STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

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MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751

ATTORNEY GENERAL OPINION NO. 79- 19

The Honorable Keith Farrar
State Representative
Kansas House of Representatives
State Capitol
Topeka, Kansas 66612

The Honorable Lee Hamm
State Representative
Kansas House of Representatives
State Capitol
Topeka, Kansas 66612

Re: U. S. Constitution--Amendments--Contingent Ratification

Synopsis: The provisions of 1972 House Concurrent Resolution No. 1155 (L. 1972, ch. 388), by which the Kansas Legislature ratified the proposed Equal Rights Amendment to the U. S. Constitution do not manifest a legislative intent that such ratification be contingent upon ratification of the proposed amendment by the required three-fourths majority of the states by the original deadline therefor established by Congress. Irrespective of any such legislative intent, the validity of a state's contingent ratification of an amendment to the U. S. Constitution can be determined only by Congress.

* * *

Dear Representatives Farrar and Hamm:

You inquire whether the State of Kansas is bound by its ratification of the proposed Equal Rights Amendment to the U. S. Constitution, if thirty-eight states have not ratified the proposed amendment by March 22, 1979. In your letter of

January 16, 1979, you stated your belief that the 1972 Legislature clearly intended that its ratification of the amendment be contingent upon the ratification thereof by the constitutionally required three-fourths majority of states within the original deadline set by congress. In essence, your inquiry is whether the Kansas ratification is rescinded automatically if the amendment is not thusly approved by March 22, 1979. It should be noted that Congress subsequently extended the ratification deadline an additional 39 months, such that the proposed amendment becomes part of the U. S. Constitution only if ratified by the required number of states within the extended time. See 124 Cong. Rec. H. 8665, Aug. 15, 1978; 124 Cong. Rec. S. 17318, Oct. 6, 1978. Even though we presume that this congressional action may have prompted your request, it is not, in our view, pertinent to answering your inquiry.

The 1972 Kansas Legislature ratified the proposed Equal Rights Amendment by adopting House Concurrent Resolution No. 1155 (L. 1972, ch. 388). The principal resolving clause of this resolution states as follows:

> "Be it resolved by the House of Representatives of the State of Kansas, the Senate concurring therein: That the foregoing and above recited amendment to the constitution of the United States be, and the same is, hereby ratified by said legislature of the state of Kansas as a part of, and amendment to, the constitution of the United States."

In our judgment, the foregoing resolution expresses a clear legislative intent to ratify unequivocally the proposed Equal Rights Amendment, as set forth in the preamble to 1972 House Concurrent Resolution No. 1155. It does not contain any reservation or contingency to such ratification. Further, we find nothing in the preamble to this resolution that would imply contrary legislative intent.

The first portion of the preamble, in reciting the congressional resolution whereby the proposed amendment was submitted to the states, provides in pertinent part:

> "[T]he following article is hereby proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution only if ratified by the legislatures of three-fourths of the several states within seven years from the date of its submission by the Congress. . . ."

The remaining paragraph of the preamble recites almost identical language, as follows:

> "WHEREAS, Said article will become valid as a part of the United States Constitution only if ratified by the legislatures of three-fourths of the several states within seven years from the date of its submission by the congress. . . ."

We do not find in these quoted excerpts from the preamble an express manifestation of legislative intent that the Kansas ratification be contingent upon the approval by said three-fourths majority by March 22, 1979, the end of the seven-year period. It appears that the latter excerpt is merely a restatement of similar language in the congressional resolution, and is not, as you imply, a condition or contingency upon which the Kansas ratification depends. In our judgment, the preamble to 1972 House Concurrent Resolution No. 1155 does nothing more than recite the facts giving rise to the resolution, i.e., the adoption of a congressional resolution containing the proposed amendment and submitting the proposition to the states.

Generally, a preamble to a statute is merely "explanatory of the reasons for its enactment and the objects sought to be accomplished." (footnote omitted) 73 Am. Jur. 2d Statutes § 92. As to the import of a preamble in statutory construction, the Kansas Supreme Court, in State, ex rel., v. Consumers Cooperative Association, 163 Kan. 324, 345 (1947), quoted with approval the general rule then stated in 50 Am. Jur. 297, § 309 (now essentially restated in 73 Am. Jur. 2d Statutes § 92):

> "'The preamble is especially helpful when the ambiguity is not simply that arising from the meaning of particular words, but such as may arise in respect to the general scope and meaning of a statute. The preamble is not, however, conclusive. Where the language of a statute is plain and unambiguous, the courts may not resort to the preamble of the act. It has also been held that the necessity of resorting to the preamble in order to ascertain the true intent and meaning of the legislature is fatal to any claim which by ordinary rules of interpretation can be sustained only by clear and unambiguous language. The preamble is not an essential part of the act, and cannot confer or enlarge powers.

