ALAN WILSON
ATTORNEY GENERAL

February 18, 2020

The Honorable Molly M. Spearman
State Superintendent of Education
Rutledge Building
1429 Senate Street
Columbia, SC 29201

Dear Superintendent Spearman:

You seek our opinion as to whether § 59-32-30(A)(5) would pass constitutional muster under the Equal Protection Clause. Your letter further notes that § 59-32-30 provides as follows:

> SECTION 59-32-30. Local school boards to implement comprehensive health education program; guidelines and restrictions.
> (A) Pursuant to guidelines developed by the board, each local school board shall implement the following program of instruction:
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> . . .
>
> (5) The program of instruction provided for in this section may not include a discussion of alternate sexual lifestyles from heterosexual relationships including, but not limited to, homosexual relationships except in the context of instruction concerning sexually transmitted diseases.
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> S.C. Code Ann. Section 59-32-30(5)

Specifically, you ask "whether Section 59-32-30(5) violates the Equal Protection Clause of the Constitution of the United States or other relevant constitutional provisions."

It is our opinion that a court would likely conclude that this provision is unconstitutional as violative of Equal Protection. In light of the United States Supreme Court decision in Obergefell v. Hodges, 575 U.S. ___, 135 S.Ct. 2584 (2015), as well as other decisions to be discussed below, relating to discrimination on the basis of sexual orientation, we suggest that the General Assembly repeal the statute. Although statutes, such as § 59-32-30(A)(5) have yet to be reviewed by the courts, there is already strong constitutional precedent in the area of discrimination on the basis of sexual orientation to predict with a fair degree of certainty that a court would strike down the statute. School officials who abide by this provision may not be

entitled to "good faith" immunity in light of Obergefell, and other authorities, thereby subjecting them to the risk of § 1983 liability.

We also note that the religious liberties of parents, students, teachers and administrators who object to a discussion of homosexuality in the classroom must be protected. Section 59-32-50 authorizes an "opt out" from the class teaching health education. Moreover, there are potentially free exercise of religion rights which must be protected as well. Only a court can balance these competing interests so that all constitutional rights are protected.

Law/Analysis

Background of Section 59-32-30(A)(5)

Section 59-32-30(5) is part of the Comprehensive Health Education Act of 1988. As we stated in an earlier opinion,

> [t]he Comprehensive Health Education Act, codified at Section 59-32-[30](5) was enacted in 1988. The General Assembly's purpose in adopting the legislation was
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> > . . . to foster the department and dissemination of education activities and materials which will assist South Carolina students, teachers, administrators and parents to the perception, appreciation and understanding of health principles and problems and responsible sexual behavior.
>
> As part of the Act, Section 59-32-30 provides for a program of instruction in health education to be presented to local school boards. This program is limited, however, by Section 59-32-30(A)(5) which mandates the following:
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> > [t]he program of instruction provided for in this section may not include a discussion of alternate sexual lifestyles from heterosexual relationships including, but not limited to homosexual relationships except in the context of instruction concerning sexually transmitted diseases.

Op. S.C. Att'y Gen., 1997 WL 569098 (August 21, 1997).

Provisions, such as are found in § 59-32-30(A)(5), were the result, at least in part, of the AIDS epidemic in the 1980's. As one scholar has noted,

> . . . [b]y the late 1980's [there resulted] a paradigm shift in sex education debates . . . which inspired many states to adopt new sex-education and HIV education laws. . . . In more than a dozen states, these new laws included anti-gay language. The inclusion of such language reflected a national backlash against the gay liberation movement. . . .

Rosky, "Antigay Curriculum Laws," 117 Colum. L. Rev. 1461, 1487-88 (Oct. 2017) (footnotes omitted). Professor Rosky further describes the passage of such laws in various states as follows:

> [i]n 1987 and 1988, nine states adopted anti-gay curriculum laws. . . . Between 1989 and 1996, another seven states adopted them. . . . All told, sixteen states adopted a total of twenty anti-gay sex-education and HIV-education laws in a period of nine years. . . . In many instances, these were the state's first laws discussing sex education of any kind. In one form or another, they all facially discriminated against homosexuality – as an unacceptable "lifestyle," a cause of HIV, a "criminal offense," or sexual activity outside of "marriage."

Id. at 1491 (footnote omitted).

