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84-28

JAMES E. TIERNEY
ATTORNEY GENERAL



STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

October 30, 1984

Honorable Joseph E. Brennan
Governor of Maine
State Capitol
Augusta, Maine 04333

Dear Governor Brennan:

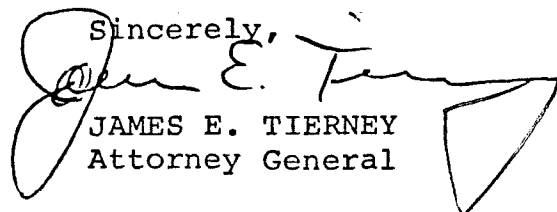
Enclosed you will find the Opinion you requested on October 19, 1984 relative to the Equal Rights Amendment. As you and I have discussed, your request was prompted by the divergent claims being raised publicly by both opponents and proponents of the Equal Rights Amendment and the obvious need for an objective analysis so that the voters will have before them accurate information upon which to base their decision. This Opinion complies with your request, and you and Maine voters can safely rely on its conclusions.

Further, this Opinion is clearly more than the thoughts of one person. It represents the collective efforts of a Department which prides itself on the accuracy of its decisions. As an official Opinion, unlike the Memorandum of the Department of the Attorney General of February 10, 1984, this document represents the official legal position of the State. As such, it will be vigorously defended in any lawsuit that attempts to utilize the Maine Equal Rights Amendment to invalidate the current restrictions on abortion or homosexual marriages. I have no doubt that the State would be successful in such a suit based on the precedents supporting the conclusions contained in this Opinion.

The Opinion does not, of course, attempt to tell anyone how to vote. Further, the Opinion clearly does not in any way speak for the moral, religious, philosophical correctness of the judicial decisions discussed. Rather, it is a comprehensive and straightforward legal analysis of the actual effect of Maine's proposed Equal Rights Amendment in two important areas.

I would be happy to meet and discuss this Opinion with you in detail at your convenience.

Sincerely,


JAMES E. TIERNEY
Attorney General

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ATTORNEY GENERAL



STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

October 30, 1984

The Honorable Joseph E. Brennan
Governor, State of Maine
State House Station No. 1
Augusta, Maine 04333

Dear Governor Brennan:

This will respond to your inquiry of October 19, 1984, in which you ask two questions about the possible effects of a Maine Equal Rights Amendment. You asked:

1. Would the approval of a Maine Equal Rights Amendment require the State of Maine to finance abortions for poor women?
2. Would the approval of a Maine Equal Rights Amendment require the State of Maine to recognize, as legal, marriages between persons of the same sex?

Prior to answering your questions, the Department reviewed the language and legislative history of the Maine Equal Rights Amendment ("ERA") and solicited the opinions, and the materials relied upon to support those opinions, of both the proponents and opponents of the ERA. In response to that request, numerous materials were provided to the Department by the ERA for Maine Committee, the ERA Impact Coalition, the Christian Civic League of Maine, the Maine Right to Life Committee, and the Stop ERA for Me. Committee. This information has been carefully scrutinized by the Department in the formulation of this Opinion. Additionally, members of the Department reviewed the impact of the ERA in the sixteen states that have adopted it, and all relevant judicial decisions, whether or not based on a State ERA, on abortion funding and homosexual marriages.

Having completed this review, it is the Opinion of the Department of the Attorney General that approval of the Maine Equal Rights Amendment would not require the State either to fund abortions for poor women or to recognize homosexual marriages.

While the remainder of this Opinion will document these conclusions in detail, they rest primarily on two facts. First, the unambiguous legislative history of the ERA precludes any attempt to use that amendment to require state funded abortions or recognize homosexual marriage. Second, no state has been required either to fund abortions or to recognize homosexual marriages as a result of its ERA. Because Maine's refusal to finance abortions for indigent women distinguishes between indigent and non-indigent women, not between men and women, and because similarly the State's refusal to recognize the homosexual marriage of either homosexual men or homosexual women does not distinguish between men and women, neither refusal constitutes the discrimination prohibited by the proposed ERA.

