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August 25, 2005

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
711 Hart Senate Office Building
Washington, D.C. 20510-3802

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
433 Russell Senate Office Building
Washington, D.C. 20510-4502

Dear Senators Specter and Leahy,

On behalf of the National Employment Lawyers Association (NELA)[1], I am writing to urge the Senate Judiciary Committee to conduct a thorough and independent review of Judge John G. Roberts' qualifications, background, and constitutional philosophy. In nominating Judge Roberts to the Supreme Court of the United States, President Bush has stated that Judge Roberts "has profound respect for the rule of law and for the liberties guaranteed to every citizen. He will strictly apply the Constitution and laws, not legislate from the bench."[2] However, Judge Roberts cannot be confirmed based on President Bush's guarantees alone. Rather, all Senators must be given the opportunity to conduct a thorough and independent review of John Roberts' record. This includes not only reviewing his rulings from the D.C. Circuit, but also questioning him about his judicial philosophy and gaining access to the briefs, memoranda and other documents he prepared as a litigator for two Republican administrations and in private practice.

NELA is especially concerned about his commitment to and respect for workers' rights. Though Judge Roberts' pre-judicial advocacy on behalf of corporations does not necessarily demonstrate an aversion to workers' rights, it is not indicative of a judicial philosophy that embraces workplace fairness. Unfortunately, his rulings do not shed light on this issue. During his two years on the D.C. Circuit bench, Judge Roberts has authored the majority, concurring or dissenting opinions in less than ten labor or employment cases. As such, NELA strongly believes that the public is entitled to know whether Judge Roberts will place the interest of employers over the rights of employees.

In light of the dearth of Judge Roberts' employment rulings, NELA urges the Senate Judiciary Committee to ask Judge Roberts to critique past significant Supreme Court employment decisions. As Professor Vikram Amar points out, "Asking the nominee to critique past cases is as legitimate as asking a job candidate to imagine how he or she would have handled situations

[1] NELA is the country's only professional organization exclusively comprised of attorneys who represent plaintiffs in employment discrimination and other employment-related claims. NELA and its 67 state and local affiliates have over 3,000 members.
[2] President George W. Bush's Radio Address, July 23, 2005.

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that faced employees in the past. After all, a justice's job is to decide and explain cases, while a nominee's job is to give senators information about the kind of justice he will most likely be."[3]

Thus, American workers need to know:

Does John Roberts have a demonstrated commitment to the enforcement of Congressional intent with respect to the laws protecting employees' rights?

To answer this question, Judge Roberts should provide his analysis of significant employment and civil rights cases which have shaped the landscape of employment and anti-discrimination law. These cases include:

- *Jackson v. Birmingham Bd. Of Educ.*, 351 F.3d 183 (2005): In a 5-4 decision delivered by Justice Sandra Day O'Connor, the Court ruled that federal law protects against retaliation against someone for complaining about illegal sex discrimination in federally assisted education programs.
- *Grutter v. Bollinger*, 539 U.S. 309 (2003): Here, the Court held that the Equal Protection Clause does not prohibit the University of Michigan Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body. Justice O'Connor delivered the 5-4 opinion.
- *Circuit City v. Adams*, 532 U.S. 105 (2001): In a 5-4 decision, the Court ruled that employers can require employees, as a condition of employment, to agree that they will submit all employment disputes, including discrimination claims under state or federal law, to binding arbitration before an arbitrator, rather than a judge or jury in a court of law.
- *Reeves v. Sanderson*, 530 U.S. 133 (2000): In a unanimous opinion delivered by Justice O'Connor, the Court held that held that while independent evidence showing that the employer acted with the intent to discriminate may strengthen an age discrimination case, it is not required for a plaintiff to prevail. Thus, an employer is liable to a former employee under the Age Discrimination in Employment Act if a reasonable jury can find that the employer's explanation for the employee's dismissal was pretext for discrimination.
- *Davis v. Monroe County Board of Educ.*, 526 U.S. 629 (1999): The Court ruled that it is a violation of federal law for school districts to be deliberately indifferent towards severe and pervasive student-on-student sexual harassment. Justice O'Connor was the deciding fifth vote.
- *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. Boca Raton*, 524 U.S. 775 (1998): In these companion cases, the Court held that an employer can avoid liability for a hostile work environment where (a) "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and (b) "the plaintiff employee unreasonably failed to take advantage of any protective or corrective opportunities provided by the employer or to avoid harm otherwise."
- *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995): The Court ruled 5-4 that a federal affirmative action program can consider race as a factor by demonstrating that it serves a compelling government interest and is narrowly tailored to achieve that interest.

