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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

C.A. No.: 2011-CP-40-2044

ROCKY DISABATO D/B/A "ROCKY D," .....Appellant.

v.

SC ASSOCIATION OF SCHOOL ADMINISTRATORS, ...Respondent.

STATE EX REL ALAN WILSON,.....Intervenor.

AMICUS CURIAE BRIEF OF THE SOUTH CAROLINA SCHOOL BOARDS ASSOCIATION AND THE AMERICAN SOCIETY OF ASSOCIATION EXECUTIVES

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IV. STATEMENT OF INTEREST

The South Carolina School Boards Association ("SCSBA") is a South Carolina nonprofit corporation, which provides a vehicle for personal and corporate associational activity. SCSBA provides a variety of services and benefits to its members in exchange for dues and other consideration. These services and benefits include professional development, industry newsgathering, insurance coverage, and commercial, governmental relations and advocacy services. SCSBA's members leverage the associational ties to achieve economies of scale for such services and benefits. Most importantly for the present case, SBSBA has an advocacy program wherein members study, debate, refine, adopt, and ultimately pursue public policy objectives of the members and SCSBA at state and federal levels.

Likewise, SCSBA is periodically called upon by government officers, departments, political subdivisions, municipalities, and other public bodies for its expertise, comments, and advice on public policy matters concerning its purposes and interests. Not only does SCSBA routinely respond to these invitations for ad hoc advice and expertise, but in some cases they (like Respondent SCASA) may be placed in a position of recommending or appointing members to public boards or commissions.

SCSBA has members who are public officials, public employees, members of public bodies, or governmental entities themselves. SCSBA has internal officers and committee members who are public employees or public officials. SCSBA may interact from time to time with members during the "business hours" of the members or their employers, and some SCSBA members likely use public telecommunications equipment to interact with SCSBA.

SCSBA is within the scope of private politically active associational entities that stand to be adversely affected in the exercise of their First Amendment and State

constitutional rights of speech and association, should the prescriptive, expansive, and invasive requirements of the South Carolina Freedom of Information Act ("FOIA"), S.C. Code Ann. §§ 30-4-10 to -165, be applied to it on one or more of the bases by which SCSBA is similar to Respondent SCASA.[1] SCSBA's interest derives from both the threat of protracted litigation over "public body" status and from any actual application of "public body" status to its speech and records, and SCSBA concurs in SCASA's arguments that the First Amendment permits neither. A broad misapplication of the FOIA to private corporate entities engaged in core associational political advocacy will "enable private citizens and elected officials to implement political strategies *specifically calculated* to curtail campaign-related activity and prevent the lawful, peaceful exercise of First Amendment rights." John Doe No. 1 v. Reed, 130 S.Ct. 2811, 2846 (2010) (Thomas, J., dissenting).

SCSBA does not always agree with SCASA on what public policy to pursue, but SCSBA agrees that the burdens of an expansive FOIA, including increased operational costs and chilling of political activity, do not respect core First Amendment rights. SCASA's experience after Edwards v. State, 383 S.C. 82, 678 S.E.2d 412 (2009), is instructive. The confluence of nearly unprecedented constitutional and fiscal crises does not come along very often, but when it does, core private political activity is at its most precious. It may also be at its most controversial, but it is hard to conceive of a governmental interest sufficient to warrant chilling such activity. The informational interest expressed in the FOIA is no candidate for the task. Without the full toolkit of associational liberties, SCSBA could find itself unable to operate in a similar future

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[1] As noted by SCASA, the posture of the case is an appeal on a Rule 12(b)(6) dismissal for which the Circuit Court was required to assume the veracity of the Complaint's claim that SCASA is a "public body." Like SCASA, SCSBA denies that it actually is a "public body" under FOIA. See Woods v. Boeing Co., No. 2:11-cv-02932-PMD, 2012 WL 10587 (D.S.C. 2012).

political crisis situation, which ultimately shortchanges not only SCSBA and its members, but the polity at large.

The American Society of Association Executives ("ASAE") is a 501(c)(6) organization comprised of employed executives who manage trade and professional organizations, including nonprofit membership organizations, such as SCASA. ASAE's mission is to provide resources, education, ideas, and advocacy to enhance the power and performance of the association community. ASAE is a leading voice for legislative and regulatory policies that enable associations to carry out their vital missions. ASAE also works to educate legislators, members of the Administration, and other key audiences about the true value of associations and the resources they bring to bear on our nation's most pressing issues. ASAE currently has 101 members representing 73 different nonprofit membership organizations located in South Carolina. These members and their organizations, many of which may receive "public funds," are directly affected by South Carolina laws, including the South Carolina Freedom of Information Act.

V. ARGUMENT

A. The FOIA Burdens Corporations' First Amendment Rights

As recognized by Judge Cooper in his order, this dispute arising under the FOIA is not principally about Appellant's access to the specific records he sought from SCASA under the FOIA, but rather about the permanent injunction he seeks to compel SCASA's ongoing compliance with the FOIA with regard to all of SCASA's future activity. On a specific transactional basis, in certain instances the government may constitutionally require the disclosure of limited relevant documents and access to meetings. However, as noted by Judge Cooper, the FOIA is not narrowly limited in this way. Instead of regulating specific transactions between private entities and the government, the FOIA

regulates whole organizations and all of their activities indefinitely.

