THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

C.A. No.: 2011-CP-40-2044

ROCKY DISABATO D/B/A "ROCKY D" ....Appellant,

v.

SC ASSOCIATION OF SCHOOL ADMINISTRATORS ....Respondent.

STATE EX REL ALAN WILSON..Intervenor.

FINAL BRIEF OF RESPONDENT, SOUTH CAROLINA ASSOCIATION OF SCHOOL ADMINISTRATORS

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TABLE OF CONTENTS

Pages

Table of Authorities ii

Statement of Issue on Appeal 1

Statement of the Case 1

Statement of Facts 2

Standard of Review 4

Arguments 5

Conclusion 25

TABLE OF AUTHORITIES

Pages

CASES

AFL-CIO v. Fed. Election Comm'n, 333 F.3d 168 (D.C. Cir. 2003) 12

Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) 16

Bates v. City of Little Rock, 361 U.S. 516 (1960) 8, 12, 13

Bd. of Trs. of Woodstock Acad. v. Freedom of Info. Comm'n, 436 A.2d 266 (Conn. 1980) 21

Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) 5

Broward Coal. of Condos., Homeowners Ass'ns & Cmty. Orgs, Inc. v. Browning, No. 4:08cv445-SPM/WCS, 2008 WL 4791004 (N.D. Fla. Oct. 29, 2008) 12, 18

Buckley v. Valeo, 424 U.S. 1 23

Burk v. Augusta-Richmond County, 365 F.3d 1247 (11th Cir. 2004) 16

Citizens United v. Fed. Election Comm'n, 130 S.Ct. 876 .... 13, 14, 18, 22

Colo. Right to Life Comm., Inc. v. Coffman, 498 F.3d 1137 (10th Cir. 2007) 22, 23, 24

Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530 (1980) 14, 15

Cricket Cove Ventures, LLC v. Gilland, 390 S.C. 312, 701 S.E.2d 39 (Ct. App. 2010) 7

Davis v. Fed. Elections Comm'n, 554 U.S. 724 (2008) 12, 18

Edwards v. State of South Carolina, 383 S.C. 82, 678 S.E.2d 412 (2009) 3

FCC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) 11

FCC v. League of Women Voters of Cal., 468 U.S. 364 (1984) 16

Fed. Election Comm'n v. Wis. Right to Life, 551 U.S. 449 (2007) 9, 22

First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 10, 14

Forsham v. Harris, 445 U.S. 169 (1980) 21

Gressette v. S.C. Elec. & Gas Co., 370 S.C. 377, 635 S.E.2d 538 (2006) 4

Herbert v. Lando, 441 U.S. 153 (1979) 11, 20

Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995) 10

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) 21

John Doe No. 1 v. Reed, 130 S.Ct. 2811 (2010) 20

Kneeland v. Nat'l Collegiate Athletic Ass'n, 850 F.2d 224 (5th Cir. 1988) 14, 24

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995) 8, 10, 15, 18

Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) 12

In re Motor Fuel Temperature Sales Practices Litig., 641 F.3d 470 (10th Cir. 2011) 9

NAACP v. Button, 371 U.S. 415 (1963) 14, 20

NAACP v. Clairborne Hardware Co., 458 U.S. 886 (1982) 15

N.C. Right to Life, Inc. v. Leake, 525 F.3d 274 (4th Cir. 2008) 8, 22

Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1 (1986) 17

Page v. Lexington County Sch. Dist. One, 531 F.3d 275 (4th Cir. 2008) 4

Perry v. Schwarzenegger, 591 F.3d 1126 (9th Cir. 2009) 8

Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972) 15, 16

Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781 (1988) 10, 13, 17, 18, 22, 23

S.C. Citizens for Life, Inc. v. Krawcheck, 759 F. Supp. 2d 708 (D.S.C. 2010) 22, 23

Sampson v. Buescher, 625 F.3d 1247 (10th Cir. 2010) 9

Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105 (1991) 9

United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2002) 5, 17

Watchtower Bible and Tract Soc'y of N.Y., Inc. v. Village of Stratton, 536 U.S. 150 (2002) 12

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 12

Weston v. Carolina Research & Dev. Found., 303 S.C. 398, 401 S.E.2d 161 (1991) 7

Woodley v. Maynard, 430 U.S. 705 (1977) 10

Woods v. Boeing Co., No. 2:11-cv-02932-PMD, 2012 WL 10587 (D.S.C. Jan. 3, 2012) 10

