THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2011-CP-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.

FINAL BRIEF OF APPELLANT

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ISSUES PRESENTED

This case presents three issues for the Court's consideration:

1. Is the South Carolina Association of School Administrators a "public body" subject to the South Carolina Freedom of Information Act?

2. Does compliance with the South Carolina Freedom of Information Act implicate an organization's First Amendment rights?

3. Does the South Carolina Freedom of Information Act's definition of "public body" violate the First Amendment?

STATEMENT OF THE CASE

This case asks whether the South Carolina Freedom of Information Act applies to the South Carolina Association of School Administrators, an entity that is supported by public funds, that is populated by public employees, and that wields the authority of the sovereign when exercising a series of statutorily-assigned powers. The indisputable answer to this question should be an emphatic "Yes."

The circuit court, however, took a remarkable and unprecedented step and declared the FOIA to be unconstitutional. In its view, FOIA runs afoul of the First Amendment because it "restrict[s] a corporation's right to control its message and to not speak publicly." (R. p. 27, Order (Aug. 10, 2011).)

No other court in the country has ever made a similar ruling. To the contrary, courts that have addressed such an argument have summarily rejected it. *See, e.g.*, *Dorrier v. Dark*, 537 S.W.2d 888, 892 (Tenn. 1976) ("We are not impressed by the argument that a citizen member of a governing body suffers an infringement of his right to free speech by the requirement that any deliberation toward an official decision must be conducted openly."). This Court should be similarly dismissive of SCASA's argument, rehabilitate the FOIA by reversing the circuit court's ruling, and declare SCASA to be a "public body" subject to the FOIA.

I. Proceedings in State Court

This case was commenced on December 4, 2009, when Rocky Disabato, a radio broadcaster in Charleston, filed a complaint in Charleston County seeking a declaration that SCASA is a "public body," as defined by FOIA, and an injunction barring SCASA from refusing to comply with FOIA. (R. pp. 58–67, Complaint.) On March 14, 2011, the

circuit court in Charleston transferred the case to Richland County, finding that any FOIA complaint must be filed in the county where the defendant, rather than the plaintiff, is located. (R. pp. 1–10, Order (Mar. 14, 2011).)

Meanwhile, in January 2010, Mr. Disabato served SCASA with a set of interrogatories and a set of requests to produce documents. SCASA refused to provide substantive responses to those written discovery requests. The circuit court subsequently granted Mr. Disabato's motion to compel and ordered SCASA to submit full and complete responses to several interrogatories and document requests. (R. pp. 12–20, Order (May 3, 2011).)

On March 29, 2011, SCASA filed a motion to dismiss Mr. Disabato's complaint pursuant to Rule 12(b)(6), SCRCP, on grounds that the FOIA violates the First Amendment. Despite previously rejecting the same First Amendment-based argument when compelling SCASA to provide discovery responses, the circuit court granted SCASA's motion, held the FOIA to be unconstitutional, and dismissed this case. (R. pp. 22–33, Order (Aug. 10, 2011).)

Mr. Disabato filed and served his notice of appeal on September 1, 2011. (R. pp. 413–14, Notice of Appeal (Sept. 1, 2011).) On September 30, 2011, the Attorney General moved to intervene in this case in order to defend the constitutionality of the FOIA. The Court granted that motion on October 14, 2011. (R. pp. 34–35, Order of the Supreme Court (Oct. 14, 2011).) Mr. Disabato received copies of transcripts of the proceedings before the circuit court on November 15, 2011.

II. Proceedings in Federal Court

In response to Mr. Disabato's complaint, and prior to appearing in the state-level proceedings, SCASA filed a competing action in federal court and sought a declaration that the FOIA violates the First Amendment. (R. pp. 85–94, V. Compl. for Decl. Relief in Federal Court.) Recognizing the impropriety of SCASA's efforts to short-circuit Mr. Disabato's case, the United States District Court dismissed that complaint pursuant to *Younger* abstention and *Pullman* abstention. (R. pp. 36–38, Order of The Honorable Cameron M. Currie (Apr. 22, 2010).) In dismissing SCASA's complaint, Judge Currie expressly recognized that SCASA has "public attributes," and based her conclusion on its "receipt of public funds and the statutory assignment of duties." (R. p. 37, Order of The Honorable Cameron M. Currie (Apr. 22, 2010).)

SCASA appealed Judge Currie's dismissal. The Fourth Circuit held oral argument on that appeal, during which counsel for SCASA expressed concerns about whether the state court could adequately address these constitutional issues. (*E.g.*, R. p. 301:20–24, Hr'g Tr. (Oct. 25, 2011).) Also during that argument, the panelists indicated that the notion that the FOIA could somehow run afoul of the First Amendment was "a little bit trumped up. I always thought FOIA was designed to further and promote First Amendment interest by adding to the store of knowledge that would inform public debate." (R. p. 312:2–7, Hr'g Tr. (Oct. 25, 2011).) After argument, the Fourth Circuit unanimously affirmed the dismissal. (R. pp. 39–50, *S.C. Ass'n of Sch. Adm'rs v. Disabato*, Case No. 10-1540, 2012 U.S. App. LEXIS 120, at *14 (4th Cir. Jan. 4, 2012).)

