

REPORT ON

THE NOMINATION OF

JUDGE SONIA SOTOMAYOR

TO THE SUPREME COURT

OF THE UNITED STATES



NAACP LEGAL DEFENSE

AND EDUCATIONAL FUND, INC.

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## I. INTRODUCTION

The NAACP Legal Defense and Educational Fund, Inc. (“LDF”) is the nation’s leading civil rights legal advocacy organization. Initially established in 1940 as the legal arm of the National Association for the Advancement of Colored People under the direction of Thurgood Marshall, LDF has been separate from the NAACP since 1957.

LDF has fought for racial equality and justice as part of a larger mission to ensure that we are an inclusive democracy in which African Americans and other minorities are full and thriving participants. It has been a long and difficult struggle, but one in which we have seen clear progress. The United States has become increasingly aware of the strengths that come from its remarkable diversity. The Supreme Court made this point explicitly in *Grutter v. Bollinger*, when it stated:

Nothing less than the nation’s future depends on leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.<sup>1</sup>

That statement is about democracy and its requirement of inclusion, and those leaders include the members of our judiciary.

Until relatively recently, our federal judiciary consisted exclusively of white male judges. That is no longer the case, and we are certain that no one today is advocating for a return to an all white male judiciary. Today’s courts are strengthened by their diversity—both with respect to gender and with respect to race and ethnicity. To be direct: diversity has made our courts better courts. It should therefore be a cause for celebration when an obviously well-qualified nominee to the Supreme Court would also enhance the diversity of that Court.

For the reasons discussed below, we strongly endorse the nomination of Judge Sonia Sotomayor to serve as an Associate Justice on the Supreme Court. She is one of the most qualified nominees to be considered for the Supreme Court in decades. Indeed, Judge Sotomayor possesses a unique combination of qualities that makes her especially suited to join the Court at this time. As a prosecutor, corporate litigator, trial judge, and appellate judge, Judge Sotomayor has professional experiences that we believe are richer and more diverse than those of most justices in recent history. Her nomination is also rooted in bipartisanship: Judge Sotomayor would be the only justice on the current Court nominated by a president of a different political party from the president who initially nominated her to the bench. And, her confirmation as the first Latina on the Court would inspire confidence and pride among all Americans.

LDF has conducted a review of Judge Sotomayor’s judicial record on the district court and appellate court. We have examined cases in a number of civil rights subject areas that are very important to us: employment discrimination, housing, voting rights, access to justice, and criminal justice. This record shows that Judge Sotomayor is a measured, dispassionate jurist who faithfully adheres to precedent and who meticulously applies the law to the facts before the court. In her written opinions on the appellate court, she carefully and even painstakingly

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<sup>1</sup> *Grutter v. Bollinger*, 539 U.S. 306, 324 (2003) (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978)) (internal quotation marks omitted).

reviews the record on appeal; her litigation background is apparent from her practical approach to pre-trial and trial proceedings. She does not appear driven by personal ideology but, as she told the Senate Judiciary Committee during her confirmation to the Second Circuit, by the principled belief that “judges should seek only to resolve the specific grievance, ripe for resolution, of the parties before the court and within the law as written and interpreted in precedents.”<sup>2</sup>

## II. ANOTHER MOMENT IN HISTORY

“I believe it is the right thing to do, the right time to do it, the right man, and the right place.”<sup>3</sup> These words were spoken by President Lyndon B. Johnson, forty-two years ago as he nominated Thurgood Marshall to the Supreme Court. Viewed then and now through the lens of history, the appointment of the first African American to the Supreme Court at the crest of the civil rights movement was one of the boldest nominations ever made by a president.

At the time, there were only three African-American circuit court judges<sup>4</sup> and six African-American district court judges<sup>5</sup> in the entire country. African Americans had barely gained access to the ballot, could only recently challenge discrimination in employment and public accommodations, and had yet to secure the right to fair housing. With Marshall’s appointment, millions of Americans, who were still effectively disenfranchised and still relegated to second-class status, suddenly and rather improbably could see an African American on the highest court in the land. It was a picture made even more encouraging because the nominee was the lawyer most responsible for legal challenges to racial segregation over the previous three decades.

Marshall was one of the most qualified persons ever nominated to the Supreme Court. As Solicitor General, he had argued 19 cases before the Court, and as head of LDF, he had argued 32 cases. Despite his unimpeachable credentials, Marshall faced thunderous attacks on his character, his qualifications, and a record which opponents described as that of a “judicial activist.”<sup>6</sup> As Yale Law Professor Stephen Carter recounted, “In the 1960s, racial segregation was legally dead, but politically and ideologically, it was very much alive. When Lyndon Johnson nominated his friend Marshall for the Supreme Court in 1967, segregationists saw a chance to release the pent-up venom from years of courtroom defeats. And so they did.”<sup>7</sup> Segregationist senators led the charge at Marshall’s confirmation hearing, alleging Communist connections and asking him, for example, to identify the members of the committee that had

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<sup>2</sup> *Confirmation Hearings on the Nomination of Sonia Sotomayor to be Judge on the Second Circuit Court of Appeals: Hearings Before the S. Comm. on the Judiciary*, 105th Cong. 499 (1998) (questionnaire of Judge Sonia Sotomayor).

<sup>3</sup> *Negro Justice*, TIME, June 23, 1967.

<sup>4</sup> William Hastie was appointed to the Third Circuit in 1949; Wade McCree was appointed to the Sixth Circuit in 1966; and Spottswood Robinson III was appointed to the District of Columbia Circuit in 1966. Fed. Jud. Ctr., *Biographical Directory of Federal Judges* (2009), <http://www.fjc.gov/history/home.nsf> (follow “Judges of the United States Courts” hyperlink).

<sup>5</sup> James Parsons was appointed to the Northern District of Illinois in 1961; A. Leon Higginbotham, Jr., was appointed to the Eastern District of Pennsylvania in 1964; William Bryant was appointed to the District Court for the District of Columbia in 1965; Constance Baker Motley was appointed to the Southern District of New York in 1966; Aubrey Robinson was appointed to the District Court for the District of Columbia in 1966; and Joseph Waddy was appointed to the District Court for the District of Columbia in 1967. *Id.*

<sup>6</sup> Fred P. Graham, *Senate Confirms Marshall as the First Negro Justice*, N.Y. TIMES, Aug. 31, 1967, at 1.

<sup>7</sup> Stephen L. Carter, *Thurgood Marshall: A Remembrance*, 47 OKLA. L. REV. 5, 7 (1994).

drafted the Fourteenth Amendment.<sup>8</sup> As Professor Carter has documented, “although nominees have always been asked about such matters as prior experience or controversies in their backgrounds, no nominee before Marshall was questioned so closely about constitutional interpretation, including his views on major precedents.”<sup>9</sup> These critics were overshadowed, however, when the Senate voted overwhelmingly to confirm Marshall, 69 to 11.<sup>10</sup>

Forty-two years later, President Barack Obama, whose presidency is itself historic, offers a nominee who would make a similar, indelible mark on the Supreme Court. Judge Sotomayor would be the first Hispanic and the third woman ever to serve on the Court. As the organization headed for two decades by Thurgood Marshall, LDF understands perhaps better than most the pride and admiration surrounding this momentous nomination. Thankfully, our country is in a very different place when it comes to race relations. Racial and ethnic minorities are embedded deeply within the fabric of our society in ways that few could anticipate in the 1960s. Yet, even with the election of President Barack Obama, the color line persists. And so, while the Sotomayor nomination provides a welcome occasion to celebrate, it also provides an opportunity to reflect on how far we still have to go in our collective pursuit of racial justice. Most encouragingly, the prospect of Justice Sotomayor promises further advancement on the path towards racial justice.

### III. A LIFETIME OF EXPERIENCE

In describing Thurgood Marshall’s qualifications for the Supreme Court in 1967, Michigan Senator Philip Hart stated that there had never before been a Supreme Court nominee “whose qualifications are so dramatically and compellingly established.”<sup>11</sup> Justice Marshall’s experiences as Solicitor General, a court of appeals judge, and the leading legal advocate for racial justice of his generation made him eminently qualified to serve as a justice of the Supreme Court. The compassion and empathy he gained from those experiences, as well as from growing up as an African American in segregated America, made his service so important.

One of the most famous sayings in American legal history is Justice Oliver Wendell Holmes’ maxim that “[t]he life of the law has not been logic, it has been experience.”<sup>12</sup> Present-day justices agree that their own life experiences are something they necessarily bring to their positions on the Court. At his confirmation hearing, Chief Justice John Roberts commented: “I wasn’t raised in different circumstances and would have different experiences if I were. If you look at the Supreme Court, the people on there come from widely different backgrounds and experiences and I think that’s a healthy thing.”<sup>13</sup> And at Justice Samuel Alito’s confirmation hearing, he discussed being shaped by his family’s immigrant background:

[W]hen a case comes before me involving ... someone who is an immigrant ... I can’t help but think of my own ancestors.... And so it’s my job to apply the law. It’s not my job to change the law or to bend the law to achieve any results, but I

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<sup>8</sup> *Id.* at 8.

<sup>9</sup> Stephen L. Carter, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* 64 (1995).

<sup>10</sup> Graham, *supra* n.6, at 1.

<sup>11</sup> *The First Negro Justice*, *TIME*, Sept. 8, 1967.

<sup>12</sup> O.W. HOLMES, *THE COMMON LAW* 1 (1881).

<sup>13</sup> *Confirmation Hearing on the Nomination of John G. Roberts, Jr., to be Chief Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 388 (2005) (statement of Judge John G. Roberts, Jr.).

have to, when I look at those cases, I have to say to myself, and I do say to myself, this could be your grandfather. This could be your grandmother. They were not citizens at one time and they were people who came to this country.

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. When I have a case involving someone who's been subjected to discrimination because of disability, I have to think of people who I've known and admired very greatly who had disabilities and I've watched them struggle to overcome the barriers that society puts up, often just because it doesn't think of what it's doing, the barriers that it puts up to them. So those are some of the experiences that have shaped me as a person.<sup>14</sup>

One of Thurgood Marshall's most lasting legacies on the Supreme Court is the perspective he brought and shared as an African American and as a litigator who spent decades in the trenches of the civil rights movement. Justice Anthony Kennedy has commented: "It is not settled what formal role the element of compassion should play in constitutional and common law judicial decisionmaking, but the compassion of Thurgood Marshall is Exhibit A for the proposition that judicial reason cannot be divorced from the life experience of judges."<sup>15</sup> Justice Byron White has written:

I doubt we were prepared for the impact his presence would have on all of us. While every new Justice makes the Court a somewhat different institution, Thurgood brought to the conference table years of experience in an area that was of vital importance to our work, experience that none of us could claim to match. ... He characteristically would tell us things that we knew but would rather forget; and he told us much that we did not know due to the limitations of our own experience.<sup>16</sup>

And, in a particularly moving tribute, Justice Sandra Day O'Connor has said:

Although all of us come to the Court with our own personal histories and experiences, Justice Marshall brought a special perspective. His was the eye of a lawyer who saw the deepest wounds in the social fabric and used law to help heal them. His was the ear of a counselor who understood the vulnerabilities of the accused and established safeguards for their protection. His was the mouth of a man who knew the anguish of the silenced and gave them a voice.

At oral arguments and conference meetings, in opinions and dissents, Justice Marshall imparted not only his legal acumen but also his life experiences,

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<sup>14</sup> *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 475 (2006) (statement of Judge Samuel A. Alito, Jr.).

<sup>15</sup> Anthony Kennedy, *The Voice of Thurgood Marshall*, 44 *Stan. L. Rev.* 1221, 1221-22 (1992).

