

**Report of the American Civil Liberties Union
on the Nomination of Judge Sonia Sotomayor
to be Associate Justice of the
United States Supreme Court**

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INTRODUCTION

In accordance with ACLU Policy 519, this report summarizes the civil liberties and civil rights record of Judge Sonia Sotomayor, who was nominated by President Obama on May 26, 2009, to replace Justice David Souter as an Associate Justice of the United States Supreme Court. ACLU Policy 519 provides:

Whenever a Supreme Court nominee is sent to the Senate the ACLU will prepare a report for use by the Senate, the press and the public in evaluating the nominee. The report will examine the nominee's record with regard to civil liberties, and the role of the courts in protecting civil liberties, including the nominee's judicial record (if any), writings, speeches, and activities.

Judge Sotomayor has been a judge on the United States Court of Appeals for the Second Circuit since 1998. Before joining the appeals court, she served for six years as a trial judge on the United States District Court for the Southern District of New York. After graduating from Princeton University and Yale Law School, she worked for five years as an assistant district attorney in Manhattan and for eight years as a commercial litigator with a New York law firm. If confirmed by the Senate, Judge Sotomayor will be the first Hispanic to sit on the United States Supreme Court and only the third woman. She will also become the only member of the Court who has been a trial judge (replacing Justice Souter in that regard, as well).

After seventeen years on the federal bench, Judge Sotomayor's judicial record is extensive. Like past reports on prior nominees, therefore, this report focuses on Judge Sotomayor's written opinions, including her concurrences and dissents. We have also included a few significant cases in which Judge Sotomayor joined opinions written by other judges, but did not write separately.

In general, Judge Sotomayor's judicial opinions reflect a detailed attention to the facts and a close regard for precedent. They are carefully reasoned but do not engage in broad

discussions about constitutional philosophy or competing modes of constitutional interpretation. Because Judge Sotomayor's opinions are so fact-based and rarely stray far from well-established precedents, they are often difficult to characterize as either liberal or conservative. It is worth noting, however, that Judge Sotomayor has not written about many of the hot button topics that often dominate public discussions about the Supreme Court. Despite a lengthy judicial tenure, her opinions have not directly addressed a wide range of issues that frequently appear on the Supreme Court's docket, including abortion, gay rights, presidential power, and the death penalty.

Since her nomination, some critics have suggested that Judge Sotomayor's advocacy efforts on behalf of racial and ethnic minorities prior to her judicial career somehow call into question her judicial impartiality and therefore disqualify her from a seat on the Supreme Court. Her judicial record refutes any such suggestion. It is a standard, moreover, that has not been applied to other Supreme Court nominees and that would have eliminated some of the Supreme Court's most prominent justices, including Thurgood Marshall.

Judge Sotomayor has also been criticized for a 2001 speech in which she highlighted the relatively small number of minority judges on the federal bench and, quoting Professor Martha Minow of Harvard Law School, acknowledged that "there is no objective stance but only a series of perspectives – no neutrality, no escape from choice in judging."¹ In elaborating on that latter point, Judge Sotomayor added: "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life." *Id.* at 92. Critics of her nomination have seized on that comment as evidence

¹ The text of the 2001 talk Judge Sotomayor gave at University of California Berkeley was published in the *La Raza Law Journal*. See Sonia Sotomayor, *Raising the Bar: Latino and Latina Presence in the Judiciary and the Struggle for Representation: Judge Mario G. Olmos Memorial Lecture: Latina Judge's Voice*, 13 *LA RAZA L.J.* 87, 91 (2002).

that her judicial decisions are the product of a perceived bias rather than a principled application of the law. As noted above, the record does not substantiate that claim. Judge Sotomayor's life experience may have helped her to appreciate the impact of discrimination in the real world, but she has nevertheless rejected discrimination claims that she found were not supported by the facts or the law.² Likewise, Judge Sotomayor's experience as a prosecutor has made her sympathetic to the needs of law enforcement, but she has still stressed the importance of the warrant requirement before the police invade a home.

Read in context, Judge Sotomayor's candid assessment that she has been shaped by her background is both unremarkable and consistent with comments made by other Supreme Court justices. Justice Alito, for example, stated during his confirmation hearings that "[w]hen 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."³

The ACLU has appeared before Judge Sotomayor in approximately a dozen cases discussed in this report. She has agreed with the ACLU position in some cases and disagreed in others. For example, she joined in an opinion holding that recipients of so-called national security letters could not be subject to an automatic gag order, and argued in a dissent that the New York City Police Department violated the First Amendment by terminating a civilian employee for distributing offensive literature while off-duty. She also joined a dissent arguing that a decision by the police to stop and question all black men in an upstate New York city should have triggered strict scrutiny because its emphasis solely on race ignored other crucial

² According to one analysis of Judge Sotomayor's record on the Second Circuit, she has voted to reject discrimination claims in 78 cases and voted in favor of discrimination claims in 10 cases. See <http://www.scotusblog.com/wp/judge-sotomayor-and-race-results-from-the-full-data-set/>

³ Editorial, N.Y. TIMES, May 30, 2009.

identifying information provided by the crime victim, including a description of the assailant as a young man. On the other hand, she joined an opinion rejecting a First Amendment challenge to New York's anti-mask statute as applied to political protests, and joined another opinion holding that the plaza in front of Lincoln Center is not a public forum.

In two voting rights cases where the ACLU participated as a friend of the court, Judge Sotomayor agreed that New York's method of electing judges was unconstitutional in a ruling later overturned by the Supreme Court, and dissented from an en banc decision rejecting a challenge to New York's felon disenfranchisement law under the Voting Rights Act. But she also ruled that the ACLU lacked standing to challenge certain disclosure rules adopted by the New York State Lobbying Commission, and that a teacher's union supported by the ACLU lacked standing to challenge a local school board policy directing school employees to notify the parents of pregnant students. Finally, Judge Sotomayor wrote the Second Circuit's opinion upholding a policy of warrantless and suspicionless searches on the Lake Champlain ferry in another ACLU case.

As stated in ACLU Policy 519, "the Supreme Court has a unique and special role under the Constitution in protecting civil liberties." As Policy 519 further states, "in fulfilling its constitutional role of advice and consent the Senate has an obligation to undertake a thorough examination of a nominee's views on civil liberties and on the function and role of the judiciary in protecting civil liberties." It is our hope that this report will assist in that effort.

RACIAL JUSTICE

Judge Sotomayor's approach to racial justice issues is consistent with her approach to other areas of the law. Here, as elsewhere, her opinions generally reflect a careful examination of the relevant facts and law, and a disposition to decide cases narrowly. Since her nomination,

there has been a great deal of attention focused on *Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008), a case discussed more fully below. Judge Sotomayor was part of a three-judge panel in that case that affirmed a Title VII ruling in favor of New Haven “for the reasons stated in the thorough, thoughtful, and well-reasoned opinion of the court below.” *Id.* *Ricci* is an important case that merits consideration, but it is also important to evaluate it in the context of Judge Sotomayor’s entire judicial record on race.

1. Employment

In *Ricci v. DeStefano*, white firefighters sued the City of New Haven after it refused to certify the results of a promotional exam based on the city’s concern that the test results had a disparate impact on minority applicants. Because Title VII prohibits employment practices that have a disparate racial impact if the employer’s legitimate needs can be achieved through other means, the district court held that New Haven did not violate Title VII by refusing to certify the test results. The district court further held that New Haven did not engage in intentional racial discrimination by refusing to certify the test results in order to avoid potential Title VII liability, and therefore did not violate the Equal Protection Clause. After a Second Circuit panel, including Judge Sotomayor, affirmed the district court decision in a summary order, plaintiffs petitioned for rehearing en banc. That petition was denied by a 7-6 vote, with the dissent criticizing the panel’s reliance on a summary affirmance rather than a full opinion. The Supreme Court granted certiorari, 129 S.Ct. 894 (2009), and a decision is expected later this Term.

Whatever the explanation for the panel’s summary affirmance in *Ricci*, Judge Sotomayor’s decisions in discrimination cases typically involve a detailed analysis of the law and facts that often produces a nuanced outcome. For example, in *Norville v. Staten Island University Hospital*, 196 F.3d 89 (2d Cir. 1999), Judge Sotomayor upheld a district court

decision rejecting claims of race and age discrimination brought by an African American nurse against the defendant hospital but vacated the jury's verdict against the plaintiff on her disability claim because of inadequate jury instructions on the definition of "reasonable accommodation." *Id.* at 101("When the employer proposes reassignment as a form of accommodation ... the law is clear that the offer of an inferior position does not satisfy the employer's duty of reasonable accommodation if a comparable position is vacant."). Likewise, in *Cruz v. Coach Stores Inc.*, 202 F.3d 560 (2d Cir. 2000), Judge Sotomayor upheld a district court opinion dismissing plaintiff's claims of racially discriminatory retaliation, termination and failure to promote, while vacating the trial court's dismissal of plaintiffs' claims of racial and sexual harassment and remanding the case for further proceedings. (The decision in *Cruz* is discussed more fully *infra* at p. 14).

Judge Sotomayor's district court decisions reflect the same attention to the facts and adherence to precedent. In most of those decisions, she appears to have ruled at least in part in favor of defendants: *see, e.g., McNeil v. St. Barnabus Hosp.*, 1997 WL 729026 (S.D.N.Y. 1997) (rejecting discriminatory termination claims as untimely and granting summary judgment against plaintiff for failure to provide evidence of discriminatory pretext in retaliation claim); *Crawford v. New York City Hous. Auth.*, 1998 WL 10368 (S.D.N.Y. 1998) (no prima facie case of race or age discrimination or retaliation when plaintiff's job was not significantly altered); *Gilani v. National Ass'n of Sec. Dealers, Inc.*, 1997 WL 473383 (S.D.N.Y. 1997) (dismissing plaintiff's claims of racial discrimination because of insufficient complaint with E.E.O.C., but denying motion to dismiss with regard to retaliation charge and claims under state antidiscrimination law); *Baba v. Japan Travel Int'l, Inc.*, 165 F.R.D. 398 (S.D.N.Y. 1996) (dismissing *pro se* plaintiff's Title VII case after her failure to comply with discovery orders).

2. Education

Gant v. Wallingford Board of Education, 195 F.3d 134 (2d Cir. 1999) represents one of Judge Sotomayor's clearest statements regarding discrimination. *Gant* involved a six year old student who was the lone African American student in his class and who was subjected to racial taunts by at least one student and one parent. Shortly after beginning first grade, the school demoted him to kindergarten claiming that he demonstrated inadequate reading skills. The district court granted summary judgment, dismissing plaintiff's claims that the school district failed to discharge its legal obligations to protect him from racial harassment and that they discriminated against him by making him repeat kindergarten.

Judge Sotomayor joined the majority's decision to affirm summary judgment in favor of the defendants on Ray Gant's racial harassment claim because she did not believe the record contained sufficient evidence that the defendants acted with deliberate indifference. Judge Sotomayor dissented, however, from the majority's decision affirming summary judgment in favor of two teachers and the school board on the kindergarten transfer claim. She argued that "the treatment this lone black child encountered" was contrary to the school's established policies, in that "every other Cook Hill student having academic difficulty received some form of transitional help . . ." *Id* at 151. By contrast, Gant was transferred to a grade he already completed over the objections of his parents, without consulting his teacher, and without being provided the same resources as other students. As Judge Sotomayor explained, "'a prima facie case and a finding of a pretext may in some cases powerfully show discrimination. In my view', this is such a case.'" *Id.* at 151 (citing *Fisher v. Vassar College*, 114 F.3d 1332, 1338 (2d Cir. 1997)). Viewed in the light most favorable to the plaintiff, this prima facie evidence, combined

with the showing of pretext, fully supports the inference that race discrimination played a role in Mrs. Cronin's transfer decision." *Id.* at 152.

3. Housing

In *Boykin v. Keycorp*, 521 F.3d 202 (2d Cir. 2008), an African-American female borrower sued several lenders, alleging violations of the Fair Housing Act and other federal and state statutes because they denied her "home equity loan application for her non-owner-occupied multifamily house in a minority-concentrated neighborhood." *Id.* at 202. The district court dismissed the complaint, holding that Boykin's allegations of discrimination were untimely and, in the alternative, lacked sufficient detail. Judge Sotomayor vacated the district court's decision on both grounds and remanded for further proceedings. Her discussion of the relevant pleading standards rested on prior Second Circuit decisions that have since been called into question by the Supreme Court's decision in *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009).

4. Jury Selection

In *Galarza v. Keane*, 252 F.3d 630 (2001), an Hispanic defendant raised a *Batson* claim after the prosecution used its peremptory challenges to strike six Hispanic jurors from the venire. In response, the prosecution offered racially-neutral explanations for three of the strikes. The district court judge then rejected the *Batson* claim although three of the six peremptory challenges at issue were never explained. Judge Sotomayor reversed. After holding that the defendant had not waived his right to raise the *Batson* claim in federal habeas corpus proceedings, Judge Sotomayor ruled that the district court erred in failing to consider whether the unexplained exclusion of three jurors was racially-based, and remanded the case for that purpose. *Id.* at 637-41.

5. Racial Profiling

In *Brown v. City of Oneonta*, 235 F.3d 769, 779 (2d Cir. 2000), Judge Sotomayor joined an opinion written by Judge Calabresi that dissented from the denial of rehearing en banc in this highly publicized case in which the police allegedly stopped every black male they could find in the City of Oneonta after a 77 year old woman reported that a young black man with a knife had broken into her home. The dissenting opinion argued that the decision to disregard all elements of the victim's description except the assailant's race should have triggered strict scrutiny.

VOTING RIGHTS

Overall, Judge Sotomayor has been a strong supporter of equal voting rights and the integrity of the electoral process. She has written that Section 2 of the Voting Rights Act subjects felony disenfranchisement and all other voting qualifications to its coverage. She has held that judicial rules which prohibit high ranking political party officials and their associates from receiving New York State court fiduciary appointments are appropriate to redress the widespread abuses of the existing system. Her occasional observation that federal courts are not the proper forum for “garden variety” election challenges is consistent with prevailing law.

In *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006), a divided en banc court affirmed the decision of the district court that Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, did not encompass claims that a state law disenfranchising incarcerated felons and parolees resulted in unlawful vote denial or vote dilution. *Id.* at 315-16. The majority concluded that Congress did not intend Section 2 to reach such claims, and that application of Section 2 to felon disenfranchisement statutes would “alter the constitutional balance between the States and the

Federal Government.” *Id.* at 310. In a short dissenting opinion, Judge Sotomayor said the case before the court, despite the lengthy opinions written by judges on opposing sides, was not in fact “complex.” Rather, she wrote, “[i]t is plain to anyone reading the Voting Rights Act that it applies to all ‘voting qualification[s].’ . . . Section 2 of the Act by its unambiguous terms subjects felony disenfranchisement and all other voting qualifications to its coverage.” *Id.* at 367-68. After noting that that “[t]he duty of a judge is to follow the law, not to question its plain terms,” she said that “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.” *Id.* at 368. She thus supported an expanded interpretation of the reach of Section 2 prohibiting discrimination in voting, and a restricted role of the courts in interpreting acts of Congress.

In *Rivera-Powell v. New York City Bd. of Elections*, 470 F.3d 458 (2d Cir. 2006), Judge Sotomayor affirmed the dismissal of a complaint brought by a candidate for state court judge, who raised a variety of constitutional challenges to her exclusion from the ballot for failure to submit the required number of petitions. First, Judge Sotomayor held that Rivera-Powell was not denied due process because she was given a hearing by the City Board of Elections prior to her removal from the ballot, and state law provided for full and expedited judicial review of the board’s decision. *Id.* at 461. Judge Sotomayor then dismissed the plaintiff’s claim that her exclusion from the ballot violated her associational rights and the associational rights of her supporters because it was “virtually indistinguishable from her due process claim, in that she alleges no additional deprivation of her First Amendment interests independent from the deprivation that forms the basis of her due process claim.” *Id.* at 468. To hold otherwise, Judge Sotomayor wrote, would allow a plaintiff to obtain federal court review of routine “garden

variety” election disputes “merely by adding a First Amendment claim to his or her due process claim.” *Id.* at 469.

Judge Sotomayor also wrote the unanimous opinion of the court in *Kraham v. Lippman*, 478 F.3d 502 (2d Cir. 2007), which rejected a First Amendment challenge to judicial rules prohibiting certain high ranking political party officials, their families, and the members, associates, counsel, and employees of their law firms from receiving New York State court fiduciary appointments. Judge Sotomayor acknowledged that regulations which impose severe burdens on the right to associate with political parties “must survive strict scrutiny.” *Id.* at 506. However, she concluded the rules in question affected “political party participation only in a limited and incidental fashion,” and should therefore be reviewed “only for a rational basis.” *Id.* at 506. Applying that standard, she held that the interest in protecting the integrity and the appearance of integrity of the state judicial system “is not merely legitimate, but compelling, and we easily find that the Rule is rationally related to that interest.” *Id.* at 508.

Judge Sotomayor’s opinion noted that a judicial commission had investigated the fiduciary appointment process in New York and concluded there was widespread abuse based on political party connections. She further pointed out that the judicial rules were no more restrictive than the Hatch Act’s prohibition on federal employees’ participation in a wide variety of political activities, including holding party office. *Id.* at 507-08.

Judge Sotomayor did not write a separate opinion in *Lopez-Torres v. New York State Bd. of Elections*, 462 F.3d 161 (2d Cir. 2006), but she joined the majority opinion which found that New York’s unique system for nominating and electing trial court judges violated the First Amendment rights of judicial candidates and voters. Under the challenged system, a highly restrictive network of regulations controlled by party leadership effectively excluded qualified

candidates and voters from participating in the primary election and subsequent convention, and thus severely limited voter choice at the general election. *Id.* at 195-201. The Supreme Court reversed, concluding that “[s]election by convention has been a traditional means of choosing party nominees. While a State may determine it is not desirable and replace it, it is not unconstitutional.” *New York State Bd. of Elections v. Lopez-Torres*, 128 S.Ct. 791, 800 (2008).

Judge Sotomayor participated, but did not write an opinion, in several other cases raising voting rights issues during her tenure as an appellate judge. *See Wingate v. Horn*, 2009 WL 320182 (2d Cir.) (summary order) (joined order that on-site voting for prison detainees was not required where procedures for absentee voting were provided); *Person v. New York State Board of Elections*, 467 F.3d 141 (2d Cir. 2006) (per curiam) (joined opinion that prohibition on per-signature payment of those employed to circulate election petitions did not violate the First and Fourteenth Amendments and assigning official status only to parties whose gubernatorial candidates received 50,000 votes in the last election was constitutional); *Muntaqim v. Coombe*, 449 F.3d 371 (2d Cir. 2006) (en banc) (per curiam) (joined opinion dismissing a challenge under Section 2 of the Voting Rights Act to New York’s felon disfranchisement statute on ground that the plaintiff was not a resident of the state); *Landell v. Sorrell*, 406 F.3d 159 (2d Cir. 2005) (joined order denying rehearing en banc) (panel opinion both invalidated and upheld portions of Vermont’s campaign-finance statute); *Muntaqim v. Coombe*, 385 F.3d 793 (2d Cir. 2004) (dissented from a denial of rehearing en banc) (panel opinion held that the Voting Rights Act did not apply to New York statute that disfranchised currently incarcerated felons and parolees).

