

REPORT ON

THE NOMINATION OF

JUDGE SAMUEL A. ALITO, JR.

TO THE SUPREME COURT

OF THE UNITED STATES



NAACP LEGAL DEFENSE

AND EDUCATIONAL FUND, INC.

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INTRODUCTION

Justice Thurgood Marshall once stated, "A child born to a black mother in a state like Mississippi . . . has exactly the same right as a white baby born to the wealthiest person in the United States. It's not true, but I challenge anyone to say it's not a goal worth working for."¹ The history of African Americans in the United States Supreme Court can in many ways be described as a history of striving toward this goal. Through every step of the African-American experience in this nation, the Court has – in ways both positive and otherwise – shaped the lives and opportunities of black Americans. *Dred Scott*, *Plessy*, *Brown*, *Bakke*, *McCleskey*, *Grutter*: these cases describe not only where we have stood as a nation, but in so many ways have described the lives of African-American people. The Court is no less important today than it was in 1857 when *Dred Scott* was decided, or in 1954, when Marshall argued before the Court in *Brown*. From voting to education, racial profiling to employment, civil rights issues continue to affect the lives of African Americans every day. Who is on the Court – who decides – is thus a decision which merits the highest consideration.

The NAACP Legal Defense and Educational Fund, Inc. ("the Legal Defense Fund") is the nation's oldest civil rights public interest law firm. Initially established in 1940 as the legal arm of the National Association for the Advancement of Colored People under the direction of Thurgood Marshall, the Legal Defense Fund has been separate from the N.A.A.C.P. since 1957. We have litigated or been amicus curiae in many of our nation's most important civil rights cases, from *Brown v. Board of Education* to *Grutter v. Bollinger*. We have served as the legal arm of the civil rights movement in federal and state courts throughout the nation, and have served as legal counsel for African-American civil rights claimants in most of the major racial discrimination cases decided by the Supreme Court.

Through decades of civil rights litigation in courts around the country, the Legal Defense Fund understands first-hand the unique role of the courts in protecting our rights and liberties. Since the 1970s, we have monitored judicial appointments to all levels of the federal bench, made under Republican and Democratic Administrations alike, to ensure that nominees are fair, open-minded, and committed to the advances our nation has made in achieving racial justice.

The Legal Defense Fund does not take a position on every Supreme Court nomination. We are mindful of the fact that we appear before the Court frequently, and that our first obligation is to our clients. However, we are keenly aware of the hopes and, indeed, expectations held by our clients and other civil rights litigants that, in hearing civil rights cases before the Court, each of the nine Justices will consider the arguments with an open mind, with no predisposition for or against an issue.

¹ Justice Thurgood Marshall, Address to the National Bar Association (1988), *reprinted in* ARIZ. REPUBLIC/GAZETTE, Aug. 11, 1988, at A6.

Although we evaluate each nominee on his or her record, this nomination has additional significance because it is proposed to fill the seat held by Justice Sandra Day O'Connor on the Court. In the last two decades, most of the Supreme Court cases involving race have been decided by razor thin 5-4 votes. Justice O'Connor's vote was widely seen to be the "swing vote." Although we certainly did not always win Justice O'Connor's vote in many, if not most, of the cases we litigated and monitored before the Court, we always viewed her vote as being in play.

The Legal Defense Fund has conducted a thorough review of Judge Alito's legal and judicial record in a number of civil rights subject areas which are very important to us: federalism, affirmative action, employment discrimination, voting rights, criminal justice, and other race discrimination cases. The overwhelming majority of African-American litigants whose claims Judge Alito has adjudicated has lost his vote. We can predict with substantial certainty that Judge Alito will very likely vote in a manner that, given the current composition of the Court, will cause a substantial shift in the Court's civil rights jurisprudence with devastating effects. We have concluded that the confirmation of Judge Alito is a risk we can ill-afford to take at this point in the Court's history. Accordingly, we oppose the nomination of Judge Samuel Alito to the United States Supreme Court as an Associate Justice.

The Legal Defense Fund is not alone in our prediction of what Judge Alito's confirmation would mean for civil rights jurisprudence. Even Judge Alito's allies admit there would be a substantial shift in the Court's jurisprudence if he was to replace Justice O'Connor; indeed, this is likely a reason they are supportive of the nomination. Bruce Fein, who worked with Samuel Alito in the Reagan Justice Department, has been outspoken about the impact of his former colleague's confirmation on the future of the Court. Mr. Fein commented: "Those who think that Sam Alito is somehow a duplicate of Sandra Day O'Connor, trying to suggest or insinuate that the Court's philosophical balance will not be altered by Alito, simply are being exceptionally disingenuous."²

BIOGRAPHICAL BACKGROUND

Judge Samuel Alito was appointed by President George H.W. Bush to the United States Court of Appeals for the Third Circuit in 1990. Prior to his judicial appointment, Judge Alito spent his entire legal career as an employee or officer of the Department of Justice; the United States has been his only client. Judge Alito's life experiences may influence his approach to the major constitutional questions of our time with far-reaching effect on the lives of millions of persons including but not limited to minorities. For example, as Judge Alito noted in responses to the Senate Judiciary Committee, his career with the Justice Department or as a judge has precluded him from representing private

² Transcript, *Analysis: A Survey Course on Samuel Alito's Legal Views*, MORNING EDITION, NATIONAL PUBLIC RADIO, Nov. 11, 2005, at 1.

clients.³ He has done no *pro bono* work, although he noted his efforts as a judge to ensure parties are provided with high quality *pro bono* representation.⁴

Samuel Alito is a graduate of Princeton University (A.B., 1972), and Yale Law School (J.D., 1975). Judge Alito began his legal career in 1977 as an Assistant U.S. Attorney for the District of New Jersey. In that position for four years, he focused on appellate matters involving criminal law.

In the first year of the Reagan Administration, Judge Alito moved to Washington and began work in the Reagan Justice Department. He started the same month – August 1981 – in which now-Chief Justice John Roberts began his work at the Department. From 1981 until 1985, Judge Alito served in a career position as Assistant to the Solicitor General. The Solicitor General was first Rex E. Lee, and then Charles Fried. Judge Alito argued twelve cases before the Supreme Court and worked on briefs on the merits filed with the Court in more than twenty-five cases.⁵ Only three of the cases directly involved issues of race; all were affirmative action cases and as discussed *infra*, Judge Alito advanced extreme positions against the use of efforts to address racial discrimination and its effects in all three cases.

In November 1985, Judge Alito applied for and received a political appointment in the Justice Department by Attorney General, Edwin Meese, III.⁶ Attorney General Meese had taken office in March 1985, and was widely seen as more aggressive than his predecessor, William French Smith, in the Justice Department’s efforts to “translate the Reagan Administration’s views on race, religion and abortion into the law of the land.”⁷ The Washington Post noted at the time that “Meese, more than any of his predecessors in the last 50 years, has waged a highly visible campaign” against decisions by the Supreme Court.⁸

³ Responses by Samuel Alito, Jr. to Senate Judiciary Committee Questionnaire (Nov. 30, 2005), at 58 [hereinafter QUESTIONNAIRE RESPONSES].

⁴ *Id.*

⁵ Although Judge Alito’s responses to the Senate Judiciary Committee Questionnaire indicate he drafted or assisted in drafting merits briefs in twenty-five cases, *see* QUESTIONNAIRE RESPONSES, *supra* note 3, at 23-46, there is evidence that he worked on other cases pending before the Supreme Court such as *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), and *Tennessee v. Garner*, 471 U.S. 1 (1985). *See e.g.*, Memorandum from Samuel Alito to Solicitor General, May 30, 1985 (*Thornburgh*); Memorandum from Samuel Alito to Solicitor General, May 18, 1984 (*Garner*). Several members of the Senate Judiciary Committee have asked Judge Alito to supplement his responses. Letter from Senator Patrick Leahy *et al.*, to Judge Samuel Alito, Dec. 7, 2005.

⁶ QUESTIONNAIRE RESPONSES, *supra* note 3, at 18.

⁷ *Court Confronts Reagan Agenda*, WASH. POST, Oct. 7, 1985.

⁸ *High Court Is Defended by Brennan*, WASH. POST, Oct. 13, 1985.

The political position to which Judge Alito was appointed was Deputy Assistant Attorney General in the Office of Legal Counsel (“OLC”). The head of the OLC was Assistant Attorney General Charles Cooper, who was confirmed by the Senate only days before Alito’s job application.⁹ Cooper had served for four years as special assistant and deputy to Assistant Attorney General William Bradford Reynolds in the Civil Rights Division, where he was involved in a host of controversial actions to undermine civil rights enforcement.¹⁰ Civil rights organizations had opposed the nomination of Charles Cooper to head the OLC,¹¹ and his confirmation hearing involved numerous questions about his civil rights record.¹²

The OLC assisted Attorney General Edwin Meese in his capacity as legal advisor to the President and all federal agencies. Samuel Alito was one of three Deputies working under Charles Cooper. One Deputy concentrated on issues relating to foreign relations and international law, one Deputy reviewed proposed legislation for constitutional problems, and Alito “was responsible for a broad range of matters not falling into either of the above categories.”¹³ Unfortunately, there is little information about Judge Alito’s tenure with the OLC. In responses to the Senate, Judge Alito notes only that, with Charles Cooper and under his direction, he “assisted in preparing formal opinions for the [OLC] and in rendering informal opinions and legal advice on a wide variety of subjects and legal questions facing the departments and agencies of the Executive Branch.”¹⁴ During his confirmation to the Third Circuit, Judge Alito reported that he authored or supervised the preparation of approximately fifty memoranda containing his recommendations “on a very broad range of legal issues, on many of which there was sharp division between government agencies.”¹⁵ Although the Department of Justice has released certain materials,¹⁶ none of the OLC opinions

⁹ Congressional Quarterly, Almanac, 99th Cong., 2nd Sess. (1985) at 237.

¹⁰ Cooper was among the “band of young zealots” who pressed the Reagan Administration to allow tax-exempt status to Bob Jones University although it discriminated on the basis of race. *Abroad at Home, The Court Says No*, N.Y. TIMES, May 26, 1983.

¹¹ Birmingham Mayor Richard Arrington testified against Charles Cooper, accusing him of “actively misrepresenting facts and allegations before a court of law” in an affirmative action case. *Justice Nominee Fields Hard Questions*, WASH. POST, Oct. 24, 1985.

¹² Confirmation Hearings on Federal Appointments, Hearings Before the Committee on the Judiciary United States Senate (99th Cong., 1st Sess.) (Oct. 23, 1985) at 545-98.

¹³ QUESTIONNAIRE RESPONSES, *supra* note 3, at 48.

¹⁴ *Id.* at 20.

¹⁵ Responses by Samuel Alito, Jr. to Senate Judiciary Committee Questionnaire (Feb. 24, 1990), at 14.

¹⁶ QUESTIONNAIRE RESPONSES, *supra* note 3, at 18 & Appendix 2 (Question 14.b.).

prepared by Judge Alito have been produced, with the exception of four that are publicly available.¹⁷

On March 18, 1987, Judge Alito was given an interim appointment to be the United States Attorney for the District of New Jersey.¹⁸ In August 1987, he was nominated to the same position and was confirmed by the Senate in December 1987.¹⁹ Judge Alito was responsible for the management of all federal criminal prosecutions and the prosecution and defense of all civil matters within the jurisdiction.²⁰ He served in that position until his confirmation to the Third Circuit in 1990.

The Third Circuit includes New Jersey, Pennsylvania and Delaware. Over twenty percent of the residents of the Third Circuit are minority: twelve percent are African American;²¹ seven percent are Latino;²² and three percent are Asian-American.²³ There are fourteen seats on the Court; two are vacant. There are six Republican appointees and six Democratic appointees. When Samuel Alito was confirmed in 1990, there were twelve seats on the Court,²⁴ with one other vacancy. Of the ten sitting judges, eight were appointed by Ronald Reagan and two were appointed by Jimmy Carter.²⁵ Thus, while the Third Circuit is now “evenly divided” according to party of the nominating president, for some of Samuel Alito’s tenure, he was serving on a court dominated by Republican appointees. This is relevant to any comparison of Judge Alito’s positions with those of his Third Circuit colleagues. For example, Professor Cass Sunstein of the University of Chicago Law School has rated all of Judge Alito’s dissenting opinions; ninety-one

¹⁷ QUESTIONNAIRE RESPONSES, *supra* note 3, at 48. Members of the Senate Judiciary Committee have asked Judge Alito to produce these memoranda. Letter from Senator Patrick Leahy *et al.*, to Judge Samuel Alito, Dec. 7, 2005.

¹⁸ Letter from Edwin Meese, III to President Reagan, July 6, 1987, Bates No. WH-002.

¹⁹ Samuel Alito Commission, Bates Nos. WH-108-09.

²⁰ QUESTIONNAIRE RESPONSES, *supra* note 3, at 20.

²¹ United States Census Bureau, The Black Population: Census 2000 Brief at Table 2 (Aug. 2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-5.pdf>

²² United States Census Bureau, The Hispanic Population: Census 2000 Brief at Table 2 (May 2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-3.pdf>

²³ United States Census Bureau, The Asian Population: Census 2000 Brief at Table 2 (Feb. 2002), available at <http://www.census.gov/prod/2002pubs/c2kbr01-16.pdf>

²⁴ Two additional judgeships were authorized in 1990. http://www.fjc.gov/history/home.nsf/page/usca_03-leg

²⁵ The judges included Edward Becker, Robert Cowen, Morton Greenberg, A. Leon Higginbotham, Jr., William Hutchinson, Carol Mansmann, Richard Nygaard, Anthony Scirica, Dolores Sloviter, and Walter Stapleton. Biographical profiles are available at <http://www.fjc.gov/history/home.nsf>

percent of Judge Alito's dissents take more conservative positions than his colleagues on the Third Circuit.²⁶

FEDERALISM

Since the Supreme Court's 1995 decision in *United States v. Lopez*,²⁷ which invalidated for the first time in sixty years a federal statute as exceeding Congress' legislative authority under the Commerce Clause, the Court has issued dozens of rulings restricting Congress' power to protect civil rights and liberties under the Commerce Clause and the Fourteenth Amendment, and strengthening state immunity under the Eleventh Amendment from suits for damages where federal statutes are violated. In just the past few years, however, the Court has shown signs of reaching the doctrinal breaking point of its "federalism" movement, and has voted to uphold Congress' authority to enforce constitutional protections through appropriate legislation. Judge Alito's record gives every indication that he is not only prepared to join the federalism revolution, but that he would carry it even further than its recent stopping point. Indeed, the logical reach of Alito's written opinions in this area could extend so far as to invalidate the dozens of congressional enactments since the New Deal that protect civil rights and the environment; establish minimum-wage and maximum-hour protections and other labor health and safety benefits; and regulate the securities, banking, media, and energy industries.

In *Chittister v. Department of Community & Economic Development*,²⁸ Judge Alito held that Congress did not have the power to make state employers liable for damages if they violated the sick leave provision of the Family and Medical Leave Act of 1993 (FMLA). The FMLA provides for up to twelve weeks of unpaid leave for the birth of a child; for care of a sick child, spouse, or parent; or for employees who develop a serious health condition that renders them unable to perform their jobs.²⁹ David Chittister, an employee of a Pennsylvania state agency, was originally approved for sick leave, but while he was out on leave his employer revoked his leave and fired him. At trial, a jury agreed that the state agency violated the FMLA in revoking Mr. Chittister's leave and firing him, but the district court vacated the jury award on the ground that the state could not be sued for damages.³⁰ Judge Alito affirmed the district court's decision, in an opinion that construed Congress' legislative authority with remarkable narrowness.

²⁶ Transcript, *Analysis: A Survey Course on Samuel Alito's Legal Views*, MORNING EDITION, NATIONAL PUBLIC RADIO, Nov. 11, 2005, at 2.

²⁷ 514 U.S. 549 (1995).

²⁸ 226 F.3d 223 (3d Cir. 2000).

²⁹ See 29 U.S.C. § 2612(a)(1).

³⁰ *Chittister*, 226 F.3d at 225-26.

The Eleventh Amendment to the Constitution provides that states may not be sued in federal court unless the state consents to be sued, or unless Congress abrogates state immunity under a provision of the Constitution that gives Congress the power to do so. The Fourteenth Amendment is among the constitutional provisions that allows Congress to abrogate state sovereign immunity, by authorizing Congress to enact legislation to enforce the Fourteenth Amendment's prohibition against discrimination. Such enforcement legislation, if properly aimed at remedying and deterring unconstitutional conduct, may prohibit conduct *broader* than simply that which would violate the Fourteenth Amendment itself.³¹ In passing the FMLA, Congress made clear that it was attempting to deter and remedy sex discrimination and sex stereotyping that continued to persist in the workplace, even after a generation of experience with Title VII and its ban on such discrimination.

In holding that Congress exceeded its legislative authority, Judge Alito held first that Congress did not have adequate evidence of sex discrimination in the workplace: "Notably absent [from the Congressional record] 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."³² Judge Alito then went even further to hold that even if there *was* evidence of pervasive unlawful sex discrimination, the FMLA was not properly aimed at addressing it, and instead created a "substantive entitlement to sick leave."³³

The Supreme Court strongly disagreed with Judge Alito's conclusions on both points, effectively overruling *Chittister* in *Nevada Department of Human Resources v. Hibbs*.³⁴ In *Hibbs*, Chief Justice Rehnquist held for a majority of six Justices (including Justice O'Connor) that Congress *did* have the power to make state employers liable for damages if they violated the family leave provision of the FMLA. Rehnquist first held that there was ample and troubling evidence of sex discrimination and sex-stereotyping in the workplace, discussing at some length the history of state laws and employment practices that limited women's employment opportunities and that persisted despite prior congressional attempts at a remedy.³⁵ Chief Justice Rehnquist further explained the history and continued pervasiveness of state laws and policies that perpetuated sex-stereotyping and assumptions about the allocation of family duties, noting that "stereotype-based beliefs about the allocation of family duties remained firmly rooted, and employers' reliance on them in establishing discriminatory leave policies remained

³¹ See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

³² *Chittister*, 226 F.3d at 228-29.

³³ *Id.* at 229.

³⁴ 538 U.S. 721 (2003).

³⁵ *Id.* at 729-30.

widespread.”³⁶ This extensive discussion conclusively rebutted Judge Alito’s cursory analysis of the extent to which sex discrimination persisted among state employers.

Chief Justice Rehnquist next held that the FMLA was properly designed to remedy the history of sex discrimination and the pervasiveness of sex-stereotyping that Congress had identified. Where Judge Alito claimed that the FMLA impermissibly created a “substantive entitlement to sick leave,”³⁷ Chief Justice Rehnquist concluded to the contrary that “[t]he FMLA is *not* a substantive entitlement program; Congress did not create a particular leave policy for its own sake. Rather, Congress sought to adjust family-leave policies in order to eliminate their reliance on, and perpetuation of, invalid stereotypes, and thereby dismantle persisting gender-based barriers to the hiring, retention, and promotion of women in the workplace.”³⁸

Judge Alito’s *Chittister* opinion is striking not just for its inability to recognize the long and pervasive history of sex discrimination and sex-stereotyping in state employment, but also – perhaps more so – for its hostility to congressional legislative authority. The Supreme Court had little difficulty recognizing that in light of the evidence of sex discrimination that Congress sought to remedy, the FMLA was an appropriate exercise of Congress’ authority to enforce the Fourteenth Amendment. Judge Alito, by contrast, not only contested whether such discrimination existed, but went so far as to expound that even if it did, Congress could not redress it by establishing baseline unpaid leave provisions.

Judge Alito’s cramped view of Congress’ legislative authority – and the potential ramifications of his confirmation on a huge range of congressional statutes – is further illuminated by a dissenting opinion he authored in *United States v. Rybar*.³⁹ In that case, Raymond Rybar, Jr., was convicted of violating 18 U.S.C. § 922(o), a federal law banning the possession or transfer of machine guns. Rybar appealed his criminal conviction on the ground that Congress did not have the authority under the Commerce Clause to pass § 922(o). A panel of the Third Circuit joined the five other federal appeals courts that had already held that § 922(o) was, in fact, a constitutional exercise of Congress’ commerce power.⁴⁰

³⁶ *Id.* at 730-31.

³⁷ *Chittister*, 226 F.3d at 229.

³⁸ *Hibbs*, 538 U.S. at 734 & n.10 (emphasis added) (internal citations omitted).

³⁹ 103 F.3d 273 (3d Cir. 1996).

⁴⁰ See *United States v. Beuckelaere*, 91 F.3d 781 (6th Cir. 1996); *United States v. Kenney*, 91 F.3d 884 (7th Cir. 1996); *United States v. Rambo*, 74 F.3d 948 (9th Cir. 1996); *United States v. Kirk*, 70 F.3d 791 (5th Cir. 1995); *United States v. Wilks*, 58 F.3d 1518 (10th Cir. 1995).

