

**Report of the American Civil Liberties Union  
on the Nomination of Third Circuit Court Judge  
Samuel A. Alito Jr.,  
to be Associate Justice on the United States  
Supreme Court**

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## INTRODUCTION

In accordance with ACLU Policy 519, this report summarizes the civil liberties and civil rights record of Judge Samuel A. Alito, Jr., who was nominated by President Bush on October 31, 2005, to replace retiring Justice Sandra Day O'Connor as an Associate Justice of the United States Supreme Court. ACLU Policy 519 provides:

Whenever a Supreme Court nomination is sent to the Senate, the ACLU will prepare a summary of the candidate's past judicial record (if any), writings, speeches, etc., in regard to civil liberties for use by the Senate as well as by the press and other members of the public in evaluating the nominee.

Judge Alito's public record is an extensive one, which explains the length of the accompanying report. In preparing this report, we reviewed his judicial opinions on civil liberties and civil rights, including his concurrences and dissents. We also reviewed some of the significant cases in which Judge Alito joined the opinions of other judges. We reviewed the answers he submitted in response to the Judiciary Committee's questionnaire, and the memos he wrote while in government service that have so far been released.

Perhaps the best description of Judge Alito's overall philosophy was provided by Judge Alito himself in 1985, when he submitted a now well-publicized letter to the Reagan Administration seeking a position with the Justice Department's Office of Legal Counsel. "I am and always have been a conservative," he wrote, "and an adherent to the same philosophical views that I believe are central to this Administration." He then went on to explain that he had been inspired to attend law school by his disagreement with the decisions of the Warren Court, "particularly in the areas of criminal procedure, the Establishment Clause, and reapportionment." He also expressed particular pride in the role he had played in the Solicitor General's Office in helping to craft Supreme Court briefs arguing "that racial and ethnic quotas should not be allowed and that the Constitution does not protect a right to an abortion." Finally, his letter proclaimed, in stark contrast to the position taken by Chief Justice Roberts during his recent confirmation hearings, that these were positions "in which I personally believe very strongly."

These remarks, made two decades ago, would be easier to discount if they were not largely consistent with positions that Judge Alito has taken during his fifteen years on the United States Court of Appeals for the Third Circuit. In addition, they are particularly worrisome because they involve a series of issues – race, religion, and reproductive rights – in which Justice O'Connor has played a critical role on the Supreme Court as an often-decisive swing vote. It is not enough, therefore, to evaluate Judge Alito's record in the abstract. It must be considered in light of the Justice whom he will be replacing on the Supreme Court, if confirmed.

Judge Alito's intellectual qualifications are not in doubt. He has a stellar academic record and has held a succession of important government positions during his career. His opinions as a judge are thoughtful and, on the whole, cautious. Generally speaking, he operates within existing precedent rather than rails against it. This judicial style may be partially

temperamental; in part, it undoubtedly reflects his role as a circuit court judge bound by Supreme Court caselaw. As every lawyer knows, however, there is considerable room to interpret Supreme Court decisions and congressional statutes. Judge Alito has regularly used that opportunity to rule against civil rights and civil liberties claims. For example, Judge Alito:

- Wrote a dissent in *Planned Parenthood v. Casey* arguing that a state's spousal notification requirement did not unduly burden a woman's right to privacy, a position later rejected by the Supreme Court;
- Joined a dissent arguing that a student-led prayer at a high school graduation ceremony did not violate the Establishment Clause;
- Wrote several dissents arguing for tighter standards for plaintiffs seeking trial on their race, gender and disability discrimination claims;
- Dissented from a decision ruling that the strip search of a suspect's wife and ten-year-old daughter exceeded the scope of the search warrant and was therefore unconstitutional;
- Rejected a death row inmate's ineffective assistance of counsel claim where the trial counsel had failed to uncover substantial mitigating evidence – a decision later reversed by the Supreme Court;
- Dissented from an *en banc* ruling in a death penalty case arguing that the prosecution had unconstitutionally used its peremptory challenges to exclude all the black prospective jurors;
- Wrote a dissent arguing that a policy prohibiting all prisoners in long-term segregation from possessing newspapers, magazines or photographs unless they were religious or legal did not violate the First Amendment.

It is, of course, impossible to summarize a fifteen-year judicial career in a few bullet points. But it is also fair to say that these highlighted decisions illustrate a broader pattern of judicial decision-making. By and large, Judge Alito's opinions make it more difficult for plaintiffs alleging discrimination to prevail, easier for the government to lend its support to religion, and harder to challenge questionable tactics by the police and prosecution.

Judge Alito has also taken a narrow view of congressional power in two noteworthy cases. First, Judge Alito held that Congress had exceeded its power under the Fourteenth Amendment by requiring the states to provide time off for sick employees under the Family and Medical Leave Act. Several years later, the Supreme Court rejected a similar claim in upholding a parallel provision of the FMLA. Second, Judge Alito argued in dissent that Congress had exceeded its power under the Commerce Clause by making it a federal crime to possess a machine gun. This narrow view of the Commerce Clause could have implications in future civil rights cases.

On the other hand, Judge Alito has a generally positive record on issues involving free speech and the free exercise of religion. For example, he upheld an injunction barring a police department from enforcing a rule that prohibited its employees from testifying in court without prior approval in certain cases, and ruled that Muslim police officers cannot be required to shave their beards if other beards are allowed for health reasons.

The ACLU's own record in cases before Judge Alito reflects these broader patterns. The ACLU has been directly involved in three Establishment Clause cases before Judge Alito – one involving graduation prayers and two involving holiday displays – and lost Judge Alito's vote in all three. Conversely, he voted with the ACLU when it brought a First Amendment challenge to a Pennsylvania law barring university newspapers from accepting paid liquor advertisements, and when it supported the free exercise rights of Muslim police officers in the case described above. The ACLU represented the plaintiffs in *Casey*, where Judge Alito voted to uphold the spousal notification provision that the Supreme Court later struck down. It also represented the plaintiffs in a challenge to New Jersey's ban on so-called "partial birth" abortions, which Judge Alito agreed was unconstitutional based on the Supreme Court's recent decision in a similar case from Nebraska but refused to join the majority's broader discussion of the constitutional issues. In addition, Judge Alito rejected our challenge to the constitutionality of a key provision of the Prison Litigation Reform Act, but agreed with the ACLU that Pennsylvania's foster care policies discriminated on the basis of HIV status in violation of federal disability laws.

In fulfilling its advise-and-consent function under the Constitution, the Senate should carefully review Judge Alito's record and judicial philosophy. Given how closely divided the present Court is on numerous civil rights and civil liberties questions, there is a great deal at stake.

## BACKGROUND

Samuel Alito was born in 1950 in Trenton, New Jersey. He received his B.A. from Princeton University in 1972 and his J.D. from Yale Law School in 1975. While at Yale, Alito served as an editor of the Yale Law Journal. After law school, he clerked for Judge Leonard A. Garth on the Third Circuit from 1976 to 1977.

Following his clerkship, Alito served as an Assistant U.S. Attorney in the District of New Jersey until 1980. From 1981 to 1985, he served as an Assistant to the U.S. Solicitor General, Rex Lee. In that capacity, he argued 12 cases before the Supreme Court. He then worked for two years in the Office of Legal Counsel as Deputy Assistant Attorney General under Charles Cooper, where he provided constitutional advice for the Executive Branch. In 1987, Alito was nominated to serve as U.S. Attorney for the District of New Jersey and unanimously confirmed by the Senate. During his time as United States Attorney, he handled cases involving organized crime, child pornography, and a terrorism case against a member of the Japanese Red Army who was sentenced to 30 years in prison for plotting to bomb a Navy recruiting center.

President George H. Bush nominated Judge Alito to the U.S. Court of Appeals for the Third Circuit in 1990. Alito was confirmed by the Senate on April 27, 1990 on a unanimous voice vote.



## I. REPRODUCTIVE RIGHTS

Judge Alito's views on reproductive rights have raised understandable concern, especially given the pivotal role that Justice O'Connor has played on this issue in the Supreme Court. Not only did Judge Alito vote to uphold a spousal notification provision that Justice O'Connor later struck down in *Planned Parenthood v. Casey*, but in a well-publicized job application submitted to the Reagan White House in 1985, Judge Alito stated that he was "particularly proud" of the contribution he had made to a Supreme Court brief that argued, on behalf of the Reagan Administration, "that the Constitution does not protect a right to abortion." Moreover, in contrast to the position taken by Chief Justice Roberts during his recent confirmation hearings, Judge Alito announced that the desire to overrule *Roe* was more than an advocacy position; it was, in his words, a "legal position[] in which I personally believe very strongly." The nature of that position was spelled out more fully in a memo Judge Alito prepared, also in 1985, while still working in the Solicitor General's Office.<sup>1</sup> The memo proposed a legal strategy for the Administration to pursue in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 717 (1986), which was then pending before the Supreme Court. The bulk of the memo is devoted to defending a series of regulatory provisions that the Supreme Court ultimately struck down. In explaining its decision, the Supreme Court observed that the challenged provisions "wholly subordinate constitutional privacy interests and concerns with maternal health in an effort to deter women from making a decision that, with her physician, is hers to make." *Id.* at 759. Judge Alito was equally blunt in articulating the larger goal that his litigation memo was designed to advance. "What can be made," he wrote, "of this opportunity to advance the goals of bringing about the eventual overruling of *Roe v. Wade* and, in the meantime, of mitigating its effects?"<sup>2</sup> Neither personal beliefs nor dissenting opinions on a circuit court necessarily indicate how Judge Alito would rule on these questions if his Supreme Court nomination is confirmed. But they are sufficient to call into question his judicial commitment to reproductive rights.

### A. *Planned Parenthood v. Casey*

Judge Alito's most troubling and controversial opinion in the area of abortion rights is his concurrence/dissent in the Third Circuit's decision in *Planned Parenthood v. Casey*, 947 F.2d 682 (3d Cir. 1991), *aff'd in part and rev'd in part*, 505 U.S. 833 (1992). In *Casey*, the Third Circuit considered the constitutionality of certain provisions of the Pennsylvania Abortion Control Act of 1982, 18 Pa. Cons. Stat. Ann. §§ 3201-3220. The district court had held that several of these provisions – in particular, laws requiring mandated counseling and delay, parental consent, and spousal notice, as well as certain clinic reporting requirements – were unconstitutional. *Id.* at 687, 702-19.

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<sup>1</sup> See Memorandum from Samuel J. Alito to Solicitor General, May 30, 1985, *available at* <http://www.washingtonpost.com/wp-srv/nation/documents/alito/Thornburgh-v-ACOG-1985-box20-memoAlitotoSolicitorGeneral-May30.pdf>, at 13, 17.

<sup>2</sup> Memorandum, at 8.

The Third Circuit reversed the district court's holding that the mandated counseling and delay, parental consent, and clinic reporting requirements were unconstitutional. *Id.* The circuit's majority opinion, however, affirmed the district court's holding that the spousal notice requirement was unconstitutional because it "impose[d] an undue burden on a woman's abortion decision and [did] not serve a compelling state interest." *Id.* at 709-15. In reaching this conclusion, the Third Circuit spoke at length about the potentially grave harms that the spousal notice provision created for women seeking to terminate their pregnancies, including the risk that an abusive husband might use physical force, economic coercion or psychological pressure to prevent his wife from pursuing an abortion. *See id.* at 172. The majority concluded that "the number of different situations in which women may reasonably fear dire consequences from notifying their husbands is potentially limitless" and that the "fear of those consequences is likely to dissuade many from seeking an abortion if such notification is required." *Id.* at 713.

While concurring with the majority's judgment that the mandated counseling and delay, parental consent, and clinic reporting requirements were constitutional, Judge Alito dissented from the majority's holding that the spousal notice provision was unconstitutional. *Id.* at 719-27. The crux of Judge Alito's dissent was that the spousal notice provision requirement did not constitute an "undue burden" on a woman's ability to procure an abortion. *Id.* at 720-22. Failing to address the majority's analysis of the dangers posed to women by the spousal notice provision, Judge Alito reasoned that the plaintiffs had failed to prove that the spousal notice provision would impose an undue burden because, "the plaintiffs did not even roughly substantiate how many women might be inhibited from obtaining an abortion or otherwise harmed" by the spousal notice provision, *id.* at 723, a number that Judge Alito suggested was actually quite small. *Id.* at 722. Moreover, Judge Alito relied upon the reasoning in prior Supreme Court decisions upholding parental notice requirements for minors seeking abortions, stating that any harms flowing from those requirements were "almost identical to those that the majority in this case attribute[d] to" the spousal notice provision. He then surmised that because the Supreme Court found that certain parental notice requirements did not unduly burden minors seeking abortions, the Pennsylvania spousal notice requirement similarly did not unduly burden adult women seeking abortions. *Id.* at 721-25. Finally he concluded that the spousal notice provision reflected the state's legitimate interest "in furthering the husband's interest in the fetus." *Id.* at 725.

The Supreme Court substantially affirmed the Third Circuit's decision, including its holding that the spousal notice provision was unconstitutional. Justice O'Connor, in particular, emphasized that the provision would pose a substantial obstacle to women who, "fear[ing] for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases." 505 U.S. at 890-84. In addition, Justice O'Connor specifically rejected the reasoning endorsed by Judge Alito. "The analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects." *Id.* at 894. Justice O'Connor also rejected Judge Alito's comparison between spousal notification and parental notification, observing that it rested on outdated assumptions about the marital relationship. *Id.* at 898.<sup>3</sup> Whereas Judge Alito stressed the

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<sup>3</sup> Justice O'Connor found that the spousal notification provision "embodies a view of marriage consonant with the common-law status of married women but repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution. Women do not lose their constitutionally protected liberty when they marry.

husband's interest in the "fate of the fetus," Justice O'Connor wrote: "A state may not give to a man the kind of dominion over his wife that parents exercise over their children." *Id.*

#### B. "Partial Birth" Abortion

In *Planned Parenthood of Central New Jersey v. Farmer*, 220 F.3d 127 (3d Cir. 2000), Judge Alito voted with a majority of the Third Circuit in striking down the New Jersey Partial-Birth Abortion Ban Act of 1997 (the "Act"), although he explicitly distanced himself from the majority's opinion. *See id.* at 130. The case was argued and an opinion prepared prior to the Supreme Court's decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000), which held that an abortion ban in Nebraska "nearly identical" to the New Jersey statute was unconstitutional. *Id.* Once the Supreme Court decided *Stenberg*, the Third Circuit issued its decision, noting that "nothing in [*Stenberg*] is at odds with this Court's opinion." *Id.*

Like the Supreme Court in *Stenberg*, the Third Circuit concluded that the ban on so-called "partial birth" abortion in Pennsylvania's law posed an undue burden on reproductive rights because its vague language threatened to ban a wide array of abortion methods that were commonly used to terminate pregnancies. *Id.* at 134-41. The circuit court further noted that the ambiguity of the statute reflected a legislative animus toward reproductive rights. *See id.* at 141 ("[W]e, as was the District Court, are left to wonder whether the drafters chose a path of deliberate ambiguity, coupled with public outrage based largely on misinformation, in an attempt to proscribe legitimate abortion practices."); *see also id.* at 143 ("The Legislature's argument that *Roe* and *Casey* are inapplicable to 'partial-birth' abortion procedures because such procedures are infanticide rather than abortion is based on semantic machinations, irrational line-drawing, and an obvious attempt to inflame public opinion instead of logic or medical evidence. Positing an 'unborn' versus 'partially born' distinction, the Legislature would have us accept, and the public believe, that during a 'partial-birth abortion' the fetus is in the process of being 'born' at the time of its demise. It is not. A woman seeking an abortion is plainly not seeking to give birth").

Judge Alito concurred in the judgment but distanced himself from the majority opinion. *Id.* at 152. Noting that *Stenberg* "compels affirmance" of the district court, *id.* at 153, he stated that "I do not join Judge Barry's opinion, which was *never* necessary and is now obsolete." *Id.* at 152 (emphasis added).

#### C. Other

Judge Alito was part of a unanimous panel decision in *Shelton v. University of Medicine & Dentistry of New Jersey*, 223 F.3d 220 (3d Cir. 2000), which centered on the question of whether, in a Title VII employment discrimination case, "a state hospital reasonably accommodated the religious beliefs and practices of a staff nurse who refused to participate in what she believed to be abortions." *Id.* at 222. The hospital terminated the nurse for refusing to

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The Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power, even where that power is employed for the supposed benefit of a member of the individual's family. These considerations confirm our conclusion that [the Pennsylvania spousal notice provision] is invalid." 505 U.S. at 898.

treat patients on two occasions. First, the nurse refused to assist in inducing labor for a pregnant patient suffering from a life-threatening membrane rupture. *Id.* at 222-23. Second, she refused to assist with the emergency caesarean-section delivery of a heavily bleeding woman suffering from placenta previa, objecting because the procedure would terminate the pregnancy. *Id.* at 223. Subsequently, the hospital told the nurse that she could no longer work in the Labor and Delivery section of the hospital “because of her refusal to assist in ‘medical procedures necessary to save the life of the mother and/or child.’” *Id.* at 223. The hospital’s staffing schedule prevented it from allowing the nurse to trade assignments potentially involving abortion with other nurses; moreover, the hospital “believed that [her] refusals to assist risked patients’ safety.” *Id.* The hospital did not terminate the nurse, however, instead offering her a lateral transfer to the Newborn Intensive Care Unit (“ICU”) and suggesting that she contact its Human Resources Department for its help in identifying other suitable nursing positions. *Id.* The hospital gave her thirty days to apply for another nursing position, within or outside the Newborn ICU. *Id.* She did neither but, on the thirtieth day, sent a note to her supervisor reiterating her beliefs; subsequently, the hospital fired her. *Id.*

In an opinion that Judge Alito joined but did not write, the Third Circuit affirmed the district court’s grant of summary judgment for the employer that the hospital had reasonably accommodated the plaintiff’s beliefs. *Id.* at 222, 226-29. In particular, the court observed that the plaintiff would suffer no adverse career or economic consequences if she transferred to a different nursing position in the hospital and concluded the nurse’s “refusal to cooperate in attempting to find an acceptable religious accommodation was unjustified. . . . [and] undermine[d] the cooperative approach to religious accommodation issues that Congress intended to foster.” *Id.* at 227-28.

Furthermore, the Third Circuit commented that “[i]t would seem unremarkable that public protectors such as [public health care providers] must be neutral in providing their services. . . . Although we do not interpret Title VII to require a presumption of an undue burden, we believe public trust and confidence requires that a public hospital’s health care practitioners—with professional ethical obligations to care for the sick and injured—will provide treatment in a time of emergency.” *Id.* at 228. In affirming the district court, the Third Circuit also rejected the nurse’s contention that the hospital engaged in impermissible viewpoint discrimination in violation of the First Amendment by firing her on the basis of her views on abortion. *Id.* at 229.

In *Alexander v. Whitman*, 114 F.3d 1392 (3d Cir. 1997), Judge Alito voted to uphold a district court’s dismissal of a complaint alleging that certain New Jersey wrongful death and survival action statutes violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment because they denied a cause of action for a fetus that did not survive past birth. *Id.* at 1396. Relying upon the Supreme Court’s decisions in *Roe* and *Casey* interpreting the term “person” in the Fourteenth Amendment to exclude the unborn, the Third Circuit held that “[s]ince the unborn are not persons within the meaning of the Fourteenth Amendment, no claim alleging an equal protection violation can be brought on behalf of the stillborn child.” *Id.* at 1400. The court noted that “the issue is not whether the unborn are human beings, but whether the unborn are constitutional persons. . . . The Supreme Court has consistently adhered to *Roe*’s holding that the unborn are not persons under the Fourteenth Amendment.” *Id.* at 1402.

The Third Circuit also rejected the plaintiff's claim for relief, rooted in an argument that "her interest in her relationship with her unborn child during pregnancy [was] a fundamental interest protected by the United States Constitution and that the challenged statutes violate[d] both the Due Process and the Equal Protection Clauses of the Fourteenth Amendment." *Id.* at 1402. In so holding, the court emphasized that "the New Jersey statutes at issue here do not affect [the plaintiff-mother's] *relationship* with her unborn child. A mother's relationship with her fetus is exactly the same whether or not she can bring a wrongful death or survivor action. It is not the relationship that is affected here, it is the ability to recover for the loss of that relationship." *Id.* at 1403-04. The court noted that the plaintiff-mother was not entirely denied the protections of New Jersey tort law but could still recover for emotional distress and any injury to herself. *Id.* at 1404. In addition, the court rejected the plaintiff-mother's claim that "New Jersey's exclusion of the stillborn and fetuses from coverage under the wrongful death and survival acts create[d] two distinct classes" in violation of the Equal Protection Clause, finding that the classification scheme was subject to, and satisfied, rational basis review. *Id.* at 1406-08. Finally, the court rejected related constitutional claims brought by the woman's attorneys. *Id.* at 1408-09.

Judge Alito wrote a one paragraph concurring opinion focused on the majority's characterization of the fetus:

I am in almost complete agreement with the court's opinion, but I write to comment briefly on two points. First, I think that the court's suggestion that there could be "human beings" who are not "constitutional persons" . . . is unfortunate. I agree with the essential point that the court is making: that the Supreme Court has held that a fetus is not a "person" within the meaning of the Fourteenth Amendment. However, the reference to constitutional non-persons, taken out of context, is capable of misuse.

*Id.* at 1409. Alito concluded by stating that "I think our substantive due process inquiry must be informed by history. It is therefore significant that at the time of the adoption of the Fourteenth Amendment and for many years thereafter, the right to recover for injury to a stillborn child was not recognized." *Id.*

Judge Alito has also addressed questions of reproductive freedom arising in the context of judicial deference to administrative agency decision-making.

In *Elizabeth Blackwell Health Center for Women v. Knoll*, 61 F.3d 170 (3d Cir. 1995), Judge Alito joined the majority opinion affirming the reasonableness of an administrative agency position that favored reproductive rights. In *Knoll*, the Third Circuit struck down two portions of a Pennsylvania abortion law on the basis that these state laws conflicted with federal law. *Id.* at 172. Under federal law at the time of the case, the expenditure of federal funds for abortion was permissible only when an abortion was necessary to save the life of the mother or when the pregnancy resulted from rape or incest. *Id.* at 173-74. The Medicaid statute "require[d] participating states to fund those abortions for which federal reimbursement is available." *Id.* at 174. Pennsylvania imposed two additional requirements. *Id.* at 175-76. The first established

that funds could not be used for abortions in cases of rape or incest unless the crime was reported to the appropriate law-enforcement agency. *Id.* at 175. For lifesaving abortions, the Pennsylvania law required that a physician “who [was] not the physician who [would] perform the abortion and who ha[d] no financial interest in the procedure” certify that the procedure was lifesaving. *Id.* at 175-76. Plaintiffs challenged the law as conflicting with the regulations issued by the United States Department of Health and Human Services (HHS).

The Third Circuit affirmed the district court’s grant of summary judgment to the plaintiffs challenging the Pennsylvania abortion laws. *Id.* at 176, 185. First, the court recognized that HHS had interpreted the relevant laws and regulations to conclude that “reasonable reporting requirements [were] valid only if they contain[ed] a waiver provision.” *Id.* at 178. The court noted that according to the HHS interpretation, “[a] waiver . . . ensure[d] that reporting requirements [did] not prevent or impede coverage for covered abortions. Without Pennsylvania’s assurance that it will waive the reporting requirements if the woman is physically or psychologically unable to comply, the Pennsylvania . . . requirements comprise[d] impermissible eligibility criteria.” *Id.* at 181. The court concluded that this interpretation was reasonable and entitled to considerable deference under principles of administrative law. *Id.* at 182. Second, the court deferred to HHS’ interpretation that “a state regulation that attempts, in effect, to require a second physician’s certification in addition to a certification given by a ‘physician’ is inconsistent with the regulation,” *id.* at 183, and held that the Pennsylvania second-physician certification requirement was invalid. *Id.* at 183-85. Judge Nygaard, another judge on the panel, wrote a dissent in which he challenged the deference given to HHS. *Id.* at 185.

## II. FIRST AMENDMENT

### A. *Free Speech*

Judge Alito has participated in numerous decisions addressing free speech and association. In general, he has applied Supreme Court precedent in a manner protective of the speech rights of students, public employees, commercial entities, and those engaging in sexually explicit but not obscene speech. He has been less protective of the free speech rights of prisoners.

