THE GENERAL ASSEMBLY INVOLVEMENT IN THAT THRESHOLD STEP AND THEN SAY FROM THAT POINT ON THE GOVERNOR GETS TO CALL THE SHOTS AND HE CAN KILL IT IF HE WANTS TO? IT IS JUST LIKE CONGRESS PERFORMED A FUTILE ACT IN PASSING THAT AMENDMENT.

MR. CHARNES: YOUR HONOR, WE HAVE RESEARCHED TO SEE WHETHER THERE IS ANY LEGISLATIVE HISTORY BEHIND SECTION 1607 THAT WOULD PROVIDE SOME GUIDANCE. WE HAVE BEEN UNABLE TO FIND IT.

THE COURT: THERE MAY NOT BE ANY IN THE OFFICIAL LEGISLATIVE HISTORY, BUT THE POLITICAL HISTORY AND THE NEWS MEDIA IS THAT AFTER THE GOVERNOR OF THIS STATE ANNOUNCED HE WASN'T GOING TO TAKE THE MONEY, A CONGRESSMAN FROM THIS STATE

SPONSORED THAT AMENDMENT AND GOT IT PASSED.

MR. CHARNES: BUT, OF COURSE, AS YOUR HONOR WELL KNOWS, AND THE FOURTH CIRCUIT HAS BEEN DEFINITIVE ON THIS AS WELL, CONGRESS IS BOUND BY THE LANGUAGE IT CHOOSES. ITS GENERAL INTENT IS NOT WHAT GOVERNS THE LANGUAGE IT USES. AND FOR BETTER OR WORSE, 1607 AS WRITTEN, FROM ITS SPONSORS PERSPECTIVE, THE LANGUAGE USED. AND I WOULD JUST QUOTE FOR THE COURT THE HEART OF THE MARCH 31, 2009 LETTER FROM THE DIRECTOR OF THE OFFICE OF MANAGEMENT AND BUDGET TO SENATOR GRAHAM. AND WHAT OMB SAID WAS, FOR A STATE TO ACCESS ITS ALLOCATION OF STATE FISCAL STABILIZATION -- OF THE STATE FISCAL STABILIZATION FUND, THE GOVERNOR MUST SUBMIT AN APPLICATION TO THE SECRETARY OF EDUCATION. HERE IS THE KEY LANGUAGE, YOUR HONOR.

> "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."

WHAT THAT MEANS IS THAT REALLY THE EDWARDS' PLAINTIFFS ARE ASKING THIS COURT FOR AN ADVISORY OPINION. NO MATTER WHAT YOU OR THE STATE SUPREME COURT DECIDE, THE FEDERAL GOVERNMENT IS NOT PAYING THIS MONEY BASED SOLELY ON WHAT THE GENERAL ASSEMBLY DID. IF THEY WANT -- IF ANY OF THE PARTIES WANT

THE FEDERAL GOVERNMENT TO PAY THE MONEY BASED ON THE CURRENT RESOLUTION OR ANY OTHER ACTION OF THE GENERAL ASSEMBLY, THEY ARE GOING TO NEED TO ASK THE COURT TO ORDER THE UNITED STATES GOVERNMENT TO DO THAT.

THE COURT: BUT THEN DON'T WE HAVE SOME TENTH AMENDMENT PROBLEMS? WHAT IF SOUTH CAROLINA IS A UNIQUE STATE IN THE COUNTRY? WE HAVE AN 1895 CONSTITUTION PASSED BACK WHEN EVERYBODY IN THE STATE WERE FARMERS AND THINGS WERE DIFFERENT THEN. AND WE HAVE A STRONGLY POWERFUL LEGISLATURE AND VERY WEAK GOVERNOR. PROBABLY NO OTHER STATE LIKE IT. SO CONGRESS COMES ALONG AND SAYS, WE WILL OVERRIDE STATE POLICY AND GIVE THE ONE CHIEF EXECUTIVE THE AUTHORITY TO DRAW DOWN THIS MONEY, OVERRIDING STATE LAW THAT LETS THE LEGISLATURE CLAIM THE MONEY.

MR. CHARNES: YOUR HONOR, I WOULD LIKE TO, WITH YOUR PERMISSION, I WOULD LIKE TO GO THROUGH BRIEFLY WHAT OUR ARGUMENT ON ARRA IS.

THE COURT: GO AHEAD. WHILE YOU ARE UP, LET'S GO INTO THAT.

MR. CHARNES: AND THEN ALSO ADDRESS THE TENTH AMENDMENT QUESTION, WHICH WE THINK IS RESOLVED BY THE LAWRENCE COUNTY CASE. I WANT TO PUT UP A COUPLE OF PROVISIONS. I DIDN'T KNOW THE COURT WAS SO HIGH-TECH, OTHERWISE I WOULD HAVE USED YOUR ELMO.

AS I INDICATED, WE BELIEVE THAT THIS IS PART OF THE

STATE -- FISCAL STABILIZATION FUNDS PROVISIONS OF ARRA. WE THINK CONGRESS WAS CLEAR THAT IT SAID, THE GOVERNOR IS THE ONE TO APPLY, THE GOVERNOR IS THE ONE TO USE THE FUNDS. AND IT STARTS HERE IN 14005-A, WHERE EXPRESSLY SAYS:

"THE GOVERNOR OF A STATE DESIRING TO RECEIVE AN ALLOCATION SHALL SUBMIT AN APPLICATION."

AFTER 14005-A --

THE COURT: STOP RIGHT THERE. YOU COULD MAKE A VERY GOOD STATUTORY INTERPRETATION ARGUMENT, IT IS REALLY GRAMMATICAL INTERPRETATION, THAT THE MODIFIER "DESIRING TO RECEIVE AN ALLOCATION," MODIFIED "STATE" AND NOT "GOVERNOR." SO IT IS THE GOVERNOR OF THE STATE THAT WANTS TO GET THE MONEY, "SHALL." THE STATE'S WILL IS EXPRESSED BY THE GENERAL ASSEMBLY.

MR. CHARNES: YOUR HONOR, I THINK THERE IS A GRAMMATICAL QUESTION ABOUT WHERE THE DEPENDENT CLAUSE BEGINNING WITH THE WORD "OF" ENDS. WHETHER IT IS, "OF A STATE" OR "A STATE DESIRING TO RECEIVE AN ALLOCATION." BUT I THINK THERE IS NO GRAMMATICAL QUESTION THAT THE SUBJECT OF THE SENTENCE IS "THE GOVERNOR." AND IT SAYS, "THE GOVERNOR SHALL SUBMIT AN APPLICATION." AND WE THINK THAT THERE IS REALLY NO --

THE COURT: BUT YOU COULD READ IT, THE GOVERNOR SHALL SUBMIT AN APPLICATION WHEN THE STATE WANTS IT.

MR. CHARNES: WE DON'T THINK --

THE COURT: THE STATE DESIRES TO GET IT, THE GOVERNOR MUST DO IT.

MR. CHARNES: WE DON'T THINK THAT IS THE BEST READING OF THAT SENTENCE, AND THAT IS CONFIRMED BY THE REST OF THESE PROVISIONS OF ARRA. 14005-A SAYS, WE THINK THE GOVERNOR SHALL SUBMIT THE APPLICATION. THEN B AND C SAY -- DICTATE THE CONTENTS OF THE APPLICATION. IN 14005-B, "IN SUCH APPLICATION, THE GOVERNOR SHALL INCLUDE," VARIOUS THINGS, DATA, DESCRIBE HOW THE STATE INTENDS TO USE. 14005-C SAYS WITH RESPECT TO THE INCENTIVE GROUNDS, THAT "THE GOVERNOR OF A STATE SEEKING A GRANT SHALL," INCLUDES A NUMBER OF REQUIREMENTS. WITH RESPECT TO THE APPLICATION, ALL OF THESE PROVISIONS REFERENCE EXPRESSLY THE GOVERNOR. AND WHEN THE GOVERNOR APPLIES, YOUR HONOR, I APOLOGIZE THAT WE DID NOT ATTACH THIS TO OUR BRIEF. IF I COULD APPROACH AND GIVE YOU A COPY OF THE APPLICATION.

THIS IS THE APPLICATION THAT THE SECRETARY OF EDUCATION HAS PUT FORWARD WHEN THE GOVERNOR APPLIES FOR THE FUNDS. AND NO FEWER THAN SEVEN TIMES IN THIS APPLICATION, THE GOVERNOR IS REQUIRED TO PERSONALLY SIGN IT. AND I WOULD REFER THE COURT STARTING AT PAGE 3, WHICH IS ABOUT TWO-THIRDS OF THE WAY DOWN, IT REQUIRES THE SIGNATURE OF THE GOVERNOR OR THE AUTHORIZED REPRESENTATIVE OF THE GOVERNOR. AND AGAIN ON PAGE -- IT IS LABELED PAGE TWO, GOVERNOR OR AUTHORIZED REPRESENTATIVE.

PAGE THREE, GOVERNOR OR AUTHORIZED REPRESENTATIVE. PAGE FOUR, GOVERNOR OR AUTHORIZED REPRESENTATIVE. YOUR HONOR GETS THE PICTURE.

THE COURT: I READ YOUR BRIEFS. I UNDERSTAND THAT. BUT WILL YOU CONCEDE THAT CONGRESS WANTED TO ALLOW STATES TO OVERRIDE THE GOVERNOR, BUT DID SO IMPERFECTLY? IT WAS A POORLY DRAFTED AMENDMENT THAT DOESN'T DO WHAT CONGRESS INTENDED TO DO?

MR. CHARNES: SECTION 1607 YOU ARE REFERRING TO?

THE COURT: YES. WHY GIVE THE STATE THE RIGHT TO OVERRIDE THE GOVERNOR ON THE CERTIFICATION, BUT NOTHING ELSE? CERTIFICATION IS JUST A MINISTERIAL FIRST STEP --

MR. CHARNES: ACTUALLY, I AM NOT SURE THAT I AGREE, BECAUSE GOING BACK A COUPLE OF MONTHS, THERE WAS SUBSTANTIAL QUESTION ABOUT WHETHER CERTAIN GOVERNORS, INCLUDING GOVERNOR SANFORD, WOULD EVEN HAVE CERTIFIED AS PROVIDED IN THE DRAFT OF WHAT WAS THEN 1607. I THINK THE FOCUS WAS ON ALLOWING SOME PROCEDURE, WHETHER IT PRESENTED TENTH AMENDMENT PROBLEMS OR NOT IS A SEPARATE QUESTION, BUT ALLOWING SOME PROCEDURE FOR THE LEGISLATURE TO CERTIFY THE STATE'S INTEREST IN GETTING THE MONEY, EVEN IF THE GOVERNOR WAS NOT GOING TO DO SO. SO I THINK THE CLYBURN AMENDMENT, 1607, WAS TARGETED ON THE ISSUE, THE POLITICAL ISSUE, THAT WAS THEN PRESENTED IN THE PUBLIC SPHERE. I THINK CONGRESS SIMPLY DIDN'T THINK PROBABLY OF THE QUESTION OF WOULD HAPPEN. IN FACT, IT IS HARD TO IMAGINE HOW

1607 WOULD BE WRITTEN IF YOU LOOK AT THE REST OF THE SFSF PROVISIONS OF ARRA, WHICH REQUIRES THE GOVERNOR DO MANY, MANY DIFFERENT THINGS IN CERTIFYING -- EXCUSE ME, IN APPLYING FOR FUNDS. SO, WE THINK THAT CONGRESS IN THE CLYBURN AMENDMENT WAS AIMING AT A SPECIFIC ISSUE, SPECIFIC PROBLEM THAT THEY PERCEIVED, AND THEY ADDRESSED THAT PROBLEM, AND THEY DIDN'T ADDRESS THE QUESTION THAT YOUR HONOR IS RAISING NOW. AND I THINK OBVIOUSLY IT IS NOT FOR THE COURT TO SORT OF REWRITE THE STATUTE TO ADDRESS THE PROBLEM OR CIRCUMSTANCE THAT CONGRESS DID NOT ANTICIPATE IN FEBRUARY WHEN THEY PASSED THE LAW.

SO, AS I INDICATED, ARRA IS PRETTY CLEAR, WE THINK, IN SAYING IT IS THE GOVERNOR WHO HAS TO APPLY, GOVERNOR HAS TO FILL OUT THE APPLICATION, AND THE SECRETARY OF EDUCATION AGREES.

THE COURT: YOU COULD ARGUE THAT IS A MINISTERIAL REQUIREMENT THAT YOU JUST PUT UP, 14005, THE GOVERNOR SHALL SUBMIT AN APPLICATION, YOU COULD SAY IT IS MINISTERIAL. STATE LEGISLATURE CAN ORDER THE GOVERNOR TO PERFORM MINISTERIAL FUNCTIONS. THAT IS THE QUESTION

MR. CHARNES: I CAN GET TO THAT NOW OR GO OVER THROUGH A COUPLE OTHER PROVISIONS OF STATUTE.

THE GOVERNOR SHALL APPLY, WE BELIEVE ARRA MEANS. THE QUESTION IS, WHERE DOES THE MONEY GO? ARRA SAYS THAT AS WELL, 14001 SAYS IN SUBSECTION E SAYS, FROM THE FUNDS ALLOCATED UNDER SUBSECTION (D), THE SECRETARY SHALL MAKE GRANTS TO THE

GOVERNOR OF EACH STATE. WHO SHOULD USE THE MONEY? WELL, 14002, WHICH I DON'T KNOW IF YOUR HONOR CAN SEE. IN THE SUBSTANTIVE PROVISIONS OF ARRA WHEN IT TALKS ABOUT HOW THE MONEY SHOULD BE USED, AGAIN IT REFERS TO THE GOVERNOR, THE GOVERNOR SHALL USE THE MONEY. AT THE END OF THE PROCESS, IF THERE IS ANY UNUSED MONEY, WE THINK THIS PROVISION IS CRITICAL, SUBSECTION (F) OF 14001, SAYS THE GOVERNOR SHALL RETURN TO THE SECRETARY ANY FUNDS RECEIVED UNDER SUBSECTION E THAT THE GOVERNOR DOES NOT AWARD AS SUBGRANTS OR OTHERWISE COMMIT.

WE BELIEVE THE ENTIRETY OF THE STATUTE, AS WELL AS THE ADMINISTRATIVE AGENCIES, THE SECRETARY'S FOCUS ON THIS STATUTE, AND THE IMPLEMENTATION OF THE STATUTE IS FOCUSED ON THE GOVERNOR AND THE GOVERNOR'S AUTHORITY.

NOW YOUR HONOR RAISED THE QUESTION A COUPLE OF MINUTES AGO ABOUT WHETHER THE FIFTH -- CONGRESS ESSENTIALLY HAS AUTHORITY TO OVERRIDE HOW THE STATE CHOOSES TO ALLOCATE ITS RESPONSIBILITY WITH RESPECT TO APPROPRIATIONS. AND WE THINK THE ANSWER IS, YES, UNDER ITS SPENDING CLAUSE POWERS. WE THINK THE LAWRENCE COUNTY CASE, WHICH WE DISCUSSED IN OUR BRIEF ON FRIDAY, SAYS EXACTLY THAT.

THE COURT: I READ THAT CASE. BUT THE GOVERNMENT AGENCY INVOLVED WAS NOT THE STATE, WASN'T IT A COUNTY?

MR. CHARNES: IT WAS THE COUNTY, BUT, OF COURSE, THE COUNTY IS A CREATURE OF THE STATE. THAT WAS THE STATE'S

ARGUMENT THERE. THEY CAME TO THE SUPREME COURT AND SAID, LISTEN, THE COUNTY IS A CREATURE OF THE STATE, AND WE HAVE AUTHORITY TO TELL THE COUNTY HOW IT SPENDS ITS MONEY AND HOW IT DOESN'T SPEND THE MONEY. AND THE SUPREME COURT DISAGREED AS A MATTER OF STATUTORY CONSTRUCTION ABOUT WHAT CONGRESS MEANT. I WILL SUBMIT TO THE COURT THAT THIS STATUTE ARRA IS MUCH CLEARER THAN THE STATUTE WAS IN LAWRENCE COUNTY ABOUT WHAT CONGRESS INTENDED. IN LAWRENCE COUNTY, THE FEDERAL STATUTE CALLED, THE PAYMENT IN LIEU OF TAXES ACT, SIMPLY SAID THE COUNTY COULD USE THE PAYMENT FOR ANY GOVERNMENTAL PURPOSE. AND WHEN THE STATE CAME IN AND SAID, WELL, WE WANT YOU TO USE IT FOR THIS GOVERNMENTAL PURPOSE AND THAT GOVERNMENTAL PURPOSE, THE COUNTY SAID WE WANT TO USE IT DIFFERENTLY. WHAT THE U. S. SUPREME COURT HELD IN A 7 TO 2 DECISION WAS, NOT. CONGRESS SAID -- WHEN THE CONGRESS SAID TO THE COUNTY, YOU MAY USE IT FOR ANY GOVERNMENTAL PURPOSE, IT MEAN, YOU CAN USE IT FOR ANY GOVERNMENTAL PURPOSE WITHIN YOUR DISCRETION. THE STATE VIOLATED CONGRESS' INTENT BY INTERFERING WITH THAT. WE THINK THE SAME THING IS TRUE HERE.

MORE SIGNIFICANTLY, YOUR HONOR, FOR THE QUESTION YOU JUST RAISED, THE COURT VERY QUICKLY DEALT WITH THE TENTH AMENDMENT FEDERALISM QUESTION. AND WHAT THE COURT SAID WAS THAT:

> AND ACCORDING NOW IS FAR FROM A NOVEL PROPOSITION, PURSUANT TO ITS POWERS THE UNDER SPENDING CLAUSE,

CONGRESS MAY IMPOSE CONDITIONS ON THE RECEIPT OF FEDERAL FUNDS ABSENT SOME INDEPENDENT CONSTITUTIONAL BAR."

BY "INDEPENDENT CONSTITUTIONAL BAR," THEY MEANT, FOR EXAMPLE, IF THE CONGRESS DICTATED THAT THE STATE VIOLATE THE EQUAL PROTECTION CLAUSE OR SOMETHING LIKE THAT.

NOW, I BELIEVE THE SCHOOL ADMINISTRATORS HAVE SUGGESTED, WELL, IF THIS INTERPRETATION OF ARRA IS CORRECT, THAT WOULD BE A COMMANDEERING OF STATE OFFICIALS IN VIOLATION OF A CASE CALLED PRINTZ. AND THEY DIDN'T CITE IT, BUT ANOTHER CASE CALLED NEW YORK VERSUS UNITED STATES, WHICH ARE TWO SUPREME COURT CASES IN WHICH THE U.S. SUPREME COURT HAS ADDRESSED THE COMMANDEERING OF STATE OFFICIALS. WE THINK THAT IS JUST PLAINLY WRONG. BOTH PRINTZ AND NEW YORK VERSUS UNITED STATES EXPRESSLY SAY -- THOSE ARE NOT SPENDING CLAUSE CASES, AND THEY EXPRESSLY DISTINGUISH THE SPENDING CLAUSE CONTEXT. IN FACT, THERE ARE PROBABLY DOZENS OF LAW REVIEWS ARTICLES IN WHICH LAW PROFESSORS SORT OF SAY CONGRESS CAN AVOID PRINTZ SIMPLY BY DOING WHAT IT DID IN PRINTZ VIA THE SPENDING CLAUSE.

AND THE FOURTH CIRCUIT HAS RECOGNIZED THIS. THE FOURTH CIRCUIT IN A CASE CALLED CONDON VERSUS RENO, 155 F3D 453, IN FOOTNOTE SIX AT PAGE 463, EXPRESSLY RECOGNIZED THAT THE COMMANDEERING PRINCIPLES ESTABLISHED IN PRINTZ AND NEW YORK VERSUS UNITED STATES DO NOT APPLY WHERE CONGRESS IS EXERCISING

ITS SPENDING CLAUSE AUTHORITY.

AND SO IN SUM, BECAUSE WE BELIEVE IN ARRA CONGRESS WAS UTILIZING ITS POWERS UNDER THE SPENDING CLAUSE, IT WAS CONSTITUTIONAL FOR IT TO DICTATE THAT THE GOVERNOR HAD AUTHORITY, NOTWITHSTANDING THAT STATE LAW MIGHT OTHERWISE PROVIDE DISCRETION AND AUTHORITY TO THE GENERAL ASSEMBLY.

THE COURT: TO SUM UP YOUR POSITION, YOU SAY THE CASES WERE BOTH PROPERLY REMOVED?

MR. CHARNES: CORRECT.

THE COURT: FOR THE REASONS YOU ARTICULATED. IF I MAKE THAT DETERMINATION, THEN YOU WOULDN'T OPPOSE A CERTIFICATION OF THOSE STATE LAW QUESTIONS BACK. BUT YOU WANT ME TO KEEP THE FEDERAL QUESTION HERE?

MR. CHARNES: THAT IS RIGHT. I AM NOT SURE WHAT THE STATE LAW QUESTIONS REALLY ARE. AS WE SAID, WE THINK THE ISSUE OF THE CONCURRENT RESOLUTION AND ITS FORCE UNDER 1607 IS NOT PROPERLY PRESENTED BECAUSE, AS A MATTER AFTER STATE LAW, THERE IS REALLY NO STATE LAW ISSUE THERE WE THINK.

