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.

RETURN TO PETITION FOR ORIGINAL JURISDICTION

The State of South Carolina has no objection to this Court's exercise of its original jurisdiction in this matter. The Court concluded in *Edwards v. State (Edwards I)* that the issues raised in that Petition for Original Jurisdiction were not then ripe with respect to the question of whether the Court could declare that "if the General Assembly constitutionally appropriates the stimulus funds, the Governor and the Executive Branch must perform the actions required to accept the funds." At that time, the General Assembly had not appropriated these Fiscal Stabilization funds authorized by the American Recovery and Reinvestment Act. According to the Court, "unless or until the General Assembly has taken, as it is authorized to do, measures to appropriate the funds," the matter is not judicially cognizable.

Petitioners have in this case submitted documents which fully demonstrate that the General Assembly, over the veto of the Governor, has now appropriated the stimulus funds at issue. Moreover, notwithstanding the Governor's objection, the Appropriations Act further provides:

> [a]s a result of the Governor's action [certifying ARRA funds pursuant to §1607(a)], the General Assembly recognizes $694,062,272 of federal funds pursuant to the State Fiscal Stabilization Fund established by Title XIV of ARRA and that these funds are authorized for appropriation pursuant to the provisions of this Part. In order to fund the appropriations provided by this Part, the Governor and the State Superintendent of Education shall take all actions necessary and required by the ARRA and the U.S. Secretary of Education in order to secure the receipt of the funds recognized and authorized for appropriation pursuant to this section. The action required by this Part includes but is not limited to: (1) 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 (2) within thirty days of phase two State Fiscal Stabilization Funds becoming available or thirty days following the effective date of this act, whichever is later, the Governor shall submit an application to the United States Secretary of Education to obtain phase two State Fiscal Stabilization Funds. The State Superintendent of Education shall take all action necessary and provide any information needed to assist the Governor in fulfilling his obligation to apply for State Fiscal Stabilization funds pursuant to this Section.

H3560, Part III, section 1 [Petitioner's Exhibit 9]. Thus, consistent with this Court's order in *Edwards I*, the issues raised in this action are now ripe and appropriate for judicial review by this Court.

As we stated in our Return in *Edwards I,* "[s]ubstantively, the State's position is expressed in the *Opinion of the Attorney General,* dated March 31, 2009 [Petitioner's Exhibit 4]. We incorporate that Opinion and the relevant portions of the State's Return in *Edwards I* as the State's response here. We will briefly summarize the Attorney General's Opinion

below.

First, however, we note as we did in our Return in *Edwards I,* that ARRA cannot be interpreted without necessarily considering the impact of that interpretation upon the General Assembly's powers to legislate and appropriate funds pursuant to the processes set forth in the South Carolina Constitution. Any construction of the federal stimulus legislation which could constitute an infringement upon the State's sovereign powers in contravention of the Tenth Amendment is to be avoided unless absolutely necessary. *Gregory v. Ashcroft,* 501 U.S. 452, 467 ["We will not read the ADEA to cover State judges unless Congress has made it clear that judges are included."] As the United States Supreme Court stated long ago in *Texas v. White*, 7 Wall. 700, 725, 19 L.Ed. 227 (1869), ". . . the preservation of the States, and the maintenance of their governments, are [well] . . . within . . . the design and care of the [federal] Constitution . . . ." (emphasis added). Thus, ". . . courts should not presume that Congress has intruded upon a core area of State sovereignty unless the relevant federal statute is clear and unambiguous." *Nat. Assn. of Regulatory Utility Commr's. v. FERC,* 475 F. 3d 1277, 1089(D.C. Cir. 2007).

