

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.

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CERTIFICATION OF COUNSEL

The below-signed certify that this record contains all matter designated by the parties and not any other material.

Respectfully submitted,

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Columbia, South Carolina
May 10, 2012

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

Rocky Disabato d/b/a "Rocky D,")

Plaintiff,)

vs.)

South Carolina Association of School
Administrators,)

Defendant.)

IN THE COURT OF COMMON PLEAS
FOR THE NINT
CASE NO.: 2009

**ORDER GRANTING
MOTION TO DISMISS
RULE 1**

1 → 2

Presiding Judge:

Hearing Date:

Court Reporter:

Plaintiff's Attorneys:

Defendant's Attorneys:

Deadra L. Jefferson

January 18, 2011

Anne Meyer

Kevin Hall, Esq.

M. Todd Carroll, Esq.

John M. Reagle, Esq.

Keith R. Powell, Esq.

ARMSTRONG
OF COURT

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ED

This matter is before the Court on Defendant South Carolina Association of School Administrators' ("SCASA") Motion to Dismiss filed February 4, 2010. Defendant moves to transfer venue from Charleston County to Richland County pursuant to Rule 12(b)(3), SCRCF. This motion was argued before the Court on January 18, 2011.¹ Representing the Plaintiff were Kevin Hall, Esq. and M. Todd Carroll, Esq., and representing the Defendant were Keith R. Powell, Esq. and John M. Reagle, Esq.

BACKGROUND

In August 2009, Plaintiff sent SCASA a written request for materials pursuant to the South Carolina Freedom of Information Act ("FOIA"). (Compl. ¶ 17 & Compl. Ex. D.) Plaintiff

¹ Also before the Court on January 18, 2011 were Plaintiff's Motion to Compel Discovery Responses filed March 17, 2010 and Defendant's Motion for a Protective Order filed March 15, 2010. The Court, at the request of counsel, ordered these motions continued until the Motion to Dismiss pursuant to Rule 12(b)(3) is disposed of.

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[Signature]

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is a resident of Charleston County, and his FOIA request was sent from within Charleston County. (Compl. ¶ 2 & Compl. Ex. D.) SCASA declined to produce the requested materials, claiming it is not a public entity subject to the FOIA, and this lawsuit resulted. (Compl. ¶¶ 18-20 & Compl. Ex. E.)

This action was initiated by the filing of a Summons and Complaint on December 7, 2009. The Complaint asserts causes of action for (1) Declaration of a FOIA Violation, and (2) Injunction from Further FOIA Violations. The Plaintiff alleges in paragraph five (5) of the Complaint that venue is proper in Charleston County pursuant to S.C. Code Ann. § 15-7-20, which provides:

Actions for the following causes must be tried in the county where the cause or some part thereof arose, subject to the like power of the court to change the place of trial:

(1) For the recovery of a penalty or forfeiture imposed by statute, except that when it is imposed for an offense committed on a lake, river or other stream of water situated in two or more counties the action may be brought in any county bordering on such lake, river or stream, and opposite to the place where the offense was committed; and

(2) Against a public officer or person specially appointed to execute his duties for an act done by him in virtue of his office or against a person who by his command or in his aid shall do anything touching the duties of such officer.

S.C. Code Ann. § 15-7-20 (1976). In response, on February 4, 2010, the Defendant filed the present Motion to Dismiss pursuant to Rule 12(b)(3), SCRCP. The Defendant contends in its Motion that the Plaintiff improperly relied on Section 15-7-20(2) when asserting venue in Charleston County. The Complaint makes no reference to a particular subsection of Section 15-7-20, but the Plaintiff contends it relied on Section 15-7-20(1). Therefore, the Court will address both contentions as argued to determine whether venue is proper in Charleston County under

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Section 15-7-20.

ANALYSIS

- I. **Venue is not proper for this cause of action under S.C. Code Ann. § 15-7-20(1) because the relief sought by the Plaintiff does not constitute a statutory penalty.**

South Carolina Code Ann. § 15-7-20(1) provides as follows:

Actions for the following causes must be tried in the county where the cause or some part thereof arose, subject to the like power of the court to change the place of trial:

- (1) For the recovery of a penalty or forfeiture imposed by statute . .

Under this statute's plain terms, venue is proper in a county when (a) the litigation involves a statutory penalty, and (b) at least part of the case arose in that county. See All v. British & Am. Mortgage Co., 104 S.C. 239, 241, 88 S.E. 529, 529 (1916) (holding that under this section [former Code 1962 § 10-302] an action to recover a penalty for receiving usurious interest on a contract for the lending of money should be instituted in the county where the loan was made and in which the land that was mortgaged to secure the loan was located).

As the Complaint maintains, "This litigation involves a violation of the South Carolina Freedom of Information Act ("FOIA") by SCASA." (Compl. ¶ 1.) A component of the FOIA is its assessment of attorney fees when a public body fails to fully and properly respond to a request for records. See S.C. Code Ann. § 30-4-100(b) ("If a person or entity seeking such relief prevails, he or it may be awarded reasonable attorney fees and other costs of litigation."). The Plaintiff specifically seeks to recover his attorneys' fees and costs associated with this litigation. (Compl. ¶ 1) ("Plaintiff brings this suit . . . to recover his attorneys' fees and costs as directed by the statute."); (Compl. "Wherefore" ¶ d) (requesting that the Court award Plaintiff his "[a]ttorneys' fees and costs as provided by South Carolina Code § 30-4-100(b)"). The Plaintiff contends the assessment of attorneys' fees constitutes a statutory penalty bringing this action

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within Section 15-7-20(1).

First, the Court finds the relief requested by the Plaintiff does not constitute a "penalty" under the FOIA. "The determination of whether statutory attorney fees should be awarded is treated as one in equity." Hardaway Concrete Co. v. Hall Contracting Corp., 374 S.C. 216, 230, 647 S.E.2d 488, 495 (Ct. App. 2007). Forfeitures or penalties are not favored in either law or equity. Cody Discount, Inc. v. Merritt, 368 S.C. 570, 575, 629 S.E.2d 697, 700 (Ct. App. 2006). The FOIA itself classifies attorney fees and costs as equitable relief rather than a penalty. See S.C. Code Ann. § 30-4-100. The Court finds Section 30-4-100 permits a discretionary award of attorney fees and costs when a person seeking equitable relief prevails. See id. Moreover, the FOIA contains a separate "Penalties" provision at Section 30-4-110 which imposes fines and imprisonment for willful violation of the FOIA. See S.C. Code Ann. § 30-4-110. Accordingly, the attorney fees and costs the Plaintiff seeks in this action do not constitute a penalty imposed by the FOIA.

Secondly, the Court finds that no part of the case arose in Charleston County. The Plaintiff contends venue is proper in Charleston County because the FOIA request on which this entire litigation is based came from Charleston County. (Compl. Ex. (stating that Rocky D's return address was in North Charleston).) Likewise, the Plaintiff contends SCASA's letter that gave rise to the alleged FOIA violation was delivered to Charleston County making it the proper county for venue. (Compl. Ex. E.) The Court finds that the alleged act which gave rise to this cause of action was SCASA's denial of Plaintiff's request for records pursuant to the FOIA. Plaintiff's request was received and denied by SCASA in Richland County. The Court finds that the most substantial part of the alleged act giving rise to the cause of action occurred in Richland County. Therefore, there is no basis for venue in Charleston County under Section 15-7-20(1).

II. Venue is not proper for this cause of action under S.C. Code Ann. § 15-7-20(2) because SCASA is not a public officer.

South Carolina Code Ann. § 15-7-20(2) provides as follows:

Actions for the following causes must be tried in the county where the cause or some part thereof arose, subject to the like power of the court to change the place of trial:

...

(2) Against a public officer or person specially appointed to execute his duties for an act done by him in virtue of his office or against a person who by his command or in his aid shall do anything touching the duties of such officer.

It is undisputed that SCASA is a South Carolina, non-profit corporation with its sole office in Richland County. Plaintiff asserts that SCASA is also a public body subject to the FOIA under Section 30-4-20(a) and Weston v. Carolina Research & Dev. Found., 303 S.C. 398, 403, 401 S.E.2d 161, 164 (1991). (Compl. ¶¶ 25-26.) SCASA denies it is a "public body," and further argues that even if it were assumed to be one for purposes of venue, venue would not be proper in this Court under Section 15-7-20(2), because "public body" as used in Section 30-4-20(a) is not equivalent to "public officer" as used in Section 15-7-20(2).

Whether SCASA is a "public body" as defined in Section 30-4-20(a) is the central issue in this case. However, this Court need not determine whether SCASA is a "public body" in order to determine proper venue.² Even if SCASA were assumed to be a public body under the FOIA, it would not follow that it is a public officer under Section 15-7-20(2). The definition of a public body is broad, and by the terms of the FOIA includes "any organization, corporation, or agency supported in whole or in part by public funds or expending public funds, including

² The parties have stipulated that the issue of whether SCASA is a public body is not before this Court, as it is premature at this time and is not required to be decided by the Court when deciding whether venue is proper under Section 15-7-20.

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committees, subcommittees, advisory committees, and the like of any such body" S.C. Code Ann. § 30-4-20(a). The definition of a public officer on the other hand is not so broad. A public officer is "one who is charged with exercising some sovereign power in the performance of his duties." State v. Thrift, 312 S.C. 282, 309, 440 S.E.2d 341, 356 (1994) (citing Sanders v. Belue, 78 S.C. 171, 58 S.E. 762 (1907)). Absent the statutory authority, the position would be one of mere employment. See State v. Bridgers, 329 S.C. 11, 14, 495 S.E.2d 196, 198 (1997) ("[T]he criteria we have considered when distinguishing between public officers and public employees include 'whether the position was created by the Legislature; whether the qualifications for appointment are established; whether the duties, tenure, salary, bond and oath are prescribed or required [and] whether the one occupying the position is a representative of the sovereign.'" (citing State v. Crenshaw, 274 S.C. 475, 478, 266 S.E.2d 61, 62 (S.C.1980)).

One who is charged by law with duties involving an exercise of some part of the sovereign power, either small or great, in the performance of which the public is concerned, and which are continuing, and not occasional or intermittent, is a public officer. In considering whether a particular position is an office in the constitutional sense, it must be demonstrated that the power of appointment comes from the state, the authority is derived from the law, and the duties are exercised for the benefit of the public. The powers conferred and the duties to be discharged with regard to a public office must be defined, directly or impliedly, by the legislature or through legislative authority. The duties must be performed independently and without control of a superior officer, other than the law, unless they are those of an inferior or subordinate officer, created or authorized by the legislature and by it placed under the general control of a superior officer or body.

Segars-Andrews v. Judicial Merit Selection Comm'n, 387 S.C. 109, 124, 691 S.E.2d 453, 461 (2010) (internal citations and quotation marks omitted).

The Plaintiff asserts SCASA is supported in whole or in part by public funds. The Court notes that it need not resolve the issue of whether SCASA is supported in whole or in part by

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public funds pursuant to the parties' stipulation in order to rule on the current Motion to Dismiss pursuant to Rule 12(b)(3), SCRCF. Nonetheless, even if SCASA were supported by public funds, it meets none of the criteria required for a "public officer." SCASA does not have a duty to exercise any sovereign power of the State. SCASA was not created by the legislature. There are no legal qualifications for membership in SCASA or for SCASA's existence, other than those generally set forth in S.C. Code Ann. §§ 33-31-101 to -1708 respecting any non-profit corporation's existence.³ SCASA has no duties it must fulfill by legislative act, it has no tenure, it receives no salary, it posts no bond, it takes no oath of office, and it is not a representative of the sovereign or State. Consequently, even if SCASA is found to be supported by public funds and subject to the FOIA as a public body, SCASA would not thereby be transformed into a public office or officer clothed with both the rights and powers of the sovereign. Ultimately, SCASA does not qualify as a "public officer" under Section 15-7-20(2). Therefore, venue is not proper under Section 15-7-20(2).

Alternatively, even assuming that SCASA is a public body and that a public body is equivalent to a public official under § 15-7-20, Charleston County would not be the proper venue for this civil action. In Stalheim v. Doskocil, 275 S.C. 252, 269 S.E.2d 346 (1980), the Supreme Court established the rule under Section 15-7-20: "Accordingly, we hold that where the Plaintiff has not demonstrated any infirmity which would make prosecution of his action in the county where the public official presides unduly difficult or burdensome . . . that county is the proper venue under [S.C.] Code § 15-7-20(2)" Stalheim, 275 S.C. at 255, 269 S.E.2d at 347.

Plaintiff has neither alleged nor offered evidence that prosecution of his declaratory

³ Active SCASA membership is open to all persons who serve as a school system leader or who are in an administrative position in a public or private school system, education agency/association, college or university. South Carolina Ass'n of Sch. Adm'rs, *SCASA Membership*, <http://www.scasa.org/displaycommon.cfm?an=1&subarticlenbr=241> (last visited February 9, 2011).

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judgment action in Richland County would be unduly difficult or burdensome. Consequently, even assuming that SCASA is a public body and that a public body is equivalent to a public officer under Section 15-7-20(2), Richland County would be the proper venue for this civil action under the holding in Stalheim.

III. Venue should be evaluated pursuant to S.C. Code Ann. § 15-7-30.

Section 15-7-30(B) provides, "In cases not provided for in Sections 15-7-10, 15-7-20, or 15-78-100, the action must be tried in the county where it properly may be brought and tried against the defendant according to the provisions of this section." S.C. Code Ann. 15-7-30(B) (2005). Actions against a domestic corporation are controlled by Section 15-7-30(E) which provides,

A civil action tried pursuant to this section against a domestic corporation, domestic limited partnership, domestic limited liability company, or domestic limited liability partnership, must be brought and tried in the county in which the:

(1) corporation, limited partnership, limited liability company, or limited liability partnership has its principal place of business at the time the cause of action arose; or

(2) most substantial part of the alleged act or omission giving rise to the cause of action occurred.

S.C. Code Ann. 15-7-30(E) (2005).

SCASA is a non-profit domestic corporation which was filed with the South Carolina Secretary of State on January 7, 1975. Its principal place of business is in Columbia, South Carolina which is located in Richland County. SCASA's only office is in Richland County, its records are maintained in Richland County, and its meetings are held in Richland County. The alleged act which gave rise to this cause of action was SCASA's denial of Plaintiff's request for records pursuant to the FOIA. Plaintiff's request was received and denied by SCASA in Richland County. The Court finds the corporation's principal place of business, as well as the

most substantial part of the alleged act giving rise to the cause of action occurred in Richland County. Accordingly, venue is proper in Richland County pursuant to Section 15-7-30(E).

Moreover, "[t]he right of a defendant to have a case tried against him in the county in which he resides is a substantial right." Chestnut v. Reid, 299 S.C. 305, 306, 384 S.E.2d 713, 714 (1989). The South Carolina Supreme Court has held that "when a motion to change venue is brought pursuant to [Section] 15-7-30 and the facts concerning the defendant's residence are uncontradicted, the trial court must change the venue to the county where the defendant resides." Id. at 307, 384 S.E.2d at 714.⁴ However,

where an action is properly instituted in a county other than that of the defendant's residence, a defendant has no right to request a change of venue to the county of his or her residence on the ground that the action was not brought in a proper county, even if the action could also have been commenced in the county where the defendant resides.

Jeter v. South Carolina Dep't of Transp., 369 S.C. 433, 442, 633 S.E.2d 143, 148 (2006). As established, *supra*, this action was not properly instituted in Charleston County pursuant to Section 15-7-20. Therefore, the Defendant had the right to request a change of venue to the county of its residence pursuant to Section 15-7-30, which it did in its Motion to Dismiss pursuant to Rule 12(b)(3), SCRCp. ("Venue is therefore only proper in the Fifth Judicial Circuit, Court of Common Pleas for Richland County, pursuant to S.C. Code § 15-7-30(E).") The Court finds the residence of SCASA to be uncontradicted. Therefore, the Court must transfer the venue to Richland County where SCASA resides.

⁴ "If the plaintiff then wishes to change venue based on the convenience of witnesses and the promotion of justice, he may make such motion to the trial judge in the county of the defendant's residence." Chestnut, 299 S.C. at 307, 384 S.E.2d at 714.

Conclusion

Wherefore, the Court finds the proper venue for this civil action is Richland County pursuant to Section 15-7-30(E). The Complaint is accordingly transferred to the Court of Common Pleas for Richland County, Fifth Judicial Court.

AND IT IS SO ORDERED.

D. L. Jefferson

The Honorable Deadra L. Jefferson
Presiding Judge, Ninth Judicial Circuit

March 14, 2011
Charleston, South Carolina

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C.P., C.D. & P.C.
Samuel E. Ewing
DEPUTY CLERK

100 of 10
10 *[Signature]*

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2011CP4002044

Rocky Disabato

vs.

South Carolina Assn of School Administrators

Plaintiff

Defendant

2011 MAY -3 PM 12:24
 JEANETTE W. MCBRIDE
 C.C.P. & G.S.
 RICHLAND COUNTY

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other:
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy:
- ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
- ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
- NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

☒ See attached order;☐ Statement of Judgment by the Court:

Dated at Columbia, South Carolina, this _____ day of _____, 2011.

PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 2011, and a copy mailed first class this 3 May 2011, to attorneys of record or to parties (when appearing pro se) as follows:

Kevin A Hall
M Todd CarrollJohn Marshall Reagle
Keith Robert Powell

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

SCRPC APP-24/FORM 4

Jeanette W. McBride
 Clerk of Court

SCANNED

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND) IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Rocky Disabato, d/b/a "Rocky D,") Civil Action No. 2011-CP-40-2044
Plaintiff,)
vs.)
South Carolina Association of School)
Administrators,)
Defendant.)

ORDER GRANTING PLAINTIFF'S
MOTION TO COMPEL IN PART
AND GRANTING DEFENDANT'S
MOTION FOR A PROTECTIVE
ORDER IN PART

RICHLAND COUNTY
FILED
2011 MAY - 2
C.C. BEANETT
CLERK
APR 20
PRIDE

Before the Court are two motions: (1) Plaintiff Rocky Disabato's Motion to Compel Discovery Responses and (2) Defendant South Carolina Association of School Administrator's ("SCASA") Motion for a Protective Order. For the reasons stated below, the Court grants Plaintiff's motion in part and grants Defendant's motion in part.

BACKGROUND

This case involves a dispute about whether SCASA is a "public body" subject to the South Carolina Freedom of Information Act ("FOIA"). According to the Complaint, Mr. Disabato sent SCASA a request for documents and telephone records pursuant to the State FOIA. In response, SCASA declined to produce the requested materials and claimed that it is not a "public body" subject to the FOIA.

Mr. Disabato filed suit thereafter, seeking a declaration that SCASA is a "public body," as defined by South Carolina Code § 30-4-20(a), and an injunction to prohibit SCASA from continuing its alleged violation of the FOIA. Mr. Disabato, a radio broadcaster and host of a talk show on 1250 AM WTMA in Charleston, filed this suit in

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Charleston County in December 2009. In March 2011, Judge Deadra L. Jefferson issued an order transferring this case from Charleston County to Richland County.

Shortly after filing suit, Plaintiff served SCASA with a set of 18 interrogatories and 27 requests to produce documents. SCASA responded to these discovery requests by serving Plaintiff with a two-page response that stated five "general objections." Counsel for Plaintiff then wrote a letter to counsel for SCASA contending that SCASA's response was insufficient under the South Carolina Rules of Civil Procedure. The discovery-based motions that are now before the Court were filed in March 2010 following that correspondence.

In February 2011, SCASA served Plaintiff with its "First Supplemental Answers" to the interrogatories and its "First Supplemental Responses" to the requests for production. These supplements provided several responses to Plaintiff's discovery requests, but, as a general matter, objected to the majority of the interrogatories and requests for documents on the same grounds that were stated in SCASA's initial response.

The Court held a hearing on these two motions on Monday, April 18th, in Richland County. Counsel for both parties appeared and presented arguments. SCASA also presented a Memorandum of Law regarding these motions. The Court has reviewed and considered all filings and materials submitted by the parties, all arguments presented by counsel, and all relevant procedural rules and governing authorities.

STANDARD OF REVIEW

The South Carolina Rules of Civil Procedure are designed broadly to allow discovery of "any matter, not privileged, which is relevant to the subject matter involved



in the pending action.” Rule 26(b), SCRCPP. In this regard, the Rules afford circuit court judges “broad latitude” when addressing discovery disputes. *Hamm v. S.C. PSC*, 312 S.C. 238, 241, 439 S.E.2d 852, 854 (1994). However, the Court is keenly aware of the Supreme Court’s recent instructions in *Oncology & Hematology Associates of S.C., LLC v. S.C. DHEC*, 387 S.C. 380, 692 S.E.2d 920 (2010), to limit discovery only to issues that are relevant to the dispute. The Court issues this Order consistent with that directive.

DISCUSSION

Based on the Court’s review of the Complaint, the fundamental question at stake in this case appears to be whether SCASA is a “public body” subject to the South Carolina FOIA. The statute broadly defines that term in pertinent part as follows:

“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. . . .

S.C. Code Ann. § 30-4-20(a).

In interpreting this provision, the Supreme Court has explained that this definition can reach “‘private’ corporations,” *Weston v. Carolina Research & Dev. Found.*, 303 S.C. 398, 403, 401 S.E.2d 161, 164 (1991), and organizations that perform a “governmental function,” *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 163, 547 S.E.2d 862, 865 (2001). On the other hand, it does not “apply to business



enterprises that receive payment from public bodies in return for supplying specific goods or services on an arms-length basis.” *Weston*, 303 S.C. at 404, 401 S.E.2d at 165. Because this is a question of fact, a determination as to whether an organization is a “public body” cannot be made without an “analysis of [its] specific activities.” *Id.* at 401, 401 S.E.2d at 163.¹

In light of the pleadings, the statutory provision quoted above, and the case law interpreting the statute, the Court examines below the discovery requests that are in dispute.

I. Plaintiff's Interrogatories

A. Interrogatories 1 through 7

SCASA has answered Interrogatories 1, 2, 3, 4, 5, 6, and 7 without interposing any objections, and Plaintiff has not provided the Court with anything that would demonstrate that these answers are deficient. Therefore, at this time, the Court takes no action on either party's motion with respect to these Interrogatories, though the Court may reconsider this ruling if additional information demonstrates that these responses are deficient or incomplete.

B. Interrogatories 8 through 13

Interrogatories 8, 9, 10, 11, 12, and 13 each ask SCASA to provide Plaintiff with information regarding SCASA's finances. Interrogatory 8 seeks SCASA's “gross

¹ At the hearing on these motions, SCASA suggested that the Court should hold consideration of this discovery dispute in abeyance until SCASA's now-pending motion to dismiss is resolved. That motion, which was filed over a year after these discovery motions, is based on SCASA's contention that the FOIA cannot constitutionally apply to “private, non-profit entities.” However, the basis of that motion presumes as a factual matter that SCASA is a “private” entity, which is the very issue in dispute in this case and at which Plaintiff's discovery requests are aimed, as discussed herein. Therefore, the Court finds that it is appropriate to resolve these discovery motions at this time.

revenue for each fiscal year since January 1, 2005." Interrogatories 9, 10, 11, 12, and 13 then ask for information regarding the individual components of that gross revenue for the same time period:

- Interrogatory 9: Funds SCASA has received from the South Carolina Department of Education
- Interrogatory 10: Funds received from any other statewide agency
- Interrogatory 11: Funds received from any public school district
- Interrogatory 12: Funds received from any individual public school
- Interrogatory 13: Funds received from private sources

These interrogatories ask SCASA to identify the date on which it received said funds from each of these sources, as well as the amount received.

SCASA has not provided any responsive information to these interrogatories. Instead, it has objected to each of these interrogatories on grounds of relevance, overbreadth, and a claim that disclosure of the requested information will result in a violation of the First Amendment to the United States Constitution.

The relevance of these interrogatories is plainly evident, as the FOIA's definition of "public body" is in part based on whether the organization in question is "supported in whole or in part by public funds." S.C. Code Ann. § 30-4-20(a). In order to prove his case, Plaintiff must be able to show whether SCASA meets this statutory criterion, and these interrogatories attempt to identify the percentage of SCASA's support that is derived from public sources as compared to private sources.

Second, these interrogatories are limited in scope. Plaintiff has restricted his interrogatories to the period of January 1, 2005 to present.



Finally, the Court disagrees that being subject to discovery here will disrupt SCASA's First Amendment rights. In the context of disclosing contributors' names or membership lists, the United States Supreme Court has been clear that any attempt to withhold such information from disclosure pursuant to a First Amendment claim must be accompanied by actual evidence that disclosure "will subject [the members] to threats, harassment, or reprisals from either Government officials or private parties." *Citizens United v. FEC*, 130 S. Ct. 876, 914 (2010) (quoting *McConnell v. FEC*, 540 U.S. 93, 198 (2003)). Evidence required to support such an argument would include specific threats of severe physical or economic harm that would befall someone whose advocacy efforts required anonymity. See, e.g., *Ctr. for Individual Freedom, Inc. v. Ireland*, 613 F. Supp. 2d 777, 804 (S.D. W. Va. 2009) ("The party seeking an exemption from campaign disclosure requirements bears the burden of establishing that disclosure will impose a 'substantial burden' on its First Amendment rights. A substantial burden can be demonstrated by evidence of threats, harassment, or reprisals roughly on par with *NAACP v. Alabama*, 357 U.S. 449 (1958), and *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982).")

No such evidence has been presented here. Though SCASA has made generalized arguments about a potential "chill" to its associational rights, it has not provided the Court with specific evidence that anything adverse will happen to SCASA or its members if the requested information is produced. In fact, SCASA has not presented the Court with any evidence suggesting that it cannot conduct its business if this information is produced. To the contrary, in its responses to Plaintiff's discovery requests, SCASA frequently states that the information sought is already publicly

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available. (E.g., SCASA's responses to Interrogatories 9, 10, 11, and 12.) In light of these considerations, the Court finds that SCASA will not be harmed by responding to these requests. See *Burton v. York County Sheriff's Dep't*, 358 S.C. 339, 353–54, 594 S.E.2d 888, 895–96 (Ct. App. 2004) (rejecting arguments that production of materials in response to a FOIA request would result in a violation of the constitutional right to privacy).

SCASA is therefore ordered to serve Plaintiff with full and complete responses to each of these interrogatories within 30 days of entry of this Order.

II. Plaintiff's Requests to Produce Documents

When it initially responded to Plaintiff's requests to produce documents, SCASA refused to provide any responsive information or documents. In supplementing those initial responses, SCASA affirmatively stated that there are no documents that are responsive to Requests 6, 7, and 27. Plaintiff has not provided the Court with anything that would demonstrate that these responses are deficient. Therefore, at this time, the Court takes no action on either party's motion with respect to these Requests, though the Court may reconsider this ruling if additional information demonstrates that these responses are deficient or incomplete.

SCASA has not produced a single document in response to Plaintiff's requests other than a handful of pleadings from other cases. The Rules of Civil Procedure require much more.

Plaintiff's requests seek documents that are associated with the same categories of information sought in his interrogatories:

- documents related to SCASA's finances and receipt of public monies (e.g., Requests 8, 9, 10, and 11);



Additionally, the requests also include generalized "catch all" requests that, on their face, are limited only to information that is relevant to the facts underlying this case or to trial preparations (e.g., Requests 1, 2, 3, 4, 5, and 26).

With respect to relevancy, the Court has explained above in Section I why the information sought in Plaintiff's discovery requests is relevant to this case. Simply put, the FOIA's definition of "public body" requires a careful examination of an organization's finances and composition in order to determine whether, and to what extent, it is supported by public monies or exercises governmental authority. The Court finds that Plaintiff's requests for production seek information that is relevant to this action.

CONCLUSION

For the reasons stated above, and to provide the Court with sufficient information upon which to determine whether SCASA meets the statutory definition of a "public body," the Court **GRANTS** Plaintiff's Motion to Compel Discovery Responses In Part and **GRANTS** SCASA's Motion for a Protective Order In Part. With the limitations noted herein, SCASA is hereby **ORDERED** as follows:

- 1) to provide full and complete answers to Plaintiff's interrogatories 8, 9, 10, 11, 12, and 13,
- 2) to provide full and complete responses to Plaintiff's requests to produce documents 8, 9, 10, and 11, and
- 3) to fully and completely produce all materials that are responsive to Plaintiff's requests to produce documents 8, 9, 10, and 11.

SCASA is **ORDERED** to fulfill each of these tasks within 30 days of entry of this Order.

SCASA is **NOT** Required to respond to the following:



- 1) Interrogatories 14, 15, 16, 17, and 18, and
- 2) Production of Documents requested in 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 25.

AND IT IS SO ORDERED.



The Honorable G. Thomas Cooper, Jr.
Judge of the Fifth Judicial Circuit

Columbia, South Carolina

May 3, 2011

Form 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2011CP4002044

Rocky Disabato

vs.

South Carolina Assn of School Administrators

Plaintiff

Defendant

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 43(k), SCRPC (Settled); ☐ Other: ☐ Rule 40(j) SCRPC; ☐ Bankruptcy: ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy: ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

☒ See attached order;

☐ Statement of Judgment by the Court:

Dated at Columbia, South Carolina, this _____ day of _____, 2011.

PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 2011, and a copy mailed first class this 15 August 2011, to attorneys of record or to parties (when appearing pro se) as follows:

Kevin A Hall
M Todd Carroll

ATTORNEY(S) FOR THE PLAINTIFF(S)

John Marshall Reagle
Keith Robert Powell

ATTORNEY(S) FOR THE DEFENDANT(S)

Clerk of Court

SCRPC APP-24/FORM 4

REC 000021

SCANNED

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
Rocky Disabato d/b/a "Rocky D",)
)
Plaintiff,)
)
v.)
)
South Carolina Association of School)
Administrators,)
)
Defendant.)
)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
C/A No. 2011-CP-40-02044

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS**

RICHLAND COUNTY
FILED
2011 AUG 15 AM 9:55
JEANETTE W. HENRIOT
CLERK, S.C.

This matter is before the Court on Defendant South Carolina Association of School Administrators' ("SCASA") Motion to Dismiss pursuant to Rule 12(b)(6), SCRPC. Plaintiff, Rocky Disabato ("Rocky D"), seeks a declaratory judgment and injunctive relief against SCASA both declaring SCASA to be a "public body" under the South Carolina Freedom of Information Act ("FOIA"), S.C. Code Ann. § 30-4-10, et seq., and requiring SCASA to disclose requested records. In its Motion to Dismiss, SCASA contends that Rocky D's claim must fail as a matter of law because the FOIA's definition of a "public body" cannot constitutionally embrace a corporation, like SCASA, engaged in political speech or issue advocacy. In other words, SCASA asserts that the FOIA's definition of "public body"—to which the FOIA's broad open meeting and records disclosure requirements apply—unconstitutionally burdens the First Amendment rights of freedom of speech and association of issue advocacy organizations like SCASA.

For the reasons stated herein, SCASA cannot constitutionally be subject to the requirements of a "public body" under the FOIA.

I. INTRODUCTION

Because SCASA has moved to dismiss Rocky D's FOIA claim, this Court must accept the well-pleaded allegations of the Complaint as true. *Gressette v. S.C. Elec. & Gas Co.*, 370



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S.C. 377, 378-79, 635 S.E.2d 538, 538 (2006). Consequently, for purposes of this motion, this Court assumes 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. This Court further assumes, from the following allegations set forth in the Complaint, that SCASA is a corporation engaging in political speech and issue advocacy:

- "Plaintiff requested . . . records of SCASA that relate to its collusive efforts with the State Department of Education and others regarding the debate about the federal stimulus funds in the American Recovery and Reinvestment Act of 2009." (Compl. ¶ 1)
- "SCASA is a corporate entity organized under the laws of the state of South Carolina..." (Compl. ¶ 3)
- "SCASA describes itself as 'the leading force for public education' in South Carolina." (Compl. ¶ 6)
- "The mission of SCASA, a united alliance of diverse school leaders and the leading force for public education in our state, is to advocate for a superior education for citizens of South Carolina by influencing education legislation and policy..." (Compl. ¶ 6, Exhibit A)

These assumptions are consistent with the Court's order of March 14, 2011, in which the Court determined as a matter of law that:

SCASA does not have a duty to exercise any sovereign power of the State. SCASA was not created by the legislature. There are no legal qualifications for membership in SCASA or for SCASA's existence, other than those generally set forth in S.C. Code Ann. §§ 33-31-101 to -1708 respecting any non-profit corporation's existence. [footnote omitted] SCASA has no duties it must fulfill by legislative act, it has no tenure, it receives no salary, it posts no bond, it takes no oath of office, and it is not a representative of the sovereign or State.

(Order, p. 7.)



II. ANALYSIS

A. The FOIA.

The purpose of the FOIA is set forth in the statute:

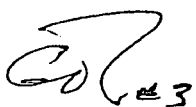
[I]t is vital in a democratic society that *public* business be performed in an open and public manner so that citizens shall be advised of the *performance of public officials* and of the decisions that are reached *in public activity* and in the formulation of public policy.

S.C. Code Ann. § 30-4-15 (emphases added).

In an effort to fulfill its purpose, the FOIA states numerous requirements for public bodies. For example, the FOIA mandates that "[a]ny person has a right to inspect or copy any public record of a public body, except as otherwise provided by § 30-4-40, in accordance with reasonable rules concerning time and place of access." S.C. Code Ann. § 30-4-30(a). The FOIA also requires that "[e]very meeting of all public bodies shall be open to the public unless closed pursuant to § 30-4-70 of this chapter." S.C. Code Ann. § 30-4-60. The term "meeting" is broadly defined as "the convening of a quorum of the constituent membership of a public body, whether corporal or by means of electronic equipment, to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power." S.C. Code Ann. § 30-4-20(d). Further, any person in attendance at a meeting of a public body may tape record or video record the meeting. S.C. Code Ann. § 30-4-90(c).

Moreover, ancillary to its open meeting requirements, the FOIA mandates that a public body give written public notice of its meetings. S.C. Code Ann § 30-4-80. The method, timing, and content of the written notice are dictated in detail by the FOIA. S.C. Code Ann. § 30-4-80. Additionally, the FOIA requires a public body to create and maintain written minutes of its meetings. S.C. Code Ann. § 30-4-90. The content of the written minutes is also dictated by statute. S.C. Code Ann. § 30-4-90(a).

Under the FOIA, these extensive record disclosure and open meeting requirements apply



to any "public body." The FOIA defines a "public body" as "any organization, corporation, or agency supported in whole or in part by public funds or expending public funds. . . ." S.C. Code Ann. § 30-4-20(a). The South Carolina Supreme Court has further explained this definition of "public body":

[T]he 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 SE.2d 161, 164 (1991). Relying on *Weston*, the South Carolina Attorney General formally opined that there is no "de minimus" public funds exception to the FOIA's definition of "public body." Op. S.C. Att'y Gen., 2006 WL 1574910 (May 19, 2006).

To enforce its requirements, the FOIA authorizes any citizen of the state to bring an action for a declaratory judgment and injunctive relief against a public body. S.C. Code Ann. § 30-4-100; *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 327-28, 701 S.E.2d 39, 47-48 (Ct. App. 2010). Further, the FOIA authorizes a court to award reasonable attorneys' fees and other costs of litigation to a prevailing plaintiff. S.C. Code Ann. § 30-4-100. The FOIA also provides that any person or group of persons who willfully violate the FOIA's provisions shall be deemed guilty of a misdemeanor and, upon conviction, shall be fined or imprisoned. S.C. Code Ann. § 30-4-110.

B. Standard Of Review.

In ruling on a First Amendment challenge to a statute, it is the Court's "unflagging obligation to apply constitutional standards to State legislative enactments." *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 277 (4th Cir. 2008). "[A] significant impairment of First Amendment rights must survive exacting scrutiny." *Elrod v. Burns*, 427 U.S. 347, 362 (1976). Exacting scrutiny "is necessary even if any deterrent effect on the exercise of First Amendment

rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct" *Buckley v. Valeo*, 424 U.S. 1, 65 (1976). The government interest advanced for impairing First Amendment rights must be one of vital importance, and the State must choose the least restrictive means to achieve its vital interest. *Elrod*, 427 U.S. 362-63.

C. Applying the FOIA

1. The FOIA burdens SCASA's issue advocacy and political speech.

SCASA engages in core political speech and issue advocacy. For example, SCASA was directly involved in the debate about Federal Stimulus Funds in the American Recovery and Reimbursement Act of 2009. *See Edwards v. State of S.C.*, 383 S.C. 82, 678 S.E. 2d 412 (2009). Further, SCASA represents itself as the leading force for public education, and the mission of SCASA includes advocacy for a superior education for citizens of South Carolina by influencing legislation and policy. SCASA's political speech and issue advocacy in support of public education are undoubtedly protected by the First Amendment. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995) (recognizing that speech and advocacy of politically controversial viewpoints relating to school funding is "the essence of First Amendment expression").

A State "cannot foreclose the exercise of constitutional rights by mere labels." *NAACP v. Button*, 371 U.S. 415, 429 (1963). However, by pinning the label of "public body" onto corporations like SCASA engaging in issue advocacy and political speech this is precisely the effect of the FOIA.

Initially, the FOIA's records disclosure and open meeting requirements foreclose a corporation's First Amendment right to control its message and not to speak publicly.¹ The

¹ With respect to corporations, the FOIA's open meeting requirements regulating meetings and discussions of a corporation's board of directors or members to determine corporate affairs are particularly significant. A corporation, unlike a natural person, can only govern itself through action of its board or members. The open

First Amendment encompasses the right not to speak publically:

There is necessarily a ... freedom not to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.

Pac. Gas & Elec. v. Pub. Util. Comm'n, 475 U.S. 1, 11 (1986). See also *McIntyre*, 514 U.S. at 342 ("decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment"); *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 791 (1988) ("[T]he government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government."); *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573-74 (1995) (discussing the "general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid").

Open meeting requirements obviously restrict a corporation's right to control its message and to not speak publicly. However, disclosure requirements also restrict the right not to speak publicly. In *Citizens United*, the Supreme Court noted that "disclosure requirements may burden the ability to speak." *Citizens United*, 130 S.Ct. at 914. See also *McIntyre*, 514 U.S. at 355 (noting that "mandatory reporting undeniably impedes protected First Amendment activity . . ."). Consequently, the Court "has subjected these [disclosure] requirements to 'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United*, 130 S.Ct. at 914. Similarly, the Fourth Circuit Court of Appeals recognized that reporting requirements burden the speech of groups engaging in issue advocacy:

The statute subjects groups engaged in only issue advocacy to an

meeting requirements, therefore, effectively compel a corporation to "think out loud," laying bare its inner thoughts and mandating that they be written down and made public, even if ultimately not adopted by the corporation.

intrusive set of reporting requirements. In so doing, it 'blankets with uncertainty' the entire field of campaign politics 'compelling the speaker to hedge and trim.' *Thomas v. Collins*, 323 U.S. 516, 535, 65 S.Ct. 315, 89 L.Ed. 430 (1945). Burdening speech of this sort is unacceptable in an area of such crucial import to our representative democracy. The district court was correct in finding section 163-278.6(14) facially unconstitutional, and we affirm its judgment.

N.C. Right to Life, Inc. v. Bartlett, 168 F.3d 705, 713 (4th Cir. 1999). By requiring a corporation to hold its meetings open to the public and disclose its records, the FOIA restricts a corporation's ability and right to control its speech and not to speak publicly.

Moreover, the FOIA's record disclosure and open meetings requirements also restrict a corporation's freedom of association. It has long been recognized that freedom of association is fully protected under the First Amendment:

Like freedom of speech and a free press, the right of peaceable assembly was considered by the Framers of our Constitution to lie at the foundation of a government based upon the consent of an informed citizenry—a government dedicated to the establishment of justice and the preservation of liberty. U.S. Const., Amend. I. And it is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected by the Due Process Clause of the Fourteenth Amendment from invasion by the States.

Bates v. City of Little Rock, 361 U.S. 516, 522-23 (1960). The Court further made clear in *Bates* that these First Amendment freedoms "are protected not only against the heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates*, 361 U.S. at 523. By requiring corporations to open their meetings and disclose their records to others, the FOIA restricts those corporations' freedom of association. *See Id.* ("This Court has recognized the vital relationship between freedom to associate and privacy in one's associations.").

Additionally, the FOIA's broad definition of "public body" imposes a chilling effect on the exercise of free speech by corporations engaged in political speech because of the threat of FOIA litigation against those corporations. The citizen lawsuit, the FOIA's primary enforcement

procedure, exacerbates the burden the FOIA imposes on First Amendment rights. FOIA litigation involving corporations requires a detailed analysis of the economic relationship between the corporation and the State and a determination of whether payments from the State were in exchange for goods or services. *Weston*, 303 S.C. at 403-04, 401 S.E.2d at 164; *Sutler v. Palmetto Elec. Coop., Inc.*, 325 S.C. 465, 468, 481 S.E.2d 179, 180 (Ct. App. 1997). The United States Supreme Court has explained that:

the burden and expense of litigating the issue—especially when what must be established is a complex and amorphous economic relationship—would unduly impinge on the exercise of the constitutional right. The free dissemination of ideas might be the loser.

First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 785, n.21 (1978). Likewise, the Fourth Circuit Court of Appeals has explained that:

Speakers are left to guess and wonder whether a regulator, applying supple and flexible criteria, will make a *post hoc* determination that their speech is regulable This approach simply guarantees that ordinary political speech will be chilled, the very speech that people use to express themselves on all sides of those issues about which they care most deeply.

N.C. Right to Life, Inc., 525 F.3d at 284-85. See also *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. at 793 (burdensome enforcement "scheme must necessarily chill speech in direct contravention of the First Amendment's dictates."); *Citizens United*, 130 S.Ct. at 896; *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 255-56 (1986). Thus, the FOIA's chilling effect is increased by the risk of ad hoc, arbitrary, or retaliatory enforcement efforts because any citizen may bring a lawsuit under the FOIA. The First Amendment does not tolerate laws, such as the FOIA, that require an organization to hire lawyers or engage in litigation and case-by-case interpretations before determining that the organization can discuss political issues.

In summary, the FOIA's record disclosure and open meeting requirements stifle, burden,

and chill the constitutionally protected speech and assembly of corporations such as SCASA engaged in political speech and issue advocacy by (1) eliminating such corporations' right not to speak, to speak anonymously, or to otherwise control their message (2) restricting such corporations' right to freely associate, and (3) imposing the threat of ad hoc, arbitrary, or retaliatory litigation on such corporations.

2. The FOIA's requirements are neither substantially related to a legitimate governmental purpose nor narrowly tailored to achieve the FOIA's purpose.

The FOIA's broad definition of "public body" can only be sustained as constitutional if the FOIA's open meeting and records disclosure requirements are substantially related to a sufficiently important governmental purpose and no less restrictive means of achieving this purpose exist. *Citizens United*, 130 S.Ct. at 914; *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Elrod v. Burns*, 427 U.S. 347, 362-63 (1976). Although the FOIA's purpose as set forth in the Act, § 30-4-10, is an important governmental interest, the FOIA's open meeting and records disclosure requirements are not substantially related to the FOIA's purpose, which could be achieved by narrower means less burdensome on First Amendment rights.

Notably, the test for whether an organization is subject to the FOIA, *i.e.*, whether the organization is supported by any public funds, is completely different from the more nuanced test under the federal FOIA. In *Irwin Mem'l Blood Bank of the S.F. Med. Soc'y v. Am. Nat'l Red Cross*, 640 F.2d 1051 (9th Cir. 1980), the federal test was described as follows:

It is the existence of this element of substantial federal control that distinguishes those entities that can be fairly denominated as federal agencies under the FOIA from the organizations whose activities may be described as merely quasi-public or quasi-governmental.

Irwin, at 1055. See also *Forsham v. Harris*, 445 U.S. 169 (1980); *Bd. of Trs. of Woodstock Acad. v. Freedom of Info. Comm'n*, 436 A.2d 266 (Conn. 1980) (adopting federal "functional

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equivalent" test). The federal "functional equivalent" test, which requires "substantial federal control," obviously does not raise the patent First Amendment concerns with respect to private corporations that South Carolina's "any support" test does. This "functional equivalent" test has a narrowing purpose, absent from South Carolina's FOIA, that is similar in operation to the "main purpose" test used to determine when electioneering advocacy can be regulated. *See S.C. Citizens for Life, Inc. v. Krawcheck*, 759 F. Supp. 2d 708, 715-20 (D.S.C. 2010).

The FOIA restrains and burdens the political speech and assembly of corporations such as SCASA by mandating that all meetings be open to the public, requiring that meetings be subject to prior public notice, and prescribing the content of the meeting notice, meeting minutes, and meeting discussions. The FOIA also requires that the records of a corporation such as SCASA be accessible to the public. The FOIA imposes its open meeting and record disclosure requirements on corporations such as SCASA without regard to the amount of public funds or support received by the corporation or whether the meeting or records of the corporation pertain to public funds or public activity.

Further, the FOIA has no temporal limitations. Once a corporation such as SCASA is determined to be a public body, its records are subject to disclosure, even those predating any support from public funds. Likewise, the FOIA's disclosure and open meeting requirements extend limitlessly into the future, even if years have passed since the corporation's receipt of public support. This overly broad sweep of the FOIA's mandates simply does not bear any substantial relationship to vindicating the interest of citizens to be advised of the performance of public officials, the decisions that are reached in public activity, or the formulation of public policy. This is particularly true of SCASA, which is neither a public officer nor a representative of the State. *See Order Granting Defendant's Motion to Dismiss Pursuant to Rule (12)(B)(3), SCRCP*, p. 7.

The statutory purpose of the FOIA could be fully achieved with regard to public activity



and funds that support private corporations in a more narrowly tailored manner by merely requiring one-time reporting and disclosure of actions and records relating to the receipt and expenditure of such funds. Such limited disclosure requirements have been approved in the context of election law regulations. In *Buckley*, the United States Supreme Court approved a limited disclosure requirement, noting that the disclosure requirement was narrowly limited to those situations where the information sought had a substantial connection with the governmental interest sought to be advanced. *Buckley*, 424 U.S. at 80-82. Importantly, the disclosures approved by the Court, and unlike those required under the FOIA, did "not reach all partisan discussion for it only requires disclosure of those expenditures that expressly advocate a particular election result." *Buckley*, 424 U.S. at 80. See also *Riley*, 487 U.S. at 800 (expressing approval of narrowly limited disclosure requirements in the context of regulation of charitable fundraising).

Similarly, disclosure requirements narrowly limited to the receipt or expenditure of public funds would reasonably serve to fulfill the important interests the FOIA seeks to vindicate with regard to private corporations supported in part by public funds. In *S.C. Citizens for Life, Inc. v. Krawcheck*, 759 F. Supp. 2d 708 (D.S.C. 2010), the District Court for South Carolina recently declared provisions of the South Carolina Ethics Act facially unconstitutional because the term "committee" as used in the Act was overly broad and imposed undue burdens on the First Amendment rights of groups engaged primarily in issue advocacy. The court noted other jurisdictions' use of one-time reporting requirements as narrowly designed to achieve the legitimate governmental objective of transparency and accountability rather than the overly broad panalogy of registration, disclosure, and reporting requirements mandated by the Act. See also *N.C. Right to Life, Inc.* 525 F.3d at 281; *Colo. Right to Life Comm. v. Coffman*, 498 F.3d 1137, 1154 (10th Cir. 2007).

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III. CONCLUSION

The FOIA unconstitutionally burdens SCASA's protected speech and associational rights. Specifically, the FOIA's open meeting and records disclosure requirements restrict SCASA's political speech and issue advocacy without a substantial relation to the purpose of the FOIA, and where narrower means are available to achieve the FOIA's purpose. As a result, the First Amendment prohibits the application of the FOIA's requirements to SCASA, and the Plaintiff's claim must fail because Plaintiff cannot, as a matter of law, state a claim for relief under the FOIA against SCASA.

This ruling does not conflict with the holding in *Weston v. Carolina Research and Dev. Found.*, 303 S.C. 398, 401 S.E.2d 161 (1991). *Weston* held that a private corporation can be a "public body" under certain circumstances. *Weston* did not address the specific circumstances of the FOIA's application to an issue advocacy organization like SCASA, and this Court's decision does not limit the FOIA's application to corporations or organizations not engaging in political speech or issue advocacy. Moreover, this decision does not find the FOIA to be unconstitutional, but that the First Amendment protects SCASA from the requirements of the FOIA, and consequently Plaintiff cannot state a claim against SCASA under the FOIA.

THEREFORE, Plaintiff's claim against SCASA is hereby DISMISSED with prejudice.

IT IS SO ORDERED.

August 10, 2011
Columbia, South Carolina


G. Thomas Cooper, Jr.
Judge, Fifth Judicial Circuit



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

October 14, 2011

Attorney General Alan Wilson
Deputy Attorney General Robert D. Cook
Assistant Deputy Attorney General J. Emory Smith, Jr.
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Re: Disabato v. SC Association of School Administrators

Dear Counsel:

The following Order has been endorsed on your Motion to Intervene of State Ex Rel Alan Wilson, Attorney General in the above entitled case on appeal.

"Granted.

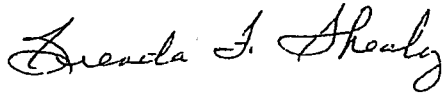
s/ Jean H. Toal C.J.
For the Court

October 14, 2011."

By copy of this letter we are advising all counsel of record of the action of the Court in this matter.

Disabato v. SC Association of School Administrators
Page Two
October 14, 2011

Very truly yours,

A handwritten signature in cursive script, reading "Brenda J. Shealy".

CHIEF DEPUTY CLERK

BFS/dmh

cc: Attorney General Alan Wilson
Deputy Attorney General Robert D. Cook
Assistant Deputy Attorney General J. Emory Smith, Jr.
Kevin A. Hall, Esquire
Karl S. Bowers, Jr., Esquire
M. Todd Carroll, Esquire
Kenneth L. Childs, Esquire
John M. Reagle, Esquire
Keith R. Powell, Esquire

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

SOUTH CAROLINA ASSOCIATION OF)	C.A. No. 3:10-271-CMC
SCHOOL ADMINISTRATORS,)	
Plaintiff,)	ORDER GRANTING MOTION
v.)	TO ABSTAIN AND DISMISS
ROCKY DISABATO d/b/a "ROCKY D,")	
Defendant.)	
_____)	

Through this declaratory judgment action, Plaintiff seeks a ruling that South Carolina's Freedom of Information Act ("FOIA") violates Plaintiff's rights under the First Amendment to the United States Constitution. Plaintiff sought this relief after Defendant filed a state court action seeking to enforce his rights to obtain documents from Plaintiff under FOIA. The matter is now before the court on Defendant's motion to abstain and dismiss under the federal abstention doctrines announced in *Younger v. Harris*, 401 U.S. 37 (1971) and *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

Younger abstention is applicable where a federal court's consideration of a matter would interfere with pending state-level proceedings. As the Fourth Circuit has explained:

The *Younger* doctrine expresses a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances. . . . The doctrine recognizes that state courts are fully competent to decide issues of federal law, and has as a corollary the idea that all state and federal claims should be presented to the state courts.

Richmond, Fredericksburg & Potomac R. Co. v. Forst, 4 F.3d 244, 251 (4th Cir. 1993) (internal citations and quotation marks omitted). See also *Moore v. City of Asheville*, 396 F.3d 385, 394–95 (4th Cir. 2005) (explaining that *Younger* abstention "command[s] federal restraint when the federal

action is duplicative, casts aspersions on state proceedings, disrupts important state enforcement efforts, and is designed to annul a state proceeding"). In light of these considerations, the Fourth Circuit has directed district courts to abstain under *Younger* where the following three factors are present: (1) there is an ongoing state proceeding; (2) that proceeding implicates important state interests; and (3) there is an adequate opportunity to raise federal claims in that proceeding. *Nivens v. Gilchrist*, 444 F.3d 237, 241 (4th Cir. 2006) (addressing *Younger* in context of state criminal proceeding but recognizing that doctrine has been extended to civil cases).

Here, it is undisputed that there is an ongoing state proceeding through which Defendant seeks documents from Plaintiff pursuant to FOIA. Thus, Plaintiff concedes that the first *Younger* factor is satisfied but argues that the second and third are not. The court disagrees. As to the second factor, the undersigned concludes that the state has significant interests in interpreting and applying FOIA, including with regard to entities such as Plaintiff which have mixed private and public attributes, the latter based on receipt of public funds and the statutory assignment of duties. The court also finds the third factor satisfied as Plaintiff is free to raise its First Amendment defenses in state court. Plaintiff's various alternative arguments may, likewise, be presented to the state court. The court, therefore, concludes that it should abstain under *Younger*.

At least to the extent Plaintiff argues that state law is vague,¹ *Pullman* abstention also applies. *Nivens*, 444 F.3d at 245 (noting that *Pullman* directs federal courts to defer exercising jurisdiction over a matter when a state law can be interpreted by a state court in such a manner as

¹ Plaintiff suggests such an argument in its complaint. See, e.g., Dkt. No. 1 at Introduction, ¶ 18. In response to Defendant's motion, it appears to abandon this argument, at least in part. See Dkt. No. 11 at 12-13 (arguing that *Pullman* abstention is not applicable because state courts have already interpreted FOIA broadly).

to avoid making a federal constitutional ruling).² This basis for abstention is consistent with the Supreme Court's directive to avoid constitutional rulings when other avenues for relief are available. *See Slack v. McDaniel*, 529 U.S. 473, 485 (2000) (noting general rule that federal courts should "not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of").

For the reasons set forth above, the court declines to exercise jurisdiction over this declaratory judgment action. Because this decision is based predominantly on *Younger* abstention, this dismissal is with prejudice. *See Nivens*, 444 F.3d at 247 ("when a district court abstains from a case based on *Younger*, it should typically dismiss the case with prejudice; not on the merits, . . . but instead because the court is denied the equitable discretion ever to reach the merits").

IT IS SO ORDERED.

s/ Cameron McGowan Currie
CAMERON MCGOWAN CURRIE
UNITED STATES DISTRICT JUDGE

Columbia, South Carolina
April 22, 2010

² The Fourth Circuit further noted that the appropriate course where *Pullman* abstention was the only concern was to stay the matter pending resolution of the state-law issue by the state court. *Id.* Here, *Pullman* does not present the only basis for abstention.

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10-1540

SOUTH CAROLINA ASSOCIATION OF SCHOOL ADMINISTRATORS,

Plaintiff - Appellant,

v.

ROCKY DISABATO, d/b/a Rocky D,

Defendant - Appellee.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Cameron McGowan Currie, District Judge. (3:10-cv-00271-CMC)

Argued: October 25, 2011

Decided: January 4, 2012

Before TRAXLER, Chief Judge, and WILKINSON and WYNN, Circuit Judges.

Affirmed by unpublished opinion. Judge Wynn wrote the opinion, in which Chief Judge Traxler and Judge Wilkinson concurred.

ARGUED: John Marshall Reagle, CHILDS & HALLIGAN, P.A., Columbia, South Carolina, for Appellant. Kevin Alan Hall, HALL & BOWERS, LLC, Columbia, South Carolina, for Appellee. ON BRIEF: Kenneth L. Childs, Keith R. Powell, CHILDS & HALLIGAN, P.A., Columbia, South Carolina, for Appellant. Karl S. Bowers, Jr., M. Todd Carroll, HALL & BOWERS, LLC, Columbia, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

WYNN, Circuit Judge:

With this appeal, the South Carolina Association of School Administrators ("SCASA") seeks to reinstate its federal declaratory judgment action against radio personality Rocky Disabato. Before the district court, SCASA sought to have South Carolina's Freedom of Information Act ("SC FOIA") declared unconstitutional as applied to it as a purportedly public corporation. But in an earlier-filed state case, a state court judge has already held exactly that. Because the district court did not abuse its discretion in determining that abstention in favor of the earlier-filed state suit was appropriate under Younger v. Harris, 401 U.S. 37 (1971), we affirm the dismissal of SCASA's complaint.

I.

SCASA is a non-profit corporation that views itself as "a leading force for public education in South Carolina" J.A. 5. SCASA engages in issue advocacy through, among other things, "influencing education legislation and policy" and "ensuring a cadre of effective leaders" J.A. 5.

In May 2009, SCASA brought a lawsuit against then-South Carolina Governor Mark Sanford seeking a writ of mandamus requiring former Governor Sanford to apply to the federal government for federal funds, including approximately \$780

million for public education and other public services. In June 2009, the South Carolina Supreme Court entered judgment in favor of SCASA and issued a writ of mandamus against former Governor Sanford.

In August 2009, SCASA received a public records request from Disabato. Purportedly pursuant to the SC FOIA, Disabato demanded SCASA records discussing the American Recovery and Reinvestment Act of 2009 and former Governor Sanford, including anything with references to SCASA's lawsuit against former Governor Sanford. Disabato further demanded telephone records reflecting all calls made or received by SCASA and its staff—including staff members' cell phone records—from January 1, 2009 to July 31, 2009.

SCASA responded to Disabato's request in writing, asserting that it was not subject to the SC FOIA because it "is not a public entity and therefore does not have to comply with the Freedom of Information procedures." J.A. 41. Nevertheless, SCASA advised Disabato that it would "be happy to talk with [him] about [his] interest and would try and provide [him] with as much information as possible verbally regarding the stimulus funding issue and Governor Sanford." J.A. 41. SCASA received no further communications from Disabato until it received notice of a lawsuit Disabato had filed against SCASA on December 7, 2009 in the Charleston County Court of Common Pleas.

On February 2, 2010, SCASA, in turn, brought a federal declaratory judgment action contending that the SC FOIA was unconstitutional as applied to it as a purportedly public corporation.¹ Specifically, SCASA alleged that

Relative to non-profit corporations engaged in political speech and issue advocacy, such as SCASA, the FOIA's broad record disclosure requirements chill the exercise of First Amendment rights, and the FOIA's broad record disclosure requirements chill the exercise of First Amendment rights, and the FOIA's open meeting requirements and vague application to any corporation supported in whole or in part by public funds constitute prior restraints on freedom of speech and association.

J.A. 4.

Instead of answering SCASA's federal complaint, Disabato moved the federal district court to abstain and dismiss. SCASA opposed the motion. On April 22, 2010, the district court granted Disabato's motion and dismissed the case on the basis of abstention. SCASA appeals.

¹ On February 9, 2010, SCASA notified the State of South Carolina of its constitutional challenge. Though the State has not moved to intervene in SCASA's federal case, the State did move to intervene in the state suit—albeit first at the appellate stage—on September 30, 2011. The Supreme Court of South Carolina granted the motion to intervene on October 14, 2011.

II.

We review a district court's decision to decline jurisdiction based on abstention principles for abuse of discretion. Nivens v. Gilchrist, 444 F.3d 237, 240 (4th Cir. 2006). A district court abuses its discretion whenever "its decision is guided by erroneous legal principles." Martin v. Stewart, 499 F.3d 360, 363 (4th Cir. 2007) (quotation marks omitted). Further, "there is little or no discretion to abstain in a case which does not meet traditional abstention requirements." Id. (quotation marks omitted).

In Younger, 401 U.S. 37, the Supreme Court held that a federal court should not enjoin a state criminal prosecution begun before the institution of a federal suit except in rare circumstances. The Supreme Court held that even the possibility of a "chilling effect" on First Amendment freedoms does not by itself justify federal intervention. Id. at 51. Later cases have articulated a three-part test for evaluating Younger abstention claims: "Absent a few extraordinary exceptions, Younger mandates that a federal court abstain from exercising jurisdiction and interfering in a state criminal proceeding if (1) there is an ongoing state judicial proceeding brought prior to substantial progress in the federal proceeding; that (2) implicates important, substantial, or vital state interests; and

(3) provides adequate opportunity to raise constitutional challenges." Nivens, 444 F.3d at 241 (footnote omitted).

In Younger, which concerned an underlying state criminal case, the Supreme Court did not address abstention in the context of civil proceedings. But the Supreme Court later carried Younger into the civil arena, and even to administrative proceedings. See, e.g., Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987) (civil proceedings); Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619 (1986) (administrative proceedings). The Supreme Court noted that Younger was based on concerns for comity and federalism—concerns "equally applicable" to "civil proceedings in which important state interests are involved[,] " so long as those proceedings provide the federal plaintiff with "a full and fair opportunity to litigate [its] constitutional claim." Ohio Civil Rights Comm'n, 477 U.S. at 627.

The Supreme Court's application of Younger abstention in Pennzoil is particularly relevant to our analysis here. In that case, Pennzoil had obtained a state court verdict against Texaco for over \$11 billion. Pennzoil, 481 U.S. at 4. Under Texas law, it appeared that the only way Texaco could prevent enforcement of the judgment while challenging it was by posting a bond for more than \$13 billion, a bond that Texaco could not have obtained. Id. at 5.

Texaco brought a federal action arguing that application of the Texas bond and lien requirements would deny it various constitutional and statutory rights. Id. at 6. Texaco sought an injunction restraining Pennzoil from taking any action to enforce the judgment pending appeal to the Texas appellate courts. Id. Notably, the State of Texas was not a party to the case. The district court granted, and the appellate court affirmed, injunctive relief for Texaco. Id. at 7-9. The Supreme Court reversed.

The Supreme Court focused on the notion of comity: "This concern mandates application of *Younger* abstention not only when the pending state proceedings are criminal, but also when certain civil proceedings are pending, if the State's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government." Id. at 11. The Supreme Court noted that its opinion "does not hold that *Younger* abstention is always appropriate whenever a civil proceeding is pending in a state court." Id. at 14 n.12. Nevertheless, the Court applied Younger to civil proceedings in which the state was not a party without setting clear guidelines. As a consequence, "the lower courts will have to work out for themselves what limits, if any, there are on the sweep of Younger." 17B Fed. Prac. & Proc. Juris. § 4254 (3d ed. 2011).

Against this backdrop, the district court here applied the three-part Younger test: (1) was there an ongoing state proceeding, (2) did the proceeding implicate important state interests, and (3) did the state proceeding provided an adequate opportunity to raise federal claims. Nivens, 444 F.3d at 241 (addressing Younger in the context of state criminal proceeding but recognizing that Younger has been extended beyond criminal cases). As to the first factor, the district court determined that "it is undisputed that there is an ongoing state proceeding through which Defendant seeks documents from Plaintiff pursuant to FOIA. Thus, Plaintiff concedes that the first Younger factor is satisfied" J.A. 83. This is indeed undisputedly so, and the first Younger factor is clearly met.

Moving, for the moment, to the third Younger factor, i.e., whether the state proceeding provided an adequate opportunity to raise federal claims, the district court held that "Plaintiff is free to raise its First Amendment defenses in state court. Plaintiff's various alternative arguments may, likewise, be presented to the state court." J.A. 83. If this were in any way previously unclear, supplements to the joint appendix filed with this Court show that SCASA did in fact raise the very same First Amendment arguments underlying its federal complaint before the state court. In Disabato's state court action, SCASA moved to dismiss, arguing that Disabato's claim must fail

"because the FOIA's definition of a 'public body' cannot constitutionally embrace a corporation, like SCASA, engaged in political speech or issue advocacy. In other words, SCASA asserts that the FOIA's definition of 'public body' . . . unconstitutionally burdens the First Amendment rights of freedom of speech and association of issue advocacy organizations like SCASA." J.A. 108.

Notably, the state court granted SCASA's motion and dismissed Disabato's suit. The state court held that "the FOIA's open meeting and records disclosure requirements restrict SCASA's political speech and issue advocacy without a substantial relation to the purpose of the FOIA, and where narrower means are available to achieve the FOIA's purpose. As a result, the First Amendment prohibits the application of the FOIA's requirements to SCASA, and the Plaintiff's claim must fail" J.A. 119. Clearly, then, SCASA had an adequate opportunity to raise its First Amendment arguments before the state court, and the third Younger factor is met.

That leaves the second factor, i.e., whether the proceeding implicates important state interests. The district court concluded that "the state has significant interests in interpreting and applying FOIA, including with regard to entities such as Plaintiff which have mixed private and public attributes, the latter based on receipt of public funds and the

statutory assignment of duties." J.A. 83. Indeed, this case revolves around the interpretation and constitutionality of a state statute that the state legislature deemed "vital":

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. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.

