

rights.<sup>141</sup> This is demonstrated not only by his consistent and overwhelming pattern of dissenting or ruling against civil rights claims, but also by the content of those decisions. Dissents in which all ten of his colleagues rule the other way, and where his positions are described as “eviscerating” civil rights laws or threatening “manifest injustice,” demonstrate that, particularly when compared with Justice O’Connor, Judge Alito is dangerously out of the mainstream on civil rights.

#### D. Judge Alito’s Record on Immigration

Immigration is a specialized area of the law with important civil rights implications. Although the Supreme Court has often issued rulings that have limited the rights of immigrants, Judge Alito’s record suggests that his confirmation would likely make matters even worse. Alito’s record as a government lawyer and federal judge raise serious concerns about his views on immigrants’ rights.

In a 1986 letter written by Alito in his capacity as Deputy Assistant Attorney General, he advised William Webster, Director of the Federal Bureau of Investigation (FBI), that the FBI’s desire to document fingerprint and criminal information of nonresident non-citizens of the U.S. was constitutionally proper. In a footnote to this letter, he went further and issued a broad legal opinion regarding the constitutional protections that should properly be afforded to undocumented immigrants living in the United States. He argued that the Supreme Court’s decision in *Matthews v. Diaz*,<sup>142</sup> suggests that “illegal aliens have no claim to nondiscrimination with respect to nonfundamental rights,” and the Constitution “grants only fundamental rights to illegal aliens within the United States.”<sup>143</sup>

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<sup>141</sup> Knight-Ridder

<sup>142</sup> 426 U.S. 67 (1976) (addressing whether Congress may condition a non-citizen’s eligibility for Medicare’s supplemental insurance program upon continuous residence in the United States for a 5-year period and permanent residency status).

<sup>143</sup> See letter from Samuel Alito to William Webster (Jan. 10, 1986).

In fact, Alito’s analysis rests on a flawed interpretation of *Matthews* and ignored a more recent case in which the Supreme Court had held to the contrary. In *Plyler v. Doe*,<sup>144</sup> the Court held that the Fourteenth Amendment prohibited states from discriminating against undocumented immigrant children in the provision of public education, even though the Supreme Court has held that education is not considered a “fundamental right” under the Constitution. Even the dissenting Justices in *Plyler* indicated that they “ha[d] no quarrel with the conclusion that the Equal Protection Clause of the Fourteenth Amendment applies to aliens, who, after their illegal entry into this country, are indeed physically ‘within the jurisdiction’ of a state.”<sup>145</sup> None of the Justices on the *Plyler* Court would have gone as far as Alito to restrict equal protection rights of undocumented immigrants. As conservative constitutional analyst Bruce Fein noted, “[Alito] seems to be saying that there is no constitutional constraints placed on U.S. officials in their treatment of nonresident aliens or illegal aliens. Could you shoot them? Could you torture them? . . . It’s a very aggressive reading of cases that addressed much narrower issues.”<sup>146</sup>

Cases in which Alito, in his capacity as a federal judge, has written for the majority or filed a dissent raise serious concerns about how he would deal with foreign nationals seeking asylum in the United States and the rights of legal immigrants residing in the U.S., if confirmed to the Supreme Court. Alito has issued troubling dissents from decisions protecting immigrants’ rights, arguing that foreign nationals who were facing persecution be denied asylum and that legal immigrants be deported. On the other hand, he has authored decisions protecting the rights of immigrants whose religious beliefs, such as the opposition to abortion, were at issue.

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<sup>144</sup> 457 U.S. 202 (1982).

<sup>145</sup> *Id.* at 243.

<sup>146</sup> Jo Becker and Amy Goldstein, ‘86 Alito Memo Argues Against Foreigners’ Rights, *Washington Post*, Nov. 22, 2005, at A4.

## Asylum Cases

Alito's dissents in several cases involving foreign nationals seeking asylum raise serious concern about his views of protecting individuals who are seeking refuge from persecution. In *Dia v. Ashcroft*,<sup>147</sup> decided *en banc*, the majority vacated the Board of Immigration Appeals' (BIA) order denying asylum to a citizen of Guinea who alleged that the Guinean military was planning to kill him because of his membership in a particular political organization and refusal to join the military. The court determined that the immigration judge (IJ) and BIA must provide "substantial evidence" to deny an applicant asylum on the ground that he or she is not credible. Holding that substantial evidence was lacking, the court remanded the case to the BIA "to further explain or supplement the record."<sup>148</sup> In a heated dissent, Alito asserted that the majority failed "to take the totality of the circumstances into account in reviewing the IJ's credibility determination. . . focuse[d] one by one on specific statements . . . and ask[ing] whether each of those statements is plausible."<sup>149</sup> The majority strongly criticized Alito's act of ignoring the "substantial evidence" requirement, explaining that Alito's opinion "not only guts the statutory standard, but ignores our precedent."<sup>150</sup>

