

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ON APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS
Hon G. Thomas Cooper, Jr., Circuit Court Judge

No. 2011-CP-40-2044

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S.C. Supreme Court

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

v.

South Carolina Association of School Administrators (SCASA), Respondent

BRIEF *AMICUS CURIAE* OF
THE STUDENT PRESS LAW CENTER AND
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
IN SUPPORT OF PETITIONER ROCKY DISABATO

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I. AMICIS' STATEMENT OF IDENTITY AND INTEREST

The Student Press Law Center (the "SPLC") is a nonprofit, non-partisan organization which, since 1974, has been the nation's only legal assistance agency devoted exclusively to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment to the Constitution of the United States. The SPLC provides free legal assistance, information and educational materials for student journalists on a variety of legal topics.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

Amici share an interest in the continued viability of open-records and open-meetings laws, which are in many ways the lifeblood of the news reporting performed by the journalists served by the SPLC and the RCFP. *Amici* have appeared in many dozens of cases across the United States to speak on behalf of working journalists and the audiences they serve, and their interest in keeping open-government laws strong and effective. *Amici* share a concern that the ruling below gravely undermines the effectiveness of South Carolina's Freedom of Information Act, and – if not reversed – may be used to shed doubt on the

enforceability of such acts not only in South Carolina but throughout the country, to the great detriment of an informed citizenry.

II. STATEMENT OF THE CASE AND ISSUES

Open-records and open-meetings laws are perhaps the most valuable tools available to journalists and citizens alike to keep watch on the activities of their government and guard against abuses of public trust.¹ The South Carolina legislature made the informed decision to enact a “sunshine law” that reaches government activity in all of its forms, regardless of whether the governmental actor is structured as an “agency” or as a “corporation.” The decision below gravely threatens the continued effectiveness of South Carolina’s open-records and open-meetings laws as tools of civic vigilance.

The First Amendment exists, *inter alia*, as a check on the abuse of government authority to the detriment of citizens’ well-being. To regard the First Amendment as protecting government actors against an inquisitive public, as the trial court did below, fundamentally misconceives and defeats its purpose. People who voluntarily undertake positions of public trust for which they accept public money accept that they must transact business transparently.

¹ David Cuillier & Charles Davis, *THE ART OF ACCESS* xv (2010) (“Documents provide the foundation for reporting that changes the world, and they keep government accountable.”).

The trial court erred in holding that a public body has a First Amendment right to do the people’s business behind closed doors. Applying the First Amendment in this context raises the very real risk that all mandatory disclosure laws – in South Carolina and throughout the country – are unconstitutional, since all of them can be misconstrued as “compelling speech.”

Amici agree with the briefs filed by Appellant Disabato and by the Attorney General, and consequently do not reiterate their arguments. *Amici* write separately to call the Court’s attention to additional supporting authority, and to emphasize the vital importance of overturning the trial court’s misapplication of the First Amendment in a case with potential to undermine ethics and disclosure laws across the country.

III. LEGAL DISCUSSION AND CITATION TO AUTHORITY

Although the trial court stated that it was not ruling on the facial constitutionality of the South Carolina Freedom of Information Act, S.C. Code Ann. § 30-4-10 *et. seq.*, the practical effect of the ruling, if not overturned, will be to cloud the enforceability of the Act in all contexts. Because the trial court assumed without deciding that the South Carolina Association of School Administrators (SCASA) is a “public body” for purposes of Act, the trial court’s First Amendment rationale may be applied to *any* public body, even a more

traditionally structured government agency such as a school board or a city council.