THE ONLY OTHER STATE LAW QUESTION THAT I REALLY SEE IN THESE CASES, AND I AM SURE MY COLLEAGUES WILL DISAGREE WITH ME, BUT THE ONLY STATE LAW QUESTION WE SEE IS THE SCHOOL ADMINISTRATORS ARGUE THAT THE APPROPRIATIONS LAW SOMEHOW AUTHORIZES THE SUPERINTENDENT TO APPLY FOR THESE FUND. WE THINK, FIRST OF ALL, ARRA -- THAT WOULD NOT BE PERMISSIBLE UNDER ARRA. EVEN THE SUPERINTENDENT SAYS THAT. WE THINK

THERE IS REALLY NOTHING IN THE APPROPRIATIONS LAW WHICH LENDS ITSELF TO THAT INTERPRETATION. IF THAT WERE A CLOSE QUESTION OR DIFFICULT QUESTION, PERHAPS IT SHOULD BE CERTIFIED TO THE STATE SUPREME COURT. I THINK IF THE COURT READS THAT SECTION ONE OF PART THREE OF THE APPROPRIATIONS LAW, IT NO WAY LENDS ITSELF TO THAT INTERPRETATION AT ALL. AND, THEREFORE, WE THINK CERTIFICATION OF A STRAIGHTFORWARD QUESTION IS NOT REQUIRED. OTHER THAN THAT, WE REALLY DON'T SEE WHAT THE STATE LAW QUESTIONS WOULD BE IF THE COURT WERE TO CERTIFY IT.

THE COURT: ALL RIGHT. THANK YOU, SIR.

MR. CHARNES: THANK YOU, SIR.

THE COURT: THANK YOU MR. DIETZ. YOU HAVE DONE A VERY COMMENDABLE JOB. NEXT TIME I SEE JUDGE WILKINSON, I AM GOING TO TELL HIM YOU ACQUITTED YOURSELF VERY WELL.

MR. CHARNES: THANK YOU.

THE COURT: ALL RIGHT. WHO WANTS TO GO NEXT? LET'S HEAR -- LET'S MR. HARPOOTLIAN IN THE EDWARDS CASE. WE MIGHT WANT TO TAKE A LITTLE RECESS HERE IN ABOUT TEN MINUTES. DO YOU WANT TO TAKE IT NOW OR TAKE A BREAK IN YOUR ARGUMENT?

MR. HARPOOTLIAN: I THINK I MAY TAKE MORE THAN TEN MINUTES, YOUR HONOR.

THE COURT: I KNOW. I AM JUST SAYING, YOU WANT TO GO AHEAD AND START.

MR. HARPOOTLIAN: SURE.

THE COURT: GO AHEAD AND START, WE WILL TAKE A RECESS

AT SOME POINT.

MR. CHARNES, I'M SORRY, I CALLED YOU MR. DIETZ. I HAVE TOO MUCH TO KEEP STRAIGHT HERE, I COULDN'T KEEP THE LAWYER NAMES STRAIGHT.

MR. CHARNES: THAT IS ALL RIGHT.

MR. HARPOOTLIAN: PLEASE THE COURT YOUR HONOR. I MUST SAY I AM FASCINATED TO HEAR THE GOVERNOR OF THE STATE OF SOUTH CAROLINA, REPUBLICAN GOVERNOR OF THE STATE OF SOUTH CAROLINA, RELYING ON THE OBAMA-APPOINTED OMB CHIEF AS THEIR AUTHORITY FOR THIS MATTER TO BE RESOLVED IN THEIR FAVOR. AGAIN, WE ARE IN FEDERAL COURT, AND WHEN YOU ASKED, DID WE FIND ANY CASES WHERE A GOVERNOR OR A LEGISLATURE HAD SUED THE OTHER IN FEDERAL COURT, THERE ARE NONE THAT WE CAN FIND. BECAUSE --

THE COURT: WHICH WOULD SUGGEST THAT THERE ARE SOME ELEVENTH AMENDMENT PROBLEMS AND NOBODY HAS GONE THERE.

MR. HARPOOTLIAN: WE EVEN WENT BACK AND LOOKED AT RECONSTRUCTION, WE FIGURED AT LEAST AT THAT POINT SOME NORTHERN-APPOINTED GOVERNOR MIGHT BE SUING SOMEBODY DOWN HERE IN FEDERAL COURT, IT DIDN'T EVEN HAPPEN THEN.

SO, IT NOT ONLY IMPLIES THE ELEVENTH AMENDMENT, BUT IT IMPLIES THAT THESE ARE STATE COURT ISSUES PREDOMINANTLY. I WOULD DISAGREE WITH THE GOVERNMENT'S LAWYER WHEN HE INTERVENED IN THIS CASE, MADE A MOTION TO INTERVENE. HE INDICATED THAT HE HAD A INTEREST IN THIS MATTER IN FRONT OF THE SOUTH CAROLINA SUPREME COURT. NOT SOME FEDERAL ISSUE, BUT IN THE

MATTER PENDING BEFORE THE SOUTH CAROLINA SUPREME COURT. AND WE BROUGHT A DECLARATORY JUDGMENT ACTION, YOUR HONOR, THE EDWARDS AND WILLIAMS MATTER AS A DECLARATORY JUDGMENT. AND CLEARLY, WITHOUT GETTING INTO THE MERITS OF THE FEDERAL STATUTE BECAUSE YOU ASKED US TO COME HERE TODAY ON THE JURISDICTIONAL ISSUE AND WHETHER OR NOT YOU OUGHT TO CERTIFY ANYTHING TO THE SOUTH CAROLINA SUPREME COURT, I DON'T BELIEVE YOU ARE GOING TO CERTIFY FEDERAL QUESTIONS TO THE SOUTH CAROLINA SUPREME COURT. IF YOU CERTIFIED SOMETHING, IT WOULD JUST BE THE STATE ISSUES. THE STATE ISSUES ARE, AS THE GOVERNOR SAID ON A NUMBER OF DIFFERENT OCCASIONS, THE BALANCE OF POWER BETWEEN THE LEGISLATURE AND THE STATE -- AND THE GOVERNOR. BUT TO ALLEGE THAT THE STATE HAS NO INTEREST IN IT, THEY HAVE GOT HUNDREDS OF MILLIONS OF DOLLARS OF INTEREST IN IT. THE GOVERNOR IS NOT THE STATE OF SOUTH CAROLINA, NEITHER IS THE LEGISLATURE: IT IS THE COMBINATION OF ALL OF THAT, IT IS THE DEPARTMENT OF EDUCATION, IT IS ALL OF IT. AND IN THE HODGES VERSUS CONDON CASE, WHICH IS -- AND IN THE HODGES VERSUS RAINEY CASE, THE SOUTH CAROLINA SUPREME COURT HAS INDICATED THAT THE STATE HAS AN INTEREST IN THE RESOLUTION OF INTERPRETING A STATUTE FOR GETTING MONEY. I MEAN, THEY SAY IT OVER AND OVER IN BOTH OF THOSE CASES. AND THEY ACTUALLY, THE ATTORNEY GENERAL IN REPRESENTING THE STATE SUED THE GOVERNOR, NOT IN FEDERAL COURT, BUT IN STATE COURT, TO RESOLVE THE ISSUE AS TO WHETHER OR NOT HE WAS APPROPRIATELY

SPENDING THE MONEY AS APPROPRIATED BY THE LEGISLATURE. THE SAME THING IN THE RAINEY CASE.

SO, WE FIND OURSELVES HERE TODAY, HAVING BEEN REMOVED, THE BURDEN ON THE GOVERNOR TO SHOW THAT THERE IS NO CHANCE, AND THE BALTIMORE VERSUS CIGNA CASE IS A FOURTH CIRCUIT CASE IN WHICH THEY SAY, I THINK I WANT TO QUOTE FROM THIS FOR JUST A MINUTE, JUDGE, BECAUSE WE HAVE TO LOOK AT THE FRAMEWORK THAT WE ARE HERE TODAY.

> "A DEFENDANT SEEKING REMOVAL OF A STATE COURT ACTION TO FEDERAL COURT BEARS THE HEAVY BURDEN OF ESTABLISHING THAT A NON-DIVERSE DEFENDANT HAS BEEN FRAUDULENTLY JOINED. IN ORDER TO ESTABLISH THE EXISTENCE OF FRAUDULENT JOINDER, THE REMOVING PARTY MUST ESTABLISH EITHER THERE IS NO POSSIBILITY" -- THEY EMPHASIZE IT, I AM NOT EMPHASIZING IT, THEY ARE EMPHASIZING IT IN THEIR OPINION -- "THAT THE PLAINTIFF WOULD BE ABLE TO ESTABLISH A CAUSE OF ACTION AGAINST THE IN-STATE DEFENDANT IN STATE COURT, OR THERE HAS BEEN OUTRIGHT FRAUD IN THE PLAINTIFF'S PLEADING OF THE

JURISDICTIONAL FACTS.

IN APPLYING THIS STRICT STANDARD, WE HAVE RECOGNIZED THAT, QUOTE, A CLAIM NEED NOT ULTIMATELY SUCCEED TO DEFEAT REMOVAL, ONLY A POSSIBILITY OF A RIGHT TO RELIEF NEED BE ASSERTED," QUOTING FROM A PRIOR FOURTH CIRCUIT CASE. "IN EVALUATING A CLAIM OF FRAUDULENT JOINDER, ALL LEGAL AND FACTUAL ISSUES MUST BE RESOLVED IN FAVOR OF THE PLAINTIFF. A COURT MAKING SUCH AN ASSESSMENT IS NOT BOUND BY THE ALLEGATIONS OF THE PLEADINGS, BUT MAY INSTEAD CONSIDER THE ENTIRE RECORD AND DETERMINE THE BASIS OF JOINDER BY ANY MEANS AVAILABLE. FURTHERMORE, WE HAVE EMPHASIZED THAT THE STANDARD FOR EVALUATING A FRAUDULENT JOINDER ISSUE IS EVEN MORE FAVORABLE TO THE PLAINTIFF THAN THE STANDARD FOR RULING ON A MOTION TO DISMISS UNDER RULE 12(B)6."

NOW, JUDGE, IF YOU LOOK AT WHAT WE HAVE HERE, AND YOU READ, I MEAN, CREED, WHICH IS A UNITED STATES DISTRICT COURT

CASE OUT OF VIRGINIA, THE ISSUE IS NOT WHETHER AN INCIDENTAL PARTY, ONE NOT CONCERNED -- AN INCIDENTAL PARTY IS ONE WHO IS NOT ACTUALLY CONCERNED WITH WHO WINS THE SUIT. THE STATE HAS AN INTEREST HERE. THE CONDON CASE MAKES IT CLEAR, THE STATE IS AN INTERESTED PARTY IN THIS ACTION. THE WAY IN WHICH PUBLIC FUNDS ARE HANDLED AND WHETHER A VIOLATION OF THE SEPARATION OF POWERS DOCTRINE IS OCCURRED IS CLEARLY QUESTIONS IN WHICH THE STATE HAS AN INTEREST.

THE COURT: BUT THAT WAS THE STATE COURT SAYING THAT. THEY WEREN'T REALLY ADDRESSING THE ELEVENTH AMENDMENT.

MR. HARPOOTLIAN: NO, NO, THIS IS THE FRAUDULENT JOINDER, THE NOMINAL PLAINTIFF. I'M NOT TALKING ABOUT ELEVENTH AMENDMENT.

THE COURT: I UNDERSTAND.

MR. HARPOOTLIAN: ALL I AM TALKING ABOUT IS, THE GOVERNOR'S COUNSEL INDICATED THAT THE QUESTION ISN'T WHETHER THEY HAVE A CASE IN STATE COURT, THE ONLY QUESTION IS WHETHER THEY HAVE A CASE IN STATE COURT, NOT FEDERAL COURT. IT IS WHETHER OR NOT THE STATE IS A FRAUDULENT PARTY BROUGHT OR A NOMINAL PARTY BROUGHT IN STATE COURT, IN THIS CASE, TO DEFEAT FEDERAL JURISDICTION. I WOULD INDICATE THAT, ACCORDING TO CONDON AND ACCORDING TO JUST CASE AFTER CASE AFTER CASE, AND OF COURSE THEY CITE THIS NORMAN CASE OUT OF NEW YORK, THE STATE OF NEW YORK WASN'T A PARTY TO THAT. THAT WAS A REAPPORTIONMENT CASE. AND APPLYING FEDERAL LAW, IN PURELY

FEDERAL LAW, CHALLENGING THE -- AND A THREE-JUDGE PANEL HAD BEEN APPOINTED, YOU AND I HAVE ACTUALLY BEEN THROUGH THAT PROCESS, AND CLEARLY A FEDERAL CASE, NOT A STATE CASE. AND THEY SAID THAT IS TO SAY A PARTY IS CONSIDERED NOMINAL IF NO CAUSE OF ACTION OR CLAIM OF RELIEF CAN BE STATED AGAINST HIM OR ON HIS BEHALF. NOW, YOUR HONOR, I DON'T WANT TO BEAT A DEAD HORSE HERE, BUT WE DON'T NEED TO GET INTO ALL OF THE DIAGRAMING OF THESE SENTENCES OVER HERE TODAY.

THE COURT: I KNOW. BUT SOMEBODY HAS GOT TO DO IT SOONER OR LATER.

MR. HARPOOTLIAN: I WOULD SUBMIT TO YOU THAT THE PROPER PARTY TO DO THAT BECAUSE WE BROUGHT THIS IN STATE COURT, AND IT IS NOT REMOVABLE, IS THE STATE OF SOUTH CAROLINA SUPREME COURT. BECAUSE WE ARE GOING TO HAVE TO DO THIS. THEY ARE NOT ONLY GOING TO HAVE TO INTERPRET THIS, BUT THEY ARE GOING TO HAVE TO DETERMINE THE STATE LAW, WHETHER WHAT THE LEGISLATURE DID, THEY DID TWO THINGS NOW, WE HAVE ASKED THEM IF THOSE ARE CONSTITUTIONAL, WHETHER THEY CAN DO THAT. THEY HAVE ORDERED THE GOVERNOR TO APPLY FOR THE FUND AND FILL THAT FORM OUT. CAN THEY ORDER HIM TO DO THAT? SECONDLY, THEY HAVE PASSED A RESOLUTION PURSUANT TO THE FEDERAL STATUTE AND APPROPRIATED THE MONEY.

NOW, THE QUESTION FOR THE STATE SUPREME COURT, FIRST OF ALL IS, IS THAT CONSTITUTIONAL UNDER THE STATE SCHEME OF THINGS? THE SECOND THING THEY HAVE TO DO IS, THEY NEED TO

PARSE THESE WORDS TO SEE EVEN IF THAT IS CONSTITUTIONAL, WHETHER IT MEETS THE REQUIREMENT OF THIS STATUTE.

THE COURT: SO YOU SAY THEY ARE SO WRAPPED UP TOGETHER, THE STATE SUPREME COURT NEEDS TO DEAL WITH THE STATE ISSUES AND THE INTERRELATED FEDERAL ISSUE --

MR. HARPOOTLIAN: ABSOLUTELY.

THE COURT: -- AND ONCE THAT IS DONE, THERE WILL BE NOTHING FOR ME TO DECIDE LATER.

MR. HARPOOTLIAN: ABSOLUTELY, YOUR HONOR. OF COURSE, IF YOU CERTIFY SOMETHING BACK, THEY HAVE TO DECIDE THE STATE ISSUE, THEN IT HAS TO COME BACK UP HERE, YOU HAVE TO DECIDE THE FEDERAL ISSUE. THERE IS NO -- NOW THAT THEY HAVE DISMISSED THE FEDERAL -- THE ISSUES OUT OF THE.

THE COURT: SANFORD CASE.

MR. HARPOOTLIAN: -- RIGHT, THE SANFORD CASE, THERE IS ONLY ONE CASE REALLY LEFT WHERE THESE ISSUES ARE RAISED, ALL OF THEM IN ONE, IT CAN BE DECIDED AT ONE TIME BY ONE COURT IN ONE PLACE AND THAT IS THE EDWARDS CASE. SO I WOULD SUBMIT TO YOU THAT WE DON'T HAVE TO REACH ALL OF THE STUFF THAT THEY HAVE JUST SPENT 30 MINUTES ARGUING, ALTHOUGH IT IS INTERESTING, AND I AM SURE AT SOME POINT, HOPEFULLY THIS WEEK WE, WILL DEAL WITH THESE ISSUES.

THE COURT: DO YOU AGREE THAT 1607 WAS INARTFULLY DRAFTED? I KNOW YOU SAY YOU DON'T NEED TO GET TO IT BECAUSE YOU SAY THAT STATE LAW ALLOWS YOU TO DO WHAT YOU WANT TO, DO

DO YOU AGREE IT COULD HAVE BEEN DRAFTED BETTER?

MR. HARPOOTLIAN: YOUR HONOR, I THINK IT WAS INARTFULLY DRAFTED, HOWEVER, I WILL SAY THIS. UNDER THE FEDERAL LAW, LEGISLATIVE HISTORY, WHAT HAPPENS IS CONSIDERED, UNLIKE STATE, THE STATE INTERPRETATION, AND THERE IS A BOATLOAD OF COMMENTS MADE IN THE RECORD, COMMENTS MADE BY REPRESENTATIVE CLYBURN AND OTHERS. AND THE OMB AND THE CONGRESSIONAL BUDGET OFFICE OPINION ON IT CERTAINLY WOULD BE INTERESTING, BUT IT IS NOT BINDING.

AND WHAT IS, OF COURSE, WE COME BACK TO THIS, WHAT WAS THE INTENT OF THE CLYBURN AMENDMENT? THE INTENT WAS THAT HE HAD A GOVERNOR SAYING, I DON'T CARE IF YOU APPROPRIATE THE MONEY, WE ARE NOT TAKING IT. HE SAID, YOU KNOW, I WANT MY STATE TO GET THE BENEFIT OF 3 OR 4 OR 5 OR 600 MILLION DOLLARS, AND TO DO THAT, I AM GOING TO PASS THIS AMENDMENT. WELL, WAS IT INARTFULLY DRAWN? ARE THERE CONCERNS ABOUT THE STATUTORY INTERACTION? SURE. BUT I THINK THAT THE LEGISLATIVE INTENT TRUMPS ALL OF THAT. THAT IS AN ARGUMENT THAT WILL BE MADE ON ANOTHER DAY, NOT HERE TODAY. WHAT I WOULD ASK YOU TO DO, YOUR HONOR, VERY SIMPLY, IS TO REMAND THIS BACK TO STATE COURT, BECAUSE THE STATE IS NOT A NOMINAL PARTY, AND THEIR CONSENT HADN'T BEEN OBTAINED. AND ONCE WE DO THAT, AND BY THE WAY, I BY NO MEANS WANT THIS COURT TO MISUNDERSTAND WHAT I SAID ABOUT RULE 19, AND WHILE THE FOOTNOTE MAY BE OBSCURE, RULE 19 SAYS, STATE RULE 19:

"A PERSON WHO IS SUBJECT TO SERVICE OF PROCESS, WHOSE JOINDER WILL NOT DEPRIVE THE COURT OF JURISDICTION, SHALL BE JOINED."

AND THE SUPREME COURT ORDERED HIM TO BE JOINED. AND THERE WAS NO RULE 11 CONSULTATION, THERE WAS NOTHING DONE, THE NEXT THING WE KNOW THEY FILED A MOTION IT WAS REMOVED. NOW, FILED A MOTION TO BE INTERVENED AND THEN THEY REMOVED. SO IF THE GOVERNOR HAD NOT REMOVED LAST WEDNESDAY, WE WOULDN'T BE HERE TODAY. WE WOULD BE -- THIS WOULD BE THE STATE SUPREME COURT, I SUBMIT, BECAUSE OF THE EXIGENCY OF THE SITUATION, WOULD HAVE ALREADY DECIDED THIS ISSUE. AND THEY COULD HAVE BEEN GOING TO THE U.S. SUPREME COURT TO HAVE IT RESOLVED, IF THAT PETITION FOR CERT THERE, WHICH WOULD NOT STAY THE APPLICATION FOR THE MONEY.

THE MOST EXPEDITIOUS WAY, YOUR HONOR, I DON'T WANT YOU TO INTERPRET MY COMMENTS IN ANY WAY YOU WOULD NOT HAVE THE ABILITY TO RESOLVE THESE ISSUES, BUT YOU CAN RESOLVE PART OF IT, AND YOUR HONOR HAS ALREADY INDICATED A PREDILECTION TO LET THE STATE DECIDE THE STATE ISSUES, THERE IS ONLY ONE PLACE BOTH CAN BE CONSIDERED AT THE SAME TIME, AND THAT IS THE STATE SUPREME COURT.

SO, RESPECTFULLY, I WOULD ASK YOU TO FIND THE STATE NOT TO BE A NOMINAL PARTY, UNDER THE STANDARD I WOULD SUBMIT THERE IS NO EVIDENCE -- NOTHING BEFORE YOU TO INDICATE THE STATE DOES

NOT HAVE AN INTEREST UNDER THE CREED CASE OR UNDER THE CIGNA CASE.

THE COURT: ALL RIGHT. LET'S TAKE A FIFTEEN-MINUTE RECESS. WE WILL RECONVENE IN EXACTLY FIFTEEN MINUTES.

(WHEREUPON, A RECESS WAS HELD.)

THE COURT: I SUPPOSE I WILL HEAR FROM MR. CHILDS.

MR. CHILDS: VERY BRIEFLY, YOUR HONOR. WE ACKNOWLEDGED AT THE OUTSET, THAT WHILE I THINK YOUR PROPOSAL IS CERTAINLY CONSTRUCTIVE, I THINK YOU RAISED THE OPERATIVE QUESTION YOURSELF, I DIDN'T HEAR THE CONSTITUTIONAL LAW PROFESSOR, BUT OUR POSITION IS THAT THERE IS NO JURISDICTION OVER OUR CASE IN THIS COURT. THAT REMAND IS PROPER, THAT REMOVAL WAS IMPROPER. THE ENTIRE TIME THE ATTORNEY FOR THE GOVERNOR WAS UP HERE DIDN'T SAY MUCH ABOUT ANY FEDERAL QUESTION IN OUR CASE. WE SUBMIT TO THE COURT VERY STRONGLY THAT WE HAVE RAISED NO FEDERAL QUESTION, THIS IS FUNDAMENTALLY AN ISSUE QUESTION OF STATE LAW.

