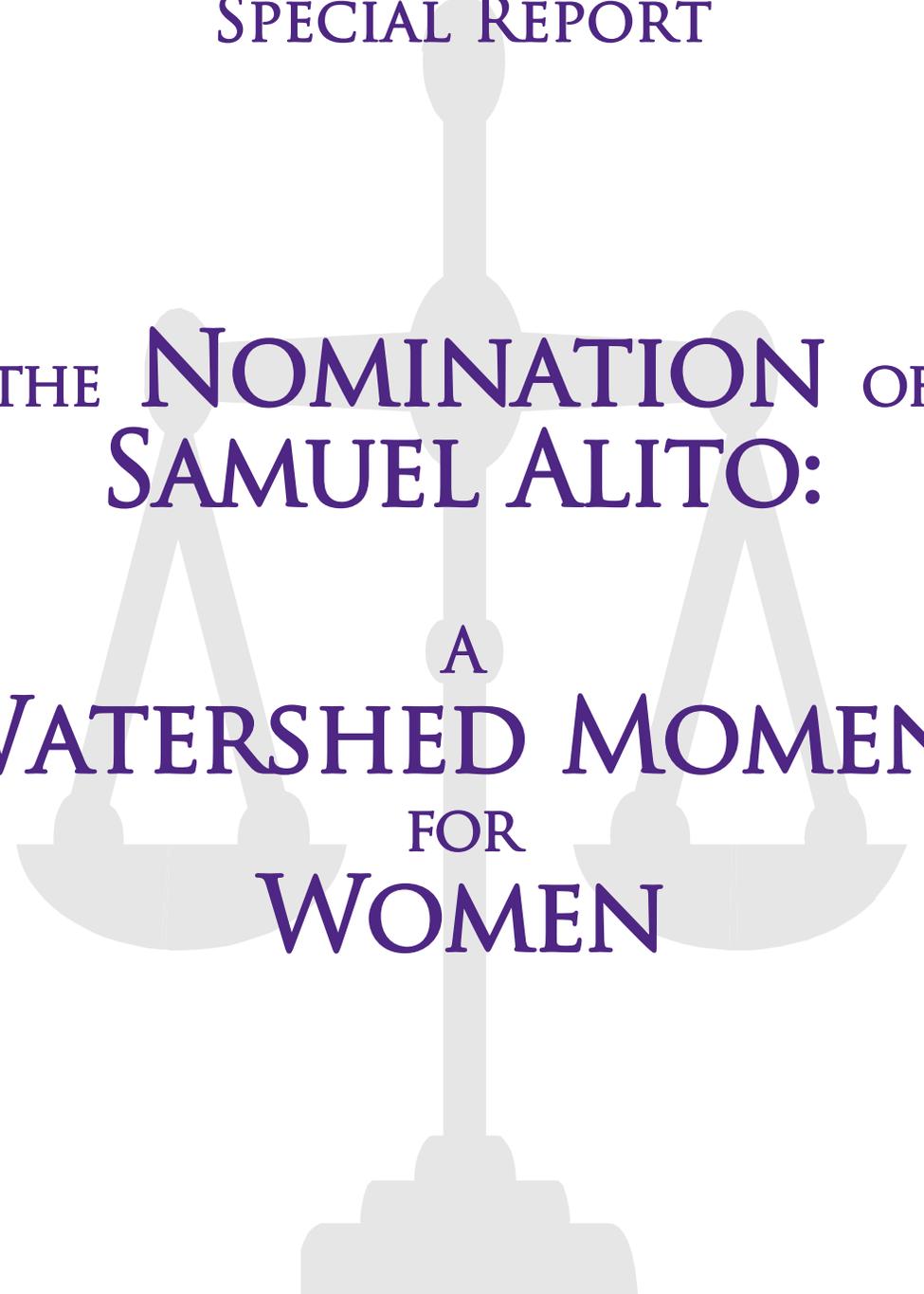


NATIONAL WOMEN'S LAW CENTER
SPECIAL REPORT



THE NOMINATION OF
SAMUEL ALITO:
A
WATERSHED MOMENT
FOR
WOMEN

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THE NOMINATION OF SAMUEL ALITO: A WATERSHED MOMENT FOR WOMEN

I. INTRODUCTION AND SUMMARY

A. Overview of the Alito Record

Samuel Alito's record demonstrates a judicial philosophy that places him on the far right of the ideological spectrum on critical legal issues. Legal scholars have gone so far as to say that he is one of the most conservative federal judges in the United States¹ and that there will be no one to his right on the Supreme Court if he joins it.² Among the issues on which Judge Alito's record is on the outer edge of the spectrum are those of particular importance to women. Based on an extensive review of the publicly available record, the Center has concluded that if Judge Alito is confirmed to the Supreme Court, core legal rights for women would be endangered, with profound and harmful consequences for women across the country and for decades to come.

For women in this country, the stakes could not be higher, nor the implications more profound. In recent years, the Supreme Court has decided cases affecting women's legal rights by narrow margins over vigorous dissents, often by votes of 5 to 4. Justice Sandra Day O'Connor, the first woman on the Supreme Court, has often cast the decisive vote in these cases. In a number of key cases, Justice O'Connor has parted company with the Court's most doctrinaire, conservative Justices, and if she is replaced by a Justice in their mold, critical women's rights are likely to be seriously weakened if not lost altogether.

Judge Alito's record makes clear that his approach to the law is dramatically different from that of Justice O'Connor. Indeed, taken as a whole, his publicly available record, both from his government service and on the Third Circuit, shows that placing Samuel Alito on the Supreme Court would be likely to shift the Court in a new and dangerous direction on core legal issues for women. It is no wonder that conservative voices have called the Alito nomination "an important moment in American history that has been decades in the making"³ and "the moment conservatives have been waiting for."⁴

The contrast with Justice O'Connor is stark. While Alito worked to undermine the right to choose, Justice O'Connor co-authored the Supreme Court's opinion in 1992 reaffirming the essential holding of *Roe v. Wade*⁵ and later voted to strike down a law that made some abortions illegal without ensuring that women's health would be protected.⁶ While Alito joined an

¹ Erwin Chemerinsky, Editorial, *Alito is Too Far Right for the High Court*, BLOOMBERG NEWS, Nov. 3, 2005, available at http://media.pfaw.org/pdf/Chemerinsky_11-03-05.pdf.

² *Today Show* (NBC television broadcast, Oct. 31, 2005) (interview with Jonathan Turley), *excerpts from transcript available at* <http://thinkprogress.org/2005/10/31/alito-turley/>.

³ Ronald Brownstein, *Alito Nomination Ignites Costly Battle*, L.A. TIMES, Oct. 31, 2005 (statement of Tony Perkins, president of the Family Research Council), available at http://www.latimes.com/news/nationworld/nation/la-103105assess_lat,0,1366297,full.story?coll=la-home-headlines.

⁴ Editorial, *A Supreme Nomination*, WASH. TIMES, Nov. 1, 2005, available at <http://www.washtimes.com/op-ed/20051031-090107-3949r.htm>.

⁵ *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992) ("[T]he essential holding of *Roe v. Wade* should be retained and once again reaffirmed.").

⁶ *Stenberg v. Carhart*, 530 U.S. 914 (2000).

organization that objected to women attending Princeton, worked to end affirmative action, and wrote opinions that raised the bar for victims of discrimination to succeed in court, Justice O'Connor not only broke the barrier to service by women on the Supreme Court, but also served as a voice and vote on the Court for strong protections against sex discrimination in education,⁷ employment,⁸ jury service,⁹ and other areas of American life, and cast the decisive vote upholding affirmative action in higher education.¹⁰ While Alito promoted an extreme version of "federalism," which would prevent Congress from enacting strong public protections in many areas critical to women including family and medical leave, Justice O'Connor voted to uphold a key provision of the Family and Medical Leave Act.¹¹

Judge Alito's application for a Justice Department promotion in 1985, when he was serving in the Solicitor General's office, is particularly instructive on his legal philosophy in a number of areas, including several areas of central importance to women. In a statement supporting his application, he wrote:

[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. I am particularly proud of my contributions in recent cases in which the government has argued in the Supreme Court that racial and ethnic quotas should not be allowed and that the Constitution does not protect a right to an abortion.¹²

Among other things, he also said in his job application that he was a strong believer in "federalism" and cited his membership in an organization that was openly hostile to the admission of women and minorities to his alma mater, Princeton.¹³ His record in the Solicitor General's office confirms his contributions to the government's effort to undermine *Roe v. Wade* with the goal of reversing it altogether, as well as the government's attacks on affirmative action. In a subsequent position (after receiving the promotion he sought in 1985), he relied on policy considerations based on federalism to support a Presidential veto of consumer protection legislation.

Most recently, and extensively, his record on the Third Circuit confirms that he continues to hold strong legal views on issues he cited in 1985, but also demonstrates his willingness to use

⁷ *Jackson v. Birmingham Bd. of Educ.*, ___ U.S. ___, 125 S.Ct. 1497 (2005); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999); *United States v. Virginia*, 518 U.S. 515 (1996); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

⁸ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Harris v. Forklift Sys. Inc.*, 510 U.S. 17 (1993); *Meritor Sav. Bank F.S.B. v. Vinson*, 477 U.S. 57 (1986).

⁹ *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127 (1994).

¹⁰ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

¹¹ *Nevada v. Hibbs*, 538 U.S. 721 (2003).

¹² Samuel A. Alito, Attachment to PPO Non-Career Appointment Form (Nov. 15, 1985) [hereinafter 1985 Job Application].

¹³ *Id.*

his position as a judge to serve the legal agenda he wrote about earlier.¹⁴ Others have reached this conclusion as well. For example, based on its own review of Judge Alito’s opinions on the Third Circuit, Knight Ridder concluded that “During his 15 years on the federal bench, Supreme Court nominee Samuel Alito has worked quietly but resolutely to weave a conservative legal agenda into the fabric of the nation’s laws.”¹⁵

The most troubling aspects of Alito’s record on issues of particular importance to women are summarized below under three general headings: women’s reproductive rights, Congress’s power under federalism principles to protect the public, and legal protections against discrimination.

Alito has rejected the constitutional right to choose and worked to overrule Roe v. Wade, supported dangerous limits on this fundamental right, and as a judge upheld such limits. Judge Alito’s record, both before he joined the bench and on the Third Circuit, makes it clear that he does not support a constitutional right to choose and that his elevation to the Supreme Court would endanger this fundamental right. Indeed, to what degree he supports a general constitutional right to privacy at all, especially one that extends beyond the narrow confines of contraceptive use by married couples, must be explored thoroughly in his confirmation hearing. But on the right to choose, his record could hardly be clearer:

- In June 1985, while in the Solicitor General’s office, Alito volunteered to help write a brief in *Thornburgh v. American College of Obstetricians and Gynecologists*,¹⁶ and wrote a 17-page memo offering his own strategy for using the government’s brief in that case as an “opportunity to advance the goals of bringing about the eventual overruling of *Roe v. Wade* and, in the meantime, of mitigating its effects.”¹⁷ His memo argued in favor of upholding even the most burdensome, dangerous, and unsupportable barriers to abortion¹⁸ – apparently what he meant by “mitigating” *Roe*’s effects.

¹⁴ See *infra* Section II.B.1.b.

¹⁵ Stephen Henderson & Howard Mintz, *Alito’s Record as a Judge Among Most Conservative*, SEATTLE TIMES, Dec. 5, 2005, available at http://seattletimes.nwsources.com/html/nationworld/2002665072_aalito05.html.

¹⁶ Michael Kranish, *A Coauthor Says Alito Was Instrumental In Roe v. Wade Brief*, BOSTON GLOBE, Nov. 16, 2005 (quoting Albert Lauber, who served with Alito in the Solicitor General’s office), available at http://www.boston.com/news/nation/washington/articles/2005/11/16/a_coauthor_says_alito_was_instrumental_in_roe_v_wade_brief/.

¹⁷ Memorandum from Samuel A. Alito, Assistant to the Solicitor General, to Charles Fried, Acting Solicitor General, re “*Thornburgh v. American College of Obstetricians & Gynecologists* No. 84-495; *Diamond v. Charles*, No. 84-1379,” at 8 (June 3, 1985) [hereinafter *Thornburgh Memo*].

¹⁸ For example, Alito argued in favor of reporting requirements that the Court later found to “go well beyond . . . health-related interests” and that would “raise the specter of public exposure and harassment of women” who chose to undergo an abortion, *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 765–68 (1986); a second physician requirement without a medical emergency exception; and a requirement that insurers offer policies excluding abortion at lower cost than other policies – even though it had been stipulated that the actuarial cost of such policies might actually be higher. See *Thornburgh Memo*, *supra* note 17, at 8–16. See also *infra* Section II.B.1.b.

- The Solicitor General’s office did file a brief in *Thornburgh*, which Alito helped write.¹⁹ It argued, as Alito recommended, that the Court should sustain a series of burdens on the right to choose. The Court rejected those arguments.²⁰ The brief also argued directly (instead of indirectly, as Alito had recommended) that *Roe v. Wade* be overturned. *Roe*, the government argued, “is so far flawed that this Court should overrule it and return the law to the condition in which it was before that case was decided.”²¹ It argued not only that *Roe* was wrongly decided, but that it did not deserve to be “sheltered” from “abandonment” by the principles of *stare decisis* (respect for precedent).²² The Court did not address this argument in depth but did reaffirm *Roe v. Wade*.²³
- As noted above, in his application for a promotion in the Reagan Administration a few months later, Alito wrote: “I am particularly proud of my contributions in recent cases in which the government has argued in the Supreme Court . . . that the Constitution does not protect a right to an abortion.”²⁴ This was plainly a reference to his role in the *Thornburgh* case.²⁵
- Judge Alito’s record on the Third Circuit reinforces the concerns raised by his earlier record. Unlike the other members of his court and the majority of the Supreme Court, Judge Alito, in *Planned Parenthood v. Casey*, would have upheld a requirement that a woman notify her husband before having an abortion (along with a range of other barriers to abortion).²⁶ Judge Alito’s dissenting opinion in *Casey* is particularly telling because it is the only case in which, as a judge, he has squarely addressed the scope of the right to choose in a context in which there was no Supreme Court precedent directly on point to constrain him. The approach Judge Alito took in his dissent is one that would eviscerate *Roe* by upholding many dangerous government-imposed requirements, not only spousal notification. He focused on the women who would not be affected by the dangers of the requirement rather than those who would be hurt by it; he showed more concern for the husband’s rights than for the liberty and bodily integrity of the woman; he discounted evidence of the harm the spousal notification requirement would cause to women; and he failed to recognize that requiring a teen to notify a parent is different from requiring a grown woman to notify her husband. On each of these points, a majority of his panel found ample guidance in previous Supreme Court precedents to approach the case in a way that would protect women.²⁷ And a majority of the Supreme Court – in an opinion

¹⁹ Brief for the United States as Amicus Curiae in Support of Appellants, *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (Nos. 84-495, 84-1379) [hereinafter *Thornburgh* Brief]; see Kranish, *supra* note 16 (saying, based on an interview with Alito’s former colleague, that Alito had a “major role” in crafting the brief and was “instrumental” in drafting arguments for the brief).

