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November 9, 2017

RECEIVED
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S.C. SUPREME COURT

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: State v. Elias J. Walker, Appellate Case No. 2014-001462
Oral Argument Wednesday, November 15, 2017, Supplemental Authority

Dear Ms. Shearouse:

Pursuant to Rule 208(b)(7), SCACR, appellant cites to this Court the attached authority of Jane Doe v. State, Op. No. 27728, Shearouse's Adv. Sh. No. 28, at pp. 55–74 (filed July 26, 2017), on the equal protection argument issue in the present case. I have attached six copies of this case for the Court's convenience. Pursuant to Rule 208(b)(7), SCACR, I am also serving a copy of this case today on opposing counsel, William F. Schumacher, of the South Carolina Attorney General's office. I thank the Court for its consideration of this supplemental citation.

Please do not hesitate to contact me if any additional information is needed or desired.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

RMD/csb

Enclosure

cc: William F. Schumacher, Esq.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jane Doe, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2015-001726

IN THE ORIGINAL JURISDICTION

Opinion No. 27728
Heard March 23, 2016 – Filed July 26, 2017

DECLARATORY JUDGMENT ISSUED

John S. Nichols, of Bluestein Nichols Thompson & Delgado, L.L.C., and Bakari T. Sellers and Alexandra Marie Benevento, both of Strom Law Firm, L.L.C., all of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Solicitor General Robert D. Cook, Deputy Solicitor General J. Emory Smith, Jr., and Assistant Attorney General Brendan Jackson McDonald, all of Columbia, for Respondent.

ACTING JUSTICE PLEICONES: We agreed to hear this matter in our original jurisdiction. The issue in this case arises from the classifications contained in South Carolina's domestic violence statutes. Specifically, the classifications

provide that only "Household member[s]," defined as, *inter alia*, a "*male and female* who are cohabiting or formerly have cohabited," are protected under the statutes. (Emphasis supplied). Petitioner challenges these classifications, arguing they unconstitutionally exclude unmarried, cohabiting or formerly cohabiting, same-sex couples from the protection of the domestic violence statutes—the very protections afforded their opposite-sex counterparts. 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 Criminal 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 subsection from each Act.[1]

FACTS

The General Assembly originally passed the Acts in 1984. At that time, while § 20-4-20 did not provide protection for any unmarried, cohabiting couples, § 16-25-10 stated: "As used in this article, 'family or household member' means spouses, former spouses, parents and children, persons related by consanguinity or affinity within the second degree, and *persons cohabitating or formerly cohabitating.*" (Emphasis supplied). Thus, as initially enacted, there were no gender-based classifications as to persons protected under the Acts.

In 1994, the original definitions of "Household member[s]" were amended and replaced with more narrow definitions providing domestic violence protection for, *inter alia*, "a *male and female who are cohabiting or formerly have cohabited.*"[2]

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[1] We decline to address petitioner's Due Process argument as we find the Equal Protection issue dispositive. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting an appellate court need not address remaining issues on appeal when the disposition of an independent issue is dispositive (citation omitted)).

[2] In full, the 1994 provisions at issue read:

> As used in this article, 'household member' means spouses, former spouses, parents and children, persons

See Act No. 484, 1984 S.C. Acts 2029; Act No. 519, 1994 S.C. Acts 5926, 5926–27; 5929 (emphasis supplied). Subsequent amendments to the Acts in 2003 and 2005 retained the gender-based distinctions made in 1994. *See* Act No. 92, 2003 S.C. Acts 1538, 1541, 1550; Act No. 166, 2005 S.C. Acts 1834, 1836, 1842.

In June 2015, the General Assembly substantially amended the Domestic Violence Reform Act,[3] which provided harsher penalties for offenders, including a partial gun ban, and authorized judges to issue permanent Orders of Protection.[4] *See* Act No. 58, 2015 S.C. Acts 225 (effective June 4, 2015). These most recent amendments left intact the gender-based designations of "Household member[s]" first adopted in 1994. The distinction—affording protection under the Acts to unmarried, cohabiting or formerly cohabiting, opposite-sex couples only—is challenged as a violation of Equal Protection.

In this case, following an alleged domestic violence incident between petitioner and her former same-sex partner, petitioner sought an Order of Protection from the Richland County Family Court. The Family Court denied her request, finding she was not entitled to protection under the Protection from Criminal Domestic Violence Act due to the statutory definitions of "Household member." We agreed

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> related by consanguinity or affinity within the second degree, persons who have a child in common, and a male and female who are cohabiting or formerly have cohabited. § 16-25-10.
>
> 'Household member' means spouses, former spouses, parents and children, persons related by consanguinity or affinity within the second degree, persons who have a child in common, and a male and female who are cohabiting or formerly have cohabited. § 20-4-20.

