THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

Appellate Case No. 2015-001726

Jane Doe.....Petitioner,

v.

State of South Carolina.....Respondent.

PETITION FOR REHEARING

SUMMARY

Pursuant to Rule 221, SCACR, the State respectfully petitions for rehearing of the Court's decision in its original jurisdiction of July 26, 2017. We believe the remedy the majority chose – that of severance of all cohabitation protections – was ill-suited to protecting cohabitors from domestic violence. In three separate opinions, and one concurrence in result only, [Pleicones and Hearn, JJ.) (Kittredge, J. concurring in result only), (Beatty C.J.) and (Few, J.], the Court was unanimous in concluding that same-sex couples who "are cohabiting or have formerly cohabited" must be included within the protections of S.C. Code Ann. § 16-25-10(3)(d) of the Domestic Violence Reform Act of 2015 and S.C. Code Ann. § 20-4-20(b)(iv) of the Protection From Criminal Domestic Violence Act (collectively, "the Acts"). The Court, however, was sharply divided as to the proper remedy to rectify the constitutional violation.

We readily agree with the Court's conclusion that the Equal Protection Clause requires that same-sex couples who are cohabiting or formerly have cohabited must be included within

these protections from domestic violence. On the other hand, the State strongly urges the Court to reconsider its decision to sever in its entirety the language "male and female who are cohabiting or formerly have cohabited" from the Acts – a path chosen by the majority. Such a drastic remedy is completely unnecessary to resolve the Court's finding of a constitutional violation. Further, the remedy of severance provides the Petitioner and other same-sex couples who are cohabiting only the most pyrrhic of victories. Petitioner, rather than receiving protection from domestic violence under the Acts, will now receive – along with other cohabitors – no protections whatever. Instead of broadening the protected class under the Acts of those who cohabit to comply with the demands of Equal Protection, the Court's decision removes those protections from domestic violence altogether. Moreover, the decision has thrown the law enforcement, prosecutorial, and victims advocacy communities, as well as the lower courts, into confusion, not knowing the status of pending cases, or even whether the ruling retroactively reopens previous convictions.

In short, severing this cohabitation language in its entirety (as opposed to striking only the words "male and female") strips the Act's protections from all cohabiting couples, both same-sex and opposite-sex couples alike. Domestic violence between those who cohabit or formerly have cohabited, comprises a major portion of domestic violence cases. That is why the General Assembly has always included cohabitors within the definition of "household member." Thus, ironically, the remedy of complete severability makes the cure even worse than the disease.

For purposes of the need for rehearing, we believe the Court overlooked or misapprehended the well-recognized and often preferred principle that the remedy for underinclusiveness in Equal Protection cases is not severance, but inclusion of those who have

been discriminated against. Rather than "leveling down" to address the inequality posed by the Acts, the preferred remedy is to "level up" so as to best fulfill the legislative purpose of protecting one member of a cohabiting couple beaten or assaulted by the other. We stated in our Brief on the merits,

> [t]he importance of the domestic violence statutes . . . cannot be overstated. Where there is a statute which confers benefits on an underinclusive basis, "extension, rather than nullification, is the proper course." See [Califano] v. Westcott, 443 U.S. 76, 90-91 (1979) (citing cases). Thus, should the Court find a constitutional violation in this case, we urge it to add same-sex couples to the definition of "household member," rather than taking the drastic step of striking the entire statute.

State's Brief at 9. Importantly, heretofore, as will be discussed, this Court has also taken the approach of inclusion, rather than nullification, as a remedy for an Equal Protection violation.

In short, the Court need not have resorted to the unnecessary remedy of severing the facial invalidity the cohabitation provision of the Acts. It could have instead concluded – as did the Chief Justice – that the challenged portions of the Acts are unconstitutional as applied to Petitioner and other cohabiting same-sex victims of domestic violence. The preferred remedy is thus to include those discriminated against within the Acts' protections, not abolish those protections. Inclusion is the approach the United States Supreme Court employed in City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 372 (1985). Rather than facially invalidate the challenged ordinance, which discriminated against the mentally retarded, Cleburne held the ordinance was unconstitutional as applied to the mentally retarded and included the mentally retarded in the same class as others. As we argued in our Brief, even with a declaration of unconstitutionality, such a violation can be remedied without striking "any part of South Carolina's Domestic Violence law." State's Brief at 24. We thus believe the Court overlooked these generally governing principles. Thus, we respectfully urge the Court to reconsider.

Important also is the fact that if the chosen remedy of severance of the cohabitation language (as opposed simply to severing the words "male and female") remains in place, there is a strong possibility that the Court's decision has itself created the prospect for another Equal Protection challenge. If the majority's decision is allowed to stand, unmarried, cohabiting couples without a child may well consider that they are now being discriminated against by the "household member" definition, as severed. The Court's decision has created two basic classes: married or formerly married; and unmarried, cohabiting or formerly cohabiting couples without a child in common. The latter class now possesses no protections under the Acts, while the former class does receive such protections. That distinction can be subject to constitutional challenge. See Atkisson v. Kern Co. Housing Authority, 59 Cal. App.3d 89 (1976) [regulation of local housing authority which forbade all low income public housing tenants from living with anyone of opposite sex not related by blood, marriage, or adoption violates equal protection]. See also Eisenstadt v. Baird, 405 U.S. 438 (1972) [Massachusetts statute permitting married persons to obtain contraceptives, but prohibiting distribution to single persons violates Equal Protection].

