Report on the Civil Rights Record of Supreme Court Nominee

# Judge Sonia Sotomayor

Lawyers' Committee for Civil Rights Under Law

[Please note: this page is intentionally left blank.]

LAWYERS' COMMITTEE FOR
CIVIL RIGHTS
UNDER LAW

1401 New York Avenue, NW
Suite 400
Washington, DC 20005-2124

Tel: 202.662.8600
Fax: 202.783.0857
www.lawyerscommittee.org

July 9, 2009

Chairman Patrick J. Leahy
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510-6275

Ranking Member, Jeff Sessions
Senate Judiciary Committee
152 Dirksen Senate Office Building
Washington, DC 20510

*Co-Chairs*
Nicholas T. Christakos
John S. Kiernan
*Secretary*
Eleanor H. Smith
*Treasurer*
William L. Robinson
*Counsel*
Hamilton P. "Phil" Fox, III
*Executive Director*
Barbara R. Arnwine

*Regional Vice-Chairs*

*Midwest Region*
Jack Block
Teresa J. Kimker
*Northeastern Region*
Gregory P. Hansel
Neil V. McKittrick
*Mid-Atlantic Region*
John McKeever
Bettina B. Plevan
*Southeastern Region*
Valerie Shea
Michael W. Tyler
*Western Region*
Paul F. Eckstein
Amos Hartston
Gregory P. Landis
*Chesapeake Region*
Michael Chanin
James J. Joseph

Dear Senators Leahy and Sessions:

As the Co-Chairs of the Lawyers' Committee for Civil Rights Under Law, we submit the attached Statement in Support of the nomination of Judge Sonia Sotomayor as an Associate Justice of the United States Supreme Court. This Statement is presented on behalf of our organization and with the particular support of the identified individual members of the Board of Directors and Trustees, who have joined to highlight their commitment to the Lawyers' Committee's position.

We also enclose an 81 page Report analyzing Judge Sotomayor's record pertaining to constitutional interpretation and civil rights, issues which are of paramount importance to the Lawyers' Committee.

We believe that the members of the Lawyers' Committee who have joined us in support of Judge Sotomayor have done so because the record demonstrates that Judge Sotomayor is well qualified to serve as an Associate Justice, with a record of judicial service characterized by both its longevity and its quality. Judge Sotomayor's record in the area of civil rights reveals a balanced and considered approach to following precedent and safeguarding the protections contained in our nation's Constitution and civil rights statutes. We also believe Judge Sotomayor brings needed diversity to the Court based on her gender, ethnicity and experience as a prosecutor and trial judge.

We urge the members of the Senate Judiciary Committee to recommend Judge Sonia M. Sotomayor for confirmation by the full Senate.

Sincerely,

Nicholas T. Christakos
Co-Chair

John S. Kiernan
Co-Chair

cc: The Senate Judiciary Committee

23004163v2

[Please note: this page is intentionally left blank.]

[Please note: this page is intentionally left blank.]

[Please note: this page is intentionally left blank.]

# TABLE OF CONTENTS

Statement on the Nomination of Sonia Sotomayor as an Associate Justice of the United State Supreme Court

Report on the Civil Rights Record of Supreme Court Nominee Judge Sonia Sotomayor

[Please note: this page is intentionally left blank.]

[Please note: this page is intentionally left blank.]

[Please note: this page is intentionally left blank.]

**STATEMENT SUPPORTING THE NOMINATION OF**

**JUDGE SONIA SOTOMAYOR**

**AS AN**

**ASSOCIATE JUSTICE OF THE**

**UNITED STATES SUPREME COURT**

The Lawyers' Committee for Civil Rights Under Law, and the undersigned members of its Board of Directors and Trustees, write to support the nomination of Judge Sonia Sotomayor to the Supreme Court of the United States and to urge the Senate to confirm that nomination.

On May 26, 2009, President Barack Obama nominated Judge Sotomayor, who currently serves on the U.S. Court of Appeals for the Second Circuit, to replace retiring Justice David Souter. The last vacancy on the Court occurred in 2005, when Sandra Day O'Connor, the first woman to serve on the Supreme Court, retired. If confirmed, Judge Sotomayor would be the first Hispanic and the third female justice in the 219 year history of the Supreme Court.

Judge Sotomayor has impressive academic and professional credentials. She has had a wide-ranging legal career as a prosecutor, a corporate litigator, and both a district and appellate court judge. These combined experiences would add a perspective not currently available on the Supreme Court. In addition, having sat for six years on the district court and more than ten years on the court of appeals, Judge Sotomayor has more federal judicial experience at the time of her nomination than any Supreme Court nominee in the last hundred years.

This nomination is of special interest to us as directors and trustees of the Lawyers' Committee for Civil Rights Under Law because of our shared goal of promoting equal justice. In recent years, the Supreme Court has issued a number of decisions scaling back the critical protections against discrimination that are afforded by the Constitution and our nation's civil rights laws. This trend underscores the pressing need for a Justice who understands the persistent realities of discrimination and who interprets our civil rights laws as they were intended – to provide meaningful protections.

We believe that the best evidence of Judge Sotomayor's qualifications as a nominee is the judicial opinions she has written over her long career on the bench. Analysis of her opinions in

civil rights cases and related areas prepared by the Lawyers' Committee forms the primary basis for our support for Judge Sotomayor's nomination. The Lawyers' Committee also examined her speeches and other writings to see whether they contained anything that should disqualify her from serving on the Supreme Court or that might indicate that she has a different judicial philosophy, particularly in the civil rights arena, from that reflected in her judicial opinions. The results of the Lawyers' Committee's analysis are contained in its Report on Judge Sotomayor's nomination.

Based on our review, we conclude that Judge Sotomayor's record in civil rights cases demonstrates careful judicial analysis, with full consideration of the relevant facts and law, accompanied by a sensitivity to civil rights issues that is consonant with constitutional and statutory provisions. We have found nothing in Judge Sotomayor's speeches or non-judicial writings, which appropriately refer to her unique life story and the perspective she has gained from her background, that should disqualify her from serving on the Supreme Court. Our review of her judicial decisions, as well as her speeches and other writings, leads us to conclude that Judge Sotomayor would bring to the Court an appropriate regard for the importance of enforcement of the civil rights protections of the Constitution and federal civil rights laws. We further conclude that her performance as a Court of Appeals judge clearly supports the proposition that she will honor *stare decisis* and adhere to the rule of law.

On the Second Circuit, Judge Sotomayor has heard over 3,000 appeals and has written over 250 signed panel opinions. Her opinions reveal a jurist who follows established precedent yet is willing to raise concerns about the practical impact of that precedent. Her opinions exhibit deference to the discretion of trial judges. Judge Sotomayor's jurisprudence in civil rights cases indicates that she carefully weighs the facts and the law, and her rulings fall within the

mainstream of existing judicial decisions and legal scholarship. She interprets civil rights laws in a manner that provides meaningful protection from discrimination, while being mindful of the need to grant early relief to defendants when the facts and law justify a summary ruling.

Judge Sotomayor possesses both the exceptional competence necessary to serve on the Court and a profound respect for the importance of protecting the civil rights afforded by the Constitution and the nation's civil rights laws. Additionally, we believe that having a diverse Court is important for our nation. For these reasons, we support the nomination of Judge Sotomayor to the Supreme Court of the United States and urge the Senate to confirm her nomination.

By action of the Executive Committee, this statement has been submitted to members of the Board of Directors and the Board of Trustees of the Lawyers' Committee for Civil Rights Under Law, for the individual signature of subscribing Board members whose names are set forth below. The following individual members of the Boards of Directors and Trustees of the Lawyers' Committee hereby subscribe to the statement.

Atiba D. Adams
David R. Andrews
Barbara R. Arnwine
Jeffrey Barist
Daniel C. Barr
Lynne Bernabei
Victoria Bjorklund
John W. Borkowski
Patricia A. Brannan
Steven H. Brose
Paulette M. Caldwell
John A. Camp
Douglass W. Cassel
Michael H. Chanin
Nicholas T. Christakos
Lisa E. Cleary
Frank M. Conner, III
Michael A. Cooper
Edward Correia
Peter J. Covington
Marion Cowell
Nora Cregan
Michael Birney de Leeuw
Doneene K. Damon
Armand G. Derfner
John H. Doyle, III
Paul F. Eckstein
Robert Ehrenbard
Joseph D. Feaster, Jr.
Fred N. Fishman

Marc L. Fleischaker
John H. Fleming
Alexander D. Forger
Katherine Forrest
Eleanor M. Fox
Joseph W. Gelb
Peter B. Gelblum
Susan M. Glenn
Jon Greenblatt
Peter R. Haje
Gregory P. Hansel
Conrad K. Harper
Robert E. Harrington
David L. Harris
Mark I. Harrison
Amos Hartston
John E. Hickey
Jerome E. Hyman
Blair M. Jacobs
Malachi B. Jones, Jr.
Michael D. Jones
James P. Joseph
Heather Lamberg Kafele
Stephen Kastenberg
Laura Kaster
Kim M. Keenan
Frederick W. Kanner
Frank Kennamer
Andrew W. Kentz
John S. Kiernan
Loren Kieve
Teresa J. Kimker
Adam T. Klein
Alan M. Klinger
Naho Kobayashi
Daniel F. Kolb
Edward Labaton
Gregory P. Landis
Brian K. Landsberg
Michael L. Lehr
Charles T. Lester
Marjorie Press Lindblom
David M. Lipman
Andrew Liu
Jack W. Londen
Robert MacCrate
Cheryl W. Mason
Christopher Mason
Julia Tarver Mason
Gaye A. Massey
Colleen McIntosh
John E. McKeever
Kenneth E. McNeil
Neil V. McKittrick
D. Stuart Meiklejohn
Charles R. Morgan
Robert S. Mucklestone
Robert A. Murphy
Aasia Mustakeem
Karen K. Narasaki
Frederick M. Nicholas
John E. Nolan
John Nonna
Roswell B. Perkins
Bradley S. Phillips
Kit Pierson
Bettina B. Plevan
Robert H. Rawson
William L. Robinson
Guy Rounsaville
Michael L. Rugen
Lowell E. Sachnoff
Gail C. Saracco
John F. Savarese
Jennifer R. Scullion

Richard T. Seymour

Valerie Shea

Jane C. Sherburne

Richard Silberberg

Jeffrey Simes

Robert Sims

Marsha E. Simms

John S. Skilton

Rodney E. Slater

Eleanor H. Smith

Edward Soto

John B. Strasburger

Daniel P. Tokaji

Michael Traynor

Reginald M. Turner

Suzanne E. Turner

Michael W. Tyler

Kenneth Vittor

Joseph F. Wayland

Vaughn C. Williams

Thomas S. Williamson

Brenda Wright

Erika Thomas-Yuille

[Please note: this page is intentionally left blank.]

[Please note: this page is intentionally left blank.]

# REPORT ON THE CIVIL RIGHTS RECORD

# OF SUPREME COURT NOMINEE

# JUDGE SONIA SOTOMAYOR

The Lawyers' Committee for Civil Rights Under Law, a nonpartisan, nonprofit organization, was formed in 1963 at the request of President John F. Kennedy to involve the private bar in providing legal services to address racial discrimination. The principal mission of the Lawyers' Committee is to secure, through the rule of law, equal justice under law.

The Committee's major objective is to use the skills and resources of the bar to obtain equal opportunity for minorities by addressing factors that contribute to racial justice and economic opportunity. Given our nation's history of racial discrimination, de jure segregation, and the de facto inequities that persist, the Lawyers' Committee's primary focus is to represent the interest of African Americans in particular, other racial and ethnic minorities, and other victims of discrimination, where doing so can help to secure justice for all racial and ethnic minorities.

The Lawyers' Committee implements its mission and objectives by marshaling the pro bono resources of the bar for litigation, public policy advocacy, and other forms of service by lawyers to the cause of civil rights.

Copyright © 2009 by Lawyers' Committee for Civil Rights Under Law

Published by Lawyers' Committee for Civil Rights Under Law
All Rights Reserved

To order additional copies, contact the Lawyers' Committee at 1401 New York Avenue N.W. Suit 400, Washington, D.C. 20005, (tel) 202-662-8600, (fax) 202-628-2858.

**TABLE OF CONTENTS**

**I. EXECUTIVE SUMMARY ..... 1**
- A. Judge Sotomayor's Jurisprudence in Civil Rights Cases ..... 3
  - 1. Employment ..... 3
  - 2. Voting ..... 8
  - 3. Housing ..... 9
  - 4. Education ..... 9
- B. Recommendation ..... 10

**II. THE LAWYERS' COMMITTEE'S POLICY REGARDING NOMINATIONS TO THE SUPREME COURT ..... 11**

**III. BIOGRAPHY ..... 11**

**IV. TESTIMONY FROM PREVIOUS CONFIRMATION HEARINGS ..... 13**
- A. District Court Confirmation ..... 13
- B. Second Circuit Confirmation ..... 14

**V. ANALYSIS OF JUDGE SOTOMAYOR'S SECOND CIRCUIT OPINIONS ..... 15**
- A. Core Issues ..... 15
  - 1. Employment Discrimination ..... 15
    - a. Race-based Employment Discrimination ..... 16
    - b. Gender-based Employment Discrimination ..... 23
    - c. Age-based Employment Discrimination ..... 24
    - d. Employment Discrimination Based on Disability ..... 26
    - e. Other Employment Decisions ..... 29
  - 2. Education ..... 29
    - a. Race and Gender Discrimination ..... 30
    - b. Disability ..... 32
    - c. Privacy/ Freedom of Information ..... 35
    - d. First Amendment ..... 35
  - 3. Housing ..... 37
  - 4. Voting Rights ..... 40
  - 5. Environmental Law and Environmental Justice ..... 46
- B. Other Issues of Interest ..... 51
  - 1. Equal Protection ..... 51
  - 2. Stare Decisis ..... 57
  - 3. Statutory Interpretation ..... 57
  - 4. Federalism ..... 58
  - 5. Prisoners' Rights ..... 59
  - 1. Constitutional Claims Against the Federal Government ..... 63
  - 2. Standing ..... 63

**VI. OTHER CONSIDERATIONS ..... 65**
- A. The Role of Diversity in Choosing and Confirming Nominees ..... 66
- B. The "Policy" Role of Appellate Judges ..... 71

**VII. CONCLUSION ....................................................................................................72**

# I. EXECUTIVE SUMMARY

On May 26, 2009, President Barack Obama nominated Judge Sonia Sotomayor of the U.S. Court of Appeals for the Second Circuit to the Supreme Court of the United States, to replace retiring Justice David Souter. The last vacancy on the Court occurred in 2005, when Sandra Day O'Connor, the first woman to serve on the Supreme Court, retired. If confirmed, Judge Sotomayor would be the first Hispanic and the third female justice in the 219 year history of the Supreme Court. (At present, of the 217 members of the federal judiciary, 56 are women. Of the women judges, 11 are minorities.)

Judge Sotomayor has impressive academic and professional credentials. She has had a wide-ranging legal career as a prosecutor, a corporate litigator, and both a district and appellate court judge. These combined experiences would add a perspective not currently available on the Supreme Court. In addition, having sat for six years on the district court and more than ten years on the court of appeals, Judge Sotomayor has more federal judicial experience at the time of her nomination than any Supreme Court nominee in the last hundred years.

In announcing his nominee, President Obama quoted Justice Oliver Wendell Holmes: "The life of the law has not been logic; it has been experience." In doing so, he emphasized the importance of nominating a justice who has "an understanding of how the world works and how ordinary people live." The public and the media have not missed the significance of the nation's first African-American President nominating a candidate who is both a woman and Hispanic – leading to considerable public debate and commentary about the value of diversity on the Supreme Court and how to evaluate a nominee with a record of speaking about being one of a very small minority in the federal judiciary.

This nomination is of special interest to the Lawyers' Committee for Civil Rights Under Law because of our concern for our mission of promoting equal justice. In recent years, the Supreme Court has issued a number of decisions scaling back the critical protections against discrimination that are afforded by the Constitution and our nation's civil rights laws. This trend underscores the pressing need for a Justice who understands the persistent realities of discrimination and who interprets our civil rights laws as they were intended – to provide meaningful protections.

The Lawyers' Committee believes the best evidence of Judge Sotomayor's qualifications as a nominee is the judicial opinions she has written over her long career on the bench. Her opinions in civil rights cases and related areas form the primary basis of our review and recommendations. We also examined her speeches and other writings to see if they contained anything that should disqualify her from serving on the Supreme Court or that might indicate that she has a different judicial philosophy, particularly in the civil rights arena, from that reflected in her judicial opinions.

