January 11, 2006

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

Senator Patrick Leahy
Ranking Member
Senate Judiciary Committee
United States Senate
433 Russell Senate Office Bldg.
Washington, DC 20510

Dear Senators:

On behalf of the National Partnership for Women & Families (National Partnership), I am writing in opposition to the nomination of Judge Samuel Alito to the United States Supreme Court. For over thirty years, the National Partnership has been a leading advocate in support of women's rights. From working to outlaw sexual harassment, to fighting to prohibit pregnancy discrimination, to leading the effort to ensure family and medical leave for over 50 million Americans, the National Partnership has fought for every major policy advance for women and families in the last three decades. The National Partnership also has monitored every Supreme Court nomination that has occurred since our inception, extensively researching and analyzing the records of pending nominees. Our work has been driven by our commitment to the core values of fairness, equality, opportunity, and justice – and it is these values that underlie the principles, policies, and initiatives we have pursued throughout our history.

Judge Alito's nomination comes at a particularly critical time. Justice Sandra Day O'Connor's retirement threatens to alter the balance on the U.S. Supreme Court and undermine years of progress on women's rights, civil rights and the right to privacy. The Court has been closely divided on many critical issues, and Justice O'Connor often has cast the deciding vote in cases with enormous implications for women, people of color, seniors, people with disabilities and others. Thus, there is much at stake with her replacement.

The National Partnership looked closely at Judge Alito's available record, examining his writings and opinions on a range of issues from employment to reproductive rights to affirmative action, and more. Central to our assessment was whether his record evinced a demonstrated commitment to equal justice under law, and a commitment to apply the law in a fair, even-handed manner, regardless of his own views. Our analysis led us to only one possible conclusion: Judge Alito would turn the Supreme Court sharply to the right, and vote to reverse crucial gains from recent years. From protections against discrimination such as sexual and racial harassment, to a woman's right to make her own reproductive health decisions, to accountability if states violate the Family & Medical Leave Act (FMLA), Judge Alito's appointment would put the rights and liberties of women, working people, people of color, and families in serious jeopardy. It is a record that does not merit elevation to the nation's highest court.

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Evaluating Samuel Alito and his Record. Time and again, Judge Alito has interpreted the law in an overly restrictive and unnecessarily rigid manner, at times taking positions so regressive that his court colleagues categorically rejected them. There are few examples of Judge Alito siding with victims of job discrimination, but no shortage of cases in which he sided with employers charged with discrimination. It is clear that he would deny critical rights and protections to women and people of color.

- Judge Alito would make it harder for workers to challenge state employers for violating the FMLA. He ruled that states are immune from lawsuits by state workers alleging violations of the FMLA's medical leave provisions. In doing so, he ignored the persistent gender stereotypes that often have limited women's job opportunities, and concluded that Congress' creation of a leave remedy was not justified.

- He frequently erects evidentiary or procedural hurdles that make it difficult for plaintiffs to win employment discrimination cases or even have their day in court. He has a propensity for discounting the evidence presented by victims of discrimination, while deferring to the evidence presented by employers, even in the face of inaccuracies and discrepancies. In one case, Judge Alito defended an employer's decision not to promote an African American female employee, despite evidence of irregularities in the hiring and interview process. He was willing to accept on its face the employer position that she was not the "best" qualified candidate, without examining whether racial bias was the reason the employer reached that conclusion. Judge Alito would not have allowed this case to even go to trial.

- Judge Alito's briefs urging the Supreme Court to strike down affirmative action programs raise serious questions about whether he would uphold the Court's precedent, or undo the careful balance the Court struck to achieve diversity, nondiscrimination and equal opportunity goals. His views could turn back the clock on advances that have been critical to the success of women and people of color.

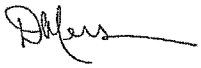
- He consistently questions the constitutional right to privacy, touting his work on cases in which he argued that the Constitution does not protect a right to an abortion, and indicating his personal belief that *Roe v.* Wade should be overturned. As a government lawyer, Judge Alito was the architect of a strategy to uphold restrictive regulations that would make it harder for women to make their own reproductive health decisions without government interference and ultimately lead to complete elimination of women's right to choose.

- His judicial philosophy often results in higher burdens for plaintiffs, greater deference to states or institutional defendants, and limits on Congressional authority.

When President Bush nominated Third Circuit Court of Appeals Judge Samuel A. Alito, Jr. to replace Justice O'Connor, he asked Congress to confirm one of the most conservative judges in the nation to take her seat – a judge who would put at risk our right to make our own private family decisions without government intrusion, to be free from gender-based stereotypes, and to

have full and fair access to jobs, education and fair pay. We all deserve a Supreme Court justice who is committed to the principles of equality and fairness enshrined in our Constitution, and at the heart of hard-won gains central to women's success. Judge Alito would not be that Justice. The National Partnership urges the Senate to reject his nomination.

Respectfully Submitted,



Debra L. Ness
President

CC:

Senator Orrin Hatch
Senator Charles Grassley
Senator Jon Kyl
Senator Mike DeWine
Senator Jeff Sessions
Senator Lindsey Graham
Senator John Cornyn
Senator Sam Brownback
Senator Tom Coburn
Senator Edward Kennedy
Senator Joseph Biden
Senator Herbert Kohl
Senator Dianne Feinstein
Senator Russell Feingold
Senator Charles Schumer
Senator Richard Durbin

TESTIMONY
OF
DEBRA L. NESS,
PRESIDENT OF
THE NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES,
TO THE UNITED STATES SENATE JUDICIARY COMMITTEE
ON THE
NOMINATION OF JUDGE SAMUEL ALITO
TO BECOME AN ASSOCIATE JUSTICE
OF THE
UNITED STATES SUPREME COURT

January 18, 2006

I am Debra L. Ness, President of the National Partnership for Women & Families, and I submit this testimony on behalf of the National Partnership in opposition to the nomination of Judge Samuel Alito to become an Associate Justice of the United States Supreme Court. The National Partnership is a national advocacy organization that has been working since 1971 to advance women's rights, with a particular focus on employment opportunity, work-family policy, and health care policy. From working to outlaw sexual harassment, to fighting to prohibit pregnancy discrimination, to leading the effort to ensure family and medical leave for over 50 million Americans, the National Partnership has fought for every major policy advance for women and families in the last three decades. The National Partnership also has monitored every Supreme Court nomination that has occurred since our inception, extensively researching and analyzing the records of pending nominees. Our work has been driven by our commitment to the core values of fairness, equality, opportunity, and justice – and it is these values that underlie the principles, policies, and initiatives we have pursued throughout our history.

The National Partnership looked closely at Judge Alito's available record, examining his writings and opinions on a range of issues from employment to reproductive rights to affirmative action, and more. Central to our assessment was whether his record evinced a demonstrated commitment to equal justice under law, and a commitment to apply the law in a fair, even-handed manner, regardless of his own views. Our analysis led us to only one possible conclusion: Judge Alito would turn the Supreme Court sharply to the right, and vote to reverse crucial gains from recent years. From protections against discrimination such as sexual and racial harassment, to a woman's right to make her own reproductive health decisions, to accountability if states violate the Family & Medical Leave Act (FMLA), Judge Alito's appointment would put the rights and liberties of women, working people, people of color, and families in serious jeopardy. It is a record that does not merit elevation to the nation's highest court.

Evaluating Samuel Alito and His Record. Judge Alito's available record paints a picture that is deeply troubling. He adopts overly restrictive and unnecessarily rigid interpretations of the law that often deny critical rights and protections to women and people of color. For example:

- 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*

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Economic Development,[1] Judge Alito wrote for a Third Circuit panel that the state of Pennsylvania was immune from lawsuits by state workers alleging violations of the FMLA's medical leave provisions. The decision effectively insulated the state from FMLA claims, and undermined the ability of these workers to access medical leave when needed. If the Supreme Court adopted these views, millions of workers could lose their ability to vindicate their rights under the Family & Medical Leave Act.

- Judge Alito has taken a very restrictive approach in employment discrimination cases, resulting in few successes for plaintiffs. In *Bray v. Marriott*,[2] he would have let stand an employer's decision not to hire an African American female employee who applied for a promotion, even though there was considerable evidence of irregularities in the hiring and interview process. Judge Alito argued in a dissent in that case 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."

- Judge Alito's record on affirmative action raises serious questions about whether he would uphold the Court's precedent, or turn back the clock on advances that have been critical to the success of women and people of color. As a government lawyer, Judge Alito helped prepare briefs urging the Supreme Court to strike down affirmative action efforts aimed at remedying longstanding racial discrimination. His mixed record as a judge on the Third Circuit largely mirrors these views, indicating little support for targeted affirmative efforts to ensure equal opportunity. Judge Alito's elevation to the Court likely would put at risk the careful balance struck by the Court to achieve diversity, nondiscrimination, and equal opportunity goals – and potentially undo hard-won gains for women and people of color.

- Judge Alito's record strongly indicates that he would deny our 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 that argued 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 Court of Appeals, he wrote a dissent in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[3] 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.

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[1] 226 F.3d 223 (3d Cir. 2000).
[2] 110 F.3d 986 (3d Cir. 1997).
[3] 947 F.2d 682 (3d Cir. 1991), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992).

After careful consideration of his available record, the National Partnership for Women & Families concludes that Judge Samuel Alito should not be elevated to the Supreme Court. If his views were to prevail on the Court, women would lose ground – in achieving equal opportunity in the workplace, in their ability to make health care decisions without government intrusion, in having access to family and medical leave, and in getting their cases heard in court.

I. JUDGE SAMUEL ALITO'S RESTRICTIVE INTERPRETATIONS OF LAWS PROTECTING CIVIL AND INDIVIDUAL RIGHTS THREATEN TO UNDO CRITICAL GAINS FOR WOMEN

Many of the gains made by women over the last four decades have grown out of our nation's commitment to equality. The Supreme Court has been at the heart of that progress – its rulings interpreting constitutional and legal rights have secured essential protections for women in the workplace, in schools, in making health care decisions, and at home. As a result, it is *essential* that any nominee to the Supreme Court have a *demonstrated commitment* to the equal justice principles that have been the basis for women's equality. By that measure, Judge Alito's record falls far short. His restrictive interpretations of laws aimed at prohibiting discrimination and ensuring equal opportunity for women and people of color too often have resulted in denying individuals their day in court. He frequently favors imposing higher burdens on plaintiffs that would make it harder for them to vindicate their rights. If adopted by the Supreme Court, Judge Alito's positions would turn back the clock, erode hard-won gains and pose a serious danger to the critical legal rights women depend on every day.