Respectfully, the State therefore requests that the Court reconsider its decision as to the remedy chosen for the Equal Protection violation in this case. The remedy should provide for equitably reconciling the requirement of enforcement of the Constitution with the protections long afforded to the large group of persons who cohabit.

ARGUMENT

The "cohabitation" provisions are the mainstay of domestic violence protections in the Acts, and always have been, since the Legislature began to address the acute problem of domestic violence in South Carolina over thirty years ago. It is well known that, year after year, South Carolina is one of the leaders in men killing women through domestic violence. As this

Court noted in State v. Cannon, 336 S.C. 335, 338, 520 S.E.2d 317, 318 (1999), "[i]n 1984, the General Assembly enacted the Criminal Domestic Violence Act. . . . 1984 S.C. Act 484, § 1. It defined the statutory offense of criminal domestic violence . . . and set forth the penalties for a conviction." Yet, even with the initial passage of the Domestic Violence Act in 1984, the Legislature recognized the importance of protecting the substantial group of "persons cohabitating or formerly cohabitating". The General Assembly well understood that a person in a cohabiting relationship may fall prey to domestic violence.

Indeed, a national study in 1989 found that cohabitants are twice as likely to be victims of domestic violence as married persons. Stets and Straus, "The Marriage License as a Hitting License: A Comparison of Assaults in Dating, Cohabiting and Married Couples," in Dating Relationships: emerging Social Issues, 33, 39 (Pirogood and Stets, eds., 1989). Obviously, the Legislature was aware of the significant percentage of CDV victims who are in cohabiting relationships because the 1984 Act defined the terms "household member" to include "persons" who cohabit or have cohabited.

The 1994 Act Inserting The Words "Male and Female"

In 1994, the General Assembly stiffened the penalties for domestic violence and created the offense of CDV HAN, making it a felony. It also inserted the words "male and female" for the word "persons" with respect to cohabitors, but essentially preserved the same language regarding cohabitation ("who are cohabiting or formerly have cohabited"). See State v. Leopard, 349 S.C. 467, 471-72, 563 S.E.2d 342, 345 (Ct. App. 2002) (referencing 1994 Act No. 519, § 1). Various amended versions of the Acts have carried forth these cohabitation protections, form 1984 until today.

It is important to note that the 1994 Act, in substituting the words "male and female" for "persons" is not what some might have assumed, i.e., an effort to discriminate against same-sex couples who cohabit. Instead, this legislative change was, in fact, gender-neutral. It appears from news reports that the issue which caused this particular modification was a concern that the concept of "family" for purposes of domestic violence could be extended to anyone living together – e.g. brother living with brother, two sisters living together or even two or more roommates. Apparently, an initial compromise was to strike full protection for cohabiting couples and provide protection from domestic violence only to those who cohabit for at least a year. However, as can be seen in Attachment A, domestic violence advocacy groups believed such a change was a step backwards in protecting victims. Thus, negotiations continued as to the exact language.

Eventually, as a further compromise, the one year provision, which House Judiciary had proposed, was dropped, but the words "male and female" were added to ensure that "cohabitation" protection did not extend to virtually anyone living under the same roof, such as roommates. Thus, there appears to have been no intentional discrimination in the use of the words "male and female," but, instead, such was an attempt to separate genuine "cohabitation" from merely living together.

Other states, about the same time, used the same limiting words to define cohabitation. Delaware's Domestic Abuse law in 1994 defined "those to be protected" to include "a man and woman cohabiting in a home with the child of either or both." See Holmes v. Wilson, 1994 WL 872663 (1994). Kansas' provision defines "household member" to include "a man and woman if the woman is pregnant and the man is alleged to be the father, regardless of whether they have been married or have lived together at any time." State v. Perez-Rivera, 203 P.3d 735 (Kan.

2009). The Kentucky Court of Appeals noted that the word "couple," while not defined, "refers to two people engaged in an intimate relationship and would not include roommates." Ireland v. Davis, 957 S.W.2d 310, 312 (Ky. 1997). Therefore, South Carolina's 1994 Act relied upon language designed to preclude roommates and others not "engaged in an intimate relationship" from falling within the definition of "household member" for purposes of domestic violence protection.

Moreover, the text of the Acts may be subject to alternative interpretations. Justice Few makes the argument in his separate opinion that "we should construe the Acts to protect partners in unmarried same-sex couples. . . ." We agreed with that assessment in our Brief. Given the history of the 1994 amendments, by inserting the words "male and female," discussed above, (and the word "person being retained in the Senate version of the Bill) as well as the overarching purpose of the Acts to protect cohabiting couples, such a construction is indeed possible. The words used are "a male and female who are cohabiting or formerly have cohabited." As Justice Few points out, the word "between" is not present so as to require that the cohabitation must be between a male and female. Compare U.S. v. Windsor, 133 S.Ct. 2675 (2013) [DOMA, defining marriage as only a legal union "between one man and one woman is unconstitutionally discriminatory].

We offered in our Brief alternative constructions to ensure the constitutionality of the cohabitation provisions. See State's Brief, 23-29. In addition, the term "a male and female" could be deemed to be used simply to signify two people of the opposite sex acting either together or each acting separately. Thus, without the word "between," an alternative reading could be construed to allow a male to cohabit with another male and a female with another female. This is particularly so because the word "persons" had been used for ten years prior.

