THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2011-CP-40-2044

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

v.

South Carolina Association of School Administrators, ... Respondent.

State Ex Rel Alan Wilson, Attorney General, ... Intervenor.

INITIAL REPLY BRIEF OF STATE EX REL ALAN WILSON, ATTORNEY GENERAL

ALAN WILSON
Attorney General

ROBERT D. COOK
Deputy Attorney General

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

ATTORNEYS FOR THE
STATE EX REL WILSON

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I

SCASA'S NATURE AS A PUBLIC BODY IS RELEVANT TO THE APPLICATION OF FOIA IN THIS CASE, BUT SCASA COULD SEEK REMOVAL FROM APPLICATION OF FOIA BY DISENGAGING FROM PUBLIC FUNDS AND DUTIES

Respondent SCASA concedes that it is a public body "for purposes of this appeal," and acknowledges that it performs public functions. Respondent's Brief at p. 14, note 4. Although SCASA appears to minimize the significance of its being a public body, that status triggers the application of the Freedom of Information Act, makes appropriate the application of that law and avoids the constitutional issues that SCASA has raised. SCASA references other organizations that perform similar public functions and are not subject to FOIA, but SCASA appears to recognize that its receipt of public funds puts it within the scope of FOIA. Although funding is the trigger for FOIA applicability, SCASA's performance of public functions underscores its nature as a public entity. SCASA cannot receive public funds and perform public functions and, at the same time, avoid the application of laws for public bodies.

The solution for SCASA is simple. If SCASA does not want to be subject to FOIA, it may request legislative action to remove it from participation in the State Health Plan and Retirement Systems and any statutory public responsibilities and withdraw from any other

public funding.[1] Therefore, SCASA's exposition of general law regarding application of freedoms of speech and association to private entities has no relevance because SCASA is a public body. If SCASA does not want to be a public body, it can disengage from the funding and activities that make it public.

II

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

SCASA contends that strict scrutiny applies because FOIA imposes content based restrictions on speech. The organization argues that the content restrictions are in FOIA's definition of "meeting" as "the convening of a quorum of the constituent membership of a public body . . . to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power." §30-4-20(d). According to SCASA, this definition requires that the content of the speech be examined to determine whether it relates to these powers of "supervision, control, jurisdiction or advisory power," or whether it relates to exempt matters such as the discussion of the employment or release of an employee or the receipt of legal advice (§30-4-70).

SCASA misunderstands First Amendment law. The application of the definition of "meeting" and its exemptions does not trigger First Amendment considerations because the definition is not directed at whether the speech is favored or unfavored. *Turner Broad. Sys.,*

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1 The State does not intend in this brief to address all steps that SCASA might need to take to avoid application of FOIA in the future.

Inc. v. F.C.C., 512 U.S. 622, 642-43 (1994).

Turner explained what constitutes a content based restriction as follows:

> . . .the "principal inquiry in determining content neutrality ... is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). *See R.A.V., supra*, 505 U.S., at 386 ("The government may not regulate [speech] based on hostility-or favoritism-towards the underlying message expressed"). . . .
>
> As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based. . . . .By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral. [emphasis added]

South Carolina's FOIA is content neutral because it does not "distinguish favored speech from disfavored speech on the basis of the ideas or views." *Id.* Limitation of the scope of covered "meetings" to the discussion of public business is not a restriction on the basis of "ideas or views." Any benefits or burdens on speech are "without reference to the ideas or views expressed." *Id.*

SCASA relies on cases that have no relation whatsoever to FOIA. Certainly, FOIA's limitations are not at all comparable to the express content based restrictions on "sexually explicit adult programming or other programming that is indecent" at issue in *United States v. Playboy Entertainment Group*, 529 U.S. 803 (2000). FOIA does not require the covered bodies "to associate with the views of other speakers, [or "select"] other speakers on the basis of their viewpoints" as in the provision at issue in *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of California*, 475 U.S. 1, 20 (1986).). FOIA does not compel speech as

did the statute questioned in *Riley v. Nat'l Fed. Of the Blind of NC, Inc.* 487 US 781, 796 (1986) nor are its requirements tied to other provisions found to be unconstitutional as in *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 744 (2008) ("§319(b) disclosure requirements were designed to implement the asymmetrical contribution limits provided for in § 319(a), and as discussed above, § 319(a) violates the First Amendment."). SCASA has provided no valid support for its argument that the open meetings requirements of FOIA are content restrictions on speech.

SCASA summarily asserts that the disclosure of records under FOIA is also content related. The organization provides no support whatsoever for this argument. The broad disclosures of public records requirements are absolutely not conditioned on whether the records involve favored or unfavored speech. §§30-4-30 and 30-4-40; *Turner.* Accordingly, the records requirements do not constitute content based restrictions on speech, and intermediate scrutiny applies.

