Council of the District of Columbia
John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004

Brianne K. Nadeau
Councilmember, Ward 1

Chairperson
Human Services Committee

Statement for the Record
Human Rights Sanctuary Amendment Act of 2022

July 14, 2022

I drafted the "Human Rights Sanctuary Amendment Act of 2022" because the struggle to have control over my own life, to love who I love, and to raise my family the way I see best, is so deeply personal. I have two daughters, both under the age of five. I have two sisters. Numerous female cousins and nieces. And, as a Councilmember, I represent tens of thousands of people who are counting on their government to protect their right to whatever healthcare intervention they want or need. I do not know what freedoms a post-*Roe* world will guarantee them.

I remember how proud I was when I first joined Planned Parenthood in high school. I didn't particularly need their services, but I wanted to do my part to support the organization that was defending people's rights in my home state of Michigan. When those rights came under attack in 2004, I had already been living in D.C. for a couple of years. I had come here to participate in protest, activism, and change. It was that April that I joined the March for Women's Lives, along with 1.3 million others, and vowed that I would become a public servant to lift up the voices of my neighbors. Two years later, I ran for Advisory Neighborhood Commission.

Now, as Councilmember, I've been proud to support measures that bolster people's access to reproductive healthcare, like the legislation recently moved by Councilmembers Henderson and Robert White. I have stayed in the fight throughout my time in office.

I continue that fight today, and I hope to lift up the voices of others who have fought and suffered for a better future for vulnerable people.

State legislators introduce bills to solve constituents' problems. Ideally, we don't introduce bills to score political points or shame or punish lawmakers in other states. We introduce legislation to protect what matters to us, closest to home: to protect our residents; our values; the people who, for one reason or another, come to our neighborhoods. We introduce bills to protect the things we value. We introduce bills to protect the people we love.

I introduced this legislation to solve the problems facing District residents and District visitors. I want to explain what exactly those problems are, and why I chose to use this legislation to solve them.

Ultimately, I had no choice but to introduce the bill I did at the time I did. The tools available to the D.C. Council under the Home Rule Act and federal law are limited. We can only aspire to use them well.

First, the problem.

Dobbs v. Jackson Women's Health overturned fifty years of settled law and eliminated the constitutional right to an abortion. For the people targeted, there is no way to prepare for a constitutional right to be taken away. But the people doing the targeting had been preparing to ban and punish abortion for decades. And they were putting those plans into action before *Dobbs* even came down.

On December 10, 2021, the Supreme Court blessed Texas's six-week abortion ban, which is enforced by a provision allowing private citizens to put bounties out on people who they believe facilitated abortions. In Texas, anyone who successfully sues an abortion provider, a health center worker, a member of the clergy, or any person who helps someone access an abortion is rewarded with at least $10,000 in damages.

Now, nine states have banned abortions either in almost all cases or after six weeks of pregnancy, a point at which many people do not yet know they are pregnant. Four states have abortion bans poised to take effect in the coming days. And eight states have abortion bans on the books that have been blocked by the courts.

In nearby West Virginia, the Attorney General has determined that the state's pre-*Roe* criminal ban, which was found unconstitutional by the Fourth Circuit in 1975, is now valid. Experts agree that the statute would not only put doctors and nurses at risk for three to ten years of incarceration but would also apply to pregnant women and their partners.

And, in Virginia, Governor Glenn Youngkin is pursuing a fifteen-week abortion ban.

It is unrealistic to think that this assault on reproductive freedom will stop at state lines. If you think a zygote is a person, and that a fetus is a person at every subsequent stage of development, you will treat abortion like murder and do whatever you can to punish people who receive abortions. The Thomas More Society has already drafted model legislation that punishes people for procuring or facilitating abortions in other jurisdictions. Peter Breen, their Vice President and Senior Counsel, told This American Life that,

> when you frame the question in the way that the *Dobbs* Supreme Court majority framed it, which is, this is an unborn human child, well, then the question looks a lot different, and the unborn child is now a resident and can be treated as a resident of their home state. And when you look at it that way, the state's interest in protecting a minor who is a resident of that state, you can't just take the minor across state lines to do something illegal to that minor. That would be a grave crime. It is something that, in other contexts, such as sex trafficking or child abuse, no one would challenge that that home state has jurisdiction to protect that child.

