Testimony

by

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and

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before the Senate Judiciary Committee
on the nomination of Clarence Thomas
to the United States Supreme Court

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Mr. Chairman:

I appreciate the opportunity to appear today in my role as president of Planned Parenthood Federation of America and the Planned Parenthood Action Fund. For 75 years, as advocates and providers of reproductive health care, Planned Parenthood has promoted greater liberty in individual decision making about pregnancy and childbearing. Planned Parenthood has empowered tens of millions of women and their families to take control of their -- lives -- enabling individuals to make informed decisions about reproduction and to obtain quality medical services to prevent unwanted pregnancies. Each year more than 2.4 million Americans -- mostly young, mostly low income -- come to our 911 clinics nationwide for the information and support they need to make the most basic and private decisions about their reproductive lives.

Precisely one year ago this committee heard Judge David H. Souter solemnly proclaim that a Supreme Court justice holds the responsibility "to make the promises of the Constitution a reality for our time, and to preserve that Constitution for the generations that will follow us." We too believe in the Constitution as a living document that must be nurtured and preserved through each generation. Such is its enduring quality. Yet the reality of our generation is that the process of nurturing and preserving our rights and freedoms is being abandoned. For the first time,

established constitutional rights -- specifically reproductive rights -- are in danger of being reversed at the hands of the highest constitutional arbiters of our nation.

It is the constitutional vision and methodology of those potential arbiters that this committee is charged with discerning -- as well as ensuring that the court retains a meaningful diversity of judicial philosophy. There are no guarantees that what a nominee says will govern how he or she will rule on the court; but that in no way obviates the Senate's obligation to determine the candidate's position.

While Mr. Souter last year acknowledged that the Constitution protects marital privacy, he stubbornly refused to answer questions on the substance of that right and the landmark Supreme Court rulings that have flowed from it. Reproductive rights was the only area of questioning in which Mr. Souter demurred.

In Justice Souter's first opportunity to express himself on the issue of reproductive rights as a member of the Supreme Court, he became the fifth vote forming a majority in Rust v. Sullivan, holding that the federal bureaucracy can enforce speech censorship between a woman and her doctor. Rust v. Sullivan upheld the right of the Bush administration to direct what a medical professional can say in a family planning clinic for low-income women. In permitting the government to prohibit any discussion of abortion,

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the court struck at one of the sacred tenets of our liberties -- freedom of speech.

The Senate, like the American people it represents, has responded - with shock and outrage to the Rust decision, and has acted boldly to overturn it. But I must say to you that had the Senate been as bold in insisting that Judge Souter come forward with more candor in explaining his philosophy on the right to reproductive control, it might have rejected his candidacy instead of leaving American women to hope and pray for the best.

I refer to last year's confirmation hearing to underscore the real-life consequences that flow out of this process. A nominee who systematically evades questions on this fundamental issue arrives at the court as a blank slate on an issue of profound importance to women. If he conducted himself similarly on other issues of constitutional law, Americans would be compelled to ask what is the meaning of the confirmation process.

Americans watched and listened to learn of Judge Thomas's views about the constitutional right to privacy. The committee did not hesitate to press Mr. Thomas on other "unsettled" doctrinal questions that are likely to be brought before the Supreme Court, ranging from discrimination law to capital punishment. Nor has he refused to express his philosophy on these matters. He didn't even refuse to answer all questions on privacy. What he did refuse to

acknowledge was that the right to privacy extends to the right of a woman to terminate a pregnancy. What we have seen is another Souter-type performance.

There are those who argue that Judge Thomas should not be forced to answer questions about abortion because to do so would alienate one side or another in Congress -- and that other candidates for the court have not been required to do so. We believe that the committee should have pressed those other candidates to answer --or should have rejected them for failing to do so.

But the fact that it did not take those actions does not justify excusing Judge Thomas from responding, and the reason should be obvious: A high court nominee's views on the constitutional right to choose abortion have never been more critical than they are today. The Supreme Court is now heavily weighted toward right-wing extremism, as evidenced by numerous recent rulings, and an upcoming reconsideration of Roe v. Wade is virtually guaranteed. If Judge Thomas fully accepts the "natural law" doctrine as regards fetuses, it would make him more strongly anti-abortion than any of the sitting justices, because that doctrine holds that abortion is constitutionally outlawed rather than a subject for each state to regulate. We fear that if Mr. Thomas is confirmed, he will join the ranks of others on the court who have signaled their willingness to dismantle Roe v. Wade. This process began with the Webster decision in 1989 and moved forward last May with Rust. This

is the first time in constitutional history that a right recognized as fundamental is in danger of being denied. Women's lives hang in the balance.