STATUTES AND OTHER AUTHORITIES

S.C. Code Ann. § 1-11-720 14

S.C. Code Ann. §§ 30-4-10 to -165 1

S.C. Code Ann. § 30-4-15 .... 6, 17, 19

S.C. Code Ann. § 30-4-20 .... 6, 7, 15

S.C. Code Ann. § 30-4-30 6

S.C. Code Ann., §§ 30-4-40 .... 16, 19, 22

S.C. Code Ann. § 30-4-60 6

S.C. Code § 30-4-70 .... 16, 19

S.C. Code Ann § 30-4-80 7

S.C. Code Ann. § 30-4-90 7

S.C. Code Ann. § 30-4-100 .... 7, 8

S.C. Code § 30-4-110 8

S.C. Code Ann. §§ 33-31-170, et seq. 24

S.C. Code Ann. § 33-31-173 24

S.C. Code Ann. § 33-31-1430 2

S.C. Code Ann. § 44-2-150 14

S.C. Code Ann. § 44-6-170 14

S.C. Code Ann. § 51-13-610 14

S.C. Code Ann. § 51-13-1810 14

S.C. Code Ann. § 54-14-40 14

S.C. Code Ann. § 59-28-220 14

S.C. Code Ann. § 59-40-70 14

S.C. Code Ann. § 59-40-230 14

S.C. Code Ann. § 59-59-170 14

Op. S.C. Atty Gen., 2006 WL 1574910 (May 19, 2006) 7

Ga. Code Ann. § 50-14-1 21

N.C. Gen. Stat. Ann. § 143-318-10 21

OMB Circular A-133 24

OMB Circular Compliance Supplement and Government Auditing Standards 24

P.L. 104-156 24

The Single Audit Act Amendments of 1996 24

I. STATEMENT OF ISSUES ON APPEAL

Issues presented by this appeal from the Order of the Honorable G. Thomas Cooper, Jr. are:

(1) Whether the FOIA burdens SCASA's issue advocacy and political speech;

(2) Whether the FOIA's application to SCASA must survive strict scrutiny constitutional analysis; and

(3) Whether the FOIA's requirements are substantially related to a legitimate government purpose and narrowly tailored to achieve the FOIA's purpose.

II. STATEMENT OF THE CASE

On December 7, 2009, the Plaintiff and Appellant Rocky Disabato ("Rocky D") filed a Complaint in the Court of Common Pleas for Charleston County against the Defendant and Respondent South Carolina Association of School Administrators ("SCASA") seeking a declaratory judgment and injunctive relief under the South Carolina Freedom of Information Act, S.C. Code Ann. §§ 30-4-10 to -165. (Complaint at R. pp. 58-79.) Rocky D's complaint was served on SCASA on January 4, 2010. (Affidavit of Service at R. p. 80.)

On February 3, 2010, SCASA filed a motion with the Court of Common Pleas for Charleston County to change venue from Charleston County to Richland County pursuant to Rule 12(b)(3), SCRCP. (Motion to Change Venue at R. pp. 81-82.) This motion was argued on January 18, 2011, and subsequently granted on March 14, 2011, by the Honorable Circuit Court Judge, Deadra L. Jefferson, Ninth Judicial Circuit, finding that SCASA was not a "public official" and that venue was proper in Richland County where SCASA has its office. (Order at R. pp. 1-10.)

Thereafter, on March 29, 2011, SCASA filed a motion to dismiss Rocky D's Complaint pursuant to Rule 12(b)(6), SCRCP, on the grounds that the First Amendment to the United States Constitution and Article I, Section 2 to the South Carolina Constitution protect SCASA as an issue advocacy organization from the requirements of the FOIA. (Motion to Dismiss at R. pp. 83-84.) By order filed on August 15, 2011, the Honorable Circuit Court Judge G. Thomas Cooper, Jr., Fifth Judicial Circuit, granted SCASA's Motion to Dismiss, finding that as an organization engaged in political speech and issue advocacy, "[t]he FOIA unconstitutionally burdens SCASA's protected speech and associational rights." (Order p. 12 at R. p. 33.)

On September 1, 2011, Rocky D filed this appeal from the Circuit Court's order dismissing the Complaint. Thereafter the Honorable Alan Wilson, Attorney General of the State of South Carolina ("Intervenor"), moved to intervene in the appeal. (Motion to Intervene at R. pp. 438-444.) This Court granted the Attorney General's Motion to Intervene by Order dated October 14, 2011. (Order at R. pp. 34-35.) SCASA respectfully asks this Court to affirm Judge Cooper's Order granting SCASA's Motion to Dismiss.

III. STATEMENT OF FACTS

SCASA is a South Carolina eleemosynary, non-profit corporation. (Complaint ¶ 3 at R. p. 59.) 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. (Complaint ¶ 6 and Exhibit A thereto at R. pp. 59, 68-69.)

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, this Court entered judgment in favor of SCASA and Casey Edwards and issued the requested writ of mandamus against the Governor. (Complaint ¶ 1 at R. p. 58.) See Edwards v. State, 383 S.C. 82, 678 S.E.2d 412 (2009).

