TESTIMONY OF THE NATIONAL BAR ASSOCIATION

BY ITS PRESIDENT, REGINALD M. TURNER, JR.

BEFORE THE

U.S. SENATE JUDICIARY COMMITTEE

IN THE CONFIRMATION HEARINGS OF

JUDGE SAMUEL A. ALITO, JR. (3d. CIR.)

ON HIS NOMINATION TO THE

UNITED STATES SUPREME COURT

JANUARY 13, 2006

SALUTATION

Mr. Chairman and other distinguished Members of the United States Senate Judiciary Committee, good morning.

I am Reginald Turner, the 63rd President of the National Bar Association. It is an extraordinary honor to testify on behalf of the National Bar Association before this Committee during these Confirmation Hearings regarding the nomination of Judge Samuel A. Alito to serve as an Associate Justice of the United States Supreme Court.

I. THE NATIONAL BAR ASSOCIATION

The National Bar Association ("NBA") was organized in 1925. With a network of more than 20,000 members and 80 bar affiliates, the NBA is the oldest and largest association of African American and minority attorneys, jurists, legal scholars, and law students in the world. When the NBA was organized in 1925, lawyers of color were prohibited from belonging to many other bar associations. At the time, there were fewer than 1,000 African American lawyers in the nation, and less than 120 of them belonged to the Association. Over the past 75 years, the NBA has grown enormously in size and influence. The objectives of the NBA are "... to advance the science of jurisprudence; improve the administration of justice; preserve the independence of the judiciary and to uphold the honor and integrity of the legal profession; to promote professional and social exchange among the members of the American and the international bars; to promote legislation that will improve the economic condition of all American citizens, regardless of race, sex or creed in their efforts to secure a free and untrammeled use of the franchise guaranteed by the Constitution of the United States; and to protect the civil and political rights of the citizens and residents of the United States."

The NBA extends its sincerest thanks to Chairman Arlen Specter, ranking Democratic member, Senator Patrick Leahy, and the other members of the Senate Judiciary Committee for the opportunity to participate in this Confirmation Hearing.

II. THE NBA EVALUATION OF JUDGE SAMUEL ALITO

The NBA has established a rigorous process and clear criteria for evaluating judicial nominees. The NBA takes a position on a nomination only after a complete and exhaustive evaluation of the nominee's record. Judge Alito was evaluated consistent with this process and these criteria. The NBA reviewed Judge Alito's entire record, including his professional and educational background and the available records of his years as a government lawyer. His record is troubling.

Judge Alito has solid educational and professional credentials. However, these credentials, alone, are not sufficient to qualify a lawyer or judge to become an Associate Justice of the United States Supreme Court. We strongly believe that a nominee to our Nation's highest court must share an unequivocal commitment to the basic liberties afforded to all Americans under the United States Constitution.[1] Unfortunately, Judge Alito's judicial decisions and other written records evidence an undeniable hostility to civil rights and personal liberties.

In this country, race and the treatment of racial issues by the judiciary profoundly affect every aspect of American life and play critical roles in the formulation of social, economic, and political agendas. Accordingly, the NBA has adopted a standard to determine whether a federal judicial nominee will interpret the Constitution and laws to effectuate racial and gender equality and eliminate oppression. This standard employs a contextual and historical jurisprudential

[1] See also, Lawyers Committee For Civil Rights Under the Law Report, *The Opposition of Judge Samuel Alito as an Associate Justice of the of the Supreme Court of the United States Statement of Opposition and Final Report* (2006) ["Lawyers Committee For Civil Rights Report"], p. 4.("Recognizing the Supreme Court's critical role in civil rights enforcement and the central role that civil rights plays in our democracy, a nominee must demonstrate a commitment to civil rights as a basic qualification.")

approach, in order to achieve equal justice under the law. Our standard examines not only the professional qualifications of a nominee, but also scrutinizes the nominee's ability to judge fairly and to advance our great Nation's slow but steady progress toward equality of opportunity. The NBA standard challenges unconstitutional and illegal oppression on the basis of race, gender, and class, to ensure that historically marginalized groups obtain the constitutional mandates of due process and the equal protection of the laws.

