TESTIMONY OF THE CENTER FOR REPRODUCTIVE RIGHTS ON THE NOMINATION OF SAMUEL A. ALITO TO THE UNITED STATES SUPREME COURT

The Center for Reproductive Rights ("Center") respectfully submits this testimony to provide an analysis of Judge Samuel A. Alito's record and testimony on issues relating to reproductive rights, *Roe v. Wade*, and stare decisis.

The Center was established in 1992 as an organization that uses the law to advance reproductive freedom as a fundamental right. The Center is the only public interest law firm dedicated exclusively to the protection of reproductive rights in the United States and abroad. Center attorneys have represented women and health care providers in numerous challenges to restrictive laws at every level of the state and federal court systems and were lead counsel in several Supreme Court cases concerning the right to choose and related issues, including *Ferguson v. City of Charleston*, 121 S. Ct. 1281 (2001), *Stenberg v. Carhart*, 530 U.S. 914 (2000), *Mazurek v. Armstrong*, 520 U.S. 968 (1997), *Lambert v. Wicklund*, 520 U.S. 292 (1997), and *Leavitt v. Jane L.*, 518 U.S. 137 (1996). It is this real-world view of the effects of Supreme Court jurisprudence on reproductive rights that we bring to our analysis of Judge Alito's record and testimony.

While the Center does not normally take positions on judicial nominations, our review of Judge Alito's record and testimony has spurred us to submit this written testimony to express our grave concern over the impact Judge Alito would have on reproductive rights jurisprudence as an Associate Justice of the United States Supreme Court. Of particular concern are 1) Judge Alito's repeated refusal to discuss whether he still holds the view, as he expressed in his 1985 job application, that "the Constitution does not protect a right to an abortion"; 2) his refusal to agree that *Roe v. Wade* is "settled law"; and 3) his failure to explain satisfactorily his dissent in the Third Circuit's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. In that case, he voted to uphold a requirement that a woman notify her husband before obtaining an abortion and compared the woman's relationship with her husband to a child's relationship to a parent. Moreover, his testimony that *Roe v. Wade* is a precedent that is entitled to respect under the doctrine of *stare decisis* coupled with his refusal to state that *Roe* is "settled law," does not allay our concerns. After all, the dissenters in *Planned Parenthood v. Casey*, 505 U.S. 833, 944 (1992) (Rehnquist, J., dissenting) argued that *Roe* "can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases."

We are hopeful that, if confirmed, Judge Alito will recognize that the United States Constitution, which he testified provides substantive protection for the liberty of U.S. citizens, protects a woman's ability to decide whether to carry a pregnancy to term. We are hopeful that he will recognize, as the Court did in *Casey*, that:

> That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. . . . Her suffering is too intimate and personal for

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> the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.

Casey, 505 U.S. at 852. However, taken together, Judge Alito's record and his testimony leave us with significant concerns about what he meant when he testified that he does not have an "agenda" when it comes to abortion and that, as a Supreme Court Justice, he would approach the issue with an "open" mind. Rather than eliminating our concerns, Judge Alito's testimony at the hearings – both the questions he answered as well as the ones he artfully left unanswered – has only deepened our concerns for the reasons we outline below.

I. Judge Alito's Testimony Does Not Adequately Explain his Dissent from the Third Circuit's Decision in *Planned Parenthood v. Casey* in which He Voted to Uphold Pennsylvania's Spousal Notification Requirement.

Judge Alito's dissent in *Planned Parenthood v. Casey* provides an especially important look into his approach to abortion jurisprudence. It is the only abortion case in which the outcome was not controlled directly by precedent and instead allowed him some leeway to interpret Supreme Court standards. When given this leeway, he interpreted these standards to provide the least protection to the right possible and, specifically, to uphold a spousal notification provision that he admitted placed some battered women and their children at risk.

At issue in *Casey* were a number of amendments to Pennsylvania's abortion law, including a parental consent requirement (with judicial bypass), a 24-hour waiting period, an "informed consent" requirement, and a spousal notice requirement. The Third Circuit struck down the spousal notice requirement but upheld the rest of the regulations under an "undue burden" standard. *Casey*, 947 F.2d 682 (3d Cir. 1991), *aff'd*, 112 S. Ct 2791 (1992). The Supreme Court later affirmed the Third Circuit's decision in a decision that replaced *Roe's* strict scrutiny analysis with an "undue burden" analysis. *See Casey*, 112 S. Ct. at 2821-22 ("We agree generally" with the conclusion of the Third Circuit, but "refine the undue burden analysis."). Judge Alito dissented from the Third Circuit's opinion, voting to uphold the spousal notice requirement and applying an interpretation of the "undue burden" standard that would allow almost any regulation of abortion to stand, short of an absolute ban.