The National Right to Life Committee, meanwhile, has drafted model legislation that would give the father and the grandparents of a fetus the ability to sue for compensatory and punitive damages. If a pregnancy was caused by rape or incest, the father of the fetus would not be able to sue for damages, but his parents could.

And one focus at Texas's next legislative session will be finding a way to punish people for sending medication for self-managed abortion into the state.

We are looking at a future then where a person who is raped in Virginia and who procures an abortion in the District could be sued by the parents of her rapist for punitive damages. And where someone who sends an abortifacient to another jurisdiction from within the District could be punished for it elsewhere.

It is also unrealistic to think that the assault on reproductive freedom and other constitutional rights will stop at abortion. *Dobbs* implied that the following rights, do not "have a sound basis in precedent," and that the cases establishing those rights are subject to legal challenge, including

> the right to marry a person of a different race, *Loving v. Virginia*, 388 U.S. 1 (1967); the right to marry while in prison, *Turner v. Safley*, 482 U. S. 78 (1987); the right to obtain contraceptives, *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Eisenstadt v. Baird*, 405 U. S. 438 (1972), *Carey v. Population Services International*, 431 U.S. 678 (1977); the right to reside with relatives, *Moore v. East Cleveland*, 431 U.S. 494 (1977); the right to make decisions about the education of one's children, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), *Meyer v. Nebraska*, 262 U.S. 390 (1923); the right not to be sterilized without consent, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); and the right in certain circumstances not to undergo involuntary surgery, the forced administration of drugs, or other substantially similar procedures, *Winston v. Lee*, 470 U.S. 753 (1985), *Washington v. Harper*, 494 U. S. 210 (1990), *Rochin v. California*, 342 U. S. 165 (1952).

The opinion also singled out "post-Casey decisions like *Lawrence v. Texas*, 539 U.S. 558 (2003) (right to engage in private, consensual sexual acts), and *Obergefell v. Hodges*, 576 U.S. 644 (2015) (right to marry a person of the same sex)." It is clear that the right to engage in private, consensual sexual activity and the right to marry a person of the same sex are also subject to attack.

And just like Justice Thomas's jurisprudence laid the foundation for *Dobbs*, his concurrence in *Dobbs* tells the conservative legal movement which rights to target next. Justice Thomas explicitly says in his opinion that the Court "should reconsider all of [its] substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. . . .[b]ecause any substantive due process decision is 'demonstrably erroneous.'"

What's more, the right to make decisions about how to raise one's children was under fire before *Dobbs* even came down. On February 22, 2022, Governor Greg Abbott ordered the Texas Department of Family and Protective Services to investigate parents who consent to gender-affirming care for their children and to take action to separate their families. And, on May 8,

2022, legislation took effect in Alabama making it a felony, punishable by up to ten years in prison, to provide gender-affirming care to people up to eighteen years old. Other states have pursued this course of action despite social scientific research demonstrating that gender-affirming care is linked to lower rates of depression and suicide for transgender youth.

The values of the District of Columbia are not reflected in these policy choices, which will result in shame, alienation, suffering, and death. That force people to choose between carrying a pregnancy that is the product of rape to term and risking civil and criminal liability. That undermine women's status as equal citizens, attempt to punish queer and gender non-conforming people and erase them from public life, and that go so far as to break up families because of the choices made within them.

What can the District do in response? We can pass this legislation.

The Human Rights Sanctuary Amendment Act of 2022 prevents the District from cooperating with investigations with the goal of imposing civil or criminal liability for engaging in conduct protected by District law.

The bill also creates a private right of action through something called a claw-back provision. If you get sued for engaging in protected conduct under a bounty law like the one in Texas, you can, under this legislation, recover the amount for which you were sued in a District court. That means that someone could get sued by the father of a fetus in West Virginia, consent to the entry of a judgment against themselves in West Virginia without paying any attorney's fees, and then sue in D.C. to get the amount of the judgment against them back.

Why did I draft a law that does precisely these things?