While on the district court, Judge Sotomayor wrote two opinions addressing a broad-based challenge to New York’s procedures for casting write-in votes. In *Gelb v. Board of Elections in the City of New York*, 888 F.Supp. 509 (S.D. N.Y. 1995), she denied a motion to

dismiss by the state Board of Elections on the ground that plaintiff had adequately stated a claim for relief by alleging in the complaint that the “effect of defendants’ actions was to bolster the candidacies of people nominated by the established parties.” *Id.* at 517. Subsequently, in *Gelb v. Board of Elections in the City of New York*, 950 F.Supp. 82 (S.D. N.Y. 1996), Judge Sotomayor granted the Board of Elections’ motion for summary judgment, holding that any imperfections in the voting process were minor and did not rise to the level of a constitutional violation, and that where “state remedies are available, the Second Circuit has unequivocally found that Federal intervention is inappropriate.” *Id.* at 86.

WOMEN’S RIGHTS

Judge Sotomayor’s opinions addressing sex discrimination and the treatment of women and girls do not contain novel interpretations of law but they do reflect a common-sense understanding of the way the law operates in the real world. For example, in one opinion, she recognized that race- and sex-based discrimination do not occur in separate vacuums, but rather reinforce one another to the detriment of women of color. Similarly, in a widely-cited partial dissent from a majority opinion upholding certain strip-searches of girls in juvenile justice, she emphasized the intrusive and harmful nature of such searches for girls, many of whom are victims of abuse and who have engaged in self-destructive behaviors such as self-mutilation.

1 Gender and workplace protections

a. Sex discrimination in employment

Raniola v. Bratton, 243 F.3d 610 (2d Cir. 2001), concerned a woman police officer’s Title VII claims for sexual harassment (hostile work environment) and retaliation. The specific conduct included verbal abuse, disparate treatment (being denied shift requests granted to her male peers), and workplace sabotage, but not sexual advances. The district court granted

summary judgment for the defendant in the middle of trial, finding that some of the abuse the plaintiff complained of was typical of “the camaraderie of a precinct house.” *Id.* at 615 (quoting district court). The district court also found that the treatment plaintiff suffered, while difficult, was not attributable to her gender.

Judge Sotomayor, writing for the Court of Appeals, reversed and remanded for a new trial on the hostile work environment and retaliation claims. In her opinion, she clarified that sexual harassment includes employer action that is based on sex, even if it has nothing to do with sexuality or sexual demands. *Id.* at 621-22. She also held that, by virtue of the sex-based abuse committed by the plaintiff’s supervisor, a reasonable jury could infer that the other abuses, such as workplace sabotage, were also on account of sex. *Id.* at 622. Finally, Judge Sotomayor held that a reasonable jury could conclude that the plaintiff’s suspension, probation, and termination, in the wake of her having filed EEOC charges, were carried out in retaliation for having complained of unlawful treatment. *Id.* at 625.

In *Cruz v. Coach Stores, Inc.*, 202 F.3d 560 (2d Cir. 2000), an Hispanic woman raised multiple claims of race and sex discrimination under Title VII. The employer prevailed in the district court on all claims and the Second Circuit largely affirmed that ruling, with one significant exception. Based on the totality of the evidence, Judge Sotomayor found that plaintiff had documented an atmosphere of sexual and racial hostility, including physically threatening behavior by a supervisor and remarks by that same supervisor to the effect that women should be barefoot and pregnant. *Id.* at 571.

Notably, Judge Sotomayor’s opinion in *Cruz* recognized that an Hispanic woman may suffer from intersecting forms of discrimination, although she stopped short of recognizing women of color as a separate protected class:

Cruz's claim finds further support, moreover, in the interplay between the two forms of harassment. Given the evidence of both race-based and sex-based hostility, a jury could find that Bloom's racial harassment exacerbated the effect of his sexually threatening behavior and vice versa. Based on the evidence Cruz presented of both racial and sexual harassment, therefore, a jury reasonably could conclude that Bloom's behavior 'alter[ed] the conditions of [her] employment' based on her race and/or her gender.

Id. at 572 (internal citations and footnotes omitted) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)).

On the other hand, Judge Sotomayor has not hesitated to reject discrimination claims that are unsupported by the facts. In *Williams v. R.H. Donnelly Corp.*, 368 F.3d 123 (2d Cir. 2004), an African-American woman alleged racial and gender discrimination based on her employer's failure to promote her, denial of a requested transfer, and refusal to create a management position for her. Judge Sotomayor affirmed the district court's grant of summary judgment for the employer. She found that the woman was not qualified for the positions to which she sought promotion, that the employer did not treat white male employees more favorably by creating management positions for them, and that the employer's failure to transfer the plaintiff to a different branch did not constitute an adverse employment action for purposes of Title VII. For the last point, she relied on precedent holding that a mere alteration of job responsibilities is not an adverse employment action, and that a plaintiff must show that an involuntary transfer created significant disadvantages. *Id.* at 128 (citing *Galabya v. New York City Board of Education*, 202 F.3d 636, 640 (2d Cir. 2002)).

Judge Sotomayor also handled a number of sex discrimination in employment cases as a district court judge. For many years as a district judge (and later sitting by designation in 1999), she handled a complex sex discrimination and retaliation case, *Greenbaum v. Svenska Hendelsbanken*, in which a woman alleged that a bank had refused to promote her because of her

sex and age, had subjected her to a hostile work environment because of her sex, and had retaliated against her by failing to promote her after she filed a complaint with a state human rights agency. Judge Sotomayor entered judgment on the jury's verdict in favor of the plaintiff on her discrimination and retaliation claims (the jury found against the plaintiff on harassment and age discrimination), 979 F. Supp. 973 (S.D.N.Y. 1997), although she denied the plaintiff reinstatement and front pay. Denying the defendant's post-trial motion for judgment as a matter of law, Judge Sotomayor reviewed Second Circuit precedent at length and concluded that an inference of discrimination will often be appropriate where the employer cannot explain its actions credibly; that is, where its explanation is shown to be pretextual. 67 F. Supp. 2d 228 (S.D.N.Y. 1999). Turning to the facts, Judge Sotomayor concluded that a reasonable jury could have found the employer's explanations for failing to promote Greenbaum pretextual and that such a finding could have been probative of discriminatory intent, particularly where there was also evidence of sex stereotyping by the employer. She upheld both a \$320,000 compensatory damages award and a \$1.25 million punitive damages award, relying in part on the fact that the defendant had discriminated on many occasions and that the discrimination was egregious and persistent.

In a sexual harassment case concerning the commercial activities exception to the Foreign Sovereign Immunities Act (FSIA), Judge Sotomayor denied the motions to dismiss of a Brazilian company and a Brazilian government agency. *Zveiter v. Brazilian Nat'l Superintendancy of Merch. Marine*, 833 F. Supp. 1089 (S.D.N.Y. 1993). The plaintiff brought sexual harassment claims under New York state law, and the defendants argued that they were immune under the FSIA and that the plaintiff had failed to state a claim for sexual harassment. Adhering to the prevailing rule, Judge Sotomayor found that employment of a secretary (the

plaintiff's job) was a commercial activity for purposes of the exception, so defendants could not avail themselves of sovereign immunity. She also found an issue of fact with regard to both the hostile work environment and *quid pro quo* aspects of the plaintiff's harassment claim.

b. Family and Medical Leave Act:

In *Moore v. Consolidated Edison Co. of New York*, 409 F.3d 506 (2d Cir. 2005), the district court had held that a negative performance evaluation of the plaintiff, which was followed by her termination, did not rise to the level of irreparable injury required to justify granting injunctive relief in an action brought by an African-American woman alleging sexually offensive conduct and violations of § 1981 and the Family and Medical Leave Act (FMLA). Judge Sotomayor affirmed, holding that, while a retaliatory discharge may, in some cases, inflict irreparable harm by intimidating witnesses, there was no such risk of irreparable harm in this case, and the plaintiff's injuries could be compensated through money damages alone.

2. Girls in Juvenile Justice

In *N.G. v. Connecticut*, 382 F.3d 225 (2d Cir. 2004), the families of two girls in juvenile detention brought a § 1983 suit against the facilities and their administrators concerning strip searches that the girls had been forced to undergo, alleging violations of the girls' Fourth Amendment rights. After their complaint was dismissed by the district court, the Second Circuit held that some aspects of the state's strip search policy were unconstitutional, both facially and as-applied, but upheld the state's right to strip search girls when they are initially placed in detention.

Judge Sotomayor dissented from the majority's holding on the initial strip search policy. Courts "should be especially wary of strip searches of children," she wrote, "since youth 'is a time and condition of life when a person may be most susceptible to influence and to

psychological damage.” 382 F.3d at 239 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)). “When officials are dealing with children who may be victims of sexual abuse, the concerns are even greater.” *Id.* She then added:

The case before us presents facts that provoke all of our typical concerns about strip searches. The detention facility officers on numerous occasions ordered appellants—troubled adolescent girls facing no criminal charges—to remove all of their clothes and underwear. The officials inspected the girls’ naked bodies front and back, and had them lift their breasts and spread out folds of fat. The young girls described the process as embarrassing and humiliating. Indeed, T.W. cried throughout one of her searches. During one of S.C.’s searches, two other detainees were present. The juvenile detention facilities perform similar searches on every girl who enters notwithstanding the fact that many of them—indeed, most of them—have been victims of abuse or neglect, and may be more vulnerable mentally and emotionally than other youths their age.” *Id.* (footnotes omitted).

In balancing the privacy intrusion against the state’s asserted interests, Judge Sotomayor relied heavily on the government’s record to question its reasoning, noting, for example, that the strip searches in the record had not been effective (or, at least, had not been necessary) either in uncovering contraband or in detecting child abuse. She concluded that the government’s concerns were not “sufficiently credible and sufficiently weighty to justify a highly degrading, intrusive strip search absent any individualized suspicion that the particular young adolescents ordered by the state to disrobe possess contraband.” *Id.* at 244.

DISABILITY RIGHTS

Judge Sotomayor’s opinions on matters relating to disability are consistently thorough. She generally construes civil rights statutes broadly to protect the interests of people with disabilities, within the limitations of the statutes and existing precedent. Where procedural rules are in place to protect parties with disabilities, she has held district and administrative law judges (ALJ’s) to them.

1. Americans with Disabilities Act

In *EEOC v. J.B. Hunt Transp., Inc.*, 321 F.3d 69, 78 (2d Cir. 2003), Judge Sotomayor dissents from the majority's holding that plaintiffs, applicants for truck driving jobs, did not have disabilities. Judge Sotomayor conducted a thorough review of the facts asserted in the case to conclude that summary judgment in favor of the employer was inappropriate where there was "ample support in the record for the assertion that Hunt regarded the applicants as substantially limited in the major life activity of working, and thus, the applicants were disabled within the meaning of the ADA." *Id.* at 83. Protesting the majority's assertion that the persons reviewing applications for Hunt were not the ultimate decision makers, Judge Sotomayor wrote: "Hunt proffers no evidence that these unidentified 'ultimate hiring authorities' did not share the reviewers' perceptions or rely upon their statements about the applicants' limitations." *Id.* at 82.

Judge Sotomayor's decisions in *Bartlett v. New York State Board of Law Examiners*⁴ likewise demonstrate a careful regard for precedent, congressional intent, and the factual record. "This case, tried to the bench in 21 days of testimony accompanied by exhibits and briefs aggregating to more than 5000 pages, principally devolve[d] to the meaning of a single word – *substantially* - as used in the [ADA and Rehabilitation Act]." *Bartlett*, 970 F. Supp. at 1098 (citations omitted). Judge Sotomayor held that an applicant for a law license who was denied accommodations for the bar exam is a person with a disability covered by the ADA. She determined that because of the plaintiff's self-accommodation, she was not disabled in the major life activity of reading, but, following prior decisions and EEOC guidance, determined plaintiff substantially limited in the major life activity of working, here the "class of jobs" known as the

⁴ *Bartlett v. New York State Board of Law Examiners*, 970 F. Supp. 1094, (S.D.N.Y. 1997), *recon. denied*, 970 F. Supp. 1094 (S.D.N.Y. 1997), *aff'd in part, vacated and remanded in part*, 156 F.3d 321 (2d Cir.1998), *vacated and remanded for further consideration*, 527 U.S. 1031 (1999), *aff'd in part, vacated and remanded in part*, 226 F.3d 69 (2d Cir. 2000), 2001 WL 930792 (S.D.N.Y. Aug. 15, 2001.) A subsequent appeal by defendants was withdrawn and the matter settled in favor of the plaintiff.

practice of law. Judge Sotomoyar found the plaintiff otherwise qualified to perform the functions of a practicing lawyer, and that the accommodations plaintiff sought were reasonable.

Judge Sotomoyar's initial decision was overruled in part by the Second Circuit, which held that the applicant was substantially limited in reading. *Bartlett*, 156 F.3d 321 (2d Cir. 1998). The Supreme Court vacated the Second Circuit's judgment and remanded for the Circuit to reconsider the case in light of the Supreme Court's intervening decisions in the "Sutton trilogy,"⁵ decisions in which the Supreme Court held that corrective devices and mitigating measures must be considered in determining whether an individual is disabled under the ADA.⁶ On remand, following the new test as defined by the Second Circuit, Judge Sotomoyar determined that the applicant was substantially limited with regards to both reading and working. *Bartlett*, No. 93 Civ. 4986(SS), 2001 WL 930792 (S.D.N.Y. Aug. 15, 2001).

In *Parker v. Columbia Pictures Industries*, 204 F.3d 326 (2d Cir. 2000), Judge Sotomoyar reversed the lower court's grant of summary judgment to the employer, finding that statements made by plaintiff in his applications for Social Security and for employer's long-term disability benefit did not preclude his subsequent claim that he could perform essential functions of his job with reasonable accommodations. Although a "close question," and although there was an apparent conflict between plaintiff's earlier and later statements, Judge Sotomoyar concluded that "th[e] facial conflict [was] not enough to warrant summary judgment in favor of the [employer]." *Parker*, 204 F.3d at 334.

⁵ *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999), and *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999).

⁶ Judge Sotomoyar's initial decision in *Bartlett* formed one of the putative bases for the delays in her confirmation to the Second Circuit. Senator Moynihan defended her reasoning as "made-as it ought to have been made-on the basis of law. Nothing more." 144 Cong. Rec. S7920-01 (July 10, 1998). The reasoning as to who was intended to be protected by the ADA as articulated by Judge Sotomoyar in *Bartlett* was subsequently considered and approved of by members of Congress on the floor when considering the Americans with Disabilities Amendments Act of 2008, (Pub.L. 110-325, 122 Stat. 3553(2008)). See 154 Cong. Rec. H8286-03, H8291 (Sept. 17, 2008). In the ADA Amendments Act, Congress repudiated the Supreme Court's decision in the "Sutton trilogy" of ADA cases.

Additionally, as a matter of first impression in the circuit, the court followed several other circuits and held that “mixed motive” analysis applies to ADA claims. As such, despite the plaintiff’s testimony “that his termination resulted from [the employer’s] plan to replace current employees with employees who were loyal ‘only [to] her,’ [where] he also alleged that, among the allegedly disloyal employees, he was singled out for quick termination because of his disability,” the allegation was adequate to defeat summary judgment. *Id.* at 337.

On the other hand, in *Valentine v. Standard & Poor’s*, 50 F. Supp. 2d 262 (S.D.N.Y. 1999), Judge Sotomoyar issued an order granting summary judgment to the employer where a plaintiff with manic-depressive disorder left an admittedly threatening, obnoxious and taunting voice mail message for a coworker, despite having received a warning less than a year earlier about threatening a fellow employee’s reputation. “[A] disabled plaintiff ceases to be otherwise qualified for a position when she or he engages in misconduct in violation of a workplace policy of the employer or poses a direct threat to the health or safety of others which cannot be eliminated by a reasonable accommodation.” *Id.* at 287.

In *Pell v. Trustees of Columbia Univ. in City of New York*, No. 97 Civ. 0193(SS), 1998 WL 19989 (S.D.N.Y. Jan. 21, 1998), Judge Sotomayor issued an order examining relevant case law and holding that a hostile educational environment claim could be brought under § 504 of Rehabilitation Act. The judge denied Columbia’s motion to dismiss where plaintiff alleged that she was repeatedly accused of faking her dyslexia, and was also repeatedly told that she was mentally retarded, that she should be in the mentally retarded Olympics, and that she was lazy and stupid. “[P]laintiff’s complaint is replete with the ‘sharply-pointed, crudely-crafted, and frequently-launched ‘slings and arrows’ that courts have found sufficient to establish severe and pervasive harassment that alters a plaintiff’s working conditions.” *Id.* at *18 (citing

Guckenberger v. Boston Univ., 957 F. Supp. 306, 315 (D. Mass. 1997)).

In *Brown v. Parkchester South Condominiums*, 287 F.3d 58 (2d Cir. 2002), Judge Sotomayor wrote the panel's opinion reversing the district court's dismissal of a pro se plaintiff's claims, including ADA discrimination, for failure to timely serve his complaint. The court also found that plaintiff had alleged facts sufficient to find that an evidentiary hearing was appropriate to determine to what extent, if any, Brown's condition did in fact inhibit his understanding or otherwise impair his ability to comply, such that equitable tolling would be in order.

In *Lloret v. Lockwood Greene Engineers, Inc.*, No. 97 CIV. 5750(SS), 1998 WL 142326 (S.D.N.Y. Mar. 27, 1998), Judge Sotomayor considered sua sponte in an employment case whether the plaintiff's depression was a sufficient basis to toll the time for filing his charge of discrimination with the EEOC. Noting case law both supporting and denying tolling on this basis, the court ruled that, even if equitable tolling based on mental disability might apply in some civil rights cases, "plaintiff's post-termination depression is not sufficient to warrant tolling of the statutes of limitations on his claims." *Id.* at *4.

2. Individuals with Disabilities Education Act

In *Frank G. v. Board of Educ. of Hyde Park*, 459 F.3d 356 (2d Cir. 2006), Judge Sotomayor joined a unanimous panel opinion holding that the parents' unilateral placement of a child with disability in private school was appropriate after the parents notified the district that they were refusing the offered Individual Education Plan. As the school district admitted, the private school provided the student with appropriately small class size and appropriately modified instruction, and the student's social and academic progress supported the appropriateness of placement. "[A] 'first bite' at failure is not required by the IDEA." *Id.* at 372 (internal citation omitted). (This case involves the same issue being considered by the Supreme

Court this term in *Forest Grove v. T.A.*, No. 08-305.)