A. Judge Alito Voted to Uphold a Spousal Notification Provision that Would Have Put Battered Women and Their Children at Risk.

In his dissent in *Casey,* Judge Alito indicated that he would have upheld Pennsylvania's spousal notification provision, even though, as he acknowledged, it contained only limited exceptions and, in particular, lacked an exception to notification for a woman who feared her husband would retaliate by beating their children. He acknowledged that the plight of women who "may suffer physical abuse or other harm as a result of th[e]

provision [was] a matter of grave concern." But he also said that whether Pennsylvania's approach of granting limited exceptions was sound was "not a question for [the courts] to decide."

B. Judge Alito Voted to Uphold the Provision Even Where He Determined It Would have a Heavy Impact on Some Women

Judge Alito also determined that there was no "undue burden" because the plaintiffs had not been able to prove "how many" women would be harmed. *Casey*, 947 F.2d at 722 (Alito, J., dissenting). Judge Alito contended that the burden imposed by the regulation should be analyzed according to the number of woman overall who were seeking abortions – not according to the impact it would have on the women it actually affected. *See id.* at 722 (arguing that an "undue burden may not be established by showing that a law will have a heavy impact on a few women but that instead a broader inhibiting effect must be shown."). In so doing, Judge Alito adopted the state's argument that there was no constitutional violation because the number of women who would be affected by the restriction was less than 1% of the *total number of women seeking abortions*.[1] In contrast, the Third Circuit majority rejected this approach because "the right not to carry to term is a constitutional right of *each individual woman*." *Id.* 691 n.4 (emphasis added).

Similarly, the Supreme Court flatly disagreed with Alito's approach, writing, "[t]he analysis does not end with the one percent of women upon whom the statute operates [to force spousal notification]; it begins there." *Casey*, 112 S. Ct. at 2830. The Court held that the "proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Id.* at 2829. The opinion carefully notes that this group is not all women, nor all women seeking abortions, nor even all married women seeking abortions. The proper focus of inquiry is "married women seeking abortions *who do not wish to notify their husbands of their intentions* and do not qualify for one of the statutory exemptions to the notice requirement." *Id.* at 2829-30. The Court struck down the spousal notice provision on its face because in a "large fraction" of this narrowed group, this group to which the restriction "is relevant," the restriction would operate as substantial obstacle to the woman's choice, i.e., an "undue burden." Id.

At the hearings, Judge Alito was asked by Senator Biden to explain the difference between his approach and the Supreme Court's approach in *Casey*, but in response he failed to explain why he adopted a contrary view. He also appeared to misunderstand the Supreme Court's ruling, and seemed to suggest that the proper focus of inquiry is *married women seeking abortions*, the point specifically rejected by the Court in *Casey*. 112 S. Ct. at 2829-30. Judge Alito's misunderstanding or misrepresentation of the proper standard is disturbing.

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[1] Only one percent of all women seeking abortions were married and didn't want to notify their husbands. The state argued that fewer than this one percent would be harmed by being *forced* to tell their husbands. *See Casey,* 112 S. Ct. at 2829 (discussing State's contention).

C. Judge Alito's Definition of the "Undue Burden" Standard Was Extremely Limited.

At the time of the Third Circuit's opinion in *Casey*, the Supreme Court had yet to explicitly adopt the "undue burden" standard later adopted in *Casey*. Nevertheless, the Third Circuit, joined by Judge Alito, held that a series of concurrences and dissents written primarily by Justice O'Connor indicated that the standard that applied to review of abortion regulations had already changed from the "strict scrutiny" standard adopted by *Roe* to an "undue burden" standard. Judge Alito disagreed with the Third Circuit majority, though, when it came to defining the scope of the undue burden standard. First, he stated that an undue burden did not exist unless a law prohibits abortion, gives another person veto power over the abortion, or imposes "severe limitations" on the rights. *Casey*, 947 F.2d at 721 (Alito, J., dissenting). He then appears to go further, discarding the "severe limitation" prong to hold that the spousal notice provision did not impose an undue burden, because it "d[id] not create an '*absolute* obstacle' [to having an abortion] or give a husband 'veto power'" over the abortion decision, and because the plaintiffs had not proven that the regulation would have a "broad practical impact." *Id.* at 722-23.