SCSBA and ASAE have two central concerns with the FOIA's application to private organizations. The first is that the FOIA's open meeting and records disclosure requirements burden private organizations' exercise of free speech and advocacy efforts, which is the primary purpose of many nonprofit organizations and associations. Secondly, when applied to private organizations, the FOIA is overly broad by regulating the entire organization, rather than the specific transactions involving governmental funds or activity. For example, "public records" are defined to include all records maintained by a public body without regard to whether those records reflect the receipt or expenditure of any public funds or reflect any governmental decision-making. Likewise, a "meeting" is defined to include any discussion by a quorum of an organization's governing board regarding any matter over which the board has authority—again without regard to whether the board is discussing public funds or government activity, or exercising government authority.

Further compounding the FOIA's expansive reach is its ambiguity concerning what constitutes support by public funds coupled with its ad hoc, private enforcement scheme that leaves organizations, particularly small nonprofit organizations, in a constant position of uncertainty and under perpetual threat of costly litigation. For small nonprofit organizations not only is the threat and cost of litigation a real and significant concern, but the cost and burden of complying with the FOIA is also burdensome and could easily overwhelm a small organization with limited administrative staff.

In addition to these concerns, while the FOIA's exemptions and exclusions show some sensitivity to the importance of privacy in decision making and records regarding

commercial, legal, and personnel matters, they provide no exclusion for the formulation and development of advocacy positions or political speech, which is a central purpose and major activity of many nonprofit organizations. In this way, the FOIA, unlike much governmental regulation of corporate speech, actually favors or prefers commercial speech over political speech.

The positions asserted by the Appellant essentially seek to unwind more than half a century of First Amendment jurisprudence. Admittedly, the FOIA does not seek to compel an organization to state any specific words or point of view as in W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). However, the FOIA's open meeting and record disclosure requirements do impede an organization's ability to control its communications and corporate thought process. The First Amendment, particularly with regard to political speech, protects corporate decision-making whether in the board room, the drafting of minutes, press releases, newsletters, advocacy strategies and activities, or other forms of corporate communications. See, e.g., Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256 (1974); Herbert v. Lando, 441 U.S. 153, 190-91 (1979); Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 533 (1980); Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 19 (1986); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 574 (1995); Boy Scouts of Am. v. Dale, 530 U.S. 640, 648-49 (2000). The constitutional significance of such cases is not narrowly limited to an organization's ability to control and articulate its message as it—not the government—determines best, but more broadly encompasses the First Amendment right to control one's decision-making and editorial processes, i.e., how and

whether one chooses to speak, and what one chooses to say. Herbert v. Lando, 441 U.S. at 190 ("to regulate the process is therefore to regulate the expression . . . the autonomy of the speaker is thereby compromised"). See also Donaggio v. Arlington County, Va., 880 F. Supp. 446, 454 (E.D. Va. 1995) (discussing First Amendment rights as including the "right to decide whether, when, and how to speak").

Compelled access with respect to open meetings and records disclosure impedes speech and expressive autonomy, especially with regard to corporate decision-making. The United States Supreme Court stated "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." United States v. Nixon, 418 U.S. 683, 705 (1974). Moreover, compelled access to corporate meetings and records likewise impedes an organization's ability to control the content of its message. Although the FOIA does not compel an organization to express any particular words, compelled access to meetings is just as detrimental to an organization's First Amendment Rights. One need not orally speak to express oneself. A political detractor, such as Will Folks or Randy Page, attending an organization's meeting can just as surely interfere with an organization's expressive content without uttering a sound.

> [P]hysical presence is a fully valid and eloquent form of expressive or communicative activity. It is in no way legally limited or subordinate to other forms of expression or communication, such as oral communication.

Nat'l Ass'n of Soc. Workers v. Harwood, 860 F. Supp. 943, 954 (D.R.I. 1994).

Accordingly, compelling an organization under the FOIA to permit political detractors to attend meetings, and even record them, is constitutionally tantamount to

mandating political detractors to express themselves in and during the organization's forum and media. This is expressly proscribed by the First Amendment. See, e.g., Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530 (1980); Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1 (1986); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995).

"The generation that drafted the First Amendment ... understood that the rights of speech, press, assembly, association, and petition are all at heart political freedoms that are essential to democratic self-governance." Ashutosh Bhagwat, Associational Speech, 120 Yale L.J. 978, 992 (2011). The FOIA applied to a private political association would burden First Amendment rights of the highest order, as the FOIA completely fails to respect, let alone accommodate, these rights.

