September 6, 2005

Honorable Arlen Specter, Chairman

Honorable Orrin G. Hatch
Honorable Charles E. Grassley
Honorable Jon Kyl
Honorable Mike DeWine
Honorable Jeff Sessions
Honorable Lindsey O. Graham
Honorable John Cornyn
Honorable Sam Brownback
Honorable Tom Coburn

Honorable Patrick Leahy
Honorable Edward M. Kennedy
Honorable Joseph R. Biden, Jr.
Honorable Herbert Kohl
Honorable Diane Feinstein
Honorable Russell D. Feingold
Honorable Charles E. Schumer
Honorable Richard J. Durbin

Dear Members of the United States Senate Committee on the Judiciary:

As a civil rights organization that litigates on behalf of lesbian, gay, bisexual and transgender (LGBT) people and those with HIV, Lambda Legal has serious concerns about John Roberts's nomination to the U.S. Supreme Court.

His record raises troubling questions about his judicial philosophy, specifically in terms of his views on the right to privacy, Congress's power to enact laws that address matters of national concern like civil rights, the guarantee of equal justice for all and other issues that have important implications for LGBT and HIV-affected people.

The U.S. Senate now has the responsibility of closely scrutinizing these issues and many others to determine whether John Roberts can be a Supreme Court justice who will protect the individual rights of all Americans. It is critical that the Senate exercise its constitutional duty to fully vet the Roberts nomination rather than serve as a mere rubber stamp for the President's choice. And it is equally critical that Roberts answer the tough questions that the Senate has a constitutional responsibility to ask about his judicial philosophy.

On behalf of the LGBT and HIV-affected communities and the thousands of Lambda Legal members who have attached their names to this letter, we respectfully submit the following questions to pinpoint areas that we believe must be explored during the confirmation hearings. We urge you to pose these questions in ways that will ensure meaningful responses and to engage in in-depth follow-up, so that the Senate and the

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American people truly will know whether or not John Roberts deserves a lifetime seat on the highest court in our nation.

Equal Protection (*Romer v. Evans*)

1. Do you agree with the analysis of the majority of the Supreme Court in *Romer v. Evans* that when an enactment targeting a group of Americans sweeps as broadly as Colorado's Amendment 2, which prohibited all legislative, executive or judicial action designed to protect lesbians and gay men, it can be explained only by animus?

2. Do you agree with the analysis of the majority of the Supreme Court in *Romer v. Evans* that a law that can be explained only by antigay animus does not satisfy the requirements of equal protection?

3. Do you agree with the dissenting opinion in *Romer v. Evans* that voters may prohibit all legislative, executive and judicial action to protect gays and lesbians in order to preserve traditional morals?

4. Do you agree with the dissenting opinion in *Romer v. Evans* that moral disapproval of homosexuality is sufficient justification to establish the constitutionality of laws that treat lesbians and gay men differently than heterosexuals?

5. Do you agree with the dissenting opinion in *Romer v. Evans* that the majority in that case, by striking down Colorado's Amendment 2, inappropriately took sides in a debate that should have been allowed to be resolved exclusively through the political process?

6. In written answers recently submitted to the Senate Judiciary Committee, you said "To the extent the term 'judicial activism' is used to describe unjustified intrusions by the judiciary into the realm of policy making, the criticism is well founded." While it's of course true that if the intrusion is "unjustified," the criticism would be well founded, what are examples of cases where you believe the intrusion was unjustified? What guideposts do you believe judges should follow in determining when they may be making an unjustified intrusion into the realm of policy making, as opposed to doing their job of enforcing the law as well as the guarantees of the Constitution? Do you believe that the analysis of the majority of the Supreme Court in *Romer v. Evans* constituted such an "unjustified intrusion"? Do you believe that the analysis of the majority of the Supreme Court in *Lawrence v. Texas* constituted such an "unjustified intrusion"?

