Planned Parenthood® Federation of America, Inc.

Planned Parenthood® Action Fund, Inc.

January 10, 2006

United States Senator Arlen Specter
Chairman, Committee on the Judiciary
United States Senate

United States Senator Patrick Leahy
Ranking Member, Committee on the Judiciary
United States Senate

Dear Chairman Specter and Senator Leahy:

On behalf of the Planned Parenthood, the world's largest and most trusted voluntary reproductive health care provider, we urge you to oppose the nomination of Judge Samuel Alito to be Associate Justice of the United States Supreme Court. Planned Parenthood has a long-standing history of working to ensure the protection of reproductive rights, as well as working to advance the social, economic, and political rights of women. Because the United States Supreme Court wields the ultimate and unreviewable power to define the contours of women's rights, the right to privacy, reproductive freedoms, and other basic civil rights, Planned Parenthood believes that justices appointed to this Court must demonstrate an affirmative commitment to safeguarding these fundamental rights and freedoms.

We believe that not only has Samuel Alito, Judge for the Third Circuit Court of Appeals, failed to demonstrate a commitment to protecting these rights, he has revealed himself to be actively hostile toward them. Indeed, his record is one of open antagonism toward constitutional protections for reproductive rights and freedoms. Therefore, PPFA strongly opposes his nomination to the United States Supreme Court.

Alito has made clear on repeated occasions his hostility toward the right to choose. In 1985, while serving as an Assistant to the Solicitor General in the Department of Justice, Alito devised and promoted a legal strategy to bring about the eventual overruling of *Roe v. Wade*, and, in the meantime, to "mitigate its effects." In an application he submitted to become a Deputy Assistant U.S. Attorney General, he wrote that he was that he was "particularly proud" of his work on cases where the government argued that "the Constitution does not protect a right to an abortion."

His hostility continued as an appellate judge. Indeed, Judge Alito's judicial record reflects and advanced the very legal strategy he laid out years earlier to undermine the

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right to choose. Judge Alito was the lone dissenter in *Planned Parenthood of Southeastern Pennsylvania v. Casey* when the case was before the Third Circuit. Writing separately from his colleagues, Alito voted to uphold a state law that forced married women to notify their husbands prior to obtaining an abortion. On review, a majority of the Supreme Court – including Justice O'Connor – emphatically rejected Alito's interpretation as one based on outdated notions of women's role in marriage and society and held the husband notification provision unconstitutional.

Judge Alito's record demonstrates hostility to women's equality in general and reproductive rights specifically. Judge Alito has been nominated to replace Justice Sandra Day O'Connor, who has for over a decade played a crucial role in protecting these fundamental rights. If permitted to take Justice O'Connor's seat on the High Court, Judge Alito would have the power to advance his "closely held" personal view that *Roe* should be overturned, to work to unravel settled law and to influence adversely the course of the Constitution's basic protections for access to reproductive health care for more than a generation. Judge Alito's record suggests that, if confirmed, he would do just that.

On behalf of the millions of women and men who count on us to protect their reproductive health, we urge you to oppose the nomination of Judge Samuel Alito to Associate Justice and protect the right to choose.

Sincerely,

Karen Pearl
Interim President

Written Testimony of
Karen Pearl, Interim President
Planned Parenthood Federation of America and Planned Parenthood Action Fund

submitted to the

Senate Judiciary Committee

on

the Nomination of Samuel A. Alito, Jr.
to the United States Supreme Court

January 18, 2006

Testimony of Karen Pearl, Interim President
Planned Parenthood Federation of America
Planned Parenthood Action Fund
January 18, 2005

Planned Parenthood Federation of America (PPFA), the world's largest and most trusted voluntary family planning organization, and the Planned Parenthood Action Fund (PPAF), PPFA's political and advocacy arm, have a long-standing history of working to protect reproductive rights as well as working to advance the social, economic, and political rights of women. Each year, Planned Parenthood affiliated health centers provide high-quality, affordable reproductive health care and sexual health information to nearly five million people nationwide. Planned Parenthood welcomes everyone — regardless of race, age, sexuality, disability, or income. In fact, one in four American women has visited a Planned Parenthood health clinic at least once in her life. This year Planned Parenthood will celebrate 90 years of providing these vital services.

