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 REPLY BRIEF OF APPELLANT

WOMBLE CARLYLE SANDRIDGE & RICE, LLP

Kevin A. Hall
Karl S. Bowers, Jr.
M. Todd Carroll
1727 Hampton Street
Columbia, South Carolina 29201
(803) 454-6504

Attorneys for Appellant Rocky Disabato

Columbia, South Carolina
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INTRODUCTION

Mr. Disabato filed this suit in order to enforce his "immutable right"—codified in the Freedom of Information Act—to access public records. *Seago v. Horry County*, 378 S.C. 414, 423, 663 S.E.2d 38, 42 (2008). In response, SCASA argues that it should be able to prevent Mr. Disabato from reviewing this information even though:

- By statute, SCASA has designees on statewide education boards. *See, e.g.*, S.C. Code Ann. § 59-40-70(A) (designating SCASA as a member of the Charter Schools Advisory Committee); *id.* § 59-40-230(A) (providing that SCASA is to advise on appointments to the South Carolina Public Charter School District's board of trustees);

- By statute, SCASA must be consulted by the State Department of Education with respect to various state education policies. *See, e.g.*, *id.* § 59-1-452 (authorizing SCASA to appoint members of a committee that evaluates cost-saving proposals through a program administered by the Department of Education); *id.* § 59-141-10 (directing the Department of Education to consult with SCASA regarding certain education goals);

- SCASA's overhead is largely absorbed or subsidized by the State. *See, e.g.*, *id.* § 1-11-720(A)(15) (indicating that SCASA's employees, retirees, and their dependents receive state-funded health insurance and dental insurance); *id.* § 9-1-10(14) (indicating that SCASA's employees participate in the State Retirement System);

- Part of SCASA's website is hosted on public servers. (R. p. 75, Screenshot of SCASA website hosted on Dillon County School District Two's servers); and

- SCASA's members are public employees who pay dues with public monies and conduct SCASA's business on public time using public resources, such as email addresses. (R. pp. 59–60, Compl. ¶¶ 7–9; R. pp. 71–73, SCASA's 2009–10 Executive Board.)

Despite the fact that SCASA indisputably is a "public body" subject to the FOIA, the circuit court held that the First Amendment prevents the FOIA's definition of "public body" from applying to a so-called "issue advocacy organization." (R. p. 33, Order (Aug. 10, 2011).) The dispositive errors in the circuit court's order were fully explained in Mr. Disabato's opening brief, as well as in the opening brief of the South Carolina

Attorney General and in the *amici* filing of the Student Press Law Center and the Reporters Committee for Freedom of the Press. In particular, the circuit court (1) wrongly assumed that SCASA has any First Amendment rights that are in play in this case and (2) applied the incorrect First Amendment analysis when declaring FOIA to be unconstitutional.

In opposing reversal, SCASA provides absolutely nothing to rebut those arguments or to justify the circuit court's erroneous ruling. SCASA's return brief, although stuffed with platitudes regarding the freedoms of speech and association, does not identify a single instance from anywhere in the country where a court has agreed with the circuit court's analysis or conclusion. Nor does it provide any legitimate analysis of FOIA's definition of "public body," which is the only part of the statute actually at issue in this case. At bottom, ***no court has ever held that an open government law infringes First Amendment rights***, and there is no reason for this Court to create law that turns the First Amendment on its head or to create an enormous blind spot in the State's sunshine law.

ARGUMENTS AND AUTHORITIES

SCASA's return brief tracks three major themes: (1) the FOIA implicates SCASA's First Amendment rights, (2) the FOIA is subject to strict scrutiny, and (3) the FOIA does not advance a legitimate government purpose. Each of SCASA's arguments is demonstrably wrong, as discussed below.

I. The Freedom of Information Act does not implicate any First Amendment right.

As discussed in Mr. Disabato's opening brief, the circuit court first had to find that the FOIA implicates SCASA's First Amendment rights before it could find that those rights would be infringed by a declaration that SCASA is a "public body." The circuit court identified three supposed ways this could occur—the FOIA could restrict SCASA's "right to control its message" and SCASA's ability "to not speak publicly," and FOIA litigation could impact SCASA's speech—none of which are supported by case law or anything in the appellate record. (Br. of Appellant at 9–15.)

