



Access to Justice

Report on Supreme Court Nominee Judge Sonia Sotomayor*

Because federal courts are courts of limited jurisdiction, plaintiffs must satisfy a number of procedural requirements before having their claims considered on the merits. Cases are frequently decided not on their merits but on preliminary issues regarding a plaintiffs' right to be in court. When individuals are denied their chance to be heard in court, they lose their opportunity to win redress and important issues can remain undecided. Individuals also face barriers presented by the cost of attorneys' fees. Many federal statutes designed to aid individuals in winning redress for discrimination and other wrongs authorize awards of attorneys' fees to prevailing plaintiffs. Judicial interpretation of these fee award statutes is a key element in ensuring fair access to court.

Access to justice and the courts encompasses a variety of legal issues including justiciability, preemption, stripping courts of their jurisdiction to hear certain claims, sovereign immunity, recovering attorneys' fees, interpretations of statutes of limitations, and certifying classes for class-action litigation. These issues, sometimes esoteric in nature, illustrate the important role courts play in ensuring equal justice for all. This report analyzes each of these areas as applied to the record of Judge Sonia Sotomayor, President Obama's nominee to the United States Supreme Court.

Judge Sonia Sotomayor has a careful, cautious, and reasoned approach to access to justice issues. Her rulings are well within the legal mainstream. She closely follows precedent, and analyzes facts with meticulous detail. Judge Sotomayor shows no bias for or against plaintiffs. She shows sensitivity toward persons bringing claims, but always grounds her decision making on the law and binding authority.

Justiciability

Judge Sotomayor's rulings on justiciability issues are those of a careful, analytical jurist who takes a measured approach to standing, mootness, and ripeness. She has consistently demonstrated fidelity to examining jurisdictional prerequisites before allowing a case to proceed — even when justiciability issues are not raised by litigants themselves. She has shown a healthy respect for *stare decisis*, with a meticulous approach to analyzing how the facts presented in any given context differ from those involved in binding precedent. Judge Sotomayor has applied precedent dispassionately, showing no bias toward or against litigants based on their backgrounds or affiliations. The following sections highlight her rulings in each area.

* The Alliance for Justice thanks the following individuals who helped contribute to this report: Adam Skaggs, Andrew Boyle, Justin Levitt, Harper Jean Tobin of the National Senior Citizens Law Center, Glenn Sugameli of Earth Justice, and Zachary Caplan of People for the American Way.

Standing

A person must demonstrate actual or imminent harm to challenge the legality of a law, a doctrine known as standing. Judge Sotomayor's opinions in this area illustrate a moderate and thorough approach. She is a practical judge who carefully applies binding precedent to the facts presented in cases to determine whether parties have suffered sufficient legal injury to prosecute their claims in federal court. Judge Sotomayor has rejected expansive views of standing that would broaden access to the federal courts beyond clearly established law. Both as a trial judge and a member of the court of appeals, Judge Sotomayor has carefully applied standing law, and faithfully dismissed claims of litigants who do not meet rigorous standing requirements. For example, she dismissed the claims of an inmate who suffered insufficient injury to bestow standing, *see Perez v. Metro. Corr. Ctr. Warden*, 5 F. Supp. 2d 208 (S.D.N.Y. 1998), *aff'd*, 181 F.3d 83 (2d Cir. 1999), and of a parolee who she similarly concluded was not sufficiently injured to warrant the expenditure of judicial resources, *see Farrell v. Burke*, 449 F.3d 470 (2d Cir. 2006).

Judge Sotomayor has rejected an expansive view of associational or organizational standing, *see Mid-Hudson Catskill Rural Migrant Ministry, Inc. v. Fine Host Corp.*, 418 F.3d 168 (2d Cir. 2005). She has also not hesitated to strictly apply prudential, not only constitutional, standing guidelines. *See Ctr. for Reprod. Law and Policy v. Bush*, 304 F.3d 183 (2d Cir. 2002) (finding that plaintiff lacked standing to prosecute due process claim where party did not meet prudential standing requirements). Furthermore, she has emphasized the need to show a definitive injury, even when the claim is one that implicates important First Amendment values. *Mehdi v. U.S. Postal Serv.*, 988 F. Supp. 721 (S.D.N.Y. 1997) (holding that a "stigmatic injury" is insufficient to confer standing.)

Judge Sotomayor has shown a preference for limiting her decisions on standing issues to avoid commenting on issues that are not necessary to the decision of a particular case. Thus, she has declined to wade into making new standing law where it was not necessary. *See, e.g., Moore v. Consol. Edison Company of NY, Inc.*, 409 F.3d 506 (2d Cir. 2005) (declining to address whether prudential limits on standing apply to sexual discrimination claims, though issue had not been resolved in the Circuit, because plaintiff's claims would fail in any event); *Thibodeau v. Portuondo*, 486 F.3d 61 (2d Cir. 2007) (declining to address whether plaintiff could assert third-party standing in facial challenge where plaintiff failed to articulate any scenario under which application of challenged statute was unconstitutional).

