



## **Preliminary Report on the Nomination of Judge Sonia Sotomayor to the Supreme Court**

President Obama has nominated Second Circuit Court of Appeals Judge Sonia Sotomayor of New York to the United States Supreme Court. In selecting Judge Sotomayor, the president has nominated a candidate of sterling credentials who will uphold the Constitution and the law. We commend President Obama for choosing a brilliant and fair-minded jurist to serve on our nation's highest court. Judge Sotomayor is precisely the kind of nominee we need – one who, as President Obama described, “has the intellectual firepower but also a little bit of a common touch and has a practical sense of how the world works.”

### **Background**

Judge Sotomayor has a record of academic and professional excellence. She graduated from Princeton University *summa cum laude* and holds a law degree from Yale, where she was an editor of the *Yale Law Journal* and managing editor of the *Yale Studies in World Public Order*. Following law school, Judge Sotomayor was an assistant district attorney in Robert Morgenthau's New York County District Attorney's Office and then moved to the small New York law firm of Pavia & Harcourt where she focused on intellectual property issues and international litigation and arbitration of commercial and commodity export trading cases.

In 1991, after eight years in private practice, Judge Sotomayor was nominated by President George H.W. Bush to the United States District Court for the Southern District of New York. At the time of her appointment, she was the first Hispanic American on that court. She was then nominated by President Clinton in 1997 to a seat on the United States Court of Appeals for the Second Circuit; the Senate confirmed her nomination in 1998.

In addition to her impressive legal accomplishments, Judge Sotomayor has experience upon which she can draw to assess the real-world impacts of the Supreme Court's decisions. Judge Sotomayor was born in 1954 to parents from Puerto Rico and raised in the housing projects of the south Bronx. Her father was a factory worker who died when she was nine years old. Her mother was a nurse who raised Judge Sotomayor and her brother (now a doctor) to value education and excellence. Judge Sotomayor saw her mother sacrifice and work six days a week to send her children to private school and to buy the only encyclopedia set in the neighborhood.

Always aspiring to public service, Judge Sotomayor was involved in activities in which she could assist others and make a difference. Judge Sotomayor has been an adjunct professor at New York University School of Law and is currently a lecturer-in-law at Columbia Law School. Before becoming a judge, she served for twelve years on the board of the Puerto Rican Legal Defense and Education Fund. She was appointed by Governor Mario Cuomo to a seat on the

Board of the State of New York Mortgage Agency, an agency tasked with helping low- and moderate-income families buy homes. Judge Sotomayor was appointed by Mayor Koch to the newly-formed New York City Campaign Finance Board designed as an independent and nonpartisan agency that would provide public money for city campaigns, publish voter guides, and ensure public disclosure of campaign finance information.

Judge Sotomayor was a member of the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts and on the board of the Maternity Center Association. She is also a member of the American Bar Association, New York City Chapter of the Women's Bar Association, Hispanic National Bar Association, Puerto Rican Bar Association, Association of Judges of Hispanic Heritage, National Association of Women Judges, and American Philosophical Society.

As a jurist, Judge Sotomayor is recognized as a centrist and a pragmatist. In an interview before stepping on the bench, she said: "The cases that shake the world don't come along every day. But the world of the litigants is shaken by the existence of their case, and I don't lose sight of that, either." This sensitivity to the impacts of court decisions, combined with her life experiences, will allow Judge Sotomayor to be a welcome and fresh voice on the Court.

## **Judicial History**

Because Judge Sotomayor has been on the bench for nearly seventeen years, she has authored over 700 opinions in a wide variety of areas of the law. As a general matter, it is clear from her opinions that she is an outstanding legal mind and careful jurist who digs into the facts of a case. Judge Sotomayor is also a strong advocate, writing concurrences and dissents with some frequency to explain her position. Below is an analysis of Judge Sotomayor's rulings that shed light on how she approaches various areas of the law.

### *First Amendment*

Judge Sotomayor has a strong record in First Amendment cases and has repeatedly ruled in favor of plaintiffs asserting their First Amendment rights.