Subsequently, the Supreme Court flatly rejected Judge Alito's proposed construction of the "undue burden standard," resuscitating the "severe limitation" prong and emphasizing that an abortion regulation imposes an "undue burden" when it "places a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Casey*, 112 S. Ct. at 2820-21. It is difficult to think of any restriction, short of an absolute ban or veto, that would have been an undue burden under Judge Alito's proposed construction.

In his testimony, Judge Alito stated that the standard of review, the "undue burden test," was the "big issue" when *Casey* came before the Third Circuit. In response to questioning by Senator Biden on January 11th, Judge Alito testified, "[t]hat was the most hotly contested argument before us – had there been any change in the Supreme Court's case law? – and the plaintiffs argued strenuously that there had not." Judge Alito further stated that the panel struggled to determine the standard but concluded that it was the "undue burden standard. And there just wasn't a lot to go on. ... I looked for whatever guidance I could find." *Id.* Judge Alito did not explain how he came to such a different conclusion from the majority or the Supreme Court itself. Nor did he explain how he came to consider the burden imposed by the spousal notice provision on battered women who feared their children would be physically abused or that they themselves would be subject to mental torture if their husbands were notified of the abortion not to be "undue."

D. Judge Alito Compared a Woman's Relationship to Her Husband to A Child's Relationship to a Parent

In his *Casey* dissent, Judge Alito broke from the majority to argue that Pennsylvania's statute requiring a married woman to notify her husband before having an abortion was constitutional. His analysis appears not to recognize that a married woman's relationship to her husband should not be treated the same as a minor's relationship to her parents. As with Judge Alito's testimony on his view of the "undue burden standard," his explanation

of this apparent failure did little to allay our concerns about how he will address issues of reproductive freedom as a Supreme Court justice.

In arguing that the evidence presented in *Casey* failed to show that the spousal notice requirement imposed an undue burden, Judge Alito relied on several Supreme Court opinions upholding parental notice requirements. He wrote that "Justice O'Connor's opinions [on parental notice] disclose that the practical effect of a law will not amount to an undue burden unless the effect is greater than the burden imposed on minors seeking abortions in *Hodgson* or *Matheson*." *Casey*, 947 F.2d at 721.[2] In other words, Judge Alito made no distinction between the justifications for requiring parental notice and those for requiring spousal notice that would alter the constitutional analysis of the two types of restrictions.

Responding to questions from Sen. Feinstein on this issue, Judge Alito testified that "I've never equated the situation of an adult woman who fell within the notification provision of the Pennsylvania statute with the situation of a minor . . . . I actually said that I don't equate these two situations. I was mindful of the fact that they are very different situations." (1/10 p.m. Sen. Feinstein)

While he may have been "mindful" that the situations are different, it is simply not true that he stated that he didn't equate them. In fact, after comparing the two situations he never recognized or explored any differences between them. To the contrary, Judge Alito wrote that even as to the women who were inhibited from obtaining an abortion because of the notice requirement, "the plaintiffs did not show that the impact [of the law] would be any greater or any different from the impact of the notice requirement upheld in *Matheson*," one of the parental notice cases, 947 F.2d at 723, i.e., the constitutional inquiry was the same.[3]

Before the Judiciary Committee, Judge Alito defended his use of *Hodgson* and *Matheson* by explaining that he was reasoning by analogy and that this is what lawyers do. The problem with this explanation, of course, is that in this case Judge Alito, "reasoned by analogy" that the situations *were the same* with respect to the constitutional inquiry, not that they were the same in some ways but different in others relevant to the constitutional inquiry. For example, Judge Alito never pointed out or took account of the significant difference between the woman's relationship to her husband (as co-equals) and the child's relationship to her parent. That this distinction is crucial to analyzing whether spousal or parental notice restrictions on the liberty of the individual are justified is clear

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[2] In *Hodgson v. Minnesota*, 497 U.S. 417 (1990), and *H.L. v. Matheson*, 450 U.S. 398 (1981), the Court reviewed laws requiring parental involvement before a minor could obtain an abortion.

