



**Position Statement of the National Association of Social Workers (NASW)
Regarding the Confirmation of Judge Samuel A. Alito, Jr. to the
United States Supreme Court**

Introduction

The National Association of Social Workers, Inc. (“NASW”), a nonprofit professional association with over 150,000 members, is the largest membership association of social workers in the world. NASW works to enhance the professional growth and development of its members, to create and maintain professional standards, and to advance sound social policies.

NASW opposes the nomination of Judge Samuel A. Alito, Jr. to the United States Supreme Court. Furthermore, NASW joins other prominent organizations in calling for a thorough and deliberative confirmation process where Judge Alito can demonstrate his commitment to constitutional protections for women’s health and reproductive rights, to the constitutional principle of the separation of church and state, and to the significant progress that has been made in civil rights and liberties.

Diversity

NASW “supports the appointment of judges who reflect more accurately the demographic diversity of the United States, particularly in regard to people of color and women.”¹ The appointment of Judge Alito does not serve that goal and the appointment reflects a backward step in achieving diversity among the Justices. According to the Census 2000, 50.9 percent of the population of the United States is female, and women outnumber men by 5.3 million.² With the retirement of Justice Sandra Day O’Connor, the percentage of women on the country’s highest court will fall to 11 percent, a number far below the national average. In fact,

Justice O'Connor, in a statement to the Associated Press on Wednesday, July 20, 2005, acknowledged that she was disappointed "to see the percentage of women on our court drop by fifty percent."³ This reduction in the representation of women on the United States Supreme Court is especially relevant considering that, according to the American Bar Association, 48 percent of law school students last year were women.⁴

Since Justice O'Connor was nominated to the Supreme Court in 1981, becoming the first woman on the Court, the opportunities for women in the legal profession have changed dramatically. In 1981, approximately 7 percent of federal judges were women, whereas, today, 32.3 percent of federal judges are women. Furthermore, 16 percent of law firm partners, today, are women.⁵ The failure of President Bush to nominate a woman to the Supreme Court undermines the significant progress that the legal profession has made in the last quarter century and does not reflect the demographic diversity of the United States.

Choice

The *NASW Code of Ethics*⁶ states that "social workers promote clients' socially responsible self-determination."⁷ Thus, in its *Policy Statement on Family Planning and Reproductive Choice*,⁸ NASW encourages the recognition and protection of an individual's "unimpeded access to family planning and reproductive health services, including abortion services, [as] a fundamental human right that contributes to the advancement of women worldwide."⁹ The nomination of Judge Alito raises serious concerns for women's health and safety.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹⁰ Judge Alito wrote the sole dissent supporting a provision of a Pennsylvania abortion statute that required a woman to notify her husband before obtaining an abortion. Arguing that the statutory provision did not

place an undue burden on a woman's right to an abortion despite the concern that battered women may face physical and psychological abuse as a result of the spousal notification requirement, Judge Alito wrote, "an undue burden may not be established simply by showing that a law will have a heavy impact on a few women but instead a broader inhibiting effect must be shown."¹¹ He further stated that a spousal notification requirement neither created an "absolute obstacle" nor gave "a husband 'veto power'" over a woman's decision to obtain an abortion.¹² On appeal, the Supreme Court upheld the Third Circuit majority opinion that the spousal notification requirement was unconstitutional.¹³ Rejecting Judge Alito's argument, Justice O'Connor wrote in her concurring opinion that "[w]e must not blind ourselves to the fact that the significant number of women who fear for their safety . . . are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases."¹⁴ In *Planned Parenthood of Central New Jersey v. Farmer*,¹⁵ Judge Alito concurred in the majority's finding that a New Jersey statute banning partial birth abortions created an "undue burden" on a woman's right to obtain an abortion. However, Judge Alito argued that the case should have been decided on the narrow basis that the statute lacked an exception for the preservation of the health of the pregnant woman as required by *Stenberg v. Carhart*,¹⁶ and stated that the majority's opinion was "never necessary and is now obsolete."¹⁷ Judge Alito's decision to distance himself from the majority's opinion in this case raises concern about his commitment to a woman's constitutional right to obtain an abortion

The opinions of Judge Alito, in these cases, raise serious concern for NASW about his commitment to women's constitutionally based privacy rights. Should he replace Justice O'Connor, Judge Alito's commitment to women's privacy rights is of immediate concern since

the Supreme Court is scheduled to revisit the legal standard by which courts consider abortion restrictions, in *Ayotte v. Planned Parenthood*, this session.

