national RIGHT TO LIFE committee, inc.

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June 23, 2010

To the Honorable Members of the United States Senate:

The National Right to Life Committee (NRLC), representing affiliated right-to-life organizations in all 50 states, respectfully urges you to oppose the confirmation of Elena Kagan to the office of Associate Justice of the United States Supreme Court.

We have studied carefully various memoranda and other material written by Ms. Kagan during her tenure on the White House staff of President Bill Clinton (1995-1999) (although a large amount of material has been suppressed for reasons not adequately explained), as well as other writings and actions by Ms. Kagan as a clerk to Justice Thurgood Marshall, as an academic, and as Solicitor General of the United States. Our conclusion is that Elena Kagan is first and foremost a social engineer, animated primarily by a desire to shape public policy on a host of issues. Her legal training and talent is chiefly directed to these ends. Ms. Kagan has demonstrated that she has strong convictions on how public policy should be cast on a wide range of issues, yet it also appears that she has long aspired to judicial rather than elective office. This is perhaps not surprising, because she believes that it "is not necessarily wrong or invalid" for appointed judges "to mold and steer the law in order to promote certain ethical values and achieve certain social ends," as she opined in her 1983 Oxford University thesis. For one with such a view, a seat on the U.S. Supreme Court is the apex of power – a lifetime license to make law and reshape public policy by decree, on a wide range of issues, without any need to achieve the degree of consensus required in legislative bodies or the distracting requirement for periodic accountability to an electorate.

Thus, if she is confirmed to the U.S. Supreme Court, we anticipate that Ms. Kagan often will treat the U.S. Constitution not as a body of basic law that truly constrains both legislators and judges, but rather, as a cookbook in which may be found legal recipes that will allow the imposition of the policies that Ms. Kagan deems to be justified or advisable, or that are so regarded by whatever groups she sees as the enlightened elites on a given subject. This will be in keeping with the models provided by two of Ms. Kagan's judicial heroes, Justice Marshall and Aharon Barak, the former president of the Supreme Court of Israel.

The White House documents reveal Ms. Kagan to have been a key strategist – perhaps, indeed, the lead strategist within the White House – in the successful effort to prevent enactment of the Partial-Birth Abortion Ban Act during the Clinton Administration. The picture that emerges of

Ms. Kagan is not that of a staffer who presented the President with objective information and disinterested analysis, but rather, a staffer who sometimes presented selective and tendentious information, and who employed a variety of legal and political arguments, to achieve her overriding goal of defeating the legislation.

Early on (in January, 1996, if not earlier), it appears that Ms. Kagan was instrumental in providing President Clinton gravely distorted assertions regarding the frequency of partial-birth abortion and the reasons for which it was typically performed, although more accurate information had been published by a congressional committee and was readily available. In June, 1996, she described a private briefing from the American College of Obstetricians and Gynecologists (ACOG) in which she learned that "[i]n the vast majority of cases, selection of the partial birth procedure is not necessary to avert serious adverse consequences to a woman's health . . . . there just aren't many [circumstances] where use of the partial-birth abortion is the least risky, let alone the 'necessary,' approach." Although Ms. Kagan herself described this briefing as "a revelation," she also advised against immediately conveying its substance to the President. Moreover, in December 1996, when Ms. Kagan obtained an ACOG draft for a proposed *public* statement that reported that "a select panel convened by ACOG could identify no circumstances under which [the partial-birth] procedure . . . would be the only option to save the life or preserve the health of the woman," Ms. Kagan wrote that such a public statement "of course, would be disaster." It appears that Ms. Kagan was dismayed not by the *realities* of partial-birth abortion, but by the prospect that public awareness of those realities would harm the White House efforts to prevent enactment of the ban. In addition, it appears that Ms. Kagan herself was probably the originator of diluting language that appeared in the final public statement approved and released by the ACOG Executive Board in January, 1997 – ostensibly as the judgment of top medical authorities.

Initially, in February 1996, President Clinton favored banning partial-birth abortions, both before and after "viability," except in any case in which, in the abortionist's judgment**,** *the pregnancy itself* threatened the life of the mother or serious adverse health consequences. But Ms. Kagan objected that this was unconstitutional and that pro-abortion advocacy groups "will go crazy." She argued for allowing use of the method when any "serious" health benefit was asserted *even if the woman and her unborn baby were entirely healthy*, and prevailed. The following year (in May, 1997), Ms. Kagan pushed further. Employing a mixture of legal, policy, and political arguments, she ultimately won Mr. Clinton's endorsement for a substitute bill proposed by Senator Daschle, which applied *no restrictions whatever* on partial-birth abortion prior to "viability" (for example, in the fifth and sixth months, which in fact is when the greatest number of partial-birth abortions are performed), and which applied only a loose, loophole-ridden standard on abortionists even in the seventh month and later. Ms. Kagan explicitly recognized, in a memorandum dated December 14, 1996, that Daschle's purpose was to "provide cover for pro-choice Senators (who can be expected to support it) . . . ." In a memo dated May 13, 1997, Ms. Kagan advised President Clinton to "endorse the Daschle amendment in order to sustain your credibility on HR 1122 [the Partial-Birth Abortion Ban Act] and prevent Congress from overriding your veto."

