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.

INITIAL BRIEF OF STATE EX REL ALAN WILSON, ATTORNEY GENERAL

ALAN WILSON
Attorney General

ROBERT D. COOK
Deputy Attorney General

J. EMORY SMITH, JR.
Assistant Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3680

ATTORNEYS FOR THE
STATE EX REL WILSON

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STATEMENT OF ISSUES

1. Whether the South Carolina Association of School Administrators is a public body under South Carolina's Freedom of Information Act?
2. Whether intermediate scrutiny applies to the First Amendment claims of SCASA rather than strict scrutiny?
3. Whether application of FOIA to SCASA violates the First Amendment?

STATEMENT OF THE CASE

Plaintiff / Appellant Disabato sought declaratory judgment and injunctive relief against the South Carolina Association of School Administrators declaring it to be a "public body" under the Freedom of Information Act, S. C. Code Ann. §30-4-20(a), and requiring it to disclose requested records. Record (R.) p. * (Complaint). SCASA moved to dismiss, and the Circuit Court granted that motion from which Disabato took this appeal. *Disabato v. South Carolina Association of School Administrators*, 2011-CP-40-2044, the Honorable G.Thomas Cooper, filed August 15, 2011, p.. 1. R. p. *.

In Circuit Court, SCASA contended that "FOIA's definition of a "public body" cannot constitutionally embrace a corporation like SCASA, engaged in political speech or issue advocacy." *Id.* In particular, SCASA asserted that the definition of "public body" "unconstitutionally burdens the First Amendment rights of freedom of speech and association of issue advocacy organizations like SCASA." *Id.* For the purposes of considering the Motion to Dismiss of Appellant Disabato, the Circuit "Court assume[d] that SCASA is supported in part by public funds and that SCASA would fall within the FOIA's definition of "public body" as alleged in the Complaint. *Id.* at p. 2. That definition includes "any organization, corporation, or agency supported in whole or in part by public funds or expending public funds . . . ." §30-4-20(a). The Circuit Court declared that South Carolina's Freedom of Information Act, §30-4-10, *et seq.*, unconstitutionally burdens First Amendment Rights of Respondent, SCASA. Neither the State of South Carolina nor the Office of the

Attorney General was a party to this case in Circuit Court.

The Attorney General moved for leave to intervene in this appeal for the State to be heard on an important constitutional issue of the application of FOIA to SCASA. R. p. * (Motion to Intervene). This Court granted that Motion by Order dated October 14, 2011. The Attorney General and the State are not seeking the documents that are the subject of the FOIA request in this case, but they take the following legal position as to the statutory and constitutional issues in this case.

ARGUMENT

I

SCASA IS A PUBLIC BODY

The Circuit Court's assuming without deciding that SCASA is a public body, overlooks or minimizes the substantial reasons why that entity is a public body under FOIA. His conclusion that "SCASA does not have a duty to exercise any sovereign power of the State" is plain error. Order at p. 2; March 14, 2011 at p. 7. So is his characterization that the State has engaged in merely "pinning the label of 'public body' onto corporations like SCASA . . . ." R. p. * (Order at p. 5)

Weston v. Carolina Research & Dev. Found., 303 S.C. 398, 403, 401 S.E.2d 161, 164 (1991) stated that "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." As stated in *Weston, supra*, "when a block of public funds is diverted en masse

from a public body to a related organization, or when the related organization undertakes the management of the expenditure of public funds, the only way that the public can determine with specificity how those funds were spent is through access to the records and affairs of the organization receiving and spending the funds." *Id. Weston* found that the Carolina Research and Development Foundation affiliated with the University of South Carolina was a public body under FOIA.

SCASA squarely falls well within the definition of a public body under FOIA. As noted above, that definition includes "any organization, corporation, or agency supported in whole or in part by public funds or expending public funds . . . ." §30-4-20(a). By statute, SCASA employees participate in the State's health and dental insurance plans (S.C. Code Ann. §§1-11-720(A)(15) and the State's Retirement Systems (§9-1-10(11 and 14)). The Complaint alleges other, at least indirect public funding. More significantly, SCASA exercises the sovereign power of the State through service on a statutory State Committee and by recommending appointments and engaging in other governmental functions. *See,* §59-40-70(A)(membership of SCASA or his designee on the Charter School Advisory Committee which reviews charter school applications); §59-40-230(A)(Power to recommend appointment to Governor to South Carolina Public Charter School District Board of Trustees); §59-1-45 (State Board of Education appoints school superintendent or financial administrator to a special committee to assist State Board of Education regarding Public School Employee Cost Savings Program upon recommendation of SCASA); §59-141-10 (input required from SCASA and other organizations and associations in the Department of

Education's formulation of implementation plan to accomplish the following national education goals). This funding and the functions of SCASA bring the organization well within the definition of a public body.