S.C. Code. Ann. § 30-4-15. And South Carolina's Attorney General has successfully intervened in the state suit at the appellate stage, stating that he has "a strong interest in defending the constitutionality of the application of FOIA" J.A. 123. Under these circumstances, we cannot say that the district court abused its discretion in abstaining from SCASA's federal suit in favor of the earlier-filed state action.²

SCASA points out that there are some exceptions to Younger abstention. The Supreme Court has indeed indicated that federal

² We note that the district court also ruled that "[a]t least to the extent [SCASA] argues that state law is vague, [Railroad Comm'n of Tx. V. Pullman, 312 U.S. 496 (1941)] abstention also applies." J.A. 83 (footnote omitted). Because we affirm the district court's abstention under Younger, we need not address whether abstention under Pullman would also have been appropriate.

courts need not abstain under "extraordinary circumstances" such as where a statute is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." Younger, 401 U.S. at 53-54 (quotation marks omitted). Abstention may also be inappropriate where there has been a "showing of bad faith, harassment, or any other unusual circumstance that would call for equitable relief." Id. at 54. SCASA contends that these exceptions apply here. We cannot agree.

As to the first exception, SCASA seeks, with its complaint, a declaration that "the FOIA violates the First Amendment and is unconstitutional in so far as its definition of public body encompasses private corporations engaging in political speech and issue advocacy" J.A. 12. This limited declaration essentially concedes that the SC FOIA is not "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." Younger, 401 U.S. at 53-54 (quotation marks omitted).

As to the second exception, SCASA claims that it has been pursued by political forces, including former Governor Sanford, under the SC FOIA, and that Disabato's attorneys in this case have repeatedly represented its challengers. What SCASA has

not, and apparently cannot, argue, however, is that Disabato has repeatedly brought SC FOIA suits against it. (This appears to be his first such challenge against SCASA.) SCASA does not contend that Disabato is a straw man for another party who has previously brought SC FOIA claims against it. And SCASA cites no support for the notion that looking to the lawyers instead of the parties is appropriate in evaluating its harassment contention; under the circumstances of this suit, we decline to do so.

III.

In sum, SCASA has already obtained the relief it sought with this federal suit through its participation in an earlier-filed state suit.³ The district court did not abuse its discretion in determining that abstention in favor of that state suit was appropriate under Younger. We therefore affirm the district court's dismissal of SCASA's federal complaint.

AFFIRMED

³ We express no opinion as to the merits of SCASA's First Amendment claims.

FILED: January 4, 2012

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10-1540
(3:10-cv-00271-CMC)

SOUTH CAROLINA ASSOCIATION OF SCHOOL ADMINISTRATORS

Plaintiff - Appellant

v.

ROCKY DISABATO, d/b/a Rocky D

Defendant - Appellee

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

FILED: January 4, 2012

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10-1540, South Carolina Association v. Rocky Disabato
3:10-cv-00271-CMC

NOTICE OF JUDGMENT

Judgment was entered on this date in accordance with Fed. R. App. P. 36. Please be advised of the following time periods:

PETITION FOR WRIT OF CERTIORARI: To be timely, a petition for certiorari must be filed in the United States Supreme Court within 90 days of this court's entry of judgment. The time does not run from issuance of the mandate. If a petition for panel or en banc rehearing is timely filed, the time runs from denial of that petition. Review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for compelling reasons.

(www.supremecourtus.gov)

VOUCHERS FOR PAYMENT OF APPOINTED OR ASSIGNED

COUNSEL: Vouchers are sent to counsel appointed or assigned by the court in a separate transmission at the time judgment is entered. CJA 30 vouchers are sent to counsel in capital cases. CJA 20 vouchers are sent to counsel in criminal, post-judgment, habeas, and § 2255 cases. Assigned counsel vouchers are sent to counsel in civil, civil rights, and agency cases. Vouchers should be completed and returned within 60 days of the later of entry of judgment, denial of a petition for rehearing, or the grant or denial of a petition for writ of certiorari. If counsel appointed or assigned by the court did not receive a voucher, forms and instructions are available from the court's web site, www.ca4.uscourts.gov, or from the clerk's office.

BILL OF COSTS: A party to whom costs are allowable, who desires taxation of costs, shall file a Bill of Costs within 14 calendar days of entry of judgment. (FRAP 39, Loc. R. 39(b)).

PETITION FOR REHEARING AND PETITION FOR REHEARING EN

BANC: A petition for rehearing must be filed within 14 calendar days after entry of judgment, except that in civil cases in which the United States or its officer or agency is a party, the petition must be filed within 45 days after entry of judgment. A petition for rehearing en banc must be filed within the same time limits and in the same document as the petition for rehearing and must be clearly identified in the title. The only grounds for an extension of time to file a petition for rehearing are the death or serious illness of counsel or a family member (or of a party or family member in pro se cases) or an extraordinary circumstance wholly beyond the control of counsel or a party proceeding without counsel.

Each case number to which the petition applies must be listed on the petition to identify the cases to which the petition applies and to avoid companion cases proceeding to mandate during the pendency of a petition for rehearing in the lead case. A timely filed petition for rehearing or petition for rehearing en banc stays the mandate and tolls the running of time for filing a petition for writ of certiorari.

A petition for rehearing must contain an introduction stating that, in counsel's judgment, one or more of the following situations exist: (1) a material factual or legal matter was overlooked; (2) a change in the law occurred after submission of the case and was overlooked; (3) the opinion conflicts with a decision of the U.S. Supreme Court, this court, or another court of appeals, and the conflict was not addressed; or (4) the case involves one or more questions of exceptional importance. A petition for rehearing, with or without a petition for rehearing en banc, may not exceed 15 pages. Copies are not required unless requested by the court. (FRAP 35 & 40, Loc. R. 40(c)).

MANDATE: In original proceedings before this court, there is no mandate. Unless the court shortens or extends the time, in all other cases, the mandate issues 7 days after the expiration of the time for filing a petition for rehearing. A timely petition for rehearing, petition for rehearing en banc, or motion to stay the mandate will stay issuance of the mandate. If the petition or motion is denied, the mandate will issue 7 days later. A motion to stay the mandate will ordinarily be denied, unless the motion presents a substantial question or otherwise sets forth good or probable cause for a stay. (FRAP 41, Loc. R. 41).

STATE OF SOUTH CAROLINA

COUNTY OF Charleston

Rocky Disabato, d/b/a "Rocky D"

Plaintiff(s)

vs.

South Carolina Association of School
Administrators

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

-CP -

(Please Print)

Submitted By: Kevin A. Hall

Address: Hall & Bowers, LLC

1329 Blanding Street

Columbia, SC 29201

SC Bar #: 015063

Telephone #: 803. 454. 6504

Fax #: 803. 454. 6509

Other:

E-mail: kevin.hall@hallbowers.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

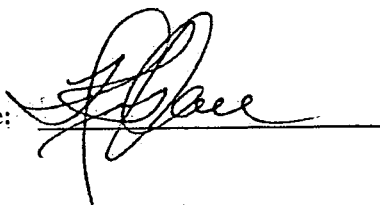
**If Action is Judgment/Settlement do not complete*

- ☐ JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

Contracts	Torts - Professional Malpractice	Torts - Personal Injury	Real Property
☐ Constructions (100)	☐ Dental Malpractice (200)	☐ Assault/Slander/Label (300)	☐ Claim & Delivery (400)
☐ Debt Collection (110)	☐ Legal Malpractice (210)	☐ Conversion (310)	☐ Condemnation (410)
☐ Employment (120)	☐ Medical Malpractice (220)	☐ Motor Vehicle Accident (320)	☐ Foreclosure (420)
☐ General (130)	☐ Previous Notice of Intent Case #	☐ Premises Liability (330)	☐ Mechanic's Lien (430)
☐ Breach of Contract (140)	20 -CP-	☐ Products Liability (340)	☐ Partition (440)
☐ Other (199)	☐ Notice/ File Med Mal (230)	☐ Personal Injury (350)	☐ Possession (450)
	☐ Other (299)	☐ Wrongful Death (360)	☐ Building Code Violation (460)
		☐ Other (399)	☐ Other (499)
Inmate Petitions	Judgments/Settlements	Administrative Law/Relief	Appeals
☐ PCR (500)	☐ Death Settlement (700)	☐ Reinstate Driver's License (800)	☐ Arbitration (900)
☐ Mandamus (520)	☐ Foreign Judgment (710)	☐ Judicial Review (810)	☐ Magistrate-Civil (910)
☐ Habeas Corpus (530)	☐ Magistrate's Judgment (720)	☐ Relief (820)	☐ Magistrate-Criminal (920)
☐ Other (599)	☐ Minor Settlement (730)	☐ Permanent Injunction (830)	☐ Municipal (930)
	☐ Transcript Judgment (740)	☐ Forfeiture-Petition (840)	☐ Probate Court (940)
	☐ Lis Pendens (750)	☐ Forfeiture-Consent Order (850)	☐ SCDOT (950)
	☐ Transfer of Structured Settlement Payment Rights Application (760)	☐ Other (899)	☐ Worker's Comp (960)
	☐ Other (799)		☐ Zoning Board (970)
Special/Complex /Other			☐ Public Service Commission (990)
☐ Environmental (600)	☐ Pharmaceuticals (630)		☐ Employment Security Comm (991)
☐ Automobile Arb. (610)	☐ Unfair Trade Practices (640)		☐ Other (999)
☐ Medical (620)	☐ Out-of State Depositions (650)		
☒ Other (699)	☐ Motion to Quash Subpoena in an Out-of-County Action (660)		
	☐ Sexual Predator (510)		
S. C. Freedom of Information Act Violation			

Submitting Party Signature:



Date: December 4, 2009

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Colleton, Florence, Greenville,
Hampton, Horry, Jasper, Lexington, Pickens (Family Court Only), and Richland

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON) IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Rocky Disabato, d/b/a "Rocky D,") Civil Action No.

Plaintiff,)

vs.)

South Carolina Association of School)
Administrators,)

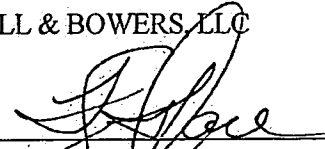
Defendant.)

SUMMONS

TO: THE DEFENDANT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to the said Complaint upon the subscribers at 1329 Blanding Street, Post Office Box 12107, Columbia, South Carolina, 29201, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in said Complaint.

HALL & BOWERS, LLC

By: 

Kevin A. Hall

SC Bar No. 015063

Email: kevin.hall@hallbowers.com

Karl S. Bowers, Jr.

SC Bar No. 16141

Email: butch.bowers@hallbowers.com

M. Todd Carroll

SC Bar No. 74000

Email: todd.carroll@hallbowers.com

1329 Blanding Street

Post Office Box 12107 (29211)

Columbia, SC 29201

(803) 454-6504

Attorneys for Plaintiff Rocky D

December 4, 2009
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
Rocky Disabato, d/b/a "Rocky D,"	)	Civil Action No.
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	<u>COMPLAINT</u>
South Carolina Association of School	)	
Administrators,	)	
	)	
Defendant.	)	
	)	

Plaintiff Rocky Disabato, d/b/a "Rocky D," hereby files this Complaint against Defendant South Carolina Association of School Administrators ("SCASA") and alleges as follows:

INTRODUCTION AND NATURE OF THE CASE

1. This litigation involves a violation of the South Carolina Freedom of Information Act ("FOIA") by SCASA. Plaintiff requested access to certain public records of SCASA that relate to its collusive efforts with the State Department of Education and others regarding the debate about the federal stimulus funds in the American Recovery and Reinvestment Act of 2009. SCASA refused to comply with this request and claimed that it is not subject to the FOIA. However, because SCASA meets the FOIA's definition of "public body," the statute is applicable and the organization is in violation of the FOIA by refusing to furnish access to these records. Accordingly, Plaintiff brings this suit to enforce his right of access under the FOIA, to ensure the right of access to all citizens by enjoining SCASA from further FOIA violations, and to recover his attorneys' fees and costs as directed by the statute.

PARTIES

2. Plaintiff Rocky D is a citizen and resident of Charleston County in the State of South Carolina, who hosts a radio talk show that is broadcast on 1250 AM WTMA.

3. SCASA is a corporate entity organized under the laws of the State of South Carolina with its principal place of business located in Richland County in the State of South Carolina.

JURISDICTION AND VENUE

4. This action is based on and seeks redress for a violation of the FOIA by SCASA. Jurisdiction is therefore properly in this Court pursuant to South Carolina Code § 30-4-100(a).

5. Venue is proper in this Court pursuant to South Carolina Code § 15-7-20.

BACKGROUND AND FACTUAL ALLEGATIONS

I. SCASA is Comprised of Public Employees and Officials

6. SCASA describes itself as "the leading force for public education" in South Carolina. See Ex. A, SCASA Website, "Mission Statement," <http://www.scasa.org/displaycommon.cfm?an=1&subarticlenbr=1> (last visited December 4, 2009).

7. Upon information and belief, SCASA's membership is comprised primarily, if not exclusively, of public employees.

8. Upon information and belief, until last year, SCASA's Executive Board was comprised exclusively of employees of public schools or public school districts in

South Carolina. SCASA's current Executive Board is comprised exclusively of public employees with three exceptions.

9. With few exceptions, SCASA's website provides viewers with links to the publicly-maintained email addresses for each of its Executive Board members:

<u>SCASA Executive Board Member</u>	<u>Public Email Address Linked To Website</u>
Nancy Gregory	ngregory@bm.richland2.org
Zona Jefferson	jefferson@sumter17.k12.sc.us
Rhett Dean	edean@marion7.k12.sc.us
Rodney Graves	rdgraves@echalk.spart7.org
Marion Douglas Waters	mwaters@greenville.k12.sc.us
Louis Lavelly	bmcDaniel@flo2.k12.sc.us
Daniel H. Matthews	daniel.matthews@kscdschools.net
Marisa Vickers	mvickers@richlandone.org
Marian Crum-Mack	mcrum-mack@richlandone.org
Jerome Hudson	hudsonj@anderson1.k12.sc.us
Nancy O. Verburg	nverburg@lexington1.net
Sandy Andrews	sandrews@rock-hill.k12.sc.us
Mike Mahaffey	mikemahaffey@anderson5.net
Randall Vaughn	vaughnr@gwd50.org
Teresa Hinnant	hinnantt@obg3.k12.sc.us
Marelyn Murdaugh	mmurdaugh@hampton1.k12.sc.us
Jeff Wilson	jeffwilson@anderson5.net

See Ex. B, SCASA Website, "SCASA Executive Board 2009-2010," <http://www.scasa.org/displaycommon.cfm?an=1&subarticlenbr=3> (last visited December 4, 2009).

II. SCASA is Supported by Public Funds

10. Upon information and belief, the South Carolina Department of Education, South Carolina's public schools, and South Carolina's public school districts provide public funds to SCASA in the form of direct disbursements.

11. Upon information and belief, the South Carolina Department of Education, South Carolina's public schools, and South Carolina's public school districts

provide public funds to SCASA indirectly by reimbursing their employees for costs incurred while planning, attending, and participating in SCASA meetings and events, as well as for dues paid to SCASA.

12. Upon information and belief, the South Carolina Department of Education, South Carolina's public schools, and South Carolina's public school districts provide public funds to SCASA by allowing their employees to conduct business on behalf of SCASA during normal business hours at their respective public offices, using publicly-provided email addresses, computers, telephones, office space, office supplies, utilities, administrative support, and other public resources.

13. At least part of SCASA's website is supported through public servers. *See* Ex. C, "SCASA's Technology Leaders' Roundtable," <http://www.dillon2.k12.sc.us/scasatechroundtable/Default.asp> (last visited December 4, 2009).

14. Upon information and belief, SCASA's employees are eligible to and do participate in the South Carolina State Health and Dental Insurance plan, which has been characterized as a "special perk" and a "taxpayer subsidy" due to the fact that the State spends between \$261 and \$602 of public funds per month, per employee to help each covered employee insure his or her family. *See* S.C. Code Ann. § 1-11-720(A)(15); Cindi Ross Scoppe, Associate Editor, "Legislature Has Another Sweet Perk, and It Could Be Skewing Policy," *The State*, March 5, 2008, at A6.

15. Upon information and belief, SCASA's employees are eligible to and do participate in the South Carolina Retirement System.

III. SCASA Performs Governmental Functions

16. In addition to its stated mission as "the leading force for public education," SCASA also performs the following governmental functions:

- 1) SCASA has the statutory responsibility of recommending superintendents and financial administrators of public school districts to three-year appointments as members of a "special committee" that evaluates proposals made pursuant to the Public School Employee Cost Savings Program, a program administered by the South Carolina Department of Education. *See* S.C. Code Ann. § 59-1-452.
- 2) SCASA has the statutory responsibility of advising the governor about potential members of the South Carolina Public Charter School District's board of trustees. *See id.* § 59-40-230.
- 3) Pursuant to South Carolina Code § 59-40-70, SCASA is a standing member of the Charter School Advisory Committee that has the statutory responsibility of reviewing and recommending approval or denial of applications for charter schools in South Carolina.
- 4) Pursuant to South Carolina Code § 59-141-10, SCASA had a statutory responsibility to give advice to the South Carolina Department of Education with regard to the Department's plan for achieving certain educational goals.

IV. Plaintiff's FOIA Request to SCASA

17. In August 2009, Plaintiff sent SCASA a written request pursuant to the South Carolina Freedom of Information Act. In this request, Plaintiff sought, and continues to seek, access to two categories of public records:

- 1) 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."
- 2) 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."

A copy of this letter is attached hereto as Exhibit D.

18. On September 4, 2009, Molly M. Spearman responded on behalf of SCASA to Plaintiff's FOIA request. In her letter, Ms. Spearman asserted that "SCASA is not a public entity and therefore does not have to comply with the Freedom of Information procedures." As a result, SCASA refused to provide Plaintiff with any of the public records sought in the FOIA request. A copy of this correspondence is attached hereto as Exhibit E.

19. In its September 4, 2009 letter, SCASA did not assert that the public records listed in Plaintiff's FOIA request were subject to any of the exemptions listed in South Carolina Code § 30-4-40(a).

20. SCASA has never provided the requested public records to Plaintiff, nor has it asserted any of the exemptions listed in South Carolina Code § 30-4-40(a) in response to Plaintiff's FOIA request.

FOR A FIRST CAUSE OF ACTION
(Declaration of a FOIA Violation)

21. Each and every allegation contained in the preceding paragraphs is realleged and reasserted as if set forth verbatim herein.

22. In promulgating the FOIA, the General Assembly determined 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 public performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. Toward this end, provisions of [the FOIA] must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.

S.C. Code Ann. § 30-4-15.

23. In this vein, a violation of the FOIA “must be considered an irreparable injury for which no adequate remedy at law exists.” *Id.* § 30-4-100(a).

24. The FOIA provides that “[a]ny person has a right to inspect or copy any public record of a public body, except as otherwise provided by § 30-4-40, in accordance with reasonable rules concerning time and place of access.” *Id.* § 30-4-30(a).

25. The FOIA defines “public body” in pertinent part as follows:

“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.

Id. § 30-4-20(a).

26. “[T]he 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).

27. SCASA is a “public body,” as defined by the FOIA, by virtue of:

- (1) its support by public funds through (a) direct and indirect disbursements from the South Carolina Department of Education, South Carolina's public schools, and South Carolina's public school districts, (b) its members' use of public resources to conduct SCASA's business, (c) participation in the State Health and Dental Insurance plan, and (d) participation in the State Retirement System;
- (2) its statutory obligations to perform certain governmental functions, including giving advice to various public officials and agencies and serving on the Charter School Advisory Committee; and/or
- (3) its membership and Executive Board being comprised almost entirely of public employees.

28. The FOIA defines "public record" in pertinent part as follows: "'Public record' includes all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body." S.C. Code Ann. § 30-4-20(c).

29. The materials sought by Plaintiff in his FOIA request are "public records," as defined by FOIA.

30. None of the materials sought by Plaintiff in his FOIA request are subject to any of the exemptions listed in South Carolina Code § 30-4-40(a), nor has SCASA ever asserted that any of these exemptions are applicable to Plaintiff's request.

31. Because SCASA refused to provide Plaintiff with the requested public records pursuant to the FOIA, it has violated South Carolina Code § 30-4-30(a).

32. South Carolina Code § 30-4-100(b) provides that if a party prevails in enforcing the provisions of the FOIA, "he or it may be awarded reasonable attorney fees and other costs of litigation."

33. Accordingly, Plaintiff seeks a declaratory judgment from this Court that:

- (1) SCASA is a "public body," as defined by the FOIA;

(2) By refusing to comply with Plaintiff's FOIA request, SCASA has violated the FOIA; and

(3) Plaintiff is entitled to recover his costs and attorneys' fees from SCASA pursuant to South Carolina Code § 30-4-100(b).

FOR A SECOND CAUSE OF ACTION
(Injunction from Further FOIA Violations)

34. Each and every allegation contained in the preceding paragraphs is realleged and reasserted as if set forth verbatim herein.

35. Despite a request from Plaintiff to provide access to certain public records, SCASA has acted and continues to act in open violation of its duties and obligations under the FOIA.

36. The FOIA places an ongoing obligation on SCASA to provide access to its public records and its meetings.

37. Pursuant to South Carolina Code § 30-4-100(a), Plaintiff is entitled to injunctive relief prohibiting SCASA from continuing to violate the FOIA and requiring SCASA to comply with the FOIA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against SCASA providing the following relief:

- (a) That the Court declare that SCASA is a "public body," as defined by the South Carolina Freedom of Information Act;
- (b) That the Court declare that SCASA has violated the South Carolina Freedom of Information Act by refusing to provide access to public records;
- (c) That the Court enter an order enjoining SCASA from continuing its violation of the South Carolina Freedom of Information Act and requiring SCASA to comply with the provisions of the South Carolina Freedom of Information Act;

- (d) Attorneys' fees and costs as provided by South Carolina Code § 30-4-100(b); and
- (e) Such other and further relief as this Court deems just and proper.

HALL & BOWERS, LLC

By: 

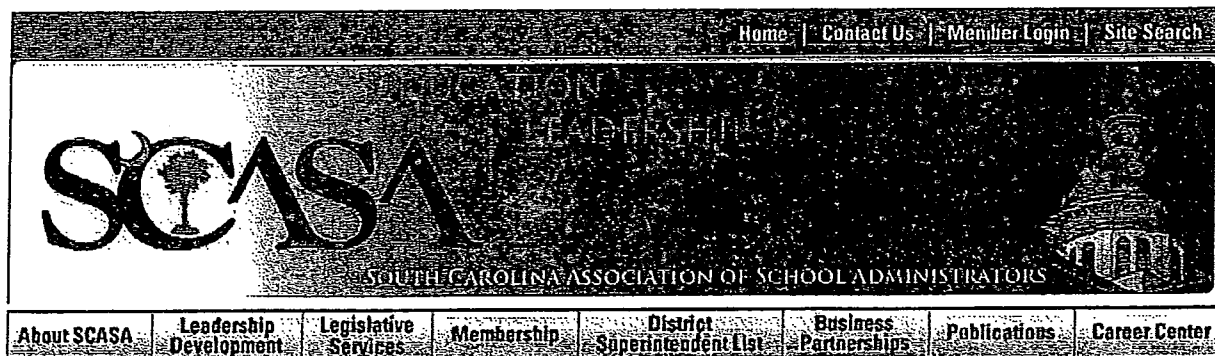
Kevin A. Hall
SC Bar No. 015063
Email: kevin.hall@hallbowers.com
Karl S. Bowers, Jr.
SC Bar No. 16141
Email: butch.bowers@hallbowers.com
M. Todd Carroll
SC Bar No. 74000
Email: todd.carroll@hallbowers.com
1329 Blanding Street
Post Office Box 12107 (29211)
Columbia, SC 29201
(803) 454-6504

Attorneys for Plaintiff Rocky D

December 4, 2009
Columbia, South Carolina

Exhibit A

**Screenshot of SCASA's "Beliefs, Mission,
and Objectives" Website**



Beliefs, Mission, and Objectives

We Believe:

- God created one race: the human race.
- Children have first call on society's resources.
- The family is the primary influence in the development of the individual.
- Successful human relationships depend on effective communication.
- All people need to give and receive love.
- People have a responsibility to help each other.
- All people inherently have worth.
- All people deserve to be treated fairly.
- Understanding self is essential to leading others.
- Integrity is necessary for respect.
- The individual has the right to self determination.
- Each person has the capacity to learn.
- Everyone has the right to the best education possible.
- Individual accomplishment is determined by effort more than ability.
- Human potential, individual or collective, is unlimited.
- Success can be measured in terms of goals.
- Higher expectations yield higher results.

Mission Statement:

The mission of SCASA, a united alliance of diverse school leaders and the leading force for public education in our state, is to advocate for a superior education for the citizens of South Carolina by influencing education legislation and policy, stimulating and fostering support, building successful coalitions, ensuring a cadre of effective leaders, and providing programs and services for members.

Objectives:

1. SCASA will be recognized as the leading force for education in South Carolina.
2. All eligible educators will be members of SCASA.
3. South Carolina will exceed all national and international educational standards.

South Carolina Association of School Administrators
 121 Westpark Boulevard, Suite A
 Columbia, SC 29210
 Phone: 803-798-8380
 Fax: 803-731-8429

Exhibit B

Screenshot of SCASA's 2009-10 Executive Board

Home Contact Us Member Login Site Search							
About SCASA	Leadership Development	Legislative Services	Membership	District Superintendent List	Business Partnerships	Publications	Career Center

SCASA Executive Board 2009-2010

The SCASA Executive Board is made up of president, president-elect and past president (elected by the SCASA membership), and board representatives (elected by each division, based on division membership).

**SCASA President
2009-2010**



Dr. Joanne Avery
Deputy Superintendent
Anderson District 4

**SCASA President Elect
2010-2011**



Mrs. Nancy Gregory
Director of Curriculum, Instruction &
Professional Development
Richland District 2

**SCASA Past President
2008-2009**



Mr. John Tindal
Superintendent
Clarendon District 2

Superintendents' Division Representatives



Dr. Zona Jefferson
Sumter District 17



Dr. Rhett Dean
Marion District 7

Secondary Principals' Representatives



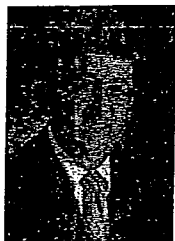
Mr. Rodney Graves
Spartanburg High School
Spartanburg District 7

Mr. Marion Douglas Waters
Greenville County Schools



Mr. Louis Lavelle
Travelers Rest High School
Greenville County Schools

Middle Level Principals' Representatives



Mr. Daniel H. Matthews
Kershaw County Schools



Ms. Marisa Vickers
Hand Middle School
Richland District 1

Elementary Principals' Representatives



Ms. Christina Melton
Lexington District 5



Dr. Marian Crum-Mack
Brennan Elementary School
Richland District 1



Mr. Jerome Hudson
Palmetto Elementary School
Anderson District 1

Career & Technology Education Administrators' Representatives



Ms. Nancy O. Verburg
Lexington District 1

Adult Education Directors' Representative



Ms. Sandy Andrews
Director, Adult and Community Education
York District 3

Personnel Administrators' Representatives



Mr. Mike Mahaffey
Anderson District 5



Mr. Randall Vaughn
Greenwood District 50

Education Specialists' Division Representatives



Mrs. Maryln Murdaugh
Hampton District 1



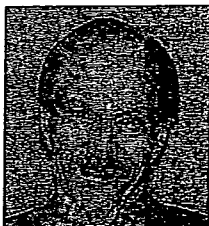
Mrs. Teresa Hinnant
Orangeburg Consolidated 3

Instructional Leaders' Representatives



Dr. Jeff Wilson
Anderson District 5

Education Deans' Representative



Dr. David W. Blackmon

Higher Education Representative



Dr. Mark Mitchell
Assistant Professor of Ed. Leadership
Winthrop University

Business Representative



Mr. Chris Christiansen
R.L. Bryan Company

South Carolina Association of School Administrators
121 Westpark Boulevard, Suite A
Columbia, SC 29210
Phone: 803-798-8380
Fax: 803-731-8429

Exhibit C

Screenshot of SCASA's "Technology
Leaders' Roundtable"

About Us

SCASA
Home
Officers
Meeting
Dates
Minutes
TLR Home



Tech Info

- ▶ Covenants
- ▶ Membership Information
- ▶ Listserv Information
- ▶ Technology Topics

The Technology Leaders' Roundtable

Welcome

About the Roundtable

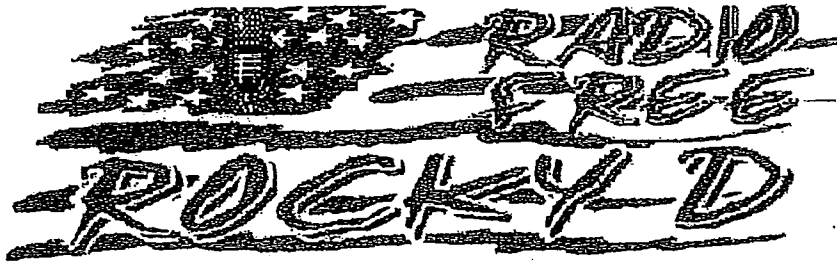
SCASA consolidates the resources and strength of administrators in every phase of education. Eight divisions enable professionals to network with others who share their immediate concerns, while the association as a whole provides a strong foundation for educational improvement and individual professional growth. The Technology Leaders' Roundtable lies within the Allied School Administrators' Division which consists of Directors of Technology, Guidance, Curriculum and others.

Technology Leaders Working Together for Students and Teachers



Exhibit D

Rocky D's FOIA Request to SCASA



The Price of Liberty



Molly Spearman
Executive Director
South Carolina Association of School Administrators
121 Westpark Blvd.
Columbia, SC 29210
RE: FOIA Request

Dear Ms. Spearman:

Pursuant to the South Carolina Freedom of Information Act, I hereby request that you provide me with a copy 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. I also request that you provide me with a copy 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. Your response is due within fifteen days.

Sincerely,

Rocky D / WTMA
c.o. Citadel Broadcasting
4230 Faber Place
North Charleston, SC. 29405
843-277-1200

Exhibit E

SCASA's Response to Rocky D's FOIA Request



SCASA DIVISIONS

School Superintendents

Secondary Principals

Middle Level Principals

Elementary Principals

Career & Technology
Education Administrators

Adult Education
Directors

School Personnel
Administrators

Allied School
Administrators

September 4, 2009

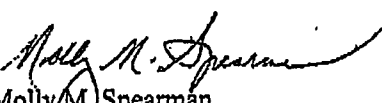
Rocky D/WTMA
c.o. Citadel Broadcasting
4230 Faber Place
North Charleston, SC 29405

Dear Rocky D:

The South Carolina Association of School Administrators is not a public entity and therefore does not have to comply with the Freedom of Information procedures. I telephoned your office on Friday, September 04, 2009 and unfortunately, you were not available. I will be happy to talk with you about your interest and would try and provide you with as much information as possible verbally regarding the stimulus funding issue and Governor Sanford.

Thank you.

Sincerely,


Molly M. Spearman
Executive Director

South Carolina Association of School Administrators
121 Westpark Boulevard ■ Columbia, SC 29210
(803) 798-8380 ■ FAX (803) 731-8429
www.scasa.org

REC 000079

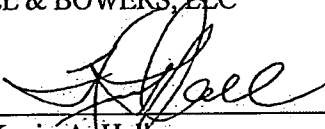
STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
Rocky Disabato, d/b/a "Rocky D,"	)	Civil Action No. 09-CP-10-7593
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	<u>AFFIDAVIT OF MAILING</u>
South Carolina Association of School	)	
Administrators,	)	
	)	
Defendant.	)	

I, the undersigned attorney of the law offices of Hall & Bowers, LLC, attorneys for Rocky Disabato, d/b/a "Rocky D," do hereby certify that I have served all parties required to be served in this action with a copy of the Civil Action Coversheet, Summons and Complaint by mailing same via certified mail, return receipt requested, to the following address:

Registered Agent – Headquarters
 South Carolina Association of School Administrators
 421 Zimacrest Drive
 Columbia, SC 29210-6835

HALL & BOWERS, LLC

By: _____


 Kevin A. Hall
 SC Bar No. 015063
 Email: kevin.hall@hallbowers.com
 Karl S. Bowers, Jr.
 SC Bar No. 16141
 Email: butch.bowers@hallbowers.com
 M. Todd Carroll
 SC Bar No. 74000
 Email: todd.carroll@hallbowers.com
 1329 Blanding Street
 Post Office Box 12107 (29211)
 Columbia, SC 29201
 (803) 454-6504

Attorneys for Plaintiff Rocky Disabato, d/b/a "Rocky D"

December 10, 2009
 Columbia, South Carolina

REC 000080

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

Rocky Disabato d/b/a "Rocky D",

Plaintiff,

vs.

South Carolina Association of School
Administrators,

Defendant.

C.A. No. 2009-CP-10-07593

**DEFENDANT'S MOTION PURSUANT TO
RULE 12(b)(3), SCRPC**

Defendant South Carolina Association of School Administrators ("SCASA") hereby respectfully moves this Court pursuant to Rule 12(b)(3), SCRPC, for an order dismissing this civil action and transferring the case to the Court of Common Pleas for the Fifth Judicial Circuit where venue is proper.

The Plaintiff's complaint asserts venue in the Ninth Judicial Circuit, Court of Common Pleas for Charleston County, under S.C. Code § 15-7-20(2), which provides that actions against a public officer for an act done by him in virtue of his office must be tried in the county where the cause of or some part thereof arose. Plaintiff improperly relies on this venue provision because SCASA's executive director, Molly Spearman, who responded to Plaintiff's Freedom of Information Act request, is not a public officer; the complaint is not against Ms. Spearman as a public officer, but against SCASA; and, finally, no part of the cause of action can properly be determined to have arisen in Charleston County.

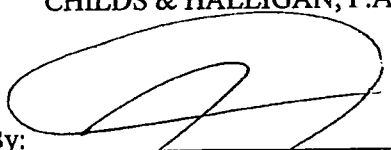
Rather, SCASA is a non-profit, domestic corporation with its principal office in Richland County, South Carolina. The FOIA request from Plaintiff was responded to by Ms. Spearman in Richland County and SCASA's records that Plaintiff seeks are situated in Richland County. Venue is therefore only proper in the Fifth Judicial Circuit, Court of Common Pleas for Richland

County, pursuant to S.C. Code § 15-7-30 (E). Moreover, even if SCASA were to be declared a "public body" under the FOIA, compliance with the FOIA's disclosure and open meeting requirements, as well as with the required permanent injunction, would generally occur in Richland County.

WHEREFORE, SCASA respectfully asks the court to dismiss the complaint and transfer the cause to the Fifth Judicial Circuit, Court of Common Pleas for Richland County.

Respectfully submitted,

CHILDS & HALLIGAN, P.A.

By: 

Kenneth L. Childs, S.C. Bar No. 1217
William F. Halligan, S.C. Bar No. 2607
John M. Reagle, S.C. Bar No. 14185
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(803) 254-4035

Attorneys for Defendant

February 3, 2010

Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Rocky Disabato d/b/a "Rocky D,"

Plaintiff,

vs.

South Carolina Association of School
Administrators,

Defendant.

C.A. No. 2011 CP 40-02044

**DEFENDANT'S RULE 12(B)(6)
MOTION TO DISMISS**

Defendant, South Carolina Association of School Administrators, respectfully moves this Court pursuant to Rule 12(b)(6) to dismiss the Complaint against it. Defendant's motion is made on the grounds that the Plaintiff's claim under the South Carolina Freedom of Information Act, § 30-4-10, et seq. (FOIA) against the Defendant is barred as a matter of law. The Defendant is a private non-profit corporation engaged in political speech and advocacy. To the extent the FOIA would purport to apply to private, non-profit entities engaging in political speech and advocacy, it is unconstitutional and violates the Fourteenth and First Amendment of the United States Constitution.

The Defendant, therefore, asks this Court to dismiss Plaintiff's complaint against it. The Defendant will rely on this Motion, the pleadings and record in this matter, a memorandum of law to be filed prior to a hearing on this motion and such other information as may properly come before the court.

Respectfully submitted,

CHILDS & HALLIGAN, P.A.

By: 

Kenneth L. Childs, S.C. Bar No. 1217
John M. Reagle, S.C. Bar No. 14185
~~Keith R. Powell~~, S.C. Bar No. 69292

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(803) 254-4035

Attorneys for Defendant

March 29, 2011

Columbia, South Carolina

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

South Carolina Association of School
Administrators,

Plaintiff,

vs.

Rocky Disabato d/b/a "Rocky D",

Defendant.

C.A. No. 3:10-271-CMC

**VERIFIED COMPLAINT FOR
DECLARATORY RELIEF**

INTRODUCTION

The South Carolina Association of School Administrators ("SCASA") brings this civil action for declaratory judgment against Rocky Disabato, d/b/a "Rocky D" ("Rocky D"), to obtain a judicial declaration regarding its rights under the First and Fourteenth Amendments to the United States Constitution with respect to the South Carolina Freedom of Information Act ("FOIA"), S.C. Code § 30-4-10, *et seq.* SCASA respectfully asks this Court through this declaratory judgment action to declare the FOIA to be violative of SCASA's First Amendment freedoms of speech, assembly, and association, both on its face and as applied. Relative to non-profit corporations engaged in political speech and issue advocacy, such as SCASA, the FOIA's broad record disclosure requirements chill the exercise of First Amendment rights, and the FOIA's open meeting requirements and vague application to any corporation supported in whole or in part by public funds constitute prior restraints on freedom of speech and association.

JURISDICTION AND VENUE

1. This is an action for declaratory relief pursuant to 28 U.S.C. § 2201, and this action arises under the First and Fourteenth Amendments to the United States Constitution.

2. This Court has jurisdiction of this action pursuant to 28 U.S.C. § 1331 and § 1343.

3. Venue is proper in this district and division pursuant to 28 U.S.C. § 121 and §1391(b), as Richland County, South Carolina, is where a substantial part of the events subject to this civil action occurred and where SCASA's records are generally maintained and its meetings are routinely held.

PARTIES

4. SCASA is a South Carolina non-profit corporation with its principal place of business in Richland County, South Carolina. SCASA is an eleemosynary organization, and its membership is a united alliance of diverse school leaders. SCASA is a leading force for public education in South Carolina and advocates for a superior education for the citizens of South Carolina by influencing education legislation and policy, stimulating and fostering support, building successful coalitions, ensuring a cadre of effective leaders, and providing programs and services for its members.

5. Defendant Rocky D is an individual who, upon information and belief, is a resident of Charleston County, South Carolina. Rocky D is a media personality who routinely advocates positions on legislative and social issues adverse to SCASA. Rocky D currently asserts that SCASA is a public body under the FOIA and is seeking a judicial declaration and permanent injunction against SCASA to compel SCASA's compliance with the FOIA, along with other appropriate relief. Rocky D's complaint filed in the Court of Common Pleas for the Ninth Judicial Circuit of the State of South Carolina is attached hereto as Exhibit 1.

BACKGROUND AND FACTUAL ALLEGATIONS

6. Molly Spearman is the executive director of SCASA. She is familiar with its operations and verifies the facts set forth below based on her personal knowledge, except where it is stated that the alleged act is made upon information and belief, in which case she believes

the allegations of fact to be true based on information available to her:

7. SCASA and its members associate, in part, politically to advocate for legislation and government policies in the context of education for social, political, and economic justice and equality, including maintenance and improvement of an integrated, public school system in South Carolina. SCASA's advocacy efforts in recent years have included such issues as support for enhanced public school funding and opposition to private school tax vouchers.

8. On May 22, 2009, SCASA commenced a civil action against South Carolina Governor Mark Sanford seeking a writ of mandamus requiring the Governor to apply to the Federal government on behalf of the State of South Carolina for Federal funds, including approximately \$780 million dollars for public education and other public services. On June 4, 2009, the South Carolina Supreme Court entered judgment in favor of SCASA on this claim and issued the requested writ of mandamus against the Governor.

9. In August 2009, Rocky D sent a letter to SCASA demanding records from it pursuant to the FOIA. Rocky D's FOIA demand sought records possessed or maintained by SCASA discussing both the American Recovery and Reinvestment Act of 2009 and Governor Mark Sanford, including by not limited to any references to the lawsuit filed by SCASA against Governor Mark Sanford in May 2009. Additionally, Rocky D's FOIA demand sought records reflecting all telephone calls made or received by SCASA and its staff from January 1, 2009, to July 31, 2009. A copy of Rocky D's FOIA letter is attached hereto as Exhibit 2. On September 4, 2009, Molly Spearman responded in writing to Rocky D on behalf of SCASA in writing stating that SCASA is not a public entity subject to the FOIA. A copy of Molly Spearman's correspondence to Rocky D, dated September 4, 2009, is attached hereto as Exhibit 3.

10. Thereafter, SCASA received no further communications from Rocky D, but on January 4, 2010, SCASA received the complaint, attached hereto as Exhibit 1, alleging SCASA to be a public body under the FOIA and seeking disclosure of the previously requested records,

along with a declaration that SCASA is a public body subject to the FOIA and a permanent injunction compelling SCASA's future compliance with the FOIA. The attorneys representing Rocky D in this state court civil action under the FOIA are Kevin A. Hall and Karl S. Bowers, Jr., who also have represented Governor Mark Sanford in various lawsuits and administrative actions. Additionally, attorneys Hall and Bowers represented Randall S. Page, the president of South Carolinians for Responsible Government, in a similar declaratory judgment action against SCASA that was dismissed without prejudice by mutual consent of the parties in 2009. A copy of the complaint in Mr. Page's civil action is attached hereto as Exhibit 4. On January 15, 2010, Rocky D propounded voluminous, invasive, and burdensome discovery requests on SCASA, seeking further disclosure of documents and information privileged under the First Amendment. A copy of these discovery requests are attached hereto as Exhibit 5.

11. Rocky D's demands for records under the FOIA from SCASA, concerning among other things SCASA's political speech and advocacy efforts relating to public issues, and Rocky D's efforts to obtain a judicial declaration that SCASA is a public body subject to the requirements of the FOIA, has had and will have a chilling effect on SCASA's and its members' exercise of their rights to freedom of assembly, speech, and association secured by the First Amendment.

12. Rocky D purports to be acting under the authority of the FOIA, a South Carolina statute, in seeking disclosure of records and a declaratory judgment and permanent injunction against SCASA. Rocky D's FOIA demand and subsequent civil action under the FOIA have the effect of chilling SCASA's and its members' exercise of their First Amendment freedoms of assembly, speech, and association, thereby impeding and interfering with SCASA's and its members' political speech and advocacy efforts on issues affecting public education in South Carolina, through the threatened authority and coercive power of the State of South Carolina.

13. The purpose of the FOIA, as provided by the General Assembly in its enactment,

is:

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 public performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy.

S.C. Code § 30-4-15.

14. The FOIA provides that "[a]ny person has a right to inspect or copy any public record of a public body, except as otherwise provided by § 30-4-40, in accordance with reasonable rules concerning time and place of access." S.C. Code § 30-4-30(a).

15. The FOIA further provides that "[e]very meeting of all public bodies shall be open to the public unless closed pursuant to § 30-4-70 of this chapter." S.C. Code § 30-4-60.

16. In furtherance of its open meetings requirement, § 30-4-80 of the FOIA mandates that

(a) All public bodies, except as provided in sub-sections (b) and (c) of this section must give written public notice of their regular meetings at the beginning of each calendar year. The notice must include the dates, times, and places of such meetings. Agenda, if any, for regularly scheduled meetings must be posted on a bulletin board at the office or meeting place of the public body at least twenty-four hours prior to such meetings. All public bodies must post on such bulletin board public notice for any called, special, or re-scheduled meetings. Such notice must be posted as early as is practicable but not later than twenty-four hours before the meeting. The notice must include the agenda, date, time, and place of the meeting. This requirement does not apply to emergency meetings of public bodies.

...

(d) Written public notice must include but need not be limited to posting a copy of the notice at the principal office of the public body holding the meeting or, if no such office exists, at the building in which the meeting is to be held.

(e) All public bodies shall notify persons or organizations, local news media, or such other news media as may request

notification of the times, dates, places, and agenda of all public meetings, whether scheduled, rescheduled, or called, and the efforts made to comply with this requirement must be noted in the minutes of the meetings.

S.C. Code § 30-4-80.

16. A "public body" is defined by the FOIA as:

"Public body" means. . . any organization, corporation, or agency supported in whole or in part by public funds or expending public funds. . . .

§ 30-4-20(a). The South Carolina Supreme Court has further expanded on this definition of "public body," holding that

[t]he 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 & Development Foundation, 303 S.C. 398,403, 401 S.E.2d 161, 164 (1991). The South Carolina Attorney General's Office has opined relying on Weston, that there is no "de minimus" public funds exception to the scope of FOIA's definition of "public body." 2006 WL 1574910 (May 19, 2006).

17. The FOIA additionally authorizes any citizen of the State to enforce its provisions through actions for declaratory judgment and/or injunctive relief, and the FOIA authorizes a court to award reasonable attorneys' fees and other costs of litigation to a prevailing plaintiff. S.C. Code § 30-4-100. The FOIA further provides that any person or group of persons who willfully violates its provisions shall be deemed guilty of a misdemeanor and, upon conviction, shall be fined or imprisoned. S.C. Code § 30-4-110.

18. Because of the FOIA's extremely broad yet vague definition of a public body which simultaneously fails to recognize any distinction between a public and private corporation,

coupled with the FOIA's broad and invasive open meeting and record disclosure requirements, the FOIA both on its face and as applied contravenes the First Amendment rights of private corporations engaged in political speech and issue advocacy, such as SCASA, and other politically active associational entities like the Chambers of Commerce.

19. The open meeting requirements of the FOIA with respect to private corporations engaged in political speech and issue advocacy operate as a prior restraint on the speech of such corporations and their members and further chill their speech, in violation of First Amendment rights.

20. Likewise, the FOIA's record disclosure requirement chills and impedes the political speech and issue advocacy of private corporations' and their members' rights to freedom of speech and freedom of association.

21. The chilling effect of the FOIA on the exercise of free speech rights occurs even though a private corporation engaged in political speech and issue advocacy has not been judicially declared to be a public body, simply because of the threat that such a declaration could occur. This threat is patent with respect to SCASA, and SCASA's and its members' speech has been and will continue to be chilled while they are subject to the threat of FOIA's application and its civil and criminal penalties.

22. The FOIA's chilling effect on free speech is exacerbated by the risk of ad hoc and discriminatory enforcement efforts due to the fact that any citizen may bring a lawsuit under the FOIA.

23. The FOIA further violates the First Amendment rights of corporations engaged in issue advocacy and their members because it exempts certain records and discussions of some issues from public disclosure. These exemptions, or the lack thereof, are tantamount to the government burdening (or favoring) speech relating to certain issues.

24. The FOIA also violates the First Amendment rights of private corporations

engaged in political speech and issue advocacy and their members because it operates to invade the First Amendment rights only of such corporations supported in whole or in part by public funds and not individuals supported in whole or in part by public funds, thereby discriminating against and burdening the speech and associational rights of corporations, as opposed to similarly situated individuals.

25. The FOIA also violates the First Amendment rights of private corporations engaged in political speech and issue advocacy that may benefit from public funds by requiring as a price for such funds or other special advantages from the government the forfeiture of First Amendment rights.

26. The FOIA's open meeting and public disclosure requirements are overly broad and limit and burden political speech without bearing even a substantial relation to a sufficiently important governmental interest. As stated in the FOIA, as previously alleged, the governmental interest sought to be vindicated or protected by the FOIA is that "it is vital in a democratic society that public business be performed in an open and public manner, so that citizens should 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 § 30-4-15. Imposing prior restraints on the meetings of private corporations and their members and mandating that their meetings be open to the public and subject to prior notice, as well as requiring that all records of the private corporation be accessible to the public, without regard to the amount of public funds or support received by the corporation or whether the records or discussions of the corporation and/or its members pertain to public funds, simply does not bear any substantial relationship to vindicating the interest of citizens to 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. Rather, these restrictions and mandates of the FOIA operate with respect to private corporations engaging in political speech and issue advocacy, to chill, stifle, and limit constitutionally protected speech,

thereby harming not only the citizens of the State but society as a whole, which is deprived of an uninhibited marketplace of ideas, and the FOIA's requirements necessarily reduce the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. The FOIA, therefore, represses speech and association by effectively silencing the voices of corporations like SCASA engaging in political speech and issue advocacy at multiple points in the speech and associational process and by preferring speech on certain topics and by certain persons or entities over others.

27. The purpose of the FOIA could be fully achieved with regard to public funds that support in whole or part private corporations in a more narrowly tailored manner by merely requiring appropriate reporting and disclosure of actions and records relating to the receipt and expenditure of such funds, as is currently required for many grants of public funds to private individuals and corporations.

28. State law already gives the state's Attorney General the authority to investigate the organization, conduct, and management of non-profit associations like SCASA, and to examine and "take copies" of records. S.C. Code §§ 33-31-170, et seq. Public disclosure of SCASA's records by the Attorney General is strictly limited. S.C. Code § 33-31-173. The Attorney General may bring a judicial dissolution action if, among other reasons, SCASA misappropriates or wastes its assets. S.C. Code § 33-31-1430 (a)(1).

PRAYER FOR RELIEF

29. SCASA prays this Court for a declaration that the FOIA violates the First Amendment and is unconstitutional in so far as its definition of public body encompasses private corporations engaging in political speech and issue advocacy and that, therefore, private corporations, including SCASA, are not subject to the FOIA. SCASA further prays the Court for such other and further relief as is just.

<signature page attached>

Respectfully submitted,

CHILDS & HALLIGAN, P.A.

By: s/John M. Reagle
Kenneth L. Childs, Fed. I.D. No. 122
William F. Halligan, Fed. I.D. No. 1680
John M. Reagle, Fed. I.D. No. 7723
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Attorneys for SCASA

February 2, 2010

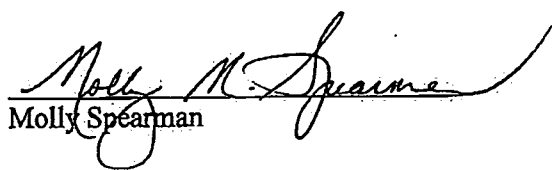
Columbia, South Carolina

STATE OF SOUTH CAROLINA)

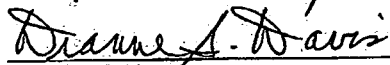
VERIFICATION

)
)
)

PERSONALLY APPEARED Molly Spearman, who, being duly sworn, deposes and says that she has read the foregoing Verified Complaint and that the same is true to deponent's own knowledge, except those matters stated on information and belief, and as to those matters, deponent believes them to be true.


Molly Spearman

SWORN TO BEFORE ME THIS 2nd
DAY OF February, 2010



NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires: 01-23-12

EXHIBIT 1

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

Rocky Disabato, d/b/a "Rocky D,")

Plaintiff,)

vs.)

South Carolina Association of School
Administrators,)

Defendant.)

Civil Action No.

09-CP-10-7593

COMPLAINT

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2009 DEC -7 PM 12:25

FILED

Plaintiff Rocky Disabato, d/b/a "Rocky D," hereby files this Complaint against Defendant South Carolina Association of School Administrators ("SCASA") and alleges as follows:

INTRODUCTION AND NATURE OF THE CASE

1. This litigation involves a violation of the South Carolina Freedom of Information Act ("FOIA") by SCASA. Plaintiff requested access to certain public records of SCASA that relate to its collusive efforts with the State Department of Education and others regarding the debate about the federal stimulus funds in the American Recovery and Reinvestment Act of 2009. SCASA refused to comply with this request and claimed that it is not subject to the FOIA. However, because SCASA meets the FOIA's definition of "public body," the statute is applicable and the organization is in violation of the FOIA by refusing to furnish access to these records. Accordingly, Plaintiff brings this suit to enforce his right of access under the FOIA, to ensure the right of access to all citizens by enjoining SCASA from further FOIA violations, and to recover his attorneys' fees and costs as directed by the statute.

PARTIES

2. Plaintiff Rocky D is a citizen and resident of Charleston County in the State of South Carolina, who hosts a radio talk show that is broadcast on 1250 AM WTMA.

3. SCASA is a corporate entity organized under the laws of the State of South Carolina with its principal place of business located in Richland County in the State of South Carolina.

JURISDICTION AND VENUE

4. This action is based on and seeks redress for a violation of the FOIA by SCASA. Jurisdiction is therefore properly in this Court pursuant to South Carolina Code § 30-4-100(a).

5. Venue is proper in this Court pursuant to South Carolina Code § 15-7-20.

BACKGROUND AND FACTUAL ALLEGATIONS

I. SCASA is Comprised of Public Employees and Officials

6. SCASA describes itself as "the leading force for public education" in South Carolina. See Ex. A, SCASA Website, "Mission Statement," <http://www.scasa.org/displaycommon.cfm?an=1&subarticlenbr=1> (last visited December 4, 2009).

7. Upon information and belief, SCASA's membership is comprised primarily, if not exclusively, of public employees.

8. Upon information and belief, until last year, SCASA's Executive Board was comprised exclusively of employees of public schools or public school districts in

South Carolina. SCASA's current Executive Board is comprised exclusively of public employees with three exceptions.

9. With few exceptions, SCASA's website provides viewers with links to the publicly-maintained email addresses for each of its Executive Board members:

<u>SCASA Executive Board Member</u>	<u>Public Email Address Linked To Website</u>
Nancy Gregory	ngregory@bm.richland2.org
Zona Jefferson	jefferson@sumter17.k12.sc.us
Rhett Dean	edean@marion7.k12.sc.us
Rodney Graves	rdgraves@echalk.spart7.org
Marion Douglas Waters	mwaters@greenville.k12.sc.us
Louis Lavelly	bmcdaniel@flo2.k12.sc.us
Daniel H. Matthews	daniel.matthews@kscdschools.net
Marisa Vickers	mvickers@richlandone.org
Marian Crum-Mack	mcrum-mack@richlandone.org
Jerome Hudson	hudsonj@anderson1.k12.sc.us
Nancy O. Verburg	nverburg@lexington1.net
Sandy Andrews	sandrews@rock-hill.k12.sc.us
Mike Mahaffey	mikemahaffey@anderson5.net
Randall Vaughn	vaughnr@gwd50.org
Teresa Hinnant	hinnantt@obg3.k12.sc.us
Marelyn Murdaugh	mmurdaugh@hampton1.k12.sc.us
Jeff Wilson	jeffwilson@anderson5.net

See Ex. B, SCASA Website, "SCASA Executive Board 2009-2010," <http://www.scasa.org/displaycommon.cfm?an=1&subarticlenbr=3> (last visited December 4, 2009).

II. SCASA is Supported by Public Funds

10. Upon information and belief, the South Carolina Department of Education, South Carolina's public schools, and South Carolina's public school districts provide public funds to SCASA in the form of direct disbursements.

11. Upon information and belief, the South Carolina Department of Education, South Carolina's public schools, and South Carolina's public school districts

provide public funds to SCASA indirectly by reimbursing their employees for costs incurred while planning, attending, and participating in SCASA meetings and events, as well as for dues paid to SCASA.

12. Upon information and belief, the South Carolina Department of Education, South Carolina's public schools, and South Carolina's public school districts provide public funds to SCASA by allowing their employees to conduct business on behalf of SCASA during normal business hours at their respective public offices, using publicly-provided email addresses, computers, telephones, office space, office supplies, utilities, administrative support, and other public resources.

13. At least part of SCASA's website is supported through public servers. *See* Ex. C, "SCASA's Technology Leaders' Roundtable," <http://www.dillon2.k12.sc.us/scasatechroundtable/Default.asp> (last visited December 4, 2009).

14. Upon information and belief, SCASA's employees are eligible to and do participate in the South Carolina State Health and Dental Insurance plan, which has been characterized as a "special perk" and a "taxpayer subsidy" due to the fact that the State spends between \$261 and \$602 of public funds per month, per employee to help each covered employee insure his or her family. *See* S.C. Code Ann. § 1-11-720(A)(15); Cindi Ross Scoppe, Associate Editor, "Legislature Has Another Sweet Perk, and It Could Be Skewing Policy," *The State*, March 5, 2008, at A6.

15. Upon information and belief, SCASA's employees are eligible to and do participate in the South Carolina Retirement System.

III. SCASA Performs Governmental Functions

16. In addition to its stated mission as "the leading force for public education," SCASA also performs the following governmental functions:

- 1) SCASA has the statutory responsibility of recommending superintendents and financial administrators of public school districts to three-year appointments as members of a "special committee" that evaluates proposals made pursuant to the Public School Employee Cost Savings Program, a program administered by the South Carolina Department of Education. *See* S.C. Code Ann. § 59-1-452.
- 2) SCASA has the statutory responsibility of advising the governor about potential members of the South Carolina Public Charter School District's board of trustees. *See id.* § 59-40-230.
- 3) Pursuant to South Carolina Code § 59-40-70, SCASA is a standing member of the Charter School Advisory Committee that has the statutory responsibility of reviewing and recommending approval or denial of applications for charter schools in South Carolina.
- 4) Pursuant to South Carolina Code § 59-141-10, SCASA had a statutory responsibility to give advice to the South Carolina Department of Education with regard to the Department's plan for achieving certain educational goals.

IV. Plaintiff's FOIA Request to SCASA

17. In August 2009, Plaintiff sent SCASA a written request pursuant to the South Carolina Freedom of Information Act. In this request, Plaintiff sought, and continues to seek, access to two categories of public records:

- 1) 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."
- 2) 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."

A copy of this letter is attached hereto as Exhibit D.

18. On September 4, 2009, Molly M. Spearman responded on behalf of SCASA to Plaintiff's FOIA request. In her letter, Ms. Spearman asserted that "SCASA is not a public entity and therefore does not have to comply with the Freedom of Information procedures." As a result, SCASA refused to provide Plaintiff with any of the public records sought in the FOIA request. A copy of this correspondence is attached hereto as Exhibit E.

19. In its September 4, 2009 letter, SCASA did not assert that the public records listed in Plaintiff's FOIA request were subject to any of the exemptions listed in South Carolina Code § 30-4-40(a).

20. SCASA has never provided the requested public records to Plaintiff, nor has it asserted any of the exemptions listed in South Carolina Code § 30-4-40(a) in response to Plaintiff's FOIA request.

FOR A FIRST CAUSE OF ACTION
(Declaration of a FOIA Violation)

21. Each and every allegation contained in the preceding paragraphs is realleged and reasserted as if set forth verbatim herein.

22. In promulgating the FOIA, the General Assembly determined 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 public performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. Toward this end, provisions of [the FOIA] must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.

S.C. Code Ann. § 30-4-15.

23. In this vein, a violation of the FOIA "must be considered an irreparable injury for which no adequate remedy at law exists." *Id.* § 30-4-100(a).

24. The FOIA provides that "[a]ny person has a right to inspect or copy any public record of a public body, except as otherwise provided by § 30-4-40, in accordance with reasonable rules concerning time and place of access." *Id.* § 30-4-30(a).

25. The FOIA defines "public body" in pertinent part as follows:

"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.

Id. § 30-4-20(a).

26. "[T]he 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).

27. SCASA is a "public body," as defined by the FOIA, by virtue of:

- (1) its support by public funds through (a) direct and indirect disbursements from the South Carolina Department of Education, South Carolina's public schools, and South Carolina's public school districts, (b) its members' use of public resources to conduct SCASA's business, (c) participation in the State Health and Dental Insurance plan, and (d) participation in the State Retirement System;
- (2) its statutory obligations to perform certain governmental functions, including giving advice to various public officials and agencies and serving on the Charter School Advisory Committee; and/or
- (3) its membership and Executive Board being comprised almost entirely of public employees.

28. The FOIA defines "public record" in pertinent part as follows: "'Public record' includes all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body." S.C. Code Ann. § 30-4-20(c).

29. The materials sought by Plaintiff in his FOIA request are "public records," as defined by FOIA.

30. None of the materials sought by Plaintiff in his FOIA request are subject to any of the exemptions listed in South Carolina Code § 30-4-40(a), nor has SCASA ever asserted that any of these exemptions are applicable to Plaintiff's request.

31. Because SCASA refused to provide Plaintiff with the requested public records pursuant to the FOIA, it has violated South Carolina Code § 30-4-30(a).

32. South Carolina Code § 30-4-100(b) provides that if a party prevails in enforcing the provisions of the FOIA, "he or it may be awarded reasonable attorney fees and other costs of litigation."

33. Accordingly, Plaintiff seeks a declaratory judgment from this Court that:

- (1) SCASA is a "public body," as defined by the FOIA;

(2) By refusing to comply with Plaintiff's FOIA request, SCASA has violated the FOIA; and

(3) Plaintiff is entitled to recover his costs and attorneys' fees from SCASA pursuant to South Carolina Code § 30-4-100(b).

FOR A SECOND CAUSE OF ACTION
(Injunction from Further FOIA Violations)

34. Each and every allegation contained in the preceding paragraphs is realleged and reasserted as if set forth verbatim herein.

35. Despite a request from Plaintiff to provide access to certain public records, SCASA has acted and continues to act in open violation of its duties and obligations under the FOIA.

36. The FOIA places an ongoing obligation on SCASA to provide access to its public records and its meetings.

37. Pursuant to South Carolina Code § 30-4-100(a), Plaintiff is entitled to injunctive relief prohibiting SCASA from continuing to violate the FOIA and requiring SCASA to comply with the FOIA.

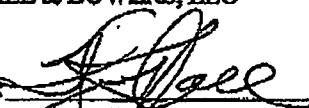
PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against SCASA providing the following relief:

- (a) That the Court declare that SCASA is a "public body," as defined by the South Carolina Freedom of Information Act;
- (b) That the Court declare that SCASA has violated the South Carolina Freedom of Information Act by refusing to provide access to public records;
- (c) That the Court enter an order enjoining SCASA from continuing its violation of the South Carolina Freedom of Information Act and requiring SCASA to comply with the provisions of the South Carolina Freedom of Information Act;

- (d) Attorneys' fees and costs as provided by South Carolina Code § 30-4-100(b); and
- (e) Such other and further relief as this Court deems just and proper.

HALL & BOWERS, LLC

By: 

Kevin A. Hall

SC Bar No. 015063

Email: kevin.hall@hallbowers.com

Karl S. Bowers, Jr.

SC Bar No. 16141

Email: butch.bowers@hallbowers.com

M. Todd Carroll

SC Bar No. 74000

Email: todd.carroll@hallbowers.com

1329 Blanding Street

Post Office Box 12107 (29211)

Columbia, SC 29201

(803) 454-6504

Attorneys for Plaintiff Rocky D

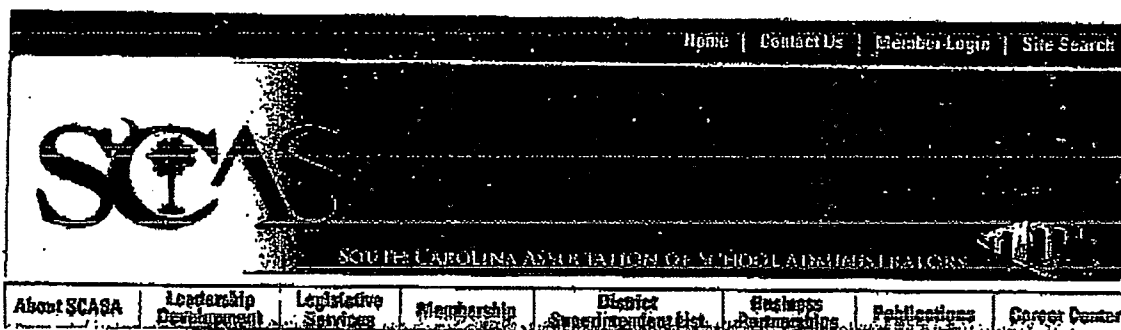
December 4, 2009
Columbia, South Carolina

Exhibit A

**Screenshot of SCASA's "Beliefs, Mission,
and Objectives" Website**

South Carolina Association of School Administrators: Mission Statement

Page 1 of 1



Bellefs, Mission, and Objectives

We Believe:

- God created one race: the human race.
- Children have first call on society's resources.
- The family is the primary influence in the development of the individual.
- Successful human relationships depend on effective communication.
- All people need to give and receive love.
- People have a responsibility to help each other.
- All people inherently have worth.
- All people deserve to be treated fairly.
- Understanding self is essential to leading others.
- Integrity is necessary for respect.
- The individual has the right to self determination.
- Each person has the capacity to learn.
- Everyone has the right to the best education possible.
- Individual accomplishment is determined by effort more than ability.
- Human potential, individual or collective, is unlimited.
- Success can be measured in terms of goals.
- Higher expectations yield higher results.

Mission Statement:

The mission of SCASA, a united alliance of diverse school leaders and the leading force for public education in our state, is to advocate for a superior education for the citizens of South Carolina by influencing education legislation and policy, stimulating and fostering support, building successful coalitions, ensuring a cadre of effective leaders, and providing programs and services for members.