In deciding *Rybar*, the Third Circuit was required to apply the Supreme Court’s decision from the previous year in *United States v. Lopez*.⁴¹ *Lopez*, which marked the first time in over sixty years that the Supreme Court held that a federal statute exceeded Congress’ commerce power, invalidated the Gun-Free School Zones Act of 1990 on the ground that the activity prohibited by the Act – possessing a firearm within one thousand feet of a school – was not sufficiently connected to interstate commerce to permit Congress to legislate.⁴² *Lopez* held that Congress is within its commerce power where activity regulated by a given statute substantially affects interstate commerce, and where the means chosen by Congress to regulate are reasonably adapted to its goal.⁴³

The Third Circuit exhaustively canvassed over a half-century of congressional enactments with regard to gun control, and found overwhelming evidence on which Congress could rely to conclude that a ban on machine gun possession substantially affected interstate commerce: “Congressional findings generated throughout Congress’ history of firearms regulation link both the flow of firearms across state lines and their consequential indiscriminate availability with the resulting violent criminal acts that are beyond the effective control of the states.”⁴⁴ The majority also held that a ban on intrastate possession of machine guns was reasonably related to its goal of addressing the proliferation of dangerous weapons.⁴⁵

Judge Alito began his dissent by asking, “Was *United States v. Lopez* a constitutional freak? Or did it signify that the Commerce Clause still imposes some meaningful limits on congressional power?”⁴⁶ In an opinion that is surprising in its disregard for congressional legislative authority, Judge Alito argued that Congress did *not* have constitutional authority to pass the machine gun statute. The problem, according to Alito, was that Congress did not present enough evidence showing either that machine gun possession affected interstate commerce, or that regulating machine gun possession could have any connection to reducing violent crime or other problems.⁴⁷ Most notably, Judge Alito suggested that Congress could only meet his test for whether it properly carried out its legislative function if Congress were to “assemble[] empirical evidence documenting” a link between the possession of machine guns and interstate commerce.⁴⁸ At the same time, however, Judge Alito acknowledged that there is no constitutional

⁴¹ 514 U.S. 549 (1995).

⁴² *Id.* at 561-63.

⁴³ *Id.* at 558-59.

⁴⁴ *Rybar*, 103 F.3d at 279.

⁴⁵ *Id.* at 278, 283-84.

⁴⁶ *Id.* at 286 (Alito, J., dissenting) (citation omitted).

⁴⁷ *Id.* at 291-92 (Alito, J., dissenting).

⁴⁸ *Id.* at 287 (Alito, J., dissenting).

requirement for Congress to do so,⁴⁹ and the Supreme Court has expressly held as much.⁵⁰ Judge Alito’s dissent thus makes the astonishing proposal of imposing an *extra-constitutional mandate* on Congress to present specific evidence to judges if Congress wants to ensure the validity of its legislation. Judge Alito’s Third Circuit colleagues in the majority in *Rybar* recognized the revolutionary nature of Alito’s proposed approach, and criticized his reasoning as extending well beyond the proper scope of judicial authority and trampling on the appropriate deference owed by the judiciary to the legislature: “We know of no authority to support such a demand on Congress. . . . [M]aking such a demand of Congress or the Executive 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.”⁵¹

Criticism of Judge Alito’s overreaching dissent has come from a wide array of sources. As just one example, Republican Senator Tom Coburn appeared on NBC’s *Meet the Press* after Judge Alito’s Supreme Court nomination and agreed that the approach in Alito’s *Rybar* dissent would violate separation of powers and interfere with Congress’s legislative authority: “Those aren’t decisions judges should be making. Those are decisions legislatures should be making.”⁵²

Judge Alito’s *Rybar* dissent and his *Chittister* opinion are extreme examples of legislating – or perhaps more accurately, de-legislating – from the bench. Both opinions reflect a willingness to overrule the democratic prerogatives of Congress, the judiciary’s constitutionally co-equal branch. Taken to its logical conclusion, the interpretation that Alito has given to Congress’ legislative authority pursuant to the Commerce Clause and the Fourteenth Amendment could result in the invalidation of scores of congressional enactments over the past seventy-five years, including those that protect civil rights and the environment; establish fundamental labor protections such as minimum-wage and maximum-hour laws; and regulate the nation’s largest industries, including the securities, banking, media, and energy industries.

AFFIRMATIVE ACTION

Throughout its history, the Legal Defense Fund has sought to secure access to higher education and to employment and economic opportunities for African Americans and other people of color. Although substantial progress has been made since the era of Jim Crow, this nation is still struggling to overcome the persistent intergenerational

⁴⁹ See *id.* at 292 (Alito, J., dissenting) (“Of course, Congress is not obligated to make findings.”).

⁵⁰ See, e.g., *United States v. Perez*, 402 U.S. 146, 156 (1971) (“Congress need [not] make particularized findings in order to legislate.”); *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964).

⁵¹ *Rybar*, 103 F.3d at 282.

⁵² *Meet the Press* (NBC television broadcast Nov. 6, 2005) (statement of Sen. Tom Coburn (R-OK)).

effects of slavery, segregation, and ongoing discrimination. Notwithstanding the notable successes of some African Americans, the disturbing reality is that by virtually every social and economic indicator, African Americans as a group lag significantly behind. In the absence of affirmative efforts by state and private actors to eradicate the deeply rooted effects of hundreds of years of discrimination, African Americans will continue to be denied true equality and the benefits of full citizenship.

The battle that has been waged in the Supreme Court over affirmative action has been at the epicenter of the modern struggle for racial equality. Affirmative action remains one of the most important mediums for providing African Americans educational, employment, and economic opportunities. Forces on both sides have galvanized around the central legal question of whether and to what extent state actors may voluntarily take race into account to address the persistent effects of discrimination. The Court's jurisprudence in this area will continue to shape the opportunities that African Americans and other people of color have to attend institutions of higher education, to participate in state-funded contracting programs, and to be employed in jobs that provide a more secure economic footing and entree to the middle class.

Undisputedly, Justice O'Connor has been at the center of this legal debate. During her long tenure on the Court, she has cast significant votes in many of the decisions to uphold affirmative action such as *Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC*;⁵³ *Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*;⁵⁴ and *Johnson v. Transp. Agency, Santa Clara County*.⁵⁵ Justice O'Connor's opinion two years ago in *Grutter v. Bollinger*,⁵⁶ supporting affirmative action in admissions to promote diversity in higher education, provides a recent and compelling example of her immense contribution in this area of the law. As Senate Judiciary Committee Chairman Arlen Specter suggested in his letter to Judge Alito about issues he intends to explore at the confirmation hearing, affirmative action has undergone many changes in the twenty-five years in which Justice O'Connor has served on the Court, and it is important to determine how Judge Alito's views compare.⁵⁷ Any consideration by the Legal Defense Fund of Justice O'Connor's replacement must necessarily include an analysis of the nominee's record on this critical issue.

Given the tremendous stakes involved in replacing Justice O'Connor, Judge Alito's record on affirmative action is extremely troubling to the Legal Defense Fund. As a lawyer in the Reagan Administration, Samuel Alito took extreme positions on several occasions before the Supreme Court against the use of race-based action to

⁵³ 478 U.S. 421 (1986).

⁵⁴ 478 U.S. 501 (1986).

⁵⁵ 480 U.S. 616 (1987).

⁵⁶ 539 U.S. 306 (2003).

⁵⁷ Letter from Senate Judiciary Committee Chairman Arlen Specter to Judge Samuel Alito, Nov. 30, 2005.

remedy discrimination. Contemporaneously, in personnel documents, Alito attested to his strong belief in the positions he advanced before the Court. These positions were far less measured than those adopted by Justice O'Connor in her opinions. In fifteen years on the bench, Judge Alito's record contains no evidence that he has since modified his views; in fact, he has ruled against African Americans on these issues when they came before him. It is exceedingly obvious to the Legal Defense Fund that the Senate's confirmation of Judge Alito as Associate Justice would ensure that the Court regressed on the issue of affirmative action.

Judge Alito arrived at the Justice Department at the very beginning of the Reagan Administration's campaign against affirmative action. He began his tenure in the Solicitor General's office in August 1981. Just three months earlier, Attorney General William French Smith had announced the attack on any remedies for discrimination containing goals and timetables, erroneously labeling these as "quotas."⁵⁸ Largely through Assistant Attorney General on Civil Rights William Bradford Reynolds, the Justice Department sought to eliminate the use of race-conscious action in remedying proven employment discrimination beyond identifiable victims. This position represented a radical departure from longstanding policy followed by previous Administrations to support goals and timetables in a remedial context.⁵⁹ Providing relief only to individual victims of discrimination was grossly inadequate where individuals could no longer be identified or were not available for employment, and did nothing to eliminate systemic discriminatory practices. The campaign against affirmative action was viewed as the "hallmark of the Reagan Administration's civil rights policy."⁶⁰ The Washington Post noted: "[T]he Justice Department's most important initiative – argued in speeches and news conferences, before Congress and the courts – has been the assertion that minority hiring goals represent illegal discrimination and that only limited relief for specific victims could pass constitutional muster."⁶¹

The Department's campaign to outlaw affirmative action took several forms. William Bradford Reynolds announced to Congress that the Justice Department would no longer seek as a remedy for employment discrimination goals which benefited a group of persons, calling such relief preferential treatment for non-victims based on race.⁶² The Department also sought to limit use of affirmative action by other federal agencies. The

⁵⁸ WILLIAM FRENCH SMITH, *LAW & JUSTICE IN THE REAGAN ADMINISTRATION 89-90* (Hoover Press) (1991).

⁵⁹ *See Reagan's Changes On Rights Are Starting To Have Impact*, N.Y. TIMES, Jan. 23, 1982.

⁶⁰ *Affirmative Action Upheld by High Court As A Remedy For Past Job Discrimination*, N.Y. TIMES, July 3, 1986.

⁶¹ *Administration Seeks Silver Lining in Rulings*, WASH. POST, July 3, 1986.

⁶² *Op-Ed, 'The Justice Department Will Not Retreat,'* WASH. POST, Oct. 3, 1981; Statement of Assistant Attorney General William Bradford Reynolds Before the Subcommittee on Employment Opportunities, House Committee on Education and Labor, reprinted in 1981 Daily Lab. Rep. (BNA) No. 184, at F-1 (Sept. 23 1981).

Department objected when the Equal Employment Opportunity Commission urged all federal agencies to include goals and timetables in their own affirmative action plans.⁶³ The Department sought to prevent the Labor Department from implementing Executive Order No. 11246,⁶⁴ which requires government contractors to use goals and timetables where underutilization of minorities and women can be demonstrated.⁶⁵ These efforts culminated in 1985, when the Department proposed, unsuccessfully, that President Reagan repeal the requirements of the Executive Order.⁶⁶

The Reagan Justice Department also ignored or misinterpreted recent Supreme Court decisions on affirmative action. In 1979, the Supreme Court upheld voluntary adoption of affirmative action by employers in *United Steel Workers v. Weber*.⁶⁷ William Bradford Reynolds called the case “wrongly decided” and vowed to seek its reversal.⁶⁸ Attorney General William French Smith acknowledged he would have taken a different position had his Department argued the case.⁶⁹ Additionally, the Department misconstrued the Supreme Court’s holding in *Firefighters Local Union No. 1784 v. Stotts*.⁷⁰ While the holding was limited to whether affirmative action remedies could override a seniority plan in a layoff situation, the Department misinterpreted the ruling to prohibit all forms of affirmative action in hiring and promotions.⁷¹ Although this interpretation was rejected by the Equal Employment Opportunity Commission and by each of the five appellate courts to consider the issue, Assistant Attorney General William Bradford Reynolds sent letters to fifty jurisdictions to reopen consent and court-ordered decrees obtained by the government for the purpose of eliminating all race-conscious remedies in view of its interpretation of *Stotts*.⁷² This misreading of *Stotts*

⁶³ *U.S. Agencies Vary on Rights Policy*, N.Y. TIMES, Nov. 16, 1981.

⁶⁴ Exec. Order No. 11246, 3 C.F.R. § 399 (1964-65), as amended 3 C.F.R. § 684 (1967).

⁶⁵ *Donovan Backs ‘Realistic’ Hiring Goals*, WASH. POST, Oct. 24, 1981.

⁶⁶ *Goals for Hiring to Stay in Place*, N.Y. TIMES, Aug. 25, 1986.

⁶⁷ 443 U.S. 193 (1979).

⁶⁸ *Civil Rights Division Head Will Seek Supreme Court Ban on Affirmative Action*, WALL ST. J., Dec. 8, 1981.

⁶⁹ *Reagan Backs Affirmative Action Plans Set Up Voluntarily by Firms and Unions*, WALL ST. J., Dec. 18, 1981.

⁷⁰ 467 U.S. 561 (1984).

⁷¹ Hearings before the Senate Judiciary Committee, Nomination of William Bradford Reynolds to be Associate Attorney General (99th Cong., 1st Sess.) (June 4, 5, and 18, 1985) (Testimony of William Taylor, Director, Center for National Policy Review) at 192-93.

⁷² Hearings before the Senate Judiciary Committee, Nomination of William Bradford Reynolds to be Associate Attorney General (99th Cong., 1st Sess.) (June 4, 5, and 18, 1985) (Statement of the Lawyers’ Committee for Civil Rights Under Law) at 260-63.

became an issue in the defeat of Mr. Reynolds' nomination to Associate Attorney General in 1985.⁷³

A review of Samuel Alito's tenure in the Justice Department reveals that he was directly involved in the Reagan Administration's frontal attacks on affirmative action. As a lawyer in the Solicitor General's office, Alito participated in three major affirmative action cases before the Supreme Court. These were among a total of twenty-five cases in which he participated in drafting briefs on the merits and were the only such cases directly involving race. In the cases, he argued against court-ordered affirmative action as a remedy for violations of Title VII of the Civil Rights Act of 1964 in *Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC*,⁷⁴ against voluntary affirmative action under Title VII in *Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*,⁷⁵ and against voluntary affirmative action under the Constitution in *Wygant v. Jackson Bd. of Educ.*⁷⁶ As discussed *infra*, in each case Samuel Alito was associated with positions far more extreme than positions taken by Justice Sandra Day O'Connor.

Significantly, newly released documents from Samuel Alito's service in the Reagan Administration indicate that Judge Alito maintained his own strongly-held views against affirmative action, in addition to his role as an advocate against affirmative action in each of the three cases. In 1985, Alito applied for a position as Deputy Assistant Attorney General. He had served as Assistant to the Solicitor General since 1981, and it was during this period that he had participated in the three Supreme Court cases. The application asked for information relevant to his "philosophical commitment" to the policies of the Reagan Administration.⁷⁷ In a narrative response, Alito wrote: "I am and always have been a conservative and an adherent to the same philosophical views that I believe are central to this Administration."⁷⁸ By this time, it was of course abundantly clear that the Reagan Administration was against the use of race-conscious action in any form – the "hallmark" of its civil rights policy.

Another portion of Judge Alito's response addressed affirmative action directly:

Most recently, it 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 advance legal positions in which I

⁷³ Hearings before the Senate Judiciary Committee, Nomination of William Bradford Reynolds to be Associate Attorney General (99th Cong., 1st Sess.) (June 4, 5, and 18, 1985) (Questioning by Senator Arlen Specter (R-PA)) at 40-45.

⁷⁴ 478 U.S. 421 (1986).

⁷⁵ 478 U.S. 501 (1986).

⁷⁶ 476 U.S. 267 (1986).

⁷⁷ PPO Non-Career Appointment Form, Nov. 15, 1985, Bates Nos. WH-118-19.

⁷⁸ *Id.*, at Bates No. WH-120.

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 allowed⁷⁹

In this statement, it is evident that Judge Alito strongly agreed with the legal positions against affirmative action, positions which he helped to craft. In fact, Judge Alito was on the extreme side of the issue even within the Reagan Administration; at the time of his application, several Reagan Cabinet members expressed opposition to the Justice Department's plans to weaken Executive Order No. 11246, requiring affirmative action by government contractors.⁸⁰

The organizational affiliations identified by Judge Alito in his Office of Legal Counsel application also raise concerns about his views toward affirmative action in the education context. In addition to asking for information regarding his "philosophical commitment" to the Administration's policies, the application asked whether he had been identified in a public way with a particular political organization, candidate or issue.⁸¹ In his response, Alito listed his membership with Concerned Alumni of Princeton University, which he described as a conservative alumni group.⁸² The Concerned Alumni of Princeton University was founded the same year Samuel Alito graduated from Princeton and was well-known for favoring restrictions on admission of minorities and women to the University.⁸³ In 1975, a group of alumni including Senator Bill Frist even concluded that Concerned Alumni had "presented a distorted narrow and hostile view of the university that cannot help but have misinformed and even alarmed many alumni" and "undoubtedly generated adverse national publicity."⁸⁴

Within weeks of his application to the Office of Legal Counsel, Judge Alito signed a brief filed by the United States in *Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC*.⁸⁵ By the time this case reached the Supreme Court, it had been litigated for fifteen years due to the union's refusal to comply with court directives to end its discriminatory practices. The Department of Justice had filed the case in 1971, claiming the union violated Title VII of the Civil Rights Act of 1964 by engaging in a pattern and practice of discrimination against African Americans and Hispanics in recruitment,

⁷⁹ *Id.*

⁸⁰ *Revisionists Lose Ground*, WASH. POST, Oct. 23, 1985; *Affirmative Action Policy Gains A Reprieve*, WASH. POST, Oct. 25, 1985.

⁸¹ PPO Non-Career Appointment Form, Nov. 15, 1985, at Bates No. WH-119.

⁸² *Id.* at Bates No. WH-121.

⁸³ *From Alito's Past, a Window on Conservatives at Princeton*, WASH. POST, Nov. 26, 2005.

⁸⁴ *Id.*

⁸⁵ 478 U.S. 421 (1986).

selection, training and admission to the union.⁸⁶ The district court found the union liable in 1975 and, in order to “place eligible non-whites in the position they would have enjoyed had there been no discrimination,” ordered the union to take steps to recruit non-whites, including adopting a temporary remedial goal for union admission based on the percentage of non-whites in the relevant labor pool.⁸⁷ The Second Circuit upheld the goal as justified by a “long and persistent pattern of discrimination.”⁸⁸

In 1982, contempt proceedings were filed against the union for failing to achieve the membership goal due to numerous violations of the court orders. The union was held in contempt for failing to comply almost from the date of entry of the court’s order.⁸⁹ The Second Circuit upheld the contempt findings and again affirmed the membership goal as a permissible temporary remedy justified by the union’s “long continued and egregious racial discrimination.”⁹⁰ The Court specifically rejected the union’s attempts to interpret *Firefighters Local Union No. 1784 v. Stotts*,⁹¹ as forbidding all race-conscious remedies except for identifiable victims of past discrimination.⁹² The Court noted that the affirmative action plan rejected in *Stotts* directly conflicted with a bona fide seniority plan, pertained only to “make whole” relief, and was not based on a finding of intentional discrimination.⁹³

Although the federal government had filed the case and prosecuted it up until this time, the government’s brief in the Supreme Court – signed by Samuel Alito, William Bradford Reynolds and others – joined the union in attacking the lower court’s order for “exceed[ing] the scope of remedies available under Title VII because they extend race-conscious preferences to individuals who are not the identified victims of [the union’s] unlawful discrimination.”⁹⁴ Significantly, in its opinion the Supreme Court remarked on the change in the government’s position: “Both petitioners and the EEOC present this challenge from a rather curious position. . . . The EEOC challenges the membership goal and Fund order even though the EEOC has, throughout this litigation, joined the other

⁸⁶ The Equal Employment Opportunity Commission was substituted as a plaintiff; the City of New York and the New York State Division of Human Rights were also plaintiffs. 753 F.2d 1172, 1175 (2d Cir. 1985).

⁸⁷ 401 F. Supp. 467, 488-89 (S.D.N.Y. 1975).

⁸⁸ 532 F.2d 821, 830 (2d Cir. 1976).

⁸⁹ 753 F.2d 1172, 1177 (2d Cir. 1985).

⁹⁰ *Id.* at 1186.

⁹¹ 467 U.S. 561 (1984).

⁹² *Local 28, Sheet Metal Workers Int’l Ass’n*, 753 F.2d at 1185.

⁹³ *Id.* at 1886.

⁹⁴ 478 U.S. 421, 440 (1986).

plaintiffs in asking the courts to order numerical goals, implementing ratios and timetables.”⁹⁵

Samuel Alito and the government contended that the membership goal unlawfully extended benefits to individuals solely on the basis of race. “Nondiscrimination is neither the end nor the means of this [court] order. Instead, the order requires a racial ratio through racially discriminatory means.”⁹⁶ They argued that the court’s remedy was a rigid quota that was illegal under Title VII, which, they contended, prohibited relief to persons who were not actual victims of discrimination.⁹⁷ Significantly, Alito argued that *Stotts* precluded such relief and that the Second Circuit had been wrong to distinguish *Stotts*: “The remedial principle recognized in *Stotts* is not limited to cases involving seniority rights, as the court of appeals believed. On the contrary, Section 706(g) governs all Title VII relief, not just relief affecting seniority rights. The court of appeals was also wrong in holding that *Stotts*’ interpretation of Section 706(g) does not apply to ‘prospective’ relief. By its express terms, Section 706(g) applies to forms of prospective relief such as hiring and promotion. Indeed, Section 706(g) expressly applies to the very form of relief at issue here – admission to union membership. Finally, there is no support for the court of appeals’ bald assertion that *Stotts*’ interpretation of Section 706(g) does not apply to cases of intentional discrimination.”⁹⁸

While five Justices upheld the remedial goal in question, six Justices rejected Samuel Alito’s position that federal courts could not require employers who have discriminated to adhere to goals for minorities who were not actual victims of discrimination.⁹⁹ In his plurality opinion, Justice Brennan wrote: “Specifically, we hold that such relief may be appropriate where an employer or a labor union has engaged in persistent or egregious discrimination, or where necessary to dissipate the lingering effects of pervasive discrimination.”¹⁰⁰

As was reported at the time, Justice Brennan “took explicit issue with the Justice Department’s interpretations, singling out the analysis . . . for repeated and direct

⁹⁵ *Id.* at 444 n.24.

⁹⁶ Brief for the Equal Employment Opportunity Commission, *Local 28, Sheet Metal Workers’ Int’l Ass’n v. Equal Employment Opportunity Comm’n*, No. 84-1656, available at 1985 WL 670084, *24.

⁹⁷ *Id.* at **10-11.

