TESTIMONY OF MARCIA D. GREENBERGER
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BEFORE THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ON THE NOMINATION OF JOHN ROBERTS TO
CHIEF JUSTICE OF THE UNITED STATES

September 15, 2005

My name is Marcia Greenberger and I am Co-President of the National Women's Law Center, which since 1972 has involved in virtually every major effort to secure and defend women's legal rights. I appreciate your invitation to testify before the Committee on behalf of the Center on such a profoundly important issue – the nomination of John Roberts to serve as the next Chief Justice of the United States.

From all accounts, John Roberts is a person of enormous professional accomplishment, who has many admirable personal qualities. But his distinguished credentials are only a part of the inquiry. It is also essential that a nominee have a judicial philosophy that supports the most basic principles of fairness and justice embodied in our Constitution, and key laws and Court precedents in place for decades. In the weeks since President Bush first nominated John Roberts to the U.S. Supreme Court, originally to the seat being vacated by Justice Sandra Day O'Connor, thousands of pages of documents have been made public shedding light on Judge Roberts's judicial philosophy and approach to fundamental legal rights. While there are important parts of his record that the administration has refused to release, the publicly-available information demonstrates that on a breadth of issues John Roberts followed an unmistakable pattern of developing,

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advancing and embracing legal arguments and positions that would undermine women's most basic legal rights. Based on the available record, the Center concluded that Judge Roberts should not be confirmed to the U.S. Supreme Court. The Center's analysis of the record, which provides the basis for that conclusion, is set forth in an extensive report, *The Record of John Roberts on Critical Legal Rights for Women,* which was released on August 31. The report is attached hereto, and I would like to submit it for the record of this hearing. (It is also available at http://www.nwlc.org/details.cfm?id=2376&section=JCWR.)

I will briefly summarize the central findings of our report in my testimony today. But first, it is important to underscore that the concerns raised by our review of Judge Roberts's record are heightened now that the nomination is to the position of Chief Justice, rather than Associate Justice.

The position of Chief Justice of the United States is uniquely powerful and important. Although the Chief Justice casts just one vote, like the other eight Justices on the high court, the Chief Justice has significant additional powers and functions. The Chief Justice wields added influence over the Court's jurisprudence in several ways: by circulating a list of cases he proposes the Court agree to hear; by presiding over the conferences at which the Justices discuss and vote on cases after oral arguments have been heard; and by assigning the writing of the Court's opinion (when the Chief Justice is in the majority), which enables him to affect on what grounds, and how broadly or narrowly, an opinion is written. These procedural powers allow the Chief Justice to influence the Court's agenda and shape the law itself.

The Chief Justice also serves as Chairman of the Judicial Conference of the United States, and in that capacity functions as head of the judicial branch of the government. As such, he selects the judges who sit on judicial committees on various issues, and he influences positions the judiciary takes on legislation relating to the courts. For example, the Judicial Conference, under Justice Rehnquist's leadership, opposed a portion of a bill (later enacted as the Violence Against Women Act) that allowed victims of gender-motivated violence to sue their attackers in federal court.[1] The Chief Justice also selects judges to sit on special federal tribunals, like the Foreign Intelligence Surveillance Act (FISA) Court, which approves government requests for warrants for secret surveillance, searches and wiretaps.

Finally, the position of Chief Justice carries crucial symbolic importance. The Chief Justice defines and represents the Court, embodying the prestige of the Court and the legitimacy of its decisions. As one scholar put it, the Chief Justice must lead in such a way as to "convince not only the litigants but the American people that what the Court collectively decides is ethically and morally sound and legally correct, that the Court is not only conforming to the Constitution but is in tune with transcendent justice."[2]

For all these reasons, a nomination to the position of Chief Justice of the United States requires an even higher level of scrutiny than that applied to any other nomination to the Supreme Court.

The Center's review of John Roberts's record leads us to conclude that he should not be confirmed as Chief Justice. Although Judge Roberts's writings sometimes couch

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[1] Judith Resnik & Theodore Ruger, Editorial, *One Robe, Two Hats*, N.Y. TIMES, July 17, 2005, § 4, at 13. Although the Judicial Conference later backed away from its initial position, see id., the Supreme Court in 2000, in an opinion written by Chief Justice Rehnquist, ruled that Congress had exceeded its power in giving women that new right to sue as part of the Violence Against Women Act. United States v. Morrison, 529 U.S. 598 (2000).

