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"Choose Justice: Protect Our Rights; Oppose John Roberts' Nomination"

Testimony Presented by

Nancy Keenan
President
NARAL Pro-Choice America

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1156 15th Street, NW • Suite 700 • Washington, DC 20005
www.ProChoiceAmerica.org • 202 973 3000 • 202 973 3070 fax

Chairman Specter and members of the committee: I thank you for the opportunity to submit this testimony for the record.

You have before you the nomination of John Roberts to the position of Chief Justice of the United States. Your constitutional responsibility to evaluate this nomination is a considerable one – made all the more important by the times in which we live. Our nation is constantly faced with novel legal questions and remains severely divided over the scope of constitutional protections and the role of each branch of government. As has always been the case, the Supreme Court will be the final arbiter of our Constitution and will be trusted with the final say on decisions affecting the daily lives of all Americans.

Without question, John Roberts is smart, accomplished, and affable – but those qualities alone do not qualify him for life tenure on the highest court in the land. Regrettably, his record of opposition to the right to privacy, reproductive choice, and the right to access reproductive-health clinics demonstrates that the American people cannot depend on him to protect our civil rights and civil liberties.

It is clear from John Roberts' own words, legal writings, and substantive work product as a lawyer in the Reagan and Bush I administrations that Roberts possesses a cramped view of the law and a regressive judicial philosophy – a philosophy created and advanced by conservative jurists and politicians who, when advantageous for their causes, view the law as stagnant text isolated from its broad purpose, anticipated application, and practical effect. If confirmed, John Roberts could have a dramatic effect on the right to privacy and the right to choose.

Each of the Supreme Court's nine Justices has extensive discretion to determine the breadth of our fundamental rights, the constitutionality of a wide spectrum of legislation and executive actions, and the scope of the rule of law and constitutional governance for decades.[1] Moreover, the Chief Justice has additional responsibilities; among other things, he or she plays a leading role in shaping the Court's agenda and has significant opportunities to direct and control the discussion of cases. For example, when the Chief Justice votes with the majority in a case, he decides who will draft the opinion; the power to select the author of an opinion enables the Chief Justice to influence the breadth of an opinion, which can determine how the precedent is applied to future cases.

Excluding Justice Sandra Day O'Connor, only five current Supreme Court Justices, a bare majority, support the central holding of *Roe v. Wade*, that the Constitution's right to privacy encompasses the right to terminate a pregnancy. Three of the four oldest members of the Court are part of this narrow five-Justice majority. Two Justices argue that the Constitution does not protect a woman's right to choose, a position which has been held by only four of the 17 Justices having served on the Court since *Roe*. Three Justices – Kennedy, Scalia, and Thomas – already have voted to uphold onerous restrictions on abortion and to ignore or eliminate the longstanding doctrine that the Constitution forbids politicians from endangering women's

health.[2] With the addition of John Roberts, increasingly onerous restrictions will likely be upheld.

This coming term the Supreme Court will decide two cases that could drastically alter women's reproductive rights. In *Ayotte v. Planned Parenthood of Northern New England*, the Court will decide whether a restriction on the right to choose can endanger women's health and what the standard of review is for abortion cases. Under current law, the standard of review is whether the law creates an undue burden for a large fraction of the women for whom the law is relevant. If the Court adopts the standard of review proposed in *Ayotte*, the standard of review will be whether the law would be unconstitutional in *every* application – that is, the law would have to be an undue burden for *each individual* woman seeking to exercise her right to choose, or it could not be struck down entirely. This change of the standard of review would force many, many more women to go to court to get permission to exercise a fundamental right and could effectively eliminate the right to choose for millions of women.

In *Scheidler v. National Organization for Women*, the Court will decide the validity of a permanent nationwide injunction that prohibits anti-choice demonstrators from obstructing access to clinics, trespassing, damaging property, or using violence or threats of violence against clinics, their employees, or their patients.

With a slim pro-choice majority on the Court and two seminal Supreme Court cases on reproductive rights scheduled this fall, we cannot afford to confirm a Justice – much less a Chief Justice of the United States – to the Court unless he or she is committed to protecting basic rights of privacy and choice. Regrettably, John Roberts is not.

John Roberts and the Right to Privacy

In *Roe v. Wade*, a seven-Justice majority held that "Th[e] right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent."[3] Freedom as we know it today – the right to choose, right to contraception, right to have children, right to marry, right to refuse medical treatment, and right to engage in consensual sexual intimacy – depends in large measure on our constitutional right to privacy. The constitutional right to privacy is a well-established legal doctrine and an essential component of the freedoms Americans enjoy. However, as a young lawyer in the Reagan administration, Supreme Court Chief Justice nominee John Roberts dismissed the right to privacy and expressed the view that the right to privacy is not found in the Constitution.