<sup>16</sup> Byron White, *A Tribute to Thurgood Marshall*, 44 *Stan. L. Rev.* 1215, 1215-16 (1992).

constantly pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth.<sup>17</sup>

Like Justice Marshall, Judge Sotomayor brings stellar qualifications as a nominee, including a wide variety of legal experience. Coincidentally, both Marshall and Sotomayor served on the Second Circuit; Marshall was the last judge from the Second Circuit to serve on the Supreme Court.

Much has been said about Judge Sotomayor's seventeen years of federal judicial experience—the most such experience of any justice in the past century.<sup>18</sup> This is an extremely compelling aspect of her record. Judge Sotomayor has served for eleven years on the U.S. Court of Appeals for the Second Circuit, one of the most demanding appellate courts in the country and where she has participated in over 3000 decisions. In addition, Judge Sotomayor served for six years as a district court judge in one of the busiest and most well-respected federal courts, the Southern District of New York. There, she presided over a number of high profile cases, including one which ended the baseball strike in 1995. Importantly, she would replace Justice David Souter as the only justice on the Supreme Court with experience as a trial judge.

As a consequence of her long tenure on both the appellate and trial bench, Judge Sotomayor is certain to have developed a deep appreciation of the importance of providing clear, workable guidance and standards to judges and litigants. She will know how a decision of the Supreme Court will affect the day-to-day mechanics of courtroom and litigation proceedings. As a trial judge who has participated in numerous criminal trials and sentencing proceedings, Judge Sotomayor will also have a real sense of the factors that judges and juries weigh in reaching verdicts and determining remedies. She will also likely have an instinctive appreciation of the critical credibility issues and litigation strategies that are involved in district court proceedings.

If confirmed, Judge Sotomayor would also bring to the Court the background of a seasoned litigator. In our view, this is an important and often underappreciated qualification. It was through his years of experience litigating cases throughout the country that Justice Marshall gained the insights that informed his contributions to the Court as a justice. At the time he nominated Judge Sotomayor, President Obama stated that he had searched for a nominee with experience: “It is experience that can give a person a common touch and a sense of compassion, an understanding of how the world works and how ordinary people live.”<sup>19</sup> As a litigator, Judge Sotomayor practiced in both state and federal courts, and her positions allowed her to become immersed in both civil and criminal law. Although she undoubtedly gained great perspective about the legal system as a jurist, we are convinced it is her litigation experience that gives her the best insight into the impact of the justice system on litigants and their families.

Judge Sotomayor practiced law for thirteen years.<sup>20</sup> Her first job as a prosecutor in the highly respected Manhattan District Attorney's Office gave her a vivid perspective from the

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<sup>17</sup> Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 Stan. L. Rev. 1217, 1217 (1992).

<sup>18</sup> See, e.g., Harry Reid, Op-Ed., *Life Experience Not at Odds with Judicial Ability*, MIAMI HERALD, June 9, 2009, at A13.

<sup>19</sup> President Barack Obama, Nomination of Judge Sonia Sotomayor to be Associate Justice on the United States Supreme Court (May 26, 2009) (transcript available at <http://www.npr.org/templates/story/story.php?storyID=104542818>).

<sup>20</sup> SONIA SOTOMAYOR, RESPONSES TO SENATE JUDICIARY COMMITTEE QUESTIONNAIRE 2-3 (2009), available at <http://judiciary.senate.gov/nominations/SupremeCourt/Sotomayor/Sonia-Sotomayor-Questionnaire.cfm> (hereinafter QUESTIONNAIRE RESPONSES).

front lines of the criminal justice system. She was hired when District Attorney Robert Morgenthau asked Second Circuit Judge Jose Cabranes (then-counsel to Yale University and a professor at the Law School) for recommendations for new attorneys. Cabranes responded: “I have one student. I don’t think she’s ever thought about being an assistant D.A., but I think she’d be very good. Her name is Sonia Sotomayor.”<sup>21</sup> Judge Sotomayor reportedly accepted the job because she wanted “real-life experience” and relished the opportunity to try cases immediately. By all accounts, she excelled in the position, which typically involved managing 80 to 100 cases at a time. She was described as a “no-nonsense,” “intense, chain-smoking prosecutor known for working into the night.”<sup>22</sup> Her prosecutions ran the gamut, beginning with shoplifting and minor assault cases before moving on to felony prosecutions, including child pornography cases. The senior lawyer on her first murder case recalled that “[s]he had that uncanny ability of putting together a complicated set of facts and distilling them into a very simple story that would resonate with the jury.”<sup>23</sup>

From there, Judge Sotomayor entered private practice, spending eight years as an associate and partner at a business law firm, Pavia & Harcourt, in New York City. Most of her experience came in the form of commercial litigation, which complements her years working in the criminal justice system. She engaged in all facets of commercial law, including real estate, employment, banking, contract, intellectual property law, and export commodity trading.<sup>24</sup> Her practice was almost exclusively devoted to federal court litigation, again complementing her background as a prosecutor in state court. Significantly, no sitting justice today has litigation experience in such diverse areas of the law.

In addition to her career as a lawyer and judge, Judge Sotomayor has had a variety of experiences gained through a lifetime of public service. These include her membership on the Board of Directors of the Puerto Rican Legal Defense & Education Fund, currently known as LatinoJustice PRLDEF (“PRLDEF”). Again, this aspect of Judge Sotomayor’s background is strikingly similar to the career path of Justice Marshall, who headed LDF—the first “Legal Defense Fund”—for twenty-one years. Marshall founded LDF in 1940 in order to provide legal representation to racial minorities in civil rights cases. It was the first public interest law firm, necessary because few lawyers were willing and able to take civil rights cases, both because of their unpopularity and because of the shortage of African-American lawyers—African Americans were not allowed even to attend law school in many states. Congress’s recognition in the 1960s civil rights statutes of the “private attorney general” concept further enabled LDF to pursue private litigation to advance the public interest.<sup>25</sup> After a quarter of a century of LDF success, members of the Latino community and philanthropists, assisted by LDF, founded the Mexican American Legal Defense & Education Fund (“MALDEF”) in 1967, which uses the LDF model to pursue equal opportunity for Mexican Americans through litigation, advocacy, and education. Several other organizations, such as PRLDEF, the Asian American Legal Defense and Education Fund, the Women’s Legal Defense Fund, and the Lambda Legal Defense and Education Fund would follow, all using the LDF model.

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<sup>21</sup> *All Things Considered: Sotomayor’s Real-World Schooling in Law and Order* (NPR radio broadcast June 23, 2009).

<sup>22</sup> Joe Stephens & Del Quentin Wilbur, *Gritty First Job Shaped Nominee*, WASH. POST, June 4, 2009, at A01.

<sup>23</sup> *Sotomayor’s Real-World Schooling in Law and Order*, *supra*, n.21.

<sup>24</sup> QUESTIONNAIRE RESPONSES at 145.

<sup>25</sup> *See Newman v. Piggie Park Enterprises*, 390 U.S. 400, 401-02 (1968).

PRLDEF was founded in 1972. As PRLDEF recalls on its website, “Puerto Ricans had no voice and were almost totally excluded from participating in public life. From the courts to town councils, from boardrooms to classrooms, Puerto Ricans were simply invisible.”<sup>26</sup> Its first Board of Directors was comprised of legal luminaries such as New York Senator Jacob Javits, former U.S. Attorney General Nicholas Katzenbach, former New York Attorney General Robert Abrams, and New York District Attorney Robert Morgenthau. During the 1970s, PRLDEF brought precedent-setting education cases on behalf of Puerto Rican students, confronted discrimination against Latinos in public employment, fought for bilingual ballots in school board elections, obtained housing for Latino apartment applicants faced with discrimination, and secured protections for migrant farm laborers. When Judge Sotomayor joined its Board of Directors in 1980, PRLDEF was not yet a decade old, but it was already a well-respected legal organization.

Judge Sotomayor served on PRLDEF’s Board for twelve years, resigning in 1992 upon her appointment by President George H.W. Bush to the federal bench. She held positions of First Vice President and Chair of the Litigation and Education Committees, but never participated in any PRLDEF litigation herself. As Board members recently clarified in a letter to the Senate Judiciary Committee, neither the Board as a whole nor individual members select litigation to be undertaken or control ongoing litigation; instead, the Board is limited to an advisory role on the direction of overall policy, along with its fundraising and other duties.<sup>27</sup> To this day, PRLDEF continues to challenge entrenched discrimination affecting the Latino community, and is known as the “leading advocate for Latinos in New York and the Northeast.”<sup>28</sup> Its program on promoting diversity within the legal profession is legendary: it operates mentor and training programs and is responsible for encouraging thousands of Latino students to become lawyers and judges. For nearly four decades, LDF has proudly stood side-by-side with PRLDEF as it has sought, through the courts and public education, to promote equal opportunity for Latinos in every facet of society. For all of these reasons, Judge Sotomayor’s past affiliation with PRLDEF is something of which we should all be very proud.

Judge Sotomayor’s rich and varied background provides her with an extraordinary set of life experiences to bring to the Supreme Court. These experiences include her professional positions but they also include the fact of her Puerto Rican heritage, her growing up in public housing in the South Bronx, her struggle with diabetes since age eight, and her excelling as an undergraduate and law student at the nation’s finest universities. No one can or should expect that judges check their personal backgrounds at the courthouse door. Indeed, such a feat would be impossible. This is not to suggest that individualized life experiences should govern or even influence one’s decision-making as a judge. It is merely a recognition that these experiences cannot somehow be divorced from the person charged with upholding her oath to “solemnly swear (or affirm) that [she] will administer justice without respect to persons, and do equal right to the poor and to the rich, and . . . faithfully and impartially discharge and perform all the duties incumbent upon [her] as Associate Justice of the United States Supreme Court under the Constitution and laws of the United States.”<sup>29</sup>

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<sup>26</sup> PRLDEF, Our Founding, <http://www.prldf.org/about/about.html> (last visited July 9, 2009).

<sup>27</sup> Letter from former PRLDEF Board Members to the Hon. Jeff Sessions, Ranking Member, S. Judiciary Comm. (July 7, 2009) (on file with author).

<sup>28</sup> Latino Justice PRLDEF, Home Page, <http://www.prldf.org/index.html> (last visited July 10, 2009).

<sup>29</sup> 28 U.S.C. § 453 (2009).

## IV. EMPLOYMENT DISCRIMINATION

Employment discrimination claims make up the largest category of civil rights cases in federal court. As a result, the Supreme Court is frequently asked to decide the scope of the federal laws governing employment discrimination—in the last term alone, employment-related cases occupied over a tenth of the Court’s docket, and the majority of those cases involved discrimination.<sup>30</sup> Thus, as a Justice on the Court, Judge Sotomayor will play a key role in determining the extent of workplace protections for current and future generations.

Unfortunately, the federal courts have become increasingly hostile places for workers attempting to vindicate their rights under federal anti-discrimination laws. A recent study by two Cornell Law School professors found that employment discrimination plaintiffs fare much worse than other plaintiffs in both the federal trial and appellate courts.<sup>31</sup> At the appellate level, plaintiffs who have won at trial have an extremely disproportionate chance of seeing their wins reversed: the federal appeals courts reverse 41.1% of plaintiffs’ victories, but only 8.7% of defendants’ victories.<sup>32</sup> In other words, employment discrimination plaintiffs are five times more likely than defendants to have verdicts in their favor reversed on appeal—an incredible statistic given that the critical questions in employment discrimination cases are fact-driven, and that appellate judges normally defer to factual findings made by a jury or trial judge. At trial, plaintiffs win before juries at roughly similar rates in employment discrimination and other types of cases (37.6% and 44.4%, respectively)—yet judges rule in plaintiffs’ favor at trial in employment cases far less often than in other cases (19.6% versus 45.5%).<sup>33</sup> As the authors suggest, these trends have made workers increasingly reluctant to bring discrimination cases in federal court: the number of employment discrimination cases fell by 37% from 1999 to 2007, a huge decline (and one which did not occur in other types of cases).<sup>34</sup>

The lesson of the Cornell study is simple: it is imperative that persons bringing employment discrimination claims in federal court have their cases heard before fair and impartial judges, who are not predisposed to decide cases against them. We believe that Judge Sotomayor is precisely that type of jurist. Her record on employment discrimination cases reveals a balanced approach, where decision-making is based not on ideology but on the application of the law to the particular facts at hand. Below, we discuss Judge Sotomayor’s record based on a sampling of her decisions, primarily drawn from race discrimination cases.