²⁰ The Court struck down all of the abortion regulations before it. *Thornburgh*, 476 U.S. 747.

²¹ *Thornburgh* Brief, *supra* note 19 (citation omitted).

²² *Id.*

²³ *Thornburgh*, 476 U.S. at 759 (“Again today, we reaffirm the general principles laid down in *Roe* and in *Akron*.”).

²⁴ 1985 Job Application, *supra* note 12.

²⁵ See *infra* Section II.B.1.b.

²⁶ *Planned Parenthood v. Casey*, 947 F.2d 682, 720 (3d Cir. 1991) (Alito, J., concurring in part and dissenting in part), *aff’d in part, rev’d in part*, 505 U.S. 833 (1992).

²⁷ *Casey*, 947 F.2d 682.

co-authored by Justice O'Connor, whom Judge Alito has been named to replace – soundly rejected his analysis as well.²⁸

- Judge Alito's opinions in other cases involving abortion do not allay the concerns raised by this record. Indeed, two cases raise additional concerns because in them, instead of joining the Third Circuit majority opinions striking down an unconstitutional abortion ban²⁹ and rejecting a wrongful death claim for a stillborn baby premised on the argument that a fetus is a "person" under the Fourteenth Amendment,³⁰ he wrote separate concurrences that avoided demonstrating agreement with the core tenets of *Roe v. Wade*.
- The conclusion that replacing Justice O'Connor with Judge Alito on the Court would be the death knell for meaningful protection for the right to choose is buttressed by the way far-right, anti-choice groups reacted to the nomination. These groups, which vehemently opposed the nomination of Harriet Miers as too much of an unknown, immediately expressed strong support for the Alito nomination in large measure because they believe he will totally undermine, if not overturn, *Roe v. Wade*. For example, Operation Rescue said of the nomination: "Roe's days are numbered. . . . We are trusting that we are now on the fast-track to derailing *Roe v. Wade* as the law of the land."³¹

Alito has extreme views on the limits of Congress's power to protect the public and the ability of citizens to enforce federal statutory rights. Alito's 1985 job application, Justice Department work, and Third Circuit record demonstrate that he is an extreme proponent of "federalist" views that severely limit the ability of Congress to address the public health, safety and welfare at the national level. Based on Alito's opinions in this area, one scholar listed him as one of the top four "Conservative Activists" on the Courts of Appeals, as distinguished from what he called the "Principled Conservatives."³² Judge Alito also has shown a willingness to limit individual enforcement of important statutory rights to benefits that are critical for low-income women.

- In his 1985 job application, Alito specifically cited "federalism" as a philosophy he shared and hoped to advance, and noted his active participation in the Federalist Society. And as a Deputy Assistant Attorney General (the position he sought in the 1985 job application), carrying out his office's responsibility to review veto messages for form and legality,³³ Alito urged the President to veto a consumer protection law regulating odometer tampering on the ground that it "violates the principles of federalism supported by this Administration."³⁴ The draft veto message attached to his memo argued that as a

²⁸ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

²⁹ *Planned Parenthood v. Farmer*, 220 F.3d 127 (3d Cir. 2000).

³⁰ *Alexander v. Whitman*, 114 F.3d 1392 (3d Cir. 1997), *cert. denied*, 522 U.S. 949 (1997).

³¹ Press Release, Operation Rescue, Bush Nominates Alito: OR says, "Roe's Days Are Numbered" (Oct. 31, 2005) (quoting Operation Rescue President Troy Newman), available at <http://www.operationrescue.org/?p=290>.

³² Jeffrey Rosen, *Evaluating Strict Constructionists: How to Judge*, NEW REPUBLIC ONLINE, Nov. 29, 2004, at <http://www.tnr.com/doc.mhtml?i=20041129&s=rosen112904>.

³³ Memorandum from Samuel A. Alito Jr., Deputy Assistant Attorney General, Office of Legal Counsel, to Peter J. Wallison, Counsel to the President, re "Enrolled bill S. 475" (Oct. 27, 1985) (attaching proposed veto statement "pursuant to [the Office of Legal Counsel's] responsibility to review veto messages for form and legality").

³⁴ *Id.*

policy matter, the issue was properly for the states to address, and noted, “After all, it is the states, and not the federal government, that are charged with protecting the health, safety and welfare of their citizens.”³⁵

- The “federalist” goal of narrowing federal authority is strikingly evident in Judge Alito’s opinions on the Third Circuit. In *United States v. Rybar*,³⁶ he dissented from his court’s decision upholding Congress’s power, under the Commerce Clause, to regulate the possession and transfer of machine guns. His Third Circuit colleagues took him to task for failing to give appropriate deference to Congress as a coordinate branch of government, and noted that every other circuit court to review this law had upheld it. Indeed, Judge Alito’s position has been repudiated by all of the nine circuit courts that have reviewed the law.³⁷
- Judge Alito wrote an opinion in another case, *Chittister v. Department of Community and Economic Development*,³⁸ striking down a key provision of the Family and Medical Leave Act (FMLA) as outside of Congress’s authority under the Fourteenth Amendment. A 6-3 majority of the Supreme Court, including even Justice Rehnquist, subsequently upheld another provision of the FMLA under that constitutional authority on the ground that the FMLA was enacted to address sex discrimination in the workplace.³⁹ Judge Alito gave short shrift to this argument.
- Judge Alito wrote an opinion in *Sabree v. Richman*,⁴⁰ involving the rights of developmentally disabled individuals to receive Medicaid services, strongly suggesting that if he were to join the Supreme Court, he would change currently binding precedent and move the law to limit, and potentially preclude, the ability of individuals to enforce rights created under the Spending Clause of the Constitution, such as Medicaid, public housing, child support enforcement, and public assistance – benefits and services that are especially important to low-income women.

Alito has weakened anti-discrimination protections. Judge Alito’s record is troubling in several areas of the law central to addressing discrimination against women, especially in cases involving discrimination on the job.

- Alito’s 1985 job application touts his membership in Concerned Alumni of Princeton (CAP), a group that was openly hostile to the admission of women and minorities to Princeton.⁴¹ One of its members, in the group’s magazine, fondly reminisced about the days when Princeton was “a body of men, relatively homogenous in interests and

³⁵ Suggested Language for Presidential Veto Message for S. 475, Attachment to Memorandum from Samuel A. Alito Jr., *supra* note 33 [hereinafter Veto Message].

³⁶ *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996) (Alito, J., dissenting), *cert. denied*, 522 U.S. 807 (1997).

³⁷ See *infra* note 164 and accompanying text.

³⁸ *Chittister v. Dep’t of Cmty. & Econ. Dev.*, 226 F.3d 223 (3d Cir. 2000).

³⁹ *Nevada v. Hibbs*, 538 U.S. 721 (2003).

⁴⁰ *Sabree v. Richman*, 367 F.3d 180, 194 (3d Cir. 2004) (Alito, J., concurring).

⁴¹ 1985 Job Application, *supra* note 12; David D. Kirkpatrick, *From Alito's Past, a Window on Conservatives at Princeton*, N.Y. TIMES, Nov. 27, 2005, at A1 (noting that CAP was founded “by alumni upset that Princeton had recently begun admitting women”).

backgrounds.”⁴² Although other Princeton alumni, including Senator Bill Frist, condemned CAP back in the 1970s,⁴³ Alito has never done so.

- Judge Alito’s opinions in employment discrimination cases raise significant concerns that, if confirmed to the Court, he would act to substantially limit effective enforcement of the federal anti-discrimination laws. In particular, in a number of Judge Alito’s opinions in employment discrimination cases, he has found ways to make it harder for a plaintiff to prevail, or even to allow a jury to decide on his or her claims. These opinions resolve issues of fact that should be left to the jury; inappropriately discredit the plaintiff’s evidence of discrimination and construe the evidence in a light favorable to the employer; fail to examine the totality of the plaintiff’s evidence; and even bar the plaintiff from presenting evidence at all. For example:
 - In one sex discrimination case, *Sheridan v. E.I. DuPont De Nemours and Company*,⁴⁴ Judge Alito dissented from a decision joined by *all 10 of the other members of the Third Circuit* reversing the trial court that had refused to allow a jury verdict in the plaintiff’s favor to stand because they found that she had cast sufficient doubt on her employer’s stated, non-discriminatory reasons for its actions. In doing so, Judge Alito ignored applicable legal standards to urge overturning the jury verdict, inappropriately credited the employer’s explanations for its actions, and, standing in for the jury, dismissed the value of the plaintiff’s evidence undermining the employer’s assertions.
 - In a race discrimination case in which Judge Alito dissented and again usurped the jury’s role, *Bray v. Marriott Hotels*, the majority said that under his approach to the evidence, “Title VII [of the Civil Rights Act of 1964] would be eviscerated.”⁴⁵
- Judge Alito has a record of hostility to affirmative action. He stated in his 1985 job application that he was particularly proud of his contributions to the government’s attacks on affirmative action, and he co-authored three briefs in the Solicitor General’s office that constituted part of that attack. His record on this issue on the Third Circuit is limited, but he did join in one Third Circuit ruling striking down a school district’s affirmative action plan.⁴⁶
- Judge Alito’s record on the Third Circuit on other sex discrimination issues raises concerns as well. He voted with the majority on the Third Circuit in a closely divided *en banc* decision rejecting constitutional claims against a school district that failed to take action to stop repeated and extreme sexual harassment of two young female students –

⁴² Shelby Cullom Davis, *Preserving the Spirit of the Princeton Alumni Body*, PROSPECT, May 7, 1973, at 8.

⁴³ On an alumni panel in 1975, Senator Frist said CAP had “presented a distorted, narrow and hostile view of the university that cannot help but have misinformed and even alarmed many alumni.” Kirkpatrick, *supra* note 41.

⁴⁴ *Sheridan v. E.I. DuPont De Nemours & Co.*, 100 F.3d 1061, 1078 (3d Cir. 1996) (Alito, J., concurring in part and dissenting in part), *cert. denied*, 521 U.S. 1129 (1997).

⁴⁵ *Bray v. Marriott Hotels*, 110 F.3d 986, 993 (3d Cir. 1997).

⁴⁶ *Taxman v. Bd. of Educ. of the Township of Piscataway*, 91 F.3d 1547 (3d Cir. 1996), *cert. granted*, 521 U.S. 1117 (1997), *and dismissed*, 522 U.S. 1010 (1997) (by agreement of the parties).

one of whom was hearing- and speech-impaired – by fellow students.⁴⁷ And in an immigration case, while acknowledging that an asylum claim could be based on a fear of gender-based persecution, he denied an asylum claim by an Iranian woman who asserted that if she returned to Iran she would be persecuted for her refusal to wear the traditional veil and for her feminist beliefs.⁴⁸ Judge Alito was not persuaded by the evidence that she would be willing to suffer severe consequences for non-compliance with Iranian customs, a conclusion that has been criticized by immigration experts as requiring a woman in such circumstances to show “unwilling martyrdom” that normally would not be required in an asylum case.⁴⁹

- Judge Alito’s publicly available record does not reveal his views on the constitutional protection against sex discrimination under the Equal Protection Clause of the Fourteenth Amendment. But in his 1985 job application he expressed support for at least some of the central legal tenets of the Reagan Administration, and the Justice Department under Attorney General Ed Meese favored the “originalist” approach to constitutional interpretation advocated by Robert Bork,⁵⁰ which would permit almost any gender-based distinctions in law or government policy. Judge Alito’s views in this area must be carefully explored at his confirmation hearing.

This is a watershed moment for women’s legal rights. With the retirement of Justice O’Connor, the Court will lose not only its first female Justice, but also the Justice whose vote often has been pivotal on issues critical to women. Judge Alito’s record demonstrates that if he is confirmed to the Supreme Court, he is likely to eviscerate core rights that American women rely upon, and shift the Court in a dangerous and harmful direction.

B. A Watershed Moment: Women’s Rights Hang in the Balance

In recent years, the Supreme Court has decided cases affecting core legal rights for women by narrow margins over vigorous dissents, often by votes of 5 to 4, and Justice Sandra Day O’Connor often casting the decisive vote. Justice O’Connor has not always ruled to support legal rights of importance to women, but she has parted company with the Court’s most conservative Justices in a number of key cases, and if she is replaced by a Justice in their mold, women’s rights in a number of areas are at serious risk. For example:

- The Right to Choose. In *Planned Parenthood v. Casey*, the Court reaffirmed the essential holding of *Roe v. Wade* protecting a woman’s right to choose.⁵¹ Justice O’Connor co-authored the controlling opinion of the Court. In 2000, in *Stenberg v. Carhart*,⁵² the

⁴⁷ D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364 (3d Cir. 1992), *cert. denied*, 506 U.S. 1079 (1993).

⁴⁸ *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993).

⁴⁹ See DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 391 n.724 (3d ed. 1999) (“[T]here is no reason women should have to show especially strong opposition – in effect, conscientious objection and unwilling martyrdom – in order to obtain protection.”).

⁵⁰ See, e.g., OFFICE OF LEGAL POLICY, U.S. DEP’T OF JUSTICE, GUIDELINES ON CONSTITUTIONAL LITIGATION 3–7 (Feb. 19, 1988).

⁵¹ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

⁵² *Stenberg v. Carhart*, 530 U.S. 914 (2000).

Court struck down a law that made some abortions illegal without ensuring that women's health would be protected, by a 5-4 vote with Justice O'Connor in the majority. Justice O'Connor's replacement on the Court could be the fifth vote to overturn the core principle of *Roe* that a woman's health must be protected, and could mean the Court will be just one additional retirement away from the reversal of *Roe* altogether.

- The Constitutional Guarantee Against Sex Discrimination. Since the 1970s, the Supreme Court has repeatedly held that under the Constitution's guarantee of equal protection, a law or government policy that discriminates on the basis of sex is subject to "heightened scrutiny" – and will be struck down unless (as Justice O'Connor has written) the government can show it has an "exceedingly persuasive justification" for the discrimination.⁵³ This guarantee has prevented states and the federal government from limiting women's careers, their service on juries, benefits to which they are entitled for military service, educational opportunities, Social Security benefits for their families, and equal treatment for women in myriad other ways. Justice O'Connor has been a consistent vote and strong voice for applying heightened scrutiny and invalidating official discrimination on the basis of sex, over the objections of some of her colleagues – such as Justice Scalia, who does not believe heightened scrutiny should apply at all.⁵⁴
- Title IX's Prohibition on Sex Discrimination in School. Two important Title IX cases in the past few years were decided by 5-4 votes, with Justice O'Connor casting the deciding vote and writing the majority opinion in both. (The Center represented the plaintiffs in both cases.) In *Davis v. Monroe County Board of Education*,⁵⁵ the Court held, 5-4, that a claim may be brought under Title IX to challenge the sexual harassment by one student of another where the school authorities have failed to adequately protect the students. In *Jackson v. Birmingham Board of Education*,⁵⁶ just last Term, the Court held, again 5-4, that a claim may be brought under Title IX to challenge a school's retaliation against an individual who complains of sex discrimination in violation of Title IX – in that case, the coach of a girls' high school basketball team who was stripped of his coaching position when he complained about unequal treatment for the female athletes.
- Sex Discrimination in the Workplace. Justice O'Connor joined the Court's majority in several major cases enabling women to challenge sexual harassment in the workplace, starting with the Court's landmark decision in *Meritor Savings Bank v. Vinson*⁵⁷ in 1986 and continuing in several other cases during her tenure on the Court, including two in 1998 (*Burlington Industries v. Ellerth*⁵⁸ and *Faragher v. City of Boca Raton*⁵⁹). In another

⁵³ The government's burden of showing an "exceedingly persuasive justification" is met "only by showing at least that the classification [on the basis of sex] serves 'important government objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" In addition, the heightened scrutiny test must be "applied free of fixed notions concerning the roles and abilities of males and females." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982) (internal citation omitted).

