ALAN WILSON
ATTORNEY GENERAL

July 6, 2015

The Honorable Lawrence K. Grooms
Senator
District No. 37
Post Office Box 142
Columbia, South Carolina 29202

Dear Senator Grooms:

You have raised two issues regarding "the possibility of placing on a referendum the question of whether to change state law regarding the display of the Confederate battle flag on the grounds of the South Carolina State House." You question whether a binding statewide referendum is constitutional and also whether a non-binding referendum is valid under the Constitution?

You have asked that your request be expedited "[b]ecause the General Assembly reconvenes next week . . . ." We received your letter late Thursday, July 2, and with the intervening Fourth of July holiday, have not had sufficient time to prepare a formal opinion. However, we have located two Supreme Court decisions on point, which answer these questions. We forward these for your review.

With respect to the constitutional validity of a binding referendum, the case of Joytime Distributors and Amusement Co. v. The State, 338 S.C. 634, 528 S.E.2d 647 (1999) resolves the issue in that the Supreme Court concluded that such a binding referendum is unconstitutional. There, the Court stated: ". . . since the [present] constitution does not contain a specific provision reserving to the people the power to legislate, . . . Art. III, § 1 [of the Constitution] requires the legislature, not the people, to enact the general law." 338 S.C. at 641, 528 S.E.2d at 650. Further, the Court in Joytime concluded: ". . . it is clear that our constitution does not give the people the right of direct legislation by referendum." 338 S.C. at 643, 528 S.E.2d at 652. Finally, the Joytime Court said this: a binding referendum is "an unconstitutional attempt to delegate to the people the legislature's power to set the policy of the state and enact laws to effectuate that policy." 338 S.C. at 648, 528 S.E.2d at 654.

As to your second question regarding the constitutional permissibility of a non-binding referendum, while such advisory referenda have been enacted in the past, see Griggs v. Hodge, 229 S.C. 245, 92 S.E.2d 654 (1956), the case of State ex rel. Riley v. Pechilis, 273 S.C. 628, 258 S.E.2d 433 (1979) concluded that advisory elections are unconstitutional as "chilling" the decision of officers, who are required under the Constitution to take action within their discretion. In Pechilis, the Court struck down advisory elections for magistrates as intruding upon the power of the Governor to nominate a magistrate and the Senate to confirm the

magistrate's appointment. The Court cited with approval State v. Green, 220 S.C. 315, 67 S.E.2d 509 (1951), which had set aside the seeking of a recommendation by the trial judge to the jury regarding sentencing. In Green, the Supreme Court found that the trial judge's seeking advice from the jury, intruded upon the sentencing discretion of the Court. The Green Court characterized such a practice as "highly irregular, if not a dangerous innovation. . . ." 220 S.C. at 320, 67 S.E.2d at 511.

Pechilis, found the Green precedent dispositive. Thus, the Court held:

> [w]e therefore conclude that the establishment of the election procedure to select a nominee for magistrate, either by party primary or statute, and the resulting almost universally coerced acceptance by the Governor and the Senate of the nominee of the election has, in fact, so chilled the discretionary power of the Governor and Senate to appoint magistrates in this State as to amount to the circumvention of the constitutionally mandated method for the appointment of magistrates.

273 S.C. at 633, 258 S.E.2d at 435.

As noted, these decisions answer your questions. In each instance, the Supreme Court concluded the referendum (both binding and non-binding) to be unconstitutional. I trust these decisions will be helpful to you.

Sincerely,

Robert D. Cook
Solicitor General