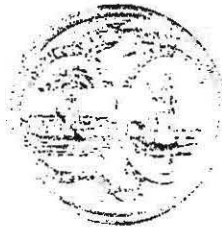


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STATE of SOUTH CAROLINA

CHARLES MOLONY CONDON
ATTORNEY GENERAL

Office of the Attorney General
Columbia 29211

April 11, 1996

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

Dear Senator Wilson:

You have asked whether legislation which prohibits South Carolina from recognizing marriages between members of the same sex which are performed in other states is constitutional.

Law / Analysis

"Marriage" is defined as "the status or relation of a man or a woman who have been legally united as husband and wife." 52 Am.Jur.2d Marriages, § 1. Our Supreme Court has repeatedly recognized that it is the public policy of South Carolina to "foster and protect marriage." Russo v. Sutton, 310 S.C. 200, 422 S.E.2d 750, 753 (1992). It has also been stated that

... no State in the Union has been more ardent, as a matter of public policy, in protecting marriage as an institution, together with all of the reciprocal rights of both husband and wife, than has the State of South Carolina.

Page v. Winter, 240 S.C. 516, 531, 126 S.E.2d 570 (1962) (Bussey, dissenting). Moreover, in Brown v. Brown, 215 S.C. 502, 56 S.E.2d 330, 333, the Court quoted the United States Supreme Court in Maynard v. Hill, 125 U.S. 190, 8 S.Ct. 723, 729, 31 L.Ed. 654 (1881), that marriage

... is an institution, in the maintenance of which, in its purity the public is deeply interested, for it is the foundation of the

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family and of society, without which there would be neither civilization nor progress.

In short, the protection of our institution of marriage, as it has been recognized and revered for centuries, together with that of the home, is what "our civilization is largely built around" Baker v. Allen, 220 S.C. 141, 161-2, 66 S.E.2d 618 (1951).

The foregoing principles are thus entirely consistent with an opinion of this Office, dated August 12, 1976 which concluded that in South Carolina, marriage between members of the same sex is prohibited by common and statutory law and any such marriage performed in this State is void. In that opinion, we interpreted what is now S.C. Code Ann. Section 20-1-10, which provides that "all persons, except mentally incompetent persons, and persons whose marriage is prohibited by this section," to prohibit same-sex marriages. We stated:

[t]he prohibition of Section 20-1 forbids the union between direct members of the same family which would result in incestuous relationships, but there is no specific wording that prohibits the union of members of the same sex. In the absence of such a provision it becomes necessary to consider the legislative intent of the statute to determine whether our legislature meant to include homosexual marriages. The legislative intent can be extrapolated through a careful inspection of the structure and wording to the statute. The statute is replete with language of sexual distinction. ... There is a strong inference here that the intention was to include only marriages between the opposite sex.

The legislature permeated the marriage statutes with heterosexual terms such as "husband and wife", "marriage", and reference to "female and male" knowing the definitions and usages of the words and with provisions exclusively limited to heterosexual relations. Sections 20-5, 20-5.1, 20-5.2, 20-6.1 all refer to the issue of a marriage, a condition that cannot possibly include a union between members of the same sex. Section 20-24 concerning [requirements of a marriage license] ... and consent to the marriage when the applicant is under a specified age refers to the "male" and the "female" applicants for the marriage license. The language and conditions of the statutes when viewed in toto clearly exclude

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the intention that a union between the same sex should be allowed.

We likewise rejected the notion that same-sex marriages were permitted by the common law. Finding "that a marriage at common law could exist only between a man and a woman," we opined:

[t]herefore, at common law the terms "husband and wife" and "marriage" apply strictly to a relationship between a man and a woman. These definitions constitute the very rules by which the common law is enforced. As it is impossible for members of the same sex to bring themselves within these definitions, it is the opinion of this office that homosexuals cannot effect a valid common law marriage in South Carolina.

Accordingly, it was our conclusion that

[b]ased on the accepted definition of marriage, the apparent legislative intent of Section [20-1-10] and related sections of our marriage laws and the effect of 16-412 it is the opinion of this office that the statutory law of South Carolina prohibits the union of members of the same sex. Furthermore it is the opinion of this office that such a union is prohibited at common law and any attempted solemnization of such marriage would be void. (emphasis added).