A. Understanding the Context

Judge Alito's available record dates back to his work in the Reagan Administration, where he helped shape legal policy at the Department of Justice.[4] At the start of the 1980s, the incoming Reagan Administration provoked substantial controversy by moving aggressively to re-interpret longstanding civil rights laws and policies, and retreat on initiatives and positions that had proven key to achieving equality for women and people of color.[5] These efforts included strategies to change the direction of the courts through legal advocacy and judicial appointments, and trying to roll back rulings particularly on civil and individual rights with which the Administration disagreed.[6] His own words reveal that Judge Alito was deeply immersed in the Administration's work, helping to craft briefs and develop strategy to advance the Administration's goals.[7] While the full scope of his work is unknown,[8] it is clear that he provided leadership on some of the most

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[4] In August 1981, Judge Alito began working at the Department of Justice in the Reagan Administration in the office of the Solicitor General. In December 1985, he moved to DOJ's Office of Legal Counsel. He left the Administration after being appointed United States Attorney for the District of New Jersey in 1987.

[5] David F. Pike, *Rights Lawyers Rebel at Justice*, Nat'l Law Journal, October 12, 1981.

[6] Dawn E. Johnsen, *Ronald Regan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 Ind. L.J. 363 (2003).

[7] In a 1985 job application to become Deputy Assistant Attorney General in DOJ's Office of Legal Counsel, he wrote that it was "an honor and source of personal satisfaction for me to serve in the office of the Solicitor General during President Reagan's administration and to help to advance legal positions in which I personally believe very strongly. I am particularly proud of my contributions in recent cases in which the government has argued in the Supreme Court that racial and ethnic quotas should not be allowed and that the Constitution does not protect a right to an abortion." Department of Justice Application of Samuel A. Alito, Jr. for the Position of Deputy Assistant Attorney General, Nov. 15, 1985.

[8] Many of Judge Alito's memoranda, briefs, and other documents from his time in the Solicitor General's office and the Office of Legal Counsel at the Department of Justice are being withheld by the Bush Administration. Thus, it is difficult to get a comprehensive picture of the work he performed and the substantive issues he worked on during that time.

controversial issues – such as abortion and affirmative action – frequently staking out the most restrictive positions. A thorough review of Judge Alito's record demonstrates consistency throughout, from his career in the Reagan Justice Department through his 15-year tenure on the Third Circuit Court of Appeals. He restricts core rights and protections, erects barriers for plaintiffs and preserves state power. His words demonstrate personal agreement with many of the legal positions he has taken.[9] But more importantly, his words reveal that the positions he has taken are not simply arguments on behalf of a client, but rather reflect his views on the way the law should work. In sum, it provides a clear and disconcerting picture of the approach to and interpretation of the law he would bring to the Supreme Court.

B. Employment Discrimination and Equal Employment Opportunity

A review of Judge Alito's available written decisions on employment discrimination reveals that plaintiffs before him frequently face significant hurdles in turning to the courts to vindicate their rights.[10]

1. The Family & Medical Leave Act

The Family & Medical Leave Act (FMLA), signed into law in 1993, broke new ground by requiring employers to provide employees with 12 weeks of leave for family or medical emergencies. The enactment of the FMLA was the culmination of a ten-year struggle to pass legislation aimed at creating a level playing field for women and men seeking to balance work and family obligations. Too often, job opportunities for women were limited by persistent stereotypes about their work ethic, commitment, and overall abilities. Women frequently were perceived as "too costly" or "unreliable" in part because of their health care needs, including the potential need for time off from work to deal with a variety of medical conditions such as complications or recovery from pregnancy. These discriminatory attitudes resulted in qualified women losing out on valuable job opportunities – with hiring and promotion decisions driven by biased perceptions, rather than competence or capacity to do the job.

The FMLA, which provides for 12 weeks of family or medical leave for all eligible employees, was a legislative response designed to remedy this ongoing gender discrimination in the workplace. The availability of leave provides women as well as men with the necessary flexibility to take care of their health or family responsibilities without fear of repercussions at work such as losing or being denied a job. Without such a requirement, too many employers could make arbitrary decisions about who is entitled to leave and who is not, based in part on gender-based stereotypes about "proper" caregiving and wage earning roles. Judge Alito's views about the FMLA have drawn particular attention because he has argued that the goal of remedying gender discrimination was not sufficient to justify the medical leave remedy provided by the FMLA. He also has questioned whether Congress' enactment of the FMLA was a valid use of its constitutionally defined powers. Both of these views, if adopted more broadly by the Supreme Court, would have devastating consequences for workers seeking to make use of the FMLA's protections. These views also reflect a fundamental disagreement about the real purposes of the FMLA and its legislative history, which is clear and direct about

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[9] In his 1985 job application, supra n. 12, Judge Alito states: "I am and always have been a conservative and an adherent to the same philosophical views that I believe are central to this Administration."

[10] This analysis focuses primarily on opinions written by Judge Alito to gain a better understanding of his legal analysis and views. Because many of his unpublished opinions were unavailable, we were limited in our ability to undertake an exhaustive assessment of his unpublished writings, although some that were available have been included.

the critical link between family and medical leave on the one hand, and deterring discriminatory behavior by employers on the other.

The Legislative History of the Family & Medical Leave Act Makes Clear That the FMLA's Medical and Family Leave Provisions Were Crafted to Remedy Longstanding Discrimination. The legislation that ultimately was enacted as the Family & Medical Leave Act was the culmination of a decade-long evolution. Although there were many hearings and reports and different versions of the legislation over many years, there were several core goals advocates consistently sought to address.

- First, the legislation was intended to remedy persistent discrimination facing women – and men – in the workplace. Too frequently, employers avoided hiring women because of longstanding stereotypes, including assumptions that women would become pregnant and take leave. Employers that hired women often limited certain types of leave, like pregnancy leave, to women only, without providing men the same opportunity to take time off to care for a newborn child. The goal of the FMLA, from the earliest drafts to the final version of the legislation, was to counteract these discriminatory perceptions by creating a gender-neutral leave remedy available to men and women.

- Second, the legislation was intended to fill in gaps in the law to help women balance their health care needs with their work responsibilities. While pregnancy discrimination was already illegal, the law only required employers to treat pregnancy the way they would treat other temporary disabilities. The FMLA's concept of a serious health condition included pregnancy, in part, to enable women to take medical leave for pregnancy complications that might otherwise not be covered by their employer. Without leave for serious health problems, many women, particularly low-income women and women of color, were disadvantaged by existing gaps in the law because they often were employed in jobs without adequate coverage for medical emergencies. Thus, if they took time off for an illness, they risked losing their jobs.

- Third, the legislation was intended to provide a comprehensive remedy for the intersecting work, family, and medical challenges facing both women and men. Gender stereotypes that cast women and men into certain roles often led employers to treat female and male employees differently, with different expectations, different opportunities for advancement, and different responsibilities. These stereotypes often were multi-layered, encompassing perceptions about women and men that cut across the workplace, family, health, and caregiving spheres. Creating a family and medical leave remedy provided women and men with equal access to leave, so that employers could no longer rely on their own arbitrary attitudes to make decisions about who was more deserving of such protections.

All of these goals are reflected in the FMLA's findings and legislative history. For example, the FMLA's purposes explicitly note that the FMLA's medical leave provision was designed to prevent unconstitutional sex discrimination.

> "SEC. 2. FINDINGS AND PURPOSES.
>
> (b) PURPOSES.-It is the purpose of this Act-
>
> (1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;

> (2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition; ...
> (4) to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, *minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability)* and for compelling family reasons, on a gender-neutral basis; and
> (5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause." [Emphasis supplied.][11]

Section 2(b)(4) explicitly refers to medical leave, stating that a Congressional purpose in including "leave...for eligible medical reasons (including maternity-related disability)" in the FMLA was to "minimize[ ] the potential for employment discrimination on the basis of sex." Discussions in Congressional committee reports about the FMLA and its roots in the Equal Protection clause (in addition to the Commerce Clause) also stressed how the medical leave provisions of the Act effectuated non-discrimination:

> Equal Protection and Non-Discrimination
>
> *A law providing special protection to women or any narrowly defined group, in addition to being inequitable, runs the risk of causing discriminatory treatment. Employers might be less inclined to hire women or some other category of worker provided special treatment.* For example, legislation addressing the needs of pregnant women only would give employers an economic incentive to discriminate against women in hiring policies; legislation addressing the needs of all workers equally does not have this effect. *The FMLA avoids providing employers the temptation to discriminate by addressing the serious leave needs of all employees....* The evidence ... suggests that the incidence of serious medical conditions that would be covered by medical leave under the bill is virtually the same for men and women. Employers will find that women and men will take medical leave with equal frequency.

FAMILY AND MEDICAL LEAVE ACT OF 1990, House Report No. 101-28(I) (Apr. 13, 1989), 101ST Cong., 2ND Sess. 1990, 1989 WL 223041 (Leg.Hist.), at 14-15. [Emphasis supplied.]

The unique challenges facing women in the workplace also were discussed at length in many of the hearings over the years that the FMLA and early versions of the bill were under consideration:

> Thus, while Title VII, as amended by the PDA, has required that benefits and protections be provided to millions of previously unprotected women wage earners in this country, it leaves gaps which an antidiscrimination law, by its nature, cannot fill. This bill, H.R. 2020, is designed to fill those gaps. ...In doing so, the bill conforms to principles of equality previously established under the PDA because pregnancy-related illness and injury would be included within this medical leave protection.....More fundamentally, the bill addresses itself to a much larger structural inequity in the workplace, guaranteeing minimum

[11] Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C.A. § 2601 (a)(6); (b)(1)-(5).

> protection to that disproportionately female, nonwhite segment of the labor force least likely to have job security when illness strikes.

Joint House Oversight Hearing on the Parental and Disability Leave Act, H.R. 2020 Before the Subcommittees on Labor-Management Relations and Labor Standards of the Committee on Education and Labor, and the Subcommittees on Civil Service and Compensation and Employee Benefits of the Committee on Post Office and Civil Service, 99th Cong. 7-8 (1985) (Statement of Wendy Williams, Associate Professor of Law, Georgetown University Law Center).

> The bill's simple two-fold test for availability of leave means that employers will be required to treat employees affected by pregnancy, childbirth, and related medical conditions in the same manner as they treat other employees similar in their ability or inability to work—in harmony with their obligations under the Pregnancy Discrimination Act of 1978. ...The [bill] wisely upholds that well-established principle, thereby protecting working women from the danger that pregnancy-based distinctions could be extended to limit their employment opportunities.

