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DÉJÀ VU ALL OVER AGAIN: RE-NOMINATION OF CONTROVERSIAL NOMINEES THREATENS POLICIES AND PROTECTIONS CRITICAL TO WOMEN'S PROGRESS

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The start of each new Congress and Administration provides an opportunity for a fresh start and a fresh approach to critical issues facing our nation. Nowhere is this opportunity more sorely needed than with judicial nominations. President Bush's first term was marked by bitter divisions over his appointments to the federal bench – and many of these disputes stemmed from his failure to work with both sides of the aisle to identify moderate, consensus nominees. The re-nomination of his most controversial and contentious judicial nominees sends a troubling message about what lies ahead for the overall judicial nominations process. Rather than carving out a path towards unity, these re-nominations simply deepen the divide. Many of these nominees have been opposed vigorously because they have extensive records of working to undermine critical rights and protections, many of which have been crucial to the progress of women and people of color. Confirming such nominees would put that very progress at risk.

Here is a snapshot of how these nominees could . . .

UNDERMINE PROTECTIONS AGAINST WORKPLACE DISCRIMINATION

• **Janice Rogers Brown,** a justice on the California Supreme Court and a nominee to the D.C. Circuit Court of Appeals, has authored many opinions dismissive of allegations of employment discrimination. In *Aguilar v. Avis Rent A Car Sys., Inc.,* 980 P.2d 846 (Cal. 1999), for example, a group of Latino employees brought a race discrimination suit challenging the use of offensive racial epithets in the workplace. The majority of the court upheld an injunction to prohibit the use of epithets because they created a hostile work environment. In dissent, however, Justice Brown argued against the injunction, claiming that the right to free speech under the First Amendment protects racially discriminatory speech in the workplace – even though the majority of the court held that it created a hostile work environment violative of the California Fair Employment and Housing Act (FEHA). The analysis advanced by Justice Brown would circumvent important legal principles critical to creating discrimination-free workplaces.

UNDERMINE PROTECTIONS AGAINST SEXUAL HARASSMENT

• **Terrence Boyle,** currently a federal judge in North Carolina, was nominated to the Fourth Circuit Court of Appeals. A review of his record reveals that he has dismissed numerous gender discrimination claims at the earliest stages of the case, often in favor of the defendant. For example, in *Mills v. Brown & Wood*, 940 F.Supp. 903 (E.D.N.C.), the plaintiff was sexually harassed by her immediate supervisor for fifteen months. She endured the harassment for a year before reporting the harasser to others in the company, and she left shortly thereafter. She sued the employer for discrimination, and the case was assigned to Judge Boyle. The employer asked the judge to dismiss the case by filing a motion for summary judgment – a motion that asks a judge to end a case before it even goes to trial. In considering such a request, the judge is supposed to look at the evidence most favorable to the plaintiff and determine whether a valid legal claim has been presented and there are legitimate facts in dispute. But Judge Boyle granted

the employer's motion and dismissed the case. In doing so, he tried to explain away much of the plaintiff's evidence. For example, Judge Boyle dismissed as "irrelevant" plaintiff's allegation that she was kicked by her harasser after she complained, by blithely opining that "a kick in the buttocks, without more, is battery, not sexual harassment." 940 F.Supp. at 907.

UNDERMINE THE FAMILY AND MEDICAL LEAVE ACT AND NONDISCRIMINATION PROTECTIONS FOR STATE WORKERS

• **William Pryor,** appointed by the President through a recess appointment to the United States Eleventh Circuit Court of Appeals and re-nominated to that same court, has been a zealous advocate of states' rights, elevating state sovereignty over Congress' power to protect against discrimination and to ensure equality for women in the workplace. As a result, he has argued that states should not be subject to certain anti-discrimination claims by their employees. He stated, for example that, "in my judgment, money damages claims will not be allowed against states under the Equal Pay Act and the Family and Medical Leave Act."[1] He followed up those comments by submitting an *amicus curiae* brief in *Nevada Dept. of Human Resources v. Hibbs*, arguing that state employees should not be allowed to sue their employer for violations of the *Family and Medical Leave Act*. Despite substantial evidence in the record that Congress intended to remedy gender discrimination by states in awarding family and medical leave, Pryor argued to the contrary. If adopted, Pryor's position would have denied these important protections to many state workers. Fortunately, the Supreme Court, led by Justice Rehnquist, disagreed with his states' rights argument and preserved remedial measures for state employees suing under the Family and Medical Leave Act.