I. The ERA Would Not Require State Funded Abortions

The answer to the question whether the ERA would require state funded abortions for poor women turns on the legislative history of the ERA and court decisions construing similar provisions. First, the plain wording of the ERA does not require it. Second, the legislative history leaves little doubt that the Legislature did not intend the ERA to affect the State's restrictions on abortion funding or require abortion funding. Third, no similar provision has been interpreted to require a State to fund abortions. The reasoning of the courts in reaching this result--and considering abortion funding under other constitutional provisions--makes clear that the State's decision not to fund abortions for poor women is a reasonable allocation of the State's resources that will not be affected by passage of the ERA.

A. The Legislative History of the Maine ERA Precludes Its Application To Require State Funding of Abortion.

The Maine Equal Rights Amendment prohibits discrimination on the basis of sex. It reads in full:

"Equality of rights under the law shall not be denied or abridged in this State because of the sex of the individual."

In both Houses of the Legislature, the sponsors stated unequivocally in response to direct inquiries that the Maine ERA would not require the State to finance abortions. See Legis. Rec. 581 (Apr. 14, 1983) (statement of Rep. Murphy) (Maine ERA would not affect abortion or abortion funding). As Senator Minkowsky reported the views of Senator Conley, President of the Senate:

"The area relevant to the Attorney General's ruling of February 20, 1983 stated the following: 'In the area where the Maine Equal Rights Amendment could have an impact on eliminating invidious or benign discrimination much will depend on the interpretation of the Equal Rights Amendment by the courts. Without a comprehensive Legislative history that goes beyond the breadth and depth of this memorandum it can't be predicted what interpretation will be adopted by the courts.'

The question was raised for the Record this morning is the following: Is it the intent of the sponsors of LD 59 that the Maine State ERA includes a Right to Abortion or Abortion funding? That is the question.

I had addressed this question with Senator Clark who is not here this morning, and she was going to discuss it on the Record, but I had an opportunity, as I said previously, to discuss it with the President of the Senate and he assures me that the answer is No. Thank you very much Mr. President."

Legis. Rec. 600 (Apr. 15, 1983). No one suggested to the contrary during the debate.^{1/} The amendment was approved 22-0 by the Senate and 125-5 by the House.

^{1/} Had any one suggested to the contrary, of course, it would have been of little relevance because "[o]bviously, opponents of a piece of legislation tend to exaggerate its flaws; their statements are poor evidence of legislative intent." Hatfield v. Bishop Clarkson Memorial Hospital, 679 F.2d 1258, 1263-64 n.10 (8th Cir. 1982), modified on other grounds, 701 F.2d 1266 (8th Cir. 1983) (en banc), citing, Holtzman v. Schlesinger, 414 U.S. 1304, 1313 n.13 (1973) (Marshall, J., on opposition for stay); Harden v. Kentucky Utilities Co., 390 U.S. 1, 11 (1968).

As uncontradicted statements of the sponsors, these contentions are an "authoritative guide" to the interpretation of the Maine Equal Rights Amendment. See North Haven Board of Education v. Bell, 456 U.S. 512, 526-27 (1982). See generally 2A Sands, Sutherland's Statutory Construction, § 48.15 (4th ed. 1973 & Supp. 1984). In deciding the meaning of constitutional provisions, the Supreme Judicial Court has consistently applied the rules of construction that "language shall be interpreted in accordance with the intention with which it was used," Opinion of the Justices, 142 Me. 409, 415, 60 A.2d 903, ___ (1947), and that the reason and intention of the Legislature should be effectuated whenever possible. See Opinion of the Justices, 137 Me. 347, 349, 16 A.2d 585, ___ (1940). There is no reason to believe that the Court will change its long-standing rules of construction in interpreting the State's ERA.

Accordingly, the legislative history unambiguously and inevitably leads to the conclusion that the ERA will not affect abortion or abortion funding.^{2/}

B. The History of the ERA in Other States Demonstrates that ERA Will Not Affect State Funding of Abortion.

Although the legislative history leads us to conclude that the ERA will not require State funded abortions, that conclusion is strengthened by the history of similar amendments in other states. Examination of the literally hundreds of decisions interpreting state equal rights amendments yields two general conclusions. First, equal rights amendments, like other constitutional provisions, apply to the actions of government, not to private individuals or entities, and, accordingly, will not affect many institutions involved in the performance of abortions. Second, states have uniformly refused to require state funding of abortions because of an equal rights amendment. The analysis of the state courts, like the analysis of the United States Supreme Court in deciding

