# JUDGE ALITO'S FIRST AMENDMENT VIGILANCE ON THE THIRD CIRCUIT

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Seventeen years ago, Justice Alito ascended to the Supreme Court. His tenure there has just surpassed the fifteen-plus years that he served on the court where I sit, the U.S. Court of Appeals for the Third Circuit. When I interviewed them for this chapter, my colleagues who served with him all remembered him fondly as "well respected and well liked." He got along with everyone, embodying the Third Circuit's strong tradition of collegiality. And he "inspire[d] intense loyalty" in his friends and law clerks.

Judge Alito, they recall, was "very smart." He was always "extraordinarily prepared" for oral argument, where his questions "zeroed in on the key issue." He "wrote beautifully," and his opinions got to the point. He was also "a lawyer's lawyer," following the law wherever it took him, even when he found the result distasteful. Despite his many accomplishments, he was humble and quiet. Yet he had a hilarious, "very dry sense of humor," befitting a judge born on April Fools' Day.

Judge Alito was not only a terrific guy, but also a brilliant jurist. He made valuable contributions to the Third Circuit's case law, staking out robust defenses of religious liberty, free speech, and the role of religion in the public square. These precedents remain landmarks and presage many positions he has continued to champion at the Supreme Court. Collectively, they reflect now-Justice Alito's principled, consistent defense of the First Amendment.

## I. FREE EXERCISE

Three decades ago, the Supreme Court greatly narrowed its reading of the Free Exercise Clause. Under *Smith*, "neutral law[s] of general applicability" do not implicate free exercise, even if they burden religious activity.[1] On the other hand, laws that target religious practice still trigger strict scrutiny.[2]

*Smith* and its progeny, though, did not fully define what made a law neutral or generally applicable. It was hard to tell what was constitutional: many laws do not openly target religious activity, yet they exempt some secular actions without likewise exempting their religious

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[1] Emp. Div. v. Smith, 494 U.S. 872, 879 (1990) (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)).

[2] Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 546 (1993).

counterparts. Religious exemptions might be required sometimes, the Court suggested, but it did not explain when.[3]

In his time on the Third Circuit, Judge Alito did his best to fill this void. Twice, he carefully explained why policies could not exempt secular activities without doing the same for comparable religious ones. In so doing, he protected a diverse array of religious practices. His decisions two decades ago have foretold the high Court's direction since then.

*A. Clean-shaven cops and Muslim beards*

Police departments make their officers wear uniforms to create a disciplined image, make officers identifiable, and forge esprit de corps. For the same reasons, Newark's police department ordered its officers to shave off their beards. The Department granted exemptions from the policy for undercover officers and medical reasons, but not religious ones.[4]

Two Sunni Muslim officers objected. They believed that shaving off or refusing to grow a beard was a serious sin, equivalent to eating pork. As the Department prepared to discipline them, they sued to enjoin the policy. The Department responded that disability law required a medical exemption, but the First Amendment did not require a religious one.

Judge Alito held the policy unconstitutional. He rejected the disability-law defense, noting that civil-rights law equally requires religious accommodations. In any event, the First Amendment bars treating religious claims worse than medical ones. The government seemed to have decided that "secular motivations are more important than religious motivations."[5] And that apparent intent to discriminate triggered heightened scrutiny.

The policy could not survive that scrutiny. The relevant question, he reasoned, was whether religious exemptions would undermine the no-beard policy more than medical exemptions would.[6] Here, it wouldn't. The Department justified its policy as needed to preserve uniformity and morale. But religious exemptions wouldn't affect those goals any more than medical exemptions would.

Thus, *Fraternal Order of Police* established that granting nonreligious exemptions, but denying individual religious exemptions, could show discriminatory intent.[7] And it did so while protecting a minority religion.

*B. Wildlife permits, zoos, Indian tribes, and bear rituals*

Five years later, Judge Alito expanded *Fraternal Order of Police*'s rule from individual to categorical exemptions. This one involved Dennis Blackhawk, a holy man of the Lakota Indian tribe. Blackhawk owned two black bears that he used in religious ceremonies. Pennsylvania law required anyone who owned wildlife to get a permit and pay a fee. But it allowed waiver of these

[3] *Id.* at 537–38; James M. Oleske, Jr., *Lukumi at Twenty: A Legacy of Uncertainty for Religious Liberty and Animal Welfare Laws*, 19 ANIMAL L. 295, 299 (2013).