Moreover, while Congress possesses broad authority under its spending power, that authority is not unlimited. Conditions for receipt of federal funds must be unambiguous and the State cannot be coerced into accepting funds. *South Dakota v. Dole,* 483 U.S. 203 (1987); *Pennhurst v. Halderman,* 451 U.S. 1, 17 (1981) [receipt of Federal funds is likened to a contract between State and federal government. *See also, West Va. v. U.S. Dept. Of HHS,* 389 F. 3d 281, 291 (4th Cirt, 2002)(Opinion of Traxler, J.)[federal statues may not threaten loss of an entire block of funds upon a relatively minor failing by the State]. As

stated in *N.Y. v. U.S.,* 504 U.S. 144, 168 (1992), the State's residents retain "the ultimate decision as to whether or not the State will comply" with federal funding conditions.

Moreover, as was emphasized in *Joytime Dis. and Amusement Co. v. State*, 338 S.C. 634, 528 S.E. 2d 647 (1999), South Carolina has a representative government whose citizens speak through enactments of the General Assembly. Such laws are "*ipso facto binding*" for the State and its people, unless unconstitutional. *McKenzie v. Ramsay,* 1 Bail 457, 17 S.C.L. 457 (1830). *See also, Hearon v. Calus,* 178 S.C. 381, 183 S.E. 13, 22 (1935) [Constitution and laws of the State are the "charter" of executive powers]; *Heyward v. Long,* 178 S.C. 351, 183 S.E. 145 (1935) [Governor's powers are derived from State Constitution and statutes].

Therefore, Congress can neither bestow upon the Governor powers not given by or in conflict with the Constitution or legislative acts of South Carolina nor may it authorize the legislature to bind the State through the mechanism of a concurrent resolution which bypasses South Carolina's Constitutional processes and excludes executive input. As this Court has emphasized, a federal funding program "cannot and does not change the South Carolina Constitution and statutory law." *Creative Displays, Inc. v. S.C. Highway Dept.,* 272 S.C. 68, 73-74, 248 S.E. 2d 916 (1978). Pursuant to the State Constitution, binding legislative action is only by act or a joint resolution, and a concurrent resolution does not "give the action or the legislation the force of law." *Stolbrand v Hoge,* 5 S.C. 209 (1874). A concurrent resolution cannot replace a properly enacted statute or joint resolution. *State v. Cola. Water Power Co.,* 90 S.C. 568, 74 S.E. 26 (1912)

Consistent with these constitutional requirements is art. X, §8 of the Constitution, requiring expenditure of funds only "by appropriation made by law." (emphasis added). The

appropriation power is exclusively a legislative function. The Legislature's power to appropriate is plenary, subject only to constitutional limitations. *State v. Moorer,* 152 S.C. 455, 150 S.E. 269 (1929; *Clarke v. S.C. Pubic Service Authority,* 177 SC 427, 181 SE 481 (1935). Funds cannot be spent without an appropriation and must be spent as directed by appropriation. *State ex rel. Condon v. Hodges,* 349 S. C. 232, 562 S.E. 2d 623 (2002); *Grimball v. Beattie,* 174 S.C. 422, 177 S.E. 668 (1934); *Gilstrap v. S,C. Budget and Control Bd.,* 310 S.C. 210, 423 S.E. 2d 105 (1992). *See also,* S.C. Code Ann. §§11-35-45; 2-65-20 ["the General Assembly shall appropriate all anticipated federal and other funds for the operation of state agencies in the appropriations act and must include a condition on the expenditure of these funds as part of the appropriations act, consistent with federal laws and regulations."]; 59-31-60 [Governor shall procure federal grants for textbooks and "other purposes."]; *Shapp v. Sloan,* 391 A. 2d 595, 599 (Pa. 1978), appeal dismissed for want of a federal question, *sub nom., Thornburgh v. Casey,* 440 U.S. 942 (1979); *Opinion of the Justices,* 381 A. 2d 1204 (N.H. 1978).