This opinion was reaffirmed in an opinion dated October 17, 1983 and it is reaffirmed today. To put it plainly and unequivocally, South Carolina law does not recognize marriages between members of the same sex. In the eyes of the law, such marriages performed in this State are void, against public policy and contrary to centuries of common law teachings and tradition.

Next, we address your question regarding the constitutionality of legislation which prohibits recognition of a marriage between members of the same sex when performed in a state other than South Carolina. It is my opinion that such legislation would be constitutional and should be enacted prior to any state recognizing same-sex marriages.

You specifically inquire about the constitutionality of such legislation in light of the Full Faith and Credit Clause of the United States Constitution. Art. IV, Section 1 of the federal Constitution contains the Full Faith and Credit Clause which requires that "Full

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Faith and Credit shall be given in each State to the public acts, Records and judicial Proceedings of every other State."

In Newberry v. Georgia Dept. of Industry and Trade, 283 S.C. 312, 322 S.E.2d 212 (Ct. App. 1984), our Court of Appeals had this to say regarding the command of this clause of the federal Constitution:

[t]he United States Supreme Court has long held that the Full Faith and Credit clause is not "an inexorable and unqualified command." Pink v. AAA Highway Express, 314 U.S. 201, 210, 62 S.Ct. 241, 246, 86 L.Ed. 152 (1941). Forum states are not bound to apply the law of a sister state if that law violates the forum state's own public policy. Nevada v. Hall, [440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979)]

Further, in Nevada v. Hall supra, the United States Supreme Court quoted with approval its earlier decision in Pacific Ins. Co. v. Industrial Accident Comm., 306 U.S. 493, 59 S.Ct. 629, 83 L.Ed. 940 wherein the Court stated as follows with respect to the Full Faith and Credit Clause:

It has often been recognized by this Court that there are some limitations upon the extent to which a state may be required by the full faith and credit clause to enforce even the judgment of another state in contravention of its own statutes or policy. ...

59 L.Ed.2d at 426. In short, concluded the Hall Court, "the Full Faith and Credit Clause does not require a state to apply another State's law in violation of its own legitimate public policy." Id.

Similarly, in Alaska Packers Assn. v. Industrial Accident Commission of California, 294 U.S. 323, 347-48, 55 S.Ct. 518, 523 (1935), the United States Supreme Court earlier stated:

[a] rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, whenever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own. Unless by force of that clause a greater effect is thus to be given to a state statute abroad than the clause permits it to have at home, it is unavoidable

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that this Court determine for itself the extent to which the statute of one state may qualify or deny rights asserted under the statute of another Prima facie every state is entitled to enforce in its own courts its own statutes, lawfully enacted. One who challenges that right, because of the force given to a conflicting statute of another state by the full faith and credit clause, assumes the burden of showing, upon some rational basis, that the conflicting interests involved those of the foreign state are superior to those of the forum. It follows that not every statute of another state will override a conflicting statute of the forum by virtue of the full faith and credit clause; that the statute of a state may sometimes override the conflicting statute of another, both at home and abroad; and, again, that the two conflicting statutes may each prevail over the other at home, although given no extraterritorial effect in the state of the other.

55 S.Ct. at 523-524.

With respect to the recognition of contracts made in other states and the duty of a forum state whose public policy the contract contravenes to enforce such agreement, the Court further stated in Griffin v. McCoach, 313 U.S. 498, 506, 61 S.Ct. 1023, 1027, 85 L.Ed. 1481 (1941):

... It is "rudimentary" that a state "will not lend the aid of its courts to enforce a contract founded upon a foreign law where to do so would be repugnant to good morals, would lead to the disturbance and disorganization of the local municipal law, or in other words violate the public policy of the state where the enforcement of the contract is sought."