Judge Sotomayor wrote the opinion in *Taylor v. Vermont Dep't of Educ.*, 313 F.3d 768 (2d Cir. 2002), a case where the non-custodial mother brought claims under the Family Educational Rights and Privacy Act (FERPA) and IDEA seeking seeking an Independent Educational Evaluation (IEE) of her child as well as access to records. The panel interpreted the Supreme Court's decision in *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002), and held FERPA does not create a private right enforceable under § 1983. However, the panel permitted plaintiff to pursue a similar claim under the IDEA by holding that mother was exempted from the exhaustion requirement of IDEA on grounds of futility and inadequacy of remedy.

3. Social Security Act

In a series of Social Security Act cases, Judge Sotomayor has reversed administrative rulings denying benefits on the basis of disability when she concluded that the Administrative Law Judge did not adequately assess the claimant's disability or thoroughly evaluate the entire record. *See, e.g., Kohler v. Astrue*, 546 F.3d 260 (2d Cir. 2008) (holding that the ALJ had improperly denied an applicant with bipolar disorder Social Security disability benefits); *Rosa v. Callahan*, 168 F.3d 72, (2d Cir. 1999) (holding that the ALJ had improperly substituted her judgment for the judgment of the treating physician); *Hilton v. Apfel*, No. 97 Civ. 1613(SS), 1998 WL 241616 (S.D.N.Y. May 13, 1998) (holding that ALJ had used improper method in evaluating the significance of claimant's chronic fatigue syndrome); *Jasmin v. Callahan*, No. 97 Civ. 2429(SS), 1998 WL 74290 (S.D.N.Y. Feb. 20, 1998) (holding that ALJ failed to adequately explore disability claim presented by pro se claimant); *Polanco v. Shalala*, No. 92 Civ. 3035 (SS), 1994 WL 30415 (S.D.N.Y. Feb. 2, 1994)(holding that ALJ did not sufficiently consider claimant's limited English proficiency and lack of education in assigning fault for failure to file a

required report).

Conversely, Judge Sotomayor has affirmed the denial of benefits in other cases where she believes that appropriate legal standards were applied and the Commissioner's determination was supported by substantial evidence. *See, e.g., Goldstein v. Apfel*, No. 97 Civ. 2933(SS), 1998 WL 99562 (S.D.N.Y. 1998); *Todd v. Chater*, No. 95 Civ. 2996 (SS), 1997 WL 97833 (S.D.N.Y. March 6, 1997); and *Smith v. Shalala*, 94 Civ. 2486 (SS), 1995 WL 125388 (S.D.N.Y. Mar. 23, 1995).

4. Protection and Advocacy

Judge Sotomayor wrote the opinion in *Connecticut Office of Protection & Advocacy for Persons with Disabilities v. Hartford Bd. of Educ.*, 464 F.3d 229 (2d Cir. 2006) which held that the Office of Protection & Advocacy (P&A) must have reasonable access to "therapeutic educational program for students who are seriously emotionally disturbed," even though it is not a residential program, and even though agency is "monitoring" program, and not investigating specific incidents. The panel held that the Agency's enabling statute also permits agency to obtain the names and contact information for parents or guardians of students in the program.

In *Connecticut Office of Protection & Advocacy for Persons with Disabilities v. Mental Health & Addiction Services*, 448 F.3d 119 (2d Cir. 2006), Judge Sotomayor wrote an opinion in which the panel adopted a broad definition of terms under the Protection and Advocacy for Individuals with Mental Illness Act (PAIMI), to compel disclosure to the P&A of peer review records at department-administered facilities in connection with deaths of certain residents.

5. Due Process

In *Neilson v. Colgate-Palmolive Co.*, 199 F.3d 642 (2d Cir. 1999), an employment case on appeal after approval of a settlement negotiated by a guardian ad litem, Judge Sotomayor

dissented on the ground that the district court had failed to provide adequate notice before imposing a guardian ad litem on a pro se plaintiff. “In holding that the district court adequately notified Neilson of the pending competency proceedings in this case, the majority adopts the astonishing position that a mentally ill individual is entitled to less, rather than more, notice based on her illness. In my opinion, this conclusion turns the due process principle of ‘notice and opportunity to be heard’ on its head.” *Id.* at 658.

In *Robinson v. Shalala*, 1994 U.S. Dist. LEXIS 3988 (S.D.N.Y. Apr. 1, 1994), an individual’s application for disability benefits was denied. The individual’s pro se request for reconsideration was denied by way of a notice that failed to inform claimant that the denial would become final if she did not request a hearing before an administrative law judge. Judge Sotomayor ruled that this omission violated claimant’s Fifth Amendment right to procedural due process.

FREEDOM OF SPEECH

Judge Sotomayor has participated in numerous decisions addressing issues relating to free speech and association. Here, as in other areas, the decisions that she has authored hew closely to established precedent.

1. Prior Restraints

In *United States v. Quattrone*, 402 F.3d 304 (2d Cir. 2005), Judge Sotomayor wrote an opinion for a unanimous panel reversing the district court’s entry of a gag order in a criminal trial prohibiting the publication of the names of prospective or selected jurors disclosed in open court. The district court had imposed the gag order because of actual problems faced by jurors in a similar case. *Id.* at 307. Numerous media organizations appealed the order. *Id.* at 308. Judge Sotomayor held that the order violated the First Amendment for two separate reasons: “[a]

judicial order forbidding the publication of information disclosed in a public judicial proceeding collides with two basic First Amendment protections: the right against prior restraints on speech and the right to report freely on events that transpire in an open courtroom.” *Id.* The opinion relies on the well-established prior restraint caselaw stating that prior restraints are “‘the most serious and the least tolerable infringement’ on our freedoms of speech and press.” *Id.* at 309 (quoting *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976)). The gag order was particularly egregious in these particular circumstances, Judge Sotomayor concluded, because it infringed the press’s “freedom to publish information disclosed in open court. This imposed an independent constitutional harm on [the press] and rendered the district court’s violation of the First Amendment even more plain.” *Id.* at 312.

Judge Sotomayor demonstrated a similar view of prior restraints by joining the decision in the ACLU’s National Security Letter (“NSL”) challenge, *Doe v. Mukasey*, 549 F.3d 861 (2d Cir. 2008). That decision, authored by Judge Newman, struck down a portion of the Patriot Act imposing an automatic gag order on recipients of national security letters. *Id.* at 884-85. *See* p. 42 *infra* for further discussion of that decision.

2. Public Employee Speech

Judge Sotomayor has reached results favorable to both sides in decisions involving free speech claims brought by government employees. In *Singh v. City of New York*, 524 F.3d 361 (2d Cir. 2008), her opinion rejected claims brought by city fire alarm inspectors against their city employer, including a First Amendment claim by one inspector. The inspector claimed that he was retaliated against for, among other things, complaining about overtime payment issues. Judge Sotomayor rejected the claim, holding that the speech did not concern a matter of public

concern because it related “only to internal employment policies of the City,” and because the speech was “made only in his capacity as an employee and not as a citizen.” *Id.* at 372.

The most notable of Judge Sotomayor’s public employee speech cases – and arguably her most important free speech opinion – is her dissenting opinion in *Pappas v. Giuliani*, 290 F.3d 143 (2d Cir. 2002). In that case, the plaintiff was fired from his job as a police department employee for making racist written statements in response to requests for random campaign solicitations he received at home. The statements were made on the employee’s own time and were made anonymously, without reference or relationship to his employment. Judge Sotomayor’s dissent criticized the majority’s application of the *Pickering* test and argued that the employee’s non-work-related offensive speech should not have been grounds for termination. *Id.* at 154 (“The Court should not, however, gloss over three decades of jurisprudence and the centrality of First Amendment freedoms in our lives because it is confronted with speech it does not like and because a government employer fears a potential public response that it alone precipitated.”); *id.* at 155 (“[W]hile we are more comfortable when the speech we are protecting involves protestations against racial discrimination, it is not our role to approve or disapprove of the viewpoint advanced.”); *id.* at 159 (“The majority’s decision allows a government employer to launch an investigation, ferret out an employee’s views anonymously expressed away from the workplace and unrelated to the employee’s job, bring the speech to the attention of the media and the community, hold a public disciplinary hearing, and then terminate the employee because, at that point, the government ‘reasonably believed that the speech would potentially ... disrupt the government’s activities.’ This is a perversion of our ‘reasonable belief’ standard, and does not give due respect to the First Amendment interests at stake.”) (citation omitted).⁷

⁷ In another case involving a consultant to the New York City Department of Education, *Brevot v. New York City Dep’t of Education*, 299 Fed.Appx. 19 (2d Cir. 2008), a Second Circuit panel that included Judge Sotomayor issued

3. Student Speech

Judge Sotomayor has not personally authored any student speech cases. The decisions she has joined at the Second Circuit have been mixed with respect to the protection of students' First Amendment rights. In *Guiles v. Marineau*, 461 F.3d 320 (2d Cir. 2006), Judge Sotomayor joined a unanimous opinion upholding the right of the plaintiff, a thirteen year-old Vermont middle school student, to wear a t-shirt in school criticizing George W. Bush as a "chicken-hawk president" and accusing him of being a "former alcohol and cocaine abuser." *Id.* at 321. The school had disciplined the student when he refused to cover up the references to alcohol and drugs on the shirt. The opinion rejected the concept that "all images of illegal drugs and alcohol" could per se be prohibited by the school. *Id.* at 329. Applying *Tinker*, the Court held that the shirt was not disruptive based on the fact that the plaintiff had previously worn the shirt once a week for two months without causing any incidents. This decision was decided prior to the Supreme Court's decision in *Morse v. Frederick*, 551 U.S. 393 (2007), so it is unclear if that decision would have affected Judge Sotomayor's position.

In *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008), Judge Sotomayor joined an opinion rejecting a student's free speech claim. The student plaintiff in that case had written an online blog post from her home computer in which she called school officials "douchebags," urged other students to complain to officials about the cancellation of a school event called "Jamfest," and requested that students email the district superintendent "to piss her off more." School officials became aware of the blog and subsequently barred the student from having her name on the election ballot for senior class secretary and from giving a campaign speech at an assembly

a summary order holding that the consultant's claim that she had been stigmatized by a 1998 departmental report in violation of her due process rights was time-barred. A similar claim involving a 2004 departmental report was rejected because the report was never published. The Plaintiff in *Brevot* was represented by the New York Civil Liberties Union.

regarding the election. The student sued, and the district court rejected a request for a preliminary injunction. On appeal, the Second Circuit, in an opinion written by Judge Livingston, affirmed, concluding that school officials could reasonably forecast that the student's critical online blog would create a "risk of substantial disruption" in the school. *Id.* at 43. The opinion is troubling both because it applies *Tinker* to off-campus speech, and because it equates evidence that it was "reasonably foreseeable" that the blog would reach school grounds with the conclusion that there was therefore a material risk of "substantial disruption" at the school, even though there was no independent evidence to support that conclusion. *Id.* at 50-51. The decision relies heavily on a prior Second Circuit precedent, which may have been a critical factor for Judge Sotomayor although it is impossible to know for sure since she did not write separately.

4. Protestors' Rights

In *Jones v. Parmley*, 465 F.3d 46 (2d Cir. 2006), protesters brought a § 1983 action against various law enforcement entities and officers for violation of their rights of freedom of speech, religion, and assembly, use of excessive force, violation of equal protection rights, violation of due process, and various state law claims. The district court had granted defendants qualified immunity on the free speech and assembly claims. Judge Sotomayor reversed, expressly rejecting defendants' argument that they were entitled to qualified immunity "unless a Supreme Court or Second Circuit case expressly denies it." *Id.* at 57. As Judge Sotomayor explained, "that standard was rejected by the Supreme Court in favor of one in which courts must examine whether in 'the light of pre-existing law the unlawfulness [is] apparent.'" *Id.* at 57 (citations omitted) (brackets in original). The decision also makes clear that, "although defendants make much of the fact that some demonstrators had allegedly violated the law, transforming the peaceful demonstration into a potentially disruptive one, the Supreme Court has

expressly held that “[t]he right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected.” *Id.* (citation omitted).

Judge Sotomayor also reversed a grant of summary judgment to law enforcement in *Amnesty of America v. Town of West Hartford*, 361 R.3d 113 (2d Cir. 2004), an excessive force case brought by anti-abortion protestors at an abortion clinic. Relying on the Fourth Amendment rather than the First Amendment, Judge Sotomayor held that it was up to the jury to decide whether the police tactics were excessive in light of the protestors’ behavior.

In *Church of the American Knights of the KKK v. Kerik*, 356 F.3d 197 (2d Cir. 2004), a case brought by the New York Civil Liberties Union, Judge Sotomayor joined an opinion holding that New York’s anti-mask statute was constitutional both on its face and as applied to KKK protestors. The latter holding was premised on the court’s conclusion that the mask did not convey any independent expressive message apart from the robe and hood traditionally worn by the KKK. In *HERE v. New York City Dep’t of Parks*, 311 F.3d 534 (2d Cir. 2002), another ACLU case, Judge Sotomayor joined an opinion holding that the plaza in front of Lincoln Center is not a traditional public forum for First Amendment purposes.

5. Internet Speech

Judge Sotomayor does not appear to have been confronted by too many cases involving Internet speech or other speech involving new technologies. In *Zieper v. Metzinger*, 474 F.3d 60 (2d Cir. 2007), an ACLU case, she joined an opinion affirming the district court’s grant of qualified immunity to an AUSA and a FBI agent who had attempted to force plaintiffs to remove a fictional film from the Internet. The opinion did not directly address the issue of Internet speech and did not extensively discuss the indirect censorship issues raised by the case.

Although the panel rejected the district court's conclusion that the defendants did not improperly coerce the film's removal, the Court found that qualified immunity was appropriate because reasonable government officials could not have foreseen that their actions were not permissible. This result was disappointing based on the evidence in the record and the caselaw, but the opinion did advise the defendants that they (and other government officials) were now on notice that similar actions could violate the Constitution.

The *Doninger* case discussed above also involved Internet speech, but, as in *Zieper*, it is difficult to discern anything about Judge Sotomayor's views towards speech on the Internet.⁸

6. Campaign Finance

Judge Sotomayor has not written any opinions illustrating her views on campaign finance legislation.⁹ Although it is not necessarily indicative of anything, she voted to deny rehearing of her Second Circuit colleagues' decision in the *Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2004), *reh'g denied*, 406 F.3d 159 (2d Cir. 2005), an ACLU case challenging Vermont's campaign contribution limits. The Supreme Court later overturned the Second Circuit's decision, invalidating the legislation. *See Randall v. Sorrell* 548 U.S. 230 (2006).

Despite the absence of any written opinions, some commentators have inferred from Judge Sotomayor's extrajudicial writings and activities that she is, in fact, a strong supporter of

⁸ Judge Sotomayor has written opinions in cases involving "cyberlaw" issues, but none of them have directly raised "cyberspeech" issues. *See, e.g., Specht v. Netscape Communications Corp.*, 306 F.3d 17 (2d Cir. 2002) (holding that online contract terms available behind a hyperlink that could only be seen if a user scrolled down on a Web page were not enforceable because a reasonably prudent user would not have learned of the existence of the terms before "assenting" by clicking a button); *Storey v. Cello Holdings, LLC*, 347 F.3d 370 (2d Cir. 2003) (holding that an adverse outcome in an administrative proceeding under the Uniform Domain Name Dispute Resolution Policy did not have preclusive effect on a later-initiated federal suit brought under the Anticybersquatting Consumer Protection Act); *Mattel Inc. v. Barbie-Club.com*, 310 F.3d 293 (2d Cir. 2002) (holding that a federal court may obtain *in rem* jurisdiction over a domain name under the ACPA only in a district in which the domain name registrar or other domain-name authority is located).

⁹ As a district judge, Judge Sotomayor oversaw one case, *Herrington v. Cuevas*, No. 97 Cir. 5806 (SS), 1997 WL 703392 (S.D.N.Y. Nov. 10, 1997), touching on campaign finance issues, but no opinion was rendered on the constitutionality of the law at issue.

campaign finance regulations. *See, e.g.,* Kenneth P. Vogel, *Sotomayor No Fan of Campaign Cash*, YAHOO NEWS, May 28, 2009, http://news.yahoo.com/s/politico/20090529/pl_politico/23070 (quoting several campaign finance experts). This belief stems from a 1996 speech and law review article co-written by Judge Sotomayor and from the fact that from 1988-1992, Judge Sotomayor served as one of the original members of the New York City Campaign Finance Board. In that position, Judge Sotomayor is said to have “helped implement — enthusiastically, according to her cohorts — one of the most comprehensive campaign finance laws in the country.” *Id.* The law review article, written while she was a District Judge, provides a wide-ranging discussion of issues of professional responsibility and ethics for lawyers and public officials. It spends only one paragraph on a substantive discussion of campaign finance, setting forth her views as to why campaign finance regulations are right as a matter of policy. Sonia Sotomayor & Nicole A. Gordon, *Returning Majesty to the Law and Politics: A Modern Approach*, 30 *Suffolk U. L. Rev.* 35, 42 (1996) (“The continued failure to do this has greatly damaged public trust in officials and exacerbated the public's sense that no higher morality is in place by which public officials measure their conduct.”); *Id.* (privately-financed elections raise “again and again the question what the difference is between contributions and bribes and how legislators or other officials can operate objectively on behalf of the electorate. Can elected officials say with credibility that they are carrying out the mandate of a ‘democratic’ society, representing only the general public good, when private money plays such a large role in their campaigns? If they cannot, the public must demand a change in the role of private money or find other ways, such as through strict, well-enforced regulation, to ensure that politicians are not inappropriately influenced in their legislative or executive decision-making by the interests that give them contributions.”). The article criticizes the lack of campaign finance regulation and

suggests developing non-partisan mechanisms for monitoring campaign contributions, *id.* at 42, 48-49, but there is no legal analysis of these issues. Despite these clear policy statements, it is unclear whether Judge Sotomayor’s position on these matters has changed over the years, what impact her personal policy preferences would have on her actions as a Justice ruling on such a legal issue, or what effect the Supreme Court’s subsequent campaign finance decisions would have on her legal analysis if such a case came before her.

6. Sexually Explicit Speech

Farrell v. Burke, 449 F.3d 470 (2d Cir. 2006), involved a § 1983 action brought by a former parolee against his parole officers, alleging that they violated his constitutional rights by imposing and enforcing a special condition of parole that prohibited his possession of “pornographic material.” The parole officers took action against the plaintiff when they discovered a copy of a book called *Scum: True Homosexual Experiences* in his apartment. Judge Sotomayor acknowledged prior Second Circuit cases holding that the term “pornography” was inherently vague, but she nevertheless rejected the plaintiff’s claim on the ground that the plaintiff had sufficient notice that possession of this book would violate the conditions of his parole. Specifically, even though the term was vague and even though the evidence showed that the parole officers involved had very different views as to what constituted “pornography,” Judge Sotomayor concluded that the book’s sexually explicit pictures and lurid descriptions of sex between men and boys fell within all definitions of “pornography.” *Id.* at 490 (“Even if the condition is inherently vague, therefore, we must begin by considering its clarity as to the way it was enforced against Farrell. Although the actors in Farrell’s case had divergent views on what constituted “pornography” and why, an examination of those views reveals that all of their definitions had one thing in common: *Scum* fit comfortably within each of them.”). Judge

Sotomayor similarly rejected the plaintiff's overbreadth claim, holding that in these circumstances, "because Farrell was the only person affected by the Special Condition, we cannot say that the Special Condition's overbreadth was both real and substantial in relation to its plainly legitimate sweep." *Id.* at 499.