Passage of the 1988 Comprehensive Health Education bill in South Carolina, and particularly § 59-32-30(A)(5), generated considerable controversy at the time, and has since. The media described the enactment of the legislation as follows:

> [a]s if they didn't have enough problems dealing with the marital rape bill, legislators were plunged into debate over teaching sex education in public schools.
>
> The battle pitted conservatives, who didn't want their children to learn about sex at school, against those who argued teaching students about sex would cut down on teenage pregnancies.
>
> In the end, both sides won a little.
>
> The Legislature passed a bill that requires schools to each comprehensive health education and sex education to students. Generally, it bars contraception from being discussed before the sixth grade, bars contraceptives from being sold at schools, segregates students by sex for classes on contraception and makes teachers preach [abstinence] or be fired. It won't let them talk about homosexuality except in the context of diseases.

Scoppe, "Assembly Debated Sex, Drugs, Alcohol Among Other Things," The State, 1988 WLNR 418436 (June 5, 1988). In 1992, the South Carolina Gay and Lesbian Pride Movement called for amendment of the Comprehensive Health Education Act to permit inclusion of information on homosexuality as an alternative lifestyle in the schools. See The State, 1992 WLNR (June 15, 1992).

Subsequently, we issued the 1997 opinion, referenced above, regarding the constitutionality of § 59-32-30(A)(5). There, we noted that, with respect to instruction in the public schools concerning alternate lifestyles, including the "gay lifestyle," "[i]t is apparent from the face of Section 59-32-30(A)(5) that the Comprehensive Health Education Act does not

permit such 'instruction' in the public schools." In that opinion, we addressed the First Amendment rights of students and teachers as limited by § 59-32-30(A)(5). We there concluded:

>]i]n matters of curriculum, the State is given even more control over expression than may be enjoyed in other areas of activity. Virgil v. Sch.Bd. of Columbia County, 862 F.2d 1517 (11th Cir. 1989). In Virgil, the school board decided to discontinue use of a universities textbook which it deemed sexual and vulgar. The Court concluded that the decision to remove the text from the curriculum met the standards of the First Amendment because such decision was "reasonably related to its [the Board's] legitimate concerns regarding the appropriateness (for this high school audience) of the sexuality and vulgarity in these works." 862F.2d at 1523.
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> And in Cary v. Bd. Ed. of Adams-Araphoe Sch. Dist. 28-J.. Aurora. Colorado, 598 F.2d 535(10th Cir. 1979), the Court concluded that it is entirely appropriate under the First Amendment that a school's curriculum "reflect the value systems and educational emphasis which are the collective will of those whose children are being educated and who are paying the costs." Id. at 542.
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> Mercer v. State Bd. of Ed., 379 F.Supp. 580 (E.D.Mich.S.D. 1974), affd, 419 U.S. 1081 (1974), is instructive here. In Mercer, the Court reviewed the constitutionality of a state statute which forbade the teaching of birth control in the public schools. In upholding the constitutional validity of the statute, the Court stated that
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> [t]he State may establish its curriculum either by law or by delegation of its authority to the local school boards and communities. This is a long recognized system of operation within our Nation....
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> The parents who send their children to public schools accept the curriculum which is offered with certain limited exceptions. Parents may and often times do work at local and state levels in an effort to add to or delete from the curriculum certain material.... The legislature has seen fit to insure a particularly sensitive subject be left to the wisdom of parents....
>
> The statutes which have been presented for the court's scrutiny are not overly broad nor do they violate the First Amendment Anti-establishment Clause. The State has the power to establish the curriculum or to delegate some of its authority to local agencies for the final shaping of the curriculum.
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> Id. at 585-586. Here the State has by statute determined the limits of discussion of homosexual relationships in the classroom of the State's schools. Such a statutory requirement is reasonably related to legitimate pedagogical concerns and is thus constitutionally valid.

Op. S.C. Att'y Gen., 1997 WL 569098, supra. This opinion was considered before the series of Supreme Court decisions striking down various forms of discrimination on the basis of sexual orientation, which will be discussed fully below. As one commentator has stated, while "no

promo homo" laws may not violate the First Amendment rights of teachers, such laws "likely violate the Fourteenth Amendment." Hamed-Troyansky, "Erasing 'Gay' From the Blackboard: The Unconstitutionality of 'No Promo Homo' Education Laws," 20 U.C. Davis J. Juv. L. & Pol'y 85, 98 (Winter, 2016).

