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April 5, 2016

Via Email (House.Health.And.Social.Services@akleg.gov)

The Honorable Paul Seaton, Chair
The Honorable Liz Vazquez, Vice Chair
Health and Human Services Committee
Alaska State House of Representatives
State Capitol
Juneau, AK 99801

Re: Senate Bill 89 concerning the prohibition of a school district from allowing an abortion services provider to furnish course materials or provide instruction concerning sexuality or sexually transmitted diseases

Dear Chair Seaton and Vice Chair Vazquez:

Thank you for this opportunity to provide this written testimony in support of those provisions of Senate Bill 89 which would, among other things, prohibit a school district from allowing an abortion services provider to furnish course materials or provide instruction concerning sexuality or sexually transmitted diseases.

By way of background, I am a member of the Denver law firm of Thomas N. Scheffel & Associates, P.C. I also serve as president and general counsel of the Colorado Freedom Institute, a nonprofit legal organization dedicated to protecting and promoting, among other things, the sanctity of human life. Until January 31, 2016, I also served for five years as Senior Counsel to Alliance Defending Freedom, a First Amendment-Religious Liberty legal organization.

In these capacities, I have had substantial experience in crafting and providing support for legislation similar to that proposed by Senate Bill 89, including offering to defend such measures when enacted by state and local governments and later challenged by organizations such as the American Civil Liberties Union.

We have been asked us to specifically focus on two sections of Senate Bill 89, to wit:

- Section 3 of Senate Bill 89 which would amend AS 14.03.083 to add a new subsection (e) that would provide that:

> A school district and an educational services organization that has a contract with a school district may not contract with an abortion services provider.

- Section 5 of Senate Bill 89 which would amend AS 14.30.360 to add a new subsection (c) to provide that:

> A school district may not permit an abortion services provider or an employee or volunteer of an abortion services provider who is acting on behalf of the abortion services provider to offer, sponsor, furnish course materials, or provide instruction relating to human sexuality or sexually transmitted diseases.

We note that Legal Services, Division of Legal and Research Services, Legislative Affairs Agency, State of Alaska, has, in a March 14, 2016 memorandum to Chair Seaton,[1] noted that "[t]he restrictions in sections 3 and 5 of [Senate Bill 89] raise issues under 1) the First Amendment of the United States Constitution and art. I, secs. 5 and 6 of the Constitution of the State of Alaska . . . [relating to speech and association rights]; 2) art. I, sec. 10 of the United States Constitution and art. I, sec. 15 of the Constitution of the State of Alaska [relating to bills of attainder]; and 3) the Fourteenth Amendment to the United States Constitution and art. I, sec. 1 of the Constitution of the State of Alaska [relating to equal protection]. The Legal Services memorandum concludes that "[f]ederal and state courts have come to different conclusions on each of these issues when reviewing similar restrictions, and there are no cases from the Alaska Supreme Court that are directly on point." *See* Legal Services Memorandum, page 1.

We understand that the goal of these two sections of Senate Bill 89 is, as expressed in its title, to prohibit a school district from allowing an abortion services provider to furnish course materials or provide instruction concerning sexuality or sexually transmitted diseases. We think that goal would be achieved by the enactment of Section 5 of Senate Bill 89. Unless Section 3 of Senate Bill 89 has some different purpose, we believe its inclusion is unnecessary to achieve this result. While we agree with Legal Services that the outcome of any litigation would be "difficult to predict," elimination of Section 3 of Senate Bill 89, which, as written, could be applied in a far broader context, should substantially reduce or eliminate risks identified by Legal Services.

We believe therefore that the State of Alaska has the authority, free of constitutional constraints, to prohibit abortion services providers from gaining access to Alaska's young men and women in public school settings. In our opinion, Section 5 of Senate Bill 89, if enacted, would not impermissibly abridge the free speech and associational rights of abortion services

[1] We note that the Legal Services' Memorandum contains general principles of constitutional law. For the most part, however, the cases cited in the Legal Services' Memorandum do not apply to our analysis of the constitutionality of Section 5 of Senate Bill 89.

providers or their representatives. Rather, Section 5 of Senate Bill 89, if enacted, would simply preclude a representative of an abortion services provider presenting or delivering any instruction or program to students at a public school. Section 5 of Senate Bill 89 would not otherwise restrict or direct public school employees or personnel with respect to curriculum or with respect to the teaching of health-related matters to students.

That is because, for First Amendment analysis purposes, a public school is simply not a public forum. We are not aware of any legal authority from any court in any jurisdiction in the Nation that supports the novel idea that persons or entities who are not employees of a public school can claim that a public school classroom is a First Amendment "forum" to which they are entitled access. *See, e.g., Searcy v. Crim,* 815 F.2d 1389, 1392-94 (11th Cir. 1987) (assuming that bulletin boards within a public school were nonpublic forums); *Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.,* 386 F.3d 514, 526 (3d Cir. 2004) (finding that flyer posting, flyer distribution, and tabling forums in public schools are limited public forums). "[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or any manner that may be desired." *Heffron v. Int'l Soc'y for Krishna Consciousness,* 452 U.S. 640, 647 (1981).

When a public employer conveys its message through its employee, the employee's speech is not covered by the First Amendment. *Rust v. Sullivan,* 500 U.S. 173 (1991); *Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819 (1995). Where a public school employee speaks pursuant to his or her work responsibilities, the employee's free speech interests are not implicated. *Garcetti v. Ceballos,* 547 U.S. 410 (2006). *See also Pickering v. Board of Education,* 391 U.S. 563 (1968). The notion that employees or representatives of abortion services providers can claim some First Amendment right to access to Alaska public school rooms, including the right to display or distribute promotional materials that advocate their abortion services, or speak on any topic they may desire, including abortion or other sexual activities, is seriously misguided.

