national partnership for women & families
Because actions speak louder than words.

STATEMENT ON THE NOMINATION OF WILLIAM PRYOR

The National Partnership for Women & Families opposes the nomination of William Pryor to the U.S. Court of Appeals for the Eleventh Circuit. Pryor has an extensive, troubling record of aggressive advocacy to restrict fundamental rights and protections, many of which have been critical to women's advancement. He is a staunch advocate of states' rights, consistently promoting an ideology that elevates state sovereignty over Congress' power to protect civil rights. More than a mere proponent of states' rights, he has been a zealous activist, seeking to advance his ideology through litigation and oral and written advocacy, and leading efforts to curtail Congress' ability to protect against discrimination and ensure equal opportunity. In practical terms, this philosophy has led Pryor to fight vigorously efforts to hold states liable when they violate hard-won legal protections such as the Family and Medical Leave Act and the Americans with Disabilities Act. Indeed, many of the gains central to women's progress have been jeopardized by federalism arguments that would eliminate state accountability. He also has been prolific and explicit in his vehement opposition to reproductive rights, frequently employing inflammatory language to reject the legitimacy of *Roe v. Wade* and *Planned Parenthood v. Casey*.

His extremist rhetoric and relentless efforts to further his singular, conservative agenda raise serious concerns about whether he possesses the judicial temperament required of an appellate court judge to apply the law in even-handed, balanced manner. Moreover, his confirmation to a lifetime position on the federal bench threatens to dismantle the important gains that have been critical to the furtherance of equality in this country, particularly gender equality. We urge you to reject his nomination.

Pryor's Record Demonstrates a Continued Effort to Undermine Essential Constitutional Protections and Civil Rights Principles

William Pryor is a self-proclaimed conservative whose legal philosophy is focused on limiting Congress' role in protecting the civil and constitutional rights of all Americans. Not shy about his views, Pryor has been outspoken and clear about his conservative ideology and agenda:

- "[i]t was intentional on my part to improve our advocacy"[1] by taking as many state's rights cases as possible to the U.S. Supreme Court.
- "…our last real hope for federalism is the election of George W. Bush as President of the United States who has said his favorite justices are Antonin Scalia and Clarence Thomas."…."[F]or the next administration: Please God, no more [Justice] Souters."[2]

[1] Mary Orndorff, *Pryor Pitches Right Fights for Supreme Court*, Birmingham News, Apr. 26, 2001.
[2] Bill Pryor, The Supreme Court as Guardian of Federalism, Federalism: The Quiet Revolution (July 11, 2000), *available at* http://www.ago.state.al.us/speeches.cfm?Item=Single&Case=8.

- "… the Rehnquist court is our last best hope for federalism."[3]
- "I am a conservative, and I believe in the strict separation of governmental powers. Courts should not resolve political problems. For more than 30 years, the liberal agenda has been pushed through the courts, without a vote of either the people or their representatives. The courts have imposed results on a wide range of issues, including racial quotas, school prayer, abortion and homosexual rights. Those rights belong in Congress and the state legislature."[4]

In reviewing his record, what becomes clear is that Pryor's statements and writings are more than just occasional musings about federalism. Rather, they reflect rigidly held personal policy preferences about important legal rights – and he undoubtedly would rely on these extreme views to trump well-settled law and the Constitution. It is precisely this type of activist approach to the law that undermines confidence in the courts and the fair administration of justice. Detailed below are a few troubling examples from Pryor's record which demonstrate how his radical ideology already has eroded important women's rights, reproductive rights, and civil rights principles.

<u>Gender Discrimination</u>

- Pryor submitted an *amicus curiae* brief in a case recently decided by the U.S. Supreme Court, *Nevada Department of Human Resources v. Hibbs*. In the brief, Pryor argued 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 the awarding of family and medical leave, Pryor argued to the contrary. The Supreme Court disagreed in an opinion written by Justice Rehnquist, finding that Congress had before it a long and extensive history of sex discrimination by the states in leave administration, and preserved this important remedy for state employees.

- In *United States v. Morrison*, 529 U.S. 598 (2000), Pryor involved Alabama as the sole *amicus curiae* state arguing that the civil rights remedy of the Violence Against Women Act (VAWA) was unconstitutional. Congress passed VAWA after hearing wide-ranging testimony that states were not adequately protecting women from violence motivated by gender. Despite substantial evidence gathered by Congress and the views of attorneys general from 36 states, the brief argued that there was no "tenable showing" that states had violated the Fourteenth Amendment through their regulation of gender-based violence. Pryor later called the Court's decision, which invalidated the civil remedy, "the best example of the Court as the principal guardian of federalism."[5]

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[3] *Id.*
[4] Bill Pryor, *Litigators' Smoke Screen*, Wall St. Journal, Apr. 7, 1997.
[5] Pryor, *supra* note 2.

