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January 10, 2006

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Washington, DC 20510

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United States Senate
112 Hart Senate Office Bldg.
Washington, DC 20510

Senator Arlen Specter
United States Senate
711 Hart Senate Office Bldg.
Washington, DC 20510

Senator Patrick Leahy
United States Senate
433 Russell Senate Office Bldg.
Washington, DC 20510

Dear Senators,

The Bar Association of San Francisco (BASF) is one of the largest and most recognized metropolitan bar associations in the United States. Consistent with its By-Laws, BASF historically has addressed issues of legal and social significance to its membership. The appointment of a Supreme Court Justice to replace Justice Sandra Day O'Connor has substantial potential to alter the course of jurisprudence in the United States on issues of great significance to members of the BASF. Accordingly, the Board of BASF has commissioned a careful review of the writings and public statements of the person that the President has nominated to fill this crucial position on the Court. BASF has endeavored to assess whether Judge Samuel Alito possesses the qualities necessary to provide assurance to members of this Association that he will interpret the Constitution and other acts of Congress in a manner that is faithful to and consistent with core values contained in the Constitution.

Judge Alito has served on the Court of Appeals for the Third Circuit for fifteen years, during which time he has issued a substantial number of opinions regarding issues of Constitutional law and national significance. Judge Alito has demonstrated strong legal ability, extensive experience and knowledge in law, as well as substantial intellectual and analytical skills. All of these are important factors in assessing the merits of a candidate for the United States Supreme Court. In addition to these factors, however, it is particularly important when evaluating a nominee for the Supreme Court to consider whether the nominee satisfies standards unique to the position of being the final arbiter of the meaning of the Constitution with ultimate authority to refuse to effectuate acts of Congress. These factors include an understanding of the Court's role under the Constitution to protect the personal rights of individuals and a respect for and sensitivity to the respective powers and reciprocal responsibilities of the Congress, the Court, and the Executive, federal-state relations, and limits on governmental power.

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In both his public statements and his opinions on the Third Circuit, Judge Alito has taken positions that are contrary to the long-established tenets of Constitutional interpretation adopted by BASF. Several of these differences involve core values - fundamental understandings about the rights and responsibilities of citizens and the powers and obligations of government. Because decisions of the Supreme Court are not reviewable and - once final - will determine the course of interpretation for all lower federal courts and state courts interpreting federal law, BASF believes it is important that any Justice serving on the Court respect certain basic principles of constitutional law and interpretation established in prior decisions of the Court. If Judge Alito continued to adopt the same contrary approaches and positions as a member of the Supreme Court, his vote would likely tip the balance away from the decisions of prior courts in a manner that would limit individual rights and expand Executive powers. Such decisions would be incompatible with existing precedents and, by degrees, may deviate from faithful application of core tenets of the Constitution recognized by this Association. Accordingly, to the extent Judge Alito's views run contrary to those expressed by this Bar Association, it is important to determine whether he has nonetheless demonstrated respect for certain core doctrines and has an open mind in his approach to these issues.

BASF is principally concerned about Judge Alito's position concerning the following areas:

1. Reproductive Freedom and Privacy: Judge Alito's dissent in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, his comment in concurrence in *Alexander v. Whitman*, and the strong opinions expressed in his 1985 Justice Department job application, indicate that he does not agree with the fundamental holding in *Roe v. Wade* that the Constitution guarantees to individuals the right to reproductive privacy which includes the qualified right to terminate a pregnancy. His opinions indicate that he would likely vote to overrule this core principle of *Roe v. Wade*, or would otherwise support substantial burdens on a woman's' right to choose. Such a position would be incompatible with the fundamental obligation to adhere to precedent and to faithfully respect and protect individual rights embodied in the Constitution. His approach to *Roe v. Wade* is inconsistent with the positions taken by Justice O'Connor and would thus potentially alter the outcome of Court decisions. It is also inconsistent with prior resolutions of BASF.