"Implicit in the right to engage in activities protected by the First Amendment is a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." Boy Scouts of Am. v. Dale, 530 U.S. 640, 647 (2000). Political speech "is indispensable to decisionmaking in a democracy, and ... the courts play a critical role in its protection." N.C. Right to Life, Inc. v. Leake, 525 F.3d 274, 295 (4th Cir. 2008). "The freedom of members of a political association to deliberate internally over strategy and messaging is an incident of associational autonomy." Perry v. Schwarzenegger, 591 F.3d 1126, 1142 at n.9. (9th Cir. 2009). Associations, no less than individuals, have the right to shape their own messages:

> Indeed, the right of association guaranteed by the First Amendment is premised in part on the notion that some

> ideas will only be expressed through collective efforts. Moreover, because some collective efforts to express ideas will only be undertaken if they can be undertaken in private, the Supreme Court has recognized a privilege, grounded in the First Amendment right of association, not to disclose certain associational information when disclosure may impede future collective expression. In other words, the First Amendment privilege generally guarantees the right to maintain private associations when, without that privacy, there is a chance that there may be no association and, consequently, no expression of the ideas that association helps to foster.

In re Motor Fuel Temperature Sales Practices Litig., 641 F.3d 470, 479 (10th Cir. 2011) (internal quotations & citations omitted). Belaboring the existence and force of political and associational First Amendment protections is not necessary. *See* Ashutosh Bhagwat, Associational Speech, 120 Yale L.J. 978, 992 (2011) (providing a recent summary of this field of constitutional law.) In no meaningful way can these rights, as held and exercised by associations and their members, be candidates for subordination under the FOIA.

B. The State's Limited Informational Interest

The General Assembly "finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy." S.C. Code Ann. § 30-4-15. The General Assembly then immediately starts retrenching.

For much public business, performance of public officials, decisions reached in public activity, and formulation of public policy, it is apparently *not* vital that the citizens be advised. The § 30-4-15 informational interest is subordinated to other interests, including:

- committees of health care facilities for medical staff disciplinary proceedings, quality assurance, peer review, including the medical staff credentialing process, specific medical case review, and self-evaluation;
- records such as income tax returns, medical records, hospital medical staff reports,
- scholastic records,
- adoption records,
- records related to registration, and circulation of library materials which contain names or other personally identifying details regarding the users
- records of the Board of Financial Institutions pertaining to applications and surveys for charters and branches of banks and savings and loan associations or surveys and examinations of the institutions required to be made by law;
- information relating to security plans and devices;
- trade secrets
- for public bodies who market services or products in competition with others, feasibility, planning, and marketing studies,
- marine terminal service and nontariff agreements,
- evaluations and other materials which contain references to potential customers, competitive information, or evaluation;
- gross receipts contained in applications for business licenses;
- public records which include the name, address, and telephone number or other such information of an individual or individuals who are handicapped or disabled when the information is requested for person-to-person commercial solicitation of handicapped persons solely by virtue of their handicap;
- exact compensation of public employees paid less than fifty thousand dollars per year;
- [regardless of content,] memoranda, correspondence, and working papers in the possession of individual members of the General Assembly or their immediate staffs;
- memoranda, correspondence, documents, and working papers relative to efforts or activities of a public body and of a person or entity employed by or authorized to act for or on behalf of a public body to attract business or industry to invest within South Carolina;
- all materials, regardless of form, gathered by a public body during a search to fill an employment position, except the materials relating to not fewer than the final three applicants;
- photographs, videos, and other visual images, and audio recordings of and related to the performance of an autopsy;[2]

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[2]Not to put too fine a point on it, but an individual must be *dead*—and presumably beyond the capacity for personal interest in the "public records" generated—to be the subject of an autopsy. Yet, the citizens suffer a diminished capacity to review the performance of the coroner because of the exemption.

- environmental off-site consequence analyses;
- discussion of employment, appointment, compensation, promotion, demotion, discipline, or release of an employee, a student, or a person regulated by a public body or the appointment of a person to a public body;
- discussion of matters relating to the proposed location, expansion, or the provision of services encouraging location or expansion of industries or other businesses in the area served by the public body;
- a person's height, weight, race, photograph, signature, and digitized image contained in his driver's license or special identification card;
- any records, oral, written, or recorded statements, papers, documents, or any materials utilized by a Crime-Stoppers organization in reporting suspected criminal activity; and
- a catch-all for "matters specifically exempted from disclosure by statute or law."

S.C. Code Ann. §§ 30-4-20 & -40.

These excluded and exempted matters may be of profound practical effect on the citizens and public policy. However, public information for the sake of public information, even concerning core government functions, is not treated as an unqualified good in the FOIA itself. The interests served by the FOIA exclusions and exemptions are many, diverse, and of variegated merit. Some are in the nature of an interest in operational efficiency of the government itself. Some are purely commercial interests.

Other interests represented by FOIA exclusions and exemptions clearly respect the dignity and privacy of individuals, not of the government, and they are instructive. South Carolina is a state jealous of personal privacy. Beyond even the FOIA exclusions and exemptions, and beyond Federal constitutional privacy jurisprudence, "South Carolina's right to privacy is explicit." Gregory S. Forman, Privacy Rights in South Carolina after Singleton v. State, 5-APR S.C. Law 24 (1994).

