December 20, 2005

The Honorable Patrick J. Leahy
United States Senate
433 Russell Senate Office Building
Washington, DC 20510

RE: Nomination of Samuel A. Alito to be Associate Justice of the United States Supreme Court

Dear Senator Leahy:

The nomination of Samuel Alito to the Supreme Court presents the country with a stark choice between competing visions of justice. In one vision, courts are institutions that protect rights and breathe life into our laws and our constitution. But the other vision takes us back to an earlier and darker period in our history as a nation - a period when courts constrained government's ability to protect working people and restricted ordinary American's access to the law's protection.

I write on behalf of the 1.8 million members of the Service Employees International Union (SEIU). Having reviewed Samuel Alito's record, we are left with no doubt as to his values and his vision of justice: In many areas of importance to our members, Judge Alito has acted to deprive working men and women of their rights.

We do not share Judge Alito's values or his views on the role of the federal judiciary. We believe that courts exist to ensure that ordinary people can secure statutory and constitutional protections. And so, I write to express SEIU's opposition to the nomination of Samuel Alito to be an Associate Justice of the Supreme Court.

I. A THREAT TO WORKERS' RIGHTS: JUDGE ALITO'S CONSTITUTIONAL IDEOLOGY

Of primary concern to SEIU members, and to all working Americans, is Judge Alito's radically constrictive view of Congress's ability to pass legislation that protects workers' rights.

In a personal statement that Alito submitted when applying for a high-ranking job in the Reagan justice department at age 35, he stated in explicit terms the ideological nature of his approach to law. "I am and always have been a conservative," Alito wrote. "I believe very strongly in limited government, federalism, free enterprise . . . and the legitimacy of a government role in protecting traditional values." These deeply held ideological beliefs have

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informed Alito's judicial decision making, and are quite clearly expressed in his opinions regarding government's ability to act on behalf of working families.

Judge Alito's tenure on the U.S. Court of Appeals for the Third Circuit has borne out this ideological bias. The most drastic example came in his opinion in *Chittister v. Department of Community and Economic Development*, which involved the Family and Medical Leave Act. As working families well know, this law allows workers to care for a newborn or newly adopted child or a seriously ill family member, or to take leave when they are themselves ill, without having to risk losing their jobs. But in *Chittister*, Judge Alito held that Congress lacked the authority to extend these critical protections to state employees. *Chittister*'s reasoning was rejected by the United States Supreme Court, in an opinion authored by former Chief Justice Rehnquist.

SEIU represents hardworking state employees across the nation. Our members' interests are directly threatened by a judge who believes that Congress cannot protect the rights of state workers.

Perhaps even more alarming, in terms of what it suggests about Judge Alito's understanding of Congressional power, is Alito's dissenting opinion in the *United States v. Rybar* case. There, the third circuit held that Congress had the power under the Commerce Clause to regulate the transfer and possession of machine guns. Alito disagreed. He argued that the Commerce Clause isn't broad enough to give Congress the authority to ban the possession of machine guns. The reasoning that Alito employed in *Rybar* was rejected by Justice Scalia in last year's medical marijuana decision.

The *Chittister* and *Rybar* decisions by Judge Alito are part of the broader "federalism" ideology that judges in recent years have employed in overturning an unprecedented number of federal statutes meant to protect Americans' rights and safety. But, as demonstrated by the contrary viewpoints of former Chief Judge William Rehnquist and Judge Scalia, Judge Alito's analysis in *Chittister* and *Rybar* actually go beyond what most proponents of this ideology would hold.

A radically constrictive vision of Congressional power, like Judge Alito's, puts at risk the core federal statutes of greatest concern to our members and to all working families. Our civil rights laws – including Title VII, the Fair Labor Standards Act, the National Labor Relations Act, the Occupational Safety and Health Act, the Migrant Seasonal Agricultural Protection Act, and many other federal labor laws would be threatened by Judge Alito's constitutional ideology.

II. A THREAT TO WORKERS' RIGHTS: JUDGE ALITO'S HOSTILITY TO THE RIGHTS OF INDIVIDUALS

SEIU is the nation's most diverse union. Over sixty percent of SEIU members are women and approximately forty percent are people of color. SEIU represents more immigrant workers than any other union in the U.S. Our members rely on the Constitution and on laws that protect individual rights.