The institution of marriage is deemed a civil contract. 52 Am.Jur.2d, Marriages, § 4; Campbell v. Moore, 189 S.C. 497, 1 S.E.2d 784 (1937). Thus, the South Carolina Supreme Court has adopted the above-stated principles in the context of the necessity of this State to recognize the validity of an out-of-state marriage where that marriage is against South Carolina public policy. In Zwerling v. Zwerling, 270 S.C. 685, 244 S.E.2d 311 (1978), the Court stated the generally prevailing rule of law in this area:

[a]s a general rule, "the validity of a marriage is determined by the law of the place where it is contracted," 52 Am.Jur.2d, Marriage, Section 80; and will be recognized in another state

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unless "such recognition would be contrary to a strong public policy of that State," *id.*, Section 82.

244 S.E.2d at 312. Thus, where a marriage in another state contravenes this State's public policy, South Carolina has no duty under the federal Constitution, or otherwise, to recognize it.

Courts have applied these principles in the context of marriages in other states which are deemed to be inconsistent with the forum state's public policy. For example, in Metropolitan Life Ins. Co. v. Spearman, 344 F.Supp. 665 (1972), the Court stated:

[l]astly, the public policy of Alabama against bigamous marriages is well settled by a long line of cases holding that a valid existing marriage renders a subsequent marriage utterly null and void. See Dorsey v. Dorsey, 259 Ala. 220, 66 So.2d 135, and cases there cited. A court is not compelled by the "full faith and credit clause" or by comity to enforce a contract entered into in a foreign state which involves a matter contrary to the public policy of the forum. Watson v. Emp. Liability Assur. Corp., 348 U.S. 66, 75 S.Ct. 166, 99 L.Ed. 74; Warner v. Fla. Bank & Trust Co. (SCCA) 160 F.2d 766; Lack v. Borsum, (D.C. La.) 44 F.Supp. 47.

Moreover, it has also been recognized that

[o]ther states, however, have ruled that uncle-niece or aunt-nephew, and sometimes even first-cousin, marriages violate a sufficiently strong public policy of the forum and therefore will not be recognized as valid. The latter view is more likely to be followed where the parties to the marriage were domiciled in the forum at the time of the ceremony, or where the forum has a statute declaring the marriage in question void or absolutely void, rather than merely prohibiting it.

52 Am.Jur.2d, Marriage, § 97; Op. Atty. Gen., January 25, 1968 [it is a matter of North Dakota public policy as to whether a common law marriage in South Carolina would be recognized there].

The question of the constitutionality of a statute prohibiting the recognition of same-sex marriages performed in other states has been addressed in at least two comprehensive opinions by Attorneys General in other states. The Attorney General of

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Tennessee in Tenn. Op. Atty. Gen., Op. No. 96-016 (February 16, 1996) recently concluded that a proposed bill which "prohibits same-sex marriages in Tennessee and declares that same-sex marriages entered into in another state are void in this state" to be constitutionally valid. Analyzing the question of whether the bill "would violate the Full Faith and Credit Clause of the United States Constitution," the Tennessee Attorney General wrote that it would not:

[i]f enacted into law and if not unconstitutional on some other ground, Senate Bill 2305 would probably provide the expression of state public policy necessary to justify an exception to the Full Faith and Credit Clause so that this state would not recognize the validity of a same-sex marriage obtained in another jurisdiction.

The Attorney General further noted that Utah had a similar statute and that legislation was pending in other states as well.

The Tennessee Attorney General also rejected the idea that such a statute violated the Equal Protection Clause of the Constitution. Citing the Washington case of Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187 (1974), the Attorney General, as did the Court in Singer, distinguished the United States Supreme Court decision of Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 187, 18 L.Ed.2d 1010 (1967) which had struck down Virginia's statutes forbidding miscegenation. The Attorney General concluded in summarizing Singer and distinguishing Loving,

Singer v. Hara, supra, dealt with the state of Washington's Equal Rights Amendment and marriage laws. The Court of Appeals of Washington held that the state's marriage laws did not authorize same-sex marriages and that this did not violate the Washington constitutional amendment providing that "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex." The State maintained that the sexes were treated equally because male couples and female couples were both denied marriage licenses. The plaintiffs argued that Loving required a different result. The Court, however, distinguished Loving as involving a racial classification invalidating a marriage, whereas the plaintiffs' relationship did not involve a marriage at all. Loving, the Court said, did not alter the basic definition of marriage as involving only two persons who are members of the opposite sex. Id., 522 P.2d at 1191-1192. The failure to

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recognize same-sex marriages "is based upon the state's recognition that our society as a whole views marriage as the appropriate desirable forum for procreation and the rearing of children."