In its return brief, SCASA parrots the circuit court's "control its message" suggestion, but it goes further and claims that the FOIA actually "compels speech," "invades freedom of thought or mind," and "chills a private organization's associational rights." (Br. of Resp't at 10–12.) SCASA's claims are empty.

A. Public bodies retain full control of their respective messages.

Mr. Disabato's opening brief fully explained that the FOIA does not cause a public body to lose control of its message by allowing a disfavored speaker equal access to the public body's resources. (Br. of Appellant at 9–11.) In short, nothing in the FOIA suggests that a public body forfeits any control of its message, as a public body remains free to speak about whatever topics it desires. The United States Supreme Court recently made this same point when upholding the Washington Public Records Act against an identical constitutional challenge as that presented here. *See Doe v. Reed*, 130 S. Ct. 2811, 2818 (2010) ("Also pertinent to our analysis is the fact that the PRA is not a prohibition on speech, but instead a ***disclosure*** requirement.") (emphasis supplied by the *Doe* Court). The Court should not credit SCASA's argument to the contrary.

B. The FOIA does not compel any speech.

SCASA's second argument—that the FOIA compels speech—is equally incorrect. The FOIA requires records of a public body to be available to the citizenry; it does not require a public body to create any particular documents, to adopt or reject any particular viewpoints, or to speak or remain silent on any particular topics. *See* S.C. Code Ann. § 30-4-30(a) ("Any person has a right to inspect or copy any public record of a public body, except as otherwise provided by Section 30-4-40, in accordance with reasonable rules concerning time and place of access.").

To support its position, SCASA notes in passing that the FOIA requires public bodies to maintain meeting minutes. (Br. of Resp't at 10.) But SCASA—as a South Carolina corporation—is already required by statute to create and maintain meeting minutes, among a host of other corporate documents. S.C. Code Ann. § 33-16-101. Accordingly, the FOIA does not compel SCASA to do anything that it is not already required to do in order to enjoy protections of the corporate form in South Carolina.[1] And certainly there is no argument that adherence to corporate formalities creates a constitutional problem. The Court should reject this point accordingly.

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[1] For this same reason, the Court should reject SCASA's conclusory argument that the FOIA is constitutionally defective because it only applies to organizations, not individuals. (Br. of Resp't at 13.) This is nonsense. Under SCASA's argument, the entire Title 33 of the South Carolina Code would violate the First Amendment because it outlines laws applicable only to organizations. Even more fundamentally problematic, though, is that SCASA's position incorrectly assumes that the FOIA touches on First Amendment rights in the first place. As explained herein and in Mr. Disabato's opening brief, the FOIA does not implicate First Amendment rights in any way, thus nullifying SCASA's argument on this point.

C. Public bodies retain full "freedom of thought" under the FOIA.

In its third point, SCASA argues that the FOIA could adversely impact SCASA's "freedom of thought" because it provides access to meetings and records to those who are so-called "opponents" of the public body. (Br. of Resp't at 11.) But SCASA never actually explains how transparency could possibly affect a public body's "freedom of thought." Regardless, courts have rejected this precise argument. *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."). The Court should be similarly dismissive of SCASA's argument.

SCASA's discussion on this issue, however, underscores the entire purpose of the FOIA: To provide the citizenry with the ability to evaluate how public resources are consumed and public decisions are reached. S.C. Code Ann. § 30-4-15. According to SCASA, such awareness of how taxpayer dollars are spent should be limited only to friends, and "opponents" should be left in the dark. This is not how the General Assembly intended for the FOIA to be applied, nor is it consistent with the Court's previous recognition of the citizenry's "immutable right" of access. The Court should reject SCASA's position for this additional reason.

D. The FOIA does not affect SCASA's associational rights.

Recited in full, SCASA's last argument that the FOIA implicates its First Amendment rights is as follows: "By mandating open meetings and records disclosure, the FOIA burdens and chills a private organization's associational rights under the First Amendment." (Br. of Resp't at 12.) Entirely absent from SCASA's argument is ***any***

explanation as to how this could possibly be true. And entirely absent from the appellate record is ***any*** evidence that application of the FOIA could possibly impact SCASA's associational rights.

These omissions are not surprising, as the FOIA does not touch on a public body's associational rights. Unlike a "compelled inclusion of a disfavored member" mandate—such as those found in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), and *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995)—the FOIA does not require a public body to accept into its membership or management anyone with whom it disagrees. Under the FOIA, public bodies are free to control with whom they associate.