7. Privacy Rights

In *Leventhal v. Knappek*, 266 F.3d 64 (2d Cir. 2001), a state agency employee brought a §1983 action against the agency and various officials, alleging that his rights to due process and freedom from unreasonable searches had been violated by their search of his work computer and subsequent disciplinary action taken against him. Judge Sotomayor held that the employee had a reasonable expectation of privacy in his office computer based on the circumstances, but that there was no constitutional violation because the defendants possessed "individualized suspicion of misconduct" justifying the searches, *id.* at 75, and because the intrusion caused by the searches was "modest." *Id.* at 66.

8. Copyright and Other Intellectual Property

Judge Sotomayor has not written any intellectual property decisions while on the Second Circuit. As a district court judge, she issued two significant copyright decisions.¹⁰ She was the district court judge in *Tasini v. New York Times Co.*, 972 F. Supp. 804 (S.D.N.Y. 1997), *rev'd*, 206 F.3d 161 (2d Cir. 2000), *aff'd*, 533 U.S. 483 (2001), a decision that was ultimately overturned by the Supreme Court. That case involved copyright infringement claims brought by freelance authors against several publishers and electronic database providers for disseminating the writers' works in electronic format (including on Lexis/Nexis) without the writers' permission. Judge Sotomayor held that the writers did not have a copyright interest in the re-published articles and that under the Copyright Act, the electronic versions were permissible

¹⁰ Judge Sotomayor does not appear to have written any significant patent infringement decisions.

“revisions” of the original articles and therefore covered by the publishers’ “collective work” copyright interests. This decision was one of the earliest extensions of the Copyright Act’s “revision” clause to electronic versions of print articles. The Supreme Court voted 7-2 to overturn the decision, holding that the reproduced articles were new works, not revisions included in a collective work, and that the authors had copyright interests in the electronic versions of their works. Justice Ginsburg wrote the majority decision; Justices Stevens and Breyer dissented.

In *Castle Rock Entm’t v. Carol Publ’g Group, Inc.*, 955 F. Supp. 260 (S.D.N.Y. 1997), *aff’d*, 150 F.3d 132 (2d Cir. 1998), the owner of the “Seinfeld” TV show sued the defendant publishing company for infringing on its copyright through publication of a book of Seinfeld trivia. Judge Sotomayor granted partial summary judgment to the plaintiff, finding that the defendant did not have a valid claim of fair use based on well-established precedent. The opinion offers an in-depth analysis of defendant’s fair use argument, before rejecting it. *See id.* at 267-72.

9. Freedom of Association

In *Kraham v. Lippman*, 478 F.3d 502 (2d Cir. 2007), an attorney challenged an anti-nepotism rule prohibiting family members and associates of certain political party officials from receiving fiduciary appointments in the New York State courts. Judge Sotomayor’s opinion affirmed the district court’s grant of summary judgment to the defendants, holding that the court rule was rationally related to a legitimate government interest in “protecting the integrity and the appearance of integrity of the New York judicial system,” *id.* at 508, and did not violate plaintiff’s freedom of association. In reaching this conclusion, Judge Sotomayor found that any burden on plaintiff’s First Amendment rights was “incidental” and not “severe” enough to trigger

strict scrutiny. *Id.* at 507-508. Her opinion closely follows and exhaustively discusses the existing case law in reaching this result.¹¹

FREEDOM OF RELIGION

Judge Sotomayor has authored relatively few opinions in religious liberty cases. The majority of those involve free exercise claims, all but one of which have arisen in the prison context. Collectively, Judge Sotomayor's decisions embrace a broad, robust approach to protecting constitutional and statutory free exercise rights.

Judge Sotomayor has a relatively thin record on Establishment Clause issues, having addressed those matters only twice as a district court judge. In both cases, Judge Sotomayor rejected Establishment Clause arguments relating to public displays of religious symbols.

1. Free Exercise

Judge Sotomayor has written six opinions addressing constitutional and statutory free exercise claims. Taken as a whole, those opinions generally take a sympathetic and expansive view of the right of religious exercise.

In *Ford v. McGinnis*, 352 F.3d 582 (2d Cir. 2003), Judge Sotomayor, writing for the court, vacated the district court's grant of summary judgment to prison officials who denied a Muslim inmate the Eid ul Fitr feast celebrating the completion of Ramadan. Judge Sotomayor emphasized that, contrary to the district court's decision, the free exercise of religious beliefs is not dependent upon the objective truth of those beliefs. *Id.* at 591. "By looking behind Ford's sincerely held belief," she explained, "the district court impermissibly confronted what is, in essence, the 'ecclesiastical question' of whether, under Islam, the postponed meal retained

¹¹*Ctr. for Reprod. Law and Policy v. Bush*, 304 F.3d 183 (2d Cir. 2002), discussed *infra* at 56 & 83, also involved free speech and association claims. Judge Sotomayor's opinion does not have any noteworthy discussion of these issues.

religious meaning.” *Id.* at 590. The Second Circuit remanded the case, directing the district court to apply the standard set out in *Turner v. Safley*, 482 U.S. 78, 89 (1987) (asking whether prison regulation is “reasonably related to legitimate penological interests”), and its progeny. *See Ford*, 352 F.3d at 596.

Judge Sotomayor authored several other opinions supportive of prisoner free exercise claims. As a district court judge, in *Campos v. Coughlin*, 854 F. Supp. 194 (S.D.N.Y. 1994), she enjoined prison officials from enforcing a rule prohibiting inmates from wearing Orisha beads in conformity with the Santeria faith. Judge Sotomayor concluded that the prisoners demonstrated a likelihood of success on their Religious Freedom Restoration Act (“RFRA”) claim because the purported connection between the prison’s ban and the institution’s interest in curbing gang violence was pure speculation and therefore did not further a compelling interest in the least restrictive manner. *Id.* at 207-08. Writing for a unanimous Second Circuit panel in *Salahuddin v. Mead*, 174 F.3d 271 (2d Cir. 1999), Judge Sotomayor addressed a purely procedural question regarding a prisoner’s free exercise rights. Her decision reinstated dismissed free exercise claim, holding that the exhaustion requirements of the Prison Litigation Reform Act could not be applied to an action already pending when the statute was enacted. *Id.* at 276.

Judge Sotomayor rejected prisoner free exercise claims several times while sitting on the district court, but each instance involved apparently weak claims filed by *pro se* plaintiffs. In *Moore v. Kennedy*, No. 94 Civ. 8280, 1996 WL 452279 (S.D.N.Y. Aug. 8, 1996), Judge Sotomayor granted summary judgment against a prisoner who had failed to provide any evidence that that his requested vegetarian meals would have furthered a religious purpose. *Id.* at *2. And in *Phillips v. Ienuso*, No. 93 Civ. 6027, 1995 WL 239062 (S.D.N.Y. Apr. 24, 1995), Judge Sotomayor dismissed as moot an Orthodox Jewish Rastafarian prisoner’s claim for injunctive

relief (seeking kosher meals), because the plaintiff had already been transferred from the defendant correctional facility. *Id.* at *2.¹²

2. Establishment Clause

Judge Sotomayor has issued only two Establishment Clause decisions, both addressing disputes over public religious displays during her tenure on the district court, and both rejecting the Establishment Clause challenges.

In *Flamer v. City of White Plains, New York*, 841 F. Supp. 1365 (S.D.N.Y. 1993), Judge Sotomayor addressed a rabbi's challenge to a city's refusal to allow him to display a menorah during Chanukah in two city parks. Relying on the extensive record of private speech activity in the parks – which included rallies, demonstrations, and numerous long-term, free-standing, fixed displays and signs – Judge Sotomayor concluded that the parks were traditional public fora, and subjected the city's content-based restrictions on the rabbi's display to strict scrutiny. *Id.* at 1374-76. Judge Sotomayor rejected the city's argument that the restrictions were necessary to avoid potential Establishment Clause concerns, concluding that “such considerations do not provide a compelling justification for the City's Resolution [banning religious and political displays] because it applies to public parks not closely associated with the seat of government, and traditionally open to diverse public expressive activity, including private free-standing non-

¹² Judge Sotomayor has also written one dissent in a free exercise case. In *Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2006), a former clergy member brought an age discrimination action against his church after being forced to retire at the age of 70. The district court had dismissed the plaintiff's complaint based on the “ministerial exception” – “a rule adopted by several circuits that civil rights laws cannot govern church employment relationships with ministers without violating the free exercise clause because they substantially burden religious freedom.” *Id.* at 100. The majority reversed and remanded because the district court had failed to consider the possible impact of the Religious Freedom Restoration Act (“RFRA”). *Id.* at 99. In dissent, Judge Sotomayor argued that the church had waived any reliance on RFRA and the statute does not apply in any event to disputes between private parties. *Id.* at 109. Judge Sotomayor would have affirmed the district court's dismissal of the action on “ministerial exception” grounds. *Id.* at 118-19.

religious displays.” *Id.* at 1376. The Supreme Court subsequently took a similar view in *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753 (1995).

In *Mehdi v. United States Postal Service*, 988 F. Supp. 721 (S.D.N.Y. 1997), several Muslim plaintiffs filed a *pro se* action challenging the U.S. Postal Service’s refusal to display the Muslim Crescent and Star together with Christmas and Chanukah holiday decorations in post office buildings across the country. The relevant Postal Service policy permitted postmasters to display, *inter alia*, “evergreen trees bearing nonreligious ornaments and menorahs (when displayed in conjunction with other seasonal matter).” *Id.* at 729 (internal quotation marks omitted). Judge Sotomayor rejected the plaintiffs’ free speech claim, concluding that post offices were nonpublic fora and that the Postal Service’s seasonal display policy – prohibiting members of the public from posting *any* private display – was both reasonable and viewpoint-neutral. *Id.* at 725-27. Turning next to Plaintiffs’ claim that the Postal Service’s display of Christmas and Chanukah symbols impermissibly favored Christianity and Judaism, Judge Sotomayor relied heavily on the Supreme Court’s decision in *Allegheny v. ACLU*, 492 U.S. 573 (1989) (holding that Establishment Clause did not bar governmental display of a Christmas tree and menorah together), and determined that the Postal Service’s policy did not, on its face, violate the Establishment Clause. *Mehdi*, 988 F. Supp. at 728.

In reaching this result in *Mehdi*, Judge Sotomayor added a troubling footnote, stating, “there is some question as to whether plaintiffs have standing to maintain this claim at all.” *Id.* at 727 n.6. Although ultimately concluding that the plaintiffs had standing as federal taxpayers, Judge Sotomayor opined that “the plaintiffs would not have standing *qua* Muslims to challenge the purely dignitary harm of the USPS’s alleged favoring of other religions over Islam.”

NATIONAL SECURITY

Judge Sotomayor has not established an extensive record on national security issues. It is therefore difficult to draw general conclusions about her approach in this area. Only three cases warrant discussion, and of those, she authored the opinion in only two. While the two she wrote turn, at least in part, on deference to the government's assessment of national security risks, the specific doctrinal contexts she faced make it hard to infer her overarching views on the appropriate scope of government power in the name of national security.

In *Cassidy v. Chertoff*, 471 F.3d 67 (2d Cir. 2006), Judge Sotomayor rejected a constitutional challenge to a policy of suspicionless searches of commuters on the Lake Champlain ferry. (Plaintiffs in *Cassidy* were represented by the ACLU of Vermont.) The search program was executed by the Lake Champlain Transportation Company ("LCT"), pursuant to Coast Guard regulations promulgated under the Maritime Transportation Security Act of 2002. The actual policy was treated as "sensitive security information" and never disclosed to the court, but the LCT posted a notice announcing that it was required "to conduct random screening of persons, cargo, vehicles, or carry-on baggage." *Id.* at 72. In practice, this involved searching carry-on bags of foot and bicycle passengers, as well as visually inspecting the trunks and passenger compartments of automobiles. *Id.* at 73.

The case boiled down to whether the searches qualified for the "special needs" exception to the Fourth Amendment. *Id.* at 74. (Significantly, the panel's decision followed by only a few months a different panel's ruling in *MacWade v. Kelly*, 460 F.3d 260 (2d Cir. 2006), which held that New York City could conduct random bag searches at subway entrances.) As prescribed by the special needs line of cases, the court weighed the nature of the privacy interest involved, the character and degree of government intrusion, and the nature and immediacy of the

government's needs, as well as the efficacy of the challenged policy. *Cassidy*, 471 F.3d at 75. The court first held that ferry passengers maintain an undiminished expectation of privacy in their carry-on bags, *Cassidy* 471 F.3d at 76; it went on to assume without deciding that plaintiffs possess a similarly undiminished interest in the privacy of their vehicles' trunks, *id.* at 78. But the court ruled in favor of the government on the remaining factors. Notably, it found that the degree of intrusiveness involved in the ferry searches was comparable to that involved in suspicionless search programs that had qualified for the special needs exception, including *MacWade* and *United States v. Edwards*, 498 F.2d 496 (2d Cir. 1974) (upholding suspicionless searches of airplane passengers). Citing, *inter alia*, the circuit's recent decision in *MacWade*, the court concluded that "[p]reventing or deterring large-scale terrorist attacks present problems that are distinct from standard law enforcement needs and indeed go well beyond them." *Id.* at 82. It also concluded that the government had proffered a valid special need. In arriving at that conclusion, the court relied in part on the statutorily mandated national risk assessment undertaken by the Coast Guard, which identified a threat associated with commuter vessels. Finally, in determining the efficacy of the challenged policy, the court defined its "task [as] determin[ing] not whether [the policy] was optimally effective, but whether it was reasonably so." *Id.* at 85.

Judge Sotomayor's opinion did acknowledge that the kind of deference sought by the government posed risks to constitutional values—even if the opinion did not find those risks imminent enough to sway its analysis of the ferry searches. At least as a matter of dicta, it recognized that plaintiff's "slippery slope argument"—i.e., the concern that "because the threat of terrorism is omnipresent, there is no clear limit to the government power to conduct suspicionless searches"—constituted "a legitimate concern." *Id.* at 80. But at the same time, it

explicitly emphasized the high degree of deference it accorded the government's risk assessments. *Id.* at 84. It grounded that deference in traditional doctrines of agency expertise, because the Coast Guard's assessments reflected regulatory authority directly granted by Congress. *Id.* at 84. Whether Judge Sotomayor would have accorded a similar degree of deference in the absence of a direct legislative fact-finding mandate is hard to discern.

Judge Sotomayor also joined an opinion written by Judge Newman in *Doe v. Mukasey*, 549 F.3d 861 (2d Cir. 2008). Plaintiff, represented by the ACLU National Security Project, brought a First Amendment challenge to the constitutionality of statutes governing the issuance and judicial review of National Security Letters. *Id.* After articulating narrowing constructions of key statutory terms, *id.* at 874-76, the court went on to find constitutional violations even after the narrowing interpretations. In particular, it found the statute unconstitutional insofar as it required recipients of National Security Letters to initiate litigation challenging gag orders and imposed an overly-deferential standard for judicial review. Interestingly, the opinion noted that the “panel is not in agreement as to” what standard of First Amendment review to apply. *Id.* at 878. It ultimately determined that it would reach the same outcome whether it applied strict scrutiny or a less stringent standard, and it provides no clues as to which analysis each judge believed was appropriate. *Id.*

Finally, as a district judge, Sotomayor rendered an interpretation of the Hostage Taking Act that evinced a significant degree of deference to the government, despite some expressed misgivings about the potential reach of her holding. In *United States v. Ni Fa Yi*, 951 F. Supp. 42 (S.D.N.Y. 1997), a criminal defendant brought an Equal Protection challenge to hostage-taking provision that only applied if the offender or victim was an alien—i.e., it did not apply if the conduct “occurred inside the United States, each alleged offender and each person seized or

detained are nationals of the United States, and each alleged offender is found in the United States...” *Id.* at 43 (quoting 18 U.S.C. § 1203). Judge Sotomayor rejected the argument that this scheme represented an unconstitutional classification on the basis of alienage. *Id.* at 46.

As an initial matter, Judge Sotomayor held that the classification needed only to satisfy rational basis review, rather than strict scrutiny, because federal laws governing alienage justify a more deferential posture—this was apparently the holding of “[a]ll of the courts to have considered Equal Protection challenges to the Hostage Taking Act.” *Id.* at 44. She ruled against the government insofar as it argued that the statute should survive constitutional review based solely on its congruence with U.S. treaty obligations. *Id.* at 45. Such obligations, she explained, cannot diminish the strength of constitutional equal protection guarantees. However, she ultimately found that the “ostensible purpose for the Act—combating international terrorism—is undoubtedly a legitimate federal governmental end,” and that the provision reasonably serves that end. *Id.* She reached this holding despite finding an imperfect means-ends fit, since the statute reached conduct disconnected from fighting international terrorism. *Id.* But in light of the “applicable deferential standard of review,” and the existence of some relationship to the overriding congressional purpose, Judge Sotomayor found no Equal Protection violation. She concluded the discussion with this note of anxiety:

It troubles this Court to contemplate that its holding today might come to be relied upon as authority in support of some other provision or regime which, at bottom, effects no sounder purpose than to discriminate against persons on the basis of their alienage. Nevertheless, this does not appear to be the motivation behind the Hostage Taking Act. In light of the deference afforded to the federal government in connection with legislation passed pursuant to its immigration and foreign policy powers, the Act must therefore be upheld as constitutional.

Id. at 46.

IMMIGRATION

Judge Sotomayor has written or joined in over 120 published decisions involving immigration. In general, Judge Sotomayor has taken an even-handed approach, applying caselaw and other authorities with care and holding courts and administrative agencies to proper legal standards and procedures. Her opinions are notable for their firm grasp on this technical area of law, a pragmatic approach, and an exceedingly careful review of the record.

1. The Deportation Process and Judicial Review of Deportation Orders

Judge Sotomayor has decided at least five cases that address the federal courts' jurisdiction to review administrative deportation decisions or procedural issues relating to the deportation process.