[4] Fraternal Ord. of Police Newark Lodge v. City of Newark, 170 F.3d 359, 360, 365–66 (3d Cir. 1999).

[5] *Id.* at 365.

[6] *Id.* at 366–67; see also Oleske, supra note 4, at 309.

[7] *See* Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise:* Smith, Lukumi *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 873–74 (2001).

requirements for zoos and circuses, as well as for "hardship or extraordinary circumstance," so long as the waiver was "consistent with sound game or wildlife management activities."[8]

Blackhawk sought a religious exemption from the fee. But Pennsylvania denied it, regardless of hardship, because it thought that keeping wild animals captive conflicted with sound wildlife management.

Judge Alito rejected Pennsylvania's justification. The Commonwealth gave zoos and circuses broad, categorical exemptions. So its opposition to keeping wild animals was not "firm or uniform."[9]

Next, the court extended *Fraternal Order of Police* to categorical exemptions. That case, Judge Alito noted, had held that "individualized, discretionary exemptions" undercut a law's general applicability.[10] But the same is true of laws that broadly exempt secular actions that undermine the laws' purposes without doing the same for comparable religious actions. By extending the doctrine to broad exemptions, Judge Alito deemphasized the role of suspected discriminatory intent. All that mattered was that the law was substantially underinclusive in pursuing its stated goals. Thus, Judge Alito applied strict scrutiny and invalidated the unequal exemption scheme.

The principles that Judge Alito announced in these two cases echo in his work on the Supreme Court. Two terms ago, Justice Alito criticized state COVID policies that restricted worship more than some secular activities. In one case, he reprimanded Nevada for capping worship services at fifty people while letting casinos operate at half capacity.[11] In another, he would have made California prove that "nothing short of" its restrictions on churches would "reduce the community spread of COVID-19" as much as the laxer restrictions on "essential" activities.[12] In short, states may not treat secular activities better than religious ones without compelling reasons. And in *Fulton v. City of Philadelphia*, he drew on *Fraternal Order of Police* to advocate overruling *Smith*, in part because courts have struggled to discern whether laws target religion and whether exemptions are uneven.[13]

Critics knock Justice Alito as narrowly protecting conservative Christians.[14] But as *Fraternal Order of Police* and *Blackhawk* illustrate, his free-exercise commitment protects people of all faiths, just as the Constitution demands.

## II. ESTABLISHMENT

Confusion about the First Amendment and religion extends to the Establishment Clause too. Broad religious accommodation often gets criticized as violating the Establishment Clause.[15] And courts remain unclear about how that provision interacts with the Free Exercise Clause.

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[8] 34 PA. CONS. STAT. §§ 2901(d), 2965.

[9] Blackhawk v. Pennsylvania, 381 F.3d 202, 210 (3d Cir. 2004).

[10] *Id.* at 209.

[11] Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2604 (2020) (Alito, J., dissenting from denial of injunction).

[12] S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 716 (2021).

[13] 141 S. Ct. 1868, 1919–21 (2021) (Alito, J., concurring in the judgment) (citing *Fraternal Order of Police*).

[14] *See, e.g.*, Ronald Brownstein, *The Supreme Court Is Colliding With a Less-Religious America*, THE ATLANTIC, Dec. 3, 2020.

[15] *See, e.g.*, Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48 B.C. L. REV. 781, 787–88 & n.41 (2007).

Half a century ago, in *Lemon v. Kurtzman*, the Supreme Court read the Establishment Clause as requiring a law to satisfy a three-pronged test.[16] First, it "must have a secular legislative purpose."[17] Second, its main effect must be neither to promote nor to retard religion.[18] And third, it must "not foster an excessive government entanglement with religion."[19] But the Court often used other standards, leaving the whole field muddled.[20] Only recently has the Court at last buried the zombified test.[21]

On the Supreme Court, Justice Alito criticized the *Lemon* test as obsolete.[22] At worst, he said, it "puzzled" and "terrified" government officials into making the public square "a religion-free zone."[23] But, as the Court now agrees, the Constitution does not require the government to erase religion from public life.[24]

Justice Alito's justified skepticism began with his work on the Third Circuit. Twice, he carefully drew the Establishment Clause's lines to leave people free to express their beliefs in the public square.