Despite the claims of neutrality and equality, the legal system is not as colorblind as it pretends to be. In *Grutter v. Bollinger,*[2] which upheld the use of affirmative action in the admissions process at educational institutions, Supreme Court Justice Sandra Day O'Connor acknowledged that: ". . . in a society, like our own . . . race unfortunately still matters."[3] Moreover, insofar as our judicial system has historically marginalized women and people of color, it is imperative that the law be viewed through a historical and contextual lens. A judicial nominee should be able to articulate support for Constitutional principles, statutes, and legal doctrines that serve to extend the blessings of liberty and equality to all Americans, including people of color.[4]

Upon Justice Sandra Day O'Connor's announcement of her retirement from the Supreme Court, the NBA urged President Bush to nominate a candidate for the Supreme Court who is not ideologically rigid and predictable, but who is fair, open-minded and committed to the protection of civil rights, civil liberties and the independence of the judiciary. The NBA's Judicial Selection Committee has reviewed Judge Alito's published opinions and his Senate Judiciary Committee Questionnaire to create a context for comparison to the judicial philosophy of Justice

[2] 539 U.S. 306 (2003).
[3] *Id.* at 333.
[4] Testimony of the National Bar Association by its President, Reginald M. Turner, Jr. Before the U.S. Senate Judiciary Committee in the Confirmation Hearings of Judge John G. Roberts, Jr. (D.C. Cir.) on His Nomination to the United States Supreme Court (September 15, 2005).

O'Connor, who demonstrated a conservative but fair and balanced approach to questions of civil rights and civil liberties. Our committee examined thousands of pages of documents, conducted confidential interviews and discussions with jurists, professors of law, Republicans and Democrats, conservatives and liberals, legal scholars, and officers and members of many organizations, including the American Association of Law Schools, Society of American Law Teachers, American Bar Association, Southeastern Association of Law Schools, Alliance for Justice, Lawyers Committee for Civil Rights, Leadership Conference for Civil Rights, NAACP Legal Defense and Educational Fund, and People for the American Way, to determine whether the nominee meets our exacting standards.

On the basis of the NBA's review of Judge Alito's record, we are precluded from supporting his nomination of Judge Alito to the United States Supreme Court.

The NBA takes this position on the following grounds:

(1) there are numerous available documents demonstrating that the nominee does not support an independent judiciary, civil rights, personal liberties, and equal justice under the law;

(2) there are numerous documents evidencing the nominee's "long-held" views on the authority of Congress to promulgate legislation for the public good under the Commerce Clause and Section 5 of the 14th Amendment of the Constitution, which are inconsistent with well-established jurisprudence, and contrary to the well-being of the public;

(3) the nominee views the Executive Branch as supreme and possessing unlimited powers; and

(4) the record is incomplete, as Judge Alito and the White House have not responded to the NBA's request to meet with the nominee to discuss his qualifications utilizing the NBA standard, so as to permit the NBA Judicial Selection Committee to evaluate fully and completely whether he could be fair and impartial while sitting as an Associate Justice of the United States Supreme Court.

The following is the NBA's summary of the record of Judge Alito and our reasons for opposition to his nomination.

A. The Nominee's Judicial Philosophy Would Severely Curtail Civil Rights.

Judge Alito's record evidences a long held, extremist judicial philosophy. Regardless of the specific facts before him, Judge Alito repeatedly reaches conclusions that would curtail the power of Congress and the Federal Judiciary to protect the rights of all Americans, and particularly the rights of the most vulnerable Americans – minorities, women, the disabled, and the poor. As a consequence, Judge Alito is considered one of the nation's most far-right federal judges.[5] Although Justice O'Connor was the "swing-vote" in cases involving many different areas of the law, the majority of the 5-4 decisions have been in the area of civil rights, involving affirmative action, sex discrimination, disability rights, sexual harassment, voting rights, and the application of civil rights laws to associations.[6] Therefore, if Judge Alito is confirmed as an Associate Justice of the Supreme Court, his extreme judicial philosophy would have a profound and detrimental impact upon the direction of the Supreme Court in the areas of civil rights and civil liberties.

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[5] People For the American Way, *The Record and Legal Philosophy of Judge Samuel Alito: "No One to the Right of Sam Alito on This Court"* (2006) ["PFAW Report"], p. 8.
[6] Lawyers Committee for Civil Rights Report, pp. 3-4

1. Judge Alito's Writings As A Lawyer

Judge Alito's philosophy is unequivocally revealed in his 1985 Justice Department employment application for the position of Deputy Assistant Attorney General ("1985 Job Application"). Among other things, Judge Alito referred to the "supremacy" of the Executive and Congressional Branches over the Federal Judiciary.[7] However, this view was specifically renounced by the drafters of the Constitution, who consciously established three co-equal branches of government, which is documented extensively in historical writings.[8] Accordingly, the NBA believes that Judge Alito improperly and dangerously minimizes the significance of an independent Federal Judiciary, while viewing the Executive Branch as possessing unlimited authority. Such views directly contravene the views of our Constitutional Framers and effectively would lead to the erosion of the system of checks and balances they envisioned and memorialized within the United States Constitution.[9]

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[7] *See* Attachment to PPO Non-Career Appointment Form of Samuel Alito, Nov. 15, 1985 ["1985 Job Application"].

