**TESTIMONY**
**OF**
**DEBRA L. NESS,**
**PRESIDENT OF**
**THE NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES,**
**TO THE UNITED STATES SENATE JUDICIARY COMMITTEE**
**ON THE**
**NOMINATION OF JUDGE JOHN G. ROBERTS, JR.**
**TO BECOME CHIEF JUSTICE**
**OF THE**
**UNITED STATES SUPREME COURT**

September 16, 2005

I am Debra L. Ness, President of the National Partnership for Women & Families, and I submit this testimony on behalf of the National Partnership in opposition to the nomination of Judge John G. Roberts, Jr. to become Chief Justice of the United States Supreme Court. The National Partnership is a national advocacy organization that has been working since 1971 to advance women's rights, with a particular focus on employment opportunity, work-family policy, and health care policy. From working to outlaw sexual harassment, to fighting to prohibit pregnancy discrimination, to leading the effort to ensure family and medical leave for over 50 million Americans, the National Partnership has fought for every major policy advance for women and families in the last three decades. The National Partnership also has monitored every Supreme Court nomination that has occurred since our inception, extensively researching and analyzing the records of pending nominees. Our work has been driven by our commitment to the core values of fairness, equality, opportunity, and justice – and it is these values that underlie the principles, policies, and initiatives we have pursued throughout our history.

The record of Judge John Roberts is extensive, revealing, and deeply troubling. He has expressed narrow and restrictive views of laws protecting women's and civil rights; he consistently has taken positions that would undermine women's access to jobs, education, and fair pay; and he has questioned whether the Constitution can be interpreted to protect critical fundamental rights such as the right to privacy and our freedom from government intrusion into private family decisions.

Based on our careful consideration of his available record, the National Partnership for Women & Families concluded that John Roberts should not be elevated to the nation's highest court. Our comprehensive report, *John Roberts' Record on Issues Important to Women & Families*, which is attached, documents our findings.

At the time our report was released, Judge Roberts was the nominee to fill the seat of retiring Justice Sandra Day O'Connor. That nomination was withdrawn after the

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unfortunate passing of Chief Justice William Rehnquist, and Judge Roberts was quickly re-nominated for the Chief Justice's seat. His re-nomination only deepened our concerns and opposition. As Chief Justice, he will become the most powerful judge in the nation, with even greater ability to shape the direction of our courts, our laws, and our lives. He will decide which justices are assigned to write the opinion in each case before the Court; he will serve as the lead policy maker for the federal judiciary; and he will stand as the public face of our courts.

During his confirmation hearing, Judge Roberts had the opportunity to address the serious questions raised by his record, but he repeatedly failed to do so in critical areas:

**Equal Protection for Women**

- In memoranda and other writings, Judge Roberts questioned whether courts should use a special, heightened legal standard when evaluating rules or practices that treat women and men differently. He took this position despite Supreme Court precedent that clearly had established this heightened review as the proper legal standard. This high standard set by the Court was particularly important because it raises the bar, making it more difficult to justify rules that apply to men in one way and women in another. But when asked about his past positions during his hearing, Judge Roberts remarkably argued that, notwithstanding his writings, he never opposed the use of this heightened legal standard in gender cases. Instead, he asserted that he really was questioning the use of a different standard – strict scrutiny – although that standard was never mentioned in his relevant writings. Rather than confront his past statements head on and disavow them, Judge Roberts simply tried to revise the plain meaning of his words.

- While serving as a Special Assistant at the Department of Justice, Judge Roberts urged the Attorney General not to approve a request from the Department of Justice's Civil Rights Division to intervene in a case alleging discriminatory treatment of female prisoners in Kentucky state prisons. Female prisoners were denied access to the same types of vocational education programs as male prisoners, thus severely impairing their future educational and employment opportunities. In his memorandum to then-Attorney General William French Smith, Judge Roberts rationalized that such discrimination could be justified because it was too expensive for states to provide equal programs for women – even though similar "cost" defenses had been rejected by the Supreme Court in other cases. But when asked about this statement during his hearing, he had no explanation. Instead, he said that he could not recall the issue.