A case that typifies Judge Sotomayor's approach to standing is *Center for Reproductive Law and Policy v. Bush*, 304 F.3d 183 (2d Cir. 2002). A domestic reproductive rights organization brought a challenge to the Bush administration's policy under which foreign non-governmental organizations had to agree not to perform or promote abortion as a condition of receiving government funds. Plaintiffs asserted First Amendment, Due Process and Equal Protection claims and, after the district court dismissed the case for lack of standing, Judge Sotomayor wrote for a unanimous panel affirming the decision. As to the First Amendment claim, Judge Sotomayor observed that the case presented a novel question of whether the plaintiff had standing. But, she concluded, the court should not break new doctrinal ground on the standing question, because precisely the same claim had been rejected on the merits by binding precedent, *Planned Parenthood Fed'n of Am. v. Agency for Int'l Dev.*, 915 F.2d 59 (2d Cir. 1990), and therefore to opine on the novel standing question would amount to rendering an advisory opinion. On the Due Process claim, Judge Sotomayor concluded that the claim was "precisely the sort of claim that the prudential

standing doctrine is designed to foreclose,” and therefore found standing lacking. *Id.* at 196. And while Judge Sotomayor concluded that plaintiff did have standing to assert the Equal Protection claim, she determined that the claim failed on the merits. Judge Sotomayor’s meticulous approach in *Center for Reproductive Law and Policy* is emblematic of her standing jurisprudence: she carefully examined plaintiff’s ability to assert each distinct claim, and relied heavily on precedent in reaching her conclusion that the district court was right to dismiss plaintiff’s case.

Mootness

A court may only hear claims having legal effect; a matter is moot if further proceedings lack legal significance and would render a purely advisory opinion. In most cases where Judge Sotomayor assessed mootness, the issue involved either a limited portion of plaintiffs’ claims, or a secondary motion that did not resolve the entire litigation. In these cases, Judge Sotomayor routinely took a technical approach to applying the relevant doctrine to the facts of the case. For example, she unanimously agreed with her colleagues in concluding that the amendment of a municipal ordinance mooted those parts of a lawsuit challenging aspects of the original ordinance that no longer applied after the amendment, *see Lamar Adver. of Penn, LLC v. Town of Orchard Park, N.Y.*, 356 F.3d 365 (2d Cir. 2004), and that the existence of a pending claim for damages defeats any argument that the grant of a preliminary injunction moots the parties’ dispute, *see Loyal Tire & Auto Ctr., Inc. v. Town of Woodbury*, 445 F.3d 136 (2d Cir. 2006). Her rulings as a district court judge are equally technical, such as her ruling that a prisoner’s release from incarceration mooted those portions of his lawsuit that sought his release from prison. *See Gadson v. Goord*, 1997 U.S. Dist. LEXIS 18131 (S.D.N.Y. 1997).

In a limited number of cases, Judge Sotomayor confronted cases in which the mootness of a litigant’s entire case was at stake. In her appellate opinions involving such cases, she avoided controversial positions, and most often joined a unanimous panel. *See, e.g., U.S. v. Hamdi*, 432 F.3d 115 (2d Cir. 2005) (a released prisoner’s appeal of his sentence was not mooted by his discharge when the length of his incarceration had important collateral consequences).

In only one case did Judge Sotomayor come to a different conclusion than her colleagues with respect to mootness. That case, *United States v. Blackburn*, 461 F.3d 259 (2d Cir. 2006), *cert. denied*, 550 U.S. 969 (2007), involved an appeal of a sentence by a felon who, though discharged from custody, was still under supervised release. All three judges on the panel agreed that, given intervening changes in the law since the appellant’s sentencing, the trial court had the discretion to reduce his term of supervised release. Judge Sotomayor concluded that the trial court should be permitted, in the first instance, to determine whether or not to exercise this discretion; her two colleagues, in contrast, decided that it was unlikely the district court would choose to do so. Because they concluded that it was unlikely the trial judge would reduce the term of supervised release, Judge Sotomayor’s colleagues determined that the appeal was moot. Significantly, the dispute in *Blackburn* turned not on a substantive issue of criminal law. Rather, Judge Sotomayor’s position evidently resulted from her view of the need to protect the prerogatives of the trial court.

Ripeness

The doctrine of ripeness deals with the readiness of a case to be heard before a court, and furthers the goal of preventing premature adjudication. Judge Sotomayor has shown a reasoned and moderate approach to ripeness analysis. In cases where ripeness is a concern, she carefully

examines the issue before proceeding, even where the parties have not raised the issue. *See, e.g., Herrington v. Cuevas*, 1997 U.S. Dist. LEXIS 17856 (S.D.N.Y. 1997). Her decisions balance the interest in preserving a judicial forum for valid claims of harm with an aversion to diverting judicial resources to those claims that are constitutionally or prudentially premature. *See, e.g., NYCLU v. Grandeau*, 528 F.3d 122 (2d Cir. 2008). Indeed, Judge Sotomayor has shown great sensitivity to the need and ability of trial courts to manage their dockets efficiently. To that end, she has guided parties to use limited discovery where appropriate to resolve a jurisdictional issue or isolated issue of fact before subjecting litigants to more expansive proceedings. She further displays careful attention to the facts, noting gaps in the record. *See id.*

Judge Sotomayor systematically works through alleged harms, identifies those that create an active case or controversy, and gives attention to statutory limits on injury or on the class of plaintiffs authorized to seek court redress. *See, e.g., Pedre Co., v. Robins*, 901 F. Supp. 660 (S.D.N.Y. 1995). She has also, even when confronted with a controversy that is sufficiently ripe to satisfy constitutional limitations on federal court jurisdiction, examined prudential ripeness to avoid entanglement in disputes that will become more concrete without sacrificing litigants' rights. *See, e.g., NYCLU v. Grandeau*, 528 F.3d 122 (2d Cir. 2008). In the latter cases, she has carefully distinguished those cases in which harm or hardship has not yet occurred but is imminent from those in which harm is contingent or speculative — and in distinguishing those cases in which a law or administrative policy has been enacted but not yet enforced from those in which a challenged policy or proposed legislation is still vague or under development.

Preemption

The doctrine of preemption has garnered increased attention in recent years as federal courts, led by the Supreme Court, have invalidated broad swaths of state law enacted to protect consumers and victims. Traditionally, preemption has been used to supplant only state laws that are plainly in conflict with federal statutes. But, as courts have expanded the preemptive reach of federal law, an untold number of American citizens have been left without redress.