[3] Prior to 2015, the Domestic Violence Reform Act was designated the "Criminal Domestic Violence Act." Act No. 58, 2015 S.C. Acts 225 (effective June 4, 2015).

[4] "'Order of protection' means an order of protection issued to protect the petitioner or minor household members from the abuse of another household member where the respondent has received notice of the proceedings and has had an opportunity to be heard." S.C. Code Ann. § 20-4-20(f) (2014) (emphasis supplied).

to hear petitioner's constitutional challenges to these definitional statutory subsections in our original jurisdiction.

ISSUE

Do the subsections at issue, which exclude from domestic violence protection unmarried, cohabiting or formerly cohabiting, same-sex couples, violate the Equal Protection Clause?

LAW/ANALYSIS

The Acts provide remedies for victims of domestic violence who meet the statutory definition of "Household member[s]," currently defined 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." § 16-25-10(3); § 20-4-20(b) (emphasis supplied). In affording protection to victims of domestic violence, both Acts protect persons in an unmarried, cohabiting or formerly cohabiting relationship, but only if the relationship is between a male and a female. Petitioner contends the definitions of "Household member[s]," delineating into classes unmarried, cohabiting or formerly cohabiting couples based on the gender of the persons in the relationship, offend the Equal Protection Clause. We agree.

It is undeniable that in 1994, the General Assembly divided the original class designated "persons cohabiting or formerly cohabiting" into two sub-classes. The members of the first sub-class—consisting of unmarried, cohabiting or formerly cohabiting, opposite-sex couples—remain entitled to seek protection under the Acts if they become victims of domestic violence. To the contrary, since 1994, similarly situated same-sex couples are no longer afforded such protection.

The Equal Protection Clause states, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Equal Protection Clause applies to government classifications, which occur when government action imposes a burden or confers a benefit on one class of persons to the exclusion of others. *See* Russell W. Galloway, Jr., Basic Equal Protection Analysis, 29 Santa Clara L. Rev. 121, 123 (1989) (citing S*an Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 59 (1973) (Stewart, J., concurring) ("The function of the Equal Protection Clause, rather, is simply to measure the validity of classifications created by state laws.")). A government classification does not violate the Equal Protection Clause, however, if the classification can

survive the applicable level of scrutiny. *Denene, Inc. v. City of Charleston*, 359 S.C. 85, 91, 596 S.E.2d 917, 920 (2004) (citing 16B Am.Jur.2d Constitutional Law § 812 (1998)). While the applicable level of scrutiny may be unclear,[5] we find the statutory subsections cannot survive even the most government-friendly, deferential level of scrutiny—the rational basis standard.

A statutory classification does not violate the Equal Protection Clause under the rational basis standard if: (1) the classification bears a reasonable relation to the legislative purpose sought to be achieved; (2) the members of the class are treated alike under similar circumstances and conditions; and (3) the classification rests on some reasonable basis. *See Curtis v. State*, 345 S.C. 557, 574, 549 S.E.2d 591, 599–600 (2001) (citing *Whaley v. Dorchester Cnty. Zoning Bd. of Appeals*, 337 S.C. 568, 524 S.E.2d 404 (1999)). In this case, we cannot find a reasonable basis for providing protection to one set of domestic violence victims—unmarried, cohabiting or formerly cohabiting, opposite-sex couples—while denying it to others.[6] Accordingly, we find no constitutionally valid rational basis for the

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[5] The United States Supreme Court has unquestionably found discrimination against same-sex couples is violative of Equal Protection; however, the Supreme Court has provided little guidance as to the level of scrutiny such cases should be afforded. *Cf. Obergefell v. Hodges*, 135 S.Ct. 2584 (2015) (failing to apply any level of scrutiny in striking down the ban on gay marriage); *United States v. Windsor*, 133 S. Ct. 2675, 2706 (2013) (Scalia, J., dissenting) ("The opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality.").

[6] We disagree with Justice Few that the language at issue is ambiguous. Without citing the language of the Acts or their legislative history, Justice Few concludes that "male and female" can reasonably include all same-sex cohabiting or formerly cohabitating couples. The plain language is clear and the intent is unmistakable: the legislative history of the Acts unequivocally demonstrates the General Assembly intentionally excluded same-sex couples from the protections of the Acts. *Cf. Obergefell*, 135 S.Ct. at 2590.

We further disagree with Justice Few's reliance on the parties' positions in this action rather than on the law. In deciding legal issues, we err when we abdicate our judicial responsibilities and instead defer to a party's argument. *See Joytime*

statutory classifications created by the definitional subsections at issue under the Acts.

