*A Constitutional Guarantee: The Significance of the Equal Rights Amendment*

By: Naomi Franco

In *Dobbs v. Jackson Women's Health Organization*[1] the United States Supreme Court, for the first time in its history, ended a basic constitutional protection for more than half the country.[2] With its holding, the Court threw into question the future of various substantive rights with major implications for all United States citizens. With this new reality and an increasingly activist Supreme Court that seems eager to continue curtailing important legal protections, the ratification of the Equal Rights Amendment would provide women and persons of non-traditional gender identities essential constitutional rights to equal protection in areas involving bodily autonomy, reproductive health, and personal family decisions.

## A. Constitutional Rights of Women in Areas Involving Reproductive Health, Childbearing, and Non-Traditional Marriage

The ratification of the ERA would provide women with a constitutional right to the equal protection in areas involving individual decisions on reproductive health, childbearing, and non-traditional marriage. If the ERA is ratified with its original language it will read "equality of rights under the law shall not be denied or abridged by the United States or any State on the account of sex."[3] This wording would provide a solid basis for the court to apply the full force of the 14th Amendment and with it, equal protection with regards to laws that discriminate on the basis of sex. Additionally, by amending the Constitution to include the language of the ERA, a fundamental right to not be discriminated against on the basis of sex would be created. As such,

[1] 597 U.S. ____ (2022).
[2] Rosenbaum, et. al., *The United States Supreme Court Ends the Constitutional Right to Abortion*, THE COMMONWEALTH FUND (Jun. 27, 2022), https://www.commonwealthfund.org/blog/2022/united-states-supreme-court-ends-constitutional-right abortion#:~:text=Never%20in%20its%20history%20has,ended%20a%20basic%20constitutional%20protection.
[3] House Joint Resolution (H.J. Res.) 208, 92nd Congress, March 22, 1972.

the court would have to elevate its intermediate scrutiny test it established in *Reed v. Reed* and apply a strict scrutiny test for laws that would seek to abridge or limit rights on the basis of sex. [4] Further, this strict scrutiny test should be applied when considering laws that involve individual decisions on reproductive health, childbearing and non-traditional marriage.

First, the ERA should create a strict scrutiny review of any law that seeks to abridge or limit an individual's decision regarding reproductive health and childbearing. In *Dobbs v. Jackson Women's Health Org.* the court held that a "State's regulation of abortion is not a sex-based classification and is thus not subject to the 'heightened scrutiny' that applies to such classifications." [5] The court further states "[T]he regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a 'mere pretex[t] designed to effect an invidious discrimination against members of one sex or the other."[6] However, by limiting its discussion to a "State's regulation of abortion" the Supreme Court has consistently and willfully overlooked the implications of withholding important and often times lifesaving reproductive healthcare, including abortions, that in practice creates a clear "pretext" that is designed only to discriminate against women and members of the non-male sex.

This discrimination has been identified and felt by persons all over the country after *Dobbs*. Immediately after the *Dobbs* holding, an obstetrician and gynecologist at Brigham and Women's Hospital in Boston explained that "[L]aws will exist that ask [physicians] to deprioritize the person in front of them and to act in a way that is medically harmful."[7] These

[4] *Reed v. Reed*, 404 U.S. 71 (1971).
[5] 142 S. Ct. 2228, 2245 (2022).
[6] *Id* at 2245-45 (citing *Geduldig v. Aiello*, 417 U.S. 484, 496 (1974)).
[7] Selena Simmons-Duffin, *For doctors, abortion restrictions create an 'impossible choice' when providing care*, NPR (June 24, 2022) https://www.npr.org/sections/health-shots/2022/06/24/1107316711/doctors-ethical-bind-abortion.

fears have become a reality with doctors now having to withhold ordinary treatment for sometimes life threatening conditions from women when men receive the same or comparable treatment without delay. For example, in Texas, an oncologist explained that "they now wait for pregnant women with cancer to get sicker before they treat them, because the standard of care would be to abort the fetus rather than allow treatments that damage it".[8] Additionally, women are losing access to medical treatments for life threatening autoimmune conditions such as lupus because drugs to treat the disease are being withheld as they are also known to be used to induce abortions when taken in high doses.[9] These examples show that state laws regulating reproductive health have the invidious discriminatory effects against one sex over the other that the court claimed was necessary to invoke sex based discrimination.

State laws that regulate and limit reproductive health and childbearing would violate the equal protection clause if the ERA was adopted and the court used strict scrutiny to review the states laws. Strict scrutiny has been articulated to require that the law "must be shown to be necessary to the accomplishment of some permissible state objective, independent" of the discrimination "which it was the object of the Fourteenth Amendment to eliminate."[10] More simply , in order to overcome a strict scrutiny review, a state must show that the law was passed to further a compelling state interest and must narrowly tailor the law to achieve that interest. In *Dobbs,* the State's asserted interest is "protecting the life of the unborn".[11] However, if the EPA has been ratified and strict scrutiny is applied, banning abortion to achieve this interest would not be sufficiently tailored to achieve this state interest. There is much evidence that abortion bans

[8] Kate Zernike, *Medical Impact of Roe Reversal Goes Well Beyond Abortion Clinics, Doctors Say,* NEW YORK TIMES (Sept. 20, 2022) https://www.nytimes.com/2022/09/10/us/abortion-bans-medical-care-women.html.
[9] Katherine Tangalakis-Lippert, *Autoimmune patients are losing access to essential medications as states crack down on abortions. The reason? The drugs can also be used to end pregnancies,* BUSINESS INSIDER (Jul. 16, 2022).
[10] *Loving v. Virginia,* 388 U.S. 1 (1967).
[11] *Supra* note 3 at 2239. e

do not prevent women from receiving abortions.[12] Additionally, many states with abortion bans have high infant mortality rates and little to no affordable public health and economic support for pregnant persons in order to "protect the life of the unborn".[13] Thus, it is clear that abortion bans are not only insufficiently tailored to meet the states interest but are instead mechanisms through which the state uses to prevent non-male persons from receiving lifesaving healthcare.