Separation of Church and State

NASW “strongly supports the constitutional principle of separation of church and state.”¹⁸ Therefore, NASW maintains that the expression of religious beliefs “is a personal and private matter that should be neither constrained nor promoted by the government in any way.” The nomination of Judge Alito raises concerns for NASW about his commitment to the constitutional principle of separation of church and state. A number of arguments by Judge Alito demonstrate his conservative view that courts should be more accommodating when considering state entanglement with religion.

First, in *American Civil Liberties Union of New Jersey v. Schundler*,¹⁹ Judge Alito’s majority opinion stated that a city’s holiday display, which originally contained only a menorah and a crèche, did not violate the Establishment Clause due to the addition of secular symbols and two signs referring to cultural diversity.²⁰ The dissenting judge disagreed with the majority, arguing that “the addition of a few small token secular objects is not enough to constitutionally legitimate the modified display.”²¹ Furthermore, she distinguished the city’s holiday display in *Schundler* from the display that the Supreme Court allowed in *Lynch v. Donnelly*²² by the “superabundance of secular symbols [diluting] the message of the crèche” in the *Lynch* display.²³ Second, in a factually similar case, *American Civil Liberties Union of New Jersey v. Township of Wall*,²⁴ Judge Alito held that the plaintiffs lacked standing to challenge the constitutionality of a holiday display on Establishment Clause grounds because both the Nativity display and the menorah were donated to the township.²⁵ Furthermore, Judge Alito stated that any Township expenditure “in lighting the religious elements in the display” would have been “de minimus.”²⁶ Third, in

Child Evangelism Fellowship of New Jersey, Inc. v. Stafford Township School District,²⁷ Judge Alito opined for the majority that allowing a religious organization to have access to certain elementary schools to distribute religious materials through teachers, on bulletin boards, and on school walls did not violate the Establishment Clause. Judge Alito stated that granting the religious organization access to the school would not be an excessive entanglement of government and religion because it “would produce little interaction between [the religious organization] and [the school district]” and would not “coerce anyone to support or participate in religion or its exercise.”²⁸

Civil Rights

The *NASW Code of Ethics*²⁹ establishes an affirmative obligation for social workers “to prevent and eliminate discrimination, . . . to expand choice and opportunity for all people, . . . [and to] advocate changes in policy and legislation to improve social conditions and to promote social justice.”³⁰ As such, NASW opposes any executive order, legislation, or judicial decision that diminishes the gains in civil liberties and social justice obtained by the civil rights movements of the 1950s and 1960s. In its *Policy Statement on Civil Liberties and Justice*,³¹ NASW (1) encourages the protection of the rights of criminal defendants,³² (2) supports “the full implementation of existing civil rights legislation and its application,”³³ (3) supports the constitutional principle of separation of church and state³⁴ and (4) supports the preservation of the constitutional right to privacy.³⁵ The nomination of Judge Alito raises concerns for NASW about his commitment to the advances made in civil liberties in the past half-century. A number of opinions written by Judge Alito, in various cases, “have undermined the preservation of individual liberties and set back long-standing societal efforts to broaden the application of social justice principles.”³⁶

First, in his dissenting opinion in *Baker v. Monroe Township*,³⁷ Judge Alito argued that a search warrant lacking specific reference to the person or people to be searched should be read expansively to authorize “not only the premises . . . but also any persons found on the premises.”³⁸ However, stating that the “flawed document does not demonstrate that the magistrate determined search of any particular person to be justified,” the majority held that the warrant clearly lacked the particularity required by the Fourth Amendment and could not have authorized the searches of the plaintiffs.³⁹ Again, in *Doe v. Groody*,⁴⁰ the majority found that a strip search exceeding the scope of the search warrant violated the Fourth Amendment rights of a mother and her minor daughter.⁴¹ The search warrant did not, on its face, grant authority to search either of the plaintiffs and failed to incorporate those parts of an accompanying affidavit that requested the search of anyone on the premises.⁴² However, Judge Alito dissented, stating that the “majority employs a technical and legalistic approach” and arguing that the deficient warrant “authorized the search of any persons found on the premises” despite the fact that the search warrant only authorized the search of the suspect alone.⁴³