[3] Vikram Amar, "Casing John Roberts," *The New York Times*, July 27, 2005.

The Senate Judiciary Committee can further elicit Judge Roberts' views on workers' rights by asking him the following questions:

- How do you reconcile the Seventh Amendment right to a jury trial with federal courts' enforcement of employers' pre-dispute arbitration clauses that employees are required to sign as a condition of employment?
- What is the relationship between the Contracts Clause and pre-dispute, mandatory arbitration agreements?
- What is your view about whether and to what extent employers can use pre-dispute, mandatory arbitration agreements to limit discovery or remedies for claims under federal or state anti-discrimination laws?
- Can employers prohibit class actions in arbitration? Why or why not?
- Does an arbitration agreement between private parties materially change a state agency's statutory function or the remedies otherwise available? Why or why not?
- Can state employees sue their employers for violation of federal anti-discrimination laws? Why or why not?
- What is your view of the ability of Congress to waive states' Eleventh Amendment immunity for violation of federal anti-discrimination laws?
- What is the proper role of the federal government in enacting laws to protect the rights of the disabled?
- Do you believe that an employee should be covered by the Americans with Disabilities Act if that employee is substantially limited in the major life activity of working?
- Can Congress regulate labor standards for states and cities under its Commerce Clause power? Why or why not?
- Can Congress condition grants of federal funds, under its Spending Clause powers, to states, cities or educational institutions on the grounds that those entities do not violate anti-discrimination laws? Why or why not?
- Are employers immune from liability under the Age Discrimination in Employment Act unless plaintiffs can prove actual intent to discriminate on the basis of age? Why or why not?
- In a memorandum you wrote on January 17, 1983, you referred to the "Fifty States Project" as addressing "perceived problems of gender discrimination." Is it your view today that there are only "perceived" problems of gender discrimination in employment? If not, what do you believe are the problems of actual sex discrimination on the job that continue to need to be addressed in the courts?
- In that same memorandum, you stated that "many of the reported proposals and efforts are themselves highly objectionable." One example you gave was a California proposal for "passage of a law requiring the order of layoff to reflect affirmative action programs and not merely seniority." Do you believe today that a law that provides that persons who have been historically excluded from certain jobs shall not be laid off from those jobs in strict order of seniority would be "highly objectionable" and possibly unconstitutional?
- What do you believe to be the proper role of the courts in reviewing Congressional waivers of the states' Eleventh Amendment immunity? Do you believe that the courts always should defer to those Congressional waivers? If not, when do you believe that the federal courts should refuse to recognize those waivers?

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- Disabled employees are finding it increasingly difficult to prevail in Americans with Disabilities Act (ADA) cases. They often have to be severely disabled in order to satisfy stringent requirements imposed by the courts to be covered by the ADA, but still cannot be so disabled that they are unable to work with or without an accommodation. What are your views on how severely disabled employees must and can be for an employer to be required to offer them a reasonable accommodation?
- The Employment Retirement Security Income Act (ERISA) provides plan participants and beneficiaries with the right to remedy fiduciary breaches, whether those participants were covered by defined benefit plans or defined contribution plans (e.g., 401(k) plans). Can a plan participant bring a lawsuit when a fiduciary imprudently selects an investment option or manages some of the plan's assets imprudently, even if only a percentage of the plan participants are affected? Why or why not?

The stakes could not be higher. The Supreme Court is closely divided on cases involving some of our most basic rights and freedoms. NELA urges the Committee to ask these questions, and many others, of Judge Roberts to determine whether he is committed to the rights of and protections afforded to American workers.

Thank you for your consideration. If you have any questions, please feel free to contact NELA Program Director Marissa Tirona at (415) 296.7629.

Sincerely,

Janet E. Hill
President
National Employment Lawyers Association

cc: Senator Edward M. Kennedy
Senator Joseph R. Biden, Jr.
Senator Herbert Kohl
Senator Dianne Feinstein
Senator Russell D. Feingold
Senator Charles E. Schumer
Senator Richard J. Durbin

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