Thus, the Attorney General of Tennessee found that "Senate Bill 2305 is constitutionally defensible under the Equal Protection Clause of the United States Constitution."

Likewise, the Nebraska Attorney General has reached the same conclusion. In Neb. Op. Atty. Gen. Op. No. 96025 (March 25, 1996), the Nebraska Attorney General, relying upon the aforementioned opinion of the Tennessee Attorney General and the authorities contained therein, stated:

... we conclude Nebraska could validly enact legislation expressly refusing to recognize same-sex marriages before another state legalizes such marriages. We believe such legislation could be defended against a constitutional challenge. ... The legislature may also be able to enact such legislation after legalization of same-sex marriages in another state. However, after-the-fact adoption could raise a number of additional legal problems, and would likely make defense of such a statute more difficult.¹

Accordingly, we strongly recommend that the Legislature act yet this session if it wishes to prevent same-sex couples "married" in another state from having that arrangement legally recognized in Nebraska.

¹ The Nebraska Attorney General strongly recommended that legislation be enacted before same-sex marriages become legal in any state, thereby making a prohibition upon recognition "more difficult to defend since it would clearly be aimed at the law of a particular state." His reference here was to the pending litigation in Hawaii in reaction to Baehr v. Lewin, 852 P.2d 44 (1993). In that case, the Hawaii Supreme Court concluded that laws which denied persons of the same sex the right to a marriage license were presumed to be invalid under the Hawaii Constitution and unless the state can show a compelling state interest for such laws, the statutes would be held to be unconstitutional. Apparently, this case will go to trial in Hawaii around August 1, 1996, but it is probable that Hawaii will soon recognize same-sex marriages. Thus, time is of the essence.

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The recent decision by the D.C. Court of Appeals, Dean v. District of Cola., 653 A.2d 307 (D.C. App. 1995) represents a thorough and compelling analysis of the constitutionality of a jurisdiction's prohibition upon same-sex marriages. The Court concluded that the District of Columbia statute "reflects a legislative understanding that marriage, as understood by Congress at the time of original enactment and thereafter, is inherently a male-female relationship." 653 A.2d at 313. Moreover, the Court cited decisions from other jurisdictions such as Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971), Jones v. Callahan, 501 S.W.2d 588, 589 (Ky. 1973), M.T. v. J.T., 140 N.J. Super. 77, 355 A.2d 204, 208 (App. Div. 1976) and Singer v. Hara, *supra*, all which concluded that "marriage" as it has always been known, constituted the union between a man and a woman. Quoting M.T. v. J.T., the Court said that the

"requirement that marriage must be between a man and a woman ... is so strongly and firmly implied from a full reading of the statutes that a different legislative intent, one which would sanction a marriage between persons of the same sex cannot be fathomed."

653 A.2d at 316.

The Dean Court also concluded that the right of members of the same sex to marry is not to be considered a fundamental right under the federal Due Process Clause. Indeed, the right to marry generally had been deemed fundamental by the Supreme Court "because of its link to procreation ...". The Dean Court quoted Zablocki v. Redhail, 434 U.S. 374, 386, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978) where the United States Supreme Court had stated:

[i]t is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. As the facts of this case illustrate, it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society [I]f appellee's right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place.

653 A.2d at 333, quoting 434 U.S. at 386. Thus, Dean concluded with respect to the Due Process claim, that

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[t]he question, then, is whether there is a constitutional basis under the due process clause for say that this recognized, fundamental right of heterosexual couples to marry also extends to gay and lesbian couples. The answer, very simply, is "No."

Id.

