THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

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S.C. Supreme Court

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.

REPLY BRIEF OF APPELLANT IN RESPONSE TO AMICUS BRIEF OF THE SOUTH CAROLINA SCHOOL BOARDS ASSOCIATION AND THE AMERICAN SOCIETY OF ASSOCIATION EXECUTIVES

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INTRODUCTION

The School Boards Association's and the American Society of Association Executives' joint brief would have been more properly characterized as a motion to argue against precedent. As discussed below, virtually every point presented in that filing has been addressed by this Court in the opposite manner than that which is suggested by these *amici* parties. Nothing in that brief—or in SCASA's own return brief, for that matter—supports the truly unprecedented argument that the South Carolina Freedom of Information Act is unconstitutional.

I. The Court has rejected the notion that "private" organizations are exempt from the Freedom of Information Act.

Amici's position in this case is apparently based on the fiction that SCASA is a "private" entity and, therefore, should be permitted to reap a windfall from the public coffers and exercise governmental authority without any corresponding obligations under the Freedom of Information Act. Indeed, the entire basis of their interest in this case is a concern about an alleged "misapplication of the FOIA to private corporate entities." (Amicus Br. at 3.) This premise is squarely at odds with long-settled South Carolina jurisprudence.

Over twenty years ago, the Court categorically rejected this precise argument:

> The Foundation contends that it is a private corporation and that the FOIA does not apply to private corporations, regardless of whether they receive the support of public funds. However, the unambiguous language of the FOIA mandates that the receipt of support in whole or in part from public funds brings a corporation within the definition of a public body. The common law concept of "public" versus "private" corporations is inconsistent with the FOIA's definition of "public body" and thus cannot be superimposed on the FOIA.

Weston v. Carolina Research & Dev. Found., 303 S.C. 398, 403, 401 S.E.2d 161, 164 (1991). Even before *Weston*, the Attorney General had formally opined that a "private" entity's use of public resources would cause it to be subject to FOIA. *See, e.g.*, Op. S.C. Att'y Gen., 1989 S.C. AG LEXIS 216, at *7 (Sept. 21, 1989) (determining that a "private" committee organized to study the Charleston Harbor Estuary would be a "public body" subject to the FOIA because it used office space and support staff services from the South Carolina Sea Grants Consortium, and federal grant monies paid for the committee's administrative costs).

Nothing has changed since the Court's seminal decision in *Weston*. Just last year, in fact, the Attorney General's office again reminded that "*Weston* rejected any argument that a 'private' corporation could not constitute a 'public body' under the Freedom of Information Act." Op. S.C. Att'y Gen., 2011 S.C. AG LEXIS 122, at *6 (Aug. 8, 2011). The foundational premise of *amici*'s position, therefore, has been expressly discredited by the Court.

II. South Carolina has a substantial interest in enforcing the Freedom of Information Act.

The second overarching theme of *amici*'s brief is that the General Assembly did not really mean what it said when it declared that openness and transparency are "vital in a democratic society." S.C. Code Ann. § 30-4-15. They entitle a section of their brief "The State's Limited Informational Interest," and spend almost ten pages arguing that "South Carolina's information interest is neither substantial nor compelling." (Amicus Br. at 9–18.)

In addition to the simple fact that the General Assembly should be taken at its word when it talks about the importance of FOIA, this Court has repeatedly rejected *amici*'s argument on this point as well:

- "The General Assembly, by the clear language of the statute, believes FOIA should be broadly construed to allow the public to gain access to public records." *Evening Post Publ'g Co. v. Berkeley County Sch. Dist.*, 392 S.C. 76, 84, 708 S.E.2d 745, 749 (2011).

- "The purpose of FOIA is to protect citizens from secret government activity." *Seago v. Horry County*, 378 S.C. 414, 422, 663 S.E.2d 38, 42 (2008).

- "FOIA must be construed so as to make it possible for citizens to learn and report fully the activities of public officials." *N.Y. Times Co. v. Spartanburg County Sch. Dist. No. 7*, 374 S.C. 307, 311, 649 S.E.2d 28, 30 (2007).

- "The purpose of FOIA is to protect the public by providing a mechanism for the disclosure of information by public bodies." *Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 26, 630 S.E.2d 474, 478 (2006).

