ALAN WILSON
ATTORNEY GENERAL

September 17, 2018

Isaac McDuffie Stone, III, Chairman
South Carolina Commission on Prosecution Coordination
P.O. Box 11561
Columbia, SC 29211-1561

Dear Solicitor Stone:

You have raised a question regarding the South Carolina Supreme Court decision in Doe v. State, 421 S.C. 490, 808 S.E.2d 807 (2017). By way of background, you state the following:

> The South Carolina's Supreme Court's decision in Doe v. State, 421 S.C. 490, 808 S.E.2d 807 (2017), held that the definition of "household member" in South Carolina's Criminal Domestic Violence Act (S.C. Code §16-25-10(3)) and Protection from Domestic Abuse Act (§20-4-20(b)) is unconstitutional as applied to Doe and other unmarried, same-sex individuals who are cohabiting or formerly have cohabited. This decision explicitly affords individuals in or formerly in a same-sex relationship the protections granted other "household members" as defined by these statutes when seeking an Order of Protection against an individual with whom the victim is cohabiting or has formerly cohabited.
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> The South Carolina Commission on Prosecution Coordination (SCCPC) purports, based on the Supreme Court's decision, that individuals in or formerly in a same-sex relationship not only may seek an Order of Protection against a same-sex partner, but that similarly situated individuals may pursue a criminal prosecution for acts of domestic violence where criteria of SC Code §16-25-20 or §16-25-65 are satisfied. Nonetheless, the Doe v. State decision leaves need for clarification on this question.
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> On behalf of the SCCPC, I respectfully ask for a formal opinion regarding the applicability of the domestic violence statutes under Title 16, Chapter 25, of the South Carolina Code of Laws to such acts committed against a victim by an individual with whom the victim is cohabiting or has formerly cohabited in a same-sex relationship. Specifically,
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> (1) Does the South Carolina Supreme Court's decision in Doe v. State, 421 S.C. 490, 808 S.E.2d 807 (2017), finding the definitions of "household member" in §16-25-10(3) and §20-4-20(b) of the South Carolina Code of Laws unconstitutional as applied to an unmarried same-sex victim of domestic violence who was seeking an Order of Protection also permit criminal prosecution of a same-sex defendant with whom the victim is cohabitating or has cohabitated, per the provisions of §16-25-20 or §16-25-65?

(2) If so, does either the decision in Doe or the language of the relevant statutory provisions provide fair notice to the above-referenced defendant that his or her actions constituted a criminal violation of §16-25-20 or §16-25-65, satisfying due process requirements?

LAW/ANALYSIS

Background in Doe

It is important, in considering your question, first to provide a detailed background of the Doe case. Doe involved an action brought against the State in the original jurisdiction of the Supreme Court. Petitioner Doe alleged that she had been "assaulted and choked by her ex-fiancé causing scratches, cuts, bruises and swelling to her neck, arm, and lip." In addition, she contended that her partner had "stalked and harassed" her, as well as threatened her. Petitioner alleged she had sought an Order of Protection from the Family Court, but the Order of Protection was denied because the Protection from Domestic Abuse Act defined a "household member" as "a spouse, a former spouse, persons who have a child in common or a male and female who are cohabiting or formerly have cohabited." § 20-4-20(b) (emphasis added). Doe did not appeal the Family Court ruling, but sought relief in the original jurisdiction, claiming such "act (Protection from Domestic Abuse Act) does not provide for protection from abuse for persons involved [in] same-sex relationships outside of marriage." See Petition for Original Jurisdiction in Doe v. State, filed August 14, 2015.

There is no doubt, however, that Petitioner also sought relief from the identical definition of "household member" found in the Domestic Violence Reform Act. Petitioner alleged in her Petition for Original Jurisdiction that "in the context of domestic violence charges, S.C. Code Ann. § 16-25-10 similarly defines 'household member' thereby making these charges inapplicable to same-sex couples. . . . Such an exclusion, from the statutory definition of 'household member' leaves unmarried same-sex victims of abuse without the benefit of the same remedy afforded to their heterosexual counterparts." Id. (emphasis added). Petitioner further alleged that the "urgent nature of this request is significant as the safety and health of the Petitioner is of vital import." Id. (emphasis added).

