**Report on Judge Sonia Sotomayor's**
**Civil Rights & Constitutional Protections Record**

Judge Sotomayor's record in adjudicating civil and constitutional rights is consistent with her record on the bench in other areas. She is a model of judicial restraint, acutely and openly conscious of the limits imposed by her role as a judge. Her opinions thoroughly recount and dissect the facts and contain extensive citation to precedent. She tends to address meticulously every contention raised by the parties. Her reading of statutes is driven by conventional attention to the text and traditional indicators of the intent of Congress. Indeed, she does not hesitate to base her decisions on the plain language of a statute where she believes it fully addresses the issue. When she finds that the matter before her is not squarely addressed by precedent, Judge Sotomayor tends to rule narrowly and move the law in small increments, rather than taking large or bold steps. Her approach is very much that of a traditional common law judge.

While Judge Sotomayor has refrained from aggressively interpreting statutes or the Constitution, she has paid consistent attention to matters of process, including procedural due process. She insists that individuals in the justice system are entitled to adequate notice, a right to be heard, and representation. She has shown particular attention to the procedural rights of individuals who are less likely to be able to fend for themselves.

Regarding civil rights protections against discrimination, Judge Sotomayor has not departed from her cautious and incremental approach. On matters of employment discrimination, she has ruled for both plaintiffs and defendants, and her rulings are largely unexceptional. As discussed in this report, she has addressed discrimination on the basis of race, gender, disability, and age, and her record is consistently balanced.

Two race related cases have gathered disproportionate attention: *Ricci v. DeStefano* and *Hayden v. Pataki*. *Ricci*, the challenge to New Haven's refusal to certify the results of its test for firefighter promotions, was a unanimous summary affirmance by a panel on which Judge Sotomayor sat. Despite the furor surrounding the decision, it was a modest application of longstanding civil rights precedent to defer to the actions of a local government trying voluntarily to comply with civil rights law. The Supreme Court's reversal of the panel's decision says little about Judge Sotomayor's fitness for the Supreme Court. The Supreme Court created a new standard to govern the case, which Judge Sotomayor could not have applied at the Court of Appeals level. In addition, Justice Souter, whom she will replace, voted to affirm her decision.

In *Hayden*, the plaintiffs alleged that New York's disenfranchisement of felons violated the Voting Rights Act. Dissenting from a divided *in banc* court, Judge Sotomayor would have held that the Voting Rights Act applied and the case should have been allowed to proceed. Her

opinion displays judicial modesty, relying on the plain test of the statute, and arguing that if the text were to be rewritten it was up to Congress, and not the court, to do so. Little noticed, of course, is the fact that she did not reach the merits of the plaintiffs' claim.

Judge Sotomayor has not addressed some hot-button constitutional issues while on the bench, including abortion and the death penalty. As a result, critics have mined her extra-judicial statements and activities for some indication of her views. But, surely, her seventeen years on the bench remain the best predictor of her likely behavior as a Justice.

Judge Sotomayor has given unpopular speech First Amendment protection and she has a strong record of protecting the exercise of religion. Though she has been attacked for refusing to extend the protections of the Second Amendment to block state action, her ruling, once again, was a model of restraint in which she pointed out that she was bound by Supreme Court precedent and it was up to the Supreme Court to change its precedents. Her decision was recently seconded by a panel of the Seventh Circuit featuring Judges Easterbrook and Posner. Similarly, her takings jurisprudence has been governed by the Supreme Court's decision in *Kelo* as a precedent and characteristically reflects deference to the decisions of local government.

In the following report, we examine Judge Sotomayor's record in these and other areas of civil and constitutional rights in greater detail.

## CIVIL RIGHTS

### Race

Opponents of Judge Sotomayor's nomination referred to comments she made during a speech as evidence that she is "racist," and by implication is likely to decide cases based on her racial views. There is no evidence of any racial bias in any of the hundreds of decisions Judge Sotomayor has written. To the contrary, her jurisprudence in cases involving claims of racial discrimination is very much like her jurisprudence in other areas of the law. She is deliberate, measured, and adheres closely to precedent.

#### *Voting Rights*

Section 2 of the Voting Rights Act provides that "no voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." Judge Sotomayor participated in two cases involving this section of the Voting Rights Act, both of which challenged New York's statute disenfranchising felons. *Muntaqim v. Coombe*, 449 F.3d 371 (2d Cir. 2006) (in banc), *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006).

The *Muntaqim* and *Hayden* cases presented the same issue: whether New York's disenfranchisement of felons and parolees was a denial of the right to vote in violation of the

Voting Rights Act. In *Muntaquim,* the Second Circuit, in banc, determined that the plaintiff did not have standing to sue, thus avoiding the substantive issues. *Muntaqim*, 449 F.3d at 375-76.

In *Hayden*, the Second Circuit in banc upheld the New York law prohibiting felon voting, but Judge Sotomayor wrote a separate dissent and joined a dissent by Judge Parker. The primary dissent written by Judge Parker and joined by Judge Sotomayor argued that the majority erred in concluding that the Voting Rights Act did not apply and concluded that the plaintiffs should be permitted to offer proof that they were unlawfully disenfranchised. *Hayden*, 449 F.3d at 343.

In her separate dissent, Judge Sotomayor wrote to make clear that she believed that this was an easy case that should be resolved based on the plain language of the statute. *Id.* at 367-68. Judge Sotomayor supported a strict reading of the plain language of the Voting Rights Act and her approach urged judicial restraint and deference to Congress. She reasoned that, by its terms, the Voting Rights Act applies to all voting qualifications, including felon disenfranchisement. *Id.* She criticized the majority for stretching to find that Congress intended to shield felony disenfranchisement laws from the Voting Right Act and concluded that "even if Congress had doubts about the wisdom of subjecting felony disenfranchisement laws to the results test of [the Voting Rights Act], I trust that Congress would prefer to make any needed changes itself, rather than have courts do so for it." *Id.* at 368.

