



NARAL
Pro-Choice America

August 11, 2005

Brooks Jackson, Director
Annenberg Political Fact Check
320 National Press Building
Washington, DC 20045

Re: Rebuttal to Factcheck.org Analysis of NARAL Pro-Choice America's TV Ad

Dear Mr. Jackson,

Factcheck.org's analysis of the television advertisement released by NARAL Pro-Choice America on August 8, 2005 is deeply flawed, and its conclusion that the "ad is false" should be retracted. The analysis, written by Matthew Barge,¹ contains many legal and factual errors. One might disagree with the opinions stated in the ad or even have a different view of how John Roberts' role in a particular case should be characterized; however, **every factual statement made in NARAL Pro-Choice America's ad is completely accurate and supported by objective documents. The ad is not "false."** John Roberts did indeed file briefs (and although not mentioned in the ad, actually presented oral argument before the U.S. Supreme Court twice) supporting violent fringe groups, with the effect of excusing their actions by helping to remove a crucial legal remedy that had been the most effective tool against them.

Some of the more glaring errors in Factcheck.org's analysis are detailed below.

Factcheck.org Makes Factual Misstatement About "Clinic Bomber" Statement in Ad: Factcheck.org asserts that the ad is false in part because *Bray v. Alexandria Women's Health Clinic* "didn't deal with bombing at all." Though NARAL Pro-Choice America's ad never claimed that *Bray* involved bombing, there were serious concerns about violence escalating from the types of blockades involved in *Bray*, and clinic violence had in the past included bombings. What the ad did claim – and what is beyond question true – is that John Roberts "sided with violent fringe groups, including a convicted clinic bomber." Long before Roberts involved himself in the case, Michael Bray, one of the named defendants in the *Bray* case, was convicted for his role in the bombings of several reproductive health facilities.² John Roberts did, therefore, side with a convicted clinic bomber. He also sided with a violent fringe group - the violent history of Operation Rescue is well known.³

Factcheck.org Falsely Suggests that Roberts Did Not Support *Bray* Defendants: In a puzzling statement, Factcheck.org states that “the ad misleads when it says Roberts supported a clinic bomber. It is true that Roberts sided with the bomber . . .” Factcheck.org further states that Roberts merely “made the same arguments as” the defendants. However, there is no question that Roberts **sided with** convicted bomber Michael Bray and the other defendants, and, in doing so, Roberts **supported** those defendants. The brief itself is titled a “brief for the United States as amicus curiae **supporting** petitioners,”⁴ with the petitioners in this case of course being the defendants, including Michael Bray. The filing of an amicus brief is a discretionary act, and the office of the Solicitor General enjoys wide latitude in deciding whether to participate as an amicus in any particular case. If the Solicitor General’s office did not intend to support the *Bray* defendants, the office could have chosen to participate on the side of the reproductive health clinics or not to participate in the case at all. As an attorney for several of the defendants in *Bray* stated: “It adds a lot of credibility to our arguments to have the United States Government to our side.”⁵

Factcheck.org Makes Factual Misstatement About Timeline Used in Ad: Factcheck.org states that the “ad fails to mention that the ‘court briefs’ it mentions are actually from nearly seven years before the abortion clinic bombing talked about in the ad.” As the sidebar to the Factcheck.org article demonstrates, the date of the filing of the brief – April 11, 1991 – appears on screen as part of the overall image of the brief’s cover. The year of the brief’s filing is visible on-screen, as is evidenced by the date’s inclusion in Factcheck.org’s summary of the ad in its sidebar. Furthermore, the ad opens with the announcer stating that Ms. Lyons was injured in a bombing “seven years ago” and includes an image of the New Woman All Women Health Clinic and the date – January 29, 1998. There was no attempt by NARAL Pro-Choice America to misstate the timeline of events or to imply that Ms. Lyons’ injuries occurred as the result of the actions at issue in the *Bray* case.