In one instance, then-Special Assistant to the Attorney General John Roberts wrote a memorandum to then-Attorney General William French Smith dated December 11, 1981. The memo was in reference to a letter sent to the attorney general's office by Erwin N. Griswold, then an attorney at Jones, Day, Reavis, and Pogue in Washington D.C. Griswold had sent the letter and a copy of his 1976 lecture given at Washington and Lee University entitled "Equal

Justice Under Law." Griswold's letter suggested that the Smith might find "a measure of resonance" with his lecture. In his memo summarizing Griswold's views, John Roberts wrote, "The second part of the piece is devoted to the same judicial policymaking themes which you have recently been addressing. . . . He devotes a section to the *so-called 'right to privacy,'* arguing *as we have* that such an amorphous right is not to be found in the Constitution. He specifically criticizes *Roe v. Wade*."[4] (emphases added). Roberts expresses his derisory attitude for legal doctrine on privacy when he tags the phrase "so-called" to the right to privacy and puts the right in quotes.

In another instance, John Roberts apparently drafted an article on behalf of Attorney General Smith on judicial restraint that accused courts of inappropriately laying claim to functions reserved to Congress or the states through "so-called 'fundamental rights'" analyses. Roberts wrote:

> All of us, for example, may heartily endorse a "right to privacy." That does not, however, mean that courts should discern such an abstraction in the Constitution, arbitrarily elevate it over other constitutional rights and powers by attaching the label "fundamental," and then resort to it as, in the words of one of Justice Black's dissents, "a loose, flexible, uncontrolled standard for holding laws unconstitutional."[5]

Over the last several decades, the Supreme Court has decided and reaffirmed a series of significant cases in which it has recognized and relied upon a constitutional right to privacy to protect important and deeply personal decisions concerning bodily integrity, identity, dignity, and destiny from undue governmental interference.[6] However, John Roberts' record on the right to privacy is one of ideological opposition, doubt, and criticism. If, as his record suggests, Roberts does not believe that the Constitution's right to privacy fully protects our fundamental rights as we know them today, then our most cherished freedoms are in grave danger of being taken away.

John Roberts and a Woman's Right to Choose

Before *Roe v. Wade* was decided in January 1973, abortion, except to save a woman's life, was illegal in nearly two-thirds of the states.[7] Laws in most of the remaining states contained only a few additional exceptions.[8] Throughout the past 32 years, the Supreme Court has consistently reaffirmed *Roe*'s central holding,[9] noting that "[a]n entire generation has come of age free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society"[10] and that "[t]he soundness of this . . . analysis is apparent from a consideration of the alternative."[11] Nevertheless, John Roberts' record on *Roe v. Wade* shows that he cannot be trusted to uphold this landmark decision and the moral vision it represents: that women are capable of making the most important personal decisions about their reproductive lives, their health, and their families without politicians imposing criminal penalties on the doctors who assist them.

As the principal deputy solicitor general in the first Bush administration, John Roberts co-authored and supervised the preparation for a Supreme Court brief that asked the Court to overturn *Roe v. Wade*.[12] In *Rust v. Sullivan*, the Supreme Court was asked to decide whether federal regulations that prohibited federally funded Title X projects from providing abortion counseling or giving referrals for abortion services were permissible under the regulation's authorizing legislation and whether they violated the First or Fifth Amendment.[13] The opening argument of the solicitor general's brief advocated overturning *Roe*:

> We continue to believe that Roe was wrongly decided and should be overruled. . . . [T]he Court's conclusions in Roe that there is a fundamental right to an abortion and that government has no compelling interest in protecting prenatal human life throughout pregnancy find no support in the text, structure, or history of the Constitution.[14]

The brief went on to defend the "gag rule," which barred doctors and clinic counselors from providing women with the full range of information and options regarding their reproductive health.[15] Ultimately, a closely divided Court (5-4) decided – over two strong dissents joined by four Justices, including Sandra Day O'Connor – that the regulations were permissible.[16]

The Court's decision in *Rust*, following the lines of Roberts' brief with respect to the "gag rule," drew immediate fire from Congress, which voted to overturn it, narrowly missing the two-thirds marks necessary to override the President's veto. One of Bill Clinton's first executive actions in January 1993 was to suspend the rule and return to the prior policy of providing women full options counseling regarding their pregnancies. The "gag rule" was formally repealed in 2000.[17]

Roberts' supporters have unpersuasively suggested that his role in *Rust* was simply that of a lawyer representing the views of his client. However, this characterization fundamentally misconstrues both the Office of the Solicitor General and the nature of Roberts' position as principal deputy solicitor general. In this key position, John Roberts was a powerful and influential political appointee and advisor to the solicitor general, whose office wielded vast powers to shape and carry out the legal policies of the administration under which he served. In this role, Roberts was a dedicated architect of the anti-choice legal agenda of that administration.

