Abortions: Withholding State Funds

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Honorable Walter Hichens
Senate Chambers
State House
Augusta, Maine

Dear Senator Hichens:

This responds to your letter of March 1, 1977, in which you requested our opinion regarding the current state of the law and its impact on legislation which you enclosed and which you are introducing. Basically you request advice as to the state of the law on a proposed statutory prohibition on the use of State funds for abortions, except to save the mother's life.

You are correct that the current state of the law regarding this question is unsettled. Federal legislation has been enacted which would prohibit the United States Department of Health, Education and Welfare from using federal funds to perform abortions except in cases where the life of the mother would be endangered. Section 209, P.L. 94-439, Labor - Health, Education and Welfare Appropriations Act. This section is currently being challenged in Federal Court. McRae v. Mathews, 421 F. Supp. 533 (E.D.N.Y., 1976). It will ultimately be decided by the Supreme Court; however, the lower court has issued a Temporary Restraining Order forbidding Health, Education and Welfare from denying reimbursement for "elective" abortions.

At least three states, Pennsylvania, Connecticut and Utah, which have attempted to control the use of state funds for "elective" abortions, have been enjoined from enforcing these restrictions. Doe v. Beal, 523 F.2d 611 (3rd Cir., 1975); Doe v. Rose, 499 F.2d 1112 (10th Cir., 1974); Roe v. Norton, 408 F. Supp. 660 (D. Conn., 1975), also see discussion in Wolfe v. Schwering, 541 F.2d 523 (6th Cir., 1976). In these cases the courts reasoned that the states had violated the Equal Protection

Clause of the Constitution or the former provisions of the Federal Social Security Act, 42 U.S.C.A. § 1396, et seq.,* in that they were treating the class of pregnant women differently, depending on whether the woman decided to give birth to the child, or decided to abort the fetus. One court found no inconsistency with the former provisions of the Social Security Act in an Ohio restriction, but deferred the constitutional question. Roe v. Ferguson, 515 F.2d 279 (6th Cir., 1975).

In Roe v. Norton, the Court noted, on the constitutional issue:

> "The state may not justify its refusal to pay for one type of expense arising from pregnancy on the basis that it morally opposes such expenditure of money. To sanction such discrimination would be to permit discrimination against those seeking to exercise a constitutional right on the basis that the state simply does not approve of the exercise of that right." 408 F. Supp. at 664.

In Doe v. Beal, the Court noted:

> ". . . Once the state has decided to finance full-term delivery and therapeutic abortion as methods for the treatment of pregnancy, it cannot decline to finance non-therapeutic abortions without violating the requirements of Title XIX. Since the decisions of the Supreme Court have forced the states to include elective abortions in the legal practice of medicine through the second trimester of pregnancy, we also hold that the statute requires Pennsylvania to fund abortions through the end of the second trimester." 523 F.2d at 622.

This case will be heard by the United States Supreme Court sub. nom. Beal v. Doe, No. 75-554 (cert. granted, 44 L.W. 3757, 3761).

Thus, based on current precedent, such prohibitions on use of state funds for elective abortions may violate the Equal Protection Clause of the United States Constitution. However, the matter is before the United States Supreme Court, and any definitive answer must await that Court's determination.

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* Prior to P.L. 94-439 § 209.

I hope this information is helpful to you.

Sincerely,

DONALD G. ALEXANDER
Deputy Attorney General

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