As a district court judge ruling on First Amendment religion cases, in *Flamer v. White Plains*, 841 F. Supp. 1365 (S.D.N.Y. 1993), Judge Sotomayor struck down a municipal resolution that barred the display of religious or political symbols in city parks and consequently caused the city to deny a rabbi's requests to place a menorah in a city park during the Chanukah holiday. In *Campos v. Coughlin*, 854 F. Supp. 194 (S.D.N.Y. 1994), Judge Sotomayor issued a very careful decision granting a request for preliminary injunction that would allow the plaintiffs, two prison inmates who were practitioners of the Santeria religion, to wear religious beads for the duration of the litigation even in the face of Department of Corrections arguments that the challenged restriction on the wearing of Santeria beads was based the fear that the beads could be used to signal gang affiliation. Similarly, on the Second Circuit, Judge Sotomayor upheld an inmate's right to observe the end of Ramadan with a special meal in *Ford v. McGinnis*, 352 F.3d 382 (2d Cir. 2003).

In *Papineau v. Parmley*, 465 F.3d 46 (2006), Judge Sotomayor authored the opinion for a unanimous majority holding that police officers were not entitled to the defense of qualified

immunity where they forcefully dispersed a protest on private property writing that “[w]ere we to accept defendants’ view of the First Amendment, we see little that would prevent the police from ending a demonstration without notice for the slightest transgression by a single protester (or even a mere rabble rouser, wholly unconnected to the lawful protest).”

In *Papas v. Giuliani*, 290 F.3d 143 (2002), Judge Sotomayor dissented from an opinion holding that a police department did not violate the First Amendment when it fired a police officer after discovering that he anonymously sent racist and anti-Semitic literature to various organizations; despite the fact that the speech was “patently offensive, hateful, and insulting,” Judge Sotomayor reasoned that the plaintiff’s First Amendment rights outweighed the police department’s interests because the inflammatory speech was unlikely to be linked to or disrupt the police department.

Judge Sotomayor has been criticized for joining the majority opinion in *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008), which upheld a school’s punishment of a student who posted a blog entry disparaging school officials in vulgar language and encouraging blog readers (which included other students) to “piss off” school officials by calling to complain about the school’s alleged cancellation of a musical event. This case, however, does not call into question Judge Sotomayor’s commitment to upholding the First Amendment protections given her strong record and the fact that the outcome of this case was largely dictated by binding Second Circuit precedent.

### *Environment*

Judge Sotomayor has only written one opinion addressing the substantive requirements of an environmental law, but it was a case of nationwide significance and strongly suggests that she will be a strong and positive voice on the Court when it comes to environmental issues. Judge Sotomayor wrote the opinion in *Riverkeeper, Inc. v. EPA*, 475 F.3d 83 (2d Cir. 2007), *rev’d in part sub nom., Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498 (2009), a major environmental case that ultimately went to the Supreme Court. The opinion reviewed EPA’s final rule promulgating regulations under Clean Water Act §316(b) related to minimizing the environmental impact of cooling water intake structures and applicable to existing power plants. Challenges to EPA’s rule came from state and environmental petitioners arguing that EPA’s rule was too lenient and from industry petitioners arguing that EPA’s rules were too strict. Judge Sotomayor’s very careful and well-reasoned opinion interpreted the statute in a way that would lead to more protective environmental regulations. The most significant finding in the opinion was that where the Clean Water Act directed that cooling water intake structures utilize the “best technology available for minimizing adverse environmental impact,” that “standard permits cost-effectiveness considerations to influence the choice among technologies whose performance does not essentially differ from the performance of the best-performing technology whose cost the industry can reasonably bear, but that the statute does not permit the EPA to choose BTA [*i.e.*, the “best technology available”] on the basis of cost-benefit analysis.”

This issue was appealed to the Supreme Court and while Justice Sotomayor’s reasoning did not persuade the majority of the Court, it was adopted and amplified in a vigorous dissent written by Justice Stevens and joined by Justices Souter and Ginsburg.