In *Chang v. INS*,<sup>151</sup> the majority vacated the BIA's order denying asylum to a Chinese citizen who sought asylum on the ground that he faced arrest in China for violating the State Security Law, having failed to report that members of his delegation had considered remaining in the United States. The majority stated that he feared "los[ing] his job . . . imprison[ment], and that his family w[ould] suffer retaliation," if he returned home, and that the "FBI told Chang he was in 'danger.'"<sup>152</sup> Alito dissented, and would have upheld the administrative determination to deport Chang, despite the

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<sup>147</sup> 353 F.3d 228 (3d Cir. 2003) (*en banc*).

<sup>148</sup> *Id.* at 260.

<sup>149</sup> *Id.* at 262.

<sup>150</sup> *Id.* at 251 n. 22.

<sup>151</sup> 119 F.3d 1055 (3d Cir. 1997).

<sup>152</sup> *Id.* at 1058, 1068.

uncontradicted testimony relied upon by the majority that Chang “faced potential imprisonment and economic repercussions for violations of the security laws.”<sup>153</sup>

In marked contrast, Alito has challenged administrative decisions and judges, refusing to defer to their judgment, in asylum cases involving individuals who had been persecuted for their religious values and opposition to abortion. In *Liu v. Ashcroft*, a husband and wife from China sought asylum on the ground that “Mrs. Liu was twice forced by the Chinese government to undergo an abortion, and that both [Petitioners] face government persecution on account of their Christian faith.”<sup>154</sup> The IJ held that the Lius were not credible, having found inconsistencies in the evidence that they presented, a decision affirmed by the BIA. In a similar case, *Zhang v. Gonzales*,<sup>155</sup> a Chinese citizen sought asylum on the ground that Chinese family planning authorities had subjected her to a forced abortion and demanded that she or her husband be sterilized.<sup>156</sup> Zhang expressed her opposition to abortion. The IJ held that Zhang lacked credibility, finding her testimony weak and her story unbelievable, a decision affirmed by the BIA.<sup>157</sup>

Alito wrote opinions in both cases vacating the BIA’s orders denying asylum to the petitioners. In *Liu*, the IJ had excluded certificates presented by the petitioners that purportedly confirmed that two abortions had been performed because they did not comply with the regulatory authentication procedure.<sup>158</sup> Alito’s opinion rejected the IJ’s interpretation of its own regulation, holding that the regulatory authentication of documents, as set forth in 8 C.F.R. § 287.6 of the Immigration and Naturalization Act (“Act”),<sup>159</sup> is not an absolute rule of exclusion or the exclusive way to authenticate

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<sup>153</sup> *Id.* at 1067. *See also Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993)(opinion by Alito upholding refusal to grant asylum to Iranian who claimed she faced fear of persecution because she belonged to group of Iranian women who refused to conform to restrictive gender-specific laws).

<sup>154</sup> 372 F.3d 529, 530 (3d Cir. 2004).

<sup>155</sup> 405 F.3d 150 (3d Cir. 2005).

<sup>156</sup> *Id.* at 152.

<sup>157</sup> *Id.* at 153-54.

<sup>158</sup> *Liu*, 372 F.3d at 531.

<sup>159</sup> *Id.* at 532.

documents in asylum cases.<sup>160</sup> Alito held that the IJ had erred in excluding the certificates, and remanded the case.<sup>161</sup> Alito also rejected factual findings made by the IJ.<sup>162</sup>

In *Zhang*, Alito also rejected the IJ's decision and demanded that the IJ further explain his process of weighing the evidence. Alito suggested that the IJ may have inappropriately excluded uncertified documents,<sup>163</sup> violating the rule set forth in *Liu*, and, therefore, remanded the case "for clarification on this point."<sup>164</sup> Alito speculated that the documents referred to by the IJ might not have been in the official record, stating that "[t]he IJ referred to the documents . . . stating: 'The court also has Exhibit 4 which consists of some documents . . .' But what the IJ meant when he said he 'had' the documents in unclear." Alito explained that it was "conceivable that [the IJ] merely meant . . . submitted and not . . . part of the record."<sup>165</sup>

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<sup>160</sup> *Id.* at 533. Alito's opinion, flatly rejecting the IJ's interpretation of the Act, was in marked contrast to the opinion he wrote in *Chen v. Ashcroft*, 381 F.3d 221 (3d Cir. 2004) (questioning the BIA's decision not to extend protection to the unnamed partner of a woman who had been forced to abort their child), where he found it necessary to first evaluate the BIA's interpretation of its own statute under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984), to determine whether it deserved deference.