### Individual Cases

As an appellate judge, Judge Sotomayor has taken a careful, fact-sensitive approach to reviewing individual claims of employment discrimination. She has also shown appropriate

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<sup>30</sup> The Court issued seventy-five merits opinions during its October 2008 Term. Nine were employment-related cases: five of those were employment discrimination cases (*Crawford v. Metropolitan Government of Nashville & Davidson County*; *14 Penn Plaza LLC v. Pyett*; *AT&T Corp. v. Hulteen*; *Gross v. FBL Financial Services, Inc.*; and *Ricci v. DeStefano*) and four dealt with other workplace issues (*Locke v. Karass*; *Ysursa v. Pocatello Education Ass’n*; *CSX Transportation, Inc. v. Hensley*; and *Atlantic Sounding Co. v. Townsend*).

<sup>31</sup> Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse*, 3 *Harv. L. & Pol’y Rev.* 103 (2009).

<sup>32</sup> *Id.* at 110. There is also a gap in the relative reversal rates for plaintiffs and defendants in non-jobs cases, but it is much smaller (35.1% and 14.7%, respectively). *Id.* at 111 n.21.

<sup>33</sup> *Id.* at 130 display 2.

<sup>34</sup> *Id.* at 117.

respect for the jury's role in resolving factual disputes. Taken as a whole, her decisions are extremely balanced and show no tendency to favor either side in discrimination cases

Judge Sotomayor has joined a number of decisions in which the panel, after close examination of the facts and the law, reversed summary judgment in whole or in part and remanded for a jury trial. For example, in *Duzant v. Electric Boat Corp.*,<sup>35</sup> Judge Sotomayor joined an order vacating summary judgment and remanding for trial on plaintiff's claim that he was denied overtime based on his race. The plaintiff, a designer of piping systems, offered evidence that all other designers in his department were given an average of 240 overtime hours annually, while he—the only African American in the department—received none. Although the employer claimed that the plaintiff was not offered overtime because he did a different type of design work than the others, the plaintiff provided evidence that this was not true. He also provided other evidence of possible racial animus—that his supervisor tracked him more closely than her other subordinates, and that she had reprimanded him for speaking with another African-American employee. The panel held that given the conflicting evidence, the proper course was to allow a jury to hear the case and determine whether it was racial animus or legitimate factors that precluded the plaintiff from obtaining overtime hours.<sup>36</sup>

In *Williams v. Consolidated Edison Corp. of New York*,<sup>37</sup> Judge Sotomayor joined an order affirming summary judgment against an African-American female plaintiff on her race discrimination and retaliation claims, but vacating summary judgment and remanding for trial on the plaintiff's hostile work environment claim. The panel held that a reasonable fact-finder could find that Williams demonstrated a hostile work environment, based on evidence that she and co-workers were repeatedly subjected to racial and sexual epithets, along with other forms of harassment and discrimination.<sup>38</sup> The panel also stated that there was a genuine factual dispute regarding Con Ed's liability for the hostile work environment, because Williams offered evidence indicating that Con Ed was aware of the incidents and failed to take prompt, appropriate remedial action.<sup>39</sup>

Judge Sotomayor's balanced approach and close scrutiny of the facts are evident in the decision she wrote in *Cruz v. Coach Stores, Inc.*<sup>40</sup> The decision began by affirming the dismissal of several of the plaintiff's discrimination and retaliation claims. Judge Sotomayor wrote that the plaintiff failed to sufficiently plead a claim that her employer discriminated against her in refusing to promote her, because she did not allege that she was qualified for and had applied for the relevant position. Nor did the plaintiff adequately allege a retaliatory termination claim.<sup>41</sup> The decision also affirmed summary judgment on the plaintiff's termination and disparate impact claims. However, the panel reversed as to Cruz's hostile work environment claim, finding that she had supplied enough evidence of harassment that a reasonable jury could find in her favor. Judge Sotomayor described evidence that Cruz's supervisor subjected her "to blatant racial epithets on a regular if not constant basis" and to physically threatening behavior based on her

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<sup>35</sup> 81 F. App'x 370 (2d Cir. 2003).

<sup>36</sup> *Id.* at 372.

<sup>37</sup> 255 F. App'x 546 (2d Cir. 2007).

<sup>38</sup> *Id.* at 549-50.

<sup>39</sup> *Id.* at 550-51.

<sup>40</sup> 202 F.3d 560 (2d Cir. 2000).

<sup>41</sup> *Id.* at 566.

sex. Judge Sotomayor also pointed out that the race and sex harassment that Cruz experienced might be mutually reinforcing, an often overlooked point.<sup>42</sup>

Where Judge Sotomayor has found that the law, as applied to the facts of the case before her, doomed the plaintiff's case, she has affirmed dismissal or summary judgment against the plaintiff. In *Williams v. R.H. Donnelley, Corp.*,<sup>43</sup> she wrote an opinion affirming summary judgment for the employer in a race discrimination case. The plaintiff, who alleged that the employer refused to promote or transfer her for discriminatory reasons, had failed to prove that she was qualified for the promotions. Further, the employer's refusal to grant her a lateral transfer (which was arguably a demotion) was not an actionable "adverse employment action." Similarly, in *Norville v. Staten Island University Hospital*,<sup>44</sup> Judge Sotomayor wrote for the panel, concluding that judgment as a matter of law was properly granted to the defendant on the plaintiff's race discrimination claim, as the plaintiff had failed to show that similarly situated white employees were treated more favorably. In *Washington v. County of Rockland*,<sup>45</sup> she authored an opinion affirming the lower court's rejection of several African-American correction officers' claims that they were discriminatorily targeted for disciplinary proceedings. The officers had not met applicable filing deadlines for their discrimination claims and had failed to show that there was any continuing violation that would have extended the time for filing. In *Moore v. Consolidated Edison Co. of New York*,<sup>46</sup> Judge Sotomayor wrote a decision upholding a refusal to enter a preliminary injunction in favor of the plaintiff, who had requested that her employer be enjoined from terminating her in retaliation for her discrimination suit. The panel agreed with the lower court's conclusion that the plaintiff had not shown a risk of irreparable harm if the injunction were not granted: while money damages might not always be a sufficient remedy for a retaliatory termination—for example, in cases where fear of being treated similarly would deter other employees in the company from opposing discrimination—the plaintiff had not shown that there was any such risk of intimidation or deterrence of others in her case.

Earlier, as a district court judge, Judge Sotomayor followed a similar path, allowing individual plaintiffs a chance to try potentially meritorious claims to a jury if the facts merited it. For example, in *Cartagena v. Ogden Services Corp.*,<sup>47</sup> Judge Sotomayor denied the defendant's motion for summary judgment based on evidence that the plaintiff's supervisor made repeated discriminatory remarks to him in the six months preceding his termination. In *Mitchell v. Reich*,<sup>48</sup> she denied the employer's motion for judgment on the pleadings, ruling that the pro se plaintiff's complaint sufficiently alleged that the employer retaliated against him for previous discrimination claims and "should not be barred at this early stage of the litigation." In *Gilani v. National Ass'n of Securities Dealers*,<sup>49</sup> she dismissed the plaintiff's federal race discrimination claims on procedural grounds, but held that his retaliation claims and state law discrimination claims could go forward. And, in *Black v. New York University Medical Center*,<sup>50</sup> Judge

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<sup>42</sup> *Id.* at 572.

<sup>43</sup> 368 F.3d 123 (2d Cir. 2004).

<sup>44</sup> 196 F.3d 89 (2d Cir. 1999).

<sup>45</sup> 373 F.3d 310 (2d Cir. 2004).

<sup>46</sup> 409 F.3d 506 (2d Cir. 2005).

<sup>47</sup> 995 F. Supp. 459 (S.D.N.Y. 1998).

<sup>48</sup> No. 93 Civ. 2206, 1994 U.S. Dist. LEXIS 11712 (S.D.N.Y. Aug. 18, 1994), *aff'd*, No. 95-6196, 1996 U.S. App. LEXIS 3045 (2d Cir. Jan. 24, 1996).

<sup>49</sup> No. 96 Civ. 8070, 1997 U.S. Dist. LEXIS 12287 (S.D.N.Y. Aug. 18, 1997).

<sup>50</sup> No. 94 Civ. 9074, 1996 U.S. Dist. LEXIS 7178 (S.D.N.Y. May 23, 1996).

Sotomayor found that the plaintiff had satisfied time limitations for filing her gender discrimination claim, because her pro se complaint had adequately alleged an ongoing discriminatory policy or practice. She also allowed the plaintiff an opportunity to amend her Equal Pay Act claim to include sufficient specific facts to show that men doing substantially similar work to her own were paid more on account of their gender.

On the other hand, when it was clear that discrimination plaintiffs did not meet procedural requirements, Judge Sotomayor applied the law and dismissed their cases. For example, in *McNeill v. St. Barnabas Hospital*,<sup>51</sup> she granted the defendant's motion for summary judgment on the plaintiff's race discrimination and retaliation claims. The claims were untimely, and the plaintiff had failed to provide any evidence that the defendant was motivated by a desire to retaliate against her.

### **Broader Challenges**

In cases dealing with broader challenges to employment practices, Judge Sotomayor has also taken a restrained, careful approach. In *Malave v. Potter*,<sup>52</sup> she joined an opinion vacating a district court's grant of summary judgment on an employee's claim that the Postal Service's promotion practices had an illegal disparate impact on Hispanics. The lower court had mistakenly required the plaintiff to prove underrepresentation based on the number of Hispanics applying for the promotional positions, even though no such data existed. The appellate court noted that, under Supreme Court and circuit precedent, the appropriate population for comparison could be either the applicant pool or the eligible labor pool, depending on various factors; on remand the lower court was to focus on whether the expert evidence "utilized the best and most appropriate available labor pool information."<sup>53</sup>

In other disparate impact cases, Judge Sotomayor has taken a similarly even-handed approach. In *Atkins v. Westchester County Department of Social Service*,<sup>54</sup> a case involving a challenge to a social service agency's promotional exam for managerial positions, she joined a panel decision affirming summary judgment for the employer, because the plaintiffs failed to show any statistically significant disparity between the white and black applicants' exam scores. In *Amador v. City of Hartford*,<sup>55</sup> she joined an order vacating the lower court's grant of summary judgment for the employer. The plaintiffs were eighteen male police officers who alleged gender bias in their department's promotional process. They specifically challenged the department's decision to send all female applicants for promotion to the only oral examination panel that included a female examiner, because it had become known after the fact that the panel gave higher average scores than the other three panels. The court remanded for the lower court to reconsider whether the express gender classification of the applicants qualified as actionable discrimination.<sup>56</sup>

In another recent case involving the disparate impact standard, *Ricci v. DeStefano*, Judge Sotomayor once again demonstrated her respect for precedent. *Ricci* involved a decision by the City of New Haven to temporarily suspend promotions within its fire department after it

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<sup>51</sup> No. 94 Civ. 6215, 1997 U.S. Dist. LEXIS 18606 (S.D.N.Y. Nov. 19, 1997).

