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Statement of the National Abortion Federation
Nomination of Samuel A. Alito to be Associate Justice of the Supreme Court
January 18, 2006

The National Abortion Federation welcomes the opportunity to submit testimony on the nomination of Judge Samuel Alito to become an Associate Justice of the United States Supreme Court. NAF strongly opposes his nomination. If confirmed, we believe Alito would be a vote to overturn or considerably weaken the longstanding precedent of *Roe v. Wade,*[1] thereby jeopardizing the health and lives of American women.

The National Abortion Federation (NAF) is the professional association of abortion providers in North America. NAF's mission is to ensure that abortion remains safe, legal, and accessible. NAF's members include physicians, advanced practice clinicians, nurses, counselors, administrators, and other medical professionals at more than 400 facilities in the United States and Canada. NAF members are recognized experts in abortion care, and include non-profit and private clinics, women's health centers, Planned Parenthood facilities, hospitals, and private physicians' offices, as well as nationally and internationally recognized researchers, clinicians, and educators at major universities and teaching hospitals. Together, they care for more than half the women who choose abortion each year in the United States.

In the last Supreme Court case on abortion in June 2000, *Stenberg v. Carhart,*[2] only five justices, including Justice Sandra Day O'Connor, supported *Roe* and a woman's right to choose. With the retirement of Justice O'Connor, President Bush now has the ability with the nomination of Samuel Alito to destroy this fragile five to four balance that currently protects women's access to safe and legal abortion in the United States.
Alito has made no secret of his opposition to abortion and a woman's constitutional right to privacy. For example, in his 1985 application for deputy assistant attorney general, Alito stated:

> "I am particularly proud of my contributions in recent cases in which the government has argued in the Supreme Court that...the Constitution does not protect a right to an abortion."[3]

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[1] 410 U.S. 113 (1973).
[2] 530 U.S. 914 (2000).
[3] Application for Deputy Assistant Attorney General November 18, 1985. PPO Non-Career Appointment form. Presidential Office of Personnel, Office of Records, Reagan Library.

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Shortly after Alito went to work in the Department of Justice, he worked on the case that he referred to in his application. The Reagan administration filed an amicus brief in the case, *Thornburgh v. American College of Obstetricians and Gynecologists*,[4] which specifically argued that *Roe v. Wade* should be overturned.[5] The *Thornburgh* case was not assigned to Alito but that did not stop him from actively offering to contribute to drafting the brief. Alito's research memo outlined a specific and detailed strategy for eviscerating *Roe*. Alito called the brief an opportunity to "advance the goals of bringing about the eventual overruling of *Roe v. Wade*..."[6]Alito concluded his memo by stating that a back-door assault on *Roe* was preferable to a "frontal assault" on *Roe* because:

> "It has most of the advantages of a brief devoted to the overruling of *Roe v. Wade*: it makes our position clear, does not even tacitly concede *Roe*'s legitimacy, and signals that we regard the question as live and open. At the same time, it is free of many of the disadvantages that would accompany a major effort to overturn *Roe*."[7]

Only six years after his stint as deputy assistant attorney general, while serving on the Philadelphia-based U.S. Court of Appeals for the Third Circuit, Judge Alito supported restricting access to abortion and limiting the right to privacy. In the 1991 case *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[8] Alito would have upheld a provision requiring women to notify their husbands prior to having an abortion. Justice Sandra Day O'Connor, whose seat he is nominated to fill, joined the plurality opinion striking down that requirement. The plurality wrote: "Women do not lose their constitutionally protected liberty when they marry."[9]

Alito's hostility toward abortion continued in the 2000 case *Planned Parenthood of Central New Jersey v. Farmer*,[10] where he did not join the majority opinion in striking down a ban on abortion that lacked an exception to protect women's health. While supporters have argued that this case shows that he has a mixed record on abortion cases, Alito wrote his own opinion making clear he joined the decision only because he was required to follow the Supreme Court precedent of *Stenberg v. Carhart*, a case he no longer will be required to follow as a Supreme Court justice. Alito himself held out a decision he joined in *Elizabeth Blackwell Health Center v. Knoll*[11] as an

