

SPECIAL REPORT



The Record and Legal Philosophy of Samuel Alito: *"No One to the Right of Sam Alito on this Court"*

January 2006

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Executive Summary

If confirmed as the next Associate Justice, Judge Samuel A. Alito would bring dramatic, sweeping change to the Supreme Court. While his words are carefully chosen and his demeanor is measured, Judge Alito's ultraconservative judicial philosophy is nothing short of radical. He would join Justices Clarence Thomas and Antonin Scalia at the center of a radical right-wing bloc that would change the direction of the Court and the country for decades to come, and threaten fundamental rights and legal protections. He stands in sharp contrast to the justice he would replace: Sandra Day O'Connor, a mainstream conservative whose swing vote has helped to preserve hard-won progress on civil rights, reproductive freedom, environmental protections, and a host of other issues preserving equality and justice for every American.

The White House has tried to distance Judge Alito from his lengthy record, which demonstrates he is among the most extreme members of the federal bench. His nomination has been unanimously acclaimed by the leaders of the Radical Right. He has shown a pronounced willingness to impose a narrow right-wing ideology from the bench, and compiled an extraordinary record of dissents to mainstream opinions -- indeed, the largest number of dissents on the Court of Appeals on which he currently sits.

This report analyzes Judge Alito's public record, drawing a disturbing thread from the legal views he advanced while serving in the Reagan Department of Justice to his fifteen years on the Third Circuit Court of Appeals. It makes a resounding case for rejection of his nomination by the United States Senate in the exercise of its constitutional advice and consent duty.

Increasing Presidential Powers

Throughout his career, Judge Alito has shown a strong predilection to concentrate power in the executive branch and the President, eroding governmental checks and balances and diminishing the rights of private citizens. His record is especially troubling at a time when one party controls all three branches of government and allegations of abuse of

power abound -- from warrantless wiretapping of American citizens to the unlawful detention and torture of suspects held by the government at home and overseas.

Eroding Civil Rights

As a government lawyer and a federal judge, Judge Alito has consistently failed to protect civil rights. He has said he disagrees with historic Supreme Court decisions articulating the “one person – one vote” principle. As a judge, he has rarely sided with individuals seeking relief from discrimination on the basis of race, age, gender, or disability, and he has opposed efforts to redress the historic effects of discrimination in the workplace. Indeed, in civil rights cases where the Third Circuit was divided, Alito advocated positions detrimental to civil rights 85 percent of the time. He once argued that it was permissible to seat an all-white jury in a case in which the evidence indicated that prosecutors had rejected black jurors on the basis of race. As part of a 1985 application for promotion in the Justice Department, he highlighted his membership in a reactionary Princeton alumni group that opposed the admission of women and attempts by the university to increase minority enrollment.

Ending Reproductive Freedom

Judge Alito has written that the Constitution does not guarantee a right to an abortion. He is on record opposing *Roe v. Wade*, and endorsing state laws so burdensome they effectively deprive women of their right to privacy, reproductive freedom, and reproductive health. There is little doubt that as a Supreme Court justice, Alito would vote to overturn *Roe*.

Favoring the Powerful over the Powerless

More than his colleagues on the Third Circuit, Judge Alito has sided with corporations and government entities accused of discrimination. Several analyses of his record by academics and the news media indicate that he consistently sides with powerful entities against individuals. He once wrote that high government officials should be absolutely immune from liability in cases involving the illegal wiretapping of U.S. citizens. And he

endorses broad powers for law enforcement, once writing a dissent that would have upheld the strip search of a ten-year-old girl who was not named in the search warrant.

Curtailing Congress' Power to Protect Citizens

Judge Alito has voted to strike down Congressional legislation banning the possession and transfer of machine guns, and legislation requiring that states fully comply with obligations to give their workers unpaid medical leave. He once wrote that it is not the role of the federal government to protect the "health, safety and welfare" of the American people. This ultraconservative ideology would undermine an enormous range of laws Americans rely on, including civil rights protections, health and safety standards in the workplace, regulations protecting air and water quality, food and drug quality standards, the regulation of firearms, and even the Social Security, Medicare and Medicaid programs.

Threatening Religious Liberty

Judge Alito's nomination threatens to erode fundamental constitutional protections that ensure that all Americans continue to enjoy freedom of conscience and religious liberty. Alito has consistently ruled against those who believe that taxpayer funds should not be used to promote religion, and he has reportedly told Senators that the Supreme Court has gone "too far" in maintaining the separation of church and state.

A Growing Credibility Gap

There have been disturbing inconsistencies in Judge Alito's explanations of controversial issues. He pledged to Congress that he would recuse himself from cases involving certain companies and firms -- including the Vanguard companies, the brokerage firm of Smith Barney, and his sister's law firm -- then broke that pledge, in one case offering several different excuses. He claims not to remember his membership in the reactionary "Concerned Alumni of Princeton," although he prominently highlighted that involvement in a 1985 application for a promotion. He reportedly said his statement in that same application "that the Constitution does not protect a right to an abortion" was made to get the job and should not be taken seriously.

Conclusion

Judge Alito's quiet demeanor cloaks a far right ideology that places him among the most conservative judges on the federal bench. If he replaces Justice O'Connor, he would be a consistent vote to turn back the clock on decades of progress in civil rights, civil liberties, health and safety, environmental protection and religious liberty. His extreme judicial philosophy threatens fundamental rights and legal protections for all Americans -- for decades to come. The Senate should reject his confirmation to a lifetime seat on the Supreme Court.

I. Introduction: The Record and Legal Philosophy of Samuel Alito: “No One to the Right of Sam Alito on this Court”

When President Bush nominated Judge Samuel Alito to replace Justice Sandra Day O'Connor immediately after the far right forced the withdrawal of Harriet Miers, far right leaders were immediately and unanimously enthusiastic. Robert Bork concluded “let us rejoice.”¹ Concerned Women for America pronounced that Alito “has always been one of our top choices.”² Disgraced former Republican Senate staffer Manny Miranda called the selection a “grand slam,”³ and columnist Cal Thomas reported that right-wing advocates who had opposed Miers were now “ecstatic.”⁴ Operation Rescue proclaimed that as a result of the nomination, “*Roe*’s days are numbered.”⁵ Jay Sekulow of the American Center for Law and Justice echoed the views of many by crowing that “President Bush promised that he would nominate Justices in the mold of Justices Scalia and Thomas. President Bush has done just that.”⁶ Indeed, prior to Alito’s nomination, one report noted that the “Scalito” nickname for Alito “appears to have caught on even among some conservatives who appear to use it as a compliment.”⁷

Alito supporters and White House spinners nonetheless claim that he is not like Justice Scalia -- he is mild-mannered, polite, and does not write bombastic opinions. But this confuses style with substance. As concluded by George Washington law professor Jonathan Turley, who supported John Roberts’ confirmation as Chief Justice, if Alito

¹ R. Bork, “A Narrowed Rift,” *National Review Online* (Nov. 3, 2005).

² Concerned Women for America press release, “Alito is Outstanding Choice” (Oct. 31, 2005).

<<http://www.cwfa.org/articledisplay.asp?id=9319&department=MEDIA&categoryia=misc>>

³ C. Thomas, “Bring it on with Alito,” *Jewish World Review* (Nov. 3, 2005).

⁴ *Id.*

⁵ Operation Rescue press release, “Bush Nominates Alito” (Oct. 31, 2005).

< <http://www.operationrescue.org/?p=290>>

⁶ American Center for Law and Justice press release, “Nomination of Judge Samuel Alito to Supreme Court is “wise” choice,” (Oct. 31, 2005).

<<http://www.aclj.org/news/Read.aspx?ID=1985>>

⁷ S. Duffy, “Justice Alito?,” *Legal Intelligencer* (Oct. 31, 2005).

were confirmed, “there will be no one to the right of Sam Alito on this Court.”⁸ Indeed, Alito’s record, particularly on “federalism” and restricting congressional authority, has earned him his ranking by Professor Jeffrey Rosen as one of the top four “conservative activists” on the federal bench.⁹

People For the American Way’s detailed review of Judge Alito’s record confirms these conclusions. Although he is well qualified professionally and lacks the bombast of Justice Scalia, Alito has a lifelong record of loyal adherence to a far right legal movement that seeks to curtail the ability of the federal courts, as well as Congress, to protect the rights of all Americans. Rather than leaving these views at the courthouse door, Alito’s record shows that he has brought them with him on the bench to become one of the nation’s most far right federal judges. His nomination for a lifetime post to replace Justice O’Connor -- who has often served as the swing vote on a closely divided Court concerning civil rights, reproductive freedom, other constitutional liberties, environmental protections, and a host of other issues -- threatens to swing the Court decisively to the right and jeopardize Americans’ rights and freedoms for a generation or more.

Many of Alito’s views were revealed in the now infamous 1985 memo he wrote as part of his job application with Attorney General Ed Meese for a high-level position in the Reagan Justice Department. In that application, Alito proudly touted his membership in right-wing groups like the Federalist Society and Concerned Alumni of Princeton. He made a clear pledge of allegiance to a right-wing agenda to limit the federal courts’ ability to protect individual rights. He referred to the “supremacy” of the executive branch and Congress over the federal judiciary, a view rejected by the Founders, and expressed disagreement with established Supreme Court precedents concerning one-

⁸ Interview with Jonathan Turley, *The Today Show*, NBC (Oct. 31, 2005)(Transcript available at <http://thinkprogress.org/2005/10/31/alito-turley/>); J. Turley, “Roberts the Elder,” *Village Voice* (Sept. 13, 2005)

⁹ J. Rosen. “Evaluating Strict Constructionists,” *New Republic Online*, (Nov. 29, 2004).

person, one-vote and other matters crucial to Americans' rights.¹⁰ In fact, Alito's 1985 statement of what he described as his "very strongly" held legal views provides a blueprint for his extremely troubling legal and judicial record. For example:

- As a judge, Alito has been the most frequent dissenter among all the other judges, appointed by Republicans as well as Democrats, on the Third Circuit Court of Appeals since he began serving in 1990. He has the largest number of dissents written (64) as well as written or joined (70). In fact, he has written or joined more than 10% of the 659 dissents issued during his period of service on a court that currently includes 13 active and 8 senior judges.¹¹
- According to estimates by University of Chicago law professor Cass Sunstein, more than 90% of Alito's dissents take positions more conservative than those of his colleagues. This is much more lopsided than the record of other very conservative federal appellate judges; for example, Judge Michael Luttig has dissented in the more liberal direction 32% of the time, compared to only 9% for Judge Alito.¹²
- Alito felt so strongly about limiting congressional authority and "federalism" that as a Justice Department official, he urged President Reagan to veto an uncontroversial bill protecting against odometer fraud because in his view the states, and "not the federal government," are charged with protecting the "health, safety and welfare" of Americans. President Reagan rejected Alito's advice and signed the bill.¹³

¹⁰ See Attachment to PPO Non-Career Appointment Form of Samuel Alito, Nov. 15, 1985 ("1985 Job Application").

¹¹ See Appendix A – Judge Samuel Alito's Record of Dissents on the Third Circuit.

¹² See Transcript of "A survey course on Samuel Alito's legal views," *NPR: Morning Edition* (Nov. 11, 2005).

¹³ See section II, *infra*.

- As a judge, Alito rejected the views of a majority of his court, as well as the rulings of six other federal appellate courts, and argued that the federal law limiting the possession and transfer of machine guns was unconstitutional in the name of “constitutional federalism” and to uphold what he considered “limits on Congressional power.” The court majority criticized his dissent as “counter to the deference that the judiciary owes” to Congress.¹⁴
- Both before and after becoming a judge, Alito has argued for extreme deference to presidential and executive power. He has criticized the Supreme Court decision upholding Congress’ authority to provide for an independent prosecutor. While at the Justice Department, he agreed that Executive Branch officials should be absolutely immune from claims concerning illegal domestic wiretapping.¹⁵ And he has described himself as an advocate of the theory of the “unitary executive,” which the current Administration has used to try to justify its unilateral assertions of broad power and would undermine the independence of federal agencies like OSHA and the NLRB.
- Alito explained in 1985 that he believed “very strongly” that “the Constitution does not protect a right to an abortion” and that he was “proud” to help advance that position in the Justice Department. That included laying out a proposed strategy to produce the goal of the “eventual overturning of *Roe v. Wade*, and in the meantime, of mitigating its effects.” As a judge, in the only abortion-related case he decided not clearly dictated by binding precedent, Alito vote to approve a “spousal notice” restriction on reproductive rights that

¹⁴ *Id.* Alito’s dissent also demonstrates his inconsistent criticism of judicial activism, described more fully below. When applying for a Justice Department promotion, he touts executive branch and congressional “supremacy” over the federal judiciary. Yet when Congress takes steps to protect the health and safety of Americans inconsistent with “federalist” principles, he argues -- as a judicial activist -- for striking down these provisions.

¹⁵ *Id.*

was later struck down by the Supreme Court as an “undue burden,” with Justice O’Connor casting the deciding vote.¹⁶

- While at the Justice Department, Alito said that he “personally believe[d] very strongly” in opposition to affirmative action, even as a remedy for past discrimination, claiming that he was opposing quotas and making arguments rejected by the Supreme Court. At the same time, he proudly touted his membership in Concerned Alumni of Princeton, a notorious Princeton alumni group that advocated quotas intended to harm women and minorities.¹⁷
- As a judge, in civil rights cases where the Third Circuit was divided, Alito has opposed civil rights protections more than any of his colleagues. He has advocated positions detrimental to civil rights 85% of the time. Alito filed solo dissents in more than a third of those cases.¹⁸
- In one civil rights case, all ten of Alito’s colleagues who decided the case with him, appointed by Republicans and Democrats alike, agreed that a sex discrimination victim’s case was properly submitted to the jury. Alito was the only judge who dissented.¹⁹
- While at the Justice Department, Alito maintained that the Constitution permits police to shoot in the back and kill an unarmed 15-year-old boy suspected of a nonviolent offense, and that the police action was not even a “seizure” under the Fourth Amendment. The Supreme Court ruled precisely the opposite, with every member of the Court disagreeing with Alito’s view on whether the Fourth Amendment applied, and every police group that filed a brief in the case disagreeing with Alito’s position.²⁰

¹⁶ See section IV *infra*.

¹⁷ See section III *infra*.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See section V *infra*.

- In every case in which Alito has participated as a judge in which judges disagreed on citizens' rights to be free from unreasonable searches and seizures, Alito adopted the view most supportive of the government's position. In more than a dozen dissents he filed in criminal cases, not one urged a position more protective of individual rights than did the majority.²¹
- In one case, Alito voted in dissent to uphold the strip search of a 10-year-old girl and her mother, even though they were not named in the warrant authorizing the search. The majority opinion by then-Judge Michael Chertoff, now Secretary of Homeland Security, criticized Alito's view as threatening to turn the search warrant requirement into "little more than the cliché 'rubber stamp.'"²²

These are only a few examples of the extreme positions advocated by Judge Alito throughout his career. The remainder of this report examines his record in more detail, analyzing his views and opinions on congressional and executive power, civil rights and discrimination, reproductive choice, religious liberty and the First Amendment, criminal law and individual liberties, environmental protection, and corporate power and individual rights.²³ In addition, serious questions that have been raised about Judge Alito's credibility are discussed as well.

Even beyond Alito's decisions in any particular area of the law, Alito's record demonstrates what one observer has called an inconsistent "criticism of activism on one front with the embrace of activism on the other."²⁴ He dissents in a civil rights case because he claims the discrimination victim's lawyer has not adequately presented an issue, but then tries to deny relief in a death penalty case by bringing up new arguments

²¹ *Id.*

²² *Id.*

²³ Except as otherwise noted, this review focuses on split or divided cases involving Judge Alito and opinions that he has written, which provide the most guidance as to his record and legal philosophy.

²⁴ R. Gordon, "Alito or Scalito?," *Slate* (Nov. 1, 2005).

on his own that were never raised by the government. He frequently claims that precedent or statutory language requires the result he supports, but is criticized by colleagues for a dissent in an individual rights case that “not only guts the statutory standard, but ignores our precedent” and for another dissent that improperly seeks to require Congress “to play Show and Tell with the federal courts at the peril of invalidation of a federal statute.”²⁵ As one professor has explained, Alito “massages the precedents” and legal doctrines “to make them say what he wants to say.”²⁶

This explains why the apparent differences between Alito and Scalia may well make Alito, if confirmed, even more dangerous on the Supreme Court. As law professor Andrew Siegel has explained, by “marrying” extremely conservative views like Scalia’s with “tact, politeness, and a deferential writing style,” Alito may well be more persuasive with other Supreme Court justices, a “more powerful advocate for his conclusions, and a bigger danger to those who support opposing legal or constitutional visions.”²⁷ On the question of how Alito would decide controversial cases not clearly dictated by accepted legal principles, Siegel writes, Alito’s record provides “a long and consistent answer: He will tack hard to the right” and “might be the most dangerous possible nominee.”²⁸ The Senate should reject Judge Alito’s confirmation.

²⁵ C. Savage, “Alito’s colleagues said he ignored precedent,” *Boston Globe* (Nov. 2, 2005).

²⁶ J. Bravin, “Alito prefers scalpel to sledgehammer,” *Wall Street Journal* (Nov. 16, 2005) (quoting Professor Robert Post of Yale Law School).

²⁷ A. Siegel, “Nice Disguise: Alito’s Frightening Geniality,” *New Republic Online* (Nov. 14, 2005).

²⁸ *Id.*

II. Congressional and Executive Authority

One of the most important functions of the Supreme Court is to determine the scope and limits of congressional and executive power. This is not just a matter of constitutional theory, but instead an issue of crucial significance for our country. In recent years, the most right-wing Justices on the Court have tried -- and have succeeded more than ever before in our history -- in striking down laws passed by Congress and limiting Congress' authority to pass laws protecting the rights, health, and safety of the American people. In addition, the nation has seen broad and sometimes unprecedented assertions of presidential power that directly affect the rights of Americans, most recently the Administration's unprecedented assertion of unilateral power to order secret domestic wiretapping, which the Court has often been called upon to review. Justice O'Connor has played a pivotal role in many of these cases, including providing the decisive fifth vote to check unlimited executive powers.

Unfortunately, the record of Judge Alito strongly suggests that he would shift the Court in a dangerous direction in this area. Both before and after becoming a judge, he has expressed extreme views, often rejected by other judges and far out of the mainstream, which would severely limit Congress' authority and would defer to presidential and executive authority despite serious harm to individual rights. Alito's troubling record on these issues is an important reason that the Senate should reject his nomination.

A. Congress' Authority to Protect Americans' "Health, Safety and Welfare"

Beginning in the 1980s, a key goal of right-wing lawyers, judges, and activists, led by members of the Federalist Society, has been to severely limit the ability of Congress to pass laws protecting the rights, safety, and welfare of Americans. Based on the view that the Supreme Court was wrong in the 1930s to uphold New Deal programs as legitimate exercises of Congress' authority under the Constitution's Commerce Clause and other provisions, the end result would be the overturning of more than 70 years of

jurisprudence and, in the words of a Federalist Society 2001 conference, “Rolling Back the New Deal.”²⁹

Starting in 1995, this effort produced tangible, and troubling, results. Usually by narrow 5-4 margins, the Supreme Court began to strike down federal laws such as those protecting against violence against women, discrimination against the disabled, and violations of religious freedom because they purportedly exceeded Congress’ authority. From 1995 to 2000 alone, the Court invalidated all or part of more than 22 laws passed by Congress, in contrast to the 128 laws struck down during the first 200 years of the Constitution.³⁰ One Supreme Court expert has remarked that “[n]ot since before the 1937 constitutional crisis over the court’s invalidation of progressive New Deal legislation has a bare majority been so bent on reining in Congress.”³¹ Many Senators have also criticized what Senator Specter has recently called the Supreme Court’s “judicial activism which has usurped Congressional authority” through its interpretations of the Commerce Clause, the Eleventh Amendment, and Section 5 of the Fourteenth Amendment.³²

Justice O’Connor has been a key vote in these cases. Although she has joined the narrow 5-4 majority in some of these decisions limiting Congress’ authority, she has also cast a crucial vote in several cases to restrain justices like Thomas and Scalia who have sought to overturn even more congressional laws. *See Tennessee v. Lane*, 541 U.S. 509 (2004)(5-4 vote including O’Connor to uphold Title II of Americans with Disabilities Act); *Nevada v. Hibbs*, 538 U.S. 721 (2003)(6-3 vote including O’Connor to uphold Family and Medical Leave Act).

²⁹ See People For the American Way Foundation, *The Federalist Society: From Obscurity to Power* (Jan. 2003), at 9-10, 17-19.

³⁰ See S. Waxman, “Defending Congress in the Courts,” *Keynote Address at 7th Circuit Judicial Conference* (May 1, 2000) at 1-2.

³¹ D. O’Brien, “Justice: Supreme Court Can No Longer Duck the Big Issues,” *Los Angeles Times* (Oct. 3, 1999).

³² Letter from Senator Arlen Specter to John G. Roberts, Jr. (Aug. 23, 2005) at 1.

Throughout his career, however, Judge Alito has advocated an extreme legal view on these issues that threatens to shift the Court dramatically if he replaces Justice O'Connor. In his 1985 job application to Ed Meese for a position in the Office of Legal Counsel, Alito proudly noted that he was a member of and "regular participant" in meetings of the Federalist Society. At the top of his list of "very strongly" held beliefs were "limited government" and "federalism."³³ After he got the OLC job, Alito advocated action in the name of an extreme federalist view that was rejected by President Reagan himself.

Specifically, Congress passed in 1986 the Truth in Mileage Act, which was designed to protect consumers who buy used cars by making odometer fraud by dishonest used car dealers more difficult. As deputy at OLC, however, Alito recommended that President Reagan veto the bill "because it violates the principles of federalism."³⁴ "After all," Alito wrote in a proposed veto message, "it is the States, and *not the federal government*, that are charged with protecting the health, safety, and welfare of their citizens."³⁵ President Reagan rejected Alito's radical "federalist" advice and signed the odometer bill.³⁶

Ten years later, after he became a federal judge, Alito took the opportunity to try to translate his extreme federalist philosophy and anti-Congress views into action. In *United States v. Rybar*,³⁷ the Third Circuit considered the constitutionality of the federal law banning the transfer or possession of machine guns. Across the country, a number of criminal defendants like Raymond Rybar, a federally licensed firearms dealer convicted of violating the statute, challenged the law's constitutionality under the Commerce Clause, following the Supreme Court's 5-4 decision in *United States v. Lopez*, striking down the Gun-Free School Zones Act as beyond Congress' Commerce Clause

³³ 1985 Job Application.

³⁴ Memorandum from Samuel A. Alito, R. to Peter J. Wallison, counsel to the President re: Enrolled Bill S.475 (Oct. 27, 1986)("Wallison memo").

³⁵ Proposed Veto Message attached to Wallison memo (emphasis added).

³⁶ "Consumer Notes," *Baton Rouge Morning Advocate*, (Dec. 15), 1986, at 2d.

³⁷ 103 F.3d 273 (3d Cir. 1996), *cert. denied*, 522 U.S. 807 (1997).

authority.³⁸ Even after hearing arguments based on *Lopez*, however, five other courts of appeal had rejected Commerce Clause challenges to the machine gun law by the time *Rybar* was considered.³⁹ The Third Circuit majority agreed with its sister circuits and ruled that the law was constitutional. As suggested by the crucial concurring opinion of Justices Kennedy and O'Connor in *Lopez*, the Third Circuit majority stated that *Lopez* was a "limited holding."⁴⁰ The majority further explained that unlike *Lopez*, which applied only to gun possession inside school zones, "a discrete area unlikely to have a meaningful aggregate effect on commerce," the law in *Rybar* concerned "possession and transfer" anywhere of machine guns, which Congress reasonably concluded would "substantially affect interstate commerce."⁴¹

Nevertheless, Judge Alito disagreed with the Third Circuit majority and five other circuits and argued in dissent that the machine gun law was unconstitutional under *Lopez*. According to Alito, the law should be struck down in the name of "constitutional federalism" and in line with his view that *Lopez* showed that the Commerce Clause imposes "meaningful limits on congressional power," because Congress did not make what he considered sufficiently specific findings or present empirical evidence on the effects of machine gun possession on interstate commerce.⁴² The majority specifically rejected Alito's view. The court explained that Congress had made general findings concerning the effects of such gun possession on commerce and on crime and that Alito's demand was "counter to the deference that the judiciary owes to its two coordinate branches of government." The majority pointedly noted that "[n]othing in *Lopez* requires

³⁸ 514 U.S. 549 (1995).

³⁹ See *United States v. Beuckalaere*, 91 F.3d 781 (6th Cir. 1996); *United States v. Kenney*, *United States v. Kirk*, 70 F.3d 791 (5th Cir. 1995), *aff'd*, 105 F.3d 997 (5th Cir. 1997); 91 F.3d 884 (7th Cir. 1996); *United States v. Rambo*, 74 F.3d 948 (9th Cir.), *cert. denied*, 519 U.S. 819 (1996); *United States v. Wilks*, 58 F.3d 1518 (10th Cir. 1995). As recognized in *Rybar*, a sixth court of appeals had rejected a challenge to the machine gun law prior to *Lopez*. See *United States v. Pearson*, 8 F.3d 631 (8th Cir. 1993), *cert. denied*, 114 S.Ct. 2132 (1994).

⁴⁰ *Rybar*, 103 F.3d at 277 (quoting concurring opinion in *Lopez*).

⁴¹ *Rybar*, 103 F. 3d at 282.

⁴² *Id.* at 287, 286.

either Congress or the Executive to play Show and Tell with the federal courts at the peril of invalidation of a Congressional statute.”⁴³

The significance of Judge Alito’s dissent in *Rybar* can hardly be overstated. Not only was it out of the mainstream as measured by the opinions of six federal courts of appeals at the time, but even conservative Senator Tom Coburn has also recognized that it was an improper effort to legislate from the bench and strike down a law passed by Congress.⁴⁴ Subsequently, all the other federal courts of appeals that have considered such claims have repudiated Alito’s argument, and the Supreme Court has repeatedly declined to review these decisions.⁴⁵ The Commerce Clause, moreover, is the basis for numerous congressional statutes protecting civil rights, health, safety, and the environment. In fact, just this coming February, the Supreme Court is to consider two cases from Michigan concerning whether the Clean Water Act can constitutionally combat pollution in wetlands and tributaries. As the *Detroit Free Press* has explained, a negative ruling “could wash away federal environmental standards for anything that doesn’t cross state lines” and could “open the way” for challenges to the Endangered Species Act and other key federal environmental laws.⁴⁶ Replacing the moderate Justice O’Connor with Judge Alito could literally make the difference in these key environmental cases this year, as well as in numerous other challenges to congressional statutes that protect Americans in the years to come.

Alito has also sought to undermine Congress’ authority under Section 5 of the Fourteenth Amendment to protect Americans from discrimination and harm. In *Chittister v. Department of Community and Economic Development*, 226 F.3d 223 (3d Cir. 2000), Alito wrote the opinion ruling that it was unconstitutional for Congress to authorize a

⁴³ *Id.* at 282.

⁴⁴ See “Interview: Senator Tom Coburn Discusses the Supreme Court, the CIA Leak and the Iraq War.” *NBC News: Meet the Press* (Nov. 6, 2005).

⁴⁵ See National Women’s Law Center, “Special Report: The Nomination of Samuel Alito: A Watershed Movement for Women” (Dec. 15, 2005), at 23 n.164 and accompanying text. In fact, the Supreme Court vacated and remanded the one court of appeals decision that struck down the statute. *Id.*

⁴⁶ “Save Wetlands: Clean water at stake in cases going to high court,” *Detroit Free Press* (Nov. 21, 2005).

state employee to sue his employer for damages for firing him because he took medical leave under the federal Family and Medical Leave Act (FMLA). Alito recognized that in some cases Congress may be able to overcome states' immunity under the Eleventh Amendment from such lawsuits pursuant to its authority to enforce the equal protection of the laws under the Fourteenth Amendment, but held that this rationale did not apply to the sick leave provisions of the FMLA. In particular, Alito argued, the FMLA requirement of 12 weeks of leave was "out of proportion" to any gender discrimination that the Act was to help prevent or remedy.⁴⁷

The Supreme Court reached precisely the opposite conclusion in an FMLA case raising similar issues several years later. In *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003), the Court ruled 6-3 that a state worker could sue his employer for violating his family leave rights under the FMLA. Contrary to Alito's opinion in *Chittister*, the Court specifically found that Congress had appropriately sought to remedy and prevent gender discrimination by providing up to 12 weeks of unpaid family leave.⁴⁸ Although Justices Scalia, Thomas, and Kennedy dissented in *Hibbs*, key votes upholding the law were cast by Chief Justice Rehnquist, who wrote the majority opinion, and Justice O'Connor.

Particularly now that Chief Justice Rehnquist is no longer on the Court, replacing Justice O'Connor with Judge Alito would jeopardize both Congress' authority under the Fourteenth Amendment and the rights of numerous Americans across the country. As one of the organizations instrumental to the passage of the FMLA has recently stated, if Alito's views prevail on the Supreme Court, "millions of state workers would be prevented from filing claims against their employers when denied medical leave under the FMLA."⁴⁹ In addition, replacing O'Connor with Alito could also threaten other

⁴⁷ *Chittister*, 226 F.3d at 229.

⁴⁸ *Hibbs*, 538 U.S. at 739.

⁴⁹ National Partnership for Women and Families, *Ensuring Access to The Family and Medical Leave Act (FMLA); What is at Stake: Judge Alito's Views on the FMLA Raise Serious Concerns* (Nov. 8, 2005).

federal laws protecting state employees and others who interact with state governments under such laws as the Americans with Disabilities Act and the Fair Labor Standards Act.

In short, Alito's career-long record of extreme views on "federalism" clearly has earned him his ranking by Professor Jeffrey Rosen as one of the top four "conservative activists" on the federal appellate bench.⁵⁰ Replacing Justice O'Connor with Judge Alito would shift the Court dramatically to the right and threaten to severely restrict Congress' authority to protect the health, safety, rights, and welfare of all Americans.

B. Presidential and Executive Authority

Another set of key questions that continues to confront the Supreme Court concerns the limits on unilateral executive and presidential power. From efforts to keep executive branch documents or proceedings secret, to assertions of unilateral power to imprison alleged enemy combatants, to more recent claims of executive power to order electronic surveillance of U.S. citizens inside our borders without any judicial approval, the executive branch has asserted broad power to take unilateral action that may threaten individual rights as well as the authority of Congress as a co-equal branch of government. The Supreme Court has played and will continue to play a crucial role in determining the limits of executive power, and no justice has been more important than Justice O'Connor in helping vindicate the fundamental principle that executive power must be constrained by the Constitution and federal law. For example, it was Justice O'Connor who wrote recently in *Hamdi v. Rumsfeld* that even "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."⁵¹

Even as he has advocated an extreme, narrow view of Congress' constitutional authority, however, Alito has pushed for an extremely broad scope for executive and presidential authority. Prior to becoming a judge, Alito worked exclusively in the executive branch of government in the Justice Department and the U.S. Attorney's

⁵⁰ See Jeffrey Rosen, "Evaluating Strict Constructionists," *New Republic Online* (Nov. 29, 2004).

⁵¹ *Hamdi v. Rumsfeld*, 542 U.S. 507, 536.

office.⁵² After becoming a judge, Alito himself best explained his philosophy in a 2001 speech to the Federalist Society. Alito stated that he believed when he was at OLC, “and I still think,” that “the theory of the unitary executive . . . best captures the meaning of the Constitution’s text and structure.”⁵³ According to Alito’s brief explanation, under the unitary executive theory, “all federal executive power is vested” in “the President,” and “a vigorous executive is needed.”⁵⁴

Scholars and commentators have elaborated on the “unitary executive” theory and its use by the Bush Administration. In a comprehensive 2005 paper, one scholar has explained that the “unitary executive” theory has “mostly been championed by the founding members of the Federalist Society” and “seeks to aggressively push the constitutional boundaries to protect the prerogatives of the office” of the President from incursion by Congress or others and “to advance the president’s policy preferences.”⁵⁵ The theory has been used by the Bush Administration to justify not only controversial steps concerning the “war on terror” like the infamous torture memorandum, but also efforts to control independent regulatory agencies and to directly limit congressional authority through signing statements purporting to narrowly interpret congressional legislation.⁵⁶ Justice Thomas recently referred to the “unitary Executive” in dissenting

⁵² Specifically, Judge Alito’s responses to the Senate Judiciary Committee’s questionnaire explain that before becoming a judge in 1990, he served as an assistant U.S. Attorney in New Jersey from November 1977 (after a judicial clerkship) until August 1981. He then worked as an Assistant Solicitor General until December 1985, Deputy Assistant Attorney General in the Office of Legal Counsel until March 1987, and U.S. Attorney for the District of New Jersey until June 1990.

⁵³ Remarks of Judge Samuel Alito in “Administrative Law and Regulation: Presidential Oversight and the Administrative State,” *Engage* (Nov. 2001)(“Unitary Executive Speech”) at 12.

⁵⁴ *Id.*

⁵⁵ C. Kelley, “Rethinking Presidential Power – the Unitary Executive and the George W. Bush Presidency,” *Paper Prepared for the 63rd Annual Meeting of the Midwest Political Science Association* (April 7-10, 2005)(“Kelley”) at 10, 11-12.

⁵⁶ *Id.* at 23-25 (unilateral action concerning war on terror including torture memo), 34-39 (use of signing statements with respect to Sarbanes-Oxley Act and DOJ authorization act), 41-44 (control of regulatory agencies). *See also* J. VanBergen, “Scholar says Bush has used obscure doctrine to extend power 95 times,” *Infowars.com* (Sept. 30, 2005), available at http://www.infoworld.com/articles/ps/bush_obscure_doctrine_extend_power.htm; Scott

from the Court's decision to restrict the President's power to unilaterally detain U.S. citizens as enemy combatants in *Hamdi v. Rumsfeld*.⁵⁷

As Judge Alito himself has pointed out, he has had little occasion to rule directly on claims concerning presidential power.⁵⁸ In addition to his general support for the troubling "unitary executive" theory, however, several aspects of his record raise serious concerns about his views on executive and presidential power.

