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September 9, 2005

The Honorable Arlen Specter
Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Patrick Leahy
Ranking Member
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

RE: Nomination of John G. Roberts to be Chief Justice of the United States

Dear Senators:

We find ourselves at an extraordinary moment of history. A devastating natural disaster has laid bare the disturbing truth that we are still a nation trying to deal with complicated issues of race and economic class.

It is in this context that we are asked to evaluate President Bush's nominee for Chief Justice of the United States. We have grave concerns about this nomination, particularly regarding the impact that Judge Roberts' judicial approach would have on equal opportunity for working people.

On behalf of the 1.7 million members of the Service Employees International Union, I write, first and foremost, to request that you demand President Bush turn over to the American public *the entire record of John Roberts' career.* The stakes are simply too high to make a decision on this nominee without access to all relevant information about his views. Most particularly, a complete review of Roberts' qualifications is impossible without access to the memoranda he wrote while serving as principal deputy solicitor general. These papers will shed great light on Roberts' views on such critical questions as the scope of governmental power and the rights of minorities and workers.

In this letter, I will also outline our concerns regarding John Roberts' record on several issues of importance to our members.

Government Service

As a high-ranking lawyer in the Reagan and George H.W. Bush administrations, John Roberts advocated for a wide range of deeply troubling positions. I review the most egregious examples here:

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A. Immigrant Rights

While working in the Reagan administration, Roberts co-wrote an internal memo about a case called *Plyler v. Doe,* which involved a Texas law that closed the schoolhouse doors to the children of undocumented immigrants. In *Plyler,* the Supreme Court held that denying a class of children access to education would create a "permanent caste of undocumented resident aliens" and thus struck down the Texas law as violative of the constitution's Equal Protection Clause. While the Supreme Court understood that the *Plyler case* was about the imposition of a "lifetime of hardship on a discrete class of children," Roberts thought that the Reagan administration should have invoked principles of "judicial restraint" and intervened in the case *on the side of the Texas law that kept kids out of school.* Roberts' memo makes clear that his vision of equal protection is not broad enough to protect the right of all children to attend public school.

SEIU believes that all workers, and all working families, should have equal access to the American dream regardless of their immigration status. But John Roberts has a view of the Constitution that could deny some immigrants the chance to achieve that dream.

B. Gender Equality

In 1984, at a time when women earned 57 cents for every dollar earned by a man for comparable work, Judge Roberts denigrated the notion of paying women and men the same wages for work of equal value. In an internal government memo, Roberts called the legal theory of equal pay for comparable work a "radical redistributive concept," and denigrated it by parodying a Marxist slogan. In 1990, as a government advocate, Roberts argued in the *UAW v. Johnson Controls* case that it was legally permissible for an employer to deny certain lead-exposed jobs to fertile women, even if the women were fully qualified to do the work. This employer policy, which Roberts argued did not violate the anti-discrimination laws, *meant that fertile women had to choose between undergoing a sterilization procedure and keeping their jobs.* And, in *Canterino v. Wilson,* Roberts opposed the government's intervention on behalf of female inmates who had been denied equal access to job training and education programs.

We believe that gender equality is a core American value, and that male and female workers should be treated the same at work. We know that women continue to face discrimination in the workplace, and continue to earn less than men for doing work of equal value. John Roberts does not share our commitment to gender equality.

C. Access to Healthcare

In the *Rust v. Sullivan* case, Roberts filed a brief for the government that defended the constitutionality of a rule that "gagged" health care providers from discussing abortion with patients.

We believe that all Americans should have equal access to the full range of available healthcare services. John Roberts argued that the government should be able to tell healthcare workers which services they can discuss with patients and which they cannot.

D. Access to Public Education

Besides embracing a position that would have excluded undocumented children from school, as a government advocate Roberts pushed legal arguments that would have made it even more difficult to desegregate public schools. And Roberts criticized lower court decisions in *Hendrick Hudson Dist. Bd. of Educ. v. Rowley* that had offered expanded accommodation to a deaf student under the Education for all Handicapped Children Act.

No right is more central to working Americans than the right to a free public education. But John Roberts has taken positions that would limit rather than facilitate full access to quality education for all Americans.