Thereafter, in August 2009, Rocky D sent a letter to SCASA demanding records 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. (Complaint ¶ 17 and Exhibit D thereto at R. pp. 62-63. 76-77.) 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. (Complaint ¶ 18 and Exhibit E thereto at R. pp. 63, 78-79.)

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, a declaration that SCASA is a public body subject to the FOIA, and a permanent injunction compelling SCASA's future compliance with the FOIA. (Complaint at R. pp. 58-79.)

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,[1] 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 One over its government speech under the First Amendment. See Page v. Lexington County Sch. Dist. One, 531 F.3d 275 (4th Cir. 2008). Mr. Page further filed unsuccessful complaints against SCASA, its employees, and agents under the state Ethics Act relating to public disclosure requirements.[2]

IV. STANDARD OF REVIEW

The Appellant and Intervenor appeal from an order granting a Rule 12(b)(6) Motion to Dismiss. Consequently, this Court reviews the Circuit Court's order de novo, assuming the factual allegations of the complaint to be true. Gressette v. S.C. Elec. & Gas Co., 370 S.C. 377, 378-79, 635 S.E.2d 538, 538 (2006). This appeal also entails the Court's review of SCASA's First Amendment rights. Accordingly, the Court must

[1] See: www.scrgov.org

[2] SCASA, C2008-106, June 6, 2008; LEAPAC, C2008-107, June 6, 2008; Ross Shealy, C2008-111, June 6, 2008.

independently review the factual record. Boy Scouts of Am. v. Dale, 530 U.S. 640, 648-649 (2000). Further, in reviewing SCASA's claims regarding the nature and impairment of its speech, expression, and associational activities, the Court must give deference to SCASA's views of its speech and what would impair that speech. Id. at 653.

Like Dale, where the United States Supreme Court found the First Amendment prohibits New Jersey from imposing its law on the Boy Scouts of America, Id. at 659, here the Circuit Court did not find the FOIA itself to be unconstitutional (contrary to Appellant's assertion), but rather that the First Amendment prohibits the State from imposing the FOIA's open meeting and records disclosure requirements on SCASA. (Order p. 12 at R. pp. 33.) No matter what level of constitutional scrutiny applies—intermediate, exacting, or strict—because First Amendment rights are at issue, the Appellants must bear the burden of proving the constitutional application of the FOIA's requirements to SCASA. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 816 (2002). The Appellant and Intervenor, therefore, bear the burden of showing the State's sufficient interest (whether compelling or substantial) in regulating SCASA's speech and associational activities and that, at a minimum, the FOIA's requirements affecting these activities are appropriately narrow and limited to achieving the State's interest.

V. ARGUMENTS

A. The FOIA Burdens SCASA's Political Speech And Issue Advocacy Rights.

SCASA is opposing the application of the FOIA's open meeting and record disclosure requirements to it because a principal purpose of SCASA and many of its activities involve the development and implementation of advocacy programs in support

of public education in South Carolina. If SCASA were required to develop its advocacy positions and strategies in open meetings and comply with record disclosure requirements, not only would SCASA's issue advocacy efforts be seriously impeded, but opponents of SCASA's advocacy positions would be aided by access to SCASA's governance meetings, editorial and advocacy development processes, private correspondence, and other confidential and sensitive records.

1. 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).

It is important to highlight, however, that the FOIA's requirements go well beyond such record disclosure requirements. 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, not by reference to public business or activity, but 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).

Ancillary to its open meeting requirements, the FOIA mandates that a public body give advance 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 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 S.E.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 it requirements, the FOIA authorizes any citizen of the state to bring an action for 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 litigation costs 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 § 30-4-110.

2. SCASA's issue advocacy and political speech rights are fully protected by the First Amendment.

SCASA engages in core political speech and issue advocacy. Political speech "is indispensable to decision-making in a democracy, and ... 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). 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, 347 (1995) (recognizing that speech and advocacy of politically controversial viewpoints relating to school funding is "the essence of First Amendment expression").

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).

"Implicit in the right to associate with others to advance one's shared political beliefs is the right . . . to do so in private." Perry v. Schwarzenegger, 591 F.3d 1126, 1142 (9th Cir. 2009).

> Indeed, the right of association guaranteed by the First Amendment is premised in part on the notion that some ideas will only be expressed through collective efforts. Moreover, because some collective efforts to express ideas will only be undertaken if they can be undertaken in private, the Supreme Court has recognized a privilege, grounded in the First Amendment right of association, not to disclose certain associational information when disclosure may impede future collective expression. In other words, the First Amendment privilege generally guarantees the right to maintain private associations when, without that privacy, there is a chance that there may be no association and, consequently, no expression of the ideas that association helps to foster."

In re Motor Fuel Temperature Sales Practices Litig., 641 F.3d 470, 479 (10th Cir. 2011) (internal quotations & citations omitted).