Initially, Alito has specifically criticized an important Supreme Court decision upholding congressional limits on presidential power -- *Morrison v. Olson*, which upheld Congress' authority to provide for a truly independent counsel to investigate and prosecute executive branch misconduct.⁵⁹ In a 7 to 1 decision in *Morrison*, in which only Justice Scalia dissented, the Court ruled that it was constitutional for Congress to ensure the independence of an independent counsel by restricting the ability of the Attorney General to fire him or her. The year after *Morrison* was decided, Alito lamented in remarks at a Federalist Society conference that the decision "hit the doctrine of separation of powers about as hard as heavy weight champ Mike Tyson usually hits his opponents."⁶⁰ He described the decision as "stunning" for its vote and its breadth, stated that the ruling had "restricted the executive's constitutionally guaranteed appointment power," and praised Justice Scalia for his "brilliant but very lonely dissent."⁶¹ Although more restrained when addressing the Federalist Society as a judge several years later, Alito noted that the constitutionality of the independent counsel law was "questionable"

Shane, "Behind Power, One Principle as Bush Pushes Prerogatives," *New York Times* (Dec. 16, 2005).

⁵⁷ See *Hamdi*, 542 U.S. at 581 (arguing that "judicial interference" through Court's ruling would "destroy[] the purpose of vesting primary responsibility in a unitary Executive").

⁵⁸ Unitary Executive Speech at 11. Judge Alito did issue dissents in several cases concerning the reviewability of executive branch decisions to close military bases, which were reversed by the Supreme Court. See *Specter v. Garrett*, 971 F.2d 936 (3d Cir. 1992), *rev'd*, 511 U.S. 462 (1994).

⁵⁹ 487 U.S. 654 (1988).

⁶⁰ Introduction by Samuel Alito, "Debate: After the Independent Counsel Decision: Is Separation of Powers Dead," 26 *Am. Crim. L. Rev.* 1667 (1989).

⁶¹ *Id.*

under the “unitary executive” theory that he favors.⁶² While opinions vary on the wisdom of an independent counsel law at any particular time, there can be no question that Congress’ authority to enact such a statute can be critical to our nation. Alito’s criticism of *Morrison* in the context of his advocacy of the “unitary executive” theory is troubling.

In addition, both at the Justice Department and as a judge, Alito has frequently argued for deference to executive branch assertions of authority even where other courts and judges have disagreed. While serving in the Office of Legal Counsel in September 1986, he advised the FBI that it could continue to conduct personnel investigations pursuant to a McCarthy-era “loyalty” program with no change despite a contrary federal district court opinion, which Alito claimed was “wrongly decided.”⁶³ Similarly, he advised that the FBI could decline to transfer certain electronic surveillance records to the National Archives and Records Administration, despite a D.C. Circuit decision that stated that it “reject[ed]” such an argument, claiming that the court’s statement was “dictum” and “appears to us to be incorrect.”⁶⁴

In addition, recently revealed documents show that, while he was at OLC, Alito advocated increasing unilateral presidential power at the expense of Congress. In a 1986 memorandum, Alito recommended the increased use on a trial basis of presidential signing statements -- statements issued by the President when he signs a bill into law that provide his unilateral view of how the law should be interpreted and how he will carry it out -- giving the President “the last word” on such questions regardless of what Congress has done.⁶⁵ Alito explained that his proposal would “increase the power of the Executive to shape the law” and would “curb” what he called “prevalent abuses of legislative

⁶² Unitary Executive Speech at 13.

⁶³ Memorandum from Samuel Alito to Joseph R. Davis, Assistant Director, re Personnel Security Investigations (Sept. 9, 1986) at 1. The decision at issue was *Flake v. Bennett*, 611 F. Supp. 70 (D.D.C. 1985), which has never been overruled.

⁶⁴ *American Friends Service Comm. v. Webster*, 720 F.2d 29, 76 n.75 (D.C. Cir. 1983); Memorandum from Samuel A. Alito to Richard K. Willard, Assistant Attorney General, re Authority of FBI to Transfer Restricted Records to the National Archives and Records Administration (Feb. 27, 1986) at 2. *AFSC* also remains good law.

⁶⁵ Memorandum from Samuel A. Alito to The Litigation Strategy Working Group re: Using Presidential Signing Statement (Feb. 5, 1986) at 2.

history,” which he recognized would not be “warmly welcomed” in Congress.⁶⁶ In fact, scholars have recognized that presidential signing statements began to be utilized aggressively to “advance presidential power” during this stage of the Reagan Administration.⁶⁷

Recently revealed documents also provide important information about Alito’s role in another controversy concerning executive power. While in the Solicitor General’s office, Alito argued in a Supreme Court brief in *Mitchell v. Forsyth*, 472 U.S. 511 (1985) that Cabinet officials who authorized illegal wiretaps of Americans in this country to gather intelligence about possible terrorist activities -- a situation with chilling relevance today -- were entitled to absolute immunity from any legal liability, a claim rejected by the Supreme Court.⁶⁸ A recently released 1984 memorandum makes clear that although he advised arguing for qualified rather than absolute immunity in *Forsyth* itself “for tactical reasons,” Alito himself believed that officials “should have this immunity.”⁶⁹ Several senators have already raised concerns about this issue; Senator Kennedy noted with dismay that at a time when “the nation is faced with revelations that the Administration has been wiretapping American citizens, we find that we have a nominee who believes that officials who order warrantless wiretaps of Americans should be immune from legal accountability.”⁷⁰

Alito’s record as a judge in criminal cases in this area is discussed in more detail in section V, *infra*. On the subject most relevant to potential abuses in the name of the war on terror, Alito has consistently voted in close cases to dissent from rulings against law enforcement violations of Fourth Amendment rights and to cast the deciding vote in

⁶⁶ *Id.* at 2.

⁶⁷ Kelley at 29, 27.

⁶⁸ See *Mitchell v. Forsyth*, 472 U.S. 511 (1985)(discussed at p. 33 of Judge Alito’s 2005 Senate Judiciary Committee questionnaire responses).

⁶⁹ Memorandum from Samuel A. Alito to the Solicitor General re: *Forsyth v. Kleindienst* (June 12, 1984) at 5. As the memorandum makes clear, whether the immunity was considered absolute or qualified, Cabinet officials would not be liable for the illegal wiretaps.

⁷⁰ C. Savage, “Alito backed immunity in wiretap case,” *Boston Globe* (Dec. 24, 2005).

favor of law enforcement authority. This has included one case in which Alito cast the deciding vote to uphold the FBI's video surveillance without a warrant of a suspect's hotel room, which the dissent criticized as failing to protect against "arbitrary intrusions into our privacy."⁷¹

There are also non-criminal cases in which Alito has broadly deferred to executive power even when individual rights are clearly at stake. For example, in two cases, the full Third Circuit considered what notice must be provided by federal agencies to an incarcerated individual before they can use forfeiture proceedings to take his property away. The individual contended, and the government did not dispute, that he had not received notice. The court clearly decided that the government had violated due process of law, ruling 9-2 in one case that notice by mail must be sent to the specific place where the individual was being held, and ruling 10-1 in the other case that the notice must be reasonably calculated to actually reach the person whose property is to be seized. Only Judge Alito dissented in both cases. In one case, he even contended that notice was sufficient if sent to the U.S. Marshals Service in Pittsburgh, although the majority indicated that the government knew that the individual was being held in West Virginia.⁷²

In short, every indication from Alito's record suggests that his appointment to the Supreme Court would shift the Court's balance towards potentially dangerous deference to presidential and executive power.

⁷¹ *United States v. Lee*, 359 F.3d 194, 225-26 (3d Cir.) (McKee, dissenting), *cert. denied*, 125 S. Ct. 408 (2004) (discussed further in section V *infra*).

⁷² See *United States v. McGlory*, 202 F.3d 664, 673 (3d Cir. 2000) (*en banc*); *United States v. One Toshiba Color Television*, 213 F.3d 147 (3d Cir. 2000) (*en banc*).

III. Discrimination and Civil Rights

Throughout our history, the Supreme Court has played a crucial role in upholding Americans' civil rights. Whether the issue has been our Constitution's protections against discrimination and inequality, as in the landmark case of *Brown v. Board of Education*, 349 U.S. 294 (1955), or whether the Court has been called upon to interpret and apply congressional statutes banning discrimination based on race, gender, disability, age or other grounds, Supreme Court decisions have often been critical to upholding our nation's guarantee of equal protection of the laws.

In recent years, the Supreme Court has been closely divided on these issues, and Justice O'Connor has often been the deciding vote to uphold civil rights protections.⁷³ Replacing Justice O'Connor with someone whose views are similar to those of far-right justices like Scalia and Thomas threatens to severely turn back the clock on civil rights.

Unfortunately, the record reflects that Judge Alito is just such a nominee. Numerous organizations devoted to civil rights, including some that seldom take positions on judicial nominations, have opposed Judge Alito's confirmation.⁷⁴ Judge Alito's record, both before and after he became a judge, demonstrates that his views are far more restrictive than those of Justice O'Connor's and indeed out of the legal mainstream.

A. Judge Alito's Pre-Judicial Record at the Justice Department

⁷³ See, e.g., *Jackson v. Birmingham Bd. Of Educ.*, 125 S.Ct. 1497 (2005)(5-4 decision written by Justice O'Connor ruling that federal law protects against retaliation for complaining about illegal gender discrimination in federally assisted programs); *Grutter v. Bollinger*, 539 U.S. 306 (2003)(5-4 decision written by Justice O'Connor upholding use of affirmative action in college admissions).

⁷⁴ Among many others, the organizations include the Asian American Justice Center, the Judge David L. Bazelon Center for Mental Health Law, Lambda Legal, Leadership Conference on Civil Rights, Mexican American Legal Defense and Educational Fund, NAACP, NAACP Legal Defense Fund, National Council on Independent Living, National Partnership for Women and Families, and the National Women's Law Center.

While serving as deputy in the Office of Legal Counsel, Alito was directly involved in a controversy concerning discrimination against people with disabilities. Alito helped draft an OLC opinion in June 1986 that stated that despite the prohibitions against discrimination against persons with disabilities in any federally funded program under Section 504 of the Rehabilitation Act, it was legal to exclude people with AIDS from such programs, and for employers to fire them, because of a “fear of contagion whether reasonable or not.”⁷⁵ The opinion received a very negative reception, with most states and courts making clear even by November 1986 that it was illegal to discriminate against someone with AIDS in such key areas as employment or admission to public school.⁷⁶

Alito, however, remarked at the time that the widespread negative reaction “hasn’t shaken our belief in the rightness of our opinion.” According to him, the law “does not regulate” what an employer “can do if he has a fear of a contagious disease.”⁷⁷

In fact, as the Supreme Court made clear less than four months after Alito’s statement, Alito was clearly wrong. In *School Dist. of Nassau County v. Arline*, the Supreme Court ruled 7-2 that a teacher could properly claim that a school board had violated Section 504 for firing her “because of the threat that her relapses of tuberculosis posed to the health of others” and the fear of the “contagious effects of a physical impairment.”⁷⁸ The Court specifically rejected the argument in the OLC opinion that “the contagious effects of a disease can be meaningfully distinguished from the disease’s

⁷⁵ See S. Boodman, “AIDS Discrimination Issue Mushrooming,” *Washington Post* (Nov. 24, 1986)(“Boodman”); Memo From Assistant Attorney General Cooper on Application of Section 504 of Rehabilitation Act to Persons with AIDS, *BNA Daily Labor Report* No. 122, D-1 (June 25, 1986)(“1986 AIDS Opinion”). Although the *Post* article reports specifically that Alito “helped draft” the opinion that was signed by his superior, Charles Cooper, OLC has failed to produce documents concerning Alito’s role in it, either in response to requests from Senators or FOIA requests, and OLC has stated that it is withholding some 50 documents relating to Alito during his period there.

⁷⁶ See Boodman.

⁷⁷ *Id.*

⁷⁸ 480 U.S. 273, 281, 284 (1987). The Court’s decision in *Arline* was announced on March 3, 1987 and affirmed a court of appeals decision that had been issued in 1985, prior to the 1986 OLC opinion.

physical effects on a claimant.”⁷⁹ The Court specifically applied its holding in *Arline* to AIDS in its decision the next year in *Bragdon v. Abbott*.⁸⁰ Alito’s strong adherence to an incorrect and harmful view on discrimination against people with disabilities raises even more concerns about his record on discrimination issues.

In his 1985 job application for the OLC position, Alito expressed views on important legal issues concerning civil rights that are extremely troubling. Initially, he explained that his interest in constitutional law was “motivated in large part by disagreement with Warren Court decisions,” including “particularly” in the area of “reapportionment.”⁸¹ In fact, the Warren Court decisions in the area of reapportionment were key rulings like *Baker v. Carr*⁸² and *Reynolds v. Sims*⁸³ that recognized the fundamental principle of “one person, one vote.” As Senate Judiciary Committee chair Arlen Specter has recently stated, this principle has been “instrumental to ensuring that all people’s votes are weighted equally in our representative democracy.”⁸⁴ Although judges have sometimes differed about how to implement the “one person – one vote” concept, not a single Supreme Court justice expressed disagreement with the Warren Court-established principle by the mid-1980s, when Alito made his remarkable statement to Ed Meese.⁸⁵ Although Judge Alito has reportedly told senators in private meetings that he now accepts the “one person – one vote” concept, his apparent disagreement with that fundamental principle at least as late as the mid-1980s was clearly out of the mainstream.

⁷⁹ *Id.* at 282.

⁸⁰ See *Bragdon v. Abbott*, 524 U.S. 624 (1988). The decision in *Bragdon* was based in part on a 1988 OLC opinion that superseded the opinion that Alito helped draft. See 1988 OLC LEXIS 25 (Sept. 27, 1988).

⁸¹ See 1985 Job Application.

⁸² 369 U.S. 186 (1962).

⁸³ 377 U.S. 533 (1964).

⁸⁴ See Letter from Senator Specter to Judge Samuel Alito (Nov. 30, 2005). See also E. Paterson, “Alito nomination endangers civil rights legacy,” *San Francisco Chronicle* (Dec. 1, 2005) (“Paterson”)(explaining importance of reapportionment decisions in preventing improperly “dilut[ing] the influence of people of color by scattering minority voters among numerous districts”).

⁸⁵ See, e.g., *Karcher v. Daggett*, 462 U.S. 725 (1983); *Board of Estimate v. Morris*, 489 U.S. 688 (1989).

In addition, Alito's 1985 job application singled out his work as Assistant Solicitor General as an area where he had helped advance "legal positions in which I personally believe very strongly." He wrote that he was "particularly proud" of his "contributions in recent cases in which the government has argued in the Supreme Court that racial and ethnic quotas should not be allowed."⁸⁶ In fact, Alito's application erroneously labels as "quota" litigation the troubling efforts of the Reagan Justice Department to restrict affirmative action as well as remedies that courts can order in cases of proven discrimination, including in cases in which Justice O'Connor and the Supreme Court rejected the extreme views that Alito "personally believe[d] very strongly."

Specifically, in one of the cases that Alito worked on, Alito and the Solicitor General's office argued that it was illegal for courts to order remedies including affirmative action even in cases of intentional, egregious, and long-standing discrimination. In the *Sheet Metal Workers* case, the federal government itself had argued in the lower courts in favor of requiring a union to take action to recruit African American and Hispanic members, including a temporary remedial goal for union membership, as a remedy warranted by the union's "long continued and egregious racial discrimination."⁸⁷ In the Supreme Court, however, the federal government switched sides and Alito and the Solicitor General ("SG") argued that Title VII prohibited any remedy that included what they called "race-conscious preferences to individuals who are not the identified victims of . . . unlawful discrimination."⁸⁸

The Supreme Court noted that the SG's claims contradicted the EEOC's earlier position and rejected the SG's arguments in its decision in *Sheet Metal Workers*.⁸⁹ Although the Court's decision upholding the use of remedial affirmative action goals in that particular case was 5-4, six justices, including Justice O'Connor, rejected the claims

⁸⁶ See 1985 Job Application.

⁸⁷ *EEOC v. Local 28 of The Sheet Metal Workers Int'l Ass'n* ("Sheet Metal Workers"), 753 F.2d 1172, 1186 (2d Cir. 1985), *aff'd*, 478 U.S. 421 (1986).

⁸⁸ See *Sheet Metal Workers*, 478 U.S. 421, 440 (1986).

⁸⁹ *Id.* at 445 n.24.

advanced by Alito and agreed that affirmative action relief “may be ordered by a court as a remedy for past discrimination even though the beneficiaries may be non-victims.”⁹⁰

In another case, *Local 93, International Ass’n of Firefighters v. City of Cleveland*, Alito and the Solicitor General argued in a friend of the court brief that the Court should declare illegal a consent decree that included numerical goals for the promotion of minority firemen in a case raising claims of racial discrimination in promotion.⁹¹ By a 6-3 vote, with Justice O’Connor in the majority, the Supreme Court again rejected Alito’s argument and upheld the affirmative action plan.⁹² Even the National Association of Manufacturers, surely no proponent of “quotas,” praised the Court’s decision.⁹³

In the third case in which Alito participated, *Wygant v. Jackson Bd. of Educ.*, Alito helped write an *amicus* brief opposing an affirmative action plan agreed to by a school board and its union in order to prevent the laying off of disproportionate numbers of minority teachers. Alito and the SG not only argued that a history of societal discrimination and the fact that minorities were underrepresented among the district’s teachers did not justify the plan, but also asserted that such affirmative action could never be justified unless there was an actual finding of discrimination and the plan was directed at identifiable victims of bias.⁹⁴ The brief even went so far as to outrageously compare the affirmative action measure to slavery, asserting that it could teach students “that one hundred and twenty years after the end of slavery government may still advance some and suppress others not as individuals but because of the color of their skin.”⁹⁵

⁹⁰ *Id.* at 496 (O’Connor, J., concurring in part and dissenting in part). *See also id.* at 474-75 (plurality opinion); *id.* at 483 (Powell, J., concurring).

⁹¹ *See* Brief for the United States as *Amicus Curiae*, *Local 93, International Ass’n of Firefighters v. City of Cleveland*, No. 84-1999 (July 24, 1985).

⁹² *Local 93, International Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986).

⁹³ *See* “Affirmative Action Upheld to Rectify Past Job Bias,” *Washington Post* (July 3, 1986).

⁹⁴ *See* Brief for the United States as *Amicus Curiae*, *Wygant v. Jackson Board of Educ.*, No. 84-1340 (June 25, 1985).

⁹⁵ *Id.*

Although the Supreme Court disapproved the Jackson plan by a 5-4 vote, the Court majority, including Justice O'Connor, rejected the key claims of Alito and the SG. In particular, the majority made clear that formal findings of discrimination were not necessary to warrant affirmative action and that an affirmative action plan that goes beyond remedying particular instances of identified discrimination can nonetheless be sufficiently "narrowly tailored" to be constitutional.⁹⁶ Almost twenty years later, Justice O'Connor was the deciding vote and wrote the opinion in a decision upholding the use of affirmative action in higher education admissions in *Grutter v. Bollinger*.⁹⁷ Alito's record strongly suggests that if he had been on the Court instead of O'Connor, affirmative action by government institutions would have been completely prohibited instead of being preserved.⁹⁸

B. Alito's Membership in Concerned Alumni of Princeton and his Memory Gap

Ironically, in the same 1985 job application in which he proudly referred to his work in the Solicitor General's office against what he erroneously described as quotas, Alito also proudly touted his membership in a group that was explicitly in favor of quotas — quotas that were intended to harm women and minorities. Alito explained in his 1985 application that he was a member of Concerned Alumni of Princeton (CAP), which he described as a "conservative alumni group."⁹⁹

However, in Judge Alito's recent response to the Senate Judiciary Committee's questionnaire, Alito wrote this about CAP:

⁹⁶ *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 287, 289-90 (1986) (O'Connor, J., concurring in part).

⁹⁷ 539 U.S. 306 (2003).

⁹⁸ In accordance with the strong anti-affirmative action views expressed in his 1985 job application and his work in the Solicitor General's office, Judge Alito in fact voted in a split decision in *Taxman v. Board of Educ. of Township of Piscataway*, 91 F.3d 1547 (3d Cir. 1996), *cert. dismissed*, 522 U.S. 1010 (1997), to hold a school district affirmative action plan illegal under Title VII. One of the dissenters called the majority's interpretation of Title VII "unprecedented" and explained that it would have harmful effects upon "legitimate, thoughtful efforts to redress the vestiges of our Nation's history of discrimination in the workplace and in education." *Id.* at 1577 (Lewis, J., dissenting).

⁹⁹ 1985 Job Application.

Concerned Alumni of Princeton: This was a group of Princeton Alumni. A document I recently reviewed reflects that I was a member of the group 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. The group has no current officers from whom more information may be obtained.¹⁰⁰

These facts alone -- the notion that Alito has no memory whatsoever of membership in a group he thought so important that he chose to highlight it in his efforts to obtain a high level position in the Reagan Justice Department -- raise serious credibility concerns.

Moreover, for Princeton alumni, particularly those of Alito's generation, CAP was notorious, hardly a group that one would forget having joined. CAP (which is now defunct) was not merely a "conservative" group, as Alito in 1985 described it; it was a reactionary group, "created to thwart the reforms that provided equal access to Princeton University" for women and racial minorities.¹⁰¹

CAP was founded in 1972 by Alito's classmate, T. Harding Jones, and two older, "wealthy, blue-blood" alumni, including Shelby Cullom Davis, a member of the Class of 1930.¹⁰² Princeton, an all-male (and mostly white) school for more than 200 years, had begun admitting women in the fall of 1969, and the Princeton Class of 1972 -- Alito's class -- was the last all-male class at Princeton.¹⁰³

¹⁰⁰ Samuel A. Alito, Jr., Responses to Senate Judiciary Committee Questionnaire, Ans. 12a, at 7 (Nov. 30, 2005) (emphasis added).

¹⁰¹ Stephen R. Dujack, "Flagging Alito's Alliances," *Newark Star-Ledger* (Dec. 18, 2005) (hereafter "Dujack 2005"). Dujack, a 1976 graduate of Princeton, followed CAP "through its entire history, first as an undergraduate, later as associate editor of [the *Princeton Alumni Weekly*]," and then as an alumnus. See Stephen R. Dujack, "The Contradictions of CAP," *Princeton Alumni Weekly* (Apr. 9, 1986) (hereafter "Dujack 1986"), at 28.

¹⁰² Dujack 1986, at 34. See also, E.J. Kahn, Jr., "Annals of Higher Education: A Tiger By the Tail," *The New Yorker* (May 23, 1977) (hereafter "A Tiger By the Tail"), at 94; and Dujack 2005.

¹⁰³ See generally, Jerome Karabel, *The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale and Princeton* (2005). *The Chosen* contains a discussion of CAP at pages 471-82.

From the outset, CAP overtly opposed increased gender and racial diversification of Princeton's student body. In May 1973, Davis wrote in CAP's magazine, effectively suggesting an exclusionary quota: "Why should not a goal of 10%-20% women and minorities be appropriate for Princeton's long term strength and future?"¹⁰⁴ Later that year, Davis:

composed a fund-raising pamphlet for CAP called "A Special Word to Alumni in the Business Community," which read, in part . . . "The unannounced goal of the Administration, now achieved, of a student population of approximately 40% women and minorities, will largely vitiate the alumni body of the future."¹⁰⁵

Also in 1973, worried about increasing numbers of women at Princeton, CAP stated unequivocally that "it opposes adoption of a sex-blind admission policy."¹⁰⁶ And CAP co-founder Jones complained in CAP's magazine that:

alumni were told with the adoption of coeducation that the goal would be 650 women by 1974, with no reduction in the 3200 man student body. Today however, there are 971 women, and 3088 men with more women scheduled to be added, toward a goal of forty percent women and minorities for 1973. . . . *The make-up of the Princeton student body has changed dramatically for the worse.*¹⁰⁷

In 1974, Jones was quoted in the *New York Times* as saying "Co-education has ruined the mystique and the camaraderies that used to exist. Princeton has now given in to the fad of the moment, and I think it's going to prove to be a very unfortunate thing."¹⁰⁸

¹⁰⁴ Shelby Cullom Davis, "Preserving the Spirit of the Princeton Alumni Body," *Prospect* (May 7, 1973), at 9.

¹⁰⁵ *A Tiger By the Tail*, at 98.

¹⁰⁶ A Statement of the Concerned Alumni of Princeton Executive Committee, *Prospect* (Dec. 17, 1973), at 14.

¹⁰⁷ T. Harding Jones, "It Is Time . . . For Some Answers," *Prospect* (Feb. 26, 1973), at 5 (emphasis added).

¹⁰⁸ Maxine Lepeles, "Conservative Alumni Act to Alter Princeton's Image," *New York Times* (Mar. 3, 1974), at 62.

As Eyal Press, writing in *The Nation*, recently described it, “CAP had an innocuous-sounding name that disguised a less benign agenda, which included preventing women and minorities from entering an institution that had long been a bastion of white male privilege.”¹⁰⁹ A Princeton graduate of Alito’s era who reported on CAP during its existence wrote in 1986 that “Opposition to women and minorities . . . is a theme that runs through its entire history.”¹¹⁰

The *New York Times*, in a recent article looking back at CAP, reported that “[a]s Princeton admitted a growing number of minority students, Concerned Alumni charged repeatedly that the administration was lowering admission standards, undermining the university’s distinctive traditions and admitting too few children of alumni.”¹¹¹ In a fundraising letter sent to “all living Princeton alumni” in 1985 -- the same year that Alito bragged about his CAP membership -- CAP complained that “Currently alumni children comprise 14 percent of each entering class, compared with an 11 percent quota for blacks and Hispanics.”¹¹² That same year, in a similar vein, CAP criticized Princeton’s president, saying, “While increasing the number of blacks and Chicanos admitted, he decreases the number of alumni children”¹¹³

In October 1972, CAP began publishing a magazine called *Prospect*, which became a vehicle for the airing of CAP’s views. *Prospect*’s first editor was CAP co-founder T. Harding Jones. During the 1980s, *Prospect* was edited by Dinesh D’Souza and Laura Ingraham, “alumni of the *Dartmouth Review*,” described in 1986 by one commentator on CAP as “the celebrated conservative magazine published by

¹⁰⁹ Eyal Press, “Alito the CAP Crusader,” *The Nation* (Dec. 12, 2005).

¹¹⁰ Dujack 1986, at 33.

¹¹¹ David D. Kirkpatrick, “From Alito’s Past, a Window on Conservatives at Princeton,” *New York Times* (Nov. 27, 2005) (emphasis added).

¹¹² *Prospect*, at 4-5 (Feb. 1985), and David D. Kirkpatrick, “From Alito’s Past, a Window on Conservatives at Princeton,” *New York Times* (Nov. 27, 2005). According to the *Times*, this prompted one CAP board member to ask in an internal memo “Is the issue the percentage of alumni children admitted or the percentage of minorities? I don’t see the relevance in comparing the two, except in a racist context (i.e., why do we let in so many minorities and not alumni children?).” *Id.*

¹¹³ “CAP replies,” *Prospect*, at 7 (Feb. 1985).

undergraduates [at Dartmouth] that has received a well-earned reputation for racist rhetoric and unethical journalistic practices.”¹¹⁴

Not only were CAP’s views reactionary, but it also used *Prospect* to express those views in rhetoric that was often inflammatory and ugly. For example:

- In June 1984, *Prospect* published “A Lesson for Sally,” a report of the death in a mining accident of a female coal miner who had obtained her job after a successful lawsuit contesting sex discrimination. The “Lesson” ended with the chilling remark: “Sally Frank, take note.”¹¹⁵ Sally Frank was a member of the Princeton Class of 1980 and was well known to students and alumni for having “successfully sued to open the doors” of the remaining all-male eating clubs at Princeton to women.¹¹⁶
- An essay in the November 1983 issue of *Prospect* had called Sally Frank “a putative female.”¹¹⁷ That same essay, “In Defense of Elitism,” began:

People nowadays just don’t seem to know their place. Everywhere one turns black and hispanics are demanding jobs simply because they’re black and hispanic, the physically handicapped are trying to gain equal representation in professional sports, and homosexuals are demanding that government vouchsafe them the right to bear children.¹¹⁸

- Gay students were another target of CAP. In the February 1985 issue of *Prospect*, CAP asked: “why is the Gay Alliance [of Princeton] a student organization? Princeton should not recognize groups based solely on sexual preference; certainly the University does not (and would not) recognize or fund a Straight

¹¹⁴ Dujack 1986, at 35.

¹¹⁵ News & Comment, “A Lesson for Sally,” *Prospect* (June 1984), at 3.

¹¹⁶ Dujack 2005.

¹¹⁷ Harry Crocker III, “In Defense of Elitism,” *Prospect* (Nov. 1983), at 6.

¹¹⁸ Harry Crocker III, “In Defense of Elitism,” *Prospect* (Nov. 1983), at 6.

Student Association *or a Bestiality Society*. CAP challenges [Princeton President William B.] Bowen to announce that Princeton would recognize and provide University space and money for the Ku Klux Klan group or the Nazi group.”¹¹⁹

- In a “News & Comment” piece, the January 1984 issue of *Prospect* referred to members of the Gay Alliance of Princeton as “campus lispers.”¹²⁰ The piece, which began “[h]ere at Princeton homosexuals are on the rampage,” mocked members of the Gay Alliance for protesting the refusal by one of Princeton’s eating clubs to allow the Gay Alliance to rent space in the club to hold a dance (“campus activists began to prance about in anger”), and criticized the club for responding to the protest by changing its mind and allowing the Gay Alliance to hold its dance there (“[m]embers of [the club] are invertebrate”).¹²¹
- Another “News & Comment” item in the January 1984 issue disparaged an announcement by female professors at Harvard University that many of them had been victims of sexual harassment. *Prospect* commented: “We’ve noticed that women who claim sexual harassment often tend to be low on the pulchritude index. We bring this up not to sneer or make a political point, only to define a curiosity which sociologists may want to take up for further study.”¹²²
- In March 1984, *Prospect* published an article discussing, without the student’s permission, the sex life of a female undergraduate that invaded her privacy and created such a furor on campus that it was the subject of two articles in the *New York Times*.¹²³ The University’s vice president for public affairs called the

¹¹⁹ CAP Replies, *Prospect* (Feb. 1985), at 7 (emphasis added).

¹²⁰ News & Comment, “Shutting Closet Doors,” *Prospect* (Jan. 1984), at 3.

¹²¹ News & Comment, “Shutting Closet Doors,” *Prospect* (Jan. 1984), at 3.

¹²² News & Comment, “Shutting Closet Doors,” *Prospect* (Jan. 1984), at 4.

¹²³ Paul Ben-Itzak, “Magazine Angers Princeton Students,” *New York Times* (Mar. 25, 1984); “Critical Monthly Rouses Princeton,” *New York Times* (Apr. 29, 1984).

Prospect article “another example of the unprincipled nature of that magazine,”¹²⁴ and said that *Prospect* had become “outwardly destructive and irresponsible.”¹²⁵

Prospect’s pages are filled with similar examples of CAP’s extreme views and its vicious stereotyping of women and minorities. We have highlighted the examples above because “Samuel Alito touted his membership in CAP at the same time *Prospect* was pushing these destructive messages.”¹²⁶ Indeed, examples like these have prompted Eyal Press in *The Nation* to ask:

Is the Princeton graduate slated to replace the first female Supreme Court Justice proud of his affiliation with an organization that attempted to prevent women and minorities from receiving the same education he did? If not, why did he flaunt his membership in it? What does this say about his character, and about the kind of place he would ultimately like America to be?¹²⁷

Given Alito’s touting of his CAP membership as late as 1985, it is illuminating to look at the reaction of two other notable Princeton alumni, former Senator Bill Bradley (Princeton ’65) and current Senate Majority Leader Bill Frist (Princeton ’74), to the organization. In 1972, contemporaneous with its founding, CAP invited Bradley, then a basketball superstar with the New York Knicks and one of Princeton’s most famous alumni, to serve on the Alumni Advisory Board of *Prospect*.¹²⁸ According to Bradley, he accepted this invitation, extended “in advance of the first issue” of *Prospect*, for the sole purpose of helping fulfill what he called *Prospect*’s “stated goal, namely: ‘to provide constructive criticism . . . making sure that both sides of controversial issues are represented.’”¹²⁹

¹²⁴ Paul Ben-Itzak, “Magazine Angers Princeton Students,” *New York Times* (Mar. 25, 1984).

¹²⁵ “Critical Monthly Rouses Princeton,” *New York Times* (Apr. 29, 1984).

¹²⁶ Dujack 2005.

¹²⁷ Eyal Press, “Alito the CAP Crusader,” *The Nation* (Dec. 12, 2005).

¹²⁸ Announcement by Concerned Alumni of Princeton, *Prospect* (Oct. 23, 1972), at

3.

¹²⁹ Bill Bradley, Letter to the Editor, *Prospect* (Sept. 10, 1973), at 6.

