

*Leaders Opposing the Senate Confirmation of  
Andrew David Hurwitz  
to the United States Court of Appeals for the Ninth Circuit*

May 23, 2012

The Honorable Jon Kyl  
730 Hart Senate Office Building  
United States Senate  
Washington, DC 20510

***Re: Opposition to Andrew David Hurwitz***

Dear Senator Kyl:

Your long and distinguished career in the Senate has given us many opportunities to agree with each other, particularly on the issues of life and defense of the unborn. In recognition of this legacy, we respectfully ask that you vote “nay” on the question of the confirmation of Andrew David Hurwitz to the United States Court of Appeals for the Ninth Circuit, and that you encourage your Senate colleagues to do the same.

**Hurwitz was a key author of two pro-abortion court decisions whose rationale was significantly relied upon by the Supreme Court in *Roe v. Wade*.**<sup>1</sup> As a young law clerk to Judge Jon O. Newman (U.S. District Court Judge for the Dist. of Connecticut) Hurwitz played a key role in authoring two 1972 decisions which the U.S. Supreme Court mimicked and expanded in the majority opinion of *Roe v. Wade*. Hurwitz accurately claims that these pro-abortion decisions influenced the Supreme Court’s decision in *Roe* and Hurwitz makes it clear that he is proud of his role in these pro-abortion decisions. Hurwitz wrote:

“One need no longer speculate on the point: it is now clear that Jon O. Newman [and Hurwitz] had, in words [sic] of one historian, ‘crucial influence’ on both the outcome and the reasoning in the [*Roe v. Wade*] case.”<sup>2</sup>

Hurwitz continued:

“[I] received some small inkling of the influence of *Abele II* [Judge Newman’s pro-abortion decision] on the [Supreme] Court’s thinking [in *Roe v. Wade*] in the fall of 1972, when interviewing for clerkships at the Supreme Court ... **Justice Stewart (my future boss) jokingly referred to me as ‘the clerk who wrote the [pro-abortion] Newman opinion.’**”<sup>3</sup>

While legal experts on both ends of the abortion debate have wisely chosen to back away from the constitutionally indefensible “reasoning” of the Court’s decision in *Roe*,<sup>4</sup> Hurwitz instead chose to celebrate it.<sup>5</sup> Hurwitz’s recent and continued celebration of *Roe* places him far outside the mainstream of legal thought and demonstrates his fundamental misunderstanding of

the Constitutional role of the Judiciary. As such, Hurwitz is one of President Obama's most controversial and dangerous nominees.

### **Conclusion**

Hurwitz's professional record is distinguished by his significant contribution to – and defense of – one of the most activist Supreme Court opinions in history. As such, any vote for Hurwitz would stand as a tacit – if not outright – endorsement of his radical views on abortion and the constitutional role of the judiciary. One of the most enduring legacies of United States Senators is determined by the records of judges that they voted to confirm. In light of your past work to defend life, we ask that you withdraw your support for Hurwitz and that you encourage your colleagues to vote against his confirmation. We respectfully ask for your response to our request.

Respectfully,

Penny Nance, President and CEO, Concerned Women for America\*  
Tom McClusky, Executive Vice President, Family Research Council Action\*  
Phyllis Schlafly, President, Eagle Forum\*  
Rev. Robert Schenck, President, National Clergy Council\*  
Andrea Lafferty, President, Traditional Values Coalition\*  
Rev. Rick Scarborough, President, Vision America\*  
Gary A. Marx, Executive Director, Faith and Freedom Coalition\*  
Janet Porter, President, Faith2Action\*  
Kyle Ebersole, Editor, Conservative Action Alerts\*  
Linda Harvey, President, Mission America\*  
C. Preston Noell III, President, Tradition, Family, Property, Inc.\*  
Mike Donnelly, Home School Legal Defense Association\*  
Rabbi Yehuda Levin, Rabbinical Alliance of America\*  
Rabbi Noson S. Leiter, Executive Director, Torah Jews for Decency; Founder, Rescue Our Children\*  
Rabbi Jonathan Hausman  
Chaplain Gordon James Klingenschmitt, PhD, The Pray In Jesus Name Project\*  
Virginia Armstrong, Ph.D., National Chairman., Eagle Forum's Court Watch\*  
Dr. Rod D. Martin, President, National Federation of Republican Assemblies\*  
Rick Needham, President, Alabama Republican Assembly\*  
Charlotte Reed, President, Arizona Republican Assembly\*  
Dr. Pat Briney, President, Arkansas Republican Assembly\*  
Celeste Greig, President, California Republican Assembly\*  
Rev. Brian Ward, President, Florida Republican Assembly\*  
Paul Smith, President, Hawaii Republican Assembly\*  
Ken Calzavara, President, Illinois Republican Assembly\*  
Craig Bergman, President, Iowa Republican Assembly\*  
Mark Gietzen, President, Kansas Republican Assembly\*  
Sallie Taylor, President, Maryland Republican Assembly\*  
David Kopacz, President, Massachusetts Republican Assembly\*