But, regardless of alternative interpretations, it is clear, based upon the history of the 1994 Amendment, that the Legislature was not seeking to discriminate against same-sex cohabitors, but was instead attempting to address the "roommate" situation and distinguish it from true "cohabitants."

Importance of Protections For Cohabitants

The importance of the protections afforded all cohabitants may be seen by the Court of Appeals' decision in Pelzer v. State, 381 S.C. 217, 219-20, 672 S.E.2d 790, 791 (Ct. App. 2009). In that case, the Court recounted that the defendant had threatened to set fire to the home where his formerly cohabiting partner and their two children in common were sleeping. He then brutally beat the victim. Among other things, Pelzer was charged with CDV HAN and violation of a family court restraining order.

Certainly such horrid acts of violence do not occur only in cohabiting relationships, but it is clear that domestic violence often occurs in such relations outside of marriage. Thus, the protections of the Acts are needed just as much, if not more, for cohabitors as for spouses or former spouses. By way of illustration, the State Report for fiscal 2014-15, provided by DSS, found that 33% of domestic violence victims were a current spouse and four percent a former spouse. Twenty four percent of domestic violence victims were cohabiting intimate partners, and three percent a former dating partner. Thirty six percent were in a dating relationship. See South Carolina Department of Social Services, The Domestic Violence State Report, Federal Fiscal Year October 2014 – September 2015, at 33. Another study by the Department of Public Safety concluded that "[t]he most frequently reported marital status among domestic violence offenders under supervision was single and never married." (45.8%). See McManus, "Nowhere to Run, Nowhere to Hide: A Profile of Domestic Violence in South Carolina" at 76 (2006).

Recognition of statistics like these is the reason the General Assembly has, since 1984, maintained protections for cohabitants which this Court has now excised. The Acts are underinclusive to be sure – but the majority's cure for such underinclusiveness is even worse. The remedy of severance that the majority prescribes not only denies Family Courts the authority to enter protective orders as to all cohabitants, but severely restricts prosecutors from prosecuting acts of violence by one cohabitant against another. As Chief Justice Beatty aptly observed, severance is a "drastic measure . . . neither necessary or desired." (Opinion of Beatty, C.J.). He added: "Such a decision [results] . . . in grave consequences for victims of domestic abuse."

Law Relating to Remedies

The decision of the United States Supreme Court in Califano v. Westcott, supra is particularly instructive with respect to the rule governing underinclusive statutes violating Equal Protection. Califano involved a case of gender discrimination in the AFDC program, a program providing benefits to dependent children because of the death, absence or incapacity of a parent. The particular provision in question, § 407's definition of "dependent child," made the unemployment of the "father" but not the "mother," the basis for benefits. As in this case, the Justices of the Supreme Court were unanimous that § 407 violated the Equal Protection Clause because not "substantially related to any important and valid statutory goals." Instead, § 407 was part of the "baggage of sexual stereotypes." 443 U.S. at 8 (quoting Orr v. Orr, 440 U.S. 268, 283 (1979)). Further, as here, in Califano, the issue immediately turned to the remedy for the underinclusive § 407. The majority opinion, written by Justice Blackmun, provides a good summary of existing precedent and the reasons for the majority's choice of the remedy of "inclusion," rather than "nullification" to resolve the Equal Protection violation:

> [W]here a statute is defective because of under inclusion, Mr. Justice Harlan noted, "there exist two remedial alternatives: a court may either

> declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion." Welsh v. United States, 398 U.S. 333, 361, 90 S.Ct. 1792, 1807-1808, 26 L.Ed.2d 308 (1970) (concurring in result). In previous cases involving equal protection challenges to underinclusive federal benefits statutes, this Court has suggested that extension, rather than nullification, is the proper course. See e.g. Jimenez v. Weinberger, 417 U.S. 628, 637-638, 94 S.Ct. 2496, 2502-2503, 41 L.Ed.2d 363 (1974); Frontiero v. Richardson, 411 U.S. at 691 and n. 25, 93 S.Ct. at 1772 and n. 25 (plurality opinion). Indeed, this Court has regularly affirmed District Court judgments ordering that welfare benefits be paid to members of an unconstitutionally excluded class. E.g. Califano v. Goldfarb, 430 U.S. 199, 97 S.Ct. 1021, 51 L.Ed.2d 270 (1977), affg. 396 F.Supp. 308, 309 (E.D.N.Y. 1975); Califano v. Silbowitz, 430 U.S. 924, 97 S.Ct. 1539, 51 L.Ed.2d 768 (1977), summarily affg, 399 F.Supp. 118, 132-133 (Md. 1975); Weinberger v. Wiesenfeld, 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975), affg. 367 F.Supp. 981, 991 (N.J. 1993); United States Dept. of Agriculture v. Moreno, 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973), affg. 345 F.Supp. 310, 315-16 (D.C. 1972); Richardson v. Griffin, 409 U.S. 1069, 93 S.Ct. 689, 34 L.Ed.2d 660 (1972), summarily affg. 346 F.Supp. 1226, 1237 (Md.).
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> The District Court ordered extension rather than invalidation by way of remedy here, and equitable considerations surely support its choice. Approximately 300,000 needy children currently receive AFDC-UF benefits, see 42 Soc. Bull. 78 (Jan. 1979), and an injunction suspending the program's operation would impose hardship on beneficiaries whom Congress plainly meant to protect. The presence in the Social Security Act of a strong severability clause, 42 U.S. § 1303, . . . likewise counsels against nullification, for it evidences a congressional intent to minimize the burdens imposed by a declaration of unconstitutionality upon innocent recipients of government largesse.

