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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

May 20, 1998

The Honorable Mike Fair
Senator, District No. 6
P. O. Box 14632
Greenville, South Carolina 29610

Re: Informal Opinion

Dear Senator Fair::

You have asked whether the proposed amendment to H.3569 is constitutional.

Law / Analysis

The amendment to H.3569 concerns public nudity and provides as follows:

> (A) For the purposes of this Section, 'Nudity' means the showing of the human male or female genitals, anus, pubic area, or buttocks, with less that a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, including the areola, or the showing of covered male genitals in a discernibly, turgid state. For purposes of this section, that portion of the buttocks that must be covered is one-third of the gluteus maximus centered over the cleavage for the length of the cleavage.
>
> (B) Except for constitutionally protected expression, and as provided in Subsection (F), it is unlawful for a person knowingly or intentionally to appear in a state of nudity in a public place, on property of others, or to the view of a person on a street or highway.

Request Letter

(C) Except for constitutionally protected expression, and as provided in Subsection (F), it is unlawful for a person or business entity knowingly or intentionally to encourage, allow, permit or suffer another person to appear or be nude in a public place, on property of others, on property that they lease, own, control, or have the legal capacity to control, or to the view of a person on a street or highway. For purposes of this Section, a person who owns or controls real estate who leaves real estate to another person, when he knew or should have known the real estate would be used by the lessee or another person in violation of this Section, is guilty of a violation of this Section whenever the leased real estate is knowingly and intentionally used by the lessee, or any other person with the knowledge of the lessor or lessee in violation of this Section.

(D) A person who violates the provisions of this Section is guilty of a misdemeanor and, upon conviction, must be fined not less than five hundred dollars nor more than twenty-five hundred dollars for a first offense. For a second and subsequent offense, he must be imprisoned not more than six months.

(E) A business that violates the provisions of this Section by permitting a person knowingly or intentionally to appear in a state of nudity within its premises is guilty of a misdemeanor. Upon conviction, any license issued pursuant to the Alcoholic Beverage Control Act is suspended for one year and the business must be fined not less than one thousand dollars nor more than twenty-five hundred dollars. For a second and subsequent offense, a license issued pursuant to the Alcohol Beverage Control Act is revoked and the business must be fined not less than twenty-five hundred dollars nor more than five thousand dollars.

(F) It is not unlawful for:

(1) A person to appear or be nude in a place customarily set aside for nudity provided the person appears or is nude for the purpose of

> performing a legal function customarily intended to be performed within that place, and that person does not appear and is not nude within that place for the purpose of obtaining tips, wages, money, property financial gain, or anything of value for the person or any other person or entity in consideration or exchange for appearing or being nude, or to facilitate or enhance the sale of food, beverages, whether alcoholic or not, commodities or any other items of property of whatsoever kind or nature; or
>
> (2) The care, hygiene, and feeding of babies and infants when necessary under the circumstances and no alternative to brief nudity is reasonably available.

We have often commented as to the guidelines within which this Office may review the constitutionality of an Act of the General Assembly. Time and again, we have stressed that in considering the constitutionality of an Act, it must be presumed that the Act is constitutional in all respects. Moreover, no statute will be considered void unless its constitutionality is clear beyond all reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 190 S.E. 539 (1938); Townsend v. Richland County, 190 S.C. 270, 2 S.E.2d 777 (1939). All doubts of constitutionality are generally resolved in favor of constitutionality. While this Office may comment upon potential constitutional problems, it is solely within the province of the courts of this State to declare an Act unconstitutional.

The landmark decision in this area of the law is Barnes v. Glen Threatre, Inc., 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991). Barnes required the courts to analyze the State's efforts to proscribe conduct such as public nudity pursuant to a four-part test. There, the United States Supreme Court upheld an Indiana public indecency statute, applied in the context of nude dancing. The Indiana statute at issue in Barnes provided as follows:

> (A) A person who knowingly or intentionally, in a public place:
>
> (1) engages in sexual intercourse;
> (2) engages in deviate sexual conduct;
> (3) appears in a state of nudity;

> (4) fondles the genitals of himself or another person; commits public indecency.