Unfortunately, the courts do not appear to have addressed the validity of provisions such as § 59-32-30(A)(5). Moreover, as noted, our 1997 opinion focused primarily upon the First Amendment, and did not directly address Equal Protection. Most importantly, as noted, the law concerning discrimination on the basis of sexual orientation and whether such discrimination is violative of the Equal Protection Clause has evolved considerably since 1997 when our opinion was written. Thus, we must now review the case law as it stands today.

Evolution of Equal Protection Law
As Related to Sexual Orientation

Professor Rosky, in his extensive article on so-called "promo homo" laws, focuses his analysis upon the Equal Protection Clause rather than the First Amendment. He notes that Supreme Court decisions in recent years addressing anti-gay legislation have consistently concluded that the specific law in question violates Equal Protection. For that reason, he concludes, an Equal Protection challenge to anti-gay curriculum laws will likely succeed in court. His overview of the recent Supreme Court jurisprudence may be summarized as follows:

> [t]he equal protection challenge is more relevant to a national campaign against anti-gay curriculum laws for both pragmatic and doctrinal reasons. First, the equal protection challenge targets a single quality shared by all antigay curriculum laws: the fact that they facially discriminate against lesbian, gay and bisexual people. By contrast, the free speech challenge depends on the specific meaning and scope of each state's anti-gay curriculum law – issues that vary significantly from one jurisdiction to another. . . . Second, the equal protection challenge is based on a consistent trend in the Court's analysis of anti-gay laws. In four rulings issued over the last two decades – Romer v. Evans, . . . [517 U.S. 620 (1996)], Lawrence v. Texas, [539 U.S. 558 (2003)], . . . United States v. Windsor, [133 S.Ct. 2675 (2013)] . . . and Obergefell v. Hodges, [135 S.Ct. 2584 (2015) – the Court has invalidated every anti-gay law that has come before it, without specifying the level of scrutiny that applies to such laws. Although the Court primarily analyzed two of these cases under a due process framework, rather than an equal protection framework, . . . the Court expressly endorsed the equal protection claims brought in all four cases. . . . By relying on the principles articulated in these cases, [this] . . . explains why the equal protection challenge is likely to prevail in all jurisdictions, regardless of what level of scrutiny is applied to anti-gay curriculum laws. . . .

Rosky, supra at 1518. Other commentators agree with Professor Rosky. See e.g., Cooley, "Constitutional Representations of the Family In Public Schools: Ensuring Equal Protection For All Students Regardless of Parental Sexual Orientation or Gender Identity," 76 Ohio St. L.J. 1007 (2015). ["The central thesis of this Article is that there is a viable foundation for student-

centered, federal constitutional challenges to legislation that stigmatizes or prohibits the teaching of LGBTQI relationships in public schools."]. Id. at 1012. As Professor Cooley further explained:

> [e]ssentially, these laws could be successfully challenged by children of LGBTQI parents on equal protection grounds with a claim of a protected class status subject to elevated scrutiny akin to the school children protected by *Plyler v. Doe* [, 457 U.S. 202, 219 (1982)]. . . . Even if the judiciary is not prepared to afford the children of these families heightened constitutional protections in the context of "no promo homo" educational laws, this stigmatizing legislation would likely not be able to withstand the deferential level of rational basis review, as these laws are paradigmatic of the type of animus that cannot survive this type of constitutional scrutiny.

Id. (footnotes omitted).

Professor Cooley discussed South Carolina's § 59-32-30(A)(5) extensively. Her analysis of this provision states:

> [s]imilar to its other state counterparts, South Carolina's code prohibits any positive portrayals of LGBTQI relationships. . . . Specifically, South Carolina's statutory comprehensive health education program requires the exclusion of any "discussion of alternate sexual lifestyles from heterosexual relationships including, but not limited to, homosexual relationships except in the context of instruction concerning sexually transmitted diseases." . . . . In South Carolina, teachers who "refuse [ ] to comply with this sexual education curriculum are subject to dismissal." [§ 59-32-80]. This type of punitive statutory provision has a considerably coercive effect in terms of teaching or discussion of any nonheterosexual relationships within the schoolhouse door. . . . It also reflects the Briggs Initiative ideology of the expansive reach of its prohibitions on the speech and teaching of all public school employees, regardless of their own sexual orientation. . . . Parents have the right to opt their children out of the 'health education program [if it] conflicts with the family's beliefs [§ 59-32-50].... School districts are charged with the responsibility to not "penalize" or "embarrass" such excepted students. . . .

