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MEMORANDUM March 14, 2016

SUBJECT: Constitutional issues
(CSSB 89(RLS) am(efd add); Work Order No. 29-LS0735\F.A)

TO: Representative Paul Seaton
Attn: Jenny Martin

FROM: Kate S. Glover KG
Legislative Counsel

You have asked for a legal opinion regarding CSSB 89(RLS), and freedom of speech and association, bills of attainder, and equal protection. The restrictions in sections 3 and 5 of CSSB 89(RLS) 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, which protect freedom of speech and association; 2) art. I, sec. 10 of the United States Constitution and art. 1, sec. 15 of the Constitution of the State of Alaska, which prohibit the enactment of 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, which relate to equal protection. Federal 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. It is likely that, if enacted, secs. 3 and 5 of the bill will be challenged in court, but it is difficult to predict the outcome.

First amendment. The bill singles out a group – abortion services providers – and bars members of the group from contracting with public agencies. This restriction could violate the rights of expression or association, guaranteed by art. I, sec. 5 of the Constitution of the State of Alaska and the First Amendment to the United State Constitution.[1]

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[1] Art. I, sec. 5 provides:

> Section 5. Freedom of Speech. Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.

The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech,

In determining whether a law burdens freedom of expression, a court will examine the reason for the law, and whether it is neutral and of general application.[2] As the United States Supreme Court observed, "To determine the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). In this case, the law discriminates on its face in that it directly identifies certain people to bar from contracting.

Affiliation or expression discrimination can be a violation of the First Amendment. In *Board of County Commissioners of Waubaunsee Co. v. Umbehr*, 518 U.S. 668, 686 (1996), the United States Supreme Court found that a contractor had the right not to have a contract terminated for exercise of his First Amendment rights.[3] However, being an abortion provider or associated with a provider may not qualify as expressive conduct for the purpose of determining whether the law burdens First Amendment rights. In *Planned Parenthood of Kan. & Mid-Mo. v. Moser*, 747 F.3d 814, 838 - 40 (10th Cir. 2014), the 10th Circuit Court of Appeals rejected a claim that state denial of funding to an organization because the organization provided abortions constituted unconstitutional punishment for exercise of free speech and associational rights:

> Under the "modern unconstitutional conditions doctrine . . . the government may not deny a benefit to a person on a basis that infringes his constitutionally protected freedom of speech even if he has no entitlement to that benefit." *Bd. of Cnty. Comm'rs v. Umbehr*, [*supra* at] 674 . . . [T]he doctrine has been applied when the condition acts prospectively in statutes or regulations that limit a government-provided benefit—typically a subsidy or tax break—to those who refrain from or engage in certain expression or association. *See, e.g., FCC v. League of Women Voters*, 468 U.S. 364, 366 (1984) (federal statute that forbids recipients of public-broadcasting subsidy from "engag[ing] in editorializing" *Speiser v. Randall*, 357 U.S. 513, 515 (1958) (state constitutional provision and

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> or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

[2] *Swanner v. Anchorage Equal Rights Com'n*, 874 P. 2d 274, 279 (Alaska 1994); *cert. denied* 513 U.S. 979 (1994).

[3] The case involved a trash hauling contractor whose contract was terminated in retaliation for the contractor's public complaints about the county commission and the costs of various government services. *Id. Compare State v. ACLU*, 978 P.2d 597, 619 (Alaska 1999) (a measure that limits persons in a profession from participating in campaigns -- in this case lobbying -- must be narrowly tailored to avoid an undue burden on expressive activity).

> effectuating statute that grant tax exemption only to veterans who pledge not to advocate overthrowing the government). These cases recognize that the government ordinarily can impose conditions on the receipt of government funding, but that conditioning a benefit on someone's speech or association achieves an effect similar to direct regulation of the speech or association. *See Rumsfeld v. Forum for Academic & Institutional Rights,* 547 U.S. 47, 59 (2006). These cases have addressed only conditions *explicitly* imposed by the law.
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> [T]he unconstitutional-conditions doctrine has been applied when the condition acts retrospectively in a *discretionary* executive action that terminates a government-provided benefit—typically public employment, a government contract, or eligibility for either—in retaliation for prior protected speech or association. *See, e.g., Umbehr,* 518 U.S. at 671, 116 S.Ct. 2342 (termination of independent contractor by county officials in retaliation for contractor's criticism of county board); *Perry,* 408 U.S. at 597, 92 S.Ct. 2694 (nonrenewal of professor's contract with state university by board of regents in retaliation for his criticizing the board). In these cases, the government official's action has not been compelled by a statute or regulation; rather, the challenged action is one that would be within the official's discretion if it were not taken in retaliation for the exercise of a constitutional right. Thus, these cases necessarily examine the official's motive for taking the action; the challenge will be rejected unless retaliation against the protected conduct was "a substantial or motivating factor" for taking the action and the official would not "have taken the same action . . . in the absence of the protected conduct." *Umbehr,* 518 U.S. at 675.[4]

In *Planned Parenthood of Kansas & Mid-Missouri,* the plaintiff could have altered its activities to qualify for the grant for providing women's health services, and the law did not itself limit expressive conduct. The 10th Circuit further noted that the legislative motive for the exclusion was not a proper subject of inquiry.[5] Other courts, however, have found that disqualifying abortion advocacy groups from public funding violates first amendment rights.[6]

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[4] *Planned Parenthood of Kansas & Mid-Missouri v. Moser*, 747 F.3d 814, 838 - 39 (10th Cir. 2014) (some quotations, citations, parallel citations omitted; emphasis in original).