STATEMENT OF FACTS

I. Mr. Disabato sent SCASA a written request for public records, to which SCASA refused to comply on grounds that it is not a "public body" subject to the FOIA.

In August 2009, Mr. Disabato—a Charleston radio broadcaster—sent SCASA a request for information pursuant to the FOIA. In his request, Mr. Disabato sought two categories of public records:

- Copies of all "emails, letters, memos, documents, and other records possessed or maintained by the South Carolina Association of School Administrators that discuss both the American Recovery and Reinvestment Act of 2009 and Governor Mark Sanford, including but not limited to any references to the lawsuit filed by your organization against Gov. Sanford in May 2009."

- Copies of "any record that reflects all telephone calls made by or received by your organization and its staff, including the staff members' cell phones, from January 1, 2009, to July 31, 2009."

(R. p. 77, Letter from Disabato to Spearman.) SCASA refused to produce any responsive materials and denied that it was a "public body" subject to the FOIA. (R. p. 79, Letter from Spearman to Disabato.) It did not, however, assert any of the exemptions to production identified within FOIA itself. (*Id.*)

II. SCASA indisputably is a "public body" subject to the FOIA.

SCASA's refusal to comply with Mr. Disabato's request is indefensible. The FOIA defines a "public body" to be, *inter alia*,

> any organization, corporation, or agency supported in whole or in part by public funds or expending public funds, including committees, subcommittees, advisory committees, and the like of any such body by whatever name known, and includes any quasi-governmental body of the State and its political subdivisions, including, without limitation, bodies such as the South Carolina Public Service Authority and the South Carolina State Ports Authority.

S.C. Code Ann. § 30-4-20(a).

As a matter of law, SCASA falls squarely within this definition. Even without the benefit of full factual discovery, Mr. Disabato has identified a series of ways in which SCASA is supported by public monies:

- As a matter of state law, SCASA's employees and retirees, as well as their dependents, receive state-funded health insurance and dental insurance. *Id.* § 1-11-720(A)(15).

- As a matter of state law, SCASA's employees participate in the state's retirement system. *Id.* § 9-1-10(14).

- At least part of SCASA's website is hosted on servers maintained by public school districts. (*E.g.*, R. p. 75, Screenshot of SCASA website hosted on Dillon County School District Two's servers.)

- SCASA's members are public employees who pay their dues with public funds and who conduct SCASA's business through publicly-funded email addresses. (R. pp. 59–60, Compl. ¶¶ 7–9; R. pp. 71–73, SCASA's 2009–10 Executive Board.)

In addition to this substantial support from the public coffers, the State Code repeatedly assigns responsibilities within the public education system to SCASA. *See, e.g.*, S.C. Code Ann. § 59-1-452 (directing SCASA to appoint members of a group that evaluates costsaving proposals through a program administered by the State Department of Education); *id.* § 59-40-70(A) (establishing SCASA as a member of the Charter Schools Advisory Committee, which is a body that reviews all applications to form new charter schools anywhere in the state); *id.* § 59-40-230(A) (vesting SCASA with authority to advise on appointments to the board of trustees of the South Carolina Public Charter School District); *id.* § 59-141-10 (providing that the Department of Education must coordinate with SCASA regarding certain educational goals).[1]

[1] Because of this host of statutory responsibilities, the circuit court's statement that "SCASA has no duties it must fulfill by legislative act" is clearly misplaced and should be reversed by this Court. (R. pp. 6–7, Order (Mar. 14, 2011).)

In light of the fact that SCASA receives public financial support—any employer would be thrilled to have its employee insurance programs subsidized by the State and to be able to provide its employees a defined-benefit retirement program that is guaranteed by the State—***and*** exercises the authority of the sovereign in a host of respects, there cannot be any legitimate dispute that SCASA is a "public body" under the FOIA. In fact, the circuit court assumed this determination to be correct when dismissing Mr. Disabato's complaint. (R. p. 23, Order (Aug. 10, 2011).) The Court should not hesitate to resolve this aspect of the case by declaring that SCASA is a "public body" subject to the FOIA and enjoining it from further violations of the law. The remainder of the circuit court's ruling, however, should be reversed, as there is no conceivable way that the FOIA's definition of "public body" is constitutionally defective.

STANDARD OF REVIEW

This appeal arises from the circuit court's dismissal of Mr. Disabato's case pursuant to Rule 12(b)(6), SCRCP. This Court applies the same standard of review as the trial court when evaluating that decision and must "construe the complaint in a light most favorable to the nonmovant and determine if the 'facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case.'" *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009) (quoting *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 499 (Ct. App. 2001)). However, because this appeal involves the constitutionality of a state statute, this Court reviews the circuit court's ruling *de novo* "with no particular deference to the lower court." *City of Rock Hill v. Harris*, 391 S.C. 149, 152, 705 S.E.2d 53, 54 (2011).

