UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

GENDER AND SEXUALITY ALLIANCE; CAMPAIGN FOR SOUTHERN EQUALITY; and SOUTH CAROLINA EQUALITY COALITION, INC., Plaintiffs, v. MOLLY SPEARMAN, in her official capacity as South Carolina State Superintendent of Education, Defendant.	No. 2:20-cv-00847-DCN

JOINT MEMORANDUM IN SUPPORT OF MOTION FOR ENTRY OF CONSENT DECREE AND JUDGMENT

Plaintiffs Gender and Sexuality Alliance, Campaign for Southern Equality, and South Carolina Equality Coalition, Inc. ("Plaintiffs") and Defendant Molly Spearman, South Carolina State Superintendent of Education ("Defendant"; collectively, "the Parties") respectfully submit the following memorandum of law in support of their Joint Motion for Entry of a Consent Decree and Judgment.

I. FACTUAL BACKGROUND

In 1988, South Carolina enacted the Comprehensive Health Education Act ("the Act"), codified at S.C. Code §§ 59-32-5 et seq. The Act requires local school boards to adopt and implement a program of instruction in comprehensive health education, which includes subjects such as community health, growth and development, personal health, prevention and control of diseases and disorders, safety and accident prevention, and mental and emotional health. *See id.* § 59-32-30.

The Act provides that a program of instruction under the Comprehensive Health Education Act "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." S.C. Code § 59-32-30(A)(5) ("the Challenged Provision"). The Act further provides that "[a]ny teacher violating the provisions of this chapter or who refuses to comply with the curriculum prescribed by the school board as provided by this chapter is subject to dismissal." S.C. Code § 59-32-80.

On February 26, 2020, the Plaintiffs filed a Complaint in the United States District Court for the District of South Carolina, alleging that the Challenged Provision violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. The Complaint alleged the Challenged Provision singled out non-heterosexual students as a class for negative treatment based on their sexual orientation by preventing any health education about their relationships except in the context of sexually transmitted diseases, without imposing any comparable restriction on health education about heterosexual people. The Complaint sought to permanently enjoin Defendant from enforcing the Challenged Provision, and a declaration from the Court that the Challenged Provision violates the Equal Protection Clause.

II. TERMS OF THE PROPOSED CONSENT DECREE

The Consent Decree would order, adjudge, and decree that:

1. The Equal Protection Clause of the Fourteenth Amendment to the U. S. Constitution provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." The Challenged Provision, S.C. Code § 59-32-30(A)(5), is a classification based on sexual orientation that does not serve any legitimate state interest and thus cannot satisfy any standard of judicial review under the Equal Protection Clause.

2. The Superintendent and the Superintendent's officers, assigns, successors, agents, employees, attorneys, and other persons who are acting in concert or in participation with each or any of them, are permanently enjoined from enforcing, applying, or relying on S.C. Code. § 59-

32-30(A)(5).

3. The duties and obligations of this Consent Decree and Judgment are placed on the South Carolina Superintendent of Public Education in her official capacity and not in her individual capacity. The Consent Decree and Judgment names Superintendent Molly Spearman, the Superintendent of Schools when this action was commenced. If and when Ms. Spearman is no longer Superintendent of Schools, the duties and obligations of this Consent Decree and Judgment shall apply to any successor to the position of the South Carolina Superintendent of Public Education as long as the current version of S.C. Code § 59-32-30(A)(5) remains in the South Carolina Code.

4. Defendant Superintendent shall ensure, to the fullest extent of her authority under applicable law that instruction under the Comprehensive Health Education Act be designed and implemented without regard to S.C. Code § 59-32-30(A)(5). This includes, at a minimum, that all future policies (including but not limited to regulations, practices, guidelines, curriculum standards, accreditation materials, and training materials) of Defendant, her agents and employees, and the South Carolina Department of Education, shall be consistent with this Consent Decree and Judgment.

5. Within 60 days of entry of this Consent Decree and Judgment, the Superintendent shall issue a Superintendent Memorandum (Memorandum) to all members of the State Board of Education and the superintendents of every public school district in South Carolina. The Memorandum will, at the minimum: (1) include a copy of this Consent Decree; (2) state that S.C. Code § 59-32-30(A)(5) may no longer be enforced, applied, or relied on by any person or entity, including but not limited to local school districts, local school district boards, and public school administrators and teachers; and (3) direct that instruction under the Comprehensive Health

Education Act be designed and implemented without regard to S.C. Code § 59-32-30(A)(5).

6. Within 60 days of the entry of this Consent Decree and Judgment, the Superintendent shall also provide notice to the public on the websites of the State Board of Education and State Department of Education that will, at a minimum: (1) provide that S.C. Code § 59-32-30(A)(5) may no longer be enforced, applied, or relied on by any person or entity, including but not limited to local school districts, local school district boards, and public school administrators and teachers; (2) provide that instruction under the Comprehensive Health Education Act must be designed and implemented without regard to S.C. Code § 59-32-30(A)(5); and (3) link to a copy of this Consent Decree and Judgment. This notice will remain on the State Board of Education's and State Department of Education's website so long as the current version of S.C. Code § 59-32-30(A)(5) remains in the South Carolina Code.