Id. at 1020 [footnotes omitted]. See also Hamed-Troyansky, "Erasing 'Gay' From the Blackboard: The Unconstitutionality of 'No Promo Homo' Education Laws," supra at 112 [". . . 'no promo homo' education laws likely do not even pass rational basis review."].

We now proceed to review the recent Supreme Court jurisprudence in the area of discrimination based upon sexual orientation. Romer v. Evans represented a landmark case in sexual orientation jurisprudence. In Romer, supra, the United States Supreme Court invalidated Colorado's amendment to the State Constitution which prohibited all legislative, executive, or judicial action designed to protect homosexual persons from discrimination. The Court concluded that "[i]t is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is

the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." 517 U.S. at 633. Rejecting the State's justification for the amendment – that the measure protected freedom of association – the Court concluded that the amendment was a "status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." Id. at 635.

In Bostic v. Schaefer, 760 F.3d 352, 374 (4th Cir. 2014), the Fourth Circuit recognized the importance of Romer, as well as the cases decided subsequently to it. According to the Court,

> [t]wo decades later, in Romer v. Evans, the Supreme Court struck down a Colorado constitutional amendment that prohibited legislative, executive, and judicial action aimed at protecting gay, lesbian, and bisexual individuals from discrimination. . . . The Court concluded that the law violated the Fourteenth Amendment's Equal Protection Clause because "its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects," causing the law to "lack [ ] a rational relationship to legitimate state interests." Id. at 632, 116 S.Ct. 1620. . . . The Court has meaningfully altered the way it views both sex and sexual orientation through the equal protection lens.

See also Condon v. Haley, et al., 21 F.Supp.3d 572 (D.S.C. 2014) [Court declares South Carolina's constitutional amendment banning same-sex marriage unconstitutional [ ]]; Bradacs v Haley, 58 F.Supp.3d 514 (D.S.C. 2014) [same].

In Lawrence v. Texas, supra, the Court struck down Texas' sodomy law. The statute made it a crime for two persons of the same sex to engage in certain intimate sexual conduct. Overruling its earlier decision in Bowers v. Hardwick, 474 U.S. 186 (1986), which had upheld a sodomy statute as constitutional, the Court in Lawrence found that the Bowers decision was rooted in the historical moral disapproval of homosexuality:

> [i]t must be acknowledged, of course, that the Court in Bowers was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the state to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code." Planned Parenthood of Southeastern Pa v. Casey, 505 U.S. 833, 850, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992).

539 U.S. at 571.

Lawrence cited Romer with approval, noting that the constitutional amendment in Romer was "'born of animosity toward the class of persons affected'" and that it had "no rational relation to a legitimate government purpose." Id. at 574. The Court noted that "[t]he stigma this criminal statute imposes is not trivial." Id. Further, according to the Court, "[t]he foundations of Bowers have sustained serious erosion from our recent decisions in Casey and Romer." Id. at 576. In the Court's view,

> [t]he case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.

Id. at 578.

The decision in United States v. Windsor, supra, invalidated the federally enacted Defense of Marriage Act's (DOMA) definition of "marriage" which excluded same-sex partners. In Windsor, a same-sex couple had been lawfully married in New York, but faced dramatic burdens imposed by DOMA. According to the Supreme Court,

> [a]gainst this background, DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each state, though they may vary, subject to constitutional guarantees, from one state to the next. Despite these considerations, it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance. The State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism. Here the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity and protection of the class in their own community. DOMA because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage.
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> "'[D]iscrimination of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.'" Romer v. Evans, 517 U.S. 620, 623, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) (quoting Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 37-38, 48 S.Ct. 423, 72 L.Ed. 770 (1928)).

570 U.S. at 768. In short, the Court determined that "DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government." Id. at 769.

Finally, in Obergefell v. Hodges, supra, the Court struck down state constitutional amendments which prohibited same-sex marriages. Citing Romer, Lawrence, and Windsor, the Court concluded:

> [i]t is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central principles of equality. Here the marriage laws enforced by the respondents are in essence unequal; same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, the denial of same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry. . . .