^{2/} In this context, the attempt by opponents of the ERA to rely on the statement in the February 10, 1984 memorandum of this Department that "it can't be predicted what interpretation will be adopted by the courts" is puzzling. Since our statement was predicated on the absence at that time of any legislative history, the existence of such history, particularly such unequivocal history, should resolve any uncertainty about the likely interpretation of the Maine courts.

whether states can be required to fund abortions under the equal protection clause, is persuasive that a state's decision to restrict abortion funding is not impermissible sex discrimination. Accordingly, the experience in other states confirms that the Maine ERA would not mandate abortion funding for poor women.^{3/}

By its terms, the Maine ERA applies only to state action: "Equality of rights under the law shall not be denied or abridged in this State because of the sex of the individual." (Emphasis added). Interpreting a similarly worded ERA, the Massachusetts Supreme Judicial Court recently observed that "[t]o be sure, the constitutional prohibition of discrimination based on sex . . . is directed against State action. This has been the universal construction of similar Equal Rights Amendments in other states." United States Jaycees v. Massachusetts Commission Against Discrimination, 391 Mass. 594, ___ n.9, 463 N.E.2d 1151, 1160 n.9 (1983).^{4/} Therefore, for example, the Maine ERA cannot require doctors or private hospitals to perform abortions, since no state action is involved. See, e.g., Jones v. Eastern Maine Medical Center, 448 F.Supp. 1156 (D.Me. 1978) (Equal Protection Clause).

^{3/} Since 1980, sixteen states have enacted such amendments. Nine of these states employ language similar to the Maine ERA. These states are Colorado, Hawaii, Maryland, Massachusetts, New Hampshire, New Mexico, Pennsylvania, Texas, and Washington. The other states generally employ language similar to the Equal Protection Clause of the Fourteenth Amendment. See Alas. Const. art. 1, § 3 (enacted in 1972); Colo. Const. art. 2, § 29 (1972); Conn. Const. of 1965, art. 1, § 20 (1974); Hawaii Const. art. 1, § 3 (1972); Ill. Const. art. 1, § 18 (1971); Md. Const. art. 46 (1972); Mass. Const. pt. 1, art. I (1976); Mont. Const. art. 2, § 4 (1973); N.H. Const. pt. 1, art. 2 (1974); N.M. Const. art. 2, § 18 (1973); Pa. Const. art. 1, § 28 (1971); Tex. Const. art. 1, § 32 (1972); Utah Const. art. 4, § 1 (1896); Va. Const. art. 1, § 11 (1971); Wash. Const. art. 31, § 1 (1972); Wyo. Const. art. 1, §§ 2, 3, art. 6, § 1 (1890).

^{4/} See also United States Jaycees v. Richardet, 666 P.2d 1008, 1012-13 (Alaska 1983) (private organization, no state action); Murphy v. Harleysville Mutual Insurance Co., 282 Pa. Super. 244, 254-57, 422 A.2d 1097, 1102-1103 (1980), cert. denied, 454 U.S. 896 (1981) (insurance rates, no state action); Lincoln v. Mid-Cities Pee Wee Football Association, 576 S.W.2d 922, 924-26, (Tex. Civ. App. 1979) (non-profit community corporation, state action); MacLean v. First Northwest Industries of America, 96 Wash.2d 338, 347, 635 P.2d 683, 688 (1981) (dicta).

The most important explanation for the failure of every state with an ERA to require state funded abortions for poor women because of that state's ERA is the conclusion that a state's decision to restrict abortion funding does not constitute discrimination on the basis of sex. To understand that conclusion, it is necessary briefly to review the constitutional cases relating to abortion and then analyze the affect of state ERA's on this right.

1. Abortion and the Equal Protection Clause.

Any analysis of the constitutional questions surrounding abortion must begin with Roe v. Wade, 410 U.S. 113 (1973). As explained by the Court,

In the Wade case, this Court held unconstitutional a Texas statute making it a crime to procure or attempt an abortion except on medical advice for the purpose of saving the mother's life. The constitutional underpinning of Wade was a recognition that the "liberty" protected by the Due Process Clause of the Fourteenth Amendment includes not only the freedoms of personal choice in certain matters of marriage and family life. This implicit constitutional liberty, the Court in Wade held, includes the freedom of a woman to decide whether to terminate a pregnancy.