⁹⁸ *Id.* at *11.

⁹⁹ *Local 28, Sheet Metal Workers’ Int’l Ass’n*, 478 U.S. at 474-75 (Brennan, J. plurality opinion); *id.* at 483 (Powell, J., concurring in part and concurring in the judgment); *id.* at 496 (O’Connor, J., concurring in part and dissenting in part); *id.* at 499 (White, J., dissenting).

¹⁰⁰ 478 U.S. at 445 (Brennan, J. plurality opinion).

criticism.”¹⁰¹ Justice Brennan wrote that the government’s reading of Title VII “twists the plain language of the statute.”¹⁰² He rejected the government’s interpretation of the legislative history of Title VII, writing that the statements relied upon did not indicate that Congress intended to limit relief to only actual victims of lawful discrimination.¹⁰³ He called the government’s reliance on cases interpreting Title VII’s remedial provisions “misguided.”¹⁰⁴ He specifically rejected the government’s broad interpretation of *Stotts*, noting that the government had urged a different interpretation earlier in the lawsuit and that appellate courts had declined to read *Stotts* broadly, instead limiting it to its facts.¹⁰⁵ Justice Brennan noted that the government’s view of *Stotts* to prohibit a court from ordering any race-conscious relief that might benefit nonvictims “would deprive the courts of an important means of enforcing Title VII’s guarantee of equal employment opportunity.”¹⁰⁶

Significantly, Justice Sandra Day O’Connor, whom Judge Alito has been nominated to replace, indicated her support of race-conscious remedies imposed by courts where necessary and tailored to fit the violation. Although she believed that the court’s remedy in this instance was too rigid,¹⁰⁷ she clearly endorsed some race-conscious action in limited circumstances: “To be consistent with [Title VII], a racial hiring or membership goal must be intended to serve merely as a benchmark for measuring compliance with Title VII and eliminating the lingering effects of past discrimination, rather than as a rigid numerical requirement that must unconditionally be met on pain of sanctions.”¹⁰⁸ She also wrote:

If, then, some racial preferences may be ordered by a court as a remedy for past discrimination even though the beneficiaries may be nonvictims, I would employ a distinction between quotas and goals in setting standards to inform use by district courts of their remedial powers under Section 706(g) to fashion such relief. If, as the Court holds, Title VII sometimes allows district courts to employ race-conscious remedies that may result in racially preferential treatment for nonvictims, it does so only where such

¹⁰¹ *Affirmative Action Upheld to Rectify Past Job Bias*, WASH. POST, July 3, 1986; *see also*, *Six Vote for Idea*, N.Y. TIMES, July 3, 1986 (“Justice Brennan . . . directed detailed and unusually pointed criticism at the Department’s ‘misguided’ arguments.”).

¹⁰² *Local 28, Sheet Metal Workers’ Int’l Ass’n.*, 478 U.S. at 447.

¹⁰³ *Id.* at 453-62.

¹⁰⁴ *Id.* at 471-72.

¹⁰⁵ *Id.* at 474-75 & nn.46, 47.

¹⁰⁶ *Id.* at 474-75.

¹⁰⁷ *Id.* at 489 (O’Connor, J., concurring in part and dissenting in part).

¹⁰⁸ *Id.* at 495 (O’Connor, J., concurring in part and dissenting in part).

remedies are truly necessary. In fashioning any such remedy, including racial hiring goals, the court should exercise caution and ‘take care to tailor its orders to fit the nature of the violation it seeks to correct.’ . . . In sum, the creation of racial preferences by courts, even in the more limited form of goals rather than quotas, must be done sparingly and only where manifestly necessary to remedy violations of Title VII if the policy underlying [its provisions] is to be honored.¹⁰⁹

Samuel Alito argued against *voluntary* race-conscious relief in the second affirmative action case in which he participated, *Local 93, Int’l Ass’n of Firefighters v. City of Cleveland*.¹¹⁰ African-American and Hispanic firefighters had filed a class action against the City of Cleveland, alleging race and national origin discrimination in promotions. The parties entered into a consent decree providing for race-conscious relief, which was then adopted by the federal court over the union’s objection. The Sixth Circuit upheld the race-conscious relief as justified by statistical evidence of discrimination and the City’s express admission that it had discriminated in hiring and promoting minority firefighters.¹¹¹

Samuel Alito signed the *amicus curiae* brief filed by the Justice Department, along with William Bradford Reynolds who argued the Department’s position before the Court. As in *Local 28, Sheet Metal Workers Int’l Ass’n*, the government advocated an extreme interpretation of Title VII that banned relief for individuals who were not actual victims of discrimination, this time in voluntary affirmative action plans.¹¹² In its opinion, the Supreme Court noted that the government had taken “exactly the opposite position” seven years earlier in *Steelworkers v. Weber*,¹¹³ which upheld voluntary affirmative action.¹¹⁴ The Court also noted that the E.E.O.C.’s own affirmative action guidelines contemplated the use of consent decrees as an appropriate form of voluntary affirmative action, and that the E.E.O.C. had not joined the Justice Department’s brief.¹¹⁵

The brief was unabashed in its attempt to change the direction of the law. Recognizing that lower courts were unanimous in narrowly interpreting *Stotts*, the government asked for the Supreme Court’s “intervention.” “Unless corrected, this growing body of lower court precedent will have a major continuing impact, sanctioning

¹⁰⁹ *Id.* at 496-97 (O’Connor, J., concurring in part and dissenting in part).

¹¹⁰ 478 U.S. 501 (1986).

¹¹¹ 753 F.2d 479, 485 (6th Cir. 1985).

¹¹² Brief for the United States as *Amicus Curiae*, *Local 93, Int’l Ass’n of Firefighters v. City of Cleveland*, No. 84-1999, available at 1985 U.S. S. Ct. Briefs LEXIS 197, at **10-11.

¹¹³ 443 U.S. 193 (1979).

¹¹⁴ *Local 93, Int’l Ass’n of Firefighters*, 478 U.S. 501, 514 & n.6 (1986).

¹¹⁵ *Id.* at 517-18 & n.9 (1986), citing 29 C.F.R. § 1608.8 (1985).

both the continued implementation of old decrees and the entry of new judgments that may ultimately have to be overturned.”¹¹⁶ The brief argued against limiting *Stotts* to cases involving seniority systems, noting that workers’ expectations in promotions were similar to those involving seniority rights.¹¹⁷ It also maintained that consent decrees fell within Title VII’s restrictions on judicial relief, emphasizing that “vital interests of innocent employees are at stake.”¹¹⁸ “[A] Title VII consent decree awarding preferences in hiring, promotions, seniority, or lay-offs to ‘minority’ employees or prospective employees necessarily disadvantages those individuals who are not preferred. Neither the plaintiffs who sought such relief nor the employer who acceded to it can be counted on to protect the interests of the individuals who are disadvantaged by the decree.”¹¹⁹ The brief speculated that a public employer responsible to a minority electorate may be motivated to join a consent decree “awarding preferential treatment” to minorities.”¹²⁰ The brief warned that “if the courts do not police those limitations, the legitimate rights and interests of employees who do not belong to the favored groups will frequently be sacrificed.”¹²¹

In a 6-3 decision issued on the same day as *Local 28, Sheet Metal Workers*, the Supreme Court rejected Judge Alito’s arguments and upheld the voluntary race-conscious relief adopted in the consent decree.¹²² Six Justices, including Justice O’Connor, held that regardless of the relief Title VII permitted a court to order after trial, Title VII did not preclude entry of a consent decree that may benefit individuals who were not actual victims of discrimination. The Court noted Congress’ intent that voluntary compliance be the preferred means of achieving Title VII’s objectives.¹²³ The Court rejected the government’s argument that consent decrees are “orders” and therefore governed by Title VII’s remedial powers for courts, noting that the “voluntary nature of a consent decree is its most fundamental characteristic.”¹²⁴ The Court also rejected the government’s reading of *Stotts* that a consent decree could not provide greater relief than a court could have ordered after trial.¹²⁵ As noted, Justice O’Connor joined the opinion written by Justice

¹¹⁶ Brief for the United States as *Amicus Curiae*, *Local 93, Int’l Ass’n of Firefighters v. City of Cleveland*, No. 84-1999, available at 1985 U.S. S. Ct. Briefs LEXIS 197, at **10-11, 15.

¹¹⁷ *Id.* at *19.

¹¹⁸ *Id.* at **20-27.

¹¹⁹ *Id.* at *27.

¹²⁰ *Id.* at **27-28.

¹²¹ *Id.* at *28.

¹²² *Local 93, Int’l Ass’n of Firefighters*, 478 U.S. 501 (1986).

¹²³ *Id.* at 515.

¹²⁴ *Id.* at 518-22.

¹²⁵ *Id.* at 524-25

Brennan. She wrote separately to emphasize the narrowness of the holding, noting that the validity of race-conscious relief in a consent decree must be consistent with Title VII's other provisions and the Fourteenth Amendment.¹²⁶

The ruling was widely perceived as a victory for civil rights organizations, municipalities and business groups in their six-year battle with the Reagan Administration over race-conscious relief.¹²⁷ Corporations and state and local governments with affirmative action plans had been hesitant to pursue certain remedies because the Administration's position might expose them to reverse discrimination suits.¹²⁸ The Court's ruling specifically empowered them to adopt and to continue affirmative action plans providing even more protection than what courts could order. A spokesperson for the National Association of Manufacturers commented: "We're pleased that the Supreme Court has reinforced the concept of affirmative action and has recognized its value as a tool to help eradicate the present effects of past discrimination."¹²⁹ The Executive Director of the National League of Cities stated that the ruling "puts to rest efforts by the federal government and others to open old wounds by seeking to characterize voluntarily agreed-to hiring targets and similar practices as a form of reverse discrimination."¹³⁰ Even William Bradford Reynolds acknowledged that he would have to review letters he had sent to fifty jurisdictions ordering them to modify their affirmative action plans in the Department's attempt to use *Stotts* to ban all relief for non-victims.¹³¹

In his third affirmative action case, *Wygant v. Jackson Bd. of Educ.*,¹³² Samuel Alito argued in the government's *amicus curiae* brief that a school board's voluntary race-conscious layoff plan violated the Equal Protection Clause. According to Acting Solicitor General Charles Fried, Alito played a large role in writing the *Wygant* brief. In later remarks at a symposium sponsored by the Brigham Young Law Review, Charles Fried said the following:

I was acting in the office and doing all these things and they had a chance to get a really good look at me. There was the abortion brief and also the brief in the *Wygant* case. I had a big hand in writing it, and so did Sam

¹²⁶ *Id.* at 501, 530-31 (O'Connor, J., concurring).

¹²⁷ *Affirmative Action Upheld to Rectify Past Job Bias*, WASH. POST, July 3, 1986; *Administration Seeks Silver Lining in Rulings*, WASH. POST, July 3, 1986.

¹²⁸ *Employers, Unions Welcome Decisions*, WASH. POST, July 3, 1986.

¹²⁹ *Affirmative Action Upheld to Rectify Past Job Bias*, WASH. POST, July 3, 1986.

¹³⁰ *Rulings Cap Decades of Political, Legal Debate*, WASH. POST, July 3, 1986.

¹³¹ *Justice Official Terms Court's Ruling A 'Disappointment' and 'Unfortunate'*, N.Y. TIMES, July 3, 1986; *Administration Seeks Silver Lining in Rulings*, WASH. POST, July 3, 1986.

¹³² 476 U.S. 267 (1986).

Alito, who had this marvelous phrase saying that a particular African American baseball player would not have served as a great role model if the fences had been pulled in every time he was up at bat, at point which some people were greatly offended by because they thought it to be pamphleteering. I thought it was entirely appropriate. If it had been made in the other direction, it would have been applauded rather than deplored by the New York Times.¹³³

In the brief, Alito contended that the Department's argument against affirmative action was the same argument made in *Brown v. Board of Education*¹³⁴ – that the Fourteenth Amendment prohibited all legal distinctions based on race or color.¹³⁵ He contended that the layoff measure, which limited layoffs of minority teachers in order to preserve minority hiring gains, was subject to strict scrutiny. He stated that the history of the Fourteenth Amendment did not support discrimination against whites, noting that Congress intended to protect two groups of whites who were “in real danger of deprivation of civil rights” – aliens and white unionists in the South.¹³⁶ Citing Alexander Bickel, he wrote that the Equal Protection Clause not only protects against flagrant wrongs but “embodies a broad principle of equality that is subverted unless applied equally to all racial and ethnic classifications.”¹³⁷ Alito maintained that “preferences” harmed innocent individuals: “Whether a Plessy is ejected from a railroad coach because he is one-eighth black or laid-off because he is seven-eighths white, the concrete wrong to him is much the same.”¹³⁸ He also argued that “preferences” perpetuated racial division: “[W]hen preferences are granted to some groups, there is inevitable pressure for similar preferences to benefit every group that can mount a claim of past discrimination.”¹³⁹

Judge Alito criticized the justifications offered by the school board for the race-conscious measure and adopted by the lower courts – a history of societal discrimination, underrepresentation of minority teachers, and the need for role models for minority students.¹⁴⁰ He wrote that the measure did not compensate for societal discrimination

¹³³ Rex E. Lee Conference on the Office of the Solicitor General of the United States, 2003 BYU L. REV. 1, 179 (2003).

¹³⁴ 347 U.S. 483 (1954).

¹³⁵ Brief for the United States as *Amicus Curiae*, *Wygant v. Jackson Bd. of Educ.*, No. 84-1340, available at 1985 WL 669739, at *4.

¹³⁶ *Id.* at **11, 13-14.

¹³⁷ *Id.* at *21 (citation omitted).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at *4.

since the benefits did not correspond to identifiable wrongs and were not directed to specific victims.¹⁴¹ According to Alito, such measures can never be “precisely tailored” to remedy discrimination since the groups benefiting are seldom the most disadvantaged, noting that many minorities have surpassed whites in income, education and other measure of success.¹⁴² He argued that, by itself, the absence of a finding of discrimination invalidated the layoff measure.¹⁴³ Regarding the role model justification, Alito called for “special wariness” when the justification is that a social institution would work better or more smoothly, and claimed this was an argument for quotas in every occupation.¹⁴⁴ He believed that minority role models would be undermined rather than fostered because the moral lesson is not that “ours is a society in which each person can succeed as a result of his or her own work and talent.”¹⁴⁵ “The most powerful role models are those who have succeeded without a hint of favoritism. For example, Henry Aaron would not be regarded as the all-time home run king, and he would not be a model for youth, if the fences had been moved in whenever he came to the plate.”¹⁴⁶

Again rejecting the government’s wholesale assault on affirmative action, the Supreme Court ruled that some race-conscious action is constitutionally permissible while holding that the layoff measure in question violated the Equal Protection Clause. Although the Court’s decision was splintered, Justice O’Connor set forth the Justices’ agreement on “certain core principles” in a concurring opinion: “Ultimately, the Court is at least in accord in believing that a public employer, consistent with the Constitution, may undertake an affirmative action program which is designed to further a legitimate remedial purpose and which implements that purpose by means that do not impose disproportionate harm on the interests, or unnecessarily trammel the rights, of innocent individuals directly and adversely affected by a plan’s racial preference.”¹⁴⁷ Rejecting one of the government’s most persistent arguments against affirmative action, Justice O’Connor wrote that a “degree of unanimity” was forged in holding that a plan need not be limited to remedying specific instances of identified discrimination for it to be sufficiently “narrowly tailored” to redress discrimination.¹⁴⁸ And contrary to what Samuel Alito had argued, five Justices – including Justice O’Connor – agreed that the Equal Protection Clause did not require a public employer’s affirmative action plan to be

¹⁴¹ *Id.* at *26.

¹⁴² *Id.* at **26-27.

¹⁴³ *Id.* at *29.

¹⁴⁴ *Id.* at **22, 24.

¹⁴⁵ *Id.* at **6, 23.

¹⁴⁶ *Id.* at *23.

¹⁴⁷ *Wygant v. Jackson Bd. of Educ.*, 476 U.S. at 287 (O’Connor, J., concurring in part and concurring in the judgment).

¹⁴⁸ *Id.*

based on formal findings of discrimination; convincing evidence that remedial action was justified would suffice.¹⁴⁹ Foreshadowing her opinion twenty years later in *Grutter v. Bollinger*,¹⁵⁰ Justice O'Connor wrote that the holding in *Wygant* did not foreclose "the possibility that the Court will find other governmental interests . . . to sustain the use of affirmative action policies."¹⁵¹ Indeed, in *Grutter*, Justice O'Connor wrote that "we have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination. . . . Today, we hold that the Law School has a compelling interest in attaining a diverse student body."¹⁵²

Records released by the National Archives indicate that Samuel Alito was involved in reviewing at least one additional affirmative action case during his tenure in the Solicitor General's office. In *Marsh v. Flint Bd. of Educ.*,¹⁵³ the Sixth Circuit upheld an affirmative action plan for African-American counselors in the layoff context. The white plaintiff challenging the plan sought review by the Supreme Court. Judge Alito counseled against the government's involvement on the basis that the case raised identical issues to those in *Wygant*, which was pending before the Court. He wrote that "[o]n the facts, this case is somewhat less appealing than *Wygant* because the harm to petitioner (temporary demotion from guidance counselor to teacher) is less dramatic."¹⁵⁴ He noted that the case did illustrate "the endless reach of the role model argument," noting that here "it has extended beyond the teaching corps as a whole to counselors and librarians – and then to math teachers, French teachers, etc.?"¹⁵⁵ The Supreme Court granted the petition for writ of certiorari, and vacated and remanded the case for further consideration in view of *Wygant*.¹⁵⁶ On remand, the district court rejected the affirmative action plan as unjustifiable after *Wygant*, and ruled for the white counselor.¹⁵⁷

Judge Alito's record on the bench gives no indication that he no longer holds strong views against affirmative action or that he has put aside such views when evaluating cases. In the two cases coming before him involving challenges by white

¹⁴⁹ *Id.* at 277-78 (Powell, J. plurality opinion); *id.* at 289-90 (O'Connor, J., concurring in part and concurring in the judgment).

¹⁵⁰ 539 U.S. 306 (2003).

¹⁵¹ *Wygant v. Jackson Bd. of Educ.*, 476 U.S. at 286 (O'Connor, J., concurring in part and concurring in the judgment).

¹⁵² *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

¹⁵³ 762 F.2d 1009 (6th Cir. 1985).

¹⁵⁴ Note from Samuel Alito, Aug. 1, 1985, Bates No. DOJ2-00008.

¹⁵⁵ *Id.*

¹⁵⁶ *Marsh v. Flint Bd. of Educ.*, 476 U.S. 1137 (1986).

¹⁵⁷ 708 F.Supp. 821 (E.D. Mich. 1989).

plaintiffs to policies adopted for the purpose of benefiting minorities, he ruled for the white plaintiffs. In *Taxman v. Bd. of Educ. of Township of Piscataway*,¹⁵⁸ he ruled against a school district's voluntary affirmative action plan which retained an African-American teacher over a white teacher deemed equally qualified in a layoff decision for the purpose of promoting diversity in the workforce and as an educational objective. The African American teacher was the only minority teacher in the Business Department of Piscataway High School.¹⁵⁹ Judge Alito joined a ruling by seven judges in favor of the white teacher. The Court held the affirmative action plan violated Title VII because it did not have a remedial purpose as required under *United Steelworkers v. Weber*,¹⁶⁰ and *Johnson v. Transp. Agency, Santa Clara County*.¹⁶¹

Chief Judge Sloviter dissented on the ground that no Supreme Court decision has interpreted Title VII to preclude a school board from considering the desire for a racially diverse faculty among other factors in deciding which teacher to retain.¹⁶² She noted that *Weber* and *Johnson* upheld affirmative action plans, deviating from the literal interpretation of Title VII precluding use of race or gender in any employment decision, and did not require rejection of a plan which pursues a purpose other than correcting a manifest imbalance or remedying past discrimination.¹⁶³

In dissent, Judge Timothy Lewis called the majority's interpretation of Title VII "unprecedented." "[W]e should be mindful of the effects the majority's approach will impose upon legitimate, thoughtful efforts to redress the vestiges of our Nation's history of discrimination in the workplace and in education; efforts which, in seeking to achieve pluralism and diversity, have helped define and enrich our offices and institutions, and which were intended to open, and keep open the doors of opportunity to those would have 'been excluded from the American dream for so long.' This, after all, is what I had always thought Title VII was intended to accomplish."¹⁶⁴ Judge Lewis wrote that employers without a history of intentional discrimination should be able to consider race as one among many factors in order to promote diversity, and that to hold otherwise "eviscerates the purpose and goals of Title VII."¹⁶⁵ Judge Theodore McKee wrote that the majority's conclusion that an employer's voluntary affirmative action plan must be limited to remedying past discrimination ignores the legislative history that *Weber* and

¹⁵⁸ 91 F.3d 1547 (3d Cir. 1996), *cert. granted* 521 U.S. 1117, and *cert. dismissed*, 522 U.S. 1010 (1997).

¹⁵⁹ *Id.* at 1551.

¹⁶⁰ 443 U.S. 193 (1979).

¹⁶¹ 480 U.S. 616 (1987).

¹⁶² *Taxman*, 91 F.3d at 1569 (Sloviter, J., dissenting).

¹⁶³ *Id.* at 1570 (Sloviter, J., dissenting).

¹⁶⁴ *Id.* at 1577 (Lewis, J., dissenting) (citation omitted).

¹⁶⁵ *Id.* at 1577-78 (Lewis, J., dissenting).