[8] *See generally*, the Federalist Papers (Nos. 47-51). More specifically, Federalist No. 51 highlights the inherent checks and balances needed within a federal government such as ours:

> TO WHAT expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places. . . .
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> We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State."

Alexander Hamilton or James Madison, Federalist Paper No. 51: The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments (From the New York Packet)(Friday, February 8, 1788).

[9] Based upon his written record, it is apparent that Judge Alito's views have further evolved from his early days in the Department of Justice such that he no longer respects the authority of Congress to promulgate legislation, and now it appears he would concede undue power and authority to the Executive Branch.

Furthermore, Judge Alito expressed disagreement with well-established Supreme Court precedents that relate to matters crucial to Americans' rights.[10] For example, in his 1985 Job Application, Judge Alito indicated that he was attracted to constitutional law because of his "disagreement with Warren Court decisions," including those involving reapportionment.[11] The reapportionment cases to which Judge Alito referred include a series of landmark decisions mandating creation of electoral districts in which minority voters would have real opportunities to elect candidates of their choice.[12] Most importantly, these cases established the constitutional principle of "one person—one vote."[13] Under this fundamental doctrine, every citizen of the United States has the right to an equally effective vote, rather than the mere right to cast a ballot.[14]

In addition, Judge Alito felt so strongly about limiting congressional authority that, as a Justice Department official, he urged President Reagan to veto a minor and uncontroversial bill to prevent odometer fraud because, in Judge Alito's view, the States and "not the federal government" are charged with protecting the "health, safety and welfare" of Americans.[15] Fortunately, President Reagan rejected Alito's extremist advice and signed the bill.[16] Finally, as a Justice Department lawyer, Judge Alito said that he "personally believe[d] very strongly," that affirmative action should never be used even as a remedy for past discrimination, ostensibly because he opposed quotas. He argued this, notwithstanding the fact the very programs he condemned did not involve quotas. At the same time, he proudly boasted of his membership in Concerned Alumni of Princeton, a notorious Princeton alumni group that advocated quotas for

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[10] *See* 1985 Job Application.
[11] *Id.* It appears one of those cases was *Reynolds v. Sims*, 377 U.S. 533 (1964).
[12] *See generally*, *Reynolds v. Sims*, 377 U.S. 533 (1964).
[13] *Id.*
[14] *Id.*
[15] PFAW Report, p. 8.
[16] *Id.*

children of alumni in an effort to reduce the admissions of women and minorities to the prestigious university.[17]

Although these writings are twenty years old, they are relevant today because the extremist views espoused by Judge Alito are reflected in his judicial record.[18]

2. Judge Alito's Judicial Record

Judge Alito's judicial record further evidences that he is unqualified for confirmation to the Nation's highest court. Judge Alito's 1985 self-described, "very strongly" held legal views[19] are manifested in his extremely troubling judicial record. Notwithstanding his statements to the contrary, Judge Alito is a judicial activist who seeks to legislate from the bench, by implementing extreme ideology through court opinions. Most significantly, his opinions evidence an agenda to reverse hard-fought civil rights gains. Judge Alito has an agenda to limit improperly the authority and power of Congress. Significantly, Judge Alito's record demonstrates an inconsistent "criticism of judicial activism on one front while embracing it on another."[20]

To summarize:

- Judge Alito has been the most frequent dissenter among the Third Circuit Court of Appeals judges (appointed by both Republican and Democratic Presidents), since his

[17] *Id.*

[18] It is well known that during the Reagan era, Judge Alito worked on several affirmative action case briefs, which wound up before the United States Supreme Court. The extremist views of the Solicitor General's office can be seen clearly. *See e.g., Local 93, Int'l Assoc. of Firefighters v. City of Cleveland,* 478 U.S. 501 (1986); *Local 28 of the Sheet Metal Workers' Int'l Assoc. v. EEOC,* 478 U.S. 421 (1986). Both of these cases in our view demonstrate Judge Alito's consistent mischaracterization of remedial affirmative action programs as racial quotas. *See also,* 1985 Job Application.

