NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

The Record of Judge Sonia Sotomayor on Critical Legal Rights for Women

July 2009

Introduction

On May 28, 2009, President Obama nominated Judge Sonia Sotomayor of the Second Circuit Court of Appeals to replace Justice David Souter as an Associate Justice of the United States Supreme Court.

As will be discussed in more detail below, Judge Sotomayor possesses sterling academic and legal credentials. Her varied legal career includes government service as a prosecutor, private practice in complex areas of commercial law, and 17 years as a federal judge. If confirmed to replace Justice Souter, she will be the only sitting Justice with trial court experience. In addition to her exceptional legal qualifications, Judge Sotomayor brings an inspiring life story and a demonstrated commitment to public and community service, including within the civil rights community.

President Obama's first Supreme Court nomination is an historic one for a number of reasons. First, Judge Sotomayor, if confirmed, would be only the third woman to sit on the Supreme Court and would bring the number of sitting female Justices back up to two.[1] In addition, Judge Sotomayor, if confirmed, would be only the third person of color, and the first Latina and woman of color, to sit on the Supreme Court.

The National Women's Law Center ("the Center") has reviewed Judge Sotomayor's legal record, with a focus on cases addressing issues of particular importance to women. In addition, the

[1] As Justice Ginsburg has stated on several occasions since Justice O'Connor retired, and most recently and pointedly in May, the Court sorely needs another woman Justice. Justice Ginsburg put it plainly: "Women belong in all places where decisions are being made. . . . It shouldn't be that women are the exception." Joan Biskupic, *Ginsburg; Court Needs Another Woman*, USA TODAY, May 5, 2009, *available at* http://www.usatoday.com/news/washington/judicial/2009-05-05-ruthginsburg_N.htm. Both Justice Ginsburg and former Justice Sandra Day O'Connor stated that they were pleased that President Obama had nominated a woman. *See* Tony Mauro, *Justice O'Connor Happy There Will be Another Woman on High Court*, BLOG OF LEGAL TIMES, Jun. 24, 2009 (reporting Justice O'Connor's statement on the Late Show with David Letterman that "I'm very happy we're getting another woman on the court. Very happy."), *available at* http://legaltimes.typepad.com/blt/2009/06/justice-oconnor-happy-there-will-be-another-woman-on-high-court.html; Tony Mauro, *Justice Ginsburg Welcomes Sotomayor Nomination*, BLOG OF LEGAL TIMES, Jun. 14, 2009 (reporting on Justice Ginsburg's address at the annual conference of the U.S. Court of Appeals for the Second Circuit), *available at* http://legaltimes.typepad.com/blt/2009/06/jusitce-ginsburg-welcomes-sotomayor-nomination.html. And Justice Ginsburg went further, saying that "[Judge Sotomayor] will bring to the Supreme Court, as she did to the district court and then the Court of Appeals, a wealth of experience in law and in life." *Id*. Justice Ginsburg added, "I look forward to a new colleague well-equipped to handle the challenges our work presents." *Id.*

Center has reviewed key activities, public statements, and experiences of Judge Sotomayor outside of her service on the bench, and her testimony during her confirmation hearings before the Senate Judiciary Committee, which began on July 13, 2009, and continued until July 16, 2009. This report, which presents this analysis, is intended to educate the public not only about Judge Sotomayor's record, but also more broadly about legal rights of key importance to women and the importance of fair and independent courts.

Based on this review, the Center concludes that Judge Sotomayor will bring a real-world perspective, much-needed diversity of experience and background, considerable legal acumen, and a fair-minded approach to the Court. Further, Judge Sotomayor's record and testimony provide confidence that her judicial philosophy and approach to the law are consistent with the legal rights and principles that are the underpinning of the Center's core mission.

The Center's Criteria

The National Women's Law Center has worked for over 35 years to expand opportunities and eliminate barriers for women and their families, with a major emphasis on the areas of family economic security, education and employment, and health. Women have won core legal rights over the last four decades, such as the right to reproductive choices, the right to equal opportunities in the workplace and schools, and a broad range of other legal protections that promote women's well-being and safety. The Center has engaged in substantial public education and outreach activities, including this report, to provide the public with information not only about the legal records of judicial nominees, but of the importance of a fair and independent judiciary more generally, as well as of the underlying legal rights.

In addition to meeting the necessary requirements of honesty, integrity, character, temperament, intellect, and lack of bias in applying the law, to be confirmed to a federal judgeship a nominee should be required to demonstrate a commitment to protecting the rights of ordinary American citizens and the progress that has been made on civil rights and individual liberties, including core constitutional principles and statutes that protect women's legal rights. The Center focuses, in particular, on a nominee's record on prohibitions against sex discrimination under the Equal Protection Clause, the constitutional right to privacy (which includes the right to terminate a pregnancy and related aspects of women's reproductive rights and health), as well as the statutory provisions that protect women's legal rights in such fundamental areas as education, employment, health and safety, and social welfare. In addition, access to justice and public benefits represent additional areas of importance to women, and thus to the Center.

Background

Sonia Sotomayor was born in New York in 1954, to working-class parents of Puerto Rican origin. Notably, the family spent time in public housing projects in the Bronx, and, after her father died, her mother worked to support Judge Sotomayor and her brother. Judge Sotomayor attended Princeton University on scholarships, graduating second in her class, Phi Beta Kappa, and *summa cum laude* in 1976. She then attended Yale Law School, where she served as an editor on the Yale Law Journal and managing editor of the Yale Studies in World Public Order, and graduated in 1979. After receiving her J.D., Judge Sotomayor worked for Robert

Morgenthau at the New York County District Attorney's Office, where she prosecuted criminal cases in state court for five years. Following her stint as a prosecutor, she joined the firm of Pavia & Harcourt as an associate. She worked primarily on complex commercial civil litigation, and became a partner in the firm in 1988. She was nominated to the U.S. District Court in 1992 by President George H.W. Bush, and was elevated to the Second Circuit Court of Appeals by President Clinton in 1998 (confirmed by a vote of 67-29). At various points in her career, Judge Sotomayor also taught at NYU and Columbia Law Schools.

Judge Sotomayor has contributed a significant amount of time to public service and community service during her career. She has served on the Board of Directors of numerous organizations, including the New York City Campaign Finance Board, the State of New York Mortgage Agency, the Maternity Center Association,[2] and the Puerto Rican Legal Defense and Education Fund, now called Latino Justice PRLDEF (PRLDEF). She has also been, at various times, a member of the National Association of Women Judges, the American Bar Association, the Belizean Grove,[3] the National Council of La Raza, the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts, and the selection committee for several public interest legal fellowship programs. She has received many awards and commendations during her career, including the Arabella Babb Mansfield award from the National Association of Women Lawyers, the Latina of the Year Judiciary Award of the Hispanic National Bar Association, and the Gertrude E. Rush award from the National Bar Association. She has received numerous awards from Hispanic legal groups, organizations, and student associations, and has spoken before such groups many times.

Judge Sotomayor is well-respected in the profession and has an excellent reputation as a careful, thoughtful, fair, and extremely intelligent jurist. The ABA Standing Committee on the Federal Judiciary unanimously rated her well-qualified for the Supreme Court.[4] She has also received the support of the National Association of Women Lawyers, the Hispanic National Bar Association, and the New York City Bar Association.[5] Although some have raised questions about her demeanor on the bench, her colleague on the Second Circuit, Judge Guido Calabresi, said that he kept track of the kinds of questions that Judge Sotomayor asked on the bench and compared them to those of her colleagues. "And I must say I found no difference at all. So I concluded that all that was going on was that there were some male lawyers who couldn't stand being questioned toughly by a woman," Calabresi said in an interview. "It was sexism in its most obvious form."[6]

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[2] The Maternity Center Association, currently known as Childbirth Connection, has worked as a national not-for-profit organization to improve the quality of maternity care through research, education, advocacy, and demonstration of maternity innovations since 1918. *See* http://www.childbirthconnection.org.

[3] The Belizean Grove was described on Judge Sotomayor's Judiciary Committee Questionnaire as a private association of female professionals from the profit, non-profit, and social sectors. In June, Judge Sotomayor resigned her membership. *See* Associated Press, *Sotomayor Resigns from All-Women's Club*, NEW YORK TIMES, Jun. 20, 2009, *available at* http://www.nytimes.com/2009/06/20/us/politics/20grove.html.

[4] *See* American Bar Association, *Ratings of Article III Judicial Nominees: 111th Congress*, *available at* http://www.abanet.org/scfedjud/ratings/ratings111.pdf.

[5] *See* Senate Judiciary Committee, Associate Justice of the U.S. Supreme Court - Sonia Sotomayor - Letters and Materials, *available at* http://judiciary.senate.gov/nominations/SupremeCourt/Sotomayor/SoniaSotomayor-Letters.cfm.

[6] Nina Totenberg, *Is Sonia Sotomayor Mean?*, NATIONAL PUBLIC RADIO, Jun. 15, 2009, *available at* http://www.npr.org/templates/story/story.php?storyId=105343155.

One topic that has drawn much public attention and commentary is the impact that Judge Sotomayor's ethnicity and gender may have upon her work as a judge. Judge Sotomayor has stated in a number of speeches that her background as a Latina is a significant part of her identity. She has discussed her status as a Latina judge as part of the debate about whether judges should transcend their personal experiences and viewpoints in their decision-making, or whether a judge's background inevitably influences his or her decisions (or as Judge Sotomayor put it, that "[p]ersonal experiences affect the facts that judges choose to see.").[7] Judge Sotomayor stated, most famously in a 2001 speech, that "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life,"[8] and this statement has generated much criticism.

It should be noted that Judge Sotomayor concluded in the speech that:

> I am reminded each day that I render decisions that affect people concretely and that I owe them constant and complete vigilance in checking my assumptions, presumptions and perspectives and ensuring that to the extent that my limited abilities and capabilities permit me, that I reevaluate them and change as circumstances and cases before me requires. I can and do aspire to be greater than the sum total of my experiences but I accept my limitations. I willingly accept that we who judge must not deny the differences resulting from experience and heritage but attempt, as the Supreme Court suggests, continuously to judge when those opinions, sympathies and prejudices are appropriate.

Judge Sotomayor was asked about this issue and these statements repeatedly during the hearing, and she replied consistently that she believes strongly that the even-handed application of the law must always prevail. For example, she stated in response to Senator Sessions:

> I believe my record of 17 years demonstrates fully that I do believe that law – that judges must apply the law and not make the law. Whether I've agreed with a party or not, found them sympathetic or not, in every case I have decided, I have done what the law requires. [9]

And in response to Senator Grassley she said:

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[7] Sonia Sotomayor, *A Latina Judge's Voice*, 13 BERKELEY LA RAZA L.J. 87, 92 (2002), *available at* http://www.nytimes.com/2009/05/15/us/politics/15judge.text.html?pagewanted=all.

[8] *Id*. at 92. Judge Sotomayor had made similar statements in earlier speeches, with minor differences. For example, in 1994 Judge Sotomayor elaborated on a statement that a wise woman would reach a better conclusion by stating, "What is better? I like professor Resnik hope that better will mean a more compassionate, and caring conclusion." Sonia Sotomayor, Remarks at Panel Presentation at 40th National Conference of Law Reviews, Puerto Rico: Women in the Judiciary 11 (Mar. 17, 1994) (transcript available at http://judiciary.senate.gov/nominations/SupremeCourt/Sotomayor/upload/Question-12-d-No-5-3-17-94-women-in-the-judiciary.pdf).

[9] Transcript, *Hearing: Nomination of Sonia Sotomayor to be Associate Justice of the United States Supreme Court*, Jul. 14, 2009, *available at* http://www.nytimes.com/2009/07/14/us/politics/14confirm-text.html?_r=1&ref=politics.

> No, I do not believe that judges should use their personal feelings, beliefs or value systems * * * to influence their outcomes. Neither do I believe that they should consider the gender, race or ethnicity of any group that's before them. I absolutely do not believe that.[10]

And regarding the statement itself, she said,

> It was bad, because it left an impression that I believed that life experiences commanded a result in a case, but that's clearly not what I do as a judge. It's clearly not what I intended in the context of my broader speech, which was attempting to inspire young Hispanic, Latino students and lawyers to believe that their life experiences added value to the process.[11]

Clearly, the "wise Latina" statement, when viewed in context, absolutely does not support the conclusion that some extremely right-wing conservatives have reached. Indeed, as will be discussed in more detail below, the careful nature of her opinions makes clear that Judge Sotomayor does not decide cases based on anything other than a reasoned view of the law.[12]

But it is also true that, as Justice Ginsburg wrote in her dissent in *Ricci v. DeStefano*,[13] "[c]ontext matters." Justice Ginsburg has been forthright about the extent to which her background has influenced her views of particular cases, but then again, so has Justice Alito.[14] Moreover, a

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[10] Transcript, *Hearing: Nomination of Sonia Sotomayor to be Associate Justice of the United States Supreme Court*, Jul. 15, 2009, *available at* http://www.nytimes.com/2009/07/15/us/politics/15confirm-text.html?ref=politics.

