Statement of Ms. Ann Marie Tallman, President and General Counsel, Regarding MALDEF's Opposition to the Confirmation of Judge Samuel A. Alito as Associate Justice of the United States Supreme Court

Good morning. I am Ann Marie Tallman, President and General Counsel of MALDEF, the Mexican American Legal Defense and Educational Fund.

MALDEF's thorough review of Judge Alito's legal record has revealed a disturbing pattern of insensitivity towards Latinos' lives and a pattern of legal opinions that would, if he is confirmed, dismantle fundamental constitutional protections currently enjoyed by the Latino community and all Americans. I will highlight today three areas of Alito's record that are particularly troubling to MALDEF: access to justice, employment discrimination, and immigrants' rights.

First, in the 1994 case of *Pemberthy v. Beyer*, Judge Alito issued a decision as a member of the Third Circuit Court of Appeals that has had the effect of barring many Latinos from serving on juries in cases in which Spanish evidence is at issue. In *Pemberthy*, the prosecution's case featured testimony in Spanish that was translated by the police and used in translation by prosecutors in presenting their case. In selecting jurors, prosecutors exercised peremptory challenges to strike five jurors who understood Spanish. The prosecutors said that they barred these jurors because jurors who speak Spanish might not credit the official, State-provided translations of the evidence and may use their special knowledge to glean additional information from the evidence.

After being convicted in New Jersey state court, the defendants petitioned the federal district court for review. The district court in New Jersey overturned the convictions, holding in part that dismissing Latino jurors because they can understand Spanish is tantamount to dismissing them based on race and is therefore unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.

The State of New Jersey appealed to the Third Circuit, where Judge Alito heard the case and wrote the majority opinion, which reinstated the convictions. Alito held that the Constitution does not prohibit a trial attorney from dismissing jurors because of their proficiency in Spanish when translations of evidence are at issue.

Clearly, not all Americans who are proficient in Spanish are Latinos, and not every potential juror dismissed on this basis will be Latino. But a clear majority of Spanish-speakers in America are Latino, and a substantial segment of the Latino community in this country is Spanish-speaking. The rule of law applied in *Pemberthy*, therefore, clearly acts to prevent Latino litigants from enjoying equal access to justice in America by being

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heard by a jury of their peers. Further, this rule of law denies the reality of the Latino of being subject to discrimination on the basis of language ability.

Next, I will highlight Judge Alito's work in employment discrimination, which has also contributed to MALDEF's decision to oppose his confirmation. In the case of *Bray v. Marriott* in 1997, Judge Alito wrote a dissent that would have, as the majority wrote in rejecting his views, "eviscerated" protections against racial discrimination in the workplace.

In addition, as an attorney in the Reagan Administration, Judge Alito wrote legal briefs and developed legal strategies to overturn affirmative action workplace programs that favored groups historically subject to discrimination. The positions espoused by Alito in these cases represent significant rollbacks of Latino progress in the drive towards fair employment practices. Disturbingly, Judge Alito also wrote in an application for promotion during this period that he felt particular pride in having participated in the Reagan Administration's efforts to invalidate affirmative action programs designed to remedy employment discrimination.

I would also like to note at this point that in this same 1985 application for promotion, Alito wrote that he "developed a deep interested in constitutional law" in part because he disagreed with Warren Court decisions in voting rights. Latinos have been politically empowered by the constitutional precedents that Judge Alito so readily dismisses here, and MALDEF is properly concerned about the prospect of elevating to the Court a man who wrote that his legal awakening was as an opponent of these fundamental precedents, including the principle of "one person, one vote." MALDEF is, I will note here, attorney of record for Latino plaintiffs in the Texas redistricting case that the Supreme Court agreed to hear this week. As such, we are concerned that the nominee wishes to roll back voting rights to their pre-Warren Court status.

The final area that I will highlight here today is Alito's legal record regarding immigrants' rights. As an attorney in the Reagan Administration, Alito drafted a legal opinion for FBI Director William Webster that MALDEF finds very troubling. Alito's opinion, which goes beyond the scope of the question that the FBI Director submitted to the Department of Justice, provides an overly narrow interpretation of the constitutional protections available to undocumented immigrants in the United States. Alito wrote that caselaw "suggests" that undocumented immigrants have no claim to nondiscrimination with respect to nonfundamental Constitutional rights.

Significantly, Judge Alito's legal opinion in his communication to the FBI Director omits mention of *Plyler v. Doe*, a case which MALDEF brought and won in 1982 on behalf of undocumented immigrant students who were barred from Texas schools in violation of their equal protection rights. The *Plyler* Court expressly held that education is not a fundamental right but that undocumented immigrants have equal protection rights in this context despite the right being "nonfundamental." *Plyler* was decided four years prior to Alito's letter to the FBI Director, but he ignores it entirely and chooses to cite older cases

that were not directly relevant to the legal question presented but which suggested limited readings of the availability of constitutional protections for undocumented immigrants.

MALDEF is very concerned that Alito's misstatement of the law regarding the constitutional rights of non-citizens may not be merely an omission or a simple mistake by a junior attorney, but may reflect a tendency on his part to disfavor constitutional protections for undocumented immigrants, many of whom are Latino.

In addition to the three areas of law that I have described here today, MALDEF has also uncovered disturbing tendencies on the part of Alito in the areas of federalism, criminal procedure, and the right to privacy.

In conclusion, MALDEF's thorough review of Judge Alito's record has revealed a jurist who has spent a career attempting to roll back the clock on the civil rights protections available to Latinos. As an attorney in the Reagan Administration, Alito advanced radical legal opinions which opposed civil rights protections for immigrants and minorities. As a judge, he has chipped away at fundamental constitutional protections which should properly be afforded to Latinos and all Americans. We strongly urge senators to vote "no" on the confirmation of Judge Alito.