The March 31, 2009 Opinion of the Attorney General discussed in detail these constitutional issues as well as the federal stimulus legislation. It was concluded therein that the relevant provisions of ARRA were "ambiguous" and that while §1607(b) of the Act could in isolation, be interpreted in such a way that a concurrent resolution constituted sufficient "acceptance . . . to provide funding," the better reading of the Act as a whole and one avoiding certain Tenth Amendment concerns, was that the Governor possessed exclusive

authority[1] under ARRA to apply for State Fiscal Stabilization funds. Since the opinion was written, the Governor has certified that the State "will request and use funds provided by the Act and that these funds "will be used to create jobs and promote economic growth." Petitioners' Ex. 7. The Governor's certification letter made clear, however, that the certification "in no way represented an application for State Fiscal Stabilization Funds." *Id.* (emphasis in original).

Moreover, the Opinion further emphasized that analysis of the text of ARRA "does not end the inquiry." It was pointed out that in *State ex rel. McLeod v. McInnis,* 278 S.C. 307, 255 S.E. 2d 663 (1982) the exclusive constitutional powers of the legislature to appropriate funds and to further legislate to that end applies with equal force to federal funds. As the Court recognized in *McInnis,* the application and receipt of federal funds is ultimately a "policy matter[] in the province of the General Assembly . . . . " *Id.* at 314. Thus, there is a long line of decisions over the course of the history of the State which have drawn the constitutional line of demarcation between the appropriations and legislative powers of the General Assembly on the one hand, and the authority of the Executive to "faithfully execute" the laws on the other. Compare, *State ex rel Condon v. Hodges, supra* [concerted action of members of the Executive Branch to transfer funds unconstitutional because "there is not a

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[1] Section 14005 of ARRA provides that "[t]he Governor of a State desiring to receive an allocation under Section 14001 [State Fiscal Stabilization funds] shall submit an application . . . ." This provision is ambiguous in terms of what the word "desiring" modifies - either "Governor" or "State." Regardless, however, it is our understanding that the appropriate federal authorities have interpreted this provision as enabling only the Governor to apply for these funds as opposed to certifying that the State will request and use the funds. Any interpretation of this and other provisions of ARRA must, in our view, be consistent with the South Carolina Constitution and State law.

provision in the South Carolina Code or Constitution which provides that members of the executive branch have the ability to transfer funds from those to whom the General Assembly has appropriated money."] *State v. Pechilis,* 273 S.C. 628, 258 S.E.2d 433 (1979)[Governor's discretion in appointment of magistrates was unconstitutionally "chilled" by laws providing for advisory elections]; *Morton Bliss & Co. v. Comptroller Gen.,* 4 S.C. 430 (1873)[" the legislature is the proper authority to determine to what extent public property and revenue should be applied to meet the pecuniary wants of the State, and how far the collective body of the payers should be called upon to contribute to such end."]; *State ex rel McLeod v. Yonce*, 274 S.C. 81, 261 S.E. 2d 803 (1979) [assignment of executive functions to judiciary is unconstitutional]; *Easler v. Maybank,* 191 S.C. 511, 5 S.E. 2d 288 (1939) [Supreme Court compelled ordering by Governor of election pursuant to existing statute]; *Layman v. State*, 376 S.C. 434, 450, 658 S.E. 2d 320, 328 (2008) [executive agencies are obligated to comply with General Assembly's enactment of law until it is otherwise declared invalid].

The Attorney General's Opinion cautioned, however, that this particular situation regarding ARRA funds is a novel one and may be perceived as different from this Court's previous decisions. This situation was characterized as a "constitutional standoff." The Opinion summarized the Attorney General's conclusions this way:

> in cases such as *Grimball, Gilstrap and Condon v. Hodges, supra,* our Supreme Court has on previous occasions resolved conflicts between the legislative and executive branches by giving force to the legislative appropriation, thereby requiring the executive branch to faithfully execute the law. Here, however, federal law bestows broad discretion upon the Governor, as the chief executive of the State, to decide whether or not to apply for and utilize these funds. Thus, this situation may be perceived as

