TESTIMONY CONCERNING THE NOMINATION OF

JUDGE CLARENCE THOMAS,

UNITED STATES COURT OF APPEALS,

DISTRICT OF COLUMBIA,

TO THE SUPREME COURT OF THE UNITED STATES

BEFORE THE

SENATE COMMITTEE ON THE JUDICIARY

Presented by:
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Chairperson Biden and Members of the Judiciary Committee, the National Conference of Black Lawyers appreciates the opportunity to testify before you on the nomination of Clarence Thomas as Associate Justice of the Supreme Court. We urge you to refuse to confirm Judge Thomas' nomination.

The National Conference of Black Lawyers (NCBL), founded in 1968, is a national organization composed of Black judges, law professors, lawyers, law students and legal workers. The organization was formed to advocate for economic, social and political justice for people of color generally, and Black people specifically. It provides legal assistance to communities of color and develops educational forums to increase awareness of the numerous issues that affect communities of color. It seeks to rid the American legal system of racism and introduce law students to alternative legal careers which advance social change.

The NCBL believes that it is extremely important to confirm a person of African descent to serve on this country's highest court.[1] However, of greater importance to NCBL and its members is the confirmation of a candidate whose record demonstrates a clear respect for the law combined with a compassion to securing political, economic and social justice for the millions of people

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[1] In nominating Judge Thomas, President Bush attempted to deceive the American public by stating that, "[t]he fact that he is black and a minority had nothing to do with this." Indeed, Judge Thomas has been nominated to fill the seat left vacant by the retirement of Justice Thurgood Marshall, the 96th Supreme Court Justice and the only person of African descent to serve on the Supreme Court in its 202-year history. This nomination also comes on the heels of President Bush's veto of a Civil Rights Bill, while at the same time he says he supports civil rights. The fact that Judge Thomas is of African descent, thus, can hardly be a coincidence.

in this country excluded from the "American dream." Judge Thomas' record demonstrates none of these aspirations. Clarence Thomas scoffs at the legal values essential to maintaining the hard-won rights to social, economic and political justice for people of color, women, the disabled, the elderly, children and other historically disadvantaged groups. There are any number of lawyers and judges of African descent who have demonstrated respect for these values. Judge Thomas' record[2] indicates that he is not one of those persons and for this reason he should not be confirmed. Indeed, his record consistently reveals disrespect for the law and for the rights of individuals and groups guaranteed by law. For this reason, NCBL is testifying today in opposition to Judge Thomas' confirmation as an Associate Justice of the Supreme Court of the United States.

Mr. Chairman, President Bush's nomination of Judge Thomas to fill the seat vacated by Justice Marshall is an insult not only to people of color and women but to the legacy of Justice Marshall. His lackluster career supports our conclusion that the nomination of Judge Thomas is meant to confuse and manipulate those who firmly believe there should be a person of African descent on this Court while solidifying a conservative majority. For over 50 years Justice Marshall has been a champion of the constitutional, civil

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[2] Our opposition to Judge Thomas' confirmation as an Associate Justice of the Supreme Court rests on Judge Thomas' record as Assistant Secretary for Civil Rights at the Department of Education, his eight-year tenure as Chair of the Equal Employment Opportunities Commission (EEOC), his decisions as an appellate judge of the Court of Appeals for the District of Columbia and Judge Thomas' writings and speeches.

and human rights of people of color, women, the elderly and differently-abled people in this country. Although Justice Marshall's nomination to the Supreme Court was opposed in 1967 by some members of this body because of his race, he was, unlike Judge Thomas, eminently qualified for service on the Supreme Court.[3] But for the efforts of Justice Marshall, the NAACP and the NAACP LDF, many, if not most of the Black lawyers in this country, including Clarence Thomas, would not have graduated from law school - not because we were unqualified, but because of the barriers, many of which were governmentally imposed, that barred our admission.[4]

As Professor Derrick Bell of Harvard University stated in discussing Judge Thomas' qualifications to serve on the Supreme Court, "[e]ven had Bush limited his selection pool to Black judges on the federal courts of appeals, there are at least a half dozen other Black judges whose accomplishments, both on the bench and

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[3] Prior to his appointment to the Supreme Court, Justice Marshall was a private attorney in Baltimore, Maryland; chief counsel to the National Association for the Advancement of Colored People (NAACP); head of the NAACP Legal Defense Fund; an Appellate Justice of the United States Court of Appeals for the Second Circuit; and, Solicitor General of the United States.