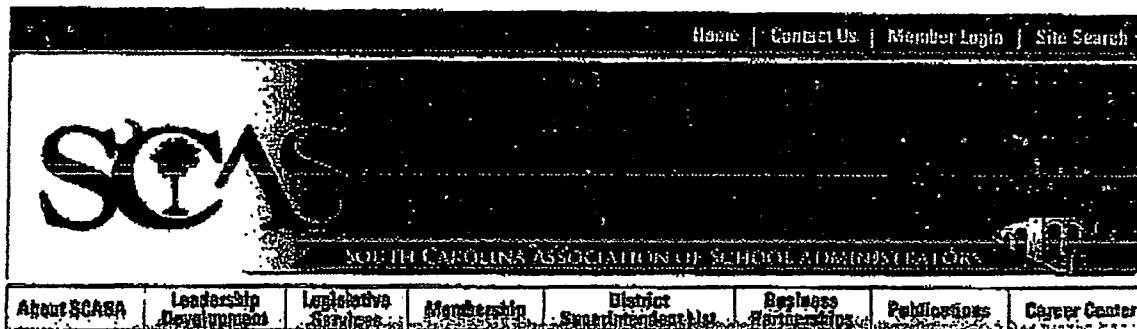
Objectives:

1. SCASA will be recognized as the leading force for education in South Carolina.
2. All eligible educators will be members of SCASA.
3. South Carolina will exceed all national and international educational standards.

South Carolina Association of School Administrators
121 Westpark Boulevard, Suite A
Columbia, SC 29210
Phone: 803-798-8380
Fax: 803-731-8429

Exhibit B

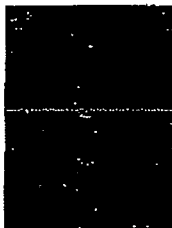
**Screenshot of SCASA's
2009-10 Executive Board**



SCASA Executive Board 2009-2010

The SCASA Executive Board is made up of president, president-elect and past president (elected by the SCASA membership), and board representatives (elected by each division, based on division membership).

**SCASA President
2009-2010**



Dr. Joanne Avery
Deputy Superintendent
Anderson District 4

**SCASA President Elect
2010-2011**



Mrs. Nancy Gregory
Director of Curriculum, Instruction &
Professional Development
Richland District 2

**SCASA Past President
2008-2009**



Mr. John Tindal
Superintendent
Clarendon District 2

Superintendents' Division Representatives



Dr. Zana Jefferson
Sumter District 17



Dr. Brett Dean
Marion District 7

Secondary Principals' Representatives



Mr. Rodney Graves
Spartanburg High School
Spartanburg District 7

Mr. Marion Douglas Waters
Greenville County Schools



Mr. Louis Lusk
Travelers Rest High School
Greenville County Schools

Middle Level Principals' Representatives

South Carolina Association of School Administrators: Executive Board

Page 2 of 3



Mr. Daniel H. Matthews
Kershaw County Schools



Ms. Marian Vickers
Hard Middle School
Richland District 1

Elementary Principals' Representatives



Ms. Christina Melton
Lexington District 3



Dr. Marian Crum-Mack
Brennan Elementary School
Richland District 1



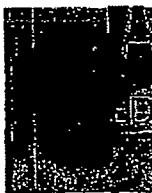
Mr. Jerome Hudson
Palmetto Elementary School
Anderson District 1

Career & Technology Education Administrators' Representatives



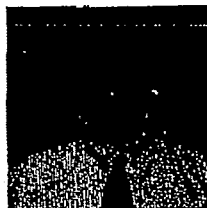
Ms. Nancy O. Verburg
Lexington District 1

Adult Education Directors' Representative



Ms. Sandy Andrews
Director, Adult and Community Education
York District 3

Personnel Administrators' Representatives



Mr. Mike Mahaffey
Anderson District 3



Mr. Randal Vaughn
Greenwood District 60

Education Specialists' Division Representatives



Mrs. Madelyn Murchugh
Hampton District 1



Mrs. Teresa Hinson
Orangeburg Consolidated 3

South Carolina Association of School Administrators: Executive Board

Page 3 of 3

Instructional Leaders' Representatives



Dr. Jeff Village
Anderson District 5

Education Deans' Representative



Dr. David W. Blackmon

Higher Education Representative



Dr. Mark Mitchell
Assistant Professor of Ed. Leadership
Winthrop University

Business Representative



Mr. Chris Christensen
R.L. Bryan Company

South Carolina Association of School Administrators
121 Westpark Boulevard, Suite A
Columbia, SC 29210
Phone: 803-788-8380
Fax: 803-731-8429

Exhibit C

**Screenshot of SCASA's "Technology
Leaders' Roundtable"**

Dillon School District Two

Page 1 of 1

About Us

SCASA
Home
Officers
Meeting
Dates
Minutes
TLR Home



Tech Info

- ▶ Covenants
- ▶ Membership Information
- ▶ Listserv Information
- ▶ Technology Topics

The Technology Leaders' Roundtable

Welcome

About the Roundtable

SCASA consolidates the resources and strength of administrators in every phase of education. Eight divisions enable professionals to network with others who share their immediate concerns, while the association as a whole provides a strong foundation for educational improvement and individual professional growth. The Technology Leaders' Roundtable lies within the Allied School Administrators' Division which consists of Directors of Technology, Guidance, Curriculum and others.

Technology Leaders Working Together for Students and Teachers

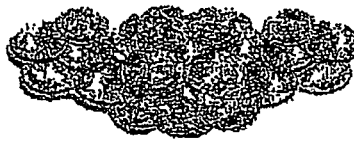


Exhibit D

Rocky D's FOIA Request to SCASA



The Price of Liberty



Molly Spearman
Executive Director
South Carolina Association of School Administrators
121 Westpark Blvd.
Columbia, SC 29210
RE: FOIA Request

Dear Ms. Spearman:

Pursuant to the South Carolina Freedom of Information Act, I hereby request that you provide me with a copy 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. I also request that you provide me with a copy 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. Your response is due within fifteen days.

Sincerely,

Rocky D / WTMA
c.o. Citadel Broadcasting
4230 Faber Place
North Charleston, SC. 29405
843-277-1200

Exhibit E

**SCASA's Response to
Rocky D's FOIA Request**



SCASA DIVISIONS

School Superintendents

Secondary Principals

Middle Level Principals

Elementary Principals

Career & Technology
Education Administrators

Adult Education
Directors

School Personnel
Administrators

Allied School
Administrators

September 4, 2009

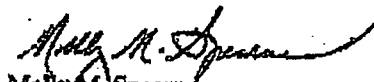
Rocky D/WTMA
c.o. Citadel Broadcasting
4230 Faber Place
North Charleston, SC 29405

Dear Rocky D:

The South Carolina Association of School Administrators is not a public entity and therefore does not have to comply with the Freedom of Information procedures. I telephoned your office on Friday, September 04, 2009 and unfortunately, you were not available. I will be happy to talk with you about your interest and would try and provide you with as much information as possible verbally regarding the stimulus funding issue and Governor Sanford.

Thank you.

Sincerely,


Molly M. Spearman
Executive Director

South Carolina Association of School Administrators
121 Westpark Boulevard ■ Columbia, SC 29210
(803) 798-8380 ■ FAX (803) 731-8429
www.scasasa.org

EXHIBIT 2



The Price of Liberty



Molly Spearman
Executive Director
South Carolina Association of School Administrators
121 Westpark Blvd.
Columbia, SC 29210
RE: FOIA Request

Dear Ms. Spearman:

Pursuant to the South Carolina Freedom of Information Act, I hereby request that you provide me with a copy 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. I also request that you provide me with a copy 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. Your response is due within fifteen days.

Sincerely,

Rocky D / WTMA
c.o. Citadel Broadcasting
4230 Faber Place
North Charleston, SC. 29405
843-277-1200

EXHIBIT 3



SCASA DIVISIONS

School Superintendents

Secondary Principals

Middle Level Principals

Elementary Principals

Career & Technology
Education Administrators

Adult Education
Directors

School Personnel
Administrators

Allied School
Administrators

September 4, 2009

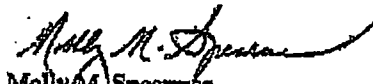
Rocky D/WTMA
c/o. Citadel Broadcasting
4230 Faber Place
North Charleston, SC 29405

Dear Rocky D:

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Thank you.

Sincerely,


Molly M. Spearman
Executive Director

South Carolina Association of School Administrators
121 Westpark Boulevard ■ Columbia, SC 29210
(803) 798-8380 ■ FAX (803) 731-8429
www.scasasa.org

EXHIBIT 4

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
Randall S. Page,	)	Civil Action No. 2008-CP-40-1869
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	<u>AMENDED COMPLAINT</u>
South Carolina Association of School	)	
Administrators,	)	
	)	
Defendant.	)	

Pursuant to Rule 15(a) of the South Carolina Rules of Civil Procedure, Plaintiff Randall S. Page hereby amends his Complaint against Defendant South Carolina Association of School Administrators ("SCASA") and alleges as follows:

INTRODUCTION AND NATURE OF THE CASE

1. This litigation involves a violation of the South Carolina Freedom of Information Act ("FOIA") by SCASA. Plaintiff requested access to certain public records of SCASA that relate to that organization's relationship with a political action committee. SCASA refused to comply with Plaintiff's request and claimed that it is not subject to the statute. However, because SCASA meets the FOIA's definition of "public body," the statute is applicable and the organization is in violation of the FOIA by refusing to furnish access. Accordingly, Plaintiff brings this suit to enforce his right of access under the FOIA, to ensure the right of access to all citizens by enjoining SCASA from further FOIA violations, and to recover his attorneys' fees and costs as directed by the statute. Additionally, Plaintiff seeks declaratory and injunctive relief, as well as to recover his attorneys' fees and costs, in connection with having to defend

against frivolous counterclaims pressed by SCASA in an apparent attempt to delay disclosure of the information requested.

PARTIES

2. Plaintiff is a citizen and resident of Lexington County in the State of South Carolina.

3. SCASA is a corporate entity organized under the laws of the State of South Carolina with its principal place of business located in Richland County in the State of South Carolina.

JURISDICTION AND VENUE

4. This action is based on and seeks redress for a violation of the FOIA by SCASA. Jurisdiction is therefore properly in this Court pursuant to South Carolina Code § 30-4-100(a).

5. Because SCASA has its principal place of business in Richland County, venue is proper in this Court pursuant to South Carolina Code § 15-7-30.

BACKGROUND AND FACTUAL ALLEGATIONS

I. SCASA is Comprised of Public Employees and Officials

6. SCASA describes itself as "the leading force for public education" in South Carolina. See Ex. A, SCASA Website, "Mission Statement," <http://www.scasa.org/displaycommon.cfm?an=1&subarticlenbr=1> (last visited April 28, 2008).

7. Upon information and belief, SCASA's membership is comprised exclusively of public employees.

8. SCASA's Executive Board is comprised exclusively of employees of public schools or public school districts in South Carolina. See Ex. B, SCASA Website, "SCASA Executive Board 2007-2008," <http://www.scasa.org/displaycommon.cfm?an=1&subarticlenbr=3> (last visited April 28, 2008).

9. With one exception, SCASA's website provides viewers with links to the following publicly-maintained email addresses for each of its Executive Board members:

<u>SCASA Executive Board Member</u>	<u>Public Email Address Linked To Website</u>
Dr. Steve Hefner	shefner@richland2.org
John Tindal	jtindal@clarendon2.k12.sc.us
Dr. James O. Ray, Sr.	jray@Spa3.K12.sc.us
Dr. Rhett Dean	edean@marion7.k12.sc.us
Rodney Graves	rdgraves@echalk.spart7.org
Edward Dean	deanr@kcsd.k12.sc.us
Bernard McDaniel	bmcDaniel@flo2.k12.sc.us
Nancy Gregory	ngregory@bm.richland2.org
Marisa Vickers	mvickers@richlandone.org
Dr. Evelyn Cohens	ecohens@richlandone.org
Jerome Hudson	hudsonj@anderson1.k12.sc.us
Nancy O. Verburg	nverburg@lexington1.net
Sandy Andrews	sandrews@rock-hill.k12.sc.us
Mike Mahaffey	mikemahaffey@anderson5.net
Dr. John Gardner	gardnerj@kcsd.k12.sc.us
Teresa Hinnant	hinnantt@obg3.k12.sc.us
Marelyn Murdaugh	mmurdaugh@hampton1.k12.sc.us

See id.

II. SCASA is Supported by Public Funds

10. Upon information and belief, the South Carolina Department of Education, South Carolina's public schools, and South Carolina's public school districts provide public funds to SCASA in the form of direct disbursements.

11. Upon information and belief, the South Carolina Department of Education, South Carolina's public schools, and South Carolina's public school districts provide public funds to SCASA indirectly by reimbursing their employees for costs incurred while planning, attending, and participating in SCASA meetings and events, as well as for dues paid to SCASA.

12. Upon information and belief, the South Carolina Department of Education, South Carolina's public schools, and South Carolina's public school districts provide public funds to SCASA by allowing their employees to conduct business on behalf of SCASA during normal business hours at their respective public offices, using publicly-provided email addresses, computers, telephones, office space, office supplies, utilities, administrative support, and other public resources.

13. At least part of SCASA's website is supported through public servers. See Ex. C, "SCASA's Technology Leaders' Roundtable," <http://www.dillon2.k12.sc.us/scasatechroundtable/Default.asp> (last visited April 28, 2008).

14. Upon information and belief, SCASA's employees are eligible to and do participate in the South Carolina State Health and Dental Insurance plan, which has been characterized as a "special perk" and a "taxpayer subsidy" due to the fact that the State spends between \$261 and \$602 of public funds per month, per employee to help each covered employee insure his or her family. See Ex. D, S.C. Code Ann. § 1-11-720(A)(15); Ex. E, Cindi Ross Scoppe, Associate Editor, "Legislature Has Another Sweet Perk, and It Could Be Skewing Policy," *The State*, March 5, 2008, at A6.

15. Upon information and belief, SCASA's employees are eligible to and do participate in the South Carolina Retirement System.

III. SCASA Performs Governmental Functions

16. In addition to its stated mission as "the leading force for public education," SCASA also performs the following governmental functions:

- 1) SCASA has the statutory responsibility of recommending superintendents and financial administrators of public school districts to three-year appointments as members of a "special committee" that evaluates proposals made pursuant to the Public School Employee Cost Savings Program, a program administered by the South Carolina Department of Education. *See* Ex. D, S.C. Code Ann. § 59-1-452.
- 2) SCASA has the statutory responsibility of giving advice to the governor about potential members of the South Carolina Public Charter School District's board of trustees. *See id.* § 59-40-230.
- 3) Pursuant to South Carolina Code § 59-40-70, SCASA is a standing member of the Charter School Advisory Committee that has the statutory responsibility of reviewing and approving or denying applications for charter schools in South Carolina.
- 4) Pursuant to South Carolina Code § 59-141-10, SCASA had a statutory responsibility to give advice to the South Carolina Department of Education with regard to the Department's plan for achieving certain educational goals.

IV. SCASA is Linked to the Leaders in Education Administration Political Action Committee

17. In its Mission Statement, SCASA proposes to "influenc[e] education legislation and policy" by "building successful coalitions." *See* Ex. A, SCASA Website, "Mission Statement," <http://www.scasa.org/displaycommon.cfm?an=1&subarticlenbr=1> (last visited April 28, 2008).

18. SCASA offers "legislative services" for its members. *See* Ex. F, SCASA Website, "Legislative Services," <http://www.scasa.org/displaycommon.cfm?an=2> (last visited April 28, 2008). It advertises these services as one of the primary

benefits that members will receive, telling prospective members that "SCASA maintains representation on behalf of students and administrators at the highest level of state government through the Association's legislative network." See Ex. G, SCASA Website, "Join SCASA," <http://www.scasa.org/displaycommon.cfm?an=14> (last visited April 28, 2008).

19. SCASA is registered as a lobbyist's principal with the South Carolina State Ethics Commission. As of April 21, 2008, the State Ethics Commission lists Mia M. Butler, Amelia B. McKie, and Elizabeth A. Phibbs as the lobbyists of record for SCASA. See Ex. H, Non-State Agency Lobbyist Principal Report, at 13 (updated Apr. 21, 2008), available at <http://www.scstatehouse.net/reports/NonStateLobbPrinApr212008.pdf>.

20. In 2007, the Leaders in Education Administration Political Action Committee ("LEAPAC") was formed, ostensibly to defend the existing structure of South Carolina's public education system. According to LEAPAC's filings with the State Ethics Commission, the overwhelming majority of its contributors are employed by the South Carolina Department of Education, South Carolina's public school districts, or South Carolina's public schools. See Ex. I, Leaders in Education Administration PAC Campaign Disclosure Form (July 12, 2007); Ex. J, Leaders in Education Administration PAC Campaign Disclosure Form (Oct. 10, 2007); Ex. K, Leaders in Education Administration PAC Campaign Disclosure Form (Jan. 9, 2008).

21. According to LEAPAC's filings with the State Ethics Commission, LEAPAC and SCASA share the same mailing address:

121 Westpark Boulevard
Columbia, South Carolina 29210.

22. According to LEAPAC's filings with the State Ethics Commission, LEAPAC and SCASA share the same telephone number:

(803) 798-8380.

V. Plaintiff's FOIA Request to SCASA

23. On August 10, 2007, Plaintiff sent SCASA a written request pursuant to the South Carolina Freedom of Information Act. In this request, Plaintiff sought, and continues to seek, access to two categories of public records:

- 1) Copies of any and all records, including but not limited to all correspondence, memoranda, emails, telephone records, and lists of contributions, contributors, expenditures, loans, debts, and obligations, related to the establishment, organization, operation, administration, or fundraising of the Leaders in Education Administration PAC.
- 2) Copy of the employment contract between the South Carolina Association of School Administrators and Jerry E. Welch, Jr.

24. On August 24, 2007, Molly M. Spearman responded on behalf of SCASA to Plaintiff's FOIA request. In her letter, Ms. Spearman asserted that "SCASA is not a public body subject to the requirements of the [Freedom of Information] Act." As a result, SCASA refused to provide Plaintiff with any of the public records sought in his FOIA request. A copy of this correspondence is attached hereto as Exhibit L.

25. In its August 24, 2007 letter, SCASA did not assert that the public records listed in Plaintiff's FOIA request were subject to any of the exemptions listed in South Carolina Code § 30-4-40(a).

26. On September 2, 2007, the *Myrtle Beach Sun News* published an opinion column authored by Ms. Spearman entitled "Vouchers Lobby Group Abuses FOI

Requests.” The column expressly criticized those who submit FOIA requests to public school districts. See Ex. M, Molly Spearman, “Vouchers Lobby Group Abuses FOI Requests,” *Myrtle Beach Sun News*, Sept. 2, 2007, at D4. It then explained that some public educators:

have chosen to get involved politically by contributing to a new political action committee. This new committee, the Leaders in Education Administration PAC, has been established to counter the influx of out-of-state, anti-public school money in our elections, and to support the lawmakers and candidates who take a principled stand toward the continued investment in our state’s future.

Id. A copy of this opinion column is also available on the campaign website of Dr. Jim Rex, South Carolina’s current Superintendent of Education. See Ex. N, Molly Spearman, “Vouchers Lobby Group Abuses FOI Requests,” available at <http://www.jimrex.com/news/?id=200> (last visited April 28, 2008).

27. On September 6, 2007, Plaintiff wrote SCASA a second letter that reiterated his request pursuant to the FOIA. In this correspondence, Plaintiff explained to SCASA that it is a “public body” subject to the FOIA’s terms. Also, Plaintiff put SCASA on notice that its failure to respond to his FOIA request would cause him “to consider [his] legal options to enforce the provisions of the FOIA, which would include but not be limited to seeking [his] costs and attorney’s fees associated with taking such action.” A copy of this correspondence is attached hereto as Exhibit O.

28. On September 17, 2007, counsel for SCASA responded to Plaintiff’s September 6, 2007 letter. In this correspondence, SCASA asserted that it “disagree[s] with [Plaintiff’s] contention that SCASA is a public body within the meaning of the South Carolina Freedom of Information Act” and again refused to comply with

Plaintiff's FOIA request. SCASA also confirmed its awareness of the possibility of a lawsuit as the result of its refusal to comply with the FOIA. A copy of this correspondence is attached hereto as Exhibit P.

29. As with its August 24, 2007 letter, SCASA did not assert that the public records listed in Plaintiff's FOIA request were subject to any of the exemptions listed in South Carolina Code § 30-4-40(a) in its September 17, 2007 correspondence.

30. SCASA has never provided the requested public records to Plaintiff, nor has it asserted any of the exemptions listed in South Carolina Code § 30-4-40(a) in response to Plaintiff's FOIA request.

FOR A FIRST CAUSE OF ACTION
(Declaration of a FOIA Violation)

31. Each and every allegation contained in the preceding paragraphs is realleged and reasserted as if set forth verbatim herein.

32. In promulgating the FOIA, the South Carolina General Assembly determined:

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 public performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. Toward this end, provisions of [the FOIA] must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.

Ex. D, S.C. Code Ann. § 30-4-15.

33. In this vein, a violation of the FOIA "must be considered an irreparable injury for which no adequate remedy at law exists." *Id.* § 30-4-100(a).

34. The FOIA provides that "[a]ny person has a right to inspect or copy any public record of a public body, except as otherwise provided by § 30-4-40, in accordance with reasonable rules concerning time and place of access." *Id.* § 30-4-30(a).

35. The FOIA defines "public body" in pertinent part as follows:

"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.

Id. § 30-4-20(a).

36. "[T]he 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." Ex. Q, *Weston v. Carolina Research & Dev. Found.*, 303 S.C. 398, 403, 401 S.E.2d 161, 164 (1991).

37. SCASA is a "public body," as defined by the FOIA, by virtue of:

- (1) its support by public funds through (a) direct and indirect disbursements from the South Carolina Department of Education,

South Carolina's public schools, and South Carolina's public school districts, (b) its members' use of public resources to conduct SCASA's business, (c) participation in the State Health and Dental Insurance plan, and (d) participation in the State Retirement System;

(2) its statutory obligations to perform certain governmental functions, including giving advice to various public officials and agencies and serving on the Charter School Advisory Committee; and

(3) its membership and Executive Board being comprised entirely of public employees.

38. The FOIA defines "public record" in pertinent part as follows: "'Public record' includes all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body." Ex. D, S.C. Code Ann. § 30-4-20(c).

39. The materials sought by Plaintiff in his FOIA request are "public records," as defined by FOIA.

40. None of the materials sought by Plaintiff in his FOIA request are subject to any of the exemptions listed in South Carolina Code § 30-4-40(a), nor has SCASA ever asserted that any of these exemptions are applicable to Plaintiff's request.

41. Because SCASA refused to provide Plaintiff with the requested public records pursuant to the FOIA, it has violated South Carolina Code § 30-4-30(a).

42. South Carolina Code § 30-4-100(b) provides that if a party prevails in enforcing the provisions of the FOIA, "he or it may be awarded reasonable attorney fees and other costs of litigation."

43. Accordingly, Plaintiff seeks a declaratory judgment from this Court that:

(1) By refusing to comply with Plaintiff's FOIA request, SCASA has violated the FOIA; and

- (2) Plaintiff is entitled to recover his costs and attorneys' fees from SCASA pursuant to South Carolina Code § 30-4-100(b).

FOR A SECOND CAUSE OF ACTION
(Injunction from Further FOIA Violations)

44. Each and every allegation contained in the preceding paragraphs is realleged and reasserted as if set forth verbatim herein.

45. Despite requests from Plaintiff to provide access to certain public records, SCASA has acted and continues to act in open violation of its duties and obligations under the FOIA.

46. The FOIA places an ongoing obligation on SCASA to provide access to its public records and its meetings.

47. Pursuant to South Carolina Code § 30-4-100(a), Plaintiff is entitled to injunctive relief prohibiting SCASA from continuing to violate the FOIA and requiring SCASA to comply with the FOIA.

FOR A THIRD CAUSE OF ACTION
(Violation of the South Carolina Frivolous Civil Proceedings Sanctions Act)

48. Each and every allegation contained in the preceding paragraphs is realleged and reasserted as if set forth verbatim herein.

49. In responding to Plaintiff's Complaint, SCASA asserted four putative counterclaims, styled as follows: a) "Abuse of Process," b) "Conspiracy to Harm," c) "42 U.S.C. § 1985 Conspiracy to Deprive of Rights and Privileges," and d) "42 U.S.C. § 1983." See Ans., Affirmative Defenses, and Countercls. ¶¶ 53-81 (Apr. 11, 2008).

50. The latter two of these claims alleged putative violations by Plaintiff of SCASA's alleged First Amendment "rights to association and speech." *Id.* ¶¶ 69, 77.

51. It is hornbook law that First Amendment rights are only secured against intrusion by the government, not by a private citizen such as Plaintiff. *See, e.g., Rendell-Baker v. Kohn*, 457 U.S. 830, 837 (1982) ("[I]t is fundamental that the First Amendment prohibits governmental infringement on the right of free speech.").

52. In pressing these claims of a First Amendment violation, SCASA did not provide a single allegation that Plaintiff is the "government" or a state actor in any way, nor would there be any conceivable basis for such an allegation under existing jurisprudence. As a result, no reasonable attorney would believe there to be any basis for prosecuting these claims against Plaintiff.

53. South Carolina Code § 15-36-10(C)(1) provides that a party "shall be sanctioned" for a frivolous claim when:

- (a) a reasonable attorney in the same circumstances would believe that under the facts, his claim . . . was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law;
- (b) a reasonable attorney in the same circumstances would believe that his procurement, initiation, continuation, or defense of the civil suit was intended merely to harass or injure the other party; or
- (c) a reasonable attorney in the same circumstances would believe that the case or defense was frivolous as not reasonably founded in fact or was interposed merely for delay

54. Because no reasonable attorney would believe that Plaintiff, a private citizen, is a state actor capable of violating the First Amendment rights of others, SCASA has violated South Carolina Code § 15-36-10(C)(1).

55. Upon information and belief, SCASA has wrongly attempted to delay ultimate adjudication this case by asserting these frivolous claims. Further, SCASA has wrongly attempted to inflame the public against Plaintiff by improperly casting him as one who violates civil rights.

56. South Carolina Code § 15-36-10(G) provides that a party prosecuting a frivolous claim may be required "to pay the reasonable costs and attorney's fees of the prevailing party," and it also authorizes the Court to issue "a directive of a nonmonetary nature, including injunctive relief, designed to deter a future frivolous action or an action in bad faith."

57. Accordingly, Plaintiff requests that the Court enter an order that :

- (1) Awards Plaintiff his costs and attorneys' fees; and
- (2) Enjoins SCASA from continuing, initiating, or commencing frivolous litigation against Plaintiff and from continuing, initiating, or commencing litigation against Plaintiff in bad faith.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against SCASA providing the following relief:

- (a) That the Court enter an order declaring that SCASA has violated the South Carolina Freedom of Information Act;
- (b) That the Court enter an order enjoining SCASA from continuing its violation of the South Carolina Freedom of Information Act and requiring SCASA to comply with the provisions of the South Carolina Freedom of Information Act;
- (c) Attorneys' fees and costs as provided by South Carolina Code § 30-4-100(b);
- (d) That the Court enter an order declaring that SCASA's counterclaims against Plaintiff were frivolous;

- (e) That the Court enter an order enjoining SCASA from filing similarly frivolous claims against Plaintiff in any forum or from filing claims against Plaintiff in bad faith in any forum;
- (f) Attorneys' fees and costs as provided by South Carolina Code § 15-36-10(G); and
- (g) Such other and further relief as this Court deems just and proper.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: Kevin A. Hall
Kevin A. Hall
SC Bar No. 015063
M. Todd Carroll
SC Bar No. 74000
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Plaintiff

Columbia, South Carolina

May 9, 2008

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Plaintiff Randall S. Page, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by having a copy of the same sent via United States Mail to the following address(es):

Pleadings:

AMENDED COMPLAINT

Party Served:

William F. Halligan, Esquire
Childs & Halligan, PA
P.O. Box 11367
Columbia, SC 29211

Attorneys for Defendant


Deborah L. Johnson
Administrative Assistant

May 9, 2008

EXHIBIT 5

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
Rocky Disabato, d/b/a "Rocky D,"	)	Civil Action No. 09-CP-10-7593
	)	
Plaintiff,	)	
	)	
vs.	)	<u>PLAINTIFF'S FIRST SET OF</u>
	)	<u>REQUESTS TO PRODUCE</u>
	)	<u>DOCUMENTS</u>
South Carolina Association of School	)	
Administrators,	)	
	)	
Defendant.	)	

Pursuant to Rules 26 and 34 of the South Carolina Rules of Civil Procedure, Plaintiff Rocky D, though his undersigned attorneys, hereby submits his First Set of Requests to Produce to Defendant South Carolina Association of School Administrators ("SCASA"), to which written and sworn answers shall be submitted in accordance with the South Carolina Rules of Civil Procedure. After so responding to the following Requests to Produce, should further information called for therein come to the knowledge or attention of SCASA, then SCASA is required to properly transmit such information by supplemental responses to these Requests to Produce in accordance with Rule 26(e) of the South Carolina Rules of Civil Procedure.

DEFINITIONS

The following definitions apply to these Requests to Produce:

1. The terms "YOU" and "YOUR" when used herein refer to SCASA, its officers, its employees, and its agents.
2. The term "STATE DEPARTMENT OF EDUCATION" when used herein means the South Carolina Department of Education or any elected officials, officers, or employees of the South Carolina Department of Education.

3. The term "SCHOOL DISTRICT" when used herein means any school district in the State of South Carolina or any elected officials, officers, or employees of a school district in the State of South Carolina.

4. The term "PUBLIC SCHOOL" when used herein means any public school in the State of South Carolina or any officers or employees of public school in the State of South Carolina.

5. The term "DOCUMENT" or "DOCUMENTS" when used herein means and includes the originals of any written, recorded or graphic matter, however produced or reproduced, in whatever form and regardless of where located, whether reduced to tangible form or stored in electronic or other medium which can be reduced to tangible form, including but not limited to: any summary, schedule, memorandum, note, working paper, drawing, statement, letter, telegram, interoffice communication, report, diary, desk or pocket calendar, time sheet, notebook, daybook, appointment book, pamphlet, periodical, work sheet, cost sheet, list, graph, charge, index, tape, record, partial or complete report of telephone or oral conversation, compilation, tabulation, study, analysis, transcript, minutes, accounting records, data sheet, data processing card or tape, ELECTRONIC DATA, listing, manual, bill of lading, shipping tally or similar freight documents, and all other memorials of any conversations, meetings and conferences, by telephone or otherwise, all other documents as defined in Rule 34 of the South Carolina Rules of Civil Procedure, and any other writing or recording, electronic or otherwise, which is in SCASA's possession, custody, or control or that of any employee, servant or agent of SCASA or SCASA's attorneys. In all cases where original and/or non-identical copies are unavailable, "documents" also means copies thereof. Further, the term "DOCUMENT" or

"DOCUMENTS" shall include the original files and or containers in which said DOCUMENTS are maintained and any and all drafts of responsive DOCUMENTS.

6. "ELECTRONIC DATA"¹ includes, but is not limited to, electronic mail messages and any electronic folder or subfolder containing such messages; any other electronic messages, including electronic bulletin boards and/or intranet or internet web sites or postings; activity listings of electronic mail receipts and/or transmittals; electronic calendars or planners; electronic documents or files created by or stored in Microsoft Word, Word Perfect or any other word-processing or document-creation applications; electronic spreadsheets, graphs, charts, records or other similar files or documents created by or stored in Microsoft Excel, Quicken, or any similar applications; electronic data, documents, files, or records created by or stored in Microsoft Access, Oracle, or any other data-management system or application; electronic documents, images, or files created by or stored in a ".tiff" or other similar format; electronic documents or files created by or stored in a ".pdf" or other similar format; electronic documents, files, or pages created by or stored in an ".html" or other similar format; electronic log or cookie files created by any application or operating system; voice mail; digital audio or video recordings of any kind; computer programs or applications (whether private, commercial, legacy, enterprise, or a work in progress); programming notes or instructions; output resulting from the use of any software program; all miscellaneous electronic files and/or file fragments regardless of the media on

¹ Plaintiff considers Electronic Data to be a valuable and irreplaceable source of discovery and/or evidence in this matter. The laws and rules prohibiting the destruction of evidence apply to Electronic Data with the same force as they apply to other kinds of evidence. Proper safeguards against destruction of Electronic Data, including the destruction of back-up and archival data, must be put in place pending final resolution of this case. Where information responsive to these requests is stored on electronic media, Plaintiff seeks access to the electronic copies of responsive information (together with instructions and programs necessary to search or retrieve such data), including all attachments and enclosures to any responsive information, which shall not be separated from the items to which they are attached or enclosed.

which they are stored and regardless of whether the data resides in an active file, deleted file, archived file, slack space or file fragment, and any other electronic document, file, or data created by or stored in any enterprise, proprietary, shrink-wrap data-management program or application, any operating system or other computer software application or other program whatsoever.

"ELECTRONIC DATA" includes, but is not limited to, all of the items and data described above or any other similar items or data stored or archived on personal computers, including desktop, notebook or laptop computers or personal digital assistants; hard drives of any kind; magnetic media diskettes; compact disks, including but not limited to CD-ROMs and DVDs; magnetic tapes of all kinds including data cartridges of any kind; zip, jaz, Imation SuperDisks, or other types of magnetic or digital drives; floppy disks, zip drive disks, syquest disks, Bernoulli disks or their equivalents; computer chips, (including, but not limited to, EPROM, PROM, RAM, and ROM); servers, including portable servers; and any other digital or magnetic device whatsoever.

"ELECTRONIC DATA" also includes the file, folder tabs, containers, or labels appended to any storage device containing ELECTRONIC DATA.

REQUESTS TO PRODUCE

Please produce the following:

1. Each and every document that relates in any way to any claim, defense, or counterclaim in this action.
2. Each and every document referenced or identified in your responses to Plaintiff's First Set of Interrogatories.
3. Each and every document reviewed, consulted, or relied upon in responding to Plaintiff's First Set of Interrogatories.
4. Each and every document that relates in any way to Plaintiff's August 2009 request to you for documents that was made pursuant to the South Carolina Freedom of Information Act ("FOIA").
5. Each and every document, including but not limited to electronic correspondence, that relates in any way to your decision to deny Plaintiff's FOIA request.
6. All prior drafts of your September 4, 2009 letter to Plaintiff denying his FOIA request to you.
7. Each and every document, including but not limited to electronic correspondence, that you provided to or received from an elected official, officer, or employee of the State of South Carolina, any school district, any public school, the South Carolina School Boards Association, the South Carolina Education Association, the South Carolina Parent Teacher Association, the Palmetto State Teachers Association, or the Leaders in Education Administration Political Action Committee ("LEAPAC") that in any way relates to Plaintiff's FOIA request.

8. All balance sheets, income statements, ledgers, tax forms, and any other document that relates in any way to your gross revenue for each fiscal year since January 1, 2005.

9. Each and every document, including but not limited to electronic correspondence, that you provided to or received from an elected official, officer, or employee of the South Carolina state government, any school district, or any public school that in any way relates to providing funding or payments of monies to you since January 1, 2005.

10. Each and every document, including checks and receipts, that in any way relates to your receipt of monies from an elected official, officer, or employee of the South Carolina state government, any school district, or any public school since January 1, 2005.

11. Each and every document, including checks and receipts, that in any way relates to your receipt of monies from a private person or organization, including for-profit and nonprofit entities, since January 1, 2005.

12. Each and every application for a grant that you have submitted since January 1, 1999.

13. Each and every grant of which you have been the recipient since January 1, 1999.

14. Each and every document related in any way to any grant of which you have been the recipient since January 1, 1999.

15. Each and every contract into which you have entered with the State Department of Education since January 1, 1999.

16. Each and every document, including but not limited to electronic correspondence, related in any way to the creation, formation, terms, execution, administration, or termination of

any contract into which you have entered with the State Department of Education since January 1, 1999.

17. Each and every contract into which you have entered with any South Carolina state agency or department other than the State Department of Education since January 1, 1999.

18. Each and every document, including but not limited to electronic correspondence, related in any way to the creation, formation, terms, execution, administration, or termination of any contract into which you have entered with any South Carolina state agency or department other than the State Department of Education since January 1, 1999.

19. Each and every contract into which you have entered with any school district since January 1, 1999.

20. Each and every document, including but not limited to electronic correspondence, related in any way to the creation, formation, terms, execution, administration, or termination of any contract into which you have entered with any school district since January 1, 1999;

21. Each and every contract into which you have entered with any public school since January 1, 1999.

22. Each and every document, including but not limited to electronic correspondence, related in any way to the creation, formation, terms, execution, administration, or termination of any contract into which you have entered with any public school since January 1, 1999.

23. Each and every document that contains a list of your current membership.

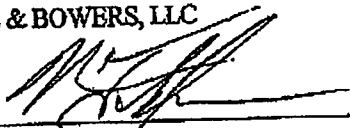
24. Each and every document that contains a list of your current "business affiliates," as that term is used on your website.

25. Each and every document that contains a list of your current employees, staff, and other persons paid or retained by you to perform services on your behalf.

26. Each and every document that you plan to introduce as evidence or as an exhibit in the trial of this matter.

27. Each and every document that you provided to or received from any putative expert witness in this matter.

HALL & BOWERS, LLC

By: 

Kevin A. Hall
Karl S. Bowers, Jr.
M. Todd Carroll
1329 Blanding Street
Post Office Box 12107 (29211)
Columbia, SC 29201
(803) 454-6504

Attorneys for Plaintiff Rocky D

Columbia, South Carolina
January 15, 2010

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Hall & Bowers, LLC, attorneys for Rocky Disahato, d/b/a "Rocky D," do hereby certify that I have served all parties in this action with a copy of the pleading(s) hereinbelow specified by mailing, via U.S. Mail, postage prepaid, a copy of the same to the following address(es):

Pleadings:

**PLAINTIFF'S FIRST SET OF REQUESTS TO
PRODUCE DOCUMENTS**

Party Served:

South Carolina Association of School Administrators
121 Westpark Blvd.
Columbia, SC 29210


Deborah L. Johnson
Administrative Assistant

January 15, 2010

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
Rocky Disabato, d/b/a "Rocky D,"	)	Civil Action No. 09-CP-10-7593
	)	
Plaintiff,	)	
	)	
vs.	)	<u>PLAINTIFF'S FIRST SET OF</u>
	)	<u>INTERROGATORIES</u>
South Carolina Association of School	)	
Administrators,	)	
	)	
Defendant.	)	

Pursuant to Rules 26 and 33 of the South Carolina Rules of Civil Procedure, Plaintiff Rocky D, though his undersigned attorneys, hereby submits his First Set of Interrogatories to Defendant South Carolina Association of School Administrators ("SCASA"), to which written and sworn answers shall be submitted in accordance with the South Carolina Rules of Civil Procedure. After so answering the following Interrogatories, should further information called for therein come to the knowledge or attention of SCASA, then SCASA is required to properly transmit such information by supplemental answers to these Interrogatories in accordance with Rule 26(e) of the South Carolina Rules of Civil Procedure.

DEFINITIONS

The following definitions apply to these Interrogatories:

1. The terms "YOU" and "YOUR" when used herein refer to SCASA, its officers, its employees, and its agents.
2. The term "STATE DEPARTMENT OF EDUCATION" when used herein means the South Carolina Department of Education or any elected officials, officers, or employees of the South Carolina Department of Education.
3. The term "SCHOOL DISTRICT" when used herein means any school district in the State of South Carolina or any elected officials, officers, or employees of a school district in the State of South Carolina.
4. The term "PUBLIC SCHOOL" when used herein means any public school in the State of South Carolina or any officers or employees of public school in the State of South Carolina.
5. The term "IDENTIFY" when used herein in connection with natural persons means to state their full name, title and job description, if applicable, and their present business and resident addresses, if applicable; the term "IDENTIFY" when used in connection with other entities means to state the name and present address of each said entity. When an interrogatory asks for description or identification of a document, the answer shall be given in sufficient detail to enable a party or person to whom a subpoena or request to produce documents is directed to identify fully the documents sought to be produced and to enable counsel for Plaintiff to determine that such documents, when produced, are in fact the documents so described.
6. The term "DOCUMENT" or "DOCUMENTS" when used herein means and includes the originals of any written, recorded or graphic matter, however produced or

reproduced, in whatever form and regardless of where located, whether reduced to tangible form or stored in electronic or other medium which can be reduced to tangible form, including but not limited to: any summary, schedule, memorandum, note, working paper, drawing, statement, letter, telegram, interoffice communication, report, diary, desk or pocket calendar, time sheet, notebook, daybook, appointment book, pamphlet, periodical, work sheet, cost sheet, list, graph, charge, index, tape, record, partial or complete report of telephone or oral conversation, compilation, tabulation, study, analysis, transcript, minutes, accounting records, data sheet, data processing card or tape, ELECTRONIC DATA, listing, manual, bill of lading, shipping tally or similar freight documents, and all other memorials of any conversations, meetings and conferences, by telephone or otherwise, all other documents as defined in Rule 34 of the South Carolina Rules of Civil Procedure, and any other writing or recording, electronic or otherwise, which is in SCASA's possession, custody, or control or that of any employee, servant or agent of SCASA or SCASA's attorneys. In all cases where original and/or non-identical copies are unavailable, "documents" also means copies thereof. Further, the term "DOCUMENT" or "DOCUMENTS" shall include the original files and or containers in which said DOCUMENTS are maintained and any and all drafts of responsive DOCUMENTS.

7. "ELECTRONIC DATA"¹ includes, but is not limited to, electronic mail messages and any electronic folder or subfolder containing such messages; any other electronic messages,

¹ Plaintiff considers Electronic Data to be a valuable and irreplaceable source of discovery and/or evidence in this matter. The laws and rules prohibiting the destruction of evidence apply to Electronic Data with the same force as they apply to other kinds of evidence. Proper safeguards against destruction of Electronic Data, including the destruction of back-up and archival data, must be put in place pending final resolution of this case. Where information responsive to these requests is stored on electronic media, Plaintiff seeks access to the electronic copies of responsive information (together with instructions and programs necessary to search or retrieve such data), including all attachments and enclosures to any responsive information, which shall not be separated from the items to which they are attached or enclosed.

including electronic bulletin boards and/or intranet or internet web sites or postings; activity listings of electronic mail receipts and/or transmittals; electronic calendars or planners; electronic documents or files created by or stored in Microsoft Word, Word Perfect or any other word-processing or document-creation applications; electronic spreadsheets, graphs, charts, records or other similar files or documents created by or stored in Microsoft Excel, Quicken, or any similar applications; electronic data, documents, files, or records created by or stored in Microsoft Access, Oracle, or any other data-management system or application; electronic documents, images, or files created by or stored in a ".tiff" or other similar format; electronic documents or files created by or stored in a ".pdf" or other similar format; electronic documents, files, or pages created by or stored in an ".html" or other similar format; electronic log or cookie files created by any application or operating system; voice mail; digital audio or video recordings of any kind; computer programs or applications (whether private, commercial, legacy, enterprise, or a work in progress); programming notes or instructions; output resulting from the use of any software program; all miscellaneous electronic files and/or file fragments regardless of the media on which they are stored and regardless of whether the data resides in an active file, deleted file, archived file, slack space or file fragment, and any other electronic document, file, or data created by or stored in any enterprise, proprietary, shrink-wrap data-management program or application, any operating system or other computer software application or other program whatsoever.

"ELECTRONIC DATA" includes, but is not limited to, all of the items and data described above or any other similar items or data stored or archived on personal computers, including desktop, notebook or laptop computers or personal digital assistants; hard drives of any kind; magnetic media diskettes; compact disks, including but not limited to CD-ROMs and

DVDs; magnetic tapes of all kinds including data cartridges of any kind; zip, jaz, Imation SuperDisks, or other types of magnetic or digital drives; floppy disks, zip drive disks, syquest disks, Bernoulli disks or their equivalents; computer chips, (including, but not limited to, EPROM, PROM, RAM, and ROM); servers, including portable servers; and any other digital or magnetic device whatsoever.

"ELECTRONIC DATA" also includes the file, folder tabs, containers, or labels appended to any storage device containing ELECTRONIC DATA.

INTERROGATORIES

1. Identify the names, addresses, telephone numbers, and email addresses of persons known to you to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.
2. For each person known to you to be a witness concerning the facts of the case, set forth either a summary sufficient to inform Plaintiff of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.
3. Set forth a list of photographs, plats, sketches, or other prepared documents in your possession that relate to the claims or defenses in the case.
4. Identify the names and addresses of any expert witnesses whom you propose to use as a witness at the trial of this case. In so doing, provide in detail (a) the area of expertise in which you intend to offer each expert witness; (b) a complete statement of all opinions each putative expert witness will express and the basis and reasons for them; (c) the data or other information considered by each putative expert witness in forming his or her opinions; (d) any

exhibits that will be used to summarize or support such opinions; (e) the qualifications of each putative expert witness, including a list of all publications authored in the previous ten years and a list of all other cases in which the witness testified as an expert by deposition or at trial, arbitration, or mediation in the previous four years; and (f) a statement of the compensation to be paid for the study and testimony of each putative expert witness.

5. Identify each and every person who participated in your decision to deny Plaintiff's August 2009 request for documents made pursuant to the South Carolina Freedom of Information Act ("FOIA"). This Interrogatory includes all persons who played any role—consulting, advisory, voting, and so forth—in the decision to deny Plaintiff's FOIA request. For your reference, a copy of this letter is attached to the Complaint as Exhibit D.

6. Identify with specificity each and every reason why you denied Plaintiff's FOIA request.

7. Identify each and every person who participated in the composing, drafting, editing, or revising of your September 4, 2009 letter to Plaintiff denying his FOIA request. This Interrogatory includes all persons who actually typed or hand-wrote portions of the letter, as well as all persons who provided input, suggestions, or feedback regarding the response. For your reference, a copy of this letter is attached to the Complaint as Exhibit E.

8. Identify your gross revenue for each fiscal year since January 1, 2005.

9. Identify each and every occasion you received money from the State Department of Education since January 1, 2005. In so doing, provide in detail (a) the date of your receipt of the money and (b) the amount of money you received on each occasion.

10. Identify each and every occasion you received money from any state-level agencies or departments of the South Carolina government other than the State Department of

Education since January 1, 2005. In so doing, provide in detail (a) the department, agency, official, or employee responsible for the payment to you; (b) the date of your receipt of the money; and (c) the amount of money you received on each occasion.

11. Identify each and every occasion you received money from any school district since January 1, 2005. In so doing, provide in detail (a) the date of your receipt of the money and (b) the amount of money you received on each occasion.

12. Identify each and every occasion you received money from any public school since January 1, 2005. In so doing, provide in detail (a) the date of your receipt of the money and (b) the amount of money you received on each occasion.

13. Identify each and every occasion you received money from a private person or organization, including for-profit and nonprofit entities, since January 1, 2005. In so doing, provide in detail (a) the date of your receipt of the money and (b) the amount of money you received on each occasion.

14. Identify each and every grant for which you have applied since January 1, 1999. In so doing, provide in detail (a) the name of the grantor organization, (b) the goods or services putatively provided under the grant, (c) the amount of money provided by the grant, and (d) whether you were awarded the grant.

15. Identify each and every contract into which you have entered with the State Department of Education, any other South Carolina state agency or department, any school district, or any public school since January 1, 1999. In so doing, provide in detail (a) the date on which the contract was entered, (b) whether the contract was written or oral, (c) the goods or services putatively provided under the contract, (d) whether the contract was entered through a

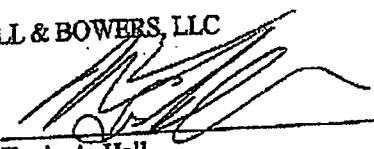
competitive bidding process, and (e) the sum of money you have received from the organization as the result of each contract.

16. Identify each of your employees who participates in the South Carolina State Health and Dental Insurance plan.

17. Identify each of your employees who participates in the South Carolina State Retirement System.

18. State the total number of members that you currently have and identify each and every one of your active members who is not presently employed by or a retiree of the State of South Carolina, a school district, or a public school.

HALL & BOWERS, LLC

By: 

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Columbia, South Carolina
January 15, 2010

CERTIFICATE OF SERVICE

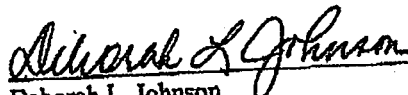
I, the undersigned Administrative Assistant of the law offices of Hall & Bowers, LLC, attorneys for Rocky Disabato, d/b/a "Rocky D," do hereby certify that I have served all parties in this action with a copy of the pleading(s) hereinbelow specified by mailing, via U.S. Mail, postage prepaid, a copy of the same to the following address(es):

Pleadings:

PLAINTIFF'S FIRST SET OF INTERROGATORIES

Party Served:

South Carolina Association of School Administrators
121 Westpark Blvd.
Columbia, SC 29210


Deborah L. Johnson
Administrative Assistant

January 15, 2010

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

South Carolina Association of School Administrators,	)	Civil Action No. 3:10-CV-00271-CMC
	)	
	)	
Plaintiff,	)	
	)	<u>MOTION TO ABSTAIN AND DISMISS</u>
vs.	)	
	)	
Rocky Disabato d/b/a "Rocky D,"	)	
	)	
Defendant.	)	

This case presents a classic example of when a federal court should abstain from exercising jurisdiction over an action. As the instant complaint readily admits, this case was commenced in response to—and apparently in an effort to trump—a state-level action brought to enforce the South Carolina Freedom of Information Act ("FOIA"). However, in instances where a party attempts to short-circuit a case pending before a state court by filing a competing federal action, federal courts regularly defer to their state counterparts and abstain from exercising jurisdiction. The Court should follow this established model, abstain here pursuant to both *Younger* abstention and *Pullman* abstention, and dismiss this case.

FACTUAL BACKGROUND

The facts underlying this case are simple and straightforward. As alleged in the complaint, Defendant Rocky Disabato ("Rocky D"), a radio commentator and resident of Charleston County, sent Plaintiff South Carolina Association of School Administrators ("SCASA") a written request for public records pursuant to the South Carolina FOIA. V. Compl. for Declaratory Relief ¶ 9 (Dkt. No. 1). SCASA refused to provide these records and denied that it is subject to South Carolina's sunshine laws despite the facts that (a) SCASA's membership is comprised almost exclusively of public school administrators who pay their dues

with taxpayer monies; (b) SCASA's employees participate in both the South Carolina Health and Dental Insurance plan and the South Carolina Retirement System; (c) at least part of SCASA's website is hosted on servers maintained by public school districts; and (d) by operation of the South Carolina Code of Laws, SCASA performs several governmental functions. *See generally* Complaint filed in *Disabato v. SCASA*, Civil Action No. 09-CP-10-7593, ¶¶ 6-16 (Charleston County Ct. of C.P.) (copy filed as Exhibit 1 to Verified Complaint) (Dkt. No. 1-1).

In order to enforce his right to review the requested records, Rocky D filed a complaint against SCASA in the Charleston County Court of Common Pleas. In that complaint, Rocky D seeks a declaration that SCASA is a "public body," as defined in the South Carolina FOIA, and for disclosure of the requested public records. *Id.* ¶ 33. But before it answered the state-court complaint, SCASA commenced the instant action and now asks this Court—rather than any of South Carolina's state courts—to adjudicate SCASA's sole defense to Rocky D's claims: that the South Carolina FOIA is somehow unconstitutional. V. Compl. for Declaratory Relief ¶ 29 (Dkt. No. 1).¹ Under these circumstances, abstention—and dismissal—is appropriate.

ARGUMENTS AND AUTHORITIES

It is well-settled that federal courts have the discretion to abstain from adjudicating disputes that essentially involve matters of state law or state policy. As the Fourth Circuit has observed: "The Supreme Court has admonished the federal courts to respect the efforts of state governments to ensure uniform treatment of essentially local problems. Principles of federalism and comity require no less. Basic abstention doctrine requires federal courts to avoid interference with a state's administration of its own affairs." *Johnson v. Collins Entm't Co.*, 199 F.3d 710, 719 (4th Cir. 1999) (internal citations omitted).

¹ Of course, SCASA's commencement of this action is tantamount to an admission that it is subject to the South Carolina FOIA. Otherwise, SCASA would lack standing to bring this case.

At least two separate grounds for abstention are present here. The first, *Younger* abstention, directs a federal court to abstain from adjudicating a matter when a related proceeding exists at the state level. The other, *Pullman* abstention, is appropriate where the federal court can avoid unnecessary constitutional rulings by allowing a state's courts to clarify the state's own law.

When analyzing each of these abstention doctrines, it is critical to note that the South Carolina FOIA, like each state's unique sunshine statute, is aimed at addressing an issue of local concern. In this regard, an entire chapter of the State Code of Laws is dedicated to ensuring that South Carolina's citizens are able to scrutinize "public business" conducted within the State's borders, both at the statewide and local levels. See S.C. Code Ann. § 30-4-15 (declaring that "it is vital in a democratic society that public business be performed in an open and public manner"); *N.Y. Times Co. v. Spartanburg County Sch. Dist. No. 7*, 374 S.C. 307, 311, 649 S.E.2d 28, 30 (2007) ("FOIA must be construed so as to make it possible for citizens to learn and report fully the activities of public officials."); *Bellamy v. Brown*, 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991) ("The purpose of the Act is to protect the public by providing for the disclosure of information."). In this regard, the South Carolina Supreme Court has explained that the State FOIA "grants the public an immutable right to access public records." *Seago v. Horry County*, 378 S.C. 414, 423, 663 S.E.2d 38, 42 (2008).

Just as in other states, South Carolina's open-government statute has been held applicable to a variety of different groups, including a city manager's advisory panel for awarding contracts, a delegation of elected officials, and a private foundation. See, e.g., *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 162-63, 547 S.E.2d 862, 865 (2001) (holding that a panel of unelected officials created to review contract proposals submitted to a city manager was a

“public body” subject to the South Carolina FOIA); *Fowler v. Beasley*, 322 S.C. 463, 468 n.5, 472 S.E.2d 630, 633 n.5 (1996) (stating that a county’s legislative delegation “falls within the definition of ‘public body’”); *Weston v. Carolina Research & Dev. Found.*, 303 S.C. 398, 401–04, 401 S.E.2d 161, 163–64 (1991) (finding a nonprofit corporation to be a “public body” under the South Carolina FOIA and rejecting any argument that private organizations are necessarily exempt from the statute). Against this background of liberally protecting the right of South Carolina’s citizenry to monitor how the public’s business is conducted, each of the applicable abstention doctrines is discussed below.

I. *Younger* abstention is appropriate because there are pending state-level proceedings that involve important state interests.

Younger abstention, which is based on the Supreme Court’s holding in *Younger v. Harris*, 401 U.S. 37 (1971), is applicable where a federal court’s consideration of a matter would interfere with pending state-level proceedings. As the Fourth Circuit describes:

The *Younger* doctrine expresses “a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances.” The doctrine recognizes that state courts are fully competent to decide issues of federal law, and has as a corollary the idea that all state and federal claims should be presented to the state courts.

Richmond, Fredericksburg & Potomac R.R. Co. v. Forst, 4 F.3d 244, 251 (4th Cir. 1993) (citations omitted). The Fourth Circuit further explains that *Younger* abstention “command[s] federal restraint when the federal action is duplicative, casts aspersion on state proceedings, disrupts important state enforcement efforts, and is designed to annul a state proceeding.” *Moore v. City of Asheville*, 396 F.3d 385, 394–95 (4th Cir. 2005); *see also Beam v. Tatum*, 299 F. App’x 243, 246 (4th Cir. 2008) (reminding that *Younger* abstention reflects a “[s]ensitiv[ity] to principles of equity, comity, and federalism”).

In order for *Younger* to be applicable, there must be (1) an ongoing state proceeding (2) that implicates important state interests (3) in which there is an adequate opportunity to raise federal claims. *Nivens v. Gilchrist*, 444 F.3d 237, 241 (4th Cir. 2006). Here, all three factors are readily satisfied.

A. There are ongoing proceedings before the Charleston County Court of Common Pleas involving the same parties and subject matter presented here.

The first *Younger* factor is admitted by SCASA's pleadings. In fact, SCASA attached the complaint that is currently pending before a South Carolina state court as an exhibit to its initial filing with this Court. *See generally* Complaint filed in *Disabato v. SCASA*, Civil Action No. 09-CP-10-7593 (Charleston County Ct. of C.P.) (copy filed as Exhibit 1 to Verified Complaint) (Dkt. No. 1-1). Moreover, that case was commenced on December 4, 2009, nearly two months before SCASA's complaint was filed here. Because the proceedings pending before the state circuit court in Charleston County involve the same parties and the identical subject matter that is presented in this case, the first *Younger* factor is met.

B. South Carolina has significant interests in the administration of its sunshine laws.

There can be no doubt that proper enforcement of the South Carolina FOIA is of paramount importance to the State. The statutory scheme begins with a preamble declaring that open government is "vital in a democratic society." S.C. Code Ann. § 30-4-15. In this regard, the General Assembly has instructed courts to interpret the statute liberally "so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings." *Id.* The desire to employ the South Carolina FOIA as a means for monitoring both public business and expenditures from the public coffers is shared by the judicial and executive

branches of the State's government as well. *See, e.g., N.Y. Times*, 374 S.C. at 311, 649 S.E.2d at 30 ("FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature."); Op. S.C. Att'y Gen., 1992 S.C. AG LEXIS 5, at *7 (Jan. 16, 1992) ("As always, this Office advises that doubt as to applicability of the FOIA be resolved in favor of openness and disclosure."). In fact, as the Attorney General's office guides:

The Freedom of Information Act (FOIA) was designed to give the public and the press access to the workings of their government. Indeed, a representative democracy cannot function in secrecy. . . .

The Attorney General's Office operates on the following principles in opining on the FOIA:

When in doubt, disclose requested information.
When in doubt, post the time, place, and purpose of the meeting.
When in doubt, open the meeting to the public.
When in doubt, release the document.

S.C. Press Ass'n, *Public Official's Guide to Compliance with South Carolina's Freedom of Information Act* at Introductory Letter, available at <http://www.scattorneygeneral.org/newsroom/pdf/foia.pdf> (last visited Mar. 1, 2010).

South Carolina's recent history has borne out the need for thorough enforcement of the State's sunshine laws. One need not look any further than the Operation Lost Trust scandal—the FBI's investigation of drugs and corruption in the South Carolina General Assembly that resulted in the indictment of nearly ten percent of the legislature by a federal grand jury—to recognize the peculiar need for openness in South Carolina's government. Or the City of Columbia's recently-exposed financial disrepair. Or the rampant problems plaguing the Fairfield County School Board. The list could go on, but the point is clear: South Carolina—at all levels of government, and within every branch of government—has a keen interest in transparency with respect to how

public monies are spent and how decisions impacting the public are made. *Younger*'s second prong is satisfied accordingly.

C. SCASA can raise its First Amendment claims in the state-level proceedings.

The final prong of the *Younger* analysis is also met. SCASA will have every opportunity to raise its First Amendment claims in the pending state-level proceedings. To be sure, South Carolina's courts routinely adjudicate questions involving the First Amendment. *See, e.g., In re Amir X.S.*, 371 S.C. 380, 391, 639 S.E.2d 144, 149–50 (2006) (rejecting an overbreadth challenge to a state law defining the offense of disturbing schools); *State v. Rothschild*, 351 S.C. 238, 242, 569 S.E.2d 346, 348 (2002) (rejecting a First Amendment challenge to a state criminal statute). Moreover, the State's Appellate Court Rules allow constitutional challenges to bypass the normal appellate procedure through the Court of Appeals and, instead, route them immediately from the trial court to the Supreme Court. Rule 203(d)(1)(A)(ii), SCACR. It is straightforward, then, that SCASA's constitutional claim can be adjudicated in the state—rather than federal—forum, and *Younger* abstention is therefore proper. *See Laurel Sand & Gravel, Inc. v. Wilson*, 519 F.3d 156, 166 (4th Cir. 2008) (reiterating that a primary purpose of abstention is “to maintain comity between the state and federal courts.”).²

² SCASA presumably recognizes the applicability of *Younger* here, as it argued for Judge Anderson to dismiss the *Sanford v. McMaster* case involving South Carolina's potential refusal of federal stimulus funds on this exact basis. *See* Intervenor/Def. SCASA's Mem. in Supp. of Mot. to Dismiss at 10–11 (May 26, 2009) (arguing for application of a “*Younger* type” abstention), filed in *Sanford v. McMaster*, Case No. 3:09-1322-JFA (D.S.C.), available at <http://www.childs-halligan.com/pubs/PDF%20Docs/4%20SCASA's%20First%20federal%20brief%20seeking%20dismissal%20of%20Sanford%20v%20McMaster.pdf> (last visited Mar. 1, 2010).

II. The Court should avoid making an unnecessary constitutional ruling pursuant to *Pullman* abstention.

A second abstention doctrine applicable here derives from *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), and directs federal courts to defer exercising jurisdiction over a matter when a state law can be interpreted by a state court in such a manner as to avoid making a federal constitutional ruling. *Nivens*, 444 F.3d at 245. This basis for abstention is consistent with the Supreme Court's directive to avoid constitutional rulings when other avenues for relief are available. *See Slack v. McDaniel*, 529 U.S. 473, 485 (2000) (explaining that federal courts "will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of" (quoting *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring))).

Following this mandate, the Fourth Circuit has repeatedly relied on *Pullman* abstention to defer ruling on federal constitutional issues until after a state court has had an opportunity to resolve unclear issues of state law. *See, e.g., K. Hope, Inc. v. Onslow County*, No. 95-3126, 1997 U.S. App. LEXIS 3337, at *3-4 (4th Cir. Feb. 25, 1997) (per curiam) (vacating district court's ruling on constitutionality of state law pursuant to *Pullman* because a state court's resolution of the law "would avoid any need to address the constitutional questions presented"); *Meredith v. Talbot County*, 828 F.2d 228, 232 (4th Cir. 1987) (holding that *Pullman* abstention "is certainly appropriate" because possible constructions of state law would cause "the federal constitutional questions raised in the complaint [to] disappear"); *Ratcliff v. County of Buncombe*, 759 F.2d 1183, 1186-87 (4th Cir. 1985) (ruling that abstention was proper because resolution of a state law issue "could be dispositive of the federal constitutional issues").

Here, all of SCASA's claims for relief appear to hinge on the definition of "public body" in the South Carolina FOIA, which SCASA alleges is "vague." *See* V. Compl. for Declaratory

Relief ¶ 18 (Dkt. No. 1) (complaining of “FOIA’s extremely broad yet vague definition of a public body”); *id.* ¶¶ 19–26 (complaining of alleged consequences that follow the designation of a “private corporation” as a “public body” under the South Carolina FOIA). This statutory term, which is defined at South Carolina Code § 30-4-20(a), has been examined several times before by the State Supreme Court. *See, e.g., Quality Towing*, 345 S.C. at 162–63, 547 S.E.2d at 865 (construing the term “public body” in the context of an advisory committee formed by a city manager); *Weston*, 303 S.C. at 401–04, 401 S.E.2d at 163–64 (construing the term “public body” with respect to a nonprofit foundation). To the extent that there is any remaining uncertainty or vagueness in the statutory definition of “public body,” this issue should be addressed by South Carolina’s courts so that they can construe the term in a manner to bring it within constitutional bounds (if necessary), not through a broad declaration by a federal court that South Carolina’s open government laws are unconstitutional. *See, e.g., List v. County of Carroll*, 240 F. App’x 155, 157 (8th Cir. 2007) (abstaining pursuant to *Pullman* from resolving a series of federal claims that required an interpretation of the Missouri Sunshine Law).³ Abstention pursuant to *Pullman* is therefore appropriate in order to provide South Carolina’s courts with the opportunity to interpret the South Carolina FOIA in a constitutional manner (again, if necessary).

³ By arguing for *Pullman* abstention here, Rocky D does not concede that the South Carolina FOIA is unclear, vague, or somehow constitutionally impaired. To the contrary, the law appears quite clear that an organization of public officials that is (a) intimately involved with setting the State’s education policy, (b) a recipient of taxpayer-funded health and dental insurance benefits, and (c) a recipient of taxpayer-funded retirement benefits—all as a matter of South Carolina law—is also subject to the State’s sunshine laws. Nevertheless, in the event that the South Carolina FOIA needs to be construed against the background of a constitutional challenge, Rocky D respectfully submits that such an analysis should be done by South Carolina, rather than federal, courts.

