NCIL

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November 28, 2005

The Honorable Arlen Specter
Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Patrick Leahy
Ranking Member
Senate Judiciary Committee
152 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Specter and Senator Leahy:

We write to inform you that the National Council on Independent Living (NCIL) strongly opposes the nomination of Judge Samuel Alito to replace Justice Sandra Day O'Connor as an Associate Justice of the United States Supreme Court.

NCIL is the oldest cross-disability, national grassroots organization run by and for people with disabilities. Our membership is comprised of centers for independent living, state independent living councils, people with disabilities and other disability rights organizations. As a membership organization, NCIL advances independent living and the rights of people with disabilities through consumer-driven advocacy. NCIL envisions a world in which people with disabilities are valued equally and participate fully.

Judge Alito's 15-year track record on the Third Circuit Court of Appeals compels NCIL to formally oppose a US Supreme Court nominee for the first time. Judge Alito's apparent hostility to the *Olmstead* precedent, his activist attacks on Congress' power to enact key civil rights legislation that would endanger laws such as the Americans with Disabilities Act, and his discomfort with enforcement of key safeguards in the Medicaid statute make his confirmation a grave and direct threat to the civil rights of persons with disabilities.

A key part of our work is to eliminate the institutional bias of Medicaid by moving persons with disabilities out of institutions and into community settings so they can control their own destinies and live independently. NCIL also works tirelessly to ensure that the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, the Fair Housing Act Amendments, the Individuals with Disabilities Education Act and other crucial civil rights laws are fully implemented and enforced.

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A thorough review of Judge Alito's long record has demonstrated to persons with disabilities that as a Supreme Court Justice, he would be ideologically predisposed to use the law to roll back the rights we fought so hard to secure and to eliminate recourse for persons with disabilities who are subjected to illegal discrimination. His record on the Third Circuit Court of Appeals is full of examples of results-oriented judicial activism on federalism and access to justice cases and of inordinately rigid interpretations of civil rights statutes. His ideological agenda is undeniable. We are convinced that the same approach to federalism found in Alito's ruling in *Chittister v. Department of Community & Economic Development*[1] in which he ruled that Congress lacked the power to pass the Family and Medical Leave Act (FMLA) would lead an Associate Supreme Court Justice Alito to strike down the Americans with Disabilities Act. His decision in *Chittister* places him to the right of the justice he has been nominated to replace, Sandra Day O'Connor, as well as the late Chief Justice William Rehnquist, who both were part of the 6-3 Majority that upheld the FMLA's leave provisions in *Nevada v. Hibbs.*[2] Rehnquist was unwilling to even hold states responsible for providing access to justice for persons with disabilities. What kind of a chance would persons with disabilities possibly have with an Associate Justice Alito?

If this was not problematic enough, consider the interpretation of the Commerce Clause exemplified by Judge Alito's contention that machine gun sales cannot be regulated under the Commerce Clause in *United States v. Rybar.* This interpretation, which contradicts over 60 years of precedent, poses a direct threat to the ADA's regulatory scheme.[3]

Judge Alito's decisions in housing cases have deprived persons with disabilities of the accessible housing that they need to liberate them from incarceration in institutions and allow them to live independently in the community. His 1999 ruling in *ADAPT v. HUD*[4] gave a free pass to federal agencies to ignore the rules and

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[1] *Chittister v. Department of Community & Economic Development*, 226 F.3d 223 (3d Cir. 2000).

[2] *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003).

[3] *United States v. Rybar*, 103 F.3d 273, 286-94 (Alito, J., dissenting). The Supreme Court's recent decision in *Gonzales v. Raich*, 125 S.Ct. 2195 (2005), squarely rejects the reasoning of Alito's dissent in the gun possession case.

[4] *ADAPT v. HUD*, 170 F.3d 381 (3d Cir. 1999).

regulations they have promulgated and has contributed to a trend that has severely undermined fair housing enforcement in the 3rd Circuit, despite rampant non-compliance with these requirements by public housing authorities.[5] Also, in *Lapid Laurel, L.L.C. v. Zoning Board of Adjustment of Scotch Plains* (2002), Judge Alito joined a decision seriously weakening the protections of the Fair Housing Act. This ruling excused local zoning boards from engaging in an interactive process to identify reasonable accommodations needed to provide equal access for people with disabilities.[6] A 2005 HUD PD&R study has found that people with disabilities face discrimination in up to half of all rental inquiries.[7] It is evident that Judge Alito is more concerned with protecting state and local governments from litigation than he is with enforcing the fair housing laws.