***Employment Discrimination***

One of Judge Sotomayor's most talked about decisions is *Ricci v. Destefano*, 530 F.3d 87 (2d Cir. 2008), *denial of re-hearing en banc,* 530 F.3d 88 (2d Cir. 2008). In *Ricci*, seventeen white firefighters and one Hispanic firefighter challenged New Haven's decision to set aside the results of promotional exams that would have resulted in no African-Americans being promoted. The district court agreed with the City and dismissed the plaintiffs' claims on summary judgment. *Ricci v. Destefano*, 554 F.Supp.2d 142 (D.Conn. 2006). Judge Sotomayor sat on a three judge panel that issued a short *per curiam* opinion affirming for the reasons given by the district court in its "thorough, thoughtful, and well-reasoned opinion." *Ricci v. Destefano*, 530 F.3d 87 (2008). The court went on to note that although it sympathized with the plaintiffs' frustration and appreciated their efforts to pass the exam, the City was simply trying to meet its legal obligations to prevent and avoid racial discrimination.

In an order issued days later, a majority of the court, including Judge Sotomayor, voted to deny re-hearing *in banc*. *Ricci v. Destefano*, 530 F.3d 88 (2d Cir. 2008). The decision prompted a protest from some members of the court who argued that the Second Circuit had an obligation to review the matter rather than leave the district court's opinion as the guiding law of the circuit. *See id*. at 94 (Cabranes, J., dissenting). Notably, the dissenters did not take issue with the court's decision on the merits. *Id.* The Supreme Court reversed. It created a new standard for evaluating reliance on disparate impact as a defense to an allegation of intentional discrimination. Judge Sotomayor was bound to apply Second Circuit precedent and could not have anticipated or relied on the Court's new standard.

In addition to *Ricci*, Judge Sotomayor has heard other cases involving a promotional exam or a purportedly race-conscious remedies. When considered as a whole, these cases

illustrate Judge Sotomayor's fact-specific approach and reveal no inclination to rule one way or another when deciding race-based or other discrimination claims. For example, in *Atkins v. Westchester Cty. Dept. of Soc. Serv.*, 2002 U.S.App. LEXIS 5241 (2d Cir. 2002), she joined an opinion affirming the dismissal of a Title VII challenge by African-American county employees to a promotional exam. The court found the mere fact that the test scores of white applicants "were clustered at the top of the rankings" was not alone sufficient to support a discrimination claim. *Id.* at *3. But, in *Amador v. Hartford*, 2001 U.S.App. LEXIS 23189 (2d Cir. 2001), Judge Sotomayor joined a panel that vacated the lower court's dismissal of a gender discrimination claim by eighteen male police officers also challenging a promotional exam.

In many instances, Judge Sotomayor applied Second Circuit precedent to bar plaintiffs' claims based on procedural defects. *See*, *e.g., McNeill v. St. Barnabas Hosp.,* 1997 U.S. Dist. LEXIS 18606 (S.D.N.Y. 1997) (finding plaintiff's Title VII and § 1981 claims for discriminatory termination were time barred, and dismissing plaintiff's retaliation claim after finding that plaintiff failed to show any evidence that the defendant's reasons for its treatment of her were pretext for discrimination); *Washington v. County of Rockland,* 373 F.3d 310 (2d Cir. 2004) (ruling that plaintiffs' § 1981 claim of being singled out for discriminatory administrative disciplinary proceedings was untimely after finding no continuing violation).

In other cases she allowed claims to proceed. *See Mitchell v. Reich,* 1994 U.S. Dist. LEXIS 11712 (S.D.N.Y. 1994) (denying a defendant's motion for judgment on the pleadings because plaintiff had pleaded sufficient allegations to establish a *prima facie* case of racial discrimination or retaliation, and stating that "plaintiff should not be barred at this early stage in the litigation"); *Cartagena v. Ogden*, 995 F. Supp. 459 (S.D.N.Y. 1998) (denying defendant's motion for summary judgment because plaintiff alleged sufficient "direct evidence" of discrimination to reach a jury); *Gilani v. NASD,* 1997 U.S. Dist. LEXIS 12287 (S.D.N.Y. Aug. 1997) (dismissing plaintiff's race discrimination and hostile work environment claims as procedurally defective, but allowing plaintiff's retaliation claims). And, she has been open to novel claims of race and national origin discrimination. *See McNeil v. Aguilos,* 831 F.Supp. 1079 (S.D.N.Y. 1993) (allowing Title VII claims of English-only speaker to proceed against non-English coworker communications).

***Education, Housing, and Travel***

Judge Sotomayor has also ruled in cases with allegations of racial discrimination in other contexts. Consistent with her usual practice, Judge Sotomayor has approached each of these cases with no apparent preconceptions and has thoroughly explored the facts.

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, [the student] was entitled to an equal opportunity to learn, and failing that a full hearing in court." *Id.* at 153.

Judge Sotomayor, in a case brought under the Fair Housing Act, allowed Yvette Boykin, an African American plaintiff to proceed with her claim against a bank that denied her a home equity loan. *Boykin v. KeyCorp*, 521 F.3d 202 (2d Cir. 2008). The plaintiff, acting as her own lawyer, alleged the bank discriminated against her because of her race, sex, and property location. Writing for a Second Circuit panel, Judge Sotomayor reversed the district court's judgment that Ms. Boykin failed to file her complaint on time and sent the case back to the district court for further proceedings.

Yet, in *King v. American Airlines, Inc.*, 284 F.3d 352 (2d Cir. 2002), she wrote for a unanimous panel that rejected a claim of racial discrimination brought by two African American airline passengers who were bumped from a flight and whose seats were given to white passengers. Judge Sotomayor dismissed their claims holding that their suit was time barred and preempted by the Warsaw Convention, an international treaty governing air travel.

**Gender**

Judge Sotomayor's decisions on Title VII sex discrimination claims show that she is receptive to plaintiffs' claims of gender discrimination, especially those involving hostile work environments. In the majority of the sex discrimination cases over which she presided, Judge Sotomayor sided with the plaintiffs. As in other areas of the law, Judge Sotomayor adhered faithfully to Second Circuit precedent when reviewing sex discrimination claims and on at least two occasions her rulings narrowed a plaintiff's ability to seek relief for alleged sex discrimination. *Baba v. Japan Travel Bureau International,* 1995 U.S. Dist. LEXIS 1005 (S.D.N.Y. Jan. 27, 1995), *aff'd* by 111 F.3d 2 (2d Cir. 1997), (ruling that Title VII provides no explicit or implied cause of action against EEOC for a claim that it failed to properly investigate or process an employment discrimination charge); *Williams v. R.H. Donnelly Corp.,* 368 F.3d at 128 (2d Cir. 2004) (denial of employee's request for a lateral transfer is not adverse employment action for purposes of establishing a *prima facie* case of discrimination).

