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The Honorable Arlen Specter, Chairman  
The Honorable Patrick J. Leahy, Ranking Member  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

Dear Chairman Specter and Ranking Member Leahy:

On behalf of the Leadership Conference on Civil Rights (LCCR), the nation's oldest, largest, and most diverse civil and human rights coalition, we write to express our opposition to the confirmation of Judge Samuel A. Alito, Jr. as Associate Justice of the Supreme Court of the United States.<sup>1</sup> The Supreme Court's jurisprudence over the past 50 years has often served to protect the fundamental constitutional rights of all Americans. Judge Alito's decisions, however, often stand in direct contrast to that jurisprudence and embrace a much more limited and narrow view of constitutional rights and civil rights guarantees. A careful examination of Judge Alito's record reveals a history of troubling decisions in the areas of civil rights, civil liberties, and fundamental freedoms, decisions that undermine the power of the Constitution and of Congress to protect the civil and human rights of all Americans. LCCR believes that Judge Alito's record does not demonstrate an adequate commitment to protecting fundamental rights and, therefore, urges the Senate to reject his nomination.

The Supreme Court is the final arbiter of our laws, and its rulings can drastically impact the lives, liberties, and rights of all Americans. As such, LCCR believes that no individual should be confirmed to the Supreme Court unless he or she has clearly shown a strong commitment to the protection of civil rights and liberties, human rights, privacy, and religious freedom. The evidence reviewed to date shows that Judge Alito's record in these areas is highly troubling. His overall record reveals a jurist whose views are clearly to the right of where most Americans stand on a number of issues, including the reach of civil rights laws, the constitutional safeguards afforded those within our criminal justice system, and the power of Congress to protect Americans in the workplace and elsewhere.

In addition, LCCR is very troubled by the statements Judge Alito made in his 1985 application to be the Reagan administration's Deputy Assistant Attorney General in the Office of Legal Counsel. In particular, Judge Alito cited his disagreement with key rulings by the Supreme Court on legislative reapportionment, criminal justice and religious liberties, and added that he was "particularly proud" of his work to restrict affirmative action and limit remedies in racial discrimination cases. Although he now claims that these were just mere words on an application, his record as a jurist reveals

<sup>1</sup> Some organizations in the Leadership Conference on Civil Rights have not opposed Judge Samuel Alito's confirmation to the Supreme Court.



something different. The ideological views taken in the application and during his time in the Reagan administration are exemplified throughout his judicial decision making, where he routinely favors a reading of statutory and constitutional law that limits the rights of individuals and the power of Congress to protect those individuals. The following is a summary of the reasons for LCCR's opposition:

#### Judge Alito's "Disagreement" with Supreme Court Rulings on Reapportionment

In an essay attached to a 1985 application for a position within the Department of Justice, Judge Alito wrote that he had been motivated by his opposition to, among other things, the Warren Court's rulings on legislative reapportionment.<sup>2</sup> Because those rulings first articulated the fundamental civil rights principle of "one person, one vote," and paved the way for major strides in the effort to secure equal voting rights for all Americans, his stated opposition to them is extremely troubling. It is vital to understand the context in which these cases were decided.

Prior to the 1960s, as urban areas throughout the country experienced rapid population growth, many state and federal legislative districts were not redrawn, often leaving rural voters with far more representation *per capita* – and thus far more political power – than urban residents. In Florida, for example, just 12 percent of the population could elect a majority of the state senate. While unequal districts affected all voters, their impact was especially harsh in the South, where, along with discriminatory requirements like poll taxes and literacy tests, malapportionment virtually guaranteed the exclusion of racial minorities from the democratic process. Until 1962, the federal courts generally refused to intervene, dismissing such matters as "political questions."

The Supreme Court's ruling in *Baker v. Carr*<sup>3</sup> broke new ground when the Court declared, for the first time, that the federal courts had a role to play in making sure that all Americans have a constitutional right to equal representation. In *Wesberry v. Sanders*,<sup>4</sup> the Court examined Congressional districts in the State of Georgia, which had drawn its legislative map so that 823,680 people in the Atlanta area were all represented by one Congressman, while a rural Congressman represented only 272,154 people. The Court held that these disparities violated the Equal Protection Clause of the 14<sup>th</sup> Amendment, and ordered that the districts be redrawn more evenly. In *Reynolds v. Sims*,<sup>5</sup> the Court applied the principle of "one person, one vote" to state legislatures, which, in many cases, had even more drastic malapportionment than Congressional districts. For example, the *Reynolds* case itself challenged Alabama's legislative districts, in which one county with more than 600,000 people had only one senator, while another county with only 15,417 people also had its own senator.

