COLORADO FREEDOM INSTITUTE

March 11, 2016

The Honorable Mike Dunleavy, Chairman
The Honorable Charlie Huggins, Vice Chairman
Senate Education Committee
Alaska State Senate
State Capitol
Juneau, AK 99801

Re: Senate Bill 191 – A Bill for an Act to Restrict Employees and Representatives of Abortion Service Providers and Affiliates of Abortion Service Providers from Delivering Instruction or Distributing Materials in Public Schools

Dear Chairman Dunleavy and Vice Chairman Huggins:

Thank you for this opportunity to provide this written testimony in support of Senate Bill 191.

I am president and general counsel of the Colorado Freedom Institute. The Colorado Freedom Institute is a nonprofit legal organization dedicated to protecting religious freedom for people across America in the public square, in our schools, and for our churches. The Colorado Freedom Institute also fights for the sanctity of human life and for traditional marriage and families. Until January 31, 2016, I also served for five years as Senior Counsel to Alliance Defending Freedom, a First Amendment-Religious Liberty legal organization. In these capacities, I have had substantial experience in providing support for legislation similar to that proposed by Senate Bill 191, including offering to defend such measures when enacted by state and local governments and later challenged by organizations such as the American Civil Liberties Union.

If enacted, Senate Bill 191 would prohibit an employee or representative of an abortion services provider or an affiliate of an abortion services provider from (a) presenting or delivering instruction on any topic to students at a public school, (b) from distributing or displaying materials to students at a public school, and (c) from providing or displaying materials to students at public schools which bear the identifying mark of the abortion services provider or

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affiliate of an abortion services provider where the materials are knowingly used for instruction or display at a public school. Senate Bill 191 provides for penalties in the event of a violation, including a penalty of the greater of $5,000 or actual damages, plus reasonable attorney's fees, and a prohibition on the receipt of state funds by a teacher or school board member who knowingly authorizes or allows a person to provide such instruction or display such materials at a public school.

It appears that Senate Bill 191 has been modeled after laws that have been adopted in both the States of Missouri and Louisiana. La. R.S. 40:1299.35 prohibits employees or representatives of an organization that performs abortion from providing instruction or materials at a public elementary or secondary school, or at a charter school that receives state funding. *See* H.B. 305 as enacted at http://www.legis.la.gov/legis/ViewDocument.aspx?d=914186&n=HB305%20Act%20617. I am not aware of any legal challenge to this law.

Senate Bill 191 is also consistent with a Missouri law enacted in 2007, Mo. R.S. 170.015. 1, that provides, "No school district or charter school, or its personnel or agents, shall provide abortion services, or permit a person or entity to offer, sponsor, or furnish in any manner any course materials or instruction relating to human sexuality or sexually transmitted diseases to its students if such person or entity is a provider of abortion services." I am not aware of any legal challenge to this law.

Based on our legal analysis of these state laws and Senate Bill 191, we disagree with the analysis and conclusions by the American Civil Liberties Union of Alaska and by the Alaska Division of Legal and Research Services, Legislative Affairs Agency that Senate Bill 191 would impermissibly abridge the free speech and associational rights of abortion industry representatives and others.

Rather, Senate Bill 191 would simply preclude the use of instructional materials which bear the identifying mark of the abortion services provider or affiliate of an abortion services provider or prohibit an employee or representative of an abortion services provider or affiliate of an abortion services provider from presenting or delivering any instruction or program to students at a public school. Senate Bill 191 would not otherwise restrict or direct public school employees or personnel with respect to curriculum or with respect to the teaching of health-related matters to students.

We believe therefore that the State of Alaska has the authority, free of constitutional constraints, to prohibit abortion services providers from gaining access to Alaska's young men and women in public school settings.

Though argued otherwise by the ACLU and Alaska Legal Services, a public school is simply not a public forum. "[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or any manner than may be desired." *Heffron v. Int'l Soc'y for Krishna Consciousness,* 452 U.S. 640, 647 (1981).

The notion that employees or representatives of abortion services providers or an affiliates of an abortion services providers can claim some First Amendment right to access to Alaska public school rooms, including the right to display or distribute promotional materials that advocate their abortion services, or speak on any topic they may desire is seriously misguided. We are not aware of any legal authority from any court in any jurisdiction in the Nation that supports the novel idea that persons or entities who are not employees of a public school can claim that a public school classroom is a First Amendment "forum" to which they are entitled access. *See, e.g., Searcy v. Crim,* 815 F.2d 1389, 1392-94 (11th Cir. 1987) (assuming that bulletin boards within a public school were nonpublic forums); *Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.,* 386 F.3d 514, 526 (3d Cir. 2004) (finding that flyer posting, flyer distribution, and tabling forums in public schools are limited public forums).