(emphasis added). See also Heckler v. Mathews, 465 U.S. 728, 739, n. 5 (1984). In Heckler, the Court noted that "[a]s Justice Brandeis explained, when the 'right invoked is that of equal treatment, the appropriate remedy is a mandated or equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class.'" (quoting Iowa-Des Moines National Bank v. Bennett, 284 U.S. 239, 247 (1931)). 465 U.S. at 740. Nevertheless, Heckler reaffirmed that "extension" is the

preferred rule. Id. at 739, n. 5. Thus, the Westcott Court looked to the hardship imposed upon children by any remedy of nullification, as well as whether such a remedy was consistent with overarching legislative intent.

Based upon these factors, particularly the impact of the remedy of nullification, decisions elsewhere often follow Califano v. Westcott and apply "the extension rather than nullification" rule. See e.g. Cimaglia v. Schweiker, 555 F.Supp. 710, 713 (S.D. Fla. 1983) ["the appropriate remedy is to extend the benefits to the women who have been constitutionally excluded"]; Mertz v. Harris, 497 F.Supp. 1134, 1143 (S.D. Tex. 1980) ["The final issue faced by this Court is whether the Defendant should be required to extend to widowers those benefits which are presently provided to widows, or to nullify those benefits presently enjoyed by widows, but not widowers. This Court finds that "extension, rather than nullification is the proper course." (quoting Califano)]; State v. Denney, 101 P.3d 1257, 1269 (Kan. 2004) ["In short, Kansas' obvious commitment to exoneration of the innocent through DNA – both sampling and later testing – would be severely reduced if we nullify K.S.A. 2003 Supp. 21-2512. On the other hand, if we extend the statute's coverage to include situations such as Denney's we have increased the chances of freeing the innocent."].

As recently as this past term, the United States Supreme Court reaffirmed Califano v. Westcott, supra in Sessions v. Morales-Santana, ___ U.S. ___, 137 S.Ct. 1678 (2017). There, the Court concluded that the exception to the statute generally requiring that, in order for a child to acquire U.S. citizenship, there must be a five year physical presence in the United States for an unwed U.S. citizen-father, but only a one year presence for the unwed mother, violated the Constitution. Writing for the Court, Justice Ginsburg concluded that "[p]rescribing one rule for mothers, another for fathers, § 1409 is of the same genre as the classifications we [have

previously] declared unconstitutional [in other cases, including Westcott]." 137 S.Ct. at 1690. With respect to the remedy, the Court reaffirmed that Califano v. Westcott is the "ordinarily" governing rule. However, the situation in Sessions posed a different problem. According to the Court, "[t]he residual policy here, the longer physical-presence requirement . . . evidences Congress' recognition of 'the importance of residence in this country as the talisman of dedicated attachment.'" Id. at 1700 (quoting Rogers v. Bellei, 401 U.S. 815, 834 (1971)). A unanimous Court concluded:

> [a]lthough extension of benefits is customary in federal benefits cases , . . . all indicators in this case point in the opposite direction.... Put to the choice, Congress, we believe, would have abrogated § 1409(c)'s exception, preferring preservation of the general rule. . . .
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> For the reasons stated, however, we must adopt the remedial course Congress likely would have chosen "had it been apprised of the constitutional infirmity." Levin, 560 U.S. at 427. . . . Although the preferred rule in the typical case is to extend favorable treatment, see Westcott, 443 U.S. at 89-90, 99 S.Ct. 2655 this is hardly the typical case. . . . Extension here would render the special treatment congress prescribed in § 1409(c), the one-year special treatment for U.S.-citizen mothers, the general rule, no longer an exception. Section 1401(a)(7)'s larger physical presence – requirement, applicable to a substantial majority of children born abroad to one U.S.-citizen parent and one foreign-citizen parent, therefore, must hold sway. . . .

Id. at 1701. In short, the special exception for unwed citizen-mothers in Sessions had to be stricken because it was facially invalid and perpetuation of that exception – a holdover from the Roosevelt Administration – was inconsistent with Congressional intent. Unlike the classic underinclusive provision, such as is contained in the Acts in this case, the statute in Sessions was overtly discriminatory. The "cohabitation" provisions contained in the Acts are not. (See Opinion of Chief Justice Beatty). And, as we discussed earlier, the purpose of the insertion of the "male and female" language appears to have been to ensure that persons merely living

together, such as roommates, did not receive domestic violence protections. Thus, the "ordinary" remedy of inclusion, rather than nullification, should apply.

This Court employed just such a rule of inclusion in Green v. Lewis Truck Lines, Inc., 315 S.C. 253, 433 S.E.2d 844 (1993). There, the Tort Claims Act contained no provision for tolling a minor's cause of action against the State. The Court concluded that there was "no justification to deny tolling of a minor's claim merely because the minor is suing a governmental, rather than a private, entity." 315 S.C. at 256, 433 S.E.2d at 845. According to the Court, the lack of such a provision violated Equal Protection. The remedy for the violation was that "Green is entitled to the tolling provisions in his action against Department, no less than in an action against a private entity." 315 S.C. at 256, 433 S.E.2d at 846. In short, the Court included Green within the protections of the Tort Claims Act.