Neither Roberts nor the Office of the Solicitor General was required to argue for the overturning of *Roe*.[18] At the time, Harvard Law School Professor Laurence Tribe, who argued the case before the Supreme Court on behalf of those challenging the "gag rule," termed the argument to overrule *Roe* "gratuitous."[19] He added that the case would be a "clearly irresponsible occasion" for the Court to reconsider *Roe*.[20] The argument was discretionary and seems highly predictive of the position Roberts would take as Chief Justice of the United States.[21]

John Roberts and the Right to Access Reproductive-Health Clinics

At a time when clinic violence was sweeping the nation, John Roberts, as principal deputy solicitor general, took a narrow view of a broad civil rights law and brought the prestige and power of the U.S. government into two cases in which the government was not a party in support of the notorious anti-choice group Operation Rescue and other anti-choice extremists. In *Bray v. Alexandria Women's Health Clinic* and *Women's Health Care Services v. Operation Rescue-National*, Roberts' position was that the civil rights law and the remedy it provides should not apply to stop escalating conflicts at health-care facilities and to protect women's right to access to reproductive-health services.

Bray v. Alexandria Women's Health Clinic

In 1989 in *Bray*, reproductive-health clinics and pro-choice organizations sued Operation Rescue and six anti-choice extremists under a civil rights law (42 U.S.C. § 1985(3) also known as the "Ku Klux Klan Act") and asked the court to prohibit them from conducting blockades that prevented women, doctors, and others from entering clinics.[22] The case reached the U.S. Supreme Court first in 1991 and was re-argued in 1992. Rather than arguing in support of women, doctors, and the rule of law,[23] John Roberts argued for a narrow interpretation of the civil rights law on the side of Operation Rescue and other notorious anti-choice defendants, including:

- **Michael Bray:** Bray, also known as the Chaplain of the Army of God, is most infamous for his conviction for his involvement in ten bombings at reproductive-health clinics and advocacy organizations in Washington, D.C., Delaware, Virginia, and Maryland in the mid-1980s.[24] Bray is also the author of a book called *A Time to Kill*, which offers supposed biblical justifications for the use of violence against abortion providers.[25] When a *Baltimore Sun* reporter asked Bray if he would ever shoot an abortion provider, Bray said: "I could . . . As to whether I would – I may."[26]

- **Randall Terry:** Terry, founder of the violent anti-choice group Operation Rescue, has been arrested at least 30 times and jailed repeatedly for his anti-choice activities. He has blocked access to clinics, harassed clinic employees, and even locked himself inside a clinic. In 1992, Terry was sentenced to a year in jail because he violated a restraining order that prohibited him from coming within 100 feet of a reproductive-health clinic in Houston, Texas. That same year, Terry sent a human fetus to Bill Clinton during the presidential campaign.[27]

- **Patrick Mahoney:** Mahoney was a retained consultant for Operation Rescue and has been a long-time anti-choice activist. By way of example, after a court issued an injunction prohibiting him from going within 20 feet of a reproductive-health clinic in Washington, D.C., Mahoney publicly boasted of his intentions to violate it – "I'm going to pray and read scripture 25 feet [away] on the public sidewalk. I am then going to

> move within 10 feet . . ."[28] In 2000, Mahoney – like Randall Terry – attempted to hand President Clinton a dead fetus.[29]

John Roberts not only co-authored the *amicus* brief for the United States, but also twice argued the case in front of the U.S. Supreme Court.[30] He maintained that Operation Rescue's unlawful behavior and "military-style tactics"[31] used to block women from accessing reproductive-health clinics did not amount to discrimination against women and that a civil rights remedy – the only federal remedy available to clinics at the time – was inappropriate.[32]

The wholly discretionary decision to become involved in *Bray* was made when clinic violence was widespread and out of control; reproductive-health clinics were under siege, and in many cases, state law enforcement proved inadequate despite their best efforts. In fact, from the time *Bray* was filed in federal district court (1989) to the time John Roberts argued the case in front of the Supreme Court (1992), clinics experienced hundreds of acts of violence and thousands of acts of disruption that resulted in an incalculable loss of health-care services to women and communities along with millions of dollars of destruction.[33]

Neither the Solicitor General's office in particular nor the federal government at large was required to side with the anti-choice extremists. The two lead staff members at the solicitor general's office – Kenneth Starr and John Roberts – had three options in this case: (1) stay out of the case; (2) enter the case and support applying a federal civil rights law to protect women and their doctors; or (3) enter the case and urge the Court to prevent this protection. They chose the last option.