⁵⁴ *United States v. Virginia*, 518 U.S. 515, 574-575 (1996) (Scalia, J., dissenting).

⁵⁵ *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

⁵⁶ *Jackson v. Birmingham Bd. of Educ.*, ___ U.S. ___, 125 S.Ct. 1497 (2005).

⁵⁷ *Meritor Sav. Bank, F.S.B. v. Vinson*, 477 U.S. 57 (1986).

⁵⁸ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

⁵⁹ *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

sexual harassment case, *Harris v. Forklift Systems, Inc.*, Justice O'Connor wrote the Court's opinion concluding that "Title VII [the federal law prohibiting sex discrimination on the job] comes into play before the harassing conduct leads to a nervous breakdown."⁶⁰

- Affirmative Action. *Grutter v. Bollinger*,⁶¹ the landmark ruling upholding the right of public universities to use affirmative action in their admissions policies to promote diversity, was decided 5-4, with Justice O'Connor writing the Court's opinion. This decision allows affirmative action on the basis of sex as well as race, which is especially important in areas in which women remain dramatically under-represented, such as science, engineering and technology. Earlier, Justice O'Connor joined the Court's majority in *Johnson v. Transportation Agency of Santa Clara County*,⁶² in which the Court upheld a state agency's use of affirmative action in the workplace, ruling that it was permissible under Title VII for an employer to take gender into consideration in promotion decisions in a field in which women were manifestly underrepresented.
- Congress's Power to Protect the Public. Several cases involving Congress's power to act in important areas have been decided by 5-4 votes. These include *United States v. Morrison*,⁶³ in which the Court struck down a key provision of the Violence Against Women Act, with Justice O'Connor in the majority. However, she was in the 5-4 majority in *Tennessee v. Lane*,⁶⁴ in which the Court went the other way and ruled that Congress did have the power to allow suits for damages against states under the Americans With Disabilities Act when a disabled person was denied physical access to a courthouse. She also joined the Court's majority in *Nevada v. Hibbs*,⁶⁵ holding that Congress was within its authority in allowing damage suits against the states under the Family and Medical Leave Act for violations of the Act's provision guaranteeing workers leave to take care of family members.

In these areas and others, the Court is at a crossroads. With two new Justices – Chief Justice Roberts and Justice O'Connor's successor — there is a very real danger that it will shift course and weaken core legal protections for women. Thus, while any nomination to the Supreme Court is of great importance, the stakes are especially high at this time.

II. THE ALITO RECORD ON ISSUES OF IMPORTANCE TO WOMEN

A. Overview: A Nominee on the Far Right of the Spectrum

There is no doubt that Judge Alito is extremely conservative, on the far right of the ideological spectrum on critical legal issues. Shortly after his nomination was announced, even

⁶⁰ *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 22 (1993).

⁶¹ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

⁶² *Johnson v. Transp. Agency of Santa Clara County*, 480 U.S. 616 (1987).

⁶³ *United States v. Morrison*, 529 U.S. 598 (2000).

⁶⁴ *Tennessee v. Lane*, 541 U.S. 509 (2004).

⁶⁵ *Nevada v. Hibbs*, 538 U.S. 721 (2003).

before any internal government documents were disclosed to the public, a number of scholars reached that conclusion and expressed it in the strongest possible terms:

- George Washington University Law Professor Jonathan Turley said, “There will be no one to the right of Sam Alito on this Court. This is a pretty hardcore fellow on abortion issues.”⁶⁶
- Duke University Law Professor Erwin Chemerinsky called Judge Alito “one of the most conservative federal judges in the U.S.” and said, “In virtually every important area, Alito’s opinions are on the far right of the ideological spectrum.”⁶⁷
- An article in *Slate* pointed out areas of the law in which Judge Alito’s record is even more conservative than that of Justice Scalia.⁶⁸
- University of Chicago Professor Cass Sunstein reviewed Judge Alito’s dissenting opinions and concluded that they “show a remarkable pattern: They are almost uniformly conservative.”⁶⁹ Of the 41 dissents Professor Sunstein reviewed, 91% took a position more conservative than that of his colleagues on the Third Circuit, including those appointed by Presidents George H.W. Bush and Ronald Reagan.⁷⁰

Independent reviews by journalists agree with these assessments. Based on a comprehensive review of Judge Alito’s 311 published opinions on the Third Circuit, the Knight Ridder news service concluded that “Alito’s voluminous judicial record . . . puts him among the nation’s most conservative judges.”⁷¹ In fact, Knight Ridder found that “During his 15 years on the federal bench, Supreme Court nominee Samuel Alito has worked quietly but resolutely to weave a conservative legal agenda into the fabric of the nation’s laws.”⁷² A review by the *New York Times* of dozens of Judge Alito’s opinions noted, further, that Judge Alito’s decisions show a marked tendency to favor big business and reveal “a jurist deeply skeptical of claims against large corporations.”⁷³ The *Times* concluded that, with few exceptions, he “has sided with employers over employees in discrimination lawsuits and in favor of corporations over investors in securities fraud cases.”⁷⁴

The release of documents from Alito’s government service only underscores the conclusion that he has extreme views on the law. In his 1985 job application, for example, he said, referring to his work in the Solicitor General’s office, that it had been an honor to “help to advance legal positions in which I personally believe very strongly,” and specifically that he was “particularly proud” of his contributions to the effort to persuade the Supreme Court that *Roe v. Wade* should be reversed and that affirmative action measures should be struck down.⁷⁵

⁶⁶ *Today Show*, *supra* note 2.

⁶⁷ Chemerinsky, *supra* note 1.

⁶⁸ Robert Gordon, *Alito or Scalito? If You’re a Liberal, You’d Prefer Scalia*, SLATE, Nov. 1, 2005, at <http://www.slate.com/id/2129107> (last visited Dec. 14, 2005).

⁶⁹ Cass Sunstein, Editorial, *On the Contrary*, WASH. POST, Nov. 1, 2005, at A25.

⁷⁰ *Morning Edition: A Survey Course on Alito Legal Views* (NPR radio broadcast, Nov. 11, 2005), available at <http://www.npr.org/templates/story/story.php?storyId=5008701>.

⁷¹ Henderson & Mintz, *supra* note 15.

⁷² *Id.*

⁷³ Stephen Labaton, *Court Nominee Has Paper Trail Businesses Like*, N.Y. TIMES, Nov. 5, 2005, at A1.

⁷⁴ *Id.*

⁷⁵ 1985 Job Application, *supra* note 12.

The conclusion that Judge Alito is a stalwart conservative who can be counted on to shift the Court on critical issues is buttressed by the reaction of the far right to his nomination. After hounding the White House to withdraw the nomination of Harriet Miers because they were not certain that Ms. Miers would advance their agenda on the Court, far-right activists were euphoric over the selection of Judge Alito. Conservative columnist Cal Thomas wrote that conservatives are “ecstatic” about the Alito nomination, and noted that “The same blogs that registered extreme opposition to Harriet Miers’ Supreme Court nomination are overjoyed by President Bush’s selection of Judge Samuel A. Alito, Jr. . . .”⁷⁶ Chuck Colson, a prominent conservative commentator, said Judge Alito is “just what the doctor ordered.”⁷⁷ James Dobson, of Focus on the Family, said that as to Ms. Miers, he “wasn’t absolutely sure what she stood for . . . I don’t feel that way about Judge Samuel Alito.”⁷⁸ Jay Sekulow, head of Pat Robertson’s legal organization, was described as having “a smile on from ear to ear” when the Alito nomination was announced, and said, “This is the strongest nominee the President could have possibly put forward.”⁷⁹ Phyllis Schlafly, a founder of the Eagle Forum, had said conservatives were “betrayed” by the Miers nomination,⁸⁰ but the Eagle Forum supports the Alito nomination.⁸¹ Concerned Women for America said, “Judge Alito has always been one of our top choices for the Supreme Court . . . Judge Alito will help swing the Court back to the Constitution and restore the only balance that matters.”⁸² Operation Rescue was more direct: “*Roe*’s days are numbered. . . . We are trusting that we are now on the fast-track to derailing *Roe v. Wade* as the law of the land.”⁸³

On legal issues of critical importance to women, the Alito record is extremely troubling. This report focuses on these areas in particular: the right to privacy and *Roe v. Wade*; Congress’s power to protect the public and citizens’ ability to enforce federal statutory rights; and anti-discrimination protections.

B. Alito’s Record on Legal Issues of Importance to Women

1. Alito Has Shown Hostility to Women’s Reproductive Rights

⁷⁶ Cal Thomas, Letter to the Editor, *Bring it On . . .*, WASH. TIMES, Nov. 4, 2005, available at <http://www.washtimes.com/commentary/20051103-081012-3879r.htm>.

⁷⁷ *A Look at Judge Alito* (Focus on the Family radio broadcast, Nov. 1, 2005), quoted by People for the Am. Way, Right Wing Reactions to the Alito Nomination: WEEK ONE, at <http://www.SaveTheCourt.org> (last visited Dec. 14, 2005).

⁷⁸ *Id.*

⁷⁹ *Jay Sekulow on High Court Nominee Samuel Alito* (Christian Broadcasting Network, Oct. 31, 2005) (interview by Pat Robertson with Jay Sekulow), available at <http://www.cbn.com/cbnnews/news/051031b.asp>.

⁸⁰ Alvin Powell, *Conservative Icon Speaks at K School*, HARV. UNIV. GAZETTE, Oct. 20, 2005, available at <http://www.news.harvard.edu/gazette/2005/10.20/11-schlaflly.html>.

⁸¹ *On Point: Justice Samuel Alito?* (NPR radio broadcast, Oct. 31, 2005) (statement of Jessica Echard, executive director of the Eagle Forum, saying, “Sam Alito has an impressive resume and based on what we know of his record now, we support his nomination.”), available at http://www.onpointradio.org/shows/2005/10/20051031_a_main.asp.

⁸² Press Release, Concerned Women for America, CWA: Alito is Outstanding Choice (Oct. 31, 2005) (quoting Jan LaRue, CWA’s chief counsel), available at <http://www.cwfa.org/articles/9319/MEDIA/misc/index.htm>.

⁸³ Press Release, Operation Rescue, *supra* note 31.

a. Alito’s Record Does Not Show That He Supports the Constitutional Right to Privacy Beyond the Specific Factual Setting of *Griswold v. Connecticut*

Alito’s views on the existence of a constitutional right to privacy, and whether that right extends beyond the context of *Griswold v. Connecticut* – the landmark case holding that there is a constitutional right to privacy that protects the right of married couples to use contraception⁸⁴ – do not appear in the publicly available record.⁸⁵ When Judge Alito served in the Reagan Administration, he wrote that he was an adherent to the philosophical views that were central to that Administration and that he was proud to advance some of its legal positions.⁸⁶ The Department of Justice in that era took the position that the right to privacy is “not reasonably found in the Constitution”⁸⁷ and identified the Supreme Court’s “so-called ‘right to privacy’” cases, beginning with *Griswold*, as inconsistent with the Administration’s principles of constitutional interpretation.⁸⁸ Whether Judge Alito shares the view that there is no general right of privacy in the Constitution must be determined in the confirmation hearings.⁸⁹

One notorious opinion by Judge Alito on the Third Circuit, while not implicating the existence or scope of an independent constitutional right to privacy, does show a disturbing willingness to allow bodily intrusion by the government, even when the individual involved is a young girl. In *Doe v. Groody*, Judge Alito issued a dissent from the court’s opinion finding a strip search of a woman and her ten-year-old daughter, who were not named in the search warrant, to be a violation of their right against unreasonable search and seizure under the Fourth Amendment.⁹⁰ The majority opinion, written by Michael Chertoff (now Secretary of the Department of Homeland Security), noted that the woman and girl were forced to lift their shirts and drop their pants and submit to visual inspection and touching by a female officer, and concluded that “the nature of the intrusion . . . is significant.”⁹¹ Judge Alito said, “I share the

⁸⁴ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁸⁵ Minimal weight should be given to press reports indicating that in his private meetings with Senators, Judge Alito said that he believes in a constitutional right to privacy and accepts *Griswold* as good law. See, e.g., James Kuhnhenh & William Douglas, *Road Ahead May be Rocky for Alito*, MIAMI HERALD, Nov. 1, 2005, at A1. It is difficult to tell from newspaper articles what Judge Alito actually said in these informal meetings. Moreover, John Roberts testified in his confirmation hearing (as did Clarence Thomas) that he believes the Constitution protects the right to privacy and agrees with *Griswold*, but he was unwilling to say whether he accepted the right to privacy in any other context, including with respect to any issues involving the beginning of life or the end of life (even as to the use of contraceptives by unmarried people), or whether he disagreed with the view Justice Thomas has expressed on the Court that the Constitution guarantees no general right to privacy. See, e.g., *Roberts’s Testimony Gives No Assurance That He Will Uphold a Woman’s Right to Choose* (Nat’l Women’s Law Ctr., Wash., D.C.), Sept. 19, 2005, available at http://www.nwlc.org/pdf/RobertsHearingAnalysisOnRoe_Sept2005.pdf. Judge Alito’s testimony in this area must be scrutinized very closely.

⁸⁶ 1985 Job Application, *supra* note 12.

⁸⁷ OFFICE OF LEGAL POLICY, *supra* note 50, at 8, quoted in Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363, 396 (2003).

⁸⁸ OFFICE OF LEGAL POLICY, *supra* note 50, at 82.

⁸⁹ Alito’s name appears on a 1971 undergraduate Princeton student report that speaks favorably about privacy in a variety of contexts, but it is unclear whether Alito actually wrote or approved the paper. Conference on the Boundaries of Privacy in American Society (1971) (unpublished report, Princeton University Woodrow Wilson School of Public & International Affairs).

⁹⁰ *Doe v. Groody*, 361 F.3d 232, 244 (3d Cir. 2004) (Alito, J., dissenting).

⁹¹ *Id.* at 238.

majority’s visceral dislike of the intrusive search” of the young girl, but he would have held this conduct permissible.⁹² While this case did not turn on the right to privacy per se, Judge Alito’s dissent is extremely troubling.

b. Alito’s Record Shows Hostility to *Roe v. Wade* and the Right to Choose

In the area of women’s reproductive rights, Alito’s views on privacy are quite clear. His record in the Reagan Administration and on the Third Circuit reveals that he does not believe there is a constitutional right to privacy that protects the right to choose; that he believes *Roe v. Wade* was wrongly decided and should be overturned; and that in the meantime, as a way to undermine *Roe*, even burdensome, dangerous, and unsupportable barriers to abortion should be upheld.