Mr. Thomas has acknowledged a general right to marital privacy. But Justice Souter and Justice Kennedy embraced that same vague view. Before these hearings began, however, it seemed very clear that this nominee had very clear objections to Roe v. Wade and the constitutional principles underpinning it. Why else would he have praised Lewis Lehrman's essay, titled "The Declaration of Independence and the Right to Life," with its references to "the struggle for the inalienable right to life of the child-in-the-womb..." and "the conjured right to abortion in Roe v. Wade"? His explanation to the committee about political coalition-building is insufficient, particularly when such coalition-building takes the form of condemning a decision that has done more than any other of the 20th century to improve the condition of women's lives.

Mr. Thomas went on to sign a report on the family to President Reagan, which sharply attacks a series of Supreme Court decisions - that -- according to the report -- "abruptly strip the family of its legal protections." The decisions specifically cited in this report, in addition to Roe, were Planned Parenthood of Central Missouri v. Danforth -- which struck down a state law giving husbands and parents veto powers over their wives' and daughters'

abortions, and Eisenstadt v. Baird -- which held that unmarried people have a right to use contraceptives. Judge Thomas has stated that he signed that report without reading it. So be it. Many of us have been guilty of signing documents without paying sufficient attention to them. But when we discover a mistake or a public misstatement, a correction or clarifying statement is the minimal norm. Judge Thomas insists, several years later, that he never got around to reading the report, even though it was highly controversial and well-publicized at the time.

Although he seems to have positioned himself otherwise for this hearing by his general embrace of Griswold v. Connecticut, Judge Thomas has previously criticized Justice Goldberg's use of the Ninth Amendment in reaching that decision. This seeming contradiction -- taken in light of his praise for the Lehrman article -- should be fully explained before this body. But even if we give Mr. Thomas the benefit of the doubt, there is absolutely nothing in his record -- in his writings and speeches and court cases -- to indicate support for Griswold. Neither is there anything anywhere, prior to his statements before this committee, to indicate that he is sensitive to, concerned about, or respectful of the privacy right for all individuals to make reproductive decisions, including the choice of abortion.

Finally, it strains logic and stretches the imagination when this man -- who has boldly spoken out on many controversial, cutting-

edge issues -- also claims that he has never read about, discussed, or thought about the historic Roe decision -- even when he has spoken and written about it. Judge Thomas was studying at Yale University Law School when Roe was decided. Is it possible that such a distinguished law school would have failed to foster discussion and broad debate among its students on a major constitutional landmark? His testimony leaves the American people in a difficult position, both in evaluating Judge Thomas' disposition toward the constitutional privacy protection and in evaluating his overall credibility and integrity.

There is no doubt in my mind that if this committee had reason to suspect that a nominee were prepared to overrule Brown v. Board of Education, or New York Times v. Sullivan, it would insist upon answers to clarify the nominee's beliefs and intentions. As an African-American, I fully appreciate the significance that you and the American people attach to the court's decision in Brown. As an American who cherishes the right to free speech, I appreciate as well the significance attached to New York Times v. Sullivan. As a woman, Griswold and Roe are no less important. The right to reproductive privacy -- to determine whether and when to bear children -- is as fundamentally important to the wellbeing of American women and families as we enter the 21st century, as Brown or Sullivan were at the mid-point of the 20th century. All Americans, regardless of gender or race, are beneficiaries of these landmark decisions that have recognized inalienable human rights.

It is unfortunate that he is unwilling to acknowledge their universality, their constitutional soundness, and the rights and freedoms that emanate from them.

Planned Parenthood opposes Judge Thomas's confirmation for the same reasons that we opposed that of Judge Souter. As I testified to this committee last year, our fundamental reproductive rights, as well as the health and wellbeing of American women, are on the line. Any Supreme Court nominee who fails to reveal his or her judicial philosophy in this area of established constitutional law, or who rejects the fundamental nature of Americans' reproductive rights, must likewise be rejected by those who represent us. We urge you to refuse to confirm Clarence Thomas.