II

THE CIRCUIT COURT APPLIED THE WRONG STANDARD OF REVIEW. INTERMEDIATE SCRUTINY APPLIES

The Circuit Court applied strict scrutiny to the claims in this case without analysis. R. p. * (Order, p. 4). The Court simply assumed that "exacting scrutiny" applied under *Elrod v. Burns*, 427 U.S. 347, 362 (1976). Instead, the instant case is subject to a lesser intermediate level of scrutiny because FOIA does not impose content based restrictions on speech.

Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 642-43 (1994) analyzed the differences between the levels of scrutiny, as follows, and ultimately applied intermediate scrutiny to the "must-carry" FCC regulations required cable companies to carry local full power broadcast television channels:

> Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content. *See Simon & Schuster*, 502 U.S., at 115; id., at 125-126 (KENNEDY, J., concurring in judgment); *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983). Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny. *See Riley v. National Federation for Blind of N.C., Inc.*, 487 U.S., at 798; *West Virginia Bd. of Ed. v. Barnette, supra*. In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny, *see Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984), because in most cases they pose a less

substantial risk of excising certain ideas or viewpoints from the public dialogue.

Deciding whether a particular regulation is content based or content neutral is not always a simple task. We have said that the "principal inquiry in determining content neutrality ... is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). *See R.A.V., supra*, 505 U.S., at 386 ("The government may not regulate [speech] based on hostility-or favoritism-towards the underlying message expressed"). The purpose, or justification, of a regulation will often be evident on its face. *See Frisby v. Schultz*, 487 U.S. 474, 481 (1988). But while a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary to such a showing in all cases. *Cf. Simon & Schuster, supra*, 502 U.S., at 117 (" '[I]llicit legislative intent is not the sine qua non of a violation of the First Amendment' ") (quoting *Minneapolis Star & Tribune, supra*, 460 U.S., at 592). Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content. *Arkansas Writers' Project,* 481 U.S., at 231-232; Carey v. Brown, 447 U.S. 455, 464-469 (1980).

As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based. *See, e.g., Burson v. Freeman*, 504 U.S. 191, 197 (1992) ("Whether individuals may exercise their free-speech rights near polling places depends entirely on whether their speech is related to a political campaign"); *Boos v. Barry*, 485 U.S. 312, 318-319 (1988) (plurality opinion) (whether municipal ordinance *permits* individuals to "picket in front of a foreign embassy depends entirely upon whether their picket signs are critical of the foreign government or not"). By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral. [emphasis added] *See, e.g., Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (ordinance prohibiting the posting of signs on public property "is neutral-indeed it is silent-concerning any speaker's point of view"); *Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981) (State Fair regulation requiring that sales and solicitations take place at designated locations "applies evenhandedly to all who wish to distribute and sell written materials or to solicit funds"). . . . Our cases have recognized that even a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys.

South Carolina's FOIA is not a content based restriction because it does not "distinguish favored speech from disfavored speech on the basis of the ideas or views." *Id.* It is content neutral because any benefits or burdens on speech are "without reference to the ideas or views expressed." *Id.* The Act merely requires open meetings and disclosure of documents as provided under its terms. Accordingly, the following intermediate level of scrutiny should apply under *Turner:*

> Under *O'Brien,* a content-neutral regulation will be sustained if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." Id., at 377. To satisfy this standard, a regulation need not be the least speech-restrictive means of advancing the Government's interests. "Rather, the requirement of narrow tailoring is satisfied 'so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.' " *Ward,* supra, 491 U.S., at 799 (quoting *United States v. Albertini,* 472 U.S. 675, 689(1985)). Narrow tailoring in this context requires, in other words, that the means chosen do not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward, supra,* 491 U.S., at 799.

Turner, 512 U.S. at 662; *see also Diamonds v. Greenville County,* 325 S.C. 154, 480 S.E.2d 718, 719 (1997) (applying this test).

III

APPLICATION OF FOIA TO SCASA DOES NOT VIOLATE THE FIRST AMENDMENT

A

Application of Intermediate Scrutiny

Under the above intermediate scrutiny test, FOIA does not violate the First Amendment because "it furthers an important or substantial governmental interest [in that] the governmental interest is unrelated to the [alleged] suppression of free expression. . . ." *Turner.* This public interest includes the "mandate" of FOIA "that the public be provided with information regarding the expenditure of public funds." *Weston, supra,* 401 S.E.2d at 164. The State has also given SCASA governmental authority as set forth above. Accordingly, requiring SCASA to comply with FOIA is consistent with the express statutory purpose of FOIA to ensure that "citizens shall be advised . . . . of the decisions that are reached in public activity and in the formulation of public policy." §30-4-15.