Joint Hearing Before the Subcommittee on Labor-Management Relations and the Subcommittee on Labor Standards of the Committee on Education and Labor House of Representatives, 99th Congress (1986), The Parental and Medical Leave Act of 1986 (Statement of Women's Legal Defense Fund).

> Another significant *benefit of the temporary medical leave* provided by this legislation is the form of protection it offers women workers who bear children. *Because the bill treats all employees who are temporarily unable to work due to serious health conditions in the same fashion, it does not create the risk of discrimination against pregnant women posed by legislation which provides job protection only for pregnancy related disability.* Legislation solely protecting pregnant women gives employers an economic incentive to discriminate against women in hiring policies; legislation helping all workers equally does not have this effect.

S. REP. 102-68, 102ND Cong., 1ST Sess. 1991, 1991 WL 144271 (Leg. Hist.) at 35 [emphasis supplied].

All of these statements make clear the critical connection between the FMLA's goal to remedy gender discrimination in employer practices and the provision of family **and** medical leave. It is this history that Judge Alito largely ignored when he ruled in a case that required him to analyze the FMLA's antidiscrimination purposes.

Judge Alito's Analysis of the FMLA's Medical Leave Provision Undermines Important FMLA Protections. In *Chittister v. Department of Community and Economic Development*,[12] the Third Circuit considered whether a state employee could sue his state employer for removing him from his job after he took medical leave.[13] The employee, David Chittister, requested sick leave

[12] 226 F.3d 223 (3d Cir. 2000).

[13] Some state employers have argued that state workers cannot sue their state for violating their FMLA rights because the Constitution's 11th Amendment gives states sovereign immunity – meaning that states are immunized, or shielded, from being sued in federal court except under certain circumstances. At issue in these types of legal challenges is whether Congress was authorized under the Constitution to enact the FMLA and apply it to certain actors. The Constitution's 14th Amendment is one source of authority for

from his employer, the Pennsylvania Department of Community and Economic Development (the Pennsylvania DCED). The leave was initially granted, and during the tenth week of the leave, Mr. Chittister was terminated. Mr. Chittister filed a claim against the Pennsylvania DCED under the FMLA. The Pennsylvania DCED defended the case by arguing its 11th Amendment sovereign immunity shielded it and other state employers from such lawsuits. In an opinion written by Judge Alito, the Third Circuit panel ruled that Congress did not have the power to subject states to suit for violating the FMLA's medical leave provisions. He ruled that requiring employers to provide medical leave was not a proper remedy for gender discrimination, characterizing it as a disproportionate remedy when compared to the harm at issue. Specifically, Judge Alito concluded that 12 weeks of unpaid leave "[i]s so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."[14] Further, he also questioned whether there was sufficient evidence of gender discrimination to justify the creation of a 12 week leave requirement.

The Supreme Court, however, reached a very different conclusion in a case raising similar issues to those in *Chittister*. In *Nevada Department of Human Resources v. Hibbs*, the Court considered whether a state worker could sue his state employer for violating the FMLA's family leave requirements.[15] In this case, the employee, William Hibbs, took leave to care for his ailing wife. When his employer, the Nevada Department of Human Resources (Nevada DHR) terminated Mr. Hibbs, he filed a claim under the FMLA. Just as in *Chittister*, the Nevada DHR defended the case by arguing that its 11th Amendment sovereign immunity shielded it from suit. In a 6-3 decision written by Chief Justice William Rehnquist, the Court concluded that the goal of remedying gender discrimination in employment was a sufficient reason to allow Congress to abrogate or dissolve states' sovereign immunity. The Court found that Congress appropriately remedied gender discrimination by providing for up to12 weeks of unpaid family leave, and that making a specific amount of leave available to both women and men helps dispel employer stereotypes about women's domestic roles as primary caregivers.

While the plaintiffs in *Chittister* and *Hibbs* were requesting two different types of FMLA leave, the broader implications of Judge Alito's ruling in *Chittister* raise serious concerns about his views on medical leave, family leave, and the overall length of leave available to workers under the FMLA.

- First, Judge Alito concludes in *Chittister* that Congress did not have the authority to abrogate the state's immunity with respect to the medical leave provisions of the FMLA. In doing so, he dismisses as unpersuasive the gender discrimination rationale used by Congress to enact the FMLA. Instead, he argues that the law offers no evidence of intentional gender discrimination in sick leave policies.[16] But his analysis ignores the

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Congressional action – Congress is empowered to pass laws to enforce the 14th Amendment, which among other things prohibits states from denying persons equal protection under the law. Here, Congress' passage of the FMLA effectuated the 14th Amendment's equal protection purposes by providing a gender-neutral remedy for longstanding gender-based discrimination and stereotypes about women and the workplace.

[14] *Chittister*, 226 F.3d at 229.

[15] 538 U.S. 721 (2003).

[16] Contrary to Judge Alito's assertions, Congress did consider evidence of and make findings about "personal sick leave practices that amounted to intentional gender discrimination" – and there *was* "substantial evidence of … violations [of the Equal Protection Clause] in the legislative record." *Chittister*, 226 F.3d at 228, 229. When considering the FMLA, Congress examined leave statutes applicable to states (as well as to private and local employers) and state (as well as private and local) employers' family and medical leave actual practices. Despite the Pregnancy Discrimination Act, it found that many state (as well as private and local) employers had leave policies that were discriminatory on their face or discriminated in practice in the provision of leave. Thus, Congress could reasonably conclude that existing laws were not

legislative history and how persistent, discriminatory stereotypes about women – including perceptions about their health care needs, the costs of such care, and the potential need for time away from work – coupled with inadequate health care coverage for pregnancy and other health conditions, can be used to deny women job opportunities. This is precisely the type of discrimination the FMLA sought to address. If his views prevailed in the Supreme Court, millions of state workers would be prevented from filing claims against their employers when denied medical leave under the FMLA.

- Second, Judge Alito questions whether the FMLA's leave requirement is a proper remedy for discrimination, in effect arguing that an affirmative requirement to provide leave far exceeds what is necessary to remedy alleged discriminatory conduct. **His criticism arguably questions whether requiring leave as a remedy – in either the family or medical leave context – is ever warranted.** In contrast, in *Hibbs*, the Supreme Court held that the FMLA's family-care provision is an appropriate remedy to ensure that women would not be penalized because of perceptions about their caregiving responsibilities, and to avoid having family leave viewed as a drain on the workforce caused by female employees.

- Finally, the language of the opinion suggests that Judge Alito also questions whether the length of leave provided by the FMLA is an appropriate and proportionate remedy for discrimination. The Supreme Court in *Hibbs* found that "[i]n choosing 12 weeks as the appropriate leave floor, Congress chose 'a middle ground, a period long enough to serve "the needs of families" but not so long that it would upset "the legitimate interests of employers." ' "[17] Judge Alito's skepticism in *Chittister* may indicate that he would reach a different conclusion than the *Hibbs* majority.

The implications of *Chittister* become even more clear when reading the dissent in *Hibbs*, which relied in part on Judge Alito's reasoning.[18] Just as Judge Alito concludes the FMLA "...creates a substantive entitlement to sick leave" rather than a remedy for discrimination,[19] the dissenters in *Hibbs* chastised Congress for enacting "a substantive entitlement program of its own."[20] **In both cases, Judge Alito and the *Hibbs* dissenters flatly dismiss the crucial connection between providing leave and remedying discrimination. Thus, if Judge Alito's views take hold on the Court, meaningful FMLA rights for millions of state workers could evaporate.**

Other Supreme Court Analysis of State Sovereign Immunity Issues. While Judge Alito's opinion mirrored decisions reached by other circuit courts, nothing in the Supreme Court's precedent, as later demonstrated by *Hibbs*, or Third Circuit precedent required the *Chittister* result. Questions about the scope of the 11th Amendment to the United States Constitution and state sovereign immunity have a long history before the Supreme Court. Over the decades, the Court's rulings have searched for the proper balance between Congressional authority and state autonomy, setting forth standards governing the valid uses of federal power. In *Fitzpatrick v. Bitzer*,[21] the Court held that Congress could subject states to private lawsuits for damages

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sufficient to ensure non-discrimination, and that it would have to do more: it would have to establish affirmative obligations to provide leave on a gender-neutral basis through the FMLA.

[17] Hibbs, 538 U.S. at 739.

[18] *Id.* at 746.

[19] Chittister, 226 F.3d at 229.

[20] Hibbs, 538 U.S. at 754.

[21] 427 U.S. 445 (1976).

pursuant to its power to enforce the equal protection mandate the 14th Amendment.[22] In that case, a class of male employees of the state of Connecticut filed suit to challenge the state's retirement benefits plan. They claimed the plan discriminated on the basis of sex in violation of Title VII of the Civil Rights Act of 1964, the landmark employment discrimination law that prohibits unlawful employment practices on the basis of race, color, religion, sex, or national origin. The Court made clear that state sovereign immunity was "necessarily limited by the enforcement provisions of §5 of the 14th Amendment;" thus, Congress could pass "appropriate legislation" to enforce the amendment's substantive provisions.[23]

But the 1990s ushered in a shift in the Court's direction, with a series of cases preserving state sovereign immunity and invalidating Congressional action. In *Seminole Tribe of Florida v. Florida*,[24] the Court ruled that, beyond its enforcement powers under §5 of the 14th Amendment, Congress' powers were limited. Thus, the power given to Congress under Article I of the Constitution was not sufficient to waive state sovereign immunity. Just a few years later, the Court ruled that Congress was not authorized to subject states to lawsuits for violating the Age Discrimination in Employment Act in *Kimel v. Florida Board of Regents*.[25] The Court in that case concluded that the ADEA's waiver of state sovereign immunity was not a valid exercise of Congress' authority under §5 of the 14th Amendment. Further, the Court distinguished age from race or gender discrimination, arguing that Congress had exceeded its enforcement mandate by seeking to allow suits against states for age-related practices that would be subject to a lower level of scrutiny – and thus sustained more easily – under the equal protection clause.