What we found is that Judge Sotomayor's record in civil rights cases demonstrates careful judicial analysis, with full consideration of the relevant facts and law, accompanied by a sensitivity to civil rights issues that is consonant with constitutional and statutory provisions. We also found that, as one of a very small group of minority women who sit on the Circuit Courts of Appeal, Judge Sotomayor is frequently asked to speak to members of minority groups. Not surprisingly, those speeches often refer to her unique life story and to the perspective she has gained from that background. We do not see anything in those speeches that should disqualify Judge Sotomayor from serving on the Supreme Court. Our review of her judicial decisions, as well as her speeches and other writings, leads us to conclude that Judge Sotomayor would bring

to the Court an appropriate regard for the importance of enforcement of the civil rights protections of the Constitution and federal civil rights laws. We further conclude that her performance as a Court of Appeals judge clearly supports the proposition that she will honor *stare decisis* and adhere to the rule of law.

### A. Judge Sotomayor's Jurisprudence in Civil Rights Cases

On the Second Circuit, Judge Sotomayor has heard over 3,000 appeals and has written over 250 signed panel opinions. Our analysis focuses on her participation as an appellate judge in civil rights cases, with particular emphasis on cases involving issues at the heart of the Lawyers' Committee's mission.

Judge Sotomayor's opinions reveal a jurist who follows established precedent yet is willing to raise concerns about the practical impact of that precedent. Her opinions exhibit deference to the discretion of trial judges. Judge Sotomayor's jurisprudence in civil rights cases indicates that she carefully weighs the facts and the law, and her rulings fall within the mainstream of existing judicial decisions and legal scholarship. She interprets civil rights laws in a manner that provides meaningful protection from discrimination, while being mindful of the need to grant early relief to defendants when the facts and law justify a summary ruling.

#### 1. Employment

Overall, Judge Sotomayor's approach to employment discrimination cases is even-handed, thorough, and without discernible bias for either side. She neither gives civil rights statutes an especially broad construction nor seeks ways to circumscribe their scope. She also pays careful attention to the standards of review and the standards for summary judgment and dismissal. In the majority of employment cases, Judge Sotomayor affirms the decision of the trial court.

A recent case that has drawn significant scrutiny is the Second Circuit's decision in *Ricci v. DeStefano*,[1] which was overturned by the Supreme Court on June 29, 2009.[2] In *Ricci*, the Civil Service Board of the City of New Haven, Connecticut declined to certify the results of a promotional exam that would have all but excluded African-Americans and Hispanics from promotional opportunities within the fire department. The city argued that it declined to certify the test results in an effort to comply with Title VII of the Civil Rights Act of 1964, due to the disparate impact of the test, flaws in it, and the availability of what it believed to be fairer and more effective tests that could be used to fill the vacancies. The plaintiffs, including 17 Caucasian firefighters and one Latino firefighter who passed the original exam, claimed that the city's conduct constituted racial discrimination.

The trial court granted summary judgment for the city. Judge Sotomayor served on the three-judge panel that issued a *per curiam* opinion affirming the trial court's "thorough, thoughtful, and well-reasoned opinion."[3] When the *Ricci* plaintiffs asked the Second Circuit to reconsider their appeal, Judge Sotomayor was one of the seven judges who voted (over the dissent of six of their colleagues) to deny the request for rehearing by the full court.

The Lawyers' Committee agreed with the position taken by Judge Sotomayor and filed an amicus brief urging the Supreme Court to affirm the rulings below. Our brief argued that the city acted in accordance with its obligations under Title VII.

On June 29, the Supreme Court ruled 5 to 4 that the city of New Haven violated Title VII, finding that the city "rejected the test results solely because the higher scoring candidates were

---

[1] 264 Fed. Appx. 106 (2d Cir. 2008).

[2] *Ricci v. DeStefano*, Nos. 07-1428 and 08-328, slip op. (U.S. June 29, 2009).

[3] 264 Fed. Appx. 106 (2d Cir. 2008).

white”[4] and thereby engaged in intentional discrimination. The Court held that the city’s decision not to use the test results was made “because of race”[5] within the meaning of Title VII, rather than, as the city argued, having been made because of the racially discriminatory impact of the test.

Justice Kennedy wrote the majority opinion, which was joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito. The Court acknowledged that “[t]he racial adverse impact here was significant,”[6] that “the City was faced with a prima facie case of disparate-impact liability”[7] if it certified the results, and that the city was “compelled to take a hard look at the examinations to determine whether certifying the results would have had an impermissible disparate impact.”[8] But the Court rejected the city’s argument that its good faith effort to avoid disparate impact liability was a sufficient defense to the claim of intentional discrimination. Instead, the Court created a new standard that had not been advanced or litigated in the trial court or the Second Circuit. The Court held that the city needed to have proven that it had a “strong basis in evidence”[9] not just that it faced a prima facie claim for disparate impact liability, but also that it had no defense to a disparate impact claim. Thus, the Court ruled that the city needed to prove not just that the test disproportionately screened out minority candidates, but also that the city had a strong basis in evidence that the test was not job-related or that there were

4 *Ricci v. DeStefano*, Nos. 07-1428 and 08-328, slip op. at 20 (U.S. June 29, 2009).

5 *Id*.

6 *Id*. at 27.

7 *Id*.

8 *Id*. at 27–28.

9 *Id*. at 2 (U.S. June 29, 2009).

available alternatives to the test that would lessen the discriminatory impact. The Court thus held, for the first time, that when an employer makes a decision in order to avoid a racially discriminatory impact on certain of its employees, it engages in intentional discrimination under Title VII. The Court then held, without remanding for an evidentiary hearing based on this new standard, that the city could not satisfy this standard.

The Court did not reach the question whether the city's actions or the disparate impact provision of Title VII violated the Equal Protection Clause of the Fourteenth Amendment. Justice Scalia, concurring, recognized that the disparate impact laws do not mandate the imposition of quotas but expressed concern that employers may design hiring practices to achieve that end. Justice Scalia also argued that the Court should address the question of whether Title VII's disparate impact provision comports with the Equal Protection Clause of the Fourteenth Amendment. Justice Alito's concurring opinion asserted that the city was motivated by "the desire to placate a politically important racial constituency."[10]

Justice Ginsburg's dissenting opinion was joined by Justices Stevens, Souter, and Breyer. The dissent argued that the Second Circuit's decision should have been affirmed, because the city had "good cause to believe [the test] would not withstand examination for business necessity" under Title VII. The dissent concluded that the city had good cause to refuse to certify the test results, in light of the substantial evidence of flaws in the tests and the availability of less discriminatory alternatives. Justice Ginsburg noted that the majority ignored the landmark decision of *Griggs v. Duke Power*¸ 401 U.S. 424 (1971), which explained the centrality of the disparate impact concept to effective enforcement of Title VII. The dissent argued that, at a minimum, the case should have been remanded on the issue whether, under the majority's new

---

10 *Ricci v. DeStefano*, Nos. 07-1428 and 08-328, slip op. at 3 (U.S. June 29, 2009) (Alito, J., concurring).

standard, the city had a strong basis in evidence to decline to certify the test results. Finally, Justice Ginsburg anticipated that "the decision will not have staying power."[11]

The Supreme Court's decision in *Ricci* will likely be a focus of Judge Sotomayor's confirmation hearing. It is important to note, however, that the majority in *Ricci* created a new standard – different from the one that controlled in the Second Circuit at the time of its decision. Additionally, four members of the Supreme Court, who were appointed by both Republican and Democratic Presidents, and including Justice Souter, agreed with the result reached by Judge Sotomayor.

In other employment discrimination cases, Judge Sotomayor has ruled for both plaintiffs and employers, depending on the facts of the particular cases. In *Cruz v. Coach Stores, Inc.*, for example, she wrote for the panel to reverse the trial court's grant of summary judgment and reinstate a Hispanic woman's hostile work environment claim.[12] The opinion held that although the plaintiff "might have stated her claim of hostile work environment harassment more artfully . . . the essential elements of the charge do appear in the complaint."[13] Similarly, in *Raniola v. Bratton*, Judge Sotomayor wrote for a panel to reverse the trial court's judgment as a matter of law and sustain a female police officer's hostile work environment claim.[14]

Judge Sotomayor often rules in favor of employers in discrimination cases. *See e.g.*, *Washington v. County of Rockland*, 373 F.3d 310 (2d Cir. 2004) (rejecting plaintiffs' claims of retaliation); *Williams v. R.H. Donnelly Co.*, 368 F.3d 123 (2d Cir. 2004) (employee failed to

---

11 *Ricci v. DeStefano*, Nos. 07-1428 and 08-328, slip op. at 2 (U.S. June 29, 2009) (Ginsburg, J., dissenting).

12 *Cruz v. Coach Stores, Inc.*, 202 F.3d 560 (2d Cir. 2000).

13 *Id.*

14 *Raniola v. Bratton*, 243 F.3d 610 (2d Cir. 2001).

prove discrimination resulting from employer's failure to create a position for her); *Norville v. Staten Island Univ. Hosp.*, 196 F.3d 89 (2d Cir. 1999) (plaintiff failed to prove that she was similarly situated to white employees).

### 2. Voting

In the small number of voting rights cases in which Judge Sotomayor has participated as an appellate judge, she has been deferential to the states' prerogative to run their own elections. Her rejection of the claims of some plaintiffs, however, may reflect more the weakness of the claims in those cases than any enduring skepticism of voting rights claims. She hews closely to the text of statutes and to precedent and appears unwilling to go out of her way to rule either for or against voting rights plaintiffs.

In *Hayden v. Pataki*, for example, the *en banc* court rejected a Voting Rights Act challenge to New York's felony disenfranchisement statute, reasoning that Congress did not intend the Act's protections to apply to state felon disenfranchisement laws.[15] Judge Sotomayor was one of five judges who dissented. In her separate opinion, she urged a straightforward reading of the statute:

> It is plain to anyone reading the Voting Rights Act that it applies to all "voting qualification[s]." And it is equally plain that [the New York statute] disqualifies a group of people from voting. These two propositions should constitute the entirety of our analysis. Section 2 of the [Voting Rights Act] by its unambiguous terms subjects felony disenfranchisement and all other voting qualifications to its coverage.
>
> The duty of a judge is to follow the law, not to question its plain terms. I do not believe that Congress wishes us to disregard the plain language of any statute or to invent exceptions to the statutes it has created.[16]

---

15 *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006) (*en banc*).

16 *Id.* at 367–68.

The Lawyers' Committee took a similar position in its amicus brief filed with the Supreme Court.

### 3. Housing

Judge Sotomayor was a member of panels that found for plaintiffs in two fair housing cases and one flood insurance case. None of the cases raised a major civil rights issue, but the opinions demonstrated thoroughness, a rigorous review of the facts and law, and a sharp legal acumen tempered by a keen sense of fairness for the rights of the individual.

In *United States v. Secretary of HUD*, for example, Judge Sotomayor joined a unanimous opinion affirming the trial court's entry of a race-conscious modification of a consent decree intended to desegregate public housing and schools.[17] The Second Circuit held that the plan "satisfied even the strict scrutiny to which legislative race-conscious remedies must be subjected."[18]

### 4. Education

Judge Sotomayor's application of racial discrimination laws in the educational context is even-handed and fair. She has not advocated for any changes to current legal tests or evidentiary burdens imposed on litigants in discrimination cases. She is, however, aware of the evidentiary difficulty in proving discrimination claims – a difficulty that many academic studies of discrimination litigation have identified. As her dissenting opinion in *Gant v. Wallingford Board of Education* discloses, she believes judges should seriously analyze the totality of circumstantial evidence presented by plaintiffs in discrimination suits.[19] She understands the evidentiary

[17] *United States v. Sec'y of HUD*, 239 F.3d 211, 213 (2d Cir. 2001).

[18] *Id.* at 215.

[19] *Gant v. Wallingford Bd. of Educ.*, 195 F.3d 134 (2d Cir. 1999).

problems inherent in these suits, which are often of necessity based on circumstantial evidence. In *Gant*, although Judge Sotomayor agreed with the majority's decision to dismiss plaintiff's racial harassment claim, she dissented from its conclusion that transferring the student to a lower grade after just 9 days of school was not race discrimination, noting that the transfer was "unprecedented and contrary to the school's established policies."[20]

**B. Recommendation**

Judge Sotomayor's background and jurisprudence demonstrate that she possesses both the exceptional competence necessary to serve on the Court and a profound respect for the importance of protecting the civil rights afforded by the Constitution and the nation's civil rights laws. Her rulings in civil rights cases fall within the mainstream of existing judicial decisions and legal scholarship. Additionally, the Lawyers' Committee believes that having a diverse Court is important for our nation. For these reasons, the Lawyers' Committee for Civil Rights Under Law supports the nomination of Judge Sotomayor to the Supreme Court of the United States.

* * *

This report reviews Judge Sotomayor's judicial and public record concerning civil rights. Section II briefly describes the Lawyers' Committee's standards for evaluating the civil rights records of Supreme Court nominees. Section III gives an overview of Judge Sotomayor's biography. Section IV discusses her prior confirmation hearings. Section V, the heart of the report, is an analysis of her judicial opinions in the core practice areas of the Lawyers' Committee and on related issues. Section VI discusses Judge Sotomayor's publications, public statements and organizational affiliations. Section VII gives the report's conclusion.

---

[20] *Id.* at 151.

## II. THE LAWYERS' COMMITTEE'S POLICY REGARDING NOMINATIONS TO THE SUPREME COURT

Since its creation in 1963 at the urging of President John F. Kennedy, the Lawyers' Committee for Civil Rights Under Law has been devoted to the recognition and enforcement of civil rights in the United States. During these more than four decades, our nation has been transformed as we have taken important strides in confronting racial discrimination and injustice. Yet the challenges of unlawful discrimination remain, with inequities and disparities throughout our society, and they continue to obstruct and undermine the principle of equal justice for all.

Recognizing the Supreme Court's critical role in civil rights enforcement and the central role that civil rights enforcement plays in our democracy, the Lawyers' Committee has long reviewed the record of nominees to the Supreme Court to see if the nominee demonstrates views that are manifestly hostile to the core civil rights principles for which the Lawyers' Committee has advocated and has opposed nominees in very few instances. With this report, the Lawyers' Committee also evaluates whether Judge Sotomayor's record demonstrates that she possesses both the exceptional competence necessary to serve on the Court and a profound respect for the importance of protecting the civil rights afforded by the Constitution and the nation's civil rights laws.

## III. BIOGRAPHY

Sonia Maria Sotomayor was born in New York City on June 25, 1954. She was raised by her mother, a practical nurse, in a South Bronx housing project after her father, a tool-and-die worker with a third-grade education, died when she was nine. In 1972, she graduated from Cardinal Spellman High School as the valedictorian. She entered Princeton University, where she was active in Acción Puertorriqueña, a Latino student caucus that sought diversity in faculty hiring and admissions. In addition to writing letters to the campus newspaper about anti-Latino

discrimination, she also joined in criticizing an anti-gay attack on campus. In 1976, she received an A.B. from the university, graduating summa cum laude, and was one of two undergraduates to receive the M. Taylor Senior Pyne Prize for scholastic excellence and service to the University. Her senior thesis also received an honorable mention from the University's History Department.

From Princeton, Judge Sotomayor went on to Yale Law School, where she was an editor of the *Yale Law Journal* and interned at the University's Office of the General Counsel. In 1978, she worked as a summer associate at Paul, Weiss, Rifkind, Wharton & Garrison in New York. When another law firm's recruiter asked her whether she would have been admitted to the law school were she not Hispanic, and whether she was "culturally deprived," she filed a discrimination complaint with the university. She received her J.D. in 1979 and began work for the New York District Attorney's Office, where she stayed for five years.

In 1984, Judge Sotomayor joined a small corporate law firm, Pavia & Harcourt, where she specialized in trademark enforcement. While at the firm, she did significant work for Fendi, the luxury goods brand: an oft-told story at the firm recounted how she once pursued escaping purse counterfeiters on a motorcycle. During her confirmation hearing for the district court, Senator Kennedy asked her to comment on the adequacy of trademark laws. She recommended that the laws be strengthened, but stated that in her view it was equally important that prosecutors seeking to enforce the law receive additional resources.

Almost all of Judge Sotomayor's career has been in public service, as a prosecutor in the New York County District Attorney's office and then as a judge. In 1991, she was nominated to the U.S. District Court for the Southern District of New York by President George H.W. Bush; she was confirmed unanimously on August 11, 1992. In 1997, she was nominated by President

Clinton for a seat on the U.S. Court of Appeals for the Second Circuit; she was confirmed on October 2, 1998 by a final vote of sixty-seven to twenty-nine.