<sup>52</sup> 320 F.3d 321 (2d Cir. 2003).

<sup>53</sup> *Id.* at 326-27.

<sup>54</sup> 31 F. App'x 52 (2d Cir. 2002).

<sup>55</sup> 21 F. App'x 68 (2d Cir. 2001).

<sup>56</sup> *Id.* at 69-70.

identified serious concerns regarding the fairness of the process for African-American and Latino employees. Based on the examination results, no African Americans would have been eligible to fill any of the available positions. In addition to the significant adverse impact on minority candidates, public hearings raised serious questions regarding whether the tests actually selected the most qualified candidates. The City decided to evaluate other promotional processes that could select captains and lieutenants more fairly and effectively, in light of its obligation under Title VII of the Civil Rights Act of 1964 to avoid employment practices with an illegal disparate impact. In response, the City was sued by white firefighters claiming that the City's actions discriminated against them. The district court granted summary judgment for the City, holding that the City's actions taken to comply with Title VII did not qualify as intentional discrimination.<sup>57</sup> Judge Sotomayor joined an opinion affirming and adopting the district court's reasoning.<sup>58</sup>

The Supreme Court reversed the *Ricci* panel's decision by a narrow majority on June 29.<sup>59</sup> (LDF filed an amicus brief in *Ricci* urging affirmance.) The Court adopted a new standard for judging the validity of a public employer's response to potential disparate impact liability, and, applying that standard, granted summary judgment to the white firefighters. As most commentators have agreed, the Court's reversal in no way reflects on Judge Sotomayor's decision to join the opinion affirming the district court: unlike the Supreme Court, the panel on which Judge Sotomayor sat was bound to follow precedent from the Supreme Court and the Second Circuit, and it correctly applied that precedent in affirming the lower court.

## V. EDUCATION

Education is the foundation of our democratic society. As Judge Sotomayor's own journey exemplifies, education provides the means by which students of all backgrounds can succeed and meaningfully participate in American civic, political, and economic life. Today, our education system is in crisis; nearly half of the students attending the nation's largest school districts do not graduate from high school. The high school completion rates are even lower among African-American and Latino students, who too often attend schools that fail to provide the basic education necessary for students to have a chance to succeed in life. For more than six decades, LDF has worked to dismantle barriers in public education and ensure equal educational opportunity for all students and has been involved in the litigation of numerous education cases in the Supreme Court, including *Brown v. Board of Education*,<sup>60</sup> *Grutter v. Bollinger*,<sup>61</sup> *Missouri v. Jenkins*,<sup>62</sup> and *Freeman v. Pitts*.<sup>63</sup>

Judge Sotomayor's education-related jurisprudence has not been extensive. Her opinions in the handful of education-related cases in which she participated, however, clearly demonstrate her overall commitment to ensuring that educational institutions are open and accessible to all students and treat students fairly and with respect. Students are "entitled to an equal opportunity

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<sup>57</sup> *Ricci v. DeStefano*, 554 F. Supp. 2d 142 (D. Conn. 2006).

<sup>58</sup> *Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008) (per curiam).

<sup>59</sup> *Ricci v. DeStefano*, Nos. 07-1428, 08-328, \_\_\_ S. Ct. \_\_\_ (June 29, 2009).

<sup>60</sup> 347 U.S. 483 (1954).

<sup>61</sup> 539 U.S. 306 (2003).

<sup>62</sup> 515 U.S. 70 (1995).

<sup>63</sup> 503 U.S. 467 (1992).

to learn.”<sup>64</sup> Judge Sotomayor demonstrates she is acutely aware of the obstacles and discriminatory practices that students have faced within the educational system and the need to examine the totality of the circumstances in addressing claims of discrimination or exclusion.

In *Gant v. Wallingford Board of Education*, Judge Sotomayor dissented in part from a ruling upholding summary judgment against an African American first-grade student who claimed he was demoted to kindergarten because of his race. Upon a thorough and comprehensive review of the record and taking account of the totality of the circumstances, Judge Sotomayor noted, “the treatment this lone black child encountered during his brief time in [first grade was] not merely ‘arguably unusual’ or ‘indisputably discretionary,’ but unprecedented and contrary to the school’s established policies.”<sup>65</sup> She concluded that the “unprecedented nature of his transfer and the disparate treatment of similarly situated white students”—combined with the showing of pretext—supported an inference of racial discrimination.<sup>66</sup>

In *Tolbert v. Queens College*,<sup>67</sup> Judge Sotomayor voted to reverse and remand a district court’s decision to set aside a jury verdict and punitive damages for an African-American student who claimed he was denied his master’s degree on the basis of race. Judge Sotomayor ruled that when the evidence was viewed in the light most favorable to the student, as the law required, there was a sufficient basis on which the jury could have found discrimination, i.e., that the college “had intentionally injected consideration of ethnicity into its exam-grading decisions and applied a more rigorous standard to Tolbert than to students of other ethnicit[ies].”<sup>68</sup>

Judge Sotomayor has also sought to protect equal educational opportunity and vindicate the rights of students with disabilities under the Individuals with Disabilities Education Act (“IDEA”). In *Frank G. v. Board of Education of Hyde Park*,<sup>69</sup> Judge Sotomayor held that a family could be reimbursed for private school tuition for a child with disabilities even if that child had never received such services from his or her district public school. (In a separate case this term, *Forest Grove School District v. T.A.*,<sup>70</sup> the Supreme Court came to the same conclusion.)

## VI. VOTING RIGHTS

Since its inception, LDF has been committed to securing and protecting minority voting rights. Over the last several decades, LDF has conducted extensive litigation both enforcing and defending the provisions of the Voting Rights Act of 1965, and other federal voting rights laws. Through this litigation, LDF has developed significant expertise regarding the important role played by the Voting Rights Act to ensure minority voters’ access to the polls. As the Court

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<sup>64</sup> *Gant v. Wallingford Bd. of Educ.*, 195 F.3d 134, 153 (2d Cir. 1999) (Sotomayor, J., dissenting).

<sup>65</sup> *Id.* at 151.

<sup>66</sup> *Id.* at 152.

<sup>67</sup> 242 F.3d 58 (2d Cir. 2001).

<sup>68</sup> *Id.* at 73-74.

<sup>69</sup> 459 F.3d 356 (2d Cir. 2006).

<sup>70</sup> 557 U.S. \_\_\_\_ (2009); *see also* Connecticut Office of Protection & Advocacy v. Hartford Bd. of Educ., 464 F.3d 229 (2d Cir. 2006) (upholding the authority of Connecticut’s Office of Protection and Advocacy for Persons with Disabilities to access and monitor a school for students with serious emotional disabilities after widespread complaints of abuse and neglect).

observed in *Yick Wo v. Hopkins*, the right to vote is fundamental because it is “preservative of all rights.”<sup>71</sup>

The Supreme Court’s role in interpreting the Voting Rights Act, and the Fourteenth and Fifteenth Amendments, is of paramount importance. Over the last two terms, for example, the Supreme Court has heard a number of critical cases concerning the scope and constitutionality of various provisions of the Voting Rights Act of 1965, including *Northwest Austin Municipal Utility District Number One v. Holder*,<sup>72</sup> *Bartlett v. Strickland*,<sup>73</sup> and *Crawford v. Marion County Election Board*.<sup>74</sup> All of these cases bear directly on the protections afforded to minority voters under our nation’s most historic and effective federal civil rights law: the Voting Rights Act of 1965.

Judge Sotomayor’s participation in *Hayden v. Pataki*,<sup>75</sup> which was decided en banc, offers a key insight into her handling of matters concerning voting rights and political participation. From *Hayden v. Pataki* and several other election law cases in which she has participated, we can discern an evenhanded commitment to interpreting and enforcing the constitutional and statutory provisions that protect the right to vote. In *Hayden v. Pataki*, the Second Circuit considered whether state felon disenfranchisement statutes constituted the kind of “voting qualification or prerequisite” that could be subject to challenge under Section 2 of the Voting Rights Act. The litigants in the case argued that New York’s felon disenfranchisement statutes resulted in a disproportionate denial of the right to vote to African-American and Latino citizens with felony convictions in violation of Section 2 of the Act. LDF, along with the Community Service Society (CSS), presented oral argument before an en banc panel of judges on the Second Circuit.

In *Hayden v. Pataki*, Judge Sotomayor dissented from the ruling of the en banc court, which held that the prohibition against discriminatory qualifications and prerequisites found in Section 2 of the Voting Rights Act did not extend to state felon disenfranchisement statutes. The court’s reasoning was based, in part, on its view that Congress did not explicitly consider felon disenfranchisement laws despite recognition that “Congress intended ‘to give the Act the broadest possible scope.’”<sup>76</sup> Judge Sotomayor wrote separately to underscore the canon of statutory interpretation that guided her view of the case. In particular, Judge Sotomayor observed that a “plain” reading of the Voting Rights Act subjects felony disenfranchisement and all other voting qualifications to its coverage. Judge Sotomayor noted:

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

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<sup>71</sup> 118 U.S. 356, 370 (1886).

<sup>72</sup> \_\_\_ S. Ct. \_\_\_, 2009 WL 1738645 (June 22, 2009) (adopting expanded interpretation of Section 4 “bailout” provision but declining to reach question concerning the constitutionality of Section 5 of the Voting Rights Act).

<sup>73</sup> 556 U.S. 1, \_\_\_ (2009) (plurality opinion) (finding that Section 2 of the Voting Rights Act does not require the creation of districts that are less than 50 percent minority in population but observing that “Passage of the Voting Rights Act of 1965 was an important step in the struggle to end discriminatory treatment of minorities who seek to exercise one of the most fundamental rights of our citizens: the right to vote”).

<sup>74</sup> 128 S. Ct. 1610 (Apr. 28, 2008) (rejecting challenge brought pursuant to Section 2 of the Voting Rights Act to Indiana government-issued voter identification requirement).

<sup>75</sup> 449 F.3d 302 (2d Cir. 2006) (en banc).

<sup>76</sup> *Id.* at 318 (citing *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969)).

analysis. Section 2 of the Act by its unambiguous terms subjects felony disenfranchisement and all other voting qualifications to its coverage.

The duty of a judge is to follow the law, not to question its plain terms. I do not believe that Congress wishes us to disregard the plain language of any statute or to invent exceptions to the statutes it has created. The majority’s “wealth of persuasive evidence” that Congress intended felony disenfranchisement laws to be immune from scrutiny under § 2 of the Act includes not a single legislator actually saying so. But even if Congress had doubts about the wisdom of subjecting felony disenfranchisement laws to the results test of § 2, I trust that Congress would prefer to make any needed changes itself, rather than have courts do so for it.<sup>77</sup>

Lending further insight into her views on the proper interpretation and scope of the Voting Rights Act is Judge Barrington Parker’s dissent in *Hayden v. Pataki*, which Judge Sotomayor joined. Judge Parker’s dissent embraced the broad powers of Congress, afforded by the Reconstruction Era amendments, to ban racial discrimination in our political processes.<sup>78</sup> In particular, Judge Parker observed that “[Section] 2 of the Fourteenth Amendment—which expressly contemplated and essentially sanctioned racially discriminatory voting qualifications—in no way diminishes Congress’s power to enforce the Fifteenth Amendment.”<sup>79</sup> The dissenting opinion also noted that “the scope of Congress’s enforcement authority is at its zenith when protecting against [race discrimination],”<sup>80</sup> and that “the country’s long and persistent history of discrimination gives Congress much greater latitude in fashioning appropriate remedies for racial discrimination in voting. . . .”<sup>81</sup>

In addition to *Hayden v. Pataki*, Judge Sotomayor has also participated in a number of cases that make clear her ability to appropriately balance federal and state interests in the election law context. For example, in *Gelb v. Board of Elections*,<sup>82</sup> a case concerning the obligation of a board of elections to provide ballot space for write-in voting in contested primary elections, Judge Sotomayor observed that, while voting rights are of fundamental significance, states retain authority to enact certain regulations that affect an individual’s right to vote and associate for political ends in order to ensure an honest and orderly election. Her reasoning was guided by recognition of the critical importance of the right to vote as she observed that “[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.”<sup>83</sup>

In *Rivera-Powell v. New York City Board of Elections*,<sup>84</sup> a prospective judicial candidate and her supporters appealed a lower court’s ruling dismissing claims brought against the New York City Board of Elections, alleging improper removal from the primary ballot. Judge Sotomayor affirmed the lower court’s ruling finding that the candidate received adequate due

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<sup>77</sup> *Id.* at 367-68 (Sotomayor, J., dissenting) (internal citations omitted).