"Nudity" was defined by the Indiana statute as meaning

> the showing of the human male or female genitals, pubic area, or buttocks with less that a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state.

The Court's plurality noted that "[s]everal of our cases contain language suggesting that nude dancing of the kind involved here is expressive conduct protected by the First Amendment." However, noted the Court,

> Indiana, of course, has not banned nude dancing as such, but has proscribed public nudity across the board.

111 S.Ct. at 2460. The Court further stated that the "time, place or manner" test was "developed for evaluating restrictions on expression taking place on public property which had been dedicated as a public forum ... ." Thus, since the public indecency statute was aimed at what are essentially places of public accommodation," it was deemed appropriate to apply the test previously enunciated by the Court in United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). O'Brien involved the burning of a draft card on the steps of the South Boston courthouse in the presence of a crowd. There, the Court had stated:

> This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms ... (w)e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

111 S.Ct. at 2461. Applying the O'Brien test, the plurality in Barnes determined that the public indecency law was "justified despite its incidental limitations on some expressive activity." With respect to application of the statute to nude dancing, the plurality opined:

> ... we do not think that when Indiana applies its statute to the nude dancing in these nightclubs it is proscribing nudity because of the erotic message conveyed by the dancers ... while the dancing to which it applied has a communicative element, it was not the dancing that was prohibited, but simply its being done in the nude.

Requiring the dancers to wear pasties and a G-string, in the view of the Barnes Court, thus did not violate the First Amendment.

Justice Souter separately concurred in an opinion, thereby providing the Barnes Court's majority. The Souter concurrence is best summarized by his words as follows:

> [a]lthough such performance dancing is inherently expressive, nudity per se is not. It is a condition, not an activity, and the voluntary assumption of that condition, without more, apparently expresses nothing beyond the view that the condition is somehow appropriate to the circumstances. But every voluntary act implies some such idea, and the implication is thus so common and minimal that calling all voluntary activity expressive would reduce the concept of expression to the point of meaningless. A search for some expression beyond the minimal in the minimal in the choice to go nude will often yield nothing: a person may choose nudity, for example, for maximum sunbathing.

111 S.Ct. at 2468.

In an Opinion of this Office, dated February 2, 1994, we commented at length upon the constitutionality of legislation similar to H.3569. There, such proposed legislation made it unlawful to knowingly or intentionally appear in a state of nudity in a public place, on property of others, or to the view of a person on a street or highway. Such legislation reviewed in the 1994 opinion also provided that

> [a] business that violated the provisions of this section by permitting a person to knowingly or intentionally appear in a

> state of nudity is guilty of a misdemeanor. Upon conviction, any license issued by the Alcoholic Beverage Control Commission is suspended for one year ... .

In addition, the legislation provided the criminal penalties and fines for the offense and set forth a definition of "nudity" similar to that proposed here.

Our opinion referenced and relied upon Barnes in commenting upon the constitutionality of the proposed legislation. We noted that the Indiana statute adjudicated in Barnes was quite similar to the statute pending before the General Assembly at the time (and here as well). In the 1994 Opinion, we stated as follows:

> [a]s referenced, the Indiana statute and S.286 are identical in that both make it unlawful for an individual to "knowingly and intentionally" appear in a public place in a state of nudity. The Indiana statute however did not contain a provision prohibiting a business from permitting an individual to appear in a state of nudity.
>
> You also forwarded a copy of an opinion from Professor Eldon Wedlock, Jr., which construed the constitutionality of S.286 in light of Barnes. In his opinion he stated
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> > The analysis turns upon Justice Souter's convoluted and cryptic concurring opinion, since his was the deciding vote and his opinion was much narrower than those of the Chief Justice or concurring Justice Scalia. If the proposed amendment would survive Justice Souter's scrutiny it would be constitutional; if not, it would not be.
> >
> > ....
> >
> > Justice Souter agreed with the plurality's observation that the statute was not directed toward nude dancing per se, but was a general indecent exposure statute. But unlike the plurality he did not conclude that the statute