> Express provisions in the body of the act cannot be controlled or restrained by the preamble. Hence, it has been stated by some courts as the general rule that if there is a broader proposition expressed in the act than is suggested in the preamble, the body or enacting part of the law will prevail over the preamble.'"

Even though the foregoing technically applies to a preamble included as prefatory to a statute, the rules applicable thereto have relevance to the concurrent resolution adopted by the 1972 Legislature to ratify the Equal Rights Amendment. Accordingly, since the language of the resolution itself is plain and unambiguous, resort to the preamble to ascertain legislative intent is inappropriate. Nonetheless, we find nothing in the preamble that would impart a contingency to the ratification accomplished by the principal resolving clause of the concurrent resolution.

It is our conclusion, then, that 1972 House Concurrent Resolution 1155 itself does not convey any legislative intent to ratify contingently the Equal Rights Amendment. Further, we find nothing in the legislative history of this resolution that would impart such an intent. See 1972 Journal of the Kansas House of Representatives, pp. 875, 876; 1972 Journal of the Kansas Senate, p. 550.

However, assuming arguendo that the contingency you suggest is implicit in the Kansas resolution, it should be noted that the validity of a conditional ratification may be decided only by the United States Congress, if and when the required majority of states ratify the proposed amendment. Rescission of the Kansas ratification of the Equal Rights Amendment has been the subject of numerous opinions written by the Attorney General in the years since the amendment was approved. Although the precise question of whether a state may contingently ratify and subsequently rescind a proposed constitutional amendment due to failure of the contingency has not been considered previously by this office, it entails the general question: does a state have constitutional power to ratify, and later rescind its ratification of, a constitutional amendment?

This question has been answered by the 1939 U. S. Supreme Court decision in Coleman v. Miller, 307 U.S. 433, 83 L. Ed. 1385, 59 S. Ct. 972. Here, in holding that Congress must decide

whether the Kansas Legislature could effectively ratify a proposed amendment which a previous legislature had rejected, the Court stated the controlling rule:

> "[T]he question of the efficacy of ratifications, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment." Id. at 450, 83 L. Ed. at 1394, 59 S. Ct. at 980. (Emphasis added.)

The Court decided Coleman in light of the "historic precedent" of the adoption of the Fourteenth Amendment of the U. S. Constitution in 1868. The Legislatures of Ohio and New Jersey had both rescinded earlier resolutions ratifying the proposed amendment. Despite those rescissions (and ratifications following earlier rejections by some of the southern states), Congress declared the amendment ratified and part of the U. S. Constitution, reciting that three-fourths of the States had ratified, naming Ohio and New Jersey as among that number. The Court noted: "This decision by the political departments of the Government as to the validity of the adoption of the Fourteenth Amendment has been accepted." Id. at 449, 450, 83 L. Ed. at 1394, 59 S. Ct. at 980.

In summary, the U. S. Supreme Court, with deference to the separate and co-equal powers of Congress, concluded in Coleman that Article V of the U. S. Constitution vests in Congress plenary control over the constitutional amendment process, that questions as to the effectiveness of rescissions or withdrawal of earlier ratifications may only be decided by the Congress and that neither courts nor state legislatures may interfere with that determination.

None of the foregoing is to suggest that the Kansas Legislature may not withdraw or rescind its ratification of the proposed Equal Rights Amendment. If Kansas, or any other state which has previously ratified the amendment, chooses to rescind, the Congress must then decide, as it did in 1868, whether or not such rescissions are effective. Whether the Congress will abandon or follow its "historic precedent" also is a question which only the Congress may decide.

However, as discussed above, the Kansas Legislature, in our judgment, has not contingently ratified the proposed amendment whereby its ratification is no longer binding if thirty-eight states fail to ratify the amendment by March 22, 1979.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
Attorney General of Kansas

W. Robert Alderson

W. Robert Alderson
First Deputy Attorney General

RTS:WRA:gk