<sup>78</sup> *Id.* at 343-62 (Parker, J., dissenting).

<sup>79</sup> *Id.* at 350.

<sup>80</sup> *Id.* at 359.

<sup>81</sup> *Id.* at 361.

<sup>82</sup> 888 F. Supp. 509 (S.D.N.Y. 1995).

<sup>83</sup> *Id.* at 515 (citing *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)).

<sup>84</sup> 470 F.3d 458 (2d Cir. 2006).

process before removal from the ballot and that removal of the candidate did not violate the candidate's First or Fourteenth Amendment rights. Judge Sotomayor observed that "[f]ederal court intervention in garden variety state election disputes is inappropriate."<sup>85</sup> Judge Sotomayor also rejected the candidate's equal protection claim of race-based discrimination, finding the allegations to be "conclusory in nature and lacking evidence of intentional discrimination."<sup>86</sup>

## VII. DISCRIMINATION IN HOUSING AND ACCOMMODATIONS

For decades, LDF has sought to promote equal housing opportunity through challenges to racially restrictive covenants, blockbusting, exclusionary zoning, racial steering, and predatory lending. Last year, LDF issued a report lamenting the slow progress of our nation in achieving racially integrated housing forty years after the passage of the Fair Housing Act of 1968, and offering creative suggestions for future work in fair housing.<sup>87</sup> As our nation's public schools become increasingly resegregated, it is imperative that we continue to rely on strong enforcement of our federal fair housing statutes to ensure that everyone has the choice to live, work, and be educated in more racially and culturally diverse neighborhoods.

Judge Sotomayor has had few opportunities to rule on cases involving fair housing laws. In her only case addressing an individual fair housing violation, her decision reveals a practical, careful application of the law. In *Boykin v. Keycorp*,<sup>88</sup> Judge Sotomayor authored an opinion tolling the statute of limitations under the Fair Housing Act. An African-American woman had alleged lending discrimination after a bank denied her home equity loan application pertaining to property she owned and rented in a predominantly minority neighborhood. The plaintiff had filed a complaint with the United States Department of Housing & Urban Development ("HUD"), thereby initiating the administrative process that tolls the time for filing a complaint in federal court. HUD then referred the complaint to a state agency pursuant to the Fair Housing Act; the agency investigated the matter and issued a finding of "no probable cause" to the plaintiff.<sup>89</sup> Thereafter, HUD itself notified the plaintiff that the matter was closed. The plaintiff filed a federal lawsuit within two years after receiving the later notice from HUD. The district court dismissed the suit, concluding that the claims were untimely since they were tolled only by the state administrative proceeding.

In a lengthy opinion, Judge Sotomayor vacated the ruling and held that the administrative proceeding terminated upon HUD's notification to the plaintiff, thereby allowing the plaintiff to file suit. She painstakingly reviewed HUD's practice in this area, noting the absence of regulations on this question, and found it unreasonable.<sup>90</sup> "We hold that when a complainant receives a final letter from a HUD regional office, stating that HUD has closed its investigation based on notification that the certified agency to which the complaint was referred has closed its investigation, we will consider the administrative proceeding to have been 'pending,' and the filing limitation tolled, until the date of the final letter."<sup>91</sup>

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<sup>85</sup> *Id.* at 469.

<sup>86</sup> *Id.* at 470.

<sup>87</sup> NATIONAL COMMISSION ON FAIR HOUSING AND EQUAL OPPORTUNITY, *THE FUTURE OF FAIR HOUSING* (2008), available at [http://www.naacpldf.org/content/pdf/housing\\_discrimination/fair\\_housing\\_report.pdf](http://www.naacpldf.org/content/pdf/housing_discrimination/fair_housing_report.pdf).

<sup>88</sup> 521 F.3d 202 (2d Cir. 2008).

<sup>89</sup> *Id.* at 205.

<sup>90</sup> *Id.* at 207-11.

<sup>91</sup> *Id.* at 211.

Judge Sotomayor also joined a panel opinion in *United States v. Secretary of HUD*,<sup>92</sup> which affirmed a district court's modification of a consent decree stemming from the famous Yonkers desegregation case. In *United States v. Yonkers Board of Education*,<sup>93</sup> Judge Leonard Sand had found that the City of Yonkers intentionally segregated its public housing and public schools by directing its subsidized housing to predominantly minority neighborhoods. For years thereafter, the City resisted implementing the court's desegregation orders. The subsequent case, *Secretary of HUD*, arose when the City appealed the entry of a modified decree as an unconstitutional race-conscious remedy. Judge Sotomayor joined Judge Guido Calabresi's opinion, holding that the decree's modification was sufficiently narrowly tailored to respond to the City's failure to meet integrative housing goals. The panel wrote: "In spite of fifteen years of remedial efforts encompassing four race-neutral remedial regimes . . . and at least partly because of the active and passive resistance to integration displayed by the City, Yonkers public housing remains substantially segregated even today."<sup>94</sup>

Although Judge Sotomayor does not appear to have presided over any traditional public accommodations cases under Title II of the Civil Rights Act of 1964, she did hear a case involving discrimination in airline travel, *King v. American Airlines*.<sup>95</sup> There, she authored an opinion rejecting claims under 42 U.S.C. § 1981 and the Federal Aviation Act by African-American passengers who alleged they were bumped from an international flight because of their race. In affirming the district court's dismissal of the claims, Judge Sotomayor held that discrimination claims that arise in the course of embarking on an aircraft are preempted by the Warsaw Convention, which established a comprehensive liability system to govern claims involving international air travel. On this basis, the claims must be filed within the Convention's two-year limitations period; since the plaintiffs filed their claims within just under three years of the allegedly discriminatory incident, they were not timely.

## VIII. ACCESS TO JUSTICE

Judge Sotomayor has distinguished herself as a jurist who understands the importance of meaningful access to courts. Having sat as a trial judge, her jurisprudence reflects a nuanced understanding of the rulings district court judges make on dispositive motions.

Her opinions convey a keen understanding of the importance of judicial review and the obstacles that prevent cases from being heard. They are also remarkable for their balanced approach, reflecting appropriate judicial restraint, careful analysis of the facts at hand, and a respect for the principle of *stare decisis*. Judge Sotomayor has neither gone out of her way to erect insurmountable procedural bars to plaintiffs seeking relief, nor has she engaged in results-oriented decision-making that ignores jurisdictional prerequisites and binding precedent. This measured approach has led to reasonable and equitable results, seen in rulings that bar some claims while allowing others. And Judge Sotomayor has articulated and reinforced legal standards in a way that is clear and concise.

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<sup>92</sup> 239 F.3d 211 (2d Cir. 2001).

<sup>93</sup> 624 F. Supp. 1276 (S.D.N.Y.).

<sup>94</sup> *Id.* at 219-20.

<sup>95</sup> 284 F.3d 352 (2d Cir. 2002).

## Standing

In cases involving issues of standing and mootness, Judge Sotomayor has routinely declined to adopt either excessively narrow or unnecessarily expansive readings of pleading requirements. A hallmark of her disciplined decision-making is that she has often found standing and then ruled on the merits in favor of the defendants.

In *Lamar Advertising of Penn, LLC v. Town of Orchard Park*,<sup>96</sup> Judge Sotomayor found on behalf of a unanimous court that an outdoor advertising business had standing to bring a facial challenge to a municipal ordinance even though the corporation's First Amendment rights to commercial speech had not yet been denied. She was also careful to order that the plaintiff be permitted to re-plead its complaint on remand in order to address mootness concerns. And in *Brody v. Village of Port Chester*,<sup>97</sup> Judge Sotomayor wrote for another unanimous court in finding that a property owner who was denied due process prior to the exercise of eminent domain satisfied the standing requirement, even though he had failed to specify any additional harm beyond being denied procedural protections to which he was entitled under the Constitution.

Judge Sotomayor is also willing to make difficult judgments and apply prudential standing principles to refrain from addressing matters inappropriate for consideration on the merits. In *New York Civil Liberties Union v. Grandeau*,<sup>98</sup> the court determined that the plaintiff organization's First Amendment free speech claim was not moot under a constitutional analysis; however, it determined that the claim was not yet ripe for judicial review. And in *Center for Reproductive Law and Policy v. Bush*,<sup>99</sup> Judge Sotomayor used varying approaches to resolve the claims in a suit filed by a U.S.-based organization seeking to challenge the executive branch's policy of refusing aid to foreign nonprofits that performed or provided information about abortions. First, the court bypassed a potentially dispositive standing argument in order to reject a First Amendment claim on the merits because the outcome was "foreordained" by a prior decision of the circuit.<sup>100</sup> The court also found that the plaintiff organization had standing to bring an equal protection claim, but rejected that claim on the merits. Finally, the court found that the organization lacked standing to assert a due process challenge to the policy—a ruling based in large part upon the finding that plaintiffs did not assert harm to their own interests, but to those of third parties.

In another prudential standing analysis, Judge Sotomayor joined a unanimous panel in finding that a defendant had standing to challenge an order of removal in the immigration context, but declining to address the merits because the claims would be better resolved at a time closer to petitioner's parole.<sup>101</sup> And in a host of other cases, Judge Sotomayor has demonstrated

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<sup>96</sup> 356 F.3d 365 (2d Cir. 2004).

<sup>97</sup> 345 F.3d 103 (2d Cir. 2003).

<sup>98</sup> 528 F.3d 122 (2d Cir. 2008).

<sup>99</sup> 304 F.3d 183 (2d Cir. 2002).

<sup>100</sup> *Id.* at 187, 195; *cf.* *Moore v. Consol. Edison Co. of N.Y.*, 409 F.3d 506, 511 n.5 (2d Cir. 2005) (declining to address whether prudential limits on standing apply to Title VII sex discrimination claims and instead exercising "hypothetical jurisdiction" and ruling on the merits because plaintiff's claims would fail).

<sup>101</sup> *Simmonds v. INS*, 326 F.3d 351, 361 (2d Cir. 2003).

a willingness to dismiss claims in which the pleadings are clearly insufficient to state a claim for relief.<sup>102</sup>

## Sovereign Immunity

Judge Sotomayor's few decisions in the area of sovereign immunity have all strictly applied existing precedent, even when written in dissent, and displayed a reluctance to limit states' Eleventh Amendment immunity absent guidance from the Supreme Court. In this area, her adherence to precedent is indicative of a disciplined judicial restraint, placing her squarely in the mainstream.