For this basic reason, courts have rejected similar "associational" challenges to open government laws. As the Florida Court of Appeals explained when finding application of Florida's open records law to the NCAA to be constitutionally permissible:

> The argument that the application of the Florida public records law violates the NCAA's right to freedom of association under the First Amendment is also unavailing. We acknowledge that the NCAA is a private voluntary organization and that it enjoys the freedom of association guaranteed by the First Amendment, but the NCAA has not shown that the application of the Florida public records law impairs that right.
>
> . . . The situation presented here is a far cry from the one presented in the *Dale* case. The application of the Florida public records law could not, by any stretch of the imagination, require the NCAA to admit or reject certain institutions. Nor does it require the NCAA to reject the values it wishes to express. The law may prevent the NCAA from conducting secret proceedings against a public school in this state, but that does not impair the NCAA's freedom of expression or its freedom of association.

NCAA v. Associated Press, 18 So. 3d 1201, 1214 (Fla. Ct. App. 2009).

In sum, the circuit court erred in finding that the FOIA implicates any First Amendment rights. SCASA's opposition brief does nothing to rehabilitate this threshold, dispositive defect in the circuit court's ruling. Every point argued by SCASA is squarely rebutted the FOIA itself, applicable case law, or both. Accordingly, the Court should reverse the circuit court's ruling and declare SCASA to be a "public body" subject to the FOIA. Importantly, this conclusion holds true even if the Court determines that some level of constitutional scrutiny is appropriate here.

II. Assuming *arguendo* that the FOIA implicates any First Amendment interest, the statute passes constitutional muster.

After incorrectly assuming that its constitutional rights are at stake, SCASA makes the same analytical mistake as the circuit court and argues that the FOIA must survive strict scrutiny, rather than intermediate scrutiny. Critically, though, SCASA's argument completely avoids any analysis of the definition of "public body," which is the only part of the FOIA at issue in this case. (*See* R. p. 66, Complaint ¶ "Wherefore"(a) (seeking a declaration "that SCASA is a 'public body,' as defined by the South Carolina Freedom of Information Act").)

Instead of engaging on the narrow issue that is actually before the Court, SCASA argues that the FOIA as a whole is "content-based," and therefore subject to strict scrutiny, because it contains a list of exemptions from disclosure. (Br. of Resp't at 13–18.) The Court should not be misled. SCASA has never asserted any exemption to disclosure in this case; it has only argued that it is not subject to the FOIA because, in its view, it is not a public body. (R. p. 79, Letter from Spearman to Disabato.) Accordingly, the only potential constitutional issue here is whether the definition of "public body" passes muster. It indisputably does.

A. Because it is content neutral, any examination of the FOIA's definition of "public body" would be subject to intermediate scrutiny.

As discussed in Mr. Disabato's opening brief, the United States Supreme Court has prescribed an intermediate level of scrutiny for content-neutral laws that may have an incidental effect on speech, but that do not regulate speech "because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The FOIA's definition of "public body" falls squarely within this framework.

The statute only looks to an entity's sources of funding or performance of governmental functions to determine whether it is a public body. S.C. Code Ann. § 30-4-20(a). It is not triggered by any particular type of speech or by any particular viewpoints. In fact, an entity can become a public body even if it does not engage in any speech activities at all. The relevant constitutional test, therefore, is not strict scrutiny, but intermediate scrutiny outlined in *United States v. O'Brien*, 391 U.S. 367 (1968), for content-neutral laws. The FOIA's definition of "public body" readily satisfies this test.

B. The FOIA's definition of "public body" furthers a substantial governmental interest without unduly impacting any First Amendment rights.

When applying its incorrectly-formulated constitutional test, SCASA argues that the FOIA is not "substantially related to a legitimate government purpose" and that there are ways to more "narrowly tailor" the FOIA's disclosure provisions. (Br. of Resp't at 19–25.) This is not the applicable standard, as noted above, and SCASA's argument should be rejected for this preliminary reason. As explained in Mr. Disabato's opening brief, the FOIA's definition of "public body" easily meets all four prongs of the *O'Brien* test. (Br. of Appellant at 19–25.)