INTERESTINGLY, WE ARE TALKING ABOUT THE APPROPRIATIONS BILL HERE WHERE THE LEGISLATURE SAID THAT THE GOVERNOR SHALL TAKE CERTAIN ACTION WITHIN FIVE DAYS AND THE STATE SUPERINTENDENT SHALL DO CERTAIN THINGS.

INTERESTINGLY, AND JUST SOME QUICK RESEARCH, WE FOUND THAT THERE ARE OVER A HUNDRED EXAMPLES IN SOUTH CAROLINA LAW WHERE THE LEGISLATURE HAS PASSED A LAW IN WHICH THEY SAY THE GOVERNOR SHALL DO CERTAIN THINGS. THE CONSTITUTION HAS A

CLEAR PROVISION THAT THE GOVERNOR SHALL TAKE CARE TO SEE THAT THE LAWS ARE FAITHFULLY EXECUTED.

SO, THE ISSUE HERE IS, WHAT IS THE MEANING OF SOUTH CAROLINA LAW? AND I WOULD JUST POINT OUT, ALSO, FOR THE COURT'S CONSIDERATION THAT BLACKWELDER, THE BLACKWELDER CASE WHICH WE CITED IN OUR BRIEF AND WHICH DEALS WITH REMOVAL ISSUES, MAKES A VARIANCE THAT SAYS VERY EMPHATICALLY THAT A MANDAMUS WOULD NOT BE APPROPRIATE IN OUR CASE. WE WOULD ASK THE COURT TO REMAND IT BACK TO THE SOUTH CAROLINA SUPREME COURT WHERE WE THINK THIS CASE BELONGS.

THE COURT: ALL RIGHT. NOW YOU SAID EARLIER, YOU CAREFULLY AVOIDED RAISING ANY FEDERAL QUESTIONS IN YOUR CASE.

MR. CHILDS: YES.

THE COURT: SO IF YOUR CASE WENT BACK BY ITSELF, THEN I STILL WOULD HAVE TO REACH THIS STATUTORY INTERPRETATION ISSUE EVENTUALLY, RIGHT, OR NOT?

MR. CHILDS: NOT NECESSARILY, BECAUSE, AND I WOULD POINT THE COURT'S ATTENTION TO THE LAWRENCE CASE, WHICH IS A VERY CAREFUL OPINION, JUST IN 2005 BY WILKINSON, LUDDIG, AND JUDGE TRAXLER. AND THEY SAY THERE THAT EVEN IF PREEMPTION FORMS THE VERY CORE OF THE LITIGATION, IT IS INSUFFICIENT FOR REMOVAL. SO OUR POSITION HAS BEEN, IF THE GOVERNOR WANTS TO RAISE THIS FEDERAL ISSUE IN STATE COURT, HE CAN CERTAINLY DO SO. AND THE SOUTH CAROLINA SUPREME COURT CAN OPINE ON THE MATTER. AND THEIR DECISION IS REVIEWABLE BY THE U.S. SUPREME

COURT.

THE COURT: IF THE FEDERAL ISSUE IS NOT RESOLVED, WHAT IF THE FEDS DON'T RELEASE THE MONEY? THE STATE SUPREME COURT COULD PRONOUNCE STATE LAW, BUT WHAT IF THE POWERS-TO-BE IN WASHINGTON SAY WE HAVEN'T GOTTEN CERTIFICATION FROM THE GOVERNOR AS REQUIRED BY THE STATE LAW?

MR. CHILDS: YOUR HONOR, WE HAVE ASKED IN OUR COMPLAINT FOR MANDAMUS. I DO NOT THINK --

THE COURT: THAT IS RIGHT. THE MANDAMUS WOULD CURE IT.

MR. CHILDS: I DO NOT THINK THE GOVERNOR WILL IGNORE A DIRECT ORDER.

THE COURT: IF THAT IS GRANTED, THAT WOULD CURE THE PROBLEM, I GUESS.

MR. CHILDS: THAT IS OUR POSITION.

THE COURT: ANYTHING ELSE?

MR. CHILDS: NOTHING FURTHER.

THE COURT: ALL RIGHT. I WILL BE GLAD TO HEAR FROM THE SECRETARY.

MS. KELLY: I WOULD LIKE TO ADDRESS FIRST THE ISSUE OF THE FUNDAMENTAL STATE QUESTION HERE. WE HAVE SEEN THE LANGUAGE OF 16 -- I MEAN, 1607 AND THE SCASA'S PLEADINGS DO NOT REST PRIMARILY ON THE INTERPRETATION OF 1607, THEY DO REST ON -- RELY ON THE INTERPRETATION OF THE APPROPRIATIONS ACT. THE AMERICAN RECOVERY AND REINVESTMENT ACT IS SIMPLY A

FEDERAL APPROPRIATION ACT. IT IS AN APPROPRIATION THAT WE HAVE ASKED THIS COURT NOT TO INTERPRET THE AMERICAN RECOVERY AND REINVESTMENT ACT, BUT TO DECIDE WHETHER THE GENERAL ASSEMBLY BASICALLY HAS THE RIGHT TO, BASICALLY, ORDER THE GOVERNOR, THROUGH THE APPROPRIATIONS ACT, TO MAKE THIS APPLICATION. SO, I THINK THAT THE LANGUAGE IN 1607 HAS TO BE LOOKED AT AND APPROPRIATELY BY THE SOUTH CAROLINA SUPREME COURT.

THE COURT: YOU SAY -- YOU AND MR. CHILDS SAY THIS CASE CAN BE DECIDED PURELY ON STATE LAW. IF THE STATE LAW GIVES THE GENERAL ASSEMBLY THE AUTHORITY TO COMMAND THE GOVERNOR TO DO SOMETHING AND A MANDAMUS ISSUES OUT OF THE SUPREME COURT, WE CAN AVOID THE FEDERAL CONSTITUTION QUESTION ALTOGETHER, WHICH IS DESIRABLE AS A WELL-ESTABLISHED DOCTRINE YOU TRY TO AVOID DECIDING CONSTITUTION, IF YOU CAN.

MS. KELLY: I BELIEVE SO. I THINK IF YOU EVEN LOOK AT THE PREEMPTION ISSUE, THE LAWRENCE CASE THAT WAS CITED BY THE GOVERNOR, WHAT YOU LOOK AT FOR PREEMPTION IS WHETHER THE STATE LAW, WHICH WOULD BE THE APPROPRIATIONS ACT, STANDS AS AN OBSTACLE TO THE ACCOMPLISHMENT OF THE FULL PURPOSE AND OBJECTIVE OF CONGRESS. SO, YOU ARE LOOKING AT THE OBSTACLE TO THE ACCOMPLISHMENT AND FULL PURPOSE AND OBJECTIVE OF CONGRESS. I THINK IF YOU LOOK AT THE PURPOSE OF THE ARRA, IT IS NOT TO GRANT DISCRETIONARY AUTHORITY TO THE GOVERNOR. IT IS NOT TO REARRANGE THE BALANCE OF POWER OF THE STATE. AND IT

IS NOT TO GRANT UNBRIDLED DISCRETION OVER FUNDS, IT IS ACTUALLY SPECIFIED IN THE ACT IN PART THREE AS PRESERVING STATE JOBS, ASSISTING THOSE MOST IMPACTED BY THE RECESSION, AND MOST IMPORTANTLY TO THIS CASE, IS STABILIZATION OF STATE AND LOCAL GOVERNMENT. SO, I WOULD ASK THAT -- I THINK THE OBVIOUS READING OF THE STATUTE WHERE IT DOES SAY THAT A -- THE GOVERNOR OF A STATE DESIRING, AND WE DID PUT THIS IN OUR BRIEF, THAT IF THE PLAIN READING OF THE STATUTE, I THINK AND OF COURSE THE SOUTH CAROLINA SUPREME COURT IS THE APPROPRIATE -- WOULD HAVE AUTHORITY TO DO THIS, IT SAYS, THE GOVERNOR OF A STATE DESIRING TO RECEIVE ALLOCATION. IT DOES NOT GIVE THIS UNBRIDLED DISCRETION TO THE GOVERNOR WHICH HAS BEEN PUT FORTH BY THE GOVERNOR.

THE COURT: THERE AGAIN, YOU SAY THE THORNY FEDERAL ISSUE COULD BE RESOLVED BY STATUTORY CONSTRUCTION WHICH WOULD ELIMINATE ANY PREEMPTION OR SUPREMACY CLAUSE ISSUE?

MS. KELLY: THAT IS TRUE. THAT IS CORRECT. I THINK IF YOU LOOK AT ALL OF THE QUALIFICATIONS THAT ARE REQUIRED BY THE ACT TO RECEIVE THE FUNDS ALL OF THOSE OR MOST OF THOSE QUALIFICATIONS ARE REQUIRED OR THINGS THAT ONLY THE SOUTH CAROLINA GENERAL ASSEMBLY CAN DO. THE MAINTENANCE OF EFFORT OF SPECIFIC FUNDING. THE LEVELS OF FUNDING PERCENTAGES THAT HAVE TO BE FUNDED THROUGH, IF THE STATE DOES ACCEPT THOSE FUNDS, THE HIGHER ED AND K-12 EDUCATION HAS TO BE MADE -- THE FUNDING -- THE STATE FUNDING HAS TO BE MAINTAINED

AT A CERTAIN LEVEL. IT IS NOT VERY MUCH DISCRETION IN THAT ACT AS FAR AS THE GOVERNOR IS CONCERNED. EIGHTY-ONE POINT EIGHT (81.8) PERCENT OF THE STABILIZATION FUNDS ARE DIRECTED SPECIFICALLY AT K-12 AND HIGHER ED. SO WE ARE TALKING ABOUT 18 PERCENT OF FUNDS THAT MAY HAVE SOME DISCRETION. THE GOVERNOR IN OUR STATE, WE HAVE A GENERAL ASSEMBLY THAT REALIZE THAT THE GOVERNOR WAS NOT GOING TO ACCEPT THE MONEY AND PASSED A LAW REQUIRING HIM TO DO SO, AND WE BELIEVE THIS IS A STATE CONSTITUTIONAL ISSUE THAT THE STATE SUPREME COURT SHOULD CONSIDER. AND IT IS SOMETHING THAT THE STATE HAS STRUGGLED WITH. NO QUESTION, THE STATE HAS BEEN SEEING THIS AS HAVING A WEAK GOVERNOR, THE BALANCE OF POWER HAS BEEN DEBATED OVER RECENT DECADES, AND THE GOVERNOR HIMSELF STATED THE QUESTION BEST, EVERYBODY -- WE ALL PUT IT IN OUR BRIEFS:

> "OUR SUIT IS FUNDAMENTALLY ABOUT THE BALANCE OF POWER AND SEPARATION OF POWER IN OUR STATE AND WHETHER OR NOT THE LEGISLATURE IS GOING TO BE ALLOWED TO ERODE THE EXECUTIVE BRANCH EVEN FURTHER IN SOUTH CAROLINA."

SO, I THINK WHAT WE HAVE IS WE HAVE AN ATTEMPT TO TAKE -- TO TRY TO INTERPRET THE ARRA, TRY TO MAKE IT AMBIGUOUS, TO MAKE IT A FEDERAL ISSUE. AND I DON'T BELIEVE -- I THINK THE LANGUAGE IS VERY CLEAR, IT DOESN'T EVEN REQUIRE THAT MUCH

INTERPRETATION. YOU COULD -- THE PLAIN READING ACTUALLY SAYS THE GOVERNOR OF A STATE DESIRING, AND THERE IS NO GREATER EVIDENCE THAT THE STATE DESIRES THE MONEY THAN THE GENERAL ASSEMBLY PASSING THE APPROPRIATIONS ACT AND THEN OVERRIDING THE VETO.

I ALSO WANT TO ADDRESS THE ISSUE OF THE NON-CONSENT FOR REMOVAL, BECAUSE THAT, OF COURSE, IS ONE OF OUR MAIN QUESTIONS AS WELL. A LOT HAS BEEN RAISED ABOUT THE SUPERINTENDENT REX'S PUBLIC OPINION REGARDING THESE FUNDS, AND CERTAINLY HE WANTS THE STATE TO BENEFIT FROM THESE FUNDS AND WILL DO EVERYTHING HE CAN TO ADVANCE THAT. BUT IF YOU LOOK -- WHEN DECIDING THESE REMOVAL ISSUES, YOU NEED TO LOOK AT THE COMPLAINT ITSELF, NOT THE GOVERNOR'S -- NOT THE SUPERINTENDENT'S ANSWER UNDER THE WELL-PLEADED COMPLAINT RULE AND LOOK AT, IS THERE ANY --

THE COURT: I CAN'T LOOK TO THE ANSWER TO SEE IF YOU ARE TRULY ADVERSE TO THE PLAINTIFF?

MS. KELLY: NOT UNDER THE CASE LAW YOU ARE NOT SUPPOSED TO. THE CASE LAW SUPPORTS YOU ARE TO LOOK AT THE FACE OF THE COMPLAINT. NOW --

THE COURT: WHY IS HE EVEN A PARTY AT ALL?

MS. KELLY: I BELIEVE HE WAS A PARTY BECAUSE AT THE TIME THE LAWSUIT WAS FILED, THE GOVERNOR HAD NOT CERTIFIED -- EXCUSE ME, HAD NOT APPLIED FOR THE FUNDS, BUT THERE IS ALSO A REQUIREMENT THAT THE APPROPRIATIONS ACT THAT THE STATE

SUPERINTENDENT ASSIST THE GOVERNOR IN FILING THIS APPLICATION. AND AT THE TIME THE LAWSUIT WAS FILED, WE HAD NOT COMPLETED THE APPLICATION. WE HAD TO WAIT FOR SOME FINAL APPROPRIATIONS NUMBERS TO BE PUT TOGETHER. SO, IF ANYTHING, THERE WAS THAT KIND OF PUSH TO MAKE SURE THAT THE SUPERINTENDENT -- NOW WE WOULD CERTAINLY SAY THAT WE WERE PLANNING ON DOING ALL THAT WE COULD TO FOLLOW THAT LAW, BECAUSE GOVERNOR REX -- EXCUSE ME, NOT GOVERNOR REX, SUPERINTENDENT REX INTENDED TO COMPLY WITH THE APPROPRIATIONS ACT, AND WE HAD BEEN WORKING FOR A LONG TIME ON THAT APPLICATION.

BUT THE OTHER ISSUE, I THINK, IS THAT FALL-BACK ISSUE THAT WAS RAISED AS THE CLAIM NUMBER THREE WHICH IS SORT OF A UNIQUE INTERPRETATION OF THE STATE LAW BECAUSE OF THE WAY THE STATE STATUTES AND THE STATE CONSTITUTION SETS THE -- PUTS A LOT OF EXECUTIVE AUTHORITY WITHIN THE STATE SUPERINTENDENT WITH REGARDS TO EDUCATION POLICY. AND REALLY THE GOVERNOR HAS LITTLE OR NO AUTHORITY WITH REGARD TO EDUCATION IN OUR STATE, WHICH IS SOMEWHAT UNIQUE, BECAUSE IN A LOT OF STATES THEY HAVE APPOINTED SUPERINTENDENTS OF EDUCATION.

AND THE ACTION NUMBER THREE IS ASKING THAT THE SUPERINTENDENT BE ALLOWED TO APPLY FOR THESE FUNDS. AND SOMETHING THAT I DON'T -- WE ANSWERED THAT WE DID NOT BELIEVE THE LAW WOULD ALLOW FOR THAT BECAUSE I DON'T KNOW IF THE U.S. -- WE ARE AFRAID THE U. S. DEPARTMENT OF EDUCATION WOULD NOT

ACCEPT THE APPLICATION THAT WAS SUBMITTED BY THE SUPERINTENDENT OF EDUCATION FOR ONE THING. SO THAT IS AN AREA THAT WE ARE ADVERSE TO THE CLAIMANTS ON THAT ISSUE. WE DON'T BELIEVE THAT IS A CLAIM AGAINST THE SUPERINTENDENT, NOT AGAINST THE GOVERNOR AT ALL.

THE COURT: ALL RIGHT. THANK YOU VERY MUCH.

ANYBODY ELSE ON THE -- YES, SIR, GO AHEAD.

MR. COOK.

MR. COOK: YOUR HONOR, I THINK THIS MATTER BOILS DOWN TO ONE SIMPLE ISSUE. THAT IS WHETHER THE STATE OF SOUTH CAROLINA IN THE EDWARDS CASE, AT LEAST, WHETHER THE STATE OF SOUTH CAROLINA CONSENTED TO THE REMOVAL AND WHETHER -- AND, OF COURSE, WE DID NOT, AND WHETHER THE STATE OF SOUTH CAROLINA IS A NOMINAL PARTY AND, THEREFORE, ITS CONSENT DOESN'T COUNT IN THIS CASE.

LET ME JUST BRIEFLY READ YOU FROM THE ORDER OF THE SOUTH CAROLINA SUPREME COURT IN THE CASE OF EDWARDS VERSUS THE STATE OF SOUTH CAROLINA, WHICH THE COURT ACCEPTED JURISDICTION. THIS MATTER, I THINK, RESOLVES EVERYTHING.

"PETITIONER SEEK A DECLARATORY JUDGMENT IN THIS COURT'S ORIGINAL JURISDICTION THAT THE SOUTH CAROLINA GENERAL ASSEMBLY MAY REQUEST, ACCEPT, AND DISTRIBUTE THE AMERICAN RECOVERY AND REINVESTMENT ACT OF

2009 FUNDS, WHICH THE GENERAL ASSEMBLY INCLUDED IN THE 2009-10 GENERAL APPROPRIATIONS BILL, THE BUDGET, AND THAT THE GOVERNOR MUST EXECUTE THE BUDGET AS ENACTED BY THE GENERAL ASSEMBLY. WE ACCEPT THIS MATTER IN OUR ORIGINAL JURISDICTION, DISPENSE WITH FURTHER BRIEFING, AND SET THE MATTER FOR ORAL ARGUMENT FOR THURSDAY, MAY 28TH, 2009 AT 2:30 P.M., THE TIME ALLOTTED FOR ARGUMENT IS AS FOLLOWS."

THE SUPREME COURT LOOKED AT THIS CASE, THEY LOOKED AT THE PAPERS OF THE PLAINTIFF, THEY LOOKED AT THE RETURN OF THE DEFENDANT OF THE STATE OF SOUTH CAROLINA. THE COURT KICKED OUT THE FIRST CASE THAT WAS BROUGHT BECAUSE THEY CONCLUDED THAT THE CASE WAS NOT RIPE FOR REVIEW BECAUSE THE GENERAL ASSEMBLY HAD DONE NOTHING YET. IT HAD PASSED NO BUDGET, IT HAD PASSED NO DIRECTIVE TO THE GOVERNOR, IT HAD ADOPTED NO CONCURRENT RESOLUTION. THE STATE MOVED AND ADVISED THE COURT IN THAT FIRST CASE THAT THE CASE WAS NOT RIPE FOR REVIEW. ALL OF THOSE THINGS, OF COURSE, HAPPENED. AND SUBSEQUENTLY, THE CASE WAS RE-FILED AND THE SUPREME COURT WITH AN ADDITIONAL PLAINTIFF ADDED.

THE SUPREME COURT OBVIOUSLY VIEWS THE STATE OF SOUTH

CAROLINA AS A PROPER PARTY IN THIS CASE, NOT A NOMINAL PARTY, NOT A SHAM PARTY, NOT AN IMPROPERLY JOINED PARTY. SO, THIS CASE IS BEFORE THE SUPREME COURT. I KNOW THE ARGUMENT IS THAT FEDERAL LAW APPLIES, BUT THIS CASE BEGAN IN THE STATE SUPREME COURT. SO, WHERE YOU START OUT IS WHETHER THE SUPREME COURT VIEWS THE STATE OF SOUTH CAROLINA AS AN INTERESTED OR PROPER PARTY, AND CLEARLY THE COURT DOES HERE.

SO, WE WOULD ASK THE COURT TO REMAND BECAUSE, IN THIS CASE, BECAUSE CONSENT WAS NOT -- CONSENT WAS NOT PROPERLY OBTAINED FROM THE STATE. AND THE STATE IS HARDLY A NOMINAL PARTY, BUT IS A REAL PARTY IN THIS CASE. AND THAT WOULD BE OUR POSITION ON THE BOTTOM LINE FOR THE EDWARDS' CASE.

THE COURT: ALL RIGHT. WHILE YOU ARE UP, MY LAW CLERK POINTED OUT A FOOTNOTE IN SOMEONE'S BRIEF LAST NIGHT THAT DESCRIBES THE ATTORNEY GENERAL'S DUTY TO REPRESENT THE STATE. AND IT SAID, BASICALLY, THAT ATTORNEY GENERAL SHOULD REPRESENT THE STATE IN GENERAL SESSIONS COURT, AND COMMON PLEAS COURT, AND IN OTHER TRIBUNALS WHEN REQUIRED BY THE GOVERNOR.

MR. COOK? YES, SIR.

