MEMORANDUM
National Organization for Women
Government Relations

To: National Organization for Women Board Members
From: Jan Erickson, Director, Government Relations
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REPRODUCTIVE RIGHTS AND JUSTICE

Post-Dobbs Decision - Some Thoughts

The experience in the United States since the Supreme Court overturned *Roe v. Wade* should be instructive for politicians and judges everywhere. This is the first time in U.S. history that a constitutional protection has been withdrawn and done so against the views of a majority of the public. The ruling has proven very unpopular; even conservative politicians who for years campaigned to ban abortion are now backing away. As of early October, litigation challenging state bans has increased, and injunctions have been placed on a number of restrictive state laws. The level of outrage is very high among younger women who have only known a time when they could obtain a safe and legal abortion. And voter registration by women has significantly increased in many states.

Widespread Support for Abortion Rights - The U.S. Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization* has prompted Americans to consider the serious consequences of abortion bans and to re-affirm their own views. A substantial majority of the public supports abortion access and opposes the Court's decision. According to several national polls, a majority of the public ranging between 59 percent to 70 percent say abortion should be legal in most or all cases. This majority, by the way, has remained fairly steady since *Roe*. *Catholics by 37 percent agree on abortion being accessible in most cases, with another 23 percent say all cases, a total of 60 percent – close to the views of the general population.* Other demographic categories show similar high levels of support. (Pew Research Center, June-July 2022)

The Court's ruling in *Dobbs* permits states to adopt their own laws concerning abortion, asserting that state legislatures should decide whether to allow

abortion. At this moment, 24 states have retained laws protective of abortion care, including six states with certain limitations. Fourteen states completely ban abortion and four more variously ban the procedure at 14-, 18- and 20-weeks' gestation. Nine states have their bans currently blocked by court-imposed injunctions.

More Ballot Measures Proposed - At least six states will be voting on ballot initiatives in November, three in support of abortion rights. In early August, Kansas voters resoundingly rejected a ballot measure that would have affirmed that the state constitution cannot be interpreted to establish a state constitutional right to abortion; a similar ballot measure is pending in Kentucky. Montanans will be considering a ballot measure which requires" medical care to be provided to infants born alive after an attempted abortion by classifying them as a "legal person" with "the right to appropriate and reasonable medical care and treatment.'

Additionally – and most importantly, activists are gearing up for the November 8th midterm elections determined to defeat ballot measures that prohibit abortion access and vote against candidates who oppose abortion rights.

Women May Die - Predictably, the situation has created widespread confusion -- not only for persons needing abortion care but also for physicians concerned about protecting their professional practice. The dilemma arises when a pregnant woman in a health crisis and needing an abortion is required by state law to be *near death* before an abortion can be provided. Some states prescribe criminal penalties for providers who perform an abortion outside of the law's strict limitations. *Clearly, this cannot be sound medical practice to wait until a woman is experiencing organ failure or sepsis before she can receive a live-saving abortion.* In other cases when there is a severe fetal abnormality that will not allow for life outside the womb such conditions may also require urgent medical intervention – but some state laws now do not permit that.

Pregnant women from states with extreme bans are travelling -- sometimes thousands of miles – to obtain an abortion. Those who have the means – financial and otherwise – can obtain abortion care. While those who do not have the financial resources to travel, pay for a hotel and the care of their children are not able to obtain abortions. It is primarily those women who live in poverty-

impacted communities – often communities of color -- who are most harmed by abortion bans. A consequence of the *Dobbs* decision is a tragic racial disparity that will only deepen poverty and suffering for many.

Women's Clinics Disappearing - *Dobbs* has meant the closure of scores of women's health clinics where bans have been put in place. In states where clinics continue to provide care, they are overwhelmed with hundreds of patients from other states each day, resulting in long waits and over-worked providers. There is widespread uncertainty about where lines are drawn for physicians in emergency situations, when criminal prosecution is threatened. Prohibitions against performing an abortion when rape or incest is alleged is causing further uncertainty. Excessive reporting requirements for providers when an abortion is required due to a medical emergency place an extra burden on already stressed healthcare professionals.

We have heard the report of a pregnant ten-year-old victim of rape refused an abortion in one state, needing to travel to another for care. Additionally, one report related to a 16-year-old said that she is not old enough to have an abortion -- but the question arises does that mean she is old enough to support a child? It has also been reported that women whose fetuses have no heartbeat or other severe abnormalities are being forced to continue with the pregnancy, endangering their own health and lives.

Experience prior to *Roe v. Wade* in 1973 demonstrated that restricting women's access to safe and legal abortion services has important health implications. We know that such laws do not result in fewer abortions. Women must have legal access to abortion care provided by professionals – that is the fundamental fact.