During his over 22-year tenure with the NAACP and NAACP Legal Defense Fund, Justice Marshall argued 34 cases before the Supreme Court and won 29. Among Justice Marshall's string of victories, in addition to Brown v. Board of Education, was Sweat v. Painter, decided four years prior to Brown, holding the educational opportunities offered Black and Caucasian law students by the State of Texas violated the 14th Amendment and directing Texas to admit Herman Sweat into the University of Texas.

[4] See generally, Richard Kluger, Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality (1975).

before becoming federal judges, put those of Thomas to shame."[5]

Mr. Thomas, prior to his appointment to the Court of Appeals in 1990, had very little litigation experience, functioning more in administrative and legislative capacities. Indeed, he owes virtually all of his employment experiences to his relationship to Senator John Danforth. Upon graduation from law school in 1974, Mr. Thomas served as an Assistant Attorney General for the State of Missouri for less than three years. From January 1977 to August 1979, Mr. Thomas was an attorney in the Law Department of the Monsanto Company in Missouri. Thereafter, from August 1979 to May 1981, Mr. Thomas was a Legislative Assistant to Senator Danforth of Missouri.

In 1981, Mr. Thomas was appointed by then-President Reagan to become Assistant Secretary for Civil Rights in the Department of Education, a position he initially declined because, in his own words "my career was not in civil rights and I had no intention of moving into this area." In 1982, Mr. Thomas was appointed Chair of the EEOC, a position he held until his confirmation to the Court of Appeals in 1990. But even if one ignores his lack of litigation experience, his administrative record and his speeches and writings underscore his departure from the rule of law.

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[5] D. Bell, "The Choice of Thomas Insults Blacks," New York Newsday, July 10, 1991, pp. 79-90.

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JUDGE THOMAS' RECORD AT THE DEPARTMENT OF EDUCATION

The Office of Civil Rights of the Department of Education (OCR) is responsible for insuring that educational institutions do not discriminate on the basis of race, sex, handicap and age. The OCR is responsible for enforcing Title VII of the Civil Rights Act and Title IX of the Educational Amendments of 1973.

As Assistant Secretary of Civil Rights at the Department of Education, Mr. Thomas, notwithstanding his professed admiration and support of Black colleges, adopted positions that made it far easier for the states to avoid their responsibility of ensuring equality among all state financed educational institutions. When Judge Thomas took office as Assistant Secretary, the Department had been under court order since the early 1970s to implement desegregation and to enhance Black colleges to make up for their historical neglect by many southern governments.[6] The court order made clear that institutions which receive federal funds must do more than just adopt non-discriminatory policies but also must take affirmative steps, including elimination of duplicate programs as well as enhancement of Black colleges.[7]

During Thomas' first months at the agency, he began to undermine enforcement of this court order by accepting state plans

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[6] See, Adams v. Bell, 711 F.2d 161, 187 (D.C. Cir. 1983), cert. denied, 465 U.S. 1021, 104 S.Ct. 1272, 79 L.Ed.2d 678 (1984); Adams v. Califano, 430 F. Supp. 118 (D.D.C. 1977); Adams v. Weinberger, 391 F. Supp. 269 (D.D.C. 1975); Adams v. Richardson, 351 F. Supp. 636 (D.D.C. 1974); aff'd. 480 F.2d 1159 (D.C. Cir. 1973).

[7] See Adams v. Bell, 711 F. 2d 161 (1983).

which gave the states free reign to control desegregation efforts. In accepting these higher education plans, the OCR waived established guidelines that had the force of law. The positions taken by the OCR under Thomas' leadership led to increased budget reductions, admission constraints and other barriers that had a negative effect on Black institutions of higher learning.

In effect, Mr. Thomas, while Assistant Secretary for Civil Rights, deliberately disobeyed a court order. He substituted his own personal views for the court order, even though, as he admitted in federal court, the beneficiaries under the civil rights laws would have been helped by compliance with the court order.