3. The FOIA burdens SCASA's First Amendment rights.

Because of the extremely broad and invasive reach of the FOIA's open meeting and public disclosure requirements, when applied to private corporations engaging in issue advocacy, like SCASA, the FOIA crosses several First Amendment fault lines invading First Amendment rights. For example, the FOIA directly burdens and limits an affected organization's activity protected under the First Amendment by increasing financial and administrative costs in order to comply with the FOIA. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 115 (1991) ("A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech."); Sampson v. Buescher, 625 F.3d 1247, 1260 (10th Cir. 2010); Fed. Election Comm'n v. Wis. Right to Life, 551 U.S. 449, 516-17 (2007).

Likewise, by utilizing complex economic or other factors for determining whether

an entity is a public body[3] or an exemption to the FOIA applies, the FOIA unduly burdens and chills speech. (First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 785, n. 21 (1978) ("the burden and expense of litigating...a complex and amorphous economic relationship . . . would unduly impinge on the exercise of the constitutional right"); Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 793 (1988).

Further, and of particular significance to corporations like SCASA engaging in issue advocacy, by requiring open meetings, creation and publication of meeting minutes, and disclosure of records, the FOIA compels speech, impedes an organization's ability to control its message, interferes with an organization's editorial control of its speech, and invades freedom of thought or mind. Woodley v. Maynard, 430 U.S. 705, 714(1977) ("We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all . . . . The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind . . . . Government-enforced right of access inescapably dampens the vigor and limits the variety of public debate.") (internal citations and quotations omitted); Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 574 (1995) (recognizing "principle of autonomy to control one's own speech"); Riley at 790-91 ("The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it....To this end, the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners.") (internal citations omitted); McIntyre v. Ohio Elections

[3] With respect to the complexity of this analysis to a private corporation, see Woods v. Boeing Co., No. 2:11-cv-02932-PMD, 2012 WL 10587 (D.S.C. Jan. 3, 2012).

Comm'n., 514 U.S. 334, 342 (1995) ("Accordingly, an author's 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."); FCC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 264 (1986) ("[F]reedom of thought and speech is the matrix, the indispensible condition, of nearly every other form of freedom.") (internal citation and quotations omitted); Herbert v. Lando, 441 U.S. 153, 190-91 (1979) ("Through the editorial process expression is composed; to regulate the process is therefore to regulate the expression. The autonomy of the speaker is thereby compromised, whether that speaker is a large urban newspaper or an individual pamphleteer. ...The protection of the editorial process of these institutions thus becomes a matter of particular First Amendment concern.").

The FOIA's limitations and adverse affects on SCASA's freedom of thought and editorial processes are particularly important. As a corporation, SCASA can only govern itself, develop advocacy positions, and compose its expression through the speech and discussion of its board and members. Just like the media institutions discussed in Herbert v. Lando, because of SCASA's structure as an issue advocacy non-profit corporation, it cannot exist without some form of editorial process. The FOIA's open meeting and records disclosure requirements directly regulate, inhibit, and limit SCASA's freedom of thought and speech.

Another effect of the FOIA's open meeting and record disclosure requirements particularly detrimental to the First Amendment rights of issue advocacy organizations is that the FOIA requires providing access to strategic meetings and records to political opponents. This aspect of compelled access to meetings and records effectively enhances

SCASA's opponent's speech in opposition to its own advocacy efforts. AFL-CIO v. Fed. Election Comm'n, 333 F.3d 168, 178 (D.C. Cir. 2003) (noting "the incentive for political adversaries to attempt to turn the Commission's disclosure regulation to their own advantage"); Davis v. Fed. Elections Comm'n, 554 U.S. 724, 741-42 (2008) (the First Amendment forbids the government from restricting the speech of some to enhance the relative voice of others); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256 (1974) (compelled speech "exacts a penalty on the basis of the content of a newspaper").

Similarly, by requiring prior, public notice of meetings and prior publication of agenda, the FOIA acts as a permanent injunction on a private corporation's speech for at least 24 hours after publishing public notice of a meeting, preventing spontaneous speech by a private corporation and acting as a prior restraint on speech by imposing a restraint on speech in advance of its expression. Watchtower Bible and Tract Soc'y of N.Y., Inc. v. Village of Stratton, 536 U.S. 150, 167-68 (2002) (discussing spontaneous speech); Ward v. Rock Against Racism, 491 U.S. 781, 795 n. 5 (1989) ("The relevant question is whether the challenged regulation *authorizes* suppression of speech in advance of its expression."); Broward Coal. of Condos., Homeowners Ass'ns & Cmty. Orgs. Inc. v. Browning, No. 4:08cv445-SPM/WCS, 2008 WL 4791004 (N.D. Fla. Oct. 29, 2008).

Associational rights are also recognized and protected under the First Amendment. By mandating open meetings and records disclosure, the FOIA burdens and chills a private organization's associational rights under the First Amendment. Bates v. City of Little Rock, 361 U.S. 516, 522-23 (1960) ("[I]t is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected.").