The State Constitution provides that, "[t]he right of the people to be secure in their persons, houses, papers, and effects against ... *unreasonable invasions of privacy* shall

not be violated ...." S.C. Const. art. I, § 10 (emphasis added). The FOIA fails this mandatory limit with regard to private political associational activity. Although the FOIA exclusions and exemptions respective of individual privacy have been a start, along with like legislation such as the Family Privacy Protection Act of 2002, S.C. Code Ann. §§ 30-2-10 to -340, "the drafters [of art. I, § 10] specifically agreed that the privacy provision should fall upon the courts to interpret, developing the case law necessary to effectuate the provision in South Carolina." Constance Boken, Expounding the State Constitution: The Substantive Right of Privacy in South Carolina, 46 S.C. L. Rev. 191, 201 (1994).

Privacy is not just a platitude. It has an important place in the American political process. Jospeh B. Robison, Protection of Associations from Compulsory Disclosure of Membership, 58 Colum. L. Rev. 614, 631 (1958). To ignore the effect of privacy interests on the strength of the FOIA's informational purposes would not only ignore policy implicitly driving many existing exemptions, but also should recall a warning issued over a century ago:

> The common law has always recognized a man's house as his castle, impregnable, often, even to its own officers engaged in the execution of its commands. Shall the courts thus close the front entrance to constituted authority, and open wide the back door to idle or prurient curiosity?

Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 220 (1890).

Deleterious exploitation of private information is not a new concern. In 1890, recounting the manifold ways in which the common law protects intangible and intellectual personal interests, including "the exercise of extensive civil privileges," future Supreme Court Justice Brandeis and his co-author Warren stated "Instantaneous

photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.'" Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 195 (1890). An equivalent current observation is:

> Internet disclosure on a massive scale changes everything. ... Courts and policymakers ignore reality if they require blacklists or burning crosses before recognizing any potential chilling effect. ... One should anticipate that individuals who wish to avoid confrontation with others, or to maintain an apolitical reputation within at least some of their relationships, *likely avoid political activity that will later be disclosed. Moreover, the perception of possible negative consequences itself can contribute to a chill on political activity.* In other areas of much less dramatic societal importance than political debate, privacy rules recognize the risk that disclosure might inhibit honest communication and self-expression.

William McGeveran, Mrs. McIntyre's Presona: Bringing Privacy Theory to Election Law, 19 Wm. & Mary Bill Rts. J. 859, 863-877 (2011) (emphases added).

Thus, even setting aside Federal First Amendment concerns,[3] it is plain that South Carolina's informational interest is neither substantial nor compelling. In the interest-balancing undertaking, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." Nat'l Ass'n of Mfrs. v. Taylor, 582 F.3d 1, 10 (D.C. Cir. 2009). The FOIA already conceals information, much of which is core and exclusive governmental activity. The FOIA has an inelegant form

[3] First Amendment considerations have not been well integrated into "sunshine" regimes, which of course brings this case before the Court. The problem is not unique to South Carolina. The federal Court of Appeals for the District of Columbia recognized this shortcoming in stating that "the [federal] Freedom of Information Act does little to protect the First Amendment interests at issue." AFL-CIO v. Fed. Election Comm'n, 333 F.3d 168, 178 (D.C. Cir. 2003) (also noting "the incentive for political adversaries to

precisely because of the necessity of accommodating competing policy interests. See, e.g., Prof'l Firefighters of N.H. v. Local Gov't Ctr., Inc., 992 A.2d 582, 589 (N.H. 2010) ("The Right-to-Know Law does not guarantee the public an unfettered right of access to all governmental workings, as evidenced by the statutory exceptions and exemptions."). Many interests less quintessential than First Amendment rights are included in this observation. To see the malleability of the information interest, no better example exists than FOIA's catch-all exemption for "matters specifically exempted from disclosure by statute or law." S.C. Code Ann. § 30-4-40(a)(4). The words "or law" indicate the non-exclusivity of legislation in setting the boundaries of the FOIA. If the FOIA informational interest is as "vital" as is claimed, the FOIA should not contain a sweeping, catch-all exemption for any other "statute or law" that happens to exempt from disclosure something that would otherwise be a FOIA meeting or record.

Further tempering the force of the State's interest is another key component of public policy—the public interest in protecting the citizens in their robust exercise of political freedoms. "Preservation of the right to associate privately in order to pursue common objectives is undoubtedly a substantial public interest." In re Motor Fuel Temperature Sales Practices Litig., 641 F.3d 470, 483 (10th Cir. 2011). "Public assembly and association free of state control, then, are essential both to popular participation in government—self-governance in its active form—and to underlying concepts of popular sovereignty." Ashutosh Bhagwat, Associational Speech, 120 Yale L.J. 978, 998 (2011). Here, the State Constitution weighs in again. Its Preamble states "We, the people of the State of South Carolina, in Convention assembled, grateful to God for our liberties, do

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attempt to turn the Commission's disclosure regulation to their own advantage").

ordain and establish this Constitution for the preservation and perpetuation of the same." S.C. Const. pmbl. The first section of the first article notes, "All political power is vested in and derived from the people only ...." S.C. Const. art. I, § 1. Next, the General Assembly is forbidden "from abridging the freedom of speech ... or the right of the people peaceably to assemble and to petition the government or any department thereof for a redress of grievances." S.C. Const. art. I, § 2. These provisions are "mandatory and prohibitory" and meant to preserve and perpetuate these fundamental liberties. S.C. Const. art. I, § 23.