In *Rompilla v. Horn*,⁴⁴ Judge Alito, writing for the majority, held that the failure of a capital defendant’s attorneys to obtain school, hospital, court, and prison records that revealed mitigating evidence relating to the defendant’s mental condition did not constitute ineffective assistance of counsel.⁴⁵ The Supreme Court subsequently reversed Judge Alito, and Justice O’Connor stated in her concurring opinion that “the attorney’s failure to obtain and review the case file from their client’s prior conviction did not meet the standards of ‘reasonable professional judgment[t].’”⁴⁶ Additionally, in *Riley v. Taylor*,⁴⁷ Judge Alito voted to deny *habeas* relief to a death row inmate asserting a violation of the defendant’s equal protection rights, under *Batson v. Kentucky*, that discrimination on account of race occurred during jury selection. The

majority determined that a *Batson* violation had occurred; Judge Alito dissented despite statistical evidence of the State's systematic exclusion of minorities in jury selection and the majority's finding that there was a lack of "probative evidence underlying [the state court's] conclusion."⁴⁸ Finally, in *Banks v. Beard*,⁴⁹ the Third Circuit held that a policy of the state corrections department restricting access to non-legal and non-religious newspapers, magazines, and photographs by "high risk" inmates violated the inmates' First Amendment free speech rights.⁵⁰ Again, Judge Alito dissented, arguing that because high risk inmates have the "option of modifying their behavior and being promoted to a less restricted environment," despite "uncertainty about what must be done to obtain such a transfer," no First Amendment violation occurred.⁵¹

Second, in a number of cases, Judge Alito has voted to restrict the ability of employees to bring discrimination claims under Title VII of the Civil Rights Act of 1964. First, in *Sheridan v. E.I. DuPont de Nemours*,⁵² Judge Alito was the sole dissent in the Third Circuit's decision to reverse the district court's grant of summary judgment in a sex discrimination claim by a female employee. The majority concluded that where a plaintiff has made out a prima facie case for sex discrimination and has offered evidence of pretext concerning the defendant's claim that there was a legitimate reason for the allegedly discriminatory action the court must *always* deny summary judgment.⁵³ However, Alito argued for a more restrictive showing by the plaintiff, stating that summary judgment should "not always" be denied even when the majority's test has been met.⁵⁴ Again, in *Bray v. Marriot Hotels*,⁵⁵ Alito dissented in another discrimination in employment claim under Title VII, finding that the plaintiff had not produced sufficient evidence for a reasonable jury to doubt the defendant's claim that it made hiring decisions based on who was the "best" candidate.⁵⁶ Criticizing Judge Alito's argument, the majority noted that "[t]his

statute must not be applied in a manner than ignores the sad reality that racial animus can all too easily warp an individual's perspective to the point that he or she never considers the member of a protected class the 'best' candidate regardless of that person's credentials."⁵⁷ The majority further stated that "Title VII would be eviscerated if our analysis were to halt where the dissent suggests."⁵⁸ Furthermore, the majority again criticized Judge Alito for limiting the ability of an employee to bring a discrimination claim under Title VII in *Nathanson v. Medical College of Pennsylvania*.⁵⁹ The majority accused Judge Alito of judicial overreach, specifically stating that "the dissent has resolved several issues of disputed fact."⁶⁰

Third, Judge Alito's positions in *Schundler, Township of Wall*, and *Child Evangelism Fellowship* raise concern about his commitment to the constitutional principle of separation of church and state.⁶¹ Fourth, Judge Alito's positions in *Casey* and *Farmer* raise serious concerns over his commitment to the constitutional right to privacy.⁶² NASW calls for a thorough confirmation process that includes questions concerning Alito's commitment to the Constitutional right to privacy, the Constitutional principle of separation of church and state, and civil rights legislation.