Judge Sotomayor has ruled on only a few preemption cases. In these cases, she exhibits a characteristically measured approach. Her rulings reflect the often complex interplay between state and federal law, and generally recognize the legitimate interests of those bringing claims. On more than one occasion, Judge Sotomayor has recognized a strong presumption against preemption, especially in cases addressing areas traditionally governed by state law. She has subjected preemption claims to rigorous statutory analysis, relying on text and legislative history to discern congressional intent. Judge Sotomayor has exhibited notable deference to Congress; her opinions emphasize that the legislative branch determines whether federal law preempts state law and it is her responsibility to give effect to Congress's determination. Her opinions rely heavily on applicable case law, and while her work demonstrates sensitivity towards persons seeking protections under both state and federal laws, she has not strayed from controlling precedent that limits plaintiffs' rights. A review of her opinions follows.

Interpreting a federal law governing the care and treatment of institutionalized individuals, Judge Sotomayor wrote the majority opinion in favor of heightened patient protection. In *Protection & Advocacy for Persons with Disabilities v. Kirk*, 448 F.3d 119 (2d Cir. 2006), she held that the Protection and Advocacy for Individuals with Mental Illness Act ("PAIMI"), 42 U.S.C. §§ 10801-

10851, required the Connecticut Department of Mental Health and Addiction Services (“the Department”) to disclose the peer review records of two patients who died under their care to a state agency investigating suspected abuse. To arrive at this conclusion, Judge Sotomayor confronted two significant issues: Connecticut law prohibited disclosure of peer review records during discovery in any civil action, and PAIMI itself contained a provision proscribing preemption of state law. Her nuanced approach to both resulted in the documents release. Sotomayor relied upon statutory analysis employed by other circuit courts — in particular Judge Alito’s ruling on the Third Circuit in *Patient Protection & Advocacy, Inc. v. Houstoun*, 228 F.3d 423 (3d Cir. 2000) (holding that peer review records were among those Congress meant to be disclosed under PAIMI). She then held that an agency investigation was not a “civil action” as applied to Connecticut’s evidentiary law (with the caveat that if the agency were to initiate a lawsuit, the peer review records would not be allowed into evidence). Short of that, no privilege existed and consequently the administrative agency was able to review the records in its investigation into patient deaths.

Judge Sotomayor allowed a state law claim against Merrill Lynch to proceed after allegations surfaced that it manipulated research data to reflect higher than actual value of its securities. *Dabit v. Merrill Lynch*, 395 F.3d 25 (2d Cir. 2005), *vacated*, 547 U.S. 71 (2006), addressed the application of the Securities Litigation Uniform Standards Act (“SLUSA”), 15 U.S.C. § 78bb(f), and its alleged preemption of class action suits predicated on state common law claims. In the wake of an investigation by the New York attorney general into conflicts of interest within large investment firms, the plaintiffs brought suit against Merrill Lynch alleging that the firm issued faulty research overvaluing stocks and manipulating investment recommendations. Although SLUSA preempted claims that had a “connection with [a] purchase or sale” of a security, the Supreme Court had not yet defined the full scope of the “connection” requirement. Accordingly, plaintiffs claimed that their violations arose not from a sale or purchase, but from the holding of a security. Although Judge Sotomayor agreed, joining the Eleventh, Ninth, and Eighth Circuits in finding the claims were not preempted under SLUSA, the Supreme Court reversed 8-0 (Judge Alito did not participate).

In *A. Brod v. SK&I Co.*, 998 F. Supp. 314 (S.D.N.Y. 1998), companies claimed ownership of a toy aquarium known as Aqua World. One company, Masudaya, asserted a state law trust theory of ownership, contending that throughout various business deals it had retained equitable title to the product. Another company, SK&I, alleged that the Copyright Act preempted state trust law. Judge Sotomayor conducted a thorough statutory analysis of the Copyright Act, finding that the statute’s plain language, legislative history, and subsequent case law supported the conclusion that the claim was not preempted.

Judge Sotomayor authored the majority opinion on a split panel in *Empire Healthchoice Assurance v. McVeigh*, 396 F.3d 136 (2d Cir. 2005), *aff’d*, 547 U.S. 677 (2006), in which she held that a healthcare plan administrator’s suit to reclaim benefits it paid to a plan enrollee was not preempted by federal statute. Joseph McVeigh, a federal employee, received benefits from Empire Healthchoice Assurance (“Empire”) for many years following an accident. Under the terms of the plan, enrollees were required to reimburse Empire for compensation enrollees received from third parties. Empire brought suit in federal court against Mrs. McVeigh after she won a state court suit following her husband’s death, seeking to recoup the benefits it had earlier provided to Mr. McVeigh. Although Empire asserted federal court jurisdiction over the issue, Judge Sotomayor disagreed. She held that the dispute was a contract claim between two private parties: Empire and McVeigh. Sotomayor also held that the Federal Employee Health Benefits Act did not contain an affirmative grant of authority to federal courts to make federal common law, which would have

allowed Empire's claim to proceed. And, alternatively, there was no demonstrated conflict of uniquely federal interests with state law that would warrant an exercise of federal jurisdiction. On appeal, the Supreme Court affirmed her ruling in a 5-4 split featuring an unusual lineup of Justices (Justice Ginsburg authored the majority, joined by Chief Justice Roberts and Judges Stevens, Scalia, and Thomas). *See* 547 U.S. 677..