Moreover, in Arnold et al. v. Assn. of Citadel Men, et al., 337 S.C. 265, 523 S.E.2d 757 (1999), this Court concluded that a statute prohibiting election to the Citadel Board of Visitors if the member would turn seventy-five during the term violated Equal Protection because, under the statute, no such age limitation applied to the Governor's appointment to the Board. Accordingly, the statute was discriminatory because it did not provide the same protections for other Board Members as it did the Governor's appointee. In fashioning a remedy, the Court declared that "Scarborough was a qualified nominee for the 1996 election." 337 S.C. at 273, 523 S.E.2d at 762. No provision was severed or nullified; the Court simply concluded, in effect, that the law was unconstitutional as applied to Scarborough and found him included within the statute's reach along with the Governor's appointee.

In the case before this Court, there is every reason to apply the "customary" rule of extension or inclusion of benefits, rather than a nullification of those benefits altogether. This is

particularly so in view of the history of the insertion of the "male and female" language, discussed above. There is no evidence that the Legislature sought overtly to discriminate against same-sex couples. As Califano emphasized, the Court must give strong consideration to the impact which a remedy of nullification might have, thereby noting the many children who would be severely affected by such a remedy. Moreover, as the Court in Califano and Sessions emphasized, legislative intent should be the guide as to the proper remedy. From the very start in 1984, the General Assembly has stressed the importance of protecting cohabitors from domestic violence in the same way that spouses and former spouses are protected. Through numerous amendments over the years, the cohabitor language has remained intact. We believe the General Assembly would likely choose to continue these cohabitation provisions, with their benefits extended to same-sex couples, as Chief Justice Beatty proposes, as opposed to their removal altogether. Indeed, in the original language in 1984, the Legislature used the words "persons" and such language was retained in the Senate-passed version in 1993, leading up to the 1994 legislation. The 1994 "male and female" language was a compromise to avoid persons, such as a college roommate, being considered a "household member." To sever this cohabitation provision entirely to address the constitutional violation in the manner the plurality opinion does, ignores the intent of the General Assembly and effectuates a partial repeal of the Acts. The severe impact upon victims of domestic violence is obvious. As in Califano, here, the existence of a strong severability clause "counsels against nullification," indicating the Legislature's intent to "minimize the burdens by a declaration of unconstitutionality upon innocent recipients" of a benefit or protection long bestowed by the General Assembly. Califano, 443 U.S. at 90.

In addition, we also agree with the analysis contained in the opinion of Chief Justice Beatty. The Chief Justice summarized his positon as follows:

> [c]onsequently, in order to address the important issue presented in this case and remain within the confines of the Court's jurisdiction, I would declare Sections 16-25-10(3) and 20-4-(b) unconstitutional as applied to Doe. Accordingly, I would hold that the family court may not utilize these statutory provisions to prevent Doe or those in similar same-sex relationships from seeking an Order of Protection.

(Beatty, C.J. concurring in part and dissenting in part). Chief Justice Beatty was careful to note that the Acts' cohabitation provisions are not facially invalid, because under the rule of United States v. Salerno, 481 U.S. 739, 745 (1987), the Acts are not "unconstitutional in all [their] . . . applications." In short, Chief Justice Beatty viewed the statute as underinclusive and deemed it unconstitutional as applied. See Cleburne, supra. The Chief Justice cited Gartner v. Iowa Dept. of Public Health, 830 N.W.2d 335 (Iowa 2013) in support of his position. There, the Iowa Supreme Court invalidated the presumption of parentage statute which referenced a mother, father and husband. The Court found that the statute violated equal protection as applied to a married same-sex couple to whom a child was born to one spouse during marriage. The remedy imposed by the Iowa Supreme Court was to refrain from striking the provision, but instead to expand the statute's reach:

> [w]e find the presumption of parentage statute violates equal protection under the Iowa Constitution as applied to married lesbian couples. However, we are not required to strike down the statute because our obligation is to preserve as much of s statute as possible, within constitutional restraints. See Racing Assn. of cent. Iowa v. Fitzgerald, 648 N.W.2d 555, 563 (Iowa 2002), rev'd. on other grounds, 539 U.S. 103, 123 S.Ct. 2156, 156 L.Ed.2d 97 (2003). Accordingly, instead of striking Section 144.13(2) form the Code, we will preserve it as to married, opposite-sex couples and require the Department to apply the statute to married, lesbian couples.

830 N.W.2d at 354. Thus, the Chief Justice effectively applied the "customary" rule of inclusion, rather than nullification.

Chief Justice Beatty's analysis is, as noted, consistent with City of Cleburne, supra. There, the Supreme Court applied a rational basis review to a city ordinance which required a group home for the mentally retarded to obtain a special-use permit. No such permit was required for other group homes. Rather than addressing the Equal Protection issue as one of facial invalidity, the ordinance was deemed "invalid as applied." 473 U.S. at 435. The dissent protested that it was unprecedented to "treat [ ] an equal protection challenge to a statute on an as applied basis." Id. at 476. According to the dissent, a division into the ordinance's "permissible and impermissible applications" might be possible, but not in this instance. Id. at 475.

