Foundation Opposes Judge John Roberts' Nomination as Chief Justice of the Supreme Court

The Women's Sports Foundation issued the following statement in response to questions regarding its position on the appointment of Judge John Roberts as Chief Justice of the Supreme Court and the Title IX implications if he were to be confirmed:

The Women's Sports Foundation opposes the nomination of Judge John Roberts to the United States Supreme Court. Dating back to the 1980s, Roberts has taken positions in several key cases that substantially weakened Title IX's protections or could have, had his positions prevailed.

1. Roberts Took Positions that Would Have Resulted in Eliminating Title IX Coverage of Athletics

During his tenure as a Special Assistant to the Attorney General, Roberts argued that Title IX coverage should not extend institution-wide. He argued that Title IX covered only those programs that specifically receive federal funds. (1) These arguments were accepted by the Department of Justice in *Grove City v. Bell* (1984), where it successfully argued for the Supreme Court to adopt a program-specific approach to Title IX (i.e., only the specific program that receives federal funds would be prohibited from discriminating on the basis of sex, not the entire educational institution). (2) Because virtually no athletic program receives direct financial aid, this ruling essentially stripped the OCR of the power to eradicate sex discrimination in intercollegiate athletics and the growth of women's sports was significantly slowed for a period of almost four years.

Grove City marked a major setback in the progress Title IX had made for women and girls. Roberts continued to support the program-specific approach, and even opposed the Civil Rights Restoration Act (CRRA), which restored Title IX to its pre-Grove City (institution-wide) status and was eventually passed in 1988. The law has since been pivotal in the successful enforcement of civil rights laws like Title IX.

2. Roberts Advocated Limits on Title IX's Application to Athletics Governance Organizations (NCAA)

While in private practice, Roberts brought a case to the Supreme Court on behalf of the NCAA, arguing that it was not covered **at all** by Title IX. (3) The court agreed with Roberts, in part, ruling that the receipt of dues from member institutions that were subject to Title IX

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was alone insufficient to subject the NCAA to Title IX. (4) However, according to a report by the National Women's Law Center, the court did not rule on Robert's more "far-reaching" claim, that the NCAA be exempt from Title IX coverage altogether. "Because the NCAA effectively controls intercollegiate athletics, if this argument were to prevail there would be no recourse for any practices or policies of the NCAA that discriminate on the basis of sex, (race, national origin, disability, or age.)" (5)

3. Roberts Urged the Denial of Full Remedies for Intentional Discrimination Prohibited by Title IX (Franklin)

As a Deputy Solicitor General, Roberts filed an amicus brief in *Franklin v. Gwinnett County Public Schools* that argued that victims of intentional discrimination should not receive any damages for the injuries suffered under Title IX. (6) The Supreme Court rejected Robert's arguments and found that victims could recover monetary damages in Title IX cases. (7)

Franklin was a case regarding sexual harassment of an athlete by her coach. This position is particularly disturbing because monetary damages are sometimes the only form of relief available to the victims, who may have graduated by the time their cases reach a decision.

Over the past few years, women's rights in athletics have been advanced by the judicial system—progress that we want to continue. Chief Justice William Rehnquist's replacement must be someone who will continue to support progress towards gender equality for women and girls in sports. As we examined Robert's record, we are gravely concerned that his placement on the Supreme Court would result in Title IX setbacks and send the wrong message to women and girls in sport.

The Foundation is urging its members to take action by writing to their Senators expressing concern about Robert's Title IX record, asking them to oppose his appointment to a lifetime seat on the Supreme Court.

Take action! Ask your Senators to oppose Roberts.

Editor's Note:
The Women's Sports Foundation is non-partisan. We do not take sides based on the political affiliation of proponents of bills or the party that nominated an appointee, etc. By policy, we do not get involved in issues that are not directly related to sports and physical activity participation and do not comment on political or judicial appointee unless they are directly involved in making decisions related to sports or physical activity participation. Our internal test

for whether we comment on an issue, urge action or support or reject proposed appointees is whether doing so would advance increased participation in sports and physical activity, guarantee equality of treatment in sports or physical activity or support the enforcement or promulgation of gender equity laws or policies that impact opportunities or treatment of girls and women in sports.

As a 501-c-3 not for profit organization, we are prohibited from campaigning for the election of political candidates. However, 501-c-3 organizations are permitted to engage in limited lobbying in support of legislation, urge elected representatives to take positions on issues or influence confirmation of judicial or other federal appointees. Such lobbying (1) must be directly related to our exempt purpose and (2) may not be a "substantial part of our organization's activities". With regard to this latter point, in general 501-c-3 non-profit organization cannot spend more than 5% of its operating budget on such an activities. The Foundation does not expend dollars when we take such positions because communications to members are via e-mail. Of course, there are always a few hours of volunteer or staff time devoted to developing position papers or doing the research that justifies our positions on an issue or an appointee.

References

(1) Memorandum to the Attorney General from John Roberts, Special Assistant to the Attorney General, re *"University of Richmond v. Bell"* at 1-2 (Aug. 31, 1982).
(2) *Grove City College v. Bell*, 465 U.S. 555, 564 (1984).
(3) Brief of Petitioner at 26-28, *NCAA v. Smith*, 525 U.S. 459 (1999) (No. 98-84), 1998 WL 784591 (Nov. 10, 1998).
(4) NCAA v. Smith, 525 U.S. 459 (1999).
(5) National Women's Law Center. *Judge John Roberts' Record on Protection From Sex Discrimination Under Title IX and the Equal Protection Clause*. Aug., 2005.
(6) *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992).
(7) *Franklin*, 503 U.S. at 75-76.