In *McGinty v. New York*,<sup>103</sup> Judge Sotomayor joined a unanimous panel in rejecting the argument that the Age Discrimination in Employment Act (ADEA) abrogated states' sovereign immunity when a constitutional violation (there, a violation of the Equal Protection Clause) was also alleged,<sup>104</sup> following the Supreme Court's decision in *Kimel v. Florida Board of Regents*.<sup>105</sup> Though this unanimous decision was implicitly overruled by the Supreme Court in *United States v. Georgia*,<sup>106</sup> that decision announced a new rule and thus *McGinty* was a strict application of existing precedent.

In *Burnette v. Carothers*,<sup>107</sup> another unanimous panel rejected the claim that a trio of environmental protection statutes abrogated state sovereign immunity because each statute contained language authorizing suits against governments only "to the extent permitted by the eleventh amendment to the Constitution."<sup>108</sup> Like *McGinty*, this decision also reflects a strict application of Supreme Court precedent—here, the Court's decision in *Seminole Tribe v. Florida*,<sup>109</sup> which held that Congress may only abrogate sovereign immunity pursuant to its powers under Section V of the Fourteenth Amendment, even if it has unequivocally expressed its intent to abrogate the immunity and has acted pursuant to another valid exercise of Congressional power.

And in *Connecticut v. Cahill*,<sup>110</sup> Judge Sotomayor dissented from the majority opinion, which allowed a suit by a state against officers of another state to proceed in federal district court under an argument imported from *Ex parte Young*. Judge Sotomayor would have found that the suit was between two states, thereby implicating sovereign immunity concerns and vesting original jurisdiction in the Supreme Court pursuant to 28 U.S.C. § 1251(a). In her dissent, she criticized the majority for finding that the state was not the real party in interest simply because a state official, and not the state itself, was named as the defendant. Specifically, she accused the majority of "uprooting the doctrine of *Ex parte Young*, from its foundation in the law of

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<sup>102</sup> See, e.g., *Port Wash. Teachers' Ass'n v. Bd. of Educ.*, 478 F.3d 494 (2d Cir. 2007) (holding that because a policy stating that school staff members should report student pregnancies was not mandatory, the plaintiffs lacked Article III standing to challenge it); *Farrell v. Burke*, 449 F.3d 470 (2d Cir. 2006) (dismissing the claims of a parolee who did not establish sufficient injury to confer standing); *Perez v. Metropolitan Correctional Center Warden*, 5 F. Supp. 2d 208 (S.D.N.Y. 1998), *aff'd* 181 F.3d 83 (2d Cir. 1999).

<sup>103</sup> 251 F.3d 84 (2d Cir. 2001).

<sup>104</sup> *Id.* at 92.

<sup>105</sup> 528 U.S. 62 (2000).

<sup>106</sup> 546 U.S. 151 (2006) (holding that constitutional violations may serve to abrogate sovereign immunity).

<sup>107</sup> 192 F.3d 52 (2d Cir. 1999).

<sup>108</sup> *Id.* at 57.

<sup>109</sup> 517 U.S. 44, 55 (1996).

<sup>110</sup> 217 F.3d 93 (2d Cir. 2000).

sovereign immunity and artificially transplanting it into the area of Supreme Court jurisdiction.”<sup>111</sup> She continued, “[a]lthough recognizing that the doctrine of *Young* is ‘not directly applicable’ here, . . . the majority fails to acknowledge that the *Young* doctrine is a ‘legal fiction’ that arose in a narrow context, has been limited continually by the Supreme Court, and, if at all relevant to this case, teaches that federal jurisdiction should not be readily expanded.”<sup>112</sup>

## Statutes of Limitations

Judge Sotomayor’s opinions on statutes of limitations comport with her measured approach in other areas. She has shielded plaintiffs from improper applications of the statutes while rejecting the claims of dilatory plaintiffs.

In *Strom v. Siegel Fenchel & Peddy P.C. Profit Sharing Plan*,<sup>113</sup> Judge Sotomayor wrote the majority opinion vacating the district court’s partial grant of summary judgment to defendants who argued that the plaintiff’s claims were time-barred because she had waived her right to appeal. The plaintiff, a member of a retirement plan, filed suit under the Employee Retirement Income Security Act (“ERISA”), seeking a declaration of her rights to pension benefits and claiming a breach of fiduciary duty by plan administrators. On appeal, Judge Sotomayor found that the plan administrators were precluded from raising a failure-to-exhaust defense because they did not provide the plaintiff with written notice of their decision or a description of the applicable review procedures and time limits. “When a plan assiduously refuses to provide a claimant with information concerning her eligibility or administrative review rights under the plan,” Judge Sotomayor held, “any alleged waiver simply cannot be knowing or voluntary.”<sup>114</sup>

In *United States v. Lopez*,<sup>115</sup> Judge Sotomayor wrote for a majority finding that an eighteen-month delay in an immigration defendant’s efforts to exhaust his administrative remedies was not unreasonable because he had been erroneously told by both the immigration judge and the Board of Immigration Appeals that relief was no longer available and was thereby denied an opportunity to seek judicial review.<sup>116</sup>

In *Brown v. Parkchester South Condominiums*,<sup>117</sup> Judge Sotomayor disagreed with the district court’s dismissal of an employment discrimination claim for failure to comply with Title VII’s statute of limitations. But instead of usurping the role of the district court, she remanded the case to the district court. Judge Sotomayor found sufficient evidence to warrant a hearing to determine whether the employee’s alleged medical condition warranted equitable tolling.

However, in *United States v. Cote*,<sup>118</sup> Judge Sotomayor ruled in favor of the respondent, finding noncoercive the government’s offer to pursue lesser charges in exchange for plaintiff’s agreement that the running of the statutory limitation period be tolled. The petitioner would have otherwise been vulnerable to prosecution on a capital charge with no statute of limitations, and

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<sup>111</sup> *Id.* at 107 (Sotomayor, J., dissenting).

<sup>112</sup> *Id.* at 106-07.

<sup>113</sup> 497 F.3d 234 (2d Cir. 2007).

<sup>114</sup> *Id.* at 246.

<sup>115</sup> 445 F.3d 90 (2d Cir. 2006).

<sup>116</sup> *Id.* at 93.

<sup>117</sup> 287 F.3d 58 (2d Cir. 2002).

<sup>118</sup> 544 F.3d 88 (2d Cir. 2008).

he failed to assert a statute of limitations defense at trial.<sup>119</sup> And in *King v. American Airlines*,<sup>120</sup> Judge Sotomayor ruled against African-American plaintiffs who appealed the dismissal of their race discrimination claim against an airline, which the district court had ruled untimely. The plaintiffs—a couple bumped from an international flight originating in the United States, allegedly on the basis of their race—argued that the three-year statute of limitations applicable to 42 U.S.C. § 1981 actions governed their suit. But Judge Sotomayor affirmed the district court, holding that the discrimination claim fell within the scope of an international treaty that preempted federal and state civil rights claims and required the application of the two-year statute of limitations prescribed under the treaty.

### Attorneys' Fees

Judge Sotomayor's jurisprudence in attorneys' fees cases again shows her to be a balanced and disciplined jurist. She appears to appreciate that the unavailability of attorneys' fees chills the enforcement of civil rights laws and frustrates attempts by the civil rights bar to fulfill its congressionally-approved role as "private attorneys general." She has often joined majorities to uphold reasonable awards of attorneys' fees. In doing so, she has adopted an appropriately narrow reading of the Supreme Court's decision in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*,<sup>121</sup> which established new rules for determining whether a plaintiff could be considered a "prevailing party" for purposes of such awards. But she has also limited overreaching by plaintiffs' counsel.

In *A.R. ex rel. R.V. v. New York City Department of Education*,<sup>122</sup> Judge Sotomayor joined a unanimous opinion affirming the grant of fee awards by the district court to parents of disabled children who, after administrative due process hearings under the IDEA, secured administrative orders in their favor incorporating the terms of a favorable settlement. The panel reasoned that such an order changes the legal relationship between the parties and is enforceable under 42 U.S.C. § 1983.<sup>123</sup> By making fees available even if a lawsuit is not filed, this decision provides a tremendous incentive to parents to vindicate their children's rights through administrative hearings.<sup>124</sup> And in *National Helicopter Corp. v. City of New York*,<sup>125</sup> then-District Judge Sotomayor deemed the plaintiff to be a "prevailing party" even though it ultimately succeeded on fewer than half of its claims. Judge Sotomayor also declined to adopt the defendant's theory that fees were inappropriate under 42 U.S.C. § 1988 because the only basis for the plaintiff's partial relief was the Supremacy Clause, which is unenforceable under 42 U.S.C. § 1983.

In a number of other cases, Judge Sotomayor has limited fee awards.<sup>126</sup> Again demonstrating her balanced approach, Judge Sotomayor has also joined majority opinions in other cases holding that fees were unavailable.<sup>127</sup>

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<sup>119</sup> *Id.* at 103.

<sup>120</sup> 284 F.3d 352 (2d Cir. 2002).

<sup>121</sup> 532 U.S. 598 (2001).

<sup>122</sup> 407 F.3d 65 (2d Cir. 2005).

<sup>123</sup> *Id.* at 76.

<sup>124</sup> *Cf.* *Mr. L. v. Sloan*, 449 F.3d 405 (2d Cir. 2006) (excluding from the reach of *A.R. ex rel. R.V.* those cases in which a settlement agreement is reached privately, without changing the legal relationship of the parties).

<sup>125</sup> No. 96-3574 (SS), 1999 WL 562031, at \*1 (S.D.N.Y. July 30, 1999).

<sup>126</sup> *See, e.g., B. ex rel. M.B. v. East Granby Bd. of Educ.*, 2006 U.S. App. LEXIS 27014 (2d Cir. 2006) (vacating in part a district court's award of attorneys' fees in an IDEA claim because the due process hearing officer lacked

## IX. CRIMINAL JUSTICE

One of LDF's primary missions is ensuring the fair and equitable treatment of African Americans within the criminal justice system. Issues such as defendants' rights to appeal their constitutional claims to federal courts through habeas proceedings, the right to jury selection procedures free from racial discrimination, and the protection of an individual's right to be free of unreasonable searches and seizures, are at the core of the protections due to criminal defendants, and of LDF's advocacy in the criminal justice arena.

Each year, the Supreme Court is the final arbiter of many matters of critical importance to criminal defendants. In its 2008 Term, the Court considered, among other things, the scope of the Fourth Amendment's exclusionary rule,<sup>128</sup> the right of inmates to obtain post-conviction analysis of DNA evidence,<sup>129</sup> the right to a speedy trial,<sup>130</sup> the conditions under which the government may conduct a warrantless search,<sup>131</sup> and the circumstances under which an individual is entitled to the protections attached to the Sixth Amendment right to counsel.<sup>132</sup> If appointed to the bench, Judge Sotomayor would have the opportunity to join her fellow justices in shaping the scope of criminal law and procedures for many years to come.

LDF has examined Judge Sotomayor's circuit court record in cases involving jury discrimination, habeas corpus, civil rights prosecutions, and Fourth and Sixth Amendment issues. While we do not necessarily agree with the rulings in all of the cases discussed below, we nonetheless believe her overall record supports her nomination.

### Discrimination in Jury Selection

In its landmark *Batson v. Kentucky*<sup>133</sup> decision, the Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment prohibits the use of peremptory strikes to remove jurors on the basis of race. The Court held that "[p]urposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure,"<sup>134</sup> and that "[a] person's race simply is unrelated to his fitness as a juror."<sup>135</sup> In 1991, the Court clarified aspects of its *Batson* ruling in

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jurisdiction to award fees and had miscalculated the same, and remanding to the district court for proper calculation); *Mid-Hudson Catskill Rural Migrant Ministry, Inc. v. Fine Host Corp.*, 418 F.3d 168 (2d Cir. 2005) (limiting a fee award based upon the language of the plaintiff's retainer agreement and finding unenforceable language in the agreement that attempted to calculate client's liabilities to counsel based on what client could secure as reimbursement for those liabilities in a contractual indemnity action).