Yet, after Cleburne, the type of "as applied" analysis of a statute which violates Equal Protection, and which Chief Justice Beatty employed, is not at all unusual. One court has summarized the "as applied" jurisprudence following Cleburne as follows:

> [s]ince City of Cleburne, the Supreme Court and lower federal courts have continued to recognize a distinction between facial and as-applied challenges in the equal protection context. For example, in Romer v. Evans, in which the Court used rational-basis scrutiny to strike down a Colorado constitutional amendment that prohibited government action designed to protect homosexuals from discrimination, the dissent objected that even if some provisions of the amendment were invalid, the respondents' "facial" challenge to the amendment fell short because the respondents failed to "establish that no set of circumstances exists under which the Act would be valid." 517 U.S. 620, 643, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) (Scalia, J., dissenting) (emphasis added). Accord, e.g., Quinn v. Millsap, 491 U.S. 95, 103 n. 8, 109 S.Ct. 2324, 105 L.Ed.2d 74 (1989) (recognizing the possibility of both facial and as-applied equal protection challenges to a state law that provides that only real property owners can be appointed to a government board); Williams v. Pryor, 240 F.3d 944, 951—52 (11th Cir.2001) (distinguishing the "as-applied" equal protection challenge of City of Cleburne from the facial, fundamental rights challenge brought by the Williams plaintiffs); Greenspring Racquet Club, Inc. v. Baltimore County, Md., 232 F.3d 887, 2000 WL 1624496 *6 (4th Cir.2000) (unpublished disposition) (evaluating both a facial and an as-applied, rational-basis, equal protection challenge to a state zoning ordinance); Batra v. Board of Regents of Univ. of Neb. 79 F.3d 717, 721 (8th Cir.1996) ("Most equal protection cases involve facial or as-applied challenges to legislative action. Absent a 'suspect classification' such as

> race, courts review legislative actions under the highly deferential 'rational basis' standard." (emphasis added)); Steffan v. Perry, 41 F.3d 677, 693 (D.C.Cir.1994) (evaluating a rational-basis, equal protection challenge to a DOD directive that prohibits homosexuals from serving in the Navy, and observing that "where ... a statute or regulation has some concededly constitutional applications, a successful challenger must demonstrate that the statute is unconstitutional as 'applied to the particular facts of [his] case.'") (emphasis added) (citing United States v. Salerno, 481 U.S. 739,745,107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)). These cases clearly establish that federal courts are generally willing to entertain as applied equal protection challenges.

Britell v. U.S., 150 F.Supp. 211, 221-222 (D. Mass. 2001). Thus, based upon the foregoing analysis, the analysis of Chief Justice Beatty is well-reasoned and well-supported. Certainly, this Court could easily adopt his reasoning in shaping the remedy in this case without discarding the long-standing protections afforded by the Acts for a cohabitor who has suffered domestic violence at the hands of his or her cohabiting partner.

Chief Justice Beatty's approach is also supported by this Court's decision in Joint Legislative Comm. for Judicial Screening v. Huff, 320 S.C. 241, 464 S.E.2d 324 (1995). In that case, the Court concluded that § 2-1-100, which prohibited appointment or election of senators or representatives during their term to any office created during that term was unconstitutional as applied to constitutional offices. According to the Court "This section [2-1-100] does not apply to members seeking election to the Court of Appeals and circuit court since it would provide an additional qualification. However, it does apply to members seeking election to family court." 320 S.C. at 245, 464 S.E.2d at 326. While the statute in Joint Legislative Committee involved a prohibition, rather than a protection, the result is the same. In McConnell, the Court, in holding § 2-1-100 to be unconstitutional as applied to constitutional offices, did not strike the provision, nor alter it in any way, but simply concluded that those who were unconstitutionally included, must be excluded. By the same token, the Chief Justice here concluded that those who were

unconstitutionally excluded, must be included. Such a remedy best protects legislative intent and does not strip all cohabitants of the protections from domestic violence which they have long been afforded.

Guideposts for Remedies

A seminal case which provides key guideposts to a court in fashioning a judicial remedy for an unconstitutional statute is Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320 (2006). The central issue in that case was the proper remedy for a statute which "lacks an exception of the preservation of pregnant minor's health." Id. at 326. The District Court held the Act unconstitutional in toto and enjoined it. The Court of Appeals affirmed. The Supreme Court, however, vacated and remanded. In its unanimous decision, the Court set forth several fundamental principles regarding the determination of a judicial remedy, which are applicable here:

> [g]enerally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other constitutional applications in force, see United States v. Raines, 362 U.S. 17, 20-22, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960), or to sever its problematic portions while leaving the remainder intact. United States v. Booker, 543 U.S. 220, 227-229, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).
>
> Three unrelated principles inform our approach to remedies. First, we try not to nullify more of a legislature's work than is necessary for we know that "[a] ruling of unconstitutionality frustrates the elected representatives of the people." Regan v. Time, Inc., 468 U.S. 641, 652, 104 S.Ct. 3262, 82 L.Ed.2d 847 (plurality opinion. It is axiomatic that a "statute may be invalid as applied to one state of fact and yet valid as applied to another.") Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 289, 42 S.Ct. 106, 66 L.Ed. 239 (1921). Accordingly, the "normal rule" is that "partial, rather than facial, invalidation is the required course," such that a "statute may be declared invalid to the extent that it reaches too far, but otherwise left intact." [citing cases].
>
> Second, mindful that our constitutional mandate and institutional competence is limited, we restrain ourselves from "rewrit[ing] state law to

> conform it to constitutional requirements" even as we strive to salvage it. . . . [citing authorities].
>
> Third, the touchstone for any decision about remedy is legislative intent, for a court cannot "use its remedial powers to circumvent the intent of the legislature." Califano v. Westcott, 443 U.S. 76, 94, 99 S.Ct. 2655, 61 L.Ed.2d 382 (1979) (Powell, J. concurring in part and dissenting in part) [citing other cases]. . . . After finding an application or portion of a statute unconstitutional, we must next ask: Would the legislature have preferred what is left of its statute to no statute at all? . . . .