Judge Alito’s record in this area begins with his participation in developing strategy and helping to write an amicus brief, as an attorney in the Solicitor General’s office, in *Thornburgh v. American College of Obstetricians and Gynecologists*, a case decided by the Supreme Court in 1986.⁹³ The case involved the constitutionality, under *Roe v. Wade*, of abortion restrictions enacted in Pennsylvania. Even though Alito was not assigned to the case, one of his colleagues in the Solicitor General’s office has confirmed that Alito helped write the government’s brief because he stepped forward and *volunteered* to help.⁹⁴ In fact, Alito helped develop the government’s strategy in the case. In a memorandum to the Acting Solicitor General authored by Alito in June 1985, he urged the Acting Solicitor General to file a brief in *Thornburgh* aimed at bringing about the reversal of *Roe v. Wade*.⁹⁵

Alito’s memo argues that a “frontal assault” on *Roe* is unlikely to be successful, and therefore asks, “What can be made of this opportunity to advance the goals of bringing about the eventual overruling of *Roe v. Wade* and, in the meantime, of mitigating its effects?”⁹⁶ His answer: the government should file a brief making clear that it disagrees with *Roe* and offering to brief the issue of whether *Roe* should be overruled, but focus on making the case that state restrictions on abortion that have been struck down under *Roe* are “eminently reasonable and legitimate” and should be upheld.⁹⁷ Alito’s argument was that this approach would limit and undermine the right to choose (“mitigate its effects”) and simultaneously demonstrate to the Court that in order to ensure that courts would uphold what he viewed as “reasonable and legitimate” barriers to the right to choose, the Court must ultimately revisit *Roe* and reverse the decision outright.⁹⁸ He concludes:

⁹² *Id.* at 249 (Alito, J., dissenting).

⁹³ *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986).

⁹⁴ Kranish, *supra* note 16.

⁹⁵ *Thornburgh Memo*, *supra* note 17. The memo also discussed another abortion-related case before the Supreme Court at the same time, *Diamond v. Charles*. The Supreme Court dismissed on standing grounds. *Charles v. Carey*, 627 F.2d 772 (7th Cir. 1980), *dismissed sub nom.*, *Diamond v. Charles*, 476 U.S. 54 (1986).

⁹⁶ *Thornburgh Memo*, *supra* note 17, at 8, 17.

⁹⁷ *Id.* at 9.

⁹⁸ *Id.* at 8, 9.

I find this approach preferable to a frontal assault on Roe v. Wade. It has most of the advantages of a brief devoted to the overruling of Roe v. Wade: it makes our position clear, does not even tacitly concede Roe's legitimacy, and signals that we regard the question as live and open. At the same time, it is free of many of the disadvantages that would accompany a major effort to overturn Roe.⁹⁹

The “disadvantages” that would accompany a frontal assault are clear. As Alito pointed out, one is that the Court’s rejection of it would be seen as a “stinging rebuke” to the government.¹⁰⁰ In addition, of course, public opinion polls then as now have shown that the vast majority of the public does not support overturning *Roe v. Wade*.

In the course of his memo, Alito shows utter disdain for deference to the medical judgment of doctors. He writes that the *Thornburgh* brief “may be an opportunity to nudge the Court . . . to dispel in part the mystical faith in the attending physician that supports *Roe* and the subsequent cases.”¹⁰¹ He calls doctors “abortionists”¹⁰² and makes clear that he does not trust them to provide relevant information to their patients before an abortion.¹⁰³ Moreover, he argues in favor of every abortion restriction at issue in the two cases before the Court and even some that are not, such as one struck down by the lower court that would have required health insurers to offer policies excluding abortion at lower cost than other policies – even though it had been stipulated that the actuarial cost of such policies might actually be higher.¹⁰⁴ He also argues in favor of state requirements that women be told that certain methods of birth control are “abortifacients,”¹⁰⁵ an assertion that is completely inconsistent with medical terminology.¹⁰⁶ And he even seems to argue that requiring women to view certain information before exercising the right to choose is a good thing even if the information would cause emotional distress, anxiety, and even increased physical pain.¹⁰⁷

It is no wonder that when Alito’s boss, Acting Solicitor General Charles Fried, circulated the memo to a handful of others in DOJ, he wrote in his cover note, “I need hardly say how sensitive this material is, and ask that it have no wider circulation.”¹⁰⁸

⁹⁹ *Id.* at 17 (citation omitted).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 16.

¹⁰² *Id.* at 15.

¹⁰³ *Id.* at 11.

¹⁰⁴ *Id.* at 15.

¹⁰⁵ *Id.* at 9.

¹⁰⁶ Contraception prevents pregnancy by inhibiting ovulation, fertilization, and implantation, while abortifacients (substances that cause an abortion) terminate an existing pregnancy, which begins only after implantation. See AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, STATEMENT ON CONTRACEPTIVE METHODS (1998); *Emergency Contraception*, 106 ACOG PRACTICE BULLETIN 1443, 1444 (2005).

¹⁰⁷ *Thornburgh* Memo, *supra* note 17, at 12.

¹⁰⁸ Memorandum from Charles Fried, Acting Solicitor General, to Samuel A. Alito et al. (June 3, 1985).

The Solicitor General’s office did file a brief in *Thornburgh*, which Alito helped write.¹⁰⁹ It argued, as Alito had recommended, that the Court should sustain a series of burdens on the right to choose.¹¹⁰ The Court rejected those arguments.¹¹¹ The brief also argued (directly instead of indirectly, as Alito had recommended) that *Roe* be overturned. It argued that *Roe v. Wade* “is so far flawed that this Court should overrule it and return the law to the condition in which it was before that case was decided.”¹¹² This was part of a full-blown argument that *Roe* was wrong to begin with and that it should not be “sheltered” from “abandonment” by the principle of *stare decisis*, or respect for precedent.¹¹³ The Court did not address this argument in depth but did reaffirm *Roe v. Wade*.¹¹⁴

While the Court did not overturn *Roe* in *Thornburgh*, it is important to recognize that the very strategy outlined by Alito in 1985 – sustain barriers to abortion that weaken the right to choose step by step, while awaiting the day when a majority on the Court is willing to deliver the final blow and reverse *Roe* outright – has been the anti-choice strategy ever since then. Indeed, right now a case is pending in the Court that could determine whether one essential protection of *Roe* – forbidding a state to interfere with abortion in circumstances where it would threaten a woman’s health – remains the law.¹¹⁵ If that requirement were to fall when this case is decided, it would represent a huge stride down the path laid out by Alito 20 years ago, while seeming to avoid any overt, “frontal assault” on the decision.

It was just a few months after Alito’s assistance with the *Thornburgh* strategy and brief that he applied for a promotion in the Department of Justice. In his application, he specifically expressed his satisfaction and pride in having contributed to that effort. Alito wrote:

[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. 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.¹¹⁶

Judge Alito’s recent attempts to dismiss the 1985 documents strain credulity. He reportedly suggested to at least one Senator that statements in his job application were merely

¹⁰⁹ Thornburg Brief, *supra* note 19; see Kranish, *supra* note 16 (saying, based on an interview with Alito’s former colleague, that Alito had a “major role” in crafting the brief and was “instrumental” in drafting arguments for the brief).

¹¹⁰ Thornburgh Brief, *supra* note 19.

¹¹¹ The Court struck down all of the abortion regulations before it. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986).

¹¹² Thornburgh Brief, *supra* note 19 (citation omitted).

¹¹³ *Id.*

¹¹⁴ *Thornburgh*, 476 U.S. at 759 (“Again today, we reaffirm the general principles laid down in *Roe* and in *Akron*.”).

¹¹⁵ *Ayotte v. Planned Parenthood*, ___ U.S. ___, 125 S. Ct. 2294 (2005), *cert. granted* (argued Nov. 30, 2005).

¹¹⁶ 1985 Job Application, *supra* note 12.

those of “an advocate seeking a job.”¹¹⁷ But it is now clear that this was not just a matter of padding a resume. The subsequent release of the *Thornburgh* strategy memo shows that he did in fact make the “contributions” for which he expressed pride in the job application.¹¹⁸ Alito also has reportedly claimed that his 1985 statement represented only his “personal” views.¹¹⁹ On their face, however, the statements in his job application expressly referred to his views *on the law* (his “legal positions”), and the argument that “the Constitution does not protect a right to an abortion”¹²⁰ is a quintessentially legal proposition.¹²¹ Nor can Judge Alito argue that he was merely carrying out Administration policy with which he may or may not have agreed, because the job application refers to “legal positions *in which I personally believe very strongly*”¹²² (emphasis added), the strategy memo expressly contains his own views and recommendations for consideration by his superiors, and, as noted, he was not even assigned to the *Thornburgh* case but asked for a chance to work on it. Finally, Alito’s statements cannot be dismissed as that of a young man fresh out of law school; in November 1985, he was 35 years old and had argued 12 cases before the Supreme Court.

Judge Alito also has reportedly suggested that the views he expressed in 1985 are irrelevant now because he is in a different role, as a judge.¹²³ But his record on the Third Circuit reinforces the concerns raised by his conduct and statements in the 1980s. The most troubling opinion he wrote in this area is his dissent in *Planned Parenthood v. Casey*,¹²⁴ which deserves particular attention because it is the only one in which Judge Alito was squarely addressing the scope of the abortion right in a context in which he was not constrained by a Supreme Court precedent directly on point that he was bound to follow. Moreover, because the case was ultimately decided by the Supreme Court, his approach can be directly contrasted with that of Justice O’Connor.

Planned Parenthood v. Casey is the 1992 case in which the Supreme Court, by a vote of 5-4, reaffirmed the basic right to choose established in *Roe v. Wade*.¹²⁵ At issue in *Casey* were a series of restrictions on abortion enacted in Pennsylvania. The Third Circuit panel on which Judge Alito sat upheld all of the restrictions except one: a requirement (with few exceptions) that

¹¹⁷ Carolyn Lochhead, *Alito Tries to Assuage Democrats Supreme Court in Transition: Nominee Says Views on Abortion Rights ‘Very Different’ Now*, S.F. CHRON., Nov. 16, 2005, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2005/11/16/MNGK4FP4UQ1.DTL>.

¹¹⁸ If Alito had in fact been less than fully accurate on his job application, and did not mean what he wrote in a signed, formal application for a federal job, that would raise serious questions about his honesty and integrity. It would raise another question as well: if he was willing to shade the truth in order to get a job then, can his statements be trusted now, as he is being considered for a lifetime seat on the nation’s highest court?

¹¹⁹ Lochhead, *supra* note 117; Charles Babington, *Alito Distances Himself from 1985 Memos*, WASH. POST, Dec. 3, 2005, at A1.

¹²⁰ 1985 Job Application, *supra* note 12.

¹²¹ These were not expressions of personal views, such as whether he believes abortion is wrong – although his mother has been quoted as saying, “Of course, he’s against abortion,” so that may be true as well. Joseph Curl, *Bush Picks Alito for Supreme Court*, WASH. TIMES, Nov. 1, 2005, available at <http://www.washingtontimes.com/national/20051101-121951-4730r.htm>.

¹²² 1985 Job Application, *supra* note 12.

¹²³ Babington, *supra* note 119 (quoting Senate Judiciary Chairman Arlen Specter, after a meeting with Alito).

¹²⁴ *Planned Parenthood v. Casey*, 947 F.2d 682 (3d Cir. 1991), *aff’d in part, rev’d in part*, 505 U.S. 833 (1992).

¹²⁵ *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992) (“[T]he essential holding of *Roe v. Wade* should be retained and once again reaffirmed.”).

women notify their husbands before obtaining an abortion.¹²⁶ Judge Alito dissented from the portion of his court’s opinion striking down the spousal notification requirement as an “undue burden” on the right to choose.¹²⁷ He dismissed evidence that notification of the pregnancy is frequently a flashpoint for battering or other abuse of the woman or her children, since the plaintiffs had not shown with any precision how many women this phenomenon affects, and he reasoned that most women seeking abortions are either unmarried or would tell their husbands – and therefore few would be harmed in any event.¹²⁸

In contrast, when *Casey* was decided in the Supreme Court, the Court’s majority agreed with the Third Circuit majority and struck down the spousal notification provision (while upholding the other restrictions).¹²⁹ In the controlling opinion of Justices O’Connor, Kennedy and Souter, of which Justice O’Connor is widely viewed as the author, the Court noted the extensive evidence of family violence in this country and the findings of the District Court (noting they “reinforce what common sense would suggest”) that many pregnant women, including the millions who are victims of regular physical and psychological abuse at the hands of their husbands, “may have very good reasons for not wishing to inform their husbands of their decision to obtain an abortion.”¹³⁰ The Court concluded that the spousal notification requirement thus presented a substantial obstacle to abortion. Rejecting the argument that the provision must nonetheless be upheld because most women seeking an abortion either are not married or will notify their husbands of their own volition, leaving very few affected by the notification requirement – the basis of Judge Alito’s dissent below – the Court ruled that “[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.”¹³¹ The Court said, “We must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if [Pennsylvania] had outlawed abortion in all cases.”¹³² In his dissent, Justice Rehnquist, who would have overturned *Roe v. Wade* outright, quoted favorably from the Alito dissent on the spousal notification provision.¹³³

The Supreme Court also emphasized that the woman has an individual interest, independent of her marital relationship, in her own bodily integrity – distinguishing a time in our history when a woman had no legal existence separate from that of her husband.¹³⁴ Judge Alito’s opinion, in contrast, made virtually no mention of the woman’s liberty interest, but focused instead on the spouse.¹³⁵ It is important to recognize that Judge Alito’s approach in *Casey* would give husbands power over a wide range of their wives’ personal decisions. As the Supreme Court’s opinion noted, the Alito reasoning could permit the government to empower a husband with “a troubling degree of authority over his wife.”¹³⁶ The Court gave these examples:

¹²⁶ *Casey*, 947 F.2d at 709–15.

¹²⁷ *Id.* at 719 (Alito, J., concurring in part and dissenting in part).

¹²⁸ *Id.* at 722–23 (Alito, J., concurring in part and dissenting in part).

¹²⁹ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

¹³⁰ *Id.* at 893.

¹³¹ *Id.* at 894.

¹³² *Id.*

¹³³ *See id.* at 974–75 (Rehnquist, J., concurring in part and dissenting in part).

¹³⁴ *Id.* at 895–99.

¹³⁵ *Planned Parenthood v. Casey*, 947 F.2d at 725–26 (Alito, J., concurring in part and dissenting in part).

¹³⁶ *Casey*, 505 U.S. at 898.

“the State could require a married woman to notify her husband before she uses a postfertilization contraceptive [or] before engaging in conduct causing risks to the fetus [such as] . . . drinking alcohol or smoking [or] before undergoing any type of surgery that may have complications affecting the husband’s interest in his wife’s reproductive organs.”¹³⁷ The Court noted, “A State may not give to a man the kind of dominion over his wife that parents exercise over their children.”¹³⁸ Judge Alito took none of this into account.¹³⁹

Judge Alito’s dissent in *Casey* thus raises serious concerns not only because of his view on spousal notification in and of itself, but also because of the analysis he used: discounting evidence of harm to women, focusing not on the women who would be harmed but on those who would not be affected, and ignoring a woman’s interest in her own autonomy and bodily integrity.