> The following intermediate level of scrutiny applies under *Turner:*
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> Under *O'Brien*[2], a content-neutral regulation will be sustained if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.*, at 377. To satisfy this standard, a regulation need not be the least speech-restrictive means of advancing the Government's interests. "Rather, the requirement of narrow

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2 *United States v. O'Brien*, 391 U.S. 367 (1968). The South Carolina Supreme Court followed this test in *Diamonds v. Greenville County,* 325 S.C. 154, 156, 480 S.E. 2d 718, 719 (1997).

> tailoring is satisfied 'so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.' " *Ward*, supra, 491 U.S., at 799 (quoting *United States v. Albertini*, 472 U.S. 675, 689(1985)). Narrow tailoring in this context requires, in other words, that the means chosen do not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward, supra,* 491 U.S., at 799.

Turner, 512 U.S. at 662.

III

FOIA IS CONSTITUTIONAL AS APPLIED TO SCASA

Application of FOIA to SCASA certainly meets the *O'Brien* test set forth in *Turner, supra.* It furthers "an important or substantial government interest" because SCASA is a public body that receives public funds and performs governmental functions. Although SCASA contends that the exceptions under FOIA do not serve its purpose, it does not contend that those exemptions apply unequally and it ignores the substantial amount of public records that are subject to disclosure and meetings that must be open. Without question, application of FOIA complies with the second part of the *O'Brien* test in that "the governmental interest is unrelated to the suppression of free expression." In fact, free expression is not suppressed. FOIA merely requires open meetings and disclosure of public records. Finally, FOIA meets the third part of the test in that its ". . .incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that [governmental] interest." SCASA contends that FOIA is not "narrowly tailored" because it opens to the public much information completely unrelated to the activity of public officials

and public funds, but SCASA receives public funding which thereby touches all of its activities. As noted above, if SCASA did not want to be subject to FOIA, it could seek legislative and other changes to disengage from public funding and governmental functions.

SCASA draws on campaign finance cases for its argument that FOIA fails to meet Constitutional standards, but those cases involve regulatory issues and non-public bodies not involved in the instant case.[3] SCASA also cites a concurring opinion in *John Doe No. 1 v. Reed*, 130 S.Ct. 2811(2010), but that case treated the issue of the disclosure of referendum petitions as a facial challenge and found that disclosure of referendum petitions would not violate the First Amendment.

A Florida Court considered and rejected issues similar to those raised by SCASA in this case. *Nat'l Collegiate Athletic Ass'n v. Associated Press*, 18 So. 3d 1201, 1204 (Fla. Dist. Ct. App. 2009). In that case, NCAA records had become subject to disclosure under a Florida public records law because they had been examined by lawyers for Florida State University. The Court rejected the NCAA's contention that application of the law violated

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3 The campaign finance cases involved challenges to parts of regulatory laws that the Courts determined ran afoul of the United States Supreme Court ruling that "campaign finance laws may constitutionally regulate only those actions that are 'unambiguously related to the campaign of a particular ... candidate.'" *N. Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 281 (4th Cir. 2008); *S.C. Citizens for Life, Inc. v. Krawcheck*, 759 F. Supp. 2d 708, 718 (D.S.C. 2010); *Colo, Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1154 (10th Cir. 2007). Issues of whether the covered entities were public bodies were not involved in those cases and FOIA does not regulate the covered public bodies.

the organization's right to freedom of association. The Court "acknowledge[d] that the NCAA is a private voluntary organization and that it enjoys the freedom of association guaranteed by the First Amendment, but the NCAA has not shown that the application of the Florida public records law impairs that right. . . . The application of the Florida public records law could not, by any stretch of the imagination, require the NCAA to admit or reject certain institutions. Nor does it require the NCAA to reject the values it wishes to express. The law may prevent the NCAA from conducting secret proceedings against a public school in this state, but that does not impair the NCAA's freedom of expression or its freedom of association." 18 So. 2d at 1214.

Plaintiff has pointed to no case that has found unconstitutional the application of a state public records or open meetings law to entities that are alleged to have characteristics of a private organization, and none appear to exist. The Appellant Disabato cited a number of cases applying state public information laws to entities other than traditional state agencies. Opening Brief of Disabato at pp. 12-22. The State's opening brief cited a number of cases rejecting First Amendment claims against the application of public meetings laws in other states. Although organizations such as SCASA were not at issue, the cases demonstrate that application of FOIA to SCASA does not violate the First Amendment. Opening Brief of State at pp. 9-13.

CONCLUSION

Although SCASA receives public funds, performs governmental functions and concedes that it is a public body, it has alleged First Amendment claims against compliance with our State's Freedom of Information Act. Those claims are baseless and do not provide a judicial basis for SCASA to avoid FOIA compliance; however, a non-judicial solution lies within the grasp of SCASA. It can simply disengage from the receipt of public funding and request any necessary legislative authorization to do so. SCASA can also seek disengagement from exercising governmental authority. The Court system is not necessary for SCASA to take these steps to remove its status as a public body. Until such time as SCASA accomplishes this disengagement, it must comply with FOIA.

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

Respectfully submitted,

ALAN WILSON
Attorney General

ROBERT D. COOK
Deputy Attorney General

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

By: _____
ATTORNEYS FOR THE
STATE EX REL WILSON

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