Further, the FOIA treats the speech of individuals differently than that of corporate entities; only a corporate "body" is subject to the FOIA and its open meeting requirements. Accordingly, by applying only to a "public body," the FOIA favors the speech of individuals (even those individuals who receive support from public funds) over that of corporate entities, thereby burdening speech based upon the corporate identity of the speaker. Citizens United v. Fed. Election Comm'n, 130 S.Ct. 876, 913 ("[T]he Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations."). Thus, even though an individual may receive or expend large amounts of public funds, under the FOIA, he or she would not be required to disclose records or make decisions publicly and only following at least 24 hours advance written notice.

Finally, although several specific components of the First Amendment's protection of speech are identified above and in some cases in different factual contexts, it is essential to bear in mind that governmental restraints on protected First Amendment freedoms need not fit into "familiar or traditional patterns to be subject to constitutional limitations on governmental powers." Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 797 (1988). First Amendment freedoms "are protected not only against [the] heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." Bates at 523.

B. The FOIA's Application To SCASA Must Survive Strict Scrutiny Constitutional Analysis.

SCASA's speech is fully protected by the First Amendment. SCASA is a private corporation, regardless of whether it receives some level of support from public funds. The label of "public body" imposed by the FOIA is irrelevant to the constitutional

question of whether the First Amendment protects SCASA from the requirements of the FOIA. Because this appeal is from an order granting a Rule 12(b)(6) motion to dismiss, SCASA concedes for purposes of its Rule 12 motion only that it is a "public body" as alleged in the Complaint.[4] This concession, however, does not resolve, but only raises the constitutional issue of whether a constitutionally sufficient nexus exists between the FOIA's restrictions on First Amendment rights and the governmental interest it seeks to vindicate. NAACP v. Button, 371 U.S. 415, 429, (1963) ("[A] State cannot foreclose the exercise of constitutional rights by mere labels.").

The First Amendment protects the speech, expression, and association of SCASA. Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 533 (1980); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978); Citizens United v. Fed.

[4] Appellant and Intervenor argue extensively that SCASA is a public body—an issue conceded for purposes of this appeal. It is worth noting here that SCASA does deny it is in fact a "public body." Under the tests set forth in Weston and Woods, SCASA is neither an agent of the government nor a related organization, but an independent, private non-profit corporation. Funds it receives from the government in the form of dues or otherwise are payments for services. See, e.g., Kneeland v. Nat'l Collegiate Athletic Ass'n, 850 F.2d 224, 230 (5th Cir. 1988). SCASA's employees' participation in State benefit plans is fully paid for by SCASA and its employees as required by S.C. Code Ann. § 1-11-720(C). Likewise, SCASA's limited statutory authority to make advisory appointments is similar to that of many other associations like the Chamber of Commerce. See, e.g., S.C. Code Ann. § 59-28-220 (tax credit incentives), § 59-59-170 (Education and Economic Development, Coor. Council), § 44-2-150(c)(6) (Superb Advisory Committee), § 44-6-170(B)(10) (Data Oversight Council), § 51-13-610 (Pee Dee Tourism Commission), § 51-13-1810 (Lowcountry and Resort Islands Tourism Commission), § 54-14-40 (South Carolina Commission for the Lower Coastal Area), § 59-40-70 (Charter School Advisory Committee), and § 59-40-230 (Charter School District Board). Merely by seeking the expertise of various knowledgeable and informed organizations to provide input or to appoint members to committees and commissions, the General Assembly has not made such organizations public bodies under the FOIA. Indeed, if this were the case, a valuable source of expertise likely would be lost to the government. Finally, the fact that SCASA's membership includes public employees does not make it a public body. Public employees can and do participate in private associational activity like any other citizens. If their leadership in an organization made that organization subject to the FOIA, then virtually every association and church would be transformed into a public body. Ultimately, the posture of this case and appeal does not permit or require any final factual determination that SCASA is or is not a "public body." A great bulk of the briefs opposing Judge Cooper's order is devoted to this inapposite inquiry.

Election Comm'n., 130 S. Ct. 876, 913 (2010) ("No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations."); NAACP v. Clairborne Hardware Co., 458 U.S. 886, 908 (1982). It is firmly established that "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

Consequently, "[w]here a government restricts the speech of a private person, the state action may be sustained only if the government can show that regulation is a precisely drawn means of serving a compelling state interest." Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 540 (1980). The Supreme Court has also said that, "[w]hen a law burdens core political speech, we apply exacting scrutiny, and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995) (internal citation and quotations omitted). "The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit." Id. at 348.