<sup>161</sup> Judge Alito and his colleagues disregarded the government's contention that "the improper application of § 287.6 was not prejudicial here since there was evidence in the record indicating that official documents from Fujian . . . are commonly forged and thus are 'virtually useless' as credible corroborating evidence." *Liu*, 372 F.3d at 533.

<sup>162</sup> For example, Alito rejected the IJ's determination that Mr. Liu was not credible because he gave two different dates for his date of baptism. Alito interpreted the facts differently than the IJ had, speculating that the inconsistency "almost certainly resulted from the apparent difference the translator had in expressing the concept of baptism," distinguishing the moment when Mr. Liu formally accepted Christianity through a confession of faith from the time he was actually baptized. *Id.* at 533-34.

<sup>163</sup> *Zhang*, 405 F.3d at 155 ("it is possible that the IJ in this case refused to admit the documents in question and thus gave them no weight. It is also possible that the IJ admitted the documents but found that they were entitled to less weight . . . . Without further explanation, however, neither approach can be sustained.").

<sup>164</sup> *Id.* at 155-56.

<sup>165</sup> *Id.* at 153.

The differences and contradictions between Alito’s opinions in asylum cases like *Dia* and *Chang*, where he deferred extensively to administrative findings, and those involving forced abortion claims, where he did not, is troubling.<sup>166</sup>

### Other Immigration Decisions

In several non-asylum immigration cases in which the Third Circuit has protected the rights of immigrants, Alito has filed disturbing dissents. He has argued that deference should be given to an agency’s decision to deport legal immigrants and criticized his colleagues for even questioning the decisions of immigration agencies. In one case, he argued for a restrictive interpretation of a federal law related to immigration that was later rejected by the Supreme Court. The views expressed by Alito in his dissents in these cases raise additional serious concerns about how he would protect the rights of immigrants if confirmed to be a Supreme Court Justice.

In *Lee v. Ashcroft*,<sup>167</sup> the majority reversed the IJ’s determination that filing a false tax return was an aggravated felony warranting deportation under federal immigration law of a Korean couple who had lived in the U.S. for almost twenty years. The court held that the IJ had misinterpreted the statutory provision at issue. Alito dissented and argued that filing a false tax return was indeed an “aggravated felony.”<sup>168</sup> The majority criticized Alito’s argument and his failure to apply “well-established principles of statutory construction,” writing “[i]t may be that Congress will wish to broaden the categories of aggravated felony to include other or all tax felonies. But we

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<sup>166</sup> Alito has written decisions affirming the denial of asylum relating to abortion in only one published opinion, where the couple involved was unmarried, *Chen v. Ashcroft*, 381 F.3d 221 (3d Cir. 2004), and two unpublished cases where the facts clearly contradicted the applicants’ claims. *Chen v. Gonzales*, No. 04-3871 (3d Cir. Sept. 29, 2005) (petitioner’s claim was not corroborated by her husband); *Wong v. Ashcroft*, 76 Fed. Appx. 446, No. 02-4375 (3d Cir. Sept. 29, 2003), (petitioner initially alleged that she was given notice that she would be sterilized and later claimed that she had already been forcibly sterilized).

<sup>167</sup> 368 F.3d 218 (3d Cir. 2004).

<sup>168</sup> *Id.* at 226 (Alito, dissenting).

must interpret what it has written by well-recognized rules of statutory construction, unaided by speculation.”<sup>169</sup>

Similarly, in *Partyka v. Attorney General*,<sup>170</sup> the Third Circuit held that third degree aggravated assault, under New Jersey law, did not involve a crime of moral turpitude warranting deportation under another provision of federal immigration law. The majority held that “[w]hether an alien’s crime involves moral turpitude is determined by the criminal statute and the record of conviction, not the alien’s conduct.”<sup>171</sup> The court continued, “[u]nder this categorical approach, we read the applicable statute to ascertain the least culpable conduct necessary to sustain a conviction under the statute.”<sup>172</sup> Because the least culpable mens rea for third degree aggravated assault was negligence, the court determined that Partyka had not committed a crime involving moral turpitude. Although Alito agreed that the IJ had misread the assault statute, he argued in his dissent that the case should have been remanded to the BIA to “apply its understanding of the concept of a crime of moral turpitude.”<sup>173</sup> He contended that “the [BIA] may think that the unintentional infliction of bodily injury upon a person known to be a police officer who is performing an official duty constitutes a crime of moral turpitude.”<sup>174</sup> Such an argument threatens to seriously harm legal residents by threatening them with deportation for clearly unintentional acts.<sup>175</sup>

In *Sandoval v. Reno*,<sup>176</sup> Judge Alito’s harsh interpretation of an immigration-related statute was not only rejected by the majority of his court but also by the Supreme

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<sup>169</sup> *Id.* at 225 n. 11.