JUDGE THOMAS' RECORD AS CHAIR OF THE EQUAL EMPLOYMENT OPPORTUNITIES COMMISSION

Mr. Chairman, Judge Thomas' record as chair of the Equal Employment Opportunities Commission alone warrants the rejection of his nomination. As you are aware, the EEOC is responsible for the enforcement of Title VII of the Civil Rights Act of 1964 which prohibits discrimination in employment based on race, color, religion, sex or national origin; the Equal Pay Act, the Age Discrimination in Employment Act, and Section 501 of the Rehabilitation Act, which prohibits discrimination on the basis of handicap by federal agencies. The EEOC is also responsible for coordinating all equal employment programs in the federal work place.

During Mr. Thomas' eight-year tenure as Chair of the EEOC, "[t]he EEOC effectively lost the role as lead agency conferred to it by the historic Civil Rights Reorganization Act of 1978, not

because of any change in the law but by abdication to the Justice Department."[8] Specifically, during Mr. Thomas' administration, the backlog of cases rose from 31,500 in 1983 to 46,000 in 1989; while the number of class action suits filed by the EEOC actually decreased from 218 in fiscal year 1980 to 129 in 1989. The number of Equal Pay Act cases filed by the EEOC also declined under his leadership. In 1980, 50 Equal Pay Act cases were filed. After Thomas assumed leadership, there were nine cases in 1984; in FY 1985, ten; in FY 1986, twelve; in FY 1988, five, and in FY 1989, seven cases.

Although Judge Thomas attempted to justify the reduction in class action cases by claiming that the agency was placing greater emphasis on individual complainants, this was far from the truth. In fact, the EEOC under Thomas' leadership saw a sharp decline in the rate of remedies for individual claimants: settlement rates plunged from 32.1 percent in 1980 to 13.9 percent in fiscal year 1989. A 1988 review by the General Accounting Office of the investigations of charges that had been closed with "no cause" determinations by six EEOC district offices and five states found that 41 to 82 percent of the charges closed by the EEOC offices were not fully investigated, and 40 to 87 percent of those closed by the state agencies had not been fully investigated.[9] Moreover,

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[8] Eleanor Holmes Norton's comments appeared in 62 Tulane Law Review, 601, 703 (1988).

[9] U.S. General Accounting Office, Equal Employment Opportunity: EEOC and State Agencies Did Not Fully Investigate Discrimination Charges 3 (1988).

according to Professor Herbert Hill, who for more than a quarter of a century was the National Labor Director of the NAACP, during Judge Thomas' tenure at the EEOC, "over 90 percent of all litigation filed under Title VII" was initiated and conducted by the private bar.[10]

Further, in 1984 and again in 1985, without either a basis in the prevailing case law or consultation with the various federal agencies and interested parties, Judge Thomas unilaterally proposed significant changes in the Uniform Guidelines on Employee Selection Procedures. The Guidelines, adopted in 1978, were jointly drafted and issued by the Department of Justice, the Department of Labor, the Civil Service Commission (later renamed the Office of Personnel Management) and the EEOC, with the solicited input of civil rights groups. The purpose of the Guidelines is to provide employers and others with a statement of the prevailing law on all selection practices used to make employment decisions, including application forms, educational requirements and standardized tests.[11]

At the time, the Guidelines were based on Griggs v. Duke Power Co.,[12] a unanimous Supreme Court decision and the-then leading Supreme Court decision on employment tests. Under Griggs, employment tests or selection criteria that have a disparate impact

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[10] Hearings on the Nomination of Clarence Thomas to the U.S. Court of Appeals for the District of Columbia Before the Senate Committee on the Judiciary, 101st Cong., 2nd Sess, at p. 59 (Letter from Professor Herbert Hill to Clarence Thomas, dated May 29, 1987).

[11] 29 C.F.R. 1607.1 (1991).

[12] 401 U.S. 424 (1971).

on people of color and women are prohibited unless the criteria are shown to be job-related. Although recent Supreme Court decisions have shifted the burden of proving job-relatedness from the employer to the plaintiff, the rule established by Griggs - that statistical evidence may be used to demonstrate disparate impact - remains intact.[13]

Judge Thomas, as the EEOC Chair, attacked the Guidelines because in his view they encouraged "too much reliance on statistical disparities evidence of employment discrimination."[14]

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[13] See Wards Cove Packing Co. v. Antonio, 109 S.Ct. 2115 (1989).

