TESTIMONY OF
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BEFORE THE UNITED STATES SENATE COMMITTEE ON THE JUDICIARY
ON THE CONFIRMATION OF SONIA SOTOMAYOR
TO THE UNITED STATES SUPREME COURT

Thank you Chairman Leahy, Ranking Member Sessions, and members of the Committee for inviting me to testify before you today. I am here on behalf of Americans United for Life (AUL), the nation's oldest pro-life legal organization. Our vision at AUL is a nation where everyone is welcome in life and protected by law. We have been committed to defending human life through vigorous judical, legislative, and educational efforts since 1971, and have been involved in every abortion-related case before the United States Supreme Court including *Roe v. Wade*.

Introduction

I am here today because of AUL's deep concern about the nomination of Judge Sonia Sotomayor to the United States Supreme Court. Based on our research, we believe that Judge Sotomayor's judicial philosophy is far outside of the mainstream, and that her confirmation will dramatically shift the dynamics of the Court. There are three primary points that I want to leave with you today. First, like most Americans, we believe that a nominee's judicial philosophy goes to the heart of his or her qualifications to serve on the United States Supreme Court. Second, we believe that based on Judge Sotomayor's record of prior statements and her involvement with the Puerto Rican Legal Defense and Education Fund ("PRLDEF"), Judge Sotomayor's judicial philosophy makes her unqualified to serve on the Court. Finally, we believe that as a justice, Judge Sotomayor would undermine any efforts by our elected representatives to pass even the most widely accepted regulations on abortion and circumvent the will of the people.

I. The Importance of Judicial Philosophy

A United States Supreme Court nominee's judicial philosophy, i.e. the methodology that she would use to decide a case, is as relevant to whether she is qualified to serve on the Court as her intellectual ability, education, and professional experience. AUL does not expect Judge Sotomayor to state how she would vote on hypothetical abortion-related cases. However, we do expect Judge Sotomayor to articulate her judicial philosophy, and a component of that is whether she will respect the right of the people to determine the content of abortion-related laws through the democratic process.

a. The role of the Justice is not to make policy.

Supreme Court Justices should exercise restraint by applying our laws, not directing policy. When judges fail to respect their limited role under our Constitution, their decisions merely reflect their personal preferences regarding public policy. In 1973, the Supreme Court did exactly that when it purported to find a right to abortion in the Constitution in *Roe v. Wade*,[1] and virtually eliminated the ability of states to regulate this new "fundamental right" with the notoriously broad definition of health in *Doe v. Bolton*.[2] Since that day, the Supreme Court has permitted some regulation of abortion,[3] but far less than before *Roe.* Elected legislative bodies are constantly struggling to determine what language will pass whatever is the current "test"[4] used by the Supreme Court in abortion jurisprudence.[5] This confusion is the direct result of judicial interference in a matter that should be handled by the legislative process. If the Court continues to interfere in abortion-related law, a simple ideological shift in the Court will completely undermine abortion regulations across the country – even those regulations that have the most widespread support among Americans, like parental notification statutes, informed consent laws, and partial birth abortion bans.

Recent polling data confirms that Americans want judges who follow the law. Majorities of self-identified Republicans, Independents, and Democrats agreed that "[w]hen considering a new Justice for the United States Supreme Court, I would prefer that my United States Senators look for a man or woman who will interpret the law as it is written and not take into account his or her personal viewpoints and experiences." (Agreement: 87% Total, 84% of Democrats, 86% of Independents, 92% of Republicans, 80% of liberals, 85% of moderates, 91% of conservatives).[6] Also, Americans strongly opposed a nominee who "believes that the Courts, and not the voters or elected officials, should make policies on abortion in the United States." (70% Total, 69% of Democrats,