Factcheck.org Makes Factual Misstatement About Roberts’ Legal Argument: It is worth noting that even Factcheck.org’s legal description of the brief Roberts filed in the *Bray* case is not accurate. Factcheck.org states that Roberts argued that the act at issue in the case “applied only to conspiracies to deprive people of civil rights due to racial discrimination, not gender discrimination.” In fact, that was not Roberts’ position. Roberts actually argued that, regardless of whether gender discrimination was covered by the act at issue in the case, the clinic blockades were not gender discrimination at all. The brief states that the question of whether gender discrimination was actionable under the law was one that there was “no need to answer” in this case.⁶ The brief further adds that, even if the act at issue was “broad enough to reach gender-based animus, the actions taken by the petitioners are not a form of gender-based discrimination.”⁷

Factcheck.org Minimizes John Roberts’ Role in Filing of the *Bray* Brief: The ad states that “John Roberts filed court briefs supporting violent fringe groups and a convicted clinic bomber.” Factcheck.org states, without explanation but apparently in an attempt to minimize Roberts’ role, that Roberts was “one of six Justice Department officials who submitted the brief.” In fact, the ad is accurate when it says Roberts filed the brief – his name appears on the brief itself. Furthermore, Roberts was the second in command at the Solicitor General’s office, a senior political appointee largely responsible for shaping legal strategy. Roberts appeared to have been the office’s point person

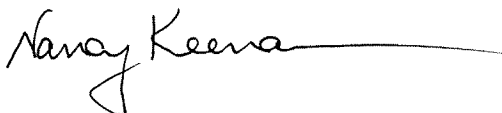
on its strategy around the clinic violence issue – appearing twice before the Supreme Court to argue the *Bray* case and making media appearances to defend his office’s position.⁸

Factcheck.org Minimizes Operation Rescue’s Lawlessness: Factcheck.org paints a grossly misleading picture of the nature of Operation Rescue “protestors.” At the time of *Bray*, reproductive health clinics were under siege by anti-choice extremists. In many cases, state law enforcement was outnumbered, overpowered, and overwhelmed, despite their best efforts. For example, in their *amicus* brief in *Bray*, the State Attorneys General of Virginia and New York pleaded to the Supreme Court to make federal civil rights laws and remedies available to reproductive health clinics and other victims of Operation Rescue’s lawlessness. They insisted that “[n]o state, or group of states, is equipped alone to deal with and redress the deprivations of federal rights caused by the nationwide activity of Operation Rescue.”⁹

The City of Falls Church, home to one of the plaintiff clinics in *Bray* that experienced clinic blockades on almost a weekly basis for five years,¹⁰ declared in its *amicus* brief that it could not effectively contend with Operation Rescue’s “military-style tactics.” During blockades that local law enforcement were unable to effectively handle, Falls Church reported that “[s]ome [patients] suffered physical injury, locked captive in cars that could not move through the parking lot, or bunkered inside the clinic from which medical personnel seeking to treat them had been denied access. . . . It was only when the federal court in this case entered its injunction under § 1985(3) against the blockades and those that would act in furtherance of them that these disturbances ceased.”¹¹

Factcheck.org Is Profoundly Misguided To State That Operation Rescue’s Behavior Is Akin to the Civil Rights Movement: Factcheck.org states that Operation Rescue’s actions “in some ways mirrored the non-violent tactics used earlier by civil-rights activists.” This restatement of anti-choice extremists’ talking points is clearly untrue. As Justice Stevens wrote in *Bray*, “the demonstrations in the 1960’s were motivated by a desire to extend the equal protection of the laws to all classes – not to impose burdens on any disadvantaged class. . . . The suggestion that there is an analogy between their struggle to achieve equality and these petitioners’ concerted efforts to deny women equal access to a constitutionally protected privilege may have rhetorical appeal, but it is insupportable on the record before us. . . .”¹² Justice Stevens also noted that *Bray* “presents a striking contemporary example of the kind of zealous, politically motivated, lawless conduct that led to the enactment of the Ku Klux Act in 1871 and gave it its name.”¹³ Similarly, Justice O’Connor likened Operation Rescue’s behavior to the Ku Klux Klan, noting that “[l]ike the Klan conspiracies Congress tried to reach in enacting §1985(3), [p]etitioners intended to hinder a particular group in the exercise of their legal rights because of their membership in a specific class.”¹⁴