2. Civil Rights and Discrimination: In decisions such as *Sheridan v. E.I. Dupont*, *Bray v. Marriott Hotels*, and *Nathanson v. Medical College of Pennsylvania*, among others, Judge Alito urged a very narrow reading of civil rights laws, notably Title VII of the Civil Rights Act of 1964, particularly with respect to claims based on race, gender, age and disability. He has also demonstrated a lack of sympathy to individuals alleging race discrimination in jury selection in such decisions as *Ramseur v. Beyer* and *Riley v. Taylor*. Based on these decisions, it appears that Judge Alito would permit federal civil rights legislation and current interpretations of the Constitution's guarantee of equal protection to be compromised, potentially allowing unchecked prejudice and discrimination to limit the opportunity of Americans. Although Justice O'Connor's decisions in the area of civil rights and discrimination varied at times from those principles articulated by BASF, her opinions reflected both a cautious sensitivity to the grave risks of discrimination and fell within the range of reasonable debate on these issues. Judge Alito's views by contrast fall outside of that range.

3. Separation of Church and State: In cases such as *A.C.L.U. (N.J) v. Black Horse Pike Regional Board of Education*, *Child Evangelism Fellowship v. Stafford Township School District*, *A.C.L.U. (N.J) v. Township of Wall*, Judge Alito has consistently ruled that various public displays of and public support for religious activities do not offend the Establishment Clause and he has supported claims of groups or individuals (excepting prisoners) that their right to the free exercise of religion has been improperly limited. BASF notes with concern the contrast between Judge Alito's solicitude to plaintiffs' claiming

to engage government resources in defense of their private religious activities and his approach toward parties seeking to engage government resources to protect them from bias on the basis of race, gender, and age or disability discrimination. Judge Alito appears unduly inclined to allow government entan glement in issues of religion well beyond that countenanced by the First Amendment or the Supreme Court's Lemon test. This position is in marked contrast to that of Justice O'Connor and to BASF's com mitments to First Amendment principles. It would appear that Judge Alito's decision would have the capacity to tip the balance away from a strict separation of church and state.

4. Civil Liberties: In his rulings, Judge Alito has been conspicuously deferential to law enforcement and has ruled consistently against those alleging that law enforcement officials exceeded or abused their power. In the relatively few instances where he has found that constitutional violations occurred, he has routinely denied any relief for those constitutional violations (e.g., *United States v. Zimmerman*, *Brosius v. Warden*; *Baker v. Monroe Township*; *Doe v. Groody*). BASF has long been concerned with the protection of individual freedom and civil liberties, and the decisions of Judge Alito are overall not consistent with a commitment to protection of individuals against government excesses.

5. Limitations on Congressional Power: Judge Alito's decisions in *United States v. Rybar* and *Chittister v. Dept. of Community and Economic Development*, have been noted as reflecting insights into Judge Alito's approach to issues of restricting Congress' power. In both of these cases, Judge Alito took a very narrow view of Congressional power under the Commerce Clause and voted to overturn Congressional enactments which he believed were in excess of its power. Rybar involved a ban against possession or transfer of machine guns, and Chittister involved an Eleventh Amendment challenge to the application of the Family and Medical Leave Act to state employees. BASF has supported strongly the right of the federal government to enact laws consistent with its Commerce Clause power and to protect public safety from dangerous weapons. Judge Alito's views in Rybar were inconsistent with the range of reasoned debate about the scope of the Commerce Clause power and were rejected by numer ous jurists, including Justice O'Connor. Likewise, Judge Alito's position regarding sovereign immunity was outside the range of views regarding the limited scope of that Amendment. As such, his decision is incompatible with core Constitutional principles requiring deference to the legitimate authority of the Congress, which has long been recognized by the courts as well as BASF.