III. Dismissal with prejudice is the appropriate resolution for SCASA's complaint.

If the Court agrees that abstention is the proper course in this case, it should dismiss, rather than stay, SCASA's complaint. The Fourth Circuit has held that a necessary component of *Younger* abstention is dismissing a complaint with prejudice. As the court reasoned: "Because *Younger* is in part based on the idea that a state court is equally competent in deciding federal constitutional issues when faced with a pending prosecution, *Younger* does not contemplate those issues returning to federal court." *Nivens*, 444 F.3d at 246. And because *Younger* abstention involves a federal court rejecting subject matter jurisdiction in favor of resolution at the state level, dismissal with prejudice is the proper resolution. *See id.* at 247 ("Thus, when a district court abstains from a case based on *Younger*, it should typically dismiss the case with prejudice; not on the merits, but instead because the court is denied the equitable discretion ever to reach the merits.") (internal citations omitted).

Similarly, while *Pullman* abstention usually results in a stay of federal proceedings while a state court clarifies state law, the Fourth Circuit has been clear that dismissal is appropriate when both *Pullman* abstention and another abstention doctrine are jointly applicable. *See, e.g., Meredith*, 828 F.2d at 232 (affirming a district court's dismissal of a complaint pursuant to both *Burford* abstention and *Pullman* abstention because "retention of jurisdiction does not comport with the underlying principles and purpose of *Burford* abstention"). Because *Younger* abstention accompanies *Pullman* abstention here, dismissal with prejudice is proper.

CONCLUSION

This case presents a textbook example of when federal courts should abstain from exercising jurisdiction in deference to their state-level counterparts. But for the pendency of an action before the Charleston County Court of Common Pleas, this action would have never been

filed. Now, SCASA asks this Court to set aside those proceedings and, remarkably, to declare that South Carolina's open government laws are facially unconstitutional. Both *Younger* abstention and *Pullman* abstention prohibit this sort of procedural gamesmanship. Instead of allowing SCASA to enjoin state-level proceedings by running to a federal court, these traditional abstention doctrines direct that SCASA's complaint should be dismissed with prejudice. Rocky D respectfully requests that this Motion be granted accordingly.

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March 1, 2010
Columbia, South Carolina

Exhibit A

Copies of Unpublished Decisions

Exhibit A – Copies of Unpublished Decisions

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299 Fed. Appx. 243, *, 2008 U.S. App. LEXIS 23201, **

MARK H. BEAM, Plaintiff - Appellant, v. GEORGE TATUM, Commissioner,
North Carolina Division of Motor Vehicles; BRYAN BEATTY, Secretary, North
Carolina Department of Crime Control and Public Safety; LYNDY TIPPETT, Sec-
retary, North Carolina Department of Transportation, Defendants - Appellees.

No. 07-1719

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

299 Fed. Appx. 243; 2008 U.S. App. LEXIS 23201

September 24, 2008, Argued
November 10, 2008, Decided

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. (5:06-cv-00279-D). James C. Dever III, District Judge. *Beam v. Tatum*, 492 F. Supp. 2d 535, 2007 U.S. Dist. LEXIS 47108 (E.D.N.C., 2007)

DISPOSITION: AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

COUNSEL: ARGUED: Ralph David Wicker, Jr., ROBERTI, WITTENBERG, LAUFFER & WICKER, P.A., Durham, North Carolina, for Appellant.

Mark Allen Davis, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellees.

ON BRIEF: Roy Cooper, North Carolina Attorney General, Christopher G. Browning, Jr., Solicitor General, John W. Congleton, Assistant Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellees.

JUDGES: Before WILLIAMS, Chief Judge, AGEE, Circuit Judge, and T. S. ELLIS, III, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

OPINION

[*244] PER CURIAM:

Mark H. Beam brought this action in the United States District Court for the Eastern District of North Carolina, pursuant to 42 U.S.C.A. § 1983 (*West* 2003),

requesting a declaration that a civil penalty imposed upon him by the State of North Carolina violates the United States and North Carolina Constitutions and that a refund of the civil penalty be ordered. The district court [**2] abstained under *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971), from exercising jurisdiction, concluding that Beam failed to exhaust his state judicial remedies, this case involves North Carolina's substantial interest in motor safety, and Beam will have an opportunity to raise his constitutional claims in North Carolina's state courts. For the reasons that follow, we agree and therefore affirm the district court's decision to abstain. Because Beam's complaint requests monetary relief, however, we vacate the district court's order dismissing Beam's suit and remand with instructions to stay the action.

I.

The underlying facts in this case are not in dispute. Beam drives a truck for BarMar Transportation Corp. ("BarMar"), a small trucking firm owned by Beam and his wife. In 2005, BarMar contracted with Daystar Transportation, LLC ("Daystar") to haul a large piece of industrial equipment from Pineville, North Carolina to the Tennessee border. On December 15, 2005, the North Carolina Department of Transportation ("DOT") issued Daystar a permit to transport the equipment. The permit, which listed Beam as the "permittee," required the hauling truck to be accompanied by two escort vehicles with certified [**3] drivers. (J.A. at 6-7.)

On December 19, 2005, during the transport of the industrial equipment, a North Carolina vehicle enforcement officer issued Beam two civil penalties at a weigh station: (1) a \$ 500 citation for "Operating an Escort Vehicle Without the Required Certification" because the rear escort driver could not produce an escort permit (the "escort penalty") and (2) a \$ 23,820 citation for carrying too much weight (the "overweight penalty"). (J.A. at 27.) Had the officer not treated the permit as invalid because of the escort penalty, the weight total would have been

299 Fed. Appx. 243, *, 2008 U.S. App. LEXIS 23201, **

within the weight limit permitted by the permit. Both civil penalties were paid.

On January 10, 2006, Beam sent a letter to the North Carolina Department of Motor Vehicles ("DMV") stating that, pursuant to *N.C. Gen. Stat. § 20-91.1, repealed by 2007 N.C. Sess. Laws 491*, he paid the [*245] overweight penalty under protest and demanded that this money be repaid to him within 90 days.¹ On January 31, 2006, the North Carolina Department of Crime Control and Public Safety ("CCPS") responded with a letter informing Beam that an administrative review had determined that the overweight penalty was issued in accordance with [*4] state law and that the CCPS lacked authority to reduce "any penalty imposed according to law." (J.A. at 11.) Further, the letter specifically informed Beam of his right to appeal the CCPS's administrative decision in North Carolina state court under *N.C. Gen. Stat. § 20-91.1*.

1 *N.C. Gen. Stat. § 20-91.1* provided:

No court of this State shall entertain a suit of any kind brought for the purpose of preventing the collection of any tax imposed in this Article. Whenever a person shall have a valid defense to the enforcement of the collection of a tax assessed or charged against him or his property, such person shall pay such tax . . . and if the same shall not be refunded within 90 days thereafter, may sue such official in the courts of the State for the amount so demanded. Such suit must be brought in the Superior Court of Wake County, or in the county in which the taxpayer resides.

N.C. Gen. Stat. § 20-91.1, repealed by 2007 N.C. Sess. Laws 491.

In lieu of seeking judicial review of the administrative decision in state court, on July 7, 2006, Beam filed this § 1983 action seeking a refund of the overweight penalty. Beam named as defendants George Tatum, Commissioner of the DMV; Bryan Beatty, [*5] the Secretary of the CCPS; and Lyndo Tippet, the Secretary of the DOT (collectively "North Carolina"). He alleged that North Carolina's actions violated the Excessive Fines Clauses of the *Eighth Amendment* and the North Carolina Constitution, the prohibition against delegation of judicial power in the North Carolina Constitution, the

Double Jeopardy Clause of the Fifth Amendment, and the *Due Process Clauses of the Fifth and Fourteenth Amendments*.

On June 26, 2007, the district court abstained under *Younger* from exercising jurisdiction and dismissed Beam's case, concluding that by filing suit in federal court:

[Beam] has expressly short-circuited North Carolina's statutory scheme concerning such civil penalties. *See N.C. Gen. Stat. § 20-91.1*. Under that statutory scheme, [Beam] may protest the penalty administratively (which he did) and then file suit in Wake County Superior Court (which he did not do). In Wake County Superior Court, [Beam] . . . could raise the constitutional challenges set forth in his complaint.

(J.A. at 91.) Beam timely appealed, and we have jurisdiction pursuant to 28 U.S.C.A. § 1291 (*West 2006*).

II.

The sole issue on appeal is whether the district court properly abstained [*6] under *Younger* from exercising jurisdiction. "We review for abuse of discretion the district court's decision to abstain under *Younger*." *Ni vens v. Gilchrist*, 444 F.3d 237, 240 (4th Cir. 2006). *Younger* and "its progeny espouse a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances." *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431, 102 S. Ct. 2515, 73 L. Ed. 2d 116 (1982). The principle of "comity" underlying this abstention doctrine includes "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform [*246] their separate functions in their separate ways." *Younger*, 401 U.S. at 44.

Sensitive to principles of equity, comity, and federalism, *Younger* mandates "abstention not only when the pending state proceedings are criminal, but also when certain civil proceedings are pending, if the State's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between [*7] the States and the National Government." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11, 107 S. Ct. 1519, 95 L. Ed. 2d 1 (1987). Further, *Younger* "recognizes that state courts are fully competent to decide issues of federal law and has as a corollary the idea that

all state and federal claims should be presented to the state courts." *Richmond, Fredericksburg & Potomac R.R. Co. v. Forst*, 4 F.3d 244, 251 (4th Cir. 1993) (internal citation omitted). In sum, *Younger* abstention requires a federal court to abstain from interfering in state proceedings, even if federal subject matter jurisdiction exists, if the following three factors are present:

- (1) there is an ongoing state judicial proceeding brought prior to substantial progress in the federal proceeding; that
- (2) implicates important, substantial, or vital state interests; and (3) provides adequate opportunity to raise constitutional challenges.

Nivens, 444 F.3d at 241; see *Middlesex*, 457 U.S. at 432. We analyze each of these factors in turn.

First, we consider whether there is an ongoing state proceeding. The pertinent question presented in this case is whether this factor is met where a party fails to exhaust its state judicial remedies before seeking relief in federal [**8] district court. The Supreme Court has answered this question in the affirmative: "a necessary concomitant of *Younger* is that a party . . . must exhaust his state appellate remedies before seeking relief in the District Court." *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 608, 95 S. Ct. 1200, 43 L. Ed. 2d 482 (1975). This rule applies with equal force to judicial review of state administrative proceedings. See *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 629, 106 S. Ct. 2718, 91 L. Ed. 2d 512 (1986) (holding that *Younger* abstention is appropriate where "constitutional claims may be raised in state-court judicial review of the administrative proceeding"). Relying on the principles articulated in *Huffman* and *Ohio Civil Rights Comm'n*, we have similarly held that "a defendant to a coercive state administrative proceeding must exhaust his state administrative and judicial remedies and may not bypass them in favor of a federal court proceeding in which he seeks effectively 'to annul the results' of a state administrative body." *Moore v. City of Asheville*, 396 F.3d 385, 388 (4th Cir. 2005) (citing *Huffman*, 420 U.S. at 609) (emphasis added).²

2. Beam contends that the district court's decision to abstain was improper because the state proceedings [**9] in this case are not sufficiently "coercive." We disagree. Similar to the proceedings in *Moore v. City of Asheville*, the state proceedings in this case are "unquestionably coercive." 396 F.3d 385, 395 n.4 (4th Cir. 2005).

In this case, Beam did not exhaust his state judicial remedies. Rather, he abandoned the state review process he initiated and bypassed state court judicial review of the CCPS's administrative decision in favor of filing suit in federal court. As noted above, Beam initially challenged the overweight penalty under the procedures provided by *N.C. Gen. Stat. § 20-91.1*, North Carolina's statutory scheme concerning such penalties. Specifically, on January 10, 2006, Beam sent a letter to the DMV pursuant to "*N.C. Gen. Stat. § 20-91.1*" [**247] demanding a refund of the amount of the overweight penalty. (J.A. at 10.) On January 31, 2006, the CCPS responded with a letter informing Beam that an administrative review had determined that the overweight penalty was issued in accordance with state law and that he had a right to appeal the CCPS's administrative decision in "Wake County Superior Court" as provided for by *N.C. Gen. Stat. § 20-91.1*. (J.A. 11.) Beam, however, did not challenge [**10] the CCPS's decision in Wake County Superior Court; instead he filed suit in federal court.

Beam attempts to excuse his failure to exhaust his state judicial remedies, asserting that *N.C. Gen. Stat. § 20-91.1* did not and does not afford him a right to appeal the CCPS's administrative decision in state court. Specifically, he argues: (1) the North Carolina Supreme Court in *North Carolina Sch. Bds. Ass'n v. Moore*, 359 N.C. 474, 614 S.E.2d 504 (2005) made clear that the statute is solely a tax statute and he is seeking recovery of a civil penalty (not a tax); and (2) that the statute was repealed *after* he filed this suit, preserving only a right to litigate tax cases, not a right to sue for recovery of a civil penalty. In response, North Carolina asserts: (1) the North Carolina Supreme Court in *Cedar Creek Enter., Inc. v. State Dep't of Motor Vehicles*, 290 N.C. 450, 226 S.E.2d 336 (1976) concluded that *N.C. Gen. Stat. § 20-91.1* applied to monetary penalties like the one Beam received and that *North Carolina Sch. Bds. Ass'n* does not even address this issue (nor in anyway purport to overrule *Cedar Creek*); and (2) because Beam invoked his rights under this statute prior to its repeal, he can still seek judicial review [**11] in state court.³

3. North Carolina forcefully reiterated this position at oral argument, stating that "without question" Beam can still raise all of his state and federal claims in state court pursuant to *N.C. Gen. Stat. § 20-91.1* and that the State would "absolutely" support his entitlement to raise these claims in such a suit.

We find Beam's arguments unpersuasive, particularly given that he initially challenged the overweight penalty under the very statute he now claims does not apply to him. Moreover, *N.C. Gen. Stat. § 20-91.1* had not been repealed at time Beam filed the instant federal

suit. Therefore, the point remains: If Beam wanted to challenge the CCPS's decision he should have continued the process he invoked under *N.C. Gen. Stat. § 20-91.1* and filed suit in North Carolina state court. Because he did not do so, we conclude that *Younger's* first prong is satisfied. *Cf. Moore, 396 F.3d at 395* (affirming the district court's decision to abstain under *Younger* even though the plaintiff was left without any remedy for challenging his citation because his appellate rights in state court had already expired.)

Next, we examine whether the proceedings at issue implicate a substantial state *[**12]* interest. To satisfy this factor, the ongoing state proceedings must be "the type of proceeding to which *Younger* applies." *New Orleans Public Serv., Inc. v. Council of the City of New Orleans, 491 U.S. 350, 367, 109 S. Ct. 2506, 105 L. Ed. 2d 298 (1989)*. Beam concedes that "the district court was correct in holding that [North Carolina] has 'a substantial interest in motor safety' . . ." (Appellant's Br. at 32.) He argues, however, that this interest was not genuinely implicated because Beam's only real offense was failing to ensure that the rear escort's certification was not expired. We disagree. As North Carolina points out, Beam's "argument ignores the direct link between the State's desire to ensure the safety of its roadways and the requirement that escort vehicles driven by properly certified drivers accompany an overweight vehicle." (Appellees' Br. at *[*248]* 10.) Hence, the district court correctly concluded that North Carolina has a substantial state interest in motor safety.

Finally, we consider whether Beam will have an adequate opportunity to raise his constitutional claims in North Carolina state court. *See Middlesex, 457 U.S. at 432*. As to this consideration, we agree with the district court that Beam "will receive *[**13]* a full and fair opportunity to litigate the constitutional claims during the state proceedings." (J.A. 98.) Thus, the three prong test for *Younger* abstention is met.⁴

4 Beam also argues that the district court abused its discretion by failing to take into account any existing *Commerce Clause* considerations. Similar to Beam's other contentions, this argument is likewise without merit.

In sum, Beam failed to exhaust his state judicial remedies, where he could have asserted his constitutional claims, and North Carolina has a substantial interest in motor safety. Therefore, we hold that the principles of federalism and comity demand application of *Younger* abstention. As we concluded in *Moore*:

[T]o the extent that [Beam] in this case seeks to annul or trample on the results of state administrative proceedings, he inter-

feres with the State's interest in enforcing its substantive laws as well as its interest in enforcing those laws through available administrative procedures and in its own courts. That [Beam] did not avail himself of state-provided avenues for review can only cast aspersions on the State's capabilities and good faith and deprive the State of a function which quite legitimately *[**14]* is left to the state appellate bodies, that of overseeing agency dispositions of constitutional issues which arise in civil litigation over which they have jurisdiction.

Moore, 396 F.3d at 395 (internal quotation marks, citations and alteration omitted). Accordingly, the district court did not abuse its discretion in abstaining from entertaining Beam's claims in deference to North Carolina's substantial interest in motor safety.⁵

5 North Carolina contends that *Burford v. Sun Oil Co., 319 U.S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943)* also mandated abstention. To be sure, abstention doctrines "are not rigid pigeonholes into which federal courts must try to fit cases." *Pennzoil Co. v. Texaco Inc., 481 U.S. 1, 11 n.9, 107 S. Ct. 1519, 95 L. Ed. 2d 1, (1987)*. The district court, however, solely relied on the principles of federalism articulated in *Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971)*, and so, although *Burford* abstention may (or may not) apply here, our analysis is limited to whether or not the district court correctly abstained under *Younger*.

III.

For the foregoing reasons, we affirm the district court's decision to abstain. We note, however, that because Beam's complaint requests monetary relief, the proper resolution is to stay Beam's case pending conclusion *[**15]* of the state proceedings. *See Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 731, 116 S. Ct. 1712, 135 L. Ed. 2d 1 (1996)* ("[f]ederal courts have the power to dismiss . . . based on abstention principles only where the relief being sought is equitable or otherwise discretionary."); *see also Traverso v. Penn, 874 F.2d 209, 213 (4th Cir. 1989)* (same). Accordingly, we vacate the district court's order dismissing Beam's action and remand with instructions to stay the action.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

240 Fed. Appx. 155, *; 2007 U.S. App. LEXIS 13411, **

Gerhardt List; Clara A. List, Guardian of Theresa E. List; Peggy Hines; Plaintiffs,
Manuel Machado, Jr., Appellant, v. County of Carroll; Nelson Hell, Presiding
Commissioner; Jim Stewart, Commissioner, District #1; David Martin, Commis-
sioner, District #2; Peggy McGaugh, County Clerk, County of Carroll; Associated
Electric Cooperative, Inc., Appellees.

No. 06-2319

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

240 Fed. Appx. 155; 2007 U.S. App. LEXIS 13411

May 30, 2007, Submitted
June 6, 2007, Filed

NOTICE: [**1] PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: Appeal from the United States District Court for the Western District of Missouri.

COUNSEL: Manuel Machado Jr., Plaintiff - Appellant, Pro se, Carrollton, MO.

For County of Carroll, Nelson Hell, Presiding Commissioner, Jim Stewart, Commissioner, District # 1, David Martin, Commissioner, District # 2, Peggy McGaugh, County Clerk, County of Carroll, Defendants - Appellees: Steven F. Coronado, Christopher Lee Heigle, SHERMAN & TAFF, Kansas City, MO.

For Associated Electric Cooperative, Inc., Defendant - Appellee: Terry M. Evans, ANDRECK & EVANS, Smithville, MO.

JUDGES: Before SMITH, GRUENDER, and SHERPHERD, Circuit Judges.

OPINION

[*156] PER CURIAM.

Manuel Machado appeals the district court's dismissal of the complaint he and others filed against the County of Carroll and four County officials (the County defendants) and the Associated Electric Cooperative, Inc. (AECI), alleging violations of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132; Section 504 of the Rehabilitation Act (RA), 29 U.S.C. § 794; the [**2] Missouri Sunshine Law (MSL), Mo. Rev. Stat. § 610.010-.035; the Missouri Human Rights Act (MHRA), Mo. Rev. Stat. § 213.010-.137; and "civil rights and due process" (based upon alleged violations of the MSL).

The district court dismissed all of the claims for lack of subject matter jurisdiction, which in effect was a dismissal without prejudice. Cf. *Kahn v. Kahn*, 21 F.3d 859, 862 (8th Cir. 1994) (based upon determination that district court lacked subject matter jurisdiction, no opinion was expressed as to merits of claims or whether action could be brought in state court; case remanded for dismissal without prejudice). For reversal, Machado argues that the district court erred in concluding it lacked subject matter jurisdiction over the federal claims, erred in dismissing the state law claims, and abused its discretion in denying a motion to amend the complaint.

Upon de novo review of the district court's dismissal for lack of subject matter jurisdiction, see *Hansen v. United States*, 248 F.3d 761, 763 (8th Cir. 2001) (standard of review), we hold the district court erred in concluding [**3] that, under *Randolph v. Rodgers*, 170 F.3d 850 (8th Cir. 1999), it lacked subject matter jurisdiction over plaintiffs' ADA, RA, and civil rights and due process claims. In *Randolph*, *id.* at 858-59, this court did not make a finding of lack of subject matter jurisdiction, but rather held that state law was not dispositive of the federal claims.

In the present case, we nevertheless affirm the dismissal of the federal claims, but for other reasons and with modifications. See *Mead v. Intermec Techs. Corp.*, 271 F.3d 715, 716 (8th Cir. 2001) (affirmance may be on any basis supported by record).

To the extent the ADA and RA claims against the County defendants were based upon denial of access to "closed sessions," we hold that plaintiffs failed to state a claim upon which relief may be granted. Cf. *Int'l Ass'n of Fire Fighters v. City of Harrisonville*, No. 06-0301-CV-W-ODS, 2006 U.S. Dist. LEXIS 54290, 2006 WL 2062098 (W. D. Mo. June 19, 2006) (unpublished order) (dismissing for failure to state claim plaintiffs' claim that exclusion from city meetings was viewpoint discrimination: where plaintiffs alleged that meetings were closed, plaintiffs were [**4] not treated dif-

240 Fed. Appx. 155, *; 2007 U.S. App. LEXIS 13411, **

ferently from others because of viewpoint; plaintiffs' only recourse was with state law); see also *Layton v. Elder*, 143 F.3d 469, 472 (8th Cir. 1998) (to establish violation under Title II of ADA or section 504 of RA, plaintiff must show (1) he is qualified individual with disability; (2) he was excluded from [*157] participation in or denied benefit of public entity's services, programs, or activities, or was otherwise discriminated against; and (3) such exclusion, denial, or discrimination was because of disability). The dismissal of these claims is affirmed, but modified to be with prejudice.

To the extent the ADA and RA claims against the County defendants were based upon allegations of disability discrimination in connection with "public hearings," the viability of such claims, as well as the "civil rights and due process" claim against all defendants, depends (at a minimum) on whether, under the MSL, the hearings and notices in question had to be made available to the public. That uncertain determination is within the exclusive jurisdiction of the "circuit court for the county in which the public governmental body has its principal place of business, [**5] " *Mo. Rev. Stat. § 610.027.1*. We therefore conclude that the federal courts should abstain from addressing these claims. See *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 501, 61 S. Ct. 643, 85 L. Ed. 971 (1941) (where complaint raised federal claim which could have been avoided by state court's definitive ruling on state law issue, district court should have exercised "wise discretion by staying its hands"); *Robinson v. City of Omaha*, 866 F.2d 1042, 1043 (8th Cir. 1989) (this court may sua sponte raise the issue of appropriateness of abstention; for Pullman abstention to be appropriate, (1) controlling state law must be unclear, and (2) tenable interpretation of state law must be dispositive of case); *Coley v. Clinton*, 635 F.2d 1364, 1372-73 (8th Cir. 1980) (Pullman applies where case involves unsettled question of state law which concerns important state interests and which may be resolved in such a way as to avoid need for decision of federal constitutional question). Accordingly, we affirm on abstention grounds the dismissal without prejudice of the ADA and RA claims against the County defendants related [**6] to alleged "public hearings," and the dismissal without prejudice of the "civil rights and due process" claim against all defendants. Cf. *Metzger v. Village of Cedar Creek*, 370 F.3d 822, 822-24 (8th Cir. 2004) (affirming district court's dismissal without prejudice for lack of subject matter jurisdiction where plaintiff's complaint alleged conspiracy to take property without just compensation in violation of federal constitution and state law, Supreme

Court precedent expressly declared that property owner could not bring constitutional takings claim absent prior use of available state court procedure and denial of compensation, and plaintiff had not pursued available state court remedies).

As to the ADA and RA claims against AECI, we hold that the plaintiffs failed to state a claim upon which relief may be granted, because an alleged "quasi-governmental entity by virtue of project ownership by the County" is plainly not within the applicable definition of "public entity," see 42 U.S.C. § 12131(1) ("public entity" means, as relevant, "any State or local government" or "any department, agency, special purpose district, or other instrumentality [**7] of a State or States or local government"), and because plaintiffs did not allege that AECI had received federal funds, see 29 U.S.C. § 794(a) (prohibiting disability discrimination "under any program or activity receiving Federal financial assistance"). Thus the dismissal of these claims is affirmed, but modified to be with prejudice.

We affirm the dismissal without prejudice of the MSL claim for lack of subject matter jurisdiction, in light of *Mo. Rev. Stat. § 610.027.1* ("Suits to enforce sections 610.010 to 610.026 shall be brought in the circuit court for the county in which the public governmental body has its principal [**158] place of business."). As to the MHRA claim, we affirm the dismissal without prejudice, under 28 U.S.C. § 1367(c)(3) (district court may decline to exercise supplemental jurisdiction over pendent state law claims if court has dismissed all claims over which it has original jurisdiction). See *Mead*, 271 F.3d at 716.

Finally, we hold that the district court did not abuse its discretion in summarily denying the motion to amend the complaint. See *United States ex. rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552, 555-59 [**8] (8th Cir.) (denial of plaintiffs' motion for leave to amend complaint is reviewed for abuse of discretion; however, underlying legal conclusion that amendment would have been futile is reviewed de novo; affirming denial of motion for leave to amend complaint on basis of futility where proposed amendments would not have eliminated complaint's deficiencies), cert. denied, 127 S. Ct. 189, 166 L. Ed. 2d 142 (2006).

The judgment of the district court is affirmed subject to the modifications specified herein. The requests for attorneys' fees and costs, filed separately by the County defendants and AECI, are denied.

1997 U.S. App. LEXIS 3337, *

K. HOPE, INCORPORATED, Plaintiff-Appellant, v. ONSLOW COUNTY, Defendant-Appellee. TREANTS ENTERPRISES, Plaintiff-Appellant, v. ONSLOW COUNTY, Defendant-Appellee. DONALD E. MERCER, SR., d/b/a Pleasure Palace, Plaintiff-Appellant, v. ONSLOW COUNTY, Defendant-Appellee. K. HOPE, INCORPORATED, Plaintiff-Appellee, v. ONSLOW COUNTY, Defendant-Appellant. TREANTS ENTERPRISES, Plaintiff-Appellee, v. ONSLOW COUNTY, Defendant-Appellant. DONALD E. MERCER, SR., d/b/a Pleasure Palace, Plaintiff-Appellee, v. ONSLOW COUNTY, Defendant-Appellant.

No. 95-3126, No. 95-3127, No. 95-3153, No. 95-3195, No. 95-3196, No. 95-3197

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

1997 U.S. App. LEXIS 3337

January 28, 1997, Argued
February 25, 1997, Decided

NOTICE: [*1] RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: Reported in Table Case Format at: 107 F.3d 866, 1997 U.S. App. LEXIS 7487.

PRIOR HISTORY: Appeals from the United States District Court for the Eastern District of North Carolina, at Greenville. Terrence W. Boyle, District Judge. (CA-94-130-4-BO, CA-94-133-4-BO, CA-94-132-4-BO).

DISPOSITION: VACATED AND REMANDED WITH INSTRUCTIONS.

COUNSEL: ARGUED: Jeffrey Stephen Miller, Jacksonville, North Carolina, for Appellants.

Gary Keith Shipman, SHIPMAN & UMBACH, L.L.P., Wilmington, North Carolina, for Appellee.

ON BRIEF: Keith Elton Fountain, LANIER & FOUNTAIN, Jacksonville, North Carolina, for Appellants.

Carl W. Thurman, III, C. Wes Hodges, II, SHIPMAN & UMBACH, L.L.P., Wilmington, North Carolina, for Appellee.

JUDGES: Before RUSSELL and WILKINS, Circuit Judges, and OSTEEEN, United States District Judge for the Middle District of North Carolina, sitting by designation.

OPINION

PER CURIAM:

K. Hope, Incorporated, Donald E. Mercer, Sr., d/b/a Pleasure Palace, and Treants Enterprises (collectively, "Plaintiffs") brought these actions against Onslow County, North Carolina, challenging an Onslow County ordinance [*2] that regulates the location of adult businesses. Plaintiffs sought a declaration that the ordinance is violative of the United States Constitution and North Carolina law and an injunction against its enforcement. Ruling on cross-motions for summary judgment, the district court concluded that: (1) the ordinance was partially preempted by North Carolina law; (2) although the County was not authorized to adopt the ordinance pursuant to its general police power, see *N.C. Gen. Stat. § 153A-121* (1991), the County properly enacted the ordinance pursuant to a comprehensive plan as an exercise of its zoning power, see *N.C. Gen. Stat. § 153A-340* (1991); (3) the ordinance does not violate the North Carolina Constitution; and (4) the ordinance is not an unconstitutional restraint on freedom of expression violative of the *First Amendment* or facially overbroad in violation of the *First* or *Fourteenth Amendments*. Both parties appeal from this ruling.

1 Plaintiffs brought separate actions that were consolidated before the district court.

[*3] The principal issue presented to us is a difficult and unsettled question of state law: Whether the County's enactment of the ordinance constituted a valid exercise of the power granted to counties by the North Carolina legislature. If the County's enactment of the ordinance was violative of North Carolina law, the ordinance is a nullity. See *Jackson v. Guilford County Bd. of Adjustment*, 275 N.C. 155, 166 S.E.2d 78, 83 (N.C. 1969). Thus, resolution of this perplexing state issue in

1997 U.S. App. LEXIS 3337, *

favor of Plaintiffs would avoid any need to address the constitutional questions presented. Under such circumstances, though jurisdiction is present, abstention pursuant to *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 501, 85 L. Ed. 971, 61 S. Ct. 643 (1941), is appropriate to permit the state courts to decide the questions of state law. See, e.g., *Meredith v. Talbot County, Md.*, 828 F.2d 228, 231 (4th Cir. 1987) ("Pullman abstention . . . is appropriate where there are unsettled questions of state law that may dispose of the case and avoid the need for deciding the constitutional question.").

2 The fact that the parties did not raise *Pullman* abstention below does not foreclose our consideration of it. See *Bellotti v. Baird*, 428 U.S. 132,

143 n.10, 49 L. Ed. 2d 844, 96 S. Ct. 2857 (1976) (explaining that failure of the parties to raise *Pullman* abstention before a district court does not bar sua sponte appellate consideration).

[*4] Consequently, we vacate the judgment entered below and remand with instructions that the district court abstain from deciding the questions of state law presented. But, the district court should retain jurisdiction over the federal claim until such time as the parties may properly return to federal court. See *Harrison v. NAACP*, 360 U.S. 167, 177-79, 3 L. Ed. 2d 1152, 79 S. Ct. 1025 (1959).

VACATED AND REMANDED WITH INSTRUCTIONS

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

COURT OR COMMON PLEAS
2009-CP-10-07593

ROCKY DISABATO,

Plaintiff,

v.

SOUTH CAROLINA ASSOCIATION OF
SCHOOL ADMINISTRATORS,

Defendant.

TRANSCRIPT OF RECORD.

January 18, 2011
Charleston, South Carolina

B E F O R E:

THE HONORABLE DEADRA L. JEFFERSON, JUDGE

A P P E A R A N C E S:

MR. KEVIN A. HALL, ESQUIRE
MR. M. TODD CARROLL, ESQUIRE
REPRESENTING THE PLAINTIFF

MR. JOHN M. REAGLE, ESQUIRE
MR. KEITH POWELL, ESQUIRE
REPRESENTING THE DEFENDANT

Anne Bouley Meyer, RPR
Circuit Court Reporter

1 THE COURT: This is Rocky Disabato doing
2 business as Rocky D versus South Carolina Association
3 of Schools Administrators 2009-CP-10-7593. It's before
4 the Court on several motions. They will be heard in
5 the order they were filed. The defendant's motion to
6 dismiss pursuant to 12(B)(3). Defendant's motion for
7 protective order filed March 15, 2010. And plaintiff's
8 motion to compel discovery responses filed March 17,
9 2010.

10 And the plaintiff is represented by John Reagle,
11 is that correct?

12 MR. REAGLE: Yes, Your Honor.

13 THE COURT: And Todd Carroll; is that correct?

14 MR. REAGLE: I'm sorry. The defendant is
15 represented by John Reagle.

16 THE COURT: I think my secretary got these
17 confused. I apologize.

18 Mr. Hall and Mr. Carroll, you represent the
19 defendants?

20 MR. CARROLL: Actually the plaintiffs.

21 THE COURT: Or am I still confused?

22 MR. HALL: Your Honor, may it please the Court,
23 Kevin Hall --

24 THE COURT: You know why I'm confused? Because
25 on the cover sheet it's list backwards.

1 MR. HALL: Yes, Your Honor. It's Kevin Hall and
2 Todd Carroll for Mr. Disabato who is the plaintiff.

3 THE COURT: Okay.

4 MR. HALL: Thank you, Your Honor.

5 THE COURT: And, Mr. Reagle, you represent the
6 defendant?

7 MR. REAGLE: Yes, Your Honor. Keith Powell as
8 well here today.

9 THE COURT: Now I need to disclose for the
10 record that Mr. Hall and I are members of the same
11 liberty fellowship class. And I need for you to
12 discuss with your client whether he would have any
13 opposition to me hearing these motions. And I'm
14 referring to defense counsel, Mr. Reagle.

15 MR. REAGLE: I don't have an opportunity right
16 now to discuss that with our --

17 THE COURT: Is your client not here?

18 MR. REAGLE: No.

19 THE COURT: I'm sorry. I would have told you
20 all in advance if I had -- I tend to look at, when I'm
21 studying ahead of time, I really don't look at the
22 lawyers, I look at the substance of what is in the
23 file. So I tend to gloss over all of that part of it.

24 And I would have called you earlier if I had
25 caught it to save you a trip. Do you need time to call

1 THE COURT: All right. Counsel, give me your
2 appearances from my left to right.

3 Mr. Childs, who do you represent?

4 MR. CHILDS: Ken Childs, we're here on behalf of the
5 South Carolina Association of School Administrators.
6 John Reagle is the principle attorney. Keith Powell is
7 with me. My name is Ken Childs.

8 THE COURT: Your name, please?

9 MR. POWELL: Keith Powell, sir.

10 THE COURT: Mr. Powell?

11 MR. POWELL: Yes.

12 THE COURT: And you represent?

13 MR. POWELL: We're all representing SCASA.

14 MR. CHILDS: South Carolina Association of School
15 Administrators.

16 THE COURT: You are --- I understand that.

17 MR. CHILDS: Yes, sir.

18 THE COURT: But you are counsel?

19 MR. POWELL: Yes, sir.

20 THE COURT: Okay. Your name, please?

21 MR. REAGLE: John Reagle, Your Honor.

22 THE COURT: Mr. Reagle.

23 All right. Yes, sir.

24 MR. HALL: Good morning, Your Honor. I'm Kevin
25 Hall --- may it please the Court --- with the firm of Hall

1 and Bowers. We represent the plaintiff, Rocky Disabato
2 in this case. I am joined by my colleague, Todd Carroll,
3 also of the same firm.

4 THE COURT: All right.

5 MR. HALL: Thank you, Judge.

6 THE COURT: It's your motion, Mr. Hall?

7 MR. HALL: Yes, Your Honor. Thank you. May it please
8 the Court.

9 If I might, Your Honor, if I could just give you a
10 brief run down of where we are, I think we could
11 expedite what we have got pending, which are
12 essentially dueling discovery motions.

13 What is technically pending is a motion to compel and
14 a motion for a protective order. They don't really join
15 the same issues, so resolution of one is likely the
16 resolution of the other.

17 By way of background, this case was filed in
18 August of 2009 --- excuse me, a FOIA request was
19 presented in August of 2009 by Citadel Broadcasting and
20 WTMA radio in the Low Country, Rocky Disabato being the
21 plaintiff.

22 It was submitted to SCASA. SCASA's position was that
23 it was not a public body, and therefore, did not need to
24 respond to that FOIA request.

25 THE COURT: He is --- he is Citadel Broadcasting?

1 MR. HALL: He is employed by Citadel Broadcasting,
2 Citadel Broadcasting and WTMA.

3 Your Honor, what happened after the lawsuit was filed
4 in Charleston County by Mr. Disabato, essentially to
5 establish if they are, in fact, a public body.

6 Discovery requests were propounded to establish
7 those facts that would demonstrate that they are, in fact,
8 a public body, those are the discovery issues that are in
9 dispute.

10 THE COURT: What's his cause of action?

11 MR. HALL: The cause of action is declaratory
12 judgment under the Freedom of Information Act, and to
13 require that you respond to the FOIA request.

14 THE COURT: What is the FOIA request?

15 MR. HALL: Excuse me, Judge?

16 THE COURT: What is he seeking?

17 MR. HALL: He --- his original FOIA request sought
18 information with regard to SCASA's participation in the
19 stimulus litigation from 2009, what role did SCASA
20 play in that lawsuit.

21 The legal questions presented to the Court don't
22 relate to that, Your Honor. They're going to relate to
23 whether SCASA is a public body, and that's what the
24 discovery requests in dispute and at issue today are
25 aimed at.

1 This case, and the discovery in it, will establish
2 that they are, in fact, a public body and a relevant party.
3 That would be the Weston case and, obviously, the Freedom
4 of Information Act itself.

5 So our motion is to compel responses to the
6 discovery requests, substantive responses. That's the
7 position, and they have been pending since January
8 of 2010, Your Honor, those discovery requests.

9 THE COURT: Okay.

10 MR. HALL: Thank you, Judge.

11 THE COURT: Who's going to argue it? Mr. Reagle?

12 MR. REAGLE: Thank you, Your Honor. And I want to
13 thank opposing counsel. I think they have been very
14 courteous in discussions and amicable and we appreciate
15 that.

16 This case --- or this motion, really, raises two
17 broad issues, and specifically SCASA's motion for a
18 protective order raises two broad issues: One is the
19 relevance to the plaintiff's discovery requests, what
20 kind of information is relevant in whether or not a
21 private organization that engages in issue advocacy can
22 be subject to FOIA.

23 The second is the scope of the First Amendment
24 protection over SCASA's reference activities. Generally,
25 the background of this litigation is --- and plaintiff's

1 discovery requests --- I want to highlight one thing:
2 This is the first motion to compel that I have been a part
3 of where we have not yet heard any explicit justification
4 in terms of the relevancy of --- of the requests that have
5 been propounded.

6 Even today, there have been no specific delineation
7 of why certain requests are, in fact, relevant to showing
8 that SCASA is a public body.

9 Importantly, SCASA is a leading advocate for
10 public education in South Carolina. As I think anybody
11 in South Carolina is aware, there has been an ongoing and
12 heated legislative debate over public education and
13 funding vouchers, credits, those issues which SCASA has
14 been essentially involved in as an advocate for public
15 education.

16 THE COURT: They're registered as a lobbyist?

17 MR. REAGLE: They have lobbyists. Those are some
18 technical issues. I'm not certain that Phibbs does
19 provide lobbying activities for them. There is also a ---

20 THE COURT: What does --- I didn't hear what you said.

21 MR. REAGLE: I don't know if technically.

22 THE COURT: I can't hear you.

23 MR. REAGLE: Technically they are registered as a
24 lobbyist. I believe they --- they are. Mr. Hall might
25 actually be able to answer that. Beth Phibbs is listed

1 by them as a lobbyist and does ---

2 THE COURT: Was? Lobbyist?

3 MR. REAGLE: Beth Phibbs.

4 THE COURT: Beth Phibbs? Oh. That's a person?

5 MR. REAGLE: They certainly do engage in, you know,
6 lobbying and presenting information to the General
7 Assembly.

8 Additionally, part of their advocacy efforts
9 include what Mr. Hall referenced, which was being a
10 plaintiff in the lawsuit against Governor Mark Sanford in
11 the spring of 2009 compelling the Governor to accept the
12 federal stimulus funds, approximately \$780 million.
13 That's what Rocky D's discovery request or initial FOIA
14 request was directed towards.

15 This --- and in light of SCASA's leading advocacy
16 role, I think it's significant that this complaint was
17 initially filed in early December 2009.

18 It was not served on SCASA until January 4th, 2010,
19 which was the first day of the legislative session for
20 2010.

21 It was seeking to make SCASA subject to the FOIA and
22 seeking records relating to SCASA's educational
23 advocacy efforts.

24 Within two weeks of serving the complaint, Rocky D
25 propounded the discovery requests which are now at

1 issue, which SCASA believes are invasive, particularly
2 its First Amendment associational rights.

3 SCASA moved to change venue. This case was initially
4 brought Charleston. SCASA's offices are in Richland
5 County.

6 For whatever reason, the Circuit Court in Charleston
7 took almost --- well, probably did take year and maybe
8 even a little more to actually reach a decision on the
9 venue motion and transfer venue up to Richland County.

10 So although this case is, you know, old or has
11 being pending for a year, it really has not been --- is
12 subject to active litigation for, you know, but a couple
13 of months because the venue motion is supposed to be heard
14 and determined before other motions are resolved.

15 SCASA filed a motion for a protective order, and then
16 a couple of days following that, the plaintiff filed a
17 motion to compel.

18 SCASA initially --- additionally, also, filed a
19 declaratory judgment action in federal court asserting its
20 First Amendment rights to freedom of association with
21 respect to possible application of the FOIA to it, but the
22 circuit court, the district court, Judge Curry,
23 abstained under both Younger and Holdman doctrine
24 principles and dismissed SCASA's claim. That matter is
25 now pending before the fourth circuit.

1 SCASA has vigorously asserted its First Amendment
2 rights with respect to the FOIA and Rocky D's discovery
3 requests precisely because it believes it is being
4 harassed, whether intentionally or not, the effect of
5 this litigation and prior complaints has been harassing
6 to SCASA and repeating its associational advocacy
7 efforts in support of public education.

8 Although, any effort to invade its associational
9 activities would be disruptive to SCASA's and Rocky D's
10 efforts are particularly so.

11 This is not the first case filed against SCASA
12 seeking a declaration that it's a public body subject to
13 FOIA.

14 South Carolinians for Responsible Government filed
15 a similar declaratory action, judgment action, in state
16 court. That was dismissed without prejudice by consent
17 of the parties in 2009.

18 Additionally, Mr. Paige filed, who is the president
19 of the South Carolinians for Responsible Government, filed
20 an Ethics Act complaint against SCASA, against LEAPAC
21 (phonetic), which is a...

22 THE COURT REPORTER: I'm sorry. Against who?

23 MR. REAGLE: LEAPAC, L-E-A-P-A-C, which is a political
24 action committee that is associated with SCASA and against
25 Ross Shealey, who is an agent and a consultant with

1 SCASA. Those were all done in 2008.

2 Then there's another case, Paige vs. Lexington County
3 School District I, which was a First Amendment action
4 brought, again, by Randy Paige, the president of --- or
5 former president, perhaps, of South Carolinians for
6 Responsible Government.

7 There was third-party discovery that was limited by
8 Judge Curry in that action and also affected some
9 Chambers of Commerce that were supporting Lexington
10 One's advocacy against some of the legislation at that
11 time relating to vouchers and credits.

12 So there's been a history over the past couple of
13 years relating to litigation and complaints that has had
14 SCASA directly involved in defending its First
15 Amendment rights and that have been really directed at
16 trying to subject it to the FOIA such --- so that it can't
17 act, really, as an effective advocacy association.

18 So accordingly, SCASA believes it is subject to a
19 pattern of harassment and perhaps retaliation because of
20 its leading advocacy role on behalf of public education
21 in South Carolina.

22 And I think this is compounded by the fact that right
23 after this case was filed, on the first day of the
24 legislative session, these discovery requests were
25 propounded to literally seek cause, all of SCASA's

1 financial records and other communications.

2 Courts have repeatedly limited discovery with
3 respect to groups engaging in issue advocacy like SCASA.
4 We submitted a brief last Wednesday detailing this, but
5 the seminal case was NAACP vs. Alabama. That case
6 specifically related to membership lists, but highlighted
7 the importance of freedom of association, associational
8 advocacy.

9 Since then, courts have expanded the reach of
10 associational rights and privacy and International Action
11 Center vs. United States, the case we cited in our memo,
12 that the Court discussed protections for membership lists
13 but also volunteer lists, contributor lists and documents
14 related to past political activities.

15 Then in Right Price Recreational --- Recreation vs.
16 Connells Prairie Community Council, which was a Washington
17 State case, the Court had a very comprehensive discussion
18 of First Amendment associational rights in discovery and
19 issued a protective order affecting membership lists,
20 minutes of the meetings, all financial records and
21 virtually every document or piece of correspondence
22 generated by the association. That's what the discovery
23 request was seeking. That he very similar to what
24 plaintiff's discovery requests are seeking from --- from
25 SCASA.

1 So there is a --- I think, a fairly --- a
2 well-developed body of law that provides an analytical
3 framework for addressing discovery disputes in the context
4 of First Amendment associational rights.

5 Specifically, that framework is the relevance and
6 materiality of the information sought must first be
7 established. Then, additionally, there must be
8 reasonable efforts to obtain the information by other
9 means, and those efforts must have been unsuccessful.

10 To establish relevance, the parties seeking discovery
11 must specifically describe the information sought and its
12 importance. To date, that hasn't happened. Speculation
13 will not suffice.

14 To meet the second requirement, the party seeking
15 discovery must make a reasonably explicit showing that
16 every reasonable alternative source of information has
17 been exhausted.

18 If both parties make the required showing, the court
19 then balances the need for disclosure against the claim
20 for privilege to determine which is more compelling. An
21 in-camera review is appropriate and necessary to fairly
22 evaluate these repeating claims.

23 In-camera review is also the mechanism preferred
24 under the FOIA. As well established, our City of Columbia
25 vs. A.C.L.U., that where there are claims of exemptions

1 of records under the FOIA, the court should examine and
2 analyze those claims of exemptions in the FOIA in-camera
3 before deciding whether to allow the other party to have
4 those records or not.

5 Consequently, after a concrete showing of relevance
6 by the plaintiffs supporting the need for the broad
7 discovery requests, the plaintiffs need to demonstrate a
8 compelling relevance and that they've also sought
9 information from other sources.

10 Now, with respect to relevance, obviously, the
11 starting place is the FOIA itself, which provides that a
12 --- any organization that is supported, in whole or in
13 part, by public funds is a public body.

14 Now, the Weston case actually limited that definition
15 and said, "Well, that --- that is true, and it's true of
16 private organizations, as well, but it doesn't --- it
17 doesn't encompass fees that are --- payments that are in
18 exchange for services.

19 Then in a subsequent case, which is Sutler vs.
20 Palmetto Electric Cooperative, which is actually a case
21 under the Whistle Blower Act, which has the same
22 definition of public body.

23 So the court in the Sutler case looked to Weston for ---
24 you know, information or guidance as to how to interpret ---
25 determine public body.

1 In the Sutler case, you know, it dealt with low
2 interest rates, loans, subsidized loans by the government
3 and said it has noted that cooperatives received these low
4 interest rate loans because they are providing
5 electricity to areas that would not otherwise have
6 electrical service.

7 Since, similarly, the farmers and small businesses
8 receive favorable interest rates on loans because they
9 are performing certain services.

10 Just as the FOIA does not apply to enterprises and
11 accept payment from the public body in exchange for
12 services, the Whistle Blower Act does not apply to
13 respondent who provides electricity to rural areas in
14 exchange for loans with beneficial interest rates.

15 So I think in terms of looking at relevance and
16 looking at the plaintiff's complaint, it certainly --- the
17 mere fact that public employees pay dues is an exchange
18 for service, and I think another thing that I tried to
19 highlight is the fact that SCASA employees are eligible
20 to participate in the health --- the State Health and
21 retirement plans. Again, those are the nature of --- if
22 they are subsidies at all, I mean, SCASA pays the employer
23 contribution. So it's not that the State is making any
24 payment on behalf of SCASA's employees.

25 It may be that the plans themselves are not adequately

1 funded by the State or managed by the State. If anything,
2 that falls within something like the subsidized loan
3 programs that are provided.

4 In other areas that they look at seem to be just the
5 fact that SCASA is primarily composed of public employees
6 as an association. It's not an association of school
7 districts; it's an association of school administrators.

8 It's certainly --- there is nothing in FOIA that says
9 public employees cannot associate together. There are all
10 sorts of public employee associations, from Firemen's
11 Associations, Sheriffs' Associations, Policemen's
12 Associations. There's even a Circuit Court Judges'
13 Association.

14 I don't think simply because the employees are
15 associating together, public employees are associated
16 together that they don't carry with them their ---
17 certainly not their First Amendment associational
18 rights, but there is nothing in FOIA that says they can't
19 do that or that that's something that makes them a public
20 body simply because it is a body that is perhaps largely
21 composed of public employees.

22 So I think there's --- what we're --- what we're
23 asking for if light of the pending motion to dismiss,
24 we're asking that this discovery be stayed until
25 resolution of the motion to dismiss.

1 THE COURT: Wait a minute. Wait a minute. Where is
2 the motion to dismiss? I thought this was ---

3 MR. REAGLE: It --- Judge Lee did not schedule that
4 for hearing today. I think because --- I think this ---
5 these motions got accelerated on the calendar because they
6 had been pending since last February probably. So
7 these were accelerated on the calendar with Judge Lee.

8 We did not file ---

9 THE COURT: Well ---

10 MR. REAGLE: We did not file ---

11 THE COURT: You should have told me that to start
12 with.

13 MR. REAGLE: Okay.

14 THE COURT: This hearing might have been over 30
15 minutes ago.

16 MR. HALL: Your Honor, if I might, the discovery ---
17 the motion to dismiss, obviously, wouldn't be heard,
18 respectfully, I think until discovery had been complete,
19 all right.

20 THE COURT: No, no. It's a 12(b)(6)?

21 MR. REAGLE: Yes.

22 MR. HALL: Well, the question is --- again, remember,
23 there's a Freedom of Information Act request propounded,
24 a refusal to answer, a lawsuit saying please declare that
25 they are, in fact, a public body and must respond,

1 discovery requests propounded, the subject of the
2 motions today, discovery requests track Weston.

3 They say, "Are you supported in whole or in part by
4 public funds?"

5 The discovery requests, for instance, say "Identify
6 your gross revenues for the fiscal years" ---

7 THE COURT: I don't know why the motion to dismiss
8 would not take precedence over these two motions.

9 MR. HALL: Well, the motion to dismiss is based on
10 an assertion that they're not subject to FOIA.

11 THE COURT: Okay.

12 MR. HALL: In order to determine ---

13 THE COURT: Okay. So what if that's granted?

14 MR. HALL: Well, in order to determine whether to
15 grant that motion, there's going to have to be factual
16 discovery.

17 You can't --- if you look at the Weston case, for
18 instance, you have to examine what are they? Where
19 does their money come from? Are they supported in whole
20 or in part by public funds?

21 If they are, you, obviously, wouldn't dismiss a
22 freedom of information act lawsuit, all right. What
23 they say is look, we're not subject to FOIA. They said,
24 "We don't want to answer any discovery in this case that
25 allows you to establish that we're subject to FOIA, and

1 Judge, we want you to dismiss the case without any
2 discovery as to whether we're subject to FOIA." That's
3 their position.

4 Now, clearly, there's discovery in FOIA cases. You
5 can't say --- when you have statutory duties assigned to
6 you, when your employees receive State retirement
7 benefits, State health insurance benefits, State
8 dental benefits, when the statutes in four separate
9 locations reference the organization and assign to it
10 public responsibilities, in our argument, there could be
11 no question that it is a public body. Their position is
12 we are not. We are not. We are a private organization.
13 We're like the Kiwanis Club, Lyons Club, the Association
14 of ---

15 THE COURT: Well, he didn't say that. He said ---

16 MR. HALL: Well, the Association of Truckers.

17 THE COURT: No. He said of State employees.

18 MR. HALL: Well, here is the thing, Judge. When a
19 state employee ---

20 THE COURT: He used the Fireman's --- Fireman's ---
21 or the Sheriff's Association, let's take that.

22 MR. HALL: Let's take an example. If the ---

23 THE COURT: Public employee.

24 MR. HALL: If public employees on company time, on
25 government time, come to meetings and participate and

1 are paid for their presence, if their hotel is paid for,
2 if ---

3 THE COURT: By whom?

4 MR. HALL: By the school districts, with public
5 dollars.

6 Now, we say it's a --- the argument is, "Well, they're
7 school administrators." Well, school administrators
8 can have a cookout or whatever, but when you spend
9 government money on government time in a government
10 vehicle to fulfill statutory duties assigned to you by
11 the legislature and you receive medical benefits,
12 health insurance benefits, retirement benefits, you are
13 a public body.

14 In the Weston case, the court looked at the USC
15 Foundations. The USC Foundation said, "Look, we're a
16 foundation. We're separate from the University of South
17 Carolina. We are not a public body."

18 The court said, "Wait a second. Money comes from the
19 University to you, and you use that money to do certain
20 things."

21 The Court said you, Carolina R&D foundation,
22 Carolina Educational Foundation, you are subject to the
23 Freedom of Information Act. We have the same situation
24 here.

25 Even more extreme, we have four statutory

1 assignments of duties to this organization. You can go
2 to the Code and search for the South Carolina
3 Association of School Administrators, and you will see
4 that the General Assembly has assigned them public
5 responsibilities.

6 Now, in light of that --- all of which are undisputed
7 that I just laid out to you, the Code is the Code. Their
8 position before this court is, "Judge, you ought to just
9 dismiss this lawsuit. You shouldn't --- there shouldn't
10 be discovery as to whether we are a public body."

11 Well, how could this logically be? How could we
12 dismiss a suit without discovery as to whether they're
13 supported in whole or in part by public funds?

14 This is how organizations evade FOIA. The South
15 Carolina High School League has been through this.
16 Other organizations have been through this, all right.

17 We get it. That is a FOIA lawsuit. Ultimately, a
18 circuit court will ultimately, after discovery, will
19 have to make a judgment as to whether they are a public
20 body.

21 If the circuit court concludes, based on the
22 evidence, they are not a public body, then it will go up
23 on appeal on that basis. If they conclude they are, I
24 guarantee they will go up on appeal on that basis.

25 The question, the threshold question, is whether

1 the South Carolina Association of School Administrators
2 is a public body and subject to the Freedom of
3 Information Act.

4 That's why you have a member of Acceptable Press
5 Association, Citadel Broadcasting is bringing this case.
6 So this suggestion that the motion to dismiss, that
7 this is frivolity; that this all just ought to go away and
8 oh, discovery be darned is completely misplaced,
9 completely misplaced.

10 There should be discovery. Requested here, I'm
11 prepared to go through every single one of the requests,
12 identify its relevance, why we want it, what it proves,
13 the statutory or case cite that demonstrates its
14 relevance and why have to give it to us. I'm prepared to
15 go through every one of them.

16 What we have is two years of --- respectfully, and
17 I don't mean to disparage them when I say obstruction. We
18 have had a case filed in federal court to block this.

19 Judge Curry bootied it. She said in part --- she
20 said Younginer and Holdman extension filed. The federal
21 court wasn't even getting in the middle of what is the
22 state --- the State determined who was subject to FOIA.

23 She noted that the plaintiff has mixed private and
24 public attributes, the latter based on receipt of public
25 funds and the statutory assignment of duties.

1 The district court knew it was a state Freedom of
2 Information Act Issue and looked at it. What SCASA has
3 been able to do --- I don't say this critically --- I
4 actually applaud my colleagues here: They've avoided
5 the substance for two years, for two years.

6 Now, what you heard was a speech about exemptions.
7 There aren't any exemptions asserted. They said it
8 doesn't apply to them. They haven't said it applies, but
9 this exemption is applicable.

10 They said it doesn't apply. We said it does apply.
11 Here is the discovery request that we filed on them.
12 They say, "Oh, no, no, no. We get First Amendment
13 rights."

14 The court punted that already, and so here we are.
15 What do we say in this Court? Just boot them out of court.
16 Make it go away, make the press go away.

17 But when you receive the public funds, when you do
18 it on state time, and you receive those benefits, they
19 receive the same State Retirement benefits that, for
20 instance, Court Administration here will receive.
21 That's public money being spent. You don't get to say,
22 "I'm not a public body."

23 We're not going to decide that question today. That
24 question is --- is a factual determination based on what
25 they receive and the way of public funds supported in

1 whole or in part by public funds. Without that discovery,
2 the case cannot proceed, Your Honor.

3 THE COURT: All right. Is there any request for
4 those --- they're interrogatories?

5 MR. HALL: They are interrogatories and requests for
6 production, Your Honor.

7 THE COURT: And requests for production; that they
8 be reviewed in-camera?

9 MR. HALL: I'm not sure I understand the question.
10 There has not been a request that the responses be
11 reviewed in-camera. Obviously ---

12 THE COURT: Without a repercussion.

13 MR. HALL: Well, if they were responses subject to
14 the discovery requests, they could certainly include ---
15 for instance, in response to requests for production,
16 they could say look, we think something should be reviewed
17 in-camera.

18 They can put it on a log, an exemption log or
19 whatever they want, and we can bring that issue up, but
20 I want to be clear, judge. You don't under FOIA just get
21 to have in-camera review as a matter of right.

22 If there's a reasonable request for the in-camera
23 review, obviously, we're going to cooperate with the
24 court so that Your Honor can make a judgment.

25 If there's something they shouldn't have to give up

1 and the court can look at that, we'll cooperate in that
2 process.

3 THE COURT: All right.

4 MR. HALL: There has been no request in this case
5 for a confidentiality order. Here we're talking about
6 the court doing something in secret when nobody has
7 even said, we'll produce something pursuant to a
8 confidentiality order.

9 THE COURT: All right. Let me hear from Mr. Reagle.

10 MR. REAGLE: Initially, our motion to dismiss this
11 case is based on First Amendment grounds. It's not saying
12 the FOIA issue needs to be reached at all. It says even
13 if we might be subject to FOIA, FOIA cannot reach an issue
14 advocate --- private issue advocacy organization
15 consistent with the First Amendment.

16 The government can't simply say because we're giving
17 you some money, which is not the case with SCASA, nobody
18 gives us any money --- because we're giving you money, you
19 waive all your First Amendment rights.

20 What the law says --- and very clearly in a case
21 brought by Mr. Hall recently against the Ethics
22 Commission, that there have been narrow inroads made in
23 issue advocacy organizations, waiver of First Amendment
24 rights that are one-time targeted towards the
25 governmental interests.

1 So, obviously, if the government were to give SCASA,
2 you know, \$5 million or, you know, in the Weston case, it
3 was \$16.3 million, so it's an extremely different
4 situation, then disclosure about how those specific funds
5 might be managed or expended might be constitutional, but
6 simply to say because --- whether it's SCASA, the Chamber
7 of Commerce, a newspaper, policy council might take some
8 funding from the government that it has --- has to have
9 all the other meeting act requirements of FOIA and
10 disclose all of its records is simply not consistent with
11 the First Amendment.

12 That is --- that is what our --- our motion to dismiss
13 is based on. And, you know, actually, if I --- the Court
14 will indulge me, I could read a little bit from
15 Mr. Hall's recent case he brought by --- it was South
16 Carolinians for Life against the members of the Ethics
17 Commission.

18 There Judge Wooten was quoting from a Utah case,
19 stating, "The Court noted that being designated a
20 political issues committee in Utah causes a substantial
21 burden to our organization."

22 It's just like being designated a public body in
23 South Carolina poses substantial burdens on issue
24 advocacy organizations, including requirements of the
25 committee filed statement of registration, disclosing

1 all of the organization's officers, board members, and any
2 other entities, or corporations or organization it
3 affiliates with.

4 Political issues committees were also required to
5 file periodic continuous financial statements which
6 detailed the organizations' contributors and the amount
7 contributed.

8 The court noted that the burdensome disclosure
9 requirements may provide a disincentive for many
10 individuals and entities to engage in activities that
11 might classify them as members of a political issue
12 committee, and that otherwise protected political
13 speech, such as true issue advocacy may be
14 self- (unintelligible) during individuals of...

15 THE COURT REPORTER: I'm sorry, can you slow down
16 please, and can you provide me a copy of what you're
17 reading from? Thank you.

18 MR. REAGLE: Such as --- such as true issue advocacy
19 may be self-censored as individuals and entities attempt
20 to avoid political issues, committee designation.

21 The Court, therefore, held the State definition was
22 unconstitutional on its face. That that motion to
23 dismiss issue, and then the court went on to --- to discuss
24 provingly a similar North Carolina decision...

25 THE COURT: Is that --- is that a part of your

1 memorandum?

2 MR. REAGLE: It is not because this is really part
3 of the motion to dismiss.

4 MR. HALL: And, Your Honor, we have not received the
5 memorandum.

6 MR. REAGLE: We served it on Wednesday.

7 MR. HALL: Perhaps by mail, but I don't have a copy
8 of it.

9 THE COURT: Defendant's memorandum?

10 MR. HALL: I've never seen it. The first I've heard
11 of it was this morning, Your Honor.

12 THE COURT: I just happen to have an extra one.

13 MR. REAGLE: The court then went on to say the Fourth
14 Circuit noted that instead, North Carolina could impose
15 one (unintelligible) ---

16 THE COURT: Sorry to speak. I'm sorry.

17 MR. REAGLE: Yes, sir.

18 MR. HALL: Thank you, Judge.

19 THE COURT: I happen to have two.

20 MR. HALL: Thank you.

21 MR. REAGLE: And just for the record, I have a signed
22 certificate of service. Now, maybe they neglect to do it
23 but we ---

24 MR. HALL: I think it probably was dropped in the
25 mail.

1 THE COURT: Well, let's move on.

2 MR. REAGLE: Okay. The Fourth Circuit noted that
3 instead, North Carolina could impose one-time reporting
4 requirements, as it already does in certain individual
5 expenditures and contributions by nonpolitical
6 committee organizations.

7 The same --- North Carolina would produce the same
8 benefits and transparency ---

9 THE COURT: Why don't you just ---

10 MR. HALL: Okay.

11 THE COURT: Give me a copy.

12 MR. REAGLE: And that's just one. I think there are
13 other First Amendment concerns. We're trying to apply
14 FOIA to issue advocacy organizations and not use a more
15 narrowly tailored approach.

16 For example, Mr. Hall references the four times SCASA
17 is mentioned in the statute, and those are things like the
18 State Department is supposed to consult with SCASA about
19 some educational goals.

20 We get to appoint some people to a couple of charter
21 school related committees, but by contrast, the Chamber
22 of Commerce is mentioned. If you were to search the
23 Chamber of Commerce in the Code, I think it comes up over
24 ten times. So it's not unusual.

25 Certainly, it shouldn't be a disincentive in the

1 FOIA for the legislature to seek the input of
2 knowledgeable associations. That's a part of what they
3 do exist for. That is part of the service they provide.

4 In the Weston case, it clearly recognizes that where
5 payments are for services, it does not constitute
6 supporting the FOIA.

7 In the Weston case, the main issue they were
8 discussing is that the foundation accepted \$16.3 million
9 in federal grant money and the grant application itself
10 was to --- the grant was awarded to the University of
11 South Carolina acting through the Carolina Research and
12 Development Foundation.

13 So the foundation there clearly had undertaken to act
14 directly as the agent for the government. That's a very
15 different thing. Obviously, if the government
16 organization sets up a nonprofit corporation and then
17 tries to carry out all its activities through that,
18 that's a different issue.

19 THE COURT: All right. I think I understand the
20 issues.

21 Let me ask you to --- again, to furnish the Court with
22 proposed orders within ten days, please.

23 MR. HALL: We will do that, Your Honor.

24 THE COURT: Thank you very much.

25 MR. REAGLE: Thank you, Your Honor.

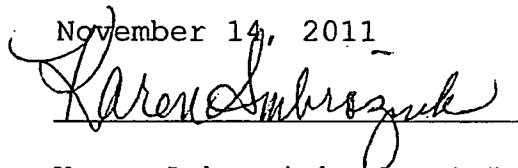
CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

I, Karen Ambroziak, Official Court Reporter for the
5th Judicial Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true, accurate
and complete Transcript of Record of the proceedings had
and evidence introduced in the trial of the captioned case,
relative to appeal, in the Common Pleas Court for
Richland County, South Carolina, on the 18th day of April,
2011.

Signed

November 14, 2011

A handwritten signature in cursive script, appearing to read "Karen Ambroziak", written over a horizontal line.

