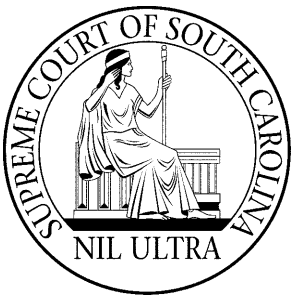


# OPINIONS

## OF

# THE SUPREME COURT

## AND

# COURT OF APPEALS

## OF

# SOUTH CAROLINA

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**ADVANCE SHEET NO. 32**
**July 17, 2013**
**Daniel E. Shearouse, Clerk**
**Columbia, South Carolina**
**www.sccourts.org**

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**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

Jennifer H. Turner, Appellant,

v.

Francis D. Daniels, Personal Representative of the Estate of Robert Leverne Gilmore, a/k/a Robert L. Gilmore, II, a/k/a Robert L. Gilmore, Jr., Francis D. Daniels, a/k/a Frank Daniels, individually and Patricia C. Daniels, a/k/a Patti Daniels, individually, Respondents.

Appellate Case No. 2012-211949

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Appeal from Georgetown County
Larry B. Hyman, Jr., Circuit Court Judge

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Opinion No. 27283
Heard June 18, 2013 – Filed July 17, 2013

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**AFFIRMED**

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Tracy L. Wright, of Willcox Buyck & Williams, PA, of Myrtle Beach, for Appellant.

George M. Hearn, Jr., of Hearn & Hearn, PA, of Conway, for Respondents.

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**JUSTICE KITTREDGE:** This case requires us to construe section 62-2-302(b) of the South Carolina Probate Code to determine whether Appellant Jennifer H. Turner qualifies as a pretermitted child. Because the presumed facts of this case

fall outside the clear language of section 62-2-302(b), the probate court, and the circuit court on review, correctly dismissed Appellant's claim. We affirm.

## I.

In July 2008, Decedent Robert L. Gilmore ("Decedent") executed his Will, which was filed with the probate court upon his death in August of 2010. Decedent bequeathed his entire estate to Respondents Francis D. Daniels and Patricia C. Daniels, who are unrelated to Decedent.

Appellant Jennifer H. Turner was born on November 8, 1972. It is undisputed that Appellant and Decedent did not know each other. Following Decedent's death, Appellant's mother informed her that Decedent was her biological father.[1] Appellant filed a claim of inheritance with the probate court based on section 62-2-302(b) of the South Carolina Code, which allows a pretermitted child to receive an intestate share if the testator failed to provide for the child based upon a mistaken belief that the child was dead.

The probate court dismissed Appellant's claim pursuant to Rule 12(b)(6), SCRCP, finding the allegations in Appellant's petition did not fit within the clear language of the statute. On appeal, the circuit court affirmed. Appellant's appeal from the circuit court was certified to this Court. Rule 204, SCACR.

## II.

Appellant contends the circuit court erred in affirming the probate court's dismissal of her inheritance claim.[2] We disagree.

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[1] We acknowledge no DNA testing has been conducted to verify the biological relationship between Appellant and Decedent; however, under the standard of review applied to Rule 12(b)(6), SCRCP, motions, we construe all of the facts in Appellant's well-plead petition in the light most favorable to her. Thus, our analysis presumes that Appellant is Decedent's child.

[2] Appellant also claims the probate court's construction of section 62-2-302(b) violates the public policy of South Carolina and the Equal Protection Clause of the United States Constitution. However, these arguments were not ruled upon by the probate court, and Appellant failed to file a motion pursuant to Rule 59(e), SCRCP, to obtain a ruling. Because these issues are not preserved for appellate

Section 62-2-302(b) states:

> If, at the time of execution of the will the testator fails to provide in his will for a living child *solely because he believes that child to be dead*, the child . . . receives a share in the estate equal in value to that which he would have received if the testator had died intestate.

(emphasis added).

We find the rules of statutory construction preclude Appellant's claim. It is clear from the unambiguous language of section 62-2-302(b) that the Legislature intended to limit this exception to include only the scenario specifically enumerated in the statute. Appellant readily admits Decedent never learned of her existence before his death; therefore, Appellant was not omitted from Decedent's will *solely because* Decedent believed her to be dead. *See Jennings v. Jennings*, 401 S.C. 1, 4, 736 S.E.2d 242, 244 (2012) ("Where the language of the statute is unambiguous, the Court's inquiry is over, and the statute must be applied according to its plain meaning."); *Hodges v. Rainey*, 341 S.C. 79, 87, 533 S.E.2d 578, 582 (2000) ("When the language of a statute is clear and explicit, a court cannot rewrite the statute and inject matters into it which are not in the legislature's language, and there is no need to resort to statutory interpretation or legislative intent to determine its meaning."). Because the plain meaning of section 62-2-302(b) is clear, Appellant's inheritance claim was properly dismissed.

**AFFIRMED**.

**TOAL, C.J., PLEICONES, BEATTY, JJ., and Acting Justice Alison Renee Lee, concur.**

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review, we do not address them. *See Great Games, Inc. v. S.C. Dep't of Rev.*, 339 S.C. 79, 85, 529 S.E.2d 6, 9 (2000) (finding a constitutional challenge was not preserved for appellate review where it was not ruled upon by the trial court and that omission was not raised in a motion for reconsideration).

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

Bennett & Bennett Construction, Inc., Respondent,

v.

Auto Owners Insurance Company, Appellant.

Appellate Case No. 2011-183007

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Appeal from Richland County
J. Ernest Kinard, Jr., Circuit Court Judge

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Opinion No. 27284
Heard October 30, 2012 – Filed July 17, 2013

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**REVERSED**

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John Lucius McCants, of Rogers Lewis Jackson Mann & Quinn, LLC, of Columbia, for Appellant.

Edwin Russell Jeter Jr., of Jeter & Williams, PA, of Columbia, for Respondent.

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**JUSTICE PLEICONES:** In this declaratory judgment action we are asked to decide whether the circuit court erred when it found a commercial general liability (CGL) policy provided coverage when a brick face was damaged by improper cleaning after the insured completed its installation. We conclude the policy does not provide coverage.

## FACTS

Bennett & Bennett Construction, Inc. (Bennett & Bennett), a general contractor, was engaged by a homeowner to remove synthetic stucco cladding from her home and replace it with a decorative brick face. Bennett & Bennett hired a subcontractor, M&M Construction of the Carolinas, LLC (M&M), to install the brick. The brick featured a sandy finish, and both Bennett & Bennett and the instructions included with the brick warned M&M not to use pressure washing or acid to clean the brick.

M&M completed installation of the brick face, removed the scaffolding, and left the site. It informed Bennett & Bennett the work was complete and sent a final invoice. Bennett & Bennett inspected the work and discovered mortar and slurry dried onto the face of the brick in a few areas. Bennett & Bennett informed M&M of the problem and directed it to make necessary corrections.

M&M hired a subcontractor to clean the brick. The subcontractor used a pressure washer and acid solution that discolored some of the bricks and removed their decorative finish. After attempts to repair the appearance of the brick face without entirely replacing it proved unsuccessful, Bennett & Bennett instructed M&M to remove and replace all of the brick. M&M ceased all communication with Bennett & Bennett, which then replaced the brick face at its own expense.

Bennett & Bennett filed suit against M&M for breach of contract, breach of warranty, and negligence. Bennett & Bennett gave notice to both M&M and Auto Owners Insurance Company (Auto Owners), M&M's CGL insurer. Neither M&M nor Auto Owners responded or appeared to defend the suit or at the damages hearing after entry of default against M&M. The circuit court awarded default judgment against M&M.

Bennett & Bennett then brought this action against Auto Owners and M&M seeking a declaratory judgment that M&M's CGL policy from Auto Owners provided coverage for the damages caused by M&M's subcontractor. Following a bench trial, the circuit court found the incident was an occurrence under the policy and that neither exclusion j(5) nor exclusion n applied to remove coverage. It denied Auto Owners' motion to reconsider. This appeal followed.

## ISSUES

I. Did the circuit court err when it ruled exclusion j(5) does not bar coverage under the policy?
II. Did the circuit court err when it ruled exclusion n does not bar coverage under the policy?

## STANDARD OF REVIEW

Insurance policies are subject to the general rules of contract construction. *B.L.G. Enterprises, Inc. v. First Financial Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999). Whether a contract is ambiguous is a question of law, and the interpretation of an unambiguous contract is a question of law. *South Carolina Dept. of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302-303 (2001). Questions of law are reviewed de novo. *Town of Summerville v. City of North Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

## ANALYSIS

I. Exclusion j(5)

Auto Owners contends the circuit court erred when it held exclusion j(5) did not apply because M&M's work was complete. We agree.

When a contract is unambiguous, it must be construed according to the terms the parties have used. *B.L.G. Enterprises, Inc.*, 334 S.C. at 535, 514 S.E.2d at 330.

In the policy at issue, exclusion j(5) removes from the policy's coverage "property damage" to

> That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations . . . .

The circuit court held exclusion j(5) did not apply to operations that occur after the insured's work has been completed. We disagree. Exclusion j(5) unambiguously excludes coverage whenever the insured or a person acting on the insured's behalf

causes damages in the course of working on the property, regardless of whether the insured's work has been completed.

Exclusion j(5) removes coverage when a subcontractor working on the insured's behalf "[is] performing operations, if the 'property damage' arises out of those operations." It is not disputed here that the damage was caused by a subcontractor working on behalf of the insured and that the property damage arose from that work. The only question is whether the subcontractor was "performing operations" for purposes of the policy.

"Operations" is not defined in the policy. When policy language is undefined, courts must give it its plain, ordinary, and popular meaning. *See American Credit of Sumter, Inc. v. Nationwide Mut. Ins. Co*., 367 S.C. 623, 628, 663 S.E.2d 492, 495 (2008). The *American Heritage Dictionary* defines "operation" as "A process or series of acts performed to effect a certain purpose or result." 2nd College Ed. 1991. Nothing in the context of exclusion j(5) or elsewhere in the policy suggests "operations" should not be given its plain, ordinary, and popular meaning.

The verb phrase "are performing" is in the present continuous tense, indicating that the temporal limits of the exclusion are coterminous with the performance of the acts. There can be no question the damage in this case occurred while the insured's subcontractor was actively "performing operations." *See Action Auto Stores, Inc. v. United Capitol Ins. Co*., 845 F.Supp. 428, 435 (W.D. Mich. 1993) (construing "are performing operations" narrowly in favor of the insured to hold "that the only damage which is excludable is damage which occurred during the time defendant worked upon the property"); *Fisher v. American Family Mut. Ins. Co*., 579 N.W.2d 599, 604 (N.D. 1998) ("exclusion j(5) excludes coverage only for property damage during the time [the subcontractor] worked upon the property"); *Advantage Homebuilding, LLC v. Maryland Casualty Company*, 470 F.3d 1003, 1011 (10th Cir. 2006) ("[T]he better reasoned view is that exclusion j(5) applies *whenever* property damage arises out of the work of the insured, its contractors, or its subcontractors while 'performing operations.'" (internal emphasis and quotation marks omitted; emphasis added)).

The circuit court held that M&M's subcontractor was not "performing operations" when the damage occurred by invoking a time period in the policy that does not affect the applicability of the policy exclusions but only governs which coverage limitation applies. The circuit court correctly determined that "your work" was completed under the policy when the damage occurred but incorrectly concluded

that exclusion j(5) therefore did not apply. But the policy language regarding when "your work" is completed is relevant only to the "products completed operations hazard" coverage that applies to damages incurred after "your work" is completed. Products completed operations hazard coverage requires an additional premium, and a separate aggregate limit applies. *See Valmont Energy Stell, Inc. v. Commercial Union Ins. Co*., 359 F.3d 770, 775-76 (5th Cir. 2004) (general aggregate limit and products completed operations aggregate limit divided the coverage "into two components, each of which contained its own coverage limitation"). The point at which "your work" is completed as defined under "products completed operations hazard" marks the end of the period when the policy's general aggregate limit applies and the beginning of the period when the products completed operations aggregate limit applies.

M&M purchased both types of coverage. In M&M's policy, both coverages are conferred under the same general grant of coverage and are subject to the same set of exclusions. Thus, the coverage provided to M&M under the general aggregate limit and the products completed operations hazard limit is identical in every way except the time when it applies. The point in time when M&M's general aggregate coverage ended and its products completed operations coverage began is immaterial to this case since the insurer is not defending on the basis that the policy's limits have been exhausted.[1]

Other cases cited by the circuit court in support of its finding were inapposite. They dealt with damages that occurred after the contractors' activities on the project had completely ceased, not with damages that occurred during the course of the actions of the insured or his subcontractor, as is the case here. *See Pinkerton & Laws, Inc. v. Royal Insurance Company of America*, 227 F.Supp.2d 1348, 1355 (2002) (concluding exclusion j(5) did not apply when water damage resulted to

[1] M&M's policy provides a $1,000,000 aggregate limit for each of these types of coverage. Thus, for example, had a falling brick injured a passerby while the brick was initially being installed and the damages exceeded $1,000,000, coverage would have been exhausted under the general aggregate limit. Despite the exhaustion of that coverage, however, another $1,000,000 in coverage would have been available under the products completed operations aggregate limit had another passerby then been injured while the brick was being removed ("[w]ork that may need service maintenance correction repair or replacement but which is otherwise complete will be treated as completed").

other property after improper installation of windows); *Lennar Corp. v. Great American Ins. Co.*, 200 S.W.3d 651 (Tex. Ct. App. 2006), abrogated on other grounds by *Gilbert Texas Const., L.P. v. Underwriters at Llyod's London*, 327 S.W.3d 118 (Tex. 2010) (water damage caused by defective installation of exterior insulation and finish systems); *McMath Const. Co., Inc. v. Dupuy*, 897 So.2d 677 (La. Ct. App. 2004) (water damage from leaks caused by defective installation of stucco); *Spears v. Smith*, 690 N.E.2d 557 (Ohio Ct. App. 1996) (sinking, cracking, separating, and other issues caused by inadequate floor support).

Because we conclude that exclusion j(5) unambiguously excludes coverage when the insured's subcontractor damages the work product while performing operations, regardless of whether "your work" is complete under the policy, we hold that exclusion j(5) barred coverage for damages caused by M&M's subcontractor while improperly cleaning the brick face.

II. Exclusion n

The circuit court also held exclusion n did not exclude coverage under the facts of this case. Although unnecessary to our analysis, we note that exclusion n also bars coverage under the policy.

The plain language of exclusion n states in relevant part that the policy does not cover

> Damages claimed for any loss, cost or expense . . . incurred . . . for the . . . repair, replacement, adjustment, removal or disposal of . . . "Your work" . . . If such . . . work . . . is withdrawn . . . from use . . . because of a known or suspected defect, deficiency, inadequacy, or dangerous condition in it.

In *Auto Owners v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009), this Court held exclusion n barred coverage under a CGL policy for the cost of removing and replacing defectively installed stucco because it was the insured's work. Likewise, in this case, the insured contracted to install a decorative brick face, and the aesthetic characteristics of the brick were an important aspect of the contract. The brick face was replaced because of a deficiency in its aesthetic characteristics. *See also Alverson v. Northwestern Nat. Cas. Co.*, 559 N.W.2d 234, 236 (S.D. 1997) (finding that improperly performed cleaning of windows to remove mortar dropped on them by masons became the masonry contractor's work incidental to its contract

and finding resulting damage excluded from coverage as "that particular part of any property [the windows] that must be restored, repaired, or replaced because 'your work' [window cleaning] was incorrectly performed on it"). Thus, the insured's work was replaced because of a deficiency or inadequacy in it, and coverage is barred under exclusion n.

