Opinion No. 04-03

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OPINION OF: PATRICIA A. MADRID, Attorney General

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TO: The Honorable Gail C. Beam State Representative 425 Aliso Drive NE Albuquerque, NM 87108

QUESTION

Is a 2003 amendment to the Human Rights Act that makes it unlawful to discriminate based on sexual orientation or gender identity subject to referendum under Article IV, Section 1 of the New Mexico Constitution?

CONCLUSION

No. As a valid exercise of the state's police power, the 2003 amendment is excepted from the constitution's referendum authority.

FACTS

In 2003, the New Mexico legislature passed an amendment to the Human Rights Act that prohibited discrimination based on sexual orientation or gender identity in certain areas, including employment and housing. **See** 2003 N.M. Laws, ch. 383, codified at NMSA 1978, §§ 28-1-2, 28-1-7, 28-1-7.2, 28-1-9 ("Chapter 383").1 Shortly after it was enacted, opponents of the amendment began organizing a petition drive for disapproval of the amendment under the referendum process governed by Article IV, Section 1 of the New Mexico Constitution. Proponents of the amendment then questioned whether the amendment was properly subject to a referendum vote, or what is termed "referable," in light of Article IV, Section 1's exception for "laws providing for the preservation of the public peace, health or safety."

DISCUSSION

In pertinent part, Article IV, Section 1 provides:

> The people reserve the power to disapprove, suspend and annul any law enacted by the legislature, except … laws providing for the preservation of the public peace, health or safety….

The New Mexico Supreme Court has long held that "laws providing for the preservation of the public peace, health or safety" excepted from the constitutional referendum authority represent an exercise of the state's inherent police powers. **See State ex rel.**

Hughes v. Cleveland, 47 N.M. 230, 242-43, 141 P.2d 192 (1943) (**"Cleveland"**) (holding that a statute imposing an excise tax on cigars and cigarettes and allocating the proceeds of the tax to old age assistance was an act providing for the preservation of public health, and thus exempt from popular referendum under N.M. Const. art. IV, § 1). If a law can "be sustained as a reasonable exercise of the police power involved in the referendum clause of the Constitution, its nonreferable character is automatically established under" Article IV, Section 1. **Otto v. Buck,** 61 N.M. 123, 129, 295 P.2d 1028 (1956) (holding that a law regulating the size and weight of vehicles on state highways was properly excepted from referendum because it was reasonably related to the preservation of public peace, health or safety). A law need not "affect all or even a major portion of the people of the State" to constitute "a measure providing for the preservation of public peace, health or safety." **Otto,** 61 N.M. at 129; Cleveland, 47 N.M. at 238.

In contrast to other states' constitutional referendum provisions, Article IV, Section 1 does not require that a law be "necessary" for the "immediate" preservation of public peace, health or safety. **See Cleveland,** 47 N.M. at 236-37. Such a requirement was proposed during the Constitutional Convention, but rejected. Id. at 236. Particularly in light of the framer's conscious omission of language implying an emergency or crisis, the Supreme Court declined to read such a requirement into the exception from referendum. **See Otto,** 61 N.M. at 129-30; **Cleveland,** 47 N.M. at 243. As a result, the Supreme Court acknowledged, "a massive field of legislative power is carved out of the reserved referendum rights." **Otto,** 61 N.M. at 130.

Based on judicial authority from New Mexico and other jurisdictions, there seems little doubt that Chapter 383 is a law "providing for the preservation of public peace, health or safety" within the meaning of Article IV, Section 1. In a case discussing the applicability of collective bargaining laws to the Board of Regents for the University of New Mexico, the New Mexico Supreme Court contended:

> [T]he Board of Regents is subject to the Legislature's exercise of its police power. "The Legislature is the proper branch of government to determine what should be proscribed under the police power; a statute is sustainable as a proper exercise of that power if the enactment is reasonably necessary to prevent manifest evil or reasonably necessary to preserve the public safety, or general welfare." The Board of Regents is not immune from statutes that further the public welfare and that are of statewide concern and general applicability such as the New Mexico Human Rights Act….