Harris v. McRae, 448 U.S. 297, 312 (1980) (footnote omitted). That holding was recently reaffirmed in City of Akron v. Akron Center for Reproductive Health, Inc., 103 S.Ct. 2481, 2487 (1983). Thus, the Supreme Court decisions regarding abortion are neither premised on nor have any relation to an analysis of sex discrimination, i.e., the disparate treatment of men and women, but rather are based on an "implicit constitutional liberty" afforded women "to decide whether to terminate a pregnancy."

State and federal restrictions on this "liberty", however, have consistently been upheld by the Supreme Court on a variety of grounds in the face of challenges based on the equal protection clause. In Maher v. Roe, 432 U.S. 464 (1977), for example, the Court confronted the issue of whether Connecticut was obligated to pay for nontherapeutic abortions. The theory advanced in that case was that the state's failure to pay for abortions while paying for childbirth constituted wealth discrimination and impinged on the "fundamental right" to abortion. In rejecting that argument, the Court held that:

The Connecticut regulation places no obstacles--absolute or otherwise--in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there. The indigency that may make it difficult--and in some cases, perhaps, impossible--for some women to have abortions is neither created nor in any way affected by the Connecticut regulation.

Id. at 474 (footnote omitted).^{5/} Similarly, the Court rejected the contention that abortion was a "fundamental right":

Roe did not declare an unqualified 'constitutional right to an abortion' as the District Court seemed to think. Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. It implies no constitutional limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds. 432 U.S. at 473-74.^{5/}

^{5/} The Court left unresolved whether the federal government or a state could further restrict abortion funding by refusing to fund "medically necessary" abortions. In a companion case, the Court held that Title XIX of the Social Security Act ("Title XIX"), 42 U.S.C. § 1396, et seq., did not require "the funding of nontherapeutic abortions as a condition of participation in the joint state-federal medicaid program established by that statute." Maher v. Roe, 432 U.S. at 465-66, explaining, Beal v. Doe, 432 U.S. 438 (1977).

^{5/} Indeed, the Court recognized explicitly that a State's interests in the health of the pregnant woman and the potential life of the fetus were sufficient to justify substantial regulation of abortions in the second and third trimesters. Id. at 472.

In Harris v. McRae, 448 U.S. 297 (1980), the Court upheld the constitutionality of the Hyde Amendment, which provided, in pertinent part, that: "None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term." Pub. L. No. 94-439, § 209, 90 Stat. 1434 (1976).^{2/} The Court held that "a state that participates in the medicaid program is not obligated under Title XIX to continue to fund those medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment." Id. at 326.^{3/} The Court relied on Maheer's analysis of "the basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy," id. at 315, to conclude that "[w]hether freedom of choice that is constitutionally protected warrants federal subsidization is a question for Congress to answer, not a matter of constitutional entitlement." Id. at 318.

Thus, it is established beyond question that state restrictions on abortion funding are not prohibited by the federal equal protection clause. Since 1980, "[a] participating state [has been] free, if it chooses, to include in its medicaid plan those medically necessary abortions for which federal reimbursement is unavailable." Harris v. McRae, 448 U.S. at 311 n.16 (citations omitted). Although some states

^{2/} In 1977 Congress amended the Hyde Amendment to allow federal funding for abortions "for the victims of rape and incest" and for "those instances where severe and longlasting physical health damage to the mother would result if the pregnancy were carried to term." Pub. L. No. 95-205, § 101, 91 Stat. 1460 (1977). In 1980, Congress again restricted federal funding for abortions, permitting funding only for abortions necessary to save the life of the mother, or those "necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service." Pub. L. No. 96-86, § 118, 93 Stat. 662 (1979).

