



House Education Committee
Alaska State Senate
State Capitol
Juneau, AK 99801

Re: Senate Bill 89 – An Act Restricting Employees and Representatives of Abortion Services Providers, and Affiliates of Abortion Services Providers, from Providing Instruction or Materials Relating to Human Sexuality or Sexually Transmitted Diseases

Dear Legislator,

I am an attorney for Alliance Defending Freedom, a non-profit legal organization. I am writing to advise you of the constitutionality of SB 89, which prohibits abortion services providers, or an employee or volunteer of an abortion services provider, to provide instruction or materials relating to human sexuality or sexually transmitted diseases.

1. SB 89 does not infringe on First Amendment rights.

SB 89 does not restrict the rights of teachers to speak outside of their employment, contrary to the allegations of opponents to this bill such as the American Civil Liberties Union of Alaska. It does not forbid teachers from volunteering or working with abortion services providers in their private capacity as citizens. Instead, SB 89 prohibits any abortion services provider, its employees or volunteers, from delivering instruction or materials relating to human sexuality or sexually transmitted diseases in the capacity as a representative of any abortion services provider. This means that teachers and other school personnel would, for example, be permitted to volunteer with an abortion provider to stuff envelopes, answer phone calls, educate women about their health, collect signatures for petitions, and speak at a rally supportive of abortion rights in their capacity as a citizen, while also being permitted to deliver instruction in sexual education in their capacity as a teacher. Instead, SB 89 prohibits any person—including teachers or other school personnel—who is an employee or volunteer of an abortion services provider, from providing such instruction in their capacity as a volunteer or an employee of an abortion services provider. Teachers may deliver sexual education instruction in their capacity as a teacher, but not in their capacity as a volunteer or employee of an abortion services organization.

While a public employer does not generally have the power to restrict the speech of public employees outside of their job duties, *see Pickering v. Board of Education*, 391 U.S. 563 (1968), the Constitution permits public employers to regulate speech within the context of government employment. Where an employee of a public school speaks pursuant to his or her responsibilities as an employee, free speech rights are not implicated. *See Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006) (“[T]he First Amendment does not prohibit managerial discipline based on an employee’s expression made pursuant to official responsibilities.”). It is therefore



permissible that the State of Alaska forbid teachers and other school personnel from acting as a representative for an abortion services provider in the course of their employment—they cannot act as representatives of an abortion provider when delivering sexual education instruction or materials to students.

Nothing in this bill forbids school personnel from speaking about the issues implicated by SB 89 in their capacity as citizens. Teachers and school personnel are free to speak on public issues such as abortion and reproductive health care in their private capacity as citizens without fear of liability under SB 89. *See Connick v. Myers*, 461 U.S. 138, 147 (1983) & *Garcetti*, 547 U.S. at 417 (recognizing the rights of public employees to speak on “matters of public concern” within their capacity as citizens). SB 89 undoubtedly permits employees to speak “as citizens about matters of public concern” such as abortion, *see Garcetti*, 547 U.S. at 419, but places reasonable limits on speech undertaken “pursuant to official responsibilities.” *Id.* at 424. SB 89 merely limits actions within the scope of public employment, consistent with the Constitution.

Furthermore, SB 89 does nothing to prevent a teacher from talking about abortion and other reproductive health topics in the classroom as part of the curriculum approved by the school board. The proposed law also has no effect on the ability of public school students from expressing their views on abortion or reproductive health issues while at school.

Likewise, this bill does not infringe the right to associate. Teachers and school personnel are free to volunteer for abortion services providers or affiliates in their personal capacity and to engage in public debate about abortion and other reproductive health care issues. The bill would not implicate the ability of any public employee to associate with abortion services providers or affiliates as a citizen.

2. SB 89 does not violate the right to equal protection.

SB 89 does not infringe on the right of equal protection of the laws under the Fourteenth Amendment. The Equal Protection Clause is “essentially a direction that all persons similarly situated should be treated alike.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). However, when fundamental rights are not implicated, such as here, “[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.” *Id.* at 440.

Because SB 89 does not affect any fundamental right of abortion services providers or affiliates, as discussed above, even if SB 89 treats similarly situated persons differently, it need only be supported by a rational basis. Under state law, Alaska’s public policy mandates “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. SB 89 serves these legitimate interests by educating Alaska public school students to become productive members of society by establishing a policy that promotes self-discipline, personal



responsibility, and ethical considerations such as the respect for the dignity and worth of all human beings. The prohibition of abortion providers from providing curriculum, instruction, or materials in public schools serves these legitimate interests, and Alaska is therefore permitted to exclude such organizations from its schools.

Furthermore, public school districts have broad authority to determine their curriculum. *See, e.g. Edwards v. Aguillard*, 482 U.S. 578, 583 (1987) (“States and local school boards are generally afforded 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.”). Likewise, a public school district’s decisions over what materials are to be made available to students within their schools are curricular decisions to which the courts owe substantial deference. *See Board of Education, Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 863 (1982) (Noting that “local school boards have broad discretion in the management of schools affairs” in the provision of materials in the school library context). SB 89 seeks to prohibit certain organizations from participating in its curriculum, and the state is owed substantial deference in this determination about what it is best for the students and families it serves.

SB 89 is a common sense bill that appropriately restricts access of abortion providers and their affiliates to students in Alaska’s public schools.

Respectfully submitted,

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