THE COURT: I GUESS THIS IS ANOTHER TRIBUNAL HERE. THE GOVERNOR SUED YOU IN THIS COURT, IT DOESN'T MEAN HE REQUIRED YOU --

MR. COOK: I THINK THE COURT ADDRESSED THAT VERY WELL IN THE CONDON CASE. THE COURT SAYS, THE ATTORNEY GENERAL

WEARS TWO HATS. THE ATTORNEY GENERAL REPRESENTS THE STATE AS THE STATE AND AN ENTITY, BUT THE ATTORNEY GENERAL ALSO REPRESENTS THE PUBLIC INTEREST. AND THE ATTORNEY GENERAL, ON BEHALF OF THE STATE, CAN AND USUALLY DOES TAKE THE POSITION IN THE STATE SUPREME COURT ON MATTERS IN THE ORIGINAL JURISDICTION. THAT HAPPENS REPEATEDLY. YOUR HONOR WAS IN THE GENERAL ASSEMBLY AND THAT HAS HAPPENED OVER THE YEARS. YOU RECALL THE JOYTIME CASE INVOLVING THE REFERENDUM ON VIDEO POKER, THE STATE-WIDE REFERENDUM. THE STATE WAS THE PARTY THERE. THE STATE REPRESENTS -- THE ATTORNEY GENERAL REPRESENTS THE STATE BOTH AS THE STATE, THE CORPORATE STATE, AND IN THE PUBLIC INTEREST. AND THAT IS WHAT WE ARE DOING IN THIS CASE. AND WE ARE NOT JUST LIMITED, IT IS NOT JUST THE GENERAL ASSEMBLY VERSUS THE GOVERNOR, THE STATE HAS AN INDEPENDENT INTEREST HERE. THE STATE'S INTEREST IS IN THESE FUNDS. THE STATE APPLIES FOR THE FUNDS, THE STATE RECEIVES THE FUNDS, THE STATE IS ACCOUNTABLE TO THE TAXPAYERS FOR THE FUND.

MR. HARPOOTLIAN'S LAWSUIT IS BROUGHT BY TWO STUDENTS AS STUDENTS, BUT ALSO AS TAXPAYERS. SO THE PUBLIC IS INVOLVED IN THIS AS WELL, AND THE ATTORNEY GENERAL, REPRESENTING THE STATE, IS VERY MUCH INVOLVED IN THIS. AND IF WE ARE NOT A PROPER PARTY IN THIS CASE, I HAVE NEVER SEEN ONE WE ARE. SO, THAT IS OUR POSITION.

THE COURT: YOU KNOW, YOUR CLIENT, THE STATE, WAS

ONCE DESCRIBED BY A FORMER GOVERNOR, I AM SURE YOU HAVE HEARD IT, TOO SMALL TO BE A NATION, TOO LARGE TO BE AN INSANE ASYLUM.

MR. COOK: JAMES L. PETTIGRU.

THE COURT: THAT IS YOUR CLIENT.

MR. COOK: I QUOTE THAT, ADVISED THE ATTORNEY GENERAL BEFORE HE WAS A FORMER ATTORNEY GENERAL OF JAMES L. PETTIGRU. HE SAID JUST THAT, THAT THE STATE IS TOO SMALL TO BE A NATION AND TOO LARGE TO BE AN INSANE ASYLUM.

THE COURT: WITH THAT, WE DO HAVE SOME, SERIOUSLY, SOME VERY UNIQUE FINANCIAL ARRANGEMENTS IN SOUTH CAROLINA PROBABLY UNPARALLELED ANYWHERE. I REMEMBER WHEN I WAS IN THE GENERAL ASSEMBLY, THERE WAS A ROAD CONSTRUCTION FUND CALLED THE C FUND. THE STATE LEGISLATIVE DELEGATION GOT TO SPEND THAT MONEY TO DECIDE WHICH ROADS TO PAVE IN THEIR DISTRICT. AND I NEVER FIGURED OUT HOW THAT SQUARED WITH THE THREE BRANCHES OF GOVERNMENT AND SEPARATE POWERS. AND THEN THERE WAS ANOTHER FUND -- DO THEY STILL HAVE THAT?

MR. COOK: C FUNDS? YES, SIR.

THE COURT: THEN THERE WAS A WILDLIFE FUND.

MR. COOK: YES, SIR.

THE COURT: I REMEMBER THE GAME WARDEN COMING BY MY OFFICE TO GET ME TO SIGN SOMETHING SO HE COULD BUY WADER BOOTS. AND I SIGNED IT AS A STATE LEGISLATOR SPENDING THAT MONEY.

MR. COOK: HAPPILY FOR YOUR CONCERNS, YOUR HONOR, THE STATE SUPREME COURT AND BOTH OF THOSE INSTANCES HAS CONCLUDED THAT THE SEPARATION OF POWERS IS VIOLATED FOR THE LEGISLATURE TO SPEND THE MONEY OR APPROPRIATE THE MONEY AND THEN EXECUTE.

THE COURT: THOSE ARE THINGS THAT HAVE BOTH PASSED NOW?

MR. COOK: YES, SIR. THE COURT HAS -- THEY HAVE HAD TO FIX THOSE FUNDS BECAUSE OF STATE SUPREME COURT RULINGS IN BOTH THE C FUNDS AND THE WILDLIFE FUNDS. THE WILDLIFE FUNDS CASE WAS JUST A YEAR OR TWO AGO, KNOTTS VERSUS SOMEBODY, YOU KNOW WHO MR. KNOTTS IS. HE WAS INVOLVED IN THAT CASE AND THE COURT, I THINK IT WAS AGAINST THE DEPARTMENT OF NATURAL RESOURCES, ACTUALLY. AND THE COURT SAID THE LEGISLATURE CAN'T EXECUTE THE LAW IN THAT SITUATION. SO, THE SUPREME COURT IS VERY STEADFAST IN SEPARATING THE -- IN DEALING WITH THE SEPARATION OF POWERS ISSUES IN SOUTH CAROLINA, AND THEY ARE VERY STEADFAST IN THROWING OUT LAWSUITS THAT ARE A SHAM LAWSUIT. AND THEY DIDN'T DO THAT HERE. THEY THINK THE STATE IS THE APPROPRIATE PARTY AND THAT IS GOOD ENOUGH FOR ME WHEN THE SUPREME COURT SAYS THAT.

THE COURT: ONE THING I HAVE NEVER UNDERSTOOD, NEVER HAD TO REALLY ADDRESS IT BEFORE, WHO WAS THE PROPER STATE OFFICIAL TO SUE? DO YOU AGREE THE AG IS THE PROPER PERSON TO SUE TO BRING THE STATE IN IN THIS CASE? THE REASON I MENTION

--

MR. COOK: IN WHICH CASE, YOUR HONOR?

THE COURT: WELL, MR. HARPOOTLIAN MENTIONED A MOMENT AGO WE HAD SOME REDISTRICTING CASES. ONE YEAR WHEN THE SUPREME COURT SUBSTANTIALLY CHANGED THE LAW ON MAXIMIZING MINORITY DISTRICTS, THERE WERE TWO SUITS BROUGHT, AND ONE, GOVERNOR BEASLEY WAS THE DEFENDANT, AND THE OTHER SPEAKER WILKINS WAS THE DEFENDANT. AND I NEVER UNDERSTOOD HOW -- WHO DO YOU SUE? COULD HE HAVE SUED THE AG IN THOSE CASES? NO, THERE WAS A DEADLOCK THERE, LEGISLATIVE STEAL MADE. NO THERE WASN'T. I'M SORRY. THIS WAS AFTER THE SUPREME COURT HAD CHANGED THE LAW AND WE HAD EXISTING DISTRICTS, BUT THE ARGUMENT WAS THE DISTRICTS WERE NO LONGER GOOD AFTER THE SUPREME COURT. BUT I MEAN IS, IS THE AG THE RIGHT PERSON TO NAME TO BRING THE STATE INTO A CASE?

MR. COOK: IN THE SANFORD CASE, OF COURSE, I DON'T BELIEVE THE AG IS THE RIGHT PERSON. BECAUSE IN THAT CASE WE HAVE NO ENFORCEMENT DUTIES UNIQUE TO THAT PARTICULAR LAW. THE PROVISO OF THE BUDGET BILL, THERE IS NOTHING THAT SAYS THE AG HAS ENFORCEMENT DUTIES. UNLIKE THE UNFAIR TRADE PRACTICES ACT IN SOUTH CAROLINA, WHERE WE DO HAVE SPECIFIC DUTIES. I THINK IT WOULD DEPEND ON THE CIRCUMSTANCES. OBVIOUSLY, FEDERAL PLAINTIFFS SUE THE ATTORNEY GENERAL. WE HAVE A GAMBLING CASE PENDING RIGHT NOW WHERE ATTORNEY GENERAL MCMASTER IS A DEFENDANT BECAUSE HE HAS THREATENED TO ENFORCE

THE GAMBLING LAWS AGAINST VARIOUS PEOPLE IN THE GAMBLING INDUSTRY. BUT THAT DOESN'T ALWAYS HOLD WATER. IN THIS CASE, I AM NOT SURE WHY THEY SUED THE ATTORNEY GENERAL. I AM A LITTLE AT A LOSS FOR THAT. I THINK IT WOULD DEPEND ON THE CIRCUMSTANCES. THE AG HAS BROAD COMMON-LAW POWERS AND ENFORCEMENT DUTIES IN SOUTH CAROLINA, BUT HE HAS TO DO SOMETHING, I THINK, BEFORE YOU COME INTO THIS COURT.

THE COURT: ALL RIGHT. THANK YOU, SIR.

ANYBODY ELSE WANT TO BE HEARD IN FAVOR OF REMAND? THEN I WILL COME BACK TO MR. CHARNES.

MR. HARPOOTLIAN: YOUR HONOR, I JUST WANT TO NOTE FOR THE RECORD, THAT REAPPORTIONMENT CASE WAS BROUGHT BY MR. GERGEL AND I, AND WE SUED THE TWO INDIVIDUALS RATHER THEN THE STATE BECAUSE OF THE ELEVENTH AMENDMENT CONCERNS.

THE COURT: WASN'T IT THE GOVERNOR AND THE SPEAKER?

MR. HARPOOTLIAN: WE SUED THE GOVERNOR AND THE SPEAKER, WE DID NOT SUE THE STATE OF SOUTH CAROLINA BECAUSE WE HAD ELEVENTH AMENDMENT CONCERNS:

MR. REAGLE: YOUR HONOR, IF I COULD BE HEARD BRIEFLY IN RESPONSE TO THE SUPERINTENDENT OF EDUCATION'S POSITION.

THE COURT: GIVE US YOUR NAME. I WILL COME BACK TO THE GOVERNOR IN JUST A MOMENT.

MR. REAGLE: I AM JOHN REAGLE, YOUR HONOR. THERE ARE TWO BASIS FOR OPPOSING OR FOR REMANDING THIS CASE, THE SCASA CASE, TO THE STATE SUPREME COURT. ONE IS THAT THE

CONSENT OF THE PARTIES WAS NOT PROPERLY OBTAINED AS REQUIRED BY THE REMOVAL STATUTE. THE OTHER IS NO FEDERAL QUESTION JURISDICTION. WE ARE ASKING THE COURT EXPRESSLY TO LIMIT A REMAND ORDER TO THE FEDERAL QUESTION ISSUE. WE ARE REQUESTING THAT THIS MATTER BE REMANDED TO THE STATE SUPREME COURT BECAUSE OUR COMPLAINT RAISES NO FEDERAL QUESTION.

UNDER THE BLACKWATER CASE, THE FOURTH CIRCUIT CASE, BLACKWATER, THE FOURTH CIRCUIT MADE IT VERY CLEAR THAT THERE IS NO GO AHEAD RIGHT OF MANDAMUS REVIEW IF THE REMAND IS BASED SOLELY ON FEDERAL QUESTION JURISDICTION; HOWEVER, THERE ARE SOME CASES THAT PROVIDE FOR MANDAMUS REVIEW WHERE THE REMAND IS BASED ON CONSENT OF PARTIES OR FRAUDULENT JOINDER ISSUES. SO, WE CERTAINLY BELIEVE THAT THE STATE SUPERINTENDENT IS PROPERLY A DEFENDANT IN THIS MATTER.

WE ARE ADVERSE TO THE STATE SUPERINTENDENT ON SOME ISSUES ABOUT HIS AUTHORITY UNDER STATE LAW. BUT THE THRESHOLD QUESTION, THE PRIMARY JURISDICTIONAL QUESTION, IS FEDERAL QUESTION JURISDICTION. AND THAT NEEDS TOO BE RESOLVED FIRST, AND IT SHOULD BE RESOLVED IN FAVOR OF SCASA, AND THE CASE REMANDED TO THE STATE SUPREME COURT ON THE BASIS OF THE FEDERAL QUESTION JURISDICTION ALONE. AND THE PINPOINT CITE TO THE BLACKWATER CASE IS 460 F3D 576.

THANK YOU, YOUR HONOR.

THE COURT: ALL RIGHT, MR. CHARNES.

MR. CHARNES: THANK YOU, YOUR HONOR. I WILL TRY TO

BE BRIEF, BUT COVER THE ESSENTIAL POINTS.

I AGREE WITH MR. HARPOOTLIAN THAT THE STANDARD, ESSENTIALLY, IS WITH RESPECT TO WHETHER THE STATE IS A NOMINAL PARTY. WHETHER THERE IS ANY POSSIBILITY OF THE EDWARDS PLAINTIFFS GETTING RELIEF FROM THE STATE. I WOULD REFER THE COURT TO MR. HARPOOTLIAN'S COMPLAINT. IF YOU LOOK AT THE PRAYER FOR RELIEF, PRAYERS FOR RELIEF ON PAGES 10 TO 11, THEY DON'T ASK FOR ANY RELIEF FROM THE STATE. THEY DON'T ASK FOR THE COURT, WHATEVER COURT IS ULTIMATELY -- ULTIMATELY HEARS THIS COMPLAINT, RESOLVES THIS COMPLAINT, THEY DON'T ASK FOR RELIEF AGAINST THE STATE. SO THERE IS NO POSSIBILITY OF GETTING RELIEF FROM THE STATE AGAINST THE STATE BECAUSE THEY DON'T ASK FOR IT IN THE COMPLAINT.

WHAT THEY DO ASK FOR IS RELIEF AGAINST THE GOVERNOR. IT SAYS THE GOVERNOR AND THE EXECUTIVE BRANCH MUST PERFORM THE ACTIONS REQUIRED TO ACCEPT THE ARRA FUNDS FROM THE FEDERAL GOVERNMENT. THAT IS IN THEIR SECOND PARAGRAPH B IN THEIR PRAYER FOR RELIEF. SO, FOR THAT REASON ALONE WE THINK IT IS THE CLEAR THE STATE IS A NOMINAL PARTY. THE PLAINTIFFS CAN NOT ASK FOR AFFIRMATIVE RELIEF FROM THE STATE.

ON HIS POINT ABOUT DELAY, AS I INDICATED BEFORE, YOUR HONOR, WE AGREE THIS CASE SHOULD AND MUST PROCEED EXPEDITIOUSLY. I THINK THAT YOU HAVE THE ABILITY, I HAVE EVERY CONFIDENCE IN YOUR ABILITY TO DECIDE THIS AS QUICKLY, NOT WALK WITHIN THE STATE SUPREME COURT. WE HAVE

ESSENTIALLY, IN SOMEWHAT SUMMARY FORM, WE HAVE ESSENTIALLY LAID OUT OUR PREEMPTION ARGUMENT ALREADY. WE HAVE NOT BRIEFED THE 1607 QUESTION, BUT THE PARTIES CAN SHORE UP THE BRIEF, THOSE ISSUES, AND GET IT TO YOUR HONOR FOR DECISION WELL IN ADVANCE OF THE JULY 1ST DEADLINE.

IF THE COURT THINKS IT IS APPROPRIATE TO CERTIFY ANY QUESTIONS TO THE STATE SUPREME COURT, AS I INDICATED, I AM NOT SURE WHAT THOSE QUESTIONS ARE, I DIDN'T HEAR ANY OF THE OTHER -- COUNSEL FOR ANY OF OTHER PARTIES TO IDENTIFY A SPECIFIC QUESTION THAT THEY WOULD ASK THE COURT, STATE LAW QUESTION.

THE COURT: THE SCASA SUIT ALLEGES THAT THE GENERAL ASSEMBLY HAS THE AUTHORITY TO MAKE THE GOVERNOR DO SOMETHING AND ASK FOR A WRIT OF MANDAMUS FROM THE COURT TO ORDER HIM TO DO SOMETHING, SO THAT IS A STATE LAW QUESTION THAT COULD SETTLE THE ISSUE, REALLY.

MR. CHARNES: IT WOULD SETTLE THE ISSUE IF THE STATE COURT CONCLUDED THAT THE GENERAL ASSEMBLY, AS A MATTER OF STATE, LAW LACKED THAT AUTHORITY. BUT IF THE STATE COURT CONCLUDED THAT THE GENERAL ASSEMBLY, AS A MATTER OF STATE LAW HAD THAT AUTHORITY, THEN THE FEDERAL PREEMPTION ARGUMENT WOULD STILL BE NEEDED TO BE DECIDED. AND IF THE COURT DOES CERTIFY --

THE COURT: NO. BUT IF THE STATE SUPREME COURT ORDERS GOVERNOR SANFORD TO MAKE THE APPLICATION, ISSUES A WRIT OF MANDAMUS AND HE DOES SO, YOU KNOW, UNDER DURESS

ALMOST, BUT HE DOES, THEN THE FEDERAL GOVERNMENT WOULD RELEASE THE FUNDS, WOULDN'T THEY? IF A FORM COMES IN WITH THE GOVERNOR'S SIGNATURE --

MR. CHARNES: I CAN'T SPEAK FOR THE UNITED STATES GOVERNMENT, THAT MIGHT BE A LIKELY SCENARIO. I THINK THAT MIGHT BE TRUE. I THINK THAT THE PREEMPTION ARGUMENT, HOWEVER, WOULD NEED TO BE DECIDED BEFORE THE COURT, I THINK, THE STATE COURT COULD ISSUE MANDAMUS AND COMPEL THE GOVERNOR TO SIGN THE APPLICATION. THE GOVERNOR DEFENSE TO THAT CLAIM IS THAT THE STATE STATUTE IS INVALID AND UNENFORCEABLE BECAUSE IT IS PREEMPTED BY ARRA, THAT IS THE SAME ISSUE THAT IS, OF COURSE, BEFORE THIS COURT IN THE SANFORD CASE. I THINK THE STATE COURT WOULD NEED TO RESOLVE THAT FEDERAL QUESTION BEFORE ISSUING THE MANDAMUS RELIEF.

I THINK THAT ON THAT ISSUE, I THINK IF YOU LOOK AT THE SCHOOL ADMINISTRATOR'S COMPLAINT, WE SIMPLY DISAGREE THAT IT DOESN'T STATE A FEDERAL CLAIM. AND I REFER THE COURT, AS I DID BEFORE TO PARAGRAPH 22 OF THE COMPLAINT, WHICH IS PART OF THEIR FIRST CLAIM FOR RELIEF. THEY PLEAD THAT NOTHING IN ARRA PROVIDES THAT A GOVERNOR OF ANY STATE MUST MAKE HIS OR HER APPLICATION FOR ARRA STABILIZATION FUNDS AS A MATTER OF PERSONAL CHOICE AS A MATTER OF THE APPLICANT'S OWN STATE LAW. AND THAT IS A FEDERAL QUESTION. FURTHER, THEY SAY, A FEDERAL STATUTE CANNOT CHANGE THE CONSTITUTION OF THE STATE. WELL, THAT IS WRONG. THE SUPREMACY CLAUSE EXPRESSLY SAYS THAT

FEDERAL LAW PREEMPTS CONSTITUTION, BUT IN ANY EVENT, IT IS A FEDERAL QUESTION.

THEY SAY -- THEY CONTINUE IN SAYING, IT WILL BE A FUNDAMENTAL AFFRONT OF STATE DIGNITY IF CONGRESS WERE ABLE TO REARRANGE THE DISTRIBUTION OF POWER AND THE STATE. AN INTERPRETATION OF ARRA IS A FEDERAL STATUTE WHICH DID THAT, THEY GO ON TO SAY, WOULD BE COMMANDEERING OF STATE GOVERNMENT UNDER THE PRINTZ CASE, THAT IS ALSO A FEDERAL QUESTION. SO, THEY EXPRESSLY PLEAD FEDERAL QUESTIONS IN THEIR COMPLAINT. WE THINK THAT IS MORE THAN ENOUGH TO GIVE THE COURT FEDERAL QUESTION JURISDICTION.

THEY ALSO, THE SCHOOL ADMINISTRATORS, ALSO SAY THAT PREEMPTION IS INSUFFICIENT TO RAISE A FEDERAL CLAIM. THAT IS TRUE IF PREEMPTION -- IF PREEMPTION IS NOT -- LET ME STEP BACK. IN SANFORD VERSUS MCMASTER, WE ALLEGE THAT THE STATE LAW IS PREEMPTED. THAT IS AUTHORIZED BY THE SUPREME COURT CASE CALLED DELTA -- EXCUSE ME, SHAW VERSUS DELTA AIRLINES, WHICH SAYS IT IS A FEDERAL CLAIM THAT YOU CAN ASSERT IN FEDERAL COURT TO ALLEGE A STATE LAW IS PREEMPTED.

THE COURT: ISN'T IT SAME THING AS THE SUPREMACY CLAUSE?

MR. CHARNES: YES.

THE COURT: THE SUPREMACY CLAUSE FITS IT BETTER THAN PREEMPTION?

MR. CHARNES: I AGREE. THE PREEMPTION WORKS THROUGH

THE SUPREMACY CLAUSE IS THE WAY I WOULD PHRASE IT, BUT I THINK WE ARE TALKING ABOUT THE SAME THING.