^{3/} In a companion case, the Court held that an Illinois statute restricting abortion funding likewise was not unconstitutional. Williams v. Zbaraz, 448 U.S. 358 (1980).

have chosen to fund abortions, no state has been required to do so as a result of any federal constitutional or statutory provision.^{9/}

2. Effect of ERA on State Funding of Abortions

No state's funding of or restrictions on abortion has been affected by a State ERA. There are 15 states that fund abortions for which federal reimbursement is prohibited by the Hyde Amendment. Ten of these states (including four non-ERA states) fund such abortions as a result of legislation or regulation.^{10/} The other five fund abortions as a result of State court decisions interpreting various state constitutional provisions, none of which is based on the State's ERA. Indeed, three of these states--California, New Jersey, and Oregon--do not even have an ERA.^{11/}

Most important here, in the two states that have both equal rights amendments and court ordered abortion funding--Connecticut and Massachusetts--the plaintiffs contended without success that the state ERA mandated abortion

^{9/} The opponents of the ERA also rely on Title VII of the Civil Rights Act of 1964 to argue that state funded abortions will be required by an ERA. In the principal case they cite, however, the Supreme Court rejected the argument that Title VII, which prohibits employment discrimination, precluded any different treatment of men and women in connection with disability benefits. General Electric Company v. Gilbert, 429 U.S. 125 (1976). The Court's decision was later overruled by Congress by enactment of the Pregnancy Disability Act, 42 U.S.C. § 2000e(k). See also Geduldig v. Aiello, 417 U.S. 484 (1974) (exclusion of pregnancy from disability coverage not discrimination based on sex).

^{10/} The ten states are Alaska, Colorado, Hawaii, Illinois, Maryland, Michigan,, New York, North Carolina, Washington, and West Virginia.

^{11/} See Committee to Defend Reproductive Rights v. Myers, 29 Cal.3d 352, 625 P.2d 779, 172 Cal.Rptr. 866 (1981); Doe v. Maher, 8 Fam. L. Rep. (BNA) 2006 (Conn.Super.Ct., Oct. 9, 1981); Moe v. Secretary of Administration and Finance, 382 Mass. 629, 417 N.E.2d 387 (1981); Right to Choose v. Byrne, 81 N.J. 287, 450 A.2d 925 (1982); Planned Parenthood, Inc. v. Department of Human Resources, 63 Or.App. 41, 663 P.2d 1247 (1983).

funding. In both Connecticut and Massachusetts, the state courts concluded that the due process clause of the state constitution (which is similar to the due process clause of the Maine Constitution, see Me. Const., art. I, § 6-A), required the state to fund certain non-reimbursable "medically necessary" abortions. See Doe v. Maher, 8 Fam. L. Rep (BNA) 2006, 2007 (Conn. Super. Ct., Oct. 9, 1981); Moe v. Secretary of Finance and Administration, 382 Mass. at ____, 417 N.E.2d at 395. Neither court stated that the state ERA would mandate a similar result. Accordingly, the experience in Massachusetts and Connecticut indicates that the ERA will not affect the funding of abortion, and certainly that the ERA will have less effect on this question than existing state constitutional provisions.

It is in this context that the history of the decision relied on most heavily by opponents of the ERA must be examined. In an unreported decision of a single trial court justice in the Pennsylvania Commonwealth Court, funding for abortion was ordered and, in addition to reliance upon other constitutional provisions, reference was made to the state ERA. Fischer v. Department of Public Welfare, No. 283 C.D. 1981 (Pa. Commw. Ct., Mar. 9, 1984), reversed en banc (Sept. 20, 1984), appeal filed (Oct. 1984). The Court ordered Pennsylvania to fund abortions because it concluded the Pennsylvania statute prohibiting such funding violated the state Equal Protection Clause. Although it was not necessary to its decision, the Court addressed the challenge based upon the state ERA only because it "believe[d] that on appellate review it may be helpful for the reviewing court to have our opinion with respect to each of the constitutional challenges before us." Slip op. at 19. Like every other court that has considered the ERA and abortion funding, it found that other state constitutional provisions provided greater support for the plaintiffs' arguments. Slip op. at 21. Nonetheless, the court offered the opinion that the plaintiffs' ERA argument was "meritorious and sufficient in and of itself to invalidate the statutes before us . . ." Id.

On September 20, 1984, the appeals court reversed this decision in all respects. The Court observed:

In the case sub judice, indigent women who choose to carry a fetus to term receive certain benefits which indigent women who choose to terminate their pregnancy do not. This simply is not actionable sex discrimination under the provisions of ERA.

This case does not involve a gender-based classification cognizable under the equal rights amendment. True, this statute has a basis in gender, for only women may choose to have an abortion or bear a child. But women are not being unfairly discriminated against because of their sex. The legislation is directed at abortion as a medical procedure, not at women as a class. The Commonwealth has chosen to further a legitimate state interest through the use of its funding power. We hold that the funding sections of the Public Welfare Code and the 1982 Abortion Control Act do not violate the provisions of the Pennsylvania equal rights amendment.