## CONCLUSION

As we have repeatedly explained, a CGL policy does not insure the insured's work itself but consequential risks that stem from the insured's work. *See Century Indemnity Co. v. Golden Hills Builders, Inc.*, 348 S.C. 559, 565-66, 561 S.E.2d 355, 358 (2002), overruled in part on other grounds by *Crossman Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011). CGL coverage "is for tort liability for injury to persons and damage to *other* property and not for contractual liability of [the] insured for economic loss because [the] completed work is not that for which the damaged person bargained[.]" *Id.* at 566, 561 S.E.2d at 358 (*citing Sapp v. State Farm Fire & Cas. Co.*, 226 Ga. App. 200, 486 S.E.2d 71 (1997)) (emphasis in original). Consistent with this understanding of the type of coverage that is provided by a CGL policy, the plain language of exclusions j(5) and n each independently exclude coverage when, as here, a subcontractor acting on behalf of the insured directly damages the insured's work product, necessitating its removal and replacement.

Because we find coverage unambiguously barred under both exclusion j(5) and exclusion n, we reverse.

**TOAL, C.J., concurs. BEATTY, J., concurring in result only. HEARN, J., concurring in a separate opinion in which KITTREDGE, J., concurs.**

**JUSTICE HEARN:** I concur in part. I agree with the majority that exclusion N bars coverage and accordingly, join Section II of the majority's analysis.

**KITTREDGE, J., concurs.**

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

Darren L. Pollack, Employee, Appellant,

v.

Southern Wine & Spirits of America, Employer, and Specialty Risk Services, Inc., Carrier, Respondents.

Appellate Case No. 2011-200466

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Appeal from the Workers' Compensation Commission

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Opinion No. 27285
Heard May 14, 2013 – Filed July 17, 2013

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**AFFIRMED**

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Stephen B. Samuels, of Samuels Law Firm, LLC, of Columbia, for Appellant.

Carmelo B. Sammataro and Cynthia C. Dooley, both of Turner Padget Graham & Laney, PA, of Columbia, for Respondents.

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**JUSTICE KITTREDGE:** This is a direct appeal from an order of the Workers' Compensation Commission denying Temporary Total Disability benefits. Following Appellant Darren L. Pollack's injury on the job, his employer accommodated his work restrictions by providing him light duty employment. Thereafter, Appellant was discharged for violating a company policy by failing to report an accident involving an employer vehicle. Appellant filed a claim seeking

Temporary Total Disability benefits. The Workers' Compensation Commission denied the claim, holding Appellant's termination and resulting incapacity to earn wages was due to his violation of company policy and not his work-related injury. We affirm.

## I.

Appellant was employed by Respondent Southern Wine & Spirits of America as a drivers' supervisor.[1] On March 31, 2010, Appellant suffered an admitted injury to his back while lifting a case of alcohol. Appellant was seen by a physician and returned to work five days later on April 5 with restrictions, including lifting restrictions not to exceed 15 pounds. Respondent accommodated Appellant's work restrictions and, at his full salary, assigned him to light duty in the same position he held prior to the injury.

Approximately two months later, on May 27, Appellant responded to an accident involving another company vehicle assigned to Jessie Richardson. Respondent's company policy states that "All accidents and incidents with a vehicle must be reported, whether or not there is damage to the Company vehicle, another vehicle, or other property" and that "All accidents in a Company vehicle, at fault or not, must be immediately reported to the Driver Supervisor. Failure to report an accident will result in immediate termination." Appellant completed his investigation of the initial accident involving Richardson's vehicle. As he was leaving the scene, Appellant's company vehicle hit the side of Richardson's vehicle. Appellant claimed he surveyed his company vehicle and only saw what he described as a line of dirt on the vehicle, as opposed to any real property damage. Appellant did not report the collision between his vehicle and Richardson's to Respondent.[2]

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[1] Our reference to Respondent in the singular is to the employer, Southern Wine & Spirits of America, although we recognize that the insurance carrier is an additional named Respondent.

[2] The employer was informed of Appellant's accident by Richardson. As discussed *infra*, Richardson prepared a written statement, which was admitted into evidence at the workers' compensation hearing over Appellant's objection on hearsay grounds.

Respondent suspended Appellant pending an investigation. At the direction of his supervisors, Appellant subsequently completed an accident report detailing the incident. Following routine drug and breath alcohol tests, Appellant was reinstated by his local superiors on June 4, pending review by Respondent's corporate office in Miami, Florida. On June 15, Respondent terminated Appellant for his failure to report the accident.

Thereafter, Appellant filed a Workers' Compensation Form 50 seeking Temporary Total Disability (TTD) compensation for the admitted injury to his back from June 15, the date of his termination. Respondent opposed Appellant's request for TTD benefits and asserted he was terminated for cause and therefore ineligible for TTD compensation.

At the hearing before the single commissioner, Appellant, who admitted he had previous infractions during his employment, testified he was aware of the company policy, but maintained that he decided the accident was not serious enough to warrant a formal report.

Sonny Blocker, Appellant's supervisor and Respondent's plant manager, testified the decision to terminate Appellant went through the human resources department and ultimately came from the company headquarters in Miami. Blocker also testified that other employees have been terminated for failing to report incidents or accidents in the past. Additionally, Blocker stated that, but for Appellant's violation of company policy, Appellant would still be working in a light duty capacity for Respondent.

The single commissioner denied Appellant's request for TTD compensation. The commissioner held Appellant failed to prove his entitlement to TTD benefits, concluding that Appellant was terminated for cause for violating company policy. An appellate panel of the Workers' Compensation Commission (the Commission) affirmed the single commissioner's denial of TTD compensation. The Commission concluded that Respondent accommodated Appellant's work restrictions until he was terminated. Moreover, the Commission found Appellant was terminated for cause stemming from violations of company policy and stated:

> Pursuant to S.C. Code § 42-9-260, an employer is required to pay temporary total disability benefits when the employee is out of work due to a reported work-related injury. Nothing in this statute can be read for the proposition that an employer may never terminate for

> cause an employee who is otherwise entitled to receive temporary total disability payments.

Thus, the Commission determined that Appellant was not out of work due to his injury, but rather for violating company policies that led to his termination for cause. It reasoned that to hold otherwise would lead to an absurd result in which an employer could never terminate a light duty, accommodated employee without triggering TTD benefits. This appeal followed.

## II.

Under the Administrative Procedures Act (APA), an appellate court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, but it may reverse when the decision is affected by an error of law. S.C. Code Ann. § 1-23-380(5) (Supp. 2012). "This Court will not overturn a decision by the Commission unless the determination is unsupported by substantial evidence." *Jones v. Georgia-Pacific Corp.*, 355 S.C. 413, 416, 586 S.E.2d 111, 113 (2003) (citing *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981)). "'Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached to justify its action.'" *Id.* at 417, 586 S.E.2d at 113 (quoting *Howell v. Pacific Columbia Mills*, 291 S.C. 469, 471, 354 S.E.2d 384, 385 (1987)).

## III.

Appellant argues the Commission erred in denying him TTD compensation.[3] We disagree.

Pursuant to section 42-9-260 of the South Carolina Code, TTD payments may begin when "an employee has been out of work *due to* a reported work-related injury . . . for eight days[.] . . ." S.C. Code Ann. § 42-9-260 (Supp. 2012) (emphasis added). Under the workers' compensation regulations, disability is considered "incapacity *because of injury* to earn wages which the employee was receiving at the time of the injury in the same or any other employment." 25A S.C. Code Reg. 67-502(B)(1) (Supp. 2012) (emphasis added). A disability is

[3] Respondent contends the Commission's order is not immediately appealable. We disagree and summarily reject this contention pursuant to Rule 220(b)(1), SCACR.

"presumed to continue until the employee returns to work or compensation is otherwise suspended or terminated according to Section 42-9-260." *Id.* An employer is not obligated to pay TTD benefits if the employee has returned to work for more than 15 days or the employee has been released by the treating physician for limited duty work and the employer provides limited duty work consistent with the terms upon which the employee has been released. *Id.*

Appellant seeks to avoid the law of substantial evidence by suggesting that "as a matter of law, when the injured worker is under work restrictions, the employer must either offer suitable employment within the injured worker's capacity or pay temporary total disability compensation." We do not disagree with Appellant's proposition, but find it has no application here, for it is premised on the false assumption that Respondent did not offer suitable employment within his restrictions. It is beyond dispute that Respondent offered Appellant continued employment within his light duty restrictions, which was accepted by Appellant. Thus, in this case we are presented with a factual determination, not a question of law.

It appears Appellant seeks to have this Court construe South Carolina's workers' compensation laws to mandate the payment of TTD benefits, regardless of the factual circumstances of the particular case, whenever an employee is discharged from an accommodated, light duty position. We categorically reject such an interpretation, as the fallacy in Appellant's position is self-evident.[4] *See Lancaster Cnty. Bar Ass'n v. S.C. Comm'n on Indigent Defense*, 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008) ("In construing a statute, this Court will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature.").

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[4] To accept Appellant's argument that, as a matter of law, no employer may *ever* terminate an injured, accommodated employee without incurring responsibility for TTD benefits would be contrary to section 42-9-260 and applicable regulations. Appellant's interpretation of the law would essentially insulate injured employees who engage in misconduct while employed in rehabilitative settings and essentially tie the hands of an employer who has sought to accommodate the employee to the best of its ability. Such an unwarranted construction of the statutory and regulatory language would have the additional and undesirable effect of discouraging employers from endeavoring to accommodate injured workers with light duty work.

Pursuant to section 42-9-260 and the accompanying regulations, the entitlement of TTD benefits is premised on a nexus between the work-related injury and the inability to earn wages. An injured employee will be entitled to TTD compensation when his incapacity to earn wages is *due to* or *because of* the injury. *See Travelscape, LLC v. S.C. Dep't of Rev.*, 391 S.C. 89, 98, 705 S.E.2d 28, 33 (2011) ("Where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning."). This is a quintessential factual question for the fact-finder, the Commission. *See, e.g.*, *Johnson v. Rent-A-Center, Inc.*, 398 S.C. 595, 730 S.E.2d 857 (2012) (holding substantial evidence supports the Commission's findings that the employee was disabled and entitled to TTD benefits). As a result, this Court is limited to determining whether substantial evidence supports the Commission's finding that Appellant's inability to earn wages was a result of his termination for cause, not his work-related injury.

While we are constrained by the substantial evidence standard of review, we do agree with Appellant that an employer's denial of TTD benefits must be scrutinized carefully. Certainly, this is a critically important task for the Commission in its fact-finding role. Having thoroughly reviewed the record, we are persuaded the single commissioner and the Commission thoughtfully considered the evidence, remaining sensitive to an employer's possible motivation to "look for" a reason to fire an injured worker.[5]

[5] The jurisprudence in this area reflects the Commission's commendable recognition of the natural motivations that may be at play when an employer seeks to deny or terminate TTD benefits. *See, e.g.*, *Johnson*, 398 S.C. 595, 730 S.E.2d 857 (affirming the Commission's award of TTD benefits and rejection of the employer's argument that it attempted to accommodate the employee's injury and that its purported offer of light duty work was reasonable); *Last v. MSI Const. Co.*, 305 S.C. 349, 409 S.E.2d 334 (1991) (affirming the Commission and holding substantial evidence supported the continuation of TTD benefits where the employer sought to terminate TTD benefits based on a claimant's refusal to accept medical care while the claimant was incarcerated); *Davis v. UniHealth Post Acute Care*, --- S.C. ---, 741 S.E.2d 770 (Ct. App. 2013) (affirming the Commission and holding substantial evidence supported the Commission's determination that the employer was required to pay TTD compensation to the claimant where the claimant did not refuse employment by falling asleep briefly on the job). Here, the

We hold there is substantial evidence to support the Commission's finding that Appellant's incapacity to earn wages was due to his termination for cause, not his work-related injury. It is undisputed that Appellant, who never received TTD benefits, was accommodated by Respondent within his light duty work restrictions. Appellant was permitted to remain in his position, subject to the 15-pound lifting restriction. Further, Appellant admits he violated company policy by not reporting the accident involving the company vehicle.[6] We find there is substantial evidence to support the Commission's finding that Appellant was terminated for cause and therefore Appellant's inability to earn wages was not *due to* or *because of* a work-related injury.[7]

**IV.**

Because the decision of the Commission denying Appellant TTD benefits is supported by substantial evidence, it is affirmed.

**AFFIRMED.**

**TOAL, C.J., PLEICONES, BEATTY and HEARN, JJ., concur.**

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Commission has made a factual determination contrary to Appellant's position, and that finding is manifestly supported by substantial evidence.

[6] Appellant further acknowledged that his conduct at work prior to his injury had not been ideal. Respondent, through counsel, characterizes Appellant's previous work history as putting him on "thin ice." While this characterization is likely hyperbole, Appellant's less than model employment weighs against the suggestion that he was terminated due to his work injury.

[7] Pursuant to Rule 220(b)(1), SCACR, we affirm Appellant's challenge to the Commission's consideration of Jessie Richardson's written statement. Having determined that the decision of the Commission is supported by substantial evidence, we decline to address the Commission's discussion of the doctrine of constructive refusal.

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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

v.

South Carolina Association of School Administrators, Respondent. State ex rel. Alan Wilson, Attorney General, Intervenor.

Appellate Case No. 2011-198146

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Appeal from Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

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Opinion No. 27286
Heard October 3, 2012 – Filed July 17, 2013

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**REVERSED**

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Kevin A. Hall, Karl S. Bowers, Jr., and M. Todd Carroll, of Womble, Carlyle, Sandridge, & Rice, LLP, of Columbia, for Appellant.

Kenneth L. Childs, John M. Reagle, and Keith R. Powell, of Childs & Halligan, PA, of Columbia, for Respondent.

Attorney General Alan McCrory Wilson, Solicitor General Robert D. Cook and Deputy Solicitor General J. Emory Smith, Jr., all of Columbia, for Intervenor.

Scott Thomas Price, of Columbia, for Amicus Curiae, South Carolina School Boards Association.

Jerald A. Jacobs, of Pillsbury Winthrop Shaw Pittman, LLP, of Washington, DC, for Amicus Curiae, American Society of Association Executives.

Jerry Jay Bender, of Baker, Ravenel & Bender, LLP, of Columbia, for Amicus Curiae, South Carolina Press Association and South Carolina Broadcasters Association.

Marsha A. Ward, of Atlanta, GA, for Amicus Curiae, The Student Press Law Center and Reporters Committee for Freedom of the Press in Support of Petitioner Rocky Disabato.

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**JUSTICE HEARN:** This case requires us to reconcile two competing principles of our democratic tradition. First, embodied in the South Carolina Freedom of Information Act, Title 30, Chapter 4 of the South Carolina Code (the FOIA), is the principle of an open, transparent system of government, vital to maintaining an informed electorate and preventing the secret exercise of governmental power with its potential corruption. Juxtaposed against this principle are the rights of citizens to freely speak and associate embodied in the First Amendment to the United States Constitution. We must decide whether the FOIA as applied to the South Carolina Association of School Administrators (SCASA), a non-profit corporation engaged in political advocacy, unconstitutionally infringes upon SCASA's First Amendment speech and association rights. We hold the FOIA does not violate those rights and reverse the circuit court's order granting SCASA's motion to dismiss.

## FACTUAL/PROCEDURAL BACKGROUND

SCASA is a non-profit, South Carolina corporation whose purpose is to advocate on legislative and policy issues impacting education. In August of 2009,

Rocky Disabato sent SCASA a request for information pursuant to the FOIA.[1] The Executive Director of SCASA sent Disabato a response in which she refused to produce any of the requested materials and asserted that SCASA is not a public entity subject to the FOIA.