In articulating the concept of "one person, one vote," the so-called "Reapportionment Revolution" cases equalized political power between urban and rural voters, and ensured that every citizen would have an equal voice in the legislative process. Along with the passage of the Voting Rights Act of 1965 and its subsequent amendments, the decisions also paved the way to far greater representation of racial and ethnic minorities, at both the state and federal levels of government. They also helped open the door for legal challenges to the "at-large" and "multi-

<sup>2</sup> Department of Justice Application of Samuel A. Alito, Jr. for the Position of Deputy Assistant Attorney General, Nov. 15, 1985.

<sup>3</sup> 369 U.S. 186 (1962).

<sup>4</sup> 376 U.S. 1 (1964).

<sup>5</sup> 377 U.S. 533 (1964).



member” districts that many Southern states established in an effort to circumvent the *Baker* rulings and continue excluding African-American voters from the political process.

The Warren Court decisions that established the constitutional principle of “one person, one vote” were a catalyst for tremendous progress in our nation’s efforts to secure equal voting rights for all Americans, and quickly became so accepted as a matter of constitutional law that they could fairly be described as “superprecedent.” Yet two decades later, long after most of the nation had come to embrace this progress, Judge Alito still boasted of his opposition to it. The fact that he would use his opposition as a “selling tactic” for a job in 1985 is disconcerting, and raises suspicions about his overall legal philosophy that deserve extensive scrutiny.

#### **Judge Alito’s Narrow Reading of Anti-Discrimination and Other Worker Protection Laws**

Judge Alito’s record also raises concerns about whether he would be a strong enforcer of our nation’s civil rights and labor laws. His decisions thus far in such cases show a pattern of narrow interpretations of the laws, placing greater burdens on civil rights plaintiffs to prove discrimination and making it harder for the government to protect workers.

In a number of cases involving race, gender, disability, and age discrimination, Judge Alito was clearly to the right of his colleagues on the Third Circuit. In *Bray v. Marriott Hotels*,<sup>6</sup> for example, the Third Circuit ruled that an African-American plaintiff who had been denied a promotion had shown that racial discrimination might have been a factor, and that she was therefore entitled to take her case to trial. But Judge Alito dissented, writing an opinion that prompted the majority to charge that “Title VII would be eviscerated if our analysis were to halt where the dissent suggests.”<sup>7</sup> In *Sheridan v. E.I. DuPont de Nemours and Co.*,<sup>8</sup> a gender discrimination plaintiff sued after being denied a promotion. A jury ruled in her favor, but the trial judge threw out the verdict. The Third Circuit found that she had presented enough evidence to persuade the jury that discrimination was a factor, but Judge Alito was the lone dissenter in the *en banc* decision. Judge Alito acknowledged that additional evidence of discrimination, beyond proof that an employer’s explanation for an adverse decision was pretextual, should not usually be required for a plaintiff to get to a jury, but he maintained that summary judgment might still be appropriate in some cases. The result Judge Alito would have reached in the *Sheridan* case, however – reversing a jury finding of sex discrimination that every other judge on the Third Circuit would have upheld – undermines the neutral standard he articulated. To reach this result, Judge Alito not only gave the employer the benefit of the doubt but failed to consider some of the most important evidence brought by Sheridan. Finally, in *Nathanson v. Medical College of Pennsylvania*,<sup>9</sup> a prospective medical student filed suit under the Rehabilitation Act of 1973, claiming that the school failed to provide accommodations for a back injury. The trial court granted summary judgment in favor of the school, but a Third Circuit panel reversed on the Rehabilitation Act claim because there were different factual assertions that necessitated a jury trial. Judge Alito dissented, prompting his colleagues to write that under his standards, “few if any Rehabilitation Act cases would survive summary judgment.”<sup>10</sup>

<sup>6</sup> 110 F.3d 986 (3d Cir. 1997).

<sup>7</sup> *Bray*, 110 F.3d at 993.

<sup>8</sup> 100 F.3d 1061 (3d Cir. 1996).

<sup>9</sup> 926 F.2d 1368 (3d Cir. 1991).

<sup>10</sup> *Nathanson*, 926 F.2d at 1387.



