Testimony of Sarah Weddington
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Before the Senate Judiciary Committee
On the Nomination of Judge Clarence Thomas to be an
Associate Justice of the United States Supreme Court
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Mr. Chairman, Members of the Committee, thank you for the opportunity to address you today. My name is Sarah Weddington and I am the attorney who litigated Roe v. Wade.

In 1969, abortion was illegal in Texas, my home state. But that did not change the determination of women in Texas -- like women all across the nation -- to choose for themselves the appropriate response to a pregnancy. Some chose abortion. Those who could somehow get together the necessary money went to states like California or New York for legal abortions. Those who could not had illegal abortions, often in Mexico. Many women died because of that Texas law, and more suffered permanent physical injury.

That year a group of women formed to provide free information about the safest places to go. They were concerned about whether they could be charged as accomplices to the crime of abortion. They asked me, the only woman lawyer they knew, for advice. My offer to do some research led to the case of Roe v. Wade.

Soon it will be twenty years since we celebrated the Roe v. Wade decision, January 22, 1973. Now I fear that Roe will not survive

-- even in its currently weakened state -- until that twentieth anniversary.

I believe that if the Senate confirms Judge Thomas he will vote to overrule Roe and uphold laws as extreme as the Texas law that the Supreme Court struck down in 1973.

I have followed these hearings with great interest, but Judge Thomas's testimony here has been frustrating and unenlightening. What we have learned is that he had wonderful, careful coaching about how to avoid political pitfalls. What we have seen is a nominee who was willing to answer questions only on issues that are politically safe and who was deliberately evasive on the critical issue of a woman's fundamental right to privacy.

Judge Thomas' record, however, does provide clear indications of the views he was unwilling to share during these hearings. I know that this Committee is very familiar with Judge Thomas' record, but I wish to address two specific concerns that I believe members of this Committee have expressed.

First, I would like to address the attempts during the last few days to dismiss concerns about Judge Thomas' record as unfairly based on a single sentence. Of course, I am referring to Judge Thomas' startling praise of an article by Lewis Lehrman on the "right to life" of the fetus as a "splendid example of applying

natural law." One line can be of enormous importance. Few would dispute that the phrase "All men are created equal" in the Declaration of Independence is significant. The true issue is the content of the sentence. The terrifying significance of Thomas' praise for Lehrman's article lies in the extreme position the article takes: the article compares abortion to a "holocaust" and argues that the Constitutution requires abortion to be outlawed in every state, under all circumstances.

Imagine if Lehrman had taken a different extreme position in opposition to a basic constitutional principle. What if, for example, Lehrman had said that natural law required the "separate but equal" ruling in Plessy v. Ferguson, and Judge Thomas had praised Lehrman's article calling for racial segregation as "a splendid example of applying natural law." Would anyone on this panel even consider confirming a nominee who had made such a statement unless he had established with both certainty and clarity that he would find unconstitutional a law that would force school children to go to segregated schools? This panel should demand the same certainty and clarity of Judge Thomas given his endorsement of an extreme position that would abolish the fundamental right to choose. To vote to confirm Judge Thomas when he has responded with only evasion would be to treat the right to choose abortion as a second-class right.

Moreover, the endorsement of the Lehrman article is not an anomaly, but is part of a pattern that appears throughout Judge Thomas' speeches and writings. For example, Judge Thomas criticized Roe v. Wade in an article in the Harvard Journal of Law and Public Policy. In the context of exhorting his "conservative allies" to embrace natural law as a tool against "judicial activism," Judge Thomas identified Roe v. Wade as the case "provoking the most protest from conservatives." In another article, Judge Thomas criticized protection of the right to privacy under the Ninth Amendment as an "invention." Judge Thomas also participated on a White House Working Group that called for the overruling of Roe v. Wade. Never, until these confirmation hearings, did Judge Thomas seek to clarify his views or to distance himself from that highly publicized, controversial report. Judge Thomas also referred to the Republican Party's opposition to abortion as likely to attract African Americans to the Republican Party.