The notion that the First Amendment, the shield that protects the public against government overreaching into individual liberties, may instead be used as a sword by government against the citizenry is fundamentally wrong. Indeed, the Supreme Court has said time and again – including last term – that the First Amendment embodies a constitutional right to *receive* information as well as to speak. *See, e.g., Brown v. Ent'mt Merchants Ass'n*, 131 S.Ct. 2729, 2736 (2011) (state's authority to protect children from harm “does not include a free-floating power to restrict the ideas to which children may be exposed”); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) (“[The] First Amendment . . . prohibit[s] government from limiting the stock of information from which members of the public may draw.”); *Richmond Newspapers v. Virginia*, 448 U.S. 555, 575 (1980) (asserting that the First Amendment had a “purpose of assuring freedom of communication on matters relating to the functioning of government”); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (recognizing that the First Amendment includes an inherent right to acquire and proliferate knowledge and information). The Court's precedent on this issue illustrates its understanding that the First Amendment embodies a right to gather information, most especially information about the workings of government. *Kleindienst v. Mandel*, 408 U.S.

753, 762 (1972) (“In a variety of contexts this Court has referred to a First Amendment right to receive information and ideas.”). Therefore, the First Amendment cannot be used as a means to *limit* public access to government; doing so would be directly in conflict with the First Amendment’s core purpose.

A. The SCASA is a Public Body Properly Subject to Public Disclosure Laws

As the parties’ briefs have amply demonstrated, the South Carolina Association of School Administrators may be “private” in legal form, but it is a public entity in every other respect. From exercising statutorily delegated powers² to enjoying statutorily granted benefits normally reserved for government employees³ to receiving substantial taxpayer funding through its member school districts,⁴ it is readily apparent that the SCASA exists simply as an extension of the school districts for which it speaks.

² See, e.g., S.C. Code Ann. § 59-40-70 (1976) (SCASA representative appointed to Charter School Advisory Committee); S.C. Code Ann. § 59-40-230(A)(4)(b) (1976) (SCASA one of several organizations that provides recommendations to the governor as to whom to appoint to board of trustees for the Public Charter School District); S.C. Code Ann. § 59-1-452 (1976) (State Board of Education appoints a candidate recommended by SCASA to a special committee that assists DOE in administering the Public School Employee Cost Saving Program); S.C. Code Ann. § 59-141-10 (1976) (SCASA input must be solicited in forming a plan for South Carolina to meet the National Education Goals).

³ See, e.g., S.C. Code Ann. § 1-11-720 (1976) (SCASA employees, retirees, and eligible dependents are eligible for coverage under the state’s health and dental insurance plans).

⁴ While individual school administrators are eligible to join SCASA, the Association also sells “Institutional Group Plans” directly to schools and school

It is beyond dispute that, if two superintendents drove to Columbia to lobby the legislature directly, their activities and expenditures would all be subject to public scrutiny under the FOIA. It is further beyond dispute that, if the superintendents instead pooled their money and hired a lobbyist out of district-reimbursed funds to make the trip to the Statehouse as their agent, that transaction – and all of the lobbyist’s government-subsidized activities – would be subject to the FOIA. If it is a public matter when two superintendents do this, then it cannot alchemically become a private matter when 85 superintendents do it, just because they choose a corporate form.

The trial court placed inordinate and seemingly decisive weight on the SCASA’s legal status as a corporate entity. There is, however, nothing unusual

districts. Among other benefits, these plans entitle any district employee to attend professional development conferences without additional charge. *See* “SCASA Member Categories”, <http://www.scasa.org/displaycommon.cfm?an=1&subarticlenbr=241> (last visited Jan. 25, 2012). The Association lists 47 (out of the state’s 85 total) school districts as “subscribers” on its website, <http://www.scasa.org/displaycommon.cfm?an=7> (last visited Jan. 25, 2012), meaning that fully half of all school districts purchase group plans. Further, according to the Association’s membership application, downloadable at <http://www.scasa.org/displaycommon.cfm?an=1&subarticlenbr=285> (last visited Jan. 25, 2012), the Association accepts only two payment methods for an Institutional Membership: a check or a credit card drawn on the account of a school or school district. It is thus beyond dispute that SCASA solicits and receives substantial funding directly from government agencies, in addition to whatever funding it receives indirectly through school-district reimbursement of the individual memberships that school administrators purchase and their paid on-duty time participating in SCASA activities.

about applying the FOI statute to a nonprofit corporation, if the corporation is exercising a governmental function or is utilizing government resources. Indeed, the FOIA statute, S.C. Code Ann. § 30-4-20(a), expressly includes “corporation” within the range of entities that can be classified as “public bodies,” evidencing that the legislature was unhesitant to subject the activities of quasi-governmental corporate actors to public scrutiny.