Chris Brown, President, Missouri Republican Assembly\*  
Travis Christensen, President, Nevada Republican Assembly\*  
Nathan Dahm, President, Oklahoma Republican Assembly\*  
Ray McKay, President, Rhode Island Republican Assembly\*  
Paula Mabry, President, Tennessee Republican Assembly\*  
Hon. Bob Gill, President, Texas Republican Assembly\*  
Patrick Bradley, President, Utah Republican Assembly\*  
Ryan Nichols, President, Virginia Republican Assembly\*  
Mark Scott, President, West Virginia Republican Assembly\*  
Mandi D. Campbell, Esq., Legal Director, Liberty Center for Law and Policy\*  
Phillip Jauregui, President, Judicial Action Group\*

\* Organizations listed for identification purposes only.

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<sup>1</sup> Hurwitz, Andrew D., *Jon O. Newman and the Abortion Decisions: A Remarkable First Year*, 46 N.Y.L. Sch. L. Rev. 231 (2002-2003).

<sup>2</sup> *Id.* at 238-39 (internal footnotes omitted). The context of the above quotation is as follows:

“In short, there was copious evidence when *Roe* was issued from which a legal detective could discern Judge Newman’s [and Hurwitz’s] fingerprints on the Court’s decision. Indeed, in describing *Roe*, Time Magazine contended that the Court was ‘influenced by the 1972 opinion of District Judge Jon O. Newman.’ But it took the retirement of several of the *Roe* Justices, and the subsequent release of their papers, to demonstrate just how significant Judge Newman’s *Abele II* analysis was to the *Roe* opinion. One need no longer speculate on the point: it is now clear that Jon O. Newman [and Hurwitz] had, in words of one historian, ‘crucial influence’ on both the outcome and the reasoning in the case.”

<sup>3</sup> *Id.* The context of the above quotation is as follows:

“[I] received some small inkling of the influence of *Abele II* [Judge Newman’s decision] on the [Supreme] Court’s thinking [in *Roe v. Wade*] in the fall of 1972, when interviewing for clerkships at the Supreme Court. Justice Powell devoted over an hour of conversation to a discussion of Judge Newman’s [pro-abortion] analysis, while **Justice Stewart (my future boss) jokingly referred to me as ‘the clerk who wrote the [pro-abortion] Newman opinion.’** I assume that the latter was based on Judge Newman’s generous letter of recommendation, a medium in which some exaggeration is expected” (Emphasis added.)

<sup>4</sup> Roosevelt, Kermit. "[Shaky Basis for a Constitutional ‘Right’](#)", *Washington Post*, (2003-01-22):

"[I]t is time to admit in public that, as an example of the practice of constitutional opinion writing, *Roe* is a serious disappointment. **You will be hard-pressed to find a constitutional law professor, even among those who support the idea of constitutional protection for the right to choose, who will embrace the opinion itself rather than the result....This is not surprising. As constitutional argument, *Roe* is barely coherent.** The court pulled its fundamental right to choose more or less from the constitutional ether. It supported that right via a lengthy, but purposeless, cross-cultural historical review of abortion restrictions and a tidy but irrelevant refutation of the straw-man argument that a fetus is a constitutional ‘person’ entitled to the protection of the 14th Amendment....By declaring an inviolable fundamental right to abortion, *Roe* short-circuited the democratic deliberation that is the most reliable method of deciding questions of competing values."

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<http://pqasb.pqarchiver.com/washingtonpost/access/279325011.html?dids=279325011:279325011&FMT=ABS&FTS=ABS:FT&fmac=&date=Jan+22%2C+2003&author=Kermit+Roosevelt&desc=Shaky+Basis+for+a+Constitutional+%27Right%27>

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<sup>5</sup> As Ed Whelan points out, no serious judge would want to take credit for a decision that amounts to one of the worst instances of judicial usurpation of legislative power. Whelan explains that “even liberals who support a right to abortion condemn *Roe* in scathing terms.” Whelan explains that a former clerk to Justice Blackmun admitted: “[a]s a matter of constitutional interpretation and judicial method, *Roe* borders on the indefensible.” Available at: <http://www.nationalreview.com/bench-memos/289542/iroeis-lone-remaining-defender-nominated-ninth-circuit-ed-whelan>