As a matter of State law, these provisions must explicitly temper any other interest of the State, before balancing it against the First Amendment. It is this watered-down FOIA, not § 30-4-15 in isolation, that expresses the strength of the State's interest in opening the meetings and records of a "public body" to citizen review.[4] Even bodies engaged in core governmental functioning may act confidentially when any one of an open-ended list of other public and private interests are at stake. For private organizations with constitutional rights, particularly when not engaged in core governing functions, the FOIA must accommodate these extra, and weighty, countervailing interests. See, e.g., Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010).

Shortcomings in protecting these rights are not conjecture. The U.S. Court of Appeals for the District of Columbia Circuit rejected a broad political and associational disclosure practice under rules of the Federal Elections Commission which bears forcefully upon this Court's analysis of the application of the FOIA to private, politically

[4] As noted in SCASA's brief, the FOIA discriminates against private corporations in that private natural persons cannot be considered "public bodies" under FOIA even with substantial public support lacking any indicia of an exchange of consideration.

active associational activity and the State's lack of effort, much less success, in curtailing its burdens to suit an informational interest:

> [W]here, as here, the Commission compels public disclosure of an association's confidential internal materials, it intrudes on the privacy of association and belief guaranteed by the First Amendment [and] seriously interferes with internal group operations and effectiveness.
>
> . . [W]e need not engage in a detailed balancing analysis, for the Commission made no attempt to tailor its policy to avoid unnecessarily burdening the First Amendment rights of the political organizations it investigates. Indeed, the blanket nature of the Commission's regulation–requiring, as it does, the release of all information not expressly exempted by FOIA – appears to result in the release of significant amounts of information that furthers neither goal. . . . The fact that the Commission redacts information falling under one or more FOIA exemptions is no answer, since the Freedom of Information Act does little to protect the First Amendment interests at issue.
>
> . . [There is] incentive for political adversaries to attempt to turn the Commission's disclosure regulation to their own advantage.
> ...
>
> . . [T]he Commission must attempt to avoid unnecessarily infringing on First Amendment interests where it regularly subpoenas materials of a delicate nature representing the very heart of the organism which the first amendment was intended to nurture and protect.

AFL-CIO, 333 F.3d at 177-179 (internal citations & quotations omitted).

The FOIA suffers the same shortcomings. The FOIA is not tailored to provide a due respect for the First Amendment rights it burdens. The informational interest expressed in the FOIA is clearly not compelling. Beneath "compelling," any substantiality of the interest is belied by the legerdemain with which it is overridden by

the General Assembly. The FOIA as it exists manifestly fails the requirement that the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights. Nat'l Ass'n of Mfrs. v. Taylor, 582 F.3d 1, 10 (D.C. Cir. 2009).

Concern over the FOIA's use as a commercial or political weapon is not new. Justice Scalia, as a professor of law at the University of Chicago, described the FOIA as "part of the basic weaponry of modern regulatory war." Antonin Scalia, The Freedom of Information Has No Clothes, AEI Journal on Gov't & Soc., 14, 15 (March/April 1982). Precisely because of the FOIA's compliance costs to nonprofit organizations and the chilling effect the FOIA has on their expression and advocacy, the FOIA indeed is a weapon when pointed at nonprofit organizations engaging in issue advocacy. Judge Cooper's Order properly recognized such and appropriately seeks to narrow and limit the FOIA's use as a weapon against private advocacy organizations, while recognizing the government's limited interest in information about the expenditure of public funds and official decision-making on a transactional basis.

This maneuver is consistent with the approach other courts have taken in resolving FOIA litigation against private organizations. For example, the Florida District Court of Appeal, applying Florida's more nuanced public records law, side-stepped the issue of whether the NCAA was a public agency:

> Nor is it necessary to decide whether the NCAA became a public "agency" in its own right under section 119.011(2) by stepping into the shoes of the University and assuming a public duty of the University. The documents at issue in this case became public records by a much more direct route: they were received by agents of the University and used in connection with the University's business.

NCAA v. Associated Press, 18 So. 3d 1201, 1209 (Fla. Dist. Ct. App. 2009).

Thus, based on a specific transaction involving the records at issue, the Florida

court was able, in a relatively unobtrusive manner, to resolve the public character of the records by assessing the specific records' relationship to government activity, without declaring the NCAA to be a public agency and subjecting all of its records to public disclosure without regard to the relationship of the records to actual governmental activity. Accordingly, even within the context of FOIA laws, reasonable means exist to declare records and portions of meetings of private organizations to be public on a transactional basis that avoids the First Amendment concerns inherent in declaring private organizations in toto to be "public bodies," and thereby effectively divesting them of important First Amendment rights.