<sup>127</sup> See, e.g., *Vultaggio v. Bd. of Regents*, 343 F.3d 598 (2d Cir. 2003) (per curiam) (holding that plaintiffs who engage in complaint resolution procedures are not entitled to awards of attorneys' fees because such actions were not identified in the IDEA); *Garcia v. Yonkers Sch. Dist.*, 561 F.3d 97 (2d Cir. 2009) (holding that the plaintiffs were not "prevailing parties" under *Buckhannon* because verbal comments from the bench suggesting the possible entry of an order favorable to plaintiffs were insufficient to change the legal relationship between the parties).

<sup>128</sup> *Herring v. United States*, 129 S.Ct. 695 (2009).

<sup>129</sup> *Dist. Att'y's Office of Third Jud. Dist. v. Osborne*, 129 S. Ct. 488 (2008).

<sup>130</sup> *Vermont v. Brillon*, 129 S.Ct. 1283 (2009).

<sup>131</sup> *Pearson v. Callahan*, 129 S.Ct. 808 (2009); *Arizona v. Gant*, 129 S. Ct. 1710 (2009).

<sup>132</sup> *Montejo v. Louisiana*, 129 S.Ct. 2079 (2009).

<sup>133</sup> 476 U.S. 79 (1986).

<sup>134</sup> *Id.* at 86.

<sup>135</sup> *Id.* at 87 (citation omitted).

*Powers v. Ohio*.<sup>136</sup> In *Powers*, the Court held that “a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded jurors share the same race.”<sup>137</sup> In so holding, the Court noted that despite the many cases it had heard raising the issue of racial discrimination in jury selection, it had “not questioned the premise that racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts.”<sup>138</sup>

A review of the *Batson* decisions for which Judge Sotomayor has authored opinions or sat on the panel reveals a commitment to the core principle of *Batson*, as well as to the procedural protections surrounding a defendant’s right to bring such challenges through habeas proceedings.

In *Galarza v. Keane*,<sup>139</sup> Judge Sotomayor wrote for the majority in a case questioning whether a defendant had properly preserved his *Batson* challenge for federal habeas review where a trial court had explicitly ruled on only two of the defendant’s five *Batson* challenges, and the defendant failed to object. At trial, the petitioner, Galarza, made a *Batson* objection after the prosecutor used peremptory strikes to remove five Hispanic members of the jury venire.<sup>140</sup> In rejecting Galarza’s *Batson* challenge the trial court only discussed and credited the prosecution’s race-neutral reasons for two of the strikes.<sup>141</sup> Galarza did not object to the trial court’s incomplete *Batson* ruling. The state appellate court rejected Galarza’s appeal on the merits.<sup>142</sup> On habeas review, the magistrate judge and district court found that Galarza had waived his *Batson* claims by failing to properly pursue them during voir dire, and, in the alternative, found that the trial court had credited the prosecutor’s race-neutral explanations for the strikes.<sup>143</sup>

The most important aspect of the Second Circuit opinion authored by Judge Sotomayor is the court’s ruling regarding the application of a state procedural bar. Although Judge Walker, writing in dissent, would have found that Galarza’s failure to object to the trial court’s incomplete factual finding was “fatal to his claim,”<sup>144</sup> Judge Sotomayor’s majority decision countered that “in order for federal habeas review to be procedurally barred, a state court must actually have relied on a procedural bar as an independent basis for its disposition of the case, and the state court’s reliance on state law must be unambiguous and clear from the face of the opinion.”<sup>145</sup> The majority found that the state appellate court had ruled on the merits of the *Batson* claim, and did not in fact apply or reference such a procedural bar.<sup>146</sup> However, the majority held that even assuming the appellate court had made an ambiguous reference to such a bar, “the dissent’s analysis would require us to disregard our established precedent that such an ambiguity is insufficient to preclude our review of a habeas petition.”<sup>147</sup> The court concluded that “we decline to create a procedural requirement that a party must repeat his or her *Batson*

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<sup>136</sup> 499 U.S. 400 (1991).

<sup>137</sup> *Id.* at 402.

<sup>138</sup> *Id.*

<sup>139</sup> 252 F.3d 630 (2d Cir. 2001).

<sup>140</sup> *Id.* at 633-34.

<sup>141</sup> *Id.* at 634.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 634-35.

<sup>144</sup> *Id.* at 642.

<sup>145</sup> *Id.* at 637.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

challenges three times at trial in order to avoid a procedural bar.”<sup>148</sup> Because the trial court had failed to issue a complete *Batson* ruling, the court remanded the case to the district court to determine whether to expand the record or return the matter to the state court for reconsideration.<sup>149</sup>

Although the panel ultimately rejected the petitioner’s *Batson* challenge in *Green v. Travis*,<sup>150</sup> the decision demonstrates Judge Sotomayor’s straightforward application of federal precedent to reverse a state court finding that the defendant had not made a prima facie case of a *Batson* violation. In *Green*, the defendant alleged at trial that *Batson* was violated by the removal of African-Americans and Hispanics from his jury, stating that although the jurors in question were of “different genders and different Hispanic race and the black race [sic] ... I believe that the People are discriminating on race, which is absolutely forbidden to be done.”<sup>151</sup> The state appellate court held that “the defendant failed to establish a prima facie case that the prosecutor’s peremptory challenges were employed for discriminatory purposes because ‘minorities’ in general do not constitute a cognizable racial group.”<sup>152</sup> On habeas review before the Second Circuit, the state urged adoption of this standard. Judge Sotomayor’s decision pointedly disagreed with the state and the appellate court’s analysis. Writing for the unanimous panel, she noted that *Batson* held that a defendant seeking to establish a prima facie case of discrimination in the peremptory exercise of petit jury strikes “first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant’s race.”<sup>153</sup> However, she noted that:

The Supreme Court’s subsequent decision in *Powers v. Ohio*, 499 U.S. 400 (1991), dramatically lessened the import of *Batson*’s “cognizable racial group” language....*Powers* makes clear that the only continuing relevance of *Batson*’s “cognizable racial group” language is the requirement that a defendant alleging purposeful racial discrimination in the exercise of peremptory strikes must demonstrate that a peremptorily excused venireperson was challenged by reason of being a member of *some* “cognizable racial group.”<sup>154</sup>

The court concluded by stating that it “is indisputable that one venireperson cannot be excluded from a jury on account of race. *A fortiori*, several venirepersons of different races cannot be excluded from a jury on account of race.”<sup>155</sup> Nevertheless, turning to the merits, the panel rejected the *Batson* claim.

In *United States v. Bryce*,<sup>156</sup> co-authored by Judges Jacobs and Sotomayor, the panel applied *Batson* to uphold the district court’s determination that the prosecutor had offered a valid race-neutral reason when the prosecutor explained that the reason for striking a 19-year-old

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<sup>148</sup> *Id.* at 638.

<sup>149</sup> *Id.* at 640.

<sup>150</sup> 414 F.3d 288 (2d Cir. 2005).

<sup>151</sup> *Id.* at 291-92.

<sup>152</sup> *Id.* at 292.

<sup>153</sup> *Id.* at 296-97 (internal quotation and citation omitted).

<sup>154</sup> *Id.* at 297-98.

<sup>155</sup> *Id.* at 298.

<sup>156</sup> 208 F.3d 346 (2d Cir. 1999).

African-American potential juror was the juror's lack of life experience, and the prosecutor also struck all other jurors younger than age 41.<sup>157</sup>

In two cases, Judge Sotomayor joined panel decisions reversing the district court's grant of a writ of habeas corpus on a petitioner's *Batson* claims. In *Rodriguez v. Schriver*,<sup>158</sup> the state appellate court had held that the petitioner's *Batson* challenge was unpreserved for appellate review under New York's contemporaneous objection requirement because after the prosecutor provided race-neutral reasons for striking four Hispanic jurors at trial, Rodriguez had not alleged that the reasons were pretexts, indicating only that the prosecutor had "challenged every single Hispanic on the record."<sup>159</sup> The district court disagreed with the state appellate court's analysis, finding that the prosecutor's strike of one of the four Hispanic jurors as to whom the *Batson* claim was raised was not race neutral for purposes of *Batson*'s second step.<sup>160</sup> On review, the Second Circuit held, however, that the prosecutor's strike of juror Gomez because he was from Santo Domingo was not "inherently discriminatory" considering the other facts presented in the case.<sup>161</sup> The panel therefore held that an adequate state procedural bar applied and reversed the district court's grant of the writ of habeas corpus.

In the unpublished case of *Hunter v. Miller*,<sup>162</sup> the district court had granted a writ of habeas corpus after finding that "the trial court precluded petitioner from developing the record to support his *Batson* claim, first by hearing petitioner's challenge off the record and second, through his hasty denial of that claim, by intimidating petitioner's attorney from making his record or raising additional *Batson* challenges later in the jury selection process."<sup>163</sup> In a summary order, the Second Circuit found nothing in the record to support the intimidation finding, and noted that while it was "deeply troubled" by the state trial court practice of going off-the-record during jury selection, the petitioner's attorney had neither objected to this procedure nor raised a challenge to make a record.<sup>164</sup>

## Habeas

According to a study by the National Center for State Courts, each year, state prisoners file more than 18,000 cases seeking habeas relief, which amounts to one out of every 14 civil cases filed in federal district courts.<sup>165</sup> Between her service on the district court and as a circuit court judge, Judge Sotomayor has extensive experience with habeas cases. In each of the published decisions Judge Sotomayor has authored where the habeas issue was resolved by the decision, the panel has denied the petition.

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<sup>157</sup> *See id.* at 350 n.3.

<sup>158</sup> 392 F.3d 505 (2d Cir. 2004).

<sup>159</sup> *Id.* at 508-10.

<sup>160</sup> *Id.* at 509.

<sup>161</sup> *Id.* at 510-11.

<sup>162</sup> 144 F. App'x 202 (2d Cir. 2005).

<sup>163</sup> *Id.* at 203.

<sup>164</sup> *Id.*

<sup>165</sup> NANCY J. KING, ET AL., NAT'L CTR. FOR STATE COURTS, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, at 3 (National Center for State Court, Aug. 2007), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/219558.pdf>.

In *Doe v. Menefee*,<sup>166</sup> over a lengthy dissent by Judge Pooler, Judge Sotomayor rejected a district court's finding that petitioner Doe had presented a credible claim of actual innocence, and affirmed the district court's ultimate denial of his habeas petition. Doe, who had been convicted of second-degree sodomy, sought to file a petition for habeas corpus after Antiterrorism and Effective Death Penalty Act of 1996's ("AEDPA") limitation period had run. Although the case raised the question of whether AEDPA's statute of limitations can be tolled by credible claims of actual innocence, the panel did not reach the question because it held that such a credible claim had not been presented. Judge Pooler, in dissent, criticized the majority for "second guess[ing] the trial judge's credibility findings where no compelling extrinsic or other evidence compels a different conclusion."<sup>167</sup>

In *Gilchrist v. O'Keefe*,<sup>168</sup> the court examined a habeas case raising the question of the scope of the Sixth Amendment right to counsel. Judge Sotomayor wrote for a unanimous panel to hold that the state court's decision to deprive an indigent defendant of counsel at his sentencing hearing after the defendant punched his appointed attorney in the ear and ruptured his eardrum was neither contrary to nor an unreasonable application of clearly established federal law for purposes of the court's habeas review. In coming to this conclusion, the panel noted that the Supreme Court precedents of *Illinois v. Allen*<sup>169</sup> and *Taylor v. United States*<sup>170</sup> stand for the principle that fundamental rights can be forfeited, and held that in the instant case, the state court's determination that the defendant had forfeited the right to counsel, rather than waived that right, was not unreasonable.