Some recent commentators have viewed these documents as showing Ms. Kagan in a "centrist" role, since even the Daschle Amendment was criticized by some pro-abortion advocacy groups and by some Justice Department officials, who regarded it as too restrictive. We disagree with this reading. The documents contain clear evidence that Ms. Kagan was in sympathy with the Justice Department's perspective regarding the Supreme Court precedents (see, for example, Ms. Kagan's memorandum to Walter Dellinger dated February 24, 1996), but Ms. Kagan had no intention of allowing constitutional technicalities to get in the way of what she viewed as a workable strategy to defeat the bill and keep partial-birth abortion unrestricted.

The bottom line is that Ms. Kagan was instrumental in persuading President Clinton to endorse in 1997 an alternative proposal (the Daschle substitute) that was more protective of the practice of partial-birth abortion than the position which the President had embraced in 1996, but which also was sufficiently artful in its language to provide political "cover" for pro-abortion senators, and thereby to prevent the real ban from becoming law. Although the Partial-Birth Abortion Ban Act was supported, in the 105th Congress, by more than two-thirds of the House of Representatives and by 64 members of the U.S. Senate, the effort to override President Clinton's second veto fell three votes short in the Senate in 1998. Thus, the Kagan-backed strategy did, in fact, prevent enactment of the Partial-Birth Abortion Ban Act during the Clinton Administration. **Ms. Kagan played a key role in keeping the brutal partial-birth abortion method legal for an additional decade.**

Ultimately, a bill that differed little from the bill that Elena Kagan fought so tenaciously and deemed unconstitutional – a bill that banned partial-birth abortion both before and after "viability," unless necessary to save a woman's *life* – was upheld by the U.S. Supreme Court in 2007, after having been signed into law by President George W. Bush in 2003.

On other issues of interest to our organization, Ms. Kagan also comes across in the White House documents as a goal-oriented staffer who worked hard to push policy decisions in directions that we regard as pernicious.

For example, soon after the first cloned human mammal (Dolly the sheep) was created in 1996, Ms. Kagan defended the position that the creation of human embryos by cloning should be allowed, as long as the embryos were used as research subjects and not allowed to develop to birth (a policy that in later years came to be known as "clone and kill").

In 1998, Ms. Kagan addressed the question of whether physicians in Oregon should be prevented by federal law from using federally controlled drugs in the practice of assisted suicide. Ms. Kagan opined that federal legislation would be a "terrible idea."

In the area of First Amendment jurisprudence, Ms. Kagan has troubling views. For decades, the U.S. Supreme Court has read the First Amendment's command, "Congress shall make no law . . . abridging the freedom of speech, or of the press . . .," to apply to speech – including paid advertising – by organized groups of Americans regarding those who hold or seek federal office. In an e-mail written October 31, 1996, Ms. Kagan went out of her way to say that she disagreed.

She wrote: "I also think the Court should reexamine its premise that the freedom of speech guaranteed by the First Amendment entails a right to throw money at the political system." But if modes of communication that cost money are excluded from the scope of the First Amendment, then those with control of mainstream media outlets and other entrenched elites gain political advantage, while those who represent unfashionable causes are relegated to the soapbox in the park.

As Solicitor General, in the case of *Citizens United v. FEC*, Ms. Kagan defended the proposition that the government has the authority to severely restrict or ban not only broadcast ads but even pamphlets, if produced by incorporated groups, that are deemed to be election-related because of their proximity to an election and their reference to federal office seekers. President Obama singled out Ms. Kagan's work on this case for special praise at the press conference at which he announced her nomination to the U.S. Supreme Court. On this issue, in which the social policy favored by most contemporary liberal elites runs headlong into one of the clearest prohibitions in the Bill of Rights, the evidence suggests that Elena Kagan, if confirmed to the Supreme Court, will disregard the command of the First Amendment in order to permit a system of government-managed speech about officeholders and office seekers, with the underlying purpose of enhancing the influence of some groups of political stakeholders at the expense of other groups.

In 1995, Elena Kagan wrote that "it should be no surprise by now that many of the votes a Supreme Court Justice casts have little to do with technical legal ability and much to do with conceptions of value." We respectfully suggest that enormous damage already has been done to the body politic by Supreme Court justices who believe that they have the right to impose their "conceptions of value" even when this requires overriding constitutional laws adopted through the normal processes of representative democracy, as we saw in *Roe v. Wade*, and even when it requires tortured evasions of clear constitutional prohibitions, such as some justices have employed to justify government-imposed restrictions on political speech.

While all of these matters should be explored in greater depth during the forthcoming hearings, we cannot conceive that anything could be said that would fundamentally alter our assessment of this nominee. Therefore, we respectfully urge that you oppose Ms. Kagan's confirmation to the U.S. Supreme Court.

Sincerely,

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