When reviewing procedural hurdles to Title VII sex discrimination claims, Judge Sotomayor was often willing to preserve a plaintiff's claim. For example, in *Black v. N.Y.U. Medical Center,* 1996 U.S. Dist. LEXIS 7178 (S.D.N.Y. 1996), Judge Sotomayor allowed an associate professor's claim that she was not promoted based on her gender to go forward even though the defendant argued that the plaintiff filed too late. Judge Sotomayor based her decision on a finding that the plaintiff's allegations demonstrated a continuing violation and the last act of discrimination alleged fell within the limitations period. In addition, Judge Sotomayor gave the plaintiff a chance to add facts to her Equal Pay Act claim which otherwise might have been dismissed as too vague to go forward.

In an interesting case, Judge Sotomayor's agreed with the result reached by her colleagues on the Second Circuit, but disagreed with their reasoning. In *Higgins v. Metro-North Railroad Co.,* 318 F.3d 422 (2d Cir. 2003), the plaintiff brought tort claims against her employer under the Federal Employers' Liability Act alleging that verbal and physical harassment at work caused her latent multiple sclerosis to become symptomatic. Judge Walker's majority opinion affirmed the grant of summary judgment to defendant. Judge Sotomayor, concurred in the result, but disagreed with the majority's sole focus on the sexual nature of the alleged harassment. *Id.*

at 428-29. Instead, she viewed the record through the wider lens of inappropriate conduct that might amount to more general abuse of the employees, ultimately concluding that the plaintiff had failed to allege a physical injury necessary to sustain her negligence claims. *Id.* at 431.

***Hostile Work Environment***

On the Second Circuit, Judge Sotomayor authored two lengthy opinions in which she vacated a district court's ruling and remanded in favor of a hostile work environment claim. In *Raniola v. Bratton,* 243 F.3d 610 (2d Cir. 2001), Judge Sotomayor, writing for a unanimous panel, concluded that a New York City Police Department officer presented enough evidence support a jury verdict in her favor by showing that: her supervisor targeted her with sex-based derogatory remarks; her work assignments were disproportionately burdensome; she was sabotaged at work; and a supervisor threatened her in a meeting saying that if she "opens her mouth, I am going to put one in her fucking head." *Id.* at 618-23.

In *Cruz v. Coach Stores, Inc.,* 202 F.3d 560 (2d Cir. 2000), Judge Sotomayor, again writing for a unanimous panel, agreed with the district court that most of plaintiff Yvette Cruz's claims could not go forward, but reversed and remanded with respect to her hostile work environment claim. Judge Sotomayor relied on Ms. Cruz's testimony about her Human Resources Manager's behavior that included: repeated racially derogatory remarks, repeated statements that she should be barefoot and pregnant, and a tendency to stand very close to women and look at them "up and down in a way that's very uncomfortable." *Id.* at 570-71. Judge Sotomayor found that a reasonable jury could view the racial and sexual harassment as severe and pervasive enough to alter the conditions of her working environment. *Id.* at 571. Judge Sotomayor declined to reach the open question as to whether a plaintiff may aggregate evidence of racial and sexual harassment to support a hostile work environment claim where neither charge could survive on its own. *Id.* at 572 n.7.

***Punitive Damages and Other Relief under Title VII***

In 1997, Judge Sotomayor presided over a high-profile sex discrimination trial in which a female bank executive sued her employer for failure to promote, disparate treatment, and retaliation. The jury returned a verdict for Plaintiff of $320,000 in back pay and $1.25 million in punitive damages. *See* Benjamin Weiser, "Jury Finds Bank Must Pay Damages for Sex Discrimination," *New York Times,* May 20, 1997, at B6. On review of post-trial motions, Judge Sotomayor left the punitive damage award in place by holding that: the jury could find punitive damages based on a preponderance of the evidence instead of the more demanding clear and convingcing standard; punitive damages were available under both Title VII (which capped damages at $300,000) and the New York City anti-discrimination law (which has no damages cap); and that the damages assessed by the jury were reasonable and not excessive. *Greenbaum v. Svenska Handelsbanken,* 979 F. Supp. 973 (S.D.N.Y. 1997); 26 F. Supp. 2d 649 (S.D.N.Y. 1998); 67 F. Supp. 2d 228 (S.D.N.Y. 1999).

## Disability

In this area of law, Judge Sotomayor has taken strong positions protecting the rights of individuals with disabilities. *See, e.g.*, *Capobianco v. City of New York*, 422 F.3d 47 (2d Cir. 2005) (reversing summary judgment for employer, holding that worker with visual impairment may have disability); *Price v. City of New York*, 2008 U.S. App. LEXIS 3133 (2d Cir. 2008) (reversing summary judgment and remanding to district court issue of whether task was essential function of the job); *Norville v. Staten Is. Univ. Hosp.*, 196 F.3d 89 (2d Cir. 1999) (reversing jury verdict for employer refusing to reassign employee to comparable position; jury received wrong jury instruction); *Persons with Disabilities v. Kirk*, 448 F.3d 119 (2d Cir. 2006) (holding that federal law governing care and treatment of institutionalized individuals required state health department to disclose peer review records of patients who died in their care).

Although she robustly interprets statutory mandates, she does so within the limits of the law. *See, e.g.*, *Johnson v. New York Hosp*., 189 F.3d 461 (2d Cir. 1999) (giving substantial deference to employer determination of essential job functions); *Lloret v. Lockwood Greene Engineers, Inc.*, 1998 U.S. Dist. LEXIS 3999 (S.D.N.Y. 1998) (finding that post-termination depression is not sufficient to warrant tolling of the statute of limitations). In a matter of first impression in the Circuit, Judge Sotomayor authored a decision holding that "mixed motive" analysis – a pleading standard allowing discrimination claims to survive when both discriminatory and non-discriminatory motives are in play – applies to ADA employment cases. *Parker v. Columbia Pictures Indus.*, 204 F.3d 326 (2d Cir. 2000). This allowed a plaintiff to present his case to a jury where he alleged that he was fired only in part due to his disability.