When a public employer conveys its message through its employee, the employee's speech is not covered by the First Amendment. *Rust v. Sullivan*, 500 U.S. 173 (1991); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995). Where a public school employee speaks pursuant to his or her work responsibilities, the employee's free speech interests are not implicated. *Garcetti v. Ceballos*, 547 U.S. 410 (2006). *See also Pickering v. Board of Education*, 391 U.S. 563 (1968).

Simply put, the forum doctrine does not govern the policy proposed by Senate Bill 191 to prohibit abortion providing organizations and their materials from Alaska public schools. Indeed, it is the responsibility of the State of Alaska to determine the means for educating Alaska public school students to become productive members of their community and society as a whole and to behave responsibly. Because public schools are not public forums, the First Amendment analysis presented by the ACLU and Alaska Legal Services simply does not apply.

It is well-settled law that public school districts have broad authority to determine their curriculum. *Edwards v. Aguillard,* 482 U.S. 578, 583 (1987) ("States and local school boards are generally afforded considerable 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").

It is equally well-settled that a public school district's decisions over what materials are made available to students within their schools and libraries are curricular decisions to which the courts owe substantial deference. *Board of Education, Island trees Union Free Sch. Dist. No. 26 v. Pico,* 457 U.S. 853, 863 (1982) (applying the principle that "local school boards have broad discretion in the management of school affairs" in the library context); *President's Council, Dist. 25 v. Community School Bd. No. 25,* 457 F.2d 289 (2d Cir. 1972) (same).

Just as the First Amendment right of free speech in open public forums does not apply within the context of public schools, neither is there any constitutional infirmity with Senate Bill 191 as related to the associational rights of teachers. Importantly, it seems highly unlikely that a public school teacher would concurrently be "[a]n employee or representative of an abortion services provider or of an affiliate of an abortion services provider." In any event, "the government as employer indeed has far broader power than does the government as sovereign." *Waters v.*

Churchill, 511 U.S. 661, 671 (1994) (plurality opinion). In any event, government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services. *Connick v. Myers,* 461 U.S. 138, 143 (1983).

Indeed, "it is the educational institution that has a right to academic freedom, not the individual teacher; where a teacher speaks pursuant to official job duties, the teacher is not entitled to the protections of the First Amendment." *Evans-Marshall v. Bd. of Educ. Of Tipp Exempted Vill. Sch. Dist.*, 624 F.3d 332, 344 (6th Cir. 2010). *See also Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (The "four essential freedoms" that constitute academic freedom have been described as the school's freedom to choose "who may teach, what may be taught, how it shall be taught, and who may be admitted to study."); *Meyer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477 (7th Cir. 2007) (if employed to teach elementary school, for example, the teacher must teach the prescribed material and not discuss matters the teacher is told to avoid).

If a public employee's speech is considered to involve a matter of public concern, the court would weigh whether the employee's interest in expression outweighs the employer's interest in workplace efficiency and avoiding disruption. *Connick v. Myers*, 461 U.S. 138; *Garcetti*, 547 U.S. 410 (ruling that public employee speaking pursuant to official duties is not speaking as private citizen, and First Amendment does not bar employer regulation of speech); *Nicholson v. Bd. of Educ., Torrance Unified Sch. Dist.*, 682 F.2d 858 (9th Cir. 1982) (ruling teacher's speech rights not infringed where interfered with smooth school operations). *See also Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

Thus, Senate Bill 191 would not restrict the associational rights of public school teachers and others who happen to teach health related topics or subjects within the public school curriculum. Teachers who would be teaching health-related subjects that meet the approved curriculum of Alaska public schools would be acting on behalf of the public schools and not on behalf of an abortion services provider or an affiliate of an abortion services provider. We do not believe that, if enacted, Senate Bill 191 would affect what a teacher or other public school employee might choose to do in their personal life, outside of their public school employment.

Alaska law mandates that "[i]t is the policy of [Alaska] 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. Enactment of Senate Bill 191 would undoubtedly advance this State of Alaska policy.

It is therefore appropriate that Senate Bill 191 be enacted so as to educate Alaska public school students to become productive members of their community and society as a whole and to behave responsibly. It is likewise appropriate for Alaska to establish a policy that promotes self-discipline, sense of responsibility, self-control, and ethical considerations such as respect for self and other and respect for the dignity and worth of the human person.

It is our opinion therefore that it is not only appropriate, but prudent, for the State of Alaska to enact a policy that restricts access of abortion providers to children in Alaska's public schools. Senate Bill 191 would do just that. We urge its passage.

Please do not hesitate to contact me if you have questions or require additional information.

Sincerely,

Michael J. Norton
President and General Counsel