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TESTIMONY OF
MARJORIE PRESS LINDBLOM AND ROBERT E. HARRINGTON
CO-CHAIRS OF
THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
REGARDING ITS BOARD MEMBERS'
OPPOSITION TO THE NOMINATION OF
JUDGE SAMUEL A. ALITO
AS AN
ASSOCIATE JUSTICE OF
THE SUPREME COURT OF THE UNITED STATES

We, the undersigned, are the Co-Chairs of the Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee"). We appreciate the opportunity to present this written testimony for the record in connection with the Senate Judiciary Committee's consideration of the nomination of Judge Samuel A. Alito to be an Associate Justice of the United States Supreme Court. For more than forty years, the Lawyers' Committee has been devoted to the recognition and enforcement of civil rights in the United States. Throughout its history, the Board Members of the Lawyers' Committee have opposed only two other nominations to the Supreme Court.

On January 5, 2005, we submitted a Statement on behalf of 114 Board Members of the Lawyers' Committee and members of the boards of local Lawyers' Committees in opposition to the proposed appointment of Judge Alito. Our Statement urged the Judiciary Committee to inquire about, and Judge Alito to address fully, important civil rights issues raised by his record. Regrettably, what has been added to the public record about Judge Alito does not reduce or mitigate the concerns that motivate our opposition to his confirmation.

Affirmative Action and Diversity Measures

Our Statement noted that Judge Alito had made it plain that he personally believes "very strongly" in positions he had advanced while he was a government lawyer in the 1980's seeking to sharply curtail the scope and effectiveness of affirmative action measures. His relevant judicial opinions and votes did not show that he has changed his position. To the contrary, his record indicates that he is likely to interpret the Constitution and federal civil rights laws in a way that undermines the efforts of educational institutions and others to promote diversity in many different contexts. In view of his prior statements in this area, his hearing testimony did not alter our conclusion that as a Justice of the Supreme Court he is likely to take positions that might prevent the adoption and implementation of constructive affirmative action policies.

Senator Russell Feingold pressed Judge Alito to address the importance of racial and ethnic diversity to our country, but Judge Alito refused to acknowledge that it is a compelling national interest. Senator Feingold asked:

We talk about affirmative action. In her opinion in *Grutter v. Bollinger*, Justice O'Connor recognized the, quote, "real-world significance and impact of affirmative action programs and policies." And she noted that American businesses need skills obtained through exposure to widely diverse people and

cultures. A racially diverse officer corps is essential to the military's ability to fulfill its mission to provide national security. And diversity in colleges and university leads to diversity in civil society, which is, quote, "essential if the dream of one nation indivisible is to be realized," unquote.

Justice O'Connor expressly gave great weight to the views of military leaders who said a highly qualified, racially diverse military is essential.

How much weight would you give to that view?

Judge Alito responded that "I have personal experience about how valuable having people with diverse backgrounds and viewpoints can be. And the Supreme Court has expressed the view that diversity is a compelling interest, having a diverse student body is a compelling interest. Justice Powell voiced that back in the *Bakke* case, and it's been reiterated in a number of cases, and, most prominently, most recently in the *Grutter* case."

But when Senator Feingold pressed the question "Do you think that increasing diversity in the classroom is a compelling state interest?," Judge Alito's response was disappointing and unresponsive. He said that "*Grutter* is a precedent that directly addressed this issue, and *Gratz*, in the context of education. And it's the Supreme Court's recent word on this issue." We acknowledge that this statement does not rule out the possibility that he will vote to uphold affirmative action programs similar to the law school's program reviewed in *Grutter*. However, we believe that it is significant that he carefully refused to agree that the goal of realizing and advancing diversity in education and other contexts is a compelling national interest. This reluctance to give any support to the majority's approach in that case, particularly in light of his prior statements on this issue, leaves us convinced that his confirmation would threaten, not advance, the achievement of this vital national goal.