However, after seeing the first issue of *Prospect*, Bradley wrote to the magazine to state:

I cannot concur with the views presented. When I accepted the position on the Advisory Committee, I felt there would be a more representative cross-section of opinion. I do not believe from what I have read that an open forum is what the magazine desires to give to alumni.¹³⁰

And, less than a year after CAP began publishing *Prospect*, Bradley sent a letter announcing his resignation from the Advisory Board, stating:

It is clear to me, after eight months of publication, *that Prospect does not desire a balanced view within its pages but prefers to present the right-wing view within the Princeton community*. I have no objection to that view being presented and well financed by a group of disenchanted alumni, as long as such a pressure group does not present itself under the guise of an open forum. Furthermore, I am in personal disagreement with the viewpoints expressed in most of the articles printed up to this time in *Prospect*.¹³¹

Senator Frist, to his credit, played a role in denouncing CAP. The group was so destructive toward Princeton, and its tactics so reprehensible, that it was condemned in a report of a special committee of the Princeton University Board of Trustees dealing with alumni affairs.¹³² The report was co-authored by Frist and was unanimously approved and endorsed by the full Board of Trustees of the University on Oct. 24, 1975.¹³³ According to that report:

¹³⁰ Bill Bradley, Letter to the Editor, *Prospect* (Dec. 4, 1972), at 12.

¹³¹ Bill Bradley, Letter to the Editor, *Prospect* (Sept. 10, 1973), at 6 (emphasis added).

¹³² Princeton University, Report of the Trustee Committee on Alumni Affairs (Oct. 1975).

¹³³ Princeton University, Report of the Trustee Committee on Alumni Affairs (Oct. 24, 1975), at 14; Memorandum from R. Manning Brown '36, Chairman of the Executive Committee, Board of Trustees, Princeton University.

the manner in which CAP has pursued its aims has been harmful to the University in a variety of ways. . . [T]he CAP publications have presented a distorted, narrow, and hostile view of the University that cannot help but have misinformed and even alarmed many alumni. . . . CAP, through *Prospect* and its mailings, has presented a grossly inaccurate view of what is going on at Princeton. . . . And the language has become more strident . . .

Many CAP supporters profess to disassociate themselves from the organization's more extreme language and more questionable activities. They appear to believe, however, that CAP's announced goal of changing the University in more conservative directions justifies their support regardless of the means used to try to achieve that end. Other alumni, too, appear to tolerate CAP as if it were a "loyal opposition" whose existence might be bothersome to the University but is, on balance, healthy. *We emphatically disagree.*¹³⁴

The Board of Trustees' report was published in the Nov. 17, 1975 issue of the *Princeton Alumni Weekly*, a magazine sent to all alumni of Princeton. This issue of the *Alumni Weekly* contained a full page "Letter to the Alumni," written by the Chairman and Vice-Chairman of the Trustee Committee on Alumni Affairs, announcing the report and calling specific attention to the report's discussion of CAP.¹³⁵

Princeton alumni as different as Senators Bill Frist and Bill Bradley quickly recognized what CAP stood for and repudiated and disassociated themselves from it, yet in 1985, Samuel Alito was (still) a member and bragging about it. That Alito chose to join and remain a member of such a group, let alone tout his membership, is extremely disturbing as part of his pre-judicial record on civil rights. And that he now claims to have total amnesia about this as he seeks a lifetime appointment to the United States Supreme Court is even more disturbing.

¹³⁴ Princeton University, Report of the Trustee Committee on Alumni Affairs, at 9-10 (emphasis added).

¹³⁵ From the University: A Letter to the Alumni, Stephen Ailes and Franklin E. Agnew III, *Princeton Alumni Weekly* (Nov. 17, 1975).

C. Judge Alito's Judicial Record in Discrimination Cases

As a judge, Alito has ruled in numerous cases raising claims of discrimination. His troubling record in such cases involving criminal prosecution is discussed in section V below. With respect to civil cases, several independent reviews of Judge Alito's record have reached disturbing conclusions. A group of Yale law school professors and students who reviewed all of the decisions he has written have recently concluded that in "the area of civil rights law, Judge Alito consistently has used procedural and evidentiary standards to rule against female, minority, age and disability claimants."¹³⁶ A comprehensive review of Alito's 311 published opinions by Knight-Ridder similarly found that although his opinions are "rarely written with obvious ideology," Judge Alito has "seldom sided" with "an employee alleging discrimination."¹³⁷

To further probe Judge Alito's jurisprudence in the civil rights area, People For the American Way has analyzed his record in a smaller but perhaps the most revealing category of such cases: claims of discrimination based on race, gender, age, or disability under federal law where the appellate court was divided — close cases, most likely to resemble cases that the Supreme Court will consider, where at least one judge concludes that the civil rights claims have merit.

The results of that analysis confirm, and in fact deepen, the concerns about Judge Alito's civil rights record. Out of 20 such divided cases, Alito sided against civil rights protections in 17, or 85%. Of the 3 favorable cases, only one was on the merits of civil rights claims, since 2 concerned statute of limitations issues. None of the other judges in the divided cases on which Judge Alito sat had such a consistent anti-civil rights record.

¹³⁶ *The Alito Opinions: A Report of the Alito Project at the Yale Law School* (Dec. 19, 2005) at 3. As the Yale project explains, and as discussed below in section VIII, Alito's record is much more favorable with respect to claims of religious discrimination.

¹³⁷ S. Henderson and H. Mintz, "Review of cases shows Alito to be staunch conservative," *Knight-Ridder Newspapers* (Dec. 1, 2005)("Knight Ridder").

In fact, 6 of the 17 anti-civil rights opinions were solo dissents by Judge Alito, including one in which he was outvoted 10 to 1.¹³⁸

The extreme and out-of-the-mainstream nature of Judge Alito's civil rights record can best be illustrated by examining in detail some of the opinions in these divided decisions, especially the dissents. As Knight-Ridder concluded, Judge Alito seldom writes in broad, ideological terms. But the pattern of his opinions, as well as the opinions in individual cases, reveal a judge who consistently seeks to raise barriers against discrimination victims and to severely constrict the scope of anti-discrimination laws, often producing strong criticism by his own colleagues. Approving such a judge to replace Justice O'Connor, particularly in light of his previous background, threatens to shift the Court in a dangerous direction on civil rights.

- *Bray v. Marriott Hotels*, 110 F.3d 986 (3d Cir. 1997)

Beryl Bray, an African American woman, applied for a promotion that was instead given to a white employee. Evidence showed that Marriott did not follow its own guidelines in such cases and there were conflicting statements about how and why the selection decision was made, but the lower court granted summary judgment for Marriott in her discrimination case without a trial. The Third Circuit reversed, explaining that in light of the conflicting evidence, it was up to a jury to decide whether the decision was discriminatory. Judge Alito strongly dissented, arguing that Ms. Bray should not be able even to take her case to a jury, and that the decision would allow “disgruntled employees to impose the costs of trial on employers.” *Id.* at 1003. The majority was extremely critical of Judge Alito's dissent, commenting that his theory “would immunize an employer from the reach of Title VII if the employer's belief that it had selected the

¹³⁸ See Appendix B – Judge Alito's Record in Divided Civil Rights Cases. Judge Alito has also written troubling opinions in divided cases involving discrimination issues other than pursuant to specific civil rights statutes. See, e.g., *Grant v. Shalala*, 989 F.2d 1332, 1359 (3d Cir. 1993)(ruling that district court should not substantively review on the merits fact findings of administrative agency concerning claim of racial and other bias against administrative law judge, despite strong dissent that ruling will “have courts take a back seat to bureaucratic agencies in protecting constitutional liberties.”).

‘best’ candidate was the result of conscious racial bias.” *Id.* at 993. Under Alito’s view, the majority concluded, “Title VII would be eviscerated.” *Id.*

- *Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061 (3d Cir. 1996), *cert. denied*, 521 U.S. 1129 (1997)

In another case in which Alito sought to prevent a discrimination victim from even presenting her case to a jury, Barbara Sheridan had already received a jury verdict that she was the victim of illegal sex discrimination. The issue before the entire Third Circuit was whether the case was properly presented to the jury or whether it should have been dismissed on summary judgment as legally insufficient. Ten of the eleven judges who heard the case, Republican and Democratic appointees alike, agreed and upheld the jury verdict, based in part on evidence that DuPont’s alleged reasons for its actions harming Ms. Sheridan were untrue. Only Judge Alito dissented and would have thrown out the jury verdict in her favor. The majority sharply criticized Judge Alito’s dissent from the “otherwise unanimous” decision, pointing out that he had provided “no reason why a plaintiff alleging discrimination is not entitled to the real reason for the personnel decision, no matter how uncomfortable the truth may be to the employer.” *Id.* at 1070.¹³⁹

¹³⁹ Some defenders of Judge Alito have tried to argue that his dissent in *Sheridan* was vindicated by the Supreme Court’s decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). In fact, as explained in more detail by the NAACP Legal Defense Fund, Alito committed essentially the same error that Justice O’Connor pointed out had been committed by the lower court in *Reeves* -- substituting his judgment for the judgment of the jury. *See* NAACP Legal Defense and Education Fund *Report* (Dec. 15, 2005) at 36-37. In addition, although the *Reeves* court did not rule as a matter of law against Alito’s claim that evidence of pretext may in theory not automatically require a case to go to a jury, it emphasized that a discrimination claimant should be able to present her case to a jury unless “no rational fact-finder could conclude that the action was discriminatory,” which clearly was not the case in *Sheridan* according to ten appellate judges and the jury itself. *Reeves*, 530 U.S. at 148.

- *Nathanson v. Medical College of Pennsylvania*, 926 F.2d 1368 (3d Cir. 1991)

In yet another case in which Alito tried to prevent a discrimination claim from reaching a jury, Jayne Nathanson filed suit against the Medical College of Pennsylvania for refusing to make reasonable accommodations because of injuries she had suffered in a car accident so that she could continue her medical education. The majority of the Third Circuit reversed a lower court ruling and held that since there was conflicting evidence about whether the college had adequately accommodated her disability under Section 504 of the Rehabilitation Act, the case should be decided by a jury. Judge Alito dissented and would have thrown out the case without a jury even considering it. The majority was critical of Alito's dissent, explaining that "few if any Rehabilitation Act cases would survive summary judgment if such an analysis were applied to each handicapped individual's request for accommodations." *Id.* at 1387.

- *Glass v. Philadelphia Electric Co.*, 34 F.3d 188 (3d Cir. 1994)

Following 23 years at the Philadelphia Electric Company, Harold Glass sued for racial and age discrimination after he was passed over for several promotions. The lower court refused to allow him to present evidence of racial harassment and a hostile work environment against him, including racially derogatory remarks by senior employees and the posting of demeaning and hostile images of him. The Third Circuit majority ruled that the trial judge was wrong to exclude such evidence and that Mr. Glass was entitled to a new trial. Yet Judge Alito dissented. Incredibly, Alito claimed both that the evidence was "limited" and that presenting it would cause "substantial unfair prejudice" to the employer accused of discriminating. *Id.* at 199, 200. The majority clearly disagreed, and explained that the lower court had prejudiced Glass by not allowing him to tell "his side of the story." *Id.* at 189-90.

- *Bhaya v. Westinghouse Electric Corp*, 922 F.2d 184 (3d Cir. 1990), *cert. denied*, 501 U.S. 1217 (1991)

Westinghouse decided to eliminate the job progression program for a number of engineers, effectively terminating their employment. Engineers in one group contended that their group was terminated as opposed to others because it included a larger number of older employees, and filed an age discrimination lawsuit. One of the plaintiffs testified that a supervisor stated that “maybe we shouldn’t be eliminating this group. Maybe we’re doing something illegal or against the contract,” but another supervisor stated “let’s give it a try. What do we have to lose?” *Id.* at 186. Although a jury found in favor of the older employees, the trial judge threw out the verdict because he decided that the supervisor’s statement should not have been admitted, and held a new trial, without the evidence, which Westinghouse won. In a divided decision, Alito affirmed the trial court. Judge Mansmann (a Reagan appointee) strongly dissented, explaining that the supervisor’s statement was “highly relevant and admissible” on the issue of discrimination and the jury should have been able to consider it, as it did when it found in favor of the employees at the first trial. *Id.* at 192.

- *Jenkins v. Manning*, 116 F.3d 685 (3d Cir. 1997)

African American voters brought a voting rights suit against the Red Clay school district, contending that, as the courts have found in many other cases, the district’s at-large voting system improperly diluted the voting strength of minorities. The lower court found that although all of the criteria for such a claim established by the Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986) were met, and even though there was evidence of racial polarization and that the lingering effects of discrimination could depress voter turnout, section 2 of the Voting Rights Act had not been violated. Judge Alito joined a split decision affirming the lower court’s ruling. Judge Rosenn (a Nixon appointee) vigorously dissented. He explained that the majority had improperly “placed its imprimatur on a system which only by a series of flukes and anomalies has permitted any minority representation at all” contrary to Congress’ intent and had “overlooked the broad sweep of the Voting Rights Act.” *Id.* at 701, 700. Rosenn pointed out that the court’s decision appeared to contradict a previous Third Circuit decision in the case, in

which the court had “repeatedly” emphasized the “rarity” of a case in which facts as in *Jenkins* are “not violative” of the Voting Rights Act. *Id.* at 702.

- *Pirolli v. World Flavors, Inc.*, No. 99-2043 (3d Cir. June 11, 2001)

Judge Alito again dissented from a decision to allow a discrimination claim to simply go to a jury in a case charging sexual harassment by Kenneth Pirolli, a young developmentally disabled worker. Pirolli presented evidence of “multiple incidents of a co-worker rubbing his penis against Pirolli’s behind,” an instance where a co-worker “attempted to push a broom pole into his behind as others watched,” and an episode in a changing room that “caused Pirolli to fear he would be raped.” *Id.*, slip op. at 5,7. Although the trial court concluded that this was simply “macho horseplay and adolescent roughhousing,” the Third Circuit majority explained that this evidence was very different from other instances of “horseplay” and clearly was enough to allow a reasonable jury to conclude that an “abusive work environment” was created in violation of federal law. *Id.* at 6, 7. But Judge Alito dissented, not disagreeing on the legal or factual issues, but asserting instead that Pirolli’s lawyer had not “adequately presented” the claim in his brief. *Id.* at 11. The majority strongly disagreed, explaining that the “briefs are adequate” to present the issues, that no prejudice would occur to the employer, that the issues were important in “the administration of Title VII,” and that “the error is so ‘plain’ that manifest injustice would otherwise result.” *Id.* at 4. In marked contrast, Alito himself has sought in other cases to argue issues not even raised by the parties (much less “adequately presented”), such as in a death penalty case in which Alito dissented and would have allowed execution of a prisoner despite an unconstitutionally confusing jury instruction based on an argument never presented by the government that Alito himself raised.¹⁴⁰

In short, it is clear that as a judge, Alito has “worked quietly but resolutely to weave a conservative legal agenda into the fabric of the nation’s laws” relating to civil

¹⁴⁰ The case was *Smith v. Horn*, 120 F.3d 400 (3d Cir. 1997), discussed in section V below and in Alliance for Justice, *Pirolli v. World Flavors* (Dec. 9, 2005).

rights.¹⁴¹ This is demonstrated not only by his consistent and overwhelming pattern of dissenting or ruling against civil rights claims, but also by the content of those decisions. Dissents in which all ten of his colleagues rule the other way, and where his positions are described as “eviscerating” civil rights laws or threatening “manifest injustice,” demonstrate that, particularly when compared with Justice O’Connor, Judge Alito is dangerously out of the mainstream on civil rights.

D. Judge Alito’s Record on Immigration

Immigration is a specialized area of the law with important civil rights implications. Although the Supreme Court has often issued rulings that have limited the rights of immigrants, Judge Alito’s record suggests that his confirmation would likely make matters even worse. Alito’s record as a government lawyer and federal judge raise serious concerns about his views on immigrants’ rights.

In a 1986 letter written by Alito in his capacity as Deputy Assistant Attorney General, he advised William Webster, Director of the Federal Bureau of Investigation (FBI), that the FBI’s desire to document fingerprint and criminal information of nonresident non-citizens of the U.S. was constitutionally proper. In a footnote to this letter, he went further and issued a broad legal opinion regarding the constitutional protections that should properly be afforded to undocumented immigrants living in the United States. He argued that the Supreme Court’s decision in *Matthews v. Diaz*,¹⁴² suggests that “illegal aliens have no claim to nondiscrimination with respect to nonfundamental rights,” and the Constitution “grants only fundamental rights to illegal aliens within the United States.”¹⁴³

¹⁴¹ Knight-Ridder

¹⁴² 426 U.S. 67 (1976) (addressing whether Congress may condition a non-citizen’s eligibility for Medicare’s supplemental insurance program upon continuous residence in the United States for a 5-year period and permanent residency status).

¹⁴³ See letter from Samuel Alito to William Webster (Jan. 10, 1986).

In fact, Alito's analysis rests on a flawed interpretation of *Matthews* and ignored a more recent case in which the Supreme Court had held to the contrary. In *Plyler v. Doe*,¹⁴⁴ the Court held that the Fourteenth Amendment prohibited states from discriminating against undocumented immigrant children in the provision of public education, even though the Supreme Court has held that education is not considered a "fundamental right" under the Constitution. Even the dissenting Justices in *Plyler* indicated that they "ha[d] no quarrel with the conclusion that the Equal Protection Clause of the Fourteenth Amendment applies to aliens, who, after their illegal entry into this country, are indeed physically 'within the jurisdiction' of a state."¹⁴⁵ None of the Justices on the *Plyler* Court would have gone as far as Alito to restrict equal protection rights of undocumented immigrants. As conservative constitutional analyst Bruce Fein noted, "[Alito] seems to be saying that there is no constitutional constraints placed on U.S. officials in their treatment of nonresident aliens or illegal aliens. Could you shoot them? Could you torture them? . . . It's a very aggressive reading of cases that addressed much narrower issues."¹⁴⁶

Cases in which Alito, in his capacity as a federal judge, has written for the majority or filed a dissent raise serious concerns about how he would deal with foreign nationals seeking asylum in the United States and the rights of legal immigrants residing in the U.S., if confirmed to the Supreme Court. Alito has issued troubling dissents from decisions protecting immigrants' rights, arguing that foreign nationals who were facing persecution be denied asylum and that legal immigrants be deported. On the other hand, he has authored decisions protecting the rights of immigrants whose religious beliefs, such as the opposition to abortion, were at issue.

¹⁴⁴ 457 U.S. 202 (1982).

¹⁴⁵ *Id.* at 243.

¹⁴⁶ Jo Becker and Amy Goldstein, '86 Alito Memo Argues Against Foreigners' Rights, Washington Post, Nov. 22, 2005, at A4.

Asylum Cases

Alito's dissents in several cases involving foreign nationals seeking asylum raise serious concern about his views of protecting individuals who are seeking refuge from persecution. In *Dia v. Ashcroft*,¹⁴⁷ decided *en banc*, the majority vacated the Board of Immigration Appeals' (BIA) order denying asylum to a citizen of Guinea who alleged that the Guinean military was planning to kill him because of his membership in a particular political organization and refusal to join the military. The court determined that the immigration judge (IJ) and BIA must provide "substantial evidence" to deny an applicant asylum on the ground that he or she is not credible. Holding that substantial evidence was lacking, the court remanded the case to the BIA "to further explain or supplement the record."¹⁴⁸ In a heated dissent, Alito asserted that the majority failed "to take the totality of the circumstances into account in reviewing the IJ's credibility determination. . . focuse[d] one by one on specific statements . . . and ask[ing] whether each of those statements is plausible."¹⁴⁹ The majority strongly criticized Alito's act of ignoring the "substantial evidence" requirement, explaining that Alito's opinion "not only guts the statutory standard, but ignores our precedent."¹⁵⁰

In *Chang v. INS*,¹⁵¹ the majority vacated the BIA's order denying asylum to a Chinese citizen who sought asylum on the ground that he faced arrest in China for violating the State Security Law, having failed to report that members of his delegation had considered remaining in the United States. The majority stated that he feared "los[ing] his job . . . imprison[ment], and that his family w[ould] suffer retaliation," if he returned home, and that the "FBI told Chang he was in 'danger.'"¹⁵² Alito dissented, and would have upheld the administrative determination to deport Chang, despite the

¹⁴⁷ 353 F.3d 228 (3d Cir. 2003) (*en banc*).

¹⁴⁸ *Id.* at 260.

¹⁴⁹ *Id.* at 262.

¹⁵⁰ *Id.* at 251 n. 22.

¹⁵¹ 119 F.3d 1055 (3d Cir. 1997).

¹⁵² *Id.* at 1058, 1068.

uncontradicted testimony relied upon by the majority that Chang “faced potential imprisonment and economic repercussions for violations of the security laws.”¹⁵³

In marked contrast, Alito has challenged administrative decisions and judges, refusing to defer to their judgment, in asylum cases involving individuals who had been persecuted for their religious values and opposition to abortion. In *Liu v. Ashcroft*, a husband and wife from China sought asylum on the ground that “Mrs. Liu was twice forced by the Chinese government to undergo an abortion, and that both [Petitioners] face government persecution on account of their Christian faith.”¹⁵⁴ The IJ held that the Lius were not credible, having found inconsistencies in the evidence that they presented, a decision affirmed by the BIA. In a similar case, *Zhang v. Gonzales*,¹⁵⁵ a Chinese citizen sought asylum on the ground that Chinese family planning authorities had subjected her to a forced abortion and demanded that she or her husband be sterilized.¹⁵⁶ Zhang expressed her opposition to abortion. The IJ held that Zhang lacked credibility, finding her testimony weak and her story unbelievable, a decision affirmed by the BIA.¹⁵⁷

Alito wrote opinions in both cases vacating the BIA’s orders denying asylum to the petitioners. In *Liu*, the IJ had excluded certificates presented by the petitioners that purportedly confirmed that two abortions had been performed because they did not comply with the regulatory authentication procedure.¹⁵⁸ Alito’s opinion rejected the IJ’s interpretation of its own regulation, holding that the regulatory authentication of documents, as set forth in 8 C.F.R. § 287.6 of the Immigration and Naturalization Act (“Act”),¹⁵⁹ is not an absolute rule of exclusion or the exclusive way to authenticate

¹⁵³ *Id.* at 1067. *See also Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993)(opinion by Alito upholding refusal to grant asylum to Iranian who claimed she faced fear of persecution because she belonged to group of Iranian women who refused to conform to restrictive gender-specific laws).

¹⁵⁴ 372 F.3d 529, 530 (3d Cir. 2004).

¹⁵⁵ 405 F.3d 150 (3d Cir. 2005).

¹⁵⁶ *Id.* at 152.

¹⁵⁷ *Id.* at 153-54.

¹⁵⁸ *Liu*, 372 F.3d at 531.

¹⁵⁹ *Id.* at 532.

documents in asylum cases.¹⁶⁰ Alito held that the IJ had erred in excluding the certificates, and remanded the case.¹⁶¹ Alito also rejected factual findings made by the IJ.¹⁶²

In *Zhang*, Alito also rejected the IJ's decision and demanded that the IJ further explain his process of weighing the evidence. Alito suggested that the IJ may have inappropriately excluded uncertified documents,¹⁶³ violating the rule set forth in *Liu*, and, therefore, remanded the case "for clarification on this point."¹⁶⁴ Alito speculated that the documents referred to by the IJ might not have been in the official record, stating that "[t]he IJ referred to the documents . . . stating: 'The court also has Exhibit 4 which consists of some documents . . . ' But what the IJ meant when he said he 'had' the documents in unclear." Alito explained that it was "conceivable that [the IJ] merely meant . . . submitted and not . . . part of the record."¹⁶⁵

¹⁶⁰ *Id.* at 533. Alito's opinion, flatly rejecting the IJ's interpretation of the Act, was in marked contrast to the opinion he wrote in *Chen v. Ashcroft*, 381 F.3d 221 (3d Cir. 2004) (questioning the BIA's decision not to extend protection to the unnamed partner of a woman who had been forced to abort their child), where he found it necessary to first evaluate the BIA's interpretation of its own statute under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984), to determine whether it deserved deference.

¹⁶¹ Judge Alito and his colleagues disregarded the government's contention that "the improper application of § 287.6 was not prejudicial here since there was evidence in the record indicating that official documents from Fujian . . . are commonly forged and thus are 'virtually useless' as credible corroborating evidence." *Liu*, 372 F.3d at 533.

¹⁶² For example, Alito rejected the IJ's determination that Mr. Liu was not credible because he gave two different dates for his date of baptism. Alito interpreted the facts differently than the IJ had, speculating that the inconsistency "almost certainly resulted from the apparent difference the translator had in expressing the concept of baptism," distinguishing the moment when Mr. Liu formally accepted Christianity through a confession of faith from the time he was actually baptized. *Id.* at 533-34.

¹⁶³ *Zhang*, 405 F.3d at 155 ("it is possible that the IJ in this case refused to admit the documents in question and thus gave them no weight. It is also possible that the IJ admitted the documents but found that they were entitled to less weight Without further explanation, however, neither approach can be sustained.").

¹⁶⁴ *Id.* at 155-56.

¹⁶⁵ *Id.* at 153.

The differences and contradictions between Alito’s opinions in asylum cases like *Dia* and *Chang*, where he deferred extensively to administrative findings, and those involving forced abortion claims, where he did not, is troubling.¹⁶⁶

Other Immigration Decisions

In several non-asylum immigration cases in which the Third Circuit has protected the rights of immigrants, Alito has filed disturbing dissents. He has argued that deference should be given to an agency’s decision to deport legal immigrants and criticized his colleagues for even questioning the decisions of immigration agencies. In one case, he argued for a restrictive interpretation of a federal law related to immigration that was later rejected by the Supreme Court. The views expressed by Alito in his dissents in these cases raise additional serious concerns about how he would protect the rights of immigrants if confirmed to be a Supreme Court Justice.

In *Lee v. Ashcroft*,¹⁶⁷ the majority reversed the IJ’s determination that filing a false tax return was an aggravated felony warranting deportation under federal immigration law of a Korean couple who had lived in the U.S. for almost twenty years. The court held that the IJ had misinterpreted the statutory provision at issue. Alito dissented and argued that filing a false tax return was indeed an “aggravated felony.”¹⁶⁸ The majority criticized Alito’s argument and his failure to apply “well-established principles of statutory construction,” writing “[i]t may be that Congress will wish to broaden the categories of aggravated felony to include other or all tax felonies. But we

¹⁶⁶ Alito has written decisions affirming the denial of asylum relating to abortion in only one published opinion, where the couple involved was unmarried, *Chen v. Ashcroft*, 381 F.3d 221 (3d Cir. 2004), and two unpublished cases where the facts clearly contradicted the applicants’ claims. *Chen v. Gonzales*, No. 04-3871 (3d Cir. Sept. 29, 2005) (petitioner’s claim was not corroborated by her husband); *Wong v. Ashcroft*, 76 Fed. Appx. 446, No. 02-4375 (3d Cir. Sept. 29, 2003), (petitioner initially alleged that she was given notice that she would be sterilized and later claimed that she had already been forcibly sterilized).

¹⁶⁷ 368 F.3d 218 (3d Cir. 2004).

¹⁶⁸ *Id.* at 226 (Alito, dissenting).

must interpret what it has written by well-recognized rules of statutory construction, unaided by speculation.”¹⁶⁹

Similarly, in *Partyka v. Attorney General*,¹⁷⁰ the Third Circuit held that third degree aggravated assault, under New Jersey law, did not involve a crime of moral turpitude warranting deportation under another provision of federal immigration law. The majority held that “[w]hether an alien’s crime involves moral turpitude is determined by the criminal statute and the record of conviction, not the alien’s conduct.”¹⁷¹ The court continued, “[u]nder this categorical approach, we read the applicable statute to ascertain the least culpable conduct necessary to sustain a conviction under the statute.”¹⁷² Because the least culpable mens rea for third degree aggravated assault was negligence, the court determined that Partyka had not committed a crime involving moral turpitude. Although Alito agreed that the IJ had misread the assault statute, he argued in his dissent that the case should have been remanded to the BIA to “apply its understanding of the concept of a crime of moral turpitude.”¹⁷³ He contended that “the [BIA] may think that the unintentional infliction of bodily injury upon a person known to be a police officer who is performing an official duty constitutes a crime of moral turpitude.”¹⁷⁴ Such an argument threatens to seriously harm legal residents by threatening them with deportation for clearly unintentional acts.¹⁷⁵

In *Sandoval v. Reno*,¹⁷⁶ Judge Alito’s harsh interpretation of an immigration-related statute was not only rejected by the majority of his court but also by the Supreme

¹⁶⁹ *Id.* at 225 n. 11.

¹⁷⁰ 417 F.3d 408 (3d Cir. 2005).

¹⁷¹ *Id.* at 411.

¹⁷² *Id.*

¹⁷³ *Id.* at 417 (Alito, dissenting).

¹⁷⁴ *Id.*

¹⁷⁵ In contrast to his dissent in *Partyka*, Alito wrote a unanimous opinion in *Oyebanji v. Gonzales*, 418 F.3d 260 (3d Cir. 2005), holding that a conviction for vehicular homicide was not an aggravated felony justifying removal, based on the clear precedent in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), involving a DUI offense. Alito nonetheless concluded by stating that “we appreciate the force of the government’s arguments to the contrary” and that they should be “directed to the Supreme Court or Congress.” 418 F.3d at 265.

¹⁷⁶ 166 F.3d 225 (3d Cir. 1999).

Court in a later case.¹⁷⁷ Alito disagreed both with the district court and the Third Circuit majority and argued that the BIA should not even consider Sandoval's claim for discretionary relief from deportation because of a change in federal law that restricted eligibility for such relief, even though the change had occurred while Sandoval's claim was pending. The Supreme Court similarly rejected the position taken by Alito in another case, pointing out that such an interpretation would raise serious constitutional questions.¹⁷⁸

In one case in which an immigrant had pleaded guilty to a crime, Alito dissented and disregarded clear evidence of the immigrant's rehabilitation and significant ties to the U.S. when considering deportation. In *Tipu v. INS*,¹⁷⁹ the majority vacated the BIA's decision to deny Tipu discretionary relief from deportation. Tipu, a Pakistani immigrant, had lived in the U.S. for twenty-three years, supported his brother and his brother's family, and owned a taxicab business; he had played a minor role in a conspiracy to distribute heroin. The Third Circuit held that the BIA had abused its discretion in its consideration of the facts by failing to adequately consider the substantial evidence in the record that favored Tipu. Alito dissented and argued that the court should have deferred to the agency.¹⁸⁰

In contrast, Judge Alito declined to defer to an administrative agency and disagreed with the agency's interpretation of its own rules in a case that benefited a non-profit religious organization. In *Soltane v. U.S. Dept. of Justice*,¹⁸¹ Alito wrote for the court, vacating the Immigration and Naturalization Service's Administrative Appeals Office's (AAO) decision to deny a visa petition that was filed by the organization on behalf its immigrant employee. The petitioner was a non-profit organization "focused on

¹⁷⁷ *INS v. St. Cyr*, 533 U.S. 289 (2001).

¹⁷⁸ *See INS v. St. Cyr*, 533 U.S. 289 (2001).

¹⁷⁹ 20 F.3d 580 (3d Cir. 1994).

¹⁸⁰ *Id.* another unpublished opinion written by Alito, *Vilcapoma v. INS*, No. 94-3778 (May 19, 1995)(upholding the BIA's reversal of the IJ's deportation waiver, despite evidence that the petitioner had been raised in the U.S. since the age of 3 and had a high likelihood of rehabilitation).

¹⁸¹ 381 F.3d 143 (3d Cir. 2004).

Christianizing the ordinary aspects of life for the mentally handicapped as well as for the fully able members of the community.”¹⁸² Its employee worked as a “houseparent.” Alito challenged both the AAO’s interpretation of its own regulation¹⁸³ and its determination that the employee was not eligible for a visa because she only performed wholly secular functions. Alito relied on his own reinterpretation of the facts and found that the employee’s position involved “a number of clearly religious responsibilities.”¹⁸⁴ Alito thus wrote that “[t]he AAO clearly did not consider all relevant evidentiary factors in this case, nor did it properly interpret its regulation defining ‘religious occupation.’”¹⁸⁵

Judge Alito’s record limiting or attempting to limit the rights of immigrants raises serious concerns about how he would treat legal and undocumented immigrants if he were confirmed to the Supreme Court. The inconsistency in this pattern, in which he has protected some religious individuals and organizations, especially those opposed to abortion, raises concerns as well.

¹⁸² *Id.* at 145.

¹⁸³ 8 C.F.R. § 204.5(m)(2).

¹⁸⁴ *Soltane*, 381 F.3d at 150.

¹⁸⁵ *Id.* at 152.

IV. Reproductive Freedom

The record of Samuel Alito makes clear that, in considering his nomination to replace Justice O'Connor, no single constitutional liberty is more at stake or more in jeopardy than reproductive freedom. The Supreme Court is sharply divided as to the core principles of *Roe v. Wade*, 410 U.S. 113 (1973), which recognized that a woman's right to choose an abortion is constitutionally protected. Justice Sandra Day O'Connor's decisions in this area in particular have provided the critical vote — often the decisive fifth vote — to protect that right and limit the kinds of restrictions that may be placed on it. For example, Justice O'Connor was one of the three justices who joined in the controlling opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), which reaffirmed the core precepts of *Roe* despite the vigorous and growing attempts to dismantle it. As discussed in more detail below, Judge Alito authored a dissenting opinion seeking to uphold a spousal notification restriction in *Casey* when the court of appeals reviewed that case — a viewpoint that was rejected by the Supreme Court with Justice O'Connor casting the deciding vote. Eight years later in *Stenberg v. Carhart*, 530 U.S. 914 (2000), when confronted with the Court's interpretation of the undue burden standard set forth in *Casey*, Justice O'Connor again provided the critical fifth vote to overturn a ban on a specific abortion procedure because the ban did not include an exception for the preservation of the health of the woman, as required under *Casey*.

On the other hand, Alito's opinions and other work make clear that he believes that the Constitution does not protect a woman's right to choose, and he has sought to restrict that right whenever possible, including while on the federal bench. The danger to reproductive freedom if Justice O'Connor were replaced by Judge Alito is all too clear. There is little doubt that, if given the opportunity, Judge Alito would vote to overturn *Roe v. Wade*.