[11] Transcript, *Hearing: Nomination of Sonia Sotomayor to be Associate Justice of the United States Supreme Court*, Jul. 14, 2009, *available at* http://www.nytimes.com/2009/07/14/us/politics/14confirm-text.html?_r=1&ref=politics.

[12] In addition, Tom Goldstein, a Supreme Court practitioner who has reviewed Judge Sotomayor's cases, has concluded that she has not demonstrated racial bias in her votes or decisions in cases dealing with race discrimination. Tom Goldstein, *Judge Sotomayor and Race: Results from the Full Data Set*, SCOTUSBLOG, May 29, 2009, *available at* http://www.scotusblog.com/wp/judge-sotomayor-and-race-results-from-the-full-data-set/. Numerous reporters and commentators have concurred in that opinion. *See, e.g.*, Greg Stohr, *Sotomayor Took Cautious Approach in Cases on Race, Gun Rights*, BLOOMBERG.COM, May 28, 2009, *available at* http://www.bloomberg.com/apps/news?pid=20601070&sid=a9DyXLjNi9PU; Nina Totenberg, *Sotomayor's Judicial History: Racially Biased?*, NPR MORNING EDITION, Jun. 5, 2009, *available at* http://www.npr.org/templates/story/story.php?storyId=104941870; Marc Ambinder, *Sotomayor and Race: Read Her Opinions*, THE ATLANTIC, May 30, 2009, *available at* http://politics.theatlantic.com/2009/05/sotomayor_and_race_read_her_opinions.php; and Charlie Savage, *Uncertain Evidence for 'Activist' Label on Sotomayor*, N.Y. TIMES, Jun. 30, 2009, *available at* http://www.nytimes.com/2009/06/20/us/politics/20judge.html.

[13] No. 07-1428, slip op. (U.S. Jun. 29, 2009).

[14] At his confirmation hearing, Justice Alito testified: "Because when a case comes before me involving, let's say, someone who is an immigrant — and we get an awful lot of immigration cases and naturalization cases — I can't help but think of my own ancestors, because it wasn't that long ago when they were in that position. [...] And that goes down the line. When I get a case about discrimination, I have to think about people in my own family who suffered discrimination because of their ethnic background or because of religion or because of gender. And I do take that into account." *See* Transcript, *Hearing: Nomination of Samuel A. Alito to be Associate Justice of the United States Supreme Court*, Jan. 11, 2005, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/01/11/AR2006011101148.html. And in recent interviews, Justice Ginsburg noted that, at the oral arguments this Term in *Redding v. Safford Unified School District*, No. 08-479, slip op. (U.S. Jun. 25, 2009), her male colleagues did not understand how humiliating it would be for a thirteen-year old girl to have been strip-searched before school officials. *See* Joan Biskupic, *Ginsburg; Court Needs Another Woman*, *supra* note 1.

number of recent cases, including *Ledbetter v. Goodyear Tire & Rubber Co.*[15] and *AT&T v. Hulteen*,[16] the majority of the Court did not appreciate the realities of the workplace for women and other workers protected by federal antidiscrimination laws. By contrast, Judge Sotomayor's record, as set forth below, demonstrates that in many cases, she brings a real-world perspective to bear. Assuming Judge Sotomayor is confirmed, her ability to do so will provide a particularly important contribution to the Court.

Judge Sotomayor's Legal Record

Judge Sotomayor's legal record demonstrates that she is a careful judge who is extremely respectful of the role of the judiciary, who is deferential to precedent, who delves deeply into the factual record, and who is not inclined to make sweeping statements of legal policy in her decisions. The overwhelming majority of reports, analyses, and commentators who have undertaken reviews of her record have reached the same conclusion.[17] Thus, the totality of her record demonstrates that concerns arising from Judge Sotomayor's statement at a Duke University panel discussion in 2005 that "the Court of Appeals is where policy is made"[18] are groundless.

Moreover, Judge Sotomayor's decisions have been fully justifiable as a matter of law, fit the Justice Souter mold in their results, and fall well within the mainstream of judicial thought. She has not been inclined to extend the law, even where precedent left room to do so. Nor have her decisions favored plaintiffs over defendants (or defendants over plaintiffs) as a general rule. Nonetheless, Judge Sotomayor's understanding of the real world has, in a number of cases, resulted in plaintiffs being permitted to bring their cases before a jury or otherwise permitted plaintiffs to have their day in court by ensuring that procedural hurdles do not foreclose a substantive hearing.

Judge Sotomayor's testimony at her confirmation hearings only reinforced her record as a judge, reiterating her commitment to precedent, her careful and fact-bound approach, and her understanding of the role of the judiciary.

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[15] 550 U.S. 618 (2007).

[16] No. 07-543, slip op. (U.S. May 18, 2009).

[17] *See, e.g*, Congressional Research Service, *Judge Sonia Sotomayor: Analysis of Selected Opinions*, Jun. 19, 2009 (concluding that the primary characteristic of Judge Sotomayor's record is adherence to precedent, careful application of the law to the facts, and reluctance to overstep judicial role), *available at* http://opencrs.com/document/R40649/; Brennan Center for Justice, *Judge Sotomayor's Record on Constitutional Cases*, Jul. 9, 2009 (concluding that in constitutional cases, Judge Sotomayor is solidly in the mainstream of the Second Circuit), *available at* http://www.brennancenter.org/content/resource/sotomayor; *Letter from Professors of Law to Senate Judiciary Committee*, Jul. 9, 2009 (stating that "[Judge Sotomayor's] opinions reflect careful attention to the facts of each case and a reading of the law that demonstrates fidelity to the text of statutes and the Constitution. She plays close attention to precedent and has proper respect for the role of courts and the other branches of government in our society."), *available at* http://legaltimes.typepad.com/files/sotomayorletter.pdf at 1; *see also* David Brooks, *Op Ed: Cautious at Heart*, N.Y. TIMES, Jun. 8, 2009 ("If you look at the whole record, you come away with the impression that Sotomayor is a hard-working, careful-though-unspectacular jurist whose primary commitment is to the law.") *available at* http://www.nytimes.com/2009/06/09/opinion/09brooks.html.

[18] Videotape: Dean's Cup Moot Court Panel and Discussion at Duke Law School (Feb. 25, 2005) *available at* http://www.politico.com/news/stories/0509/22997.html.

Right to Privacy and Abortion

Prior to the hearings, it did not appear that Judge Sotomayor had stated publicly her legal views regarding *Roe v. Wade* or the constitutional right to privacy. In her 17 years on the federal bench, Judge Sotomayor has never ruled directly on the right to abortion, nor has she written or spoken extensively on the right. Although she has authored or joined opinions in cases that touch upon reproductive rights, it is difficult to tell much about Judge Sotomayor's views from these cases. Her record does suggest, however, that she would support the constitutional right to privacy, and respect *Roe v. Wade*, and her testimony at her confirmation hearings supports this conclusion.

Judicial Record and Other Experience

Judge Sotomayor's opinions demonstrate respect for fundamental privacy rights. In a concurrence in one asylum case, for example, Judge Sotomayor recognized the decision to have, or continue, a wanted pregnancy as a "fundamental right." In *Shi Liang Lin v. Dep't of Justice,*[19] the *en banc* court held that refugee status does not automatically extend to the spouse or unmarried partner of a woman forced to undergo abortion or sterilization under China's coercive family planning policies. Concurring in only the judgment of the court, Judge Sotomayor noted that the majority's broad rule ignored the fact that "the state's interference with this fundamental right" affects both spouses, observing that "[t]he 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."[20] And Judge Sotomayor recognized the fundamental right to privacy again in another case, *United States v. Myers*.[21] Although Judge Sotomayor's majority opinion concluded that the record in that case was inadequate to determine whether the defendant, an unwed father who had to obtain prior written approval from the probation office prior to visiting his child in foster care, had a protected liberty interest in his relationship with his son, the opinion recognized the fundamental right to privacy underlying a parent's care, custody, and control of his or child.

In addition, Judge Sotomayor's majority opinion in *Center for Reproductive Law and Policy v. Bush*,[22] a case rejecting a challenge to the Global Gag Rule[23] brought under the First Amendment, Due Process and Equal Protection clauses of the Constitution, demonstrates her respect for precedent without revealing her views on the precedents or the underlying Global Gag Rule policy issues. Because a prior Second Circuit case had "entertained and rejected the

[19] 494 F.3d 296 (2d Cir. 2007) (en banc).
[20] *Id*. at 330 (Sotomayor, J., concurring).
[21] 426 F.3d 117 (2d Cir. 2005).
[22] 304 F.3d 183 (2d Cir. 2002).
[23] The Global Gag Rule was a Bush Administration policy under which foreign nongovernmental organizations were required to agree not to perform or actively promote abortion as a method of family planning in order to receive funding from the U.S. Agency for International Development.

same constitutional challenge to the same provision,"[24] she concluded that the panel need not address the issue of standing before determining that the Center for Reproductive Law and Policy ("CRLP")'s First Amendment rights were not violated. Further, after finding that CRLP had "competitive advocate standing" to bring an Equal Protection challenge, Judge Sotomayor held that the policy did not violate its Equal Protection rights because "[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."[25]

Similarly, Judge Sotomayor's approach to the three cases involving anti-abortion protesters in which she participated do not demonstrate a bias towards the protesters (despite ruling in favor of anti-abortion protestors in two cases), but rather a concern that the facts be fully explored. For example, in *Amnesty America v. Town of West Hartford*,[26] anti-abortion protestors brought a § 1983 claim against the town and its police chief, alleging that town police officers used excessive force when removing the plaintiffs from two anti-abortion protests outside a West Hartford abortion clinic. The Second Circuit twice heard appeals in this case; both times, Judge Sotomayor authored opinions reversing the district court's grants of summary judgment to the defendants. Judge Sotomayor suggested that summary judgment on excessive force claims is often inappropriate given the very fact-specific nature of the inquiry.[27] Further, in *United States v. Lynch*,[28] a case that would have extremely troubling implications if it were applied broadly to clinic protest cases, Judge Sotomayor joined a dissent to a denial of rehearing *en banc* that indicated that she viewed the district court ruling as erroneous. In *Lynch*, anti-abortion protestors faced criminal contempt charges for their alleged violation of a court order. Despite clear evidence that the protestors knew of the injunction and still intentionally seated themselves in the clinic driveway, the district court found them not guilty of criminal contempt on the grounds that their sincere religious beliefs precluded a finding of willfulness. Upon appeal to the Second Circuit, a panel (not including Judge Sotomayor) concluded that appellate jurisdiction did not exist. When the government's petition for rehearing *en banc* was denied, Judge Sotomayor joined Judge Cabranes's dissent, in which he argued that the panel applied the incorrect standard and that *en banc* reconsideration was necessary to reexamine the district court's erroneous definition of "willfulness."[29]

Two other cases that touch on privacy or reproductive rights are of note. In *N.G. and S.G. v. Connecticut*,[30] Judge Sotomayor dissented from a majority opinion holding that strip searches of 13- and 14-year old girls upon admission to a juvenile detention facility were constitutional. Judge Sotomayor's dissent discussed the "severely intrusive nature of strip searches," especially when "the privacy interests of emotionally troubled children are at stake."[31] Like Justice Ginsburg at the oral argument of *Safford United School District No. 1 v. Redding* in April 2009, Judge Sotomayor noted that the girls who had been searched found the process to be

[24] *Id.* at 195 (citing *Planned Parenthood Federation of America, Inc. v. Agency for International Development*, 915 F.2d 59 (2d Cir. 1990)).
[25] *Id.* at 198 (citing *Rust v. Sullivan*, 500 U.S. 173, 192-94 (1991)).
[26] 361 F.3d 113 (2d Cir. 2004); 288 F.3d 467 (2d Cir. 2002).
[27] *See* 361 F.3d at 124.
[28] 181 F.3d 330 (2d Cir. 1999) (en banc) (Cabranes, J., dissenting).
[29] *See id.*
[30] 382 F.3d 225 (2d Cir. 2004) (Sotomayor, J., dissenting).
[31] *Id*. at 238.

embarrassing and humiliating.[32] Thus, Judge Sotomayor's dissent in *N.G.* demonstrated a respect for the troubled girls' privacy rights, an approach that was endorsed by the Supreme Court's majority opinion in *Safford* in reaching its conclusion that the strip search in that case violated the Fourth Amendment.[33]

In addition, Judge Sotomayor joined the opinion in *Saks v. Franklin Covey*,[34] a case involving a challenge to an employer's denial of insurance coverage for a reproductive health service. There, the panel agreed with virtually every other court to examine the issue and held that an employer's denial of insurance coverage for infertility treatment does not constitute discrimination based on sex under Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978 (PDA), given that infertility treatments apply to both genders. However, of great significance, the panel did explicitly support the EEOC's position that the exclusion of prescription contraceptive drugs and devices violates Title VII because only women are disadvantaged.