- "FOIA was enacted to prevent the government from acting in secret." *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 163, 547 S.E.2d 862, 865 (2001).

- "The FOIA creates an affirmative duty on the part of public bodies to disclose information." *Bellamy v. Brown*, 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991).

Likewise, when denying SCASA's efforts to short-circuit the Court's review of this case, both Judge Currie (R. p. 37) and the Fourth Circuit (R. pp. 47–48) recognized that South Carolina has "significant interests" in enforcing the FOIA against an entity like SCASA that has "mixed private and public attributes, the latter based on receipt of public funds and the statutory assignment of duties." The *amici*'s second major point, therefore, is just as baseless as their first.

III. The General Assembly has already provided a definition of "public body," rendering a "functional equivalent" test inapplicable.

After suggesting that the State of South Carolina has no real interest in accountability and that an organization can duck its duties under the FOIA by declaring itself to be "private," *amici* argue that the Court should rewrite the definition of a "public body" to incorporate a "functional equivalent" test that a handful of other states use. (Amicus Br. at 18–20.) For this proposition, they present a string cite of cases from six states. Critically, as the chart attached as Appendix A illustrates, those states have written a "functional equivalent" test into their respective sunshine laws, which is not part of South Carolina's definition of "public body."

The General Assembly has crafted a definition of "public body" that leaves no room for a "functional equivalent" test. The Legislature is presumed to have knowledge of the Court's *Weston* ruling from over twenty years ago, but it has not modified the law in any way to exempt so-called "private" organizations from the FOIA's scope or to incorporate a "functional equivalent" test. *See State v. 192 Coin-Operated Video Game Machs.*, 338 S.C. 176, 188, 525 S.E.2d 872, 879 (2000) ("The legislature is presumed to be aware of this Court's interpretation of its statutes.").[1] Accordingly, the Court should decline *amici*'s suggestion to rewrite the definition of "public body."[2]

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[1] To justify their position, *amici* argue that *Weston* is "basically a functional equivalency case," and that a federal court's ruling in *Woods v. Boeing Co.* is "a logically consistent application" of the "functional equivalent" test. (Amicus Br. at 20.) The Court should reject both of these mischaracterizations. The *Weston* Court never evaluated whether the Foundation was the "functional equivalent" of the University of South Carolina. Instead, the Court analyzed four separate transactions that the Foundation undertook involving public monies, and it held that "***[e]ach of the above transactions alone*** would bring the Foundation within the FOIA's definition of 'public body.'" 303 S.C. at 403, 401 S.E.2d at 164 (emphasis added). And the *Woods* court was evaluating the definition of "public body" under the Whistleblower Act, ***not*** the FOIA.

The citations provided by *amici* do, however, demonstrate the propriety of declaring SCASA to be a "public body." For instance, in *Fair Share Housing Center, Inc. v. New Jersey State League of Municipalities*, 25 A.3d 1063, 1072 (N.J. 2011)—which is cited on Page 18 of the Amicus Brief—the court held New Jersey's open records law applicable to a "private," nonprofit association that represented the state's municipalities.

Similarly, SCASA would indisputably be subject to the sunshine statutes of other states cited by *amici*. *See, e.g.*, Ga. Code Ann. § 50-18-70(b)(1) (defining "agency" to include "any association, corporation, or other similar organization that has a membership or ownership body composed primarily of counties, municipal corporations, or school districts of this state, their officers, or any combination thereof and derives more than 33 1/3 percent of its general operating budget from payments from such political subdivisions"); 1 Me. Laws § 402(2)(D) (defining "public proceedings" to include "[t]he full membership meetings of any association, the membership of which is composed exclusively of counties, municipalities, school administrative units or other political or administrative subdivisions; of boards, commissions, agencies or authorities of any such subdivisions; or of any combination of any of these entities").

No. 2:11-cv-2932-PMD, 2012 U.S. Dist. LEXIS 256, at *5 (D.S.C. Jan. 3, 2012). That statute, unlike FOIA, specifically exempts "private" organizations from its scope. *See* S.C. Code Ann. § 8-27-50 ("The provisions of this chapter do not apply to nonpublic, private corporations."). Neither of these decisions, therefore, supports *amici*'s argument that the Court should rewrite South Carolina law.