In *Paul v. INS*, 348 F.3d 43 (2d Cir. 2003), for example, Judge Sotomayor addressed the statutory 30-day deadline to file a petition for review of a BIA decision in the Court of Appeals. Within 30 days of the BIA order, the petitioner had filed a "motion for extension of time" with the district court. Rather than transferring the case to the Court of Appeals, the district court returned the motion to petitioner. Petitioner then filed a petition for review in the Court of Appeals after the 30-day deadline. Judge Sotomayor authored a unanimous majority opinion holding that the "motion for extension of time" met all of the requirements for a petition for review and that it was an abuse of discretion for the district court to fail to transfer the motion to the Court of Appeals. *Id.* at 47. Because Paul had effectively filed a petition for review within the 30-day deadline, the court held that it had jurisdiction over the petition. *Id.*

In *Iavorski v. I.N.S.*, 232 F.3d 124 (2d Cir. 2000), Judge Sotomayor held that equitable tolling could apply to a regulatory deadline for the filing of an administrative motion to reopen deportation proceedings. Petitioner Iavorski filed his motion to reopen with the IJ two years

after the 90-day deadline had passed, and the agency dismissed the motion as untimely. *Id.* Writing for a unanimous panel, Judge Sotomayor concluded that the 90-day deadline was not jurisdictional and could therefore be equitably tolled if Iavorski demonstrated extraordinary circumstances and due diligence. *Id.* at 130. Examining carefully “the text, structure, legislative history, and purpose” of the federal statute that had directed the Attorney General to set the regulatory deadline, the panel concluded that there was no indication of congressional intent to forbid equitable tolling. *Id.* Turning to the facts of Iavorski’s case, however, Judge Sotomayor held that he had not established due diligence during the two-year period following the initial IJ decision, and that he was therefore not entitled to equitable tolling. *Id.* at 134.

This practical approach to an alien’s right to judicial and administrative review is also evident in *United States v. Lopez*, 445 F.3d 90 (2d Cir. 2006), in which a question about the right to judicial review of a removal order arose in the context of a criminal prosecution for illegal reentry. Judge Sotomayor, writing for a two-judge majority, rejected the government’s argument that the defendant had waived his challenge to the validity of the prior removal order. She held that the defendant had been denied the opportunity for judicial review in his previous immigration proceedings because he was “affirmatively misl[ed]” by both the IJ and the BIA about the availability of relief from deportation. *Id.* at 99.

Judge Sotomayor has also authored or joined several important decisions about the scope of judicial review of final orders of removal. Notably, in a pair of cases on the effect of 8 U.S.C. § 1252(a)(2)(B)(i), which strips courts of jurisdiction over certain enumerated “[d]enials of discretionary relief,” Judge Sotomayor construed bars to jurisdiction narrowly, and emphasized that the court retains power to correct errors of law. In *Sepulveda v. Gonzales*, 407 F.3d 59 (2d Cir. 2005), Judge Sotomayor, in a unanimous panel opinion, addressed the application of §

1252(a)(2)(B)(i) to applications for cancellation of removal and adjustment of status. Judge Sotomayor held, consistent with the other Courts of Appeals to have reached the issue, that jurisdiction is only barred when relief is denied as a matter of discretion and not when “a nondiscretionary factor was found to preclude eligibility for relief.” *Id.* at 62. *See also Mendez v. Holder*, ___ F.3d ___, 2009 WL 1259078 (2d Cir. May 8, 2009) (per curiam) (holding that IJ’s determination that alien’s deportation would not cause “exceptional and extremely unusual hardship” was so flawed that it amounted to an “error of law,” and was therefore reviewable).

2. Deportability

Judge Sotomayor has written several decisions affirming the BIA’s determination that a criminal conviction falls within a statutory ground of deportability. *See, e.g., Sutherland v. Reno*, 228 F.3d 171 (2d Cir. 2000); *Michel v. INS*, 206 F.3d 253 (2d Cir. 2000). In *Michel*, Judge Sotomayor rejected petitioner’s argument that his criminal convictions under New York state law for possession of a stolen bus transfer were too trivial to constitute a deportable crime involving moral turpitude under 8 U.S.C. § 1227(a)(2)(A)(ii). *Michel*, 206 F.3d at 261. Judge Sotomayor began the opinion by noting that a court must defer to the the BIA’s interpretation of an immigration statute as long as it is reasonable. *Id.* at 262. The BIA had held that the criminal statute under which the petitioner was convicted categorically involved vicious motive or a corrupt mind, regardless of the facts of any individual case. As a matter of policy, Judge Sotomayor opined that the BIA’s categorical approach merited deference because it “is the essence of evenhanded administration of the law to define rules *ex ante* and apply them regardless of the particular circumstances of a given case.” *Id.* at 263.

Judge Sotomayor has consistently applied the categorical approach to asserted criminal grounds of removability, which has in some cases resulted in rulings in favor of the petitioner.

In *Dickson v. Ashcroft*, 346 F.3d 44 (2d Cir. 2003), Judge Sotomayor held that a state conviction for “unlawful imprisonment” was not an aggravated felony rendering the petitioner removable. Writing for a unanimous panel, Judge Sotomayor emphasized that in determining deportability courts may consider only “the *fact of conviction* of a specific offense” not “the *particular factual circumstances* underlying that conviction.” *Id.* at 52. The BIA’s reliance on the “factual narrative” in a pre-sentence report to determine removability is thus inappropriate, because it may often contain “inaccurate” hearsay that is “not a highly reliable basis for a decision of such importance as deportation.” *Id.* at 54.

In a subsequent case raising a similar question, *Dulal-Whiteway v. United States*, 501 F.3d 116 (2d Cir. 2007), Judge Sotomayor once again delved into this complex area. Writing for a unanimous panel, Judge Sotomayor considered whether petitioner’s conviction constituted a “fraud” offense in which the loss to the victim was more than \$10,000 and therefore a removable offense. Judge Sotomayor concluded that the agency could not consider the amount in a restitution order in determining whether petitioner’s crime was a removable offense because such an order “is based on a loss amount” that is only “established by a preponderance of the evidence and need not be tied to the facts admitted by a defendant’s plea.” *Id.* at 130. She held that “general conceptions of fairness” require that the BIA “remove only those aliens who have actually or necessarily pleaded to the elements of a removable offense.” *Id.* at 132-33.

Other deportability decisions demonstrate that Judge Sotomayor takes a similarly even-handed approach on procedural issues in deportation, ruling for or against petitioners after careful consideration of the record. In *Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003), Judge Sotomayor strictly applied procedural rules against a non-citizen who filed a habeas petition to challenge a deportation order. The petitioner had conceded deportability but sought a

discretionary waiver of deportation under § 212(h) of the Immigration and Nationality Act, on the ground that his family would suffer extreme hardship. The district court reversed the BIA's decision denying relief. On appeal, Judge Sotomayor reversed the district court, holding that the petitioner had failed to exhaust administrative remedies because he did not raise the issue of 212(h) relief before either the IJ or BIA. *Id.* at 57-60, 62. Accordingly, Judge Sotomayor concluded that the court lacked subject matter jurisdiction and remanded for an entry of judgment dismissing the petition. *Id.* at 64.

When the record warrants, however, Judge Sotomayor holds the BIA and immigration judges to procedural rules, as well. In *Alrefae v. Chertoff*, 471 F.3d 353 (2d Cir. 2006), the petitioner failed to appear for a removal proceeding and was ordered removed *in absentia*. *Alrefae*, 471 F.3d at 354. Thereafter, the petitioner submitted a motion to rescind on the basis that he never received the mailed notice of his removal hearing and that exceptional circumstances prevented him from appearing at the hearing. *Id.* The IJ denied petitioner's motion, and the BIA affirmed without opinion. *Id.* Judge Sotomayor vacated the BIA's order and held that the IJ had erred by failing to provide any reasoning to explain his rulings. *Id.* at 358-60, 61-63. While a relatively straightforward case, this opinion is nonetheless significant for the detailed review of the administrative record and the especially detailed instructions Judge Sotomayor provides upon remand; the court notes several facts in the record both in favor of and against petitioner for consideration upon remand.

3. Asylum

In the immigration field, Judge Sotomayor has probably written most frequently on the subject of asylum. Her asylum opinions reflect a deep and pragmatic understanding of trial-level proceedings, no doubt reflecting her years on the district court. As in other immigration areas,

she is even-handed, sometimes affirming and sometimes reversing the BIA. Her opinions show deference to the BIA's expertise in the immigration field while also holding the BIA to its obligations to provide reasoned bases for its rulings and to apply legal standards consistently.

One notable characteristic of Judge Sotomayor's asylum decisions is their painstaking review of the administrative record and careful instruction to the BIA for proceedings on remand. Examples of such opinions include *Lin v. Gonzales*, 445 F.3d 127 (2d Cir. 2006) and *Edimo-Doualla v. Gonzales*, 464 F.3d 276 (2d Cir. 2006). In *Lin*, for example, Judge Sotomayor summarized the factual record thoroughly and repeatedly referred to specific testimony. She then applied this mastery of the record in her rulings, holding that the IJ improperly, and contrary to controlling caselaw, penalized the petitioner for using a false document in order to escape the country in which he had suffered persecution. 445 F.3d at 133-34. Similarly, in *Edimo-Doualla*, Judge Sotomayor remanded an asylum case because the IJ had improperly required physical evidence of abuse without explaining why he believed such evidence was reasonably available, and had discounted portions of petitioner's testimony because of the use of false identification documents without explaining what weight was assigned to the factor and without distinguishing between use of false documents to flee persecution and use of false documents to attempt illegal entry into United States.

Judge Sotomayor has also called the BIA to task for failing to provide adequate reasoning on questions of law. In *Zhang v. Gonzales*, 426 F.3d 540 (2d Cir. 2005), for example, she wrote for a panel that reversed an order denying asylum where an IJ had held that opposition to government corruption could not amount to political opinion. She explained that whether an individual's attempt to oppose a government's economic practices manifests a political opinion requires an examination of the political context of the dispute. *Id.* at 548; *see also Mirzoyan v.*

Gonzales, 457 F.3d 217 (2d Cir. 2006) (per curiam) (remanding asylum case to BIA because it failed to explain its statutory construction of the term “persecution” as applied to claims of persecution based upon ethnic discrimination in higher education and employment that interfered with the ability to earn a livelihood). At the same time, Judge Sotomayor’s asylum opinions show even-handedness and deference to the BIA’s reasoned decisions. *See, e.g., Ramsameachire v. Ashcroft*, 357 F.3d 169 (2d Cir. 2004) (upholding IJ’s adverse credibility determination based on the record while also pointing out the BIA’s legal error). Her opinions also demonstrate fidelity to precedent and judicial restraint, regardless of which party those principles favor in a given case.

4. Detention in Deportation Proceedings

Judge Sotomayor has not written extensively in the immigration detention context. In *Elkimya v. Dep’t of Homeland Security*, 484 F.3d 151 (2d Cir. 2007), Judge Sotomayor reaffirmed the federal courts’ inherent authority to grant bail to habeas petitioners in immigration custody, as in criminal cases, but found that petitioner had failed to show “extraordinary circumstances” warranting a grant of bail. *Elkimya* was a straightforward application of a prior Second Circuit decision, *Mapp v. Reno*, 241 F.3d 221 (2d Cir. 2001), in which Judge Sotomayor joined the majority opinion. *Mapp* held that though the federal courts’ inherent bail authority might well be subject to appropriate limits imposed by Congress, Congress had not curtailed federal judicial power to grant bail to a habeas petitioner with a final removal order who was challenging the BIA’s determination that he was ineligible for discretionary relief from deportation. Accordingly, the district court acted within its power when it considered whether *Mapp* was entitled to be released on bail. The Second Circuit nonetheless vacated and remanded the district court’s decision granting bail because the lower court had applied the wrong standard

in determining release was warranted. Under existing caselaw, a court considering a habeas petitioner's fitness for bail must inquire into "whether extraordinary circumstances exist that make the grant of bail necessary to make the habeas remedy effective." *Id.* at 230 (alterations and internal quotations omitted).

5. Immigration Issues in Criminal Proceedings

Judge Sotomayor has written several opinions in federal criminal cases involving immigration issues. As a Second Circuit judge, she has generally sided with the government, opting for a broad reading of criminal statutes even where the statutory text or legislative history permitted a narrower construction.

For example, in *United States v. Figueroa*, 165 F.3d 111 (2d Cir. 1998), Judge Sotomayor, writing for a unanimous panel, construed a criminal illegal re-entry statute to require the defendant's knowledge of only some, and not all, of the material elements of the offense. The provision at issue, 8 U.S.C. § 1327, imposed criminal penalties upon any person who "knowingly aids or assists any alien excludable [for being convicted of an aggravated felony], or who connives or conspires with any person or persons to allow, procure, or permit any such alien to enter the United States." Judge Sotomayor acknowledged that neither the statutory text nor legislative history delineated the reach of the mens rea requirement, but nonetheless rejected the defendant's argument that, under plain language principles – or, in the alternative, the rule of lenity – the term "knowing" must encompass the stated ground of excludability. Rather, Judge Sotomayor held that defendant need only know that the entering alien was excludable – *not* that the alien was excludable due to a prior aggravated felony offense.

Notably, the *Figueroa* decision seems at odds with the Supreme Court's reasoning in *Flores-Figueroa*, 129 S. Ct. 1886 (2009), which confronted a similar mens rea question. The

statute before the Supreme Court, 18 U.S.C. § 1028A(a)(1), imposes penalties upon any person who “knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person.” The Court held that the term “knowingly” modified the term “of another person,” so that a defendant must know that the identification at issue belonged to a real person. The Supreme Court held that the “knowingly” requirement extended not only to the verbs immediately following, but to the full object of the verb in the sentence. By this reasoning, the Supreme Court presumably would reject Judge Sotomayor’s holding in *Figueuroa* that under 8 U.S.C. § 1327, a defendant need not know the entering alien’s ground of excludability.

Similarly, in *United States v. George*, 386 F.3d 383 (2d Cir. 2004), Judge Sotomayor, writing for a unanimous panel upon rehearing, adopted the Government’s expansive view of the mens rea element of 18 U.S.C. § 1542, criminalizing the making of false statements in a passport application. Judge Sotomayor had authored the original panel decision agreeing with defendant that the terms “willfully and knowingly” as used in § 1542 required a defendant’s specific intent to make a false statement. She was persuaded by the government, however, upon panel rehearing. Vacating the relevant portion of her prior opinion, Judge Sotomayor held that the term “willfully and knowingly” does not require that the defendant “act with a specific purpose to make false statements or to violate the law, either generally or § 1542 specifically,” but only that he knew the information he was providing was false. 386 F.3d at 389.

In *United States v. Acevedo*, 229 F.3d 350 (2d Cir. 2000) Judge Sotomayor adopted a broad reading of a criminal statute of limitations, rejecting the non-citizen defendant’s claim of ineffective assistance of counsel based on counsel’s failure to raise a statute of limitations defense. The provision at issue, 8 U.S.C. § 1326, criminalized re-entry into the United States by a person who was previously deported and carried a five-year statute of limitations. *See* 18

U.S.C. § 3282. Defendant argued that the statute of limitations was triggered at the time of his re-entry into the United States at Miami International Airport, which occurred more than five years prior to his indictment; the Government countered that the clock did not begin running until his subsequent discovery by immigration authorities, less than two years prior to the filing of the indictment. Writing for a unanimous panel, Judge Sotomayor agreed with the Government, even though Second Circuit precedent arguably should have permitted the defendant to prevail if he could demonstrate that immigration officials, “with the exercise of diligence typical of law enforcement authorities[,] could have discovered the illegality of his presence” at the time of his entry at Miami International Airport. *See United States v. Rivera-Ventura*, 72 F.3d 277, 282 (2d Cir. 1995), *quoted in Avecedo*, 229 F.3d at 355. Although the defendant properly raised this argument, Judge Sotomayor “decline[d] to reach the issue of diligence” because the defendant “[did] not suggest that immigration authorities had available any equipment enabling them to conduct the necessary investigation.” *Id.* at 355-56.

Although Judge Sotomayor has tended to side with the government when considering the merits of immigrant defendants’ challenges to their convictions, she has held that the courts at least have jurisdiction to consider such claims. For example, in *United States v. Hamdi*, 432 F.3d 115 (2005), Judge Sotomayor, writing for a unanimous panel, held that the defendant’s completion of his sentence and subsequent removal from the United States did not render his appeal of his conviction moot. Because a reduction in the defendant’s sentence would have a substantial impact on his ability to obtain a discretionary waiver of inadmissibility under 8 U.S.C. § 1182(d)(3) (granting the Attorney General discretion to admit certain otherwise inadmissible aliens as temporary, nonimmigrant visitors), Judge Sotomayor held that the defendant’s appeal of his conviction presented a live case or controversy and was not moot.

INTERNATIONAL LAW

During her tenure on the District Court and the Court of Appeals, Judge Sotomayor has authored only one opinion involving international and foreign law; a dissenting opinion in a international child abduction case.. *Croll v. Croll*, 229 F. 3d. 133 (2d. Cir. 2000).

The parties in *Croll* were U.S. citizens who had been both married and divorced while living in Hong Kong. The Hong Kong divorce decree awarded custody of the couple's only child to the mother but granted the father "reasonable access." It also included a "ne exeat" clause prohibiting either parent from removing the child from Hong Kong without the consent of the other parent. Upon learning that the mother had brought the child to New York, the father filed suit in U.S. federal court seeking the child's return to Hong Kong under the Hague Convention on the Civil Aspects of International Child Abduction. The district court ruled in favor of the father, but its decision was reversed by the Second Circuit, which reasoned that the Hague Convention could only be invoked by a custodial parent, and that neither the father's "right of access" under the Hong Kong decree nor the "ne exeat" clause contained in the decree qualified as a "right of custody" under the Convention. It supported its decision, in part, by relying on U.S. dictionary definitions of the term "custody."

Judge Sotomayor dissented. Among other things, she criticized the majority's reliance on U.S. dictionaries to define the terms of an international treaty as "parochial," *id.* at 146. In contrast to the majority, she also concluded that the "ne exeat" clause was sufficient to create enforceable custodial rights under the Convention because its express purpose was to ensure that one parent did not remove a child from the jurisdiction without the other parent's consent,

Both the majority and Judge Sotomayor referred to foreign decisions as helpful but not binding in trying to determine the meaning and scope of the Convention. The majority

concluded that “[f]oreign courts are split on the issue presented in this case.” *Id.* at 145. Judge Sotomayor, on the other hand, concluded that “[m]ost foreign courts addressing the question have interpreted the notion of ‘rights of custody’ broadly in light of the Convention’s purpose and structure.” *Id.* at 150. At the same time, she made clear that international case law was not “essential” to her conclusion even though she clearly believed that it lent support to it. *Id.*

Judge Sotomayor elaborated on her views about international law in a speech she delivered this spring in Puerto Rico.¹³ She began the speech by describing what she called a misunderstanding about the “use” of foreign and international law in U.S. courts. “We don’t use foreign or international law,” she said. “We consider the ideas that are suggested by international and foreign law.” She then added: “If the idea has validity . . . you will adopt its reasoning. If it doesn’t fit, you won’t use it.” She noted that the Supreme Court had used foreign and international law in precisely this way in several recent decisions -- including *Roper v. Simmons*, 543 U.S. 551 (2005)(holding that the Eighth Amendment barred the execution of juveniles), and *Lawrence v. Texas*, 539 U.S. 558 (2003)(striking down a state criminal law prohibiting consensual sodomy between adults) – and expressly aligned herself with the views of Justice Ginsburg on this subject. Citing the Supreme Court’s decision in *Medillín v. Texas*, 129 S.Ct. 360 (2008), she also noted that even U.S. treaty obligations are not enforceable in U.S. courts unless they have been implemented through congressional legislation.