Accordingly, in the original jurisdiction action, Petitioner challenged both acts' definitions of "household member." The Petitioner clearly stated that "[t]he omission of same-sex couples from both statutes violates the Due Process Clauses of the Fourteenth Amendment." Id. (emphasis added). Further, in Doe's Complaint, accompanying her Petition for Original Jurisdiction, she requested that the Court, in its original jurisdiction, declare that "the statutory definition of 'household member' found in § 16-25-20 and 20-4-10, is unconstitutional and, as such, is void as a matter of law." Complaint at 1 (emphasis added).

The Attorney General's Office represented the State in Doe's original jurisdiction action. The Attorney General argued that the case was best resolved by statutory construction, instead of a ruling on the constitutionality of the statutes. In the view of the Attorney General's Office, a

ruling declaring the statutory definitions unconstitutional might well jeopardize the entire Domestic Violence statutes with respect to cohabitation if the Court expressly decided to sever the cohabitation provisions. The State, in response to Doe's claim, also challenged Doe's standing to assert that § 16-25-10(3)(d)'s definition of "household member" in the Domestic Violence Reform Act was unconstitutional. As the State's Brief put it:

> Petitioner lacks standing to challenge the definition in § 16-25-10 because it applies to § 16-25-20 which sets forth domestic violence crimes and their penalties. Petitioner has not been charged with any crime under this statute, and therefore, she lacks standing. Although Petitioner complains that she would not have been faced with the dilemma of having to choose whether to prosecute for assault had the CDV law applied, whether charges are brought for CDV, assault or some other crime are still up to law enforcement. . . .

The State further argued that "'[a] court can inquire into the general constitutionality of a statute only at the instance of a Petitioner whose 'liberty, rights or property was invaded through its operation.'" (citing authorities). . . . The lack of standing of Petitioner to challenge this statute causes her to fail to state a cause of action as to this statute. '"" State's Brief at 11. While the issue of Petitioner's standing to challenge the Domestic Violence statute's definition of "household member" was clearly raised by the State, as will be seen below, the Supreme Court implicitly rejected this argument, proceeding instead to decide the constitutionality of both statutes (§ 20-4-20(b)(iv) and § 16-25-10(d)(3).

The First Doe Decision

The initial Doe decision was issued by the Supreme Court on July 26, 2017. That decision involved a divided Court. The majority consisted of Chief Justice Pleicones, Justice Hearn and Justice Kittredge (who concurred in the result only). Justice Beatty concurred in part and dissented in part; and Justice Few dissented.

The majority opinion, authored by then Chief Justice Pleicones, first noted that

> Petitioner therefore asks this Court to declare that the subsections which exclude same sex couples – S.C. Code Ann. § 16-25-10(3)(d) (effective June 4, 2015) of the Domestic Violence Reform Act and S.C. Code Ann. § 20-4-20(b)(iv) (effective June 4, 2015) of the Protection from Domestic Violence Act (collectively 'the Acts') violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. We agree the definitional subsections at issue offend the Equal Protection Clause, and therefore, strike the subsections from the said Acts.

(emphasis added). The majority opinion thus concluded:

> Accordingly, because the subsections at issue violate the Equal Protection Clause, we hold § 16-25-10(3)(d) of the Domestic Violence Reform Act, and § 20-4-20(b)(iv) of

> Protection from Criminal Violence Act, must be, and are stricken, particularly in light of the fact that each Act contains a severability clause.

Justice Beatty concurred in the majority's conclusion that both definitional provisions violated the Constitution. However, his approach to the appropriate remedy for the unconstitutional provisions was far different from the majority. Justice Beatty wrote:

> I respectfully concur in part and dissent in part. I agree with the majority that the definition of "household member" in South Carolina Code Section 16-25-10(3) of the Domestic Violence Reform Act and Section 20-4-20(b) the Protection from Domestic Abuse Act (collectively "the Acts") violates Doe's rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution due to the non-inclusive scheme. Yet, unlike the majority, I would not sever these offending provisions. Instead, in order to remain within the confines of the Court's jurisdiction and preserve the validity of the Acts, I would declare sections 16-25-10(d) and 20-4-20(b) unconstitutional as applied to Doe.