[5] *Id.* at 842 - 43.

[6] *See Planned Parenthood of Greater Memphis Region v. Dreyzehner,* 853 F. Supp. 2d 724, 734 - 35 (M.D. Tenn. 2012) ("Circuit and district courts have held in the ????? of abortion advocacy groups that the First Amendment rights of expression, association and advocacy are violated where states target abortion groups for disqualification from public funding.").

It is not clear whether the Alaska Supreme Court would rule similarly. It is also not clear whether the application of the law to participation of individuals with respect to providing instruction and literature sweeps too broadly.[7]

Bill of attainder. In at least one case, Planned Parenthood has successfully challenged legislation prohibiting abortion services providers from receiving any state funding as a bill of attainder. Art. 1, sec. 10 of the United States Constitution and art. 1 sec. 15 of the Constitution of the State of Alaska prohibit the enactment of bills of attainder. "To constitute a bill of attainder, the statute must (1) specify affected persons, (2) impose punishment, and (3) fail to provide for a judicial trial."[8] The primary question in this case would likely be whether the bill "imposes punishment." "To rise to the level of 'punishment' under the Bill of Attainder Clause, harm must fall within the traditional meaning of legislative punishment, fail to further a nonpunitive purpose, or be based on a [legislative] intent to punish."[9] Whether the bill is construed to further a nonpunitive purpose will depend on what the legislature says about the purpose for the bill in sponsor statements, committee hearings, and floor debates.

Equal protection. The draft bill also implicates the equal protection clauses of the United States Constitution and the Constitution of the State of Alaska because it singles out employees and representatives of abortion services providers for differential treatment.

The Alaska Supreme Court applies a sliding scale test to reviewing challenges under the equal protection clause. The Court must: (1) determine the weight of the individual interest impaired by the classification; (2) examine the importance of the purposes underlying the government's action; and (3) evaluate the means employed to further those

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[7] *Compare Alaskans for a Common Language vs. Kritz*, 170 P.3d 183, 200 (Alaska 2007) (provision of "English only" law that affected not only official government speech, which can be regulated, but that of private citizens and government employees swept too broadly to survive scrutiny).

[8] *Planned Parenthood of Central N. Carol. v. Cansler*, 804 F. Supp. 2d 482, 495 (M.D. N.C. 2011) (quoting *Planned Parenthood of Mid-Mo. and E. Kansas v. Dempsey*, 167 F.3d 458, 465 (8th Cir. 1999)). The statute at issue in *Cansler* specifically targets Planned Parenthood and its affiliates. The draft bill does not name Planned Parenthood, but by singling out "abortion services providers," it targets "a narrow class of persons. . . ." *Id.*

[9] *Dempsey*, 167 F.3d at 465 (citing *Selective Serv. Sys. v. Minn. Pub. Int. Research Group*, 468 U.S. 841, 852 (1984)).

goals to determine the closeness of the means-to-end fit.[10] The greater the weight of the individual interest, the greater the burden on the state to demonstrate that the classification achieves a legitimate governmental objective. At a minimum, the legislature must provide a "legitimate reason" for the disparate treatment and demonstrate that the classification "bears a fair and substantial relationship to that reason."[11] If, however, the interest burdened is a fundamental right (i.e. free speech), then the state must demonstrate a compelling interest and show that no narrower means could be used to meet that interest.[12]

If I may be of further assistance, please advise.

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[10] *Malabed v. N. Slope Borough*; 70 P.3d 416, 421 (Alaska 2003). The legitimate interest standard applies to economic interests, but, to the extent the draft bill burdens interests in employment, it may merit a stricter degree of scrutiny. In *Malabed*, the Court considered an individual's right to seek and obtain employment to be an "important interest," which required not just a legitimate interest, but an important one "and that the nexus between the enactment and the important interest it serves be close." *Id.* at 421 (quoting *State, Dep'ts of Transp. & Labor v. Enserch Alaska Constr., Inc.*, 787 P.2d 624, 633 (Alaska 1989)).

[11] *Griswold v. City of Homer*, 252 P.2d 1020 (Alaska 2011) (internal citations and quotation marks omitted).

[12] *See Treacy v. Municipality of Anchorage*, 91 P.3d 252, 265 – 66 (Alaska 2004).