Having found the definitional subsections excluding unmarried, cohabiting or formerly cohabiting, same-sex couples violate the Equal Protection Clause, the inquiry then becomes: What is the remedy?

A statute may be constitutional and valid in part and unconstitutional and invalid in part. *See Thayer v. South Carolina Tax Comm'n*, 307 S.C. 6, 12–13, 413 S.E.2d 810, 814–15 (1992) (citing *Strom v. Amvets*, 280 S.C. 146, 311 S.E.2d 721 (1984)). Where a portion of a statute is deemed unconstitutional, courts should determine whether the unconstitutional portion may be severed from the remainder of the statute. *See Dean v. Timmerman*, 234 S.C. 35, 43, 106 S.E.2d 665, 669 (1959) (citation omitted). The test for severability is whether the constitutional[7] portion of the statute remains "complete in itself, wholly independent of that which is rejected, and is of such a character as that it may fairly be presumed that the Legislature would have passed it independent of that which is in conflict with the Constitution. . . ." *Id.* (quoting *Shumpert v. South Carolina Dep't of Highways*, 306 S.C. 64, 409 S.E.2d 771 (1991) (citation omitted)). The existence of a severability clause within a piece of legislation indicates the General Assembly's intent that the several parts of the legislation be treated independently, and that in the event a portion of the legislation is found unconstitutional, the remainder be allowed to stand. *See State v. Dykes*, 403 S.C. 499, 509, 744 S.E.2d 505, 510 (2013); *Joytime Distributors & Amusement Co. v. State*, 338 S.C. 634, 648–49, 528 S.E.2d 647,

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Distributors, 338 S.C. at 654, 528 S.E.2d at 657 ("Although we may view the task with disfavor, and may have varying personal views on the merits of the controversy . . . we cannot ignore precedent and our duty to interpret the constitution."). The important constitutional question in this case requires each member of this Court exercise his or her own legal judgment, and reach his or her own conclusion rather than acceding to the positions expounded by the parties. *Cf. McMaster v. Columbia Bd. of Zoning Appeals*, 395 S.C. 499, 504, 719 S.E.2d 660, 662 (2011) (noting an issue regarding the constitutional interpretation of a legislative enactment is a question of law to be decided by the Court).

[7] We do not intend by this analysis to imply the remaining subsections of the Acts are constitutional. As no issue pertaining to the remaining subsections is currently before this Court, we express no opinion as to their constitutionality.

654 (1999).

In this case, the test for severability is met. Specifically, all provisions of the Acts, save the discriminatory definitions, are capable of being executed in accordance with the legislative intent. *Thayer*, 307 S.C. at 12–13, 413 S.E.2d at 814–15. Further, it may be fairly presumed the General Assembly would have passed each Act absent the offending provision, and both Acts contain severability clauses. *See Joytime Distributors*, 338 S.C. at 648–49, 528 S.E.2d at 654; *Thayer*, 307 S.C. at 12–13, 413 S.E.2d at 814–15. Therefore, the remedy for this constitutional infirmity is to sever the discriminatory provision from each Act.[8] *See Thayer*, 307 S.C. at 13, 413 S.E.2d at 814–15. The remainder of each Act—providing domestic violence protection to "Household member[s]" defined as a spouse, former spouse, or persons who have a child in common—remain in effect. *See* § 16-25-10(3)(a–c); § 20-4-20(b)(i–iii).

CONCLUSION

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

The Declaratory Judgment is therefore

ISSUED

HEARN, J., concurs. KITTREDGE, J., concurring in result only. BEATTY, C.J., concurring in part and dissenting in part in a separate opinion. FEW, J., concurring in part and dissenting in part in a separate opinion.

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[8] Specifically, the severed provisions are: § 16-25-10(3)(d) of the Domestic Violence Reform Act; and S.C. Code Ann. § 20-4-20(b)(iv) of the Protection from Criminal Domestic Violence Act.

CHIEF JUSTICE BEATTY: 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) of the Protection from Domestic Abuse Act[9] (collectively "the Acts") violates Doe's rights under the Equal Protection Clause of the Fourteenth Amendment[10] 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(3) and 20-4-20(b) unconstitutional as applied to Doe.

I. Type of Constitutional Challenge

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[9] The Acts define "household member" as:

> (a) a spouse;
>
> (b) a former spouse;
>
> (c) persons who have a child in common; or
>
> (d) *a male **and** female* who are cohabiting or formerly have cohabited.

S.C. Code Ann. § 16-25-10(3) (Supp. 2015) (emphasis added); *id.* § 20-4-20(b) (2014) (defining "household member" identical to section 16-25-10(3), but designating provisions with lowercase Roman numerals rather than letters).