[19] *See* 1985 Job Application.

[20] R. Gordon, "*Alito or Scalito?*," SLATE, Nov. 1, 2005.

appointment in 1990. He has the largest number of dissents (64 written; 70 written or joined).[21]

- According to estimates by University of Chicago law professor Cass Sunstein, more than 90% of Alito's dissents take positions more conservative than those of his colleagues. This is a much more conservative record than other very conservative federal appellate judges. For example, while Judge Michael Luttig – reputed for his conservative ideology – has dissented in the more liberal direction 32% of the time, only 9% of Judge Alito dissents have gone in this direction.[22]
- Judge Alito rejected the views of a majority of his court, as well as the rulings of six other federal appellate courts, when he reasoned that the federal law limiting the possession and transfer of machine guns was unconstitutional, and upheld alleged "limits on Congressional power." The court majority criticized his dissent as "counter to the deference that the judiciary owes" to Congress.[23]
- In civil rights cases where the Third Circuit was divided, Judge Alito has opposed civil rights protections more than any of his colleagues. Indeed, he has advocated positions detrimental to civil rights 85% of the time and has filed solo dissents in more than a third of those cases.[24]

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[21] PFAW Report, pp. 8-11. *See* Appendix A – Judge Samuel Alito's Record of Dissents on the Third Circuit.
[22] *Id.* at. 8. *See also,* Transcript of *A survey course on Samuel Alito's legal views*, NPR: MORNING EDITION, Nov. 11, 2005.
[23] *See, United States v. Rybar*, 103 F3rd. 273 (3d Cir. 1996).
[24] PFAW Report at 8. *See also,* Transcript of *A survey course on Samuel Alito's legal views*, NPR: MORNING EDITION, Nov. 11, 2005.

- In one civil rights case, all ten of Judge Alito's colleagues – appointed by Republicans and Democrats alike – agreed that a sex discrimination victim's case was properly submitted to the jury, contrary to Judge Alito's sole dissent.[25]
- In one case, Judge Alito's dissent condoned the strip search of a 10-year-old girl and her mother, even though they were not named in the warrant that authorized. The majority opinion by then-Judge Michael Chertoff (now Secretary of the Department of Homeland Security) criticized Judge Alito's view as threatening to turn the search warrant requirement into "little more than the cliché 'rubber stamp.'"[26]

a. <u>Voting Rights</u>

As previously stated, in Judge Alito's 1985 Job Application, he denigrated case law that protected the voting rights of citizens of color. Although Judge Alito has only presided over one case interpreting the Voting Rights Act, his decision created a substantial negative impact upon the voting rights of minority voters. In *Jenkins v. Manning*,[27] Judge Alito ruled against minority voters' challenge of a Delaware school board voting plan, which utilized an at-large system, because it illegally diluted their voting strength. Judge Alito's decision perpetuated an electoral system that diluted the voting strength of racial minorities.

b. Limiting Congress' Authority to Remedy Discrimination

Judge Alito's decisions demonstrate that he clearly assigns minimal weight to Congressional authority to remedy discrimination and reduce inequalities.[28] In fact, Judge Alito would require specific Congressional legislative findings to justify the exercise of that

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[25] *Id.*
[26] *Id.*
[27] 116 F.3d 685 (3d Cir. 1997).
[28] Lawyers Committee for Civil Rights Report, p. 5.

authority.[29] For example, Judge Alito's majority opinion in *Chittister v. Department of Community and Economic Dev.*,[30] held that the Family and Medical Leave Act ("FMLA") was inapplicable to a state employer because Congress failed to articulate legislative findings of intentional discriminatory sick leave practices by public employers. Judge Alito held that these provisions did not represent a valid exercise of Congress' power to enforce the Fourteenth Amendment and that the FMLA does not abrogate Eleventh Amendment immunity. In FMLA, Congress had identified the conduct transgressing the Fourteenth Amendment as "the potential for employment discrimination on the basis of sex" in violation of the Equal Protection Clause. However, in Judge Alito's view, Congress had not met the standard established in *City of Boerne v. Flores*,[31] where the Supreme Court held that in order for an exercise of Congress' enforcement power under the Fourteenth Amendment to be sustained, "there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[32] Thus in *Chittister,* Judge Alito substituted his judgment for that of Congress, stating *inter alia*: "Notably absent is any finding concerning the existence, much less the prevalence, in public employment of personal sick leave practices that amounted to intentional gender discrimination in violation of the Equal Protection Clause."[33] Judge Alito remarkably stated that "the FMLA does much more than require nondiscriminatory sick leave practices; it creates a substantive entitlement to sick leave."[34] "This requirement is 'disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act.'"[35]