Johnson required – that there is Congressional recognition of diversity as an objective of Title VII.¹⁶⁶

In *Hopp v. City of Pittsburgh*,¹⁶⁷ Judge Alito authored an opinion affirming a jury verdict for nine white police officers who challenged the City’s new hiring procedure as discriminatory against white applicants. To replace experienced police officers it lost to early retirement, the City allowed the hiring of officers without rankings after competitive testing. After a state court objected, the City administered a written examination. Concerned this might have an adverse impact on African-American applicants, the City also adopted an oral examination in order to minimize any adverse impact and promote “greater flexibility in creating a police force that reflected [the] overall population.”¹⁶⁸ Applicants were required to pass both exams in order to be certified for employment. Nine white plaintiff officers who performed well on the written exam but failed the oral exam sued. Among the issues on appeal, the City argued that the evidence did not support a finding of intentional discrimination. Instead of the exhaustive analysis he has conducted when examining an employer’s explanation for adverse employment action against African Americans, as discussed *infra*, Judge Alito summarily accepted the evidence offered by the white plaintiffs and concluded that a reasonable factfinder could find the City’s explanation to be a pretext for discrimination.¹⁶⁹ With no discussion whatsoever, Judge Alito merely cited the evidence offered: the previous written examination was a powerful job predictor; the City refused to explain why the plaintiffs failed the oral exam; the City maintained records of applicants’ race; the City raised the number of applicants it planned to fail “in an attempt to hire fewer white applicants;” the City did not “undercut” similarly situated African-American applicants; and the City failed few African Americans who performed poorly on the written exam.¹⁷⁰ Notably unlike his opinions in employment discrimination cases filed by African-American plaintiffs, Judge Alito made no reference to arguments made by the defendant or evidence offered by the defendant in rebuttal to the pretext claim by the white plaintiffs.

EMPLOYMENT DISCRIMINATION

Since the passage of the first fair employment laws in the 1960s, the Supreme Court’s jurisprudence in the area of employment discrimination has ensured that the workplace door is open to millions of individuals who were previously excluded from the opportunity simply to earn an honest living. The Court’s rulings throughout the years

¹⁶⁶ *Id.* at 1578 (McKee, J., dissenting).

¹⁶⁷ 194 F.3d 434 (3d Cir. 1999).

¹⁶⁸ *Id.* at 437, 439.

¹⁶⁹ *Id.* at 439-40.

¹⁷⁰ *Id.* at 439.

upholding challenges to systemic discrimination, *Teamsters v. United States*;¹⁷¹ recognizing that discrimination may be indirect though no less injurious, *McDonnell Douglas Corp. v. Green*;¹⁷² and permitting discrimination to be proven according to its adverse impact on minorities, *Griggs v. Duke Power Co.*,¹⁷³ have contributed significantly to full and effective enforcement of the fair employment laws.

As in other areas of civil rights, Justice O'Connor played a key role formulating the Court's jurisprudence in this area over the last twenty-five years. While she did not always vote in favor of a broad interpretation of a fair employment statute, her vote was consistently in play. The stakes in replacing Justice O'Connor in employment discrimination cases cannot be overstated. Fair employment cases constitute the most commonly litigated civil rights complaint. In federal jurisdictions all over the country, a significant portion of any district court's docket consists of employment discrimination cases filed by persons seeking to redress discrimination on the basis of race, ethnicity, national origin, gender, age, disability or religion. As Judge Alito's own record on the Third Circuit reveals, he has participated in dozens if not hundreds of such cases.

Judge Alito's record in this area should be extremely troubling to minority workers, women and others who depend on the protection of our nation's fair employment laws. In his fifteen years on the bench, Judge Alito has almost never ruled for African-American plaintiffs in employment discrimination cases. Significantly, he has never written a majority opinion for the Third Circuit in favor of an African-American plaintiff on the merits of a claim of race discrimination in employment. In each majority opinion authored by Judge Alito and addressing such a claim, he has ruled against the African-American plaintiff.¹⁷⁴

Moreover, in key cases, he has dissented from rulings of his colleagues favoring African-American plaintiffs, seeking to impose upon the plaintiffs higher burdens for proving discrimination. Although the Supreme Court has long held that subtle

¹⁷¹ 431 U.S. 324 (1977).

¹⁷² 411 U.S. 792 (1973).

¹⁷³ 401 U.S. 424 (1971).

¹⁷⁴ Our review revealed the following opinions authored by Judge Alito. In *Tomlinson v. Continental Express*, No. 99-5564 (3d Cir. May 22, 2000), Judge Alito affirmed summary judgment against the plaintiff on the ground she failed to provide sufficient evidence to establish pretext regarding her assignment claim. In *Williams v. Dalton*, No. 98-6033 (3d Cir. Dec. 30, 1998), Judge Alito affirmed summary judgment against the plaintiff on the ground he failed to provide sufficient evidence to establish pretext regarding his promotion claim. In *Hobbs v. Rubin*, No. 97-1584 (3d Cir. May 7, 1998), Judge Alito affirmed a jury trial verdict against the plaintiff on a termination claim on evidentiary grounds. In *Embry v. Harris Hub*, No. 96-2153 (3d Cir. Mar. 4, 1998), Judge Alito affirmed summary judgment against the plaintiff on the ground he failed to provide sufficient evidence to establish pretext regarding his termination claim. In *Cooper v. Port Authority Trans-Hudson Corp.*, No. 97-5146 (3d Cir. Mar. 3, 1998), Judge Alito affirmed summary judgment against the plaintiff on grounds that he failed to establish a *prima facie* case for his "failure-to-reclassify" claim and failed to provide sufficient evidence to establish pretext regarding his termination claim.

discrimination is just as unlawful as overt discrimination, Judge Alito appears to downplay important facts that would allow plaintiffs to prove circumstantially their claims of discrimination.

In *Bray v. Marriott Hotels*,¹⁷⁵ Judge Alito dissented from a ruling allowing a jury trial for Beryl Bray, an African-American female denied a promotion to “Director of Services” at the Park Ridge Marriott in New Jersey. Judge Theodore McKee held that a jury should decide whether Marriott’s stated reason for the decision – that a white female was the best applicant – was a pretext for race discrimination. After the key decision-maker testified at trial that Bray was not qualified, he had to retract the statement since, under Marriott’s personnel procedures, Bray could not have “posted” for the position had she not been qualified.¹⁷⁶ Judge McKee wrote that a jury could conclude from this “concededly inaccurate assessment” that the decision to reject Bray was motivated by race.¹⁷⁷ In analyzing the factors Marriott allegedly considered in evaluating Bray, Judge McKee concluded that discrepancies in the timing and accuracy of the evaluations of the two candidates, in the ranking of their respective experience, and in the weight afforded to their occupational grade levels raised factual questions about whether racial bias infected Marriott’s analysis of Bray’s qualifications.¹⁷⁸

Judge Alito issued a strong dissent. Citing factors that usually support a factual question about an employer’s motives, *e.g.*, the candidates were approximately equal in qualifications and many qualifications were subjective in nature, Judge Alito concluded that no jury could find Marriott did not honestly believe the white candidate was better qualified.¹⁷⁹ Judge Alito accused the majority of “weaken[ing] the burden on the plaintiff” for proving pretext to “one where all the plaintiff needs to do is to point to minor inconsistencies or discrepancies in terms of the employer’s failure to follow its own internal procedures in order to get to trial.”¹⁸⁰ “What we end up doing then is converting anti-discrimination law into a ‘conditions of employment’ law, because we are allowing disgruntled employees to impose the costs of trial on employers who, although they have not acted with the intent to discriminate, may have treated their employees unfairly. This represents an unwarranted extension of the anti-discrimination laws.”¹⁸¹

Judge McKee was extremely critical of Judge Alito’s dissent. He stated that Judge Alito improperly explained each discrepancy in isolation, rather than examining

¹⁷⁵ 110 F.3d 986 (3d Cir. 1997).

¹⁷⁶ *Id.* at 992.

¹⁷⁷ *Id.* at 993.

¹⁷⁸ *Id.* at 994-98.

¹⁷⁹ *Id.* at 1002 (Alito, J., dissenting).

¹⁸⁰ *Id.* at 1003 (Alito, J., dissenting).

¹⁸¹ *Id.*

the totality of the circumstances as Third Circuit precedent required.¹⁸² He commented on Judge Alito’s conclusion that none of the discrepancies in evaluating the two candidates would allow a jury to doubt Marriott’s explanation that it was looking for the “best” candidate:

We do not believe that Title VII analysis is so tightly constricted. This statute must not be applied in a manner that 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. The dissent’s position would immunize an employer from the reach of Title VII if the employer’s belief that it had selected the ‘best’ candidate, was the result of conscious racial bias. Thus, the issue here, is not merely whether Marriott was seeking the ‘best’ candidate but whether a reasonable factfinder could conclude that Bray was not deemed the best because she is Black. Indeed, Title VII would be eviscerated if our analysis were to halt where the dissent suggests.¹⁸³

Judge Alito also dissented in *Glass v. Philadelphia Electric Co.*,¹⁸⁴ writing that African-American plaintiff Harold Glass should not be granted a new trial because the trial judge had excluded evidence of racial harassment in support of his discrimination and retaliation claims. Mr. Glass worked for the Philadelphia Electric Company for twenty-three years. During that time, he attended school to enhance his career opportunities and received degrees in engineering. He also served as an employee advocate and sought to promote racial fairness and increased minority representation within the company. He was actively involved in two large race discrimination cases against the company and filed a charge resulting in an African-American employee group having a greater role in the company on racial issues.¹⁸⁵ Throughout his employment, Glass received only one less than satisfactory performance evaluation. Glass applied for several positions over the years, including engineer and labor relations representative, but the positions were filled by younger, white employees.¹⁸⁶ At trial, Glass sought to introduce evidence of racial hostility toward him, including the posting of hostile and demeaning images of him on the wall and racially derogatory remarks by senior employees.¹⁸⁷ He sought to show this treatment affected his only negative performance evaluation since his junior technician’s job was dependent on the support of senior

¹⁸² *Id.* at 991 (citation omitted).

¹⁸³ *Id.* at 993.

¹⁸⁴ 34 F.3d 188 (3d Cir. 1994).

¹⁸⁵ *Id.* at 190.

¹⁸⁶ *Id.* at 190-91.

¹⁸⁷ *Id.* at 192-93.

employees.¹⁸⁸ On repeated occasions, the trial court excluded this evidence while admitting evidence of Glass's poor performance evaluation in support of the company's decision to deny Glass promotions. In an opinion by Judge Jane Roth and joined by Judge Edward Becker, the Third Circuit ruled that the trial court abused its discretion and substantially prejudiced Glass by not allowing him to tell "his side of the story" about how the racial harassment impacted his performance.¹⁸⁹ The Court concluded that "Glass was repeatedly unable to introduce any evidence concerning the racially hostile environment at [the plant], management's failure to take corrective action when it learned of the harassment, or the connection between these incidents and his negative performance evaluation."¹⁹⁰ It also held that the evidence should have been admitted to help Glass prove that the company's stated reasons for the job denials were pretexts for discrimination.¹⁹¹ After the Court remanded the case, Glass was able to settle it.

Judge Alito found no reversible error in excluding the evidence, concluding that the prejudice to the company from the harassment evidence outweighed its probative value to the plaintiff under Fed.R.Evid. 403. While acknowledging that evidence of racial harassment had some probative value, he concluded it was "limited."¹⁹² Although the decision-maker had testified that poor performance was one reason Glass was rejected, Judge Alito said that the company did not "rely heavily" on the performance evaluation and that, even if the trial judge had erroneously excluded it, the error was harmless since other factors were considered in rejecting Glass.¹⁹³ Judge Alito argued that Glass did introduce evidence of harassment by testifying he was a "victim of harassment" and had "experienced problems."¹⁹⁴ This testimony, however, was extremely vague, did not even identify the basis for the harassment (race), and was no substitute for the repeated proffers of very specific evidence of racial harassment, the company's knowledge of the harassment and the connection between the harassment and Glass's performance. In sharp contrast, Judge Alito found substance in the company's argument that allowing evidence of racial harassment would have led to a mini-trial of this issue, causing substantial unfair prejudice.¹⁹⁵ He also speculated that the company

¹⁸⁸ *Id.* at 192-93.

¹⁸⁹ *Id.* at 189-90, 192. With respect to one job for which Glass had applied, the Court noted: "Even though Glass had met the education requirements and had the experiential background in labor relations, a qualification characterized as 'preferred' on the job posting, he was rejected in favor of younger, white candidates, none of whom had comparable employee or labor relations experience." *Id.* at 193.

¹⁹⁰ *Id.* at 194.

¹⁹¹ *Id.* at 194-95.

¹⁹² *Id.* at 199 (Alito, J., dissenting).

¹⁹³ *Id.* at 199-200 (Alito, J., dissenting).

¹⁹⁴ *Id.* at 200 (Alito, J., dissenting). Judge Alito also argued that the value of the evidence was diminished by Glass's unwillingness to argue that the decision-makers believed the evaluation was inaccurate. *Id.*

¹⁹⁵ *Id.*

might be prejudiced if the harassment evidence led the jury to believe there was a pattern of discrimination, which was not a claim presented by Glass.¹⁹⁶ In effect, Judge Alito would have ruled that the evidence may be so overwhelmingly indicative of race discrimination, it should not be admitted to prove it.

According to the Legal Defense Fund's review of dozens of published and unpublished opinions in employment discrimination cases, Judge Alito has sided with an African-American plaintiff on the merits of an employment discrimination claim in only two instances.¹⁹⁷ He did not author either opinion and the first ruling came after Judge Alito had been on the bench for ten years. In both instances, the question involved the sufficiency of the evidence to permit the claim to be heard by a jury. In both instances, the evidence overwhelmingly indicated that the employer's stated reason for the job

¹⁹⁶ *Id.*

¹⁹⁷ In addition to the cases discussed *supra*, Judge Alito joined rulings adverse to plaintiffs in the following race discrimination cases: *Lawrence v. O'Neil Buick*, No. 04-3231 (3d Cir. Feb. 23, 2005) (affirming summary judgment against termination claim); *Barber v. Univ. of Medicine & Dentistry of New Jersey*, 118 Fed. Appx. 588 (3d Cir. 2004) (affirming summary judgment against promotion and termination claims); *Ellis v. 88 Transit Lines*, No. 03-1968 (3d Cir. Oct. 29, 2004) (affirming judgment as a matter of law against termination claim); *Phillips v. Daimler Chrysler Corp.*, Nos. 03-2829 & 03-2946 (3d Cir. May 21, 2004) (affirming summary judgment against claims of discriminatory job assignments); *Murray v. Maple Creek Mining, Inc.*, No. 03-2059 (3d Cir. Mar. 17, 2004) (affirming summary judgment against termination claim); *Johnson v. Gober*, 83 Fed. Appx. 455 (3d Cir. 2003) (affirming summary judgment against assignment and termination claims); *Bullock v. Fed. Express Newark Hub*, 75 Fed. Appx. 898 (3d Cir. 2003) (affirming lower court's rejection of *prima facie* case); *Miller v. Ashcroft*, 76 Fed. Appx. 457 (3d Cir. 2003) (affirming summary judgment on procedural grounds and on merits in demotion case); *Clarke v. Readington Farm*, No. 02-3417 (3d Cir. June 12, 2003) (affirming summary judgment against termination claim); *Young v. Pennsauken Township Sch. Dist.*, 47 Fed. Appx. 160 (3d Cir. 2002) (affirming summary judgment against promotion claim); *Williams v. Rumsfeld*, 44 Fed. Appx. 592 (3d Cir. 2002) (affirming summary judgment against termination claim); *Collins v. Univ. of Pennsylvania*, 35 Fed. Appx. 352 (3d Cir. 2002) (affirming dismissal of claims as barred by Title VII's statute of limitations); *Buchanan v. Pennsylvania*, 47 Fed. Appx. 117 (3d Cir. 2002) (affirming summary judgment against hostile environment, termination and retaliation claims); *Beatty v. Temple Univ.*, No. 01-3983 (3d Cir. Sept. 9, 2002) (affirming jury verdict against plaintiff on discharge claim); *Morris v. Dep't of the Army*, No. 00-2778 (3d Cir. Feb. 7, 2002) (affirming summary judgment against promotion claim); *Cureton v. Xerox Corp.*, No. 00-4390 (3d Cir. Nov. 21, 2001) (affirming summary judgment against termination claim based on race); *Smith v. Pinnacle Health*, No. 00-4144 (3d Cir. Sept. 17, 2001) (affirming summary judgment against failure to hire claim); *Chatman v. Pennsylvania State Police*, No. 00-1797 (3d Cir. July 16, 2001) (affirming summary judgment against hostile environment and termination claims); *Warren v. Deutsche Wurlitzer*, Nos. 99-5106 & 99-5107 (3d Cir. Nov. 30, 1999) (affirming denial of judgment for termination and conditions of employment claims); *Jones v. Dalton*, No. 98-1964 (3d Cir. Oct. 14, 1999) (affirming jury verdict against termination claim); *Newsome v. Port Auth. of Allegheny County*, No. 97-3279 (3d Cir. June 17, 1998) (affirming jury verdict against termination claim); *Amaechi v. West Manchester Township*, No. 97-7596 (3d Cir. Apr. 6, 1998) (affirming summary judgment against failure to hire claim); *Miller v. Central New Jersey Medical Group*, No. 96-5777 (3d Cir. Dec. 15, 1997) (affirming summary judgment against termination claim); *Burnett v. U.S. Air Corp.*, No. 96-3132 (3d Cir. Jan. 8, 1997) (affirming summary judgment against termination claim); *Hinds v. United Parcel Service*, No. 94-1540 (3d Cir. June 27, 1995) (affirming jury verdict against termination claim); *Simmons v. Urban Redevelopment Auth. of Pittsburgh*, No. 94-3135 (3d Cir. Mar. 16, 1995) (affirming jury verdict against failure to hire claim); *Bryant v. Armstrong County Children and Youth Serv.*, No. 94-3251 (3d Cir. Nov. 14, 1994) (affirming judgment against hostile environment claims).

actual was a pretext for discrimination, and the case was allowed to proceed to trial. Importantly, the two rulings which Judge Alito joined did not mean that the plaintiffs prevailed on their race discrimination claims; rather, they merely allowed the claims to be presented to a jury. In both instances, the rulings of the three-judge panels were unanimous.

In *Goosby v. Johnson and Johnson Medical, Inc.*,¹⁹⁸ Judge Alito joined Judge Theodore McKee and a visiting district judge in reversing summary judgment against an African-American female on her race and gender claims arising from her assignment to a disfavored sales position after a company restructuring. Although Deborah Goosby wanted either of two positions, which sold the same products and used the same sales contacts, the company placed her in a third position. In its defense, the company claimed to rely on Goosby's low ratings in an assessment it conducted to match employees with new positions. The Court found factual questions about this reason based on evidence that other employees' assessment scores did not always dictate their ultimate positions, that other employees with poor scores were nevertheless awarded more preferable positions, and that the assessment criteria and weighting were highly subjective.¹⁹⁹ The Court, however, affirmed the dismissal of Goosby's two other discrimination claims (she was not allowed to return to work in a limited capacity after a disability leave and her territory was reassigned while on leave) and the dismissal of her retaliation claim.²⁰⁰

In *Smith v. Davis*,²⁰¹ Judge Alito joined an opinion written by a visiting district judge, reversing summary judgment against Rodney Smith on his claims of discrimination based on race and disability (alcoholism) arising from his termination as a probation officer. The three-page opinion began with an analysis of the disability claim, and concluded there were factual issues about whether Smith remained qualified for the job, although the employer alleged excessive absenteeism.²⁰² The Court held there were factual issues about the real reason for the termination. Although Smith's supervisors told him he was terminated for violating a drug and alcohol policy, the Court found nothing in the record identifying which aspect of the policy was violated.²⁰³ On appeal, the employer changed its reason and contended that Smith was fired for absenteeism, but Smith's supervisors had never mentioned absenteeism, and the drug and alcohol policy contained no applicable provision about absenteeism.²⁰⁴ The Court also cited evidence

¹⁹⁸ 228 F.3d 313 (3d Cir. 2000).

¹⁹⁹ *Id.* at 320-21. The Court also held that Goosby's testimony about the undesirability of the position and her difficulty in achieving the same level of sales created a factual question about whether the reassignment constituted an "adverse employment action" under Title VII. *Id.* at 319.

²⁰⁰ *Id.* at 322-23.

²⁰¹ 248 F.3d 249 (3d Cir. 2001).

²⁰² *Id.* at 251-52.

²⁰³ *Id.* at 252.

²⁰⁴ *Id.*

that Smith performed his duties satisfactorily for six years and had a larger caseload than his colleagues.²⁰⁵ In ruling on Smith’s race claim, the Court merely concluded that its rulings about whether Smith remained qualified for the job and whether the employer’s reason was pretextual applied with equal force to the race claim.²⁰⁶

On procedural issues, Judge Alito has sided with minority plaintiffs in only two other cases involving race discrimination. In *Collins v. Sload*,²⁰⁷ Judge Alito joined a *per curiam* ruling to vacate a district court’s dismissal of discrimination claims for failure to exhaust administrative remedies. A *pro se* plaintiff had filed a second amended complaint and only later requested leave to file it. The district court struck the complaint without considering the request but relied “squarely” on facts alleged in the complaint to conclude the plaintiff had not exhausted his administrative remedies for filing a Title VII charge.²⁰⁸ The Third Circuit held that district court erred in striking the complaint without considering the request for leave to amend and in dismissing the claims for failure to exhaust administrative remedies.²⁰⁹

In *Zubi v. AT&T Corp.*,²¹⁰ the question concerned the statute of limitations to be applied to a termination claim under 42 U.S.C. § 1981. The majority held that New Jersey’s two-year statute of limitations applied and thereby foreclosed Zubi’s complaint filed more than two years after the discriminatory event. Zubi argued that because his claim arose under amendments in the Civil Rights Act of 1991, it fell within 28 U.S.C. § 1658, which provided that actions arising under an Act of Congress enacted after December 1, 1990 had to be filed within four years. The Court considered the language of 28 U.S.C. § 1658 ambiguous, and looked to its legislative history and purpose.²¹¹ It concluded that Congress’ amendment of a preexisting statute did not create a “new act,” and claims arising under the amended statute continue to arise under the preexisting statute.²¹² In dissent, Judge Alito accused the majority of ignoring the meaning of the terms used in 28 U.S.C. § 1658, such as “action,” “Act of Congress” and “arising under.”²¹³ Judge Alito noted that *Patterson v. McClean Credit Union*²¹⁴ finally decided

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ No. 01-4529 (3d Cir. Nov. 3, 2003).