[10] U.S. Const. amend XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); *see* S.C. Const. art. I, § 3 ("The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.").

In reaching this conclusion, my analysis differs from the majority as I believe it is necessary to first determine the type of constitutional challenge posed by Doe. In her brief and the allegations in the declaratory judgment pleadings, it appears that Doe claims the statutes are facially invalid *and* invalid "as applied" to her. However, as will be discussed, I would find that Doe can only utilize an "as-applied" challenge.

"The line between facial and as-applied relief is [a] fluid one, and many constitutional challenges may occupy an intermediate position on the spectrum between purely as-applied relief and complete facial invalidation." 16 C.J.S. *Constitutional Law* § 153, at 147 (2015). Further, "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010). Rather, "[t]he distinction is both instructive and necessary, for it goes to the breadth of the *remedy* employed by the Court, not what must be pleaded in a complaint." *Id.* (emphasis added).

"A facial challenge is an attack on a statute itself as opposed to a particular application." *State v. Legg*, 416 S.C. 9, 13, 785 S.E.2d 369, 371 (2016) (citing *City of Los Angeles, Calif. v. Patel*, ___U.S. ___, 135 S. Ct. 2443, 192 L. Ed. 2d 435 (2015)). Consequently, in analyzing a facial challenge to the constitutional validity of a statute, a court "considers only the text of the measure itself and not its application to the particular circumstances of an individual." 16 C.J.S. *Constitutional Law* § 163, at 161 (2015).

One asserting a facial challenge claims that the law is "invalid *in toto* – and therefore incapable of any valid application." *Steffel v. Thompson*, 415 U.S. 452, 474 (1974). This type of challenge is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [statute] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Thus, "[u]nless the statute is unconstitutional in all its applications, an as-applied challenge must be used to attack its constitutionality." *Travelscape, L.L.C. v. S.C. Dep't of Revenue*, 391 S.C. 89, 109 n.11, 705 S.E.2d 28, 39 n.11 (2011) (quoting *Williams v. Pryor*, 240 F.3d 944, 953 (11th Cir. 2001)); *Renne v. Geary*, 501 U.S. 312, 323-24 (1991) (recognizing that a facial challenge should generally not be entertained when an "as-applied" challenge could resolve the case).

In an "as-applied" challenge, the party challenging the constitutionality of the statute claims that the "application of the statute in the particular context in which

he has acted, or in which he proposes to act, would be unconstitutional." *Ada v. Guam Soc'y of Obstetricians & Gynecologists*, 506 U.S. 1011, 1011 (1992) (Scalia, J., Rehnquist, C.J., and White, J., dissenting), *denying cert. to* 962 F.2d 1366 (9th Cir. 1992). However, "finding a statute or regulation unconstitutional as applied to a specific party does not affect the facial validity of that provision." *Travelscape,* 391 S.C. at 109, 705 S.E.2d at 39; *see Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 965 (1984) (discussing "as-applied" challenges and stating, "despite some possibly impermissible application, the remainder of the statute covers a whole range of easily identifiable and constitutionally proscribable conduct" (internal quotation marks and citation omitted)). Instead, "[t]he practical effect of holding a statute unconstitutional 'as applied' is to prevent its future application in a similar context, but not to render it utterly inoperative." *Ada*, 506 U.S. at 1011.

Here, Doe contends that by failing to include unmarried, same-sex couples within the definition of "household member," the statutes are not only facially invalid, but invalid "as applied" because they excluded her from consideration for an Order of Protection in family court based on her sexual orientation. I find that Doe has failed to establish that the statutes are facially unconstitutional.

Initially, I note that Doe has not launched a wholesale attack on the Acts or the definition of "household member" nor does she advocate for invalidation of the statutory provisions in their entirety. Rather, she merely seeks to be included with those eligible to receive an Order of Protection. While this fact is not dispositive of a facial challenge, as it is necessary to focus on the text of the statutes, it is significant given the judicial preference to remedy any constitutional infirmity in the least restrictive way possible.

Turning to the text of the definition of "household member," I would find that it is facially valid because it does not overtly discriminate based on sexual orientation. Though not an all-inclusive list, the statutes would be valid as to same-sex married couples, opposite-sex married couples, and unmarried opposite-sex couples who live together or have lived together. Because there are numerous valid applications of the definition of "household member," it is not "invalid *in toto*." Consequently, I believe Doe must use an "as-applied" challenge to present her claim that she was intentionally excluded as a qualifying "household member" for an Order of Protection in family court. Thus, the question becomes whether the statutory

definition of "household member" as applied denied Doe equal protection of the laws.