During her time as a district court judge, Judge Sotomayor presided over about 450 cases. As an appellate judge she has heard more than 3,000 appeals and written over 250 signed panel opinions for the Second Circuit. Of the five panel opinions that she wrote that have thus far been reviewed by the Supreme Court, three have been overturned: *Correctional Services Corp. v. Malesko*, *Entergy Corp. v. Riverkeeper*, and *Merrill Lynch v. Dabit*.

She is currently a member of (and has received a variety of awards from) several professional organizations, including the Hispanic National Bar Association, the Puerto Rican Bar Association, and the National Association of Women Lawyers. She has in the past been a member of the National Council of La Raza and the Public Service Committee of the Federal Bar Council. Before becoming a judge, she was also a board member of the Puerto Rican Legal Defense and Education Fund, the Maternity Center Association (an organization, now known as Childbirth Connection, that advocates for better care for pregnant women), and the New York Mortgage Agency, which structures affordable housing programs.

## IV. TESTIMONY FROM PREVIOUS CONFIRMATION HEARINGS

### A. District Court Confirmation

Judge Sotomayor's district court confirmation hearings, held in June 1992, were relatively uneventful. The hearing began with Sen. Edward Kennedy (D-MA) praising Judge Sotomayor's "impressive" pro bono activities and asking how she could convince lawyers to commit to public service. She replied that she "as an individual believe[s] that those of us who have opportunities in this life must give them back to those who have less." Judge Sotomayor explained that she had been on the board of the Puerto Rican Legal Defense and Education Fund

(now known as LatinoJustice PRLDEF) for twelve years, serving as its first chairperson and the head of its litigation and education committees. She highlighted a bilingual public school education case as one of PRLDEF's important victories in Hispanic civil rights. She also noted that PRLDEF's work included housing issues; in her view, such work tied neatly with her involvement with the New York Mortgage Agency, with which she had worked on projects to provide below-market-rate mortgages for first-time homeowners in poor areas, mortgage insurance to community developers, and assistance to families with closing costs.

### B. Second Circuit Confirmation

Judge Sotomayor's nomination to the Second Circuit was more contentious, as some Republican senators feared – accurately, as it turned out – that she would be a potential candidate for a future vacancy on the Supreme Court. At her confirmation hearing in September 1997, Sen. John Ashcroft (R-MO) asked Judge Sotomayor about her denial of the defendants' motion to dismiss in a 1995 case, *Holmes v. Artuz*, in which an inmate sued prison officials who transferred him from a food-service job to prevent disciplinary issues or security threats that could arise from his open homosexuality. When asked by Senator Ashcroft whether "there's a constitutional right to homosexual conduct by prisoners," Judge Sotomayor responded that "[t]he only constitutional right that homosexuals have is the same constitutional right every citizen of the United States has, which is not to have government action taken against them arbitrarily and capriciously."

Sen. Mike DeWine (R-OH) asked Judge Sotomayor about her 1994 decision in *Campos v. Coughlin*, allowing prisoners to wear Santeria beads under their clothes. She explained that "the Supreme Court in these cases has held that you must give heightened deference to prison security concerns and other concerns, but that prisoners do not lose fundamental rights, like religion, in prison . . . you must balance, as a judge, the security concerns with readily accessible

alternatives. There is no bright line rule. But there, unlike the traditional rational basis test, where you take, as a presumption, that the government is doing what it thinks is right . . . you must weigh whether there are reasonable alternatives that could be just as effective. And, my reasoning, in that particular case, as the opinion stated, was that, in essence, hiding the beads was a reasonable alternative, because they couldn't show."

## V. ANALYSIS OF JUDGE SOTOMAYOR'S SECOND CIRCUIT OPINIONS

The Lawyers' Committee reviewed all civil rights cases in which Judge Sotomayor participated while on the Second Circuit. In addition, the Lawyers' Committee reviewed cases that, while not directly addressing core civil rights claims, deal with issues that often are implicated in civil rights cases, in order to assess how Judge Sotomayor's approach might impact her analysis of civil rights claims. We discuss below her decisions in core civil rights areas, including employment discrimination, education, housing, voting rights, and environmental law and environmental justice. We also summarize her decisions in related areas of interest, including equal protection, *stare decisis*, statutory interpretation, federalism, prisoners' rights, Constitutional claims against the federal government, and standing.

### A. Core Issues

#### 1. Employment Discrimination

During her tenure on the Second Circuit, Judge Sotomayor has participated in more than 100 employment discrimination cases. In those cases she more often than not has voted in favor of the defendant, and most of the time she has voted to affirm the judgment of the district court.

Judge Sotomayor's general approach to employment discrimination cases emphasizes adherence to precedent, deference to the conclusions of trial judges, and a lack of any predilection either for or against plaintiffs or employers. The principal opinions she has written

in this area have been roughly evenly divided between rulings for and against plaintiffs. During her tenure as a judge on the district court, Judge Sotomayor issued rulings in more than 40 employment discrimination cases, and in only one of those cases was her ruling even partially overturned on appeal.

**a. Race-based Employment Discrimination**

Although Judge Sotomayor has written opinions in a number of employment discrimination cases, she did not do so in the case that recently has drawn the most intense scrutiny, *Ricci v. DeStefano*.[21] In that case, the three-judge panel on which she sat unanimously upheld the decision of the district court, which had granted summary judgment to the defendants on Title VII and related claims.

In *Ricci*, plaintiff firefighters claimed that the New Haven Civil Service Board ("CSB") discriminated against them by refusing to certify the results of promotional exams that disproportionately screened out minority candidates for firefighter positions. The district judge issued a 48-page opinion describing the largely undisputed evidence in detail.[22] As set forth in the district court opinion, the CSB conducted a series of public hearings about whether to certify the test results so that they could be used to promote firefighters. Among those who spoke at the hearings were some firefighters who raised concerns about whether the test questions truly related to the positions; a testing expert who suggested that equally effective, alternative tests would be expected to lessen the racial disparity; and another testing expert who explained why the tests might have produced such a racially disparate impact. Ultimately, the CSB declined to certify the test results, so that no one was promoted.

---

[21] *Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008), *cert. granted*, 129 S.Ct. 894 (2009).

[22] *Ricci v. DeStefano*, 554 F. Supp. 2d 142 (D. Conn. 2006). As published, the district court opinion is 20 pages long.

Eighteen firefighters who had scored highly on the tests – 17 white candidates and one Latino – filed suit, claiming that the city discriminated on the basis of race by *not* certifying the test results. The case hinged on whether the defendants could show that their "legitimate, non-discriminatory reason" for not certifying the test was that they wished "to comply with the letter and the spirit of Title VII."[23] Title VII of the Civil Rights Act of 1964 prohibits employers from utilizing a test – even a test that appears to be neutral on its face – that adversely affects members of one race as compared to members of another race, unless the test is "job-related" and "consistent with business necessity."[24] EEOC Guidelines enunciate a "four-fifths" rule, which provide that a test is regarded as having an adverse impact if the passing rate for a minority is less than 4/5 that of the group with the highest passing rate. The district court found that it was "necessarily undisputed that, had minority firefighters challenged the results of the examinations, the City would have been in a position of defending tests that, under applicable Guidelines, presumptively had a disparate racial impact."[25] The district court also found that Title VII does not *require* an employer to conduct a validity study if it decides against using a particular selection procedure, nor does it require that an exam be certified because no other alternative was yet in place:

> Notwithstanding the shortcomings in the evidence on existing, effective alternatives, it is not the case that defendants must certify a test where they cannot pinpoint its deficiency explaining its disparate impact under the four-fifths rule simply because they have not yet formulated a better selection method.[26]

[23] *Id.* at 152–53.

[24] *See* 42 U.S.C. § 2000e-2(k)(1)(A).

[25] *Id.* at 153.

[26] *Id.* at 156.

Following established Second Circuit precedent, the district court went on to find that the result of the decision was race-neutral and there was no discriminatory animus toward plaintiffs:

> [W]hile the evidence shows that race was taken into account in the decision not to certify the test results, the result was race-neutral: all the test results were discarded, no one was promoted, and firefighters of every race will have to participate in another selection process to be considered for promotion. Indeed, there is a total absence of any evidence of discriminatory animus towards plaintiffs – under the reasoning of *Hayden*, 180 F.3d at 51, "nothing in our jurisprudence precludes the use of race-neutral means to improve racial and gender representation . . . . [T]he intent to remedy the disparate impact of the prior exams is not equivalent to an intent to discriminate against non-minority applicants."[27]

In addition, the district court found that plaintiffs "were not 'deprived of promotions,'"[28] because the civil service rules gave the top scorers an opportunity to be promoted, but not a guarantee. The court therefore concluded that "[d]efendants' motivation to avoid making promotions based on a test with a racially disparate impact, even in a political context, does not, as a matter of law, constitute discriminatory intent, and therefore such evidence is insufficient for plaintiffs to prevail on their Title VII claim."[29]

The Second Circuit panel, including Judge Sotomayor, unanimously agreed with the district court's reasoning. The panel issued a summary order, later changed to a *per curiam* opinion, affirming "for the reasons stated in the thorough, thoughtful, and well-reasoned opinion of the court below."[30] Although the panel said they were "not unsympathetic to the plaintiffs' expression of frustration," that did not mean that plaintiffs had "a viable Title VII claim."[31]

---

[27] *Id.* at 158.

[28] *Id*. at 159.

[29] *Id.* at 160 (footnote omitted).

[30] *Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008), *cert. granted*, 129 S.Ct. 894 (2009).

[31] *Id.*

When the *Ricci* plaintiffs asked the Second Circuit to rehear the case *en banc*, the seven-judge majority of the Court, including Judge Sotomayor, denied the request for rehearing.[32] Six of their colleagues dissented from that denial.[33] The *Ricci* plaintiffs appealed to the Supreme Court, which granted certiorari. The Lawyers' Committee filed an *amicus curiae* brief in the case urging the Supreme Court to affirm the rulings below. Our brief asserted that the Second Circuit's decision conforms to the disparate impact provisions of Title VII.

On June 29, 2009, the Supreme Court reversed the Second Circuit, ruling 5 to 4 that the city of New Haven violated Title VII. That decision, which is discussed in some detail in the Executive Summary above, created a new standard for judging the claims made by the *Ricci* plaintiffs, different from the standard that controlled at the time of the decision by the Second Circuit panel. Four members of the Supreme Court, who were appointed by both Republican and Democratic Presidents, and including Justice Souter, agreed with the result reached by Judge Sotomayor.

Another race-based employment case in which Judge Sotomayor served on the appellate panel is the *Grant v. Local 638* litigation (commonly referred to as the *Local 28* case).[34] The Lawyers' Committee, working with pro bono counsel, represents the plaintiff-intervenors, who joined this longstanding litigation against Local 28 of the International Sheet Metal Workers Association to represent minority sheet metal workers who had suffered discrimination at the hands of their union. The Lawyers' Committee's clients objected to a proposed settlement with the union, because it failed to provide adequate relief. One of the issues in dispute was an

---

[32] *Ricci v. DeStefano*, 530 F.3d 88 (2d Cir. 2008).

[33] *Id.* at 92.

[34] *Grant v. Local 638*, 373 F.3d 104 (2d Cir. 2004).

affirmative action plan that set a minority membership goal for the union, and based on the objections of our clients, the district court concluded that the proposed settlement was inadequate. The union sought to appeal the district court's rejection of the proposed settlement, but the Second Circuit dismissed the appeal because it unanimously concluded that the district court's ruling constituted an interlocutory order that could not be appealed. The Second Circuit's ruling did not reach the merits of the affirmative action plan.

In *Cruz v. Coach Stores, Inc*., another race-based employment discrimination case, Judge Sotomayor wrote the opinion for the Second Circuit panel, which vacated a district court's judgment that an employee had failed to state a claim for a racially hostile work environment.[35] Finding that an employee had used racial epithets to describe both the plaintiff and her co-workers, Judge Sotomayor concluded that this individual's actions were sufficient to state a claim, notwithstanding that the discriminatory remarks had not been directed entirely at the plaintiff: "From this evidence, a jury reasonably might conclude that [the employee] in fact subjected [the plaintiff] and others to blatant racial epithets on a regular if not constant basis . . . . Moreover, even if [the plaintiff] herself were not present or were not the target of some of the [employee's] racial remarks, a jury plausibly could find that his persistently offensive conduct created an overall 'hostile or abusive environment,' which exacerbated the effect of the harassment [that the plaintiff] experienced individually."[36]

In *Cartagena v. Ogden Serv. Corp.*, Judge Sotomayor, sitting as a district judge, denied an employer's motion for summary judgment in a Title VII action for racially discriminatory

[35] *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 572 (2d Cir. 2000).

[36] *Id.* at 571 (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)).

termination.[37] In Judge Sotomayor's view, a question of fact existed as to whether discriminatory animus was a motivating factor in the plaintiff's discharge, because his supervisor had repeatedly used racial epithets to address him during evaluations shortly before he was fired.[38]

By contrast, in *Norville v. Staten Island University Hospital*, the court of appeals, in an opinion by Judge Sotomayor, affirmed a district court's entry of judgment as a matter of law against a race discrimination claim brought by an elderly, African-American nurse.[39] The plaintiff claimed that the hospital where she worked had accommodated the disabilities of two Caucasian nurses, but had refused to make accommodations for hers.[40] The court of appeals affirmed the district court's conclusion that the plaintiff had failed to demonstrate that she and the two Caucasian nurses were "similarly situated in all material respects" because the plaintiff had introduced no evidence "regarding the specific degree to which either of these nurses was disabled, the type of work they did prior to becoming disabled, or the ways in which they were limited in performing their jobs," and therefore had failed to demonstrate that they were "'subject to the same standards governing performance evaluation and discipline' or that they 'engaged in conduct similar to [hers].'"[41]

In *Williams v. R.H. Donnelley, Corp.*, the court of appeals affirmed a grant of summary judgment against an African-American former employee who alleged that her former employer

---

37 *Cartagena v. Ogden Serv. Corp.*, 995 F. Supp. 459, 464 (S.D.N.Y. 1998).

38 *Id.*

39 *Norville v. Staten Island Univ. Hosp.*, 196 F.3d 89 (2d Cir. 1999).

40 *Id.* at 95.

41 *Id.* (internal citations to *Mazzella v. RCA Global Communications, Inc.*, 642 F. Supp. 1531, 1547 (S.D.N.Y. 1986), *aff'd*, 814 F.2d 653 (2d Cir. 1987)).

had refused to promote her to three different positions within the company, declined to "create a management position" for her, and refused to approve a discretionary transfer from one location to another, all because of her race.[42] Judge Sotomayor's opinion disposed of the "failure to promote" claims when the plaintiff conceded that she was not qualified to undertake any of the positions to which she sought promotion.[43] Regarding the failure to transfer claim, Judge Sotomayor noted that while an *involuntary* transfer had been held to constitute an adverse employment action for purposes of a Title VII claim, she was unaware of any precedent addressing the question of whether a *denial* of a transfer request to a lower-paying position that was organizationally junior to the employee's current position could qualify.[44] In concluding that in this case, at least, such a denial could not be actionable under Title VII, the opinion noted that "subjective, personal disappointments do not meet the objective indicia of an adverse employment action."[45] Similarly, in rejecting the claim that the employer's failure to create a management position for the plaintiff in the city of her choice violated Title VII, the court concluded that the plaintiff had failed to introduce any evidence of discriminatory intent or that her employer had "ever created a position for an employee – white or otherwise – who sought a transfer for purely personal reasons."[46]

---

42 *Williams v. R. H. Donnelley, Corp.*, 368 F.3d 123, 126-30 (2d Cir. 2004).

43 *Id.*

44 *Id.*

45 *Id.* (citing to *Galabya v. New York City Bd. of Educ.*, 202 F.3d 636, 640 (2d Cir. 2000)).

46 *Id*. at 129.