In stark contrast, the state attorneys general of Virginia and New York filed an *amicus* brief in *Bray* pleading with the Supreme Court to make the federal civil rights law's remedies available to reproductive-health clinics and other victims of Operation Rescue's lawlessness. They insisted that "[n]o state, or group of states, is equipped alone to deal with and redress the deprivations of federal rights caused by the nationwide activity of Operation Rescue."[34] They explained in the brief:

> At the heart of Operation Rescue's purpose and method is obstruction and hindrance of prompt, effective, and equal enforcement of state law. Through a panoply of tactics which overwhelm the police, shut down health care clinics, hinder police efforts to reopen them, and delay arrest or arraignment, Operation Rescue hinders state authorities from securing to citizens the equal protection of state laws. . .[35]

Similarly, the City of Falls Church – home to one of the *Bray* plaintiffs, the Commonwealth Women's Clinic, which experienced blockades almost weekly for five years – declared in its *amicus* brief that it could not effectively contend with Operation Rescue's "military-style tactics":

> The police force (even as supplemented at considerable cost by county and state law enforcement officers) was unable to ensure access to the clinic for many hours, during which several patients were unable to have scheduled abortions or receive even the simplest of gynecological services. Some suffered physical injury, locked captive in cars that could not move through the parking lot, or bunkered inside the clinic from which medical personnel seeking to treat them had been denied access. . . . It was only when the federal court in this case entered its injunction under § 1985(3) against the blockades and those that would act in furtherance of them that these disturbances ceased.[36]

Ultimately, a closely divided Court held – over forceful dissents from Justice Sandra Day O'Connor and other Justices – that Operation Rescue's activities did not amount to discrimination against women and that Operation Rescue had not sufficiently interfered with women's constitutionally protected rights for purposes of the civil rights law.[37]

To be sure, John Roberts in his Supreme Court argument claimed that the Department of Justice was not defending Operation Rescue's unlawful conduct but rather was defending what it viewed as the appropriate interpretation of the civil rights law. Yet one wonders why the lawlessness of Operation Rescue and other blockade leaders was not disavowed in the brief, too, and whether, to the clinic protestors, the government's brief gave their harassing, blockading, and threatening actions the imprimatur of government endorsement at the highest levels. Moreover, after leaving the solicitor general's office, Roberts himself admitted the significance of the office's decision to file an amicus brief in a particular case and the impact it can have on the outcome of a case.[38] As Deborah Ellis, the attorney who represented the reproductive-health clinics in *Bray*, recently wrote "no courtroom caveat can erase the impact of the federal government's lending its weight on the side of the mob intent on stopping women from exercising a constitutional right. It was a devastating blow."[39]

The error of the decision to intervene in *Bray* is illuminated by the rapid response from Congress to restore federal civil rights protection to women and their doctors. In the year after the *Bray* decision, Congress responded to the Court's and the Department of Justice's narrow interpretation of the civil rights law at issue. It enacted the Freedom of Access to Clinic Entrances Act of 1994 ("FACE"), which imposes civil and criminal penalties upon those using or threatening to use violence to prevent access to clinics and prohibiting blockades. FACE upholds the rule of law and recognizes that state and local law enforcement are often unwilling or unable to address clinic violence. It empowers women and clinics to initiate civil suits against clinic violence perpetrators. Notably, even many members of Congress who oppose abortion itself supported FACE – that is, they understood that it was untenable for lawlessness to be essentially unredressable under our civil rights laws.

Women's Health Care Services v. Operation Rescue-National

In the summer of 1991, the same summer the Supreme Court was considering *Bray*, hundreds of

anti-choice clinic blockaders descended upon Wichita, Kansas in an orchestrated effort to shut down three reproductive-health clinics.[40] During the so-called "Summer of Mercy," Operation Rescue's tactics were twofold: (1) to engage in "sidewalk counseling" during which protestors would "abuse, harass, or intimidate women patients . . . so that they do not enter the [doctors'] clinics" and (2) to "physically blockade the driveways and doors of the clinics, thereby preventing anyone from entering."[41]

Operation Rescue's blockades resulted in a complete shutdown of the clinics during the first week and more than 2,600 arrests over the course of six weeks.[42] Left with no other choice, the clinics went to federal court and obtained an injunction prohibiting Operation Rescue and some of its most notorious headliners, including Randall Terry and Patrick Mahoney, from blocking access to the clinics.[43]

After the court issued the injunction and *after* the court ordered federal marshals to enforce the injunction because local law enforcement proved inadequate,[44] the U.S. Department of Justice (DOJ) filed an *amicus* brief in support of Operation Rescue. Supporting the same legal arguments put forth by Operation Rescue and the other blockaders, DOJ argued that federal law should not be applied and requested the court to lift the injunction during the appeals process of the case – *even though there were ongoing attempts to continue blockading*.[45]

John Roberts acknowledged that he participated in the decision on whether the Department of Justice would get involved in the case.[46] Indeed, he was a leader in the United States' intervention in opposition to the district court's actions.[47] In the district court's published opinion, the federal judge admonished DOJ for even getting involved in the case:

> This court has expressed its profound disappointment at the United States for its entry into the present dispute. The issues addressed herein doubtless will be resolved at a higher level than this court. It is the purpose and obligation of this court to uphold the laws of the United States and the State of Kansas, and to protect the persons, property, and liberties of the individuals within its jurisdiction. This court will fulfill that obligation and that purpose, though in doing so it is ill-served by the action of the United States.[48]

The judge explained that an injunction was absolutely necessary in this case to ensure patients' health and safety and to maintain the rule of law. He wrote:

> Denying the injunction, the court finds, would imperil the health and safety of plaintiffs' patients, injure the legitimate economic rights of the plaintiffs, cause further expense and harassment for the police forces of the City of Wichita, yet do nothing to further the legitimate First Amendment rights of Operation Rescue.[49]

> The court finds that, given the lawlessness of Operation Rescue and the willingness of its leaders to disregard as well the orders of this court, that significant injunctive relief, with accompanying sanctions of similar gravity, must issue. To do otherwise would imperil the rule of law.[50]

Roberts' role in *Women's Health Care Services* was far from that of a simple bureaucrat or functionary. In fact, when the first Bush administration was called upon by the media to defend its position in the case, it designated John Roberts as its spokesperson. On national television, Roberts defended the DOJ's actions, stating "[W]e filed a brief with the court sending him a copy of a brief we filed in April, in the Supreme Court in a related case . . . explaining that the law under which the abortion clinic providers and patients were suing the demonstrators did not apply in this case . . ."[51] Roberts even characterized his department's actions as having *helped* the volatile situation in Wichita, noting "We think what the Department did in Kansas has had a calming effect. It has made clear that the orders of the court must be obeyed and it has made clear that the marshals will enforce them . . ."[52]

In contrast, when renowned Harvard Law School Professor Laurence Tribe appeared on national television with Roberts during the Wichita blockades, he explained "I think Mr. Roberts is doing a pretty good job of making the government's position sound fairly reasonable, but . . . I'm afraid Mr. Roberts is, is not being really candid. It's true that the government is not positively approving of the blockade by Operation Rescue, but it's made no doubt at all about the fact that it is urging immediate lifting of this injunction on the ground that, just as Mr. Roberts said, they don't think that the Ku Klux Klan Act gives the federal courts any jurisdiction here."[53]

Tribe further explained that "the suggestion that one shouldn't make a federal case out of it, just go to state court, is not nearly as simple as it sounds. This is exactly the argument -- the argument about going to state court -- that was made in Little Rock, Arkansas, in 1957, when federal courts were taking the locally unpopular position of enforcing desegregation orders and when the argument was made that the federal courts had no business doing exactly that. That took a while but President Eisenhower finally saw the light and exerted the legal and moral leadership in saying that because federal rights were at stake, this did, indeed, belong in federal court."[54]

The federal government's decision to intervene in *Women's Health Care Services*, in support of anti-choice clinic blockaders once again, is unusual, inappropriate,[55] and very troubling. With the exception of the blockaders themselves, virtually everyone else seemed ill-served by the United States' intervention. John Roberts must take responsibility for the efforts he made in *Women's Health Care Services* as well in *Bray*. In a climate of widespread clinic violence and pleas from women and state law enforcement for help, he felt it necessary or desirable to bring the weight of the federal government to assist clinic blockaders instead of women, doctors, and law enforcement.[56] Our nation needs a Chief Justice upon whom we can depend to understand that the nation's civil rights laws protect women and their doctors, communities, and the rule of

law against the intimidation and obstructionism of those who disagree with the constitutional freedom to choose.

Conclusion

The American people deserve a Supreme Court made up of independent and fair-minded Justices who will respect and preserve our fundamental rights, including the right to privacy and a woman's right to choose. John Roberts' record demonstrates that the American people cannot depend on him to protect our most basic rights and freedoms. If John Roberts is confirmed as Chief Justice of the United States, he will almost surely provide a vote necessary to further dismantle the protections of *Roe v. Wade,* and he may even vote to overturn the decision altogether, erasing 32 years of life-saving constitutional law, law which has been a bedrock of women's privacy, freedom, and equality. At the very least, as Chief Justice, he will have great influence over how broad or narrow women's fundamental rights are for decades to come.

Before *Roe,* as many as 1.2 million women each year resorted to illegal abortion,[57] despite its known hazards, including: frightening trips to dangerous locations in strange parts of town, whiskey as an anesthetic, doctors who were often marginal or unlicensed practitioners, unsanitary conditions, incompetent treatment, infection, hemorrhage, disfiguration, and death.[58] Even without explicitly overturning *Roe,* the Court could uphold such a complicated array of restrictions, coupled with various procedural hurdles to bar women and their doctors from the courthouse door, that the right to choose will be illusory for millions of women.

