TESTIMONY OF BRUCE FEIN
ON BEHALF OF UNITED FAMILIES OF AMERICA

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

IN SUPPORT OF JUDGE ANTONIN SCALIA
NOMINATED AS ASSOCIATE JUSTICE OF THE UNITED STATES

Mr. Chairman and members of the committee,

My name is Bruce Fein and I represent United Families of America. United Families of America enthusiastically urges the Senate to confirm Judge Antonin Scalia as Associate Justice of the United States.

Judge Scalia is more richly endowed with the experience and attributes necessary for outstanding performance on the Supreme Court than any nominee since Charles Evans Hughes over 50 years ago. Judge Scalia has taught law; and "taught" law is intellectually tough law. Judge Scalia has occupied high level positions within the Executive Branch. The experience has honed Scalia's mind to a deep appreciation of the Constitution's separation of powers, its subtleties, and its indispensability to energetic, accountable, and unoppressive government. Finally, Judge Scalia has served several years on the United States Court of Appeals for the District of Columbia Circuit. His judicial performance has been exemplary: always well-prepared for oral argument; incisive in opinion writing; and a close intellectual companion of any judge searching for constitutional or statutory principle in expounding the law.

Judge Scalia will bring to the Supreme Court desperately needed mental rigor and analytical power. Three areas of constitutional law illustrate the Court's recent departures from constitutional intent and substitution of social policy concerns

as a basis for decision-making: abortion, obscenity, and Church-State issues.

In the landmark 1973 decision of Roe v. Wade, the Supreme Court discovered a broad constitutional right to an abortion in the due process clause of the Fourteenth Amendment, over a century after the Amendment was ratified. The Court held that during the first trimester of pregnancy, abortions must be virtually unregulated; that during the second trimester of pregnancy, regulation of abortions was permissible, but only to further maternal health; and, that during the third trimester of pregnancy, abortions might be prohibited, unless necessary to safeguard the mental or physical health of the mother. The Court added that its announced constitutional code of abortion would change with progress in medical technology that shortened the gestational period when the fetus would be viable outside the womb.

The Roe v. Wade ruling was not a vindication of the intent of the Fourteenth Amendment architects. Rather, the decree vindicated the public policy preferences of a majority on the Supreme Court. That conclusion is reinforced by the fact that the Court's opinion consulted ancient attitudes, the Hippocratic Oath, the common law, the English statutory law, the American law, the views of the American Medical Association, the views of the American Public Health Association, and the views of the American Bar Association, while generally ignoring the intent of the Fourteenth Amendment authors. A right of privacy, found nowhere in the constitutional text or constitutional history, was invoked to justify the Court's general denunciation of laws that regulated abortion in order to safeguard potential life.

Unchained from the Constitution, the Court's right of privacy concept became a juggernaut to invalidate involvement of

concerned fathers or parents in the abortion decision. On the other hand, the Court upheld restrictions on government funding of abortions, and acknowledged a valid state interest in encouraging childbirth over abortion. But then last month, the Court held in Thornburgh v. College of Obstetricians that a state invaded the right to privacy by requiring truthful information relating to the abortion decision that might convince the mother to choose childbirth.

The Supreme Court's creation of a constitutional right to an abortion represents social policy, not legal judgment. That explains why the Court's cluster of abortion rulings are in legal principle irreconcilable; social policy judgments differ from Justice to Justice.

Judge Scalia, we believe, will employ constitutionally pertinent criteria in examining abortion issues, and lead the Court out of its current confusion and constitutional lawlessness. As Associate Justice White recently warned, "the court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made law having little or no cognizable roots in the language or design of the Constitution."

Rectifying the Supreme Court's abortion cases will not require that abortions be restricted. The rectification will simply return the question to State and local officials to struggle with the anguishing issues involving the fetus, the mother, the father, and social ethics. It would be slanderous to the good name of the American people and contrary to experience to suggest that questions of abortion will not be responsibly handled by elected representatives of the people.