[2] ROBERT J. STEAMER, CHIEF JUSTICE: LEADERSHIP AND THE SUPREME COURT 24 (1986).

his philosophy in terms of support for "judicial restraint," his record shows that, in reality, the common thread is not restraint but sharp curtailment of federal rights and remedies.

Judge Roberts has argued that courts should not recognize established fundamental rights, like the constitutional right to privacy, or apply heightened review of government policies and practices that discriminate on the basis of sex; that courts should interpret federal statutory protections for women's rights and other civil rights narrowly despite congressional intent to the contrary; that federal remedies are unavailable even where state remedies are inadequate; that Congress's power to protect the public welfare should be interpreted narrowly; and that the ability of citizens to sue in federal court to enforce federal rights should be severely restricted.

Indeed, John Roberts supported the constitutionality of proposals to completely strip federal appellate courts of jurisdiction over cases involving the constitutionality of laws on abortion and certain anti-discrimination issues – an extreme position that the Reagan Administration, in which Roberts then served, did not adopt.

On too many occasions and in too many ways, John Roberts has closed his eyes to the devastating consequences to women of his legal arguments, and has simply disregarded contrary judicial precedents.

He repeatedly ignored the facts. He wrote of "perceived problems of gender discrimination" as if there were no *actual* gender discrimination.[3] He wrote of "the canard that women are discriminated against because they receive $0.59 to every $1.00 earned by men," despite ample evidence that the pay gap for women was, and is, based in part on

[3] Memorandum from John G. Roberts, Associate Counsel to the President, to Fred F. Fielding, Counsel to the President, re "Draft 'Status of the States' 1982 Year End Report" 1 (Jan. 17, 1983).

discrimination.[4] Twenty years ago, he endorsed the statement that "Today, women and men are freed of former stereotypes and may enter any field of work they choose."[5] In recommending against Justice Department involvement in a case challenging sex discrimination in a state prison system, he wrote that equal treatment for women in training and pay would cost the state too much money.[6] This assertion was without basis, as shown by the government's intervention despite his recommendation to the contrary, and the state's decision not even to appeal the lower court's eventual finding of discrimination in these programs.[7]

He repeatedly failed to acknowledge the harmful impact on women of his arguments for limited remedies against sex discrimination. In a case involving a teacher's sexual abuse of a 10th grade student, he argued that Title IX, the landmark law prohibiting sex discrimination by educational institutions that receive federal financial assistance, did not allow for recovery of damages under any circumstances, although this position would have left girls like that student with no Title IX remedies whatsoever.[8] He argued for an interpretation of Title IX that would have exempted intercollegiate athletics programs from its non-discrimination requirement and produced other indefensible results, such as no Title IX protection against sexual harassment that took place in a campus building not constructed with federal funds despite the university's receipt of millions of dollars of

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[4] Memorandum from John G. Roberts, Associate Counsel to the President, to Fred F. Fielding, Counsel to the President, re "Clearance for Publication of Remarks Made by Eliza Paschall Before Board Meeting of National Federation of Republican Women" 1 (Oct. 4, 1984).
[5] Draft Responses at 2, attached to Memorandum from John G. Roberts, Associate Counsel to the President, and Deborah K. Owen, to Fred F. Fielding, Counsel to the President, re "Domestic Briefing Materials for Press Conference" 1 (Sept. 13, 1985).
[6] Memorandum from John Roberts, Special Assistant to the Attorney General, to the Attorney General, re "Proposed Intervention in Canterino v. Wilson" 1 (Feb. 12, 1982).
[7] *Canterino v. Wilson,* 538 F.Supp. 62 (W.D. Ky. 1982). The state did not appeal the district court's core order requiring it to provide equal vocational programs for men and women prisoners. *See Canterino v. Wilson*, 875 F.2d 862 (6th Cir. 1989).
[8] Brief for the United States as Amicus Curiae Supporting Respondents, Franklin v. Gwinnett County Sch. Dist., 503 U.S. 60 (1992) (No. 90-918).