The SCASA is unlike any other corporation because the entire reason it exists is to further the policy agenda of the government officials who comprise its membership and board. This sharply distinguishes it from, for instance, a lumber yard that sells supplies to the school district in a commercial marketplace transaction. SCASA exists solely as a collective creation of public officials to conduct public business that, if not for SCASA, would be done by school district employees.

Courts elsewhere have had no difficulty looking past the veneer of incorporation to apply open-records and open-meetings laws to entities just like the SCASA. To cite just a few examples:

In *Fair Share Hous. v. League of Mun.*, 25 A.3d 1063 (N.J. 2011), the New Jersey Supreme Court found that a collective body representing city government officials at the Statehouse – a body much like the SCASA – was a “public agency” subject to the Open Public Records Act although chartered as a nonprofit

corporation. Among the decisive factors was that the League of Municipalities received partial funding from the taxpayers through its members, and that its staff participated in the state retirement benefits system.

In *Telford v. Thurston Cnty. Bd. of Comm'rs*, 974 P.2d 886 (Wash. Ct. App. 1999), Washington's Court of Appeals held that two associations of county appointed and elected officials were quasi-public agencies and subject to Washington's open records law. Noting that membership dues were paid for by the counties, some of the associations' employees had state health insurance, the associations were under exclusive control of government officials, and the associations carried statutorily designated responsibilities (duties that "could not be delegated to the private sector"), the court concluded, "Although WSAC and WACO retain some characteristics of private entities, their essential functions and attributes are those of a public agency." *Id.* at 895.

In *N. Cent. Ass'n of Colls. and Sch. v. Troutt Bros.*, 548 S.W.2d 825, 826 (Ark. 1977), the Arkansas Supreme Court found that the Freedom of Information Act applied to the North Central Association of Schools (NCA), a voluntary association of schools and colleges responsible for school accreditation. Though NCA was a private nonprofit corporation, membership dues paid by public schools supported the organization. State personnel were used to carry out the functions of both organizations, and the State Committee was located in a publicly owned

building. In addition, accreditation from NCA was deemed to have a great impact upon students and parents and are a matter of great public concern.” Citing *N. Cent. Ass’n*, the Arkansas court held that an athletic association of public and private colleges, which was partially supported by public funds, was subject to the state’s open records law although chartered as a not-for-profit corporation. *Ark. Gazette Co. v. S. State Coll.*, 620 S.W.2d 258, 259 (Ark. 1981).

If the court below is correct, then all of these courts are wrong, as no state’s FOI law could constitutionally be applied to the records of a nonprofit that is engaged in formulating public policy. History and experience teach otherwise. Just as in these analogous cases, the SCASA is subsidized substantially by the government-reimbursed dues of its member public officials, is benefiting from its governmental status with access to such privileges as access to the state health plan, and is exercising statutorily delegated powers that could not be “outsourced” to a nongovernmental actor. The SCASA looks like a public body, walks like a public body, and quacks like a public body. The conclusion is obvious: it is a public body.

B. Supreme Court Precedent Forecloses the SCASA’s First Amendment Argument

- (1) No First Amendment interests are implicated by requiring a public body to obey public disclosure requirements.

Once it was determined (or in the case of the court below, presumed) that the SCASA was a public body, then the First Amendment inquiry should have ended. Neither a public body nor the employees of a public body have a First Amendment interest in evading public disclosure as it regards the conduct of official agency business.