REPRODUCTIVE FREEDOM

Judge Sotomayor has never directly addressed the constitutional right to abortion in any of her judicial opinions. Nor does it appear that she has elsewhere publicly written or spoken

¹³ An audio recording of the speech is available at <http://cpipr.org/inicio/reportajes/40-reportajes/102-la-ultima-comparecencia-publica-de-sotomayor-antes-de-la-nominacion-audios.html>.

about her legal views on the nature and scope of the right. She has, however, authored a few opinions in cases that do not turn on, but involve, issues of abortion and reproductive freedom. In each of these decisions, consistent with her general judicial approach, she adheres closely to binding precedent and, where possible, avoids reaching novel issues. Thus, it is difficult to make any generalized assessment about how narrowly or expansively she might interpret the constitutional protections afforded various reproductive freedoms when squarely presented with such issues. All that can be reasonably drawn from these few decisions is that she has not employed language or analysis that is hostile to the right to choose abortion, *see Ctr. for Reprod. Law & Policy v. Bush*, 304 F.3d 183 (2d Cir. 2002), and she views the decision to have, or continue, a desired pregnancy as a “fundamental right,” *Lin v. U.S. Dep’t of Justice*, 494 F.3d 296, 330 (2d Cir. 2007) (concurring in judgment). The relevant aspects of these two opinions are discussed more fully below.

In *Ctr. for Reprod. Law & Policy v. Bush*, a domestic reproductive rights organization and its attorneys challenged the “Global Gag Rule” (since rescinded by President Obama), which required foreign family planning organizations to agree that they would not use any of their funds from any source to perform or promote abortion as a condition of receiving funding from the United States government. First, plaintiffs claimed that such a restriction violated their First Amendment rights because it “effectively prevented them from associating and collaborating” with foreign organizations. 304 F.3d at 190. Judge Sotomayor held this claim was squarely controlled by a prior Second Circuit case, *Planned Parenthood Fed’n v. Agency for Int’l Dev.*, 915 F.2d 59 (2d Cir. 1990), which rejected the same claim against the same restriction. In so doing, she did not indicate any agreement or disagreement with the prior decision, but simply reiterated its relevant analysis and held, it “controls this case conceptually,” “presented the same

issue,” and “no intervening Supreme Court case law alters its precedential value.” 304 F.3d at 190. Judge Sotomayor dismissed plaintiffs’ second claim, that the language of the restriction was unconstitutionally vague, on prudential grounds without reaching the merits. She held that any harm to plaintiffs was derivative of a due process harm to third parties – the foreign organizations directly restricted by the allegedly vague language – and thus plaintiffs lacked prudential standing. *Id.* at 196. Finally, Judge Sotomayor quickly dismissed plaintiffs’ Equal Protection claim that the government created an unfair playing field by allowing foreign grantees to collaborate with anti-abortion groups, but not with plaintiffs. Judge Sotomayor fully agreed that the restriction benefited plaintiffs’ “competitive adversaries” but concluded that such favoritism was not unconstitutional because “[t]he Supreme Court has made clear that the government is free to favor the anti-abortion position over the pro-choice position, and can do so with public funds.” *Id.* at 198 (citing *Rust v. Sullivan*, 500 U.S. 173, 192-94 (1991)). As with the First Amendment claim, Judge Sotomayor did not indicate agreement or disagreement with the analysis of the controlling case.

In *Lin v. United States Dep’t of Justice*, the Second Circuit reviewed a Board of Immigration Appeals (BIA) decision interpreting statutory language that affords automatic, or *per se*, refugee status to an asylum applicant who has been subject to involuntary abortion or sterilization. *Lin v. United States Dep’t of Justice*, 494 F.3d 296, 300-01 (2d Cir. 2009). Three applicants sought asylum alleging they suffered persecution when their partners suffered involuntary abortions and sterilizations. *Id.* at 299. In denying these claims, the BIA affirmed a prior decision extending *per se* refugee status to legally married spouses, but held that this protection did not similarly extend to the *unmarried* partners in this case. *Id.* The Second Circuit agreed with the BIA that the unmarried petitioners did not qualify for automatic refugee

status, but also held that the BIA's interpretation of the statute as to married spouses was incorrect because the statutory scheme unambiguously limited protection to individuals who are, themselves, subject to a forced abortion or sterilization. Thus, neither spouses nor unmarried partners are entitled to *per se* asylum eligibility under the statute. *Id.* at 300.

Judge Sotomayor concurred in the judgment only, both joining a concurrence written by Judge Katzmann and writing her own opinion. In her view, the court was obligated to defer to a reasonable interpretation of the statute by the BIA and should have limited its review to the question of whether the "BIA's distinction between married and unmarried couples was unreasonable" as applied to the *unmarried* petitioners in this case. *Id.* at 334. She joined Judge Katzmann in his conclusion that the BIA's distinction was reasonable based on its consideration of how China's family planning policies more often apply to *married* couples. *Id.* at 326 (Katzmann J., concurring in the judgment). She wrote separately to "highlight the potentially ill-considered breadth of the majority opinion," which endorsed the view that "asylum can never be based on, in whole or in part, harm to others, no matter how closely related the harm or the person harmed is to the applicant." *Id.* at 328. In her concurring opinion, Judge Sotomayor characterized the harms that flow from government policies of coercive contraception, sterilization, and abortion as implicating fundamental procreative rights. In so doing, she described the harm of forced sterilization or abortion as extending to both spouses who together desire a pregnancy: "[T]he state's interference with this fundamental right 'may have subtle, far reaching and devastating effects' for both husband and wife. The termination of a wanted pregnancy under a coercive population control program can only be devastating to any couple, akin, no doubt, to the killing of a child." *Id.* at 330 (quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)). This, and other similar language in her opinion, is

forceful with respect to procreative rights, particularly within marriage. *See also id.* at 330-31 (noting “special reverence every civilization has accorded to child-rearing and parenthood in marriage”). However, the bulk of her concurrence focuses on the range of “unforeseen repercussions” that are likely to flow from the majority approach. *Id.* at 334.¹⁴

LGBT/HIV/AIDS

Judge Sotomayor has authored very few opinions involving sexual orientation and no opinions involving gender identity. In the most significant of the few cases of relevance, *Holmes v. Artuz*, No. 95 CIV. 2309 (SS), 1995 WL 634995 (S.D.N.Y. Oct. 27, 1995), Judge Sotomayor denied a motion to dismiss a claim of sexual orientation discrimination by a pro se prisoner, rejecting the argument of prison officials that the prisoner had failed to state a claim and, alternatively, that the prison officials were entitled to qualified immunity. The prisoner had alleged that he had been terminated from a food service job because he was “an overt homosexual.” *Id.* at *1. Judge Sotomayor began by acknowledging the pendency of *Romer v. Evans*, 517 U.S. 620 (1996), in the Supreme Court. She then proceeded to recognize that the prisoner’s allegation of discrimination based on “his sexual orientation may itself state a claim under § 1983 for violation of his equal protection rights.” *Id.* at *1. In the course of doing so, she rejected the prison officials’ assertion of a rational relationship between the discrimination at issue and “a legitimate state interest in preserving order in the correction facility messhall (sic),”

¹⁴ In two other asylum cases, Sotomayor wrote short panel opinions vacating and remanding BIA denials of asylum claims involving facts related to forced insertions of IUDs. *See Jiang v. Bureau of Citizenship & Immigration Svcs.*, 520 F.3d 132 (2d Cir. 2008); *Zheng v. Gonzales*, 497 F.3d 201 (2d Cir. 2007). Both cases were remanded to allow the BIA to resolve its inconsistent and unpublished decisions by issuing a precedential opinion to “articulate its position on ‘whether and under what conditions the forced insertion of an IUD constitutes persecution.’” *Jiang*, 520 F.3d at 135 (quoting *Zheng*, 497 F.3d at 203-04). Unlike *Lin*, neither of these brief opinions elaborates on the constitutional implications of government interference with procreative decisions. However, in *Jiang*, Judge Sotomayor did question the BIA’s assessment that forcible IUD insertion may only rise to the level of persecution when accompanied by detention, by cogently noting, “Presumably, any ‘forcible’ insertion of an IUD presupposes a restraint of liberty, if only during the time of the procedure.” 520 F.3d at 135 n.5.

noting that “[the prison officials] [had] proffer[ed] no explanation of what this ‘rational relationship’ might be,” and that “[a] person’s sexual orientation, standing alone, does not reasonably, rationally or self-evidently implicate mess hall security concerns,” *Id.* at *2. Judge Sotomayor then concluded that the prison officials were not entitled to qualified immunity because “[t]he constitutional right not to be discriminated against for any reason, including sexual orientation, without a rational basis is an established proposition of law.” *Id.*

There is only one case of any note in which Judge Sotomayor addressed issues related to people living with HIV, and that one does so only tangentially. In *Haybeck v. Prodigy Services Co.*, 944 F. Supp. 326 (S.D.N.Y. 1996), the plaintiff sued Prodigy, an internet services provider, alleging that she met a Prodigy employee in a Prodigy chat room, that she contracted HIV from him, and that Prodigy was negligent in failing to protect her from him. In dismissing this tort claim, Judge Sotomayor noted in passing that to do otherwise “would be setting a precedent under which employers would be forced to monitor, and in some cases control, not only the health of their employees, but also the most intimate aspects of their off-duty lives. Such monitoring would contravene clear law and public policy that prohibits employers from inquiring into the HIV status of employees and attempting to control their off-duty behavior with others.” *Id.* at 331.

PRISONERS’ RIGHTS

Judge Sotomayor has not written much on the meaning of Eighth Amendment in the context of prison conditions. In general, the opinions she has written in prisoners’ rights cases have shown a careful attention to precedent and the factual record with little attempt to take the law in new directions.

Hudak v. Miller, 28 F. Supp. 2d 827 (S.D.N.Y. 1998), is illustrative. In *Hudak*, Judge Sotomayor considered a summary judgment motion filed by the defendant prison physician in a § 1983 action in which a prisoner challenged the delay in diagnosis of his large aneurysm. The physician had seen the prisoner over the course of eight months for symptoms of headache, nausea and vomiting. *Id.* at 829. Under *Farmer v. Brennan*, 511 U.S. 825 (1996), in order to avoid summary judgment, plaintiff was required to present evidence sufficient to allow a jury to conclude that the physician knew that he had a serious medical need that posed a substantial risk of serious harm, and that the physician failed to respond reasonably to that risk. *Id.* at 847.

Judge Sotomayor's opinion correctly notes that the issue is not whether the defendant physician recognized that the plaintiff suffered from an aneurysm, but whether he recognized that the prisoner had a serious medical need that required further investigation. *Hudak*, 28 F. Supp. 2d at 831. Although the plaintiff presented no direct evidence that the physician knew of the need for further diagnostic work, Judge Sotomayor's opinion noted circumstantial evidence from which such knowledge could be inferred, including the plaintiff's repeated complaints and the exclusion of other diagnoses. *Id.* at 832-33. While the decision is not a doctrinal departure from the standards established in *Farmer*, it is striking how carefully Judge Sotomayor reviewed the record.

In *Lee v. Coughlin*, 26 F. Supp. 2d 615 (S.D.N.Y. 1998), Judge Sotomayor found that the plaintiff's 376-day segregated confinement was a sufficiently severe and atypical hardship that it triggered his right to a due process hearing. Among other things, the opinion is notable for its detailed description of the harsh conditions in prison segregation units, quoting both the plaintiff's own affidavit as well as research regarding the psychological effects of prolonged isolation in prison. Judge Sotomayor's dissent in *N.G. v. Connecticut*, 382 F.3d 225, 239 (2d

Cir. 2004), contains a similarly sympathetic description of the impact of a strip search policy on young girls in juvenile detention. For a full description of the case, *see supra* at p. 17.

Judge Sotomayor also ruled, in *Malesko v. Correctional Service Corp.*, 229 F.3d 374 (2d Cir. 2000), that a federal prisoner injured in a private prison facility operated under contract with the federal government could sue the private company for violating his constitutional rights. The prisoner had based his claim on *Bivens v. Six Unknown Named Agents of the FBI*, 403 U.S. 388 (1971), which created an implied right of action against federal officials accused of violating the Constitution. Agreeing with an earlier Sixth Circuit decision, Judge Sotomayor concluded that recognizing a *Bivens* claim against private companies that had been delegated the task of running federal prisons was justified by the primary purpose of *Bivens*, which is to provide a remedy for victims of constitutional violations, and that it would preserve the parallel treatment of constitutional claims against state and federal agents. 229 F.3d at 379. The Supreme Court reversed, by a 5-4 vote, over a vigorous dissent by Justice Stevens.

Judge Sotomayor did join a troubling opinion in *Berry v. Kerik*, 366 F.3d 85 (2d Cir. 2004), in which the court of appeals disavowed a previous ruling of the circuit and applied the Prison Litigation Reform Act (PLRA) to hold that a prisoner's failure to exhaust administrative remedies before filing a federal lawsuit should lead to a dismissal of the lawsuit with prejudice (meaning that the case cannot be refilled) if the administrative remedies are no longer available and the prisoner had once had a fair opportunity to exhaust. *Id.* at 88. This ruling is not compelled by the language of PLRA and other circuits have ruled to the contrary. *Ford v. Johnson*, 362 F.3d 395, 401 (7th Cir. 2004) (Easterbrook, J.); *see also Steele v. Federal Bureau of Prisons*, 355 F.3d 1204, 1213 (10th Cir. 2003) (dismissal for failure to exhaust pursuant to PLRA should ordinarily be without prejudice); *Wyatt v. Terhune*, 315 F.3d 1108, 1120 (9th Cir. 2003)

(if court finds that complaint subject to PLRA was not properly exhausted, it should be dismissed without prejudice).

In *Duamutef v. Hollins*, 297 F.3d 108 (2d Cir. 2002), Judge Sotomayor weighed the First Amendment rights of a prisoner who received through the mail a book entitled *Blood in the Streets*, which actually promoted an investment strategy of buying when prices are low, with the expectation of realizing profits during times of financial upheaval. *Id.* at 110-11. The prisoner also had a history of disciplinary offenses related to his involvement with an organization seeking to overthrow the government. As a result he was placed on a 30-day mail watch which involved stopping, opening and reading all his non-privileged mail. Judge Sotomayor reversed the district court and held that the temporary mail watch did not violate the First Amendment, even though prison officials had imposed the mail watch without actually reviewing the contents of the book that had triggered it. Two years later, however, in *Shakur v. Selsky*, 391 F.3d 106 (2d Cir. 2004), Judge Sotomayor joined a decision that clarified *Duamutef* by holding that prison officials could not categorically ban all literature by outside organizations that have not been approved by corrections officials.

SENTENCING AND FORFEITURE

1. Sentencing

The clearest expression of Judge Sotomayor's position on sentencing is her opinion concurring in part and dissenting in part from a recent sentencing decision, *United States v. Cavera*, 550 F.3d 180 (2d Cir. 2008) (en banc). In *Cavera*, the court reviewed a district court's decision to sentence a gun-trafficking defendant to a longer term than that prescribed by the United States Sentencing Guidelines because of the district judge's view that the Guideline range failed to take account of local conditions calling for greater deterrence of gun traffic in urban

areas like New York City. *See id.* at 184. Relying on the Supreme Court’s decision in *Kimbrough v. United States*, 552 U.S. 85 (2007), the en banc court unanimously affirmed that district judges could depart from Guidelines based on the judges’ own policy disagreements with the Guidelines “even where that disagreement applies to a wide class of offenders or offenses.” *Id.* at 191. The members of the Second Circuit divided regarding whether the particular Guideline departure in Cavera’s case was justified; a 10-judge majority upheld Cavera’s sentence, with four judges, including Judge Sotomayor, dissenting. Judge Sotomayor would have required stronger justification for the Guideline departure; she warned of the “serious danger” that “sentencing judges will dress their subjective views in objective trappings, either by using questionable empirical data or by invoking a ‘common sense’ at odds with reality.” 550 F.3d at 220 (Sotomayor, J., concurring in part and dissenting in part).

Although Judge Sotomayor’s position in *Cavera* would have benefited that particular defendant, her opinion reflects two important views about sentencing that could lead to results less favorable to defendants in other sentencing cases. First, Judge Sotomayor stated that “closer review” of a sentencing decision is warranted either where a sentence reflects a judge’s policy disagreement with the Guidelines or where the sentence is “not grounded in the district court’s discrete institutional strengths,” i.e., where the sentence is based on “overarching considerations of criminal jurisprudence” rather than cases the judge himself or herself sees regularly. *Id.* at 217-18 (citation and internal quotation marks omitted). Second, Judge Sotomayor characterized the goal of sentencing uniformity as being “at the heart of the Guidelines.” *Id.* at 219. Bringing these two strands of thought together, she concluded, “Appellate courts must not abdicate their responsibility to ensure that sentences are based on sound judgment, lest we return to the shameful lack of parity, which the Guidelines sought to remedy.” *Id.* at 224 (citation and

internal quotation marks omitted). Although Judge Sotomayor allowed (following Supreme Court precedent on this point) that district courts are well-positioned to judge whether the crack/powder cocaine sentencing disparity is warranted because district judges sentence both types of defendants frequently, *see id.* at 218, Judge Sotomayor's comments encouraging closer scrutiny of district court sentencing decisions in order to promote uniformity suggest a strong attachment to the Guidelines.

Judge Sotomayor's other sentencing opinions provide few further clues about her approach to sentencing issues. *See, e.g., United States v. Vaughn*, 430 F.3d 518, 525-27 (2d Cir. 2005) (joining three other circuits in holding that, now that the Sentencing Guidelines are advisory, judges may consider at sentencing charged conduct of which a defendant was acquitted); *United States v. Outen*, 286 F.3d 622, 636-39 (2d Cir. 2002) (accepting the government's position about what "baseline" sentence a drug defendant must receive in the absence of jury-found aggravating factors, within a mandatory Guideline system). Both of those decisions favored the government. Of her two opinions favoring criminal defendants, one (*Cavera*, discussed above) was based on broader views about the Guidelines and sentencing rather than any apparent sympathy for the defendant, and the other was a logical extension of Supreme Court precedent that five other circuits had already adopted. *See United States v. Moreno*, 2000 WL 1843232, at *4-*5 (S.D.N.Y. Dec. 14, 2000) (Sotomayor, J., sitting as a district judge).