On behalf of the millions of women and men we serve each year, Planned Parenthood is committed to protecting and advancing many of the right and freedoms – such as women's rights and access to reproductive health care – that the United States Supreme Court has the power to secure or dismantle. The United States Supreme Court is responsible for interpreting the Constitution, and, as the final arbiter of law, has enormous power in deciding cases involving women's rights, the right to privacy, reproductive freedoms, and other basic civil rights that Planned Parenthood holds dear. Planned Parenthood believes that judges appointed to the Supreme Court must demonstrate a strong commitment to safeguarding these fundamental rights. PPFA and PPAF will oppose the confirmation of nominees who fail to do so.

Not only has Samuel Alito, Judge for the Third Circuit Court of Appeals, failed to demonstrate a commitment to protecting these rights, he has revealed himself to be actively hostile toward them. Indeed, his record is one of open antagonism toward constitutional protections for reproductive rights and freedoms. During his confirmation hearings, he consistently declined to disavow his prior writings and indeed left open the possibility that – given the opportunity – he would overturn *Roe v. Wade*. Therefore, PPFA and PPAF strongly oppose his nomination to the United States Supreme Court.

Judge Alito has been nominated to fill the seat of Justice Sandra Day O'Connor. In two of the most significant abortion rights cases to come before the Supreme Court in our times, *Planned Parenthood of Southeastern Pennsylvania v. Casey*[1] and *Stenberg v. Carhart*,[2] Justice O'Connor cast the decisive fifth vote in favor of protecting the right to reproductive freedom. Replacing her with a judge – like Judge Alito – who is hostile to this cherished right could place the liberty, equality, health and safety of American women in jeopardy for generations to come.

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[1] *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) (plurality opinion).
[2] *Stenberg v. Carhart*, 530 U.S. 914 (2000).

Testimony of Karen Pearl, Interim President
Planned Parenthood Federation of America
Planned Parenthood Action Fund
January 18, 2005

Judge Alito Does Not Believe the Constitution Protects the Right to Choose

The Supreme Court "in the course of a generation, has determined and then redetermined that the Constitution offers basic protection to the woman's right to choose."[3] In 1973, in *Roe v. Wade*,[4] the Supreme Court recognized for the first time that the Constitution protects a woman's right to choose to terminate a pregnancy at its early stages and protects against all government regulation of abortion that places women's health and safety at risk. Since that historic decision, women and men of this country have come to rely on these protections. In the words of the Court:

> People have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.[5]

And yet, Judge Alito has made clear on repeated occasions his hostility toward this constitutional right. In 1985, while serving as an Assistant to the Solicitor General in the Department of Justice, Judge Alito devised and promoted a legal strategy to bring about the eventual overruling of *Roe v. Wade*, and, in the meantime, to "mitigat[e] its effects."[6] In a memorandum setting forth this strategy, Judge Alito likened the decision of a woman to have an abortion to that of a "judge or juror pronouncing a sentence of death" or "a military officer commanding a mission that he knows will cost lives."[7] He made clear his view that the question of whether *Roe* should be overruled is "live and open" and urged that the Solicitor General "not even tacitly concede *Roe*'s legitimacy."[8]

Contrary to assertions, Judge Alito's record while in the Reagan Justice Department was not merely the work of a disinterested advocate representing a client. Rather, Judge Alito took great pride in this work he did at the Solicitor General's office working to erode the right to choose. Indeed, he wrote in an application that he submitted to become a Deputy Assistant U.S. Attorney General that he was "particularly proud" of his work on cases where the government argued that "the Constitution does not protect a right to an abortion."[9] This was not the statement of a lawyer vigorously advocating the views of his client; Judge Alito stated unequivocally that he "personally believe[s] very strongly" in this legal position.[10]

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[3] *Stenberg*, 530 U.S. at 921.
[4] *Roe v. Wade*, 410 U.S. 113, 153 (1973).
[5] *Casey*, 505 U.S. at 856.
[6] Memorandum from Samuel A. Alito, Assistant to the Solicitor General, to Charles Fried, Solicitor General (June 3, 1985) (National Archives and Records Administration, Record Group 60, #060-89-216), at 8.
[7] *Id.* at 12.
[8] *Id.* at 17.
[9] Samuel A. Alito, attachment to PPO Non-Career Appointment Form (November 11, 1985), at 1.
[10] *Id.*

When offered numerous opportunities during his confirmation hearings to disavow his views of twenty years ago, Judge Alito repeatedly declined to do so. He made clear, repeatedly and unequivocally, his view that the question of whether *Roe* should stand is – in his mind – an open one. Despite his willingness to opine at length about other areas of law, and to openly disavow many controversial views he had expressed in younger years on other areas of law, Judge Alito steadfastly declined to offer the Committee his views on *Roe v. Wade*. We can only surmise from his silence that he continues to believe that the Constitution does not protect the right to an abortion. We are left to draw only one ominous conclusion. Given the opportunity, Judge Alito would strip future generations of American women of the opportunities, liberty and equality guaranteed to their mothers before them by *Roe v. Wade*.