*A. Crèche, menorah, and Frosty the Snowman*

The Supreme Court's fact-intensive precedents on holiday displays have long puzzled judges and local officials in places like Jersey City. For years, Jersey City's holiday display was comprised of only a menorah and a Christmas tree.[25] After a trial court enjoined that, the City added a crèche, sled, Santa Claus, Frosty the Snowman, and Kwanzaa symbols.[26]

In reviewing the revised display, the Third Circuit panel struggled to make sense of the Supreme Court's holiday-display cases. In *Lynch v. Donnelly*, a majority of the Court had upheld a holiday display including a crèche under the *Lemon* test.[27] But Justice O'Connor, the deciding vote, had suggested that the right approach was to ask whether the display appeared to endorse religion.[28] Five years later, the full Court adopted her endorsement test in *County of Allegheny v. ACLU*, striking down a crèche-focused display but upholding one with a menorah and Christmas tree.[29]

[16] 403 U.S. 602 (1971).

[17] *Id.* at 612.

[18] *See id.*

[19] *Id.* at 613 (internal quotation marks omitted).

[20] *See generally* Patrick M. Garry, *Establishment Clause Jurisprudence Still Groping for Clarity: Articulating a New Constitutional Model*, 12 NE. UNIV. L. REV. 660 (2020).

[21] *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427–28 (2022) ("abandon[ing]" *Lemon* for an "analysis focused on original meaning and history").

[22] Am. Legion v. Am. Humanist Soc'y, 139 S. Ct. 2067, 2080–81 (2019) (Alito, J., plurality opinion in relevant part).

[23] Town of Greece v. Galloway, 572 U.S. 565, 597 (2014) (Alito, J., concurring).

[24] *Kennedy*, 142 S. Ct. at 2431.

[25] ACLU of N.J. v. Schundler, 168 F.3d 92, 94–95 (3d Cir. 1999) (Alito, J.) (describing the town's several-decades-old Christmas tree and menorah display).

[26] *Id.* at 95.

[27] 465 U.S. 668 (1984).

[28] *Id.* at 690 (O'Connor, J., concurring).

[29] 492 U.S. 573, 592–94, 602 (1989).

In the Jersey City case, Judge Alito spent pages summarizing both cases and comparing their facts.[30] Ultimately, he thought the modified display more closely resembled those upheld by the Court. But his reasoning drew a strident dissent, which read *Lynch* and *Allegheny* differently.[31]

Frustrated with parsing the precedents' factual minutiae, the dissent begged the Supreme Court to clarify its standard.[32] In response, Judge Alito's opinion advanced a prescient suggestion: to decide how reasonable observers would view a practice, courts should consider the practice's "history and ubiquity."[33]

Now on the Supreme Court, Justice Alito has continued this focus on history. In several cases, he has set aside the *Lemon* test. Instead, in upholding legislative prayer, he has focused on the history of the practice.[34] He has done likewise with monuments.[35] And the Court has since joined him, replacing *Lemon* with an "analysis focused on original meaning and history."[36] These opinions have given lower-court judges clearer guidance than he had while serving on the Third Circuit.

*B. Boy Scouts as well as Bible games*

Judge Alito's *Lemon* skepticism extended equally to after-school clubs, like the one in Stafford.[37] The Stafford School District sent home literature about lots of nonprofits, like the Parent-Teacher Association, Boy Scouts, Girl Scouts, Four-H Club, Lions Club, and Elks.[38] But when a Christian group wanted to publicize its Good News Club, offering after-school Bible education and games, the school said no.[39] It feared that distributing their flyers would violate the Establishment Clause or at least "create divisiveness."[40]

Judge Alito rejected the Establishment Clause defense under any of three possible tests. First, the *Lemon* test was satisfied.[41] Giving religious groups equal access to public fora advances the secular purpose of informing families of the diverse community groups available; helps religious groups only incidentally, no more than secular ones; and does not entangle states with religion.[42]

Second, giving religious groups equal access would not reasonably be perceived as endorsing religion.[43] As the Supreme Court has repeatedly held, letting religious groups use school facilities to host a club or show a film does not, in context, endorse religion.[44] So too here. A "reasonable

[30] *Schundler*, 168 F.3d at 107 (3d Cir. 1999) (Alito, J.).