During the tobacco litigation in the late 1990s, Judge Sotomayor refrained from deciding whether Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq., preempted state fraudulent concealment law as it related to tobacco marketing, and instead remanded the case back to New York state court. In *Eastern States Health & Welfare Fund v. Philip Morris, Inc.*, 11 F. Supp. 2d 384 (S.D.N.Y. 1998), ten employee health benefit plans sought to recoup from cigarette manufacturers medical and health care benefits they paid to beneficiaries. They asserted various common-law tort and statutory causes of action as well as a state-law claim to recover their costs. The tobacco companies argued that cost recovery was preempted by ERISA. Judge Sotomayor disagreed. She ruled that ERISA's complete preemption doctrine did not apply because the cost recovery claim did not fall within the scope of ERISA's civil enforcement provisions. She remanded the case to New York state court to decide the claims, including whether ERISA preempted state law.

She has ruled on two labor-related preemption matters — both as a district court judge — and in both instances she ruled against supplanting state law. In *Schepis v. Local Union No. 17*, 989 F. Supp. 511 (S.D.N.Y. 1998), a former union official filed suit in state court seeking indemnification from the union for fees he incurred defending himself against a subsequently overturned criminal conviction for duties he performed as a union officer. He asserted only state law claims based upon New York statutory and common law principles of agency, trust/fiduciary duties, and contract. The Union tried to remove the case to federal court under both the federal Labor Management Disclosure and Reporting Act ("LMDRA"), 29 U.S.C. § 501(b) — comparing it to ERISA provisions that completely preempt state rules — and the federal Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. Addressing the LMDRA basis for preemption, Judge Sotomayor relied on Second Circuit precedent finding that the LMDRA was not applicable to the type of reimbursement fees sought by Schepis. Moreover, the statute explicitly preserved a plaintiff's right to resort to state law for the reimbursement of criminal defense costs. Judge Sotomayor rejected the LMRA claim because the Union failed to raise it in its removal petition.

In another labor matter, *Modest v. Local 1199*, 850 F. Supp. 1156 (S.D.N.Y. 1994), *aff'd*, 38 F.3d 626 (2d Cir. 1994). Judge Sotomayor addressed the preemptive effect of Section 6 of the federal Norris-LaGuardia Act, 29 U.S.C. § 106, on state evidentiary and tort law. The Act clarified the amount of proof needed to establish the liability of labor unions and their officers, but left untouched a state's traditional ability to define for itself these same issues. Under New York law, liability attached only if a person could show that individual members of the union leadership authorized or ratified the act — a higher burden of proof than that required under federal law. Plaintiffs in *Modest*, employees who worked during a strike, sued the union after being physically attacked by some of its members for crossing a picket line. The plaintiffs claimed that the Norris-LaGuardia Act so completely occupied the field as to impliedly preempt state laws. Judge Sotomayor disagreed, and held the plaintiffs to New York's more demanding evidentiary standard. She held that federal law would preempt lower state standards of proof, but would not supplant state laws requiring higher burdens of proof.

And, in *St. Johnsbury Trucking Co. v. Mead Johnson & Co.*, 1996 U.S. Dist. LEXIS 10275 (S.D.N.Y. 1996), Judge Sotomayor analyzed whether the Federal Aviation Authorization Administration Act, 49 U.S.C. § 14501(c), preempts a state “undercharge” claim. Trucking companies assert undercharge claims to recoup the difference between shipping rates prescribed by regulations and the rates actually charged. Relying on statutory language, Judge Sotomayor concluded that the state claims were preempted, and stated: “[a] broad federal pre-emption of the enforcement of state pricing regulations is akin to a repeal of those [state] regulations.” *Id.* at 7.

Finally, in *King v. Am. Airlines, Inc.*, 284 F.3d 352 (2d Cir. 2002), Judge Sotomayor concluded that a treaty preempted federal and state civil rights claims. As a result, she held that an African American couple could not pursue allegations of intentional racial discrimination against American Airlines. In *King*, two African Americans alleged a violation of Section 1981, the Federal Aviation Act, and various other state and local laws. The Kings’ vacation flight from Miami to the Bahamas was overbooked and they rejected an offer of financial compensation to give up their seats. When they attempted to board the plane, airline agents confiscated their passes and bumped them from the plane. All the white passengers, including those who did not have confirmed reservations, were allowed to board. The Kings filed their claim within three years — well within the New York and Florida statutes of limitation, but beyond the two-year limitation period mandated for claims governed by the Warsaw Convention. Judge Sotomayor held that the Convention preempted the Kings’ claims and dismissed their suit. Notably, the Convention would not have provided a remedy for the discrimination claims even if they had been filed within the two-year statute of limitations period. Acknowledging this fact, Sotomayor suggested that the Kings should have sought administrative remedies through the Secretary of Transportation.

In *King*, Sotomayor relied on *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155 (1999), in which the Supreme Court reversed a Second Circuit holding that the Warsaw Convention did not preempt a state tort claim. In *Tseng*, the Supreme Court clarified the Convention’s scope and broadened its applicability. Notably, while on the district court and before *Tseng*, Judge Sotomayor allowed a state tort claim to proceed against an airline. In *Rombom v. United Airlines*, 867 F. Supp. 214 (S.D.N.Y. 1994), passengers sued United Airlines for mental and physical distress after the airline summoned police officers to forcefully remove them from a plane. The company alleged that the Federal Aviation Act explicitly preempted the state tort claim, or alternatively, the claim was impliedly preempted by the Act and its federal regulations. Judge Sotomayor engaged in a thoughtful evaluation of the statutory language and its application to both federal and state law. She disagreed with the assertion that the statute preempted all tort claims, deciding instead that issues should be resolved on a case-by-case basis. She also called attention to the inadequate remedy plaintiffs would receive if they were left with administrative remedies alone (no money damages would be available). Thus, her subsequent ruling eight years later in *King* illustrates Sotomayor’s commitment to following precedent and following her reading of the law.