2. Forfeiture

In *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002), Judge Sotomayor held (reversing then-district judge and future Attorney General Michael Mukasey) that, under the Fourteenth Amendment's Due Process Clause, an individual whose vehicle is seized under New York law

because of its suspected involvement with a crime is entitled to a prompt hearing to determine whether the government should be allowed to keep the vehicle based on the government's likelihood of success in the eventual forfeiture proceeding. *See id.* at 44. Judge Sotomayor had considerable latitude because there was little governing precedent. The opinion itself reflects a serious concern for the individuals affected. Judge Sotomayor noted the often lengthy delay between the initial seizure and the forfeiture proceedings, *see id.* at 54; she discussed the important role that vehicles play in individuals' lives as a means of mobility and even livelihood, *see id.* at 61; and she referred to the "plight of innocent owners" in evaluating the due process interest at stake, *id.* at 58.

Judge Sotomayor's other forfeiture cases provide little additional guidance. *See United States v. \$577,933.89 More or Less, in U.S. Funds*, 287 F.3d 66, 89-91 (2d Cir. 2002) (holding that 15-month delay between seizure of money orders and judicial forfeiture proceedings did not require setting aside the forfeiture, because the government sent notice of administrative forfeiture proceedings to the claimant only one month after seizure, and because even assuming unreasonable delay, the claimant did not demonstrate that the proper remedy would be immunization of the money orders from forfeiture); *United States v. Real Property Known As 77 East 3d Street*, 869 F. Supp. 1042 (1994) (denying government's motion to set aside jury verdict against forfeiture of a building, because government's evidence was not sufficient to render jury determination unreasonable).

DEATH PENALTY

Federal circuit and district court judges preside over two different types of death penalty cases. First are death penalty prosecutions brought under federal law. Second is federal *habeas corpus* review of state death-penalty judgments. During her time on the federal bench, however,

Judge Sotomayor has handled virtually no capital cases. As a federal district court judge, she presided over only one of the relatively few potentially capital cases brought in the Southern District of New York. As a circuit court judge, she never served on a panel hearing a death penalty appeal.

In her one potential capital case as a district court judge, Judge Sotomayor issued a standard funding order to protect the defendant's constitutional right to counsel. *See United States v. Heatley*, 1996 WL 700923, *1 (S.D.N.Y., Dec. 5, 1996). The order appointed two defense attorneys and, consistent with prevailing practice at the time, allowed them to seek interim payments because of the "expected length of the trial in this case and the anticipated hardship on counsel in undertaking representation full-time for such a period without compensation." She wrote that this type of funding order was necessary "[d]ue to the complex and demanding nature of death penalty proceedings." *Id.*

Later in the same case, however, Judge Sotomayor rejected the defendant's claim that the indictment should be dismissed because he was allegedly indicted, despite his willingness to enter into a cooperation agreement, "due to a desire on the part of the [prosecutors] to pursue a capital case" *United States v. Heatley*, 39 F.Supp.2d 287, 308 (S.D.N.Y. 1998). Explaining her decision, Judge Sotomayor wrote,

[W]hile this Court would hope that no member of the U.S. Attorney's office would reject a cooperation agreement and pursue a prosecution solely for the purpose of getting his or her first death sentence, it is far from clear that such a motive would be unconstitutional, provided that the prosecution could in good faith assert that the defendant had committed a capital crime which was of sufficient unusual severity to 'warrant' the death penalty." *Id.*¹⁵

¹⁵ The ACLU has argued in capital appeals that the prosecutor must use consistently-applied standards to determine when to seek capital punishment. *See, e.g., DeGarmo v. Texas*, 474 U.S. 973, 974-75 (1985) (Brennan, J., dissenting from denial of cert) (arguing that because the prosecutor's "decision whether or not to seek capital punishment is no less important than the jury's, . . . [his or her] discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action").

The defendant ultimately entered into a plea bargain resulting in a life sentence. *See Heatley v. United States*, 2001 WL 6728 (S.D.N.Y. Jan. 2, 2001).

Prior to her appointment to the federal bench, Judge Sotomayor “was part of a three-person committee of the [Puerto Rican Legal Defense and Education Fund] board that recommended in 1981 that the fund oppose the reinstatement of the death penalty in New York State, according to board minutes from that time.” Raymond Hernandez and David W. Chen, *Nominee’s Links With Advocates Fuel Her Critics*, N.Y. TIMES, May 29, 2009, at A1. Ms. Sotomayor’s committee found that “[c]apital punishment is associated with evident racism in our society. It creates inhuman psychological burdens for the offender and his/her family.” *Id.* The ACLU has not had access to those board minutes. The published reports, however, appear to describe a policy recommendation rather than a legal judgment on the constitutionality of the death penalty.

HABEAS CORPUS

Although Judge Sotomayor has a limited track record in capital cases, she has extensive experience with federal habeas corpus review of state convictions. Her habeas opinions are thorough but narrow; although Judge Sotomayor often acknowledges interesting legal issues potentially at issue, she generally does not reach out to decide those issues unless they are necessary to the disposition at hand. In the twenty-two publicly-available decisions Judge Sotomayor authored as a district and circuit court judge, she never once granted the writ of habeas corpus. Many of those decisions, however, reflect a relatively straightforward application of existing and uncontroversial law.¹⁶

¹⁶ *See, e.g., Thibodeau v. Portuondo*, 486 F.3d 61 (2d Cir. 2007) (rejecting claim that kidnapping statute was void for vagueness).

The closest Judge Sotomayor came to granting habeas relief was her decision in *Galarza v. Keane*, 252 F.3d 630 (2d Cir. 2001). In *Galarza*, over the objections of a dissenting colleague, she remanded to the district court for a determination of whether a state prosecutor's purported race-neutral reasons for striking Hispanic members of the venire were credible. See *Batson v. Kentucky*, 476 U.S. 79 (1986). Despite the fact that the state courts had reviewed the *Batson* claim on the merits, the dissent argued that the claim was waived because defense counsel had not objected to the trial court's failure to rule on the credibility of the prosecutor's purported race-neutral reasons. Judge Sotomayor declined to impose a procedural bar where the state had not, and declined to require a litigant to repeat a *Batson* challenge several times before federal habeas review was available. On remand, the district court judge conducted a reconstruction hearing, determined that the trial judge had in fact credited the prosecutor's race-neutral reasons, and denied the writ of habeas corpus. See *Galarza v. Keane*, 2003 WL 1918310 (S.D.N.Y. 2003).

Judge Sotomayor also declined the state's invitation to reject a petition based on state procedural bars in other cases. See *Brown v. Miller*, 451 F.3d 54 (2d Cir. 2006) (rejecting state's attempt to interpose procedural bar because the bar imposed in state court was interwoven with rejection of claim on the merits, but finding state court's ruling concerning state sentencing scheme not an unreasonable application of *Apprendi v. New Jersey*, 530 U.S. 466 (2000)); *Green v. Travis*, 414 F.3d 288 (2d Cir. 2005) (setting aside state procedural bar found in state courts and urged by the state because it was intertwined with federal question of whether petitioner had made out a prima facie case of discrimination, but affirming district court's denial of *Batson* claim after reconstruction hearing on prosecutor's reasons for striking black prospective jurors); *Galdamez v. Keane*, 394 F.3d 68,72-77 (2d Cir. 2005) (rejecting facially-plausible state

arguments that habeas claims were not exhausted and procedurally defaulted in New York courts based on a more nuanced understanding of how the New York Court of Appeals decides applications for leave to appeal, but denying underlying constitutional claim as harmless error, if error at all). *See also Brown v. Miller*, 1998 WL 91081 (S.D.N.Y. 1998) (dismissing pro se petitioner's claim as unexhausted, but leaving open the door to future review by: 1) undertaking review of state procedural rules in the course of rejecting magistrate judge's finding that claim was time barred, and 2) declining to exercise discretion to dismiss the claim on the merits as patently frivolous); *Cuadrado v. Stinson*, 992 F.Supp. 685 (S.D.N.Y. 1998) (similar treatment of unexhausted claim by pro se petitioner).

On the other hand, during her time on the district court, Judge Sotomayor dismissed several habeas petitions as untimely based on a strict application of the relevant statute of limitations. Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a federal habeas corpus petition seeking review of a state court conviction must be filed within one year after the state conviction becomes final. AEDPA, however, is silent on the statute of limitations for litigants whose convictions became final before AEDPA's effective date in 1996. In an early decision on this issue, the Second Circuit set forth a vague "reasonableness" standard for determining timeliness. *Peterson v. Demskie*, 107 F.3d 92 (2d Cir. 1997). While recognizing that other circuit courts had decided that such petitions would be timely if filed within a year of AEDPA's effective date, *see, e.g., Rashid v. Khulmann*, 991 F.Supp. 254, 257 (S.D.N.Y.1998), Judge Sotomayor often found petitions filed within that time period untimely under the *Peterson* test. *See Santana v. Artuz*, 1998 WL 9378 (S.D.N.Y. 1998) (dismissing petition filed close to one year after AEDPA effective date), *vacated*, (2d Cir. Sept. 22, 1998); *Albert v. Strack*, 1998 WL 9382 (S.D.N.Y. 1998) ("Petitioner mailed his petition to the Court over 355 days after the

effective date of the AEDPA, and over two years after exhausting his state remedies. For the reasons to be discussed, I grant respondent's motion to dismiss the habeas petition as untimely.”); *Rashid*, 991 F.Supp. at 261 (similar); *Alexander v. Keane*, 991 F.Supp. 329, 333-34 (S.D.N.Y. 1998) (similar). *But see United States v. Felzenberg*, 1998 WL 152569, at *7-10 (S.D.N.Y. 1998) (permitting motion pursuant to 28 U.S.C. 2255, filed almost one year after AEDPA’s effective date, and three years after conviction became final was reasonable because petitioner exercised diligence in attempting to prepare petition and find attorney).

Eventually, the Second Circuit overruled its own precedent in *Peterson*, and brought the court in line with the practice of the other circuits that allowed petitions filed up to one year after AEDPA’s effective date. *See Ross v. Arruz*, 150 F.3d 97, 103 (2d Cir. 1998). As a result, at least two of Judge Sotomayor’s dismissals were reversed. *Albert v. Strack*, 173 F.3d 843 (2d Cir. 1999); *See Santana v. Artuz*, 1998 WL 9378 (S.D.N.Y. 1998), *vacated*, (2d Cir. Sept. 22, 1998) (unpublished, no Westlaw cite available).¹⁷

On one occasion, Judge Sotomayor reversed the grant of habeas corpus awarded by the district court. *See Benn v. Greiner*, 402 F.3d 100 (2d Cir. 2005). Contrary to the district court, Judge Sotomayor held that a state court ruling barring the defendant in a rape case from cross-examining the alleged victim about prior false rape accusations was harmless error, even if it violated the Confrontation Clause, because the testimony of other eyewitnesses who testified about events closely connected to the crime (but not the crime itself) was sufficient to support the jury’s guilty verdict.

¹⁷ Three other of Judge Sotomayor’s dismissals based on the *Peterson* reasonableness test would have been appropriate under the new 1-year rule set forth in *Ross*. *See Cowart v. Goord*, 1998 WL 65985 (S.D.N.Y. 1998); *Rodriguez v. Artuz*, 990 F.Supp. 275 (S.D.N.Y. 1998) (dismissing claim filed more than 1 year after AEDPA effective date as time barred); *Halo v. New York State Div. of Parole*, 1998 WL 355429 (S.D.N.Y. 1998) (same, but granting certificate of appealability on constitutionality of statute of limitations).

In *Doe v. Menefee*, 391 F.3d 147 (2d Cir. 2004), Judge Sotomayor considered the still unresolved question of whether AEDPA's one-year statute of limitations applies to habeas petitions based on a claim of actual innocence. The district court found that Doe, the habeas petitioner, had presented a credible claim of actual innocence but that showing was not enough by itself to toll the statute of limitations. Judge Sotomayor reviewed the factual record in great detail on appeal and concluded for a divided court that Doe had not presented a credible claim of actual innocence, which allowed her to uphold the district court's dismissal of the habeas petition without reaching the question of what effect, if any, a claim of actual innocence would have on the statute of limitations.

FOURTH AMENDMENT

The Fourth Amendment opinions written by Justice Sotomayor are largely unexceptional in their application of established precedent. In general, she appears most receptive to Fourth Amendment claims involving bodily privacy and the privacy of the home. In other contexts, she has tended to rule for the government and, in several cases, has broadly construed recognized Fourth Amendment exceptions to permit the admission of contested evidence.

In *United States v. Gori*, 230 F.3d 44 (2d Cir. 2000), Judge Sotomayor forcefully dissented from a decision upholding a warrantless entry into a home and seizure of its occupant where the door had been left open. Judge Sotomayor rejected the majority's position that "voluntarily making yourself visible to a person standing in a public area is the same as making yourself available to be physically touched or otherwise seized." *Id.* at 58 (Sotomayor, J., dissenting). According to Judge Sotomayor, although the plain view doctrine gave the police the right to look into the apartment through the open door, a warrant was still required to enter the home or to seize its contents because of the high expectation of privacy that has traditionally

been associated with the home. *Id.* at 58-59. The majority, having decided that no warrant was necessary to enter the apartment, justified the seizure of its occupant by characterizing it as a *Terry* stop; in dissent, Judge Sotomayor decried this “unprecedented expansion” of *Terry* stops into the home as a severe misapplication of precedent and an end run around the entire structure of Fourth Amendment law. *See id.* at 63-65 (“The majority’s decision transforms the limited *Terry* exception into an exception that swallows the Fourth Amendment’s warrant and probable cause requirements.”).

By contrast, in *Anthony v. City of New York*, 339 F.3d 129 (2d Cir. 2003), Judge Sotomayor held that exigent circumstances justified the police decision to enter a home without a warrant after receiving a 911 call that there was an armed man inside. She also held that the subsequent decision to take the only person found at the scene, an adult woman with Down’s Syndrome, to a psychiatric hospital was protected by qualified immunity because the officer’s on the scene were acting on the apparently valid order of their superior officer and thus reasonably believed that they had probable cause for the seizure. The New York Civil Liberties Union participated as a friend of the court in support of the plaintiff.

Judge Sotomayor’s recent dissent in another case indicates she would have provided greater protection against invasions of bodily privacy than the majority. In *Kelsey v. County of Schoharie*, ___ F.3d ___, 2009 WL 1424206 (2d Cir. May 22, 2009), the majority rejected the claim that prison inmates were functionally strip-searched when they were forced to change clothes in front of corrections officers; Judge Sotomayor would have treated these incidents as strip searches, and she criticized her colleagues for both an implausible reading of the record and a failure to accept the appropriate party’s version of the facts in light of the procedural posture of the case. *See id.* at *12-*14 (Sotomayor, J., dissenting). Judge Sotomayor also disputed the

majority's conclusion that the searches were necessary as a "penological" measure, a conclusion she pointed out did not follow from the government's interest in having inmates wear uniforms to promote cleanliness and to distinguish them from members of the public. *See id.* at *14.

Judge Sotomayor's dissenting opinion in *N.G. v. Connecticut*, 382 F.3d 225 (2d Cir. 2004), which is discussed elsewhere in this report, *see infra* at pp. 17 & 61, demonstrates her sympathetic understanding of the trauma experienced by adolescent girls who are strip searched.

Outside of the contexts of homes and bodily privacy, Judge Sotomayor has written several opinions in which she applied or even expanded upon recognized exceptions to the Fourth Amendment. In *United States v. Howard*, 489 F.3d 484 (2d Cir. 2007), Judge Sotomayor upheld a warrantless search of the defendants' car based on probable cause alone, even though there was little possibility of flight because the police had lured the defendants away from their car by a ruse and had ample time to obtain a warrant. Judge Sotomayor rejected the traditional justifications for the automobile exception such as flight risk and the impracticability of obtaining a warrant; instead, she reasoned that the exception to the warrant requirement was based on cars' inherent mobility and the diminished privacy interest attached to automobiles generally. *Id.* at 492-94. Though Judge Sotomayor grounded her analysis in a number of Supreme Court and Second Circuit precedents, she did not merely apply them, but extended these rights-restrictive cases. For example, Judge Sotomayor relied on this principle from *California v. Carney*, 471 U.S. 386 (1985): "[e]ven in cases where an automobile was not immediately mobile, the lesser expectation of privacy resulting from its use as a *readily mobile* vehicle justified application of the vehicular exception." *Id.* at 494 (quoting *Carney*, 471 U.S. at 391) (emphasis ours). Judge Sotomayor then expanded the principle, stating that "even if the vehicles searched in the case at bar were not 'readily mobile' within the meaning of the

automobile exception, a warrantless search of them would be justified *based on the diminished expectation of privacy enjoyed by the drivers and passenger while traveling on the Thruway.*” *Id.* at 494 (emphasis added). Thus, while *Carney* described privacy as diminishing only when a vehicle was “readily mobile,” Judge Sotomayor asserted that automobiles are inherently public, and drivers’ and passengers’ expectations of privacy in their vehicles are diminished accordingly.

Judge Sotomayor’s use of the special needs exception to uphold random, suspicionless and warrantless searches of ferry passengers’ baggage and cars in *Cassidy v. Chertoff*, 471 F.3d 67 (2d Cir. 2006), is discussed elsewhere in this report. *See supra* at p.40.

In *United States v. Santa*, 180 F.3d 20 (2d Cir. 1999), Judge Sotomayor applied the good-faith exception to uphold admission of evidence seized incident to an improper arrest caused by a clerical error by court employees. *Id.* at 30. Judge Sotomayor based her decision on *Arizona v. Evans*, 514 U.S. 1 (1995), which similarly applied the good-faith exception to the exclusionary rule to instances where law enforcement officers rely on police records that contain erroneous information resulting from court employees’ clerical errors. In dicta, Judge Sotomayor explained that her holding might have been different had the error been committed by law enforcement rather than court employees, or had the police relied on consistently ineffective recordkeeping. *Id.* at 27. In *United States v. Herring*, 129 S. Ct. 695 (2009), the Supreme Court recently addressed this exact issue, holding that the good faith exception to the exclusionary rule applies even when negligent errors are committed directly by law enforcement, rather than by court employees as in *Evans* and *Santa*. *See id.* at 701, 704.

In another good-faith exception case, *United States v. Falso*, 544 F.3d 110 (2d Cir. 2008), Judge Sotomayor affirmed the denial of a motion to suppress evidence gathered under a

defective search warrant, on the basis of the Supreme Court's decision in *United States v. Leon*, 468 U.S. 897 (1984), which held that evidence would not be suppressed when police had reasonably relied on a warrant "issued by a neutral magistrate judge, even if the warrant is subsequently deemed invalid." *Id* at 125. Writing for a divided court, Judge Sotomayor concluded that the affidavit submitted in support of the search warrant was not intentionally or recklessly misleading, and thus the invalid search warrant could not be attributed to law enforcement for Fourth Amendment purposes.