7. Recent news reports indicated that you assisted one of the attorneys representing the plaintiffs in *Romer v. Evans* in preparing for oral argument. Why did you choose not to indicate that you had done any work related to that case in the

answers you submitted to the Senate Judiciary Committee describing your *pro bono* work? Did you agree or disagree with the legal arguments advocated by the plaintiffs's attorneys in that case, including the equal protection argument ultimately accepted by the Court majority? If you agreed with some of the arguments advanced by the plaintiffs in the case but not others, please identify each and explain why you agreed or disagreed with them.

Right to Liberty (*Lawrence v. Texas*)

8. Do you agree with the analysis of the majority of the Supreme Court in *Lawrence v. Texas* that, under the U.S. Constitution, religious or moral beliefs cannot be the sole basis for the enactment and enforcement of criminal laws?

9. Do you agree with the analysis of the majority of the Supreme Court in *Lawrence v. Texas* that the right to liberty under the due process clause gives individuals the right to engage in private, adult, consensual, noncommercial sex without interference by the government? If so, do you agree with the analysis of the majority of the Supreme Court in *Lawrence v. Texas* that the right belongs equally to lesbians and gay men as to heterosexuals? Do you believe that lesbian and gay people should be denied "fundamental rights" to which others are constitutionally entitled?

10. Do you agree with the dissenting opinion in *Lawrence v. Texas*, authored by Justice Scalia, that promotion of a majoritarian morality is, on its own, a legitimate state interest? If so, do you agree with the dissenting opinion that this interest is sufficient for so-called sodomy laws to withstand constitutional scrutiny?

11. Do you agree with the dissenting opinion in *Lawrence v. Texas*, authored by Justice Scalia, that it should be left entirely to the political process to decide whether a state may enact laws making it a crime for lesbians and gay men to have certain forms of private, consensual, noncommercial sex with other adult partners?

12. Do you agree with Justice O'Connor's concurring opinion in *Lawrence v. Texas* that, when a law exhibits a desire to harm a politically unpopular group like lesbians and gay men, the Supreme Court has applied a more searching form of rational basis review to strike down such laws under the equal protection clause?

13. Do you agree with Justice O'Connor's concurring opinion in *Lawrence v. Texas* that moral disapproval of gay people is not a sufficient state interest to satisfy rational basis review under the equal protection clause?

Right to Privacy

14. Do you agree that there is a right to privacy under the U.S. Constitution and that this right limits the ways in which government can restrict individual rights?

15. Do you agree with the analysis of the majority of the Supreme Court in *Roe v. Wade* that the constitutional right to privacy is broad enough to encompass a woman's decision whether or not to terminate her pregnancy?

16. Do you agree with Justice Douglas's opinion for the Court in *Griswold v. Connecticut* that laws prohibiting the sale or use of contraceptives violate the constitutional right to privacy for married couples? And with the Court's decision in *Eisenstadt v. Baird* that this right belongs equally to those who are not married?

17. Does the *amicus* brief you helped author in *Rust v. Sullivan* reflect your judicial philosophy regarding whether *Roe v. Wade* was decided correctly?

18. Does the *amicus* brief you helped author in *Bray v. Alexandria Women's Health Clinic* reflect your judicial philosophy regarding the scope of the Civil Rights Act of 1871?

Federalism

19. Do you agree with the analysis of the majority of the Supreme Court in *Tennessee v. Lane* that Congress acted within its power in providing disabled individuals the right to sue in state courts under the Americans with Disabilities Act?

20. What limits does your judicial philosophy place on Congress's power to enact laws to address important national interests like protecting civil rights? How does your dissent from the denial of *en banc* review in *Rancho Viejo, LLC v. Norton* shed light on your judicial philosophy?

Disability Discrimination

21. Do you agree with the analysis of the majority of the Supreme Court in *Bragdon v. Abbott* that HIV infection is a disability that limits one or more major life activities, and therefore HIV discrimination is covered by the Americans with Disabilities Act?

22. Do you agree with Chief Justice Rehnquist's dissenting opinion in *Bragdon v. Abbott* that decisions about having children, whom to marry, where to live and how to earn a living are not major life activities under the Americans with Disabilities Act?