II. Equal Protection Analysis

The Equal Protection Clauses of our federal and state constitutions declare that no person shall be denied the equal protection of the laws. U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3. Equal protection "requires that all persons be treated alike under like circumstances and conditions, both in privileges conferred and liabilities imposed." *GTE Sprint Commc'ns Corp. v. Pub. Serv. Comm'n of S.C.*, 288 S.C. 174, 181, 341 S.E.2d 126, 129 (1986) (quoting *Marley v. Kirby*, 271 S.C. 122, 123-24, 245 S.E.2d 604, 605 (1978)). "The *sine qua non* of an equal protection claim is a showing that similarly situated persons received disparate treatment." *Grant v. S.C. Coastal Council*, 319 S.C. 348, 354, 461 S.E.2d 388, 391 (1995).

"Courts generally analyze equal protection challenges under one of three standards: (1) rational basis; (2) intermediate scrutiny; or, (3) strict scrutiny." *Denene, Inc. v. City of Charleston*, 359 S.C. 85, 91, 596 S.E.2d 917, 920 (2004). "If the classification does not implicate a suspect class or abridge a fundamental right, the rational basis test is used." *Id.* "Under the rational basis test, the requirements of equal protection are satisfied when: (1) the classification bears a reasonable relation to the legislative purpose sought to be affected; (2) the members of the class are treated alike under similar circumstances and conditions; and; (3) the classification rests on some reasonable basis." *Id.* "Those attacking the validity of legislation under the rational basis test of the Equal Protection Clause have the burden to negate every conceivable basis which might support it." *Boiter v. S.C. Dep't of Transp.*, 393 S.C. 123, 128, 712 S.E.2d 401, 403-04 (2011) (citations omitted).

Turning to the facts of the instant case, Doe has met her burden of showing that similarly situated persons received disparate treatment. Doe suggests that this case should be subject to the intermediate level of scrutiny as a result of "gender classification"; however, she seems to concede that the appropriate standard is the rational basis test. While there is some limited authority to support the application of intermediate scrutiny, such a determination is unnecessary 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, 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.

Based on an interpretation of the Acts, the overall legislative purpose is to protect victims from domestic violence that occurs within the home and between members of the home. *See Moore v. Moore*, 376 S.C. 467, 476, 657 S.E.2d 743, 748 (2008) ("The Protection from Domestic Abuse Act was enacted to deal with the problem of abuse between family members. The effect of the Act was to bring the parties before a judge as quickly as possible to prevent further violence." (quoting 17 S.C. Jur. *Criminal Domestic Violence*, § 14 (Supp. 2007)).

Statistics, as identified by the State, reveal that "women are far more at risk from domestic violence at the hands of men than vice versa." Thus, the State maintains the General Assembly defined "household member" as "a male *and* female who are cohabiting or formerly have cohabited" to address the primary problem of domestic abuse within opposite-sex couples.

Without question, the statistics relied on by the State are accurate. However, a *victim* of domestic abuse is neither defined by gender, as the word is non-gender specific,[11] nor limited by the type of relationship within a home. For example, the abuse may occur between a mother and adult daughter or a father and adult son.

Moreover, although the Acts may have been originally enacted to address traditional findings of domestic abuse, new research shows that individuals within same-sex couples experience a similar degree of domestic violence as those in opposite-sex couples. *See* Christina Samons, *Same-Sex Domestic Violence: The Need for Affirmative Legal Protections at All Levels of Government*, 22 S. Cal. Rev. L. & Soc. Just. 417, 430-35 (2013) (recognizing recent reform to criminal and family laws for domestic abuse involving same-sex couples at the federal level and

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[11] *Cf.* S.C. Const. art. I, § 24 (outlining Victims' Bill of Rights and providing that it is intended to "preserve and protect victims' rights to justice and due process regardless of race, sex, age, religion, or economic status").

identifying need for similar reform at state level); Leonard D. Pertnoy, *Same Violence, Same Sex, Different Standard: An Examination of Same-Sex Domestic Violence and the Use of Expert Testimony on Battered Woman's Syndrome in Same-Sex Domestic Violence Cases*, 24 St. Thomas L. Rev. 544 (2012) (discussing similarities of domestic violence in same-sex versus opposite-sex couples; recognizing disparity in remedies afforded by the courts to victims of domestic violence in same-sex versus opposite-sex couples).

Because the Acts are intended to provide protection for all victims of domestic abuse, the definition of "household member," which eliminates Doe's relationship as a "qualifying relationship" for an Order of Protection, bears no relation to furthering the legislative purpose of Acts.