As a public body, the SCASA exists as an extension of the local governments that provide at least some substantial part of its funding and the government employees who make up all of its board of directors by virtue of the public offices they hold. A public entity simply does not have First Amendment rights as an institution – the SCASA would have no more standing to bring a First Amendment claim than would the City of Charleston.

Nor would the individual employees of SCASA have a protected First Amendment interest in intra-office discussions of agency business. “When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom,” *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). If a superintendent hired a lobbyist with public funds, the lobbyist’s speech as an agent of the school system would be unprotected by the First Amendment; only when speaking as a citizen to call attention to a matter of public concern would the lobbyist’s speech be protected. *See id.* at 419 (public employees’ speech is protected by the First Amendment only when “speaking as citizens about matters

of public concern”). The same limited legal protection applies whether the speaker is an “employee” of the government or an “independent contractor.” *See Board of County Com'rs, Wabaunsee County, Kan. v. Umbehr*, 518 U.S. 668 (1996) (applying Supreme Court’s public-employee speech jurisprudence to First Amendment retaliation claims of independent contractor).

SCASA “speaks” only through people who are directly employed by the government (the superintendents and principals who make up its governing board) or through the staff members answerable to those government employees. The position that SCASA staff members occupy is analogous to that of a contract lobbyist. If a contract lobbyist for a single school system has no First Amendment protection in speech made pursuant to official duties, then neither does a contract lobbyist for 85 school systems.

(2) Similar good-government measures have been subjected to, and have satisfied, intermediate scrutiny.

Even if the Court finds that some level of First Amendment scrutiny applies to the disclosure of a public body’s documents, the trial court appeared to err in applying strict scrutiny, which is appropriate only where a government regulation discriminates on the basis of content. *See City of Los Angeles v. Alameda Books*,

Inc., 535 U.S. 425, 455 (2002) (applying intermediate level of scrutiny to city ordinance regarding zoning of adult businesses).⁵

Applying intermediate scrutiny, the U.S. Supreme Court last term dispensed with a claim comparable to that raised by SCASA, rejecting a city government official's contention that Nevada's ethics laws constituted an impermissible burden on his First Amendment rights.

In *Nev. Comm'n on Ethics v. Carrigan*, 131 S.Ct. 2343 (2011), a city council member challenged a state statute requiring him to recuse from involvement in matters presenting a conflict-of-interest. The statute prohibited not only voting on legislation in which a council member had a potential ethical conflict, but also "advocating the passage or failure" of such legislation. *Id.* at 2346.

The Supreme Court reversed the Nevada Supreme Court's holding that the statute violated the First Amendment. The Court held that the recusal statute did not impinge on any protected speech because the legislator was acting in his official capacity as a representative of his constituents: "The legislative power ... is not personal to the legislator but belongs to the people; the legislator has no

⁵ The trial court purported to be applying the proper standard, "exacting" (a/k/a intermediate) scrutiny (*see Disabato v. South Carolina Ass'n of Sch. Adm.*, No. 2011-CP-40-02044, slip op. at 4 (S.C. Comm. Pleas Aug. 15, 2011)), but in reality appeared to be applying strict scrutiny. *See id.* at 5 ("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."). The "least restrictive means" standard is proper only when a content-based regulation is reviewed under strict scrutiny.

personal right to it.” *Id.* at 2350. Further, even if voting did have an expressive element, “[t]his Court has rejected the notion that the First Amendment confers a right to use governmental mechanics to convey a message.” *Id.* at 2351.

The lesson of *Carrigan* is unmistakable. A person who undertakes a position of public responsibility and trust must understand, and agree to abide by, a measure of enhanced scrutiny when acting in an official capacity. Just as the Court found that a city council member cannot complain that mandatory recusal unduly burdens his First Amendment right to “advocate” for the enactment of legislation, the SCASA cannot complain that disclosure of its records – a burden much lighter than recusal – impermissibly constrains its ability to advocate for the enactment of state legislation.