Court Stripping

In her confirmation hearings for the Second Circuit, Judge Sotomayor was asked by then-Senator John Ashcroft whether she thought Congress had the constitutional right to restrict the jurisdiction of the lower federal courts. She stated, “if Congress created it, Congress can take it away.” *Nominations Hearing Before the S. Comm. on the Judiciary*. 105th Cong. 362 (1997). “But,” she said, “what you cannot do is take away that which the Constitution would give the courts.

I think that was established in *Marbury v. Madison*.” *Id.* She has rarely had to confront this issue on the bench, but several opinions suggest that she understands the importance of access to judicial consideration of claims.

In *Sepulveda v. Gonzales*, 407 F.3d 59 (2d Cir. 2005), Judge Sotomayor wrote the majority opinion emphasizing the importance of access to judicial review of administrative decisions. In this immigration appeal, she ruled against the government and ordered it to evaluate a deportee’s new petitions. Although a jurisdiction stripping provision was applicable to the case, Sotomayor found that the provision did “not strip courts of jurisdiction to review nondiscretionary decisions regarding an alien’s eligibility for relief.” *Id.* at 62-63. Similarly, in *Mapp v. Reno*, 241 F.3d 221 (2d Cir. 2001), she joined a panel opinion on a case addressing whether a federal court had the power grant bail to a person detained by the Immigration and Naturalization Service (INS). Judge Calabresi, writing for the panel, held that federal courts possess the same authority to admit *habeas* petitioners in the immigration context as they do in criminal *habeas* cases. The ruling was sharply critical of the government’s position that the Court should give unquestioning deference to the attorney general.

Although Sotomayor consistently adheres to precedent, she is also mindful of the need for access to a fair and impartial judiciary. In *Mendez v. Mukasey*, 525 F.3d 216 (2d Cir. 2008), an immigration and deportation case in which the Court was asked to review the determination of what constitutes “exceptional and extremely unusual hardship.” Binding circuit precedent limited the panel’s ability to provide a remedy to the plaintiff, a Mexican-born alien living illegally in the United States who, at the time of his deportation, had fathered two children (one of whom suffered many physical ailments). Sotomayor wrote, “[w]ere we operating on a new slate, we would be inclined to hold that the question . . . is a determination for which we have jurisdiction to review.” *Id.* at 221. But, she acknowledged that “[w]e are bound by past decisions of this Court.” *Id.* Circuit precedent prohibited an alternative remedy and Sotomayor gave due deference to the discretionary immigration decisions of the attorney general. In *Mendez v. Holder*, 2009 U.S. App. LEXIS 9951 (2d Cir. 2009) (*per curiam*), the Second Circuit panel on which Sotomayor sat deferred to the same binding precedent. However, the Court showed a commitment to court access by finding that the petitioner had presented a nondiscretionary issue that was within the Court’s jurisdiction. The Court wrote that “where, as here, some facts . . . have been totally overlooked and others have been seriously mischaracterized, we conclude that an error of law has occurred.” The Court remanded the case and ordered the Board of Immigration Appeals to evaluate the “hardship” determination absent the error of law.

Finally, in *John Doe v. Mukasey*, 549 F.3d 861 (2d Cir. 2008), the Second Circuit ruled in a case concerning FBI National Security Letters (“NSL”) (a type of administrative subpoena) and the procedures under which they may be reviewed by the courts. Judge Sotomayor joined the panel opinion which showed both judicial restraint and commitment to access to federal courts. The panel found that there was “not meaningful judicial review of the decision of the Executive Branch to prohibit speech if the position of the Executive Branch that speech would be harmful is conclusive on a reviewing court, absent only a demonstration of bad faith.” *Id.* at 882. Thus, the Court held that the Executive Branch may not use national security to encroach upon constitutional rights and shield all judicial review.

Sovereign Immunity

As in other areas, Judge Sotomayor is guided by close adherence to precedent and strict reading of statutory text when faced with sovereign immunity issues. For example, in 2000, the Second Circuit faced a matter of first impression: whether a suit brought by a state against officers of another state should be deemed to be against the other State itself, in which event it would lie within the Supreme Court's "original and exclusive jurisdiction of all controversies between two or more States." 28 U.S.C. § 1251(a). The State of Connecticut sued New York officials on the grounds that a New York law restricting lobster trapping was unconstitutional under the Commerce Clause. A divided panel in *Connecticut v. Cahill*, 217 F.3d 93 (2d Cir. 2000), held that the suit could proceed in federal district court because the state was not the real party in interest. Judge Sotomayor dissented, arguing that the jurisdictional statute clearly resolved the issue.

The majority reasoned that plaintiff states have "considerable freedom to name, or decline to name, another State as defendant in suits seeking declaratory and injunctive relief from the official acts of that State, its officers, or political subdivisions." *Id.* at 99. In dissent, Judge Sotomayor argued that the plain text of the jurisdictional statute resolved the matter by placing "all controversies between two or more states" in the high court's original jurisdiction. 217 F.3d at 105 (emphasis in original). "As a policy matter," she wrote, "I do not disagree that this creative approach to § 1251(a) makes the resolution of seemingly less weighty disputes between States more efficient, faster, and thus likely more desirable for the States and, perhaps, the busy Supreme Court as well." *Id.* Sotomayor held that as a "general rule" a suit is in fact against a state if "the effect of the judgment would be to restrain the Government from acting, or to compel it to act." *Id.* at 106 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 & n. 11 (1984)). And, she criticized the majority for drawing broad inferences from language in the Supreme Court cases dealing with its original jurisdiction, thereby allowing plaintiffs to avoid the jurisdictional requirements simply by naming a state official instead of the state itself as a defendant.

