



**NARAL**

*Reproductive Freedom & Choice*

## **John G. Roberts, Jr.**

Nominated to the U. S. Court of Appeals for the District of Columbia

### Career

- Partner, Hogan & Hartson (head of the appellate group), Washington, DC, 1993-present.
- Previously nominated by President George Bush to the United States Court of Appeals for the District of Columbia, 1992.
- Principal Deputy Solicitor General of the United States, 1989-93.
- Associate, Partner, Hogan & Hartson, Washington, DC, 1986-89.
- Associate Counsel to President Ronald Reagan, 1982-86.
- Special Assistant to U.S. Attorney General William French Smith, 1981-82.
- Clerk, Justice William H. Rehnquist, U.S. Supreme Court, 1980-81.
- Clerk, Judge Henry J. Friendly, U.S. Court of Appeals for the Second Circuit, 1979-80.

### Power of the Office of the Solicitor General

Throughout his tenure in the Department of Justice during the Reagan and first Bush Administrations, the Department actively worked to overturn *Roe v. Wade* and restrict reproductive rights. Mr. Roberts, particularly as Principal Deputy Solicitor General, played an active role in these efforts to abridge women's right and access to abortion services. The Solicitor General's office is highly effective in arguing before the Supreme Court and ultimately prevailing, either as a party to the case or an *amicus curiae*.

- "Of cases decided by the Court on the merits during the early- to mid-1980s, for example, the Government's position prevailed between 67 percent of the time, in 1982, and 83 percent of the time, in 1983. Overall, from 1959 to 1989, the Government's position prevailed in 67.6 percent of all cases decided on the merits in which the United States participated as either a party or *amicus curiae*."<sup>1</sup> "With respect to the *amicus* filings of the Solicitor General . . . such

briefs are associated on average with a 17% increase in petitioner success and a 26% increase in respondent success.”<sup>2</sup>

- Of the 6 cases in which Solicitors General in the Reagan and first Bush Administrations filed *amicus curiae* briefs against reproductive rights, the Solicitor General’s office “won” 4 of the cases restricting women’s reproductive rights.<sup>3</sup>
- Overturning a woman’s right to choose was a cornerstone of the first Bush Administration as signaled by the fact that Solicitor General Kenneth Starr himself argued reproductive rights cases before the Supreme Court.<sup>4</sup> The Court was so accustomed to the Solicitor General and the Deputy Solicitor General arguing for the overturn of *Roe* that during John Roberts’ oral argument before the Supreme Court in *Bray*, a Justice asked, “Mr. Roberts, in this case are you asking that *Roe v. Wade* be overruled?” He responded, “No, your honor, the issue doesn’t even come up.” To this the justice said, “Well that hasn’t prevented the Solicitor General from taking that position in prior cases.”<sup>5</sup>

#### Hostility to Reproductive Rights

- As Deputy Solicitor General, Roberts argued in a brief before the U.S. Supreme Court (in a case that did not implicate *Roe v. Wade*) that “[w]e continue to believe that *Roe* was wrongly decided and should be overruled.... [T]he Court’s conclusion in *Roe* that there is a fundamental right to an abortion... finds no support in the text, structure, or history of the Constitution.”<sup>6</sup>
- In *Rust v. Sullivan*<sup>7</sup>, the Supreme Court considered whether Department of Health and Human Services regulations limiting the ability of Title X recipients to engage in abortion-related activities violated various constitutional provisions. Roberts, appearing on behalf of HHS as Deputy Solicitor General, argued that this domestic gag rule did not violate constitutional protections.
- Roberts, again as Deputy Solicitor General, argued as *amicus curiae* for the United States supporting Operation Rescue and six other individuals who routinely blocked access to reproductive health care clinics, arguing that the protesters’ behavior did not amount to discrimination against women even though only women could exercise the right to seek an abortion. Intervening as *amicus* is a wholly discretionary decision on the part of the Solicitor General. Here the government chose to involve itself in a case in support of those who sought to deprive women of the right to choose. Roberts argued that the protesters’ blockade and protests merely amounted to an expression of their opposition to abortion and that a civil rights remedy was therefore inappropriate.<sup>8</sup> The case – *Bray v. Alexandria Women’s Health Clinic*<sup>9</sup> –

presented the Supreme Court with the question of whether the Civil Rights Act of 1871 provided a federal cause of action against persons obstructing access to abortion clinics. The year after *Bray* was rendered, Congress enacted the Freedom of Access to Clinic Entrances Act to protect women and health care providers from violence and harassment.<sup>10</sup>

<sup>1</sup> David M. Rosenzweig, *Confession of Error in the Supreme Court by the Solicitor General*, 82 GEO. L.J. 2079, 2083-86 (1994) (citations omitted).

<sup>2</sup> Joseph D. Kearney and Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 820 (2000) (studying amicus briefs from 1946 through 1995) (citations omitted).

<sup>3</sup> Brief for the United States as Amicus Curiae Supporting Petitioners, *Bray v. Alexandria Women's Health Center*, 506 U.S. 263 (1993) (No. 90-985); Brief for the United States as Amicus Curiae Supporting Respondents, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (Nos. 91-744, 91-902); Brief for the United States as Amicus Curiae Supporting Respondents in No. 88-1125 and Supporting Cross-Petitioners in No. 88-1309, *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (Nos. 88-1125, 88-1309); Brief for the United States as Amicus Curiae Supporting Appellants, *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (No. 88-605); Brief for the United States as Amicus Curiae, *Thornburgh v. American College Obstetricians and Gynecologists*, 476 U.S. 747 (1986) (Nos. 84-495, 84-1379); Brief for the United States in Support of Petitioners, *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (Nos. 81-746, 81-1623).

<sup>4</sup> Transcript of Oral Argument of Kenneth W. Starr, dated Apr. 22, 1992, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1993) (Nos. 91-744, 91-902); Transcript of Oral Argument of Kenneth W. Starr, dated Oct. 30, 1990, *Rust v. Sullivan*, 500 U.S. 173 (1991) (Nos. 89-1991, 89-1392).

<sup>5</sup> Transcript of Oral Argument of John Roberts, Jr., dated Oct. 16, 1991, *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) (No. 90-985).

<sup>6</sup> Brief for the Respondent at 13, *Rust v. Sullivan*, 500 U.S. 173 (1991) (Nos. 89-1391, 89-1392).

<sup>7</sup> 500 U.S. 173 (1991).

<sup>8</sup> Transcript of Oral Reargument of John Roberts, Jr., dated Oct. 6, 1992, *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) (No. 90-985).

<sup>9</sup> 506 U.S. 263 (1993).

<sup>10</sup> HR 796/S 636, 1994.