The U.S. Supreme Court's ultimate responsibility is to fulfill the American promise of equal justice under law.[59] Given John Roberts' record, we cannot trust him with this lifetime appointment.

Notes

[1] U.S. Supreme Court, *The Court and Constitutional Interpretation, available at* http://www.supremecourtus.gov/about/constitutional.pdf (last visited Aug. 28, 2005).

[2] *Stenberg v. Carhart*, 530 U.S. 914 (2000).

[3] *Roe v. Wade*, 410 U.S. 113, 153 (1973).

[4] Memorandum from John Roberts, Special Assistant to the Attorney General, to William French Smith, Attorney General (Dec. 11, 1981) (National Archives & Records Administration, Record Group 60, #60-89-372).

[5] Draft Article on Judicial Restraint, National Archives & Records Administration, Record Group 60, #60-89-372.

[6] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 926-927 (1992) (Blackmun, J., concurring and dissenting); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Loving v. Virginia*, 388 U.S. 1 (1967).

[7] *Roe*, 410 U.S. at 118 n.2.

[8] *See, e.g.*, DEL. CODE ANN., tit. 24, §§ 1790-1793 (Supp. 1972).

[9] *See, e.g., Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); *Casey*, 505 U.S. 833 (1992), *cf. Lawrence v. Texas*, 539 U.S. 558 (2003).

[10] *Casey*, 505 U.S. at 860.

[11] *Casey*, 505 U.S. at 859.

[12] Brief for the Respondent at 13, *Rust v. Sullivan*, 500 U.S. 173 (1991) (Nos. 89-1391, 89-1392); Robin Toner, *Cold Paper Trail Leads Some to Scrutinize Nominee's Past Words on Abortion*, N.Y. TIMES, July 20, 2005, at A22.

[13] *Rust v. Sullivan*, 500 U.S. 173 (1991).

[14] Brief for the Respondent at 13, *Rust v. Sullivan*, 500 U.S. 173 (1991) (Nos. 89-1391, 89-1392).

[15] Brief for the Respondent, *Rust v. Sullivan*, 500 U.S. 173 (1991) (Nos. 89-1391, 89-1392).

[16] *Rust v. Sullivan*, 500 U.S. 173 (1991).

[17] The Alan Guttmacher Institute, *Title X 'Gag Rule' Is Formally Repealed*, GUTTMACHER REP. ON PUB. POL'Y, Aug. 2000.

[18] When asked to comment on the brief, Roberts stated, "We'll let the brief speak for itself." *Bush Administration Asks Supreme Court to Reject Roe vs. Wade*, PITTSBURGH POST-GAZETTE, Sept. 8, 1990, at A8. *See generally* NARAL Pro-Choice America, *What Roberts' Actions as Deputy Solicitor General Say About His Own Ideology* (Aug. 26, 2005).

[19] *Bush Administration Asks Supreme Court to Reject Roe vs. Wade*, PITTSBURGH POST-GAZETTE, Sept. 8, 1990, at A8.

[20] *Bush Administration Asks Supreme Court to Reject Roe vs. Wade*, PITTSBURGH POST-GAZETTE, Sept. 8, 1990, at A8.

[21] NARAL Pro-Choice America, *What Roberts' Actions as Deputy Solicitor General Say About His Own Ideology* (Aug. 26, 2005).

[22] *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993).

[23] Brief of the Attorneys General of the State of New York and the Commonwealth of Virginia as Amici Curiae in Support of Respondents, *Bray v. Alexandria Women's Health Clinic*, No. 90-985 (May 13, 1991) ("At the heart of Operation Rescue's purpose and method is obstruction and hindrance of prompt, effective, and equal enforcement of state law. Through a panoply of tactics which overwhelm the police, shut down health care clinics, hinder police efforts to reopen them, and delay arrest or arraignment, Operation Rescue hinders state authorities from securing to citizens the equal protection of state laws. . . ."); Brief for Falls Church, Virginia as Amicus Curiae Supporting Respondents, *Bray v. Alexandria Women's Health Clinic*, No. 90-985 (May 13, 1991) ("In this case, the Falls Church police did all that they were able to do to secure the protection of state law to plaintiffs in this action as they sought to enter Commonwealth Women's Clinic to receive or render services there. Against the forces of Operation Rescue, however, the City's efforts proved inadequate. . . . It was only when the federal court in this case entered its injunction under § 1985(3) against the blockades and those that would act in furtherance of them that these disturbances ceased.").