These recent cases document the Court's efforts to constrain Congress' power over states. But the Court's rulings also have signaled that race and gender discrimination cases might lead to different results, in part because they require a higher, more rigorous standard of review when evaluating whether equal protection violations have occurred. This higher standard means that it is tougher for states to justify discriminatory practices, and conversely provides stronger support for holding states accountable for violating the law. Indeed, lower circuit courts, for example, considering 11th Amendment challenges to the Equal Pay Act, which prohibits gender discrimination in wages, uniformly concluded that states were not immune from such lawsuits.[26] Similarly, courts have rejected attempts to reverse *Fitzpatrick* and its application to Title VII, which prohibits race and gender discrimination in employment.[27] The Supreme Court has declined numerous opportunities to reverse these decisions.[28] While these cases involve statutes

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[22] Section 5 of the 14th Amendment gives Congress the power to enforce the 14th Amendment's substantive provisions. It reads: "Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. Constitution XIV.

[23] *Fitzpatrick v. Bitzer*, 427 U.S. at 456.

[24] 517 U.S. 44 (1996).

[25] 528 U.S. 62, 72 (2000).

[26] *See, e.g.*, Varner v. Illinois State Univ., 226 F.3d 927 (7th Cir. 2000).

[27] *See e.g.* Okruhlik v. University of Arkansas ex rel. May, 255 F.3d 615 (8th Cir. 2001); Johnson v. Univ. of Cincinnati, 215 F.3d 561, 571 (6th Cir. 2000); In re: Employment Discrimination Litig. Against the State of Ala., 198 F.3d 1305, 1316-17 (11th Cir. 1999); Ussery v. Louisiana, 150 F.3d 431, 434-35 (5th Cir. 1998); Blanciak v. Allegheny Ludlum Corp., 77 F.3d 690, 696 n. 4 (3d Cir. 1996); Cerrato v. San Francisco Cmty. Coll., 26 F.3d 968, 975-76 (9th Cir. 1994).

[28] The Supreme Court did strike down portions of the Violence Against Women Act (VAWA). United States v. Morrison, 529 U.S. 528 (2000). That case can be distinguished because, there, the Court reasoned that neither § 5 of the 14th Amendment nor the Commerce Clause were sufficient sources of authority because the law granted civil remedies to violence victims against *private individuals*, not states. VAWA's civil remedies were not directed "at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias." Morrison, 529 U.S. at 626.

other than the FMLA, they demonstrate that many lower courts have denied states immunity from claims involving race and gender discrimination without placing an unfair burden on states.

The Future of the FMLA Before the Supreme Court. In the wake of *Hibbs*, courts have reached different conclusions about whether that ruling should be read to allow lawsuits against states that violate the FMLA's medical leave protections. Since *Hibbs,* two circuits have held that state employees can bring FMLA claims against their employers in cases of both family and medical leave, and two circuit cases have held that state employees can only bring FMLA claims against their employers in family leave cases – creating a split in the circuits on the question of access to medical leave.[29] Thus, the next Supreme Court justice is likely to consider many of the very arguments at issue in *Chittister* and *Hibbs*. And, because Justice O'Connor and Justice Rehnquist, both part of the *Hibbs* majority, will no longer be on the Court, the fate of the FMLA will be in the hands of the next Supreme Court justice, who is likely to cast the decisive vote in an FMLA case. Judge Alito's views, therefore, are deeply disconcerting because they raise serious doubts about his willingness to preserve the rights of state employees who depend on the FMLA, or to ensure that state employees and their families have the same protections as private sector workers.

2. Title VII of the Civil Rights Act of 1964 and Other Workplace Discrimination Protections

Title VII of the Civil Rights Act of 1964 (Title VII) prohibits job discrimination on the basis of race, sex, color, religion, and national origin, and is thus among Americans' most important civil rights protections. Title VII paved the way for the development of sex discrimination jurisprudence over the last four decades, forever changing hiring, promotion, pay, and benefits practices for women. Thanks to Title VII, for example, employers both private and public can no longer advertise openings for "men's" and "women's" jobs. Nor can they engage in sexual harassment or pregnancy discrimination. Nor can they impose different hiring standards for men and women, like requiring that women - but not men - be unmarried or without young children to qualify for jobs. Because stereotypes and biases about women and their abilities still limit women's pay, their career advancement, and their efforts to achieve economic independence and stability, Title VII remains a key tool for dismantling barriers to workplace equality. Women depend on the courts to interpret antidiscrimination law fairly and vigorously.

Yet Judge Alito's decisions erect excessively high barriers to victims' ability to prove illegal job discrimination, frustrating civil rights laws' important purposes of remedying the injuries caused by discrimination and deterring future wrongdoing. First, his judicial opinions reveal a disturbing propensity to discount plaintiffs' evidence of discrimination while simultaneously deferring to employers' evidence despite inaccuracies and discrepancies. Second, his decisions expose a greater concern for protecting the court's docket than for preserving victims' rights.

Bray v. Marriott Hotels. Judge Alito displayed this deference to employers at the expense of plaintiffs, for example, in a race discrimination case where the judges in the majority predicted that "Title VII would be eviscerated if our analysis were to halt where [Judge Alito's] dissent suggests."[30] In *Bray*, the plaintiff alleged that her employer had denied her a promotion because of her race, while the defendant countered that it had simply chosen a more qualified

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[29] *Compare* Bylsma v. Freeman, et al., 346 F.3d 1324 (11th Cir. 2003), and Montgomery v. Maryland, et al., 72 Fed.Appx. 17 (4th Cir. July 30, 2003), *with* Touvell v. Ohio Dep't of Mental Retardation & Developmental Disabilities, 422 F.3d (6th Cir. 2005) *and* Brockman v. Wyoming Dep't of Family Services, et al., 342 F.3d 1159 (10th Cir. 2003).

[30] Bray v. Marriott Hotels, 110 F. 3d 986, 993 (3d Cir. 1997).

candidate. The majority ruled that Ms. Bray was entitled to have a jury decide her case. Noting discrepancies and inaccuracies in the employer's testimony about its evaluation of Ms. Bray's qualifications, along with evidence that the employer deviated from its usual evaluation and promotion practices and that Ms. Bray had more experience than the successful white candidate, the majority concluded that the case should proceed to trial.

More specifically, the majority found that "[a] reasonable jury could conclude from [the key decisionmaker's] concededly inaccurate assessment of Bray that the decision to reject her and interview [the white candidate] was driven by racial bias and not by the explanations offered by Marriott."[31] The majority similarly held that a reasonable jury could find that racial bias explained the employer's deviation from its normal procedures (for example, by giving the white candidate an extra opportunity for a performance evaluation).

But Judge Alito dissented, arguing that Ms. Bray was not even entitled to a trial on the merits. He acknowledged both that the employer "may have treated Bray unfairly," and that there were inconsistencies in the employer's testimony and behavior.[32] Yet he explained away the irregularities one by one, failing to consider the possibility that – considered collectively – they would allow a jury reasonably to conclude that racial bias infected the employer's evaluation of the two candidates. In short, he deferred to the employer's explanation despite its discrepancies, and urged that the defendant be awarded summary judgment rather than face a jury.[33]

Rather than focusing on the possibility that Ms. Bray had been the victim of race discrimination, Judge Alito instead viewed the majority's decision as simply adding to the court's docket: "I have no doubt that in the future we are going to get many more cases where an employer is choosing between candidates of roughly equal qualifications and the candidate who is not hired or promoted claims discrimination."[34] Nowhere did he consider the chance that such candidates might in fact be victims of illegal bias.

Indeed, the Third Circuit majority rejected Judge Alito's approach, observing that he addresses

> each of the discrepancies in this record in isolation and concludes that none of them creates a material issue of fact. We have previously noted that such an analysis is improper in a discrimination case . . . . Thus, we must determine whether *the totality of the evidence* would allow a reasonable factfinder to conclude that Bray has established the alleged bias.[35]

The majority went on to characterize Judge Alito's dissent as reflecting an unnecessarily narrow view of Title VII that threatened to undermine its protections:

> We do not believe that Title VII analysis is so tightly constricted. This statute must not be applied in a manner that ignores the sad reality that racial animus can all too easily warp an individual's perspective to the point that he or she never considers the member of a protected class the 'best' candidate regardless of that person's credentials. The dissent's position would immunize an employer from the reach of Title VII if the employer's belief that it had selected the "best" candidate was the result of conscious racial basis. Thus, the issue here is not

[31] *Id.* at 993.
[32] *Id.* at 1000.
[33] *See id.* at 1000-03.
[34] *Id.* at 1003.
[35] *Id.* at 991 (emphasis in original; citations omitted).

> merely whether Marriott was seeking the "best" candidates but whether a reasonable factfinder could conclude that Bray was not deemed the best because she is Black. *Indeed, Title VII would be eviscerated if our analysis were to halt where the dissent suggests.*[36]

Glass v. Philadelphia Electric Co. Judge Alito downplayed a plaintiff's evidence of illegal bias in yet another dissent, where he supported the exclusion of evidence he acknowledged was relevant to a plaintiff's race discrimination claim. *Glass v. Philadelphia Electric Co.*[37] The plaintiff, Mr. Glass, alleged that he was denied a number of promotions because of his race, noting that he possessed the education and experience required for the openings, only to be rejected in favor of younger white candidates who did not have comparable experience. The defendant claimed that it passed Mr. Glass over for promotion in part because of his poor performance review at a particular plant – Mr. Glass's only less than fully satisfactory performance evaluation in more than 23 years of employment. The lower court allowed the employer to introduce evidence of this poor performance review to explain its decision not to promote him. The lower court refused, however, to admit Mr. Glass' evidence that – at the time of that review – senior employees subjected him to racially derogatory remarks and posted hostile and demeaning images about him, thus impairing his ability to train and perform.

On appeal, the Third Circuit panel majority (Reagan appointee Judge Becker and George H.W. Bush appointee Judge Roth) found that the lower court had abused its discretion by excluding Mr. Glass's evidence that he had been racially harassed at the time of his poor review. The majority noted that such evidence was relevant both to indicate that the employer engaged in race discrimination generally and to explain why Mr. Glass's performance might have suffered at the time.

Judge Alito dissented, arguing that while Mr. Glass's evidence was relevant to his claim, its value was outweighed by the additional complexity its introduction would have added. He cited as examples potential disputes between the parties about whether the racial harassment actually occurred or affected the performance evaluation. To Judge Alito, the burden these additional skirmishes posed to the court and to the defendant outweighed the evidence's value to Mr. Glass's case.[38] Nowhere did he confront the fundamental unfairness generated by his approach, which would allow the employer to offer evidence against the plaintiff, while denying the plaintiff the opportunity to rebut with relevant and important evidence of his own. Again, Judge Alito demonstrated an unsettling tendency to defer to the employer's version of events, at the expense of the plaintiff's ability to prove illegal job discrimination.