Additionally, the definition of "household member" treats unmarried, same-sex couples who live together or have lived together differently than all other couples. As I interpret the definition of "household member" a person, who fits within one of the following relationships, would be eligible for an Order of Protection: (1) a same-sex married or formerly married couple;[12] (2) a same-sex couple, either married or unmarried, who have a child in common;[13] (3) an opposite-sex married or formerly married couple; (4) an opposite-sex couple, either married or unmarried, who have a child in common; and (5) an unmarried opposite-sex couple who is living together or who has lived together.

Thus, while Doe and her ex-fiancé were similarly situated to other unmarried or formerly married couples, particularly unmarried opposite-sex couples who live

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[12] Judicial declarations have eliminated, for the most part, disparate treatment between same-sex and opposite-sex couples. *See Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding that states' ban on same-sex marriages violated the Equal Protection and Due Process Clauses).

[13] Sections 16-25-10(3)(c) and 20-4-20(b)(iii) identify a "household member" as including "*persons* who have a child in common." Thus, arguably an unmarried, same-sex couple who has a child in common would constitute a "qualifying relationship" for an Order of Protection. *See, e.g., V.L. v. E.L.*, 136 S. Ct. 1017 (2016) (holding the Alabama Supreme Court erred in refusing to grant full faith and credit to a Georgia decree of adoption, which was between an unmarried, same-sex couple who had three children in common but did not reside together).

together, Doe was precluded from seeking an Order of Protection based on the definition of "household member." There is no reasonable basis, and the State has offered none, to support a definition that results in disparate treatment of same-sex couples who are cohabiting or formerly have cohabited.

III. Remedy

Having concluded that the definition of "household member" is unconstitutional as applied to Doe, the question becomes what is the appropriate remedy.

Clearly, in the context of the statutory scheme of the Acts, this Court cannot construe and effectively amend the statutes to change the plain language of "and" to "or" as proposed by the State. *See Shelley Constr. Co. v. Sea Garden Homes, Inc.*, 287 S.C. 24, 28, 336 S.E.2d 488, 491 (Ct. App. 1985) ("We are not at liberty, under the guise of construction, to alter the plain language of the statute by adding words which the Legislature saw fit not to include."); *cf. State v. Leopard*, 349 S.C. 467, 473, 563 S.E.2d 342, 345 (Ct. App. 2002) (declining to alter statutory definition of "household member" in section 16-25-10; stating, "[i]f it is desirable public policy to limit the class to those physically residing in the household, that public policy must emanate from the legislature").

Also, even though the Acts include severability clauses,[14] there is no reason to employ them as 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 in the definition of "household member." Thus, severance cannot rectify the under inclusive nature of the definition.

Further, the majority's decision to remedy the constitutional infirmity through severance of the entire phrase "a male **and** female who are cohabiting or formerly have cohabited," is unavailing since the constitutional infirmity still remains. Specifically, 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

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[14] Act No. 58, 2015 Acts 225, 265-66 (providing a severability clause in 2015 Domestic Violence Reform Act); Act No. 166, 2005 Acts 1834, 1846 (providing a severability clause in 2005 Act amending Protection from Domestic Abuse Act, which includes definition of "household member" in section 20-4-20).

cohabited. Yet, it would be available to unmarried persons such as former spouses (same-sex or not) and persons (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. Such a drastic measure is neither necessary nor desired. *See Thayer v. S.C. Tax Comm'n*, 307 S.C. 6, 13, 413 S.E2d 810, 814-15 (1992) ("The test for severability is whether the constitutional portion of the statute remains complete in itself, wholly independent of that which is rejected, and is of such a character as that it may fairly be presumed that the Legislature would have passed it independent of that which is in conflict with the Constitution." (internal quotation marks and citation omitted)). Consequently, in contrast to the majority, I would reject the State's suggestion to sever the Acts as it is inconsistent with our rules of statutory construction and would contravene the intent of the General Assembly.

Finally, I would decline to invalidate the Acts in their entirety. Such a decision would result in grave consequences for victims of domestic abuse. To leave these victims unprotected for any length of time would be a great disservice to the citizens of South Carolina.

Consequently, in order to address the important issue presented in this case and remain within the confines of the Court's jurisdiction, I would declare sections 16-25-10(3) and 20-4-20(b) unconstitutional as applied to Doe. Accordingly, I would hold that 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. Gartner v. Iowa Dep't 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 married lesbian couple to whom a child was born to one of the spouse's during the couple's marriage; identifying appropriate remedy by stating, "Accordingly, instead of striking section 144.13(2) 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").

JUSTICE FEW: 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."); S.C. 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.").

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 in 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.