[14] "Changes Needed in Federal Rules on Discrimination," New York Times, December 3, 1984, at A1. In a March, 1985 speech to Cascade Employers Association Thomas stated:

> We have permitted sociological and demographic realities to be manipulated to the point of surreality convenient legal theories such as adverse impact...we have locked amorphous, complex, and sometimes unexplainable social phenomena into legal theories that sound good to the public, please lawyers, fit legal precedents, but make no sense. If I have my way, we will have the legal theories conform to reality as opposed to reality being made to conform to legal theories.

Speech to Cascade Employers Association, p. 18 (March 13, 1985).

In another speech in August, 1985, Thomas, attacking what he believed was the rationale of the Guidelines and Griggs, said:

> The premise underlying [the Guidelines] is that but for unlawful discrimination by an employer, there would not be variations in the rates of hire or promotion of people of different races, sexes, or national origins...[The Guidelines] also see[m] to assume inherent inferiority of blacks, Hispanics, other minorities, and women by suggesting that they should not be held to the same standards as other people, even if those standards are race-and sex-neutral. Operating from these premises, [the Guidelines] ma[e] determinations of discrimination on the basis of a mechanical statistical rule that has no relationship to the plain meaning of the term 'discrimination.'

Reprinted in Oversight Hearing on EEOC's Proposed Modification of Enforcement Regulations before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor 99th

In the same December 1984 interview with the New York Times, Mr. Thomas went so far as to criticize the merits of his own agency's then-pending lawsuit against Sears, although it was consistent with the theory of the Guidelines, stating that it "relies almost exclusively on statistics." Through these machinations, Thomas attempted to make proof of discrimination insurmountably difficult, with total disregard for current law.

Judge Thomas' unilateral attempt to revise the Uniform Guidelines was not the only instance in which his actions while at the EEOC demonstrated a lack of respect for the law and the rights of victims of discrimination. Since 1979, the EEOC had on its books regulations concerning affirmative action, adopted after notice and comment pursuant to the Administrative Procedure Act, providing it with the authority to grant immunity under Title VII. These regulations authorized employers to take affirmative action, including goals and timetables to improve employment opportunities for people of color and women. The "overview" of these regulations published at the time of their adoption states:

> It is the Commission's interpretation that the appropriate voluntary affirmative action, or affirmative action pursuant to an administrative or judicial requirement, does not constitute unlawful discrimination in violation of the Act.[15]

Judge Thomas, who has variously attacked affirmative action programs as creating "a narcotic of dependency" and "social

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Cong., 1st Sess., 27-28 (1985).

[15] EEOC Guidelines on Affirmative Action, 44 Fed. Reg. 4422, Jan. 19, 1979, codified as 29 CAR 1608 (1989 edition).

engineering," disapproved of the Affirmative Action Guidelines and, thus, sought to evade them. In the fall of 1985, the EEOC Acting General Counsel, with Judge Thomas' support, ordered EEOC regional attorneys not to include goals and timetables in settlement proposals or other actions in which the EEOC had intervened. In addition, the Acting General Counsel ordered the EEOC legal staff not to seek enforcement of goals and timetables in existing consent decrees. Here again Judge Thomas' action demonstrated both disrespect for the law and indifference to the rights of victims of discrimination.

Although Judge Thomas attempted to justify his rejection of the use of goals and timetables on the basis of Firefighters v. Stotts,[16] his actions were legally and procedurally indefensible, as Professor Alfred Blumrosen pointed out in opposing Thomas' nomination to the Court of Appeals:

> If Chairman Thomas' view was that the use of goals and timetables was illegal after Stotts the proper course of administrative action was to suspend those sections of the Affirmative Action Guidelines which authorized their use. The Administrative Procedure Act permits an agency to act promptly in issuing or revising a rule when it finds for "good cause" that "notice and public procedures are impracticable, unnecessary, or contrary to the public interest." This would have allowed public notice of the EEOC's position, would have been based on a formal legal opinion which could then have been considered by the concerned community. But Chairman Thomas had a preference for private decisionmaking, rather than public participation.[17]

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[16] 467 U.S. 561 (1981).

[17]. Hearings on the Nomination of Clarence Thomas to the U.S. Court of Appeals for the District of Columbia Before the Senate Committee on the Judiciary, 101st Cong., 2nd Sess, at p. 94 (Statement of Professor Alfred W. Blumrosen).