### b. Gender-based Employment Discrimination

In both of the gender-based workplace discrimination cases in which Judge Sotomayor wrote an appellate opinion, the court ruled in favor of the employee at least in part. In the first such case, *Cruz* (described above), the court reinstated a sexual harassment claim of a female retail employee, while affirming the dismissal of a retaliation claim. The court held that the "nature of [the supervisor's] behavior, which repeatedly ended with him backing Cruz into the wall until she had to . . . extricate herself, brings this case over the line separating merely offensive or boorish conduct from actionable sexual harassment."[47] Interestingly, the panel in *Cruz* held that because there was evidence of both racial and sexual harassment, a jury could find that the supervisor's racial harassment, when combined with the evidence of sexual harassment, "exacerbated the effect of his sexually threatening behavior and vice versa" so as to make the claim more viable.[48] This idea was new to the Second Circuit at the time of the *Cruz* opinion, although cases from the Sixth and Tenth Circuits supported the idea of using one form of harassment based on membership in a protected class to support a claim of another form of harassment.[49] The court in *Cruz* upheld the dismissal of the plaintiff's retaliatory discharge claim, because the evidence showed she was fired for slapping her harasser, not for opposing the harassment.[50]

---

47 *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 571 (2d Cir. 2000).

48 *Id.* at 572.

49 *See id*. (citing *Hafford v. Seidner*, 183 F.3d 506, 515 (6th Cir. 1999) ("recognizing that evidence of religious harassment could help support racial hostile work environment claim") and *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416 (10th Cir. 1987) ("noting that evidence of racial harassment may help establish sexually hostile work environment.")).

50 *Cruz*, 202 F.3d at 566.

In *Raniola v. Bratton*, the court of appeals vacated a district court's order granting the New York Police Department's motion for a judgment as a matter of law on Title VII claims by a former female police officer charging hostile work environment, retaliation, and sexual harassment.[51] Judge Sotomayor's opinion rejected the district court's assertion that Raniola's treatment in her precinct was "typical of the 'camaraderie of a precinct house,' which lacks '[s]ome of the niceties of expression that one would expect' in many other workplaces,"[52] and held instead that the evidence of consistent verbal abuse directed to the plaintiff on the basis of her sex, the disparate treatment of the plaintiff in the workplace based on her sex, and the "workplace sabotage" that the plaintiff suffered based on her sex were sufficient to take her hostile work environment claim to a jury.[53] In addition, because the plaintiff introduced evidence that she had been singled out by her supervisor for increasingly onerous assignments and termination because she had filed several EEOC complaints against him, the court ruled that she should be allowed to present her termination claim to a jury.[54]

### c. Age-based Employment Discrimination

Judge Sotomayor has not written a decision that solely addresses age-based employment discrimination, but has addressed the issue as a part of other employment discrimination decisions.[55] In *Norville* (described above), the court, in an opinion written by Judge Sotomayor, ruled for the defendant. Although finding that an African-American nurse had made a *prima*

---

[51] *Raniola v. Bratton*, 243 F.3d 610 (2d Cir. 2001).

[52] *Id.* at 615.

[53] *Id.* at 618.

[54] *Id.* at 625–28.

[55] *Norville v. Staten Island Univ. Hosp.*, 196 F.3d 89 (2d Cir. 1999).

*facie* case of age discrimination, the court held that she had failed to show pretext in her employer's reasons for choosing a younger employee for a position that she desired: "Even assuming that [the supervisor] could have inferred each applicant's age based on their respective answers [to the question of when they graduated from nursing school]," the opinion notes, "there is simply no evidence that this was the purpose of his question, and nothing else in the record indicates that [the supervisor] selected [the younger applicant] because he was [younger]."[56]

In *Hankins v. Lyght*, the two other judges on the Second Circuit panel vacated the district court's dismissal of an ADEA claim by a former clergy member against his former church and bishop.[57] Judge Sotomayor dissented, voting instead to affirm the dismissal of the claim. In her view, "Supreme Court and Second Circuit precedent compels a finding that [the ADEA] does not govern disputes between a religious entity and its spiritual leaders."[58] She criticized her colleagues for applying the Religious Freedom Restoration Act ("RFRA"). In particular, she stated that defendants had waived a RFRA defense by not raising it below, and that in any event RFRA does not apply to private disputes.[59] In her opinion, her colleagues were violating "a cardinal principle of judicial restraint by reaching unnecessarily the question of RFRA's constitutionality" in the context of this case.[60]

---

56 *Id.* at 97–98.

57 *Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2006).

58 *Id.* at 109 (Sotomayor, J., dissenting).

59 *Id.*

60 *Id.*

#### d. Employment Discrimination Based on Disability

Judge Sotomayor has written opinions in several employment discrimination cases based on disability. In *Brown v. Parkchester South Condominiums*, the court held that equitable tolling applies to extend Title VII's statute of limitations where the plaintiff's disability prevented him from filing on time.[61] Judge Sotomayor's opinion noted that "a plaintiff's failure to act diligently is not a reason to invoke equitable tolling," but that equitable tolling might be appropriate "where the plaintiff's failure to comply with the statute of limitations is attributable to the plaintiff's medical condition."[62]

In *EEOC v. J.B. Hunt Transport, Inc.*, the Second Circuit affirmed the grant of summary judgment to defendant, rejecting the EEOC's claim that a trucking company violated the Americans with Disabilities Act ("ADA") by refusing to hire long-haul route drivers who used prescription medications that might impair their driving ability.[63] The court of appeals held that the inability to perform long-haul truck driving was not a major life activity triggering the ADA. Judge Sotomayor dissented. In her view, the EEOC had presented sufficient evidence that the defendant viewed the employees as incapable of serving as drivers of any kind (not merely long-haul), thereby triggering the ADA. She therefore would have allowed the case to go to trial.

In *Bartlett v. New York State Board of Law Examiners*, a case decided by Judge Sotomayor while still on the district court, she held that a law student with dyslexia was substantially impaired under the standards of the ADA and thus entitled to a reasonable

---

[61] *Brown v. Parkchester S. Condo.*, 287 F.3d 58, 60 (2d Cir. 2002).

[62] *Id.*

[63] *EEOC v. J.B. Hunt Transp., Inc.*, 321 F.3d 69 (2d Cir. 2003).

accommodation when taking the bar exam.[64] After going to the Supreme Court and back, this holding has been maintained, although the basis of the disability finding has changed. Judge Sotomayor originally ruled that the plaintiff was disabled in her ability to work (since inability to pass the bar exam without accommodations impaired her ability to work as a lawyer), but was not disabled in reading or learning due to mitigating measures she had learned to cope with her dyslexia. She therefore ordered the bar examiners to accommodate the plaintiff in taking the exam. On appeal, the Second Circuit found that plaintiff was substantially limited in her major life activity of reading or learning, reasoning that her disability must be assessed without regard to the availability of mitigating or self-accommodation measures.[65] The appeals court also asked that the district court determine whether any of the Board's denials of plaintiff's requests for accommodations on each of the five bar examinations she took were based on illegal discrimination. The Supreme Court vacated the Second Circuit's judgment and remanded for reconsideration in light of Supreme Court holdings that corrective devices and mitigating measures must be considered in determining whether an individual is disabled under the ADA.[66] On remand, the Second Circuit, while now recognizing that Judge Sotomayor had been correct in concluding that an individual's "self-accommodation" can render her non-disabled for purposes of the ADA, still disagreed with her rulings on the basis of the disability and remanded the case because it considered Judge Sotomayor's rulings both too favorable to the plaintiff (because with respect to the life activity of working she failed to require the plaintiff to prove that her "inability to practice law results from her learning impairment, rather than from other factors that might

---

64 *Bartlett v. N.Y. State Bd. of Law Exam'rs*, 970 F. Supp. 1094 (S.D.N.Y. 1997).

65 *Bartlett v. N.Y. State Bd. of Law Exam'rs*, 156 F.3d 321, 327–29 (2d Cir. 1998).

66 *N.Y. State Bd. of Law Exam'rs v. Bartlett,* 527 U.S. 1031 (1999).

prevent her from passing the bar") and too hostile to the plaintiff (because with respect to the life activity of reading she did not sufficiently consider whether even with the self-corrective measures the plaintiff's "ability to read is substantially limited").[67] On remand to the district court, Judge Sotomayor – now a Second Circuit judge, but sitting by designation – found that the plaintiff was substantially limited in the life activities of both reading and working.[68]

In *Parker v. Columbia Pictures Industries*, Judge Sotomayor's opinion for the Second Circuit reversed the grant of summary judgment in favor of the defendant on the plaintiff's claim of discriminatory discharge under the ADA.[69] The court of appeals found that statements in the plaintiff's applications for disability benefits did not necessarily demonstrate that he was unable to perform the relevant job. More significantly, the court of appeals held that ADA claims are subject to a mixed-motive analysis, so that plaintiff's burden is to show that disability is a motivating factor, rather than the sole cause, of an employment action. Though that conclusion has been adopted by every circuit, it has been called into question by the Supreme Court's recent holding in *Gross v. FBL Financial Services* (June 18, 2009) that the mixed-motive burden shifting framework of Title VII does not apply to claims under the ADEA.[70]

In *Valentine v. Standard & Poor's*, the Second Circuit affirmed an opinion written by Judge Sotomayor granting summary judgment to an employer in an ADA claim brought by an employee with bipolar disorder, because the employer had introduced sufficient evidence to

---

67 *Bartlett v. N.Y. State Bd. of Law Exam'rs*, 226 F.3d 69, 74-75 (2d Cir. 2000).

68 *Bartlett v. N.Y. State Bd. of Law Exam'rs*, No. 93-CIV-4986(SS), 2001 930792, at *3 (S.D.N.Y. August 15, 2001).

69 *Parker v. Columbia Pictures Indus.*, 204 F.3d 326 (2d Cir. 2000).

70 *Gross v. FBL Fin. Serv.*, 129 S.Ct. 2343 (2009).

show that it had tried to accommodate the employee but ultimately was forced to terminate him because of poor job performance.[71]

#### e. Other Employment Decisions

Other employment discrimination cases in which Judge Sotomayor joined in the panel's opinion but did not file a separate concurring or dissenting opinion are: *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103 (2d Cir. 2001); *Brooks v. Travelers Insurance Co.*, 297 F.3d 167 (2d Cir. 2002); *Cifra v. General Electric Co.*, 252 F.3d 205 (2d Cir. 2001); *Cross v. New York City Transit Authority*, 417 F.3d 241 (2d Cir. 2005); *Malave v. Potter*, 320 F.3d 321 (2d Cir. 2003); *Demoret v. Zegarelli*, 451 F.3d 140 (2d Cir. 2006); *Saks v. Franklin Covey Co.* 316 F.3d 337 (2d Cir. 2003); *Grant v. Local 638*, 373 F.3d 104 (2d Cir. 2004); *Salamon v. Our Lady of Victory Hospital*, 514 F.3d 217 (2d Cir. 2008); *Alleyne v. American Airlines, Inc.*, 548 F.3d 219 (2d Cir. 2008); *Wilburn v. Eastman Kodak Co.*, 180 F.3d 475 (2d Cir. 1999). Nearly all of these cases were employee appeals from either grants of summary judgment or dismissals for their failure to demonstrate some aspect of the *McDonnell–Douglas* burden shifting framework.

### 2. Education

Judge Sotomayor has participated in decisions addressing a wide range of issues relating to education, including discrimination, disability, free speech, and privacy issues. Her decisions are usually narrowly tailored to the facts at hand and do not reflect an ideological agenda.

[71] *Valentine v. Standard & Poors*, 50 F. Supp. 2d 262 (S.D.N.Y. 1999), *aff'd*, 205 F.3d 1327 (2000).

#### a. Race and Gender Discrimination

Judge Sotomayor's best-known (and perhaps most strongly worded) opinion addressing racial discrimination is her dissent in *Gant v. Wallingford Board of Education*.[72] Plaintiff Ray Gant, who was transferred mid-year from first grade to kindergarten because of academic difficulties, alleged that the school was deliberately indifferent to peer racial hostility that he suffered, and that the school discriminated against him when it transferred him back to kindergarten. Sotomayor agreed with the majority's decision to dismiss the peer racial harassment claim, but she rejected its conclusion that the transfer was not race discrimination. In her view, the transfer was "unprecedented and contrary to the school's established policies." White students having academic difficulties, she noted, received compensatory help, whereas Gant – the "lone black child" in his class – was not given an "equal chance" but was instead demoted to kindergarten just nine days after arriving at the school.

Judge Sotomayor also took issue with the majority's conclusion that the plaintiff presented insufficient circumstantial evidence.[73] She thought that the majority's finding implied a direct evidence requirement, which Second Circuit precedent did not require. Judge Sotomayor observed that "a plaintiff like Ray Gant will seldom be able to offer direct evidence of discrimination on the part of educators."[74] She pointed out the reality of discrimination suits, wherein, as the Second Circuit had previously recognized, the defendants often do not "leave a 'smoking gun'"[75] of blatant discrimination to which the plaintiffs can point.

---

[72] *Gant v. Wallingford Board of Education*, 195 F.3d 134 (2d Cir. 1999)

[73] *Id.* at 152.

[74] *Id.*

[75] *Id.*

In a post-secondary education racial discrimination case, Judge Sotomayor joined the panel's ruling in *Tolbert v. Queens College*, which held that a Master's program had discriminated against an African-American student.[76] The plaintiff had failed the final exam needed to complete the program, and he filed a complaint after his professors explained why he failed and the five other students in the program, all foreign Chinese students, passed.[77] They explained that the Chinese students were "cut slack" in their grading expectations, versus the plaintiff, who was held to a higher standard.[78] The plaintiff sued, alleging that this explanation constituted discriminatory race-based standards in violation of Title VI.[79] The plaintiff won in a jury trial, receiving punitive damages.[80] The district court judge overturned this verdict and instead entered judgment in favor of the defendants, giving rise to the plaintiff's appeal before the Second Circuit.[81]

Judge Sotomayor joined her colleagues' decision to reinstate the jury's verdict. The Second Circuit explained that the lower court ignored the totality of circumstantial evidence, which had raised reasonable inferences of discrimination.[82] In their view, the district judge did not give enough weight to the plaintiff's circumstantial evidence, gave too much weight to the defendants' plainly contradictory evidence, and accepted the defendants' interpretations of

---

[76] *Tolbert v. Queens College*, 242 F.3d 58, 78 (2d Cir. 2001).

[77] *Id.* at 62–63.

[78] *Id.* at 64.

[79] *Id.* at 66.

[80] *Id.* at 67.

[81] *Id.* at 68.

[82] *Id.* at 71.

events without searching for other interpretations. Because the jury had weighed the evidence logically, there was no reason to disrupt its verdict, and the Second Circuit reinstated it.[83]

In *Boucher v. Syracuse University*, a case brought under Title IX of the Education Amendments of 1972 to challenge the lack of women's lacrosse and softball teams at the university, Judge Sotomayor joined a unanimous opinion affirming the district court's holding that claims relating to the failure to establish a women's lacrosse team were moot because the university had subsequently created such a team.[84] However, the court of appeals agreed with the plaintiffs-appellants that the district court should have certified a subclass of current and future softball players. The Second Circuit panel did not reach the merits of the case, but instead remanded to the district court, based on the university's representation that a women's softball team would soon begin play.

**b. Disability**

Most of Judge Sotomayor's decisions addressing the issue of disabilities in education consider whether students and their parents are entitled to benefits, and in particular tuition reimbursement, under the Individuals with Disabilities Education Act ("IDEA"). Her most famous opinion addressing disabilities in education is likely *Bartlett v. New York State Board of Law Examiners*, discussed above, in which Judge Sotomayor held that a law student with dyslexia was substantially impaired under the standards of the ADA and thus entitled to reasonable accommodations when taking the bar exam. After intervening rulings by the Second Circuit and the Supreme Court, Judge Sotomayor—now a Second Circuit judge, but sitting by designation—held that the plaintiff was entitled to compensatory damages and, during future bar

---

[83] *Id.* at 78.

[84] *Boucher v. Syracuse Univ.*, 164 F.3d 113 (2d Cir. 1999).

examinations, should receive accommodations such as additional time and the use of a computer.[85]

Judge Sotomayor has written two other opinions construing the IDEA and joined several others. In *Murphy v. Arlington Central School District Board of Education*, in an opinion by Judge Sotomayor, the court of appeals held first that the IDEA's exhaustion requirement did not extend to a lawsuit, such as the Murphys', alleging that the school board had violated the statute's "stay put" provision.[86] Following circuit precedent, the court then held that the school board was responsible for paying tuition while administrative proceedings to determine the student's proper academic placement were ongoing.[87] And although circuit precedent at that time precluded non-attorney parents from representing their children in federal court, the court of appeals declined to reverse the lower court's ruling on that basis.[88] The court explained that the "animating purpose" behind the rule is "to protect the interests of minor children by ensuring they receive adequate representation."[89] It was "hardly in the best interest of [the child]," the court continued, "to vacate an injunction that inures to his benefit so that he may re-litigate this issue below, with licensed representation in order to re-secure a victory already obtained."[90]

---

85 *Bartlett v. N.Y. State Bd. of Law Exam'rs*, 2001 U.S. Dist. LEXIS 11926 (S.D.N.Y. 2001).