Judge Alito's record on anti-discrimination cases becomes more troubling when considered in light of his record prior to serving on the Third Circuit. As Assistant to the Solicitor General during the Reagan administration, Judge Alito co-authored several *amicus curiae* briefs that sought to eliminate affirmative action policies that were put in place to remedy past discrimination,<sup>11</sup> discrimination which, in one case, persisted in contravention of at least three court orders over an eight-year period.<sup>12</sup> In his 1985 application for a promotion within the Justice Department, Judge Alito later mischaracterized these cases as involving nothing more than challenges to "racial and ethnic quotas." Judge Alito's involvement in the Reagan Justice Department's zealous campaign to undermine affirmative action remedies suggests that he adheres to an ideology that goes beyond mere conservatism on civil rights matters.

In cases involving other worker protections that deal with such matters as salary, pensions and job safety, Judge Alito has also demonstrated a clear and unmistakable tendency to rule narrowly and against working people. Given a choice between reading a statute broadly, consistent with Congress' intent to provide workers with basic protections, or reading a statute in the narrowest way possible, he again shows a disturbing tendency to come down against workers. In *Reich v. Gateway Press*,<sup>13</sup> for example, Judge Alito dissented from a ruling in which the Third Circuit found that employees of a group of related community newspapers were protected by the overtime rules of the Fair Labor Standards Act. The majority reasoned that while the law may not have covered each individual newspaper, which were small in size and circulation, the papers and all employment decisions were managed by one company and thus amounted to an "enterprise" that was subject to the overtime law. Judge Alito dissented, however, and would have denied this coverage, claiming that neither the statute nor the legislative history could support the majority's conclusion. In *Belcufine v. Aloe*,<sup>14</sup> on the other hand, Judge Alito took a more expansive reading of the law, but in this case it was in order to benefit corporate officers at the expense of workers. *Belcufine* involved a state law that held corporate officers personally liable for unpaid wages and benefits. Judge Alito ruled, in a split decision, that the law could no longer be applicable, as a matter of policy, once a corporation has filed a bankruptcy petition. The dissenting opinion pointed out that nothing in the statute in question "even remotely can be read to excuse the agents and officers" from liability once a company files for bankruptcy.<sup>15</sup>

#### **Judge Alito's Willingness to Undercut Fundamental Privacy and Due Process Rights**

In cases involving criminal justice matters such as the Fourth Amendment, *habeas corpus*, and the right to effective assistance of counsel, Judge Alito has shown an excessive tendency to defer to police and prosecutors. This deference frequently comes at the expense of the constitutional rights and civil liberties of individual Americans, and it raises concerns about whether Judge Alito would help enable governmental abuses of power.

<sup>11</sup> See, Brief for the Equal Employment Opportunity Commission in *Local 28 v. EEOC*, No. 84-1656 (Dec. 9, 1985); Brief for the United States as *Amicus Curiae*, *Local 93, International Association of Firefighters, AFL-CIO, C.L.C. v. City of Cleveland, et. al.*, No. 84-1999 (July 24, 1985); Brief for the United States as *Amicus Curiae*, *Wygant v. Jackson Board of Education*, No. 84-1340 (June 25, 1985).

<sup>12</sup> See, *Local 28 of the Sheet Metal Workers' International Ass'n v. EEOC*, 478 U.S. 421 (1986).

<sup>13</sup> 13 F.3d 685 (3d Cir. 1994).

<sup>14</sup> 112 F.3d 633 (3d Cir. 1997)

<sup>15</sup> *Id.* at 643.



In *Doe v. Groody*,<sup>16</sup> Judge Alito argued in dissent that police officers who conducted strip searches without a warrant could still be entitled to qualified immunity. The majority concluded, in a decision authored by Judge Chertoff, that strip searches of the suspect's wife and ten-year-old daughter went well beyond the police's warrant to search the home of a suspected drug dealer, and that the officers were therefore not entitled to claim qualified immunity as a defense to a subsequent lawsuit. As Judge Chertoff noted, holding otherwise would "transform the judicial officer into little more than the cliché 'rubber stamp.'" <sup>17</sup> Judge Alito, in criticizing the majority for what he called a "technical and legalistic" ruling in favor of the plaintiffs,<sup>18</sup> would have granted authority to the police to decide who could be searched and therefore, would have given the officers immunity for invading the privacy rights of the wife and daughter. In *United States v. Lee*,<sup>19</sup> Judge Alito upheld the warrantless video surveillance by the FBI of a suspect's hotel suite. He justified his ruling on the ground that the FBI only turned on the surveillance equipment when an informant was present in the suite and could "consent" to the surveillance, but this ruling disregarded the fact that the equipment was capable of being used at any time and thus enabled the FBI to invade the suspect's privacy at any time. And in *Baker v. Monroe Township*,<sup>20</sup> a woman and her children were searched as they were entering premises that were the subject of a search warrant. The search warrant specified a location but there were no names included on the warrant, which led the majority to conclude that the warrant was deficient under the requirements of the Fourth Amendment. Judge Alito dissented, however, arguing that the lack of particularity in the warrant allowed the officers more leeway to search anyone on the premises.

