In Opposition to the Supreme Court Nomination of Samuel Alito

Testimony Presented by

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U.S. Senate
Committee on the Judiciary

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On behalf of NARAL Pro-Choice America and the pro-choice American majority we represent, I am honored to submit this testimony to the committee. I appreciate the efforts of the committee and the Senate in trying to ascertain the legal philosophy endorsed by Samuel Alito. I also appreciate your efforts in reviewing his record as an attorney and judge, and your efforts to understand what is at stake with this nomination for American law, and for the American people.

By every objective measure, the American public remains solidly pro-choice and overwhelmingly supports the landmark *Roe v. Wade* decision, which recognized the right to choose as a fundamental constitutional freedom. But Americans' views on this point speak not just to the question of legal abortion; rather, they represent a very basic and fundamental belief about the role of government in our personal lives. Americans believe in freedom and personal responsibility – and this is reflected in their stalwart support of the *Roe* decision. Unfortunately, Samuel Alito does not share their – our – view about the Constitution and the protections it grants. It is for this reason that NARAL Pro-Choice America opposes his nomination and urges you to do likewise.

As you know, as early as 1985, Samuel Alito voiced his opposition to a woman's right to choose and strategized about the best way to erode and ultimately take away this basic freedom. He stated starkly that it was his legal opinion that the Constitution does not protect a woman's right to choose. And he acted on that legal philosophy: As a high-

level lawyer and political appointee in the Reagan Department of Justice, Alito crafted a plan to dismantle *Roe* piece by piece, until such time as the Supreme Court could overturn it altogether. Far from being a mere bureaucrat carrying out the wishes of his superiors, he apparently sought this assignment and later boasted of his pride in having crafted the strategy. Later, when Alito had the opportunity as a judge, he continued to act on that legal philosophy, interpreting legal protections for the right to choose so narrowly as to endanger the most vulnerable women.

Alito had the opportunity during his testimony before this committee to refute these legal beliefs, to expand on his legal views, or explain how they had evolved – in short, to give senators and the American public confidence that their cherished rights were safe in his hands, in spite of his record. Unfortunately, he did none of the above. Instead, Alito affirmed that, in 1985, he was sincere in stating his legal judgment that a woman's right to choose finds no constitutional support. Much more troubling, Alito refused to disavow those statements as being unreflective of his current views. Though given every opportunity to recant his anti-*Roe* legal philosophy, Alito could go no further than to say he has an "open mind," without offering any instances of an issue where he had fundamentally changed his views on a matter of comparable philosophic import as the question of a woman's right to choose. Then, chillingly, he left the door open to voting against *Roe* by agreeing that precedent does not trump every other legal consideration.

At no point in his testimony did Alito agree that a woman's right to choose is protected by the Fourteenth Amendment or any other provision of the Constitution. Indeed, Alito could not even agree that *Roe* and *Casey* are "settled law." In this regard, his answers were strikingly more evasive and disturbing than John Roberts'. Roberts stated that *Roe* and *Casey* were "settled law on at least five occasions;" Alito demurred on this point. His explanation for why he refused to answer is unconvincing: He said that cases concerning reproductive freedom are currently pending before the Court and likely to arise again. Note the contrast, though, with his ability and willingness to endorse as "settled" other areas of the law: For example, although four cases are pending before the Supreme Court concerning redistricting, Alito could state unequivocally that "one man, one vote" was settled law.

Also, notably, Alito misstated and downplayed the legal basis for *Planned Parenthood of Southeastern Pennsylvania v. Casey*. He claimed, contrary to fact, that *Casey* "began and ended" with *stare decisis*. While *Casey* certainly discussed at great length respecting *Roe* for its precedential value, *Casey* also was – in itself – an articulate endorsement of constitutional protection for a woman's right to choose. To quote from the case:

> Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education. [citation omitted] Our cases recognize "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." [citation omitted] Our precedents "have respected the private realm of family

> life which the state cannot enter." [citation omitted] These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. 505 U.S. 833, 851.

How a Supreme Court Justice reads and understands *Casey* matters. Alito discounted *Casey* by saying it relied only on *stare decisis,* rather than a reaffirmation of the central principle of *Roe – that the Constitution protects a woman's right to choose.* If, as Alito contends, the Supreme Court should interpret *Casey* as simply a begrudging reaffirmation of an invalid ruling, *Casey* would become a far weaker precedent than it really is – a persuasive reaffirmation of *Roe's* core principle.

The committee has also heard testimony from scholars and representatives of organizations who analyzed Alito's opinions and speeches concerning the Fourth Amendment and executive branch powers. They determined that he systematically favors an expansion of governmental authority and rules in favor of the government when challenged by an individual nearly every time. Thus Alito's opinions on a woman's right to choose are consistent with his apparent legal philosophy that governmental power trumps individual rights. But if the courts don't set limits on such power, who will? One need not be a supporter of a woman's right to choose to be chilled by the thought of untrammeled governmental authority.

One final point: Overturning *Roe* has long been the goal of a powerful strategic movement – but the Court need not reverse *Roe* outright in order to end legal abortion or make access so difficult, expensive, and dangerous that abortion's legality is practically meaningless. Indeed, overturning *Roe* outright is not the most likely avenue for the Court and anti-choice legislatures to take in the near term. Access to abortion services is already perilously close to nonexistent in many parts of the country. Women, too, are subject to so many restrictions that in many cases traversing the legal gauntlet is, as a practical matter, already impossible.