Other cases involving abortion in which Judge Alito has participated are less revealing about his views, although his positions in two of those cases raise concerns as well. In each of them, he wrote a separate concurrence that refrained from adopting the underlying analysis of the majority and thus avoided demonstrating agreement with the core tenets of *Roe v. Wade*.

In *Planned Parenthood of Central New Jersey v. Farmer*, the Third Circuit struck down a New Jersey law penalizing certain abortion procedures (the state “Partial Birth Abortion Ban Act”) without any exception to protect a woman’s health, on the ground that it was void for vagueness and also created an undue burden on abortion.¹⁴⁰ Judge Alito joined in the result, but wrote his own concurring opinion rather than joining the majority’s opinion.¹⁴¹ He made clear that he joined the majority’s ruling because it was compelled by the Supreme Court’s decision in

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ In the immigration context, Judge Alito also has expressed views on the marriage relationship that could have broad and troubling implications, drawing a clear line between asylum claims of *husbands* and claims of *fiancés or boyfriends* of women subjected to or threatened with forced abortion or sterilization in China. (Under immigration law, a person forced to undergo an abortion or sterilization abroad is deemed to have suffered persecution for purposes of asylum claims, see Illegal Immigration Reform and Immigration Responsibility Act of 1996, Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104-208, §601, 110 Stat. 3009-546 (1996), and the Board of Immigration Appeals has held that the spouse of such a person is covered as well. See *C-Y-Z*, 21 I. & N. Dec. 915 (1997).) In one case, writing for a unanimous panel, Judge Alito affirmed a deportation order against a man whose fiancée had been forced to submit to an abortion in China. Noting that “the marriage relation is used in so many areas of the law (income tax, welfare benefits, property, inheritance, testimonial privilege, etc),” he was unwilling to extend established immigration policy for married partners to unmarried partners – even where the applicant alleged that the only reason the couple had not married was that Chinese authorities refused to allow them to do so because of unusually high minimum age requirements for marriage. *Cai Luan Chen v. Ashcroft*, 381 F.3d 221 (3d Cir. 2004). See also *Qing Sho Liu v. Ashcroft*, 84 Fed. Appx. 169 (3d Cir. 2003) (per curiam) (unpublished decision) (affirming the decision of the Board of Immigration Appeals denying the application for asylum for reasons including that “the protection for such persecution has not been extended beyond spouses of the persecuted individual”); *Shi Fei v. Att’y Gen*, 131 Fed. Appx. 390 (3d Cir. 2005) (per curiam) (unpublished decision) (denying petition for review stating that the court “recently upheld the Board [of Immigration Appeals] decision not to extend relief beyond spouses”). Judge Alito’s rigid reliance on the legal distinction between married partners and unmarried partners could affect legal issues surrounding married women’s autonomy in connection with abortion and have many other ramifications – for example for the legal rights of same-sex couples and legal protections for children of unmarried parents.

¹⁴⁰ *Planned Parenthood v. Farmer*, 220 F.3d 127 (3d Cir. 2000).

¹⁴¹ *Id.* at 152 (Alito, J., concurring).

Stenberg v. Carhart, which came down just before the Third Circuit’s ruling and dealt with an almost identical Nebraska statute. By a vote of 5-4, with Justice O’Connor as the swing vote, the Court struck down the Nebraska law on the grounds that it failed to protect a woman’s health and imposed an undue burden on the right to choose.¹⁴² Judge Alito wrote that *Stenberg* “compels” the same result with respect to the New Jersey law, and that “[o]ur responsibility as a lower court is to follow and apply controlling Supreme Court precedent.”¹⁴³ On the Supreme Court, of course, Judge Alito would not be “compelled” to follow *Stenberg* and its mandate that a woman’s health be protected, or any other precedent for that matter, if he declines to honor it under principles of *stare decisis*.

In *Alexander v. Whitman*, the Third Circuit affirmed the dismissal of a wrongful death claim for a stillborn baby.¹⁴⁴ The court rejected the plaintiff’s equal protection argument on the ground that a stillborn child is not a “person” under the Fourteenth Amendment, citing *Roe v. Wade* and *Casey*. Judge Alito wrote a very short concurrence agreeing with the majority’s point that the Supreme Court has held that a fetus is not a “person” within the meaning of the Fourteenth Amendment, but he stated, “I think that the court’s suggestion that there could be ‘human beings’ who are not ‘constitutional persons’ is unfortunate. . . . the reference to constitutional non-persons, taken out of context, is capable of misuse.”¹⁴⁵ While it is unclear precisely what he meant by this, it is of concern that he refrained from simply joining the opinion that relied on *Roe* and *Casey*, just as he refrained from joining the majority opinion in *Farmer*.

A few other cases in which Judge Alito participated touched on abortion but did not raise legal issues relating to the right to choose. In *Elizabeth Blackwell Health Center for Women v. Knoll*, Judge Alito was in the 2-1 majority (but did not write the opinion) in a case ruling that the state cannot impose a restriction on Medicaid reimbursements for abortion that is inconsistent with the federal government’s interpretation of the Medicaid law.¹⁴⁶ Under the Medicaid statute, funding was required for abortions to protect a woman’s life and also if the pregnancy resulted from rape or incest. The relevant federal agency ruled that, in implementing this provision, states could impose reasonable requirements for reporting the rape or incest to authorities before coverage would be allowed for abortions in those circumstances, but such requirements had to be waived if the treating physician certified that they could not be met. Pennsylvania enacted reporting requirements without such a waiver provision. The court upheld the lower court’s injunction of the state law on the ground that the federal agency’s interpretation of the statute

¹⁴² *Stenberg v. Carhart*, 530 U.S. 914 (2000).

¹⁴³ *Farmer*, 220 F.3d at 152-153. A most troubling – and the most plausible – way to read Judge Alito’s decision to write a separate concurrence instead of joining the majority opinion is to conclude that he did not share the view of the majority of his court (or of the Supreme Court in *Stenberg*), that before *Stenberg* came down he had intended to dissent, and that after *Stenberg* left him no room to do so, he went along with the majority’s result but in a way that avoided associating himself with any reasoning beyond what was directly required by the Supreme Court’s decision. Because Judge Alito’s concurrence says that the majority’s opinion “was never necessary and is now obsolete,” *id.*, it could be suggested that he declined to join the majority because he thought the majority should not have issued an opinion it had written before *Stenberg* came down (as the majority clearly stated it was doing), which laid out its own analysis, but instead should have applied the precise analysis of *Stenberg*. But while that may explain his description of the majority opinion as “now obsolete,” it does not explain why it would have been “never necessary.”

¹⁴⁴ *Alexander v. Whitman*, 114 F.3d 1392 (3d Cir. 1997).

¹⁴⁵ *Id.* at 1409 (Alito, J., concurring).

¹⁴⁶ *Elizabeth Blackwell Health Ctr. for Women v. Knoll*, 61 F.3d 170 (3d Cir. 1995).

was entitled to considerable deference, and that it therefore trumped state law under the Supremacy Clause of the Constitution.¹⁴⁷ The issue that divided the majority from the dissent was how much deference the court owed to the agency’s interpretation of the statute; neither opinion discussed the merits of the Pennsylvania requirements or anything else related to abortion.¹⁴⁸ Thus, Judge Alito’s vote in this case may be seen as reflecting his tendency to defer to government agency decisions and executive power,¹⁴⁹ rather than his views on any abortion-related issues.¹⁵⁰

In sum, Judge Alito’s record, both before he joined the bench and during his tenure on the Third Circuit, makes it clear that he is hostile to the right to choose. In the Reagan Administration’s Solicitor General’s office, he offered a strategy for overturning *Roe* and upholding as many barriers to abortion as possible in the meantime, contributed to a brief seeking that end, and then he said he was “particularly proud” of his role in urging the Court to find that there is no constitutional right to choose. On the bench, Judge Alito’s dissent in *Casey* shows how he was willing to carry his agenda forward, his separate opinions in *Farmer* and *Alexander* raise additional concerns, and there is nothing in his judicial record on these issues that allays any of these concerns. At a minimum, his opinion in *Casey* indicates strongly that he would be a fifth vote on the Court to uphold far more burdensome barriers to abortion than Justice O’Connor would allow. And these issues will continue to come before the Court, for example, in the *Ayotte* case pending now¹⁵¹ and in cases challenging the constitutionality of the federal version of the same abortion ban as the state laws at issue in *Farmer* and *Stenberg* – again, without a health exception.¹⁵² It appears likely that on the Supreme Court, Judge Alito

¹⁴⁷ *Id.*

¹⁴⁸ *Compare Knoll*, 61 F.3d 170 (3d Cir. 1995), with *Knoll*, 61 F.3d at 185 (3d Cir. 1995) (Nygaard, J., dissenting).

¹⁴⁹ See Adam Liptak and Jonathan D. Glater, *Alito’s Dissents Show Deference to Lower Courts*, N.Y. TIMES, Nov. 3, 2005, at A1 (commenting on Alito’s tendency to show deference to various government entities including the board of immigration appeals); see also Cass Sunstein, *Alito’s Deference to Established Institutions: Voting Pattern*, THE NEW REPUBLIC ONLINE, Nov. 1, 2005 (noting that Alito shows deference to zoning board and immigration authorities), available at <https://ssl.tnr.com/p/docsub.mhtml?i=w051031&s=sunstein110105> (last visited Dec. 13, 2005); Jo Becker, *Alito is Called ‘Sensitive’ to Executive Power*, WASH. POST, Nov. 5, 2005, at A7 (stating that Alito is “sensitive” to executive power and cites examples of deference to presidential power).

¹⁵⁰ Alito’s anti-choice supporters at Concerned Women for America agree that this case “can’t be characterized as an abortion ruling on the merits.” Charles Lane, *Nominee’s Reasoning Points to a Likely Vote Against Roe v. Wade*, Wash. Post, Nov. 2, 2005, at A6 (quoting Jan LaRue). See also *Shelton v. University of Medicine & Dentistry of New Jersey*, 223 F.3d 220 (3d Cir. 2000). In *Shelton*, a unanimous panel, including Judge Alito, upheld the dismissal of a Title VII religious discrimination claim brought by a nurse who opposed abortion based on her religion, refused to participate in emergency abortions, and was terminated after she put the lives and safety of two patients at risk and refused to accept a transfer out of the Labor and Delivery unit of the hospital. The court held that because the hospital had offered reasonable accommodations of the plaintiff’s religious beliefs, dismissal of her claim was proper. This was a straightforward application of Title VII principles in this area. Similarly, although Judge Alito participated in several asylum cases involving claims of forced abortion and sterilization in China, the rulings in these cases (some of which affirmed deportation orders and some of which did not) did not address abortion rights.

¹⁵¹ Since Justice O’Connor was still on the Court when *Ayotte* was argued on November 30, she could participate in the Court’s decision. However, if she is replaced before a decision is issued, the Court could opt to have the case re-argued so her successor could participate.

¹⁵² Three challenges to the federal abortion ban are working their way up to the Supreme Court. Three federal judges have declared the law unconstitutional and blocked its enforcement. *Carhart v. Ashcroft*, 331 F.Supp.2d 805 (D. Neb. 2004); *Planned Parenthood v. Ashcroft*, 320 F.Supp.2d 957 (N.D.Cal. 2004); *Nat’l Abortion Fed’n v. Ashcroft*, 330 F.Supp. 2d 436 (S.D.N.Y. 2004). The Eighth Circuit upheld the ruling in the Nebraska case in July

would resemble Justices Scalia, Thomas and Rehnquist more closely than Justice O'Connor, and thus swing the Court against women's rights in this core area. That is clearly the conclusion reached by the array of far-right, anti-choice groups who, as noted above, vehemently opposed the nomination of Harriet Miers as too much of an unknown, and who are now ecstatic about the Alito nomination in large measure because they believe he will weaken, if not overturn, *Roe v. Wade*.

2. Alito Has Extreme Views on the Limits of Congressional Power to Protect the Public and Citizens' Ability to Enforce Federal Statutory Rights
 - a. Alito's Restrictive View of Congress's Power to Protect the Public is Far Outside the Mainstream

Judge Alito has demonstrated that he has extreme views on the limits of Congress's power to protect the public. Indeed, based on his views in this area, George Washington University Law Professor Jeffrey Rosen, writing in the *New Republic*, listed him as one of the top four "Conservative Activists" due to his views in this area (the others were Janice Rogers Brown, on the D.C. Circuit, and Emilio Garza and Edith Brown Clement, both on the Fifth Circuit) – as distinguished from what he called the "Principled Conservatives."¹⁵³ Duke University Law Professor Erwin Chemerinsky wrote that "Alito's opinions as a federal appeals court judge have consistently urged dramatic limits on congressional power to deal with serious social problems, often going even further than the Supreme Court in seeking to protect states rights."¹⁵⁴

In his 1985 job application, Alito specifically cited "federalism" as a philosophy he shared and hoped to advance, and noted his active participation in the Federalist Society;¹⁵⁵ and as Deputy Assistant Attorney General in the Office of Legal Counsel – the position he was seeking in the 1985 job application – his interpretation of federalism led him to recommend a Presidential veto. Carrying out his office's responsibility to review veto messages for form and legality, he urged the President to veto a bill that was intended to protect consumers against odometer fraud (a consumer protection law called the Truth in Mileage Act) on the ground that it "violates the principles of federalism supported by this Administration."¹⁵⁶ The draft veto message attached to his memo argued that as a policy matter, the issue was properly for the states to address, and noted, "After all, it is the States, and not the federal government, that are charged with protecting the health, safety, and welfare of their citizens."¹⁵⁷ Although the President declined to follow this advice,¹⁵⁸ the proposed veto message was a harbinger of how severely Judge Alito has been willing to restrict congressional power in his opinions on the Third Circuit.

2005, and the U.S. government has filed a petition for review with the U.S. Supreme Court. *Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005) (*cert. pending*). In the two other cases, in the Ninth Circuit and the Second Circuit, oral arguments were heard in October.

¹⁵³ Rosen, *supra* note 32.

¹⁵⁴ Chemerinsky, *supra* note 1.

¹⁵⁵ 1985 Job Application, *supra* note 12.

¹⁵⁶ Veto Message, *supra* note 35.

¹⁵⁷ *Id.*

¹⁵⁸ Truth in Mileage Act of 1986, Pub. L. 99-579, 100 Stat. 3311 (1986).