Judge Alito's overly deferential attitude toward law enforcement at the expense of privacy rights was also evident before his appointment to the Third Circuit. In a 1984 memorandum, Judge Alito – then an attorney with the Justice Department – opined that the Attorney General and other government officials should have absolute immunity from civil liability for wiretapping the phones of Americans without a warrant.<sup>21</sup> He urged the administration not to pursue such an argument in a pending Supreme Court case, but only on purely strategic grounds. The Supreme Court, in *Mitchell v. Forsyth*,<sup>22</sup> went on to rule that absolute immunity did not apply in such situations, rejecting the broad, troubling view expressed in Judge Alito's memorandum.

Judge Alito's record is equally troubling in other areas of criminal justice, and shows the same excessive deference to law enforcement that can open the door to abuses. In another 1984 memorandum, Judge Alito argued in defense of a state law that had authorized Tennessee police to use deadly force against any fleeing felon suspect whom police have probable cause to believe had committed a violent crime or was armed or dangerous. In the case of *Tennessee v. Garner*,<sup>23</sup> that law was invoked after police shot and killed an unarmed, 15-year-old, 5'4" burglar suspect while he was climbing a fence. While Judge Alito did not recommend filing an *amicus curiae* brief in support of the police in the case, he still found the shooting to be constitutionally defensible. When given a choice between killing a possibly nonviolent suspect and allowing a

<sup>16</sup> 361 F.3d 232 (3d Cir. 2004).

<sup>17</sup> *Doe*, 361 F.3d at 243.

<sup>18</sup> *Doe*, 361 F.3d at 247 (Alito, J., dissenting).

<sup>19</sup> 359 F.3d 194 (3d Cir. 2004), cert. denied, 2004 U.S. LEXIS 7112 (2004).

<sup>20</sup> 50 F.3d 1186 (3d Cir. 1995).

<sup>21</sup> Memorandum from Samuel A. Alito to Solicitor General, June 12, 1984.

<sup>22</sup> 472 U.S. 511 (1985).

<sup>23</sup> 471 U.S. 1 (1985).



page 6

possibly violent suspect to escape, Judge Alito argued that “[r]easonable people might choose differently in this situation.”<sup>24</sup> The Supreme Court disagreed with Alito’s farfetched analysis, finding the statute unconstitutional by a 6-3 margin.

Judge Alito’s record also reveals a distressing tendency to deny the *habeas corpus* claims of those in the criminal justice system. In *Rompilla v. Horn*,<sup>25</sup> Judge Alito held that in the sentencing phase of a capital murder case, the failure of a defense attorney to investigate and present mitigating evidence, including the defendant’s traumatic childhood, alcoholism, mental retardation, cognitive impairment and organic brain damage, did not amount to ineffective assistance of counsel in violation of the Sixth Amendment. His ruling was decried as “inexplicable” by the dissent<sup>26</sup> and was overturned by the Supreme Court,<sup>27</sup> which noted that some of the mitigating evidence was publicly available in the very courthouse in which the defendant was tried.<sup>28</sup> Justice O’Connor concurred in reversing Judge Alito’s ruling, describing the defense attorney’s performance as “unreasonable.”<sup>29</sup> In another case, *Smith v. Horn*,<sup>30</sup> Judge Alito’s dissent would have denied the *habeas* claims of a death row inmate. Judge Alito concluded that a jury instruction regarding the defendant’s guilt, which the majority found the jury could have reasonably misunderstood, did not amount to a constitutional violation.