ARGUMENTS AND AUTHORITIES

The circuit court has taken a remarkable step that is literally unprecedented. The federal government has an open-government statute, as do all fifty states. Never before has a court held ***any*** of them to violate the First Amendment, and with good reason. The First Amendment is designed to ensure that discussion of issues of public interest is robust and that the marketplace of ideas remains fully stocked. *See, e.g.*, *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) (describing the First Amendment's "role in affording the public access to discussion, debate, and the dissemination of information and ideas"); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (explaining that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail"). South Carolina's FOIA, like sunshine laws everywhere, is designed to further, not impair, this overarching goal:

> 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 circuit court's ruling that the FOIA cannot constitutionally apply to SCASA turns both the First Amendment and the FOIA on their respective heads. In arriving at its erroneous conclusion, the circuit court incorrectly assumed that SCASA could suffer a constitutional injury here, and then it applied the wrong First Amendment standards throughout its analysis. These errors should be reversed, and the Court should rehabilitate the FOIA to ensure that the citizenry is able to inform itself as to how taxpayer dollars are spent and governmental decisions are made.

I. Applying the FOIA to SCASA would not infringe SCASA's First Amendment rights in any way.

In order to find that the FOIA is unconstitutional, the circuit court first had to find that SCASA's First Amendment rights are implicated by the FOIA. The circuit court held that application of the FOIA to SCASA would restrict its "right to control its message and to not speak publicly." (R. p. 27, Order (Aug. 10, 2011).) It further held that SCASA's rights would be violated because a citizen can enforce the FOIA through litigation. (R. pp. 28–29, Order (Aug. 10, 2011).) Respectfully, this is wrong on all counts.

As fully discussed below, compliance with the FOIA does not actually touch on any First Amendment right. But even if it did, the State is well within its authority to attach the condition of transparency to SCASA's receipt of public monies and discharge of statutorily-assigned public functions. Each of these errors is discussed below in turn.

A. The circuit court erred in finding that the FOIA could impact SCASA's rights.

1. A "public body" does not lose "control of its message" because the FOIA does not compel it to convey specific messages or to speak on certain topics.

There is no reason to think that compliance with the FOIA would somehow cause SCASA to lose "control of its message." The FOIA does not force "public bodies" to convey any message, to speak on specific topics, or to promote a particular viewpoint. Nor does it require a "public body" to grant equal access to its resources to members of the citizenry who have a different viewpoint on an issue to promote their competing message. In short, "public bodies" are free to set their own agendas and to craft their own messages. The FOIA simply permits the citizenry—which pays monies to support a

"public body," and which is directly impacted by the decisions of a "public body"—to scrutinize those agendas and messages. *See* S.C. Code Ann. § 30-4-30(a) (vesting the citizenry with the right to inspect "public records" of "public bodies"); *id.* § 30-4-60 (requiring meetings of "public bodies" to be open to the public).

This stands in stark contrast to the three cases cited by the circuit court in support of its erroneous conclusion on this point. (R. p. 27, Order (Aug. 10, 2011).) In two of those, the challenged government action would have forced one speaker to grant "equal access" to a disfavored speaker. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 559 (1995) ("The issue in this case is whether Massachusetts may require private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey. We hold that such a mandate violates the First Amendment."); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 4 (1986) ("The question in this case is whether the California Public Utilities Commission may require a privately owned utility company to include in its billing envelopes speech of a third party with which the utility disagrees."). In the third, the challenged law affirmatively compelled fundraisers to transmit a specific message when conducting their business. *See Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 786 (1988) ("The Act also provides that, prior to any appeal for funds, a professional fundraiser must disclose to potential donors . . . the average percentage of gross receipts actually turned over to charities by the fundraiser for all charitable solicitations conducted in North Carolina within the previous 12 months.").

There is absolutely no parallel between the FOIA and any of these cases. In each decision upon which the circuit court based its ruling, the government affirmatively

required a speaker to convey a certain message or to turn its resources over to a disfavored speaker to present a competing viewpoint. The FOIA requires nothing of the sort and, instead, leaves "public bodies" free to say whatever they wish. The circuit court, therefore, erred in its conclusion—for which no evidence exists in the record—that compliance with the FOIA would somehow infringe SCASA's right to "control its message."

2. SCASA does not have a right "not to speak publicly."

Similarly, the circuit court wrongly held that requiring SCASA to comply with the FOIA would infringe its so-called right "to not speak publicly." Simply put, there is no such right under the First Amendment.[2] This point was recently driven home by *Citizens United v. FEC*, 130 S. Ct. 876 (2010), ***the very case cited in the circuit court's order for the contrary conclusion***. (R. p. 27, Order (Aug. 10, 2011).)