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[29] *Id.*
[30] 226 F.3d 223 (3d Cir. 2000).
[31] 521 U.S. 507, 520 (1997).
[32] *Id.* at 520.
[33] *Chittister,* 226 F.3d at 228-229.
[34] *Id.* at 229.
[35] *Id.*

As the Lawyers Committee for Civil Rights notes, in *Chittister*, Judge Alito interpreted the standard for legislation under Section 5 of the Fourteenth Amendment as if Congress' authority depended on express congressional findings of discriminatory intent.[36] Furthermore, Judge Alito held that Congress was limited to legislation solely intended to prevent gender discrimination, reasoning that no findings or evidence could justify a statutorily required benefit of a minimum period of leave based upon Section 5 of the Fourteenth Amendment.[37] He reached this conclusion despite consistent and well-established Congressional legislation in this arena.

The Supreme Court effectively renounced Judge Alito's *Chittister* approach in *Nevada Dep't of Human Resources v. Hibbs*.[38] In *Hibbs*, the State of Nevada unsuccessfully argued that Section 5 did not authorize Congress to provide a "substantive entitlement program" under FMLA. The Supreme Court disagreed, stating that "Congress 'is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment,' but may prohibit 'a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.'"[39] Hence, Judge Alito has interpreted Congress' power under the Fourteenth Amendment more restrictively than current Supreme Court precedent dictates. If Judge Alito is confirmed to the Supreme Court, his extreme judicial philosophy would undermine Congress' efforts to enforce civil rights.

United States v. Rybar[40] is further illustrative of this point. In *Rybar*, Judge Alito wrote an extensive dissenting opinion regarding the scope of Congress' Commerce Clause power.[41] Congress' Commerce Clause power is crucial to civil rights enforcement because it is the basis

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[36] Lawyers Committee for Civil Rights Report, p. 6.
[37] *Id.*
[38] 538 U.S. 721 (2003).
[39] *Id., quoting Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 81 (2000).
[40] 103 F.3d 273 (3d Cir. 1996).
[41] *Id.* –

for many statutes that address private party discrimination.[42] Judge Alito reasoned that a law criminalizing possession of a machine gun required more specific Congressional findings of fact regarding its effects on interstate commerce than were presented in the findings of fact of related statutes, which addressed interstate transfer of firearms. However, the majority decision correctly criticized Judge Alito's view as undermining "the deference that the judiciary owes to its two coordinate branches of government, a basic tenet of the constitutional separation of powers."[43]

c. Employment and Other Civil Rights Cases

Judge Alito's record on the bench demonstrates a predisposition to protect businesses from civil rights claims and to make it more difficult for people of color, women, the elderly and the disabled to obtain judicial redress. Judge Alito's decisions in civil rights cases show that he has consistently used overly stringent procedural and evidentiary standards to rule against claimants seeking remedies for harm incurred on the basis of race, gender, age and disability.

The NBA also is troubled by the results of an analysis of Judge Alito's record on claims of discrimination based upon race, gender, age, or disability under federal law conducted by the

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[42] It is well settled that Congress has broad power – "broad and sweeping" - to regulate interstate commerce. *Katzenbach v. McClung*, 379 U.S. 294 (1964) (where a restaurant refused to serve African-Americans, Congress could regulate a business that served mostly local persons, but sold food that moved across state lines); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (Congress had power to enact appropriate legislation with regard to a place of public accommodation such as appellant's motel even if it is assumed to be of a purely "local" character): *United States v. Wrightwood Dairy* Co., 315 U.S. 110 (1942) (price regulation by the Secretary of Agriculture over milk produced and sold intrastate was authorized by the provisions of the Agricultural Marketing Agreement Act of June 3, 1937, and was a permissible regulation under the Commerce Clause); *Wickard v. Filburn*, 317 U.S. 111 (1942) (the Agricultural Adjustment Act of 1938, which allowed production and consumption of homegrown wheat, was a proper exercise of Congress' power under the Commerce Clause); *United States* v. *Darby*, 312 U.S. 100 (1941) (the FLSA was a proper exercise of Congress' power to regulate interstate commerce*); NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)(in this watershed case, the NLRA was a proper exercise of Congress' power to regulate interstate commerce).

