The CHAIRMAN. I want to thank you all for your testimony.

Let me begin with you, Ms. Smeal. Tell me what it is that has made you absolutely certain that Judge Souter, if Justice Souter would overrule *Roe* v. *Wade?*

Ms. SMEAL. I am glad you asked the question.

The CHAIRMAN. So am I, it is better than being——

Ms. SMEAL. I have had the experience of testifying before for Justices and I have been able to call them pretty accurately. We were one of the few women's organizations that stood up against Associate Justice Anthony Kennedy. We were not fooled. We looked at his record. We examined it in detail.

We have examined Mr. Souter's record in detail. He has never once ruled or said anything that would indicate that he is for privacy rights. Before, when he had a chance, as attorney general or judge, in fact, he has written with the language of our opponents.

As I stood here, as I say back here and I also watched on television and I have read and I have heard every word, he has indicated he is on the other side. He has even talked to us and referred to us as "the other side." Check his testimony.

When he talks about the rights of privacy, he talks about certain marital privacy acts being there, but he never says which ones, never specifies it clearly. You, Senator Biden, summarize him more generously than he is, in fact, saying, because he holds back. He will not affirm or endorse the decisions or opinions of *Griswold.* He will not speak to *Eisenstadt.* In fact, he aligns himself with the decision of Harlan, the concurring decision of Harlan, and if you read Harlan's decision carefully, under him Harlan would not go along with privacy rights for unmarried people. He talks about the tradition of the history of our country being against fornication, homosexuality, and against, in fact, rights for unmarried people.

It does not surprise me that he will not talk about *Eisenstadt,* because it would not be very popular to say that you would be against the rights of unmarried people for birth control in this country. He will not go down that road you wanted him to go very far at all. He will not even go as far as Kennedy, in my opinion.

There is no question, he is the fifth vote, because his own words, he says it is not settled law. He talks about it as if it will be called into question successfully. What does that mean, "successfully"? To me, successful would be that it would be reaffirmed; to him, the challenge would be successful.

When you are putting a fifth vote on and he is talking about original intent, original meaning, original understanding, all this jargon, but always around the question, what proof has he given to us that he would not be that vote? Everything has indicated that he will be that vote.

The CHAIRMAN. If he had indicated—and this is a question to all of you—if he had indicated that he believed there was a right to privacy of a woman to determine whether or not to terminate a pregnancy, would that have been sufficient for any of you? If not, would you have been required to know, as well, what balancing test he would apply, with specificity, in order to get your support?

Do you understand the question? I know you understand the question, but I am parsing it in two parts here. Would privacy at present be sufficient, or would you require, in order to give support

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for any nominee that will come forward—and if this nominee does not succeed, there will be someone else—would you require that nominee to specifically state how they would rule on *Roe* v. *Wade*, not just on the principles, but specifically state "I will support *Roe* v. *Wade*, if in fact put on the Court?

I guess I should start with you, Ms. Smeal, and then work my way down.

Ms. SMEAL. We believe that he should say that he is for the fundamental right to privacy and that this is, in fact, settled law, that—let us put it this way, the word game should stop, he should be saying where he is. You know, we are saying a lot about, well, you cannot ask this question or that question. That would say that the current judges would have to disqualify. They have said where they stood. We know where they are going to stand. It does not say the way they are going to rule on a particular case, but at least you would know where the man stands. He must be the only person in the United States without an opinion.

Think about it. And he sat here and said he has not discussed it, when he has had esteemed colleagues say he has talked hours to them about politics and about the major issues of our day. Well, certainly this is one of them. I think we have a right to know and you have a right to know when you are casting your vote, and he has not been forthcoming.

If this is the standard that you are going to accept, you are going to get a lot of vague questions from now on anything that is important, and we are going to get people who will just say warm, fuzzy things. A 2-hour discussion 24 years ago, in which he will not even say where he stood then, let alone where he stands now, is simply no standard at all.

I do want to again say that if we are to gain confidence on him on Harlan, I think American women and men must know that draws into question, not only his position on *Roe*, but his position on whether or not a woman can get a birth control prescription without the consent of her parents or the consent of her spouse or, if she happens to be in a certain State, or if she is single or married. He is rendering, if he does that kind of stuff and if we go down that road, the social fabric of this country. You cannot put it back together again.

The CHAIRMAN. Ms. Yard.

Ms. YARD. Well, I think if he said very, very clearly that he believed there is an absolute fundamental right under the privacy interpretation for a woman to decide when and whether to have a child, that is what you need to know.

I do not know that you need a specific answer on *Roe* v. *Wade*. I think to say that there is an absolute fundamental right to control your reproductive life is what we want to know.

The CHAIRMAN. Thank you.

Ms. ALLRED. Mr. Chairman, I would like to refer to something that I would be very happy to also put into the record, which is a very excellent article from the Georgetown Journal of Legal Ethics, "Ideology, Judicial Selection and Judicial Ethics," by Erwin Chemerinsky, and basically refers to the question of what questions a judicial nominee can be asked.