In 2001, Judge Sotomayor joined a unanimous panel in *McGinty v. New York*, 251 F.3d 84 (2d Cir. 2001), an Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, case decided shortly after the Supreme Court decision in *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000). *Kimel* held that the ADEA does not validly abrogate state immunity, and the *McGinty* court found that *Kimel* barred the suit. The court rejected the plaintiffs' argument that *Kimel* did not control because the defendant's actions violated the Equal Protection Clause. The court stated: "Even assuming defendants' conduct rose to the level of a constitutional violation, such would not show a pattern of unconstitutional age discrimination by the states across the nation sufficient to justify the broad prohibitions in the ADEA." *McGinty* at 92. Moreover, the court wrote, "nothing in *Kimel* suggests sovereign immunity is limited under the ADEA should a state engage in age discrimination in violation of the Equal Protection clause. Rather, the Supreme Court unequivocally stated that 'the ADEA does not validly abrogate the States' sovereign immunity.'" *Id.* (quoting *Kimel*, 528 U.S. at 92). While the court's reasoning in *McGinty* would later be overtaken by *United States v. Georgia*, 546 U.S. 151 (2006) (holding that abrogations of immunity are always valid in cases of actual constitutional violations) at the time the decision represented a seemingly straightforward application of *Kimel*.

Judge Sotomayor also joined a unanimous panel in *Burnette v. Carothers*, 192 F.3d 52 (2d Cir. 1999), *cert. denied*, 531 U.S. 1052 (2000), reviewing a civil enforcement action brought by a group of homeowners against Connecticut officials concerning pollutants emanating from a local

prison. Judge Sotomayor joined a unanimous panel opinion, applying precedent in a straightforward manner and affirming dismissal of all claims as barred by the Eleventh Amendment. The court held that neither the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), 42 U.S.C. § 9659, the Clean Water Act, 33 U.S.C. § 1365, nor the Resource Conservation and Recovery Act, 42 U.S.C. § 6972, evinced a clear congressional intent to abrogate state sovereign immunity. The panel reasoned that by including language authorizing suits against governments “to the extent permitted by the eleventh amendment to the Constitution,” Congress meant to recognize the limitations of sovereign immunity, not to abrogate them. 192 F.3d at 57.

In the wake of *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), the *Burnette* panel faced the question of whether CERCLA’s reimbursement provision was enacted pursuant to a constitutional provision granting Congress the power to abrogate state immunity. The court read *Seminole Tribe* as holding that Congress cannot abrogate a state’s Eleventh Amendment sovereign immunity pursuant to any Article I power. The court further held that CERCLA did not create cognizable property interest in recovering costs that could be protected pursuant to the Due Process Clause, because “to hold otherwise would eviscerate *Seminole*.” *Id.* at 60.

Attorneys’ Fees

Many federal laws authorize prevailing parties to recover attorneys’ fees and other litigation costs to ensure that the expense of litigation does not prevent claimants from seeking redress. Such laws are intended to ensure that civil rights plaintiffs and others are able to obtain counsel and bring meritorious claims before the courts. They enable individuals to act as private attorneys general to ensure that our most important guarantees are enforced. At the district court and appellate levels, Judge Sotomayor participated in numerous decisions (published and unpublished) affirming parties’ rights to recover attorneys’ fees and costs. Overall, she has consistently shown moderation both in awarding and calculating such fees.

In several cases, including two under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, (IDEA) Judge Sotomayor joined in panels that held for plaintiffs who sought to recover attorneys’ fees. In *A.R. ex rel. R.V. v. N.Y.C. Dept. of Educ.*, 407 F.3d 65 (2d Cir. 2005), Judge Sotomayor affirmed fee awards for several sets of parents of children with disabilities. The court held that where an administrative due process hearing under the IDEA results in an order in favor of parents, or an administrative order is entered incorporating the terms of a favorable settlement, the parents are prevailing parties under *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Hum. Res.*, 532 U.S. 598 (2001). In so holding, the court read *Buckhannon* narrowly and ensured that parties who pursuing administrative remedies can recover attorneys’ fees even though a judge does not rule on the case.

In a separate opinion one year after *A.R. ex rel. R.V.*, Judge Sotomayor wrote for the court identifying the limits of that case. In *Mr. L. v. Sloan*, 449 F.3d 405 (2d Cir. 2006), she affirmed the district court’s denial of an attorneys’ fee request under the IDEA on the ground that the settlement reached by the parties was “purely private” and had not been sanctioned by the hearing officer or incorporated into the order of dismissal. In *Sloan*, the school board initiated proceedings to keep the child in special education classes over the parents’ objection. Soon thereafter, both parties informed the hearing officer that they were discussing a settlement. The officer then set a date by which the claim would be dismissed if the parties failed to reach an agreement. Although the parties reached

an agreement on certain issues, they could not agree on specific language. When the parents tried to recover attorneys' fees under the IDEA, the court refused. Judge Sotomayor held that because the settlement agreement between the parties had been reached privately, and the subsequent order of dismissal neither incorporated its terms nor precluded further proceedings, the order did not change the legal relationship between the parties as required by *Buckhannon*. Consequently, unlike the parents in *A.R. ex rel. R.V.*, these parents were not "prevailing parties" under *Buckhannon*.

Additionally, in *B. ex rel. M.B. v. East Granby Bd. of Educ.*, 2006 U.S. App. LEXIS 27014 (2d Cir. 2006), Judge Sotomayor vacated in part a district court's award of attorneys' fees in an IDEA claim. The plaintiffs in *East Ganby* were parents of a disabled student who sued the Connecticut Department of Education. They alleged that the Department's education plan was inadequate for their child's needs and sought tuition reimbursement from the state after enrolling her in private school. A state hearing officer ruled against their claim but awarded them attorneys' fees. On appeal, Judge Sotomayor remanded the case. First, she held that only a district court, and not an administrative hearing officer, can award fees. And, second, she determined that the hearing officer's award failed to calculate accurately the fees. Relying on circuit precedent, *I.B. v. N.Y. City Dep't of Educ.*, 336 F.3d 79 (2d Cir. 2003), she instructed the district court to use the 'lodestar approach' (hours worked are multiplied by a reasonable hourly rate) when calculating IDEA awards.