(emphasis added). Thus, the result in the first Doe decision was to declare the "household member' definitions facially invalid and, as a remedy, to strike down altogether the unmarried, cohabitation provisions in both § 16-25-10(3)(d) and § 20-4-20(b)(iv). This conclusion would have left all unmarried, cohabiting partners (non-same-sex and same-sex alike) without any order of protection remedy, or without criminal prosecution remedy.

The Attorney General, on behalf of the State, immediately sought a stay of the first Doe decision pending its Filing and the Decision Regarding Rehearing. The Attorney General argued that the effect of the Court's ruling was to remove both the Order of Protection, as well as the criminal prosecution remedy for all unmarried cohabiting partners, whether same-sex or not. The Court granted the stay on July 26, 2017.

The State then sought rehearing. In seeking rehearing, the Attorney General "readily agree[d] with the Court's conclusion that the Equal Protection Clause requires that same-sex couples who are cohabiting or formerly have cohabited must be included within these protections [§16-25-10(3)(d) and § 20-4-20(b)(iv)] from domestic violence." The State then added:

> [o]n the other hand, the State strongly urges the Court to reconsider its decision to sever in its entirety the language "male and female who are cohabiting or formerly have cohabited" from the Acts – a path chosen by the majority. Such a drastic remedy is completely unnecessary to resolve the Court's finding of a constitutional violation. Further, the remedy of severance provides the Petitioner and other same-sex couples who are cohabiting only the most pyrrhic of victories. Petitioner, rather than receiving protection from domestic violence under the Acts, will now receive – along with other cohabitors – no protections whatever.

Attorney General's Petition for Rehearing at 2 (emphasis added). Numerous other amici, as well as Doe, asserted the same position as that of the State.

Second Doe Opinion

The Court modified its first Doe decision with a second opinion filed on November 17, 2017. Reaffirming its earlier decision regarding the unconstitutionality of the referenced definitional portions of the two statutes, Chief Justice Beatty stated for the Court as follows:

> [t]he Court granted Jane Doe's petition for original jurisdiction to consider whether the definition of "household member" in South Carolina Code section 16-25-10(3) of the Domestic Violence Reform Act and section 20-4-20(b) of the Protection from Domestic Abuse Act . . . (collectively "the Acts") is unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment . . . to the United States Constitution. Specifically, Doe contends the provisions are unconstitutional because neither affords protection from domestic abuse for unmarried, same sex individuals who are cohabiting or formerly have cohabited. In order to remain within the confines of our jurisdiction and preserve the validity of the Acts, we declare sections 16-25-10(3) and 20-4-20(b) unconstitutional as applied to Doe.

421 S.C. at 495-96, 808 S.E.2d at 809-10 (emphasis added).

While the text of the revised Opinion speaks intermittently of a constitutional violation denying Doe an "Order of Protection" only, in many other parts of the Opinion, the Court refers to both Acts (Protection from Domestic Abuse and Domestic Violence Reform Act) as denying to Doe her constitutional rights. For example, the Court stated:

> [t]o remedy the disparate treatment and avoid the invalidation of the Acts in their entirety, Doe advocates for the Court to: (1) construe the word "and" in Sections 16-25(10)(3) AND 20-4-20(b)(iv) to mean "or"; and (2) declare the definition of "household member" to include any person, male or female, who is currently cohabiting with someone or who has formerly cohabited with someone.
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> In response, the State contends that any constitutional analysis could be avoided if the Court (1) construes the phrase "male and female" as proposed by Doe; or (2) sever those words from the definition so that it reads only "cohabiting or formerly have cohabited." The State asserts that such a construction would be consistent with and effectuate the legislative purpose of the Acts, which is to protect against violence between members of the same household.
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> Alternatively, if the Court strikes down the Acts based on a constitutional violation, the State submits the Court should delay implementing its decision to allow the General Assembly time to amend the statutes consistent with the Court's ruling. Ultimately, given the importance of the domestic violence statutes, the State implores this Court not to invalidate the Acts in their entirety based solely on the literal impact of the word "and."

421 S.C.at 498, 808 S.E.2d at 811 (emphasis added).

However, the Court rejected a resolution of the case by statutory interpretation. The majority traced the history of the definition of "household member," as used in these statutes,

noting that, in 1994, the General Assembly deleted the words "family or" preceding "household member" and inserted the words "male and female who are cohabiting or formerly have cohabited" to replace "persons cohabiting or formerly cohabiting." The Court noted also that, notwithstanding other amendments to the statutes – particularly the passage of the Domestic Violence Reform Act – the definition of "household member" in the two Acts has remained the same since 1994. According to the Court,

> [a]lthough a review of the statutory evolution is not dispositive of the instant case, it is conclusive evidence the General Assembly purposefully included the phrase "male and female" within the definition of "household member" in 1994 and has retained that definition.