## *Discrimination*

Judge Sotomayor's record in civil rights cases shows that she understands discrimination and its real-world consequences. While Judge Sotomayor has not always ruled for the plaintiff, she has authored significant pro-plaintiff opinions.

In a disability discrimination case, *Parker v. Columbia Pictures*, 204 F.3d 326 (2d Cir. 2000), Judge Sotomayor wrote the opinion that applied Title VII's "mixed motive" analysis to the Americans with Disabilities Act and made clear that "[t]erminating a disabled employee who can perform the essential functions of the job but cannot return to work because the employer has denied his request for reasonable accommodation, is disability discrimination." She also found that the NY State Bar Association violated the Americans with Disabilities Act in failing to accommodate a dyslexic bar applicant in *Bartlett v. N.Y. State Board*, 970 F. Supp. 1094 (S.D.N.Y. 1997).

In a sex discrimination case, Judge Sotomayor carefully considered the evidence related to a claim based on theories of failure to promote and retaliation, and rejected a post-judgment motion to overturn the jury's finding for the plaintiff in *Greenbaum v. Svenska Handelsbanken*, 67 F.Supp.2d 228 (S.D.N.Y. 1999). Similarly, in *Raniola v. Bratton*, 243 F.3d 610 (2d Cir. 2001), Judge Sotomayor wrote the opinion overturning a district court's grant of summary judgment for the defendant and, after a detailed review of the facts, finding that there was a sufficient evidentiary basis for a reasonable jury to find for the plaintiff on her hostile work environment and retaliation claims.

In a strongly worded dissent in *Gant v. Wallingford Board of Education*, 195 F.3d 134 (2d Cir. 1999), Judge Sotomayor objected to the majority's decision to dismiss a race discrimination claim brought by a black student who was transferred from first grade to kindergarten after only nine days in his new, nearly all-white school. In reviewing the evidence, Judge Sotomayor wrote that "a jury reasonably could conclude that the school did not give the black student an equal chance to succeed (or fail). . . . In my opinion, Ray was entitled to an equal opportunity to learn, and failing that a full hearing in court."

Judge Sotomayor's most controversial discrimination case is *Ricci v. DeStefano*, 530 F.3d 87 (2008), the reverse discrimination case that is now pending before the Supreme Court. This is a case brought by a group of firefighters (nineteen white and one Hispanic) who alleged that the city discriminated against them by refusing to promote firefighters based on the scores achieved on a promotion examination when using those scores would have excluded all of the black and most of the Hispanic firefighters from consideration for promotion. The district court granted summary judgment for the City. Judge Sotomayor was one of the judges on the panel that initially affirmed the district court in a *per curiam* order that stated that though the panel was "not unsympathetic to the plaintiffs' expression of frustration . . . [but because] the Board, in refusing to validate the exams, was simply trying to fulfill its obligations under Title VII when confronted with test results that had a disproportionate racial impact, its actions were protected." Judge Sotomayor was also one of seven judges of the Second Circuit to vote to deny rehearing en banc; six other judges dissented from the denial. The Supreme Court heard argument in the case in April.

## *Rights of the Accused and Post-Conviction Proceedings*

Judge Sotomayor approaches criminal and post-conviction cases as very fact-specific inquiries. Her opinions reveal a careful and pragmatic jurist who decides cases on narrow grounds, avoids deciding issues prematurely, and crafts remedies that suit the particular circumstance presented. She voted often to uphold criminal convictions and to deny *habeas* petitions, but several exceptions are worth noting.

Judge Sotomayor wrote the majority opinion in *Malesko v. Correctional Services Corp.*, 229 F.3d 374 (2000), that extended the reach of the Eighth Amendment and which was subsequently reversed by the Supreme Court in a majority opinion written by Justice Rehnquist over the dissent of Justices Stevens, Souter, Breyer, and Ginsburg. *Malesko* was an inmate who sought to bring an Eighth Amendment action against the private corporation that operated the halfway house in which he was serving his sentence and where he suffered a heart-attack allegedly provoked by actions of a halfway house employee. Judge Sotomayor wrote the Second Circuit opinion holding, for the first time in that circuit, that a government contractor was acting under color of federal law and thus, *Malesko* had a cause of action under the rationale articulated by the Supreme Court in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). Although this ruling was reversed by a majority of the Supreme Court, Judge Sotomayor's reasoning was supported by the dissenters.