Regarding her activities before she was on the bench, there is no demonstration of any hostility to *Roe v. Wade*, and in fact Judge Sotomayor was willing to associate herself with an organization that has strongly supported *Roe v. Wade*. During Judge Sotomayor's twelve years on the Board of Directors of PRLDEF, the organization signed onto *amicus* briefs supporting reproductive rights in a number of abortion-related cases before the Supreme Court.[35] In its briefs in three of those cases, PRLDEF described itself as opposed to "any efforts to overturn or in any way restrict the rights recognized in *Roe v. Wade*."[36] PRLDEF described its support of women's right to terminate a pregnancy in these significant Supreme Court cases as related to its efforts to protect the rights of low-income Puerto Rican women.[37] In response to questions

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[32] *See* Joan Biskupic, *Ginsburg: Court Needs Another Woman*, *supra* note 1.
[33] No. 08-479, slip op. (U.S. Jun. 25, 2009).
[34] 316 F.3d 337 (2d Cir. 2003).
[35] Brief for NAACP Legal Defense & Educational Fund et al. as Amici Curiae Supporting Respondents, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (Nos. 91-744, 91-902), 1992 WL 12006401 [hereinafter Casey Amicus Brief]; Brief for Am. Pub. Health Ass'n et al. as Amici Curiae Supporting Petitioners, *Rust v. Sullivan*, 500 U.S. 173 (1991) (Nos. 83-1391, 89-1392), 1989 WL 1126796 [hereinafter Rust Amicus Brief]; Brief for Am. Indian Health Care Ass'n et al. as Amici Curiae Supporting Appellees, *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990) (No. 88-805), 1989 WL 1127542 [hereinafter Akron Amicus Brief]; Brief for Nat'l Council of Negro Women, Inc. et al. as Amici Curiae Supporting Appellees, *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) (No. 88-605), 1989 WL 1127686 [hereinafter Webster Amicus Brief]. PRLDEF also wrote an *amicus* brief in *Williams v. Zbaraz*, which was argued and decided after Judge Sotomayor joined the Board of Directors. Brief for Physicians Nat'l Housestaff Ass'n et al. as Amici Curiae Supporting Appellees, *Williams v. Zbaraz*, 448 U.S. 358 (1989) (Nos. 7904, 79-5, 79-491), 1979 WL 199894 [hereinafter Williams Amicus Brief].
[36] Casey Amicus Brief, *supra* note 38, at *17a; Akron Amicus Brief, *supra* note 38, at *xvi; Webster Amicus Brief, *supra* note 38, at *65.
[37] As stated in its Interest of Amici in the Webster Amicus Brief, "Puerto Rican women and other women of color are particularly vulnerable to discrimination and therefore the Fund supports efforts to protect their rights. The Fund opposes any efforts to overturn or in any way restrict the rights recognized in Roe v. Wade." Webster Amicus Brief, *supra* note 38, at *65; *see also* Casey Amicus Brief, *supra* note 38, at *17a (same); Akron Amicus Brief, *supra* note 38, at *xvi (same); Rust Amicus Brief, *supra* note 38, at * 11a ("The Fund…has served as an advocate to ensure that Latinos have access to full and adequate health care, including family planning. 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."); Williams Amicus Brief, *supra* note 38, at *4 ("PRLDEF is

posed by Senator Graham, Judge Sotomayor testified that she never read the briefs, and that as a Board member, to the extent that she looked at PRLDEF's legal work, "it was to ensure that it was consistent with the broad mission statement of the fund.[38] While it is unclear whether Judge Sotomayor actually knew which specific briefs were being, or had been, filed, it is true that during the time that Judge Sotomayor served on the Board of Directors, she knew that PRLDEF filed briefs supporting *Roe v. Wade*.[39]

Given Judge Sotomayor's respectful discussions of the right to privacy in her judicial record, including the right to continue a wanted pregnancy, her association with a pro-choice organization, and the absence of any sign of opposition to *Roe v. Wade* that we were able to discern in her legal record or otherwise, there is no reason to believe that, if confirmed, Judge Sotomayor would undermine *Roe*. Moreover, her careful legal approach and demonstrated commitment to precedent provide additional assurance that she would fully uphold *Roe*.

Confirmation Hearing

Judge Sotomayor's discussion of these legal issues during her confirmation hearings support this conclusion. One major line of questions, asked repeatedly throughout the hearings, was Judge Sotomayor's views on the constitutional right to privacy, and its application to *Roe v. Wade*. Because Judge Sotomayor had not ruled directly on *Roe v. Wade* as a federal judge, her testimony in this area warrants particular attention.

On the first day of questioning, Senator Kohl asked directly, and Judge Sotomayor responded clearly, that she believes that the Constitution contains a right to privacy. She stated that it has been found "in various provisions of the Constitution," and cited the Fourth Amendment's prohibition against unreasonable search and seizures, and the Fourteenth Amendment's due process clause protecting liberty interests.[40] Later in the hearings, in response to questions asked by Senator Hatch, Judge Sotomayor stated with regard to the right to privacy, "I've not viewed what the Court has been doing as creating a right that doesn't exist in the words of the Constitution."[41]

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concerned that the inability of indigent Puerto Rican women to choose and obtain medically necessary abortions will have an adverse impact on their health, their ability to obtain and retain employment, and to raise their children.").

[38] Transcript, *Hearing: Nomination of Sonia Sotomayor to be Associate Justice of the United States Supreme Court,* Jul. 14, 2009, *available at* http://www.nytimes.com/2009/07/14/us/politics/14confirm-text.html?_r=1&ref=politics.

[39] In response to Senator Hatch, Judge Sotomayor testified that she did not know that PRLDEF was filing a specific brief, and "wouldn't know until after the fact that a brief was actually filed." Transcript, *Hearing: Nomination of Sonia Sotomayor to be Associate Justice of the United States Supreme Court,* Jul. 16, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/07/16/AR2009071602193.html. In response to Senator Graham, she said that she "did know that the Fund had a health care docket that included challenges to certain limitations on a woman's right to terminate her pregnancy under certain circumstances." Transcript, *Hearing: Nomination of Sonia Sotomayor to be Associate Justice of the United States Supreme Court,* Jul. 16, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/07/16/AR2009071601659.html.

[40] Transcript, *Hearing: Nomination of Sonia Sotomayor to be Associate Justice of the United States Supreme Court,* Jul. 14, 2009, *available at* http://www.nytimes.com/2009/07/14/us/politics/14confirm-text.html?_r=1&ref=politics.

[41] Transcript, *Hearing: Nomination of Sonia Sotomayor to be Associate Justice of the United States Supreme Court,* Jul. 15, 2009, *available at* http://www.nytimes.com/2009/07/15/us/politics/15confirm-text.html?ref=politics.

She then described *Griswold v. Connecticut*, the 1965 case in which Supreme Court held that the Constitution's right to privacy extends to a married couple's right to use contraception, as a decision of the Court and therefore settled law.[42] With respect to *Roe v. Wade*, she gave a similar answer, stating that its core holding applying the right to privacy to a woman's decision to have an abortion was reaffirmed by the Court's 1992 decision in *Planned Parenthood v. Casey*, and thus settled law.[43]

Senator Hatch asked about *Gonzales v. Carhart*,[44] the 2007, 5-4 Supreme Court decision upholding a ban on an abortion procedure without an exception to protect women's health. Many saw this decision as having overturned, without explicitly saying so, a 2000 decision written by Justice O'Connor when she was on the Court striking down a similar ban because no health protection was provided, a core requirement of *Roe*. Judge Sotomayor stated that she viewed this 2007 decision as settled law as well. [45]

Finally, Senator Feinstein, in a very important line of questioning, pursued the issue of women's health protection further. Judge Sotomayor stated that "Its prior precedents are still the precedents of the Court, the health and welfare of a woman must be – must be [a] compelling consideration."[46] Her strong reaffirmation of the requirement of protecting a woman's health as still part of the Court's precedents, and her use of the term "compelling," which in legal parlance is associated with a fundamental constitutional right, lent further support to her willingness to uphold *Roe*. (A fundamental right is the strongest type of right that exists in the Constitution.)

In sum, while for the most part Judge Sotomayor simply described the Supreme Court's cases regarding *Roe v. Wade*, and declined to give her personal views regarding the soundness of these cases or how she would rule in the future, her clear agreement with the right to privacy, and strong description of the Court's current precedents regarding *Roe* and women's health, lend further support to the judgment gleaned from her legal record that she would not undermine *Roe v. Wade* if confirmed to the Supreme Court.[47]

<u>Equal Protection</u>

[42] Transcript, *Hearing: Nomination of Sonia Sotomayor to be Associate Justice of the United States Supreme Court*, Jul. 14, 2009, *available at* http://www.nytimes.com/2009/07/14/us/politics/14confirm-text.html?_r=1&ref=politics.
[43] Transcript, *Hearing: Nomination of Sonia Sotomayor to be Associate Justice of the United States Supreme Court*, Jul. 14, 2009, *available at* http://www.nytimes.com/2009/07/14/us/politics/14confirm-text.html?_r=1&ref=politics.
[44] 550 U.S. 124 (2007).
[45] Transcript, *Hearing: Nomination of Sonia Sotomayor to be Associate Justice of the United States Supreme Court*, Jul. 14, 2009, *available at* http://www.nytimes.com/2009/07/14/us/politics/14confirm-text.html?_r=1&ref=politics.
[46] Transcript, *Hearing: Nomination of Sonia Sotomayor to be Associate Justice of the United States Supreme Court*, Jul. 14, 2009, *available at* http://www.nytimes.com/2009/07/14/us/politics/14confirm-text.html?_r=1&ref=politics.
[47] *See* Debra Cassens Weiss, *In Talk of Precedent, Sotomayor 'Showed her Hand a Touch' on Abortion*, ABA Journal.com, July 15, 2009 (citing Tom Goldstein's comment on SCOTUSblog that "[Judge Sotomayor] has, I think, shown her hand a touch on . . . abortion, erasing any suggestion that she wouldn't be with the left on both."), *available at* http://www.abajournal.com/index.php?/news/in_talk_of_precedent_sotomayor_showed_her_hand_a_touch_on_abortion.

Judge Sotomayor does not have an extensive record on the constitutional guarantee of equal protection under the law in any context,[48] and the Center did not find any cases in which she evaluated the merits of a sex discrimination claim brought under the Equal Protection Clause. In addition, Judge Sotomayor did not testify about this issue at her confirmation hearing.

But Judge Sotomayor did sit on a Second Circuit panel that issued an unpublished, unsigned summary order reversing the district court's grant of summary judgment against the plaintiffs' Equal Protection claims and remanding for application of the Equal Protection standard for gender discrimination claims.[49] In this case, the panel directed the district court to consider whether "the City's decision to send the five female applicants in the 127-person applicant pool to the panel that included the only woman among 12 examiners may have been substantially related to an important state interest."[50] This formulation is the key articulation of the heightened scrutiny test in place since 1975, although it was further amplified to require an "exceedingly persuasive" justification in Justice O'Connor's majority opinion in *Mississippi University Women v. Hogan*[51] in 1982 and later in Justice Ginsburg's majority opinion in *United States v. Virginia (VMI)* in 1996.[52] There is neither any indication that Judge Sotomayor wrote the unsigned summary order, nor any substantive discussion of the standard.