421 S.C. at 500-501, 808 S.E.2d at 812-13.

In its revised opinion, the Court also noted that Doe had argued that the two definitional statutes were unconstitutional as applied, as well being facially invalid. Again, the Court at times confusingly emphasized the "Order of Protection." This could give the reader the impression that Doe was only seeking relief with respect to the Protection from Domestic Abuse Act. As shown throughout, however, this was not the case. In its analysis of the "facial" versus "as applied" remedy, the Court, without question, spoke of both Acts:

> [a]lso, even though the Acts include severability clauses . . . [referencing severability clause in each statute], there is no reason to employ them as we have found the sections containing the definition of "household member' are not facially invalid. Rather, the constitutional infirmity is based on their application to Doe, i.e., not including unmarried same-sex couples on the definition of "household member." Thus, severance cannot rectify the under inclusive nature of the definition.
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> Further, even if we were to attempt to remedy the constitutional infirmity through severance, we find severance of the entire phrase "a male and female who are cohabiting or formerly have cohabited" to be unavailing since the constitutional infirmity would remain. Protection afforded by the Acts would still be elusive to Doe and would no longer be available to opposite-sex couples who are cohabiting or formerly have cohabited. Yet, it would be available to unmarried persons such as former spouses (same-sex or not) with a child in common. Absent an "as-applied" analysis, the "household member" definitional sections must be struck down. As a result, the Acts would be rendered useless. . . . Accordingly, we reject any suggestion to sever the Acts as it is inconsistent with our rules of statutory construction and would contravene the intent of the General Assembly.
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> Finally, we decline to invalidate the Acts in their entirety. Such a decision would result in grave consequences for victims of domestic violence. To leave these victims unprotected for any length of time would be a great disservice to the citizens of South Carolina.

421 S.C. at 508-509, 808 S.E.2d at 816-17 (emphasis added). Thus, the Court concluded:

> [i]n order to address the important issue presented in this case and remain within the confines of the Court's jurisdiction, we declare sections 16-25-10(3) and 20-4-20(b) unconstitutional as applied to Doe. Therefore, the family court may not utilize these statutory provisions to prevent Doe or those in similar same-sex relationships from seeking an Order of Protection. Cf. Garner v. Iowa Dept. of Pub. Health, 830 N.W.2d 335, 354 (Iowa 2013) (concluding that presumption of parentage statute, which expressly referred to a mother, father, and husband, violated equal protection as applied to a lesbian couple to whom a child was born to one of the spouses during the couple's marriage; identifying appropriate remedy by stating, "Accordingly, instead of striking section 144.32 from the [Iowa] Code, we will preserve it as to married opposite sex couples and require the [Iowa Department of Public Health] to apply the statute to married lesbian couples.")

421 S.C. at 509-10, 808 S.E.2d at 817 (emphasis added).

Justices Hearn and Kittredge concurred in the entire revised opinion authored by Justice Beatty. Acting Justice Pleicones concurred in the result only. Justice Few wrote a separate opinion in which he concluded as follows:

> Jane Doe, the State, and all members of this Court agree to this central point if the Acts exclude unmarried, same-sex couples from the protections they provide all other citizens, they are obviously unconstitutional. See U.S. CONST. amend. XIV, § 1 ("No state shall . . . deny to any person . . . the equal protection of the laws."); SC CONST. art. I, § 3 ("nor shall any person be denied the equal protection of the laws"); Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 428, 593 S.E.2d 462, 469 (2004) ("To satisfy the equal protection clause, a classification must . . . rest on some rational basis.").
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> For two reasons, I would not declare the Acts unconstitutional. First, Doe and the State agree the Protection From Domestic Abuse Act protects Doe and thus, there is no controversy before this Court. Second, Doe and the State are correct; ambiguity in both Acts – particularly the definition of household member – requires this Court to construe the Acts to provide Doe the same protections they provide all citizens, and thus the Acts are not unconstitutional.