On more than one occasion, Judge Sotomayor filed rigorous dissents highlighting the majority's lack of attention to the needs of incapacitated people and writing that the court should have offered greater protection. *E.E.O.C. v J.B. Hunt Transp.*, 321 F3d 69 (2d Cir. 2003) (dissenting from panel holding that truck driver applicants suffering from sleep problems were not disabled); *Neilson v. Colgate-Palmolive Co.*, 199 F.3d 642 (2d Cir. 1999) (dissenting from panel upholding settlement agreement after appointment of guardian *at litem* who usurped plaintiff's ability to negotiate terms).

Judge Sotomayor also held that prevailing parties in administrative proceedings are entitled to attorneys fees in Individuals with Disabilities in Education Act cases. *A.R. ex rel. R.V. v. New York City Dep't of Educ.*, 407 F.3d 65 (2d Cir. 2005). And, she held that the law's "stay put" provisions, which require a school to keep current student services during a placement dispute, are not subject to administrative exhaustion requirements. *Frank G. v. Board of Educ. Of Hyde Park*, 459 F.3d 356 (2d Cir. 2006). This result is similar to that recently reached by the Supreme Court in *Forest Grove Sch. Dist. v. T. A*., 2009 U.S. LEXIS 4645 (June 22, 2009).

## Age Discrimination

Judge Sotomayor has written opinions in relatively few age discrimination cases. In these, she ruled for the plaintiffs and defendants in roughly equal measure. *See, e.g., EEOC v. Doremus & Co.*, 921 F. Supp. 1048 (S.D.N.Y. 1995) (holding that plaintiff presented sufficient evidence of age discrimination to survive summary judgment), *Lanahan v. Mutual Life Ins. Co.*,

15 F. Supp. 2d 381 (S.D.N.Y. 1998) (entering summary judgment for the defendant where plaintiff did not produce credible evidence that he suffered workplace age discrimination).

On the Second Circuit, most of the age discrimination cases in which Judge Sotomayor participated were cases that turned on the particular facts in the record, and many of the appeals were decided in unsigned *per curiam* opinions or unpublished summary orders. *See, e.g. Lee v. Am. Int'l Group, Inc.,* 31 Fed. Appx. 764 (2d Cir. 2002) (summary order), *O'Hara v. Mem'l Sloan-Kettering Cancer Ctr.,* 79 Fed. Appx. 471 (2d Cir. 2003) (summary order), *Mauro v. Southern New Eng. Telcomms., Inc*., 208 F.3d 384 (2d Cir. 2000) (*per curiam*).

Judge Sotomayor has only written once – in dissent – in an age discrimination case. In an opinion entitled *Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2006) and discussed in further detail elsewhere in this report, Judge Sotomayor objected to the majority's dual holding that the Religious Freedom Restoration Act ("RFRA") amended the Age Discrimination in Employment Act ("ADEA") and that RFRA was constitutional. Judge Sotomayor took the position in dissent that the majority unnecessarily decided the constitutionality of RFRA when it could have, and should have, decided the case simply by holding that the "ADEA does not apply to employment suits brought against religious institutions by their spiritual leaders." *Id.* at 118-19.

In addition to this dissent, Judge Sotomayor was on the panel in several novel or interesting Second Circuit age discrimination cases. In *Cross v. New York City Transit Authority*, 417 F.3d 241 (2d Cir. 2005), the New York City Transit Authority appealed a judgment entered after a jury found that it discriminated against the plaintiff employees based on their age by denying them training and demoting them. The Transit Authority argued that the ADEA did not authorize the imposition of liquidated damages against government employers. Judge Raggi, writing for a unanimous panel that included Judge Sotomayor, examined the text of the ADEA and held that liquidated damages could be awarded in cases where employers willfully engage in age discrimination. *Id.* at 254-55. In *McGinty v. New York*, 251 F.3d 84 (2nd Cir. 2001), Judge Cardamone wrote an opinion, in which Judges Sotomayor and Katzmann joined, holding that the New York State and Local Employees Retirement System was an arm of the state entitled to Eleventh Amendment immunity from suit. And, in *Rose v. N.Y. City Bd. of Educ.,* 257 F.3d 156 (2d Cir. 2001), Judge Sotomayor was part of a unanimous panel that granted an age discrimination plaintiff a new trial after the district court improperly charged the jury.

**LGBT**

Judge Sotomayor has encountered very few cases addressing the rights of LGBT individuals. Her limited rulings, however, display sensitivity towards those bringing claims of discrimination on the basis of their sexual orientation. In *Holmes v. Artuz*, 1995 U.S. Dist. LEXIS 15926 (S.D.N.Y. 1995), Judge Sotomayor protected the rights of a gay prisoner who sued the prison *pro se* after he was removed from his job there because of his homosexuality. Despite Judge Sotomayor's acknowledgement that a prison inmate has no constitutional right to a specific prison job or to keep that job, she denied defendants' motion to dismiss and directed the court's Pro Se Office to try to find the plaintiff a lawyer. She found a case could be made that removing a person from a job because of that person's sexual orientation could violate the equal protection clause of the constitution. Her analysis, that open hostility toward LGBT individuals

is not a legitimate state interest, was recognized and adopted by the Supreme Court in *Romer v. Evans*. 517 U.S. 620 (1996). During her confirmation hearing to the Second Circuit, she was questioned about this case by both Senators Ashcroft (on the basis of the ruling) and Sessions (about the fact the she allowed a prisoner the opportunity to find *pro bono* counsel).

Judge Sotomayor also sat on a Second Circuit panel that issued a summary order after considering the case of a gay man who sued the City of New York alleging that his supervisor claimed he was not a "real man" and tried to "toughen him up" by assigning him work involving heavy lifting. *Miller v. City of New York*, 2006 U.S. App. LEXIS 10730 (2d Cir. April 26, 2006). The district court held that the plaintiff, Mr. Miller, failed to offer sufficient evidence that he suffered discrimination on the basis of sex, as opposed to sexual orientation. The Second Circuit disagreed, holding that Mr. Miller presented enough evidence that he was discriminated against because of his failure to conform to gender norms and thus could go forward with his sex discrimination case.