Indeed, it is the responsibility of the State of Alaska to determine the means for educating Alaska public school students to become productive members of their community and of society as a whole and to behave responsibly. It is well-settled law that public school districts have broad authority to determine their curriculum. *Edwards v. Aguillard,* 482 U.S. 578, 583 (1987) ("States and local school boards are generally afforded considerable discretion in operating public schools"); *Brown v. Li,* 308 F.3d 939, 951 (9th Cir. 2002) ("[T]he curriculum of a public educational institution is one means by which the institution itself expresses its policy, a policy with which others do not have a constitutional right to interfere").

It is equally well-settled that a public school district's decisions over what materials are made available to students within their schools and libraries are curricular decisions to which the courts owe substantial deference. *Board of Education, Island trees Union Free Sch. Dist. No. 26 v. Pico,* 457 U.S. 853, 863 (1982) (applying the principle that "local school boards have broad discretion in the management of school affairs" in the library context); *President's Council, Dist. 25 v. Community School Bd. No. 25,* 457 F.2d 289 (2d Cir. 1972) (same).

Just as the First Amendment right of free speech in open public forums does not apply within the context of public schools, neither is there any constitutional infirmity with Section 5 of Senate Bill 89, if enacted, as related to the associational rights of teachers or others. Importantly, it seems highly unlikely that a public school teacher would concurrently be "an employee or volunteer of an abortion services provider who [would] act[] on behalf of the abortion services provider" in a classroom. In any event, "the government as employer . . . has far broader power than does the government as sovereign." *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion). Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services. *Connick v. Myers,* 461 U.S. 138, 143 (1983).

Indeed, "it is the educational institution that has a right to academic freedom, not the individual teacher; where a teacher speaks pursuant to official job duties, the teacher is not entitled to the protections of the First Amendment." *Evans-Marshall v. Bd. of Educ. Of Tipp Exempted Vill. Sch. Dist.*, 624 F.3d 332, 344 (6th Cir. 2010). *See also Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (The "four essential freedoms" that constitute academic freedom have been described as the school's freedom to choose "who may teach, what may be taught, how it shall be taught, and who may be admitted to study.); *Meyer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477 (7th Cir. 2007) (if employed to teach elementary school, for example, the teacher must teach the prescribed material and not discuss matters the teacher is told to avoid).

Though the employee or volunteer of an abortion services provider would not likely simultaneously be a public employee, if a public employee's speech is considered to involve a matter of public concern, the court would weigh whether the employee's interest in expression outweighs the employer's interest in workplace efficiency and avoiding disruption. *Connick v. Myers*, 461 U.S. 138; *Garcetti*, 547 U.S. 410 (ruling that public employee speaking pursuant to official duties is not speaking as private citizen, and First Amendment does not bar employer regulation of speech); *Nicholson v. Bd. of Educ., Torrance Unified Sch. Dist.*, 682 F.2d 858 (9th Cir. 1982) (ruling teacher's speech rights not infringed where interfered with smooth school operations). *See also Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

Thus, it is our opinion that Section 5 of Senate Bill 89, if enacted, would not restrict the associational rights of public school teachers and others who happen to teach health-related topics or subjects within the public school curriculum. Teachers who would be teaching health-related subjects that meet the approved curriculum of Alaska public schools would be acting on behalf of the public schools and not on behalf of an abortion services provider. We do not believe that, if enacted, this subsection of Senate Bill 89 would affect what a teacher or other public school employee might choose to do in their personal life, outside of their public school employment.

Finally, the Legal Services' Memorandum suggests that Section 5 of Senate Bill 89, if enacted, may constitute a bill of attainder. Legal Services cites no authority for this proposition and correctly notes that the "primary question . . . would likely be whether [Section 5 of Senate Bill 89, if enacted] would 'impose punishment.'" Given the valid purposes of Section 5 of Senate

Bill 89, purposes which are articulated in this opinion as well as by the sponsors of this measure, we are confident that Section 5 of Senate Bill 89, if enacted, would not be held to constitute a bill of attainder.

As we understand it, Alaska law mandates that "[i]t is the policy of [Alaska] that the purpose of education is to help ensure that all students will succeed in their education and work, shape worthwhile and satisfying lives for themselves, exemplify the best values of society, and be effective in improving the character and quality of the world about them." AS § 14.03.015. Enactment of this subsection of Senate Bill 89 would undoubtedly advance this State of Alaska policy.

It is our opinion therefore that Section 5 of Senate Bill 89 would serve the purpose of educating Alaska public school students to become productive members of their community and society as a whole and to behave responsibly. It is our further opinion that it is appropriate for the State of Alaska to establish a policy that promotes self-discipline, sense of responsibility, self-control, and ethical considerations such as respect for self and others and respect for the dignity and worth of the human person.

In summary, we believe it is not only appropriate, but prudent, for the State of Alaska to enact a policy that restricts access of representatives and volunteers of abortion services providers to children in Alaska's public schools. Enactment of Section 5 of Senate Bill 89 would do just that.

Please do not hesitate to contact me if you have questions or require additional information.

Very truly yours,

THOMAS N. SCHEFFEL & ASSOCIATES, P.C.

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cc: Rep. Neal Foster
Rep. Louise Stutes
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