Further, any "incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Turner.* "[T]he requirement of narrow tailoring is satisfied [because the statute] promotes a substantial government interest that would be achieved less effectively absent the regulation.' " and " the means chosen do not, burden substantially more speech than is necessary to further the government's legitimate interests." *Turner.* SCASA is a beneficiary of public funds and exercises governmental power of the State. Accordingly, requiring SCASA to comply with FOIA is consistent with

the furtherance of the objectives of that statute which could not be accomplished otherwise. To exempt SCASA, would place off limits to the public matters pertaining to public funds and business. No other means exists to accomplish the purposes of FOIA as they relate to SCASA absent application of the statute to the organization. Although the Circuit Court suggested that narrow tailoring could be accomplished by simply requiring one-time reporting and disclosure of actions and records relating to the receipt and expenditure of public funds, this suggestion ignores that SCASA engages in governmental functions outlined above beyond the receipt of funding. Mere reporting regarding the receipt and expenditure of public funds would provide only limited information and would not provide information about the governmental functions exercised by SCASA.

B

Cases From Other Jurisdictions

Several cases from other jurisdictions have rejected First Amendment challenges to Open Meetings laws in those states. Although the cases did not involve an organization such as SCASA, they demonstrate that application of FOIA to SCASA does not violate the First Amendment because the organization is a public agency. The following discussion from *Cole v. State*, 673 P.2d 345, 350 (Colo. 1983) regarding application of Colorado's Open Meetings law to a legislative caucus is pertinent here:

> Appellant also asserts that the Open Meetings Law is unconstitutional because it violates his rights to freedom of speech and association as guaranteed by the Colorado and federal constitutions. We disagree.
>
> It is a well recognized constitutional principle that the government may adopt reasonable time, place, and manner regulations which do not

> discriminate among speakers and ideas in order to further an important governmental interest. *Buckley v. Valeo*, 424 U.S. 1 (1976); *Cox v. Louisiana*, 379 U.S. 536 (1965). If we assume that there is a First Amendment issue and that the Open Meetings Law impairs in a minor way appellant's right to freedom of speech, we reach a conclusion different from that asserted by appellant. Appellant and other legislators may perhaps refrain from discussing certain business matters for fear of public disclosure of sensitive matters. We are of the opinion that the restraints on appellant's freedom of speech are reasonable and justified in view of the important governmental interest furthered by the Open Meetings Laws: The public's right of access to public information. The United States Supreme Court has recognized that the First Amendment's guarantee to freedom of speech necessarily protects the right to receive ideas and information. *Virginia Pharmacy Board v. Virginia Consumer Counsel*, 425 U.S. 748 (1976); *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *see also Lamont v. Postmaster General*, 381 U.S. 301 (1965). The First Amendment plays an important role in affording the public access to discussion, debate, and the dissemination of information and ideas. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). A free self-governing people needs full information concerning the activities of its government not only to shape its views of policy and to vote intelligently in elections, but also to compel the state, the agent of the people, to act responsibly and account for its actions.
>
> We conclude that the Open Meetings Law strikes the proper balance between the public's right of access to information and a legislator's right to freedom of speech. The people have determined that they are willing to assume the detriment of a potential stifling of discussion among legislators to secure the advantages of open government. *Dorrier v. Dark*, 537 S.W.2d 888 (Tenn.1976). The Open Meetings Law does not forbid political discussion among legislators, and does not regulate the content of their discussions. The Colorado Open Meetings Law merely requires that business meetings of policy-making bodies of the General Assembly be open to the public. The Open Meetings Law, as we view it, is a reasonable legislative enactment which seeks to balance the public's right of access to public information with the right of legislators to speak candidly and to associate with whomever they choose.

Similarly, FOIA balances any speech rights of SCASA with the public's right of access to information about how its money is being spent and its governmental functions are being exercised.