[43] 103 F.3d at 282.

People for the American Way.[44] Of twenty civil rights cases where the appellate court was divided, Judge Alito decided against civil rights protections in seventeen of them (eighty-five percent of the time).[45] Of the remaining three, only one was decided on the merits. The other two cases were decided on statute of limitations grounds. In each of these divided cases, Judge Alito was the only judge who displayed such a consistent anti-civil rights record.[46] In fact, in six of the seventeen civil rights opinions, Judge Alito was the sole dissenter, including one in which Judge Alito was outvoted 10 to 1.[47]

In his dissent in *Bray v. Marriott*,[48] Judge Alito argued for imposing an evidentiary burden on victims of employment discrimination that, according to the majority, would have "eviscerated" legal protections under Title VII of the Civil Rights Act.[49] In particular, the majority contended that Judge Alito's position would protect employers from suit even in situations where an employment decision "was the result of conscious racial bias."[50]

In *Sheridan v. E.I. DuPont de Nemours & Co.*,[51] Judge Alito stood as the lone dissenter in a 10-1 decision of the full Third Circuit.[52] If adopted, his view would have made it more difficult for anyone alleging discrimination to present sufficient evidence to a jury. In particular, Judge Alito would have prevented a woman claiming gender discrimination from proceeding to trial, even where she had produced sufficient evidence showing that her employer's articulated reason to deny her a promotion was a pretext for the employer's alleged discriminatory actions.

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[44] PFAW Report, pp. 40-41.
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] 110 F.3d 986 (3d Cir. 1997).
[49] *Id.*,
[50] *Id.*
[51] 100 F.3d 1061 (3d Cir. 1996), *cert. denied*, 521 U.S. 1129 (1997).
[52] *Id.*

In *Glass v. Philadelphia Elec. Co.*,[53] a race and age discrimination case, Judge Alito also would have upheld a lower court's refusal to allow the plaintiff to cross-examine his employers about an alleged hostile work environment.[54] The majority of the court found that such evidence was "relevant to a key aspect of the case," and decided that the exclusion of hostile work environment evidence illegally undermined the plaintiff's right to a fair trial. In contrast, Judge Alito argued that the evidence was "limited," and if presented would cause "substantial unfair prejudice" to the employer.[55]

In *Bhaya v. Westinghouse Elec. Corp.*,[56] a group of employees claiming age discrimination alleged that their manager had acknowledged in a meeting that by laying off the plaintiffs, the company "might be violating . . . labor laws" and may have been "doing something illegal or against the contract."[57] Judge Alito dismissively interpreted these statements narrowly, explaining that they "lack[ed] appreciable probative value."[58] While plaintiffs argued that it was plausible and indeed likely that the manager was referring to anti-discrimination laws, Judge Alito found this argument unreasonable and "remote at best."[59]

As conservative scholar Bruce Fein wrote, "Alito's rulings on civil rights demonstrate a more conservative frame of reference than that of Sandra Day O'Connor" and would shift the court to the right.[60] The NBA concurs with Fein's conclusion.

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[53] 34 F.3d 188 (3d Cir. 1994).
[54] *Id.*
[55] 34 F.3d at 196.
[56] 922 F.2d 184 (3d Cir. 1990), *cert. denied,* 501 U.S. 1217 (1991).
[57] *Id.*
[58] 922 F.2d at 188.
[59] *Id.*
[60] Alliance for Justice, Report on the Nomination of Samuel A. Alito to the United States Supreme Court (2006), p 6; Amy Goldstein and Jo Becker, *Critics See Ammunition in Alito's Rights Record,* WASH. POST, Nov. 3, 2005.

III. CONCLUSION

In conclusion, on the basis of our thorough review of Judge Alito's record and for the reasons cited above, the NBA cannot support the nomination of Judge Alito to become an Associate Justice of the United States Supreme Court. For several decades, Judge Alito has championed limitations on civil rights and voting, as well as attempting to curtail educational and employment opportunities for people of color and women. If his views had prevailed in many cases, our Nation would not be far beyond the regrettable days when opportunities for Americans, like retiring Justice Sandra Day O'Connor and the late Justice Thurgood Marshall, were truncated on the basis of gender and race. Now is not the time for retrenchment. Now is the time for America to step forward into the 21st Century and open the doors of mainstream society for the benefit and protection of all Americans.

Again, thank you for the opportunity to testify here today.