In *Vultaggio v. Board of Education*, 343 F.3d 598 (2d Cir. 2003) (*per curiam*), another IDEA case, Sotomayor joined an opinion narrowing the scope of the IDEA's fee provision. The court disagreed with a Ninth Circuit decision, *Lucht v. Molalla River Sch. Dist.*, 225 F.3d 1023 (9th Cir. 2000) that read the statute more broadly and awarded fees in a similar factual situation. In both cases, the issue was whether parents of students who prevailed against their respective school districts under state Complaint Resolution Procedures ("CRP") were entitled to recover attorneys' fees under the IDEA. The statute requires states to establish compliant procedures such as CRPs, and provides for impartial due process hearings. 20 U.S.C. §§ 1415(a), 1415(f)(1). In both *Vultaggio* and *Lucht*, the parents prevailed under CRPs but not impartial due process hearings. Both sought fees under the IDEA. The Ninth Circuit interpreted IDEA's fee provision language broadly, finding that it did not expressly limit its application to impartial due process hearings. Sotomayor took a more restrictive view. The *per curiam* opinion held that a party who pursued a CRP was *not* entitled to recover fees under the IDEA. The court carefully reviewed the text of the statute and its accompanying regulations, and found that both were decisive in limiting the reach of the IDEA fee provision to only those actions which were specifically described in the statute itself. Relying on the Supreme Court's admonition in *Buckhannon* that "parties are ordinarily required to bear their own attorneys' fees," and the requirement that any statutory exception must be explicit, the court declined to award fees incurred in CRPs.

In several civil rights cases, Judge Sotomayor as a district court judge awarded fees to prevailing parties, but reduced the amounts awarded. In *National Helicopter Corp. v. City of New York*, 1999 U.S. Dist. LEXIS 11702, for example, Sotomayor held that the plaintiff helicopter company was a "prevailing party" entitled to recover fees even though it ultimately succeeded on only three of its seven claims. She further rejected the defendant's argument that fees were inappropriate under 42 U.S.C. § 1988 because the sole constitutional basis for the plaintiff's partial victory was the Supremacy Clause, which is not by itself enforceable under 42 U.S.C. § 1983. Judge Sotomayor noted that the plaintiff's Supremacy Clause claims were pendent upon other claims that *are* enforceable under § 1983. Even though those claims had not been resolved on the merits, she held that a fee award was appropriate since the § 1983 claims were not frivolous.

Although Sotomayor recognized National Helicopter's right to recover some fees as the prevailing party, she emphasized that the entitlement was limited only to a "reasonable" fee. Because National Helicopter had lost the most significant claims it pursued, she reduced the overall fee award accordingly. She took a similar approach in *Greenbaum v. Svenska Handelsbanken*, 998 F. Supp. 301 (1998), a Title VII case in which Judge Sotomayor awarded fees to the partially successful plaintiff but reduced the award to account for claims the plaintiff had lost. *See also* *Henriquez v. Chater*, 1997 U.S. Dist. LEXIS 1024 (awarding fees to plaintiff under the Equal Access to Justice Act but slightly reducing the amount to reflect corrected billing rates); *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129 (2d Cir. 2008) (affirming reduced fee award to class counsel).

In *Mid-Hudson Catskill Rural Migrant Ministry, Inc. v. Fine Host Corp.*, 418 F.3d 168 (2d Cir. 2005), Judge Sotomayor wrote for a three-judge panel that affirmed the prevailing plaintiff's right to recover attorneys' fees under an indemnification agreement, but limited that fee award to \$1,000 under the terms of plaintiff's fee agreement. Although the amount of fees requested was substantially higher, the court took issue with the terms of the fee agreement, which provided for a fee of "either 1/3 of any gross settlement or judgment, or the amount of fees received from defendants . . . whichever is greater." *Id.* at 179 (emphasis in original). Because the jury awarded damages of \$3,000 the district court awarded a fee of \$1,000, or 1/3 of the verdict. Judge Sotomayor noted that the plaintiff might have been entitled to a greater fee if the fee agreement had been drafted differently.

In *Garcia v. Yonkers Sch. Dist.*, 561 F.3d 97 (2d Cir. 2009), Sotomayor joined a panel decision that vacated a fee award under 42 U.S.C. § 1988 on the ground that the claimants were not "prevailing parties" because the trial court had not entered either the temporary restraining order or preliminary injunction they had sought, but merely made oral comments on the record suggesting he would. Accordingly, under *Buckhannon*, there had been no change in the legal relationship between the parties sufficient to support the conclusion that one party had prevailed.

In many of Sotomayor's cases addressing attorneys' fees, the awards were sought or granted as Rule 11 sanctions. Rule 11 prohibits lawyers from filing with the court any document for improper purposes, such as to harass or delay the resolution of a claim. In these cases, Judge Sotomayor focused heavily on whether the party against whom sanctions were sought had been afforded sufficient process. For example, in a *per curiam* opinion, a three-judge panel on which Sotomayor sat vacated in part a district court's sanctions order in part on the ground that it failed to afford the sanctioned party adequate notice and an opportunity to respond. *Nuwesra v. Merrill Lynch Fenner & Smith Inc.*, 174 F.3d 87 (2d Cir. 1999). Sotomayor wrote for panels reaching a similar result in *Martens v. Smith Barney, Inc.*, 273 F.3d 159, 179 (2d Cir. 2001) ("[W]e find that the district court failed to give 'specific notice of the conduct alleged to be sanctionable and the standard by which that conduct will be assessed.'"), and *Storey v. Cello Holdings, L.L.C.*, 347 F.3d 370, 389 (2d Cir. 2003) (holding that even where court found defendant's statements "highly suspect," such statements could not support sanctions where defendant "did not receive proper notice of the impending sanctions with regard to these statements."). Judge Sotomayor's due process concerns even caused her to overrule her own sanctions award in *Ping He Co. Ltd. v. Nonferrous Metals Inc.*, 1999 U.S. Dist. LEXIS 7299 (S.D.N.Y. 1999). After the court reviewed and corrected a series of orders entered in the case docket in response to multiple motions for sanctions and for summary judgment, she vacated her own order sanctioning defense counsel on the grounds that "[t]he Court

cannot be certain that it afforded [defense counsel] sufficient notice prior to imposing sanctions under Rule 11.” *Id.*

