



March 3, 2016

The Honorable Mike Dunleavy, Chair
The Honorable Charlie Huggins, Vice Chair
Senate Education Committee
Alaska State Senate
State Capitol
Juneau, AK 99801

by email: Senator.Mike.Dunleavy@akleg.gov
Senator.Charlie.Huggins@akleg.gov

**Re: SB 191: Banning Employees and Representatives of Abortion Services
Providers from Public Schools
ACLU Analysis of Financial and Constitutional Issues**

Dear Chair Dunleavy and Vice Chair Huggins:

Thank you for the opportunity to provide testimony about Senate Bill 191, which interferes with the freedom and livelihood of countless thousands of doctors, teachers, and other Alaskans working and volunteering in medical facilities and schools. Its purpose appears to be to denounce one form of perfectly legal, socially vital, and constitutionally protected conduct, at the expense of people's rights under the Constitution of the State of Alaska and the United States Constitution. We urge the committee not to pass SB 191.

The American Civil Liberties Union of Alaska represents thousands of members and activists throughout Alaska who seek to preserve and expand the individual freedoms and civil liberties guaranteed by the Alaska and United States Constitutions. We engage in public advocacy and education to further those rights, and—when necessary—we litigate to protect those rights when they are attacked. In this context, we write to advise you that this bill contains unconstitutional restrictions on people's freedoms. And in addition to these constitutional harms, if this bill is enacted, Alaska would likely pay hundreds of thousands of dollars in attorney's fees and costs arising out of the seemingly inevitable constitutional challenges that would follow.

1. The scope of Senate Bill 191 is so sweeping that it would subject an untold number of Alaskans to risk of lost employment or financial penalty.

Senate Bill 191 endangers the job of any teacher or school board member who knowingly allows an employee or representative of an abortion services provider to deliver instruction or to distribute materials—about any topic—in a public school. This bill makes it conceivable that a history teacher who volunteers at a women's health clinic on Saturday risks her own job by showing up for work again on Monday. Meanwhile, a teacher who volunteers at an anti-abortion "pregnancy crisis center" faces no such risk.

Conceivably, a receptionist who works at a medical practice where abortions are occasionally performed might understandably hesitate before participating in a local school's career day, lest her employer become subject to hundreds of thousands of dollars in fines. Or, erring on the side of caution, a school hosting a career day might determine that it should screen everyone who works in any capacity in the medical profession—to perform background checks schools are not equipped to perform—just to be sure no one it invites to speak at the school works for or represents a medical facility where abortions are performed.

To contemplate further how potentially damaging enacting SB 191 would be, consider a teacher whose student volunteers part-time at a hospital, in a position once popularly described as a “candy striper.” Someone in the hospital performs abortions, unbeknownst to the student or the teacher. The teacher could lose his job—and the hospital could be subject to fines and legal expenses—if the teacher lets his student present the results of a research project to her classmates. By volunteering at the hospital, the student can conceivably be said to represent an abortion services provider. By presenting her research, the student can conceivably be said to deliver instruction. Under SB 191 every student becomes suspect, and every teacher who wants to hold on to his job has to worry about where his students might be volunteering or working part-time.

The sweeping breadth of SB 191's chilling effect is difficult to fully anticipate, as it could suspend on tenterhooks anyone with even modest connections to public schools or to any organization where abortions are performed, regardless of whether that person even knows those modest connections exist.

2. If enacted, Senate Bill 191 may unconstitutionally violate Alaskans' rights to speak and to associate freely.

The right to speak without interference from the state is enshrined in Article I of the Constitution of the State of Alaska¹ and in the First Amendment of the United States Constitution.² Both constitutions protect that right robustly; the Alaska Constitution is “at least as protective of expression as the First Amendment to the United States Constitution.”³

SB 191 undermines this fundamental right by, for example, putting a teacher's continued employment at risk should that teacher speak—outside the schoolhouse gates and in a context wholly unrelated to that teacher's work—as an occasional volunteer or as a part-time worker on behalf of an abortion services provider, i.e., as a representative of the provider. While the state may have a legitimate interest in what messages its employee teachers deliver in the scope of their employment, the state does not have a legitimate

¹ ALASKA CONST. art. I, § 5. (“Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of this right.”).

² U.S. CONST. amend. I. (“Congress shall make no law . . . abridging the freedom of speech.”).

³ *Mickens v. City of Kodiak*, 640 P.2d 818, 820 (Alaska 1982).

interest in censoring the constitutionally protected messages its employee teachers deliver outside that scope.

As the U.S. Supreme Court observed in *Pickering v. Board of Education*, “[A] teacher’s exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.”⁴ In *State v. Haley*, the Supreme Court of Alaska similarly held that Alaska could not terminate a state employee for engaging in “speech focused entirely on public issues.”⁵ In contrast, SB 191 would implicate such speech by making it potential grounds for dismissal, based solely on the point of view it represents.

When the state does this, the restriction is subject to strict scrutiny under the U.S. Constitution: the law is presumed unconstitutional and the state must demonstrate that its regulation is necessary and narrowly tailored to further a compelling governmental interest. By declaring that some speakers are welcome in Alaska’s public schools while other speakers are not—based entirely on viewpoints expressed in non-school contexts—SB 191 appears destined to fail constitutional challenge.

Freedom of association is also constitutionally protected.⁶ A teacher who would otherwise choose to associate with others in order to engage in protected political speech—say, to attend a planning meeting in order to discuss a petition campaign—might, out of fear of losing her job, choose to stay at home instead. Such a chilling effect not only diminishes the vitality of public discourse; it implicates constitutionally protected rights.