²⁰⁸ *Id.*, slip op. at 8.

²⁰⁹ *Id.*, slip op. at 10.

²¹⁰ 219 F.3d 220 (3d Cir. 2000).

²¹¹ *Zubi*, 219 F.3d at 222-23.

²¹² *Id.* at 225.

²¹³ *Zubi*, 219 F.3d at 227 (Alito, J., dissenting).

²¹⁴ 491 U.S. 164 (1989).

that Section 1981's "make and enforce contracts" provision did not apply to the termination of contracts, and that the Civil Rights Act of 1991 then broadened the provision to include the termination of contracts.²¹⁵ He reasoned that the termination claim "arose under" the Civil Rights Act of 1991, and therefore the four-year statute of limitations applied.²¹⁶ In *Jones v. R.R. Donnelly & Sons*,²¹⁷ the Supreme Court upheld Judge Alito's interpretation of the law.

Finally, it is important to note that Judge Alito has very narrowly construed fair employment statutes in cases involving discrimination against other protected classes. For example, in *Keller v. Orix Credit Alliance, Inc.*,²¹⁸ Judge Alito authored an *en banc* opinion which held that a plaintiff claiming age discrimination had not produced sufficient evidence to prove the employer's reasons for failing to promote and then terminate him were pretextual, although the plaintiff was told by the company's president he may be "getting too old for the job."²¹⁹ Judge Timothy Lewis dissented, writing that a factfinder could conclude that the employment decisions were based on age.²²⁰ These cases are also important to our analysis since, in interpreting the various provisions of Title VII, such cases can be of precedential value to claims brought by African-American plaintiffs alleging employment discrimination based on race.

Sheridan v. E.I. DuPont de Nemours and Co.,²²¹ is one such case meriting special mention. Although this was not a race case, the Legal Defense Fund filed an *amicus curiae* brief because the issue concerned the nature of the evidence that would permit a jury to find intentional discrimination by an employer.²²² Resolution of the issue affected both a plaintiff's ability to overcome summary judgment and thereby go to trial, as well as whether a jury verdict for a plaintiff could be sustained after trial. Barbara Sheridan was one of five head captains at a restaurant at the Hotel DuPont. She alleged that the hotel discriminated against her on the basis of sex in failing to promote her to manage the hotel's restaurants, retaliated against her for complaining about sex discrimination when the job went to a male, and then created intolerable working conditions, including demoting her, which resulted in her constructive discharge. After a jury ruled in favor of her constructive discharge claim, the trial court overturned the verdict and granted

²¹⁵ *Zubi*, 219 F.3d at 229 (Alito J, dissenting).

²¹⁶ *Id.* at 230 (Alito, J., dissenting).

²¹⁷ 541 U.S. 369 (2004).

²¹⁸ 130 F.3d 1101 (3d Cir. 1997).

²¹⁹ *Id.* at 1112-14.

²²⁰ *Id.* at 1116, 1121-22 (Lewis, J., dissenting).

²²¹ 100 F.3d 1061 (3d Cir. 1996).

²²² Brief Amicus Curiae of the NAACP Legal Defense And Educational Fund, Inc., *Sheridan v. E.I. DuPont de Nemours and Co.*, No. 94-7509.

judgment for the hotel on the ground that even if the jury rejected its reasons for discharging her, Sheridan had not produced sufficient evidence for the jury to infer gender discrimination.²²³

In an *en banc* ruling in which Judge Alito was the lone dissent, the Third Circuit reversed the judgment for the hotel and remanded the case. Writing for the Court, Chief Judge Dolores Sloviter clarified its interpretation of *St. Mary's Honor Center v. Hicks*,²²⁴ to hold that a *prima facie* case of discrimination combined with evidence that employer's proffered reason was not the true reason permitted an inference of discrimination.²²⁵ The Court cited several of its own opinions indicating that it had never required a plaintiff to prove anything beyond pretext (known as "pretext-plus"), and recognized that a majority of appellate courts had similarly interpreted *Hicks*.²²⁶ Citing Justice O'Connor's concurrence in *Price Waterhouse v. Hopkins*,²²⁷ the Court noted that this method of proof in employment discrimination cases "arose out of the Supreme Court's recognition that direct evidence of an employer's motivation will often be unavailable or difficult to acquire."²²⁸ Using the standard it adopted, the Court reviewed the evidence presented by Sheridan at trial and concluded that the jury could have disbelieved the hotel's reasons and thereby inferred discrimination. This included Sheridan's steady promotions and awards; the proximity of her discrimination complaints to the hotel's dissatisfaction with her performance; the meticulous recordkeeping of her daily activities; and the hotel's investigation into her "misconduct" which allegedly caused her reassignment.²²⁹

Judge Alito was the only one of eleven judges to dissent. He criticized the Court's test for proving discrimination as "wrong and unwieldy."²³⁰ According to Judge Alito, sufficient evidence to support a finding that an employer's rationale was pretextual should not always permit an inference of discrimination.²³¹ He would have held that it was proper in some instances to require "pretext-plus;" that is, additional evidence beyond showing that the employer's reason was pretextual. He identified examples in which the probative force of the *prima facie* case is weak, where strong evidence exists that the decision was attributable to some ground other than discrimination or the reason

²²³ *Sheridan*, 100 F.3d at 1064.

²²⁴ 509 U.S. 502 (1993).

²²⁵ *Sheridan*, 100 F.3d at 1066-67.

²²⁶ *Id.* at 1067.

²²⁷ 490 U.S. 228, 271 (1989) (O'Connor, J., concurring).

²²⁸ *Sheridan*, 100 F.3d at 1071 (citation omitted).

²²⁹ *Id.* at 1074.

²³⁰ *Id.* at 1088 (Alito, J., dissenting).

²³¹ *Id.* at 1078-79 (Alito, J., dissenting).

offered by the employer, and where there is no other evidence that the action was due to discrimination.²³² He offered an alternative test for proving discrimination: whether there was sufficient evidence to find that discrimination was a determinative cause of the challenged employment action.²³³

The majority was extremely critical of Judge Alito's reformulation, noting that the "attack by Dupont and [Judge Alito's] dissent on the paradigm we and these other courts have constructed in the wake of *Hicks* is multifaceted,"²³⁴ and that Judge Alito's approach "would bring the courts of this circuit back to the confusion and uncertainty created by the 'pretext plus' and 'some evidence' language that promoted this court to consider this case *en banc*."²³⁵ The Court quarreled with Judge Alito's interpretation of the appellate cases he had accused the majority of ignoring and which he had characterized as "strong contrary authority,"²³⁶ and took issue with Judge Alito's belief that facts establishing a *prima facie* case of discrimination should not later factor into the jury's consideration of whether intentional discrimination was proven.²³⁷ The Court rejected Judge Alito's attempts to carve out an exception to inferring discrimination simply because the employer does not want to disclose the real reason for the employment action: "[Judge Alito] 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."²³⁸

In *Reeves v. Sanderson Plumbing Products, Inc.*,²³⁹ the Supreme Court later clarified further the evidentiary standard for permitting an inference of discrimination. The district court had denied the employer's motion for judgment as a matter of law, and a jury ruled for the plaintiff in an age discrimination case. The Fifth Circuit reversed. Writing for a unanimous Court, Justice O'Connor reversed the Fifth Circuit, and held that a *prima facie* case together with sufficient evidence to disbelieve the employer's justification was potentially sufficient to support a finding of discrimination.²⁴⁰ The distinction between Judge Alito's dissent in *Sheridan* and Justice O'Connor's opinion in

²³² *Id.* at 1086 (Alito, J., dissenting).

²³³ *Id.* at 1078, 1088 (Alito, J., dissenting).

²³⁴ *Sheridan*, 100 F.3d at 1068.

²³⁵ *Id.* at 1070.

²³⁶ *Id.* at 1068 n.7.

²³⁷ *Id.* at 1069.

²³⁸ *Id.* at 1070.

²³⁹ 530 U.S. 133 (2000).

²⁴⁰ *Reeves*, 530 U.S. at 148.

Reeves is not so much about the standard for proving discrimination but how it would apply in two cases that were identical in relevant aspects. That difference illuminates an underlying skepticism on Judge Alito’s part about both the persistence of discrimination in our society and about the reliability of jury verdicts. As Justice O’Connor recognized in *Reeves*, the Fifth Circuit erroneously substituted its view of the evidence for the witness credibility determinations that the jury had to make:

In holding that the record contained insufficient evidence to sustain the jury’s verdict, the Court of Appeals misapplied the standard of review dictated by Rule 50. Again, the court disregarded critical evidence favorable to petitioner – namely, the evidence supporting petitioner’s *prima facie* case and undermining respondent’s nondiscriminatory explanation. The court also failed to draw all reasonable inferences in favor of petitioner. . . . In concluding that these circumstances so overwhelmed the evidence favoring petitioner that no rational trier of fact could have found that petitioner was fired because of his age, the Court of Appeals impermissibly substituted its judgment concerning the weight of the evidence for the jury’s.²⁴¹

With his dissent in *Sheridan*, Judge Alito essentially committed the same error as the Fifth Circuit holding that was later condemned by Justice O’Connor in *Reeves*. In concluding that the district court properly granted a Rule 50 motion for the hotel in *Sheridan*, Judge Alito allowed the court to reweigh the evidence and make credibility determinations: “The record shows great personal friction between the plaintiff and her supervisors regarding matters such as grooming, smoking, tardiness, and giving away free food and beverages, but the district judge saw little if any evidence of any kind that could reasonably link this personal animosity to the plaintiff’s gender.”²⁴² However, the subjects of the purported “personal friction” were precisely the kinds of misconduct that the hotel accused Sheridan of committing when it articulated reasons for reassigning her, and which the jury’s verdict indicated were not credible.

VOTING RIGHTS

There are few citizens or scholars who would deny that the Supreme Court’s interpretations of the Constitution as a shield against the excesses of unchecked power have often crystallized the Court’s intended and imperative role. For many, the Court’s civil rights and voting rights jurisprudence capture the essence of these tests of the measure of our commitment to equality. The most significant Supreme Court decisions in the area of voting have elevated and not shrunk from the principle of equality embodied in the Constitution. Accordingly, a discussion of Judge Alito’s record on voting rights must begin with his comments on judicial usurpation of authority and the Supreme Court’s reapportionment cases. These statements appeared in Judge Alito’s

²⁴¹ *Id.* at 155-53.

²⁴² *Sheridan*, 100 F.3d at 1088 (Alito, J., dissenting).

1985 Department of Justice application to become Deputy Assistant Attorney General. In his application, Judge Alito wrote: “In the field of law, I disagree strenuously with the usurpation by the judiciary of decisionmaking authority that should be exercised by the branches of government responsible to the electorate.”²⁴³ He also wrote that he had developed in college “a deep interest in constitutional law, motivated in large part by disagreement with Warren Court decisions,” including those involving “reapportionment.”²⁴⁴

It is clear that during her years on the Rehnquist Court, Justice Sandra Day O’Connor has manifested an awareness of the centrality of the Court’s voting rights jurisprudence that led her to deliberative case-by-case assessments. Given the stakes involved in filling the replacement for Justice O’Connor, Judge Alito’s statements are of grave concern to the Legal Defense Fund. At the very least, Judge Alito should be thoroughly questioned during his hearing before the Senate Judiciary Committee about which cases decided by the Warren Court animated his strenuous objections, and about the precise grounds for his disagreement with the principles enunciated by the Court.

The Warren Court, spanned the years from 1953 to 1969, and presided over a series of seminal cases involving voting rights generally, and apportionment in particular. The cases largely addressed the power of the federal courts to ensure that voting rights were meaningfully protected.

Among other things, the Warren Court’s reapportionment decisions are lauded for their role in barring state legislative schemes that dilute the voting strength of racial minorities by perpetuating inequitably drawn voting districts – districts in which the votes of citizens in one part of a state would be afforded, in some cases two times, five times or even ten times more weight than the votes of citizens in another part of a state. Recognizing the concept of “one person, one vote,” the Court enshrined the principle that every citizen has the right to an equally effective vote, rather than the right to simply cast a ballot. In doing so, the Court set into motion a process that led to the dismantling of a political system infected both by prejudice and other forms of patent electoral manipulation. The result was more effective participation in the political process for all voters. As Senator Specter said recently in his letter to Judge Alito, the principle of “one man one vote” has been instrumental to ensuring that all people’s votes are weighted equally in our representative democracy,” and “the drawing of voting districts has become ever more important.”²⁴⁵

The first significant reapportionment case decided by the Warren Court was *Gomillion v. Lightfoot*.²⁴⁶ In that case, African Americans from Tuskegee, Alabama

²⁴³ PPO Non-Career Appointment Form, Nov. 15, 1985, Bates No. WH-120.

²⁴⁴ *Id.*

²⁴⁵ Letter from Senate Judiciary Committee Chairman Arlen Specter to Judge Samuel Alito, Nov. 30, 2005.

²⁴⁶ 364 U.S. 339 (1960).

challenged the redrawing of the town's municipal boundaries by the Alabama Legislature because it excluded them from voting in municipal elections. The Legislature had changed the shape of the City of Tuskegee from a square to a twenty-eight-sided figure, with the effect of removing from the City all but four or five of its 400 African-American voters.²⁴⁷ The Supreme Court held that the boundary change violated the Fifteenth Amendment. Importantly, the Court rejected the argument that impairment of voting rights could not be challenged in the face of the State's unrestricted power to realign its political subdivisions.²⁴⁸ "When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment. . . . Apart from all else, these considerations lift this controversy out of the so-called 'political arena' and into the conventional sphere of constitutional litigation."²⁴⁹

Fred Gray, who represented Rosa Parks and citizens in the Montgomery Bus Boycott, argued the case for Dr. C.G. Gomillion and other African Americans excluded from voting in Tuskegee. He has said that "[t]he case is recognized today as one of the landmarks in U.S. voting rights law."²⁵⁰ In his autobiography, Bus Ride to Justice, Mr. Gray explained *Gomillion's* impact on the development of voting rights jurisprudence:

It was the first case involving racial gerrymandering that the High Court had ever considered. This case laid the foundation for the concept of 'one man, one vote.' The fact that white authorities could no longer dilute the African-American vote set the stage for later cases to hold that African Americans must be properly represented and single-member districts should be drawn in such a fashion that African Americans may be elected to public office. In the long run, as a result of this case and others which relied upon it, there are now thousands of African Americans and other minorities who are serving throughout the country as mayors, city council persons, members of the boards of education, county commissioners, state legislators, and in Congress using the concept of single-member districts.²⁵¹

Judge John Brown, whose dissenting opinion in the Fifth Circuit provided the foundation for the Supreme Court's ruling, considered his dissent to be his most important

²⁴⁷ *Id.* at 340-41.

²⁴⁸ *Id.* at 344-45.

²⁴⁹ *Id.* at 346-47.

²⁵⁰ FRED GRAY, *BUS RIDE TO JUSTICE* 4 (Black Belt Press) (1995).

²⁵¹ *Id.* at 123.

opinion.²⁵² And Fifth Circuit Judge John Minor Wisdom believed that “*Gomillion* had a prompt and decisive effect on reapportionment and the right to vote generally.”²⁵³

Two years later, the Supreme Court issued its seminal ruling in *Baker v. Carr*.²⁵⁴ There, the Supreme Court held that federal courts could entertain as justiciable a challenge under the Equal Protection Clause to the apportionment of seats in State legislatures.²⁵⁵ The Court relied on its holding in *Gomillion* that the power of a State is within the scope of limitations imposed by the Constitution. Significantly, the Court focused on the potentially distorting impact of unfettered state power on the right that forms the foundation of the nation’s constitutional system: “It is inconceivable that guaranties embedded in the Constitution of the United States may . . . be manipulated out of existence.”²⁵⁶ It is an indication of the centrality of these voting decisions to modern constitutional jurisprudence and civil rights that Chief Justice Warren called *Baker v. Carr* “the most important case of my tenure on the Court.”²⁵⁷ After the decision was issued, President Kennedy declared, “The right to fair representation and to have each vote count equally is, it seems to me, basic to the successful operation of a democracy.”²⁵⁸

Shortly thereafter, the Court decided *Gray v. Sanders*,²⁵⁹ in which Attorney General Robert F. Kennedy participated in oral argument as *amicus curiae*. The Court held that the county unit system employed by Georgia to count votes in statewide elections violated the Equal Protection Clause because it gave significantly more voting power to rural voters than urban voters. Justice William O. Douglas set forth the now-infamous principle: “The conception of political equality from the Declaration of Independence, to the Gettysburg Address, to the 15th, 17th, and 19th Amendments can mean only one thing: one person, one vote.”²⁶⁰ Again, the Court quoted from its *Gomillion* opinion: “When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried

²⁵² Wisdom, *In Memoriam: One of a Kind*, 71 TEX. L. REV. 913, 916 (1993).

²⁵³ *Id.* at 918.

²⁵⁴ 369 U.S. 186 (1962).

²⁵⁵ *Id.* at 237.

²⁵⁶ *Id.* at 230 (citation omitted).

²⁵⁷ BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT* 410 (New York University Press) (1983).

²⁵⁸ *Id.* at 425.

²⁵⁹ 372 U.S. 368 (1963).

²⁶⁰ *Id.* at 381.

over when state power is used as an instrument for circumventing a federally protected right.”²⁶¹

The Court then applied the one-person, one-vote principle to congressional elections in *Wesberry v. Sanders*.²⁶² The Court construed Article I, § 2’s command that Representatives be chosen “by the People” to mean that “as nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s.”²⁶³ Justice Hugo Black wrote: “It would defeat the principle solemnly embodied in the Great Compromise – equal representation in the House for equal numbers of people – for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others.”²⁶⁴

Finally, in *Reynolds v. Sims*,²⁶⁵ the Court held that the Equal Protection Clause required Alabama’s legislative districts to be apportioned on the basis of population, so that the weight of a citizen’s vote would not depend on where he or she lived.²⁶⁶ Writing for the Court, Chief Justice Warren held that “[t]he right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”²⁶⁷ Once more, the Court relied on *Gomillion* in holding that “a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us.”²⁶⁸

It is difficult to overstate the importance of these cases to the foundation of our modern democracy. Judge Alito’s strong disagreement with some if not all of these

²⁶¹ *Id.* (citation omitted).

²⁶² 376 U.S. 1 (1964).

²⁶³ *Id.* at 7-8.

²⁶⁴ *Id.* at 14.

²⁶⁵ 377 U.S. 533 (1964).

²⁶⁶ On the same date, the Court issued several state legislative apportionment decisions relying upon *Reynolds v. Sims*. Each majority opinion was written by Chief Justice Warren and concluded that the state legislative representation at issue was not sufficiently based on population to withstand a challenge under the Equal Protection Clause. *WMCA v. Lomenzo*, 377 U.S. 633 (1964) (New York); *Maryland Committee for Fair Representation v. Tawes*, 377 U.S. 656 (1964) (Maryland); *Davis v. Mann*, 377 U.S. 678 (1964) (Virginia); *Roman v. Sincock*, 377 U.S. 695 (1964) (Delaware); *Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713 (1964) (Colorado). In *Lucas*, the Court also held that electoral approval of the apportionment plan was of no constitutional significance if the plan ran afoul of equal protection guarantees. *Id.* at 737.

²⁶⁷ *Reynolds*, 377 U.S. at 555.

²⁶⁸ *Id.* at 566 (citation omitted).

pivotal rulings is extremely troubling. Indeed, the criticism appears reminiscent of that expressed by Robert Bork, who wrote:

The state legislative apportionment cases were unsatisfactory precisely because the Court attempted to apply a substantive equal protection approach. Chief Justice Warren's opinions in this series of cases are remarkable for their inability to muster a single respectable supporting argument. The principle of one man, one vote . . . runs counter to the text of the fourteenth amendment, the history surrounding its adoption and ratification and the political practice of Americans from Colonial times up to the day the Court invented the new formula.²⁶⁹

In his fifteen years on the bench, Judge Alito has had few opportunities to rule on voting rights cases. In Judge Alito's only case interpreting the Voting Rights Act of 1965, *Jenkins v. Manning*,²⁷⁰ he voted to uphold an at-large system of electing members of the Red Clay School District in Delaware. The lawsuit was one of few, if not the only, at-large challenges ever to be considered by the Third Circuit under the Voting Rights Act.

At-large electoral schemes, which require candidates to receive a majority of votes within a jurisdiction to be elected, are familiar discriminatory election methods maintained to minimize the voting strength of racial minorities and/or that have that effect. In jurisdictions where voting is racially polarized, meaning white voters can outvote the minority candidate of choice, at-large election systems afford significantly less representation to minority voting populations.