Slip op. at 16 (citation omitted and emphasis in original).

The reasoning of the Pennsylvania appeals court is persuasive. It recognizes the same principle recognized by the United States Supreme Court in its abortion funding decisions--a State's restriction on the availability of State funds for abortion is a permissible exercise of spending power in furtherance of a legitimate state interest. No state in the country has interpreted its state ERA to require that state to finance abortions.^{12/} Nor has any state's restrictions on

^{12/} In addition to the Connecticut, Massachusetts, and Pennsylvania cases discussed above, ERA opponents rely upon a Hawaii case in which intervenors also attempted unsuccessfully to obtain court ordered abortion funding based upon a state ERA. See D. Johnson & P. Cunningham, ERA and Abortion: Really Separate Issues?, America, at 432-37 (June 9, 1984) (article by legislative director of National Right to Life Committee and General Counsel to Americans United for Life Legal Defense Fund), citing, Hawaii Right to Life, Inc. v. Chang, Civ. No. 53567 (Haw.Cir.Ct., Feb. 20, 1978).

abortion been overturned on the basis of an ERA.^{13/} And the uniform conclusion of the states described above has been reached notwithstanding the various standards of review applied by state courts under the ERA.^{14/}

^{13/} Maine's restrictions on abortion, therefore, will be unaffected by passage of the ERA. Maine, like most states, does not fund abortions for which federal reimbursement is unavailable. Pursuant to its rulemaking authority generally, see 22 M.R.S.A. § 42(1) (1980), and its authority specifically applied to Title XIX programs, see 22 M.R.S.A. § 3173 (Supp. 1983), the Department of Human Services has promulgated the following regulation governing reimbursement of abortion services: "Reimbursement for abortion services performed or on after October 15, 1981, will be made only in the cases where the life of the mother would be endangered if the fetus were carried to term." Maine Medical Assistance Manual, ch. II, § 85.05-2(A) (1981). Accord, id., § 45.05-4 (1980). Cf. 22 M.R.S.A. § 10 (1980) (Commissioner should expend federal funds in accordance with federal law).

^{14/} See e.g., Plas v. State, 598 P.2d 966 (Alaska 1979) (intermediate scrutiny); People v. Green, 183 Colo. 25, 514 P.2d 769 (1973) ("closest judicial scrutiny"); State v. Rivera, 62 Hawaii 120, 612 P.2d 526 (1980) (intermediate scrutiny); People v. Ellis, 57 Ill. 2d, 311 N.E.2d 98 (1974) (strict scrutiny); Turner v. State, 299 Md. 565, 474 A.2d 1297 (1984) (intermediate scrutiny); Commonwealth v. King, 374 Mass 5, 372 N.E.2d 196 (1977) (strict scrutiny); State v. Craig, 169 Mont. 150, 545 P.2d 649 (1976) (rational basis); Buckner v. Buckner, 120 N.H. 402, 404, 415 A.2d 871, 872 (1980) (State ERA would prohibit discrimination based on sex); Schaab v. Schaab, 87 N.M. 220, 531 P.2d 954 (1974) (intermediate scrutiny); Oknefski v. Workmen's Compensation Appeal Board, 63 Pa. Commw. Ct. 450, 439 A.2d 846 (1981) (intermediate scrutiny); Mercer v. Board of Trustees, North Forest Independent School District, 538 S.W.2d 201 (Tex. Civ App. 1976) (strict scrutiny); Schilling v. Bedford County Memorial Hospital, Inc., 225 Va. 39, 303 S.E.2d 905 (1983) (intermediate scrutiny); Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187 (1974) (intermediate scrutiny); A v. X, Y, Z, 641 P.2d 1222 (Wyo. 1982), cert. denied, 459 U.S. 1021 (1983) (intermediate scrutiny); Page v. Welfare Commission, 170 Conn. 258, 365 A.2d 1118 (rational basis).

* * * * *

In view of the foregoing authority, it is the conclusion of this Department that, in interpreting the Maine ERA, the Maine Supreme Judicial Court would not require the state to finance abortions for poor women. There is no precedent for such a holding in the decisions of other courts interpreting state equal rights amendments, nor is there any support for that view in the legislative history of the amendment in the Maine Legislature.