546 U.S. at 328-330.

Likewise, and consistent with Ayotte, this Court has recognized the constitutional restraints upon it in fashioning a remedy for an unconstitutional statute. In Stone v. Traynham, 278 S.C. 407, 409, 297 S.E.2d 420, 422 (1982), for example, the Court stated:

> [t]he separation and independence of each branch of government require that we go no further than absolutely necessary in declaring unconstitutional an action of the legislature. Although we are hesitant to declare any portion of a statute unconstitutional, we may invalidate a separable part without impairing the remainder. [citing numerous cases].

(emphasis added). Thus, any remedy must give due regard to the separation of powers and the recognition that legislative intent is paramount. We urge this Court in this case, to fashion a remedy which is more limited so at to give deference to the legislative purpose of protecting cohabitants. There should be considerable weight given to the history of the 1994 legislation, in which the words "male and female" were inserted, as well as the fact that such insertion was designed to avoid stretching the definition of "household" beyond its workability. While the Court has found that these words now are discriminatory, their intent in 1994 had another purpose. Thus, we ask the Court not to discard the cohabitation protections altogether.

Preferable Remedies to Severing Cohabitation Provisions

In this case, our Return to the Petition for Original Jurisdiction suggested to the Court that the General Assembly, by using the phrase "male or female who are cohabiting or formerly

have cohabited," did not intend overtly to discriminate against same-sex couples, but to address the overriding problem of violence against women at the hands of their cohabiting male partners. Thus, we suggested that the definition "be interpreted to include same-sex couples. . . ." Return at 10. In our Brief, we offered a number of possible interpretations to rectify the constitutional problem, including severing only the words "male and female." State's Brief at 23-29. As noted above, we are of the view that the remedies of inclusion (as opposed to nullification) or unconstitutionality as applied, proposed by Chief Justice Beatty, best reconcile an unconstitutional provision with that of preserving the legislative intent to protect cohabitants from domestic violence.

However, should the Court not choose these remedies, we believe it imperative to consider those proposed alternatives set forth earlier in our Brief before severing the "cohabitation" language. In particular, severing only the words "male and female" does not disrupt the Legislature's structure at all, because the immediately preceding words are "have a child in common; or." With such a more limited severance, the Acts would read as follows:

> . . . (c) persons who have a child in common; or
> (d) who are cohabiting or formerly have cohabited.

Thus, as severed, the word "persons" easily serves as the noun to precede both (c) and (d). In other words, "persons" precedes "who are cohabiting or formerly have cohabited" as well as "persons who have a child in common." Such limited severance removes the discrimination, as well as it preserves the cohabitation protections. The more limited severance, striking only the words "male and female" would return to virtually the same language the General Assembly used in 1984 in the original Domestic Abuse Act. See Act No. 484 of 1984. Moreover, this narrower severance is consistent with Stone v. Traynham's admonition that the judiciary "go no further than absolutely necessary in declaring unconstitutional an action of the legislature."

Stone, supra. If the Court were to sever these words only, leaving the word "persons" to precede "who are cohabiting ...," the legislature could address the "roommate" problem it had encountered earlier when it returns in January.

CONCLUSION

Any determination of the remedy for a constitutional violation is, of course, a judicial function. Stone v. Traynham, supra; Ayotte, supra. Therefore, we do not attempt to tell the Court what the remedy in this case should be. We ask only that the remedy not be to strike the cohabitation provisions of the Acts in their entirety, as the majority did, or to effectuate a remedy which removes protections from cohabitors or other victims of domestic violence altogether. A remedy which strikes the "cohabiting" language deals a mortal blow to protection of cohabitants from domestic violence. It gives comfort to one cohabitant to assault or beat the other. It leaves open the possibility of a constitutional attack upon the Acts, as stricken. And, it is completely unnecessary.

We certainly agree with Chief Justice Beatty that the definition of "household member," contained in the Acts, "does not overtly discriminate based on sexual orientation." Justice Few is correct also that there is no evidence that the Legislature "'excluded same-sex couples from the protections of the Acts.'" As shown above, in 1994, when the Legislature first inserted the words "male and female" in the definition of "household member," it was addressing the problem of persons living together, such as college roommates, two brothers or sisters. The evidence points to that as the reason for the change, not a desire to discriminate against same-sex couples. Indeed, the word "persons" was retained in the Senate passed version in 1993 and had been used for ten years previously. Accordingly, any unconstitutionality here is in marked

contrast to that in Obergefell v. Hodges, 135 S.Ct. 2584 (2015). In Obergefell, the right to marry was deemed a fundamental right and the provisions there at issue mandated that marriage between one man and one woman was the only form recognized under state law; all other forms were not recognized by the State. Here, such discriminatory language was never used.

In this instance, the definition of "household member" does not on its face ban or preclude same-sex cohabiting couples from the definition. Instead, the Acts' definition simply provides protection for "males and females who are cohabiting or formerly have cohabited," but does not expressly include same-sex cohabitors. Thus, the Acts' definitions of "household member" relating to cohabitants should be deemed as underinclusive, not facially invalid or void in toto. In this instance, the majority's remedy sweeps too broadly to cure the constitutional problem.