86 *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195, 199 (2d Cir. 2002).

87 *Murphy,*297 F.3d at 201.

88 *Id.*

89 *Id.*

90 *Id.* (In *Arlington Central School District Bd. of Education v. Murphy*, 548 U.S. 291 (2006), the Supreme Court reversed a different decision of the Second Circuit holding that parents could recover expert fees under the IDEA. Judge Sotomayor did not sit on that panel.)

In *Taylor v. Vermont Department of Education*, Judge Sotomayor wrote a unanimous panel opinion affirming the dismissal of a complaint brought under the IDEA by the mother of a child with a disability.[91] The court reasoned that a parent's legal standing to sue under the IDEA was predicated on state custody law.[92] Because the mother had lost custody during divorce proceedings, she lacked legal standing to make educational decisions about her child.[93]

Judge Sotomayor also joined several opinions addressing the availability of tuition reimbursement under the IDEA. The most high-profile of these decisions is *Frank G. v. Board of Education of Hyde Park Central School District*, in which she joined a unanimous opinion holding that the IDEA allowed parents to be reimbursed for tuition payments even if their child had never enrolled in public school.[94] The Supreme Court denied the school district's petition for certiorari but recently held in another case, *Forest Grove School District v. T.A.*, that the Second Circuit's decision in *Frank G.* was correct.[95] However, Judge Sotomayor has also joined several decisions denying parents' claims for tuition reimbursement because the parents failed to point to clear failures within the public school.[96]

---

[91] *Taylor v. Vt. Dep't of Educ.*, 313 F.3d 768, 772 (2d Cir. 2002).

[92] *Id.* at 780.

[93] *Id.* at 781–82.

[94] *Frank G. v. Bd. of Educ. of Hyde Park Cent. Sch. Dist.*, 459 F.3d 356 (2d Cir. 2006).

[95] *Forest Grove Sch. Dist. v. T.A.*, -- S.Ct. ----, 2009 WL 1738644 (U.S.) (June 22, 2009).

[96] *See A.H. v. Monroe-Woodbury Cent. Sch. Dist.*, 250 F. Appx. 428 (2d Cir. 2007) (denying tuition reimbursement because plaintiffs failed to meet burden of proof in showing that public school's program was inadequate); *M.B. v. E. Granby Bd. of Educ.*, 201 F. Appx. 834 (2d Cir. 2006) (denying tuition reimbursement because public school's program was procedurally and substantively sufficient); *M.S. v. Yonkers Bd. of Educ.*, 231 F.3d 96 (2d Cir. 2000) (reversing district court and denying tuition reimbursement because district court improperly ignored findings of administrative officer that private school's facilities were inadequate).

### c. Privacy/ Freedom of Information

Judge Sotomayor has sat on two panels considering privacy issues in schools, although substantive privacy law was not implicated in the outcome of either case. In *Connecticut Office of Protection & Advocacy for Persons with Disabilities v. Hartford Board of Education*, the panel, in an opinion by Judge Sotomayor, held that a state agency investigating allegations of abuse at a school for children with mental disabilities could observe the children at their school, interview them, and use the school's directory and contact information without first obtaining parental approval.[97] In the panel's view, none of the statutes governing the release of the personal information of disabled persons required prior parental consent.[98]

In *Port Washington Teachers' Ass'n v. Board of Education*, Judge Sotomayor was part of the panel that considered a challenge by a teachers' union and school social worker to a school policy that required employees to inform parents about student pregnancies if the students did not do so themselves.[99] The panel, in an opinion by Judge Sack, affirmed the district court's dismissal of the case on the ground that the plaintiffs lacked standing because they had suffered no injury-in-fact.[100]

### d. First Amendment

Judge Sotomayor has joined decisions both upholding and rejecting First Amendment claims in educational settings, but the cases have had narrow holdings and do not indicate a predilection toward either conclusion.

---

97 *Conn. Office of Protection & Advocacy for Persons with Disabilities v. Hartford Bd. of Educ.*, 464 F.3d 229, 233 (2d Cir. 2006).

98 *Id.* at 243.

99 *Port Wash. Teachers' Ass'n v. Bd. of Educ.*, 478 F.3d 494, 497 (2d Cir. 2007).

100 *Id.*

In *Doniger v. Niehoff*, Judge Sotomayor joined a unanimous opinion affirming the district court's denial of a preliminary injunction in a case brought by the mother of a student who was prohibited from running for class secretary after she posted a "vulgar and misleading" message about a school event on an independent blog.[101] The panel held that because the student's blog post had "created a foreseeable risk of substantial disruption" at the school, the mother had "failed to demonstrate a sufficient likelihood of success on her First Amendment claim."[102]

By contrast, in *Guiles v. Marineau*, Judge Sotomayor joined a unanimous opinion holding that a student was entitled to declaratory relief on his as-applied First Amendment challenge seeking to preclude the school from enforcing its dress code with regard to his T-shirt, which, as the court explained, used "harsh rhetoric and imagery," including images of drugs and alcohol, to "express disagreement with" the policies of then-President George Bush.[103] The panel reasoned that the images were not plainly offensive; moreover, they did not cause any disruption at school.[104]

In a different First Amendment vein, Judge Sotomayor joined a summary order interpreting basic principles of the Free Exercise Clause in a school setting, in *Friedman v. Clarkstown Central School District*.[105] In that case, a parent sued after her request for a religious exemption to mandatory immunization requirements was rejected by the school.[106] The Second

---

[101] *Doniger v. Niehoff*, 527 F.3d 41, 43 (2d Cir. 2009).

[102] *Id.*

[103] *Guiles v. Marineau*, 461 F.3d 320, 322 (2d Cir. 2006).

[104] *Id.* at 330.

[105] *Friedman v. Clarkstown Cent. Sch. Dist.*, 75 F. Appx. 815 (2d Cir. 2003).

[106] *Id.* at 817.

Circuit affirmed that the school had discretion to decide the relative sincerity of a parent's religious objection when used to exempt a child from immunization requirements.[107] It also affirmed the finding that in this case, the parent had not defended the sincerity of her religious objections as they related to immunization, and that the school was free to reject them.[108] Hence, the parent's First Amendment rights under the Free Exercise Clause were not violated when the school required her to fill out a questionnaire documenting her religious beliefs and when state law gave schools great discretion to question parents' religious objections to immunization.[109]

**3. Housing**

In *Boykin v. KeyCorp*, plaintiff-appellant filed a complaint with the local Housing and Urban Development (HUD) office, alleging that a bank had treated her less favorably than other applicants for a home equity loan because of her race, her gender, and the location of her property.[110] Pursuant to provisions in the Fair Housing Act, HUD referred the complaint to the New York State Department of Human Rights, which conducted a lengthy investigation of her complaint and eventually issued a finding of no reasonable cause and dismissed the complaint.[111] Thereafter, HUD sent the plaintiff a final letter on her complaint indicating it was closing the matter as well.[112] Plaintiff brought a civil suit more than two years after the alleged

---

[107] *Id.* at 819.

[108] *Id.*

[109] *Id.* at 820.

[110] *Boykin v. KeyCorp*, 521 F.3d 202 (2d Cir. 2008).

[111] *Id.* at 205.

[112] *Id.* at 206.

discrimination had occurred, and the district court dismissed her complaint as time-barred.[113] In an opinion by Judge Sotomayor, the panel reversed, holding that the statute of limitations was tolled until HUD issued its final letter.[114] Judge Winter wrote a concurring opinion; he would have held that the issuance of the final letter was not a legally cognizable event but would have reached the same result by relying on equitable tolling.[115]

In *United States v. Secretary of HUD*, Judge Sotomayor joined an opinion affirming the district court's entry of a race-conscious remedial order modifying a consent decree intended to desegregate public housing and schools.[116] The consent decree arose from earlier proceedings in which the district court found that the City of Yonkers, through a long history of egregiously discriminatory actions, had intentionally segregated its public housing and schools by locating them all in neighborhoods that were predominantly occupied by minorities.[117] After two failed desegregation orders, the court finally implemented a third plan, which the City then challenged as "employ[ing] race-conscious remedial devices in an unconstitutional manner." [118] The court of appeals rejected this argument, holding that the third plan "satisfies even the strict scrutiny to which legislative race-conscious remedies must be subject."[119]

---

113 *Id.*

114 *Id.* at 211.

115 *Id.* at 218-19.

116 *U. S. v. Sec'y of HUD*, 239 F.3d 211, 213 (2d Cir. 2001).

117 *Id.*

118 *Id.* at 216.

119 *Id.* at 216.

In *Palmieri v. Allstate Insurance Co.*, Judge Sotomayor's majority opinion addressed the federal court's jurisdiction under the National Flood Insurance Act ("NFIA"), § 1340(a)(1), 42 U.S.C.A. § 4071(a)(1), and the related National Flood Insurance Program ("NFIP").[120] An insured homeowner sued for the full replacement cost of her home and personal property. Ruling on the merits, the court determined that the homeowner was entitled only to the actual cash value (rather than the replacement cost) of the personal property damaged in the flood, based on the unambiguous terms of the agreed-to insurance contract.[121] The court also affirmed the district court's ruling that the homeowner was entitled to the replacement cost of his home because "no reasonable insured could discern the intended meaning" of a clause requiring the homeowner to submit her claim within 180 days.[122] In this decision, Judge Sotomayor carefully balanced the rights of a vulnerable individual against those of a major corporation. She refused to stray from the statutory text or contract terms on several issues, yet she ultimately found for the homeowner on the largest issue – the amount the homeowner could receive for her flood-damaged home – by interpreting the contract from the perspective of a "reasonable insured."[123] In *Romea v. Heiberger & Assocs.*, Judge Sotomayor joined an opinion that affirmed the district court's denial of the defendant-landlord's motion to dismiss the complaint in action brought under the Fair Debt Collection Practices Act ("FDCPA").[124] The court agreed that the requirements of this Act "apply to an attorney's execution and delivery of the three-day rent

---

[120] *Palmieri v. Allstate Ins. Co.*, 445 F.3d 179 (2d Cir. 2006).

[121] *Id.* at 187–88.

[122] *Id.* at 190–92.

[123] *Id.*

[124] *Romea v. Heiberger & Assocs.*, 163 F.3d 111 (2d Cir. 1998).

demand notice that is required by New York law as a condition precedent to a summary eviction proceeding."[125] In particular, the court rejected the landlord's contention that reading both the FDCPA and New York's landlord-tenant statutes together would impose more restrictions "than either Congress or the New York legislature intended"; instead, it relied on the plain text of the statute to conclude that both sets of laws applied.[126]

**4. Voting Rights**

Although Judge Sotomayor has encountered few voting rights cases during her tenure on the bench, she has written opinions supporting the broad reach of the protections and prohibitions of the Voting Rights Act. Of the eight published cases relating to voting rights in which she has been directly involved, she has written three opinions—two in the Southern District of New York and one in the Second Circuit.[127] She wrote a brief but significant dissent in *Hayden v. Pataki*,[128] which was decided *en banc*, and she has joined in the majority or dissenting opinions of her Second Circuit colleagues four times.[129] She has also participated as an active judge of the court in hearing a second case *en banc* which had previously been consolidated with *Hayden*.[130] While the relatively small number of opinions available makes it

---

125 *Id.* at 113.

126 *Id.* at 118.

127 *See Gelb v. Bd. of Elections*, 888 F. Supp. 509 (S.D.N.Y. 1995); *Gelb v. Bd. of Elections*, 950 F. Supp. 82 (S.D.N.Y. 1996); *Rivera-Powell v. New York City Bd. of Elections*, 470 F.3d 458 (2d Cir. 2006).

128 *Hayden v. Pataki*, 449 F.3d 305, 367–68 (2d Cir. 2006).

129 *See id.* at 343 (Parker, J. dissenting, in which Calabresi, Pooler, and Sotomayor, J.J., joined); *Lopez-Torres v. N.Y. State Bd. of Elections*, 462 F.3d 161 (2d Cir. 2006); *Person v. N.Y. State Bd. of Elections*, 467 F.3d 141 (2d Cir. 2006); *Muntaqim v. Coombe*, 385 F.3d 793 (2d Cir. 2004).

130 *Muntaqim v. Coombe*, 449 F.3d 371 (2d Cir. 2006).

difficult to draw definitive conclusions about her judicial stance on voting rights, a few observations can be made.

In *Hayden v. Pataki*, Judge Sotomayor dissented from the court's denial of rehearing *en banc* when the panel held that New York's felon disenfranchisement statute did not violate section 2 of the Voting Rights Act ("VRA").[131] In that case, the plaintiffs alleged that because African-American and Latino citizens were prosecuted, convicted, and incarcerated in New York much more frequently than were Caucasian citizens, New York Election Law § 5-106 violated Section 2 of the VRA's proscription against voting practices that "result[] in a denial or abridgement of the right of any citizen of the United States to vote on account of race."[132] The panel grounded its decision in the long history of felon disenfranchisement in the country, evidence that Congress intended to leave felon disenfranchisement laws unaffected by the VRA, and the negative implication created by section two of the Fourteenth Amendment, which reduces representation in the U.S. House of Representatives for states that deny individuals the right to vote unless the denial is because of "participation in rebellion, or other crime."[133] Moreover, the panel held that applying the VRA to state felon disenfranchisement statutes would "alter the usual constitutional balance between the Federal Government and the States," and that absent "unmistakably clear" Congressional intent to do so, courts should err on the side of not disturbing that balance.[134]

---

[131] *Hayden*, 449 F.3d at 367.

[132] *Id*. at 310.

[133] *Id.* at 316–28.

[134] *Id.* at 323–35.

Judge Sotomayor joined in Judge Parker's exhaustive dissent addressing each of these justifications in detail. She also submitted a brief, yet significant, dissent of her own in which she emphasized that the court's decision should begin and end with the clear language of the VRA:

> It is plain to anyone reading the Voting Rights Act that it applies to all 'voting qualification[s].' And it is equally plain that § 5-106 disqualifies a group of people from voting. These two propositions should constitute the entirety of our analysis. Section 2 of the Act by its unambiguous terms subjects felony disenfranchisement and all other voting qualifications to its coverage.[135]

She also took exception to the majority's interpretation of what she considered to be unambiguous statutory language: "The duty of a judge," she wrote,

> is to follow the law, not to question its plain terms. I do not believe that Congress wishes us to disregard the plain language of any statute or to invent exceptions to the statutes it has created. . . . But even if Congress had doubts about the wisdom of subjecting felony disenfranchisement laws to the results test of § 2, I trust that Congress would prefer to make any needed changes itself, rather than have courts do so for it.[136]

Like Judge Sotomayor, the Lawyers' Committee interprets Section 2 to apply to felony disenfranchisement laws based on the plain text of the statute.

In several cases, Judge Sotomayor has generally been deferential to state and local governments' conduct of elections.[137] In *Gelb v. Board of Elections*, for example, a write-in candidate for the office of Bronx Borough President alleged that the New York Board of Elections had violated his First, Fourth, and Fourteenth Amendment rights by denying voters,

---

[135] *Id.* at 367–68.

[136] *Id.* at 368.

[137] *See Rivera-Powell*, 470 F.3d at 469–70; *Gelb*, 888 F. Supp. at 514–16; *Gelb*, 950 F. Supp. at 84–86.

including himself, both the information and resources necessary to cast their votes for write-in candidates.[138] Specifically, the plaintiff alleged that the Board had failed to

> (1) provide sample ballots that instructed voters on how to write in their choice of candidate; (2) provide voters with absentee ballots that instructed them of their right to vote for a write-in candidate; (3) provide voters with the space on the voting booth ballot to write-in the candidate of their choice; (4) provide voters with display cards in the voting booths that would give instructions on how to vote for a write-in candidate; and (5) provide pencils within the voting booth so that voters could cast a ballot for a write-in candidate without surrendering their right to secrecy.[139]

After initially denying the Board's motion to dismiss,[140] Judge Sotomayor granted the Board's summary judgment motion on the constitutional claims. While acknowledging that "there is no right more fundamental in our country than the right to vote," she also wrote that "not every irregularity arises to the level of a federal constitutional violation."[141] In her view, granting the plaintiff's request for a federal remedy "would be the epitome of what the Second Circuit has characterized as being 'thrust into the details of virtually every election, tinkering with the state's election machinery, reviewing petitions, registration cards, vote tallies, and certificates of election for all manner of error and insufficiency under state and federal law.'"[142] Such judicial "micromanagement," she felt, was inappropriate for a federal court.[143]

---

[138] *Gelb*, 950 F. Supp. at 84.