With regard to the rights of gay Americans under the Equal Protection Clause, Judge Sotomayor's record is similarly sparse. In one case she heard as a district court judge,[53] Judge Sotomayor refused to dismiss a prisoner's claim that he had been discriminated against on the basis of sexual orientation during the pendency of *Romer v. Evans*, which held that Colorado's prohibition of state or local laws that protected against discrimination on the basis of sexual orientation violated the Equal Protection Clause,[54] anticipating that the Supreme Court's decision in that case might "elucidate further the equal protection rights of persons with homosexual, lesbian or bisexual orientation."[55] However, it does not appear that she ruled as a matter of law on whether such discrimination would violate the Equal Protection clause.[56]

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[48] As a district court judge, Judge Sotomayor wrote decisions in a number of cases that dealt substantively with Equal Protection claims, but all involved rational basis review. Those claims arose in a variety of contexts (for example, challenging election board procedures, prison policies banning Santeria beads but not rosaries, bar examiners' allowance of accommodations for learning disabled test takers, and the federal hostage taking statute's distinctions on the basis of alienage), but none addressed discrimination on the basis of gender. In none of these decisions did Judge Sotomayor's Equal Protection analysis raise any concerns.

[49] *Amador v. City of Hartford*, 2001 WL 1313747 (C.A.2 (Conn.)), *unpub'd*.

[50] *Id*. at *2 (emphasis added).

[51] 458 U.S. 718, 724 (1982).

[52] 518 U.S. 515 (1996) (holding that official action denying rights or opportunities based on sex will receive "*skeptical scrutiny*" from the courts; that the burden of justifying such action is "*demanding and it rests entirely on the state*;" and that the state must show an "*exceedingly persuasive justification*" for all gender-based classifications). (Emphasis added).

[53] *Epps v. Comm'r of Correctional Svcs.*, 1993 WL 213035 (S.D.N.Y.)).

[54] 517 U.S. 620 (1996). The Supreme Court struck down the amendment as a violation of the Equal Protection clause.

[55] 1993 WL 213035, at *1.

[56] At Judge Sotomayor's confirmation hearing before the Senate Judiciary Committee related to her nomination to the Second Circuit in 1997, she stated that the case went to trial, and that the jury found for the defendant prison system. Transcript, *Hearing of Sonia Sotomayor for Circuit Court Nomination*, Sept. 30, 1997, *available at* http://judiciary.senate.gov/nominations/SupremeCourt/Sotomayor/upload/Question-12-d-No-5-3-17-94-women-in-the-judiciary.pdf).

In addition, while Judge Sotomayor was a member of the board of PRLDEF, that organization filed an *amicus* brief in *United States v. Paradise*,[57] which involved a challenge to a court-ordered affirmative action policy under the Equal Protection Clause.[58] The brief, which was also joined by the Center, argued that the court order, which established that one African American officer be promoted for every white officer promoted at every rank in the Alabama state police force until either 25% of the rank was African American, or the Department of Public Safety developed a lawful promotional procedure, met constitutional muster. The statement of the joint interests of *amici* stated, in part:

> *Amici* conduct extensive litigation to eliminate employment discrimination, representing employees in both the governmental and private sectors. In some of these cases, courts have entered consent decrees or adjudicated decrees that provide race- and sex-conscious hiring and promotional goals to remedy employers' past discrimination. . . . Although less drastic measures will in many cases be sufficient, some cases, including egregious cases like the instant one, have taught *amici* that the lingering effects of discrimination cannot always be eradicated without the very sort of race-conscious relief approved below.[59]

It should be noted that the Supreme Court rejected the challenge to the court order, and that, as stated above, Judge Sotomayor testified that PRLDEF board members did not approve litigation or read *amicus* or other briefs,[60] but PRLDEF staff informed the Board that the organization had filed the brief.[61] However, it is fair to state that Judge Sotomayor was a board member of an organization that advocated for affirmative action protections.

Federal Anti-Discrimination Protections

Title VII disparate treatment cases

We found about 20 cases raising claims under Title VII of the Civil Rights Act of 1964, which bars discrimination in employment based on race, color, sex, national origin and religion, that came before Judge Sotomayor in the district court. In addition, Judge Sotomayor heard over 120 Title VII cases while on the Second Circuit (although not all of the opinions directly implicate Title VII). She is identified as the writing judge in only 12 of these Second Circuit cases, but

[57] 478 U.S. 501 (1987).
[58] Brief for the Lawyers' Committee for Civil Rights Under Law, the American Civil Liberties Union, the American Jewish Congress, the Mexican American Legal Defense and Educational Fund, the National Association for the Advancement of Colored People, the National Women's Law Center, the Puerto Rican Legal Defense and Education Fund, Women Employed, and the Women's Legal Defense Fund as Amici Curiae in Support of Respondents Phillip Paradise, et al., *United States v. Paradise*, 478 U.S. 501 (1987) (No. 85-999), 1986 WL 727620.
[59] *Id*. at *3-4. PRLDEF's individual statement of interest provided that PRLDEF "is a national organization dedicated to protecting and furthering the civil rights of Puerto Ricans and other Hispanics." *Id.* at *3.
[60] *See, e.g.*, Transcript, *Hearing: Nomination of Sonia Sotomayor to be Associate Justice of the United States Supreme Court*, Jul. 14, 2009, *available at* http://www.nytimes.com/2009/07/14/us/politics/14confirm-text.html?_r=1&ref=politics.
[61] Puerto Rican Legal Defense and Education Fund, Inc., *A History of the Litigation 1982-1987*, *available at* http://judiciary.senate.gov/nominations/SupremeCourt/Sotomayor/upload/Doc-36-LitHx1982.pdf.

many decisions were issued as unpublished, unsigned summary orders and there is no way to definitively determine the authoring judge in those cases.[62]

The Title VII opinions written by Judge Sotomayor suggest that she appropriately articulates the Title VII principles that she applies to the particular facts before her. They do not suggest that she would seek to expand Title VII principles in ways that would favor plaintiffs, nor do they suggest that she would seek to favor employers. Her harassment cases do suggest, however, that she has a particular understanding of the impact of harassment in the workplace, and is more likely to leave to a jury an assessment of whether conduct amounts to a hostile environment than are some other judges. The following are examples of her Title VII opinions:

- In *Greenbaum v. Svenska Handelsbanken*,[63] a woman working as a trader for an international bank alleged that the bank refused to promote her because of her sex and age and that it subjected her to a sex-based hostile environment and again failed to promote her in retaliation for filing a state discrimination complaint. Judge Sotomayor presided over this case on the district court, issuing at least four opinions in the case over several years. A jury decided in favor of the plaintiff on claims of failure to promote and retaliation, but against her on her claims of sexual harassment and age discrimination. Granting appropriate deference to the jury determination, Judge Sotomayor upheld the verdict and damages awards in a series of opinions, finding that a reasonable jury could have found that the employer's explanations for failing to promote the plaintiff were pretextual. In so doing, she appropriately emphasized that the jury could rely on the fact that an employer could not credibly explain its conduct as evidence of pretext.

- In a 1996 (pre-*Ledbetter v. Goodyear Tire & Rubber Co.*[64]) pay discrimination case, *Black v. NYU Medical Center*,[65] Judge Sotomayor did not bar a Title VII pay discrimination claim filed 300 days after the initial pay setting decision as untimely. Because the plaintiff alleged that NYU's School of Medicine had a policy of pay disparities, she determined that the allegation was of an ongoing violation of Title VII. Judge Sotomayor did dismiss the plaintiff's Equal Pay Act claim as untimely because the plaintiff failed to identify the specific individuals performing substantially similar work to hers within the School of Medicine. But Judge Sotomayor notably did not allow procedural hurdles to bar the Equal Pay Act claim – she dismissed the plaintiff's claim without prejudice and stated she would grant leave to allow her to amend the complaint, assuming she had sufficient facts to meet her burden**.**

- In *Cruz v. Coach Stores*,[66] Judge Sotomayor not only showed that she was attuned to workplace harassment, but also recognized overlapping forms of race and sex discrimination. Yvette Cruz, a Hispanic woman, worked as a part-time sales associate for Coach and was later appointed to a secretarial position. She believed she was entitled to a

[62] Although we were concerned by some of the language in the unpublished, unsigned summary orders, in each of those cases we believe the panel reached the right result. Furthermore, as mentioned above, there is no indication that Judge Sotomayor wrote any of the summary orders of concern.
[63] 67 F.Supp. 2d 228 (1998).
[64] 550 U.S. 618 (2007).
[65] 1996 WL 280802 (S.D.N.Y. 1996).
[66] 202 F.3d 560 (2d Cir. 2000).

financial analyst position based on prior promises made about her advancement at Coach. Cruz also alleged that she was routinely subject to racial and gender harassment by coworkers and a supervisor. She was ultimately terminated after getting into a physical altercation with a coworker. Writing for the panel, Judge Sotomayor affirmed the dismissal of plaintiff's failure to promote claim and retaliation claim. Cruz never applied for the financial analyst position and there was evidence in the record that she was not qualified for the position. On the retaliation claim, Judge Sotomayor emphasized that Cruz was terminated not in retaliation for complaining but because of a physical altercation – as she put it, "[s]lapping one's harasser, even assuming arguendo that Cruz did so in response to Title VII-barred harassment, is not a protected activity."

But Judge Sotomayor allowed the hostile work environment claim to proceed. She emphasized that while the plaintiff could have presented her claim "more artfully," a reasonable jury could find that the plaintiff had made out a hostile work environment claim.[67] She further noted that the plaintiff presented evidence of both race and gender harassment and that "a jury could find that [Defendant's] racial harassment exacerbated the effect of his sexually threatening behavior and vice versa."[68]

- In another case involving overlapping race and sex discrimination, *Williams v. Consolidated Edison Corp. of New York*,[69] Judge Sotomayor joined a panel decision vacating the district court's grant of summary judgment on a hostile environment claim (the panel affirmed the district court's decision on the additional retaliation and discrimination claims). In that case, the plaintiff alleged that she was regularly subject to race- and sex-based epithets by coworkers and supervisors. In addition, women were routinely made to believe they did not belong in the workplace in other ways – e.g., pornographic materials were prominently displayed, their male coworkers avoided shifts with women, and women were not provide with adequate locker room facilities. In addition to the racial epithets, the work location and assignments had racial patterns. The panel held that a reasonable jury could determine that that the plaintiff was subject to a hostile environment. In addition, there was no dispute that Con Ed knew about the majority of the harassment – the plaintiff reported much of the conduct to supervisors and human resources – but the panel held that there was a factual dispute over whether Con Ed responded to the harassment appropriately.

- In *Raniola v. Bratton*,[70] a New York City police officer claimed that she was subject to years of abuse, including threats, false accusations of misconduct, derogatory remarks, and disproportionately burdensome assignments because of her sex. She claimed that after filing an EEOC complaint, she was singled out for worse assignments and heavier workloads. In addition, at one point during a lineup where the officer was the only woman, the Captain said "listen up everybody, we have a problem. There . . . is a rat here in the precinct. Until I get rid of her, we are all in this together."[71] The officer was ultimately terminated following a remark that she allegedly made while off duty.

[67] *Id*. at 569.
[68] *Id*. at 572.
[69] 2007 WL 4179358 (2d Cir. Nov. 27, 2007)
[70] 243 F.3d 610 (2d Cir. 2001).
[71] *Id*. at 614 (emphasis added).

Three days into a jury trial, the district court invited motions for judgment as a matter of law and granted judgment in favor of the police department, dismissing the complaint in part because the trial judge did not believe the conduct was "because of sex." Judge Sotomayor revived the officer's claim in the Second Circuit. Writing for the panel, she emphasized that a reasonable jury could conclude that the gender-based conduct towards the officer (abusive language and derogatory remarks, disparate treatment (denied shift requests that her male peers were granted), and workplace sabotage) created an actionable hostile environment. In addition, Judge Sotomayor reversed the trial court's dismissal of plaintiff's retaliation claim, concluding that a reasonable jury could find that following plaintiff's EEOC complaint, the department was indeed "looking to fire" her.[72]

- In addition, a summary order in a case where she sat on the panel is an example of Judge Sotomayor's understanding of the way in which Title VII applies to sex stereotyping discrimination. In *Miller v. City of New York*,[73] the panel reversed the district court's grant of summary judgment in a Title VII case involving sex stereotyping. In that case, a small, non-muscular man with a disability alleged that his supervisor complained that he was not a "manly man" or a "real man" and devised a scheme to give him dangerous assignments to "toughen him up." In an unpublished summary order, the panel found that although sexual orientation discrimination is not actionable under Title VII, "discrimination on the basis of a failure to conform to sex stereotypes can evidence the sort of difference in treatment of persons of different genders that is actionable under Title VII."[74] The panel next held that a hostile environment must be "severe and pervasive enough to create an environment that would reasonably be perceived, and is perceived, as hostile or abusive."[75] This use of the conjunctive, rather than the severe or pervasive standard set forth by the Supreme Court, implies that more is required of a plaintiff in a hostile environment claim. But even applying this heightened standard, the court held that the facts met the standard for harassment under Title VII and that the hostile environment claim, together with a claim for constructive discharge and retaliation, should go to a jury.