135 S.Ct. at 2604.

And, in Pavan v. Smith, 137 S.Ct. 2075 (2017), the Court held that a provisions of Arkansas law which required name of mother's male spouse to appear on the child's birth certificate when the mother conceived the child by artificial insemination, but allowed omission of mother's female spouse violated the Equal Protection Clause. In the words of the Court, "Obergefell proscribes such disparate treatment." Further, added the Court in Pavan,

> [a]s we explained there [in Obergefell], a state may not "exclude same-sex couples from civil marriage in the same terms and conditions as opposite-sex couples." . . . Indeed, in listing those terms and conditions – the "rights, benefits and responsibilities" to which same-sex couples must have access – we expressly identified "birth and death certificates." That was no accident: Several of the Plaintiffs in Obergefell challenged a state's refusal to recognize their same-sex spouses on their children's birth certificates. . . . In considering those challenges, we held the relevant state laws unconstitutional to the extent they treated same-sex couples differently from opposite-sex couples. . . . Id. at 2078 (citations omitted).

Likewise, our own Supreme Court, in Doe v. State, 421 S.C. 490, 808 S.E.2d 807 (2017), has followed these decisions in striking down the exclusion of same-sex couples from the protections of South Carolina's domestic violence statutes. Concluding that the definition of "household member" was unconstitutional as applied to same-sex couples under the Equal Protection Clause, the Court determined that these laws encompassed same-sex couples rather than severing the domestic violence protections altogether. According to the Court,

> [t]urning to the facts of the instant case, Doe has met her burden of showing that similarly situated persons received disparate treatment. . . . While there is some limited authority to support the application of intermediate scrutiny, we need not make that determination because the definition of "household member" as applied to Doe cannot even satisfy the rational basis test.

> Defining "household member" to include "a male and female who are cohabiting or formerly have cohabited," yet exclude (1) a male and male and (2) a female and female who are cohabiting or formerly have cohabited," fails this low level of scrutiny. Specifically, we conclude the definition: (1) bears no relation to the legislative purpose of the Acts; (2) treats same-sex couples who live together or have lived together differently than all other couples; and (3) lacks a rational reason to justify this disparate treatment.

421 S.C. at 505, 828 S.E.2d at 814-15.

The State's Interest In Section 59-32-30(A)(5)

Scholars have recognized at least four interests arguably served by anti-gay curriculum laws. These are: (1) the promotion of moral disapproval of homosexual conduct; (2) the promotion of children's heterosexual development; the prevention of sexually transmitted infections, and (4) the tradition of federalism which grants states broad authority to regulate public schools. Rosky, supra at 1525. However, as Professor Rosky explains, "the first and second interests do not qualify as 'legitimate' under the principles articulated in Romer, Lawrence and Windsor. The third and fourth interests are legitimate, but anti-gay curriculum laws are not rationally related to them."

With respect to the third justification set forth above, Professor Rosky states:

> [i]n cases challenging anti-gay curriculum laws, the link between homosexual conduct and sexually transmitted infections is even weaker than in cases challenging anti-gay sodomy laws. Unlike the sodomy laws challenged in Lawrence and Limon [State v. Limon, 122 P.3d 22 (Kan. 2008)], most anti-gay curriculum laws do not specify the types of sexual activity that they seek to deter. By using turns like the "homosexual lifestyle," "homosexuality," and "marriage," anti-gay curriculum laws sweep in a "way of life" a "quality or state of being," and a "contractual relationship recognized by law" – far more than oral and anal intercourse between two persons of the same sex.

Id. at 1529.

Further, as to the State's broad power to regulate public schools, the Court recognized in Epperson v. Arkansas, 393 U.S. 97, 107 (1968) the "State's undoubted right to prescribe the curriculum for its public schools. . . ." However,

> . . .[t]he Court's jurisprudence leaves no reason to presume that state legislatures have broader authority to regulate within public schools than in . . . other traditional domains of state power. On the contrary, the Court has long held that a state's authority to regulate public schools must be discharged "within the limits of the Bill of Rights." [W.Pa. State Bd. of Ed v. Barnette, 319 U.S. 624, 637 (1943)]. . . . The

> leading cases are familiar, but they offer instructive examples in this regard. In West Virginia v. Barnette, the Court held that states could not require schoolchildren to recite the Pledge of Allegiance and salute the American flag. . . .
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> In Brown v. Board of Education [347 U.S. 483, 495 (1954), the Court held that states could not segregate public schools based on race, even if they provided school facilities that were otherwise equal. . . . In Tinker v. Des Moines Independent School District [393 U.S. 503, 514 (1969)] . . . the Court held that public schools could not prohibit students from wearing black armbands to protest the Vietnam War. . . . In Epperson v. Arkansas [supra], the Court held that states could not ban the teaching of Darwin's Theory of evolution in public schools. . . . And in Edwards v. Aguillard, [482 U.S. 578, 596-99 (1987)], the Court held that states could not require the teaching of creationism in public schools. . . . In Barnette, the first of these cases, the Court explained:
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> > The Fourteenth Amendment, as now applied to the States, protects the citizen against the state itself and all of its creatures – Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights.