II. The ERA Would Not Lead to Recognition of Homosexual Marriages

In determining whether the Maine ERA would result in the legalization of homosexual marriages, it should be noted that,

In all the cases so far discovered which have considered the question whether persons of the same sex may marry each other, the view has been taken that since the marriage relationship has always been the union of a man and a woman as husband and wife, there may be no valid marital contract entered into between persons of the same sex.

Annot., 63 A.L.R. 3d 1199 (1975) (collecting cases). Nothing has occurred since 1975, and especially nothing has occurred since that time as a result of a state ERA, that would lead to a contrary conclusion. In the most recent case on the issue, the Pennsylvania Superior Court refused to consider a challenge to the prohibition of homosexual marriages based upon the state ERA, and summarily dismissed the plaintiffs other constitutional objections, observing that: "Other jurisdictions have considered whether statutory or ceremonial marriages can be entered into by same sex couples and have uniformly held it cannot be." DeSanto v. Barnley, ___ Pa. Super. ___, ___, 476 A.2d 952, 953 (1984).

Because it is a "fundamental premise" that marriage can occur only between persons of the opposite sex, courts uniformly have interpreted their marriage statutes to prohibit homosexual marriages even when there is no reference to sex in the statute. See M.T. v. J.T., 140 N.J. Super. 77, 83, 355 A.2d 204, 206 (1976). Accord, Weaver v. G.D. Searle & Co., 558 F. Supp. 720 (N.D. Ala. 1983) (applying Alabama law) (dicta); Adams v. Haverton, 673 F.2d 1036 (9th Cir.), cert. denied, 458

U.S. 1111 (1982) (applying Colorado law); Jones v. Howerton, 501 S.W.2d 588 (Ky.App. 1973); Anonymous v. Anonymous, 67 Misc. 2d 982, 325 N.Y.S.2d 499 (1971); Stayton v. State, 633 S.W.2d 934 (Tex.Crim.App. 1982).

Furthermore, no court has ever sustained a constitutional challenge to the prohibition on homosexual marriages. See, e.g., Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971), appeal dismissed for lack of a substantial federal question, 409 U.S. 810 (1972). Indeed, in 1974, the Washington Court of Appeals confronted directly the question of whether a state statute prohibiting homosexual marriages violated the state ERA, and concluded that it did not. Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187 (1974). The court's analysis of the plaintiffs' contentions in the context of the purpose of the state ERA is illuminating:

We do not believe that approval of the ERA by the people of this state reflects any intention upon their part to offer couples involved in same-sex relationships the protection of our marriage laws. A consideration of the basic purpose of the ERA makes it apparent why that amendment does not support appellants' claim of discrimination. The primary purpose of the ERA is to overcome discriminatory legal treatment as between men and women "on account of sex." The popular slogan, "Equal pay for equal work," particularly expresses the rejection of the notion that merely because a person is a woman, rather than a man, she is to be treated differently than a man with qualifications equal to her own.

Id. at 257-58, 522 P.2d at 1193-94. Because the court concluded that prohibition against discrimination "on account of sex" did not likewise prohibit discrimination "on account of sexual preference," it concluded that the prohibition on homosexual marriages did not violate the state ERA:

In the instant case, it is apparent that the state's refusal to grant a license allowing the appellants to marry one another is not based upon appellants' status as males, but rather it is based upon the state's recognition that our society as a whole views marriage as the appropriate and

desirable forum for procreation and the rearing of children. * * * Therefore, the definition of marriage as the legal union of one man and one woman is permissible as applied to appellants, notwithstanding the prohibition contained in the ERA, because it is founded upon the unique physical characteristics of the sexes and appellants are not being discriminated against because of their status as males per se. In short, we hold the ERA does not require the state to authorize same-sex marriage.

Id. at 259-60, 522 P.2d at 1195.

No court has ever interpreted a state ERA to require legal recognition of homosexual marriages. Additionally, Title VII, which proscribes discrimination by employers, employment agencies, and unions on the basis of sex, see 42 U.S.C. § 2000e-2, likewise does not prohibit discrimination on the basis of sexual preference. DeSantis v. Pacific Telephone and Telegraph Co., 608 F.2d 327, 329-30 (9th Cir. 1983); Smith v. Liberty Mutual Insurance Co., 569 F.2d 325, 326-27 (5th Cir. 1978). Similarly, the Maine Human Rights Act, which prohibits discrimination in employment, housing, and access to public accommodations on the basis of sex, see 5 M.R.S.A. § 4552 (1979), has never been interpreted to prohibit discrimination on the basis of sexual preference.^{15/} In short, "sex" does not mean "sexual preference," and therefore, the Maine ERA should have no effect upon homosexual rights. Assertions to the contrary are without legal foundation.