[2] Were the Court to adopt a "functional equivalent" test, SCASA would indisputably remain subject to FOIA. By law, it exercises the authority of the sovereign; its employees receive state health, dental, and retirement benefits; its membership must be comprised exclusively of public employees who pay their dues with public monies; at least part of its website is hosted on public servers; and its members use public resources to perform the organization's work. (Reply Br. of Appellant at 1.) By ***any*** standard, SCASA is a public body.

At bottom, applying FOIA to SCASA is both unavoidable under South Carolina law and consistent with sunshine laws across the country. The *amici*'s own citations confirm this basic conclusion.

IV. Privacy interests that are immune from disclosure under the FOIA are limited to "personal" matters.

Throughout the *amici*'s brief, they argue that applying FOIA to an organization that is supported by public monies and that exercises the authority of the sovereign would somehow unlawfully invade that organization's "privacy." (*See, e.g.*, Amicus Br. at 12 ("Privacy is not just a platitude.").) Just as with their other arguments, South Carolina's appellate courts have already rejected this position. *See, e.g.*, *Soc'y of Prof'l Journalists v. Sexton*, 283 S.C. 563, 566, 324 S.E.2d 313, 315 (1984) (explaining that under the FOIA, "privacy rights are considered personal rights" and that the right to privacy "does not prohibit the publication of matter which is of legitimate public or general interest" (quoting *Meetze v. Associated Press*, 230 S.C. 330, 337, 95 S.E.2d 606, 609 (1956))); *Burton v. York County Sheriff's Dep't*, 358 S.C. 339, 351–54, 594 S.E.2d 888, 895–96 (Ct. App. 2004) (rejecting arguments that the State and Federal rights to privacy overcome the interests protected by the FOIA and noting that these privacy rights are typically limited to "certain highly personal activities," such as "marital, sexual, and reproductive matters"). The Court should dismiss these arguments accordingly.

V. The First Amendment is not implicated in this case.

As discussed at length in the briefs of both Mr. Disabato and the Attorney General, any claim that the First Amendment has anything to do with this case is a red herring. There are simply no First Amendment rights at stake here. *See, e.g.*, *NCAA v. Associated Press*, 18 So. 3d 1201, 1214 (Fla. Ct. App. 2009) ("The [Florida open

government] 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.***") (emphasis added). And to the limited extent the Court decides to evaluate FOIA's definition of "public body" against First Amendment standards, the law easily passes the *O'Brien* test. (Br. of Appellant at 19–25.)

Nevertheless, *amici* devote a considerable portion of their brief to arguing that the United States Supreme Court has effectively ruled that sunshine laws infringe on associational and speech rights. (Amicus Br. at 4–9.) This is simply untrue. None of the filings by any of the parties have identified a single case, federal or state, holding that an open government law unconstitutionally impairs First Amendment rights.

Further, the cases that *amici* cite in support of their position are completely unrelated to the issue presented here. As outlined in the charts attached as Appendix B, the cases on which *amici* rely are cases where the Supreme Court examined a state law or policy that either (a) forced an entity to communicate certain messages or prohibited it from communicating certain messages, or (b) forced an entity to adopt as its own a message or member with which it disagreed.[3]

The FOIA, of course, does not fall into either of these categories. South Carolina's sunshine law does not require public bodies to speak on any particular messages or prohibit them from speaking on certain topics. Nor does it require public bodies to accept as members those with whom it would not otherwise associate. *Amici*'s

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[3] For one of the cases cited in *amici*'s brief, they rely only on a dissenting opinion of a single justice. (*See* Amicus Br. at 6, 7 (citing Justice Brennan's dissenting opinion in *Herbert v. Lando*, 441 U.S. 153 (1979), in two places).) Though they cite that case twice in their brief, they never disclosed that they were actually relying on a dissenting opinion, not any governing law.

cases, therefore, are irrelevant to this litigation, and they should be disregarded accordingly.

VI. SCASA is a "public body."

The remainder of *amici*'s brief is devoted arguing that all of SCASA's attributes that render it a "public body" are nothing more than SCASA propping up South Carolina's public employee benefits programs and providing a "public service" when it exercises South Carolina's sovereign authority. (Amicus Br. at 20–27.) These arguments are misguided.