WITH RESPECT TO THE LANGUAGE OF ARRA AND SUPERINTENDENT REX'S ARGUMENT, I WOULD GO BACK TO WHAT THE WHITE HOUSE HAS SAID. THE WHITE HOUSE SIMPLY DISAGREES WITH THEIR INTERPRETATION OF THE GOVERNOR'S ROLE UNDER ARRA. AND WE BELIEVE THAT IT IS CLEAR FROM THAT OMB LETTER AND FROM THE OTHER PUBLIC STATEMENTS THAT THE UNITED STATES GOVERNMENT IS NOT GOING TO PAY MONEY UNLESS THE GOVERNOR DOES THE CERTIFICATION. AND, THEREFORE, ANY CLAIM THAT WOULD SEEK A CONSTRUCTION OF THE CLYBURN AMENDMENT WOULD REALLY HAVE NO EFFECT IN THE REAL WORLD.

THE SUPERINTENDENT ALSO ARGUES THAT FOR REALIGNMENT PURPOSES, YOUR HONOR IS ONLY SUPPOSED TO LOOK AT THE COMPLAINT, YOU CAN'T LOOK AT ANYTHING ELSE, AND THAT IS SIMPLY WRONG. WE CITED IT IN OUR BRIEF, A CASE CALLED AIDS COUNSELING, 903 F2D 1000, AT PAGE 1004, WHICH SAYS THE COURT IS REQUIRED TO LOOK AT THE ENTIRE RECORD.

AND, FINALLY, ONE LAST POINT -- OR TWO LAST POINTS, QUICKLY. WITH RESPECT TO THE NOMINAL PARTY ISSUE, AGAIN, THAT IS A QUESTION OF FEDERAL LAW WHETHER OR NOT IT IS A MATTER OF FEDERAL LAW THE STATE HAS THE REAL PARTY IN INTEREST OR NOT. AND I AM NOT SURE I FULLY UNDERSTOOD WHAT THE ATTORNEY GENERAL'S ARGUMENT WAS, BUT TO THE EXTENT THAT THEY ARE ARGUING THAT THE STATE IS A REAL PARTY AND INTEREST IN

ORDER TO PROTECT THE PUBLIC INTEREST OF THE CITIZENS OF SOUTH CAROLINA, THAT CLEARLY DOES NOT GIVE THEM STANDING TO LITIGATE AS A REAL PARTY IN INTEREST. WE CITED A CASE IN OUR BRIEF CALLED MISSOURI AND TEXAS RAILWAY VERSUS HICKMAN, OLD U.S. SUPREME COURT CASE THAT SAYS, YES, THE STATE HAS AN INTEREST, THE GENERAL POLITICAL INTEREST IN REPRESENTING THE INTERESTS OF ITS CITIZENS, BUT THAT IS NOT ENOUGH TO GIVE IT STANDING IN FEDERAL COURT.

AND, FINALLY, OUR SUPPLEMENTAL BRIEF ADDRESS THIS QUESTION WHETHER THE ATTORNEY GENERAL IS THE PROPER PARTY TO SUE HERE, WHICH YOUR HONOR JUST RAISED. AND WE THINK IT CLEARLY IS. I THINK YOUR HONOR IS ALLUDING TO THE FACT THAT IN SOME CASES PLAINTIFFS UNDER EX PARTE YOUNG SUE A GOVERNOR OF THE STATE TO STOP HIM OR HER FROM ENFORCING THE STATE LAW WHEN THE GOVERNOR HAS NO DIRECT ENFORCEMENT AUTHORITY, YOU SHOULD HAVE SUED THE COMMISSIONER OF WILDLIFE OR SOMETHING LIKE THAT. AND THERE ARE A LOT OF CASES TALKING ABOUT THAT QUESTION. I THINK THE PARTIES -- SOME OF THE PARTIES IN THEIR BRIEFS TALKED ABOUT A DIFFERENT QUESTION, WHICH IS WHETHER, ESSENTIALLY, A RIPENESS QUESTION, WHETHER OUR CLAIM IS RIPE AGAINST THE ATTORNEY GENERAL BECAUSE HE HAS NOT EXPRESSLY SAID THAT HE WILL ACT TO ENFORCE THE LAW. AND WE THINK THAT CLEARLY THE CLAIM IS RIPE. THE ATTORNEY GENERAL, NEITHER IN HIS BRIEFS NOR HERE TODAY, HAS SAID THAT HE WILL NOT ENFORCE THE LAW AGAINST THE GOVERNOR. AND WE CITED A CASE

FROM THE FOURTH CIRCUIT OUT OF VIRGINIA, WHICH IS FACTUALLY, DIRECTLY ON POINT INVOLVING MOBILE OIL, WHERE THE ATTORNEY GENERAL OF VIRGINIA SAID, THE CLAIM IS NOT RIPE BECAUSE I HAVEN'T SAID I AM GOING TO ENFORCE IT YET. WHAT THE FOURTH CIRCUIT SAID IS THE PARTIES ARE NOT REQUIRED TO SIT BACK AND WAIT FOR THEM TO BE SUED TO OR VIOLATE THE LAW UNDER THE PAIN OF PUNISHMENT. THE ATTORNEY GENERAL IS OBLIGATED TO ENFORCE THE LAW, AND THE FOURTH CIRCUIT SAID WE ASSUME THAT THE LEGISLATURE PASSED THE LAW IN ORDER FOR IT TO BE ENFORCED. FOR THOSE REASONS, WE THINK THAT THE CLAIM AGAINST THE ATTORNEY GENERAL IS PROPER UNDER EX PARTE YOUNG, AND IS ALSO RIPE UNDER ARTICLE THREE.

THE COURT: THANK YOU, SIR.

MR. CHARNES: THANK YOU, YOUR HONOR.

THE COURT: ANYBODY ELSE?

LET ME SAY. I WANT TO COMMEND ALL OF THE ATTORNEYS IN THIS CASE. THIS CASE WAS UNUSUALLY WELL BRIEFED AND WELL ARGUED IN SHORT ORDER, AND I KNOW THERE WAS A LOT OF MIDNIGHT OIL BURNED AND I APPRECIATE IT. AS I SAID, EVERYBODY RECOGNIZES THE IMPORTANCE OF THE TIME PRESSURES IN THIS CASE.

WHAT I WOULD LIKE TO DO IS GO AHEAD AND ANNOUNCE MY RULING TO BE FOLLOWED UP BY A WRITTEN OPINION. THIS CASE PRESENTS VERY CLOSE QUESTIONS, BUT SUFFICE IT TO SAY, THE BURDEN OF PROVING THIS COURT'S JURISDICTION UNDER REMOVAL IS UPON THE REMOVING PARTY, OR HERE THE GOVERNOR. AND AS HAS BEEN SAID,

ALL DOUBTS ABOUT REMOVAL ARE TO BE RESOLVED IN FAVOR OF REMAND. IN OTHER WORDS, THIS IS A COURT OF LIMITED JURISDICTION AND I HAVE AN OBLIGATION TO POLICE THE JURISDICTION OF THIS COURT AND GIVE A CAREFUL EYE TO CASES THAT ARE REMOVED HERE. THE ANSWER IS FAR FROM CLEAR AND I WISH IT WERE CLEARER.

BUT SINCE IT IS SUCH A CLOSE CALL, I AM GOING TO RESOLVE THE DOUBTS IN FAVOR OF REMAND AND SEND BOTH CASES, THE EDWARDS CASE AND THE SCASA CASE BACK TO THE SOUTH CAROLINA SUPREME COURT.

WHAT I WOULD LIKE TO DO IS SIMPLY DO A ONE-PAGE ORDER BEFORE LUNCH TODAY INDICATING MY RULING. AND INDICATING I WILL FOLLOW UP WITH A WRITTEN OPINION. THAT WILL START THE MACHINERY WORKING IN THE SUPREME COURT SO THAT THEY CAN SCHEDULE A HEARING.

I WILL SAY HERE ON THE RECORD THAT THE REMAND OF THE SCASA ACTION IS AT LEAST IN PART BECAUSE OF THE LACK OF A FEDERAL QUESTION. I WILL EXPAND ON THAT AND OTHER MATTERS IN THE WRITTEN OPINION.

WITH THAT, AGAIN, I EXPRESS MY APPRECIATION. UNLESS ANYBODY HAS ANYTHING ELSE, WE WILL ADJOURN. I WILL STEP DOWN AND SPEAK TO COUNSEL WHILE WE ARE IN THE COURTROOM. ANYTHING ELSE? ALL RIGHT. WE WILL BE IN RECESS.

*** END OF REQUESTED TRANSCRIPT ***

* *

CERTIFICATE OF REPORTER

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM MY STENOGRAPHIC NOTES IN THE ABOVE-ENTITLED MATTER.

S/DEBRA R. JERNIGAN, RPR, CRR

JUNE 1, 2009

DATE

ATTACHMENT B

Guidance on the

State Fiscal Stabilization Fund Program

U.S. Department of Education
Washington, D.C. 20202

April 2009

Purpose of the Guidance

The purpose of this guidance is to provide comprehensive information on the State Fiscal Stabilization Fund Program. The guidance provides the U.S. Department of Education's interpretation of various statutory provisions and does not impose any requirements beyond those included in the American Recovery and Reinvestment Act of 2009 and other applicable laws and regulations. In addition, it does not create or confer any rights for or on any person.

The Department will provide additional or updated program guidance as necessary. If you are interested in commenting on this guidance, please send your comments to State.Fiscal.Fund@ed.gov.

Table of Contents

I. Introduction

I-1. What is the State Fiscal Stabilization Fund (Stabilization) program?

The Stabilization program is a new, one-time appropriation of approximately $48.6 billion that the U.S. Department of Education (Department) will award to Governors to help stabilize State and local budgets in order to minimize and avoid reductions in education and other essential services, in exchange for a State's commitment to advance essential education reform in four areas: (1) making improvements in teacher effectiveness and in the equitable distribution of qualified teachers for all students, particularly students who are most in need; (2) establishing pre-K-to-college-and-career data systems that track progress and foster continuous improvement; (3) making progress toward rigorous college- and career-ready standards and high-quality assessments that are valid and reliable for all students, including limited English proficient students and students with disabilities; and (4) providing targeted, intensive support and effective interventions for the lowest-performing schools.

I-2. What is the statutory authority for the program?

The Stabilization program is authorized in Title XIV of Division A of the American Recovery and Reinvestment Act of 2009 (ARRA) (Pub. L. 111-5), which President Barack Obama signed into law on February 17, 2009. The provisions of the ARRA relevant to the Stabilization program and other Department programs are available on the Department's website at http://www.ed.gov/policy/gen/leg/recovery/index.html.

I-3. What are the two components of the Stabilization program?

The two components of the Stabilization program are the Education Stabilization Fund (CFDA No. 84.394) and the Government Services Fund (CFDA No. 84.397). By statute, the Department will award 81.8 percent of a State's total Stabilization allocation under the Education Stabilization Fund and the remaining 18.2 percent of its allocation under the Government Services Fund.

States must use the Education Stabilization Fund to restore State support for elementary and secondary education, public higher education, and, as applicable, early childhood education programs and services. States must use the Government Services Fund for public safety and other government services, which may include assistance for elementary and secondary education and public institutions of higher education (IHEs), and for modernization, renovation, or repair of public school facilities and IHE facilities.

Illustration 1: The Two Funds

Education Stabilization Fund	Government Services Fund
➢ 81.8 percent of the State's total Stabilization Fund allocation	➢ 18.2 percent of the State's total Stabilization Fund allocation

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.* ARRA funds should be used to improve student achievement and help close the achievement gap. Furthermore, in exchange for receiving funds under the State Fiscal Stabilization Fund, States must commit to advancing education reforms in four specific areas. (*See* Question I-1 and Illustration 2.)

3. *Ensure transparency and accountability and report publicly on the use of funds.* To prevent fraud and abuse, support the most effective uses of ARRA funds, and accurately measure and track results, ARRA recipients must publicly report on how funds are used. Due to the unprecedented scope and importance of this investment, ARRA funds are subject to additional and more rigorous reporting requirements than normally apply to grant recipients. (*See* Part VII of the guidance.)

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. These funds should be invested in ways that do not result in unsustainable continuing commitments after the funding expires. Under the Stabilization program, funds are available for obligation through September 30, 2011. (*See* Questions III-D-16, III-E-11, and IV-10.)

I-5. How does the Department determine the amount of funding that each State may receive under the Stabilization program?

The Department determines each State's total Stabilization allocation by formula on the basis of (1) its relative population of individuals who are aged 5 to 24, and (2) its relative total population. The amount of funding available to each State under the program is provided on the Stabilization program website at http://www.ed.gov/programs/statestabilization/index.html.

II. Process for Awarding Funds to Governors

II-1. What is the Department's process for awarding Stabilization funds to Governors?

The Department will award Stabilization funds to Governors in two phases. To receive its initial Stabilization fund allocation, a State must submit to the Department an application that provides:

1. Assurances that the State is committed to advancing education reform in four specific areas (*see* Illustration 2);
2. Baseline data that demonstrate the State's current status in each of the four education reform areas;
3. Maintenance-of-effort (MOE) information; and
4. A description of how the State intends to use its Stabilization allocation.

The Department has developed a very streamlined application process for the initial phase of funding under the Stabilization program. In the application package, for example, the Department has identified available data that States may use as initial baseline data for each of the required education reform assurances. If a State accepts these data as its initial baseline data, it does not have to submit additional data on the reform assurances in order to receive its initial Stabilization allocation. Similarly, the Department has included in the application not only the required MOE assurances, but also a separate MOE waiver assurance for States that may be unable to meet the MOE requirements. (*See* Questions VI-A-6 through VI-A-10.)

Illustration 2: Commitment to Advancing Education Reform

Commitment to Advancing Education Reform
As part of its application for Stabilization Funding, a State must assure that it will implement strategies to: ➢ Increase teacher effectiveness and address inequities in the distribution of highly qualified teachers; ➢ Establish and use a pre-K-through-college-and-career data system to track progress and foster continuous improvement; ➢ Make progress towards rigorous college- and career-ready standards and high-quality assessments that are valid and reliable for all students, including limited English proficient students and students with disabilities; and ➢ Provide targeted, intensive support and effective interventions to turn around schools identified for corrective action and restructuring.

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. (That is, the Department will release 67 percent of both the State's total Education Stabilization Fund allocation and its total Government Services Fund allocation).

A State will receive the remaining 33 percent of its total Stabilization allocation in phase two, after the Department approves the State's comprehensive plan for making progress in the four education reform areas for which it provided assurances in phase one. In the near future, the Department will provide further information on the Department's proposal for the phase two application process.

The Department will review the phase one and phase two applications on a rolling basis as they are received. The Department anticipates that the phase two funds will be awarded by September 30, 2009.

If a State demonstrates that the amount of funds it will receive in phase one (67 percent of its total Stabilization allocation) is insufficient to prevent the immediate layoff of personnel by school districts, public IHEs, or State or local agencies, the Department will award the State up to 90 percent of its total Stabilization allocation in phase one. In such cases, the remaining portion of the State's allocation will be provided after the Department approves the State's phase two submission.

II-2. How does a State demonstrate that the amount of Stabilization funds that it will receive in phase one is insufficient to prevent the immediate layoff of State or local personnel?

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. States are not required to submit additional information to demonstrate their need for additional resources.

Specifically, if a State demonstrates in Part 5, Section A of its application that the fiscal year (FY) 2009 "restoration amount" (i.e., the amount of Stabilization funds that is needed to restore the levels of State support for both elementary and secondary education and public IHEs for FY 2009) is greater than its phase one allocation amount (i.e., 67 percent of the State's total Stabilization allocation), the Department will provide the State in phase one the lesser of (a) 90 percent of the State's total Stabilization allocation or (b) the State's FY 2009 restoration amount. In such cases, the remaining portion of the State's allocation will be provided after the Department approves the State's phase two submission.

II-3. What is the application process for phase two funding?

In the near future, the Department intends to publish in the *Federal Register* for public comment a notice detailing the proposed phase two application process. The notice will describe the Department's proposal for: (1) "metrics" that a State would use to demonstrate that it is making progress relative to the education reform assurances in its phase one application; (2) the State's plan for providing data under the proposed "metrics" if the data are currently unavailable; and (3) the criteria by which a State's plan will be evaluated. Expert peer reviewers will review each State's phase two plan and make recommendations to the Secretary concerning the adequacy of the plan.

Illustration 3: Federal Release of Funds

Phase One	➢ 67 percent of the State's total Stabilization allocation released.
Phase One Exceptional Circumstances	➢ Up to an additional 23 percent of the State's total Stabilization allocation released (for a total of up to 90 percent).
Phase Two	➢ Remaining portion of the State's total Stabilization allocation released.

III. The Education Stabilization Fund

A. Eligible Entities

III-A-1. To which entities does the Governor make awards under the Education Stabilization Fund?

The Governor makes awards under the Education Stabilization Fund only to local educational agencies (LEAs) and public IHEs. The Governor may not retain any portion of the Education Stabilization Fund for State purposes (*see* Question III-B-11), nor award any portion of this allocation to entities other than LEAs and public IHEs. The awards to LEAs and public IHEs must be made in accordance with requirements in section 14002(a) of Division A of the ARRA.[1]

III-A-2. What is a "local educational agency"?

For purposes of the Stabilization program, the term "local educational agency" has the meaning given that term in section 9101 of the Elementary and Secondary Education Act of 1965 (ESEA). That is, a "local educational agency" is "a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or of or for a combination of school districts or counties that is recognized in a State as an administrative agency for its public elementary schools or secondary schools."

III-A-3. What is an "institution of higher education"?

For purposes of the Stabilization program, the term "institution of higher education" has the meaning given that term in section 101 of the Higher Education Act of 1965. That is, an "institution of higher education" is an educational institution that is legally authorized within the State to provide a program of education beyond secondary education and that admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate.

The institution must provide an educational program for which it awards a bachelor's degree or provides not less than a two-year program that is acceptable for full credit toward such a degree. In addition, it must be accredited by a nationally recognized accrediting agency or association or, if not so accredited, be an institution that has been granted pre-accreditation status by an agency or association that has been recognized by

[1] All subsequent references in this guidance to particular sections of the ARRA relate to sections in Division A of the ARRA.

the Secretary of Education for the granting of pre-accreditation status, and that the Secretary has determined there is satisfactory assurance that it will meet the accreditation standards within a reasonable time. For-profit institutions and postsecondary vocational institutions are not included in the definition of an institution of higher education.

Finally, under the Education Stabilization Fund, only *public* IHEs are eligible for assistance.

Illustration 4: Entities Eligible for Funding under the Education Stabilization Fund

Education Fund – Eligible Entities
➢ Only LEAs and *public* IHEs may receive funds under the Education Stabilization Fund. ➢ Private IHEs are not eligible to receive any portion of the Education Stabilization Fund. ➢ The Governor may not retain any portion of the Education Stabilization Fund for State uses.

III-A-4. Are charter schools considered to be LEAs for purposes of the Stabilization program?

State law determines whether a charter school is an LEA, or a school within an LEA. A charter school LEA must receive Stabilization funding on the same basis as other LEAs in the State.

Section 5206 of the ESEA requires State educational agencies to take necessary measures to ensure that a newly opening or a significantly expanding charter school LEA receives Department of Education formula grant funds to which it is entitled within five months after opening or expanding even if the identity of the children in those LEAs needed to determine allocations may not be available at the time the charter school LEA opens or expands. For more details on how to address issues concerning newly opening or significantly expanding charter school LEAs, *see* the regulations concerning charter schools at 34 C.F.R. Part 76, Subpart H and guidance on how a State or LEA allocates funds to charter schools that are opening for the first time or significantly expanding enrollment at http://www.uscharterschools.org/pdf/fr/sea_guidance_main.pdf.

III-A-5. Must an LEA receive State funds through the State's primary elementary and secondary education formulae in order to be eligible to receive Education Stabilization funds?

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.

However, if there are Education Stabilization funds remaining after the State calculates the amount needed to restore fully the levels of State support for elementary and secondary education and public IHEs, any LEA (including a charter school LEA) that receives Title I, Part A funds will receive a share of those remaining Education Stabilization funds based on its Title I, Part A share, even if that LEA does not receive State funds through the State's primary funding formulae. (*See* discussion in section B below.)

III-A-6. May Governors award Education Stabilization funds to private IHEs?

No. Governors may not make awards under the Education Stabilization Fund to private IHEs. However, they may provide support to such institutions under the State's Government Services Fund allocation, subject to the limitations in the ARRA.

III-A-7. In restoring the levels of State support for public IHEs, may a Governor award Education Stabilization funds to a centralized State agency that administers insurance and pension costs for employees of public IHEs?

No. The Governor must award these funds only to public IHEs. A public IHE, however, may use its Education Stabilization funds to support the insurance and pension costs of its employees.

III-A-8. May a Governor award Education Stabilization funds to a State Higher Education Board that, for example, receives appropriated State student financial aid funds?

No. A State Higher Education Board is not a public IHE.

III-A-9. May the Governor award Education Stabilization funds directly to students for scholarships or financial aid or to support State-agency-run scholarship programs for students to attend public IHEs?

No. The Governor must award funds that are needed to restore State support for public higher education directly to public IHEs. However, an IHE may use these funds for scholarship programs and student financial aid.

B. Restoring Levels of State Support for Education

III-B-1. What levels of State support must a Governor restore for elementary and secondary education and public IHEs?

For each of FYs 2009, 2010, and 2011, a Governor must restore the levels of State support for elementary and secondary education and for public IHEs to the greater of the FY 2008 or FY 2009 levels of such support.

- For *elementary and secondary education*, a State must restore the levels of State support provided through the State's primary elementary and secondary education formulae to the greater of the FY 2008 or FY 2009 levels. (*See* Question III-B-7.) In restoring the levels of State support for elementary and secondary education for FYs 2010 and 2011, a State must allow: (a) existing State formulae increases to support elementary and secondary education for FYs 2010 and 2011 to be implemented, if these increases were enacted pursuant to State law prior to October 1, 2008; and (b) funding for phasing in State equity and adequacy adjustments, if the adjustments were enacted pursuant to State law prior to October 1, 2008.