- Finally, as a district court judge, Judge Sotomayor wrote an opinion in a case in which the plaintiff alleged sexual harassment, but did not bring claims under Title VII. In *Zveiter v. Brazilian Nat'l Superintendency of Merchant Marine*,[76] the plaintiff alleged that she was subject to unwelcome touching, staring, jokes/comments, and invitations for cocktails, was reassigned from her position as a secretary to serve as a receptionist, and was told that her failure to "play the game" could jeopardize her employment. The plaintiff sued claiming sexual harassment under the New York Human Rights Law. Judge Sotomayor denied the defendant employer's motion for summary judgment, in part because she concluded that a jury could reasonably find that the abuse Zveiter experienced constituted a hostile work environment. Notably, Judge Sotomayor observed that a "female employee need not

[72] *Id*. at 627.
[73] 2006 WL 1116094 (2d Cir. Apr. 26, 2006).
[74] *Id*. at 197.
[75] *Id*. (emphasis added). Note that in several unpublished orders, and in opinions written by Judge Sotomayor, the standard for Title VII sexual harassment claims was identified as "severe *and* pervasive" rather than severe or pervasive.
[76] 833 F.Supp. 1089 (S.D.N.Y. 1993).

subject herself to an extended period of demeaning and degrading provocation before being entitled to remedies for sexual harassment."[77]

In addition, while Judge Sotomayor was a PRLDEF board member, the organization was involved in Title VII litigation that raised disparate treatment claims.[78] PRLDEF staff did report to the Board that they had been involved in these cases, but as Judge Sotomayor testified at her hearings, board members did not approve specific litigation activities, and at most would look at the organization's legal work to ensure that it was consistent with the broad mission statement of the fund.[79] It is therefore fair to say that Judge Sotomayor knowingly served on the board of an organization that engaged in employment discrimination litigation, generally on behalf of plaintiffs.

Title VII disparate treatment cases were not substantively discussed at Judge Sotomayor's confirmation hearing.

Promotion Policies and Affirmative Action

A great deal of public attention has focused on Judge Sotomayor's participation in the lower court decision in one Title VII disparate impact case involving promotion policies in the public sector, *Ricci v. DeStefano*.[80]

In 2003, the City of New Haven administered written and oral promotional examinations for captain and lieutenant positions in its fire department. Based on the results, no Hispanic or African American applicants were eligible for the available lieutenant positions, and only two Hispanic and no African Americans were eligible for the captain positions. In fact, though not a part of the case, no women of any race were eligible for promotion to any job as a result of the test. Following hearings before the City's Civil Service Board, the Board determined that it should not certify the exam results for promotions, believing that the City could be in violation of Title VII if it made promotions based on the results of a flawed exam.

The City would not have been able to justify its use of the exam if it could not show that the exam was both job-related and consistent with its business needs. And even if it could make such a showing, there remained the questions of whether an acceptable, nondiscriminatory alternative was available. The City therefore also considered testimony about alternative approaches to the exam. Testing experts offered evidence that other methods of testing candidates for promotion were available and suggested that alternative tests might not have an adverse effect on minority candidates. Twenty white firefighters, including one Hispanic firefighter, filed suit, claiming that the decision by the City to not certify the test results was reverse discrimination.

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[77] *Id*. at 1095.
[78] *See*, *e.g.*, Puerto Rican Legal Defense and Education Fund, Inc., Report of Program Activities, 1987 (describing employment discrimination case on behalf of individuals asserting that they were treated differently than non-Latino employers), *available at* http://judiciary.senate.gov/nominations/SupremeCourt/Sotomayor/SoniaSotomayor-Letters.cfm.
[79] Transcript, *Hearing: Nomination of Sonia Sotomayor to be Associate Justice of the United States Supreme Court,* Jul. 14, 2009, *available at* http://www.nytimes.com/2009/07/14/us/politics/14confirm-text.html?_r=1&ref=politics.
[80] *Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008) (per curiam).

In an extremely thorough and detailed opinion, the district court rejected the firefighters' arguments that the City was required to certify the results of a test that it believed violated Title VII. A panel of the Court of Appeals for the Second Circuit, including Judge Sotomayor, affirmed the district court decision in a summary order following a very active oral argument.[81] The unsigned order stated that the panel was constrained in its decision by Second Circuit precedent. A judge on the Second Circuit *sua sponte* requested a vote on whether the case should be heard *en banc*, but a majority of the Second Circuit judges declined to review the panel's decision. The firefighters petitioned for certiorari, and the Supreme Court agreed to review the case.

In a 5-4 decision, the Supreme Court ruled in favor of petitioners.[82] In so doing, the majority opinion, written by Justice Kennedy, declared that employers must have "a strong basis in evidence" before discarding a discriminatory test or practices.[83] This represents a shift in the standard traditionally guiding employers confronting discriminatory practices, which the Second Circuit panel could not have anticipated and could not have reasonably instituted itself. In fact, no other court to consider the application of disparate impact and disparate treatment cases had ever applied the "strong basis in evidence" standard. Four Justices, including Justice Souter, would have upheld the Second Circuit ruling.[84] The closely divided decision demonstrates that the Second Circuit panel fell within the mainstream of judicial thought, with four Justices in agreement.

Judge Sotomayor has been criticized both for the summary manner in which the Second Circuit panel disposed of the case and for the actual outcome in the decision. But these critics do not account for the standard practice of summary orders (unpublished orders adopting the reasoning of the district court) on the Second Circuit. The Second Circuit rules allow for summary orders where "there is no jurisprudential purpose" in publishing an opinion and 75% of the court's cases are disposed of in this manner.[85] Its use in *Ricci* was not so unusual given that there was directly applicable Second Circuit precedent. There would have been no way for the panel to have anticipated that, upon review by the Supreme Court, an entirely different rule never before applied to Title VII disparate impact claims would be adopted.

In addition, the Center strongly believes that the Second Circuit and district court reached the right outcome and authored an *amicus* brief in support of New Haven that stressed the importance of the disparate impact provision, particularly in nontraditional fields, for women.[86]

Despite intense and lengthy questioning about the case during her confirmation hearing, Judge Sotomayor consistently made the point that she was following Second Circuit precedent and that the summary opinion was justified, given the lengthy and persuasive lower court opinion.

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[81] *See* Warren Richey, *Sotomayor on tape: What she said in firefighter race case*, CHRISTIAN SCI. MONITOR, May 29, 2009, *available at* http://features.csmonitor.com/politics/2009/06/03/sotomayor-on-tape-what-she-said-in-firefighter-race-case/.

[82] No. 07-1428, slip op. (U.S. Jun. 29, 2009).

[83] *Id.*

[84] No. 07-1428, slip op. (U.S. Jun. 29, 2009) (Ginsberg, J., Stevens, J., Souter, J., and Breyer, J., dissenting).

[85] The Second Circuit's Handbook states that 75% of cases are decided on summary orders. *See* http://www.ca2.uscourts.gov/Docs/COAManual/everything%20manual.pdf

[86] Following the decision, the Center produced materials and participated in a coalition press call to explain the impact of the *Ricci* decision on women.

In other cases involving the disparate impact of promotional practices, Judge Sotomayor has similarly applied the law consistent with the facts before her. And where the lower court decision was inconsistent with Second Circuit or Supreme Court precedent, she joined opinions to vacate the lower court decision. In *Malave v. Potter*,[87] for example, Judge Sotomayor joined an opinion vacating a district court's grant of summary judgment in a challenge to the promotion practices of the Postal Service, which the plaintiff claimed had an unlawful disparate impact on Hispanics. The panel held that the district court outlined the wrong standard of proof for a Title VII disparate impact claim. The court required the plaintiff to prove that the promotional practices had an adverse impact by looking at the number of Hispanics applying for promotional positions. As the panel decision noted, this standard conflicted with both Supreme Court and Second Circuit precedent, which permitted adverse impact to be determined by looking at either the applicant pool or the eligible labor pool.

In *Atkins v. Westchester County Department of Social Service*,[88] Judge Sotomayor joined a summary order affirming the district court's decision to grant summary judgment against a group of African American employees who claimed that the promotional exam used by the county had an unlawful disparate impact. But, the panel noted, the plaintiffs were unable to show a measurable racial disparity. In fact, the promotion rates were actually higher for African American candidates than white candidates.

In addition, while Judge Sotomayor was a PRLDEF board member, the organization was involved in litigation challenging promotional exams,[89] and filed a number of *amicus* briefs in Supreme Court cases dealing with affirmative action policies challenged under Title VII,[90] including *Johnson v. Transportation Agency*,[91] *Local 28 v. EEOC*,[92] and *Local 93 v. City of Cleveland*.[93] The affirmative action plan in *Johnson* did not contain numerical requirements, but the plans at issue in *Local 28* and *Local 93* did. The Supreme Court upheld the plans in all three of these cases.

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[87] 320 F.3d 321 (2d Cir. 2003).
[88] 2002 WL 465163 (2d Cir. May 27, 2002).
[89] *See, e.g.*, Puerto Rican Legal Defense and Education Fund, Inc., Report of Program Activities, 1987 (describing several challenges to promotional exams brought under Title VII) *supra*.
[90] Brief for the Lawyers' Committee for Civil Rights under Law, the Mexican American Legal Defense and Education Fund, the National Association for the Advancement of Colored People, and the Puerto Rican Legal Defense and Education Fund, Inc. as Amicus Curiae Supporting Respondents*; Johnson v. Transportation Agency*, 480 U.S. 616 (1987) (No. 85-1129) WL 728159 [hereinafter *Johnson* Amicus Brief]; Brief for the NAACP Legal Defense and Education Fund, Inc., National Association for the Advancement of Colored People, Mexican American Legal Defense and Education Fund, Inc., National Urban League, Inc., Puerto Rican Legal Defense and Education Fund, Inc., Asian American Legal Defense and Education Fund, Inc., and the New Jewish Agenda as Amicus Curiae, *Local 93 v. City of Cleveland*, 478 U.S. 501 (1986) (No. 84-1999) WL 728300 [hereinafter *Local 93* Amicus Brief]; Brief of the NAACP Legal Defense and Education Fund, American Jewish Congress, American Jewish Committee, National Association for the Advancement of Colored People, Mexican American Legal Defense and Educational Fund, Inc., National Urban League, Inc., Puerto Rican Legal Defense and Education Fund, Inc., Asian American Legal Defense and Education Fund, Inc., the New Jewish Agenda, the Commission on Social Action of the Union of American Hebrew Congregations and the Central Conference of American Rabbis as Amicus Curiae, *Local 28 v. E.E.O.C.*, 478 U.S. 421 (1986) (No. 84-1656) WL 1031747 [hereinafter *Local 28* Amicus Brief].
[91] 480 U.S. 616 (1987) (challenge to voluntary affirmative action policy).
[92] 478 U.S. 421 (1986) (challenge to affirmative action plan ordered as part of contempt sanctions).
[93] 478 U.S. 501 (1986) (challenge to affirmative action plan entered into pursuant to consent decree).

PRLDEF staff did report to the Board that they had been involved in these cases,[94] but as Judge Sotomayor testified at her confirmation hearings, Board members did not review the organization's legal work generally[95] or review *amicus* or other briefs.[96] As a result, it is fair to say that Judge Sotomayor knowingly served on the Board of Directors of an organization that engaged in litigation challenging promotional exams and supported legal protection for affirmative action programs in the context of employment.

Judge Sotomayor was asked several questions regarding affirmative action at her confirmation hearing. She stated her belief that:

> The Constitution promotes and requires the equal protection of the law of all citizens in its 14th Amendment. To ensure that protection, there are situations in which race in some form must be considered; the courts have recognized that. Equality requires effort, and so there are some situations in which some form of race has been recognized by the Court.[97]

Americans With Disabilities Act (ADA)

Judge Sotomayor has not presided over many cases raising ADA claims, but several of the cases in which she wrote opinions are notable because they demonstrate Judge Sotomayor's careful review of the record and respect for the rights of the disabled. There was no testimony of note about ADA or other disability-related issues at her confirmation hearing.