Alito's record on individual rights bespeaks an unacceptably narrow approach to interpreting important Constitutional and statutory protections, an approach that consistently results in depriving workers of their rights.

A. Limited Constitutional Rights available to Immigrant Workers

While working as a senior attorney in the Reagan Justice Department in 1986, Judge Alito authored a memorandum suggesting that undocumented immigrants in the United States have limited constitutional rights. As the *Washington Post* has reported, even conservative constitutional scholars are surprised by the views expressed by Alito in this memorandum. Bruce Fein, who worked with Alito in the Reagan administration, had this to say about Alito's views on constitutional protections for immigrants: "[Alito] seems to be saying that there are no constitutional constraints placed on U.S. officials in their treatment of nonresident aliens or illegal aliens. Could you shoot them? Could you torture them?"

Clearly, Alito's views of the constitutional protections available to hardworking immigrants are cause for enormous concern. The Supreme Court has a responsibility to protect all of our rights, and SEIU is committed to ensuring that all working people in this country enjoy full protection under the law. A Justice who would deprive immigrants of these protections is a threat to our core value of equality before the law.

B. Restricted Access to Justice for Victims of Workplace Discrimination

Sheridan v. E.I. DuPont de Nemours, for example, involved a female employee's suit for sex discrimination based on her employer's promotion decisions. The question for the court of appeals was how much evidence such a plaintiff has to show in order to get her case to trial. The full third circuit court endorsed a standard that facilitates a worker's ability to have her meritorious claim presented to a jury. **Judge Alito was the sole dissenter in this *12-1 decision*. He argued for a more stringent evidentiary standard – a standard that would deprive employees of their day in court.**

Judge Alito has pressed for similarly restrictive evidentiary standards in employment cases involving race discrimination. Thus, in *Bray v. Marriott Hotels*, an African-American worker sued when she was denied a promotion and a white woman got the job instead. Again, the third circuit ruled that the plaintiff should be able to pursue her claim, and again Alito dissented from the court's ruling. **Alito pushed for a more stringent evidentiary burden in this discrimination case, and in doing so expressed his lack of sensitivity to employees' claims.**

And, true to form, **Judge Alito has advocated a stringent evidentiary burden in disability discrimination cases, a standard that would deprive disabled plaintiffs full access to justice.** In *Nathanson v. Medical College of Pennsylvania*, for example, the plaintiff needed an accommodation in order to attend medical school. The court of appeals ruled that the plaintiff was entitled to pursue her Rehabilitation Act claim, but Judge Alito again dissented. He pushed for a standard of proof that led the majority to write that "few in any Rehabilitation Act cases would survive summary judgment if such an analysis were applied to each handicapped individual's request for accommodations."

C. Restricting Access to Justice for Immigrants

In immigration cases, Judge Alito has exhibited a hostility to the federal courts' critical role of protecting the rights of vulnerable individuals. In *Chang v. INS*, for example, the third circuit ruled in favor of extending protections to a Chinese immigrant who told the FBI that he needed asylum in the United States and faced danger if returned home. Despite evidence that Chang's family had already faced persecution in China, and despite the fact that Chang's photograph had been posted in a local security office, Alito dissented and would not have prevented Chang's deportation. Similarly, *Dia v. Ashcroft* involved an immigrant from Guinea who fled to the United States after his wife was raped and his house destroyed by the military in retaliation for his political opposition work. After Dia was ordered removed from the U.S., the third circuit, sitting en banc, refused to enforce the removal, ordering the case back to the immigration court for further review. Alito dissented and argued that the appeals court should not have offered any recourse to Dia. And in *Lee v. Ashcroft*, Alito dissented from the majority's holding and argued that filing a false tax return was an "aggravated felony" for which 20-year residents of the United States could be deported.

D. Curtailing Protections for the Dignity of Individuals

Judge Alito's disdain for individual rights is also clear from his record in criminal and search and seizure cases. As a third circuit judge, for example, Alito filed numerous dissents in criminal cases and search and seizure cases, and in not one of those dissents did he advocate a position more protective of individual rights than the majority. **In one alarming case, Alito dissented from the court's decision (authored by then-judge, now Secretary of Homeland Security Michael Chertoff), and argued that a woman and her 10-year-old child, who were strip-searched by police officers, should not be able to pursue a claim against the officers.**

III. A THREAT TO THE RIGHTS OF LOW-WAGE WORKERS

SEIU represents approximately 250,000 janitors, and more than 500,000 nursing home and home care workers. Non-union workers in these low-wage sectors of the economy must depend on the protection of our federal wage and hour laws. Judge Alito's narrow interpretation of the Fair Labor Standards Act is hostile to the interests of these working Americans.