The FOIA restricts and regulates speech specifically because of its subject matter or content. The open meeting requirements of the FOIA regulates the speech of a "public body" concerning any subject matter or content over which it has supervision, control, jurisdiction, or advisory power. S.C. Code Ann. § 30-4-20(d). Accordingly, in order to determine whether the open meeting requirements of the FOIA apply to a meeting of a "public body," one must look to the content or subject matter of what the "public body" discusses. A regulatory scheme that requires the government to "examine the content of

the message that is conveyed" is content-based regardless of its motivating purpose. Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 230 (1987) (quoting FCC v. League of Women Voters of Cal., 468 U.S. 364, 383 (1984); Burk v. Augusta-Richmond County, 365 F.3d 1247 (11th Cir. 2004).

The FOIA's content-based restriction on speech is highlighted by its explicit exemption of various subjects from public discussion and disclosure. S.C. Code Ann. §§ 30-4-40, -70. Through these exemptions the FOIA singles out or prefers, certain subjects for different treatment and authorizes private discussion subjects by a public body. Conversely, the FOIA burdens speech by a public body concerning those subjects not enumerated in §§ 30-4-40, -70. Significantly, discussion or records about core political issues is not exempt from public discussion under the FOIA.

As noted by the United States Supreme Court in Mosley,

> In this case, the ordinance itself describes impressible picketing not in terms of time, place, and manner, but in terms of subject matter. The regulation 'thus slip(s) from the neutrality of time, place and circumstance into a concern about content.' This is never permitted.

Mosley, 408 U.S. at 99 (citation omitted). Similarly, the FOIA itself describes impermissible speech by a public body not in terms of time, place, or manner, but rather, in terms of the content or subject matter of that speech, i.e., whether a public body is speaking about a matter over which it has supervision, control, jurisdiction, or advisory power. The FOIA's further regulation of speech through its exemptions from public discussion of certain topics only compounds its regulation of speech based on content and subject matter. Like the ordinance discussed in Mosley, the FOIA too slips from the neutrality of time, place, and circumstance into the regulation of the content of speech.

Additionally, the FOIA's express content-based speech requirements focus not only on the context of a public body's speech, but also on the direct impact that speech has on listeners. The very purpose of the FOIA is to inform or advise citizens of the performance of public officials and of the decisions that are reached in public activity. S.C. Code Ann. § 30-4-15. "This is the essence of content-based regulation." United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 811-12. As further explained in Playboy Entertainment Group, laws like the FOIA that are designed to restrict the speech of specific speakers, e.g., public bodies, contradict basic First Amendment principles. Id. at 812. Consequently, the FOIA's regulation of a public body's expression cannot fairly be understood as a merely incidental restriction of expression that is subject to an intermediate level of constitutional scrutiny. The FOIA can only be logically viewed for what it is—a restriction on the private speech of public bodies because of the content or subject matter of the speech itself specifically because the government desires that speech to be public.

The FOIA's regulation of speech is not unrelated or incidental to the suppression of free expression by public bodies. To the contrary, the FOIA expressly regulates or limits the speech of public bodies precisely because the government believes private speech by public bodies over matters within their jurisdiction to be harmful in some way to a democratic society. The FOIA regulates speech based on its content, not for reasons incidental to that speech, but precisely because of the affect of the speech it seeks to regulate. This type of direct regulation on speech must be subject to strict constitutional scrutiny. Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 19 (1986); Riley v. Nat'l Fed. of the Blind of N.C., Inc., 487 U.S. 781, 796 ("[W]e cannot parcel out

the speech, applying one test to one phase and another test to another phrase . . . [t]herefore, we apply our test for fully protected expression."). See also Davis v. Fed. Elections Comm'n, 554 U.S. 724, 744 (2008) (invalidating disclosure requirements because designed to implement invalid speech requirements); Broward Coal. of Condos., Homeowners Ass'ns & Cmty. Orgs., Inc. v. Browning, No. 4:08cv445-SPM/WCS, 2008 WL 4791004, at *7 (N.D. Fla. Oct. 29, 2008) ("If disclosure requirements are part of a broader regulatory regime that is unconstitutional, then the disclosure requirements are unconstitutional.").

Even viewing the FOIA's records disclosure requirements as wholly distinct from the open meeting requirements, contrary to Riley and Davis, the relevant constitutional analysis is not the content neutral time, place, and manner intermediate level of scrutiny. Instead, disclosure requirements must satisfy exacting scrutiny. Exacting scrutiny requires a "substantial relationship" between the disclosure requirement and a "sufficiently important" governmental interest. Citizens United v. Fed. Election Comm'n, 130 S.Ct. 876, 914; Davis, 554 U.S. at 744. This standard of analysis too requires an appropriate tailoring of the FOIA's disclosure requirements to an important governmental interest. Even under "exacting scrutiny" a law burdening political speech will only be upheld if "the restriction... is narrowly tailored to serve an overriding state interest." McIntyre, 514 U.S. at 347. Ultimately it may be unnecessary to specifically fix whether the entire FOIA has to be reviewed under "strict" scrutiny, or whether it must be parsed into those provisions which require "strict" and those which require "exacting" scrutiny, because the FOIA falls short under either examination.