As to the Equal Protection argument, the Court divided among its members. However, the majority found that a prohibition on same-sex marriages did not violate the Equal Protection Clause. Justice Terry found that the word "marriage" in denoting legal status "refers only to the mutual relationship between a man and a woman as husband and wife, and therefore that same-sex "marriages" are legally and factually -- i.e. definitionally impossible. Elaborating upon this idea, he reasoned:

[t]his conclusion necessarily disposes of the equal protection issue That is, if it is impossible for two persons of the same sex to "marry," then surely no court can say that a refusal to allow a same-sex couple to "marry" could ever be a denial of equal protection. ... [I]f two people are incapable of being married because they are members of the same sex and marriage requires two persons of opposite sexes, as Judge Ferren has shown, then I do not see how it makes any difference that the District of Columbia, or any agency of its government, discriminates against these two appellants by refusing to allow them to enter into a legal status which the sameness of their gender prevents them from entering in the first place.

Justice Terry concluded by saying that

[i]f these appellants cannot enter into a marriage because the very nature of marriage makes it impossible for them to do so, then their quest for a marriage license is a futile act, and the District's refusal to issue a license to them is legally and constitutionally meaningless. They are, of course, free to refer to their relationship by whatever name they wish. But it is not a marriage, and calling it a marriage will not make it one.

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Justice Steadman agreed. He argued that "every appellate court in the land presented with the issue" has rejected "federal constitutional challenges to opposite sex marriage statutes." He cited Jones v. Hallahan, supra [two females are not capable of entering a marriage]; In re Cooper, 187 A.D.2d 128, 592 N.Y.S.2d 797, 799-800 [same sex partner not a "surviving spouse"]; Singer, supra [states refusal to issue a marriage license to same-sex couple did not violate state and federal equal protection clause]; Baker, supra 191 N.W.2d at 186-87 [prohibition upon same-sex marriages does not violate federal Constitution]. Justice Steadman thus analyzed the Equal Protection issue as follows:

[b]ut even assuming that the marriage statute should be analyzed as one of unequal application to homosexuals and assuming further that homosexuals are a quasi-suspect class ..., I fail to see an unconstitutional transgression of equal protection ... While plainly the marriage state involves far more, the Supreme Court teaches at bottom the institution reflects considerations "fundamental to the very existence and survival of the human race," and bound up with sexual relations, procreation, childbirth and child rearing Surely, if only opposite-sex marriage is a fundamental right, the State may give separate recognition solely to that institution through a marriage act as here.

653 A.2d t 363-364.

Similarly, in Singer, the Court stated:

[g]iven the definition of marriage which we have enunciated, the distinction between the case presented by appellants and those presented in Loving and Perez [v. Lippold, 32 Cal.2d 711, 198 P.2d 17 (1948)] is apparent. In Loving and Perez, the parties were barred from entering into the marriage relationship because of an impermissible racial classification. There is no analogous sexual classification involved in the instant case because appellants are not being denied entry into the marriage relationship because of their sex; rather, they are being denied entry into the marriage relationship because of the recognized definition of that relationship as one which may be entered into only by two persons who are members of the opposite sex. As the court observed in Jones v. Hallahan, supra, 501 S.W.2d at 590: "In

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substance, the relationship proposed by the appellants does not authorize the issuance of a marriage license because what they propose is not a marriage." Loving and Perez are inapposite.

522 P.2d at 1192; see also, Annotation, "Marriage Between Persons of Same Sex," 63 A.L.R.3d 1199 (1975); M.T. v. J.T., 355 A.2d at 207 ["In the matrimonial field the heterosexual union is usually regarded as the only one entitled to legal recognition and public sanction."]

Our Court of Appeals has, in somewhat different contexts, similarly defined and analyzed the institution of marriage. In Panhorst v. Panhorst, 301 S.C. 100, 390 S.E.2d 376 (Ct. App. 1990), the Court observed:

[a]t common law, marriage is both a contract and a status. Fennell v. Littlejohn, 240 S.C. 189, 125 S.E.2d 408 (1962); Garlock v. Garlock, 279 N.Y. 337, 18 N.E.2d 521 (1939). As a status, it gives rise to rights and duties imposed by law on the marriage partners. Id. Among these are material support and consortium, i.e. the conjugal society, comfort, companionship and affection of each other. Id. Bennett v. Bennett, 116 N.Y. 584, 23 N.E. 17 (1889). As far as the law is concerned, the contract of marriage is, in its essence, a consent on the part of a man and a woman (emphasis added).