[139] *Id.* at 83.

[140] *Gelb*, 888 F. Supp. at 509.

[141] *Gelb*, 950 F. Supp. at 84.

[142] *Id.* (citing *Powell v. Power*, 436 F.2d 84, 86 (2d Cir. 1970)).

[143] *Id.*

Similarly, in *Rivera-Powell v. New York City Board of Elections*,[144] a candidate for a seat on the New York City civil court claimed that the state Board of Elections had violated various provisions of New York election law, as well as the First and Fourteenth Amendments, by entertaining her opponent's allegedly untimely objection to her candidacy and then removing her from the ballot because of it.[145] Specifically, the candidate alleged that she had been removed without due process and for racially discriminatory reasons, and that her removal also violated her and other voter-plaintiffs' rights to "organize, access the ballot, and vote for the candidate of their choice."[146] The court of appeals, in an opinion by Judge Sotomayor, affirmed the district court's decision to dismiss the case.[147]

In rejecting the candidate's due process argument, the court held that because the candidate had been afforded notice and both a pre- and post-removal opportunity to be heard, her due process rights had not been violated.[148] Rivera-Powell's First Amendment claims also failed: "When, as here, a plaintiff challenges a Board of Election decision not as stemming from a constitutionally or statutorily invalid law or regulation, but rather as contravening a law or regulation whose validity the plaintiff does not contest, there is no independent burden on First Amendment rights when the state provides adequate procedures by which to remedy the alleged illegality."[149] Finally, the court held that the plaintiff had failed to allege any basis for her

---

144 *Rivera-Powell v. N.Y. City Bd. of Elections*, 470 F.3d 458 (2d Cir. 2006).

145 *Id.* at 468.

146 *Id.*

147 *Id*. at 470.

148 *Id.* at 467.

149 *Id.* at 468–69.

conclusory assertion that the board of elections had acted out of racial animus towards her, in violation of the Fourteenth Amendment.  Instead, the board had simply applied rules adopted long before the plaintiff's candidacy came before them.

As in *Gelb*, Judge Sotomayor's opinion concluded by noting that the role of the judiciary in state elections and voters' rights questions should be carefully circumscribed, that federal court intervention in "garden variety" election disputes was inappropriate, and that "only in extraordinary circumstances will a challenge to a state . . . election rise to the level of a constitutional deprivation."[150]  A holding to the contrary would "permit any plaintiff to obtain a federal court review of even the most mundane election dispute merely by adding a First Amendment claim to his or her due process claim."[151]

In *Kraham v. Lippman*,[152] the court, in an opinion written by Judge Sotomayor, rejected the claim that the First Amendment right of association was violated by a prohibition on high-ranking officials of political parties (as well as their family members, associates, and employees of the firms) receiving certain court appointments, such as being named guardians ad litem.  The court recognized that the rule forced a choice between party positions and appointments, but found in light of the history of abuse of the appointment process that the "incidental effect on individual decision-making . . . furthers the rational and legitimate goal of eliminating corrupt

---

150 *Id.* at 469–70 (quoting *Shannon v. Jacobowitz*, 394 F.3d 80, 96 (2d Cir. 2005)) (internal citations omitted).

151 *Id.* at 469.  Judge Sotomayor supported her stance on judicial intervention in election disputes by citing to cases from the First (*Rosello-Gonzalez v. Caleron-Sierra*, 398 F.3d 1, 14 (1st Cir. 2004)), Eleventh (*Siegel v. LePore*, 234 F.3d 1163, 1181 (11th Cir. 2000)), Ninth (*Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998)), and Fourth Circuits (*Hutchinson v. Miller*, 797 F.2d 1279, 1283 (4th Cir. 1986)).

152 *Kraham v. Lippman*, 478 F.3d 502 (2d Cir. 2007).

appointments."[153] A more significant burden on association with political parties, the court recognized, would be subject to "strict scrutiny."[154]

Finally noteworthy is *Lopez-Torres v. New York State Board of Elections*,[155] in which a panel that included Judge Sotomayor upheld a preliminary injunction against the system for nominating trial judges in New York State. The district judge had found that the party officials exercised overwhelming control in the selection of judges, in violation of the First Amendment. The Supreme Court unanimously reversed.[156] It held that the plaintiffs were complaining at bottom that as a practical matter party officials have tremendous influence – not that there was some formal legal obstacle to their candidacy – which did not give rise to a First Amendment claim. Two things are notable about this case: (1) the civil rights community was split about this case and the Lawyers' Committee elected not to participate as *amicus*, and (2) the Second Circuit panel rejected the argument made by the defendants that the enjoined practice was necessary to promote the alleged compelling interest of racial and geographic diversity.

### 5. Environmental Law and Environmental Justice

The Lawyers' Committee reviewed Judge Sotmayor's opinions dealing with environmental law because of its active involvement in environmental justice issues. The environmental justice movement recognizes that America's environmental laws and policies should protect all communities, regardless of race, color, national origin or income level. Communities of color currently bear a disproportionate burden of the effects of environmental

---

153 *Id.* at 507.

154 *Id.*

155 *Lopez-Torres v. N.Y. State Bd. of Elections*, 462 F.3d 161 (2d Cir. 2006).

156 *N.Y. State Bd. of Elections v. Lopez-Torres*, 552 U.S. 196 (2008).

pollution, and citizen suits have been critical to the enforcement of environmental laws in minority and low-income communities. Prior to the Supreme Court's ruling in *Alexander v. Sandoval*,[157] Title VI of the Civil Rights Act of 1964 was an important tool for minority communities challenging the discriminatory impact of conduct by recipients of federal funding. Since the *Sandoval* case, however, individuals can no longer assert disparate impact claims under Title VI. As a result, fair and equitable environmental protection through the use of environmental laws has become increasingly vital to these highly vulnerable populations.

Judge Sotomayor's treatment of environmental issues demonstrates no discernible bias toward plaintiffs, defendants, or agencies. In *Riverkeeper v. EPA*,[158] Judge Sotomayor's most notable environmental opinion, the court considered a challenge to an EPA rule regulating cooling-water intake structures at power plants. To minimize the adverse impact on aquatic life, the Clean Water Act ("CWA") requires the intake structures to use the "best technology available," without specifying how the EPA should determine what constitutes the "best technology available."[159] In an opinion by Judge Sotomayor, the court held that the EPA could not engage in a cost-benefit analysis to determine "best technology available"; instead, it could consider cost only to determine "what technology can be 'reasonably borne' by the industry" and whether the proposed technology was "cost-effective" – which, it concluded, requires the EPA in turn to determine whether the technology at issue is "a less expensive technology that achieves

---

[157] *Alexander v. Sandoval*, 532 U.S. 275 (2001).

[158] *Riverkeeper v. EPA*, 475 F.3d 83 (2d Cir. 2007).

[159] *Riverkeeper v. EPA*, 475 F.3d 83, 90 (2d Cir. 2007).

essentially the same results" as the best technology that the industry could reasonably bear.[160]

Thus,

> assuming the EPA has determined that power plants governed by the Phase II Rule can reasonably bear the price of technology that saves between 100–105 fish, the EPA, given a choice between a technology that costs $100 to save 99–101 fish and one that costs $150 to save 100–103 fish . . . could appropriately choose the cheaper technology on cost-effectiveness grounds.[161]

On this issue, the court remanded to the EPA, finding it "unclear" how the EPA had arrived at its conclusions and, in particular, whether the EPA had improperly weighed costs and benefits.[162] The court also held that the EPA could not consider restoration measures when determining the best technology available for a particular power plant, reasoning that

> [r]estoration measures are not part of the location, design, construction, or capacity of cooling water intake structures, and a rule permitting compliance with the statute through restoration measures allows facilities to avoid adopting *any* cooling water intake structure technology at all, in contravention of the Act's clear language as well as its technology-forcing principle.[163]

Finally, the panel determined that, at a minimum, EPA's determination that the CWA provision at issue applies to existing and new facilities was a reasonable interpretation of the statute.[164]

The industry plaintiffs filed petitions for certiorari, which the Supreme Court granted with regard to the cost-benefit issue.[165] In April of this year, by a vote of 6-3, the Court reversed.[166] In an opinion by Justice Scalia, the majority deemed "[i]t . . . eminently reasonable

---

160 *Id.* at 99–100.

161 *Id.* at 100.

162 *Id.* at 101.

163 *Id.* at 110 (internal citation omitted).

164 *Id.* at 105–07.

165 *Entergy Corp. v. EPA*, 128 S.Ct. 1867 (2008).

166 *Entergy Corp. v. Riverkeeper*, 129 S.Ct. 1498 (2009).

to conclude that" the CWA's silence with regard to determining the best technology available "is meant to convey nothing more than a refusal to tie the agency's hands as to whether cost-benefit analysis should be used, and if so to what degree."[167] Justice Stevens wrote a dissenting opinion, joined by Justices Souter and Ginsburg. In their view, because "Congress granted the EPA authority to use cost-benefit analysis in some contexts but not others" and intended "to control, not delegate, when cost-benefit analysis should be used," Congress's silence on this issue did not constitute "an invitation for the Agency to decide for itself which factors should govern its regulatory approach."[168]

In *Viacom International, Inc. v. Kearney*, 212 F.3d 721 (2d Cir. 2000), Judge Sotomayor authored the panel's opinion, holding that a party brought into a case as a fourth-party defendant could file claims to protect its interests without destroying diversity jurisdiction. Taylor Forge properties had been the subject of extensive contamination clean-up, resulting in this suit involving claims, counter-claims, and third and fourth-party complaints seeking indemnification and other relief related to the costs of the clean-up.[169] The original defendant in the case filed a motion to dismiss under Fed. R. Civ. P. 19, arguing that Taylor Forge was a necessary and indispensable party who, by joining in the defendant's counterclaims against the plaintiff, would destroy the court's diversity jurisdiction.[170] This opinion stated that as Taylor Forge was already

---

[167] *Id.* at 1508.

[168] *Id.* at 1518.

[169] *Viacom Int'l, Inc. v. Kearney*, 212 F.3d 721, 723 (2d Cir. 2000).

[170] *Id.* at 724.

part of the proceedings as a fourth-party defendant, it could join in the counterclaims of the defendant under the court's supplemental jurisdiction without destroying diversity jurisdiction.[171]

In another case, *Maska U.S., Inc. v. Kansa General Insurance Co.*, 198 F.3d 74 (2d Cir. 1999), the court held, in an opinion written by Judge Sotomayor, that pollution exclusions to insurance coverage were not contrary to public policy and thus were enforceable.[172] The opinion rejected plaintiff's reliance on the practice of the Vermont Department of Banking and Insurance, which was to deny effect to pollution exclusions, on the ground that the Department had never formally adopted the rule.[173] The opinion noted that the state was in fact "free to establish a public policy prohibiting pollution exclusions," but it "simply [found] no statute, binding precedent or valid administrative rule expressing such a policy."[174]

Judge Sotomayor has joined other notable environmental decisions, including *McCue v. City of New York (In re World Trade Ctr. Disaster Site, Litig.)*, 521 F.3d 169 (2d Cir. 2008) (holding, *inter alia*, that summary judgment for plaintiffs, who worked at WTC site and were exposed to toxic fumes, was improper because of the inseparability of federal agency and individual decisions regarding the preventive actions taken on site); *New York v. National Service Industries, Inc.*, 460 F.3d 201 (2d Cir. 2006) (holding that as New York follows the traditional common law rule of successor liability, which would govern the issue of successor liability under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), the issue of whether CERCLA displaced state law did not need to be decided);

---

[171] *Id.* at 726–28.

[172] *Maska U.S., Inc. v. Kansa Gen. Ins. Co.*, 198 F.3d 74, 84 (2d Cir. 1999).

[173] *Id.* at 81.

[174] *Id.* at 82.

*Schaefer v. Town of Victor*, 457 F.3d 188 (2d Cir. 2006) (holding that citizen's claims for contribution and for full recovery of costs under CERCLA failed to meet the statute of limitations); *Environmental Defense Fund v. EPA*, 369 F.3d 193 (2d Cir. 2004) (rejecting plaintiffs' claim that EPA approval of New York's Clean Air Act Implementation plan was improper because EPA had rational basis for approving the plan and did not contravene its own rules or guidelines); *National Electrical Manufacturers Ass'n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001) (holding that mandatory labels for light bulbs containing lead were not compulsory speech violative of First Amendment); *Allens Creek/Corbetts Glen Preservation Group, Inc. v. West*, 2 Fed. Appx. 162 (2d Cir. 2001) (affirming the grant of defendant's motion for summary judgment on the ground of laches); *Atlantic States Legal Foundation, Inc. v. Whitman*, 14 Fed. Appx. 76 (2d Cir. 2001) (holding that the issuance of an Environmental Assessment with a Finding of No Significant Impact was sufficient to satisfy National Environmental Policy Act requirements); *In re Duplan Corp.*, 212 F.3d 144 (2d Cir. 2000) (holding, *inter alia*, that CERCLA claims were not discharged under a bankruptcy final decree as CERCLA was enacted after the petition for bankruptcy was filed); and *Burnette v. Carothers*, 192 F.3d 52 (2d Cir. 1999) (holding that the Eleventh Amendment bars citizen suits against state governments under the CWA, the Resource Conservation and Recovery Act, and CERCLA).

### B. Other Issues of Interest

#### 1. Equal Protection

During her years as a judge, Judge Sotomayor has heard over one hundred cases dealing with equal protection. Eighty-one of those cases came before her while she sat on the Second Circuit; she wrote the majority opinion in ten cases and dissented in three. Although she is generally sensitive to claims of discrimination, her opinions reflect a searching level of analysis, and she carefully adheres to applicable Supreme Court precedent in reaching her results. Several

opinions reach the conclusion mandated by Supreme Court authority but nonetheless express reservations about the practical impact of the decision based on the particular facts before the court.

In *United States v. Ni Fa Yi*, a defendant charged with hostage-taking argued that the Hostage Taking Act deprived him of equal protection by differentiating between U.S. nationals and non-citizens with regard to both hostage-takers and victims.[175] Emphasizing the deference due the federal government in areas of immigration, Judge Sotomayor agreed with the government that the Act was constitutional, noting that "[t]he ostensible purpose for the Act – combating international terrorism – is undoubtedly a legitimate federal governmental end" sufficient to satisfy rational-basis scrutiny.[176] She nonetheless expressed her "genuine concern . . . that the Act reaches a significant amount of conduct unrelated to" the government's goal and described herself as "trouble[d]" by the prospect that her holding could support some other provision which "effect[ed] no sounder purpose than to discriminate against persons on the basis of their alienage."[177]

Judge Sotomayor was less willing to defer to the government in *Campos v. Coughlin*, a case challenging a prison policy that prohibited prisoners from possessing Santeria beads but allowed them to have rosary and Dhikr beads and religious medals. Although Judge Sotomayor accepted the justification offered by the New York State Department of Correctional Services for distinguishing between beads and medals on security grounds, she nonetheless refused to grant summary judgment to the Department, finding nothing in the record to justify the distinction

---

[175] *United States v. Ni Fa Yi*, 951 F. Supp. 42, 43 (S.D.N.Y. 1997).

[176] *Id.* at 45.

[177] *Id.* at 45-46.

between Santeria beads and rosary beads.[178] In particular, Judge Sotomayor questioned "the apparent bias prominent throughout the directive toward 'traditional' Catholic and Christian religious symbols."[179]

Similarly, Judge Sotomayor joined Judge Calabresi's dissent from the denial of rehearing *en banc* in *Brown v. City of Oneonta*.[180] The case arose out of an investigation conducted by Oneonta police, who after being told by a crime victim that her assailant was a young black male with a cut on his hand, made a sweep of the city in which they inspected the hands of every non-white person they encountered, regardless of age or gender.[181] Residents who had been questioned by police filed suit under Section 1983, alleging, *inter alia*, violations of their rights under the Fourth Amendment and the Equal Protection Clause. The district court dismissed the claims under the Equal Protection Clause and granted summary judgment on the Fourth Amendment claims.[182] On appeal, the three-judge panel affirmed the dismissal of the equal protection claims. It reasoned that because the police had a description of the assailant, even if it "consisted primarily of the suspect's race and gender . . . they could act on the basis of that description" without violating the Equal Protection Clause as long as they did so without discriminatory racial animus.[183] In his dissent from the denial of rehearing en banc, Judge Calabresi acknowledged that police may, in some circumstances, detain suspects based upon a

---

178 *Campos v. Coughlin*, 854 F. Supp 194, 213–14 (S.D.N.Y. 1994).