Rosky, supra at 1531-32 (quoting Barnette, 319 U.S. at 687).

Further, in Keyishian v. Bd. of Regents of the University of the State of New York, 385 U.S. 589, 603 (1967), the Court observed that the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The classroom is peculiarly the 'marketplace of ideas.'" Moreover, in Epperson, the Court explained that

> Arkansas' law cannot be defended as an act of religious neutrality. Arkansas did not seek to excise from the curricula of its schools and universities all discussion of the origin of man. The law's effort was confined to an attempt to blot out a particular theory because of the supposed conflict of the Biblical account, literally read. Plainly, the law is contrary to the mandate of the first and in violation of the Fourteenth Amendment to the Constitution.

393 U.S. at 109.

Religious Liberty and Free Speech Rights

While a court is likely to conclude that § 59-32-30(A)(5) violates the Equal Protection Clause, at the same time, the religious beliefs of students, teachers, parents and administrators must also be protected. There are, of course, those teachers, students and parents who object to a discussion of homosexuality on religious grounds. As the Court in Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm., ___ U.S. ___, 138 S.Ct. 1719, 201 L.Ed.2d 35 (2018) stated, in the context of a baker who objected to same-sex marriage as a matter of religious conscience,

"[t]he case present difficult questions as to the proper reconciliation of at least two principles. The first is the authority of the State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be married but who face discrimination when they seek goods or services. The second is the right of all persons to exercise fundamental [religious] freedoms under the First Amendment. . . ." Id. at 1723. The Court further explained that

> [o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts. At the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression. As this Court observed in Obergefell v. Hodges, 576 U.S. ___, 135 S.Ct. 2584, 192 L.Ed.2d 609(2015), "[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths."

Id. at ____, 135 S.Ct. at 7607. . . .

The Eighth Circuit, in Telescope Media Group v. Lucero, 936 F.3d 740 (8th Cir. 2019), relied upon Masterpiece Cakeshop in concluding that a ban on sexual orientation discrimination in the Minnesota Human Rights Act, thereby requiring that a wedding videographer serve same-sex couples seeking wedding video services violated the First and Fourteenth Amendment rights of free speech, expressive association, free exercise, equal protection and due process. According to the Court, "[e]ven discrimination laws, as critically important as they are, must yield to the Constitution." 936 F.3d at 755. The Court cited Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. Of Boston, 515 U.S. 557 (1995) as "particularly instructive." In Hurley, noted the Court,

> [w]hen Massachusetts forced the organizers of a private parade to include a group that wished "to march in the parade as a way to express pride in their Irish heritage as openly gay, lesbian and bisexual individuals, "id. at 560-61, 115 S.Ct. 2338, the Supreme Court concluded that applying the State's public accommodation law in this way violated the organizers' freedom of speech, id. at 566, 115 S.Ct. 2338. Although antidiscrimination laws are generally constitutional, the Court reasoned, a "peculiar" application that required speakers "to alter the[ir] expressive conduct was not. Id. at 572-73, 115 S.Ct. at 2338 (emphasis added). In short, the Court drew the line exactly where the Larsens ask us to here: to prevent the government from requiring their speech to serve as a public accommodation for others.

Id. at 755. The Court cited *Masterpiece Cakeshop* for the proposition that it "is not . . . the role of the State or its officials to prescribe what shall be offensive." Id. (quoting Masterpiece Cakeshop, 138 S.Ct. at 1731).

Conclusion

Courts have not yet addressed the constitutionality of statutes such as § 59-32-30(A)(5), which are commonly known as "no promo homo" laws. Such statues require that homosexuality may not be discussed in the public schools as part of the sex education curriculum. A number of states enacted such statutes in the late 1980's, in the wake of the AIDS epidemic, including South Carolina. However, the United States Supreme Court, in a series of decisions, has concluded that provisions which discriminate on the basis of sexual orientation violate the Equal Protection Clause. Likewise, in Doe v. State, our own Supreme Court has held that exclusion of same-sex couples from the protections of domestic violence statutes contravenes the State and federal Equal Protection Clause as applied to those same-sex couples. In other words, statutes which discriminate on the basis of sexual orientation, typically, will not stand up in court.