> could be enforced against all nude dancing. For him, the question was only whether the statute could be constitutionally applied to nude dancers of the "adult entertainment" type. He concluded that in some circumstances it could, and hence its enforcement should not be completely enjoined.
>
> He wrote that the statute could be constitutionally enforced against nude dancing of the "adult" type if the enforcement were related to suppressing the "secondary effects" which might flow from such activities -- prostitution, sexual assault, and associated crimes -- rather than suppressing nude dancing per se. His rationale, he opined, would not support the enforcement of the statute against productions of Hair or Equus, or presumably other nude appearances which do not raise the threat of the "secondary effects." 113 S. Ct. at 2470 n.2 (Souter, J. concurring).
>
> Thus it would appear that any attempt to apply the statute would be unconstitutional if the likelihood of its spawning "secondary effects" are minimal. This suggests that the constitutionality of the statute's application to nude performances must be reviewed on a case-by-case basis, with reference to the potential for the activity to spawn "secondary effects."

As to the prohibition against businesses permitting an individual to appear nude, Professor Wedlock indicates that such presents problems not included in Barnes. He states:

> When the South Carolina proposal adds a penalty for business which permit nude dancing it leaves itself more vulnerable to an overbreadth attack not made or available in Barnes. This section changes the proposal from a straightfor-

> ward indecent exposure statute, not aimed at expressive activity, into one which clearly is aimed at expressive activity. As such, the proposal sweeps within its proscriptions precisely those activities which Justice Souter would find protected from the reach of the Indiana statute because they would not spawn the "secondary effects" which the state has an interest in suppressing.
>
> In addition, the proposal would have a greater chilling effect on protected nude expression than the Indiana statute does, even when interpreted to apply to private places of public accommodation. Under Justice Souter's analysis, businesses would only be chilled from offering nude, expressive entertainment if it was of the variety which would justify the application of the statute to control the "secondary effects." The proposal recognizes no such limit, and hence businesses and entertainers would be more chilled from offering "non-adult," nude, expressive entertainment, making the proposal very likely facially unconstitutional.

Based upon the foregoing analysis and authorities, the 1994 Opinion concluded:

> [r]eferencing the above, it appears on its face that S.286 is substantially similar to Barnes so as to be facially constitutional. However, to avoid First Amendment challenges we would caution that its enforcement would be subject to careful scrutiny. Moreover, consideration must be given to the question of whether enforcement is reasonable, such as in situations of public breast-feeding. One criteria would be the evaluation of the advancement of a substantial governmental interest in the enforcement of the law. Moreover, as set forth in Professor Wedlock's analysis, as to the specific restriction for businesses, despite the presumption of constitutionality, we would advise that the General Assembly proceed cautiously in enactment of this provision as

> such could be subject to challenge. The safest approach would be to enact a statute identical to Indiana's.

Several cases decided subsequent to Barnes further support the constitutionality of the proposed legislation. I would call your attention particularly to Cafe 207, Inc. v. St. Johns County, 856 F.Supp. 641, affd. 66 F.3d 272 (11th Cir. 1995), cert. den., ___ U.S. ___, 116 S.Ct. 1544, 134 L.Ed.2d 647 (1996). In that case, the District Court upheld (and the 11th Circuit Court of Appeals affirmed the District Court) an anti-nudity ordinance which is very similar to the proposed legislation about which you inquire. The St. Johns Ordinance made it unlawful "for any person to knowingly, intentionally, or recklessly appear or cause another person to appear nude in a public place or in any other place which is readily visible to the public ..." Such Ordinance defined a "public place" to include business or commercial establishments such as restaurants. St. John's County "[i]n net effect, [defined] a female [as] ... nude whenever more than three-fourths of the breasts are exposed; and detailed definitions of those body parts are provided to facilitate making the fractional measurements necessary in applying the ordinance to any given state of dress (or undress, as the case may be). 856 F.Supp. at 642.

