ALAN WILSON
ATTORNEY GENERAL

August 11, 2023

The Honorable G. Murrell Smith, Speaker
South Carolina House of Representatives
506 Blatt Building
Columbia, SC 29201

Dear Mr. Speaker:

You ask for our opinion concerning interpretation of a provision of Act 38 of 2023. By way of further background, you provide the following information:

> On May 16, 2023, Governor McMaster signed Act 38, a copy of which is attached for your reference.
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> The clear intent of this legislation is to preempt political subdivisions from enacting ordinances or other measures pertaining to the sale of cigarettes, electronic smoking devices, E-Liquid and vapor products to minors.
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> Further, the intent of the General Assembly in the passage of the legislation was not to prohibit the sale of any and all cigarettes or other tobacco products through vending machines. Notwithstanding the intent for this legislation to deal with the sale to minors, the Senate adopted subsection (D) of Section 16-17-500 which purports to prohibit the sale of any and all tobacco products through a vending machine.
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> Additionally, Article III, Section 17 of the South Carolina Constitution requires a bill to relate to only one subject and further requires that it be expressed in the title. You will note that the prohibition of the sale of cigarettes is not referenced or mentioned in the title.
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> I would appreciate your office rendering an opinion on whether subsection (D) of Section 16-17-500 is contrary to the case law of South Carolina regarding the intent of Act 38. I would further request your opinion as to whether this same subsection is not expressed in the title, and, whether the lack of reference to the provisions of subsection (D) in the title renders that subsection to be in violation of Article III, Section 17 of the South Carolina Constitution.

> I expect there to be legislation introduced in January 2024 to clarify this ambiguity. In the event your opinion is that subsection (D) is contrary to the intent and/or is violative of Article III, Section 17 of the Constitution, I would appreciate your opinion as to the efficacy of the enforcement of subsection (D) pending legislative clarification given the potential liability the State may face due to the enforcement of a provision of a statute that may not be valid.

Law/Analysis

We agree with your analysis and will discuss the issue more fully below. We think a court would likely construe § (5)(D) as not prohibiting all sales of tobacco products through vending machines, but would interpret the provision as forbidding minors from purchasing such products in those machines. If the General Assembly had intended to prohibit all vending machine sales of cigarettes and other tobacco products, it would have surely said so in the title of the Act, but did not. Based upon our reading of the Act as a whole, rather than merely focusing upon § (5)(D), the more reasonable interpretation is that the Legislature intended to bar vending machine sales to minors.

In any construction of Act 38 (H. 3681), certain fundamental principles of statutory interpretation are applicable. As we recognized in Op. S.C. Att'y Gen., 2004 WL 2745669 (Nov. 22, 2004), the following guideposts for statutory construction are relevant:

> [f]irst and foremost, is the cardinal rule of construction that the primary purpose in interpreting statutes is to ascertain the intent of the General Assembly. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). A statute must receive a practical, reasonable and fair interpretation consonant with the purpose, design and policy of the lawmakers. Caughman v. Columbia Y.M.C.A., 212 S.C. 337, 47 S.E.2d 788 (1948). Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1990). However, the Court has cautioned against an overly literal interpretation of a statute which may not be consistent with legislative intent. Greenville Baseball, Inc. v. Bearden, 200 S.C. 363, 20 S.E.2d 813 (1942). As stated by our Supreme Court in Bearden,
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> > [i]t is a familiar canon of construction that a thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter. It is an old and well established rule that the words ought to be subservient to the intent and not the intent to the words.
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> Id. at 368-369. A sensible construction, rather than one which leads to irrational results is always warranted. McLeod v. Montgomery, 244 S.C. 308, 136 S.E.2d 778 (1964).

Moreover, as we observed in Op. S.C. Att'y Gen., 2013 WL 4873939 (Sept. 5, 2013), "[t]he historical background and circumstances at the time the statute was enacted may be used

to assist in interpreting the meaning of an ambiguous statute." Bearden, supra. Further, a "literal application of language which leads to absurd consequences should be avoided whenever a reasonable application can be given consistent with the legislative purpose." U.S. v. Rippetoe, 178 F.2d 735, 737 (4th Cir. 1950).

In addition, "[a] court should not consider a particular clause or provision in a statute as being construed in isolation, but should read it in conjunction with the purpose and policy of the law." State v. Gordon, 356 S.C. 143, 588 S.E.2d 105 (2003). As our Supreme Court has recognized, "[i]n ascertaining the intent of the Legislature, a court should not focus on a single section or provision, but should consider the language of the statute as a whole." Croft v. Old Republic Ins. Co., 365 S.C. 402, 412, 618 S.E.2d 909, 914 (2005).

The Court also recognizes that ". . . the title or caption of an act may be properly considered to aid in the construction of a statute and to show the intent of the Legislature." Op. S.C. Att'y Gen., 2004 WL 2451474 (Oct. 15, 2004) (citing Lindsay v. Southern Farm Bureau Cas. Ins. Co., 258 S.C. 272, 188 S.E.2d 374 (1972)). This is the case particularly in this instance because Article III, § 17 of the South Carolina Constitution provides that "[e]very law shall relate to one subject, and that shall be expressed in the title." As our Supreme Court has stated with regard to this constitutional provision,

> [t]he purpose of Article III, § 17 is: (1) to apprise the members of the General Assembly of the contents of an act by reading the title; (2) to prevent legislative "log-rolling"; and to inform the people of the state of the matters with which the General Assembly concerns itself.