In a particularly noteworthy case, *United States v. Rybar*, Judge Alito wrote a strong dissent from a decision upholding Congress's power under the Commerce Clause to enact a federal law prohibiting the transfer or possession of machine guns.¹⁵⁹ The majority found ample basis to conclude that the law regulated activity that substantially affects interstate commerce, distinguishing the Supreme Court's invalidation of the Gun-Free School Zones Act in *United States v. Lopez*, where the Court (in a 5-4 decision) found such evidence lacking.¹⁶⁰ As the majority noted, every other court of appeals to address the machine gun statute had upheld it. Judge Alito, however, concluded that there was not sufficient evidence in the record to sustain the law, since Congress had not made *specific* findings on interstate commerce in the legislative history of that law. He wrote that his conclusion was mandated by "our system of constitutional federalism."¹⁶¹ The majority, commenting on his dissent, said that demanding such explicit findings of Congress "runs counter to the deference that the judiciary owes to its two coordinate branches of government, a basic tenet of the constitutional separation of powers. Nothing in *Lopez* requires either Congress or the Executive to play Show and Tell with the federal courts at the peril of invalidation of a Congressional statute."¹⁶² Jeffrey Rosen, in the *New Republic* piece quoted above, wrote that in this decision, Judge Alito's "lack of deference to Congress is unsettling."¹⁶³

Judge Alito's position in the *Rybar* case has been repudiated by *all nine Circuit Courts* that have reviewed the machine gun law under the Commerce Clause, and the Supreme Court has repeatedly declined to review these decisions.¹⁶⁴ Indeed, most recently, the Supreme Court gave strong indication that it disagrees with Judge Alito's position on that law. In 2003, a panel of the Ninth Circuit (by a 2-1 vote) adopted his approach and attempted to distinguish an earlier Ninth Circuit ruling upholding the law¹⁶⁵ -- but the Supreme Court vacated and remanded the later ruling this year in a brief order without opinion.¹⁶⁶ Clearly, Judge Alito's view of the Commerce Clause, as expressed his dissent in *Rybar*, was far out of the mainstream.

Another of Judge Alito's troubling federalism opinions involved a law of special importance to women, the Family and Medical Leave Act (FMLA). The FMLA, passed by Congress in 1993, guarantees employees (in the private sector as well as those working for state agencies) unpaid leave for up to 12 weeks for personal medical needs, the birth or adoption of a child, or the care of a family member with a serious health condition. Congress intended to provide such leave, as it explained in the preamble to the Act, in a manner that "minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is

¹⁵⁹ *United States v. Rybar*, 103 F.3d 273 (3d Cir. 1996), *cert. denied* 522 U.S. 807 (1997) (Alito, J. dissenting).

¹⁶⁰ *United States v. Lopez*, 514 U.S. 549 (1995).

¹⁶¹ *Rybar*, 103 F.3d at 288 (Alito, J. dissenting)

¹⁶² *Id.* at 282.

¹⁶³ Rosen, *supra* note 32.

¹⁶⁴ *United States v. Franklyn*, 157 F.3d 90 (2d Cir. 1998), *cert. denied*, 525 U.S. 1027 (1998); *United States v. Wright*, 117 F.3d 1265 (11th Cir. 1997), *cert. denied*, 522 U.S. 1007 (1997); *United States v. Kirk*, 70 F.3d 791 (5th Cir. 1995), *aff'd by an equally divided court*, 105 F.3d 997 (5th Cir. 1997), *cert. denied*, 522 U.S. 808 (1997); *Rybar*, 103 F.3d 273; *United States v. Kenney*, 91 F.3d 884 (7th Cir. 1996); *United States v. Beuckelaere*, 91 F.3d 781 (6th Cir. 1996); *United States v. Rambo*, 74 F.3d 948 (9th Cir. 1996), *cert. denied*, 519 U.S. 819 (1996); *United States v. Wilks*, 58 F.3d 1518 (10th Cir. 1995); *United States v. Hale*, 978 F.2d 1016 (8th Cir. 1992), *cert. denied*, 507 U.S. 997 (1993).

¹⁶⁵ *United States v. Stewart*, 348 F.3d 1132 (9th Cir. 2003), *vacated by* 125 S. Ct. 2899 (2005).

¹⁶⁶ *United States v. Stewart*, 125 S.Ct. 2899 (2005).

available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis.”¹⁶⁷

In *Chittister v. Department of Community and Economic Development*, Judge Alito wrote the Third Circuit’s opinion ruling that in enacting the Family and Medical Leave Act, Congress lacked authority to allow state employees to sue for damages for violations of the law.¹⁶⁸ The Supreme Court subsequently ruled in *Nevada v. Hibbs*, in an opinion by Justice Rehnquist (over the dissent of Justices Thomas, Scalia and Kennedy), that Congress did have this power under Section 5 of the Fourteenth Amendment because the FMLA was enacted to address sex discrimination in the workplace.¹⁶⁹ *Chittister* did involve a different provision of the FMLA – the one guaranteeing medical leave for an employee’s own health reasons, not family leave for the care of a family member (the provision at issue in *Hibbs*). But in enacting the FMLA, Congress recognized the connection between the medical leave provision and sex discrimination.¹⁷⁰ Judge Alito gave short shrift to this reality, and his opinion portrays a judge who is not attuned to the nature of sex discrimination in the workplace that Congress was intent on addressing in the FMLA as a whole.¹⁷¹ Moreover, Judge Alito’s analysis could be read to apply to both the medical and family leave provisions of the Act,¹⁷² and even if it were read to address only the medical leave provision, both it and the family leave provision could be at risk with the replacement of both Justice Rehnquist and Justice O’Connor on the Court.

These opinions leave little doubt that Judge Alito would be a strong, added force on the Supreme Court to undermine Congress’s power in many areas of importance to women. Congress’s power to legislate under the Commerce Clause and the Fourteenth Amendment (and other provisions of the Constitution) is critical to its ability to address the public health, safety and welfare in a wide range of areas, including discrimination, clean air and water, and safe access to health care clinics, to name a few.

b. Alito Has Shown a Willingness to Limit Citizen Enforcement of Federal Statutory Rights

¹⁶⁷ 29 U.S.C.A. § 2601 (2005).

¹⁶⁸ *Chittister v. Department of Community and Economic Development*, 226 F.3d 223 (2000).

¹⁶⁹ *See, e.g., Nevada v. Hibbs*, 538 U.S. 721, 728 (2003).

¹⁷⁰ Congress specifically noted that the Act was necessary to minimize the potential for sex discrimination by ensuring that leave would be available for medical reasons (including medical leave used for maternity-related reasons) on a gender-neutral basis – reflecting the fact that women had been denied medical leave and suffered other adverse employment actions for taking medical leave for reasons related to pregnancy. 29 U.S.C.A. § 2601 (2005).

¹⁷¹ *Chittister*, 226 F.3d at 229. Even if his ruling were confined to the medical leave provision not considered in *Hibbs*, the same reasoning the Supreme Court employed in *Hibbs* should apply to that provision. In fact, since *Hibbs* was decided, two Circuit courts have ruled that it applies to the medical leave provision, and one of these was a unanimous Fourth Circuit panel composed of three of the most conservative members of that very conservative court. *See* *Bylsma v. Freeman*, 346 F.3d 1324 (11th Cir. 2003); *Montgomery v. Maryland*, No. 02-1998, 2003 WL 21752919 (4th Cir. July 30, 2003). *But see* *Touvell v. Ohio Dept. of Mental Retardation & Developmental Disabilities*, 422 F.3d 392 (6th Cir. 2005) (holding that Eleventh Amendment bars damages claim of state employee for violation of medical leave guarantee); *Brockman v. Wyoming Dept. of Family Serv.*, 342 F.3d 1159 (10th Cir. 2003), *cert. denied*, 540 U.S. 1219 (2004) (same).

¹⁷² His opinion asserted that *even if* Congress intended to address sex discrimination by enacting the medical leave requirements, mandating 12 weeks of leave was not tailored to prevent such discrimination. *Chittister*, 226 F.3d at 229. That reasoning could apply equally to the family leave provision.

Judge Alito's concurrence in one case suggests his support for restricting individuals' ability to enforce rights to public benefits such as Medicaid further than current Supreme Court precedents permit. In *Sabree v. Richman*, developmentally disabled Pennsylvania residents who had waited for years to receive services from a community-based intermediate care facility, for which they were eligible under Medicaid, sued the state's public welfare department to enforce their rights.¹⁷³ They brought suit under 42 U.S.C. § 1983, which permits individuals who are deprived of rights secured by the federal "Constitution and laws" by state action to bring an action in federal court. The district court, relying on a 2002 Supreme Court case, *Gonzaga University v. Doe*,¹⁷⁴ concluded that Congress had not unambiguously conferred the rights that plaintiffs sought to vindicate under §1983, and dismissed the suit. The Third Circuit reversed; after it carefully considered the relevant portions of the Medicaid Act against the backdrop of *Gonzaga University*, it was convinced that Congress had unambiguously conferred the rights that plaintiffs sought to enforce. But Judge Alito wrote a two-sentence concurrence explaining that he joined in the decision because "currently binding precedent" of the Supreme Court supported it, while pointedly noting that "the analysis and decision of the District Court may reflect the direction that future Supreme Court cases in this area will take."¹⁷⁵

Judge Alito's concurrence strongly suggests that if he were free to do so as a Supreme Court justice, he would change currently binding precedent and move the law in the direction taken by the District Court. This would further limit, and potentially preclude, individuals' ability to enforce rights created by legislation enacted under the Spending Clause such as Medicaid, public housing, child support enforcement, and public assistance – benefits and services that are especially important to low-income women and their families.

3. Alito Has Taken Positions That Would Undermine Anti-Discrimination Protections

Judge Alito has a very disturbing record with respect to legal protections against discrimination, especially in cases involving employment discrimination and affirmative action. Moreover, his record on the standards for reviewing sex discrimination under the Equal Protection Clause is not clear but raises concerns that should be probed further at his hearings.

There are troubling indicia about Judge Alito's views on sex discrimination more generally. In his 1985 job application, he touted his membership in Concerned Alumni of Princeton University (CAP).¹⁷⁶ CAP was founded in 1972, the year Alito graduated from Princeton, "by alumni upset that Princeton had recently begun admitting women," and it was openly hostile to the admission of women and minorities to Princeton.¹⁷⁷ One of the organization's founders, in a 1973 article in *Prospect*, its magazine, fondly reminisced about the days when Princeton was "a body of men, relatively homogenous in interests and backgrounds."¹⁷⁸ In 1983, just two years before Alito proudly cited his membership in CAP, an

¹⁷³ *Sabree v. Richman*, 367 F.3d 180 (3d Cir. 2004).

¹⁷⁴ *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002).

¹⁷⁵ *Sabree*, 367 F.3d at 194 (Alito, J., concurring).

¹⁷⁶ 1985 Job Application, *supra* note 12.

¹⁷⁷ Kirkpatrick, *supra* note 41.

¹⁷⁸ Davis, *supra* note 42, at 8.

article in *Prospect* entitled “In Defense of Elitism” argued that “People nowadays just don’t seem to know their place. . . . Everywhere one turns blacks 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.”¹⁷⁹ Even Princeton alumnus Bill Frist, now the Senate Majority Leader, condemned CAP back in 1975 – but Judge Alito has never done so.¹⁸⁰ Alito’s membership in an organization whose central purpose was to ensure that Princeton remained a white, male institution raises serious questions about his commitment to advancing and protecting the hard-won rights of women and minorities. Moreover, it is particularly problematic that a man affiliated with “a far right organization . . . committed to turning back the clock on coeducation at the University”¹⁸¹ has been nominated to replace the first woman ever to serve on the U.S. Supreme Court.

a. Alito’s Record Does Not Show That He Supports Strong Protections Against Sex Discrimination under the Constitution’s Equal Protection Clause

Since the 1970’s, the Supreme Court has repeatedly held that under the Constitution’s guarantee of equal protection, a law or government policy that discriminates on the basis of sex is subject to “heightened scrutiny” – and will be struck down unless the government can show it has an “exceedingly persuasive justification” for the discrimination.¹⁸² Before that time, under the “rational basis” test, the government had virtually unfettered ability to discriminate against women (or men) in every walk of life. The vigorous application of the heightened scrutiny test is critical to ensuring continued progress for women.

Judge Alito’s publicly available record does not contain clear statements of his views on these principles.¹⁸³ His professed support for the philosophy and some of the central legal tenets

¹⁷⁹ H.W. Crocker III, *In Defense of Elitism*, PROSPECT, Nov. 1983, at 6. The views of CAP were so far out of the mainstream that even one of its conservative members questioned the group’s motives when CAP “charged repeatedly that the administration was lowering admission standards, undermining the university’s distinctive traditions and admitting too few children of alumni.” In an internal memorandum, one member asked the board members, “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.” Kirkpatrick, *supra* note 41.

¹⁸⁰ On an alumni panel in 1975, Senator Frist said CAP had “presented a distorted, narrow and hostile view of the university that cannot help but have misinformed and even alarmed many alumni.” Kirkpatrick, *supra* note 41. Judge Alito has neither denied his membership in CAP nor condemned its agenda. In his response to the Senate Judiciary Committee questionnaire, he stated that he had “no recollection” of being a member of CAP. Samuel A. Alito, Jr., Responses to United States Senate Committee on the Judiciary, Questionnaire to Nominee for the Supreme Court of the United States, Nov. 30, 2005, at 7 [hereinafter Alito Questionnaire]. He clearly recalled it in 1985, however, when he sought to prove his conservative credentials for a promotion in the Reagan Administration. If he was not in fact a member of CAP or did not believe in its agenda, he was guilty of dishonesty on his job application.

¹⁸¹ Chanakya Sethi, *Alito ’72 Joined Conservative Alumni Group*, DAILY PRINCETONIAN, Nov. 18, 2005, at 1.

¹⁸² *United States v. Virginia (VMI)*, 518 U.S. 515 (1996).

¹⁸³ In an opinion in a case involving a different issue (finding that the Equal Protection Clause does not prohibit prosecutors from striking Spanish-speaking people from a jury when the accuracy of a translation will be at issue in the trial), Judge Alito catalogued the different standards of review applicable to different classifications, and stated accurately, without comment, that gender classifications are subject to heightened review. *Pemberthy v. Beyer*, 19 F.3d 857 (1994), *cert. denied* 513 U.S. 969 (1994). He wrote a law review article shortly after graduating from law

of the Reagan Administration, however, raises concerns. As noted earlier, in his application for a promotion in the Justice Department in 1985, Alito said, “I am and always have been a conservative and an adherent to the same philosophical views that I believe are central to this Administration.” He continued, “[I]t is my hope that even greater advances can be achieved during the second term, especially with Attorney General Meese’s leadership at the Department of Justice.”¹⁸⁴

The Meese-era Justice Department favored an “originalist” approach to constitutional interpretation, as advocated by Robert Bork. As explained in DOJ’s Guidelines on Constitutional Interpretation, citing Bork, “[C]onstitutional language should be construed as it was publicly understood at the time of its drafting and ratification and government attorneys should advance constitutional arguments based only on this ‘original meaning.’”¹⁸⁵ Bork had specifically written that, under this approach, the Equal Protection Clause of the Fourteenth Amendment did not apply to sex discrimination.¹⁸⁶ This reading of the Constitution would be devastating to women’s legal rights because it would mean that sex discrimination would be subject only to “rational basis” review.

Judge Alito therefore should be questioned closely at his confirmation hearing about his views on heightened scrutiny for sex discrimination. He should be asked specifically whether he believes heightened scrutiny applies to sex discrimination, under the Equal Protection Clause, and if so, whether it requires an “exceedingly persuasive justification” for discrimination, as articulated, for example, in the opinion of Justice O’Connor in *Mississippi University for Women v. Hogan*¹⁸⁷ and the opinion of Justice Ginsburg in *United States v. Virginia (VMI)*.¹⁸⁸ It is important to determine whether he believes in a weak version of heightened scrutiny, or even

school on equal protection and classifications based on family membership, but it did not discuss discrimination based on sex (except to note, without comment, that at that time, the rational basis -- which he called “minimal scrutiny” -- test had been applied in two cases to find violations of the Constitution: *Reed v. Reed*, 404 U.S. 71 (1971) and *Eisenstadt v. Baird*, 405 U.S. 438 (1972). Samuel A. Alito, *Equal Protection and Classifications Based on Family Membership*, 80 DICK. L. REV. 410 (1975-1976).