Finally, in one of the most controversial and outrageous incidents of his eight-year tenure at the EEOC, the EEOC allowed more than 13,000 Age Discrimination in Employment (ADEA) claims to lapse by failing to act within the prescribed time limits, thereby compromising the discrimination claims of thousands of older workers, who comprise more than one-third of the national work force. Ultimately, Congress had to pass special legislation to reinstate the rights of those older workers whose claims the EEOC had failed to act on.

As thirteen members of the House of Representatives with oversight responsibilities for the EEOC expressed to President Bush in a letter concerning Mr. Thomas' nomination to the Court of Appeals: "during Mr. Thomas' administration, the Commission . . . adopted policies involving pension accrual, supervised waivers, apprenticeship exclusions and early incentive plans inimical to ADEA's purpose - to encourage the employment of qualified older workers." In a series of cases involving precisely the kinds of early retirement plans the ADEA was designed to prohibit, the EEOC sided with the employer. In Lusardi v. Xerox Corp, for example, the EEOC declined to assist over 100 older workers who were faced with an early retirement program and could not join a class action suit because of a class cutoff date. The EEOC refused to assist the workers even though the EEOC staff had found substantial reason to believe that there was a company policy of targeting older, higher paid employees for termination. In Paolillo v. Dresser Industries,

Inc.,[18] the EEOC, after the plaintiffs prevailed on appeal, filed an amicus brief in support of the employer's request for a modification of the decision. Specifically, the Commission argued that the plaintiffs should have been forced to meet a higher standard for showing coercion and that the plaintiffs should have to carry the burden of proof on the question of voluntariness.

NCBL is particularly outraged by Judge Thomas' treatment of the discrimination complaints of elderly workers because, as members of this Committee well know, people of African descent are disproportionately represented among the ranks of the unemployed and underemployed and consequently often have to work longer than white workers.

JUDGE THOMAS' RECORD AS AN APPELLATE JUDGE OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Last year, when President Bush nominated Mr. Thomas for the Court of Appeals, his nomination was opposed by various civil rights and civil liberties organizations and individuals because of his record at the EEOC and his otherwise slender legal experience. In the less than two years since his appointment to the Court of Appeals Judge Thomas has authored 20 opinions, most of them in the area of criminal law and procedure and, in all but one, he ruled against the defendant.

People of color and the poor are disproportionately represented as defendants in the criminal court. Judge Thomas' lack of sensitivity to them as a group, evidenced by his record in

[18] 821 F. 2d 81 (2nd Cir. 1987).

the Court of Appeals, combined with his record at the EEOC and OCR, lead the NCBL to the opinion that his confirmation to the Supreme Court would serve only to continue to eviscerate the hard-won criminal procedural rights that once protected defendants from governmental misconduct.

Judge Thomas appears to be particularly insensitive to the prejudice that may result from the joinder of offenses or of defendants and the admission of prior convictions and acts. In one case, for example, Judge Thomas affirmed the conviction of a defendant who had requested and been denied a severance of his trial, even though the attorney of one of his co-defendant's had called him to testify, knowing he would refuse to do so, undermining his constitutional rights against self-incrimination.[19] In another case, United States v. Rogers,[20] Judge Thomas authored the opinion for the Court upholding a defendant's conviction over his arguments that the district court had improperly admitted evidence of his prior conviction and past ownership of a beeper. The elevation to Supreme Court of Judge Thomas will certainly add an additional vote to the increasingly conservative trend in the Court in the area of criminal procedure, which this past term overturned five of its own recent cases.

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[19] United States v. Harrison; United States v. Black; United States v. Butler, 932 F. 2d 65 (1991).

[20] 918 F. 2d 207 (D.C. Cir. 1990).

As a member of the Court of Appeals, Judge Thomas has also demonstrated undue deference to federal agencies that suggests, in particular, a disregard for the rights of workers and environmental protection issues. In one case Judge Thomas rejected a union challenge to a Labor Department decision permitting a mine owner in Alabama, in violation of federal health and safety regulations, to use a high-voltage electrical cable within 150 feet of a working mineface over arguments by the union that use of such cables increased miners' exposure to dust and methane, created ventilation problems and made escape from the mines more difficult.[21]

In another case, Citizens Against Burlington v. Busby,[22] a group of Ohio citizens who live near the Toledo airport and who use a park and campground near the airport challenged the Federal Aviation Administration's (FAA) decision to allow expansion of the airport. The Ohio citizens urged that expansion of alternative airports where less environmental damage might occur be considered by the FAA in its environmental impact statement. The law requires consideration of "reasonable alternatives" in environmental impact statements. Writing for the majority, Judge Thomas ruled against the citizens and accepted the FAA's reasoning that the only alternative needed to be considered was the goal of improving the Toledo economy. Judge Thomas' lack of sensitivity to the rights of criminal defendants and apparent deference to federal agencies,

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[21] International Union, United Mineworkers of America v. Federal Mine Safety and Health Administration, 931 F.2d 908 (D.C. Cir. 1991).