Summarizing it, basically, we do walk a fine line. I would not ask him, perhaps, how he would rule, to promise how he would rule on *Roe* v. *Wade*. I would not necessarily ask him to predict how he would rule on *Roe* v. *Wade*. I would, however, insist that he answer what his analysis of *Roe* v. *Wade* is and what guidelines and what standards he would use. And that is not only reasonable, it is absolutely necessary. An ideology is necessary, and I would like to point out to the conservative members of this committee, as well as, of course, the less conservative or liberal or moderate members of the committee, that Phillip Kurland, the conservative law professor at the University of Chicago, has said, "It is not any more unfair for the Senate to have ideological grounds to oppose a nominee, than for the President to nominate someone on those grounds." That is from the Washington Post, July 1, 1987, 1989.

So the point is his ideology is important. Why must this committee operate in ignorance? Why must women in this country be forced to live in ignorance, because somehow he does not want to answer the question. Ideology has played a part for many years in the history of these proceedings, we know that. Talk about a litmus test, talk about Chief Justice Rutledge, John Rutledge, President Washington's first appointee as Chief Justice of the Supreme Court, who was rejected on one ground, because of his interpretation of a treaty with Great Britain–yes, we have a right to even one ground–yes, we have a right to even one litmus test, especially when it is about life and death.

Not only a right, but I would urge all of you Senators to please recall Judge Souter back to this table and require that he answers where he stands on abortion. Chairman Biden and other members of this committee, if he were a member of the Ku Klux Klan or the Nazi Party, I have no doubt, because of your fine records as Senators, you would say to him, "I must know how you would rule, or I must know your analysis on issues involving the Nazi Party, I must know your analysis of the Ku Klux Klan." That one thing alone, because it has so much impact on blacks and other minorities in our country, would be sufficient to disqualify him, I have no doubt, as a member of the United States Supreme Court.

Yes, his position on *Roe* v. *Wade* alone should be sufficient to disqualify him.

The CHAIRMAN. Ms. Allred and for the remainder of the panel, I am not asking what we should or could ask. We know that. I wrote that speech and so I understand that. As a matter of fact, I respectfully suggest, to the chagrin of my colleagues on my right, that that issue was an issue first raised not too long ago by me, when every editorial writer in the country was writing we had no right to ask or expect to know certain things. So, I have no disagreement about that.

My question for the remainder of the panel is this: What would have satisfied you, not what satisfies me or what we have a right to ask or what we have a right to know, what is what you would have a right to insist on knowing? Is it sufficient to know that he believed there was a fundamental right to privacy relating to termination of pregnancy, or is it required for you to know, as well, precisely how he would rule on *Roe* v. *Wade*? That is the question I am asking you.

Ms. NEUBORNE. I think it is the first part, if we knew that he believed there was a fundamental right to privacy, basically as defined in *Roe*, that a woman had a right to make a decision of when and whether to carry to term, and that that was as fundamental right—again, that is an important piece, as I know you know, that he is not saying—that would be sufficient, because then, under our standard of laws, it would require a compelling State interest to restrict that, and there would have to be defined what that compelling State interest is, and that decision would be made with the utmost seriousness.

What we are hearing is that some aspects of privacy are protected and we know that if there is just a simple right that is not deemed fundamental, then practically any government regulation would be deemed sufficient to overrule that, and that is our legitimate concern, so that is the point that we felt had to be made.

As you know, Senator Biden, our concern here is that he has been open and forthright on other issues, again using church-state as an example, in areas of the law where there will be changes, where he admitted that the law perhaps was not settled and would likely be changed, and he had no compunction in those areas about discussing the underpinnings of those laws, what the core issues were there. It is only in the area of privacy that he has refused to tell us what the basic fundamental right is.

The CHAIRMAN. Thank you.

Ms. HOLTZMAN. Mr. Chairman, I do not know if I could answer the hypothetical question of what would satisfy me, because I think you would have to take many factors into account, including the nature of his reasoning and his ability to hear.

But I can tell you what does not satisfy me, and the fact is that this committee does not even have a commitment from Judge Souter that there is a right to privacy with respect to abortion, that there is a right to privacy even for married people with respect to the use of contraception. We need to have those commitments.

He was willing to come here and say to you, "I believe the Constitution permits States and the Federal Government to impose the death penalty." Can he not say "I believe the Constitution allows people to use contraceptives, that that is a fundamental right?" I think also that it is especially important that he give a statement on the fundamental right, given, as other members of the panel pointed out, and I myself, other factors in his background that raise questions about the respect that he gives to women and their rights, particularly in the area, as I pointed out in the rape shield, in the area of privacy there, and also with regards to prior statements on abortion.

The CHAIRMAN. I thank you very much. My time is up.

Senator Thurmond.

Senator THURMOND. Mr. Chairman, we have a lovely group of ladies here. We thank you for your presence. I have no questions.

The CHAIRMAN. Senator Hatch.

Senator HATCH. Thank you, Mr. Chairman.

I welcome all of you here and we appreciate the fervent testimonies that you have given.