MEMORANDUM

To: Senator Bert Stedman, Chair, Alaska Senate Health & Social Services Committee
From: Planned Parenthood Votes Northwest & Hawaii
Re: Opposition arguments to SB 179
Date: March 17, 2016

There are a number of significant problems with Senate Bill 179, making it both legally and medically questionable. Before outlining the numerous legal and operational problems with this bill, it is important to note that a "child removed from a pregnant woman's womb alive," as referenced repeatedly in this bill, is not referring to an abortion. It is a delivery. Therefore, regulating this through abortion code is both medically and legally inappropriate. Despite this clear confusion of medical terminology, this memo provides an analysis of the individual components of the bill that together make the bill unworkable, unenforceable, and likely unconstitutional. This document is intended to supplement and reinforce the legally sound advice from the Alaska Legal Services memorandum dated February 15, 2016.

Senate Bill 179 directs physicians to alter their practice of medicine based on vague terminology that conflicts with multiple legal precedents:

> Proposed AS 18.16.010(*l*) in Sec. 2: "When a physician performs or induces an abortion under (k) of this section, the physician shall use the method of terminating the pregnancy that provides the best opportunity for the unborn child to survive after the child is removed from the pregnant woman's womb if, in the physician's clinical judgment, the method of terminating the pregnancy does not present a serious risk to the life or physical health of the pregnant woman."

This provision directs physicians to alter their practice of medicine for interests unrelated to what is best for the patient – the pregnant woman. This would force doctors to deviate from best medical practice to achieve an intrusive legislative goal, rather than advance the woman's health. It is a dangerous precedent for legislation to direct doctors to practice medicine in a manner that may conflict with their training, expertise, and experience.

Furthermore, the provision runs contrary to Alaska court precedent on balancing the state's interest in potential human life and a woman's health:

> "Under the U.S. Supreme Court's analysis in *Roe v. Wade*, the State's interest in the life and health of the mother is paramount at every stage of pregnancy. And in Alaska, '[t]he scope of the fundamental right to an abortion … is similar to that expressed in *Roe v. Wade.*' Thus, although the State has a legitimate interest in protecting a fetus, *at no point does*

> *that interest outweigh the State's interest in the life and health of the pregnant woman."*[1] (Emphasis added.)

This bill would require that physicians put the interest of the fetus at the forefront of their medical decision-making instead of prioritizing a woman's health, which directly violates the underpinnings of Alaska law regarding abortion as laid out in *State v. Planned Parenthood.*

Indeed, nearly identical language[2] has been struck down because it was impermissibly vague. In *Colautti v. Franklin* 439 U.S. 379 (1979), the U.S. Supreme Court held that several provisions of a similar law in Pennsylvania were void for vagueness. Most applicable to SB 179 is a similar provision that directed physicians to use a standard of care in which "the abortion technique employed shall be that which would provide the best opportunity for the fetus to be aborted alive." The court found that this provision was impermissibly vague and left physicians without certainty as to their legal duty:

> "Consequently, it is uncertain whether the statute permits the physician to consider his duty to the patient to be paramount to his duty to the fetus, or whether it requires the physician to make a "trade-off" between the woman's health and additional percentage points of fetal survival. Serious ethical and constitutional difficulties, that we do not address, lurk behind this ambiguity."

In light of *Colautti v. Franklin*, it is highly questionable whether the language in SB 179 could stand up in court.

Additionally, and as noted by the Alaska Legal Services memorandum, the definition of "medically necessary" in AS 47.07.068 and as referred to in SB 179 has already been found unconstitutional by the Alaska Superior Court.[3] Compounding the problems with this narrow terminology is *Roe v. Wade*'s companion case, *Doe v. Bolton* 410 U.S. 179 (1973), which upheld a broad medical definition of "medical necessity" when it pertains to abortion, writing: "We agree with the District Court that the medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health." SB 179 is in direct conflict with this well-established precedent.

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[1] *State Dept. of Health & Social Services v. Planned Parenthood of Alaska, Inc.,* 28 P.3d 904, 913 (Alaska 2001)

[2] Pennsylvania's law directed physicians to "exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted and *the abortion technique employed shall be that which would provide the best opportunity for the fetus to be aborted alive so long as a different technique would not be necessary in order to preserve the life or health of the mother.*" (Emphasis added.)