UNDERMINE REPRODUCTIVE RIGHTS AND ACCESS TO HEALTH CARE SERVICES

• **William Pryor** has an extreme anti-choice record. In a 1997 speech, Pryor recounted his reaction to *Roe v. Wade*: "I will never forget Jan. 22, 1973, the day seven members of our highest court ripped the Constitution and ripped out the life of millions of unborn children."[2] It is doubtful that Pryor will uphold the settled law of *Roe v. Wade* since he has called it an "abomination" and has similarly criticized *Planned Parenthood v. Casey*.[3]

• **Priscilla Owen**, currently a justice on the Texas Supreme Court, consistently has issued opinions that would prevent young women from accessing abortion services. In one particularly troubling example, *In re Jane Doe 3*, Justice Owen wrote that "emotional distress … cannot be the basis for denying a parent information as basic as the fact that his or her child is pregnant and intends to have an abortion" in a case where a pregnant girl feared that her alcoholic father, who was a batterer, would physically or emotionally abuse her if he learned she was pregnant.

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[1] Bill Pryor, Fighting for Federalism (Marc. 28, 2001), *available at* http://www.ago.state.al.us/speeches.cfm?Item=Single&Case=63.

[2] Kelly Greene, *Bill Pryor hopes to Ride Court Crusade to the Top,* Wall St. Journal, Apr. 21, 1997.

[3] *See* National Abortion and Reproductive Rights Action league (NARAL), Who Decides? A State-by-State Review of Abortion and Reproductive Rights, 12th ed., Jan. 2003, at 1 (quoting Pryor's statement, which reads in part "…*Roe v. Wade* is an abominable decision."); Bill Pryor, Federalism and the Court: Do not Unlock the Champagne Yet (Oct. 16, 1997) ("In the 1992 case of *Planned parenthood v. Casey,* the Court preserved the worst abomination of constitutional law in our history: *Roe v. Wade."*), *available at* http://www.ago.state.al.us/speeches.cfm?Item=Single&Case=11.

• **Janice Rogers Brown** was the lone dissenter in *Catholic Charities of Sacramento, Inc. v. Superior Court*, a precedent-setting decision in which the California Supreme Court ruled that a Roman Catholic charitable organization must offer birth-control coverage to its employees under California's Women's Contraception Equity Act ("WCEA"). 85 P.3d 67 (2004). Even though Justice Brown agreed that women are entitled to be "treated fairly and equitably and to be free from discrimination on the basis of gender," she alone concluded that the anti-discrimination interest was outweighed by religious freedom interest. In reaching her conclusion, Justice Brown scoffed at the majority's reliance on the WCEA's narrow exemption for religious employers, explaining that women of childbearing age to whom contraceptive coverage is a major concern are not prevented from finding "more congenial employment." Justice Brown's dissent reflects extremist views that may endanger women's rights to equal treatment under the law, especially where non-religious organizations attempt to use religion to deny women access to health care that they are legally entitled to receive.

UNDERMINE PROTECTIONS AGAINST SEX DISCRIMINATION IN EDUCATION

• **Thomas Griffith** served as a member of the Opportunity in Athletics Commission, a 15-member advisory body charged with examining Title IX of the Education Amendments of 1972 – the groundbreaking law that prohibits sex discrimination in federally funded education programs or activities. Title IX has been instrumental in expanding opportunities for women in education. But while on the Commission, Mr. Griffith pushed a controversial proposal to alter part of the three-prong test used to measure compliance with the Title IX. He urged the elimination of the first prong of the test, which allows a school to comply with Title IX by offering programs or opportunities that are "substantially proportionate" to each gender's representation in that school's student body. Even though this prong had been upheld by eight Circuit Courts as consistent with the Department of Education's policy interpretations, he urged its elimination, stating matter-of-factly that "the courts got it wrong."[4] His proposal and resistance to existing court precedent, together, raise serious concerns about his ability or inclination to apply the law in a fair and even-handed manner.

CONCLUSION

Because federal judges have lifetime tenure, it is imperative that the Senate only confirm nominees who will decide cases in a fair and objective manner – and reject nominees whose records suggest an ideological agenda and resistance to following the law. This nation deserves judges committed to upholding our most cherished legal principles that reflect our nation's values and the promise of equality and fairness for all.

[4] Transcript of January 30, 2003 Town Hall Meeting of the Commission on Opportunity in Athletics.