

LEGAL SERVICES

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MEMORANDUM

February 24, 2016

SUBJECT: Constitutionality of SB 179
(SB 179; Work Order No. 29-LS1236\W)

TO: Senator Bert Stedman
Attn: David Scott

FROM: Kate S. Glover *KG*
Legislative Counsel

You requested an opinion on the constitutionality of SB 179, which bans abortions after an unborn child is, in the opinion of the physician, viable outside the mother's womb. The bill includes exceptions allowing abortions to be performed after the unborn child is viable if the pregnancy is the result of sexual assault or incest, or if the abortion is medically necessary. In my opinion, the narrow definition of "medically necessary" used in the bill is likely unconstitutional under a recent superior court decision finding this definition unconstitutional in the context of the state's obligation to fund medically necessary abortions through the medical assistance program.¹

The privacy clause of the Constitution of the State of Alaska, art. I, sec. 22, protects a woman's fundamental right to choose whether to terminate her pregnancy and is generally more protective of this right than the United States Constitution.² Under *Roe v. Wade*, after the point of viability, "[i]f the State is interested in protecting fetal life . . . , it may go so far as to proscribe abortion during that period, *except when it is necessary to preserve the life or health of the mother*" (emphasis added).³ The Alaska Supreme Court has stated that the "scope of the fundamental right to an abortion" under the Constitution of the State of Alaska "is similar to that expressed in *Roe v. Wade*."⁴ Although the prohibition under SB 179 applies after viability, the exception for medically necessary abortions allows an abortion only if necessary to "avoid a threat of serious risk to the life

¹ See *Planned Parenthood of the Great Northwest v. Streur*, No. 3AN-14-04711 CI (Aug. 27, 2015); see also *Planned Parenthood of Alaska v. Perdue*, No. 3AN-98-07004 CI (Mar. 16, 1999), *aff'd in part by State v. Planned Parenthood of Alaska*, 28 P.3d 904 (Alaska 2001).

² See *Valley Hospital Ass'n v. Mat-Su Coal. for Choice*, 948 P.2d 963 (Alaska 1997).

³ *Roe v. Wade*, 410 U.S. 113, 163 – 65 (1973).

⁴ See *Valley Hospital Ass'n*, 948 P.2d at 969, see also *DeJarlais v. State*, 300 P.3d 900, 904 (Alaska 2013).

or physical health of a woman from continuation of the woman's pregnancy."⁵ The definition lists a series of physical conditions that constitute a "serious risk to the life or physical health" of the mother.⁶ A superior court found this definition to be unconstitutional last fall in a similar context, because the definition excludes conditions that are harmful to a woman's psychological health.⁷ Although the superior court decision analyzed the definition under the equal protection clause, the decision provides guidance for what is required under the privacy clause of the Constitution of the State of Alaska as well. The superior court ordered that, for purposes of the state medical assistance program, "medically necessary" should be defined as follows:

The terms medically necessary abortions or therapeutic abortions are used interchangeably to refer to those abortions certified by a physician as necessary to prevent the death or disability of the woman, or to ameliorate a condition harmful to the woman's physical or psychological health, as determined by the treating physician performing the abortion services in his or her professional judgment.^[8]

Because the definition used in SB 179 does not allow an abortion to be performed after viability in a case where a woman is likely to suffer severe psychological, but not physical, harm if she carries the pregnancy to term, it may be too narrow to meet the requirements of the state constitution.

If I may be of further assistance, please advise.

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⁵ AS 47.07.068(b) (cross-referenced in SB 179 in proposed AS 18.16.010(k) and (n)).

⁶ *Id.*

⁷ The case is under appeal as *State v. Planned Parenthood of the Great Northwest*, No. S-16123. The superior court decision, Case No. 3AN-14-04711 CI, was issued Oct. 7, 2015, and the case status in the Alaska Supreme Court is listed as "Briefing Stage."

⁸ See *Planned Parenthood v. Streur*, No. 3AN-14-04711 CI, Decision and Order at 53 (Aug. 27, 2015); see also *id.* at 36. You can find the decision on the Alaska Court System website, under "Cases of Current Interest": <http://courts.alaska.gov/media/index.htm#cases>. The court's definition of medical necessity comes from an earlier superior court decision considering restrictions on funding abortions through the state medical assistance program. The earlier decision found, under both the equal protection and privacy clauses, that the state must fund medically necessary abortions for medical assistance recipients if the state funds other pregnancy related services. See *Perdue*, No. 3AN-98-07004 CI. The Alaska Supreme Court affirmed the decision on equal protection grounds, but declined to rule on the privacy clause question. See *State v. Planned Parenthood*, 28 P.3d 904.