¹⁸⁴ 1985 Job Application, *supra* note 12.

¹⁸⁵ OFFICE OF LEGAL POLICY, *supra* note 50 at 3; *see also* Edwin Meese III, *The Battle for the Constitution: The Attorney General Replies to His Critics*, POLICY REVIEW, Winter 1986, at 34-35 (arguing for “a jurisprudence of original intention”). Under the heading “Suspect Classifications,” the Guidelines note that the Court has applied intermediate scrutiny – neither strict scrutiny nor rational basis review – to gender, but then go on to cast doubt on DOJ’s approval of heightened scrutiny for anything other than race discrimination, commenting that “whatever the efficacy of the existing suspect classes recognized by the Supreme Court – and with the exception of racial equality, which under the Fourteenth Amendment is entitled to special scrutiny, the constitutional rationale of these classes is tenuous at best. . . .” OFFICE OF LEGAL POLICY, *supra*, at 78.

¹⁸⁶ *See, e.g.*, Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 11 (1971); Judge Robert Bork, *Federalism and Gentrification*, Address before the Federalist Society (Apr. 24, 1982). Judge Bork subsequently confirmed, in his Supreme Court confirmation hearing, that he rejected heightened scrutiny for sex discrimination, and that was one reason for the Senate’s rejection of his nomination. *The Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States, Hearings Before the Senate Comm. on the Judiciary*, 100th Cong. 133, 160, 391-393, 396 (Sept. 15, 1987).

¹⁸⁷ *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 731 (1982) (in a 5-4 ruling, O’Connor wrote the opinion of the Court and emphasized the Court’s prior decisions holding that a law discriminating on the basis of sex requires “an exceedingly persuasive justification,” and that this standard was not met by a state university that excluded men from admission to its nursing school based on gender stereotypes).

¹⁸⁸ *United States v. Virginia (VMI)*, 518 U.S. 515 (1996) (holding that the Equal Protection Clause prohibits women from being barred from admission to a public university based on gender stereotypes).

agrees with Justice Scalia’s argument in *VMI* that the courts should not interfere with public institutions that discriminate against women when that discrimination is part of the traditions of the institution.¹⁸⁹

b. Alito Has Repeatedly Raised the Bar for Victims of Employment Discrimination to Succeed in Court

Judge Alito has a troubling record in the civil rights arena. In the area of employment discrimination, a number of his opinions, and particularly his dissents, take positions that, in the words of *The Washington Post* (which conducted its own research), “set a higher bar than his fellow judges for plaintiffs to prove that they were discriminated against – and sometimes even to get a trial.”¹⁹⁰ Similarly, based on an independent review of all 311 of Judge Alito’s published Third Circuit opinions, Knight Ridder concluded that “Alito has been particularly rigid in employment discrimination cases.”¹⁹¹

Indeed, in a number of notable cases, Judge Alito has found ways to make it harder for a plaintiff to prevail, or even to allow a jury to decide on his or her claims. These opinions resolve issues of fact that should be left to the jury; inappropriately discredit the plaintiff’s evidence of discrimination and construe the evidence in a light favorable to the employer; fail to examine the totality of the plaintiff’s evidence; and even bar the plaintiff from presenting relevant evidence at all out of concern that it would create “unfair prejudice” against the employer. In one case in which Judge Alito dissented (discussed below), the majority went so far as to say that had Judge Alito’s position prevailed, “Title VII [the federal law prohibiting discrimination in employment on the basis of race, national origin, sex and religion] would be eviscerated.”¹⁹²

In *Sheridan v. E.I. DuPont de Nemours and Company*,¹⁹³ for example, Barbara Sheridan alleged that, because of her sex, she was denied a promotion as a hotel’s manager of restaurants, retaliated against for complaining, then forced out of her job. The jury found in her favor on the last claim, for constructive discharge. Judge Alito – contrary to all ten of his colleagues on the Third Circuit, sitting *en banc* – voted to affirm the district court’s reversal of the jury verdict on this claim. The majority, finding that Sheridan had cast sufficient doubt on the employer’s stated reasons for its actions to enable the jury to find that those reasons were pretexts for discrimination, and rejecting the argument that Sheridan was required to produce any other evidence of discriminatory motivation, reversed the district court and remanded for reconsideration of the employer’s motion for a new trial.

In dissent, Judge Alito acknowledged that additional evidence of discrimination (beyond proof of pretext) should not usually be required for a plaintiff to get to a jury.¹⁹⁴ Despite this recognition, however, Judge Alito found that Sheridan had produced insufficient evidence to

¹⁸⁹ *Id.* at 566 (Scalia, J., dissenting).

¹⁹⁰ Amy Goldstein & Jo Becker, *Critics See Ammunition in Alito’s Rights Record*, WASH. POST, Nov. 3, 2005, at A1.

¹⁹¹ Henderson & Mintz, *supra* note 15.

¹⁹² *Bray v. Marriott Hotels*, 110 F.3d 986, 993 (3d Cir. 1997).

¹⁹³ *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061 (3d Cir. 1996), *cert. denied*, 521 U.S. 1129 (1997).

¹⁹⁴ *Id.* at 1078-79 (Alito, J., concurring in part and dissenting in part). This legal standard was largely adopted by the Supreme Court in a subsequent case, *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133, 146-47 (2000), under the Age Discrimination in Employment Act.

avoid a reversal of the jury verdict in her favor.¹⁹⁵ Ignoring the applicable standard for granting judgments as a matter of law – a standard that requires a court to find that “there is *no* legally sufficient evidentiary basis for a reasonable jury” to have found as it did,¹⁹⁶ and mandates that the evidence be viewed in the light most favorable to the non-moving party¹⁹⁷ – Judge Alito not only credited the employer’s explanations for its actions, but failed to consider some of the most salient aspects of Sheridan’s case in his summary of the evidence (such as the fact that her supervisor’s negative comments about her closely followed her complaints about sex discrimination). The result Judge Alito would have sanctioned in this case – reversal of a jury finding of sex discrimination that *every other judge on the Third Circuit would have upheld* – belies his general acknowledgement¹⁹⁸ that evidence of the sort Sheridan submitted should typically be sufficient to sustain a verdict. Moreover, Judge Alito’s dissent shows a willingness to give employers who fail to divulge the true reason for their adverse actions an inappropriate benefit of the doubt. As the majority noted, he “gives 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. Surely, the judicial system has little to gain by [Judge Alito’s] approach.”¹⁹⁹

Similarly, in *Bray v. Marriott Hotels*, Judge Alito dissented from a panel decision that allowed Beryl Bray, who alleged race discrimination in her employer’s failure to promote her, to present her case to a jury.²⁰⁰ Again disregarding the legal requirement that the court give Bray “the benefit of all reasonable inferences” in deciding whether a jury should hear her case,²⁰¹ Judge Alito ignored numerous inconsistencies in the employer’s evidence of the reason for its actions; dismissively characterized the employer’s clearly false statement that Bray was not qualified for the job as merely “loose language” insufficient to raise even a question of pretext; and decided for himself that the employer honestly believed that Bray was less qualified than the white applicant.²⁰²

In doing so, Judge Alito both usurped the role of the jury and engaged in what the majority characterized as an “improper” analysis of “each of the discrepancies in this record in isolation,”²⁰³ contrary to the Third Circuit rule – one that we believe is clearly correct – that “it is the totality of the evidence that must guide [the] analysis rather than the strength of each individual argument.”²⁰⁴ Moreover, Judge Alito failed to address the possibility that the employer’s assessment of whether Bray was the “best” qualified for the position could itself have been tainted by racial bias, and betrayed a troubling skepticism about the legitimacy of discrimination claims in general. In fact, the majority found that Judge Alito’s position “would immunize an employer from the reach of Title VII if the employer’s belief that it had selected the

¹⁹⁵ *Sheridan*, 100 F.3d at 1088 (Alito, J., concurring in part and dissenting in part).

¹⁹⁶ FED. R. CIV. P. 50(a) (emphasis added).

¹⁹⁷ Charles Alan Wright & Arthur R. Miller, 9A FEDERAL PRACTICE AND PROCEDURE § 2524 (2005).

¹⁹⁸ *Sheridan*, 100 F.3d at 1078 (Alito, J., concurring in part and dissenting in part).

¹⁹⁹ *Id.* at 1070.

²⁰⁰ *Bray*, 110 F.3d at 998 (Alito, J. dissenting).

²⁰¹ Wright & Miller, *supra* note 201.

²⁰² *Bray*, 110 F.3d at 1000-02 (Alito, J. dissenting).

²⁰³ *Id.* at 991.

²⁰⁴ *Id.*

‘best’ candidate was the result of conscious racial bias.”²⁰⁵ The majority went so far as to declare that “Title VII would be eviscerated if our analysis were to halt where [Judge Alito’s] dissent suggests” – *i.e.*, at the employer’s assertion that it honestly believed it had selected the best candidate for the job.²⁰⁶

Judge Alito’s colleagues accused him of resolving issues of disputed fact that were properly for a jury to decide in some disability and age discrimination cases as well. In *Nathanson v. Medical College of Pennsylvania*, the majority reversed the district court’s grant of summary judgment to a medical school, finding that the plaintiff had raised significant factual issues, which should have been resolved by a jury, about whether her school had offered a reasonable accommodation for her disability.²⁰⁷ In dissent, Judge Alito voted to deny the plaintiff a jury trial, arguing that she “did not show that she could have continued attending classes,” despite her testimony to the contrary, had the accommodation been made.²⁰⁸ Judge Alito’s opinion once again shows his willingness to usurp the function of the jury and to conclusively resolve disputed issues of fact. It also gives the employer inappropriate leeway to avoid providing a requested accommodation by simply asserting that the accommodation might not effectively assist the person with a disability. As the majority stated, “few if any Rehabilitation Act cases would survive summary judgment if [Judge Alito’s] analysis were applied to each handicapped individual’s request for accommodations.”²⁰⁹ Similarly, in *Keller v. ORIX Credit Alliance, Inc.*,²¹⁰ writing for an *en banc* majority, Judge Alito found that an age discrimination plaintiff had failed to present sufficient evidence to get to a jury, even though the plaintiff was passed over for a promotion and fired, and the plaintiff testified that the president of his company made blatantly aged-based comments, stating “[i]f you are getting too old for the job, maybe you should hire one or two young bankers.”²¹¹ The dissent in *Keller* stated that Judge Alito had usurped the role of the finder of fact in determining the weight to be given to the president’s statement.²¹²

Several other opinions authored by Judge Alito betray a disturbing tendency to discount the value of a plaintiff’s evidence or to heighten the evidentiary burden on an individual trying to prove discrimination. In *Antol v. Perry*,²¹³ where the plaintiff claimed that he was subject to discrimination based on his disability, Judge Alito wrote separately to stress that he saw little probative value in the plaintiff’s evidence that his employer had violated its statutorily required

²⁰⁵ *Id.* at 993.

²⁰⁶ *Id.*

²⁰⁷ *Nathanson v. Med. Coll. of Pa.*, 926 F.2d 1368 (3d Cir. 1991).

²⁰⁸ *Id.* at 1393 (Alito, J. dissenting).

²⁰⁹ *Id.* at 1387 n.13.

²¹⁰ *Keller v. ORIX Credit Alliance, Inc.*, 130 F.3d 1101 (3d Cir. 1997) (*en banc*).

²¹¹ *Id.* at 1106.

²¹² *Keller*, 130 F.3d at 1115 n6. Similarly, in *Delli Santi v. CNA Ins. Co.*, 88 F.3d 192 (3d Cir. 1996), Judge Alito improperly second-guessed a jury verdict in dissenting in part from a panel decision that upheld a jury award of front pay to a plaintiff who challenged retaliation for her complaints of sex and age discrimination. Although the employer asserted that it terminated Evelyn Delli Santi because she violated the company’s mileage reimbursement policy, the jury rejected this rationale, finding, among other things, that over 200 employees who were in violation of the mileage policy were not reprimanded. Dismissing the jury’s conclusion, Judge Alito instead asserted that no reasonable jury could believe that an employer would not terminate an employee for violating its policy. *Id.* at 208 (Alito, J. concurring in part and dissenting in part).

²¹³ *Antol v. Perry*, 82 F.3d 1291 (3d Cir. 1996).

affirmative action plan for individuals with disabilities – even though the majority had already made clear that the employer’s failure to adhere to its affirmative action plan was not conclusive evidence that the employer had discriminated against the plan’s intended beneficiaries.²¹⁴ In *Bhaya v. Westinghouse Electric Corporation*, moreover, Judge Alito went so far as to uphold a trial court’s refusal to provide clarifying jury instructions, summarily sweeping aside²¹⁵ the plaintiffs’ and the dissent’s “substantial and ineradicable” concerns that the jury could have been led by prior instructions to believe that the plaintiffs needed to produce direct, “smoking gun” evidence in order to prevail on their age discrimination claims.²¹⁶

Indeed, Judge Alito has, in some cases, voted to exclude probative evidence altogether. In *Bhaya*, Judge Alito, writing the majority opinion for a divided panel, held that testimony that a senior manager said “let’s give it a try” when another high-level executive pointed out that terminating the employees might be “illegal or against contract” was not relevant to the plaintiffs’ case because the “most natural interpretation” of the statement involved the collective bargaining agreement rather than age discrimination.²¹⁷ Moreover, rather than allowing a jury to determine whether the employer’s statements, even assuming they related to the collective bargaining agreement, were evidence of age discrimination, Judge Alito determined that any connection was “remote at best.”²¹⁸ But as the dissent in *Bhaya* emphasized, that argument not only takes an issue away from the jury but “ignores the fact that age and seniority often are related” since “savings in salary and pensions * * * are tightly linked with age and seniority.”²¹⁹

Judge Alito took a similar stance in *Glass v. Philadelphia Electric Company*,²²⁰ a race discrimination case challenging an employer’s failure to promote the plaintiff. In *Glass*, the majority overturned the district court’s refusal to admit Harold Glass’s evidence that harassment he had endured negatively affected his performance – evidence that would have helped rebut the employer’s claim that it had legitimately denied plaintiff a promotion based in part on his performance reviews. Although Judge Alito conceded, in dissent, that the evidence was relevant to Glass’s case, he concluded that its value was outweighed by the “substantial unfair prejudice” it would have caused to the employer.²²¹ Once again standing in for the jury, Judge Alito also opined that the trial court’s ruling excluding the evidence did not affect the jury’s view of the case because the employer had cited reasons other than the performance evaluation for its decision.²²² Echoing his problematic approach in *Bray*, moreover, Judge Alito raised a question whether a plaintiff should *ever* be allowed to prevail based on evidence of the employer’s

²¹⁴ *Id.* at 1303 (Alito, J. concurring).

²¹⁵ *Bhaya v. Westinghouse Elec. Corp.*, 922 F.2d 184, 190-91 (3d Cir. 1990).