Thereafter, Disabato filed a complaint in circuit court seeking a declaration that SCASA violated the FOIA by refusing to comply with his request as well as an injunction requiring SCASA to comply with the FOIA. SCASA filed a motion to dismiss the action pursuant to Rule 12(b)(6), SCRCP, on the grounds that, when the FOIA is applied to a public body that is a non-profit corporation engaged in political advocacy, the FOIA unconstitutionally violates the First Amendment rights of speech and association.[2]

In ruling on the motion to dismiss, the circuit court assumed that SCASA is supported by public funds, is a public body subject to the FOIA, and is a corporation engaged in political speech and issue advocacy. The court first held that the FOIA burdens SCASA's First Amendment speech and association rights,

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[1] Disabato's letter stated in pertinent part:

> Pursuant to the South Carolina Freedom of Information Act, I hereby request that you provide me with a copy of all emails, letters, memos, documents, and other records possessed or maintained by the South Carolina Association of School Administrators that discuss both the American Recovery and Reinvestment Act of 2009 and Governor Mark Sanford, including but not limited to any references to the lawsuit filed by your organization against Gov. Sanford in May 2009. I also request that you provide me with a copy of any record that reflects all telephone calls made by or received by your organization and its staff, including the staff members' cell phones, from January 1, 2009 to July 31, 2009. Your response is due within fifteen days.

[2] SCASA's brief asserts that it also moved to dismiss the complaint on the grounds that application of the FOIA to SCASA violates Article 1, Section 2 of the South Carolina Constitution which provides for the "freedom of speech." S.C. Const. art. I, § 2 (1976). However, the record is devoid of any mention of Article 1, Section 2, and therefore, the issue is not before us. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal . . . .").

and then reviewed the constitutionality of the FOIA using a combination of the exacting and strict scrutiny standards of review. In its order dismissing Disabato's complaint, the court stated that "[t]he FOIA's broad definition of 'public body' can only be sustained as constitutional if the FOIA's open meeting and records disclosure requirements are substantially related to a sufficiently important governmental purpose and no less restrictive means of achieving this purpose exists." The court held the FOIA as applied to SCASA does not meet that standard because the disclosure and open meetings requirements are not substantially related to the purposes of the statute and because a less restrictive means of achieving the statute's purposes exists. Accordingly, the court held the FOIA violates SCASA's First Amendment speech and association rights and granted the motion to dismiss. This appeal followed.

## ISSUES PRESENTED

I. Is SCASA a "public body" subject to the South Carolina Freedom of Information Act?

II. Does application of the FOIA to SCASA violate SCASA's First Amendment speech and association rights as incorporated through the Fourteenth Amendment?

## STANDARD OF REVIEW

A claim may be dismissed when the defendant demonstrates that the plaintiff has failed to allege facts sufficient to establish a cause of action. Rule 12(b)(6), SCRCP. We review the grant of dismissal according to the same standard applied by the circuit court. *See Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 500 (Ct. App. 2001). A ruling on a motion to dismiss pursuant to Rule 12(b)(6) must be based solely on the factual allegations set forth in the complaint, and the court must consider all well-pled allegations as true. *Gressette v. S.C. Elec. & Gas Co.*, 370 S.C. 377, 378–79, 635 S.E.2d 538, 538 (2006).

The Supreme Court has a limited scope of review in considering constitutional challenges to statutes. *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999). The Court presumes that all statutes are constitutional and will, if possible, construe a statute so as to render it constitutional. *Davis v. Cnty. of Greenville*, 322 S.C. 73, 77, 470 S.E.2d 94, 96 (1996).

## LAW/ANALYSIS

Our General Assembly enacted the FOIA based on the premise "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." S.C. Code Ann. § 30-4-15 (2007). In furtherance of that purpose, the FOIA subjects a "public body" to record disclosure and open meeting requirements.

Among those entities defined as a public body subject to the statute are "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). We held in *Weston v. Carolina Research & Development Foundation*, 303 S.C. 398, 401 S.E.2d 161 (1991), that the statute's unambiguous language brings even a private corporation supported by public funds within the definition of a public body. *Id.* at 403, 401 S.E.2d at 164. We further clarified that holding, stating:

> this decision does not mean that the FOIA would apply to business enterprises that receive payment from public bodies in return for supplying specific goods or services on an arm[']s length basis. In that situation, there is an exchange of money for identifiable goods or services and access to the public body's records would show how the money was spent. However, when a block of public funds is diverted *en masse* from a public body to a related organization, or when the related organization undertakes the management of the expenditure of public funds, the only way that the public can determine with specificity how those funds were spent is through access to the records and affairs of the organization receiving and spending the funds.

*Id.* at 404, 401 S.E.2d at 165.

The FOIA's record disclosure requirement provides that "any person has a right to inspect or copy any public record of a public body" subject to certain exceptions. S.C. Code Ann. § 30-4-30(a). A public body must provide any requested records within fifteen days of a request, and the body may collect fees to cover the costs of searching for and producing records. S.C. Code Ann § 30-4-30(b) – (c). Additionally, the FOIA's open meetings requirement provides that all

meetings of public bodies must be open to the public, subject to limited exceptions. S.C. Code Ann. § 30-4-60. A public body must provide advance notice of all meetings and keep written minutes which must include statutorily specified information. S.C. Code Ann. §§ 30-4-80 & 30-4-90. Finally, the FOIA provides that any citizen of the State may seek a declaratory judgment and injunctive relief to enforce the provisions of the FOIA, and willful violations of the FOIA are a misdemeanor subject to punishment by a fine or imprisonment. S.C. Code Ann. §§ 30-4-100 & 110.

## I. PUBLIC BODY

As an initial matter, Disabato asks us to declare that SCASA is a public body subject to the FOIA. However, SCASA's motion to dismiss did not challenge the sufficiency of Disabato's allegation that SCASA is a public body. Therefore, the issue is not before us. The allegations in Disabato's complaint, if true, may or may not be enough to establish that SCASA is a public body for purposes of the FOIA; however, a judicial declaration that SCASA is a public body must be based upon evidence, not on mere allegations. Therefore, the issue of whether SCASA is a public body can only be resolved after the parties have engaged in discovery, and at this procedural stage, we assume, but do not decide, that SCASA is a public body.

## II. FIRST AMENDMENT CHALLENGE

The only issue before us is whether the application of the FOIA to SCASA is an unconstitutional infringement upon SCASA's First Amendment speech and association rights. Disabato contends that the FOIA does not impact SCASA's First Amendment rights in any way, and thus, we need not consider the FOIA's constitutionality under the First Amendment. Disabato also contends that even if the FOIA does impact SCASA's First Amendment rights, the FOIA does not unconstitutionally infringe upon those rights.

Accordingly, we must engage in a two-step analysis of SCASA's challenge. Initially, we must determine whether the FOIA impacts SCASA's speech and association rights, and if we conclude it does, we must then determine whether it is an unconstitutional infringement of SCASA's rights. *See, e.g.*, *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983) (first concluding that the

challenged law implicated First Amendment rights before proceeding to consider the constitutionality of the law). We conclude that while the FOIA does impact upon SCASA's speech and association rights, the First Amendment is not violated.

### A. The FOIA's Impact on SCASA's First Amendment Rights

#### 1. Freedom of Speech

Among the protections afforded by the First Amendment against state action is the right to not speak publicly.[3] *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985). Affording persons a right to speak in private furthers the interests in enabling and promoting speech behind the First Amendment. *Id.* Persons may not be willing to express some speech in public, for example dissident beliefs or personal information, and thus, such speech would be stifled were persons not able to express it in private.

By requiring that all meetings be open to the public, the FOIA prevents private oral communication among SCASA's members. The records disclosure requirement prevents private written communications because any such communications are subject to public disclosure. Thus, the FOIA implicates SCASA's right to not speak publicly.

#### 2. Freedom of Association

The United States Supreme Court has interpreted the First Amendment as encompassing an implicit right to associate for the purpose of engaging in speech and the other activities protected by the First Amendment.[4] *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984). The right to associate is recognized due to the inextricable link between association and the enumerated rights of the First

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[3] The freedom of speech found in the First Amendment is a fundamental right, and thus, the First Amendment's prohibition against laws abridging the freedom of speech applies against the states through the Fourteenth Amendment. *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940).

[4] The freedom of association implicit in the First Amendment is a fundamental right, and thus, like the freedom of speech, the First Amendment's protection against the abridgement of the freedom of association applies against the states through the Fourteenth Amendment. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460–66 (1958).

Amendment and the role of association in facilitating self-governance. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) (noting the "close nexus between the freedoms of speech and assembly"); Ashutosh Bhagwat, *Associational Speech*, 120 Yale L.J. 978, 993 (2011) (discussing the rationale for recognizing a right to associate). By associating, persons can increase the strength and visibility of their views, and are accordingly better able to communicate those views to their representatives in government. *See Patterson*, 357 U.S. at 460 ("The effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . . ."). Thus, for the freedom to speak on political issues to have any substance, people must be able to associate in order to make their common views heard.

Among the protections afforded by the freedom of association are the rights to not associate, to privacy in one's associations, and to be free from governmental interference with the internal affairs and organization of one's associations. *Roberts*, 468 U.S. at 622–23. The FOIA implicates SCASA's right to associational privacy both by requiring that SCASA's meetings be open to the public and by requiring SCASA to disclose records including membership lists. More importantly, the FOIA's open meeting requirement impairs SCASA's ability to effectively associate for the purpose of political and issue advocacy. By requiring that all meetings be open to the public, the provision essentially demands that SCASA conduct all of its associational activities with members of its opposition present. We recognize that the ability of a group such as SCASA to formulate a strategy for political advocacy may be diminished by the presence of persons opposed to the organization's views because the members' ability to freely and openly debate their views may be chilled. As a result, an organization that cannot deliberate internally over its strategy and message has a weakened ability to meaningfully associate. *See Perry v. Schwarzenegger*, 591 F.3d 1126, 1142 n.9 (9th Cir. 2009) (holding that an organization's ability to engage in internal deliberations on strategy is a component of the freedom of association). Thus, the FOIA implicates SCASA's right to associate by interfering with its ability to deliberate internally and by removing any associational privacy.

In conclusion, the FOIA impacts SCASA's freedoms of speech and association. However, simply because a statute negatively affects a constitutional right does not mean the statute unconstitutionally infringes that right. Instead, courts assess the constitutionality of a statute by selecting the appropriate level of scrutiny and subjecting the statute to that scrutiny. If a statute satisfies the

appropriate level of scrutiny, it is constitutional despite its impacts upon a constitutional right. Accordingly, while we agree with the circuit court that the FOIA burdens SCASA's First Amendment rights of speech and association, we must now determine the appropriate level of scrutiny in order to determine whether that infringement is unconstitutional.

### B. Level of Scrutiny

First, Disabato contends the circuit court erred in selecting an exacting scrutiny or strict scrutiny standard as the appropriate standard. We agree.

The circuit court misapprehended the United States Supreme Court's recent decisions in *John Doe No. 1 v. Reed*, 130 S. Ct. 2811 (2010) and *Citizens United v. FEC*, 558 U.S. 310 (2010), in holding that those decisions dictate the appropriate standard of review to be applied here. In *Reed* and *Citizens United*, the Court considered First Amendment challenges to disclosure requirements related to elections, and reviewed those requirements under an exacting scrutiny standard. Exacting scrutiny is a special level of scrutiny applied only in election disclosure cases, and it falls somewhere "in the gray area between strict scrutiny and deference under rational basis review." Anthony Johnstone, *A Madisonian Case for Disclosure*, 19 Geo. Mason L. Rev. 413, 425 (2012). To satisfy exacting scrutiny there must be a substantial relationship between the disclosure requirement and a sufficiently important governmental interest. *Reed*, 130 S. Ct. at 2818. While the *Reed* and *Citizens United* decisions involved disclosure requirements and the FOIA requires disclosure, those decisions made clear they were applying exacting scrutiny because the First Amendment challenges were made in the election context. *See Reed*, 130 S. Ct. at 2818; *Citizens United*, 558 U.S. at 366–71. Here, the First Amendment challenge to the FOIA is not a challenge in the electoral context, and thus, exacting scrutiny is not applicable.[5]

[5] Additionally, we note that even if *Reed* and *Citizens United* supplied the appropriate standard of review, the circuit court misstated that standard. The circuit court stated the exacting scrutiny standard—"substantially related to a sufficiently important governmental purpose"—and then tacked on the additional requirement that "no less restrictive means of achieving this purpose exists." The requirement that there be no less restrictive means is a component of strict scrutiny, the highest standard of review. *See United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000).

Outside the context of electoral disclosure requirements, the level of scrutiny applied to a statute that affects speech depends on whether the statute is content-based or content-neutral in relation to the affected speech. Content-based statutes are subjected to strict scrutiny, whereas content-neutral statutes are subjected to intermediate scrutiny. *See Republican Party of Minnesota v. White*, 536 U.S. 765, 774–75 (2002) (finding a statute was content-based and applying strict scrutiny); *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 189 (1997) (finding a statute was content-neutral and applying intermediate scrutiny). A statute will be upheld under intermediate scrutiny despite its impact on speech if it serves important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests. *Turner*, 520 U.S. at 189. To survive strict scrutiny, a statute must serve a compelling state interest and be narrowly tailored to serve that interest. *White*, 536 U.S. at 774–75.

The United States Supreme Court supplied the following guidance for distinguishing content-based statutes from content-neutral statutes:

> The principal inquiry in determining content-neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of the expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content neutral so long as it is "*justified* without reference to the content of the regulated speech."

*Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)) (citations omitted).

The language of the FOIA contains no indication that it is intended to or does distinguish between speech or that it places a greater burden on any particular message. Rather, the FOIA equally burdens all public bodies regardless of the content of their speech. Moreover, the State's purpose in enacting the FOIA, as expressed by the General Assembly, was to strengthen our democracy, a purpose unrelated to the content of the expression. Thus, we conclude the statute is content-neutral and the intermediate scrutiny standard applies.

Turning to the freedom of association, when a statute severely affects associational rights, such as when an organization is required to accept a member it does not desire, strict scrutiny applies. *Clingman v. Beaver*, 544 U.S. 581, 586 (2005); *see also Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (applying strict scrutiny where an association was forced to accept a member it did not desire). However, when a statute only incidentally affects associational rights, it is subject to the more permissive *Clingman* standard. *Clingman*, 544 U.S. at 586–87. Under that standard, the statute is constitutional, provided it serves an important governmental interest and is a reasonable and nondiscriminatory restriction on association. *Id.*

Considering the FOIA's impacts upon SCASA's right to associate, we find it only incidentally affects that right. It does not bar public bodies from exercising their associational rights, nor does it require them to admit members they do not desire. Rather, the FOIA only indirectly impacts SCASA's associational rights by burdening its ability to effectively associate through the requirement that it open its meetings to the public.

Also, while the FOIA burdens SCASA's members' right to privacy or anonymity in their associations, the United States Supreme Court has indicated that right only merits strong constitutional protection where disclosure of one's association creates a risk of harassment or reprisal. In *Patterson*, the Court recognized the importance of associational privacy but noted that its importance depends upon the circumstances, including whether the association expresses dissident beliefs. *Patterson*, 357 U.S. at 462. There, the NAACP established that its members had been subjected to economic reprisals and threats of physical harm when their memberships in the association were made public. *Id.* at 462. In light of those circumstances, the Court held the NAACP's right to associational privacy could only be constitutionally overcome by a compelling state interest. *Id.* at 463. Subsequently, in *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court held the *Patterson* decision was inapposite where there was not actual or threatened harassment similar to that in the *Patterson* case. *Id.* at 70. More, recently, in *Reed*, the Court stated that an individual can prevail on a claim that a statute unconstitutionally interferes with his right to associational privacy if he can establish to a reasonable probability that disclosure of information identifying him as a member of the association would cause him to suffer threats, harassment, or reprisals. *Reed*, 130 S. Ct. at 2820. Here, the record is devoid of any claim that SCASA expresses

dissident beliefs or that its members would suffer threats, harassment, or reprisal if their membership in SCASA was to be disclosed to the public.