NOTE: The abortion rights landscape changes almost daily. To keep up, here are several important sources:

Center for Reproductive Rights, Center for Reproductive Rights

Guttmacher Institute, Guttmacher Institute | Good reproductive health policy starts with credible research

The Washington Post, Abortion - Washington Post

The New York Times, Abortion News - The New York Times (nytimes.com)

Women's eNews, The Current State of Abortion: State-by-State - Women's eNews (womensenews.org)

Dobbs' Stealth Provision – 14th Amendment Doesn't Cover Sex Discrimination

Conservative, anti-abortion rights justices on the Supreme Court flatly declared in *Dobbs v. Jackson Women's Health Organization* that the Fourteenth Amendment's Equal Protection Clause of the U.S. Constitution does not apply to sex discrimination – an astonishing claim. Since most of the conservative justices adhere to an 'originalist' or 'textual' interpretation of the U.S. Constitution this means, apparently, that since sex discrimination was not recognized by the framers, women and others cannot depend upon the 14th Amendment to support equal treatment. Readers may remember women, at the time, were not considered full citizens and had no recognized rights – so that mode of interpretation of the Constitution will always present a dead-end for persons seeking redress for sex-based discrimination. (How do you say *Equal Rights Amendment*?)

The States Now Will Decide - Nonetheless, Republicans have asserted that abortion rights should be decided by the states, the conservative justices knew that some states would protect abortion access, while other states would let their "trigger" bills immediately go into effort or move quickly ban abortion. Getting rid of the Equal Protection Clause as it pertains to sex discrimination solves the problem for them and creates a host problems for millions of women, LGBTQIA+ persons, racial and other marginalized communities.

Repealing Equality Gains Over Decades -- A future of court adjudicating against equality lies before us to take us back before 1959 or earlier. Supreme Court Justice Clarence Thomas has indicated that the Court should "reconsider" rulings on cases involving substantive due process, such as contraceptive access, same-sex relations and same-sex marriage. Dozens of important rulings that have benefitted women, including many in which Ruth Bader Ginsberg argued for or ruled on as a Supreme Court justice, are now on the chopping block. These include women's equal rights to credit, serving on a jury, a woman as an executor of a will, etc. etc. Women's rights advocates should take it as a serious matter

that these precedents will be challenged, *Dobbs* is the best example of how this can and may happen.

Codifying Roe – Will the Senate Vote on Women's Health Protection Act?

Activists are calling and writing Senate Majority Leader Schumer, asking him to schedule a floor vote for the Women's Health Protection Act (WHPA, H.R. 8296/S. 4132) that would codify Roe's framework to protect abortion access. NOW sent a letter to Sen. Schumer asking that he schedule the vote before the mid-term elections so that voters could see who supports or doesn't support abortion rights. WHPA would prohibit state and federal laws that would interfere with access to abortion care.

The bill has been passed twice by the House of Representatives (2020, 2021). It is doubtful that the Women's Health Protection Act could gain 60 votes needed for passage. *But, if in the next Congress the Democrats can win a solid, filibuster-proof majority in the Senate, WHPA could become the law of the land – overcoming all state's abortion restrictions*. Supreme Court Justice Samuel Alito wrote in the majority opinion for *Dobbs* that if the public wants to protect abortion rights, they can get Congress to pass a law.

NOW President Testifies in Puerto Rico Against Abortion Bills

NOW president**, Christian F. Nunes**, has traveled to Puerto Rico to testify against restrictive abortion bills. She spoke before the Puerto Rican Senate in April against several measures. However, in June the Senate did pass legislation that would establish a ban on abortion after 22 weeks. The House was preparing to take up the legislation in September when hurricane Fiona hit the islands. Many parts of country, a territory of the United States, are still without electricity and needing urgent aid. President Biden recently visited Puerto Rico to pledge increased assistance.

The Puerto Rican House soon will consider the 22-week ban and a so-called Heartbeat ban at 6 – 7 weeks, like the vigilante enforcement scheme that Texas first adopted, plus a bill authorizing ballot measures that would give voters two

options: fully prohibit abortion and, alternatively, permit abortion with no restrictions and, finally, another a bill that would define a fetus as a person with legal rights, but (confusingly) states the pregnant woman also has rights. Abortion is currently legal in PR but remains difficult to access, there are only four women's clinics for a population of 3.2 million with very limited access to funding.

Pregnant Worker's Fairness Act Deserves a "PUSH!"

Advocates ae gearing up to press Senators to pass the **Pregnant Worker's Fairness Act** before the 117th Congress ends. PWFA (H.R. 1065/ S. 1486), has passed the House with broad bipartisan support (316-101), with 99 Republican votes). The legislation has an assured 60 votes (!!) in the Senate and there is hope that the bill can be passed before the mid-term elections.