E. Voting Rights

While he was in the Reagan Justice Department, Roberts urged the Administration to oppose a bill that would have restored the Voting Rights Act to its full strength. Roberts would have preferred a bill that prohibited only those voting practices where discriminatory intent could be proved. Fortunately, Roberts' view did not prevail.

SEIU believes that democracy means honoring every American's right to vote. John Roberts' record reflects a narrow view of the Voting Rights Act, the key federal statute designed to ensure that all Americans – regardless of their race – can vote and that every vote counts.

II. Private Practice

In addition to the troubling positions Roberts advocated during his work in government, he has chosen to represent clients and make arguments in his private practice that advance the interests of corporations at the expense of working people and their unions. I set forth below some of the most relevant examples:

- In 1989, a group of low-wage African American poultry workers attempted to organize with the Teamsters union. The workers involved in the union campaign were known as "live-haul crews:" chicken catchers, fork-lift operators, and drivers. Holly Farms argued that these workers were not entitled to organize under the National Labor Relations Act because they were "agricultural" employees. **John Roberts authored a brief on behalf of a council of poultry companies and argued that these low-wage, primarily African American workers were not entitled to the protection of the labor act.** The Supreme Court rejected Roberts' argument and held that the workers were entitled to protection. *[See Holly Farms Corp. v. NLRB,* 517 U.S. 392 (1996).]

Si. Carpal tunnel syndrome (CTS) is a debilitating condition that forces tens of thousands of U.S. workers to miss work every year. In 2003, for example, the Department of Labor recorded more than 22,000 cases in which CTS led to lost work days. Ella Williams worked with pneumatic tools on the Toyota assembly line in Georgetown, Kentucky, and was diagnosed with CTS. When she was reassigned to a different job, and had to hold her hands and arms up at shoulder length for hours at a time, she developed thoracic outlet compression, a condition that causes pain in the nerves that lead to the upper extremities. When Toyota fired Ella Williams, she sued under the Americans with Disabilities Act, claiming that the company had failed to reasonably accommodate her disability. **John Roberts represented Toyota Motors and argued that Ms. Williams' serious physical impairments did not qualify her for ADA protection.** *[See Toyota Motor Mfg. v. Williams,* 534 U.S. 184 (2002)1

T· The *United Mine Workers v. Bagwell* case grew out of the historic Pittston Coal strike of 1989-90. The strike involved a struggle between the mine workers and Pittston over subcontracting, the introduction of irregular work schedules and Sunday shifts, and the drastic limitation of health and pension benefits for retired and disabled miners and their dependents. A Virginia court imposed $64 million in civil contempt fines against the union, and John Roberts represented the administrator appointed to enforce the contempt sanction. **In the** U.S. **Supreme Court, Roberts argued that the contempt fines were civil and not criminal and that, accordingly, it was permissible for the court to fine the union $64 million without giving the union a trial by jury.** The Supreme Court, in a 9-0 decision, rejected Roberts' argument and held for the union. *[See* 512 U.S. 821 (1994).]

)'. On numerous occasions, Roberts has represented coal companies against the interests of coal miners. In one appellate court case, Roberts took the side of the coal company in a dispute with enormous implications for the job security of miners. At a time when coal mines were attempting to escape their obligations to workers through use of complex corporate restructurings (a phenomenon that continues to hurt workers in a number of industries today), an arbitrator ruled that a group of displaced Ohio miners was entitled to jobs at KenAmerican mines. Roberts, however, argued that the court should reject the arbitrator's decision and leave the miners without employment protection. In his Senate questionnaire, Roberts listed this case as one of the ten most significant cases he has handled. *[See KenAmerican Resources v. UMWA,* 99 F. 3d 1161 (D.C. Cir. 1996).] And in a coal case that came before the Supreme Court, Roberts asked the Court to overturn a private arbitration decision under a collective bargaining agreement that reinstated a discharged worker. The Supreme Court rejected Roberts' argument 9-0. *[See Eastern Associated Coal Corp v. UMWA,* 531 U.S. 57 (2000).]