Karen Ambroziak, Court Reporter

My Commission Expires: 04/01/14

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
County of Richland	)	2011-CP-40-02044
	)	
	)	
Rocky Disabato	)	
d/b/a Rocky D	)	
	)	
Plaintiff	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
South Carolina Association	)	
Of School Administrators	)	
	)	
Defendant	)	

July 26, 2011
Columbia, South Carolina

BEFORE:

The Honorable G. Thomas Cooper, Judge

APPEARANCES:

M. Todd Carroll, Esq.
Kevin A. Hall, Esq.
Attorneys for the Plaintiff

Keith Robert Powell, Esq.
John Marshall Reagle, Esq.
Attorneys for the Defendant

KAREN AMBROZIAK
Official Court Reporter

CONTENTS:EXHIBITS:

(There were no exhibits introduced.)

WITNESSES:

(There were no witnesses called.)

Certificate of Reporter

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1 THE COURT: All right. Counsel, was this motion
2 filed prior to the last hearing?

3 MR. CARROLL: It was, Your Honor.

4 THE COURT: That's what I thought. Where I
5 granted certain motions of the plaintiff for discovery,
6 correct?

7 MR. CARROLL: Yes, sir.

8 THE COURT: So what's the status of the discovery?

9 MR. CARROLL: Your Honor, Todd Carroll for
10 Mr. Disabato. After you issued your ruling, SCASA did
11 supplement its responses to interrogatories and
12 requests to produce documents that Your Honor had
13 outlined in the order.

14 We're in the process of --- there are a lot of
15 documents in play here, and we've been to opposing
16 counsel's offices to start going through the documents
17 to pinpoint exactly which ones, you know, we believe
18 are relevant and need to be produced and so forth. So
19 we're up to our knees in documents right now, but
20 we're ---

21 THE COURT: So at least, perhaps, that part of
22 the suit is progressing?

23 MR. CARROLL: Yes, sir. We're working well
24 through it.

25 THE COURT: Now, in the motion today, the 12(b)(6)

1 is purely the issue of constitutionality of the
2 statute; is that correct?

3 MR. REAGLE: Yes, Your Honor. I think even more
4 narrowly than that, because it is a motion to dismiss.
5 It's --- really a ---

6 THE COURT: Well ---

7 MR. REAGLE: --- challenge to the application of
8 the statute to issue advocacy organizations. So we're
9 not asking the whole statute be stricken, but that it
10 be limited in its application what the term public
11 body can mean to exclude issue advocacy organizations.

12 THE COURT: I have the wrong folder. Just hold
13 on.

14 (Pause)

15 THE COURT: Let me focus in on what you just told
16 me. To the extent that FOIA would --- FOIA would
17 apply to private non-profit entities engaging in
18 political speech and advocacy, it is unconstitutional.
19 That is your position?

20 MR. REAGLE: Yes, Your Honor.

21 THE COURT: You may proceed.

22 MR. REAGLE: Thank you. Thank the court for
23 hearing our motion this morning and also in particular,
24 I want to thank Mr. Carroll, opposing counsel. I
25 think he's worked very cooperatively with us through

1 discovery issues and generally trying to resolve,
2 bring this matter before the court.

3 The plaintiff is asking this court through their
4 claim to declare that the FOIA can apply to private
5 corporations that engage in issue advocacy and
6 political speech.

7 SCASA's contention in its motion to dismiss is
8 that, as a matter of law, the first amendment bars
9 FOIA's application to issue advocacy organizations.

10 Plaintiff's assertion that FOIA can't apply to
11 issue advocacy organizations represents an
12 unprecedented effort to expand the reach and scope of
13 the FOIA.

14 The ultimate effect of the FOIA, if allowed, to
15 reach issue advocacy organizations is to put a drag or
16 a chill on these organizations exercising first
17 amendment rights.

18 Because of the broad and deep reach of the FOIA's
19 open meeting and disclosure requirements ---

20 THE COURT REPORTER: I'm sorry. Can you speak up
21 a little bit?

22 MR. REAGLE: Okay. Because of the broad and deep
23 reach of the FOIA's opening meeting and disclosure
24 requirements --- and I want to emphasize that the
25 challenge is it's not --- so far, the discussions have

1 been about disclosure, but the major thrust of the
2 FOIA from a corporation's standpoint, at least from
3 SCASA's standpoint is the open meeting requirements.

4 Also, that it's alleged in the complaint --- it
5 hasn't been argued --- but there's the issue of if you
6 advise the government, as well, you can become subject
7 to the FOIA.

8 So it's open meeting requirements, simply being
9 asked to advise the government, as well as disclosure
10 requirements.

11 These applications of the FOIA, when threatened
12 to apply to issue advocacy organizations, particularly
13 reach a large amount of speech and records by numerous
14 organizations and is ultimately unrelated to the
15 expenditure of government funds or the activity of
16 public officials, but instead relates to political
17 speech.

18 This especially is true of issue advocacy
19 organizations, like SCASA, which tend to interface
20 broadly with the government, precisely because of
21 their engagement and issue advocacy in political
22 speech.

23 For purposes of this motion, SCASA will assume,
24 without admitting, that it is a public body because
25 this is a motion to dismiss.

1 SCASA even assumes for purposes of this motion
2 that the State's stated purpose for the FOIA, and
3 quote, "That citizens shall be advised of the
4 performance of public officials and of the decisions
5 that are reached in public activity and in the
6 formulation of policy is a vital and substantial
7 government purpose."

8 The fundamental question raised in this motion is
9 whether as a matter of law, the FOIA's open meeting
10 and disclosure requirements, along with its
11 enforcement provisions, broadly stifle fundamental and
12 personal liberties when the end can be more narrowly
13 achieved.

14 There are numerous cases that have set out this
15 standard in different ways. For example, in Shelby vs.
16 Tucker, 364 U.S. 479. The Supreme Court stated, "In a
17 series of decisions, this Court has held that even
18 though the governmental purpose be legitimate and
19 substantial, that purpose cannot be pursued by means
20 that broadly stifle fundamental personal liberties
21 when the end could be more narrowly achieved.

22 "The breadth of the legislative abridgment must
23 be viewed in light of the less drastic means for
24 achieving the same basic purpose."

25 In NAACP v. Button, 371 US 415, the Court stated,

1 "This formulation as --- because the first amendment
2 freedoms need breathing space to survive, government
3 may regulate in the area only when met with narrow
4 specificity.

5 In Elrod v. Burns, another Supreme Court decision,
6 427 US 347, the Court stated, "A state may not choose
7 means that unnecessarily restrict constitutionally
8 protected liberty.

9 "A decision of regulation must be the touchstone
10 in an area so closely touching our most precious
11 freedoms. If the State has open to it a less drastic
12 way of satisfying such human interest, it may not
13 choose a legislative scheme that broadly stifles the
14 exercise of fundamental personal liberties."

15 And finally, in I think a case that's very
16 important here, North Carolina Right to Life vs. Lee,
17 527 F3d 274, the fourth circuit stated --- in striking
18 down a statute, "North Carolina is regulating a
19 relatively large amount of constitutionally protected
20 speech unrelated to elections merely to regulate a
21 relatively small amount of election-related speech.

22 So the fundamental question is whether the
23 statute implicates fundamental liberties, and if it
24 does, does it pursue a legitimate state interest,
25 which we are conceding for this motion that there is a

1 substantial legitimate interest, certainly in the
2 expenditure of public funds, but the question is
3 whether it's narrow --- the remedy or the provisions
4 of the FOIA are narrowly tailored to achieving this
5 interest.

6 First, it's clear that the FOIA's open meaning
7 and disclosure and ad hoc enforcement procedures
8 regulate and stifle first amendment freedoms of
9 corporations and their members in a variety of ways,
10 including compelling speech, regulating --- regulating
11 how and whether a corporation may speech --- may speak,
12 compelling access to a corporation's speech,
13 prohibiting anonymous speech, and regulating what a
14 corporation's members may speak about when assembled
15 and compelling publication and disclosure of records.

16 Additionally, with respect to the notion of
17 advising a public body triggering FOIA's application
18 to that body, it also implicates the right to petition
19 and speak to your government officials.

20 For example, in Pacific Gas & Electric
21 Corporation vs. Public Utilities Commission, 475 US 10,
22 the court noted that the essential thrust of the first
23 amendment is to prohibit improper restraints from
24 voluntary public expression of ideas.

25 There is necessarily a concomitant freedom not to

1 speak publicly, one which serves the same ultimate end,
2 and as freedom of speech and its affirmative aspect.

3 Likewise, in Riley vs. National Federation of the
4 Blind of North Carolina, 487 US 781, the Supreme Court
5 noted the very purpose of the first amendment is to
6 foreclose public authority from assuming a
7 guardianship of the public mind through regulating the
8 press, speech, and religion. To this end, the
9 government, even with the purest of motives, may not
10 substitute its judgment as to how best to speak for
11 that of speakers and listeners.

12 In NAACP v. Clairborne Hardware, the Supreme
13 Court noted similarly that the holding of meetings for
14 peaceable political action cannot be prescribed.

15 Question: If rights of free speech and peaceful
16 assembly are to be preserved, it's not as to these
17 auspices under which the meeting is held, but as to
18 its purpose, not as the regulation --- relations of
19 the speaker, but whether their utterances transcend
20 the bounds of freedom of speech, which the
21 constitution protects.

22 And the South Carolina case, Legacy Alliance, Inc.
23 v. Condon, the South Carolina District Court noted to
24 place any limit on individuals wishing to band
25 together to advance their views on a ballot measure

1 which placing none of the individual acting alone is
2 clearly a restraint for the right of association.

3 First National Bank vs. Billotti, similarly the
4 Supreme Court said in the realm of protected speech,
5 the legislature is constitutionally disqualified from
6 dictating the subjects about which persons may speak
7 and the speakers who may address a public issue. Yet,
8 the FOIA specifically describes when and what members
9 of the public body can talk about when assembled.

10 Importantly, another case outside of the election
11 content --- oh, no, it's in the election context,
12 McIntyre v. Ohio Election Commission, the Supreme
13 Court noted, "Whatever the motivation may be, at least
14 in the field of literary endeavor, the interest of
15 having anonymous works enter the marketplace
16 unquestionably outweighs any public interest in
17 regulating disclosure as a condition of entry.

18 "Accordingly, an author's decision to remain
19 anonymous, like other decisions concerning omissions
20 or additions, the content of the publication is an
21 aspect of the freedom of the speech protected by the
22 first amendment.

23 "The FOIA is hoping meeting requirements prohibit
24 any kind of anonymous discussion, you know, an
25 anonymous editorial, editing of documents made public

1 the discussions about what might be left in or out of
2 the policy statements or advice, if any, may be given
3 to public officials."

4 I want to apologize for quoting so many cases,
5 but as a lawyer, I'm going to impress now what the
6 court says than what I might have to say.

7 In Sheldon v. Tucker, the court again on a
8 similar note stated, "It is not disputed that to
9 compel a teacher to disclose associational ties to
10 impair that teacher's right of free association, a
11 right closely aligned to freedom of speech and a right
12 which, like free, speech lies at the foundation of a
13 free society."

14 McIntyre, again, the courts noted further, "No
15 such mandatory reporting of deniably impedes first
16 protected first amendment activity, intrusion is a far
17 cry from compelled self-identification on all
18 election-related writings.

19 "As such, identification of an author against her
20 will is particularly intrusive and reveals a mistake
21 with the content of her thoughts on a controversial
22 issue."

23 I think this is an important decision by the
24 Supreme Court. It clearly recognizes without more
25 that disclosure --- and it says here mandatory

1 reporting undeniably impedes protected first amendment
2 activity.

3 It goes on to say that its self-identification is
4 a particularly egregious form of mandatory reporting.
5 That is even more constitutionally protected.

6 So I think there is no question that there is a
7 first amendment right that it --- an issue advocacy
8 organization is implicated by the FOIA's open meeting
9 and mandatory disclosure requirements.

10 These --- the invasiveness of the FOIA and its
11 chill on free speech rights is further exacerbated by
12 the ad hoc and often post hoc enforcement procedures
13 authorizing citizen enforcement actions against public
14 entities or against what is labeled as a public body.

15 And --- and I think, again, this is important
16 because this is kind of the process we're in, in the
17 middle of litigation on these issues.

18 The courts have repeatedly recognized the
19 chilling effect of just being --- having to adjudicate
20 whether or not you are subject to a statute like FOIA.

21 In Riley vs. National Federation of the Blind,
22 North Carolina Supreme Court decision, 47 US 781. The
23 court noted --- and, of course, in every case the
24 fundraiser must bear the cost of litigation and the
25 risk of a mistake and adverse finding by the fact

1 finder.

2 Even if the fundraiser and the charity believe
3 that the fee was, in fact, fair, this scheme must
4 necessarily chill speech in direct contravention of
5 the first amendment dictates.

6 In NAACP vs. Button, the court noted the threat
7 of sections may deter their first amendment for
8 freedoms exercise, almost as potently as the actual
9 application of the sanctions.

10 In Billotti --- First National Bank of Boston vs.
11 Billotti, the Supreme Court noted in addition, the
12 burden and expense of litigating the issue, especially
13 when what must be established is a complex and a
14 morphos economic relationship, which is exactly the
15 same kind of inquiry that the FOIA's any public
16 support demands, would unduly impinge on the exercise
17 of the constitutional right to free dissemination of
18 ideas might be the loser.

19 And in North Carolina Right to Life, the post hoc
20 and ad hoc enforcement of the election disclosure
21 requirements, one of the key factors that the court
22 relied on in deciding to strike down the statute is
23 facially invalid.

24 It noted that speakers are left to guess and
25 wonder whether a regulator applying supple and

1 flexible criteria will make a post hoc determination
2 that their speech is regulable as electoral activity.

3 This approach simply guarantees that ordinary
4 political speech would be chilled. The very speech
5 that people use to express themselves on all sides of
6 those issues about which they care most deeply.

7 So the FOIA's definition of public body broadly
8 encompasses any corporate --- corporation supported in
9 whole or in part by public funds.

10 This necessarily reaches and stifles a large
11 amount of protected speech. You need to look at
12 almost any of these case headings. It's the
13 Manufacturer's Association, Chamber of Commerce ---
14 the --- you know, Pope Broward Kelly Homeowners
15 Condominium (phonetic) Association, the Right to Life
16 Association.

17 This is what issue advocacy associations do in
18 their --- a substantial amount of speech in the
19 political arena, political speech is effected by the
20 FOIA.

21 As noted in NAACP v. Button, the state cannot
22 foreclose the exercise of constitutional rights by
23 mere label, such as public body.

24 Here, the label of public body does just that.
25 Given the vast number of associations and corporations

1 advising at various levels, public officials and
2 agencies and receiving some kind of support of public
3 funds, the shadow of the FOIA must reach a substantial
4 amount of the protected corporate political speech or
5 issue advocacy.

6 As noted, for example, in North Carolina Right to
7 Life, which is really, I think, very much on point to
8 this whole case, the court noted by diluting Buckley's
9 (phonetic) test, and regulating entities that have the
10 opposition or support of political candidates as a,
11 quote, major purpose, which is part of the statutory
12 test, North Carolina runs the risk of burdening a
13 substantial amount of the constitutionally protected
14 political speech.

15 A single organization can have multiple major
16 purposes in imposing political --- many burdens on a
17 multi-faceted organization, may mean that North
18 Carolina is regulating a relatively large amount of
19 constitutionally protected speech unrelated to
20 election. It's merely to regulate a relatively small
21 amount of election-related speech.

22 Importantly, North Carolina Right to Life dealt
23 with just election-related speech, which is a much
24 narrower category than all entities receiving any
25 support from public funds or all entities advising

1 government officials.

2 Moreover, the threat of post hoc FOIA enforcement
3 reaches more corporations than those that actually may,
4 in fact, be supported by public funds, because as
5 previously noted, as well, in North Carolina Right to
6 Life, the speech corporations merely might fall within
7 the definition of public body will be chilled.

8 Accordingly, in light of applicable case law,
9 FOIA's definition of public body reaches a substantial
10 amount of protected speech.

11 Moreover, narrower means exist for South Carolina
12 to achieve its regulatory objective of advising
13 citizen of the performance of public officials and of
14 the decisions that are reached by public activity and
15 in the formulation of public policy.

16 For example, one time disclosure requirements
17 have been repeatedly upheld as narrowly tailored.
18 This is referenced in North Carolina Right to Life.
19 It's referenced in South Carolina Citizens for Life v.
20 Project (phonetic) as --- additionally appropriate way
21 to more narrowly achieve governmental interest.

22 I think it's important to highlight here, we are
23 not saying that there can be no disclosure
24 requirements. There can be no meeting requirements,
25 but the FOIAs are overly broad. That is the

1 fundamental issue.

2 The plaintiff in his memorandum tries to
3 highlight the fact that disclosure requirements have
4 been approved, and they have been approved in the
5 election --- election hearing context. In --- only in
6 rare cases, in fact, approved --- have proved with
7 regard to issue advocacy.

8 McIntyre case addresses this issue and states
9 would recognize the state's enforcement interest. In
10 here, it's in requiring --- relates to compelling some
11 sort of identification on election-related pamphlets
12 might justify a more limited identification
13 requirement though Ohio has shown cause for inhibiting
14 relief at issue here.

15 And, again, plaintiff cites to Citizens United.
16 The disclosure requirements upheld in Citizens United
17 were narrowly related, like the requirements in
18 Buckley, really, related to just election hearing
19 activity, not broadly to issue advocacy.

20 And, indeed, this case is cited in our brief, so
21 I won't cite in again, in North Carolina Citizens ---
22 or North Carolina Right to Life v. Bartlett. The
23 court said you cannot apply disclosure requirements to
24 an issue advocacy organization in an effort to
25 regulate election-related activity.

1 So again, we're not saying that one-time
2 disclosure requirements wouldn't be appropriate or
3 that some public disclosure relating to meetings in
4 which decisions about public funds are discussed.

5 If that happened to be the case, that wouldn't
6 be --- or is necessarily inappropriate.

7 THE COURT: How do you recast the statute?

8 MR. REAGLE: I think the legislature would have
9 to go back and --- and recast the statute. I think in
10 one-time reporting disclosure would be to disclose
11 records relating to decisions and reflecting the
12 expenditure of public funds, and I think...

13 THE COURT: But if this court does what you argue
14 for, I'm not sure how you get back to the legislature.
15 If there's some ruling that this provision --- it's
16 actually not the entire provision that you're seeking
17 to declare unconstitutional.

18 MR. REAGLE: Correct.

19 THE COURT: Not quite focusing on --- when the
20 statute says any organization, corporation or agency
21 supported in whole or in part by public funds or
22 expending public funds. How does that get tailored to
23 meet your objections to the statute?

24 MR. REAGLE: I'm not sure that it would be
25 appropriate for the court to try and line out sections

1 and tailor it.

2 I think the court would have to issue a
3 declaration saying that public body --- when it says
4 organization supported in whole or in part by public
5 funds or any organization advising a public official
6 could not mean an organization to issue advocacy,
7 which is essentially the same thing that the Supreme
8 Court did in Buckley.

9 It didn't change the language of the statute. It
10 just said when we're interpreting this term of --- and
11 I don't recall exactly, but election organization.
12 That does not mean an organization engaging in issue
13 advocacy only.

14 THE COURT: I assume your proposed order will
15 spell that out more specifically?

16 MR. REAGLE: We would be happy to do that in a
17 proposed order. I'm trying to conclude quickly on ---
18 on this.

19 And I want to read, --- well, let me go back to
20 the --- a couple other issues we raised, which is the
21 Unconstitutional Conditions Doctrine and the fact that
22 the FOIA only applies to corporations and not to
23 individuals. Really, both of those are just other
24 ways that this impedes free speech.

25 You know, they're --- they're both subject to the

1 same test. I mean, you can discriminate between
2 individuals and corporations, again, if you have a ---
3 a substantial government issue --- interest, and the
4 discrimination is narrowly tailored to achieving that
5 interest.

6 Similarly, the government can, when it has
7 important interest, condition the receipt of public
8 funds or public benefit on certain waivers of
9 constitutional rights, but again, it has to be
10 narrowly tailored in doing that.

11 And I just am thinking this issue through, and it
12 really touches on both of those two claims.

13 My wife is a professor. She received a
14 government grant to go to Italy to think, okay. She
15 is an individual. She is supported by government
16 money.

17 Had she been a corporation, that corporation
18 under this plaintiff's interpretation of FOIA would
19 have subjected everything she does to open meanings,
20 public disclosure. All of the sudden, every record of
21 her corporation would be public.

22 She couldn't sit down to have meetings with
23 herself to decide what to do with the grant money, for
24 example, without, you know, sending a notice to the
25 press and anyone else who asked to be given notice.

1 I mean, it seems almost unthinkable that we would
2 pose --- impose those kind of, you know, obligations
3 and limits on individuals and even individuals that
4 might be sole corporations as a sole shareholder of
5 the corporation, but somehow it's acceptable to do
6 that to a corporation.

7 Citizens United made it very clear that you
8 cannot draw those types of distinctions, and so did
9 the NAACP v. Claiborne Hardware is a strong quote that
10 says there are, of course, some activities legal ---
11 if engaged in by one yet illegal if performed in
12 concert with others.

13 Political expression is not one of them. Again,
14 without proper notice and disclosure requirements, the
15 members of a corporation getting together to discuss
16 their business is made illegal by the FOIA, which
17 clearly is contrary to the established first amendment
18 presses.

19 In North Carolina Right to Life, in which was a
20 facial challenge case, the court noted --- again, I
21 think you can just switch the term major purposes in
22 this quote for public body and it directly applies.

23 The court noted more narrow means exists for
24 North Carolina to achieve its regulatory objectives.
25 North Carolina is surely right to think that

1 organizations, particularly large organizations, can
2 have a substantial impact on the electoral process,
3 even if influencing elections is merely one of their
4 many major purposes.

5 When faced with such organizations, however,
6 North Carolina does not have to impose the substantial
7 burdens of political committee designation to achieve
8 its goal of preventing corruption.

9 Instead, North Carolina could impose one-time
10 reporting requirements, as it already does on certain
11 individual expenditures and contributions, by
12 nonpolitical committee organizations.

13 THE COURT: All right.

14 MR. REAGLE: Based on communication, not the
15 organization.

16 In doing so, North Carolina would produce the
17 same benefits of transparency and accountability while
18 imposing regulatory burdens on communications that are
19 unambiguously campaign related.

20 It is, thus, clear that North Carolina's
21 definition of political committee is overbroad and
22 vague. Not only does the statute threaten to regulate
23 organizations primarily engaging in protecting
24 political speech, but it also magnifies its over
25 breadth by providing insufficient direction to

1 speakers and leaving regulators free to operate
2 without even the guidance of discernable, neutral
3 criteria.

4 Furthermore, narrower means exist for North
5 Carolina to achieve its regulatory goals. We,
6 therefore, hold the statute would be facially
7 unconstitutional.

8 THE COURT: All right. Let me hear ---

9 MR. REAGLE: Thank you.

10 THE COURT: --- from the plaintiff.

11 MR. CARROLL: Thank you, Your Honor. Again, my
12 name is Todd Carroll. Again, I'm here on behalf of Mr.
13 Disabato, who is with Citadel Broadcasting, Channel
14 1250, 50 TMA down in Charleston.

15 I appreciate your time this morning, Judge, and
16 for hearing us a couple of months ago when we talked
17 about a lot of these same issues.

18 Your Honor, let me begin by pointing out that the
19 arguments that are being presented by SCASA here are
20 just as unprecedented as the arguments that Mr. Harvey
21 (phonetic) presented at that same table 45 minutes ago
22 in which he was asking Your Honor to give him --- give
23 him a lawyer in a civil foreclosure case.

24 SCASA submitted an 18-page memorandum in support
25 of its motion. It cited a lot of cases, Judge. Not a

1 single one of these cases in any way touches on the
2 constitutionality of an open government law, okay.

3 South Carolina is absolutely not unique in the
4 United States. All 50 states have an open government
5 law. The federal government has an open government
6 law. These things have been around for decades.
7 They're not new. South Carolina is not unique in any
8 respect with this type of law.

9 Courts across the country have applied various
10 state and open government laws to so-called private
11 organizations just like SCASA is.

12 There has never been any type of first amendment
13 constitutional defect in any of those laws. This is a
14 completely unprecedented position that they have taken.

15 There's good reason for that, Your Honor. The
16 cases that Mr. Reagle just cited for you, Buckley case,
17 Citizens United, North Carolina Right to Life ---
18 heard a lot about that case --- South Carolina
19 Citizens for Life, which came from Judge Wooten a few
20 months ago.

21 Actually, that was my case. I was quite pleased
22 with its outcome, but the --- the law in all of these
23 cases is designed to restrict speech. That is the
24 point of those election hearing statutes.

25 Open government laws, like South Carolina's FOIA

1 and the FOIAs in other states, are content neutral.
2 The object of the law is not to restrict speech.
3 These election --- these election hearing cases, the
4 point of the statute is to --- is to try to regulate
5 what is being said.

6 South Carolina's FOIA and the other 50 FOIAs that
7 are out there are content neutral. They don't care
8 what you say. They just --- their point is
9 transparency in government, transparency in how public
10 monies are being spent.

11 The first amendment jurisprudence is quite clear
12 when you're dealing with a content neutral statute,
13 like the FOIA. This isn't a statute that says you
14 cannot burn a flag. This is a statute that says you
15 can't burn in the public. You can't burn things in
16 public.

17 The point of the latter of those is to prevent
18 pollution, prevent wildfires and so forth. It's not
19 to suppress a particular type of speech.

20 So when you have a content neutral statute like
21 the South Carolina FOIA, a completely different rubric
22 applies.

23 I heard Mr. Reagle say several times at least ---
24 you know, this --- the South Carolina FOIA is not the
25 least restrictive. It's not narrowly tailored.

1 Well, Judge, that's not the standard. A content
2 neutral statute, like the FOIA, is subject to
3 intermediate scrutiny. The United States Supreme
4 Court set out the precedent, the standard for
5 intermediate scrutiny in United States vs. O'Brien and
6 that's from 1968.

7 I've actually prepared a memorandum, Your Honor,
8 I'll be pleased to provide to the court that kind of
9 spells all of this out, but under intermediate
10 scrutiny, what the government has to show is that as
11 a --- the interest that the law tries to protect is
12 important, which Mr. Reagle and SCASA can see that
13 South Carolina has an important interest in
14 transparent government in allowing the citizenry to
15 know what --- how --- how public money is being spent,
16 how public decisions are being made.

17 Once you have an important interest, then the
18 test looks to whether or not the --- the amount of
19 incidental speech, because that's --- that's what this
20 is.

21 The FOIA doesn't directly restrict speech. It
22 doesn't say you can't talk about that topic, but SCASA
23 is --- said, well, if you apply it to us, it may
24 affect our speech.

25 And while we absolutely dispute that, there is no

1 evidence in the record or in --- that we're aware of
2 that any speech has been chilled by the application of
3 FOIA to a, again, so-called private organization.

4 But the --- the intermediate scrutiny test as to
5 whether or not --- asks whether or not the law does
6 not --- is not substantially broader than necessary to
7 achieve the government's interest.

8 In other words, has the government crafted its
9 law in such a way that if you apply it, you're ---
10 you're meeting the government's interest, the interest
11 sought to be protected by law, without accidentally
12 getting a huge swat of speech, chilling speech, in ---
13 in the wake of the law.

14 And here, there just can't be any doubt that our
15 General Assembly has narrowly crafted this law to
16 avoid the exact harms that SCASA has prevented.

17 Now, you heard a lot of --- you heard a lot of
18 discussion of gee, all of our records are subject to
19 scrutiny and all of our meetings are open to the
20 public.

21 Your Honor, that is just not true. Under our
22 FOIA, there are --- with respect to records, there are
23 18 specific categories of documents that are exempt
24 from public disclosure within the FOIA.

25 Additionally, the FOIA contains a 19th catchall

1 provision that says anything else that's --- other
2 laws exempt from disclosure are also exempt from
3 disclosure under FOIA.

4 There --- Your Honor, there are approximately 20
5 other sets of documents or types of documents
6 elsewhere in the South Carolina code that are exempt
7 from disclosure.

8 So our General Assembly has set out 40, 40
9 categories of information, that a public body can
10 exempt from disclosure, if it so chooses. I mean,
11 that's the choice of the public body.

12 These are things that you would expect, like
13 attorney/client communications, trade secrets,
14 contract negotiations, personnel decisions.

15 I mean, these are things that our General
16 Assembly has looked at and said, well, we need our
17 government to be transparent. We need the citizenry
18 to be able to inform itself as to how public money is
19 being spent and how public decisions are being made.

20 It's just unworkable if every single thing has
21 to --- has to be done out in the open. So we're going
22 to --- we're going to create these categories of
23 information that can be protected, and that --- and
24 with respect to open meanings, there are also, as well,
25 other --- there are certain categories of things that

1 can be dealt with in executive session. They parallel
2 the records, you know, the receipt of legal advice,
3 the discussion of contracts, personnel decisions.

4 Our General Assembly has --- has --- they said
5 the default is if you get public money, then you
6 should be open and transparent, and the public should
7 be allowed to know how its money is being spent and
8 how decisions are being made with its money, but there
9 are 40 categories of information that if you choose,
10 you can withhold from public disclosure.

11 There's certain categories of topics, that if you
12 choose, you do not have to discuss in an open meeting.
13 So our General Assembly has absolutely met --- and
14 that test comes from Ward vs. Rock Against Racism.
15 It's a 1989 US Supreme Court case.

16 Again, this is all in our brief, but our Supreme
17 Court absolutely met the --- has met the standard of
18 intermediate scrutiny that the US Supreme Court has
19 set and ourselves --- and the State Supreme Court has
20 actually adopted it in all, as you would expect, but
21 our General Assembly has completely met the criteria
22 established by --- by the case law.

23 In fact, in the Weston case --- you know, this
24 is --- SCASA is not the first so-called private entity
25 that the FOIA has been applied to, that our FOIA has

1 been applied to.

2 The 199 case of Weston vs. Mid-Carolina
3 Foundation or --- it was --- the University of South
4 Carolina Foundation, somebody sent them a FOIA request
5 and said whoa, we're private. You can't come --- you
6 can't bother us.

7 The State Supreme Court said oh, yes you can,
8 because you are supported in whole or in part by
9 public money, but there's a caveat. We're not going
10 to --- as Mr. Reagle was suggesting, you know, well,
11 maybe we can --- we can kind of redefine the General
12 Assembly's statutory language to mean something other
13 than exactly what it says.

14 In the Weston case, the state Supreme Court did
15 exactly that. They said okay, if you --- the
16 so-called private organizations, are supported by ---
17 in whole or in part by public funds, then you're
18 subject to FOIA unless your public funding is only the
19 receipt of public monies by virtue of an arm's-length
20 transaction.

21 In other words, a government contract is not
22 subject to FOIA because it has a contract with the
23 state, and it's --- you know, technically supported by
24 public money. We're not going to --- we're not going
25 to extend FOIA to those folks, but people that ---

1 that do nothing but sit back and accept public funds
2 without giving a good or a service exchange, well, if
3 you accept --- if you accept the --- if you accept our
4 public funding, then here are the rules you have to
5 play by.

6 And with respect to SCASA --- now, I understand
7 --- I tried to write it down verbatim. I don't ---
8 I'm sure I missed something, but the whole
9 conversation began with, Judge, this is not a facial
10 challenge to the statute in whole. It's a --- I guess,
11 an as-applied challenge to the FOIA with respect to
12 private nonprofit corporations that engage in issue
13 advocacy.

14 Well, the fact that they're framing the issue as
15 being for private corporations kind of begs the
16 question because our --- this whole case is designed
17 to have the court declare that they are a public body,
18 not a private group. There --- without any discovery,
19 we know --- we know that ---

20 THE COURT: What are they now?

21 MR. CARROLL: No, no, no. This is --- what are
22 they now? Well, we think they're a public body. I
23 mean, they have been --- they can go ---

24 THE COURT: You think they are.

25 MR. CARROLL: Well, here is what we know, Judge.

1 We say they are, but we want you to say that, too.

2 They are ---

3 THE COURT: Well, until I do or until the court
4 does.

5 MR. CARROLL: Right.

6 THE COURT: They're still a private corporation.

7 MR. CARROLL: That's right. They are a so-called
8 private corporation that participates in the State
9 Retirement System. They are on the State Health
10 Insurance plan. They're on the State Dental Insurance
11 plan.

12 THE COURT: The members are.

13 MR. CARROLL: No, their employees are. Their
14 membership --- I mean, the executive director of SCASA,
15 Ms. Spearman, I --- I --- I mean, they can tell me if
16 I'm mistaken, but under the statute, their employees
17 participate in the State Retirement System. I mean,
18 they get the state pension, not their members.

19 There members, I'm sure are also, because their
20 members are all public employees. They spend public
21 resources and public time doing SCASA's business, but
22 the employees of the organization itself are also in
23 the State Retirement System, State Health Insurance
24 plan, State Dental Insurance plan by --- under the
25 state --- under the South Carolina Code of Laws, if

1 you just go through Title 59, the education title,
2 you'll see this organization is kind of sprinkled
3 throughout as having responsibilities under --- I mean,
4 they exercise the power of the sovereign in --- in
5 several ways.

6 I mean, they are ---

7 THE COURT: The ---

8 MR. CARROLL: Well, they --- they appoint ---
9 they appoint members to the South Carolina Public
10 Charter School District board of trustees. They
11 appoint members --- I'm sorry?

12 THE COURT: If I recall, they have a slot.

13 MR. CARROLL: That's right. They have --- they
14 have a designated seat on the board --- on the charter
15 public school district board of trustees.

16 They have a designated slot on the charter school
17 district --- charter school advisory committee. Both
18 of those are statewide entities, and there are a
19 couple of other places in the state code where the ---
20 where SCASA is required to fulfill some type of
21 statutory duty. That's just from looking at the state
22 code; that we --- that we believe that they're public
23 body.

24 They work, you know, like I said earlier, we're
25 knee deep in documents trying to get to the bottom of

1 exactly how much public money they take in, but we
2 know for a fact that their retirement plan --- I mean,
3 I wish my firm had --- had this kind of
4 benefits-in-a-box kind of thing set up. You know,
5 they got their retirement taken care of. They have
6 their insurance taken care of. They have their health
7 and dental.

8 Now, I'm sure they have to chip in with premiums
9 and stuff, just like any other public employee does,
10 but it's still supplemented, boosted by the state and
11 guaranteed by the state.

12 So the --- their whole motion is based on this
13 myth, slash, assumption of, "Well, we're private, so
14 you can't apply it to us."

15 The whole point of the case is to establish that,
16 in fact, they're not private. They're public bodies.
17 They're subject to FOIA.

18 What they've asked the court to do is to declare
19 a law that is --- that is carefully crafted to not
20 over reach, and that served an admittedly important
21 government purpose.

22 They're asking the court to take the dramatic
23 step that no other court in the United States has ever
24 taken to say, "Well, that's just --- that's just not
25 constitutional."

1 I want to wrap up, but I do want --- I do want to
2 comment briefly on this idea of anonymous speech.
3 Your Honor dealt with this in the discovery order.
4 The US Supreme Court in the Citizens United case put
5 this whole idea to rest.

6 In the United States, you have a right to engage
7 in anonymous free speech, but that --- it only becomes
8 a right to do so if you can show --- you have to show
9 with evidence. You can't just say, "Well, I want to
10 speak anonymously." You have to show with evidence
11 that if you lose your anonymity, then you stand to be
12 on the business end of economic harm or physical harm.

13 I mean, this whole --- this whole threat of case
14 law derives from NAACP vs. Alabama from, I believe,
15 1958. That --- that's kind of the fountainhead for
16 this whole thread of jurisprudence.

17 Obviously, SCASA does not stand to --- they're
18 not facing the type of threats that the NAACP was in
19 Alabama in the civil rights era.

20 So with that, Your Honor, obviously, we think
21 that you should deny their motion. I'll be pleased to
22 answer any questions you have.

23 THE COURT: You said something about a memorandum.

24 MR. CARROLL: Yes, sir, Your Honor.

25 THE COURT: I have no memorandum.

1 MR. CARROLL: That's right.

2 THE COURT: Did you supply it to opposing counsel?

3 MR. CARROLL: I have.

4 Your Honor, I e-mailed it to them this morning
5 before we got here, and I apologize for my --- the
6 lateness. It's a --- it's a response brief to --- to
7 their supporting memo. We got their supporting memo
8 at the end of last week, so we tried to turn it around
9 as fast as we could.

10 THE COURT: Mr. Reagle.

11 MR. REAGLE: Thank you, Your Honor.

12 Briefly, to touch on the --- respond to the
13 points raised by Mr. Carroll, FOIA is a direct
14 regulation of speech.

15 What it says is you cannot engage --- if you're a
16 public body, you cannot engage in nonpublic speech.
17 It's not content neutral.

18 A meeting is defined as coming together with the
19 quorum in the corporation to discuss, essentially, the
20 business of the organization.

21 So it's specifically just as the election-hearing
22 statutes say --- it doesn't say which side you have to
23 be supporting, but if you're talking about an
24 election-related issue, then you're subject to the
25 requirements.

1 Similarly here, if you're talking about the
2 business of the corporation, you are subject to the
3 FOIA's requirements for an open meeting.

4 This is, again, not a content neutral statute
5 that says you can only march in the park if you get a
6 license, and it's during daylight hours. Now, this is
7 something that says you cannot even meet unless you
8 have posted your agenda in advance, and you cannot
9 discuss, except in an open meeting, any decisions
10 about your corporation except in an open meeting.

11 So it's expressly triggered by the content of
12 what the quorum of the association will be discussing.
13 Similarly, if you're looking at the advisory prong,
14 which again gets brought up because there's four
15 situations in which SCASA is invited by the
16 legislature to advise the state, any time --- it's a
17 --- you know, it's a phenomenal breach of government
18 power when you think about it.

19 You say you're an organization. If you're asked
20 by the government to give advice, you will waive all
21 your rights to, you know, speak non-publically and to
22 keep your records private.

23 So, again, the advisory piece, as well, is
24 triggered expressly by the act of speaking, both your
25 meeting and the speech of the meeting is what triggers

1 the open meeting requirements.

2 If you're advising, obviously, it's the act of
3 speaking to the government itself, which is one of our
4 most precious rights that triggers the FOIA --- the
5 FOIA's application.

6 So I would submit this is not a time demand ---
7 you know, neutral time, manner, place type restriction
8 that you largely impart, but rather, it is a direct
9 regulation of speech.

10 It's not just this. It's what must be recorded.
11 What speech must be recorded at your open meeting, and
12 the people have a right to access and listen to your
13 speech, even if they are your political opponent.

14 Further, on that point, it's interesting the FOIA
15 doesn't restrict if SCASA's members want to come
16 together and talk about Gamecocks baseball, it
17 wouldn't prevent them from talking about that, but it
18 would prevent them from coming together and talking
19 about the things that are expressly the purpose of the
20 organization, the advocacy and policy development, and
21 what positions it wants to take and advocate for with
22 respect to educational issues. So it, in fact,
23 applies and regulates the speech that is most
24 important to any issue advocacy organization.

25 Further, even aside from the time, place, manner

1 restrictions, it is not neutral with regard to
2 discrimination between corporations and individuals,
3 and it also affects an unconstitutional waiver of
4 rights as a condition for a government benefit, both
5 of which, again, are subject to not intermediate
6 scrutiny but the higher strict scrutiny as applied to
7 speech.

8 The exceptions --- the issue of the exemptions
9 and that somehow this is narrowly tailored, again, I
10 think the exemptions in many ways exacerbate the
11 unconstitutionality of the FOIA, because it clearly
12 distinguishes that, again, it's not content neutral.

13 You can talk in private, or at least in executive
14 session about certain things, your personnel, you know,
15 with your attorney, but again, for an issue advocacy
16 organization, the things they most want to talk about,
17 their policy development and advocacy issues, they
18 can't talk about it in private.

19 So, in a sense it discriminates and prefers
20 certain types of speech over other types of speech
21 specifically drew its exemptions, and it favors why
22 the discussions about contracts and economic
23 developments and disfavors discussions about --- you
24 know, what kind of --- you know, are we going to
25 support this legislation or that legislation, and

1 what --- you know, what is our position going to be on
2 school vouchers, for example.

3 So I think the exemptions, again, clearly are
4 another example of the content restriction of the ---
5 of the FOIA, exacerbated and don't narrowly tailor it
6 to the concern of the first amendment violation, which
7 is the discussion of political speech, because they
8 largely apply to business operations and nonpolitical
9 speech discussions.

10 With respect to open meeting laws in other states,
11 again, I'm not going to say we've done a completely
12 exhaustive search, because if --- we haven't, but
13 we've looked at a number of statutes, and none of them
14 use the --- the "in part" language. Some don't use
15 public funds in whole or in part at all. Some say
16 substantial support by public funds, but almost none
17 that we've seen in practicality look at the support
18 from public funds prong at all.

19 They're looking at what the federal government
20 looks at, which is sort of a functional equivalent
21 test. That's, you know --- I --- going back, I think
22 it's a federal case from the early '80s where I think
23 the court went that route precisely to avoid first
24 amendment implications, although it doesn't expressly
25 say that in the case --- the...

1 So this is not --- our FOIA law and its
2 application and its --- you know, its enforcement
3 mechanism is different, as well.

4 In Connecticut --- we cited the Connecticut case,
5 which provides a broad discussion of these issues in
6 our brief. It has, for example, a separate FOIA
7 commission that is kind of a gatekeeper that allows
8 a --- a body that is concerned whether it might be
9 subject to the FOIA to go to the commission and get a
10 ruling in advance.

11 I think Texas at one point had a similar ---
12 whether they still do, I don't know, but had a similar
13 type procedure where they could go to the attorney
14 general in advance and get a formal type ruling about
15 whether they were subject to the FOIA or not, and even
16 in drilling down into the FOIA, there's --- even if
17 you try and use the exemptions, there's a risk of
18 continued litigation with respect to every time you
19 assert an exemption.

20 Most of the FOIA lawsuits aren't about whether a
21 body is a public body or not. They're about whether a
22 specific exemption can properly be applied or not.

23 So it's --- from a standpoint of an issue
24 advocacy organization, it's a never-ending, you know,
25 risk of litigation that FOIA subjects your

1 organization to, and it's always hanging over your
2 head.

3 Again, if you're attempting to assert any of the
4 exemptions or exclusions under the FOIA --- but I
5 think it's important that, you know, it's easy to say.

6 You know, there's no other case related directly
7 to open records, but you know, I believe other courts
8 have been --- and other state statutes that are
9 narrower than ours, and the courts have been --- the
10 federal courts have not adopted a funded in whole or
11 in part type test. It says any amount of funds will
12 subject the body to --- to the requirements of the
13 FOIA.

14 THE COURT: All right.

15 MR. REAGLE: Thank you, Your Honor.

16 THE COURT: All right.

17 MR. CARROLL: May I make one real quick point,
18 Your Honor?

19 THE COURT: Go ahead.

20 MR. CARROLL: With respect to the content
21 neutrality inquiry, which seems to be kind of the
22 turning point of this whole discussion is that --- it
23 depends on what type of scrutiny we're applying to
24 this statute.

25 On page four of our opposition brief, we've

1 cited --- there's a block quote in Ward vs. Rock
2 Against Racism. I mentioned it in my principal
3 argument.

4 I don't want to read it all, but I will quote the
5 court. The Supreme Court says, "The principal of
6 inquiry in determining the content neutrality.

7 "In speech cases generally and in time, place or
8 manner cases in particular is whether the government
9 has adopted a regulation of speech because of
10 disagreement with the message it conveys. The
11 government's purpose is the controlling
12 consideration."

13 Your Honor, this is one of the few statutes in
14 South Carolina where the General Assembly has actually
15 said what its purpose in passing the law was.

16 In our FOIA section 30-4-15 expressly says that
17 speech content --- the controlling speech is not the
18 idea. The idea is to allow the citizenry to inform
19 itself of government conduct.

20 So, therefore, we would submit that this
21 absolutely is a content neutral statute subject to the
22 lower level of scrutiny. We would encourage this
23 court to not break unprecedented legal ground to
24 declare our FOIA violation to the first amendment.

25 THE COURT: All right. Thank you.

1 MR. CARROLL: Thank you, Your Honor.

2 THE COURT: Obviously, I'll look at it. How much
3 time do you need for proposed orders?

4 MR. CARROLL: We can get you something by the end
5 of the week, Judge.

6 THE COURT: Ten days?

7 MR. REAGLE: Ten days will be fine, Your Honor.
8 Thank you.

9 THE COURT: Thank you very much.

10 MR. REAGLE: Did Your Honor get a copy of our
11 memo?

12 THE COURT: Yes, sir.

13 MR. REAGLE: Okay.

14 THE COURT: Read it thoroughly. I just didn't
15 have one from the plaintiff.

16 MR. CARROLL: I was reading theirs thoroughly,
17 too, Judge. It took me a while to get back to it.

18 THE COURT: All right.

19 MR. REAGLE: Thank you, Your Honor. I know this
20 is lengthy. I appreciate it.

21 THE COURT: Well, you're on the record. You made
22 a record.

23 (WHEREUPON, the proceedings were concluded.)
24
25

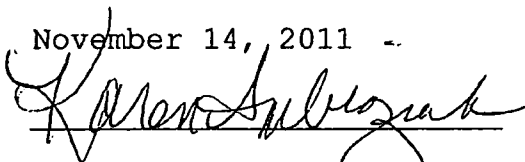
CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

I, Karen Ambroziak, Official Court Reporter for
the 5th Judicial Circuit of the State of South Carolina,
do hereby certify that the foregoing is a true,
accurate and complete Transcript of Record of the
proceedings had and evidence introduced in the trial of
the captioned case, relative to appeal, in the Common
Pleas Court for Richland County, South Carolina, on the
26th day of July, 2011.

Signed

November 14, 2011

A handwritten signature in cursive script, appearing to read "Karen Ambroziak", written over a horizontal line.

Karen Ambroziak, Court Reporter

My Commission Expires: 04/01/14

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THE COURT: Mr. Reagle, whenever you're ready.

MR. REAGLE: I'm with the law firm of Childs & Halligan. We represent the South Carolina Association of School Administrators in this matter, which we'll refer to as SCASA.

SCASA's appeal presents the question of whether the District Court erred in declining jurisdiction over SCASA's Declaratory Judgment Action, challenging the constitutionality of the South Carolina Freedom of Information Act or the FOIA. Specifically, the District Court defines jurisdiction under the Younger and Pullman Abstention doctrines over SCASA's claim that the FOIA's definition of public body to include private organizations supported only in part that public funds violate the First Amendment.

THE COURT: Well, the normal course of getting into federal court is by way of removal, not by way of filing a separate declaratory judgment.

MR. REAGLE: Yes, Your Honor, that is one course, to do a removal since there would be a

1 defense to the FOIA claim.

2 THE COURT: Well, but --

3 MR. REAGLE: I wouldn't --

4 THE COURT: Wasn't it removed?

5 MR. REAGLE: No, it was not removed,
6 because the FOIA claim itself is a state court
7 claim that was brought by Mr. Disabato in
8 state court.

9 THE COURT: But there was no diversity?

10 MR. REAGLE: No, Your Honor.

11 THE COURT: And as far as there's no
12 federal question raised, other than
13 defensively, because there's no federal
14 question on the face of the Complaint.

15 MR. REAGLE: That's correct. Yes, Your
16 Honor.

17 THE COURT: So this was not covered under
18 any of the removal statute?

19 MR. REAGLE: No.

20 THE COURT: You could not remove the
21 case?

22 MR. REAGLE: We could not have removed
23 it. It would have been --

24 THE COURT: So you decided to essentially
25 make the removal statute via letter by

1 circumventing them, circumventing the
2 requirement of diversity and circumventing the
3 face of the Complaint rule by filing a
4 Declaratory Judgment Act in federal court?

5 MR. REAGLE: I would respectfully
6 disagree with that characterization.

7 THE COURT: No. But isn't that what
8 happened? You couldn't get into federal court
9 in the way that Congress has prescribed by
10 virtue of federal questions of jurisdiction on
11 diversity. You said, well, "We don't care
12 what the removal statutes say. We'll do an
13 end run around and file a declaratory
14 judgment."

15 MR. REAGLE: We couldn't get into federal
16 court by way of removal jurisdiction or
17 diversity, but Declaratory Judgment Action
18 asserting a First Amendment right is a
19 perfectly legitimate action.

20 THE COURT: Where does this leave the
21 removal factor and where does it leave the
22 face of the Complaint?

23 MR. REAGLE: I think --

24 THE COURT: I mean, what does it do to
25 the removal statute, the very, very highly

1 reticulated scheme that Congress has set forth
2 as to when you can take -- this was a state
3 court action brought under discretion of state
4 law. The federal question can come in only
5 defensively.

6 Congress has set forth very strict ground
7 rules about when something is removable and
8 when something is not. The Supreme Court has
9 set forth very strict ground rules about the
10 face of the Complaint. And so this
11 Declaratory Judgment Act sort of takes on the
12 Supreme Court and the face of the Complaint
13 rule and takes on Congress and its stipulation
14 for the ground rule for removal, doesn't it?

15 MR. REAGLE: Yes, Your Honor. I mean, it
16 does take it on and it does implicate that.

17 THE COURT: It takes them all on, doesn't
18 it?

19 MR. REAGLE: And I think the Younger
20 Abstention, to the extent it applies or is
21 meant to apply in various --

22 THE COURT: Normally I'm a little bit
23 afraid of taking on either kind before the
24 Supreme Court. But here we appear to be
25 challenging them both.

1 And while I'm at it, we're going to rule
2 Judge Perry is guilty of abuse of discretion?

3 MR. REAGLE: Correct.

4 THE COURT: We're going to do that, too?

5 MR. REAGLE: We are arguing she is --
6 guilty is, I think, not the word I would
7 choose, but she did abuse her discretion.

8 THE COURT: She committed abuse of
9 discretion while abstaining under these
10 (inaudible).

11 MR. REAGLE: Yes, Your Honor. And it's
12 not --

13 THE COURT: Despite the fact -- there was
14 an abuse of discretion despite the fact that
15 there was a pending state lawsuit, right?

16 MR. REAGLE: Yes.

17 THE COURT: A pending state lawsuit. And
18 the same parties were involved in the state
19 lawsuit that were involved in the federal
20 lawsuit; is that right?

21 MR. REAGLE: Yes, Your Honor.

22 THE COURT: Okay. And the same questions
23 were presented in the state lawsuit as in the
24 federal lawsuit?

25 MR. REAGLE: Not at the time, they were

1 not.

2 THE COURT: Well, they are now.

3 MR. REAGLE: They are now.

4 THE COURT: And given all of this, in
5 addition to everything you and I have gone
6 over, you're going to say that this is an
7 abuse of discretion on the part of the
8 district court?

9 MR. REAGLE: Yes, Your Honor.

10 THE COURT: Now, I have a further
11 question for you: Where does this leave state
12 courts trying to adjudicate questions of state
13 law dealing with a state statute, such as
14 FOIA, which is important to the state's
15 sovereign interest or whatever?

16 I'll put it generously to say that it
17 leaves them as second-class citizens. Perhaps
18 it would be more accurate to say that taking
19 this case away would leave them as third-class
20 citizens, does it not?

21 MR. REAGLE: I would disagree, Your
22 Honor. I think that the body of abstention
23 law, one, specifically arises and addresses
24 issues where removal often is not available,
25 but it has the same effect in bringing an

1 action in federal court as what might be
2 termed as circumvention of the state court
3 process. It is not relegating the state
4 courts to second-class status --

5 THE COURT: I said third.

6 MR. REAGLE: -- or third-class status.

7 This is a federal issue. Adjudicating
8 questions of the First Amendment are the
9 unflagging responsibility --

10 THE COURT: It's a federal issue. Okay?
11 But since when are state courts disabled from
12 adjudicating a federal question?

13 MR. REAGLE: They are not disabled from
14 adjudicating.

15 THE COURT: Is there any reason they
16 could not have adjudicated this claim as
17 raised in the Answer?

18 MR. REAGLE: Well, we have not -- just
19 for clarification, we have not answered the
20 Complaint in state court. And just another --
21 just to be, I guess, so the Court is fully up
22 to date on the status of that, the state court
23 case, we did supplement the record.

24 The claim was dismissed by the Circuit
25 Court and is now on appeal before the State

1 Supreme Court. And the State Attorney General
2 has intervened -- has moved, at least, to
3 intervene in that action.

4 UNIDENTIFIED SPEAKER: And what was the
5 basis for the state court's dismissal?

6 MR. REAGLE: That the FOIA violated First
7 Amendment as applied to SCASA.

8 UNIDENTIFIED SPEAKER: So it's taken on
9 the constitutional challenge?

10 MR. REAGLE: It did. We raised it in a
11 Motion to Dismiss, and the Circuit Court,
12 Judge Cooper, granted our Motion to Dismiss.

13 (Inaudible.)

14 MR. REAGLE: Well, at this point it is on
15 appeal.

16 THE COURT: I'm going back to Judge
17 Wilkerson's point, and that is it seems as
18 though you just answered the question by
19 saying it's already happened. The state
20 court's (inaudible). That's one of the
21 factors to consider under the general
22 (inaudible). From what I can see, at least
23 two of them are slam dunk. That's one of
24 them. And the other one being that it's an
25 ongoing state proceeding.

1 The only thing you got left is whether
2 there's a substantial state interest, and
3 clearly they've got an interest in their own
4 FOIA act and what's going on here. So, I
5 mean, maybe I'm trying to understand. Where
6 are you going with this?

7 MR. REAGLE: Well, if I take on those
8 questions. Initially the matter is on appeal.
9 So until the Supreme Court rules on the
10 matter --

11 UNIDENTIFIED SPEAKER: Why should the
12 parties be having to litigate these same
13 issues twice?

14 MR. REAGLE: We shouldn't have to
15 litigate them twice.

16 UNIDENTIFIED SPEAKER: I mean, isn't that
17 just running up the meter for everybody?

18 MR. REAGLE: No. We should not have to
19 be litigating them twice, and typically we
20 would not have. In the state court proceeding
21 almost a year -- it did take a year and a half
22 to get to our Motion to Dismiss. Had Judge
23 Currie not dismissed this action, I believe
24 the federal court would have reached the issue
25 in advance of that, so we wouldn't have been

1 in the position to --

2 THE COURT: Oh, so --

3 MR. REAGLE: -- do that twice.

4 THE COURT: So we're supposed to look at
5 who's likely to reach the issue first?

6 MR. REAGLE: That is one of the factors,
7 yes, of an expeditious hearing.

8 THE COURT: And how long it's going to
9 take?

10 MR. REAGLE: Yes, that is one of the
11 factors. Particularly with the First
12 Amendment claim recently in Wisconsin, Right
13 to Life, Judge Alito issued a concurring
14 opinion. And in another recent Supreme Court
15 case, John Doe versus Read, the Court opined
16 that certainly in an applied analysis as to
17 constitutionality, it's important that there
18 be an opportunity for expeditious resolution
19 of the claim with minimal or no discovery.

20 We are still not confident that the state
21 court ultimately will afford us that
22 opportunity. It took us 18 months to get to
23 our Motion to Dismiss. (Inaudible) appeal
24 with the Supreme Court now.

25 THE COURT: Don't you have mechanisms in

1 state court for expediting? I hate to tell
2 you, but the federal courts aren't always
3 prescriptive for running the race either.

4 MR. REAGLE: There are mechanisms for
5 expediting them, but I think the central
6 concern is South Carolina's Motion to Dismiss
7 standards and Summary Judgment standards
8 are -- represent -- are higher burdens than
9 federal court standards for those expedited
10 resolution procedures.

11 THE COURT: But the fact that state
12 procedures and federal procedures may not be
13 identical, that seems to me a very illusory
14 basis on which to (inaudible) judge these kind
15 of (inaudible).

16 I don't know what the state courts have
17 done wrong here. I associate myself with
18 Judge (inaudible). Why are you here? I don't
19 think -- what have the state courts done
20 wrong?

21 Normally, when you say that somebody
22 abused the discretion in ordering, you know, a
23 Younger Abstention, you look to see if
24 something has gone amiss in state court. But
25 I don't see that.

1 MR. REAGLE: When this was filed, the
2 federal case -- the state court case was 30
3 days old -- it represented a decision by SCASA
4 to seek a declaration in federal court,
5 federal court whose almost unflagging
6 obligation is to resolve constitutional
7 issues, because we believe we'd get a farther
8 reaching and more expeditious resolution of
9 the First Amendment issue, which, again, is a
10 paramount concern to SCASA to exercise its
11 First Amendment rights and to the federal
12 courts. It's a direct federal question.

13 The FOIA claim is a state law question.
14 It did not and does not seem illegitimate to
15 me to ask a federal court to resolve a federal
16 question, particularly one of paramount
17 federal concern.

18 We do not agree that the FOIA itself
19 represents a sovereign interest of the State
20 of South Carolina. It creates a private right
21 of access in citizen. It's not like a
22 Pay-To-Pay law or the Ethics Act.

23 THE COURT: You won, did you not, in
24 state court?

25 MR. REAGLE: We did win in state court.

1 When we filed this case, we did not know,
2 obviously, whether or not we'd be successful
3 in state court. And we did it only after
4 having to undergo extensive and burdensome
5 discovery, which again is expressly contrary
6 to Justice Alito and the Supreme Court's
7 discussion as to how as applied challenges
8 should be resolved, and certainly as to how
9 facial challenges should be resolved.

10 Back to the state interest. It's not
11 like a Pay-To-Play law or an Ethics Act which
12 are designed to protect the government itself
13 from corruption. The FOIA creates a private
14 right of access to records. And to paraphrase
15 the Harper decision, it says how you get
16 records. It doesn't say what to do with those
17 records. It doesn't require citizens to give
18 copies of records to the Attorney General so
19 that the Attorney General can determine
20 whether its public bodies are acting in
21 accordance with law or are acting responsibly.
22 It's simply a statutory expansion of private
23 right of access. And here it's a private
24 right of access to the records of private
25 organizations.

1 THE COURT: Is there anything that you've
2 just said to me that you couldn't say in state
3 court?

4 MR. REAGLE: No, there is not.

5 THE COURT: Every word of it.

6 MR. REAGLE: That is --

7 THE COURT: Every single word of it.

8 MR. REAGLE: That is correct, but that is
9 not the ultimate question under Younger or
10 under Pullman.

11 Further, we have alleged in the federal
12 Complaint -- my time is up.

13 UNIDENTIFIED SPEAKER: You've got some
14 time remaining. Let's hear from Mr. Hall.

15 MR. REAGLE: Thank you.

16 MR. HALL: Good morning, and may it
17 please the Court. I'm Kevin Hall. I
18 represent Rocky D, a radio broadcaster in this
19 case. This is Forum Shopping 101. All right.
20 This is let's take a second bite at the apple
21 before we've even finished the first or maybe
22 even answered the Complaint in the first. And
23 it demonstrates offense to the notions of
24 federalism and comity that undergird all of
25 the abstention doctrines, and specifically

1 Pullman and Younger on which Judge Currie
2 relied.

3 THE COURT: The point is we're here on an
4 abuse of discretion standing.

5 MR. HALL: Absolutely. Here, as the
6 Court's well aware, there's a three-step
7 process under Younger. Is there a state court
8 proceeding? Undisputed, yes, there is. Does
9 the state court proceeding implicate an
10 important state interest?

11 Now, the only substantive argument that
12 I've heard is that a conclusionary statement
13 that somehow FOIA doesn't implicate the
14 state's interest. Now, FOIA regulates exactly
15 how the government works and the people of the
16 state interact with the government. It says
17 what records you can inspect. It says a
18 jailer must maintain a list of who's in jail
19 for the preceding three months.

20 THE COURT: Is the status of the state
21 case something for the Supreme Court?

22 MR. HALL: It is. An order was issued by
23 Judge Cooper holding the FOIA statute
24 unconstitutional. We disagree with that. The
25 Attorney General obviously disagrees, as well.

1 He has intervened on the appeal to the South
2 Carolina Supreme Court. And that intervention
3 was --

4 THE COURT: There's going to be a
5 thorough airing of the issue in the state's
6 highest court.

7 MR. HALL: Absolutely, Judge. And every
8 argument constitutionally that you said could
9 be made here you could have said to the state
10 court was said to the state court and
11 persuaded Judge Cooper.

12 UNIDENTIFIED SPEAKER: (Inaudible).

13 MR. HALL: We have a system that can take
14 you either directly to the Court of Appeals,
15 but yes, we also do have a rule that allows
16 you to expedite directly to the Supreme Court.
17 So it would have gone there had that not been
18 the normal trap.

19 UNIDENTIFIED SPEAKER: So the state
20 interest seems to be the real (inaudible) any
21 possibility of the Younger case. The Pennzoil
22 case, which is the one that sort of, in terms
23 of trying to identify (inaudible) with respect
24 to this case, don't look at -- the FOIA is the
25 only thing you can look at to make a

1 determination of the state interest that you
2 think would be the basis.

3 MR. HALL: I have, Judge, and I could go
4 on and on. And I could give you several more
5 examples. Our third rests on an autopsy of
6 the public record, wherever the states speak
7 to that in their FOIA law.

8 UNIDENTIFIED SPEAKER: You don't even
9 need to go to the full extent (inaudible).

10 MR. HALL: Absolutely. And, again, the
11 first sentence of the FOIA statute reads, "The
12 General Assembly finds that it is vital in a
13 Democratic society" --

14 THE COURT: (inaudible) effective in the
15 Younger Abstention from the standpoint that
16 federally, the federal court has to retain.

17 MR. HALL: That's right, Your Honor. And
18 you know that, obviously, Younger is primarily
19 where Judge Currie's brief order went and
20 dropped the footnote with regard to Pullman.
21 But clearly here, the whole question of
22 anyone's rights being implicated as a
23 constitutional matter in terms of whether
24 they, quote-unquote, are in fact a public
25 body.

1 THE COURT: Nobody's being denied their
2 day in court, "they" being singular. Maybe
3 people are being denied their multiple days in
4 multiple court, but nobody's being -- you
5 know, when you look at it from a standpoint of
6 somebody's right to access, to hear their
7 claims heard, to have their claims fairly
8 considered, that's what the courts are
9 basically about. And that's not being denied
10 here. That's not being deprived here. It's
11 afforded amply.

12 MR. HALL: We agree with that, Judge.
13 And the record -- that's not a hypothetical
14 statement, because the record here and the
15 pendency of this case demonstrates that.
16 We've seen a Circuit Court judge act. We've
17 seen the case go to Supreme Court. We've seen
18 the Attorney General intervene. We've seen
19 the Press Association make inquiry and
20 contemplate intervention publicly.

21 This is the normal course of action. It
22 happens all the time. We respectfully, but
23 candidly -- we're a little surprised to be
24 here for oral argument. We thought the issues
25 were pretty direct.

1 UNIDENTIFIED SPEAKER: (Inaudible).

2 MR. HALL: Well, I've seen you guys, and
3 I got to see a deer in the courtyard outside
4 this morning, which was the first in the city.

5 But in all seriousness, the interference
6 of a state court with a pending state court
7 proceeding is so aptly demonstrated here.

8 What we have is an attempt to prevent the
9 state court from adjudicating its own
10 determination of how government is to operate
11 and how people are to interface with
12 government. There couldn't be anything more
13 directly related to state interest than that.

14 Now, we can go through the --

15 UNIDENTIFIED SPEAKER: (Inaudible.)

16 THE COURT: I don't know why Citizens
17 United -- when I hear something like nonprofit
18 organization (inaudible) that was a
19 corporation. Don't we have something really
20 big that's happening here that --

21 MR. HALL: I don't think so, Judge. Let
22 me tell you why. I've been up here on those
23 Citizens United in Wisconsin Right to Life
24 cases, as well. Here is the difference.
25 Statutes that regulate speech implicate First

1 Amendment rights facially. The only thing
2 that triggers FOIA is whether you receive or
3 expend public funds.

4 This isn't a speech statute. It's not a
5 campaign finance statute. It says if you take
6 public money, with that comes certain
7 responsibilities. You are rendered a public
8 body or you render yourself a public body, and
9 there are certain -- there's a certain degree
10 of transparency required.

11 That is materially different than the
12 First Amendment cases cited with regard to
13 Citizens United, Wisconsin Right to Life and
14 so forth. Those speech cases deal with
15 political speech and whether you can regulate
16 political speech.

17 THE COURT: The First Amendment claim
18 here is that FOIA violates the First
19 Amendment?

20 MR. HALL: Yes, sir. That's the claim.

21 THE COURT: I have never heard that
22 before. There may be other problems with the
23 FOIA statute, and there may be questions about
24 its scope and its applicability and all of
25 those. They strike me primarily as state law

1 question.

2 In addition to all the other problems
3 with this, the federal question seems to me to
4 be a little bit trumped up. I always thought
5 FOIA was designed to further and promote First
6 Amendment interest by adding to the store of
7 knowledge that would inform public debate.