Sheridan v. E.I. DuPont de Nemours and Co. Judge Alito again demonstrated his willingness to defer to the employer's defense to discrimination despite its inaccuracies, while downplaying the plaintiff's evidence of illegal bias, in a solo dissent from an *en banc* decision. In *Sheridan v. E.I. DuPont de Nemours and Co.*, the entire 11-judge panel[39] – except for Judge Alito – voted to uphold a jury's verdict that Barbara Sheridan was the victim of illegal sex discrimination.[40] There, the defendant argued that its adverse treatment of Ms. Sheridan was based on factors other than her sex, alleging, among other things, that she had inappropriately "comped" customers with free food and/or drinks in violation of company policy. Ms. Sheridan,

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[36] *Id.* at 993 (emphasis added).
[37] 34 F.3d 188 (3d Cir. 1994).
[38] *See id.* at 199.
[39] One member of the *en banc* panel died before the final decision was issued, thus the official vote was 10-1 in favor of the plaintiff.
[40] 100 F.3d 1061 (3d Cir. 1996).

however, undermined this defense with the employer's own documentation that she was on jury duty or otherwise not scheduled to work on many of the dates she was alleged to be inappropriately comping. She also pointed out that the employer's ostensible comping concerns closely followed her complaints of sex discrimination. The other ten Third Circuit judges found that – because Ms. Sheridan had proven that the employer's proffered explanation for its actions was untrue – the evidence supported the jury's conclusion that sex discrimination was likely the true reason for her adverse treatment.

But Judge Alito voted to displace the jury's verdict, arguing that Ms. Sheridan's ability to prove that the employer's defense was untrue was not enough to support the jury's finding of sex discrimination. Instead, Judge Alito apparently would have required additional evidence linking the employer's behavior and Ms. Sheridan's sex. More specifically, Judge Alito maintained that an employer might lie about the motivations for its behavior for reasons unrelated to sex discrimination – for example, if its decision were actually due to race discrimination or some other illegal or embarrassing basis rather than sex discrimination. Under Justice Alito's theory, just because the employer lied in its defense didn't mean that it was necessarily covering up sex discrimination.[41] Thus, Judge Alito would have deferred to an employer's claim that it had not engaged in sex discrimination *even though* the alternative explanation it offered for its behavior had been disproven.

The majority rejected Judge Alito's approach as encouraging Title VII defendants to deceive the court, thus undermining antidiscrimination protections specifically and the judicial system generally:

> The other situation posited by the dissent for its unwillingness to join the otherwise unanimous en banc court is that [situation] created where an employer "may not wish to disclose his real reasons for not promoting B over A." The persistence in maintaining that the employment action was taken because the plaintiff was unqualified or the position was being eliminated due to a reduction in force when the employer knows that the real reason is nepotism would violate the spirit if not the language of Rule 11 of the Federal Rules of Civil Procedure. The dissent gives no reason why a plaintiff alleging discrimination is not entitled to the real reason for the personnel decision, no matter how uncomfortable the truth may be to the employer. Surely, the judicial system has little to gain by the dissent's approach.[42]

Pirolli v. World Flavors, Inc. Finally, in an unpublished opinion, Judge Alito dissented from the majority's decision to allow a plaintiff with a mental disability to take his claims that he had been sexually harassed – indeed, sexually assaulted – before a jury.[43] In that case, the plaintiff, Mr. Pirolli, presented the following evidence: his "co-worker attempted to push a broom pole into his behind as others watched," "multiple incidents of a co-worker rubbing his penis against Pirolli's behind," and "an incident in the changing room which caused Pirolli to fear he would be raped."[44] The employer did not dispute these facts, but instead argued – and the lower court agreed – that Mr. Pirolli was not singled out for abuse, but was instead subjected to the sort of "macho horseplay and adolescent roughhousing" that was commonplace in that workplace.[45]

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[41] *See id.* at 1086.
[42] *Id.* at 1070 (citations omitted).
[43] Pirolli v. World Flavors, Inc, No. 99-2043 (3d Cir. June 11, 2001).
[44] Slip op. at 5 and 7.
[45] Id. at 6.

The majority reversed, finding that Mr. Pirolli had indeed offered enough evidence to warrant a jury trial on his claims: "The report contains specific allegations of persistent conduct that a reasonable jury could view as having occurred because of his sex and as severe and pervasive enough to create an abusive work environment . . . ."[46] The majority also noted that the plaintiff's alleged treatment differed considerably from the other "physical horseplay and roughhousing" endemic to that workplace, "such as punching and wrestling around, squirting water and throwing balls of tape."[47]

Yet Judge Alito dissented, arguing instead that Mr. Pirolli was not entitled to a trial on the merits, and that the defendant should instead be awarded summary judgment rather than face a jury trial. Instead of addressing Mr. Pirolli's strong evidence of harassment, Judge Alito focused on deficiencies in the lawyer's brief: "I cannot join the majority, however, because this argument is not adequately presented in Pirolli's brief. . . . In the long term, both the quality of our decisions and our ability to handle our caseload will suffer if we insist on deciding questions that are not presented to us in a minimally adequate fashion."[48]

The majority opinion had noted that the lawyer's brief was "perhaps less than pellucid," but nonetheless found "that the briefs are adequate to present the critical issues, that the case potentially involved issues important in the administration of Title VII, and that 'the [lower court's] error is so plain that manifest injustice would otherwise result.'"[49] In stunning contrast, Judge Alito demonstrated considerably more concern for protecting the court's docket than for enforcing the right of a mentally disabled man to be free from discrimination and assault.[50]

Keller v. Orix Credit Alliance. Judge Alito again raised an unusually high barrier for plaintiffs seeking to prove job discrimination in *Keller v. Orix Credit Alliance, Inc.*[51] There he wrote for the *en banc* majority in an age discrimination case, concluding that the plaintiff, Mr. Keller, was not entitled to a trial on the merits, and that the defendant should instead be awarded summary judgment rather than face a jury trial. In so holding, Judge Alito discounted evidence that the company CEO disparaged Mr. Keller's age shortly before he was terminated: "If you are getting too old for the job, maybe you should hire one or two young bankers." Judge Alito found this evidence of little value, stressing that it occurred four or five months before Mr. Keller's discharge and did not threaten firing.[52]

But four judges dissented from Judge Alito's view, including Reagan appointee Judge Mansmann and two judges appointed by the first President Bush (Judges Lewis and Roth). The dissenters maintained that a reasonable jury could conclude that age discrimination explained Mr. Keller's termination, in light of the CEO's age-based criticism of his performance, along with evidence that he was replaced by a younger employee. As several of the dissenters pointed out, evidence

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[46] Id. at 7.
[47] Id. at 8.
[48] Slip op. (dissenting opinion) at 1, 2-3.
[49] Slip op. at 3-4 (citations omitted)
[50] Ironically, although he complained about the quality of the plaintiff's brief, Judge Alito signed an order denying a motion by the Equal Employment Opportunity Commission (EEOC) to file to a brief in the case that could have provided greater substantive analysis and argument on plaintiff's behalf. Unfortunately, the EEOC had received inaccurate information about the timing for the brief. When it asked to file a brief after the filing deadline, which was within the court's discretion, the request was denied by Judge Alito and his colleagues. Motion of the Equal Employment Opportunity Commission to file brief as Amicus Curiae, *Pirolli v. World Flavors*, No. 99-2043, denied by Judge Samuel Alito (February 5, 2001).
[51] 130 F.3d 1101 (3d Cir. 1996).
[52] *See id.* at 1112.

of this type – age-related criticism regarding the plaintiff's job performance a few months before the speaker made an adverse employment decision regarding the plaintiff – is quite rare and usually considered strong enough to allow a case to proceed to trial: "The key inquiry is not the number of times a comment is made but the context in which it is made."[53]

3. Affirmative Action

Gender-based affirmative action is an antidote to the sex discrimination that too often infects decisions about jobs, education, and business opportunities. Affirmative action has provided qualified women with opportunities previously denied them: thanks to affirmative action, women today are road dispatchers, professors, corporate executives, carpenters, engineers, and police officers.

For this reason, the Supreme Court has consistently made clear that gender or race can be taken into account in programs designed to expand opportunities for women and people of color. The Court also has established that lawful programs can adopt flexible goals and timetables to measure the effectiveness and success of different strategies. As Justice O'Connor emphasized, "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minorities in this country is an unfortunately reality and government is not disqualified from acting in response to it."[54] Indeed, Justice O'Connor – whom Judge Alito has been nominated to replace – played a key role in developing the Supreme Court's affirmative action jurisprudence, most recently casting the deciding vote to uphold the University of Michigan School of Law's race-conscious admissions program as a properly-designed means for achieving its compelling interest in a racially diverse student body.[55]

Despite the ongoing need for affirmative action, Judge Alito made clear his opposition to such programs – which he mischaracterized as "quotas" – in his 1985 application for a political appointment to the Department of Justice: "I am particularly proud of my contributions in recent cases in which the government has argued in the Supreme Court that racial and ethnic quotas should not be allowed . . . ."[56] Indeed, he co-wrote briefs in several key cases in which the Reagan Administration attacked various affirmative action programs. Yet the Supreme Court often rejected the positions taken in these briefs – of which Judge Alito was particularly proud – as undermining key antidiscrimination protections.

Local No. 93, International Ass'n of Firefighters v. Cleveland. For example, while working at the Department of Justice, Judge Alito was one of the authors of the Reagan Administration's *amicus* brief challenging an affirmative action program in *Local No. 93, International Ass'n of Firefighters v. Cleveland.*[57] In that case, African-American and Latino firefighters sued the city of Cleveland, alleging race and national origin discrimination in promotions and other areas. The city settled the lawsuit by agreeing to a consent decree that established various race-conscious programs to ensure the promotion of more minority firefighters. The local union, joined by the Reagan Administration, argued that the affirmative action measures constituted reverse discrimination forbidden under Title VII, especially since they would allow for the promotion of African-Americans and Latino firefighters who had not been specifically identified as victims of the city's discrimination.

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[53] *Id.* at 1116.
[54] Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).
[55] Grutter v. Bollinger, 539 U.S. 306 (2003).
[56] 1985 job application, supra n. 12.
[57] 478 U.S. 501 (1986).

The Supreme Court, including Justice O'Connor, upheld the programs and rejected the government's arguments.[58] The Court pointed out that "Congress intended voluntary compliance" – like a consent decree in settlement of a discrimination lawsuit – "to be the preferred means of achieving the objectives of Title VII."[59] The Court went on to hold that the consent decree was fully in conformity with Title VII's text and purposes by expanding employment opportunities for all African-Americans and Latinos. In contrast, Judge Alito's brief, if adopted by the court, would have denied plaintiffs and employers the ability to fashion effective consent decrees to resolve discrimination complaints and expand employment opportunities.