federal money.[9] Arguing against a federal remedy for women who were barred from access to health clinics by massive Operation Rescue blockades, he said such women could simply "repair to state court"[10] – even though state laws and remedies had proven seriously inadequate and the presiding federal judge had warned that eliminating the protection of federal marshals could lead to mayhem and bloodshed.[11]

He flouted judicial precedents. Roberts repeatedly wrote in 1981 and 1982 that sex discrimination does not call for "heightened scrutiny" under the Equal Protection Clause,[12] even though heightened scrutiny of government policies that discriminate on the basis of sex had been explicitly adopted by the Supreme Court in 1976 as the standard required by the Constitution.[13] He dismissed a Supreme Court precedent upholding affirmative action, decided only two years earlier, asserting that only four members of the majority in that case remained on the Court and therefore it was not necessary to "accept it as the guiding principle in this area."[14] He questioned whether the Constitution contains a fundamental

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[9] Memorandum from John Roberts, Special Assistant to the Attorney General, to the Attorney General, re "Department of Education Proposal to Amend Definition of 'Federal Financial Assistance'" 1 (Dec. 8, 1981); Memorandum from John Roberts, Special Assistant to the Attorney General, to the Attorney General re "University of Richmond v. Bell" 1 (Aug. 31, 1982); Memorandum from John G. Roberts, Associate Counsel to the President, to Fred F. Fielding, Counsel to the President, re "Correspondence from T.H. Bell on Grove City Legislation" 1 (July 24, 1985). See also MARCIA D. GREENBERGER & C.A. BEIER, FEDERAL FUNDING OF DISCRIMINATION: THE IMPACT OF GROVE CITY COLLEGE V. BELL," REPORT BY THE NATIONAL WOMEN'S LAW CENTER 17, *reprinted in Civil Rights Restoration Act of 1987: Hearing on S. 557 Before the Senate Comm. On Labor and Human Resources*, 100th Cong. 258, 277 (1987).

[10] *The MacNeil/Lehrer NewsHour: Abortion Protest; Divided Nation; Makeover with a Mission* (PBS television broadcast, Aug. 7, 1991).

[11] *Id.*

[12] *See* Memorandum from John Roberts, Special Assistant to the Attorney General, to Kenneth W. Starr, Counselor to the Attorney General, re "Judicial Restraint Drafts," attaching short and long draft articles on judicial restraint (Nov. 24, 1981); Memorandum from John Roberts, Special Assistant to the Attorney General, to the Attorney General, re "Proposed Intevention [sic] in Canterino v. Wilson" 1 (Feb. 12, 1982); Memorandum from John Roberts, Special Assistant to the Attorney General, to the Attorney General and others, re "Proposals to Divest the Supreme Court of Appellate Jurisdiction: An Analysis in Light of Recent Developments" 23-24 (undated).

[13] Craig v. Boren, 429 U.S. 190, 197 (1976).

[14] Memorandum from John Roberts, Special Assistant to the Attorney General, to the Attorney General re "Meeting with Secretary Donovan on Affirmative Action" 1 (Dec. 2, 1981).

right to privacy at all, referring to "the so-called 'right to privacy.'"[15] And as Deputy Solicitor General, he asked the Supreme Court to overturn *Roe v. Wade* altogether.[16]

Had John Roberts's views prevailed on issues like Title IX and other broad protections against sex discrimination and guarantees of women's legal rights, aspiring Mia Hamms, Olympic gold medal champions and WNBA players would not have had the opportunities that have enabled them to shine. Women would be facing an even greater pay gap today and their progress would be slowed in entering fields of study and careers that were simply off limits in the past. Protections would not be in place to secure essential reproductive health care without massive blockades and physical intimidation; indeed, laws would be upheld making reproductive health care illegal altogether.

Women's livelihoods and their very lives would be placed at risk if their legal rights were limited and weakened in the ways John Roberts advocated throughout his career. The Senate should not confirm John Roberts on this record.

Thank you again for this opportunity to testify before the Committee.

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[15] Memorandum from John Roberts, Special Assistant to the Attorney General, to the Attorney General, re "Erwin Griswold Correspondence" 1 (Dec. 11, 1981).
[16] Brief for the Respondent at 13, Rust v. Sullivan, 500 U.S. 173 (1991) (Nos. 89-1391 and 89-1392).