In *Citizens United*, a private party challenged the federal campaign-finance statute's requirement that a speaker conveying an electioneering communication must comply with certain disclaimer and disclosure requirements. *Id.* at 914–15. The Supreme Court soundly rejected that constitutional challenge, finding that the government's interest in providing the electorate with information about who is speaking

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[2] The only time such a "right" exists is if a speaker risks imminent severe physical or economic harm as a result of his or her speech, and anonymity is needed to avoid such injuries. This exception, of course, stems from the NAACP's advocacy efforts during the Civil Rights Era. *See, e.g.*, *NAACP v. Alabama*, 357 U.S. 449, 462–63 (1958) (affirming the NAACP's right to keep its membership roles confidential because of the "unconverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility"). This exception has not been extended, and it certainly has never been construed to apply to a situation where public school administrators speak collectively on matters of state education policy. SCASA has ***never*** suggested that any harm would befall it or its members if required to comply with the FOIA, nor would such a claim even be plausible.

overrode any competing interest the speaker could claim in maintaining its anonymity. *Id.* at 915–16. As the *Citizens United* Court explained: "This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Id.* at 916.

This reasoning is just as applicable here, if not more so. In *Citizens United*, a group of private citizens attempted to speak anonymously. In this case, SCASA—an organization whose membership is comprised solely of public officials—is apparently claiming that it has a right to speak anonymously on matters of public education policy even though its constituent members do not have that right individually. There is nothing in the law—the First Amendment, the FOIA, or anywhere else—to suggest that individual public officials can avoid public scrutiny altogether simply by acting collectively. The perverse incentive that the circuit court's ruling creates on this point is obvious and should be reversed.

3. The fact that a statute can be enforced through litigation does not render it constitutionally defective.

The final manner in which the circuit court found that the FOIA infringed SCASA's First Amendment rights was "because of the threat of FOIA litigation." (R. pp. 28–29, Order (Aug. 10, 2011).) In the circuit court's view, the fact that a citizen can file suit to enforce his or her right of access "exacerbates the burden the FOIA imposes on First Amendment rights." (R. p. 29, Order (Aug. 10, 2011).)[3]

Just as above, there is no legal basis for this finding. The only circumstance under which the Supreme Court has held that the threat of a lawsuit could potentially

[3] This Court has previously determined the citizen's right of access under the FOIA to be "immutable," suggesting that it derives from an authority higher than the statute itself. *Seago v. Horry County*, 378 S.C. 414, 423, 663 S.E.2d 38, 42 (2008).

infringe on First Amendment rights has been in the context of campaign-finance laws that (1) contain content-based speech restrictions and (2) are written in vague terms such that speakers cannot know without judicial intervention whether they were allowed to even speak on certain topics.

In *Bellotti*, for instance, the Supreme Court considered the constitutionality of a Massachusetts statute that forbid corporations from making expenditures or contributions for the purpose of influencing ballot referenda unless the question presented to voters "materially affect[ed]" their business. 435 U.S. at 768. In finding such a prohibition to be constitutionally defective, the Supreme Court noted that the vagueness and ambiguity inherent in this phrase could chill speech because "management never could be sure whether a court would disagree with its judgment as to the effect upon the corporation's business of a particular referendum issue." *Id.* at 785 n.21.

The FOIA has none of these attributes. With respect to whether an entity is a "public body," the FOIA is clear in its aim, its scope, and its application. If an organization (a) accepts public funding and benefits, (b) discharges governmental authority, or (c) does both, then it is subject to the FOIA. It's as simple as that.

As outlined above in the Statement of Facts, SCASA indisputably meets all of these criteria: It receives substantial monetary assistance from the public coffers, ***and*** it performs a series of statutory duties related to the State's education policy. The fact that SCASA chose not to comply with the law and forced Mr. Disabato to file this lawsuit does not put the FOIA on par with the limited circumstances under which the Supreme Court has held that the threat of litigation might implicate First Amendment rights. Accordingly, this Court should reject the circuit court's conclusion on this final point.

B. The State is free to require entities that receive public monies or discharge public duties to be transparent to the citizenry.

Assuming *arguendo* that application of the FOIA to SCASA could somehow touch on SCASA's First Amendment rights, the circuit court erred in finding that this automatically exempts SCASA from complying with the FOIA. It is well-established that the government may attach conditions to the receipt of a discretionary benefit as long as there is a relationship between the benefit and the conditions. *See, e.g.*, *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) (explaining that the government may condition the receipt of a benefit on the forfeiture of a right unless "the benefit sought has little or no relationship to the property" forfeited).

