The State of South Carolina

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September 9, 1987

The Honorable Mickey Burriss
Member, House of Representatives
Post Office Box 9186
Columbia, South Carolina 29290

Dear Representative Burriss:

You have forwarded to this Office a resolution under consideration by the Richland County Legislative Delegation concerning organizations which limit membership on the basis of race, sex, creed, or color. You have questioned the constitutionality of part (a), which would have the effect of withholding from participation in government those citizens who belong to such groups.

The proposed resolution provides in its entirety:

> Whereas, the Richland County Legislative Delegation is sensitive to recent reports of racial and religious discrimination in the admissions policies of certain local private social clubs in Richland County, and
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> Whereas, the denial of admission to these clubs of certain prominent Columbians for reasons related solely to race, color or creed and has proved a lamentable embarrassment to our community, and
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> Whereas, there is general agreement among our economic development leaders that the exclusionary policies of local private social clubs constitutes a serious barrier to continued efforts to recruit quality new industries into Richland County, and

> Whereas, the Richland County Legislative Delegation appoints members of various public governing and advisory boards and commissions with the ostensible purpose of representing all of the citizens of Richland County, regardless of race, creed or color, and
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> Whereas, the Richland County Legislative Delegation has an obligation to provide leadership not only in continuing efforts in economic development but also in continuing efforts to secure the dignity and equality of opportunity for all our constituents,
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> NOW, THEREFORE, BE IT HEREBY RESOLVED:
>
> (a). That the Richland County Legislative Delegation adopt as a policy the premise that no person shall be considered for appointment to any governing or advisory board or commission who shall be a member of any organization which limits its membership on the basis of race, sex, creed or color, and
>
> (b). That the Richland County Legislative Delegation policy be that its membership not conduct or attend functions at the aforementioned social clubs or organizations.

You are concerned about the impact of the First Amendment to the United States Constitution upon part (a).

In addressing questions of a constitutional nature, this Office generally advises that constitutionality is usually presumed in all respects. Unless unconstitutionality is clear beyond any reasonable doubt, an act or activity is not considered void under the First Amendment. 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 on potential constitutional problems, it is solely within the province of the courts of this State to declare an act or activity unconstitutional.

The First Amendment provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The United States Supreme Court stated recently in Roberts v. United States Jaycees, 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984):

> An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. ... According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority. ... Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.

Id., 468 U.S. at 622, 104 S.Ct. at 3252.

In Roberts v. United States Jaycees, supra, the United States Supreme Court found that a policy of the Jaycees to admit only males as members was plainly implicated under the First Amendment. In striking down that policy, the Court stated further:

> The right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive

> of associational freedoms. ... We are persuaded that Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms.1/

It is clear from Roberts that if the First Amendment rights are to be infringed upon, a compelling state interest must be served thereby.

To determine whether the First Amendment has been impermissibly infringed upon, the action complained of must survive a test of strict or exacting scrutiny. A mere showing of a legitimate state interest will not survive the necessary strict scrutiny. Clark v. Library of Congress, 750 F.2d 89 (D.C. Cir. 1984).

The test is stated in Selfridge v. Carey, 522 F.Supp. 693 (N.D.N.Y. 1981), stay denied 660 F.2d 516 (2d Cir. 1981), in the context of action taken by a governor:

> First, the State bears the burden of justifying its prohibition. ... Second, the Governor must establish "weighty reasons" for his ban. ... Third, and most importantly, the Governor must show that his prohibition is the least drastic means of protecting the governmental interest involved. ...

Id., 522 F.Supp. at 696.

Applying these tests to the situation at hand, we advise that a court would look for more than merely a legitimate state interest in actions taken pursuant to the proposed resolution. Applying a standard of strict scrutiny, the following must be established to uphold the proposed resolution:

1/ The law found to have been violated by the by-laws of the Jaycees was a part of the Minnesota Human Rights Act, which stated that it was an unfair discriminatory practice to "deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodations because of race, color, creed, religion, disability, national origin or sex."

1. That the prohibition imposed by the proposed resolution is justified.

2. That there are "weighty reasons" for imposing the resolution and taking action thereunder.

3. That the prohibition imposed by the proposed resolution is the least drastic means of protecting the governmental interest involved.

In considering whether to adopt the resolution in light of the important First Amendment rights to be implicated, the Delegation may wish to consider these three points, in the event the resolution is challenged in a court if it is adopted.

It must be noted that in the absence of associational activities which are illegal or which would incite illegal activities, generally speaking, the freedom of association is usually deemed to be inviolate. Kraus v. Village of Barrington Hills, 571 F.Supp. 538 (N.D. Ill. 1982). Indeed, in an employment setting, it has been stated:

> In the absence of any showing that private, off-duty, personal activities of the type protected by the constitutional guarantees of privacy and free association have an impact upon an applicant's on-the-job performance, and of specific policies with narrow implementing regulations, we hold that reliance on these private non-job-related considerations by the state in rejecting an applicant for employment violates the applicant's protected constitutional interests and cannot be upheld under any level of scrutiny. ...

Thorne v. City of El Segundo, 726 F.2d 459, 471 (9th Cir. 1983). However,

> The state has a legitimate interest in excluding from office those who would impair efficiency and honesty in government operations. This cannot be doubted. To achieve this end conditions and penalties can be imposed even where they may involve the relinquishment of constitutional rights and

> privileges, so long as they hear a reasonable relation to the end sought to be achieved. Thus, for example, in United Public Workers of America (CIO) v. Mitchell, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947), the Supreme Court upheld the provisions of the Hatch Act which called for dismissal of Government employees engaging in political activity where the exercise of that right would substantially interfere with the proper performance of their duties. ...

United States v. Warden of Wallkill Prison, 246 F.Supp. 72, 95 (S.D.N.Y. 1965).

Whether the proposed resolution under consideration by the Richland County Legislative Delegation infringes upon constitutionally protected rights under the First Amendment and whether such an infringement, if one exists, would survive strict scrutiny by a court cannot be determined by this Office. Only a court could finally make that determination. The three-pronged test and various factors considered in connection thereto have been presented for the use of the Delegation as it decides whether to adopt the resolution, taking into account the goals sought to be achieved and the means to be employed.

With kindest regards, I am

Sincerely,

Patricia D. Petway

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Assistant Attorney General

PDP/rhm

REVIEWED AND APPROVED BY:

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