Local 28, Sheet Metal Workers International Ass'n v. EEOC. Similarly, Judge Alito co-authored the Reagan Administration's brief opposing affirmative action remedies for repeated discrimination in *Local 28, Sheet Metal Workers International Ass'n v. EEOC.*[60] In that case, a lower court found that the defendant union engaged in consistent and egregious race discrimination in recruiting, selecting, training, and admitting new members. After the union later repeatedly failed to stop its discrimination and ignored the court's remedial orders, the lower court required the union to achieve a 29 percent minority membership goal – a target that reflected the availability of eligible minority workers. Judge Alito's brief took the position that Title VII does not permit such affirmative race-conscious goals as a remedy for past discrimination.

This position was again rejected by the Court.[61] As Justice Powell wrote in providing a fifth vote to uphold the lower court, the court's order was an appropriate and narrowly tailored response to the defendant's "contemptuous racial discrimination and successive attempts to evade all efforts to end that discrimination. . . . It would be difficult to find defendants more determined to discriminate against minorities."[62] Yet Judge Alito's brief, if adopted by the Court, would have stripped courts of this important tool in addressing persistent and proven discrimination.

Taxman v. Board of Education. Once on the bench, Judge Alito also voted to strike down an affirmative action program in *Taxman v. Board of Education.*[63] There he joined an en banc majority that found that Title VII did not permit a school district faced with a lay-off decision to choose to retain an African-American rather than a white teacher when the two teachers were found to be equally qualified with the exact same seniority. Unlike the job discrimination cases discussed above, where Judge Alito readily deferred to employers' justifications for their employment decisions, here he refused to defer to the school's determination that a racially diverse faculty would further its educational mission.

Four judges – including Reagan appointee Judge Scirica and G.H.W. Bush appointee Judge Lewis – dissented. As Judge Scirica pointed out, the school board

> concluded that a diverse faculty also serves a compelling educational purpose; namely, it benefits students in the business department by exposing them to teachers with varied backgrounds. The Board implemented a program that, in limited circumstances, allows consideration of race as a factor in school employment decision. The Board did not countenance the layoff of a more-

[58] *Id.*
[59] *Id.* at 515.
[60] 478 U.S. 421 (1986).
[61] *Id.*
[62] *Id.* at 484-85.
[63] 91 F.3d 1547 (3d Cir. 1996).

> qualified teacher in the place of a less-qualified one. It did not prefer teachers junior in seniority to those with more experience. Rather it concluded that when teachers are equal in ability and in all other respects – and only then – diversity of the faculty is a relevant consideration.[64]

He and the other dissenters – unlike Judge Alito – concluded that Title VII permitted schools to consider racial diversity under those circumstances.

C. Equal Educational Opportunity

Protections aimed at eliminating gender discrimination and expanding fair treatment have helped provide opportunities for women and girls in schools and universities. The Supreme Court has used the Constitution's Equal Protection Clause to invalidate longstanding practices that denied educational opportunities to one gender and not the other.[65] The groundbreaking law, Title IX of the Education Amendments of 1972, also prohibits gender discrimination in federally funded education programs or activities. That law has helped break down barriers that often excluded women and girls from activities such as school athletics, math and science programs, and educational scholarships.

Concerned Alumni of Princeton. In the 1985 job application he submitted for a job at the Department of Justice, Judge Alito listed himself as a member of Concerned Alumni of Princeton University (CAP). Throughout its 15-year existence, CAP was notorious for its outspoken, inflammatory rhetoric opposing Princeton's decision to enroll female students. Indeed, CAP reportedly advocated limiting the percentage of women admitted to the school.[66] It also derided Princeton's efforts to increase the number of minority students, contending that children of alumni were more deserving of admission. In 1975, an alumni panel reviewed admission issues and condemned CAP's characterization of Princeton's policies. The panel, which included current Senate Majority leader Bill Frist, determined that CAP "presented a distorted, narrow and hostile view of the university that cannot help but have misinformed and even alarmed many alumni."[67] It is unclear when Judge Alito joined the group and what role he played in its activities. But his listing of his CAP affiliation is distressing given the views the organization espoused throughout its history. In particular, the group's hostility towards the inclusion of women and minorities on Princeton's campus raises serious concerns about his commitment to gender and racial equality both inside and out of the academic setting.

D. Other Civil Rights Issues

1. Voting Rights and Reapportionment

The right to vote is a fundamental cornerstone of our democracy, premised on the idea that each citizen ought to have a role in shaping his or her government. The Constitution did not originally extend the franchise to every person, however, and only in the recent past—after a series of Supreme Court voting cases—has each citizen been granted this fundamental right. Key among the voting cases is *Reynolds v. Simms*,[68] in which the Supreme Court held that the size of

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[64] *Id.* at 1576.
[65] *See, e.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982).
[66] Scott Shepard, *Critics Dust Off Old Files to Assail Court Nominee*, Atlanta Journal-Constitution Nov. 20, 2005, at 7C.
[67] David D. Kirkpatrick, *From Alito's Past, a Window on Conservatives at Princeton*, N.Y. TIMES, Nov. 27, 2005, at A1.
[68] 377 U.S. 533 (1964).

legislative districts could not be drawn to dilute the vote of those in densely populated cities, thus strengthening the power of smaller numbers of rural votes. The Court held that:

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society...the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.[69]

The "one person, one vote" principal embodied in *Reynolds* makes clear that not only does every citizen deserve the franchise, but no citizen's vote should have greater strength and significance than another's. But Judge Alito seems to question this core principle. In a 1985 job application, Judge Alito wrote that as a young man he "developed a deep interest in constitutional law, motivated in large part by disagreement with the Warren Court decisions... [such as] reapportionment."[70] He does not mention specific cases, but the Warren Court decided several important voting cases during its tenure, such as *Baker v. Carr*[71] and *State of South Carolina. v. Katzenbach*.[72] These cases have been instrumental in advancing the rights of all citizens, and Judge Alito's apparent criticism of this line of cases is disconcerting.

II. RESTRICTING ACCESS TO REPRODUCTIVE HEALTH

A. Understanding the Context

In 1965, in *Griswold v Connecticut*,[73] the Court recognized a fundamental constitutional right to reproductive liberty and privacy, holding that the state cannot criminalize the use of contraceptives by married persons. Several years later, in *Eisenstadt v. Baird*, the Court extended that ruling to unmarried persons, holding that if "the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwanted governmental intrusions into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[74] Although the Justices offered multiple rationales for the decisions in those cases, one that resides at the center of reproductive privacy is a "liberty" protected by the 14th Amendment's Due Process Clause. The idea that the Constitution protects so intimate a decision as to whether to use contraception is commonplace today. In 1973, the *Baird* and *Griswold* decisions became the basis for the ruling in *Roe v. Wade* in which the Court invalidated state laws criminalizing abortion and recognized that a woman's right to decide whether or not to end a pregnancy is a "fundamental" right protected by the Due Process Clause.[75] The decision was controversial. Opponents of *Roe* mobilized politically and, since that time, have worked to overrule the *Roe* decision.

By 1992, after Presidents Reagan and Bush had appointed five new Justices, it seemed that the Supreme Court might well be poised to overrule *Roe*. But in *Planned Parenthood v. Casey*,[76] instead of overturning *Roe*, the Court reaffirmed what it characterized as the right of a woman to be free from "undue" governmental burdens in making the decision whether or not to have an

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[69] Reynolds v. Sims, 377 U.S. 533 (1964).
[70] 1985 job application, supra n. 12.
[71] 369 U.S. 186 (1962) (holding apportionment an appropriate matter for judicial review under the 14th Amendment).
[72] 383 U.S. 301 (1966) (holding that the Voting Rights Act of 1965 was an appropriate measure given Congressional responsibilities under the Fifteenth Amendment).
[73] 381 U.S. 479 (1965).
[74] 405 U.S. 438, 453 (1972) (emphasis in original).
[75] 410 U.S. 113 (1973).
[76] 505 U.S. 833 (1992).

abortion in the pre-viability period. The *Casey* Court also affirmed *Roe*'s holding that any governmental regulation of abortion – post-viability, as well as pre-viability – must except cases in which a woman's life or health is at risk. But while a six-Justice majority (including Justice O'Connor) rejected calls to overturn *Roe*, the Court instead refashioned the legal analysis used to evaluate abortion-related provisions. Under *Roe*'s "fundamental rights" analysis, restrictions on the right to have an abortion were judged under a "strict scrutiny" standard – a demanding standard that allowed very few pre-viability restrictions. *Casey* replaced that standard with a new and less protective "undue burden" test, under which abortion restrictions would be upheld so long as they did not "unduly" burden a woman's right to decide whether or not to end pregnancy. Although providing greater protection for abortion rights than the broad deference to legislatures allowed under the "rational relationship" standard that Judge Samuel Alito appears to support, the "undue burden" test could allow for new and very substantial abortion restrictions depending on how the Court defined and applied this new test.

In *Stenberg v. Carhart*,[77] the Supreme Court, applying *Casey*, invalidated a Nebraska statute that prohibited the use of abortion procedures falling within what the law labeled "partial birth" abortions. The vote in *Stenberg* was five to four. The majority (including Justice O'Connor as the critical fifth vote) held that the statute was impermissible for two reasons: first, it lacked an express health exception for cases in which the procedure was necessary to protect a woman's health; and second, it "unduly burdened" the right to terminate a pregnancy because its language would have banned the most common form of second-trimester surgical abortion. But Justice Kennedy – who had voted with the majority in *Casey* – applied the "undue burden" standard differently, and, breaking with Justice O'Connor and the other members of the *Casey* majority, became one of the four Justices who would have sustained the statute. As *Stenberg* makes clear, what constitutes an "undue" burden is both critically important and subject to interpretation – and with the Court so closely divided, subject particularly to the interpretation of Justice O'Connor's successor.