Judge Alito's vote to rehear *Helen L. v. DiDario* (1995) *en banc* raises grave doubts as to whether Judge Alito supports, and would fully uphold, the ADA's integration mandate.[8] The Supreme Court held in *Olmstead v. L.C.* (1999) that unnecessary institutionalization is a form of discrimination. In *Helen L*, a key predecessor of the *Olmstead* decision, the Third Circuit ruled in favor of plaintiffs who had been denied community placements by Pennsylvania's Department of Public Welfare. The ruling held that "the ADA and its attendant regulations clearly define unnecessary segregation as a form of illegal discrimination against the disabled." When Pennsylvania moved for the Third Circuit to rehear the case and reverse its ruling, the motion was rejected for lack of votes. However, Judge Alito favored rehearing the case, strongly suggesting that he objected to its core holdings. Justice O'Connor was a part of the *Olmstead* majority. The *Olmstead* decision has become a crucial touchstone of public policy – and with good reason. When we have hardly turned the corner on the institutional bias in the Medicaid system, we cannot afford to have a justice who would roll back our rights to community integration on the Supreme Court.

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[5] See also, *Three Rivers Center for Independent Living v. Housing Authority of Pittsburgh*, 382 F.3d 412 (3d Cir. 2004). Judge Alito was not involved in this ruling.

[6] *Lapid Laurel, L.L.C. v. Zoning Board of Adjustment of Scotch Plains*, 284 F.3d 442 (3d Cir.2002).

[7] Department of Housing and Urban Development, Policy Development and Research, *Housing Discrimination Study 2000 (HDS 2000): Discrimination Against Persons with Disabilities: Barriers at Every Step*, released July 25, 2005, available online at http://www.huduser.org/publications/hsgspec/dds.html.

[8] *Helen L. v. DiDario*, 46 F.3d 325 (3d Cir. 1995).

In a concurrence in *Sabree v. Houstoun* (2003),[9] Judge Alito reluctantly agreed that individuals who have been denied services under Medicaid were permitted to sue to enforce their rights, but seemed to question that proposition. He described the present rights of beneficiaries as "currently binding precedent" but suggested that he expected that this would change in time. The current environment has seen draconian budgetary cuts in a number of states' Medicaid programs, which are often being done without regard to the impact on the health and welfare of beneficiaries or the institutional bias in the Medicaid system. Individuals with disabilities on Medicaid need judges who are not looking to push the envelope to narrow their legal recourse or to prevent individuals from holding states accountable for violations of the Medicaid statute. Judge Alito's concurrence raises grave concerns that he presents a clear and present danger to the rights of people with disabilities using Medicaid.

Finally, too many of Alito's decisions reflect an activist, hostile and unacceptably restrictive reading and application of disability rights statutes including the Rehabilitation Act of 1973 and the Americans with Disabilities Act. In *Nathanson v. Medical College of Pennsylvania* (1991), Judge Alito's dissent from a Third Circuit ruling that a medical student could take her school to trial for failure to reasonably accommodate her back injury was condemned by his colleagues. They stated, "...[F]ew if any Rehabilitation Act cases would survive summary judgment if such an analysis were applied to each handicapped individual's request for accommodations."[10] Moreover, in *Katekovich v. Team Rent A Car of Pittsburgh, Inc.*, (2002) Judge Alito joined in a troubling decision that ignored Congress' clear intent and permitted an employer to fire an employee with a disability who had been hospitalized for three weeks due to depression and a sleep disorder.[11] In an example of legislating from the bench in its purest form, Judge Alito joined the Third Circuit in ruling that neither the ADA nor the FMLA covered the employee. The court failed to consider whether she was regarded by the employer as having a disability. The Third Circuit also effectively reversed the burden of proof under the FMLA by ruling that Katekovich had not presented sufficient evidence that she was capable of returning to work. In fact, the FMLA explicitly places the burden of proof on the **employer** to demonstrate that the worker is **unable** to return.

NCIL refuses to stand idly by as a President who has promised us a "New Freedom Initiative" to implement the *Olmstead* decision and to uphold the Americans with Disabilities Act nominates a judicial activist whose record strongly suggests that he is predisposed to dismantle many of these landmark civil rights achievements. His nomination, which would dramatically shift the ideological balance of the US

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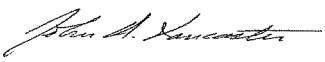
[9] *Sabree v. Houstoun,* 367 F.3d 180 (3d Cir. 2003).

[10] *Nathanson v. Medical College of Pennsylvania*, 926 F.2d 1368, 1387 n.13 (3d Cir. 1991).

[11] *Katekovich v. Team Rent A Car of Pittsburgh, Inc.*, 36 Fed. Appx. 688 (3d Cir. 2002).

Supreme Court, presents a stark threat to the fundamental rights of persons with disabilities that were only won recently through great effort. Our commitment to the belief that people with disabilities are to be valued as equals in American society requires that we take an unprecedented act in our 23-year history to formally, and without reservation, oppose a nominee to the Supreme Court of the United States. We strongly and without hesitation urge you to reject this nomination. By doing so, you would send a message to President Bush that he needs to nominate judges committed to honoring his father's legacy by upholding the Americans with Disabilities Act and guaranteeing access to the courts for persons with disabilities to vindicate their fundamental rights.

Respectfully,



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