[24] Bray was convicted of two counts of conspiracy and one count of possessing unregistered explosive devices. The court sentenced him to 10 years in prison and ordered him to pay restitution in the amount of $43,782. The U.S. Court of Appeals for the Fourth Circuit overturned his conviction on a technicality relating to jury selection. Before he was retried, Bray entered a plea that resulted in him serving 46 months in prison. Planned Parenthood Federation of America, *Extremist Biography: Michael Bray, at* http://www.ppfa.org/pp2/portal/files/portal/webzine/eyeonextremism/eoe-050202-michael-bray.xml (Feb. 2, 2005); National Abortion Federation, *Anti-Abortion Extremists/The Army of God and Justifiable Homicide, at* http://www.prochoice.org/about_abortion/violence/army_god.html (last visited Aug. 1, 2005); National Abortion Federation, *History of Violence/Arsons and Bombings, at* http://www.prochoice.org/about_abortion/violence/arsons.asp (last visited Aug. 3, 2005); Sandy Banisky, *Bowie Family Condones Anti-Abortion Violence*, BALT. SUN, Oct. 9, 1994, at 1A.

[25] National Abortion Federation, *Anti-Abortion Extremists/The Army of God and Justifiable Homicide, at* http://www.prochoice.org/about_abortion/violence/army_god.html (last visited Aug. 1, 2005); Planned Parenthood Federation of America, *Extremist Biography: Michael Bray, at* http://www.ppfa.org/pp2/portal/files/portal/webzine/eyeonextremism/eoe-050202-michael-bray.xml (Feb. 2, 2005).

[26] Sandy Banisky, *Bowie Family Condones Anti-Abortion Violence*, BALT. SUN, Oct. 9, 1994, at 1A.

[27] Planned Parenthood Federation of America, *Extremist Biography: Randall Terry, at* http://www.ppfa.org/pp2/portal/files/portal/webzine/eyeonextremism/eoe-050329-terry.xml (Mar. 29, 2005); *Who is Randall Terry?*, Media Matters for America, *at* http://mediamatters.org/items/200503220001 (Mar. 21, 2005).

[28] Jim Burns, *Minister Risks Jail Time to Read Scripture in Front of Abortion Clinic*, CNSNEWS.COM, June 19, 2002.

[29] Planned Parenthood Federation of America, *Stalked and Shot: Dr. Douglas Karpen Strikes Back* (Jan. 11, 2005).

[30] Brief for the United States as Amicus Curiae Supporting Petitioners, *Bray v. Alexandria Women's Health Clinic*, No. 90-985 (Apr. 11, 1991); Transcript of Oral Argument of John Roberts, Jr., *Bray v. Alexandria Women's Health Clinic*, No. 90-985 (Oct. 16, 1991); Transcript of Oral Reargument of John Roberts, Jr., *Bray v. Alexandria Women's Health Clinic*, No. 90-985 (Oct. 6, 1992).

[31] Brief for Falls Church, Virginia as Amicus Curiae Supporting Respondents, *Bray v. Alexandria Women's Health Clinic*, No. 90-985 (May 13, 1991) (acknowledging that the Falls Church police force could not "combat effectively the military-style tactics of these blockades. . .").

[32] Brief for the United States as Amicus Curiae Supporting Petitioners, *Bray v. Alexandria Women's Health Clinic*, No. 90-985 (Apr. 11, 1991); Transcript of Oral Argument of John Roberts, Jr., *Bray v. Alexandria Women's Health Clinic*, No. 90-985 (Oct. 16, 1991); Transcript of Oral Reargument of John Roberts, Jr., *Bray v. Alexandria Women's Health Clinic*, No. 90-985 (Oct. 6, 1992).

[33] Note that the number of actual incidents is probably much higher. The statistics reported herein represent incidents reported to or obtained by the National Abortion Federation (NAF). NAF statistics include incidents from both the United States and Canada. NAF derives most of its statistics from its members, most of whom are in the United States. National Abortion Federation (NAF), *NAF Violence and Disruption Statistics: Incidents of Violence & Disruption Against Abortion Providers in the U.S. & Canada* (Sept. 16, 2004); National Abortion Federation, *History of Violence/Butyric Acid Attacks, at* http://www.prochoice.org/about_abortion/violence/butyric_acid.asp (last visited Aug. 5, 2005).

[34] Brief of the Attorneys General of the State of New York and the Commonwealth of Virginia as Amici Curiae in Support of Respondents, *Bray v. Alexandria Women's Health Clinic*, No. 90-985 (May 13, 1991).

[35] Brief of the Attorneys General of the State of New York and the Commonwealth of Virginia as Amici Curiae in Support of Respondents, *Bray v. Alexandria Women's Health Clinic*, No. 90-985 (May 13, 1991).

[36] Brief for Falls Church, Virginia as Amicus Curiae Supporting Respondents, *Bray v. Alexandria Women's Health Clinic*, No. 90-985 (May 13, 1991).

[37] *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993).

[38] John Roberts, *Rule of Law: The New Solicitor General and the Power of the Amicus*, WALL ST. J., May 5, 1993, at A23.