In *Brown v. Miller*<sup>171</sup> the defendant argued that the procedure by which he was sentenced as a persistent felony offender violated his right to a jury trial under the Sixth Amendment. The state appellate court found that the claim was procedurally barred under its precedent in *People v. Rosen*,<sup>172</sup> which involved a decision about whether a defendant had a valid federal *Apprendi* claim. The Second Circuit held that, "[b]ecause the Appellate Division in this case relied on *Rosen* ... [t]he procedural ruling based on state law was therefore interwoven with the court's rejection of the federal law claim on the merits and does not bar federal habeas review."<sup>173</sup> However, the panel ultimately rejected the habeas petition, finding that the state court's ruling had not constituted an unreasonable application of federal law.

In *Campusano v. U.S.*,<sup>174</sup> the court faced the question whether an attorney can be ineffective for failing to file an appeal where the petitioner waived his right to appeal in a plea agreement. Judge Sotomayor, writing for a unanimous panel, held that "where counsel does not file a requested notice of appeal and fails to file an adequate *Anders* brief [requesting withdrawal but referring to anything in the record that might support an appeal], courts may not dismiss the hypothetical appeal as frivolous on collateral review."<sup>175</sup> The panel thus remanded to the district court for an evaluation of whether the petitioner instructed his attorney to file an appeal,

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<sup>166</sup> 391 F.3d 147 (2d Cir. 2004).

<sup>167</sup> *Id.* at 178 (Pooler, J., dissenting).

<sup>168</sup> 260 F.3d 87 (2d Cir. 2001).

<sup>169</sup> 397 U.S. 337 (1970).

<sup>170</sup> 414 U.S. 17 (1973).

<sup>171</sup> 451 F.3d 54 (2d Cir. 2006).

<sup>172</sup> 96 N.Y.2d 329 (2001).

<sup>173</sup> *Brown*, 451 F.3d at 57 (citation and quotation marks omitted).

<sup>174</sup> 442 F.3d 770 (2d Cir. 2006).

<sup>175</sup> *Id.* at 775.

instructing that he should be allowed a direct appeal if the district court answered this question in the affirmative.

### **Civil Rights Actions in the Criminal Context**

Judge Sotomayor has authored a number of decisions in civil rights actions sounding in the criminal context. In *United States v. Cote*,<sup>176</sup> Judge Sotomayor wrote for a unanimous panel to reverse a district court's entry of acquittal in a case where a prison security guard was charged with depriving an inmate of his civil rights under 18 U.S.C. § 242. The statute makes willfully depriving a person of his or her constitutional or federal rights a criminal violation when the official is acting under color of law. After conducting a lengthy examination of the facts of the case, Judge Sotomayor concluded that the district court had abused its discretion in discrediting testimony supporting the conviction, including testimony from three inmates who were eyewitnesses to the offense and a neurosurgeon who had examined the deceased inmate.

In *Smith v. Edwards*,<sup>177</sup> Judge Sotomayor wrote for the panel to reverse a district court's refusal to dismiss plaintiff's 42 U.S.C. § 1983 claim against a police officer and the town of Fairfield, CT, alleging unlawful arrest and a failure to train. The officer had filed a probable cause affidavit and obtained an arrest warrant based on his investigation of allegations that plaintiff had sexually abused his daughter. The charges were subsequently dismissed, and the plaintiff sued, alleging that the officer withheld material information from the magistrate. The Second Circuit found, however, that there was no evidence that the additional information would have been critical to the magistrate's evaluation of probable cause for purposes of issuing the warrant, and remanded the case for dismissal of the plaintiff's federal claims.

In *Amaker v. Foley*,<sup>178</sup> a state inmate brought a 42 U.S.C. § 1983 action against correctional officers alleging race discrimination. The district court entered summary judgment for the officers because the inmate failed to file opposition papers to the summary judgment motion. Judge Sotomayor, writing for a unanimous panel, reversed. The court held that the district court's judgment was, "inconsistent with Federal Rule of Civil Procedure 56 because a court cannot relieve the moving party of its initial burden of production under that rule."<sup>179</sup> The court noted that, "[t]he district court granted summary judgment solely for failure to file opposing papers and did not, as required, assess whether the defendants had met their burden to demonstrate that summary judgment was appropriate."<sup>180</sup>

In *Brown v. City of Oneonta, New York*,<sup>181</sup> Judge Sotomayor joined Judge Calabresi's dissent from a denial of rehearing en banc in a case in which the Second Circuit denied African-American citizens' racial discrimination claims under 42 U.S.C. §§ 1981, 1985, 1985(3), and 1986, and the Equal Protection Clause of the Fourteenth Amendment. The citizens filed these claims after, in their town of predominantly white citizens, police attempted to locate and question all African-American males in the town based upon the description of a crime suspect. The dissent noted that police in effect created their own racial classification by questioning every black male student, and at least one black woman, along with every non-white person in the city

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<sup>176</sup> 544 F.3d 88 (2d Cir. 2008).

<sup>177</sup> 175 F.3d 99 (2d Cir. 1999).

<sup>178</sup> 274 F.3d 677 (2d Cir. 2001).

<sup>179</sup> *Id.* at 681.

<sup>180</sup> *Id.*

<sup>181</sup> 235 F.3d 769 (2d Cir. 2000).

regardless of age or sex, despite the victim's description, which included mention of a cut on the assailant's hands.

#### **Fourth Amendment**

While on the Second Circuit, Judge Sotomayor has issued dissents from two cases about whether the Fourth Amendment permits strip searches in the absence of individualized suspicion. In *N.G. and S.G. v. Connecticut*,<sup>182</sup> Judge Sotomayor dissented from the panel decision upholding Connecticut's blanket strip search policy for juveniles' initial entries into juvenile detention facilities absent any individualized suspicion and where the juveniles in question had not been accused of committing a crime. Detailing the trauma and humiliation the young female plaintiffs had experienced, she noted that courts "should be especially wary of strip searches of children, since youth 'is a time and condition of life when a person may be most susceptible to influence and to psychological damage.'"<sup>183</sup> Similarly, in *Kelsey v. County of Schoharie*,<sup>184</sup> Judge Sotomayor dissented from a panel decision upholding a county jail's "clothing exchange" procedure, whereby male inmates who were not expected to make bail had to change out of their street clothes and into jail-issued clothing, in view of officers and without any reasonable suspicion. Citing to the *N.G.* decision, she observed that "insofar as the majority suggests that 'brief[]' exposure of one's private parts does not implicate the Fourth Amendment ... our precedent does not support the notion that a search need be prolonged or thorough to be termed a 'strip search.'"<sup>185</sup>

Judge Sotomayor has also authored a number of notable decisions regarding the Fourth Amendment's exclusionary rule. In *United States v. Santa*<sup>186</sup> and *United States v. Falso*<sup>187</sup> Judge Sotomayor wrote opinions in cases involving exceptions to this rule. In *Santa*, Judge Sotomayor applied the Supreme Court's decision in *Arizona v. Evans*<sup>188</sup> to a case in which officers arrested defendant Santa based upon a warrant that, due to the errors of court employees, remained in the police database despite having been vacated. Santa was convicted of possession with intent to distribute after three grams of cocaine were discovered on his person during the arrest. Writing for a unanimous panel, Judge Sotomayor held that the arresting officers' reliance on the statewide computer database was objectively reasonable.<sup>189</sup> The Supreme Court endorsed this position in its ruling in *Herring v. United States*<sup>190</sup> last term.

In *Falso*, Chief Judge Jacobs dissented from Judge Sotomayor's decision extending the good-faith exception to the exclusionary rule to a situation where the officer who swore out an affidavit supporting a warrant for which there was not probable cause was the same officer who executed the warrant. Following the denial of defendant Falso's motion to suppress evidence seized from his home, he was convicted of numerous crimes related to child pornography. On

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<sup>182</sup> 382 F.3d 225 (2d Cir. 2004).

<sup>183</sup> *Id.* at 239 (Sotomayor, J., dissenting) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)).

<sup>184</sup> 567 F.3d 54 (2d Cir. 2009).

<sup>185</sup> *Id.* at 68 (Sotomayor, J., dissenting) (citing *N.G.*, 382 F.3d at 228 n.4).

<sup>186</sup> 180 F.3d 20 (2d Cir. 1999).

<sup>187</sup> 544 F.3d 110 (2d Cir. 2008).

<sup>188</sup> 514 U.S. 1 (1995) (holding that evidence is not excludable under the Fourth Amendment where law enforcement officers act in reliance upon police records containing erroneous information due to the clerical errors of court employees).

<sup>189</sup> *Santa*, 180 F.3d at 27-30.

<sup>190</sup> 129 S.Ct. 695 (2009).

appeal, he claimed that the search warrant was not supported by probable cause. Judge Sotomayor agreed that there was insufficient probable cause to search Falso's home. However, the panel held that the good-faith exception to the exclusionary rule outlined in *United States v. Leon*<sup>191</sup> applied "to evidence seized 'in objectively reasonable reliance on' a warrant issued by a detached and neutral magistrate judge, even where the warrant is subsequently deemed invalid," and thus to Falso's situation.<sup>192</sup> In dissent, Chief Judge Jacobs wrote that, in his assessment, the good-faith exception could not apply, because the affidavit was "recklessly misleading (at best),"<sup>193</sup> and the officer who swore out the affidavit also executed it. Under such circumstances, the officer could "hardly claim good-faith reliance on a warrant issued by a judge who was mis-directed by the officer himself[.]"<sup>194</sup>

Judge Sotomayor also expanded upon the application of the exclusionary rule in *United States v. Howard*.<sup>195</sup> In that case, she ruled that the automobile exception to the Fourth Amendment's warrant requirement applied even though the defendants had been lured away from their cars by state troopers at the time of the searches.<sup>196</sup> Judge Sotomayor held that the exception applies "[e]ven where there is little practical likelihood that the vehicle will be driven away," as long as the "possibility exists."<sup>197</sup>

## X. CONCLUSION

It is LDF's assessment that Judge Sotomayor's personal and professional background, and her years of experience in government, private practice, and on the bench, make her an ideal nominee to serve as the 111th Justice of the United States Supreme Court. As reflected in the body of decisions we have reviewed here, Judge Sotomayor applies a detailed, considered evaluation of the matters that come before her, delving into the law and facts in a manner consistent with controlling precedent. While maintaining a jurisprudence that is detached from ideological concerns, Judge Sotomayor has nevertheless demonstrated a sense of understanding about how judicial decisions impact the real-life experiences of everyday people. It is her rigorous intellect coupled with this common touch that we believe makes Judge Sotomayor precisely the type of justice needed for these times, when, despite the progress that has been made on civil rights issues, there is still much to accomplish. We are thus pleased to strongly support President Obama's nomination of Judge Sonia Sotomayor to serve as the next justice of the United States Supreme Court.

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<sup>191</sup> 468 U.S. 897 (1984).

<sup>192</sup> *Falso*, 544 F.3d at 125 (citation omitted).

<sup>193</sup> *Id.* at 132 (Jacobs, C.J., dissenting).

<sup>194</sup> *Id.* at 136 (Jacobs, C.J., dissenting).

<sup>195</sup> 489 F.3d 484 (2d Cir. 2007).

<sup>196</sup> *Id.* at 492-94.

<sup>197</sup> *Id.* at 493.