Judge Alito's Record Suggests Opposition to the Constitutional Right to Certain Forms of Contraception

In the years since Judge Alito mapped out his strategy to undermine the protections *Roe* promised to American women, anti-choice legislators have been doing just that – chipping away at *Roe*, law-by-law, restriction-by-restriction, state-by-state. Legislators have enacted anti-choice laws that restrict government funding of abortion services, require mandatory delays, forced parental involvement, biased pre-procedure counseling, and create other unnecessary barriers to access. More recently, anti-choice law enforcement officials have attempted to subpoena the personal, private medical records of women who have had abortions. Ironically, there have even been renewed efforts to restrict access to birth control, including emergency contraception, without which there would no doubt be more unintended pregnancies and a higher demand for abortion services.

Like the right to choose, the right to contraception is a central component of the freedom from government interference in private matters that Americans hold dear. Contraception is fundamental to the ability to plan the number and timing of children, and the struggle to gain and maintain the right to access contraception has been a cornerstone of our advocacy.

It was not until 1965, in *Griswold v. Connecticut,* that the U.S. Supreme Court ruled that the constitutional right to privacy protects the decision of married couples to use contraceptives. In the 1972 case *Eisenstadt v. Baird*, the Court explained that the right to obtain contraceptives also extends to unmarried individuals. The Supreme Court made clear in that historic decision that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[11] During his confirmation hearings, Judge Alito articulated his view that *Griswold* and *Eisenstadt* are settled law. Yet, Judge Alito's writings call into question even the fundamental right of access to certain forms of contraception.

In his 1985 legal memorandum outlining strategies to undermine *Roe*, Judge Alito articulated his view that many common forms of contraception are in fact abortion-causing

[11] *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

agents.[12] This view is at odds with all scientific and medical evidence and is held only by the most extreme opponents of reproductive rights. Taken to a logical conclusion, Judge Alito's belief that certain forms of birth control are abortion-causing agents coupled with his belief that the government should be permitted to ban abortion altogether suggests that Judge Alito would uphold as constitutional laws banning the use of certain common forms of contraception. These radical views are out of step with those of the vast majority of Americans and contravene well-established Supreme Court precedent.

Judge Alito also testified during the hearings that the questions decided in *Griswold* and *Eisenstadt* were so settled that they could not come before him as a Third Circuit judge, or – if confirmed – as a Supreme Court justice. We at Planned Parenthood know this to be false. Our health centers throughout the country witness legislative attempts to attack family planning access, funding, and services. The next associate justice will no doubt be asked to opine on the constitutional validity of these attempts. We cannot afford a justice who will not protect Americans' access to all forms of contraception.

As a Sitting Judge, Alito Seized Upon the Opportunity to Bring to Fruition His Legal Plan to Undermine the Right to Choose

Not long after he was appointed to the Third Circuit Court of Appeals, an historic case would come before Judge Alito that provided him an opportunity to carry out the very strategy to undermine *Roe* that he articulated in his 1985 memo. In 1991, *Planned Parenthood of Southeastern Pennsylvania v. Casey*[13] came before Judge Alito and his colleagues on the Third Circuit. In this historic case, the court was asked to consider the constitutionality of a Pennsylvania law which contained many of the same restrictions on access to abortion that Judge Alito had advocated for only 6 years earlier. The Third Circuit upheld all but one of the restrictions in the Pennsylvania law. Though the court was willing to grant the state great latitude in restricting abortion, a majority of the court concluded that the requirement that married women notify their husbands prior to obtaining an abortion went too far; accordingly, they struck down this requirement.

