Mabel Wadsworth Women's Health Center

December 28, 2005

Senator Patrick J. Leahy
433 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Leahy:

We write you on behalf of Mabel Wadsworth Women's Health Center in Bangor, Maine. At this time, we strongly oppose the nomination of Judge Samuel Alito to the United States Supreme Court. We urge you to subject his nomination to the most demanding scrutiny.

Mabel Wadsworth Center provides comprehensive women's reproductive health care to thousands of women from across the state, regardless of their economic status. We are often the only link our clients have to the health care system; we are one of the most largest providers of prenatal care to low income women in the Bangor region; and we meet the need for cancer screening, contraception, abortion care, childbirth classes, breast care, lesbian health care, adoption referrals, pap smears and much more. We receive no government grants. For 21 years, we have operated successfully as both a clinic and an advocate for women's well-being.

Our stance today is closely related to an insight shared at a January 2004 meeting with our own Senators: That the dangers to Roe v. Wade and its protections of women's most private rights lie more immediately in its being further weakened through attrition than in its being overruled.

We now know that Judge Alito is an architect of that attrition strategy. His underlying reasoning places us on high alert.

As you are aware, in a May 30, 1985 Memorandum to the Solicitor General concerning Thornburgh v. American College of Obstetricians

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and Gynecologists ("Memorandum")[1], Judge Alito set forth in detail a plan to weaken Roe and facilitate overruling it:[2]

> Accordingly, and in view of the lessons of Akron, I make the following recommendation. We should file a brief as amicus curiae supporting appellants in both cases. In the course of the brief, we should make clear that we disagree with Roe v. Wade and would welcome the opportunity to brief the issue of whether, and if so to what extent, that decision should be overruled. Then, without great formal discussion of levels of scrutiny or degrees of state interest, we should demonstrate that many of the provisions struck down by the Third and [Seventh] Circuits are eminently reasonable and legitimate and would be upheld without a moment's hesitation in other contexts. If the Court can be convinced to sustain these regulations, it may have to adjust its standard of review. This is essentially the opposite of the Akron approach; it is an argument from the specific to the general, rather than vice versa.[3]

Judge Alito[4] knew that convincing the Supreme Court to accept "eminently reasonable" – rather than compelling – state regulations on abortion would logically lead to lowering the legal standard of review for a woman's right to choose; and that this would result in a downward spiral of fading constitutional importance for that right – and potential disappearance of the right.

Judge Alito specifically advocated for upholding a wide range of state regulations – some of which reached beyond abortion to contraception. He supported "an entirely legitimate state regulation"[5] requiring doctors to inform women that certain methods of birth control are "abortifacients"[6] and "do not prevent fertilization but terminate the development of the fetus after conception."[7] Despite his claim that such a regulation would fall "within the confines of Roe,"[8] Judge Alito's position conflated the jurisprudence of abortion and contraception; was at odds with the Supreme Court's silence on when life begins; and undermined Roe's deference to women's ability to make their own moral decisions, particularly in their first trimester of pregnancy.

Further, Judge Alito characterized a requirement that women contemplating abortion be informed, for example, that "aid may be available to pay for prenatal and neonatal care and delivery" and that "the father is financially liable for child support"[9] as "relevant,

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[1] Found at The National Archives online at http://www.archives.gov/news/samuel-alito/accession-060-89-216/Thornburgh-v-ACOG-1985-box20-memoAlitotoSolicitorGeneral-May30.pdf.

[2] "Thus, by taking these cases, the Court may be signaling an inclination to cut back [on Roe]. What can be made of this opportunity to advance the goals of bringing about the eventual overruling of Roe v. Wade and, in the meantime, of mitigatingg [*sic*] its effects?" Memorandum at 8.

[3] *Id.* at 9.

[4] Judge Alito was not a judge at the time he wrote the Memorandum. We use his current title as a matter of convenience.

[5] Memorandum at 9.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.* at 10.

accurate, factual, and non-inflammatory."[10] On the contrary, such advice is inaccurate and misleading. The financial and personal costs of supporting a child last long after prenatal and neonatal care are over; and actually collecting child support payments from a reluctant man is notoriously difficult. We do not believe, as Judge Alito apparently did, that the above regulations are "eminently reasonable." They conflict with the realities of women's lives and constitute moralizing in disguise.