179 *Id.* at 213.

180 *Brown v. City of Oneonta*, 235 F.3d 769, 779 (2d Cir. 2000).

181 *Id.* at 779–80.

182 *Brown v. City of Oneonta*, 221 F.3d 329, 336 (2d. Cir. 2000).

183 *Id.* at 333.

victim's description; here, however, the description was so broadly racial as to render the police's sweep an equal protection violation.[184]

In *Bartlett v. New York State Board of Law Examiners*, discussed above, Judge Sotomayor considered claims by a law school graduate with a learning disability who alleged that the New York State Board of Bar Examiners violated, *inter alia*, the Americans with Disabilities Act and the Equal Protection Clause by failing to grant her appropriate accommodations.[185] Judge Sotomayor began by considering whether the rational-basis standard of review for disability claims established by the Supreme Court in *City of Cleburne v. Cleburne Living Center, Inc.*[186] had been affected by the subsequent passage of the ADA.[187] While acknowledging that Congress "likely intended the ADA to be a springing board from which the courts might themselves develop a stricter level of scrutiny for legislation or action impacting the disabled,"[188] Judge Sotomayor nonetheless regarded the court as bound by *Cleburne*, which was directly applicable to the facts before the court.[189] Applying *Cleburne*, Judge Sotomayor described the fact that the Board was approximately 3.5 times more likely to deny an accommodation request based on a learning disability as "troubling" but declined to find that

---

[184] *Brown v. City of Oneonta*, 235 F.3d 769, 785 (2d Cir. 2000).

[185] *Bartlett v. New York Bd. of Law Exam'rs*, 970 F. Supp. 1094, 1098 (S.D.N.Y. 1997).

[186] *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985).

[187] *Bartlett*, 970 F. Supp. at 1133.

[188] *Id.* at 1134.

[189] *Id.* at 1135 ("I find that the *Cleburne* case has direct application here, and that fact constrains my ability to determine whether the ADA has, or should, effect a change in the level of scrutiny afforded the disabled. Such a question must be brought to this nation's highest Court to decide.").

such a result was intentional or that the Board's underlying purpose was irrational.[190] After making her findings, Judge Sotomayor went on to note that the disparate effect generated a perception of bias, which was in turn exacerbated "by the suspicion with which the Board view[ed] learning disabled applicants."[191] She also expressed concern that the Board members had not taken time to familiarize themselves with the qualifications of its experts or the criticisms against them.[192]

Similarly, in *Mehdi v. United States Postal Service*, Judge Sotomayor relied on Supreme Court precedent to dismiss an equal protection claim for lack of standing, even while acknowledging that the plaintiffs could have suffered a dignitary harm when the Postal Service refused to display a Muslim Crescent and Star alongside Christmas and Chanukah decorations in post offices.[193]

In *Center for Reproductive Law & Policy v. Bush*, a panel of the Second Circuit (in an opinion by Judge Sotomayor) considered, *inter alia*, an equal protection challenge to the federal government's "Mexico City Policy," which required foreign organizations desiring to receive federal funds to agree to refrain from both performing and promoting abortions.[194] The panel agreed with the plaintiff organization that it had standing to bring its equal protection claim because since the policy bestowed a benefit on the plaintiffs' competitive adversaries by

---

[190] *Id.*

[191] *Id.* at 1136.

[192] *Id.*

[193] *Mehdi v. United States Postal Serv.*, 988 F. Supp. 721, 729–30 (S.D.N.Y. 1997).

[194] *Ctr. for Reprod. Law & Policy v. Bush*, 304 F.3d 183, 197–98 (2d Cir. 2002).

awarding them grants, the plaintiff organization had suffered a cognizable injury.[195] But analyzing the policy under rational-basis review, the panel held that no equal protection violation had occurred. Instead, it explained, the Supreme Court "has made clear that the government is free to favor the anti-abortion position over the pro-choice position, and can do so with public funds."[196]

In *Galarza v. Keane*, the Hispanic defendant's habeas petition alleged that the removal of Hispanic jurors violated *Batson*.[197] Judge Sotomayor's opinion for the court affirmed the district court's denial of a habeas petition as to two jurors, but remanded for further proceedings as to three others.[198] The panel majority rejected the district court's conclusion that the *Batson* claim was waived by not raising it during voir dire.[199] The dissent would have held that the *Batson* claim was waived because counsel did not renew the claim after the trial judge credited the state's race-neutral explanation for the strikes.[200] The majority, by contrast, found it dispositive that the state courts had not found a waiver.[201] On the merits of the claim, the majority reversed because the state trial judge had failed to explain the denial of the *Batson* claim as to the three jurors, and remanded to the district court for further consideration of the merits of the claim.[202]

---

[195] *Id.* at 197.

[196] *Id.* at 197–98.

[197] *Galarza v. Keane*, 252 F.3d 630, 632 (2d Cir. 2001).

[198] *Id.* at 641.

[199] *Id.* at 636-37.

[200] *Id.* at 641 (Walker, J., dissenting).

[201] *Id.* at 636-37.

[202] *Id.* at 641.

### 2. Stare Decisis

Judge Sotomayor has neither authored nor joined an appellate opinion with a significant discussion of the issue. As noted above, her decisions reflect a recognition of the need for stability in legal doctrine, while at the same time they remain alive to the effect the law has on the life of the country's citizens.

### 3. Statutory Interpretation

In cases involving statutory instruction, Judge Sotomayor tends to focus on the literal meaning of the text. This is illustrated by two Supreme Court cases, one affirming and one reversing her rulings. In *William L. Rudkin Testamentary Trust v. Commissioner*, the court of appeals, in an opinion written by Judge Sotomayor, interpreted the "plain text" of the relevant provision of the Internal Revenue Code to limit the deductibility of certain trust expenses.[203] Though the Supreme Court rejected the Second Circuit's reasoning, it affirmed for different reasons.[204] In *Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, the Court of Appeals, in an opinion written by Judge Sotomayor, read the text of the Securities Litigation Uniform Standards Act to permit suits by "holders" of stock – *i.e.*, persons who had not made a sale – because the statute applies to claims "in connection with the purchase or sale" of stock.[205] The Supreme Court unanimously reversed.[206]

---

[203] *William L. Rudkin Testamentary Trust v. Commissioner*, 467 F.3d 149, 150 (2d Cir. 2006).

[204] *Knight v. Comm'r for Internal Revenue,* 128 S. Ct. 782, 785 (2008).

[205] *Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 395 F.3d 25 (2d Cir. 2005).

[206] *Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 547 U.S. 71 (2006).

#### 4. Federalism

Judge Sotomayor's decisions do not address any of the more controversial questions relating to federalism: she has not had occasion to address questions relating to Congress's power under the Commerce Clause or its power to waive or abrogate states' sovereign immunity.

In *United States v. Giordano*, the court of appeals, in an opinion by Judge Sotomayor, rejected a Commerce Clause challenge to the federal criminal prohibition on using a facility of interstate commerce to solicit underage sex.[207] The court reasoned that although there are "limits on Congress's power to create federal criminal prohibitions on traditionally state-regulated spheres of noneconomic activity," the statute is "clearly founded" on "the power to regulate and protect the instrumentalities of interstate commerce," which extends to "even purely intrastate use of those instrumentalities."[208] Judge Sotomayor also joined the opinion in *United States v. Santiago*, holding that the Supreme Court's decisions in *United States v. Morrison* and *Jones v. United States* did not alter the Second Circuit's prior conclusion that the federal felon-in-possession statute is within Congress's Commerce Clause power.[209]

With respect to the abrogation of state sovereign immunity, Judge Sotomayor joined the opinion in *McGinty v. State of New York*, which held that the court was bound by Supreme Court precedent to hold that the ADEA did not validly abrogate state sovereign immunity, and that the plaintiffs in that case furthermore had not satisfied "the 'stringent' test for finding waiver of immunity" on the basis of the state's conduct.[210] To similar effect is *Burnette v. Carothers*, an

---

[207] *United States v. Giordano*, 442 F.3d 30 (2d Cir. 2006).

[208] *Id.* at 42.

[209] *United States v. Santiago*, 238 F.3d 213 (2d Cir. 2001) (*per curiam*); *United States v. Morrison*, 529 U.S. 598 (2000); *Jones v. United States*, 529 U.S. 848 (2000).

[210] *McGinty v. New York*, 251 F.3d 84 (2d Cir. 2001).

opinion she joined in which the Court of Appeals held that Supreme Court precedent compelled the conclusion that states remain immune from money damages in suits under CERCLA.[211]

**5. Prisoners' Rights**

Judge Sotomayor has heard a variety of cases implicating the civil rights of prisoners. She has either joined or written opinions regarding inmates' access to the courts,[212] disciplinary procedures for prisoners,[213] discrimination,[214] maintenance of a safe prison environment,[215] freedom of speech,[216] freedom of religion,[217] medical treatment,[218] and the welfare of inmates.[219] However, there are no published opinions to provide any insight into her opinions on

---

[211] *Burnette v. Carothers*, 192 F.3d 52 (2d Cir. 1999).

[212] *See Thompson v. Choinski*, 525 F.3d 205 (2d Cir. 2008); *Fernandez v. Artuz,* 402 F.3d 111 (2d Cir. 2005); *Marvin v. Goord*, 255 F.3d 40 (2d Cir. 2001); *Hizbullahankhamon v. Walker*, 255 F.3d 65 (2d Cir. 2001); *Salahuddin v. Mead*, 174 F.3d 271 (2d Cir. 1999); *Campusano v. United States*, 442 F.3d 770 (2d Cir. 2006).

[213] *See United States v. Cote*, 544 F.3d 88 (2d Cir. 2008); *Thompson v. Choinski*, 525 F.3d 205 (2d Cir. 2008); *Anderson v. Recore*, 446 F.3d 324 (2d Cir. 2006); *Sash v. Zenk*, 439 F.3d 61 (2d Cir. 2006); *Porter v. Coughlin*, 421 F.3d 141 (2d Cir. 2005); *Washington v. County of Rockland*, 373 F.3d 310 (2d Cir. 2004); *Zamakshari v. Dvoskin*, 899 F.Supp. 1097 (S.D.N.Y. 1995).

[214] *See Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006); *Green v. Travis*, 414 F.3d 288 (2d Cir. 2005); *Muntaqim v. Coombe*, 385 F.3d 793 (2d Cir. 2004); *Washington v. County of Rockland*, 373 F.3d 310 (2d Cir. 2004); *Church of the Am. Knights of the KKK v. Kerik*, 356 F.3d 197 (2d Cir. 2004); *Amaker v. Foley*, 274 F.3d 677 (2d Cir. 2001); *United States v. Bryce*, 208 F.3d 346 (2d Cir. 1999).

[215] *See Duamutef v. Hollins*, 297 F.3d 108 (2d Cir. 2002); *Abed v. Armstrong*, 209 F.3d 63 (2d Cir. 2000); *Gant v. Wallingford Bd. of Educ.*, 195 F.3d 134 (2d Cir. 1999).

[216] *See Duamutef v. Hollins*, 297 F.3d 108 (2d Cir. 2002).

[217] *See Ford v. McGinnis*, 352 F.3d 582 (2d Cir. 2003); *Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570 (2d Cir. 2002); *Marvin v. Goord*, 255 F.3d 40 (2d Cir. 2001); *Salahuddin v. Mead*, 174 F.3d 271 (2d Cir. 1999).

[218] *See Richardson v. Goord*, 347 F.3d 431 (2d Cir. 2003).

[219] *See Thompson v. Choinski*, 525 F.3d 205 (2d Cir. 2008).

confinement conditions, inmates' educational opportunities, or the associational rights of prisoners.

In both her district court decisions and on the court of appeals, Judge Sotomayor has generally protected inmates' free exercise of religion. For example, as a district court judge she granted two inmates' request for injunctive relief to permit them to wear religious beads under their clothing and place the beads on shrines that were not publicly displayed, despite a Department of Correctional Services' directive prohibiting the beads.[220] On the court of appeals, she was the author of a panel opinion holding that the denial of a special meal on an Islamic holy day to a Muslim prisoner was more than a minimal burden on his free exercise rights.[221]

In *Hudak v. Miller*, Judge Sotomayor denied summary judgment to a prison physician alleged to have shown deliberate indifference to a prisoner's aneurysm in violation of the Eighth Amendment.[222] Recognizing that the burden of proving such a claim is very significant – equivalent to showing criminal recklessness – Judge Sotomayor held that it could be met if "the risk of serious medical problems was [sufficiently] obvious" that it could be inferred that the doctor knew that the prisoner "had some serious medical problem which bore further investigation."[223] Sufficient evidence existed on the record before her to preclude summary judgment:

> Were this a case of intermittent complaints over a short period of time, this Court would have no problem deciding that any inference of actual knowledge by a jury would be sheer speculation and would grant summary judgment for the defendant. However, the facts of this case are a much closer call. We have, in essence, a

---

[220] *Campos v. Coughlin,* 854 F. Supp. 194 (S.D.N.Y. 1994).

[221] *Ford v. McGinnis*, 352 F.3d 582 (2d Cir. 2003).

[222] *Hudak v. Miller*, 28 F. Supp. 2d 827, 828 (S.D.N.Y. 1998).

[223] *Id.* at 831.

> case of chronic headaches, consisting of sharp or 'bubbling' pain behind the right eye, over an approximately eight month period, with no evidence of unusual stress or neurological damage, and evidence of two doctors concluding that these headaches were atypical for migraines.[224]

On the court of appeals, Judge Sotomayor has generally (although not uniformly) been sympathetic to prisoners in cases based on civil rights violations. Thus, in *Campusano v. United States*, she was a member of a panel presented with a prisoner's claim that his counsel was ineffective because he failed to file the appeal requested by the prisoner.[225] The district court denied the prisoner's motion to set aside his conviction, but the Second Circuit (in an opinion by Judge Sotomayor) reversed, holding that the prisoner was entitled to a direct appeal if it was indeed requested.[226] The opinion emphasized that "[o]ur precedents take very seriously the need to make sure that defendants are not unfairly deprived of the opportunity to appeal."[227] Judge Sotomayor also joined an opinion that reversed a district court's decision dismissing a prisoner's claim that the confiscation of political material violated his free speech rights.[228]

In *Clark v. Perez*, Judge Sotomayor joined an opinion that rejected a prisoner's claim of ineffective assistance of counsel, reasoning that the prisoner had voluntarily taken on self-representation.[229] And she also joined an opinion that reversed a district court's grant of habeas

---

[224] *Id.* at 832–33.

[225] *Campusano v. United States*, 442 F.3d 770 (2d Cir. 2006).

[226] *Id.* at 772.

[227] *Id.* at 775.

[228] *Shakur v. Selsky*, 391 F.3d 106 (2d Cir. 2004).

[229] *Clark v. Perez*, 510 F.3d 382, 396 (2d Cir. 2008).

corpus based on the exclusion of prisoner's relatives from trial during an undercover police officer's testimony.[230]

In *Farrell v. Burke*, Judge Sotomayor wrote for the panel, which considered a challenge by a parolee who had been convicted of having sex with underage boys to a special condition of his parole that prohibited him from possessing "pornography."[231] The parolee was arrested when parole officers found a copy of a book "contain[ing] sexually explicit pictures and lurid descriptions of sex between men and boys" in his apartment.[232] The panel first rejected Farrell's as-applied challenge to the special condition. It acknowledged that the term "pornography" was vague, and that delegating the authority to interpret that term to the probation officer "creates 'a real danger that the prohibition on pornography may ultimately translate to a prohibition on whatever the officer personally finds titillating,'" but it concluded that it was "difficult to imagine" that someone in Farrell's position could think that such a book would pass muster.[233] The panel also rejected Farrell's facial challenge to the special condition; in so doing, however, it emphasized that it could not "ignore the State's failure to provide meaningful notice of the scope of the Special Condition's prohibition or meaningful limits on an enforcing officer's discretion," and it expressed "hope that greater efforts will be made in the future to define adequately the terms of parole conditions dealing with pornographic materials."[234]

---

[230] *Hoi Man Yung v. Walker*, 468 F.3d 169 (2d Cir. 2006).

[231] *Farrell v. Burke*, 449 F.3d 470 (2d Cir. 2006).

[232] *Id.* at 476.

[233] *Id.* at 488, 491.

