

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

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|----------------------------------|---|------------------------------------|
| United States of America, |) | Civil Action No. 2:11-cv-02958-RMG |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | MOTION OF DEFENDANTS |
| |) | GOVERNOR AND |
| State of South Carolina, et al., |) | STATE OF SOUTH CAROLINA |
| |) | TO STAY SUIT |
| Defendants. |) | AND ALLOW ACT 69 |
| |) | TO GO INTO EFFECT |

The Defendants Governor and State of South Carolina, as named in this suit, respectfully move for a stay of this case pending resolution of two cases pending before the United States Supreme Court: *Douglas v. Independent Living Center, et al.* (Nos. 09-958, 09-1158, 10-283) and *State of Arizona v. USA*, No. 11-182. In making this request, these Defendants request that no further proceedings be held in this case until resolution of *Douglas* and *Arizona*. Accordingly, they ask that Act 69 of 2011 be allowed to take effect in January as scheduled. They most certainly do not request or consent to an injunction and oppose the issuance of an injunction for reasons set forth in their Memorandum in Opposition to the Motion for a Preliminary Injunction.

AUTHORITY TO GRANT STAY

“The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.” *Hickey v. Baxter*, 833 F.2d 1005 (4th Cir. 1987)(Table), 1987 WL 39020(unpublished)(copy attached). *Hickey* found that “the district court acted within its discretion in staying proceedings while awaiting guidance from the

Supreme Court in a case that could decide relevant issues.” *See also, Joseph v. Blair*, 488 F.2d 403, 404 (4th Cir. 1973)(“While in the ordinary case we would probably stay our decision pending enlightenment from the Supreme Court in *Becker v. Thompson*, cert. granted, 410 U.S. 593 (1973), we are presented with conflicting decisions from a single district within our circuit.)

**THIS CASE SHOULD AWAIT A DECISION IN
STATE OF ARIZONA V. USA**

Arizona v. USA involves the review of the Ninth Circuit’s decision in *United States v. Arizona*, 641 F.3d 339 (9th Cir., 2011) which is cited throughout the briefs of these Defendants and Plaintiffs. That case involves a challenge to an Arizona statute that is similar to South Carolina’s Act 69 that is at issue in the instant proceeding. Brief at www.scotusblog.com.¹

The Ninth Circuit decision has serious flaws as recognized in the Petition for Certiorari filed for the Petitioners in that case by former Solicitor General, Paul D. Clement. Mr. Clement notes that “[w]hile [the Supreme] Court has emphasized that state efforts to cooperate with the enforcement of federal law are primarily governed by state law and are a healthy component of our federal system, the Ninth Circuit viewed such efforts with what amounts to a presumption of unconstitutionality.” Petition at p. 18. In the words of Mr. Clement, “(r)ather than begin with the premise that States enjoy plenary power and state law enforcement efforts do not require authorization from the federal Congress, the Ninth Circuit took the opposite approach. It concluded that States have no inherent enforcement power.” Petition at p. 26. Thus, he said that the Ninth Circuit “decision turns well-established principles of federalism and facial challenges upside down, and implicates issues of the most fundamental importance.” Petition at p. 16. The Supreme Court has agreed to hear this Petition.

Given the serious problems with the Ninth Circuit decision, that Opinion does not

¹ http://www.scotusblog.com/case-files/cases/arizona-v-united-states/?wpmp_switcher=desktop

provide a reliable basis for deciding any issues in the present proceeding while that *Arizona* case is under review. To say that this case before the Supreme Court is important to the instant suit would be an understatement. A ruling by the Supreme Court in *Arizona* is likely to resolve most or all of the issues in the instant case.

**THIS CASE SHOULD ALSO AWAIT A DECISION IN
*DOUGLAS v INDEPENDENT LIVING CENTERS***

As we discussed in our previous briefing, the United States Supreme Court has granted certiorari and has heard arguments in a case involving the question of any right of action directly under the Supremacy Clause. The question presented, upon which the Court granted certiorari in *Douglas v. Independent Living Center, et al.* (Nos. 09-958, 09-1158, 10-283) is “[w]hether Medicaid recipients and providers may maintain a cause of action under the Supremacy Clause to enforce § 1396(a)(30)(A) by asserting the provision preempts a state law reducing reimbursement rates.” See Memorandum of Defendants Governor and Attorney General In Opposition to LIC Motion for Preliminary Injunction, pp. 8, 14-15; Memorandum of Defendants State of South Carolina and Governor in Opposition to USA Motion for Preliminary Injunction, p. 8. As we have noted, various members of the Supreme Court expressed strong concerns about implying under the Supremacy Clause any right of action which circumvents the will of Congress.

Each action before this Court rests upon the argument that the Supremacy Clause itself provides a right of action to challenge Act No. 69 or portions thereof, even though there is no claim of right of action conferred by the federal Immigration laws or other statutes. See, Plaintiff LIC et al.’s Reply in Support of Motion for Preliminary Injunction, at 3 [“Plaintiffs have a right of action directly under the Supremacy Clause”]; Plaintiff United States’ Reply in Support of

Plaintiff's Motion for Preliminary Injunction, at 7 ["Here, the United States sues under the Supremacy Clause"]. Even with respect to the United States (which argued on the side of the State of California as amicus curiae in *Douglas*), the Supreme Court decision in *Douglas* could have a dramatic impact upon the law concerning the Supremacy Clause. Therefore, a stay for this reason in order to await guidance from the Supreme Court concerning whether, or to what extent, the Supremacy Clause confers a right of action is also well warranted.

CONCLUSION

For the significant guidance that both of these cases can bring, for reasons of judicial economy, for savings of litigation costs and to avoid any rulings that may need to be modified as a result of decisions by the United States Supreme Court, the Defendants Governor and State of South Carolina respectfully request that this case be stayed pending outcomes in the above cases. Consistent with fundamental principles of federalism and the presumption against preemption, they ask that Act 69 be allowed to go into effect during this stay.

These Defendants have checked with counsel for the Plaintiff and they do not consent to this Motion.

Respectfully submitted,

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