Finally, the case of *Riley v. Taylor*<sup>31</sup> shows Judge Alito’s reluctance to question prosecutors even where racism is alleged in the jury selection process. In that case, Judge Alito did not find a constitutional violation in the prosecution’s apparent use of peremptory challenges to exclude black jurors from a death penalty case involving an African-American defendant. His dissent in the case illustrated a disregard for the impact of racially motivated peremptory jury strikes on African-American defendants. The majority had relied, in part, on statistical data to conclude that black jurors had been excluded, but Judge Alito took issue with the use of statistics, questioning the exclusion of black jurors as a statistical oddity and comparing it to the fact that five of the last six U.S. Presidents had been left-handed. His comments drew a sharp rebuke from the majority, who said that “[t]o suggest any comparability to the striking of jurors based on their race is to minimize the history of discrimination against prospective black jurors and black defendants.”<sup>32</sup>

#### Judge Alito’s Troubling Record on Immigration Law

Judge Alito’s record in appeals of asylum and deportation orders reveals an abnormally strong tendency to let adverse Board of Immigration Appeals (BIA) and lower court rulings stand. For example, an analysis by *The Washington Post* found that Judge Alito has sided with immigrants in only one out of every eight cases he has handled, which, according to the *Post*, sets him apart even from most Republican-appointed judges.<sup>33</sup> Judge Alito’s record is more problematic in

<sup>24</sup> Memorandum from Samuel A. Alito to Solicitor General, May 18, 1984.

<sup>25</sup> 355 F.3d 233 (3d Cir. 2004).

<sup>26</sup> *Rompilla*, 355 F.3d at 274 (Sloviter, J., dissenting).

<sup>27</sup> *Rompilla v. Beard*, 125 S. Ct. 2456 (2005).

<sup>28</sup> *Rompilla*, 125 S. Ct. at 2464.

<sup>29</sup> *Rompilla*, 125 S. Ct. at 2470 (O’Connor, J., concurring).

<sup>30</sup> 120 F.3d 400 (3d Cir. 1997).

<sup>31</sup> 277 F.3d 261 (3d Cir. 2001).

<sup>32</sup> *Riley*, 277 F.3d at 292.

<sup>33</sup> Amy Goldstein and Sarah Cohen, *Alito, In and Out of the Mainstream*, THE WASHINGTON POST, January 1, 2006, at A01.

light of the recently growing criticism, by many other federal judges from both parties, of asylum rulings by the BIA and administrative immigration judges.<sup>34</sup>

In asylum cases, Judge Alito has a strong tendency to rule against individuals who are seeking protection in the United States, even where evidence shows that they have been or would have been persecuted in their own countries. In *Chang v. INS*,<sup>35</sup> Judge Alito dissented from the court's grant of asylum for a Chinese engineer who claimed he would face persecution if returned to his own country. Judge Alito found no reason to reverse the INS denial of asylum despite the fact that Chang had presented evidence that his wife and son already faced persecution and he was threatened with jail if he returned to China. Similarly, in *Dia v. Ashcroft*,<sup>36</sup> Judge Alito dissented from a majority opinion granting asylum to an immigrant from the Republic of Guinea whose house had been burnt down and whose wife had been raped in retaliation for his opposition to the government. The majority noted that the immigration judge seemed to be searching for ways to deny asylum and find fault with the credibility of Dia. Judge Alito's dissent pushed for a higher standard.<sup>37</sup> The majority criticized Judge Alito's dissent, noting that his proposed standard would "gut the statutory standard" and "ignore our precedent."<sup>38</sup>

Judge Alito's excessive tendency to defer to the BIA is also evident from his record in deportation cases. In *Lee v. Ashcroft*,<sup>39</sup> Judge Alito dissented when the court ruled that a false tax return is not an "aggravated felony,"<sup>40</sup> an immigration law term that triggers mandatory deportation and bars most forms of humanitarian waivers. The court reasoned that Congress only intended for tax evasion to trigger mandatory deportation, but Judge Alito disagreed and pushed for a more expansive reading of the law. The majority noted that ambiguity in the law should be resolved in favor of the immigrant and that Judge Alito's interpretation was grounded in "speculation."<sup>41</sup> In *Sandoval v. Reno*,<sup>42</sup> Judge Alito's dissent would have construed the Antiterrorism and Effective Death Penalty Act of 1996 to strip the federal courts of their ability to hear *habeas corpus* claims from aliens in custody challenging deportation orders. The Supreme Court ultimately rejected Judge Alito's reading of the law, in *INS v. St. Cyr*,<sup>43</sup> because such an interpretation would raise serious constitutional questions.

