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M E M O R A N D U M March 11, 2024

SUBJECT: Constitutional issues (HB 205; Work Order No. 33-LS0827\A)

TO: Representative Mike Prax
Attn: Riley Nye

FROM: Claire Radford
Legislative Counsel

You requested a legal opinion about the constitutionality of HB 205. This bill will be ruled unconstitutional because it criminalizes abortion entirely and repeals the medical assistance (Medicaid) coverage provision for all abortions. The constitutional issues in this bill are addressed below.

This bill unconstitutionally criminalizes all abortion. Under this bill, abortion would be illegal regardless of whether the fetus is viable and with no exceptions for the life or health of the mother. The Alaska Constitution protects a woman's fundamental right to make reproductive choices and provides more protection of individual privacy rights than does the federal constitution.[1] Unlike the federal constitution, the Alaska Constitution contains an express guarantee of the right to privacy.[2] Reproductive rights are fundamental, and fall within the scope of the right to privacy protected in the Alaska Constitution.[3]

Although the state may regulate abortion, under the Alaska Constitution, a restriction on reproductive choice will only be upheld when "the constraints are justified by a compelling state interest, and no less restrictive means could advance that interest."[4] The change to federal constitutional law articulated in *Dobbs v. Jackson Women's Health Organization*[5] does not change the analysis the Alaska Supreme Court would undertake

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[1] *Valley Hosp. Ass'n, Inc. v. Mat-Su Coal. for Choice*, 948 P.2d 963, 968 (1997).

[2] Art. I, sec. 22, Constitution of the State of Alaska, provides, "The right of the people to privacy is recognized and shall not be infringed."

[3] *Valley Hosp. Ass'n, Inc.*, 948 P.2d at 968 – 69.

[4] *Id*. at 969.

[5] 597 U.S. 215 (2022).

under art. I, secs. 1 and 22, of the Alaska Constitution.[6] The Alaska Supreme Court has expressly adopted a standard similar to *Roe v. Wade* (and rejected *Casey v. Planned Parenthood*) under our state constitution.[7] Thus, *Roe*'s recognition of abortion as a fundamental constitutional right remains good law in Alaska, and *Valley Hosp. Ass'n, Inc. v. Mat-Su Coal. for Choice* remains binding precedent.

This bill unconstitutionally restricts Medicaid funding for abortions. This bill repeals AS 47.07.068, the Medicaid payment provision for abortions. Under Alaska law, the state must fund medically necessary abortion services for eligible women for coverage under the Medicaid program, just as the state funds pregnancy services for women covered under Medicaid. Article I, sec. 1, of the Alaska Constitution provides, in part, that "all persons are equal and entitled to equal rights, opportunities, and protection under the law." This constitutional equal protection clause mandates "equal treatment of those similarly situated."[8]

In 2001, the Alaska Supreme Court held that denial of Medicaid coverage to indigent women who medically require abortions violates the equal protection clause of the Alaska Constitution. The court stated: "the manner in which the State allocates public benefits is subject to constitutional limitation under Alaska's equal protection provision. The State, having undertaken to provide health care for poor Alaskans, must adhere to neutral criteria in distributing that care."[9] The court further explained:

> [T]he State's decision to fund prenatal care and other pregnancy-related services has not been challenged. Indeed, a woman who carries her pregnancy to term and a woman who terminates her pregnancy exercise the same fundamental right to reproductive choice. Alaska's equal protection clause does not permit governmental discrimination against either woman; both must be granted access to state health care under the same terms as any similarly situated person. The State's undisputed interest in providing health care to women who carry pregnancies to term

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[6] *State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 909 (Alaska 2001). Like the right to privacy, the Constitution of the State of Alaska provides more protection of individual rights to non-discriminatory treatment than does the federal constitution.

[7] *Valley Hosp. Ass'n, Inc.*, 948 P.2d at 969 ("The scope of the fundamental right to an abortion that we conclude is encompassed within article I, section 22, is similar to that expressed in *Roe v. Wade*. We do not, however, adopt as Alaska constitutional law the narrower definition of that right promulgated in the plurality opinion in *Casey*.").

[8] *Planned Parenthood of Alaska, Inc.*, at 909 .

[9] *Id*. at 915 (invalidating regulations that prohibited public funding for abortions except when necessary to save the life or health of the mother, or in cases of rape or incest).