<sup>170</sup> 417 F.3d 408 (3d Cir. 2005).

<sup>171</sup> *Id.* at 411.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 417 (Alito, dissenting).

<sup>174</sup> *Id.*

<sup>175</sup> In contrast to his dissent in *Partyka*, Alito wrote a unanimous opinion in *Oyebanji v. Gonzales*, 418 F.3d 260 (3d Cir. 2005), holding that a conviction for vehicular homicide was not an aggravated felony justifying removal, based on the clear precedent in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), involving a DUI offense. Alito nonetheless concluded by stating that “we appreciate the force of the government’s arguments to the contrary” and that they should be “directed to the Supreme Court or Congress.” 418 F.3d at 265.

<sup>176</sup> 166 F.3d 225 (3d Cir. 1999).

Court in a later case.<sup>177</sup> Alito disagreed both with the district court and the Third Circuit majority and argued that the BIA should not even consider Sandoval's claim for discretionary relief from deportation because of a change in federal law that restricted eligibility for such relief, even though the change had occurred while Sandoval's claim was pending. The Supreme Court similarly rejected the position taken by Alito in another case, pointing out that such an interpretation would raise serious constitutional questions.<sup>178</sup>

In one case in which an immigrant had pleaded guilty to a crime, Alito dissented and disregarded clear evidence of the immigrant's rehabilitation and significant ties to the U.S. when considering deportation. In *Tipu v. INS*,<sup>179</sup> the majority vacated the BIA's decision to deny Tipu discretionary relief from deportation. Tipu, a Pakistani immigrant, had lived in the U.S. for twenty-three years, supported his brother and his brother's family, and owned a taxicab business; he had played a minor role in a conspiracy to distribute heroin. The Third Circuit held that the BIA had abused its discretion in its consideration of the facts by failing to adequately consider the substantial evidence in the record that favored Tipu. Alito dissented and argued that the court should have deferred to the agency.<sup>180</sup>

In contrast, Judge Alito declined to defer to an administrative agency and disagreed with the agency's interpretation of its own rules in a case that benefited a non-profit religious organization. In *Soltane v. U.S. Dept. of Justice*,<sup>181</sup> Alito wrote for the court, vacating the Immigration and Naturalization Service's Administrative Appeals Office's (AAO) decision to deny a visa petition that was filed by the organization on behalf its immigrant employee. The petitioner was a non-profit organization "focused on

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<sup>177</sup> *INS v. St. Cyr*, 533 U.S. 289 (2001).

<sup>178</sup> *See INS v. St. Cyr*, 533 U.S. 289 (2001).

<sup>179</sup> 20 F.3d 580 (3d Cir. 1994).

<sup>180</sup> *Id.* another unpublished opinion written by Alito, *Vilcapoma v. INS*, No. 94-3778 (May 19, 1995)(upholding the BIA's reversal of the IJ's deportation waiver, despite evidence that the petitioner had been raised in the U.S. since the age of 3 and had a high likelihood of rehabilitation).

<sup>181</sup> 381 F.3d 143 (3d Cir. 2004).

Christianizing the ordinary aspects of life for the mentally handicapped as well as for the fully able members of the community.”<sup>182</sup> Its employee worked as a “houseparent.” Alito challenged both the AAO’s interpretation of its own regulation<sup>183</sup> and its determination that the employee was not eligible for a visa because she only performed wholly secular functions. Alito relied on his own reinterpretation of the facts and found that the employee’s position involved “a number of clearly religious responsibilities.”<sup>184</sup> Alito thus wrote that “[t]he AAO clearly did not consider all relevant evidentiary factors in this case, nor did it properly interpret its regulation defining ‘religious occupation.’”<sup>185</sup>

Judge Alito’s record limiting or attempting to limit the rights of immigrants raises serious concerns about how he would treat legal and undocumented immigrants if he were confirmed to the Supreme Court. The inconsistency in this pattern, in which he has protected some religious individuals and organizations, especially those opposed to abortion, raises concerns as well.

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<sup>182</sup> *Id.* at 145.

<sup>183</sup> 8 C.F.R. § 204.5(m)(2).

<sup>184</sup> *Soltane*, 381 F.3d at 150.

<sup>185</sup> *Id.* at 152.