[31] *Id.* at 109–13 (Nygaard, J., dissenting).

[32] *Id.* at 113 (Nygaard, J., dissenting) ("The inconsistent results in this Court can be directly attributed to the insufficient and inconsistent guidance given to the inferior federal courts[.]").

[33] *Id.* at 106–07 (Alito, J.) (internal quotation marks omitted).

[34] Town of Greece v. Galloway, 572 U.S. 565, 602–03 (2014) (Alito, J., concurring).

[35] *Am. Legion*, 139 S. Ct. at 2087–89 (Alito, J., plurality opinion in relevant part).

[36] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427–28 (2022) (citing *Town of Greece* and *American Legion*).

[37] Child Evangelism Fellowship v. Stafford Twp. Sch. Dist., 386 F.3d 514 (3d Cir. 2004).

[38] *See id.* at 521.

[39] *Id.* at 523.

[40] *Id.* at 523 (3d Cir. 2004).

[41] *Id.* at 534–35.

[42] *Id.*

[43] *Id.* at 530–34.

[44] *Id.* at 530–31 (citing Bd. of Educ. of the Westside Cmty. Schs. v. Mergens, 496 U.S. 226, 252 (1990); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394–97 (1993); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 112–20 (2001)).

observer who is aware of the history and context of the community and forum" would know that Stafford was not endorsing the Club.[45]

Finally, Judge Alito reasoned, sending home the flyers would not coerce parents or their students to take part in religion.[46] So the Club's activities passed all three tests. The Club thus deserved equal access to the school.

His evenhandedness toward religion contrasts with that of another circuit. A panel of the Second Circuit upheld a school policy that let civic groups, but not church services, meet in its buildings after hours.[47] It reasoned that keeping religious groups out was a reasonable way to avoid the risk of violating the Establishment Clause.[48] That overreading of the Establishment Clause, to allow if not require discrimination against religion, is precisely what then-Judge Alito consistently rejected. Indeed, the Supreme Court has continued the same evenhanded approach in recent cases like *Trinity Lutheran Church v. Comer*, *Espinoza v. Montana Department of Revenue*, *Carson v. Makin*, and *Kennedy v. Bremerton School District*, supported by Justice Alito.[49] His thoughtful jurisprudence has carried the day.

## III. FREE SPEECH

Schools also loom large in free-speech disputes. And in the same vein, Judge Alito consistently opposed efforts to discriminate against religious, controversial, or unpopular speech.

Even in school, the First Amendment guards against viewpoint discrimination. If school officials let a range of speakers express their views, they may not shut down some viewpoints just to avoid uncomfortable disagreement. Students do not lose all freedom of speech "at the schoolhouse gate."[50] As the Court held in *Tinker*, school officials must show "something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[51] To justify restricting speech, they must show that the suppressed speech would "materially and substantially disrupt the work and discipline of the school."[52]

Judge Alito zealously guarded speech from schools' efforts to censor religious or unpopular content. In *Child Evangelism*, he rejected the school district's argument that Good News's flyers would amount to the school's own speech. And the school district could not ban the Good News Club just because its speech was controversial. "To exclude a group simply because it is controversial or divisive is viewpoint discrimination," Judge Alito held, relying on *Tinker*.[53] Religious speech is fully protected, he insisted, even if it might discomfit some hearers and even if its traditional views might clash with the school's notion of "diversity and tolerance."[54] In the

[45] *Id.* at 531–32 (internal quotation marks omitted); *accord* C.H. *ex rel.* Z.H. v. Oliva, 226 F.3d 198, 212 (3d Cir. 2000) (en banc) (Alito, J., dissenting).

[46] *Child Evangelism*, 386 F.3d at 535 (citing Lee v. Weisman, 505 U.S. 577, 587 (1992)).

[47] Bronx Household of Faith v. Bd. of Educ., 650 F.3d 30 (2d Cir. 2011).

[48] *Id.* at 46 (2d Cir. 2011).

[49] 137 S. Ct. 2012 (2017); 140 S. Ct. 2246 (2020); 142 S. Ct. 1987 (2022); 142 S. Ct. 2407 (2022).

[50] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)

[51] *Id.* at 509.

[52] *Id.* at 513.