I. There is no Controversy before the Court

Our courts will not address the merits of any case unless it presents a justiciable controversy. *Byrd v. Irmo High Sch.*, 321 S.C. 426, 430-31, 468 S.E.2d 861, 864 (1996). In *Byrd*, we stated, "Before any action can be maintained, there must exist a justiciable controversy," and, "This Court will not pass on . . . academic questions or make an adjudication where there remains no actual controversy." *Id.*; *see also Peoples Fed. Sav. & Loan Ass'n v. Res. Planning Corp.*, 358 S.C. 460, 477, 596 S.E.2d 51, 60 (2004) ("A threshold inquiry for any court is a determination of justiciability, i.e., whether the litigation presents an active case or controversy."). Doe and the State agree the Protection from Domestic Abuse Act protects Doe, and therefore, there is no controversy.

Jane Doe filed an action in the family court seeking an order of protection from a threat of domestic violence pursuant to section 20-4-40 of the Protection from Domestic Abuse Act. S.C. Code Ann. § 20-4-40(a) (2014). By its terms, the Act applies to "any household members in need of protection." *Id.* By filing the action seeking the protection of the Act, Doe necessarily took the position that the definition of "household member" includes partners in unmarried same-sex couples, and thus includes her. Doe argues to this Court that the definition should be interpreted to include her. Her alternative argument—that the Act is unconstitutional—is based on the family court ruling she chose not to appeal. Rather than appeal, she filed this action naming the State as the only defendant.

The State, however, agrees with the position Doe took in family court—the definition of household member includes partners in unmarried same-sex couples, and thus includes Doe. In its Answer, the State contends that any "constitutional problem associated with the definitions at issue . . . may be addressed through interpretation to encompass unmarried same-sex couples." In its return to Doe's petition for original jurisdiction, the State wrote, "There is . . . no evidence that the Legislature intentionally discriminated against same-sex couples." At oral argument before this Court, the State disagreed with the statement "it is clear it is the legislative intent to exclude homosexual couples."[15] Also at oral argument, the State was asked—referring to the Protection from Domestic Abuse Act—"You're saying the statute covers Jane Doe?" to which the State responded, "Yes." In making these statements, the State asks this Court to interpret the definition of "household member" to include Doe and partners in other non-marital same-sex domestic relationships.

If Doe had appealed the family court's ruling that the Protection from Domestic Abuse Act did not apply to her, she would have presented a justiciable controversy to this Court. Doe chose not to appeal, and she filed this action. When the State agreed with Doe that the Act should be interpreted to protect her, it eliminated any controversy. The majority and concurring opinions overlook this important detail, and the majority suggests that my "reliance on the parties' positions" is contrary to the law. *See supra* note 6. In *Byrd*, we stated the law: "there must exist a justiciable controversy." 321 S.C. at 430, 468 S.E.2d at 864. When both sides agree, there is no controversy.

II. The Acts are *not* Unconstitutional

In *Joytime Distributors & Amusement Co. v. State*, 338 S.C. 634, 528 S.E.2d 647 (1999), this Court declared we would not construe an act of the General Assembly to be unconstitutional unless there was no choice but to do so.

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[15] A justice of the Court stated, "Following the legislative history of this statute, it is clear it is the legislative intent to exclude homosexual couples. Otherwise, they would not have changed the word 'person' to 'male and female.'" The State responded, "I respectfully disagree."

> This Court has a very limited scope of review in cases involving a constitutional challenge to a statute. All statutes are presumed constitutional and will, if possible, be construed so as to render them valid. A legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt. A legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates a provision of the constitution.

338 S.C. at 640, 528 S.E.2d at 650; *see In re Stephen W.*, 409 S.C. 73, 76, 761 S.E.2d 231, 232 (2014) (same); *S.C. Pub. Interest Found. v. S.C. Transp. Infrastructure Bank*, 403 S.C. 640, 645, 744 S.E.2d 521, 523 (2013) (same); *Clarke v. S.C. Pub. Serv. Auth.*, 177 S.C. 427, 435, 181 S.E. 481, 484 (1935) (same); *see also Abbeville Cty. Sch. Dist. v. State*, 410 S.C. 619, 628, 767 S.E.2d 157, 161 (2014) (reciting the principle that "we will not find a statute unconstitutional unless 'its repugnance to the Constitution is clear beyond a reasonable doubt'").

Under *Joytime Distributors*, we are constrained to interpret the Acts to include unmarried same-sex couples unless the Acts "so clearly" exclude them "as to leave no room for reasonable doubt." In other words, if the definition of "household member" in the Acts is clear, and if the definition so clearly excludes unmarried same-sex couples as to leave no reasonable doubt they are excluded, then the Court is correct to find the Acts unconstitutional. In my opinion, however, the definition of household member is not clear, and therefore the Acts are ambiguous. Because of this ambiguity, the Court is not correct to find the Acts unconstitutional. Rather, we should construe the Acts to protect partners in unmarried same-sex couples, and find them constitutional. *See Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011) ("Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law.").