8 Now we've got this, you know, turned
9 outside in question that FOIA violates. And
10 so the federal question such as it is has the
11 oddest kind of ring about it.

12 MR. HALL: Well, and Your Honor, that's
13 why there aren't any cases cited --

14 THE COURT: It's a little bit trumped up.
15 And the real questions here are questions of
16 state law, it seems to me, which is how far
17 does this question go. Does the South
18 Carolina FOIA statute cover only public
19 entities or does it cover private entities
20 which receives substantial public funding.

21 Well, you know, that's a question of
22 state law.

23 MR. HALL: Absolutely.

24 THE COURT: You know, that's not a
25 question of -- the state can design that. I

1 mean, I cannot imagine the Supreme Court
2 saying that a FOIA statute in a state which is
3 designed to have -- the Supreme Court's been
4 very protective of FOIA at the federal level.
5 And you're not going to -- they're going to
6 smile ever so gently here at the claim that
7 FOIA statute violates the -- violates the
8 First Amendment.

9 MR. HALL: Well, Judge, we agree with
10 that. And in fact the Court has done in South
11 Carolina exactly what you've described. Back
12 in the early '90s there was a case, the Weston
13 case, in which the Court was asked the
14 question: Does the South Carolina Research
15 and Development Foundation, that works in
16 conjunction with the University but is a
17 private entity, is that a public body for FOIA
18 purposes?

19 And there was much debate about it. On
20 the one end people said, oh, my goodness --

21 THE COURT: But it seems like the kind of
22 body of law that is ideally developed by state
23 court.

24 MR. HALL: It is, and it's developed
25 every day in 50 state courts with Press

1 Associations pushing those issues and
2 litigating them. And I've represented press
3 interests in those. It is a robust area of
4 state law practice.

5 If this jaunt to federal court were
6 encouraged, you'd see 50 FOIAs or their state
7 equivalents and a federal one rendered pretty
8 much a nullity with regard to a state court's
9 ability to adjudicate those statutes.

10 THE COURT: We'd be giving a hefty boost
11 to our own docket.

12 MR. HALL: I think you would. It might
13 start looking like a criminal docket, at least
14 as to a percentage of what you deal with.

15 I will sit myself down unless the Court
16 has any additional questions.

17 THE COURT: I want to ask -- (inaudible).

18 MR. HALL: Yes, sir.

19 THE COURT: (Inaudible.) The argument
20 here is (inaudible) First Amendment focusing
21 on a narrow audit that says public
22 corporation, because it's involved in an issue
23 of advocacy of (inaudible) and therein the
24 First Amendment violation is asserted. So
25 once you get that asserted First Amendment

1 violation, then you come up to the question
2 that that's what exception is being asked
3 (inaudible.)

4 I'm with you in terms of a general First
5 Amendment to FOIA, I don't see anything at
6 all. When you start getting into you're going
7 to define a public corporation, maybe break it
8 down as a private corporation that engages in
9 political speech issue of advocacy, you are
10 implicating a First Amendment right probably
11 that will be looked at.

12 That's why I brought up the Citizens
13 United issue. It sounded just like to me
14 you've got a statute, you can basically say
15 any corporation that does (inaudible.)

16 MR. HALL: Well --

17 THE COURT: It's something that I
18 (inaudible).

19 MR. HALL: A couple points in response,
20 Judge. I acknowledge that the theoretical
21 potential for what Your Honor's described. I
22 think that what you have, though, is an
23 argument there that is premised on the idea
24 that they are not a public body. When you see
25 a brief that sprinkles the words "flagrantly

1 and patently unconstitutional" all over the
2 place without saying why, those are obviously
3 the magic words for the exception.

4 But then you go and say, what is it that
5 is being implicated here? What are the
6 constitutional issues? There aren't any.
7 This is not a speech statute. Someone says,
8 "I happen to engage in that sort of speech."
9 All right. That doesn't exempt you from all
10 regulation.

11 A classic example would be, take a
12 Citizens United. Citizens United doesn't
13 strike down disclosure requirements.

14 THE COURT: That's the point. A Citizens
15 United decision is very emphatic in saying
16 that the quid pro quo here is, yes, you get to
17 speak as much as you want, but the other side
18 of the fence is you've got to disclose.

19 MR. HALL: That's right.

20 THE COURT: And FOIA deals with that
21 disclosure aspect. And the Supreme Court and
22 Citizens United was very intent upon upholding
23 the disclosure aspect of campaign finance laws
24 as sort of a quid pro quo for greater
25 expenditure rights.

1 MR. HALL: Exactly, Judge. It's a
2 question between prohibition and sunshine.
3 Essentially Citizens United allows the
4 sunshine by way of disclosure requirements.
5 It strikes down the prohibition on certain
6 speech and activity by unions and
7 corporations.

8 So it again goes back precisely to the
9 point Your Honor made. There is no greater
10 statutory effort to champion the cause of the
11 First Amendment than Freedom of Information
12 Act. And it's for that reason that you see
13 the Press Association and press interest
14 everywhere being the leading folks here.

15 THE COURT: (Inaudible) the Supreme Court
16 sitting up there.

17 MR. HALL: That's right.

18 THE COURT: The point is I'm getting a
19 little bit far afield because your point, your
20 basic point is that even if there was a
21 significant First Amendment issue, you know,
22 the state courts are competent to resolve it.
23 I mean, I know an awful lot of very able,
24 capable state court judges. And I would be
25 reluctant to say to one, "Look, I can do this

1 and you can't."

2 MR. HALL: Judge, we agree. And I think
3 the process that has unfolded during this
4 case's pendency demonstrates that. The
5 process is working its normal course. We had
6 a disappointing order from a Circuit Court
7 judge and we've appealed it to the State
8 Supreme Court. The Attorney General's
9 intervened, and we'll hash it out. We'll
10 either win or we'll lose, but the Court will
11 clarify.

12 Another important note I want to make the
13 Court aware of, and the Court is already aware
14 of it, but obviously to string the term
15 "public body" is the triggering mechanism in
16 any FOIA case. And so when you say, "Hey, I'm
17 not a public body; and therefore my
18 constitutional rights are implicated," you are
19 presupposing a determination that you are not
20 a public body.

21 Well, who would determine if you're a
22 public body? Is a federal court going to do
23 that? Is the federal court going to read the
24 definition? Is the federal court going to
25 address discovery as to what you are and what

1 you do and what you don't do? Why can't the
2 state court do that?

3 UNIDENTIFIED SPEAKER: (Inaudible.)

4 MR. HALL: What we'll do, with the
5 Court's permission, is simply make the order
6 of last week granting the Attorney General's
7 intervention a part of the record. I'm not
8 sure exactly as I stand here procedurally how
9 to do that, but I will figure that out and do
10 it.

11 You know, one of the arguments in advance
12 in the brief that predated, obviously, the
13 Attorney General's successful intervention
14 was: Hey, the State doesn't have a dog in
15 this fight. They obviously don't care.
16 They're looking the other way.

17 Well, that wasn't true at the time, and
18 that's obviously not the test. The test is
19 whether a State interest is there, not whether
20 a particular political actor has decided to
21 engage or somebody with limited resources has
22 decided to engage. But clearly now that the
23 Attorney General has engaged, that argument is
24 rendered hollow. Thank y'all.

25 THE COURT: Mr. Reagle, you have some

1 time remaining.

2 MR. REAGLE: Briefly, back to the removal
3 issue. I think removal does not want state
4 claims dragged into federal court. That's not
5 the issue here. There's nothing about removal
6 that disfavors federal courts from hearing
7 federal claims.

8 It is further --

9 THE COURT: It's certainly something that
10 a district judge (inaudible) in making a
11 decision about this case under no removal
12 (inaudible).

13 MR. REAGLE: I don't disagree with that.
14 Certainly one of the Younger factors is is
15 there an ongoing state proceeding. So that is
16 something they can and should take into
17 account.

18 THE COURT: You know, that's -- I mean,
19 that's -- we come back in the final analysis
20 and we stand as a review (inaudible) and say
21 that someone abused the discretion
22 (inaudible).

23 We've got to look down the road. A
24 number of declaratory judgments may need to be
25 skyrocketed.

1 MR. REAGLE: Your Honor mentioned the
2 right term. It is comity. It is not whether
3 or not SCASA would be denied a day in court,
4 that claims could not be heard in federal
5 court. It's whether federal court accepting
6 jurisdiction over a federal question would
7 offend the comity between the state and
8 federal governments.

9 Again, in the Harper decision, the Court
10 correctly -- you know, it's probably the best
11 discussion I have seen of Younger abstention
12 and the factors that are involved. This is
13 not a case that involves those sovereign
14 interests of criminal law, of family law, of
15 land use law. It is much more akin to Harper
16 as a fundamental conflict between a portion of
17 a state law and the First Amendment. And it's
18 a state law which does not seek to vindicate
19 any state sovereign interest, but rather
20 create a private right of access enforceable
21 by private citizens.

22 And in looking at the First Amendment
23 issue, since we got into that, you indicated
24 by the corporations that are substantially
25 funded by public funds. That's not South

1 Carolina's FOIA. South Carolina's FOIA says a
2 private corporation that receives any public
3 funds, any -- and that includes any kind of
4 public funds -- is subject to the FOIA. And
5 it doesn't then impose limited disclosure
6 requirements. It requires every document that
7 that corporation has, ever had had, or ever
8 will have to be subject to disclosure.

9 THE COURT: Is there any reason to
10 suppose the South Carolina court would be
11 insensitive to that? You've already got a
12 trial court ruling in your favor.

13 MR. REAGLE: Well, the reason we suppose
14 it would be insensitive to that is the Supreme
15 Court's prior ruling, and then it's echoed in
16 a Court of Appeals ruling stating our Supreme
17 Court has ruled the fact that an organization,
18 corporation or agency is supported in whole or
19 in part by public funds or expends public
20 funds is sufficient grounds alone to find the
21 organization as a public body.

22 THE COURT: You're talking about a facial
23 argument. The State Supreme Court may look
24 and say, well, we may want to do this as a
25 fly. They may want to -- they may not rule

1 facially, just what you've been discussing.
2 You've been discussing almost a facial
3 invalidation. But we know that the State
4 Supreme Court would say, well, you know, they
5 may want to take the particular
6 characteristics of your particular
7 organization into account, and they may want
8 to have a case-by-case adjudication of this
9 and say this is unconstitutional as applied or
10 this is perfectly constitutional as applied.

11 And, you know, why isn't a state court
12 perfectly capable of looking at the different
13 characteristics of different entities within
14 the state who receive public funding, the
15 extent that they receive public funding, and
16 going about it on a case-by-case, as applied,
17 basis?

18 MR. REAGLE: Well, Judge Cooper's ruling
19 was an as-applied decision essentially.

20 THE COURT: It may get affirmed.

21 MR. REAGLE: The reason why is because,
22 even as this court recognized in the North
23 Carolina Right to Life cases, resolution of
24 First Amendment rights on a case-by-case
25 basis, particularly as recognized by the

1 Supreme Court in Billotti, based on a
2 complicated set of economic factors, is
3 unconstitutional. It imposes -- you can't
4 have corporations --

5 UNIDENTIFIED SPEAKER: You have
6 Washington State (inaudible) the year after
7 that, and they said be very, very careful
8 about facial (inaudible).

9 MR. REAGLE: Again, that's not
10 procedurally where we are, but I think there
11 is a strong facial claim. And the FOIA is, if
12 I may answer the question -- my time is up.
13 The FOIA is -- thank you, Your Honor.

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

Rocky Disabato d/b/a "Rocky D",
Plaintiff,

C.A. No. 2009-CP-10-07593

vs.

**DEFENDANT'S MOTION FOR A
PROTECTIVE ORDER**

South Carolina Association of School
Administrators,
Defendant.

The Defendant, South Carolina Association of School Administrators ("SCASA"), hereby respectfully moves the Court for a protective order denying or limiting discovery, pursuant to Rule 26, SCRPC. The Plaintiff, Rocky D, has propounded voluminous and burdensome discovery requests on SCASA, even though the venue has not been established for this proceeding and the issues not joined. (Attached hereto as Exhibit A is a copy of Plaintiff's discovery requests.) In response, SCASA served general objections to Plaintiff's discovery at this stage of the proceedings on the grounds that the requested discovery was privileged, unduly burdensome, and harassing, in light of the needs of the case, among other objections. (SCASA's objections are attached hereto as Exhibit B.) Plaintiff responded to SCASA's objections to discovery by correspondence dated February 25, 2010. (Attached hereto as Exhibit C.)

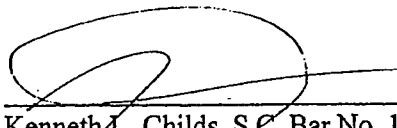
Because the discovery propounded by Plaintiff at this early stage of the proceedings is unduly burdensome and harassing in light of the needs of the case, Plaintiff's discovery is improper under Rules 26, 33, 34 and 37, SCRPC. Likewise, discovery in this case, at this time, is inconsistent with the procedures specified for the adjudication of claims under the South Carolina Freedom of Information Act ("FOIA"), S.C. Code Ann. § 30-4-10 *et seq.* SCASA expressly denies that it is a public body under the FOIA, and as such asserts that all its records

are exempt from mandatory disclosure pursuant to the FOIA. In adjudicating FOIA claims where exemptions to the FOIA are asserted, the Supreme Court has held that, before a party seeking disclosure is entitled to allegedly exempt records, the trial court must first examine the records *in camera* in order to determine whether the records are exempt. *See City of Columbia v. ACLU*, 475 S.E.2d 747, 749-50 (1996). Accordingly, as a threshold issue, this Court would need to first determine, based on an *in camera* review of records if determined necessary by the Court, whether SCASA is a public body under the FOIA, before any further discovery would even be appropriate. To proceed otherwise would improperly allow Plaintiff to seek through discovery in a FOIA action records he would not be entitled to under the FOIA itself. With regard to records allegedly exempt under the FOIA, the South Carolina Supreme Court has not permitted discovery to be used in such a manner.

SCASA's motion is based on the pleadings in this case, any memorandum of law submitted in support hereof, and such other records and arguments as may properly come before the Court. WHEREFORE, SCASA respectfully moves the Court for a protective order limiting discovery.

Respectfully submitted,

CHILDS & HALLIGAN, P.A.

By: 

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March 12, 2010

Columbia, South Carolina

EXHIBIT A

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT

Rocky Disabato, d/b/a "Rocky D,"

) Civil Action No. 09-CP-10-7593

) Plaintiff,

) vs.

) PLAINTIFF'S FIRST SET OF
) INTERROGATORIES

) South Carolina Association of School
) Administrators,

) Defendant.
)

Pursuant to Rules 26 and 33 of the South Carolina Rules of Civil Procedure, Plaintiff Rocky D, though his undersigned attorneys, hereby submits his First Set of Interrogatories to Defendant South Carolina Association of School Administrators ("SCASA"), to which written and sworn answers shall be submitted in accordance with the South Carolina Rules of Civil Procedure. After so answering the following Interrogatories, should further information called for therein come to the knowledge or attention of SCASA, then SCASA is required to properly transmit such information by supplemental answers to these Interrogatories in accordance with Rule 26(e) of the South Carolina Rules of Civil Procedure.

DEFINITIONS

The following definitions apply to these Interrogatories:

1. The terms "YOU" and "YOUR" when used herein refer to SCASA, its officers, its employees, and its agents.
2. The term "STATE DEPARTMENT OF EDUCATION" when used herein means the South Carolina Department of Education or any elected officials, officers, or employees of the South Carolina Department of Education.
3. The term "SCHOOL DISTRICT" when used herein means any school district in the State of South Carolina or any elected officials, officers, or employees of a school district in the State of South Carolina.
4. The term "PUBLIC SCHOOL" when used herein means any public school in the State of South Carolina or any officers or employees of public school in the State of South Carolina.
5. The term "IDENTIFY" when used herein in connection with natural persons means to state their full name, title and job description, if applicable, and their present business and resident addresses, if applicable; the term "IDENTIFY" when used in connection with other entities means to state the name and present address of each said entity. When an interrogatory asks for description or identification of a document, the answer shall be given in sufficient detail to enable a party or person to whom a subpoena or request to produce documents is directed to identify fully the documents sought to be produced and to enable counsel for Plaintiff to determine that such documents, when produced, are in fact the documents so described.
6. The term "DOCUMENT" or "DOCUMENTS" when used herein means and includes the originals of any written, recorded or graphic matter, however produced or

reproduced, in whatever form and regardless of where located, whether reduced to tangible form or stored in electronic or other medium which can be reduced to tangible form, including but not limited to: any summary, schedule, memorandum, note, working paper, drawing, statement, letter, telegram, interoffice communication, report, diary, desk or pocket calendar, time sheet, notebook, daybook, appointment book, pamphlet, periodical, work sheet, cost sheet, list, graph, charge, index, tape, record, partial or complete report of telephone or oral conversation, compilation, tabulation, study, analysis, transcript, minutes, accounting records, data sheet, data processing card or tape, ELECTRONIC DATA, listing, manual, bill of lading, shipping tally or similar freight documents, and all other memorials of any conversations, meetings and conferences, by telephone or otherwise, all other documents as defined in Rule 34 of the South Carolina Rules of Civil Procedure, and any other writing or recording, electronic or otherwise, which is in SCASA's possession, custody, or control or that of any employee, servant or agent of SCASA or SCASA's attorneys. In all cases where original and/or non-identical copies are unavailable, "documents" also means copies thereof. Further, the term "DOCUMENT" or "DOCUMENTS" shall include the original files and or containers in which said DOCUMENTS are maintained and any and all drafts of responsive DOCUMENTS.

7. "ELECTRONIC DATA"¹ includes, but is not limited to, electronic mail messages and any electronic folder or subfolder containing such messages; any other electronic messages,

¹ Plaintiff considers Electronic Data to be a valuable and irreplaceable source of discovery and/or evidence in this matter. The laws and rules prohibiting the destruction of evidence apply to Electronic Data with the same force as they apply to other kinds of evidence. Proper safeguards against destruction of Electronic Data, including the destruction of back-up and archival data, must be put in place pending final resolution of this case. Where information responsive to these requests is stored on electronic media, Plaintiff seeks access to the electronic copies of responsive information (together with instructions and programs necessary to search or retrieve such data), including all attachments and enclosures to any responsive information, which shall not be separated from the items to which they are attached or enclosed.

including electronic bulletin boards and/or intranet or internet web sites or postings; activity listings of electronic mail receipts and/or transmittals; electronic calendars or planners; electronic documents or files created by or stored in Microsoft Word, Word Perfect or any other word-processing or document-creation applications; electronic spreadsheets, graphs, charts, records or other similar files or documents created by or stored in Microsoft Excel, Quicken, or any similar applications; electronic data, documents, files, or records created by or stored in Microsoft Access, Oracle, or any other data-management system or application; electronic documents, images, or files created by or stored in a ".tiff" or other similar format; electronic documents or files created by or stored in a ".pdf" or other similar format; electronic documents, files, or pages created by or stored in an ".html" or other similar format; electronic log or cookie files created by any application or operating system; voice mail; digital audio or video recordings of any kind; computer programs or applications (whether private, commercial, legacy, enterprise, or a work in progress); programming notes or instructions; output resulting from the use of any software program; all miscellaneous electronic files and/or file fragments regardless of the media on which they are stored and regardless of whether the data resides in an active file, deleted file, archived file, slack space or file fragment, and any other electronic document, file, or data created by or stored in any enterprise, proprietary, shrink-wrap data-management program or application, any operating system or other computer software application or other program whatsoever.

"ELECTRONIC DATA" includes, but is not limited to, all of the items and data described above or any other similar items or data stored or archived on personal computers, including desktop, notebook or laptop computers or personal digital assistants; hard drives of any kind; magnetic media diskettes; compact disks, including but not limited to CD-ROMs and

DVDs; magnetic tapes of all kinds including data cartridges of any kind; zip, jaz, Imation SuperDisks, or other types of magnetic or digital drives; floppy disks, zip drive disks, syquest disks, Bernoulli disks or their equivalents; computer chips, (including, but not limited to, EPROM, PROM, RAM, and ROM); servers, including portable servers; and any other digital or magnetic device whatsoever.

"ELECTRONIC DATA" also includes the file, folder tabs, containers, or labels appended to any storage device containing ELECTRONIC DATA.

INTERROGATORIES

1. Identify the names, addresses, telephone numbers, and email addresses of persons known to you to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

2. For each person known to you to be a witness concerning the facts of the case, set forth either a summary sufficient to inform Plaintiff of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

3. Set forth a list of photographs, plats, sketches, or other prepared documents in your possession that relate to the claims or defenses in the case.

4. Identify the names and addresses of any expert witnesses whom you propose to use as a witness at the trial of this case. In so doing, provide in detail (a) the area of expertise in which you intend to offer each expert witness; (b) a complete statement of all opinions each putative expert witness will express and the basis and reasons for them; (c) the data or other information considered by each putative expert witness in forming his or her opinions; (d) any

exhibits that will be used to summarize or support such opinions; (e) the qualifications of each putative expert witness, including a list of all publications authored in the previous ten years and a list of all other cases in which the witness testified as an expert by deposition or at trial, arbitration, or mediation in the previous four years; and (f) a statement of the compensation to be paid for the study and testimony of each putative expert witness.

5. Identify each and every person who participated in your decision to deny Plaintiff's August 2009 request for documents made pursuant to the South Carolina Freedom of Information Act ("FOIA"). This Interrogatory includes all persons who played any role—consulting, advisory, voting, and so forth—in the decision to deny Plaintiff's FOIA request. For your reference, a copy of this letter is attached to the Complaint as Exhibit D.

6. Identify with specificity each and every reason why you denied Plaintiff's FOIA request.

7. Identify each and every person who participated in the composing, drafting, editing, or revising of your September 4, 2009 letter to Plaintiff denying his FOIA request. This Interrogatory includes all persons who actually typed or hand-wrote portions of the letter, as well as all persons who provided input, suggestions, or feedback regarding the response. For your reference, a copy of this letter is attached to the Complaint as Exhibit E.

8. Identify your gross revenue for each fiscal year since January 1, 2005.

9. Identify each and every occasion you received money from the State Department of Education since January 1, 2005. In so doing, provide in detail (a) the date of your receipt of the money and (b) the amount of money you received on each occasion.

10. Identify each and every occasion you received money from any state-level agencies or departments of the South Carolina government other than the State Department of

Education since January 1, 2005. In so doing, provide in detail (a) the department, agency, official, or employee responsible for the payment to you; (b) the date of your receipt of the money; and (c) the amount of money you received on each occasion.

11. Identify each and every occasion you received money from any school district since January 1, 2005. In so doing, provide in detail (a) the date of your receipt of the money and (b) the amount of money you received on each occasion.

12. Identify each and every occasion you received money from any public school since January 1, 2005. In so doing, provide in detail (a) the date of your receipt of the money and (b) the amount of money you received on each occasion.

13. Identify each and every occasion you received money from a private person or organization, including for-profit and nonprofit entities, since January 1, 2005. In so doing, provide in detail (a) the date of your receipt of the money and (b) the amount of money you received on each occasion.

14. Identify each and every grant for which you have applied since January 1, 1999. In so doing, provide in detail (a) the name of the grantor organization, (b) the goods or services putatively provided under the grant, (c) the amount of money provided by the grant, and (d) whether you were awarded the grant.

15. Identify each and every contract into which you have entered with the State Department of Education, any other South Carolina state agency or department, any school district, or any public school since January 1, 1999. In so doing, provide in detail (a) the date on which the contract was entered, (b) whether the contract was written or oral, (c) the goods or services putatively provided under the contract, (d) whether the contract was entered through a

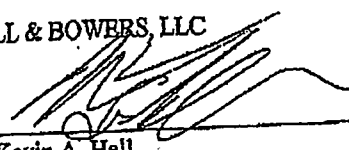
competitive bidding process, and (e) the sum of money you have received from the organization as the result of each contract.

16. Identify each of your employees who participates in the South Carolina State Health and Dental Insurance plan.

17. Identify each of your employees who participates in the South Carolina State Retirement System.

18. State the total number of members that you currently have and identify each and every one of your active members who is not presently employed by or a retiree of the State of South Carolina, a school district, or a public school.

HALL & BOWERS, LLC

By: 

Kevin A. Hall
Karl S. Bowers, Jr.
M. Todd Carroll
1329 Blanding Street
Post Office Box 12107 (29211)
Columbia, SC 29201
(803) 454-6504

Attorneys for Plaintiff Rocky D

Columbia, South Carolina
January 15, 2010

CERTIFICATE OF SERVICE

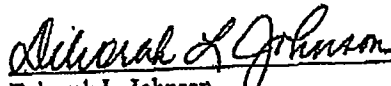
I, the undersigned Administrative Assistant of the law offices of Hall & Bowers, LLC, attorneys for Rocky Disabato, d/b/a "Rocky D," do hereby certify that I have served all parties in this action with a copy of the pleading(s) hereinbelow specified by mailing, via U.S. Mail, postage prepaid, a copy of the same to the following address(es):

Pleadings:

PLAINTIFF'S FIRST SET OF INTERROGATORIES

Party Served:

South Carolina Association of School Administrators
121 Westpark Blvd.
Columbia, SC 29210


Deborah L. Johnson
Administrative Assistant

January 15, 2010

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
Rocky Disabato, d/b/a "Rocky D,"	)	Civil Action No. 09-CP-10-7593
	)	
Plaintiff,	)	
	)	
vs.	)	<u>PLAINTIFF'S FIRST SET OF</u>
	)	<u>REQUESTS TO PRODUCE</u>
South Carolina Association of School	)	<u>DOCUMENTS</u>
Administrators,	)	
	)	
Defendant.	)	

Pursuant to Rules 26 and 34 of the South Carolina Rules of Civil Procedure, Plaintiff Rocky D, though his undersigned attorneys, hereby submits his First Set of Requests to Produce to Defendant South Carolina Association of School Administrators ("SCASA"), to which written and sworn answers shall be submitted in accordance with the South Carolina Rules of Civil Procedure. After so responding to the following Requests to Produce, should further information called for therein come to the knowledge or attention of SCASA, then SCASA is required to properly transmit such information by supplemental responses to these Requests to Produce in accordance with Rule 26(e) of the South Carolina Rules of Civil Procedure.

DEFINITIONS

The following definitions apply to these Requests to Produce:

1. The terms "YOU" and "YOUR" when used herein refer to SCASA, its officers, its employees, and its agents.
2. The term "STATE DEPARTMENT OF EDUCATION" when used herein means the South Carolina Department of Education or any elected officials, officers, or employees of the South Carolina Department of Education.

3. The term "SCHOOL DISTRICT" when used herein means any school district in the State of South Carolina or any elected officials, officers, or employees of a school district in the State of South Carolina.

4. The term "PUBLIC SCHOOL" when used herein means any public school in the State of South Carolina or any officers or employees of public school in the State of South Carolina.

5. The term "DOCUMENT" or "DOCUMENTS" when used herein means and includes the originals of any written, recorded or graphic matter, however produced or reproduced, in whatever form and regardless of where located, whether reduced to tangible form or stored in electronic or other medium which can be reduced to tangible form, including but not limited to: any summary, schedule, memorandum, note, working paper, drawing, statement, letter, telegram, interoffice communication, report, diary, desk or pocket calendar, time sheet, notebook, daybook, appointment book, pamphlet, periodical, work sheet, cost sheet, list, graph, charge, index, tape, record, partial or complete report of telephone or oral conversation, compilation, tabulation, study, analysis, transcript, minutes, accounting records, data sheet, data processing card or tape, ELECTRONIC DATA, listing, manual, bill of lading, shipping tally or similar freight documents, and all other memorials of any conversations, meetings and conferences, by telephone or otherwise, all other documents as defined in Rule 34 of the South Carolina Rules of Civil Procedure, and any other writing or recording, electronic or otherwise, which is in SCASA's possession, custody, or control or that of any employee, servant or agent of SCASA or SCASA's attorneys. In all cases where original and/or non-identical copies are unavailable, "documents" also means copies thereof. Further, the term "DOCUMENT" or

"DOCUMENTS" shall include the original files and or containers in which said DOCUMENTS are maintained and any and all drafts of responsive DOCUMENTS.

6. "ELECTRONIC DATA"¹ includes, but is not limited to, electronic mail messages and any electronic folder or subfolder containing such messages; any other electronic messages, including electronic bulletin boards and/or intranet or Internet web sites or postings; activity listings of electronic mail receipts and/or transmittals; electronic calendars or planners; electronic documents or files created by or stored in Microsoft Word, Word Perfect or any other word-processing or document-creation applications; electronic spreadsheets, graphs, charts, records or other similar files or documents created by or stored in Microsoft Excel, Quicken, or any similar applications; electronic data, documents, files, or records created by or stored in Microsoft Access, Oracle, or any other data-management system or application; electronic documents, images, or files created by or stored in a ".tiff" or other similar format; electronic documents or files created by or stored in a ".pdf" or other similar format; electronic documents, files, or pages created by or stored in an ".html" or other similar format; electronic log or cookie files created by any application or operating system; voice mail; digital audio or video recordings of any kind; computer programs or applications (whether private, commercial, legacy, enterprise, or a work in progress); programming notes or instructions; output resulting from the use of any software program; all miscellaneous electronic files and/or file fragments regardless of the media on

¹ Plaintiff considers Electronic Data to be a valuable and irreplaceable source of discovery and/or evidence in this matter. The laws and rules prohibiting the destruction of evidence apply to Electronic Data with the same force as they apply to other kinds of evidence. Proper safeguards against destruction of Electronic Data, including the destruction of back-up and archival data, must be put in place pending final resolution of this case. Where information responsive to these requests is stored on electronic media, Plaintiff seeks access to the electronic copies of responsive information (together with instructions and programs necessary to search or retrieve such data), including all attachments and enclosures to any responsive information, which shall not be separated from the items to which they are attached or enclosed.

which they are stored and regardless of whether the data resides in an active file, deleted file, archived file, slack space or file fragment, and any other electronic document, file, or data created by or stored in any enterprise, proprietary, shrink-wrap data-management program or application, any operating system or other computer software application or other program whatsoever.

"ELECTRONIC DATA" includes, but is not limited to, all of the items and data described above or any other similar items or data stored or archived on personal computers, including desktop, notebook or laptop computers or personal digital assistants; hard drives of any kind; magnetic media diskettes; compact disks, including but not limited to CD-ROMs and DVDs; magnetic tapes of all kinds including data cartridges of any kind; zip, jaz, Imation SuperDisks, or other types of magnetic or digital drives; floppy disks, zip drive disks, syquest disks, Bernoulli disks or their equivalents; computer chips, (including, but not limited to, EPROM, PROM, RAM, and ROM); servers, including portable servers; and any other digital or magnetic device whatsoever.

"ELECTRONIC DATA" also includes the file, folder tabs, containers, or labels appended to any storage device containing ELECTRONIC DATA.

REQUESTS TO PRODUCE

Please produce the following:

1. Each and every document that relates in any way to any claim, defense, or counterclaim in this action.
2. Each and every document referenced or identified in your responses to Plaintiff's First Set of Interrogatories.
3. Each and every document reviewed, consulted, or relied upon in responding to Plaintiff's First Set of Interrogatories.
4. Each and every document that relates in any way to Plaintiff's August 2009 request to you for documents that was made pursuant to the South Carolina Freedom of Information Act ("FOIA").
5. Each and every document, including but not limited to electronic correspondence, that relates in any way to your decision to deny Plaintiff's FOIA request.
6. All prior drafts of your September 4, 2009 letter to Plaintiff denying his FOIA request to you.
7. Each and every document, including but not limited to electronic correspondence, that you provided to or received from an elected official, officer, or employee of the State of South Carolina, any school district, any public school, the South Carolina School Boards Association, the South Carolina Education Association, the South Carolina Parent Teacher Association, the Palmetto State Teachers Association, or the Leaders in Education Administration Political Action Committee ("LEAPAC") that in any way relates to Plaintiff's FOIA request.

8. All balance sheets, income statements, ledgers, tax forms, and any other document that relates in any way to your gross revenue for each fiscal year since January 1, 2005.

9. Each and every document, including but not limited to electronic correspondence, that you provided to or received from an elected official, officer, or employee of the South Carolina state government, any school district, or any public school that in any way relates to providing funding or payments of monies to you since January 1, 2005.

10. Each and every document, including checks and receipts, that in any way relates to your receipt of monies from an elected official, officer, or employee of the South Carolina state government, any school district, or any public school since January 1, 2005.

11. Each and every document, including checks and receipts, that in any way relates to your receipt of monies from a private person or organization, including for-profit and nonprofit entities, since January 1, 2005.

12. Each and every application for a grant that you have submitted since January 1, 1999.

13. Each and every grant of which you have been the recipient since January 1, 1999.

14. Each and every document related in any way to any grant of which you have been the recipient since January 1, 1999.

15. Each and every contract into which you have entered with the State Department of Education since January 1, 1999.

16. Each and every document, including but not limited to electronic correspondence, related in any way to the creation, formation, terms, execution, administration, or termination of

any contract into which you have entered with the State Department of Education since January 1, 1999.

17. Each and every contract into which you have entered with any South Carolina state agency or department other than the State Department of Education since January 1, 1999.

18. Each and every document, including but not limited to electronic correspondence, related in any way to the creation, formation, terms, execution, administration, or termination of any contract into which you have entered with any South Carolina state agency or department other than the State Department of Education since January 1, 1999.

19. Each and every contract into which you have entered with any school district since January 1, 1999.

20. Each and every document, including but not limited to electronic correspondence, related in any way to the creation, formation, terms, execution, administration, or termination of any contract into which you have entered with any school district since January 1, 1999.

21. Each and every contract into which you have entered with any public school since January 1, 1999.

22. Each and every document, including but not limited to electronic correspondence, related in any way to the creation, formation, terms, execution, administration, or termination of any contract into which you have entered with any public school since January 1, 1999.

23. Each and every document that contains a list of your current membership.

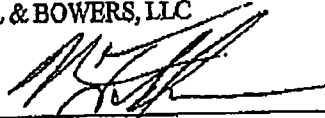
24. Each and every document that contains a list of your current "business affiliates," as that term is used on your website.

25. Each and every document that contains a list of your current employees, staff, and other persons paid or retained by you to perform services on your behalf.

26. Each and every document that you plan to introduce as evidence or as an exhibit in the trial of this matter.

27. Each and every document that you provided to or received from any putative expert witness in this matter.

HALL & BOWERS, LLC

By: 

Kevin A. Hall
Karl S. Bowers, Jr.
M. Todd Carroll
1329 Blanding Street
Post Office Box 12107 (29211)
Columbia, SC 29201
(803) 454-6504

Attorneys for Plaintiff Rocky D

Columbia, South Carolina
January 15, 2010

CERTIFICATE OF SERVICE

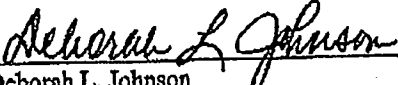
I, the undersigned Administrative Assistant of the law offices of Hall & Bowers, LLC, attorneys for Rocky Disabato, d/b/a "Rocky D," do hereby certify that I have served all parties in this action with a copy of the pleading(s) hereinbelow specified by mailing, via U.S. Mail, postage prepaid, a copy of the same to the following address(es):

Pleadings:

**PLAINTIFF'S FIRST SET OF REQUESTS TO
PRODUCE DOCUMENTS**

Party Served:

South Carolina Association of School Administrators
121 Westpark Blvd.
Columbia, SC 29210


Deborah L. Johnson
Administrative Assistant

January 15, 2010

EXHIBIT B

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

Rocky Disabato d/b/a "Rocky D",

C.A. No. 2009-CP-10-07593

Plaintiff,

vs.

South Carolina Association of School
Administrators,

Defendant.

**DEFENDANT'S RESPONSES TO
PLAINTIFF'S FIRST SET OF
INTERROGATORIES AND FIRST SET OF
REQUESTS TO PRODUCE DOCUMENTS**

TO KARL S. BOWERS, ESQ, ATTORNEY FOR PLAINTIFF:

GENERAL OBJECTIONS

1. Defendant objects to providing or disclosing any information protected by the attorney-client privilege or attorney work-product doctrine.
2. Defendant objects to providing or disclosing any information constituting trial preparation materials or materials otherwise encompassed within the work-product doctrine without and unless Plaintiff makes the requisite showing required by Rule 26, SCRPC.
3. Defendant objects to each Request that (i) is unreasonably cumulative, duplicative, or excessive; (ii) seeks material obtainable from some other source that is more convenient, less burdensome, or less expensive; or (iii) otherwise constitutes an abuse of discovery.
4. Defendant objects to each and every request individually and generally on the grounds that the discovery requests are unduly burdensome and excessive in light of the needs of the case at this time, because proper venue has not been established, the sufficiency of the complaint is not admitted, and the issues in the case are not joined because the pleadings are not closed. Given the private and confidential nature, as well as the volume, of the records sought,

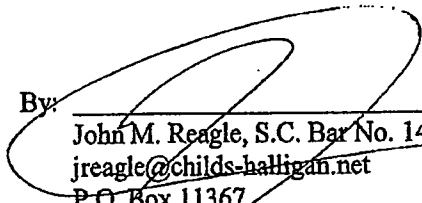
the burden on Defendant is particularly acute, and since any relevant public records may be obtained from other sources at equal or less cost, and Defendant's responding further to the Plaintiff's discovery requests would not secure the just, speedy, and inexpensive determination of this action.

Moreover, Defendant has asserted First Amendment protection from the S.C. FOIA in a separate declaratory judgment action in the United States District Court for the District of South Carolina. Plaintiff should not be able to obtain, in an action purporting to enforce the FOIA, information through discovery what he could not obtain under the FOIA itself.

5. Defendant reserves the right to respond further to Plaintiff's discovery requests once an order establishing appropriate venue has been entered.

Respectfully submitted,

CHILDS & HALLIGAN, P.A.

By: 

John M. Reagle, S.C. Bar No. 14185
jreagle@childs-halligan.net
P.O. Box 11367
Columbia, South Carolina 29211
(803) 254-4035

Attorneys for Defendant

February 19, 2010

Columbia, South Carolina

CERTIFICATE OF SERVICE BY MAIL

The undersigned of Childs & Halligan, P.A., hereby certifies that she has served the following counsel of record with the foregoing **DEFENDANT'S RESPONSES TO PLAINTIFF'S FIRST SET OF INTERROGATORIES AND FIRST SET OF REQUESTS TO PRODUCE DOCUMENTS** by mailing a copy of same, postage prepaid and return address clearly indicated, to the following on this 19th day of February 2010:

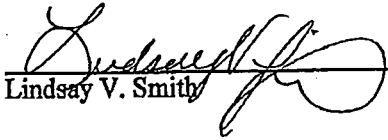

Lindsay V. Smith

EXHIBIT C

Feb. 25. 2010 3:29PM

No. 2019 P. 2



HALL & BOWERS, LLC
ATTORNEYS AT LAW

1329 Blanding Street | Columbia, SC 29201
P.O. Box 12107 | Columbia, SC 29211

803.454.6504 tel
803.454.6509 fax
hallbowers.com

February 25, 2010

Via Facsimile

John M. Reagle, Esquire
Childs & Halligan, P.A.
1301 Gervais Street, Suite 900
Columbia, South Carolina 29201

KEVIN A. HALL
kavin.hall@hallbowers.com
KARL S. (BUTCH) BOWERS, JR.
butch.bowers@hallbowers.com
M. TODD CARROLL
todd.carroll@hallbowers.com

Re: Disabato v. South Carolina Association of School Administrators
Civil Action No. 09-CP-10-7593

Dear John:

We write to follow up on SCASA's responses to our client's first set of interrogatories and first set of requests to produce documents. As you can imagine, we were surprised that SCASA altogether failed to provide any responsive information and, instead, stated only a handful of generalized objections to our discovery requests. With respect to SCASA's first two objections, which are based on the attorney-client privilege or work product doctrine, we obviously do not seek discovery of materials or information that would violate these privileges. The remaining objections, however, are without any support.

Objection 3 appears to be a generic allegation that our discovery requests "constitute[] an abuse of discovery." There is no basis for this. Rule 33(b)(9) of the South Carolina Rules of Civil Procedure allows service of up to 50 interrogatories without seeking leave of the Court; we have only served 18 on SCASA at this point, several of which are pulled from the "Standard Interrogatories" that are specifically authorized by Rule 33(b) in all litigation. Likewise, our interrogatories and requests to produce seek information that is relevant to the questions of whether SCASA is a "public body" under the South Carolina Freedom of Information Act or whether SCASA improperly failed to respond to our client's request under that statute. If SCASA is willing to admit in these proceedings that it is a public body for purposes of the FOIA, as it has apparently done in a companion federal-court case, we will accept that admission and withdraw our requests on that point. Otherwise, our discovery requests are permitted by and are proper under the Rules, and we expect SCASA to provide good-faith responses to them.

Objection 4 contains a hodgepodge of topics, several of which are duplicative of those identified under Objection 3. Among the new topics, though, is that SCASA believes it is relieved from responding to discovery "because proper venue has not been established." We, of course, dispute the assertion that venue in Charleston is improper. However, regardless of the county in which this case is pending, it will ultimately be resolved by a South Carolina circuit court, all of which operate under the same Rules of Civil Procedure. Therefore, a motion to change venue does not stay discovery.

REC 000352

John M. Reagle, Esquire
February 25, 2010
Page 2

SCASA also objects to responding to discovery because "the sufficiency of the complaint is not admitted, and the issues in the case are not joined because the pleadings are not closed." Like with SCASA's venue-based objection, these objections are inconsistent with the Rules. Rule 33(a) specifically provides that interrogatories can be served on any party "with or after service of the summons and complaint upon that party." Rule 34(b) contains an identical provision with respect to service of requests to produce. The Rules simply do not condition discovery rights on closure of the pleadings, and SCASA's objections are therefore misplaced.

Finally, SCASA objects to responding to discovery requests in this case because of a separate proceeding, filed nearly two months after commencement of this action, that is pending in the federal court system. But the existence of a related proceeding in a different jurisdiction does not obviate SCASA's obligations under the South Carolina Rules of Civil Procedure.

Because none of SCASA's objections to our discovery requests are proper, we would appreciate it if you would please provide full and complete responses to those requests—both the interrogatories and the requests to produce documents—no later than Friday, March 12, 2010. If SCASA intends to stand on its objections and not provide responses, we would appreciate it if you would let us know so that we can move forward with filing a motion to compel. Thank you for your help with this, and we will look forward to hearing from you soon.

Sincerely,



M. Todd Carroll

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

Rocky Disabato, d/b/a "Rocky D,")

Plaintiff,)

vs.)

South Carolina Association of School
Administrators,)

Defendant.)

Civil Action No. 09-CP-10-7593

PLAINTIFF'S MOTION TO COMPEL
DISCOVERY RESPONSES

Pursuant to Rule 37 of the South Carolina Rules of Civil Procedure, Plaintiff moves the Court for an order compelling Defendant to respond to Plaintiff's First Set of Interrogatories and First Set of Requests to Produce Documents. The grounds for this Motion are as follows:

BACKGROUND OF CASE

The issue presented in this case is whether Defendant is a "public body" subject to the South Carolina Freedom of Information Act ("FOIA"). In August 2009, Plaintiff sent Defendant a request for documents pursuant to the FOIA. Compl. ¶ 17. Defendant responded to this request by denying that it is subject to the FOIA. *Id.* ¶ 18. Notably, Defendant did not assert any of the nineteen statutory exemptions from disclosure when responding to Plaintiff's FOIA request. *Id.* ¶ 19. Plaintiff subsequently commenced this litigation and seeks a declaration that Defendant is a "public body" under the FOIA, among other requested relief. *Id.* ¶ "Prayer for Relief"(a).

SEQUENCE OF DISCOVERY GIVING RISE TO THIS MOTION

This Motion seeks an order compelling Defendant to respond to discovery requests served on it by Plaintiff pursuant to Rules 33 and 34 of the South Carolina Rules of Civil Procedure. The timeline of discovery is as follows:

1. On January 15, 2010, Plaintiff served Defendant with Plaintiff's First Set of Interrogatories and First Set of Requests to Produce Documents. Copies of these discovery requests are attached hereto as Exhibits A and B, respectfully.
2. On February 19, 2010, Defendant purported to respond to these discovery requests. However, it did not provide an actual response to any of Plaintiff's interrogatories or any of Plaintiff's requests to produce. Instead, Defendant asserted generic objections to all of Plaintiff's discovery requests. These objections, however, are without any legal basis and in no way excuse Defendant from responding to Plaintiff's discovery requests. A copy of Defendant's response to Plaintiff's first set of discovery requests is attached hereto as Exhibit C.
3. On February 25, 2010, Plaintiff wrote Defendant a letter explaining why none of Defendant's objections to discovery had any merit and requesting full and complete responses to Plaintiff's discovery requests no later than March 12, 2010. A copy of this letter is attached hereto as Exhibit D.
4. Rather than responding to Plaintiff's letter or providing any responses to Plaintiff's discovery requests, Defendant filed a motion for a protective order on March 12, 2010. In that motion, Defendant parroted its same baseless objections to Plaintiff's discovery requests. Further, Defendant's motion suggested that no discovery at all should be allowed here because in cases where a public body has withheld a document

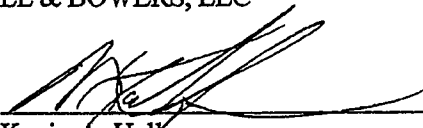
pursuant to one of FOIA's nineteen statutory exemptions to disclosure, the Supreme Court has directed that an *in camera* review of the withheld document may be appropriate to assess whether any of FOIA's exemptions are applicable. But this is not the issue presented here. As noted above, Defendant's response to Plaintiff's FOIA request did not reference any of FOIA's statutory exemptions; instead, it claimed that Defendant is not a "public body" subject to FOIA. Accordingly, the line of authority on which Defendant's motion is based is irrelevant to this case. In short, there is no basis for Defendant's failure to respond to Plaintiff's discovery requests.

REQUESTED RELIEF

Because Defendant is obligated to respond to Plaintiff's discovery requests, yet it has entirely failed to do so, the Court should issue an order directing Defendant to provide full and complete responses to each of Plaintiff's interrogatories and document requests. Additionally, because Defendant has deliberately refused to respond to Plaintiff's discovery requests without any legitimate reason for doing so, the Court should award Plaintiff his attorneys' fees and costs incurred in pursuing this Motion, as provided by Rule 37(a)(4), SCRCP.

For the reasons stated above, Plaintiff respectfully requests that the Court grant this Motion, compel Defendant to provide full and complete responses to each of Plaintiff's interrogatories and requests for the production of documents, and award Plaintiff his attorneys' fees and costs associated with this Motion. This Motion is supported by the pleadings of this case, as well as any memorandum or other submission that may be allowed by the Court.

HALL & BOWERS, LLC

By: 

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SC Bar No. 015063

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Karl S. Bowers, Jr.

SC Bar No. 16141

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M. Todd Carroll

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1329 Blanding Street

Columbia, SC 29201

(803) 454-6504

Attorneys for Plaintiff Rocky D

March 16, 2010
Columbia, South Carolina

Exhibit A

Plaintiff's First Set of Interrogatories

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT

Rocky Disabato, d/b/a "Rocky D,") Civil Action No. 09-CP-10-7593
)

Plaintiff,)

vs.)

PLAINTIFF'S FIRST SET OF
INTERROGATORIES

South Carolina Association of School
Administrators,)

Defendant.)

Pursuant to Rules 26 and 33 of the South Carolina Rules of Civil Procedure, Plaintiff Rocky D, though his undersigned attorneys, hereby submits his First Set of Interrogatories to Defendant South Carolina Association of School Administrators ("SCASA"), to which written and sworn answers shall be submitted in accordance with the South Carolina Rules of Civil Procedure. After so answering the following Interrogatories, should further information called for therein come to the knowledge or attention of SCASA, then SCASA is required to properly transmit such information by supplemental answers to these Interrogatories in accordance with Rule 26(e) of the South Carolina Rules of Civil Procedure.

DEFINITIONS

The following definitions apply to these Interrogatories:

1. The terms "YOU" and "YOUR" when used herein refer to SCASA, its officers, its employees, and its agents.
2. The term "STATE DEPARTMENT OF EDUCATION" when used herein means the South Carolina Department of Education or any elected officials, officers, or employees of the South Carolina Department of Education.
3. The term "SCHOOL DISTRICT" when used herein means any school district in the State of South Carolina or any elected officials, officers, or employees of a school district in the State of South Carolina.
4. The term "PUBLIC SCHOOL" when used herein means any public school in the State of South Carolina or any officers or employees of public school in the State of South Carolina.
5. The term "IDENTIFY" when used herein in connection with natural persons means to state their full name, title and job description, if applicable, and their present business and resident addresses, if applicable; the term "IDENTIFY" when used in connection with other entities means to state the name and present address of each said entity. When an interrogatory asks for description or identification of a document, the answer shall be given in sufficient detail to enable a party or person to whom a subpoena or request to produce documents is directed to identify fully the documents sought to be produced and to enable counsel for Plaintiff to determine that such documents, when produced, are in fact the documents so described.
6. The term "DOCUMENT" or "DOCUMENTS" when used herein means and includes the originals of any written, recorded or graphic matter, however produced or

reproduced, in whatever form and regardless of where located, whether reduced to tangible form or stored in electronic or other medium which can be reduced to tangible form, including but not limited to: any summary, schedule, memorandum, note, working paper, drawing, statement, letter, telegram, interoffice communication, report, diary, desk or pocket calendar, time sheet, notebook, daybook, appointment book, pamphlet, periodical, work sheet, cost sheet, list, graph, charge, index, tape, record, partial or complete report of telephone or oral conversation, compilation, tabulation, study, analysis, transcript, minutes, accounting records, data sheet, data processing card or tape, ELECTRONIC DATA, listing, manual, bill of lading, shipping tally or similar freight documents, and all other memorials of any conversations, meetings and conferences, by telephone or otherwise, all other documents as defined in Rule 34 of the South Carolina Rules of Civil Procedure, and any other writing or recording, electronic or otherwise, which is in SCASA's possession, custody, or control or that of any employee, servant or agent of SCASA or SCASA's attorneys. In all cases where original and/or non-identical copies are unavailable, "documents" also means copies thereof. Further, the term "DOCUMENT" or "DOCUMENTS" shall include the original files and or containers in which said DOCUMENTS are maintained and any and all drafts of responsive DOCUMENTS.

7. "ELECTRONIC DATA"¹ includes, but is not limited to, electronic mail messages and any electronic folder or subfolder containing such messages; any other electronic messages,

¹ Plaintiff considers Electronic Data to be a valuable and irreplaceable source of discovery and/or evidence in this matter. The laws and rules prohibiting the destruction of evidence apply to Electronic Data with the same force as they apply to other kinds of evidence. Proper safeguards against destruction of Electronic Data, including the destruction of back-up and archival data, must be put in place pending final resolution of this case. Where information responsive to these requests is stored on electronic media, Plaintiff seeks access to the electronic copies of responsive information (together with instructions and programs necessary to search or retrieve such data), including all attachments and enclosures to any responsive information, which shall not be separated from the items to which they are attached or enclosed.

including electronic bulletin boards and/or intranet or internet web sites or postings; activity listings of electronic mail receipts and/or transmittals; electronic calendars or planners; electronic documents or files created by or stored in Microsoft Word, Word Perfect or any other word-processing or document-creation applications; electronic spreadsheets, graphs, charts, records or other similar files or documents created by or stored in Microsoft Excel, Quicken, or any similar applications; electronic data, documents, files, or records created by or stored in Microsoft Access, Oracle, or any other data-management system or application; electronic documents, images, or files created by or stored in a ".tiff" or other similar format; electronic documents or files created by or stored in a ".pdf" or other similar format; electronic documents, files, or pages created by or stored in an ".html" or other similar format; electronic log or cookie files created by any application or operating system; voice mail; digital audio or video recordings of any kind; computer programs or applications (whether private, commercial, legacy, enterprise, or a work in progress); programming notes or instructions; output resulting from the use of any software program; all miscellaneous electronic files and/or file fragments regardless of the media on which they are stored and regardless of whether the data resides in an active file, deleted file, archived file, slack space or file fragment, and any other electronic document, file, or data created by or stored in any enterprise, proprietary, shrink-wrap data-management program or application, any operating system or other computer software application or other program whatsoever.

"ELECTRONIC DATA" includes, but is not limited to, all of the items and data described above or any other similar items or data stored or archived on personal computers, including desktop, notebook or laptop computers or personal digital assistants; hard drives of any kind; magnetic media diskettes; compact disks, including but not limited to CD-ROMs and

DVDs; magnetic tapes of all kinds including data cartridges of any kind; zip, jaz, Imation SuperDisks, or other types of magnetic or digital drives; floppy disks, zip drive disks, syquest disks, Bernoulli disks or their equivalents; computer chips, (including, but not limited to, EPROM, PROM, RAM, and ROM); servers, including portable servers; and any other digital or magnetic device whatsoever.

"ELECTRONIC DATA" also includes the file, folder tabs, containers, or labels appended to any storage device containing ELECTRONIC DATA.

INTERROGATORIES

1. Identify the names, addresses, telephone numbers, and email addresses of persons known to you to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.
2. For each person known to you to be a witness concerning the facts of the case, set forth either a summary sufficient to inform Plaintiff of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.
3. Set forth a list of photographs, plats, sketches, or other prepared documents in your possession that relate to the claims or defenses in the case.
4. Identify the names and addresses of any expert witnesses whom you propose to use as a witness at the trial of this case. In so doing, provide in detail (a) the area of expertise in which you intend to offer each expert witness; (b) a complete statement of all opinions each putative expert witness will express and the basis and reasons for them; (c) the data or other information considered by each putative expert witness in forming his or her opinions; (d) any

exhibits that will be used to summarize or support such opinions; (e) the qualifications of each putative expert witness, including a list of all publications authored in the previous ten years and a list of all other cases in which the witness testified as an expert by deposition or at trial, arbitration, or mediation in the previous four years; and (f) a statement of the compensation to be paid for the study and testimony of each putative expert witness.

5. Identify each and every person who participated in your decision to deny Plaintiff's August 2009 request for documents made pursuant to the South Carolina Freedom of Information Act ("FOIA"). This Interrogatory includes all persons who played any role—consulting, advisory, voting, and so forth—in the decision to deny Plaintiff's FOIA request. For your reference, a copy of this letter is attached to the Complaint as Exhibit D.

6. Identify with specificity each and every reason why you denied Plaintiff's FOIA request.

7. Identify each and every person who participated in the composing, drafting, editing, or revising of your September 4, 2009 letter to Plaintiff denying his FOIA request. This Interrogatory includes all persons who actually typed or hand-wrote portions of the letter, as well as all persons who provided input, suggestions, or feedback regarding the response. For your reference, a copy of this letter is attached to the Complaint as Exhibit E.

8. Identify your gross revenue for each fiscal year since January 1, 2005.

9. Identify each and every occasion you received money from the State Department of Education since January 1, 2005. In so doing, provide in detail (a) the date of your receipt of the money and (b) the amount of money you received on each occasion.

10. Identify each and every occasion you received money from any state-level agencies or departments of the South Carolina government other than the State Department of

Education since January 1, 2005. In so doing, provide in detail (a) the department, agency, official, or employee responsible for the payment to you; (b) the date of your receipt of the money; and (c) the amount of money you received on each occasion.

11. Identify each and every occasion you received money from any school district since January 1, 2005. In so doing, provide in detail (a) the date of your receipt of the money and (b) the amount of money you received on each occasion.

12. Identify each and every occasion you received money from any public school since January 1, 2005. In so doing, provide in detail (a) the date of your receipt of the money and (b) the amount of money you received on each occasion.

13. Identify each and every occasion you received money from a private person or organization, including for-profit and nonprofit entities, since January 1, 2005. In so doing, provide in detail (a) the date of your receipt of the money and (b) the amount of money you received on each occasion.

14. Identify each and every grant for which you have applied since January 1, 1999. In so doing, provide in detail (a) the name of the grantor organization, (b) the goods or services putatively provided under the grant, (c) the amount of money provided by the grant, and (d) whether you were awarded the grant.

15. Identify each and every contract into which you have entered with the State Department of Education, any other South Carolina state agency or department, any school district, or any public school since January 1, 1999. In so doing, provide in detail (a) the date on which the contract was entered, (b) whether the contract was written or oral, (c) the goods or services putatively provided under the contract, (d) whether the contract was entered through a

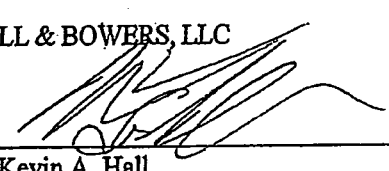
competitive bidding process, and (e) the sum of money you have received from the organization as the result of each contract.

16. Identify each of your employees who participates in the South Carolina State Health and Dental Insurance plan.

17. Identify each of your employees who participates in the South Carolina State Retirement System.

18. State the total number of members that you currently have and identify each and every one of your active members who is not presently employed by or a retiree of the State of South Carolina, a school district, or a public school.

HALL & BOWERS, LLC

By: 

Kevin A. Hall
Karl S. Bowers, Jr.
M. Todd Carroll
1329 Blanding Street
Post Office Box 12107 (29211)
Columbia, SC 29201
(803) 454-6504

Attorneys for Plaintiff Rocky D

Columbia, South Carolina
January 15, 2010

CERTIFICATE OF SERVICE

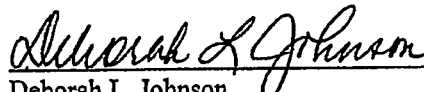
I, the undersigned Administrative Assistant of the law offices of Hall & Bowers, LLC, attorneys for Rocky Disabato, d/b/a "Rocky D," do hereby certify that I have served all parties in this action with a copy of the pleading(s) hereinbelow specified by mailing, via U.S. Mail, postage prepaid, a copy of the same to the following address(es):

Pleadings:

PLAINTIFF'S FIRST SET OF INTERROGATORIES

Party Served:

South Carolina Association of School Administrators
121 Westpark Blvd.
Columbia, SC 29210


Deborah L. Johnson
Administrative Assistant

January 15, 2010

Exhibit B

Plaintiff's First Set of Requests to
Produce Documents

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON) IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Rocky Disabato, d/b/a "Rocky D,") Civil Action No. 09-CP-10-7593

Plaintiff,)

vs.)

South Carolina Association of School
Administrators,)

Defendant.)

PLAINTIFF'S FIRST SET OF
REQUESTS TO PRODUCE
DOCUMENTS

Pursuant to Rules 26 and 34 of the South Carolina Rules of Civil Procedure, Plaintiff Rocky D, though his undersigned attorneys, hereby submits his First Set of Requests to Produce to Defendant South Carolina Association of School Administrators ("SCASA"), to which written and sworn answers shall be submitted in accordance with the South Carolina Rules of Civil Procedure. After so responding to the following Requests to Produce, should further information called for therein come to the knowledge or attention of SCASA, then SCASA is required to properly transmit such information by supplemental responses to these Requests to Produce in accordance with Rule 26(e) of the South Carolina Rules of Civil Procedure.

DEFINITIONS

The following definitions apply to these Requests to Produce:

1. The terms "YOU" and "YOUR" when used herein refer to SCASA, its officers, its employees, and its agents.
2. The term "STATE DEPARTMENT OF EDUCATION" when used herein means the South Carolina Department of Education or any elected officials, officers, or employees of the South Carolina Department of Education.

3. The term "SCHOOL DISTRICT" when used herein means any school district in the State of South Carolina or any elected officials, officers, or employees of a school district in the State of South Carolina.

4. The term "PUBLIC SCHOOL" when used herein means any public school in the State of South Carolina or any officers or employees of public school in the State of South Carolina.

5. The term "DOCUMENT" or "DOCUMENTS" when used herein means and includes the originals of any written, recorded or graphic matter, however produced or reproduced, in whatever form and regardless of where located, whether reduced to tangible form or stored in electronic or other medium which can be reduced to tangible form, including but not limited to: any summary, schedule, memorandum, note, working paper, drawing, statement, letter, telegram, interoffice communication, report, diary, desk or pocket calendar, time sheet, notebook, daybook, appointment book, pamphlet, periodical, work sheet, cost sheet, list, graph, charge, index, tape, record, partial or complete report of telephone or oral conversation, compilation, tabulation, study, analysis, transcript, minutes, accounting records, data sheet, data processing card or tape, ELECTRONIC DATA, listing, manual, bill of lading, shipping tally or similar freight documents, and all other memorials of any conversations, meetings and conferences, by telephone or otherwise, all other documents as defined in Rule 34 of the South Carolina Rules of Civil Procedure, and any other writing or recording, electronic or otherwise, which is in SCASA's possession, custody, or control or that of any employee, servant or agent of SCASA or SCASA's attorneys. In all cases where original and/or non-identical copies are unavailable, "documents" also means copies thereof. Further, the term "DOCUMENT" or

"DOCUMENTS" shall include the original files and or containers in which said DOCUMENTS are maintained and any and all drafts of responsive DOCUMENTS.

6. "ELECTRONIC DATA"¹ includes, but is not limited to, electronic mail messages and any electronic folder or subfolder containing such messages; any other electronic messages, including electronic bulletin boards and/or intranet or internet web sites or postings; activity listings of electronic mail receipts and/or transmittals; electronic calendars or planners; electronic documents or files created by or stored in Microsoft Word, Word Perfect or any other word-processing or document-creation applications; electronic spreadsheets, graphs, charts, records or other similar files or documents created by or stored in Microsoft Excel, Quicken, or any similar applications; electronic data, documents, files, or records created by or stored in Microsoft Access, Oracle, or any other data-management system or application; electronic documents, images, or files created by or stored in a ".tiff" or other similar format; electronic documents or files created by or stored in a ".pdf" or other similar format; electronic documents, files, or pages created by or stored in an ".html" or other similar format; electronic log or cookie files created by any application or operating system; voice mail; digital audio or video recordings of any kind; computer programs or applications (whether private, commercial, legacy, enterprise, or a work in progress); programming notes or instructions; output resulting from the use of any software program; all miscellaneous electronic files and/or file fragments regardless of the media on

¹ Plaintiff considers Electronic Data to be a valuable and irreplaceable source of discovery and/or evidence in this matter. The laws and rules prohibiting the destruction of evidence apply to Electronic Data with the same force as they apply to other kinds of evidence. Proper safeguards against destruction of Electronic Data, including the destruction of back-up and archival data, must be put in place pending final resolution of this case. Where information responsive to these requests is stored on electronic media, Plaintiff seeks access to the electronic copies of responsive information (together with instructions and programs necessary to search or retrieve such data), including all attachments and enclosures to any responsive information, which shall not be separated from the items to which they are attached or enclosed.

which they are stored and regardless of whether the data resides in an active file, deleted file, archived file, slack space or file fragment, and any other electronic document, file, or data created by or stored in any enterprise, proprietary, shrink-wrap data-management program or application, any operating system or other computer software application or other program whatsoever.

"ELECTRONIC DATA" includes, but is not limited to, all of the items and data described above or any other similar items or data stored or archived on personal computers, including desktop, notebook or laptop computers or personal digital assistants; hard drives of any kind; magnetic media diskettes; compact disks, including but not limited to CD-ROMs and DVDs; magnetic tapes of all kinds including data cartridges of any kind; zip, jaz, Imation SuperDisks, or other types of magnetic or digital drives; floppy disks, zip drive disks, syquest disks, Bernoulli disks or their equivalents; computer chips, (including, but not limited to, EPROM, PROM, RAM, and ROM); servers, including portable servers; and any other digital or magnetic device whatsoever.

"ELECTRONIC DATA" also includes the file, folder tabs, containers, or labels appended to any storage device containing ELECTRONIC DATA.

REQUESTS TO PRODUCE

Please produce the following:

1. Each and every document that relates in any way to any claim, defense, or counterclaim in this action.
2. Each and every document referenced or identified in your responses to Plaintiff's First Set of Interrogatories.
3. Each and every document reviewed, consulted, or relied upon in responding to Plaintiff's First Set of Interrogatories.
4. Each and every document that relates in any way to Plaintiff's August 2009 request to you for documents that was made pursuant to the South Carolina Freedom of Information Act ("FOIA").
5. Each and every document, including but not limited to electronic correspondence, that relates in any way to your decision to deny Plaintiff's FOIA request.
6. All prior drafts of your September 4, 2009 letter to Plaintiff denying his FOIA request to you.
7. Each and every document, including but not limited to electronic correspondence, that you provided to or received from an elected official, officer, or employee of the State of South Carolina, any school district, any public school, the South Carolina School Boards Association, the South Carolina Education Association, the South Carolina Parent Teacher Association, the Palmetto State Teachers Association, or the Leaders in Education Administration Political Action Committee ("LEAPAC") that in any way relates to Plaintiff's FOIA request.