[39] Deborah Ellis, *Questions for John Roberts*, WASH. POST, Aug. 17, 2005, at A13.

[40] Mimi Hall, *'Protest from Hell' Divides, Disrupts Wichita*, USA TODAY, AUG. 5, 1991, at 2A.

[41] *Women's Health Care Services v. Operation Rescue-Nat'l*, 773 F. Supp. 258, 261 (D. Kan. 1991); Michael Abramowitz, *The War in Wichita; In a Community Divided, a Judge and Antiabortion Protestors Stand Their Ground*, WASH. POST, Aug. 9, 1991, at D1.

[42] *Judge Orders U.S. Marshals to Prevent Closing of Abortion Clinics*, N.Y. TIMES, July 30, 1991, at 16A; *Antiabortion Arrests Resume in Kansas*, WASH. POST, Sept. 8, 1991, at 7A.

[43] *Women's Health Care Services*, 773 F. Supp. at 258.

[44] *Women's Health Care Services*, 773 F. Supp. at 268; *The MacNeil/Lehrer NewsHour* Transcript #4133, Aug. 7, 1991.

[45] Brief of the United States of America as Amicus Curiae in Support of Defendants' Motion for Stay Pending Appeal, *Women's Health Care Services v. Operation Rescue-Nat'l*, 773 F. Supp. 258 (D. Kan. 1991) (No. 91-1303-K).

[46] Aaron Epstein, Angelia Herrin, & Ellen Warren, *Thornburgh OKD Abortion-Case Intervention*, PHILA. INQUIRER, Aug. 8, 1991.

[47] Brief of the United States of America as Amicus Curiae in Support of Defendants' Motion for Stay Pending Appeal, *Women's Health Care Services v. Operation Rescue-Nat'l*, 773 F. Supp. 258 (D. Kan. 1991)

(No. 91-1303-K); *The MacNeil/Lehrer NewsHour* Transcript #4133, Aug. 7, 1991; Alan Bjerga, *Roberts Faces Scrutiny of Role in Wichita Case*, WICHITA EAGLE, Aug. 11, 2005, at 1A.

[48] *Women's Health Care Services*, 773 F. Supp. at 270.

[49] *Women's Health Care Services*, 773 F. Supp. at 263.

[50] *Women's Health Care Services*, 773 F. Supp. at 269.

[51] *The MacNeil/Lehrer NewsHour* Transcript #4133, Aug. 7, 1991.

[52] *The MacNeil/Lehrer NewsHour* Transcript #4133, Aug. 7, 1991.

[53] *The MacNeil/Lehrer NewsHour* Transcript #4133, Aug. 7, 1991.

[54] *The MacNeil/Lehrer NewsHour* Transcript #4133, Aug. 7, 1991.

[55] Former Deputy Solicitor General Andrew Frey said: "I don't remember it ever happening. I assume that it's purely political. . . . Since they've staked out their position in the Supreme Court [in *Bray*] and the Supreme Court is hearing the case, there's no interest of orderly judicial administration that they are serving by intervening," and DOJ's action "would be taken by many to be an endorsement of disobedience of the court order." Former Deputy Solicitor General Kenneth Geller said: "My sense is that it happened very, very rarely because the government has more important things to do than file amicus briefs in private litigation in the district courts." *U.S. Officials Defend Move in Wichita; Women's Groups Hit Abortion Protest Role*, WASH. POST., Aug. 8, 1991, at 1A.

[56] Roberts' supporters attempt to dismiss the significance of his work in these cases by pointing to a 1986 letter drafted by Roberts on behalf of Deputy Counsel to the President Richard Houser. A response to anti-choice Congressman Romano Mazzoli, the letter reassures a concerned Mazzoli that the Administration would not pardon bombers whose targets were abortion clinics, despite rumors to the contrary. In truth, the draft's minimal expression of adherence to the principle of law and order says little, if anything, about the reasons behind Roberts' later involvement in the cases as Principal Deputy Solicitor General. Memorandum from John Roberts, Associate Counsel to the President, to Nancy J. Risque, Deputy Assistant to the President for Legislative Affairs (Feb. 10, 1986); Letter from Richard A. Hauser, Deputy Counsel to the President, to The Honorable Romano L. Mazzoli (Feb. 10, 1986).

[57] Rachel Benson Gold, *Lessons from Before Roe: Will Past be Prologue*, GUTTMACHER REP. ON PUB. POL'Y, March 2003, at 8.

[58] Walter Dellinger & Gene B. Sperling, *Abortion and the Supreme Court: The Retreat from* Roe v. Wade, 138 U. PA. L. REV. 83, 117 (Nov. 1989).

[59] U.S. Supreme Court, *The Court and Constitutional Interpretation, available at* http://www.supremecourtus.gov/about/constitutional.pdf (last visited Aug. 28, 2005).