Alito's 1985 application to Ed Meese for the position of Deputy Assistant Attorney General provides a blueprint for his legal philosophy and record in this area.

“[I]t has been an honor and source of personal satisfaction for me to serve in the office of the Solicitor General during President Reagan's administration and to help to advance legal positions in which I personally believe very strongly,” Alito wrote.¹⁸⁶ “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.”¹⁸⁷

An important part of the “contributions” of which Alito was “particularly proud” was revealed in a lengthy memo from his work in the Solicitor General’s office, in which Alito laid out a plan for an attack on abortion rights that he hoped would directly lead to the reversal of the Supreme Court’s landmark decision in *Roe v. Wade*. In that 17-page memo, he urged the Administration to file an *amicus curiae* brief in the case of *Thornburgh v. American College of Obstetricians and Gynecologists*, then pending before the Supreme Court, which involved a Pennsylvania law that discouraged women from exercising their reproductive rights, and required doctors to submit detailed reports about their patients, including, private, non-medical information.¹⁸⁸ Alito advised the Administration to use the tactic of supporting extremely restrictive state laws such as those in Pennsylvania to discourage women from seeking or obtaining abortions, and stated his belief that a woman’s decision to choose an abortion involved a “moral choice.”¹⁸⁹ In emphasizing that the *amicus* brief could be used to promote “the goals of bringing about the eventual overruling of *Roe v. Wade*, and in the meantime, of mitigating its effects,” Alito wrote:

we should make clear that we disagree with *Roe v. Wade* and would welcome the opportunity to brief the issue of whether, and if so to what extent, that decision should be overruled. Then, without great formal discussion of levels of scrutiny or degrees of state interest, we should demonstrate that many of the provisions

¹⁸⁶ See 1985 Job Application (emphasis added).

¹⁸⁷ *Id.* (emphasis added).

¹⁸⁸ Memorandum to the Solicitor General from Samuel A. Alito, re: *Thornburgh v. American College Obstetricians & Gynecologists*, No. 84-495; *Diamond v. Charles*, No. 84-1379 (May 30, 1985).

¹⁸⁹ *Id.* at 11.

struck down by the Third and Seventh Circuits are eminently reasonable and legitimate. . . If the Court can be convinced to sustain these regulations, it may have to adjust its standard of review.¹⁹⁰

Although the Solicitor General did in fact file a brief urging that *Roe* be overturned, the Supreme Court rejected the Solicitor General's arguments, with only two justices agreeing that *Roe* should be overturned.¹⁹¹ According to published reports, Alito also worked on the Solicitor General's brief.¹⁹²

Judge Alito's dissent in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 947 F.2d 682 (3d Cir. 1991), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992), is the most telling indication in his judicial record as to what Americans can expect if he were confirmed to replace Sandra Day O'Connor on the Supreme Court. In a case involving the interpretation of the "undue burden" standard concerning state laws regulating abortion, Alito took advantage of the lack of binding Supreme Court precedent and argued for an interpretation that would effectively "mitigate" or eviscerate *Roe*.

In the late 1980s, the Pennsylvania state legislature passed a number of amendments to the Pennsylvania Abortion Control Act of 1982 that placed significant restrictions on the right of women to obtain an abortion. For example, the amendments required: 1) women to wait for 24 hours after being given certain information about abortion before undergoing the procedure; 2) minors to obtain parental consent or a judicial bypass; 3) women to inform their spouses of their decision to seek an abortion except in very narrow circumstances; 4) reporting requirements for abortion clinics and public disclosure of those reports. The district court held that all of these provisions were unconstitutional because they placed an undue burden on women seeking an abortion, and the state appealed.

¹⁹⁰ *Id.* at 8, 9.

¹⁹¹ *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986).

¹⁹² Michael Kranish, *A Coauthor Says Alito Was Instrumental in Roe v. Wade Brief*, *Boston Globe*, Nov. 16, 2005, at A22.

On appeal, a three-judge panel of the Third Circuit, including Judge Alito, reversed the district court on every issue except the spousal notification provision, which two of the judges, not including Alito, held unconstitutional. Specifically, the panel found that none of the provisions -- except spousal notification -- subjected women seeking abortions to an undue burden. A majority of the panel agreed that the spousal notification provision did pose an undue burden on women seeking an abortion and was unconstitutional.

Alito argued, however, that none of the provisions, even the spousal notification provision, posed an undue burden on women seeking abortions. Citing some of the Supreme Court's prior abortion opinions, Alito argued that Justice O'Connor -- the so-called swing vote -- "suggested that there is no undue burden unless a measure has the effect of '*substantially* limiting access.'" 947 F.2d at 720 (quoting *Carey v. Population Services International*, 431 U.S. 678, 688 (1977)). In determining the constitutionality of the Act's spousal notification provision, Alito compared the restriction to parental notification provisions, finding that the harms posed "are almost identical" and therefore not an undue burden. 947 F. 2d at 721.

Part of Alito's decision also appeared to rest on the fact that, according to him, those challenging the provision "failed to show even roughly how many of the women in this small group would actually be adversely affected by" the spousal notification provisions. *Id.* at 722. Since he found that no undue burden was imposed by the statute, Alito argued that the regulation needed only to meet a lower level of scrutiny of being rationally related to a legitimate state interest. Therefore, Alito would have held that any minimal burden posed by the spousal notification provisions was justified by Pennsylvania's legitimate interest in furthering the husband's interest in the fetus carried by his wife and that the spousal notification requirement was constitutional. This dissenting view demonstrates Alito's extremely narrow construction of what constitutes an undue burden on a woman's right to obtain an abortion and his effort to urge the Supreme Court to adopt that view.

After the Third Circuit's ruling in *Casey*, there were a number of press reports about the holding. One article in *The New York Times* made it clear that the *Casey* decision had enormous legal and practical implications on privacy rights and reproductive freedom:

A Federal appeals court today upheld most provisions of Pennsylvania's abortion law, one of the strictest in the nation, and set the stage for an appeal to the Supreme Court that could provide the first direct test of the 1973 *Roe v. Wade* decision establishing the right to an abortion. . . . Legal experts say the Third Circuit's decision today is essentially a reasoned guess on how the Supreme Court would have ruled on the Pennsylvania law, perhaps motivated by the Third Circuit's desire not to have its decision overturned by the High Court. . . . Denise Neary, executive director of the Pennsylvania Pro-Life Federation, in Scranton, said: "I'm obviously delighted. The court upheld everything except spousal notification. The bottom line is that *Roe v. Wade* is doomed."

Michael deCourcy "Appeals Court Upholds Limits for Abortions," *The New York Times*, 10/22/91, p. A1.

The Supreme Court's decision in *Casey* reaffirmed the essential holding of *Roe v. Wade*, while substantially affirming the Third Circuit's majority opinion. In the joint controlling opinion by Justices O'Connor, Kennedy and Souter, the Court specifically rejected Alito's interpretation of "undue burden" as applying only to regulations that prohibit or severely limit a woman's right to obtain an abortion. Finding the spousal notification provision to be invalid, the Court said: "A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1992).

As to Alito's comparison of the spousal notification restriction to parental notification, Justice O'Connor was particularly critical. Parental notification

requirements, she wrote, “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. . . . A State may not give to a man the kind of dominion over his wife that parents exercise over their children.” *Id.* at 895, 898 (emphasis added). Still, four of the most conservative justices of the Supreme Court (including Scalia and Thomas) wrote that they wanted to revisit and overturn *Roe v. Wade*. These same justices approvingly quoted Alito’s argument in favor of the spousal notification provision in their opinion. *Planned Parenthood v. Casey*, 505 U.S. 833, 974-75 (1992).

Other than *Casey*, Alito’s judicial record relating to abortion primarily involves issues as to which there was direct, controlling precedent and is thus of limited value in evaluating what he would do as a Supreme Court justice who would help set such precedent. His opinions are nevertheless disturbing in how they diverge from his court’s majority. For example, the Third Circuit considered a law banning what opponents call “partial birth abortion” in *Planned Parenthood of Central New Jersey v. Farmer, et. al.*, 220 F.3d 127 (3d Cir. 2000). After the Third Circuit opinion was drafted, but before it was issued, the Supreme Court issued its opinion in *Stenberg v. Carhart*, 530 U.S. 914 (2000), which struck down a restrictive abortion law very similar to the one at issue in New Jersey. As the Third Circuit had already determined that the New Jersey law was unconstitutionally vague, the court issued its opinion written by Judge Maryanne Trump Barry unchanged except to note, in the beginning of the opinion, the intervening opinion of the U.S. Supreme Court. The opinion is a lengthy discussion of the constitutional inadequacies of the New Jersey statute. Alito wrote separately to state that he believed that the whole majority opinion was “never necessary and is now obsolete.” 220 F.3d at 152. He would have preferred that the court simply hold that the New Jersey statute was unconstitutional because it conflicted with the binding precedent in *Stenberg v. Carhart*, and pointedly declined to join the majority’s decision.

In *Alexander v. Whitman*, 114 F.3d 1392 (3d Cir. 1997), *cert. denied*, 522 U.S. 949 (1997), Alito again distinguished himself by authoring a separate concurrence in a

case arising from the delivery of a stillborn fetus. In 1992, Karen Alexander was admitted to the hospital at eight and one-half months pregnant to give birth to her child. Just before delivery by cesarean section, the child's vital signs appeared to be normal, but sadly the child was stillborn. Ms. Alexander and her lawyers sued the state of New Jersey. Their main argument was that the wrongful death and survival action laws in New Jersey were unconstitutional because they do not allow for recovery against negligent doctors and other medical personnel for a fetus who dies before birth. The district court dismissed the case and a three-judge panel of the Third Circuit affirmed the lower court's decision. The Court of Appeals' opinion made clear that *Roe v. Wade*, and the reproductive choice cases that followed, explicitly held that an unborn child is not a "person" cognizable under the Constitution. Therefore, the Court reasoned, none of the due process and equal protection claims available to people who had been born were available to, or on behalf of, an unborn fetus.

In a very brief concurrence, which is ambiguous as to his views on *Roe v. Wade*, Alito stated that he was "in almost complete agreement" with the majority opinion. He wrote separately to make the following comments:

I think the court's suggestion that there could be 'human beings' who are not 'constitutional persons' is unfortunate. I agree with the essential point that the court is making: that the Supreme Court has held that a fetus is not a 'person' within the meaning of the Fourteenth Amendment. However, the reference to constitutional non-persons, taken out of context, is capable of misuse.

114 F.3d at 1409 (citations omitted). Alito also went out of his way to note that his view was based in large part on the "originalist" history at the time the Fourteenth Amendment was adopted. He wrote: "I think that our substantive due process inquiry must be informed by history. It is therefore significant that at the time of the adoption of

the Fourteenth Amendment and for many years thereafter, the right to recover for injury to a stillborn child was not recognized.” *Id.*¹⁹³

The concern that Judge Alito would vote to overturn *Roe v. Wade* if he had the power to do so is reinforced by his judicial record in a related area: the scope of the “substantive due process” protection of the Fourteenth Amendment. A key legal underpinning of *Roe* is that the guarantee of “liberty” in the Fourteenth Amendment’s due process clause provides substantive protection for a woman’s reproductive freedom. Beginning in the 1980s, the Third Circuit ruled in a series of cases that substantive due process rights are violated when a government official with improper motive deprives a person of certain types of property through improper zoning or other decisions. *See, e.g., Bello v. Walker*, 840 F.2d 1124 (3d Cir. 1987), *cert. denied*, 488 U.S. 851 (1988). Judge Alito vigorously disagreed with this line of precedent and reached out on several occasions to try to overturn or neutralize it.

Initially, Alito’s efforts began in a 1995 case, in which the majority sent a substantive due process claim back to the lower court because there were disputed factual issues and because appellate courts should generally “not consider an issue not passed upon below.”¹⁹⁴ Alito nonetheless wrote a separate opinion to criticize the *Bello* line of cases, to argue that the scope of substantive due process protection should be “narrowly construed,” and to proclaim that the substantive due process claim should be dismissed by the lower court.¹⁹⁵ Alito then tried to convince his colleagues to overturn *Bello* in a case considered by the entire Third Circuit in 1997. In *Phillips v. Borough of Keyport*,

¹⁹³ In addition to these cases, Judge Alito also joined in the majority opinion in *Elizabeth Blackwell Health Ctr. for Women v. Knoll*, 61 F.3d 170 (3d Cir. 1995), a Medicaid related case that held invalid certain provisions of Pennsylvania’s Abortion Control Act that withheld funding for abortions where the patient failed to meet certain reporting requirements of rape or incest or when the patient failed to obtain a second physician’s certification that an abortion was necessary to save the life of the mother. The issue in the case was not constitutional protection for reproductive rights, but instead a question of administrative law as to what deference should be given to federal administrative regulation that was in conflict with provisions of the state statute.

¹⁹⁴ *Homar v. Gilbert*, 89 F.3d 1009, 1021 (3d Cir. 1995), *rev’d on other grounds*, 520 U.S. 924 (1997).

¹⁹⁵ *Id.* at 1030, 1031.

107 F.3d 165 (3d Cir. 1997)(*en banc*), *cert. denied*, 522 U.S. 932 (1997), the court considered a claim that a zoning request was improperly denied on First Amendment and substantive due process grounds. In accordance with the principle of judicial restraint that a court should not reach out to decide issues or reconsider precedents when not necessary to its ruling and not squarely before it, eleven judges explained that since the “only improper motivation alleged” was disagreement with the content of the speech involved, its decision would be based on the First Amendment issue and the *Bello* line of substantive due process cases was “inapposite.”¹⁹⁶ Alito, however, filed a lone dissent urging that the court “should not skirt” the issue and should “overrule *Bello* and the cases that followed it.”¹⁹⁷

Alito finally had his opportunity in a 2003 case brought by a movie theater company against a town for abusing its zoning power. Alito wrote an opinion for himself and one other judge, not a member of the Third Circuit but a visiting judge from D.C., holding that *Bello* “and its progeny are no longer good law.”¹⁹⁸ Third Circuit Judge Robert Cowen, a Reagan appointee, vigorously dissented. Initially, Judge Cowen explained, the issue of whether to use the *Bello* standard should not even have been decided by the court because a previous Third Circuit panel had already ruled on it in the same case. In addition, he protested, Alito’s ruling had placed “misguided” reliance on a Supreme Court decision that concerned an entirely different subject (obligations of the police when conducting a high speed chase) and that had not previously prevented the Third Circuit from continuing to apply the *Bello* standard.¹⁹⁹ Most important, Judge Cowen stated, Alito had given “far too little weight” to the “well-established jurisprudence” he was effectively overturning, which by then had been followed for some fifteen years.²⁰⁰ Alito’s action would clearly disrupt settled expectations, Judge Cowen

¹⁹⁶ *Phillips*, 107 F.3d at 180.

¹⁹⁷ *Id.* at 184, 187.

¹⁹⁸ *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392, 394 (3d Cir. 2003).

¹⁹⁹ *Id.* at 405.

²⁰⁰ *Id.*

noted, and the “confusion and potential for disparate results across the districts will haunt us for years to come.”²⁰¹

Regardless of the merits of the debate between Judge Alito and Judge Cowen, the concern that Alito’s opinions in these cases present for the future of *Roe v. Wade* and other precedents with which he disagrees is clear. On “at least three occasions,” Alito reached out, in violation of principles of judicial restraint, “to overturn an established liberty-rights precedent he disagreed with.”²⁰² He did not even discuss the principle of *stare decisis* or the practical results of his efforts. The basis of his action, he made clear, was that the protections of substantive due process, a crucial part of the legal basis for *Roe*, should be “narrowly construed.” Whatever he may say at his upcoming hearing, Alito’s record makes clear that when he has the power to overturn or neutralize a precedent with which he disagrees, he will not hesitate to do so.

Alito’s unequivocal statements in documents from 1985 and his record as a judge especially in *Casey* make clear that if he were confirmed to a seat on the Supreme Court, the future of *Roe v. Wade* would be in serious jeopardy. Both his 1985 job application and his later judicial opinions strongly indicate that Alito would restrict reproductive freedom and would likely vote to overturn *Roe*.

²⁰¹ *Id.* at 407.

²⁰² C. Savage, “Foes cite Alito’s stance on liberty,” *Boston Globe* (Dec. 27, 2005).

V. Police Power and Individual Rights

Numerous provisions of the Constitution, particularly the Fourth, Fifth, and Sixth Amendments of the Bill of Rights, provide critical protections to individuals -- the innocent as well as the guilty -- against abuses of government power, including police power. Through its interpretation of these fundamental constitutional protections, the Supreme Court has been instrumental in ensuring that they are applied in a manner that carries out their purpose. Thus, for example, the Court has consistently reaffirmed the right of every person to be free of unreasonable searches and seizures. And it has held that the right to counsel in a criminal trial includes the right to an “effective” attorney, one who has, for example, investigated the case and not ignored important evidence. And the Court has made clear that a defendant’s right to a trial before an “impartial jury” encompasses the right to a jury that has been chosen without racial or gender bias.

In his long public record, however, including his 15 years as an appellate court judge, Samuel Alito has demonstrated time and again an extreme disregard for these critical provisions of the Bill of Rights, and a willingness to overlook their violation and to allow the police and other law enforcement officials to trample on the rights that these provisions were intended to protect. In addition, Alito’s record in this area demonstrates a disturbing tendency to defer to executive authority and a troubling lack of sensitivity toward claims of racial discrimination.

While most judges rule in favor of prosecutors and police in most cases, Alito’s views are out of the mainstream. As discussed below, in Samuel Alito’s world, it is constitutionally acceptable for the police to shoot to kill a fleeing, unarmed teenager suspected only of a nonviolent crime, and to strip search a ten-year-old girl not suspected of a crime or named in a search warrant. Fortunately, the courts have rejected these dangerous views of the Constitution. However, if Judge Alito were confirmed to the Supreme Court, he would be in a position to help make his jurisprudential views the law of the land, to the great detriment of the privacy, security and protection of ordinary Americans. This is particularly so because Alito has been nominated to succeed Justice

O'Connor, who, while a conservative to be sure, approaches each case on its own merits and does not engage in the results-oriented jurisprudence that has so marked Judge Alito's career, particularly when it comes to the rights of ordinary individuals against the enormous police power of the state.

A. Alito's Pre-Judicial Record

Judge Alito's troubling views on these fundamental constitutional protections is long-standing, and predates his becoming a judge. Indeed, in his 1985 application for a promotion within the Justice Department, Alito wrote that "[i]n college, I developed a deep interest in constitutional law, *motivated in large part by disagreement with Warren Court decisions*, particularly in the areas of criminal procedure . . ."²⁰³ The Warren Court's criminal procedure rulings include some of the Supreme Court's most important decisions protecting Americans against unreasonable searches and seizures, ensuring the right to counsel, and vindicating the right against self-incrimination.²⁰⁴

Whether one might be inclined to excuse the views of a college student, Samuel Alito reaffirmed these views in 1985, when he was 35 years old and had already been a lawyer for a decade. Moreover, as we show below, Alito's disturbing views of the Constitution have been a blueprint for his judicial career and are echoed in his opinions, particularly in his dissents that would give police virtually unfettered authority to trample on individual rights.

Indeed, in 1984, when he was an Assistant Solicitor General in the Reagan Justice Department, and only a year before writing his job promotion application, Alito had written a memorandum setting out some of his own views on the Fourth Amendment that indicate the enormous power and discretion that he would give to the police. According to Alito, a federal court of appeals was "wrong" in *Garner v. Memphis Police Dept.*, 710

²⁰³ 1985 Job Application.

²⁰⁴ See, e.g., *Katz v. United States*, 389 U.S. 347 (1967); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961).

F.2d 240 (6th Cir. 1983), to rule unconstitutional as applied a state law that authorized the police to shoot to kill a fleeing unarmed teenager, suspected only of a nonviolent offense.²⁰⁵

Garner was a civil rights action brought by the father of a 15-year-old unarmed boy who had been shot in the back and killed by the police when he disobeyed their command to halt; the boy was the suspect in the burglary of a house (where he had stolen ten dollars and a purse). The officer who killed the boy knew that he was shooting at a teenager who did not appear to be armed, and shot him solely to prevent him from escaping. The father charged that the killing of his son was an unreasonable seizure in violation of the Fourth Amendment, and the Sixth Circuit agreed.

In Alito's memorandum analyzing the Sixth Circuit's ruling -- which he believed "should be reversed"²⁰⁶ -- Alito first questioned whether a police officer's killing of a human being to keep him from escaping was even a "seizure" within the meaning of the Fourth Amendment. After all, wrote Alito, it would have been justifiable for the police to have "seized" the teenager by using non-deadly force. The Sixth Circuit, according to Alito, "objected to the officer's conduct *only insofar as he went further and killed the suspect*."²⁰⁷

Assuming for the sake of argument that the killing of the unarmed teenager was a "seizure," Alito then opined that "the shooting can be justified as reasonable within the meaning of the Fourth Amendment."²⁰⁸ Alito relied in large measure on the fact that the Tennessee statute was based on the common law as it existed *in 1790* (when the Fourth Amendment was adopted), and which permitted the use of deadly force against all fleeing felons. Ignoring any development in societal thinking over the past two centuries, Alito

²⁰⁵ Memorandum from Samuel A. Alito to the Solicitor General re *Memphis Police Dept. v. Garner*, May 18, 1984 (hereafter: "Alito *Garner* Memo"), at 1.

²⁰⁶ Alito *Garner* Memo, at 3.

²⁰⁷ Alito *Garner* Memo, at 3 (emphasis added).

²⁰⁸ Alito *Garner* Memo, at 12.

found the 1790 state of the common law “highly relevant, if not dispositive.”²⁰⁹ Further, Alito contended that “there are additional persuasive reasons why the courts should not attempt to develop an alternative constitutional rule more stringent than that of the common law.”²¹⁰

Alito’s memo is chilling, particularly in his dismissive examination of the specific facts of the case. According to Alito, “[m]any of the facts recited by the court of appeals . . . seem *essentially irrelevant*.”²¹¹ In particular, Alito stated that “[t]he suspect’s age (15) does not seem determinative, *since teenage males are the most prone to commit violent crimes*.”²¹² Does that mean that the police can just shoot “teenage males” on the street, when they are only suspected of a crime?²¹³

Fortunately, the Supreme Court did not share Alito’s views. In *Tennessee v. Garner*, 471 U.S. 1 (1985), the Court in a 6-3 ruling affirmed *Garner v. Memphis*, effectively rejecting Alito’s views of the Fourth Amendment. In an opinion by Justice White, the Court held that it is a violation of the Fourth Amendment for a police officer to use deadly force to prevent the escape of an apparently unarmed suspected felon, unless “it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.” 471 U.S. at 3. The Court went on to state:

[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. . . . It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little

²⁰⁹ Alito *Garner* Memo, at 5.

²¹⁰ Alito *Garner* Memo, at 5.

²¹¹ Alito *Garner* Memo, at 12 (emphasis added).

²¹² Alito *Garner* Memo, at 12 (emphasis added).

²¹³ Ironically, Alito recommended that the government not file an *amicus* brief in the Supreme Court in this case in support of the Tennessee shoot to kill law, in large measure because federal law enforcement agencies “uniformly restrict the use of deadly force by their agents at least as strictly (and generally more strictly) than the court of appeals’ rule.” Alito *Garner* Memo, at 13.

slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.

471 U.S. at 11.

In its ruling, the Court specifically noted that “a majority of police departments in this country have forbidden the use of deadly force against nonviolent suspects.” 471 U.S. at 10-11. The Court also rejected the argument (adopted by Alito) that the common law of 1790 should govern the reasonableness of police conduct in the late 20th Century. As Justice White wrote, quoting prior Court precedent, the Court “has not simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment’s passage.” 471 U.S. at 13 (citation omitted).

In addition to the majority’s rejection of Alito’s view that killing the unarmed teenager was “reasonable,” *all nine members of the Court* -- including the three dissenters -- agreed that the use of deadly force against a fleeing suspect constituted a “seizure” within the meaning of the Fourth Amendment, also in sharp contrast to Alito’s questioning that this was so. As Justice White put it,

[w]henver an officer restrains the freedom of a person to walk away, he has seized that person. While it is not always clear just when minimal police interference becomes a seizure, there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.

471 U.S. at 7 (citations omitted).

Particularly given Alito’s views about this case and efforts by some of Alito’s supporters to misportray his record as properly supportive of law enforcement, rather than hostile to constitutional protections, it is significant to note that the only *amicus curiae* brief filed in the Supreme Court in *Tennessee v. Garner* by law enforcement

officials was a brief urging the Court to *uphold* the Sixth Circuit ruling striking down the deadly force law as applied. This brief was filed by the Police Foundation, nine national and international associations of police and criminal justice professionals, the Chiefs of Police Associations of two states, and 31 law enforcement Chief Executives (including the police chiefs of Atlanta, Baltimore, Denver, Lubbock, Newark, San Antonio, and San Diego).²¹⁴

This brief explained that the deadly force statute was unsound as a matter of law enforcement policy. According to the *amici*, they had concluded, “[a]fter extensive research and consideration,” that

laws permitting police officers to use deadly force to apprehend unarmed, non-violent fleeing felony suspects actually do not protect citizens or law enforcement officers, do not deter crime or alleviate problems caused by crime, and do not improve the crime-fighting ability of law enforcement agencies.²¹⁵

In the words of the law enforcement *amici*, “[t]he Tennessee statute in question is, in fact, an authorization to shoot to kill car thieves, pickpockets, and shoplifters, and it cannot be justified as a legitimate exercise of public authority.”²¹⁶

B. Alito’s Judicial Record

As a judge, Alito has carried his long-held and disturbing views about police power and individual rights onto the appellate court bench, where he has endeavored to implement them -- and has sometimes succeeded. Alito’s judicial record in this regard, discussed in greater detail below, was recently summarized by Robert Gordon writing in *Slate*:

²¹⁴ Brief for the Police Foundation, *et al.*, As *Amici Curiae* in Support of the Respondent-Appellee, 1984 WL 566025, *Tennessee v. Garner*, No. 83-1035, 83-1070 (Aug. 9, 1984).

²¹⁵ *Id.* at 11.

²¹⁶ *Id.* at 48.

In 15 years on the bench, Alito has filed more than a dozen dissents in criminal cases or cases involving the Fourth Amendment right to be free from unreasonable search and seizure. *Not one of those dissents urges a position more protective of individual rights than the majority.* . . . Alito sat on a dozen panels in which judges disagreed regarding a citizen's Fourth Amendment rights. *In each of those cases, Alito adopted the view most supportive of the government's position.*²¹⁷

If confirmed to the Supreme Court, Alito would be in a much more powerful position to make these views the law of the land. And particularly at a time when it has been revealed that the administration of President Bush has been engaged in the secret, warrantless surveillance of American citizens, Americans cannot afford to confirm to the Supreme Court a judge who has already shown such a willingness to give enormous discretion to executive branch law enforcement officials to engage in unauthorized searches and seizures and to otherwise trample on the rights of individual Americans.

1. The Fourth Amendment: the right to be free from unreasonable searches and seizures

As reflected by his memorandum analyzing *Garner v. Memphis*, discussed above, Samuel Alito has a very narrow view of the restrictions imposed on the government by the Fourth Amendment, one that would allow the police to run roughshod over the rights of individuals. And, as Robert Gordon has found, Alito has a disturbing judicial record in Fourth Amendment cases when the court was divided, consistently taking the position most favorable to the government.

The concern here, however, is far more than quantitative. As the following cases show, Alito's troubling willingness to allow police officials to trample on Americans'

²¹⁷ Robert Gordon, "Alito or Scalito? If You're a Liberal, You'd Prefer Scalia," *Slate* (Nov. 1, 2005) (emphasis added); available at <<http://www.slate.com/id/2129107/>> (visited Nov. 22, 2005).

Fourth Amendment rights includes cases involving particularly egregious police conduct and extreme legal positions taken by Judge Alito, raising particular concerns in light of our country's need for Supreme Court Justices who will truly serve as independent checks on executive branch powers.

- *Doe v. Groody*, 361 F.3d 232 (3d Cir. 2004), *cert. denied*, 125 S. Ct. 111 (2004)

Perhaps one of Judge Alito's most disturbing opinions is his dissent in this case in which he would have upheld the strip search of a mother and her ten-year-old daughter, although they were not named in the warrant authorizing the search of their home, and would have prevented them even from presenting to a jury their claims that the strip search was illegal. Alito's dissent reveals that he would give virtually unfettered authority to the police to trample on the clear protections given to every American by the Fourth Amendment.

In 1998, police in Ashland, Pennsylvania, conducted a search at the premises of John Doe, whom they suspected of selling drugs. Although the police affidavit applying for a search warrant sought permission to search "all occupants" of the Doe residence and was stapled to the warrant, the warrant itself granted by the magistrate specified only John Doe as a person to be searched, and the affidavit's request to search "all occupants" was not incorporated by reference into the warrant. Nonetheless, in carrying out the search at the Doe residence, the police strip searched John Doe's wife and ten-year-old daughter, Jane and Mary Doe. As described by the Third Circuit:

the female officer removed both Jane and Mary Doe to an upstairs bathroom. They were instructed to empty their pockets and lift their shirts. The female officer patted their pockets. She then told Jane and Mary Doe to drop their pants and turn around. No contraband was found.

361 F.3d at 237. Jane and Mary Doe had also been directed by the police officer to “pull their bras away from their bodies.”²¹⁸

Although some of Judge Alito’s supporters have attempted to minimize this case by claiming that it did not involve a strip search, there can be no question from the facts as recounted by the Third Circuit that it most certainly did. Indeed, the court specifically noted that Jane and Mary Doe “were asked to remove or shift articles of clothing and were visually inspected and touched by a female officer who was searching for contraband.” 361 F.3d at 238.

Jane and Mary Doe brought a civil rights action against the police officers responsible for strip searching them. The officers claimed that they did not violate any clearly established constitutional rights of the mother and her child, and that they were therefore entitled to qualified immunity from suit. The district court rejected the officers’ qualified immunity claim, and the officers appealed.

In a 2-1 ruling, the Third Circuit upheld the denial of qualified immunity to the police officers, allowing the Does to proceed with their claims. The majority opinion, written by then-Judge Michael Chertoff -- now the Secretary of the federal Department of Homeland Security -- carefully explained that the strip search of Jane and Mary Doe was illegal, as the warrant did not authorize the police to search them.

Judge Alito dissented, and would have held that the warrant authorized the police to search *anyone* on the premises of the Doe residence, although it did not say so. According to Alito, the court should have read into the warrant an authorization that was not there, since the police had asked for the authorization in their affidavit. This approach would effectively have nullified the critical role of the judicial officer in the Fourth Amendment’s search warrant process, which requires that a judicial officer must review and approve a request for a search warrant and the scope of that warrant. As Judge

²¹⁸ Brief for Appellants, *Doe v. Groody*, No. 02-4532 (3d Cir., Mar. 25, 2003), at 10.

Chertoff, writing for the majority, stated, such an approach “might indeed transform the judicial officer into little more than the cliché ‘rubber stamp.’” 361 F.3d at 243.

Judge Chertoff further explained the fallacy behind Alito’s willingness to broaden the warrant into an “all occupants” warrant merely because the police affidavit sought one: “A state magistrate reviewing a search warrant affidavit might well draw the line at including unnamed ‘all occupants’ in the affidavit because *Pennsylvania law disfavors ‘all occupant’ warrants.*” 361 F.3d at 240 (emphasis added). And, making clear that this case went to the heart of the Fourth Amendment’s protection against unreasonable searches and seizures, Judge Chertoff explained:

To be sure, a warrant must be read in a common sense, non-technical fashion. But it may not be read in a way that violates its fundamental purposes. As the text of the Fourth Amendment itself denotes, a particular description is the touchstone of a warrant.

361 F.3d at 239 (citations omitted).

Judge Alito, in his dissent, would also have held that even if the strip search were illegal (as the majority ruled), the police officers nonetheless should be immune from liability because a “reasonable police officer” could certainly have read the warrant as authorizing the search. 361 F.3d at 244. The majority rejected this as well, holding that “[s]earching Jane and Mary Doe for evidence beyond the scope of the warrant and without probable cause *violated their clearly established Fourth Amendment rights,*” and that the police therefore were not entitled to qualified immunity. 361 F.3d at 244 (emphasis added).

- *Baker v. Monroe Township*, 50 F.3d 1186 (3d Cir. 1995)

Judge Alito's dissent in *Doe v. Groody* and his willingness to allow the police almost unfettered power, despite the Fourth Amendment, was hardly an aberration in his record, as this legally similar case shows.

Here, a mother -- Inez Baker -- and three of her children, approaching the home of another of Mrs. Baker's sons, found themselves innocent bystanders caught up in a drug raid on the son's premises. Although the warrant that the police had obtained specified only a search of the premises, 50 F.3d 1189, n.1, the police forced the Bakers to the ground, pointed guns at them, searched one of the children, emptied out Mrs. Baker's purse onto the ground, handcuffed the Bakers, and left some of them handcuffed for nearly half an hour. Mrs. Baker and the three children brought a civil rights action against the police officer in charge of the raid and the township, alleging that they had been subjected to an illegal search and seizure as well as to the use of excessive force, in violation of the Fourth Amendment.

The district court entered judgment for the officer and the township, holding that the Bakers had failed to show that the defendants were "legally responsible for any violation of the Bakers' rights that may have occurred." *Id.* at 1188. On appeal, the Third Circuit, in a 2-1 ruling with Judge Alito dissenting, reversed the judgment for the police officer and sent the case back to the district court for a determination of whether the Bakers had presented evidence that could make the officer personally liable for the alleged civil rights violations, either because he had "participated in violating [the Bakers'] rights," or had "directed others to violate them," or because, "as the person in charge of the raid, [he] had knowledge of and acquiesced in his subordinates' violations." *Id.* at 1190-91.