[3] The case is under appeal as *State v. Planned Parenthood of the Great Northwest,* No. S-16123

The omission of psychological conditions in this law highlights why this bill would be so harmful to Alaska women and their families. When we are talking about post-viability, the vast majority of abortions that take place this late in pregnancy are due to serious fetal anomalies that cannot be detected earlier in the pregnancy. In these situations, the infant may live a short and potentially painful life if the woman carries the pregnancy to term. This bill would strip the woman and her family of the ability to make that decision, forcing her to carry the pregnancy to term and put the fetus on artificial aid, regardless of the devastating psychological and mental health conditions she may suffer. It is hard to fathom how the bill's sponsor could argue how either the interest of the fetus *or* the health of a woman is served in this scenario as required in *State v. Planned Parenthood.*

SB 179's definition of "viable" is impermissibly vague and therefore unenforceable:

This bill is riddled with problematic clauses that are overly vague and therefore makes it impossible to enforce, opening up the law to legal challenges. Proposed AS 18.16.101(n)(8) reads: "viable" means capable of surviving outside the mother's womb, with or without artificial aid." This definition raises a number of critical yet unanswered questions:

- If a fetus could survive for several minutes, is it considered viable?
- What level of aid is required? For how long? To what extent?
- What if there is medical certainty that the infant will never survive if removed from artificial aid?
- What if the family knows that an infant will not survive and therefore do not want to put it on artificial aid? Will the state force parents to use artificial aid? For how long? At whose cost?

None of these questions are answered in this bill, putting a physician at risk of unintentionally violating this law even when acting in accordance to his/her best medical judgment. Without the ability to interpret how the state will enforce this law, it can easily be challenged on the basis of vagueness.

"Surrender of a child removed from womb alive" provisions are vague and unenforceable:

Proposed AS 18.16.012 in Section 3 also suffers from legally questionable vagueness and could deny parents of their legally protected rights: "If a child is removed from a pregnant woman's womb alive under AS 18.16.010(k) – (m), the child's parent may surrender the child…" In the rare and unlikely circumstance that this would occur, it is unclear how such surrender would work: Which parent may surrender? One? Both? What if they disagree? Could a father who is unable to fathom the idea supporting an infant who will be on unknown levels of artificial care, surrender the infant on behalf of both parents? This bill leaves these – and other – gaping holes that would render the bill unworkable.

Another section of the bill relating to the surrender is vague and its intent unclear: Proposed AS 47.10.011(13) adds the following as a "child in need of aid" through the Department of Health

and Social Services: "the infant was removed from the mother's womb alive during an abortion performed under AS 18.16.010(k) – (m) and a parent of the child is unwilling or unable to care for the infant." This language certainly implies that an infant becomes in need of public aid if just one parent expresses unwillingness or inability to provide care, yet that would certainly deprive the other biological parent of his/her parental rights. Does this provision mean that an impoverished family's inability to pay for an infant on artificial aid renders the infant eligible for aid, even if the family retains parental rights? Or does this refer solely to the proposed AS 18.16.012 that allows for surrender of such a child that is "removed from a pregnant woman's womb alive"? If the biological father walks away from the family, therefore expressing his unwillingness to care for the infant, is the infant now eligible for aid even if the mother is still there? These are important questions are left entirely unanswered in the bill and could most certainly be argued as void for vagueness.

SB 179 repeals constitutionally necessary exceptions to Alaska's parental consent law:

Lastly, the bill would repeal AS 18.16.010(g)(1), code that allows physicians to bypass the state's parental consent process for abortions on minors because "an immediate abortion of the minor's pregnancy is necessary to avert the minor's death." This eliminates a critical exception to the states parental notice and consent requirements, which threatens anew the constitutionality of the parental involvement laws already being challenged in court.[4]

As outlined here, Senate Bill 179 presents myriad legal, medical, and practical challenges that make this bill simply unworkable and legally questionable. We ask the Chair not to hold a hearing on this dangerous bill, particularly when Alaska faces an unprecedented budget crisis. We urge the Chair to use his committee to enact policies that improve and serve the health and livelihood of everyday Alaskans, rather than advance harmful legislation that steps on the constitutional rights of women.

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[4] The Alaska Supreme court has noted that "the State's interest in the life and health of the mother is paramount at every stage of pregnancy [, and] at no point does state's interest in protecting fetal life "outweigh the State's interest in the life and health of the pregnant woman." *Planned Parenthood of Alaska*, 23 P.3d at 913 (citing *inter alia Valley Hosp. Ass'n. v. Mat-Su Coalition for Choice*, 948 P.2d 963, 969 (Alaska 1997). And as to laws that delay abortions, the United States Supreme Court in Planned Parenthood of Southeastern Pennsylvania v. Casey noted that the medical emergency exception was "central to the operation of various other requirements," including a parental consent provision. The Court went on to explain that if the medical emergency provision "foreclose[d] the possibility of an immediate abortion despite some significant health risks," it would be unconstitutional because "the essential holding of Roe forbids a State to interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health." *Casey*, 505 U.S. at 880. 833, 879, 899 (1992).