The new Justice will have an immediate opportunity to restrict or even eliminate the protections of *Roe* and *Casey*. In the 2005-06 term, two abortion-related cases are under consideration: *Ayotte v. Planned Parenthood* and *Scheidler v. National Organization for Women*. At issue in *Ayotte v. Planned Parenthood* is a New Hampshire statute prohibiting a minor from obtaining an abortion until at least 48 hours after her parents have been notified. The statute fails to include an exception for cases in which the 48-hour delay would threaten the health of the young woman, however seriously. The case thus presents an opportunity for the Court – with its first new justices in eleven years – to consider whether health protections for pregnant women, which under *Roe* and *Casey* have always been a bright-line constitutional requirement, are still necessary. *Ayotte* also may allow the newly constituted Court to revisit a broader question: whether, as *Casey* held, an abortion restriction that operates in practice as an undue burden may be invalidated "on its face" before it takes effect, to avoid harm to women; or whether the restrictions may take effect regardless, leaving women seeking abortions – including abortions necessary to protect their health – to convince judges that the restrictions must be waived in their cases because it is unconstitutional as applied to them. The other abortion-related decision before the Court this term is *Scheidler v. National Organization for Women*, decades-long litigation regarding the appropriate mechanisms to prohibit acts and threats of physical violence against abortion clinics and their employees and patients. At issue in *Scheidler*'s third appearance before the Court is the validity of a permanent nationwide injunction that prohibits the defendants from trespassing, obstructing access to, or damaging certain clinic property, or using violence or threats of violence against certain clinics, their employees, or their patients. Although Justice O'Connor participated in the oral arguments in these cases, a decision is not expected in either case until

[77] 530 U.S. 914 (2000).

after Justice O'Connor's successor has been confirmed. Thus, it is entirely possible that Justice O'Connor's successor will be involved in the final decisionmaking.

In short, this is a pivotal moment for the Court and reproductive health. Judge Alito's long-standing opposition to reproductive rights gives great cause for concern. As detailed below:

- Judge Alito has consistently advocated for the overturn of *Roe v. Wade* in professional writings over the course of two decades. There is every reason to fear that he will not respect *Roe's* core holding if elevated to the Supreme Court, where he no longer feels constrained by precedent.
- The legal philosophy that Judge Alito advocated in his analysis of a spousal notification provision in *Planned Parenthood v. Casey*,[78] supported a deference to state abortion restrictions that would severely curtail constitutional protections for women.
- Judge Alito's opinions applying the Supreme Court's precedents reveal his efforts to disassociate himself from the mainstream jurisprudence underlying the right to abortion.

Importantly, there is nothing in Judge Alito's record that indicates that he has abandoned his personal and professional commitment to overturning *Roe*. As a Supreme Court Justice, rather than a lower-court judge, he would no longer be constrained to follow the Court's precedents and would be free once again to argue, as discussed below, that the Constitution does not protect the right to abortion. Everything we know about Judge Alito suggests that his addition to the Court at this moment in time would undermine the cause of women's health and reproductive freedom and result in a dramatic overturning of established reproductive rights jurisprudence.

B. Judge Alito's Record: Limiting Access to Reproductive Health Care

1. Commitment to Overturning *Roe*

In his personal and professional writings over the course of two decades, Judge Alito consistently advocated for the overturn of *Roe v. Wade*. In a memorandum he drafted while serving in the Justice Department, his application for promotion within the Department, and the opinions he issued as a judge on the Third Circuit Court of Appeals, his writings demonstrate hostility to established abortion rights jurisprudence. Judge Alito's statements on *Roe* reflect a legal philosophy that leaves him little room to acknowledge reproductive freedoms.

In 1985, when serving as Assistant to the U.S. Solicitor General, Judge Alito analyzed whether the Reagan Administration should participate in *Thornburgh v. American College of Obstetricians and Gynecologists* by posing the rhetorical question, "What can be made of this opportunity to advance the goals of bringing about the eventual overturning of *Roe v. Wade* and, in the meantime, of mitigating its effects?"[79] He recommends that "in the course of the brief we should make clear that we disagree with *Roe v. Wade* and would welcome the opportunity to brief the issue of whether, and to what extent, that decision should be overruled."[80] Moreover, he advocates a strategy that "does not even tacitly concede *Roe's* legitimacy,"[81] while urging the Court to uphold numerous state restrictions on access to abortions. Judge Alito's recommendation calls for the Administration to demonstrate the overall "reasonableness" of

[78] Planned Parenthood of Southeastern Pennsylvania v. Casey, 947 F2d 682 (3d Cir. 1991), (Alito, J. concurring and dissenting).
[79] Memorandum from Samuel Alito to Charles Fried re Thornburgh v. American College of Obstetricians and Gynecologists, at 8.
[80] *Id.* at 9.
[81] *Id.* at 8.

abortion restrictions, thereby discouraging the Court from focusing its analysis on the harmful effect of the restriction on a few individuals. In his personal writings and from the bench, he continues to embrace this strategy of narrowly construing the scope of the judicially-recognized right to an abortion and advocating for restrictions.

Judge Alito highlighted these views and expressed his personal commitment to them later in 1985, when he applied for the job of Deputy Assistant to the Attorney General. He notes that he is "particularly proud of [his] contributions" in cases in which the government argued that the "Constitution does not protect a right to an abortion."[82] This statement of his deeply held personal views reflects a Constitutional philosophy that is fundamentally incompatible with longstanding Supreme Court precedents.

Judge Alito's expressions of support for this restrictive legal philosophy are not limited to his writings as an employee of the Reagan Administration or as an advocate seeking a job. In *Planned Parenthood v. Casey*,[83] a case he considered on the Third Circuit Court of Appeals for which the Supreme Court had not clearly established relevant precedent, he advanced the same legal philosophy evident six years earlier in his memorandum on *Thornburgh* and in his job application essay. Judge Alito concurred with the Third Circuit's decision to uphold four of Pennsylvania's restrictions on abortion, but dissented from the majority's finding that a fifth restriction, requiring spousal notification, was unconstitutional. In reaching this conclusion, he applied the constitutional philosophy he articulated as a government attorney six years earlier by both upholding restrictions on access to abortions and arguing that under his interpretation of Justice O'Connor's undue burden test, the spousal notification requirement should be reviewed under a "rational relationship" standard that allows great deference to the legislature. Both the majority of the Third Circuit and the Supreme Court rejected Judge Alito's argument.

In subsequent legal opinions in cases involving abortion issues, Judge Alito applies established precedent to hold that the relevant abortion restrictions are unconstitutional. All of these opinions, however, are in cases where Supreme Court precedent clearly constrained his judicial discretion.[84] As discussed below, these opinions do not provide evidence of a shift in his commitment to overturn *Roe* but rather suggest that, if freed from such constraints, he would once again seek to advance his view that the Constitution does not protect the right to abortion.

2. ***Planned Parenthood v. Casey***

Judge Alito's opinion in *Casey v. Planned Parenthood of Southeastern Pennsylvania*,[85] offers a clear window into how he would analyze the framework for the constitutional right to an abortion, unconstrained by governing judicial precedent. In this opinion, which concurred in part and dissented in part from the Third Circuit's ruling, he argued that the Pennsylvania law requiring a woman to notify her husband before she could legally obtain an abortion was constitutional, even though it does not contain an exception for women likely to face abuse, other than physical injury, as a result of notifying their husbands.

When analyzing the spousal notification provision, Judge Alito argued that even if the appropriate standard for analyzing the provision is the undue burden test (a substantive point, which as noted above he does not concede), an "undue burden may not be established simply by showing that a

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[82] 1985 job application, supra n. 12

[83] 942 F.2d 682 (3d Cir. 1991)(Alito, J. concurring in part and dissenting in part).

[84] *See* Alexander v. Whitman, 114 F.3d 1392 (3d Cir. 1997); Planned Parenthood of Central New Jersey v. Farmer, 220 F.3d 127 (3d Cir. 2000).

[85] 942 F.2d 682 (3d Cir. 1991)(Alito, J. concurring in part and dissenting in part).

law will have a heavy impact on a few women, but instead a broader inhibiting effect must be shown."[86] He dismisses the substantial evidence of the significant risks the requirement would impose on a class of women, including risks of physical and emotional abuse, assault on her children, and withdrawal of emotional, social, and financial support, and instead relies on the testimony stating that the overwhelming majority of women seeking abortions are not married and that the vast majority of married women voluntarily inform their husbands. Although he notes that the risk of domestic violence was "a matter of grave concern," he discounts the constitutional significance of this concern, noting "whether the legislature's approach represents sound public policy is not for us to decide." Having rejected the constitutional significance of the harms the regulation poses to such women, he concludes that the spousal notification requirement is constitutional because it advances "the state's interest in furthering the husband's interest in the fetus."

The majority of the Third Circuit panel and the Supreme Court rejected Judge Alito's opinion on the spousal notification requirement and deemed the restriction unconstitutional. Rather than dismissing the plight of abused women as constitutionally insignificant, Justice O'Connor's constitutional analysis of the spousal notification provision hinges on the impact of the restriction on a small class of women. Justice O'Connor's opinion for the Court notes that the notification requirement fails to consider the "millions of women in this country who are the victims of regular physical and psychological abuse at the hands of their husbands" who "may have very good reasons for not wishing to tell their husbands of their decision to obtain an abortion."[87]

The Court notes that the impact of the spousal notification provision that Judge Alito ruled was constitutionally permissible would be to subjugate the woman's constitutional right to reproductive autonomy to her husband's interests. O'Connor rejects this view of the marital relationship as "no longer consistent with our understanding of the family, the individual and the Constitution." In direct contrast to Judge Alito's support for the provision, which the Court notes would allow husbands veto power over their wives' decisions, the Court affirms the fundamental premise that "women do not lose their constitutionally protected liberty when they marry."

If Judge Alito's approach in *Casey* (rather than O'Connor's) were the law of the land, constitutional protection for the right to choose abortion would be significantly curtailed and perhaps eliminated. The rights of married women would be subordinated to that of their husbands and any abortion regulation would be upheld as long as the burden of each individual restriction is felt by only a small percentage of the total population potentially effected by the law, regardless of how substantial the harm is for that population. It is possible that the confirmation of Samuel Alito as a Supreme Court Justice would provide the crucial vote necessary to overturn *Roe v. Wade* and to once again permit states to criminalize abortion. At least, it appears that confirmation will result in a marked shift from the jurisprudence set forth by Justice O'Connor in *Casey* that would undermine women's autonomy and reproductive rights.

3. ***Planned Parenthood v. Farmer & Alexander v. Whitman***

In his judicial opinions in the decade after *Casey*, Judge Alito makes considerable efforts to dissociate himself from mainstream jurisprudence on the constitutional right to an abortion. In two notable concurrences, Alito agrees with the outcome reached by the majority, but he distances himself from the court's reasoning in favor of stark statements that the Supreme Court dictated the outcome. These opinions suggest that, absent the constraints imposed upon Circuit Courts by Supreme Court precedent, Judge Alito would rule in a different manner. When

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[86] *Id.*
[87] *Id.* at 898.

combined with the views expressed in his personal and professional writings, these concurrences suggest that his legal philosophy deviates from the mainstream of reproductive rights jurisprudence and indicate that, given the opportunity, he would use a seat on the Supreme Court to revisit the underlying principles on which the right to choose abortion is based.