Judge Alito was not satisfied with his colleagues' decision upholding most of the Pennsylvania law. He dissented from the majority opinion, voting instead to uphold the husband notification requirement. On review, a majority of the Supreme Court – including Justice O'Connor – emphatically rejected Judge Alito's interpretation as one based on outdated notions of women's role in marriage and society and agreed with the majority of the Third Circuit panel that the husband notification requirement is unconstitutional. The Supreme Court emphasized that the requirement hearkens back to a time when "a different understanding of the family" prevailed, when a woman "had no legal existence separate from her husband."[14] Today,

[12] Memorandum from Samuel A. Alito, Assistant to the Solicitor General, to Charles Fried, Solicitor General, *supra* note 6, at 9 ("certain methods of birth control are 'abortifacients.'").
[13] *Planned Parenthood of Southeastern Pa. v. Casey*, 947 F.2d 682 (3d Cir. 1991), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992).
[14] *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 896-97 (1992).

however, such notions are "repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution." In our modern society:

> Women do not lose their constitutionally protected liberty when they marry. The Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power . . . [15]

Judge Alito ignored the inequitable effect of the law on married women, focusing instead on the right of the state to protect a husband's interest.

The Supreme Court majority also emphasized the grave harm the husband notification requirement would inflict on women who are victims of physical, sexual or psychological abuse at the hands of their husbands. For "the significant number of women who fear for their safety and the safety of their children," the Supreme Court concluded, husband notification would have the same impact on some women's right to choose abortion as if the state "had outlawed abortion in all cases."[16] By contrast, Judge Alito inexplicably dismissed what he described as the "heavy impact" husband notification laws would have on some abused women, suggesting that the law at issue was somehow constitutional because it would only adversely impact "a few women."[17]

Finally, Judge Alito noted that the percentage of women adversely impacted relative to the general population of women was small; the requirement would not affect unmarried women at all, nor would it affect the large majority of women who would choose voluntarily to involve their husbands in their decisions to have abortions. Thus, Judge Alito crassly concluded, the burden imposed on women by the requirement is not sufficiently great to find the law unconstitutional. The Supreme Court rejected this reasoning as well. Rather than focusing on the women for whom the law is irrelevant, the Court focused on the women for whom it imposes a burden, correctly noting that "[t]he analysis does not end with the one percent of women upon whom the statute operates; it begins there."[18]

A majority of the Court found that for these women the requirement that they notify their husbands imposes a substantial obstacle to their ability to access abortion. It is the obligation of the courts to protect those – like the battered women who fear the wrath of their husbands – whose rights are most at risk. The reasoning and conclusion of Judge Alito's dissent in *Casey* clearly indicate a lack of respect for the rights of women, married or unmarried, to privacy and reproductive autonomy.

The Supreme Court split 5-4 in *Casey*, with Justice O'Connor providing the crucial fifth vote. Had Judge Alito sat in Justice O'Connor's seat in 1992 and voted to uphold the Pennsylvania law in its entirety, states would be free today to require married women to notify

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[15] *Id.* at 898.
[16] *Id.* at 894.
[17] *Casey*, 947 F.2d at 721 (Alito, J., concurring in part and dissenting in part).
[18] *Casey,* 505 U.S. 833, 894.

their husbands of their intention to obtain abortions. The "repugnant" notion that women lose some of their constitutionally protected liberty upon marriage would be enshrined in Constitutional jurisprudence.

Planned Parenthood does not only fight for women's equality and liberty in Congress and in the courts. Year to year, month to month, and day to day, we wage this battle in our health care clinics all across the country. It is there that we dispense birth control and information, treat illnesses, screen for cancer, and, indeed, save women's lives. *Roe v. Wade* is about much more than the right to abortion. It is about self-determination and bodily integrity; it's about giving women an equal place at life's table. Twenty years after *Roe* was decided, the author of *Roe*'s majority opinion Justice Blackmun described the historic ruling as "a step that had to be taken as we go down the road toward the full emancipation of women."

Judge Alito's record demonstrates hostility to women's equality in general and to reproductive rights specifically. Judge Alito has been nominated to replace Justice Sandra Day O'Connor, who has for over a decade played a crucial role in protecting these fundamental rights. If permitted to take Justice O'Connor's seat on the High Court, Judge Alito would have the power to advance his "closely held" personal view that *Roe* should be overturned, to work to unravel settled law, and to adversely influence the course of the Constitution's basic protections for access to reproductive health care for more than a generation to come. Judge Alito's record suggests that, if confirmed, he would do just that. It is for these reasons that PPFA and PPAF have joined other organizations concerned with women's rights and civil rights in opposing Judge Samuel Alito's nomination to the Supreme Court of the United States. On behalf of the millions of women and men who depend on us to protect their reproductive health, Planned Parenthood urges members of the Senate Judiciary Committee to oppose the nomination of Judge Samuel Alito to the United States Supreme Court.