In analyzing these particular areas, BASF notes that this appears to be consistent with a broader pattern of doctrinal interpretation. Judge Alito has also often voted in ways that would result in limiting citizens' access to the courts and which substantially restrict due process to individuals claiming a violation of their rights. In particular, Judge Alito has been consistently unsympathetic to defendants' rights in capital appeals, often dissenting from opinions by conservative jurists. Judge Alito's public statements are also consistent with this judicial record. For example, he is on record in a job application stating that he believed *Roe v. Wade* should be overruled. Based upon the consistency of his positions in a range of contexts over two decades, it appears reasonable to conclude that Judge Alito would bring this same approach as a member of the Supreme Court.

The membership of The Bar Association of San Francisco reflects a range of views, including some that vary from adopted positions on the foregoing issues, and thus in reviewing the record of a particular candidate some allowance must be made for a range of debate about the scope of certain core rights. Judge Alito's apparent rejection of the core right of reproductive privacy falls outside of that range. Likewise, with respect to his positions on other topics identified as vital by the Bar Association, his views generally fall outside the range of debate that is consistent with the fundamental constitutional tenet. It is notable that Judge Alito has frequently stood alone, even among conservative jurists in defending his positions. As noted, in *United States v. Rybar*, Judge Alito dissented from the majori-

ty holding that Congress had the power to regulate machine guns. Judge Alito purported to be following Supreme Court precedent. However, in addition to the majority in Rybar, eight of nine other Circuits disagreed with Judge Alito, seven of them unanimously. The only decision agreeing with his dissent was vacated by the Supreme Court. Perhaps more significantly, the majority in Rybar was critical not only of Judge Alito's conclusion, but also of his underlying analysis of the Commerce Clause in reaching that conclusion.

Similarly, in *Sheridan v. E.I. Dupont*, Judge Alito was the only judge who dissented from an en banc decision reversing a grant of summary judgment against a sex discrimination claimant. The ten judges who joined the majority opinion pointed out that their holding was supported by three Third Circuit precedents and seven other Circuits' interpretations of the Supreme Court's approach on the issue. In two other discrimination cases, **Bray v. Marriott Hotels** and *Nathanson v. Medical College of Pennsylvania*, Judge Alito dissented on grounds that were sharply criticized by the majority. In Bray, Judge Alito's view of Title VII was characterized as "tightly constricted" and in Nathanson the majority asserted that few disability cases would survive summary judgment if Judge Alito's analysis were applied. In both cases, the majority also criticized Judge Alito for overstepping his appellate role and acting as a fact finder.

In *Baker v. Monroe Township*, and *Doe v. Groody*, claims involving Fourth Amendment violations and allegations of abuse of police power, Judge Alito dissented, contending in Baker that the police were justified in strip searching a woman and her ten year old daughter who happened to be visiting premises that were being searched under a warrant, even though the warrant did not authorize such a search. Judge Alito's dissent caused his then-colleague on the Third Circuit, and now-Director of Homeland Security, Hon. Michael Chertoff, to characterize the effect of Judge Alito's approach as one that would "transform the judicial officer into little more than a cliché 'rubber stamp.'"

Finally, we note with concern that Judge Alito's ideology appears to affect his judgment about the scope of appellate review. With respect to interpretation of facts, a review of Judge Alito's dissenting opinions is instructive, particularly because dissenting opinions often indicate the types of issues and matters upon which a judge has sufficiently strong feelings to formally explain why he or she parts company with judicial colleagues. In these instances, the Bar Association observed several analytical concerns. These include adopting a questionable and inconsistent allocation of the burden of proof in scrutinizing the basis for governmental action. For example, in both Rybar and Chittister, Judge Alito was unwilling to accept Congressional determinations to uphold legislation. In Rybar, Judge Alito placed great weight on the fact that Congress had failed to provide "empirical support" for its determination that interstate commerce was affected, and had instead relied upon theoretical connections. This approach was criticized by the Rybar majority for violating the separation of powers, and requiring Congress to "play show and tell with the federal courts."