> As Americans well know, patients' rights are threatened when health maintenance organizations have unchecked power over medical choices. Some states have passed laws designed to protect patients, as Illinois did with its Health Maintenance Organization Act. That law gave patients the right to independent medical review when their HMO denied them certain benefits. **In *Rush Prudential HMO v. Moran,* John Roberts represented the HMO and attacked this important Illinois patients' rights law.** Roberts argued that the state law was preempted by the federal ERISA statute, but the Supreme Court rejected Roberts' argument. *[See* 536 U.S. 355 (2002).]

III. The D.C. Circuit

As a judge on the U.S. Court of Appeals for the D.C. Circuit, John Roberts has heard a number of cases involving unions and employees. The vast majority of these cases were fairly standard disputes that, while important to those involved, do not tell us much about Roberts' views of labor and employment matters. In most decisions, Roberts went along with a unanimous court – sometimes holding for the union or employee, sometimes holding for the employer. Some of his decisions, however, bear mention and – in light of the record already reviewed above – raise further concern:

> Congress depends on its power under the "Commerce Clause" to pass worker protection laws. Roberts expressed an opinion, as a judge on the U.S. Court of Appeals, in the recent *Rancho Viejo case* which may indicate an inclination to adopt of restricted reading of Congress's Commerce Clause power. Such a reading could make it difficult for Congress to offer new, and badly needed, protections to workers involved in union organizing. *[See* 334 F.3d 1158 (D.C. Cir. 2003).]

> In *AFL-CIO v. Chao,* the court of appeals was called on to address new regulations issued by the Department of Labor that placed onerous financial reporting requirements on unions. All three judges on the three-judge panel that reviewed the case rejected the unions' claims and upheld the Department's authority to issue the new "LM-2" regulations, but a two-judge majority accepted the unions' argument and struck down the Department's new "trust reporting" rules. Roberts dissented from the second part of the court's holding, and argued that *all* of the new reporting rules – the LM-2 and trust reporting rules – should be upheld. *[See* 409 F.3d 377 (2005).]

> LeMoyne-Owen College is a historically black college in Memphis, Tennessee. In 2002, the college faculty attempted to unionize, but the College argued that the faculty members were managerial employees and thus not entitled to protection under the National Labor Relations Act. The NLRB rejected the College's argument and ordered the College to recognize and bargain with the faculty's representative. In *LeMoyne-Owen College v. NLRB,* however, Judge Roberts wrote an opinion for the court of appeals that reversed the Board's decision. According to Roberts' opinion, the Board had not provided an adequate

explanation for its holding that the faculty were not managerial employees. The case was sent back to the Board for further proceedings. *[See* 357 F.3d 55 (D.C. Cir. 2004).]

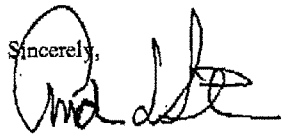
Stanford Hospital and Clinics v. NLRB, involved SEIU Local 715's attempt to include in the bargaining unit eleven housekeepers who worked at a new research facility at Stanford. The Board had included the new housekeepers in the pre-existing bargaining unit, but the court of appeals reversed the Board's decision. According to the court, the union's attempt to include these workers in the unit was contrary to the rule that a union can't seek to "clarify" a bargaining unit that is already "clearly defined." Roberts joined in this unanimous three-judge decision. *[See* 370 F.3d 1210 (D.C. Cir. 2004).]

W Conclusion

As I stated above, the American public is entitled to the complete Roberts' record. The White House has a duty to turn over to your Committee *all* of Roberts' writings, including the memoranda he wrote as principal deputy solicitor general. If these documents are eventually released, or if we learn more from Roberts' testimony during his Senate confirmation hearings, we will revisit the question of his suitability for confirmation. Based on the record that is before us, we do not know enough to make a final determination regarding John Roberts' qualification to be Chief Justice of the U.S. Supreme Court. And because the remainder of Roberts' record is readily available, it would be inappropriate for the Senate to confirm this nominee without first gaining access to these critical documents.

At this crucial time, we need a nominee who is a sign of hope that our nation might be reunited. Thank you for considering our views.

Sincerely,



Andrew L. Stern
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