<sup>34</sup> See, e.g. Adam Liptak, *Courts Criticize Judges' Handling of Asylum Cases*, THE NEW YORK TIMES, December 26, 2005, at A1 ("In one decision last month, Richard A. Posner, a prominent and relatively conservative federal appeals court judge in Chicago, concluded that 'the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice,'" *id.*).

<sup>35</sup> 119 F.3d 1055 (3d Cir. 1997).

<sup>36</sup> 353 F.3d 228 (3d Cir. 2003).

<sup>37</sup> *Dia*, 353 F.3d at 262.

<sup>38</sup> *Id.* at 251 n.22.

<sup>39</sup> 368 F.3d 218 (3d Cir. 2004).

<sup>40</sup> See 8 U.S.C. 1101(a)(43). It should be noted that many "aggravated felonies" under the statute are neither "aggravated" nor "felonies" in the ordinary criminal context, often leading to harsh results. For example, one legal permanent resident was labeled an "aggravated felon" and ordered deported five years after a \$14.99 shoplifting conviction. Elizabeth Kurylo, *Nigerian Woman Faces Deportation*, THE ATLANTA JOURNAL AND CONSTITUTION, June 12, 1998, at 01C.

<sup>41</sup> *Lee*, 368 F.3d at 225 n.11.

<sup>42</sup> 166 F.3d 225 (3d Cir. 1999).

<sup>43</sup> 533 U.S. 289, 310 (2001).



Also troubling is a 1986 letter Judge Alito wrote, in his capacity as Deputy Assistant Attorney General, to former FBI Director William Webster in which he suggested, *inter alia*, that “illegal aliens have no claim to nondiscrimination with respect to nonfundamental rights,” and that the Constitution “grants only fundamental rights to illegal aliens within the United States.”<sup>44</sup> Judge Alito uses a strained reading of the 1976 Supreme Court ruling in *Mathews v. Diaz*<sup>45</sup> to support this assertion, but oddly, he makes no mention of the 1982 ruling in *Plyler v. Doe*,<sup>46</sup> which squarely ruled that a state could not discriminate against undocumented children in public education, even though education is not considered a fundamental constitutional right. As such, Judge Alito’s letter raises questions about whether he would be willing to adequately protect undocumented immigrants from unconstitutional forms of discrimination.

#### Judge Alito’s Restrictive View of the Establishment Clause

Judge Alito’s record shows that he takes an overly narrow view of the First Amendment’s Establishment Clause, a view that sets him apart from Justice O’Connor and the majority of her colleagues to serve on the Supreme Court. His record – along with his acknowledged disagreement with the Supreme Court’s most noteworthy rulings in this area<sup>47</sup> – raises concerns that he would not do enough to protect the religious liberties of an increasingly diverse America.

For example, in *ACLU of New Jersey v. Black Horse Pike Regional Board of Education*,<sup>48</sup> Judge Alito voted – against an *en banc* majority of his colleagues on the Third Circuit – to uphold a public school policy that allowed high school seniors to vote on whether to include prayer during a graduation ceremony. By allowing a popular majority of public school students to waive the rights of a minority, Judge Alito’s view – had it not also been subsequently rejected by the Supreme Court in a later case<sup>49</sup> – would have essentially defeated the purpose of the Establishment Clause.

Judge Alito’s ruling in *ACLU of New Jersey v. Schundler (Schundler II)*<sup>50</sup> is equally troubling. In *Schundler*, the municipality of Jersey City, New Jersey had placed a crèche and menorah outside of City Hall. After a district court ruled that the display violated the Establishment Clause, the city added additional figures to the following year’s display, including those of Santa Claus, Frosty the Snowman, a red sled, and Kwanzaa symbols. The district court eventually found that this modified display was also unconstitutional. Judge Alito reversed this decision, however, and upheld the modified display. In doing so, he minimized the fact that the display had only been modified in response to litigation and that the city had been attempting to promote religion through its holiday displays for decades – even though the Supreme Court considers such history to be highly relevant when determining whether a practice or policy violates the Establishment Clause.<sup>51</sup>

<sup>44</sup> Letter from Samuel A. Alito, Jr. to Hon. William Webster, January 10, 1986.

<sup>45</sup> 426 U.S. 67 (1976).

<sup>46</sup> 457 U.S. 202 (1982).