3. If enacted, Senate Bill 191 would unconstitutionally violate Alaskans’ right to equal protection under the law.

The right to equal protection under the law is enshrined in Article I of the Constitution of the State of Alaska⁷ and in the Fourteenth Amendment of the United States Constitution.⁸

SB 191 particularly implicates the Alaska Equal Protection Clause. It singles out a specific group of Alaskans—employees and representatives of abortion services providers—to negatively affect their livelihood, including certified teachers. But because of the important constitutional right to engage in economic endeavor, courts closely scrutinize laws that

⁴ *Pickering v. Bd. of Ed. of Tp. High Sch. Dist. 205, Will County, Illinois*, 391 U.S. 563, 574 (1968).

⁵ *State v. Haley*, 687 P.2d 305, 314 (Alaska 1984).

⁶ See, e.g., *New York State Club Ass’n, Inc. v. City of New York*, 487 U.S. 1, 13 (1988) (“The ability and the opportunity to combine with others to advance one’s views is a powerful practical means of ensuring the perpetuation of the freedoms the First Amendment has guaranteed to individuals as against the government.”).

⁷ ALASKA CONST. art. I, § 1. (“This constitution is dedicated to the principle[] . . . that all persons are equal and entitled to equal rights, opportunities, and protection under the law.”).

⁸ U.S. CONST. amend. XIV, § 1. (“No state shall . . . deny to any person within its jurisdiction the equal protection of the laws”).

interfere with that right by treating some groups differently than others.⁹ By singling out people affiliated with abortion services providers and interfering with their livelihood, Alaska can expect SB 191 to be struck down.

4. The amount of taxpayer money Alaska has already spent defending unconstitutional laws like this possibly exceeds \$1 million.

For the three reasons described above, SB 191 is plainly unconstitutional. Passage of the bill would entangle Alaska in lengthy and complex—and avoidable—litigation. As Members of this Committee are aware, this would not be the first time, or even the second or third, that unconstitutional restrictions relating to the constitutionally protected right to obtain an abortion were struck down following prolonged and expensive litigation.

Alaska was recently embroiled in costly litigation over its attempt to impermissibly restrict the ability of low-income women to have abortions—the court struck down this restriction just over six months ago.¹⁰ Such litigation has been costly for Alaska. When Alaska’s endeavor to eliminate Medicaid funding for medically-necessary abortions was struck down in *State, Department of Health & Social Services v. Planned Parenthood of Alaska, Inc.*,¹¹ Alaska wound up paying the plaintiffs \$236,026.16 plus interest (or \$321,141.37 plus interest in 2016 dollars).¹² Similarly, the unconstitutional Parental Consent Act spawned a lawsuit, *State v. Planned Parenthood of Alaska*, and multiple appeals, lasting over ten years.¹³ Alaska paid the successful plaintiffs \$278,127.42 (or \$354,277.61 in 2016 dollars).¹⁴ And, any fair accounting of the total cost must include what Alaska had to pay its own attorneys and the other internal costs of defending those suits.

Such unnecessary drain of taxpayer resources would have been avoided had those respective Legislatures simply refrained from passing statutes, like SB 191, that are constitutionally infirm. Alaska has better uses to which it can direct the people’s time and money than defending the constitutionality of squarely unconstitutional laws.

⁹ See, e.g., *State, By and Through Departments of Transp. and Lab. v. Enserch Alaska Const., Inc.*, 787 P.2d 624, 632 (Alaska 1989) (“the right to engage in an economic endeavor within a particular industry is an important right for state equal protection purposes.”) (internal quotations omitted).

¹⁰ *Planned Parenthood of the Great Northwest v. Streur*, No. 3AN-14-04711CI (Anchorage Super. Ct. Aug. 27, 2015), *appeal filed*, No. S-16123.

¹¹ 28 P.3d 904 (Alaska 2001).

¹² We have used the U.S. Bureau of Labor Statistics inflation calculator, available online at http://www.bls.gov/data/inflation_calculator.htm, to derive the inflation-adjusted 2016-dollar amounts. For the original raw dollar amounts from the litigation addressed in this footnote and the next, please see the attached orders from the Anchorage Superior Court and the Alaska Supreme Court.

¹³ *State v. Planned Parenthood of Alaska*, 171 P.3d 577 (Alaska 2007).

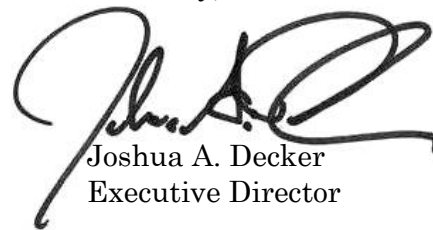
¹⁴ *Id.*

Conclusion

We appreciate the opportunity to share our concerns about SB 191 with the Senate Education Committee. We hope our testimony proves valuable to Members contemplating the bill's constitutional infirmities. Because of these infirmities, we oppose this bill and urge the Committee to vote Do Not Pass.

We further hope that this Committee will refrain from approving legislation that squarely violates the Alaska and United States Constitutions and would entangle Alaska in expensive, time-consuming, and needless litigation.

Sincerely,

A handwritten signature in black ink, appearing to read "Joshua A. Decker", with a stylized, flowing script.

Joshua A. Decker
Executive Director

cc: Senator Cathy Giessel, Senator.Cathy.Giessel@akleg.gov
Senator Gary Stevens, Senator.Gary.Stevens@akleg.gov
Senator Berta Gardner, Senator.Berta.Gardner@akleg.gov