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[1] 410 U.S. 113 (1973).
[2] 410 U.S. 179 (1973).
[3] *See, e.g.,* Maher v. Roe, 432 U.S. 464 (1977) (upholding a Connecticut prohibition on the use of public funds for abortions, except those that are "medically necessary"); Harris v. McRae, 448 U.S. 297 (1980) (upholding the Hyde Amendment which restricts federal funding of Medicaid abortions only to cases of life endangerment); Webster v. Reproductive Health Services, 492 U.S. 490 (1989) (upholding Missouri statute that (1) prohibited the use of public facilities and personnel to perform abortions and (2) in pregnancies of 20 weeks or more, required ultrasound tests to determine viability of the unborn child); Ohio v. Akron Center for Reproductive Health, 497 U.S. 502 (1990) (upholding an Ohio statute requiring a minor to notify one parent or obtain a judicial waiver); Rust v. Sullivan, 500 U.S. 173 (1991) (upholding federal regulation prohibiting personnel at family planning clinics that receive Title X funds from counseling or referring women regarding abortion); Planned Parenthood v. Casey, 505 U.S. 833 (1992) (upholding provisions of a Pennsylvania statute that required informed consent, a waiting period, reporting requirements, and parental consent with a judicial bypass); Gonzales v. Carhart, 550 U.S. 124 (2007) (upholding the "Federal Partial-Birth Abortion Ban of 2003").
[4] Clarke D. Forsythe, *Who Will Fix the Supreme Court's Mess? A history of United States Supreme Court abortion decisions and how they have shaped abortion law*, *in Defending Life 2009: Proven Strategies for a Pro-Life America* 47 (Denise M. Burke et al. eds., 2009) (discussing how the Supreme Court has changed the standard of review for abortion legislation at least four times).
[5] *Id.* at 47-49 (discussing the challenges that legislative bodies face when writing abortion-related laws).
[6] The Polling Company, Inc. / WomanTrend. "Americans United for Life." Survey. 17-18 May 2009.

65% of Independents, 78% of Republicans, 65% of liberals, 71% of moderates, 75% of conservatives).[7]

Americans across the political spectrum understand that it is not the role of judges to substitute their policy preferences for the deliberations of legislatures.

b. Justices must respect precedent, but may overturn it.

Supreme Court Justices must have a respect for precedent, but also recognize that following precedent is "not an inexorable command."[8] In his hearing before this Committee, Chief Justice Roberts explained the factors to consider under the principle of *stare decisis*: "[1] [S]ettled expectations . . . [2] [w]hether or not particular precedents have proven to be unworkable . . . [3] whether the doctrinal bases of a decision have been eroded by subsequent developments. . . ."[9] In fact, the Court enhances its legitimacy when it reverses a decision after overstepping its bounds into policymaking. Furthermore, the Supreme Court should never affirm a decision at odds with the Constitution.[10]

Under the principles of *stare decisis*, *Roe* is a prime example of precedent on shaky ground. First, any argument that settled expectations and reliance[11] should prohibit the overturning of *Roe* reflects unawareness of the state of the law; in fact, if *Roe* were overturned, abortion would still be legal in at least 41 states.[12] Second, *Roe* and its progeny have clearly proven to be unworkable. For over 30 years, state legislatures and federal courts have struggled to understand what regulations of abortion are permissible, and legislatures often resort to copying the language found in laws previously deemed constitutional by the Court.[13] Third, the purported justifications of *Roe*, flimsy as they were, have dramatically eroded with further in-depth scientific information about when life begins and prenatal development, as well as public health data showing the substantial and negative physical and psychological impact of abortion on women.[14] Finally, people who favor[15] and people who oppose abortion rights agree that *Roe* is

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[7] *Id.*
[8] Payne v. Tennessee, 501 U.S. 808, 828 (1991).
[9] *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Supreme Court*, 109 Cong. 142 (2005).
[10] *See* Brown v. Board of Education, 347 U.S. 483 (1954).
[11] *See* Casey, 505 U.S. at 855-56 (discussing "reliance" on the availability of abortion).
[12] Clarke D. Forsythe, *The Day After Roe: Abortion would still be legal in at least 41 states*, *in Defending Life 2009: Proven Strategies for a Pro-Life America* 83-85 (Denise M. Burke et al. eds., 2009).
[13] *See supra* notes 5, 12.
[14] *See generally* John M. Thorp, Jr., MD, Katherine E. Hartmann, MD & Elizabeth Shadigian, MD*, Long-Term Physical and Psychological Health Consequences of Induced Abortion: Review of the Evidence*, 58 Obst. & Gyn. Survey 67 (2003 (finding an increased risk for placenta previa, subsequent preterm delivery, and "mood disorders substantial enough to provoke attempts of self-harm" following an induced abortion).
[15] *See, e.g.*, Laurence H. Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 Harv. L. Rev. 1, 7 (1973) (stating "[o]ne of the most curious things about Roe is that, behind its own verbal smokescreen, the substantive judgment on which it rests is nowhere to be found."); Benjamin Wittes, *Letting Go of Roe*, The Atlantic Monthly, Jan/Feb 2005 (stating Roe "is a lousy opinion that disenfranchised millions of conservatives on an issue about which they care deeply."); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 935-37

