Testimony of Phyllis Snyder,

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On the Nomination of Judge John G. Roberts, Jr., to be

Chief Justice of the United States

September 14, 2005

We appreciate the opportunity to submit written testimony to the Senate Judiciary Committee on behalf of 90,000 members and supporters of the National Council of Jewish Women (NCJW). NCJW is a volunteer organization, inspired by Jewish values, that works to improve the quality of life for women, children, and families and to ensure individual rights and freedoms for all through his network of 90,000 members, supporters, and volunteers nationwide.

NCJW opposes the confirmation of Judge John G. Roberts, Jr. as Chief Justice of the United States. We have done so because we believe that only those nominees with a proven commitment to fundamental freedoms, including a woman's right to choose, should be confirmed to a lifetime seat on the federal bench. As Jews, we understand what it means to have fundamental rights and liberties stripped away. As women, we are also especially cognizant of the mandate to treat women equally under the law and to preserve their ability to make critical decisions about their own lives and bodies.

We have decided to oppose Judge Roberts for many reasons, most notably because of his past record concerning the right to privacy and reproductive rights, his views on civil rights and women's equality, and his support for weakening the wall of separation between religion and

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state. Judge Roberts' testimony before the Judiciary Committee has provided few moments of clarity. In fact, it has reinforced the impression that Judge Roberts has put his considerable talent to work parsing the law to explain why an injustice cannot be corrected, rather than seeking to use the law to preserve the values embodied in our Constitution and its Bill of Rights.

We did not take this position lightly. Much of Roberts' record is still shrouded in mystery because the White House refuses to release documents that would provide insight into the later years of Roberts' public career. But what we have learned to date causes us to believe that our basic rights may well be threatened by his views, however sincerely held or articulately expressed.

As a political appointee in the Reagan Administration, Judge Roberts allied himself with efforts to overturn *Roe v. Wade* outright. While serving as Deputy Solicitor General in the Bush Administration, Roberts argued in *Rust v. Sullivan* (1991) to allow the federal government to bar doctors working in federally funded family planning programs from even discussing abortion options with patients. The brief he authored also argued that *Roe v. Wade* was wrongly decided -- a question not even posed in the case.

As Deputy Solicitor General, Roberts also argued in an amicus curiae brief filed in *Bray v. Alexandria Women's Health Clinic* (1993) that protesters from Operation Rescue and six other individuals who blocked access to reproductive health care clinics did not discriminate against women, even though only women could exercise the right to seek an abortion.

Judge Roberts' personal opinions are of a piece with his legal advocacy. In documents released by the Reagan Presidential Library, Judge Roberts referred dismissively to the "so-called 'right to privacy;'" derided the conclusion in *Griswold v. Connecticut* that privacy is a fundamental constitutional right; and expressed approval of the idea of a mass funeral for fetal remains as "an entirely appropriate means of calling attention to the abortion tragedy." Not surprisingly, Judge Roberts refused to affirm a constitutional right to privacy during his confirmation hearing for the DC Court of Appeals.

Now Judge Roberts has testified that he does find a right to privacy in the Constitution, but he still refuses to assert that it extends to the right to choose abortion or provide any information on his views on the scope of this right. While some will argue that a reversal of *Roe v. Wade* is highly unlikely, we believe that it would die a death of thousand cuts at the hands of a Chief Justice Roberts. Unfortunately, the history of litigation on *Roe* is one of regression, not progress or steadfastness, and there is every reason to believe that a Chief Justice Roberts would side with those seeking to narrow it further.

But it is not only the right to choose that concerns us. Throughout his career, Judge Roberts has revealed a bias in favor of allowing government to sponsor and endorse religious expression. For example, he approved a 1985 speech by then-Secretary of Education William J. Bennett who opined that "[o]ur values as a free people and the central values of the Judeo-Christian tradition are flesh of the flesh, blood of the blood," and that "our history has . . . deepened the intimate relationship between the Judeo-Christian tradition and the American

political order." Roberts had no legal objection to the remarks, believing they would "stir things up," despite an affirmation by the Supreme Court three years earlier that above all else the government cannot favor one religion over another.

While working in the Solicitor General's office, Roberts argued that government-sponsored prayers are permissible at a public school graduation, because they "merely respect the religious heritage of the community" and are "an expression of civic tolerance and accommodation to all citizens." Whether those with minority religious views or no religious views at all feel accommodated did not concern Roberts in his brief, he contended: they can simply choose "not to be present for [the] graduation."

Roberts advocated replacing the test used by the Supreme Court in *Lemon v. Kurtzman* to measure whether government action breached the constitutional mandate separating religion and state. Instead, he advocated a "coercion" test that would only evaluate whether government action coerced participation. Justice O'Connor called this view "abandoning our settled law." Recent cases have shown only a 5-4 majority in favor of Justice O'Connor's view. Here again we can reasonably expect a Chief Justice Roberts to join those who would allow government to incorporate explicit religious expression in its activities – expression that necessarily endorses a religious view.

In his testimony, Judge Roberts readily agreed with President John F. Kennedy when the president said in effect that he did not speak for his church on public policy and it did not speak for him. But when asked if he agreed with President Kennedy's assertion that he was proud to

live in country where "the separation of church and state is absolute," he demurred.

Finally, the views with which Judge Roberts has associated himself on civil rights and gender equality are equally disturbing. He opposed strengthening the Voting Rights Act. He favored limiting the application of Title IX. He referred with disdain to the "the purported gender gap" and even opposed initiatives on behalf of women taken by senior Reagan Administration officials.

As disturbing as this record is, it is incomplete. Documents on key cases generated by Judge Roberts while he served as Deputy Solicitor General in the administration of President George H.W. Bush have been withheld by the White House. Thus the Senate and the general public are deprived of information that would illuminate Judge Roberts' more recent government career – a liability the President does not share.

Judge Roberts has been nominated to serve, in effect, as the symbol of American justice as well as the highest official in our judicial system. Yet when it comes to issues and cases in which the expansion of justice is in question, his is a cramped view of the law. His testimony before this Committee has reinforced this view of his career and his commitments. The National Council of Jewish Women urges that his nomination be rejected.