The majority -- both Reagan appointees -- specifically noted that, given the "use of guns and handcuffs and, indeed, the length of the detention," the Bakers had been subjected to "*a very substantial invasion of [their] personal security.*" *Id.* at 1193 (emphasis added). Moreover, they stated, "[c]onsidering the facts in the light most favorable to the Bakers, the appearances were those of a family paying a social visit, and

while it may have been a visit to a wayward son, *there is simply no evidence of anything that should have caused the officers to use the kind of force they are alleged to have used.*” *Id.* (emphasis added).

Judge Alito dissented and would have upheld the award of qualified immunity to the police officer. As in *Groody*, Alito would have held that the warrant authorized the search not only of the premises but also of “any persons found on the premises,” 50 F.3d at 1197, even though the warrant contained no such authorization. Indeed, as the majority specifically explained, the warrant was filled out only to specify the premises to be searched, and did not mention the search of any persons. 50 F.3d at 1189, n.1. The majority pointedly rejected Alito’s dissent, stating that “[a]lthough the dissent . . . considers this a warrant for the search of specified persons, the only common-sense interpretation of the document is that no one ever bothered to complete it to include specified persons as well as premises. This flawed document *does not demonstrate that the magistrate determined [the] search of any particular persons to be justified.*” *Id.* (emphasis added).

The majority went on to explain the constitutional significance of the omission from the warrant of any description or identification of any persons to be searched:

The Fourth Amendment requires that the warrant particularly describe the place to be searched and the persons to be seized. The face of the warrant demonstrates its failure to meet the requirement of the Fourth Amendment.

50 F.3d at 1189, n.1.

Here, as in *Groody*, Judge Alito would also have held that even if the warrant did not authorize the search of the Bakers, the police officer nonetheless should still be immune from liability. According to Alito -- who would not have allowed a jury to determine the matter -- the evidence was insufficient to render the officer personally liable to the Bakers.

- *Mellott v. Heemer*, 161 F.3d 117 (3d Cir. 1998)

In his analysis of Alito's record published in *Slate*, Robert Gordon drew a link between Alito's dissent in *Baker* and his subsequent ruling for the majority in *Mellott*, stating that, in *Baker*, "Alito crossed swords with two Reagan appointees in arguing that a jury shouldn't decide whether a police officer lawfully allowed his men to push to the ground, handcuff, and hold at gunpoint an innocent family. That case was echoed three years later when Alito, this time writing for a majority, found that in the course of an eviction, marshals could reasonably pump a sawed-off shotgun at a family sitting around its living room."²¹⁹

In *Mellott*, the plaintiff family charged that several Deputy United States Marshals had used excessive force in carrying out a court order to evict them from their dairy farm in Pennsylvania, after they had gone into bankruptcy and the farm had been sold at public auction. According to the Mellotts, when the marshals entered their house, one of the marshals pointed a gun at Mrs. Mellott's face and kept it pointed at her throughout the eviction. Another marshal entered the house and allegedly "'pumped a round into the barrel' of his sawed-off shotgun," pointed it at Mr. Mellott -- who they apparently knew was recovering from heart surgery -- and told him "to sit still, not move and to keep his mouth shut." 161 F.3d at 120.

A radio reporter was also in the house at this time, talking on the phone in the kitchen. She testified that "one of the marshals ran into the kitchen, 'pumped' his semi-automatic gun, stuck it right in [her] face and . . . said: 'Who are you talking to, hang up the phone.'" 161 F.3d at 121. When the woman kept talking, "the marshal put his gun 'to the back of her head' and told her to 'shut the hell up and hang up the phone.'" *Id.* The marshals told the Mellotts to start driving away "and not to look back or they would be shot." 161 F.3d at 121.

²¹⁹ Robert Gordon, "Alito or Scalito? If You're a Liberal, You'd Prefer Scalia," *Slate*, Nov. 1, 2005 (emphasis added); available at <<http://www.slate.com/id/2129107/>> (visited Nov. 22, 2005).

The marshals also went to the home of the Mellotts' son, Kirk, located on the property, to evict him as well, and were accompanied by a family friend, Jackie Wright, who had been in the Mellotts' home during the eviction. The marshals had Wright enter Kirk's home first, and held a gun to his back. They found Kirk "sitting in his living room with a bag full of his belongings." One of the marshals aimed his gun at Kirk Mellott, spun him around, pushed him up against a wall, searched his bag, and ordered him off the property. 161 F.3d at 121.

The Mellotts brought an action against the marshals for violating their constitutional rights, including their Fourth Amendment right to be free from unreasonable seizures. The marshals moved for summary judgment on the ground that they had qualified immunity. The district court denied their motion, holding that there were disputed issues of material fact as to whether the marshals reasonably could have believed that their conduct did not violate clearly established law.

In a 2-1 ruling, with Judge Alito writing the majority opinion, the Third Circuit reversed, holding as a matter of law that "the force used by the marshals" was "objectively reasonable at the time," 161 F.3d at 122-23, thus depriving the Mellotts of the opportunity to present their claims to a jury. According to Alito, the marshals were justified in their use of force because the Mellotts were reported to own numerous firearms and, prior to the eviction, a Farmers Home Administration County Supervisor had told the marshals that Mr. Mellott had chased him off his property, had displayed a handgun, and had threatened to shoot any federal agent who came on his property. In addition, Kirk Mellott was considered unstable and had said his family would not leave the property.

Judge Rendell dissented, relying in large measure on the Third Circuit's holding in *Baker v. Monroe Township*, a holding from which, as discussed above, Judge Alito had dissented. According to Judge Rendell, "The majority's conclusion that the conduct in this case was, without doubt, objectively reasonable and not excessive based upon the plaintiff's chilling tale *runs counter to our Fourth Amendment jurisprudence* as most

recently explicated in *Baker v. Monroe Township* . . . relied upon by the district court but not mentioned in the majority’s opinion.” 161 F.3d at 125 (emphasis added). Judge Rendell would have held that in this case, as in *Baker*, it was for a jury to decide whether the law enforcement personnel had acted in an objectively unreasonable manner, and not for a court to take the case away from the jury. *Id.*

Judge Rendell acknowledged that while the marshals may have been justified in approaching the Mellotts’ home with guns, whatever fear they might have had should have been “immediately dissipated when they encountered a pastoral scene of several people sitting peaceably in a parlor. *While it might have been reasonable for the marshals to approach and enter the home in an aggressive mode, the clearly passive conduct of those present should have caused them to adjust their response to the situation accordingly.*” 161 F.3d at 126 (emphasis added).

Judge Rendell closed by stating that the marshals’ conduct “could be described as Gestapo-like,” noting that “seven marshals [had] detained and terrorized a family and friends, and ransacked a home, while carrying out an unresisted civil eviction.” 161 F.3d at 127.

In addition to his opinions in the foregoing cases, Judge Alito has written or joined the majority opinion in a number of 2-1 rulings in favor of the police in Fourth Amendment cases, upholding the police conduct over a dissent. These include:

- *United States v. Brown*, 159 F.3d 147 (3d Cir. 1998), *cert. denied*, 525 U.S. 1184 (1999)

Judge Alito joined Judge Nygaard’s opinion holding that the police, shortly after a shooting at 1:30 a.m. in a high crime area, had been justified in stopping and frisking Kenneth Brown, an African American male, near the scene of the shooting; Brown was wearing clothing that matched the description of the clothes worn by one of three African American men who had been seen by officers in a

police car and who did not comply when asked to “hold up” but kept walking. The majority rejected Brown’s claim that his flight from the police was insufficient to support a stop and frisk under the Supreme Court’s decision in *Terry v. Ohio*, 392 U.S. 1 (1968).

Judge Rendell dissented, explaining that the majority had improperly approved the stop and frisk based on “‘nothing more substantial than inarticulate hunches’ as proscribed by *Terry v. Ohio*.” 159 F.3d at 150. According to Judge Rendell, Brown “was merely near the wrong place at the wrong time.” *Id.* Judge Rendell was strongly critical of the majority, stating that “[w]e take a giant step backward in our Fourth Amendment jurisprudence in giving our stamp of approval to the police conduct in this case.” *Id.* (emphasis added).

➤ *United States v. Lee*, 359 F.3d 194 (3d Cir. 2004), *cert. denied*, 125 S.Ct. 408 (2004)

Judge Alito wrote the majority opinion in this 2-1 ruling upholding the FBI’s *warrantless* video surveillance of the hotel suite of the defendant, Robert Lee. The suite had been rented for Lee by a government informant, and the FBI had hidden a video camera and microphone in the suite without a warrant but with the informant’s consent. The FBI claimed that its agents were instructed to turn on the monitoring equipment only when the informant was in the suite. Alito rejected Lee’s argument that the warrantless surveillance violated his Fourth Amendment rights, holding that a person has no legitimate expectation of privacy “in conversations with a person who consents to the recording of the conversation.” 359 F.3d at 201. Alito found it of no constitutional significance that the video surveillance equipment remained in Lee’s hotel suite and was capable of use by the FBI 24 hours a day, even when the informant was not present and thus consenting to the monitoring.

Judge McKee strongly disagreed and dissented, explaining that regardless of any asserted self-restraint by the FBI, the fact remained that the FBI “had the ability to manipulate a video camera to see and hear practically everything Lee did in the privacy of his hotel suite throughout the day and night. *The limitations of that Orwellian capability were not subject to any court order.* Rather, they were defined by the curiosity and scruples of a single agent. That is simply not adequate given the importance of Fourth Amendment guarantees.” 359 F.3d at 214 (emphasis added). Judge McKee went on to state that “[t]o the extent the Fourth Amendment has any vitality in an era of increasingly sophisticated electronic eavesdropping, it surely protects the privacy of someone in the intimacy of a hotel suite *from the potential of warrantless 24-hour surveillance,*” noting that the FBI camera could transmit not only video of the living area but also “parts of the bedroom and bathroom throughout the day and night.” 359 F.3d at 215, 224 (emphasis added).

Judge McKee concluded his dissent by explaining that “[t]he Constitution’s primary bulwark against arbitrary intrusions into our privacy is the warrant requirement of the Fourth Amendment,” and that the government had done an “end run” against this requirement. 359 F.3d at 225. “I cannot endorse my colleague’s willingness to entrust the fundamental right of privacy to law enforcement’s discretion.” 359 F.3d at 226.

In light of recent revelations that the Bush Administration has been engaged in the secret, warrantless surveillance of American citizens, the extreme deference that Judge Alito has shown to executive branch law enforcement officials poses an even greater threat to Americans’ privacy and constitutional rights.

- *United States v. Kithcart*, 134 F.3d 529 (3d Cir. 1998)

Judge Alito’s record in Fourth Amendment cases is so disturbing that some of his supporters have resorted to misrepresenting that record, particularly in connection with

his ruling in *United States v. Kithcart*. In this case, a police officer who heard on a radio call that two African American males driving a black sports car, possibly a Camaro, were suspected in several armed robberies, stopped the first car driven by an African American male that she saw, even though she only believed there was one person in the car, and the car was not a Camaro. As it turned out, there were two people in the car, including the passenger, Jesse Kithcart. The police searched Kithcart, found that he was carrying a gun, and arrested him. He was later charged with being a felon in possession of a firearm. Kithcart asked the district court to suppress the firearm, contending that the police had lacked probable cause to stop the car and arrest him, and that they also lacked reasonable suspicion for an investigatory stop under *Terry v. Ohio*. The district court denied Kithcart's motion to suppress, holding that the police had probable cause. Kithcart then pleaded guilty but reserved his right to appeal the denial of his motion to suppress.

On appeal, a unanimous panel of the Third Circuit, in an opinion written by Judge Alito, agreed that the police lacked probable cause to stop the car and that the district court had erred in denying the motion to suppress. However, rather than reverse Kithcart's conviction, Judges Alito and Lewis sent the case back to the district court to give the government an opportunity to prove whether the police had a basis for an investigative stop and weapons search. Judge McKee dissented, explaining that "the same testimony that requires us to reverse the district court's determination that the government had probable cause also establishes that Officer Nelson did not have reasonable suspicion to stop and detain the occupants of the car. . . . Just as this record fails to establish that Officer Nelson had probable cause to arrest any Black male who happened to drive by in a black sports car, it fails to establish reasonable suspicion to justify stopping any and all such cars that happened to contain a Black male." 134 F.3d at 532, 533.

On remand, the district court ultimately held that the police were entitled to stop the car and search Kithcart and again denied Kithcart's motion to suppress.²²⁰ Kithcart again appealed, and a three-judge panel of the Third Circuit, including Judge Alito (but

²²⁰ *United States v. Kithcart*, 169 F. Supp. 2d 369 (E.D. Pa. 2001).

not Judge McKee), upheld the denial of the motion to suppress, thus effectively affirming Kithcart's conviction.²²¹

Astonishingly, on December 7, 2005, the Senate Republican Conference published what it called a "myth/fact" piece in response to Knight-Ridder's critical evaluation of Judge Alito's judicial record. Attempting to show that Alito does not have what the SRC called a "results-oriented approach in criminal cases," the SRC claimed that "in *United States v. Kithcart*, 134 F.3d 529 (3d Cir. 1998), Judge Alito wrote for the court in *overturning the defendant's conviction* for being a felon in possession of a firearm on the grounds that the police had lacked probable cause to stop and search the defendant based on the fact that they were African-Americans."²²² However, as discussed above, not only did Judge Alito *not* reverse Kithcart's conviction, but over a strong dissent by Judge McKee, he voted to give the government a second bite at the apple in attempting to justify the stop of the car and the search of Kithcart. And, when the case was before him again on appeal, Judge Alito voted to uphold the search and thus effectively upheld Kithcart's conviction.

2. The Sixth Amendment: the right to the effective assistance of counsel

As shown in the two cases discussed below, Judge Alito has given short shrift to a defendant's constitutional right to the effective assistance of counsel, including in a case in which the attorney had completely ignored certain evidence relevant to the imposition of the death penalty and the defendant was subsequently sentenced to death. Alito's ruling in that case was reversed by the Supreme Court.

²²¹ *United States v. Kithcart*, 34 Fed. Appx. 872 (3d Cir. 2002), *cert. denied*, 537 U.S. 1061 (2002).

²²² Senate Republican Conference, "Knight-Ridder distorts Supreme Court nominee Samuel Alito's 15-year record on the U.S. 3rd Circuit Court of Appeals," Dec. 7, 2005 (emphasis added), available at <http://src.senate.gov/public/index/.cfm?FuseAction=PenPad.View&ContentRecord_id=2194&CFID=23883140&CFTOKEN=13765930> (visited Dec. 9, 2005).

- *Rompilla v. Horn*, 355 F.3d 233 (3d Cir. 2004), *rev'd*, 125 S.Ct. 2456 (2005)

Ronald Rompilla was convicted of murder and sentenced to death. During the sentencing phase of his trial, his attorneys failed to consider material that they knew the prosecution was likely to rely on as evidence of aggravation supporting capital punishment. Had they taken this material into consideration, “it is uncontested that they would have found a range of mitigation leads that no other source had opened up.” *Id.* at 2468. Rompilla brought a petition for a writ of habeas corpus, arguing that he had been denied his constitutional right to the effective assistance of counsel. The district court agreed, holding that defense counsel had failed to investigate “‘pretty obvious’ signs that Rompilla had a troubled childhood and suffered from mental illness and alcoholism.” *Id.* at 2461.

In a 2-1 ruling, the Third Circuit reversed. Judge Alito wrote the majority opinion, holding that Rompilla was not entitled to relief. Judge Sloviter dissented, citing the “shocking ineffective assistance of counsel at the sentencing phase.” 355 F.3d at 273.

Rompilla appealed to the Supreme Court, which overturned Alito’s ruling, 5-4. In an opinion by Justice Souter (joined by, among others, Justice O’Connor), the Court held that a defense attorney is “bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial.” 125 S.Ct. at 2460. As Justice Souter explained, “[t]he notion that defense counsel must obtain information that the State has and will use against the defendant is not simply a matter of common sense,” but also an obligation set out in the ABA’s Standards for Criminal Justice: “[t]he investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities.” *Id.* at 2466.

- *United States v. Kauffman*, 109 F.3d 186 (3d Cir. 1997)

In an opinion that foreshadowed his ruling in *Rompilla*, Judge Alito dissented from the court's ruling in favor of the defendant in this case, Kourtney Kauffman, who maintained that he had not received the effective assistance of counsel in the criminal proceedings against him.

In 1991, Kauffman was released from a psychiatric center against the advice of his psychiatrists. Five days later, Kauffman was arrested for trying to sell stolen guns to a firearms dealer. He was examined by a psychiatrist at a state hospital, who later informed Kauffman's attorney that Kauffman was "manic and psychotic" at the time of the crime for which he had been charged. 109 F.3d at 187. "Despite the exculpatory nature of this letter, [the attorney] declined to investigate further a possible insanity defense and advised Kauffman to plead guilty." *Id.* at 188. Kauffman did so and was sentenced to 15 years in prison. He subsequently moved to vacate, set aside, or correct his sentence, arguing that his attorney had "rendered ineffective assistance by failing to counsel him regarding his right to proceed to trial and present an insanity defense." *Id.* at 188. The district court denied Kauffman's petition, and Kauffman appealed.

In a 2-1 ruling, the Third Circuit reversed, holding that Kauffman was entitled to relief because his counsel had failed to conduct any investigation into a possible insanity defense. The majority specifically explained that, "[i]n this case, minimal factual investigation by [the attorney] would have uncovered Kauffman's long-standing history of bipolar syndrome and his numerous psychotic episodes leading to multiple psychiatric hospitalizations, all of which preceded the offense [at issue]." *Id.* at 191.

Judge Alito dissented, and would have upheld the attorney's conduct "as a tactical decision that, while perhaps debatable, remains safely within the expansive realm of constitutional reasonableness." *Id.* at 191-92. The majority pointedly rejected this, stating:

[o]nly if [the attorney] had investigated Kauffman's long history of serious mental illness, and conducted some legal research regarding the insanity defense could

his counseling be characterized as ‘strategy.’ Instead, his failure to investigate or research the insanity issue at all resulted in a cursory, uninformed judgment call which deprived Kauffman of the affirmative defense of insanity and the meaningful representation which the Constitution requires.

109 F.3d at 190.

3. The Fifth, Sixth, and Fourteenth Amendments: the right to due process, the right to be charged by a grand jury, and the right to a trial before an impartial jury

In criminal cases, a defendant -- who of course is presumed innocent -- has the fundamental right to be tried before an impartial jury that has been chosen without regard to racial or gender bias and that has been properly instructed on the law by the trial judge. Nonetheless, as the following cases demonstrate, Judge Alito has shown a disturbing willingness to overlook violations of these crucial requirements, even in cases in which the death penalty or life imprisonment was involved.

- *Riley v. Taylor*, 277 F.3d 261 (3d Cir. 2001) (*en banc*)

In this case involving the murder conviction of an African American by a jury from which blacks had been excluded because of their race, Judge Alito was overruled and criticized by a majority of the Third Circuit judges for minimizing “the history of discrimination against prospective black jurors and black defendants. . . .” 277 F.3d at 292.

In May 1982, James Riley, an African American, was indicted for felony murder. He pleaded not guilty on all counts and was tried, convicted and sentenced to death by an all white jury. After several unsuccessful post-conviction motions and appeals, Riley filed a motion in federal court to challenge his conviction. He raised several grounds to support his motion including a charge that jurors had been impermissibly struck from the jury based on their race and that the jury had been misled about their role in applying the

death penalty. The district court denied Riley's motion on all grounds and Riley appealed.

Initially, in an opinion authored by Judge Alito, a divided three-judge panel of the Third Circuit denied Riley's claims.²²³ Judge Sloviter, in dissent, strongly disagreed because she found plausible Riley's contention that the prosecution had excluded African American jurors based on their race and that the prosecution had misled the jurors about their role in imposing the death penalty. She wrote:

The considerable deference that we are obliged to give to state court findings of fact does not require that we give uncritical acceptance to a prosecutor's story merely because a state judge accepted it when the story cries out for skepticism and is inherently improbable. . . . I dissent from the majority opinion because I believe the record in this case compels the conclusion that the prosecution, in pursuing its express goal of 'mak[ing] sure that James Riley received the death penalty,' violated Riley's constitutional rights. . . .

237 F.3d at 339. (citations omitted).

The entire Third Circuit reconsidered Riley's appeal, and a majority of the full court reversed parts of Judge Alito's previous holding.²²⁴ The majority opinion, written by Judge Sloviter, took strong exception to Judge Alito's arguments. Specifically, the Third Circuit held that Riley's rights had been violated with respect to the peremptory strikes against black jurors and with respect to the comments by the prosecutor about the jury's role in applying the death penalty.

Judge Alito disparaged Riley's statistical evidence showing that the prosecution repeatedly excluded blacks from juries in capital cases by asserting that this was comparable to an analysis attempting to explain why a disproportionate number of recent

²²³ *Riley v. Taylor*, 237 F.3d 300 (3d Cir. 2001).

²²⁴ *Riley v. Taylor*, 277 F.3d 261 (3d Cir. 2001) (*en banc*).

U.S Presidents have been left-handed. 277 F.3d at 327. The majority sharply criticized Judge Alito:

the [d]issent's attempt to analogize the statistical evidence of the use of peremptory challenges to strike black jurors to the percent of left-handed presidents requires some comment. The dissent has overlooked the obvious fact that there is no provision in the Constitution that protects persons from discrimination based on whether they are right-handed or left handed. To 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*. . . .

Id. at 292 (emphasis added).

- *Ramseur v. Beyer*, 983 F.2d 1215 (3d Cir. 1992), *cert. denied*, 508 U.S. 947 (1993)

Thomas Ramseur challenged his conviction for murder based on alleged race discrimination during the grand jury selection process.²²⁵ While picking the grand jury that later indicted Ramseur, the assignment judge in Essex County, New Jersey, announced that he was “trying to get a cross-section” of the community. 983 F.2d at 1222. In attempting to achieve this goal, the assignment judge did not seat potential grand jurors in the order in which they were called -- as required by state law -- but instead asked some potential jurors, including at least two African Americans, to sit separately in the body of the courtroom for a period of time while others were first seated on the grand jury. The blacks who had been asked to sit aside were later seated on the grand jury. The evidence showed that this was also the local practice at the time Ramseur’s grand jury was chosen, despite state law requiring the random selection of grand jurors.

²²⁵ Ramseur was sentenced to death but the New Jersey Supreme Court, while affirming his conviction, reversed the death sentence. 983 F.3d at 1221.

With three judges dissenting, the remaining judges of the full Third Circuit, including Alito, rejected Ramseur's habeas corpus petition, but for different reasons. The majority opinion, which Judge Alito did not join on this point, held that Ramseur was not entitled to relief because he had not shown "purposeful discrimination in the selection of the grand jury panel that indicted him." 983 F.3d at 1226. Although the majority recognized that the troubling procedure used by the assignment judge to select the grand jury presented an "opportunity for discrimination," *id.* at 1227, the majority found it determinative that there was no proof of "the actual exclusion from jury service of someone on the basis of her race." *Id.* at 1226. Thus, the majority held that there had been no equal protection violation.

Judge Alito disagreed with the majority for even evaluating the merits of Ramseur's claims regarding the assignment process, for he would have held that Ramseur had not shown that his own equal protection rights had been violated and that Ramseur lacked standing even to assert the equal protection rights of actual or potential grand jurors. Alito's opinion was extremely dismissive of some of the Supreme Court's precedents prohibiting race discrimination in the selection of juries, calling statements in the Court's rulings "technically dicta" and opining that the rulings were not controlling in this case. *Id.* at 1243.

The majority made it a point to note its disagreement with Judge Alito's narrow view of standing, stating that "[w]e disagree with Judge Alito's analysis of third party standing . . . because it underemphasizes the community's interest in the jury selection process." 983 F.2d at 1228. The dissenting judges likewise agreed that the defendant in a criminal case has standing to assert that potential grand jurors had been subjected to race discrimination in the selection process:

Because jury selection procedures like the one before us infect court proceedings with racism and help to perpetuate negative stereotypes about African-Americans, [we] believe Ramseur suffered a sufficiently concrete injury to give him standing to assert the equal protection rights of the temporarily excluded jurors.

983 F.2d at 1251. Thus, of the ten judges on the full Third Circuit who considered this case, *only Alito* would have restricted a defendant's standing to pursue these race discrimination claims.

On the merits, the three dissenting judges would have granted Ramseur's habeas corpus petition, stating that "[t]he procedure employed by the assignment judge -- of temporarily excluding qualified African-American grand jurors and allowing them to serve only on condition that whites were unavailable -- does violence to the principle of equal protection and can only undermine public confidence in the justice system. . . . Even if he was not motivated by malice toward any race, the judge's attempt to proportionally limit the number of African-Americans on the jury is purposeful discrimination in violation of the Equal Protection Clause." 983 F.2d at 1246, 1249.

- *Pemberthy v. Beyer*, 19 F.3d 857 (3d Cir. 1994), *cert. denied*, 513 U.S. 969 (1994)

Judge Alito wrote the court's opinion upholding the prosecution's striking of Spanish language speakers from a jury in a case in which there were issues related to the use of translations of taped Spanish conversations as evidence in the case. Alito accepted the prosecution's argument that the potential jurors had been stricken not because they were Latinos but because of the issues regarding the translation of the taped Spanish conversations.

The Mexican American Legal Defense and Educational Fund in particular has expressed great concern about Judge Alito's ruling in this case, fearing that the striking of bilingual jurors "will fall disproportionately upon members of the Latino community," and that, accordingly, this decision could make it less likely for Latinos than non-Latinos to be tried by a jury of their peers. *See* MALDEF, Report Regarding the Nomination of

Judge Samuel A. Alito, Jr. as Associate Justice of the United States Supreme Court, at 6-7 (Dec. 15, 2005).²²⁶

- *United States v. Edmonds*, 80 F.3d 810 (3d Cir. 1996)(*en banc*) *cert. denied*, 519 U.S. 927 (1996)

Judge Alito was one of the dissenters from the full Third Circuit's 8-6 ruling in this case vindicating the requirement of jury unanimity in federal criminal trials. Theodore Edmonds had been charged with violating the federal Continuing Criminal Enterprise ("CCE") statute, which makes it a crime to organize, supervise, or manage five or more persons in a "continuing series of violations" of the federal narcotics laws; typically three such violation are required to establish the "continuing series of violations." Here, the trial judge denied Edmonds's request that the jury be instructed that it must unanimously agree on which three related violations occurred. Edmonds was convicted and he appealed.

A three-judge panel of the Third Circuit (not including Alito) reversed Edmonds's conviction,²²⁷ relying on a prior ruling of the court that "the CCE statute requires jury

²²⁶ Attempting to counter Judge Alito's disturbing record in cases raising claims of racial bias in jury selection, some of Alito's supporters have cited his ruling in favor of a convicted defendant in *Brinson v. Vaughn*, 398 F.3d 225 (3d Cir. 2005), *cert. denied*, 126 S.Ct. 473 (2005), who claimed that the prosecution had engaged in race discrimination in selecting the jury that convicted him. Apart from the fact that this ruling was unanimous, the evidence of race discrimination was egregious. Not only had the prosecutor used 13 peremptory challenges -- out of a total of 14 that he exercised -- to strike prospective African American jurors, but he appeared in a training videotape in which he "advocated the use of peremptory challenges against African Americans." 398 F.3d at 229.

Egregious race discrimination was also at issue in another case in which Alito wrote a unanimous opinion in favor of a convicted defendant, *Williams v. Price*, 343 F.3d 223 (3d Cir. 2003). In this case, Alito ruled that the defendant was entitled in post-trial proceedings to have the court consider certain evidence of racial bias by a member of the jury (who allegedly stated after the trial that "[a]ll niggers do is cause trouble") and the opportunity to establish that the juror had lied during voir dire in denying that he was racially biased. 343 F.3d at 226-27. Even here, however, Alito ruled that the defendant was not entitled to present certain other evidence of bias by jurors.

unanimity as to the identity of the three related violations comprising the continuing series.” 80 F.3d at 812. The full Third Circuit re-heard Edmonds’s appeal, and in an 8-6 ruling, reaffirmed the Third Circuit’s prior holding that jury unanimity is required as to the identity of each of the related violations making up the continuing series. According to the majority, any other holding would raise the “real possibility that the CCE statute would violate the Due Process Clause.” 80 F.3d at 819.

Judge Garth wrote a dissent joined by all of the dissenting judges, including Alito, but Alito also wrote his own dissenting opinion to explain his view that nothing in the statute, the legislative history, or the Constitution required the jury to be unanimous as to the related violations. The majority was sharply critical of Alito’s dissent, stating that he had engaged in the wrong inquiry, 80 F.3d at 817, n.7, that his argument that the CCE statute is “unambiguous” was “not tenable,” *id.* at 818, n.9, and that his response to the majority “artificially atomizes our position” and “is fundamentally flawed,” *id.* at 819, n.12.

Several years later, in a different case dealing with the same issue, the Supreme Court in a 6-3 ruling held that the jury in a CCE case must be unanimous as to the related violations. The Court thus effectively repudiated Judge Alito’s view that would have allowed the government to convict someone under the CCE statute without jury unanimity as to the underlying related offenses. *Richardson v. United States*, 526 U.S. 813 (1999).

- *United States v. Russell*, 134 F.3d 171 (3d Cir. 1998)

In this case decided two years after *United States v. Edmonds*, Judge Alito dissented from the court’s reversal of James Russell’s conviction for violating the Continuing Criminal Enterprise statute because the trial judge had failed to instruct the jury that it had to be unanimous as to the related offenses constituting the criminal enterprise. Specifically at issue was whether Russell’s attorney had objected to the failure

²²⁷ *United States v. Edmonds*, 52 F.3d 1236 (3d Cir. 1995).

by the judge to instruct the jury properly and thus preserved the issue for appeal. The Third Circuit panel majority held that he had, and thus the standard on review on appeal was whether the error by the trial judge was “harmless.” The court held that it was not, and that Russell’s conviction should be overturned.

Judge Alito dissented. In his dissent, he grudgingly acknowledged that the full Third Circuit’s ruling in *Edmonds* required that the jury be instructed on unanimity as to the related offenses, but stated that he continued to believe this was not required by the CCE statute. *Id.* at 184-85. He further acknowledged that he was bound by *Edmonds*, but of course if Alito were confirmed to the Supreme Court he would not be bound by this or any other case with which he disagrees.

Having acknowledged that *Edmonds* was binding and that the trial judge had erred in instructing the jury that convicted Russell, Judge Alito nonetheless disagreed with the majority that Russell’s attorney had preserved this issue for appeal. Alito thus would have applied the much more demanding “plain error” standard for appellate review of the trial judge’s error. Not surprisingly, Judge Alito would have held that the trial judge’s failure to instruct the jury as required by *Edmonds* was not “plain error” and would have affirmed Russell’s conviction. *Id.* at 184, 188.

The majority specifically repudiated Judge Alito’s approach. Although the majority held that “plain error” analysis did not apply, it nonetheless analyzed the trial judge’s error under this standard as well, and concluded that even under this more difficult test, the judge’s failure constituted “plain error.” In so holding, the court explained that “[f]or there to be plain error, there must be an ‘error’ that is ‘plain’ and that ‘affects substantial rights.’” 134 F.3d at 180 (citations omitted). The majority held that the first part of this test was met because “the error was plain in that it was ‘clear’ and ‘obvious’ *from even a cursory reading of our decision in Edmonds* that a finding of specific unanimity was required to sustain a CCE conviction.” 134 F.3d at 181 (emphasis added). And the court held that the second part of the test was met as well, stating that “[w]e have no hesitation in concluding that the error did affect a substantial right of Mr.

Russell -- his constitutional right to a unanimous jury verdict on each element of the CCE charge.” *Id.*

- *Government of the Virgin Islands v. Smith*, 949 F.2d 677 (3d Cir. 1991)

Judge Alito also dissented in this murder case involving an erroneous jury instruction on self-defense and would have given the convicted defendant, Louis Smith, no relief. Smith was charged with murder, but claimed that he had acted in self-defense. Under applicable law, the prosecution was required to prove the absence of self-defense beyond a reasonable doubt, but the trial judge had failed to so instruct the jury.

Smith was sentenced to life imprisonment and appealed his conviction. In a 2-1 ruling, the Third Circuit reversed, holding that the trial judge’s failure to properly instruct the jury “undermined the fundamental fairness of the trial, and constituted plain error.” 949 F.3d at 686. The court therefore ordered that Smith be given a new trial, noting that Smith’s “entire case” rested on the self-defense issue. *Id.* Judge Alito dissented, even though he admitted that it was “possible that the jury might have been confused about the burden of proof regarding self-defense,” and that the judge’s statements “also had some potential to mislead.” 949 F.3d at 689 (emphasis omitted).

- *Smith v. Horn*, 120 F.3d 400 (3d Cir. 1997), *cert. denied*, *DA v. Smith*, 118 S.Ct. 1037 (1998)

Judge Alito was the dissenter in this 2-1 ruling by the Third Circuit that errors in the jury instructions at the guilt phase of Clifford Smith’s murder trial required a grant of his habeas corpus petition. Alito not only dissented on the merits, but would also have erected procedural barriers to the court’s consideration of the petition in the first place, barriers not even sought by the government.

Smith and an accomplice, Roland Alston, had robbed a pharmacy. During the course of the robbery, either Smith or Alston shot to death one of the persons inside the

store. Smith was charged with first-degree murder. Under applicable state law, Smith could only be convicted of this offense if the jury found beyond a reasonable doubt that he intended that the victim be killed. However, during the prosecution's closing argument, the prosecutor told the jury that who shot the victim was irrelevant, and the judge instructed the jury that if it found that "Smith and Alston were accomplices of each other, then it is not important for you to determine which one actually pulled the trigger that brought about the killing" of the victim. 120 F.3d at 405. Smith was convicted of first-degree murder and sentenced to death.