Protections Against Employment Discrimination

Our Statement expressed concern about Judge Alito's apparent hostility to plaintiffs in employment discrimination cases. Nothing presented during the hearings diminishes our concerns about Judge Alito's appellate decisions in employment discrimination cases. Senators Kyl and DeWine, seeking to defend the nomination, framed an issue as to whether Judge Alito's record demonstrates a pattern of ruling against the "little guy," and referred to a list of cases in which they said Judge Alito had ruled in favor of black plaintiffs in employment discrimination cases. But of the race cases listed, only one was an opinion written in dissent by Judge Alito, and

although it was in favor of the plaintiff, the decision was limited to – a procedural matter - the issue of the statute of limitations; it did not address the merits of the claim. Consequently, the list of cases cited by the Senators provides little if any support for the argument that Judge Alito has been sensitive to the claims of minorities in civil rights cases. To the contrary, a much more telling observation is one that we noted in our earlier Statement: in employment discrimination cases where a key legal issue was still unresolved by the Supreme Court, Judge Alito consistently took a position that made it more difficult for the plaintiff to prevail. The statute of limitations case appears to be the only exception to that pattern. Moreover, it remains true that Judge Alito has never written an opinion in favor of an African-American plaintiff in an employment discrimination case on the merits. Nothing presented during the hearings diminishes our concerns about Judge Alito's appellate decisions in employment discrimination cases.

Concerned Alumni of Princeton

Despite the many questions to Judge Alito about the Concerned Alumni of Princeton, he never responded to the most serious cause for concern: Why did he consider it appropriate and advantageous, in his 1985 job application, to emphasize his affiliation with an organization that identified itself with opposition to allowing minority and women applicants greater access to a prestigious university? His disclaimer of recollection about being a member does not provide an adequate response to this concern.

Additional Threats to Civil Rights

Civil rights issues received too little attention in the questioning to explore fully all of our concerns about Judge Alito. These concerns extend to other topics, such as his sense of deference to the actions of the executive branch. While this area of the law is not directly related to civil rights, as we noted in our original Statement, minorities can be adversely affected if the executive branch operates without sufficient checks and balances. For example, there is invariably a temptation for a society to be less sensitive to the rights of ethnic minorities if they are, simply because of their race or ethnic groups, suspected to be sympathetic with a foreign enemy. Our experience during World War II in the inexcusable treatment of Japanese-Americans is one terrible example. More recently, the executive branch has detained many individuals of Middle Eastern origin based on suspicion of links to terrorism. While we make no judgment on the appropriateness of the executive branch's actions in this area, our society's understandable concern about foreign enemies still has the potential to create similar risks. Too much deference

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to the executive branch based on national security or similar concerns can have a particularly adverse affect on minorities. We fear that if Judge Alito is confirmed, his addition to the Supreme Court will come to be regarded as a turning point, diminishing our nation's dedication to overcoming its tragic legacy of racial injustice.

We urge Senators who value the protection of civil rights, and effective measures for the full participation of people of all racial and ethnic backgrounds, to vote against cloture and to vote in opposition to the nomination of Judge Alito.

Marjorie Press Lindblom
Co-Chair

Robert E. Harrington
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January 5, 2006

The Honorable Arlen Specter
 Chairman
 Committee on the Judiciary
 United States Senate
 Washington, DC 20510

The Honorable Patrick J. Leahy
 Ranking Member
 Committee on the Judiciary
 United States Senate
 Washington, DC 20510

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 Patricia A. Brennan

Dear Chairman Specter and Ranking Member Leahy:

As the Co-Chairs of the Lawyers' Committee for Civil Rights Under Law, we submit the enclosed "Statement of Board Members Opposing the Nomination of Judge Samuel A. Alito as an Associate Justice of the Supreme Court of the United States" on behalf of the 114 individual members of the Board of Directors and Trustees who subscribe to the Statement.¹

These members of our Board oppose Judge Alito because the record demonstrates that his views are in direct conflict with the core civil rights principles to which the Lawyers' Committee is dedicated, and that as a member of the Supreme Court, Judge Alito would cast votes and write opinions that would set back the cause of civil rights in our country and impede our progress toward the goal of equal justice for all. It is worth noting that in the Lawyers' Committee's 42-year history, its Directors and Trustees have opposed a Supreme Court nominee on only two previous occasions.

We also enclose a Final Report that analyzes Judge Alito's legal philosophy pertaining to civil rights and constitutional interpretation. This in-depth Report serves as the basis for the conclusions contained in the Statement and provides extensive analysis of Judge Alito's background. If Judge Alito's testimony during confirmation hearings or other evidence justifies a change in the conclusions we have drawn, we will so inform you.

We hope the Statement and Report are of assistance to you and your staff. For the reasons noted in them, we strongly urge the Judiciary Committee to vote not to confirm this nominee.

Respectfully,

Marjorie Press Lindblom
 Marjorie Press Lindblom
 Co-Chair

Robert E. Harrington
 Robert E. Harrington
 Co-Chair

Enclosures

cc: All Members of the U.S. Senate

¹ This Statement also list the names of a few board members from our affiliate local Lawyers' Committee offices.