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[4] 476 U.S. 747 (1986).
[5] Brief for the Unites States as Amicus Curiae in Support of Appellants, *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) (Nos. 84-495, 84-1379).
[6] Samuel A. Alito. Memo to the Solicitor General, re: *Thornburgh v. American College of Obstetricians and Gynecologists*. Reproduced from the holdings of the National Archives and Records Administration, Record Group 60, Department of Justice, Files of the Deputy Assistant Attorney General, Charles Cooper, 1981-1985, Accession #060-89-216, Box 20.
[7] Id.
[8] 947 F.2d 682 (3d Cir. 1991).
[9] 505 U.S. 833 at 898 (1992).
[10] 220 F.3d 127 (3d Cir. 2000).
[11] 61 F.3d 120 (3d Cir. 1995).

example of impartiality. However, that case concerned the applications of administrative law and Medicaid requirements, not the constitutionality of safe and legal abortion.

Despite being presented with many opportunities during his testimony before the Senate Judiciary Committee, Alito did nothing to distance himself from his long public record as a lawyer and as a judge. His record on choice is very clear. As a lawyer, he said that the Constitution does not protect the right to an abortion. In the Reagan Administration, he outlined a strategy to chip away at, and eventually overturn *Roe v. Wade.* On the Third Circuit, Alito voted to restrict a woman's right to choose, going further than the U.S. Supreme Court and Justice O'Connor, whose seat he is nominated to fill.
We have every reason to believe that given the opportunity to weaken and/or overrule *Roe*, he would vote to do so, thereby jeopardizing the lives and health of American women for generations to come. A retreat to the days of unsafe, back-alley abortion is unacceptable. Several NAF members have first-hand experience with the devastating health consequences of illegal, unsafe abortion. Our members were there when *Roe* was decided, and they have been on the front lines ever since, protecting women's health and saving women's lives despite the harassment, threats, and violence they face on a regular basis.

Dr. Curtis Boyd of Albuquerque, New Mexico remembers desperate women pleading with him, "But, Doctor, can't *you* do something?" Dr. Boyd risked his medical license, his career, and his own freedom because "I could no longer live with the knowledge that I could do something and I was choosing not to." Dr. Boyd provided abortions because he knew "women's lives could be ruined when they could not abort a pregnancy."[12]

Dr. Eugene Glick of San Francisco, California vividly remembers "a 31-year-old Mexican-American woman who died of endotoxic shock with her husband and four or five children around. And that scene is in my mind and has been in my mind coming back all the time. I see the bed, I see the kids crying and I see the husband crying."[13]

Dr. Mildred Hanson of Minneapolis, Minnesota served as the head of a hospital committee on abortion and sterilization in the 1960's. She coached women through an elaborate system to prove that an unwanted pregnancy threatened their life or mental health. But one day she received a frantic call from a young woman seeking her help, and without a name or number all she could do was familiarize her with the process and ask her to call back. She never called back. "I later learned that she committed suicide by jumping out of a 17th-story window," said Dr. Hanson, now 82, her voice breaking. "To this day, I feel responsible for her death."[14] Dr. Hanson also recalls an earlier incident in 1935 when a woman died from a septic abortion, orphaning six children. That memory is still engrained in her head to this day.

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[12] Dr. Curtis Boyd. Sermon Given to the Universalist Unitarian Church of Peoria, Illinois. Sunday, September 20, 1992, page, 4
[13] Felicia R. Lee, "Think Tank; Doctors who Performed Abortions Before *Roe v. Wade*," *The New York Times*, October 4, 2003, Section B, Page 9.
[14] Id.

It is estimated that if *Roe v. Wade* is overturned and the issue returns to the states, as many as twenty states would ban abortion immediately and as many as ten more could follow. Only about twenty states would keep abortion safe and legal. But the bans would not end abortion in those states. Instead, they would mean that women may once again have to risk their lives, health and fertility in order to terminate an unwanted pregnancy.

Currently, abortion is one of the safest medical procedures provided in the United States and an essential part of the continuum of women's reproductive health care. But that has not always been the case. Between the 1880s and 1973, abortion was illegal in all or most states, and countless women died or experienced serious medical problems as a result. Women often made desperate and dangerous attempts to induce their own abortions or resorted to untrained practitioners who performed back-alley abortions with primitive instruments or in unsanitary conditions. Women streamed into emergency rooms with serious complications -- perforations of the uterus, retained placentas, severe bleeding, cervical wounds, rampant infections, poisoning, shock, and gangrene that resulted in sterility or even death in many cases.