In *Planned Parenthood of Central New Jersey v. Farmer,* the Third Circuit relies on the precedents of *Roe*, *Casey*, and *Carhart v. Stenberg* to overturn New Jersey's late term abortion ban.[88] In his concurrence, Judge Alito asserts that *Stenberg* is "the one authority that dictates" the court's result. He makes no mention of – and does not acknowledge – the longstanding constitutional principles and reasoning in *Roe* and *Casey* applied by the majority in reaching its result, and applied by the majority of circuits in similar cases. This omission is particularly striking given that the Supreme Court itself relied on these same core principles in *Roe* and *Casey* in deciding *Stenberg*. By emphasizing solely that he was constrained by the Supreme Court's precedent in *Stenberg*, he indicates his antipathy toward the majority's recognition of *Roe* and *Casey* as relevant precedent in this case. Had the Supreme Court not decided *Stenberg*, a case involving a statute substantially similar to the New Jersey law, as it did, Judge Alito very well might have reached a different conclusion in *Farmer*. Without the constraint he currently faces as a Circuit Court judge to comply with Supreme Court precedent, he could uphold a similar law in the future.

In *Alexander v. Whitman*, Judge Alito wrote a separate opinion to distance himself from the majority's discussion of the legal status of an unborn fetus in a wrongful death case.[89] His brief concurrence notes that he is in "almost complete agreement with the court's opinion," regarding the scope of the New Jersey wrongful death statute at issue and he agrees with the majority's finding that the Supreme Court held that a fetus is not a "person" under the 14th Amendment. Judge Alito, however, is compelled to object to the majority's further elaboration on this precedent through its reference to "constitutional non-persons." Given his efforts to avoid any articulation on this matter beyond the simple statement that the court is bound by Supreme Court precedent, his concurrence raises the question of whether absent such constraints he would seek to revisit the issue of fetal "personhood."

If elevated to the Supreme Court, Judge Alito would no longer be bound by precedent in the same way he is as a judge on the Third Circuit. His record suggests that as a Supreme Court justice, he would be the fifth vote to reconsider whether regulations governing abortion still must include an exception for cases where a woman's life or health is at risk. He also could cast a decisive vote to review and even overrule *Roe* and other cases involving the constitutional right to privacy. In the words of Justice Harry Blackmun, the author of *Roe v. Wade*, "For today, at least, the law of abortion stands undisturbed. For today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows."[90]

III. QUESTIONS ABOUT JUDGE ALITO'S JUDICIAL PHILOSOPHY AND APPROACH TO THE LAW

A. Understanding the Context

It is particularly important to focus special attention on the philosophy and approach Samuel Alito would bring to the Supreme Court because a nominee's judicial philosophy shapes how he

[88] 220 F.3d 127 (3d Cir. 2000).
[89] 114 F.3d 1392 (3d Cir. 1997).
[90] Webster v. Reproductive Health Services, 492 U.S. 490, 559 (1989) (Blackmun, J. concurring in part and dissenting in part).

or she analyzes legal questions and interprets the law, and affects the experiences and outcomes for plaintiffs and defendants in court. A nominee who believes that a law should be read very restrictively, for example, might reach a very different conclusion than a nominee who takes a more expansive view of the law's protections. Judge Alito's record raises serious concerns that his approach to the law would result in cutting back key civil rights protections, and undermine the ability of individuals to vindicate their rights in court.

B. Record Raises Serious Questions About Alito's Philosophy

Judge Alito's available record reveals a judicial philosophy that would undermine critical 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 most narrow 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.
- 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.

As discussed below, these views have enormous implications for civil rights and women's rights. But his nomination also raises broader concerns about judicial independence. He was nominated to the Court only after the President's first nominee, Harriet Miers, withdrew her name from consideration. The Miers nomination was the subject of unrelenting attacks by some of the President's most ardent and ideologically rigid supporters on the far-right. They complained that Ms. Miers did not have a proven track record of opposition to reproductive rights – including evidence demonstrating that she would vote to overturn *Roe v. Wade* – and opposition to civil rights issues such as affirmative action. The ensuing debacle saw the President's surrogates frantically trying to assure anti-choice activists that Ms. Miers' votes would be consistent with their views, but ultimately she withdrew her nomination from consideration.

The lingering memory of the Miers uproar casts an uneasy shadow on Judge Alito's nomination. Harriet Miers was perceived as an unknown who was deemed unacceptable by those seeking to advance a specific, narrow, far-right agenda; Judge Alito was picked in the wake of that criticism presumably to satisfy the President's supporters as a nominee with a record of reliable conservatism on critical legal issues. That context raises serious questions, not only about the philosophy and views that Judge Alito would bring to the Court, but also about judicial independence, to the extent that any nominee is perceived to be "hand-picked" to satisfy a powerful, vocal constituency. Judge Alito's restrictive, narrow approach to the law, when viewed in light of this broader context, only heightens concerns that he is the candidate of choice for those seeking to move the Court backward. Thus, Judge Alito has a special burden – and an obligation – to demonstrate that he would consider each case with an independent mind, interpret the law in a fair and even-handed manner, respect fundamental rights, and adhere to equal justice principles enshrined in our laws. We believe his available record raises serious doubts about whether he can meet this standard.

1. States' Rights, Congressional Power, and Federalism

One important question crucial to preserving women's rights involves the balance courts must strike between the authority of Congress to enact laws, and the autonomy of states to establish their own laws and operate independently of other states and the federal government. Questions about a nominee's views on states' rights are important to women because placing limits on Congressional power often means making it tougher for women to vindicate their rights at the state level. Judge Alito's' record raises troubling questions about whether he would defer to states' rights at the expense of individual rights or Congressional authority.

In a 1996 case, *United States v. Rybar*,[91] Judge Alito questioned the authority of Congress to criminalize the transfer or possession of a machine gun. The case involved a licensed gun dealer who was prosecuted for selling two machine guns at a gun show in violation of federal law. The gun dealer argued the gun law was invalid because Congress had exceeded its constitutionally defined powers. The majority disagreed, ruling that the gun law was within Congress' regulatory authority pursuant to the Constitution's commerce clause.[92] They noted that the law's general ban on machine gun possession was a reasonable response to deter the sale or transfer of machine guns across state lines. Further, disputing arguments that the gun sale at issue was solely an intrastate activity, they argued that Supreme Court precedent had long recognized the authority of Congress to regulate such activities that might have substantial effects on interstate commerce.[93] In dissent, however, Judge Alito interpreted the commerce clause much more restrictively to limit Congressional authority. He argued that the gun law at issue failed to include adequate findings of the link between machine gun possession and any impact on interstate commerce. Not only was Judge Alito's analysis rejected by the *Rybar* majority, but most of the appellate courts that have ruled on analogous machine gun issues also have rejected his narrow commerce clause analysis.[94]

As already discussed, Judge Alito also used a narrow reading of Congress' authority under the 14th Amendment to deny individual lawsuits against states alleging violations of the FMLA's medical leave provision. In *Chittister v. Department of Community and Economic Development*, he argued that Congress had exceeded its power because there was insufficient connection between gender discrimination and the need for a medical leave remedy. His analysis has troubling implications for Congress and its ability to enact meaningful antidiscrimination protections, and for individuals who rely on such protections to ensure fair treatment. More broadly, his views collectively would make it tougher to hold states accountable for complying with important legal standards and protections, consistent with constitutional mandates.

IV. CONCLUSION

With the stroke of a pen, the Supreme Court can touch the lives of millions of Americans, determining the scope of their rights in the workplace, in their doctor's office, in schools, in the

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[91] 103 F.3d 273 (1996).

[92] The Constitution's commerce clause provides another source of power for Congressional action. Congress is authorized under the commerce clause to regulate interstate commerce. This authority has been used, for example, to sustain federal laws governing health and safety, the environment, civil rights, labor, and other areas.

[93] United States v. Rybar, 103 F.3d 273 *(3d. Cir. 1996)*

[94] *See* U.S. v. Beuckelaere, 91 F.3d 781 (6th Cir. 1996); U.S. v. Rambo, 74 F.3d 948 (9th Cir.), cert denied 519 U.S. 819; U.S. v. Kirk, 70 F.3d 791 (5th Cir. 1995); U.S. v. Wilks, 58 F.3d 1518 (10th Cir. 1995); U.S. v. Bell, 70 F.3d 495 (7th Cir. 1995). Additionally, the Supreme Court recently vacated and remanded a 9th Circuit case that agreed with Judge Alito's analysis. United States v. Stewart, 348 F.3d 1132 (9th Cir. 2003), *vacated and remanded*, 125 S.Ct. 2899 (2005).

public sphere, in business, and even in their personal relationships. The justices who serve on the Court bear enormous responsibility to interpret the law in a fair and even-handed manner, to approach each case with an open mind, to respect the Court's rules and precedents, and to demonstrate an unflinching commitment to equality under the law. The Court must transcend political divisions and partisan rhetoric and give every person who comes before it a fair hearing.

To be confirmed, each Supreme Court nominee must make a convincing case that she or he will respect precedent, protect fundamental rights and advance justice. The record makes clear that Judge Samuel Alito will not. He has a long record that is remarkably consistent; his regressive views make it more difficult for victims of discrimination to vindicate their rights and for women to protect their privacy. On the Supreme Court, he would turn back the clock and take away critical rights and liberties.

- If his views on the FMLA were to prevail, meaningful FMLA rights for millions of state workers would disappear. Judge Alito's views are particularly troubling because he rejects a core tenet of the FMLA – that medical leave is a necessary and crucial remedy for longstanding gender-based discrimination and stereotypes about women in the workplace.
- Judge Alito's opposition to constitutional privacy protections that encompass the right to an abortion would deny women the ability to make their own reproductive health decisions without government interference.
- His restrictive interpretations of employment discrimination laws would make it harder for victims to vindicate their rights in court, and his opposition to affirmative action would undermine efforts to expand opportunities for women and people of color.
- Judge Alito's rigid, narrow views on the powers of Congress would make it tougher to hold states accountable for complying with a myriad of laws – from environmental protections, health and safety standards, civil rights, and women's rights.