First, there are District values we must protect. And protecting District values means making the District a place where individuals can make and act on private medical decisions, marry and live with the people they love, and organize their families as they see fit without the threat of state interference or civil liability. Protecting District values means allowing parents to exercise their constitutional right to the care, custody, and control of their children, especially when they are making sensitive decisions about gender-affirming care. It means forging a community that is a sanctuary for human freedom, gender equality, and the medical privacy that makes both possible.

Dobbs struck down *Roe* and *Casey* in part because it found the freedoms they protected not to be "deeply rooted" in the nation's history and traditions. In the District, the roots of equality, acceptance, and individual autonomy run deep. St. Stephen's Episcopal Church in Ward 1 was ordaining women and blessing same-sex marriages in the 1970s, celebrating female participation in public life and the value of openly including LGBTQ people in society. Mayor Adrian Fenty signed same-sex marriage into law at Ward 1's All Souls Unitarian Church in 2009, six years before *Obergefell*.

It is already the public policy of the District that it is "the right of every individual who becomes pregnant to decide whether to carry a pregnancy to term, to give birth, or to have an abortion," and that the use of contraception, consent to sterilization, and other private medical decisions must be beyond the intrusive reach of government. *See* D.C. Official Code § 2–1401.06. It is also the public policy of the District that marriage is the legally recognized union of any two persons, D.C. Official Code § 46–401(a), and that consensual, non-procreative sexual conduct ought not be prohibited, *see, e.g.*, D.C. Official Code § 22–201 (repealed 2004); § 22–1601 (repealed 2004); § 22–1602 (repealed 2004); § 22–3802 (repealed 1995).

One must be free, in the District, to facilitate or procure legal abortions, use contraception, and receive gender-affirming care, and one must be free to marry, reside with, and engage in consensual sexual conduct with the person one loves. Now, immediate legislative action is necessary to secure each of those rights. Now, failure to act in light of the circumstances I have discussed would render the District's professed public policy a nullity by allowing other states to punish District residents and District visitors for conduct that is lawful and protected in the District and which occurs in the District.

That is why a legislative response is necessary. Why did I take this particular approach to this legislation?

I did it because it's what the Home Rule Act and federal law allow us to do. Advocates have told us time and again that one of the most pressing needs in terms of ensuring abortion access is directly funding abortion care. Under the Dornan Amendment attached to federal appropriations laws, however, we cannot do that.

I did it because this legislation is narrowly designed to avoid collateral damage. It does not protect people who try to force people to receive abortions, and it does not protect people who do things that are illegal in the District. The claw-back provision does not protect people who commit torts like assault or the intentional infliction of emotional distress. It does not protect people who break contracts, like surrogacy contracts, and it does not protect people who break District laws or who don't have any connection to the District. A Virginia resident who gets an abortion in Maryland, for instance, cannot sue in D.C. under this law.

I did it because the volume of information in the control of the District government is staggering. It is no fantasy to think that authorities or litigants in Virginia, West Virginia, and elsewhere will soon be asking the District government to cooperate with bounty lawsuits and criminal prosecutions against people who either live here or spend time here. They will be asking for government cooperation because of all the information the government has, especially about women, poor people, people of color, and members of other vulnerable populations.

Consider the Department of Human Services' integrated application for cash, medical, and food benefits. Applying for public benefits in the District requires disclosing how many "babies were expected" from a given pregnancy, the date on which a pregnancy ended, and the number of past pregnancies.

People are thinking a lot about the privacy of medical records, and they should be. But what is at issue here is far more than medical records. The District issues stillbirth and domestic partnership certificates. The District has the closing documents from when you bought your house. It knows who you live with. If the public policy of the District—if the values of the District—are going to have any protection in this small new world, what is private must stay private.

Finally, I want to say that I look forward to hearing the testimony of those who have come forward to speak about this bill. And I thank them for making their voices heard.

I would also like to thank Planned Parenthood, the National Coalition Against Domestic Violence, the American Civil Liberties Union, the Office of the Attorney General, the Council's Office of General Counsel, and Professor David Cohen of Drexel University's School of Law. I am confident that this bill is sound because of the work we did together before and after its introduction to get this right.

Brianne K. Nadeau

Brianne K. Nadeau
Councilmember, Ward 1
Chairperson, Committee on Human Services