To demonstrate the ambiguity, in 1994, "household member" was defined in terms of pairs or groups of people, "spouses, former spouses, parents and children, persons related . . . ." *See supra* note 2. In that context, the Acts logically applied when domestic violence occurred *between* the members of a defined pair or group.

In 2005, however, the definitions were amended[16] so that the primary subsections of each definition are now framed in terms of individual people: "a spouse; . . . a former spouse." *See supra* note 9. Under this current structure, the Acts apply when domestic violence is committed *upon* the members of the defined group.

The Protection from Domestic Abuse Act follows this structure. The Act "created an action known as a 'Petition for an Order of Protection' in cases of abuse *to* a household member." § 20-4-40 (emphasis added). The "petition for relief must allege the existence of abuse *to* a household member." § 20-4-40(b) (emphasis added). Under the current version of the Protection from Domestic Abuse Act, therefore, it is not necessary to imply the term "between" to understand how the Act operates.

The majority and concurring opinions overlook this important detail. In fact, the majority continues to rely on the pre-2005 structure of the Acts and holds the Protection from Domestic Abuse Act affords protection "only if the relationship is *between* a male and a female." Under the current structure of the Acts, however, the majority's statement is unjustified. The word "between" is simply not in the Acts. The fact the majority must read the term into the Acts demonstrates the definition of household member is not clear.

The ambiguity is further demonstrated by comparing the operation of the Acts regarding individuals included in the first and second subsections of the definition—"a spouse" and "a former spouse"—to those included in the fourth subsection—"a male and female . . ."—the subsection the majority finds unconstitutional. A person may seek an order of protection under the Protection from Domestic Abuse Act "in cases of abuse to a household member." If we apply that provision using the first subsection of the definition, an order of protection is available "in cases of abuse to [a spouse]." This construction makes perfect sense. Using that same construction when applying the provision using the subsection at issue here, an order of protection is available "in cases of abuse to [a male and female . . .]." This application makes no sense. Reading the text literally, there must be two victims before an order of protection is available.

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[16] Act No. 166, 2005 S.C. Acts 1834, 1836.

It also makes no sense to apply the majority's "between" construction to the first and second subsections of the definitions of household member after the 2005 amendments. The following is a sentence from the majority opinion substituting the text of the first subsection where the majority used the text of the fourth, "In affording protection to victims of domestic violence, both Acts protect persons . . . , but only if the relationship is between [a spouse]." The "between" construction worked in 1994 because the text of the subsection was "spouses," but the construction does not work in the post-2005 version because the General Assembly changed the text.

However, the majority's constitutional analysis is not driven by its interpretation of the text of the Acts. Rather, the majority's analysis is driven by its interpretation of the *actions* the General Assembly took in 1994, and the improper motives the majority believes may be inferred from those actions. The majority states "the legislative history of the Acts unequivocally demonstrates the General Assembly intentionally excluded same-sex couples from the protections of the Acts." *See also supra* note 15. According to this Court's own jurisprudence, however, the majority's consideration of legislative history is itself improper. Rather, the Court may not consider legislative history unless the text of the statute is ambiguous. *See Smith v. Tiffany*, 419 S.C. 548, ___, 799 S.E.2d 479, 483 (2017) ("If a statute is clear and explicit in its language, then there is no need to resort to statutory interpretation or legislative intent to determine its meaning." (quoting *Timmons v. S.C. Tricentennial Comm'n*, 254 S.C. 378, 401, 175 S.E.2d 805, 817 (1970))). "Absent an ambiguity, there is nothing for a court to construe, that is, a court should not look beyond the statutory text to discern its meaning." *Smith*, 419 S.C. at ___, 799 S.E.2d at 483.

If the statutory text truly was clear and unambiguous, the majority would not need to consider legislative history to determine the motives of the General Assembly. The statutory text is not clear, and therefore, this Court must find a way to construe the Acts as constitutional. *Abbeville Cty. Sch. Dist.*, 410 S.C. at 628, 767 S.E.2d at 161; *Stephen W.*, 409 S.C. at 76, 761 S.E.2d at 232; *S.C. Pub. Interest Found.*, 403 S.C. at 645, 744 S.E.2d at 523; *Joytime Distributors*, 338 S.C. at 640, 528 S.E.2d at 650; *Clarke*, 177 S.C. at 435, 181 S.E. at 484.

I respectfully believe Doe and other members of same-sex unmarried couples are covered by the Acts and the Acts are therefore constitutional.