²¹⁶ *Id.* at 196 (Mansmann, J., dissenting). This tendency is apparent even in decisions in which Judge Alito concurred with his colleagues. In *Abramson v. William Paterson Coll. of N.J.*, 260 F.3d 265 (3d Cir. 2001), Judge Alito’s separate opinion suggested that he was raising the bar in cases of religious harassment to require plaintiffs to show that their employers intentionally pressured them to choose between their religions and their careers – a burden that goes beyond the established legal requirement simply to show the existence of a hostile work environment.

²¹⁷ *Bhaya*, 922 F.2d at 186-88.

²¹⁸ *Id.* at 188.

²¹⁹ *Id.* at 193 (Mansmann, J. dissenting).

²²⁰ *Glass v. Philadelphia Elec. Co.*, 34 F.3d 188 (3d Cir. 1994).

²²¹ *Id.* at 200 (Alito, J. dissenting).

²²² *Id.* at 201 (Alito, J. dissenting).

“unconscious discrimination”²²³ – as opposed to being forced to prove that an employer consciously lied in giving its reasons for the adverse action.

Judge Alito’s restrictive approach to evaluating plaintiffs’ claims has not been limited to his analysis of their evidence. In an unpublished split decision that has recently been made publicly available, *Pirolli v. World Flavors, Inc.*,²²⁴ Judge Alito would have affirmed the district court’s grant of summary judgment to the employer in a case of egregious sexual harassment – all because of a pleading error made by attorneys for Kenneth Pirolli, a plaintiff with an IQ of 75. According to Judge Alito’s dissent, Pirolli failed to include in his appellate brief a general statement that he was subjected to a hostile work environment or to point to specific parts of the record that described the severe conduct to which he had been subjected.²²⁵ And yet the majority in the case had no problem finding ample record evidence to overturn the district court’s summary judgment ruling – including evidence of an incident that caused Pirolli to believe he was being raped, “his coworker’s pushing a broom pole into his behind, and multiple incidents of a coworker rubbing his penis against Pirolli’s behind.”²²⁶ In fact, the majority was so incensed by the facts of the record that it felt compelled to hear the appeal and reverse the district court’s decision, asserting that “the error is so ‘plain’ that manifest injustice would otherwise result.”²²⁷

In sum, Judge Alito’s opinions in these employment discrimination cases reveal a troubling tendency to find ways to make it harder for plaintiffs to win, or even to get to a jury.²²⁸ The cumulative effect of his analyses could greatly weaken legal protections for women, minorities, and others against discrimination on the job.

c. Alito’s Record Shows Hostility to Affirmative Action

Every time Alito has had the opportunity to consider affirmative action, he has weighed in against its validity. In his 1985 application for a Justice Department position, Alito asserted that “it has been an honor and source of personal satisfaction for me to . . . help to advance legal positions in which I personally believe very strongly,” and said he was “particularly proud” of his contributions as Assistant to the Solicitor General in cases “in which the government has argued . . . that racial and ethnic quotas should not be allowed. . . .”²²⁹ These statements – using the inflammatory, pejorative “quota” label for affirmative action -- undoubtedly refer to Alito’s

²²³ *Id.* at 200 (Alito, J. dissenting).

²²⁴ *Pirolli v. World Flavors, Inc.*, No. 99-2043, slip op. at *1-3 (3d Cir. June 11, 2001) (Alito, J. dissenting). The Center has not completed its review of unpublished opinions, which were only recently made publicly available. But Judge Alito’s dissent in *Pirolli* has already revealed deeply troubling aspects of this portion of Judge Alito’s record.

²²⁵ *Id.* (Alito, J. dissenting).

²²⁶ *Id.* at *7.

²²⁷ *Id.* at *4 (internal citations omitted).

²²⁸ This is not to say that Judge Alito has ruled against plaintiffs without exception. For example, in *Zubi v. AT&T Corp.*, 219 F.3d 220, 227-32 (3d Cir. 2000) (Alito, J. dissenting), *abrogated by Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004), Judge Alito argued in dissent for application of the federal four-year – rather than the state two-year – statute of limitations, which would have led to reinstatement of plaintiff’s race discrimination claim under 42 U.S.C. § 1981; his result was upheld in a subsequent Supreme Court case, *Jones v. R.R. Donnelley & Sons Company*, 541 U.S. 369 (2004). However, *Zubi* addressed a procedural issue related to the timeliness of the plaintiff’s claims; it thus says nothing about Judge Alito’s response to a plaintiff’s evidence of discrimination.

²²⁹ 1985 Job Application, *supra* note 12.

participation in several briefs attacking affirmative action, including the briefs in *Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland*²³⁰ and *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*.²³¹ The Solicitor General's briefs in these cases argued that under Title VII, affirmative race-conscious relief (such as goals for promotion opportunities) could be awarded only to identifiable victims of an employer's discrimination -- even in response to widespread, continuing and intentional racial discrimination. The facts were particularly egregious in *Sheet Metal Workers'*, where a union found to have discriminated against minorities in violation of Title VII persisted in its discriminatory practices, flouting no fewer than three court orders during an eight-year period. The Supreme Court rejected the Solicitor General's position in both cases.²³²

Alito also worked on the Solicitor General's brief in *Wygant v. Jackson Board of Education*, which involved a constitutional challenge to a collective bargaining agreement requiring the school board to limit the percentage of minority teachers laid off.²³³ The government not only argued categorically that affirmative action plans could not be justified under the Constitution unless they remedied past discrimination, but also employed especially inflammatory language -- e.g., calling the remedy at issue "sinister" and akin to slavery.²³⁴ In this case, the Court adopted the result advocated in the government's brief, in large part because of the unique ways in which affirmative action in the layoff context imposed burdens on individual, non-minority bystanders and disrupted their settled expectations.²³⁵ But it did not engage in the sweeping attack on affirmative action found in the government's brief. Moreover, Justice O'Connor's concurrence explicitly kept open the possibility that an affirmative action program premised on diversity or other government interests beyond remedying past discrimination could survive constitutional scrutiny²³⁶ -- a possibility that was realized in the educational context in *Grutter v. Bollinger*, in an opinion that she authored.²³⁷

On the Third Circuit, Judge Alito has had little occasion to consider the validity of affirmative action.²³⁸ However, he joined the court's *en banc* opinion in *Taxman v. Board of*

²³⁰ Brief for the United States as Amicus Curiae, *Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986) (No. 84-1999). See Alito Questionnaire, *supra* note 180, at 39-40 ("I participated in drafting the government's *amicus* brief urging reversal.").

²³¹ Respondent's Brief and Reply Brief, *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. Equal Employment Opportunity Comm'n*, 478 U.S. 421 (1986) (No. 84-1656). See Alito Questionnaire, *supra* note 180, at 40-41 ("I participated in drafting the government's brief on behalf of respondent the Equal Employment Opportunity Commission.").

²³² *Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986); *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. Equal Employment Opportunity Comm'n*, 478 U.S. 421 (1986).

²³³ Brief for the United States as Amicus Curiae Supporting Petitioners, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (No. 84-1340) [hereinafter *Wygant* Brief]. See Alito Questionnaire, *supra* note 180, at 34 ("I worked on the brief in this case, which was filed on behalf of the United States as *amicus curiae*.").

²³⁴ *Wygant* Brief, *supra* note 238, at 6.

²³⁵ *Wygant v. Jackson Bd. of Education*, 476 U.S. 267 (1986).

²³⁶ *Wygant*, 476 U.S. at 286 (O'Connor, J., concurring in part and concurring in the judgment).

²³⁷ *Grutter v. Bollinger*, 539 U.S. 306 (2003), *reh'g denied*, 539 U.S. 982 (2003).

²³⁸ In addition to Judge Alito's participation in *Taxman v. Bd. of Educ. of Township of Piscataway*, discussed below, Judge Alito wrote one opinion that appears to implicate affirmative action without addressing it directly as a legal issue. Judge Alito wrote the opinion in *Hopp v. City of Pittsburgh*, 194 F.3d 434 (3d Cir. 1999), which affirmed a jury verdict in a reverse discrimination case brought by white police officers who were not hired by the Pittsburgh Police Department. Although the facts strongly suggest that the Police Department was applying an affirmative

Education of the Township of Piscataway,²³⁹ holding that Title VII prohibited an affirmative action program adopted by a local school district that was intended to promote diversity among members of the high school faculty for the benefit of its diverse student body. In *Grutter v. Bollinger*, the Supreme Court subsequently recognized the value of diversity in the educational setting, rejecting a constitutional challenge to a law school policy that took race into account in the admission of students.²⁴⁰ In addition, at least one circuit court since *Grutter* has extended the Court's ruling to uphold affirmative action in employment based on a diversity rationale.²⁴¹

Questions concerning the permissibility of affirmative action in employment and education will continue to come before the Court. For example, the Department of Justice is currently threatening to bring a Title VII action against a university whose graduate school programs offer certain fellowships that are allegedly restricted to women and minorities.²⁴² Judge Alito's record on these issues strongly indicates that if he were to join the Supreme Court, he would reject affirmative action measures, although they remain a vital tool to promote equality of opportunity and diversity.

d. Alito Rejected Constitutional Protection Against Sexual Harassment in School

Judge Alito's vote with the narrow majority in a constitutional case raises questions about his willingness to interpret the law to protect young women from the types of discrimination, including sexual harassment, they all too often face in their education. *D.R. v. Middle Bucks Area Vocational Technical School* involved allegations that two female students in a graphic arts class were sexually harassed on a regular basis by other students.²⁴³ One plaintiff, who had impaired hearing and speech, alleged that she was forced into a bathroom or darkroom, subjected to offensive touching, and forced to perform sexual acts several times a week for five months. The plaintiffs further alleged that several school officials, including the graphic arts teacher and the Assistant Director of the school, knew about the harassment. Since the case was brought under 42 U.S.C. § 1983, the issue was whether the state had a duty under the Due Process clause to protect students in its schools.²⁴⁴ Judge Alito joined the majority in a 7-5 *en banc* decision upholding the district court's dismissal of the case and finding that the school had no constitutional duty to protect its students. The majority opinion stated that even though “[n]o

action policy in its hiring process, Judge Alito's opinion does not analyze it as such, and does not explain its failure to do so.

²³⁹ *Taxman v. Bd. of Educ. of the Township of Piscataway*, 91 F.3d 1547 (3d Cir. 1996), *cert. granted*, 521 U.S. 1117 (1997), *and dismissed*, 522 U.S. 1010 (1997) (by agreement of the parties).

²⁴⁰ *Grutter*, 539 U.S. 306.

²⁴¹ *See Petit v. Chicago*, 352 F.3d 1111 (7th Cir. 2003); *see also Wittmer v. Peters*, 87 F.3d 916 (7th Cir. 1996) (upholding affirmative action in hiring, pre-*Grutter*, on grounds that minority boot camp guards had to be hired to make the program effective).

²⁴² Associated Press, *U.S. Orders College to Drop Fellowships For Minorities*, WASH. POST, Nov. 12, 2005, at A14.

²⁴³ *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364 (3d Cir. 1992), *cert. denied*, 506 U.S. 1079 (1993).

²⁴⁴ In *Davis v. Monroe Cty. Bd. Of Educ.*, 526 U.S. 629 (1999), the Court held that under Title IX of the Education Amendments of 1972, 20 U.S.C.A. § 1681 (2005), which prohibits sex discrimination (including sexual harassment) in school, a school may be liable for student-on-student sexual harassment if it had actual notice of the harassment and did not take sufficient steps to stop it. *D.R.* was decided before *Davis*. Judge Alito does not appear to have participated in any published cases involving Title IX.

one could help but be shocked by the factual allegations in this case,²⁴⁵ imposing liability under Section 1983 “would readily convert much tortious conduct into constitutional violations at the expense of a decent regard for federalism.”²⁴⁶ The dissent attacked this narrow interpretation, writing that the majority was interpreting Supreme Court precedent too narrowly, and that a state’s (here, the school district’s) duty to protect extends beyond those in prisons and mental institutions.²⁴⁷

e. Alito Refused to Grant Asylum to a Woman Who Feared Gender Persecution In Iran

In an immigration case, *Fatin v. INS*,²⁴⁸ Judge Alito wrote an opinion for the court upholding a deportation order against an Iranian woman, Parastoo Fatin, who sought asylum in the United States on the ground that she would face persecution in Iran because she objected to wearing the traditional veil required for women, and because she held feminist political opinions. Judge Alito’s opinion concluded that Fatin’s claim could not succeed because she had not established either that her objection to Iranian laws was sufficiently deep that she would be willing to suffer severe consequences for non-compliance (i.e., by refusing to wear the veil), or that her feminist beliefs would lead her to suffer severe consequences in Iran. This aspect of the opinion is troubling because it holds women facing persecution for gender-related reasons to a higher standard than other asylum applicants. Judge Alito did accept the proposition that an asylum claim could be based on a fear of persecution due to an individual’s refusal to conform to gender-specific laws and social norms (such as wearing a veil) or a fear of persecution based on one’s feminist beliefs, and this aspect of the decision has been praised for advancing the law on asylum claims for gender-based persecution.²⁴⁹ But his application of this principle in Fatin’s circumstances is troubling, because, as one authority wrote, “there is no reason women should have to show especially strong opposition – in effect, conscientious objection and unwilling martyrdom – in order to obtain protection.”²⁵⁰ Knight Ridder’s analysis of Judge Alito’s judicial record concluded, “the ruling was a hollow victory for Fatin. She lost her case when Alito found that she hadn’t shown enough factual evidence to prove that she’d be persecuted if she were sent back to Iran.”²⁵¹

III. CONCLUSION

²⁴⁵ *D.R.*, 972 F.2d at 1377.

²⁴⁶ *Id.*

²⁴⁷ The Supreme Court case being interpreted was *DeShaney v. Winnebago County Dept. of Soc. Services*, 489 U.S. 189 (1989), holding that a state agency was not liable under Section 1983 for failing to remove from his father’s custody a child who suffered permanent brain damage, even though it had reports that the father was abusing his child. The dissent in *D.R.* argued that under *DeShaney*, a school should be found to have the kind of “special relationship” with its students that gave rise to a constitutional duty to protect them from harm by third parties.

²⁴⁸ *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993).

²⁴⁹ Pamela Goldberg, *Where in the World Is There Safety for Me?: Women Fleeing Gender-Based Persecution*, in *WOMEN’S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES* 355 n.30 (Julie Peters & Andrea Wolper eds., 1995).

²⁵⁰ ANKER, *supra* note 49.

²⁵¹ Henderson & Mintz, *supra* note 15.

The Supreme Court is at a watershed moment. Justice Sandra Day O'Connor has played a pivotal role on many issues of central importance to women, and her replacement on the Court could bring about the erosion or loss of core legal protections for women for decades to come. The record of Judge Samuel Alito demonstrates that this is a very real danger if he is confirmed to the Court. He is an extreme conservative, whose views lie at the far-right edge of the ideological spectrum. His approach to the law is one that limits women's core legal protections, especially in three areas: women's reproductive rights; Congress's power to protect the public and citizens' ability to enforce their federal statutory rights; and anti-discrimination protections. Weakening these protections would have profound and harmful consequences for women across the country.