#### 1. *Speech Codes*

In *Saxe v. State College Area School District*, 240 F.3d 200 (3d Cir. 2001), Judge Alito authored an opinion for a unanimous panel finding a school district’s antiharassment policy facially unconstitutional under the First Amendment. In *Saxe*, Christian plaintiffs wishing to speak out against homosexuality challenged the constitutionality of a school’s anti-harassment policy. Judge Alito rejected the argument that harassing speech is unprotected by the First Amendment. He explained that while harassing *conduct* is not protected, “the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another’s race or national origin or that denigrate religious beliefs.” *Id.* at 206. He wrote that anti-harassment policies that restricted speech are content-based viewpoint

restrictions subject to strict scrutiny. Judge Alito recognized that the government has a compelling interest in preventing discrimination in the workplace and in schools. Nonetheless, he concluded that the particular anti-harassment policy at issue, which reached as far as forbidding harassment on the basis of “clothing, physical appearance, social skills, peer group, intellect, educational program, hobbies or values,” was substantially overbroad. The panel struck down the policy because it prohibited “a substantial amount of non-vulgar, non-sponsored student speech,” and was not “necessary to prevent substantial disruption or interference with the work of the school or the rights of other students.”

In the course of this opinion, Judge Alito arguably suggested that civil rights laws may run afoul of the First Amendment when applied to speech based purely on that speech’s expressive content, as in some “hostile environment” sexual harassment claims. Noting that when applied to purely verbal insults or pictorial or literary material, these civil rights laws are content-based, viewpoint-discriminatory restrictions on speech, *id.* at 206, Judge Alito pointed out that “the Supreme Court . . . has never squarely addressed whether harassment, when it takes the form of pure speech, is exempt from First Amendment protection,” *id.* at 207; *see also id.* at 205 (noting that under Supreme Court precedent, a public school student can bring a Title IX claim for “so-called ‘hostile environment’ harassment”). He went on to note that while the government may prohibit speech based on its non-expressive qualities (such as when a supervisor threatens, “Sleep with me or you’re fired”), “[h]arassing’ or discriminatory speech, although evil and offensive, may be used to communicate ideas or emotions that nevertheless implicate First Amendment protections,” *id.* at 208-09, and that restrictions on such speech cannot be justified based on the speech’s effect on its listener, *id.* at 209. He concluded, “We do not suggest, of course, that no application of anti-harassment law to expressive speech can survive First Amendment scrutiny.” *Id.* at 209-210.

## 2. *Government Employee Speech*

The Supreme Court has made clear that to receive First Amendment protection, a government employee’s speech must address a matter of public concern and the government’s interest in preventing the speech must be outweighed by the interest of the public and employee in the speech. Applying this framework in *Sanguigni v. Pittsburgh Board of Public Education*, 968 F.2d 393 (3d Cir. 1992), Judge Alito concluded that Phyllis Sanguigni did not speak on a matter of public concern when she published an article in a faculty association newsletter blaming poor morale at her school on the fact that anyone who dared to criticize the principal faced retaliation. He characterized her speech as an internal grievance that provided little information of value to the public. In reaching this conclusion, Judge Alito reasoned that the fact that Sanguigni’s speech was in a newsletter filled with articles on clearly internal matters cut against her claim.

On the other hand, in *Azzaro v. County of Allegheny*, 110 F.3d 968 (3d Cir. 1997), Judge Alito joined an opinion finding that Beverly Azzaro spoke on a matter of public concern when she reported that a superior had sexually harassed her. The circuit concluded that Azzaro “brought to light actual wrongdoing on the part of one exercising public authority that would be relevant to the electorate’s evaluation of the performance of the office of an elected official.” *Id.* at 978. The circuit also held the public’s interest in the speech outweighed the government’s

interest in suppression. In addition to joining the majority opinion, Judge Alito also joined a concurring opinion cautioning that the majority opinion should not be read as establishing a rule that claims of sexual harassment always amount to speech of public concern.

In *Swartzwelder v. McNeilly*, 297 F.3d 228 (3d Cir. 2002), Judge Alito wrote for a unanimous panel that a district court did not abuse its discretion in enjoining enforcement of a Pittsburgh Police Bureau policy requiring its employees to obtain prior approval before testifying in court in certain kinds of cases. He wrote that court testimony is always considered speech on a matter of public concern. Judge Alito explained that blanket restrictions on employee speech, such as the Bureau's policy on court testimony, impose an even greater burden on speech than an isolated disciplinary action. He concluded that none of the Bureau's purported interests in the policy outweighed the public's interest in the speech.

In *Edwards v. California University of Pennsylvania*, 156 F.3d 488 (3d Cir. 1998), Judge Alito rejected the First Amendment claim of a public university professor who sued because his employer dictated what materials he must use in the classroom. Writing on behalf of a unanimous panel, Judge Alito wrote that public school teachers have no First Amendment right to control the curriculum they teach.

Judge Alito addressed the question of patronage dismissals in *Martinez-Sanes v. Turnbull*, 318 F.3d 483 (3d Cir. 2003), a case brought by several employees of the Virgin Islands Government who were fired when a new governor was elected. All had campaigned on behalf of the opposition candidate, and there was no question they had been fired because of their political affiliation. Under Supreme Court law, the critical question in patronage cases is whether the dismissed employee occupies a policy making position. Judge Alito joined an opinion concluding that a bill-collector, an auditor, a trades inspector, and a director of an independent medical clinic were not policy-makers, but that a coordinator of special events for the tourism department, whose job required "constant interaction with the public on behalf of the Government," was a policy-maker. In *Mitchum v. Hurt*, 73 F.3d 30 (3d Cir. 1996), Judge Alito authored an opinion holding that government whistleblowers who suffer retaliation may seek injunctive and declaratory relief in federal court, even though they also have administrative remedies. Joining the D.C. Circuit but parting ways with the Ninth, Tenth, and Eleventh circuits, Judge Alito stressed that the traditional power of courts to enjoin unconstitutional government acts led to a strong presumption that equitable relief was properly available to government whistleblowers.

### 3. Commercial Speech

In *Pitt News v. Pappert*, 379 F.3d 96(3d Cir. 2005). Judge Alito wrote an opinion striking down a Pennsylvania law that prohibited advertisers from paying for alcoholic beverage advertising in publications affiliated with educational institutions. *Pitt News*, represented by the Pennsylvania affiliate of the ACLU, challenged the law after it caused the paper to suffer a dramatic decline in revenue. Writing for a unanimous panel, Judge Alito held the law unconstitutional as applied to *Pitt News* for two reasons. First, Judge Alito explained that the law impermissibly burdened commercial speech. The government offered no evidence that



restricting alcoholic beverage ads in the *Pitt News* would actually achieve the government's goal of reducing underage drinking. The law was also over- and under-inclusive because most members of the community served by *Pitt News* were not underage and the state could combat underage drinking through methods that did not burden speech. Judge Alito rejected the government's argument that *Pitt News*' speech was not burdened because the law did not ban it from printing alcoholic beverage ads but merely prevented it from being paid for such ads. He wrote that "[i]f government were free to suppress disfavored speech by preventing potential speakers from being paid, there would not be much left of the First Amendment. Imposing a financial burden on a speaker based on the content of the speaker's expression is a content-based restriction of expression and must be analyzed as such." *Id.* at 106. Second, Judge Alito explained that the law was presumptively unconstitutional because it placed a special burden on a narrow segment of the media and was not justified by a compelling state interest.

#### 4. *Sexually Explicit But Not Obscene Speech*

In *Phillips v. Borough of Keyport*, 107 F.3d 164 (3d Cir. 1997), the plaintiff was denied a permit to open an adult book and video store. He sued, asserting that the Borough's zoning ordinance restricting the location of such stores violated his free speech rights. The district court upheld the constitutionality of the ordinance even before the Borough filed its answer. In an opinion joined in relevant part by Judge Alito, the circuit reversed, holding that "the Borough must be required to articulate the governmental interests on the basis of which it seeks to justify the ordinance. It should then have to shoulder the burden of building an evidentiary record." *Id.* at 173. However, the panel concluded that the Borough did not have to meet its evidentiary burden as of the time it enacted the ordinance. Rather, the ordinance would be upheld so long as the Borough could gather the necessary evidentiary record before trial.

#### 5. *Political Speech*

*Rappa v. New Castle County*, 18 F.3d 1043 (3d Cir. 1994), involved a challenge to an ordinance regulating the placement of public signs. Daniel Rappa ran for political office. A relative unknown, he depended upon outdoor signs to gain name recognition. Some of his signs were removed because their placement violated state law prohibiting certain types of signs within 25 feet of the right-of-way of any public highway. The majority found the ordinance unconstitutional because it was so riddled with exceptions for various types of signs that it was impermissibly content-based. Judge Alito wrote a concurrence in which he stated his agreement with the majority opinion's reasoning and rationale, but noted that he would have analyzed the question somewhat differently. He would have analyzed it as a content-neutral regulation and concluded it was too broad and indiscriminate to be considered narrowly tailored.

#### 6. *Freedom of Information*

Judge Alito joined an opinion protective of the public's right to receive information about the functioning of government. In *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994), the circuit set out a rule requiring district courts to account for the public's need to access information when considering whether to issue confidentiality orders. A district court judge had issued such an order covering a settlement reached between the Borough of Stroudsburg and its

former police chief, who had sued the city for violating his civil rights. A newspaper sought to intervene in the case for the purpose of petitioning the judge to reconsider the confidentiality order. The district court declined, and the newspaper appealed. The circuit reversed. It placed weight on the fact that, but for the confidentiality order, the settlement would have been available through the state's freedom of information law. The circuit acknowledged "that a strong presumption against confidentiality orders when freedom of information laws are implicated may interfere with the ability of courts to successfully encourage the settlement of cases. However, we believe that a strong presumption against entering or maintaining confidentiality orders strikes the appropriate balance by recognizing the enduring beliefs underlying freedom of information laws: that an informed public is desirable, that access to information prevents governmental abuse and helps secure freedom, and that, ultimately, government must answer to its citizens." *Id* at 791-92

#### 7. *Freedom of Association*

In *In re: Asbestos School Litigation*, 46 F.3d 1284 (3d Cir. 1995), a group of schools sued former manufacturers of products containing asbestos. Pfizer sought a writ of mandamus after the district court denied its motion for partial summary judgment on a civil conspiracy claim. The only evidence linking Pfizer to a conspiracy was the fact that it was associated with an organization called the Safe Buildings Alliance. Writing for a majority, Judge Alito granted Pfizer's writ of mandamus. He wrote that the district court's decision flatly contradicted the Supreme Court's holding in *N.A.A.C.P. v. Claiborne Hardware*, 458 U.S. at 886 (1982). Claiborne Hardware arose when some members of the N.A.A.C.P. engaged in violent protests, and a lower court held other members and the organization jointly and severally liable. The Supreme Court rejected a theory of liability based solely on guilt by association. Applying *Claiborne Hardware*, the Third Circuit concluded that Pfizer's membership in the Safe Buildings Alliance, without more, could not support a conspiracy charge.

#### 8. *Ballot Access*

In *The Council of Alternative Political Parties v. Hooks*, 179 F. 3d 64 (3rd Cir. 1999), Judge Alito wrote an opinion rejecting the claims of minority political parties, represented by the ACLU, who sought access to the New Jersey ballot. The challenged law established two methods of nominating candidates for elective offices: (1) candidates seeking the nominations of a major party needed to file nominating petitions and win the party primary process, or (2) candidates seeking the nomination of a minor party had to file nominating petitions on the date on which the major parties held their primaries. Judge Alito's opinion began by recognizing that the right to associate for political purposes and the right of voters to cast their votes effectively are fundamental but not absolute, and that the Supreme Court has developed a flexible test for determining when an election code unconstitutionally burdens plaintiff's rights under the First and Fourteenth Amendments.

The minor parties in *Hooks* argued that the requirements of New Jersey's law prevented them and their voters from responding to disaffection with candidates chosen from the primaries, prevented minor parties from achieving major party status, and subjected them to requirements, such as filing on primary day, from which major parties were exempt. Writing for the court,

Judge Alito rejected the plaintiffs' arguments. He noted that New Jersey's statute allowed minor parties 54 days more than major parties to submit nominating petitions and provided them the option of a write-in candidacy. According to Judge Alito, this additional time allowed the minor parties to respond to the candidates seeking major party nominations. The court also held that New Jersey's interests in a fair electoral process, voter education, and political stability were sufficient to outweigh the small burden imposed upon the plaintiffs' rights under the First and Fourteenth Amendments. Accordingly, Judge Alito concluded that New Jersey's filing deadline was a reasonable, nondiscriminatory regulation. *Id.* at 80.

In other cases, however, Judge Alito has ruled in favor of minority political parties. *Reform Party of Allegheny County v. Allegheny County Dept. of Elections*, 174 F.3d 305 (3d Cir. 1999), involved a Pennsylvania statute precluding minor parties, but not major parties, from cross-endorsing candidates for certain offices. Judge Alito joined the *en banc* majority's opinion that Pennsylvania's law violated the Equal Protection rights of minor parties.

## B. Religion

In recent years, the Supreme Court has become increasingly tolerant of government efforts to support religion and increasingly open to claims that restrictions on religious speech are a form of viewpoint discrimination. Judge Alito's jurisprudence in this area is generally consistent with that trend. If anything, he would go further than the Supreme Court – and further than Justice O'Connor – in protecting religious speech even in circumstances where there is a genuine risk that the government will be perceived as endorsing the religious message.

### 1. Establishment Clause

Possibly the most controversial and revealing Establishment Clause opinion written by Judge Alito was his majority decision in *ACLU of NJ v. Schundler (Schundler II)*, 168 F.3d 92 (3d Cir. 1999). For more than thirty years, during the winter holiday season, Jersey City had erected on the lawn in front of its city hall a city-owned crèche and menorah – as well as a Christmas tree. In most years the crèche and menorah were displayed at the same time because the relevant Christian and Jewish holidays overlapped. In 1994, however, the holidays did not overlap, which led Jersey City to take down the menorah the day before it erected the crèche. In response to a complaint filed by the ACLU of New Jersey, a federal district court ruled that the 1994 displays were unconstitutional and granted the ACLU's request for an injunction that applied to future holiday displays.

Shortly after the injunction was issued, Jersey City added some additional figures to its 1995 holiday display (including Santa Claus, Frosty the Snowman, a red sled and some Kwanza symbols.) The ACLU filed a motion for a preliminary injunction against the revised display and a motion for civil contempt. The District Court denied both ACLU motions, and amended its prior order to allow for the revised display. Nevertheless, Jersey City appealed to the Third Circuit both on the original order and the revised order – arguing that the original display was constitutional and that both the original and revised order unduly constrained it.

The Third Circuit panel in *Schundler I* (not including Judge Alito) unanimously found that the original display was unconstitutional, essentially affirming the district court's original order). It remanded the case to the district court for clarification regarding the revised order (which had allowed the second display, but made it clear that it was "skeptical" that the modified display would pass constitutional muster.<sup>4</sup> On remand, the district court held that the modified display violated the Constitution. *See* 168 F.3d at 97. Jersey City again appealed to the Third Circuit. Judge Nygaard remained from the original panel, but was joined in *Schundler II* by Judges Alito and Rendell.

The *Schundler II* decision, written by Judge Alito, upheld the constitutionality of the revised display. Indeed, Judge Alito wrote, "we have no alternative but to reverse the permanent injunction," *id.* at 107, citing what he described as controlling Supreme Court precedent. In dissent, Judge Nygaard reached the opposite conclusion based on the same Supreme Court precedents. Dismissing the City's efforts to secularize the display as constitutionally inadequate, he noted that a reasonable observer would understand that the revised display had been erected in response to litigation and within the context of the City's ongoing effort to promote religion for thirty years. *Id.* at 113.

In *ACLU-NJ v. Township of Wall*, 246 F.3d 258 (3d Cir. 2001), Judge Alito dismissed an Establishment Clause challenge to another holiday display by ruling that plaintiffs lacked standing as taxpayers to bring the suit. According to Judge Alito, plaintiffs "failed to establish that the Township has spent any money, much less money obtained through property taxes, on the religious elements of the [past] display [in question]." *Id.* at 263. Additionally, he held that even if the town did spend tax money on maintaining the display, it was a *de minimus* amount. Finally, he held that the feelings of exclusion that plaintiffs asserted regarding the 1998 holiday display were not asserted for the 1999 display, which had been challenged in the lawsuit.

## 2. Religious Speech at School

In schools, Judge Alito has drawn a sharper line between student-initiated speech and government-sponsored speech than the Supreme Court. In an effort to protect the former he has discounted the danger of the latter, even in a school setting where the Supreme Court has traditionally been most sensitive to the dangers of religious proselytizing.

In *ACLU of NJ v. Black Horse Pike Reg. Bd. of Educ.*, 84 F.3d 1471, 1489 (3d Cir. 1996) (*en banc*), the Third Circuit held that a school policy permitting student-led prayer at high school graduation by majority vote violates the Establishment Clause. The majority relied heavily on the Supreme Court's decision in *Lee v. Weisman*, 505 U.S. 577 (1992), which had struck down graduation prayers as unconstitutional. Judge Alito joined a dissent that attempted to distinguish the facts in *Lee* and limit *Lee* to its particular facts. The majority found the effort to distinguish *Lee* unpersuasive, and declared that the impermissible practice of school-sponsored prayer "cannot be transformed into a constitutionally acceptable one" by putting it to a vote and allowing the majority to dictate the fundamental rights of the minority. *Id.* at 1477-78.

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<sup>4</sup> The term "skeptical" was used by Judge Alito to describe *Schundler I's* opinion of the revised order. 168 F.3d at 96.

The position advocated by Judge Alito in *Black Horse Pike* was rejected by the Supreme Court four years later in *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000). Among other things, the dissent in *Black Horse Pike* had argued that “[t]he First Amendment does not condemn legislation or official policy that has the effect of assisting religion in general; the First Amendment itself gives religion an exceptionally protected status.” *Black Horse*, 84 F.3d at 1496. By contrast, in *Santa Fe*, Justice O’Connor wrote that “the Establishment Clause forbids not only state practices that ‘aid one religion . . . or prefer one religion over another,’ but also those that ‘aid all religions.’” 505 U.S. at 610.

Judge Alito’s inclination to protect students’ freedom of religious expression is evident in his dissent in *C.H. ex rel. Z.H. v. Oliva*, 226 F.3d 198 (3d Cir. 2000). In *Oliva*, a kindergartener’s religiously-themed poster, which had been placed prominently in a hall poster display, was taken down by school officials because of its religious content (a drawing of Jesus). The next day, the teacher re-hung the poster in the hallway, but in a less prominent position. Joined by only one other member of the *en banc* court, Judge Alito objected to the dismissal of certain school officials from the complaint. In an expansive discussion of the underlying claim, Judge Alito stated that “the discriminatory treatment of the poster because of its ‘religious theme’ . . . violate[s] the First Amendment.” *Id.* at 210. Alito continued: “Specifically I would hold that public school students have the right to express religious views in class discussion or in assigned work, provided that their expression falls within the scope of the discussion or the assignment and provided that the school’s restriction on expression does not satisfy strict scrutiny.” *Id.* Finally, he concluded that the school would not violate the Establishment Clause by displaying the poster: “The Establishment Clause is not violated when the government treats religious speech and other speech equally and a reasonable observer would not view the government practice as endorsing religion.” *Id.* at 212.

Judge Alito has also ruled in favor of religious speech by non-students on school premises. In *Child Evangelism Fellowship of NJ Inc. v. Stafford Township Sch. Dist.*, 386 F.3d 514 (3d Cir. 2004), a school district had a policy of assisting all organizations in the community to distribute information to students. Part of the policy involved opening the school one night each fall, called Back-to-School Night, to allow organizations to occupy a table and distribute information to parents about their organizations. *Id.* at 520-21. Child Evangelism Fellowship was not permitted to distribute information to students and was denied participation at the Back-to-School Night on the ground that allowing it to participate would violate the Establishment Clause. Judge Alito disagreed, holding that the speech was not school-sponsored, and could not be mistaken as such by any reasonable observer. He also found the school district had engaged in viewpoint discrimination by excluding only religious organizations from their community outreach policy.

### C. Free Exercise Clause

Judge Alito has positioned himself as a strong supporter of the Free Exercise Clause. In the cases summarized above, and the following two cases, Judge Alito has generally protected individuals’ rights to exercise their religious beliefs.

In *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999), Judge Alito wrote a unanimous decision holding that a police department's policy prohibiting beards violated the Free Exercise Clause because of its inconsistent application. The policy was challenged by two police officers who were devout Sunni Muslims. Both officers explained that according to their religious beliefs they could not shave their beards. *Id.* at 361. In ruling for the officers, Judge Alito stressed that the the policy allowed for secular (medical) exceptions, but not religious exceptions, "We are at a loss to understand," he wrote, why religious exemptions threaten important city interests but medical exemptions do not." *Id.* at 367.

Relying in part on the decision *Fraternal Order of Police*, Judge Alito wrote unanimous decision in *Blackhawk v. Pennsylvania*, 381 F.3d 202 (3d Cir. 2004), upholding the free exercise claim of a Native American plaintiff, who kept bears in captivity for religious ceremonies and sought a religious exemption from paying state game commission annual permit fees. The Game and Wildlife Code provided for several secular permit fee exceptions, including a general one for hardship, but no exceptions for religious reasons. Judge Alito concluded that strict scrutiny must be applied to the code. He then ruled that the state's current code did not "advance interests of the highest order" that were "narrowly tailored in pursuit of those interests," *id.* at 213, and was therefore unconstitutional.

On the other hand, Judge Alito rejected the Free Exercise claim asserted by prisoners who belonged to the Five Percent Nation, a group that its members describe as a religion but that prison officials characterize as a violent organization. *See Fraise v. Terhune*, 283 F.3d 506 (3d Cir. 2002). The prisoners in *Fraise* claimed their free exercise rights were violated by a prison policy that targeted security threat groups ("STG") and required core members of the group to participate in behavior modification programs and ultimately renounce affiliation with all STGs. In upholding the prison policy, Judge Alito assumed that the Five Percent Nation was a religion for purposes of the case. Deferring to concerns about prison security, he nonetheless concluded that the challenged policy was constitutional because it did not target particular religions and left group members with alternative means of practicing their faith, even though they were required to renounce their affiliation with the Five Percent Nation. Judge Rendell, in dissent, criticized Judge Alito's opinion for not requiring a stronger showing of proof that the Five Percent Nation was a violent group beyond the fact that some of its members were individually violent.

### III. CIVIL RIGHTS

Judge Alito's civil rights record is a distressing one. He has repeatedly advocated a narrow interpretation of civil rights laws that disfavors plaintiffs in cases involving both gender discrimination and race discrimination. In the 1985 essay he submitted in support of his application for a position with the Office of Legal Counsel, Judge Alito chose to highlight his professional advocacy and personal opposition to racial and ethnic quotas. He also explained his decision to go to law school by noting his disagreement with the Warren Court's reapportionment decisions, among other factors. That statement has been generally taken as a reference to the one-person, one-vote rule announced by the Warren Court, which is both widely viewed as a cornerstone of democratic self-governance and a crucial safeguard against unequal

districts designed to perpetuate racial discrimination. Alito has no significant decisions as a judge addressing the rights of gays and lesbians. His record on disability rights is an uneven one.

A. Race Discrimination

1. *Voting Rights*

Judge Alito joined a divided majority in *Jenkins v. Manning*, 116 F. 3d 685 (3d Cir. 1997), in rejecting the claim that a numbered-post, at-large method of electing members to the school board diluted minority voting strength in violation of Section 2 of the Voting Rights Act of 1965. Plaintiffs were found to have successfully met the three-pronged test established in the landmark case of *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986): that the minority community is politically cohesive, that they are sufficiently numerous and geographically compact to comprise a majority in a single-member district, and that white voters generally vote as a bloc to defeat the minority community's candidates of choice. Plaintiffs further showed that minorities in the district at issue suffered from past and present racial discrimination, elections were marked by racially polarized voting, and school board members were unresponsive to the minority community.

Nonetheless, Judge Alito joined an opinion by Judge Greenberg dismissing the significance of these facts on the theory that minorities had “undeniably substantial success” in the school board elections. This conclusion was based upon one election where two black candidates ran against each other after the lawsuit had been initiated, another election in which a black candidate won in a special election for a one-year term for which there was little publicity, and an election in which a black candidate won by plurality (an event that never was repeated). Thus out of ten black candidates to run for school board over a decade, only three had won under fairly unusual circumstances.

2. *Employment Discrimination and Affirmative Action*

*Bray v. Marriott Hotels*, 110 F.3d 986 (3rd Cir. 1997), involved a race discrimination claim brought by an African-American female who worked for a Marriott hotel as a housekeeping manager. Bray applied for the position of director of services, but a white female was chosen. In conducting the hiring, Marriott had failed to follow its own procedures, and had given conflicting statements on how the decision to hire the white candidate was made. Bray brought suit under Title VII alleging race discrimination. The district court granted Marriott’s summary judgment motion, but a majority of the Third Circuit reversed, stating that considering the facts (Bray’s experience, training etc.) there were flaws in Marriott’s employment assessment that entitled Bray to a trial.