Second, the ratification of the ERA would provide women with a constitutional right to equal protection involving their individual decisions regarding non-traditional marriage. The language of the ERA would again invoke a strict scrutiny review of any law abridging the right to marriage on the basis of sex. In *Obergefell v. Hodges* the court found that a law banning same-sex marriage was "in essence unequal: Same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right." [14] Thus, despite the *Dobbs* ruling and the court calling into question the validity of cases such as *Obergefell*, the ERA would provide a much needed backstop which would prevent this Court from continuing to diminish fundamental rights on the basis of sex. Because the ERA would provide that equality of rights under the law could not be denied because of sex, the fundamental right to marry whomever one chooses, be it non-traditional or otherwise, would be strictly protected. Thus, any law that would seek to regulate non-traditional marriage again would have to pass through the courts strict scrutiny review.

### B. Constitutional Rights of Persons of Non-Traditional Gender Identities in Areas Involving Individual Decisions On Gender Identity, Reproductive Health, Family and Non-Traditional Marriage

[12] Michaeleen Doucleff, *Do restrictive abortion laws actually reduce abortion? A global map offers insights*, NPR (June 27, 2022) https://www.npr.org/sections/goatsandsoda/2022/05/27/1099739656/do-restrictive-abortion-laws-actually-reduce-abortion-a-global-map-offers-insigh.
[13] Jacqueline Howard, *Maternal and infant death rates are higher in states that ban or restrict abortion, report says*, CNN (Dec. 16, 2022) https://www.cnn.com/2022/12/14/health/maternal-infant-death-abortion-access/index.html.
[14] 576 U.S. 644, 675.

Next, the ratification of the ERA would provide persons of non-traditional gender identities with the constitutional right to equal protection in areas involving individual decisions on gender identity, reproductive health, family and non-traditional marriage. Much like the above discussion on withholding life saving medical care in regard to abortion, the same application can be made in terms of reproductive health for persons of non-traditional gender identities. Additionally, the fundamental right to marriage confirmed in *Obergefell* would be extended by the ERA to non-traditional marriages between persons of non-traditional gender identity. As such the court should again have to apply strict scrutiny review of any law that seeks to limit marriage between persons of non-traditional gender identities.

Finally, the ERA would provide persons of non-traditional gender identities with a constitutional right to equal protection in areas involving individual decisions on gender identity and family. In *Bostock v. Clayton Cty*, the court held that it was "impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." [15] If the ERA were to be ratified, it's language, ("[E]quality of rights under the law shall not be denied or abridged by the United States or any State on the account of sex"), would require application of equal protection and strict scrutiny by the court to any law that's purpose and effect was to discriminate against persons of non-traditional gender identities.

Courts have already begun to recognize that laws discriminating against persons of non-traditional gender identities are impermissible. The Seventh Circuit found, and the Third Circuit noted that "a school district's policy of prohibiting transgender students from using bathrooms and locker rooms consistent with their gender identity violated Title IX because it discriminated

[15] 140 S. Ct. 1731, 1741.

against transgender students by subjecting them to 'different rules, sanctions and treatment than non-transgender students".[16] Federal courts have also been skeptical of state regulations that refuse medical care to those seeking gender reassignment surgery and have held that a "bare desire to harm a politically unpopular group cannot constitute a legitimate government interest."[17]

The ratification of the ERA would provide a stronger and more solid tool to use against state regulations that seek to limit personal decisions on gender identity and family. This tool could be used against regulations such as the Texas directive that allows child abuse inquiries into the families of trans kids.[18] As the ACLU of Texas pointed out "[D]enying healthcare to trans kids is life-threatening".[19] Opponents of this directive could reason that this directive clearly seeks to limit healthcare from minors based on their sex, and under the ERA the court would have to review the directive under a heightened level of scrutiny.

**Conclusion**

In conclusion, the ERA would not only equal protections and safeguards against the courts weakening of rights after *Dobbs*, but would allow women and persons of non-traditional gender identities to further protect themselves from state regulations that would seek to limit their rights. It is incumbent upon all of us, whether or not we practice in the particular area of healthcare, reproductive rights, or personal autonomy, to protect and fight for the right to be free

[16] *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3rd Cir. 2018) (citing *Whitaker v. Kenosha Unified School District*, 858 F.3d 1034, 1050 (7th Cir. 2017).
[17] *Toomey v. Arizona*, Civ. No. CV-19-000350TUC-RM (LAB). 2019 U.S. Dist. LEXIS 219781 (Ariz. D.C. Dec. 20, 2019) (citing Romer v. Evans, 517 U.S. 620, 634 (1996) and Diaz v. Brewer, 565 F.3d 1008 (9th Cir. 2011)).
[18] Bill Chappell, *Texas Supreme Court Oks state child abuse inquiries into the families of trans kids*, NPR (May 13, 2022) https://www.npr.org/2022/05/13/1098779201/texas-supreme-court-transgender-gender-affirming-child-abuse.
[19] *Id.*

from discrimination whether it be by other individuals or our state and federal governments. The ratification of the ERA would be one important step in the right direction.