In South Carolina, the General Assembly has determined that as a condition to the receipt of public monies or the exercise of governmental authority, an organization must make its records and meetings open to public scrutiny. This modest tradeoff, for which there is an obvious connection—*i.e.*, the citizenry should know how tax dollars are spent and public policies are crafted—is entirely consistent with a long line of case law affirming similar exchanges against constitutional challenges. *See, e.g.*, *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 203 (2003) (plurality opinion) (finding that Congress could require libraries to use content-based internet filters in order to receive federal funding while noting that "Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives"); *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 545–51 (1983) (holding that Congress could prohibit organizations that qualified for favorable tax treatment under Section 501(c)(3) of the IRS Code from spending funds on certain types of political speech); *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (affirming that an agreement "to submit any

proposed publication for prior review" was an "entirely appropriate" condition of employment in the CIA despite the plaintiff's claim that such a prior restraint was a violation of the First Amendment); *California v. LaRue*, 409 U.S. 109, 118–19 (1972) (upholding a state's ability to condition a business's receipt of a liquor license on the forfeiture of sexually-explicit entertainment).

Because application of the FOIA to SCASA would not implicate its First Amendment rights, the circuit court erred in granting judgment in SCASA's favor and dismissing this case. But even if the First Amendment could be implicated here, the FOIA's definition of "public body" easily passes constitutional muster, as explained below.

II. The FOIA's definition of "public body" is constitutional.

Assuming *arguendo* that application of the FOIA to SCASA could somehow implicate its First Amendment rights, the circuit court's ruling remains defective. It held that the FOIA's definition of "public body" is unconstitutional, but it relied on an entirely inapplicable body of case law to reach this conclusion.[4] Rather than applying a lower level of scrutiny, the circuit court improperly presumed that strict scrutiny governed this case. That threshold error guided the rest of its incorrect analysis, which is fully addressed below.

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[4] The circuit court concluded its order by stating that "this decision does not find the FOIA to be unconstitutional," but then immediately held that "the First Amendment protects SCASA from the requirements of the FOIA." (R. p. 33, Order (Aug. 10, 2011).) Respectfully, there is simply no way to interpret the circuit court's order as anything other than a declaration that the FOIA is unconstitutional, at least as applied to SCASA.

A. Because it is content-neutral, the FOIA's definition of "public body" is subject to an intermediate level of scrutiny.

The first step in any analysis under the First Amendment is to determine whether the challenged statute is "content-based" or "content-neutral." This determination is absolutely critical, as the United States Supreme Court has been clear that content-neutral laws are subject to a significantly lower standard of review than are those that are content-based. *See generally* 1 Rodney A. Smolla, *Smolla and Nimmer on Freedom of Speech* § 3.1 (2008) (explaining that content-neutral laws "qualify for significantly less rigorous levels of review" than do laws that are based on a speech's content).

When drawing this dispositive distinction, the Supreme Court has provided straightforward guidance:

> The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.

Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (internal citation omitted). This Court agrees with that analysis. *See, e.g.*, *City of Beaufort v. Baker*, 315 S.C. 146, 150, 432 S.E.2d 470, 472 (1993) (holding that a noise-control ordinance was content-neutral because it "regulat[ed] speech solely upon the noise generated, rather than the message conveyed").

The FOIA's definition of "public body" undoubtedly is content-neutral. It is not pegged to an organization's speech in any way. It does not regulate the content of speech. It is not triggered by any particular type of speech. An entity does not become a

"public body" by virtue of any message it promotes, or whether it even promotes any message at all. Instead, the FOIA's definition of "public body" only encompasses organizations that perform governmental functions or are supported by public monies:

> "Public body" means any department of the State, a majority of directors or their representatives of departments within the executive branch of state government as outlined in Section 1-30-10, any state board, commission, agency, and authority, any public or governmental body or political subdivision of the State, including counties, municipalities, townships, school districts, and special purpose districts, or any organization, corporation, or agency supported in whole or in part by public funds or expending public funds, including committees, subcommittees, advisory committees, and the like of any such body by whatever name known, and includes any quasi-governmental body of the State and its political subdivisions, including, without limitation, bodies such as the South Carolina Public Service Authority and the South Carolina State Ports Authority. Committees of health care facilities, which are subject to this chapter, for medical staff disciplinary proceedings, quality assurance, peer review, including the medical staff credentialing process, specific medical case review, and self-evaluation, are not public bodies for the purpose of this chapter.

S.C. Code Ann. § 30-4-20(a).

Moreover, the General Assembly passed this legislation to ensure that the citizenry could be fully informed as to how public policies are crafted and how taxpayer dollars are spent, ***not*** to suppress certain viewpoints or to alter speech. *See id.* § 30-4-15 ("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."). Accordingly, the FOIA's definition of "public body" must be measured against the constitutional standards that govern content-neutral laws.

The circuit court, however, never engaged in this fundamental threshold analysis. Instead, it apparently assumed that the statutory definition was content-based. The court's dismissal order identified strict scrutiny as the appropriate "Standard Of Review," and it cited three cases, each of which dealt with a law or policy that was overtly content-based, for this conclusion:

- *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008): The Fourth Circuit addressed the constitutionality of the North Carolina campaign finance law's definition of a political action committee, which was triggered only if a an organization engaged in a sufficient amount of electioneering activity.

- *Elrod v. Burns*, 427 U.S. 347 (1976): The Supreme Court addressed the constitutionality of basing public employment decisions on an employee's affiliation with the political party then in office.