Judge Alito dissented from this opinion, stating that the majority had improperly reduced the standard for discrediting the employer’s proffered reason for the hiring of an alternative candidate. According to Alito, evidence of unfairness in the selection process alone without “evidence linking the unfairness to race-based animus” should not be enough to survive summary judgment, so long as the employer’s proffered reason is a legitimate reason. In

response, the majority wrote: “Title VII would be eviscerated if our analysis were to halt where the dissent suggests.” *Id.* at 993.

In *Glass v. Philadelphia Electric Company*, 34 F.3d 188 (3d Cir. 1994), Alito again dissented from a panel ruling favoring a plaintiff in a race discrimination case. The plaintiff, Glass, worked for 23 years at Philadelphia Electric Company (PECO) and received favorable job evaluations except for one less than fully satisfactory job evaluation covering a two-year period from 1984 to 1986. During his time at PECO, Glass had been heavily involved in organizing and advocacy efforts on behalf of workers in general, and black workers in particular. After successfully completing two degrees in engineering, Glass applied for a number of promotions beginning in 1989 and each time he was rejected. In some instances, it was suggested that he was not a “team player” and that some people were “scared to take a chance on [him].” *Id.* at 190-91. In addition, his poor performance evaluation was cited as a reason. *Id.* at 190. Glass retired from PECO in 1990 and subsequently brought a claim for race and age discrimination and for retaliation. At trial, the district court allowed PECO to present evidence that Glass was rejected from the positions because of the negative evaluation, but did not allow Glass to present evidence that this negative evaluation was the result of racial harassment and a racially hostile work environment. A jury found against Glass on all his claims.

On appeal, a panel of the Third Circuit reversed, holding that the trial court abused its discretion in failing to allow Glass to present his evidence. The court relied in part on the evidence’s relevance in disproving PECO’s proffered justification. Judge Alito dissented, arguing that allowing Glass to present his evidence might have led to a “mini-trial” on the existence of a hostile work environment at PECO. *Id.* at 200. Moreover, Alito argued that even if the trial court abused its discretion in not allowing the evidence, the exclusion was harmless because PECO had offered additional reasons for failing to promote Glass. *Id.* at 201.

Judge Alito has written or joined a few decisions favoring employees. Significantly, Judge Alito dissented from a panel majority’s ruling that a civil rights claim was time-barred. *See Zubi v. AT & T*, 219 F.3d 200 (3d Cir. 2000). The majority in the case ruled that plaintiff’s Section 1981 claim for discriminatory termination was governed by New Jersey’s two-year statute of limitations, rather than four year statute of limitations for federal civil actions “arising under” an Act of Congress enacted after December 1, 1990. Judge Alito reasoned that the plaintiff’s claim of discriminatory termination arose under the federal Civil Rights Act of 1991, thus the Act’s four-year limitations period should apply. *Id.* at 230-31. Judge Alito’s position was later vindicated in a unanimous decision by the Supreme Court. *See Jones v. R.R. Donnelly & Sons*, 541 U.S. 369 (2004).

Judge Alito also joined Judge McKee’s opinion in *Goosby v. Johnson & Johnson Medical Inc.* 228 F.3d 313 (3d Cir. 2000), which reversed the trial court’s grant of summary judgment disposing of plaintiffs’ race discrimination claims. The panel held that genuine issues of fact existed as to whether the plaintiff was treated less favorably than white employees with similar weaknesses.



Judge Alito has written no opinions on the permissibility of affirmative action, but he wrote an opinion sustaining the employment claims of white police officers, and joined a separate *en banc*'s holding that Title VII prohibits non-remedial affirmative action. In *Hopp v. Pittsburgh*, 194 F.3d 434 (3d Cir. 1999), the Third Circuit reviewed an ordinance permitting the City to hire experienced police officers without following the usual civil service procedures. In response to a challenge by the Fraternal Order of Police, the district court held that the City could only hire officers after ranking them based on competitive testing. While the case was pending on appeal (the City ultimately won on the issue), the City complied with the order and administered a written examination. The City then decided to adopt a new hiring procedure, concerned that ranking applications solely according to performance on a written examination would harm African-American applicants. Accordingly the City adopted a process requiring applicants also to take an oral examination. The oral examination was scored on a pass/fail basis. As described by Judge Alito: the panel did not ask a "pre-determined series of questions or even follow a routine set of procedures, in administering the exam. . . . [meaning] each panel had complete and unreviewable discretion to decide who, among otherwise-qualified applicants, would become eligible to receive offers of employment from the City." *Id.* at 437.

Nine white police officers who performed well on the written examination, but failed the oral examination brought suit claiming racial discrimination. A jury found in favor of the plaintiffs, and the Third Circuit affirmed. Judge Alito rejected the City's argument that there was insufficient evidence of intentional discrimination since the City itself had presented evidence that the oral examination was designed to minimize a potential adverse impact on African-American applicants. He further noted the plaintiffs had presented evidence that particular African-American applicants were favored in the application process. *Id.* at 43-400. The decision in this case is not altogether surprising given that the hiring program placed great discretion in City officials, and given the constrained standard of appellate review of jury findings.<sup>5</sup>

In *Taxman v. Board of Education of the Township of Piscataway*, 91 F.3d 1547 (3d Cir. 1996), Judge Alito voted with the *en banc* majority in holding that a school district's desire to maintain a racially diverse workforce could not be a factor in who to terminate for financial reasons due to budgetary constraints. The school board in *Taxman* was forced to lay off one of two high school teachers – Taxman who was white and Williams who was black. The school board determined that the two teachers were of equal seniority and equal qualifications. In order to break the tie, the school Board invoked the goal of promoting racial diversity in its teacher workforce. Accordingly, the school Board laid off Taxman. The question in the case was whether Title VII permitted this type of non-remedial affirmative action when making a termination decision. (The statute of limitations had expired on an equal protection claim). The

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<sup>5</sup> Judge Alito has joined numerous unremarkable Title VII opinions. See, e.g., *Viggiano v State of New Jersey*, 136 Fed. Appx. 515 (3d Cir. 2005) (per curiam) (unpublished) (upholding summary judgment denial of Title VII retaliation claim of Italian-American corrections officer because employer had offered evidence of nondiscriminatory reasons for termination); *EEOC v. Muhlenberg College*, 131 Fed. Appx. 807 (3d Cir. 2005) (affirming summary judgment to defendant on Chinese professor's claim that his tenure denial was motivated by discrimination where there was evidence that plaintiff's teaching skills were inadequate); *Hoechstetter v. City of Pittsburgh*, 79 Fed.Appx. 537 (3d Cir. 2003) (unpublished) (affirming district court's grant of summary judgment to defendant where white police officers claimed racial discrimination in hiring).

court, 8-4, found that the School Board’s action violated Title VII. Judge Alito joined the majority.

After reviewing the Supreme Court’s major cases sustaining affirmative action plans under Title VII, the majority concluded that Title VII allows only remedial affirmative action plans. *See id.* at 1557-58. The majority also held that the Supreme Court’s Equal Protection law, which spoke to the importance of diversity in education, was inapplicable in a Title VII case. The dissents noted that Title VII, while by its terms forbidding any use of race or gender, had been repeatedly interpreted by the Supreme Court to allow affirmative action. *See id.* at 1570 (Sloviter, J., dissenting) (citing *United Steelworkers v. Weber*, 443 U.S. 193 (1979) and *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987)). According to the dissent, nothing in those Court opinions supported the proposition that Title VII permitted only non-remedial affirmative action. *Id.*

As an Assistant Solicitor General in the Reagan administration, Judge Alito joined a brief opposing an affirmative action program. In *Local 28 of Sheet Metal Workers Int’l v. EEOC*, 478 U.S. 421 (1986), the Supreme Court upheld a contempt order against a union that required it to meet stringent numerical requirements in nonwhite membership. The union was found to have violated Title VII by discriminating against nonwhite workers in recruitment, selection, training, and admission to the union. The trial court ordered the union to work towards a 29 % nonwhite membership goal. After several years in which the union refused to obey court orders, the court imposed a contempt fine on the union, ordering it to meet the 29% membership goal by a certain date. The government brief, written on behalf of the Respondent EEOC, argued that while some of the contempt fines were appropriate, the 29% nonwhite membership requirement violated Title VII because it was a quota and not just limited to actual victims of discrimination. *See* Respondent’s Brief, 1985 Westlaw 670094. The Supreme Court rejected this argument holding that nothing in Title VII prohibits the adoption of numerical targets as a remedy for past discrimination, particularly in cases of persistent and egregious discrimination. *See* 478 U.S. at 476.

## B. Gender Discrimination

### 1. *Sex Discrimination in Employment*

In *Watson v. SEPTA*, 207 F.3d 207 (3d Cir. 2000), Judge Alito authored an opinion that considered the effect of the 1991 Civil Rights Act on the burden of proof in Title VII “pretext” cases where the plaintiff relies on circumstantial evidence to prove discrimination, including evidence that the justification put forward by the employer to justify an adverse employment action is pretextual. Plaintiff Watson objected to the trial judge’s jury instruction that she had the burden of showing that sex was a “determining factor” in her dismissal. She argued that under the 1991 Civil Rights Act, the relevant inquiry was whether her sex was a “motivating factor.” The 1991 Civil Rights Act amended Title VII to state, “Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that . . . sex . . . was a motivating factor for any employment practice, even though other factors also motivated the practice.” 42 U.S.C. § 2000e-2(m).

On its face, the language of § 2000e-2(m) is not explicitly limited to any particular type of Title VII case. Judge Alito nevertheless concluded, in part because of the provision's reference to "other factors," that it should be understood as applying solely to "mixed motive" cases of the sort described in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). See *Watson*, 207 F.3d at 217-18. "Mixed motive" cases differ from pretext cases in the following way, the court explained: In mixed motive cases, a plaintiff demonstrates with "direct" evidence that an impermissible factor motivated the employment decision, and the burden of persuasion shifts to the employer to show that it would have taken the same action in the absence of the impermissible factor. In "pretext" cases on the other hand, the plaintiff relies on circumstantial evidence to make her case as set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and the burden of persuasion remains with the plaintiff at all times. See *id.* at 215-16. Thus, Judge Alito reasoned that use of the word "demonstrates" in § 2000e-2(m) suggested that it only applied to mixed motive cases because "the term 'demonstrates' is not the most apt choice if the drafters wanted to describe, not just cases in which the plaintiff offers 'direct' evidence of discriminatory animus, but also the greater number of disparate treatment cases in which the plaintiff, proceeding under *McDonnell Douglas*, establishes the elements of a prima facie case and urges the factfinder to infer discriminatory animus from the employer's asserted failure to offer a credible alternative reason for the contested employment action." *Id.* at 218. Thus, the court concluded, in the absence of direct evidence of discrimination, the plaintiff is not entitled to the "motivating factor" instruction, but rather to the "determining factor" instruction used by the trial court. The Supreme Court has not reached the precise question presented by this case but its 2003 decision in *Desert Palace v. Costa*, 539 U.S. 90 (2003), which held that direct evidence of discrimination is not required in a mixed motive case, appears to undermine the reasoning in *Watson*.<sup>6</sup>

Judge Alito filed a sole dissenting opinion in *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061 (3d Cir. 1996) (*en banc*), a Title VII sex discrimination case, which preceded *Bray* (discussed on page) and raised the same question of when summary judgment is permissible in certain employment discrimination cases. The majority held that when a plaintiff has proved a prima facie case of discrimination, and put forward evidence that could have led the jury to discount the nondiscriminatory reason her employer had offered as justification for its adverse action against her, summary judgment or a post-trial judgment as a matter of law in favor of the employer is always impermissible. In this case, the district court had granted judgment after trial on the ground that while plaintiff had put forward evidence disproving the employer's proffered justification, she had failed to put forward any evidence for the jury to conclude that gender motivated her employer's actions. *Id.* at 1064-65.

The Third Circuit reversed, explaining that while evidence demonstrating that an employer's alleged reason for an adverse employment action was pretextual does not mandate a finding of discrimination, it permits a factfinder to draw this inference. *Id.* at 1066-67. Thus, when a plaintiff has put forward evidence amounting to a prima facie case of discrimination and evidence that the employer's proffered rationale is discriminatory, a jury may reasonably conclude that unlawful discrimination in fact motivated the adverse employment action and a

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<sup>6</sup> Justice Thomas, for a unanimous court, wrote "If Congress intended the term 'demonstrates' [in § 2000e-2(m)] to require . . . direct evidence or some other heightened showing, it could have made that intent clear by using language to that effect in § 2000e(m)."

defense motion for summary judgment or judgment as a matter of law must always be denied. *Id.* at 1071-72.

In dissent, Judge Alito argued that while in such circumstances, judgment as a matter of law for defendant should generally be denied, in some instances—including, he argued, the present case—the evidence in the record could not persuade a rational factfinder that discrimination motivated the employment action. *Id.* at 1078-79. He argued that a prima facie case of intentional discrimination creates no presumption of discrimination once a defendant has introduced any evidence showing a nondiscriminatory rationale. *Id.* at 1079-83. According to Judge Alito, the evidence that creates a prima facie case and evidence casting doubt on an employer’s nondiscriminatory reason will not always permit a reasonable jury to conclude that discrimination was the actual motivator, because (1) the facts required to make a prima facie case will often have weak probative force and (2) in some instances there may be strong evidence of some other motivating reason that an employer may wish to conceal—for instance, nepotism or a different form of unlawful discrimination. *Id.* at 1084-86. Judge Alito concluded that there was no evidence from which a reasonable jury could conclude that gender, rather than her personal animosity, motivated the employer’s treatment of the plaintiff. *Id.* at 1088-89.

In *Reeves v. Sanderson Plumbing*, 530 U.S. 133 (2000), a unanimous Supreme Court adopted a similar standard that was not entirely inconsistent with Judge Alito’s opinion, holding that proof that an employer’s asserted justification is false will generally be sufficient to defeat summary judgment, but that “there will be instances” when summary judgment may still be appropriate. *Id.* at 148. When read with *Bray*, however, Judge Alito seems to be more willing to find such “instances” than contemplated by *Reeves*.

In *Konstantopoulos v. Westvaco Corp.*, 112 F.3d 710 (3d Cir. 1997), Judge Alito authored a decision affirming judgment for defendant on some of plaintiff’s Title VII sexual harassment and retaliation claims. Plaintiff Konstantopoulos began work in an all-male department at Westvaco in April 1989. She testified that her male coworkers in the department were rude, unhelpful, and refused to assist her from the beginning. She also testified that one male coworker exposed himself to her and made other suggestive gestures or remarks on multiple occasions. She complained to management and was transferred to another work-group in June 1989. After experiencing further harassment in the new department, including one male co-worker who made sexual remarks to her and on one occasion grabbed her by the neck and threatened to kill her, she went on medical leave in September 1989 for treatment of severe work-induced stress. In April 1990, she returned to work and was reassigned to the work group where she initially experienced harassment; the day she returned to that work group, the co-workers who previously harassed her shook their fists at her and someone threw away her lunch. The next day plaintiff again sought medical leave for work-related stress and did not return to Westvaco. *Id.* at 711-13.

The district court found that plaintiff had proved she was subject to a hostile work environment from April through August 1989. It further found that the April 1990 incidents should be considered independently from the 1989 incidents, that these were not on their own sufficient to show a hostile environment, and thus her inability to work in April 1990 was not

necessarily related to Westvaco's conduct and did not amount to constructive discharge. *Id.* at 714-15. The Third Circuit held that the district court had correctly determined that the 1989 events had "dissipated" by April 1990 and that the incidents that occurred when plaintiff returned to work were not sufficiently severe to conclude that the working environment remained hostile. *Id.* at 716. While being assigned to work with those co-workers who previously harassed her was a relevant factor for consideration, the court stated, it was not alone sufficient to justify the conclusion that she was subjected to a hostile work environment when she returned or to constitute harassment per se. *Id.* at 717-18. Thus, the court concluded she also was not constructively discharged. *Id.* at 718-19.

Judge Alito wrote a dissenting opinion in *Delli Santi v. CNA Insurance Companies*, 88 F.3d 192 (3d Cir. 1996), a case in which the plaintiff alleged she had been fired in retaliation for complaining about sex discrimination under New Jersey law. After plaintiff complained several times that the company's failure to promote her was based on age and sex discrimination, the company opened an investigation of her reported expenses for her company car and, concluding that she had fabricated gas receipts, fired her. While the company had evidence that other employees were also reporting suspiciously low gas mileage, no other employee was investigated or disciplined. A jury returned a verdict for the plaintiff, but the trial court granted judgment for the defendant, holding that the defendant had shown that regardless of its retaliatory intent, it would have discharged plaintiff for falsifying her expense accounts. The Third Circuit reversed, concluding that a rational jury could conclude that the company's failure to take action against other employees whom it believed were inflating expense accounts could support the jury's conclusion that the concern about expenses did not actually motivate plaintiff's discharge. It also concluded that the district court erred in holding that reinstatement and front-pay were not available in this case.

Judge Alito dissented as to the issue of front pay, arguing that requiring it in a case where the evidence demonstrated a nondiscriminatory reason supporting plaintiff's termination was inequitable and irrational. *See id.* at 208. Judge Alito dismissed the majority's distinction between evidence acquired after an adverse employment action and evidence acquired and relied on before an adverse employment action as "facile." *Id.* at 209. He concluded that the appropriate rule would disallow front pay or reinstatement when a legitimate reason for discharge is discovered after a discriminatory employment action or the discriminatory initiation of investigation. *Id.*

In *Robinson v. City of Pittsburgh*, 120 F.3d 1286 (3d Cir. 1994), Judge Alito wrote a decision that affirmed in part and reversed in part judgment as a matter of law for defendants in a sexual harassment and retaliation case. Plaintiff Robinson, a Pittsburgh police officer, alleged that her supervisor Dickerson sexually harassed her—e.g., unhooking her bra, making comments about the size of her breasts, touching her leg under a table, etc. After several months of harassment, she approached Edwards (one of two second-in-command officers who reported directly to the chief of police), told him about the harassment, and asked about transferring to another unit. Edwards advised her to "wait it out" because Dickerson might be changing jobs, said that the chief of police would protect Dickerson and so Edwards could do nothing about the harassment, and said that Dickerson had done this before. *Id.* at 1291. A few months later, when plaintiff drafted a letter to the chief of police complaining of the harassment, Edwards

encouraged her not to mention the harassment and simply to ask for a meeting with the Chief. She revised the letter accordingly, and the meeting was refused. *Id.* at 1291-92.

Judge Alito found that plaintiff's Equal Protection claim against Edwards for acquiescing in Dickerson's harassment was properly dismissed, because while he had a higher rank than Dickerson, he did not have direct supervisory authority over him. Characterizing Edwards' behavior as mere inaction, the court concluded that absent supervisory authority over Dickerson, he could not be understood to have acquiesced in Dickerson's unconstitutional conduct based on this inaction. *Id.* at 1294-95. The court, however, reversed the district court's judgment as a matter of law on plaintiff's quid pro quo Title VII claim against the city. Noting that an employer is strictly liable for quid pro quo harassment and that such harassment occurs when an employee is told that condition of her employment turns on her acquiescence to sexual advances or when an employee's response to sexual advances is thereafter used as a basis for an employment decision, the court held that plaintiff's allegations that Dickerson unjustifiably reprimanded her in front of others, bothered her at work and at home, and made negative comments to her about her work when she refused his advances, did not amount to an adverse employment action affecting the terms and conditions of her employment. *Id.* at 1296-98. But Judge Alito ruled, evidence that Dickerson blocked plaintiff's promotion would support a finding of quid pro quo harassment. *Id.* at 1298-99.

The court also affirmed the district court's judgment as a matter of law for defendants on her retaliation claim. It held that many of the reprimands and derogatory comments of which plaintiff complained did not constitute an adverse employment action and so did not constitute retaliation. Moreover, the court expressed skepticism about whether the timing of an adverse employment action could ever alone support a finding that the action was caused by the employee's protected activity, as required for a retaliation claim, stating that "the mere fact that adverse employment action occurs after a complaint will ordinarily be insufficient to satisfy the plaintiff's burden of demonstrating a causal link between the two events." *Id.* at 1302.

In *Stanziale v. Jargowsky*, 200 F.3d 101 (3d Cir. 2000), Judge Alito joined the majority opinion affirming summary judgment for the employer in a Title VII gender discrimination claim and reversing summary judgment for the employer in an Equal Pay Act claim. The majority found that dismissal of the Title VII claim was appropriate when an employer put forward several nondiscriminatory reasons in support of a pay differential between a male and female employee and the male plaintiff only introduced evidence that some, but not all, of these reasons were pretextual. *Id.* at 106. The plaintiff's Equal Pay Act claim survived, however, the court held, because under the Equal Pay Act, in contrast to Title VII, the burden of persuasion of showing that a factor other than gender determined a pay differential shifts to the employer upon the plaintiff's showing of such a differential. The defendant failed to put forth sufficient evidence to show that the proffered reasons in fact motivated its decision. *Id.* at 107-08. Judge Stapleton dissented from the Title VII affirmance, arguing that a "factfinder's conclusion of pretext as to some of the nondiscriminatory justifications tendered by the employer may legitimately affect its decision with respect to other justifications." *Id.* at 108-09.

## 2. *Sexual Abuse in Schools*

In *D.R. v. Middle Bucks Area Vocational Technical School*, 972 F.2d 1364 (3d Cir. 1992) (en banc), Judge Alito joined the majority in a 7-5 vote dismissing students' sexual harassment claims. The plaintiffs were two female public high school students who sued the school district and various school employees, alleging repeated sexual abuse by fellow students over the course of the school year. The two plaintiffs were students in a graphics art class, which took place in a classroom that had an attached darkroom and unisex bathroom. Plaintiffs claimed that they were forced into the bathroom or darkroom during class multiple times a week over many months, where they were molested, sodomized, and forced to perform oral sex by male students in the class. The student teacher in charge of the classroom allegedly witnessed daily chaotic behavior, including male students grabbing at one plaintiff's breasts and dragging her into the bathroom, but ignored it. The other plaintiff alleged that she told the Assistant Director of the school that another student was attempting to force her into the bathroom for sex, and no action was taken to address the situation. *Id.* at 1366, 1378.

Relying on *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989), the majority held that the plaintiffs had not stated a claim for violation of their rights under the Due Process Clause because plaintiffs, though bound by state compulsory education laws, were not in the physical custody of the state. 972 F.2d at 1372-73. While *DeShaney* states that when a State affirmatively restrains an individual's freedom to act on his own behalf it has a constitutional duty to protect that individual, such as in the case of involuntarily institutionalization, the Third Circuit found no such restraint here. The court relied on the fact that parents decide whether a child will attend public school, private school, or be schooled at home; plaintiffs thus still had the opportunity to withdraw from school or seek outside help. *Id.* at 1371-72. The majority also found that while this was an "extremely close case," the school did not create the risk of harm to plaintiffs by failing to control the class and assigning the class to an inexperienced student teacher, given that the sexual injury to plaintiffs, in contrast to "physical injury due to the roughhousing" was not a foreseeable risk of this action. *Id.* at 1374. Judges Sloviter, Mansmann, Scirica, Nygaard, and Becker dissented, holding that the students had stated a claim given the State's affirmative act of restraining their freedom to act on their own behalf. *Id.* at 1383-84.