III. THE COURT SHOULD ENTER THE PROPOSED CONSENT DECREE

"In considering whether to enter a proposed consent decree, a district court should be guided by the general principle that settlements are encouraged." *United States v. North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999) (citation omitted). Before approving entry of a consent decree, the district court has a duty to "satisfy itself that the agreement 'is fair, adequate, and reasonable' and 'is not illegal, a product of collusion, or against the public interest.'" *Id.* (quoting *United States v. Colorado*, 937 F.2d 505, 509 (10th Cir. 1991)). The district court should "ensure that it is able to reach 'an informed, just and reasoned decision.'" *Id.* at 581 (citing *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975)). The proposed Consent Decree easily meets this standard.

A. The Proposed Consent Decree Is Fair, Adequate, and Reasonable Given the Strength of Plaintiffs Case

The proposed Consent Decree is fair, adequate, and reasonable in light of the strength of

Plaintiff's case. *See North Carolina*, 180 F.3d at 581 ("In considering the fairness and adequacy of a proposed settlement, the court must assess the strength of the plaintiff's case.") (citation omitted). In making this assessment, because the determination is made before trial, the district court is "not require[d] … to conduct 'a trial or a rehearsal of the trial . . . .'" *Id.* (quoting *Flinn*, 528 F.2d at 1172-73). Indeed, "it is precisely the desire to avoid a protracted examination of the parties' legal rights that underlies entry of consent decrees." *Bragg v. Robertson*, 83 F. Supp. 2d 713, 717 (S.D.W. Va. 2000), *aff'd sub nom. Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275 (4th Cir. 2001). As a result, the district court need only "judge the fairness of a proposed compromise by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981).

The text of the Challenged Provision places it in a category of laws that have been struck down by the Supreme Court for violating the rights of gay people and people in same-sex relationships to equal treatment under the law. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015) (recognizing "a long history of disapproval of their relationships, this denial to same-sex couples [of equal status for their relationships] … works a grave and continuing harm. . . . serv[ing] to disrespect and subordinate them"). The Challenged Provision was enacted as part of South Carolina's Comprehensive Health Education Act in 1988. It creates an express classification for non-heterosexual students, prohibiting any mention of their relationships other than in the context of "instruction concerning sexually transmitted diseases," while imposing no such restrictions on classroom discussions of heterosexual relationships. S.C. Code § 59-32-30(A)(5). As such, it singles out non-heterosexual students for negative treatment in the classroom, "impos[ing] a special disability upon" them. *See Romer v. Evans*, 517 U.S. 620, 631 (1996). The Challenged Provision cannot pass muster under the Equal Protection Clause because

it "impose[s] a disadvantage, a separate status, and so a stigma upon" non-heterosexual students. *United States v. Windsor*, 570 U.S. 744, 770 (2013).

Bolstering the strength of Plaintiffs' likelihood of success on the merits, the South Carolina Attorney General's Office issued an opinion on February 18, 2020 stating that "a court likely would conclude that § 59-32-30(A)(5) violates the Equal Protection Clause." S.C. Attorney General, Opinion Letter on the Constitutionality of S.C. Code § 59-32-30(A)(5) at 14 (Feb. 18, 2020), *available at* https://bit.ly/2PHcRYx ("S.C. Att'y Gen. Op."). The opinion considered the history of the Challenged Provision, the series of Supreme Court cases published following the enactment of the Challenged Provision striking down various forms of discrimination on the basis of sexual orientation, any potential state interests, and religious liberty and free speech rights. *See id.* The Attorney General concluded that "a court is likely to adopt the analysis that Section 59-32-30(A)(5) overtly discriminates on the basis of sexual orientation" and "would likely determine that such discrimination does not serve a legitimate state interest." *Id*. at 13.

Plaintiffs and Defendant agree that the Challenged Provision "is not rationally related to any legitimate governmental interest and thus cannot satisfy any standard of judicial review under the Equal Protection Clause." Proposed Consent Decree at 3; *see also Romer*, 517 U.S. at 634 ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.") (citation omitted); S.C. Att'y Gen. Op. at 10.

Finally, the proposed Consent Decree is fair, adequate, and reasonable because the remedies agreed upon by the Parties resolve Plaintiffs' claims in a narrow manner. The Consent Decree does not impose affirmative obligations with respect to curricula. Nor does the Consent

Decree disturb the provision in the Comprehensive Health Education Act regarding notice to parents and parents' rights to exempt their children from instruction on reproductive health, family life, pregnancy prevention, and sexually transmitted diseases. *See* S.C. Code § 59-32-50. Rather, the Consent Decree simply removes the categorical prohibition on the discussion of same-sex relationships in comprehensive health education. Accordingly, the Defendant is simply "enjoined from enforcing, applying, or relying on" the Challenged Provision, and required to disseminate and publish a notice of the injunction. Proposed Consent Decree at 4 ¶¶4, 6-8. Given the strength of Plaintiffs' claims, as outlined above, the narrow remedies the Parties have agreed upon in the proposed Consent Decree are reasonable.