## CONSTITUTIONAL LAW

### First Amendment

During her seventeen years on the bench, Judge Sotomayor has emerged as a strong defender of First Amendment free speech rights, protecting a citizen's right to be free from undue governmental interference even in the face of unpopular and offensive conduct. In *Pappas v. Giuliani*, 290 F.3d 143, 154 (2d Cir. 2002), Judge Sotomayor dissented from an opinion upholding the firing of a New York City Police officer who was caught distributing racially offensive and anti-semitic screeds. She acknowledged that although she personally found "the speech in this case patently offensive, hateful, and insulting," it was entitled to First Amendment protection. *Id.* And in *Okwedy v. Molinari*, 333 F.3d 339 (2d Cir. 2003), she joined a unanimous panel holding that a public official violated First Amendment by threatening to force the removal of offensive billboards. Yet, Judge Sotomayor's rulings has applied limits to speech rights where appropriate. In *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008), she joined a unanimous panel upholding the decision of school officials to disqualify a student from running for student government office after she posted "a vulgar and misleading message" about a school event on her personal blog.

Applying the First Amendment, Judge Sotomayor has recognized the right of citizens to meaningfully participate in electoral contests. In *Lopez Torres v. New York State Bd. of Elections*, 462 F.3d 161 (2d Cir. 2006), she joined a unanimous opinion affirming a the district court's ruling enjoining the State of New York from proceeding under a party-based system of electing trial court judges that made it difficult for candidates who were not the favorites of a political party. The court reasoned that the First Amendment protected voters and candidates rights to have a "realistic opportunity to participate in [a political party's] nominating process, and to do so free from burdens that are both severe and unnecessary." Id., at 187. The Supreme Court reversed, writing that there is no "constitutional right to have a 'fair shot' at winning the party's nomination." *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196 (2008). Justice Stevens, in a concurrence, wrote "to emphasize the distinction between constitutionality

and wise policy," and concluded with Justice Marshall's remark that "The Constitution does not prohibit legislatures from enacting stupid laws."

In a case involving the right to political association, *Kraham v. Lippman,* 478 F.3d 502 (2d Cir. 2007), Judge Sotomayor wrote for a unanimous panel affirming summary judgment for the state. The plaintiff alleged that court rules prohibiting high-ranking members of political parties and their family members from receiving appointments as court fiduciaries violated her right of political association. The court rejected this claim and found that the intent of the rule – to protect the integrity and appearance of integrity of the judicial system – far outweighed any imposition it might impose on party leadership. *Id.* at 508.

**Second Amendment**

Judge Sotomayor has only twice considered a claim challenging restrictions on firearms. Both times the panels on which she sat affirmed the right of states to make and enforce gun control laws under the Second Amendment.

In *Maloney v. Cuomo,* 554 F.3d 56, 58 (2d Cir. 2009), the plaintiff was arrested for illegal possession of a "nunchaku" – a weapon consisting of two sticks connected by a chain. He challenged New York's statutory ban on nunchakus as an infringement of his Second Amendment right to keep and bear arms. The trial court rejected this argument. In a unanimous *per curiam* opinion, a Second Circuit panel that included Judge Sotomayor affirmed, citing longstanding direct precedent holding that the Second Amendment did not apply to state regulations, as opposed to federal regulations such as those at issue in the recent Supreme Court case involving gun rights in the District of Columbia. *Id.* at 58. The Seventh Circuit, in an opinion written by Judge Easterbrook, one of the nation's most prominent conservative jurists, recently agreed with the Second Circuit. *See Nat'l Rifle Assoc., Inc. v. Chicago,* 2009 U.S. App. LEXIS 11721, *4-5 (2d Cir. 2009).

Similarly, Judge Sotomayor was part of a panel that issued a summary order affirming a drug dealer's conviction and rejecting in a footnote his argument that New York's laws forbidding him from carrying a gun violated the Second Amendment. *United States v. Sanchez-Villar*, 99 Fed. Appx. 256 (2d Cir. 2004), vacated and remanded on other grounds by 544 U.S. 1029 (2005). The panel quoted longstanding Second Circuit precedent that "the right to possess a gun is clearly not a fundamental right." *Id.* at *5 n. 1.

**Eighth Amendment**

Judge Sotomayor's Eighth Amendment cases reveal a jurist who carefully considers the totality of the circumstances and decides cases on the specific facts before her. She maintains a balanced tone when ruling in favor of prisoners or prison officials. Judge Sotomayor's Eighth Amendment decisions also show her to be respectful of legal precedent and fair-minded in applying that precedent. The cases discussed below, which involve prisoner treatment and medical issues, illustrate Judge Sotomayor's measured approach to the Eighth Amendment.

When considering Eighth Amendment claims of prisoner mistreatment, Judge Sotomayor has decided cases for and against prisoners. In *Higgins v. Artuz*, 1997 U.S. Dist. LEXIS 12034 (S.D.N.Y. 1997), Judge Sotomayor ruled against an inmate who claimed he had been denied privileges as a member of the Honor Block of the prison because he encouraged other inmates to file grievances. The inmate's Eighth Amendment allegations centered on alleged verbal harassment and profanity. Judge Sotomayor's, in accordance with clear and ample precedent, held that the claims could not support a finding of an Eighth Amendment violation. The opinion also dismissed complaints about poor prison conditions holding that they amounted to inconveniences not deliberate indifference or wanton infliction of pain. By contrast, in *Dellamore v. Stenros*, 886 F.Supp. 349 (S.D.N.Y. 1995), Judge Sotomayor found that a prisoner's allegations that he was subjected to a body cavity search by corrections officers while unnecessarily handcuffed and held in a chokehold, could survive the Government's motion for summary judgment. Judge Sotomayor concluded that the evidence presented by the plaintiff could support a claim under the Eighth Amendment that the officers had used excessive force.