### C. *Disability Rights and Discrimination On the Basis of HIV status*

#### 1. *Disability Discrimination*

Judge Alito has written decisions both supporting and rejecting disability claims.<sup>7</sup> As in other discrimination contexts, however, he has placed a heavy burden on plaintiffs seeking the

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<sup>7</sup> Compare *Fiscus v. Wal-Mart Stores, Inc.*, 385 F.3d 378, 383-84 (3d Cir. 2004) (Judge Alito joined a unanimous opinion holding that an employee with end-stage renal disease could state a claim under the ADA because cleansing blood and eliminating bodily waste is a major life activity within the meaning of the ADA: "The touchstone is not publicity or frequency, but importance to the life of the individual. . . . What matters is a broad practical assessment of whether an individual's ability to pursue the major life activity is limited by the physical impairment or condition from which he or she suffers."); *Polini v. Lucent Technologies*, No. 03-2285, 100 Fed. Appx. 112, 2004 WL 1292554 (3d Cir. June 10, 2004, unpublished) (Judge Alito wrote a decision reversing the district court's grant of summary judgment to the employer, holding that an employee who was rejected based on a health exam concluding

right to a trial in order to rebut an employer's nondiscriminatory explanation for its conduct. For example, in *Nathanson v. Medical College of Pennsylvania*, 926 F.2d 1368 (3d Cir. 1991), a case in which Judge Alito dissented, the majority criticized him for setting a standard that was so restrictive that "few if any Rehabilitation Act cases would survive summary judgment." *Id.* at 1387 n.13. (Under Judge Alito's theory in *Nathanson*, defendants are effectively relieved of the obligation to make reasonable accommodations in disability cases unless the plaintiff can essentially guarantee that the accommodation will work.) In several other cases, Judge Alito joined majority opinions affirming the dismissal of ADA claims where a dissenting judge found a factual dispute on the record.<sup>8</sup>

In *Katekovich v. Team Rent-a-Car*,<sup>9</sup> Judge Alito joined an unpublished decision holding that the plaintiff employee had no substantial limitations, despite her sleep disorders and depression. The court found that even crediting the plaintiff's testimony that she was unable to stay awake during the day as a result of her sleep disorders, she had not proved that this impaired any of her major life activities. The plaintiff's claim under the Family and Medical Leave Act was also dismissed, even though the employer terminated the employee only 3 weeks after she began her leave of absence because the court found that she had not proved that she would have been able to return to work at the end of the 12 weeks guaranteed by the FMLA.

By contrast, in *Mondzelewski v. Pathmark Stores, Inc.*, 162 F.3d 778 (3d Cir. 1998), Judge Alito wrote an opinion reversing the district court's decision granting summary judgment to the employer, holding that a supermarket meat cutter with a sixth grade education and limited training and skills created a triable issue of fact on the question of whether he was substantially limited in the major life activity of working due to a back injury. Judge Alito expressly rejected the district court's analysis, which excluded consideration of the plaintiff's education and skills. Noting that the ADA requires an individualized assessment, the court held that "because the effect that a particular impairment will have on a person's ability to work varies depending on that person's background and skills, it is not easy to envision how any other approach could be

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that she had functionally monocular vision created a triable issue of fact that she was "regarded as" disabled) *with Shultz v. Potter*, 142 Fed. Appx. 598 (3d Cir. 2005) (per curiam) (relying on *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999) to conclude that a woman with diabetes, which required her to monitor her diet, but did not otherwise interfere with her daily activities, was not disabled within the meaning of the ADA); *Kelly v. Drexel Univ.*, 94 F.3d 102 (3d Cir. 1996) (unanimous opinion holding that while walking could be a major life activity for purposes of the ADA, an employee who had moderate difficulty walking and climbing stairs due to her hip injury was not disabled within the meaning of the ADA).

<sup>8</sup> For instance in *Motley v. New Jersey State Police*, 196 F.3d 160 (3d Cir. 1999), Judge Alito joined an opinion clarifying a previous Third Circuit decision that had held that a claimant who sought disability benefits could not prevail in an ADA claim because he was judicially estopped from arguing that he could perform the essential functions of a job if he was entitled to disability benefits. This decision was abrogated by an intervening Supreme Court case, and two of the three judges on the panel, including Alito, concluded that the plaintiff failed to provide a reasonable explanation for his inconsistent statements. The third judge (Rendell), noting that the parties had no way of knowing such an explanation was required, would have remanded in light of the Supreme Court case. In *Dewyer v. Temple University*, Case No. 03-1495, 89 Fed. Appx. 811, 2004 WL 503839 (3d Cir. Mar. 15, 2004, unpublished), Alito joined in an unpublished *per curiam* opinion affirming the district court's refusal to submit the plaintiff's ADA claims to the jury. The dissenting judge observed that "I think for quite some time Temple and Ms. Blanton treated Ms. DeWyer very shabbily and that a reasonable jury could have found that during that period of time DeWyer was categorically denied the accommodation of a handicapped parking space which could easily have been made available to her."

<sup>9</sup> No. 00-2389, 36 Fed. Appx. 688, 2002 WL 1288766 (3d Cir. Apr. 19, 2002, unpublished).



taken.” *Id.* at 784. The court also vacated the grant of summary judgment on the plaintiff’s retaliation claim, noting that “[a]ssigning an employee to an undesirable schedule can be more than a “trivial” or minor change in the employee’s working conditions.” *Id.* at 788.<sup>10</sup>

Judge Alito also joined a decision holding for the first time in the Third Circuit that the ADA requires an employer to engage in a meaningful dialogue with employees seeking a reasonable accommodation for a disability. He expanded that requirement in *Shapiro v. Township of Lakewood*, 292 F.3d 356 (3d Cir. 2002), ruling that an employee’s decision to write letters requesting a transfer and information about job training, rather than formally applying for the new positions, did not excuse the employer from its obligations to engage in a good-faith interactive process with the employee.

In *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998). Judge Alito concurred in a panel decision affirming the dismissal of a complaint challenging a two-year cap in long-term disability benefits for mental disabilities, as contrasted with unlimited benefits for physical disabilities as violative of the ADA. The majority held “[s]o long as every employee is offered the same plan regardless of that employee’s contemporary or future disability status, then no discrimination has occurred even if the plan offers different coverage for various disabilities.” *Id.* at 608. The majority also held that Title III of the ADA, which governs public accommodations, applied only to physical places: “Just as a bookstore must be accessible to the disabled but need not treat the disabled equally in terms of books the store stocks, likewise an insurance office must be physically accessible to the disabled but need not provide insurance that treats the disabled equally with the non-disabled.” *Id.* at 613.

In concurring, Alito relied solely on the ADA’s “safe harbor” provision, 42 U.S.C. §12201(c), which explicitly states that Titles I and III of the ADA “shall not be construed to prohibit or restrict” the terms of a bona fide insurance plan. Judge Alito expressly distanced himself from the majority’s reasoning regarding inter-disability discrimination, arguing that the plain meaning of “discrimination” would appear to capture such cases as well. *See id.* at 615.

On the other hand, in *Caruso v. Blockbuster-Sony Music Entertainment Centre*, 193 F.3d 730 (3d Cir. 1999), Judge Alito wrote an opinion holding that DOJ Standard 4.33.3, requiring “comparable” lines of sight in public accommodations, does not require that wheelchair users be able to see over standing spectators. The court refused to give deference to DOJ’s contrary interpretation, holding that while the language of the standard was ambiguous, the history of the standard did not show that DOJ was attempting to change the rule regarding sightlines, and that DOJ could not resolve the ambiguity without going through the notice and comment period. However, the Third Circuit also definitively rejected the stadium’s argument that it did not need to provide wheelchair access to the lawn area, absent proof that it was structurally impractical to do so.

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<sup>10</sup> For other decisions in which Judge Alito upheld the claims of disability plaintiffs, *see Smith v. Davis*, 248 F.3d 249 (3d Cir. 2001) (Alito joining a decision reinstating a case brought by an African-American employee with alcoholism, finding that there was a dispute about the reason for the termination because the employer attempted to rely on reasons that had not been articulated to the employee at the time of termination); *Deane v. Pocono Medical Center*, 142 F.3d 138 (3d Cir. 1998) (joining an *en banc* majority opinion concluding that a plaintiff who claimed to have been “regarded as” disabled created triable issues of fact on her discrimination claim, because there was evidence suggesting that her employer regarded her as limited in a range of jobs).

In addition, Judge Alito joined a panel decision reversing the district court's grant of a preliminary injunction against the National Board of Medical Examiners, which had prohibited the Board from "flagging" the medical board scores of individuals who took the test with disability accommodations. *See Doe v. National Board of Medical Examiners*, 199 F.3d 146 (3d Cir. 1999). The Third Circuit reasoned that the student plaintiff was not entitled to an injunction because the student had not proved "either that his scores are psychometrically comparable to the scores of candidates who take the test under standard time conditions, or that his scores will be ignored by the programs to which they are reported." *Id.* at 156-57. The panel also held that there was no reasonable likelihood that flagging violates the general anti-discrimination provision by facilitating the discrimination of others, noting that this section of the ADA did not bar public accommodations from disclosing the disability status of a disabled individual. *Id.* at 158.

Judge Alito has also issued several decisions under the IDEA that protect the rights of disabled students.<sup>11</sup> But, he also joined in a panel decision holding for the first time in the Third Circuit that an attorney-parent could not collect attorney's fees in a successful action under the IDEA. *Woodside v. Sch. Dist. of Philadelphia Bd. of Educ.*, 248 F.3d 129 (3d Cir. 2001).

Finally, Judge Alito has a mixed record, at best, in assessing whether individuals with disabilities have a private right to sue under various federal laws. Those cases are discussed more fully in the section on Access to Justice.

## 2. HIV Discrimination

Judge Alito has only participated in one case involving discrimination against people with HIV. *See Doe v. County of Centre, Pa.*, 242 F.3d 437 (3d Cir. 2001). In *Doe*, Alito joined a panel decision agreeing with the ACLU that the county had violated the Rehabilitation Act and the Americans with Disabilities Act (ADA) by refusing to consider the Does, a couple whose son had HIV and AIDS, as prospective foster parents. Both the Rehabilitation Act and the ADA have been interpreted to permit discrimination against a person with disabilities where the person would pose a "direct threat" (defined as a "significant risk of substantial harm") to others. The district court had accepted the county's argument that the policy was justified because foster children placed with the Does could sexually assault their son and contract HIV. The Third Circuit reversed and remanded, holding that the "reasoning the County and the District Court

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<sup>11</sup> *See, e.g., Ridgewood Board of Educ. v. N.E.*, 172 F.3d 238 (3d Cir. 1999) (reversing grant of summary judgment to a school board and holding that the IDEA requires schools to offer "more than a trivial educational benefit"; compensatory damages under the IDEA do not require proof of bad faith or egregious circumstances; and evidence that the school had failed to identify a disabled student and to provide appropriate public education created triable issue on the plaintiff's Rehabilitation Act claim). In addition, in *C.M. & R.M. v. Board of Education of the Union County Regional High School Dist.*, No. 04-1407, 128 Fed. Appx. 876 (3d Cir. Apr. 19, 2005), Judge Alito joined a *per curiam* unpublished decision which reinstated certain IDEA claims, holding that they were not moot despite the child's graduation from high school. However, two judges including Alito upheld the dismissal of the IDEA damages claims, concluding that the alleged procedural shortcomings in the school's assessment of the child had not been shown to have caused a specific harm to his education. *Id.* at 882. The dissent would have found that the alleged harms, including the possibility that the parents would have to retain an expert to evaluate their son to explain the alleged inaccuracies in his school records, were sufficient to state a claim for damages under the IDEA.

employed is contrary to Congress' intent that analysis of the ADA's direct threat exception should involve an individualized inquiry into the significance of the threat posed." *Id.* at 449.

This decision is significant because there is a circuit split about the application of the "direct threat" defense, particularly in the context of HIV disease. In several circuits, the mere existence of any possible threat, even if the threat is statistically very unlikely to occur, is enough to justify discrimination. While the panel claimed that it was not deciding whether to adopt this standard, the court's holding that there was a triable issue of fact about the "direct threat" defense because at least some children who could be placed with the Does would not be likely to sexually assault their son, appropriately focuses on the actual risk of transmission under individualized circumstances. The panel also rejected the county's claim that transmission could occur through roughhousing: "a reasonable factfinder could find, based on the objective medical evidence in the record, that the risk of HIV transmission from casual contact, even intense physical contact, is negligible." *Id.* at 451.

It has been reported that Judge Alito was involved with drafting an opinion memorandum that was issued under Charles Cooper's name when Alito was working in the U.S. Office of Legal Counsel for the Reagan Administration in 1986 ("the Cooper Opinion"). The Cooper Opinion took the position that an employer charged with discrimination against a person with HIV or AIDS under the Rehabilitation Act could defend by arguing that it was excluding the person with HIV or AIDS because of fear of contagion, not because of a belief that they were not physically or mentally able to perform the job. Alito was quoted in a Washington Post article in 1986 as saying, "We certainly did not want to encourage irrational discrimination, but we had to interpret the law as it stands ... and it does not regulate what a private employer can do if he has a fear of a contagious disease." While no Supreme Court case at that time had applied the Rehabilitation Act in the context of a contagious disease, the reasoning reflected in the Cooper Opinion was soundly rejected in 1987 by the Supreme Court in *School Board of Nassau Cty., Fla. v. Arline*, 480 U.S. 273 (1987), which held that a teacher who was fired because of her latent tuberculosis was a person with a handicap within the meaning of the Rehabilitation Act.

#### D. Sexual Orientation

Judge Alito has a very limited record on issues relating to sexual orientation discrimination.

In *Shore Regional High School Bd. of Educ. v. P.S. ex rel. P.S.*, 381 F.3d 194, (3d Cir. 2004). Judge Alito wrote a lengthy opinion rejecting a school district's challenge to an administrative law judge's findings requiring the district to pay for private school education under the Individuals with Disabilities Education Act (IDEA) for a high school student who was subjected to extensive harassment because he was perceived to be gay and effeminate. The student had endured severe harassment and anti-gay slurs since elementary school, and had suffered depression and a decline in grades ultimately leading to placement in a special education program, and an eventual suicide attempt. His parents sought transfer to a new high school, and when the school district refused, the parents unilaterally placed him at the other high school, where P.S. apparently thrived. When the parents sought reimbursement, the ALJ found that the

local school could not adequately protect P.S. from harassment and that it could not provide him a “free appropriate public education,” as required by the IDEA, because of the “legitimate and real fear that the same harassers who had followed P.S. through elementary and middle school would continue [to bully him.]”

The school district appealed and the district court reversed, ignoring the testimony of several experts and concluding that “the inability of the [junior high school] administration to successfully discipline its students does not make *Shore* [high school] an inappropriate placement. No school can ever guarantee that a student will not be harassed by other students . . . .” In a unanimous decision authored by Judge Alito, the Third Circuit ruled in favor of the student, holding that the district court’s failure to give appropriate weight to the findings of the ALJ was clearly erroneous. *Id.* at 200-01.

The other Alito decision tangentially related to sexual orientation is *Saxe v. State College Area School District*, 240 F.3d 200 (3d Cir. 2001), described above, in which Alito wrote a decision striking down an anti-harassment policy in response to a challenge brought by Christian students who argued that their Christian beliefs compelled them to speak out against homosexuality.

Finally, it has been reported that in 1971 (while a senior in college at Princeton), Alito chaired an undergraduate task force that recommended decriminalizing sodomy and stated that discrimination against gays in hiring “should be forbidden.”<sup>12</sup> The task force’s report focused on legislative action, rather than on the judiciary. According to the *Boston Globe*: “The report, issued in 1971 by Alito and 16 other Princeton students, stemmed from a class assignment to study the ‘boundaries of privacy in American society’ and to recommend ways to protect individual rights.” Alito wrote in the report’s forward, “We sense a great threat to privacy in modern America. . . . We all believe that privacy is too often sacrificed to other values; we all believe that the threat to privacy is steadily and rapidly mounting; we all believe that action must be taken on many fronts now to preserve privacy.” According to reports, Alito’s role in the matter was “mostly advisory,” he did not write the section of the report addressing gay rights, and it is unclear whether he personally agreed with the recommendations.<sup>13</sup> Since the report was issued more than 35 years ago and may not have reflected Alito’s own views, it is difficult to know what weight, if any, to place on it.

#### E. Religious Discrimination

In *Abramson v. William Paterson College of NJ.*, 260 F.3d 265 (3d Cir. 2001), an Orthodox Jewish professor who refused to work on the Sabbath, was retaliated against by her dean. The dean purposely scheduled meetings and conferences on Saturday so that Abramson could not attend and fulfill her academic duties and the university ultimately refused to renew her contract. The unanimous panel found Abramson had presented sufficient evidence to establish a prima facie case for a hostile work environment claim and a religious discrimination disparate treatment claim to survive summary judgment and proceed to trial. *Id.* at 280-81, 285.

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<sup>12</sup> Christian R. Buset and Alan Wirzbicki, “Alito writing backed privacy, gay rights,” *Boston Globe*, Nov. 2, 2005.

<sup>13</sup> *Id.*

Judge Alito joined the majority opinion and authored a separate concurrence that stressed why the acts in this case, or any religious discrimination/hostile work environment case, could be viewed by a reasonable trier of fact as more severe than in other cases where offensive remarks are made. “Intentionally pressuring a person to choose between faith and career is more ‘severe’ and has a more direct effect on the conditions of employment than the sort of offensive remarks at issue in *Heitzman [v. Monmouth County]*” where offensive anti-Semitic remarks at work were not found to alter the conditions of employment, and thus did not create a hostile work environment for the Jewish plaintiff. *Id.* at 209.

#### IV. FEDERALISM AND SOVEREIGN IMMUNITY

In two significant cases described below – one involving Congress’s power to enact medical leave provisions and the other its power to criminalize the possession of machine guns - Judge Alito took a narrow view of congressional power that could, at the very least, encourage future challenges to federal civil rights laws.

##### A. Section 5 of the Fourteenth Amendment

In 2000, Judge Alito wrote an opinion holding that a provision of the Family and Medical Leave Act (FMLA) entitling employees to leave when they are seriously ill could not be applied against the states, and that Congress’ effort to do so exceeded its authority under Section 5 of the Fourteenth Amendment. *See Chittister v. Department of Community and Economic Development*, 226 F.3d 223 (3d Cir. 2000).

Judge Alito reasoned that Congress had purported to abrogate sovereign immunity under the FMLA in order to prevent employment discrimination on the basis of gender and that Congress’s findings focused on (1) the importance of both men and women caring for young children and family members with serious health conditions and (2) the disproportionate burden family caretaking imposes on women. He then found “[n]otably absent . . . 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” or any such evidence in the legislative record. *Id.* at 298-99. In a one-paragraph discussion, Alito continued:

Moreover, even if there were relevant findings or evidence, the FMLA provisions at issue here would not be congruent or proportional. Unlike the Equal Protection Clause, which the FMLA is said to enforce, the FMLA does much more than require nondiscriminatory sick leave practices; it creates a substantive entitlement to leave. This requirement is disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act. *Id.* at 229.

Three years later, in *Nevada Dep’t of Human Resources v. Hibbs*, 538 U.S. 721 (2003), the Supreme Court held, in a 6-3 decision written by Chief Justice Rehnquist, that states could be required by the FMLA to provide employees with leave to care for an ill family member. Implicitly rejecting the approach followed by Judge Alito in *Chichester*, the Supreme Court held “that Congress is not confined to the enactment of legislation that merely parrots the precise

wording of the Fourteenth Amendment, but may prohibit a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Id.* at 737 (internal quotation marks omitted).

## B. Commerce Clause

In *United States v. Rybar*, 103 F.3d 273 (3d Cir. 1996), the Third Circuit held that the federal statute prohibiting possession of a machine gun, 18 U.S.C. § 922(o), was a valid exercise of congressional power under the Commerce Clause. Justice Alito dissented, notwithstanding the federal government's long history of regulating firearms. Relying on *United States v. Lopez*, 514 U.S. 549 (1995), Judge Alito faulted Congress for failing to make specific findings that the possession of a machine gun had an effect on interstate commerce. The majority responded by noting that "[n]othing 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." *Id.* at 282.

## V. IMMIGRATION

Judge Alito's has participated in over one hundred immigration-related cases, the majority of which involve asylum or criminal-immigration deportation questions. In his decisions, Alito tends to defer to lower courts or to the Board of Immigration Appeals' ("BIA's") factual findings.

### A. Asylum

In the asylum context, Judge Alito has authored four published opinions as well as two unpublished memorandum dispositions and dissented in two published cases. He has written for and against asylum seekers, siding with the Immigration Judge ("IJ") or the BIA in most matters. A review of all of Judge Alito's published asylum decisions demonstrates his unwillingness to second-guess the BIA unless the BIA has unambiguously failed to articulate its reasoning or disregarded important factors in weighing the evidence before it.

In *Chang v. Ashcroft*, 119 F.3d 1055 (3d Cir. 1997), for example, Judge Alito dissented from the court's decision to vacate the BIA's dismissal of a Chinese national's political asylum claim. As head of a technical delegation to the United States, China's State Security Law required Chang to report to the Chinese Embassy any suspicions regarding members of the delegation who intended to remain in the United States. Chang did not report his suspicions and instead spoke to an FBI agent, who encouraged Chang to apply for asylum. Chang ultimately sought asylum on the ground that he would face persecution upon returning to China for violating a law of general applicability that required him to report other delegates' suspicious actions, not returning to China, seeking asylum in the United States, and speaking to the FBI. The majority found that Chang defied the Chinese government's orders because he disagreed with the government's treatment of those who might defect; his defiance, in short, was politically motivated. Judge Alito, on the contrary, concluded that "[r]ather than representing political opposition to China's state security law, Chang's conduct simply reflect[ed] a concern for accuracy in its enforcement." *Id.* at 1069. In other words, Chang was unwilling to report his

suspicious because he was uncertain about his colleagues' intentions, not because he opposed the Chinese government's orders for political reasons.

More recently, in *Dia v. Ashcroft*, 353 F.3d 228 (3d Cir. 2003) (en banc), Judge Alito again sided with the BIA and dissented from the majority's opinion in favor of an asylum seeker from the Republic of Guinea who alleged that he would be persecuted on account of his actual and imputed political opinions if forced to return to his homeland. Dia claimed specifically that he fled Guinea after the national military sought his involvement in fighting Liberian and Sierra Leonean rebels as a result of his work with the opposition, and after both his wife was raped and his house burnt down to intimidate him. The BIA summarily affirmed the IJ's finding that Dia was not credible. On appeal to the Third Circuit, however, the *en banc* court found that the IJ, among other things, misread Dia's testimony, required documentation from Dia that he could not feasibly secure, discounted the evidence that Dia had in fact produced, and inexplicably refused to let Dia's expert witness testify. The court stressed that it was not finding Dia credible, but instead remanding the case to the BIA "to further explain or supplement the record" because of the lack of substantial evidence to support the BIA's adverse credibility determination. *Id.* at 260.

Judge Alito, joined by Judges Sloviter and Roth, disagreed with the majority, finding that the IJ had a reasonable basis for finding Dia incredible. At the outset of his dissent, Judge Alito underscored the difficulty in making credibility determinations. He explained how "the frequent unavailability of corroboration and the ease of fabricating a persecution claim" present serious problems in the asylum context. *Id.* at 262. But Judge Alito argued that a remand was inappropriate because the reviewing court has a limited role, which requires it to defer to credibility determinations of the IJ—even those about which the court is skeptical. *Id.* The majority noted that Judge Alito's interpretation of the statutory standard of review would ignore the substantial evidence requirement and instead apply a "no reasonable adjudicator" standard, which "not only guts the statutory standard, but ignores our precedent." *Id.* at 251. The majority further stated that, "to require *sound* reasoning breathes life into [the substantial evidence] standard." *Id.*

Despite Judge Alito's deferential treatment of the BIA, he has remanded to the BIA at least two asylum cases involving improper rejection of unauthenticated abortion certificates by the IJ. In *Liu v. Ashcroft*, 372 F.3d 529 (3d Cir. 2004), for example, Judge Alito wrote a unanimous opinion granting a Chinese couple's petition for review on the ground that the IJ improperly excluded evidence that would have supported the Lius' claims that the Chinese government forced Mrs. Liu to undergo two separate abortions, a form of political persecution under 8 U.S.C. § 1101(a)(42). The Lius attempted but ultimately failed to comply with the authentication procedures detailed in 8 C.F.R. § 287.6 because local Chinese officials would not cooperate in authenticating the documents. In addressing this problem, Judge Alito explained that § 287.6 is neither an absolute rule of exclusion nor the exclusive means of authenticating records before an IJ. Specifically, he wrote: "We believe that the Lius should have been allowed to attempt to prove the authenticity of the abortion certificates through other means, especially where (as here) attempts to abide by the requirements of § 287.6 failed due to lack of cooperation from government officials in the country of alleged persecution." *Id.* at 533. The court also remanded the case to the BIA to reconsider the IJ's adverse credibility determination, finding

that “the IJ’s improper application of § 287.6 caused him to disregard evidence that, if duly considered in the first instance, might have resulted in a favorable determination regarding credibility for the Lius.” *Id.* at 530; see also *Zhang v. Ashcroft*, 405 F.3d 150 (3d Cir. 2005), (remanding a Chinese asylum- seeker’s case to the BIA for further proceedings consistent with *Liu*).