[3] Judge Alito went so far as to state that the Pennsylvania legislature "could have reasonably believed that some married women are initially inclined to obtain an abortion without their husbands' knowledge because of perceived problems – such as economic constraints, future plans, or the husbands' previously expressed opposition – that may be obviated by discussion prior to abortion." 947 F.2d 726. In other words, Judge Alito seemed to believe that a woman might misunderstand her marriage or her family situation but that her husband could straighten her out – telling her that they have enough money for another child, that he would help with child care this time, that he actually wants to stay in the marriage.

from both the Third Circuit and the Supreme Court opinions. As the Court recognized in *Casey*, the analogy between parental notice requirements and spousal notice requirements can only go so far: "[Parental notification statutes], and our judgment that they are constitutional, are based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart. We cannot adopt a parallel assumption about adult women." 112 S. Ct at 2830.

II. Judge Alito Refused to Disavow His View, Expressed in 1985, that "the Constitution Does Not Protect a Right to An Abortion"

Judge Alito clearly admitted that the statement he made in his 1985 application for a promotion in the Reagan/Meese Justice Department that "the Constitution does not protect a right to an abortion" reflected his belief at the time. (*See, e.g.* 1/10 a.m. Sen. Specter, 1/10 p.m. Sen. Schumer) However, Judge Alito consistently refused to explain whether he continues to believe that "the Constitution does not protect a right to an abortion."

Instead of addressing his current views, Judge Alito claimed several times that the statement reflected his view from the "vantage point as an attorney in the Solicitor General's office." (1/10 a.m. Sen. Specter). Then, he consistently and tenaciously moved on to describe how he would address the question as a judge – by applying principles of state decisis and "if the Court were to get beyond the issue of stare decisis, then I would to go through the whole judicial decision-making process before reaching a conclusion." (1/10 p.m. Sen. Schumer).

In describing how he would address the substantive issue as a justice, Judge Alito testified that he had an open mind and appeared to be distancing himself from the 1985 statement with comments like these:

- When someone becomes a judge, you really have to put aside the things that you did as a lawyer . . . and think about legal issues the way a judge thinks about legal issues. (1/10 a.m. Sen. Specter).
- I would need to know the case before me. And I would have to consider the arguments – and they might be different arguments from the arguments that were available in 1985. (1/10 p.m. Sen. Schumer)
- The things that I said in the 1985 memo were a true expression of my views at the time . . . But that was 20 years ago, and a great deal has happened in the case law since then. *Thornburgh* was decided and then *Webster* and then *Casey* and a number of other decisions." (1/11 a.m. Sen. Durbin) *See also* Responses to Sen. Kohl (1/11 p.m.).

In response to sharp questioning from Sen. Schumer, Judge Alito explained that the due process clause of the Fifth and Fourteenth Amendments provides "protection for liberty, it provides substantive protection, and the Supreme Court has told us what the standard is for determining whether something falls within the scope of those protections."

However, unlike the question of whether the Constitution protects free speech, Judge Alito refused to opine on whether be believed the Constitution protected abortion, explaining that "[a]sking about the issue of abortion has to do with the interpretation of certain provisions of the Constitution." (1/10 p.m. Sen. Schumer). This, coupled with his refusal to agree that *Roe* is "settled law," *see infra*, causes us grave concern.

III. Judge Alito's Unwillingness to Say that *Roe v. Wade* is "Settled Law" Raises Serious Questions about How He Will Apply *Roe* and *Casey* to Abortion Issues Before the Court.

Judge Alito spent a good deal of his testimony discussing principles of stare decisis and his view of precedent. Indeed, his testimony opened with a long colloquy between him and Sen. Specter about *Casey,* its discussion of stare decisis and how that applies to the right to choose. Judge Alito, as he did throughout his testimony, carefully addressed the importance of precedent, but he consistently refused to discuss how the principles actually applied to a consideration of *Roe v. Wade, Casey*, or abortion more generally. In addition, although Judge Alito agreed that certain issues were "settled," or "well-settled," he refused to say whether he believed *Roe* and *Casey* were "settled."

Throughout his testimony, Judge Alito reiterated his respect for precedent and the important role that stare decisis should play in constitutional decision making. In response to questions about the strength of *Casey*, Judge Alito testified that when a decision is reaffirmed that "strengthens its value as stare decisis" and that when the Supreme Court declines to reach the merits of an issue but says it will rule on stare decisis principles, "that is a precedent on precedent." But he also reiterated that stare decisis is "not an inexorable command." *See, e.g.*, 1/11 p.m. Sen. Feinstein.