421 S.C. at 410, 808 S.E.2d at 817 (emphasis added).

CONCLUSION

While there is some ambiguity in the revised Doe decision (referring at times only to the "Order of Protection"), the Opinion, as a whole, makes clear that the Court declared the definition of "household member" in both § 16-25-10(3)(d) and § 20-4-20(b)(iv) to be unconstitutional as applied to Doe and similarly situated individuals. Indeed, there are numerous references throughout the Opinion to "the Acts," "the statutes" or "both Acts." See also § 2-7-30 [all words in an Act importing the masculine gender shall apply to females and vice versa]. Moreover, it is clear that Petitioner Doe sought relief against both statutes in her Petition for Original Jurisdiction and in her Complaint. Furthermore, the State even challenged Doe's

standing to assert the unconstitutionality of § 16-25-10(d)(3) (Domestic Violence Reform Act) because no prosecution had yet been initiated by Doe. Nevertheless, notwithstanding the State's assertion of lack of standing, the Court granted original jurisdiction and declared unconstitutional the definition of "household member" in both statutes. We have no doubt about that conclusion.

Both the State and Doe sought rehearing of the first Doe decision because it left victims of domestic violence who were in a cohabiting relationship or who had formerly cohabited without any remedy. The Court revised its decision to address that flaw. The conclusion in the revised Opinion states that ". . . We declare sections 16-25-10(3) and 20-4-20(b) unconstitutional as applied to Doe. Therefore, the family court may not utilize these statutory provisions to prevent Doe or those in similar same-sex relationships from seeking an Order of Protection." While the Court's language does refer to an "Order of Protection," that same language also expressly refers to "section 16-25-10(3)," as well as making reference to "these statutory provisions." It is logical that the Court singled out an "Order of Protection" merely because that is what Doe had originally sought before the Family Court, and such Order had been denied. By contrast, Doe had not sought to prosecute her partner criminally for domestic violence. However, Doe clearly sought relief in the original jurisdiction with respect to the unconstitutionality of both statutes and that is the relief the Supreme Court granted.

Accordingly, we believe it is clear that prosecutions may be initiated under the Domestic Violence Reform Act against the perpetrator of domestic violence by the victim in an unmarried, cohabiting same-sex relationship. In addition to Doe's preserving the remedy of a cohabiting partner (same-sex or heterosexual) to seek an Order of Protection, Doe also declared that a cohabiting partner (same-sex or heterosexual) possesses the remedy of criminal prosecution under the Domestic Violence Reform Act.

With respect to any argument that a potential defendant might not receive fair notice of the inclusion of same-sex relationships in § 16-25-10(d)(3), we reject such an argument. As demonstrated above, Doe included victims of domestic violence in a same-sex cohabiting (or formerly cohabiting) relationship to be included with the scope of the Domestic Violence Reform Act, notwithstanding the literal language of § 16-25-10(d)(3). Any defendant in a same-sex relationship (cohabiting or formerly cohabiting) would be deemed to be on notice of the Court's Doe decision. Of course, it is elementary that a "statute must give sufficient notice to enable a reasonable person to comprehend what is prohibited." State v. McKnight, 352 S.C. 635, 650, 576 S.E.2d 168, 176 (2003). In Whitner v. State, 328 S.C. 1, 16, 492 S.E.2d 777, 784-85 (1997), the Court rejected any argument that Whitner did not receive sufficient notice of a charge of child endangerment because the prosecution was based upon cocaine abuse to a viable fetus. Previous decisions had, however, construed a viable fetus as a "child" and thus the Court stated "we do not see how Whitner can claim she lacked that her behavior constituted child endangerment as proscribed in Section 20-7-50. Whitner had all the notice the Constitution requires."

Thus, we agree with the South Carolina Commission on Prosecution Coordination that "based on the Supreme Court's decision, that individuals in or formerly in a same-sex relationship not only may seek an Order of Protection against a same-sex partner, but that similarly situated individuals may pursue a criminal prosecution for acts of domestic violence where criteria of S.C. Code § 16-25-20 or 16-25-65 are satisfied." Accordingly, in our opinion, the language of the revised decision in Doe v. State provides fair notice that the prohibitions of the Domestic Violence Reform Act apply to same-sex, cohabiting partners, as well as to heterosexual cohabiting partners.

Sincerely,

Robert D. Cook
Solicitor General