- For *public institutions of higher education*, a State must also restore the levels of State support (excluding tuition and fees paid by students) to the greater of the FY 2008 or FY 2009 levels of support. State funding for financial assistance to students attending public IHEs is not considered State support for these institutions. Rather, such funding is considered support for students to enable them to pay their educational expenses, even if the IHEs administer the funding. However, unrestricted State funding for public IHEs is considered State support for such institutions even if those institutions choose to use a portion of that funding for financial assistance to students.

In determining the amount of Education Stabilization funds that a State must reserve for LEAs and the amount it must reserve for public IHEs, a State must follow the specific steps outlined in Illustration 6 and detailed in the worksheets in Appendix D of the Stabilization fund application. Once these amounts are determined, a Governor has some discretion in deciding when to release the funds to LEAs and public IHEs. (*See* Question III-B-10.) In addition, LEAs and public IHEs have some discretion in determining when to use any funds that they receive. (*See* Questions III-D-16 and III-E-11.)

Illustration 5 summarizes the separate stages of calculating the restoration amounts, releasing Education Stabilization funds to LEAs and public IHEs, and obligating those funds.

Illustration 5: Education Stabilization Funding Process – Calculating Restoration Amounts, Releasing Funds, and Obligating Funds

Calculating the Restoration Amounts	➢ The Governor first determines the amounts of Education Stabilization funds that the State will use to restore the levels of State support for both LEAs and public IHEs. ➢ The worksheets in Appendix D of the Stabilization program application and the Questions in Part III-B of this guidance provide detailed information on how a State determines these restoration or reservation amounts. ➢ The restoration calculations are merely a mechanism for determining the amounts of funding that LEAs and public IHEs will receive. The calculations have no bearing on when a Governor must release the funds, or on the period during which the LEAs and IHEs may use the funds.
Releasing Funds to LEAs and Public IHEs	➢ After a State determines the restoration amounts (i.e, after the State calculates the amounts of Education Stabilization funds that it will provide to LEAs and to public IHEs), the Governor may release the funds to LEAs and IHEs in phases in order to avoid a "funding cliff". For example, a Governor is not required to release in FY 2009 all of the Education Stabilization funds that LEAs and IHEs are entitled to receive on the basis of the FY 2009 restoration calculations. ➢ Additional information concerning the timing of the release of funds to LEAs and IHEs is provided in Question III-B-10.
Obligation Timeframe	➢ LEAs and IHEs have flexibility in determining when to use their Stabilization funds, as long as the funds are obligated by September 30, 2011. ➢ The restoration calculations referenced above do not affect when an LEA or IHE may spend its funds. For example, funds that an LEA receives based on FY 2009 restoration calculations do not have to be spent in school year 2008-2009. Those funds, like all Education Stabilization funds, remain available for obligation through September 30, 2011.

III-B-2. What is meant by the term "fiscal year" for purposes of restoring levels of State support for education?

"Fiscal year" in this context refers to State fiscal year. For example, FY 2009 means the State fiscal year that covers school year 2008-2009. For most States, FY 2009 will be the period from July 1, 2008 through June 30, 2009.

III-B-3. Are States required to use a particular formula in determining the levels of State support for elementary and secondary education and, as applicable, early childhood education programs and services?

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)).

III-B-4. May a State include local tax revenues in determining the levels of State support for elementary and secondary education?

No. The ARRA requires a State to consider only the levels of *State* support that is provided through the State's primary funding formula(e).

III-B-5. May State categorical funds that are not awarded through a funding formula be considered part of a State's support for elementary and secondary education for purposes of determining the amount of Education Stabilization funds that will be awarded to LEAs?

No. Only funds that a State awards through its primary elementary and secondary education funding formula(e) may be used in determining the levels of State support for elementary and secondary education. (The same is not true, however, in determining the levels of State support for elementary and secondary education for maintenance-of-effort purposes. *See* Question III-B-9.)

III-B-6. How does a State determine the level of State support for public IHEs for a given year?

The statute provides States with some flexibility in determining the level of State support for public IHEs, subject to the express restriction that a State not include amounts paid in tuition and fees by students. For example, a State may consider State appropriations for public higher education that are obtained from general tax revenues, as well as funds that are obtained from other sources (e.g., tobacco settlement funds and lotteries) and then provided by the State to public higher education. A State may also include interest or earnings received from State endowments pledged to public IHEs.

In determining the level of State support for public IHEs, a State may also include such support as: (1) State appropriations for community colleges to support adult education and career and technical education programs; and (2) State payments that are made on behalf of employees of public IHEs but that are appropriated to a different State agency (e.g., group insurance contributions that the State appropriates to a central State agency, and State contributions to IHE employee retirement systems that the State appropriates to the State agency responsible for administering retirement systems).

III-B-7. How does a State calculate the amounts of Stabilization funds that must be awarded to LEAs and to public IHEs?

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.

In determining the greater of the FY 2008 or FY 2009 levels –

- For FY 2008, a State must use the *actual* levels of State support for elementary and secondary education and for public IHEs.

- For FY 2009, a State may use (a) the actual levels of State support for elementary and secondary education and for public IHEs; (b) the projected levels of State support for elementary and secondary education and for public IHEs; or (c) prior-enacted levels of State support for elementary and secondary education and for public IHEs that were subsequently revised.

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 III-B-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.

- *Shortfall calculations*: If a State has insufficient funds to restore fully, in a given fiscal year, the levels of State support for both elementary and secondary education and public IHEs, it must use Education Stabilization funds to support elementary and secondary education and public IHEs in proportion to their relative shortfall in accordance with section 14002(a)(2)(B) of the ARRA.

- *Allocations on the basis of Title I, Part A shares*: If a State has any Education Stabilization funds remaining after it restores fully the levels of State support for both elementary and secondary education and public IHEs for FYs 2009 through 2011, the Governor awards those remaining funds to LEAs on the basis of their proportionate share of funding under Title I, Part A, Subpart 2 of the ESEA (Title I, Part A). (*See* section 14002(a)(3) of the ARRA.)

Special Notes:

- The worksheets in Appendix D of the Stabilization program application package provide detailed guidance on how to calculate the amount of Stabilization funds that will be used to restore the levels of State support for elementary and secondary education and for public IHEs for FYs 2009, 2010, and 2011.
- As discussed in Question III-B-10, although the State must follow specific restoration steps in order to determine the amount of funds that LEAs and IHEs will receive under the program, the Governor has discretion in determining when to release these funds to LEAs and IHEs.

III-B-8. May a State choose to restore its level of State support for either elementary and secondary education or public IHEs, but not both?

No. A State must restore State support for both elementary and secondary education and public IHEs. It may not choose to restore support only for elementary and secondary education or only for public IHEs.

Illustration 6: Restoring Levels of State Support

Restoring Levels of State Support	
Step One	➢ Calculate the amounts needed to restore levels of State support for both elementary and secondary education and public IHEs for FY 2009 to the greater of the FY 2008 or FY 2009 levels. ➢ Any remaining funds are carried over to Step Two. ➢ If there is a shortfall, follow shortfall calculation requirements (and there are no additional steps).
Step Two	➢ Calculate the amounts needed to restore levels of State support for both elementary and secondary education and public IHEs for FY 2010 to the greater of the FY 2008 or FY 2009 levels. ➢ If State enacted, prior to October 1, 2008, formula increases or adjustments for FY 2010, follow special restoration requirements. ➢ Any remaining funds are carried over to Step Three. ➢ If there is a shortfall, follow shortfall calculation requirements (and there are no additional steps).
Step Three	➢ Calculate the amounts needed to restore levels of State support for both elementary and secondary education and public IHEs for FY 2011 to the greater of the FY 2008 or FY 2009 levels. ➢ If State enacted, prior to October 1, 2008, formula increases or adjustments for FY 2011, follow special restoration requirements. ➢ Any remaining funds are carried over to Step Four. ➢ If there is a shortfall, follow shortfall calculation requirements (and there are no additional steps).
Step Four	➢ Award all funds that remain after completing Steps One, Two, and Three to LEAs on the basis of their Title I, Part A shares.

III-B-9. In calculating how its Education Stabilization Fund allocation will be distributed among LEAs and public IHEs, a State makes determinations on the levels of State support for elementary and secondary education and public higher education for various fiscal years. Are these levels of State support the same levels that a State must use for purposes of demonstrating compliance with the Stabilization program maintenance-of-effort (MOE) requirements?

No. The levels of "State support" for the purpose of calculating the amount of Education Stabilization funds that a State will allocate to LEAs are based on the amount of State funds that were provided through the State's primary elementary and secondary education funding formulae. The levels of "State support" for purposes of the Stabilization program elementary and secondary education *MOE requirements* may include not only the amount of State funds that a State provides through its primary funding formulae in a given year, but also the amount of other State support not provided through the primary formulae.

Similarly, the levels of "State support" for the purpose of calculating the amount of Education Stabilization funds that a State will use for public IHEs exclude the amount of tuition and fees paid by students, while the levels of "State support" for purposes of the public IHE *MOE requirements* exclude not only tuition and fees paid by students, but also support for capital projects and research and development.

III-B-10. Section 14002(a) of the ARRA directs how a State determines the amount of Education Stabilization funds that it will provide to LEAs and public IHEs. Once a State makes these determinations in accordance with that provision, does the Governor have discretion in determining when to release the funds to LEAs and IHEs?

Yes. While a Governor should consider the immediate needs of LEAs and public IHEs, the Governor has some flexibility in the timing of the release of the funds.

A Governor must return to the Secretary any funds that the State does not award as subgrants or otherwise commit within two years of receipt of those funds. The Department is awarding funds to States in two phases, and there are separate deadlines by which the Governor must subgrant or commit the funds awarded in each phase.

In determining when to award funds to LEAs and public IHEs, the Governor should also take into consideration the fact that these funds must be "obligated" by September 30, 2011. (*See* Questions III-D-16, III-D-17, and III-E-11 for additional information on when an obligation occurs.)

Finally, in order to ensure that the expenditures and activities under the Education Stabilization program occur as quickly as possible consistent with prudent management, section 807(a)(2) of the ARRA authorizes the Secretary of Education to require States to make "prompt allocations to local educational agencies". At this time, however, the Department is not invoking that authority, but is providing Governors discretion

concerning the timing of release of funds to LEAs. The Department does, however, strongly encourage Governors to make timely awards in order to minimize the impact of any reduction in State education spending and maximize the ability of these funds to save and create jobs.

III-B-11. May a Governor retain a portion of the State's Education Stabilization Fund allocation to help defray the costs of administering the program or for other purposes?

No. A Governor must award all of the Education Stabilization funds to LEAs and public IHEs in accordance with the requirements in the ARRA. However, a Governor may use funds under the State's Government Services Fund allocation to administer the Education Stabilization Fund and for other purposes. (*See* Questions IV-1 and IV-2.)

C. LEA and Public IHE Application Requirements

III-C-1. Must an LEA submit an application to the Governor in order to receive funding under the Education Stabilization Fund?

Yes. The Education Department General Administrative Regulations (EDGAR) at 34 C.F.R. 76.301 require an LEA to have on file with the State an application that contains the assurances in section 442 of the General Education Provisions Act (GEPA) (20 U.S.C. 1232e). Among other things, the LEA must assure that it will (1) administer the program in accordance with all applicable statutes and regulations, and (2) use fiscal control and fund accounting procedures that will ensure proper disbursement of, and accounting for, the funds.

In addition, in order to comply with section 427 of GEPA (20 U.S.C. 1228a) and depending on the LEA's planned uses of the funds, an LEA may need to provide in its application a description of the steps it proposes to take to permit students, teachers, and other program beneficiaries to overcome barriers (including barriers based on gender, race, color, national origin, disability, and age) that impede access to, or participation in, particular programs to be funded with Education Stabilization funds. (Information on the GEPA 427 requirement is available on the Department's website at http://www.ed.gov/fund/grant/apply/appforms/gepa427.doc.)

III-C-2. May a Governor require an LEA to include in its local application for Education Stabilization funds information other than the required assurances and the GEPA 427 statement (if applicable)?

Yes. A Governor has the discretion to require an LEA to provide in its application additional information that the Governor may reasonably require. For example, because of the Governor's administrative responsibilities over the Stabilization program, the Governor may require an LEA to describe how it intends to use its Education Stabilization funds. Such a requirement would help the State ensure that the LEA is

expending its funds on activities authorized under the ARRA. In addition, the Governor may require the LEA to demonstrate that it has the capacity to comply with the strict ARRA reporting requirements before the State awards funds to the LEA. However, a Governor may not use the local application process to restrict an LEA's use of the funds beyond the limitations in the ARRA.

While a Governor may not restrict an LEA's use of Education Stabilization funds beyond the limitations in the ARRA, he or she may require an LEA to describe in its local application how the LEA will assist the State in advancing essential reforms in the four areas for which the State provides assurances in its application for Stabilization funds.

III-C-3. Must a public IHE submit an application to the Governor in order to receive funding under the Education Stabilization Fund?

A Governor has the discretion to determine whether an IHE must submit an application before receiving Education Stabilization funds. As with LEA applications, the Governor may require that IHE applications include information that he or she may reasonably require. A Governor may require an IHE to describe, for example, how it intends to use its Education Stabilization funds to help mitigate the need for increases in tuition and fees paid by in-State students (*see Questions* III-E-9 and III-E-10) and how it will meet the ARRA reporting requirements.

Illustration 7: LEA and IHE Application Requirements

	Application Requirements
LEA	➢ An LEA must submit an application to the Governor in order to receive funds. ➢ The LEA application must include basic GEPA assurances. ➢ The LEA application must address requirements in section 427 of GEPA, as applicable. ➢ The Governor may direct an LEA to provide in its application additional information that he or she may reasonably require, but may not restrict the LEA's use of funds beyond the statutory limitations.
IHE	➢ An IHE is not required to submit an application in order to receive funds unless Governor requires an application. ➢ The Governor may direct an IHE to submit an application that contains information that he or she may reasonably require, and may restrict the IHE's use of funds to expenditures that would help mitigate the need for increases in tuition and fees paid by in-State students.

D. Uses of Education Stabilization Funds by LEAs

III-D-1. For what purposes may an LEA use Education Stabilization funds?

Subject to the limited statutory prohibitions described below, section 14003(a) of the ARRA authorizes an LEA to use Education Stabilization funds for any activity that is authorized under the following Federal education acts:

- The Elementary and Secondary Education Act of 1965 (ESEA);
- The Individuals with Disabilities Education Act (IDEA);
- The Adult Education and Family Literacy Act (AEFLA); or
- The Carl D. Perkins Career and Technical Education Act of 2006 (Perkins Act).

The ARRA also provides that, to the extent consistent with State law, an LEA may use Education Stabilization funds for modernization, renovation, or repair of public school facilities, including modernization, renovation, and repairs that are consistent with a recognized green building rating system.

If an LEA uses Education Stabilization funds for modernization, renovation, or repair of public school facilities or for construction of new school facilities[2], the LEA must comply with specific requirements relating to the use of American iron, steel, and manufactured goods used in the project. (*See* Section 1605 of the ARRA.)

III-D-2. What are the statutory prohibitions on an LEA's use of Education Stabilization funds?

Section 14003 of the ARRA prohibits an LEA from using Education Stabilization funds for –

- Payment of maintenance costs;
- Stadiums or other facilities primarily used for athletic contests or exhibitions or other events for which admission is charged to the general public;
- Purchase or upgrade of vehicles;
- Improvement of stand-alone facilities whose purpose is not the education of children, including central office administration or operations or logistical support facilities; or
- School modernization, renovation, or repair that is inconsistent with State law.

In addition, no Stabilization funds (either Education Stabilization funds or Government Services funds) may be used to provide financial assistance to students to attend private elementary or secondary schools, unless the funds are used to provide special education and related services to children with disabilities as authorized by the IDEA (Section 14011 of the ARRA).

[2] An LEA may use Education Stabilization funds for construction of new school facilities as well as for modernization, renovation, or repair of existing facilities. *See* Question III-D-11.

There are also other prohibitions in section 1604 of the ARRA – for example, prohibitions against using funds for an aquarium, zoo, golf course, or swimming pool – that apply to the use of Stabilization funds by any entity.

III-D-3. Do the same statutory requirements govern the use of all of the Education Stabilization funds that a Governor awards to an LEA?

Yes. Any Education Stabilization funds that an LEA receives – whether through the State's primary elementary and secondary education funding formulae or based on its proportionate share of funding under Part A of Title I of the ESEA – may be used for activities authorized under the ESEA, the IDEA, the AEFLA, or the Perkins Act, subject to ARRA and other applicable Federal requirements, including the limited prohibitions referenced Question III-D-2.

III-D-4. Are the Education Stabilization funds that the Governor awards to LEAs through the State's primary funding formulae considered to be State funds, subject to the requirements that generally apply to funds awarded under those formulae?

No. State funding formulae are used solely as the mechanism to determine the amount of Education Stabilization funds that each LEA will receive. The Education Stabilization funds are Federal funds, and the ARRA, the Federal laws referenced in III-D-1, and other applicable Federal requirements (such as the OMB cost principles) govern their uses.

III-D-5. If a portion of a State's Education Fund allocation remains available after the Governor restores fully the levels of State support for elementary and secondary education and public IHEs, the Governor must award any remaining Education Stabilization funds to LEAs on the basis of each LEA's proportionate share of funding under Part A of Title I of the ESEA. Would the use of these Education Stabilization funds be limited to activities authorized under Part A of Title I?

No. As with the Education Stabilization funds that an LEA receives through a State's primary elementary and secondary education funding formulae, any Education Stabilization funds that an LEA receives on the basis of its proportionate share of funding under Part A of Title I may be used for any activities authorized under the ESEA, the IDEA, the AEFLA, or the Perkins Act, subject to ARRA and other applicable Federal requirements, including the limited prohibitions referenced in Question III-D-2.

III-D-6. How much flexibility do LEAs have in determining the activities to support with Education Stabilization funds?

LEAs (including charter school LEAs) have considerable flexibility in determining how best to use Education Stabilization funds. As stated previously, an LEA may use these funds for, among other things, activities that are authorized under the ESEA. Because the ESEA includes the broad Impact Aid authority (*see* Title VIII of the ESEA), an LEA may use Education Stabilization funds for activities that would be allowable under Impact

Aid. This flexibility applies to all LEAs that receive Education Stabilization funds, and is not limited to those LEAs that also receive Impact Aid funds.

Most funds that the Department awards under Impact Aid are considered to be general aid to LEAs. Thus, under the Impact Aid authority, an LEA may use Education Stabilization funds for educational purposes consistent with State and local requirements, subject to ARRA and other applicable Federal requirements, including the limited prohibitions referenced in Question III-D-2.

Because an LEA may consider Education Stabilization funds to be available for any activity authorized under Impact Aid, the funds may be used to support both current expenditures and other expenses such as capital expenditures. Among other things, the Education Stabilization funds may be used for activities such as: paying the salaries of administrators, teachers, and support staff; purchasing textbooks, computers, and other equipment; supporting programs designed to address the educational needs of children at risk of academic failure, limited English proficient students, children with disabilities, and gifted students; and meeting the general expenses of the LEA. It is important to note, however, that all funds appropriated under the ARRA (including Education Stabilization funds that an LEA uses for activities authorized under Title VIII of the ESEA) will be subject to stringent reporting requirements, which is in contrast to the minimal reporting requirements in place for funds appropriated under Title VIII of the ESEA (Impact Aid).

Accountability and Reporting Cautionary Note

Whether an LEA uses its Education Stabilization funds for activities authorized under the Impact Aid program or for activities authorized under any of the other programs in the ESEA, the IDEA, the AEFLA, or the Perkins Act, the LEA must (a) maintain records that separately track and account for its Education Stabilization funds and (b) report on the specific uses of those funds. (*See* discussion under Part VII of this Guidance – "Transparency, Accountability, Reporting, and Other Obligations".)

III-D-7. May an LEA use Education Stabilization funds to support activities or services other than the specific activities or services that were eliminated as a result of budget reductions?

Yes. As explained in Question III-D-1, an LEA may use its Education Stabilization funds for any activities authorized under the ESEA, the IDEA, the AEFLA, or the Perkins Act, subject to limited restrictions in the ARRA and other Federal laws.

III-D-8. In addition to restoring activities or services that were eliminated as a result of budget reductions, how might an LEA use its Education Stabilization funds to advance reforms?

The Department encourages LEAs to use available Education Stabilization resources in ways most likely to assist the State in making progress in areas related to the four education reform assurances in the State's Stabilization application and to lead to improved results for students, long-term gains in school system capacity, and increased efficiency and effectiveness.

Examples of activities that an LEA might support with its funds in order to advance reform include:

1. *Improving teacher effectiveness and the equitable distribution of highly qualified teachers* by:
    - Establishing fair and reliable evaluation systems that provide feedback, help educators improve, and ensure that poor performers are dismissed;
    - Establishing a system for identifying and training highly effective teachers to serve as instructional leaders and modifying the school schedule to allow for collaboration among the instructional staff; and
    - Implementing innovative strategies for identification of, advancement of, and compensation for highly effective teachers and leaders.

2. *Establishing data systems and using data for improvement*, including:
    - Strengthening the use of longitudinal data systems to drive effective decision-making and continuous improvement efforts; and
    - Developing and providing intensive professional development on use of data to improve instruction.

