January 9, 2006 VIA FACSIMILE

The Honorable Arlen Specter, Chair
The Honorable Patrick J. Leahy, Ranking Member
Senate Committee on the Judiciary
Dirksen Senate Office Building
Room SD-224
Washington, D.C. 20510

Re: *Nomination of Judge Samuel A. Alito, Jr. as Associate Justice of the Supreme Court of the United States*

Dear Chairman Specter and Senator Leahy:

On behalf of the National Women's Law Center, an organization that has worked since 1972 to advance and protect women's legal rights, we write to reiterate the Center's opposition to the nomination of Samuel A. Alito, Jr. to the United States Supreme Court. As a result of its extensive review of Judge Alito's record, the Center has concluded that the confirmation of Judge Alito to the Supreme Court would endanger core legal rights for women, with profound and harmful consequences for women across the country and for decades to come. This letter summarizes the bases for the Center's conclusions, which are set forth more fully in the Center's December 8, 2005 letter and detailed report.[1]

Judge Alito has worked to limit a woman's right to choose. While in the Solicitor General's office, Alito urged the government to file an *amicus* brief in *Thornburgh v. American College of Obstetricians and Gynecologists* in order to "advance the goals of bringing about the eventual overruling of Roe v. Wade and, in the meantime, of mitigating its effects." His memo argued in favor of upholding even the most burdensome and dangerous barriers to abortion. Alito then volunteered to work on the government's *Thornburgh* brief, and researched and wrote key portions. The Court rejected the brief's extreme positions -- it struck down dangerous burdens on the right to choose the brief had argued to uphold, and it refused to overturn *Roe v. Wade* as the brief had urged. In plain reference to his role in the *Thornburgh* case, Alito later wrote: "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." He wrote this in an application for a promotion a few months after the *Thornburgh* brief was filed.

Judge Alito's record on the Third Circuit reinforces the concerns about his approach to the right to choose. In *Planned Parenthood v. Casey*, he not only would have upheld a law requiring married women to notify their husbands before having an abortion, but took an approach to the law that would eviscerate *Roe v. Wade* by upholding many dangerous barriers to the right to choose. For example, he failed to focus on women who would be hurt by the restrictions (such as victims of domestic abuse), and would have given husbands the same kind of control over their

[1] The Nomination of Samuel Alito: A Watershed Moment For Women (Nat'l Women's Law Ctr., Wash., D.C.), Dec. 15, 2005, *available at* http://www.nwlc.org/pdf/NWLCAlitoReport12-15-05.pdf.

11 Dupont Circle ■ Suite 800 ■ Washington, DC 20036 ■ 202.588.5180 ■ 202.588.5185 Fax ■ www.nwlc.org

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

wives' most personal decisions that parents have over their children. A majority of the Supreme Court, in an opinion co-authored by Justice O'Connor, soundly rejected his analysis.

Judge Alito has ruled to limit Congress's authority to protect public safety and welfare. Judge Alito would have struck down a federal law prohibiting the transfer and possession of machine guns, arguing in a dissenting opinion in *United States v. Rybar* that Congress did not have the authority to enact the statute under the Commerce Clause of the Constitution. Judge Alito's Third Circuit colleagues, and eight other circuit courts to date, have disagreed with him. In another case, *Chittister v. Department of Community and Economic Development*, Judge Alito wrote an opinion that barred state employees for suing for damages when their employers violate their right to take medical leave under the Family and Medical Leave Act (FMLA). A 6-3 majority of the Supreme Court, including even Justice Rehnquist, subsequently upheld another provision of the FMLA against a similar challenge on the ground that the FMLA was enacted to address sex discrimination in the workplace. Judge Alito gave short shrift to this argument.

Judge Alito has ruled to make it more difficult for plaintiffs to prove discrimination. Judge Alito's opinions in employment discrimination cases raise significant concerns. For example, he dissented from *Sheridan v. E.I. DuPont De Nemours and Company*, a sex discrimination case in which *all 10 of the other members of the Third Circuit* joined in reversing the trial court's rejection of a jury verdict for the plaintiff. Judge Alito ignored applicable legal standards to urge overturning the jury verdict, inappropriately credited the employer's explanations for its actions, and, standing in for the jury, downplayed the plaintiff's evidence. Alito also dissented in *Bray v. Marriott Hotels*, a race discrimination case, and again would have prevented the plaintiff from bringing her case before a jury by giving the employer the benefit of the doubt. The majority said that under his approach to the evidence, "Title VII [of the Civil Rights Act of 1964] would be eviscerated."

Judge Alito's publicly available record does not reveal his views on the constitutional protection against sex discrimination under the Equal Protection Clause of the Fourteenth Amendment. But in his 1985 job application he expressed support for at least some of the central legal tenets of the Reagan Administration, and the Justice Department under Attorney General Ed Meese favored the "originalist" approach to constitutional interpretation advocated by Robert Bork,[2] which would permit almost any gender-based distinctions in law or government policy. Judge Alito's views in this area must be carefully explored at his confirmation hearing.

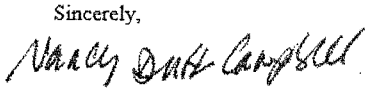
Throughout his career, Judge Alito has taken positions and issued rulings detrimental to women in other areas of the law, including through his membership in an organization that was openly hostile to the admission of women and minorities to his alma mater, Princeton; his participation in cases where the Solicitor General argued against affirmative action policies; his vote to uphold a strip search of a woman and her ten-year-old daughter, even though they were not named in a search warrant, in *Doe v. Groody*; his opinion in *Sabree v. Richman* strongly suggesting that if he were to join the Supreme Court, he would change the law to limit, and potentially preclude, the ability of individuals to enforce federal rights such as rights to Medicaid, public housing, child support enforcement, and public assistance; and his denial of an asylum claim by an Iranian woman who asserted that if she returned to Iran she would be persecuted for her feminist beliefs.

---

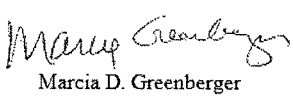
[2] *See, e.g.*, OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, GUIDELINES ON CONSTITUTIONAL LITIGATION 3-7 (1988).

This is a watershed moment for women's legal rights. In recent years, the Supreme Court has decided cases affecting women's legal rights by narrow margins. Justice Sandra Day O'Connor, the first woman on the Supreme Court, often has cast the decisive vote in these cases. With the retirement of Justice O'Connor, the Court will lose not only its first female Justice, but also the Justice whose vote often has been pivotal on issues critical to women. Judge Alito's record demonstrates that if he is confirmed to the Supreme Court, he is likely to eviscerate core rights that American women rely upon, and shift the Court in a dangerous and harmful direction. Based on the information available at this time, as summarized above, we conclude that Judge Alito should not be confirmed to the Supreme Court.

Sincerely,



Nancy Duff Campbell
Co-President



Marcia D. Greenberger
Co-President

cc: Senate Judiciary Committee