Filed by the Lawyers' Committee For Civil Rights Under Law on behalf of eligible African- American voters in the school district, the suit alleged that the at-large method of election diluted the voting strength of African-American voters and provided them less opportunity to participate in the political process and to elect candidates of their choice in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. The district court found that the plaintiffs proved two of the three threshold requirements for establishing a Section 2 claim under *Thornburg v. Gingles*:²⁷¹ the minority community was sufficiently large and geographically compact such that a majority African American district would be created; and the minority community was politically cohesive.²⁷² However, while the plaintiffs produced expert and lay testimony that the white majority usually voted in a bloc to defeat the minority group's preferred candidate, the district court found the plaintiffs failed to establish a pattern of white bloc voting.²⁷³ To provide

²⁶⁹ Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1, 18 (1971).

²⁷⁰ 116 F.3d 685 (3d Cir. 1997).

²⁷¹ 478 U.S. 30 (1986).

²⁷² *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 780 F. Supp. 221, 226-31 (D.Del. 1991).

²⁷³ *Id.* at 233.

a “comprehensive opinion,” the trial court went on to analyze the factors in the Senate Judiciary Committee Report accompanying the bill amending Section 2 in 1982 (the Senate Report factors), as required by *Gingles*, and concluded that a Section 2 violation had not occurred under the totality of the circumstances.²⁷⁴

In an initial opinion written by Judge Edward Becker and joined by Judges Carol Mansmann and Richard Nygaard, the Third Circuit reversed and remanded the case, holding that the district court improperly evaluated the evidence of bloc voting.²⁷⁵ The Court held that the district court committed reversible error in relying on the *potential* for African Americans to elect representatives with a plurality of the vote when the record showed that no candidate, black or white, had won with a mere plurality since 1981.²⁷⁶ The Court also rejected the district court’s finding that, even if the threshold requirements of *Gingles* were satisfied, application of the Senate Report factors demonstrated no violation under the totality of circumstances. The Court held that the district court’s conclusory analysis did not comport with the requirement that the totality of the circumstances be subject to a “searching practical evaluation.”²⁷⁷ Importantly, Judge Becker wrote that “it will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* prerequisites but still have failed to establish a violation of § 2 under the totality of the circumstances.”²⁷⁸ The Court indicated that in such instance, the district court must fully explain why it has concluded that an electoral system that routinely results in white bloc voting to defeat the minority community’s candidate of choice does not violate Section 2.²⁷⁹

On remand, the district court found legally sufficient white bloc voting.²⁸⁰ Although the three *Gingles* prerequisites were now satisfied, the district court again concluded that based on the totality of the circumstances, a Section 2 violation was not established.²⁸¹ The court concluded that some of the Senate Report factors were established such as evidence that the lingering effects of official and private discrimination could depress political participation, racial polarization in the electorate, and a lack of responsiveness by the board to the minority community.²⁸² However, it

²⁷⁴ *Id.* at 233-41.

²⁷⁵ *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103 (3rd Cir. 1993), *cert. denied*, 114 S.Ct. 2778 (1994).

²⁷⁶ *Id.* at 1112, 1122-23.

²⁷⁷ *Id.* at 1135.

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ 1996 WL 172327, at *18.

²⁸¹ *Id.* at *30.

²⁸² *Id.* at **20, 25.

concluded that other Senate factors were not met – electoral practices did not enhance the opportunity for discrimination, there were no barriers to access to slating or subtle racial appeals in campaigns, African Americans had experienced “great electoral success,” and the policy supporting the at-large system was not tenuous.²⁸³ The court compared the probable effects of the proposed single-member system with the actual effects of the at-large system, and concluded a Section 2 violation was not established.²⁸⁴

In an opinion written by Judge Morton Greenberg and joined by Judge Alito, the Third Circuit affirmed. The Court acknowledged this was the “unusual case” in which the *Gingles* preconditions were met but a Section 2 violation could not be proven under the totality of the circumstances.²⁸⁵ The Court rejected the plaintiffs’ argument that the lower court had improperly weighed the various Senate factors in considering the totality of the circumstances. Although the Court found that the trial court should have discounted certain races in analyzing the electoral success of minority-preferred candidates, it concluded this was not reversible error.²⁸⁶ The Court held that the substantial minority electoral success was counterbalanced by racially polarized voting, thereby raising the importance of the other Senate factors. The majority opinion concluded that the other factors were properly evaluated and upheld the “very unusual” holding of the district court that although the prerequisites were satisfied, no violation existed.²⁸⁷

Judge Max Rosenn, a Nixon appointee, issued a powerful dissent. He noted that since the first decision in *Jenkins*, several courts of appeals had held that it was unusual not to establish a Section 2 violation where the three *Gingles* preconditions were met.²⁸⁸ He believed that the Court improperly concluded there was substantial minority success, calling it “neither undeniable nor substantial.”²⁸⁹ He criticized the majority for “overlook[ing] the broad sweep of the Voting Rights Act [which] is widely considered to be the most successful piece of civil rights legislation ever enacted by Congress.”²⁹⁰ Judge Rosenn stated that, in amending Section 2, “Congress was aware that at-large elections were seen as the principal impediment to minority representation.”²⁹¹ While the

²⁸³ *Id.* at **21-23.

²⁸⁴ *Id.* at *30.

²⁸⁵ *Jenkins v. Manning*, 116 F.3d 685, 691 (3d Cir. 1993).

²⁸⁶ *Id.* at 693-96.

²⁸⁷ *Id.* at 699.

²⁸⁸ *Id.* at 700 (Rosenn, J. dissenting).

²⁸⁹ *Id.* at 700-01 (Rosenn, J., dissenting).

²⁹⁰ *Id.* at 700 (Rosenn, J., dissenting).

²⁹¹ *Id.*

plaintiffs requested the traditional remedy of single-member elections to obtain representation on the school board, Judge Rosenn stated that “the majority has instead . . . placed its imprimatur on a system which only by a series of flukes and anomalies has permitted any minority representation at all. This cannot be the desire of Congress, and it most certainly is not that of the Supreme Court.”²⁹² Judge Rosenn strongly disagreed with the holding that minorities had achieved substantial electoral success, stating that the evidence demonstrated legally significant white bloc voting.²⁹³ Rosenn concluded:

Our decision today guarantees that minority voting rights in Red Clay will continue upon happenstance. This is not what Lyndon Johnson envisioned when he instructed his attorney general to write the ‘toughest voting rights act that you can devise.’ It is not what Congress envisioned when it gave the president that law, and then made it even more effective with the 1982 amendments. And it is not what this court envisioned when in *Jenkins I* we emphasized repeatedly the rarity of a case where ‘an electoral system that routinely results in white voters voting as a bloc to defeat the candidate of choice of a politically cohesive group is not violative of § 2 of the Voting Rights Act.’²⁹⁴

CRIMINAL JUSTICE

The Legal Defense Fund's review of Judge Alito's record in the criminal justice area reveals that Judge Alito has long held an extremely narrow view of the constitutional rights of persons accused of criminal offenses. In his 1985 application to be a Deputy Assistant Attorney General, Alito wrote that his "disagreement with Warren Court decisions" extended to the area of "criminal procedure."²⁹⁵ Some of the most important principles in criminal justice were established during the Warren era, such as *Gideon v. Wainwright*'s²⁹⁶ declaration that indigent criminal defendants have a Sixth Amendment right to court-appointed counsel; *Mapp v. Ohio*'s²⁹⁷ holding that the Fourteenth Amendment extended the Fourth Amendment right against unreasonable searches and seizures to the states, and that evidence seized in violation of the right must be excluded; and *Miranda v. Arizona*'s²⁹⁸ well-known holding that defendants must be informed of their Fifth Amendment right to remain silent and their right to counsel upon being taken into custody.

²⁹² *Id.* at 701 (Rosenn, J., dissenting) (citation omitted).

²⁹³ *Id.* at 701-02 (Rosenn, J., dissenting).

²⁹⁴ *Id.* at 702 (Rosenn, J., dissenting) (internal citations omitted).

²⁹⁵ PPO Non-Career Appointment Form, Nov. 15, 1985, Bates Nos. WH-120.

²⁹⁶ 372 U.S. 335 (1963).

²⁹⁷ 367 U.S. 463 (1961).

²⁹⁸ 384 U.S. 436 (1966).

Samuel Alito's view perhaps would not have come as a surprise to those who had followed Alito's tenure as a lawyer in the Solicitor General's office. In 1984, he authored a 15-page memorandum advocating the viewpoint that the shooting of an unarmed, fleeing suspect, who was being pursued on suspicion of committing a non-violent crime, "can be justified as reasonable within the meaning of the Fourth Amendment."²⁹⁹ The memo came in the wake of the death of 15-year old Edward Garner, a 5'4" African American eighth grader suspected of having committed a late night burglary in a Memphis neighborhood. A police officer saw the teen in the yard of the home that had been vandalized and yelled for him to stop. When Garner began climbing the fence, the officer shot him in the back of the head, fatally. After Garner's death, his father argued that his son's Fourth Amendment right against unreasonable seizures had been violated. The Sixth Circuit agreed, striking down a Tennessee statute permitting the use of deadly force against any fleeing felon and holding that a police officer must have probable cause to believe a suspect had committed a violent crime or was armed or dangerous.³⁰⁰ When the case was appealed to the Supreme Court, Alito, as a lawyer in the Solicitor General's office, evaluated whether the administration should submit an amicus brief. Although he concluded that it should not, Alito's memo is a disturbing example of the solicitude that Alito has shown for law enforcement's overreaching. In the memorandum, he wrote that:

The suspect's age (15) does not seem determinative, since teenage males are the most prone to commit violent crimes. . . . The officer had no way of knowing precisely what the suspect had done, but the nighttime burglary of a residence is an extremely serious crime that often leads to murder, assault, or rape. . . . Boiled down to its essentials, the situation in this case was the following. The officer saw an unarmed suspect fleeing from the scene of a type of felony that is not uncommonly accompanied by violence. If he shot, there was the chance that he would kill a person guilty only of a simple breaking and entering; that is essentially what occurred. If he did not shoot, there was a chance that a murderer or rapist would escape and possibly strike again. I do not think the Constitution provides an answer to the officer's dilemma. Reasonable people might choose differently in this situation.³⁰¹

Fortunately for the Garner family, the Supreme Court disagreed with Alito's analysis.³⁰² In a 6-3 decision, the Court held that the Tennessee statute was unconstitutional insofar as it permitted the shooting of an unarmed, nondangerous suspect:

²⁹⁹ Memorandum from Samuel A. Alito to Solicitor General, May 18, 1984.

³⁰⁰ *Garner v. Memphis Police Dep't*, 710 F.2d 240 (6th Cir. 1983).

³⁰¹ Memorandum from Samuel A. Alito to Solicitor General, May 18, 1984, at 12.

³⁰² *Tennessee v. Garner*, 471 U.S. 1 (1985).

The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead. The Tennessee statute is unconstitutional insofar as it authorizes the use of deadly force against such fleeing suspects.³⁰³

Quite unfortunately, in his own time on the bench, Judge Alito's criminal justice jurisprudence has been consistent with the troubling views expressed in his early memoranda. In case after case, he has revealed a disregard for the rights of criminal defendants, as well as for the Supreme Court precedents protecting those rights.

Judge Alito has participated in 10 capital cases during his career, and has repeatedly shown little concern for the rights of those sentenced to death. Half of the capital cases in which Alito participated were decided unanimously. In each one of the five non-unanimous cases, however, Alito voted against the capital defendant.³⁰⁴ As University of California at Berkeley Law Professor Goodwin Liu has observed, "these opinions show a troubling tendency to tolerate serious errors in capital proceedings."³⁰⁵

Fourteenth Amendment Right to a Jury Selected Free From Racial Discrimination

Two of the capital cases were *Batson* cases. In the landmark case of *Batson v. Kentucky*,³⁰⁶ the Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment prohibits the use of peremptory strikes to remove jurors on the basis of race. The Court held that, "[p]urposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure,"³⁰⁷ and that "[a] person's race simply is unrelated to his fitness as a juror."³⁰⁸ Importantly, the Court also held that a defendant might make out a *prima*

³⁰³ *Id.* at 11.

³⁰⁴ Goodwin Liu, *Life and Death and Samuel Alito*, L.A. TIMES, Nov. 27, 2005.

³⁰⁵ *Id.*

³⁰⁶ 476 U.S. 79 (1986).

³⁰⁷ *Id.* at 86.

³⁰⁸ *Id.* at 87 (citation omitted).

facie case of racial discrimination based solely upon his own case; a systematic pattern of racial discrimination need not be proved.³⁰⁹

In the *Batson* context, Judge Alito has twice written separately to express worrying views on a defendant's right to have a jury selected free of racial discrimination. In *Riley v. Taylor*,³¹⁰ Alito dissented from an *en banc* decision granting relief to an African-American death row inmate on his *Batson* claim. The majority held that Riley had produced evidence demonstrating a *Batson* violation when he showed that the prosecutor struck all three prospective black jurors in his case, and that, further, the prosecutor's office struck all black jurors in the other first-degree murder trials occurring within a year of Riley's own trial.³¹¹ The majority observed that although no statistical analysis had been presented by either side, it was not "necessary to have a sophisticated analysis by a statistician to conclude that there is little chance of randomly selecting four consecutive all white juries[.]"³¹² Indeed, the majority noted that the state itself "never argued . . . that the selection of four consecutive all white juries could have been due to pure chance."³¹³

Alito dissented. He critiqued the majority's analysis, flippantly analogizing Riley's evidence to the statistical improbability that five out of the last six U.S. presidents would have been left-handed, and asking: "does it follow that the voters cast their ballots based on whether a candidate was right- or left-handed?"³¹⁴ Alito found that the state court's failure to draw such an inference "certainly did not constitute an abuse of discretion."³¹⁵ The majority sharply disagreed with this analysis, writing that Alito had "overlooked the obvious fact that there is no provision in the Constitution that protects persons from discrimination based on whether they are right-handed or left handed. To suggest any comparability to the striking of jurors based on their race is to minimize the history of discrimination against prospective black jurors and black defendants, which was the *raison d'etre* of the *Batson* decision."³¹⁶

Again in *Ramseur v. Beyer*,³¹⁷ Alito voted against a capital defendant bringing a *Batson* claim. Ramseur claimed that his right to equal protection was violated when the

³⁰⁹ *Id.* at 95-96.

³¹⁰ 277 F.3d 261 (3d Cir. 2001).

³¹¹ *Id.* at 277, 287.

³¹² *Id.* at 281.

³¹³ *Id.*

³¹⁴ *Id.* at 327 (Alito, J., dissenting).

³¹⁵ *Id.* at 328 (Alito, J., dissenting).

³¹⁶ *Id.* at 292.

³¹⁷ 983 F.2d 1215 (3d Cir. 1992).

trial judge openly declared a policy of racial discrimination during grand jury selection, stating, “I am deliberately trying to get an even mix of people from background and races, and things like that,”³¹⁸ and asking several people, including two African Americans, to sit aside during the empanelling of the jury.³¹⁹ Because “there was [ultimately] no actual exclusion of a prospective juror on account of her race,” the majority held that no constitutional violation had taken place.³²⁰

In his concurrence, however, Judge Alito went even further, first suggesting – in contradiction to *Batson*’s clear command – that a race-conscious method of jury selection would not be a violation of equal protection, as long as the trial judge actually achieved a cross-section grand jury, and then arguing that the defendant did not have standing to bring such a claim.³²¹ Alito first stated that, “It is not easy to comprehend how it can be said that a potential defendant is deprived of the equal protection of the laws when his or her case is presented to a cross-section grand jury.”³²² As Judge Cowen argued in dissent, however, a trial judge’s “subjective and arbitrary notion of the proportion of African Americans in the Essex County population” cannot constitutionally serve as the basis for selecting a grand jury.³²³

Judge Alito then argued that Ramseur did not even have standing to bring a claim of discrimination in grand jury selection, as a defendant never “sees any potential grand jurors who are excluded[,] . . . never sees the actual grand jury members[,] [a]nd except in very rare circumstances, . . . never learns the grand jurors’ names or anything about them.”³²⁴ The majority itself disagreed with this analysis, noting that “[j]ury selection is the primary means by which a court may enforce a defendant’s right to be tried by a jury free from ethnic, racial, or political prejudice,” and that “Judge Alito’s analysis of third party standing . . . underemphasizes the community’s interest in the jury selection process.”³²⁵

In yet a third case, *Pemberthy v. Beyer*,³²⁶ Judge Alito voted against a *Batson* claim. In *Pemberthy*, two Spanish-speaking defendants were convicted of several drug-

³¹⁸ *Id.* at 1222.

³¹⁹ *Id.*

³²⁰ *Id.* at 1228.

³²¹ *Id.* at 1243 (Alito, J., concurring).

³²² *Id.* at 1243 (Alito, J., concurring).

³²³ *Id.* at 1249 (Cowen, J., dissenting).

³²⁴ *Id.* at 1245 (Alito, J., dissenting).

³²⁵ *Id.* at 1228 n.8.

³²⁶ 19 F.3d 857 (3d Cir. 1994).

related offenses and theft of services. Part of the evidence supporting their indictment was recorded conversations related to drug importation conducted in Spanish and translated into English. At trial, the prosecutor exercised his peremptory challenges to dismiss five jurors – three Latinos, one black, and one of unknown race – all of whom were Spanish-speaking.³²⁷ Defense counsel objected to the prosecutor’s exclusions, arguing that the prosecutor had discriminated against blacks and Hispanics in striking the jurors.³²⁸ The trial judge then “observed that not all of the Spanish-speaking jurors had been ‘people with Hispanic backgrounds,’”³²⁹ and the trial began.

Although *Batson* had not yet been decided at the time of trial, by the time the defendants appealed their case *Batson* had been decided.³³⁰ The New Jersey Appellate Division rejected the defendant’s claim, but on habeas review, the federal district court reversed.³³¹ The district court held “that striking Latino jurors simply because they can speak Spanish is tantamount to striking them based on race,”³³² and that *Batson* had therefore been violated. In an opinion authored by Judge Alito, the Third Circuit reversed, holding that the prosecutor’s concern over language ability was not a pretext for racial discrimination, especially since two of the jurors struck were not Latino. Further, it found that *Batson* did not apply to peremptory challenges based on ability to speak a foreign language since this distinction did not classify its members as a protected class like race, ethnicity or other factors that invoked strict scrutiny.³³³ The Court stated:

We are not willing to hold as a matter of law that language-based classifications are always a proxy for race or ethnicity and receive strict scrutiny for that reason; nor are we willing to hold that language-based classifications receive strict or heightened scrutiny for any other reason. However, we wish to emphasize in the strongest terms that a challenger’s decision that is actually motivated by racial or ethnic considerations continues to be subject to strict scrutiny even when the attorney asserts that he or she is categorizing jurors by linguistic ability rather than by race or ethnicity. Under this rule, trial attorneys are not free to strike Latino jurors in every case that features some testimony or evidence in Spanish.³³⁴

³²⁷ *Id.* at 858.

³²⁸ *Id.* at 860.

³²⁹ *Id.* at 860-61.

³³⁰ *Id.* at 862.

³³¹ *Id.* at 862-63.

³³² *Id.* at 863.

³³³ *Id.* at 870.

³³⁴ *Id.* at 871-72.

Judge Alito has denied *Batson* challenges in other criminal cases. In *Coit v. Morton*,³³⁵ Alito, writing for the majority, denied the habeas petition of a defendant who claimed that the “state prosecutor exercised her peremptory challenges in a discriminatory manner during jury selection by excluding blacks and women from the jury.”³³⁶ Coit claimed that the prosecutor had engaged in racial discrimination by striking five black females, one black male, and one white female from the jury.³³⁷ The trial court declined to ask for an explanation, saying that the attorneys just should not “get involved in any system of exclusion of any particular class.”³³⁸ On direct appeal to the Superior Court of New Jersey, Coit claimed that both blacks and women were disproportionately struck from the jury. On appeal to the New Jersey Supreme Court, however, Coit only raised the race discrimination claim.³³⁹ The Third Circuit held that the gender claim was procedurally defaulted because it had not been raised in the New Jersey Supreme Court. Regarding the racial discrimination claim, the court affirmed the district court’s holding that “petitioner fail[ed] to present sufficient evidence to support his claim”³⁴⁰ because he had failed “to indicate how many blacks and women were in the venire panel from which the jury was chosen and fail[ed] to point to specific statements or questions made by the prosecutor.”³⁴¹ The Third Circuit agreed, observing that *Batson* requires a defendant to establish a *prima facie* case, and that Coit had “made no attempt to preserve on the record the racial composition of either the venire or the petit jury. . . . Moreover, Coit has not identified any other features of this case, such as the nature of the crime or the evidence of the conduct of the voir dire, that support his claim of discrimination.”³⁴² The Court thus affirmed the district court’s denial of the habeas petition.

In *United States v. Thompson*,³⁴³ Judge Alito joined a panel affirming the district court’s denial of a *Batson* challenge. The prosecutor had exercised two peremptory challenges to African Americans. The defendant challenged the district court’s handling of the *Batson* objection. The Third Court found the defendant had waived his objection since he did not raise the issue until after the jury was seated.³⁴⁴ It concluded that, even if

³³⁵ No. 98-6333 (3d Cir. March 10, 2000).

³³⁶ *Id.*, slip op. at 2.

³³⁷ *Id.*, slip op. at 3.

³³⁸ *Id.*

³³⁹ *Id.*, slip op. at 4-5.

³⁴⁰ *Id.*, slip op. at 6.

³⁴¹ *Id.*, slip op. at 7.

³⁴² *Id.*, slip op. at 9.

³⁴³ No. 94-1631 (3d Cir. Jan. 12, 1995).