In several cases, Judge Sotomayor ruled in favor of plaintiff prisoners alleging Eighth Amendment claims arising out of improper medical treatment. For instance, in *Thomas v. Arevalo*, 1998 U.S. Dist. LEXIS 11588 (S.D.N.Y. 1998), a prisoner argued that the delay in diagnosis of and treatment for his detached retina which resulted in vision loss violated his Eighth Amendment rights. After a careful analysis of the facts under the "deliberate indifference to medical needs" standard, Judge Sotomayor denied the defendant state and private physicians' motions, finding that this was a clear case of serious medical need, and an issue of fact arose as to whether the doctors acted with "deliberate indifference." However, Judge Sotomayor granted the defendant nurses' motions for summary judgment, finding that the plaintiff presented no evidence against them. In *Holton v. Fraitellone*, 1997 U.S. Dist. LEXIS 8431 (S.D.N.Y. 1997), Judge Sotomayor concluded that an oral surgeon's failure to take x-rays and perform surgery on a prisoner who suffered from a degenerative and painful jaw condition, despite recommendations from ten other surgeons, pointed to deliberate indifference.

Judge Sotomayor has also decided against prisoners claiming Eighth Amendment violations based on their medical treatment. In *Vento v. Lord*, 1997 U.S. Dist. LEXIS 11022 (S.D.N.Y. 1997), Judge Sotomayor ruled against a prisoner who alleged that she did not receive proper x-rays. Judge Sotomayor concluded that the claim amounted to a disagreement with medical diagnoses and dissatisfaction with the medical treatment received and, as such, did not rise to the level of "deliberate indifference" required to sustain an Eighth Amendment claim. Similarly, in *Muhammad v. Francis*, 1996 U.S. Dist. LEXIS 16785 (S.D.N.Y. 1996), Judge Sotomayor granted prison officials' motion for summary judgment because their failure to refer an inmate to an orthopedic surgeon after complaints of leg pain did not rise to the requisite level of "deliberate indifference."

**Section 1983 Claims Alleging Violations of the Fourth Amendment**

A person wrongfully searched or falsely arrested in violation of his or her constitutional rights under the Fourth Amendment may bring a civil law suit for damages pursuant to Section 1983 of the Civil Rights Act. True to form, Judge Sotomayor has written careful, narrow decisions in this area, rarely finding a constitutional violation and always limiting the holding to the case at hand.

***Searches and Seizures***

Balancing homeland security against civil liberties, Judge Sotomayor ruled that a ferry company's practice of searching the carry-on bags of randomly selected passengers and inspecting randomly selected vehicles did not violate the Fourth Amendment. *Cassidy v. Chertoff,* 471 F.3d 67 (2d Cir. 2006). The Second Circuit held the government's "special needs" of fighting terrorism and the legislative authority given to the Coast Guard to devise security plans enjoyed deference such that the minimally intrusive nature of the search policy outweighed the plaintiffs' privacy interests.

Judge Sotomayor has also authored two separate opinions – one partial dissent, one dissent – reviewing allegedly unconstitutional strip searches. The first, *N.G. v. State of Connecticut,* 382 F.3d 225 (2d Cir. 2004), is noteworthy in light of the Supreme Court's ruling *Safford Unified School District v. Redding,* 557 U.S. __ (2009) (holding that strip-search of 13 year-old student was unreasonable because it was excessively intrusive in light of student's age, sex,and suspected infraction). In *N.G.,* Judge Sotomayor dissented in part, disagreeing with the majority's decision holding certain strip searches constitutional. She found that the government failed to demonstrate that its special needs overcame the privacy interests of emotionally troubled adolescents never charged with a crime and allowed for strip searches in the absence of individualized suspicion. *Id.* at 238. Taking care to describe the physical details of the strip searches, Judge Sotomayor wrote that the court should be especially wary of strip searches of children given how susceptible to influence and psychological damage they may be, in particular when dealing with children who may have been sexually abused. *Id.* at 239.

In *Kelsey v. County of Schoharie,* 2009 U.S. App. LEXIS 10985 (2d Cir. May 22, 2009), the majority reversed the district court's finding that a "clothing exchange procedure" for newly admitted jail inmates violated of the Fourth Amendment because it was a strip search executed without reasonable suspicion. In dissent, Judge Sotomayor accused the majority of assuming the wrong party's version of the facts and ignoring key testimony about the intrusiveness of the process. Judge Sotomayor would have affirmed the district court and ruled the practice unconstitutional. *Id.* at *31-45.

***False Arrest***

Judge Sotomayor has authored two opinions on the Second Circuit reviewing claims of false arrest in violation of the Fourth Amendment. In *Jaegley v. Couch,* Judge Sotomayor held that a plaintiff is not entitled to damages for false arrest so long as the arrest was supported by probable cause. 439 F.3d 149, 154 (2d Cir. 2006). In another unanimous decision, Judge Sotomayor denied a claim for damages by a man who was arrested for sexually abusing his daughter but never faced went to trial because the prosecution dropped the charges. *Smith v. Edwards,* 175 F.3d 99 (2d Cir. 1999). The Court held that no false arrest took place because, although information was withheld from the judge issuing the arrest warrant, that information would not have changed the judge's finding that there was probable cause for arrest. *Id.* at 104.

## Due Process

Judge Sotomayor is a defender of Due Process clause rights. She consistently protects individuals' rights to have a meaningful opportunity to be heard and participate in the legal process before their life, liberty, or property is taken away.

For example, in *Southerland v. Giuliani*, 4 Fed. Appx. 33 (2d Cir. 2001). Judge Sotomayor was part of a panel that issued a summary order that allowed a plaintiff to proceed with his case against New York's child welfare organization and some of its employees who took his children away from him without giving him a hearing. The panel reiterated Second Circuit precedent that "a state actor may not deprive a parent of the custody of his children without a pre-deprivation hearing unless the children are immediately threatened with harm, in which case a prompt post-deprivation hearing is required." *Id.* at 36 (internal quotations omitted). *See also Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002) (holding that police department policy of seizing and keeping vehicles driven by DWI defendants without a hearing violated due process); *Segal v. City of New York*, 459 F.3d 207, 218 (2d Cir. 2006) (a "reasonably prompt, post-termination name-clearing hearing" constitutes sufficient due process protection for a government employee alleging injury to her reputation).

In *Neilson v. Colgate-Palmolive Co.*, 199 F.3d 642, 658 (2d Cir. 1999), Judge Sotomayor issued a powerful dissent defending the due process rights of a mentally disabled woman in an employment suit against her employer. After the defendants learned that the plaintiff had been involuntarily committed to psychiatric hospitals since her employment ended, the district court ordered her to submit to a psychiatric examination and subsequently appointed a guardian *ad litem* without holding a hearing. The trial court approved a settlement negotiated by the guardian and the plaintiff, with the help of another guardian, objected. A majority of the Second Circuit approved what the trial court did, but Judge Sotomayor dissented arguing that the plaintiff's due process rights were violated when she was not given adequate notice of the implications of the appointment of a guardian *ad litem*. She argued that courts faced with mentally ill litigants "must go to greater lengths than would be necessary in the ordinary case." *Id.* at 658.