23. Do you agree with Chief Justice Rehnquist's dissenting opinion in *Bragdon v. Abbott* that conditions like HIV, which affect reproductive and other important

personal decisions, are not disabilities that entitle affected individuals to protection under the Americans with Disabilities Act?

Gender Discrimination

24. Do you agree with the analysis of the majority of the Supreme Court in *Price Waterhouse v. Hopkins* that treating employees differently in the workplace based on whether they conform to sexual stereotypes is a form of sex discrimination that is prohibited by Title VII of the Civil Rights Act of 1964?

25. Does the *amicus* brief you helped author in *Franklin v. Gwinnett County Public Schools* reflect your judicial philosophy about the availability of damages as a remedy for sexual harassment under Title IX of the Education Amendments of 1972?

Separation of Church and State

26. Do you agree with the analysis of the majority of the Supreme Court in *Lemon v. Kurtzman* and its approach to analyzing whether a challenged government action violates the establishment clause of the U.S. Constitution?

27. According to your judicial philosophy, what if any limitations does the U.S. Constitution impose on government funding and government sponsorship of religious activity?

Congress's Power to Strip the Federal Courts of Authority

28. Opponents of the federal courts's decisions in politically controversial areas have sometimes suggested they might be able to change substantive law through a change in procedural rules referred to as "court stripping" or "jurisdiction stripping," whereby the legislature would limit the jurisdiction of the federal courts in regard to specific controversial areas of law.

    a. According to your judicial philosophy, does Article III, Sec. 2 of the U.S. Constitution, which states, "the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make," authorize Congress to preclude the Supreme Court's review of certain controversial topics?

    b. According to your judicial philosophy, does Article III of the U.S. Constitution, which grants Congress the discretion to create lower federal courts, authorize Congress to preclude the lower federal courts's review of certain controversial topics?

Stare Decisis

29. In *Planned Parenthood v. Casey*, the Supreme Court listed several basic factors for determining whether or not a prior case can be overturned. These factors were:

    a. whether [the decision's] central rule has been found unworkable;

    b. whether the rule's limitation on state power could be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by the question;

    c. whether the law's growth in the intervening years has left [the decision's] central rule a doctrinal anachronism discounted by society;

    d. and whether [the decision's] premises of fact have so far changed in the ensuing [years] as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed.

    Do you agree that each of these factors is necessary for determining whether to overrule a prior case? Would you add any additional factors for consideration of whether or not to overrule precedent?

Approach to Constitutional Interpretation

30. The approaches that judges and scholars take to constitutional interpretation have been described in various ways – for example, constitutional "originalism," "interpretivism" and "nonintepretivism," among others.

    a. Which schools of constitutional jurisprudence best describes your approach to the federal Constitution, and why?

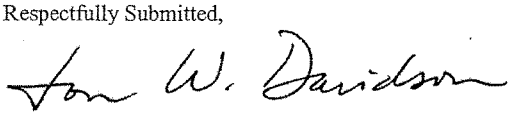
    b. Some in the press have referred to your constitutional approach as "minimalist." Do you agree that this term accurately describes your approach to interpreting the Constitution? If so, what does "minimalism" mean to you? Why do you believe that this is the best approach to constitutional interpretation, if you do? If you depart in some ways from minimalism, in what ways do you depart and why? Whatever you describe as your approach to constitutional interpretation, why do you believe it is the best approach?

    c. Former judge and constitutional scholar Robert Bork is often called an originalist in his approach to the Constitution. Which aspects, if any, of Bork's constitutional philosophy do you agree with, and disagree with,

and why? What are the principal ways in which Bork's approach and yours are similar and different?

d. Even if no one scholar's or judge's approach to constitutional interpretation and jurisprudence more generally is identical to yours, whose do you believe comes closest and why? There may be more than one. What do you admire about these scholars or judges? Which of their decisions, legal texts or analyses do you find particularly persuasive and why?

Respectfully Submitted,



Jon W. Davidson
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Attachment: Petition Signatures