fundamentally a policy decision, without Constitutional language to support it. In fact, the Supreme Court has substantially modified the doctrine announced in *Roe* in subsequent cases.[16]

As I previously mentioned, AUL does not expect Judge Sotomayor to state whether, as a Supreme Court Justice, she would vote to overturn *Roe v. Wade*. However, as then-Chairman Specter stated in Chief Justice Roberts' hearing, *Roe* is "the central issue which perhaps concerns most Americans."[17] AUL agrees, and we believe that Americans should know whether Judge Sotomayor is able to recognize the problems with *Roe* and its progeny.

II. Judge Sotomayor's Judicial Philosophy

As discussed above, a nominee's judicial philosophy is a critical part of her qualification to serve on the Court. Based on many of Judge Sotomayor's past statements and the extreme arguments made in the PRLDEF abortion briefs, AUL believes that her judicial philosophy makes her unqualified to serve on the Supreme Court.

a. Judge Sotomayor does not believe that the facts and applicable law in a case are sufficient to reach a decision.

Much has been made of President Obama's statements about wanting a justice who possesses empathy and varied life experiences. These attributes are not intrinsically problematic. However, it is fundamentally inappropriate for a justice on the Supreme Court to decide cases based on these attributes rather than the written law. What Americans need to know is whether Judge Sotomayor is capable of deciding cases based on constitutional principles, regardless of whether she empathizes with plaintiffs or defendants. In light of many of Judge Sotomayor's statements, we are deeply concerned that she does not understand or respect the appropriate role of a judge.

In her 2001 lecture "A Latina Judge's Voice," Judge Sotomayor repeatedly argued that the facts and applicable law in a case are not sufficient for a judge to reach a decision. Judge Sotomayor emphasized the importance of personal viewpoints and experience: "I would hope that a wise Latina woman with the richness of experience would more often than not reach a better conclusion than a white male who hasn't lived that life."[18] She later implied that as a judge, she does not choose to see all of the facts in cases before her: "Personal experiences affect the facts that judges choose to see. . . . I simply do not know exactly what that difference will be in my judging. But I accept there will be some based on my gender and my Latina heritage." [19]

(1973) (stating "[w]hat is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure. . . ").

[16] Casey, 505 U.S. at 869-79.

[17] *See supra* note 9 at 141.

[18] Sonia Sotomayor, *Lecture: "A Latina Judge's Voice," available* at http://www.nytimes.com/2009/05/15/us/politics/15judge.text.html?pagewanted=1&_r

[19] *Id.*

Of even greater concern, Judge Sotomayor stated in the same lecture that "[t]he aspiration to impartiality is just that--it's an aspiration because it denies the fact that we are by our experiences making different choices than others. . . ."[20] However, impartiality is not merely an aspiration. It is a discipline, and its necessity is enshrined in the judicial oath. A judge who applies the law to all of the relevant facts in a case and avoids selectively favoring one litigant over another, ensures equal protection under the law. A judge who injects personal experiences into a decision does the opposite.

Perhaps the clearest example of Judge Sotomayor's problematic philosophy is her April 2009 speech about international law. Judge Sotomayor demonstrated that she believes that she has an unbounded creative right to decide cases:

> Ideas [from foreign law] have no boundaries, ideas are what set our creative juices flowing, they permit us to think. And to suggest to anyone that you could outlaw the use of foreign or international law . . . would be asking American judges to . . . close their minds to good ideas. . . . But ideas are ideas, and whatever their source—whether they come from foreign law or international law, or a trial judge in Alabama, or a circuit court in California or any other place—if the idea has validity, if it persuades you, . . . then you are going to adopt its reasoning.[21]

In other words, Judge Sotomayor believes that judges need not rely solely on Constitutional and applicable statutory law to decide cases.

b. Judge Sotomayor's record on abortion demonstrates that she would not support the commonsense regulations permitted under Planned Parenthood v. Casey.