Judge Sotomayor has also defended the procedural due process rights of prisoners. In *Anderson v. Recore*, 446 F.3d 324 (2d Cir. 2006), she wrote for a unanimous panel that found the Department of Correctional Services violated a prisoner's right to notice and an opportunity to be heard before being removed from a temporary release program, even where the prisoner had received a disciplinary hearing before the removal. And in *Mills v. Fenger*, 216 Fed. Appx. 7 (2d Cir. 2006), Judge Sotomayor joined a unanimous panel to hold that a detainee's due process rights were violated when he was denied medical care for a ruptured tendon.

## Privacy and Reproductive Rights

Despite her lengthy career on the bench, Judge Sotomayor has never considered a direct challenge to a legislative restriction on abortion. She has, however, participated in a handful of decisions which relate to reproductive rights and which offer some insight into her views on privacy and family rights.

Judge Sotomayor authored several Second Circuit opinions in asylum cases involving forced family planning policies and other women's rights issues. Her most expressive opinion in the privacy arena is in *Lin v. United States Dep't of Justice*, 494 F.3d 296 (2d Cir. 2007), in which the Second Circuit, sitting *en banc,* denied automatic refugee status to spouses or unmarried partners of people who had been forced to undergo an abortion or involuntary sterilization as a result of China's family planning policies. *Id.* at 327-334. Concurring in the judgment but dissenting from the majority's reasoning, Judge Sotomayor strongly objected to the majority's contention that the harm of forced sterilization or abortion did not extent to spouses as well as those who had undergone the coercive procedures. *Id.* at 329. She referred to a "desired pregnancy" as a "fundamental right" and wrote that the "termination of a wanted pregnancy under a coercive population control program can only be devastating to any couple, akin, no doubt, to the killing of a child." *Id.* at 330. *See also Lin v. Mukasey,* 553 F.3d 217 (2d Cir. 2009) (opinion, joined by Judge Sotomayor, reversing denial of asylum and remanding for determination of whether the petitioner could show that he had a well-founded fear that he would be forcibly sterilized if he were returned to China and sought to have another child).

Judge Sotomayor also recognized the rights of intimate partners under the First Amendment. In *Adler v. Pataki*, 185 F.3d 35 (2d Cir. 1999), she joined an opinion reversing summary judgment for state officials in a case where a state employee alleged that his First Amendment right of intimate association was violated when he was fired in relation for a lawsuit filed by his wife against state officials. Reading Supreme Court precedent to find that the constitution protects a right to intimate association, the Second Circuit concluded that the state unconstitutionally encroached on that right because "[a] relationship as important as marriage cannot be penalized for something as insubstantial as a public employer's discomfort about a discrimination lawsuit brought by an employee's spouse." *Id.* at 44.

However, Judge Sotomayor wrote for a panel that rejected a claim that the Bush Administration's "Mexico City Policy," which prohibited foreign organizations from receiving development funds unless they agreed to neither perform abortions nor promote abortion generally, violated the First Amendment speech and association rights of reproductive rights organizations. *See Center for Reproductive Law and Pol. v. Bush*, 304 F.3d 183 (2d Cir. 2002). Relying on Second Circuit precedent rejecting a substantively identical challenge brought by another organization, *see Planned Parenthood Fed. of Amer., Inc. v. Agency for Int'l Dev.,* 915 F.2d 59 (2d Cir. 1990), Judge Sotomayor held that the First Amendment claims were not viable. *Id.* at 190. The Second Circuit also rejected the plaintiffs' due process and equal protection claims, noting that "[t]he 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." *Id.* at 198.

Prior to joining the bench, Judge Sotomayor sat on the boards of directors of the Puerto Rican Legal Defense and Education Fund ("PRLDEF") and the Maternity Center Association, both of which support access to reproductive health care. During her time on the PRLDEF board, the organization joined a series of *amicus curiae* briefs submitted to the Supreme Court defending the rights of poor women, and women of color, who were disproportionately affected by state laws restricting access to abortions and other reproductive health care. In each of these briefs, PRLDEF described its *amicus* interest as, among other things, "safeguarding the rights of Puerto Ricans of low economic status

[and protecting] Puerto Rican women and other women of color [who] are particularly vulnerable to discrimination[.]" *See, e.g.*, Brief *Amici Curiae* in *Webster v. Reproductive Health Serv.*, 1989 U.S. S. Ct. Briefs LEXIS 1529, *88 (March 28, 1989); *see also* Brief *Amici Curiae* in *Rust v. Sullivan*, 1990 U.S. S. Ct. Briefs LEXIS 692, *55 (May 4, 1990) ("The Fund recognizes that restrictions or limitations on the provision of health services, including information concerning abortions, deny women access necessary to fully exercise their rights, and place Latinos at an even greater risk of inadequate and dangerous treatment and unwanted pregnancies."). These briefs take the position that a woman has a right to safe and legal reproductive healthcare, but because Judge Sotomayor did not sign any of these briefs or appear in any of these cases, it is not known whether she was involved in these cases or agreed with PRLDEF's position.

**Takings / Substantive Due Process and Property**

Judge Sotomayor's rulings in the area of substantive due process and takings claims show her case-by-case approach to judging.