Sincerely,



Nancy Keenan
President

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- ¹ See Annenberg Political Fact Check, *About Us – Factcheck.org*, at <http://www.Factcheck.org/miscreports70.html> (last visited Aug. 10, 2005).
- ² Bray was convicted of two counts of conspiracy and one count of possessing unregistered explosive devices. The court sentenced him to 10 years in prison and ordered him to pay restitution in the amount of \$43,782. The U.S. Court of Appeals for the Fourth Circuit overturned his conviction on a technicality relating to jury selection. Before he was retried, Bray entered a plea that resulted in him serving 46 months in prison. Planned Parenthood Federation of America, *Extremist Biography: Michael Bray* (Feb. 2, 2005), at <http://www.ppfa.org/pp2/portal/files/portal/webzine/eyeonextremism/eoe-050202-michael-bray.xml> (last visited Aug. 10, 2005); National Abortion Federation, *Anti-Abortion Extremists/The Army of God and Justifiable Homicide*, at http://www.prochoice.org/about_abortion/violence/army_god.html (last visited Aug. 10, 2005); National Abortion Federation, *History of Violence/Arsons and Bombings*, at http://www.prochoice.org/about_abortion/violence/arsons.asp (last visited Aug. 10, 2005); Sandy Banisky, *Bowie Family Condone Anti-Abortion Violence*, BALTIMORE SUN, Oct. 9, 1994, at 1A.
- ³ See e.g., Brief of 29 Organizations Committed to Women's Health and Women's Equality as Amicus Curiae in Support of Respondents, *Bray v. Alexandria Women's Health Clinic*, No. 90-985 (Apr. 11, 1991).
- ⁴ Brief for the United States as Amicus Curiae Supporting Petitioners, *Bray v. Alexandria Women's Health Clinic*, No. 90-985 (Apr. 11, 1991) (emphasis added).
- ⁵ Gwen Ifill, *1871 Law at Issue in Abortion Debate*, N.Y. TIMES, Aug. 11, 1991, at 16.
- ⁶ Brief for the United States as Amicus Curiae Supporting Petitioners, *Bray v. Alexandria Women's Health Clinic*, No. 90-985 (Apr. 11, 1991).
- ⁷ Brief for the United States as Amicus Curiae Supporting Petitioners, *Bray v. Alexandria Women's Health Clinic*, No. 90-985 (Apr. 11, 1991).
- ⁸ See e.g., Gwen Ifill, *1871 Law at Issue in Abortion Debate*, N.Y. TIMES, Aug. 11, 1991, at 16; MacNeil/Lehrer NewsHour Transcript #4133, Aug. 7, 1991.
- ⁹ Brief of the Attorneys General of the State of New York and the Commonwealth of Virginia as Amici Curiae in Support of Respondents, *Bray v. Alexandria Women's Health Clinic*, No. 90-985 (May 13, 1991).
- ¹⁰ *National Organization for Women v. Operation Rescue*, 726 F. Supp. 1483, 1489 (E.D. Va. 1989).
- ¹¹ Brief for Falls Church, Virginia as Amicus Curiae Supporting Respondents, *Bray v. Alexandria Women's Health Clinic*, No. 90-985 (May 13, 1991).
- ¹² *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 344-45 (1993) (Stevens, J., dissenting).
- ¹³ *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 313 (1993) (Stevens, J., dissenting).
- ¹⁴ *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 349 (1993) (O'Connor, J., dissenting).