In addition to being inapplicable *ab initio*, SCASA's arguments are also defective on their face. The FOIA's purpose is stated in the law itself:

> 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 definition of "public body," in turn, is written so that the government cannot shield its activities under the banner of a "private" entity. For precisely this reason, the Court has held that the "common law distinction between 'public' and 'private' corporations" is irrelevant when applying the FOIA. *Weston v. Carolina Research & Dev. Found.*, 303 S.C. 398, 403, 401 S.E.2d 161, 164 (1991).

Contrary to SCASA's arguments, this interest in transparency is crucial in a democracy. Courts universally agree on this fundamental point. When dismissing SCASA's federal case that was designed to short-circuit this one, Judge Currie held that "the state has significant interests in interpreting and applying FOIA, including with regard to entities such as [SCASA] which have mixed private and public attributes, the latter based on receipt of public funds and the statutory assignment of duties." (R. p. 37, Order of The Honorable Cameron M. Currie (Apr. 22, 2010).) The Fourth Circuit confirmed that the FOIA embodies "important state interests" when it upheld Judge Currie's dismissal. (R. pp. 44–45, *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).) And the United States Supreme Court recently held that Washington's interest in "fostering government transparency and accountability" justified its open records law against a First Amendment-based challenge. *Doe*, 130 S. Ct. at 2819–20. SCASA's suggestion that the

FOIA, with its accompanying definition of "public body," does not promote a "legitimate government purpose" is untenable.

So too is SCASA's argument that the FOIA should have been written to provide less transparency. For one, the General Assembly is not under any obligation to identify the "least restrictive" means of achieving its transparency and accountability goals. *See, e.g.*, *Ward*, 491 U.S. at 800 (reiterating that a content-neutral law "will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative").

Likewise, SCASA has not provided the Court with any guiding principle for why the FOIA's definition of "public body" should be more narrowly drawn. SCASA complains that South Carolina's sunshine law is broader than its counterparts in Georgia, North Carolina, and at the federal level. (Br. of Resp't at 20–25.) But this is an argument for SCASA to make to the Legislature, not to the Court. For now, the General Assembly has decided that the citizenry is entitled to know how all public monies are spent and how all decisions that affect public policy are made. It is not the Court's role to rewrite the law, nor does the First Amendment compel the Court to explore possible ways to "narrow" the FOIA's reach.

To be sure, the way to avoid the disclosures that SCASA seems displeased about is to stay off the government dole and to not exercise the power of the sovereign. But SCASA does both in spades. As outlined above, SCASA's employees are part of the State Retirement System ***and*** its employees participate in the State Health Insurance Plan ***and*** its employees participate in the State Dental Insurance Plan ***and*** it makes appointments to statewide education boards ***and*** it advises the State Department of

Education on various policies ***and*** its members are all public employees ***and*** its members conduct SCASA's business on public time using public resources ***and*** SCASA's members pay their dues with public monies ***and*** part of SCASA's website is hosted on a public school district's servers. Nothing in the First Amendment requires the State to permit SCASA to enjoy all of this financial support and governmental authority without any accountability.[2] Its final argument, like the others, should be rejected.

III. The Court should declare SCASA to be a "public body."

Mr. Disabato filed this case to secure a declaration that SCASA is a "public body" subject to the FOIA. (R. p. 66, Complaint ¶ "Wherefore"(a).) At the federal level, Judge Currie observed that SCASA receives public monies and that it is assigned statutory duties. (R. p. 37, Order of The Honorable Cameron M. Currie (Apr. 22, 2010).) The circuit court below even assumed that SCASA was a public body. (R. p. 23, Order (Aug. 10, 2011).) However, SCASA argues in a footnote in its opposition brief that the "posture of this case" does not "permit" the Court to declare SCASA to be a public body. (Br. of Resp't at 14 n.4.) The Court should categorically reject this eleventh-hour attempt to further prolong this case.

The FOIA request that gave rise to this litigation was submitted in August ***2009***. (R. p. 77, Letter from Disabato to Spearman.) Nearly three years later, SCASA has never disputed any of the facts—which derive largely from the South Carolina Code of Laws—

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[2] By the same token, SCASA could relinquish all of these financial benefits and power. For instance, the General Assembly recently undertook a comprehensive review of the Charter Schools Act and revised it to eliminate the South Carolina Association of Public Charter Schools from both the statewide Charter School Advisory Committee and the South Carolina Public Charter School District's board of trustees. H. 3241, 119th General Assembly §§ 8, 13 (2011–12). To Mr. Disabato's knowledge, however, SCASA has not shown any interest in giving up its governmental authority or reimbursing the State and local school districts for its receipt of public financial support.

that cause it to be a public body. Even in its opposition brief, SCASA concedes (as it must) that its employees participate in government benefits plans. It concedes (as it must) that it receives membership payments from public coffers. It concedes (as it must) that it is assigned a series of responsibilities under the South Carolina Code. It only disagrees with the impact that these undisputed facts have on the legal analysis of whether SCASA is a "public body" under the FOIA's definition.