[22] (D.C. Cir. LEXIS 12035 1991)

however, are not the only reasons for our concern over his record at the Court of Appeals. We are also troubled by Judge Thomas' lack sensitivity to the obligation of all judges, federal and state, to maintain the integrity of the judicial process by steadfast vigilance to the highest standard of ethical conduct. In September 1990, in an apparent violation of the standards for judicial conduct, Judge Thomas participated in and authored the opinion for the Court in Alpo Petfoods Inc. v. Ralston Purina Company,[23] reducing a $10.4 million damage claim against Ralston Purina Company, a corporation owned in large part by the family of Judge Thomas' personal friend and political mentor, Senator John Danforth. Judge Thomas neither disclosed his relationship to Senator Danforth or disqualified himself as required by federal law.[24]

JUDGE THOMAS' WRITINGS AND SPEECHES

We are also troubled by Judge Thomas' legal and judicial philosophies expressed in his writings and speeches. In his writings and speeches, Judge Thomas has demonstrated a disturbing disdain for the members of the legislative branch and criticized a number of important Supreme Court decisions. Judge Thomas has written: "As Lt. Col. Oliver North made it perfectly clear last

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[23] 913 F.2d 958 (D.C. Cir. 1990).

[24] See 28 U.S.C. 455a; 28 U.S.C. 455e.

summer, it is Congress that is out of control."[25] In a discussion of the increasing role of the courts, Judge Thomas stated: "Not that there is a great deal of principle in Congress itself. What can one expect of a Congress that would pass the ethnic set-aside the court upheld in Fullilove v. Klutznick," the 1980 ruling establishing congressional power to enact minority set-aside programs.[26]

In addition to Fullilove, Judge Thomas has attacked the Court's decisions in United Steel Workers v. Weber,[27] Local 28 of the Sheet Metal Workers' International Association v. EEOC,[28] and Johnson v. Transportation Agency, Santa Clara County [29] as "egregious" examples of "creative interpretations of equal protection and legislative intent."[30] In the same article, Judge Thomas, in a frightening display of ignorance of the importance of the Fifth Amendment due process and equal protection guarantees to the millions of people who reside outside the fifty states, in the District of Columbia, Puerto Rico, the Virgin Islands, Guam and

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[25] C. Thomas, "The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment, " 12 Harvard Journal of Law and Public Policy 63.

[26] 448 U.S. 448 (1980).

[27] 443 U.S. 193 (1979).

[28] 478 U.S. 421 (1986).

[29] 478 U.S. 421 (1986).

[30] Thomas, "Civil Rights as principle Verus Civil Rights as an Interest," in Assessing the Reagan Years 391, 396 (D. Boaz, ed. 1988).

elsewhere, stated "[a]ny equal protection component of the Fifth Amendment due process is irrelevant."[31]

Additionally, Judge Thomas has repeatedly expressed support for the long discredited doctrine of "natural law." According to Professor Lawrence Tribe, Thomas is the first Supreme Court nominee in 50 years to "maintain that natural law should be readily consulted in constitutional interpretation."[32] As one Supreme Court justice wrote in dissenting from the Court's natural rights analysis in a 1798 probate case: "The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject. . . ."[33] The last time the Supreme Court applied the natural law doctrine some 80 years ago, the Court held that the Constitution protects such economic rights as the "liberty" of employers to conduct business free of health and safety regulations and minimum wage laws.[34]

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[31] See e.g. Bolling v. Sharpe,347 U.S. 497 (1954) (holding segregation of public schools in the District of Columbia violative of the Due Process Clause of the Fifth Amendment).

[32] Lawrence H. Tribe, "Natural Law and the Nominee," New York Times, July 15, 1991.

[33] Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) (Iredell, J. dissenting).