In the Romer, Lawrence, Windsor, and Obergefell decisions, discussed above, the Court has held that such overt discrimination, based upon sexual orientation, constitutes "a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests...." The Court deemed such discrimination to be "a classification of persons undertaken for its own sake...." Romer, supra.

While the constitutionality of these "no promo homo" laws have not yet been decided by the courts, virtually every legal commentator has concluded that, based upon Romer, Lawrence, Windsor and Obergefell, such laws are unconstitutional as violative of the Equal Protection Clause. We agree that a court is likely to adopt the analysis that Section 59-32-30(A)(5) overtly discriminates on the basis of sexual orientation, forbidding any discussion of the "homosexual relationship' in the classroom. While this may be a matter of choice as part of the parent-child relationship, a court may well conclude that such distinctions cannot be written into law as being prohibited for discussion in the public schools. The court would likely determine that such discrimination does not serve a legitimate state interest. Moreover, the Supreme Court has stated that the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom." Keyishian, supra. If the Court has concluded that same –sex marriage may not be forbidden consistent with the Constitution's Equal Protection Clause, we cannot see how laws which forbid discussion of homosexuality in the public schools altogether can pass constitutional muster.

Thus, in our view, based upon the decisions referenced above, § 59-32-30(A)(5) is constitutionally suspect. Violation of the statute can result in the teacher or school administrator being fired. See § 59-32-80. This is a drastic remedy and likely unconstitutional. In light of the decisions in Romer, Lawrence, Windsor and Obergefell, § 59-32-30(A)(5) puts school officials who would follow it, including teachers, at risk of liability pursuant to 42 U.S.C. § 1983. In our view, a court would likely say that the place for such issues is the home or the church, not the classroom. Whether we agree or not, the Constitution is the Constitution. The prudent course

would, therefore, be for the General Assembly to repeal the statute which has been done in other states having similar statutory provisions.

While we believe a court would likely conclude that § 59-32-30(A)(5) is unconstitutional, we would also emphasize that the rights of those parents, teachers and children, and administrators who object to a discussion of homosexuality in the classroom must be protected. Parents have the right to protect their children from what they perceive as an endorsement into one belief system or another. For instance, § 59-32-50, parents are given the option "to exempt their child from this instruction." [from Comprehensive Health Education Program classes]. According to the statute, "[n]otice must be provided sufficiently in advance of a student's enrollment in courses using these instructional materials to allow parents and legal guardians the opportunity to preview the materials and exempt their children." Thus, even if a court were to declare § 59-32-30(A)(5) to be unconstitutional, as we believe is likely, parents who wish to exempt their child on the basis of discussion of homosexuality, is afforded the statutory right to do so.

Also to be considered is the First Amendment's religious liberty provisions discussed above. As the Court in Masterpiece Cakeshop stated, "gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth," but "[a]t the same time, the religious and philosophical objections to gay marriage [and lifestyle are] in some instances protected terms of expression. . . . '[T]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths.'" In short, the Court has made clear that these rights must be carefully balanced. This balancing requirement in the public schools is particularly difficult, depending upon factors such as the age of the child, the right of the school to control its curriculum, the right of the parent to the free exercise of religion, the right of the student and teacher, etc. See Parker v. Hurley, 514 F.3d 87 (1st Cir. 2008). As the Court emphasized in Parker, "[p]ublic schools often walk a tightrope between the many constitutional demands made by parents, students, teachers, and the schools' other constituents." Id. at 107. It would be up to a court to ensure that the balance between these competing interests is preserved.

In response to your specific question, we believe a court likely would conclude that § 59-32-30(A)(5) violates the Equal Protection Clause. As has been summarized by one constitutional scholar, the Supreme Court has "invalidated every anti-gay law that has come before it, without specifying the level of scrutiny that applies to such laws." An "equal protection challenge is likely to prevail [in court]. . . ." Rosky, supra at 1518. It is up to the court to protect the religious liberty rights of parents, students, teachers, and administrators who object to discussions involving homosexuality as well. This office has consistently supported and will continue to support the protection of religious liberties in every context. Important free exercise of religion rights must be protected, while at the same time, ensuring that anti-gay discrimination which violates the Constitution is not present in the classroom.

Sincerely,

Robert D. Cook
Solicitor General