C. A Functional Equivalency Test Is Necessary

Recognition that First Amendment rights conflict with an abstract idea of "more information is better" has led numerous State appeals courts to look to a functional equivalency test to determine when the weight of any public activity involved might warrant some amount of sunshine upon otherwise protected private associational activity. "By homing in on the functional realities of a particular contractual agreement, the functional-equivalency test provides greater protection against unintended public disclosures while affording a more suitable framework for determining the extent to which an entity has actually assumed the role of a governmental body." State ex rel. Repository v. Nova Behavioral Health, Inc., 859 N.E.2d 936, 941 (Ohio 2006). See also Gautreaux v. Internal Med. Ed. Found., Inc., 336 S.W.3d 526 (Tenn. 2011); Dow v. Caribou Chamber of Commerce and Indus., 884 A.2d 667 (Me. 2005); Fair Share Housing Ctr., Inc. v. N.J. State League of Municipalities, 25 A.3d 1063 (N.J. 2011); Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp., 874 A.2d 1064 (N.J.

2005); State ex rel. Dist. Eight Reg'l Org. Comm. v. Cincinnati-Hamilton County Cmty. Action Agency, 949 N.E.2d 1022 (Ohio Ct. App. 2011); Spokane Research & Def. Fund v. W. Cent. Cmty. Dev. Ass'n, 137 P.3d 120 (Wash. Ct. App. 2006); Mem'l Hosp.-West Volusia, Inc. v. News-Journal Corp., 927 So. 2d 961 (Fl. Dist. Ct. App. 2006). Additionally, the New York statute itself requires "performing a governmental or proprietary function for the state or any one or more municipalities thereof." Rumore v. Bd. of Ed. of City School Dist. of Buffalo, 826 N.Y.S.2d 545, 546 (N.Y. App. Div. 2006). The Georgia Court of Appeals has cautioned that its state's Open Records Act "should not be construed broadly and in derogation of its express terms so as to bring private entities within the purview of the statute." United HealthCare of Ga., Inc. v. Ga. Dep't of Cmty. Health, 666 S.E.2d 472, 476 (Ga. Ct. App. 2008).

A functional equivalency test spares the judiciary from constitutional adjudications in most cases and avoids the public costs of chilled private political activity. Attention focuses on cases where advising the citizens of *actual government activities* (in keeping with S.C. Code Ann. § 30-4-15) and First Amendment rights are more closely matched. In so many words, the South Carolina federal district court has just used a functional equivalency test for South Carolina law, noting that Boeing Company uses "a massive amount of public money" from the government "to carry out *its* business of manufacturing planes, *not the business of the State*," in the course of determining the Boeing is not a "public body" or "related organization" under Weston and Sutler. Woods v. Boeing Co., No. 2:11-cv-02932-PMD, 2012 WL 10587 (D.S.C. 2012) (emphases added). *See* Weston v. Carolina Research & Dev. Found., 303 S.C. 398, 401 S.E.2d 161 (1991); Sutler v. Palmetto Elec. Coop., Inc., 325 S.C. 465, 481

S.E.2d 179 (Ct. App. 1997).

A "functional equivalency" test in the application of the FOIA to private corporations would serve South Carolina well and avoid reaching questions of First Amendment law in most cases. Weston itself is basically a functional equivalency case, of which Woods is a logically consistent application. The "functional equivalency" tests adopted in other states give an express name to an analysis already being applied in South Carolina courts.

D. State Benefit Participation Is Not Public Support

For associations that participate in state benefits plans, membership is a fully paid for service. Organizations invited by the State must opt in. See S.C. Code Ann. §§ 1-11-720 & 9-1-470. For group health insurance, the State gains its own commercial benefit from encouraging participation of private entities that pay full freight for participation, in that larger plan enrollments may enhance the State's buying power with regard to third-party plan providers:

> Insurance companies base rates on group size for two reasons. As size increases, administrative costs per insured decrease. Also, smaller groups tend to buy health coverage based on the needs of participants, increasing the likelihood of claims for the benefits provided. As group size increases, this custom-tailoring becomes more difficult and premiums tend to decrease.

Texas Department of Insurance, "Small Employer Health Insurance" *available at* http://www.tdi.texas.gov/pubs/consumer/cb040.html (last visited May 2, 2012).

The invitee employers bring private funds into a system that needs the help. Given the tight finances of public defined benefit retirement programs in present circumstances, the best indicator that the retirement systems do not dole out "support" to

the invitee employers is that the General Assembly has not ejected them.

Similar invitation-based mutually beneficial intercourse with government occurs when organizations participate in the DOT "Adopt-a-Highway" program or arrange for self-initiated or legislatively decreed specialty license plates administered through the DMV. The mere fact that this intercourse takes place is not sufficient to constitute public "support." Each case has the attributes of an exchange in which the government receives services or benefits.

E. Dues Are Not Public Support

Dues are paid for services rendered. Kneeland v. NCAA, 850 F.2d 224, 230 (5th Cir. 1988), cert. denied 488 U.S. 1042 (1989); Beam v. State Workmen's Comp. Fund, 261 S.C. 327, 200 S.E.2d 83 (1973) (teachers' participation in South Carolina Education Association activities was consistent with their employment contracts, logically related to their employment, and was a service that could not be provided on a local basis). The voluntary nature of private association assures that value must be produced in exchange for dues. Associations do not generally dictate or control whether membership dues are self-paid or paid by some third party. For marketing purposes, many associations offer discounts if several people in one firm, office, or organization make a financial commitment together. It is impossible for associations to determine upon receipt of a dues or program registration check whether the payment is a pass-through of private funds or not. Many associations do not know what the arrangements are between any natural person member and his or her employer—some may reimburse the employer and some may have negotiated for the payment as a term of a compensation package.