somewhat distinct from the previous cases decided by our courts, referenced above. Moreover, here, a court would need to resolve the Tenth Amendment questions present. *See*, n. 1 above. Nevertheless, while there are distinctions here not present in previous cases, we advise that *McInnis* strongly indicates our Supreme Court would not treat federal funds differently from state generated funds, and would thus require a legislative appropriation in order to expend such funds. See also, § 11-35-45 ["All federal funds received must be deposited in the State Treasury, if not in conflict with federal regulations, and withdrawn from the State Treasury as needed, as that provided for the disbursement of state funds."]; *Shapp v. Sloan, supra* ["Appellants have failed to prove their basic premise that funds not raised under general state law are constitutionally differentiated from other funds in the state Treasury, and thus constitutionally beyond the scope of the General Assembly's authority."]. We further advise that earlier precedents of our Supreme Court, referenced above, have required the executive to "faithfully execute" any state law or appropriation enacted by the General Assembly relative to the expenditure of state or federal funds. *See also, County of O'Neida v. Berle*, 404 N.E.2d 133 (N.Y. 1980) [state Constitution bestows *no implied power* in the executive branch to impound funds or reduce appropriations]; *Community Action Programs v. Ash*, 365 F.Supp. 1355 (D. N. J. 1973) [once funds are appropriated for a specific program, "the Executive Branch has a duty to spend them."].

Now, the General Assembly has appropriated the funds in question and further directed that the various acts necessary to procure those funds be performed by the Governor and the Superintendent of Education. The Legislature has, in addition, adopted a concurrent resolution pursuant to the "Clyburn Amendment." However, it is generally recognized that when the legislature wishes to act in a way which has "a binding effect on those outside the legislature, it may do so [not by concurrent resolution but] by following the enactment procedure set forth in the State constitution." 73 Am Jur. 2d *Statutes* § 2. Here, the Constitutional process for enactment has now been followed. Thus, in our view, the Recovery Act should not be interpreted in such a way that a "concurrent resolution" is declared to be controlling and to bypass the State constitutional processes. Such is not

necessary, moreover, because a legislative Act is in place. Thus, even assuming *arguendo* that section 1607 (b) is controlling here, which we dispute,[2] the term "concurrent resolution" which is ambiguous, see Statutes and Statutory Construction (6th ed.) sec. 29:6, should be read consistently with the procedural requirements of the South Carolina Constitution. Ordinarily, the greater power includes the lesser. Therefore, even assuming *arguendo* that the "Clyburn Amendment" is now applicable as a vehicle to obtain the federal funds in question, the legislative act in the form of the Appropriations Act should encompass and subsume any concurrent resolution as the constitutional means to do so. Such a reading would then comply with the South Carolina Constitution's requirements (readings, presentment to Governor, etc.) which are necessary to constitute action having force of law.

The circumstances in this case are extraordinary and unparalleled in state history. The issues are novel and fundamental constitutional questions are at stake, as this Court is asked to draw another constitutional line of demarcation between the exercise of legislative and executive power. The Court must decide between the Governor's executive authority under art. IV, §15 of the Constitution and the Legislature's appropriations powers and determine whether the actions by either the Legislature or the Governor violate the separation of powers provision of art. I, § 8 of the Constitution which states as follows:

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

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[2] Section 1607 (b) is , we believe, most probably simply an alternative means to certify the funds in question in the event the Governor did not certify the funds for acceptance by the State within the 45 day period required by Section 1607 (a).

While the State has attempted to reference herein what we believe are the relevant decisions of this Court to date, still, the Court must decide whether cases such as *Condon, McInnis, Gilstrap, Grimball*, and *Morton, Bliss* are controlling in this unique circumstance. Accordingly, we ask this Court to construe the Federal Recovery Act consistently with the principles of state sovereignty and with faithful adherence to the Constitution and laws of the State.

Respectfully submitted,

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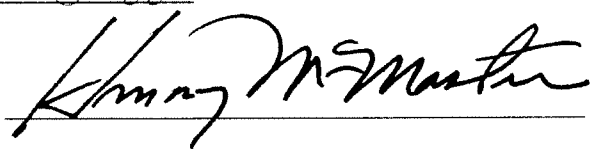
By: 

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Attorneys for the State of South Carolina