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December 28, 2005

The Honorable Dianne Feinstein
Judiciary Committee
United States Senate
331 Hart Senate Office Building
Washington, D.C. 20510-0504

BY FAX: (202) 228-3954

Dear Senator Feinstein:

California Women Lawyers (CWL), a statewide association of attorneys and women's bar associations that promotes justice and equality with an emphasis on women and children, opposes the appointment of Samuel A. Alito, Jr. to the United States Supreme Court. CWL reached this decision after a careful review of Judge Alito's writings and decisions, both before his appointment to the Third Circuit Court of Appeals and as an appellate judge following his appointment. CWL takes this position with a recognition that the judiciary must retain its independence; however, our review of Judge Alito's positions leads CWL to believe that Judge Alito has a demonstrated disregard for Constitutional and statutory protections on issues ranging from reproductive choice to the scope of executive powers.

CWL is well aware of Judge Alito's impressive scholastic and professional achievements. There is no question that he is "qualified," in terms of training and background, to be a Supreme Court justice. Nonetheless, the issue is whether Judge Alito has demonstrated the kind of fairness, independence, and considered judgment that the American people should be able to expect from a nominee to their highest court. A review of Judge Alito's stated positions indicates that he has not.

Some examples of Judge Alito's especially troubling statements and rulings include:

- **WOMEN'S REPRODUCTIVE FREEDOM.** Judge Alito's dissent in Planned Parenthood v. Casey found that the spousal notification requirement in Pennsylvania's Abortion Control Act of 1982 did not impose undue burdens on women seeking abortions and compared it to a parental notification requirement for minors that had previously been found not to impose an undue burden on such minors seeking abortions. (A-1) [See citations to cases and documents, including notes, in Attachment "A" enclosed.] Upon review, the United States Supreme Court found that the restriction placed an undue burden on a woman's reproductive freedom. Justice Sandra Day

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O'Connor, writing for the majority, concluded, "[A] State may not give to a man the kind of dominion over his wife that parents exercise over their children." (A-1, at 898) This dissent is even more troubling when viewed in the context of Alito's pre-judicial statements of his strong beliefs that Roe v. Wade should be overruled because the Constitution does not protect a right to an abortion. (A-2) CWL believes that these pre-judicial statements, when viewed against Alito's record on choice issues as a judge, reflect that if given the ability to set precedent, he will move the Supreme Court towards overturning Roe v. Wade or towards further restricting the right to reproductive choice.

- **SEXUAL HARASSMENT.** Judge Alito's opinion in Robinson v. City of Pittsburgh, demonstrated an inability to recognize the nature of sexual harassment and insensitivity to those who have encountered such harassment. The Third Circuit upheld as irrelevant a City report finding that the supervisor had created an "uncomfortable" work environment for another woman which was offered to prove notice of a hostile work environment because the conduct discussed did not put the City on notice of Robinson's alleged harassment by the same man. (A-3, at p. 993)

- **EMPLOYMENT DISCRIMINATION.** Judge Alito's dissents in several cases would have made it more difficult to prove claims of job discrimination. In Bray v. Marriott Hotels and Sheridan v. E.I. DuPont de Nemours and Co., he would have imposed exceedingly high evidentiary burdens for plaintiffs to bring their cases before a jury. (A-4) In Bray, the majority noted that his 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 bias." (A-4, at 993.)

- **RACIAL DISCRIMINATION IN JURY SELECTION.** In Riley v. Taylor, the Third Circuit reversed the findings against an African-American sentenced to death for felony murder by an all white jury because Riley's rights were violated by the prosecution's peremptory strikes of black jurors. (A-5) The court found the attempt in Alito's dissent to compare the statistical evidence of the prosecution's repeated use of peremptory challenges to strike black jurors to the percent of left-handed Presidents was insensitive and that such a comparison minimized the history of discrimination against prospective black jurors and black defendants. (A-5, at 292)