The argument has been made that Judge Sotomayor's record is not hostile towards the regulation of abortion. Her supporters first argue that Judge Sotomayor faithfully followed precedent on abortion-related issues while on the 2nd Circuit, and never authored any scholarship on life or bioethics issues. Second, they argue that because Judge Sotomayor was simply a board member of the PRLDEF when it submitted six pro-abortion briefs in Supreme Court cases, the legal arguments in the briefs cannot be attributed to her. I will address each of these arguments in turn.

i. Decisions and Writings

First, AUL acknowledges that in her seventeen years on the bench, Judge Sotomayor has never had the opportunity to decide directly on whether a law regulating

[20] *Id.*
[21] Sonia Sotomayor, Speech to the American Civil Liberties Union of Puerto Rico, *available at* http://video.nytimes.com/video/2009/06/10/us/politics/1194840839480/speech-to-the-a-c-l-u-of-puerto-rico.html, April 2009.

abortion was constitutional. This is not surprising, given that the states within the federal Second Circuit—New York, Connecticut, and Vermont—have not produced significant pro-life legislation in the last two decades. The life-related cases on which she has ruled provide very limited information about her approach to abortion jurisprudence.[22] However, Judge Sotomayor's lack of opportunity to address the constitutionality of abortion does not reassure us that she will vote to uphold regulations on abortion enacted by the people through their legislators. Additionally, a judge's willingness to follow precedent while serving on a Circuit Court, as she is obligated to do, does not necessarily indicate how that judge will rule when serving on the Supreme Court.

ii. The PRLDEF's Abortion Briefs – Judge Sotomayor's Involvement.

During the twelve years that Judge Sotomayor served as a governing board member of the PRLDEF, the organization filed six amicus briefs in five abortion-related cases before the Supreme Court. AUL believes that the legal arguments advanced by the PRLDEF in these briefs, which she has never disavowed, reflect Judge Sotomayor's personal views. This is a concern, given her particular emphasis on personal viewpoint in jurisprudence.

Judge Sotomayor served the PRLDEF "at various points" as a member and vice president of the Board of Directors, and as Chairperson of the Education and Litigation Committees.[23] Judge Sotomayor was described in *The New York Times* as "frequently meeting with the legal staff to review the status of cases . . . [and] play[ing] an active role as the defense fund staked out aggressive stances on issues. . . ." *The New York Times* continues: "The board monitored all litigation undertaken by the fund's lawyers, and a number of those lawyers said Ms. Sotomayor was an involved and ardent supporter of their various legal efforts during her time with the group."[24]

It is difficult to imagine that a member of the Board of a legal organization that has staked out a pro-abortion advocacy agenda, who was "an ardent supporter of their . . .

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[22] Most of Judge Sotomayor's abortion-related cases involved asylum claims arising from forced abortion or sterilization. *See e.g.,* Zhu v. Holder, (2d Cir. Apr. 15, 2009) (order); Lin v. Mukasey, 553 F.3d 217 (2d Cir. 2009). These cases, however, give no clear indication of Judge Sotomayor's views on Roe v. Wade. Justice Sotomayor has also voted for and against abortion protestors. For: Amnesty America v. Town of West Hartford, 361 F.3d 113 (2d Cir. 2004); Amnesty America v. Town of West Hartford, 288 F.3d 567 (2d Cir. 2002); Against: United States v. Lynch, 181 F.3d 330 (2d Cir. 1999). In Center for Reproductive Law and Policy v. Bush, 304 F.3d 183 (2d Cir. 2002), Judge Sotomayor found that a "reproductive rights" group had standing to challenge the Mexico City Policy. Judge Sotomayor specifically concluded that the group had "competitive advocate standing," on the grounds that the government's allocation of a benefit "creates an unequal playing field" for organizations advocating their views in the public arena. However, Judge Sotomayor applied Supreme Court precedent (Rust v. Sullivan) directly on point as well as a prior Second Circuit decision upholding the Mexico City policy.