In an unpublished opinion, Judge Alito, rejected a Chinese asylum-seeker’s claim that Chinese authorities had actually sterilized her after giving birth to a second child. See *Wong v. Ashcroft*, 76 Fed.Appx. 446 (3d Cir. 2003). Writing for the court, Judge Alito found that substantial evidence supported the BIA’s determination that Wong was incredible. Specifically, while Wong claimed in her asylum application that she left China because Chinese authorities had notified her that she was to be sterilized for having had a second child, she claimed at the exclusion hearing before the IJ that the Chinese authorities had in fact forcibly sterilized her. The BIA remained doubtful of Wong’s credibility even after she was permitted to present medical records showing that she had been sterilized. The BIA continued to weigh against her credibility such factors as the lack of a statement from her husband about her opposition to her own sterilization. Despite concluding that the BIA’s decision had not turned on the husband’s failure to participate in the case, Judge Alito nevertheless indicated that this factor was entitled to some weight.

Of equal or more concern perhaps is Judge Alito’s position in *Chen v. Ashcroft*, 381 F.3d 221 (3d Cir. 2004), a case in which a Chinese man sought asylum based on his fiancée’s forced abortion. Judge Alito, writing for a unanimous panel, declined to extend *Matter of C-Y-Z*, 21 I. & N. Dec. 915 (BIA 1997) (en banc), which held that husbands were eligible for asylum based on their wives’ forced abortions or sterilization, to boyfriends and fiancés, even though Chen and his fiancée, Chen Gui, lived together at Chen’s parents’ home, applied for a marriage license, and would have married but for China’s inflated age requirements for marriage. Judge Alito deferred to what he described as a reasonable determination by the BIA not to extend the statutory asylum protection afforded to women undergoing forced abortions to an unmarried partner. “Indeed, the marriage relation is used in so many areas of the law,” Alito explained, “that it would seem absurd to characterize reliance on marital status in C-Y-Z- as arbitrary and capricious.” *Chen*, 381 F.3d at 227 n.6 (citation omitted).<sup>14</sup>

*Fatin v. INS*, 12 F.3d 1233, 1240 & n.110 (3d Cir. 1993), is another example of Judge Alito’s pattern of strictly construing what constitutes “persecution” for purposes of granting asylum relief. There, an Iranian woman challenged the BIA’s denial of her asylum petition, which claimed that she had a well-founded fear of persecution if she returned to Iran on account of her membership in a particular social group and on the basis of her political opinion. Fatin identified herself as belonging to “a very visible and specific subgroup: Iranian women who *refuse to conform* to the government’s gender-specific laws and social norms.” *Id.* at 1241 (internal citations omitted). Specifically, Fatin described in her brief to the BIA her political activities while in Iran and her current “deep-rooted beliefs in freedom of choice, freedom of

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<sup>14</sup> Judge Alito’s position in *Chen* is in tension with the Ninth Circuit’s holding in *Ma v. Ashcroft*, 361 F.3d 553 (9th Cir. 2004), which extended statutory asylum protection afforded to wives undergoing forced abortions to husbands whose marriages would be recognized but for China’s coercive family planning policies. Judge Alito distinguished *Ma* by narrowly interpreting its holding to apply only to putative husbands and not to unmarried partners.



expression [and] equality of opportunity for both sexes.” *Id.* at 1237 (internal citations omitted). In denying Fatin asylum, the BIA stated that no evidence existed that Fatin would be singled out in Iran for her beliefs or membership in a particular social group given that the same restrictions and requirements applied not only to her but to the entire population.

Judge Alito echoed the BIA’s position in his opinion. He accepted Fatin’s description of her particular social group only to then narrowly construe it and consequently exclude her from the group as someone who “never testified that she would refuse to comply with the law regarding the chador or any of the other gender-specific laws or social norms.” *Id.* at 1241. Moreover, Judge Alito found that while noncompliance would constitute persecution, Fatin still had the option to comply with the Iranian laws. Indeed, Alito concluded: “the petitioner’s testimony in this case simply does not show that for [Fatin] the requirement of wearing the chador or complying with Iran’s other gender-specific laws would be so profoundly abhorrent that it could aptly be called persecution.” *Id.* at 1242. Because Fatin’s political claim and social group claim were intertwined, the court rejected her political claim as well on similar grounds.

#### B. Deportation

Judge Alito has written at least five opinions and dissented in five cases involving immigrants facing deportation as a result of committing an aggravated felony or a crime of moral turpitude. Of note are his dissenting position in *Sandoval v. Reno*, 166 F.3d 225 (3d Cir. 1999), which the Supreme Court subsequently rejected, and his opinion in *Acosta v. Ashcroft*, 341 F.3d 218 (3d Cir. 2003), which the Ninth Circuit has implicitly called into question.

*Sandoval v. Reno*, 166 F.3d 225 (3d Cir. 1999), was a case that the ACLU successfully litigated on Sandoval’s behalf. Sandoval, a legal permanent resident, was found deportable by an IJ because he had been convicted in state court of marijuana possession, a conviction that subjected him to deportation under INA § 241(a)(2)(B)(I). Sandoval applied for discretionary relief under INA § 212(c), but the IJ denied him such relief because Sandoval had not met the seven-year lawful domicile requirement for eligibility for discretionary relief. While Sandoval’s appeal was pending before the BIA, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), section 440(d) of which amended INA § 212(c) so as to make discretionary relief unavailable to any immigrant who had been convicted of any of the drug offenses listed under INA § 241(a)(2)(B)(I). The BIA accordingly denied Sandoval § 212(c) relief on the ground that AEDPA made him statutorily ineligible. The district court, however, exercised jurisdiction over Sandoval’s appeal and held that AEDPA § 440(d) did not apply to cases, such as Sandoval’s, which were pending when the statute was enacted.

While a majority panel of the Third Circuit affirmed the district court in *Sandoval*, Judge Alito dissented on the ground that he believed that AEDPA stripped federal courts of their jurisdiction to hear habeas corpus claims from aliens in custody challenging deportation orders. He did not decide, however, whether Sandoval’s claim ought to be reviewed by other means, such as by a petition for review. The Supreme Court rejected Judge Alito’s position in *INS v. St. Cyr*, 533 U.S. 289 (2001), another case successfully litigated by the ACLU. *St. Cyr* held, among other things, that eliminating federal court jurisdiction to hear such cases would raise serious

constitutional questions concerning the Suspension Clause, which protects the right of habeas corpus.

Judge Alito has been disinclined to find for petitioners in non-habeas deportation cases as well. He dissented in *Lee v. Ashcroft*, 368 F.3d 218 (3d Cir. 2004), for example, a case in which the court held that filing a false income tax return is not an “aggravated felony” warranting deportation. The majority specifically found that “[Congress] intended to specify tax evasion as the only deportable tax offense” and did not intend to cover all tax offenses. *Id.* at 224. Judge Alito, however, argued that filing a false tax return fell within the clear language of the “aggravated felony” definition under the INA. Alternatively, he explained that “[e]ven if the statutory language were ambiguous, [he] would defer to the BIA’s reasonable interpretation that [filing a false tax return] is an aggravated felony.” *Id.* at 228 n.13. The majority described Judge Alito’s position as one grounded in speculation and at odds with Supreme Court precedent that establishes that any ambiguities in deportation statutes should be construed in favor of the deportee. The court specifically cited *St. Cyr*, among other Supreme Court cases, as support for this pro-deportee proposition.

Alito’s deference to the BIA or the IJ is often questionable. In *Tipu v. INS*, 20 F.3d 580 (3d Cir. 1994), for example, Judge Alito dissented from the majority’s determination that the BIA had failed to consider important factors in the deportee’s favor that required remanding the matter to the BIA for further proceedings. The INS began deportation proceedings against Mohammad Tipu a few years after he had been convicted on narcotics charges. Tipu conceded his deportability but applied for relief from deportation under the waiver of inadmissibility provision of § 212(c) of the INA. The BIA denied Tipu a § 212(c) waiver, according to the majority, without properly weighing at least four important factors: (1) the hardship to Tipu’s family who depended on him for financial support; (2) Tipu’s minor role in the heroin conspiracy for which he was convicted; (3) Tipu’s complete rehabilitation; and (4) Tipu’s property and business ties to the United States. In dissent, Judge Alito criticized the majority for second-guessing the manner in which the BIA weighed the different factors in denying Tipu a § 212(c) waiver, arguing that the majority inserted its own judgment rather than deferring to the BIA’s decision.

Judge Alito has more willingly remanded matters to the BIA in rare situations where he finds that the BIA has misinterpreted a statute than in *Tipu*-like situations where the BIA’s discretionary determination is at issue. In *Partyka v. Attorney General of the United States*, 417 F.3d 408 (3d Cir. 2005), for example, Judge Alito concurred partly in and dissented partly from the majority’s decision to vacate the BIA’s removal order against a legal permanent resident convicted of third-degree aggravated assault on a police officer. Police officers first arrived at Partyka’s house to respond to an altercation between Partyka and his father. When the officers informed Partyka that he was to be arrested, he walked down the stairs of his house and was attacked by a K-9 police dog that bit him repeatedly on his legs, head, and face. The officers reported that Partyka spat at, wrestled with, kicked, and punched them as they were trying to gain control of him and the dog. Partyka’s injuries were so serious that he was hospitalized for three days. The BIA summarily affirmed the IJ’s finding that Partyka’s offense constituted a crime of moral turpitude warranting removal. A majority panel of the Third Circuit, however, overruled the BIA’s decision on the ground “that negligently inflicted bodily injury lacks the

inherent baseness or depravity that evinces moral turpitude . . . and therefore, Partyka was not convicted of such a crime.” *Id.* at 416.

Judge Alito agreed with the majority that the IJ misread the New Jersey statute at issue in the case, but disagreed with the majority’s conclusion that assault cannot be a crime of moral turpitude unless the perpetrator has the intent to inflict bodily harm or recklessly inflicts the same harm. He believed that the court should have remanded the case to the BIA so that the BIA could first “apply its understanding of the concept of a crime of moral turpitude to the New Jersey statute as properly construed.” *Id.* at 417.

In another instance, Judge Alito construed a deportation statute in favor of a deportee. In *Oyebanji v. Gonzalez*, 418 F.3d 260 (3d Cir. 2005), in fact, Judge Alito wrote a unanimous opinion holding that a conviction for vehicular homicide was not an “aggravated felony” warranting removal. He applied the Supreme Court’s decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), ruling that a criminal DUI offense that either lacks a mens rea element or requires a strong showing of negligence in the operation of a vehicle is not a “crime of violence” under the INA. Because the Court repeatedly explained in *Leocal* that “accidental” conduct is not enough to qualify as a crime of violence, Judge Alito found that Oyebanji’s DUI and recklessness did “not [amount to] a crime of violence in the relevant sense.” *Id.* at 265. Judge Alito nevertheless ended his opinion by hinting that the government should appeal its decision to the Supreme Court: “While we appreciate the force of the government’s arguments to the contrary, we believe that those arguments must be directed to the Supreme Court or Congress.” *Id.*

Another example of Judge Alito’s deference to the BIA is his opinion in *Acosta v. Ashcroft*, 341 F.3d 218 (3d Cir. 2003). There, Judge Alito writing for a unanimous panel dismissed Ramon Acosta’s petition for review of a final order of deportation because he concluded that Acosta, a legal permanent resident, had been convicted of a deportable offense under the INA. Acosta pled nolo contendere in Pennsylvania state court to a single charge of heroine possession and was ordered to serve one year of probation. The BIA found Acosta deportable on the ground that he had been convicted of a state law violation relating to a controlled substance within the meaning of the INA. Judge Alito agreed with the BIA’s decision, finding that Ramon’s plea and his one-year probationary punishment fell within the language of the INA’s “conviction” definition. Judge Alito also rejected Acosta’s alternative argument that the INA’s definition of “conviction” implicitly incorporated the Federal First Offenders Act (FFOA), which provides for discretionary dismissal of federal drug charges upon a first-time offender’s successful completion of probation.

The Ninth Circuit reached an opposite result in *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), holding on equal protection grounds that “aliens may not be treated differently based on the ‘mere fortuity’ that they happen to have been prosecuted under state rather than federal law . . . as there is no rational basis for distinguishing among the affected groups.” *Id.* at 748 (citation omitted). Judge Alito attempted to reconcile *Lujan-Armendariz* by first pointing out that the BIA has adopted that holding only in the Ninth Circuit. *See In re Salazar-Regino*, 23 I&N Dec. 223, Int. Dec. No. 3462 (BIA 2002) (“[E]xcept in the Ninth Circuit, a first-time simple drug possession offense expunged under a state rehabilitative statute is a conviction under Section 101(a)(48)(A) of the [INA].”). He then went on to explain that there is a rational basis

for a distinction between aliens whose criminal cases are dismissed under the federal FFOA and those whose charges are handled under similar state schemes.<sup>15</sup>

### C. Other Immigration Cases

In *Soltane v. US Department of Justice*, 381 F.3d 143 (3d Cir. 2004), Judge Alito, writing for a unanimous panel, rejected the decision of the Administrative Appeals Office of the INS denying Annagret Goetze, a German nonimmigrant employee, a special immigrant religious worker visa to work as a houseparent, music instructor, and religious instructor at a non-profit organization dedicated to providing services to young adults with mental disabilities through Christian education. The INS determined, among other things, that the proposed position of a houseparent was neither a religious occupation nor a religious vocation that qualified Goetze for a religious worker visa. Judge Alito disagreed with the INS and held that a religious occupation need not involve purely religious activities to be construed as such, it need only have “some religious significance.” *Id.* at 150. The court ultimately remanded the matter back to the INS to consider all relevant evidentiary factors in the case and to properly interpret its regulation defining “religious occupation.”

### D. Terrorism & Torture

Judge Alito has joined two immigration decisions involving questions of terrorism and torture.<sup>16</sup>

In a recent political asylum case that turned on an interpretation of the term “material support” as an aspect of engaging in terrorist activities within the meaning of the INA, *Sing-Kaur v. Ashcroft*, 385 F.3d 293 (3d Cir. 2004), Judge Alito joined Judge Aldisert’s opinion against a Sikh asylum-seeker. Sing-Kaur sought asylum on the ground that he would be arrested and persecuted in India because he belonged to the Sikh community. While Sing-Kaur first applied for asylum relief, he later acquired a skilled worker visa, which enabled him to apply for adjustment of status. During his deportation proceedings, the IJ learned that Sing-Kaur helped members of Babbar Khalsa and Sant Jarnail Singh Bhindra Wala, Sikh militant groups fighting against the Indian government, by providing them with food and helping to set up tents for them. The IJ, nevertheless, granted Sing-Kaur’s adjustment of status application, which the BIA ultimately vacated. The majority, including Judge Alito, affirmed the BIA’s finding that Sing-Kaur “engaged in terrorist activities” and, therefore, was ineligible for adjustment of status. Specifically, the court found that the BIA’s conclusion that “material support” included “the provision of food and setting up tents” was not “arbitrary, capricious or manifestly contrary to the statute.” *Id.* at 299 (citations omitted).

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<sup>15</sup> Alito explained that Congress could have thought that someone “whose federal charges are dismissed under the FFOA are unlikely to present a substantial threat of committing subsequent serious crimes” but “by contrast, Congress may have been unfamiliar with the operation of state schemes that resemble the FFOA.”

<sup>16</sup> In a letter to then-FBI Director William Webster, dated January 10, 1986, Alito wrote that the Constitution does not “apply extraterritorially to nonresident aliens” and “grants only fundamental rights to illegal aliens within the United States.” CITE The letter purports to describe existing law. Those principles, however, have again been called into question by some of the Administration’s tactics in the war against terrorism.

Judge Fisher, however, dissented from the majority's decision on the basis that Congress did not intend "material support" to include "acts that are not of importance or relevance to terrorism." *Id.* at 303. He further noted that Sing-Kaur testified that the food and tents were set up solely for religious meetings, and that the BIA erred in finding that Babbar Khalsa and Sant Jarnail Singh Bhindra Wala were terrorist organizations. Thus, Fisher concluded: "The acts here are not of the degree and kind contemplated by the 'material support' provision – material acts in support of terrorism." *Id.* at 301.

Judge Alito joined another opinion, *Auguste v. Ridge*, 395 F.3d 123 (3d Cir. 2005), in which Judge Fuentes held, among other things, that indefinite detention and deplorable conditions in Haitian prisons for a Haitian national did not rise to the level of "torture" under the U.N. Convention Against Torture. The panel decision, which was unanimous, defined "torture" as an act that must be inflicted with specific intent to cause severe pain and suffering. Because petitioner failed to establish that it was more likely than not that he would be subjected to physical beatings by Haitian guards if removed to Haiti, the court denied his petition for review.

## VI. CRIMINAL JUSTICE, DRUG POLICY AND PRISONERS' RIGHTS

In cases involving the validity of warrants under the Fourth Amendment, Judge Alito consistently defers to law enforcement, generally presuming that officers have acted in good faith. In Fourth Amendment cases involving searches without a warrant, however, Judge Alito has written several opinions ruling in favor of a suspect's rights, and he has also protected the rights of employees subject to drug testing on the job. Some of Alito's most disturbing opinions involve the death penalty. In one troubling decision, he narrowly interpreted a defendant's Sixth Amendment right to effective assistance of counsel – a ruling that was subsequently reversed by the Supreme Court. In another, he dissented from an *en banc* decision finding that the prosecution had used its peremptory challenges to strike all the black prospective jurors.

### A. Fourth Amendment

#### 1. *The Warrant Requirement*

Judge Alito has consistently voted to uphold questionable warrants and almost uniformly has found that police officers acted in good faith when executing a warrant. For example, Judge Alito dissented from a panel decision in *Doe v. Groody*, 361 F.3d 232 (3d Cir. 2004), in which the majority found that the police violated the Fourth Amendment by a strip searching a woman and her ten-year old daughter who were found in the home of a suspected drug dealer. The search warrant application in *Doe* was accompanied by an affidavit listing everything and everyone the police wanted to search. *Id.* at 236. When the magistrate judge signed the warrant, he incorporated specific parts of the affidavit, but not the request to search anyone on the premises. *Id.* Instead, the warrant limited the search of persons to the suspect, John Doe. *Id.* When the officers arrived at the house, they found John Doe, his wife, Jane Doe, and the couple's ten-year old daughter, Mary Doe. *Id.* at 237. Although neither Jane nor Mary Doe was named in the warrant, a female officer removed them to a bathroom and strip searched them. *Id.* Jane and Mary Doe subsequently brought a civil rights action under § 1983 arguing that their Fourth Amendment rights had been violated.

Writing for the majority, Judge Michael Chertoff—now the Director of Homeland Security—held that the warrant clearly limited police authority to the search of John Doe and did not authorize the search of anyone else found on the premises. *Id.* at 239. Recognizing that “the warrant plays a critical role under the Fourth Amendment,” Judge Chertoff explained that the officers were obligated to respect the specific limits set by the warrant and could not assume that the magistrate judge intended to incorporate everything requested in the affidavit. *Id.* at 242. Judge Chertoff further noted that to hold otherwise risked “transform[ing] the judicial officer into little more than the cliché ‘rubber stamp.’” *Id.* at 242-43. Finding that the law prohibiting the officers’ conduct was clearly established at the time of the search, Judge Chertoff also rejected the officer’s request for qualified immunity. *Id.* 244.

In his dissent, Judge Alito disagreed with the majority’s reading of the search warrant, finding that the warrant authorized the search of anyone found on the premises or that, at the very least, a reasonable officer could have read it as doing so. *Id.* at 244. Although acknowledging that the warrant only named John Doe to be searched, Judge Alito found the warrant to be ambiguous because another part of the warrant had incorporated the affidavit submitted in support of the warrant. *Id.* Judge Alito thus held that it was proper for the officers to consider the list of items and people to be searched that was contained in the affidavit. *Id.* Even if the warrant did not confer authorization to search other people, Judge Alito would have held that a reasonable officer could have believed that it did and was thus entitled to qualified immunity. *Id.* at 248. Noting that he “share[d] the majority’s visceral dislike of the intrusive search of John Doe’s young daughter,” Judge Alito nonetheless found that such a search was not unconstitutional where, as here, “a warrant had issued and was not illegal on its face.” *Id.* at 249.

In *United States v. Hodge*, 246 F.3d 301 (3d Cir. 2001), the defendant was charged with possession of drugs and firearms and moved to suppress the evidence obtained in a search of his home before his arrest. Although the officers who searched the defendant’s home had a warrant, the warrant was supported only by an affidavit from the investigating officer and presented no direct evidence that drugs or drug paraphernalia would be found at the defendant’s home. *Id.* at 304.

The district court granted the defendant’s motion to exclude evidence seized from his home on the ground that the affidavit supporting the warrant did not establish a nexus between the defendant’s drug activity and his home and thus did not provide a sufficient basis for probable cause to search the home. *Id.* at 305. Writing for a unanimous panel, Judge Alito reversed the district court. Despite the lack of direct evidence, Judge Alito reasoned that an informant’s detailed tip, the use of a rental car as is common in the drug trade, and the fact that defendant appeared to carry the drugs in the front of his pants all “combine to suggest that [defendant] was an experienced and repeat drug dealer who would need to store evidence of his illicit activities somewhere. It is reasonable to infer that a person involved in drug dealing on such a scale would store evidence of that dealing at his home” *Id.* at 306 (citations omitted). Judge Alito also pointed to the fact that a police officer believed that defendant’s home was likely to contain drugs and held that the magistrate judge “was entitled to give considerable weight to the conclusions of [this] experienced law enforcement officer” in finding sufficient

evidence to support the issuance of a warrant. *Id.* at 307 (internal quotation and citation omitted).

Finally, Judge Alito held that even if a substantial basis for finding probable cause were lacking and the warrant was invalid, the evidence obtained through the search would be admissible under the good faith exception to the exclusionary rule. *Id.* This exception instructs that suppression of evidence “is inappropriate when an officer executes a search in objectively reasonable reliance on a warrant’s authority.” *Id.* (quoting *United States v. Williams*, 3 F.3d 69, 74 (3d Cir. 1993)). Although there was evidence in the present case that the officer who presented the affidavit and searched the defendant’s home knew that the warrant was deficient, Judge Alito held that the officer’s subjective belief did not matter and that an objective officer, knowing the circumstantial evidence of the defendant’s drug activity, could reasonably conclude that there was probable cause for the warrant. 246 F.3d at 307.

In *United States v. Kim*, 307 F.3d 137 (3<sup>rd</sup> Cir. 2002), Judge Alito upheld the seizure of business records from the defendant’s place of business. Declining to rule on whether the warrant was supported by probable cause, Judge Alito held that the good faith exception to the exclusionary rule applied and thus refused to suppress the evidence seized from the business. *Id.* at 145. Based on a broad and general warrant, the police officers seized documents written in Chinese—a language none of the officers then present could read or speak. Significantly, Judge Alito held that the seizure of the documents in Chinese would violate the Fourth Amendment only if, upon later examination, it turned out that they were outside the scope of the warrant. *Id.* at 153-54. In dissent, Judge Ambro pointed to the laundry list of items the warrant allowed to be seized, unqualified by any relevant time period or specific subject matter, and argued that the warrant was so “inexact that the executing officers could not have reasonably presumed its validity.” *Id.* at 155. Judge Ambro also criticized the majority for applying the good faith exception, noting that the finding good of faith in this case allowed the “good faith exception to swallow the Fourth Amendment rule.” *Id.* at 160.

In *Baker v. Monroe Township*, 50 F.3d 1186 (3d Cir. 1995), Judge Alito dissented from the majority opinion in this case, which questioned both the search warrant and the manner in which it was executed. Inez Baker and her three children arrived at the home of Mrs. Baker’s oldest son, Clementh Griffith. *Id.* at 1188. Unbeknownst to the Bakers, Griffith was under investigation for drug offenses, and as the family approached the house, police from three jurisdictions were commencing a drug raid there. *Id.* Mrs. Baker and her children were threatened with guns and handcuffed—some for as long as twenty-five minutes—and one of Mrs. Baker’s sons was taken inside and searched. *Id.* at 1189.

Bringing a claim under § 1983, Mrs. Baker and her children alleged, among other things, that the police violated their Fourth Amendment rights to be free from unreasonable search and seizure. The Third Circuit affirmed the district court’s grant of summary judgment on several of the claims but reversed on the questions of excessive force and the legality of the search. The court held that, under the circumstances, there was no evidence to justify the type of force used by the officers and that if Officer Armstrong, the one named defendant, knew of and acquiesced to such use of force, he would be liable for the violation. *Id.* at 1194.