In a habeas petition, Smith contended that the trial judge had not properly instructed the jury that it could only convict him of first degree murder if it found that he intended that the victim be killed. Smith maintained that, without a proper instruction on first degree murder, the jury could have convicted him even if it found that Alston had shot the victim but made no finding as to whether Smith had intended for the victim to be killed.

The Third Circuit majority agreed, "conclud[ing] from a fair reading of the jury instructions that there is a reasonable likelihood that the jury convicted Smith of first-degree murder without finding beyond a reasonable doubt that he intended that [the victim] be killed. Such an instruction is contrary to Pennsylvania law." *Id.* at 410. The court further explained that the erroneous instructions had relieved the state of its burden of proving the elements of first-degree murder beyond a reasonable doubt, and that this "amounted to a violation of Smith's right to a fair trial pursuant to the Due Process Clause of the Fourteenth Amendment." *Id.* The court held that an error of this magnitude was not "harmless" and that Smith should be released if the state did not retry him.

Judge Alito dissented, and would have erected procedural obstacles to the court's consideration of Smith's claims. First, Alito contended that the court should not even have reached the merits of Smith's claim because it should have required the parties to brief the issue of the consequences of what Alito called Smith's failure to exhaust state remedies, an argument raised by Alito on his own that was not made by Pennsylvania.

Alito further contended that the court should have required briefing on whether Smith's failure to raise his due process claim in prior state-court proceedings was a procedural default, another argument made by Alito on his own and not raised by the state. Because Judge Alito had attempted to raise these hurdles, the majority specifically addressed them, and rejected them, finding no reason to delay review of Smith's petition to require the briefing of issues never raised by the state. The majority noted that when a court on its own raises issues never raised at all by the state, it is put:

in the untenable position of ferreting out possible defenses upon which the state has never sought to rely. When we do so, we come dangerously close to acting as advocates for the state rather than as impartial magistrates. . . . While considerations of federalism and comity sometimes weigh in favor of raising such issues sua sponte, *consideration of that other great pillar of our judicial system -- restraint -- cuts sharply in the other direction.*

120 F.3d at 409 (emphasis added).

Judge Alito did address the merits because the majority had. Although he acknowledged that one could argue that it was "inadvisable" for the trial judge to have given the instructions in the way he did, and that "one might fault the particular language that the judge chose," Alito saw "nothing in these instructions that justifies federal habeas relief." 120 F.3d at 424.

In sum, there can be no question that Judge Alito's confirmation to the Supreme Court would significantly threaten the constitutional rights of all Americans to be protected against abuse from the police and other law enforcement officials, and to be treated fairly and without discrimination in the criminal justice process.

VI. Environmental Protection

The Supreme Court is crucial to upholding and enforcing environmental protections and protecting the health, safety, and rights of Americans. As a moderate conservative, Justice Sandra Day O'Connor has been the crucial, deciding fifth vote in many important Supreme Court decisions affecting various issues, including environmental protection.²²⁸ If she is replaced by someone who does not share an impartial perspective, but sides with the views of far right Justices Scalia and Thomas, the consequences to the environment could be disastrous.

Environmental groups that have not opposed a Supreme Court nominee since Robert Bork in 1987 have now opposed the nomination of Alito, citing rulings in which he participated that suggest a constitutional view that could severely limit laws on clean air, clean water, and related issues.²²⁹ Friends of the Earth, an international network of grassroots organizations, suggests that the announcement that environmental organizations were opposing a Supreme Court nominee for the first time in almost twenty years “underscor[es] just how big of a threat [environmental groups] believe Judge Alito poses to our environment.”²³⁰ Earthjustice, a non-profit public interest law firm, explained that “Judge Alito has repeatedly sought to go even farther than the current Supreme Court majority in restricting Congress’ authority to allow Americans to protect their rights in court, and to enact laws that protect our health and environment.”²³¹

²²⁸ See, e.g., *Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461, 502 (2004) (5-4 decision holding that the Clean Air Act gives the Environmental Protection Agency supervisory authority over state conservation agencies and to intervene and take action to reduce air pollution when state agencies fail to reasonably act).

²²⁹ As of December 20, 2005, the environmental groups opposing Alito’s confirmation included: Earthjustice, Friends of the Earth, Sierra Club, National Environmental Trust, and Greenpeace. Alex Kaplun, *Enviros Launch Campaign to Derail Alito Nomination*, E&E News, Dec. 20, 2005, available at <http://www.eenews.net/Greenwire/Backissues/122005.gw.htm#2>.

²³⁰ Press Release, Friends of the Earth, *Friends of the Earth Opposes Alito Nomination* (Dec. 20, 2005).

²³¹ Press Release, Earthjustice, *Halloween Supreme Court Nomination is a Scary Choice* (Oct. 31, 2005).

Although Alito has written and otherwise joined in some decisions that have had positive outcomes for the environment, he has generally done so in unanimous decisions involving the enforcement of straightforward, clearly established laws. In cases where he has been required to make judgment calls about the scope and meaning of constitutional provisions -- such as the Commerce Clause, administrative deference, and Article III standing -- he has repeatedly done so in a manner that has been seriously detrimental to the environment. He has even contradicted his own arguments concerning the principles of judicial review of administrative decisions to strip the Environmental Protection Agency (EPA) of its power to protect the environment.

With Alito's vote, the Court could well eliminate or severely restrict the authority of Congress to enact legislation protecting the environment, overstep boundaries of judicial restraint to discredit scientific findings and decisions of the EPA, and make it more difficult for individuals to enforce environmental laws or obtain relief for environmental injuries in federal court.

A. Limiting Congress' Authority to Enact Environmental Legislation

As discussed above, one of the most important environmental issues that will come before the Supreme Court within the next several months is whether Congress has acted beyond the scope of its Commerce Clause powers by establishing laws that protect the "waters of the United States," specifically, the Clean Water Act. The Court recently granted *certiorari* in *U.S. v. Rapanos* and *U.S. v. Carabell*, both of which involve claims that the Clean Water Act is unconstitutional, questioning Congress' authority to enact laws protecting wetlands and tributaries that are within a state. Alito's views on federalism, as previously discussed, seriously threaten this authority to enact laws that regulate conduct within the states.²³² As a Supreme Court Justice, Alito could well cast a decisive vote, as early as this year, to eliminate or restrict Congress' authority to enact a number of environmental laws, and to determine whether Congress initially had the authority to enact laws such as the Clean Water Act. As one environmental legal writer

²³² See *supra* Section III.

has estimated, “[i]f the court adopts a narrow view of the federal Clean Water Act, then up to 99 percent of the streams, lakes, and wetlands currently protected by the law will fall out of federal protection.”²³³

B. Second-Guessing Scientific Findings and Judgments of the EPA

Judge Alito’s judicial record raises serious concerns about the extent to which he would approve overturning scientific and expert judgments of the EPA and other specialized agencies created to protect the environment. Despite writing for the majority in a 1997 case that deference should be given to the scientific findings and expertise of the EPA, Alito challenged and disregarded the technical studies and findings of the EPA in a 2001 decision, establishing a precedent that seriously threatens environmental protections.

In 1997, Alito wrote for the court in *Southwestern Pennsylvania Growth Alliance v. Browner* (“SWPGA”).²³⁴ In *Browner*, the SWPGA sought to challenge the EPA’s determination that a certain area of the city would not be redesignated from nonattainment to attainment status for ozone. Judge Alito and his colleagues denied SWPGA’s efforts to bypass pollution rules under the Clean Air Act. In reviewing the case, Alito wrote, “[u]nder the Administrative Procedure Act, this court must uphold the EPA’s action unless it is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’”²³⁵ He made it clear that the “only task” in reviewing the EPA’s action “is to determine whether the EPA considered the relevant factors and articulated a rational connection between the facts found and the choice made.”²³⁶ Alito wrote “[a] reviewing court ‘must generally be at its most deferential,’ when reviewing factual determinations within an agency’s area of special expertise. . . . It is not the role of a

²³³ Douglas T. Kendall, Commentary, *Environmental Stakes High in Alito Debate*, Knight Ridder/Tribute News (Dec. 2005).

²³⁴ 121 F.3d 106 (3d Cir. 1997).

²³⁵ *Browner*, 121 F.3d at 111 (citations omitted).

²³⁶ *Id.*

reviewing court to ‘second-guess the scientific judgments of the EPA.’”²³⁷ He further said, “the EPA’s [action] ‘would be arbitrary and capricious if the agency has relied on facts which Congress has not intended it to consider.’”²³⁸ Alito emphasized that “[i]f this court were to consider [SWPGA’s] argument without the benefit of the EPA’s expert input, we would undermine a fundamental principle of our system of judicial review of administrative decisions.”²³⁹

Despite having made it clear that ignoring the expert input and second-guessing the scientific judgments of the EPA would undermine a “fundamental principle” of judicial review, Judge Alito agreed to do just that in a recent case, disregarding the expertise, findings, and judgment of the EPA in a situation that the agency found threatened the public health. In *W.R. Grace & Co. v. EPA*,²⁴⁰ Judges Alito and Ambro vacated an emergency order issued by the EPA, which required a fertilizer plant owner to engage in a long-term cleanup, on the ground that it was “arbitrary and capricious.” They failed to give deference to the EPA’s expertise, setting aside the technical studies conducted by and relied upon by the EPA.

The Grace fertilizer plant had been releasing an ammonia plume, which was entering an aquifer that serviced several public drinking water wells. After the city board shut down ten wells, the Safe Drinking Water Branch (“Branch”) of the EPA evaluated the situation and determined that “excess ammonia could lead to excess nitrification and microbial growth that could cause noncompliance with a number of Federal and State regulations and pose a threat to the public’s health.”²⁴¹ The Branch set an ammonia cleanup standard at 1.75 mg/1. After conducting scientific studies, an outside consultant hired by the city subsequently concluded that “any amount of excess ammonia over . . . 0.1 – 0.5 mg/1 . . . will impact the current treatment and operational practices.”²⁴² In response to these findings, the EPA amended its recommendation and changed the

²³⁷ *Id.* at 117 (citing *New York v. EPA*, 852 F.2d 574, 580 (D.C. Cir. 1988)).

²³⁸ *Id.* at 111.

²³⁹ *Id.* at 112.

²⁴⁰ 261 F.3d 330 (3d Cir. 2001).

²⁴¹ *Id.* at 334.

²⁴² *Id.* at 335.

cleanup standard from 1.75 to 0.5 mg/l.²⁴³ The EPA then released an initial order requiring that Grace alone reduce the ammonia in the aquifer and replace drinking water capacity. In cooperation with Grace, the EPA withdrew this order to allow a newly established Saginaw Aquifer Technical Evaluation Team (“SATET”) time to determine the best approach to protect the public from the release of excess ammonia.²⁴⁴ The EPA then issued a second emergency order based upon SATET’s findings and recommendations.²⁴⁵

Completely disregarding the EPA’s judgment, Judges Alito and Ambro determined that the EPA had failed to provide a “rational basis for its determination that a cleanup standard of 1.2 mg/l is necessary to protect the health of persons . . . and a rational basis for its finding that remediation of the aquifer through [the chosen] [a]pproach is necessary to protect the health of those persons.”²⁴⁶ They challenged the technical study conducted by and findings of SATET and the EPA’s reliance on them.²⁴⁷

In his dissent, Judge Mansmann strongly disagreed with Alito and Ambro, criticizing their failure to give deference to the EPA’s judgment:

I am particularly mindful that we are a reviewing court, experts in the law, and not expert environmental toxicologists . . . All the more reason to apply the presumption of correctness to the EPA. “A reviewing court ‘must generally be at its most deferential’ when reviewing factual determinations within an agency’s area of special expertise.”²⁴⁸ . . . Thus, where the agency decision turns on issues requiring the exercise of scientific judgment, as it does here, the court “must look at the decision not as a chemist . . . that we are qualified neither by training, nor

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Id.

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Id.

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Id. at 337.

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W.R. Grace, 261 F.3d at 340.

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Id. at 341-44.

²⁴⁸

Id. at 345. Judge Mansmann specifically cited Judge Alito’s opinion written in *Browner*, 121 F.3d at 117.

experience . . . but as a reviewing court exercising our narrowly defined duty of holding agencies to certain minimal standards of rationality.”²⁴⁹

C. Limiting Individual Enforcement of Environmental Laws in Federal Court

Alito also has a history of making it more difficult for individual citizens and groups of citizens to enforce environmental laws and obtain relief for environmental injuries in federal court. If Alito were confirmed, he would likely side with Justices Scalia and Thomas to make it more difficult for individuals and citizen groups to bring lawsuits to enforce environmental protections.²⁵⁰

In *Public Interest Research Group of New Jersey, Inc. (“PIRG”) v. Magnesium Elektron, Inc. (“MEI”)*,²⁵¹ Alito cast the deciding vote in ruling that citizens lacked standing to sue under the Federal Water Pollution Control Act (“Clean Water Act”) for their recreational and aesthetic injuries. The citizens explained that they had stopped engaging in various recreational activities because the defendant corporation had been releasing more pollutants than its permit allowed. They sought to enforce the environmental laws and protections that had been established by the Clean Water Act. Judges Alito and Roth reversed the district court’s ruling in favor of plaintiffs -- overruling a fine of \$2.625 million against MEI and an award of attorneys’ fees for more than \$500,000 -- and held that plaintiffs lacked standing to sue.²⁵² They found that a

²⁴⁹ *W.R. Grace*, 261 F.3d at 345 (Mansmann, dissenting).

²⁵⁰ Justices Scalia and Thomas have written and joined, respectively, majority opinions that limited the ability of citizen groups to enforce environmental protections in federal court. *See e.g., Lujan v. Defenders of Wildlife* 504 U.S. 555 (1992) (holding that various wildlife conservation organizations lacked standing because they failed to meet Article III standing requirements); *Steel Co. v. Citizens for a Better Environment* 523 U.S. 83 (1998) (holding that an environmental organization lacked standing because it failed to meet the redressability requirement of standing). Justice O’Connor joined Justice Blackmun’s dissent in *Lujan*, arguing that the environmental groups had standing.

²⁵¹ 123 F.3d 111 (3d. Cir. 1997).

²⁵² To even address the issue of standing, Alito and Roth had to ignore the court’s own prior ruling that there was standing, as determined in *PIRG v. MEI*, 983 F.2d 1052 (3d. Cir. 1992). Although they acknowledged that “revisitation of issues resolved earlier in the litigation is a serious matter and should not be taken lightly,” they nonetheless

change in an individual's recreational and aesthetic use of land, due to fear of a corporation's discharge of pollutants, was not enough to satisfy the injury-in-fact requirement of Article III standing. Alito argued that an individual must, rather, demonstrate "actual, tangible injury" to the environment, and that evidence of his own injuries was insufficient. *Magnesium Elektron*, 123 F.3d at 121. Alito and Roth deemed Congress's intent to give plaintiffs standing irrelevant:

Congress can confer only so much power on citizens wishing to sue polluters who have violated their NPDES permit. Accordingly, we read the phrase "may be adversely affected" as inherently limited by the injury prong of the constitutional test for standing. Thus, even if PIRG's members can show that they "may be adversely affected" . . . they must also demonstrate that their threat of injury is imminent.

Id. at 122. For a "threatened injury" to be the source of an individual's standing, that individual "must show that the threatened injury is so imminent as to be 'certainly impending.'" *Id.* (citations omitted).

Several years later, the Supreme Court reached precisely the opposite result. In *Friends of the Earth, Inc. v. Laidlaw Environmental Servs.*, 528 U.S. 167 (2000), the Supreme Court -- over a heated dissent by Justices Scalia and Thomas -- rejected the type of analysis Alito had undertaken in *Magnesium Elektron* in a 7-2 holding, which Justice O'Connor joined. In *Laidlaw*, the Supreme Court held that the relevant injury-in-fact analysis for purposes of Article III standing "is not injury to the environment but injury to the plaintiff. To insist upon the former rather than the latter as part of the standing inquiry . . . is to raise the standing hurdle higher than the necessary showing for success on the merits." *Laidlaw*, 528 U.S. at 181. The Court explained that "environmental plaintiffs

proceeded and revisited whether plaintiffs had standing. *Magnesium Elektron*, 123 F.3d at 118. Moreover, the issue of standing was not raised until the penalty phase of the case. In his dissent, Judge Lewis criticized his colleagues' disregard of the court's prior judgment and failure to provide plaintiffs an opportunity to present evidence to support their standing. *Id.* at 125-26 (Lewis, dissenting).

adequately allege injury in fact when they aver that they use the affected area and are persons ‘for whom the aesthetic and recreational values of the area will be lessened’ by the challenged activity.” *Id.* at 183 (citations omitted). An individual’s “reasonable concerns about the effects” of pollutants that “directly affect[s] [their] recreational, aesthetic, and economic interests,” the court explained, is enough to satisfy the injury-in-fact element of standing.²⁵³

Alito, however, would have sided with Justices Scalia and Thomas, who argued in their dissent that individuals must show actual harm to the environment; their own injuries are not enough.²⁵⁴ His opinion in *Magnesium Elektron* suggests that he would go even further, requiring plaintiffs to establish scientific proof of harm to the environment. Under that analysis, an environmental plaintiff could well have to hire an expert, test the water body or land, demonstrate specific detrimental environmental impacts, and link the impact to a polluters’ discharge in order to demonstrate an injury and get into court. Such an extreme view of environmental standing is clearly dangerous. It is even more troublesome because the concurring opinion by Justice Kennedy in *Laidlaw* expressed a willingness to consider a separate constitutional barrier to citizen suits.²⁵⁵ Considering Chief Justice Roberts’ troubling record on individuals’ access to the courts and the opinions of Justices Kennedy, Scalia, and Thomas, a Justice Alito could well become the decisive vote to eliminate or restrict the ability of ordinary citizens to enforce environmental protections in federal court.

D. Other Environmental Decisions

Alito’s record in other environmental cases, mostly unanimous or less controversial decisions, is mixed. For example, in cases where the government has clearly expressed a waiver of its sovereign immunity, Alito has agreed with his

²⁵³ See *id.*

²⁵⁴ See *Laidlaw*, 528 U.S. at 199 (Scalia, J., dissenting).

²⁵⁵ “Difficult and fundamental questions are raised when we ask whether exactions of public fines by private litigants, and the delegation of Executive power which might be inferable from the authorization, are permissible in view of the responsibilities committed to the Executive by Article II of the Constitution.” 528 U.S. at 197.

colleagues that the government was liable in decisions that have been positive for the environment.²⁵⁶

On the other hand, in cases where plaintiffs have argued an implied waiver of sovereign immunity, Alito has joined his colleagues in holding that immunity has not been waived, resulting in decisions with outcomes detrimental to the environment. In *Cudjoe v. Dept. of Veteran Affairs*,²⁵⁷ Alito joined in a unanimous decision holding that a private citizen could not sue the Department of Veteran Affairs for negligence and seek monetary damages under either the Residential Lead-Based Paint Hazard Reduction Act or the Toxic Substances Control Act, because neither included provisions expressly waiving sovereign immunity in actions brought by private individuals. The court determined that the waiver of immunity for civil penalties and fines could not be read to imply a waiver of immunity for monetary damages in civil suits.

In another troubling decision, *U.S. v. Allegheny Ludlum Corp.*,²⁵⁸ a corporation was sued for violating the Clean Water Act at its steel manufacturing facilities. The company stipulated to violating some laws under the Act, and a jury found that it had committed other violations. The District Court held that the company should be fined, entering a judgment against it for more than \$8.2 million. Alito joined Judge Becker in overturning the District Court's decision to reject the corporation's lab error defense and choice of applicable interest rate for the penalty calculation, vacating the judgment amount and remanding the case to the District Court for further proceedings. In a dissent, Judge Fuentes criticized his colleagues' decision to substitute their own judgment for that of the trial court as it pertained to the appropriate penalty interest rate.

While Alito's record in relatively straightforward cases is mixed, it is his record on the complex constitutional and other issues likely to divide the Supreme Court on

²⁵⁶ See *PA, Dept. of Envtl. Resources v. U.S. Postal Serv.*, 13 F.3d 62 (3d Cir. 1993) (writing for a unanimous court that an expressed "sue-and-be sued clause in the [Postal Reorganization Act ("PRA")] "waived the U.S. Postal Service's immunity from suit and civil penalties, unless within a PRA exception).

²⁵⁷ 426 F.3d 241 (3d Cir. 2005).

²⁵⁸ 366 F.3d 164 (3d Cir. 2004).

environment-related cases that is cause for serious concern and opposition. In cases involving such issues, as those previously discussed, Samuel Alito has repeatedly ruled in ways that seriously threaten the validity, scope, and enforcement of laws that have been established to protect our environment.

VII. Corporate Power and Individual Rights

As news articles and commentators have noted, the nomination of Samuel Alito to replace Justice Sandra Day O'Connor on the Supreme Court has pleased corporate executives and business leaders, who expect him to be a solid vote to protect the interests of big business.²⁵⁹ Robin Conrad, senior vice president of the legal arm of the National Chamber of Commerce, has said that "[Alito] has come down on a host of issues in a way that the business community would prefer," and John Engler, president of the National Association of Manufacturers and former Republican governor of Michigan, has hailed Judge Alito as standing "in good stead" with the association.²⁶⁰

At the same time that big business has heralded Alito, labor unions, civil rights organizations and individuals dedicated to protecting worker rights have united in opposition to his confirmation. The AFL-CIO, a federation of national and international unions representing more than 9 million workers, and SEIU, the fastest growing union in North America with 1.8 million members, have opposed Alito's confirmation. Judge Alito has written dissents and other opinions that seek to interpret the scope of employment and worker protection laws narrowly, making it harder for workers to bring legal claims. In addition to the cases that were discussed in Section III of this report [concerning employment discrimination], these have included dissents that would have, for example, excluded many newspaper employees from protection under minimum wage laws and removed mine health and safety protections from workers at coal processing sites. In addition, Alito has written a number of other opinions that have tried to protect business. In addition to the troubling environmental decisions discussed in section VI above, Alito has, for example, tried to reverse an antitrust verdict against a big

²⁵⁹ See M. Selvin, "Court Nominee Has Free-Market Bent; Bush's choice to replace retiring Justice Sandra Day O'Connor has a pro-business record," *Los Angeles Times* (Nov. 1, 2005); P. Waldmeir, "Alito track record in judging cases encourages US business," *Financial Times (London, England)* (Nov. 2, 2005); L. Woellert, "A Business Kind of Guy; Executives like Alito's record on key issues," *Business Week* (Nov. 14, 2005); S. Labaton, "Court Nominee Has Paper Trail Businesses Like," *New York Times* (Nov. 5, 2005) ("Court Nominee Has Paper Trail").

²⁶⁰ Court Nominee Has Paper Trail.

corporation of more than \$68 million, and written a decision in favor of an asbestos company that one of his colleagues severely criticized as undermining all civil conspiracy claims.

While Judge Alito occasionally has written or joined opinions and dissents that oppose the interests of business, these occasions “are considered by both supporters and critics to be exceptions.”²⁶¹ On the whole, Judge Alito has “reliably favored big business litigants,” and his record on the Third Circuit reveals a deep skepticism of suits against large corporations and government efforts to protect the rights of workers and consumers by regulating business.²⁶² As demonstrated by the cases discussed below, his record in this area adds significantly to the case against his confirmation.

A. Worker Protection

- *Reich v. Gateway Press, Inc.*, 13 F.3d 685 (3d Cir. 1994)

The Secretary of Labor sued Gateway Press, a publisher of nineteen community newspapers, claiming that the company had willfully violated the minimum wage, overtime and records requirements of the Fair Labor Standards Act in connection with the wages paid to its reporters. The company argued that all but six of the nineteen papers fell within the scope of the FLSA’s “small newspaper” exemption. The trial court ruled that the company had violated the FLSA only with respect to the six papers, and rejected the Labor Secretary’s argument that the court should look at the aggregate circulation of

²⁶¹ *Id.* Examples include *Cruz v. Chesapeake Shipping, Inc.*, 932 F.2d 218 (3d Cir. 1991) (dissenting opinion that federal minimum wage provisions applied to seamen on all American flagships); *Cort v. Proctor*, Office of Workers’ Compensation Programs 996 F.2d 1549 (3d Cir. 1993) (unanimous opinion reversing administrative decision denying benefits to retired coal miners); and *Danvers Motor Co. v. Ford Motor Co.*, 2005 U.S. App. LEXIS 28035 (3d Cir. Dec. 19, 2005) (unanimous opinion that Ford dealers had met minimum threshold to bring claim against Ford concerning program allegedly violating franchisee rights).

²⁶² Court Nominee Has Paper Trail.

the nineteen papers, or at least the circulations of the five groups into which the papers were organized, in determining whether the company was entitled to the exemption.

A Third Circuit panel reversed the trial court's decision regarding the small newspaper exemption, concluding that, in applying the exemption, the court should have aggregated the circulations of the nineteen papers within each of the five groups because the papers within each group were under unified operation and control and engaged in related activities for a common publishing purpose. Judge Alito, however, dissented. He would have held that the workers at thirteen of the newspapers were entitled to no minimum wage protections.

- *DiGiacomo v. Teamsters Pension Trust Fund of Philadelphia and Vicinity*, 420 F.3d 220 (3d Cir. 2005)

DiGiacomo was a member of the Teamsters Union and a participant in the union's pension trust fund. From 1960 to 1971, he earned 10.5 years of benefit service for "covered employment," for which employer contributions on his behalf were paid to the fund according to a collective bargaining agreement with the union. He returned to covered employment in 1978, and earned approximately 18 additional years of benefit service. DiGiacomo applied to the trust fund for pension benefits in 2000. In computing his accrued pension benefits, the fund disregarded the 10.5 years of his service that preceded the passage of the Employee Retirement Income Security Act of 1974 (ERISA). The employee sued the fund in federal court, but the trial court granted the fund's motion to dismiss the employee's complaint.

A Third Circuit panel reversed the trial court and ruled that ERISA's plain and unambiguous language required the fund to credit DiGiacomo with his 10.5 years of pre-break service. Judge Alito dissented, however, and would have affirmed the lower court's dismissal of DiGiacomo's lawsuit. The majority said that Judge Alito "oversimplified" and misanalyzed ERISA's provisions. *Id.* at 224, n.9.

- *RNS Services, Inc. v. Secretary of Labor*, 115 F.3d 182 (3d Cir. 1997)

RNS Services appealed an order from the Federal Mine Safety and Health Review Commission (Commission) that it had violated federal mining law, on the grounds that the federal mine safety and health administration lacked jurisdiction over one of its facilities. The Commission held that the activities of loading and transporting coal, which occurred at the facility, were sufficient to render it a “mine” within the meaning of federal mine safety law. A Third Circuit panel affirmed the Commission’s decision that the agency had jurisdiction over the facility in question, finding that its principal function was loading coal, an activity specifically covered by federal mining law. Judge Alito dissented from the ruling and would have held that the Commission did not have any power to protect workers at the coal processing site.

- *Luden’s Inc. v. Local Union No. 6 of the Bakery, Confectionary and Tobacco Workers Int’l Union of America*, 28 F.3d 347 (3d Cir. 1994)

Luden’s and a union that represented some of the company’s employees signed a collective bargaining agreement (CBA) governing employees’ terms of employment. The CBA incorporated a grievance procedure, the final step of which permitted either party to submit unresolved grievances to final and binding arbitration. Prior to the termination of the bargaining agreement, the union gave the company notice of its intention to change, modify or terminate the agreement, and the parties began negotiating a new CBA. The first CBA contained a provision stating that the agreement would remain in effect through April 1991, or until a new agreement between the parties had been reached, and that the wage clause of any new CBA would be retroactive to the April 1991 termination date. The first CBA expired and the parties continued negotiating.

The company made a proposal that the union found acceptable, but was silent as to the retroactive payment of wages. The union members voted to accept the proposal, and Luden’s posted a notice outlining what it believed to be the terms of the new agreement, including that the new wage scale would go into affect immediately, not retroactively to the date that the first CBA expired. Disagreeing with the company’s position, the union initiated the grievance procedures under the first CBA. The company

sued the union and the American Arbitration Association (which was authorized under the CBA to conduct any arbitration), seeking a judgment that the wage dispute between the parties was not arbitrable and an injunction preventing the arbitration from proceeding. The trial court ruled in the company's favor and permanently enjoined the arbitration from going forward.

In a 2-1 decision, a Third Circuit panel reversed the trial court decision and found that the duty to arbitrate the retroactive wage dispute arose as a term of an "implied-in-fact" CBA between the company and the union. The court also held that incorporating the arbitration clause into the implied-in-fact CBA between the parties was compatible with federal labor policy, because it promoted the NLRA's statutory objectives of peaceful and stable labor relations, at the minor cost of forcing parties to make clear that they no longer wish to abide by arbitration clauses. Judge Alito dissented, stating that he would affirm the district court ruling, preventing the union from resolving the wage claim through arbitration.

- *Hotel Employees and Restaurant Employees Int'l Union Local 54 v. Elsinore Shore Associates*, 173 F.3d 175 (3d Cir. 1999)

Former employees of the Atlantis Hotel and Casino sued Elsinore Shore Associates, the owner of the company, claiming that its failure to provide the employees with 60 days notice of the closing of the casino violated the Worker Adjustment and Retraining Notification Act (WARN), which provides that "an employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notices of such an order" to its employees or their representatives. *Id.* at 180 (*quoting* WARN). The financially troubled casino had been ordered closed by the Casino Control Commission, and the lower court held that Elsinore Shore Associates' failure to provide notice was excused by the "unforeseen business circumstances" exception to the law. Judge Alito concurred in the judgment of a Third Circuit panel upholding the lower court ruling that Elsinore's failure to provide 60 days notice was justified by the exception. He wrote a separate concurrence to express his opinion that WARN did not

apply at all to government-ordered closing of a business, such as the one at issue in this case. Accordingly, he would have held that there are no circumstances under which an employer ordered closed by the government would be required to provide its employees with 60 days notice before closing the business.

- *Caterpillar, Inc. v. Int’l Union, United Automobile, Aerospace and Agricultural Implement Workers of America*, 107 F.3d 1052 (3d Cir. 1997) (*en banc*)

Caterpillar challenged the legality, under Section 302 of the Labor Management Relations Act, of “no docking” provisions, which had been incorporated into collective bargaining agreements between the company and the union since 1973. Under these provisions, Caterpillar employees who were also union stewards and committeemen and grievance chairmen were allowed to devote a portion, or all, of their work week to union business without losing pay. A labor dispute in 1991 between the employer and union resulted in employees working without a contract and, a year later, the company unilaterally stopped paying the grievance chairmen and filed suit seeking a declaratory judgment that those payments violated Section 302. Section 302(a) provides that “[i]t shall be unlawful for any employer . . . to pay, lend, deliver, or agree to pay, lend, or deliver, any money or other thing of value -- (1) to any representative of any of his employees who are employed in an industry affecting commerce. . . .” *Id.* at 1054 (*quoting* Labor Management Relations Act).

In a 9-3 *en banc* decision, the Third Circuit ruled that, although Caterpillar’s wage payments to grievance chairmen appeared to violate Section 302(a) on its face, another section of the law clarified that, if the grievance employees received the compensation “by reason of” their “service[s] as employees,” the wage payments would be lawful. *Id.* The court reasoned that, while no-docking provisions were not compensation for hours worked in the past, they arose “by reason of” the employees’ service, because the no-docking provisions arose out of the collective bargaining process itself. Judge Alito and two other judges dissented from the majority decision. Alito wrote that although he “would not vote to criminalize the payments to grievance chairmen that are at issue

here,” if he were a legislator, the plain meaning of Section 302 would be conclusive and prohibit Caterpillar from paying the grievance chairmen. *Id.* at 1066. He would have ruled that the no docking provisions were illegal.

- *Alden Leeds, Inc. v. Occupational Safety and Health Review Comm’n*, 298 F.3d 256 (3d Cir. 2002)

In 1993, Alden Leeds, a maker of pool chemicals, was cited by the Occupational Safety and Health Administration (OSHA) for thirteen instances of improper storage of oxidizers at one of its facilities, and the company entered into a settlement agreement in which it agreed to abate the violations. When OSHA reinspected the facility in 1994, it found thirty-three new instances of improper storage of oxidizers and issued a notice of failure to abate the violations and fined the company \$107,100. The company appealed the failure to abate notification and fine to an administrative law judge, and then to the Occupational Safety and Health Review Commission (Commission), arguing that the 1993 citation did not provide adequate notice that it was obligated to address its overall storage practices at the facility, rather than merely abate the thirteen violations that OSHA had identified in 1993. Both the ALJ and Commission upheld OSHA’s order and fine against the company. However, Judge Alito wrote an opinion reversing the Commission’s decision upholding the OSHA order and fine.

- *Belcufine v. Aloe*, 112 F.3d 633 (3d Cir. 1997)

Shenango Corporation, a Pennsylvania-based maker of coke and iron products, filed for bankruptcy under Chapter 11. After the bankruptcy petition was filed, former employees of the company who claimed that they were owed money for vacation and supplemental retirement benefits sued the company and two company officers in state court, under the Pennsylvania Wage Payment and Collection Law (WPCL). The law provides that, when a corporation fails to pay wages and benefits that it owes its employees, the corporation’s top officers can be held personally liable. The officers

removed the case to federal court, and the bankruptcy court ruled for the officers and company.

Judge Alito wrote the opinion for a split Third Circuit panel affirming the district court decision, including that the corporate officers could not be held personally liable for the corporation's debts. Judge Greenberg dissented from the part of the majority decision finding that the officers could not be held personally liable. As he explained, "[t]here cannot be the slightest doubt" that the legislature intended that the officers should be liable for the payments if the corporation did not make them. *Id.* at 642-43.