> has no effect on the State's interest in providing medical care to Medicaid-eligible women who, for health reasons, require abortions.[10]

In the most recent Alaska Supreme Court case relating to legislative action restricting Medicaid funding for abortions, the court found a statute and regulation redefining which abortions qualify as "medically necessary" for the purposes of Medicaid funding violated the equal protection clause of the Alaska Constitution.[11] The court stated the state's statute and regulation limiting Medicaid funding of abortion services to those that were medically necessary, according to the criteria of the statute and regulation, treated abortion services differently from childbirth services and other pregnancy care.[12] The court recognized the state may limit Medicaid expenditures by employing neutral criteria such as medical necessity to prioritize funds, but held that the statute and regulation were not narrowly tailored to meet the ends of preserving Medicaid funds.[13] In explaining how the measures singled out only one among multiple purportedly "elective" procedures available to pregnant women, the court stated abortion costs the state significantly less than a hospital delivery, and the state continued to fund other purportedly elective pregnancy-related services such as inductions of labor without any special certification of medical necessity.[14] The court found the state failed to show that the differences between the affected classes justified the discriminatory treatment, and concluded the statute and regulation violated the Alaska Constitution's guarantee of equal protection.[15]

Prohibiting abortion will force the Department of Health (department), to choose between violating a statute or a constitutional right. I do not know what the department would do in this situation, but the Alaska Attorney General has previously advised the department to pay for medically necessary abortions.[16]

Not subject to judicial review. The bill contains a number of sections that declare themselves to be "not subject to judicial review." Prohibiting the judicial branch from reviewing a statute is unconstitutional.

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[10] *Id*. at 912 - 13 (footnotes omitted).

[11] *State v. Planned Parenthood of the Great Nw.*, 436 P.3d 984 (Alaska 2019).

[12] *Id*. at 1000 - 05.

[13] *Id*. at 1005.

[14] *Id*.

[15] *Id*.

[16] 2016 Op. Alaska Att'y Gen. (June 13).

In both our federal and state systems of government, the legislative branch does not determine whether a statute or regulation is unconstitutional. If the legislature were to determine the constitutionality of statutes in the state, it would violate the separation of powers doctrine.[17] For over two centuries, it has been a bedrock principle of American law, that "[i]t is emphatically the province and duty of the judicial department to say what the law is . . . ."[18]

There is some uncertainty regarding the degree to which the legislature can modify the jurisdiction of the courts. Three sections of the state constitution are relevant to this issue. First, art. IV, sec. 1, provides, in part, that "[t]he judicial power of the State is vested in a supreme court, a superior court, and the courts established by the legislature. The jurisdiction of the courts shall be prescribed by law." Although this section clearly allows the legislature some role in prescribing the jurisdiction of the courts, the constitution also provides, in art. IV, sec. 2, that the "supreme court shall be the highest court of the State, with final appellate jurisdiction" and, in art. IV, sec. 3, that the "superior court shall be the trial court of general jurisdiction . . . ." Since the state constitution provides that the superior court is a court of general jurisdiction, it is not clear to what extent the legislature can remove particular cases or issues from the superior court's general jurisdiction.[19] However, no precedent suggests that the legislature can declare its own action to be free from judicial scrutiny.

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[17] The separation of powers doctrine applies in this state. *Public Defender Agency v. Superior Court*, 534 P.2d 947 (Alaska 1975). The doctrine prohibits one branch of government from encroaching upon and exercising the powers of another branch and requires that the blending of governmental powers will not be inferred in the absence of an express constitutional provision. *Bradner v. Hammond*, 553 P.2d 1 (Alaska 1976). The purpose of the separation of powers doctrine is to preclude the exercise of arbitrary power and to safeguard the independence of each branch of government. *Id*. at 5. The Constitution of the State of Alaska allocates such judicial power to the courts:

> **Judicial Power and Jurisdiction.** The judicial power of the State is vested in a supreme court, a superior court, and the courts established by the legislature. The jurisdiction of courts shall be prescribed by law. The courts shall constitute a unified judicial system for operation and administration. Judicial districts shall be established by law.

Art. IV, sec. 1, Constitution of the State of Alaska. *See also* AS 22.05.010.

[18] *Marbury v. Madison*, 5 U.S. 137 (1803) (cited in *Planned Parenthood of Alaska*, 28 P.3d at 915 n.69).

[19] In 2005, the legislature removed workers' compensation appeals from the jurisdiction of the superior court. An attorney general opinion concluded that this was within the legislature's authority under art. IV, sec. 1, of the Constitution of the State of Alaska.

Supremacy Clause issues. Sections 33 - 35 are also unconstitutional under the Supremacy Clause of the United States Constitution.[20] The Supremacy Clause declares that federal law is the supreme law of the land, and it prevents the states from interfering with the federal government's exercise of its constitutional powers. Because secs. 33 - 35 will encourage or mandate state public officials to disregard presidential orders, federal regulations, and federal court orders, the sections violate the Supremacy Clause and are unenforceable. Additionally, the sections may violate the separation of powers doctrine established in the Alaska Constitution. The sections infringe upon the attorney general's ability to defend this law—which is a duty that inherently lies within the executive branch.

General overview. This memorandum provides a general overview of the constitutional issues raised by HB 205, but the bill is lengthy and makes amendments to many sections of law that treat all abortions as a crime and repeals all current statutes that regulate abortion. Please let me know if you have questions about specific sections of the bill.

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See 2005 Inf. Op. Att'y Gen. (July 18; 883-05-0106). An appeal now goes to the worker's compensation board and that decision can then be appealed to the superior court.

[20] Art. VI, par. 2.