**Equal Employment Opportunity**

- While working in the Reagan Administration, Judge Roberts repeatedly urged policy changes to curb the use of affirmative action to expand hiring and promotional opportunities for women and people of color. During his hearing, however, he glossed over his past positions, claiming that he only opposed quotas and not affirmative action. But his record reveals that he resisted the adoption of

lawful affirmative action goals and timetables used to promote and measure actual progress in expanding job opportunities. Rather than acknowledge – and more importantly distance himself from – his past statements, he simply tried to revise their actual meaning.

**Pay Discrimination**

- Judge Roberts' record includes disdainful statements about reported pay disparities between men and women, ignoring the possibility that discrimination accounts for part of the wage gap. He dismissed out-of-hand measures designed to prevent wage discrimination and ensure that women's jobs are fairly valued and fairly compensated. When asked during his hearing about his comments, he simply retreated to a cursory statement about supporting equal pay for equal work. But he never acknowledged the role of discrimination in depressing women's wages.

**Reproductive Rights and the Right to Privacy**

- Judge Roberts' record revealed that he has questioned the existence of a constitutional right to privacy. He wrote that courts had gone beyond their proper role to create "fundamental rights" with no constitutional basis, and he identified the "so-called" right to privacy as one such right. His arguments demonstrate a narrow view of the Constitution's guarantees, and they have important implications for women who have relied on the Court's recognition of a right to privacy to gain greater control over their reproductive health care decisions. When asked about his prior writings and statements during his hearing, Judge Roberts argued that many of these previous positions were simply the positions of Administration that employed him. Further, while he stated that he believed the right to privacy was protected by the liberty interest in the Due Process Clause of the 14th Amendment, he refused to say whether he believed the right to privacy protected a woman's right to seek an abortion, and he refused to say that he would uphold the core principles established in the landmark case of *Roe v. Wade*. Moreover, his carefully calibrated words about respect for precedent ultimately shed no light on whether he would protect our fundamental right to privacy, or let government intrude in our most private family decisions.

**Sex Discrimination in Education**

- Judge Roberts' record revealed that he had interpreted Title IX, the groundbreaking law prohibiting sex discrimination in education programs or activities, very narrowly. He had supported proposals to limit Title IX's application in ways that would have curtailed many of the gains made by women in schools and universities in recent decades, and made it harder to hold schools accountable for failing to comply with the law. When asked about his previous writings and positions, Judge Roberts argued that he was simply advancing the position of the Administration for which he worked – a position sustained by the Supreme Court and later overturned by Congress. But he refused to acknowledge

his support for a proposal ultimately never advanced by the Reagan Administration, namely to change existing regulations so that student federal aid would no longer be sufficient to trigger Title IX coverage of an institution. Judge Roberts' failure to acknowledge or refute his past positions and provide fulsome explanations was evasive and troubling.

- While serving in the Bush Administration, Judge Roberts filed a brief arguing that a student who had been subjected to egregious sexual harassment by her teacher should not be able to obtain money damages under Title IX. When asked about his position during his hearing, Judge Roberts stated that he was simply arguing about the proper remedy that should be available to the student plaintiff, mentioning the availability of other remedies such as back pay and injunctive relief. He never acknowledged that, as a student, the plaintiff would not be able to make use of a back pay remedy. Nor did he acknowledge that his failure to support a meaningful remedy for the student would have severely undercut the law's effectiveness. During later questioning, Judge Roberts stated that he had no quarrel with Court's ultimate decision in the case unanimously rejecting his argument – but he never stated that he supported the outcome, or the reasoning, in the case.

The position of Chief Justice is a critical appointment. The Court is closely divided at a time when our nation continues to struggle with how best to confront and resolve issues involving gender, race, class, and privacy. America has yet to make the promise of equality real, concrete, and tangible for every citizen. The next Supreme Court appointment will, in great measure, determine whether we continue the progress toward equality, or turn back the clock.

The National Partnership believes that John Roberts has not demonstrated his commitment to uphold rights and protections of critical importance to women and people of color – and we urge the Senate to reject his nomination to the Supreme Court.