3. *Turning around the lowest-performing schools* by:
    - Attracting teams of committed educators who are compensated for taking on new assignments and roles in a school in corrective action or restructuring;
    - Extending time for learning, including activities provided before school, after school, during the summer, or over an extended school year;
    - Providing intensive, year-long teacher training in reading that aggressively works on improving students' oral language skills and vocabulary or, in some other way, builds teachers' capacity to address academic achievement problems;
    - Strengthening and expanding early childhood education;
    - Providing intensive training to all teachers in new curriculum and the use of assessment data to improve instruction; and
    - Using high-quality, on-line courses as supplemental learning materials to help secondary students meet core content requirements.

III-D-9. To what extent may an LEA use Education Stabilization funds to support early childhood education programs and services?

An LEA has considerable flexibility in using Education Stabilization funds to support early childhood programs and services as authorized activities under the ESEA. For example, under Title VIII of the ESEA (Impact Aid), an LEA may support pre-K programs, even if pre-K is not considered part of "elementary education" under State law. The Department encourages LEAs to use Education Stabilization funds to support early childhood programs and services that are grounded in scientifically based research.

III-D-10. May an LEA use Education Stabilization funds for modernizing, renovating, or repairing public school facilities?

Yes. Under section 14002(a) of the ARRA, LEAs (including charter school LEAs) may use Education Stabilization funds for modernization, renovation, or repair of public school facilities, including modernization, renovation, and repairs that are consistent with a recognized green-building rating system.[3] In conducting these activities, LEAs are encouraged to consider how schools might be adapted to better accommodate the needs of the community and serve as community centers.

As noted in the response to Question III-D-2, however, there are certain prohibitions that apply to an LEA's use of Education Stabilization funds, including prohibitions against using funds for: (a) stadiums or other facilities primarily used for athletic contests or exhibitions or other events for which admission is charged to the general public; (b) improvement of stand-alone facilities whose purpose is not the education of children, including central office administration or operations or logistical support facilities; and (c) school modernization, renovation, or repair that is inconsistent with State law.

In addition, if an LEA uses Education Stabilization funds for modernization, renovation, or repair of public school facilities, it must comply with specific requirements relating to the use of American iron, steel, and manufactured goods used in the project. (*See* Section 1605 of the ARRA.)

III-D-11. May an LEA use Education Stabilization funds for construction activities that are not considered to be modernization, renovation, or repair?

Yes. Construction of new school buildings is an authorized activity under the Impact Aid construction program in section 8007 of the ESEA. Thus, subject to the ARRA statutory requirements and prohibitions governing the uses of Education Stabilization funds, an LEA (including a charter school LEA) may use the funds to support the construction of new school buildings, including construction activities that are consistent with a recognized green-building rating system.

An LEA may not use Education Stabilization funds for construction of (or modernization, renovation, or repair of) stadiums or other facilities primarily used for athletic contests or exhibitions or other events for which admission is charged to the general public, or stand-alone facilities whose purpose is not the education of children, including central office

[3] Additional guidance on "green-building rating systems" is provided in Part V: "Construction, Modernization, Renovation, and Repair".

administration or operations or logistical support facilities. If an LEA uses Education Stabilization funds for construction, it must comply with specific requirements relating to the use of American iron, steel, and manufactured goods used in the project. (*See* Section 1605 of the ARRA.)

III-D-12. May an LEA use Education Stabilization funds to supplement or restore its local "rainy day" fund rather than use the funds for specific purposes?

No. An LEA's transfer of Education Stabilization funds to its local "rainy day" fund would not constitute an "obligation" of the funds. The LEA must actually obligate the funds for specific allowable activities during the period of fund availability. (*See* Question III-D-16.)

III-D-13. May an LEA use Education Stabilization funds to pay down past debt?

Although paying down an LEA's past debt may be an allowable use of these funds under Title VIII of the ESEA (Impact Aid) to the extent consistent with State and local requirements, the Department strongly encourages LEAs to consider how its Education Stabilization funds could be better used to restore cuts in essential educational services, stimulate the local economy, and promote needed educational reforms.

Under the statutory provisions governing the uses of the Government Services Fund, however, a Governor may *not* use Government Services funds for paying down past debt because this type of expenditure does not constitute the use of funds for "government services" within the plain meaning of those words in section 14002(b)(1) of the ARRA. (*See* Question IV-7.)

III-D-14. May a Governor or State educational agency (SEA) limit how an LEA uses its Education Stabilization funds?

No. Because the amount of Education Stabilization funding that an LEA receives is determined strictly on the basis of formulae and the ARRA gives LEAs considerable flexibility over the use of these funds, neither the Governor nor the SEA may mandate how an LEA will or will not use the funds. As stated above, for example, an LEA may use Education Stabilization funds for activities authorized under Title VIII of the ESEA (Impact Aid), subject to the limited ARRA statutory prohibitions on the uses of funds and other applicable Federal requirements.

There are no similar provisions directing how a Governor must award Education Stabilization funds to public IHEs. Consistent with the purposes of the Stabilization program, a Governor may restrict an IHE's use of funds to expenditures that would mitigate the need for increases in tuition and fees paid by in-State students. (*See* Questions III-E-9 and III-E-10.)

III-D-15. Is an LEA *required* to provide equitable services for private school students and teachers with Education Stabilization funds?

No. There is no requirement in the ARRA that an LEA provide equitable services for private school students with Education Stabilization funds, even if those funds are used for an activity authorized by a program that otherwise requires equitable services. However, an LEA may provide services for private school students and teachers to the extent that the activities are authorized by the ESEA, the IDEA, the AEFLA, or the Perkins Act.

Illustration 8: Summary – LEA Uses of Education Stabilization Funds

LEA Uses of Education Stabilization Funds **Cautionary Note**: All of the uses identified in this Illustration are subject to ARRA and other applicable requirements, including prohibitions relating to the uses of funds.	
Basic Rule	➢ An LEA may use its Education Stabilization funds for any activities authorized under the ESEA, the IDEA, the AEFLA, or the Perkins Act, regardless of whether the Education Stabilization Funds were awarded through the State's primary education funding formula(e) or based on the LEA's relative share of funding under Title I, Part A.
Governor's Control	➢ A Governor does not have the discretion to direct how an LEA must use its Education Stabilization Funds.
Education activities consistent with State and local requirements	➢ An LEA may use its Education Stabilization allocation for such purposes because these activities are authorized under Title VIII of the ESEA (Impact Aid). **NOTE**: The LEA must maintain records that track separately the specific uses of the funds (*see* Part VII: "Transparency, Accountability, Reporting, and Other Obligations").
Modernization, renovation, and repair of public school facilities	➢ Section 14003(a) of the ARRA expressly authorizes an LEA to use Education Stabilization funds for this purpose.
Construction	➢ Construction is allowable as an authorized activity under Title VIII of the ESEA (Impact Aid).

Illustration 9: Summary – Prohibitions on an LEA's Use of Education Stabilization Funds

Prohibitions on an LEA's Use of Education Stabilization Funds

Cautionary Note: This list is not meant to be all-inclusive. LEAs must carefully review, for example, all requirements in Titles XIV, XV, and XVI of Division A of the ARRA relating to the Education Stabilization Fund.

An LEA may not use Education Stabilization funds for –

- Payment of maintenance costs;
- Stadiums or other facilities primarily used for athletic contests or exhibitions or other events for which admission is charged to the general public;
- Purchase or upgrade of vehicles;
- Improvement of stand-alone facilities whose purpose is not the education of children, including central office administration or operations or logistical support facilities;
- Financial assistance for students to attend private elementary or secondary schools, unless the funds are used to provide special education and related services to students with disabilities, as authorized by the IDEA;
- School modernization, renovation, or repair that is inconsistent with State law; or
- Restoring or supplementing a "rainy day" fund.

III-D-16. How long does an LEA have to obligate its Education Stabilization funds?

An LEA may use Education Stabilization funds to support authorized activities in school years 2008-2009, 2009-2010, and 2010-2011. The funds may also support educational activities that the LEA provides between school years. Education Stabilization funds remain available for local obligation through September 30, 2011. This obligation deadline applies to all of the Education Stabilization funds that an LEA receives, regardless of when the Governor awards those funds to the LEA. A chart indicating when an obligation occurs for various types of activities is provided in the Education Department General Administrative Regulations (EDGAR) at 34 C.F.R. 76.707.

III-D-17. Does the Governor's award of funds to an LEA or public IHE constitute an "obligation" of those funds?

No. The Governor's awarding of funds to an LEA or public IHE does not constitute an obligation of those funds. Rather, those funds are obligated when the LEA or IHE actually commits those funds to specific purposes consistent with the EDGAR provision referenced in Question III-D-16.

E. Uses of Funds by Public Institutions of Higher Education

III-E-1. For what purposes may a public IHE use Education Stabilization funds?

Section 14004(a) of the ARRA authorizes a public IHE to use Education Stabilization funds for –

- Education and general expenditures, in such a way as to mitigate the need to raise tuition and fees for in-State residents; or
- Modernization, renovation, or repair of IHE facilities that are primarily used for instruction, research, or student housing, including modernization, renovation, and repairs that are consistent with a recognized green-building rating system.

III-E-2. Are there statutory prohibitions on an IHE's use of Education Stabilization funds?

Yes. Sections 14004(b) and (c) of the ARRA prohibit an IHE from using Education Stabilization funds for the following purposes or activities –

- To increase its endowment;
- Maintenance of systems, equipment, or facilities;
- Modernization, renovation, or repair of stadiums or other facilities primarily used for athletic contests or exhibitions or other events for which admission is charged to the general public; or
- Modernization, renovation, or repair of facilities –
    (a) used for sectarian instruction or religious worship; or
    (b) in which a substantial portion of the functions of the facilities are subsumed in a religious mission.

In addition, there are other prohibitions in section 1604 of the ARRA – for example, prohibitions against using funds for an aquarium, zoo, golf course, or swimming pool – that apply to the use of Stabilization funds by any entity.

III-E-3. What types of "education and general expenditures" may an IHE support with Education Stabilization funds?

Subject to all applicable ARRA statutory requirements and prohibitions, as well as any restrictions that a Governor places on an IHE's use of Education Stabilization funds to help mitigate the need for increases in tuition and fees paid by in-State students, an IHE may use the funds to support a broad array of activities. For example, an IHE might use Education Stabilization funds to provide:

- Support for salaries related to classroom and laboratory instruction and instructional technology;
- Academic support for libraries, laboratories, and other academic facilities;
- Institutional support for activities related to personnel, payroll, security, environmental health and safety, and administrative offices;
- Student services that promote a student's emotional and physical well-being outside the context of the formal instructional program; and
- Student financial aid, such as IHE-sponsored grants and scholarships.

III-E-4. May an IHE use Education Stabilization Funds for modernizing, renovating, or repairing facilities?

Subject to all applicable ARRA statutory requirements and prohibitions, an IHE may use these funds for modernization, renovation, or repair of IHE facilities that are used primarily for instruction, research, or student housing, including modernization, renovation, and repairs that are consistent with a recognized green building rating system. If an IHE uses Education Stabilization funds for modernization, renovation, or repair of IHE facilities, it must comply with specific requirements relating to the use of American iron, steel, and manufactured goods used in the project. (*See* Section 1605 of the ARRA.)

III-E-5. May Education Stabilization funds be awarded to *private* IHEs to modernize, renovate, or repair their IHE facilities?

No. Education Stabilization funds may not be awarded to private IHEs for any purpose. However, a Governor has the discretion to use funds from the State's Government Services Fund to modernize, renovate, or repair private IHE facilities, subject to applicable requirements in the ARRA and other Federal laws.

III-E-6. May an IHE use Education Stabilization funds to support new construction?

No. An IHE may use Education Stabilization funds only for the modernization, renovation, or repair activities described in response to Question III-E-4, or for education and general expenditures. Construction is a *capital* expenditure and not a general

expenditure. Thus, construction is not an allowable use of Education Stabilization funds by an IHE.[4]

III-E-7. May an IHE use Education Stabilization funds to pay down existing debt?

An IHE may use Education Stabilization funds to pay down existing debt unless the Governor restricts the IHE from doing so on the basis that this would not help mitigate the need for increases in tuition and fees paid by in-State students. However, the Department strongly encourages Governors and IHEs to consider how the funds could be better used to restore cuts in essential educational services, help alleviate the need to raise tuition and fees for in-State students, and stimulate the economy.

Under the statutory provisions governing the uses of the Government Services Fund, however, a Governor may *not* use Government Services funds for paying down past debt because this type of expenditure does not constitute the use of funds for "government services" within the plain meaning of those words in section 14002(b)(1) of the ARRA. (*See* Question IV-7.)

III-E-8. May an IHE use Education Stabilization funds to supplement or restore a "rainy day" fund rather than use the funds for specific purposes?

No. An IHE's transfer of Education Stabilization funds to a "rainy day" fund would not constitute an "obligation" of the funds. The IHE must actually obligate the funds for specific allowable activities during the period of fund availability. (*See* Question III-E-11.) In addition, the ARRA expressly prohibits an IHE from using funds to increase its endowment.

III-E-9. Does a Governor have the authority to award Education Stabilization funds only to those public IHEs that agree to limit increases in tuition and fees paid by in-State students?

Yes. Since a Governor has the discretion to decide how Education Stabilization funds are allocated to public IHEs, the Governor may impose specific eligibility requirements on these institutions, so as to ensure the efficient and effective allocation of funds to meet the intent of the statute.

One of the purposes of the State Fiscal Stabilization Fund program is to help mitigate the need for increases in tuition and fees that in-State students pay to attend public IHEs. Thus, consistent with this statutory purpose, a Governor may refuse to award Education Stabilization funds to public IHEs that do not minimize tuition and fee increases for in-State students.

[4] LEAs, on the other hand, may use Education Stabilization funds for construction because construction is an authorized activity under Title VIII of the ESEA (Impact Aid), and LEAs may use Education Stabilization funds for any activity authorized under the ESEA and the other referenced Federal education statutes.

III-E-10. Does a Governor have the authority to restrict an IHE's use of Education Stabilization funds?

Yes. A Governor may restrict an IHE's use of Education Stabilization funds to expenditures that would help mitigate the need for increases in tuition and fees paid by in-State students.

III-E-11. How long does an IHE have to obligate Education Stabilization funds?

An IHE may obligate Education Stabilization funds through September 30, 2011. A chart indicating when an obligation occurs for various types of activities is provided in the Education Department General Administrative Regulations (EDGAR) at 34 C.F.R. 76.707.

Illustration 10: Summary – IHE Uses of Education Stabilization Funds

IHE Uses of Education Stabilization Funds **Cautionary Note**: All of the uses identified in this Illustration are subject to ARRA and other applicable requirements, including prohibitions relating to the uses of funds.	
Basic Rule	➢ An IHE may use its Education Stabilization funds for – ➢ Education and general expenditures, in such a way as to mitigate the need to raise tuition and fees for in-State residents; or ➢ Modernization, renovation, or repair of IHE facilities that are primarily used for instruction, research, or student housing.
Governor's Control	➢ A Governor may restrict an IHE's use of Education Stabilization funds to expenditures that would help mitigate the need for increases in tuition and fees paid by in-State students.
Modernization, renovation, and repair of IHE facilities	➢ The ARRA expressly authorizes an IHE to use funds for this purpose if the facilities are used primarily for instruction, research, or student housing.

Illustration 11: Prohibitions on an IHE's Use of Education Stabilization Funds

Prohibitions on an IHE's Use of Education Stabilization Funds

Cautionary Note: This list is not meant to be all-inclusive. IHEs must carefully review, for example, all requirements in Titles XIV, XV and XVI of Division A of the ARRA relating to the Education Stabilization Fund.

An IHE may not use Education Stabilization funds for the following activities or purposes –

- To increase its endowment;
- The maintenance of systems, equipment, or facilities;
- Modernization, renovation, or repair of stadiums or other facilities primarily used for athletic contests or exhibitions or other events for which admission is charged to the general public;
- Modernization, renovation, or repair of facilities --
  (a) used for sectarian instruction or religious worship; or
  (b) in which a substantial portion of the functions of the facilities are subsumed in a religious mission;
- New construction; or
- Restoring or supplementing a "rainy day" fund.

IV. The Government Services Fund

IV-1. For what purposes may a State use its Government Services Fund?

Section 14002(b) of the ARRA authorizes a State to use its Government Services funds for "public safety and other government services", including assistance for elementary and secondary education and public IHEs. In addition, the State may use these funds for modernization, renovation, or repair of public school facilities and IHEs, including modernization, renovation, and repairs that are consistent with a recognized green-building rating system, subject to the requirements in the ARRA.

The scope of allowable activities must be determined on the basis of State law, subject to applicable requirements in the ARRA and other Federal laws, including the limited restrictions in the ARRA on the uses of funds.

A State should expend funds from its Government Services Fund allocation in a manner that will help create jobs, reduce unemployment, stabilize and improve the State's economy, and avert the need to raise taxes. The Department also encourages Governors to use these funds in ways that support State and local educational reform initiatives, especially activities that will enable the State to make progress in the areas related to the four education reform assurances provided in the State's application for Stabilization funding.

IV-2. May a Governor use part of the State's Government Services Fund to support administrative costs associated with implementing the ARRA, including costs related to monitoring subgrantees and complying with the ARRA reporting requirements?

Yes. These types of activities are allowable as "other government services". (*See* Section 14002(b) of the ARRA.)

IV-3. What are the statutory limitations on the uses of the Government Services funds?

A Governor is prohibited from using Government Services funds for –

- Casinos and other gaming establishments, aquariums, zoos, golf courses, or swimming pools (Section 1604 of the ARRA);
- Financial assistance to students to attend private elementary and secondary schools, unless the funds are used to provide special education and related services to children with disabilities as authorized by the IDEA (Section 14011 of the ARRA);
- Maintenance of systems, equipment, or facilities;
- Construction, modernization, renovation, or repair of stadiums or other facilities primarily used for athletic contests or exhibitions or other events for which admission is charged to the general public; or
- Construction, modernization, renovation, or repair of facilities –
    - (a) used for sectarian instruction or religious worship; or
    - (b) in which a substantial portion of the functions of the facilities are subsumed in a religious mission. (*See generally* Section 14004(c) of the ARRA.)

IV-4. If a State chooses to use a portion of its Government Services allocation to provide assistance for elementary and secondary education, must the funds be awarded to LEAs through the State funding formulae or on the basis of the LEAs' proportionate share of funding under Part A of Title I?

No. While awarding subgrants to LEAs in such manners would be an allowable use of the Government Services funds, a State may use its Government Services allocation to provide assistance for elementary and secondary education in other ways. For example, a State may use the funds to award competitive subgrants to LEAs or other entities to help advance educational reforms in the State or to help lower dropout rates. A State might also retain Government Services funds for activities to improve teacher effectiveness and the distribution of highly qualified teachers, develop and implement comprehensive strategies to enhance the quality of the State's assessments, improve the collection and use of data to drive reforms, and support the lowest-performing schools.

IV-5. May a State use its Government Services funds for construction or infrastructure support?

Yes. The scope of allowable activities for the Government Services funds is broad, and is not limited to modernization, renovation, or repair of public school facilities or IHEs. Subject to the limitations in section 14004(c) of the ARRA, construction and infrastructure support are allowable uses of Government Services funds. If a State uses Government Services funds for construction, alteration, maintenance, or repair of a public building or public work, it must comply with specific requirements relating to the use of American iron, steel, and manufactured goods used in the project. (*See* Section 1605 of the ARRA.)

IV-6. May a State use Government Services funds to construct, modernize, renovate, or repair a *private* school facility?

Yes. A State may use these funds to construct, modernize, renovate, or repair a private school facility. However, the limitations referenced in Question IV-3 apply to such uses of funds. For example, a State is prohibited from using Government Services funds for construction, modernization, renovation, or repair of facilities (a) that are used for sectarian instruction or religious worship; or (b) in which a substantial portion of the functions of the facilities are subsumed in a religious mission. (*See generally* Section 14004(c) of the ARRA.)

IV-7. May a State use its Government Services Fund allocation for paying down past debt?

No. A State may use its Government Services Fund allocation for "public safety and other government services, which may include assistance for elementary and secondary education and public institutions of higher education, and for modernization, renovation, or repair of public school facilities and institutions of higher education facilities, including modernization, renovation, and repairs that are consistent with a recognized

green building rating system". (*See* Section 14002(b)(1) of the ARRA.) Although payment of public debt obligations is a necessary government expenditure, the paying down of past debt or the paying of interest or other obligations on past debt does not constitute the use of funds for "government services" under the plain meaning of those words in the ARRA.

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.

IV-8. May a Governor use the Government Services funds to supplement or restore the State's "rainy day" fund rather than use the funds for specific purposes?

No. The State's transfer of Government Services funds to a "rainy day" fund would not constitute an "obligation" of the funds. The State must actually obligate the funds to specific allowable uses during the period of fund availability. (*See* Question IV-10.)

IV-9. Does a Governor have discretion in determining when to use Government Services funds?

Yes. A Governor has some flexibility in determining when to use these funds. However, a Governor must return to the Secretary any funds that the State does not award as subgrants or otherwise commit within two years of receipt of those funds. The Department is awarding funds to States in two phases, and there are separate deadlines by which the Governor must subgrant or commit the funds awarded in each phase.

IV-10. How long are the Government Services funds available for obligation?

The Government Services funds are available for obligation through September 30, 2011. The regulation at 34 C.F.R. 76.707 offers guidance on when an obligation occurs for various kinds of activities.

V. Construction, Modernization, Renovation, and Repair

V-1. May Stabilization funds be used for construction?

Stabilization funds may be used to support construction as follows:

- By LEAs under the Education Stabilization Fund – An LEA (including a charter school LEA) may use Education Stabilization funds for construction of new public school facilities because section 14003(a) of the ARRA authorizes an LEA to use its funds for any activities authorized under the ESEA (and certain other Federal education laws), and construction is an activity authorized under Title VIII of the ESEA (Impact Aid).