- *Buckley v. Valeo*, 424 U.S. 1 (1976): The Supreme Court addressed the constitutionality of the federal campaign finance statute's restrictions on electioneering speech and activity.

(R. pp. 22–33, Order (Aug. 10, 2011).)

By skipping the essential preliminary step of classifying the disputed law as content-neutral or content-based, the circuit court's constitutional analysis was fatally flawed from the outset. The FOIA's definition of "public body"—unlike campaign finance laws that are triggered only by certain types of speech, or policies that peg public employment to partisan political affiliation—is devoid of any connection to the content of any speech. FOIA's guidelines apply to any organization that meets the definition of "public body," and they do not change based on the advocacy efforts, political speech, or viewpoints of any particular organization. In short, the FOIA does not regulate any speech based on a preference for or against certain messages. Its definition of "public body," therefore, should not be subjected to the strict or "exacting" scrutiny applied by the circuit court, but instead to a lower level of review that it easily meets.

B. The FOIA's definition of "public body" readily satisfies the four-part *O'Brien* test for content-neutral laws.

Laws that are content-neutral, but that may have an "incidental" effect on speech, are examined under the relaxed constitutional standard set forth in *United States v. O'Brien*, 391 U.S. 367 (1968). *O'Brien* established a four-part test that finds a content-neutral law to be valid if:

1. "it is within the constitutional power of the Government";
2. "it furthers an important or substantial governmental interest";
3. "the governmental interest is unrelated to the suppression of free expression"; and
4. "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

Id. at 377. This Court has incorporated the *O'Brien* test into South Carolina jurisprudence. *Diamonds v. Greenville County*, 325 S.C. 154, 156, 480 S.E.2d 718, 719 (1997). The FOIA's definition of "public body" readily meets these criteria.

1. The State has the authority to determine what organizations are subject to its sunshine laws.

There is no genuine dispute that the General Assembly had authority to pass the FOIA, in general, and to define what organizations would be subject to that law, in particular. The circuit court did not find that the Legislature lacked this power, nor has SCASA ever argued such a position. To be sure, this Court has previously held that the Legislature was free to set aside the common law concepts of "public" and "private" entities when defining "public body" under the FOIA. *See Weston v. Carolina Research & Dev. Found.*, 303 S.C. 398, 403, 401 S.E.2d 161, 164 (1991) ("[W]e reject the Foundation's contention that the common law distinction between 'public' and 'private'

corporations overrides the clear language of the FOIA."). And the General Assembly certainly acted within its authority under the South Carolina Constitution. *See* S.C. Const. art. III, § 34 (identifying only a handful of subjects and purposes that are beyond the General Assembly's legislative power, none of which touch on the subject matter of the FOIA).

The General Assembly, like every other state legislature and Congress, is free to establish checks on the government and on organizations that exercise governmental power or that are supported by public monies. There is nothing in the State Constitution, the Federal Constitution, or any case law to suggest otherwise. Accordingly, *O'Brien*'s first prong is satisfied.

2. The FOIA's definition of "public body" was written in such a way as to further the State's paramount interest in providing a check on the government.

Likewise, there is no doubt that the Legislature crafted the definition of "public body" to further the FOIA's overall purposes of providing a check on the government, a goal it deemed to be "vital in a democratic society." S.C. Code Ann. § 30-4-15; *see also Bellamy v. Brown*, 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991) (holding that "the essential purpose of the FOIA is to protect the public from secret government activity").[5] The definition is written in broad terms to ensure that the government cannot use a so-called "private" organization as a shield to avoid scrutiny about how decisions affecting public policy are made and how public funds are expended.

[5] When affirming the dismissal of SCASA's competing federal case, the Fourth Circuit confirmed that the FOIA embodies "important state interests." (R. pp. 43–44, *S.C. Ass'n of Sch. Adm'rs v. Disabato*, Case No. 10-1540, 2012 U.S. App. LEXIS 120, at *10–11 (4th Cir. Jan. 4, 2012).)

Recognizing this wide scope, the Court has applied the definition of "public body" to a nonprofit entity that raises funds for a university, *Weston*, 303 S.C. at 403, 401 S.E.2d at 164, and to a group that provides advice and input regarding a city's contract with a towing company, *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 163, 547 S.E.2d 862, 865 (2001). In both instances, the Court explained that application of the FOIA was necessary in order to protect the citizenry from potential abuses of the public coffers. *See id.* ("This kind of secret determination is exactly what FOIA was designed to prevent."); *Weston*, 303 S.C. at 404, 401 S.E.2d at 165 ("[T]he only way that the public can determine with specificity how those [public] funds were spent is through access to the records and affairs of the organization receiving and spending the funds.").[6]

Nor is South Carolina unique in extending its sunshine laws to so-called "private" entities that receive public monies or that are given roles in shaping public policy. State courts regularly hold that sunshine laws are applicable to entities like SCASA that claim to be "private" but:

- **Whose employees receive government-backed employment benefits**, *see, e.g.*, *Telford v. Thurston County Bd. of Comm'rs*, 974 P.2d 886, 895 (Wash. Ct. App. 1999) ("WSAC and WACO receive some additional governmental benefits: some of their employees are members of the Washington public employees' retirement system . . . .");

- **That receive membership dues from public schools**, *see, e.g.*, *N. Cent. Ass'n of Colls. & Schs. v. Troutt Bros.*, 548 S.W.2d 825, 826 (Ark. 1977)

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[6] Even the circuit court acknowledged that the FOIA serves "an important governmental interest," though it surprisingly concluded that "the FOIA's open meeting and records disclosure requirements are not substantially related to the FOIA's purpose." (R. p. 33, Order (Aug. 10, 2011).) This position seems contradictory, as the FOIA's sunshine provisions are aimed ***solely*** at accomplishing the General Assembly's stated goal for the FOIA: To require "public business [to] 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.

("Dues paid by the member schools in Arkansas support the NCA's functions.");

- **Whose members and officers are public employees**, *see, e.g.*, *Prof'l Firefighters of N.H. v. HealthTrust, Inc.*, 861 A.2d 789, 792 (N.H. 2004) ("Second, HealthTrust is governed entirely by public officials and employees."); *Telford*, 974 P.2d at 895 ("But the associations themselves are completely controlled by elected and appointed county officials. There is no private sector involvement or membership.");[7]

- **Whose functions are carried out, at least in part, through the use of public resources**, *see, e.g.*, *North Central Ass'n of Colleges & Schools*, 548 S.W.2d at 826 ("[T]he chairman of the State Committee is an employee of the Arkansas Department of Education who uses his state owned office in performing his duties for the NCA."); and

- **That have the primary goal of providing a service for public employees or advising on matters of public policy**, *see, e.g.*, *id.* at 826 ("Obviously, the NCA's policies and decisions, which are most laudable, have a great impact upon students and parents and are a matter of great public concern."); *Professional Firefights of New Hampshire*, 861 A.2d at 793 (observing that "HealthTrust operates for the sole benefit of its constitute governmental entities"); *Telford*, 974 P.2d at 894 (identifying a series of statutory duties performed by the Washington State Association of Counties and the Washington State Association of County Officials).

The logic underlying these decisions—both from this Court and elsewhere—is unassailable: Sunshine laws are written to apply broadly so that the government cannot act in secret and avoid scrutiny by acting through "private" organizations, particularly when those organizations are supported by taxpayer funds or exercise governmental authority. This is undoubtedly a substantial interest—indeed, the General Assembly

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[7] The *Professional Firefighters of New Hampshire* court noted that exempting an organization whose individual members are already subject to sunshine laws "would create an anomaly in which the constituent political subdivisions of pooled risk management programs would be . . . individually subject to the Right-to-Know Law, but could avoid the law by forming an association [under New Hampshire law]." 861 A.2d at 793. The same illogical outcome would exist here if SCASA was not subject to the FOIA, as its membership is constituted entirely of employees of school districts, which are specifically included in the definition of "public body." S.C. Code Ann. § 30-4-20(a).

deemed it "vital in a democratic society," S.C. Code Ann. § 30-4-15—that justifies the statute under *O'Brien*'s second prong.

3. The definition of "public body" is unrelated to speech, much less the suppression of speech.

The third prong of the *O'Brien* test—whether the government's interest is related to the suppression of expression—is the functional equivalent of the test for content-neutrality. *See* 1 Smolla, *supra* § 9:13 ("Prong three of *O'Brien* is, thus, nothing more nor less than an application of the general test for content-neutrality: the law must be '***justified*** without reference to the content of the regulated speech.'" (quoting *Ward*, 491 U.S. at 791)) (emphasis supplied by the *Ward* Court).

For the reasons explained above in Section II.A, the FOIA's definition of "public body" is not aimed at suppressing speech, but instead is designed to make public bodies more accountable to the citizenry. It does not address the content of speech in any manner. An organization does not become subject to the FOIA because it promotes a specific message or speaks on a certain topic. It only becomes subject to the FOIA for reasons wholly unrelated to speech: namely, whether it exercises governmental functions or is supported by public monies. S.C. Code Ann. § 30-4-20(a). Accordingly, the FOIA's definition of "public body" meets *O'Brien*'s third criteria.

4. The FOIA's definition of "public body" is drawn such that any incidental impact on speech and assembly is minimal and no greater than necessary to further the State's interest in transparency.

The final prong of the *O'Brien* test asks whether the challenged law's "incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of th[e government's] interest." 391 U.S. at 377. Importantly, this does not

require the legislature to have used the "least restrictive" means of regulating in order for a law to pass constitutional muster, the standard that the circuit court erroneously applied. *See, e.g.*, *Ward*, 491 U.S. at 800 (explaining that "so long as the means chosen are not substantially broader than necessary to achieve the government's interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative"); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 299 (1984) (applying the *O'Brien* test to uphold a restriction on camping on federal property and stating that the Court was "unmoved" by the claim that the "challenged regulation is unnecessary, and hence invalid, because there are less speech-restrictive alternatives that could have satisfied the Government interest in preserving park lands").