Therefore, we conclude the FOIA's impacts on SCASA's associational rights are subject to the lesser standard of review established in *Clingman* whereby a reasonable and nondiscriminatory restriction on association that furthers an important governmental interest is constitutionally permissible. While that standard has not been precisely located within the usual tripartite system of constitutional review—rational basis, intermediate scrutiny, and strict scrutiny—we conclude that it is equivalent to intermediate scrutiny. Like intermediate scrutiny, the *Clingman* standard requires an important governmental interest. The *Clingman* standard also requires that the restriction be nondiscriminatory. Similarly, intermediate scrutiny requires that the restriction be nondiscriminatory because it is only applied to content-neutral restrictions on the freedom of speech and specifically requires an interest unrelated to the suppression of speech. Finally, the *Clingman* standard's requirement that the restriction be reasonable is presumably the equivalent of the intermediate scrutiny standard's requirement that the challenged law not burden substantially more speech than necessary.

Accordingly, we will employ the intermediate scrutiny standard. If the FOIA satisfies the intermediate scrutiny standard, it also satisfies the *Clingman* standard.

### C. Constitutionality

Finally, we must determine whether the FOIA's impacts on SCASA's speech and association rights are constitutionally permissible by considering whether the FOIA serves important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to advance those interests.

The FOIA serves the important governmental interests of providing transparency in governmental decision-making, preventing fraud and corruption, and fostering trust in government. An informed electorate is essential to a healthy democracy because members of the public cannot meaningfully cast their votes if they are ignorant of what actions the government has taken and the rationale for those actions. Furthermore, secret government activity creates fertile ground for fraud and corruption, especially in the area of public expenditures where, without transparency, the public can be kept unaware of misappropriations and conflicts of

interest. As Justice Brandeis wrote, "[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." L. Brandeis, *Other People's Money* 62 (National Home Library Foundation ed. 1933). Finally, regardless of whether governmental activity conducted in secrecy actually is nefarious or corrupt, the public cannot be expected to possess a high level of trust in that which is hidden from its view. The General Assembly specifically addressed these interests in the FOIA's legislative findings, and numerous states have made similar findings when enacting freedom of information laws similar to South Carolina's FOIA.

The interests giving rise to the FOIA, and recognition of their foundational role in our democracy, trace back to the earliest days of our nation. As James Madison wrote, "A popular government, without popular information or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance; And a people who mean to be their own governors, must arm themselves with the power which knowledge gives." Letter from James Madison to W.T. Barry (Aug. 4, 1822), reprinted in *The Complete Madison* 337 (S. Padover ed. 1953). John Marshall also acknowledged these interests in Virginia's convention on the adoption of the federal constitution, recognizing the importance of secrecy in some governmental matters, but cautioning that secrecy should be employed only "when it would be fatal and pernicious to publish the schemes of government." 3 Debates in the Several State Conventions on the Adoption of the Federal Constitution 233 (J. Elliot ed. 1901). *See also* Patricia M. Wald, *The Freedom of Information Act*, 33 Emory L.J. 649, 652–54 (1984) (discussing the historical background of freedom of information laws).

Furthermore, in similar cases, courts have repeatedly recognized the importance of these interests and found them sufficient to permit similar intrusions upon First Amendment rights. Most recently, in *Reed*, the United States Supreme Court considered a First Amendment challenge to the disclosure of referendum petition signatures pursuant to the Washington Public Records Act (PRA). The PRA provided that all public documents were to be made available to the public for inspection and copying. 130 S. Ct. at 2816. One of the petitioners, an advocacy group, collected and submitted signatures to the state in support of holding a referendum on a recently enacted state law. *Id.* The respondents then filed requests pursuant to the PRA for copies of the petitions and declared their intent to publish the names of the signers online. *Id.* The petitioners filed suit and

a motion for a preliminary injunction on the grounds the PRA, as applied to the referendum petitions, violated the First Amendment. *Id.* at 2816–17. The district court granted the petitioners a preliminary injunction, the United States Court of Appeals for the Ninth Circuit reversed, and the Supreme Court granted certiorari. *Id.* at 2817. The Supreme Court found the state's interests in eliminating fraud in the electoral process and ensuring governmental transparency and accountability satisfied the exacting scrutiny standard. *Id.* at 2819. Thus, the *Reed* decision is particularly instructive both because it establishes that public records disclosure acts can survive a level of scrutiny more restrictive than the intermediate scrutiny applicable here and establishes that a state's interests in promoting governmental transparency and accountability and in preventing fraud and corruption are strong governmental interests.

The United States Supreme Court also considered disclosure requirements in *Citizens United*. In that case, the plaintiff asserted a First Amendment challenge to portions of the federal Bipartisan Campaign Reform Act of 2002 that required disclosure of who created and funded a political advertisement and the election at which the advertisement was directed. 558 U.S. at 366. Upholding the disclosure requirements under the exacting scrutiny standard, the Court again emphasized the governmental interest in transparency, noting the transparency provided by the disclosures "enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Id.* at 371.

Additionally, in *Asgeirsson v. Abbott*, 773 F. Supp. 2d 684 (W.D. Tex. 2011), *aff'd*, Case No. 11-50441 (5th Cir. Sept. 25, 2012), the plaintiffs contended the Texas Open Meetings Act violated the First Amendment. The Act, similar to the open meeting requirement of South Carolina's FOIA, required governmental bodies to hold their meetings open to the public when discussing public business. *Id.* at 690. The court concluded that intermediate scrutiny was applicable because the statute was content-neutral. *Id.* at 695. The court then held the Act served three compelling interests—providing transparency, preventing fraud and corruption, and fostering trust—and survived intermediate scrutiny. *Id.* at 701–02.

Similarly, the Minnesota Supreme Court, considering a First Amendment challenge to an open meetings law, held the law served the compelling state interests of informing the electorate and allowing the public to express their views. *St. Cloud Newspapers, Inc. v. Dist. 742 Cmty. Sch.*, 332 N.W.2d 1, 7 (Minn. 1983). Accordingly, the court held the open meetings law did not unconstitutionally interfere with the First Amendment rights of speech and association. *Id.*

The Colorado Supreme Court also upheld an open meetings law under a First Amendment challenge, finding the law served the important governmental interest of the public's right to access public information. *Cole v. State*, 673 P.2d 345, 350 (Colo. 1983). The court, elaborating on that interest, noted that information concerning governmental actions is a necessary prerequisite of self-government and ensuring public access to such information promotes accountability. *Id.*

Additionally, the longstanding, universal adoption of freedom of information laws by the federal and state governments supports the conclusion that such laws advance important governmental interests. The federal government enacted its Freedom of Information Act in 1966. *See* Act of September 6, 1966, Pub. L. No. 89-554, 80 Stat. 383 (codified at 5 U.S.C. §§ 552–559 (1970)). The Act requires federal agencies to both produce records for public inspection and conduct their meetings open to the public. 5 U.S.C. §§ 552, 552b. Every state and the District of Columbia has also adopted a freedom of information law requiring the disclosure of public records and open meetings.[6]

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[6] Ala. Code §§ 36-12-40 & 36-25A-1–11; Alaska Stat. §§ 40.25.100–.295 44.62.310–.319; Ariz. Rev. Stat. Ann. §§ 38-431–431.09 & 39-121–128; Ark. Code Ann. §§ 25-19-101–110; Cal. Gov't Code §§ 54950–54963 & 6250–6270; Colo. Rev. Stat. §§ 24-6-401–402 & 24-72-201–206; Conn. Gen. Stat. §§ 1-210 & 1-225; Del. Code Ann. tit. 29, §§ 10001–10006, 10112; D.C. Code §§ 2-532 & 2-571–580; Fla. Stat. §§ 119.01 & 286.011; Ga. Code Ann. §§ 50-14-1 & 50-18-70–77; Haw. Rev. Stat. §§ 92-3 & 92F-1–119; Idaho Code Ann. §§ 9-338 & 67-2340–2346; 5 Ill. Comp. Stat. 120/1–7.5 & 140/1-11.5; Ind. Code §§ 5-14-1.5-1–8 & 5-14-3-1–10; Iowa Code §§ 21.1–.11 & 22.1–.14; Kan. Stat. Ann. §§ 45-215–250 & 75-4317–4320c; Ky. Rev. Stat. Ann. §§ 61.800–.884; La. Rev. Stat. Ann. §§ 42:11–28 & 44:1–57; Me. Rev. Stat. Ann. tit. 1, § 400–521; Md. Code Ann., State Gov't §§ 10-501–512 & 10-611–630; Mass. Gen. Laws ch. 30A, §§ 18–25 & ch. 66A, §§ 1–3; Mich. Comp. Laws §§ 15.231–.246 & 15.261–.275; Minn. Stat. §§ 13.03 & 13D.01–.07; Miss. Code Ann. §§ 25-41-1–17 & 25-51-3; Mo. Rev. Stat. §§ 109.180 & 610.010–.022; Mont. Code Ann. §§ 2-3-201–221 & 2-6-101–112; Neb. Rev. Stat. §§ 84-712–712.09 & 84-1407–1414; Nev. Rev. Stat. §§ 239.001–.030 & 241.010–.040; N.H. Rev. Stat. Ann. § 91-A:1–9; N.J. Stat. Ann. §§ 10:4-1–21 & 47:1A-1–13; N.M. Stat. §§ 10-15-1–4 & 14-2-1–23; N.Y. Pub. Off. Law §§ 87-90 & 100–111; N.C. Gen. Stat. §§ 132-1–10 & 143-318.9–.18; N.D. Cent. Code

We also find the FOIA does not burden substantially more speech than necessary to further those interests. The FOIA exempts certain sensitive records and meetings from public disclosure, and thus attempts to only implicate that speech and association necessary to serve its purposes. *See* S.C. Code Ann. § 30-4-40 (Supp. 2011) (exempting certain records from public disclosure); S.C. Code Ann. § 30-4-70 (exempting certain meetings from the open meetings requirement). For example, "correspondence or work products of legal counsel for a public body" are exempted from public disclosure, S.C. Code Ann. § 30-4-40(a)(7), and "[d]iscussion of employment, appointment, compensation, promotion, demotion, discipline, or release of an employee" is exempted from the open meetings requirement, S.C. Code Ann. § 30-4-70(a)(1).

Of course, the main thrust of SCASA's challenge to the FOIA is that it applies beyond traditional governmental entities to all public bodies, including non-profit corporations engaged in political advocacy. However, the application of the FOIA beyond traditional governmental entities is limited to statutorily defined public bodies, which are only those entities supported by public funds. *Weston*, 303 S.C. at 403, 401 S.E.2d at 164. The FOIA also serves these important governmental interests when applied to such entities due to the importance of ensuring transparency and accountability in the expenditure of public funds. We previously recognized in *Weston* that the FOIA is ineffectual if it does not extend to such bodies, explaining that when an entity receives public funds *en masse* or manages the expenditure of public funds, "the only way that the public can determine with specificity how those funds were spent is through access to the records and affairs of the organization receiving and spending the funds." *Id.* at 404, 401 S.E.2d at 165. If public bodies were not subject to the FOIA, governmental bodies could subvert the FOIA by funneling State funds to non-profit corporations so that those corporations could act, outside the public's view,

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§§ 44-04-18–19; Ohio Rev. Code Ann. §§ 121.22 & 149.43; Okla. Stat. tit. 25, §§ 301–314 & tit. 51, §§ 24A.1–.29; Or. Rev. Stat. §§ 192.410–.505 & 192.630; 65 Pa. Cons. Stat. Ann. §§ 67.101–.3104 & 701–716; R.I. Gen. Laws §§ 38-2-1–15 & 45-3-7; S.D. Codified Laws §§ 1-25-1–10 & 1-27-1–46; Tenn. Code Ann. §§ 8-44-101–201 & 10-7-503–506; Tex. Gov't Code Ann. §§ 551.001–.146 & 552.001–.353; Utah Code Ann. §§ 52-4-101–305 & 63G-2-101–901; Vt. Stat. Ann. tit. 1, §§ 310–320; Va. Code Ann. §§ 2.2-3700–3714; Wash. Rev. Code §§ 42.30.010–.920 & 42.56.070; W. Va. Code §§ 6-9a-1–12 & 29B-1-1–7; Wis. Stat. §§ 19.21–.39 & 19.81–.98; Wyo. Stat. Ann. §§ 16-4-201–205 & 16-4-401–408.

as proxies for the State. Moreover, South Carolina is not alone in extending its FOIA to cover entities beyond the traditional governmental entities based on the receipt of public funds.[7] Several states—Arkansas, Kansas, North Dakota, Virginia, and West Virginia—use nearly identical language in providing that any entity that receives public funds is subject to their freedom of information laws.

While we respect the dissent's concern about the scope of the FOIA's application, we believe the dissent overlooks the limited application of the FOIA to

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[7] *See* Ark. Code Ann. §§ 25-19-103(4) (defining "public meetings" as including the meetings of "all other boards, bureaus, commissions, or organizations in the State of Arkansas, except grand juries, supported wholly or in part by public funds") & (5)(A) (defining "public records" as including records of the activity of "any other agency or improvement district that is wholly or partially supported by public funds"); Ga. Code Ann. § 50-14-1 (defining a "public agency" subject to the statute as including "[a]ny nonprofit organization to which there is a direct allocation of tax funds made by the governing body of any agency as defined in this paragraph which constitutes more than 33⅓ percent of the funds from all sources of such organization"); Kan. Stat. Ann. § 45-217 (defining a "public agency" subject to the statute as "any other entity receiving or expending and supported in whole or in part by the public funds appropriated by the state or by public funds of any political or taxing subdivision of the state"); Ky. Rev. Stat. Ann. § 61.870 (providing that the state's open records law applies to "[a]ny body which, within any fiscal year, derives at least twenty-five percent (25%) of its funds expended by it in the Commonwealth of Kentucky from state or local authority funds."); Mich. Comp. Laws § 15.232 (defining a "public body" subject to the act as including "[a]ny other body . . . which is primarily funded by or through state or local authority"); N.D. Cent. Code § 44-04-17.1(13) (defining a "public entity" subject to the statute as including "[o]rganizations or agencies supported in whole or in part by public funds, or expending public funds"); Tex. Gov't Code Ann. § 552.003 (defining a "governmental body" subject to the state's public records law as including "the part, section, or portion of an organization, corporation, commission, committee, institution, or agency that spends or that is supported in whole or in part by public funds"); Va. Code Ann. § 2.2-3701 (defining a "public body" subject to the statute as including "other organizations . . . supported wholly or principally by public funds"); W. Va. Code § 29B-1-2 (defining a "public body" subject to the act as including "any other body . . . which is primarily funded by the state or local authority").

non-governmental entities. Examined in light of that limited application, the FOIA does not burden substantially more speech than necessary to accomplish its purpose. The dissent would read the FOIA as applying to a private organization that receives even a negligible amount of public funding for a discrete purpose. We made clear in *Weston* that the FOIA only applies to private entities who receive government funds *en masse*. *See Weston*, 303 S.C. at 404, 401 S.E.2d at 165. The FOIA would not apply to a private entity that receives public funds for a specific purpose. For example, the FOIA would not apply to a private organization that receives public funds to operate a childcare center or healthcare clinic. However, the FOIA does apply to any private organization that is generally supported by public funds.