³⁴⁴ *Id.*, slip op. at 2.

the objection was timely, the district court properly adhered to the three-step process for evaluating *Batson* claims. The Court held that the explanations offered by the prosecutor were reasonable and did not support a finding of pretext.³⁴⁵ In *United States v. Stepoli*,³⁴⁶ Judge Alito joined a panel which affirmed a district court's determination that the prosecutor lacked discriminatory intent in striking two of three African-American prospective jurors.

Judge Alito has also considered *Batson* challenges in the civil litigation context. He joined the majority in denying a *Batson* claim in *Forrest v. Beloit Corp.*,³⁴⁷ a products liability action brought by an African-American paper mill employee. Forrest claimed that Beloit Corp. improperly used two of its peremptory challenges against African Americans on the basis of their race. Judge Smith wrote for the majority that the district court "did not abuse its discretion in determining that Beloit's attorney advanced nonpretextual, race-neutral reasons in support of Beloit's challenge of two African-American jurors."³⁴⁸ Beloit claimed that it struck one of the jurors because she was a nurse, and they planned to present testimony regarding the medical care Forrest had received after the accident, and that the other juror was struck because she appeared inattentive during voir dire, and was from Philadelphia. Beloit argued that jurors from Philadelphia were more likely to award large verdicts.³⁴⁹ The Court held that "the reasons cited by Beloit in support of its challenges to the stricken African-American jurors were *not* reflected in equal measure in various white jurors who were not challenged,"³⁵⁰ and therefore affirmed the district court's decision regarding the *Batson* claim.

In *Darden v. Timms*,³⁵¹ Judge Alito authored an opinion affirming the denial of a *Batson* challenge in a case filed under 42 U.S.C. § 1983 by an African-American former borough councilman arising from a police stop. The defendant police officer used three peremptory challenges to strike African Americans. Judge Alito wrote that, although the district court never explicitly found that the councilman established a *prima facie* case, the police officer's counsel was asked to articulate his race-neutral reasons for the strikes.³⁵² One juror was struck because of anxiety over the care of her young daughter, another because she was unemployed and another because he fell asleep during jury

³⁴⁵ *Id.*, slip op. at 4.

³⁴⁶ No. 92-3062 (3d Cir. Aug. 1992).

³⁴⁷ 424 F.3d 344 (3d Cir. 2005).

³⁴⁸ *Id.* at 350.

³⁴⁹ *Id.* at 350-51.

³⁵⁰ *Id.* at 350 (emphasis in original).

³⁵¹ No. 95-1287 (3d Cir. Oct. 31, 1995).

³⁵² *Id.*, slip op. at 3.

selection. Judge Alito ruled that the councilman failed to establish that these reasons constituted a pretext for race discrimination.³⁵³

In two other *Batson* cases, Judge Alito did decide on behalf of criminal defendants. In *Brinson v. Vaughn*,³⁵⁴ the Third Circuit reversed the district court's finding that Brinson had not made out a *prima facie* case of *Batson* violation. The facts of *Brinson* are extremely compelling. After the jury was selected, but before trial began, Brinson's attorney objected that the prosecutor had violated *Batson* by exercising 13 of 14 peremptory strikes against African Americans.³⁵⁵ Astonishingly, neither the state trial judge nor the attorneys had actually read *Batson*, and the trial judge instructed the defense that the objection could be raised in a post-trial motion. Post-trial, the trial judge erroneously held that *Batson* had "not yet been accepted by this Commonwealth [of Pennsylvania]."³⁵⁶ On appeal, the state courts held that a *prima facie* case had not been established because three African Americans ended up on the jury and the prosecutor still had six challenges available.³⁵⁷ The federal district court considering the habeas petition likewise found that the prosecutor's strikes – while "troubling" – did not violate *Batson*.³⁵⁸ Reversing the district court, and citing *Batson*, Judge Alito wrote that

[T]he Superior Court was clearly wrong in holding that 'where the victim, the perpetrator and witnesses are black, a *prima facie* case of racial discrimination is not present under *Batson*.' *Batson* held that a *prima facie* case is established when 'all relevant circumstances' give rise to 'the necessary inference of purposeful discrimination.' . . . Finally, the Superior Court's reliance on the fact the 'the defense struck blacks' was misplaced. . . . [A] legitimate defense strike would not open the door for illegitimate prosecution strikes.³⁵⁹

In another instance of powerful evidence of a *Batson* violation, *Jones v. Ryan*,³⁶⁰ Judge Alito voted to uphold the *Batson* challenge. An African-American defendant argued that his Equal Protection rights were violated when the prosecutor used his peremptory challenges to strike all but one of the African-American jurors.³⁶¹ The

³⁵³ *Id.*, slip op. at 4.

³⁵⁴ 398 F.3d 225 (3d Cir. 2005).

³⁵⁵ *Id.* at 227.

³⁵⁶ *Id.* at 228.

³⁵⁷ *Id.* at 233 n.8.

³⁵⁸ *Id.* at 230.

³⁵⁹ *Id.* at 233-34.

³⁶⁰ 987 F.2d 960 (1993).

³⁶¹ *Id.* at 962-63.

prosecutor asserted that he excused one juror because her son was the same age as the defendant, another because she was the same age and race as the defendant, and a third because he refused to make eye contact.³⁶² When defense counsel objected to the exclusions, the state court judge responded by stating, “Listen I think your office is promoting racism in the court. Every time a defender comes in, he raises that question, and I think it’s unfair in provoking trouble within our community.”³⁶³ In an opinion by Judge A. Leon Higginbotham, Jr., the Third Circuit held that “the explanations proffered by the prosecutor were not neutral explanations related to the particular case to be tried.”³⁶⁴ The Court noted that the prosecutor had not applied his articulated policy about excluding jurors with children the same age as the defendant to white jurors possessing the same characteristic, that the prosecutor included race as a reason for excluding the second African-American juror, and that the explanation that the third juror did not make eye contact was not a clear, specific nonpretextual reason.³⁶⁵

Jury Instructions

The instructions a jury receives can, by definition, have a critical impact on the outcome of a case. Burdens of proof, weight of the evidence, and claims of self-defense are all factors about which a jury must be properly instructed. In three cases regarding jury instructions, however, Judge Alito demonstrated a restrictive approach towards the rights of criminal defendants, repeatedly arguing that a defendant’s rights were not violated by jury instructions that his colleagues found constitutionally deficient.

*Smith v. Horn*³⁶⁶ is a notable example of Judge Alito’s failure to exercise judicial restraint in criminal matters – it demonstrates his willingness to come to the state’s assistance in convicting a defendant. In *Smith*, the defendant was sentenced to death after being convicted of joining an accomplice in a robbery and murder. The majority of the Court held that the “jury instructions [in Smith’s case] had the effect of relieving the Commonwealth of its burden of proving beyond a reasonable doubt one of the elements of first-degree murder under Pennsylvania law,” and that there was therefore “a reasonable likelihood that the jury convicted Smith of first-degree murder without finding beyond a reasonable doubt that he intended [the killing to occur]” in violation of his rights under the Due Process Clause of the Fourteenth Amendment.³⁶⁷

³⁶² *Id.* at 964.

³⁶³ *Id.* at 963.

³⁶⁴ *Id.* at 974-975 (quotations omitted).

³⁶⁵ *Id.* at 973-74.

³⁶⁶ 120 F.3d 400 (3d. Cir. 1997).

³⁶⁷ *Id.* at 410.

In dissent, Judge Alito called the majority's decision to affirm the defendant's Fourteenth Amendment rights "troubling."³⁶⁸ Although admitting there might have been some ambiguity in the jury instructions,³⁶⁹ and despite the fact that this was a death penalty case, Judge Alito downplayed the effect of the error, saying that the majority "alchemise[d]" the ambiguity into a constitutional violation.³⁷⁰

Judge Alito then took the initiative to raise an issue that the state itself failed to raise at any point in the proceedings, and never argued before the courts: procedural default and lack of exhaustion. He wrote that it was "shocking" that the majority would order a new trial when the defendant failed to raise the ambiguity at trial or on direct appeal.³⁷¹ He stated with incredulity that, "[i]n essence, the majority holds that the Due Process Clause is violated whenever a state judge, in instructing a jury on an element of a state offense, gives an ambiguous instruction that prejudices the defendant – even if defense counsel does not object."³⁷² As one commentator has observed, given that the state never raised the procedural default, "Judge Alito must have undertaken the onerous task of poring through every page of the record to determine that Smith had never brought this legal issue to anyone's attention."³⁷³

The majority responded pointedly to Alito's approach in this case, noting that:

[W]here the state has never raised the issue at all, in any court, raising the issue sua sponte puts [the court] in the untenable position of ferreting out possible defenses upon which the state has never sought to rely. When we do so, we come dangerously close to acting as advocates for the state rather than as impartial magistrates. While considerations of federalism and comity sometimes weigh in favor of raising such issues sua sponte, consideration of that other great pillar of our judicial system – restraint – cuts sharply in the other direction.³⁷⁴

In a second jury instruction case, *Government of the Virgin Islands v. Smith*,³⁷⁵ Alito again dissented from a majority decision upholding a defendant's right to proper

³⁶⁸ *Id.* at 419 (Alito, J., dissenting).

³⁶⁹ *Id.* at 424 (Alito, J., dissenting).

³⁷⁰ *Id.*

³⁷¹ *Id.*

³⁷² *Id.* at 425 (Alito, J., dissenting).

³⁷³ Michael J. Zydney Mannheimer, *Is Alito the State's Advocate in Criminal Cases?*, available at <http://www.acsblog.org>

³⁷⁴ *Smith*, 120 F.3d at 409 (internal citations omitted).

³⁷⁵ 949 F.2d 677 (3d Cir. 1991).

jury instructions. In *Virgin Islands*, the trial court judge instructed the jury on the elements of self-defense, but failed to instruct the jury that under Virgin Islands law the prosecutor had the burden to prove the absence of self-defense beyond a reasonable doubt.³⁷⁶ The majority held that taking into account the fact that this error affected the defendant's due process rights and that defendant's "entire case rested on this issue," the "trial court's failure to instruct the jury that the prosecution bears the burden of disproving self-defense beyond a reasonable doubt undermined the fundamental fairness of the trial, and constituted plain error."³⁷⁷

In his dissent, Alito argued that the omission of the trial court did not rise to the level of plain error. He wrote that, "[w]hile I certainly agree that it is appropriate to consider whether an alleged plain error implicates a constitutional right, this factor alone is not dispositive,"³⁷⁸ and that while it was "*possible* that the jury might have been confused about the burden of proof regarding self-defense," the "likelihood that the defendant was prejudiced by the lack of a specific instruction is not great and is insufficient to establish the presence of plain error."³⁷⁹

In another jury instruction case, *Flamer v. Delaware*,³⁸⁰ Judge Alito wrote for the majority *en banc* court in holding that two inmates' capital convictions should not be overturned despite the courts' use of misleading jury questionnaires. The Delaware Supreme Court, subsequent to the defendants' trials, but before their appeal to the Third Circuit, declared invalid the "outrageously or wantonly vile" statutory aggravator upon which juries in both trials relied.³⁸¹ In contrast to states where jurors can only consider statutory aggravating factors, under the law of Delaware, juries are free to consider "all relevant evidence in aggravation. The jury is not restricted to the statutory aggravating factors."³⁸²

Jurors in both cases were nevertheless given questionnaires asking them to list the statutory factors they relied upon. These questionnaires included a list of statutory aggravators, and included the aggravating factor later declared invalid. On appeal, defendants argued that the questionnaires, coupled with jury instructions, might have led the jury to believe that they could only take the statutory factors into account, and encouraged the jury to give greater weight to the facts underlying invalid aggravating factors.

³⁷⁶ *Id.* at 680.

³⁷⁷ *Id.* at 686.

³⁷⁸ *Id.* at 688 (Alito, J., dissenting).

³⁷⁹ *Id.* at 689 (Alito, J., dissenting).

³⁸⁰ 68 F.3d 736 (3d Cir. 1995).

³⁸¹ *Id.* at 750-51.

³⁸² *Id.* at 749.

Judge Alito recognized the inappropriateness of the questionnaire, writing in a footnote that “we strongly disapprove of the practice of a judge in a non-weighting state using a jury interrogatory that asks which statutory aggravating circumstance the jury ‘relied upon’ in recommending the death penalty,” finding that because statutory aggravating circumstances have no special significance at the ‘selection’ phase, such an interrogatory is potentially misleading and injects unnecessary confusion into the jury’s deliberations.”³⁸³ Nevertheless, the majority, over the dissent of four judges, “reject[ed] the contention that . . . the references in these cases to invalid statutory aggravating circumstances led the juries to give much greater weight to the facts underlying those circumstances.”³⁸⁴

In a particularly strong dissent, Judge Lewis, joined by Judges Mansmann and McKee, took issue with Alito’s decision, noting that, “the Supreme Court has recognized as a distinctive element of a ‘non-weighting’ scheme that statutory aggravating circumstances as such have ‘no specific function in the jury’s decision whether a defendant who has been found to be eligible for the death penalty should receive it.’”³⁸⁵ Lewis continued to state that, “although the majority acknowledges that [the questionnaire was] ‘potentially misleading and injects unnecessary confusion into the jury’s deliberations,’ and, in fact, ‘disapproves of the practice of a judge in a non-weighting state using a jury interrogatory that asks which statutory aggravating circumstances the jury ‘relied upon’ in recommending the death penalty,’ it fails, in my opinion, to appreciate the constitutional significance of requiring that statutory aggravating circumstances play a role at the selection stage.”³⁸⁶

Sixth Amendment Right to Effective Assistance of Counsel

Judge Alito’s ineffective assistance of counsel jurisprudence is equally troubling. He has demonstrated himself to be out of step with both his colleagues on the Third Circuit and with the Supreme Court in his views about the quality of representation to which a defendant is constitutionally entitled. In *United States v. Kauffman*,³⁸⁷ a non-capital case, Alito parted ways with the majority with a narrow reading of counsel’s duty to conduct an investigation. Kauffman was arrested for being a felon in possession of firearms just five days after he was released from his involuntary commitment in a mental hospital. The majority held that counsel was ineffective for failing to investigate a possible insanity defense after the defendant’s psychiatrist sent the attorney a note “stating that in his opinion Kauffman was manic and psychotic ‘at the time of the

³⁸³ *Id.* at 754 n.20.

³⁸⁴ *Id.* at 754.

³⁸⁵ *Id.* at 767 (Lewis, J., dissenting).

³⁸⁶ *Id.*

³⁸⁷ 109 F.3d 186 (3d Cir. 1997).

committing of the crime he was charged with.”³⁸⁸ The Court held that counsel’s “failure to investigate or research the insanity issue at all resulted in a cursory, uninformed judgment call which deprived Kauffman of the affirmative defense of insanity and the meaningful representation which the Constitution requires.”³⁸⁹

Judge Alito dissented. Despite the psychiatrist’s letter – bolstered by “Kauffman’s long-standing history of bipolar syndrome and his numerous psychotic episodes leading to multiple psychiatric hospitalizations”³⁹⁰ – Alito found that because the attorney had previously represented Kauffman, and had known him and observed his behavior “for over a year,” the attorney “reasonably believed that Kauffman simply did not present [a] compelling picture of insanity.”³⁹¹

Kaufmann heralded Judge Alito’s most recent capital decision, *Rompilla v. Horn*.³⁹² In 2005, the Supreme Court reversed Judge Alito after it disagreed with his assessment of the defense counsel’s effectiveness.³⁹³ In *Rompilla*, Alito held that Rompilla’s counsel was permitted to rely on statements made by his client in deciding on the extent of the investigation that should be conducted in particular areas,³⁹⁴ and that counsel was not ineffective for deciding not to seek out school, medical, police and prison records, even though these records would have yielded “useful information about Rompilla’s childhood home environment, his mental problems, and his problems with alcohol.”³⁹⁵

In a 5-4 decision, with Justice Souter writing for the majority, the Supreme Court disagreed. The Court held that there was an “obvious reason” that counsel’s failure to examine Rompilla’s record of prior convictions “fell below the level of reasonable performance.”³⁹⁶

Counsel knew that the Commonwealth intended to seek the death penalty by proving Rompilla had a significant history of felony convictions indicating the use or threat of violence, an aggravator under state law.

³⁸⁸ *Id.* at 187-88.

³⁸⁹ *Id.* at 190.

³⁹⁰ *Id.* at 191.

³⁹¹ *Id.* at 192-93 (Alito, J., dissenting).

³⁹² 355 F.3d 233 (3d Cir. 2004), *rev’d by, Rompilla v. Beard*, 125 S.Ct. 2456 (2005).

³⁹³ *Rompilla v. Beard*, 125 S.Ct. 2456 (2005).

³⁹⁴ 355 F.3d at 252.

³⁹⁵ *Id.*

³⁹⁶ 125 S.Ct. at 2463.

Counsel further knew that the Commonwealth would attempt to establish this history by proving Rompilla's prior conviction for rape and assault, and would emphasize his violent character by introducing a transcript of the rape victim's testimony given in that earlier trial. . . . It flouts prudence to deny that a defense lawyer should try to look at a file he knows the prosecution will cull for aggravating evidence, let alone when the file is sitting in the trial courthouse, open for the asking. No reasonable lawyer would forgo examination of the file[.]³⁹⁷

Fourth Amendment Right Against Warrantless Searches and Seizures

As demonstrated by *Kaufmann*, Judge Alito's non-capital jurisprudence is no lesser cause for concern. In concert with his early memoranda, Judge Alito has shown himself willing to go to great lengths to affirm the acts of law enforcement agents at the expense of the rights of defendants. As has been noted, in fifteen years on the bench, Judge Alito has filed more than a dozen dissents in criminal cases or cases involving the Fourth Amendment right to be free from search and seizure, and "not one of those dissents urges a position more protective of individual rights than the majority."³⁹⁸ The Fourth Amendment context thus yields several important examples of this solicitude toward law enforcement's violation of constitutional rights.

Judge Alito has supported a view much more permissive of law enforcement's violation of citizens' rights to be free of unwarranted police invasions of the sanctity of their homes and persons than his colleagues have expressed.

In *Doe v. Groody*,³⁹⁹ Alito dissented from a decision authored by Michael Chertoff, now Secretary of Homeland Security, holding that the Fourth Amendment was violated when police conducted a strip search of a mother and daughter without a proper warrant. The police had obtained a warrant to search John Doe, who was the subject of an illegal narcotics investigation; the face of the warrant mentioned only John's name. When police arrived at Doe's home, only Jane Doe and her 10-year-old daughter Mary Doe were present. A female police officer ordered the mother and girl to an upstairs room, and then instructed them to lift their shirts and drop their pants and turn around, in an effort to search for contraband. The *Doe* majority held that the search violated the Fourth Amendment, writing that "[a]s the text of the Fourth Amendment itself denotes, a particular description is the touchstone of a warrant," and that "there [was] no language in the warrant that suggests that the premises or people to be searched include Jane Doe, Mary Doe, 'all occupants' or anybody else, save John Doe himself."⁴⁰⁰

³⁹⁷ *Id.*

³⁹⁸ Robert Gordon, *Alito or Scalito?*, SLATE MAGAZINE, Nov. 1, 2005.

³⁹⁹ 361 F.3d 232 (3d Cir. 2004).

⁴⁰⁰ *Id.* at 239.

Alito disagreed, finding that “even if the warrant did not contain . . . authorization [to search any persons found on the premises], a reasonable police officer could certainly have read the warrant as doing so.”⁴⁰¹ In contrast to the face-of-the-warrant reading that the majority urged – and that the Fourth Amendment commands – Alito wrote that the affidavit upon which the warrant issued should have been given more weight, and that a “commonsense and realistic” reading of the warrant, coupled with the affidavit, would condone the search which took place.⁴⁰²

Judge Alito authored a similar dissent in the 1995 case of *Baker v. Monroe Township*.⁴⁰³ In *Baker*, the warrant police possessed included boxes that could be checked to indicate what or who was to be searched, as well as blank spaces where descriptions could be written in. Although police had checked off boxes indicating that both people and property were to be searched, in the “description” space, they described only the premises.⁴⁰⁴

The Baker family came home just as police were arriving at the premises. Although the warrant was nonspecific as to the persons to be searched, the police nevertheless searched two members of the family. The majority reversed the district court’s grant of summary judgment against the Bakers’ Fourth Amendment claim, holding that “[t]he Fourth Amendment requires that the warrant particularly describe the place to be searched and the persons to be seized,” and that “[t]he face of the warrant demonstrates its failure to meet the requirement of the Fourth Amendment.”⁴⁰⁵ Judge Alito dissented, finding that although “it would have been better draftsmanship to have referred specifically . . . to any persons found on the premises, . . . for practical purposes the scope of the search that was authorized seems to me quite apparent.”⁴⁰⁶ Responding to Alito, the majority noted that, “the only common-sense interpretation of the document is that no one ever bothered to complete it to include specified persons as well as premises. This flawed document does not demonstrate that the magistrate determined search of any particular person to be justified.”⁴⁰⁷

In *United States v. Zimmerman*,⁴⁰⁸ the majority held that there was no probable cause for the issue of a warrant that resulted in a police search of Zimmerman’s home and

⁴⁰¹ *Id.* at 244 (Alito, J., dissenting).

⁴⁰² *Id.* at 245.

⁴⁰³ 50 F.3d 1186 (3d Cir. 1995).

⁴⁰⁴ *Id.* at 1188 n.1.

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.* at 1198.

⁴⁰⁷ *Id.* at 1188 n.1.