In *Bartlett v. New York State Board of Law Examiners*,[98] Judge Sotomayor went through a voluminous record and a painstaking analysis. The plaintiff in this case, a woman who had a learning disability, claimed she was denied reasonable accommodations in taking the bar exam. Judge Sotomayor found that the plaintiff was disabled under the ADA and Section 504 of the Rehabilitation Act, a conclusion that was affirmed by the Second Circuit.[99]

In *EEOC v. J.B. Hunt Transp.*,[100] Judge Sotomayor also exhaustively reviewed the record and would have allowed plaintiffs to bring their ADA claims to a jury. In this case, the EEOC sued

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[94] *See* PRLDEF, A History of the Litigation 1982-1987, *supra* note 56.
[95] Transcript, *Hearing: Nomination of Sonia Sotomayor to be Associate Justice of the United States Supreme Court*, Jul. 14, 2009, *available at* http://www.nytimes.com/2009/07/14/us/politics/14confirm-text.html?_r=1&ref=politics.
[96] *See, e.g.*, Transcript, *Hearing: Nomination of Sonia Sotomayor to be Associate Justice of the United States Supreme Court*, Jul. 14, 2009, *available at* http://www.nytimes.com/2009/07/14/us/politics/14confirm-text.html?_r=1&ref=politics; *Nomination of Sonia Sotomayor to be Associate Justice of the United States Supreme Court*, Jul. 16, 2009, *available at* http://www.nytimes.com/2009/07/16/us/politics/15confirm-text.html?ref=politics.
[97] Transcript, *Hearing: Nomination of Sonia Sotomayor to be Associate Justice of the United States Supreme Court*, Jul. 14, 2009, *available at* http://www.nytimes.com/2009/07/14/us/politics/14confirm-text.html?_r=1&ref=politics. Judge Sotomayor also discussed the Court's 2003 decisions in *Grutler v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003), which considered the use of affirmative action in educational institutions.
[98] 970 F. Supp. 1094 (S.D.N.Y. 1997), *rev'd in part* 156 F.3d 321 (2d. Cir. 1998).
[99] Judge Sotomayor dismissed plaintiff's claims for violation of due process and equal protection. 970 F. Supp. 1094. This conclusion was not reviewed by the Second Circuit. *See* 156 F.3d 321 (2d. Cir. 1998). The Second Circuit vacated the damages award on the grounds that Judge Sotomayor had granted damages for expenses incurred in connection with bar examinations where the plaintiff did not seek accommodations. The panel then remanded for a revised calculation of damages. *See* 156 F.3d 321 at 332.
[100] 321 F.3d 69 (2d Cir. 2003).

J.B. Hunt Transportation under the Americans with Disabilities Act for refusing to hire over-the-road truck drivers who used certain prescription medications with side effects that might impair driving ability. The district court granted summary judgment for the defendants, finding that J.B. Hunt denied the plaintiffs' over-the-road driving positions because of their use of medications with potentially harmful side effects, not as a result of their disability. A majority of the Second Circuit panel affirmed. Judge Sotomayor filed a dissenting opinion in which she stated that the EEOC produced significant evidence that J.B. Hunt regarded the applicants as substantially limited in the major life activity of working as truck drivers in general, and thus as disabled.[101]

In *Norville v. Staten Island Univ. Hospital*, [102] a 56-year-old African American woman terminated from her position as a hospital nurse brought claims of race, age, and disability discrimination. After taking a medical leave of absence, the hospital was willing to offer the nurse only positions that would require her to lose seniority or work part-time (prior to her leave, she worked full-time). When a full-time position opened that would have permitted her to keep seniority, the hospital gave the position to a younger Hispanic male nurse.[103] Judge Sotomayor, writing for a Second Circuit panel, reversed a jury verdict in favor of the hospital on the disability claim, because the district court incorrectly instructed the jury on the standard for disability accommodation. Her opinion made the important point that reassignment to a less desirable position does not constitute a reasonable accommodation under the ADA when the employee's former position is available. Judge Sotomayor found that the district court's failure to provide such an instruction was reversible error.

In *Parker v. Columbia Pictures Indus.*,[104] a former employee claimed that his employer terminated him after he took disability leave for a back injury. The district court determined that the plaintiff had not made out a prima facie case under the ADA. Specifically, the court held that he had not demonstrated that he was able to perform the essential functions of the job and he had not established that he was terminated "because of" his disability. Writing for the Second Circuit panel, Judge Sotomayor first found that the statements on the plaintiff's application for disability benefits, in which he indicated serious physical difficulties, did not compel summary judgment because the statements were not directly in conflict and the plaintiff provided an adequate explanation for the tension between the two statements. Second, although the ADA does not contain an express mixed-motive provision, Judge Sotomayor determined that claims brought under the ADA were subject to the mixed-motive analysis available in the Title VII context. At the time of the decision, every court of appeals to consider this issue was an agreement with this analysis.[105] But the recent Supreme Court decision, *Gross v. FBL Financial Serv.*,[106] which held that a plaintiff under the Age Discrimination in Employment Act may not rely on a mixed-motive analysis and instead must prove "that age was the but-for cause of the challenged adverse employment action,"[107] may call this conclusion into question. Like the recent Supreme Court decision in *Ricci*, however, there would be no way for the court of appeals to have anticipated

[101] *Id.* at 79 (Sotomayor, J., dissenting).
[102] 196 F.3d 89 (2d Cir. 1999).
[103] Judge Sotomayor affirmed the district court's grants of judgment against the plaintiff on the race and age discrimination claims, a conclusion amply supported by the law and the facts in this case.
[104] 204 F.3d 326 (2d Cir. 2000)
[105] *Id.* at 336-37 (listing cases).
[106] No. 08-441 (June 18, 2009).
[107] *Id.* at *12.

that the Supreme Court would disturb longstanding court of appeals interpretations of antidiscrimination law.

Discrimination in schools

In a case alleging race discrimination, *Gant v. Wallingford Bd of Ed.*,[108] an African American male elementary school student sued under Section 1981 and Section 1983 for violation of the right to equal protection, claiming racial hostility and a discriminatory transfer from first grade back to kindergarten. His family had moved to a new school district in the middle of the year from a neighboring town in Connecticut, where he was in the first grade. After two weeks at the new school, where he was not able to do the work, he was transferred to a kindergarten class in which he remained for the rest of the school year. The school was only one to two percent African-American, and the student was the only African American student in the first grade class. The district court granted summary judgment for the school.

Judge Cabranes wrote the decision for the Second Circuit, affirming the district court.[109] Judge Sotomayor agreed with the dismissal of the hostile environment claim, but strongly dissented on the transfer from first grade to kindergarten. She stated: "I consider the treatment this lone black child encountered during his brief time in Cook Hill's first grade to have been not merely 'arguably unusual' or 'indisputably discretionary,' but unprecedented and contrary to the school's established policies."[110] She went on to say, "Only one circumstance in this case stands out as the likely reason for the discrepancy between the defendants' treatment of other struggling students and their treatment of [the African American male student]: his race."[111]

In a district court case, *Pell v. Trustees of Columbia University*,[112] an employee at Barnard College, who was also a graduate student at Columbia, claimed a hostile environment at both institutions and quid pro quo sexual harassment by her thesis advisor. Judge Sotomayor dismissed her Title VII claims against Barnard as untimely. However, because *Pell* was decided before the Supreme Court established the harsh standard requiring deliberate indifference to actual knowledge of harassment in *Gebser v. Lago Vista Indep. Sch. Dist.*,[113] Judge Sotomayor

[108] 195 F.3d 134 (2d Cir. 1999).
[109] The majority opinion examined the hostile environment claim, borrowing a deliberate indifference analysis from Title IX law. 195 F.3d 134, 140 (2d Cir. 1999). With regard to the kindergarten transfer, Judge Cabranes concluded that "plaintiff has not shown an ability to demonstrate anything more than that an arguably unusual-yet indisputably discretionary-decision was made in an arguably unclear manner," so that it would be unreasonable for a jury to find intentional discrimination. 195 F.3d 134, 150 (2d Cir. 1999).
[110] *Id*. at 151.
[111] *Id*. at 152. At Judge Sotomayor's confirmation hearing, she briefly discussed the *Gant* case: "But in that case, there was a disparate treatment element, and I pointed out to the set of facts that showed or presented evidence of that disparate treatment. That's the quote that you were reading from, that this was a sole child who was treated completely different than other children of -- of a different race in the services that he was provided with and in the opportunities he was given to remedy or to receive remedial help. That is obviously different, because what you're looking at is the law as it exists and the promise that the law makes to every citizen of equal treatment in that situation." Transcript, *Hearing: Nomination of Sonia Sotomayor to be Associate Justice of the United States Supreme Court*, Jul. 14, 2009, *available at* http://www.nytimes.com/2009/07/14/us/politics/14confirm-text.html?_r=1&ref=politics.
[112] 1998 WL 19989 (S.D.N.Y. Jan. 21, 1998).
[113] 524 U.S. 274 (1998).

applied then-current Second Circuit precedent. Under the-then Second Circuit standard, the plaintiff's Title IX claims against Columbia were allowed to proceed. The plaintiff, who was dyslexic, also had a claim under Section 504 of the Rehabilitation Act. Here, there was no governing precedent, but Judge Sotomayor concluded that hostile environment claims could be brought under Section 504.[114]

Other than *Pell*, Judge Sotomayor has a very limited record on Title IX, only joining two unanimous panel opinions. In one of the unanimous panels decided, *Boucher v. Syracuse Univ.*,[115] female athletes asked the University to establish two varsity teams, and complained about the lack of equal treatment of female varsity athletes. The unanimous panel opinion dismissed the equal treatment claim for lack of standing because none of the plaintiffs were varsity athletes. It further found that the lacrosse claim was moot because a varsity team had been formed. While the panel also found that the district court had erred in refusing to certify a class of softball players, that claim was remanded with instructions to dismiss the case if the University completed its announced plan to start a varsity softball team. Finally, the court declined to reach the broader question of Title IX compliance in the entire athletics program, stating that that issue was "never clearly presented in the complaint nor during the prosecution of this case."[116] In the other unanimous panel decision, *Port Washington Teachers' Ass'n v. Bd. of Ed*,[117] teachers and a school social worker challenged a school's policy memorandum concerning pregnant students under Title IX, § 1983, and state law. The policy memo asked school staff to inform parents and school officials if they learned that a student was pregnant. The case was dismissed for lack of standing. Judge Sotomayor joined the unanimous panel opinion that found that plaintiffs had not shown the requisite injury to establish standing because the policy memo, which was not mandatory, did not present a threat to the plaintiff teachers and the school social worker.

Other Civil Rights Issues

Voting Rights

Judge Sotomayor's dissent in a voting rights case demonstrates a robust reading of voting rights protections based on the plain language of the Voting Rights Act.

In *Hayden v. Pataki*,[118] African American and Hispanic inmates and parolees filed suit to challenge a New York state statute disenfranchising incarcerated and paroled felons as a violation of the Voting Rights Act (VRA). The majority opinion held that New York's felon disenfranchisement statutes did not violate the VRA, relying heavily on its analysis of the statute's legislative history. Judge Sotomayor dissented separately to state that the plain language of VRA should govern, and should warrant the finding of a violation:

[114] In so doing, Judge Sotomayor noted that no New York courts, or the Second Circuit, had permitted hostile environment claims, but that the First Circuit had. 1998 WL 19989, at *17.
[115] 164 F.3d 113 (2d Cir.1999).
[116] *Id.* at 119.
[117] 478 F.3d 494 (2d Cir. 2007).
[118] 449 F.3d 305 (2d. Cir. 2006) (*en banc).*

> It is plain to anyone reading the Voting Rights Act that it applies to all "voting qualification[s]." And it is equally plain that § 5-106 disqualifies a group of people from voting. These two propositions should constitute the entirety of our analysis. Section 2 of the Act by its unambiguous terms subjects felony disenfranchisement and all other voting qualifications to its coverage.[119]

Discrimination in Housing

In *Boykin v. KeyCorp*,[120] an African American woman filed a pro se suit under a number of statutes, including the Fair Housing Act, against lenders who denied her application for a home equity loan. Plaintiff had filed a complaint with the Department of Housing and Urban Development (HUD), who referred her complaint to the New York state housing authority. The state housing authority sent her a case-closed letter, and several months later, she received a case-closed letter from HUD. The letter from HUD stated that she had two years to file a lawsuit but that the time during which the administrative proceeding was pending was not included in the two-year period. Plaintiff filed suit in federal district court more than two years after the state agency letter was received, but less than two years after the letter from HUD was received, and the district court dismissed all of her claims as untimely.