Conclusion

In conclusion, because of NASW's support for the appointment of judges who more accurately reflect the demographic diversity of the United States, as well as NASW's concern for Judge Alito's commitment to the Constitutional right of privacy, the Constitutional principle of separation of church and state, and the significant advances made in civil rights, women's rights, and the protection of civil liberties over the past half-century, NASW is opposed to the nomination of Judge Samuel A. Alito, Jr. to the Supreme Court of the United States. NASW

calls for a thorough and deliberative confirmation process where Judge Alito can demonstrate his commitment to the aforementioned principles.

¹ National Association of Social Workers, *Civil Liberties and Justice*, in *Social Work Speaks: National Association of Social Workers Policy Statements* 37, 43 (Paula L. Delo et al. eds., 6th ed. 2003)[hereinafter *Civil Liberties and Justice*].

² U.S. Census Bureau, *Census 2000 Summary File 1* (2000).

³ *O'Connor: Roberts is 'First Rate'*, CBS News, July 20, 2005, available at <http://www.cbsnews.com/stories/2005/07/20/politics/printable710487.shtml>.

⁴ Adam Liptak, *O'Connor Leap Moved Women Up the Bench*, N.Y. Times, July 5, 2005, at A1.

⁵ *Id.*

⁶ National Association of Social Workers, *Code of Ethics of the National Association of Social Workers* (1996)[hereinafter *Code of Ethics*].

⁷ *Id.* at 5.

⁸ National Association of Social Workers, *Family Planning and Reproductive Choice*, in *Social Work Speaks: National Association of Social Workers Policy Statements* 124 (Paula L. Delo et al. eds., 6th ed. 2003).

⁹ *Id.* at 127 (citing United Nations Commission for Human Rights (1979)).

¹⁰ 947 F.2d 682 (3d Cir. 1991).

¹¹ *Id.* at 721.

¹² *Id.* at 722.

¹³ 505 U.S. 833 (1992).

¹⁴ *Id.* at 894.

¹⁵ 220 F.3d 127 (3d Cir. 2000)

¹⁶ 530 U.S. 914 (2000).

¹⁷ *Farmer*, 220 F.3d at 152.

¹⁸ *Civil Liberties and Justice*, *supra* note 1, at 44.

¹⁹ 168 F.3d 92 (3d Cir. 1999).

²⁰ *Id.*

²¹ *Id.* at 109.

²² 465 U.S. 668 (1984).

²³ *Schundler*, 168 F.3d at 110.

²⁴ 246 F.3d 258 (3d Cir. 2001).

²⁵ *Id.*

²⁶ *Id.* at 264.

²⁷ 386 F.3d 514 (3d Cir. 2004).

²⁸ *Id.* at 534-35.

²⁹ *Code of Ethics*, *supra* note 6.

³⁰ *Id.* at 5.

³¹ *Civil Liberties and Justice*, *supra* note 1.

³² *Id.* at 42.

³³ *Id.* at 44.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 37.

³⁷ 50 F.3d 1186 (3d Cir. 1995).

³⁸ *Id.* at 1197.

³⁹ *Id.* at 1189.

⁴⁰ 361 F.3d 232 (*3d Cir. 2004).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 247.

⁴⁴ 355 F.3d 233 (3d Cir. 2004).

⁴⁵ *Id.* at 253.

⁴⁶ 125 S.Ct. 2456, 2471 (2005).
⁴⁷ 277 F.3d 261 (3d Cir. 2001).
⁴⁸ *Id.* at 292.
⁴⁹ 399 F.3d 134 (3d Cir. 2005).
⁵⁰ *Id.* at 148.
⁵¹ *Id.* at 149.
⁵² 100 F.2d 1061 (3d Cir. 1996).
⁵³ *Id.*
⁵⁴ *Id.*
⁵⁵ 110 F.3d 986 (3d Cir. 1997).
⁵⁶ *Id.*
⁵⁷ *Id.*
⁵⁸ *Id.*
⁵⁹ 926 F.2d 1368 (3d Cir. 1991).
⁶⁰ *Id.* at 1387.
⁶¹ *See supra* text accompanying notes ____.
⁶² *See supra* text accompanying notes 10-17.