FOIA defines a "public body," in part, as any entity that is "supported in whole or in part by public funds." S.C. Code Ann. § 30-4-20(a). The Court has previously held that to "support" means "to maintain or aid and assist in the maintenance" of an organization. *Harris v. Leslie*, 195 S.C. 526, 535, 12 S.E.2d 538, 542 (1940). Likewise, the Attorney General has reiterated that under *Weston*, "indirect support of the organization such as through the organization's use or the assistance of government resources (*e.g.* use of public employees on the governmental payroll whose primary task is their government responsibility) is sufficient to meet the 'public body' requirement of FOIA." Op. S.C. Att'y Gen., 2006 S.C. A.G. LEXIS 91, at *21 (May 19, 2006).

Against this authority, it is obvious from undisputed facts that the public treasury "assists in the maintenance" of SCASA:

- The State of South Carolina establishes, administers, maintains, subsidizes, and guarantees SCASA's health insurance program, its dental insurance program, and its retirement benefits program;
- SCASA has a continuous revenue stream from the public coffers; and
- At least part of SCASA's information technology is publicly-financed and maintained, including email accounts for its officers and part of its website.

Plus, the organization is required by law to perform several tasks within South Carolina's public education system. There is simply no way that SCASA is ***not*** a "public body."

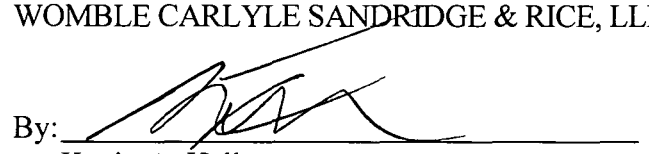
For this reason, it is no surprise that Judge Cooper dubbed SCASA a "public body" in his dismissal order. (R. p. 23.) While *amici* claim that Judge Cooper "was required to assume" that SCASA is a "public body" because of the case's procedural posture (Amicus Br. at 3 n.1), that is absolutely not true. When a trial court rules on a Rule 12(b)(6) motion, it is required to assume as true all ***facts*** alleged in a complaint. *See Clearwater Trust v. Bunting*, 367 S.C. 340, 351 n.3, 626 S.E.2d 334, 339 n.3 (2006) ("Since we are reviewing the grant of a Rule 12(b)(6) motion to dismiss, we must accept the complaint's allegations as true."). There is no similar assumption made for ***legal conclusions***—such as whether SCASA is a "public body." *Builder Mart of Am., Inc. v. First Union Corp.*, 349 S.C. 500, 512, 563 S.E.2d 352, 358 (Ct. App. 2002). Judge Cooper arrived at that legal conclusion on his own, a ruling that has not been appealed. The Court should not hesitate, then, to declare SCASA a "public body" subject to FOIA.

CONCLUSION

After the parties fully briefed this case, *amici* submitted a brief to the Court that is contrary to South Carolina law at nearly every turn. The Court should not be misled as to the actual issues before it, or as to the state of the law that governs those issues. At bottom, SCASA has been on notice since ***at least*** the Court's 1991 ruling in *Weston* that its acceptance of public support and exercise of statutory authority would subject it to responsibilities under FOIA. The Court should enforce those duties, reverse the circuit court's unprecedented ruling deeming FOIA unconstitutional, and grant judgment in Mr. Disabato's favor.

Respectfully submitted,

WOMBLE CARLYLE SANDRIDGE & RICE, LLP

By: 

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APPENDIX A: AMICI'S "FUNCTIONAL EQUIVALENT" CASES

On Pages 18 and 19 of their brief, *amici* present a string citation of cases from six states in support of their argument that the Court should attach the "functional equivalent" test onto South Carolina's definition of "public body." The relevant definitions from these states, however, incorporate a "functional equivalent" test and do not include South Carolina's "supported in whole or in part by public funds" definition.