Every sign from his record points in one direction -- Judge Thomas, if confirmed, would vote to overturn Roe v. Wade. Judge Thomas' repeated references to the issue of abortion at a minimum undercuts the credibility of his statement, that he has no opinion on Roe v. Wade and has never debated the contents.

Second, I would like to respond to the suggestion by some that Judge Thomas' testimony somehow addressed the grave concerns raised by this record. Far from being reassuring, Judge Thomas' carefully crafted and evasive answers raised new, very serious issues of credibility.

In particular, a careful reading of the transcript reveals that in his responses to Senator Biden's deliberate and repeated questions, Judge Thomas avoided saying even that an individual has any fundamental right to privacy including the right to use contraception, that is based on the liberty/due process clause of the Fourteenth Amendment. Judge Thomas struggled to give the same answer that Justice Souter gave last year, by referring to the Equal Protection Clause basis for the Court's holding in Eisenstadt v. Baird. In response to a question by Senator Heflin, Judge Thomas summarized his responses to Senator Biden's first round of questions concerning Eisenstadt as follows: "the right of privacy that applied to non-married individuals in the intimate relationship was established using equal protection analysis under Eisenstadt v. Baird." Even during Senator Biden's second round of questioning on this point, when pressed hard for a simple yes or no answer, Judge Thomas qualified his affirmative response by saying, "I have expressed on what I base that, and I would leave it at that." I do not believe that Judge Thomas' responses can fairly be interpreted to provide any meaningful reassurance that he recognizes a fundamental right of individual

privacy independent of the equal protection analysis in Eisenstadt.

At a minimum, Judge Thomas' testimony provides absolutely no reassurance on the one aspect of the right to privacy which he repeatedly refused to discuss: the fundamental right to choose abortion. Moreover, although his testimony in many respects echoes the testimony given by Judge David Souter, Judge Thomas' record is strikingly different and clearly indicates his hostility to the right to choose. While some Senators may have given Judge Souter the benefit of every doubt, Judge Thomas' record leaves no room for ambiguity.

I was not a likely candidate to be the lawyer in a very controversial case. I am the daughter of a Methodist preacher; was raised in small Texas towns like Munday, Canyon and Vernon; and in high school was President of our Future Homemakers of America chapter.

But I, like most women of my generation, questioned the limits placed on women and reacted with conviction when faced by discrimination. I played high school basketball at a time women were allowed only two dribbles and had to stop at half court. I did my practice teaching at a time pregnant teachers had to quit work. My college dean told me I shouldn't consider law school because no woman from McMurry College ever had and it would be

too difficult. After law school, I had a similar experience to that of now-Justice Sandra Day O'Connor and was unable to get a legal job with a law firm. When I applied for credit, the store manager told me I had to get my husband's signature even though I was putting him through law school. I discovered just before I argued Roe that there were no restroom facilities for women in the lawyer's lounge in the Supreme Court building.

As we worked to end blatant discrimination against women based on out-dated and false stereotypes, we realized that women could not truly make the decisions that most affect their lives -- about education, employment, family size, finances, and physical and emotional health -- unless they were able to decide when and under what circumstances to bear a child.

We did not fight anti-abortion laws because we were "for" abortion. We did so because we believed it was individuals -- and not the government -- who should make the most fundamental decisions of their lives.

We all know that if the Supreme Court overturns Roe, the affluent and people like us will find the money to travel and be able to obtain safe procedures. The poor and women of color will be those most adversely affected, just as was true pre-Roe as my University of Texas colleague Professor Mark Graber points out in his paper, "The Ghost of Abortion Past."

I would like to see the diversity of Americans reflected by those who serve as Justices, but how sad and ironic it would be if Justice Marshall, a champion for all who suffered unequal treatment, were to be replaced by a man whose presence on the Court helped to end the principles for which Justice Marshall fought.