[23] United States Senate Committee on the Judiciary, Questionnaire for Sonia Sotomayor at 13.

[24] Raymond Hernandez and David W. Chen, *Nominee's Links with Advocates Fuel Her Critics,* N.Y. Times, May 28, 2009 *available at* http://www.nytimes.com/2009/05/29/us/politics/29puerto.html?_r=1&scp=1&sq=prldef&st=cse.

legal efforts," would not agree with the organization's decision to sign onto amicus briefs in major Supreme Court cases, and she has provided no evidence to the contrary. Even the most conservative view of her involvement with the PRLDEF – the argument advanced by the Fund itself – supports our belief that the organization's legal arguments can be associated with her. The PRLDEF states on its website: "At most Board Members help decide which legal issues the organization should focus on."[25] Similarly, Cesar Perales, the PRLDEF'S president and general counsel, stated that Sotomayor's role included setting policy.[26] Clearly, if Judge Sotomayor helped set policy and decide which legal issues to focus on, she knew the position the PRLDEF would take when it focused on abortion.

Finally, the mere fact that the PRLDEF was not the lone party on their abortion-related briefs is not significant. It is highly unlikely that a legal organization would sign onto a series of politically charged and controversial opinions without reading and agreeing with them, and the fact that other organizations joined with the PRLDEF does not make the arguments in the brief mainstream.

iii. The PRLDEF's Abortion Briefs – Out of Touch with Supreme Court Jurisprudence.

The six briefs submitted by the PRLDEF in five abortion-related cases during Judge Sotomayor's service included arguments that were not in line with current Supreme Court jurisprudence. The PRLDEF's consistent position was that abortion was a fundamental right, with any regulation of abortion subject to strict scrutiny. Notably, the positions taken by the PRLDEF during Judge Sotomayor's service indicate that Sotomayor's support of abortion rights is more extreme than that of retiring Justice David Souter.

In *Planned Parenthood v. Casey*,[27] the PRLDEF urged the Court to apply strict scrutiny and strike down Pennsylvania's informed consent requirements and reflection period. The PRLDEF declared that it "oppose[d] any efforts to . . . in any way restrict the rights recognized in *Roe v. Wade*," compared abortion to the First Amendment right to free speech, and argued that any "burden" on the right to abortion was unconstitutional. Justice Souter, however, voted in *Casey* to uphold Pennsylvania's informed consent law and 24-hour reflection period.

In *Ohio v. Akron Center for Reproductive Health*[28] and *Casey*, the PRLDEF asked the Court to strike down parental involvement statutes, arguing in *Akron* that "adolescent women's right to choose [should] not [be] infringed by [parental] notification statutes,"

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[25] LatinoJustice PRLDEF, http://www.prldef.org.
[26] Deepti Hajeila, *Hispanic Rights Group is fodder for Sotomayor foes*, Associated Press, July 11, 2009 *available at* http://www.lifenews.com/nat5185.html.
[27] Brief of Amici Curiae NAACP Legal Defense and Educational Fund, Inc. et al., Planned Parenthood v. Casey, 505 U.S. 833 (1992) (Nos. 91-744 and 91-902).
[28] Brief of Amici Curiae American Indian Health Care Association et al., Ohio v. Akron Center for Reproductive Health, 497 U.S. 502 (1990) (No. 88-805).

and insisted that minors should be "protected against parental involvement that might prevent or obstruct the exercise of their right to choose." Justice Souter, however, has twice voted to uphold state parental-involvement laws. (*Casey* and *Lambert v. Wicklund*[29]).

In *Williams v. Zbaraz*[30] and *Rust v. Sullivan*,[31] the PRLDEF argued strongly for judicially compelling taxpayer funded abortion with both state and federal taxes. In *Zbaraz*, the PRLDEF unsuccessfully argued that abortions must be publicly funded and that failure to do so was "discriminat[ory]" and a violation of equal protection guarantees. Furthermore, the PRLDEF unsuccessfully argued in *Rust* that since abortion is a "fundamental right," restrictions on taxpayer funding through Title X that prohibited its use to refer for abortions should be invalidated. Finally, the PRLDEF argued in *Webster v. Reproductive Health Services*[32] that the Court should apply strict scrutiny and strike down limitations on the use of state resources to provide abortions. Justice Souter, however, voted with the Supreme Court in *Rust* to uphold prohibitions on the use of taxpayer dollars for abortion counseling and referrals.