- By Governors under the Government Services Fund – A Governor may use Government Services funds for construction because section 14002 of the ARRA authorizes the use of funds for "public safety and other government services", and construction may be considered a government service.

All construction activities under the ARRA are subject to the applicable requirements in the ARRA and other Federal statutes and the assurances that the Governor provides in the State's Stabilization program application.

Special Note on an IHE's Use of Education Stabilization Funds

An IHE may not use Education Stabilization funds for construction. An IHE may use the funds only for "education and general expenditures" or for "modernization, renovation, or repair of institutions of higher education facilities that are used primarily for instruction, research, or student housing" (Section 14004(a) of the ARRA). New construction does not fall under either of these categories.

V-2. May Stabilization funds be used for modernization, renovation, or repair?

Stabilization funds may be used to support modernization, renovation, and repair as follows:

- By LEAs under the Education Stabilization Fund – An LEA (including a charter school LEA) may use Education Stabilization funds for modernization, renovation, or repair of public school facilities, including modernization, renovation, and repairs that are consistent with a recognized green-building rating system. (*See* Section 14002(a) of the ARRA.)

- By IHEs under the Education Stabilization Fund – An IHE may use Education Stabilization funds for modernization, renovation, or repair of IHE facilities that are used primarily for instruction, research, or student housing, including modernization, renovation, and repairs that are consistent with a recognized green building rating system. (*See* Section 14004(a) of the ARRA.)

- By Governors under the Government Services Fund – A Governor may use Government Services funds for modernization, renovation, or repair of public school facilities and IHEs, including modernization, renovation, and repairs that are consistent with a recognized green building rating system. (*See* Section 14002(b)(1) of the ARRA.) Under the authority to use funds for "public safety and other government services", a Governor may also support other types of modernization, renovation, and repair activities with Government Services funds.

These activities are subject to the applicable requirements in the ARRA and other Federal statutes and the assurances that the Governor provides in the State's Stabilization program application.

V-3. Are there specific types of construction, modernization, or repair activities that may not be supported with Stabilization funds?

There are specific prohibitions that apply to the use of ARRA funds by any entity. For example, entities may not use ARRA funds for any casino or other gaming establishment, aquarium, zoo, golf course, or swimming pool. (*See* Section 1604 of the ARRA.) In addition, there is an express prohibition against any entity using Stabilization funds for: (a) modernization, renovation, or repair of stadiums or other facilities primarily used for athletic contests or exhibitions or other events for which admission is charged to the general public; or (b) modernization, renovation, or repair of facilities used for sectarian instruction or religious worship, or in which a substantial portion of the functions of the facilities are subsumed in a religious mission. These limitations also apply to construction activities that an LEA supports under the Education Stabilization Fund and that a Governor supports under the Government Services Fund. (*See generally* Section 14004(c) of the ARRA.)

A public IHE may use Education Stabilization funds for the modernization, renovation, or repair of IHE facilities that are primarily used for instruction, research, or student housing. (*See* Section 14004(a) of the ARRA.)

An LEA may use Stabilization funds for modernization, renovation, or repair of public school facilities. (*See* Section 14003(a) of the ARRA.) However, an LEA is prohibited from using Stabilization funds for: (a) stadiums or other facilities primarily used for athletic contests or exhibitions or other events for which admission is charged to the general public; (b) improvement of stand-alone facilities whose purpose is not the education of children, including central office administration or operations or logistical support facilities; and (c) school modernization, renovation, or repair that is inconsistent with State law. (*See* Sections 14003(b) and (c) of the ARRA.)

All construction, modernization, renovation, or repair activities under the ARRA are subject to the applicable requirements in the ARRA and other Federal statutes and the assurances that the Governor provides in the State's Stabilization application.

V-4. What is meant by the term "modernization, renovation, or repair"?

The term "modernization, renovation, or repair" includes altering, remodeling, repairing, or retrofitting an existing facility. Depending on the nature of the project, permissible activities might involve work related to electrical systems, plumbing systems, sewage systems, heating, ventilation or air conditioning systems, the installation of energy-efficient windows, the repair or replacement of roofs, asbestos abatement or removal,

bringing facilities into compliance with fire and safety codes, making facilities accessible, or upgrading facilities to support new programs or services.

The Department strongly encourages entities to engage in modernization, renovation, and repairs that are consistent with a recognized green-building rating.

V-5. Are there additional resources available on the construction, modernization, renovation, or repairs of schools?

The National Clearinghouse for Educational Facilities (NCEF) provides information on planning, designing, funding, building, improving, and maintaining safe, healthy, high-performance schools. NCEF's Federal Stimulus Funding for School Modernization webpage provides useful information on school construction, modernization, renovation, and repair.

Organizations supporting this "high-performance" approach to schools include:

- Collaborative for High Performance Schools
- U.S.G.B.C. Build Green Schools Program
- National Institute of Building Sciences
- Council of Educational Facility Planners International
- Green Building Initiative Green Globes ™
- American Society of Heating, Refrigerating and Air-Conditioning Engineers
- American Institute of Architects
- American Architectural Foundation
- 21st Century School Fund
- Society for College and University Planning
- ENERGY STAR for K-12 Schools
- EPA Healthy School Environments
- U.S. Access Board, Classroom Acoustics
- Healthy Schools Network

NOTE: The information provided in this response should not be construed as an endorsement by the U.S. Department of Education of any products or services offered or the views expressed by the referenced organizations.

V-6. Are there any wage requirements associated with the use of ARRA funds?

Yes. Any laborers and mechanics employed by contractors or subcontractors on construction, modernization, renovation, or repair projects assisted in whole or in part with ARRA funds must be paid in accordance with the prevailing wage requirements as determined by the Secretary of Labor in accordance with subchapter IV of chapter 31 of title 40 of the United States Code (commonly called "Davis-Bacon and related acts"). (*See also* 20 U.S.C. 1232b Labor Standards and Section 1606 of the ARRA.) Contracts must include language that acknowledges that all contractors or subcontractors must pay laborers and mechanics employed under the contract no less than the locally prevailing

wages for corresponding work on similar projects in the area. The Davis-Bacon Act directs the U.S. Department of Labor (DOL) to determine such locally prevailing wage rates.

If you need information about the prevailing wage rates in your community, you should contact the DOL regional office serving your geographic location. A list of the regional offices with contact information can be found at the following website: http://www.dol.gov/esa/contacts/whd/america2.htm#content. You can also find additional Davis-Bacon and other prevailing wage information at the following DOL website: http://www.dol.gov/esa/whd/programs/dbra/faqs.htm.

The DOL regional offices may also provide guidance as to where the required weekly payroll submissions referenced in the Davis-Bacon regulations (*see* 29 C.F.R. 3.3 and 3.4) should be sent. Your State Department of Labor (or equivalent) may also provide further guidance on these types of issues.

V-7. Does the ARRA include a preference for quick-start activities?

Yes. Section 1602 of the ARRA specifies that in using these grant funds for infrastructure investment, recipients must give preference to activities that can be started and completed expeditiously, including a goal of using at least 50 percent of the funds for activities that can be initiated not later than 120 days after February 17, 2009. In addition, recipients must use grant funds in a manner that maximizes job creation and economic benefit.

V-8. What certifications must be provided when funds under the ARRA are used for infrastructure investments?

Section 1511 of the ARRA requires that a recipient Governor or other appropriate chief executive certify that any infrastructure investment made with covered funds under the ARRA has received the full review and vetting required by law and that the executive accepts responsibility that the infrastructure investment is an appropriate use of taxpayer dollars. These certifications, along with a description of the investment, estimated total cost, and amount of ARRA funds to be used, must be posted and linked on the Recovery Accountability and Transparency Board website at www.recovery.gov. A State or local agency may not use funds under the ARRA for infrastructure investments until this certification is made and posted.

VI. Maintenance of Effort

A. Stabilization Program Maintenance-of-Effort Requirements

VI-A-1. What are the specific maintenance-of-effort (MOE) requirements that apply to the Stabilization program?

Section 14005(d) of the ARRA contains MOE requirements that apply both to a State's level of support for elementary and secondary education and to its level of support for public IHEs. Those requirements are as follows:

- In each of FYs 2009, 2010, and 2011, the State will maintain State support for elementary and secondary education at least at the level of such support in FY 2006.

- In each of FYs 2009, 2010, and 2011, the State will maintain State support for public IHEs (not including support for capital projects or for research and development or tuition and fees paid by students) at least at the level of such support in FY 2006.

VI-A-2. Will the Department require a State to provide MOE data in its annual Stabilization program reports?

Yes. As part of the annual reports that a State must submit under section 14008 of the ARRA, the Department intends to require each State to provide updated data on the levels of State support for elementary, secondary, and public higher education, as well as data on the State's total revenues (for education and all other purposes) for the relevant years so that the Department, and more importantly the public, will be fully aware of the extent that a State is committed to providing sufficient resources to support education. (*See* discussion in Part VII of this guidance for additional information concerning the Stabilization program reporting requirements.)

VI-A-3. What is meant by the term "fiscal year" in determining whether a State meets the Stabilization fund MOE requirements?

For purposes of determining MOE, a State may use either the applicable Federal fiscal years (which run from October 1 through September 30) or State fiscal years.

VI-A-4. May a State demonstrate that it is complying with the elementary and secondary education MOE requirements in the ARRA on either an aggregate or a per-student basis?

Yes. In comparing the levels of State support for elementary and secondary education in FYs 2009, 2010, and 2011, a State may demonstrate that it is meeting the MOE requirement on either an aggregate or per-student basis.

VI-A-5. How does a State determine the levels of State support for elementary and secondary education or for public IHEs?

The Department has provided guidance on determining the levels of State support for education for MOE purposes in the instructions accompanying the State Fiscal Stabilization Fund application package. (*See* Appendix C of the State Fiscal Stabilization Fund Application.)

VI-A-6. In the Stabilization program application, a State must provide assurances that it will comply with the MOE requirements. What if a State anticipates, on the basis of the best available data, that it might not meet the MOE requirements for one or more years?

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. That assurance confirms, on the basis of the best data available, that the State will meet the criterion for an MOE waiver. A State should submit its MOE waiver request as soon as the data referenced in Illustration 12 is available. As noted in Question VI-A-10, in the near future, the Department intends to issue detailed guidance on how a State applies for an MOE waiver.

VI-A-7. What criterion governs whether the Department may grant a State's request for a waiver of the Stabilization program MOE requirements?

In determining whether a State is eligible for a waiver of the elementary and secondary education MOE requirement or the higher education MOE requirement for a given fiscal year, the Secretary will consider whether or not the State has provided for elementary, secondary, and public higher education, for the fiscal year under consideration, an equal or greater percentage of the total revenues available to the State than the percentage provided for that purpose in the preceding fiscal year.

VI-A-8. Does the same criterion apply to waivers of both the elementary and secondary education MOE requirements and the public IHE MOE requirements?

Yes. Under the ARRA, the same criterion applies to waivers of both the elementary and secondary education and the public IHE MOE requirements.

VI-A-9. For purposes of the MOE waiver criterion, what is meant by the term "total revenues available to the State"?

For purposes of the MOE waiver criterion, the term "total revenues available to the State" may include either (a) projected or actual total State revenues for education and other purposes for the relevant years *or* (b) projected or actual total State appropriations for education and other purposes for those years.

VI-A-10. Will the Department be issuing further guidance on the process for obtaining waivers of the Stabilization program MOE requirements?

Yes. In the near future, the Department intends to issue detailed guidance on how a State applies for an MOE waiver. That document will also provide additional guidance on determining the levels of State support for education and the total revenues available to a State for a given fiscal year.

Illustration 12: Applying the MOE Waiver Criterion

Applying the MOE Waiver Criterion
In determining whether to grant a waiver of the Stabilization program MOE requirements, the Department will carefully examine State data demonstrating the following: • A-1: $_____. The aggregate level of State support for elementary, secondary, and public higher education for the fiscal year for which a waiver is sought (i.e., FYs 2009, 2010, or 2011). • A-2: $_____. The total revenues available to the State (for education and all other purposes) for the fiscal year for which a waiver is sought (i.e., FYs 2009, 2010, or 2011). • B-1: $_____. The aggregate level of State support for elementary, secondary, and public higher education for the fiscal year immediately preceding the fiscal year for which a waiver is sought. • B-2: $_____. The total revenues available to the State (for education and all other purposes) for the fiscal year immediately preceding the fiscal year for which a waiver is sought. In order to be eligible for an MOE waiver for a given fiscal year, a State must demonstrate that the percentage of its total State revenues that were used to support elementary, secondary, and public higher education for that fiscal year was equal to or greater than the percentage of its total State revenues that were used to support elementary, secondary, and public higher education for the preceding fiscal year. Relative to the data referenced above, to be eligible for a waiver, the State would have to demonstrate that the percentage obtained by dividing the amount on Line A-1 by the amount on Line A-2 is at least equal to or greater than the percentage obtained by dividing the amount on Line B-1 by the amount on Line B-2.

B. Using Stabilization Funds to Meet Other MOE Requirements

VI-B-1. To what extent may a State or LEA use Stabilization funds to meet the MOE requirements of other Federal programs?

Section 14012(d) of the ARRA provides that, "[u]pon prior approval from the Secretary", a State or LEA may treat Stabilization funds that are used for elementary, secondary, or postsecondary education as non-Federal funds for the purpose of any requirement to maintain fiscal effort under any other program that the Department administers.

The Secretary will permit a State or an LEA to treat Stabilization funds as non-Federal funds for MOE purposes of other Federal programs only if the following criteria are met:

1. The State first demonstrates to the Department, on the basis of auditable data, that it is complying with the Stabilization program MOE requirements, unless the Secretary has granted a waiver of those requirements pursuant to the criterion in section 14012(c) of the ARRA; and

2. The State or LEA has available for inspection auditable data demonstrating that the portion of its Stabilization funds that it seeks to treat as non-Federal funds to meet the MOE requirements of other Federal programs was spent in such a manner that had the Stabilization funds been non-Federal funds, the Stabilization funds would have been permitted to be used in determining the State's or LEA's compliance with the MOE requirement of that other program.

In addition, the Secretary will be concerned if a State reduces the proportion of total State revenues that are spent on education, and will take that into consideration in deciding whether to allow a State or LEA to treat Stabilization funds as non-Federal funds for MOE purposes of other Federal programs. If a State did reduce the proportion of total State revenues spent on education, the Secretary will consider whether there were any exceptional or uncontrollable circumstances contributing to the year-to-year decreases, the extent of the decline in available financial resources, and any changes in demand for services.

The Department intends to issue further guidance on the process for obtaining the Secretary's "prior approval" to use Stabilization funds to meet the MOE requirements of other programs.

C. Impact of MOE on a State's Receipt of Race-to-the-Top Funds

VI-C-1. How might a State's expenditures for elementary, secondary, and public higher education affect its ability to compete successfully for Race-to-the-Top funds?

In FY 2010, the Department will award $4.35 billion to States through a national competition under the State Incentive "Race-to-the-Top Fund". The Race-to-the-Top Fund will help States drive substantial gains in student achievement by supporting States that are: (a) making significant progress on the four education reform goals referenced in Illustration 2; and (b) effectively using other ARRA funds.

In the near future, the Department intends to publish in the *Federal Register* for public comment proposed criteria for the Race-to-the-Top Fund competition. As part of the process for making grant awards under this competition, the Department may propose that the following factors be taken into consideration:

1. Whether a State is complying with the Stabilization program MOE requirements (unless the Secretary has granted the State an MOE waiver); and

2. Whether a State reduced the proportion of total State revenues spent on education and, if so, whether there were any exceptional or uncontrollable circumstances contributing to the year-to-year decreases, the extent of the decline in available financial resources, and any changes in demand for services.

VII. Transparency, Accountability, Reporting, and Other Obligations

VII-1. What are our shared responsibilities for ensuring that all funds under the ARRA are used for authorized purposes and instances of fraud, waste, and abuse are prevented?

All ARRA funds must be spent with an unprecedented level of transparency and accountability. Accordingly, recipients of ARRA funds must maintain accurate, complete, and reliable documentation of all ARRA expenditures. The law contains very stringent reporting requirements and requires that detailed information on the uses of funds be available publicly on www.recovery.gov.

States have important oversight responsibilities and must monitor grant and subgrant supported activities to ensure compliance with all applicable Federal requirements. If a grantee or subgrantee fails to comply with requirements governing the funds, the Department may, consistent with applicable administrative procedures, take one or more

enforcement actions, including withholding or suspending, in whole or part, funds awarded under the program, or recovering misspent funds following an audit.

The ARRA establishes the Recovery Act Accountability and Transparency Board, which is responsible for coordinating and conducting oversight of spending under the ARRA to prevent fraud, waste, and abuse. The Department's Office of Inspector General (OIG) will be conducting comprehensive audits of ARRA implementation activities. In addition, Department program offices will closely monitor these activities.

Any instances of potential fraud, waste, and abuse should be promptly reported to the OIG hotline at 1-800-MIS-USED or oig.hotline@ed.gov. Moreover, recipients are reminded that significant new whistleblower protections are provided under section 1553 of the ARRA.

In the coming weeks, the Department will provide additional information on how to help prevent instances of fraud, waste, and abuse.

VII-2. How will the Department ensure transparency in the implementation of the State Fiscal Stabilization Fund program by States, LEAs, IHEs, and other entities?

As part of the process of ensuring transparency, the Department will keep the public fully apprised of all activities that occur throughout the State's implementation of the Stabilization program. From the date that a State first submits its application for funding through the date on which the last dollar is spent under the program, the Department will make information publicly available regarding a State's implementation of the program.

For example, the Department intends to post on its website a State's application for initial Stabilization funding, as well as its phase two application. The information will be linked to the Recovery website at www.recovery.gov. Similarly, information concerning how States, LEAs, IHEs, and other entities use their Stabilization funds will be available in the quarterly reports required under section 1512 of the ARRA. (*See* Question VII-3.) In addition, each State's annual report to the Department under section 14008 of the ARRA will be available through the referenced websites.

VII-3. What information is a State required to include in its quarterly reports under the ARRA?

A State is required to submit reports containing the information required under section 1512(c) of the ARRA. The Department is currently developing a common reporting form that will describe for States a streamlined quarterly process for reporting on the use of the ARRA funds awarded by the Department. Additionally, OMB is expected to issue government-wide guidance on the ARRA reporting requirements and procedures.

VII-4. What information is a State required to include in its annual Stabilization fund report?

For each year of the Stabilization program, the State must submit to the Department a report that describes:

- The uses of funds within the State;
- How the State distributed the funds it received;
- The number of jobs that the Governor estimates were saved or created with the funds;
- Tax increases that the Governor estimates were averted because of the funds;
- The State's progress in reducing inequities in the distribution of highly qualified teachers, implementing a State longitudinal data system, and developing and implementing valid and reliable assessments for limited English proficient students and children with disabilities;
- The tuition and fee increases for in-State students imposed by public IHEs and a description of any actions taken by the State to limit the increases;
- The extent to which public IHEs maintained, increased, or decreased enrollment of in-State students, including those students eligible for Pell Grants or other need-based financial aid; and
- A description of each modernization, renovation, and repair project funded, including the amounts awarded and project costs. (*See* Section 14008 of the ARRA.)

The Department also intends to collect in the annual reports detailed data on (1) a State's compliance with the MOE requirements, and (2) any construction activities supported with Stabilization funds.

VII-5. Will the Department be issuing guidance on the quarterly ARRA and annual Stabilization fund reporting requirements?

Yes. In the near future, the Department will provide additional guidance on both the quarterly ARRA reporting requirements (Section 1512 of the ARRA) and the annual Stabilization program reporting requirement. (*See* Section 14008 of the ARRA.)

VII-6. Are there rules that govern the amount of Stabilization funds that a grantee or subgrantee may draw down at any one time?

Yes. A State must have an effective system for managing the flow of funds that ensures that entities are able to draw down funds as needed to pay program costs but that also minimizes the time that elapses between the transfer of the funds and their disbursement by the grantee or subgrantee, in accordance with U.S. Department of the Treasury regulations at 31 C.F.R. Part 205. (*See* 34 C.F.R. 80.21(b).) Grantees and subgrantees must promptly, but at least quarterly, remit to the Department interest earned on advances

(34 C.F.R. 80.21(i)). The Department will take appropriate actions against grantees and subgrantees that fail to comply with this requirement.

VII-7. Does the receipt of Stabilization funds require recipients to comply with Federal civil rights laws?

Yes. The receipt of any Federal funds obligates recipients to comply with Federal civil rights laws that prohibit discrimination based on race, color, national origin, sex, disability, and age. For additional information on civil rights obligations, *see* http://www.ed.gov/policy/gen/leg/recovery/notices/civil-rights.html.

VIII. Resources and Information

VIII-1. Where may I obtain updated information about the State Fiscal Stabilization Fund program?

The Department will frequently post updated information about the State Fiscal Stabilization Fund program on the Department's website at http://www.ed.gov/programs/statestabilization/index.html.

VIII-2. Where may I obtain answers to specific questions that I may have about the State Fiscal Stabilization Fund program?

You may submit specific questions about the Stabilization program to the following e-mail address: State.Fiscal.Fund@ed.gov. Department staff will respond promptly to your questions.

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 Mark Sanford, the Governor of South Carolina .....Respondent.

CERTIFICATE OF SERVICE

As relates to the above-referenced case, I, Richard A. Harpootlian, Esquire, hereby certify that the following documents were served, via Hand Delivery, to the individuals listed below on this 1st day of June, 2009:

Documents Served: 1) *Reply Brief to Governor Mark Sanford.*

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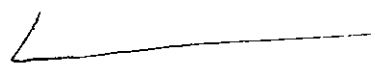

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