The Supreme Court has provided a road map for analyzing claims in which a speaker’s interest in speaking anonymously collides with the transparency and accountability interests advanced by freedom-of-information laws. This was exactly the scenario in *Doe v. Reed*, 130 S.Ct. 2811 (2010). In *Doe*, the Supreme Court found no constitutional impediment to the disclosure, under a Washington open-records law analogous to South Carolina’s, the names of voters who had signed petitions to place an initiative on the statewide ballot.

Applying what it termed “exacting” scrutiny – a standard that, as explained in *Doe*, *see id.* at 2814, is equivalent to what has elsewhere been called

“intermediate” scrutiny – the Court held that the state’s interests in transparency and honest government outweighed any burden that disclosure imposed upon the signers’ First Amendment rights.⁶ The Court left open the possibility that a particular signer might be able to establish that exceptional individual circumstances justified relief, but to do so, the signer would have to establish “a reasonable probability that the compelled disclosure ... will subject them to threats, harassment, or reprisals from either Government officials or private parties.” *Id.* at 2821 (citing *Buckley v. Valeo*, 424 U.S. 1, 74, 96 S.Ct. 612 (1976)).

No such showing has been made, or can plausibly be made, here. The internal workings of a school administrators’ association are exceedingly unlikely to provoke the type of response that the petition-signers in *Doe* feared – that zealots who opposed the anti-gay-marriage ballot initiative would track them down at home and harass or harm them. And in the absence of concrete and individualized evidence that such harm was likely, even *that* fear was found insufficient in *Doe* to justify a blanket prohibition against applying the Washington Public Records Act to initiative petitions.

⁶ Under “exacting” or “intermediate” scrutiny, unlike the strict scrutiny that would be appropriate for a content-based restriction, a regulation need not be the *least* speech-restrictive means of furthering the government’s interest. It is enough that the regulation bear a “substantial relation” to a “sufficiently important” governmental interest. *See id.* at 2814.

It is clear from *Doe* and from *Carrigan* that intermediate and not strict scrutiny is the applicable First Amendment standard when evaluating the impact of content-neutral open-government or ethics legislation on freedom of expression. It is further clear that constraints on the method of expression (though not its substantive content) are permissible where the speaker is not speaking as a private citizen for the purpose of contributing to the public discourse, and where the constraint furthers a countervailing public interest in honest government.

C. The FOIA is Already “Tailored” to Protect the Privacy of Legitimately Private Communications

The trial court further erred in substituting its judgment for that of the legislature as to whether the public interest could be served by a very limited form of disclosure far less informative than what is contemplated under the Freedom of Information Act. The trial court’s alternative notion of a properly tailored statute – one requiring a periodic financial report of public monies received and spent – would be ineffective to satisfy the public accountability purposes of the Act, which are explicitly spelled out in its preface:

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.

While it is one purpose of the FOIA to enable the public to keep watch over wasteful or dishonest spending, that is not the only purpose. As important as whether monies are properly accounted for is *how* the money is being used, and that is not discernable from a financial disclosure form. Because the Association is using public monies to engage in issue advocacy, there is a greatly heightened public interest in knowing not just what is spent but how it is spent (in the words of the FOIA statute, “the formulation of public policy”). If the Association is using its publicly subsidized resources to lobby, for instance, for pay raises for superintendents at a time of financial exigency, then school district taxpayers may legitimately question whether they wish to continue subsidizing the activities of SCASA. A perfunctory financial report that states, “Lobbying activities, \$100,000” will disclose nothing about the positions that the SCASA is advancing on the public’s dime.

The Act already is “tailored” to elicit only those disclosures that are essential to public oversight. The statute contains multiple exclusions to safeguard truly “private” communications in which there is no public interest, or communications in which there is an overriding need for confidentiality.