[34] See, e.g., Bradwell v. Illinois, 83 U.S. 130, 141 (1873) (denying a woman a license to practice law because "...civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destines of men and woman...") Muller v. Oregon, 208 U.S. 412 (1908) (upholding a statute that limited the number of hours women could work because "healthy mothers are essential to vigorous offspring, [and] the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race).

If Judge Thomas is appointed to the Supreme Court, his views with respect to natural law may have a drastic consequence. In a 1987 speech to the Heritage Foundation, for example, Judge Thomas praised as "a splendid example of applying natural law" an article that argued not only for the overruling of Roe v. Wade,[35] but for the recognition of an "inalienable right to life of the child-about-to-be-born (a person)." Judge Thomas has also criticized the majority and concurring opinions in Griswold v. State of Connecticut,[36] a decision that gave married couples the right to purchase birth control.

NCBL and its members are deeply concerned by the Supreme Court's possible reversal of Roe v. Wade because women of color and poor women were overwhelmingly overrepresented among the women who died, were left sterile or suffered other serious medical complications as a result of illegal abortions prior to the Court's decision in Roe. In 1972, prior to Roe, women of color represented 64% of the deaths associated with illegal abortion,[37] and they would be similarly endangered upon Roe's reversal.

Overturning Roe will also leave women even more vulnerable to the recent trend in criminal prosecution for prenatal conduct. This strategy punishes women rather than providing them with necessary health care. It has been wielded disproportionately

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[35] 410 U.S. 113 (1973)

[36] 381 U.S. 479 (1965).

[37] Cates & Rochat, Illegal Abortions in the United States: 1972-1974, 9 Fam. Plan. Persp. 86, 87 (1976).

against women of color.[38] Despite equal rates of drug and alcohol use across race and class, women of color amd low-income women have been found to be ten times more likely to be reported for prenatal conduct.[39] Low income women and women of color are disproportionately subject to such prosecution because their only access to health care is through public facilities where drug testing of pregnant women is also routine.

Finally, NCBL is deeply troubled by both Thomas's apparent support for the current South African government and his lending of the prestige of his office to efforts supporting the racist regime in South Africa. For the past ten years Mr. Thomas has served has a member of the Editorial Advisory Board of the Lincoln Review, the quarterly publication of the Lincoln Institute for Research and Education, founded by J. A. Parker, who is a paid agent of the racist government of South Africa and who has been described as Thomas' political mentor.[40] Mr. Parker and one of the two contributing editors of the Lincoln Review, William A. Keyes, among other things, are the founders of the International Public

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[38] See, e.g., Johnson v. Florida, No. 89-1765 (Fla. Dist. Ct. App. April 18, 1991); Michigan v. Hardy, No. 128458 (Mich. Ct. App. April 1, 1991); Commonwealth v. Pelligrini, No. 87970, slip op. (Mass. Sup. Ct. Oct. 15, 1990).

[39] Chasnoff, Landress & Barrett, "The Prevalence of Illicit Drug or Alcohol Use During Pregnancies & Discrepancies in Mandatory Reporting in Pinellas County, Florida" 322 New England Journal of Medicine 1202 (1990); Kolata, New York Times, July 20, 1990 at A13; and Winslow, Wall Street Journal, April 27, 1990.

[40]. See e.g., Russ Bellant, "The Thomas connection has white South African angle," National Catholic Review, August 2, 1991; Herb Boyd, "Clarence Thomas and his right-wing bedfellows," Amsterdam News, August 31, 1991.

Affairs Consultants, Inc. (IPAC), a lobbying firm incorporated in Virginia in 1985 and registered with the Justice Department under the Foreign Agents Registration Act as an agent of Pretoria. According to the September 10, 1987 filings for IPAC, one of the IPAC's activities listed as "Political Propaganda" was a reception held for the South African Ambassador. Mr. Thomas is listed as attending as EEOC Commissioner.

Our serious concerns about this nominee are not assuaged by Judge Thomas' attempts, in the last few days, to downplay his extreme views, his loyalty to which he has manifested through years of action, writing and speeches. His sudden inconsistency and professed sensitivity neither negate the deeds of the past nor inspire confidence in his ability or sincerity in the future to uphold and apply the law and to act to ensure that the rights of the disadvantaged in this country are protected.

CONCLUSION

Mr. Chairman, after a careful review of Mr. Thomas' record, summarized herein, we ask that the Committee refuse to confirm Mr. Thomas.