In these contexts, the phrase "supported in whole or in part by public funds" only

tells half the story, even when "public funds" are commingled in a payment to an association. Almost everything the State acquires means someone is "supported in whole or in part by public funds." For example:

- "direct grants to the private sector statewide trade association or educational foundation providing nationally certified programs in career and technology education representing the automotive, construction, engineering, healthcare, mechanical contracting/construction, and hospitality tourism career clusters" (Budget Proviso 1.61);
- Southern Regional Education Board Dues (Budget Proviso 6.1);
- National Council of Insurance Legislators Dues (Budget Proviso 62.2);
- Bar Dues (Budget Proviso 89.16); and
- membership in the Southern States Energy Board (Budget Proviso 90.18).

Accessing benefits of associational memberships is an exchange for value whether paid by a private payer or by the government. For example, Clemson University's policy is to reimburse:

> [m]emberships, dues and related expenses for civic, University, professional or other organizations [which] must relate specifically to the job or function of the individual. Individual memberships are allowed only when the organization does not permit agency memberships or it is less costly to the University to have an individual membership.

Clemson University Disbursement Guidelines, Membership Dues and License Fees, *available at* http://www.clemson.edu/cfo/procurement/policies/disbursement.html (last visited May 2, 2012).

MUSC's Direct Payment Manual provides for "payment for membership in societies or associations and certifications for individuals where there is a direct benefit to the Medical University." MUSC Direct Payment Manual, *available at* http://academicdepartments.musc.edu/vpfa/finance/controller/ap/direct_pay_manual.doc (last visited May 2, 2012). University of South Carolina Policy BUSF 7.06 provides for payment of professional dues for employees when "reasonable, justifiable and necessary to benefit the University." USC Policy BUSF 7.06, *available at* http://www.sc.edu/policies/busf706.pdf (last visited May 2, 2012). "A written statement

detailing the benefit to the University and the reason an individual membership is necessary in lieu of an institution membership must be submitted with the payment request." USC Policy BUSF 7.06, *available at* http://www.sc.edu/policies/busf706.pdf (last visited May 2, 2012).

These are all concrete examples of dues being exchanged by the government for some benefit expected to accrue to the government in return. Memberships provide associations' members with return benefits to themselves and their employing entities, regardless of the source of funding of the dues payment.

F. Government Resources Used By Associations' Members Are For Beneficial Exchange

Associations and other nonprofit corporations lack any legal or contractual authority to direct their voluntary membership to utilize public telephones, computer technology, office space, office supplies, or work time, for associational or corporate activity. Such usage is a result of third-party decisions, many of which may be for the benefit of the public entity to better carry on its own public operations and duties. *See* Beam v. State Workmen's Comp. Fund, 261 S.C. 327, 200 S.E.2d 83 (1973). Moreover, the use of government resources is often necessary to obtain or utilize the goods and services purchased from associations.

Some uses simply indicate that the underlying bargained-for exchange is complex rather than nonexistent. There is the entire category of public officials' time and resources put into economic development activities. See Carll v. S.C. Jobs-Econ. Dev. Auth., 284 S.C. 438, 442, 327 S.E.2d 331, 334 (1985). Woods demonstrates the class of problems under the FOIA if the government's pursuit of its own interests happens to align with some private interest. Woods v. Boeing Co., No. 2:11-cv-02932-PMD, 2012 WL

10587 (D.S.C. 2012). See also State ex rel. Medlock v. S.C. State Family Farm Dev. Auth., 279 S.C. 316, 321, 306 S.E.2d 605, 609 (1983) ("The public purpose is not destroyed merely because benefits will accrue to private individuals."). Recruitment activities, special source revenue bonds, fee-in-lieu-of-tax agreements, tax increment financed redevelopment projects, sales tax exemptions, and the like all constitute government support of private business that dwarfs any support received by politically active nonprofit membership associations from a few incidental bytes of web traffic or a couple of e-mails. See 1985 S.C. Op. Att'y Gen. 135 (1985) (governmental entities contracting with Chamber of Commerce to conduct industrial recruiting for county and municipalities); Johnson v. Piedmont Mun. Power Agency, 277 S.C. 345, 351, 287 S.E.2d 476, 479 (1982) ("Incidental benefits to private interest from the promotion of projects funded with bond money is not inconsistent with the overall public purpose."); Quirk v. Campbell, 302 S.C. 148, 394 S.E.2d 320 (1990) (fee in lieu of tax agreement); Wolper v. City Council of City of Charleston, 287 S.C. 209, 336 S.E.2d 871 (1985) (tax increment financing plan for redevelopment projects); Sutler v. Palmetto Elec. Coop., 325 S.C. 465, 481 S.E.2d 179 (Ct. App. 1997) (federal, low-interest loans); S.C. Code Ann. § 12-36-2120 (sales tax exemptions); and S.C. Code Ann. § 12-62-40 (motion picture sales tax exemption certificate).