[53] *Child Evangelism*, 386 F.3d at 527.

[54] *Id.* at 530 (quoting the school lawyer's defense of its actions).

process, he deftly punctured the school's Orwellian use of "tolerance" to justify its intolerance of disfavored speech.

Two other times, Judge Alito stood up for students' own speech. In each, he protected religious students' right to speak their minds free of school officials' censorship. Though *Tinker* lets school officials preserve a learning environment, he stressed, it does not let them scrub religious viewpoints for fear of giving offense.

*A. A kindergartner giving thanks for Jesus*

The first case involved a class assignment. Zachary Hood's kindergarten teacher asked him to make a Thanksgiving poster showing what he was thankful for.[55] He made a poster of Jesus.[56] For a couple of days, his poster hung in the hallway alongside those of his classmates.[57] But then school officials took it down, allegedly because its theme was religious.[58] Eventually, Zachary's teacher put it back up, but in a less prominent spot.[59] Zachary and his mother sued.

A panel of the Third Circuit upheld the school's actions as "reasonably related to legitimate pedagogical concerns."[60] It thought the school could restrict religious views in the classroom to avoid any misimpression that the school was promoting religious views.[61] The full court then reheard the case en banc yet dodged the First Amendment question. But Judge Alito dissented.

In dissent, he rejected the panel's suggestion that schools could discriminate against religious viewpoints. Instead, he insisted that as long as it falls within the assignment or discussion's scope, "public school students have the right to express religious views in class discussion or in assigned work."[62] Under *Tinker*, schools may still restrict disruptive speech. But discomfort or resentment of religion is not enough. "[V]iewpoint discrimination strikes at the heart of the freedom of expression."[63] And discriminating against religious speech is discriminating against religious viewpoints. "Zachary was entitled to give what *he* thought was the best answer" to the Thanksgiving assignment.[64] "He was entitled to be free from pressure to give an answer thought by [his] educators to be suitabl[y]" secular.[65]

On the Supreme Court, Justice Alito still takes care to distinguish schools' own speech from that of their students. He joined an opinion letting schools censor speech at a school activity that advocated drug use, but wrote separately to underscore that schools may not invoke their "educational mission" to justify censoring speech opposed to their own "political and social views."[66] And he recently condemned a school's effort to punish a student for venting anger at her cheerleading coach's decisions. Schools, he wrote, cannot restrict their students' off-campus

[55] C.H. *ex rel.* Z.H. v. Oliva, 226 F.3d 198, 201 (3d Cir. 2000) (en banc).
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] C.H. *ex rel.* Z.H. v. Oliva, 195 F.3d 167, 174 (3d Cir. 1999).
[61] *Id.* at 175.
[62] C.H. *ex rel.* Z.H. v. Oliva, 226 F.3d 198, 210 (3d Cir. 2000) (en banc) (Alito, J., dissenting).
[63] *Id.* at 213.
[64] *Id.*
[65] *Id.*
[66] Morse v. Frederick, 551 U.S. 393, 423 (2007) (Alito, J., concurring).

expressions about "politics, religion, and social relations."[67] Speech on such matters lies at the heart of the First Amendment's protection," so it "cannot be suppressed just because it expresses thoughts or sentiments that others find upsetting."[68]

*B. Offensive comments and robust debate*

Judge Alito's other school-speech case involved a broad ban on harassing or offensive remarks, including "negative name calling" based on sexual orientation.[69] The Saxe children were religiously opposed to homosexuality and believed they should voice their opposition, but feared punishment under the policy.[70] So they sued to enjoin it.

Judge Alito first rejected the school's argument that the First Amendment does not protect harassing or offensive language. True, he noted, harassing *conduct* is not speech. And a pattern of "severe, pervasive, and objectively offensive" harassment is tortious if it "effectively denie[s] [students] equal" educations.[71] But much speech that is just "deeply offensive" does not rise to that level.[72] And "anti-discrimination laws are [not] categorically immune from First Amendment challenge."[73]

In any event, the school's policy reached much further than anti-discrimination law does, to include disparaging another person's values. But the First Amendment protects arguments over values. Quoting the flag-burning case, he explained that "a principal function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose [even] when it … stirs people to anger."[74]

Next, Judge Alito followed *Tinker* in limiting school-speech regulations to disruptive speech. As he recognized, some student speech disrupts education.[75] But the school's policy reached much further than that to forbid giving offense based on personal characteristics. In the schoolhouse, as in society, the government may not ban speech just because someone takes offense to it.[76]

Judge Alito's holding put him at odds with other jurists. Five years later, the Ninth Circuit suggested that anti-gay speech could be "verbal assaults" unprotected by the First Amendment.[77] In recent years, other courts have confronted the clash between free speech and gay rights.[78]

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[67] Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2055, (2021) (Alito, J., concurring).