B. The Proposed Consent Decree Is the Product of Good-Faith Negotiation, Not Illegal or the Product of Collusion, and Is in the Public Interest

Before entering a consent decree the Court must also "satisfy itself that the agreement . . . 'is not illegal, a product of collusion, or against the public interest.'" *L.J. v. Wilbon*, 633 F.3d 297, 311 (4th Cir. 2011) (quoting *North Carolina*, 180 F.3d at 581). Courts have found these requirements satisfied when parties negotiating at arms' length seek to end a defendant's unlawful conduct by bringing it within "permanent and consisten[t] compliance" with the law. *United States v. Town of Timmonsville*, No. 4:13-cv-01522, 2013 WL 6193100, at *4 (D.S.C. Nov. 26, 2013) (approving environmental consent decree).

1. The Proposed Consent Decree Is Lawful

The Consent Decree, which prevents enforcement of an unconstitutional statutory provision, is not illegal. It removes an unconstitutional provision from South Carolina's code. *Cf. Carson v. Heigel*, No. 3:16-cv-0045, 2017 WL 624803, at *2 (D.S.C. Feb. 15, 2017) (finding South Carolina state registrar's refusal to treat "same-sex spouses in the same manner she treats opposite-sex spouses in the issuance of birth certificates" violative of "the Fourteenth

Amendment to the United States Constitution"). The Attorney General of South Carolina agrees. S.C. Att'y Gen. Op. at 1. And among the handful of states that have similar laws restricting discussion of "homosexuality" in public school health instruction, legal challenges such as this one have prompted repeal. *See* S.B. 1346, 54th Leg., 1st Reg. Sess. (Ariz. 2019), *available at* https://bit.ly/32HzD7U; S.B. 196, 62nd Leg., Gen. Sess. (Utah 2017), *available at* https://bit.ly/39miJhK. The removal of an unconstitutional provision from a state's code is lawful.

2. Good-faith Negotiations Produced the Proposed Consent Decree

The proposed Consent Decree also is the product of good-faith negotiation. All parties in this matter are represented by experienced and able counsel, and the ultimate proposal is the culmination of good-faith, arms-length negotiation. "Naturally, the agreement reached normally embodies a compromise" in which each party foregoes an interest in the litigation for the benefit of efficiency and certainty. *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971). Here, Plaintiffs have agreed to accept a settlement judgment "as it is written, and not as it might have been written had the plaintiff[s] established [their] factual claims and legal theories in litigation." *Id.* at 682. Plaintiffs also have agreed, contingent on approval of the consent decree, to forego seeking attorneys' fees and costs against Defendant. On the other side of the equation, Defendant has "waived [her] right to litigate the issues raised, a right guaranteed to [her] by the Due Process Clause" in exchange for avoiding the significant uncertainty of litigation and accompanying expenditure of public resources. *Id*. The Parties thus believe they have, "after careful negotiation" settled upon a compromise whereby "in exchange for the saving of cost and elimination of risk, the parties each give up something" otherwise available to them "had they proceeded with the litigation." *Id.* at 681.

3. Entering the Proposed Consent Decree Would Serve the Public Interest

The proposed Consent Decree also serves the public interest. Its terms protect a vulnerable segment of students from being singled out for negative treatment. The Challenged Provision singles out "homosexual relationships" for negative treatment, prohibiting any mention of them in health education except in the context of instruction about sexually transmitted diseases. The state has an interest in eliminating that unequal treatment, especially in light of other disparities such youth face. Data from the U.S. Centers for Disease Control indicate that nationally, 29% of lesbian, gay, and bisexual youth had attempted suicide at least once *in the prior year*, compared to 6% of heterosexual youth. U.S. Ctrs. for Disease Control & Prevention, LGBT Youth, at https://www.cdc.gov/lgbthealth/youth.htm (accessed Mar. 3, 2020).

The citizens of South Carolina also benefit from the Consent Decree. Resolving this matter without protracted litigation avoids the unnecessary use of public resources to litigate this case. It is "precisely the desire to avoid a protracted examination of the parties' legal rights which underlies consent decrees," and "[n]ot only the parties, but the general public as well, benefit from the saving of time and money that results from the voluntary settlement of litigation." *Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117, 1126 (D.C. Cir. 1983). Continued litigation necessarily involves continuing risk to the state. *See Armour & Co.*, 402 U.S. at 681 (explaining that in entering consent decrees "parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation"). Moreover, Defendant's assessment of these priorities is entitled to a measure of deference. *Cf. Bragg*, 83 F. Supp. 2d at 717 (where a government agency is "charged with protecting the public interest" and has assisted in constructing the proposed settlement, "a reviewing court may appropriately accord substantial weight to the agency's expertise and public

interest responsibility") (internal quotation marks and citation omitted).

CONCLUSION

For the reasons above, the Parties respectfully request that the Court grant the Parties' joint motion and enter the proposed Consent Decree and Judgment.

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