Overall, Judge Sotomayor’s rulings on fee petitions, both as a trial and appellate judge, demonstrate a consistent, careful adherence to statutory text and contractual terms, and a rigorous regard for Supreme Court precedent. Judge Sotomayor balances respect for the statutory rights of prevailing plaintiffs to recover the costs of litigation with the rights of opposing parties to avoid unreasonable, excessive and unwarranted charges.

Class Actions

Judge Sotomayor has a moderate record on class action litigation. In 2001, she wrote an opinion affirming certification of a large antitrust action by retailers. *In re Visa Check*, 280 F.3d 124 (2d Cir. 2001). She adopted a flexible approach to certification that reserved fact-finding and weighing of expert opinions until later in the case. Subsequently, she joined a unanimous panel in abandoning the reasoning of that decision, instead following several other circuits in adopting a far stricter approach that would bar many class actions. *In re Initial Public Offering Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006). And, in *Dabit v. Merrill Lynch*, 395 F.3d 25 (2d Cir. 2005), Judge Sotomayor allowed a class action suit to proceed against the investment firm that was based on state law theories, a matter of first impression in the circuit.

Most recently, she joined a unanimous panel in holding that a credit card company could not require that all card users waive their right to proceed in a class action. *In re American Express Merchants’ Litig.*, 554 F.3d 300 (2d Cir. 2009). The panel concluded that banning a class action suit violated federal law because it “would grant Amex de facto immunity from antitrust liability by removing the plaintiffs’ only reasonably feasible means of recovery.” A petition for cert in this case is currently pending before the Supreme Court.

Statutes of Limitation

Much like her rulings in other access to justice issues, Judge Sotomayor’s opinions addressing statutes of limitation are measured and highly fact specific. For example, in a case involving workplace discrimination, *Cruz v. Coach Stores, Inc.*, 202 F.3d 560 (2d Cir. 2000), Judge Sotomayor reversed a district court ruling granting summary judgment in favor of Coach Stores and found that the facts presented supported a hostile work environment claim. Ms. Cruz was subjected to multiple counts of sexual harassment and racial hostility. Although Judge Sotomayor allowed her claim to proceed, she distinguished among the acts of managers and co-workers. She held that sexual harassment allegations filed by Cruz against a co-worker who had left the company four years before Cruz filed an EEOC charge were time-barred. Judge Sotomayor further held that the co-worker’s behavior was too far removed from recent discriminatory behavior to form the basis of a “continuing violation” claim, which would have extended the time for filing. She found that there was no indication the Coach employees acted in concert, or “that their behavior was related in any way other than to be similarly offensive.” *Id.* at 569. And, in *Washington v. County of Rockland*, 373 F.3d 310 (2d Cir. 2004), Judge Sotomayor again rejected the continuing violation theory and dismissed as time-barred a civil rights claim filed by African American police officers against their county sheriff’s department.

On an issue of first impression, Judge Sotomayor wrote for a unanimous panel interpreting the statute of limitations governing a criminal claim to permit the indictment of an illegal alien. *U.S. v. Acevedo*, 229 F.3d 350 (2d Cir. 2000). Under federal law, an illegal entry charge must be brought within five years of the “completion” of the crime. The defendant was a former legal alien who was deported following a felony conviction. In 1991, he reentered the United States, presenting his social security card, passport, invalid green card, and his real name. In 1994 he was arrested and sentenced to a term of three to six years imprisonment. While in jail, correctional authorities contacted the INS and in 1997, six years after he illegally entered the country, the United States attorney filed an indictment. Judge Sotomayor adopted an expansive interpretation of the statute. She found that although Acevedo presented immigration authorities with his real name in 1991, the statute of limitations wasn’t triggered until the immigration authorities became aware of his presence in 1995. She held that the authorities were not placed on notice because an invalid travel document, such as Acevedo’s invalid green card, conceals the illegality of a person’s presence.

But, in *Boykin v. KeyCorp*, 521 F.3d 202 (2d Cir. 2008), Judge Sotomayor overturned a district court ruling dismissing as time-barred allegations that KeyCorp bank violated the Fair Housing Act, 42 U.S.C. § 3601. Yvette Boykin, an African American, filed a *pro se* suit alleging that she had been discriminated against on the basis of her sex, race, and property location after she was denied a home equity loan. Although the lower court narrowly interpreted the two year statute of limitations to be tolled upon her receipt of a letter from the New York State Division of Human Rights, Judge Sotomayor disagreed. She held that the tolling period began later, upon receipt of final notice from the United States Housing and Urban Development agency.

Conclusion

In sum, Judge Sotomayor’s record on the bench is one of a careful, cautious and thoughtful jurist. In matters related to access to the courts, she faithfully follows precedent, and defers to Congressional intent when interpreting statutes granting access to courts. Her rulings are well within the legal mainstream, and her moderate approach to these issues is unlikely to cause a philosophical shift among the Justices on the Supreme Court.