Judge Sotomayor wrote a majority opinion holding that the receipt of the HUD letter started the running of the limitations period. She reasoned that the statements in HUD's letter were misleading and inconsistent with its own regulations requiring it to provide adequate notice to complainants of their right to file a civil suit.[121] In addition, Judge Sotomayor liberally construed the pro se plaintiff's complaint, as is proper under the law, and declined to dismiss it for failure to state a legal claim. Judge Sotomayor's approach in this case, informed by the agency's responsibility to give complainants notice and the court's responsibility to ease procedural burdens on pro se plaintiffs, adhered both to the spirit and the letter of the agency regulations and the law.

<u>Other Issues That Have an Impact Women's Rights</u>

With the limited exceptions discussed below, Judge Sotomayor was not asked about the following issues in her judicial record at her confirmation hearing.

Domestic Abuse and Violence Against Women

In *United States v. Giordano*,[122] a former mayor was charged with civil rights violations for acting under color of law to deprive children of their right to be free from sexual abuse. During the mayor's time in office, he had induced a female companion with whom he had a sex-for-

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[119] *Id*. at 367-68.
[120] 521 F.3d 202 (2d Cir. 2008). Judge Sotomayor was asked briefly about *Boykin* at her confirmation hearing, but her responses were not notable.
[121] *Id*. at 210-11.
[122] 442 F.3d 30 (2d Cir. 2006). Judge Sotomayor was asked about a Commerce Clause challenge in this case at her confirmation hearing, but did not discuss the § 1983 claim. Transcript, *Hearing: Nomination of Sonia Sotomayor to be Associate Justice of the United States Supreme Court*, Jul. 14, 2009, *available at* http://www.nytimes.com/2009/07/14/us/politics/14confirm-text.html?_r=1&ref=politics.

money arrangement to bring her underage child and niece to him for sexual encounters. Judge Sotomayor's majority opinion affirmed the district court's holding that the mayor had invoked the power of his office to sexually abuse the children and keep them in fear so they would not tell anyone. In response to the dissent, which argued that the mayor did not act under the color of state law, Judge Sotomayor wrote: "The jury could very easily have concluded that the statements by Giordano that Jones would go to jail was more than a warning and that Giordano's threat carried far more weight than would a threat from a civilian customer…. A mayor with manifest authority over the city's police has vastly more credibility in threatening prosecution."[123] In this case, Judge Sotomayor's decision finding that the mayor's official position enabled him to abuse the children was amply supported by precedent, and showed a real-world understanding of the coercive influence that a government official may exercise upon citizens.

Access to Justice and Due Process Rights

In *Neilson v. Colgate-Palmolive Co.*,[124] the plaintiff had sued her employer for sex and race discrimination and retaliation under Title VII, as well as state law claims. After the complaint had been filed, plaintiff was admitted to a psychiatric facility. She was evaluated for competency as part of her court proceeding, following which the district court appointed a guardian *ad litem*. The court neither provided plaintiff with a copy of the report nor held a hearing prior to appointing the guardian *ad litem*. The guardian proceeded to negotiate a settlement, which the district court approved. A later-appointed general guardian appealed. The majority opinion affirmed the district court's decision. Judge Sotomayor wrote a partial concurrence and partial dissent, asserting that "In my view, the district court failed to give Neilson even the most basic notice before appointing a guardian *ad litem* who then assumed full control over her case. Because I believe this failure amounted to a denial of due process of law, I respectfully dissent."[125]

And in *Robinson v. Shalala*,[126] Judge Sotomayor ensured that the pro se plaintiff was not deprived of her constitutional Due Process rights. In *Robinson*, then-district court Judge Sotomayor considered the appeal of a denial to reopen an application for SSI benefits. The plaintiff had initially represented herself, and had sought reconsideration of an initial denial of benefits. Judge Sotomayor found that HHS' Reconsideration Notice failed to clearly state that failure to seek further administrative review of the reconsideration would render the reconsideration decision final and unappealable. She cited precedent holding that notice forms comparable to the 1986 Reconsideration Notice had been found to violate a claimant's Fifth Amendment right to procedural due process, and that the Due Process concerns were even more acute since plaintiff had not been represented by counsel.[127] Consequently, Judge Sotomayor remanded for consideration of whether the plaintiff was eligible for benefits.

Private Rights of Action

[123] *Id.* at 46 & n. 20.
[124] 199 F.3d 642 (2d Cir. 1999).
[125] *Id.* at 658.
[126] 1994 U.S. Dist. LEXIS 3988 (S.D.N.Y. 1998).
[127] *Id.* at *11.

The plaintiff in *Taylor v. Vermont Dept. of Ed.*,[128] was subject to a divorce decree that awarded custody of her daughter to the father, and specifically provided that he had all rights regarding decisions concerning her schooling and her health and safety. However, the decree gave the plaintiff the "right to reasonable information" concerning the daughter's progress in school and her health and safety.[129] She sued to gain access to school records under the Family Educational Rights and Privacy Act (FERPA) and the Individuals with Disabilities Education Act (IDEA). Judge Sotomayor wrote the majority opinion, holding that the plaintiff was entitled to obtain the records under IDEA, which has an express cause of action, but not FERPA.

The question of whether the mother was entitled to records under FERPA first required an analysis of whether there was a private right of action under the record-access provision of FERPA under the then recent Supreme Court decision in *Gonzaga University v. DOE*,[130] which held that there was no such action under the non-disclosure provisions of that Act. Judge Sotomayor noted that several circuits had assumed without discussion that *Gonzaga* applied to all of FERPA, but she undertook a specific analysis of the record-access provision, which she believed showed that the argument could go either way. Stating that *Gonzaga* required an "unambiguously conferred right," the court held that there was no private right of action.[131]

The wife of the plaintiff in *Roach v. Morse*[132] lived in a Vermont nursing home. The plaintiff, William Roach, made a loan of $287,000 to their daughter and son-in-law, and shortly thereafter applied for Medicaid to pay for his wife's nursing home care. The plaintiff had disclosed the loan when applying for Medicaid. In response, Vermont sent him an additional form that asked further questions about the loan. The plaintiff challenged these questions under 42 U.S.C § 1983, alleging that by using these questions the state was using a methodology for determining Medicaid eligibility that was more restrictive than that used for the SSI program, in violation of the law.

Judge Sotomayor wrote the majority opinion rejecting the plaintiff's challenge. The court upheld Vermont's ability to inquire further about plaintiff's loans. The court reached this conclusion on the grounds that, though the plaintiff argued that Vermont could not ask questions more restrictive than those required for SSI applications, the questions asked by Vermont were permissible because they were permitted (but not required) under SSI's Programs Operations Manual System (POMS).[133] The court's reliance on the POMS was supported by case law, and the ultimate conclusion appears to be reasonable.

Federalism/Congressional Authority Under the Commerce Clause

In several federal criminal cases involving convictions for gun possession and arson, defendants argued that there was no sufficient nexus to interstate commerce under the Supreme Court's

[128] 313 F. 3d 768 (2d Cir. 2002).
[129] *Id.* at 772.
[130] 536 U.S. 273 (2002).
[131] *Id.* at 783.
[132] 440 F.3d 53 (2d Cir. 2006).
[133] *Id.* at 60-1.

decisions in *United States v. Lopez*[134] (finding that Congress had no authority to regulate guns in school yards) and *United States v. Morrison*[135] (finding that Congress had no authority to provide a federal court remedy for victims of gender-based violence). Judge Sotomayor was a member of unanimous panels that interpreted these decisions narrowly, declining to strike down the statutes in question as beyond Congress' authority under the Commerce Clause. [136]

The plaintiffs in *McGinty v. New York*,[137] however, were about to be awarded damages for a violation of the Age Discrimination in Employment Act (ADEA) when the Supreme Court decided, in *Kimel v. Fla. Bd. of Regents*[138] that the ADEA does not validly abrogate state sovereign immunity. Judge Sotomayor sat on a panel of the Second Circuit that reviewed the decision, and joined the unanimous opinion stating that *Kimel* barred the suit, despite plaintiff's contention that they had shown an actual constitutional violation. This was a reasonable application of *Kimel* at the time, although later invalidated by *United States v. Georgia*.[139]

Public Benefits

As both a district and circuit judge, Judge Sotomayor reviewed cases dealing with public benefits, including challenges to denials of Social Security Disability benefits (SSDI) and Supplemental Security Income (SSI) benefits, as well as one case involving a challenge to a discontinuation of Medicaid and Medicare benefits under § 1983.

In one case involving Medicaid and Medicare, *Cohen v. Wilson-Coker*,[140] the plaintiff brought an action under §1983, claiming that the Connecticut Department of Social Services violated his federal statutory and Equal Protection rights by including the cash surrender value of his veteran's National Service Life Insurance (NSLI) policy, worth approximately $4,700, as a resource to deny him continued participation in Medicaid and Medicare programs. At issue was a statute that explicitly stated that insurance policies totaling more than $1,500 shall be taken into account.[141] The district court granted summary judgment to the Department, and plaintiff appealed. Judge Sotomayor sat on the panel of the Second Circuit that ruled, in a summary

[134] 514 U.S. 549 (1995).
[135] 529 U.S. 598 (2000).
[136] *See* United States v. Iodice, 525 F.3d 179 (2d Cir. 2008)(holding that the federal arson statute, 18 U.S.C. § 844(i), was constitutionally applied to the arson of a diner that had been unused for approximately two years at the time of the fire); United States v. Giordano, 442 F.3d 30 (holding that 18 U.S.C. §2425, a statute prohibiting the knowing transmission of minors' names by use of facilities and means of interstate commerce with intent to entice, encourage, and solicit them to engage in sexual activity, did not exceed Congress's commerce clause authority); United States v. Harris, 358 F.3d 221 (2d Cir. 2004) (holding that a federal statute prohibiting possession of child pornography using materials that moved in interstate commerce was a permissible exercise of Congress's authority under the Commerce Clause); United States v. Gaines, 295 F.3d 293 (2d Cir. 2002) (rejecting Commerce Clause challenge based on defendant's concession that the firearms had "traveled at some time in interstate commerce");United States v. Santiago, 238 F.3d 213 (2d Cir. 2001) (per curiam opinion holding that 18 U.S.C. § 922(g)(1), the felon-in-possession statute, does not exceed Congress's authority under the Commerce Clause, either in general or as applied in the case).
[137] 251 F.3d 84 (2d Cir. 2001).
[138] 528 U.S. 62 (2000).
[139] 546 U.S. 151 (2006) (abrogations of immunity always valid in cases of actual constitutional violations).
[140] 63 Fed. Appx. 33 (2d Cir. 2003).
[141] 42 U.S.C. § 1382b(a).

order, that the Department was not statutorily or constitutionally obligated to exempt veterans' life insurance policies in calculating eligibility for these benefits and affirmed the district court's order.[142]

The bulk of the cases involving public benefits heard by Judge Sotomayor involved her review of a denial of SSDI and/or SSI benefits by an Administrative Law Judge (ALJ). At the district court level, this review entails assessing whether the ALJ has applied the appropriate legal standards and whether the ALJ's findings of fact are supported by substantial evidence. ALJ decisions are given substantial deference by a reviewing district court.[143] On the Second Circuit, Judge Sotomayor participated in appeals of such district court reviews of denials of benefits.[144] In these cases, the appellate court conducts a plenary review of the ALJ decisions, similarly considering whether those decisions were supported by substantial evidence and whether the correct legal standards were applied.