Based on these undisputed facts, the circuit court assumed that SCASA is a "public body" for purposes of FOIA. (R. p. 23, Order (Aug. 10, 2011).) That legal conclusion was the gateway to the remainder of the circuit court's decision. Without first arriving at this legal conclusion, the circuit court could not have reached the issue of whether the definition of "public body" has any First Amendment implications. In short, this core legal finding was an essential component of the circuit court's decision.

Accordingly, whether SCASA is a "public body" under the FOIA is a legal question that is ripe for review by this Court. *See, e.g.*, *WDW Props. v. City of Sumter*, 342 S.C. 6, 10, 535 S.E.2d 631, 632 (2000) ("When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts."); *see also S.C. Tax Comm'n v. Gaston Copper Recycling Corp.*, 316 S.C. 163, 169 n.4, 447 S.E.2d 843, 847 n.4 (1994) (noting that declaratory actions under the FOIA are actions at law, not in equity). There are no impediments to the Court declaring SCASA to be a public body that must adhere to FOIA's guidelines, and it should not hesitate to do so.

CONCLUSION

SCASA is a public body under the FOIA, and it is not a close call. Requiring SCASA to adhere to the FOIA's guidelines would not implicate, much less infringe, any First Amendment rights. The General Assembly lawfully prescribed that the citizenry is entitled to monitor how public monies are spent and how public policies are crafted. Because SCASA indisputably falls within the parameters of the FOIA's definition of "public body," the Court should reverse the circuit court's holding that the FOIA is unconstitutional, declare SCASA to be a "public body" subject to FOIA, and enjoin it from continuing to refuse compliance with the law.

Respectfully submitted,

WOMBLE CARLYLE SANDRIDGE & RICE, LLP

By: 

Kevin A. Hall
SC Bar No. 15063
Karl S. Bowers, Jr.
SC Bar No. 16141
M. Todd Carroll
SC Bar No. 74000
1727 Hampton Street
Columbia, South Carolina 29201
(803) 454-6504

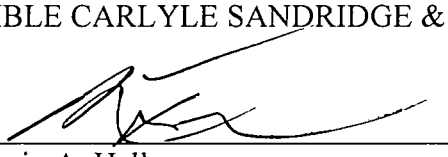
Attorneys for Appellant Rocky Disabato

Columbia, South Carolina
June 4, 2012

CERTIFICATE OF COUNSEL

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

WOMBLE CARLYLE SANDRIDGE & RICE, LLP

By: 

Kevin A. Hall
Karl S. Bowers, Jr.
M. Todd Carroll

Attorneys for Appellant Rocky Disabato

Columbia, South Carolina
June 4, 2012

PROOF OF SERVICE

I, the undersigned Attorney of the law offices of Hall & Bowers, LLC, attorneys for Appellant, do hereby certify that I have served the below parties in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same to the following address(es):

PLEADING: Final Reply Brief of Appellant

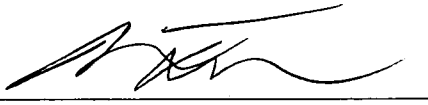
PARTIES SERVED:

Kenneth L. Childs
John M. Reagle
Keith R. Powell
The Tower at 1301 Gervais Street
Suite 900
Post Office Box 11367 (29211)
Columbia, SC 29201

The Honorable Alan Wilson
Attorney General for the State of South Carolina
Robert D. Cook
Deputy Attorney General
J. Emory Smith, Jr.
Assistant Deputy Attorney General
Post Office Box 11549
Columbia, SC 29211

Marsha Anne Ward
Sutherland Asbill & Brennan
999 Peachtree St., NE
Atlanta, GA 30309-3996

WOMBLE CARLYLE SANDRIDGE & RICE, LLP

By: 

Kevin A. Hall
Karl S. Bowers, Jr.
M. Todd Carroll

Attorneys for Appellant Rocky Disabato

Columbia, South Carolina
June 4, 2012