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To All Concerned:

In the past month, I have been talking to voters about Judge Alito's draft opinion in *Dobbs v. Jackson Women's Health Organization*, which is set to overturn the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973). Below, I have put forth why I believe Judge Alito's opinion is significantly flawed and why it has the potential to eliminate many other rights previously recognized by the Supreme Court. This analysis is not meant to be exhaustive but rather to present one clear reason the opinion is ill-considered and to set forth clearly why it lays the ground work for eliminating rights other than those related to abortion.

Almost 50 years ago, the United States Supreme Court issued its decision in *Roe v. Wade*, 410 U.S. 113 (1973), holding that a woman had a right to choose whether to have an abortion. The Court held that this right was found in one's liberty interest which is protected by the 14th Amendment to the United States Constitution.

It is notable that *Roe* had no genesis in partisan politics. It is a case that was joined by seven of the Court's nine justices. Of the seven-member majority, five were Republican appointees and two were Democratic appointees. The dissent was also evenly split with one Republican appointee and one Democrat appointee.

On May 2, 2022, a draft opinion in *Dobbs v. Jackson Women's Health Organization* was leaked to the Country. That opinion, written by Justice Alito, shows that *Roe* is about to be overturned and that women will no longer have a constitutional right to determine whether to have an abortion.

When dealing with case law that has been in existence for almost half a century, it should be incumbent upon a court to make sure that it addresses every reason that would allow the case to stand. In this respect, Justice Alito's draft opinion is significantly flawed. In the draft opinion, Justice Alito virtually glosses over what "liberty" means to women, stating "'Liberty' is a capacious term," meaning it is too broad to be defined. *Dobbs* at 13. Rather than looking at how the concept of liberty might have expanded for women over time, Justice Alito employs a test for determining whether a liberty right is guaranteed under the 14th Amendment by looking to whether the right was "'deeply rooted in this Nation's history and tradition.'" *Dobbs* at 13, quoting *Washington v. Glucksberg* , 521 U.S. 702, 720-21 (1997). Judge Alito suggests that, in using this test, it is appropriate to survey centuries of common law tradition to determine whether the right was well founded at the time the 14th Amendment was adopted. See *Dobbs* at 13. He

then proceeds to review the abortion laws that were in place between 1825 and 1868. *Dobbs* at 15, 68-84.

The problem with this analysis is that the Nation's concept of women's rights has drastically altered from 1868 till now. And, if there is a right to determine whether to have an abortion, it is undoubtedly a woman's right. Thus, a radical change in how the Country views a woman's rights counsels that such change should be taken into account when the a woman's liberty interest being considered.

In 1825 through 1868, a woman's rights, especially a married woman, had very limited rights. As an 1886 Illinois Appellate Court recognized, a married woman had virtually no rights under common law:

> By the common law upon marriage, the husband and wife became one person in law, and the husband was that person. *The legal existence of the woman was suspended during marriage*, being treated as incorporated or consolidated into that of the husband. If she had personal estate it became the absolute property of the husband upon his reducing it to possession, and *he became master* of the profits of her real estate during coverture; and if the estate was one of inheritance, upon birth of living issue he became a tenant for life of the lands. If she was injured in her person or property, she was without redress by action, unless her husband would join with her. She could make no valid contract. He could not grant anything to her or enter into any covenant with her, for the grant would be to suppose a separate existence, and the covenant would be with himself. *Basset v. Bassett*, 20 Ill.App. 543, 544 (4th Dist. 1886)(emphasis added).

This same attitude was expressed by a justice of the Supreme Court upholding an Illinois Supreme Court case denying a woman the right to obtain a law license. Justice Bradley stated:

> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. *The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life*. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interest and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that *a woman had no legal existence* separate from her husband, who was regarded as her head and representative in the social state…. *Bradwell v.*

> *People of the State of Illinois*, 83 U.S. 130 (1872), (Bradley, J. concurring).

Since the time of the above two cited opinions, women have been granted the right to vote with the passage of the 19th Amendment in 1920. Further, married women are not only allowed to practice law, they now sit on both United States Supreme Court and the Illinois Supreme Court. Thus, by almost any standard, we would find that the law that was "deeply rooted in this Nation's history and tradition" at the time the 14th Amendment was adopted was wrong with respect to women's rights. Yet, despite the changes in women's rights, Justice Alito failed to even address how such changes might affect the concept of a woman's liberty interest.

In 1949, another justice of the Supreme Court recognized the "[g]reat concept [of] 'liberty' . . . [was] purposely left to gather meaning from experience." He reasoned that liberty and other terms used in the Constitution "relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.' *National Mutual Ins. Co. v. Tidewater Transfer Co*., 337 U.S. 582, 646 (1949) (Frankfurter, J. dissenting). In failing to even acknowledge the great changes that have occurred in the Nation's concepts of women's rights, Justice Alito has opted for the nation to remain a stagnant society.

While Justice Alito believes that concept of "liberty" should be frozen in time, we know that "liberty" interests have broadened over time. This can be seen in the Constitution itself. The term "liberty" is first found in the Preamble to the Constitution – "secure the Blessings of Liberty to ourselves." Though "liberty" is first mentioned in the Preamble, it quickly becomes clear that "liberty" for "ourselves" does not mean "liberty" for everyone. By Section 2 of Article I of the Constitution, it is evident that there were "free Persons…Indians… and "all other Persons [read slaves]." With the passage of the 13th Amendment in 1865, slavery was constitutionally ended, and the application of "liberty" thereby expanded. The change in the laws of slavery would no doubt have an impact on how liberty is now defined, but changes in the laws with regard to women's rights have gone unmentioned by Justice Alito.

In short, the approach taken by Justice Alito freezes the concept of liberty in the past. It does not, as Langston Hughes implored, allow "America [to] be the dream the dreamers dreamed." Langston Hughes, "Let America be America Again."

Finally, it is evident from the draft opinion that the right to determine whether to have an abortion is not the only issue at stake. Justice Alito claims that the opinion only addresses abortions. *Dobbs* at 62. However, he clearly states that the test he uses to determine that a woman has no right to determine whether she obtains an abortion would also end a significant number of rights previously recognized by the Supreme Court. He lists:

> "the right to marry a person of a different race…the right to marry while in prison…the right to obtain contraceptives…the right to reside with

> relatives, the right to make decisions about the education of one's children… the right not be sterilized without consent…right to engage in private, consensual sexual acts…[and the] right to marry a person of the same sex." *Dobbs* at 31-32.

Of these rights, Justice Alito states: "None of these rights has any claim to being deeply rooted in history." *Dobbs* at 32. In other words, under his test, Justice Alito would find that none of the rights mentioned were protected under the due process clause of the 14th Amendment. The *Dobbs* opinion thus portends to have a far greater impact than Justice Alito admits.

Please feel free to share this with anyone who is concerned about the impact of Justice Alito's decision in *Dobbs v. Jackson Women's Health Organization.*

Sincerely,

James A. Murphy