- After submitting Alabama's brief in the *Morrison* case, but before the Court issued its decision, Pryor wrote an article expounding on his view that the federal government should remove itself from efforts to protect women from violence. In the article, he criticized VAWA supporters for expecting states to completely eradicate violence against women. Pryor wrote, "The continuing existence of violence in our society is hardly proof of bias against its victims. In fact, statistics show that any bias that does exist runs in favor of—not against—women. For example, in cases of unprovoked murders of spouses, male prison sentences average more than twice as long as those for women."[6]

- Pryor signed onto an *amicus* brief in *Anderson v. Roe*, 119 S. Ct. 1518 (1999), urging the Supreme Court to reconsider and overrule a case in which the Court struck down welfare residency requirements as violative of the Equal Protection Clause. In doing so, Pryor ignored the impact of such residency requirements on women and children who migrate to another state in order to escape domestic violence, and who rely on welfare to meet their basic necessities. Fortunately, the Court rejected Pryor's argument.

- Pryor's state's rights advocacy has had a serious impact on the implementation of Title IX, which prohibits gender discrimination in federally funded education programs or activities. Because Title IX was modeled on Title VI, many courts have applied principles established under Title VI to Title IX cases. Pryor played a significant role in weakening Title VI, through *Alexander v. Sandoval*, 532 U.S. 275 (2001), described in more detail below. Already, at least four courts have found that Title IX retaliation claims were not actionable in the wake of the *Sandoval* decision. While further action in these cases is possible, these decisions illustrate the potential harm posed by Pryor's advocacy in *Sandoval* when attempting to challenge gender discrimination in education.

<u>Reproductive Rights</u>

- Pryor has an extreme anti-choice record. In 2002, in a response to an inquiry from the National Abortion and Reproductive Rights Action League about his views on abortion, he called abortion "murder" and declared, "I support the right to life of every unborn child."[7]

- 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."[8]

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[6] Bill Pryor, *Battling Violence Against Women: States, not Feds, Should Lead in Protection Efforts*, WA Times, Jan. 11, 2000.
[7] 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.
[8] Kelly Greene, *Bill Pryor Hopes to Ride Court Crusade to the Top*, Wall St. Journal, Apr. 21, 1997.

- 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*.[9] He also said that he "personally agrees with Justice Antonin Scalia's dissent [in *Stenberg v. Carhart*] 'that the Constitution says nothing about a right to abortion.'"[10]

- Pryor signed onto an *amicus* brief in *Stenberg v. Carhart*, 530 U.S. 914 (2000), in order to further his federalist agenda. His view was that courts should not declare a state statute unconstitutional if there is any fair interpretation of the statute by which it can be saved. In the context of this case, in which Nebraska claimed that its statute prohibited a single type of abortion procedure, Pryor argued that Nebraska's interpretation should have been adopted. The Supreme Court did not agree, finding that the language in the statute applied to a more common type of abortion procedure as well, and thus imposed an undue burden on a woman's right to choose. The Court also held that the statute was unconstitutional because it lacked an exception for preservation of the woman's health.

Civil Rights

- Pryor took his state's rights agenda to the Supreme Court in *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), arguing that individuals are not permitted to sue state employers under the Age Discrimination in Employment Act. Unfortunately, the Supreme Court agreed with Pryor, eliminating this important remedy for elderly state employees who face age discrimination in employment.

- Pryor played a significant role in weakening the Civil Rights Act of 1964, arguing in *Alexander v. Sandoval*, 532 U.S. 275 (2001), that citizens could not sue under Title VI to challenge federally funded programs that had the effect of discriminating on the basis of race, color, or national origin. Pryor defended an Alabama state policy providing that state drivers-license examinations be conducted in English only, thus making it harder for non-English speaking residents to take the test. In doing so, he argued that individuals do not have the right to bring claims under Title VI to challenge policies that have a discriminatory effect on different racial or ethnic groups. The controversial *Sandoval* ruling now has made it more difficult for individuals in every state to enforce their rights under Title VI in a meaningful way.

- Pryor also took an active role in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), advancing a state's rights argument that ultimately led the Supreme Court to dismiss the claim of a woman who was fired because she had breast cancer and to further undermine the Americans with Disabilities Act. Despite evidence

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[9] *See* NARAL, *supra* note 7, 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 Uncork 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.

[10] Associated Press, *AL: Pryor Says Abortion Law May Require Changes*, June 30, 2000.

that Congress had mounted to show that states had a history of discrimination in their treatment of citizens with disabilities, Pryor argued to the contrary, and urged the Court to find that Congress had exceeded its power under the Fourteenth Amendment.

- Pryor later said that *Garrett* was the logical result of *Kimel*, and that "in my judgment, money damages claims will not be allowed against the states under the Equal Pay Act and the Family and Medical Leave Act."[11] Fortunately, the Supreme Court recently proved Pryor wrong by upholding damages claims against states under the Family and Medical Leave Act.