In face of the fact that no state has recognized homosexual marriages, notwithstanding the ERA, the ERA opponents rely exclusively upon opinion testimony of ERA opponents concerning the federal ERA and upon an article written by a law student. See Note, The Legality of Homosexual Marriage, 82 Yale L.J. 573 (1973). As with the abortion question, these materials are of little relevance to the future interpretation of the Maine ERA in light of the clear and uncontradicted legislative statements by ERA supporters that the Maine ERA would not legalize homosexual marriages. See Leg. Rec. 581 (Apr. 14, 1983)

^{15/} In each of the last four legislative sessions, bills have been introduced, and defeated, to prohibit discrimination against homosexuals. See, e.g., L.D. 679, "An Act to Include the Term 'Sexual or Affectional Orientation' in the Maine Human Rights Act" (111th Legis. 1983).

(statement of Rep. Gwadosky) (referring to previous Attorney General report).^{16/}

Based upon the foregoing authorities, it is the opinion of this Department that, in interpreting the Maine Equal Rights Amendment, the Maine Supreme Judicial Court would not require the State to recognize homosexual marriages. There is no support for that conclusion either in the decisions of the courts of any other state, or in the legislative history of the amendment in the Maine Legislature.

CONCLUSION

For the foregoing reasons, it is the opinion of the Department of the Attorney General that approval of the Maine Equal Rights Amendment would neither require the State to finance abortions for poor women nor require the State to recognize, as legal, marriages between persons of the same sex. This conclusion is based not only upon the research of this Department, but also upon a careful review of the materials relied upon by the proponents and opponents of this amendment. As Paul Freund, one of the law professors relied upon by the ERA opponents, acknowledged in 1983, "up to now, no state ERA has affected the abortion or homosexual issues." There is no reason to believe that Maine's ERA will be any different.

^{16/} Likewise, the sponsor of the federal ERA, Sen. Birch Bayh, explained why a federal ERA would not have legalized homosexual marriages:

The equal rights amendment would not prohibit a State from saying that the institution of marriage would be prohibited to two men partners. It would not prohibit a State from saying the institution of marriage would be prohibited from two women partners. All it says is that if a State legislature makes a judgment that it is wrong for a man to marry a man, then it must say it is wrong for a woman to marry a woman--or if a State says it is wrong for a woman to marry a woman, then it must say that it is wrong for a man to marry a man.

118 Cong. Rec. 4389 (March 21, 1972).

ADDENDUM

The conclusion of the foregoing Attorney General Opinion that a State Equal Rights Amendment would not require the State to finance abortions for poor women was bolstered by the recent Pennsylvania Supreme Court reaching the same conclusion. See Fisher v. Department of Public Welfare, ___ Pa. ___, ___, 502 A.2d 114, 124-26 (1985). The Court unanimously rejected the "rather simplistic argument that because only a woman can have an abortion then the [abortion] statute necessarily utilizes sex as a basis for distinction." Id. at ___, 502 A.2d at 125 (citation omitted).

This decision is significant because a single justice of Pennsylvania's trial court had reached the opposite conclusion in this case, and although that decision had been reversed by Pennsylvania's intermediate appellate court, an appeal to the Pennsylvania Supreme Court was pending when the foregoing Attorney General Opinion was issued on October 30, 1984. See Fisher v. Department of Public Welfare, 85 Pa. Commw. Ct. 215, 482 A.2d 1137, rev'd, 85 Pa. Commw. Ct. 240, 482 A.2d 1184 (1984), aff'd, ___ Pa. ___, 502 A.2d 114 (1985). Since that now repudiated trial court decision was the only known court decision concluding that a State ERA would mandate abortion financing, see Op. Me. Att'y Gen. 84-28, at 9-12 (surveying case law), it can now be stated categorically that no State court has finally concluded that a State Equal Rights Amendment would require that State to finance abortions for poor women.