In contrast, where the Pennsylvania legislature passed restrictions on a woman's right to obtain an abortion, including the requirement that a married women secure her husband's consent, Alito's dissent required no empirical support. Rather, Judge Alito offered his own perspectives regarding the likely burden on the recognized constitutional right, and offered reasons for the legislature's determination that had no nexus to the legislative record. Likewise, in *Banks v. Beard* Judge Alito dissented and would have upheld a prison regulation denying prisoners newspapers and photographs of their family even in the absence of any empirical support. Although the majority correctly observed that the Department of Corrections had offered no evidence that the rule was rationally related to any rehabilitative purpose, Judge Alito would have upheld it based upon deference to the judgment of prison officials acting without any supporting evidence.

A careful review of Judge Alito's opinions reveals numerous other instances in which Judge Alito has raised factual issues or strict technical interpretations in a manner that reduces access to procedure by individuals seeking to

vindicate individual rights except in the context of promoting religious expression. For example, in *A.C.L.U. (NJ) v. Wall*, Judge Alito issued an opinion rejecting the standing of citizens to challenge a religious display on public property where, based on prior precedent in a virtually identical case, it was evident that the challenge would have been meritorious. By contrast, in cases involving claims by religious advocates, Judge Alito has parted company with the vast majority of his Court in objecting to technical or factual principles that prevented the Court from reaching the merits. Thus, in *C.H. v. Oliva*, Judge Alito accused the nine-judge majority of wrongly avoiding the issue of whether the movement of a first-grader's picture to a less prominent area of an exhibit was motivated by discrimination against the picture's religious theme.

Finally, the perception that Judge Alito's consideration of the merits of a case may be affected by ideological judgments is presented squarely in his decision in *Smith v. Horn*. There, the majority (two former prosecutors appointed to the bench by President Reagan) had invalidated a first-degree murder conviction based on erroneous and misleading instructions. In dissent, Judge Alito characterized the majority decision as "shocking" and "dangerous." He argued not only that the instruction was not necessarily misleading, but also further that the Court should not have reached the issue because the defendant had, in Judge Alito's view, defaulted any claim by not previously objecting to the instructions in state proceedings. A review of the record demonstrated that the state itself had not raised this issue either previously to, or in front of, the Third Circuit. Rather, Judge Alito had apparently reviewed the record himself and discovered violations of state procedural rules that were not sufficiently important to be raised as concerns by the state itself. As the majority observed:

> "...where the state has never raised the issue at all in any court, raising the issue sua sponte puts us in the untenable position of ferreting out defenses upon which the state has never sought to rely. When we do so, we come dangerously close to acting as advocates of the state rather than impartial magistrates."

Based on the foregoing considerations, BASF believes that a review of Judge Alito's opinions in areas of Constitutional law reveals that his approach is in opposition to important principles recognized by the membership of the BASF. Judge Alito's approach to resolving issues in these areas is of particular concern given that Judge Alito would be replacing a Justice who has provided a critical fifth vote protecting key precedents underlying these principles. In light of the consistency of his positions on these issues implicating individual rights, the power of Congress, and the separation of church and state, and his apparent reliance on factual or interpretive standards that support achievement of these positions, BASF is not able to conclude that he has demonstrated that he will interpret the Constitution and other acts of Congress in a manner that is faithful to and consistent with core values contained in the Constitution..

For the foregoing reasons, The Bar Association of San Francisco opposes the confirmation of Judge Samuel Alito to serve as an Associate Justice of the United States Supreme Court pursuant to section 4.13 (a) of the By-Laws of The Bar Association of San Francisco. The position taken in this resolution is that of the Board. Twenty-three (23) directors voted in favor of the resolution. Two (2) opposed and one (1) abstained, with two non-votes.

Very truly yours,

Joan Mei Haratani

Joan Haratani
President, The Bar Association of San Francisco