Judge Sotomayor's district court opinions demonstrate that she was extremely careful to apply the correct standard of review, pay careful attention to the factual record and closely track relevant statutory and regulatory provisions, as well as Circuit precedent. This appears to be true whether she affirmed or vacated the ALJ's decision.[145] For example, in *Todd v. Chater*,[146] Judge Sotomayor affirmed the ALJ's denial of SSDI and SSI benefits after undertaking a careful and thorough review of a factual record that showed that the plaintiff had worked successfully for years with her physical ailment prior to applying for disability benefits.[147] In her opinion, Judge Sotomayor noted that the plaintiff had suffered her physical disability, an atrophied leg, since birth, but had been working as a secretary for many years. Judge Sotomayor also noted that the plaintiff engaged in physical activities while caring for her child which were far more strenuous than those required at her job. Looking to the legal standard and the application of that standard in her Circuit, Judge Sotomayor found that there was substantial evidence to support the ALJ's determination that the plaintiff retained a capacity to perform certain types of sedentary work, and thus was not disabled as a matter of law. In this case, she spent several paragraphs detailing her limited role in reviewing determinations of an ALJ.

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[142] 63 Fed. Appx at 34.
[143] *See* Mann v. Chater, 1997 WL 363592, 1997 U.S. Dist. LEXIS 9252, at *6 (S.D.N.Y. June 26, 1997).
[144] Some of these cases, as discussed below, involved disability benefits under the Longshore and Harbor Workers' Compensation Act.
[145] *See, e.g.,* Goldstein v. Apfel, 1998 WL 99562 (S.D.N.Y. Mar. 5, 1998); Todd v. Chater, 1997 WL 97833 (S.D.N.Y. Mar. 6, 1997); Smith v. Shalala, 1995 U.S. Dist. LEXIS 3536 (Mar. 23, 1995); *see also, e.g.,* Jasmin v. Callahan, 1998 WL 74290 (S.D.N.Y. 1998); Hilton v. Apfel, 1998 U.S. Dist. LEXIS 6786 (S.D.N.Y. May 13, 1998); Mann v Chater, 1997 WL 363592, 1997 U.S. Dist. LEXIS 9252 (S.D.N.Y. June 26, 1997); Batista v. Chater, 972 F.Supp. 211 (S.D.N.Y. 1997); Lugo v. Chater, 932 F. Supp. 497 (S.D.N.Y. 1996); Henriquez v. Chater, 1996 WL 103828 (S.D.N.Y. Mar. 11, 1996); Marine on behalf of Paez (minor child) v. Comm'r of Social Security, 1996 WL 97172 (S.D.N.Y. Mar. 5, 1996); Betances v. Shalala, 1994 WL 463011 (S.D.N.Y. Aug. 25, 1994); Polanco v. Shalala, 1994 WL 30415 (S.D.N.Y. Feb. 2, 1994). *See also* Robinson, 1994 U.S. Dist. LEXIS 3988 (appeal of denial to reopen application for SSI).
[146] 1997 WL 97833 (S.D.N.Y. Mar. 6, 1997).
[147] 1997 WL 97833, at *3. The defendant Social Security Administration did not deny the claimant's alleged ailments, rather they argued that those ailments did not reach the level of impairment needed to qualify for disability benefits. 1997 WL 97833, at *2.

Similarly, in *Jasmin v. Callahan*,[148] a case in which the ALJ had found the claimant was not disabled and thus ineligible for SSDI benefits, Judge Sotomayor vacated the determination after a careful detailing of the facts of the case and a close examination of how the factual record was developed in the administrative proceedings below. She noted in particular that the claimant was unable to respond to pre- and post hearing testimony submitted by his chiropractor, and that the claimant (who had limited English proficiency) offered incoherent and inconsistent responses to questions regarding his allegedly debilitating back condition.[149] In support of her determination that the claimant did not receive a full and fair hearing below, Judge Sotomayor quoted extensively from the testimony at the administrative hearing, and explained her standard of review by explaining the relationship between the statutory regime and case law and extensively discussing Second Circuit precedent.[150]

Judge Sotomayor's appellate cases also include a number of public benefits decisions. She sat on panels that undertook plenary review of ALJ denials of SSDI and/or SSI benefits. Judge Sotomayor also sat on panels that reviewed decisions regarding disability compensation benefits under the Longshore and Harbor Workers' Compensation Act. In these cases, the appellate court reviews decisions of the Benefits Review Board (BRB), which itself reviews decisions of ALJs. Appellate review of the BRB's legal decisions is *de novo*, while review of the BRB decision with regard to factual findings considers whether the BRB adhered to its statutory standard of review. The following are examples of such cases:

- *Horowitz v. Barnhart*[151] was a summary order in which the district court affirmed the ALJ's determination that money available to a disabled claimant via a trust can be classified as a resource for the purpose of determining eligibility for SSI benefits. The claimant had been denied SSI benefits for a three-year period because she was found to have resources in

[148] 1998 WL 74290 (S.D.N.Y. 1998)

[149] Both Supreme Court and Second Circuit precedent provide that ALJs have an affirmative duty to develop the factual record in disability cases even when a claimant is represented by counsel. *See* Sims v. Apfel, 530 U.S. 103, 111 (2000) (citing Richardson v. Perales, 402 U.S. 389, 400-01(1971)) ("The non-adversarial nature of a Social Security hearing requires the ALJ "to investigate the facts and develop the argument both for and against granting benefits."); Tejada v. Apfel, 167 F.3d 770, 774 (2d Cir. 1998) (noting the Circuit's rule that "the ALJ, unlike a judge in a trial, must . . . affirmatively develop the record . . . even if the claimant is represented by counsel" (internal quotation marks omitted)). Second Circuit precedent demands a particularly scrupulous inquiry into the facts when a claimant is unrepresented. *See, e.g*., Echevarria v. Sec'y Health & Human Servs., 685 F.2d 751, 755 (2d Cir. 1982)). ("Where . . . the claimant is unrepresented by counsel, the ALJ is under a heightened duty to scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts." (internal quotation marks and citation omitted)). Judge Sotomayor applied this standard in a number of cases in which the plaintiff was pro se, had language barriers, or both. *See, e.g.*, Mann v Chater, 1997 WL 363592, 1997 U.S. Dist. LEXIS 9252 (S.D.N.Y. June 26, 1997); Batista v. Chater, 972 F.Supp. 211 (S.D.N.Y. 1997); Lugo v. Chater, 932 F.Supp. 497 (S.D.N.Y. 1996); Henriquez v. Chater, 1996 WL 103828 (S.D.N.Y. March 11, 1996); Marine on behalf of Paez (minor child) v. Commissioner of Social Security, 1996 WL 97172 (S.D.N.Y. Mar. 5, 1996); Polanco v. Shalala, 1994 WL 30415 (S.D.N.Y. Feb. 2, 1994).

[150] *See* 1998 WL 74290, at *3-5 (citing 42 U.S.C. § 1382c (a)(3)(B); 42 U.S.C. § 1383(c)(3); Berry v. Schweiker, 675 F.2d 464, 467 (2d Cir.1982); Gold v. Secretary of HEW, 463 F.2d 38, 43 (2d Cir. 1972); Echevarria v. Secretary of Health and Human Services, 685 F2d 751, 755 (2d Cir. 1982); Dixon v. Shalala, 54 F.3d 1019, 1028 ("the Social Security Act is a remedial statute to be broadly construed and liberally applied"); Cutler v. Weinberger, 516 F.2d 1283 (2d Cir. 1975); Fernandez v. Schweiker, 650 F.2d 5, 9 (2d Cir. 1981); Towner v. Heckler, 748 F.2d 109, 114 (2d Cir. 1984) (potential violation of a plaintiff's due process rights when an ALJ relies on evidence that was submitted after the hearing)).

[151] 29 Fed. Appx. 749 (2d. Cir. 2002).

excess of $2000. The district court found the ALJ had properly considered the claimant's resources in determining her SSI eligibility for the period in question. On appeal, plaintiff argued, *inter alia*, that executive orders and Supreme Court precedent precluded the Social Security Commissioner from treating trust funds as "resources" because such action would "disobey state court orders holding funds in trust for a disabled person."[152] Plaintiff also appeared to argue that the district court's decision violated Equal Protection principles.[153] After discussing the applicable statutes and regulations, Judge Sotomayor's panel held that the district court correctly relied on Second Circuit precedent in classifying the trust as a resource, rejected the argument that counting trusts as resources would violate state court orders, and found that the appellant's Equal Protection claim was not supported by the case she cited**.**

- In *Kolher v. Astrue*,[154] Judge Sotomayor authored a unanimous panel opinion reversing the ALJ's decision to deny a bipolar plaintiff's claim for SSDI and SSI benefits. In vacating and remanding the ALJ's decision, Judge Sotomayor held that the ALJ erred by not following the five-step "special technique" analysis of evaluating the severity of a mental impairment set forth in regulations.[155] Judge Sotomayor concluded that the ALJ had not properly applied the analysis outlined in the regulations and hence had not adequately developed the evidentiary record. Judge Sotomayor concluded that in this case the error was not harmless.

- In *American Stevedoring Ltd. v. Marinelli*,[156] the respondent had applied for and was granted permanent total disability compensation under the Longshore and Harbor Workers' Compensation Act (LHWCA). The employer appealed, challenging the BRB's decision (which affirmed an initial ALJ determination) that the respondent's duties qualified as "maritime employment" for the purposes of the LHWCA, that an employer-employee relationship existed between the respondent and the employer for the purposes of the LCHWA, and that respondent was totally and permanently disabled.[157] Judge Sotomayor wrote the unanimous panel opinion undertaking a review of the BRB's decision, which concluded that the determination in favor of the respondent was supported by substantial evidence.

While Judge Sotomayor served as a member of the board of PRLDEF, that organization litigated in the area of government benefits, focusing primarily on the right of applicants to obtain Spanish-language written materials and oral assistance. During the years in which Judge Sotomayor served on the board, PRLDEF served as counsel or amicus curiae in a few public benefits cases involving multilingual access to government benefits, including cases involving claims of discrimination on the basis of national origin based on the lack of Spanish-language materials for individuals seeking public benefits or an absence of interpreters and translators in

[152] 29 Fed. Appx. At 752.
[153] 29 Fed. Appx. at 752. The plaintiff had made an implicit equal protection argument by claiming the court had to apply *White v. Apfel*, 167 F.3d 369 (7th Cir. 1999).
[154] 546 F.3d 260 (2d Cir. 2008).
[155] 20 C.F.R. § 404.1520.
[156] 248 F.3d 54 (2d Cir. 2001)
[157] 248 F.3d at 58.

public benefits administrative proceedings.[158] Again, PRLDEF's litigation activities offer only limited insight into Judge Sotomayor's legal views, but PRLDEF staff reported to the Board that the organization was involved in cases involving public benefits.[159] As a result, it is fair to say that Judge Sotomayor knowingly served on the board of an organization that supported access to Spanish-language resources for Spanish-speaking applicants for public benefits.

Conclusion

As this review demonstrates, Judge Sotomayor's record is one of balance, care, and case-specific rulings. While her decisions on legal issues of special concern to women are limited, she has approached these rights with respect, shown none of the hostility to them that marked some prior nominees to the Court, and has grounded her decisions in a search for precedent – which has also not been a characteristic of some past nominees. It is not surprising, therefore, that in a number of ways, both procedurally and on the merits, Judge Sotomayor has found on behalf of those seeking to assert their right to privacy, to nondiscrimination under the law, to protection by federal courts, and to their very access to the courts.

Judge Sotomayor's testimony at the hearings underscored the qualities that emerged from her legal record. She emphasized her respect for precedent – key for women who have secured hard-won legal rights and protections under statutes and the Constitution. And, while staying away from any commitments on how she would rule in future cases, she remained steadfast in her comfort with her record, and extremely knowledgeable about the "settled law" that she promised to respect.

[158] PRLDEF served as counsel in several cases. *See* Barcia v. Sitkin, 89 F.R.D. 382 (S.D.N.Y. 1981) (granting class certification for the plaintiffs' national origin discrimination claim against N.Y.S. Unemployment Insurance Appeal Board on the grounds that the Board failed to provide interpreters for claimants seeking unemployment insurance). PRLDEF served as amicus curiae in *Soberal-Perez v. Heckler*, 717 F.2d 36 (2d Cir. 1983), a case involving allegations that the New York Secretary of Health and Human Services' "failure to provide written notices and oral instructions, information, and advice in the Spanish language violate[d] . . . Title VI of the Civil Rights Act of 1964 . . . or plaintiffs' constitutional rights to due process and equal protection of the law."

[159] *See* Puerto Rican Legal Defense and Education Fund, Inc., A History of the Litigation: 1972-1981, at 13-15 (unpublished report), *available at* http://judiciary.senate.gov/nominations/SupremeCourt/Sotomayor/upload/Doc-35-LitHx1972-81.pdf.