- **SEPARATION OF CHURCH AND STATE.** Judge Alito's opinion in Child Evangelism Fellowship of New Jersey v. Stafford Township School District, appears to create an impermissible entanglement of church and state. (A- 6) The Fellowship's stated "purpose is to evangelize boys and girls with the Gospel of the Lord Jesus Christ and to establish (discipline) them in the Word of God and in a local church for Christian living." (A-6, at p. 521.) Writing for the majority, Judge Alito rejected the argument that students could view requiring the school district to distribute the

Fellowship's materials to students, post materials in school and distribute materials at back-to-school nights as endorsing a particular religious perspective because the school district could send home materials "explaining the school district's policies and disclaiming any endorsement of religion" or have "teachers ... explain the point to students." (A-6, at p. 534.)

- **MACHINE GUN BAN.** Dissenting from the majority in United States v. Rybar, Alito wrote that Congress did not have power under the Commerce Clause to enact a ban on machine gun possession because there had been no showing that intrastate possession of machine guns had a substantial effect on interstate commerce. (A-7) The Supreme Court rejected this restrictive interpretation of Congress' authority under the commerce clause in Gonzales v. Raich. (A-7) Judge Alito's position in Rybar is of special concern because the Commerce Clause serves as the basis for Congress's power to regulate in many areas, including civil rights, environmental protection, consumer protection, and worker protection.

- **FAMILY AND MEDICAL LEAVE ACT.** Judge Alito is the author of the opinion in Chittister v. Department of Community & Economic Development, which held that a state employee fired while on an approved sick leave did not have the ability to sue under the Family and Medical Leave Act of 1993 because Congress did not have the power to require state employers to comply with the FMLA. (A-8) The Supreme Court disagreed in Nevada Dept. of Human Resources v. Hibbs, holding that Congress validly acted under the Fourteenth Amendment when it enacted the FMLA. (A-8)

- **BLANKET IMMUNITY FOR WARRANTLESS WIRETAPS.** A recently released 1984 memo bears on Alito's ability impartially to review an issue that almost certainly will reach the Supreme Court again on different facts. While he was an assistant solicitor general, Alito wrote that he believed the attorney general should be absolutely immune from claims arising out of illegal, warrantless wiretaps based on national security. (A-9) He suggested an incremental legal strategy advocating for tactical reasons that the administration should attempt a more moderate defense instead of seeking complete immunity and should appeal on narrow procedural grounds because there were "strong reasons to believe that our chances of success will be greater in future cases." (A-9) The administration at the time did not follow Alito's advice, and the Supreme Court ruled that the attorney general only had qualified immunity from suit.

This list is not meant to be an exclusive recitation of all of the problematic points raised by Judge Alito's past statements and opinions, and it is not meant to reflect a belief that there cannot be disagreement about individual issues or cases. Nor is this list meant to imply that CWL contends that all of Judge Alito's decisions are out of step with principles of justice. Rather, this list is meant to show that Judge Alito's record does not

consistently demonstrate an open mind to decision-making, a commitment to protecting the rights of ordinary Americans, a commitment to the progress made on civil rights, women's rights, and individual liberties, or a respect for the constitutional role Congress plays in promoting those rights and health and safety protections.

CWL does not expect you to take a position with respect to Judge Alito without asking him questions. Consistent with CWL's approach with past nominees, and based on comments we have received and discussions we have held, CWL is recommending some questions for you to ask Judge Alito during his confirmation hearing next month to help determine his impartiality and independence and commitment to principles of importance to CWL. The recommended questions are set forth in Attachment "B".

We hope these questions, and CWL's statement of position, are useful in evaluating Judge Alito's suitability for the United States Supreme Court. CWL appreciates your consideration of its concerns about Judge Alito and in asking Judge Alito the questions set forth in the attachment. We welcome any questions you might have about CWL's stance on Judge Alito's nomination.

Sincerely,

CALIFORNIA WOMEN LAWYERS

Pearl Gondrella Mann

Pearl Gondrella Mann
President

cc: Senator Barbara Boxer
Senator Patrick Leahy
Senator Arlen Specter