January 10, 2006

U.S. Senator Ken Salazar
702 Hart Senate Office Building
Washington, D.C. 20510
Fax: (202) 228-5036

Dear Senator Salazar:

The Colorado Hispanic Bar Association (CHBA) expresses its opposition to the confirmation of Samuel Alito as Associate Justice of the United States Supreme Court. After review of his opinions written during his tenure on the United States Court of Appeals for the Third Circuit, the CHBA is concerned that Judge Alito has not displayed sufficient respect for two fundamental legal principles: (1) the role of the jury to resolve disputed questions of fact; and (2) the restraints that *stare decisis* imposes upon a judge's decision-making. Both of these principles recognize the important – but limited – role that an individual judge plays in our justice system. Judge Alito's resistance to these tenets is troubling and counsels against his confirmation to the highest court in the land. Although a detailed discussion of Judge Alito's writings is beyond the scope of this message, the CHBA offers a few examples to illustrate its concerns.

In a 1996 case brought under Title VII of the Civil Rights Act of 1964, an employee alleged that her employer had discriminated against her on the basis of sex. *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061 (3rd Cir. 1996). At issue was the minimum evidentiary showing the plaintiff must make in order to permit the jury to decide her case. All of the reviewing judges agreed that the plaintiff had presented both a *prima facie* case of illegal discrimination and enough evidence to permit the jury to disbelieve the employer's proffered nondiscriminatory reason (for the adverse employment action) as merely a pretext. In an *en banc* proceeding, the Third Circuit held, by an 11-to-1 vote, that the plaintiff presented sufficient evidence to permit the jury's verdict in her favor to stand. The court emphasized that "determining whether the inference of discrimination is warranted must remain within the province of the jury . . . not the court." *Id.* at 1071-72. Alone among the 12 judges, Judge Alito dissented and expressed an extreme view of the plaintiff's evidentiary burden, requiring something akin to the largely discredited "pretext-plus" requirement. *Id.* at 1070, 1078-

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88. Rather than defer to the jury's role as factfinder, Judge Alito would have thrown out the jury's verdict and granted judgment as a matter of law to the employer.

In another Title VII case, Judge Alito, again in dissent, showed similar disregard for the jury's role, voting to keep the case from the jury. *Bray v. Marriott Hotels*, 110 F.3d 986 (3rd Cir. 1997). Referring to Judge Alito's analysis of the evidence, the majority of the court explained that a "factfinder may well agree with that interpretation, but that is not for us to decide." *Id.* at 992. His fellow judges also found that "Title VII would be eviscerated" under Judge Alito's analysis of the law. *Id.* at 993.

Moreover, Judge Alito has displayed a tendency to disregard *stare decisis* (adherence to the rule announced in prior cases). For example, in a death penalty case, the *en banc* Third Circuit granted the defendant a writ of habeas corpus because the prosecution had violated the Equal Protection Clause by striking black jurors on account of their race. *Riley v. Taylor*, 277 F.3d 261 (3rd Cir. 2001). The court noted that its analysis was guided by several prior opinions. *See id.* at 290. Judge Alito dissented again. According to his colleagues, Judge Alito, rather than following precedent, "accord[ed] little weight to these authorities." *Id.* The court also took issue with Judge Alito's attempt to analogize the statistical evidence of the use of peremptory challenges to strike black jurors to the percent of left-handed presidents. *Id.* at 292. The Third Circuit found that Judge Alito had "overlooked the obvious fact that there is no provision in the Constitution that protects persons from discrimination based on whether they are right-handed or left-handed." *Id.* Further, his fellow judges found that Judge Alito had "minimize[d] the history of discrimination against prospective black jurors and black defendants, which was the *raison d'etre* of the [U.S. Supreme Court decision barring the use of peremptory challenges on the basis of race]." *Id.*

These are but a few examples of Judge Alito's seeming reluctance to recognize the limits of *stare decisis* and his willingness to invade the jury's province. Judge Alito's opinions reveal a consistent and discomforting inclination to arrogate undue authority to individual judges such as himself. Judge Alito's activist streak stands in sharp contrast to the cautious pragmatism of Justice Sandra Day O'Connor, whom he would replace on the Court.

The CHBA is particularly troubled by the addition of Judge Alito's unrestrained view of judicial authority to a Supreme Court on which Hispanics are not represented. Given that the Hispanic community has no direct voice on the Court, Hispanics should be very concerned if the Court were to embark on an era in which it feels free to upset settled law and to assume new powers within our justice system. Hispanics expect this institution to operate within the well-recognized limits on its authority. Accordingly, unless and until Judge Alito sufficiently addresses the concerns outlined herein, the CHBA opposes his elevation to the United States Supreme Court.

Thank you for your kind consideration of our message as you perform the Senate's constitutional duty to evaluate carefully the nominees to the Court.

Sincerely,

Victoria Lovato
President
Colorado Hispanic Bar Association