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UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA
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December 27, 2005

Hon. Arlen Specter, Chair
Hon. Patrick Leahy, Ranking Member
& Members of the U.S. Senate Cmte. on the Judiciary
Washington, DC 20510
By Facsimile & Electronic Mail

Dear Senators,

We write to you on behalf of the Union of Orthodox Jewish Congregations of America with regard to an issue which has arisen in the context of the Judiciary Committee's consideration of the nomination of Samuel Alito to the United States Supreme Court. The Union of Orthodox Jewish Congregations of America, the nation's largest Orthodox Jewish umbrella organization representing nearly 1,000 congregations nationwide, is a non-partisan, religious organization and it has been the UOJCA's longstanding policy neither to endorse nor oppose judicial nominees in the confirmation process. However, we feel compelled to inform you of our views on a key issue of import to our community which has been raised with regard to Judge Alito's nomination.

The issue relates to charges that Judge Alito's views on the relationship between religion and state in our society, as framed by the Free Exercise and Establishment Clauses of the First Amendment, are outside of the mainstream and, in the words of the critics, "risk many of the crucial protections for religious minorities." The critics assert that "Judge Alito's judicial opinions reveal....he gives short shrift to the Supreme Court's long tradition of protecting religious liberty by carefully policing the separation of church and state."[1] As members of a minority faith community within this great nation, we write to you to state that we believe these assertions are misleading distortions of Judge Alito's record and that calling for his rejection based upon these assertions is wrong.

The critics concede, as they must, that "Judge Alito's judicial opinions reveal that...he respects the [rights guaranteed by] the free-exercise clause." This, however, is an understatement of the depth and significance of Judge Alito's record in this arena.

[1] These quotes may be found in the Report Opposing Confirmation of Samuel Alito recently published by Americans United for the Separation of Church & State.

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It is critical to recall that in 1990, in an opinion authored by Justice Scalia, the Supreme Court severely curtailed the protection given to every American's First Amendment right to the "free exercise of religion." In *Emp. Div. of Oregon v. Smith*,[2] the court considered the Native American use of peyote as part of religious worship and the state's decision to criminalize peyote with no exception for religious use. The Native Americans challenged the lack of such an exemption as a violation of their free exercise rights. Under then-governing Supreme Court precedents,[3] Oregon would have to have met the highest standard of constitutional proof, akin to what is required in a case challenging the restriction of free speech or any other fundamental right, by proving that the denial of an exemption for religious use was necessary to serve a "compelling governmental interest" and that this interest would be undermined by any exemption.

Writing for a divided court (with Justice O'Connor taking strong exception), Justice Scalia overturned the precedents and lowered the level of protection for free exercise so that the government had to show only that it had a "rational basis" for denying the religious exemption. Religious liberty has been the neglected stepchild of the First Amendment ever since. Bipartisan efforts to fully reverse *Smith* legislatively have been hampered by the high court.[4]

In this context, one can take Judge Alito's record of opinions in cases which squarely raised Free Exercise claims and others which address religious liberty from other bases and – when viewed as a whole – conclude that Judge Alito possesses not only an appropriate level of sensitivity to people of many different faiths, but a recognition that seems to have eluded Justice Scalia fifteen years ago: The first clauses of the First Amendment – the Free Exercise and Establishment clauses -- are meant to be a bulwark against the infringements by government, or other powerful entities, upon an individual's religious conscience and practices. It is not enough to allow Americans to believe as we wish. We must be able, generally, to act in conformity with those beliefs without interference. Accommodations for religious observance are welcome from the legislative or executive branches, but the Framers put freedom of religion in the Bill of Rights to ensure that

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2 494 U.S. 872 (1990).

3 *Sherbert v. Verner*, 374 U.S. 398 (1963) and its progeny.

4 The Court invalidated the Religious Freedom Restoration Act as applied to non-federal government actors in *City of Boerne v. Flores*, 521 U.S. 507 (1997). The Court upheld the much more limited Religious Land Use & Institutionalized Persons Act with regard to its institutionalized persons provisions last term in *Cutter v. Wilkinson*, 125 S. Ct. 2113 (2005); the land use provisions of RLUIPA have not yet been reviewed by the high court.

the religious freedom of people of faith, especially minority faiths, is not contingent upon political power.