<sup>47</sup> Department of Justice Application of Samuel A. Alito, *supra* at note 2 (stating that his interest in constitutional law had been “motivated in large part by disagreement with the Warren Court’s decisions, particularly in the areas of . . . the Establishment Clause . . .”).

<sup>48</sup> 84 F.3d 1471 (3d Cir. 1996) (*en banc*).

<sup>49</sup> *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000).

<sup>50</sup> 168 F.3d 192 (3d Cir. 1999).

<sup>51</sup> See, e.g. *McCreary County, Kentucky v. ACLU of Kentucky*, 125 S.Ct. 2722, 2327 n.14 (2005) (“Just as Holmes’ dog could tell the difference between being kicked and being stumbled over, it will matter to objective observers whether posting the [modified display] follows on the heels of displays motivated by sectarianism, or whether it

### Judge Alito's Efforts to Limit Congressional Authority in Favor of "States' Rights"

Judge Alito's record demonstrates a troubling tendency to favor "states' rights" over the rights of ordinary Americans. During his tenure on the Third Circuit, he has engaged in an excessively narrow reading of the Commerce Clause and an excessively broad reading of state sovereign immunity under the 11<sup>th</sup> Amendment. In fact, his decisions show that he would go even further than the current Supreme Court in undercutting Congress' ability to protect Americans.

In *United States v. Rybar*,<sup>52</sup> the Third Circuit upheld the conviction of a firearms dealer for the sale of outlawed machine guns, joining six other circuits in finding the federal law banning the transfer or possession of machine guns<sup>53</sup> to be a valid exercise of Congressional authority under its power to regulate interstate commerce. But Judge Alito dissented, arguing that the Supreme Court's recent decision in *United States v. Lopez*<sup>54</sup>, which invalidated Congress' gun-free school zone ban, made clear that Congress did not have such power. The majority distinguished *Lopez* because it dealt with a small geographic area – school zones – whereas the law at issue in *Rybar* applied nationwide. Judge Alito would have taken *Lopez* a step beyond to place further restrictions on Congress' power to use its Commerce Clause authority to protect Americans from machine gun violence. Judge Alito's extraordinarily narrow perspective of Congressional power expressed in his *Rybar* dissent raises serious concerns about whether he will uphold major and historically effective pieces of civil rights infrastructure such as the ban on discrimination in places of employment or public accommodation in the Civil Rights Act of 1964, and whether he will hold a restrictive view of Congress' power to move the country forward with additional civil rights laws such as hate crimes and non-discrimination legislation.

In *Chittister v. Department of Community and Economic Development*,<sup>55</sup> Judge Alito's majority opinion would have denied a state employee the benefits of the Family and Medical Leave Act of 1993 ("FMLA").<sup>56</sup> In this case, a state employee had sued after being fired for taking medical leave that had been approved pursuant to FMLA. A jury ruled in Chittister's favor, but the trial court reversed the verdict on the ground that the state was immune from suit under the 11<sup>th</sup> Amendment. On appeal, Judge Alito affirmed the ruling, claiming that Congress had not abrogated state sovereign immunity. The Supreme Court later reached an opposite conclusion from Judge Alito's holding in its 2003 decision in *Nevada Department of Human Resources v. Hibbs*.<sup>57</sup> The Court held that state employees could in fact sue their employers under the FMLA, a decision that has subsequently been read by some courts to validate the constitutionality of the entire law.

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lacks a history demonstrating that purpose"); *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 308 (2000) ("When a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is, of course, entitled to some deference. But it is nonetheless the duty of the courts to 'distinguish a sham secular purpose from a sincere one.'")

<sup>52</sup> 103 F.3d 273 (3d Cir. 1996), cert. denied, 522 U.S. 807 (1997).

<sup>53</sup> 18 U.S.C. § 922(o).

<sup>54</sup> 514 U.S. 549 (1995).

<sup>55</sup> 226 F.3d 223 (3d Cir. 2000).

<sup>56</sup> P.L. 103-3 (107 Stat. 6), approved February 5, 1993.

<sup>57</sup> 538 U.S. 721 (2003).