The District Court in Cafe 207 analyzed the Ordinance under the four-part test of Barnes, and concluded that the first three steps of analysis were easily met. Said the Court,

> [t]he law, as an exercise of the county's police power, is clearly within its constitutional authority. It also serves a substantial and important governmental interest in protecting order and morality and in combating the secondary effects of nudity in adult entertainment establishments of the sort typified by the Plaintiff's Cafe Erotica. And, neither of those governmental interests is related to the suppression of free expression as such.

856 F.Supp. at 644. Further, the Cafe 207 Court concluded that the Ordinance was "narrowly tailored," finding that

> [o]nce it is established that a burden may be imposed on the expressive content of erotic dancing by requiring some clothing -- pasties and a G-string -- then it does not seem to me from a constitutional standpoint that a modest increase in the amount of body covering required by the law really adds any significant, incremental burden on the expressive

> component of the dance. As Justice Souter observed, "... the limitation is minor when measured against the dancer's remaining capacity and opportunity to express the erotic message." Barnes, 501 U.S. at 586, 111 S.Ct. at 2471. So, in this case, that erotic message may still be expressed with exposure of three-fourths of the breasts and two-thirds of the buttocks in the same manner it would be expressed while wearing pasties and a G-string. Or, even if there is some added incidental repression of speech, deference must be granted to the law making authority under Board of Trustees v. Fox [492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989)] ... in deciding the degree of regulation necessary to further the government's legitimate interests.
>
> To be sure, so long as an anti-nudity statute is subject to any First Amendment scrutiny, i.e. an O'Brien evaluation, there must be a line in every case beyond which the law makers cannot go in requiring clothing or prohibiting exposure in some contexts. See DeWeese v. Town of Palm Beach, 812 F.2d 1365 (11th Cir. 1987) (striking down as an irrational violation of the plaintiff's liberty interests under the Fourteenth Amendment an ordinance requiring male joggers to wear shirts.) Definition of that constitutional line, however, must await a case-by-case development of the law and further guidance from the Supreme Court. Suffice it to say that Ordinance 92-12 of St. John's County does not cross that constitutional boundary.

856 F.Supp. at 646. The Court also noted that the Ordinance exempted from its scope any "expressive conduct incidental to and a necessary part of the freedom of expression that is protected by United States or Florida constitutional provisions ... ." Based upon this Exemption for constitutionally protected expression, and upon "the ordinance as a whole," the Court held that the Ordinance was not unconstitutionally vague, did not violate the Equal Protection Clause and was not overly broad.

Likewise, in SBC Enterprises, Inc. v. City of South Burlington, 892 F.Supp. 578 (D.Vt. 1995), the District Court upheld as constitutional an ordinance similar to the Indiana statute in Barnes but which also provided that "[n]o person who owns, leases or controls property shall knowingly allow any person to engage in the conduct described in paragraph a. above at any time such property is open tot he public." In response to the

argument that the Ordinance acted as an unlawful prior restraint upon First Amendment rights, the Court found that it was required, in relying upon Barnes, to "apply the analysis of Justice Souter as the most narrow grounds for analyzing the Ordinance at issue as other lower courts have done." 892 F.Supp. at 582. Pursuant to Justice Souter's analysis, the Court concluded that "the Ordinance is valid." Id. The District Judge rejected the argument that the municipality lacked the power to enact the Ordinance under state law as outside the Barnes test. Similarly dismissed was any improper motive for adopting the Ordinance. With respect to any argument that the Ordinance was vague or unconstitutionally overbroad, the Court was equally unimpressed. And as to the assertion that sunbathers could be subject to the Ordinance, the Court found that "[a]s the Barnes Court intimated, the nudity itself does not constitute protected speech, and sunbathers have no First Amendment right to wear the attire of their choice." 892 F.Supp. at 583. Moreover, any contention that "live performances of serious works containing nudity" were covered although a "closer question," also failed. Responded the Court,