The majority of Judge Sotomayor's Fourth Amendment opinions represent a relatively straightforward application of well-settled law to established facts. *See e.g., Anthony v. City of New York*, 339 F.3d 129 (2d Cir. 2003) (exigent circumstances justified officers' warrantless entry into home where woman called 911 screaming that she was being attacked); *United States v. \$557,933*, 287 F.3d 66 (2d Cir. 2002) (despite traveler's expectation of privacy in his briefcase, plain view doctrine allowed airport security to seize briefcase when constitutional search of briefcase for weapons resulted in discovery of large quantity of unsigned money orders that were immediately and reasonably apparent as connected to criminal activity); *Leventhal v. Knapek*, 266 F.3d 64 (2d Cir. 2001) (employee had reasonable expectation privacy in his work computer, but warrantless search was justified under special needs exception because the scope of the search was reasonably related to the objectives of the search, and because the search as justified by the existence of reasonable grounds for suspecting that the search would uncover evidence of work-related misconduct by the employee); *United States v. Heatley*, 994 F. Supp. 483 (S.D.N.Y. 1998) (evidence gathered by listening to prisoner's telephone call admissible where case law clearly stated that prisoners give implied consent to such searches when they are notified that their telephone calls can be surveilled); *Jacobs v. Village of Tuckahoe*, No. 94-4888,

1996 WL 355376 (S.D.N.Y. June 27, 1996) (no Fourth Amendment seizure where Plaintiff was free to leave, and did so); *Mutzner v. Comptroller of the City of New York*, No. 93-5526, 1995 WL 495803 (S.D.N.Y. Aug. 18, 1995) (sheriff did not violate the Fourth Amendment in evicting the plaintiff pursuant to a valid court order); *United States v. Castellanos*, 820 F.Supp. 80 (S.D.N.Y. 1993) (motion to suppress granted where law enforcement intentionally misled magistrate into issuing warrant, and where magistrate made clear that warrant would not have been issued absent the false information that law enforcement provided); *United States v. Clarke*, No. 92-1138, 1993 WL 478374 (S.D.N.Y. Nov. 12, 1993) (motion to suppress denied where police had reasonable suspicion to stop car whose VIN plate had been reported stolen, and where police then searched the vehicle without a warrant after occupants of car fled and vehicle's dashboard VIN plate was noted missing).

FIFTH AMENDMENT AND *MIRANDA*

Judge Sotomayor's approach to the Fifth Amendment is perhaps best illustrated by a series of rulings on suppression motions in a multi-defendant trial that she presided over as a district judge. In each instance, she denied the suppression motion by applying well-settled law to factual findings that largely favored the prosecution.

In *United States v. Heatley*, 994 F.Supp. 475 (S.D.N.Y. 1998)(*Heatley I*), Judge Sotomayor ruled against a motion to suppress statements made by the defendant before he had been given his *Miranda* warnings and in response to comments by a police officer on the ground that the police officer's comments were not intended to elicit an incriminating response and thus did not qualify as interrogation.

In *United States v. Heatley*, 994 F.Supp. 477 (S.D.N.Y. 1998)(*Heatley II*), Judge Sotomayor concluded that the police had not engaged in overbearing behavior based on a

totality-of-the-circumstances test that considered not only the behavior of the police but the defendant's experience with the criminal justice system. Given that finding, she ruled that the defendant's statements to the police were admissible.

In *United States v. Heatley*, 32 F.Supp.2d 131 (S.D.N.Y. 1998)(*Heatley III*), Judge Sotomayor held that the unwillingness of the police to provide the defendant with further information about the benefits of cooperation unless he waived his *Miranda* rights did not invalidate the defendant's subsequent waiver.

And, in *United States v. Heatley*, 39 F.Supp.2d 287 (SDNY 1998), Judge Sotomayor rejected the defendant's motion to dismiss the indictment based on the government's alleged failure to fulfill promises it had made to the defendant as part of plea bargain negotiations. After stating that the government was required to fulfill its promises, Judge Sotomayor agreed with the government that it had not in fact breached its promises in this case.

In *United States v. Estrada*, 430 F.3d 606 (2d Cir. 2005), Judge Sotomayor considered the "public safety" exception to *Miranda*, which allows the police to question a suspect about imminent threats to public safety even before giving the *Miranda* warnings. Judge Sotomayor first held that the "public safety" exception applies when police officers are plausibly threatened, as well as the general public. She then held that the police officers in this case could reasonably have believed they were in danger when they arrested a known drug dealer because drug dealers, as a group, are frequently armed and dangerous. Finally, she upheld the admission of drugs found by the police when they searched the coat where the defendant said he kept his gun.

RIGHT TO COUNSEL

The language employed in some of Judge Sotomayor's opinions suggests her strong support for the criminally-accused's Sixth Amendment right to counsel. Nevertheless, Judge

Sotomayor has granted only one claim based on ineffective assistance of counsel in fourteen available decisions.

In *Campusano v. United States*, 442 F.3d 770 (2d Cir. 2006), the Second Circuit granted a criminal defendant relief when faced with a novel question: does a defendant who has waived his right to appeal in a plea agreement receive ineffective assistance of counsel when his counsel disregards his request to file an appeal? *Id.* at 773-74. The district court answered the question in the negative, denying the petitioner’s federal post-conviction motion pursuant to 28 U.S.C. § 2255. In an opinion written by Judge Sotomayor, the Second Circuit reversed. She explained that the court’s “precedents take very seriously the need to make sure that defendants are not unfairly deprived of the opportunity to appeal, even after a waiver appears to bar appeal.” *Id.* at 775. While acknowledging the need for judicial efficiency, Judge Sotomayor held that requiring defendants who have waived their right to appeal to demonstrate that their appeals raise non-frivolous issues (as proposed by the government) would undermine the “principles of the Sixth Amendment by allowing attorneys who believe their clients’ appeals to be frivolous simply to ignore the clients’ requests to appeal.” *Id.* at 776.

In *Grune v. Thoubboron*, 1995 WL 130517 (S.D.N.Y. 1995), a habeas petitioner challenged his state conviction on the grounds that he was denied his constitutional right to counsel at arraignment, a critical stage of the proceedings. A magistrate judge had recommended denying the claim, finding that the arraignment was not a critical stage. Judge Sotomayor disagreed. Still a district court judge at the time, she wrote:

Here, [petitioner’s] execution of the “Notice and Waiver of Rights” form [at the arraignment] transformed a largely administrative arraignment into a proceeding in which an unrepresented defendant was able to waive his constitutional rights to counsel, to jury trial, to a preliminary hearing, to compel witnesses to testify on his behalf, and to reasonable bail. A proceeding in which such rights are waived is clearly one in which the rights of a defendant “may be affected” or “may be

sacrificed,” or in which “potential substantial prejudice” inheres. The stage of the proceeding is thus critical, the right to counsel thus attaches, and [petitioner’s] rights were thus violated.

Id. at 1. Ultimately, however, Judge Sotomayor denied relief. After determining that the error was not a structural error, and was thus subject to harmless error analysis, she found the error harmless because the petitioner had not suffered any prejudice. *Id.* at 2-3.

In *Gilchrist v. O’Keefe* 260 F.3d 87 (2d Cir. 2001), Judge Sotomayor wrote an opinion denying a habeas petition predicated on an alleged deprivation of petitioner’s right to counsel at sentencing. Petitioner had no counsel at sentencing because he had punched his assigned attorney in the head, and the attorney withdrew. Judge Sotomayor found that the state court decisions denying this claim did not involve an unreasonable application of Supreme Court precedent, taking into account precedents that state a defendant may forfeit constitutional rights through misconduct. In dicta, however, she extolled the importance of the right to counsel and urged trial courts to proceed with caution before concluding that a defendant had forfeited his right to counsel:

[W]e do not mean to suggest that any physical assault by a defendant on counsel will automatically justify constitutionally a finding of forfeiture of the right to counsel. First, as noted above, because § 2254 severely restricts our scope of review, we have no occasion to pass on the question Second, *the right to appointed counsel provided for in Gideon [v. Wainright] and its progeny is not simply a right that benefits defendants personally. The right to counsel is a fundamental part of what makes our judicial system constitutionally fair, providing some measure of assurance against inaccurate determinations and unjust judgments, and this system as a whole suffers when counsel is absent.* In response to incidents of this nature, trial courts have the discretion to take intermediate steps short of complete denial of counsel, and we think that courts should exercise that discretion wherever possible In addition, as was the case here, threats or violence against an attorney may be considered by the court in imposing its sentence. Moreover, of course, such behavior may in itself constitute a crime for which the defendant may be separately prosecuted. By responding to threats in this manner, a defendant may still be punished for his misconduct while the constitutional interests of the judicial system remain protected to the greatest extent possible.

Id. at 100 (emphasis added).

In another decision denying habeas relief, Judge Sotomayor made similar efforts to narrow the scope of a ruling concerning the right to counsel. *See Serrano v. Fischer*, 412 F.3d 292 (2d Cir. 2005). There, the Second Circuit rejected petitioner's claim that a state trial court violated right to counsel by barring an attorney-client consultation during 90-minute break in petitioner's trial testimony. In a post-script, Judge Sotomayor wrote:

[W]e emphasize the narrowness of our holding. We do not hold that a ninety-minute bar on attorney-client communications during a recess from a defendant's testimony necessarily falls within the rule announced in [*Perry v. Leeke*, 488 U.S. 272 (1989)]. Nor do we hold that it would constitute a reasonable application of Supreme Court precedent under [28 U.S.C.] § 2254(d)(1) to bar attorney-client communications during a lunch recess in circumstances other than those present in this case. Finally, we do not express any opinion with regard to whether petitioner's trial counsel was constitutionally ineffective. We only hold that in light of defense counsel's defiant behavior at trial, the state court decisions rejecting petitioner's deprivation-of-counsel claim were not contrary to Supreme Court precedent and did not involve an unreasonable application of that precedent...

Id. at 303.

Finally, although Judge Sotomayor has repeatedly denied claims of ineffective assistance of counsel, some of those opinions have found counsel's failures ineffective under *Strickland's* first prong. These claims, however, failed because counsel's mistakes did not result in prejudice. *See Loliscio v. Goord*, 263 F.3d 178 (2d Cir. 2001) (finding state court's rejection of ineffective assistance of counsel claim not unreasonable where although trial counsel's elicitation on cross examination of petitioner's confession was constitutionally ineffective under first prong of *Strickland*, strong evidence of guilt and the prosecutor's failure to rely on this evidence in summation resulted in insufficient prejudice); *See also Rivera*, 1995 WL 594858, *2 ("I find it a closer question as to . . . petitioner's claim that defense counsel made the decision not to put him on the stand without his knowledge or consent. . . . Nevertheless, I need not decide this issue or

hold an evidentiary hearing on the question because, even assuming that petitioner could sustain his burden of proof on the claim of ineffective assistance of counsel, I agree with the Magistrate Judge that petitioner has utterly failed to establish prejudice sufficient to call into question the reliability of the trial.”); *Narvaez v. United States*, 1998 WL 255429 (S.D.N.Y. 1998), *6 (similar ineffectiveness and finding of no prejudice).

STANDING

There appear to be approximately fifty-five opinions in which Judge Sotomayor addresses standing to some degree. In the majority of these opinions, she expresses an expansive view of standing. In general, she views standing as primarily an assurance that the litigants have some stake in the matter. Often, even if she denies standing on the facts of a case, she articulates clear tests and theories by which plaintiffs could satisfy the requirements of standing. At times, however, she denies standing for prudential reasons where she believes, for example, that the suit may conflict with federalism interests or the challenge requires a more individualized inquiry.

Judge Sotomayor has written several opinions on standing issues in the context of equal protection cases. In *Green v. Travis*, 414 F.3d 288 (2d Cir. 2005), which rejected a plaintiff’s *Batson* challenge on the merits, she found standing, holding that a plaintiff need not be of the same race as the challenged jurors. In *Cruz v. Coach Stores, Inc.*, 202 F.3d 560 (2d Cir. 2000), she vacated the district court’s dismissal for failure to plead a cognizable injury and held that the plaintiff had satisfied the requirements of standing to pursue at least some of her Title VII claims. Although the plaintiff failed to show that she was prejudiced by the defendant store’s allegedly discriminatory policies, Judge Sotomayor found that there was sufficient injury to

sustain standing within the description of a hostile workplace, despite the deficiencies in the “vague and unspecifi[c]” pleadings. *Id.* at 568.¹⁸

Judge Sotomayor has also written several decisions on organizational standing. In *Center for Reproductive Law and Policy v. Bush*, 304 F.3d 183 (2d Cir. 2002), a U.S. organization challenged a policy requiring foreign organizations receiving government funds to agree not to promote abortion. The district court denied standing on all counts, reasoning that the statute, targeted at foreign organizations, did not injure the plaintiff. Judge Sotomayor affirmed the district court’s ruling, applying a “zone of interests” test to deny standing as to the due process claims, agreeing with the district court that the plaintiff organization was not directly regulated by the statute. But, she also suggested that an organization advocating its views in the public arena would have standing if it were affected by a government policy that “create[d] an uneven playing field.” *Id.* at 197. In *Mid-Hudson Catskill Rural Migrant Ministry, Inc. v. Fine Host Corp.*, 418 F.3d 168 (2d Cir. 2005), Judge Sotomayor declared that the plaintiff organization had organizational standing to sue for expenditures on procuring and training volunteers (though she denied the plaintiff standing under an associational theory to sue on behalf of the laborers it recruited). *Id.* In *Securities Investor Protection Corp. v. BDO Seidman, LLP*, 222 F.3d 63 (2d Cir. 2000), she also found that the plaintiff corporation had standing to sue on its own behalf for losses similar to those in *Mid-Hudson Catskill Rural Migrant Ministry, Inc. v. Fine Host Corp.*

At times, Judge Sotomayor is willing to extend standing to third parties. In at least one case, she had found it sufficient for standing if the plaintiff could demonstrate an “interest affected by the judgment,” even where she finds it implausible that their interest would be

¹⁸ By contrast, Judge Sotomayor joined an opinion in *Port Washington Teachers’ Ass’n v. Board of Education*, 478 F.3d 494 (2d Cir. 2007), a case brought by the New York Civil Liberties Union, holding that the teacher’s union lacked standing to challenge a school board policy directing school employees to notify the parents of pregnant students because the union had not established injury-in-fact.

materially affected by a different judgment. In *Official Committee of Unsecured Creditors of WorldCom, Inc. v. SEC*, 467 F.3d 73 (2d Cir. 2006), she established that appellants who had not been parties in the district court had standing to appeal judgments that affected their interests, extending this right to unsecured creditors whose interests were left unprotected by the approved distribution plan. In *Moore v. Consolidated Edison Co. of New York, Inc.*, 409 F.3d 506 (2d Cir. 2005), however, she affirmed the district court's denial of standing to a Title VII plaintiff seeking to sue for a preliminary injunction against psychological intimidation on behalf of coworkers. This denial of standing to assert third party rights was a finding on the particular facts of the case and not a restriction on standing to assert third party rights in Title VII suits generally. *Id.* at 511.

In First Amendment cases, Judge Sotomayor has sometimes held that plaintiffs have standing to make facial challenges. In both *Lamar Advertising of Penn, LLC v. Town of Orchard Park*, 356 F.3d 365 (2d Cir. 2004), and *Flamer v. City of White Plains, N.Y.*, 841 F.Supp. 1365 (S.D.N.Y. 1993), she made clear that a plaintiff need not have actually been denied their right of expression in order to challenge a restriction. However, where she sees prudential reasons that militate against review, she is less willing to recognize standing. In *New York Civil Liberties Union v. Grandeau*, 528 F.3d 122 (2d Cir. 2008), for instance, she denied standing to pursue a facial challenge to a policy that required organizations to report spending on billboards as a lobbying activity, holding that the potential harms implicated by the unenforced policy were too speculative for review. *See also Farrell v. Burke*, 449 F.3d 470 (2d Cir. 2006) (denying third-party standing to pursue a facial challenge to a special parole condition because the potential application was too speculative to review). Again citing prudential reasons, in *Clarett v. National Football League*, 369 F.3d 124 (2d Cir. 2004), she denied an NFL player standing to

bring a facial challenge to an NFL policy for fear of treading on areas more appropriately regulated by federal labor law and collective bargaining.

Judge Sotomayor has taken a broad view of standing in the eminent domain context. In *Brody v. Village of Port Chester*, 345 F.3d 103 (2d Cir. 2003), although the plaintiff failed to state *any* harm resulting from his failure to receive proper notice related to an impending eminent domain seizure, Judge Sotomayor noted that under existing caselaw, regardless of whether the plaintiff was ultimately entitled to a return of his property, standing requirements to assert procedural due process claims only required that a significant property interest be at stake; being denied procedural protections is sufficient injury-in-fact and the possibility that the plaintiff may obtain a declaratory judgment or nominal damages warrants standing.

In cases involving complex factual issues or legal predicates, Judge Sotomayor has proceeded cautiously. *See, e.g., Moore v. Consolidated Edison Co. of New York, Inc.*, 409 F.3d 506, 511 n.5 (2d Cir. 2005) (declining to rule on whether standing to assert third-party Title VII claims must meet prudential requirements). For example, in *Lerner v. Fleet Bank*, 318 F.3d 113 (2d Cir. 2003), she declined to follow the district court's application of the zone of interests test in the context of RICO claims; instead, she noted the troubling complexity of applying that test where the interplay of predicate criminal acts and statutory violations makes it difficult to determine whether the basic requirements of Article III standing have been met and which tests apply. Ultimately, she followed *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), in finding it inopportune to rule on how this test might apply in the RICO context and instead resolved the standing issue by finding that proximate causation was lacking on the merits.

At times, her decisions have denied plaintiffs standing in deference to principles of federalism. In *Taylor v. Vermont Department of Education*, 313 F.3d 768 (2d Cir. 2002), for instance, Judge Sotomayor denied standing to a non-custodial parent to raise a claim concerning a child’s rights under the Individuals with Disabilities Education Act (IDEA). In the absence of clear criteria in the federal statute as to parental standing to file suit, she deferred to state law for an interpretation of parental rights, preferring to rely on the “cooperative federalism” scheme already imposed in the funding structure of the IDEA. *Id.* at 776.

Finally, she has issued a number of decisions finding that claims are not moot, and in doing so, has looked to principles of standing. *See, e.g., United States v. Hamdi*, 432 F.3d 115 (2d Cir. 2005), and her dissent in *United States v. Blackburn*, 461 F.3d 259 (2d Cir. 2006).

SECOND AMENDMENT

In *Maloney v. Cuomo*, 554 F.3d 56 (2d Cir. 2009), Judge Sotomayor joined a per curiam opinion rejecting a Second Amendment challenge to a New York State ban on the possession of “chuka sticks,” even in the home. Although the Supreme Court had recently held that the Second Circuit protects an individual’s right to keep and bear arms in *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008), the panel noted that *Heller* involved federal rather than state law. The panel then declined to extend *Heller* to this state law challenge given earlier decisions from both the Supreme Court and the Second Circuit declaring that the Second Amendment is a restriction on federal power, not state power. The panel explained this reluctance by citing the well-established principle that only the Supreme Court can overrule its prior holdings. The Second Circuit opinion is only two pages long and cannot fairly be read as any indication about Judge Sotomayor’s views on the Second Amendment.