But as is usually the case, pressure needs to be placed on the Democratic leadership, **Senate Majority Leader Chuck Schumer**, to schedule a floor vote. To reach his office dial 202-224-6542 and leave a voice mail message – every call is counted.

The Pregnant Worker's Fairness Act states that employees must provide reasonable accommodations for a pregnant persons duties at work. Litigation has soared in recent years due to many pregnant workers being placed on involuntary leave, often losing health insurance, or just simply being let go.

Specifically, the bill declares that it is an unlawful employment practice to

- fail to make reasonable accommodations to known limitations of such employees unless the accommodation would impose an undue hardship on an entity's business operation;
- require a qualified employee affected by such condition to accept an accommodation other than any reasonable accommodation arrived at through an interactive process;
- deny employment opportunities based on the need of the entity to make such reasonable accommodations to a qualified employee;
- require such employees to take paid or unpaid leave if another reasonable accommodation can be provided; or
- take adverse action in terms, conditions, or privileges of employment against a qualified employee requesting or using such reasonable accommodations.

Persons may get additional information about pregnancy discrimination law from the Equal Employment Opportunity Commission (EEOC).

CONSTITUTIONAL EQUALITY

ERA Case Argued in Federal Appeals Court

The long-awaited oral arguments for the attorneys general ERA case, now entitled *Illinois v. Ferriero*, were held on Sept. 28 at the U.S. Court Appeals, D.C. Circuit. Virginia NOW and other NOW chapters organized a rally outside of the court that morning.

The arguments revolved around whether the plaintiffs had "standing" and whether they were 'harmed' by the fact that the ERA was not certified and published, becoming an amendment in the U.S. Constitution. The three-judge panel were receptive to the idea that the states had the legal right to sue the U.S. archivist to certify and publish the ERA.

Sarah Harrington, a Department of Justice attorney, said that "the Biden administration supports the principles that are espoused int the ERA," but opposes the lawsuit.

One of the Appeals Court judges, Robert L. Wilkins, questioned the assertion that the deadline in the preamble was meaningless, saying that removing the deadline might also invalidate the proposed amendment.

ERA Deadline Unenforceable - The states of Illinois and Nevada argued that the deadline in the preamble was unenforceable. Another judge suggested that the states' interpretation may be undermining Congress's ability to propose amendments to the Constitution.

Supporters of the ERA believe that the amendment is now in force because when the 38th and final state to ratify passed their bill, a date of effectiveness was included. That was two years from January 27, 2020.

The three Appeals Court judges were uncertain about whether the amendment was in effect. Illinois Solicitor General Jane Notz asserted, "Our ratifications are not being given their intended affect."

Whether the states have standing to sue may be decided by the Appeals Court, but they not decide whether the states have been 'harmed" by the failure of the Archivist of the United States to certify and publish the ERA, thus making it part of

the Constitution. The case could be remanded back to the District Court for that consideration.

ERA Deadline Removal Bill Stymied in Senate

S.J. Res. 1 – Advocates for the **Equal Rights Amendment** are continuing to push for Congressional passage of legislation that would remove the extended deadline from the 1972 ERA resolution and declare the amendment in force. The House has passed a companion measure twice (one in 2020 and again in 2021), but it appears the most votes that can be expected right now in the Senate is 52, including Sens. Lisa Murkowski (R-AK) and Susan Collins (R-ME).

NOW sent a letter to Majority Leader Chuck Schumer (D-NY) urging him to bring the bill to a vote --- before the election. We would like to get Republican senators on the record as opposing or supporting women's equality. If advocates would like to join this effort, please think about calling Sen. Schumer's office (202-224-6542) – that is the most important action you can take right now. If you live in New York, go to his Senate website, find the nearest community where the senator has an office (there are eight of them and leave a message in their voicemail box. Or send an email message to the staffer who said she would be glad to collect those messages, address it to Justine-revelle@schumer.senate.gov

An Urgency for Passage of ERA - NOW ERA Committee chair Kobby Hoffman and five other NOW members met with staff from the offices of Sen. Schumer and Sen. Ben Cardin (D-MD) in mid-September to advocate for a vote before the mid-terms. A possible Unanimous Consent type of vote was explored with the staffers. Time is of the essence, they argued, with the provision in the Dobbs ruling that declares the 14th Amendment's Equal Protection Clause does not apply to sex discrimination. NOW members present were Nevada State Senator Pat Spearman, Kate Kelly, Lisa Sales, Sharon J. Hill, and Juliana Njoku.

The advice from the Senate staffers was to increase public pressure on senators, especially the Republicans. The ERA Committee is asking that NOW members call, meet or text their two senators and two other senators of their choice every week for the next four weeks and ask ten other people they know to do the same. We will see if that has an impact.