- Pryor has shown disdain for decisions of the Court that uphold protections guaranteed by the Fourteenth Amendment. In a 1997 speech, Pryor called the Court "both antidemocratic and insensitive to federalism" because of its decisions in *Romer v. Evans*, a gay rights decision, and *United States v. Virginia*, which ended sex discrimination at the Virginia Military Institute. Pryor lamented that because of these decisions "we now have new rules of political correctness of decision making in the equal protection arena."[12]

- Pryor submitted an *amicus* brief in *Lawrence v. Texas*, a case currently before the U.S. Supreme Court, which challenges a ban on sodomy applied only to same-sex couples. In his brief, Pryor compares homosexual acts to "prostitution, adultery, necrophilia, bestiality, possession of child pornography and even incest and pedophilia."

- In 1994, Pryor fought a proposal favored by state Democrats to add more African Americans to the state's courts. Pryor viewed this as a dangerous precedent, which "would have made race a qualification for public office."[13] A federal district judge eventually entered a judgment that approved of the proposal to restructure the state appellate court system in order to increase minority representation. When testifying before the U.S. Senate Committee in 1997, Pryor said that the district court's judgment, which included the requirement that three members of the state judgeship nominating commission be African American, "sent the destructive message that race somehow matters in the administration of justice."[14] He and then-attorney general Jeff Sessions fought the judgment, which was eventually reversed by the Eleventh Circuit Court of Appeals.

- Pryor encouraged the Senate Judiciary Committee to consider the repeal or amendment of section 5 of the Voting Rights Act. This section requires covered jurisdictions to submit changes in voting qualifications or prerequisites to voting to either the U.S. Department

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[11] Bill Pryor, Fighting for Federalism (Mar. 28, 2001), *available at* http://www.ago.state.al.us/speeches.cfm?Item=Single&Case=63.
[12] Pryor, *supra* note 9.
[13] Greene, *supra* note 8.
[14] Bill Pryor, Judicial Activism: Assessing the Impact (July 15, 1997), *available at* http://www.ago.state.al.us/speeches.cfm?Item=Single&Case=13.

of Justice or the U.S. District Court for the District of Columbia for preclearance before the change may be implemented. The section was enacted in order to ensure that minority voters would have an opportunity to register to vote and fully participate in the electoral process free of discrimination. Pryor, however, sees section 5 as "an affront to federalism and an expensive burden that has far outlived its usefulness."[15]

- Pryor praised the district court decision in *Westside Mothers v. Haveman* as a "sublime ruling"[16] because it promotes federalism. In that case, plaintiffs sought to stop their state from violating the Medicaid law by depriving economically disadvantaged children of quality health care. The district court dismissed the case for lack of jurisdiction, under the Eleventh Amendment, and failure to state a claim. Despite Pryor's belief that this was a "brilliant opinion" that "should be read by every serious Federalist,"[17] it was later reversed by the U.S. Court of Appeals for the Sixth Circuit.

- In contrast, Pryor called the district court decision in *South Camden Citizens in Action v. New Jersey Department of Environmental Protection* "ridiculous."[18] The district court in that case allowed plaintiffs to move forward with their case under the disparate impact regulations of Title VI in order to enjoin the issuance of an air pollution permit for a cement processing facility. Plaintiffs alleged that the siting of the facility, in a neighborhood where 91 percent of the residents were either black or Hispanic, would have a racially discriminatory impact.

- Pryor signed onto an *amicus* brief in *City of Chicago v. Morales*, 527 U.S. 41 (1999), urging the Supreme Court to uphold a Chicago gang loitering ordinance and to confirm that the Constitution tolerates measured law enforcement in this area. The brief ignored, however, serious concerns about the use of such ordinances for unlawful racial profiling where minorities are the only targets of local enforcement efforts.

William Pryor's record closely tracks that of other nominees, with strong ties to conservative organizations, vehement anti-choice views, and hostility to women's and civil rights. His record, however, goes even further; it shows that Pryor is purposefully attempting to advance a narrow ideology through litigation and oral and written advocacy. Pryor's unwavering and extreme views on federalism would restrict Congress' power to pass civil rights laws and the abilities of individuals to seek redress for violations of those rights. Such judicial activism is contrary to the balanced approach we believe is necessary for a federal appeals court judge. We call upon the Senate Judiciary Committee to reject William Pryor's nomination to the Eleventh Circuit Court of Appeals.

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[15] *Id.*
[16] William H. Pryor, The Demand for Clarity: Federalism, Statutory Construction, and the 2000 Term (July 11, 2001), *available at* http://www.federalismproject.org/masterpages/supremecourt/pryor.html.
[17] *Id.*
[18] *Id.*