Am. Petroleum Institute v. S.C. Dept. of Revenue, 382 S.C. 572, 576, 677 S.E.2d 16, 18 (2009). While it is true that the title to an act need not be a complete index of its contents, if reference is not made in the title to the particular provision, that provision must be inherently germane to the general subject referred to in the title. Colonial Life & Acc. Ins. Co. v. S.C. Tax Comm., 233 S.C. 129, 145, 103 S.E2d 908, 916 (1958).

In Colonial Life, the Court invalidated a provision pursuant to Art. III, § 17 because it was not referenced in the title and was not germane. And in American Petroleum, the Court refused to sever the Act in question, which it deemed violative of Art. III, § 17 , and thus voided the entire Act.

We turn now to the interpretation of Act 38, or the "Omnibus Tobacco Enforcement Act of 2023." One principal purpose of the Act appears clearly to preempt, with certain exceptions such as land use regulation or zoning, political subdivisions from enacting "any laws, ordinances, or rules pertaining to ingredients, flavors or licensing" of cigarettes, electronic smoking devices or nicotine products. A second purpose of the Act, contained in Section 5 thereof, is further regulation and prohibition of the sale of cigarettes and tobacco products to minors. The title of Subsection 5 indeed specifies "Tobacco product sale prohibitions, minors." This itself is strong evidence of the legislative purpose.

More specifically, Section 5 amends § 16-17-500, which makes unlawful the sale of cigarettes and tobacco products or alternative nicotine products to minors. The previous version of Section 16-17-500(D) dealt expressly with the prohibition of the sale of cigarettes or tobacco products to minors through vending machines and contained certain precautions to ensure that minors could not purchase cigarettes through such machines. Section 5 of new Act 38's Subsection (D) now more directly and categorically states that, "It is unlawful to sell a tobacco product through a vending machine." Sections 6 and 7 of Act 38 amend § 16-17-501 and -502 respectively. Section 8 amends § 16-17-503 and provides for enforcement of the Act [§§'s 16-17-500, 16-17-502 and 16-17-506] through SLED's use of "unannounced compliance checks" and authorizes the use of persons under the age of 18 "to test the tobacco retail establishment's compliance" with these provisions. SLED must notify the Department of Revenue as to the result of these compliance checks. Further enforcement is authorized through the use of "unannounced inspections by the South Carolina Department of Alcohol and Other Drug Abuse Services."

Sections 9 and 10 of Act 38 amend §§ 16-17-504 and -506. Section 11 amends § 59-1-380 and provides for a "tobacco-free campus policy." Disciplinary action for violation by the student of such a policy is enumerated. Pursuant to Section 13, the Act "takes effect ninety days after approval by the Governor except SECTION 2, SECTION 3, and SECTION 4 which take effect upon approval by the Governor."

Thus, reading the Act as a whole, particularly Section 5, it is evident that the General Assembly sought to tighten restrictions upon the sale of cigarettes and tobacco products to minors. However, nowhere else in the Act is it suggested that the General Assembly intended to bar sales through vending machines to adults. Such would not have been in keeping with this State's legislative policy. Without clear evidence thereof, particularly in the title of the Act, we cannot so conclude.

We turn now to a more detailed analysis of your question – whether Subsection (5)(D) bans the sale of all tobacco products through a vending machine. We believe it does not. We readily acknowledge that this provision, when read literally and in isolation, at first blush, appears to do so. However, there are strong reasons not to interpret the statute in such a broad manner. We believe it is far more likely that a court would not read the Act so literally, and out of context, but instead would give effect to the overarching legislative purpose to protect minors from cigarettes and tobacco products. The intent of the Legislature, which must govern above all else, was that, pursuant to § (5)(D), when read in conjunction with the rest of the Act, purchase by minors through vending machines would be banned. Moreover, inasmuch as the Act's title does not mention the banning of vending machines for the sale of tobacco products, we would be most hesitant to construe § (5)(D) as a complete ban upon the sale of cigarettes through those machines in light of the fundamental constitutional issues which would be created by Article III, § 17.

More specifically, the heading of Section 5 is "Tobacco product sale prohibition, minors." Thus, the legislative intent of the entire section was to relate to the sale of tobacco products to minors rather than the sale of such products generally. All of the other provisions of Section 5, which amends § 16-17-500, relate to minors being unable to purchase cigarettes. Indeed, Section (5)(E)(5) states that "Failure to require identification for the purpose of verifying a person's age is prima facie evidence of a violation of this section." (emphasis added). It would thus make no sense to require an ID of a person to buy cigarettes from a vending machine if all sales from a vending machine are now banned. Thus, we believe Section (5)(D)'s unfortunate language creating an ambiguity was inadvertent and that the Legislature did not intend to ban all sales of cigarettes through vending machines. To read § (5)(D) literally and as controlling would contravene legislative intent.