One can elicit this view on Judge Alito's part from his record in which he has ruled in favor of adherents to a remarkable array of faiths. In 1999, Judge Alito ruled against the Newark Police Department when it sought to ban Muslim officers from wearing beards even though the department allowed beards to be worn for health reasons.[5] In 2000, he chastised his judicial colleagues for avoiding, on procedural grounds, ruling on a kindergartener's free speech rights to have a Thanksgiving picture he drew posted in his public school because it had a "religious theme."[6] In 2001, he wrote a strong concurrence in support of a Sabbath-observant Orthodox Jew whose supervisors at a local college deliberately scheduled faculty meetings for late-Friday afternoons in order to force a conflict between her career and religion.[7] In 2004, he ruled that the imposition of fees and filing requirements on a Native American in order for him to possess certain animals for religious purposes was an unconstitutional burden on his religious liberty.[8] He also ruled in 2004 that a public school could not exclude a religious Evangelical after school club from its premises when it allowed a wide array of secular groups such access.[9]

Judge Alito has also ruled or participated in a handful of cases involving Establishment Clause concerns.[10] The critics assert that these cases suggest that "Judge Alito is out of step" with "settled Supreme Court precedent and the founders' vision" with regard to establishment concerns. This assertion ought to be rejected. A close and non-ideological examination of Judge Alito's cases in this area show him to be working to apply Supreme Court precedents – in an area of the law acknowledged by jurists and scholars across the spectrum to be muddied, at best. His positions in these cases, if reversed by the high court, were reversed by narrowly divided panels and his positions were, it seems, animated by the struggle to strike the delicate balance between the demands of the Establishment Clause and the free exercise and freedom of expression rights of individuals.

We also note that Judge Alito does not automatically render an opinion in favor of a religious plaintiff when countervailing concerns are

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5 *Fraternal Order of Police v. Newark*, 170 F.3d 359 (3d Cir., 1999).

6 *C.H. ex rel v. Oliva*, 226 F.3d 198 (3d Cir., 2000).

7 *Abramson v. Wm. Patterson College*, 260 F.3d 265 (3d Cir., 2001).

8 *Blackhawk v. PA.*, 381 F.3d 202 (3d Cir., 2004).

9 *Child Evangelism Fellowship v. Stafford Twp. Sch. Dist.*, 386 F.3d 514 (3d Cir., 2004).

10 *ACLU of NJ v. Black Horse Pike Reg. Bd. of Educ.*, 84 F.3d 1471 (3d Cir., 1996); *ACLU of NJ v. Schundler*, 169 F.3d 92 (3d Cir., 1999); *ACLU of NJ v. Twp. of Wall*, 246 F.3d 258 (3d Cir., 2001).

present.[11] While our own organization and constituency might disagree with Judge Alito's decision in any of these cases, neither we, nor any reasonable review of these cases and their briefs, can credibly assert that the ruling authored or joined in by Judge Alito are in any way out of mainstream jurisprudence; only those who advocate the most extreme views of religion-state relations in America – either total separation or total integration – could assert as much.

The Orthodox Jewish community, like so many other American faith communities, has benefited greatly from the religious liberty guaranteed by our Constitution. For us, this issue is the seminal issue upon which the Supreme Court can impact our lives. We urge you to consider the jurisprudence and principles of religious liberty and the perspective a Justice Alito would bring to these matters, if confirmed. We pray your committee's deliberations will be fair and serve the nation well.

Sincerely,

Mark Bane

Nathan J. Diament

[11] *See In re Four Three Oh, Inc.*, 256 F.3d 107 (3d Cir., 2001); *Shelton v. Univ. of Medicine & Dentistry of N.J.*, 223 F.3d 220 (3d Cir., 2000); *Fraise v. Terhune*, 283 F.3d 506 (3d Cir., 2002).