C. The FOIA's Requirements Are Neither Substantially Related To A Legitimate Government Purpose Nor Narrowly Tailored To Achieve The FOIA's Purpose.

Although the FOIA's purpose is not as vital to the State as argued by Appellant and Intervenor, Judge Cooper held that the FOIA serves a legitimate government purpose. The purpose of the FOIA is to advise citizens of (1) the performance of public officials, (2) decisions reached in public activity, and (3) the formulation of public policy. S.C. Code Ann. § 30-4-15. However, the General Assembly lessens the FOIA's purpose within the statute itself by creating numerous exemptions and exceptions to the FOIA's requirements for political and pragmatic reasons. See, e.g., S.C. Code Ann. §§ 30-4-40, -70. Thus, on one level, the FOIA fails to inform the public of much government activity; while at the same time, by reaching private corporate activity, the FOIA opens to the public much information completely unrelated to the activity of public officials and public funds. Consequently, the FOIA's imprecise means of making the activity of public officials open to citizens of the State does not serve the FOIA's purported informational interest, particularly in light of the manifold ways this informational interest is already subordinated to interests other than those protected by the First Amendment, such as operational efficiency, economic advantage, and privacy in financial, medical, scholastic, and familial affairs. See S.C. Code Ann. §§30-4-40, -70.

A broad "informational interest" conflicting with core political First Amendment rights faces a daunting constitutional challenge. As noted recently by Justice Alito,

> Requiring such disclosures, however, runs headfirst into a half century of our case law, which firmly establishes that individuals have a right to privacy of belief and association. Indeed, the State's informational interest paints such a chilling picture of the role of government in our lives that at oral argument the Washington attorney general balked when confronted with the

logical implications of accepting such an argument.

John Doe No. 1 v. Reed, 130 S.Ct. 2811, 2824-25 (2010) (Alito, J., concurring) (internal quotations and citations omitted) (the majority opinion expressly avoided the "informational interests"). Likewise, in Lando, the Supreme Court stated,

> There is no law that subjects the editorial process to private or official examination merely to satisfy curiosity or to serve some general end such as the public interest; and if there were, it would not survive constitutional scrutiny as the First Amendment is presently construed.

Herbert v. Lando, 441 U.S. 153, 174 (1979). Ultimately, any "[b]road prophylactic rules in the area of free expression are suspect." NAACP v. Button, 371 U.S. 415, 438 (1963). "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." Id.

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. The FOIA's definition of "meeting," which relates to discussion of any matter within the supervision of a public body, rather than more narrowly to discussion of the expenditure of public funds or governmental decisions, and the FOIA's blanket application to all organizations supported by any amount of public funds, even one dollar, wholly fail to relate to the States' informational interest of advising citizens of the performance of public officials and decisions reached in public activity. Indeed, other states seek to tailor the application of their freedom of information laws only to organizations receiving substantial amounts of public funds. For example, Georgia declares a private non-profit corporation subject to its open meetings act if there is a direct allocation of tax funds constituting more than 33 1/3

percent of the organizations funds from all sources. Ga. Code Ann. § 50-14-1. Likewise, North Carolina's open meetings law does not include private organizations, but only "public corporations." N.C. Gen. Stat. Ann. § 143-318-10. Taking another approach, the federal government's public records law only covers private entities that are under substantial federal control. 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). Here, the Court of Appeals described the federal test:

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

Id. 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). All of these approaches reflect an effort—completely absent from South Carolina's FOIA—to limit and tailor, at least to some degree, the application of freedom of information laws to achieving the governmental interest they seek to serve.

On the other hand, the FOIA makes all organizations "public bodies" regardless of the amount of public support they receive and applies to all meetings and records of an organization, regardless of whether the meeting is to discuss the receipt or expenditure of public funds or whether the records relate in any way to public funds or public activity. Further, the FOIA has no temporal limitations. Once a corporation 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. (Order Granting Defendant's Motion to Dismiss Pursuant to Rule (12)(B)(3), SCRCP, p. 7 at R. p. 7). Accordingly, there is no tailoring whatsoever of the FOIA's requirements to its purpose. See, e.g., Riley, 487 U.S. at 800; S.C. Citizens for Life, Inc. v. Krawcheck, 759 F. Supp. 2d 708 (D.S.C. 2010); N.C. Right to Life, Inc. v. Leake, 525 F.3d 274, 281 (4th Cir. 2008); Colo. Right to Life Comm., Inc. v. Coffman, 498 F.3d 1137, 1154 (10th Cir. 2007).