Two *habeas* cases also give insight into Judge Sotomayor's approach. In *Campusano v. United States*, 442 F.3d 770 (2006), Judge Sotomayor reversed a district court and held that a defendant can claim ineffective assistance of counsel when the lawyer disregards a client's request that an appeal be filed, even in the absence of a showing that the appeal had merit. Judge Sotomayor noted that "[a]dmittedly, applying the . . . presumption to post-waiver situations will bestow on most defendants nothing more than an opportunity to lose[, but] we do not cut corners when Sixth Amendment rights are at stake." In *Galarza v. Keane*, 252 F.3d 630 (2001), Judge Sotomayor, writing for the majority, granted *Galarza* petition for *habeas corpus* when the trial record showed that the trial court neglected to rule on each of *Galarza's* *Batson* challenges made after prosecutors used their peremptory challenges to strike Hispanic jurors. In rejecting the state's argument that *Galarza* had waived this objection by not objecting to the trial judge's failure to make findings with respect to each stricken juror, Judge Sotomayor elevated substance over form and "decline[d] to create a procedural requirement that a party must repeat his or her *Batson* challenge three times at trial in order to avoid a procedural bar."

## *Reproductive Rights*

Judge Sotomayor has never ruled on a case directly implicating a woman's right to choose, but there are four cases that tangentially touch on the subject for which Judge Sotomayor has been the subject of scrutiny.

The first is *Center for Reproductive Law & Policy v. Bush*, 304 F.3d 183 (2d Cir. 2002), in which Judge Sotomayor authored an opinion rejecting the claims of a public interest organization challenging the "Mexico City Policy" (also known as the "global gag rule"), which prohibited foreign nongovernmental organizations receiving United States funding from performing or advocating abortion services as a method of family planning abroad. With respect

to the First Amendment issue, Judge Sotomayor followed the decision in an earlier and nearly identical Second Circuit decision and rejected the claim. Turning to claims that were not addressed in the earlier case, Judge Sotomayor held that the plaintiff organization lacked standing with respect to their due process claim, but had standing to bring an equal protection claim. On the merits of the equal protection claim, she held that it failed because “the government is free to favor the anti-abortion position over the pro-choice position, and can do so with public funds.”

The second case is *Port Washington Teachers' Association v. Board of Education*, 478 F.3d 494 (2d Cir. 2007), in which Judge Sotomayor joined an opinion dismissing a case for lack of standing brought by teachers challenging a school district policy instructing school staff that if they learned that a student was pregnant they should inform the student's parents if the student was not willing to tell her parents herself.

The third case is *Amnesty America v. Town of West Hartford*, 361 F.3d 113 (2d Cir. 2004), in which Judge Sotomayor wrote an opinion reversing a district court's grant of summary judgment for defendants in a case brought by anti-abortion protesters claiming that they had been subject to excessive force used by town police during a protest. Judge Sotomayor sent the case back to the district court holding that the case should be heard by a jury to make the determination of whether the police officers “gratuitously inflicted pain in a manner that was not a reasonable response to the circumstances” and whether the town was liable for failing to properly supervise its officers.

The fourth case is an immigration case *Lin v. U.S. Dep't of Justice*, 494 F.3d 296 (2d Cir. 2007), that presented the question of whether asylum should be granted to non-spouse partners of women who had been forced by Chinese authorities to undergo forced abortion or sterilization. In *Lin*, Judge Sotomayor concurred with an *en banc* opinion to the extent it rejected the claims of non-spouse partners, but disagreed with the majority with respect to the claims for spouses.

## **Summary**

In nominating Judge Sonia Sotomayor to serve on the Supreme Court, President Obama has selected a highly qualified individual who appears committed to upholding core constitutional values. Furthermore, her diverse background, age, and strong values will be a welcome addition to the Supreme Court.