In *Reich v. Gateway Press*, the majority of the third circuit construed the Fair Labor Standards Act as offering wage and hour protections to reporters working for community newspapers that were owned by a larger newspaper conglomerate. Judge Alito dissented. Despite the fact that Gateway owned nineteen newspapers with a total circulation of over 60,000, Alito would have ruled that the employees fell within the law's "small newspaper" exemption and, thus, **he would have deprived these workers of their federal minimum wage and overtime rights.**

IV. A THREAT TO WORKERS' SAFETY

SEIU members, and all workers, deserve a workplace that is safe and healthy. Rigorous enforcement of safety and health laws is critical to the wellbeing of America's working families. A judge, who interprets these laws in a narrow, begrudging way, threatens the health and safety of working men and women.

In the worker safety and health context, Judge Alito has applied the same judicial approach to deprive workers of the protections of federal law. In *RNS Services v. Secretary of Labor, MSHA*, the third circuit held that the Mine Safety administration could enforce federal safety regulations on behalf of employees who worked at RNS's refuse pile in Barr Township, Pennsylvania. Alito dissented. According to his reading of the statute, it wasn't sufficiently clear that the type of work performed at the RNS site entitled the workers there to federal protection.

V. HOSTILITY TO UNION RIGHTS

Judge Alito's record on cases involving unions is similarly troubling. In *Caterpillar v. UAW*, for example, the full third circuit entertained and rejected the employer's remarkable contention that allowing employees to do full-time union work, such as grievance representation, while remaining on the company's payroll was a federal crime. Alito again dissented. Despite the fact that these types of "no-docking" provisions are part and parcel of countless labor agreements, Alito argued that Congress intended to make them criminal. And in a show of remarkable hostility to union rights, Alito went out of his way to write that he would not even apply the "rule of lenity" in the case because he saw "no ambiguity" in the statute.

Judge Alito also dissented in *FLRA v. United States Dept. of the Navy*, a case in which the third circuit upheld the union's right to obtain information necessary to contact employees and extend the bargaining unit to include them. Alito would have prevented the union from obtaining the information.

And Judge Alito has indicated a lack of sensitivity to the importance of continuity in collective bargaining relationships, adopting a cramped reading of contract rights, and denying the union the right to arbitrate certain grievances, in his dissent from the majority's decision *Luden's v. Local Union No. 6*. The other courts of appeals that have considered the *Luden* question have followed the third circuit majority.

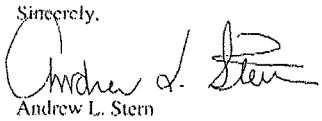
VI. FROM JUSTICE O'CONNOR TO JUDGE ALITO: A STEP DOWN FOR WORKING FAMILIES

Finally, as the Senate considers Judge Alito's nomination, it is worth observing the **vast differences between Alito and Justice O'Connor - the Justice he is nominated to replace.** No case highlights this difference more clearly than *Planned Parenthood v. Casey*. There Alito voted to uphold a Pennsylvania law that required women to notify their husbands before getting an abortion. When the case went before the Supreme Court, Justice O'Connor was the fifth vote in the Court's decision to strike down this law. O'Connor was also part of the Court majority that, rejecting Alito's arguments to

the contrary in *Chittister*, voted to extend Family and Medical Leave Act protections to state employees. And in a case where Alito voted to uphold a death sentence in the face of claims that the defendant's lawyers had provided inadequate counsel, the Supreme Court reversed with Justice O'Connor again casting the fifth vote.

The Alito nomination calls on all of us to decide what kind of federal judiciary we want: one that acts to protect individuals and breathes life into our Constitution or one that stands in the way of working Americans who seek to vindicate their rights. Judge Alito's activist record shows quite clearly that he uses his power as a judge to constrict rights, restrict access to justice, and deprive American workers of critical legal and constitutional protections. A judge with this record is not an appropriate choice for the Supreme Court. I urge you to oppose the nomination of Samuel Alito.

Sincerely,



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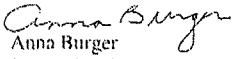

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