Regents of the Univ. of N.M. v. New Mexico Fed'n of Teachers, 125 N.M. 401, 415, 962 P.2d 1236 (1998) (citations omitted). Though not directly on point, the Court's discussion suggests that, if faced with the issue, the Court would find that Chapter 383, which amends the Human Rights Act and expands its protection against discrimination, provides for the preservation of public peace, health or safety and thus is excepted from popular referendum under Article IV, Section 1. **See also Keller v. City of Albuquerque,** 85 N.M. 134, 139, 509 P.2d 1329 (1973) (legislature's intent and

purpose in enacting the Human Rights Act was "to eliminate and prevent discrimination … and to promote good will").

Cases from other jurisdictions reviewing antidiscrimination laws similar to the Human Rights Act uniformly characterize them as a valid exercise of governmental police powers. The United States Supreme Court declared in a case addressing the enforceability of an antidiscrimination statute that "certainly so far as the Federal Constitution is concerned there is no doubt that legislation which prohibits discrimination on the basis of race in the use of facilities serving a public function is within the police power of the states." **District of Columbia v. John R. Thompson Co.,** 346 U.S. 100, 109 (1953).

Similarly, the Georgia Supreme Court held that a city's "general police power," i.e., the authority to "enact ordinances to protect the health, safety and general welfare of the public," enabled the city "to prohibit discrimination on the basis of race, color, national origin, religion, sex and sexual orientation…." **City of Atlanta v. McKinney,** 454 S.E.2d 517, 521 (Ga. 1995). **See also Chicago Real Estate Bd. v. City of Chicago,** 224 N.E.2d 793, 801-803 (Ill. 1967) (upholding an ordinance prohibiting discrimination in housing as a proper exercise of the municipality's police power); **Hutchinson Human Relations Comm'n v. Midland Credit Management, Inc.,** 517 P.2d 158, 162 (Kan. 1973) (antidiscrimination legislation is a legitimate exercise of police power as tending to promote the public health, safety and general welfare); **State Comm'n for Human Rights v. Kennelly,** 291 N.Y.S.2d 686, 691 (N.Y. App. Div. 1968) (holding that human rights enactments prohibiting discriminatory housing practices are "well within the purview of the reasonable exercise of the police power of the government, state or particular political subdivision involved, in the public interest"), aff'd, 244 N.E.2d 58 (N.Y. 1968).

Antidiscrimination laws are a legitimate exercise of the state's police powers because they address the "evil effects of such discrimination on the public welfare." **Chicago Real Estate Bd.,** 224 N.E.2d at 801. The Illinois Supreme Court noted that discrimination in housing "leads to lack of adequate housing for minority groups, which results in slum conditions, disease, crime and immorality which endangers the entire community." **Id. See also Hutchinson Human Relations Comm'n,** 517 P.2d at 162 ("discrimination against minorities has a direct and detrimental impact on the orderly processes of government, the peace and tranquility of a community, and the health, safety and general well-being of its residents"); **State Comm'n for Human Rights,** 244 N.E.2d 58 (acknowledging contention that antidiscrimination laws are a legitimate exercise of police power because "discrimination … menaces the institution and foundations of a free democratic state and threatens the peace, order, health, safety, and general welfare of the State and its inhabitants").

Under the weight of judicial authority addressing this issue, Chapter 383, which prohibits discrimination against minority groups, is properly characterized as a law "providing for the preservation of the public peace, health or safety." Accordingly, we conclude that

Chapter 383 is not subject to referendum under Article IV, Section 1 of the New Mexico Constitution.

[1] During the 2004 legislative session, the legislature passed an amendment to the Human Rights Act that corrected a provision of Chapter 383 that inadvertently limited the Act's coverage to employers with more than 15 employees. See 2004 N.M. Laws, ch. 115.