8. All balance sheets, income statements, ledgers, tax forms, and any other document that relates in any way to your gross revenue for each fiscal year since January 1, 2005.
9. Each and every document, including but not limited to electronic correspondence, that you provided to or received from an elected official, officer, or employee of the South Carolina state government, any school district, or any public school that in any way relates to providing funding or payments of monies to you since January 1, 2005.
10. Each and every document, including checks and receipts, that in any way relates to your receipt of monies from an elected official, officer, or employee of the South Carolina state government, any school district, or any public school since January 1, 2005.
11. Each and every document, including checks and receipts, that in any way relates to your receipt of monies from a private person or organization, including for-profit and nonprofit entities, since January 1, 2005.
12. Each and every application for a grant that you have submitted since January 1, 1999.
13. Each and every grant of which you have been the recipient since January 1, 1999.
14. Each and every document related in any way to any grant of which you have been the recipient since January 1, 1999.
15. Each and every contract into which you have entered with the State Department of Education since January 1, 1999.
16. Each and every document, including but not limited to electronic correspondence, related in any way to the creation, formation, terms, execution, administration, or termination of

any contract into which you have entered with the State Department of Education since January 1, 1999.

17. Each and every contract into which you have entered with any South Carolina state agency or department other than the State Department of Education since January 1, 1999.

18. Each and every document, including but not limited to electronic correspondence, related in any way to the creation, formation, terms, execution, administration, or termination of any contract into which you have entered with any South Carolina state agency or department other than the State Department of Education since January 1, 1999.

19. Each and every contract into which you have entered with any school district since January 1, 1999.

20. Each and every document, including but not limited to electronic correspondence, related in any way to the creation, formation, terms, execution, administration, or termination of any contract into which you have entered with any school district since January 1, 1999.

21. Each and every contract into which you have entered with any public school since January 1, 1999.

22. Each and every document, including but not limited to electronic correspondence, related in any way to the creation, formation, terms, execution, administration, or termination of any contract into which you have entered with any public school since January 1, 1999.

23. Each and every document that contains a list of your current membership.

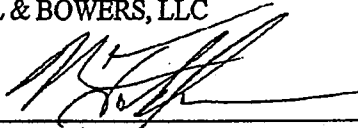
24. Each and every document that contains a list of your current "business affiliates," as that term is used on your website.

25. Each and every document that contains a list of your current employees, staff, and other persons paid or retained by you to perform services on your behalf.

26. Each and every document that you plan to introduce as evidence or as an exhibit in the trial of this matter.

27. Each and every document that you provided to or received from any putative expert witness in this matter.

HALL & BOWERS, LLC

By: 

Kevin A. Hall
Karl S. Bowers, Jr.
M. Todd Carroll
1329 Blanding Street
Post Office Box 12107 (29211)
Columbia, SC 29201
(803) 454-6504

Attorneys for Plaintiff Rocky D

Columbia, South Carolina
January 15, 2010

CERTIFICATE OF SERVICE

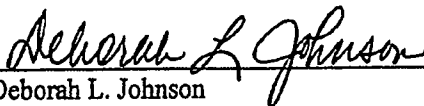
I, the undersigned Administrative Assistant of the law offices of Hall & Bowers, LLC, attorneys for Rocky Disabato, d/b/a "Rocky D," do hereby certify that I have served all parties in this action with a copy of the pleading(s) hereinbelow specified by mailing, via U.S. Mail, postage prepaid, a copy of the same to the following address(es):

Pleadings:

**PLAINTIFF'S FIRST SET OF REQUESTS TO
PRODUCE DOCUMENTS**

Party Served:

South Carolina Association of School Administrators
121 Westpark Blvd.
Columbia, SC 29210


Deborah L. Johnson
Administrative Assistant

January 15, 2010

Exhibit C

Defendant's Objections to Plaintiff's
First Set of Discovery Requests

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

Rocky Disabato d/b/a "Rocky D",

Plaintiff,

vs.

South Carolina Association of School
Administrators,

Defendant.

C.A. No. 2009-CP-10-07593

**DEFENDANT'S RESPONSES TO
PLAINTIFF'S FIRST SET OF
INTERROGATORIES AND FIRST SET OF
REQUESTS TO PRODUCE DOCUMENTS**

TO KARL S. BOWERS, ESQ, ATTORNEY FOR PLAINTIFF:

GENERAL OBJECTIONS

1. Defendant objects to providing or disclosing any information protected by the attorney-client privilege or attorney work-product doctrine.
2. Defendant objects to providing or disclosing any information constituting trial preparation materials or materials otherwise encompassed within the work-product doctrine without and unless Plaintiff makes the requisite showing required by Rule 26, SCRPC.
3. Defendant objects to each Request that (i) is unreasonably cumulative, duplicative, or excessive; (ii) seeks material obtainable from some other source that is more convenient, less burdensome, or less expensive; or (iii) otherwise constitutes an abuse of discovery.
4. Defendant objects to each and every request individually and generally on the grounds that the discovery requests are unduly burdensome and excessive in light of the needs of the case at this time, because proper venue has not been established, the sufficiency of the complaint is not admitted, and the issues in the case are not joined because the pleadings are not closed. Given the private and confidential nature, as well as the volume, of the records sought,

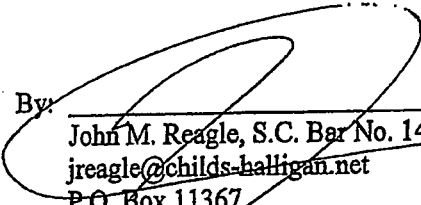
the burden on Defendant is particularly acute, and since any relevant public records may be obtained from other sources at equal or less cost, and Defendant's responding further to the Plaintiff's discovery requests would not secure the just, speedy, and inexpensive determination of this action.

Moreover, Defendant has asserted First Amendment protection from the S.C. FOIA in a separate declaratory judgment action in the United States District Court for the District of South Carolina. Plaintiff should not be able to obtain, in an action purporting to enforce the FOIA, information through discovery what he could not obtain under the FOIA itself.

5. Defendant reserves the right to respond further to Plaintiff's discovery requests once an order establishing appropriate venue has been entered.

Respectfully submitted,

CHILDS & HALLIGAN, P.A.

By: 

John M. Reagle, S.C. Bar No. 14185
jreagle@childs-halligan.net
P.O. Box 11367
Columbia, South Carolina 29211
(803) 254-4035

Attorneys for Defendant

February 19, 2010

Columbia, South Carolina

CERTIFICATE OF SERVICE BY MAIL

The undersigned of Childs & Halligan, P.A., hereby certifies that she has served the following counsel of record with the foregoing **DEFENDANT'S RESPONSES TO PLAINTIFF'S FIRST SET OF INTERROGATORIES AND FIRST SET OF REQUESTS TO PRODUCE DOCUMENTS** by mailing a copy of same, postage prepaid and return address clearly indicated, to the following on this 19th day of February 2010:

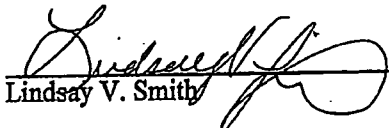

Lindsay V. Smith

Exhibit D

Plaintiff's Letter to Defendant Seeking
Responses to Discovery Requests



HALL & BOWERS, LLC
ATTORNEYS AT LAW

1329 Blanding Street | Columbia, SC 29201
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February 25, 2010

Via Facsimile

John M. Reagle, Esquire
Childs & Halligan, P.A.
1301 Gervais Street, Suite 900
Columbia, South Carolina 29201

KEVIN A. HALL
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KARL S. (BUTCH) BOWERS, JR.
butch.bowers@hallbowers.com
M. TODD CARROLL
todd.carroll@hallbowers.com

Re: Disabato v. South Carolina Association of School Administrators
Civil Action No. 09-CP-10-7593

Dear John:

We write to follow up on SCASA's responses to our client's first set of interrogatories and first set of requests to produce documents. As you can imagine, we were surprised that SCASA altogether failed to provide any responsive information and, instead, stated only a handful of generalized objections to our discovery requests. With respect to SCASA's first two objections, which are based on the attorney-client privilege or work product doctrine, we obviously do not seek discovery of materials or information that would violate these privileges. The remaining objections, however, are without any support.

Objection 3 appears to be a generic allegation that our discovery requests "constitute[] an abuse of discovery." There is no basis for this. Rule 33(b)(9) of the South Carolina Rules of Civil Procedure allows service of up to 50 interrogatories without seeking leave of the Court; we have only served 18 on SCASA at this point, several of which are pulled from the "Standard Interrogatories" that are specifically authorized by Rule 33(b) in all litigation. Likewise, our interrogatories and requests to produce seek information that is relevant to the questions of whether SCASA is a "public body" under the South Carolina Freedom of Information Act or whether SCASA improperly failed to respond to our client's request under that statute. If SCASA is willing to admit in these proceedings that it is a public body for purposes of the FOIA, as it has apparently done in a companion federal-court case, we will accept that admission and withdraw our requests on that point. Otherwise, our discovery requests are permitted by and are proper under the Rules, and we expect SCASA to provide good-faith responses to them.

Objection 4 contains a hodgepodge of topics, several of which are duplicative of those identified under Objection 3. Among the new topics, though, is that SCASA believes it is relieved from responding to discovery "because proper venue has not been established." We, of course, dispute the assertion that venue in Charleston is improper. However, regardless of the county in which this case is pending, it will ultimately be resolved by a South Carolina circuit court, all of which operate under the same Rules of Civil Procedure. Therefore, a motion to change venue does not stay discovery.

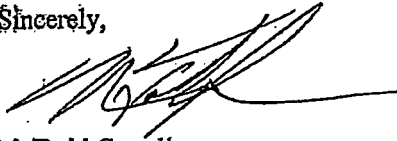
John M. Reagle, Esquire
February 25, 2010
Page 2

SCASA also objects to responding to discovery because "the sufficiency of the complaint is not admitted, and the issues in the case are not joined because the pleadings are not closed." Like with SCASA's venue-based objection, these objections are inconsistent with the Rules. Rule 33(a) specifically provides that interrogatories can be served on any party "with or after service of the summons and complaint upon that party." Rule 34(b) contains an identical provision with respect to service of requests to produce. The Rules simply do not condition discovery rights on closure of the pleadings, and SCASA's objections are therefore misplaced.

Finally, SCASA objects to responding to discovery requests in this case because of a separate proceeding, filed nearly two months after commencement of this action, that is pending in the federal court system. But the existence of a related proceeding in a different jurisdiction does not obviate SCASA's obligations under the South Carolina Rules of Civil Procedure.

Because none of SCASA's objections to our discovery requests are proper, we would appreciate it if you would please provide full and complete responses to those requests—both the interrogatories and the requests to produce documents—no later than Friday, March 12, 2010. If SCASA intends to stand on its objections and not provide responses, we would appreciate it if you would let us know so that we can move forward with filing a motion to compel. Thank you for your help with this, and we will look forward to hearing from you soon.

Sincerely,



M. Todd Carroll

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Rocky Disabato d/b/a "Rocky D,"

Plaintiff,

vs.

South Carolina Association of School
Administrators,

Defendant.

C.A. No. 2011 CP 40-02044

**DEFENDANT'S MEMORANDUM
OF LAW IN SUPPORT OF ITS
MOTION TO DISMISS**

2011 JUL 20 PM 4:22

CLERK OF COURT
& D.S.

CLERK OF COURT

Defendant, South Carolina Association of School Administrators ("SCASA"), respectfully submits this Memorandum of Law in Support of its Motion to Dismiss. Plaintiff, Rocky D, seeks a declaratory judgment and injunctive relief against SCASA requiring SCASA to comply with the South Carolina Freedom of Information Act ("FOIA"), S.C. Code Ann. § 30-4-10, et seq.

Defendant contends that Rocky D's claim fails to state a cause of action because the FOIA's definition of "public body"—to which the FOIA's broad open meeting and records disclosure requirements apply—unconstitutionally burdens the First Amendment rights of freedom of speech and association of private political issue advocacy organizations like SCASA. As the Fourth Circuit has observed,

This is not some marginal or incidental freedom Rather it is the essential freedom that defines our ability—both individually and collectively—to speak in unfettered fashion on the most pressing issues of the day, and to express approval or disapproval of the functioning of our representative government. ... The [Supreme] Court has long made clear that political speech is indispensable to decisionmaking in a democracy, and that the courts play a critical role in its protection.

N.C. Right to Life, Inc. v. Leake, 525 F.3d 274, 296 (4th Cir. 2008) (internal quotations and citations omitted) (emphasis added).

The FOIA purports to apply to any organization that is supported in whole or in part by public funds. The purpose of the FOIA, as provided by the General Assembly in its enactment, is set forth in the statute:

[I]t 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 (emphases added). Although the State's interest in informing the public of the "performance of public officials ... in public activity" and preventing public corruption may be substantial or compelling governmental interests, the FOIA's open meeting and records disclosure requirements apply to *all* meetings and records of *any* organization supported in whole or part by public funds - regardless of whether the meetings or records relate to public business, the performance of public officials, or public funds. Thus, the FOIA's different standards requirements are not narrowly tailored to achieve the State's otherwise legitimate governmental objective, and the FOIA's inclusion of private organizations engaged in issue advocacy in its broad definition of "public body" must be declared unconstitutional.

I. BACKGROUND

Rocky D seeks a judicial declaration that SCASA is subject to the FOIA. SCASA asserts that the FOIA's open meeting and record disclosure requirement, with regard to any private corporation engaged in political speech and issue advocacy that is supported in whole or in part by public funds, both unconstitutionally chills the exercise of First Amendment rights and constitutes impermissible restraint on the protected freedoms of speech and assembly.

SCASA contends the FOIA burdens political speech of private corporations without bearing even a substantial relationship to a sufficiently important governmental interest. The

FOIA's broad definition of a "public body" that is subject to its open meeting and records disclosure requirements fails to recognize any distinction between a public and private corporation or the amount of public support received. Consequently, the FOIA imposes restraints on the meetings of private corporations and their members by mandating that their meetings not only be subject to prior public notice and open to the public, but also that the records of affected private corporations be accessible to the public, all without regard to the amount of public funds or support received by a corporation or whether the records or discussions of the corporations and its members pertain to public funds.

SCASA is a South Carolina, eleemosynary, non-profit corporation. Its membership is a united alliance of diverse school leaders, and it is a leading force for public education in South Carolina. SCASA advocates for a superior education for the citizens of South Carolina by influencing education legislation and policy, stimulating and fostering support, building successful coalitions, ensuring a cadre of effective leaders, and providing programs and services for its members. SCASA and its members associate, in part, politically to advocate for legislation and government policies in the context of education for social, political, and economic justice and equality, including maintenance and improvement of an integrated public school system in South Carolina.

SCASA's advocacy efforts in recent years have included such issues as support for enhanced public school funding and opposition to private school tax vouchers. These advocacy efforts included, on May 22, 2009, SCASA's commencement of a civil action against the South Carolina governor, Mark Sanford, seeking a writ of mandamus requiring the governor to apply to the federal government on behalf of the State of South Carolina for federal funds, including approximately 780 million dollars for public education and other public services. On June 4, 2009, the South Carolina Supreme Court entered judgment in favor of SCASA on this claim and issued the requested writ of mandamus against the Governor. *See Edwards v. State of South*

Carolina, 383 S.C. 82, 678 S.E.2d 412 (2009).

Thereafter, in August 2009, Rocky D sent a letter to SCASA demanding records from it pursuant to the FOIA. Rocky D's FOIA demand sought records possessed or maintained by SCASA discussing 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 SCASA against Governor Mark Sanford in May 2009. Additionally, Rocky D's FOIA demand sought records reflecting all telephone calls made or received by SCASA and its staff from January 1, 2009 to July 31, 2009. On September 4, 2009, Molly Spearman, the Executive Director of SCASA, responded in writing to Rocky D on behalf of SCASA, stating that SCASA is not a public entity subject to the FOIA.¹

Although SCASA received no further communications from Rocky D regarding his FOIA request, on January 4, 2010, SCASA received a complaint filed by Rocky D seeking disclosure of previously requested records, along with a declaration that SCASA is a public body subject to the FOIA and a permanent injunction compelling SCASA's future compliance with the FOIA.

Significantly, this was not the first lawsuit filed against SCASA seeking a declaration that it is a public body subject to the FOIA. Randall S. Page, the president of South Carolinians for Responsible Government,² filed a similar declaratory judgment action against SCASA in state court that was dismissed without prejudice by mutual consent of the parties in 2009. The attorneys representing Mr. Page in the prior state court action also represent Rocky D in this state court civil action under the FOIA. These same attorneys, Kevin A. Hall and Karl S. Bowers, Jr., also have represented Governor Mark Sanford in various lawsuits and administrative actions. Additionally, Messrs. Page, Hall, and Bowers were involved in suing Lexington School District

¹ SCASA continues to deny that SCASA is a "public body." SCASA's motion and arguments in support of it now before the court only test the sufficiency of the plaintiff's FOIA cause of action using a juridical assumption it is well-pleaded.

One over its government speech under the First Amendment, *see Page v. Lexington County Sch. Dist. One*, 531 F.3d 275 (4th Cir. 2008), and Mr. Page further filed unsuccessful complaints against SCASA, its employees, and agents under the state Ethics Act relating to public disclosure requirements.³

The FOIA provides that "[a]ny person has a right to inspect or copy any public record of a public body, except as otherwise provided by § 30-4-40, in accordance with reasonable rules concerning time and place of access." S.C. Code Ann. § 30-4-30(a). It is important to highlight, however, that the FOIA's requirements go well beyond its disclosure requirements. In addition to the right to inspect or copy any public record of a public body, the FOIA also requires that "[e]very meeting of all public bodies shall be open to the public unless closed pursuant to § 30-4-70 of this chapter." S.C. Code Ann. § 30-4-60. The term "meeting" is broadly defined as "the convening of a quorum of the constituent membership of a public body, whether corporal or by means of electronic equipment, to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power." S.C. Code Ann. § 30-4-20(d). Likewise, the FOIA dictates that written minutes of meetings be created and maintained along with the content of the minutes:

Minutes of meetings of public bodies.

(a) All public bodies shall keep written minutes of all of their public meetings. Such minutes shall include but need not be limited to:

- (1) The date, time and place of the meeting.
- (2) The members of the public body recorded as either present or absent.
- (3) The substance of all matters proposed, discussed or decided and, at the request of any member, a record, by an individual

² See: www.scgov.org

³ SCASA, C2008-106, June 6, 2008; LEAPAC, C2008-107, June 6, 2008; Ross Shealy, C2008-111, June 6, 2008.

member, of any votes taken.

(4) Any other information that any member of the public body requests be included or reflected in the minutes.

S.C. Code Ann. § 30-4-90. In furtherance of its open meeting requirement, § 30-4-80 of the FOIA mandates the following:

(a) All public bodies, except as provided in subsections (b) and (c) of this section, must give written public notice of their regular meetings at the beginning of each calendar year. The notice must include the dates, times, and places of such meetings. Agenda, if any, for regularly scheduled meetings must be posted on a bulletin board at the office or meeting place of the public body at least twenty-four hours prior to such meetings. All public bodies must post on such bulletin board public notice for any called, special, or rescheduled meetings. Such notice must be posted as early as is practicable but not later than twenty-four hours before the meeting. The notice must include the agenda, date, time, and place of the meeting. This requirement does not apply to emergency meetings of public bodies.

...

(d) Written public notice must include but need not be limited to posting a copy of the notice at the principal office of the public body holding the meeting or, if no such office exists, at the building in which the meeting is to be held.

(e) All public bodies shall notify persons or organizations, local news media, or such other news media as may request notification of the times, dates, places, and agenda of all public meetings, whether scheduled, rescheduled, or called, and the efforts made to comply with this requirement must be noted in the minutes of the meetings.

S.C. Code Ann. § 30-4-80. Under the FOIA, these broad open meeting and records disclosure requirements apply to any "public body." The FOIA defines a public body as "any organization, corporation, or agency supported in whole or in part by public funds or expending public funds. . . ." S.C. Code Ann. § 30-4-20(a). The South Carolina Supreme Court has further expanded this definition of "public body":

[T]he 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 SE.2d 161, 164 (1991). Relying on *Weston*, the South Carolina Attorney General has also formally opined that there is no "de minimus" public funds exception to the scope of the FOIA's definition of "public body." Op. S.C. Atty Gen., 2006 WL 1574910 (May 19, 2006).

The FOIA authorizes any citizen of the state to enforce its provisions through an action for declaratory judgment and injunctive relief and further authorizes a court to award reasonable attorneys' fees and other costs of litigation to a prevailing plaintiff. *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 327-28, 701 S.E.2d 39, 47-48 (Ct. App. 2010); S.C. Code Ann. § 30-4-100. The FOIA additionally provides that any person or group of persons who willfully violate its provisions shall be deemed guilty of a misdemeanor and, upon conviction, shall be fined or imprisoned. S.C. Code § 30-4-110.

II. STANDARD OF REVIEW

At a minimum, the FOIA's open meeting requirements constitute a direct governmental regulation of speech—not only denying a corporation the ability to speak anonymously, but also restricting how, whether, and, ultimately, what it speaks. In short, the FOIA's open meeting and meeting minutes requirements directly regulate the content of a corporation's speech. The FOIA, therefore, clearly and substantially burdens the speech of SCASA and other corporations engaged in issue-advocacy or political speech. See e.g., *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). It is well established "that a significant impairment of First Amendment rights must survive exacting scrutiny." *Elrod v. Burns*, 427 U.S. 347, 362 (1976).

This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct....

Buckley v. Valeo, 424 U.S. 1, 65 (1976). The government interest advanced for impairing First Amendment rights must be one of vital importance, and the State must choose the least restrictive means in achieving its vital interest. *Elrod*, 427 U.S. 362-63. If the State has another available less drastic way of achieving its legitimate interests, it may not choose legislative scheme that broadly stifles the exercise of First Amendment freedoms. *Elrod*, 427 U.S. at 363; *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978). Moreover, "[n]o matter what level of scrutiny applies, when First Amendment rights are at stake, the government has the burden of proving the constitutionality of the challenged law." *Broward Coal. of Condos. v. Browning*, 2008 WL 4791004, at *6 (N.D. Fla. 2008).

III. ARGUMENT

A. The FOIA is Flagrantly And Patently Unconstitutional.

The FOIA's overly broad standard for when a private corporation engaged in political speech and issue advocacy is a "public body" coupled with the FOIA's expansive disclosure requirements and open meeting requirements unconstitutionally chill SCASA's undoubtedly protected First Amendment rights. The FOIA, therefore, can and must be invalidated to the extent it might apply to private corporations engaging in political speech and issue advocacy.

It is well settled that state laws may not infringe on the discussion of public issues. See *Buckley v. Valeo*, 424 U.S. at 14; *NAACP v. Button*, 371 U.S. 415 (1963); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of our system of government." *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011) (quoting *Buckley*, 424 U.S. at 14). Such issue advocacy generally "lies completely beyond the pale of constitutional governmental regulation." *Richey v. Tyson*, 120 F. Supp. 2d 1298, 1309 (S.D. Ala. 2000). "For

these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876, 898 (2010).

Applying these First Amendment principles, the Fourth Circuit struck down as violative of the First Amendment a portion of North Carolina's election and campaign finance law relative to issue advocacy organizations, with the following holding:

The statute subjects groups engaged in only issue advocacy to an intrusive set of reporting requirements. In so doing, it "blankets with uncertainty" the entire field of campaign politics "compelling the speaker to hedge and trim." *Thomas v. Collins*, 323 U.S. 516, 535, 65 S.Ct. 315, 89 L.Ed. 430 (1945). Burdening speech of this sort is unacceptable in an area of crucial import to our representative democracy. The district court was correct in finding section 163-278.6(14) facially unconstitutional, and we affirm its judgment.

N.C. Right to Life, Inc. v. Bartlett, 168 F.3d 705, 713 (4th Cir. 1999). See also *Legacy Alliance, Inc. v. Condon*, 76 F. Supp. 2d 674 (D.S.C. 1999). These concerns with overly broad statutes burdening the exercise of First Amendment rights have been echoed and amplified by the United States Supreme Court's recent decision in *Citizens United*:

The ongoing chill upon speech that is beyond all doubt protected makes it necessary in this case to invoke the earlier precedents that a statute which chills speech can and must be invalidated where its facial invalidity has been demonstrated.

130 S.Ct. at 896. Moreover, it has long been recognized that freedom of association is fully protected under the First Amendment:

Like freedom of speech and a free press, the right of peaceable assembly was considered by the Framers of our Constitution to lie at the foundation of a government based upon the consent of an informed citizenry—a government dedicated to the establishment of justice and the preservation of liberty. U.S. Const., Amend. I. And it is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected by the Due Process Clause of the Fourteenth Amendment from invasion by the States.

Bates v. City of Little Rock, 361 U.S. 516, 522-23 (1960). The Court further made clear in *Bates*

that these First Amendment freedoms "are protected not only against the heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates*, 361 U.S. at 523.

Being a "public body" under FOIA imposes "a significant regulatory burden," *cf.*, *N.C. Right to Life, Inc. v. Leake*, 525 F.3d at 286 (burden of "political committee" designation), in addition to its handicapping effect on politically infused associational activity. The chilling effect of the FOIA on the exercise of free speech by private corporations engaging in political speech occurs even though such corporations have not been judicially declared to be a "public body" (and thus subject to both the regulatory burdens and associational disadvantages of that status) simply because of the threat of litigation and that such a declaration could occur.

Private corporations alleged to be a "public body" must brave risk, steep costs, penalties, and onerous litigation to maintain their rights to assembly, free speech, and association. The restrictions and mandates of the FOIA chill, stifle, and limit the constitutionally protected speech of private corporations and their members engaging in political speech and issue advocacy, thereby harming not only the citizens of the state but society on the whole, which is deprived of an uninhibited marketplace of ideas. *See Citizens United*, 130 S.Ct. at 898; *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). The FOIA represses speech and association by effectively silencing the voice of private corporations, like SCASA, engaging in political speech and issue advocacy at multiple points in the speech and associational process and by, at a minimum: (1) preferring speech on certain topics and by certain persons or entities over others; (2) disqualifying entities from speaking anonymously; (3) dictating the form and content of entities' speech; and (4) compelling disclosure of speech and records. *Citizens United* emphatically rejects this policy. *Id.* at 899-900. *See also McIntyre*, 514 U.S. at 355; *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 791 (1988) ("[T]he government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and

listeners; free and robust debate cannot thrive if directed by the government.").

The First Amendment does not tolerate laws, such as the FOIA, that require an organization to hire lawyers or engage in litigation and case-by-case interpretations before determining that the organization can discuss political issues:

[T]his is precisely what WRTL [*Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007)] sought to avoid. WRTL said that First Amendment standards must eschew the open-ended rough-and-tumble of factors, which invites complex argument in a trial court and virtually inevitable appeal. 551 U.S. at 469 (opinion of Roberts, C.J.) (quoting *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995)).

Citizens United, 130 S. Ct. at 896. See also, *Bellotti*, 435 U.S. at 785, n.21; *Fed. Elections Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 255-56 (1986); *Riley*, 487 U.S. at 793-94; *N.C. Right to Life*, 525 F.3d at 284 ("This approach simply guarantees that ordinary political speech will be chilled."). The chilling effect of the South Carolina FOIA is exacerbated by the risk of *ad hoc* and discriminatory or retaliatory enforcement efforts due to the fact that any citizen may bring a lawsuit under the FOIA. This situation provides far less stability and predictability than the "equivalent of prior restraint," *Citizens United*, 130 S.Ct. at 896, imposed on entities the FEC regulated under its regime prior to *Citizens United*. There are manifold burdens and reasons for self-censorship when attempting to operate a politically effective associational corporation under the specter of future *ad hoc* FOIA judgments and injunctions, such as those sought *sub judice*. "[B]rooding governmental power cannot be reconciled with the confidence and stability in civic discourse that the First Amendment must secure." *Citizens United*, 130 S.Ct. at 904. See also *Riley*, 487 U.S. 781, 793-94 (1988); *Leake*, 525 F.3d at 284-86.

With respect to compelled disclosure, Supreme Court Justice Alito has recently noted the problems inherent in compelled disclosure that impinges on political speech:

Nonetheless, facially valid disclosure requirements can impose heavy burdens on First Amendment rights in individual cases.

Acknowledging that reality, we have long held that speakers can obtain as-applied exemptions from disclosure requirements if they can show a reasonable probability that the compelled disclosure of personal information will subject them to threats, harassment, or reprisals from either Government officials or private parties. Because compelled disclosure can burden the ability to speak, and seriously infringe on privacy of association and belief guaranteed by the First Amendment, the as-applied exemption plays a critical role in safeguarding First Amendment rights.

...

Additionally, speakers must be able to obtain an as-applied exemption without clearing a high evidentiary hurdle. ... From its inception, therefore, the as-applied exemption has not imposed onerous burdens of proof on speakers who fear that disclosure might lead to harassment or intimidation.

John Doe #1 v. Reed, 130 S.Ct. 2811, 2822-23 (2010). (Alito, J., concurring)

(internal quotations and citations omitted). Justice Alito discusses an "as-applied" case specifically, but the Supreme Court has already noted that in First Amendment cases "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Citizens United*, 130 S.Ct. at 893. *See also Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469 (2007) (providing that, in order to safeguard First Amendment liberty, an as-applied challenge must entail minimal if any discovery, to allow parties to resolve disputes quickly without chilling speech through threat of burdensome litigation).

Even though the chilling effects of regimes such as the FOIA upon private corporations is plainly evident from the statutory language, SCASA has also provided ample support⁴ for its contention that the threat, and certainly any actual ability, of Rocky D and any

⁴ *See especially*, attachments to Defendant's Memorandum of Law in Support of its Motion for a Protective Order and in Opposition to Plaintiffs Motion to Compel, including SCASA's *verified* federal

other person critical of SCASA's politically advocacy speech to obtain nearly *carte blanche* access to corporations' private associational and operating information under the full panoply of meetings and records disclosure obligations of the FOIA creates *more* than "a reasonable probability" that the compelled disclosure of the information "might lead to harassment or intimidation." *Id.* Far less is sufficient to acquit the purposes of the FOIA without attendant burdens on political speech.

Although monitoring and accounting for the expenditure of public funds is an important governmental interest, the FOIA imposes prior restraints on and chills the political speech and assembly of private corporations subject to FOIA by mandating that all meetings be open to the public, prescribing the content of meeting minutes, and requiring that meetings be subject to public prior notice. FOIA also requires that all records of a private corporation be accessible to the public, without regard to the amount of public funds or support received by the corporation or whether the meeting or records of the corporation pertain to public funds. This overly broad sweep of the FOIA's mandates simply does not bear any substantial relationship to vindicating the interest of citizens to be advised of the performance of public officials, the decisions that are reached in public activity, or the formulation of public policy.⁵ This is particularly true of

complaint, filed April 13, 2011.

⁵ The overbreadth problem is particularly acute with regard to the FOIA. As noted by the South Carolina Court of Appeals in *Herald Publ'g Co., Inc. v. Barnwell*, 291 S.C. 4, 9, 351 S.E.2d 878, 881, n.1 (Ct. App. 1986):

None other than recently appointed United States Supreme Court Justice Scalia has termed the Federal Freedom of Information Act "the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine-Chapel of Cost-Benefit Analysis Ignored." Scalia, *The Freedom of Information Act Has No Clothes*, REG., Mar.-Apr. 1982, at 14, 15. Needless to say, we would never apply either pejorative to a statute enacted by our General Assembly.

Unfortunately, one of these unintended consequences is the unconstitutional infringement of freedom of expression and association. The narrow tailoring required of a state's infringement of core First

SCASA. As found in the prior proceedings of this case by the Honorable Deadra L. Jefferson in her Order Granting Defendant's Motion to Dismiss Pursuant to Rule (12)(B)(3) SCRCP:

Nonetheless, even if SCASA were supported by public funds, it meets none of the criteria required for a "public officer." SCASA does not have a duty to exercise any sovereign power of the State. SCASA was not created by the legislature. There are no legal qualifications for membership in SCASA or for SCASA's existence, other than those generally set forth in S.C. Code Ann. §§ 33-31-101 to -1708 respecting any non-profit corporation's existence. [Footnote omitted.] SCASA has no duties it must fulfill by legislative act, it has no tenure, it receives no salary, it posts no bond, it takes no oath of office, and it is not a representative of the sovereign or State. Consequently, even if SCASA is found to be supported by public funds and subject to the FOIA as a public body, SCASA would not thereby be transformed into a public office or officer clothed with both the rights and powers of the sovereign.

Order, dated March 14, 2011, p. 7.

The statutory purpose of the FOIA could be fully achieved with regard to public funds that support private corporations in a more narrowly tailored manner by merely requiring one-time reporting and disclosure of actions and records relating to the receipt and expenditure of such funds, as is currently required for many grants of public funds to private corporations and individuals. For example limited disclosure requirements have been approved in the context of election law regulations. In *Buckley*, 424 U.S. at 80-82, the Court approved a limited disclosure requirement, noting the disclosure requirement is narrowly limited to those situations where the information sought has a substantial connection with the governmental interest sought to be advanced. Importantly, the disclosures approved by the Court, and unlike those required under the FOIA, did "not reach all partisan discussion for it only requires disclosure of those expenditures that expressly advocate a particular election result." *Buckley*, 424 U.S. at 80.

Similarly, SCASA believes disclosure requirements narrowly limited to the receipt and/or

Amendment rights to meet important governmental interests does not allow relative costs and benefits to be ignored.

expenditure of public funds would reasonably serve to fulfill the important interests the FOIA seeks to vindicate with regard to public funds that support private corporations. Indeed, in *S.C. Citizens for Life, Inc. v. Krawcheck*, 759 F.Supp.2d 708 (D.S.C. 2010), the District Court for South Carolina recently declared provisions of the South Carolina Ethics Act facially unconstitutional because the term "committee" as used in the Act was overly broad and imposed undue burdens on the First Amendments rights of groups engaged primarily in issue advocacy. The court noted with approval other jurisdictions' use of one-time reporting requirements as narrowly designed to achieve the legitimate governmental objective of transparency and accountability rather than overly broad panalogy of registration, disclosure, and reporting requirements mandated by the Act. *See also, N.C. Right to Life, Inc.* 525 F.3d at 281; *Colo. Right to Life Comm. v. Coffman*, 498 F.3d 1137, 1154 (10th Cir. 2007).

Notably, the test for whether an organization is subject to the FOIA established by *Weston*, i.e., whether it is supported by any public funds, is completely different from the more nuanced test under the federal FOIA and that typically used by other states. In *Irwin Mem'l Blood Bank of the S.F. Med. Soc'y v. Am. Nat'l Red Cross*, 640 F.2d 1051 (9th Cir. 1980), the federal test was described as follows:

It is the existence of this element of substantial federal control that distinguishes those entities that can be fairly denominated as federal agencies under the FOIA from the organizations whose activities may be described as merely quasi-public or quasi-governmental.

Irwin, at 1055. *See also Forsham v. Harris*, 445 U.S. 169 (1980); *Bd. of Trs. of Woodstock Acad. v. Freedom of Info. Comm'n*, 436 A.2d 266 (1980) (adopting federal "functional equivalent" test).

The "functional equivalent" test obviously does not raise the patent First Amendment concerns with respect to private corporations that South Carolina's "any support" test does. This "functional equivalent" test has a narrowing purpose, absent from South Carolina's FOIA, that is

similar in operation to the "main purpose" test used to determine when electioneering advocacy can be regulated. See *S.C. Citizens for Life, Inc.*, 759 F. Supp. 2d at 715-20. The State of South Carolina failed this test with its definition of a "political committee," *id.*, and for analogous reasons fails the constitutional scrutiny required to be applied to South Carolina's FOIA definition of "public body"—statutory burdens are imposed on private organizations speech without sufficient justification and narrowing of means.

B. The FOIA's Application to Private Corporations is barred by the Unconstitutional Conditions Doctrine.

The unconstitutional conditions doctrine prevents the government from conditioning the receipt of governmental benefits, even when discretionary, on the waiver or relinquishment of one's constitutional rights. *Stephens v. County of Albemarle*, 2005 WL 3433428, *5 (W.D. Va.). The United States Supreme Court has broadly rejected the validity of limitations on First Amendment rights as a condition of the receipt of a governmental benefit. *Elrod v. Burns*, 427 U.S. 347 (1976); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Yet, when applied to private corporations engaging in issue advocacy, like SCASA, the FOIA imposes as a condition of support by public funds the substantial limitations on freedom of speech and association of the FOIA's open meeting and records disclosure requirements. The broad imposition of such restrictions on important First Amendment rights as a condition of the receipt of public funds clearly violates the unconstitutional conditions doctrine.

C. The FOIA's Application to Only Private Corporations but not to Natural Persons who are Supported in Part by Public Funds Violates the First Amendment.

FOIA discriminates against and burdens the speech only of corporations and organizations, as opposed to similarly situated individuals, because it reaches only corporations and other organizations receiving support from public funds, but not natural individuals

supported by public funds.⁶ In *Citizens United* the United States Supreme Court made clear that the First Amendment does not allow political speech restrictions based on the speaker's corporate identity. 130 S. Ct. at 903. "We return to the principle established in *Buckley* and *Bellotti* that the government may not suppress political speech on the basis of the speaker's corporate identity." *Id.* at 913. "No sufficient governmental interest justifies limits on the political speech of non-profit or for profit corporations." *Id.* SCASA is one of the corporations that, "[o]n certain topics. . . may possess valuable expertise, leaving them the best equipped to point out errors or fallacies in speech of all sorts, including the speech of candidates and elected officials." *Id.* at 912.

FOIA also exempts certain records and discussion of some issues from public disclosure, thereby burdening (or favoring) speech relating to certain issues. FOIA imposes these burdens on the First Amendment rights of private corporations without a substantial relationship between these burdens and a sufficiently important governmental interest. In the context of political speech, the FOIA impermissibly imposes restrictions on disfavored corporate speakers and unconstitutionally suppresses political speech based on the speaker's corporate identity. Just as with natural persons, "[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations," and the FOIA is unconstitutional to the extent it does so on the basis of corporate identity. *Id.* at 913. See also *Bellotti*, 435 U.S. at 784-85 ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating...the speakers who may address a public issue.").

⁶ Obviously some "public bodies" are offices held by a natural person, see *Burton v. York County Sheriff's Dep't*, 358 S.C. 339, 348-49, 594 S.E.2d 888, 893 (Ct. App. 2004) (sheriff), but the FOIA does not require a sheriff to hand over his personal bank statements upon request of any citizen, or to give prior notice to the public and convene a meeting open to the public, in order to decide with his wife whether to refinance their house or buy a new personal car. Likewise, many natural persons are also supported in whole or in part by government funds, but the FOIA does not apply to them at all.

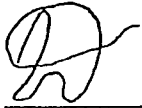
IV. CONCLUSION

The FOIA's definition of a "public body" is unconstitutionally over inclusive and impermissibly sweeps into its restraints on First Amendment rights issue advocacy organizations like SCASA, while at the same time the FOIA unconstitutionally conditions the receipt of public funds or support on the waiver or limitation of important and fundamental First Amendment rights and improperly favors the speech of natural persons over the speech of private corporations. With respect to issue advocacy organizations, the FOIA is, therefore, unconstitutional. As a result, Rocky D cannot state a claim upon which relief can be granted to him as against SCASA under the FOIA, and his declaratory judgment action should be dismissed.

For the foregoing reasons, SCASA respectfully asks this Court to affirm and uphold SCASA's First Amendment rights and to dismiss Rocky D's declaratory judgment action under the FOIA.

Respectfully submitted,

CHILDS & HALLIGAN, P.A.

By:  

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July 20, 2011

Columbia, South Carolina

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) FIFTH JUDICIAL CIRCUIT

Rocky Disabato, d/b/a "Rocky D,") Civil Action No. 2011-CP-40-2044
)

Plaintiff,)
)

vs.)

South Carolina Association of School)
Administrators,)

Defendant.)
)

PLAINTIFF'S RESPONSE BRIEF IN
OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS

INTRODUCTION

Mr. Disabato filed this suit in order to enforce his "immutable right" of access under the South Carolina Freedom of Information Act. *Seago v. Horry County*, 378 S.C. 414, 423, 663 S.E.2d 38, 42 (2008). In response, SCASA has moved the Court to dismiss this case on grounds that, in its view, the State FOIA somehow violates the First Amendment. Critically, nowhere in its 18-page supporting brief does SCASA cite a single instance where a court has struck part of any state's open-government law on First Amendment grounds. No such authority exists; indeed, the drastic step that SCASA asks this Court to take is literally unprecedented.

In addition to being unsupported by any relevant authority, SCASA's argument suffers from a dispositive defect. The FOIA's definition of "public body" is not pegged in any way to an organization's speech. In the parlance of First Amendment jurisprudence, it is a "content-neutral" statute, not a "content-based" statute. This is a fundamental point of First Amendment law, but it is completely overlooked in SCASA's Motion to Dismiss. Laws that are content neutral are not subject to strict scrutiny or

"exacting" scrutiny, but are instead examined under a more relaxed standard that the South Carolina FOIA readily meets. Accordingly, the Court should deny SCASA's Motion and allow this case to proceed on its merits.

BACKGROUND

Even without discovery being completed, there is little doubt that SCASA is a "public body" under the South Carolina FOIA. That law defines a "public body" as, *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." S.C. Code Ann. § 30-4-20(a). In Mr. Disabato's view, SCASA unquestionably meets this definition:

- It is supported by the State Retirement System, the State Health Insurance Plan, and the State Dental Insurance Plan.
- Its membership is comprised of public employees who pay dues with public monies and who do SCASA's business on public time and with public resources.
- It receives significant public grant monies from, at least, the South Carolina Department of Education.
- By law, it performs several governmental functions associated with the State's education policy.

So apparent that SCASA is, at a minimum, a quasigovernmental entity that United States District Court Judge Cameron M. Currie observed that SCASA has "mixed private and public attributes, the latter based on receipt of public funds and the statutory assignment of duties," when dismissing a competing federal action that SCASA filed in order to short-circuit this case.¹

¹ In Footnote 1 of its supporting memorandum, SCASA denies that it is a "public body" subject to the FOIA, though it has never articulated any basis for this position.

In order to avoid the applicability of the State FOIA, SCASA now argues that the statutory scheme is unconstitutional and that Mr. Disabato's complaint should be dismissed under Rule 12(b)(6). In so moving, SCASA misapplies decades of First Amendment jurisprudence to arrive at a conclusion for which there is no legal support. The Court should reject this posturing and deny SCASA's Motion.

ARGUMENTS AND AUTHORITIES

I. The South Carolina FOIA meets the standard for constitutionality under the *O'Brien* test.

The legal discussion in SCASA's brief begins with a misstatement of South Carolina law—that is, that the State FOIA “constitute[s] a direct governmental regulation of speech” (SCASA's brief at 7)—and then spends a dozen pages misapplying First Amendment jurisprudence. SCASA is mistaken on several counts.

A. Because it does not directly regulate any speech, the South Carolina FOIA is a “content-neutral” law that is subject to a lower level of scrutiny.

SCASA's entire argument is based on the notion that the South Carolina FOIA “directly regulates the content of a corporation's speech.” (SCASA's brief at 7.) This is a complete misunderstanding of South Carolina's open-government law.

Make no mistake: The State FOIA in no way regulates the content of speech, nor is it triggered by any particular type of speech. The definition of “public body”—which serves as the gateway to the remainder of the statute—has nothing to do with the content of an organization's speech. *See* S.C. Code Ann. § 30-4-20(a) (defining “public body” in pertinent part as “any organization, corporation, or agency supported in whole or in part by public funds or expending public funds”).

The guidelines that "public bodies" have to follow are uniform among all organizations that meet this statutory definition, and they do not change based on the advocacy efforts, political speech, or viewpoints of any particular organization. In other words, the South Carolina FOIA does not regulate any speech based on a preference for or against certain messages. To the contrary, the requirements that "public bodies" must follow are designed to ensure that "public business [is] 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." *Id.* § 30-4-15.

These key characteristics result in the State FOIA being a "content-neutral" statute, rather than a "content-based" statute, as incorrectly argued throughout SCASA's brief. As the Supreme Court has explained when drawing this crucial distinction:

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).

The State FOIA easily meets the criteria of "content neutrality." When passing the FOIA, the General Assembly's chief concern was making government more transparent and accountable to the citizenry. S.C. Code Ann. § 30-4-15. The legislature was not interested in "stifl[ing] the exercise of First Amendment freedoms" (SCASA's brief at 8), "repress[ing] speech" (SCASA's brief at 10), "chill[ing] political speech"

(SCASA's brief at 13), or any of the other over-the-top claims made in SCASA's brief.² And it certainly expressed no favor for or disagreement with speech promoting particular viewpoints.

Accordingly, SCASA's First Amendment argument should be viewed under the rubric established for analyzing "content neutral" laws, not under the heightened scrutiny argued in SCASA's brief. The State FOIA readily satisfies this standard for constitutionality.

B. The South Carolina FOIA meets the intermediate level of scrutiny against which content-neutral laws are measured.

Identifying a law as "content neutral" is a critical component to any First Amendment analysis, as such laws "qualify for significantly less rigorous levels of review." 1 Rodney A. Smolla, *Smolla and Nimmer on Freedom of Speech* § 3.1 (2008). Laws that are content-neutral, but that may have an "incidental" effect on speech, are examined under the relaxed standard set forth in *United States v. O'Brien*, 391 U.S. 367 (1968). Under this four-part test, a law is valid if:

1. "It is within the constitutional power of the government";
2. "It furthers an important or substantial government interest";
3. "[T]he governmental interest is unrelated to the suppression of free expression"; and

² At least one court has summarily dismissed SCASA's claim that adherence to a state's open government law even touches on First Amendment rights: "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." *Dorrier v. Dark*, 537 S.W.2d 888, 892 (Tenn. 1976). In this regard, Mr. Disabato submits that SCASA's entire claim of a First Amendment harm is illusory and that SCASA's Motion should be denied for lack of any legitimate First Amendment injury.

4. "[T]he incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

Diamonds v. Greenville County, 325 S.C. 154, 156, 480 S.E.2d 718, 719 (1997) (quoting *Barnes v. Glen Theater, Inc.*, 501 U.S. 560, 567 (1991)). The South Carolina FOIA easily meets this lower standard of review.

First, there can be no legitimate dispute that the General Assembly may establish checks on the government and on organizations that exercise governmental power or that are supported by public monies. To be sure, every state in the union has enacted some variation of the FOIA. Notably, SCASA has not identified a single case in its 18-page brief in which any state's version of the FOIA has been held to be inconsistent with the First Amendment.

Second, it is equally self-evident that the FOIA furthers an important governmental interest. The General Assembly expressly declared that the FOIA is "vital in a democratic society." S.C. Code Ann. § 30-4-15. Likewise, the State Supreme Court frequently reminds that the statute is designed to "protect the public by providing for the disclosure of information." *Bellamy v. Brown*, 305 S.C. 291, 295, 408 S.E.2d 219, 221 (1991). In this regard, the Fourth Circuit has explained that "[f]unctions which make our states self-governing sovereigns" are "inherently" important state interests. *Harper v. PSC of W. Va.*, 396 F.3d 348, 352 (4th Cir. 2005).

Third, as explained above in Section I.A, the FOIA is not tied to any legislative desire to suppress free expression.³ That is, the General Assembly's purpose in passing

³ In fact, commentators have observed that the third prong of the *O'Brien* test is nothing more than a restatement 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

the FOIA was to make public bodies more accountable to the citizenry, not to suppress particular points of view.

Fourth and finally, the FOIA is carefully crafted to meet the State's interest in maintaining workable transparency in its public bodies. While the statute envisions openness in government, the legislature carved out eighteen specific exemptions to disclosure of records within the FOIA itself, S.C. Code Ann. §§ 30-4-40(a)(1) to -40(a)(3), -40(a)(5) to -40(a)(19); it has created approximately twenty additional statutory exemptions to disclosure found elsewhere in the South Carolina Code; and it has provided a half dozen occasions during which a public body can meet in executive session, *id.* § 30-4-70(a). This series of exemptions to disclosure is consistent with the Supreme Court's explanation 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." *Ward*, 491 U.S. at 800.

C. Because they involve laws that directly regulate speech, case law examining the constitutionality of campaign-finance statutes is irrelevant.

In view of how easily the South Carolina FOIA satisfies the *O'Brien* analysis, it is no surprise that SCASA has failed to identify in its lengthy brief a single court that has struck down another state's open-government law. Instead, SCASA's argument relies exclusively on cases addressing First Amendment issues in the context of regulations affecting the political process, campaign-finance regulations in particular. This highly-stylized thread of jurisprudence has no applicability to the issues of this case, as those

content of the regulated speech." (quoting *Ward*, 491 U.S. at 791)) (emphasis supplied by the *Ward* Court).

cases uniformly involve laws that contain express, rather than “incidental,” restraints on speech. The Court should reject SCASA’s reliance on them accordingly.

The inapplicability of these cases to SCASA’s First Amendment argument is best illustrated by its argument that the South Carolina FOIA is unconstitutional because the open government law applies only to corporate entities, not “natural persons.” (SCASA’s brief at 16–17.) The sole case on which SCASA’s position is based is *Citizens United v. FEC*, 130 S. Ct. 876 (2010). There, the Supreme Court held that a federal ban on corporate independent expenditures—that is, electioneering efforts by corporations in the days leading up to an election—was unconstitutional. *Id.* at 913.

Unlike in this case, the law at issue in *Citizens United* was a direct, unambiguous gag on a speaker. *See id.* at 899 (describing the federal law at issue as “taking the right to speak from some”). The South Carolina FOIA does nothing of the sort. And while SCASA generally complains that the FOIA imposes some regulations on how a “public body” must conduct its business, these regulations are—at most—marginally different from the statutes that already govern various corporate entities in South Carolina under Title 33 of the State Code.

For instance, with respect to corporations:

- South Carolina Code § 33-16-101 details the types of records that corporations must maintain.
- South Carolina Code § 33-16-102 identifies when those records may be reviewed by shareholders.
- South Carolina Code § 33-16-200 prescribes certain financial statements that each corporation must prepare and provide to shareholders, and Section 33-16-220 indicates that certain financial reports must be publicly filed on an annual basis.

Under SCASA's logic, each of these sections, along with dozens more, would be unconstitutional under the notion that they dictate an organization's speech based only a "corporate identity." (SCASA's brief at 17.) The Court should reject such a clear misapplication of First Amendment jurisprudence and find that the State FOIA is within constitutional boundaries.

II. The "unconstitutional conditions doctrine" is inapplicable here.

On Page 16 of its brief, SCASA submits a four-sentence argument that the FOIA's application to SCASA would violate the "unconstitutional conditions doctrine." It provides little analysis of its position, and for good reason. As the Supreme Court explained in *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994):

Under the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right...in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.

This doctrine is irrelevant here for two reasons. First, SCASA has not given up a constitutional right in exchange for anything.⁴ Second, South Carolina's interest in maintaining a transparent government has a clear connection with any benefit that SCASA receives—including participating in the State's retirement and insurance plans, receiving grant money and other public funding, and exercising authority of the sovereign with respect to certain aspects of the State's education policy.

⁴ At times in its brief, SCASA suggests that it has a constitutional right to engage in anonymous speech. (SCASA's brief at 7, 10–12.) This is wholly unsupported by the law. To the contrary, the Supreme Court has been clear that a speaker has a right to remain anonymous only when revealing its identity could expose it or its members to severe economic or physical harms. *Citizens United*, 130 S. Ct. at 914. SCASA cannot make any such showing here, nor has it even attempted to do so.

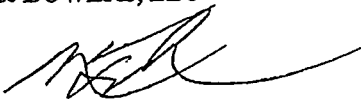
Under such circumstances, the “unconstitutional conditions doctrine” is inapplicable. *See, e.g., United States v. Am. Library Ass’n, Inc.*, 539 U.S. 194, 203 (2003) (plurality opinion) (finding that Congress could require libraries to use content-based internet filters in order to receive federal funding while nothing that “Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives”); *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). The Court should reject SCASA’s argument on this point accordingly.

CONCLUSION

For the reasons explained above, the Court should reject SCASA’s misplaced First Amendment arguments, deny its Motion to Dismiss, and permit this case to proceed forward on the merits.

Respectfully submitted,

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July 26, 2011
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2011-CP-40-2044

RECEIVED

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S.C. Supreme Court

Rocky Disabato d/b/a "Rocky D," Appellant,

v.

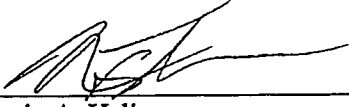
South Carolina Association of School Administrators, ... Respondent.

NOTICE OF APPEAL

Appellant Rocky Disabato appeals the Order Granting Defendant's Motion to Dismiss that was issued by the Honorable G. Thomas Cooper, Jr., Circuit Court Judge. This order was dated August 10, 2011; filed on August 15, 2011; and received by Mr. Disabato on August 17, 2011. Appellant also appeals the circuit court's interlocutory order of March 14, 2011, which was issued by the Honorable Deadra L. Jefferson and transferred venue of this dispute from Charleston County to Richland County (Charleston County Case No. 2009-CP-10-7593). Copies of both orders are attached.

Because Judge Cooper's final order holds that the South Carolina Freedom of Information Act is unconstitutional, purportedly on an "as applied" basis, Mr. Disabato files the Notice of Appeal with this Court pursuant to Rule 203(d)(1)(A)(ii), SCACR.

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Form 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NO: 2011CP4002044

Rocky Disabato vs. South Carolina Assn of School Administrators
Plaintiff Defendant

CHECK ONE:

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 43(k), SCRPC (Settled); ☐ Other: ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other:

☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; ☐ Statement of Judgment by the Court:

Dated at Columbia, South Carolina, this ____ day of ____, 2011.

PRESIDING JUDGE

This judgment was entered on the ____ day of ____, 2011, and a copy mailed first class this 15 August 2011, to attorneys of record or to parties (when appearing pro se) as follows:

Kevin A Hall
M Todd Carroll

ATTORNEY(S) FOR THE PLAINTIFF(S)

John Marshall Reagle
Keith Robert Powell

ATTORNEY(S) FOR THE DEFENDANT(S)

Jeanette W. McBride
Clerk of Court

SCRPC APP-24/FORM 4

REC 000415

SCANNED

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
Rocky Disabato d/b/a "Rocky D",)
Plaintiff,)
v.)
South Carolina Association of School)
Administrators,)
Defendant.)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
C/A No. 2011-CP-40-02044

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS**

RICHLAND COUNTY
FILED
2011 AUG 15 AM 9:50
JEANETTE W. REBERT
Clerk, C.S.

This matter is before the Court on Defendant South Carolina Association of School Administrators' ("SCASA") Motion to Dismiss pursuant to Rule 12(b)(6), SCRCP. Plaintiff, Rocky Disabato ("Rocky D"), seeks a declaratory judgment and injunctive relief against SCASA both declaring SCASA to be a "public body" under the South Carolina Freedom of Information Act ("FOIA"), S.C. Code Ann. § 30-4-10, et seq., and requiring SCASA to disclose requested records. In its Motion to Dismiss, SCASA contends that Rocky D's claim must fail as a matter of law because the FOIA's definition of a "public body" cannot constitutionally embrace a corporation, like SCASA, engaged in political speech or issue advocacy. In other words, SCASA asserts that the FOIA's definition of "public body"—to which the FOIA's broad open meeting and records disclosure requirements apply—unconstitutionally burdens the First Amendment rights of freedom of speech and association of issue advocacy organizations like SCASA.

For the reasons stated herein, SCASA cannot constitutionally be subject to the requirements of a "public body" under the FOIA.

I. INTRODUCTION

Because SCASA has moved to dismiss Rocky D's FOIA claim, this Court must accept the well-pleaded allegations of the Complaint as true. *Gressette v. S.C. Elec. & Gas Co.*, 370

REC 000416

SCANNED

S.C. 377, 378-79, 635 S.E.2d 538, 538 (2006). Consequently, for purposes of this motion, this Court assumes 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. This Court further assumes, from the following allegations set forth in the Complaint, that SCASA is a corporation engaging in political speech and issue advocacy:

- "Plaintiff requested . . . records of SCASA that relate to its collusive efforts with the State Department of Education and others regarding the debate about the federal stimulus funds in the American Recovery and Reinvestment Act of 2009." (Compl. ¶ 1)
- "SCASA is a corporate entity organized under the laws of the state of South Carolina..." (Compl. ¶ 3)
- "SCASA describes itself as 'the leading force for public education' in South Carolina." (Compl. ¶ 6)
- "The mission of SCASA, a united alliance of diverse school leaders and the leading force for public education in our state, is to advocate for a superior education for citizens of South Carolina by influencing education legislation and policy..." (Compl. ¶ 6, Exhibit A)

These assumptions are consistent with the Court's order of March 14, 2011, in which the Court determined as a matter of law that:

SCASA does not have a duty to exercise any sovereign power of the State. SCASA was not created by the legislature. There are no legal qualifications for membership in SCASA or for SCASA's existence, other than those generally set forth in S.C. Code Ann. §§ 33-31-101 to -1708 respecting any non-profit corporation's existence. [footnote omitted] SCASA has no duties it must fulfill by legislative act, it has no tenure, it receives no salary, it posts no bond, it takes no oath of office, and it is not a representative of the sovereign or State.

(Order, p. 7.)

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II. ANALYSIS

A. The FOIA.

The purpose of the FOIA is set forth in the statute:

[I]t 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 (emphases added).

In an effort to fulfill its purpose, the FOIA states numerous requirements for public bodies. For example, the FOIA mandates that "[a]ny person has a right to inspect or copy any public record of a public body, except as otherwise provided by § 30-4-40, in accordance with reasonable rules concerning time and place of access." S.C. Code Ann. § 30-4-30(a). The FOIA also requires that "[e]very meeting of all public bodies shall be open to the public unless closed pursuant to § 30-4-70 of this chapter." S.C. Code Ann. § 30-4-60. The term "meeting" is broadly defined as "the convening of a quorum of the constituent membership of a public body, whether corporal or by means of electronic equipment, to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power." S.C. Code Ann. § 30-4-20(d). Further, any person in attendance at a meeting of a public body may tape record or video record the meeting. S.C. Code Ann. § 30-4-90(c).

Moreover, ancillary to its open meeting requirements, the FOIA mandates that a public body give written public notice of its meetings. S.C. Code Ann § 30-4-80. The method, timing, and content of the written notice are dictated in detail by the FOIA. S.C. Code Ann. § 30-4-80. Additionally, the FOIA requires a public body to create and maintain written minutes of its meetings. S.C. Code Ann. § 30-4-90. The content of the written minutes is also dictated by statute. S.C. Code Ann. § 30-4-90(a).

Under the FOIA, these extensive record disclosure and open meeting requirements apply



to any "public body." The FOIA defines a "public body" as "any organization, corporation, or agency supported in whole or in part by public funds or expending public funds. . . ." S.C. Code Ann. § 30-4-20(a). The South Carolina Supreme Court has further explained this definition of "public body":

[T]he 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 SE.2d 161, 164 (1991). Relying on *Weston*, the South Carolina Attorney General formally opined that there is no "de minimus" public funds exception to the FOIA's definition of "public body." Op. S.C. Att'y Gen., 2006 WL 1574910 (May 19, 2006).

To enforce its requirements, the FOIA authorizes any citizen of the state to bring an action for a declaratory judgment and injunctive relief against a public body. S.C. Code Ann. § 30-4-100; *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 327-28, 701 S.E.2d 39, 47-48 (Ct. App. 2010). Further, the FOIA authorizes a court to award reasonable attorneys' fees and other costs of litigation to a prevailing plaintiff. S.C. Code Ann. § 30-4-100. The FOIA also provides that any person or group of persons who willfully violate the FOIA's provisions shall be deemed guilty of a misdemeanor and, upon conviction, shall be fined or imprisoned. S.C. Code Ann. § 30-4-110.

B. Standard Of Review.

In ruling on a First Amendment challenge to a statute, it is the Court's "unflagging obligation to apply constitutional standards to State legislative enactments." *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 277 (4th Cir. 2008). "[A] significant impairment of First Amendment rights must survive exacting scrutiny." *Elrod v. Burns*, 427 U.S. 347, 362 (1976). Exacting scrutiny "is necessary even if any deterrent effect on the exercise of First Amendment

rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct" *Buckley v. Valeo*, 424 U.S. 1, 65 (1976).

The government interest advanced for impairing First Amendment rights must be one of vital importance, and the State must choose the least restrictive means to achieve its vital interest. *Elrod*, 427 U.S. 362-63.

C. Applying the FOIA

1. The FOIA burdens SCASA's issue advocacy and political speech.

SCASA engages in core political speech and issue advocacy. For example, SCASA was directly involved in the debate about Federal Stimulus Funds in the American Recovery and Reimbursement Act of 2009. *See Edwards v. State of S.C.*, 383 S.C. 82, 678 S.E. 2d 412 (2009). Further, SCASA represents itself as the leading force for public education, and the mission of SCASA includes advocacy for a superior education for citizens of South Carolina by influencing legislation and policy. SCASA's political speech and issue advocacy in support of public education are undoubtedly protected by the First Amendment. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995) (recognizing that speech and advocacy of politically controversial viewpoints relating to school funding is "the essence of First Amendment expression").

A State "cannot foreclose the exercise of constitutional rights by mere labels." *NAACP v. Button*, 371 U.S. 415, 429 (1963). However, by pinning the label of "public body" onto corporations like SCASA engaging in issue advocacy and political speech this is precisely the effect of the FOIA.

Initially, the FOIA's records disclosure and open meeting requirements foreclose a corporation's First Amendment right to control its message and not to speak publicly.¹ The

¹ With respect to corporations, the FOIA's open meeting requirements regulating meetings and discussions of a corporation's board of directors or members to determine corporate affairs are particularly significant. A corporation, unlike a natural person, can only govern itself through action of its board or members. The open

First Amendment encompasses the right not to speak publically:

There is necessarily a ... freedom not to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.

Pac. Gas & Elec. v. Pub. Util. Comm'n, 475 U.S. 1, 11 (1986). See also *McIntyre*, 514 U.S. at 342 ("decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment"); *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 791 (1988) ("[T]he government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government."); *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573-74 (1995) (discussing the "general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid").

Open meeting requirements obviously restrict a corporation's right to control its message and to not speak publicly. However, disclosure requirements also restrict the right not to speak publicly. In *Citizens United*, the Supreme Court noted that "disclosure requirements may burden the ability to speak." *Citizens United*, 130 S.Ct. at 914. See also *McIntyre*, 514 U.S. at 355 (noting that "mandatory reporting undeniably impedes protected First Amendment activity . . ."). Consequently, the Court "has subjected these [disclosure] requirements to 'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United*, 130 S.Ct. at 914. Similarly, the Fourth Circuit Court of Appeals recognized that reporting requirements burden the speech of groups engaging in issue advocacy:

The statute subjects groups engaged in only issue advocacy to an

meeting requirements, therefore, effectively compel a corporation to "think out loud," laying bare its inner thoughts and mandating that they be written down and made public, even if ultimately not adopted by the corporation.

intrusive set of reporting requirements. In so doing, it 'blankets with uncertainty' the entire field of campaign politics 'compelling the speaker to hedge and trim.' *Thomas v. Collins*, 323 U.S. 516, 535, 65 S.Ct. 315, 89 L.Ed. 430 (1945). Burdening speech of this sort is unacceptable in an area of such crucial import to our representative democracy. The district court was correct in finding section 163-278.6(14) facially unconstitutional, and we affirm its judgment.

N.C. Right to Life, Inc. v. Bartlett, 168 F.3d 705, 713 (4th Cir. 1999). By requiring a corporation to hold its meetings open to the public and disclose its records, the FOIA restricts a corporation's ability and right to control its speech and not to speak publicly.

Moreover, the FOIA's record disclosure and open meetings requirements also restrict a corporation's freedom of association. It has long been recognized that freedom of association is fully protected under the First Amendment:

Like freedom of speech and a free press, the right of peaceable assembly was considered by the Framers of our Constitution to lie at the foundation of a government based upon the consent of an informed citizenry—a government dedicated to the establishment of justice and the preservation of liberty. U.S. Const., Amend. I. And it is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected by the Due Process Clause of the Fourteenth Amendment from invasion by the States.

Bates v. City of Little Rock, 361 U.S. 516, 522-23 (1960). The Court further made clear in *Bates* that these First Amendment freedoms "are protected not only against the heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates*, 361 U.S. at 523. By requiring corporations to open their meetings and disclose their records to others, the FOIA restricts those corporations' freedom of association. *See Id.* ("This Court has recognized the vital relationship between freedom to associate and privacy in one's associations.").