For the same reasons, we disagree with the dissent's characterization of the FOIA as improperly imposing conditions on the recipient of funds rather than on activities. The recipient versus activities distinction is not particularly apposite here because the FOIA does not apply to a recipient of public funds as a condition of the receipt of the funds. Rather, the general support of an entity through public funds brings it within the class of entities to which the FOIA applies.

## CONCLUSION

We hold the circuit court erred in finding the FOIA unconstitutional under the First Amendment when applied to SCASA. The FOIA is a content-neutral statute that serves important governmental interests and does not burden substantially more speech than necessary to serve those interests, and therefore, it does not violate SCASA's First Amendment speech and association rights. However, we express no opinion as to whether SCASA is a public body subject to the FOIA and leave that issue for determination on remand. For the foregoing reasons, we reverse the circuit court's dismissal of this case and remand to the circuit court for further proceedings.

**TOAL, C.J., and KITTREDGE, J., concur. PLEICONES, J., concurring in part and dissenting in part in a separate opinion in which BEATTY, J., concurs.**

**JUSTICE PLEICONES:** I respectfully concur in part and dissent in part. I wholeheartedly agree with the majority regarding the importance of ensuring transparency and accountability in the expenditure of public funds, and in my view FOIA plays a critical part in providing that transparency. But critical governmental interests alone cannot justify undue burdens on First Amendment rights. In my view, FOIA cannot constitutionally be applied to "any organization, corporation, or agency supported . . . in part by public funds or expending public funds" without regard to the potential application to organizations that may engage in both public and private functions because to do so may run afoul of First Amendment rights. I would therefore sever from the definitional section of FOIA the language that applies it in sweeping terms to any organization that receives any public funds. Whether SCASA is subject to FOIA for other reasons can be explored on remand.

South Carolina's Freedom of Information Act, S.C. Code Ann. §§ 30-4-10 et seq., 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). FOIA requires any such "public body" make its records available for public inspection and copying and announce and hold its meetings open to the public, subject to certain exemptions. §§ 30-4-30 to -90. Failure to comply with the requirements subjects both groups and individuals to civil and criminal liability. §§ 30-4-100 to -110.

SCASA moved to dismiss Appellant's suit to compel its disclosure of certain records on the basis that the FOIA requirements violate its First Amendment speech rights as a private organization engaged in issue advocacy.

"It is well established that in the area of freedom of expression an overbroad regulation may be subject to facial review and invalidation, even though its application in the case under consideration may be constitutionally unobjectionable." *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 129 (1992). Thus, we must evaluate SCASA's challenge as a facial one: does FOIA impermissibly intrude on the First Amendment rights of organizations that receive some public funding but are not wholly instrumentalities of the state? As explained *infra*, in my view the sweeping applicability of FOIA disclosure and open meetings requirements impermissibly intrudes on First Amendment rights because the requirements apply to any organization that receives any public funding without any differentiation of its publicly and privately funded activities.

The First Amendment protects not only the right to speak but also the right not to speak and the right to speak in private. *See, e.g., Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985); *Buckley v. Valeo*, 424 U.S. 1, 64-65 (1976). In addition, it protects the right of an association or organization to deliberate internally and to formulate its message without interference. *See Herbert v. Lando*, 441 U.S. 153, 190 (1979) ("Through the editorial process expression is composed; to regulate the process is therefore to regulate the expression."); *Perry v. Schwarzenegger*, 591 F.3d 1126, 1142 n.9 (9th Cir. 2009). Thus, I agree with the majority that FOIA disclosure requirements implicate First Amendment concerns.

In addition, the majority correctly recognizes that the burden FOIA disclosure and open meetings requirements impose on speech and association rights is substantial, impairing an organization's ability to deliberate internally and outside the presence of its opponents or to formulate its message in private. *See AFL-CIO v. Federal Election Commission*, 333 F.3d 168, 178 (D.C. Cir. 2003) ("[C]ompel[ling] public disclosure of an association's confidential internal materials . . . intrudes on the privacy of association and belief guaranteed by the First Amendment [and] seriously interferes with internal group operations and effectiveness."). These requirements also impose the substantial burden of legal uncertainty regarding an organization's obligations and vulnerability to legal attack and even individuals' liability to criminal charges. *See Citizens United v. Federal Election Commission*, 130 S.Ct. 876, 889, 891 (2010) ("Prolix laws chill speech for the same reason that vague laws chill speech: People of common intelligence must necessarily guess at the law's meaning and differ as to its application"; "First Amendment standards . . . must give the benefit of any doubt to protecting rather than stifling speech." (internal quotation marks and brackets omitted)).

Nevertheless, it is axiomatic that the First Amendment protects only private speech from governmental interference.[8] Thus, if an organization is in fact a

[8] *See, e.g.*, Randall Bezanson and William Buss, *The Many Faces of Government Speech*, 86 Iowa L. Rev. 1377, 1502 (2001) ("The First Amendment is explicitly drafted as a restraint on government: 'Congress shall make no law abridging the freedom of speech.' If the government can claim to act as a First Amendment right holder, the First Amendment loses coherence, for in such situations there is nothing for the First Amendment to act on or constrain. The idea of government

governmental entity or wholly a government instrumentality, it does not possess First Amendment rights. Similarly, a public employee speaking in the course and scope of her duties as a spokesperson for the government's message has no First Amendment right to avoid restrictions on that speech. *See Garcetti v. Ceballos*, 547 U.S. 410 (2006). Likewise, when the government engages a private speaker to promote its message, the resulting communication is not private speech protected by the First Amendment, and the government is free to restrict it.[9] *See Rust v. Sullivan*, 500 U.S. 173, 192-95 (1991).

The requirements at issue here purport to apply only to "public" bodies as defined by § 30-4-20(a). However, the statutory designation of an organization as a "public body" does not establish that an entity functions as a governmental body for purposes of a constitutional challenge. *See, e.g.*, *Rendell-Baker v. Kohn*, 457 U.S. 830, 840-43 (1982) (determining whether actions are fairly attributable to the state in § 1983 context).

Our previous interpretation of "public funds" in § 30-4-20(a) somewhat narrows the applicability of the FOIA disclosure requirements. We have held that the definition of "public funds" excludes "payment from public bodies in return for supplying specific goods or services on an arms[-]length basis." *Weston v. Carolina Research and Development Foundation*, 303 S.C. 398, 404, 401 S.E.2d 161, 165 (1991). Thus, many businesses and organizations engaging in transactions with government entities are not subjected to FOIA requirements. However, FOIA remains applicable to the entirety of any recipient organization if "a block of public funds is diverted en masse from a public body to a related organization, or when the related organization undertakes the management of the

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'speech' under the First Amendment is thus both illogical and inconsistent with the text.").

[9] When the government funds a limited forum for private speech rather than funding its own message, a different standard applies. *See Legal Services Corp. v. Velazquez*, 531 U.S. 533, 540-42 (2001). Viewpoint-based restrictions are permissible only when the government funds dissemination of its own message. *Id*. The FOIA disclosure requirements at issue here are viewpoint neutral, applying without distinction to a broad range of speech of any organization that receives any public funding. Thus, it is unnecessary to determine whether funds to which the requirements attach are provided for the purpose of communicating the government's own message or funding a limited forum for private speech.

expenditure of public funds . . . ." *Id.* The clear language of the statute, we said in *Weston,* mandates that an organization receiving public funds in even one transaction is a "public body" for purposes of FOIA requirements, and construing the statute to reach only governmental or quasi-governmental organizations would "obliterate both the intent and the clear meaning of the statutory definition." 303 S.C. at 403, 401 S.E.2d at 164. Thus, the statute may reach an otherwise private organization that receives even a negligible amount of public funding for a discrete purpose.[10] In effect, therefore, FOIA disclosure requirements attach as a condition to the receipt by a private organization of any government funding that is not exchanged for a specific good or service in an arm's-length transaction. § 30-4-20(a); *Weston, supra*.

Government may not impose an unconstitutional condition on the receipt of public benefits. *See Rust v. Sullivan,* 500 U.S. at 196-98; *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 59 (2006). A condition is unconstitutional if it could not be imposed directly. *See Rumsfeld*, 547 U.S. at 59.

Here, the conditions imposed by the receipt of *any* public funding include that most of the recipient organization's meetings be on the record and open to the public and that many of its records be disclosed to any interested party. Failing to comply with these requirements subjects organizations and individuals to civil liability and criminal penalty.

Although such requirements do not fit readily within any established line of First Amendment jurisprudence,[11] I assume for purposes of analysis that the majority is

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[10] At a minimum, for purposes of a First Amendment challenge, we must assume that a lay person would read the law in this way. *See Citizens United, supra.*

[11] First Amendment jurisprudence contains two clear lines of disclosure analysis. One relates to mandated disclosure of membership lists, primarily implicating the associational rights of members. *See, e.g., NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449 (1958); *NAACP v. Button*, 371 U.S. 415 (1963). The other distinct line of cases dealing with disclosure relates to the election context, primarily implicating political association and somewhat more extensive disclosure, but much less than is required under FOIA. *See, e.g., Citizens United, supra*; *Buckley v. Valeo, supra*; *John Doe No. 1 v. Reed*, 130 S.Ct. 2811 (2010). Neither is directly applicable to the required disclosure of broad swaths of an organization's internal communications, implicating the right to speak privately, deliberate internally, formulate a message without interference, and associate effectively.

correct to evaluate FOIA disclosure and open meetings requirements as content-neutral time, place, or manner restrictions on speech, thus subject to intermediate scrutiny. Under this standard, speech regulation must advance a significant, legitimate government interest (prong one). *See Hill v. Colorado*, 530 U.S. 703, 725-26.

I agree with the majority that FOIA is designed to achieve a significant and legitimate government interest in transparency regarding the spending of public funds. However, neither the State nor the majority has explained, nor is it apparent, how extending FOIA requirements beyond the publicly subsidized activities to entire organizations receiving any public funds advances the legitimate public interest at stake. Because the requirements reach activities of an organization that are unrelated to publicly funded activities, they have not been shown to *advance* a legitimate government interest and fail prong one.

In addition, to survive intermediate scrutiny, the regulation must be narrowly tailored so that the means chosen do not "burden substantially more speech than is necessary to further the government's legitimate interests" (prong two). *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). Where a statute sweeps broadly without any interest-related purpose for that sweep, it burdens substantially more speech than necessary to accomplish its purpose. *FCC v. League of Women Voters of California*, 468 U.S. 364, 400 (1984) (disallowing prohibition on any editorializing as condition of receipt of any government funding). Indeed, in its unconstitutional conditions analysis, the United States Supreme Court has emphasized that imposition of a speech-related condition is suspect when it applies to a *recipient* rather than to an *activity*.[12] *See Rust v. Sullivan*, 500 U.S. at 197

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Even if election-related disclosure precedents were directly applicable in this case, as the majority applies them for purposes of associational rights, in my view the majority has not shown how the restrictions at issue are reasonable in relation to their purpose or are not overbroad. If, for example, an organization received government funding for a discrete, relatively minor activity in which it acted to convey the government's message, there is no reason why its membership list need be disclosed in order for the public to know the purpose and manner in which public funds were spent. *See Clingman v. Beaver*, 544 U.S. 581, 590 (2005).

[12] The cases cited by the majority as upholding First Amendment challenges to other states' FOIA requirements are inapposite because, in those cases, the restrictions were challenged as infringements on the First Amendment rights of

(explaining that a condition's applying to "the *recipient* of the subsidy rather than . . . a particular program or service" is key to determination (emphasis in original)). Here, the condition is imposed on the recipient of the funds rather than on the particular program or service being funded and thus fails prong two because it lacks any tailoring. The words of another court, though in a slightly different context,[13] are applicable here:

> Having concluded that the [plaintiffs] have asserted substantial First Amendment interests in [avoiding] the disclosure of their own internal materials and at least marginal interests in preventing the chilling of political participation by their members and officials, we proceed to assess the strength of the government's proffered interest in disclosure. The Commission offers two justifications . . . . : The regulation deters FECA violations, and it promotes the agency's own public accountability. Although we have no doubt that these interests are valid, we need not engage in a detailed balancing analysis, for the Commission made no attempt to tailor its policy to avoid unnecessarily burdening the First Amendment rights of the political organizations it investigates. *See, e.g.*, *United States v. Popa*, 187 F.3d 672, 676 (D.C.Cir.1999) (declining to determine the precise level of scrutiny applicable to a particular statute where it was insufficiently tailored to meet even the least exacting standard). Indeed, the blanket nature of the Commission's regulation—requiring, as it does, the release of *all* information not expressly exempted by FOIA—appears to result in the release of significant amounts of information that furthers neither goal. For example, the Commission never explains how releasing investigatory files will deter future violations in cases where, as here, the respondents have been cleared of wrongdoing. Nor does the Commission explain how a policy requiring the release of materials that played no meaningful role in its decisionmaking process will promote its own accountability. The facts of this case are

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government officeholders acting in their official capacities. Those cases did not address the constitutionality of extending FOIA requirements to officeholders or entities engaging in protected activities unrelated to their publicly funded activities.

[13] *AFL-CIO* analyzed a Federal Election Commission policy of publicly disseminating all materials obtained in its investigations of organizations accused of violating election laws.

> particularly disturbing because the Commission proposes to release between 10,000 and 20,000 pages of documentation that it has never examined. The materials therefore cannot shed light on the Commission's reasoning, and may not even relate to questionable activities. The fact that the Commission redacts information falling under one or more FOIA exemptions is no answer, since the Freedom of Information Act does little to protect the First Amendment interests at issue.

*AFL-CIO v. Federal Election Commission*, 333 F.3d 168, 178 (2003). Moreover, the potential intrusion on First Amendment rights here is even more disturbing than in *AFL-CIO*: recipient organizations are subjected not to disclosure of material related to a discrete investigation instigated by an agency with prosecutorial discretion to decline to investigate spurious accusations but to perpetual and wide-ranging disclosure requirements at the behest of any individual or organization. *See* §§ 30-4-20(b), 30-4-30(a). In addition, as was also the case in *AFL-CIO*, the FOIA exemptions do little here to protect the First Amendment interests at issue.

The burden that is imposed on unrelated exercise of a speaker's First Amendment rights by the definition of "public body" in § 30-4-20(a) has no substantial relation to the governmental interest at stake. It applies solely by virtue of the fact that the organization has received public funds, regardless of any relationship between the organization's publicly and privately funded activities. Thus, the FOIA disclosure requirements at issue impose an unconstitutional condition on the exercise of First Amendment rights.

In my view, we must strike as unconstitutional the language "or in part" and "or expending public funds" from § 30-4-20(a). Likewise, I would hold that the interpretation of "quasi-governmental body of the State" cannot extend to organizations that engage in activities not fairly attributable to the government itself. I have no trouble also concluding that such action would not destroy the legislative intent of the General Assembly in enacting FOIA, since FOIA would still apply to governmental bodies. *Stone v. Traynham*, 278 S.C. 407, 409-10, 297 S.E.2d 420, 422 (1982) (striking an exemption from a statute only "as it applies to *appointed* bodies" upon a determination that the action would not destroy legislative intent (emphasis in original)). It would be inconceivable the General Assembly would not provide for transparency of governance by public agencies

and other governmental bodies on the basis it could not also apply the same disclosure requirements on private organizations in their entirety when they receive any amount of public funding. *Id*. This is not to say that organizations private only in form would be exempt from FOIA or that appropriately tailored requirements could not be upheld.

Thus, I would affirm as modified, holding that the portions of FOIA extending it to organizations in their entirety upon the receipt of any public funds are facially unconstitutional and are severed from the statute. I would remand to the trial court for further proceedings consistent with this view.