Indeed, elsewhere in his Memorandum, Judge Alito engages specifically in moralizing:

> While an abortion involves essentially the same medical choice as other surgery, it involves an additional moral choice, because the woman contemplating a first trimester abortion is given absolute and nonreviewable authority over the future of the fetus. Should not then the woman be given relevant and objective information bearing on this choice? Roe took from state lawmakers the authority to make this choice and gave it to the pregnant woman. Does it not follow that the woman contemplating abortion have at her disposal at least some of the same sort of information that we would want lawmakers to consider?
>
> Doctors may voluntarily provide this information. But they may also fail to do so in a large number of cases. A benevolent doctor may have a narrow idea about his patient's well-being. He may wish to spare his patient from having to confront an uncomfortable moral choice. Furthermore, many physicians, including those operating high-volume abortion clinics, have a financial interest in encouraging women to have abortions. Must the state entrust to them the sole responsibility to provide a woman with the relevant information bearing on her choice?[11]

We ask you to note several objectionable strands in this passage: (1) Women are obliged to act like legislators when they are making the most private possible decisions; (2) doctors should force abortion patients to confront selected moral choices (must one legally force a reluctant organ donor to do the same when a family member's life is at stake?); and (3) doctors in general, and those who perform abortions in particular, are financially driven and less than ethical. We do not wish to see a jurisprudence built on these false premises.

Among the most inapposite passages in Judge Alito's Memorandum is the following:

> [A] "'description of the stage of development of the unborn child'" [citations omitted] . . . is very relevant to the extra-medical dimension of the abortion choice. Second, [Judge Coffin] argued [citation omitted] that the information would cause "emotional distress, anxiety, guilt, and in some cases increased physical pain." These results, however, are part of the responsibility of moral choice. Any one confronting such a choice – a legislator voting on abortion legislation, a judge or juror pronouncing a sentence of death or imprisonment, a

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[10] *Id.*
[11] *Id.* at 11.

> military officer commanding a mission that he knows will cost lives – may experience similar effects.[12]

Please note the failed analogies: (1) A legislator assumes the burden of making public policy; a woman seeking an abortion is entitled to act as a private person. (2) A judge or juror pronouncing a sentence of death or imprisonment does so after an adjudication of guilt; a woman seeking an abortion has not been convicted of a crime. (3) A military officer commanding a mission is acting in the context of war; a woman seeking an abortion is not. The sentiments in this passage fall outside the mainstream of legal thought.

Finally, Judge Alito rejected the notion that requiring a physician to report abortion information, including the marital status of the woman, would have a "chilling effect" on physicians:

> As for the "chilling effect" on physicians, it is hard to take this argument very seriously. Doctors are subject to a host of recordkeeping and reporting laws. In truth, what probably chills them is not the thought of filling out abortion reports or the wildly unlikely prospect of criminal prosecution for an abortion-related offense but the thought of a visit from an IRS agent investigating tax shelters.[13]

One is struck by Judge Alito's intemperate speculation about physicians in this passage and elsewhere. This attitude is inconsistent with appropriate judicial restraint. As ethical health care providers, and on behalf of our physician colleagues, we object to it.

We ask you to note, moreover, that there are virtually no legal citations in the above-quoted Memorandum passages. They go beyond law-based advocacy from a government lawyer supporting an administration policy. They bear the earmarks of personal arguments.

Obviously, the Memorandum we have discussed is twenty years old. Were it an anomaly in Judge Alito's career, our objections would be muted. But despite his current verbal assurances that his personal opinions would not interfere with his honoring precedent and that his prior stance on abortion was mere advocacy, Judge Alito's later dissent on the Third Circuit in 1991 echoes that earlier stance.