After *Kelo v. City of New London,* 545 U.S. 469 (2005), the landmark Supreme Court condemnation case that permitted the state to take a person's land and transfer it to a private party as part of an economic development plan, Judge Sotomayor considered a similar factual scenario in *Didden v. Village of Port Chester*, 173 Fed. Appx. 931 (2d Cir. 2006). The plaintiffs owned property adjoining and partially within a Village of Port Chester redevelopment district. After unsuccessful negotiations with the Village's developer, the plaintiffs' property was condemned in connection with the redevelopment project. Plaintiffs sued alleging that that they had a right "not to have their property taken by the State through the power of eminent domain for a private use, regardless of whether just compensation is given." *Id.* at 933. The trial court dismissed the cased on the ground that it was barred by the statute of limitations and, in a unanimous summary order, Judge Sotomayor and two of her colleagues affirmed. The panel went on to say that even if they were to consider the plaintiffs' Takings Clause arguments on the merits, they were bound by *Kelo* to determine that the case was not viable. *Id.*

Yet in another case litigated against the backdrop of Port Chester's redevelopment prokect, *Brody v. Village of Port Chester*, 434 F3d 121 (2d Cir. 2005), Judge Sotomayor ruled against the Village indicating that, even after *Kelo*, deference to local government actors is not unlimited. In *Brody*, the plaintiff owned property within the Village redevelopment area. He refused to sell the property voluntarily, and the Village started condemnation proceedings against him and others. In an opinion written by Judge Wesley and joined by Judge Sotomayor, the court rejected the Village's contention that a public use determination did not require due process protection because it was a purely legislative decision, and emphasized the "crucial" role courts play enforcing limitations on public use.

In *Clubside, Inc. v. Valentin*, 468 F.3d 144 (2d Cir. 2006), Judge Sotomayor wrote for the court and dismissed a developer's claims that a local government denied it due process when it refused to extend the municipal sewer district to include the plaintiff's property. The Second Circuit reversed the district court's ruling in favor of the developer and held that the developer

had no constitutionally protected property interest in the sewer extension and thus, the city did not, and could not, infringe on the plaintiff's constitutional rights. *Id.* at 152-54.

**Separation of Powers - Limits on the Executive and the Legislature**

Judge Sotomayor joined a unanimous panel on the Second Circuit declaring unconstitutional portions of the Patriot Act prohibiting recipients of "national security letters," *i.e.* subpoenas for information on users of wire and/or electronic communication services, from speaking out about the letters. *Doe v. Mukasey*, 549 F.3d 861 (2d Cir. 2008). The panel rejected provisions of the statute that effectively stripped the courts of the power to meaningfully review the government's decisions to restrict the speech of national security letter recipients. *Id.* at 881-83 The panel objected to the statute to the extent that it "would cast Article III judges in the role of petty functionaries, persons required to enter as a court judgment an executive officer's decision, but stripped of capacity to evaluate independently whether the executive's decision is correct." 549 F.3d at 881. It reiterated the principle that "[u]nder no circumstances should the Judiciary become the handmaiden of the Executive" and declared the statute unconstitutional to the extent it purported to absolve the government of the need to seek judicial review before restricting disclosure or entitled the government a "conclusive presumption" in its favor. *Id.* at 881-83, *citing United States v. Smith*, 899 F.2d 564, 569 (6th Cir. 1990),

The panel also defended the courts against Congressional encroachment, asserting that "the Constitution envisions a role for all three branches when individual liberties are at stake." *Id.* at 882. It rejected any attempts by Congress to evade constitutional standards recognized by the courts and invoked the Supreme Court's admonition in *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) that "[w]hen the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed." 549 F.3d at 871.

In addition to asserting a strong role for the courts to review executive and legislative action, the *Doe* court also invoked its authority to interpret certain provisions of the statute in a way that would preserve their constitutionality. *Id.* at 883-85. Where the court felt its interpretive authority could go no further, it made recommendations to the government for future actions so that it could avoid actions that would render the statute constitutional as applied. *Id.* As a result, the court, including Judge Sotomayor, struck a balance between preserving the statute and protecting civil liberties.

In *Bartlett v. New York State Board of Law Examiners*, 970 F. Supp. 1094, 1134 (S.D.N.Y. 1997), Judge Sotomayor considered the appropriate standard of review for an equal protection claim under the Americans with Disabilities Act ("ADA") in view of *City of Boerne v. Flores*, 519 U.S. 1088 (1997). In *Boerne*, the Supreme Court invalidated the Religious Freedom Restoration Act on the grounds that the Fourteenth Amendment authorized Congress to enforce existing rights, but did not allow Congress to create substantive rights. In the ADA context, Judge Sotomayor reasoned that "[a]t the very least, *Boerne* tells us that Congress may not, under the ADA, directly alter the level of scrutiny afforded the disabled under the Equal Protection

Clause." 970 F. Supp. at 1134. She went on to note, however, that whether courts could themselves adopt a heightened level of scrutiny in response to the explicit Congressional suggestion in the text of the ADA remained an open question, and that it was one for the Supreme Court, not the district court, to decide. *Id.* at 1134-1135. Judge Sotomayor allowed the claim to proceed but then applied a rational basis standard to conclude that no equal protection violation had occurred.

This case highlights the extent to which Judge Sotomayor's jurisprudence is guided by, and constrained by, legal precedent. Accordingly, although she lauded the plaintiff and praised her "superior effort" and "courage" in the face of "crippling" challenges, Judge Sotomayor's respect for the plaintiff did not prevent her from applying the law to dismiss some of the plaintiff's claims.

Judge Sotomayor similarly urged a close adherence to the language of *Boerne* in *Hawkins v. Lyght*, 441 F.3d 96, 105 (2d Cir. 2006). In that case, Judge Sotomayor dissented from a majority opinion that distinguished *Boerne* to hold that the Religious Freedom and Restoration Act ("RFRA") was constitutional. The majority concluded that the RFRA represented a constitutionally valid amendment to the Age Discrimination in Employment Act ("ADEA"). 441 F.3d 109. Judge Sotomayor dissented from the majority's consideration of the constitutional issues, arguing that because the RFRA was irrelevant to the dispute, the majority "violate[d] a cardinal principle of judicial restraint[.]" *Id.* Although she declined to engage in the debate regarding RFRA's constitutionality, she emphasized that *Boerne* had established that RFRA went far beyond the substantive protections of the First Amendment, and implicitly questioned the majority's disregard of *Boerne*'s holding. *Id.* at 112.

While Judge Sotomayor has frequently joined decisions recognizing a strong role for the judiciary, she also recognizes and respects constitutional limitations on the courts. For example, in *Connecticut v. Cahill*, 217 F.3d 93 (2d Cir. 2000), a dispute involving fishing rights between the states of Connecticut New York, Judge Sotomayor dissented from the majority's decision to hear the case, arguing that the Supreme Court had exclusive jurisdiction over all controversies between the states, *id.* at 105.