In other words, rights can be taken away systematically, state by state, law by law, group by group, decision by decision. Alito's 1985 strategy memo to the top officials at the Department of Justice urged that the prudent course at that time would be to end the era of reproductive freedom gradually, by allowing the state more and more latitude to intervene, by redefining abortion to include common forms of birth control, by changing the legal standard of review. Then, Samuel Alito did not think a frontal assault on *Roe* was likely to prevail. But if confirmed, we risk the real possibility that Alito could endorse every tactic, every strategy, and every consequence of the movement to deprive women of their reproductive freedom, perhaps even including the overturn of *Roe* itself. Either way, the end result is that the right to choose could soon be taken away from millions of American women. This steady drumbeat has been intensifying for years.

Senators, the American majority continues to believe that choices about such intimate matters as when and whether to become a parent should be left to the individual – without interference from government and politicians. Decisions that involve so many personal considerations, decisions that go to the heart of one's ethical and moral self, one's personhood, are best left to the person most involved – the woman. Samuel Alito does not share this basic, fundamental view of government, of law, of individual rights. For this reason, I urge the Senate to oppose this nomination.

Thank you for your consideration.

January 11, 2006

United States Senate
Washington, D.C. 20510

Dear Senator:

On behalf of NARAL Pro-Choice America, I am writing to express our opposition to the confirmation of Samuel Alito to the U. S. Supreme Court. During his career, Alito has consistently demonstrated hostility toward fundamental reproductive rights. If he is confirmed as an Associate Justice on the Supreme Court, women will likely lose critical protections that *Roe v. Wade* established.

At the Department of Justice in the 1980s, Alito actively worked to limit and ultimately overturn *Roe v. Wade*. As an assistant to the Solicitor General, he wrote a lengthy, detailed strategy memorandum in which he recommended that the Reagan administration intervene in a significant abortion-related case before the Supreme Court in order to advance the administration's anti-choice agenda. In the memo, Alito detailed his legal strategy to dismantle the protections of *Roe v. Wade*, while pushing toward the ultimate goal of overturning the landmark decision altogether. He supported even the most intrusive and unreasonable restrictions on reproductive freedom. Perhaps most disturbingly, he saw nothing wrong with the government forcing doctors to tell patients that their use of birth control may cause abortion – an utterly inaccurate statement that defies scientific definitions endorsed by the medical community and the federal government.

Far from claims to the contrary, Alito's work at the Department of Justice was hardly that of a government functionary. According to a then-colleague in the Solicitor General's office, Alito sought out the opportunity to work on the administration's friend-of-the-court brief in the case, the colleague has explained that Alito was instrumental in crafting the brief, providing "the research, the thinking, as well as the legal research and analysis." In application for another job in the Department of Justice, Alito later boasted that he was "particularly proud" of his contribution in the case "in which the government has argued in the Supreme Court that ... the Constitution does not protect a right to an abortion." He emphasized that this was a "legal position" in which he personally believed "very strongly."

It was my hope that, during his Senate hearings, Alito would explain further these writings and share with senators and the American public whether he still holds these legal opinions about a woman's right to choose. Unfortunately, thus far, he has failed to

do so. Alito admitted that his 1985 statement accurately reflects his views at the time, but then flatly, repeatedly, refused to answer whether he continues to believe that "the Constitution does not protect the right to an abortion." Especially given his willingness to state his legal views in other areas, we have no choice but to conclude that he in fact continues to hold this extremely troubling view of women's fundamental freedom, and that he will vote to dismantle and ultimately overturn *Roe v. Wade* should he be confirmed.

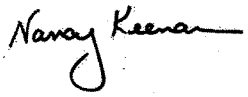
Again, turning back to Alito's career: After his appointment to U.S. Court of Appeals for the Third Circuit, Alito tried, in the single case before him affording an opportunity to shape the contours of reproductive-rights law, to allow states the greatest latitude for restricting women's right to choose. As a member of the three-judge panel that heard *Planned Parenthood of Southeastern Pennsylvania v. Casey* before the case went to the Supreme Court, he wrote a dissent in which he voted to uphold every restriction on the right to choose at issue in the case. He argued in favor of a statute that would have forced married women to notify their husbands before seeking abortion care, even though the statute would endanger and coerce women who may fear abuse if forced to notify their husbands. Just a year later, Justice Sandra Day O'Connor cast the decisive vote to strike down the law. Justice O'Connor, along with her coauthors, wrote, "Women do not lose their constitutionally protected liberty when they marry."

Alito and his defenders sometimes cite other abortion-related decisions he has issued as claimed evidence that his legal philosophy does not predispose him against a woman's right to choose. But the claim is baseless. *Planned Parenthood of Central New Jersey v. Farmer* was squarely controlled by a Supreme Court case that dealt with a virtually identical statute. *Elizabeth Blackwell Health Center for Women v. Knoll* was decided on administrative law grounds and tells us nothing about how Alito will rule on a woman's constitutional right to privacy and choice. Regrettably, pro-choice Americans can take no comfort in these decisions. At every meaningful opportunity, Alito has sought to restrict our constitutional freedom of choice.

Because Samuel Alito's record is rife with hostility toward women's reproductive freedom, NARAL Pro-Choice America must oppose his confirmation to the Supreme Court. I urge you to vote "no" on this nomination.

Thank you for your consideration.

My best,



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