**BEATTY, J., concurs.**

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

Gregory McHam, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2010-157966

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**ON WRIT OF CERTIORARI**

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Appeal from Spartanburg County
Roger L. Couch, Circuit Court Judge

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Opinion No. 27287
Submitted February 1, 2013 – Filed July 17, 2013

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**AFFIRMED AS MODIFIED**

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Appellate Defender Kathrine Haggard Hudgins, of South Commission on Indigent Defense, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Suzanne Hollifield White, all of Columbia, for Respondent.

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**JUSTICE BEATTY:** We granted certiorari to review the denial of Gregory McHam's application for post-conviction relief (PCR). McHam contends he received ineffective assistance of trial counsel because counsel failed to renew an *in limine* motion to suppress drug evidence. McHam asserts his Fourth Amendment rights were violated when an officer at a traffic checkpoint opened the passenger's side door of the vehicle he was driving, which revealed a package of crack cocaine inside the car and led to the discovery of additional drug evidence. The State contends counsel was not ineffective and the officer's action was justified by concerns for officer safety. We affirm as modified.

## I. FACTS

### A. Trial Proceedings & Direct Appeal

This case arose out of a stop at a traffic safety checkpoint conducted on May 22, 2002 by the South Carolina Highway Patrol. The checkpoint was at Powell Mill Road near U.S. Highway 29 in Spartanburg County. Three officers were present with marked patrol cars. McHam was driving a 1984 Ford Thunderbird when he was stopped at the checkpoint along with his passenger, Kobe Carter, at around 10:50 p.m. The car was making noises, and McHam's brakes were squealing due to mechanical problems as he stopped. Neither of the occupants was wearing a seat belt.

Trooper James Scott Crawford approached McHam and asked for his driver's license, registration, and proof of insurance. McHam provided his driver's license, but he and the passenger then began looking in various locations in the vehicle for the registration and insurance. According to Crawford, he thought "[t]hey were making a lot of movements in the car that [he] didn't feel was consistent [with] looking for a registration card or a proof of insurance," so he walked around to the other side "to make sure they weren't accessing a weapon or anything like that." Once he got around to the passenger's side, the officer could not see their hands clearly because it was dark out and there wasn't much artificial lighting, so "for [his own] safety he opened up the door to watch what they were doing while they were going through the car."

As soon as Crawford opened the door, he saw "a baggy of crack that was situated . . . between the seat and the passenger's door." At first he pretended not to see it, and he used his radio to summon another trooper. When the second trooper, Stephen J. Sulligan, came over, Crawford grabbed the crack, reached in

and shut the car off and took the keys, and then arrested the passenger. A third trooper, Jeff Bradley, then arrived. The troopers searched under the car seats for weapons and noticed a grocery bag with cocaine. McHam was searched and a large amount of cash was found on his person. Marijuana and a small amount of cash were found on the passenger, and more cash was discovered in the car. A set of digital scales was found near the car during the arrest. McHam was ticketed for a seat belt violation and having faulty equipment on the vehicle, and he was charged with trafficking in cocaine and possession of crack cocaine with intent to distribute.

Trial counsel made an *in limine* motion at the start of the trial to suppress the drug evidence. Counsel argued that, while the officer had the authority to order the occupants to exit the vehicle and to review the requested documents, there was no articulable suspicion that they were involved in criminal activity, and the officer had no cause to open the car door. Counsel argued this was a routine traffic stop and if the officer had not opened the car door, the drugs would never have been found, so they should be suppressed as the product of an illegal search and seizure in violation of the Fourth Amendment.[1]

The trial court denied the suppression motion. The court found the initial traffic stop was made for a legitimate purpose, and the officer acted reasonably in opening the car door to enable him to see what the occupants were doing and to ensure his own safety during the traffic stop. The court noted that traffic stops, even when thought to be routine, were inherently dangerous, especially in the dark, and stated both sides had acknowledged the officer had the right to remove the defendants from the vehicle to ensure his own safety, so opening the door in order to better view the occupants did not constitute an unreasonable search and any seizure was not violative of a constitutional provision.

During the trial, McHam's counsel did not renew his Fourth Amendment objection, although he did object to some of the drug evidence based on the chain of custody. McHam was convicted of trafficking in cocaine and possession of crack cocaine. He was sentenced to concurrent prison terms of twenty-five years and ten years, respectively, and was fined for each offense.

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[1] McHam and his passenger were tried together. Most of these arguments were articulated by the passenger's counsel, and McHam's counsel joined in the motion.

McHam's counsel filed a direct appeal pursuant to *Anders v. California*, 386 U.S. 738 (1967). The *Anders* issue raised by counsel was whether the lower court erred in refusing to suppress the evidence that was seized as a result of an unlawful search of the vehicle McHam was driving. McHam's direct appeal was dismissed by the Court of Appeals after an *Anders* review. *State v. McHam*, 2005-UP-460 (S.C. Ct. App. filed July 26, 2005).

## B. PCR Proceedings

McHam subsequently filed this PCR matter alleging ineffective assistance of counsel. At the PCR hearing, McHam's PCR counsel contended trial counsel was ineffective for failing to contemporaneously object to the admission of the drug evidence based on an illegal search and seizure. PCR counsel maintained the officer's opening of the car door constituted an improper search leading to the illegal seizure of the drug evidence, and this evidence should have been suppressed. Counsel stated that, although trial counsel raised the Fourth Amendment issue in an *in limine* motion, he failed to preserve the issue for appeal as he did not renew his objection on this basis when the drugs were actually admitted into evidence at trial. PCR counsel argued McHam was prejudiced because, if the issue had been preserved, it would have been considered on direct appeal, at which time an appellate court could have ruled the search was unlawful.

McHam presented the testimony of his trial counsel, who testified that he thoroughly investigated the search issue and thought he had a good chance of prevailing on the suppression motion. However, he conceded that he did not preserve the issue by objecting when the evidence came in at trial. He also acknowledged the suppression motion was the most critical part of McHam's trial.

The State, in contrast, asserted the opinion of the Court of Appeals did not appear to dismiss the *Anders* appeal on a procedural basis as it did not employ that language. Rather, the State maintained the Fourth Amendment issue was dismissed on the merits and, as a result, formed no basis for a PCR claim. In addition, the State reiterated its position that the officer did not violate the Fourth Amendment as his action was justified by concerns for officer safety.

The PCR judge denied McHam's application for relief and dismissed it with prejudice. The PCR judge found trial counsel's "representation on the suppression motion [] exceed[ed] the standard of reasonableness" and that he "was not ineffective for failing to prevail on the suppression motion." The PCR judge stated

it appeared the Court of Appeals had reviewed the suppression issue submitted by McHam on direct appeal and "[t]he dismissal of the appeal appears to be on [the] merits rather than for a failure to preserve as suggested by [McHam]." The PCR judge further noted: "Anders review requires a review of the appeal to determine if any issue briefed has merit. In this case, the issue was raised and found to be without merit. Therefore, attorney error, if any, was harmless." The PCR judge concluded McHam had not demonstrated that his attorney failed to properly argue the motion to suppress or that the lack of an objection had led to the dismissal of his direct appeal.

## II. STANDARD OF REVIEW

On certiorari in PCR cases, the Court applies an "any evidence" standard of review. *Terry v. State*, 394 S.C. 62, 66, 714 S.E.2d 326, 328 (2011) (citing *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). "This Court will uphold the findings of the PCR judge when there is any evidence of probative value to support them," and it "will reverse the PCR judge's decision when it is controlled by an error of law." *Suber v. State*, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007). This Court gives great deference to the PCR judge's findings of fact and conclusions of law. *Dempsey v. State*, 363 S.C. 365, 610 S.E.2d 812 (2005).

## III. LAW/ANALYSIS

McHam contends the PCR judge erred in ruling he did not receive ineffective assistance of counsel. He asserts the PCR judge erroneously assumed the Court of Appeals ruled on the merits of the unpreserved search issue when it conducted an *Anders* review. McHam argues that, although trial counsel made an *in limine* motion to suppress the drug evidence seized as a result of an illegal search, counsel was deficient because he failed to renew the objection when the drugs were admitted into evidence at trial, and this failure to preserve a meritorious issue prejudiced him.

In response, the State argues the PCR judge properly held counsel was not ineffective for failing to renew a pretrial suppression motion because the evidence was properly admitted at trial and McHam can show no prejudice from counsel's allegedly deficient performance. The State reiterates the PCR judge's finding that any attorney error was harmless because an *Anders* brief was submitted on McHam's behalf.

Alternatively, the State, quoting *State v. Lyles*, 381 S.C. 442, 444-45, 673 S.E.2d 811, 813 (2009), acknowledges that "a decision of the Court of Appeals dismissing an appeal after conducting a review pursuant to *Anders* is not a decision on the merits of the appeal, but simply reflects that the appellate court was unable to ascertain a non-frivolous issue which would require counsel to file a merits brief." The State asserts if the issue was not considered on the merits, McHam still did not show prejudice, as officer safety justified the officer's actions.

The United States Supreme Court has set forth a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, *and* (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Holden v. State*, 393 S.C. 565, 713 S.E.2d 611 (2011). The burden is on the PCR applicant to prove the allegations in his application. *Terry*, 394 S.C. at 66, 714 S.E.2d at 329.

## A. Deficient Performance

Although the PCR judge found trial counsel was not deficient, it is clear from the record that counsel did not object on Fourth Amendment grounds when the drug evidence was admitted at trial. At the PCR hearing, trial counsel was forthright in acknowledging that he failed to renew his objection. When asked if he objected to the drug evidence when it was introduced at trial, counsel admitted: "Going back through the transcript it doesn't look like I did object to or at least preserve my objection during the course of the trial." Counsel stated, "And if that were the case, and it wasn't preserved, then he would not have been able to argue the most critical piece of his trial, which was the . . . denial of the suppression motion." Counsel agreed with the characterization by McHam's PCR attorney that McHam "basically [] won or lost the case on that motion of suppression[.]" Contrary to the PCR judge's determination, we find counsel's failure to renew the Fourth Amendment objection constituted deficient performance that satisfies the first prong of the *Strickland* test. *See Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) ("The proper measure of counsel's performance remains whether he has provided representation within the range of competence required by attorneys in criminal cases.").

## B. Prejudice

The trial court further found that, even if trial counsel had been deficient, McHam was not prejudiced as the merits of the search issue were considered and rejected on direct appeal when the Court of Appeals conducted an *Anders* review.

Under the second prong of the analysis in *Strickland*, the PCR applicant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Id.*

Under the *Anders* procedure, an appellate court is required to review the entire record, including the complete trial transcript, for any *preserved* issues with potential merit. *See State v. Williams*, 305 S.C. 116, 117, 406 S.E.2d 357, 358 (1991) (Upon the receipt of an *Anders* brief and "the receipt of the *pro se* brief or the expiration of the period to file a *pro se* brief, this Court will then proceed to review the record as required by *Anders.* If no issue of arguable merit is discovered, the appeal will be dismissed and counsel's petition to be relieved will be granted. In the event the Court finds any issue(s) of arguable merit, the parties will be directed to submit new briefs."); *State v. Lawrence*, 349 S.C. 129, 130, 561 S.E.2d 633, 634 (Ct. App. 2002) (stating "[a]fter a thorough review of the record in accordance with *Anders v. California* and *State v. Williams*, we find the only *preserved* issue at trial is whether the trial court erred in denying Lawrence's motion for a directed verdict on the charge of discharging a firearm into an occupied structure" (emphasis added) (footnotes omitted)).

This Court has previously held that an issue that was raised on direct appeal but found to be unpreserved may be raised in the context of a PCR claim alleging ineffective assistance of counsel. *McLaughlin v. State*, 352 S.C. 476, 575 S.E.2d 841 (2003); *Foye v. State*, 335 S.C. 586, 518 S.E.2d 265 (1999). Based on the foregoing, it is clear the Court of Appeals did not consider the merits of the Fourth Amendment issue because it was not preserved by trial counsel. To the extent the PCR judge concluded otherwise and based his finding of a lack of prejudice on this conclusion, he was in error.

Since the Fourth Amendment issue was not considered on direct appeal because it was unpreserved, an examination of the merits of the issue is appropriate in analyzing the prejudice prong in McHam's PCR claim. *See generally Sikes v.*

*State*, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994) ("When the defendant claims that counsel's failure to articulate a Fourth Amendment claim was ineffective assistance, [the] defendant must show that such claim is *meritorious* and that the verdict would have been different absent the evidence that *should* have been excluded." (emphasis added)).

***Merits of Fourth Amendment Issue***

The Fourth Amendment to the United States Constitution guarantees the right of the people to be free from unreasonable searches and seizures and provides that no warrants shall be issued except upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized. U.S. Const. amend. IV. "A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property." *State v. Wright*, 391 S.C. 436, 442, 706 S.E.2d 324, 327 (2011) (quoting *Horton v. California*, 496 U.S. 128, 133 (1990)).

"Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of [the Fourth Amendment]." *Whren v. United States*, 517 U.S. 806, 809-10 (1996). "An automobile stop is thus subject to the constitutional imperative that it not be 'unreasonable' under the circumstances." *Id.* at 810. "As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Id.* (citing *Delaware v. Prouse*, 440 U.S. 648, 659 (1979) and *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977)). In addition, while detaining a vehicle at a traffic safety checkpoint constitutes a "seizure," where the checkpoint serves the public interest and does not impose an unreasonable restriction on one's liberty, it does not violate Fourth Amendment proscriptions. *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990); *State v. Vickery*, 399 S.C. 507, 732 S.E.2d 218 (Ct. App. 2012) .

McHam did not challenge the propriety of his initial stop, so the sole focus of our inquiry is on the validity of the officer's opening of the passenger's side door of the vehicle McHam was driving. The parties agree that an officer may order the driver and any passengers to exit a detained vehicle without violating the Fourth Amendment. *See Mimms*, 434 U.S. at 109-10 (holding once a driver has been lawfully detained, the police may order the driver to exit the vehicle, even in the absence of unusual or suspicious behavior, without violating the Fourth

Amendment's prohibition on unreasonable searches and seizures; the Court stated, "We think it too plain for argument that the State's proffered justification-the safety of the officer-is both legitimate and weighty," and it "specifically recognized the inordinate risk confronting an officer as he approaches a person seated in an automobile."); *Maryland v. Wilson*, 519 U.S. 408, 414-15 (1997) (extending the rule announced in *Mimms* and "hold[ing] that an officer making a traffic stop may order passengers to get out of the car pending completion of the stop" because the "danger to an officer from a traffic stop is likely to be greater when there are passengers in addition to the driver in the stopped car"); *State v. Banda*, 371 S.C. 245, 252-53, 639 S.E.2d 36, 40 (2006) (observing the police may order both the driver and the passenger out of a vehicle at a valid stop without violating the Fourth Amendment (citation omitted)).

In this case of first impression the Court is asked to decide whether an officer may open a car door, based on considerations of officer safety, during an otherwise valid traffic stop without violating the Fourth Amendment. Other jurisdictions that have considered the question under a variety of factual scenarios have found officer safety can be a valid justification for opening the door of an occupied vehicle. The analysis turns on a consideration of (1) whether the act constituted a search, and (2) whether any search was nevertheless justified under the Fourth Amendment.

***(1) Is it a Search?***

In our view, as to the first point, the officer's opening of the door of an occupied vehicle constituted a search.

In *State v. Schlosser*, 774 P.2d 1132, 1135-37 (Utah 1989), the court held that an officer who opened a car door to see whether the passenger was "hiding something" was a search that exceeded the legitimate objectives of the traffic stop. Citing *Arizona v. Hicks*, 480 U.S. 321, 325 (1987), the court noted "even a small intrusion" can be an unlawful search under the Fourth Amendment. *Id.* at 1135. The court rejected the plain view doctrine, stating the doctrine requires the officer to be able to observe what is in open or plain view when he is located where he has

lawful right to be, while here the officer had opened the car door to view portions of the interior of the car *that he could not otherwise see*.[2] *Id.* at 1136.