[234] *Id.* at 498.

### 1. Constitutional Claims Against the Federal Government

Judge Sotomayor has one significant ruling on the scope of the *Bivens* remedy. In *Malesko v. Correctional Services Corp.*, the court, in an opinion written by Judge Sotomayor, held that the implied right of action against federal officials under *Bivens v. Six Unknown Named Agents of the FBI* extended to constitutional claims against a private prison.[235] Putting to the side whether liability would deter wrongdoing, the court of appeals found that liability was essential "to accomplish the more important *Bivens* goal of providing a remedy for constitutional violations."[236] The court also found compelling the parallel between *Bivens* and Section 1983, under which private corporations may be held liable.[237] The Supreme Court reversed, in a 5-4 decision.[238]

### 2. Standing

In *United States v. Blackburn*, Judge Sotomayor dissented from the court of appeals' holding that a defendant lacked standing to appeal a criminal sentence that had expired.[239] Judge Sotomayor explained that the prospect that the defendant's claim would result in a reduced term of supervised release meant that the case was *not* moot.[240] (Judge Sotomayor's position puts her on the pro-standing side of the circuit conflict presented by No. 08-1428, *Burkey v. Marberry*.) In her opinion, the majority's view that the district court would not in fact reduce the sentence

---

[235] *Malesko v. Correctional Servs. Corp.*, 229 F.3d 374 (2d Cir. 2000); *Bivens v. Six Unknown Named Agents of the FBI*, 403 U.S. 388 (1971).

[236] *Malesko*, 229 F.3d at 380.

[237] *Id.* at 381.

[238] *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61 (2001).

[239] *United States v. Blackburn*, 461 F.3d 259 (2d Cir. 2006).

[240] *Id.* at 266 (Sotomayor, J., dissenting).

instead rendered any error in the sentence harmless.[241] She addressed a similar issue in *United States v. Hamdi*, writing an opinion for the court holding that a defendant had standing to challenge the length of his sentence though it had already been served because a ruling in his favor would increase the chance of securing a waiver of inadmissibility under the immigration laws.[242] In *Simmonds v. INS*, Judge Sotomayor joined an opinion holding that a defendant had standing to challenge an order of removal, notwithstanding that the order was ineffective because the defendant was serving a life sentence in state prison.[243] The opinion went on to hold, however, that the suit was not ripe on prudential grounds.[244]

In *Lamar Advertising of Penn, LLC v. Town of Orchard Park*, the court, in an opinion by Judge Sotomayor, reversed a district court's ruling that a would-be advertiser lacked standing to challenge a local sign regulation.[245] The court of appeals ruled that it was sufficient for Article III that the plaintiff wanted to erect signs covered by the regulation, even if it had yet to request a permit to do so.[246]

In *Ross v. Bank of America*, Judge Sotomayor joined an opinion holding that the plaintiff cardholders had Article III standing to bring a suit alleging collusion between credit card companies to impose mandatory arbitration provisions.[247] She also authored the opinion in

---

[241] *Id.*

[242] *United States v. Hamdi*, 432 F.3d 115 (2d Cir. 2005).

[243] *Simmonds v. INS*, 326 F.3d 351 (2d Cir. 2003).

[244] *Id.* at 354.

[245] *Lamar Adver. of Penn, LLC v. Town of Orchard Park*, 356 F.3d 365 (2d Cir. 2004).

[246] *Id.* at 374.

[247] *Ross v. Bank of Am.*, 524 F.3d 217 (2d Cir. 2008).

*Center for Reproductive Law & Policy v. Bush*, which indicated that a reproductive rights group might have Article III standing to bring a First Amendment challenge to the "Mexico City" policy restricting foreign aid funding for groups that provide abortion services or counsel, but did not reach the merits.[248] The court further held that the group had standing to challenge the policy on the equal protection theory that it interfered with their ability to compete against other organizations in advocating their viewpoint, though it rejected the claim on the merits.[249] The court also held that the group lacked prudential standing to bring a due process claim, which at bottom asserted the rights of the foreign organizations.[250]

Judge Sotomayor joined the opinion in *Port Washington Teachers' Association v. Board of Education*, which held that because a policy stating that school staff members should report student pregnancies was not mandatory, the plaintiffs lacked Article III standing to challenge it.[251]

## VI. OTHER CONSIDERATIONS

Although the Lawyers' Committee believes that judicial opinions should be the primary source of information about a nominee such as Judge Sotomayor, who has served as both a trial and appellate judge over a period of seventeen years, it is appropriate for the Senate and the public to take into account considerations and information beyond judicial opinions in determining whether Judge Sotomayer should be confirmed. Traditionally, for example, the Senate has considered speeches, articles and other writings of nominees in order to understand

---

[248] *Ctr. for Reprod. Law & Policy v. Bush*, 304 F.3d 183 (2d Cir. 2002).

[249] *Id.* at 197.

[250] *Id.* at 195-96.

[251] *Port Wash. Teachers' Ass'n v. Bd. of Educ.*, 478 F.3d 494 (2d Cir. 2007).

their judicial philosophies, legal abilities, and more intangible qualities, such as integrity and temperament. It can be difficult to evaluate these kinds of information, and there is obviously a risk that they can be misinterpreted or distorted. However, they can also be useful and, therefore, we have reviewed as many of Judge Sotomayor's speeches and articles as we could, and we believe we have canvassed the most important issues those materials raise.

We discuss below two issues that are relevant to the Senate in evaluating her speeches and articles: 1) the role of diversity in choosing a Supreme Court nominee, and 2) the "policymaking" role of judges.

### A. The Role of Diversity in Choosing and Confirming Nominees

The Lawyers' Committee believes it is appropriate for the President to consider race, gender, and other personal or experiential factors in choosing nominees to the bench, including the Supreme Court. While these factors should never be the predominant consideration, they can be relevant in deciding whether a nominee brings a perspective to the Court that is missing or under-represented.

Presidential consideration of factors relating to the personal background of a nominee is not new or unusual. George Washington took geographic balance into account in making his appointments to the Court and avoided having two Justices from the same state. William Howard Taft chose a nominee from Wyoming to take into account the westward expansion of the United States population. President Herbert Hoover was concerned about having too many Justices from New York.

Presidential consideration of race, gender or ethnicity is a relatively modern development, however, as it is only recently that Presidents have considered anyone other than white men as nominees. Thurgood Marshall, the first African-American Justice, was appointed in 1967. He is generally considered the first member of a racial minority to serve on the Court,

although arguably Benjamin Cardozo, a Sephardic Jew with Portuguese ancestry, was Hispanic. Marshall's appointment did not, however, set the stage for a diverse Court. Justice Clarence Thomas, the second African-American Justice, was not appointed until 1991. Justice O'Connor became the first female Justice in 1981, and Justice Ginsburg became the second in 1993. Judge Sotomayor (with the arguable exception of Cardozo) is the first Hispanic nominee. No other members of racial minorities have been nominated. It is striking that at this stage in our nation's history, 98.2% of the Justices – all but four – have been white males.

The Lawyers' Committee endorses the proposition that a diverse Court is a better Court. As in other areas of American life, including our political institutions, our universities, and our communities, diversity can bring enormous benefits by increasing understanding among different groups, promoting a healthy exchange of perspectives, and sending a signal to the greater community that no single narrow group has a monopoly on power and privilege in our society. In the work of the Supreme Court, the presence of varying perspectives and bodies of experience on the Court may lead to more accurate applications of the democratic will that our Constitution articulates. As long as a nominee to the Supreme Court is highly qualified – as Judge Sotomayor is – we believe these values can and should be taken into account by a President in nominating candidates and by the Senate in choosing whether to confirm them.

We accept as a premise of this conclusion that the life experiences of different people will influence the way they act as judges just as it does the other aspects of their lives. We also expect that they will do their best to be faithful to the governing law in a case and fair to the parties who appear before them. But no two judges are the same, and we should embrace the richness that comes from their differences, just as we have embraced the strength our country has derived from our long history of immigration and settlement.

Judge Sotomayor's candor on this score is admirable. As one of the very few Latina federal judges, she is a speaker very much in demand, and she has been clear about her interest in motivating her Latina and Latino audiences to work with their communities to promote their own development. At the same time, she has recognized on many occasions that she would consider her own life experiences in her work as a judge just as she does in all other aspects of her life. In an April 30, 1999 speech at Columbia Law School, in remarks to the Princeton Women's Network of New York City on February 26, 2002, in a speech published in the Berkeley La Raza Law Journal in 2002, and in remarks at the Seton Hall School of Law on October 22, 2003, she made this point. In the Seton Hall address, she amplified her remarks as follows:

> I accept the proposition that . . . my experiences will affect the facts I choose to see as a judge . . . . I simply do not know exactly what that difference will be in my judging, but I accept that there will be some based on my gender and my Latina heritage and those experiences my background has imposed on me.
>
> *  *  *
>
> I willingly accept that we who judge must not deny the differences resulting from experience and heritage but must attempt, as the Supreme Court suggests, continuously to judge when those opinions, sympathies and prejudices are appropriate.

Judge Sotomayor's highly publicized reflection, in connection with discussing a hypothetical discrimination case, that she hopes a wise Latina woman would more often than not reach a better conclusion than a white male was perhaps inartful. The Senate Judiciary Committee will no doubt ask her to clarify this statement, but based on the comments noted above, we believe she intended to convey the idea that sometimes judges with particular life experiences better understand certain concerns than those without those experiences. The proposition that judges' life experiences can influence their decision-making is unremarkable, as illustrated by Judge Alito's response to a question by Senator Coburn (R-OK) when he appeared before the Senate as a nominee to the Supreme Court:

> Senator Coburn: Can you comment just about Sam Alito, and what he cares about, and let us see a little bit of your heart and what's important to you in life?
>
> Judge Alito: I don't come from an affluent background or a privileged background. My parents were both quite poor when they were growing up. And I know about their experiences and I didn't experience those things. I don't take credit for anything that they did or anything that they overcame. But I think that children learn a lot from their parents and they learn from what the parents say. But I think they learn a lot more from what the parents do and from what they take from the stories of their parents' lives. And that's why I went into that in my opening statement. Because when a case comes before me involving, let's say, someone who is an immigrant – and we get an awful lot of immigration cases and naturalization cases – I can't help but think of my own ancestors, because it wasn't that long ago when they were in that position. And so it's my job to apply the law. It's not my job to change the law or to bend the law to achieve any result. But when I look at those cases, I have to say to myself, and I do say to myself, "You know, this could be your grandfather, this could be your grandmother. They were not citizens at one time, and they were people who came to this country."

We do not cite this exchange to criticize Justice, then Judge, Alito. Rather, we believe it is a powerful illustration that all human beings, including judges, take into account their own background when they engage in any kind of analysis, including legal analysis. We note with regret the charges of racism that were leveled at Judge Sotomayor for having made these observations about herself (even if in some cases the charges were withdrawn) and believe that such charges are unjustified and irresponsible.

One final point has arisen concerning Judge Sotomayor's life experiences: her affiliation with two organizations, the Puerto Rican Legal Defense and Education Fund (now known as LatinoJustice PRLDEF) and the Belizean Grove. Those opposed to her nomination have raised questions about whether the claims pursued by PRLDEF during her membership on its board are a better indication of her constitutional views than the evidence provided by her judicial opinions. Not surprisingly, as an organization dependent upon on the pro bono service of members of the private bar, we reject this position. The PRLDEF affiliation has little relevance to the question of how Judge Sotomayor approaches her judicial role. Her work for an advocacy

organization was consistent with the mission of that organization, just as her work for a law firm client would have been designed to promote the client's legal interests.

Judge Sotomayor's membership in a women's networking group, the Belizean Grove, from which she has recently resigned, also has occasioned comment. The group's mission statement states that it is "a constellation of influential women who are key decision makers in the profit, non-profit and social sectors; who build long term mutually beneficial relationships in order to take charge of their own destinies and help others to do the same." We understand that the group was founded in response to organizations such as the Bohemian Grove, a 130-year-old male-only network. Those who criticize her membership in this organization argue that such memberships should be as taboo as memberships in all-male organizations.

The Lawyers' Committee believes that membership in exclusionary organizations can give rise to legitimate concerns about a nominee's qualifications for judicial service. Further, Canon 2(c) of the Code of Conduct for United States Judges provides that judges should not hold membership in any organization that practices "invidious discrimination on the basis of race, sex, religion or national origin." In applying Canon 2(c), it is important to distinguish between exclusionary organizations that may have served to inhibit the success of women and minorities, and organizations (such as the National Bar Association) that were formed to enable people who have historically been excluded from power structures to form their own networks and support groups as part of their efforts to strengthen their roles in the public and private sectors. One need only note the extent to which women are under-represented as judges of the courts of appeals and Justices of the Supreme Court to see the difference. We understand that the purpose of the Belizean Grove is to promote, through networking and sharing of experiences, the advancement of an historically discriminated-against group – women – in business and the professions.

Therefore, based on our understanding of Canon 2(c), the Belizean Grove does not engage in "invidious discrimination."

### B. The "Policy" Role of Appellate Judges

Judge Sotomayor has a clearly articulated view of the roles of district court and appellate judges, consistent with her having served for many years in both capacities. The former decide individual cases, while the latter must be concerned with setting precedent and accomplishing just results for society as a whole. In a speech at Duke Law School on February 25, 2005, she noted:

> I often explain to people when you're on the district court, you're looking to do justice in the individual case. So you are looking much more to the facts of the case than you are to the application of law, because the application of the law is non-precedential. So the facts control. On the court of appeals, you're looking to how the law is developing so that it will be applied to a broad class of cases. And so you're always thinking about the ramifications of this ruling on the next step in the development of the law. You can make a choice and say "I don't care about the next step" and sometimes we do. Or sometimes we say "we'll worry about that when we get to it" – what the Supreme Court just did – but the point is that that's the . . . practical difference in the two experiences . . . .

Similarly, in a March 6, 2006 address at the University of Puerto Rico School of Law, she described "the basic difference between district court and circuit court judges" as being "that district court judges do justice for the parties, while circuit court judges do justice for the society as a whole." And in remarks to the Litigators Club on November 30, 2000, reflecting on her circuit court experience, she stated that "our decisions affect not only the individual cases before us, but the course of litigation and the outcomes of the many similar cases pending or to come. This fact has made me much more aware of the policy impact of the decisions I have drafted or worked on."

We see nothing remarkable in these observations. There is no question that appellate court judges set out rules that guide and determine judicial decisions in their circuits, and in this

respect they set "policy" for the lower courts and for successor panels of their own court. *See Gregory v. Ashcroft*, 501 U.S. 452 (1991). The Supreme Court exercises the same "policy" function for the country as a whole. This takes nothing away from the fact that all federal judges apply the law as the Constitution or the legislature has defined it, with whatever additional light the Supreme Court may have shed on the meaning of statutes or constitutional provisions. At each level of the judiciary, the goal of faithfully applying the relevant law to the facts of the case may be the same, but the effects of the judge's decision are different and so is the way in which the judge should and does conceive of her or his role.

## VII. CONCLUSION

The Lawyers' Committee's review of Judge Sotomayor's record in civil rights cases demonstrates that she is a careful and highly competent judge, respectful of both judicial precedent and Congressional intent as embodied in the words of federal statutes. Her judicial opinions in civil rights cases demonstrate a careful adherence to the mainstream of existing jurisprudence and scholarship, along with a profound respect for the importance of protecting the civil rights afforded by the Constitution and the nation's civil rights laws. While generally deferential to fact-finding and discretionary judgments by district court judges, Judge Sotomayor also shows a sensitivity to civil rights issues that makes her willing to vacate lower court rulings and, if necessary, dissent when she believes that a legally cognizable claim of discrimination has been wrongly rejected.

Judge Sotomayor will bring to the Court a wealth of experience as a prosecutor, a private practitioner, and a district court and appellate judge, as well as a perspective gained from her unique background that is currently missing from the Court. The Lawyers' Committee believes that our nation needs and deserves a Court whose diversity reflects that of our country, and Judge

Sotomayor's nomination is a step in that direction. Our review of Judge Sotomayor's cases, as well as her speeches, reveals that her judicial decision-making, while informed by her background, is not dictated by it. Her public statements show a woman who is appreciative of the opportunities she has been given and willing to share with others the insights she has gained as a result of those opportunities. Based on her demonstrated record, the Lawyers' Committee supports the nomination of Judge Sonia Sotomayor as a Justice of the Supreme Court of the United States.

Adopted by the Executive Committee of the Lawyers' Committee for Civil Rights Under Law on June 30, 2009.