Unfortunately at the same time the Supreme Court has consistently upheld the principal holding of *Roe*, it has also contributed to *Roe's* erosion by allowing states to impose restrictions that limit access to abortion. It is critical to the lives and health of millions of women that the protections of *Roe* be upheld and not weakened further. The majority of Americans believe that *Roe* should be upheld and remain the law of the land. They believe that abortion is a personal decision that should be made by a woman and her health care provider without government interference. A nominee such as Samuel Alito who is on record against *Roe* is clearly out of step with the majority of Americans.

Alito's statement that he will have an open mind is hardly an assurance given that we heard the same thing from Justice Clarence Thomas, who in his first term voted to overturn *Roe*. During his hearing, Alito confirmed that his statement that the Constitution does not protect the right to an abortion was an accurate representation of his legal philosophy rather than his personal opinion, and refused to share whether that was his legal opinion today. He also would not acknowledge that an abortion restriction which does not protect a woman's health is unconstitutional, even though that has been the standard since *Roe v. Wade*. Retreating to the days before *Roe* when women did not have that constitutional protection is unacceptable

On behalf of the members of the National Abortion Federation and the women they care for, I appreciate this opportunity to submit testimony on the nomination of Judge Samuel Alito to the Supreme Court, and I urge Senators to vote against his confirmation.

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January 9, 2006

Senator Arlen Specter
Chairman
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Senator Patrick Leahy
Ranking Minority Member
Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Specter and Senator Leahy,

On behalf of the National Abortion Federation and our members, I am writing to express our opposition to the nomination of Judge Samuel A. Alito to the United States Supreme Court. If confirmed, Alito would shift the Court to the right and would be a vote to overturn *Roe v. Wade*, thereby jeopardizing women's lives and health.

Alito has made no secret of his opposition to abortion and a woman's constitutional right to privacy. Alito has argued that the "Constitution does not protect abortion," and has touted his work to overturn *Roe v. Wade* as an early highlight of his career. Although some have tried to downplay these statements as evidence only of an advocate applying for a job, Alito was not merely expressing his personal views or advocating for a client. Instead, Alito was offering his own legal philosophy and legal opinion that the Constitution does not protect the right to choose.

Additionally, Alito has actively volunteered to work on cases arguing for a reversal of *Roe v. Wade*. For example, Alito volunteered to draft the legal strategy and framework for the government's brief in *Thornburgh v. American College of Obstetricians and Gynecologists*. In that case, the government's brief sought to mitigate the effects of *Roe* in the short term while launching a "back-door assault" on *Roe* for the long term. Alito's work on the brief was deemed "instrumental" by one of his colleagues and central to the drafting of the brief.

Judge Alito's hostility to *Roe v. Wade* is not only evident from his tenure as a government lawyer, but also from his work as a judge on the U.S. Court of Appeals for the Third Circuit. While serving on that court, Judge Alito supported restricting access to abortion and limiting the right to privacy in *Planned Parenthood v. Casey*. His opinion on spousal notification was ultimately rejected by the Supreme Court. In the 2000 case, *Planned Parenthood of Central New Jersey v. Farmer*, Alito refused to join the majority opinion in striking down a ban on abortion because it lacked an exception to protect women's health. Instead, he wrote his own opinion making clear he joined the decision only because he

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Felicia Stewart, MD • Francine Thompson • Catherine Weiss, JD • Tina Walsh

was required to follow the Supreme Court precedent of *Stenberg v. Carhart*, a case he no longer would be required to follow as a Supreme Court justice.

Rather than nominating a moderate, consensus candidate to the Supreme Court, President Bush chose to bow to the pressures and demands of his far-right base and nominate Samuel Alito, a jurist whose judicial philosophy is clearly out of the mainstream. The fact that the President chose such an extreme candidate to replace Justice O'Connor, who cast the swing vote in many reproductive rights cases, is unacceptable. For these reasons, the National Abortion Federation calls on the United States Senate to defeat the nomination of Samuel Alito to the United States Supreme Court.

Sincerely,

Vicki A. Saporta

President and CEO