In contrast to his willingness to identify as well-settled *Brown v. Board of Education*, *Griswold v. Connecticut*, and the principle of one-person, one-vote established by the Warren Court, Judge Alito consistently refused to say that *Roe* and *Casey* were settled law. For instance, when asked by Sen. Durbin if he agreed that *Roe* is settled law, Judge Alito described the opinion as an "important precedent" that had been reaffirmed, "strengthen[ing] its value as stare decisis." When pressed again about whether it is the "settled law of the land," Judge Alito replied:

> It is a – if "settled" means that it is – it can't be reexamined, then that's one thing. If "settled" means that it is a precedent that is entitled to respect as stare decisis – and all of the factors that I've mentioned come into play, including the reaffirmation and all of that – then it is a precedent that is protected, entitled to respect under the doctrine of stare decisis. (1/11 a.m. Sen. Durbin)

He declined to be more specific because "it is an issue that is involved in litigation now, at all levels." *Id.* Similarly, in response to a question from Sen. Kohl, Judge Alito refused to say whether "in [his] mind . . . the principle embodied in *Roe* ... or ... in *Casey* is clearly established law that is not subject to review." Because of the "current state of

litigation relating to the issue of abortion," Judge Alito testified that it would not be appropriate for him to "go further than that." (1/11 p.m. Sen. Kohl)

These careful responses do not clarify how Judge Alito will address challenges to *Roe* and *Casey* if they come before him as a Supreme Court justice.

IV. Judge Alito Agreed that the "Case Law" is Clear that Any Restriction on Abortion Must Include an Exception Protecting the Health of the Mother

In response to a question from Sen. Feinstein, Judge Alito agreed that "I think the case law is very clear that protecting the life and the health of a mother is a compelling interest throughout pregnancy. I think that's very clear in the case law." (1/10 p.m. Sen. Feinstein). We remain hopeful, therefore, that Judge Alito would apply this case law as an Associate Justice of the Supreme Court to require any restriction on abortion to protect the life and health of the woman.

V. Judge Alito's Other Third Circuit Decisions Relating to Abortion and His Testimony about Those Decisions Do Not Provide Any Significant Evidence of His Position on Reproductive Rights

As a judge on the Third Circuit, Judge Alito participated in several cases touching on abortion rights in addition to *Planned Parenthood v. Casey*. His participation in all three demonstrates a judge who is willing to follow precedent when it leaves him no wiggle room and to apply careful statutory, regulatory analysis but they do not provide any insight into how he would approach the issue as an Associate Justice of the Supreme Court.

In two of those cases, he was bound by the Supreme Court's clear precedent on the issue, and he followed it. In *Planned Parenthood v. Farmer,*[4] the Third Circuit was called on to review New Jersey's partial birth abortion statute that was nearly identical to the one struck down by the Supreme Court in *Stenberg v. Carhart.*[5] Judge Alito voted with the majority to apply *Stenberg*. Notably, however, he went out of his way to write a concurrence objecting to the majority's issuance of an opinion it had written before *Stenberg* was handed down. It isn't clear from his opinion whether he initially voted with or against the majority – and he was not called on to testify about his concurring opinion during his confirmation hearings. Also, in *Alexander v. Whitman,*[6] Judge Alito voted with the majority in a decision holding that stillborn fetuses did not have equal protection rights and thus state law was not required to include a cause of action for stillborn fetus. Again, Judge Alito's position here was mandated by Supreme Court and Third Circuit precedent.[7]

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[4] 220 F.3d 127 (3d Cir. 2000).

[5] 539 U.S. 914 (2000).

[6] 114 F.3d 1392 (3d Cir. 1997).

[7] Judge Alito also wrote an inscrutable concurring opinion here, seeming to distance himself from the reasoning of the precedent that bound him.

Finally, Judge Alito voted with the majority in *Elizabeth Blackwell Health Center for Woman v. Knoll*,[8] a case challenging a Pennsylvania law imposing special requirements on Medicaid funding of abortions. The court found that Pennsylvania's reporting requirement in cases of rape or incest conflicted with federal law and were thus, invalid. It also found that the requirement that a second physician certify that a woman's life was in danger was invalid. This was a simple application of federal preemption doctrine and did not address the constitutionality of abortion.

For all these reasons, the Center for Reproductive Rights remains extremely concerned about the impact Judge Alito would have on constitutional abortion jurisprudence and thus on the lives and health of women in this country if confirmed as an Associate Justice of the United States Supreme Court.

[8] 61 F.3d 170 (3d Cir. 1995).