The High Court's pronouncements addressing the discretion of elected officials to proscribe or regulate indecent or lewd

speech under the banner of the First Amendment are also unsound. The purpose of the free speech clause was to safeguard political and cognate discussion or expression from government abridgment. As Chief Justice Charles Evans Hughes explained in DeJonge v. Oregon, it is imperative "to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means." In addition, Justice Brandeis noted in Whitney v. California that rights of free speech were intended to insure that the deliberative forces in society prevail over the arbitrary on matters of public policy, and to foster the discovery and spread of political truth.

The Supreme Court, however, has nullified government efforts to regulate or prohibit indecent or lewd speech or activity inconsequential to vigorous political debate. In Cohen v. California, for instance, the Court held unconstitutional an effort to punish the public display of the words "F___ the Draft" on the back of a jacket. And in Miller v. California, the Court defined constitutionally unprotected obscenity to include only a very small category of pornography. These rulings may represent wise social policy. But social policy decisions have been assigned to elected branches of government under the Constitution. The Supreme Court's duty is to expound the Constitution in accord with original intent.

Speech or behavior that is designed to arouse sexual desire as opposed to triggering cerebral reflections should be governed by laws enacted by elected representatives. That conclusion is both consistent with the purpose of free speech in our democracy, and respectful of the rights of communities to establish rules of social discourse that fit a local ethos.

The Supreme Court's Church-State rulings are a collection of ad hoc social policy judgments generally heedless of the intent of both the First and Fourteenth Amendments. Organized but voluntary public school prayer, the public posting of the Ten Commandments, or moment-of-silence statutes are unconstitutional, according to the Court, if intended as an endorsement of religion. A State may loan parochial school children textbooks, but it may not loan a film on George Washington, or a film projector to exhibit the film in history class. A State may pay for bus transportation to religious schools, but may not pay for bus transportation from the parochial school to the public zoo or natural history museum for a field trip. A State may pay for diagnostic services conducted in the parochial school, but therapeutic services must be provided in a different building.

The incoherence of the Court's freedom of religion cases necessarily results from its use of social policy preferences rather than constitutional intent to control its deliberations. Thomas Jefferson's so-called wall of separation metaphor, expressed in a short note to the Danbury Baptist Association, has been invoked by the Court to fasten on States strict limits on aid to nonpublic schools under the aegis of the Fourteenth Amendment. Jefferson, however, was in France when the Bill of Rights was adopted by Congress and ratified by the States. Moreover, the First Amendment was explicitly drafted to exclude any application to the States. Finally, Jefferson was dead when the Fourteenth Amendment was ratified, and there is no cogent evidence that the authors of that 1868 Amendment intended to incorporate Jefferson's wall of separation theory to prohibit State assistance to religious endeavors. In sum, with a few exceptions, the Supreme Court is insincere about elaborating Church-State doctrine consistent with constitutional intent.

The decisions of the Supreme Court that affront constitutional intent may reflect enlightened social policy. If so, then there is good reason to believe many States or localities would embrace such policies voluntarily. But the tired refrain that the people of the United States would repeatedly act oppressively unless prevented by Supreme Court decrees is discredited by experience and common notions of fair play and equity. To be sure, legislatures often act unwisely, and occasionally callously. But the favored constitutional remedy is in the court of public opinion where legislative error may be corrected through the ballot box or otherwise. As Justice Cardozo taught, judges are not justified in overturning laws simply because they offend their sense of morality.

Moreover, the Supreme Court itself frequently errs and expounds harsh or unsentimental constitutional doctrine. High Court decisions holding unconstitutional the 1875 Civil Rights Act, the income tax, child labor laws, minimum wage laws, and laws protective of union activity all testify to Justice Jackson's epigram: the Supreme Court is not final because it is infallible; it is deemed infallible because it is final.

Responsibility is the mother of courage and individual growth. If, in contravention of constitutional intent, the people are denied responsibility over most questions of abortion, obscenity, or Church-State relations, then nothing prevents the courts from arrogating responsibility for virtually any contentious public policy issue. The consequence would be a demoralized citizenry unconcerned and untutored in the arts of self-government.

Judge Scalia, we believe, recognizes the significance of constitutional intent, doctrinal coherence, and predictability in the evolution of constitutional jurisprudence in a Nation founded on the creed of government by the consent of the governed. We believe Judge Scalia would help to extricate the Court from its uninspiring meanderings into the political and social policy thickets. We thus recommend his confirmation as Associate Justice of the Supreme Court.