⁴⁰⁸ 277 F.3d 426 (3d Cir. 2002).

his ultimate conviction for possession of child pornography. The majority found that there was no evidence that Zimmerman had ever possessed child pornography, and that although police had evidence that one video clip of adult pornography had been downloaded to a computer in Zimmerman's home, that evidence was stale.⁴⁰⁹ The Third Circuit held that the "good faith" exception articulated by the Supreme Court in *United States v. Leon*,⁴¹⁰ did not apply because "[t]he affidavit of Sergeant O'Connor so lacked the requisite indicia of probable cause that it was "entirely unreasonable" for an official to believe to the contrary."⁴¹¹ The Court continued, stating that, "[a]ny 'reasonably well-trained officer' would have known that there was marginal evidence at best of adult pornography, evidence which was anything but current, and no evidence whatsoever to support a search for child pornography. Perhaps this is why the affidavit is loaded with lurid – and irrelevant – accusations."⁴¹²

Judge Alito dissented, notably devoting extensive space to the accusations of inappropriate behavior towards minors that the majority described as "lurid" and "irrelevant."⁴¹³ Ultimately, Alito concluded that the majority's holding was "inconsistent with *Leon*" because "there is no bright line between fresh and stale probable cause," and the conclusion that there was probable cause was not "so obviously wrong that a lay officer could not reasonably have thought that probable cause was present."⁴¹⁴

United States v. Kithcart,⁴¹⁵ is a remarkable outlier in Judge Alito's Fourth Amendment jurisprudence. In *Kithcart*, an African-American male moved to suppress evidence of a firearm seized by the police after he was stopped while driving his vehicle, arrested, and searched. A police officer stopped Kithcart after she received three radio transmissions about robberies allegedly committed by "two black males in a black sports car;" it was also reported that one of the perpetrators might have been wearing white clothes, and the vehicle was described as a possible Z-28, possible Camaro."⁴¹⁶ The officer testified that when she first saw Kithcart, he was stopped at a red light in a black Nissan sports car, and appeared to be the only person in the car. When the officer pulled up behind the car, Kithcart ran the red light, at which time he was pulled over, searched, and the gun was seized. Kithcart filed a motion to suppress the gun. Although the district court ruled that the police had probable cause for the stop, Judge Alito, in an

⁴⁰⁹ *Id.* at 434.

⁴¹⁰ 468 U.S. 897 (1984).

⁴¹¹ *Zimmerman*, 277 F.3d at 437.

⁴¹² *Id.*

⁴¹³ *See id.* at 439 (Alito, J., dissenting).

⁴¹⁴ *Id.* at 440 (Alito, J., dissenting).

⁴¹⁵ 134 F.3d 529 (3d Cir. 1998).

⁴¹⁶ *Id.* at 530 (quotations removed).

opinion joined by the Court's two African-American judges, found that probable cause was lacking. Alito wrote:

The mere fact that Kithcart is black and the perpetrators had been described as two black males is plainly insufficient. As we have previously noted, a description of " 'two negro males' and two 'black males' . . . without more . . . would not have been sufficient to provide probable cause to arrest [the suspect]." Moreover . . . [a]lthough the Camaro Z-28 and the Nissan 300ZX could be considered "sports cars," there was no evidence offered at the suppression hearing that the shapes of the two cars were sufficiently similar so as to warrant an inference that a 300ZX could be mistaken for a Z-28. . . . In other words, armed with information that two black males driving a black sports car were believed to have committed three robberies in the area some relatively short time earlier, Officer Nelson could not justifiably arrest any African-American man who happened to drive by in any type of black sports car.⁴¹⁷

Judge Alito, however, remanded the question of whether the facts warranted an investigative stop under *Terry v. Ohio*,⁴¹⁸ which is justified when an officer has a reasonable suspicion that "criminal activity may be afoot."⁴¹⁹ Judge Theodore McKee dissented to this aspect of the ruling, finding that the same testimony that required the reversal of the probable cause determination "also establishes that Officer Nelson did not have reasonable suspicion to stop and detain the occupants of the car."⁴²⁰

Fifth Amendment Right to Remain Silent and Sixth Amendment Right to Speedy Trial

Two final cases from the Fifth and Sixth Amendment contexts also warrant attention. In *United States v. Tyler*,⁴²¹ the defendant sought to suppress confessions that were the result of the police not honoring his invocation of the right to counsel under *Miranda*.⁴²² When Tyler was arrested, he asserted his right to remain silent.⁴²³ Nevertheless, a conversation took place between him and police officers later that evening during which Tyler made an un-*Mirandized* statement. After another hour of conversation with detectives, during which Tyler broke down crying and detectives told

⁴¹⁷ *Id.* at 531-32.

⁴¹⁸ 392 U.S. 1 (1968).

⁴¹⁹ *Kithcart*, 134 F.3d at 532 (citation omitted).

⁴²⁰ *Id.* at 532 (McKee, J., dissenting in part, and concurring in part).

⁴²¹ 164 F.3d 150 (3d. Cir. 1998).

⁴²² *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁴²³ *Tyler*, 164 F.3d at 152.

him to “tell the truth,” Tyler was then *Mirandized* and at 10:55 p.m. made an inculpatory statement.⁴²⁴ Eleven days later, while Tyler was still in custody, police again *Mirandized* Tyler, and obtained a third statement.⁴²⁵ The district court suppressed the first, un-*Mirandized* statement.

Tyler argued on appeal, however, that the 10:55 p.m. statement and the subsequent statement should also have been suppressed under *Michigan v. Mosley*,⁴²⁶ which held that “the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his right to cut off questioning was scrupulously honored.”⁴²⁷

The majority held that it was clear that police had failed to “scrupulously honor” Tyler’s right to remain silent at the time of the 10:55 p.m. statement by instructing him to “tell the truth” while he was confined in a room with the murder victim’s pictures hung on the wall.⁴²⁸ The Court then held that under *Mosely*, the later statement had to be analyzed to determine if Tyler had made a knowing and intelligent waiver of his right to counsel, and that this “must include consideration of the extent to which the [statement made eleven days later] was the result of the prior misconduct that resulted in the 10:55 pm statement.”⁴²⁹ The Court thus remanded the case to the district court.

Although Judge Alito agreed that the earlier confession should have been suppressed and that a remand was necessary, he concurred to urge a different version of the questions that the district court should consider on remand.⁴³⁰ Alito argued that *Oregon v. Elstad*,⁴³¹ controlled. In *Elstad*, the Court held that a suspect who responds to non-coercive questioning before *Miranda* rights have been given can still waive his *Miranda* rights and confess later on as long as *Miranda* rights are given before the second confession. Judge Alito found that in this case, police did not use coercion when they failed to “scrupulously honor” Tyler’s *Miranda* rights. Therefore, under *Elstad*, the second confession would be admissible, so long as *Miranda* warnings were given on the day of that confession and the defendant validly waived those rights.⁴³²

⁴²⁴ *Id.* at 155.

⁴²⁵ *Id.* at 152.

⁴²⁶ 423 U.S. 96 (1975).

⁴²⁷ *Id.* at 104.

⁴²⁸ *Tyler*, 164 F.3d at 155.

⁴²⁹ *Id.* at 158.

⁴³⁰ *Id.* at 159 (Alito, J., concurring).

⁴³¹ 470 U.S. 298 (1985).

⁴³² *Tyler*, 164 F.3d at 162 (Alito, J., concurring).

Finally, Judge Alito dissented in *Burkett v. Fulcomer*,⁴³³ a Sixth Amendment speedy trial case. In *Burkett*, the majority held that extensive delays in the defendant's post-conviction proceedings amounted to a constitutional violation, and required that, on remand, the district court shorten the defendant's sentence by 39 months. Burkett was convicted in January 1983 of a number of felonies and misdemeanors.⁴³⁴ In February 1983, he timely filed post-trial motions, "but all post-trial activity came to a standstill."⁴³⁵ In March 1984, his counsel filed a state petition for habeas corpus, alleging that the detention violated Burkett's speedy trial and due process rights. In September 1984, Burkett also filed a *pro se* application for an evidentiary hearing to preserve the issue of his counsel's ineffectiveness in failing to pursue more expeditious resolution of his claims. Seven months later and more than twenty-eight months after Burkett's conviction, a hearing was held on the habeas petition. Eight weeks later, on December 12, 1984, Burkett filed for further relief after no decision had been handed down. A January 1985 hearing on Burkett's post-trial motions was finally scheduled; however, Burkett objected to proceeding because his motion regarding his counsel's ineffectiveness and requesting new counsel had not yet been scheduled. The hearing was thus postponed.⁴³⁶ In April, a hearing was held on the ineffectiveness question. Before this occurred, however, in March 1985, Burkett filed a federal habeas petition alleging speedy trial and due process violations.⁴³⁷ In holding that the extensive delays in Burkett's proceedings did constitute a violation, the Court relied in part on the fact that Burkett was incarcerated in county jail rather than prison while awaiting the disposition of his appeal and that he was therefore "unable to avail himself of institutional programs, critical to his rehabilitation[;] namely, alcohol and sex offender programs in which he was eventually able to participate when incarcerated in the state prison."⁴³⁸ In addition, because of the uncertainty of the length of his imprisonment, Burkett suffered "anxiety and distress," found himself "unable to eat and sleep," and lost his fiancée.⁴³⁹

Judge Alito dissented, objecting to the majority's analysis of prejudice.⁴⁴⁰ He stated that he "would not find on appeal that one institution is more desirable than another based solely on a transcript of the testimony of a witness who testified knowing that several decades of incarceration were potentially at stake," nor would he "conclude

⁴³³ 951 F.2d 1431 (1992).

⁴³⁴ *Id.* at 1433.

⁴³⁵ *Id.* at 1434.

⁴³⁶ *Id.* at 1434-35.

⁴³⁷ *See id.* at 1434-35.

⁴³⁸ *Id.* at 1443.

⁴³⁹ *Id.* at 1433-34.

⁴⁴⁰ *Id.* at 1450 (Alito, J., dissenting).

that Burkett was significantly prejudiced by anxiety and distress caused by uncertainty about the length of the sentence that would be imposed or the outcome of his direct appeal.”⁴⁴¹ Alito expressed concern that “If we are willing to find significant prejudice merely because a defendant states that he or she suffered from anxiety and distress, we might as well deem prejudice to exist in every case involving delay.”⁴⁴² Alito did, however, note that he “emphatically d[id] not approve or condone the type of delays that occurred throughout this case.”⁴⁴³

In sum, Judge Alito’s jurisprudence in criminal matters should be of serious concern – to both those interested in upholding the rights guaranteed by the Constitution to criminal defendants, *and* to those concerned with strict construction of the law. Judge Alito’s *Batson* decisions overlook Court precedents affirming that race should play no part in jury selection. He has demonstrated a very different concept of the Sixth Amendment right to effective counsel than mandated by the Supreme Court. His decision in the *Smith* jury instruction case demonstrates his willingness to act as both prosecutor and judge in criminal matters. And Judge Alito has shown himself willing to overlook the Fourth Amendment’s command that warrants must “particularly describ[e] the place to be searched, and the persons or things to be seized” in favor of law enforcement expediency. Time and again, Judge Alito has departed from his colleagues, and from Supreme Court precedent, to urge a narrow view of the rights guaranteed to defendants, and an expansive view of the powers granted to law enforcement. He gives little reason to expect that he will not continue to promote the hard-line views he expressed in 1985, and thus raises serious cause for concern.

OTHER FORMS OF RACE DISCRIMINATION

A review of Judge Alito’s record regarding race discrimination claims in other subject areas, including environmental justice, economic justice and fair housing, revealed the following rulings.

Judge Alito authored an opinion lifting a district court’s injunction against issuing an air quality permit to a cement processing plant despite claims by minority residents of its racially discriminatory impact. In a widely-known environmental justice case, *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*,⁴⁴⁴ a community organization and African-American and Latino residents of Waterfront South neighborhood of Camden, New Jersey, sued state agencies, alleging that the issuance of an air quality permit for the cement plant was both intentionally discriminatory and had a discriminatory impact in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. Although Waterfront South was only one of twenty-three neighborhoods in

⁴⁴¹ *Id.*

⁴⁴² *Id.*

⁴⁴³ *Id.* at 1451 (Alito, J., dissenting).

⁴⁴⁴ 274 F.3d 771 (3d Cir. 2001).

Camden, it hosted 20% of the city's contaminated sites and twice the number of facilities with permits to emit air pollution than existed within a typical New Jersey zip code.

In early 2001, the district court granted the plaintiffs' request for a preliminary injunction based on a private right of action under Title VI's implementing regulations.⁴⁴⁵ Soon thereafter, the Supreme Court issued its decision in *Alexander v. Sandoval*,⁴⁴⁶ barring a private right of action to enforce regulations under Title VI prohibiting practices with a racially disparate impact. When the cement company, which had intervened, sought to lift the injunction in light of *Sandoval*, the district court denied the motion, allowed the plaintiffs to amend their complaint to enforce Title VI through 42 U.S.C. § 1983, and asked for supplemental briefing on whether the intentional discrimination claims and/or the Section 1983 claims provided an alternate basis for relief.⁴⁴⁷ The district court then ruled that the plaintiffs could maintain a claim under Section 1983 for violating Title VI's regulations by failing to consider the disparate impact caused by operation of the cement plant, and continued the injunction.⁴⁴⁸

After the district court refused to stay the injunction, the cement company appealed to the Third Circuit seeking a suspension of the injunction pending appeal. As a member of a panel assigned to hear motions in the case, Judge Alito authored the opinion lifting the injunction. The cement company argued it was losing \$500,000 per week from closure of the plant and was suffering permanent damage to its market share. Although the district court had found that pure economic injury was not irreparable harm, Judge Alito concluded that irreparable injury can occur when a monetary judgment cannot compensate for economic injury. He then found that the cement plant's losses could not be compensated by a monetary judgment because the plaintiffs would not be responsible for the losses even if the company prevailed.⁴⁴⁹ On the question of whether the company was likely to prevail on the merits, Judge Alito signaled, contrary to the district court's ruling, that the plaintiffs' Section 1983 claim might not be viable. He noted such a claim must assert a violation of a federal right, and he deferred to dicta from *Sandoval* regarding whether Title VI created rights.⁴⁵⁰ The case was then heard on the merits by a different panel. The Third Circuit reversed the district court's order granting the injunction and remanded the case, holding that Title VI's implementing regulations did not create a right enforceable under Section 1983.⁴⁵¹ Judge Theodore McKee strongly

⁴⁴⁵ 145 F. Supp. 2d 446 (D.N.J. 2001).

⁴⁴⁶ 532 U.S. 275 (2001).

⁴⁴⁷ *South Camden*, 274 F.3d 771, 775-76 (3d Cir. 2001) (discussing case history).

⁴⁴⁸ 145 F. Supp.2d 505 (D.N.J. 2001).

⁴⁴⁹ No. 01-2224 (3d Cir. June 15, 2001) (order suspending preliminary injunction) at 2.

⁴⁵⁰ *Id.*

⁴⁵¹ 275 F.3d 771, 790-91 (3d Cir. 2001).

dissented, accusing the majority of overruling Third Circuit precedent that Section 1983 was available to enforce regulations implementing Title VI.⁴⁵²

In *Desi's Pizza, Inc. v. City of Wilkes-Barre*,⁴⁵³ Judge Alito authored an opinion allowing owners of a restaurant and bar to proceed with claims that their business was closed in violation of federal civil rights laws (42 U.S.C. §§ 1981, 1982 and 1985) and the Equal Protection Clause and the Due Process Clause. The plaintiffs alleged that the City and its officials sought to drive their African-American and Latino clientele out of predominately white Wilkes-Barre by taking various actions against their business, including asking that the liquor license not be renewed, assigning police officers to park outside the business, asking police officers to harass employees and customers of another restaurant they owned, blocking efforts to obtain a permit to open another bar and restaurant, and finally, by filing a state court action which resulted in the business being closed down as a “public nuisance.” Judge Alito, joined by Judges Marjorie Rendell and Richard Nygaard, held that the plaintiff’s claims were not barred by the doctrine set forth in *Rooker v. Fidelity Trust Co.*,⁴⁵⁴ and *District of Columbia Court of Appeals v. Feldman*,⁴⁵⁵ which precludes federal district court jurisdiction over claims that were litigated or inextricably intertwined with adjudication by state courts. Accordingly, this was not a ruling on the merits of the plaintiffs’ civil rights claims, but merely whether plaintiffs could proceed with the claims in federal court.

First, Judge Alito found the plaintiffs had not litigated their federal claims in state court since they never referred to the claims beyond reserving the right to file them later in federal court and the state court’s opinions never discussed federal law.⁴⁵⁶ Second, he held that the plaintiffs’ claims were not inextricably intertwined since the state court’s finding that the business was a “common nuisance” did not mean that plaintiffs’ federal rights were not violated. He ruled that the plaintiffs could proceed with their discrimination and Equal Protection claims on the theory that, although numerous establishments constituted “common nuisances” under Pennsylvania law, the defendants targeted the plaintiffs with the intent to drive certain ethnic groups from the city. Judge Alito noted the ruling was limited to the finding that the claims were not barred by *Rooker-Feldman*: “We have not considered any other arguments that may be made regarding these claims.”⁴⁵⁷ Judge Alito also ruled that the *Rooker-Feldman* doctrine did

⁴⁵² *Id.* at 796 (McKee, J., dissenting) (citations omitted).

⁴⁵³ 321 F.3d 411 (3d Cir. 2003).

⁴⁵⁴ 263 U.S. 413 (1923).

⁴⁵⁵ 460 U.S. 462 (1983).

⁴⁵⁶ *Id.* at 420-21.

⁴⁵⁷ *Id.* at 425.

not bar the substantive due process claim, although he noted “serious doubts whether the plaintiffs’ allegations state a substantial due process claim.”⁴⁵⁸

In *Grant v. Shalala*,⁴⁵⁹ Judge Alito authored an opinion ruling against a class action alleging racial and other bias by an Administrative Law Judge in deciding appeals of denials of Social Security benefits. The district court had certified the class and set the case for trial. When the government appealed, Judge Alito held that the district court could not make its own findings on the bias claims, but had to defer to the agency findings.⁴⁶⁰ Judge Alito wrote that “we are convinced that the plaintiffs’ right to an impartial administrative determination can be fully protected through the process of judicial review of the Secretary’s determination.”⁴⁶¹ Judge A. Leon Higginbotham, Jr. issued a strong dissent: “The determination of whether or not plaintiffs’ constitutional right has been violated is the province of the courts and not that of an agency.”⁴⁶² “What the majority proposes to do in its holding is effectively have courts take a back seat to bureaucratic agencies in protecting constitutional liberties. This . . . is a radical and unwise redefinition of the relationship between federal courts and federal agencies. . . .”⁴⁶³ The district court remanded the case to the agency, which again found no bias.⁴⁶⁴ The district court then ruled that the agency’s decision was not supported by substantial evidence, and concluded that the Administrative Law Judge “harbored biases which rendered him unable to fulfill his duty to develop the facts and to decide cases fairly.”⁴⁶⁵

Judge Alito has considered at least three cases alleging race discrimination under the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.* In *Bazzone v. Nationwide Mutual*,⁴⁶⁶ the plaintiff claimed that Nationwide’s insurance companies engaged in redlining practices in violation of the Fair Housing Act and caused injury to his business. Judge Alito joined an opinion authored by Judge D. Michael Fisher upholding an order compelling arbitration of the claim and affirming the arbitrators’ award in Nationwide’s favor. Judge Thomas Ambro dissented on the ground that the arbitration provisions in question did not apply to redlining claims which pertain to the sale of homeowners’ and automobile

⁴⁵⁸ *Id.* at 427.

⁴⁵⁹ 989 F.2d 1332 (3d Cir. 1993), *reh’g denied*, 1993 U.S. App. LEXIS 7466 (3d Cir. 1993).

⁴⁶⁰ *Id.* at 1344.

⁴⁶¹ *Id.* at 1346.

⁴⁶² *Id.* at 1357.

⁴⁶³ *Id.* at 1359.

⁴⁶⁴ 111 F. Supp. 2d 556, 563 (M.D.Pa. 2000).

⁴⁶⁵ *Id.* at 569.

⁴⁶⁶ No. 03-4659 (3d Cir. Feb. 15, 2005).

insurance, and not securities.⁴⁶⁷ In *Hartman v. Greenwich Walk Homeowners' Ass'n, Inc.*,⁴⁶⁸ Judge Alito voted to uphold summary judgment against an African-American owner of a condominium who claimed the officers of the homeowners' association failed to address a racially discriminatory environment and treated her differently on the basis of her race. The Court concluded there was no evidence to support race discrimination.⁴⁶⁹ In *Koorn v. Lacey Township*,⁴⁷⁰ Judge Alito voted to uphold summary judgment against an African American and Latino couple who alleged that the Township's enactment of an animal control ordinance was motivated by race in violation of their fair housing and constitutional rights. The Court ruled that the elements of a Fair Housing Act violation were not met.⁴⁷¹

CONCLUSION

As lawyers, we understand the importance of making a decision based upon the facts and the record. Toward that end, we have undertaken an extensive review of Judge Alito's civil rights record spanning his career as a lawyer and a judge. We have examined many civil rights issues across subject areas. Based on our review, we have determined that Judge Alito has failed to heed both Supreme Court and Third Circuit precedent as well as the expressed intent of Congress in far too many areas and in far too many ways of vital interest to Americans generally and to African Americans specifically. As a result, we have concluded that Judge Alito's confirmation would cause a substantial shift in the Supreme Court's jurisprudence on civil rights and that his confirmation would be to the detriment of the nation. Thus, we are compelled to oppose his nomination.

⁴⁶⁷ *Id.*, slip op. at 10 (Ambro, J., dissenting).

⁴⁶⁸ No. 02-4067 (3d Cir. Aug. 4, 2003).

⁴⁶⁹ *Id.*, slip op. at 6.

⁴⁷⁰ No. 03-1231 (3d Cir. Oct. 17, 2003).

⁴⁷¹ *Id.*, slip op. at 12-14.



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