In this regard, the FOIA is carefully crafted to "meet[] the demand for open government while preserving workable confidentiality in governmental decisionmaking." *Burton v. York County Sheriff's Dep't*, 358 S.C. 339, 347, 594 S.E.2d 888, 892 (Ct. App. 2004). This Court has previously reviewed the definition of "public body" in great detail. In finding that the definition has clear boundaries, the Court held that it does not reach entities that are government contractors or that deal with the State at an arm's length. *See Weston*, 303 S.C. at 404, 401 S.E.2d at 165 ("[T]his decision does not mean that the FOIA would apply to business enterprises that receive payment from public bodies in return for supplying specific goods or services on an arm's-length basis.").

Additionally, the General Assembly has narrowed the FOIA's applicability by exempting numerous topics from public disclosure to ensure that matters that genuinely require confidentiality may remain such:

- It carved out ***eighteen*** specific exemptions to disclosure of documents within the FOIA itself, S.C. Code Ann. § 30-4-40(a);

- It created at least ***fourteen*** additional statutory exemptions to disclosure found elsewhere in the South Carolina Code;[8] and

- It identified ***six*** occasions during which a public body can meet in executive session, *id.* § 30-4-70(a).

The limitations that the Court has previously recognized on the definition of "public body," combined with the host of exemptions to FOIA in general, make clear that the Legislature properly cabined the law to ensure that, to the extent the FOIA could ever touch on First Amendment rights, its effect would be *de minimis* when weighed against the supreme interest in transparency in government. *O'Brien*'s fourth and final prong is therefore satisfied, and the FOIA's definition of "public body" is accordingly constitutional. The circuit court's contrary ruling should be reversed.

CONCLUSION

The circuit court's holding that the FOIA is unconstitutional as applied to SCASA is an unprecedented ruling for which there is no constitutional or statutory basis. Worse, it threatens to create an enormous loophole in the FOIA whereby government officials can establish so-called "private" organizations, fill their coffers with public resources,

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[8] Materials that may be exempt from FOIA, but that are found elsewhere in the State Code, include *inter alia*: veterans' health information, S.C. Code Ann. § 44-40-50(B); business information provided to the State Crop Pest Commission, *id.* § 46-9-30; child abuse and neglect reports, *id.* § 63-11-550; annual reports by cooperative associations to the Agriculture Commissioner, *id.* § 33-45-190; records of the South Carolina Crime Victim's Compensation Fund, *id.* § 16-3-1240; identifying information about persons who are subject to research regarding controlled substances, *id.* § 44-53-290(g); forest products production reports, *id.* § 48-30-70; patient-identifying information, *id.* § 44-1-110; records of state mental health patients, *id.* § 44-22-100; records maintained under the Infants and Toddlers with Disabilities Act; *id.* § 44-7-2590; investigative files regarding abuse or neglect of vulnerable adults, *id.* § 43-35-60; records regarding known or suspected sexually transmitted diseases, *id.* § 44-29-135; birth and death certificates, *id.* § 44-63-84; and criminal pretrial records, *id.* § 17-22-130.

and do the people's business outside of public view simply by claiming that the "private" entity's rights would be violated if its behavior was subject to scrutiny by the very taxpayers who pay to support the organization and who are impacted by its decisions. Indeed, the Court seemed to foreclose this exact scenario when it forced the University of South Carolina's "private" fundraising entity to comply with the FOIA in *Weston*.

If SCASA wishes to lawfully avoid complying with the FOIA, it can take steps to distance itself from the factors that lead to an organization being a "public body." It can reimburse the State for the insurance and retirement benefits it has already received and purchase its insurance from the private market and establish a private retirement plan for its employees. It can refund dues payments made by school districts and grant money provided by the State Department of Education. It can lobby the Legislature to take away SCASA's current statutory duties, or it can seek a judicial ruling that strikes those duties from law. And it can provide its members with privately-maintained email addresses and prohibit them from doing SCASA's work on government time using public resources.

Unless and until SCASA takes these steps, however, it is indisputably a "public body" under the FOIA, and the Court should not hesitate to require it to comply with that statute. Such a ruling would not implicate SCASA's First Amendment rights in any way. The Court should reverse the circuit court's decision that the FOIA is unconstitutional, affirm the circuit court's conclusion that SCASA is a "public body" subject to the FOIA, and enjoin SCASA from continuing its refusal to comply with the FOIA.

Respectfully submitted,

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The undersigned certify that this Final Brief complies with Rule 211(b), SCACR.

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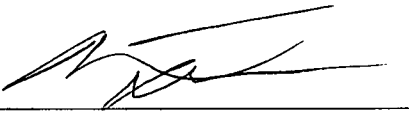
By: 

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