The court relied upon the reasoning of the United States Supreme Court in *New York v. Class*, 475 U.S. 106 (1986):

> In [*Class*, 475 U.S. at 114-15], the Supreme Court stated that "a car's interior as a whole is . . . subject to Fourth Amendment protection from unreasonable intrusions by the police." The Court held that an officer's opening the driver's door of an automobile to examine the vehicle identification number constituted a "search" and that the search was justified because the officer sought only to uncover the VIN, or vehicle identification number, a number required by state law to be located in a place ordinarily in plain view from outside the vehicle. 475 U.S. at 114, 119, 106 S.Ct. at 966, 969. The Court warned, however, that "[i]f the VIN is in the plain view of someone outside the vehicle, there is no justification for governmental intrusion into the passenger compartment to see it." 475 U.S. at 119, 106 S.Ct. at 969. Clearly, the State has no regulatory interest or justification in this case that is similar to the state's interest in *Class* to justify the intrusion into the passenger compartment.

*Schlosser*, 774 P.2d at 1135 (ellipsis and second alteration in original).[3] The court in *Schlosser* noted, however, that the officer "cited no safety concerns as the basis

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[2] *Cf. State v. Daniels*, 252 S.C. 591, 596-97, 167 S.E.2d 621, 623-24 (1969) (finding an officer investigating a robbery who looked in a vehicle's window and saw materials that appeared to be related to the robbery on the back seat did not engage in a "search" as the items were visible from a place where the officer had a right to be, and he had the duty and the right to seize them without a warrant; the Court stated "[a] seizure of what is in plain view, without a search . . . is not prohibited by either Constitution.'" (ellipsis in original) (citation omitted)).

[3] The Supreme Court in *Class* found the reasonableness of the intrusion should be measured by balancing the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. *Class*, 475 U.S. at 118. Thus, the occupants' expectations of privacy, which are less in a vehicle than one's home, should be balanced against the government's offered justification of officer safety. *See id.* at 112-13, 117-18.

for his actions; he sought only to investigate the possibility that defendants were engaged in illegal activity, and for that reason he opened the passenger door." *Id.* at 1137.

In *Commonwealth v. O'Connor*, 487 N.E.2d 238, 239-40 (Mass. App. Ct. 1986), the court held that the defendant's act of reaching below the dash after seeing the officer did not justify the officer stopping his cruiser and opening the door of the defendant's vehicle, which revealed the presence of cocaine. The court observed that, prior to opening the car door, "the officer made no attempt to question or communicate with the [defendant], nor does the record disclose that he was warranted in taking reasonable precautions for his safety." *Id.* (quoting *Commonwealth v. Podgurski*, 436 N.E.2d 150, 153 (Mass. 1982). In *Podgurski*, the officer's act of sticking his head inside the slightly ajar sliding door of a windowless cargo van, whereupon he discovered the occupants bagging hashish, was deemed to constitute a search. 436 N.E.2d at 152-53.

In *State v. Rhodes*, 843 P.2d 927, 928 (Or. 1992) (en banc), the officer found the defendant slumped over in a vehicle with the engine running and the door open. After moving the door, the officer smelled alcohol and saw an empty beer can, leading to a charge of driving under the influence. The defendant argued that an officer's "conduct in further opening [the] pickup door (beyond the three or four inches it already was open) was a 'search'" and the evidence seen should be suppressed. *Id.* at 929-30. The court defined a "search" as "an intrusion by a governmental officer, agent, or employee into the protected privacy interest of an individual." *Id.* at 930. The court explained that the officer "physically grasped the vehicle's door and moved it, exposing the inside of the passenger compartment to a visual inspection of a scope and intensity that, so far as this record shows, could not have been made without opening the door." *Id.* "In other words [the officer's] action permitted him to observe and smell what he otherwise could not have seen or smelled from a lawful vantage point. That was a search." *Id.*

Although we are aware of contrary authority, we find the above reasoning to be persuasive and hold the opening of the door of an occupied vehicle is an intrusion, however slight, that generally constitutes a search for purposes of the Fourth Amendment. In such cases, a search results based on the fact that it enables the officer to observe portions of the interior of the vehicle that would not otherwise be readily visible to those who are outside the vehicle. *See id.*

### *(2) Is the Search Justified by an Exception to the Warrant Requirement?*

Having determined the officer's conduct constitutes a search, the next point for consideration is whether the search was, nevertheless, justified because "[t]he Fourth Amendment by its terms prohibits [only] 'unreasonable' searches and seizures." *Class*, 475 U.S. at 116.

"The touchstone of our analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.'" *Mimms*, 434 U.S. at 108-09 (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968)). "Reasonableness, of course, depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.'" *Id.* at 109 (citation omitted).

"Warrantless searches and seizures are unreasonable absent a recognized exception to the warrant requirement." *State v. Wright*, 391 S.C. 436, 442, 706 S.E.2d 324, 327 (2011). These exceptions include the following: (1) search incident to a lawful arrest, (2) hot pursuit, (3) stop and frisk, (4) automobile exception, (5) the plain view doctrine, (6) consent, and (7) abandonment. *State v. Dupree*, 319 S.C. 454, 456-57, 462 S.E.2d 279, 281 (1995); *State v. Moore*, 377 S.C. 299, 309, 659 S.E.2d 256, 261 (Ct. App. 2008); *see also Wright*, 391 S.C. at 444, 706 S.E.2d at 327-28 (discussing an exception for exigent circumstances); *State v. Herring*, 387 S.C. 201, 210, 692 S.E.2d 490, 494-95 (2009) (same).

Governmental interest in officer safety has been recognized to be a substantial one, and we hold as a general principle that officer safety can justify the opening of a door to an occupied vehicle under reasonable circumstances. *See Mimms*, 434 U.S. at 110 (observing the governmental interest in officer safety during a traffic stop is substantial); *State v. Brake*, 103 P.3d 699, 704-05 (Utah 2004) (stating there is "a well-developed body of law which recognizes the inherent dangers of traffic encounters and responds to those dangers by permitting law enforcement officers to take measures to protect their safety without risk of violating constitutional protections"; the court further stated [t]he inherent danger in traffic stops does not, however, justify the warrantless search of the interior of a vehicle," and "a warrantless automobile search requires probable cause and exigent circumstances unless it satisfies *traditionally recognized justifications of protecting the safety of police* or the public or preventing the destruction of evidence" (emphasis added)).

In the current appeal, the officer observed McHam and his passenger make what he described as unusual movements in areas where he did not think a person would normally look for registration or insurance papers, and he testified that he wanted to be able to see the hands of the occupants for his own safety, in case they had weapons. Although no weapons were ultimately found in the car, when viewed at the time of the officer's confrontation, we believe the evidence supports a determination that officer safety was a legitimate concern, given the dimly-lit conditions at the scene of the stop, the presence of more than one occupant in the vehicle, the fact that the officer was the only one approaching the vehicle at that moment, and the actions of the occupants.

Based on the foregoing, we find that, even if trial counsel had renewed his motion in order to preserve the issue, McHam has not shown there is a reasonable probability that the outcome of the trial would have been different because his Fourth Amendment claim fails on its merits. Under these circumstances, McHam has not established the requisite prejudice to support his claim of ineffective assistance of counsel. *See generally Foye v. State*, 335 S.C. 586, 518 S.E.2d 265 (1999) (holding PCR was properly denied where the applicant did not prove he was prejudiced by trial counsel's deficient performance in failing to preserve an issue at trial).

## IV. CONCLUSION

We hold the PCR judge erred in finding counsel was not deficient and we conclude counsel's failure to renew an objection to the drug evidence did constitute deficient performance that satisfied the first prong of *Strickland*. To the extent the PCR judge alternatively found McHam had not satisfied the second prong of *Strickland*—prejudice—because the merits of his Fourth Amendment issue were considered in his direct appeal and rejected, we also find this was error. An appellate court conducting an *Anders* review searches only for preserved issues of arguable merit. Since the Fourth Amendment issue was not preserved, it was not considered on direct appeal. However, we agree with the PCR judge's ultimate findings that McHam did not establish prejudice and did not prove his claim for ineffective assistance of counsel as we conclude McHam's Fourth Amendment claim fails on its merits. Consequently, the decision of the PCR judge is affirmed as modified.[4]

[4] Based on our holding, we need not reach the State's remaining arguments.

**AFFIRMED AS MODIFIED.**

**TOAL, C.J., KITTREDGE and HEARN, JJ., concur. PLEICONES, J., concurring in result only.**

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

The State, Respondent,

v.

Ashley Eugene Moore, Appellant.

Appellate Case No. 2011-191327

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Appeal From Spartanburg County
Roger L. Couch, Circuit Court Judge

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Opinion No. 5160
Heard April 2, 2013 – Filed July 17, 2013

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**REVERSED**

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Appellate Defender Dayne C. Phillips, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Julie Kate Keeney, all of Columbia, for Respondent.

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**LOCKEMY, J.:** Ashley Eugene Moore was convicted and sentenced for the charges of trafficking cocaine base and possession of a weapon during the commission of a violent crime. On appeal, he argues the trial court erred in denying his motion to suppress evidence discovered during a traffic stop. Specifically, he argues his continued detention was unlawful because the State did

not present sufficient evidence to establish the police officer's reasonable and articulable suspicion of a serious crime. We reverse.

## FACTS

Officers Dale Owens and Donnie Gilbert, Corporal Ken Hancock, and K-9 handler Deputy Jason Carraway, all with the Spartanburg County Sheriff's Office, were observing traffic along the I-85 corridor in Spartanburg County the evening of June 30, 2010. Around 1:10 a.m., Officer Owens observed Moore traveling at a rate above the posted speed limit of 60 miles per hour. Officer Owens began pacing Moore's vehicle[1] and determined Moore was keeping a steady speed of 70 miles per hour. Further, Moore failed to maintain his lane and crossed into the center lane from the far right-hand lane. Officer Owens initiated his blue lights, and Moore first activated his left turn signal, then his right turn signal. Officer Owens, found those actions were an indicator that Moore might be preparing to flee. Officer Owens testified Moore also took longer than the average time to stop and that is consistent with people who have tried to run from him in the past. After stopping his vehicle, Moore failed to release his left turn signal, and Officer Owens opined this failure indicated Moore's heart rate might be so accelerated he had temporarily lost his hearing capability.

When Officer Owens approached Moore's vehicle, Moore was talking on a cell phone, and Officer Owens requested Moore end the call. Officer Owens opined the average person would end a phone a call when an officer approached their vehicle. He added that drug traffickers may stay on the phone to report to a superior who needs to hear what is happening during the stop. An alcohol odor emanated from Moore's vehicle, and Moore admitted to having a couple of drinks. Officer Owens had worked on several cases in which drug traffickers were drinking alcohol, and he maintained the alcohol calmed their nerves. Moore further informed Officer Owens the vehicle was a rental and provided the rental agreement along with his driver's license. Officer Owens observed Moore's hand shaking heavily, which Officer Owens opined was a measurement of Moore's nervousness. Also during that time, Officer Owens observed Moore's carotid

[1] Pacing is a method of measuring the speed of another vehicle. The officer maintains the same distance and speed behind the other vehicle for a period of time, and judging from the certified speedometer in the officer's car, the officer determines the other vehicle's speed.

artery and his breathing, and consequently stated he discerned Moore's pulse and breathing were accelerated, indicating nervousness.

Moore picked up his cell phone as he obeyed a request to exit his vehicle, which Officer Owens opined was an indicator of criminal activity because the cell phone is a person's device for communication when he tries to flee. Moore then lit a cigarette as he stood outside his vehicle, and Officer Owens explained that based on his training, people sometimes light cigarettes to calm their nerves. Moore agreed to a pat-down and voluntarily raised his hands to his head, which is a position known as the "felony position." Officer Owens felt what he perceived to be a large sum of wadded money. Moore moved the money from his front pocket to his back pocket, and Officer Owens said another alarm was triggered because Moore said he was unemployed. Officer Owens estimated the wad of money to be around one thousand dollars when he initially saw it, but subsequently, it was determined to be about six hundred dollars. Moore again admitted he had been drinking and placed his hands in his pockets with his head down, in a position Officer Owens described as a "defeated look." Officer Owens opined this action is used to dissipate nervous energy.

Moore was traveling from Lawrenceville, Georgia, which is a suburb of Atlanta, Georgia, to see his grandmother in Marion, North Carolina. Officer Owens testified ninety percent of the people he has arrested in major criminal drug cases have come from Atlanta. It raised some questions for Officer Owens when Moore explained he was traveling to visit his grandmother at one o'clock in the morning, especially after drinking. During questioning, Moore stated a third-party had rented the vehicle. Officer Owens explained third-party rental vehicles are one of the largest indicators of criminal activity in criminal patrol on the interstate. Officer Moore administered field sobriety tests to determine if Moore was impaired, and Moore passed two out of three. Officer Owens found Moore was not impaired and asked Moore if there was any alcohol in the vehicle. Moore denied having any alcohol, weapons, or drugs in the vehicle. Officer Owens also asked Moore if he could search the vehicle, but Moore declined consent.

Subsequently, Officer Owens decided to issue a warning ticket to Moore because he felt it would have been an injustice to arrest Moore for driving under the influence. However, he decided to detain Moore until the K-9 drug detection unit could arrive. Officer Carraway arrived after about fifteen minutes, a total of thirty-two minutes since the beginning of the traffic stop. Officer Carraway's dog alerted

to an odor inside the car, and the officers searched the vehicle. A bottle of alcohol was found under the front passenger seat of the vehicle, and contraband consistent with crack cocaine was found in two containers in a bag in the trunk of the vehicle. They also found a semiautomatic weapon and a bundle of currency. Moore was then arrested.

On October 22, 2010, Moore was indicted for trafficking cocaine base, first offense, and possession of a weapon during the commission of a violent crime. The case went to trial on April 25, 2011. The State cited *State v. Provet*, 391 S.C. 494, 706 S.E.2d 513 (Ct. App. 2011), *cert. granted*, Oct. 3, 2012, in support of its argument that Officer Owens had reasonable suspicion to further detain Moore beyond the scope of the initial traffic stop. It listed the following facts in support of finding a lawful detention: (1) Moore turned on his left turn signal when he was intending to turn right; (2) there was a distinctive odor of alcohol coming from Moore's vehicle; (3) Moore smoked two cigarettes during the traffic stop; (4) Moore failed to hang up his cell phone when Officer Owens approached; (5) Moore appeared nervous, evidenced by his shaky hands, rapid pulse, and heavy breathing; (6) Moore attempted to pick up his cell phone when Officer Moore asked him to exit the vehicle; (7) Moore had a large wad of cash on his person even though he stated he was unemployed; (8) Moore drove a vehicle rented by a third-party; (9) Moore was driving from Atlanta, a known hub for drug trafficking; and (10) Moore stated he was going to his grandmother's house, but it was already 1 a.m.

After hearing both parties' arguments and reviewing relevant case law, the trial court stated

> In particular, the problem I have with the or the facts that are revealed by the rental agreement indicate the rental in North Carolina on the evening, afternoon before the stop was made at one o'clock in the morning. I have my doubts that the car was driven from Morganton to Lawrenceville and back to Marion to visit a grandmother. Morganton and Marion is a much shorter trip than that.
>
> So, it appears that he may have been less than truthful about the purpose of his trip. Also, for someone unemployed, to be carrying such a large amount of cash

> in their pocket also would obviously give [an] officer reasonable suspicions. The other factors as noted, I have given those the weight required, and in this case I am going to refuse to suppress.

The trial proceeded and Moore was convicted of both charges. He was sentenced to twenty-five years on his trafficking charge as well as five years on his possession charge, and the sentences were to run concurrently. This appeal followed.