There is no question that, where Supreme Court decisions clearly covered all salient aspects of a reproductive rights case he faced on the appellate bench, Judge Alito adhered to Supreme Court precedent.[14] However, his well-known dissent in Planned Parenthood v. Casey[15] – in which Judge Alito maintained that requiring women to notify spouses of intent to abort does not create an "undue burden" – revives the disconnect with women's

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[12] *Id.* at 12.
[13] *Id.* at 15.
[14] *See, e.g.*, Planned Parenthood v. Farmer, (3d Cir. 2000); Alexander v. Whitman, 114 F.3d 1392 (3d Cir. 1997).
[15] 942 F.2d 683 (3d Cir. 1991).

realities reflected in his 1985 Memorandum. In Casey, Judge Alito skillfully tracked the "undue burden" standard and associated levels of scrutiny; but then accepted the state spousal notification regulation's harm to women where the numbers of injured women were small in his opinion. The Supreme Court unambiguously rejected his view.[16] Moreover, Judge Alito's Casey dissent adeptly used procedural arguments to gloss over violent harms not covered by the exceptions in the spousal notification statute – such as the possibility that the husband of a woman seeking an abortion would harm their children, rather than the woman, in retaliation.

Judge Alito reasoned differently in certain other contexts. In Fraternal Order of Police Newark Lodge No. 12 v. City of Newark,[17] he elegantly parsed the discrimination inherent in forbidding Muslim police to retain their beards by hypothesizing on-the-street scenarios involving bearded police officers. He did not require evidence that such scenarios occurred; he accepted that, in the natural course of events, they were possible. In Casey on the other hand, Judge Alito refused to entertain common-sense scenarios of harm to women who might need to inform a violent spouse of their decision to abort. Instead, he declined to consider such harms by asserting that plaintiffs had offered no evidence that such injuries had in fact occurred as the result of the statute in question.[18] The difference in Judge Alito's approaches in these two cases is striking. His understanding of religious freedom in Fraternal Order is palpable. On the other hand, his apparent lack of insight into domestic violence and the real-life consequences for women[19] in Casey is disconcerting; and if imported into Supreme Court decisions, could prove lethal for many of our clients.

We are compelled to ask what path Judge Alito would take on the Supreme Court when facing a matter in the reproductive rights arena on which he is not technically bound by *stare decisis*. He may be a decent man and he is surely an accomplished professional; but the answer to this question bodes ill for women.

If you believe there is anything we can do to help you come to a decision – or to help you oppose this nominee, as we do – please do not hesitate to contact us.

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[16] Planned Parenthood v. Casey, 505 U.S. 833, 894 (1992)("The analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects. For example, we would not say that a law which requires a newspaper to print a candidate's reply to an unfavorable editorial is valid on its face because most newspapers would adopt the policy even absent the law. [Citation omitted.] The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.") Found at http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=505&invol=833. Indeed, the role of courts is widely thought to encompass the protection of the rights of minorities in a wide range of contexts.

[17] 170 F.3d 359, 366 (3d Cir. 1999).

[18] Casey at 723 n. 6.

[19] This is an important issue. There are many legal doctrines – rejection of the "separate but equal" standard, the battered woman defense, the "reasonable person" (as contrasted to "reasonable man") standard applied to statutes of limitation in tort law that required an understanding of the parties' daily realities.

In the meantime, we hope you will pose the following questions to Judge Alito during the upcoming hearings:

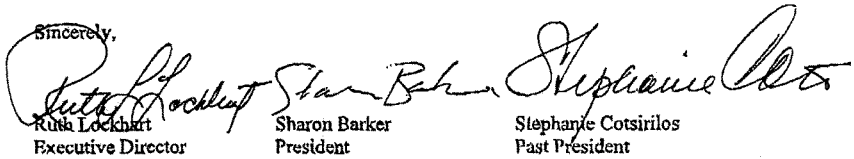
I. *Under what circumstances is the examination of hypothetical harms acceptable in judicial reasoning? Under what circumstances must evidence of harm be adduced? Under what circumstances are sociological data acceptable?*

II. *Under what circumstances should physicians be required to dispense moral advice? Who should determine the content of such advice?*

III. *What are the circumstances under which a Supreme Court precedent should be overruled?*

Thank you for your attention in this extremely important matter.

Sincerely,



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