In *Webster*,[33] the PRLDEF argued that record keeping and reporting requirements relating to abortion were solely designed to "harass" abortion patients and providers. Also, in *Casey*, the PRLDEF unsuccessfully urged the Court to apply strict scrutiny and strike down Pennsylvania's record keeping and reporting requirements. Justice Souter, however, voted in *Casey* to uphold a portion of Pennsylvania law that required "record keeping and reporting" on abortions performed in the state, viewing such requirements as "reasonably directed to the preservation of maternal health."

Justice Souter voted repeatedly to uphold laws such as those placing limits on taxpayer funding for abortion, those providing for informed consent, and those providing for parental notification – which polls show are supported by at least 70 percent of the American public – whereas the PRLDEF, during Judge Sotomayor's service, consistently argued that such common sense regulations were unconstitutional.

III. Abortion Regulations under Justice Sotomayor

As a Supreme Court Justice, Judge Sotomayor's judicial philosophy would allow her to shape judicial decisions to suit her policy preferences. When you couple her judicial-interventionist philosophy with her support for the radical arguments made by the PRLDEF in abortion-related cases, Judge Sotomayor's presence on the United States Supreme Court surely would prove disastrous for virtually all abortion regulations passed by popularly elected representatives in the states.

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[29] 520 U.S. 292 (1997).
[30] Brief of Amici Curiae The Physicians National Housestaff Association et al., Williams v. Zbaraz, 448 U.S. 358 (1980) (Nos. 79-4, 79-5, 79-491).
[31] Brief of Amici Curiae The American Public Health Association et al., Rust v. Sullivan, 500 U.S. 173 (1991) (Nos. 89-1391, 89-1392).
[32] Brief of Amici Curiae The National Council of Negro Women, Inc., Webster v. Reproductive Health Services, 492 U.S. 490 (1989) (No. 88-605).
[33] *Id.*

Americans do not want this rollback on abortion regulation. New polling data reveal that Americans want Justices who disavow politics and who will uphold the Constitution and the rule of law as written, including on issues involving abortion. They agreed on upholding common sense abortion regulations already in place in the states, including parental consent laws, and opposed late-term abortions and taxpayer-funded abortions in the U.S. and overseas. Further, this consensus was held even among Americans who self-described themselves as "pro-choice."[34]

Conclusion

AUL believes that a careful analysis of Judge Sotomayor's positions taken in the PRLDEF briefs and of her judicial philosophy clearly indicate that as a justice, she would not respect the will of the people or their elected representatives, or even our written Constitution. Such views, unless explicitly disavowed under oath by Judge Sotomayor, disqualify her to serve on the United States Supreme Court. Thank you for allowing me to testify today.

[34] *See supra* note 6 (opposed a nominee who "Supports late-term abortions, which are abortions in the 7th, 8th, or 9th months of pregnancy, and are also known as 'Partial-Birth Abortions.'" (81%, Total, 77% of Democrats, 78% of Independents, 89% of Republicans, 67% of liberals, 80% of moderates, and 89% of conservatives; Opposed a nominee who "Opposes making it illegal for someone to take a girl younger than the age of 18 across state lines to obtain abortions without her parents' knowledge." (68% Total, 62% of Democrats, 74% of Independents, 73% of Republicans, 59% of liberals, 67% of moderates, and 73% of conservatives; Opposed a nominee who "Favors using tax dollars to pay for abortions here in the United States." (71% Total, 61% of Democrats, 67% of Independents, 86% of Republicans, 54% of liberals, 62% of moderates, and 86% of conservatives; Opposed a nominee who "Favors using tax dollars to pay for abortions in other countries." (89% Total, 97% of Republicans, 86% of Independents, 84% of Democrats, 76% of liberals, 87% of moderates, and 95% of conservatives)). [34]