State	Statute	Definition
Florida	Fla. Stat. Ann. § 119.011(2)	"'Agency' means any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency."
Maine	1 Me. Laws § 402(2)	Defining "public proceedings" to include "the transactions of any functions affecting any or all citizens of the State by any of the following" organizations.
New Jersey	N.J. Stat. Ann. § 10:4-8(a)	Defining "public body" in relevant part to mean "a commission, authority, board, council, committee or any other group of two or more persons organized under the laws of this State, and collectively empowered as a voting body to perform a public governmental function affecting the rights, duties, obligations, privileges, benefits, or other legal relations of any person, or collectively authorized to spend public funds including the Legislature."
Ohio	Ohio Rev. Code Ann. § 149.011(B)	"'Public office' includes any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government."
Tennessee	No statutory definition of "governmental agency"	Tennessee law does not define "governmental agency," so its courts have adopted the "functional equivalent" test to ensure that accountability exists "in a climate of increased privatization." *Memphis Publ'g Co. v. Cherokee Children & Family Servs., Inc.*, 87 S.W.3d 67, 77 (Tenn. 2002).
Washington	Wash. Rev. Code Ann. § 42.56.010(1)	"'Agency' includes all state agencies and all local agencies. 'State agency' includes every state office, department, division, bureau, board, commission, or other state agency. 'Local agency' includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency."

APPENDIX B: AMICI'S "FIRST AMENDMENT" CASES

On both Pages 6 and 8 of their brief, *amici* present a string citation of cases from the United States Supreme Court that they claim supports the idea that the FOIA violates the First Amendment. None of these cases stand for any such proposition. Instead, they address statutes that either force or prohibit a particular type of speech or that force organizations to adopt undesired speech or members. The FOIA has none of these attributes, and these cases are irrelevant to the matter before the Court accordingly.

Forced/Prohibited Speech Cases

Case	Statement of Issue
Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 243 (1974)	"The issue in this case is whether a state statute granting a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper violates the guarantees of a free press."
Herbert v. Lando, 441 U.S. 153, 155 (1979)[4]	"[W]e are urged to hold for the first time that when a member of the press is alleged to have circulated damaging falsehoods and is sued for injury to the plaintiff's reputation, the plaintiff is barred from inquiring into the editorial processes of those responsible for the publication, even though the inquiry would produce evidence material to the proof of a critical element of his cause of action."
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.
Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 532 (1980)	"The question in this case is whether the First Amendment, as incorporated by the Fourteenth Amendment, is violated by an order of the Public Service Commission of the State of New York that prohibits the inclusion in monthly electric bills of inserts discussing controversial issues of public policy."
McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 336 (1995)	"The question presented is whether an Ohio statute that prohibits the distribution of anonymous campaign literature is a 'law . . . abridging the freedom of speech' within the meaning of the First Amendment."

[4] *Amici* cite only a dissenting opinion of a single justice in their brief, though their brief does not disclose their reliance on a dissenting opinion. (*See* Amicus Br. at 6, 7 (citing *Herbert v. Lando* in two places, though in neither instance did the *amici* disclose that their argument was based on Justice Brennan's dissenting opinion, which is found on Pages 180 through 199 of the United States Reports).)

Forced Association Cases

Case	Statement of Issue
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."
Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000)	"The New Jersey Supreme Court held that New Jersey's public accommodations law requires that the Boy Scouts admit Dale [, 'an avowed homosexual and gay rights activist']. This case presents the question whether applying New Jersey's public accommodations law in this way violates the Boy Scouts' First Amendment right of expressive association."

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PROOF OF SERVICE

I, the undersigned Legal Assistant of the law offices of Womble Carlyle Sandridge & Rice, LLP, Attorneys for Rocky Disabato, 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: **REPLY BRIEF OF APPELLANT IN RESPONSE TO AMICUS BRIEF OF THE SOUTH CAROLINA SCHOOL BOARD ASSOCIATION AND THE AMERICAN SOCIETY OF ASSOCIATION EXECUTIVES**

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VIA HAND DELIVERY

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South Carolina Association of School Administrators, Respondent, State Ex Rel Alan Wilson, Attorney General, Intervenor
Appeal from Richland County Case No. 2011-CP-40-2044
Tracking No. 2011-198146

Dear Mr. Shearouse:

Enclosed please find the original and 15 copies of the Reply Brief of Appellant in Response to Amicus Brief of the South Carolina School Boards Association and the American Society of Association Executives. Please file the original and return a file stamped copy to us. Thank you.

Sincerely,

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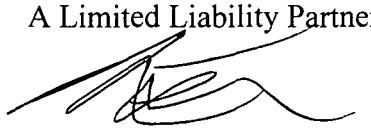

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