Senator Arlen Specter
Chairman, Committee on the Judiciary
U.S. Senate

Senator Patrick Leahy
Ranking Member, Committee on the Judiciary
U.S. Senate

January 10, 2006

Chairman Specter and Senator Leahy:

Legal Momentum, the nation's oldest women's legal rights organization, opposes the confirmation of Judge Samuel Alito as Associate Justice to the Supreme Court of the United States. Throughout his career he has pursued legal approaches that raise questions about his ability to respect the balance of power between the three branches of government. Judge Alito defers to agency decisions in many settings, while showing skepticism toward individual litigants' claims, appears to support a narrow view of civil rights, prisoners' rights, and workers' rights, appears willing to uphold legislative restrictions on the right to privacy and is willing to limit congressional power while showing excessive deference to the executive branch. This agenda poses a danger to an inclusive society, and a representative democracy with constitutionally required checks and balances that serves the needs of the whole electorate. The legacy of conservative centrist, Justice Sandra Day O'Connor, deserves a replacement that does not rule based on political considerations, but can fairly and justly interpret the laws and Constitution of the United States.

Judge Alito's available record reveals a judicial philosophy that would undermine critical civil and privacy rights and protections. In his public statements, he speaks about the restrained role of judges. Put into practice, however, these views translate into higher burdens for plaintiffs seeking to vindicate their rights, deference to states or institutional defendants and employers, and limits on the ability of Congress to require certain conduct from states. For example, Judge Alito often favors a restrictive reading of the law, which results in the narrowest interpretation of civil rights. Thus, individuals may be unable to enjoy the full reach of these protections at crucial times. Stressing the need for judicial restraint and discouraging judges from legislating from the bench, he has used these themes as a means to limit access to the ability of individuals to have their day in court. And, he frequently argues to constrain the power of the courts and the power of Congress, with regard to binding states. The end result is that individuals, courts, and Congress have less ability to hold states accountable to ensure compliance with the law and remedy legal violations.

Judge Alito has taken a very restrictive approach in employment discrimination cases, resulting in few successes for plaintiffs. In *Bray v. Marriott*, he would have let stand an employer's decision not to promote an African American female employee even though there was considerable evidence of irregularities in the hiring and interview process. Judge Alito argued in dissent that the employer's failure to follow its own rules was not sufficient to prove discrimination against the plaintiff. For him, the employer's argument that the plaintiff was not the best qualified should have been accepted at face value. In contrast, the majority concluded there were enough questions about the employer's motives and conduct to allow the plaintiff her day in court. Moreover, the majority chided Judge Alito's analysis for effectively eviscerating the antidiscrimination purposes of the law, by accepting the employer's reasoning without adequate review to determine whether racial bias influenced the hiring decision. They stressed that what mattered was not whether the company was seeking the "best" candidate, but "whether a reasonable factfinder could conclude that Bray was not deemed the best because she is Black." In his fifteen years on the bench, Judge Alito has almost never ruled for African-American plaintiffs in employment discrimination cases. The Supreme Court deserves a Justice that is willing to consider the full circumstances of the case at hand, not deny plaintiffs their right to be heard.

While Congress has made efforts to protect workers who need time off work to care for a sick family member or to heal from a long term illness, Judge Alito would make it harder for workers to challenge state employers for violating the Family & Medical Leave Act. In *Chittister v. Department of Community and Economic Development*, Judge Alito wrote for a Third Circuit panel that the state of Pennsylvania was immune from lawsuits by state workers alleging

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violations of the FMLA's medical leave provisions. The decision effectively insulated the state from FMLA claims, and undermined the ability of workers to access medical leave when needed. Meanwhile, Justice O'Connor, who Judge Alito would replace, voted to uphold a key provision of the Family and Medical Leave Act. If the Supreme Court adopted Judge Alito's views, millions of workers could lose their ability to vindicate their rights under the Family & Medical Leave Act.

Judge Alito's record strongly indicates that he would question the constitutional right to privacy and undermine existing Court precedent on the issue. In a 1985 job application, he touted his work on Reagan Administration-era cases which argued that the Constitution does not protect a right to an abortion – a position with which he indicated he personally agreed. In a memorandum discussing the strategy for the government's *amicus* brief in a pending case involving a Pennsylvania abortion regulation, he stressed the importance of finding a way to give states maximum latitude to adopt abortion restrictions to undermine, if not overrule, *Roe v. Wade.* After leaving the Administration and becoming a judge on the Third Circuit, he wrote a dissent in *Planned Parenthood of Southeastern Pennsylvania v. Casey,* arguing to uphold burdensome restrictions and hurdles aimed at women seeking an abortion. The Supreme Court ultimately rejected his position, but he once again underscored a desire to place new limits on a woman's ability to make her own reproductive health decisions.

Judge Samuel Alito's rulings on Americans' privacy rights extend even further his support for increased power for the executive branch. As a lawyer in the Solicitor General's Office in 1984, Alito wrote a memo supporting absolute immunity from civil liability for cabinet officials who authorized illegal wiretaps of Americans due to national security concerns. Later, he co-authored a brief to the Supreme Court in which the government argued for absolute immunity- an argument rejected by the Supreme Court. In contrast, Justice O'Connor, writing for an 8-1 majority in the case of American-born detainee Yaser Esam Hamdi (*Hamdi v. Rumsfeld),* in which the court ruled that an American citizen seized overseas as an "enemy combatant" must be allowed to challenge the factual basis of his or her detention, said the Court has "made clear that a state of war is not a blank check for the president when it comes to the rights of the nation's citizens."

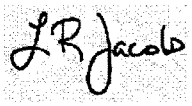
After becoming a judge, Alito wrote in several opinions that would have extended the reach of search warrants for the executive branch. In a dissenting opinion in *Doe v. Groody,* he argued that police officers did not violate the Constitution when they strip-searched a mother and her ten year-old daughter, despite the fact that neither was named in the search warrant. The majority opinion, written by now-Homeland Security Secretary Michael Chertoff, asserted that Judge Alito's position would effectively nullify the Fourth Amendment's warrant requirement and "*transform the judicial officer into little more than the cliché rubber stamp.*" In another dissent, in *Baker v. Monroe Twp.,* Judge Alito voted to keep a jury from hearing whether a police supervisor unlawfully allowed his officers to handcuff, hold at gunpoint and search a woman and her teenage children who happened to stop by to visit the home of a relative in the midst of a search.

Alito's stance on executive branch powers is further revealed in a Feb. 5, 1986 draft memo where he argued that the White House should issue "interpretive signing statements" when signing a bill into a law, and that courts might be persuaded to consider this 'executive intent' equally with legislative intent. The balance of power between the three branches is imperiled when White House interpretation is accorded equal weight with congressional support.

In conclusion, Judge Alito has consistently articulated legal opinions that are outside the mainstream, that undermine legal protections against employment discrimination, that distorts the law in favor of extending power to the executive branch, and that resorts to judicial activism, blatantly ignoring the clear intention of the legislature to push his arch-conservative political agenda. Therefore, we urge you to oppose his nomination to the U.S. Supreme Court.

If you have any further questions, please contact Lisalyn Jacobs at Legal Momentum, (202) 326-0040.

Sincerely,



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CC: Committee on the Judiciary

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