All these forms of using public resources to interact with private organizations while in the pursuit of government policy are best described as an investment in the expected return of benefits to the cause of the relevant public policy, an activity which belongs under the rubric of bargained-for-exchange instead of "support."

G. Assistance To Government Is Public Service

The type of governmental function exercised by a private corporation that would qualify it as a public body is acting as an *agent* of the government. In Weston, "the University was 'acting through' the Foundation, which in turn, was acting on 'behalf' of the University as its 'agent.'" Weston v. Carolina Research & Dev. Found., 303 S.C. 398, 401, 401 S.E.2d 161, 163 (1991). "The grant was awarded to 'the University of South Carolina acting through the Carolina Research and Development Foundation.'" *Id.*

SCSBA and many other associations like it designate or recommend members of various committees or boards. In performing these activities, associations are not acting on behalf of or as the agent of any governmental agency. By seeking the expertise of various knowledgeable and informed organizations through the authority to provide input or to appoint members to committees and commissions, the General Assembly has not made such organizations public bodies under the FOIA. In addition to references to SCASA and the Chambers of Commerce already made in the parties' briefs, many instances of the State statutorily recognizing and seeking the assistance of professional associations exist. See S.C. Code Ann. § 6-9-93 (Building Codes Council); § 8-15-60 (training programs); § 11-41-10 et seq. (State General Obligation Economic Development Bond Act); § 13-1-1770 (Downtown Redevelopment Program grants); § 13-7-40(C) (Technical Advisory Radiation Control Council); § 13-17-10 et seq. (South Carolina Research Authority and South Carolina Research Innovation Centers); § 23-1-230 (First Responders Advisory Committee); § 23-10-10 (Fire Academy Advisory Committee); § 23-25-20 (Law Enforcement Officers Hall of Fame Advisory Committee); § 23-47-65 (South Carolina 911 Advisory Committee); § 23-49-20 (Firefighter

Mobilization Oversight Committee); § 23-50-10 et seq. (South Carolina Crimestoppers Council); § 40-13-10 (State Board of Cosmetology); § 40-19-10 (Board of Funeral Service); § 40-23-10 (Environmental Certification Board); § 40-25-40 (Commission of Hearing Aid Specialists); § 40-36-10 (Board of Occupational Therapy); § 40-45-10 (Board of Physical Therapy Examiners); § 40-55-30 (State Board of Examiners in Psychology); § 43-21-200 (Physician Advisory Board); § 44-36-20 (School of Public Health Advisory Committee); § 44-39-20 (Diabetes Initiative of South Carolina Board); § 44-59-50. (Catawba/Wateree Commission and Yankee/Pee Dee Commission); § 51-18-40 (War Between the States Heritage Trust Commission); § 51-19-10 (Old Exchange Building Commission); § 59-59-170 (Education and Economic Development Coordinating Council); § 60-11-40 (Commission of Archives and History); & § 63-13-1210 (State Advisory Committee on the Regulation of Childcare Facilities). Such cooperation is obviously in jeopardy if being called upon in this manner makes an entity a "public body" under the FOIA.

As noted in the slightly different context of whether private action constituted "state action" under 42 U.S.C. § 1983, the United States Supreme Court stated "[t]hat a private entity performs a function which serves the public does not make its acts state action." Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982). The conduct must be "fairly attributable to the state" to be state action under §1983. Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 937 (1982).

The acts of advice and recommendations, either directly or through appointees to commissions and boards, in aid of the State performed by associations are better characterized as a public service than as a government function. In the appointment and

recommendation situations, it is the boards and commissions, *after being constituted*, that perform in some capacity—often merely advisory—as government, and those boards' and commissions' meetings and records are subject to the FOIA, thereby vindicating the purposes of the FOIA without needing to invade the privacy and First Amendment rights of private organizations.

VI. CONCLUSION

For the reasons set forth above, this Court should affirm the Circuit Court's order in this case.

Respectfully submitted,

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July 3, 2012
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

C.A. No.: 2011-40-2044

ROCKY DISABATO D/B/A "ROCKY D," .....Appellant.

v.

SOUTH CAROLINA ASSOCIATION OF SCHOOL ADMINISTRATORS, ...
.....Respondent.

STATE EX REL ALAN WILSON, ATTORNEY GENERAL, ...Intervenor.

PROOF OF SERVICE

I certify that I have served the Amicus Brief by depositing a copy of it in the United States Mail, postage prepaid, on July 5, 2012, addressed to attorneys for the Appellant, Kevin A. Hall, Esq., Karl S. Bowers, Jr., Esq., and M. Todd Carroll, Esq., Womble Carlyle Sandridge & Rice, LLP, 1727 Hampton Street, Columbia, SC 29201, attorneys for the Respondent, Kenneth L. Childs, Esq., John M. Reagle, Esq., and Keith R. Powell, Esq., Childs & Halligan, PA, 1301 Gervais Street, Suite 900, Columbia, SC 29201, and Intervenor, The Honorable Alan Wilson, Esq., Office of the Attorney General, PO Box 11549, Columbia, SC 29211.

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