For example, the SCASA will be entitled to withhold “(i) nformation of a personal nature where the public disclosure thereof would constitute unreasonable

invasion of personal privacy.” S.C. Code Ann. § 30-3-40(a)(2). The SCASA further may decline to produce “(c)orrespondence or work products of legal counsel for a public body and any other material that would violate attorney-client relationships.” S.C. Code Ann. § 30-3-40(a)(7).

The Act is thus already “tailored” to require disclosure only of those materials in which the public has a legitimate disclosure interest. The court below overstepped in substituting its policy judgment for that of the legislature in finding that a more narrowly tailored statute would effectively achieve the accountability purposes set forth in Section 30-4-15 of the Act.

If the release of records in compliance with the FOIA violates the author’s First Amendment right against compelled speech, then vast amounts of material that are today properly reachable by way of FOIA requests may be sheathed in secrecy.

Because the FOIA extends not merely to documents *created* by government agencies but also documents *kept in the custody of* government agencies, FOIA routinely is understood to cover documents created by private actors, including nonprofit corporations. For example, an application for a permit submitted to the South Carolina Department of Health and Environmental Control or the South Carolina Public Service Commission – and any back-and-forth correspondence relating to that permit – indisputably would be an open record as FOIA is

understood to work, in South Carolina and in all states.

If the trial court's view is correct, then a corporate entity such as the SCASA has a First Amendment right not to have its documents aired for public examination. But if the trial court's view were correct, then the legislature would have had no need to enact narrower and more targeted FOIA exclusions to exempt only a limited subset of *truly* confidential material created by private actors and kept by government agencies. For example, the FOIA statute exempts "trade secrets" (S.C. Code Ann. § 30-4-40(a)(1)) and "proprietary financial data" provided to the Venture Capital Authority (S.C. Code Ann. § 30-4-40(a)(19)). Since the legislature felt the need to enact these exemptions, then it must have been the legislature's understanding that, absent an exemption, information provided by a private actor to a state agency is subject to disclosure.

It is the duty of courts to give effect to the entirety of a statute, not to read entire sections of it as meaningless. "[Courts] must read the statute so that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous ... for the General Assembly obviously intended [the statute] to have some efficacy, or the legislature would not have enacted it into law." *CFRE, LLC v. Greenville County Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (S.C. 2011) (*quoting State v. Sweat*, 379 S.C. 367, 665 S.E.2d 645 (S.C. Ct. App. 2008)) (internal quotes and brackets omitted). If the First Amendment guarantee against anonymous speech

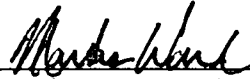
precluded the public disclosure of records created by non-state employees, then exemptions (a)(1) and (a)(19) of the FOIA, among others, would simply be surplusage. That cannot be the case.

Neither the FOIA statute itself, nor the way in which South Carolina courts have interpreted it for decades, contemplates a blanket privilege for the communications of employees of nonprofit corporations. The statute already contains fully adequate safeguards so that the only information subject to compulsory disclosure is that in which the public has a legitimate interest and no overriding need for confidentiality exists.

IV. CONCLUSION

It is the law in South Carolina, and in all states, that entities that receive public money and perform public functions must operate under transparency laws that enable the citizens to discharge their oversight responsibilities. If the trial court's misapplication of the First Amendment is allowed to become the law of South Carolina, then all of the state's "sunshine" laws will be constitutionally suspect. This Court should repudiate the reasoning of the trial court and reaffirm that there is no legitimate constitutional interest in withholding public information from the taxpayers who have subsidized its creation.

Respectfully submitted,



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I hereby certify that on the 6th day of February, 2012, I caused to be placed in United States Mail, first-class postage paid, a true and correct copy of the foregoing *Brief Amicus Curiae of the Student Press Law Center and Reporters Committee for Freedom of the Press in Support of Petitioner Disabato* to all parties via their counsel of record, as follows:

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