Judge Alito dissented, arguing that there was no suggestion in the record that Armstrong had actual knowledge of the allegedly illegal conduct and therefore was entitled to summary judgment. *Id.* at 1202. Judge Alito also disagreed with the majority’s conclusion that the search warrant clearly lacked the particularity required by the Fourth Amendment and thus could not have authorized the search and seizure of Mrs. Baker and her children. The warrant consisted of a form authorizing the search of “the (x) premises (x) person (x) vehicle described below.” *Id.* at 1188, n. 1. Although the x’s were filled in, the space for the promised description contained only an identification of the premises to be searched and mentioned nothing about any persons. *Id.* The majority reasoned that “[t]he only common-sense interpretation of the document is that no one ever bothered to complete it to include specified persons as well as premises.” *Id.* at 1189, n. 1. Judge Alito disagreed, arguing that the majority’s interpretation required an assumption that the magistrate judge made a “serious and basic error” in authorizing the search of named persons but failing to ensure that the names were included in the warrant. *Id.* at 1198. He continued: “‘To insist nonetheless that the individual be otherwise described when circumstances will not permit it, would simply deny the government a needed power to deal with crime, without advancing the interest the [Fourth] Amendment was meant to serve.’” *Id.* (quoting *State v. Simone*, 288 A.2d 849, 850 (1972)).

## 2. *Search and Seizure*

Judge Alito consistently defers the judgment and perceived good faith of law enforcement officers in executing warrants. In cases involving warrantless searches and seizures, however, Judge Alito has exhibited a higher regard for claimants’ Fourth Amendment rights. In *United States v. Kithcart*, 134 F.3d 529 (3d Cir. 1998), for example, Judge Alito reversed the defendant’s conviction for being a felon in possession of a firearm on the ground that the firearm was recovered during an unconstitutional arrest and subsequent search of the defendant’s car.

In *Kithcart*, an officer investigating several robberies received information that the alleged perpetrators were “two black males in a black sports car.” *Id.* at 530. On the basis of this information, the officer pulled over Kithcart and his companion because they were two black males driving a black Nissan 300ZX. *Id.* The officer then arrested Kithcart and discovered a gun when searching him after the arrest. *Id.* Kithcart argued that the gun should have been suppressed because it was discovered pursuant to an unlawful arrest. *Id.*

Under the Fourth Amendment, when a warrantless search is made pursuant to an arrest, “‘the constitutional validity of the search . . . must depend upon the constitutional validity of the . . . arrest.’” *Id.* at 531 (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)). Whether that arrest is constitutional turns on whether at the moment the arrest was made, the officer had probable cause to make it. *Id.* Joined by Judges Rendell and McKee, Judge Alito held that the officers did not have probable cause to arrest Kithcart. *Id.* at 532. Judge Alito firmly rejected the government’s argument that the police were justified in their actions under a totality of circumstances test: “In other words, armed with the information that two black males driving a sports car were believed to have committed three robberies in the area some relatively short time earlier, [the officer] could not justifiably arrest any African-American man who happened to drive by in any type of black sports car.” *Id.*



Because the officers might have been justified in stopping the defendant's car and temporarily detaining the defendant, Judge Alito remanded the case so that the district court could determine whether the officers had reasonable suspicion sufficient to warrant an investigative stop. *Id.* Arguing that the prosecutor had the opportunity to present such evidence in the first suppression hearing and should not be given a second chance to do so, Judge McKee dissented from the majority's decision to remand. *Id.* at 535.

In *Bolden v. Southeastern Pennsylvania Transportation Authority*, 953 F.2d 807 (3d Cir. 1991) (en banc), Judge Alito, writing for a divided *en banc* court, held that the Pennsylvania Transit Authority's (SEPTA) random drug testing of a maintenance custodian was unconstitutional because SEPTA had failed to show that the employee's job posed a substantial risk of harm to others. *Id.* at 823-24. Indeed, the main thrust of SEPTA's argument was that its drug testing of persons in Bolden's position was justified because those individuals might injure themselves if their faculties were impaired by drug use. *Id.* at 823. Relying on governing Supreme Court precedent, Judge Alito rejected this argument, and held that the court would not "endorse[] the proposition that compulsory, suspicionless drug testing may be conducted to prevent an employee from causing harm to himself, rather than to others." *Id.*

Judge Alito also rejected SEPTA's argument that Bolden's "silent submission to an otherwise unconstitutional search on pain of dismissal from employment constituted consent as a matter of law." *Id.* at 824. However, Judge Alito held that the union representing Bolden had consented to the random drug testing of its members, such as Bolden, covered by a collective bargaining agreement. *Id.* at 828-29. Judge Nygaard dissented from this portion of the majority's opinion, arguing that "[u]nions do not have inherent actual authority to waive such constitutional rights; [otherwise] individual rights would be sacrificed for some perceived collective good as unions negotiate to get economically related benefits for their members as a whole." *Id.* at 837 (Nygaard, J., concurring in part and dissenting in part). (Another judge, Judge Greenberg, also dissented on the ground that the case against SEPTA was barred by the Eleventh Amendment. *See id.* at 831 (Greenberg, J., dissenting)).<sup>17</sup>

The issue of third-party consent was also pivotal in *United States v. Lee*, 359 F.3d 194 (3d Cir. 2004), where Judge Alito held that there was no violation of a defendant's Fourth Amendment rights where FBI officials permanently installed audio and video recording devices in his hotel room and intermittently recorded his conversations with an informant who had consented to the recording. The government informant in *Lee* rented a hotel suite in the defendant's name. *Id.* at 199. With the informant's consent, the FBI concealed a video camera and microphone in the suite. *Id.* The camera could swivel 360 degrees and transmit video

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<sup>17</sup> Two years later, however, Judge Alito joined an opinion by Judge Scirica holding that an arbitration award that required a shipping company to reinstate a helmsman terminated for a positive drug test should be vacated as a violation of public policy. *See Exxon Shipping Company v. Exxon Seamen's Union*, 993 F.2d 357 (3d Cir. 1993) ("*Exxon I*"). Shortly thereafter Judge Alito applied the court's holding in *Exxon I* to affirm the district court's order vacating an arbitration award that reinstated an employee found to be intoxicated while on duty. *Exxon Shipping Company v. Exxon Seamen's Union*, 11 F.3d 1189, 1190 (3d Cir. 1993).

images, including part of the bedroom area of the defendant's suite, 24 hours a day. *Id.* at 210. The FBI agent monitored the hidden surveillance equipment from an adjacent hotel room the government had rented for that purpose. *Id.* at 199.

Judge Alito held that the surveillance did not violate the Fourth Amendment because the defendant had no legitimate expectation in the privacy of voluntary conversations with the informant. *Id.* at 199-200. Relying on the officers' assertions of good faith, Judge Alito also rejected the defendant's argument that the Fourth Amendment is violated by the installation of a fixed electronic device since in this case, "[t]here is no evidence that conversations were monitored when [the informant] was absent from the room." *Id.* at 203. Judge Alito further explained that the potential for abuse in other cases was minimal because criminal and civil penalties as well as the officers' regard for efficient use of time would deter surveillance at times when the informant was not present. *Id.* at 202-3.

In a lengthy dissent, Judge McKee "characterize[d] the majority's trivialization of the potential for abuse as naïve," *id.* at 224, and criticized Judge Alito for dispensing with the warrant requirement "where, as here, the government's ability to see intimate details of a defendant's daily activities as he/she goes about his/her business in the presumed intimacy of a hotel suite depends solely on the discretion of the unsupervised agent controlling the monitoring equipment." *Id.* at 220-21. Judge McKee also noted that the type of surveillance at issue in this case was particularly invasive, making the potential for abuse—and the need for objective supervision—that much greater. *Id.* at 223-24.

#### B. Jury Discrimination

In his most troubling opinion on jury discrimination -- discussed in the Death Penalty Section below -- Judge Alito rejected a defendant's claim that the prosecution used his peremptory challenges to eliminate all the black prospective jurors. *See Riley v. Taylor*, 237 F.3d 300 (3d Cir. 2001). Judge Alito's decision in this case was subsequently reversed by the Third Circuit en banc. *See Riley v. Taylor*, 277 F.3d 261 (3d Cir. 2001) (en banc).

In *Pemberthy v. Beyer*, 19 F.3d 857 (3d Cir. 1994), *cert. denied* 513 U.S. 969 (1994), Judge Alito wrote an opinion reversing a district court ruling that the prosecution had improperly struck Latino jurors. The defendants in the case were convicted in state court of various drug offenses. Some of the key evidence at trial involved English translations of Spanish testimony and wiretapped conversations. At trial, the prosecutor used its peremptory strikes to remove five jurors who spoke Spanish. The defendants were subsequently convicted and sentenced. On collateral review, the district court held that the striking of Spanish-speaking jurors excluded jurors based on their ethnicity or national origin. Writing for a unanimous panel, Judge Alito reversed. Because two of the five Spanish speakers who were excluded were not Latino, he concluded that the prosecution had not committed unconstitutional discrimination on the basis of ethnicity.

Judge Alito also rejected claims of discrimination in jury selection in *Ramseur v. Beyer*, 983 F.2d 1215 (3d Cir. 1992) (en banc), *cert. denied* 508 U.S. 947 (1993). In *Ramseur*, the defendant unsuccessfully challenged his criminal conviction on the ground that the grand jury

selection process was racially discriminatory. The majority found no discrimination in the facts. Judge Alito wrote a separate concurring opinion arguing that criminal defendants lacked standing to challenge racial discrimination in the grand jury, as opposed to the trial jury. In response, the majority stated that Judge Alito “underemphasized the community’s interest in the jury selection process.” *Id.* at 1228, n.8.

### C. Death Penalty

Judge Alito has voted to reverse a death sentences in two cases. *See Bronshtein v. Horn*, 404 F.3d 700 (3d Cir. 2005) (relief granted under *Simmons v. South Carolina*, 512 U.S. 154 (1994)); *Carpenter v. Vaughn*, 296 F.3d 138 (3d Cir. 2002) (petitioner's counsel was ineffective for failing to object to trial court's inaccurate instruction as to meaning of life sentence under Pennsylvania law). However, the majority of his opinions read governing Supreme Court precedent favoring death row petitioners narrowly, raising serious questions about the extent to which he will uphold their constitutional rights.

Judge Alito rejected an inmate’s claims in *Rompilla v. Horn*, 355 F.3d 233 (3d Cir. 2004) and was subsequently reversed, 5-4, by the Supreme Court. *See Rompilla v. Beard*, 125 S.Ct. 2456 (2005) (with Justice O'Connor in the majority). In *Rompilla*, the petitioner claimed that trial counsel had been ineffective, and that the jury should have been instructed that any life sentence Rompilla received would be without the possibility of parole.

The central question with respect to Rompilla's ineffective assistance of counsel claim was whether trial counsel—an assistant public defender just two and a half years out of law school and participating in her first homicide trial -- had been deficient in failing to obtain records containing mitigating evidence.<sup>18</sup> The record, subsequently uncovered by Rompilla's post-conviction lawyers included evidence that: his parents were severe alcoholics, he was beaten and abused by this father (including being locked on one occasion in a wire dog pen filled with excrement), he was repeatedly subject to verbal abuse by both parents, he was prohibited as a child from visiting other children or speaking to anyone on the phone, and he was made to attend school in rags. In addition petitioner's post-conviction mental-health experts performed testing that found that Rompilla suffered from “organic brain damage, an extreme mental disturbance significantly impairing several of his cognitive functions,' [that his] 'problems relate back to his childhood [and] were likely caused by fetal alcohol syndrome,'...[and that] Rompilla's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired at the time of the offense.” 125 S.Ct. at 2469, citing 355 F.3d at 279 (Sloviter, J., dissenting).

Judge Alito acknowledged that, with “the benefit of hindsight, we know that these records contain useful information,” but held that trial counsel’s failure to obtain the records was

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<sup>18</sup> The records included: petitioner's school records, which “reveal[ed] a number of IQ test results in the mentally retarded range, low achievement scores, placement in special education classes, childhood neglect, problems with alcohol, and an alcoholic mother” (355 F.3d at 240); petitioner's prison records, which contained the results of “psychological tests ... show[ing] serious abnormalities on the schizophrenia, paranoia, neurosis and obsessive/compulsive scales” (*id.* at 282 (Sloviter, J., dissenting)); and a file in the courthouse on petitioner's prior convictions, which “would have destroyed the benign conception of Rompilla's upbringing and mental capacity [that] defense counsel had formed....” 125 S.Ct. at 2468.

not unreasonable given counsel's extremely limited investigative resources (two investigators for 2,000 cases) and given that counsel's interviews with the petitioner and some members of his family "suggested that Rompilla's home environment, schooling, and mental condition were not promising avenues of investigation in the search for mitigating evidence." *Id.* at 252<sup>19</sup> The Supreme Court in reversing held that "even when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial." *Rompilla*, 125 S.Ct. at 2460.

Judge Alito also rejected Rompilla's claim that under *Simmons v. South Carolina*, 512 U.S. 154 (1994), *Kelly v. South Carolina*, 534 U.S. 246 (2002), and *Shafer v. South Carolina*, 532 U.S. 36 (2001), he was entitled to an instruction informing the jury that a life sentence would be without the possibility of parole. Judge Alito read *Simmons* narrowly to require a parole ineligibility instruction only when the prosecutor argues the issue of future dangerousness, but not when the prosecution's evidence implicitly raises the issue. *See Rompilla*, 355 F.3d at 265-66. Judge Alito acknowledged that the Supreme Court's decision in *Kelly* "arguably broadened the holding in *Simmons*" by requiring a parole ineligibility instruction when the prosecution's evidence raises the issue of future dangerousness. *Id.* at 266-67. However, Alito found that under provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (\*AEDPA\*), federal court review "is limited to deciding whether a state court decision is 'contrary to' or an 'unreasonable application' of Supreme Court precedent 'as of the time of the relevant state court decision.'" Accordingly, he denied petitioner relief because *Kelly* was decided after the state courts had rejected the petitioner's *Simmons* claim. *Id.* at 267.

In dissent, Judge Sloviter argued that the majority too narrowly interpreted the relevant provisions of AEDPA, and that under Supreme Court precedent federal courts could apply a subsequently-decided Supreme Court decision if that decision made no new law and was simply "illustrative of the proper application" of a prior holding by the Supreme Court. *Id.* at 291. Furthermore, she argued that "[t]here is no indication anywhere in the opinion that the *Kelly* majority thought they were doing anything other than applying *Simmons*." *Id.* On review, the United States Supreme Court did not address the *Simmons* claim, explaining: "Because we reverse on ineffective-assistance grounds, we have no occasion to consider [the *Simmons* claim]. It is enough to say that any retrial of Rompilla's sentence will be governed by the *Simmons* line of cases." 125 S.Ct. at 2461, n.1.

In *Riley v. Taylor*, 277 F.3d 261 (3d Cir. 2001) (*en banc*), Judge Alito dissented from the majority's holding that the prosecution had violated the Supreme Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986), by using its peremptory challenges in a racially discriminated manner. The case involved a 22-year-old black man who shot a 59-year-old white man in the leg at the urging of his co-defendant (who was sentenced to life imprisonment in exchange for his

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<sup>19</sup> Judge Alito reasoned that "it was permissible for [trial counsel] to consider [the] office's limited investigative resources in determining the extent of the investigation that should be conducted with respect to Rompilla's childhood, family, and mental condition." *Rompilla*, 355 F.3d at 254. He stated that "we may hope for the day when every criminal defendant receives" representation by "the most resourceful defense attorneys with bountiful investigative support," but held that such representation "is more than the Sixth Amendment demands." *Id.* at 258.

testimony against Riley). *Id.* at 270-71. When the victim shouted, "You f'ing niggers" and "threw a wine bottle that struck Riley in the arm," Riley then shot the victim in the chest, killing him. *Id.*

At Riley's trial, the prosecutor used peremptory challenges to strike all three black prospective jurors and as a result his jury was all-white. *Id.* at 276. In his state and federal post-conviction petitions, Riley claimed that the prosecutor's striking of all black prospective jurors violated the Supreme Court's decision in *Batson*, which held that attorneys could not use peremptory challenges to strike prospective jurors because of their race. In a state hearing, the prosecutor testified that he struck the first black prospective juror, Ray Nichols because he recalled that Nichols "paused" before stating that he could return a death sentence, although his answers regarding his ability to impose a death sentence were the same as a white prospective juror (who was not struck), *Id.* at 276, 283. The prosecutor testified that he struck the second black prospect, Lois Beecher, because she stated that she did not think she could impose a death sentence. *Id.* As to the third black prospective juror, Charles McGuire, the prosecutor testified that he "presumed" that McGuire would not give the trial his "full time and attention" in light of a request to be relieved of jury duty. *Id.* Riley's attorney presented evidence of the prosecutor's handwritten notes indicating that a white juror who was allowed to sit on the jury, Charles Reed, had similarly requested to be excused from jury service. *Id.* at 276-77. Riley's counsel also introduced evidence that the same prosecutor's office had "used its peremptory challenges to remove every prospective black juror in the three other first degree murder trials that occurred within a year of" Riley's trial. *Id.* at 277.

The state courts and the federal district court denied Riley relief, and Judge Alito wrote the decision of a divided panel of the Third Circuit affirming. *See Riley v. Taylor*, 237 F.3d 300 (3d Cir. 2001). A majority of the Third Circuit then granted Riley's petition for rehearing *en banc* and found that the prosecutor had violated *Batson*. In its opinion, the majority held that the state courts had misinterpreted *Batson* and thus had never considered "the weaknesses in the State's explanations" for striking Nichols and McGuire or Riley's evidence showing that the prosecutor's office had removed every prospective black juror in the three other first degree murder trials that occurred within a year of Riley's trial. *Id.* at 280, 281.

In his dissent, Judge Alito conceded that "Riley's strongest *Batson* claim concerns the prosecution's strike of Charles McGuire," but nevertheless rejected Riley's claim. *Id.* at 322-25. Judge Alito dismissed the lack of any differences between McGuire and Reed by stating that "[m]any decisions have held that *Batson* is not contravened simply because two jurors exhibit similar characteristics and one is excluded while the other is retained." *Id.* at 324-5 & n. 9 (citations omitted).<sup>20</sup> In addition, Judge Alito was highly critical of the majority's reliance on statistical evidence, writing that:

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<sup>20</sup> Subsequent Supreme Court decisions cast doubt on Alito's approach. Two years after the *Riley* decision, the United States Supreme Court analyzed the prosecutor's disparate treatment of white and black jurors in holding that the petitioner was entitled to a certificate of appealability because reasonable jurists could have debated whether the prosecution's use of peremptory strikes against African-American prospective jurors was the result of purposeful discrimination. *See Miller-El v. Cockrell*, 537 U.S. 322, 343 (2003). In a subsequent decision in the same case, *Miller-El v. Dretke*, 125 S.Ct. 23172325 (2005), the Court held that the state court's factual findings as to the nonpretextual nature of the prosecution's race-neutral explanations for its use of peremptory challenges to excuse 10 of 11 black venirepersons were wrong and that federal habeas relief was warranted. According to the Court: "If a

The dangers in the majority's approach can be easily illustrated. Suppose we asked our "amateur with a pocket calculator" whether the American people take right – or left-handedness into account in choosing their Presidents. Although only about 10% of the population is left-handed, left-handers have won five of the last six presidential elections. Our "amateur with a calculator" would conclude that "there is little chance of randomly selecting" left-handers in five out of six presidential elections. But does it follow that the voters cast their ballots based on whether a candidate was right – or left-handed? *Id.* at 327.

As Judge Sloviter pointed out in her majority opinion, "[t]o suggest any comparability [between the election of left-handers in five of six presidential elections and] 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." *Id.* at 292.

The *en banc* court also upheld Riley's claim that the prosecutor's statements during closing argument violated the Supreme Court's decisions in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), and *Romano v. Oklahoma*, 512 U.S. 1 (1994), which held that a prosecutor cannot mislead a capital jury as to the limited scope of appellate review in death penalty cases.<sup>21</sup> The prosecutor began his summation at the penalty phase by stating:

Let me say at the outset that what you do today is automatically reviewed by our Supreme Court and that is why there is an automatic review on the death penalty. That is why, if you return a decision of death, that is why you will receive and have to fill out a two-page interrogatory that the Court will give you. This is an interrogatory that specifically sets out the questions that the State request and whether or not you believe it beyond a reasonable doubt and if you want in your determination, if you believe the sentence should be death than each and every one of you has to sign this. This goes to the Supreme Court. That is why it is concise and we believe clear and it should be looked carefully on and answered appropriately. *Riley*, 277 F.3d at 296 (emphasis in original.)

The majority in *Riley* pointed out that the Delaware Supreme Court's "automatic review" of death penalty cases is limited to whether, "considering the totality of evidence in aggravation and mitigation which bears upon the particular circumstances or details of the offense and the character and propensities of the offender, the death penalty was either arbitrarily or capriciously imposed or recommended . . ." *Id.* at 296. Accordingly, the majority concluded that the prosecutor's statement "was misleading as to the scope of appellate review" by the Delaware Supreme Court. *Id.* at 296. By contrast, in his dissent, Judge Alito asserted that there was no

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prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step."

<sup>21</sup> These cases prohibit prosecutorial comments at capital penalty phases that "mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." *Romano*, 512 U.S. at 9.

error because "[e]veryone knows that after a death sentence is imposed, there are tiers of appellate review designed to catch errors . . . ." *Id.*

Judge Alito also dissented in *Smith v. Horn*, 120 F.3d 400 (3d Cir. 1997. *cert. denied*, 522 U.S. 1109 (1998), involving the propriety of a jury instruction. The trial court failed adequately to instruct the jury on an essential element of the offense of first-degree murder (i.e., specific intent to kill). *Id.* at 403-04, 416. The Third Circuit reversed the petitioner's first-degree murder conviction, finding that the error was not harmless under the facts of the case. *Id.* at 414-20.

While recognizing that the provisions of AEDPA did not apply to the petitioner's case (because the AEDPA became effective after the petitioner filed his habeas petition), Judge Alito's dissent would have required the petitioner to exhaust his claim in state court and to show that the claim was not procedurally defaulted. *Id.* at 420 n. 1, 422-23. Furthermore, reading governing Supreme Court cases extremely narrowly, Judge Alito asserted that the petitioner should have been denied relief because the Supreme Court has never expressly addressed the precise issue of whether the federal constitution is violated when a jury instruction omits or materially misdescribes an essential element of the offense. *Id.* at 424-26. As the majority responded, however, its holding "follows inexorably" from numerous Supreme Court cases holding that the constitution is violated when jury instructions set out conclusive or mandatory rebuttable presumptions regarding an essential element of the offense. *Id.* at 416. Moreover, Judge Alito offered no convincing explanation why, if the federal constitution is violated when jurors are instructed that they must presume an essential element of the offense has been established, the federal constitution is not also violated when jurors are not even instructed on an essential element.

In *Flamer v. Delaware*, 68 F.3d 736 (3rd Cir. 1995) (*en banc*) *cert. denied*, *stay of execution denied*, *Bailey v. Snyder*, 516 U.S. 1088 (1996), Judge Alito authored a deeply troubling opinion denying relief to two death row inmates, William Henry Flamer and Billie Bailey, despite the fact that their juries had relied upon an unconstitutional aggravating factor when deciding to sentence them to death.<sup>22</sup>

In both cases, despite the unconstitutional aggravating factor, the Delaware Supreme Court had automatically affirmed their death sentences on the ground that Delaware's death penalty statute was not a weighing statute. Under Supreme Court case law, an appellate court may affirm automatically a death sentence despite an invalid aggravating factor only if the state's death penalty statute is deemed not to be a "weighing" statute. With a weighing statute, jurors are required to "weigh" their findings of statutory aggravating factors when determining whether the defendant should live or die. With a non-weighing statute, jurors do not "weigh" their findings of statutory aggravating factors when determining the defendant's sentence (although jurors may consider the evidence introduced in support of aggravating factors when determining the sentence).

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<sup>22</sup> Judge Alito authored the panel opinion in *Flamer v. Delaware*, 68 F.3d 710 (3rd Cir. 1995), before the Third Circuit voted to rehear the case *en banc*.

Flamer and Bailey claimed, first, that the Delaware statute was a weighing statute; and second, that even if the Delaware statute was not a weighing statute their trial judges had turned the statute into a "de facto" weighing statute by giving their jurors an interrogatory and an instruction requiring the jurors to list which statutory aggravating factors they had relied upon in sentencing the defendants to death. *See* 68 F.3d at 744 n. 20, 751-52. In response to the interrogatory and instruction, both defendants' juries stated that they had relied on the statutory aggravating factor later determined to be constitutionally invalid.