The FOIA's statutory exemptions from disclosure do not provide adequate protection of First Amendment rights if a private organization is a public body, as argued by Appellant. The disclosure exemptions are not designed to protect First Amendment rights and do not clearly exempt them from disclosure. Any disclosure disputes would merely shift to a legal battle over exemptions, including "[m]atters specifically exempted from disclosure by...law." S.C. Code Ann. § 30-4-40(c)(4). This type of protracted litigation is its own burden on expression and must be avoided. Citizens United, 130 S. Ct. at 896 (citing Election Comm'n v. Wisc. Right to Life, Inc., 551 U.S. 449, 469 (2007)); N.C. Right to Life, Inc., 525 F.3d at 284. More importantly, however, the FOIA's disclosure exemptions do nothing to address the significant constitutional burdens imposed by the FOIA's open meeting requirements. The FOIA's exemptions and exclusions from public access simply do not reflect or provide tailoring of the law's requirements to serve the purposes of the FOIA or to avoid unduly interfering with the First Amendment rights of private organizations, especially those engaging in issue advocacy.

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 public 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 v. Valeo, 424 U.S. 1, 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 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 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 the overly broad panalopy 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., Inc. v. Coffman, 498 F.3d

1137, 1154 (10th Cir. 2007). Analogously, because statutory burdens are imposed on private organizations' speech without sufficient justification and narrowing of means, the FOIA's definition of "public body" fails constitutional scrutiny.

This is not an apocalyptic result. Any socio-political interest of the average citizen in information about SCASA is already being well served without FOIA speech and disclosure requirements being applied to SCASA. The informational purpose of the FOIA in any government payments to SCASA for the *quid pro quo* that occurs with membership dues and fees for assorted services, Kneeland, 850 F.2d at 230, or some alleged "support" beyond them, can already be seen in the financial records of public employers of SCASA members. Similarly, for any government grant or other benefit that allegedly supports SCASA in whole or in part, relevant information pertaining to those funds is obtainable through FOIA from the government entity involved and could be obtainable 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. This is currently required for many grants of public funds to private individuals and corporations. See, P.L. 104-156, The Single Audit Act Amendments of 1996, OMB Circular A-133, and OMB Circular Compliance Supplement and Government Auditing Standards.[5]

Finally, State law already gives the Intervenor 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 Ann. §§ 33-31-170, et seq. Public disclosure of SCASA's records by the Attorney General is properly strictly limited. S.C. Code Ann. § 33-31-173. The Attorney General may bring a judicial dissolution action if,

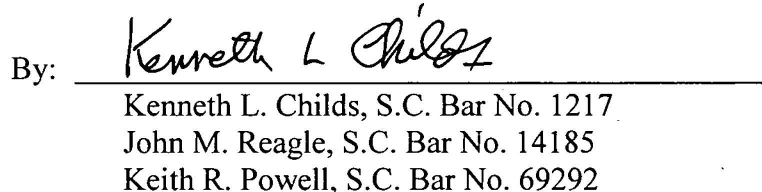
among other reasons, SCASA misappropriates or wastes its assets. S.C. Code Ann. § 33-31-1430(a)(1). The Intervenor has not exercised any of his powers under these provisions with regard to SCASA. In light of the burden the FOIA imposes on SCASA's protected First Amendment rights, there is an insufficient relationship between the FOIA's open meeting and records disclosure requirements and the public informational purpose they seek to serve. The FOIA's open meeting and records disclosure requirements, therefore, cannot constitutionally be applied to SCASA.

VI. CONCLUSION

For the reasons discussed herein, the requirements of the FOIA cannot be constitutionally imposed on SCASA. Judge Cooper's Order granting SCASA's Rule 12(b)(6) motion to dismiss, therefore, should be affirmed.

Respectfully submitted,

CHILDS & HALLIGAN, P.A.

By: 

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[5] Available at http://www.whitehouse.gov/omb/financial_fin_single_audit

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

C.A. No.: 2011-CP-40-2044

ROCKY DISABATO D/B/A "ROCKY D" .... Appellant,

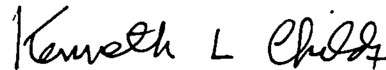
v.

SC ASSOCIATION OF SCHOOL ADMINISTRATORS .... Respondent.

STATE EX REL ALAN WILSON .... Intervenor.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Respondent's Final Brief complies with Rule 211(b), SCACR.



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PROOF OF SERVICE

I certify that I have served the Final Brief of Respondent by depositing a copy of it in the United States Mail, postage prepaid, on June 4, 2012, addressed to attorneys for the Appellant, Kevin A. Hall, Esq., Karl S. Bowers, Jr., Esq., and M. Todd Carroll, Esq., Womble Carlyle Sandridge & Rice, LLP, 1727 Hampton Street, Columbia, SC 29201, and Intervenor, The Honorable Alan Wilson, Esq., Office of the Attorney General, PO Box 11549, Columbia, SC 29211.

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