390 S.E.2d at 378.

Moreover, in Hamilton v. Board of Trustees, 282 S.C. 519, 319 S.E.2d 717 (Ct. App. 1984), the contract of a school board employee was not renewed pursuant to District policy because of her marriage to the Superintendent of Education of the County. She contended that application of the policy infringed upon her fundamental right to marry. The Court held that the policy was not shown to "substantially interfere[]" with her right to marry." Elaborating the Court concluded

[s]he has shown no direct infringement on the rights of cohabitation, sexual intercourse, or procreation. Since the Board's policy does not significantly interfere with the exercise of this fundamental right, a strict scrutiny review is not proper.

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319 S.E.2d at 720. In essence, the Court concluded that at its core, the fundamental right of marriage was based upon the "rights of cohabitation, sexual intercourse or procreation."

Based upon the foregoing, it is evident that the public policy of South Carolina deems marriage to be the lawful union between a man and a woman. Only a man and a woman can be recognized as "married" under the laws of South Carolina. The essence of the right of marriage and the marriage contract as a fundamental right is based upon the ability to bear children and rear them in the traditional family setting. In short,

[t]he institution of marriage is a union of man and woman ... [and] is as old as the book of Genesis ... This historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests [which may be asserted by same-sex couples]. [The United States or South Carolina Constitution] ... is not a charter for restructuring [marriage] by judicial legislation.

Singer v. Hara, 522 P.2d at 1197 [quoting Baker v. Nelson, 191 N.W.2d at 186].

Thus, South Carolina is not required by the federal Constitution to recognize same-sex marriages performed in other states any more than it is required to recognize bigamous marriages or any other which contravene the state's public policy. See also, Section 15-35-960 [foreign judgments against public policy not recognized]. This situation is entirely different from the laws against miscegenation, struck down in Loving v. Virginia, *supra* on the basis that such statutes constitute invidious discrimination on the basis of race. Since the Court in Loving clearly ruled that such statutes were invalid, states could "no longer deny validity to marriages on this ground." 52 Am.Jur.2d, Marriage, § 102. Here, however, the United States Supreme Court has not even addressed the issue of the validity of a same-sex marriage and, as seen, there are a number of cases which have upheld a state's right not to validate marriages between the same sex.

An Act of the General Assembly must be presumed to be constitutional. Nichols v. South Carolina Research Authority, 290 S.C. 415, 351 S.E.2d 155 (1986). Moreover, the Tenth Amendment of the United States Constitution specifically provides:

[t]he powers not delegated to the United States by the Constitution, nor prohibited it by the States, are reserved to the states respectively, or to the people.

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The institution of marriage is uniquely for the State of South Carolina to regulate and its elected representatives to protect. Neither the Fourteenth Amendment nor the Full Faith and Credit Clause of the federal Constitution mandates otherwise.

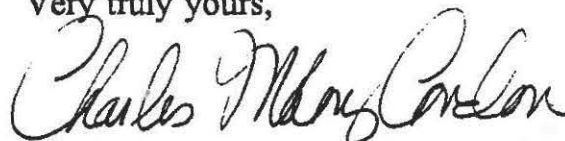
Conclusion

From time immemorial, the marital relationship has been the backbone of society and the bedrock of the family. Since South Carolina was established three centuries ago, the marriage relationship has always signified and been defined as the legal joinder between members of the opposite sex, but never the same sex. To validate and to legitimate same-sex marriages clearly would desecrate the sanctity of the traditional marriage. Thus, unlike marriages between members of different races which are constitutionally protected marriages between members of the same sex are not.

Even if another state, therefore, validates a same-sex marriage performed in that state, South Carolina still has the constitutional authority to say "no" to it. Such marriages are against the public policy of South Carolina and are void from their inception. Accordingly, legislation refusing to recognize same-sex marriages performed in other states, would not, in my opinion, contravene the federal or state constitutions. As noted above, time is of the essence in the enactment of such legislation prior to any action by the State of Hawaii to validate same-sex marriages.

With kind regards, I am

Very truly yours,



Charles Molony Condon
Attorney General

CMC/an

cc: The Honorable Michael L. Fair
The Honorable Robert W. Hayes, Jr.