Additionally, the FOIA's broad definition of "public body" imposes a chilling effect on the exercise of free speech by corporations engaged in political speech because of the threat of FOIA litigation against those corporations. The citizen lawsuit, the FOIA's primary enforcement

procedure, exacerbates the burden the FOIA imposes on First Amendment rights. FOIA litigation involving corporations requires a detailed analysis of the economic relationship between the corporation and the State and a determination of whether payments from the State were in exchange for goods or services. *Weston*, 303 S.C. at 403-04, 401 S.E.2d at 164; *Suller v. Palmetto Elec. Coop., Inc.*, 325 S.C. 465, 468, 481 S.E.2d 179, 180 (Ct. App. 1997). The United States Supreme Court has explained that:

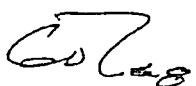
the burden and expense of litigating the issue—especially when what must be established is a complex and amorphous economic relationship—would unduly impinge on the exercise of the constitutional right. The free dissemination of ideas might be the loser.

First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 785, n.21 (1978). Likewise, the Fourth Circuit Court of Appeals has explained that:

Speakers are left to guess and wonder whether a regulator, applying supple and flexible criteria, will make a *post hoc* determination that their speech is regulable This approach simply guarantees that ordinary political speech will be chilled, the very speech that people use to express themselves on all sides of those issues about which they care most deeply.

N.C. Right to Life, Inc., 525 F.3d at 284-85. See also *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. at 793 (burdensome enforcement "scheme must necessarily chill speech in direct contravention of the First Amendment's dictates."); *Citizens United*, 130 S.Ct. at 896; *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 255-56 (1986). Thus, the FOIA's chilling effect is increased by the risk of ad hoc, arbitrary, or retaliatory enforcement efforts because any citizen may bring a lawsuit under the FOIA. The First Amendment does not tolerate laws, such as the FOIA, that require an organization to hire lawyers or engage in litigation and case-by-case interpretations before determining that the organization can discuss political issues.

In summary, the FOIA's record disclosure and open meeting requirements stifle, burden,



and chill the constitutionally protected speech and assembly of corporations such as SCASA engaged in political speech and issue advocacy by (1) eliminating such corporations' right not to speak, to speak anonymously, or to otherwise control their message (2) restricting such corporations' right to freely associate, and (3) imposing the threat of ad hoc, arbitrary, or retaliatory litigation on such corporations.

2. **The FOIA's requirements are neither substantially related to a legitimate governmental purpose nor narrowly tailored to achieve the FOIA's purpose.**

The FOIA's broad definition of "public body" can only be sustained as constitutional if the FOIA's open meeting and records disclosure requirements are substantially related to a sufficiently important governmental purpose and no less restrictive means of achieving this purpose exist. *Citizens United*, 130 S.Ct. at 914; *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Elrod v. Burns*, 427 U.S. 347, 362-63 (1976). Although the FOIA's purpose as set forth in the Act, § 30-4-10, is an important governmental interest, the FOIA's open meeting and records disclosure requirements are not substantially related to the FOIA's purpose, which could be achieved by narrower means less burdensome on First Amendment rights.

Notably, the test for whether an organization is subject to the FOIA, *i.e.*, whether the organization is supported by any public funds, is completely different from the more nuanced test under the federal FOIA. In *Irwin Mem'l Blood Bank of the S.F. Med. Soc'y v. Am. Nat'l Red Cross*, 640 F.2d 1051 (9th Cir. 1980), the federal test was described as follows:

It is the existence of this element of substantial federal control that distinguishes those entities that can be fairly denominated as federal agencies under the FOIA from the organizations whose activities may be described as merely quasi-public or quasi-governmental.

Irwin, at 1055. See also *Forsham v. Harris*, 445 U.S. 169 (1980); *Bd. of Trs. of Woodstock Acad. v. Freedom of Info. Comm'n*, 436 A.2d 266 (Conn. 1980) (adopting federal "functional

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equivalent" test). The federal "functional equivalent" test, which requires "substantial federal control," obviously does not raise the patent First Amendment concerns with respect to private corporations that South Carolina's "any support" test does. This "functional equivalent" test has a narrowing purpose, absent from South Carolina's FOIA, that is similar in operation to the "main purpose" test used to determine when electioneering advocacy can be regulated. *See S.C. Citizens for Life, Inc. v. Krawcheck*, 759 F. Supp. 2d 708, 715-20 (D.S.C. 2010).

The FOIA restrains and burdens the political speech and assembly of corporations such as SCASA by mandating that all meetings be open to the public, requiring that meetings be subject to prior public notice, and prescribing the content of the meeting notice, meeting minutes, and meeting discussions. The FOIA also requires that the records of a corporation such as SCASA be accessible to the public. The FOIA imposes its open meeting and record disclosure requirements on corporations such as SCASA without regard to the amount of public funds or support received by the corporation or whether the meeting or records of the corporation pertain to public funds or public activity.

Further, the FOIA has no temporal limitations. Once a corporation such as SCASA is determined to be a public body, its records are subject to disclosure, even those predating any support from public funds. Likewise, the FOIA's disclosure and open meeting requirements extend limitlessly into the future, even if years have passed since the corporation's receipt of public support. This overly broad sweep of the FOIA's mandates simply does not bear any substantial relationship to vindicating the interest of citizens to be advised of the performance of public officials, the decisions that are reached in public activity, or the formulation of public policy. This is particularly true of SCASA, which is neither a public officer nor a representative of the State. *See Order Granting Defendant's Motion to Dismiss Pursuant to Rule (12)(B)(3), SCRCF, p. 7.*

The statutory purpose of the FOIA could be fully achieved with regard to public activity

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and funds that support private corporations in a more narrowly tailored manner by merely requiring one-time reporting and disclosure of actions and records relating to the receipt and expenditure of such funds. Such limited disclosure requirements have been approved in the context of election law regulations. In *Buckley*, the United States Supreme Court approved a limited disclosure requirement, noting that the disclosure requirement was narrowly limited to those situations where the information sought had a substantial connection with the governmental interest sought to be advanced. *Buckley*, 424 U.S. at 80-82. Importantly, the disclosures approved by the Court, and unlike those required under the FOIA, did "not reach all partisan discussion for it only requires disclosure of those expenditures that expressly advocate a particular election result." *Buckley*, 424 U.S. at 80. See also *Riley*, 487 U.S. at 800 (expressing approval of narrowly limited disclosure requirements in the context of regulation of charitable fundraising).

Similarly, disclosure requirements narrowly limited to the receipt or expenditure of public funds would reasonably serve to fulfill the important interests the FOIA seeks to vindicate with regard to private corporations supported in part by public funds. In *S.C. Citizens for Life, Inc. v. Krawcheck*, 759 F. Supp. 2d 708 (D.S.C. 2010), the District Court for South Carolina recently declared provisions of the South Carolina Ethics Act facially unconstitutional because the term "committee" as used in the Act was overly broad and imposed undue burdens on the First Amendment rights of groups engaged primarily in issue advocacy. The court noted other jurisdictions' use of one-time reporting requirements as narrowly designed to achieve the legitimate governmental objective of transparency and accountability rather than the overly broad panalogy of registration, disclosure, and reporting requirements mandated by the Act. See also *N.C. Right to Life, Inc.* 525 F.3d at 281; *Colo. Right to Life Comm. v. Coffman*, 498 F.3d 1137, 1154 (10th Cir. 2007).

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III. CONCLUSION

The FOIA unconstitutionally burdens SCASA's protected speech and associational rights. Specifically, the FOIA's open meeting and records disclosure requirements restrict SCASA's political speech and issue advocacy without a substantial relation to the purpose of the FOIA, and where narrower means are available to achieve the FOIA's purpose. As a result, the First Amendment prohibits the application of the FOIA's requirements to SCASA, and the Plaintiff's claim must fail because Plaintiff cannot, as a matter of law, state a claim for relief under the FOIA against SCASA.

This ruling does not conflict with the holding in *Weston v. Carolina Research and Dev. Found.*, 303 S.C. 398, 401 S.E.2d 161 (1991). *Weston* held that a private corporation can be a "public body" under certain circumstances. *Weston* did not address the specific circumstances of the FOIA's application to an issue advocacy organization like SCASA, and this Court's decision does not limit the FOIA's application to corporations or organizations not engaging in political speech or issue advocacy. Moreover, this decision does not find the FOIA to be unconstitutional, but that the First Amendment protects SCASA from the requirements of the FOIA, and consequently Plaintiff cannot state a claim against SCASA under the FOIA.

THEREFORE, Plaintiff's claim against SCASA is hereby DISMISSED with prejudice.

IT IS SO ORDERED.

August 10, 2011
Columbia, South Carolina


G. Thomas Cooper, Jr.
Judge, Fifth Judicial Circuit

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Rocky Disabato d/b/a "Rocky D,"

Plaintiff,

vs.

South Carolina Association of School
Administrators,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.:2009-CP-10-7593

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS PURSUANT TO
RULE 12(B)(3), SCRPC**

Presiding Judge: Deadra L. Jefferson
Hearing Date: January 18, 2011
Court Reporter: Anne Meyer
Plaintiff's Attorneys: Kevin Hall, Esq.
M. Todd Carroll, Esq.
Defendant's Attorneys: John M. Reagle, Esq.
Keith R. Powell, Esq.

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JULIE J ARMSTRONG
CLERK OF COURT
BY _____

This matter is before the Court on Defendant South Carolina Association of School Administrators' ("SCASA") Motion to Dismiss filed February 4, 2010. Defendant moves to transfer venue from Charleston County to Richland County pursuant to Rule 12(b)(3), SCRPC. This motion was argued before the Court on January 18, 2011.¹ Representing the Plaintiff were Kevin Hall, Esq. and M. Todd Carroll, Esq., and representing the Defendant were Keith R. Powell, Esq. and John M. Reagle, Esq.

BACKGROUND

In August 2009, Plaintiff sent SCASA a written request for materials pursuant to the South Carolina Freedom of Information Act ("FOIA"). (Compl. ¶ 17 & Compl. Ex. D.) Plaintiff

¹ Also before the Court on January 18, 2011 were Plaintiff's Motion to Compel Discovery Responses filed March 17, 2010 and Defendant's Motion for a Protective Order filed March 15, 2010. The Court, at the request of counsel, ordered these motions continued until the Motion to Dismiss pursuant to Rule 12(b)(3) is disposed of.

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is a resident of Charleston County, and his FOIA request was sent from within Charleston County. (Compl. ¶ 2 & Compl. Ex. D.) SCASA declined to produce the requested materials, claiming it is not a public entity subject to the FOIA, and this lawsuit resulted. (Compl. ¶¶ 18-20 & Compl. Ex. E.)

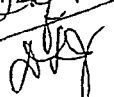
This action was initiated by the filing of a Summons and Complaint on December 7, 2009. The Complaint asserts causes of action for (1) Declaration of a FOIA Violation, and (2) Injunction from Further FOIA Violations. The Plaintiff alleges in paragraph five (5) of the Complaint that venue is proper in Charleston County pursuant to S.C. Code Ann. § 15-7-20, which provides:

Actions for the following causes must be tried in the county where the cause or some part thereof arose, subject to the like power of the court to change the place of trial:

(1) For the recovery of a penalty or forfeiture imposed by statute, except that when it is imposed for an offense committed on a lake, river or other stream of water situated in two or more counties the action may be brought in any county bordering on such lake, river or stream, and opposite to the place where the offense was committed; and

(2) Against a public officer or person specially appointed to execute his duties for an act done by him in virtue of his office or against a person who by his command or in his aid shall do anything touching the duties of such officer.

S.C. Code Ann. § 15-7-20 (1976). In response, on February 4, 2010, the Defendant filed the present Motion to Dismiss pursuant to Rule 12(b)(3), SCRCP. The Defendant contends in its Motion that the Plaintiff improperly relied on Section 15-7-20(2) when asserting venue in Charleston County. The Complaint makes no reference to a particular subsection of Section 15-7-20, but the Plaintiff contends it relied on Section 15-7-20(1). Therefore, the Court will address both contentions as argued to determine whether venue is proper in Charleston County under

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Section 15-7-20.

ANALYSIS

- I. **Venue is not proper for this cause of action under S.C. Code Ann. § 15-7-20(1) because the relief sought by the Plaintiff does not constitute a statutory penalty.**

South Carolina Code Ann. § 15-7-20(1) provides as follows:

Actions for the following causes must be tried in the county where the cause or some part thereof arose, subject to the like power of the court to change the place of trial:

- (1) For the recovery of a penalty or forfeiture imposed by statute . .

Under this statute's plain terms, venue is proper in a county when (a) the litigation involves a statutory penalty, and (b) at least part of the case arose in that county. See All v. British & Am. Mortgage Co., 104 S.C. 239, 241, 88 S.E. 529, 529 (1916) (holding that under this section [former Code 1962 § 10-302] an action to recover a penalty for receiving usurious interest on a contract for the lending of money should be instituted in the county where the loan was made and in which the land that was mortgaged to secure the loan was located).

As the Complaint maintains, "This litigation involves a violation of the South Carolina Freedom of Information Act ("FOIA") by SCASA." (Compl. ¶ 1.) A component of the FOIA is its assessment of attorney fees when a public body fails to fully and properly respond to a request for records. See S.C. Code Ann. § 30-4-100(b) ("If a person or entity seeking such relief prevails, he or it may be awarded reasonable attorney fees and other costs of litigation."). The Plaintiff specifically seeks to recover his attorneys' fees and costs associated with this litigation. (Compl. ¶ 1) ("Plaintiff brings this suit . . . to recover his attorneys' fees and costs as directed by the statute."); (Compl. "Wherefore" ¶ d) (requesting that the Court award Plaintiff his "[a]ttorneys' fees and costs as provided by South Carolina Code § 30-4-100(b)"). The Plaintiff contends the assessment of attorneys' fees constitutes a statutory penalty bringing this action

within Section 15-7-20(1).

First, the Court finds the relief requested by the Plaintiff does not constitute a "penalty" under the FOIA. "The determination of whether statutory attorney fees should be awarded is treated as one in equity." Hardaway Concrete Co. v. Hall Contracting Corp., 374 S.C. 216, 230, 647 S.E.2d 488, 495 (Ct. App. 2007). Forfeitures or penalties are not favored in either law or equity. Cody Discount, Inc. v. Merritt, 368 S.C. 570, 575, 629 S.E.2d 697, 700 (Ct. App. 2006). The FOIA itself classifies attorney fees and costs as equitable relief rather than a penalty. See S.C. Code Ann. § 30-4-100. The Court finds Section 30-4-100 permits a discretionary award of attorney fees and costs when a person seeking equitable relief prevails. See id. Moreover, the FOIA contains a separate "Penalties" provision at Section 30-4-110 which imposes fines and imprisonment for willful violation of the FOIA. See S.C. Code Ann. § 30-4-110. Accordingly, the attorney fees and costs the Plaintiff seeks in this action do not constitute a penalty imposed by the FOIA.

Secondly, the Court finds that no part of the case arose in Charleston County. The Plaintiff contends venue is proper in Charleston County because the FOIA request on which this entire litigation is based came from Charleston County. (Compl. Ex. (stating that Rocky D's return address was in North Charleston).) Likewise, the Plaintiff contends SCASA's letter that gave rise to the alleged FOIA violation was delivered to Charleston County making it the proper county for venue. (Compl. Ex. E.) The Court finds that the alleged act which gave rise to this cause of action was SCASA's denial of Plaintiff's request for records pursuant to the FOIA. Plaintiff's request was received and denied by SCASA in Richland County. The Court finds that the most substantial part of the alleged act giving rise to the cause of action occurred in Richland County. Therefore, there is no basis for venue in Charleston County under Section 15-7-20(1).

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II. Venue is not proper for this cause of action under S.C. Code Ann. § 15-7-20(2) because SCASA is not a public officer.

South Carolina Code Ann. § 15-7-20(2) provides as follows:

Actions for the following causes must be tried in the county where the cause or some part thereof arose, subject to the like power of the court to change the place of trial:

...

(2) Against a public officer or person specially appointed to execute his duties for an act done by him in virtue of his office or against a person who by his command or in his aid shall do anything touching the duties of such officer.

It is undisputed that SCASA is a South Carolina, non-profit corporation with its sole office in Richland County. Plaintiff asserts that SCASA is also a public body subject to the FOIA under Section 30-4-20(a) and Weston v. Carolina Research & Dev. Found., 303 S.C. 398, 403, 401 S.E.2d 161, 164 (1991). (Compl. ¶¶ 25-26.) SCASA denies it is a "public body," and further argues that even if it were assumed to be one for purposes of venue, venue would not be proper in this Court under Section 15-7-20(2), because "public body" as used in Section 30-4-20(a) is not equivalent to "public officer" as used in Section 15-7-20(2).

Whether SCASA is a "public body" as defined in Section 30-4-20(a) is the central issue in this case. However, this Court need not determine whether SCASA is a "public body" in order to determine proper venue.² Even if SCASA were assumed to be a public body under the FOIA, it would not follow that it is a public officer under Section 15-7-20(2). The definition of a public body is broad, and by the terms of the FOIA includes "any organization, corporation, or agency supported in whole or in part by public funds or expending public funds, including

² The parties have stipulated that the issue of whether SCASA is a public body is not before this Court, as it is premature at this time and is not required to be decided by the Court when deciding whether venue is proper under Section 15-7-20.

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committees, subcommittees, advisory committees, and the like of any such body" S.C. Code Ann. § 30-4-20(a). The definition of a public officer on the other hand is not so broad. A public officer is "one who is charged with exercising some sovereign power in the performance of his duties." State v. Thrift, 312 S.C. 282, 309, 440 S.E.2d 341, 356 (1994) (citing Sanders v. Belue, 78 S.C. 171, 58 S.E. 762 (1907)). Absent the statutory authority, the position would be one of mere employment. See State v. Bridgers, 329 S.C. 11, 14, 495 S.E.2d 196, 198 (1997) ("[T]he criteria we have considered when distinguishing between public officers and public employees include 'whether the position was created by the Legislature; whether the qualifications for appointment are established; whether the duties, tenure, salary, bond and oath are prescribed or required [and] whether the one occupying the position is a representative of the sovereign.'" (citing State v. Crenshaw, 274 S.C. 475, 478, 266 S.E.2d 61, 62 (S.C.1980)).

One who is charged by law with duties involving an exercise of some part of the sovereign power, either small or great, in the performance of which the public is concerned, and which are continuing, and not occasional or intermittent, is a public officer. In considering whether a particular position is an office in the constitutional sense, it must be demonstrated that the power of appointment comes from the state, the authority is derived from the law, and the duties are exercised for the benefit of the public. The powers conferred and the duties to be discharged with regard to a public office must be defined, directly or impliedly, by the legislature or through legislative authority. The duties must be performed independently and without control of a superior officer, other than the law, unless they are those of an inferior or subordinate officer, created or authorized by the legislature and by it placed under the general control of a superior officer of body.

Segars-Andrews v. Judicial Merit Selection Comm'n, 387 S.C. 109, 124, 691 S.E.2d 453, 461 (2010) (internal citations and quotation marks omitted).

The Plaintiff asserts SCASA is supported in whole or in part by public funds. The Court notes that it need not resolve the issue of whether SCASA is supported in whole or in part by

public funds pursuant to the parties' stipulation in order to rule on the current Motion to Dismiss pursuant to Rule 12(b)(3), SCRCF. Nonetheless, even if SCASA were supported by public funds, it meets none of the criteria required for a "public officer." SCASA does not have a duty to exercise any sovereign power of the State. SCASA was not created by the legislature. There are no legal qualifications for membership in SCASA or for SCASA's existence, other than those generally set forth in S.C. Code Ann. §§ 33-31-101 to -1708 respecting any non-profit corporation's existence.³ SCASA has no duties it must fulfill by legislative act, it has no tenure, it receives no salary, it posts no bond, it takes no oath of office, and it is not a representative of the sovereign or State. Consequently, even if SCASA is found to be supported by public funds and subject to the FOIA as a public body, SCASA would not thereby be transformed into a public office or officer clothed with both the rights and powers of the sovereign. Ultimately, SCASA does not qualify as a "public officer" under Section 15-7-20(2). Therefore, venue is not proper under Section 15-7-20(2).

Alternatively, even assuming that SCASA is a public body and that a public body is equivalent to a public official under § 15-7-20, Charleston County would not be the proper venue for this civil action. In Stalheim v. Doskocil, 275 S.C. 252, 269 S.E.2d 346 (1980), the Supreme Court established the rule under Section 15-7-20: "Accordingly, we hold that where the Plaintiff has not demonstrated any infirmity which would make prosecution of his action in the county where the public official presides unduly difficult or burdensome . . . that county is the proper venue under [S.C.] Code § 15-7-20(2)" Stalheim, 275 S.C. at 255, 269 S.E.2d at 347.

Plaintiff has neither alleged nor offered evidence that prosecution of his declaratory

³ Active SCASA membership is open to all persons who serve as a school system leader or who are in an administrative position in a public or private school system, education agency/association, college or university. South Carolina Ass'n of Sch. Adm'rs, *SCASA Membership*, <http://www.scasa.org/displaycommon.cfm?an=1&subarticlenbr=241> (last visited February 9, 2011).

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judgment action in Richland County would be unduly difficult or burdensome. Consequently, even assuming that SCASA is a public body and that a public body is equivalent to a public officer under Section 15-7-20(2), Richland County would be the proper venue for this civil action under the holding in Stalheim.

III. Venue should be evaluated pursuant to S.C. Code Ann. § 15-7-30.

Section 15-7-30(B) provides, "In cases not provided for in Sections 15-7-10, 15-7-20, or 15-7-100, the action must be tried in the county where it properly may be brought and tried against the defendant according to the provisions of this section." S.C. Code Ann. 15-7-30(B) (2005). Actions against a domestic corporation are controlled by Section 15-7-30(E) which provides,

A civil action tried pursuant to this section against a domestic corporation, domestic limited partnership, domestic limited liability company, or domestic limited liability partnership, must be brought and tried in the county in which the:

(1) corporation, limited partnership, limited liability company, or limited liability partnership has its principal place of business at the time the cause of action arose; or

(2) most substantial part of the alleged act or omission giving rise to the cause of action occurred.

S.C. Code Ann. 15-7-30(E) (2005).

SCASA is a non-profit domestic corporation which was filed with the South Carolina Secretary of State on January 7, 1975. Its principal place of business is in Columbia, South Carolina which is located in Richland County. SCASA's only office is in Richland County, its records are maintained in Richland County, and its meetings are held in Richland County. The alleged act which gave rise to this cause of action was SCASA's denial of Plaintiff's request for records pursuant to the FOIA. Plaintiff's request was received and denied by SCASA in Richland County. The Court finds the corporation's principal place of business, as well as the

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most substantial part of the alleged act giving rise to the cause of action occurred in Richland County. Accordingly, venue is proper in Richland County pursuant to Section 15-7-30(E).

Moreover, "[t]he right of a defendant to have a case tried against him in the county in which he resides is a substantial right." Chestnut v. Reid, 299 S.C. 305, 306, 384 S.E.2d 713, 714 (1989). The South Carolina Supreme Court has held that "when a motion to change venue is brought pursuant to [Section] 15-7-30 and the facts concerning the defendant's residence are uncontradicted, the trial court must change the venue to the county where the defendant resides."

Id. at 307, 384 S.E.2d at 714.⁴ However,

where an action is properly instituted in a county other than that of the defendant's residence, a defendant has no right to request a change of venue to the county of his or her residence on the ground that the action was not brought in a proper county, even if the action could also have been commenced in the county where the defendant resides.

Jeter v. South Carolina Dep't of Transp., 369 S.C. 433, 442, 633 S.E.2d 143, 148 (2006). As established, *supra*, this action was not properly instituted in Charleston County pursuant to Section 15-7-20. Therefore, the Defendant had the right to request a change of venue to the county of its residence pursuant to Section 15-7-30, which it did in its Motion to Dismiss pursuant to Rule 12(b)(3), SCRCP. ("Venue is therefore only proper in the Fifth Judicial Circuit, Court of Common Pleas for Richland County, pursuant to S.C. Code § 15-7-30(E).") The Court finds the residence of SCASA to be uncontradicted. Therefore, the Court must transfer the venue to Richland County where SCASA resides.

⁴ "If the plaintiff then wishes to change venue based on the convenience of witnesses and the promotion of justice, he may make such motion to the trial judge in the county of the defendant's residence." Chestnut, 299 S.C. at 307, 384 S.E.2d at 714.

Conclusion

Wherefore, the Court finds the proper venue for this civil action is Richland County pursuant to Section 15-7-30(E). The Complaint is accordingly transferred to the Court of Common Pleas for Richland County, Fifth Judicial Court.

AND IT IS SO ORDERED.

D. L. Jefferson

The Honorable Deadra L. Jefferson
Presiding Judge, Ninth Judicial Circuit

March 14, 2011
Charleston, South Carolina

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C.P., C.S. & P.C.
Julie J. Armstrong
DEPUTY CLERK

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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.

MOTION TO INTERVENE
OF STATE EX REL ALAN WILSON, ATTORNEY GENERAL

Alan Wilson, Attorney General moves for leave to intervene in this appeal for the State to be heard on an important constitutional issue. This appeal has been taken from an Order of the Circuit declaring that South Carolina's Freedom of Information Act, S.C. Code Ann. §30-4-10, *et seq.* (2007) unconstitutionally burdens First Amendment Rights of Respondent, South Carolina Association of School Administrators. *Disabato v. South Carolina Association of School Administrators*, 2011-CP-40-2044, the Honorable G. Thomas Cooper, ^afiled August 15, 2011. The State and he have a strong interest in defending the constitutionality of the application of FOIA under these circumstances.

BACKGROUND

Plaintiff / Appellant Disabato sought a declaratory judgment and injunctive relief against SCASA declaring it to be a “public body” under FOIA and requiring it to disclose requested records. SCASA moved to dismiss, and the Circuit Court granted that motion from which Disabato took this appeal. Order, p. 1.

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 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); *see also Weston v. Carolina Research & Dev. Found.*, 303 S.C. 398, 403, 401 S.E.2d 161, 164 (1991) (“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.”)

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 seeks to intervene now on behalf of the State.

INTEREST OF THE ATTORNEY GENERAL AND THE STATE

The State and the Attorney General have a strong interest in upholding the constitutionality of FOIA's application to organizations such as SCASA that are alleged to be supported in whole or in part by public funds. 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.* As recognized by the Circuit Court, the Office of the Attorney General has concluded that "the FOIA contains no "de minimis" threshold that an entity must meet in order to constitute a 'public body.'" 2006 WL 1574910 (S.C.A.G. May 19, 2006).

Although the Circuit Court stated that it did not find FOIA to be unconstitutional, the Court found that the statute "unconstitutionally burdens SCASA's protected speech and associational rights." Order at p. 12. This ruling potentially eliminates the applicability of FOIA to many organizations that fall within that statute's express definition of "public body." This issue needs to be resolved, not only for the purposes of this case, but also for the application of FOIA in the future.

The Attorney General has an interest in this matter because the constitutionality of a State statute is at issue, and no State officer or agency is currently a party to this case. *Cf.* Rule 4(d)(4)(B), SCRCF (service of complaint on Attorney General when constitutionality of

statute attacked). Although SCASA has certain public duties¹, it is opposing rather than defending the applicability of FOIA to itself. "This Court has recognized that the Attorney General has broad statutory and common law authority in his capacity as the chief legal officer of the State to institute actions involving the welfare of the State and its citizens . . . See, *Condon v. Hodges*, 349 S.C. 232, 562 S.E.2d 623 (2002); *State v. Beach*, 271 S.C. 425, 248 S.E.2d 115 (1978)." *Condon v. State*, 354 S.C. 634, 641, 583 S.E.2d 430, 434 (2003)." In this case, the Attorney General seeks to assert these interests of the State through intervention rather than by institution of a separate action.

INTERVENTION

Although the Appellate Court rules do not expressly provide for intervention, this Court has apparently previously allowed intervention by parties on appeal², and in original jurisdiction cases³. The Rules of Civil Procedure, of course, expressly provide for intervention. Rule 24, SCRCP. Certainly, under Rule 24 (a), the State has "an interest

¹ See, eg, S.C. Code Ann. § 59-40-70 under which SCASA has a seat on the Charter School Advisory Committee established by the State Board of Education to review charter school applications for compliance with established standards.

² *Sossamon v. Greater Gaffney Metro. Utilities Area*, 236 S.C. 173, 177, 113 S.E.2d 534, 536 (1960); *Cannon v. Sligh*, 170 S.C. 45, 169 S.E. 712 (1933).

³ *Sanford v. S. Carolina State Ethics Comm'n*, 385 S.C. 483, 489, 685 S.E.2d 600, 603 opinion clarified, 386 S.C. 274, 688 S.E.2d 120 (2009); *Am. Petroleum Inst. v. S. Carolina Dept. of Revenue*, 382 S.C. 572, 575, 677 S.E.2d 16, 17 (2009) *Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773 (2003); *Keyserling v. Beasley*, 322 S.C. 83, 470 S.E.2d 100 (1996).

relating to the . . . transaction which is the subject of the action and . . . is so situated that the disposition of the action may as a practical matter impair or impede [its] ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Although both the Appellant and the Respondent have fine lawyers, Appellant is a private citizen rather than a public entity, and Respondent's position regarding FOIA is contrary to the position the State plans to take. Therefore, neither of those parties can adequately represent the State's interests. Moreover, under Rule 24(b), intervention is permitted when the applicant's claim and the main action have a question of law in common as they do here and intervention will not unduly delay or prejudice adjudication of the rights of the existing parties which will not happen here (*see, infra*). The Rules of Civil Procedure also clearly indicate that the Attorney General should be given the opportunity to be heard when a constitutional issue is raised in an action. *Cf* Rules 4((d)(4)(B), *supra*, and 24(c) (service of intervention motion on Attorney General when constitutionality of statute drawn into question.)

The State ex rel Wilson seeks to intervene rather than simply file an amicus because it gives the State the status of a party for full participation in this case and the opportunity to participate should a party to this appeal later petition for certiorari to the United States Supreme Court. *See, Condon v. State, supra* (Attorney General must be party in order to appeal). Ordinarily, amicus curiae do not deliver oral argument in a case, but the Attorney General's Office also would like the opportunity to address the constitutional issue in this case on oral argument.

ALIGNMENT AND BRIEFING

The Attorney General requests permission to file his opening and any reply briefs for the State at the same time as Appellant's brief are due. Because this case is on appeal rather than in the original jurisdiction of the Court and involves a Motion to Dismiss rather than a Record of exhibits and testimony, the Attorney General can rely on the existing pleadings and motion in the record for purposes of his participation⁴. Therefore, his intervention would not delay proceedings in this case. Although he plans to defend the constitutionality of the application of FOIA in this case and would appreciate being aligned as an Appellant, he certainly has no objection if this Court prefers to designate the State ex rel Wilson as simply an Intervenor.

⁴ Therefore, his filing a pleading under Rule 24(c) should not be necessary, and he respectfully requests leave not to file a pleading.

CONCLUSION

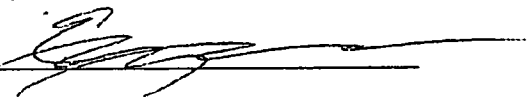
The *State ex rel Wilson* respectfully requests that this Motion to Intervene be granted.

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
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(803) 734-3680

By: 

ATTORNEYS FOR THE
STATE EX REL WILSON

September 30, 2011

PROOF OF SERVICE

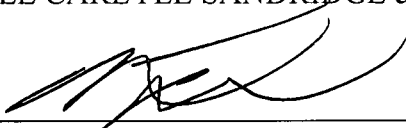
I, the undersigned Attorney of the law offices of Womble Carlyle Sandridge & Rice LLP, attorneys for Appellant, do hereby certify that I have served the below parties in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same to the following address(es):

PLEADING: Record on Appeal

PARTIES SERVED: Kenneth L. Childs
John M. Reagle
Keith R. Powell
The Tower at 1301 Gervais Street
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Post Office Box 11367 (29211)
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The Honorable Alan Wilson
Attorney General for the State of South Carolina
Robert D. Cook
Deputy Attorney General
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WOMBLE CARLYLE SANDRIDGE & RICE LLP

By: 

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

Attorneys for Appellant Rocky Disabato

Columbia, South Carolina
May 10, 2012

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S.C. Supreme Court

1 him, or do you need time to sit down with him and speak
2 with him? I defer to whichever you prefer. But I do
3 want you to have an opportunity to disclose that to
4 your client and ask him whether he has any opposition
5 to the Court hearing it.

6 Well it's the South Carolina Association of
7 School Administrators, so who would you need to talk
8 to?

9 MR. REAGLE: The executive director.

10 THE COURT: Who is that?

11 MR. REAGLE: Molly Spearman, assuming she is
12 available.

13 THE COURT: Do you want to try and give her a
14 call?

15 MR. REAGLE: If I can reach her. I guess they
16 are going to take our recommendation on it.

17 THE COURT: Have you all agreed on something?

18 MR. REAGLE: No, we haven't. But I don't know
19 what I would tell them other than you were with the
20 same liberty fellowship class.

21 THE COURT: We are part of the same fellowship
22 program. We interact with one another socially and on
23 the fellowship level, in that context with the
24 fellowship. Which means -- which met for two years
25 four times a year, and then we have reunions where we

1 meet. It's purely an intellectual exercise.

2 MR. REAGLE: I mean I just don't think, unless
3 you feel that there are grounds for you to recuse
4 yourself, that it's --

5 THE COURT: Not really. But I have found in
6 this job, having done this now 15 years, that it is
7 better to disclose than not disclose. My secretary
8 says I tell too much. But I figure -- she is like, you
9 are just so overt.

10 But I feel like there really is no way of being
11 too overly cautious. I always feel like people are in
12 a better position if they know than if they find out
13 later. It's not for me to determine if it's innocuous
14 or not, it's for you to determine that.

15 I have often had lawyers say to me, I would
16 never have known that if you didn't tell me. That to
17 me makes me feel even better because things have a
18 funny way of coming out. But the funny thing about is
19 if you were to see me and Mr. Hall someplace
20 interacting in liberty fellowship, or your client were
21 to, and I ruled on that case, they might feel like,
22 well, gosh, you know, I didn't know that.

23 Things that are innocent become very -- take on
24 different tones. So I feel it's better to let you know
25 than not let you know. So it's up to you. I take no

1 position one way or the other, but it won't hurt my
2 feelings.

3 MR. REAGLE: I appreciate the extra information,
4 but I think as long as Your Honor feels able to serve
5 impartially.

6 THE COURT: I'm fine.

7 MR. REAGLE: That sort of intellectual
8 connection is --

9 THE COURT: I often refer to judges as the
10 board. You know, we are all just a part of it.

11 You are not a Star Trek fan, are you?

12 MR. REAGLE: I am.

13 THE COURT: We are kind of like the board. We
14 are just sort of all tied into case law. And however
15 it shakes out is how it shakes out, it's not personal.

16 So wherever the logic leads me. But I have no
17 concern about being able to be fair and impartial. But
18 I felt the need to disclose that to you.

19 MR. REAGLE: I appreciate that.

20 THE COURT: So don't feel like you need to call
21 Ms. Spearman?

22 MR. REAGLE: I do not, Your Honor.

23 THE COURT: Okay. All right, we will hear the
24 motions in the order that they were filed.

25 Defendant's motion to dismiss pursuant to Rule

1 12(B)(3), which is venue.

2 MR. REAGLE: Thank you, Your Honor. John Reagle
3 with the law firm Childs and Halligan. Keith Powell
4 with our firm is here today as well. We represent the
5 South Carolina Association of School Administrators in
6 this action brought by Mr. Disabato under the South
7 Carolina Freedom of Information Act.

8 This case represents a somewhat novel effort to
9 extend the Freedom of Information Act beyond what is
10 seen as traditionally governmental or public bodies to,
11 in this case SCASA, which is a nonprofit, private
12 eleemosynary corporation that engages in issue advocacy
13 relating to education in South Carolina.

14 The central issue to the venue question, venue
15 is pled in the complaint under Paragraph 5, under
16 Section 15-7-20 that provides that actions -- the
17 following causes must be tried in the county where the
18 cause or some part thereof arose; cases for the
19 recovery of penalty or forfeiture of those by a
20 statute; or against a public officer or person
21 specially appointed to execute his duties; or an act
22 done by him in virtue of his office, or against a
23 person who by his command or at his aid shall do
24 anything touching the duties of such officer.

25 SCASA's position is that it is a resident, and

1 its offices are located in Richland County, and that
2 venue should be transferred to Richland County.

3 This is not a case where a legal penalty or
4 forfeiture or goes by statute, the relief sought is an
5 injunction against SCASA, from -- first is comply with
6 the FOIA, and secondly to not to violate the FOIA in
7 the future.

8 I think the injunctive aspects of the relief
9 highlights the venue problem. Obviously for a court in
10 Charleston to be overseeing an injunction of a
11 nonprofit corporation in Richland County is more
12 complicated than it would be if it were a Richland
13 County court.

14 Secondly, SCASA simply is not a public officer.
15 It is a private corporation. It's employees are
16 private employees. The case law dealing with public
17 officers uniformly talks about public officer having
18 exercised some portion of the sovereign power of the
19 state, and holding public office.

20 SCASA neither holds public office, nor exercises
21 any of the sovereign power of the state. Whether or
22 not some of its members do is not an issue for purposes
23 of the venue.

24 Finally, none of the cause of action arose in
25 Charleston County. Again presumably the FOIA request,

1 which is Exhibit D to the complaint, was written or
2 mailed from Charleston, but all of SCASA's records are
3 in -- are in Richland County. Richland County is where
4 SCASA regularly holds its public meeting or its
5 meetings, and where all its records are maintained and
6 its offices.

7 THE COURT: Does it have an office here?

8 MR. REAGLE: No, it does not.

9 THE COURT: Does it have any office other than
10 Richland County?

11 MR. REAGLE: Not that I'm aware of.

12 THE COURT: You may continue.

13 MR. REAGLE: And certainly the response to the
14 FOIA request, any production of records under FOIA, if
15 SCASA were determined to be subject to FOIA, would be
16 in Richland County. Any continuing production of
17 records or making documents available would be done in
18 Richland County.

19 So it seems in all respects any commonsensical
20 reading of 15-7-20 is that it simply does not apply to
21 SCASA because the cause of action did not arise in
22 Charleston but rather in Richland County. And that
23 15-7-30 ought to apply and venue transferred to
24 Richland County.

25 Finally, if this motion is granted then the

1 other motions need not be heard and venue should be
2 transferred, and the court in Richland County would
3 hear the remaining discovery motions.

4 We do have, if the Court wants to hear the
5 discovery motions, we do have a memorandum prepared for
6 consideration of the Court which we have not filed or
7 served because --

8 THE COURT: How was this association
9 established? Did they in fact file the papers with the
10 Secretary of State as an eleemosynary corporation?

11 MR. REAGLE: Yes, Your Honor. They're not
12 created by statute, they were not established by an act
13 of the legislature, they were a -- by filing the
14 articles of incorporation.

15 THE COURT: I'm sorry, repeat that last
16 sentence.

17 MR. REAGLE: They were not established by a
18 statute, unlike some corporations or associations that
19 are established by a statute or an act of legislature.
20 SCASA was established --

21 THE COURT: How was it originally established?

22 MR. REAGLE: By filing the articles of
23 incorporation.

24 THE COURT: No, I mean, who was the impetus
25 behind it being established?

1 MR. REAGLE: It came out of --

2 THE COURT: Did it come out of the education
3 association?

4 MR. REAGLE: Yes, the SCEA I believe back in the
5 early '70s.

6 THE COURT: How are they supported?

7 MR. REAGLE: Like many associations they put on
8 conferences, they have dues-paying members, they
9 provide other services. But primarily conferences,
10 educational programs and dues.

11 THE COURT: Is there anything further?

12 MR. REAGLE: No, Your Honor, thank you.

13 THE COURT: You're welcome. Mr. Hall or Mr.
14 Carroll.

15 MR. HALL: Thank you, Your Honor, may it please
16 the Court.

17 THE COURT: Yes, sir.

18 MR. HALL: We have got a case here, Judge, that
19 was filed back in December of 2009. And we have had
20 absolutely no discovery, nothing has happened since
21 then other than SCASA refusing to respond to discovery,
22 filing a motion to dismissed based on venue, and also
23 going to federal court and asking the federal court to
24 be able to suppose constitutional issues involving the
25 FOIA statute.

1 THE COURT: What happened with the federal court
2 case? Is it separate from this?

3 MR. HALL: That's correct, Your Honor. Judge
4 Curry had that case. I am holding in my hand a copy of
5 Judge Curry's order granting the motion to stay and
6 dismiss.

7 One thing importantly that Judge Curry noted was
8 that SCASA has mixed private and public attributes
9 based on, quote, receipt of public funds and statutory
10 assignment of duties.

11 What the Court there was referring to, Your
12 Honor, is sections 59-1-452, 59-40-230, 59-40-70,
13 59-140-10, those four provisions of the code which give
14 and assign to SCASA certain governmental
15 responsibilities.

16 THE COURT: I understand that, but why would
17 venue be proper here if they don't have an office here
18 and their only office is in Richland County?

19 MR. HALL: Venue is proper here, Your Honor,
20 because under 15-7-20 the statute actions must be tried
21 in the county where the cause of action or some part
22 thereof arose. If there is an attempt to recovery
23 penalty or forfeiture imposed by statute.

24 THE COURT: But your client's action is not
25 where it arose. He made a request, and is making a

1 request, but his request arises out of actions he
2 alleges or he seeks to be informed about having been
3 taken by this organization which has its principle
4 place of business in Richland County where it has all
5 of its records, its meetings, and otherwise.

6 That's why I asked a very specific question if
7 they had offices in other places across the state. I
8 was not aware that they did, but I wanted to make sure
9 for clarity's sake that I was not making an inaccurate
10 assumption.

11 MR. HALL: Your Honor, here is the problem with
12 that line of argument. If that were the case with
13 regard to FOIA requests, every citizen in the corners
14 of the state who had made requests of a governmental
15 agency, or any other public body, would have to go all
16 the way to Richland County in order to enforce a FOIA
17 request.

18 THE COURT: That's a little different.
19 Governmental entities are a little different because
20 FOIA deals with them specifically and provides for the
21 mechanism and the remedy of how they are to give
22 records.

23 MR. HALL: And it does here as well. In this
24 case the very allegation of the complaint is that SCASA
25 is a public body, no different than any other

1 governmental entity for FOIA purposes.

2 THE COURT: Were they created by statute?

3 MR. HALL: They are assigned statutory duties by
4 the general assembly.

5 THE COURT: That wasn't my question. Were they
6 created by statute?

7 MR. HALL: They were not created by statute,
8 they are given their own powers.

9 THE COURT: By what authority are they given
10 statutory powers? How did that come about?

11 MR. HALL: It's a series of different provisions
12 over the years, Your Honor. It's the code provisions
13 that I --

14 THE COURT: Uh-hum, I got those. But I mean it
15 still had to grow out of some statutory authority. The
16 legislature could not unilaterally assign authority to
17 a public -- a private entity without some underlying
18 statutory framework.

19 MR. HALL: Your Honor, that goes to what the
20 very rub is here. SCASA has a statutory
21 responsibility, for instance, to recommend the
22 superintendents and financial administrators of public
23 school districts to three-year appointments as members
24 of special committee to evaluate proposals made to the
25 public school employee cost-savings program.

1 THE COURT: Let me ask a question. When the
2 Supreme Court sets up commissions and other things, or
3 when other commissions and other things are authorized
4 by statute, let's say the Bar Association is allowed to
5 appoint members, or another association is allowed to
6 appoint members, does that make them a governmental
7 entity?

8 MR. HALL: The case law, Your Honor, provides
9 that when the entity is supported in whole or in part
10 by public funds, it is a public entity based on the
11 Westin case --

12 THE COURT: What public funds do they receive?

13 MR. HALL: All of their dues come from public
14 funds. That is noted, in fact, in Judge Curry's order
15 --

16 THE COURT: How are the dues coming from public
17 funds when their dues are paid by individuals?

18 MR. HALL: Well the dues come from the school
19 districts. The dues come from school districts.

20 THE COURT: And they don't come from individual
21 administrators?

22 MR. HALL: In some instances they may, Your
23 Honor. A significant portion of dues come from the
24 districts themselves. And the dues are assessed on
25 that basis. As Judge Curry noted because --

1 THE COURT: And I respect Judge Curry greatly,
2 but I can't take what she says as any precedent or
3 binding on this Court.

4 MR. HALL: I understand, Your Honor. The key
5 point is that the source of its dollar, its support, is
6 in fact public monies.

7 The -- they also receive -- employees of SCASA
8 receive state health insurance, they receive the
9 benefits of the state dental plan, they receive state
10 retirement.

11 THE COURT: Wouldn't they get that anyway
12 because to be a member of the association, don't you
13 have to be employed as an administrator?

14 MR. HALL: No, you do not.

15 THE COURT: You don't? what are the
16 requirements for membership?

17 MR. HALL: Your Honor, I don't know the precise
18 requirements, but let me give you an example. SCASA
19 itself, its employees and its offices wouldn't be
20 administrators in school districts, but they do receive
21 all of these public benefits that I just described;
22 retirement, dental insurance, health insurance. They
23 are in fact a public body.

24 If you take the venue argument that was offered
25 by counsel for SCASA, that would mean anybody who said,

1 hey, let's deal with a governmental entity or agency in
2 Columbia, or a public body of any kind in Columbia,
3 you'd have to go to Columbia to enforce that.

4 As the Court is aware FOIA is designed to enable
5 citizens, in this case a journalist, Mr. Disabato, who
6 is with Citadel Broadcasting here to access certain
7 information.

8 THE COURT: What information is he seeking?

9 MR. HALL: He is seeking additional information
10 with regard to their sources of funds, and also their
11 exercise of those statutory responsibilities that have
12 been delegated to them.

13 THE COURT: Isn't that public information at the
14 Secretary of State? Don't they have to provide that to
15 the Secretary of State?

16 MR. HALL: They do not, Your Honor. We don't
17 know -- they don't provide their budgets, they don't
18 provide their income statements by source, they don't
19 disclose those in any way. In fact, the discovery
20 request in this case aim exactly at those questions.

21 And importantly, even though we are in a unified
22 judicial system here, and the motion to dismiss has
23 been based on venue, they have refused to answer the
24 discovery in this case on the basis that the venue must
25 be determined in advance.

1 That's simply not the case. Regardless of
2 whether this case is in Richland County or Charleston
3 County, we've had discovery outstanding in this case
4 for many, many months at this point. And again, hiding
5 behind that venue statute which is, and we argue,
6 inappropriate.

7 So again, Your Honor, the question is where does
8 the cause of action arise, and what is involved here?
9 You've got in the petition a request for attorney's
10 fees. That is a statutory award of attorney's fees is
11 provided for under FOIA; that is sought clearly in the
12 complaint.

13 The citizen lives here. The request originated
14 from here. The denial of the request for information
15 FOIA sent back to the citizen here. To say that the
16 citizen must go to Columbia and physically be present
17 in that county to deal with a public body's refusal to
18 comply with FOIA, who happens to have an office there,
19 would make FOIA a Richland County only statute in
20 practical terms.

21 And obviously its litigation history throughout
22 the state is not that. Citizens all over the state
23 file FOIA requests and deal with them in each circuit
24 court.

25 So again, Your Honor, venue is proper here in

1 Richland County -- excuse me, here in Charleston
2 County. It has been used to obstruct the discovery
3 process here. I want to disagree very clearly with Mr.
4 Reagle's suggestion that the Court's ruling on venue
5 has anything to do with discovery.

6 THE COURT: Let me ask a quick question.
7 Mr. Reagle, why would you not go ahead and comply with
8 discovery?

9 Let's say for argument's sake, best case
10 scenario, I order that venue is appropriate in Richland
11 County. Why wouldn't you go ahead and comply with the
12 discovery? It seems to me you are delaying what is
13 going to happen anyway.

14 If venue is proper in Richland there are no
15 other motions that are outstanding other than the
16 motion to compel and the motion for protective order.
17 It seems to me you all should be able to work that out.

18 MR. REAGLE: I hope we could, and I believe we
19 probably can go a long way working that out.

20 THE COURT: I'm sorry. I didn't hear you.

21 MR. REAGLE: I hope we could, and I believe we
22 can go a long way in working that out.

23 THE COURT: Have you made any attempts to?

24 MR. REAGLE: No, we have not. And here's --
25 again our position initially was that this question

1 should be addressed in federal court. We do not
2 believe that FOIA can constitutionally --

3 THE COURT: Well hasn't that been ruled on
4 already?

5 MR. REAGLE: It has. It's in front of the 4th
6 Circuit right now. But that is the one issue. The
7 other issue is --

8 THE COURT: You mean the federal appeal --

9 MR. REAGLE: -- the discovery is not -- we are
10 not hiding behind venue, we have not answered the
11 complaint. So we think it's premature in that the
12 issues have not yet been framed.

13 The third point on this, and by most important
14 from our perspective, goes back to the First Amendment.
15 SCASA is very clearly protected by the First Amendment
16 with respect to its associational rights and its
17 records, such as its budget, its financial records, the
18 sources of income, are constitutionally protected
19 information. And that is why we sought a protective
20 order in this matter to limit what discovery could be.

21 Fourth, under FOIA typically when privileges are
22 asserted, and we certainly assert a privilege over much
23 of the information they are seeking, and probably
24 almost everything Mr. Disabato sought, which was in
25 many cases litigation-related correspondence, and arose

1 out of SCASA's lawsuit against the governor in which
2 the Supreme Court entered a writ of mandamus against
3 the governor to accept the 780 million dollars in ARRA
4 funds, those are privileged records. And FOIA
5 is very clear that in those situations, at most what
6 should happen is there should be an in-camera review by
7 the Court. And so really our protective order would
8 ask that there be no discovery until the issues have
9 been joined and we have an opportunity to see what are
10 the parameters. I don't know that Mr.

11 Hall at this time recognizes SCASA has any First
12 Amendment rights. So that issue may need to be
13 adjudicated before we can sit down and have some
14 discussion about what would be some appropriate
15 discovery, what is necessary for the litigation in
16 light of the competing First Amendment issues that
17 SCASA has.

18 I would also like to clarify some things. Judge
19 Curry did not hold any kind of --

20 THE COURT: I'm not -- whatever Judge Curry has
21 to say is not binding on this Court. But again, I have
22 a great deal of respect for her, I consider her a
23 friend, but you couldn't take my order over to her and
24 consider it as precedent, neither can hers be
25 considered as precedent on this Court.

1 It hasn't been subject to any appellate reviews.

2 MR. REAGLE: Thank you, Your Honor.

3 THE COURT: So I cannot rely on

4 MR. REAGLE: There are issues about the statutes
5 that Mr. Hall cited. Is SCASA -- for example there is
6 one statute that makes the executive director of SCASA,
7 or her designee, a member of the charter school
8 advisory committee.

9 There are a myriad of things that you were
10 talking about the Supreme Court might establish a
11 commission. Unwittingly I don't think you can, through
12 something like that, say it's a public entity and a
13 whole organization is denied its privacy rights.

14 The membership in the retirement system, dental
15 plan, those are paid-for services. SCASA's employees
16 do have an entitlement to enroll in and participate in
17 some of the state benefit plans, but they pay for them.
18 SCASA pays the matching contribution. There is no
19 funds coming from the government to SCASA to support
20 those types of so-called benefits for its employees.

21 These are factual issues that obviously may need
22 to be addressed in the future. But to assume from the
23 get-go that SCASA is a public body and should be able
24 to be dragged to any of the 46 counties, wherever a
25 letter may be written, puts the cart before the horse.

1 I think it seems if a plaintiff is interested
2 enough to try and establish that a private organization
3 should subject to the FOIA, it isn't too much to ask
4 that individual to bring the lawsuit in the state where
5 the other private individual or private entity resides.
6 That seems entirely fair. This isn't a
7 case where it is a governor being sued under the FOIA.
8 That clearly would be a public official being sued to
9 produce records under the FOIA. I think there is no
10 question that --

11 THE COURT: Let me ask a question. Are you
12 conceding that your organization is subject to a FOIA
13 request?

14 MR. REAGLE: No.

15 THE COURT: Because I wasn't hearing you
16 clearly.

17 MR. REAGLE: I think we cannot just assume SCASA
18 is a --

19 THE COURT: At some point are you going to make
20 a motion to dismiss on that basis?

21 MR. REAGLE: Yes, Your Honor. And if we have to
22 we will raise the claim in state court that we raised
23 in federal court; that the FOIA is unconstitutional as
24 opposed to issue advocacy private associations, such as
25 chamber of commerce is a very similar situation --

1 THE COURT: As I hear you all argue it, we are
2 really not talking about venue. What we are talking
3 about is whether this association is a public body
4 subject to FOIA requests. That's really what you all
5 are arguing. You really aren't arguing venue.

6 MR. REAGLE: Not right now, you are correct.

7 THE COURT: You all are arguing venue, but
8 that's really not how it is being argued.

9 MR. HALL: Your Honor, here's the question.
10 Does this Court have venue? Can this matter be heard
11 here, or does it go somewhere else?

12 You heard the arguments here with regard to
13 First Amendment rights, a lot of the things, none of
14 that has a lick to do with venue.

15 THE COURT: Well, no, we segued into the motion
16 for protective order and discovery. He was answering
17 my question about that.

18 MR. HALL: What we have here is a cause of
19 action arising in this county. FOIA requests don't
20 arise in the county of the entity that receives the
21 request. If that were the case, everything that's in
22 Columbia would only be able to be litigated in
23 Columbia.

24 I have not gone through the books to see where
25 every FOIA case came from, but I know from my own

1 experience that FOIA cases are litigated in every
2 county in the state. And the reason they are is
3 because public bodies are subject to FOIA.

4 So you file a request. If the entity does not
5 answer the request, you go to court. That's exactly
6 what Mr. Disabato has done here in Richland County as a
7 journalist here with the Citadel Broadcasting.

8 THE COURT: What is he really trying to find
9 out?

10 MR. HALL: He wants to know the financial
11 information related to a number of things. His request
12 is dated -- goes back to the stimulus fund cases. But
13 the discovery requests also deal with other budgeting
14 issues.

15 THE COURT: But what's the real issue? What is
16 it that he is really trying to get at?

17 MR. HALL: Well, Your Honor, what he is entitled
18 to know is the financial and governmental operations of
19 what is a public body.

20 This is like years ago when the University of
21 South Carolina had it's R&D Foundation, it's
22 Educational Foundation. Buildings and development and
23 other work was done through the R&D Foundation and the
24 Educational Foundation.

25 A group of folks sued the university and said,

1 look, the R&D Foundation is receiving public dollars
2 and fulfilling public responsibilities by statute. Was
3 the R&D Foundation, the Development Foundation created
4 by statute? No. Did the Court hold that they were
5 public bodies nevertheless? Yes. That's the Westin
6 decision from the early 1990's.

7 We have the same thing here. We have public
8 functions assigned by statute and performed by SCASA.
9 We have received public funds to fulfill those
10 responsibilities. And we have an entity that says,
11 hey, I'm not a public body. Yeah, my people get dental
12 insurance.

13 But I'm a private citizen. I'm not eligible for
14 state benefits. I'm not even allowed to pay for them
15 in full. So this suggestion that they might pay full
16 credit, which is disputed, doesn't change the fact that
17 they're given access to that subsidized pot.

18 So the only question is, where do we proceed?
19 Your Honor, respectfully we say that should proceed
20 here. We are a year into this. All discovery has been
21 obstructed on the basis of this venue argument
22 inappropriately.

23 THE COURT: They haven't answered yet so you are
24 not subject to discovery until they answer.

25 MR. HALL: Well, actually, Your Honor, Rule 33

1 says you can serve --

2 THE COURT: Says you can serve. It's also
3 discretionary. I've got to look at the rule right
4 quick, but I think until an answer has been filed you
5 really are not -- as long as there are dispositive
6 motions that deal with jurisdiction and venue.

7 MR. HALL: Respectfully, Your Honor --

8 THE COURT: Unless you have some limited
9 discovery on that issue which often happens in class
10 actions.

11 MR. HALL: Respectfully, Your Honor, the statute
12 provides that you can file discovery with the
13 complaint, the statute doesn't make it go away, the
14 rules don't make it go away.

15 THE COURT: Until such time as the motion for
16 protective order and the motion to compel are resolved,
17 he really doesn't have any duty to answer discovery at
18 this time because he's interposed a motion for
19 protective order.

20 MR. HALL: Your Honor, and obviously we need to
21 hear that motion then today. If we don't have a
22 dispositive motion, there is no mission to dismiss
23 here. If venue is improper here, it's goes to another
24 location. There is no jurisdictional issue.
25 So the idea that somehow the motion to change venue

1 obviates responsibilities under Rule 33. I think is
2 misplaced.

3 MR. REAGLE: Your Honor, I think the rule is
4 fairly clear. Venue motion should be resolved first,
5 and no further defenses are required to be raised until
6 that time.

7 So to say somehow we have not interposed a
8 dispositive motion is meaningless because I clearly --
9 our intent is we have filed in federal court a claim
10 challenging essentially the application of the FOIA all
11 together.

12 In addition, I'd like to say this idea that
13 somehow FOIA should be a traveling library that brings
14 records around individual citizens is just wrong. The
15 act only requires records be made available to
16 citizens, and then there can be reasonable charges
17 imposed.

18 So even if SCASA were subject to FOIA, the
19 records would be produced in Columbia in any event.
20 Doesn't seem much of a stretch to somehow to say that
21 the statute couldn't have intended to require citizens
22 to bring lawsuits where the organization is being
23 subjected to the FOIA, doesn't seem consistent with the
24 structure of FOIA.

25 MR. HALL: Your Honor, again the question is

1 where does the case proceed. Even if documents are
2 made available in Columbia, that does not mean the only
3 place you can litigate a case involving FOIA is in
4 Columbia.

5 THE COURT: The issue is still whether this is a
6 public body subject to FOIA is really what it comes
7 down to is what you all are saying to me.

8 MR. HALL: That's the issue that ultimately will
9 be --

10 THE COURT: And whether they are subject to
11 15-7-20.

12 MR. HALL: That issue will ultimately I'm sure,
13 Your Honor, be adjudicated and I'm sure appealed in
14 either direction.

15 The question here is are they a public body and
16 --

17 THE COURT: I'm going to have to resolve that
18 question to resolve the venue issue.

19 MR. REAGLE: I don't think you do because I
20 don't think there is an identity --

21 THE COURT: I will have to deal with it
22 peripherally.

23 MR. REAGLE: A public body and a public
24 official. For example, there is an attorney general's
25 opinion out there that says every school advisory

1 committee, school proving counsel, is a public body
2 under FOIA. That doesn't mean that every chairman or
3 every school group is a public official.

4 THE COURT: And again I greatly respect the
5 attorney general, but that's not binding either.

6 MR. REAGLE: No, I know. But there are many
7 bodies that are public bodies under FOIA, including the
8 Quality Towing case, the advisory committee to the city
9 manager of Conway. That doesn't mean that that
10 committee is a public official.

11 A public official is a very high position. It
12 is someone who holds a public office and exercises some
13 of the sovereign powers of the state. And I guess what
14 we would keep coming back to is under any set of
15 circumstances SCASA does not exercise any of the
16 sovereign powers of the state. We do not --

17 THE COURT: I need you to wrap it up for me. I
18 have given you all 45 minutes, which is well beyond the
19 time allocated. I need you all to give me a chance to
20 read.

21 I'm taking the motion pursuant to Rule 12(B)(3)
22 under advisement. I need both of you to submit
23 proposed orders to me within ten days of today in word
24 format to djeffersonsc@sccourts.org. Please advise
25 your staff to only send it to that address. I have a

1 junk filter on my box and it will never get to me.

2 I have it designed that way so that orders are
3 processed through my office in an orderly manner and
4 they don't fall through the cracks. They need to go to
5 my secretary first to be processed.

6 I don't even check my junk mailbox, I empty it.
7 So I would hate for your order to land there and be
8 deleted.

9 As regards to the motion for protective order
10 and the motion to compel, all of them are slightly --
11 well, I'm taking it sort of in reverse order. The
12 rules regarding discovery are really quite clear. And
13 they provide that discovery can be served on the
14 defendant within 45 days of the filing of the summons
15 and complaint.

16 And the Court may allow for shorter or longer
17 time depending on whether I guess a motion has been
18 made, the rule really does not specify. But the rules
19 do provide, Mr. Reagle, that upon service of
20 interrogatories and requests for production what you
21 are supposed to do is either answer them or file an
22 objection regarding them.

23 And so a blanket motion for a protective order
24 is not the way it should be handled. What you need to
25 do, pursuant to the rules, is the rules are not

1 contingent upon you filing an answer or whether there
2 is a dispositive pleading. It requires that you answer
3 the discovery. And that you either interpose an answer
4 or an objection.

5 So whatever the valid objection you deem
6 appropriate, you need to answer the interrogatories and
7 request for production. You can either answer them or
8 propound an objection to each of those.

9 And at that point I think then the Court will be in a
10 position to hear any motion for protective order, so I
11 am continuing that motion.

12 MR. REAGLE: Your Honor, we did file --

13 THE COURT: Actually, I am going to continue
14 both of them because I think they're premature.

15 MR. REAGLE: We did file an answer.

16 THE COURT: You did file an answer already?

17 MR. REAGLE: It was generally objection.

18 THE COURT: That's not clear from --

19 MR. REAGLE: And they're not a specific answer.

20 THE COURT: You need to answer each one of them,
21 that's what the rules provide. You need to provide an
22 answer or an objection. That's how they need to be
23 responded to.

24 I'm going to continue those other two motions
25 until that task has been completed. I suggest that you

1 all work through your issues and determine what in fact
2 is privileged or what may not be privileged.
3 While you all have indicated that the Court does not
4 have determine if this is a public body to make this
5 decision, you argued it all through your documents.
6 That's why I am trying to figure out what -- because
7 each of your documents say the Court is required to
8 determine if it's a public body.

9 So if that is not in fact what you want the
10 Court to determine, you need to make that clear in your
11 proposed orders.

12 MR. HALL: Your Honor, if I might hand up a
13 brief for Your Honor's consideration as well.

14 Your Honor, might I approach?

15 THE COURT: Uh-hum.

16 MR. HALL: Thank you. And, Your Honor, we would
17 be delighted for the Court to address the public body
18 question.

19 THE COURT: Well I'd dodge it. I'm like any
20 other court, I'm only going to answer what I'm asked.

21 MR. HALL: Your Honor, if I might inquire of the
22 Court, is it Your Honor's intention to maintain
23 jurisdiction yourself with regard to this case?

24 THE COURT: No, cannot do that, got too much to
25 do. You all would never get your cases heard.

1 It will roll to the next nonjury roster. And I will
2 be honest with you, I probably have 13 terms of nonjury
3 as I did last year, and I really don't intend to see
4 more than I have.

5 MR. HALL: Thank you, Judge.

6 THE COURT: You're welcome. I'm looking to
7 receive those proposed orders. The quicker you all get
8 them to me, the quicker we can make a decision.

9 Thank you all very much. Have a great day.

10 (Whereupon, the proceedings in this matter
11 before the Court were adjourned.)

12 * * * * *

C E R T I F I C A T E

I, the undersigned, ANNE BOULEY MEYER,
Official Court Reporter for the Ninth Judicial
Circuit of the State of South Carolina, do hereby
certify that the foregoing is a true, accurate, and
complete transcript of record, and of all the
proceedings had and evidence introduced in the above
captioned case, relative to appeal, in the Circuit
Court for South Carolina, on the indicated date.

I do further certify that I am neither
of kin, counsel, nor interest to any party hereto.

-----*Anne Bouley Meyer*-----

Anne Bouley Meyer, RPR
Circuit Court Reporter

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
County of Richland	)	2011-CP-40-02044
	)	
	)	
Rocky Disabato	)	
d/b/a Rocky D	)	
	)	
Plaintiff	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
South Carolina Association	)	
Of School Administrators	)	
	)	
Defendant	)	

April 18, 2011
Columbia, South Carolina

BEFORE:

The Honorable G. Thomas Cooper, Judge

APPEARANCES:

M. Todd Carroll, Esq.
Kevin A. Hall, Esq.
Attorneys for the Plaintiff

Keith Robert Powell, Esq.
Ken Childs, Esq.
John Marshall Reagle, Esq.
Attorneys for the Defendant

KAREN AMBROZIAK
Official Court Reporter

CONTENTS:EXHIBITS:

(There were no exhibits introduced.)

WITNESSES:

(There were no witnesses called.)

Certificate of Reporter

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