- *National Labor Relations Board v. Alan Motor Lines Inc.*, 937 F.2d 887 (3d Cir. 1991)

Alan Motor Lines appealed an order of the National Labor Relations Board, finding that the company had violated provisions of the National Labor Relations Act (NLRA) by refusing to rehire an employee because he had engaged in union activities. In a unanimous Third Circuit decision, however, Judge Alito reversed the Board's decision. Although Judge Alito acknowledged that the record contained "considerable evidence" of anti-union activity by the company, including evidence of company representatives interrogating employees about union activities, threatening employees with discharge and plant closure if they supported union activities, and telling employees that it would never allow a union, he stated that the evidence was insufficient to sustain the Board's determination that the company had violated the NLRA by refusing to rehire the employee. *Id.* at 891.

- *Bolden v. SEPTA*, 953 F.2d 807 (3d Cir. 1991) (*en banc*), *cert. denied*, 504 U.S. 943 (1992)

Mr. Bolden worked for five years for the Southeastern Pennsylvania Transit Authority (SEPTA) as a maintenance custodian. In 1986 he was fired after an altercation with another SEPTA employee. Bolden's union submitted a grievance on his behalf.

Meanwhile, SEPTA unilaterally issued a new employee drug-testing policy which, among other things, required employees returning from more than 30 days absence to submit to a drug test. The union challenged the policy in court. Before the court had ruled on the drug testing policy, SEPTA and the union resolved Bolden's grievance and he was invited to return to work after submitting to the required drug test. Bolden failed the drug test and was fired again. After Bolden was fired for the second time, a court ruled that the drug-testing policy was unconstitutional and enjoined SEPTA from performing drug tests. Subsequently, Bolden filed another grievance. This time SEPTA and the union agreed that Bolden should be allowed to return to work if he submitted to additional drug testing and substance abuse treatment. Bolden refused the drug testing and treatment and did not return to work.

Bolden then sued SEPTA for various violations of his constitutional rights, especially his Fourth Amendment right to be free of unreasonable searches. After a jury trial, the district court ruled for Bolden and against SEPTA. Eventually, the case was heard by the entire Third Circuit sitting *en banc*. In an opinion by Alito, the court rejected most of SEPTA's arguments, but it ultimately ruled against Bolden because it found that the union had validly consented on Bolden's behalf to the second drug test as a requirement of reemployment. In other words, the court held that employees could be bound by collective bargaining to a drug test that would otherwise be unconstitutional without their consent. Judge Nygaard dissented, writing that "[i]ndiscriminate drug testing, entailing invasive blood drawing or other bodily intrusions, is not rendered reasonable for Fourth Amendment purposes by a collective bargaining agreement. The Fourth Amendment bars such drug testing absent a valid *individual* consent or waiver." 953 F.2d at 834 (emphasis in original).

B. Other Corporate Issues

- *LePage's, Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003) (*en banc*)

The tape company LePage's sued the 3M Corporation, charging that 3M had engaged in anti-competitive practices that violated several anti-monopoly provisions of federal antitrust law. 3M's alleged illegal practices included offering large lump-sum cash payments, promotional allowances and other cash incentives to some of LePage's customers to encourage them to enter into exclusive dealing arrangements with 3M and the use of a multi-tiered bundled rebate structure, which offered higher rebates when customers purchased products in a number of different 3M product lines. 3M admitted to engaging in these anti-competitive practices but claimed that, absent a showing that its products were sold below cost, they were not illegal. After a nine-week trial, the trial judge entered a judgment against 3M and ordered the company to pay LePage's \$68 million in damages. In a 7-3 *en banc* ruling, the Third Circuit upheld the lower court judgment against 3M. Judge Alito joined a dissent written by Judge Greenberg, however, which would have held that 3M's anti-competitive practices were legal and would have reversed the multi-million dollar verdict against the company.

- *Kleinknecht v. Gettysburg College*, 989 F.2d 1360 (3d Cir. 1993)

The parents of a college lacrosse player who died after having a heart attack during a practice of the lacrosse team brought a wrongful death and survival action against the college. The trial court ruled in favor of the college, holding that it had no duty to anticipate and guard against the chance of a fatal heart attack in a young healthy athlete, that the actions taken by school officials after the young man's heart attack were reasonable, and that the college did not negligently breach its duty to him. On appeal, a Third Circuit panel ruled that the college had a duty to care for the Kleinknechts' son in his capacity as an intercollegiate athlete engaged in sports activity for which they had recruited him specifically, and that the school had a duty to provide prompt and adequate emergency services to the young man while he was engaged in intercollegiate activity. It concluded that whether or not the college had, in fact, breached that duty was a question of fact to be determined on remand by the trial court. Judge Alito dissented from the majority opinion, stating that the facts upon which the plaintiffs relied were insufficient to establish a breach of the college's duty to participants in its intercollegiate sports

program. He would have denied the parents the opportunity even to make their case at the trial court level.

- *In re Burlington Coat Factory Securities Litigation*, 114 F.3d 1410 (3d Cir. 1997)

A class of investors who purchased stock in Burlington Coat Factory (BCF) over an 11-month period sued the company and its officers and directors for securities fraud following a precipitous drop in the company's stock price after poor earnings followed favorable projections by company executives. Judge Alito wrote an opinion upholding the dismissal of most of the claims and making clear that those that remained would face a heavy burden. Siding with other courts that had imposed an approach favorable to defendant corporations and contrary to another appellate court, Alito wrote that to "allow plaintiffs and their attorneys" to "subject" companies to what Alito called "wasteful litigation" based on what he called "the detection of a few negligently made errors found subsequent to a drop in stock price" would be "contrary" to the goal of "deterrence of frivolous litigation based on accusations that could hurt the reputation of those being attacked." *Id.* at 1418.

- *Pfizer Inc. v. Giles*, 46 F.3d 1284 (3d Cir. 1994)

As part of extensive litigation concerning the sale of harmful asbestos-containing products to school districts without appropriate warnings, Pfizer Inc. appealed a lower court decision that refused to dismiss a claim of civil conspiracy against Pfizer and other defendants, even though the litigation was ongoing. Judge Alito wrote an opinion for a divided court that granted the extraordinary relief of a writ of mandamus, reversed the district court, and dismissed the conspiracy claims. The dissenting judge strongly disagreed, both on the propriety of allowing Pfizer to appeal the issue while the rest of the case was still pending and on Alito's decision to dismiss the conspiracy claims. As Judge Stapleton explained, Alito's opinion threatened to undermine civil conspiracy claims by suggesting that "[j]oining together with others" could somehow "render legal conduct that would be illegal if engaged in on one's own." *Id.* at 1296.

- *Beauty Time, Inc. v. Vu Skin Systems, Inc.*, 118 F.3d 140 (3d Cir. 1997)

A small corporation and its sole shareholder brought a lawsuit under the Lanham Act contending that a competitor had committed fraud in re-registering a trademark. The lower court dismissed the case because it was filed too late under Pennsylvania law, but the Third Circuit majority reversed, explaining that the statute of limitations for filing the claim did not begin to run (or be “tolled”) until the fraud was discovered or reasonably should have been discovered. Even though he acknowledged that the relevant law was ambiguous and the majority’s rule was “sound public policy,” Alito dissented and argued that “tolling” does not apply unless the person committing the fraud later actively concealed it. *Id.* at 152. The majority strongly disagreed, finding that Alito’s view was “inexplicable” and “makes no sense” since it would make it easier for those who commit fraud to avoid any action against them unless they actively concealed their fraud as well. *Id.* at 144, 147.

VIII. The First Amendment: Religious Liberty and Freedom of Speech

The First Amendment contains two Religion Clauses, each independently critical to the protection of religious liberty in this country. The Free Exercise Clause ensures that all Americans can worship as they see fit and live according to the dictates of their chosen faith. The Establishment Clause prohibits the government not only from establishing an official religion but also requires the government to be neutral toward religion and to refrain from promoting or endorsing religious beliefs. It also protects every American from being coerced by the government to participate in religious worship and religious practices. Together, the Religion Clauses of the First Amendment have protected and advanced religious liberty and freedom of conscience in America for more than 200 years.

These precious liberties, however, now hang precariously in the balance on a very divided Supreme Court. Justice O'Connor has been a key vote in Establishment Clause cases, and more than once has cast the critical fifth vote in 5-4 decisions that have preserved religious liberty for all Americans. *See, e.g., McCreary County v. ACLU*, 125 S. Ct. 2722 (2005) (5-4 decision striking down county courthouse displays of the Ten Commandments created for the impermissible government purpose of advancing religion), and *Lee v. Weisman*, 505 U.S. 577 (1992) (5-4 ruling holding school-sponsored prayer at public school graduations to be unconstitutional).

It is clear that replacing Justice O'Connor with Samuel Alito would move the Court well to the right on issues of religious liberty. Although Judge Alito does not appear to be out of the legal mainstream in his interpretation and application of the Free Exercise Clause or the Free Speech Clause, his record is quite different when it comes to the Establishment Clause. Several of his opinions in free speech and free exercise cases also raise concerns, as discussed below.

A. The Establishment Clause

Judge Alito clearly does not view the Establishment Clause and the Free Exercise Clause as twin pillars of equal importance, but instead would upset the careful balance involving these two key protections of religious liberty. As a judge, Alito has consistently ruled against plaintiffs in Establishment Clause cases. And he interprets the Establishment Clause in a manner that would not preserve government neutrality toward religion but would instead allow government to favor religion and to interfere with Americans' freedom of conscience. This can be seen from Alito's pre-judicial record as well as his record as a judge.

In his 1985 memorandum seeking a promotion to the position of Deputy Assistant Attorney General, Alito wrote that “[i]n college, I developed a deep interest in constitutional law, motivated in large part *by disagreement with Warren Court decisions*, particularly in the areas of . . . the Establishment Clause”²⁶³

The Warren Court's key Establishment Clause rulings -- *Engel v. Vitale*, 370 U.S. 421 (1962), and *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963) -- struck down government-sponsored prayer and government-sponsored devotional Bible reading in public schools. In so doing, they reaffirmed that government neutrality toward religion is an essential component of the Establishment Clause. As the Court stated in *Schempp*, “[i]n the relationship between man and religion, the State is firmly committed to a position of neutrality.” 374 U.S. at 226. And in these cases, the Court recognized that an essential purpose of the Establishment Clause is to protect religious liberty itself, for “a union of government and religion tends to destroy government and to degrade religion.” *Engel*, 370 U.S. at 431.

Engel and *Schempp* have been critical to the right of every public school student to be free of school-sponsored and coerced religious worship, and particularly to the protection of students who are members of minority religious faiths in their communities.

²⁶³ 1985 Job Application.

Nonetheless, these important rulings have been demonized by the Religious Right, which has falsely claimed that these decisions removed God and prayer from public schools. It is extremely troubling that Alito disagreed as late as 1985 with the holdings of such important cases.

Even more troubling, given that Alito has now been nominated to a lifetime seat on the Supreme Court, is the fact that the hostility to these cases and thus to the existence of a meaningful Establishment Clause that Alito expressed in his 1985 memorandum can be seen in his judicial record as well. As discussed below, this is particularly so in the dissenting opinion that Alito joined in *ACLU of New Jersey v. Black Horse Pike Regional Board of Education*, 84 F.3d 1471 (3d Cir. 1996) (*en banc*).

Indeed, citing the *Black Horse Pike* case, the Editorial Page Editor of the *Atlanta Journal-Constitution* has written that if Alito “ascends to the nation’s highest court, he is likely to further erode the protections that have kept the majority from imposing their religious views on the minority.”²⁶⁴ Moreover, according to some senators of both parties, Judge Alito during his meetings with them following his nomination “told them he believed the [Supreme] [C]ourt might have gone too far in separating church and state.”²⁶⁵ And as law professor and First Amendment scholar Douglas Laycock has stated concerning Alito’s judicial record, Alito’s “establishment-clause opinions are very deferential to government support for religion.”²⁶⁶

The following cases demonstrate that there is ample reason to be concerned that, if confirmed to the Supreme Court, Judge Alito would undermine the important religious liberty protections given by the Establishment Clause.

²⁶⁴ Cynthia Tucker, “Campaign for Religious State is No Blessing,” *Atlanta Journal-Constitution* (Dec. 18, 2005).

²⁶⁵ David Kirkpatrick, “Nominee is Said to Question Church-State Rulings,” *New York Times* (Nov. 4, 2005), at A22.

²⁶⁶ Bloomberg News, “Alito Would Likely be Religion’s Best Friend on U.S. Supreme Court” (Dec. 21, 2005).

- *ACLU of New Jersey v. Black Horse Pike Regional Board of Education*, 84 F.3d 1471 (3d Cir. 1996) (*en banc*)

In *Black Horse Pike*, the Third Circuit, sitting *en banc*, issued a 9-4 ruling striking down a public school board policy that authorized student-led prayer at official, school-sponsored high school graduation ceremonies, based on a vote of the graduating seniors. Judge Alito joined the dissent, a very disturbing opinion that would have trampled on the constitutional right of students not to be made captive audiences to religious observance by the government as the price of admission to their own graduations.

Prior to adopting the prayer policy in question, the school district had a longstanding tradition of including prayers delivered by local clergy at high school graduations. After the Supreme Court struck down such practices in *Lee v. Weisman*, 505 U.S. 577 (1992), the school district adopted the policy at issue in *Black Horse Pike* in an effort to preserve its prior practice of having prayer at graduations. The majority of the full Third Circuit held that the new policy was unconstitutional under *Lee v. Weisman* as well as under the Supreme Court's traditional Establishment Clause analysis expressed in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

As the majority recognized, the fact of a student vote did not cure the constitutional problem: "An impermissible practice cannot be transformed into a constitutionally acceptable one by putting a democratic process to an improper use." 84 F.3d at 1477. The student vote likewise "does not erase the state's imprint from this graduation prayer," and graduation remained "a school sponsored event." 84 F.3d at 1479. The majority further explained that "[t]he First Amendment is a shield that prohibits the state from interfering with a person's right to worship as he or she pleases. It is not a sword that can be used to compel others to join in a religious observance at a state sponsored event." 84 F.3d at 1481.

Judge Alito joined a dissent written by Judge Mansmann, which would have upheld the prayer policy as a matter of free exercise and free speech. The dissent evinced

a troubling disregard for the rights of the students who were opposed to having a prayer at their graduation. Claiming that the policy “cannot be deemed to cause” these students “to feel that they are not fully incorporated into the community,” the dissent asserted that it was sufficient for them to have been “fully invited to partake in the community via the right to vote on the issue of school prayer . . .” 84 F.3d at 1494. The dissent gave short shrift to the school district’s authorization of the student vote and sponsorship of the graduation ceremonies, and effectively would have allowed the Free Exercise Clause to trump the Establishment Clause.

Significantly, in the later case of *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), the Supreme Court, in an opinion joined by Justice O’Connor, reached exactly the opposite conclusion, striking down a public school board policy that authorized student-led prayer at high school football games, based on a vote of the students. And, as noted above, Justice O’Connor was also part of the majority in *Lee v. Weisman*, another 5-4 ruling.

Clearly, replacing Justice O’Connor with Judge Alito would pose a grave threat to the rights of students and others not to be subjected to coercive and other religious practices at the hands of government. Indeed, Pat Robertson’s legal arm, the American Center for Law and Justice, has written that given Judge Alito’s position in *Black Horse Pike*, he is “likely” to have joined the dissenters in *Santa Fe Independent School District v. Doe*.²⁶⁷ Perhaps even more ominously, the Southern Baptist Convention’s Richard Land has described the recent decision ruling unconstitutional the teaching of “intelligent

²⁶⁷ American Center for Law & Justice Memorandum from John Tuskey, *et. al*, to Jay Sekulow Re “The Judicial Philosophy of Potential Supreme Court Nominee Samuel Alito,” (Oct. 28, 2005), at 16. According to Senator John Cornyn, who as Texas Attorney General argued on behalf of Texas in the Supreme Court in *Santa Fe ISD v. Doe* and lost, Judge Alito had “commiserate[d]” with him over that loss during Cornyn’s meeting with the nominee. David Kirkpatrick, “Nominee is Said to Question Church-State Rulings,” *New York Times* (Nov. 4, 2005).

design” in public school science classrooms as a “poster child” for a “secularist reign of terror that’s coming to a rapid end” with “soon-to-be Justice Alito.”²⁶⁸

- *ACLU of New Jersey v. Schundler*, 168 F.3d 92 (3d Cir. 1999)

Judge Alito’s opinion in this divided case further indicates the short shrift that he gives to the Establishment Clause and his willingness to allow government promotion of religion. In particular, it suggests serious concerns with respect to his view of the important principle that government action intended to promote religion is unconstitutional.

For decades, Jersey City had erected and maintained a winter “holiday” display consisting of a creche and a menorah in front of its City Hall. The ACLU filed suit against the City in December 1994, challenging the constitutionality of this display. A federal district court agreed that the display was unconstitutional, and issued a permanent injunction prohibiting the city from “erecting the creche and menorah display . . . or any substantially similar scene or display. . . .” *ACLU of New Jersey v. Schundler*, 104 F.3d 1435, 1439 (3d Cir. 1997) (quoting district court), *cert denied*, *Schundler v. ACLU*, 520 U.S. 1265 (1997). Despite the injunction, the City in December 1995 again erected its creche and menorah display, this time adding “a four-foot tall plastic figure of Santa Claus, a four-foot tall plastic figure of Frosty the Snowman, and a red wooden sled.” *Id.* The ACLU asked the district court to enjoin the modified display but the district court refused, stating that the religious symbols in the display had been sufficiently “demystified,” “desanctified” and “deconsecrated.” *Id.*

On appeal, a panel of the Third Circuit, not including Judge Alito, affirmed the district court’s holding that the City’s original display was unconstitutional and also held that the court had used an incorrect legal standard in evaluating the constitutionality of the modified display. *Id.* at 1435 (3d Cir. 1997). Accordingly, the appellate court

²⁶⁸ M. Powell, “Advocates of ‘Intelligent Design’ Vow to Continue Despite Ruling,” *Washington Post* (Dec. 22, 2005).

remanded the case to the district court to determine whether the modified display was constitutional under the correct legal principles. In its opinion, the Third Circuit plainly indicated its belief that the modified display was unconstitutional, stating that:

[t]he token additions of the secular symbols do little to alter the “context” of the focal points of the City’s display. We reiterate that Jersey City’s display of the crèche at the seat of City government power impermissibly conveyed a message of government endorsement of religion. And, in our view, the City’s addition of Santa, Frosty, and a red sled did little to secularize that message.

Id. at 1452. On remand, clearly heeding the signal from the Third Circuit, the district court held that the modified display was unconstitutional. The court observed that the City’s “addition of the secular symbols was ‘a ploy designed to permit continued display of the religious symbols.’” 168 F.3d at 105 (quoting district court). The City appealed; this time the three-judge panel of the Third Circuit that heard the appeal included Judge Alito.

The panel did not disturb the district court’s ruling concerning the City’s original display, but in a 2-1 decision written by Judge Alito it did overturn the district court’s holding that the modified display was unconstitutional. According to Judge Alito, the first panel’s comments concerning the modified display were merely dicta and therefore the second panel was not obligated to follow them. And, according to Alito, the modified display was constitutional under *Lynch v. Donnelly*, 465 U.S. 668 (1984), and *County of Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989). Alito specifically rejected the ACLU’s argument that the City’s addition of the secular symbols as a “ploy” to permit continued display of the religious symbols reflected an impermissible purpose behind the modified display.

Judge Nygaard, who sat on both panels, dissented and would have held that the modified display did not pass muster under *Lynch* or *County of Allegheny*, stating, “I still conclude that the addition of a few small token secular objects is not enough to

constitutionally legitimate the modified display.” 168 F.3d at 109. Nygaard also strongly criticized the majority for its “lack of consistency” in not following the prior panel opinion as to the modified display, stating that “[t]his constitutional about-face in the same case . . . strikes to the core of the legitimacy of our jurisprudence. . . .” *Id.* at 114.

In addition to Judge Alito’s willingness to disregard the prior panel’s opinion, Judge Alito also evidenced in this case a disturbing willingness to overlook evidence of a government purpose to advance religion, although Supreme Court precedent makes such action to promote religion unconstitutional.²⁶⁹ Indeed, in the recent case of *McCreary County, Kentucky v. ACLU*, 125 S. Ct. 2722 (2005), the Court in a 5-4 ruling struck down a county-sponsored Ten Commandments display erected with the purpose of advancing religion, holding that the county’s subsequent addition of several secular documents to the display in an effort to keep the Ten Commandments posted did not cure the impermissible religious purpose. Justice O’Connor was in the majority in *McCreary*, indicating again that replacing her with Judge Alito would dramatically shift the Court’s Establishment Clause jurisprudence, to the detriment of religious liberty rights.

- *ACLU-NJ v. Township of Wall*, 246 F.3d 258 (3d Cir. 2001)

In this case involving a government-sponsored holiday display, Judge Alito ruled that the plaintiffs did not even have standing to challenge the display. The district court had rejected this argument, holding that the plaintiffs had standing “as a result of their ‘direct personal contact with the government-sponsored religious display’” that “made them ‘feel less welcome, less accepted, tainted and rejected.’” 246 F.3d at 260 (quoting district court).

In 1998, the Township of Wall erected a “holiday” display, including a creche and other symbols associated with Christmas, near the entrance to a municipal office building. Mr. and Mrs. Miller, two town residents and taxpayers who presented evidence that they regularly visited the municipal building in 1998, brought suit challenging the

²⁶⁹ See, e.g., *Lemon v. Kurzman*, 403 U.S. 602 (1971).

constitutionality of the display. In December 1999, while the case was pending, the Township erected a modified display that included a menorah in addition to a creche and other Christmas holiday symbols. Mr. Miller testified that he observed the 1999 display at least once, and the Millers sought an injunction prohibiting this display, to which the Township later directed that a reindeer and sleigh be added. Although the district court agreed that the Millers had standing to bring their lawsuit, it held that the modified display was constitutional. The Millers then appealed.

Judge Alito authored a unanimous opinion for the Third Circuit panel in which he held that the Millers did not have standing to challenge the 1999 display, either as taxpayers or on the basis of non-economic injury. First, Alito held that the Millers had not established that the Town spent any money “on the religious elements of the 1999 display,” and held that the court could not assume that the Town had spent “more than a de minimis amount in lighting” those elements. 246 F.3d at 263, 264. Second, Alito held that the feelings of resentment and exclusion suffered by the Millers due to their exposure to the 1998 display did not provide the basis for a lawsuit challenging the 1999 display. Finally, Alito held that while Mr. Miller had testified that “he went to the municipal complex and observed the Township’s 1999 display, *it is unclear whether he did so in order to describe the display for this litigation or whether, for example, he observed the display in the course of satisfying a civic obligation at the municipal building.*” *Id.* at 266 (emphasis added). Alito’s opinion then ordered that the case be sent back to the district court and *dismissed*.

Alito’s cramped view of standing in this Establishment Clause case is quite disturbing. In particular, Alito engaged in *speculation* that Mr. Miller had been exposed to the display for a reason that Alito did not believe conferred standing. Even assuming this were the case, if the facts as to standing were unclear, the proper role of the appellate court would have been to send the case back to the district court for appropriate fact finding, not to dismiss the case. It is also worth observing that Judge Alito’s ruling here stands in sharp contract to his dissenting opinion in *C.H. v. Oliva*, discussed below, in

which he would have reached out to have the court of appeals decide claims regarding religious expression that ten other members of the court held were not properly before it.

- *Child Evangelism Fellowship of New Jersey v. Stafford Township School District*, 386 F.3d 514 (3d Cir. 2004)

Judge Alito wrote the court’s ruling affirming the grant of a preliminary injunction in favor of a proselytizing organization that sought to distribute its materials to students in the defendant school district’s elementary schools, to post materials in the schools, and to participate in back-to-school nights and distribute materials there. According to the court, Child Evangelism Fellowship (“CEF”) described itself as:

a Bible-centered, worldwide organization composed of born-again believers whose purpose is to evangelize boys and girls with the Gospel of the Lord Jesus Christ and to establish (disciple) them in the Word of God and in a local church for Christian living.

Id. at 521. “Child Evangelism sponsors Good News Clubs, which host weekly meetings for school-age children during after-school hours,” during which children study the Bible “and learn how to apply the stories and biblical principles” to their lives. *Id.* at 521-22.

Although the school district had agreed to allow the Good News Club to meet in its schools, CEF filed suit when the district, upon advice of counsel “due to Establishment Clause concerns,” *id.*, rejected CEF’s request to have its flyers and parental permission forms distributed to students. The school district also rejected CEF’s request to distribute materials at back-to-school nights. In addition to citing its concerns under the Establishment Clause, the district explained that it did not want to open the schools as a limited public forum, and also that it feared that distributing CEF’s materials would create divisiveness.

In his opinion, Judge Alito rejected the school district's defense that its fora were closed, noting that the district allowed a number of other outside groups (including the Four-H Club, PTA, and the Boy/Girl Scouts) to distribute and post materials. In addition, the court held that even if the fora were closed, the district could not engage in what Judge Alito described as viewpoint discrimination. Judge Alito opined that it was "clear" that the school district had engaged in such discrimination. *Id.* at 526. Judge Alito rejected the school district's argument that being required to distribute CEF's materials would violate the Establishment Clause because young students would perceive such distribution as government endorsement of religion, stating that the district could issue a disclaimer of endorsement and "teachers can explain the point to students." *Id.* at 534.

In sharp contrast, the Supreme Court has recognized that public school students, particularly young elementary school students, cannot necessarily be expected to understand these distinctions. As the Court said in *Edwards v. Aguillard*, "[s]tudents in such institutions are impressionable . . ." *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987).

Recently, Bloomberg News reported that law professor Marci Hamilton, a former law clerk for Justice O'Connor and the author of *God vs. the Gavel: Religion and the Rule of Law*, has stated that "her ex-boss probably would disagree" with Judge Alito's ruling "that let an evangelical Christian group distribute flyers at two public grade schools on the same basis as non-religious groups. 'For her, its never just equal treatment, it's also a question of, is the school endorsing religion, and are the students interpreting what the school is doing as endorsing religion?' said Hamilton. 'And that did not seem to concern Judge Alito very much.'"²⁷⁰

B. Free Exercise and Free Expression of Religious Belief

²⁷⁰ Bloomberg News, "Alito Would Likely be Religion's Best Friend on U.S. Supreme Court" (Dec. 21, 2005).

As noted in the introduction to this section, Judge Alito does not appear to be out of the legal mainstream in his interpretation and application of the Free Exercise Clause. He has written unremarkable opinions upholding Americans' free exercise rights.²⁷¹ Even so, the following cases raise concerns about whether Judge Alito has an equal concern for every American's legal rights.

As shown in other cases discussed in this report, Judge Alito has often endeavored to prevent the claims of litigants raising civil rights and other violations from even being fully heard in court. However, in a case involving the alleged violation of a student's right to engage in religious expression in school, he dissented and urged the court to reach out to decide claims that ten other judges on the court did not believe were properly before them. And, while Judge Alito has been particularly solicitous of individuals claiming that the government has prevented them from expressing their religious beliefs or following the dictates of their faith, that protectiveness did not extend to a Hindu organization seeking to build a temple nor to certain state prison inmates.

- *C.H. v. Oliva*, 226 F.3d 198 (3d Cir. 2000) (*en banc*), *cert. denied sub nom. Hood v. Medford Twp. Bd. of Educ.*, 533 U.S. 915 (2001)

According to the allegations of the complaint, Zachary Hood, a public school kindergartner, made a poster of Jesus in response to a Thanksgiving assignment in which each student was asked to create a poster of something for which he or she was thankful. Zachary's poster was hung in a hallway of the school along with all of the other students' posters. On a day when Zachary's teacher was out of school, the poster was taken down by school board employees because of its religious theme. When the teacher returned, she

²⁷¹ See, e.g., *FOP Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999), *cert. denied*, 528 U.S. 817 (1999) (striking down police department policy that prohibited male police officers from wearing beards except for medical reasons, but that had no exception for religious reasons); *Blackhawk v. Commonwealth of Pennsylvania*, 381 F.3d 202 (3d Cir. 2004) (prohibiting state agency from enforcing wildlife permit fee regulation that did not contain a religious use exception but did contain one for zoos and circuses). See also *Abramson v. William Paterson College*, 260 F.3d 265 (3d Cir. 2001)(concurring in decision that reversed grant of summary judgment against employee bringing claim of religious harassment).

re-hung the poster in the hallway, but in a less prominent place. The next year, when he was in first grade, Zachary allegedly was prevented from reading an adapted Bible story to his class because of the religious content of the story.

Zachary's mother, Carol Hood, sued the school board and several of its employees on behalf of her son, asserting claims under both the Establishment Clause and the Free Speech Clause. The district court held that no constitutional violations had occurred, and Ms. Hood appealed. Sitting *en banc*, the full Third Circuit was equally divided on the question of whether judgment was properly entered in favor of the defendants on the claim arising from the first grade episode, and so the district court's ruling as to that matter was affirmed.²⁷² The court majority, in a 10-2 ruling, further held that the complaint failed to state a claim against the defendants arising out of the kindergarten episode, but remanded the case to the district court in order to give Ms. Hood an opportunity to cure, if she could, certain deficiencies in her complaint identified by the majority, including the absence of allegations of personal involvement by the defendants in the kindergarten matter.

Judge Alito wrote a dissent (joined by Judge Mansmann) in which he criticized the majority for not confronting the First Amendment issue presented by the alleged discriminatory treatment of Zachary's poster, noting that the defendants had never raised any claims of deficiency in Ms. Hood's complaint. Alito contended that the court should have decided whether the removal of Zachary's poster under the circumstances alleged was a violation of his free expression rights, and wrote:

I would hold that discriminatory treatment of the poster because of its 'religions theme' would violate the First Amendment. Specifically, I would hold that public school students have the right to express religious views in class discussion or in assigned work, provided that their expression falls within the scope of the

²⁷² The Third Circuit's opinion does not identify which judges were on which side of this issue.

discussion or the assignment and provided that the school's restriction on expression does not satisfy strict scrutiny.

226 F.3d at 210. Alito added that public school teachers have the right to specify the subjects of student assignments, and that "if a student is asked to solve a problem in mathematics or to write an essay on a great American poet, the student clearly does not have a right to speak or write about the Bible instead." *Id.* at 211. Judge Alito would have reversed the district court's grant of judgment for the defendants and remanded the case for a determination of whether the defendants had treated Zachary's poster "in a discriminatory fashion because of its religious content," and, if so, whether the defendants' actions "were supported by a compelling reason and were narrowly tailored to serve that end." *Id.* at 214.

- *In Re: Four Three Oh, Inc.*, 256 F.3d 107 (3d Cir. 2001), *cert. denied* sub nom. *Bd. Of Adjustment v. BAPS Northeast, Inc.*, 534 U.S. 1056 (2001)

In a 2-1 ruling, with Judge Alito dissenting, the Third Circuit upheld rulings by both a Bankruptcy Court and the District Court in favor of a Hindu organization ("BAPS") seeking to build a temple for Hindu worship in North Bergen, New Jersey. The property in question, which was located in an industrial zone next to a Taco Bell, was owned by a debtor in bankruptcy; the Bankruptcy Court approved the sale of the property to BAPS, which agreed to purchase it contingent upon obtaining permission from the North Bergen Board of Adjustment ("the Board") for a use variance in order to use the property for a temple. BAPS applied for the variance, but the Board repeatedly postponed the hearing. The bankruptcy trustee sought relief from the Bankruptcy Court, which gave the Board a deadline for making a decision on BAPS's request for a variance.

The Board then held hearings on that request and ultimately denied it, "citing occupancy, traffic, and parking problems." 256 F.3d at 111. BAPS appealed to the Bankruptcy Court, "which reversed the denial, concluding that the Board had acted arbitrarily in refusing to consider reasonable restrictions that would alleviate problems

with occupancy, parking, ingress and egress. The Court remanded the application back to the Board to consider such restrictions.” *Id.*

On remand, the Board required BAPS, as a condition of granting the variance, to hire off-duty police to monitor traffic entering and exiting its parking lot. Not only was this a “financially burdensome” condition, but it was “impossible to fulfill,” because the chief of police informed BAPS that no off-duty officers were available. *Id.* The Board refused BAPS’s offer to have its own volunteers perform the traffic monitoring function, and BAPS appealed to the Bankruptcy Court. The court held that the Board’s off-duty-police condition for granting the variance was arbitrary and unreasonable, vacated the condition and ordered BAPS’s application for a variance approved, allowing BAPS’s volunteers to monitor the traffic flow. *Id.* The Board appealed, and the District Court affirmed.

On appeal to the Third Circuit, the panel majority agreed with both lower courts that the Board had “acted arbitrarily and unreasonably” in denying the variance. 256 F.3d at 115. Judge Alito dissented, and would have held not only that the Board had not acted arbitrarily or capriciously, but also that the Bankruptcy Court’s order was not properly before the Third Circuit for review.

- *Fraise v. Terhune*, 283 F.3d 506 (3d Cir. 2002)

Several prison inmates in New Jersey who were, or who were accused of being, members of the Five Percent Nation (“FPN”) sued the New Jersey Department of Corrections for violations of their First and Fourteenth Amendment rights. The court described FPN as having been founded in the 1960s by Clarence Smith, who “broke away from the Nation of Islam.” According to the court, FPN was linked to “numerous incidents of prison violence.” 283 F.3d at 511, 12.

The case concerned the prison system’s policy of imposing rigid restrictions on prisoners found to be members of Security Threat Groups (“STGs”). The prison

designated the FPN as an STG and thus forbade its members from, among other things, possessing FPN literature. In addition, those designated as core members of the FPN were required under the STG policy to undergo a behavior modification program in “maximum custody.” *Id.* at 511. In order to be released from maximum custody and returned to General Population, core members were required to “sign a ‘Letter of Intention’ expressing their intention ‘to renounce formally and in spirit affiliation with all Security Threat Groups.’ ” *Id.* at 524, n3. The district court held that the STG policy did not violate the FPN members’ free exercise rights under the First Amendment, nor their due process or equal protection rights under the Fourteenth Amendment.