## STANDARD OF REVIEW

"In Fourth Amendment cases, the trial court's factual rulings are reviewed under the 'clear error' standard." *Provet*, 391 S.C. at 498, 706 S.E.2d at 515 (citing *State v. Brockman*, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000)). "Under the clear error standard, an appellate court will not reverse a trial court's findings of fact simply because it would have decided the case differently." *Id.* (internal quotations omitted) (citing *State v. Pichardo*, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005)). "Therefore, we will affirm if there is any evidence to support the trial court's rulings." *Id.* (citing *State v. Khingratsaiphon*, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002)).

## LAW/ANALYSIS

"The Fourth Amendment guarantees '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . .'" *Id.* at 499, 706 S.E.2d at 515 (alteration in original) (quoting U.S. Const. amend. IV). "Generally, the decision to conduct a traffic stop is [a] reasonable [seizure] when the police have probable cause to believe a traffic violation has occurred." *Id.* at 499, 706 S.E.2d at 515-16 (citing *Whren v. United States*, 517 U.S. 806, 810 (1996)).

"Lengthening the detention for further questioning beyond that related to the initial stop is acceptable in two situations: (1) the officer has an objectively reasonable and articulable suspicion illegal activity has occurred or is occurring; or (2) the initial detention has become a consensual encounter." *Id.* at 500, 706 S.E.2d at 516 (citing *Pichardo*, 367 S.C. at 99, 623 S.E.2d at 848). "Reasonable suspicion requires a particularized and objective basis that would lead one to suspect another

of criminal activity." *Id.* (citing *State v. Woodruff*, 344 S.C. 537, 546, 544 S.E.2d 290, 295 (Ct. App. 2001)). "Reasonable suspicion 'is not readily, or even usefully, reduced to a neat set of legal rules, but, rather, entails common sense, nontechnical conceptions that deal with factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act.'" *Id.* (quoting *United States v. Foreman*, 369 F.3d 776, 781 (4th Cir. 2004)). "Therefore, courts must 'consider the totality of the circumstances' and 'give due weight to common sense judgments reached by officers in light of their experience and training.'" *Id.* at 500-01, 706 S.E.2d at 516 (quoting *United States v. Perkins*, 363 F.3d 317, 321 (4th Cir. 2004)).

In *State v. Tindall*, 388 S.C. 518, 522, 698 S.E.2d 203, 205 (2010), an officer stopped Tindall for speeding, following too closely behind another vehicle, and failing to maintain his lane. The officer eventually informed Tindall that he would receive a warning ticket, but the officer then continued questioning Tindall for six to seven additional minutes, asking about drug crimes and various things about Tindall's business. *Id.* The issue before the court was "whether the officer reasonably suspected a serious crime at the point at which he chose not to conclude the traffic stop, despite his stated intention to issue a warning ticket, instead opting to continue his questioning." *Id.* at 523, 698 S.E.2d at 206. The court found when the officer decided to continue detaining Tindall, he had ascertained the following facts:

> (1) Tindall was driving to Durham to meet his brother; (2) Tindall was driving a rental car rented the previous day by a third-party which was to be returned to Atlanta on the day of the stop; (3) Tindall did a "felony stretch" on exiting the vehicle; and (4) Tindall seemed nervous.

*Id.* Our supreme court found those facts did not provide reasonable suspicion, and, thus, the continued detention was illegal. *Id.*

Moore concedes the initial stop was legal but contends Officer Owens exceeded the scope of the stop without reasonable suspicion of a serious crime. The question before this court is whether Officer Owens developed a reasonable, articulable suspicion that Moore was trafficking drugs at the time he intended to issue the warning citation such that the continued detention was lawful.

We first note the trial court placed a heavy emphasis on Moore's trip from Morganton to Lawrenceville to Marion in finding reasonable suspicion existed. The dissent believes the trial court's finding was consistent with Officer Owen's testimony, but we do not agree. Officer Owens simply stated the third-party rental agreement was indicative of drug trafficking and that it was an odd time of night to be visiting a grandmother especially given that Moore had been drinking. Officer Owens did not testify that the exact route Moore allegedly took was suspicious and gave no specific testimony to support the trial court's finding that it was doubtful he had driven from Morganton to Lawrenceville and back to Marion. It is important that we analyze the factors that Officer Owens considered at the time of the detention and not factors put forth by the trial court at a later date. Thus, we do not address the trial court's finding as a factor in determining whether Officer Owens' continued detention of Moore was lawful.

The State argues there were many indicators giving rise to a reasonable suspicion: (1) Moore turned on his left turn signal when he was initially pulled over (sign that Moore might flee); (2) Moore took a long time to pull over (sign that Moore might flee); (3) Moore never turned off his turn signal (sign of nervousness); (4) Moore admitted to drinking (typically used to calm a drug trafficker's nerves); (5) Moore started smoking a cigarette (another sign of attempting to calm nerves); (6) Moore continued to talk on his cell phone after he was pulled over by officer (common in drug trafficking cases because it indicates he is attempting to let a superior know he has been stopped by law enforcement); (7) Moore's hands were shaking heavily and his pulse was elevated (additional signs of nervousness); (8) Moore tried to pick up his cell phone once he got out of the car (sign that Moore might flee); (9) Moore had a large amount of cash in his pocket even though he admitted to being unemployed; (10) Moore drove a rental car rented by a third-party (common in drug trafficking); (11) Moore was driving on I-85, coming from the Atlanta area (a known drug corridor and a major drug source); (12) Moore claimed to be on the way to visit his grandmother (unusual to visit grandmother at 1 a.m.); (13) Moore assumed the felony stretch position even though the officers did not ask him to do so; and (14) Moore remained extremely nervous even after he was advised he would only receive a warning citation.

We share the Fourth Circuit's concern regarding the State's inclination toward using whatever facts are present, no matter how innocent, as indicia of suspicious activity. *See State v. Burgess*, 394 S.C. 407, 415, 714 S.E.2d 917, 921 (2011) (citing *United State v. Foster*, 634 F.3d 243, 248 (4th Cir. 2011)).

> [T]he State must do more than simply label a behavior as suspicious to make it so. The State must be able to either articulate why a particular behavior is suspicious or logically demonstrate, given the surrounding circumstances, that the behavior is likely to be indicative of some more sinister activity than may appear at first glance.

*Id.* (internal quotations and citations omitted). We recognize that factors consistent with innocent travel can, when taken together, give rise to reasonable suspicion, but we do not believe the present factors eliminate a substantial portion of innocent travelers. *See United States v. Digiovanni*, 650 F.3d 498, 511-13 (4th Cir. 2011). In our view the present factors have been expanded by the State in an effort to distinguish this case from *Provet*. Despite this effort, the alleged flight indicators lost much of their significance once Moore cooperated and stayed throughout the initial traffic stop and sobriety test. Further, the State attempted to expand the factor of nervousness into several factors by listing Moore's specific nervous conduct throughout the stop. As to Moore's wad of money, Officer Owens had no way of determining the total amount of cash in Moore's pocket, and it could have consisted of one dollar bills or one hundred dollar bills. Thus, this fact does not reasonably contribute to his reasonable suspicion. The State argues Moore's admission of drinking also contributed to Officer Owens' reasonable suspicion, but Officer Owens admitted Moore was not impaired and it would have been unfair to issue a ticket for an alcohol-related offense. Once we have viewed the factors in their totality, we find the State presented a similar case to *Tindall*: Moore was driving to visit a family member, Moore was driving a vehicle rented by a third-party, he was coming from a major city known as a drug hub and traveling along a known drug route, he assumed the felony position, and he displayed nervous conduct throughout the entire stop.

Consequently, we find these facts did not provide Officer Owen with a reasonable suspicion of a serious crime. Moore also declined consent to search his vehicle. As a result, the continued detention was illegal, and the drugs discovered during the search of the vehicle must be suppressed.

**CONCLUSION**

For the foregoing reasons, the trial court is

**REVERSED.**

**GEATHERS, J., concurs.**

**FEW, C.J., dissenting:** I would affirm the trial court's decision denying Moore's motion to suppress because there is evidence in the record to support the trial court's factual findings, and its legal conclusions are not clearly erroneous. *See State v. Tindall*, 388 S.C. 518, 523 n.5, 698 S.E.2d 203, 206 n.5 (2010) (summarizing our standard of review—"we must ask first, whether the record supports the trial court's assumed findings . . . and second, whether these facts support a finding that the officer had reasonable suspicion of a serious crime"). As explained by the majority, trial courts employ a "totality of the circumstances analysis" and "must give due weight to common sense judgments reached by officers in light of their experience and training." *State v. Taylor*, 401 S.C. 104, 112-13, 736 S.E.2d 663, 667 (2013). In this case, the trial court did just that in concluding the officer's observations and the circumstances under which he assessed the situation gave rise to a reasonable suspicion that Moore was engaged in serious criminal activity.

The majority's opinion lists numerous observations the officer made that led him to be suspicious of Moore. I agree many of the facts the officer observed are insignificant, and I share the majority's frustration over the officer's attempt to make innocent circumstances appear suspicious. In this case, however, the trial court made specific factual findings regarding observations it found to be significant, focusing on two key facts—the "large sum of wadded money in [Moore's] pocket" and Moore's explanation that he was driving to his grandmother's house at 1:00 a.m. Our standard of review forbids us to disagree with these findings if there is any evidence to support them. *See* 401 S.C. at 108, 736 S.E.2d at 665 ("A trial court's Fourth Amendment suppression ruling must be affirmed if supported by any evidence.").

The majority's decision expressly disregards this standard of review as to these key facts. First, the majority improperly reassesses the significance the officer placed on the money found in Moore's pocket. During the suppression hearing, the officer testified,

> I felt what I perceived as a large sum of wadded money in his pocket, and I left it there, and then Deputy or Corporal Hancock proceeded in checking his pockets, then he pulled out the wad of money, and then put[] it back in his pocket.

When asked how much money he thought Moore had, the officer replied, "Well, it's more . . . folded money than I carry. I would . . . [say] it was at least . . . bordering a thousand dollars." The officer also testified that Moore told him he was unemployed. When asked about the apparently large amount of money in the possession of an unemployed suspect, the officer replied, "That would be cause for alarm."

The trial court found that "someone unemployed . . . [and] carrying such a large amount of cash in their pocket . . . would obviously give an officer reasonable suspicions." Despite the officer's testimony to support the trial court's finding, the majority disagrees. The majority states, "As to Moore's wad of money, [the officer] had no way of determining the total amount of cash in Moore's pocket, and it could have consisted of one dollar bills or one hundred dollar bills. Thus, this fact does not reasonably contribute to his reasonable suspicion."[2] In *State v. Wallace*, 392 S.C. 47, 52, 707 S.E.2d 451, 453 (Ct. App. 2011), this court stated "the application of the law to a specific set of facts in an individual case can be unsettling." By that, we meant it can be difficult to determine "whether [the trial court's factual findings] support a [legal conclusion] that the officer had reasonable suspicion of a serious crime"—the second step in the analysis set out in *Tindall*. *See* 388 S.C. at 523 n.5, 698 S.E.2d at 206 n.5. In the first step of the *Tindall* analysis—reviewing the factual findings themselves—we are not permitted to make it difficult. Rather, we are constrained to determine whether there is any evidence to support the finding. In this instance, the majority simply disagrees

[2] I disagree with the majority's statement that this fact should not be considered because the officer "had no way of determining the total amount of cash in Moore's pocket." The officer made an on-the-spot assessment under the circumstances before him that Moore was carrying an unusual amount of money, and this made him suspicious. The trial court relied on this fact to find the officer's suspicion was reasonable. It makes no difference that the money could have been one dollar bills.

with the trial court despite evidence supporting the trial court's finding. In doing so, the majority has failed to observe our standard of review.

Second, the majority disregards our standard of review by minimizing the significance of the trial court's specific factual finding regarding Moore's pretextual explanation that he was driving to his grandmother's house at 1:00 a.m. along a highly improbable route. At the suppression hearing, the State offered in evidence the rental agreement the officer found in Moore's car, which showed the car had been rented in North Carolina the day before. Moore told the officer he had driven the car to a suburb of Atlanta, and was on his way back to Marion, North Carolina, to visit his grandmother. Based on this evidence, the trial court found:

> [T]he rental agreement indicates the rental in North Carolina on the evening, afternoon before the stop was made at one o'clock in the morning. I have my doubts that the car was driven from Morganton to Lawrenceville [Georgia] and back to Marion to visit a grandmother. That's a long way to go around to visit your grandmother. Morganton and Marion is a much shorter trip than that. So, it appears that he may [have] been less than truthful about the purpose of his trip.

The majority ignores this finding because it claims the officer "did not testify to this particular detail." However, as part of his testimony regarding observations he made during the traffic stop, which was offered to show why he was suspicious, the officer testified he read the rental agreement and found Moore's story regarding the purpose of his trip to North Carolina to be dubious, given the hour and his alleged destination. Because the officer's testimony and the evidence produced at the hearing supports the court's finding that Moore was "less than truthful about the purpose of his trip," we are not permitted to simply ignore this finding.

In addition to these two key facts, the trial court relied on other observations made by the officer that support the reasonableness of the officer's suspicion. In the argument portion of the suppression hearing, the assistant solicitor listed, by my count, eighteen separate facts in support of reasonable suspicion. While some of those facts are almost completely insignificant by themselves, I find the following facts, considered as a whole, to be important to our analysis: (1) Moore turned on his left turn signal, even though he was pulling over to the right side of the road,

after the officer activated his blue lights; (2) Moore took a long time to pull over; (3) the officer detected an odor of alcohol; (4) Moore smoked two cigarettes during the stop; (5) Moore continued talking on his cell phone during the stop; (6) the officer described Moore as "overly nervous;" (7) Moore's pulse was rapid; (8) Moore's breathing was heavy; (9) Moore tried to pick up his cell phone after he got out of the car; (10) someone other than Moore, who was not in the car, rented the car; (11) Moore was traveling from a city that is a known drug source; and (12) Moore looked down in a "defeated" fashion when asked if there were any illegal items in the car. The trial court clearly indicated it relied on these facts in addition to the two key facts discussed above, stating, "The other factors as noted, I have given those the weight required." While none of these twelve observations, on their own, could give rise to a reasonable suspicion of criminal activity, when considered together with the two key facts discussed above, they support the trial court's finding.

We must also consider the officer's background in law enforcement, which is extensive and includes: (1) being a member of the Highway Patrol with the South Carolina Department of Public Safety for seventeen years; (2) spending twelve of those years with the Aggressive Crime Enforcement Unit—nine of which he served as the first line supervisor for the unit; (3) receiving over a thousand hours in advanced criminal interdiction, which included drug interdiction; (4) being certified as a "master interdictor" through the National Criminal Enforcement Association; and (5) serving as an instructor for the South Carolina Criminal Justice Academy in criminal interdiction. *See Wallace*, 392 S.C. at 52, 707 S.E.2d at 453 (relying on *United State v. Branch*, 537 F.3d 328, 336, (4th Cir. 2008), for the contention that courts should give weight to the practical experience of officers when determining the reasonableness of an officer's suspicion). In particular, I find the officer's experience in the Aggressive Crime Enforcement Unit and his training in drug interdiction important to support the reasonableness of his suspicion. *See id.* (considering the officer's education in drugs and drug interdiction in its analysis); *State v. Provet*, 391 S.C. 494, 506, 706 S.E.2d 513, 519 (Ct. App. 2011) (considering, in particular, the officer's experience with the Aggressive Criminal Enforcement Unit in determining the existence of reasonable suspicion).

Reviewing the record as a whole and considering the totality of the circumstances, the trial court did not err in concluding reasonable suspicion existed. Thus, I would affirm.