[68] *Id.* at 2055, 2058 (2021) (Alito, J., concurring).

[69] Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 203 (3d Cir. 2001).

[70] *Id.*

[71] *Id.* at 205–06 (quoting Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 651 (1999)).

[72] *Id.* at 206.

[73] *Id.* at 209–10.

[74] *Id.* at 210 (quoting Texas v. Johnson, 491 U.S. 397, 408–09 (1989)) (internal quotation marks omitted).

[75] *Id.* at 211; *see also* Abby Marie Mollen, *In Defense of the "Hazardous Freedom" of Controversial Student Speech*, 102 NW. UNIV. L. REV. 1501, 1521–22 (2008).

[76] *Saxe*, 240 F.3d at 215.

[77] Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1183 n.28 (9th Cir. 2006), *vacated as moot*, 549 U.S. 1262 (2007). *See generally* Kristi L. Bowman, *Public School Students' Religious Speech and Viewpoint Discrimination*, 110 W. VA. L. REV. 187, 205–07 (2007) (contrasting the two cases).

[78] *Compare, e.g.*, 303 Creative LLC v. Elenis, 6 F.4th 1160 (10th Cir. 2021), *cert granted* (U.S. Feb. 22, 2022) (No. 21-476), *and* Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013), *with* Telescope Media Grp. v. Lucero, 936 F.3d 740 (8th Cir. 2019).

Today, Justice Alito continues to contribute to this debate on the Supreme Court. Dissenting in *Obergefell v. Hodges*, he worried that opponents of same-sex marriage who voice their beliefs will "risk being labeled as bigots and treated as such by governments, employers, and schools."[79] A few years later, he joined in overturning Colorado's fine on a baker who refused to bake a cake for a same-sex wedding.[80] Especially in cases like these, he argues, we must keep free speech "from becoming a second-tier constitutional right."[81]

Justice Alito's commitment to the First Amendment remains critical as the Court continues to work through the clash between free speech and antidiscrimination laws. Based on his record, Justice Alito will keep vigilantly protecting free speech against incursions by those who take offense. Yet as he recognizes, "there is only so much that the judiciary can do" here.[82] He understands that, as Learned Hand put it: "Liberty lies in the hearts of men and women. When it dies there, no constitution, no law, no court can do much to help it."[83]

## IV. CONCLUSION

Judge Alito built a legacy of strong First Amendment precedent. On the Third Circuit, as at the Supreme Court, he championed robust free speech, religious freedom, and religious participation in the public square. He stood up not only for his own Christian faith, but also for small, powerless ones and unpopular points of view. As he has explained, "Sometimes you have to do things that are unpopular. Unpopular with your colleagues. Unpopular with the District Judge. . . . Unpopular with the community."[84] That takes "courage," but it is the "right thing" for a judge to do.[85]

His legacy on my court is admirable, one that I aspire to live up to.

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[79] 576 U.S. 644, 741 (2015) (Alito, J., dissenting).

[80] Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719 (2018).

[81] Samuel A. Alito, Assoc. Just. Sup. Ct., *Keynote Address at the Federalist Society Lawyers Convention* (Nov. 12, 2020), https://www.rev.com/blog/transcripts/supreme-court-justice-samuel-alito-speech-transcript-to-federalist-society [https://perma.cc/G9UN-KJRJ].

[82] *Id.*

[83] *Id.* (quoting Learned Hand, District Court Judge, Speech in Central Park, New York: The Spirit of Liberty (May 21, 1944)).

[84] Samuel A. Alito, Assoc. Just. Sup. Ct., *Remarks on the Leonard I. Garth Atrium Dedication* (2011), https://web.microsoftstream.com/video/2107c44b-e006-4e28-a5d6-3948ea5fae05 (remarks at 58:31–58:59).

[85] *Id.*