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The State of South Carolina

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The Honorable Joe Wilson
Senator, District No. 23
606 Gressette Building
Columbia, South Carolina 29202

Dear Senator Wilson:

In a letter to this Office you referenced proposed legislation S.286, which prohibits nudity. Such legislation states:

> It is unlawful for a person 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.
>
> ....
>
> A business that violates 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 ....

The legislation provides the criminal penalties and fines for the offense and sets forth a definition of "nudity." You stated that the legislation is based upon language upheld in the decision of the United States Supreme Court in Barnes v. Glen Theatres, Inc., 111 S.Ct. 2456 (1991). You raised the following questions:

(1) Is the bill directed at expression in particular or is it merely an incidental restriction on First Amendment rights?

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(2) Is the bill substantially similar to the Indiana statute in Barnes so as to pass constitutional scrutiny?

(3) Is the penalty imposed against businesses that violate the provision unconstitutional?

In considering the constitutionality of an act of the General Assembly, it is presumed that the act is constitutional in all respects. Moreover, such an act will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); 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.

In Barnes, the Supreme Court in a 5-4 decision upheld the enforcement of the public indecency law of Indiana so as to prevent totally nude dancing. The Indiana statute provides:

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

The statute further defines nudity identical to that definition provided in S.286. There was no similar reference in the Indiana statute to the prohibition against a business permitting a person to appear nude as set forth in S.286.

In the situation before the Court two Indiana businesses desiring to provide totally nude dancing in their establishments brought suit to enjoin enforcement of the Indiana statute. The Supreme Court concluded that the enforcement of the Indiana law in a manner which required the dancers to wear pasties and a G-string did not violate the First Amendment.

In its decision the Court stated:

> ... nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so. This, of course, does not end our inquiry. We must determine the level of protection to be afforded to the expressive conduct at issue, and must determine whether the Indiana statute is an impermissible infringement of that protected activity ...

111 S.Ct. at 2460. In making such examination, the Court referenced the standards set forth in United States v. O'Brien, 391 U.S. 367 (1968). In O'Brien, the Supreme Court in rejecting the assertion that symbolic speech is entitled to full First Amendment protection noted:

> 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 Court determined that the Indiana statute was "justified despite its incidental limitations on some expressive activity." 111 S.Ct. at 2461. As to the particular situation before the Court involving the nude dancers, the Court stated

> ... we do not think that when Indiana applies its statute to the nude dancing in these nightclubs it is prescribing nudity because of the erotic message conveyed by the dancers ... (W)hile the dancing to which it applied had a communicative

> element, it was not the dancing that was prohibited, but simply its being done in the nude.

111 S.Ct. at 2463. The Court further noted that the governmental interest served by the Indiana statute is the "societal disapproval" of public nudity. The Court concluded that enforcement of the Indiana statute by requiring dancers to wear pasties and a G-string did not violate the First Amendment.

As 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

> 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 to nude dancing 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 straightforward indecent exposure statute, not expressly 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.

Referencing 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.

If there is anything further, please advise.

Sincerely,

Charles H. Richardson
Assistant Attorney General

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REVIEWED AND APPROVED BY:

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