Application of Minnesota's Open Meetings law to a school board and school superintendent has been upheld against a First Amendment challenge in a decision that emphasizes the importance of openness to the public and the absence of a violation of rights of speech and assembly:

> The Open Meeting Law does not violate the rights of free speech or free assembly under the First Amendment of the United States Constitution. These rights protect expression of ideas, not the right to conduct public business in closed meetings. Although there may be an effect on the free expression of ideas caused by the requirement that public meetings be open to the public, the legislature is justified in prescribing such openness in order to protect the compelling state interest of prohibiting the taking of actions at secret meetings where the public cannot be fully informed about a decision or it cannot detect improper influences. The law assures the public of its right to be informed of the reasons for decisions being made and provides the public with the opportunity to express its views. [Minnesota citations omitted]
>
> The Minnesota Open Meeting Law does not apply to chance or social gatherings. It does not prohibit meetings of affected public bodies; it merely requires that such meetings be open to the public. As the Illinois court stated in *People ex rel. Difanis v. Barr*, 83 Ill.2d 191, 46 Ill.Dec. 678, 414 N.E.2d 731 (1980):
>
> > We conclude that the General Assembly has adopted reasonable regulations with regard to public officials' rights of speech and assembly when those rights are balanced against the extremely important governmental interest of the public's right of access to public information. The Open Meetings Act does not prohibit political discussions between or among members of public bodies; thus there is no chilling effect upon political discussion.
>
> 83 Ill.2d at 209, 46 Ill.Dec. at 686, 414 N.E.2d at 739. The Minnesota Open Meeting Law is also a reasonable regulation of public officials' rights of free speech and association.

St. Cloud Newspapers, Inc. v. Dist. 742 Cmty. Sch., 332 N.W.2d 1, 7 (Minn. 1983). *See also, Hays County Water Planning P'ship v. Hays County, Texas*, 41 S.W.3d 174, 181-82 (Tex.

App. 2001(In finding that inadequate notice of a presentation at a meeting under the Texas Open Meetings Act, the Court saw "no restriction of the right of free speech by the necessity of a public official's compliance with the Open Meetings Act when the official [a county commissioner] seeks to exercise that right at a meeting of the public body [a county commission] of which he is a member.") *Sandoval v. Bd. of Regents of Univ.*, 119 Nev. 148, 156, 67 P.3d 902, 907 (2003)("We agree with the Texas Court of Appeals [in *Hays*] that requiring the [Board of Regents of University and Community College System] to comply with Nevada's Open Meeting Law does not infringe on their First Amendment rights. The regents are free to speak on any topic of their choosing, provided they place the topic on the agenda . . . . Furthermore, we do not regard this requirement as too burdensome.")

In *Dorrier v. Dark*, 537 S.W.2d 888, 892 (Tenn. 1976), the Court rejected a First Amendment challenge to the application of an open meetings law to a school board. Although the Court indicated that a stronger freedom of speech claim would be a "more substantial issue" under a state law imposing criminal penalties, the instant proceeding is civil rather than criminal. *Dorrier* stated:

> Clearly, the Open Meetings Act implements the constitutional requirement of open government. If it touches a freedom of speech issue, it is at most a subjective matter with the individual member of a covered body and is limited to a chilling effect upon free expression. The only legitimate 'chilling effect upon free expression' (appellant's phrase) that a member of a covered body could entertain is that deliberation in open meeting of a particular matter would be detrimental to the public interest. The people, speaking through the Legislature, have determined that they are willing to assume those detriments to secure the benefits of open government as prescribed in the Act. 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.

All of these decisions demonstrate that application of FOIA to SCASA does not violate the First Amendment and that the public's interest in openness is great.

The Circuit Court misapplied the First Amendment to this case by relying, instead, on case law regarding campaign finance. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 880-81, 914 (2010)[1] *see also, First Nat'l Bank v. Belotti*, 435 U.S. 765, 767785 (1978) ("criminal statute that forbids certain expenditures by banks and business corporations for the purpose of influencing the vote on referendum proposals"); *N. Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008)(Campaign finance law). These cases involve restrictions on the speech of private organizations and corporations involve in campaign related activities. They do not involve public bodies and have no bearing on FOIA which applies to public bodies and which does not restrict the speech of those bodies.

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1 This case overturned parts of the Bipartisan Campaign Reform Act of 2002 (BCRA) "which prohibits corporations and unions from using their general treasury funds to make independent expenditures for speech that is an 'electioneering communication' or for speech that expressly advocates the election or defeat of a candidate." The Court upheld provisions requiring disclosures and disclaimers for "televised electioneering communications."

CONCLUSION

This case is important because if the Circuit Court's order is followed, the public will not have access to information about how public funds are spent and government functions are exercised by SCASA and similar organizations that are public bodies under FOIA. The disclosure and openness required by FOIA does not violate the First Amendment rights of SCASA, and it furthers the public interest in its application to the organization. It should be upheld as it applies to SCASA.

For the foregoing reasons, the State ex rel Wilson, respectfully requests that this Court reverse the Circuit Court and uphold application of FOIA to SCASA.

Respectfully submitted,

ALAN WILSON
Attorney General

ROBERT D. COOK
Deputy Attorney General

J. EMORY SMITH, JR.
Assistant Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3680

By:

ATTORNEYS FOR THE
STATE EX REL WILSON

January 17, 2012