Being underinclusive, the text of the definition leaves considerable flexibility for remedies far short of severance of the entirety of the cohabitation protections, which the majority chose. The Court is thus free simply to include same-sex couples who cohabit, based upon the "normal" rule of choosing extension of benefits to those discriminated against over nullification of benefits to everyone as in Califano v. Westcott. Or, as Chief Justice Beatty preferred, it could deem the definition unconstitutional as applied to same-sex cohabitors and thereby include them within the definition, as the Constitution commands – the approach taken in Cleburne. Even striking the words "male and female" only, and leaving the cohabitation provision intact, is a far better choice than complete nullification of all cohabitation protections, so as to preserve the General Assembly's longstanding protections from domestic violence for cohabitants. This more limited severance would require no "rewriting" of the Acts. As Acting Justice Pleicones points

out, the original Domestic Abuse Act in 1984 was gender neutral; a more limited severance could virtually replicate that same language.

We fully respect that each member of the Court has sought to resolve a most difficult case with the utmost sincerity. Unfortunately, the majority's decision results in a cure worse than the disease. Ironically, in seeking to remedy the failure to include all cohabitant couples under the Acts, the majority's decision has excluded all cohabitant couples from the Acts. Now, the only beneficiaries are those who commit domestic violence against their cohabitant partner. It is safe to say that the General Assembly did not ever contemplate amnesty for these perpetrators of domestic violence. While this Court undoubtedly did not intend such a result, its decision will surely have that adverse effect.

Fortunately, as we point out herein, there are numerous remedies available to the Court short of complete abolition of the protections which have long been afforded to cohabiting couples. A number of pathways exist to protect all cohabiting couples without removing the protections for all. We have enumerated those alternative remedies herein. We would therefore respectfully request the Court adopt one of the remedies suggested.

We recognize this Court has, for the time being, stayed its decision in this matter. To remove any doubts and extend the protections against domestic violence to all cohabiting couples, we respectfully ask the Court to rule as quickly as possible on this Petition.

Whatever remedy the Court chooses, however, we ask that it not strike these cohabitation protections. A remedy which bludgeons the cohabitation provisions is unwarranted. While the Acts may have discriminated, domestic violence does not.

Respectfully submitted,

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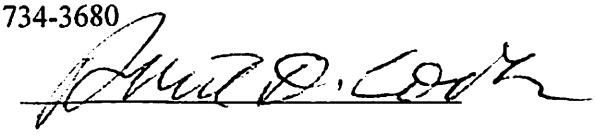
BY: 

August 8, 2017

ATTORNEYS FOR THE STATE

ATTACHMENT A

Change in domestic abuse law puts women in danger, advocates say

By CINDI ROSS SCOPPE
Staff Writer

Many unmarried couples will lose the protection they have against abusive partners unless senators reverse a House proposal they're scheduled to take up today.

When the House passed the bill last week to increase penalties for domestic abuse, it limited unmarried couples who are covered to those who have been living together at least a year.

Women's advocates say the change moves the state backward. They'll fight it today when the bill returns to the Senate for final legislative approval.

"In my opinion, that is weakening the law and placing more battered women in jeopardy, which is not contemporary law," said Nancy Barton, executive director of Sistercare of the Midlands, a shelter for battered women. "It appears to me that somebody's making a moral judgment about who should be protected under criminal domestic violence."

Rep. Rick Quinn said legislators should think not only of the victims but of neighbors, who are just as threatened by fighting unmarried couples as fighting married couples. Quinn's district includes the homes of two women whose husbands are charged in the shooting deaths of their wives this year.

"It's kind of ridiculous to ask someone to get beaten for a year before they can use the law to protect themselves," said Quinn, R-Richland.

Sen. Wes Hayes, D-York and author of the bill, said he would try today to get the Senate to reject the House's changes. He and Barton said they would rather see the bill die than become law in its present form.

The limitation on who is covered isn't the only problem Hayes has with the House version of his bill. When the Senate passed the legislation, it created a felony crime of criminal domestic violence of a high and aggravated nature, punishable by up to 10 years in prison. The House turned the crime into a misdemeanor and lowered the punishment to three years in prison.

Hayes introduced the bill after a Rock Hill woman was nearly killed by her husband, who was out on bond for a sixth wife-beating charge.

House Judiciary Chairman Jim Hodges, D-Lancaster, said his committee decided to limit the scope of the protection after Family Court judges complained that they're only supposed to be deciding disputes among family members.

The new crime would be tried in Family Court; criminal domestic violence charges, which carry a maximum sentence of 30 days in jail, go to magistrate's court.

"If you do have two people who have been living together or rooming together, a man and a woman, for a week, is that a case that should be heard in the Family Court?" Hodges asked. "I tend to think that should more appropriately be heard in the magistrate's court. We run into a problem when we try to put all these cases into the Family Court."

But there also seems to be some truth to Barton's suggestion that some lawmakers are thinking as much about morality as protection.

Some conservatives became upset last week when they discovered that state law includes unmarried couples in the definition of a family.

But one of them, Rep. Bobby Harrell, R-Charleston, said he changed his mind and decided to go along with Hodges's compromise language after the bill's sponsors said they were merely trying to protect victims.

"Those people ought to be protected," Harrell said. "My problem is how we're as a General Assembly going to define what a family is.