> ... simply conceiving of a situation where the Ordinance would be unconstitutional as applied is not sufficient to succeed on an overbreadth claim. City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 800, 104 S.Ct. 2118, 2126, 80 L.Ed.2d 772 (1984). "[P]articularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Brodrick [v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973) supra at 615, 93 S.Ct. at 2917. "Application of the overbreadth doctrine in this manner is, manifestly, strong medicine. It has been employed by the Court sparingly and only at a last resort. Id. at 613, 93 S.Ct. at 2916. See Cafe 207, Inc., 856 F.Supp. at 647-49 (holding that a similar county public nudity ordinance was not overbroad). But see Triplett Grille, Inc., 40 F.3d at 135-36 (striking down a public nudity ordinance as overbroad).
>
> The Ordinance under consideration here is not substantially overbroad. The only examples of unconstitutional application cited by Plaintiffs are the performance of serious artistic works involving nudity, and they name only a few. The Plaintiffs have the burden of showing that the Ordinance is substantially overbroad, and Plaintiffs have failed to meet that burden here. In sum, the

> Ordinance does not encompass a sufficient amount of protected behavior to make it substantially overbroad.

Id.

Based upon the foregoing authorities, it is my opinion that the proposed statute is facially constitutional. The statute purports to proscribe public nudity in much the same way and through much the same language as the Indiana statute in Barnes and the Ordinances in Cafe 207 and SBC Enterprises did. Importantly, the proposed statute also exempts, as did the Ordinance in Cafe 207, constitutionally protected expression. Thus, on its face, the statute does not permit an application thereof which would forbid expression protected by the First Amendment. Moreover, the statute expressly excepts breast-feeding, where necessary, as well as nudity "in a place customarily set aside for nudity provided the person appears or is nude for the purpose of performing a legal function customarily intended to be performed within that place" and such nudity is not for tips, wages or anything of value.

Based upon the exception "for constitutionally protected expression," a court would likely limit the reach of the statute to a "public place," although the legislation does not specifically do so when it speaks in the context of the "property of others." It is not known precisely what is meant by the "property of others," but again, the proposed amendment excepts "constitutionally protected expression." The various cases referenced herein all deal with nudity in a "public place" and, thus the General Assembly may wish to expressly limit the statute's reach in this regard.

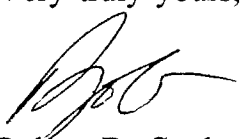
Thus, while it could be speculated as to conceivable situations of overbreadth in the proposed legislation, such are not substantial. SBC Enterprises, supra; State of South Carolina v Bouye, 325 S.C. 260, 484 S.E.2d 461 (1997). In the Bouye case, the South Carolina Supreme Court upheld as facially valid a statute (§ 16-15-365) even though it was not expressly limited to indecent exposure in public places. The Court concluded that the Legislature intended such a limitation because of the statutory language prohibiting anyone who "aids or abets any such act, or who procures another to perform such act, or any person, who as owner, manager, lessee, director, promotor, or agent, or in any other capacity" knowingly allows his or her premises to be used for the purposes of such an act (lewd and lascivious behavior). The Bouye Court held that "there is no realistic danger that this statute will be applied to people in the privacy of their homes. 325 S.C. at 268. Similar language is used in H.3569. Clearly, cases such as Bouye and SBC mandate that while a statute is theoretically capable of a construction of overbreadth, it will not be deemed overbroad unless such a possibility is real and substantial On balance, the statute

is, in my judgment, generally consistent with the cases referenced herein. Accordingly, it is my opinion that the statute would likely be upheld as facially constitutional.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,



Robert D. Cook
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