In his opinion, Judge Alito agreed with the Delaware Supreme Court that Delaware's statute was not a weighing statute. Moreover, although he "strongly disapprove[d]" of the interrogatory and instruction, which he acknowledged were "potentially misleading and inject[ed] unnecessary confusion into the jury's deliberations," Judge Alito rejected the claim that the interrogatory and instruction had turned Delaware's statute into a "de facto" weighing statute. *See id.* at 751-52; 744 n.20. Four judges dissented. *See id.* at 764, 765 (Lewis, J., dissenting & joined by Mansmann, J., and McKee, J.); *id.* at 772, 773 (Sarokin, J., dissenting) ("Accepting that Delaware is a 'non-weighing' state, I conclude that the instructions and interrogatories submitted in these two cases shifted the neutral balance contemplated under the statute and with it, the scales of justice as well").<sup>23</sup>

#### D. Sentencing Guidelines

Judge Alito is a member of the Constitution Project's bipartisan Sentencing Group. That group, under the leadership of former Reagan Attorney General Ed Meese and former Clinton Deputy Attorney General Phil Heyman, has been involved in an effort to develop consensus recommendations for the reform of criminal sentencing systems.

Judge Alito's passion for analyzing sentencing rules and policies is evident in the decisions he has authored during his tenure on the Third Circuit. Judge Alito frequently scrutinizes the district court's application of the Guidelines to criminal defendants, often expounding at great length as to his interpretation of the relevant sentencing guidelines. *See, e.g., United States v. Wright*, 363 F.3d 237 (3d Cir. 2004) (upholding district court's decision not to grant downward departure to defendant on the basis of good works performed in his occupation as a member of the clergy); *United States v. Pray*, 373 F.3d 358 (3d Cir. 2004) (vacating denial of request for downward departure because district court's explanation of refusal to grant credit did not make clear decision was discretionary); *United States v. D'Amario*, 350 F.3d 348 (3d Cir. 2003) (vacating sentence and remanding for resentencing where district court granted downward departure to defendant); *United States v. Williams*, 176 F.3d 714 (3d Cir. 1999) (holding that using a telephone to commit, cause, and facilitate distribution of heroin was a "controlled substance offense" for purposes of sentencing as a career offender); *United States v. Sharapan*, 13 F.3d 781 (3d Cir. 1994) (holding that downward departure could not be supported on the ground that if defendant were incarcerated, his business would fail and 32 persons would lose their jobs).

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<sup>23</sup> Judge Alito has an additional death penalty opinion. *See Terry v. Petsock*, 974 F.2d 372 (3d Cir. 1992) (holding that the petitioner was not entitled to a lesser-included offense instruction).



In his opinions, Judge Alito rigidly applies the Sentencing Guidelines and often reverses sentencing decisions in which the district court granted a downward departure from the sentence mandated by the Guidelines. For instance, in *United States v. Shoupe*, 926 F.2d 116 (3d Cir. 1991), Judge Alito faulted the district court for departing from the Sentencing Guidelines in granting a downward departure to the defendant. The defendant, Kenneth Shoupe, was indicted for distribution of cocaine and possession of cocaine with intent to distribute. *Id.* at 117. Citing the defendant's youth and immaturity at the time he committed the prior offenses, as well as the short time span between the commission of the offenses and his cooperation with authorities, the district court granted a substantial downward departure. *Id.* at 119. In addition, the district court departed from the range prescribed by the Guidelines on the basis of Shoupe's responsibilities with respect to his child. *Id.*

Reasoning that the district court erred in departing from the strict career offender provision and gave undue weight to Shoupe's relationship with his son, Judge Alito reversed the district court and remanded for resentencing. *Id.* at 121. In dissent, Judge Rosenn argued that the majority had "mechanically and rigidly" applied the definition of "career offender." *Id.* at 123 (Rosenn, J., dissenting). Judge Rosenn criticized the majority for its interpretation of that provision, which he argued unduly impeded district court judges from exercising discretion in cases where that judge believed the required sentence to be "fundamentally impractical, unsound, and unjust." *Id.* at 125.

In another case, *United States v. Bierley*, 922 F.2d 1061 (3d Cir. 1990), Judge Alito dissented from a decision holding that a district court had authority to grant a downward departure if the court concluded that a defendant played a "minor" or "minimal" role in activity involving only government agents and no other "criminally responsible" participants. In *Bierley*, a defendant convicted of knowing receipt of child pornography sent by an undercover federal agent appealed the district court's decision that it could not grant a downward departure under the Role in the Offense Guideline because the defendant was the sole participant in the crime. Judge Sloviter, joined by Judge Higginbotham, agreed that the Role in the Offense Guideline was inapplicable; however, they held that the court has power to "use analogic reasoning" to depart from the Guidelines when the basis for departure was conduct similar to that encompassed in the Role in the Offense Guideline. *Id.* at 1068-69. Judge Alito disagreed.

#### E. Prisoners' Rights

Judge Alito has written or joined many opinions relating to prison conditions while on the Third Circuit. Although few of Judge Alito's opinions on prisoner rights required him to resolve particularly novel or controversial questions, he has consistently shown an almost unbounded deference to prison officials and a strong tendency to protect them from adverse jury verdicts.

##### 1. *First Amendment*

Perhaps the most troubling of Judge Alito's opinions on prisoner rights is his dissent in *Banks v. Beard*, 399 F.3d 134 (3d Cir. 2005), cert. granted [CITE], because the views expressed in it could potentially eviscerate many constitutional claims prisoners. *Banks* involved a First

Amendment challenge to a policy that prohibited prisoners in a long-term segregation unit from receiving or possessing newspapers, magazines or photographs, unless they were religious or legal in nature. A majority of the panel concluded that the policy was unconstitutional; but Judge Alito argued that the policy should have been upheld.

At issue was the proper interpretation of *Turner v. Safley*, 482 U.S. 78 (1987), a decision authored by Justice O'Connor that establishes a four-part test for determining whether a prison policy violates certain constitutional rights. Judge Alito's application of each of the four parts represented the most restricted of all possible readings. With respect to the first part of the test, the majority concluded that the prison failed to show a valid, rational connection between the policy and its asserted interests in security and rehabilitation, in part because prison officials failed to point to *any* evidence that supported their arguments.

Judge Alito denied that any such evidence was required under *Turner*. Instead, Alito argued that the first part was satisfied simply because it was "rational" for prison officials to believe that the policy might have *some* deterrent effect both on inmates trying to avoid transfer to the segregation unit and inmates hoping to transfer out. *Banks*, 399 F.3d at 148-49. In effect, Judge Alito adopted a view that would permit prison officials to restrict constitutional rights solely on the basis of speculation and conjecture and would potentially allow them to invent unsupported justifications for a policy even during the pendency of litigation.

With respect to the second part of the *Turner* test, whether the prisoner has alternative means of exercising the right, a determining factor can be how the right is defined, i.e., at what level of generality. The majority defined the right at issue as one to read newspapers and magazines and thus concluded that there were in fact no alternatives for the prisoners because the prohibition was a blanket one. Judge Alito, while conceding, "[t]his is the most troubling of the four factors," *id.* at 149, concluded that the right at issue was simply to receive any kind of information. He argued that the policy did not fail the second part of *Turner* because the prisoners "may still read books from the prison library and may receive letters." *Id.* Thus, Judge Alito hoped to preserve the policy by defining the right at the highest level of generality possible.

With respect to the third and fourth factors, the effect that accommodating the right would have on others and the availability of easy alternatives to the restriction, the majority concluded that there were easy, non-disruptive alternatives to a blanket prohibition, such as allowing the prisoners to either request newspapers or magazines one at a time in their cells, or to read the items in the prison law library. Judge Alito, however, rejected these suggestions without explanation as too "time consuming," even though the prison officials themselves did not appear to present any evidence on that issue or even to argue it. *Id.* Judge Alito's extremely narrow reading of *Turner* is troubling given the importance of *Turner* in the context of prison litigation.

Judge Alito's narrow interpretation of *Turner* in *Banks* was foreshadowed in two earlier opinions that he authored. See *Fraise v. Terhune*, 283 F.3d 506 (3d Cir. 2002); *Waterman v. Farmer*, 183 F.3d 208 (3d Cir. 1999). Of the two cases, *Waterman* is less troubling. At issue in *Waterman* was a New Jersey statute that prohibited incarcerated sex offenders who exhibited repetitive and compulsive behavior from possessing sexually oriented materials. *Waterman*, 183 F.3d at 210.

Restrictions on erotica in prison are routinely upheld by courts, so the ultimate result in *Waterman* is hardly surprising. However, Judge Alito's application of *Turner* is of some concern. First, he compared the *Turner* test to rational basis review in the context of Equal Protection claims, which permits courts to speculate on what legitimate reasons *might have* motivated the legislature and whether those reasons *could* be rationally related to the restriction, even if there is no evidence supporting the conclusion. *Id.* at 215-17 (concluding that even without opinion of defendants' expert that pornographic materials hindered rehabilitation, statute would nonetheless be constitutional because legislature could have rationally believed this to be the case). With respect to the second *Turner* factor, Judge Alito defined the scope of the right at issue at a very high level of generality, concluding that the prisoners still had sufficient alternatives to exercise their rights because they could still read *non*-sexually oriented materials. *Id.* at 218-19.

*Fraise* involved the decision of the New Jersey Department of Corrections to classify as gang members all prisoners who affiliate with the Five Percent Nation, a religious group that had broken away from the Nation of Islam. Under the department's policy, core members of a prison gang, or Security Threat Group as it is called by the department, are placed in segregation, where they remain until they successfully complete a program that includes signing a statement renouncing affiliation with all security threat groups. *Fraise*, 283 F.3d at 510-11.

Members of the Five Percent Nation challenged on free exercise grounds the application of the policy to them. Applying *Turner*, Judge Alito wrote that prohibiting affiliation with the Five Percent Nation was rationally connected to the prison's interest in minimizing violence, even though violence was not part of the religion's teachings. Alito pointed to a report submitted by the defendants describing "numerous instances of actual or planned violence involving Five Percenters in New Jersey correctional facilities from August 1990 through July 1997." *Id.* at 516. Judge Alito also found that Five Percenters were not denied alternatives in practicing their religion, even though he admitted the policy prohibited prisoners from studying the teachings of the Five Percent Nation. Alito concluded that Five Percenters could still study the Bible and Qur'an, which are sometimes included in the Nation's teachings, and members could still engage in other aspects of the religion, such as "discussing or seeking to achieve self-knowledge, self-respect, responsible conduct or righteous living." *Id.* at 519. Finally, the requirement that all "core" members renounce affiliation with the Five Percent Nation was not deemed problematic by Judge Alito because, as he interpreted the policy, it required only that prisoners "promise not to associate with certain other prisoners" rather than requiring them to renounce their beliefs. *Id.* at 520.

In a dissenting opinion, Judge Rendell argued that the prison officials had failed to adequately show a connection between violence and the Five Percent Nation. The report relied on by the defendants showed only "twelve violent or threateningly violent incidents involving members of the Five Percent Nation over a seven-year period." *Id.* at 527 Moreover, according to the dissent, even in these few incidents, the report failed to demonstrate any connection between the violent incidents and the prisoners' religious beliefs. *Id.*<sup>24</sup>

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<sup>24</sup> Of particular concern in *Fraise* is Judge Alito's willingness to point to the availability of texts related to other religions as proof that a member of a religious minority still is able to practice his faith. This aspect of the opinion

Judge Alito has joined one opinion upholding a prisoner's First Amendment rights in a case that preceded *Banks*, *Fraise* and *Waterman*. In *Abu-Jamal v. Price*, 154 F.3d 128 (3d Cir. 1998), a prisoner on death row brought an as-applied challenge to a policy that prohibited prisoners from engaging in a business or profession. *Id.* at 130. The prisoner, Mumia Abu-Jamal, had been receiving compensation for writing numerous articles for a variety of publications while he was incarcerated. He had also been interviewed by National Public Radio and others for radio broadcasts. Prison officials raised no objection until members of the Fraternal Order of Police complained that Abu-Jamal was benefiting from his status as a convicted murderer. *Id.* at 131.

In a unanimous opinion written by Judge Nygaard, the court reversed the district court's denial of Abu-Jamal's motion for a preliminary injunction prohibiting the department from enforcing the rule against him. Interestingly, in concluding that the application of the policy to Abu-Jamal could not withstand scrutiny under *Turner*, the court noted that the prison officials cited no evidence that Abu-Jamal's activities "strained prison resources, contributed to unrest among the inmate population, or enhanced Jamal's stature as a prisoner, resulting in danger to himself or others." *Id.* at 134. The court did not consider, as Judge Alito did in *Waterman* and his dissent in *Banks*, whether it was rational for prison officials to believe that Abu-Jamal's activities *could* lead to these problems.

Although there is tension between the reasoning in *Abu-Jamal* and Judge Alito's other opinions, it is likely that he was persuaded by evidence in *Abu-Jamal* that the prison officials were not in fact motivated by legitimate penological interests, but instead were using those as an excuse to retaliate against Abu-Jamal and suppress criticism. It is important to note that the court in *Abu-Jamal* never determined whether the no business rule bore a logical connection to legitimate interests. Instead, the court held that enforcement of the policy against Abu-Jamal likely flunked another aspect of the *Turner* test, which requires that policies be content neutral. *Id.* at 134. Thus, although it is encouraging that Judge Alito was willing to protect a prisoner from obvious retaliation, *Abu-Jamal* sheds little light on how Judge Alito will decide most cases under *Turner*. Rather, his more recent opinions in *Fraise* and *Banks* show his generally restrictive analytic approach to First Amendment claims brought by prisoners.

## 2. *Eighth Amendment*

Judge Alito has decided few Eighth Amendment cases involving conditions of confinement and none of the holdings in those cases are particularly novel or controversial. Although Judge Alito has never authored an opinion championing the Eighth Amendment, neither has he exhibited hostility to such claims. For example, in *Rouse v. Plantier*, 182 F.3d

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has been criticized by other courts, *see, e.g., Marria v. Broaddus*, NO. 97 CIV.8297 NRB, 2003 WL 21782633 (S.D.N.Y. Jul. 31, 2003), and only a year later it was significantly undermined by another Third Circuit panel in *Sutton v. Rasheed*, 323 F.3d 236 (3d Cir. 2003). *Sutton* was a challenge brought by members of the Nation of Islam who were denied their sacred texts while in segregation. Instead, they were allowed copies of the Bible and Qur'an only. *Id.* at 255. The court concluded that this was insufficient because deprivation of the texts that contain the specific teachings of the Nation of Islam is tantamount to depriving the prisoner of the ability to practice his own religion. *Id.* at 257.

192 (3d Cir. 1999), a class of prisoner diabetics alleged that they were not receiving constitutionally adequate medical care and sought damages. The defendants moved for summary judgment on the basis of qualified immunity, which the district court denied except as to one defendant. Judge Alito wrote an opinion vacating the district court's order, but only for the purpose of directing the court to create sub-classes of diabetics based on how severe their condition was and then to re-evaluate their claims. *Id.* at 198-99.

In *Reynolds v. Wagner*, 128 F.3d 166 (3d Cir. 1997), Judge Alito wrote an opinion holding that a prison policy did not violate the Eighth Amendment even though it required prisoners to pay for medical services in many instances. Judge Alito relied heavily on qualifications in the policy that guaranteed that no prisoner would be denied medical care as a result of an unwillingness or inability to pay. He also held open the possibility that an as-applied challenge to a similar policy might lie if prisoners “could show that a prison fee program caused other inmates to delay seeking treatment [for a contagious disease] to such an extent as to cause a serious risk of an epidemic.” *Id.* at 178.

Other aspects of *Reynolds* do raise some serious questions. In concluding that the fee program did not violate the Eighth Amendment, Judge Alito quoted the holding from *Turner* that a prison regulation “is valid if it is reasonably related to legitimate penological interests.” *Id.* at 175 (quoting *Turner*, 482 U.S. at 89). Alito then wrote: “[T]he fee-for-service plan was adopted to teach prisoners financial responsibility and to deter abuse of the sick call. Both of these goals fall well within the ambit of legitimate penological interests.” *Id.* It is not clear from the context of the opinion whether Judge Alito meant to imply that the *Turner* standard should be employed by judges in reviewing prison policies challenged under the Eighth Amendment. He cited the *Turner* standard in the beginning of the opinion “as the appropriate standard of review for the constitutionality of prison regulations.” *Id.* at 172. However, he immediately followed this by stating: “[t]he specific standard applicable to an Eighth Amendment claim concerning the denial of health care to inmates is the two-pronged standard enunciated in *Estelle v. Gamble*, 429 U.S. 97, 104 (1976),” *id.*, which requires a prisoner to show that an official was deliberately indifferent to a serious medical need. With the exception of the one passage quoted above, the remainder of Judge Alito's Eighth Amendment discussion relied on the deliberate indifference standard of *Estelle*.

If Judge Alito did mean to suggest that *Turner* set forth the appropriate standard of review for Eighth Amendment claims, this would erect a significant new barrier for prisoners' claims that the Supreme Court has never imposed. Although the Supreme Court has referred to the *Turner* test in general terms, the Court has never held that the test applies in the Eighth Amendment context. The Court has considered a number of Eighth Amendment cases since *Turner*, but it has continued to hold that the general test in Eighth Amendment cases is whether the prison officials were deliberately indifferent to a substantial risk of serious harm. *See, e.g., Hope v. Pelzer*, 536 U.S. 730 (2002); *Farmer v. Brennan*, 511 U.S. 825 (1994); *Helling v. McKinney*, 509 U.S. 25 (1993).

Judge Alito has been on several panels in Eighth Amendment cases that were not published. In all of these cases, the court found no Eighth Amendment violations. *See, e.g., Henry v. Department of Corrections*, No. 03-2895, 131 Fed. Appx. 847 (3d Cir. 2005) (per

curiam) (permanent ban on contact visits was neither “atypical and significant hardship” nor cruel and unusual punishment).

### 3. *Jury Verdicts in Favor of Prisoners*

Judge Alito has been on two panels reviewing cases in which a jury found in favor of a prisoner in excessive force cases: *Pryer v. Slavic*, 251 F.3d 448 (3d Cir. 2001), and *Douglas v. Owens*, 50 F.3d 1226 (3d Cir. 1995). In both cases, he voted to send the case back for a new trial and in both cases, there was a dissenting judge who criticized the majority for failing to apply the appropriate standard of review.

In *Pryer*, a jury found four of eight defendants liable, but awarded only \$1.00 in nominal damages, even though there had been substantial and uncontroverted evidence that the prisoner suffered significant injuries, including a broken leg. The district court vacated the damages award and ordered a new trial limited to damages after concluding that the award was against the weight of the evidence and the damages instructions were erroneous. After the second trial, the new jury awarded the plaintiff \$300,000.

Judge Alito joined an opinion upholding the district court’s decision to hold a new trial, agreeing that the award was against the weight of the evidence and that the jury instructions on damages had been erroneous. However, the Third Circuit reversed the district court’s decision to limit the new trial to damages, even though it found no error with the jury’s liability finding, on the theory that liability and damages were not “so separable that the jury’s determination on one issue had no bearing on its determination on the other.” *Id.* at 457.

In dissent, Judge Mansmann criticized the majority for reversing the jury’s liability determination even though the majority had found no errors with the verdict on that issue. In addition, Judge Mansmann argued that the majority had applied a *de novo* standard of review rather than an abuse of discretion standard, and had misapplied circuit precedent on when a new trial on damages also required a new trial on liability.

In *Douglas*, a jury found that prison guards had used excessive force against a prisoner by beating him. During the trial, a prison chaplain had testified on behalf of the prisoner. On cross-examination, the district court allowed the defendants to establish that the chaplain had been “terminated” from his position, but the court prohibited any further examination into the circumstances surrounding the termination. *Id.* at 1231. Defense counsel had stated during a sidebar that the witness had been fired “because of his alleged involvement with the inmates in this riot.” *Id.* at 1229 n.4. The court refused to allow further questioning, reasoning that the fact of termination was sufficient to show bias and that allowing in allegations about his involvement in a riot would lead to “trying a case within a case.” *Id.*

Judge Alito joined an opinion in which a majority of the court concluded that it was error for the district court to limit the cross examination because it prevented the defendants from showing that the witness was both biased against the defendants (because he was fired) *and* biased for the prisoners (because he was allegedly involved in the riot). *Id.* at 1231. Without considering the district court’s conclusion that allowing the questioning would have led to a trial

within a trial and without conducting a harmless error analysis, the court directed the district court to hold a new trial.

In dissent, Judge Nygaard criticized the majority for failing to give deference to the district court's conclusion as required by the abuse of discretion standard. *Id.* at 1237. Judge Nygaard agreed with the district court that the excluded testimony could have confused the issues and distracted the jurors from the real controversy. *Id.* at 1238. Alternatively, he argued the error was harmless. *Id.*

#### 4. PLRA

Judge Alito has written or joined several opinions in which he has rejected prisoners' arguments related to the interpretation and application of the Prison Litigation Reform Act (PLRA). Many of the holdings themselves are consistent with other circuits. *See Spruill v. Gillis*, 372 F.3d 218 (3d Cir. 2004) (interpreting PLRA as barring prisoners from bringing claims in federal court if they failed to exhaust their administrative remedies within deadline imposed by prison); *Abdul-Akbar v. McKelvie*, 239 F.3d 307 (3d Cir. 2001) (en banc) (interpreting "three strikes" provision of PLRA, which deprives prisoners of ability to proceed *in forma pauperis* if, on three or more occasions, a federal suit or appeal filed by that prisoner was dismissed as malicious, frivolous or for failure to state a claim, court held that imminent danger exception to three strikes rule applies only when danger exists at time of filing complaint); *Imprisoned Citizens Union v. Ridge*, 169 F.3d 178 (3d Cir. 1999) (rejecting arguments that the PLRA termination provision violated separation-of-powers or equal protection of the laws).

However, there is dicta in *Imprisoned Citizens Union*, the only decision of the above three written by Judge Alito, that gives cause for concern. First, although the substance of the challenged consent decree was not an issue before the court, Judge Alito went out of his way to critique it anyway, stating that "the decree governs nearly every aspect of prison management," and that it imposed restrictive standards on use of force, restraints and mace and detailed procedures for conducting cell searches. *Id.* at 182. Among the restrictive standards listed by Judge Alito was a limitation on the use of mace to those prisoners who did not have a "disease or condition that would make the use of mace particularly dangerous." *Id.* at 182 n. 3. Even more worrisome was, again, a passing reference that Judge Alito made to *Turner* in the context of the discussion of the separation of powers issue. Specifically Judge Alito interpreted *Turner* as a being a "commen[t] on the importance of getting the courts out of the prison management business." *Id.* at 185.

In one case authored by Judge Alito, *Shane v. Fauver*, 213 F.3d 113 (3d Cir. 2000), the Court interpreted the PLRA favorably for prisoners. Under Third Circuit precedent, a district court may not dismiss a suit with prejudice for failure to state a claim without giving the plaintiff leave to amend, even if the plaintiff does not ask for leave. The question in *Shane* was whether the PLRA overruled these cases with respect to claims brought by prisoners. The court concluded that the rule remained unchanged, at least with respect to prisoners who had paid the filing fee themselves, as did the prisoner in *Shane*. *Id.* at 116-17. Although the result in this case was favorable for prisoners, it should be noted that the defendants had not even argued initially

that the PLRA had changed the law. It was raised *sua sponte* by the court, which asked the parties to brief the issue before rejecting it. *Id.* at 115.

#### 5. *Other Procedural Issues*

One other opinion by Judge Alito, although not including holdings on substantive points of law, is nevertheless. In *Poole v. Family Court of New Castle County*, 368 F.3d 263 (3d Cir. 2004), the district court had dismissed a *pro se* prisoner's complaint under 28 U.S.C. § 1915. This occurred on March 26, 2002, but the plaintiff did not receive the order until May 6, 2002, two weeks after the deadline for filing a notice of appeal, because the clerk had sent the order to the wrong address. The prisoner filed his notice of appeal three days later.

In an opinion written by Judge Alito, the court rejected the prisoner's appeal as untimely. The court refused to follow *United States v. Grana*, 864 F.2d 312 (3d Cir. 1989), in which the deadline for filing an appeal had been tolled because prison officials had failed to deliver the order to an incarcerated *pro se* defendant. The court pointed to differences in the civil and criminal rules of procedure, specifically Fed. R. Civ. P. 77(d), which Judge Alito said limits a court's ability to extend the time for filing a notice of appeal to those listed in Rule 4(a) of the Federal Rules of Appellate Procedure.

Judge Alito went on to interpret Rule 4(a) as requiring parties who have missed the deadline for appealing to file a motion to reopen the time for filing within seven days of receiving notice. Judge Alito refused to construe the *pro se* prisoner's notice of appeal as a motion to reopen, even while acknowledging that the Eleventh Circuit had done just that in *Sanders v. United States*, 113 F.3d 184 (11<sup>th</sup> Cir. 1997). The Eleventh Circuit had concluded that the result followed from a court's duty to liberally construe *pro se* pleadings. The court also worried that a contrary decision would give prison officials an incentive to withhold dismissal orders. Judge Alito rejected the first reason in one sentence and the second reason as overly speculative. Instead, Alito relied on *Herman v. Guardian Life Insurance Co.*, 762 F.2d 288 (3d Cir. 1985), in which the court had interpreted a different provision in Rule 4 as requiring a motion to reopen.