On appeal, in an opinion authored by Judge Alito, a divided three-judge panel of the Third Circuit upheld the district court’s ruling, agreeing that the STG policy was reasonably related to legitimate penological objectives. Judge Rendell wrote a strong dissent arguing that the court should have required far more evidence that the FPN was actually a violent group before allowing the imposition of such harsh restrictions on inmates and their religious free exercise.

C. Freedom of Speech

Judge Alito’s decisions relating to free speech suggest that while he is generally mindful and sensitive to the free expression protections of the First Amendment, his rulings appear to depend at least in part on the particular speech or speaker involved. As exhibited in some cases discussed below, Alito is especially protective of free expression as it relates to the infringement of commercial or religiously motivated speech, but he has been less protective in other contexts, such as prisoner rights.

In *Saxe v. State College Area School District*, 240 F.3d 200 (3d Cir. 2001), Alito wrote the opinion that struck down the defendant school district’s anti-harassment policy, which was challenged by a group of religious students. The policy defined harassment as “verbal or physical conduct based on one’s actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics,

and which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment” and specifically prohibited disparaging speech directed at a person’s “values.” *Id.* at 202-203. The student plaintiffs challenged the policy, which they dubbed as a “hate speech code,” and claimed that as Christians, “they have a right to speak out about the sinful nature and harmful effects of homosexuality.” *Id.* at 203.

The federal district court upheld the anti-harassment policy, but a panel of the Third Circuit, including Alito, unanimously reversed on First Amendment grounds in favor of the students. Writing the opinion, Alito explained: “There is no categorical ‘harassment exception’ to the First Amendment's free speech clause. Moreover, the . . . Policy prohibits a substantial amount of speech that would not constitute actionable harassment under either federal or state law.” *Id.* at 204. He further stated: “There is of course no question that non-expressive, physically harassing conduct is entirely outside the ambit of the free speech clause. But there is also no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another’s race or national origin or that denigrate religious beliefs.” *Id.* at 206.

In another case, Alito expressed similarly strong First Amendment concerns regarding commercial speech. *The Pitt News v. Pappert*, 379 F.3d 96 (3d Cir. 2004), involved a Pennsylvania law that banned paid advertisements for alcohol in college newspapers. A unanimous three-judge panel of the Third Circuit, with Alito writing the opinion, held that the 1996 law, which was intended to combat under-age drinking, placed an impermissible financial burden on student-run publications and impermissibly interfered with their right to free speech while doing little to achieve its goal.

Holding the law unconstitutional, Alito wrote: “First, the law represents an impermissible restriction on commercial speech. Second, the law is presumptively unconstitutional because it targets a narrow segment of the media.” *Id.* at 105. Applying a robust interpretation of the Supreme Court’s *Central Hudson Gas & Electric Corp. v.*

Public Service Comm. 447 U.S. 557, test, Alito further concluded that the state had not actually demonstrated that the law actually combated “underage or abusive drinking ‘to a material degree’” or that it provided anything more than “ineffective or remote support for the government’s purposes.” *Id.* at 107. If the law in question had “the effect of greatly reducing the quantity of alcoholic beverage ads viewed by underage and abusive drinkers on the Pitt campus, we would hold that the third prong of the *Central Hudson* test was met,” Alito wrote, but struck down the law in the absence of such proof. *Id.*

Alito’s rulings in *Saxe*, which supported even hate speech by a group of religious students, and *Pitt News*, which supported commercial speech, are somewhat at odds with his opinion in *Banks v. Beard*, 399 F.3d 134 (3d Cir. 2005), *cert granted*, 126 S.Ct. 650 (2005) which dealt with the First Amendment rights of prisoners.

In *Banks v. Beard*, Alito dissented from a ruling in favor of prison inmates primarily because he believed that the state was not required to actually demonstrate that a ban on protected speech was effective in achieving its articulated purposes. The case involved a Pennsylvania prison regulation prohibiting certain prisoners from having newspapers and magazines (unless religious or legal in nature), or any photographs of family and friends. The state’s Department of Corrections (“DOC”) imposed these restrictions on inmates confined in Level 2 of the Long Term Segregation Unit, all of whom were held in solitary confinement for 23 hours a day; evidence showed that some of these inmates had been prohibited publications and photographs for up to 2 years.

The DOC defended the prohibitions as reasonably related to the legitimate penological interests of rehabilitation and security. Essentially, the DOC argued that the ban was necessary to provide an incentive to Level 2 inmates to improve their behavior and advance to Level 1, and also argued that the inmates’ possession of any publications or family photographs created a security risk. A majority of the Third Circuit panel disagreed and found no merit to the DOC’s unsupported claims that the ban was reasonably related to either interest. In doing so, the majority took note of the state’s failure to make a “logical connection” between the ban and the asserted penological interests either by demonstrating how the policy “achieves or could achieve its stated

rehabilitative purpose” or by pointing to any evidence in the record of the misuse of periodicals or photographs in the ways described by the DOC. *Id.* at 141.

Judge Alito dissented. Even though the DOC could not show that the ban would achieve rehabilitation or increase security, Alito would have held that the regulation has not facially unconstitutional. Alito wrote that Supreme Court precedent requires only that there be a “logical connection” between the regulation and a legitimate penological goal, “not whether . . . the regulation in fact serves that goal.” *Id.* at 149. The case has been appealed to the Supreme Court, which granted *certiorari*, and may well be heard and decided by June 2006.

By contrast, in *Swartzwelder v. McNeilly*, 297 F.3d 228 (3d Cir. 2002), Alito wrote an opinion that upheld a preliminary injunction to protect the First Amendment rights of a police officer who challenged a police department order prohibiting police bureau employees from providing any opinion testimony without prior department approval. The officer had been subpoenaed to testify in a lawsuit against the police department in an excessive force police brutality case. Alito held that the officer was likely to succeed in showing that the ban was unconstitutional because it implicated important First Amendment interests and was not narrowly tailored to achieve the police bureau’s articulated legitimate interest of preventing the disclosure of confidential information.²⁷³

²⁷³ Other cases in which Alito found in favor of litigants seeking free expression protections include: *Mitchum v. Hurt*, 73 F.3d 30 (3d Cir. 1995) (holding that public employee who reported abuses in his department and was retaliated against had right to seek injunctive relief without exhausting administrative remedies); *Tucker v. Fischbein*, 237 F.3d 275 (3d Cir. 2001), *cert denied* 534 U.S. 815 (2001) (holding in libel case that plaintiff was required to meet high evidentiary standard of “reckless disregard for the truth” in order to recover damages against magazine defendants); *Patriot Party v. Allegheny County Dep’t of Elections*, 1998 U.S. App. LEXIS 12688 (3d Cir. 1998), *aff’d en banc*, 174 F.3d 305 (3d Cir. 1999) (holding that although plaintiff’s free association claims were barred by intervening Supreme Court opinion, Pennsylvania law which barred a party’s nomination of a candidate who had previously sought nomination of another party violated Equal Protection Clause).

On the other hand, in *Sanguigni v. Pittsburgh Board of Public Education*, 968 F.2d 393 (3d Cir. 1992), Alito ruled against a public employee in a free speech case. In *Sanguigni*, the plaintiff, a public high school teacher, sued the Pittsburgh School Board and a number of school officials for violating her constitutional rights after she was removed from her coaching position following comments she published in a faculty newsletter. These comments, which were only a paragraph long, dealt primarily with teacher morale and the need for support for teachers dealing with stress and self esteem problems relating to the school's principal. The comments expressed concern for these problems and suggested that possible solutions include good teaching and good education.

In an opinion by Alito, a three-judge panel of the Third Circuit ruled against the teacher and held that the teacher's statements did not involve a matter of public concern because they did not relate to "any broad social or policy issue." *Id.* at 399. This decision seems to conflict with other Third Circuit -- and even Supreme Court -- opinions that protect the rights of public employees to speak their minds on matters of public concern even where such speech is related to a personnel dispute. *See, e.g., Pickering v. Board of Education*, 391 U.S. 563 (1968); *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977); *Zamboni v. Stamler*, 847 F.2d 73 (3d Cir. 1988), *cert. denied*, 488 U.S. 899 (1988); *Johnson v. Lincoln University*, 776 F.2d 443 (3d Cir. 1985).

IX. Judge Alito's Troubling Credibility Gap

For the reasons documented above, Judge Alito should not be confirmed to the Supreme Court because he is out of the legal mainstream on issues critical to the protection of the rights and interests of ordinary Americans. In addition, serious and unanswered concerns have recently arisen regarding Alito's credibility.

Several of these concerns relate to efforts to explain or deemphasize aspects of his 1985 job application relating to reproductive rights. For example, both Alito and his supporters have reportedly stated that his statement that he believes the Constitution does not protect a right to an abortion was just part of a job application and should not be taken seriously, even though he is now applying for the most important job of his career. Although his 1985 application tried to highlight his efforts to work against reproductive freedom, his recent Senate questionnaire responses sought to deemphasize them, failing even to mention his extensive work in a case in the Solicitor General's office on that issue (*Thornburgh*). There has been significant criticism of these inconsistencies.²⁷⁴

Two issues in particular, however, have drawn even more significant attention. The first is Judge Alito's assertion that he has no recollection of belonging to the reactionary group Concerned Alumni of Princeton, even though he touted his membership in that group in his 1985 application to be promoted to Deputy Assistant Attorney General in the Reagan Justice Department, as discussed in section III above. The second involves a promise that Alito made to the Senate Judiciary Committee when he was nominated to the Third Circuit that if he were confirmed, he would recuse himself from any cases involving several entities, including the Vanguard companies, in which he then had significant financial holdings (which are worth even more now). Judge Alito violated that promise in several instances, and with respect to Vanguard, he and his supporters have given varying and conflicting excuses in an effort to explain why he did

²⁷⁴ See Memorandum from PFAW, "Samuel Alito's Growing Credibility Problem" (Dec. 2, 2005).

so and why it should not matter. These credibility issues raise significant concerns that must be fully explored by the Senate Judiciary Committee.

The Vanguard Case: recusal promise unkept amid conflicting explanations

- Background

When Samuel Alito was nominated to the Third Circuit in 1990, the questionnaire submitted to him by the Senate Judiciary Committee asked him, among other things, to:

[e]xplain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.²⁷⁵

In response, Alito wrote, in pertinent part:

I do not believe that conflicts of interest relating to my financial interests are likely to arise. I would, however, disqualify myself from any cases involving the Vanguard companies, the brokerage firm of Smith Barney, or the First Federal Savings & Loan of Rochester, New York.

I would disqualify myself from any case involving my sister's law firm, Carpenter, Bennett & Morrissey, of Newark, New Jersey.²⁷⁶

Alito's response to the Committee's questionnaire was made in writing and under oath.²⁷⁷

²⁷⁵ Senate Judiciary Committee, Questionnaire to Samuel A. Alito, Jr. (1990), ques. II (2), at 15.

²⁷⁶ *Id.*, answer II(2) at 15 (Feb. 24, 1990).

It has turned out, however, that Judge Alito did not fully keep these promises that he made to the Judiciary Committee and effectively to the American people. According to press reports, Judge Alito has failed to recuse himself in at least one case involving Smith Barney (in 1996) and one (in 1995) involving his sister's then-current law firm.²⁷⁸ Judge Alito has recently acknowledged that he was a member of the Third Circuit panel that decided the Smith Barney case.²⁷⁹ However, he has asserted that he had no obligation to recuse himself from the case and has not explained why he did not do so given his promise to the Judiciary Committee.²⁸⁰ To our knowledge, he has not publicly addressed participating in a case involving his sister's law firm.²⁸¹

But the most serious credibility concerns have arisen over Judge Alito's promise to recuse himself from any cases involving the Vanguard companies. In 2002, Judge Alito was one of three judges who participated in a unanimous, *per curiam* ruling of the Third Circuit in favor of three Vanguard companies named as defendants in a case called *Monga v. Ottenberg*.²⁸² In fact, Judge Alito was "the presiding judge and transmitted the opinion to the clerk for filing."²⁸³

The case had been pursued against Vanguard by a widow who was trying to "win back the assets of her late husband's individual retirement accounts, which had been

²⁷⁷ *Id.* at 23. At the time Alito made this promise, he "held about \$80,000 in Vanguard shares." Maura Reynolds, "Alito Case Raises Question of Conflict," *Los Angeles Times* (Nov. 10, 2005).

²⁷⁸ Tom Brune, "Alito's Judicial Ethics Questioned in Cases," *Newsday* (Nov. 4, 2005); Sheryl Gay Stolberg, *New York Times* (Nov. 10, 2005).

²⁷⁹ Letter from Judge Samuel A. Alito, Jr. to Hon. Arlen Specter (Nov. 10, 2005).

²⁸⁰ Letter from Judge Samuel A. Alito, Jr. to Hon. Arlen Specter (Nov. 10, 2005).

²⁸¹ The White House, however, has stated that Judge Alito "had no ethical obligation to recuse himself from a case involving his sister's firm unless his sister represented a party in the proceedings." Sheryl Gay Stolberg, *New York Times* (Nov. 10, 2005). Whether or not that is correct, it has no bearing on why Judge Alito did not keep his promise to the Judiciary Committee.

²⁸² The full caption of the case included the Vanguard companies by name: *Monga v. Ottenberg; Berry, Ottenberg & Dunkless; Vanguard Group, Inc.; Vanguard Fiduciary Trust Co.; Vanguard/Morgan Growth Fund, Inc., et al.*, 43 Fed. Appx. 523 (3d Cir. 2002), *cert. denied sub nom. Maharaj v. Ottenberg*, 538 U.S. 998 (2003).

²⁸³ Letter from Marcia M. Waldron, Clerk, to Hon. Anthony J. Scirica, Chief Judge of the Third Circuit (Nov. 22, 2005).

frozen by Vanguard after a court judgment in favor of a former business partner of her husband.”²⁸⁴ At the time he participated in the Third Circuit’s ruling, Judge Alito “owned more than \$390,000 in Vanguard funds”²⁸⁵ The widow later learned of Judge Alito’s extensive holdings in Vanguard funds from the financial disclosure forms that he is required to submit as a federal judge, and filed a motion asking that the judgment against her be vacated, that Judge Alito be disqualified from the case, and that the case be reassigned to a new panel.²⁸⁶

On December 10, 2003, Judge Alito wrote to Anthony J. Scirica, Chief Judge of the Third Circuit, to inform him of the receipt of the motion to vacate the judgment “and to disqualify me on the ground that I own shares in several mutual funds.”²⁸⁷ Never mentioning his promise to the Judiciary Committee to recuse himself from any cases involving Vanguard companies, Judge Alito stated, “I do not believe that I am required to disqualify myself based on my ownership of the mutual fund shares.”²⁸⁸ Nevertheless, Judge Alito said that he would voluntarily recuse himself pursuant to his practice of doing so “in any case in which any possible question might arise.”²⁸⁹ The case was re-submitted to another panel that did not include Alito, and produced the same result.

Putting aside whether or not Judge Alito would have been ethically required to recuse himself from cases involving Vanguard in the absence of his promise to the Judiciary Committee, a credibility problem has arisen not only because Alito failed to

²⁸⁴ Sarah Schweitzer and Michael Kranish, “Plaintiff Alleges Alito Conflict,” *Boston Globe* (Nov. 3, 2005).

²⁸⁵ Sarah Schweitzer and Michael Kranish, “Plaintiff Alleges Alito Conflict,” *Boston Globe* (Nov. 3, 2005).

²⁸⁶ See, e.g., Letter from Samuel A. Alito to Chief Judge Anthony J. Scirica (Dec. 10, 2003).

²⁸⁷ Letter from Samuel A. Alito to Chief Judge Anthony J. Scirica (Dec. 10, 2003).

²⁸⁸ Letter from Samuel A. Alito to Chief Judge Anthony J. Scirica (Dec. 10, 2003).

²⁸⁹ Letter from Samuel A. Alito to Chief Judge Anthony J. Scirica (Dec. 10, 2003). Thereafter, Chief Judge Scirica vacated the opinion in which Alito had participated and appointed a new panel to hear the case, which also ruled in favor of Vanguard. See Letter from Chief Judge Anthony J. Scirica to Senators Arlen Specter and Patrick Leahy (Nov. 22, 2005); Sarah Schweitzer and Michael Kranish, “Plaintiff Alleges Alito Conflict,” *Boston Globe* (Nov. 3, 2005).

keep that promise in *Monga*, but also because of the shifting and conflicting excuses that he and the White House have given for why that promise was not kept or why it should not matter that it was not kept. Those excuses include the following:²⁹⁰

- The Excuses

1. No obligation to recuse

The first known excuse that Judge Alito has given about his failure to recuse himself in *Monga* was the statement he made to Chief Judge Scirica in his letter of December 10, 2003. As noted above, in that letter, Judge Alito said that he was under no obligation to recuse himself in the case and made no mention of his promise to the Senate Judiciary Committee to recuse himself in any cases involving Vanguard companies.

2. It was a “computer glitch”

When Judge Alito’s failure to recuse himself in *Monga* became the subject of public attention and concern in 2005 following his nomination to the Supreme Court, the White House “said that Alito was put on the case due to an error by a computer that should have warned that he was taking a Vanguard-related case, because the investments were listed in the database.”²⁹¹ Similarly, Judge Alito reportedly told Senator Kent Conrad that “there was a computer glitch”²⁹²

However, while a “computer glitch” might explain how the Third Circuit clerk’s office erroneously assigned a Vanguard case to Judge Alito (if indeed that is what happened), it does not explain why Judge Alito would thereafter participate in the case, since it was clear from the briefs and other papers that three different Vanguard

²⁹⁰ And see generally Letter from Senator Edward M. Kennedy to Judge Samuel A. Alito, Jr. (Dec. 5, 2005).

²⁹¹ Sarah Schweitzer and Michael Kranish, “Plaintiff Alleges Alito Conflict,” *Boston Globe* (Nov. 3, 2005).

²⁹² Sheryl Gay Stolberg, *New York Times* (Nov. 10, 2005).

companies were named as parties in *Monga*.²⁹³ Moreover, this was not the explanation that Judge Alito gave to Chief Judge Scirica in his letter of December 10, 2003, in which Judge Alito expressly asserted that he was not obligated to recuse himself from the case.

3. It was an “oversight”

In a letter that Judge Alito sent on November 10, 2005 to Senator Arlen Specter, Chairman of the Judiciary Committee, in response to Senator Specter’s request that Judge Alito “make a full public response” about this matter,²⁹⁴ Judge Alito stated that “[d]ue to an oversight, it did not occur to me that Vanguard’s status in the matter might call for my recusal.”²⁹⁵ Judge Alito did not explain whose “oversight” this was, what it was, or why it had any bearing on the unqualified promise he made to the Judiciary Committee -- to recuse himself from “any cases” involving Vanguard companies -- and his failure to keep that promise in this case.

4. It was during the period of “initial service”

In his November 2005 letter to Senator Specter, Judge Alito claimed that he had no obligation to recuse himself from cases involving Vanguard and further stated that “[t]he 1990 questionnaire sought my recusal plans for my ‘initial service’ as a judge.”²⁹⁶ In fact, and as Senator Edward M. Kennedy, a member of the Judiciary Committee, has recently reminded Judge Alito, the Judiciary Committee questionnaire was not time-limited, nor was Alito’s answer.²⁹⁷

²⁹³ According to Senator Kennedy, in the papers received by Judge Alito and his colleagues in the case, “the name Vanguard appeared 19 times on the covers of the main briefs in the case, and over 400 times altogether in those papers, including repeated mentions in the lower court opinion” that Judge Alito and his colleagues were reviewing on appeal, as well as in “Vanguard’s required corporate disclosure form” Letter from Senator Edward M. Kennedy to Judge Samuel A. Alito, Jr. (Dec. 5, 2005).

²⁹⁴ Letter from Sen. Arlen Specter to Hon. Samuel A. Alito, Jr. (Nov. 10, 2005).

²⁹⁵ Letter from Judge Samuel A. Alito, Jr. to Hon. Arlen Specter (Nov. 10, 2005).

²⁹⁶ Letter from Judge Samuel A. Alito, Jr. to Hon. Arlen Specter (Nov. 10, 2005).

²⁹⁷ Letter from Senator Edward M. Kennedy to Judge Samuel A. Alito, Jr. (Dec. 5, 2005).

Apart from erroneously describing the Judiciary Committee’s questionnaire, the “initial service” excuse conflicts with the “computer glitch” excuse as well as with the fact that Vanguard has continued to remain on Judge Alito’s “standing recusal list” and the fact that Judge Alito was recused from other Vanguard cases after *Monga*, including as recently as 2005.²⁹⁸

5. Vanguard mutual funds were “not at issue”

Also in his letter to Senator Specter, Judge Alito stated that “[m]y principal interest in Vanguard is in the mutual funds I own, which were not at issue in this lawsuit.”²⁹⁹ However, when Alito made his 1990 promise to recuse himself from “any cases involving the Vanguard companies,” his principal interest in Vanguard was in mutual funds as well, and his promise was not qualified. Moreover, according to Senator Kennedy, Vanguard’s corporate disclosure form in *Monga* made clear that two of the Vanguard companies named as parties in the case “were wholly owned subsidiaries of a list of Vanguard funds including the 10 or more that you [Judge Alito] owned at that time.”³⁰⁰

6. Voluntary recusal took place

In his letter to Senator Specter, Judge Alito stated that “I voluntarily recused myself once my participation was called into question.”³⁰¹ Apart from the fact that this was only after Judge Alito had participated in and ruled in the case, this explanation of course does not explain why he did so in the first place.

7. It doesn’t matter

²⁹⁸ Letter from Senator Edward M. Kennedy to Judge Samuel A. Alito, Jr. (Dec. 5, 2005); Appendix 4 to Answers of Samuel A. Alito, Jr. to Senate Judiciary Committee Questionnaire (November 2005).

²⁹⁹ Letter from Judge Samuel A. Alito, Jr. to Hon. Arlen Specter (Nov. 10, 2005).

³⁰⁰ Letter from Senator Edward M. Kennedy to Judge Samuel A. Alito, Jr. (Dec. 5, 2005).

³⁰¹ Letter from Judge Samuel A. Alito, Jr. to Hon. Arlen Specter (Nov. 10, 2005).

Also in his letter to Senator Specter, Judge Alito stated that “[t]he new panel of judges reached the same unanimous conclusion as the prior panel.”³⁰² Again, this statement sheds no light on how Judge Alito came to participate in *Monga* in the first place nor why he did not keep his promise to the Judiciary Committee.

The multitude of excuses that have been offered by Judge Alito in this matter prompted Senator Kennedy to send Judge Alito a letter on December 5, 2005 listing those excuses and asking Alito to provide “prompt and clear written answers” to the questions they have raised.³⁰³ To date, Judge Alito has not responded to Senator Kennedy, and the serious concerns about Alito’s credibility in connection with this matter remain unresolved.

³⁰² Letter from Judge Samuel A. Alito, Jr. to Hon. Arlen Specter (Nov. 10, 2005).

³⁰³ Letter from Senator Edward M. Kennedy to Judge Samuel A. Alito, Jr. (Dec. 5, 2005).

X. Conclusion

The Senate is about to embark on one of its most awesome responsibilities under the Constitution: to exercise its co-equal role and determine whether to approve the President's nomination for a powerful lifetime post on the Supreme Court. That responsibility is even more awesome since the President's nominee would replace Justice Sandra Day O'Connor, who has been a key swing vote in crucial decisions concerning the basic rights of all Americans. Judge Samuel Alito's record makes clear that he should not be entrusted with this lifetime responsibility. Replacing Justice O'Connor with Judge Alito would swing the Court far to the right and grant lifetime supreme judicial power to an individual with a record that is far out of the mainstream, and would threaten the rights of all Americans. The Senate should reject his nomination.

APPENDIX A – Judge Samuel Alito’s Record of Dissents on the Third Circuit

The chart below summarizes the results of Lexis research on full or partial dissents written and joined by the judges on the Third Circuit Court of Appeals as of December 1st, 2005. The numbers in parentheses are dissents which the judge joined, but did not write; the other numbers are dissents written by each judge. Judge Alito, who received his commission on April 30, 1990, has the highest number of dissents on the court from 1990 to the present and has written or joined more than 10% of the dissents on the court during this period. The abbreviation “tss” means took senior status.

Judge	Dates of Service	# of Dissents																Total
		1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	
Alito, Samuel A. Jr.	1990-present	2	7	3 (1)	5	8	3 (1)	5 (2)	10	2	3	5	2	1	1 (2)	4	3	64 (6)
Seitz, Collins Jacques	1966-1998 (1989 tss)	3		2	3	2												10
Van Dusen, Francis Lund	1967-1993 (1977 tss)	1																1
Aldisert, Ruggero John	1968-present (1986 tss)		1	1			1	3			1					1	3	11
Rosenn, Max	1970-present (1981 tss)	1	4	2	2	3	1	3	5		3	1		4	5	3		37

Weis, Joseph Francis Jr.	1973-present (1988 tss)	2	2	2	3	1		1	1		1	1						14
Garth, Leonard I.	1973-present (1986 tss)	3 (1)	3		1	6	3	1		6	2	2	5		1	1	1	35 (1)
Higginbotham, Aloysius Leon Jr.	1977-1993 (1991 tss)	3	1	1	1													6
Sloviter, Dolores Korman	1979-present	6	6	5	3	4	1 (1)	3	3	(1)	2	3 (1)	2 (1)	2 (1)	(2)	4	4	48 (7)
Becker, Edward Roy	1981-present (2003 tss)	3 (1)	3	8	6	5 (1)	9 (1)	1 (1)	6	3	2	1 (1)	1 (1)	2	1 (1)	2	1	54 (7)
Mansmann, Carol Los	1985-2002	4	4	4 (3)	2	3	1 (3)	3	5 (1)	1	2	1 (1)	4 (1)	(1)				34 (10)
Stapleton, Walter King	1985-present (1999 tss)	6 (2)	1	2 (2)	2	8	2	6	2	3	3	8	(1)		2	1		46 (5)
Greenberg, Morton Ira	1987-present (2000 tss)	3 (2)	1	1 (1)	4 (1)	2	2 (2)	3 (2)	4 (1)	3	1	2	1	2	1		1	31 (9)

Hutchinson, William D.	1987-1995	1 (1)	3	1 (1)	2 (1)	1	3 (2)											11 (5)
Scirica, Anthony Joseph	1987-present	1	2	2 (1)	1 (1)	1 (1)	1 (2)	3	2	1		1	2 (1)	2 (1)	(1)	2	2	23 (8)
Cowen, Robert E.	1987-present (1998 tss)	3 (1)	2	5 (2)	1	2 (1)	1 (1)	3 (1)	2	3	2	1	2	1	2			30 (6)
Nygaard, Richard Lowell	1988-present (2005 tss)		5	1 (3)	5	6	4 (2)	(2)	3	4	3 (1)	2	9 (2)	3	3	4	3 (1)	55 (11)
Roth, Jane Richards	1991-present		(1)	2 (1)	4	3 (1)	5	4 (2)	4	3	2	3 (1)	2 (1)	2 (1)	2 (1)	2	1	39 (9)
Lewis, Timothy K.	1992-1999					2 (1)	4 (1)	3 (1)	3 (1)									12 (4)
McKee, Theodore Alexander	1994-present					2	1 (4)	3 (1)	4 (1)	3 (1)	3	1 (2)	1 (2)	2 (2)	2	3	1 (1)	26 (14)
Sarokin, H. Lee	1994-1996						8	5 (1)										13 (1)
Rendell, Marjorie O.	1997-present									2	4	7	2	4	1	2 (1)	2	24 (1)
Barry, Maryanne Trump	1999-present											2 (1)	1 (1)					3 (2)

Ambro, Thomas L.	2000-present												2	4	1 (1)	2	2 (1)	11 (2)
Fuentes, Julio M.	2000-present												(1)	1 (1)	2	4	3 (1)	10 (3)
Smith, D[avid] Brooks	2002-present														(1)	3	2	5 (1)
Chertoff, Michael	2003-2005															1 (1)	1	2 (1)
Fisher, D. Michael	2003-present															3	1	4
Van Antwerpen, Franklin Stuart	2004-present																	
Total		42	45	42	45	59	50	50	54	34	34	41	36	30	24	42	31	659

APPENDIX B – Judge Alito’s Record in Divided Civil Rights Cases

A total of 20 divided Third Circuit decisions have been found in which Judge Alito participated that involved statutory claims of discrimination based on race, gender, age or disability. In 17 of these cases, 85 percent, Judge Alito sided against civil rights protections. Alito dissents, all of which he wrote and no other judge joined, were filed in 6 of these 17 cases, more than 1/3. Of the 3 cases favorable to civil rights protections, 2 involved procedural, statute of limitations issues. No other judge in these cases matches Judge Alito’s record. All 20 cases are listed and briefly described below.

Divided decisions favorable to civil rights in which Judge Alito dissented (6)

Bray v. Marriott Corp., 110 F.3d 986 (3d Cir. 1997)(dissenting from ruling that claimant raising race discrimination claim under Title VII should be able to present her case to a jury).

Sheridan v. E.I. duPont de Nemours & Co., 100 F.3d 1061 (3d Cir. 1996) (*en banc*), *cert. denied*, 521 U.S. 1129 (1997)(dissenting from *en banc* decision by 10 judges that gender discrimination plaintiff was properly permitted to present her case to a jury under Title VII).

Nathanson v. Medical College of Virginia, 926 F.2d 1368 (3d Cir. 1991)(dissenting from decision that claimant raising charge of discrimination based on disability, under section 504 of Rehabilitation Act, should be able to present her claim to a jury).

Glass v. Philadelphia Electric Co., 34 F.3d 188 (3d Cir. 1994)(dissenting from ruling that lower court improperly prevented race discrimination plaintiff from presenting evidence of discriminatory harassment to the jury).

Delli Santi v. CNA Ins. Co., 88 F.3d 192 (3d Cir. 1996) (dissenting from decision to restore award of front pay to plaintiff claiming sex and age discrimination).

Pirolli v. World Flavors, Inc., No. 99-2043 (3d. Cir, June 11, 2001) (dissenting from decision allowing sexual harassment claim by developmentally disabled plaintiff to go to a jury).

Divided decisions unfavorable to civil rights written or joined by Judge Alito (11)

Jenkins v. Manning, 116 F. 3d 685 (3d Cir. 1997) (joining decision rejecting voting rights claim, described by dissent as “overlook[ing] the broad sweep of the Voting Rights Act”).

Bhaya v. Westinghouse Electric Corp., 922 F.2d 184 (3d Cir. 1990), *cert. denied*, 50 U.S. 1217 (1991)(writing decision affirming trial court decision in age discrimination case to exclude evidence described by dissent as “highly relevant and admissible”).

Taxman v. Bd. of Educ. of Piscataway, 91 F.3d 1547 (3d Cir. 1996) (*en banc*), *cert. dismissed*, 522 U.S. 1010 (1997) (joining decision to invalidate affirmative action plan challenged by white plaintiff under Title VII pursuant to interpretation described by dissent as “unprecedented”).

Keller v. ORIX Credit Alliance, 130 F. 3d 1101 (3d Cir. 1997) (*en banc*)(writing decision that lower court properly granted summary judgment against age discrimination plaintiff, despite the contention that plaintiff presented enough evidence to go to a jury).

Antol v. Perry, 82 F.3d 1291 (3d Cir. 1996)(concurring in decision upholding summary judgment ruling against disability discrimination claim despite the dissent’s opinion that disabled veteran should be able to sue under Rehabilitation Act).

Motley v. New Jersey State Police, 196 F.3d 160 (3d Cir. 1999), *cert denied*, 529 U.S. 1087 (joining opinion upholding summary judgment against Americans with Disabilities

Act (“ADA”) claim despite the dissent’s contention that factual disputes should have precluded summary judgment).

DeWyer v. Temple University, 89 Fed. Appx. 811 (3d Cir. 2004) (joining per curiam decision that plaintiffs claim that defendants failed to accommodate disability need not have been presented to the jury despite dissent contention that evidence should have been presented to jury).

Stanziale v. Jargowsky, 200 F.3d 101 (3d Cir. 2000)(joining decisions upholding summary judgment against plaintiff in sex and age discrimination case, despite the dissent’s argument that plaintiff had presented sufficient evidence of pretext to proceed to trial).

T.R. ex rel. N.R. v. Kingwood Twp. Board of Educ., 205 F.3d 572 (3d Cir. 2000)(writing decision upholding summary judgment against plaintiff in Individuals with Disabilities Education Act (IDEA) case, despite dissent contention that decision would undermine appropriate application of IDEA).

Bazzone v. Nationwide Mutual, 123 Fed Appx. 503 (3d Cir., 2005)(joining decision upholding arbitration award against redlining claims under Fair Housing Act despite the dissent’s contention that arbitration provisions did not properly apply to redlining claim).

Halprin v. Bd. of Educ. of Vocational School of County of Ocean, No. 95-5065 (3d Cir. June 9, 1997)(writing opinion affirming grant of summary judgment against gender discrimination plaintiff, despite extensive evidence of discrimination described by the dissent).

Divided decisions in which Judge Alito supported civil rights (3)

Colgan v. Fisher Scientific Co., 935 F. 2d 1407 (3d Cir. 1991) (*en banc*), *cert. denied*, 502 U.S. 941 (1991) (joining ruling that limitations period for filing age discrimination claim began after plaintiff was terminated).

Zubi v. AT&T Corp., 219 F.3d 220 (3d Cir. 2000) (dissenting from decision that two-year as opposed to four-year statute of limitations applied to race discrimination claim).

Deane v. Pocono Medical Center, 142 F.3d 138 (3d Cir. 1998) (*en banc*) (joining majority decision that district court had improperly ruled that plaintiff was not a “qualified individual” under the ADA).