Moreover, while the title of Act 38 references amendment of §§ 16-7-500, 16-17-501, 16-17-502, 16-17-503, 16-17-504 and 16-17-506 "Relating to the Prevention of Youth Access to Tobacco and Other Nicotine products," there is no mention in the title of any total ban upon the sale of these products through vending machines. The words "vending machines" does not even appear in the title. Yet, the words "minors" and "youth" do appear. This is further compelling evidence that § (5)(D) does not ban sales of tobacco products in vending machines altogether. But, even as importantly, should Section (5)(D) not be construed as limiting the sale of tobacco products in vending machines to minors only, there could well be a violation of Article III, § 17. If that is the case, under American Petroleum, the entire Act runs the risk of being voided by a court. We do not believe a court would so rule, given the clear intent in the entire Act. Instead, it would read Section (5)(D) more narrowly, consistent with that intent.

Furthermore, the Supreme Court has consistently recognized that, ". . . we will not construe a statute to do that which is unconstitutional." Ward v. State, 343 S.C. 14, 19, 538 S.E.2d 245, 247 (2000). And in State v. Peake, 353 S.C. 499, 505, 579 S.E.2d 297, 300 (2003), the Court noted that "[t]o construe the Act in a manner that involves DHEC in the decision to initiate or pursue criminal charges, would create a constitutional infirmity where none need exist." See also Curtis v. State, 345 S.C. 557, 549 S.E.2d 591 (2001) [statutes to be given a constitutional construction when possible].

Accordingly, for all the foregoing reasons, we construe Section (5)(D) of the Act as prohibiting only the sale to minors of cigarettes and tobacco products through vending machines. While read in isolation, § (5)(D) admittedly appears at first blush to lend itself to a more literal reading. However, we believe a court would, based upon the overarching intent of the statute, likely construe § (5)(D) as relating only to banning minors from purchasing cigarettes and other tobacco products through vending machines. Thus, those over the age of 18 are unaffected by § (5)(D). Not only is such an interpretation consistent with the Act as a whole, but this narrower reading would avoid the constitutional issues of Art. III, § 17, which would potentially jeopardize the entire Act under American Petroleum.

Conclusion

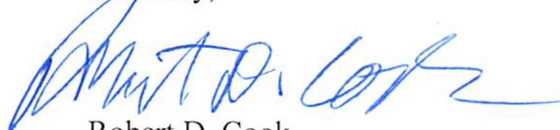
It is our opinion that a court would likely conclude that the General Assembly did not intend in the enactment of Section (5)(D) of Act 38 of 2023 to prohibit all purchases of cigarettes or other tobacco products through vending machines. Instead, the Legislature intended to ban such purchases by minors (under the age of eighteen). We believe the language of § (5)(D) creating this ambiguity was inadvertent in light of the overarching legislative intent throughout the rest of the Act.

It is fundamental that Act 38 may not "be construed by concentrating on an isolated phrase," but "the statute must be read as a whole. . . ." South Carolina State Ports Auth. v. Jasper Co., 368 S.C. 388, 399, 629 S.E.2d 624, 629 (2006). Thus, we may not focus only on Section (5)(D) of the Act. Throughout Section (5) of Act 38, the Legislature sought to deter the purchase of cigarettes and other tobacco products by minors. A good example is Section (5)(E)(5), requiring that failure to verify a person's age by an ID is a prima facie violation of the Act. It would, therefore, make no sense to require an ID for a person purchasing from a vending machine if all vending machine purchases of cigarettes are now banned by § (5)(D).

Our conclusion regarding interpretation of § (5)(D) is strengthened by the fact that the Act's title makes no mention whatever of banning the sale of cigarettes, particularly through vending machines. If the Legislature intended to ban such sales, it must be reflected in the Act's title pursuant to Art. III, § 17 of the Constitution. Thus, any broad interpretation banning sales of cigarettes through vending machines could well violate Art. III, § 17, running the risk that § (5)(D) or even the entire Act could be held unconstitutional. A more narrow construction of § (5)(D) relating only to minors would avoid this serious constitutional question because the regulation of access of cigarettes to minors is indeed contained in the Act's title. Thus, for that reason also, we believe a court would construe § (5)(D) as relating only to the purchase of cigarettes or other tobacco products through vending machines by minors. It is elementary that a court is bound to construe a statute in a constitutional manner, if possible.

Finally, we think all would agree that § (5)(D) is ambiguous and should be clarified upon the General Assembly's return, consistent with what appears to be the clear purpose of the Act – to prevent minors from purchasing cigarettes and other tobacco products. This not only would avoid confusion and chaos, but would alleviate serious constitutional concerns. Your letter assures that legislative clarification will be forthcoming. This being the case, as you indicate, it would be prudent not to enforce new § (5)(D) "pending legislative clarification given the potential liability the State may face due to the enforcement of a statute that may not be valid."

Sincerely,



Robert D. Cook
Solicitor General