#### Judge Alito's Membership in "Concerned Alumni of Princeton"

In the same job application essay described above, Judge Alito also stated that he was "a member of the Concerned Alumni of Princeton University, a conservative alumni group"<sup>58</sup> ("CAP"). Throughout its 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.<sup>59</sup> CAP also derided Princeton's efforts to increase the number of minority students; the group argued that children of alumni were more deserving of admission. In the group's magazine, *Prospect*, one of the organization's founders fondly recalled that Princeton had once been "a body of men, relatively homogenous in interests and backgrounds," but that he now worried about the future of the University "with an undergraduate student of approximately 40% woman and minorities, such as the Administration has proposed."<sup>60</sup> 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."<sup>61</sup> It is unclear when Judge Alito joined the group or what role he played in its activities. But his membership in the organization is troubling, given the group's outspoken hostility towards the inclusion of women and minorities at Princeton University, and it raises serious questions about the level of his commitment to gender and racial equality.

Also troubling is Judge Alito's current effort, following his nomination to the Supreme Court, to now deny he ever had any affiliation with the group. In a questionnaire he recently submitted to the Senate Committee on the Judiciary, Judge Alito stated that "[a] document I recently reviewed reflects that I was a member of the group [Concerned Alumni of Princeton] in the 1980s. Apart from that document, I have no recollection of being a member, of attending meetings, or otherwise participating in the activities of the group."<sup>62</sup> This supposed lack of any recollection of being a member of CAP seems difficult, at best, to reconcile with the statement he made in his 1985 job application essay – a statement in which he not only cited his membership in CAP, but deliberately used this claim of membership in an effort to bolster his conservative credentials.<sup>63</sup>

#### Conclusion

The stakes could not be higher. The Supreme Court is closely divided on cases involving many of our most basic rights and freedoms. Judge Alito has been nominated to fill the seat of retiring Justice Sandra Day O'Connor, who was the crucial deciding vote in so many of those cases. The American people want and deserve to know that any new Supreme Court justice will be committed to protecting individual rights, and will put our freedoms ahead of any political

<sup>58</sup> Department of Justice Application of Samuel A. Alito, *supra* at note 2.

<sup>59</sup> Scott Shepard, *Critics Dust Off Old Files to Assail Court Nominee*, THE ATLANTA JOURNAL AND CONSTITUTION November 20, 2005, at 7C.

<sup>60</sup> Chanakya Sethi, *Alito '72 Joined Conservative Alumni Group*, DAILY PRINCETONIAN, November 18, 2005.

<sup>61</sup> David D. Kirkpatrick, *From Alito's Past, a Window on Conservatives at Princeton*, NEW YORK TIMES, November 27, 2005, at A1.

<sup>62</sup> U.S. Senate Committee on the Judiciary, Nominee for the Supreme Court of the United States, General (Public) questionnaire completed by Samuel A. Alito, Jr., at 7.

<sup>63</sup> Judge Alito's 1985 essay in which he cites his CAP membership begins by stating that "I am and always have been a conservative and an adherent to the same philosophical views that I believe are central to this Administration." In the paragraph citing his CAP membership, he also cites his membership with the Federalist Society and his submission of articles to the magazines *National Review* and *American Spectator*. Department of Justice Application of Samuel A. Alito, *supra* at note 2.



agenda. Unfortunately, Judge Alito's record not only fails to show such a commitment, but also raises serious doubts.

In addition, we also have doubts about whether Judge Alito will, at his confirmation hearings, address the above concerns in a fully open and candid manner. For instance, Judge Alito has given numerous shifting and conflicting reasons for why he did not, as he promised to Senators before being confirmed to the Third Circuit, recuse himself from cases involving the Vanguard companies, in which he had financial holdings. Furthermore, Judge Alito has also recently tried to dismiss a number of troubling statements in his 1985 job application, such as his disagreement with the Warren Court's reapportionment cases, by suggesting that his statements should not be taken seriously because he was simply applying for a job. Finally, as discussed above, Judge Alito has also attempted to deny any affiliation with the radical group Concerned Alumni of Princeton, even though he himself proudly claimed to be a member in 1985. These incidents raise doubts about whether Judge Alito's responses to tough questions about his record and his legal philosophy can be completely believed when his confirmation hearings begin next week.

For the above reasons, we must oppose his confirmation as Associate Justice. We appreciate your consideration of our views. If you have any questions, please feel free to contact LCCR Deputy Director Nancy Zirkin at (202) 263-2880 or LCCR Counsel Rob Randhava at (202) 466-6058. We look forward to working with you.

Sincerely,

Dr. Dorothy I. Height  
Chairperson

Wade Henderson  
Executive Director