Judge Alito's emphasis on meeting technical requirements is demonstrated in other opinions as well. See *McCardle v. Tronetti*, 961 F.2d 1083 (3d Cir. 1992) (following circuit precedent in (1) refusing to consider whether a prisoner's complaint states a claim under Eighth Amendment because he failed to expressly allege Eighth Amendment violation in his complaint; and (2) dismissing substantive due process claim because prisoner had failed to allege all elements of claim in his complaint), *overruled by Leatherman v. Tarrant County*, 507 U.S. 163 (1993).

## VII. PROCEDURAL DUE PROCESS

During his tenure on the Third Circuit, Judge Alito voted to uphold a procedural due process claim only once.<sup>25</sup>

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<sup>25</sup> That case is *Rogal v. American Broadcasting Companies, Inc.*, 74 F.3d 40 (3d Cir. 1996). In a second case, *Homar v. Gilbert*, 89 F.3d 1009 (3d Cir. 1996), the panel majority upheld two of a plaintiff's three procedural due



The most notable of Judge Alito's decisions in this area is *Grant v. Shalala*, 989 F.2d 1332 (3d Cir. 1993), in which his majority opinion rejected an independent factfinding role for an Article III court in assessing a constitutional challenge to the fairness of benefits determinations by a particular Administrative Law Judge. *Grant* was a class action on behalf of a group of unsuccessful Social Security disability benefits claimants, who alleged that they had been denied due process because the ALJ who rejected their claims was biased against benefits claimants. *Id.* at 1334. Over a forceful dissent by Judge Higginbotham, Judge Alito held that the federal district court could not engage in independent factfinding; rather, the court was limited to reviewing the conclusions of the Social Security Administration's own investigation of its ALJ. *Id.* at 1333.

According to Judge Alito, the district court's review was circumscribed by the judicial review provision of the Social Security Act, which provided that the agency's findings are to be taken as conclusive if supported by substantial evidence. *Id.* at 1338-39. Although the language of the provision in question appeared to address judicial review only as to determinations of benefits in *individual* cases, Judge Alito held that the limitations on judicial review applied to class actions as well, because neither the text of the statute nor Third Circuit precedent about judicial review in individual cases drew any distinction between such cases and class actions. *Id.* at 1339. While acknowledging that due process requires an impartial adjudicator, Judge Alito contended that factfinding by the district court is not necessary to ensure the impartiality of ALJs, who may be disqualified on a case-by-case basis if they are biased. *Id.* at 1346. In fact, according to Judge Alito, it is the *restriction* on the district court's role as factfinder that serves to "safeguard[] the integrity of the administrative process" by "protect[ing] against discovery and court proceedings that could seriously undermine the independence of Social Security ALJs." *Id.* at 1344.

Judge Alito's procedural due process opinions reflect can be divided into two groups: opinions holding that a plaintiff's liberty or property interest has not been implicated, and opinions holding that adequate process has been provided.

#### A. Protectable Interests

In *Sanguigni v. Pittsburgh Bd. of Pub. Educ.*, 968 F.2d 393 (3d Cir. 1992), Judge Alito, writing for the panel, held that a public high school teacher did not have a property interest in her coaching jobs; accordingly, her removal from those positions on account of her speech did not give rise to a procedural due process claim. The procedural due process claim failed, according to Judge Alito, because Sanguigni's allegation that she had a property or liberty interest in her coaching jobs under her union's collective bargaining agreement and the past practices of the School District does not "state[] a legitimate claim of entitlement to continued employment." *Id.* at 401. Judge Alito observed that only two types of contracts – contracts that confer protected status such as tenure, and contracts that by their terms may be terminated only for cause – have been recognized as creating property interests protected by the Fourteenth Amendment; Sanguigni's contract did not fall into either of these categories. *Id.* Sanguigni's citation to "past practices" of the district, without more, was in Judge Alito's view a "conclusory allegation . . .

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process claims; Judge Alito dissented with respect to one of the claims the majority upheld without explicitly joining – or dissenting from – the majority's holding regarding the other claim. Both cases are discussed in detail below.

plainly insufficient to satisfy our requirement that claims of this nature be pled with some specificity.” *Id.* Judge Alito also rejected Sanguigni’s First Amendment retaliation claims because her speech did not involve a matter of public concern. *Id.* at 399-400.

Judge Alito’s panel opinion in *Edwards v. California University of Pennsylvania*, 156 F.3d 488 (3d Cir. 1998), held that a tenured university professor’s procedural due process rights had not been violated when the university suspended him from teaching because he had been injecting religious bias into his pedagogy. Citing the Third Circuit’s previous holding that “stigma to reputation alone, absent some accompanying deprivation of present or future employment, is not a liberty interest protected by the fourteenth amendment,” *id.* at 492, Judge Alito ruled that summary judgment for the defendants had been properly granted because Edwards had remained employed with pay during his suspension. *Id.* (The court’s treatment of plaintiff’s First Amendment claim is discussed on p.12)

B. *Adequacy of Process*

Judge Alito’s panel opinion in *Griffin v. Spratt*, 969 F.2d 16 (3d Cir. 1992), rejected an inmate’s claim that his due process rights were violated when the prison disciplined him for possessing intoxicating beverages after having failed to preserve the evidence supporting the charge. At Griffin’s disciplinary hearing, the prison’s only evidence against Griffin was a corrections officer’s testimony that he had found fermented beverages in Griffin’s cell. Griffin claimed that the beverages were not fermented, and he asked the officer why he had not tested the beverages or saved a sample for analysis. The hearing examiner ruled these questions irrelevant and found Griffin guilty. *Id.* at 18. The district court held that Griffin’s ability to mount a defense to the charges was unconstitutionally restricted by the prison’s failure to preserve the crucial evidence, and that the hearing examiner also violated Griffin’s due process rights by finding him guilty of a disciplinary infraction on the sole basis of a corrections officer’s oral summary of the key information. *Id.* at 19.

The Third Circuit reversed and directed that summary judgment be entered for the defendants. Applying the Supreme Court’s *Arizona v. Youngblood* rule for due process claims regarding the preservation of evidence in criminal investigations, Judge Alito held that, absent bad faith on the part of prison officials, the failure to preserve potentially useful evidence for a prison disciplinary hearing is not a violation of due process. *Id.* at 20-21. Judge Alito took a narrow view of a prior Third Circuit decision, *Young v. Kann*, 926 F.2d 1396 (3d Cir. 1991), in which the court held that a hearing examiner violated an inmate’s due process rights by refusing to order the production of an allegedly threatening letter, written by the inmate, that formed part of the basis of the disciplinary charge against the inmate. According to Judge Alito, “*Young* concerned a prisoner’s right to production of existing documentary evidence; the opinion in *Young* said nothing whatsoever about a prisoner’s right to have physical evidence preserved.” *Griffin*, 969 F.2d at 20. Nor could *Young* support the district court’s conclusion that Griffin’s hearing examiner violated due process by relying exclusively on the corrections officer’s testimony about the nature of the beverages he found in Griffin’s cell: Judge Alito interpreted the *Young* court’s concern about reliance on an official’s oral summary of evidence “to apply only where production of existing evidence is improperly withheld and hearsay is offered in its place.” *Id.* at 22. Because hearsay is allowed in a prison disciplinary proceeding and a

disciplinary finding need only be supported by “some evidence,” Judge Alito held that the hearing examiner’s reliance on the corrections officer’s testimony did not violate Griffin’s due process rights. *Id.*

In *Reynolds v. Wagner*, 128 F.3d 166 (3d Cir. 1997), Judge Alito, writing for the panel, held that a prison’s policy of charging inmates a small fee for certain medical services did not violate the Eighth Amendment, the First Amendment, or procedural due process. (The Eighth Amendment claim is discussed on p.57) Judge Alito rejected the inmates’ due process claim that the prison failed to provide Spanish-speaking prisoners with sufficient notice of the fee-for-service program: although the prison provided no written Spanish translation of the program description, Judge Alito held that the prison’s practice of having Spanish-speaking officers explain the policy to Spanish-speaking inmates and of always having a Spanish-speaking officer on duty, provided adequate notice. *Id.* at 179-80. The prison’s policy of debiting the accounts of inmates who received specified services, regardless of whether the inmates authorized the charges, did not run afoul of due process, according to Judge Alito, because “delaying treatment while prison officials haggled with an inmate about signing a form authorizing the assessment of a fee could lead to frustrating and hazardous Eight Amendment problems.” *Id.* at 180. Judge Alito also rejected, on factual grounds, the inmates’ claim that there was insufficient process for challenging a medical service fee imposed in violation of program rules. *Id.* at 181.

In *Homar v. Gilbert*, 89 F.3d 1009 (3d Cir. 1996), Judge Alito dissented from a ruling that a university police officer was entitled to a hearing before the university suspended him without pay in response to his arrest on drug-related charges.<sup>26</sup> While recognizing the important government interest in protecting public safety, the majority held that the university should have suspended the officer *with pay* pending a hearing, in order to protect “the fundamental rights of an employee to due process prior to being deprived of his or her property interest in employment and its accompanying salary.” *Id.* at 1016. Judge Alito’s dissent argued that the majority had unnecessarily expanded an isolated Supreme Court dictum into a blanket rule that an employee must always receive a hearing before being suspended without pay. *Id.* at 1023-24. Given that Homar freely admitted he had been arrested and that the university was entitled to suspend him from working as a police officer while charges were pending against him, Judge Alito was “at a loss as to what purpose a pre-suspension hearing would have served in this case.” *Id.* at 1023 n.1. The Supreme Court, in a unanimous opinion by Justice Scalia, sided with Judge Alito and reversed the Third Circuit’s holding that a pre-suspension hearing is always required when the employee is deprived of pay. *Gilbert v. Homar*, 520 U.S. 924, 930 (1997).

Writing for the panel in *Benn v. Universal Health System, Inc.*, 371 F.3d 165 (3d Cir. 2004), Judge Alito held that a psychiatric facility and its doctors had not violated a plaintiff’s procedural due process rights by failing to grant him a hearing before subjecting him to a three-day period of involuntarily confinement under Pennsylvania’s Mental Health Procedures Act. Benn was involuntarily confined at the instigation of a private clinic Benn had telephoned and visited earlier that day seeking psychiatric help; the parties’ accounts differed as to whether Benn

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<sup>26</sup> The majority also held that there was an issue of material fact that precluded summary judgment on the officer’s due process claim regarding a subsequent demotion, and the majority rejected the officer’s claim that his due process rights were violated when the university damaged his reputation by making several public statements about the suspension. *Id.* at 1018-20; *id.* at 1021-22. Judge Alito did not dissent from these holdings.

had characterized himself as depressed and suicidal. *Id.* at 168. Summary judgment for the defendants was properly granted, Judge Alito ruled, because Benn’s case “clearly presented an emergency situation.” *Id.* at 174. Benn was committed for “short period of time,” he was “constantly evaluated” by physicians while confined, and he “was released upon [a doctor’s] evaluation that he was no longer suicidal.” *Id.* Judge Alito also rejected Benn’s substantive due process claims regarding the conditions of his confinement, as “none of the specific conduct that Benn alleges” – specifically, that the hospital doctors were incompetent, temporarily kept him in a room without a toilet, and administered antipsychotic drugs – “shocks the conscience.” *Id.* at 174-75.

In *Graham v. City of Philadelphia*, 402 F.3d 139 (3d Cir. 2005), Judge Alito joined an opinion by Judge Fisher holding that a police officer who was fired because of his arrest on sexual abuse charges, then acquitted of the charges at a public trial, was not entitled to have the police department hold a name-clearing hearing. The panel recognized that acquittal at a criminal trial does not prove the innocence of the accused, but, applying the three-part balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), the panel held that the officer’s trial provided sufficient process to enable him to protect his liberty interest in his reputation. *Graham*, 402 F.3d at 144-47.

Judge Alito’s one decision vindicating a procedural due process claim came in *Rogal v. American Broadcasting Companies, Inc.*, 74 F.3d 40 (3d Cir. 1996). Writing for the panel, Judge Alito held that due process required a district court to hold a hearing before imposing sanctions on a civil litigant for his false testimony to the court. *Id.* at 44. In the underlying action, Rogal sued ABC and its reporter for defamation and false light invasion of privacy. After the jury returned a verdict for the defendants, ABC, alleging that Rogal had repeatedly given false testimony, moved for sanctions. *Id.* at 42. Rogal filed a brief opposing the motion, but no hearing was held. The court, citing ten areas in which Rogal’s testimony was contradicted by his own words or advertisements or by his own witnesses, granted the motion. *Id.* at 43.

The Third Circuit reversed the sanctions award based on due process concerns. Judge Alito’s opinion emphasized the particular circumstances of the case, because “the requirements of due process are not reducible to a static formula.” *Id.* at 44. A hearing would have assisted in the court’s decision on the sanctions motion, Judge Alito explained, because Rogal did not have the same incentive at trial as he would have had at a sanctions hearing to explain inconsistencies in his testimony. *Id.* at 45. “In order to prove [his] claims, it was not necessary for [Rogal] to establish the truth of every one of the matters asserted in the portions of his testimony that the district court found to be false or misleading.” *Id.* Therefore, due process required that Rogal be given the opportunity to explain the inconsistencies. *Id.* Judge Alito cautioned, however, that the panel’s holding was narrow and that “in many instances in which sanctionable conduct occurs in the court’s presence, no hearing is required.” *Id.*

## VIII. ACCESS TO JUSTICE

Judge Alito has issued several troubling decisions limiting the ability of plaintiffs to privately enforce federal statutes. His few decisions on the scope of a state’s Eleventh

Amendment immunity from suit in federal court have been narrowly focused and generally positive. He has participated in numerous decisions upholding defendant's claims of qualified immunity, but has also been willing on occasion to reject such claims.

#### A. Judicial Review and Private Rights of Action

In *American Disabled for Attendant Programs Today v. U.S. Dep't of Housing & Urban Dev.*, 170 F.3d 381 (3d Cir. 1999), Judge Alito joined a panel decision holding that there is no right to judicial review under the Administrative Procedures Act of HUD's alleged failure to investigate violations and enforce fair housing laws as to accessibility by persons with disabilities. The decision held that the Fair Housing Act Amendments, which stated that HUD "shall" investigate complaints, did not set forth specific guidelines for the agency to follow in enforcement proceedings, and thus, under the governing Supreme Court precedent, allegations that HUD was not complying with its duty to investigate were unreviewable. *Id.* at 385-86.

In *Pennsylvania Pharmacists Association v. Houstoun*, 283 F.3d 531 (3d Cir. 2002)(en banc), Judge Alito authored an opinion for the *en banc* court that pharmacists could not assert a claim under §1983 that the state's Medicaid reimbursement scheme violated the Medicaid Act. The case split the court 6-5. The majority and the dissent disagreed on whether, applying the Supreme Court's precedents, pharmacists could be seen as the intended beneficiaries of a provision of the Medicaid Act requiring reasonable provider reimbursement rates. While the plaintiffs were not injured individuals but rather pharmacies claiming they were squeezed by low reimbursement rates, Judge Alito's opinion suggests that he might narrowly construe the Supreme Court's "intended beneficiary" requirement.

A few years later, in *Sabree ex rel. Sabree v. Richman*, 367 F.3d 180 (3d Cir. 2004), Judge Alito joined the panel majority's decision recognizing that mentally retarded Medicaid recipients could privately enforce a provision of the Medicaid Act requiring states to provide medical services for the mental retarded with "reasonable promptness," and reversing the district Court's contrary decision. In a separate opinion, however, Judge Alito wrote that "the analysis and decision of the District Court may reflect the direction that future Supreme Court cases in this area will take, currently binding precedent supports the decision of the Court. I therefore concur in the Court's decision." *Id.* at 194

Judge Alito also joined a unanimous opinion in *Beth V. v. Carroll*, 87 F.3d 80 (3d Cir. 1996), holding that an express right of action exists under the IDEA to challenge a state education department's systemic failure to promptly investigate and resolve complaints. The IDEA statutes and its regulations require states to adopt minimum complaint procedures. The plaintiffs in the case claimed, among other things, that the state had failed to: resolve complaints in a timely manner, address all the allegations raised by complaints, and order or enforce corrective action. The IDEA provides disabled children and their parents the right to judicial review of the substantive and procedural rights afforded by the statute. However, the State argued against private enforcement on the ground that plaintiffs were challenging not a particular child's educational program, but the "sufficiency of a purely regulatory procedure." *Id.* at 86. The panel rejected that argument, finding that the plaintiffs' claims involved more than procedural grievances but "substantive educational outcomes." *Id.* at 87.

## B. Eleventh Amendment Immunity

The Supreme Court has interpreted the Eleventh Amendment to forbid suits in federal courts against unconsenting states, whether these suits are brought by a state's own citizens or citizens of another state.<sup>27</sup> Judge Alito has participated in a several Eleventh Amendment rulings, most of which required him to determine whether the defendant was an "arm of the state" and thus entitled to immunity. In two notable cases, he rejected claims of immunity.

In *Bolden v. Southeastern Pennsylvania Transp. Auth.*, 953 F.2d 807 (3d Cir. 1991) (en banc), which found an employee's drug test unconstitutional,<sup>28</sup> Judge Alito rejected the claim that the defendant was immune under the Eleventh Amendment. Raising the issue for the first time on appeal, the Southeastern Pennsylvania Transportation Authority (SEPTA) claimed that it was an alter ego of the state of Pennsylvania, and that it was not a person within the meaning of § 1983.

Alito found that the court had the power to address the Eleventh Amendment argument even though it was not raised until oral argument on appeal, but Judge Alito rejected SEPTA's arguments. Drawing on prior Supreme Court and circuit cases, Alito's opinion laid out a test for determining whether an entity was an "arm of the state,"<sup>29</sup> and concluded that SEPTA failed to meet that test. Judge Alito also concluded that the Supreme Court's that states were not persons under § 1983, *Will c. Michigan Dep't of State Police*, 491 U.S. 58 (1989), had no bearing on the Eleventh Amendment analysis of whether SEPTA was an arm of the state.

Several years later, in *Christy v. Pennsylvania Turnpike Comm'n*, 54 F.3d 1140 (3d Cir. 1995), Judge Alito joined a panel decision applying established circuit and Supreme Court precedent and concluding that the Pennsylvania Turnpike Commission was not an "arm of the state" and thus lacked immunity. *Christy* also held, on an issue of first impression in the Third Circuit, that the party asserting Eleventh Amendment immunity bears the burden of production and persuasion on factual questions

## C. Section 1983/Qualified Immunity

Judge Alito has written or joined a number of decisions finding that individual defendants had qualified immunity, and has voted only a few times to reject claims of qualified immunity. Nonetheless his jurisprudence in this area is not particularly striking given the current state of the law on qualified immunity.

In *Solomon v. Philadelphia Hous. Auth.*, 143 Fed. Appx. 447 (3d Cir. 2005), Judge Alito joined a panel decision finding that the neither the Philadelphia Housing Authority (PHA) nor

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<sup>27</sup> See *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 100 (1984)

<sup>28</sup> The central holding of this Fourth Amendment case is discussed above.

<sup>29</sup> This test examines : (1) whether the money that would pay the judgment would come from the state; (2) how the agency is treated under state law (including whether the agency is separately incorporated, whether it can sue and be sued in its own right, and whether it is immune from state taxation); and, (3) the degree of autonomy the agency has from the state. *Id.* at 816.

named individuals, could be held liable for failing to provide pre-suspension notice to the plaintiff. The immunity analysis involved a fairly routine application of Supreme Court precedent. The panel concluded that under *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978), the plaintiff failed to demonstrate that his suspension was the result of an official government policy or custom. In addition, the Court held that the two non-policy making officials responsible for the plaintiff's suspension were entitled to qualified immunity because the right at issue was not "clearly established," as required by the Supreme Court's precedents.

In *Doe v. County of Centre PA*, 242 F.3d 437 (3d Cir. 2001), which held that a County's policy of excluding a couple from providing foster care because of their son's AIDS violated federal disability law, Judge Alito joined a panel decision finding that named county officials were entitled to qualified immunity because the right at issue was not clearly established. On an issue of first impression, the panel also held that municipalities were immune from suit for *punitive* damages under Title II of the ADA and the Rehabilitation Act.

Again, in *BlackHawk v. Pennsylvania*, 381 F.3d 202 (3d Cir. 2004), Judge Alito required the state to provide a religious exemption to regulations governing state game kept in captivity. (That decision is described in the Free Exercise Section above). Judge Alito held, however, that the individual defendants were not required to pay money damages: because the government precedents were "complex and developing" and thus a reasonable officer might not have concluded that an exemption was required. *Id.* at 214-15; *see also* *Rappa v. New Castle County*, 18 F.3d 1043 (3d Cir. 1994) (joining panel opinion finding county officials were immune from suit after finding that County had violated the First Amendment in prohibiting political signs within 25 feet of a public highway).

Judge Alito has rejected claims of qualified immunity in several instances. In *Eddy v. Virgin Islands Water and Power Auth.*, 256 F.3d 204 (3d Cir. 2002), plaintiff brought a section 1983 suit claiming that his employer had violated his substantive due process rights under the Fourteenth Amendment. According to the plaintiff, his employer required him to work on an unsafe high-power voltage line without providing him the proper training or equipment. Judge Alito held that the right not to be subject to employment conditions that shock the conscience was clearly established, and thus defendants were not entitled to qualified immunity on this theory. *See also* *Forbes v. Township of Lower Merion*, 76 Fed. Appx. 475 (3d Cir. 2003) (unpublished) (affirming the district court's denial of summary judgment on qualified immunity grounds to police officers sued after a fatal shooting); *Brown v. Daniels*, 128 Fed. Appx. 910 (3d Cir. 2005) (unpublished) (per curiam) (reversing District Court's dismissal of claim at complaint stage on grounds of qualified immunity); *Garbacik v. Janson*, 111 Fed. Appx. 91 (3d Cir. 2004) (unpublished) (joining panel decision holding that officers who failed to intervene to prevent colleague's use of excessive force were not entitled to qualified immunity).

## **IX. WRITINGS**

Judge Alito has a handful of published writings, but they do little to illuminate his views on civil liberties issues.

In 1986, he authored a law review article analyzing the Supreme Court's decisions applying the privilege against self-incrimination to the production of documents (as opposed to testimony). See Samuel A. Alito, Jr., *Documents and the Privilege Against Self-Incrimination*, 48 U. PITT. L. REV. 27 (1986). In 1991, he published an article summarizing the 1991 Annual Report of the Sentencing Commission. See Samuel A. Alito *Reviewing the Sentencing Commission's 1991 Annual Report*, 5 FED. SENT. R. 166 (1992).

More suggestive of Alito's own views perhaps is his very short introduction to a Federalist Society debate by Charles Fried and Paul Bator on the Independent Counsel statute. See Samuel A. Alito, Jr., *Introduction, After the Independent Counsel Decision is Separation of Powers Dead?* AM. CRIM. L. REV. 26, no. 4, at 1667 (1989). In the piece, Judge Alito described the Supreme Court's decision in *Morrison v. Olson*, 478 U.S. 654 (1988), finding the independent counsel statute constitutional, as "stunning for its vote (seven to one), its author (Chief Justice Rehnquist) and its breadth." *Id.* at 1667. The concern raised by Judge Alito was that *Morrison* infringed on executive power and announced a standard permitting the Court to evaluate future encroachments on executive authority based solely on its "subjective view." *Id.* Judge Alito described Justice Scalia's "lonely" dissent criticizing the majority's "ad hoc" decision as "brilliant."

Shortly after graduating from Yale, Alito published a piece examining Supreme Court doctrine on state classifications that exclude illegitimate children, and those that favor traditional families over non-traditional or "associational families" (such as a family consisting of children and their unmarried parents). See *Equal Protection and Classifications Based on Family Membership*, 80 DICKINSON L. REV. 410 (1976). The article attempts to reconcile Supreme Court doctrine, and Alito avoids broad normative analyses. In the article, Judge Alito suggests that while the Supreme Court's jurisprudence in this area appears incoherent, the Court's cases consistently protected children from discrimination based on illegitimacy, the interests of individuals in choosing their family structure, and the state's interest in "promoting the traditional family." *Id.* at 433. Judge Alito concluded that valuing both the state's interests in the traditional family and the individual's interest in choosing their family while seemingly at odds, represented a sensible approach: states were allowed to promote traditional families, but could not unnecessarily infringe on individual rights. *Id.*